Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 2 December 2021 [1]

**Case C-156/21**

**Hungary**
**v**
**European Parliament and**

**Council of the European Union**

(Action for annulment – Article 151(1) of the Rules of Procedure of the Court of Justice – Preliminary issue – Request for the removal of a document – Opinion of the Council Legal Service – Regulation (EU, Euratom) 2020/2092 – General regime of conditionality for the protection of the Union budget – Protection of the Union budget in the case of breaches of the principles of the rule of law in a Member State – Legal basis of Regulation 2020/2092 – Article 322(1)(a) TFEU – Infringement of Article 7 TEU and Article 269 TFEU – Infringement of Article 4(1), Article 5(2) and Article 13(2) TEU – Principle of legal certainty – Principle of equal treatment between Member States – Principle of proportionality)

1. In this action, [2] brought pursuant to Article 263 TFEU, Hungary asks the Court, in its principal claim, to annul Regulation (EU, Euratom) 2020/2092 [3] or, in the alternative, to annul certain articles of that regulation.

2. In the present case, the *constitutional* importance of which is undeniable, the Court must determine whether Regulation 2020/2092, which introduces a mechanism to protect the Union budget against breaches of the principles of the rule of law by Member States relating to the implementation of the Union budget, was adopted on an appropriate legal basis and whether it is compatible with various provisions of primary law, in particular Article 7 TEU.

3. The Court has decided to assign the case to the full Court, as the appropriate formation to hear cases of 'exceptional importance' (Article 16 of the Statute of the Court of Justice of the European Union).

1 Original language: Spanish.

2 In Case C-157/21, *Poland* v *Parliament and Council*, the Republic of Poland makes the same claim. I deliver my Opinion in both cases today.

3 Regulation 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 (OJ 2020 L 433 I, p. 1).

## I. Legal framework

### *A. Primary law*

4. Article 7 TEU provides as follows:

'1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 [TFEU].'

5. According to Article 269 TFEU:

'The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 [TEU], solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.'

6. Article 322(1)(a) TFEU provides that:

'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, shall adopt by means of regulations:

(a) the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts'.

### *B. Regulation 2020/2092*

7. Article 1 ('Subject matter') provides that:

'This Regulation establishes the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States.'

8. According to Article 2 ('Definitions'):

'For the purposes of this Regulation, the following definitions apply:

(a) "the rule of law" refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making 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. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU;

…'

9. Article 3 ('Breaches of the principles of the rule of law') stipulates as follows:

'For the purposes of this Regulation, the following may be indicative of breaches of the principles of the rule of law:

(a) endangering the independence of the judiciary;

(b) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest;

(c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.'

10. Article 4 ('Conditions for the adoption of measures') provides as follows:

'1. Appropriate measures shall be taken where it is established in accordance with Article 6 that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

2. For the purposes of this Regulation, breaches of the principles of the rule of law shall concern one or more of the following:

(a) the proper functioning of the authorities implementing the Union budget, including loans and other instruments guaranteed by the Union budget, in particular in the context of public procurement or grant procedures;

(b) the proper functioning of the authorities carrying out financial control, monitoring and audit, and the proper functioning of effective and transparent financial management and accountability systems;

(c) the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union;

(d) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a), (b) and (c);

(e) the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities;

(f) the recovery of funds unduly paid;

(g) effective and timely cooperation with [the European Anti-Fraud Office (OLAF)] and, subject to the participation of the Member State concerned, with [the European Public Prosecutor's Office (EPPO)] in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation;

(h) other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.'

11. Article 5 ('Measures for the protection of the Union budget') states:

'1. Provided that the conditions set out in Article 4 of this Regulation are fulfilled, one or more of the following appropriate measures may be adopted in accordance with the procedure set out in Article 6 of this Regulation:

…

(b) where the Commission implements the Union budget under shared management with Member States pursuant to point (b) of Article 62(1) of the Financial Regulation:

(i) a suspension of the approval of one or more programmes or an amendment thereof;

(ii) a suspension of commitments;

(iii) a reduction of commitments, including through financial corrections or transfers to other spending programmes;

(iv) a reduction of pre-financing;

(v) an interruption of payment deadlines;

(vi) a suspension of payments.

2. Unless the decision adopting the measures provides otherwise, the imposition of appropriate measures shall not affect the obligations of government entities referred to in point (a) of paragraph 1 or of Member States referred to in point (b) of paragraph 1 to implement the programme or fund affected by the measure, and in particular the obligations they have towards final recipients or beneficiaries, including the obligation to make payments under this Regulation and the applicable sector-specific or financial rules. When implementing Union funds under shared management, Member States concerned by measures adopted pursuant to this Regulation shall report to the Commission on their compliance with those obligations every three months from the adoption of those measures.

The Commission shall verify whether applicable law has been complied with and, where necessary, take all appropriate measures to protect the Union budget, in line with sector-specific and financial rules.

3. The measures taken shall be proportionate. They shall be determined in light of the actual or potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union. The nature, duration, gravity and scope of the breaches of the principles of the rule of law shall be duly taken into account. The measures shall, in so far as possible, target the Union actions affected by the breaches.

4. The Commission shall provide information and guidance for the benefit of final recipients or beneficiaries on the obligations by Member States referred to in paragraph 2 via a website or an internet portal. The Commission shall also provide, on the same website or internet portal, adequate tools for final recipients or beneficiaries to inform the Commission about any breach of these obligations that, in the view of these final recipients or beneficiaries, directly affects them …

5. On the basis of the information provided by the final recipients or beneficiaries in accordance with paragraph 4 of this Article, the Commission shall do its utmost to ensure that any amount due from government entities or Member States as referred to in paragraph 2 of this Article is effectively paid to final recipients or beneficiaries …'

12. Article 6 ('Procedure') provides:

'1. Where the Commission finds that it has reasonable grounds to consider that the conditions set out in Article 4 are fulfilled, it shall, unless it considers that other procedures set out in Union legislation would allow it to protect the Union budget more effectively, send a written notification to the Member State concerned, setting out the factual elements and specific grounds on which it based its findings. The Commission shall inform the European Parliament and the Council without delay of such notification and its content.

…

9. Where the Commission considers that the conditions of Article 4 are fulfilled and that the remedial measures, if any, proposed by the Member State under paragraph 5 do not adequately address the findings in the Commission's notification, it shall submit a proposal for an implementing decision on the appropriate measures to the Council within one month of receiving the Member State's observations or, in the event that no observations are made, without undue delay and in any case within one month of the deadline set in paragraph 7. The proposal shall set out the specific grounds and evidence on which the Commission based its findings.

10. The Council shall adopt the implementing decision referred to in paragraph 9 of this Article within one month of receiving the Commission's proposal. If exceptional circumstances arise, the period for the adoption of that implementing decision may be extended by a maximum of two months. With a view to ensuring a timely decision, the Commission shall make use of its rights under Article 237 TFEU, where it deems it appropriate.

11. The Council, acting by a qualified majority, may amend the Commission's proposal and adopt the amended text by means of an implementing decision.'

### *C. Regulation (EC) No 1049/2001* [4]

13. Article 4 ('Exceptions') states:

'…

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

…

– court proceedings and legal advice,

…

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

[4] Regulation of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

…'

## II. Proceedings before the Court of Justice

14. In its application, Hungary claims that the Court should: [5]

– Annul Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget.

– In the alternative, annul the following articles of Regulation 2020/2092: Article 4(1); Article 4(2)(h); Article 5(2); Article 5(3), penultimate and final sentences; and Article 6(3) and (8).

– Order the European Parliament and the Council of the European Union to pay the costs.

15. The Parliament and the Council ask the Court to dismiss the action and to order Hungary to pay the costs.

16. On 12 May 2021 the Parliament asked for the case to be heard pursuant to Article 133 of the Rules of Procedure of the Court of Justice (expedited procedure), and on 9 June 2021 the President of the Court granted its request.

17. On 12 May 2021 the Council applied to the Court, pursuant to Article 151(1) of the Rules of Procedure, requesting that the Court disregard certain passages in Hungary's application and in Annex A.3 thereto, because they reproduced or referred to an unpublished opinion of the Council Legal Service. On 29 June 2021 the Court decided, pursuant to Article 151(5) of the Rules of Procedure, that it would rule on that issue, together with the substance of the case, in the judgment.

18. The following parties appeared at the hearing, which was held before the full Court on 11 and 12 October 2021: Hungary, the Republic of Poland, the European Parliament and the Council, the European Commission and the Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden.

19. In my Opinion, I shall first address the preliminary issue raised by the Council. I shall then set out the legal context surrounding the drafting and adoption of Regulation 2020/2092. Lastly, I shall examine the nine grounds for annulment relied on by Hungary.

## III. Preliminary issue

20. The Council asks the Court 'to disregard the passages in the application and the annexes thereto, particularly Annex A.3, which refer to, reproduce the content of, or reflect the analysis undertaken in the opinion of the Council Legal Service (Council document 13593/18) ["the opinion"] of 25 October 2018 and, in particular, the passages [in paragraphs 21, 22, 164 and 166]'.

[5] Pursuant to the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, Hungary requested that the case be allocated to the Grand Chamber.

21. Hungary asks the Court to dismiss the Council's request or, in the alternative, to order it to produce the opinion.

22. I should begin by clarifying that the Council is not seeking the *removal* of an opinion which, quite simply, Hungary has not included as such in its application. Consequently, it is not possible to talk of removing a document which is not in the case file. As can be seen from the wording of the application made by the Council pursuant to Article 151 of the Rules of Procedure, the Council simply requests that the passages in Hungary's application and its annexes which reproduce or refer to that opinion be *disregarded*.

23. All EU Member States and the Commission have the opinion, in their capacity as members of the Council or participants in the legislative procedure that led to the adoption of Regulation 2020/2092.

24. Moreover, the existence of the opinion was revealed by the press,[6] and its content is available on the internet. Nevertheless, the Council has decided to maintain its confidential nature and has refused certain requests for access submitted pursuant to Regulation No 1049/2001, restricting itself to publishing paragraphs 1 to 8 of the document.[7]

25. A paradoxical situation has therefore arisen in which all parties to these proceedings have lawfully had access to the document, of which only the Court is officially unaware. In those circumstances, the Council's request is somewhat surprising[8] and does not correspond to the *typical* case – of the kind addressed in the Court's case-law – of a request for the removal of documents produced before the Court.

26. The application by Hungary and its annexes include:

– a transcription of a passage from the opinion, in paragraph 4 of the document in Annex 3, entitled *Non-paper from Hungary* concerning the Commission's proposal of 9 November 2018, which gave rise to Regulation 2020/2092;

– references to the opinion which would appear to reproduce its content, although I am unable to determine whether these are verbatim extracts or have been paraphrased by Hungary (paragraphs 22 and 164 of the application, and paragraphs 2 to 7 and 9 of Annex 3); and

– simple references to the opinion, in the context of specific arguments adduced by Hungary (paragraphs 21 and 166 of the application).

27. Before addressing the substance of the preliminary issue, I believe it would be helpful to set out the regulations and the relevant case-law of the Court on access to, disclosure of, and reliance in legal proceedings on documents of EU institutions, especially advice from their legal services.

6 Article in *Político* on 29 October 2018.

7 Document identified by the Council as number ST 13593 2018 INIT. Paragraphs 1 to 8 contain the introduction and a description of the legal framework and the facts, but do not include the legal analysis. They have been in the public domain since 18 December 2020: https://data.consilium.europa.eu/doc/document/ST-13593-2018-INIT/en/pdf. On this point, see the judgment of the General Court of 21 April 2021, *Pech* v *Council* (T-252/19, EU:T:2021:203, paragraphs 2 to 4).

8 The General Court was required to deal with a similar request. Order of 20 May 2020, *Nord Stream 2* v *Parliament and Council* (T-526/19, EU:T:2020:210), against which an appeal is pending, on which Advocate General Bobek delivered his Opinion on 6 October 2021, *Nord Stream 2* v *Parliament and Council* (C-348/20 P, EU:C:2021:831).

### *A. Rules on access to and reliance in legal proceedings on documents of EU institutions*

28. Access on the part of natural and legal persons to documents of EU institutions is governed by Regulation No 1049/2001. Its purpose is to ensure the widest possible access and, consequently, Article 2(1) establishes the general principle of a right of access to all EU documents, albeit subject to certain conditions and limits. [9]

29. Article 4 of Regulation No 1049/2001, set out above, establishes the exceptions to the right of access, which are framed by reference to public or private interest. These exceptions include provision to refuse access to documents:

– where disclosure would undermine the protection of 'court proceedings and legal advice, … unless there is an overriding public interest in disclosure';

– drawn up 'by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, … if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

30. Regulation No 1049/2001 applies only to access requests by natural and legal persons, not by Member States. Where legislative acts of the Council are concerned, naturally, Member States have at their disposal the documents generated by the Council.

31. However, when it comes to disclosing or releasing restricted documents, Member States must request authorisation for which, in the case of the Council, provision is made in its rules of procedure. [10] Annex II to those rules contains the specific provisions governing public access to Council documents, which refer to Regulation No 1049/2001. [11]

32. The reference to the rules in Regulation No 1049/2001 is supplemented by guidelines for the handling of documents internal to the Council. [12] Paragraph 5 of the guidelines states that documents marked 'LIMITE' are deemed covered by the obligation of professional secrecy in accordance with Article 339 TFEU and Article 6(1) of the Council's Rules of Procedure, and must also be handled in compliance with the relevant EU legislation, in particular Regulation No 1049/2001.

9 'Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.'

10 Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (OJ 2009 L 325, p. 35). Article 6(2) provides that 'the Council or Coreper may authorise the production for use in legal proceedings of a copy of or an extract from Council documents which have not already been released to the public in accordance with the provisions on public access to documents'.

11 Article 5: 'When a Member State refers a request to the Council, it shall be handled in accordance with Articles 7 and 8 of Regulation (EC) No 1049/2001 and the relevant provisions of this Annex. In the event of a total or partial refusal of access, the applicant shall be informed that any confirmatory application must be addressed directly to the Council.'

12 Note by the Council of 10 April 2018 on handling of documents internal to the Council, available at https://data.consilium.europa.eu/doc/document/ST-7695-2018-INIT/en/pdf.

33. With regard to access to 'LIMITE' documents, under paragraphs 20 to 22 of the Council guidelines, disclosure is subject to prior authorisation by the Council. [13]

### *B. Case-law concerning, in particular, access to advice of the institutions' legal services and reliance on such advice in legal proceedings*

34. For the most part, the case-law of the Court has been developed in cases involving requests by natural and legal persons for access to documents from the institutions which have been refused.

35. In that case-law, the Court has applied and interpreted Regulation No 1049/2001, specifically as regards requests for access to legal advice of the European Union's institutions. That regulation has a 'certain indicative value for the purpose of the weighing up of interests that is required in order to rule' on requests for the removal of documents in a case before the Court. [14]

36. According to the Court, 'it would be contrary to the public interest [reflected in Article 4 of Regulation No 1049/2001], which requires that the institutions should be able to benefit from the advice of their legal service, given in full independence, to allow such internal documents to be produced in proceedings before the Court unless their production has been authorised by the institution concerned or ordered by the Court …'. [15]

37. Consistent with this approach, the purpose of the exception relating to legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001 is 'to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice'. [16]

38. The examination to be undertaken by the Council in applying that exception, which must be interpreted strictly, [17] takes place in three stages, which are described in detail in the judgment in *Sweden and Turco* v *Council* (paragraphs 37 to 47):

– 'First, the Council must satisfy itself that the document which it is asked to disclose does indeed relate to legal advice'.

– 'Second, the Council must examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice "would undermine the protection" of that advice … The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.'

[13] Paragraph 20: '"LIMITE" documents must not be made public unless a decision to that effect has been taken by duly authorised Council officials, by the national administration of a Member State (see paragraph 21), or, where relevant, by the Council, in accordance with Regulation (EC) No 1049/2001 and the Council's rules of procedure.'
Paragraph 21: 'Personnel in any EU institution or body other than the Council may not themselves decide to make "LIMITE" documents public without first consulting the General Secretariat of the Council (GSC). Personnel in the national administration of a Member State will consult the GSC before taking such a decision unless it is clear that the document can be made public, in line with Article 5 of Regulation (EC) No 1049/2001.'
Paragraph 22: 'The content of "LIMITE" documents can only be published on secure internet sites or web-based platforms approved by the Council or with protected access features (e.g. Delegates Portal).'

[14] Judgment of 31 January 2020, *Slovenia* v *Croatia* (C-457/18, EU:C:2020:65; 'the judgment in *Slovenia* v *Croatia*'; paragraph 67), and order of 14 May 2019, *Hungary* v *Parliament* (C-650/18, not published, EU:C:2019:438; 'the order in *Hungary* v *Parliament*'; paragraphs 9, 12 and 13).

[15] The judgment in *Slovenia* v *Croatia*, paragraph 66, citing the order in *Hungary* v *Parliament*, paragraphs 8 and 9.

[16] Judgment of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374; 'the judgment in *Sweden and Turco* v *Council*'; paragraph 42).

[17] *Ibidem*, paragraph 36.

– 'Third and last, if the Council takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined.' [18]

39. Throughout this process, regard should be had to the statements of principle established by the Court in the judgment in *ClientEarth* v *Commission*: [19]

'– Regulation No 1049/2001 reflects the intention expressed in the second paragraph of Article 1 TEU to mark a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

– That core EU objective is also reflected in Article 15(1) TFEU, which provides that the institutions, bodies, offices and agencies of the European Union are to conduct their work as openly as possible, that principle of openness also being expressed in Article 10(3) TEU and in Article 298(1) TFEU, and in the enshrining of the right of access to documents in Article 42 of the Charter of Fundamental Rights of the European Union.

– It can be seen from recital 2 of Regulation No 1049/2001 that openness enables the EU institutions to have greater legitimacy and to be more effective and more accountable to EU citizens in a democratic system. By allowing divergences between various points of view to be openly debated, it also contributes to increasing those citizens' confidence in those institutions'.

40. The requirement for 'openness' (transparency) may, however, not be sufficient to justify the retention in the case file of an institution's advice that has been submitted as part of an appeal if certain risks are present. These include the risk of compelling the institution to 'take a position publicly on advice that was quite clearly intended for internal use, [which would have] negative consequences for the [institution's] interest in seeking legal advice and in receiving frank, objective and comprehensive advice'. [20]

41. Moreover, to authorise a document to be retained in the case file, when its disclosure has not been authorised by the institution, would enable the procedure for access requests established in Regulation No 1049/2001 to be circumvented. [21]

42. When it comes to the advice of institutions *issued in the context of legislative procedures*, the case-law of the Court has established a much broader right of access, and consequently a much greater disclosure obligation.

18 On this point, see the judgments in *Sweden and Turco* v *Council*, paragraphs 38 to 44; and of 3 July 2014, *Council* v *in 't Veld* (C-350/12 P, EU:C:2014:2039, paragraph 96); and the order in *Hungary* v *Parliament*, paragraph 11.

19 Judgment of 4 September 2018 (C-57/16 P, EU:C:2018:660, paragraphs 73 to 75), and the order in *Hungary* v *Parliament*, paragraph 13.

20 The judgment in *Slovenia* v *Croatia*, paragraph 70.

21 The order in *Hungary* v *Parliament*, paragraph 14, and the judgment in *Slovenia* v *Croatia*, paragraph 68.

43. This was made clear in the judgment in *Sweden and Turco* v *Council*, when the Court rejected the 'justifications' relied on by the Council for excluding an opinion of its legal service relating to a legislative proposal from the case file. The Council had argued that disclosure of this opinion 'could lead to doubts as to the lawfulness of the legislative act concerned' and that 'the independence of its legal service would be compromised'. [22]

44. In replying to those arguments, the Court stated as follows:

– As regards the first argument, 'it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole'. [23]

– As regards the second argument, the claimed risk (of compromising the independence of the legal service) cannot be purely hypothetical, and must not be confused with the possibility of pressure being applied for the purpose of influencing the content of opinions issued by that service. [24]

45. It follows from the above considerations that 'Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process'. That finding does not preclude a refusal 'to disclose a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question'. [25]

### *C. Analysis of the request by the Council*

46. The Council's request should be divided into two parts.

47. The first part relates to the request for the removal of Annex 3 to the application, which contains the *Non-paper from Hungary* concerning the Commission's proposal that gave rise to Regulation 2020/2092. The *Non-paper* contains a verbatim extract from the opinion of the Council Legal Service, as well as references to that opinion which *appear* to reproduce its content.

48. As the *Non-paper from Hungary* is a document that was drafted and submitted by Hungary in the course of the legislative procedure used to adopt Regulation 2020/2092, it is not covered by the rules on access to documents of EU institutions.

49. There is therefore nothing to prevent Hungary, as the author of the document, from producing it in proceedings before the Court, in spite of the fact that it quotes, directly or indirectly, from the opinion of the Council Legal Service.

22 The judgment in *Sweden and Turco* v *Council*, paragraph 54.

23 *Ibidem*, paragraph 59.

24 *Ibidem*, paragraphs 62 to 66.

25 *Ibidem*, paragraphs 68 and 69.

50. In the second part of its application, the Council asks the Court to disregard the passages in the application submitted by Hungary which refer to the opinion, reproduce its content, or reflect the analysis it contains.

51. The only part of the Council's request which could, hypothetically, be granted is the part concerning the reproduction of the content of the opinion, not the points in Hungary's application which simply happen to coincide with that opinion. A Member State which challenges the validity of a legislative act of the European Union is fully entitled to defend its views, irrespective of whether they coincide with the content of documents prepared in the course of the procedure leading to the adoption of that act.

52. If Hungary had applied to the Council for access to the opinion, the case could in principle be addressed under the Council's Rules of Procedure, Article 6(2) of which states that the Council may *authorise* 'the production for use in legal proceedings of a copy of or an extract from Council documents which have not already been released to the public in accordance with the provisions on public access to documents'.

53. For Council documents marked 'LIMITE', as in this case, paragraph 5 of the guidelines for the handling of documents internal to the Council, which I referred to above, states that such documents are deemed covered by the obligation of professional secrecy in accordance with Article 339 TFEU and Article 6(1) of the Council's Rules of Procedure, and must also be handled in compliance with the relevant EU legislation, in particular Regulation No 1049/2001. With regard to access to 'LIMITE' documents, paragraphs 20 to 21 of the Council guidelines stipulate that disclosure is subject to prior authorisation by the Council.

54. Hungary would have required that same prior authorisation by the Council in order to include the opinion at issue as an annex to its application, because it is a document marked 'LIMITE', to which the Council has given only a very limited circulation and for which it has refused several access requests from private individuals.[26] As I have already argued, if blanket authorisation were given for documents to be produced in legal proceedings when their disclosure had not been authorised by the institution, the procedure for access requests established in Regulation No 1049/2001 would be easily circumvented.[27]

55. In short, in deciding on this preliminary issue, whatever approach is taken, the key point is the case-law of the Court on the inclusion of legal advice prepared in the context of a legislative process, which requires the three-stage examination I referred to above.[28]

56. As regards the first stage of that examination, there is no doubt that the document concerns *legal advice* (from the Council Legal Service), and this is not disputed by the parties.

57. In the second stage of the examination one has to assess whether disclosure of that specific advice *entails a risk that is reasonably foreseeable and not purely hypothetical to protection of the Council's legal advice.*

[26] It was one of those refusals by the Council that was annulled by the General Court in its judgment of 21 April 2021, *Pech* v *Council* (T-252/19, EU:T:2021:203).

[27] The order in *Hungary* v *Parliament*, paragraph 14, and the judgment in *Slovenia* v *Croatia*, paragraph 68. As I have also explained, the Council's Rules of Procedure and its general guidelines on access to its documents refer to Regulation No 1049/2001.

[28] Point 38 of this Opinion.

58. For the purposes of assessing whether there is such a risk in this case, I shall accept the premiss that Hungary would have required authorisation by the Council to *produce* the advice in the proceedings before the Court.

59. In my view, such authorisation would also be required in order for it to *include* in its application verbatim extracts from a document marked 'LIMITE', to which the Council restricts access, as in the present case, if, in practice, those extracts would reveal the full content of the document or its substance.

60. Without prior authorisation by the Council, the Member State would be able to evade this requirement in order to disclose confidential Council documents and produce them in proceedings: it would simply need to include the content of the documents in its application instead of appending the documents themselves as documentary evidence.

61. In the light of the above considerations, the following circumstances may be relevant:

– Apart from the first eight paragraphs of the opinion, which are purely explanatory rather than analytic, and which have been made public, the opinion is an internal document marked 'LIMITE', which is covered by the requirement for professional secrecy.

– Hungary is in possession of the text of the opinion legally, in its capacity as a Member State. It therefore obtained the text without evading the procedure in the Council's Rules of Procedure. Article 5 of Annex II to those rules indeed provides that Member States must apply to the Council for access to documents, but that formality applies only to documents not in their possession.

– The Council has not been required to adopt a public position on its legal service's opinion, since it has been able to reply to Hungary's application without needing to give an explicit assessment of the opinion. [29]

– 'Production for use in legal proceedings' cannot be taken to mean purely circumstantial references in the application to passages from the opinion. Only if the references were so extensive as to equate to unauthorised disclosure of the opinion itself would it be possible to argue that there was an attempt to evade the mandatory requirement for authorisation by the Council.

– As I have already said, Hungary is fully entitled to submit its legal arguments, however similar they are to those of the Council Legal Service, which are known to that Member State because it took part in the process of drawing up Regulation 2020/2092.

62. I do not, therefore, believe there is a risk that is reasonably foreseeable and not purely hypothetical to protection of the Council's legal advice. But if there were such a risk and the second stage of the examination were satisfied, one would still have to consider, in the third stage, whether there is an *overriding public interest* which justifies the retention in the case file of the direct or indirect references to passages of the opinion by the Council Legal Service.

[29] At the hearing, the Council was not required to express a view on the opinion of its legal service.

63. For the reasons I shall set out below, there is such an overriding public interest in this case, irrespective of any private interest on the part of Hungary in having the Council's request refused and retaining the references to the opinion, which support its argument on the (alleged) invalidity of Regulation 2020/2092.

64. The overriding interest which, in this case, would justify reliance on the passages from the Council Legal Service opinion in the proceedings and their disclosure is the transparency of the legislative process.

65. It should be recalled that access to documents of the Council when acting in its legislative capacity increases the transparency and openness of the legislative process and strengthens democracy, by allowing citizens to scrutinise all the information which has formed the basis of a legislative act. [30]

66. Moreover, in the context of a transparent legislative process, all well-founded legal opinions, whether for or against a particular proposal, which provide the co-legislators (who are ultimately responsible for the decision) and citizens in general with the essential information on which to base an assessment of that proposal should be welcomed.

67. This is possible only if the legal opinions that have been expressed are made public, which is precisely what 'contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated'. [31]

68. On the basis of these reflections, with which I am in complete agreement, the Court has determined that there is, in principle, an *obligation* to disclose legal advice relating to a legislative process. [32] The other side of this obligation is that there is no 'general need for confidentiality' in respect of that advice. [33]

69. However, the obligation is not absolute. Specifically, it 'does not preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, given in the context of a legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question'. [34]

70. The opinion at issue here was prepared in the context of the legislative process leading to the adoption of Regulation 2020/2092. In my view, the Council has failed to show that the opinion was 'particularly sensitive', although the regulation is undeniably of great importance for the European Union and its Member States.

30 The judgment in *Sweden and Turco* v *Council*, paragraph 67.

31 *Ibidem*, paragraph 59. That same paragraph goes on to say: 'It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole.'

32 The judgment in *Sweden and Turco* v *Council*, paragraphs 68 and 71.

33 *Ibidem*, paragraph 57.

34 *Ibidem*, paragraph 69.

71. It is the content of the legal opinion which must be of a particularly sensitive nature. From that perspective, while an opinion may address an important legislative measure, it can be considered *sensitive* only if contains information of a particularly delicate nature (for example, on confidential or secret matters), but not if it merely contains an assessment of questions of interpretation of the Treaties, such as issues concerning the legal bases for the measure.

72. In my view, the Council has also failed to demonstrate that the opinion has a 'particularly wide scope that goes beyond the context of the legislative process in question'.

73. While this expression in the judgment in *Sweden and Turco* v *Council* is not overly clear (since, in principle, legal opinions on a legislative proposal are limited to an examination of the validity or defects of the proposal, and do not extend further), I interpret it as referring to opinions which go beyond the content of the legislation which may potentially be subject to challenge and which are therefore not relevant to the judicial proceedings in which their production is sought.

74. Consequently, in this case the transparency of the legislative process must take precedence over the hypothetical risk that the Council's legal advice will not be duly protected (which has not been proven) or that the Council Legal Service will be hindered in providing advice that is 'frank, objective and comprehensive';[35] those characteristics are, in any event, ensured by the professionalism of the members of the legal service and must be safeguarded by the Council.

75. Having regard to all the above considerations, I propose that the Court should dismiss the Council's application on a preliminary issue.

## IV. Regulation 2020/2092: navigating between financial conditionality and safeguarding the rule of law

76. To arrive at a better understanding of the conditionality mechanism in Regulation 2020/2092 we need to consider: (a) the legislative procedure used to adopt the regulation, and (b) similar mechanisms already established in EU law, to which the mechanism introduced by that regulation is now added.

### *A. The legislative procedure used to adopt Regulation 2020/2092*

77. The drafting of Regulation 2020/2092 has been a particularly complex process, and the legislative procedure that was followed helps us to interpret it properly.[36]

[35] *Ibidem*, paragraph 64.

[36] See Louis, J.-V., 'Respect de l'État de droit et protection des finances de l'Union', *Cahiers de droit européen*, 2020, No 1, pp. 3-20; and Baraggia, A. and Bonelli, M., 'Linking Money to Values: the new Rule of Law Regulation and its constitutional challenges', *German Law Journal*, in press.

78. The regulation has its origins in the European Union's efforts to improve the means at its disposal for ensuring that Member States respect the principles of the rule of law. This European Union value, enshrined in Article 2 TEU, has been threatened by the recent practices of some Member States, as repeatedly highlighted by the Parliament and the Commission. Some of those Member States are major recipients of EU budgetary funds. [37]

79. The European Union has a limited arsenal of legal instruments available to it in order to confront breaches of the rule of law:

– The mechanism in Article 7 TEU provides for the determination of 'a clear risk of a serious breach by a Member State of the values referred to in Article 2' or 'the existence of a serious and persistent breach' of those values, and the consequences entailed by such a determination. The effectiveness of the mechanism is *fettered* by the need for a unanimous decision by the European Council in the latter case.

– Actions brought by the Commission (Article 258 TFEU) or by another Member State (Article 259 TFEU) for failure to fulfil an obligation provide an opportunity to determine whether a Member State has failed to comply with one of its obligations under the Treaties.

80. In 2014 the Commission adopted a 'new EU Framework to strengthen the Rule of Law', designed to 'ensure an effective and coherent protection of the rule of law in all Member States. It is a framework to address and resolve a situation where there is a systemic threat to the rule of law'. [38]

81. The new framework sought 'to resolve future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met. It is therefore meant to fill a gap. It is not an alternative to but rather precedes and complements Article 7 TEU mechanisms'. [39]

82. In 2019, the Commission updated its strategy, creating the European rule of law mechanism. [40] Based on close dialogue with national authorities and stakeholders, that mechanism brings transparency and covers all Member States on an objective and impartial basis. The Commission uses those data to prepare an annual report containing an assessment of each Member State. [41]

37 Hungary is one of the main recipients per capita of EU Structural Funds, with EUR 25 424 713 942 in the MFF 2014-2020 (EUR 2 532 per inhabitant) and with a high percentage of the country's public investment being co-financed by the European Union, according to data from the Commission available at https://cohesiondata.ec.europa.eu/countries/HU. The Republic of Poland is one of the clear principal beneficiaries of EU Structural Funds, having received EUR 89 990 274 817 (EUR 2 262 per inhabitant) in the MFF 2014-2020, according to data from the Commission available at https://cohesiondata.ec.europa.eu/countries/PL.

38 COM(2014) 158 final of 11 March 2014, Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law.

39 The opinion of the Council Legal Service No 10296/14 of 27 May 2014 criticises the Commission communication, stating that respect for the rule of law may be subject to action by the institutions only through the procedure in Article 7 TEU or where another specific material competence exists.

40 COM(2019) 163 final of 3 April 2019, Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the Rule of Law within the Union. State of play and possible next steps. COM(2019) 343 final of 17 July 2019, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Strengthening the rule of law within the Union A blueprint for action.

41 For 2020 and 2021, see COM(2020) 580 final of 30 September 2020, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2020 Rule of Law Report. The rule of law situation in the European Union; and COM(2021) 700 final of 20 July 2021, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2021 Rule of Law Report. The rule of law situation in the European Union.

83. In that context, in May 2018 the Commission put forward a proposal for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. [42]

84. The proposal seems to have given rise to some doubt on the part of the Council Legal Service. The Court of Auditors made certain recommendations for improving its content, [43] having noted that the legal basis for the proposal was doubtful, the criteria were not clearly specified, it gave the Commission very broad discretion, and it avoided the mechanism in Article 7 TEU.

85. After a complex legislative process, the European Council of July 2020 [44] reached an agreement to approve the Multiannual Financial Framework ('the MFF') 2021-2027 and the Next Generation EU Recovery Plan ('the Next Generation EU plan'). The agreement stated that 'a regime of conditionality to protect the budget and Next Generation EU will be introduced'.

86. In spite of that agreement, the two co-legislators continued to have different perspectives on what would eventually become Regulation 2020/2092:

– The Parliament sought to use the budget to protect the rule of law, whereas the Council wanted to use respect for the requirements of the rule of law as a means to protect the Union budget.

– The Parliament argued for a broad application of the regulation, whereas the Council wanted to limit its application, requiring a direct link between breaches of the rule of law and specific negative effects on the Union budget. [45]

87. On 5 November 2020, the two co-legislators reached agreement over the text which, with minor changes, became Regulation 2020/2092, which came into force on 1 January 2021.

88. Hungary and the Republic of Poland opposed the text agreed by the co-legislators and, while they could not veto its adoption, because the legal basis for it is Article 322(1) TFEU, which provides for a qualified majority, they threatened to prevent the adoption of the MFF 2021-2027 and the Next Generation EU plan, which did require the unanimous approval of Member States.

89. The deadlock was broken at the European Council of December 2020, the conclusions of which included a 'compromise' on the scope and application of Regulation 2020/2092. [46]

42 COM(2018) 324 final of 2 May 2018, 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.

43 See Opinion No 1/2018 of the Court of Auditors concerning the proposal of 2 May 2018 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 (OJ 2018 C 291, p. 1).

44 Document EUCO 10/20, annex, paragraphs 22 and 23, Conclusions of the European Council of 21 July 2020.

45 See Rubio, E., *Rule of Law Conditionality – what could an acceptable compromise look like*?, Institut Jacques Delors Policy Brief, October 2020; Dimitrovs, A. and Droste, H., 'Conditionality Mechanism: What's In It?', *VerfBlog*, 2020/12/30, https://verfassungsblog.de/conditionality-mechanism-whats-in-it/.

46 Document EUCO 22/20, paragraph 2, Conclusions of the European Council of 11 December 2020. See the criticism of those conclusions in Beramdane, A., 'Conditionnalité budgétaire ou conditionnalité de l'État de droit?', *Revue du droit de l'Union européenne*, 2021, No 1, p. 155; Scheppele, K.L., Pech, L. and Platon, S., 'Compromising the Rule of Law while Compromising on the Rule of Law', *VerfBlog*, 2020/12/13, https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/; and Alemanno, A. and Chamon, M, 'To Save the Rule of Law you Must Apparently Break It', *VerfBlog*, 2020/12/11, https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently break-it/, who maintained that the European Council acted *ultra vires*.

90. While the European Council has no legislative powers in this area, its conclusions reaffirm procedural and substantive guarantees for Member States included in Regulation 2020/2092 and offer an interpretation (which, in view of the source, could be classed as authoritative, although not binding) of the meaning and scope of various of its elements. In any event, I should point out that interpretation of Regulation 2020/2092 is a matter for the Court.

91. In particular, the European Council conclusions state that the new regulation 'is to be applied in full respect of Article 4(2) TEU, notably the national identities of Member States inherent in their fundamental political and constitutional structures, of the principle of conferral, as well as of the principles of objectivity, non-discrimination and equal treatment of Member States'.

92. The areas of consensus identified by the European Council include, inter alia, the following: [47]

– The objective of the regulation is to protect the Union budget, including the Next Generation EU plan, its sound financial management and the Union's financial interests. [48]

– The application of the conditionality mechanism under the regulation will be objective, fair, impartial and fact-based, ensuring due process, non-discrimination and equal treatment of Member States.

– With a view to ensuring that these principles will be respected, the Commission intends to develop and adopt guidelines on the way it will apply the regulation, including a methodology for carrying out its assessment. Such guidelines will be developed in close consultation with the Member States. Should an action for annulment be introduced with regard to the regulation, the guidelines will be finalised after the judgment of the Court so as to incorporate any relevant elements stemming from such judgment. [49]

– The measures under the mechanism will have to be proportionate to the impact of the breaches of the rule of law on the sound financial management of the Union budget or on the Union's financial interests. The causal link between such breaches and the negative consequences on the Union's financial interests will have to be sufficiently direct and be duly established.

– The triggering factors set out in the regulation are to be read and applied as a closed list of homogenous elements and not be open to factors or events of a different nature. The regulation does not relate to generalised deficiencies. [50]

– The application of the mechanism will be subsidiary to the other procedures set out in Union law and will be applied where the latter do not provide for the Union budget to be protected more effectively.

47 For a detailed analysis, see Editorial Comments, 'Compromising (on) the general conditionality mechanism and the rule of law', *Common Market Law Review*, 2021, No 2, pp. 267-284.

48 This statement follows the approach under which the regulation is seen as an instrument of budget conditionality separate from the mechanism for protecting the rule of law.

49 The Parliament voiced its opposition to this compromise and criticised the Commission for accepting the need for guidelines on the application of Regulation 2020/2092 and for making adoption of the guidelines subject to the judgment of the Court of Justice in any potential actions for annulment of the regulation. See the European Parliament resolution of 8 July 2021 on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)). In December 2021 the guidelines had still not been adopted, and the application of the regulation is therefore, de facto, suspended.

50 On this statement, see footnote 53 to this Opinion.

93. With this European Council 'compromise', Hungary and the Republic of Poland lifted their veto on the MFF and the Next Generation EU plan, and Regulation 2020/2092 was finally adopted by the Council on 14 December and by the Parliament on 16 December 2020. [51]

94. The reduction in the scope of application of Regulation 2020/2092, through the requirement for a 'sufficiently direct' link between budget implementation and the breach of the principles of the rule of law has, to some extent, been 'offset' by the application of this financial conditionality mechanism to the funds made available by the European Union to the Member States through the Next Generation EU plan, established pursuant to Regulation (EU) 2020/2094. [52] Regulation 2020/2092 will also apply to both 'widespread' and 'individual' breaches of the principles of the rule of law. [53]

95. The (non-)application of Regulation 2020/2092 continues, however, to be a source of institutional disputes between the Commission and the Parliament. [54]

### *B. Financial conditionality mechanisms in EU law*

96. The European Union has a budget that provides it with the means necessary to attain its objectives and carry through its policies. Without prejudice to other revenue, the budget is financed from own resources (Article 311 TFEU) in accordance with provisions laid down in a decision of the Council. [55] The budget is the instrument of EU law which, each year, translates the principle of solidarity [56] into financial terms and it is of constitutional importance.

97. The income and expenditure of the annual Union budget are determined by the multiannual framework referred to in Article 312 TFEU. The MFF ensures that EU expenditure develops in an orderly manner and within the limits of its own resources. The present applicable framework is the MFF 2021-2027, [57] which provides for an increase of 0.6% in own resources, together with the funds made available with the adoption of the recovery instrument to tackle the economic consequences of COVID-19. [58]

51 European Parliament resolution of 17 December 2020 on the Multiannual Financial Framework 2021-2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (2020/2923(RSP), in particular, paragraph 4.

52 Recital 7 of the Council Regulation of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (OJ 2020 L 433 I, p. 23). See also Article 8 of Regulation 2021/241.

53 According to recital 15 of Regulation 2020/2092, 'breaches of the principles of the rule of law, in particular those that affect the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union. This is the case for individual breaches of the principles of the rule of law and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities.' Note, by contrast, that according to the conclusions of the European Council of 11 December 2020, 'the Regulation does not relate to generalised deficiencies'. This statement is not consistent with the content of the recital, and therefore cannot affect the interpretation of Regulation 2020/2092.

54 On 20 October 2021 the President of the European Parliament asked the Parliament's legal service to prepare an action against the European Commission for failure to apply Regulation 2020/2092. That request gave rise to the action for failure to act in Case C-657/21, *European Parliament* v *Commission*, currently pending before the Court.

55 For the MFF 2021-2027, the relevant decision is Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (OJ 2020 L 424, p. 1).

56 See Lenaerts, K. and Adam, S., 'La solidarité, valeur commune aux États membres et principe fédératif de l'Union européenne', *Cahiers de droit européen*, 2021, No 2, pp. 307-417.

57 Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 (OJ 2020 L 433I, p. 11).

58 This instrument authorises the Commission, as an exceptional measure, to take out temporary loans on the capital markets on behalf of the European Union up to a maximum value of EUR 750 billion, of which a maximum of 360 billion is to be used to provide loans and a maximum of 390 billion to meet expenditure; both sums are to be used solely to tackle the consequences of the COVID-19 crisis. As I have already remarked in my Opinion of 18 March 2021, *Germany* v *Poland* (C-848/19, EU:C:2021:218, footnote 43), this represents the greatest solidarity initiative undertaken by the European Union in its history.

98. Responsibility for implementing the Union budget rests with the Commission, pursuant to the first paragraph of Article 317 TFEU. It must do so 'in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322 [TFEU], … having regard to the principles of sound financial management. Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management'. [59]

99. Article 310(6) TFEU provides that 'the Union and the Member States, in accordance with Article 325, shall counter fraud and any other illegal activities affecting the financial interests of the Union'.

100. The Financial Regulation [60] establishes that the Commission may implement the Union budget directly, indirectly and under shared management with Member States. In practice, over 70% of the budget is implemented by the Commission under shared management with Member States, in accordance with the stipulations in Article 63 of the Financial Regulation. Under that shared management, the tasks required to implement Union budget funds are delegated to the authorities of Member States, under the oversight of the Commission. [61]

101. It is in this context of shared budget implementation between the Commission and Member States that the conditionality mechanisms in the Financial Regulation and other specific EU rules have emerged.

102. The regimes of conditionality for the protection of good budgetary management reflect a more widespread phenomenon of the use of conditionality both in EU law and in other countries (including countries with federal legal systems) [62] and in international organisations such as the International Monetary Fund and the World Bank.

59 Article 310(5) TFEU reiterates that 'the budget shall be implemented in accordance with the principle of sound financial management. Member States shall cooperate with the Union to ensure that the appropriations entered in the budget are used in accordance with this principle'.

60 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1) ('the Financial Regulation').

61 Article 63 of the Financial Regulation states that 'where the Commission implements the budget under shared management, tasks relating to budget implementation shall be delegated to Member States. The Commission and Member States shall respect the principles of sound financial management, transparency and non-discrimination and shall ensure the visibility of the Union action when they manage Union funds. To that end, the Commission and Member States shall fulfil their respective control and audit obligations and assume the resulting responsibilities laid down in this Regulation. Complementary provisions shall be laid down in sector-specific rules'.

62 In the United States, federal institutions have used financial conditionality in their relations with the federated states and local authorities in order to make the grant of funds from the federal budget conditional on acceptance of a prohibition on racial segregation in education and in the workplace, the introduction of a minimum wage, the establishment of an independent public state administration, or the imposition of a national speed limit on motorways, among other issues. The basis for this federal financial conditionality is to be found in Article I, Section 8, Clause 1 of the United States Constitution (the Spending Clause of the Constitution), which gives Congress power 'to lay and collect Taxes, … to … provide for the … general Welfare of the United States'. The United States Supreme Court has laid down the requirements for use of this conditionality in, among other judgments, *South Dakota v. Dole*, 483 U.S. 203 (1987), and *NFIB v. Sebelius*, 567 U.S. 519 (2012). See Yeh, B.T., *The Federal Government's Authority to Impose Conditions on Grant Funds*, Congressional Research Service, 2017, at https://sgp.fas.org/crs/misc/R44797.pdf; and Margulies, P., 'Deconstructing Sanctuary Cities: The Legality of Federal Grant Conditions That Require State and Local Cooperation on Immigration Enforcement', *Wash. & Lee L. Rev*. 2018, p. 1507.

103. In EU law, conditionality naturally applies to the accession of new States, subject to compliance with what are known as the *Copenhagen criteria*, and is standard practice in the European Union's external relations, where EU development aid is similarly naturally conditional on compliance with human rights requirements. [63]

104. In the field of internal relations between Member States and EU institutions, conditionality has been used, in particular, in instruments of economic and social cohesion and in budget management. [64]

105. Purely by way of example, the following examples of financial conditionality can be found in the new regulation laying down common provisions on structural funds for 2021 to 2027: [65]

– Environmental and climate conditionality, provided for in Article 6 ('Climate targets and climate adjustment mechanism') and Article 9(4).

– Conditionality based on respect for 'horizontal principles' (Article 9) regarding protection of fundamental rights and compliance with the Charter of Fundamental Rights in the implementation of the funds.

– Conditionality linked to specific objectives, provided for in Article 15 ('Enabling conditions') and in Annex III. [66] The annex contains 'horizontal enabling conditions applicable to all specific objectives and the criteria necessary for the assessment of their fulfilment'. It includes effective monitoring mechanisms of the public procurement market; tools and capacity for effective application of State aid rules; effective application and implementation of the Charter of Fundamental Rights; and implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCRPD) in accordance with Council Decision 2010/48/EC. [67] If these conditions are not met, the Commission may suspend reimbursement of expenditure incurred by the Member State.

– Macroeconomic conditionality, provided for in Article 19 ('Measures linking effectiveness of Funds to sound economic governance'). This provision authorises the Council, acting on a proposal from the Commission, to suspend part or all of the commitments or payments for one or more of the programmes of a Member State: (i) where that Member State does not take sufficient corrective action or fails to act to avoid an excessive imbalance, determined in accordance with Regulation (EU) No 1176/2011; [68] (ii) where the Commission concludes that

63 See Viță, V., 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality', *Cambridge Yearbook of European Legal Studies*, 2017, pp. 116-143.

64 See Viță, V., *Conditionalities in Cohesion Policy*, Research for REGI Committee, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels, 2018.

65 Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (OJ 2021 L 231, p. 159; 'the Common Provisions Regulation 2021-2027'). This regulation strengthens the conditionality mechanisms already established for the MFF 2014-2020 in Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320).

66 In addition, Annex IV contains the 'thematic enabling conditions applicable to ERDF, ESF + and the Cohesion Fund …'.

67 Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (OJ 2010 L 23, p. 35).

68 Regulation of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (OJ 2011 L 306, p. 25).

the Member State has not taken measures as referred to in Council Regulation (EC) No 332/2002 [69] and decides not to authorise the disbursement of the financial assistance granted to that Member State; and (iii) where the Council decides that a Member State does not comply with the macroeconomic adjustment programme referred to in Article 7 of Regulation (EU) No 472/2013 [70] or with the measures requested by a Council decision adopted in accordance with Article 136(1) TFEU.

106. Likewise, Articles 96 and 97 of the Common Provisions Regulation 2021-2027 authorise the Commission, respectively, to interrupt the payment deadline or suspend payments to Member States where there is a serious irregularity or deficiency or there is a reasoned opinion by the Commission in respect of an infringement procedure under Article 258 TFEU on a matter that puts at risk the legality and regularity of expenditure. Under Article 104, the Commission may also make a financial correction after the event, by reducing support from the funds to a programme where this type of situation arises.

107. Conditionality mechanisms are also found in sector-specific rules applicable to EU financial instruments. By way of example, these include the following:

– Macroeconomic conditionality, provided for in Article 10 of Regulation (EU) 2021/241 [71] in similar terms to those of Article 19 of the Common Provisions Regulation 2021-2027. Macroeconomic conditionality for structural funds applies to the Recovery and Resilience Facility, which is the main financial vehicle of the European Union Recovery Instrument, adopted under Regulation 2020/2094 to supplement the MFF and designed to tackle the economic consequences of COVID-19. This facility will be implemented by the Commission under direct management, in accordance with the relevant rules adopted pursuant to Article 322 TFEU, in particular the Financial Regulation and Regulation 2020/2092.

– Conditionality to achieve respect for rules on human rights in European integrated border management, provided for in Article 4 of Regulation (EU) 2021/1148. [72]

– Conditionality aimed at respect for human rights and for environmental objectives provided for in Article 4 of Regulation (EU) 2021/1229, which establishes the public sector loan facility under the Just Transition Mechanism. [73]

– Climate and environmental conditionality for direct payments to farmers under support schemes within the framework of the CAP, provided for in Articles 43 to 47 of Regulation (EU) No 1307/2013. [74]

69 Council Regulation of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments (OJ 2002 L 53, p. 1).

70 Regulation of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (OJ 2013 L 140, p. 1).

71 Regulation of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ 2021 L 57, p. 17).

72 Regulation of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy (OJ 2021 L 251, p. 48).

73 Regulation of the European Parliament and of the Council of 14 July 2021 on the public sector loan facility under the Just Transition Mechanism (OJ 2021 L 274, p. 1).

74 Regulation of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 (OJ 2013 L 347, p. 608).

108. While these conditionality mechanisms vary, all share a common logic: eligibility for a payment from the Union budget is conditional on compliance with certain horizontal requirements that are different from and additional to the requirements directly established by the European fund from which the payment is made. [75]

109. The financial conditionality introduced by Regulation 2020/2092 is linked, as far as budget implementation is concerned, to respect for the rule of law, which is 'essential for the protection of the other fundamental values [in Article 2 TEU]'. [76] Member States must comply with it, as a horizontal condition, when implementing the Union budget.

110. Financial conditionality establishes a link between solidarity and responsibility. The European Union transfers funds from its budget to Member States provided that the money is spent responsibly, which means spending it in accordance with EU values, such as the rule of law. Only if the budget is implemented in accordance with EU values will there be sufficient mutual trust between Member States when it comes to providing the European Union with the financial resources required to achieve its objectives.

111. We are all conscious that this new dimension to the technique of conditionality has significant repercussions for relations between the European Union and Member States. As a result of the conditionality mechanism, EU institutions have stronger powers to ensure that Member States respect the values of EU law when they participate in the management of the Union budget.

112. However, the use of the technique of financial conditionality in secondary legislation must comply with the requirements of primary law and fall within the European Union's competence.

113. To date, the case-law of the Court has focused primarily on environmental conditionality applied to direct payments to farmers [77] and on macroeconomic conditionality, which was viewed favourably in the *Pringle* judgment. [78]

114. In this latter judgment, the Court considered that conditionality was an appropriate mechanism for ensuring respect for EU law and for measures adopted by EU institutions to coordinate Member State's economic policies. It also stated that the macroeconomic conditionality provided for in Article 3, Article 12(1) and the first subparagraph of Article 13(3)

75 For example, receipt of payments from structural funds such as the ERDF or the ESF is conditional on compliance by the Member State with macroeconomic stability requirements.

76 Recital 6 of Regulation 2020/2092.

77 The case-law on environmental conditionality in direct payments to farmers includes the judgments of 27 January 2021, *De Ruiter* (C-361/19, EU:C:2021:71, paragraphs 31 to 41), and of 25 July 2018, *Teglgaard and Fløjstrupgård* (C-239/17, EU:C:2018:597, paragraph 42 et seq.). The judgment of 7 August 2018, *Argo Kalda Mardi talu* (C-435/17, EU:C:2018:637, paragraph 39), states that 'according to Article 93 of that regulation [No 1306/2013], the standards for good agricultural and environmental conditions are part of the rules on cross-compliance, which, as is provided by Article 91 of that regulation, must be complied with subject to an administrative penalty. Those standards are established at national level, listed in Annex II to that regulation and concern in particular the environment'.

78 Judgment of 27 November 2012 (C-370/12, EU:C:2012:756, paragraph 69): '… the reason why the grant of financial assistance by the stability mechanism is subject to strict conditionality under paragraph 3 of Article 136 TFEU, the article affected by the revision of the FEU Treaty, is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies'.

of the Treaty establishing the European stability mechanism (ESM Treaty)[79] ensured that the activities of the ESM were compatible with, inter alia, Article 125 TFEU and the coordinating measures adopted by the European Union.[80]

115. This case and Case C-157/21 provide the Court with an opportunity to develop its case-law on financial conditionality, and to extend it to an instrument used by its institutions to promote respect by Member States for the value of the rule of law enshrined in Article 2 TEU, in order to protect the Union budget.

116. Having set out these considerations, I shall now analyse the various grounds for annulment relied on by the Hungarian Government.

## V. First plea in law: there is no legal basis for Regulation 2020/2092 or the legal basis is inappropriate

### *A. The parties' arguments*

117. According to the Hungarian Government, while Article 322(1)(a) TFEU empowers the EU legislature to adopt financial rules on the implementation of the Union budget, Regulation 2020/2092 does not contain budgetary or financial provisions.

118. Consequently, the legal basis of Regulation 2020/2092 is not correct and the European Union has no power to approve secondary legislation with this content.

119. In its view, Regulation 2020/2092 allows the Commission and the Council to define the notion of the rule of law and the conduct that breaches the requirements imposed by that value of the European Union. The adopted mechanism authorises the imposition of sanctions that affect a Member State's fundamental structures, over which the European Union has no competence.

120. Article 322 TFEU makes no provision for such actions and is therefore an inappropriate legal basis for Regulation 2020/2092, whose scope of application conflicts with the procedure in Article 7 TEU.

121. The Hungarian Government also sets out the differences between Regulation 2020/2092 and other EU financial and budgetary rules for which the basis is Article 322(1)(a) TFEU.

122. Among the elements of Regulation 2020/2092 that are incompatible with Article 322 TFEU, the Hungarian Government cites, first, conflicts of interests in the allocation of EU funds. Regulation 2020/2092 does not contain any procedural rules for Member States on establishing

[79] Treaty establishing the European stability mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, concluded in Brussels on 2 February 2012.

[80] Judgment of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraphs 111 and 112). Paragraphs 154 to 156 addressed the actions of the Commission under the ESM Treaty to monitor compliance with the conditionality attached to financial assistance. The same points were made in the judgment of 20 September 2016, *Mallis and Malli* v *Commission and ECB* (C-105/15 P to C-109/15 P, EU:C:2016:702, paragraph 54).

rules on conflicts of interest and how to avoid them, thus enabling measures to be adopted against Member States on the basis of undefined infringements that go beyond the requirements laid down in the Financial Regulation.

123. Second, it argues that Article 5(2) of Regulation 2020/2092 obliges Member States to use their own funds to finance programmes for which the European Union withdraws funding, in order to protect beneficiaries. This provision is not consistent with the rules for implementing the Union budget and represents a penalty for a Member State that breaches the requirements of the rule of law.

124. According to the Hungarian Government, Article 322 TFEU cannot be used as the basis for imposing obligations on national budgets, as it provides only for the adoption of rules on implementing the Union budget.

125. The Parliament and the Council reject the arguments of the Hungarian Government and consider that Article 322(1)(a) TFEU is the correct legal basis for Regulation 2020/2092. [81]

126. In the view of those two institutions, Regulation 2020/2092 introduces a budgetary (financial) conditionality mechanism that is designed to ensure respect for the requirements of the rule of law, in line with other conditionality mechanisms that already exist within the European Union. This is supported by an analysis of the aim and content of the regulation.

### *B. Assessment*

127. I shall begin by recalling the settled case-law of the Court on the choice of legal bases in primary legislation for the adoption of secondary legislation: [82]

– 'The choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include the aim and content of that measure. If examination of the measure concerned reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component'. [83]

– 'Moreover, … to determine the appropriate legal basis, the legal framework within which new rules are situated may be taken into account, in particular in so far as that framework is capable of shedding light on the purpose of those rules'. [84]

– Once a harmonisation measure has been adopted, 'the EU legislature cannot be denied the possibility of adapting that act to any change in circumstances or development of knowledge having regard to its task of safeguarding the general interests recognised by the Treaty'. [85]

[81] To avoid repetition, in my remaining comments I shall take it as read that the Member States which intervened in the hearing (with the natural exception of Hungary and the Republic of Poland) and the Commission share the arguments advanced by the Parliament and the Council.

[82] Judgments of 8 December 2020, *Poland* v *Parliament and Council* (C-626/18, EU:C:2020:1000, paragraphs 43 to 47); of 8 December 2020, *Hungary* v *Parliament and Council* (C-620/18, EU:C:2020:1001, paragraphs 38 to 42); and of 3 December 2019, *Czech Republic* v *Parliament and Council* (C-482/17, EU:C:2019:1035).

[83] Judgment of 3 December 2019, *Czech Republic* v *Parliament and Council* (C-482/17, EU:C:2019:1035, paragraph 31).

[84] *Ibidem*, paragraph 32.

[85] *Ibidem*, paragraph 38.

128. According to that case-law, an analysis of the aim and content of Regulation 2020/2092 will enable us to determine whether Article 322(1)(a) TFEU is the appropriate legal basis for the measure, whether a different legal basis should have been used, or whether the European Union lacks the power to adopt the regulation.

*1. The aim of Regulation 2020/2092*

129. According to Article 1 of Regulation 2020/2092, the purpose of that regulation is to establish '… the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States'.

130. Various recitals of Regulation 2020/2092 highlight the link between respect for the rule of law and sound financial management of the Union budget.

– Recital 7 states that 'whenever Member States implement the Union budget, … respect for the rule of law is an essential precondition for compliance with the principles of sound financial management enshrined in Article 317 [TFEU]'.

– Recital 8 [86] declares that sound financial management can only be ensured by Member States if public authorities act in accordance with the law, if cases of fraud are effectively prosecuted and if administrative decisions are subject to effective judicial review.

– Recital 9 [87] highlights the importance of the independence of the judiciary and the criminal investigation services to tackle unlawful and arbitrary decisions of public authorities that could harm the financial interests of the European Union.

– Recital 13 emphasises that 'there is … a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management'.

– Recital 15 underlines that 'breaches of the principles of the rule of law, in particular those that affect the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union'.

131. In the light of these recitals, which are clearly in line with the provisions of Regulation 2020/2092, I consider that the purpose of this regulation is to create a specific mechanism to ensure proper management of the Union budget where a Member State commits breaches of the rule of law which jeopardise the sound management of the European Union's funds or its financial interests.

[86] 'Sound financial management can only be ensured by Member States if public authorities act in accordance with the law, if cases of fraud, including tax fraud, tax evasion, corruption, conflict of interest or other breaches of the law are effectively pursued by investigative and prosecution services, and if arbitrary or unlawful decisions of public authorities, including law-enforcement authorities, can be subject to effective judicial review by independent courts and by the Court of Justice of the European Union.'

[87] 'The independence and impartiality of the judiciary should always be guaranteed, and investigation and prosecution services should be able to properly execute their functions. The judiciary, and investigation and prosecution services should be endowed with sufficient financial and human resources and procedures to act effectively and in a manner that fully respects the right to a fair trial, including respect for the rights of defence. Final judgments should be implemented effectively. Those conditions are required as a minimum guarantee against unlawful and arbitrary decisions of public authorities that could harm the financial interests of the Union.'

132. This aim seems to me to be consistent with the choice of Article 322(1)(a) TFEU as the legal basis for Regulation 2020/2092. [88]

133. The Parliament and the Council submit that the purpose of the disputed regulation can be identified from these recitals. They reject the analysis of the Hungarian Government which states that Regulation 2020/2092 seeks to add another procedure to those already in place [89] to protect the rule of law, with no legal basis for it in primary law.

134. It is true that, taken out of context, recital 14 of Regulation 2020/2092 would appear to provide some support for the Hungarian Government's argument, since it declares that 'the mechanism provided for in this Regulation *complements* these instruments by protecting the Union budget against breaches of the principles of the rule of law affecting its sound financial management or the protection of the financial interests of the Union'.

135. This apparent inconsistency in the logic of the recitals of Regulation 2020/2092 may be due to the way in which the legislative process took place. As I have already explained, the Commission's original proposal focused less on the financial conditionality of the proposed mechanism and more on protecting the rule of law. Opposition from the Council meant that the final text of Regulation 2020/2092 became an instrument of financial conditionality, under which safeguarding the rule of law operates as a horizontal condition that must be respected by Member States in implementing the budget.

136. It is therefore necessary to carry out a detailed analysis of the content of Regulation 2020/2092 in order to determine whether the 'final legislative product' is genuinely a financial conditionality mechanism, like others in EU law. If it is, Article 322(1)(a) TFEU would provide an appropriate legal basis, because the regulation would be a rule concerning budgetary implementation.

137. If it is not, as the Hungarian Government argues, then it would be another instrument to protect the rule of law, with budgetary implications, for which Article 322 TFEU would not offer an appropriate legal basis and which the European Union would not have competence to introduce.

138. In my view, the purpose of Regulation 2020/2092 is to ensure, through the conditionality mechanism, proper implementation of the Union budget where breaches of the rule of law occur in a Member State which jeopardise the sound financial management of EU funds.

139. Taken as a whole, the aim of Regulation 2020/2092 is therefore to protect the Union budget in the face of specific situations which pose a threat to correct budgetary implementation and breach the rule of law. Its aim is not, therefore, to protect the rule of law by means of a sanction mechanism.

140. Seen from this perspective, Regulation 2020/2092 has a similar objective to that of the Financial Regulation, where there is no dispute over the use of Article 322 TFEU as the legal basis.

88 See Martín Rodríguez, P., *El Estado de Derecho en la Unión Europea*, Marcial Pons, Madrid, 2021, p. 131, for whom 'Article 322 TFEU provides a legal basis that is more than sufficient for establishing this [financial] conditionality which, moreover, has already existed in respect of certain substantive content of the rule of law …'.

89 The European rule of law mechanism, the EU Justice Scoreboard, the infringement procedure and the Article 7 TEU procedure.

141. Indeed, in a joint declaration drawn up on the adoption of Regulation 2020/2092, the Parliament, the Council and the Commission declared their intention to incorporate the content of the regulation into the Financial Regulation when the latter was amended. [90]

142. As noted by the Council, the decision of the European legislature to draft a regulation to safeguard the proper implementation of the Union budget in the event of breaches of the rule of law falls within its legislative discretion.

143. In any event, that decision could not be classed as manifestly incorrect. Compliance with the principles of the rule of law may be vitally important for the sound operation of public finances and proper budgetary implementation. [91]

144. To sum up, the creation of a financial conditionality mechanism linked to the rule of law seems to me to be a feasible legislative option that is covered by primary law.

*2. Content of Regulation 2020/2092*

145. In assessing whether Regulation 2020/2092 is covered by Article 322(1)(a) TFEU, it is also essential, in accordance with the case-law of the Court, to analyse its content.

146. That analysis will allow us to verify whether the components of Regulation 2020/2092 are those of a genuine financial conditionality mechanism (along the lines of those that already exist in EU law) and, consequently, to ascertain whether Article 322(1)(a) TFEU provides the correct legal basis for it.

*(a) Conditions for the adoption of measures under the procedure in Regulation 2020/2092*

147. Article 4(1) of Regulation 2020/2092 provides that 'appropriate measures shall be taken where it is established in accordance with Article 6 that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way'.

148. The parties to the proceedings disagree over the interpretation of this provision:

– The Hungarian Government argues that it establishes a three-stage procedure which requires proof of: (a) a breach of the rule of law; (b) a serious and sufficiently direct risk to the sound financial management of the Union budget or to the protection of the financial interests of the Union; and (c) the need to take proportionate measures to tackle it. In its opinion, the legal basis of Article 322(1)(a) TFEU does not cover the first of these stages.

90 The wording of the joint declaration is as follows: 'Without prejudice to the Commission's right of initiative, the European Parliament, the Council and Commission agree to consider including the content of this Regulation into Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 (the "Financial Regulation") upon its next revision.' See the text in the appendix to COM(2020) 843 final of 14 December 2020, Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council on the adoption of a Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget.

91 On this point, see Opinion No 1/2018 of the Court of Auditors concerning the proposal of 2 May 2018 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 (OJ 2018 C 291, p. 1), paragraphs 10 and 11.

– The Parliament and the Council disagree with this interpretation and consider that the procedure contains only two stages: (a) proof of the existence of a breach of the rule of law which directly poses a serious risk to the sound financial management of the Union budget or to the protection of the financial interests of the Union; and (b) the adoption of measures to counteract it. Thus, conditionality would apply only in the case of serious breaches of the rule of law that directly affect the implementation of the Union budget.

149. In my view, this latter interpretation of Article 4(1) of Regulation 2020/2092 is the correct one. Financial conditionality is restricted to those breaches of the rule of law which have a sufficiently direct link to budgetary implementation and which affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union.

150. A *literal* interpretation leads to this interpretation, since Article 4(1) of Regulation 2020/2092 requires a sufficiently direct link between the breach of the rule of law and the implementation of the budget. Only then can the conditionality mechanism be triggered, meaning that Regulation 2020/2092 does not address all breaches of the rule of law, but only those that are directly linked to budgetary implementation.

151. Likewise, although Article 2(a) of Regulation 2020/2092 provides a definition of the rule of law, it does so only 'for the purposes of this Regulation'. It is true that that the provision defines 'the rule of law' both in general terms (as the Union value enshrined in Article 2 TEU) and openly, in that it links the concept to the principles which it then proceeds to set out, but, I repeat, it does so within the limited scope I have just identified.

152. Similarly, Article 3 of Regulation 2020/2092 lists examples of breaches of the principles of the rule of law 'for the purposes of this Regulation'.

153. A *systematic* interpretation of Article 4(1) of Regulation 2020/2092 in conjunction with other articles of the regulation also leads me to believe that financial conditionality applies only to serious breaches of the rule of law that have a direct effect on implementation of the Union budget.

154. The non-exhaustive examples of 'breaches of the principles of the rule of law' listed in Article 3 of Regulation 2020/2092 are limited, in Article 4(2) of the regulation, to certain areas of activity undertaken by national authorities that are directly related to the implementation of the Union budget.

155. It must be stressed that the situations described in Article 4(2) of Regulation 2020/2092 concern either specific budget implementation activities or general activities involving oversight of budget implementation activities.

156. It is true that, viewed in isolation, some general activities referred to in Article 4(2) of Regulation 2020/2092 [92] would not necessarily, in themselves, affect implementation of the Union budget within the meaning of Article 322(1)(a) TFEU, and are not automatically related to sound financial management [93] or to protection of the European Union's financial interests.

157. However, Article 4(2) of Regulation 2020/2092 is careful to restrict the scope of those general activities to activities performed by national authorities that are linked to budgetary implementation. That is the case with:

– The actions of investigation and prosecution services, which, in this context, apply only in relation to 'breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union' (subparagraph (c)).

– The effective judicial review by independent courts, where it is exercised in respect of actions or omissions by national authorities which, in turn, relate (under subparagraphs (a), (b) and (c) of the same paragraph) to implementation of the Union budget (subparagraph (d)).

– The prevention and sanctioning of fraud, corruption and other breaches of EU law where, again, these actions relate 'to the implementation of the Union budget or to the protection of the financial interests of the Union' (subparagraph (e)).

158. With regard to the closing clause (subparagraph (h)), which refers to 'other situations or conduct of authorities', these can only fall within Regulation 2020/2092 where they 'are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union'. The closing clause does not, therefore, apply to conduct unrelated to budgetary implementation.

159. In my view, the technique used by the legislature to determine the scope of the disputed mechanism and the requirements for its application is appropriate in as much as it requires respect for the principles of the rule of law as a *horizontal* condition for proper budgetary implementation.

160. The serious breaches of those principles that would allow the conditionality mechanism to be applied are those arising from activities to implement the Union budget or from general activities by national authorities that are directly related to implementing the budget.

161. In any event, Article 6(9) of Regulation 2020/2092 requires the Commission to set out the specific grounds and concrete evidence for the existence of a serious breach of the principles of the rule of law that is directly related to the implementation of the budget. Only then can appropriate measures be adopted against the offending Member State.

162. A *purposive* interpretation and a *historical* interpretation of Article 4(1) of Regulation 2020/2092 also lead me to the conclusion that financial conditionality applies only to breaches of the rule of law that directly affect implementation of the Union budget.

92 Those in subparagraphs (c) ('the proper functioning of investigation and public prosecution services'), (d) ('the effective judicial review by independent courts') and (e) ('the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law').

93 Article 2(59) of the Financial Regulation provides that 'sound financial management' means 'implementation of the budget in accordance with the principles of economy, efficiency and effectiveness'.

163. In this regard, I should stress once again that it is helpful to take account of the evolution of the legislative process that led to the adoption of Regulation 2020/2092.

164. As I noted earlier, the Commission's original proposal focused more on protecting the rule of law and less on the financial conditionality of the mechanism. As a result of the Council's involvement, the final text of Regulation 2020/2092 became more clearly a financial conditionality instrument, in which safeguarding the rule of law operates as a horizontal condition that must be respected by Member States when implementing the budget.

165. A key element in the development of the legislative text was the insertion in Article 4(1) of Regulation 2020/2092 of the requirement of a *sufficiently direct* link [94] between budgetary implementation and the breach of the principles of the rule of law. [95]

166. The introduction of this element, much criticised in some of the literature, [96] implies a certain reduction in the scope of application of the Commission's original proposal. As finally drafted, the financial conditionality mechanism is strictly linked to implementing the Union budget, so as not to breach Article 7 TEU and in order to ensure that the legislation falls within the legal basis of Article 322 TFEU. [97]

167. The *sufficiently direct* link ensures that the conditionality mechanism will not apply to all serious breaches of the rule of law, but will be limited to serious breaches that are closely related to implementation of the budget. [98] The Commission must prove this link before proposing remedial measures, and such a link is not automatically assumed proven, however serious the breach of the principles of the rule of law.

168. Recital 13 of Regulation 2020/2092 emphasises that link when it states that 'there is therefore a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management'.

169. To sum up, an interpretation of Article 4(1) of Regulation 2020/2092 based on literal, systematic, purposive and historical criteria leads me to conclude that the regulation establishes a financial conditionality mechanism which applies only to serious breaches of the rule of law that directly affect the implementation of the Union budget. Interpreted in this way, Regulation 2020/2092 has a sufficient legal basis in Article 322(1)(a) TFEU.

94 The judgment of 6 November 2014, *Italy* v *Commission* (C-385/13 P, EU:C:2014:2350, paragraphs 68 and 69), establishes the need for a sufficiently direct link between an alleged breach of EU law by the beneficiary Member State and the measure for which funding was sought, in order for the Commission to order the suspension of structural fund payments to the Member State.

95 Martín Rodríguez, P., op. cit., p. 133, also emphasises that the key to interpreting Regulation 2020/2092 lies in the requirement for the effect to apply 'in a sufficiently direct way'.

96 The editorial in *European Papers*, 2020, No 5, pp. 1101-1104, describes the requirement to prove that the breach of the rule of law solely concerns protection of the European Union's financial interests as a *probatio diabolica* for the Commission. It adds that the requirement 'will presumably render inoperative the conditionality mechanism' and that Regulation 2020/2092 'appears to be doomed to fail' if it applies only to conduct of Member States which affects the sound financial management of the Union budget.

97 Paragraph 2(e) of the conclusions of the European Council of 10 and 11 December 2020 reaffirms that 'the causal link between such breaches and the negative consequences on the Union's financial interests will have to be sufficiently direct and be duly established. The mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism'.

98 Paragraph 2(h) of the conclusions of the European Council of 10 and 11 December 2020 goes further than the regulation when it states that 'where such information and findings [on which the Commission bases its assessment], whichever their origin, are used for the purposes of the Regulation, the Commission will ensure that their relevance and use will be determined exclusively in light of the Regulation's aim to protect the Union's financial interests'.

170. That conclusion is not affected by the Hungarian Government's argument concerning the (alleged) contradiction between the provisions of the Financial Regulation relating to conflicts of interest (Article 61) [99] and Article 3(b) of Regulation 2020/2092, which provides that, among other cases, failure on the part of national authorities to ensure 'the absence of conflicts of interest' may be indicative of breach of the principles of the rule of law.

171. As noted by the Council, the application of Regulation 2020/2092 is subsidiary to the European Union's other financial rules. Article 6(1) of Regulation 2020/2092 provides that the Commission is to trigger the mechanism 'unless it considers that other procedures set out in Union legislation would allow it to protect the Union budget more effectively'. [100]

172. This means that the procedure for resolving conflicts of interest in Article 61 of the Financial Regulation will apply to specific cases, and the mechanism in Regulation 2020/2092 will be deployed only where the functioning of an authority of the Member State that is involved in implementing the Union budget is compromised by particularly serious conflicts of interest.

*(b) Criteria for the adoption of measures under the procedure in Regulation 2020/2092*

173. According to the Hungarian Government, the measures that EU institutions can adopt pursuant to Regulation 2020/2092 are, in fact, sanctions for breach of the rule of law, rather than genuine 'measures' to protect the Union budget. Consequently, Article 322(1)(a) TFEU is an inappropriate legal basis.

174. It argues that this can be inferred from recital 18 and Article 5(3) of Regulation 2020/2092, which set out criteria for adjusting those measures that focus more on the breach itself (that is, its nature, duration, gravity and scope, as well as the 'intention' of the Member State) than on protecting the Union budget.

175. The response from the Council and the Parliament is that Article 5(3) of Regulation 2020/2092 establishes a hierarchy of criteria which include, in particular, proportionality and 'the actual or potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union'. With regard to 'the nature, duration, gravity and scope of the breaches of the principles of the rule of law', these are subsidiary factors in an assessment. The criterion of the offending Member State's intention, referred to in recital 18, has no normative value.

176. In my view, Article 5(3) and recital 18 of Regulation 2020/2092 are not entirely consistent with each other. When it comes to the adoption of measures, the latter seems to regard the criterion concerning 'the effects on the sound financial management of the Union budget or the financial interests of the Union' as a subsidiary factor.

[99] Article 61(3) of the Financial Regulation provides that, 'for the purposes of paragraph 1, a conflict of interests exists where the impartial and objective exercise of the functions of a financial actor or other person, as referred to in paragraph 1, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other direct or indirect personal interest'.

[100] Paragraph 2(d) of the conclusions of the European Council of 11 December 2020 declared that 'the application of the mechanism will respect its subsidiary character. Measures under the mechanism will be considered only where other procedures set out in Union law, including under the Common Provisions Regulation, the Financial Regulation or infringement procedures under the Treaty, would not allow to protect the Union budget more effectively'.

177. However, I believe it is clear from a systematic interpretation of Article 5(3) of Regulation 2020/2092 that, when adopting measures, regard must be had, above all, to proportionality and to the actual or potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union. In so doing, the particular nature of those measures, which are not intended as penalties for breach of the principles of the rule of law, is preserved. [101]

178. The nature, duration, gravity and scope of the breaches of the principles of the rule of law committed by the offending Member State can serve only to determine the impact of the Member State's actions on the implementation of the Union budget.

179. Under this interpretation, Article 5(3) of Regulation 2020/2092 falls within Article 322(1)(a) TFEU because the measures it provides for are, I repeat, budgetary corrective measures rather than penalties on the offending Member State.

180. The Hungarian Government doubts that the content of the final sentence of Article 5(3) of Regulation 2020/2092 ('the measures shall, in so far as possible, target the Union actions affected by the breaches') is compatible with that legal basis. It considers that the provision allows for a 'cross-conditionality' that goes beyond protection of the Union budget.

181. I find the Council's explanation, which is based on the principle of proportionality, convincing. The explanation for the exceptional use of financial 'cross-conditionality' lies in the fact that certain breaches of the principles of the rule of law committed by national authorities can affect a very large number of sectors, and it would be disproportionate to adopt remedial financial measures in all those sectors. As the Council stated at the hearing, cases can also arise in which breaches of the principles of the rule of law come to light after particular EU spending programmes have been fully implemented, and financial corrective action is not feasible. In such cases, corrective action could be taken in respect of other ongoing spending programmes, to ensure that the conditionality mechanism is effective. [102]

182. Interpreted in this way, this exceptional use of financial 'cross-conditionality' (which means that corrective action need not be taken against all sectors affected by the breach of the rule of law or that it can be applied to ongoing expenditure from the Union budget) does not negate the budgetary nature of the mechanism and is compatible with Article 322 TFEU.

### *(c) Criteria for the lifting of measures under the procedure in Regulation 2020/2092*

183. Article 7(1) and (2) of Regulation 2020/2092 provides for measures to be lifted at the request of the Member State or on a proposal from the Commission, where the conditions that led to their adoption cease to exist.

184. This means that in order for the financial conditionality remedial measures to remain in place there must be a continuing impact or risk of an impact on the Union budget.

[101] See, by analogy, the case-law of the Court which establishes that '… the obligation to give back an advantage improperly received by means of an irregularity is not a penalty, but simply the consequence of a finding that the conditions required to obtain the advantage derived from EU rules have not been observed, with the result that that advantage becomes an advantage wrongly received' (judgments of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraph 64, and of 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, paragraph 50 and the case-law cited).

[102] If the Court does not accept this argument, because of the weakness of the connection with the breach of the rule of law, it should declare void only the qualifying phrase 'in so far as possible' in the final sentence of Article 5(3) of Regulation 2020/2092 (which is not material), so that the provision would simply stipulate that 'the measures shall target the Union actions affected by the breaches'.

185. As the Council explains, where the impact on implementation of the budget ceases, the remedial measures are lifted, even if the Member State remains in breach of the principles of the rule of law. As the European Parliament noted at the hearing, where penalties are imposed there is no possibility of their being lifted.

186. This therefore demonstrates (or rather, confirms) that the conditionality mechanism applies financial corrective action rather than penalties for breach of the principles of the rule of law.

*(d) Protection of beneficiaries under the procedure in Regulation 2020/2092*

187. When read in the light of recital 19 of Regulation 2020/2092, Article 5(2) of the regulation [103] introduces a safeguard for final recipients or beneficiaries of spending programmes funded by the Union budget.

188. The adoption of financial conditionality measures in the event of a breach of the rule of law by a Member State must not harm the funds' final beneficiaries, who must continue to receive funding. Moreover, the Member State must regularly report to the Commission on this obligation.

189. In the view of the Hungarian Government, in the event of financial corrective action, the Member State concerned must pay the funds to the beneficiaries from its own budget. Regulation 2020/2092 therefore imposes obligations on Member States in respect of their national budgets, for which there is no provision in Article 322 TFEU.

190. The Council's response is that Article 5(2) of Regulation 2020/2092 has a declaratory effect and does not impose obligations on the Member State over and above those specified in 'the applicable sector-specific or financial rules'. In actual fact, it merely adds a means of monitoring compliance with obligations already found in sector-specific rules, to protect beneficiaries of EU budgetary funds in the event of financial corrective action.

191. In my view, the Hungarian Government's argument should be dismissed, since the protection of beneficiaries provided for in Article 5(2) of Regulation 2020/2092 is a typical and logical measure in shared management of funds from the Union budget.

192. As recital 19 of Regulation 2020/2092 states, '… in shared management payments from the Commission to Member States are legally independent from payments by national authorities to beneficiaries'.

193. It follows from this premiss that measures adopted pursuant to Regulation 2020/2092 do not affect 'the availability of funding for payments towards beneficiaries according to the payment deadlines set out under the applicable sector-specific and financial rules. … Obligations towards final recipients or beneficiaries set out in this Regulation are part of applicable Union law with respect to implementing funding in shared management'.

194. In view of the disjunction between payments by the Commission to the Member State and payments by national management authorities to beneficiaries of the programmes and funds financed by the Union budget, it makes sense to impose a general requirement on Member States to maintain payments to beneficiaries, even where the European Union takes financial corrective action.

[103] Reproduced in point 11 of this Opinion.

195. Indeed, financial corrective action would cease to be effective if national authorities could require beneficiaries to repay funding already received, or if they did not pay them the funding that had been promised, following approval by the EU institutions of a measure to protect the Union budget in the light of a breach of the principles of the rule of law affecting management of the budget.

196. In such cases, the effect of the financial corrective action adopted by EU institutions must be borne by the offending Member State, and must not be passed on to beneficiaries of the funding, who are not party to the breach. [104]

197. The impact of financial corrective action can adversely affect natural and legal persons of a Member State only where they are responsible for breach of the EU rules governing the allocation of funds from the Union budget, which, I reiterate, is not the case under Regulation 2020/2092.

198. By contrast, where responsibility for the breach lies with national authorities, they must face the consequences of their own actions which prompted the remedial measures, [105] as is the case under Regulation 2020/2092.

199. A similar approach is to be found in Article 103 of the Common Provisions Regulation 2021-2027, which establishes rules on financial corrections by Member States. [106] Provision to protect final beneficiaries is also included in Article 11 of Regulation (EU) No 1306/2013. [107]

200. In short, the safeguard for final beneficiaries introduced by Article 5(2) of Regulation 2020/2092 can readily be included within a financial conditionality mechanism and relates to implementation of the Union budget, and therefore Article 322 TFEU provides a sufficient basis.

201. I consider, therefore, that the first plea in law should be dismissed.

## VI. Second plea in law: infringement of Article 7 TEU and infringement of Article 4(1) TEU in conjunction with Article 5(1) and Article 13(2) TEU and Article 269 TFEU

202. In its second plea in law, the Hungarian Government claims two infringements of the Treaties:

– Infringement of Article 7 TEU.

– Infringement of Article 269 TFEU and of the principle of institutional balance laid down in Article 13(2) TEU.

104 In defence of beneficiaries, the Council invokes protection of their acquired rights and their legitimate expectations, and the principle that the response to breach of an obligation cannot entail another breach.

105 In the case of management of ERDF funds, the Court has stated that this must be so even where amounts cannot be recovered, '… when it is established that the loss has been incurred as a result of fault or negligence on the part of that Member State' (judgment of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraph 71).

106 On the previous legislation and case-law on financial corrections, see Guillem Carrau, J., 'Las correcciones financieras en materia de fondos estructurales', *Revista Aragonesa de Administración Pública*, 2018, No 51, pp. 281-319.

107 Regulation of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549). Article 11 states: 'Except where otherwise explicitly provided for in Union law, payments relating to the financing provided for in this Regulation shall be disbursed in full to the beneficiaries.'

203. The Hungarian Government draws a link between the (alleged) infringement of Article 7 TEU and infringement of the principle of conferred powers in Article 4(1) and Article 5(2) TEU, on the ground that Regulation 2020/2092 is founded on an inadequate legal basis. In so far as it thus repeats arguments put forward in the context of the first plea in law, I refer to my comments on those arguments set out above.

## *A. First part of the second plea in law: infringement of Article 7 TEU*

### *1. The parties' arguments*

204. The Hungarian Government argues that the procedure in Regulation 2020/2092 is simply a specific version of the procedure laid down in Article 7 TEU, which is not permitted by Article 7 nor by any other provision of primary law. It claims that two of the three stages of that procedure are the same as those of the mechanism established in Article 7 TEU, with the conditions for triggering the latter mechanism being stricter than those for adopting measures under the contested regulation.

205. In the view of the Hungarian Government, the purpose of Regulation 2020/2092 is the same as that of Article 7 TEU, since it seeks to prevent breaches of the principles of the rule of law through the imposition of sanctions. Evidence for this is provided by the lack of any genuine conditionality mechanism; the absence of any real link between breach of the principles of the rule of law and the Union budget; the fact that the measures are connected more closely to those applicable to breaches of the rule of law than to the Union budget; the inclusion of the Member State's intention as a relevant factor; and the fact that the lifting of the measures is linked to the ending of the breach.

206. The Parliament and the Council reject these arguments, stating that the mechanism in Regulation 2020/2092 is independent of the procedure in Article 7 TEU, pursues different aims and is governed by different rules. Its purpose is to protect the Union budget, not to sanction breaches of the rule of law. The conditions for adopting measures and the type of measures involved differ from those of Article 7 TEU.

### *2. Assessment*

207. In order to determine whether Regulation 2020/2092 establishes a procedure that is compatible with the procedure in Article 7 TEU, the first question that needs to be clarified is whether the latter is the only means available under EU law to protect the value of the rule of law.

#### *(a) Non-exclusivity of Article 7 TEU as a means to protect the rule of law*

208. In my view, Article 7 TEU would not authorise the EU legislature to introduce, by means of secondary law, another similar mechanism, albeit with less extensive substantive and procedural requirements, which had the same objective of protecting the rule of law and which applied similar sanctions.

209. However, that does not mean that the protection of the rule of law can be achieved *only* through Article 7 TEU.[108] There is nothing to prevent the use of instruments other than that in Article 7 TEU to provide such protection, provided that their essential characteristics differ from those of the instrument in Article 7 TEU.

210. As noted by the Council, the principles of the rule of law have a structural value in the EU legal system, meaning that breach of those principles can have a serious impact on it.[109] That is why, particularly in its case-law on judicial independence[110] and on European arrest warrants,[111] the Court has emphasised the values in Article 2 TEU and accepted the lawfulness of provisions of secondary legislation intended to protect those values, alongside the provisions of Article 7 TEU. It has also cited the protection of the rule of law in justifying the recognition of the standing of third States to bring actions for annulment.[112]

211. With regard to arrest warrants, where the European Council and the Council have not taken the decisions referred to in Article 7 TEU, but there is evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, the executing judicial authority may refuse to execute them, where there are substantial grounds for believing that the requested person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter.[113]

212. It is thus clear that, in such cases, the Court uses one of the principles of the rule of law to identify an exception to the arrest and surrender of the requested person that is separate from the procedure in Article 7 TEU.

213. Something similar occurs with the protection of the independence of the national courts responsible for applying EU law where, once again, the Court has relied on the value of the rule of law[114] to defend that independence, even where there has been no use of Article 7 TEU.

214. Compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot, therefore, amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete

108 On this point, see Martín Rodríguez, P., *El Estado de Derecho en la Unión Europea*, Marcial Pons, Madrid, 2021, pp. 99 to 101.

109 See Rossi, L.S., 'La valeur juridique des valeurs. L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels', *Revue trimestrielle de droit européen*, 2020, No 3, pp. 639-657.

110 The Court states that 'the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them. In particular, it follows from Article 2 TEU that the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in that article' (on this point, see judgments of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 50; of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraphs 42 and 43; and of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 160).

111 Judgments of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraphs 57 and 58), and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraphs 71 and 72). The Court cites protection of the rule of law as an additional ground for refusing to execute this type of warrant.

112 Judgment of 22 June 2021, *Venezuela* v *Council (Whether a third State is affected)* (C-872/19 P, EU:C:2021:507, paragraphs 48 to 50).

113 Judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraph 69).

114 Judgments of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596, paragraph 58), and of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 51).

expression by, inter alia, Article 19 TEU. The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary. [115]

215. It is clear from these examples from the case-law of the Court concerning the protection of the rule of law that rules introduced by EU institutions that seek, in specific areas (and not necessarily through the mechanism in Article 7 TEU), to respond to certain breaches of that value which affect budgetary management are compatible with the primary legislation.

216. If those breaches affect the implementation of the Union budget by the Member States, I reiterate, nothing precludes the EU legislature from adopting a rule (such as Regulation 2020/2092) to protect that budget, without conflicting with, or circumventing the application of, Article 7 TEU.

*(b) Comparison of the procedure in Article 7 TEU with that in Regulation 2020/2092*

217. An analysis of Regulation 2020/2092 helps to determine whether the procedure it establishes is a genuine financial conditionality mechanism, along the lines of those that already exist in EU law, or an instrument for sanctioning breaches of the principles of the rule of law similar to that in Article 7 TEU.

218. I have performed that analysis, with regard to the legal basis of Regulation 2020/2092, in my examination of the previous ground for annulment. That analysis leads me to reject the Hungarian Government's arguments on the nature of the conditionality, which, in its view, is more concerned with combating breaches of the rule of law than with protecting the Union budget.

219. I shall now complete my analysis by looking at the case-law of the Court on the differences between financial conditionality mechanisms [116] and actions for failure to fulfil obligations, which provide, by analogy, some assessment criteria that can be applied to the present case. The two procedures are independent of each other, because they pursue different aims and are governed by different rules.

220. Those differences include the following:

– In actions brought under Article 258 TFEU, the Commission is free to discontinue the procedure if the Member State has put an end to the alleged failure; this is not the case, for example, with the procedure for clearing EAGGF accounts, where the Commission has no discretion to derogate from the rules regulating the allocation of those burdens. [117]

– Under the procedure for clearing EAGGF accounts, the Commission must carry out a financial correction if the expenditure in respect of which financing has been requested has not been

[115] In the words of the Court, 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'. Judgments of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596, paragraphs 51 and 58); of 20 April 2021, *Repubblika* (C-896/19, EU:C:2021:311, paragraph 51); and of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 162).

[116] Such as the procedure for clearing EAGGF accounts or the procedures for suspending or withdrawing structural funds.

[117] Judgments of 11 January 2001, *Greece* v *Commission* (C-247/98, EU:C:2001:4, paragraph 13), and of 7 February 1979, *France* v *Commission* (15/76 and 16/76, EU:C:1979:29, paragraphs 27 and 28).

carried out in accordance with EU rules. Such a financial correction is designed to avoid the EAGGF being burdened with amounts that have not served to finance an objective pursued by the EU legislation in question and therefore does not constitute a penalty. [118]

– The procedures for suspending or reducing financial assistance by means of EU structural funds for national operations differ from the procedure governed by Article 258 TFEU and do not follow the same process. If the Commission decides not to initiate infringement proceedings or discontinues proceedings, this does not mean that it cannot suspend or reduce EU aid for a national operation, particularly where there has been a breach of one or more of the conditions to be satisfied by the funding. In order to do so, the Commission must adopt a decision which, it is true, must take account of the infringement proceedings commenced under Article 258 TFEU or of the declaring by the Court that there has been a failure to fulfil obligations. [119]

– Unlike the commencement of infringement proceedings, a decision suspending or reducing Union financing constitutes a measure adversely affecting the party to which it is addressed, and may be the subject of an action before the EU Courts. [120]

221. This case-law has been used as legal authority for conditionality clauses linking payment of funds from the Union budget to compliance with horizontal obligations, such as the proper functioning of national fund management and control systems, which contributed to sound financial management of the Union budget. The same occurs in the case of systemic deficiencies in the operation of national authorities responsible for implementing the Union budget. [121]

222. In the light of this case-law, we must ascertain whether the mechanism in Article 7 TEU differs from the mechanism established by Regulation 2020/2092.

223. With regard to the *adoption of measures*, under Article 7 TEU this is conditional on a determination that there is a serious and persistent breach by a Member State of the values in Article 2 TEU. Article 4(1) of Regulation 2020/2092, however, refers only to breaches of the principles of the rule of law by a Member State that 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 direct way.

224. The threshold in Article 7 TEU is higher than that in Regulation 2020/2092, since it requires the existence of a serious and persistent breach of any of the values in Article 2 (not just that of the rule of law).

225. Article 7 TEU does not require a sufficiently direct link with a specific area of EU law, which is required by Regulation 2020/2092 in that it requires a connection between the breach of the rule of law and implementation of the Union budget. The application of Regulation 2020/2092 is therefore far more limited than that of Article 7 TEU.

118 The procedure for clearing accounts serves to determine not only that the expenditure was actually and properly incurred but also that the financial burdens of the common agricultural policy are correctly apportioned between the Member States and the European Union. See judgment of 11 January 2001, *Greece* v *Commission* (C-247/98, EU:C:2001:4, paragraphs 13 and 14).

119 Judgment of 25 October 2007, *Komninou and Others* v *Commission* (C-167/06 P, EU:C:2007:633, paragraph 52), and order of 11 July 1996, *An Taisce and WWF UK* v *Commission* (C-325/94 P, not published, EU:C:1996:293, paragraph 23). See also judgment of the General Court of 26 February 2013, *Spain* v *Commission* (T-65/10, T-113/10 and T-138/10, EU:T:2013:93, paragraph 109).

120 Order of 11 July 1996, *An Taisce and WWF UK* v *Commission* (C-325/94 P, not published, EU:C:1996:293, paragraph 24).

121 Judgments of 2 April 2020, *Commission* v *Spain* (C-406/19 P EU:C:2020:276, paragraphs 49 and 50), and of 15 October 2014, *Denmark* v *Commission* (C-417/12 P, EU:C:2014:2288, paragraphs 81 to 83).

226. As far as the conditions for the adoption of measures are concerned, the mechanism in Regulation 2020/2092 resembles other financial conditionality and budgetary implementation instruments, rather than the mechanism in Article 7 TEU. The similarity with the former rather than the latter can be seen, for example, in:

– the Financial Regulation, Article 131(3) of which authorises the suspension of payment of funds where the implementation of the legal commitment proves to have been subject to irregularities, fraud or breach of obligations, or where it is necessary to verify whether presumed irregularities, fraud or breach of obligations have actually occurred, or where irregularities, fraud or breach of obligations call into question the reliability or effectiveness of the internal control systems of a person or entity implementing Union funds or the legality and regularity of the underlying transactions;

– the Common Provisions Regulation 2021-2027, which provides in similar terms for suspension of payments (Article 97(1)) and for financial corrections (Article 104(1)).

227. With regard also to the macroeconomic conditionality in Regulation 2021/241, under Article 10 of the regulation, corrective measures are taken '… where the Council decides in accordance with Article 126(8) to (11) TFEU that a Member State has not taken effective action to correct its excessive deficit, unless it has determined the existence of a severe economic downturn for the Union as a whole …'.

228. In terms of the *types of measures*, once again Regulation 2020/2092 more closely resembles the conditionality mechanisms in the Financial Regulation and other EU rules than the procedure in Article 7 TEU.

229. Article 7(3) TEU provides that the Council may decide to suspend 'certain of the rights deriving from the application of the Treaties to the Member State in question'. The actions available to the Council under this provision far exceed the measures linked to implementation of the Union budget provided for in Article 5(1) of Regulation 2020/2092.[122] The latter (which include suspension of programmes, commitments and payments) are typical of the measures found in EU law in respect of budgetary implementation.

230. With regard to the *criteria for selecting measures*, overall the criteria in Regulation 2020/2092 are the same as those in EU financial regulations and differ from the procedure in Article 7 TEU, paragraph 3 of which stipulates that, in adopting measures, the Council is to take into account the possible consequences on the rights and obligations of natural and legal persons.

231. On this point, I refer to the analysis of Article 5(1) of Regulation 2020/2092 I carried out under the previous plea in law, with regard to the principle of proportionality as a criterion for adjusting measures, alongside the criteria of the nature, gravity and frequency of the irregularities, together with the financial implications for the Union budget.

[122] A suspension of the approval of one or more programmes or an amendment thereof; a suspension of commitments; a reduction of commitments, including through financial corrections or transfers to other spending programmes; a reduction of prefinancing; an interruption of payment deadlines; and a suspension of payments.

232. Those same criteria, and the criterion of the connection with the regularity of the expenditure, are also found in the European Union's financial rules.[123] In addition to proportionality, the macroeconomic conditionality procedure in the Recovery and Resilience Mechanism includes other specific social and economic criteria.[124]

233. As regards the *lifting of measures*, Article 7(4) TEU states that the Council may decide to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

234. Article 7(1) and (2) of Regulation 2020/2092 applies a similar criterion, but one that is linked to the circumstance that the breach of the principles of the rule of law affects the sound management of the Union budget. Only in that situation is the lifting of the financial remedial measures subject to the requirement that the Member State remedy those breaches.[125]

235. That same logic is to be found in Article 10(6) of Regulation 2021/241. The general financial rules of the European Union follow a similar pattern for the lifting of measures in the event of a provisional suspension or a provisional financial correction.[126]

236. To sum up, in terms of the conditions governing the adoption of measures, the types of measures, the selection criteria and the criteria for lifting measures, the mechanism in Regulation 2020/2092 is similar to EU financial rules and does not resemble the procedure in Article 7 TEU.

237. I therefore consider that the first part of the second plea in law should be dismissed.

### *B. Second part of the second plea in law: infringement of the principle of institutional balance and of Article 269 TFEU*

#### *1. The parties' arguments*

238. According to the Hungarian Government, Regulation 2020/2092 infringes the principle of institutional balance established in Article 13(2) TEU, and also Article 269 TFEU in respect of the jurisdiction of the Court of Justice.

239. The Hungarian Government considers that the procedure in Regulation 2020/2092, which is easier, quicker and more effective than that of Article 7 TEU in sanctioning breaches of the principles of the rule of law, alters the institutional balance underlying the latter provision and, consequently, the balance in Article 13 TEU, to the detriment of the Member State concerned. It also introduces unrestricted review by the Court of Justice, which is far stronger than that provided for in Article 269 TFEU.

123 According to recital 70 of the Common Provisions Regulation 2021-2027, in taking measures to safeguard the financial interests and the budget of the European Union (interrupting payment deadlines, suspending interim payments and applying financial corrections) 'the Commission should respect the principle of proportionality by taking into account the nature, gravity and frequency of irregularities and their financial implications for the budget of the Union'.

124 Article 10(4) of Regulation 2021/241 states that 'the scope and level of the suspension of commitments or payment to be imposed shall be proportionate, respect the equality of treatment between Member States and take into account the economic and social circumstances of the Member State concerned, in particular the level of unemployment, the level of poverty or social exclusion in the Member State concerned compared to the Union average and the impact of the suspension on the economy of the Member State concerned'.

125 In practice, the Member State must either forgo funds from the Union budget or put an end to its breach of the principles of the rule of law which affect implementation of the Union budget.

126 See the final part of Article 63(8) of the Financial Regulation.

240. The Parliament and the Council reject these arguments. In their opinion, the procedure in Regulation 2020/2092 does not infringe the principle of institutional balance and is similar to the procedure used in other EU financial rules. Moreover, there is no reason why the restriction on the Court of Justice's powers of review established in Article 269 TFEU should apply to financial conditionality mechanisms.

*2. Assessment*

241. The Hungarian Government asserts two grounds for the annulment of Regulation 2020/2092: (a) the creation of a parallel decision-making process to the procedure in Article 7 TEU, which distorts the institutional balance established in that article and in Article 13(2) TEU; and (b) the incompatibility between the unrestricted judicial review by the Court of Justice of measures taken under Regulation 2020/2092 and the far more limited powers of review in Article 269 TFEU.

*(a) Decision-making process in Regulation 2020/2092 compared with that in Article 7 TEU*

242. Article 7 TEU introduces a rigid system for taking decisions, with specific voting arrangements.[127] The procedures differ, depending on whether there is merely a risk of a serious breach of the values in Article 2 TEU or an actual breach.

243. In the former case (risk of breach):

– A proposal may be made by one third of the Member States, by the European Parliament or by the Commission.

– The Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear *risk* of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council must hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

244. In the latter case (existence of a breach):

– The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine *the existence* of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

– Where such a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question. The Council, acting by a qualified majority, may decide subsequently to vary or revoke the measures taken, in response to changes in the situation which led to their being imposed.

[127] Article 7(5) TEU provides that 'the voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 [TFEU]'.

245. Article 7 TEU therefore provides for two votes in the Council, one by a majority of four fifths and one by a qualified majority, and another vote, by unanimity, in the European Council; the Member State concerned may not participate in the votes. It is an optional procedure, and there are no time limits for the different stages. It takes place essentially within the Council, with the exception of the initiation of the procedure by means of a reasoned proposal made by one third of the Member States, the Parliament or the Commission.

246. The arrangements in Regulation 2020/2092 are different, and are similar to the procedures in Article 258 TFEU:

– The sole right of initiative lies with the Commission, which triggers the procedure where it finds that it has reasonable grounds to consider that the conditions in Article 4 of Regulation 2020/2092 are fulfilled.

– The Commission sends 'a written notification to the Member State concerned, setting out the factual elements and specific grounds on which it based its findings' (Article 6(1)).

– Within the time limit specified by the Commission, the Member State 'shall provide the required information and may make observations', in which it 'may propose the adoption of remedial measures to address the findings set out in the Commission's notification' (Article 6(5)).

– The Commission must evaluate the information received and any observations made by the Member State, as well as the adequacy of any proposed remedial measures. Where it 'intends to make a proposal [to the Council], it shall … give the Member State the opportunity to submit its observations, in particular on the proportionality of the envisaged measures' (Article 6(6) and (7)).

– Where the Commission persists in its intention, it must submit a proposal for an implementing decision to the Council, setting out the specific grounds and evidence on which it bases its findings (Article 6(9)).

– The Council must adopt the implementing decision proposed by the Commission or, acting by a qualified majority, it may amend the proposal 'and adopt the amended text by means of an implementing decision' (Article 6(11)).

247. Therefore, in Regulation 2020/2092 there is a preliminary stage managed by the Commission which includes two rounds of consultation with the Member State involved, similar to the procedure in actions for failure to fulfil obligations. The procedure is mandatory for the Commission, and time limits are established for every stage. There is a vote in the Council, by qualified majority, in which the Member State concerned takes part.

248. As compared with the procedure in Article 7 TEU, the procedure in Regulation 2020/2092 is less rigid and enables remedial action to be taken more easily, in the terms set out above.

249. The Council argues that that procedure respects the principle of institutional balance and is similar to the procedure used for other EU budgetary acts adopted pursuant to the second paragraph of Article 317 TFEU and Article 291(2) TFEU.

250. This argument has to contend, however, with two difficulties concerning the conferral of implementing powers on the Council and the intervention of the European Council in exceptional situations.

251. The conferral of implementing powers on the Council reflects 'the importance of the financial effects of measures adopted pursuant to [Regulation 2020/2092]'.[128] However, it is not clear that it complies with Article 317 TFEU, according to which it is the Commission alone, on its own responsibility, which implements the Union budget in cooperation with the Member States.

252. Can legislation such as Regulation 2020/2092, whose legal basis is Article 322(1)(a) TFEU and which establishes financial rules for implementing the Union budget, confer power on the Council to implement these rules? The case-law of the Court helps to answer this question.[129] As the Council argued at the hearing, it is possible to distinguish between implementation of the budget in a narrow sense (implementation of expenditure commitments), for which Article 317 TFEU confers responsibility on the Commission, and implementation of the budget in a broad sense, as provided for in Article 322(1)(a) when it refers to the financial rules for establishing and implementing the budget. The latter rules provide the framework for subsequent action by the Commission to implement expenditure commitments. Article 322 TFEU does not reserve powers to the Commission in respect of these financial rules. It is therefore possible for the Council to be involved in implementing financial rules on the adoption and application of the budget, through Article 291 TFEU, provided that grounds are given for that involvement,[130] as is done in this case by recital 20 of Regulation 2020/2092.

253. Indeed, Article 291 TFEU, which comes within the part of the TFEU dealing with the 'legal acts of the Union', provides as follows:

– According to Article 291(1), Member States must adopt all measures of national law necessary to implement legally binding Union acts.

– According to Article 291(2), 'where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases … on the Council'.

254. This provision provides authority to confer implementing powers on the Commission and the Council which, by default, would lie with the Member States. One of the specific cases where uniform conditions for implementation may be needed which justify conferring power on the Council is the case of budgetary implementation in its broad sense.

128 Recital 20 of Regulation 2020/2092.

129 See judgment of 24 October 1989, *Commission* v *Council* (16/88, EU:C:1989:397, paragraphs 15 to 18).

130 According to settled case-law of the Court, 'the Council must properly explain, in the light of the nature and content of the basic instrument to be implemented or amended, why exception is being made to the rule that it is the Commission that, in the normal course of events, is responsible for exercising that power' (judgment of 1 March 2016, *National Iranian Oil Company* v *Council*, C-440/14 P, EU:C:2016:128, paragraph 60 and the case-law cited).

255. As noted by the Council, other EU financial rules also confer powers on it to implement the budget. This is the case with Article 19(6), (7), (8), (11) and (13) of the Common Provisions Regulation 2021-2027, which confers power on the Council to take implementing measures under the macroeconomic conditionality mechanism it establishes. The same situation occurs with Regulation 2021/241, which provides as follows:

– 'A proposal by the Commission for a decision to suspend commitments shall be deemed adopted by the Council unless the Council decides, by means of an implementing act, to reject such a proposal by qualified majority within one month of the submission of the Commission proposal' (Article 10(3)).

– 'On a proposal from the Commission, the Council shall approve by means of an implementing decision the assessment of the recovery and resilience plan submitted by the Member State …' (Article 20).

256. It can therefore be agreed that the financial conditionality mechanism in Regulation 2020/2092 reflects one of those 'duly justified specific cases' in which implementing powers may be conferred on the Council.

257. Turning to the involvement of the European Council in the decision-making process in Regulation 2020/2092, the only mention of this occurs in recital 26 of the regulation [131] and it does not appear in the articles of the regulation (although it was mentioned in the European Council's compromise of December 2020). Since the preamble must provide concise grounds for the subsequent content of the operative part of an act (that is, its articles), in so far as it goes beyond that function it has no legal effect. [132]

258. This involvement of the European Council (which acts as an *emergency brake* on the decision-making process of Regulation 2020/2092) would not be compliant with the primary legislation if it had binding legal effect, [133] because there is no provision in the Treaties that confers such powers on it. [134]

131 Recital 26 of Regulation 2020/2092 provides that 'the procedure … 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'.

132 The Court has stated on several occasions that the preamble to an EU act has no binding legal force and cannot be validly relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording. See, in this regard, judgments of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149, paragraph 44); of 2 April 2009, *Tyson Parketthande* (C-134/08, EU:C:2009:229, paragraph 16); and of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraph 76).

133 Neither does paragraph 2(j) of the European Council's compromise set out in EUCO 22/20, Conclusions of the European Council of 11 December 2020, have legal effect when it states: 'In case the Member State concerned submits a request as set out in recital 26 of the Regulation, the President of the European Council will put the item on the European Council agenda. The European Council will strive to formulate a common position on the matter.'

134 On this point see the judgment of 6 September 2017, *Slovakia and Hungary* v *Council* (C-643/15 and C-647/15, EU:C:2017:631, paragraph 148), which states: 'Secondly, Article 78(3) TFEU allows the Council to adopt measures by a qualified majority, as it did when it adopted the contested decision. The principle of institutional balance prevents the European Council from altering that voting rule by imposing on the Council, by means of conclusions adopted pursuant to Article 68 TFEU, a rule requiring a unanimous vote.'

259. The Commission accepts the involvement of the European Council because it provides for 'a political discussion that does not entail a formal step in the procedure or an involvement of the European Council in budget implementation, and should not render the mechanism ineffective, as the decision-making power of the Council and the Commission's role are not affected'. [135]

260. Viewed in this light, and starting from the premiss that the *political* involvement of the European Council is not included in the articles of Regulation 2020/2092 and that it cannot interfere in the decision-making process provided for therein, the objections of the Hungarian Government to the European Council's involvement become inoperative.

*(b) Possible infringement of Article 269 TFEU*

261. In the view of the Hungarian Government, measures taken pursuant to Regulation 2020/2092 are subject to full judicial review by the Court of Justice, which can rule on the substance of decisions taken and not merely on 'compliance with procedural stipulations'. By contrast, under Article 269 TFEU the scope of challenges to acts adopted by the European Council or the Council pursuant to Article 7 TEU is restricted to procedural matters.

262. The implicit premiss of this part of the plea is that the mechanism in Regulation 2020/2092 is, in fact, the same as that in Article 7 TEU. For the reasons I have set out above, I believe that this premiss is incorrect, which means that all the subsequent argumentation by the Hungarian Government is devoid of substance.

263. That there are two levels of judicial oversight, one in one situation (Article 263 TFEU) and one in the other (Article 269 TFEU) is undeniable, because the Court of Justice:

– retains its *general* jurisdiction to review the legality of acts adopted by the Commission and the Council pursuant to Regulation 2020/2092 that are subject to an action for annulment. This is established, in particular, by Article 263 TFEU (in respect of decisions imposing remedial measures) and Article 265 TFEU (in respect of possible failure by the Commission to act under the procedure);

– has, pursuant to Article 269 TFEU, a jurisdiction that is *limited* to breaches of procedural rules rather than substantive rules, where an action for annulment is brought against acts adopted by the European Council or the Council pursuant to Article 7 TEU.

264. Some aspects of the procedure in Article 7 TEU have been clarified by the Court in the judgment of 3 June 2021, *Hungary* v *Parliament*. [136] Specifically, the Court has stated that:

– Article 269 TFEU covers only acts of the Council and of the European Council adopted in the context of the procedure laid down in Article 7 TEU, not resolutions of the Parliament adopted under that article; [137]

[135] COM(2020) 843 final of 14 December 2020, Communication from the Commission to the European Parliament pursuant to Article 294(6) of the TFEU concerning the position of the Council on the adoption of a Regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union, p. 3.

[136] C-650/18, EU:C:2021:426, paragraph 30.

[137] Judgment of 3 June 2021, *Hungary* v *Parliament* (C-650/18, EU:C:2021:426, paragraph 32).

– such resolutions of the Parliament are subject to the 'general jurisdiction conferred on the Court of Justice of the European Union by Article 263 TFEU for the purpose of reviewing the legality of acts of the EU institutions';[138]

– since Article 269 TFEU entails a limitation on the general jurisdiction of the Court, it must be interpreted narrowly.[139]

265. In particular, given the differences between the two procedures, there is nothing to prevent acts of the Commission and of the Council adopted pursuant to Regulation 2020/2092 being subject to a full review of legality (that is, with no restrictions) by the Court pursuant to Article 263 TFEU, rather than to the more limited review provided for in Article 269 TFEU, which applies only, by way of an exception, to acts approved pursuant to Article 7 TEU.

266. The second part of the second plea in law should therefore be dismissed.

## VII. Third plea in law: infringement of the principle of legal certainty

### *A. The parties' arguments*

267. The Hungarian Government argues that the concept of the rule of law on which Regulation 2020/2092 is based is abstract, cannot be the subject of a uniform definition in EU law and must be specifically defined by the legal systems of each Member State. It argues that Article 2(a) of Regulation 2020/2092 extends the concept and adversely affects legal certainty.

268. Moreover, in the view of the Hungarian Government, the 'aspects' used to define the concept of the rule of law in Article 4(2) of Regulation 2020/2092 (which provides examples of some of the areas where breaches may occur) are described in open and abstract terms, thus breaching the requirements of legal certainty.

269. It argues that the same flaw affects other provisions of Regulation 2020/2092 (Article 4(1) and (2)(h), Article 5(3), and Article 6(3) and (8)), resulting in a high degree of legal uncertainty.

270. The Parliament and the Council reject these arguments; in their view the definition of the rule of law for the purposes of the application of Regulation 2020/2092 is valid and respects legal certainty, as do the other conditions for applying the conditionality mechanism.

### *B. Assessment*

271. I shall begin by recalling that, according to the Court:

– The principle of legal certainty 'requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular, where they may have adverse consequences for individuals and undertakings. Specifically, in order to meet the requirements of that principle, legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those

138 *Ibidem*, paragraph 33.

139 *Ibidem*, paragraph 31.

persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly'. [140]

– That principle 'must be observed all the more strictly in the case of rules liable to have financial consequences'. [141]

– 'However, where a degree of uncertainty regarding the meaning and scope of a rule of law is inherent in that rule, it is necessary … for the examination of it to be confined to the question whether the legal measure at issue displays such ambiguity as to make it difficult for that Member State to resolve with sufficient certainty any doubts as to the scope or meaning of the contested regulation.' [142]

– The requirements of the principle of legal certainty 'cannot be regarded as requiring a norm that uses an abstract legal notion to refer to the various specific hypotheses in which it applies, given that all those hypotheses could not be determined in advance by the legislature'. [143]

– A balance must be struck between complying with the requirements of legal certainty and other public interest factors. [144]

272. Although the concept of the rule of law as a value of the European Union enshrined in Article 2 TEU is broad, there is nothing to prevent the EU legislature from defining it more precisely in a specific area of application, such as implementation of the budget, for the purposes of establishing a financial conditionality mechanism.

273. The concept of the rule of law has an autonomous meaning within the EU legal system. It cannot be left to the national law of the Member States to determine its parameters, because of the risk this would pose to its uniform application. While it has not so far been the subject of systematic legislative treatment, there would probably be no barrier to such an approach, within the areas of competence of the European Union.

274. As I noted earlier, the Court's case-law has helped to develop the value of the rule of law as regards its implications for effective judicial protection or the independence of the judiciary. That case-law can provide the EU legislature with guidelines to help in defining that value in secondary legislation. That is what has happened with Regulation 2020/2092.

275. In its review of legality, the Court has to verify whether the definition of the rule of law in Article 2(a) of Regulation 2020/2092, the indicative list of breaches (Article 3) and the examples of breaches of the principles it encompasses (Article 4(2)) satisfy the requirements of the principle of legal certainty.

276. The definition in Article 2(a) of Regulation 2020/2092 contains three elements:

– The rule of law is a Union value enshrined in Article 2 TEU.

140 Judgment of 29 April 2021, *Banco de Portugal and Others* (C-504/19, EU:C:2021:335, paragraph 51).

141 *Ibidem*, paragraph 52.

142 Judgment of 14 April 2005, *Belgium* v *Commission* (C-110/03, EU:C:2005:223, paragraph 31).

143 Judgment of 20 July 2017, *Marco Tronchetti Provera and Others* (C-206/16, EU:C:2017:572, paragraph 42).

144 Judgment of 30 April 2020, *Nelson Antunes da Cunha* (C-627/18, EU:C:2020:321, paragraph 45).

– It includes seven legal principles: legality, which implies a transparent, accountable, democratic and pluralistic law-making 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.

– These principles must be interpreted 'having regard to the other Union values and principles enshrined in Article 2 TEU'.

277. This definition which, I reiterate, is purely for the purposes of Regulation 2020/2092, takes the concept in Article 2 TEU and develops it further by specifying the seven principles included by the legislature. These are based on the case-law of the Court and on work by the Commission [145] which, in turn, has contributed to the elements of the rule of law identified by international bodies, such as the Venice Commission. [146]

278. The characterisation of the rule of law by reference to the principles set out above satisfies the minimum requirements for clarity, precision and foreseeability required by the principle of legal certainty. Member States are sufficiently aware of the obligations deriving from those principles, particularly when one considers that, for the most part, they have been developed by the case-law of the Court.

279. It is true that those principles inevitably have a degree of abstraction, and that the legislature cannot identify all the circumstances in which they will apply. That fact, which is common to all legal rules that implement a principle of law, does not of itself breach the requirements of legal certainty. It is up to the interpreter to apply the principle to a specific situation.

280. The fact that Article 3 of Regulation 2020/2092 identifies some 'indicative [examples] of breaches of the principles of the rule of law' (attacks on the independence of the judiciary; failing to sanction unlawful or arbitrary decisions by public authorities; or limiting the availability and effectiveness of legal remedies) shows that the legislature is endeavouring to foster the application of the principles of the rule of law and to increase legal certainty.

281. The same can be said of Article 4(2) of Regulation 2020/2092, which contains an indicative list of areas where breaches of the principles of the rule of law may arise.

282. The purpose of the list is to restrict breaches of the principles of the rule of law that may give rise to the adoption of the conditionality measures in Regulation 2020/2092 to cases directly linked to implementation of the Union budget.

283. Subparagraph (h) of that list refers to 'other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union'. As I have already explained, the inclusion of this provision is logical, and the effect of the scope of its terms on legal certainty is no greater than that of any other similar clause. This clause is unavoidable, given the impossibility of providing an exhaustive list of actions by Member States that may breach the principles of the rule of law during the implementation of the Union budget.

145 COM(2014) 158 final, Communication from the Commission: A new EU Framework to strengthen the Rule of Law, Annex I.

146 European Commission for Democracy through Law (Venice Commission) of the Council of Europe.

284. Article 4(2) of Regulation 2020/2092 restricts its application to an area falling within the competence of the European Union, namely the implementation of its budget. It thus provides legal certainty to Member States by allowing them to know in advance which 'aspects' of their actions are subject to financial conditionality for breach of the principles of the rule of law, which applies only to implementation of the Union budget.

285. In my view, the use of relatively imprecise concepts in Article 4(2) of Regulation 2020/2092 does not imply an ambiguity that is contrary to the requirements of the principle of legal certainty. The concepts it includes are widely used in other EU rules, particularly in the financial sphere. Providing further clarification will be an administrative matter for the Commission [147] and the Council when applying Regulation 2020/2092, and is subject to subsequent review by the Court.

286. In addition to the articles I have analysed here, the Hungarian Government cites other articles of Regulation 2020/2092 which, in its view, also breach the principle of legal certainty.

287. First, it refers to Article 4(1) of Regulation 2020/2092, which provides for remedial measures where '… 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'.

288. In the view of the Hungarian Government, the scope to adopt measures in the event of a serious risk extends the application of Regulation 2020/2092 to situations that are unclear or unproven. It also enables the Commission to propose the adoption of arbitrary measures unconnected with implementation of the Union budget, contrary to the requirements of legal certainty.

289. I do not believe, however, that these arguments can be accepted. Making provision for measures to be taken not only where there is a proven breach of the principles of the rule of law that is directly related to implementation of the Union budget but also where there is a serious risk of such a breach does not give rise to any legal uncertainty.

290. As I shall explain in my reply to the fourth plea in law, it is customary in EU financial and budgetary provisions to take into account both breaches already committed and the serious risk or serious threat that breaches will occur.

291. If the Hungarian Government's argument were to be accepted, it would be difficult for any legal rule to treat a risk or threat as a qualifying condition, since these are notions which, by their very nature, relate to the future in terms that are not entirely predictable. [148]

292. Second, the Hungarian Government reiterates that the reference in Article 4(2)(h) of Regulation 2020/2092 to 'other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union' is incompatible with the principle of legal certainty. I have already explained why I do not share this view.

147 The Commission reported at the hearing that it is preparing draft guidelines to assist in the application of Regulation 2020/2092, following a practice widely used in other spheres (such as State aid, for example).

148 Article 7 TEU addresses the 'risk of a serious breach … of the values referred to in Article 2'.

293. Third, the Hungarian Government considers that Article 5(3) of Regulation 2020/2092 infringes the principle of legal certainty, since it fails properly to specify the type and scope of the remedial measures that may be taken against the Member State and because it fails to ensure the existence of a direct link between the measures taken and the breach of the principles of the rule of law.

294. Article 5(3) of Regulation 2020/2092 allows for measures to be adopted that are proportionate to the actual or potential impact which the breach of the principles of the rule of law has on the sound financial management of the Union budget or the financial interests of the Union. In approving those measures, regard must be had to the nature, duration, gravity and scope of the breaches of those principles.

295. I do not find any incompatibility with the principle of legal certainty in this approach to determining the type and scope of the measures. As noted by the Parliament, the effectiveness of the financial conditionality mechanism lies in the power conferred on the Commission to propose remedial measures that are appropriate to the specific circumstances of each case. In any event, the Commission has to explain and give reasons for any measures it proposes to the Council, which are subject to judicial review by the Court.

296. With regard to the (hypothetical) absence of a direct link between the breach and the remedial measures due to the fact that the final sentence of Article 5(3) of Regulation 2020/2092 establishes that 'the measures shall, *in so far as possible*,[149] target the Union actions affected by the breaches', once again, I am not persuaded by the Hungarian Government's argument.

297. I do not see any incompatibility with the principle of legal certainty in this provision, because there are situations where it is not possible to identify in advance how best to respond to breaches. It is logical that the Commission and the Council should have the option of adopting remedial measures, including 'cross-conditional' measures as described above,[150] provided that they justify them properly and the measures are subject to subsequent review by the Court.

298. Fourth, the Hungarian Government argues that Article 6(3) and (8) of Regulation 2020/2092 infringes the principle of legal certainty, because it does not define sufficiently precisely the information the Commission has to weigh up in making its assessments.

299. This argument must also be rejected. The Commission has to prove breaches of the principles of the rule of law and the proportionality of the remedial measures which it considers are needed in order to correct them. It seems to me logical that, for these purposes, it should be able to gather information from all sources available to it, as indicated in Article 6(3) of Regulation 2020/2092. If the offending State considers that the information is incorrect, it has two rounds of consultation in which to demonstrate this to the Commission, before the Commission proposes measures to the Council.

300. In view of these considerations, the third plea in law should be dismissed.

149 Italics added.

150 Point 181 of and footnote 102 to this Opinion.

## VIII. Grounds for partial annulment of various provisions of Regulation 2020/2092

301. In the fourth to ninth pleas in law, the Hungarian Government seeks the annulment of various provisions of Regulation 2020/2092, employing arguments which are largely the same as those relied on in one or other of the first three pleas in law.

302. According to the Court, *partial* annulment of an EU act is possible only if the elements the annulment of which is sought may be severed from the remainder of the act. That requirement is not satisfied where the partial annulment of an act would have the effect of altering its substance. [151]

303. According to this case-law, the Hungarian Government's fourth plea in law, in which it requests the annulment of Article 4(1) of Regulation 2020/2092 is inadmissible, because this provision represents the substance of the regulation, in so far as it establishes the conditions for the adoption of remedial measures in the face of a breach of the principles of the rule of law that are directly linked to implementation of the Union budget. Without this article, Regulation 2020/2092 could not be applied.

304. The same reasoning applies to the seventh and eighth pleas in law, in which the Hungarian Government seeks the annulment of Article 5(3) of Regulation 2020/2092, which establishes the criteria for adopting remedial measures. A financial conditionality mechanism in which remedial measures cannot be applied, due to the lack of criteria, would be futile, and consequently that article is fundamental to implementing the contested regulation.

305. In any event, I shall analyse all the grounds for partial annulment, including the three that I believe to be inadmissible, in case the Court considers it appropriate to examine their substance.

### *A. Fourth plea in law: Article 4(1) of Regulation 2020/2092*

#### *1. The parties' arguments*

306. In the view of the Hungarian Government, in so far as it authorises the adoption of remedial measures in the event of a serious risk to sound financial management or to the financial interests of the European Union, Article 4(1) of Regulation 2020/2092 infringes the principles of proportionality and legal certainty.

307. The Hungarian Government adds that to allow this possibility, which is not provided for in other EU financial rules, would relieve the Commission of the duty to undertake an objective evaluation to prove the link between a breach of the principles of the rule of law and implementation of the Union budget.

308. The Parliament and the Council reject the Hungarian Government's line of argument.

[151] Judgments of 11 December 2008, *Commission* v *Département du Loiret* (C-295/07 P, EU:C:2008:707, paragraphs 105 and 106), and of 24 May 2005, *France* v *Parliament and Council* (C-244/03, EU:C:2005:299, paragraphs 12 and 13).

*2. Assessment*

309. Article 4(1) of Regulation 2020/2092 permits the adoption of remedial measures where '… breaches of the principles of the rule of law in a Member State … 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'. [152]

310. Other EU financial rules provide for similar measures, both where breaches have been committed and where there is a risk that breaches will occur. For example:

– The second and fourth paragraphs of Article 63(2) of the Financial Regulation refer to shared management between the European Union and the Member States and subject Member States to *ex ante* controls, including on-the-spot checks, on representative or risk-based samples of transactions. In addition, 'as part of its risk assessment and in accordance with sector-specific rules, the Commission shall monitor the management and control systems established in Member States. The Commission shall, in its audit work, … take into account the level of risk assessed in accordance with sector-specific rules'.

– Article 104 of the Common Provisions Regulation 2021-2027 provides that 'the Commission shall make financial corrections by reducing support from the Funds to a programme where it concludes that there is a serious deficiency which has put at risk the support from the Funds already paid to the programme'.

– The Financial Regulation (Articles 135 to 143) introduces an early detection system to exclude applicants and recipients from receiving funds from the Union budget where they are involved in situations which represent a serious risk to the financial interests of the Union.

311. Dealing only with actual breaches (of EU rules) without also addressing serious risks of breaches is incompatible with the sound financial management of the Union budget required by Article 317 TFEU. Sound financial management involves remedying breaches that have already been committed, but also entails weighing up threats (provided they are serious and credible) that such breaches will take place and will have undesirable financial implications.

312. The case-law of the Court endorses the use of the criterion of serious risk for the purposes of adopting financial corrections or other measures against Member States to protect the Union budget where the controls applied by Member States are defective, without having to prove an actual and effective loss. [153]

313. In Regulation 2020/2092, it strikes me as particularly appropriate to use the finding of a serious risk of breach of a principle of the rule of law directly linked to implementation of the budget as a criterion for adopting remedial measures, given the horizontal nature of the conditionality mechanism.

314. Generalised failings of national authorities in complying with the principles of the rule of law in connection with the budget may, in themselves, represent a risk to the sound management of the budget and to the financial interests of the Union.

[152] Italics added.

[153] Judgment of 7 October 2004, *Spain* v *Commission* (C-153/01, EU:C:2004:589, paragraphs 66 and 67).

315. Article 4(1) of Regulation 2020/2092 addresses the possibility of a threat that *seriously* affects the Union budget or the financial interests of the Union. It thus satisfies the requirements of the proportionality principle, because the measures taken in response to a situation of risk must reflect the level of risk and its impact on the Union budget or the financial interests of the Union. This is confirmed by Article 5(3) of Regulation 2020/2092.

316. Contrary to the Hungarian Government's assertion, the regulation does not enshrine a form of presumption of risk that weakens the link between the breach of the principles of the rule of law and implementation of the Union budget. At no point is the Commission relieved of its obligation to prove the existence of the threat or the risk which, I repeat, must be serious, genuine, and not merely hypothetical.

317. Under these conditions, Article 4(1) of Regulation 2020/2092 is compatible with the principle of legal certainty, and the fourth plea in law should therefore be dismissed.

### *B. Fifth plea in law: Article 4(2)(h) of Regulation 2020/2092*

318. In the view of the Hungarian Government, Article 4(2)(h) of Regulation 2020/2092 does not provide a precise definition of the circumstances in which a breach of the principles of the rule of law may be committed. The Hungarian Government argues that, by referring to 'other situations or conduct of authorities' without specifying further, the provision infringes the principle of legal certainty.

319. This plea should be dismissed for the reasons set out in the reply to the third plea.

### *C. Sixth plea in law: infringement of Article 5(2) of Regulation 2020/2092*

#### *1. The parties' arguments*

320. In the view of the Hungarian Government, the requirement in Article 5(2) of Regulation 2020/2092 (in summary, that the Member State against which measures are adopted must continue to provide funds to programmes' final beneficiaries):

– is incompatible with the legal basis of the regulation, since the obligation falls on Member States' budgets;

– infringes the provisions of EU law on budget deficits and breaches the principle of equality between Member States.

321. The Parliament and the Council dispute this argument, arguing – as they did in relation to the first plea in law – that Article 5(2) of Regulation 2020/2092 does not impose any obligation over and above existing ones and that it is essential in order to safeguard protection of the rights acquired by recipients. They also stress that responsibility for achieving budget deficit targets lies with the Member State, which must do so in accordance with the legislative options open to it, while continuing to comply with EU rules (including Regulation 2020/2092).

*2. Assessment*

322. I have already commented on the compatibility of Article 5(2) of Regulation 2020/2092 with the legal basis of Article 322(1)(a) TFEU in my examination of the first plea in law.

323. As for the (in)compatibility of this provision with EU rules on excessive public deficits, I do not share the Hungarian Government's view.

324. Each Member State (especially if it is not a member of the euro area) is able to draw up and control its budgets, subject solely to the requirement to comply with the limits established by EU law. Regulation 2020/2092 does not interfere with Member States' freedom, within those limits, to choose their own budgetary options for public revenue and expenditure.

325. It is true that, in exercising this budgetary power, the Member State must assume the cost of financial corrections imposed under Regulation 2020/2092 and, specifically, the costs arising from the obligation to comply with the requirement to continue paying funds to programmes' final beneficiaries.

326. Turning to the claim that it is easier for *large* Member States to meet this obligation, equality between Member States is not infringed where Regulation 2020/2092 imposes an identical duty on all Member States to maintain funding for final beneficiaries.

327. Moreover, the funding a Member State receives from the Union budget is, as a general rule, related to the State's economic weight and population, which are considered significant factors. Member States with less economic weight and smaller populations will benefit from EU programmes in proportion to their particular characteristics. Financial corrections imposed for breach of the principles of the rule of law will therefore have the same proportionate effect on them.

328. Whether the Member State, irrespective of its economic weight and population, is a net contributor to EU funds or a net recipient does not affect that situation. Logically, net recipients of EU budgetary funds will have a proportionally greater exposure to the financial conditionality mechanism than net contributors, but that is inevitable and does not give rise to discrimination between Member States.

329. The sixth plea in law should therefore be dismissed.

## *D. Seventh plea in law: penultimate sentence of Article 5(3) of Regulation 2020/2092*

330. In the view of the Hungarian Government, the third sentence of Article 5(3) of Regulation 2020/2092 (which provides that 'the nature, duration, gravity and scope of the breaches of the principles of the rule of law shall be duly taken into account') is incompatible with the legal basis of the regulation and with Article 7 TEU. It maintains that the provision is not related to the Union budget or the financial interests of the Union and, moreover, that it lacks the precision required by the principle of legal certainty.

331. These arguments should be rejected for the reasons adduced in the examination of the first and third pleas in law.

### *E. Eighth plea in law: final sentence of Article 5(3) of Regulation 2020/2029*

332. The Hungarian Government argues that the final sentence of Article 5(3) of Regulation 2020/2092 ('the measures shall, in so far as possible, target the Union actions affected by the breaches') does not ensure the existence of a direct connection between the specific finding of a breach of the principles of the rule of law and the measures taken. In its view, the precept infringes both the principle of proportionality and the principle of legal certainty.

333. This plea should be rejected for the reasons set out in the examination of the first and third pleas in law.

### *F. Ninth plea in law: Article 6(3) and (8) of Regulation 2020/2092*

334. The Hungarian Government considers that Article 6(3) and (8) of Regulation 2020/2092 (which requires the Commission to take into account 'relevant information from available sources, including decisions, conclusions and recommendations of Union institutions, other relevant international organisations and other recognised institutions') infringes the principle of legal certainty, because it does not adequately define the information and sources to be used.

335. This ground should be rejected for the reasons set out in the examination of the third plea in law.

## IX. Costs

336. Article 138(1) of the Rules of Procedure establish that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament and the Council have requested that Hungary be ordered to pay the costs and since, in my view, Hungary's claims should be dismissed, it should be ordered to pay those costs.

337. Pursuant to Article 140(1) of the Rules of Procedure, the European Commission, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Finland and the Kingdom of Sweden should bear their own costs.

## X. Conclusion

338. In the light of the foregoing considerations I propose that the Court should:

(1) Dismiss the Council's application on a preliminary issue in which it requests that the passages in Hungary's application and the annexes thereto, particularly Annex A.3, which refer to, reproduce the content of, or reflect the analysis undertaken in, the opinion of the Council Legal Service (Council document 13593/18) of 25 October 2018 be disregarded.

(2) Dismiss the first, second and third pleas in law in the application lodged by Hungary against 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, in which it seeks the annulment of the regulation.

(3) Declare inadmissible the fourth, seventh and eighth pleas in law and dismiss the fifth, sixth and ninth pleas in law in which it requests, in the alternative, the annulment of Article 4(1), Article 4(2)(h), Article 5(2), the penultimate sentence of Article 5(3), the final sentence of Article 5(3), and Article 6(3) and (8) of Regulation 2020/2092.

(4) Order Hungary to bear its own costs and to pay the costs of the European Parliament and of the Council.

(5) Order the European Commission, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Finland and the Kingdom of Sweden to bear their own costs.