ATTILA BADÓ – SAMANTHA CHEESMAN *

The Hungarian Judiciary under the Pressure of the Conditionality Procedure**

Guaranteeing the independence of the judiciary was and still is an important condition for accession to the EU. Although the Union gives Member States a great deal of flexibility in the organization of the judiciary, it is often sensitive to questions about the independence of the judiciary during the accession process and later for the acceding Member States. The number of more sensitive reactions has been increasing over the last two decades, mainly due to the accession of post-socialist countries to the EU. One of the effects of this is that the EU negotiating team now sets much stricter requirements for countries aspiring to EU membership than in the past. The example of Serbia illustrates the extent to which the EU's expectations of the separation of powers are being enforced to ensure that the judiciary is trusted. This is happening in an EU regulatory context which sets out only general principles of judicial independence for Member States.

The situation in the formerly acceding post-socialist countries, however, is a more serious puzzle for those who claim a lack of judicial independence in countries that have been members of the EU for decades.

The prospect of EU financial aid being withdrawn from a member state for reforms, including in the administration of the judiciary, is a new element in the history of the EU.

In the case of Hungary, a very significant administrative reform was clearly carried out at the EU's request, above all to remove an obstacle to the arrival of EU subsidies.

A spectacular strengthening of the self-administration of the judiciary has taken place, bringing to an end a long internal debate and struggle within the Hungarian judiciary. It is worth examining this reform and it's political framework in more detail to make this much-debated situation more comprehensible.

* *Attila Badó*, professor, Faculty of Law, University of Szeged; *Samantha Cheesman*, senior lecturer, Faculty of Law, University of Szeged.

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I. The opportunities and limits of EU intervention in the past and today

The institutions of the European Union are endowed with very limited competences and even more limited tools to safeguard judicial independence in Member States. Pursuant to Article 2 of the Treaty on European Union (TEU) *"the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".* The breakdown of the relationship between the rule of law, and judicial independence at the national Member State level is indicative of the Charter not being enforced or at least institutionally weakened.[1] Article 19 (1) of the TEU provides that the CJEU will ensure that, 'the interpretation and application of the Treaties the law is observed'. This principle is further reiterated in article 6 TEU which also underlines that *"fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and, as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".*

An alternative argument for EU involvement is the creation of an Area of Freedom, Security and Justice that is based *inter alia* on the automatic mutual recognition of judicial decisions rendered in other Member States. Mutual recognition is based on mutual trust, and a crucial component of this trust is the conviction that a judgment rendered in another Member State has been adopted by an independent and impartial tribunal in a fair procedure. Despite an unequivocal theoretical commitment to upholding the rule of law, the EU has very few tools to effectively implement it. 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 (Art. 7 TEU). Based on the unsatisfactory experiences related to the application of Art. 7 TEU as a nuclear option, the Commission presented a new initiative for addressing systemic threats to rule of law in Member States that was supposed to be complementary to infringement procedures and Art. 7 procedure. This meant that activities would be monitored that relate to the 'rule of law 'in Member States and would enable the EU to take proportionate and effective action if needed.

The principle of judicial independence's authority has been reduced as well as undermined by limiting it to Article 47 of the Charter. The EU Charter of Fundamental Rights might serve as another basis of EU action. Pursuant to Article 47 of the Charter everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended, and represented. However, Article 51 of the Charter limits the scope of these provisions by stating that the provisions of the Charter are

[1] KOCHENOV, DIMITRY –MORJIN, JOHN: *Strengthening the Charter's Role in the Fight for the Rule of Law in the EU. The Cases of Judicial Independence and Party Financing.* European Public Law 2021/4. pp. 759–780.

addressed to the institutions, bodies, offices, and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles, and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. In addition, the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Consequently, the Charter is not very likely to prove an effective tool in promoting the independence of domestic courts in Member States. However, , since the Commission has started publishing an annual report on the implementation of the Charter and can also initiate infringement procedures but these are usually not based exclusively on the Charter.[2] Another important European initiative on judicial independence, including the organizational independence of the judiciary, is the action plan[3] proposed by the Council of Europe by the Committee of Ministers of the CoE , which included recommendations and the monitoring of Member States. The action plan aims to depoliticize the courts but continues to respect the specificities of the Member States. It does not require the establishment of Judicial Councils everywhere. However, it articulates the need to avoid the election of members of the Councils or other judicial bodies. Overall, there are many different views and ideas in the EU about what the independence of the judiciary entails. The analysis and examination of the different solutions used in the various EU Member States must also consider the specificities of each country's domestic political institution.

For Central and Eastern European countries, it is often difficult to understand the criticisms from EU institutions or human rights organizations that call into question the behavior of a court. This is most noticeable when discussing the administration of justice and in connection with this more specifically, the selection and disciplinary accountability of judges, for which stable Western European democracies have demonstrated various solutions and mechanisms. For decades, individual legal systems in Europe have been experimenting with ways and means of ensuring the separation of powers, mutual control and a balance of independence and accountability in the judiciary. Although a clear trend is that the former ministerial powers are gradually being taken over in most countries by so-called judicial councils, which are designed to establish judicial self-government, there is considerable variation in the competences and composition of these councils. In addition, there are European countries (Austria and Germany) which, not following the indicated trend, still carry out the external administration of the courts under governmental oversight.[4] What becomes evident is that even judicial systems with a long history of legal traditions may employ institutional solutions that might arouse doubts concerning the independence

[2] For example, when – as mentioned above – the Commission contested the early retirement of around 274 judges and public prosecutors in Hungary caused by a sudden reduction of the mandatory retirement age for this profession from 70 to 62, the Court of Justice of the European Union upheld the Commission's assessment that this mandatory retirement is incompatible with EU equal treatment law (the Directive prohibiting discrimination on the basis of age and Article 21 of the Charter) – and not on considerations related to the independence of the judiciary.

[3] Council of Europe Action Plan on strengthening judicial independence and impartiality (CM(2016)36 final) available at https://rm.coe.int/1680700285

[4] RIEGER, ALEXANDER: *Verfassungsrechtliche Legitimationsgrundlagen richterlicher Unabhängigkeit. Zugleich eine Auseinandersetzung mit der Debatte um eine Selbstverwaltung der Justiz.* P. Lang, Frankfurt am Main, 2011. p. 209.

and impartiality of judges. Despite this fact it is quite possible that due to the peculiarities of the legal and political culture these solutions do not lead to the violation of the fair trial principle in practice. However, political, and legal culture is also a vague concept, so, based on this it would be very difficult to make an informed decision concerning the violation of judicial independence.

II. Hungarian judicial reforms related to the central administration of courts

In Hungary, 7 years after the change of regime, a judicial council with a judicial majority council was established in the framework of the 1997 comprehensive justice reform, which resulted in the council taking over almost all the powers of the government concerning the administration of justice.[5] The influence of the Ministry of Justice on the day-to-day operation of the courts has been only informal.

In addition to the Minister of Justice, the Council also included the Prosecutor General representing the Public Prosecutor's Office and the President of the Bar, but most of the judges elected by the judges' representative bodies provided full self-government. Prior to this, there were ongoing political battles, mostly over the appointment of court heads. Although this Council was a balanced body, professional criticism has emerged in Hungary over the "full" self-administration of justice; administrative managers elected by judges induce a barely controllable corporate system leading to an increase in nepotism within the judiciary. Taking advantage of the criticisms the government, which gained a two-thirds parliamentary majority , implemented judicial reform, entrusting the administration of the courts to an administrative body with broad powers and headed by a leader appointed by a two-thirds majority of the Parliament. The supervision of this body was entrusted to the Judicial Council, composed exclusively of judges, but with less substantial powers. The new organizational form has been widely criticized for giving a single person exceptional power over the courts.[6] The National Office for the Judiciary (Országos Bírósági Hivatal Elnöke, NOJ) is responsible for practically all matters related to the selection of judges and court leaders and supervises the administrative activities of all courts except the Hungarian Supreme Court, the Curia. The task of the Council in the field of central administration is basically to control the activities of the NOJ.[7] The service courts in Hungary have the right to adjudicate disciplinary cases. Several international organizations have criticized the state of the Rule of Law in Hungary, including the judiciary, but, interestingly, tensions have also started to rise within the judiciary. This has intensified the criticisms calling for a gradual reduction in the independence of the judiciary. For a long time, the elected judges of the National Judicial Council (Országos Bírói Tanács, NJC) seemed to tolerate, in silence, the inability to control the Parliament-appointed head of the NOJ without any power. However,

[5] Act LXVII. of 1997 on the Organization and Administration of Courts.
[6] By the end of the 2010s, there had been a change of staff at the head of the Office due to increasing conflicts between the Judicial Council and the Head of the Office.
[7] Section 103 (1) (a) of Act CLXI of 2011 on the Organization and Administration of Courts.

the Venice Commission issued an opinion[8] on the legal reforms of the judiciary in Hungary. They were particularly critical of the methods by which the president of the NJO can be elected and removed. The report recognized that the Hungarian Government had indeed taken on board their previous comments. They were particularly pleased that the President of the NJO was more accountable and that the NJC's role had been elevated more so that it could have more oversight. However, there was still concern that the powers of the President of the NJO were too extensive and that the Hungarian Government should take measures to reassure the independence of the judiciary.[9]

Despite these recommendations things started to come to a head when the European Association of Judges and the European Commission declared that the Hungarian judiciary was facing a constitutional crisis.[10] This was characterized by a changing of the roles of the NJC and the NOJ. This period saw several developments concerning the judiciary which did not go unnoticed. This was apparent from the Sargentini report[11] which recommended that Article 7 proceedings be initiated against Hungary as the steps being taken posed a serious and systemic threat to the values of the European Union.[12]

The conflicts between the NOJ and the NJ centred around the way judicial appointments were occurring. NJC is the most senior self-governing body. The NJC stared to investigate how the president of the NOJ was appointing judges and found that there were several violations, which was an attempt to overhaul the top tier of the judiciary. Attacks were mounted in the media against individual judges, who criticized the president of the NOJ. Some of the judges won defamation lawsuits. The NOJ appointed the court presidents, who then could put pressure on 'rogue judges' by using administrative measures, for example the awarding of bonuses, exclusion from training opportunities or harsher working conditions. Once it was realized that there remained a core of judges who were very resilient to governmental pressure as certain judges kept speaking out, and that they considered judicial independence to be something that ought to be taken very seriously, this led to the realization amongst politicians that it was necessary to shift strategy. This shift meant that the focus was no longer on domestication through court presidents but by shifting tactic and attacking the top tier of the judges in the Kuria. The first instance of this shift in tactic can be see with the appointment of Andras Vajda's. His appointment was made possible through a series of legal amendments. He used to be a prosecutor then a judge of the constitutional court (which is

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[8] European Commission for Democracy through Law, 'Opinion on the Cardinal Acts on the Judiciary that were Amended following the adoption of Opinion CDL-AD (2012) 001 on Hungary', (15 October 2012) Opinion no. 683/2012 available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e

[9] European Commission for Democracy through Law, 'Opinion on the Cardinal Acts on the Judiciary that were Amended following the adoption of Opinion CDL-AD (2012) 001 on Hungary', (15 October 2012) Opinion no. 683/2012 available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e

[10] Report on the fact-finding mission of the EAJ to Hungary, European Association of Judges, available: https://www.iaj-uim.org/iuw/wpcontent/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf p. 5.

[11] SARGENTINI, JUDITH: *Report on a proposal calling in the Council to determine, pursuant to Article 7 (1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.* (2017/2131(INL)) Committee on Civil Liberties, Justice and Home Affairs. Available at https://www.europarl.europa.eu/doceo/document/A-8-2018-0250_EN.pdf

[12] SARGENTINI 2017, p. 5.

not part of the ordinary judicial system in Hungary) no judicial courtroom experience which would enable him to meet the requirements for judicial appointment. The NJC said that he is not sufficiently independent due to the way in which he was appointed. These criticisms fell on deaf ears. The NJC has been hamstrung in its ability to make effective changes as they are not a legal entity and do not have their own budget. The only tool they have available to them is to "signal" problems such as dismissing a judge, but this "signal" is ultimately decided upon by the Government. However, for Hungary to be able to unlock the funding that is being withheld until they comply with a whole new component to the recovery and resilience plan which was adopted. The new component contains 111 new milestones 27 of which have been dubbed the 'super milestones'. These 'super milestones' refer to the conditionality measures which Hungary needs to take into consideration under the rule of law mechanism. The milestones also refer to the ongoing battle concerning the judicial independence questions.[13] For the budgetary conditions to be triggered the European Commission must be convinced that the [in]actions of Hungary have demonstrated sufficiently that infringements affect, 'in a sufficiently direct way,' the management of the budget or the financial interests of the Union.[14] The fact that Hungarian government has now pushed through a vote on a new law to address the shortcomings so as to unlock EU funding is a step in the right direction, but it is not necessarily enough. The EU Commission will also need to judge the impact that the new law will have to ensure that the milestones as specified will be 'fully and correctly' implemented by Hungarian for the first payment to be made.

III. The conditionality procedure

The purpose of the conditionality mechanism is to protect the EU budget, 'against systemic risks, due to rule of law deficiencies.'[15] The conditionality mechanism became enforceable from the 1 January 2021. Once in force the European Parliament sued the European Commission to trigger the mechanism against both Poland and Hungary. Article 7 is an instrument by which to ensure respect for Article 2 TEU and the values contained in Article 2.[16] The triggering of Article 7 was never intended to be an easy process rather the threshold is very high. There are three stages that need to be met before the process can start. Stage one is achieving a 4/5th majority vote of the European Council that there is indeed a threat, stage two is unanimity vote that a breach of the values has occurred and finally stage three where there is a voting on sanctions which will suspend the voting rights of the Member

[13] Multiannual financial framework for 2021–2027 adopted, Council of the EU Press Release (17 December 2020). Available at https://www.consilium.europa.eu/en/press/press-releases/2020/12/17/multiannual-financial-framework-for-2021-2027-adopted/ (accessed on 12 June 2023).

[14] SCHEPPELE, KIM LANE – KELEMEN, R. DANIEL – MORIJN, JONH: *The EU Commission has to Cut Funding to Hungary. The Legal Case*. European Parliament, 2021. http://extranet.greens-efa-service.eu/public/media/file/1/7179

[15] LEHNE, STEFAN: *The Comeback of the European Commission.* Carnegie Europe, 24 April 2023. Available at https://carnegieeurope.eu/2023/04/24/comeback-of-european-commission-pub-89577. (accessed on 07 June 2023).

[16] GRABBE, HEATHER – LEHNE, STEFAN: *Defending EU Values in Poland and Hungary.* Carnegie Europe, 04 September 2017. Available at https://carnegieeurope.eu/2017/09/04/defending-eu-values-in-poland-and-hungary-pub-72988. (accessed on 07 June 2023).

State involved. Once the European Parliament triggers Article 7 procedure and then it is up to the European Council to respond to it. These stages have resulted in Article 7 being referred to as the nuclear weapon.[17] No one wants to use the Article 7 procedure as the general idea is to exert pressure on the Member State's Governments to change.

When the European Parliament triggered the Article 7 procedure against Hungary,[18] they cited the lack of, 'independence of the judiciary and of other institutions and the rights of judges', as being one factor amongst many which needed to be addressed by Hungary as a matter of urgency.[19] When the Commission proposed to suspend 65% of its commitments to Hungary the justification was given that the concerns have not been addressed adequately and that the violations are of such systematic breaches that go right to the heart of the application of the rule of law within the meaning of Article 2 of the TEU. Hungary is also in need of the 13.2 billion euros that has been blocked because of what the EU commission has deemed as a chipping away of fundamental rights.[20] The recent proposal of a draft bill[21] on reforming the judiciary is the result of nearly more than a year and half of negotiations between Budapest and Brussels.[22] As a result the Hungarian government started the public consultation period of the draft law.[23] It is hoped that this new law will free up the European funds that the Hungarian government needs.[24] Under the new law the NJC have been granted more extensive powers vis a vis the power of the President of the National Office of the Judiciary.[25] One significant amendment is that the new law will create a separate

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[17] FEKETE BÁLAZS – CZINA VERONIKA: *Article 7 of the Treaty if the European Union – is it really a nuclear weapon?* Hungarian Academy of Sciences. Available at https://hpops.tk.hu/en/blog/2015/04/article-7-of-the-treaty-on-european-union. (accessed on 07 June 2023).

[18] SCHWARCZ ANDRÁS: *Rule of law-related 'super milestones' in the recovery and resilience plans of Hungary and Poland.* European Parliament Briefing Policy Department for Budgetary Affairs, 2023. Available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI(2023)741581_EN.pdf; MAURICE, ERIC: *Rule of law: the uncertain gamble on conditionality.* Fondation Robert Schuman The Research and Studies Centre on Europe, European Issue no 660 Policy Paper, 14 March 2023. Available at https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-660-en.pdf

[19] SCHWARCZ 2023.

[20] TAMMA, PAOLA: *Hungary embarks on judicial reform hoping to unlock EU funds*. Politico, 2 May 2023. Available at https://www.politico.eu/article/hungary-embarks-on-judicial-reform-hoping-to-unlock-eu-cash/

[21] The draft bill T/3131was first debated in parliament on the 2nd of May and was passed to the Hungarian Parliament who voted in its favour on the 3rd of May. The bill which was voted through represents the Hungarian government's response to the European Commission's request to improve the condition of judicial independence in particular the National Judicial Council (OBT). CSEKE BALÁZS – MÁRTON BALÁZS – HORVÁTH KÁVAI ANDREA: *Hungarian judicial reform worth 13 billion euros voted through, hidden in amendment.* Telex, 3 May 2023. Available at https://telex.hu/english/2023/05/03/hungarian-judicial-reform-worth-eur13-billion-voted-through-hidden-in-amendment

[22] TAMMA, PAOLA: *Hungary vows to overhaul its judiciary, hoping to unlock EU funds*. Politico 7 November 2022. Available at https://www.politico.eu/article/hungary-overhaul-judiciary-unlock-eu-funds/

[23] *The Government's draft law on the judiciary does not comply with RRP super milestones*. Hungarian Helsinki Committee, 7 February 2023. Available at https://helsinki.hu/en/the-governments-draft-law-on-the-judiciary-does-not-comply-with-rrp-super-milestones/

[24] SASVÁRI PETER: *Judicial Reform in Hungary Reaches New Stage. Unlocking of EU funds in sight.* Hungarian Conservative 10 May 2023. Available at https://www.hungarianconservative.com/articles/politics/judicial_reform_hungary_independence_judiciary_eu_funds_commission_approval/

[25] CSEKE – MÁRTON – HORVÁTH KÁVAI 2023.

budget for the NJC as well as installing safeguards which would protect both the Constitutional Court and the Kuria from political influence.[26]

The Hungarian government was indeed under pressure to comply with completion of the milestones as the Annex to the European Commission's proposal clearly states that, *"[t]he implementation of the reform shall be completed by Q1 2023 and before the first payment request under the recovery and resilience plan".*[27] Civil Society was invited to engage with the Ministry over the recommendations made to the draft law. It was highlighted at this stage that there needed to be a broadening of the powers of the NJC. It was further argued that there was need to develop further, in line with the milestones, the independence, impartiality, integrity as well as probity of the NJC. However, the Government stated that this would require the installation of a completely new system which was not necessary and that it would also greatly reduce the powers of the Parliament.[28] Unfortunately it would appear that the Government has not heeded all the recommendations of civil society. When analyzing the requirements of the milestones the Hungarian Government has either in part or not all responded to the requirements. If we look at the milestones which have not been implemented, for example milestone 213. a) (iv) and milestone 213. b), 213. d) they all concern the strengthening as well as safeguarding of the independence of the NJC through independent selection criteria, the right of the NJC to have access to documents, information that relate to the administration of courts and finally it is recommended that the NJC members cannot be re-elected except for the next term of office and that court members as well as vice-presidents shall not be involved in the deliberation or voting concerning administrative matters. When reading the proposal, the picture emerges that the Hungarian Government has paid lip service and tweaked the offending legislation just enough to hopefully unlock the purse strings of the European Commission.

The Hungarian Government is hopeful that once the new law enters into force that there will be time to fulfil the practical steps that are required of them by the European Commission.[29]In assessing compliance the EU Commission will send a delegation to overview as well as audit the use of EU funds. The delegation will be checking whether the EU conditions have been met which are the following:

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[26] SASVÁRI 2023.

[27] *Assessment of the Government's Draft Proposal on the amendment of certain laws on justice related to the Hungarian Recovery and Resilience Plan, published on 18 January 2023 in light of the milestones set out in the Annex to the European Commission's Proposal*' Amnesty International Hungary, Eötvös Károly Institute and the Hungarian Helsinki Committee,'3 February 2023. Available at https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/2023judicial_package_assessment_AIHU_EKINT_HHC.pdf

[28] *Joint assessment of the government's judicial package aimed at unblocking EU funds.* Hungarian Helsinki Committee, 21 February 2023. Available at https://helsinki.hu/en/joint-assessment-of-the-governments-judicial-package-aimed-at-unblocking-eu-funds/. *Compliance of the Hungarian Government's Draft Proposal on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan with the milestones to be achieved by 31 March 2023 under Annex to the European Commissions's Proposal.* Amnesty International Hungary, Eötvös Károly Institute and Hungarian Helsinki Committee, 21 February 2023. Available at https://helsinki.hu/en/wpcontent/uploads/sites/2/2023/02/compliance_judicial_milestones_20230221.pdfi8

[29] The Hungarian Helsinki Committee, Amnesty International and the Eötvös Károly Intézet published an open letter to Commissioner Reynders (the European Commissioner for Justice); MÁRTON BALÁZS: *Most akkor mi van az uniós pénzekkel?*' Telex, 15 May 2023. Available at https://telex.hu/kulfold/2023/05/15/europai-unio-europai-bizottsag-helyreallitasi-alap-jogallamisag-rrf-mff

- strengthening the role and powers of the NJC, which holds independent judicial oversight powers over the judiciary;
- the independence of Curia judges – formerly the Supreme Court – to protect them from political interference
- the possibility for the authorities to challenge final judgments in the Constitutional Court to be abolished, and
- obstacles to be removed for Hungarian judges referring cases to the ECJ if they consider that Hungarian and EU law are not in line – the EU Court of Justice having previously ruled that the existence of such obstacles was a violation of EU law.

However, even though the Hungarian government has indeed made some steps to meet the requirement for unlocking funds the way in which the draft bill was presented before parliament and its contents have drawn criticism from civil society in Hungary. It would seem that the optimism of the Hungarian Government is not entirely misplaced as the European Commission has decided that Hungary has met their horizontal obligations. The Commission is of the opinion that the legislative measures proposed have laid the ground work for securing judicial independence.

As with the other countries a review of the measures taken by Hungary will be a cautionary tale for others to see how the European Commission will now respond.

However, the European Parliament has expressed deep dissatisfaction with the Hungarian Government's recent proposed responses to the European Council regarding its fulfillments of the super milestones. Consequently, a resolution was adopted by the 5 main parties of the European Parliament which tabled the possibility of Hungary being deprived of their presidency of the European Council.[30] The argument from the European Parliament is that Hungary no longer complies with EU law and that rather Hungry is undermining the core values of the EU. Gwendoline Dellos-Corfield[31] stated at the press conference concerning the resolution that the situation in Hungary has deteriorated to such a state that it would not be appropriate for Hungary to take up the presidency.[32] The fact that Hungary is still subject to the Article 7 states that the rotation of the presidency is an obligation and not a right. It is on this point that the position of the Hungarian Government and the European Parliament diverge on the legal interpretation of the wording. The resolution was first proposed 2 months ago as a reaction to the Whistleblower Act[33] which would entice citizens to denounce other citizens concerning topics relating to 'rainbow families', disagree

[30] MÁRTON BALÁZS – KÁVAI HORVÁTH ANDREA: *The EP would deny the Hungarian government a unique opportunity but the threat lies elsewhere.* Telex, 31. May 2023. Available at https://telex.hu/english/2023/05/31/the-ep-would-deny-the-hungarian-government-a-special-opportunity-but-the-real-threat-lies-elsewhere (accessed on 05 June 2023).

[31] Member of the Group of the Greens/European Free Alliance.

[32] MÁRTON BALÁZS – KÁVAI HORVÁTH ANDREA: *Judit Varga: EP vote on Hungarian presidency of EU Council completely unnecessary.* Telex, 01. June 2023. Available at https://telex.hu/english/2023/06/01/judit-varga-the-eps-vote-on-the-hungarian-council-presidency-was-completely-unnecessary (accessed on 05 June 2023).

[33] Act XXV of 2023.

with the Government or Fidesz.[34] This Act was later withdrawn but there is nothing to say that it could not be reintroduced later. However, the Whistleblower Act triggered the idea of a resolution being brought against Hungary. The Resolution highlights several areas of concern for the European Parliament,

- the new 'Status' law which relates to teachers and their ability to strike, monetary and curriculum external control;
- appeals for the EU funding to remain frozen;
- the situation concerning the independence of the judiciary have not improved;
- debate is needed on the presidency of the Council.[35]

The significance of Hungary taking up the presidency in the current climate of the war in Ukraine cannot be overstated enough for the European Parliament. Concerns were expressed at the press conference about what the Presidency will communicate on behalf of the EU. Thijs Reuten[36] stated that the Council should understand the seriousness of the fact that Hungary is no longer a democracy. Of particular concern was how having the presidency could possibly have a detrimental impact upon foreign interests. It must also be clarified that the conditionality mechanism is about the rule of law conditionality and not budget conditionality. The two issues have become conflated.

IV. Question marks in the conditionality procedure

Hungary attempted to stop the conditionality procedure form being initiated by challenging the procedure before the CJEU. In a 50-page letter the Hungarian Government communicated the fact that they do not recognize the validity and legality of the CJEU's ability to rule on the legality of the entire conditionality mechanism.[37]

The Parliament and the Council adopted 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.[38] As a result of the Regulation being introduced Hungary and Poland both brought actions before the CJEU to annul the regulation or part of the regulation.[39] The main arguments of Hungary was that there was no legal basis in either the TEU or the TFEU, that there was a circumvention of the

[34] BUZÁSI BARNABÁS – SZKOK HELGA: *New whistleblowing legislation takes effect in Hungary*. WolfThesis, 20 April 2023. Available at https://www.wolftheiss.com/insights/new-whistleblowing-legislation-takes-effect-in-hungary/ (accessed on 07 June 2023).

[35] MÁRTON BALÁZS – KÁVAI HORVÁTH ANDREA: *EP votes to question Hungary's ability to credibly hold EU Council presidency.* Telex*, 01* June 2023. Available at https://telex.hu/english/2023/06/01/ep-votes-to-question-hungarys-ability-to-credibly-hold-eu-council-presidency (accessed on 05 June 2023).

[36] Member of the Group of the Progressive Alliance of Socialists and Democrats in the European Parliament.

[37] TÓTH-BIRÓ MARIANNA: *'Orbán already preparing steps for after ECJ ruling.*' Telex, 15 February 2022. Available at https://telex.hu/english/2022/02/15/orban-viktor-european-commission-court-decision (accessed on 07 June 2023).

[38] Court of Justice of the European Union Press Release No 28/22 Luxembourg, 16 February 2022.

[39] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974.

procedure set down in Article 7 of the TEU, that the EU has exceeded their powers as well as the principle of legal certainty.

The CJEU recognized that the case being brought by Hungary had significant constitutional importance as the court needed to determine it the Regulation was appropriately adopted and, 'whether it is compatible with various provisions of primary law in particular Article 7 TEU.'[40] The Regulation was created as part of an effort to hold Member States to their commitments to ensure protection of the rule of law. The new framework was seen by the EU as a mechanism by which, '*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 preceded and complements Article 7 TEU mechanisms*'.[41] The Hungarian Government's position is that there no legal basis for Regulation 2020/2092 or that the legal basis is inappropriate. The crux of the argument is that even though Article 322 (1) (a) TFEU affords the EU the power to adopt financial rules about how the union budget should be implements that the regulation 2020/2092 does not contain anything related to this issue. From this flows the logic, alleged by the Hungarian Government that there is a 'conflict of interest in the allocation of EU funds'.[42] This is problematic as the regulation 2022-2092 does not provide any guidance for Member States on how to avoid these scenarios. The second issue that the Hungarian Government raised was that Article 5 (2) of Regulation 2022/2092 penalizes the Member State by withdrawing funds but then requiring the Member State to use their own funding. The Hungarian Government found that this provision breached the requirements of the rule of law. However, the Court did not follow this line of logic and rather focused on what they viewed as being the key element to understanding the purpose and scope of the Regulation 2020/2092 which is the requirement of the 'sufficiently direct link' between the budget being implemented and the breach of the principles of the rule of law.[43] In his conclusions concerning the first objection, Mr. Campos Sánchez-Bordona stated that, *'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*'.[44]

Therefore, the request of the Hungarian Government was rejected concerning the claim that the Regulation 2020/2092 had been adopted without the legal basis to do so. Turning to the second question raised the Hungarian Government argued that the EU cannot adopt the measure it has as the sanctions are for the breach of the rule of law rather than genuine measures which have been adopted to protect the EU budget. Therefore Article 322 (1) (a) TFEU is not an appropriate legal basis. More specifically the Hungarian Government raises

[40] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para.2.
[41] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para 81
[42] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para 122.
[43] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para 165.
[44] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para 169.

the concern that Article 5 (3) of the Regulation 2020/2092 allows for a cross-conditionality that is far beyond the protection of the EU budget.[45] The cross-conditionality is that the conditions for Hungary to benefit from financial support become dependant upon them fulfilling other requirements. One of the key arguments fo the Hungarian Government centered around defining Rule of law and the establishing a hierarchy of criteria to assess whether measures to be taken would be proportional to the actual or potential breaches of the rule of law. It was considered by the Advocate General that, *'the nature, duration, gravity and scope of the breaches of the principles of the rule of law committed by the offending Member State can only serve to determine the impact of the Member State's actions on the implementation of the Union budget'*.[46]

The Hungarian Government takes issue with the final sentence of Article 5 (3) of Regulation 2020/2092 which states: 'the measures shall, in so far as possible, target the Union actions affected by the breaches'. The Advocate General rejected the interpretation of Hungary and was satisfied by the Council's explanation that working based on the principle of proportionality that there would be exceptional circumstances where cross-conditionality would come into play because breaches of the rule of law have very far reaching and that once funding has been awarded corrective measures cannot be taken. Therefore, there is a need for continuing assessment of the impact or risk for the Union budget. A further argument of the Hungarian Government was that the Regulation infringes the 'principle of institutional balance'[47] This argument is based on the fact that Regulation 2020/2092 alters the sanctioning power under Article 7 TEU which creates a parallel decision-making process and that there is an incompatibility between the unrestricted judicial review by the Court of Justice of measure taken under the Regulation and that the powers of review in Article 269 TFEU are severely limited.[48] This argumentation was rejected and the position of the Council was accepted that the procedure enabled by Regulation 2020/2092 does respect the principle of institutional balance and that the procedure it uses is not that different to other procedures that have been used for other Eu budgetary acts. Additionally, the Council does have the power to be involved in the implementation of the financial rules and the application of the budget.[49]

Turning to the crux of the matter the question of legal certainty and who gets to determine how the rule of law should be defined. When considering the question of the rule of law the Hungarian Government argued that it is an abstract one and that it should not be the subject of uniform definition in EU law and must rather be left to the Member States to define within their own legal systems.[50] This leads onto the question of the principle of legal certainty being breached as the definition provided in article 4 (2) of Regulation 2020/2092 is 'open and abstract' thus breaching the requirements of legal certainty. When considering these arguments the Advocate General relied upon the CJEU where they have stated that the principle of certainty, *'requires, on the one hand, that the rule of law be clear and*

[45] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para 180.
[46] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para 178.
[47] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; paras 238–239.
[48] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para 241.
[49] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; paras 249–252.
[50] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para 267.

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 obligation imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly'.[51]

It was recognised that even though the concept of the rule of law is broad there is nothing preventing the EU from defining the concepts enshrined in Article 2 TEU more precisely concerning a specific area of application in EU legislation. The Advocate General went onto reiterate the fact that, *'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'*.[52]

Based on this the Regulation 2020/2092 does nothing more than to further build upon the concepts in Article 2 TEU and to list specific circumstances relating to those areas where a breach will be determined that can be linked directly to the implementation of the EU budget. The Advocate General did not accept the arguments of the Hungarian Government where they claimed that the concepts were imprecise, enabling of arbitrary measures to be taken and that this was contrary to the principle of legal certainty. He went further to say that if the Hungarian Government's arguments were accepted then, 'it would be very difficult for any legal rule to treat a risk or threat as a qualifying condition, since these are notions which, are by their very nature, relate to the future in terms that are not entirely predictable.'[53] As such the application of the Hungarian Government was dismissed concerning the annulment of Regulation 2020/2092 and they were ordered to cover their own costs.[54]

We (the authors) would welcome a stricter set of rule of law requirements that could be consistently applied to all Member States. However, the current situation also provides an opportunity for populist politicians to whip up an anti-EU mood, using examples from other countries to demonstrate that criticisms of the infringement of Hungarian judicial independence are unfounded.

V. Conclusion

There has been growing tension between Hungary and the European Union in recent years. There is a general perception among the EU institutions that the rule of law is being systematically violated in this Member State. The current government in Hungary has consistently sought to refute these assertions. One of the central elements of the debate is the issue of the independence of the judiciary, which can easily be linked to EU subsidies. While in the past the Union could react to alleged violations of the independence of the judiciary with limited means, this situation has changed in recent years. In the context of the so-called

[51] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para 271; Judgment of 29 April 2021, Banco de Portugal and Others (C-504/19, EU:C:2021:335, para 51).
[52] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para 273.
[53] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para 291.
[54] Opinion of Advocate General Campos Sánchez-Bordona, Case-C-156/21, ECLI:E:C:2021:974; para 338.

conditionality procedure, a judicial reform has become enforceable through the fulfilment of specific demands, which has put Hungary (along with Poland) in a new position. The game of 'more rule of law for more money' has provoked an unworthy debate within an organization that is essentially based on consensus. The notion of judicial independence is still a vague concept that can either justify or refute the arguments of both sides.

Since the 1990 regime change, East Central European post-socialist countries have been struggling with the issue of how to meet the judicial independence requirement with a view to accession to the European Union. All legal systems pushed through several reforms under which judicial organization has been restructured several times.[55] One could witness the expansion of the application of the judicial self-administration bodies in accordance with Western European trends. Since the accession of East Central European post-socialist countries to the EU proved to be successful a new development occurred. In the initial euphoric state following the regime change the political elite of democratizing societies placed more emphasis on being 'democratic 'rather than on the question of the accountability of judges. Moreover, accountability seemed to be more of an obstacle to the realization of judicial independence. However, in post-socialist countries, similarly to Western European countries, regime change parties experimented with varied solutions to achieve the above goals. In the past the government had been responsible for the external administration of the courts, as well as the degree of external pressure which could be applied on the judiciary. It was up to the politicians to decide when and to what extent they allowed more judicial self-government. Western European (ministerial, self-government and mixed) administrative models can also be found in post-socialist legal systems.

In post-socialist countries, however, there were increasing efforts to "regulate" the courts, through various administrative reforms. The EU sent increasingly strong warnings about such government interference, with the European Parliament playing a central role. Unfortunately, these warnings have achieved little. However, a completely new situation was created by the Council of Europe's 2020 decision, which, building on the 2014 Rule of Law framework, set out specific financial consequences if the rule of law in a Member State was breached. It is this framework which is now being tested to its limits. The relationship between the European Parliament, Commission as well as the Council are also being strained as they seek to reassert the values of Article 2. The cracks in the relationship between the European institutions is visible particularly in the resolution that the European Parliament passed concerning the European commission unfreezing funding for Hungary. The European Parliament does not feel that the legislative changes go far enough to secure judicial independence and that the Commission should wait until the laws have been fully implemented in order to see what real impact they will have as well as how they will be used.

The conditionalities procedure raises a number of questions and may represent another important stage in the sovereignty debate, offering different interpretations for both populist politicians and those who advocate global rule of law values.

[55] See, for example ANDERSON, JAMES H – GRAY, CHERYL W.: *Transforming Judicial Systems in Europe and Central Asia,* Annual World Bank Conference on Economic Development, 2007, 329–355. pp. Available at https://www.mdtfjss.org.rs/archive//file/resources/Transforming_Judicial_Systems_in_Europe_and_Central_Asia.pdf

While the process of meeting the conditions is conspicuously slow and continues to be perceived as insufficient on the EU side, there are undoubtedly already winners. Judges, who have long seen the reforms introduced since 2011 as a gradual erosion of judicial self-administration, see the changes, which came into force on 1 June 2023, as a success. One of the most "militant" members of the OBT has been elected president, and in his first interview he expressed his delight at the results achieved. He said that, after the constitutional crisis that started in 2018, a co-decision mechanism between the NJC and the NJO could be established to ensure the effective participation of the NJC in the most important issues affecting judges. This could be a real guarantee of judicial independence.

BADÓ ATTILA – CHEESMAN, SAMANTA

A MAGYAR IGAZSÁGSZOLGÁLTATÁS A FELTÉTELESSÉGI ELJÁRÁS NYOMÁSA ALATT

(Összefoglalás)

Az igazságszolgáltatás függetlenségének biztosítása az EU-hoz való csatlakozás fontos feltétele volt, és a csatlakozni szándékozó országoknak továbbra is az. Bár az Unió nagyfokú rugalmasságot biztosít a tagállamoknak az igazságszolgáltatás megszervezésében, az utóbbi időben a jogállamisággal szemben támasztott elvárások keretében a bíróságok központi igazgatásának kérdése is egyre hangsúlyosabb szerephez jut. A posztszocialista országok gyakorlata több esetben nemzetközi kritikákat váltott ki, aminek egyik hatása, hogy az EU tárgyalócsoportja ma már sokkal szigorúbb követelményeket támaszt az uniós tagságra törekvő országokkal szemben, mint korábban. Szerbia példája jól szemlélteti, hogy az EU milyen mértékben érvényesíti a hatalmi ágak szétválasztásával kapcsolatos elvárásait, hogy biztosítsa az igazságszolgáltatás függetlenségét. Mindez olyan uniós szabályozási környezetben történik, amely a tagállamok számára csak az igazságszolgáltatás függetlenségének általános elveit határozza meg. Az a kilátás, hogy az EU pénzügyi támogatásokat vonjanak meg egy tagállamtól, többek között az igazságszolgáltatás központi igazgatását érintő kritika miatt, teljesen új fejlemény az Unió történetében. Magyarország esetében egyértelműen azért valósult meg egy igen jelentős igazságszolgáltatási reform, hogy sikerüljön elhárítani az uniós támogatások megérkezésének egyik akadályát. Az igazságszolgáltatás önigazgatásának látványos megerősítése történt meg, véget vetve egy hosszú belső vitána. Érdemes ezt a reformot és annak politikai kereteit részletesebben megvizsgálni, hogy érthetőbbé tegyük ezt a sokat vitatott helyzetet.