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The effectiveness of the EU's rule of law
conditionality mechanism: Theoretical observations
based on the case of Hungary

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Abstract

The effectiveness of post-accession conditionality within the EU has been of pivotal importance for the EU in past years. The European Union has plenty of tools for monitoring the compliance of EU Member States; however, when it comes to enforcement mechanisms, EU institutions perform poorly. Respect for the rule of law is especially crucial in this regard, as certain Member States (i.e. Poland and Hungary) have committed violations in this area. Hungary has been subject to several infringement procedures due to failure to comply with EU law, and the Article 7 procedure has even been activated against it. In 2020, the EU decided to connect rule-of-law violations to the EU budget disbursement by introducing the rule-of-law conditionality mechanism, which was launched against Hungary in 2022. This paper evaluates this conditionality mechanism through the example of Hungary and assesses whether it is more effective than the previous tools used to address rogue Member State behaviour and prevent continuous rule-of-law violations on a national level.

Keywords: EU conditionality; post-accession conditionality; rule of law; rule-of-law conditionality mechanism; Hungary

1 Introduction

The topic of conditionality within the European Union is a gold mine for EU experts, and it has been so since enlargement started decades ago. In recent years, however, the effectiveness of post-accession conditionality rather than pre-accession has become a prominent question. The main reason is that there have been no accessions to the EU since 2013, so the EU has entered its longest period without enlargement since 1973.

Simultaneously, protecting the rule of law has become the number-one priority of EU institutions. This comes as no surprise, as the recent crises the world and Europe have had to endure, such as the migration crisis and economic recovery after the COVID-19 pandemic, re-wrote the international playbook in many areas. In this context, some Member States used these crises as an excuse for non-cooperation and pursued behaviors potentially detrimental to EU values.

Hungary has been considered a ‘rogue’ or ‘disobedient’ Member State in the European Union ever since Fidesz won the elections in 2010 with the leadership of Prime Minister Viktor Orbán and acquired a two-thirds majority in parliament. This government started pursuing a strategy that departed from that of its predecessors. It has openly focused on the country’s perceived national interests and contradicted EU rules and legislation in numerous policy areas. The Orbán government, taking advantage of its parliamentary majority, gradually started to dismantle checks and balances in the Hungarian political system, weakening the role of judiciary institutions, the freedom of the press, and academic freedom (Medvegy, 2019). Hungary became the most vocal advocate of handling the refugee crisis by simply shutting down the borders, thus violating refugees’ fundamental rights. Moreover, people from close government circles have infiltrated Hungarian public procurement procedures, so corruption has become increasingly common in the country (Scheppel & Mészáros, 2022b). These issues have obviously raised concerns in several EU institutions.

The year 2022 was a pivotal one in the EU regarding its effort to protect the rule of law from breaches committed by Member States (Maurice, 2023, p. 1). In April 2022, the rule of law conditionality mechanism (or budget conditionality mechanism) was activated against Hungary, which involved the risk of the withdrawal of EU funds from the country. This paper evaluates the newest post-accession conditionality tool of the EU, the rule of law conditionality mechanism, through the example of Hungary, and assesses whether this mechanism is more effective than the previous tools of the Union used to address rogue Member State behavior and prevent continuous rule of law violations on a national level. It should be noted that the budget conditionality mechanism is primarily designed to protect the EU budget and not the rule of law. Yet, by forcing a Member State to enact certain domestic reforms, it can (and should) indirectly affect the rule of law of the Member State in question.

The paper starts with a theoretical review of conditionality and Member State compliance. This allows for evaluating the budget conditionality mechanism along the axis of enforcement-management and from the perspective of negative conditionality. Then, pre-existing methods used by the EU to regulate rule of law violations are briefly presented, followed by a detailed analysis of the rule of law conditionality mechanism applied against Hungary by the Commission. Last, the paper discusses whether this mechanism gives new impetus to the EU’s rule of law regulatory activity and, if not, what possibilities lie ahead for the EU.

2 Theoretical background

Navigating between sovereign Member State decisions and the legal obligations outlined by the EU is a regular feature of any EU government. The non-compliance resulting from this navigation can, however, take multiple forms. For instance, occasional noncompliance is not the same as systemic noncompliance (Kochenov & Bárd, 2018). While the former is usually involuntary and a consequence of the nature of EU law or domestic administrative constraints, the latter is a deliberate and ideological choice and, therefore, should be treated differently (Jakab & Kochenov, 2017).

The primary aim of the EU's rule of law tools is to restore compliance with democratic norms and the rule of law in backsliding Member States and to prevent similar developments in other Member States. This kind of monitoring contrasts with the EU's accession conditionality (Sedelmeier, 2011). It breaks with the 'reinforcement by reward' logic and introduces negative conditionality (Blauberger & van Hüllen, 2021, p. 4). There are two dominant approaches in compliance studies concerning how to influence non-compliant behavior (Börzel & Cichowski, 2003): the management approach (Chayes & Chayes, 1993) and the enforcement approach (Downs et al., 1996). The former assumes that noncompliance is not deliberate but accidental because fulfilling commitments is in the primary interest of states. According to this view, the factors behind violations are imprecise treaty language or limited administrative capacities. On the other hand, the enforcement approach supposes voluntary noncompliance, whereby governments disregard legal commitments based on cost-benefit calculations (Priebus, 2022). Therefore, the management approach implies that noncompliance can be addressed through prevention and dialogue, while the enforcement approach relies on sanctions to address such state behavior (Priebus, 2022).

Regarding the EU's tools, Priebus argues that there is one instrument in the Commission's hands, the rule of law conditionality method, that follows the logic of enforcement and thus considers sanctions to be the adequate response to rule violations. All others follow the logic of management, which explains the ineffectiveness of these instruments given the 'mismatch between the sources of rule violations and the remedies chosen' (Priebus, 2022, p. 6). These tools do not sanction voluntary noncompliance but rely on soft measures. They are appropriate for handling involuntary noncompliance but ineffective in cases of deliberate noncompliance (Priebus, 2022). Previous research shows that the Commission's approach mainly falls into the category of managing and not enforcing the fundamental values of the EU because the Commission is still focused on prevention through early detection and dialogue (Priebus, 2022).

Blauberger and van Hüllen analyzed the effectiveness of the rule of law conditionality mechanism at the early stages of the creation of the regulation. In an article about the conditionality of EU funds written in 2021, they revisited the literature on EU enlargement 'to identify a list of scope conditions of effective conditionality' (Blauberger & van Hüllen, 2021, p. 2). They also analyzed the literature on international sanctions and used a combination of these two theoretical angles to start a debate on the possible effectiveness of the EU's financial conditionality first proposed by the Commission in May 2018 (European Commission, 2018). They created five criteria to evaluate the potential effectiveness of the EU's proposed conditionality: the determinacy of conditions (1), the size and speed of sanctions (2), the credibility of conditionality in terms of its likelihood of application (3), the domestic adoption cost dependent on the perceived legitimacy (4), and the domestic context of the application (5) of EU sanctions (Blauberger & van Hüllen, 2021). Based on these aspects, they argue that the proposed rule of law mechanism had the potential to increase the credibility of the Commission, particularly in contrast with the Article 7 procedure, to speed up the process and to burden Member States with a considerable amount of sanctions (Blauberger & van Hüllen, 2021). On the other hand, the regulation at that time did not clearly define and operationalize the deficiencies of the rule of law and left great discretion to the Commission. Their analysis showed, despite such potential, that conditions

and procedures were too vague, which raised questions of legitimacy and doubts regarding success (Blauberger & van Hüllen, 2021). The authors projected that ‘the proposed regulation would reinforce rather than alleviate the deficits regarding the legitimacy of the Commission’s enforcement instruments against democratic backsliding’ (Blauberger & van Hüllen, 2021, p. 13). Table 1 shows the evaluation of the proposal based on the five criteria (see Annex). As Blauberger and van Hüllen analyzed the proposal before the mechanism had been tested, this study evaluates the newly introduced rule of law mechanism based on their criteria and its enforcement potential.

3 Existing rule of law methods of the EU: The rule of law conditionality mechanism as a step towards enforcement?

Before discussing the rule of law conditionality mechanism in detail, a brief assessment of the EU’s other tools for addressing Member State noncompliance is in order. The Justice Scoreboard was introduced in 2013 as part of the European Semester. It clearly lacks enforcement potential, as its main goal is to provide comparative data on the independence, quality, and efficiency of national justice systems (European Commission, 2013).

Infringement procedures are the oldest and most effective tools for monitoring Member State compliance with EU law. This approach has the potential to deal with systemic problems in EU law (see the idea of systemic infringement procedures by Scheppele, 2013), but the Commission has not been eager so far to evolve in this direction. Despite the Commission’s recent attempts to address rule of law violations (see, for example, its infringement action against Hungary over a law that discriminates against people based on their sexual orientation and gender identity), we cannot say that this tool is very effective in this area due to its tardiness (European Commission, 2022d). When a procedure is fully implemented, the damage caused by a specific regulation in a Member State is done and may be irreversible. Some Member States (such as Poland or Hungary) refuse to heed the rulings of the Court of Justice of the EU, so it is safe to say that the Commission has ‘reached the limits of the logic’ when it comes to infringements (Maurice, 2023).

The Article 7 procedure of the EU is supposed to be the most aggressive tool for addressing rogue Member State behavior. The possibility of launching this procedure has existed in the past decade concerning some Member States, especially Hungary, but was not initiated until 2017. The Commission took the initiative and launched the Article 7 procedure against Poland in 2017. However, in Hungary’s case, the European Parliament triggered the process in 2018. The procedure was nicknamed the ‘nuclear option’ prior to its deployment in relation to these two countries (Barroso, 2012). However, it became clear that it was not as dangerous for the Member State targeted by it as it was supposed to be. The main problem is the incapacity of the European Council to proceed with any of the cases. The ineffectiveness of the tool is proven by the fact that only the first paragraph of Article 7 has been activated (clear risk of a serious breach), at which stage sanctions are not allowed. Paragraph 2 would have to be activated (i.e., the determination of the existence of a serious and persistent breach of Article 2 values) for the possibility of imposing sanctions, but this requires unanimity from the European Council. This is unlikely in

either of the two cases because the two Member States would support each other in the voting.¹ Therefore, it is evident that the procedure was halted in both cases.

The Annual Report on the Rule of Law was introduced in 2019 as part of the Annual Rule of Law Review Cycle for regular monitoring. The first Report under this framework was issued by the Commission in 2020 (European Commission, 2020). Although it assesses all EU Member States' rule of law conditions, this tool is still ineffective against deliberate, systemic noncompliance and autocratic regimes. The Report nevertheless can shape certain Member State practices: Hungary submitted its recovery and resilience plan (RRP) in May 2021, but it was accepted by the Commission only in December 2022 as its acceptance was tied to the conditions outlined for Hungary in the 2019 and 2020 country-specific reports (reforms in the areas of EU budget protection and rule of law). It was the Covid-19 pandemic that allowed the EU to tie the rule of law concerns to the budget. The EU set up the €750 billion NextGenerationEU plan in the summer of 2020, which was implemented in the spring of 2021 through the Recovery and Resilience Facility (RRF) to support and help Member States to revive their economies. The RRF, endowed with €672.5 billion, is integrated into this plan. Under the RRF, each Member State must draw up a national plan (an RRP) that contains milestones and targets. The Commission and the Council evaluate the achievement of these plans, and the payment of EU grants or loans, which run until 2026, are tied to them (European Council, 2023). The RRFs are especially useful because they contain the element of conditionality, and the amount of money at stake is strong leverage in terms of forcing governments to act in line with EU law. Some members of the academic community have argued that the RRFs have become the EU's main instrument for acting to protect the rule of law (Maurice, 2023).

The operation of the RRF introduces a *de facto* conditionality, but it is not specific to the rule of law. The European Semester and the Annual Report have not shown any tangible results in the past. However, the Commission gave new power to these mechanisms because the recommendations used in these two define the objectives to be met in post-COVID recovery plans, and their implementation is conditional upon the payment of funds (Maurice, 2023). In these mechanisms, however, the bias is towards economic efficiency rather than values, but this is based on the assumption that a more efficient justice system or an effective fight against corruption is more favorable to business and growth. The fact that the RRF is integrated into the EU budget means that the budget conditionality mechanism can be applied if a certain rule of law condition jeopardizes the EU's financial interests. This allows the EU to conduct a new type of rule of law protection strategy and combine different tools to control Member State behavior. This new wave of mixing different financial tools is a step towards enforcement. Moreover, it also increases the perceived legitimacy of the instruments as their tools provide a more transparent monitoring system.

¹ The Polish parliamentary elections of 2023 might change the dynamic and speed up the two ongoing Article 7 procedures. If the Law and Justice government loses, Hungary might lose its ally in the Council, and the possibility of the two countries vetoing each other's procedures would decrease significantly.

Tying the rule of law requirements to the budget was further reinforced by the rule of law conditionality mechanism introduced by Regulation 2020/2092 on a general regime of conditionality to protect the Union budget (Official Journal of the European Union, 2020). This is the only mechanism that could culminate in a complete freezing of EU funds. According to the original idea, the Commission could propose different measures if it detected ‘generalized deficiencies as regards the rule of law’. The regulation that was ultimately adopted replaced the phrase ‘generalized deficiencies as regards the rule of law’ with ‘breaches of the principles of the rule of law in a Member State [which] 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’ in a Member State (Priebus, 2022, p. 9). This change in the original wording transformed the original mechanism that served to protect the rule of law into a mechanism for protecting the EU budget. This means that the mechanism cannot be activated if general rule of law violations are detected but only if the violations directly affect the implementation of the EU budget or the spending of EU money (Priebus, 2022). The measures this tool allows for in the case of non-compliance with the Commission’s requirements are substantial. They include the suspension of payments and commitments, the suspension of the disbursement of installments or the early repayment of loans, a reduction of funding under existing commitments, and a prohibition on entering new commitments with recipients or entering into new agreements on loans or other instruments guaranteed by the Union budget.

4 Hungary and its current affairs with the Commission on rule of law matters: Focusing on the budget conditionality mechanism

The following pages evaluate the effectiveness of the budget conditionality mechanism through the dialogue between the Commission and Hungary.² As mentioned earlier, the instrument itself was introduced in December 2020. However, the procedure against Hungary did not start until November 2021, when the Commission sent a request for information to Hungary pursuant to Article 6(4) of the Conditionality Regulation. The application of the regulation was delayed partly due to Hungary and Poland, which each brought an action before the European Court of Justice for the annulment of the Regulation. They both claimed that the actions outlined in the regulation did not have an appropriate legal basis in the TEU and TFEU, and they also argued that the EU had exceeded its powers in creating such a mechanism. Their endeavors to prevent the adoption of the Regulation were unsuccessful, as the CJEU dismissed both claims. Moreover, the Court even elevated the meaning of the rule of law, as it concluded that Article 2 TEU and its commitment to the rule of law have a legally binding quality (Court of Justice of the European Union, 2022a, p. 264) and the rule of law is an integral part of the EU’s identity (Court of Justice of the European Union, 2022b, p. 127).

In January 2022, Hungary replied to the Commission’s request for information; nevertheless, on 27 April 2022, the Commission officially triggered the conditionality mecha-

² See Table 2 in the Annex for the timeline of events.

nism against Hungary. Hungary received a written notification from the Commission, which raised alarming issues concerning Hungary's public procurement system and the use of EU funds, among other things. (Council of the European Union, 2022a).

On 27 June 2022, Hungary replied to the notification. This reply was amended by two letters, one written in June and another in July by the Hungarian Minister of Justice Judit Varga. Moreover, on 19 July 2022, Hungary also sent an additional letter proposing several remedial measures (seventeen exactly) to address the findings in the notification. Later in July, the Commission sent a letter to Hungary informing the Member State of its assessment and the proposed measures Hungary should take. Hungary was allowed to submit its observations, which it did in August 2022. Despite having contested the findings of the Commission and criticized the proportionality of the measures, Hungary promised further remedies to address the Commission's concerns (Council of the European Union, 2022a). The seventeen Hungarian remedial measures focused on correcting the illegalities and irregularities surrounding the implementation of EU funds by establishing several institutions focusing on decreasing fraud and corruption. Moreover, several measures were introduced to strengthen audit and control mechanisms and make the public procurement system more transparent and effective (Council of the European Union, 2022a).³

On 13 September 2022, Hungary sent the Commission a letter that included clarifications and further commitments under the proposed remedial measures. Although it was not part of this procedure, it needs to be mentioned that on 15 September, the European Parliament accepted a resolution 'on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded' (European Parliament, 2022a). In this resolution, MEPs called on the Council to speed up Article 7 and initiate its next phase.

On 18 September, the Commission replied to Hungary's efforts in its 'Proposal for a Council implementing decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary' (European Commission, 2022a). The Commission found that the remedial measures proposed by Hungary were not fully adequate to address the findings set out in the Commission notification sent to Hungary

³ The seventeen remedial measures in detail are the following: reinforcing prevention, detection and correction of illegalities and irregularities concerning the implementation of Union funds through a newly established Integrity Authority; creating an Anti-Corruption Task Force (by December 2022); strengthening the Anti-Corruption Framework; ensuring the transparency of the use of Union support by public interest asset management foundations; introducing a specific procedure in the case of special crimes related to the exercise of public authority or the management of public property; strengthening audit and control mechanisms to guarantee the sound use of EU support; reducing the share of tender procedures with single bids financed from Union funds; reducing the share of tender procedures with single bids financed from the national budget; development of a single-bid reporting tool to monitor and report on public procurements closed with single-bids; developing the Electronic Public Procurement System (EPS) to increase transparency; developing a performance measurement framework for assessing the efficiency and cost effectiveness of public procurements; adopting an action plan to increase the level of competition in public procurement; training to be provided for micro, small and medium-sized enterprises on public procurement practices; setting up a support scheme for compensating the costs associated with participating in public procurement of micro, small and medium-sized enterprises; applying ARACHNE; strengthening cooperation with OLAF; and adopting a legislative act ensuring enhanced transparency of public spending.

on 27 April 2022. The Commission's proposal contained the suspension of EU funds: in Hungary's case, this amounts to suspending 65 per cent of EU funds (€7.5 billion) allocated until 2027. Moreover, it also prohibited entering legal commitments with public interest trusts for programs implemented in direct and indirect management. The proposal gave Budapest two months to effectively implement the measures it had promised for the suspension to be released/softened.

At this point, reactions to the dialogue (both the Commission's role and the Hungarian remedies) became quite frequent both from other EU bodies and experts from the broader academic community. On 17 November, a press conference was held by co-rapporteur MEPs who were part of the team negotiating the rule of law conditionality regulation with the Member States (European Parliament, 2022e). The MEPs argued that the Hungarian remedies were insufficient. Thus, they expected the Commission to reiterate its September proposal to the Council about suspending the funds. Several criticisms arose concerning the remedial measures as well. Mészáros and Scheppele criticized the Integrity Authority for not being structurally independent and for consisting of political appointees with no real investigatory capacity (Scheppele & Mészáros, 2022a). They also analyzed the prospects of the Anti-corruption Task Force and predicted that it would be able to do very little because its tasks are underdefined in the law (Scheppele & Mészáros, 2022b). The joint report of the Hungarian Helsinki Committee, Transparency International Hungary, and K-monitor evaluated the proposed Hungarian remedies as follows:

The absolute lack of transparency, public consultations and published impact assessments in the process that preceded the adoption of what was supposed to be the largest anti-corruption legislative package in Hungary in over a decade foreshadowed the contents of the changes. While in some of the above areas, it is possible to identify steps in the direction suggested by the European Union, the Government, when formulating remedial measures, was careful not to introduce changes that would shake the institutional and procedural fundamentals of the captured, illiberal state. (Hungarian Helsinki Committee et al., 2022)

These opinions suggest that the determinacy of conditions, as defined by Blauberger and van Hüllen, is a weak component of the conditionality regulation.

Some MEPs were largely disappointed by the restrictive approach of the Commission in its September recommendation. In a debate in a plenary session on 4 October 2022, the EPP, Greens, S&D, Renew, and GUE/NGL groups took the view that the Commission had not fulfilled its role as guardian of the Treaties. They warned the Commission not to compromise with Hungary and suggested that a stricter catalog of measures towards Hungary was desirable (European Parliament, 2022d). Nevertheless, I argue that the Commission has proven its credibility by remaining quite firm in its opinion about withdrawing money from Hungary, and it remained so as a monitoring institution of the completion of the Hungarian milestones even months after the Regulation was adopted against Hungary. This activism increases the perceived legitimacy of the conditionality mechanism.

On 21 November, MEPs from the EPP group, S&D, Renew, Verts/ALE Group, and the Left group issued a motion for a resolution on the assessment of Hungary's compliance with the rule of law conditions under the Conditionality Regulation and state of play of the Hungarian RRP. The motion argued that the seventeen measures were insufficient to

address the existing systemic risk to the EU's financial interests. Therefore, it called on the Commission to confirm its September proposal and state that the remedies are insufficient. Moreover, it called on the Council to adopt the measures under the Conditionality Regulation, as proposed by the Commission on 18 September 2022, and collect evidence on the effective implementation of the Hungarian remedies before lifting the adopted measures. It also called out the systemic abuse of the unanimity rule by the Hungarian authorities by blocking crucial decisions (see the case of the Ukrainian aid package and the global minimum corporate tax rate below). It called on the Council and Commission to ensure this pressure does not affect their decision regarding the RRF and the rule of law conditionality. Last, the MEPs also highlighted the importance of the fact that final recipients and beneficiaries of EU funds should not be deprived of their money due to deficiencies in the operation of the rule of law in Hungary (European Parliament, 2022b). The EP voted in favor of the motion three days later (European Parliament, 2022c).

On 30 November, the Commission found that Hungary had not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds.

While a number of reforms have been undertaken or were underway, Hungary failed to adequately implement central aspects of the necessary seventeen remedial measures agreed under the general conditionality mechanism by the deadline of 19 November, as it had committed to. These relate, in particular, to the effectiveness of the newly established Integrity Authority and the procedure for the judicial review of prosecutorial decisions. (European Commission, 2022b)

The body reaffirmed its initial proposal to suspend 65 per cent of Hungary's EU funds (€7.5 billion). It endorsed Hungary's Recovery and Resilience Plan (RRP), provided the required milestones are fully and effectively implemented. These are the twenty-seven so-called super-milestones, including the original seventeen remedial measures, ten additional pledges that mainly concern strengthening judicial independence, and standard audit and control measures (European Commission, 2022b). This persistent approach from the Commission suggests that the EU has realized it is facing deliberate noncompliance from Hungary, which can no longer be addressed through prevention and dialogue.

The Economic and Financial Affairs Council scheduled for 6 December 2022 was highly anticipated because of several votes outlined for the day. The Council set out to decide on the proposal for a Council implementing decision on measures to protect the Union budget against breaches of the principles of the rule of law in Hungary. Moreover, the implementing decision of the Hungarian RRP (if the Commission puts forward a proposal) was also expected to be made that day. A legislative package on financial support to Ukraine was also put on the table, as well as a vote on introducing a global minimum level of taxation. That there was such a 'voting package' suggested that the outcome of the budget conditionality mechanism would be subjected to political bargaining. Hungary was hoping for concessions if it did not halt important Council objectives: the Hungarian RRP would receive approval, and the amount of the suspended funds would be decreased, but in return, Hungary would have to support the legislative package against Ukraine and the global minimum level of taxation. Hungary was vocally unresponsive of the latter two initiatives in the weeks preceding the vote. Moreover, the Hungarian Parliament's vote on Finnish and Swedish NATO accession was scheduled for the day after the Ecofin, and

Hungary had refused to support the accession of these countries for a long time despite growing pressure from other European countries. Eventually, at the Ecofin, Hungary vetoed the financial aid for Ukraine, and as a result, the RRP was taken off the agenda (Council of the European Union, 2022b).

At last, the COREPER meeting of 12 December 2022 brought an end to the budget conditionality negotiations. A mega-deal was reached whereby Hungary supported the financial aid for Ukraine and the global minimum corporate tax; only €6.3 billion in EU funds were frozen. The country's RRP – worth €5.8 billion – got a formal green light. However, the money remains frozen until the twenty-seven super milestones are completed. In addition to the super milestones, several 'ordinary' milestones connected to the rule of law were defined, a significant part of which coincide with the seventeen measures required under the conditionality mechanism (Amnesty International et al., 2023, p. 2). Although the authorities are reportedly constantly working on implementing the necessary reforms (the judicial package was approved by the Hungarian parliament at the beginning of May), no formal green light has arrived from the Commission yet (Tamma, 2023).

The budget cuts for Hungary did not stop in the middle of December. On 22 December 2022, the Commission approved the partnership agreement with Hungary for Cohesion Policy 2021–2027 for almost €22 billion. However, the Commission has exerted additional conditionalities through the Partnership Agreements that it negotiates with all Member States at the start of each EU budget cycle, specifying how funds from the EU budget should be spent. The Commission found in its Implementing Decision of the Partnership Agreement with Hungary (European Commission, 2022c) that in relation to several operational programs, Hungary does not comply with the horizontal enabling condition 'Effective application and implementation of the Charter of Fundamental Rights' due to the lack of judicial independence, the violation of academic freedom, the faults in the Hungarian asylum system and the failure to implement related CJEU judgments, and the anti-LGBTQI+ law (Amnesty International et al., 2023, pp. 2–3). In order to receive these cohesion funds, the Hungarian government has to comply with the four milestones related to judicial independence (that are already a part of the twenty-seven super milestones). These reforms include strengthening the National Judicial Council concerning the powers of the President of the National Office for the Judiciary; strengthening the judicial independence of the Hungarian Supreme Court (Kúria); removing obstacles to references for preliminary rulings to the CJEU; and removing the possibility for public authorities to challenge final judicial decisions before the Constitutional Court (Hegedűs, 2023). Thus, the EU is withholding money from Hungary on three accounts (the conditionality mechanism, the RRP, and the horizontal principles) that cannot be completely separated from each other, and the aspect of the protection of the rule of law is present in all of them. The judicial reform package is already being evaluated by the Commission. If it gets approval, which seems likely at this point, then part of the frozen funds could be unlocked for Hungary at the beginning of 2024.⁴

⁴ The manuscript was closed in October 2023.

5. Is the rule of law conditionality mechanism effective in enforcement?

A certain way of evaluating the direct effects of the rule of law mechanism on the national rule of law violations of Hungary would be to analyze the newly introduced domestic procedures, institutions, and their functioning. At the time of writing, these institutions have only been in operation for a few months. However, certain NGOs have created a written evaluation of Hungary's compliance with the twenty-seven super milestones (Amnesty International et al., 2023). Amnesty International Hungary, the Eötvös Károly Institute, the Hungarian Civil Liberties Union, the Hungarian Helsinki Committee, K-Monitor, and Transparency International Hungary analyzed the Hungarian government's actions and found that until the end of March 2023, the Hungarian government had fallen short of addressing all concerns related to the rule of law and human rights, thus failing to comply with most of the conditions set out by the EU. Of the twenty-seven super milestones, thirteen had been achieved, seven had been achieved only partly, and seven had not been achieved at that time. The main areas where the remedies seem unsatisfactory are related to the anti-corruption framework, competition in public procurement, judicial independence, the predictability, quality, and transparency of law-making, the rights of refugees and asylum-seekers, academic freedom and the rights of LGBTQI+ persons (Amnesty International et al., 2023). During the evaluation of the results, we should not forget that we are still in the early stages of the application of the reforms; moreover, Hungary is a special case as its status as a liberal democracy is seriously questionable (see, for example, Bozóki & Hegedűs, 2018; European Parliament, 2022a). This is why going back to our theoretical framework might be useful. For the sake of our analysis, let us take a step back and revisit Blauberger and van Hüllen's criteria, which might help us evaluate the effectiveness of the conditionality mechanism itself from a more general point of view.

As foreseen by the authors, one of the weakest aspects of the rule of law conditionality mechanism is the vague determinacy of conditions. Even though there are extensive references to the rule of law in the regulation, the deficiencies and breaches are not defined. The legal actions a Member State has to take to complete a milestone are clear, but whether those legal remedies will repair the rule of law issues at the national level is not. It is entirely up to the EU institutions to define whether the given country has done enough in a certain policy area. Even though the operation of the budget conditionality mechanism is in its early stages, it seems that the nature of the procedure enables the Member State to react quickly by introducing new institutions and mechanisms, even though many of those might not work properly or have a little tangible effect on the rule of law. Although the conditionality mechanism requires certain modifications within the Hungarian legal system that might decrease corruption or make the public procurement system more transparent, other important areas of the rule of law are not touched by the measures.

It appears Blauberger and van Hüllen were right regarding the speed of the process, but they misjudged the deterring nature of the amount of money that can be frozen under the mechanism. Even though a part of Hungary's EU funds were frozen in December 2022, the government refused to tighten its belt and emphasized that the Commission owes

money to Hungary (Hungary Today, 2023), so they expect the money to come as soon as the country has fulfilled its obligations through the remedies offered. At the same time, the government also belittled the importance of EU funds in its rhetoric, saying it considered them replaceable with FDI (HVG, 2023). It seems that by October 2023, the Hungarian government had accepted that it would have to operate without at least a certain amount of EU funds because even though they are willing to introduce reforms in some areas (such as the judicial system) which will unlock some money for the country, there will certainly be other issues where the Hungarian leadership will not be willing to comply with the conditions set out by the Commission (such as the anti-LGBTQI+ law or academic freedom). Among the authors' criteria, the likelihood of application proved to be greater in the case of this rule of law mechanism than in others, and what is observable during the two-year-long process resonates with the authors' projections. The process seems more straightforward and, thus, easier to apply. Blauburger and van Hüllen were not so optimistic about the perceived legitimacy of the tool due to the lack of systemic monitoring procedures, the problem of targetedness, and the vulnerability of Member States. Even though it is the governments that are sanctioned by the EU withholding funds, in practice, the EU citizens of the given country are indirectly deprived as a result. One example is the freezing of Erasmus+ and Horizon Europe funds for Hungarian universities managed by public interest trusts (Ceran & Guerra, 2023). Nevertheless, the Commission has the potential to strengthen the aspect of legitimacy by focusing thoroughly on monitoring the completion of the milestones. Given how determined it was to enforce the application of the regulation against Hungary, one can hope that it will continue to do so at the monitoring stage of the mechanism as well.

Blauburger and van Hüllen had mixed anticipations about the application context, particularly if the procedure targets 'anti-democratic' governments that are nevertheless members of the EU. They expected a shared EU identity, common institutions, and procedures to increase the EU's direct leverage. So far, it seems that financial punishment has not had the same deterring effect as the prospect of losing the possibility of membership in the pre-accession years. Table 3 shows this mixed picture based on the criteria (see Annex). It reveals that the rule of law conditionality mechanism became less successful during its test run than was foreseen based on the original budget proposal from 2019. However, even though there are still questions surrounding the outcome of the regulation and the direct effects it might have on the rule of law at a national level, what the Commission and EU Member States have achieved in 2022 regarding their willingness to target a particular Member State for its various breaches of EU law and values, is unprecedented. The aspects where the conditionality mechanism undoubtedly proved to be more effective than other rule of law protecting methods are the speed of the procedure (thirteen months have passed between the Commission's first notification to Hungary and the final Council decision), the simple nature of the process (no need for Council unanimity) and the increased credibility of the Commission.

Undoubtedly, the year 2022 has initiated a new practice on the EU's part: using different financial tools as leverage to achieve results in the area of the rule of law. Hungary thus represents a certain kind of 'textbook case' of the EU employing the different types of conditionality at its disposal in an over-encompassing and complementary way.

6 Conclusion

The EU has expanded its rule of law protection toolkit in recent years. Tying the rule of law concerns to the budget has been a bold step forward, and it surely has potential. However, it is early to conclude that the rule of law conditionality mechanism means a breakthrough in the post-accession effectiveness of the EU conditionality so far. It indeed increased the activism and the legitimacy of the Commission, and it also proved that there is room for swift, quicker action within the bloc and that procedures can move forward more quickly when the burden of a qualified majority is not present. However, the EU institutions still struggle to handle rogue Member States, some of which are not classic liberal democracies, and only time will tell whether the quick remedies Hungary introduced under the Commission's pressure will significantly impact the Hungarian rule of law conditions.

The complementary way of applying different conditionality methods could mean a way forward for effective enforcement. If Hungary loses a significant amount of money from the RRF or the cohesion funds due to rule of law concerns, this may have a deterring effect on other Member States in the future. However, rogue governments still have the means of disregarding certain EU commitments that do not fall under the scope of these ongoing procedures. The way forward for the Commission could be to find a balance between economic and legal dimensions in the area of conditionality, step away from its management-oriented, preventive dialogue-focused approach, and identify a firm way to make enforcement more effective. This means that this new type of conditionality should not stop at the stage of withholding money, but the reforms of Member States should be closely monitored by EU institutions to make sure they comply with EU law and respect the rule of law. The EU has a diverse toolkit for the protection of the rule of law in the form of its conditionalities, and it is the long-term, strategically crucial task of EU institutions to ensure their effectiveness.

References

- Amnesty International, Eötvös Károly Institute, TASZ, Hungarian Helsinki Committee, K-monitor, Transparency International Hungary (2023). *Assessment of compliance by Hungary with conditions to access European Union funds*. https://helsinki.hu/en/wp-content/uploads/sites/2/2023/04/HU_EU_funds_assessment_Q1_2023.pdf
- Barroso, J. M. (2012). State of the Union Address, European Parliament, Speech/12/596.
- Blauberger, M. & van Hüllen, V. (2021). Conditionality of EU funds: an instrument to enforce EU fundamental values? *Journal of European Integration*, 43(1), 1–16. <https://doi.org/10.1080/07036337.2019.1708337>
- Bozóki, A. & Hegedűs, D. (2018). An externally constrained hybrid regime: Hungary in the European Union. *Democratization*, 25(7), 1173–1189. <https://doi.org/10.1080/13510347.2018.1455664>
- Börzel, T. A. & Cichowski, R. A. (2003). *The State of the European Union*, vol. 6: *Law, Politics, and Society*. Oxford University Press. <https://doi.org/10.1093/019925740X.001.0001>

- Ceran, O. & Guerra, Y. (2023, March 28). The Council's Conditionality Decision as a Violation of Academic Freedom? *Verfassungsblog*. <https://doi.org/10.17176/20230328-195232-0>
- Chayes, A. & Chayes, A. H. (1993). On compliance. *International Organization*, 47(2), 175–205. <https://doi.org/10.1017/S0020818300027910>
- Council of the European Union (2022a). *Council implementing decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022D2506>
- Council of the European Union (2022b). *Economic and Financial Affairs Council, 6 December 2022 Main results*.
- Court of Justice of the EU (2022a). *Judgement of the Court in Case C-157/21. Poland v European Parliament and Council* EU:C:2022:98. 16 February 2022.
- Court of Justice of the EU (2022b). *Judgement of the Court in Case C-156/21. Hungary v Parliament and Council* EU:C:2022:97. 16 February 2022.
- Downs, G. W. & Rocke, D. M. & Barsoom, P. N. (1996). Is the good news about compliance good news about cooperation? *International Organization*, 50(3), 379–406. <https://doi.org/10.1017/S0020818300033427>
- European Commission (2013, March 27). *The EU Justice Scoreboard, A tool to promote effective justice and growth*. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0160>
- European Commission (2018, May 2). *Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union's Budget in case of Generalised Deficiencies as Regards the Rule of Law in the Member States*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0324>
- European Commission, (2020). *2020 Rule of Law Report*. https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2020-rule-law-report_en
- European Commission (2022a, September 18). *Proposal for a Council implementing decision on measures to protect the Union budget against breaches of the principles of the rule of law in Hungary*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0485>
- European Commission (2022b, November 30). *Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds*. https://ec.europa.eu/commission/presscorner/detail/en/IP_22_7273
- European Commission (2022c, December 22). *Commission Implementing Decision of 22.12.2022 approving the partnership Agreement with Hungary*. [https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10002&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10002&lang=en)
- European Commission (2022d, July 15). *Commission refers HUNGARY to the Court of Justice of the EU over violation of LGBTIQ rights*. https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2689
- European Council (2023). *A recovery plan for Europe*. <https://www.consilium.europa.eu/en/policies/eu-recovery-plan/>

- European Parliament (2022a, September 15). *European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded*. https://www.europarl.europa.eu/doceo/document/TA-9-2022-0324_EN.html
- European Parliament (2022b, November 21). *Motion for a resolution on the assessment of Hungary's compliance with the rule of law conditions under the Conditionality Regulation and state of play of the Hungarian RRP*. https://www.europarl.europa.eu/doceo/document/B-9-2022-0511_EN.html
- European Parliament (2022c, November 24). *European Parliament resolution of 24 November 2022 on the assessment of Hungary's compliance with the rule of law conditions under the Conditionality Regulation and state of play of the Hungarian RRP*. https://www.europarl.europa.eu/doceo/document/TA-9-2022-0422_EN.html
- European Parliament (2022d, October 4). *Protection of EU budget: MEPs warn Commission to "not compromise" with Hungary*. <https://www.europarl.europa.eu/news/en/press-room/20220930IPR41924/protection-of-eu-budget-meps-warn-commission-to-not-compromise-with-hungary>
- European Parliament (2022e, November 17). *Press conference by Petri Sarvamaa, Eider Gardiazabal Rubial, co-rapporteurs, and Moritz Körner, Daniel Freund on the Rule of Law conditionality regulation*. https://multimedia.europarl.europa.eu/hu/webstreaming/press-conference-by-petri-sarvamaa-eider-gardiazabal-rubial-co-rapporteurs-and-moritz-korner-daniel_20221117-1030-SPECIAL-PRESSER
- Hegedűs, D. (2023, September 22). The (geo)politics of sanctioning corruption and autocratization in Hungary. *AuthLib*. https://www.authlib.eu/the-geopolitics-of-sanctioning-corruption-and-autocratization-in-hungary/?fbclid=IwAR07baFERuQZKA-0_MAc3IoK0I9WhzQVly_8RRue5rDiZ9knJFG66J1bII
- Hungarian Helsinki Committee, K-Monitor, Transparency International Hungary (2022). *Half-hearted promises, disappointing delivery: An Assessment of the Hungarian Government's New Measures to Protect the EU Budget and Related Recommendations*. <https://helsinki.hu/en/half-hearted-promises-disappointing-delivery-assessment-of-the-governments-measures-to-protect-the-eu-budget/>
- Hungary Today (2023, May 3). Viktor Orbán Negotiates About EU Funds in Budapest. <https://hungarytoday.hu/viktor-orban-negotiates-about-eu-funds-in-budapest/>
- HVG (2023, June 6). Nagy Márton szerint van élet uniós források nélkül [There is life beyond EU funds according to Márton Nagy]. *Hvg.hu*. https://hvg.hu/gazdasag/20230606_Nagy_Marton_messzire_tekint_élet_unios_forrasok_nelkul
- Jakab, A. & Kochenov, D. (2017). Introductory Remarks. In A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States Compliance* (pp. 1–6). Oxford University Press.
- Kochenov, D. & Bárd, P. (2018). *Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement*. Reconnect Working Paper No. 1 – July 2018. https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf

- Maurice, E. (2023). *Rule of law: the uncertain gamble on conditionality*. Fondation Robert Schuman European issues policy paper No. 660. <https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-660-en.pdf>
- Medvegy, G. (2019, September 16). Slowly and Stealthily: Rule of Law Being Undermined in Hungary. *Liberties*. <https://www.liberties.eu/en/stories/slowly-and-stealthily-rule-of-law-being-undermined-in-hungary/17634#>
- Official Journal of the European Union (2020, December 22). *Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AAOJ.LI.2020.433.01.0001.01.ENG>
- Priebus, S. (2022). The Commission's Approach to Rule of Law Backsliding: Managing Instead of Enforcing Democratic Values? *Journal of Common Market Studies*, 60(6), 1–17. <https://doi.org/10.1111/jcms.13341>
- Scheppele, K. L. (2013, November 22). What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions. *Verfassungsblog*. <https://doi.org/10.17176/20171006-142028>
- Scheppele, K. L. & Mészáros, G. (2022a, October 6). How NOT to be an independent agency: The Hungarian Integrity Authority. *Verfassungsblog*. <https://doi.org/10.17176/20221006-110412-0>
- Scheppele, K. L. & Mészáros, G. (2022b, October 12). Corrupting the Anti-Corruption Program. *Verfassungsblog*. <https://doi.org/10.17176/20221012-230302-0>
- Sedelmeier, U. (2011). Europeanisation in new member and candidate states. *Living Reviews in European Governance*, 6(1). <https://doi.org/10.12942/lreg-2011-1>
- Tamma, P. (2023, May 2). Hungary embarks on judicial reform hoping to unlock EU cash. *Politico*. <https://www.politico.eu/article/hungary-embarks-on-judicial-reform-hoping-to-unlock-eu-cash/>

Annex

Table 1 Evaluation of the Commission's 2018 proposal for fiscal conditionality

Scope condition	Operationalization
Determinacy of conditions -	<ul style="list-style-type: none"> rule of law (precise) vs. 'generalized deficiencies' (vague) definitions backed by references to other sources, but no clear operationalization (→ political discretion)
Size and speed of sanctions+	<ul style="list-style-type: none"> non-negligible share of GDP (structural and investment funds) clear timeframe
Likelihood of application +	<ul style="list-style-type: none"> voting rules, majority requirements (number of) actors involved (veto-players) responsiveness (gradual approach)
Perceived legitimacy -	<ul style="list-style-type: none"> possibility of proportional sanctions, but problem of targetedness lack of systematic monitoring procedures de facto unequal affectedness/vulnerability of Member States
Context of application +-	<ul style="list-style-type: none"> anti-democratic government, but (still) competitive democracy extremely close bilateral relationship

Source: Blauburger & van Hüllen (2021, p. 13).

Table 2 Timeline of rule of law conditionality negotiations in respect of the EU and Hungary dialogue

Date	Event
27 April 2022	Commission sends a written notification to Hungary pursuant to Article 6(1) of Regulation (EU, Euratom) 2020/2092
27 June 2022	First reply by Hungary to the Commission's notification
30 June 2022	Hungary submits further information complementing the first reply in the form of a letter
5 July 2022	Hungary submits further information complementing the first reply in the form of another letter
19 July 2022	A third letter from Hungary to the Commission proposing remedial measures to address the findings in the notification
20 July 2022	Intention letter sent by the Commission to Hungary: informing Hungary of its assessment and of the proposed measures Hungary should take
22 August 2022	Second reply from Hungary: certain remedial measures proposed

Table 2 (continued)

Date	Event
13 September 2022	Another letter from Hungary to the Commission: clarifications and further commitments relevant to the remedial measures proposed
18 September 2022	Commission's proposal for a Council implementing decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary
24 November 2022	European Parliament resolution on the assessment of Hungary's compliance with the rule of law conditions under the Conditionality Regulation and state of play of the Hungarian RRP
30 November 2022	Commission proposal for an implementing Decision of the Council on the approval of the assessment of the Recovery and Resilience Plan for Hungary
6 December 2022	Economic and Financial Affairs Council - no decision reached
12 December 2022	COREPER meeting - mega-deal
15 December 2022	Council implementing decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary.

Table 3 Evaluation of the rule of law conditionality mechanism as adopted against Hungary in 2022

Scope condition	Operationalization
Determinacy of conditions +/-	<ul style="list-style-type: none"> rule of law is defined in the regulation, but too much discretion to the Commission difficult to measure the results of the Hungarian government's remedies
Size and speed of sanctions +/-	<ul style="list-style-type: none"> clearer timeframe shorter procedure threat of freezing a huge amount of money – is it deterring?
Likelihood of application +	<ul style="list-style-type: none"> lower decision-making hurdles fewer actors to be involved more power to the Commission
Perceived legitimacy +/-	<ul style="list-style-type: none"> possibility of proportional sanctions, but problem of targetedness Commission as leader of monitoring procedures de facto unequal affectedness/vulnerability of Member States
Context of application –	<ul style="list-style-type: none"> anti-democratic government, but (still) competitive democracy EU promoting its identity within its own bloc does not help no extra motivation (of membership)