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The Next Multiannual Financial Framework 2021-2027 and the role of the Visegrad countries regarding the conditionality of the Rule of Law

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Mémoire de stage

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The Next Multiannual Financial Framework 2021-2027 and the role of the Visegrad countries regarding the conditionality of the Rule of Law.

M2 Gouvernance Européenne

2019-2020

INDEX

Introduction	2
Tasks performed during the traineeship	3
1. Multiannual Financial Framework: from 1988 to 2020	4
1.1 MFF 2021 – 2027: pre-Covid stance	6
1.2 MFF 2021 – 2027: post-Covid and the Recovery Plan	8
2. The legal framework of the regime of conditionality on the Rule of Law	10
3. The Visegrad Group: a 29-year cooperation	14
3.1 The role of the Visegrad countries in the MFF and the Recovery Plan negotiations	16
3.1.1 Slovakia	20
3.1.2 Czech Republic	23
3.1.3 Hungary	25
3.1.4 Poland	27
4. Would the conditionality on the Rule of Law help tackling the current breaches?	28
Conclusion	29

Introduction

Article 312 of the Treaty of Functioning of the European Union establishes the legal basis for the Multiannual Financial Framework of the European Union. This former interinstitutional agreement, that is currently a binding act, sets the way on how the expenditure of the European Union develops. It shapes the limits of the Union's own resources and lays the path by which the Annual budget of the European Union must be adopted. However, this last MFF proposal has faced more setbacks than in the past, due to the current COVID-19 pandemic and the economic crisis the European Union is facing in the following years. When the European Union was seeing the light at the end of the tunnel with Brexit, one of the biggest internal crisis the European Union has faced up to date, the pandemic has arrived to shock the roots of the Union again. In the last months, the European Union has faced a deactivation of the Schengen area, with tighter border restrictions between Member States, and different levels of national lockdowns. These have caused a deep shock in the European Union, in which Member States are facing historical GDP losses that will lead to recessions of between 6% and 7% in most Member States.¹ In the light of this unprecedented crisis, the European Commission launched a proposal on a Recovery Fund for the European Union, the so-called Next Generation EU. This, which has been discussed during the last few months along with the MFF, is envisaged to help the Member States in the light of the economic shutdown they have experienced. However, the views on how this package and how the MFF had to be shaped differ from State to State, leading to one of the tougher negotiations the Council has faced in its history. From the Frugals to Visegrad, all countries have divided into blocks depending on the things they wanted to include in the packages, or, in the case of what this paper is going to cover, what they did not want to introduce.

The Rule of Law, which has been on the table for the last decade in the European Union due to the activation of Article 7 with Hungary and Poland, has lived another momentum during this pandemic. Due to the measures taken in some Member States to contain the spread of the virus, there were some countries under heightened scrutiny by the European Commission and the European Parliament for their measures during the peak of the lockdown. Among these countries, Hungary and Poland were on the spotlight, and the debates surrounding the inclusion of a conditionality on the Rule of Law in the next Multiannual Financial Framework revived.

¹ European Commission (2020). Commission Staff Working Document of the MFF and Recovery Plan. [PDF File]

This paper is going to analyse the possible introduction of a Rule of Law conditionality in the 2021-2027 Multiannual Financial Framework and the Next Generation EU package and the role of the Visegrad countries regarding this, from the first proposal back in 2018 up to the approval by the Council in July 2020.

Tasks performed during my internship

I had the chance to do my internship for the M2 year of Gouvernance Européenne at the European Commission. The Commission is divided into three different categories of services: Directorates General, Service Departments and Executive agencies. I was selected to do an administrative traineeship in the Secretariat-General, one of the service departments in charge of coordinating the work done by all Commission services. In my case I worked in Directorate A “Strategy, Better Regulation & Corporate Governance”, more specifically in Unit A3 “Multiannual Financial Framework and Annual Management Cycle”. Due to the unprecedented times due to COVID-19, I teleworked for almost the entire duration of the traineeship. However, I had the chance to work in almost every aspect of the Unit, which I will try to introduce now and will appear along the paper.

The unit is divided in three different teams, that focused on different aspects of the work. I had the chance to work for the three teams, but I mostly worked with the Accountability and the Strategic Planning and Programming team. In the former, I worked drafting, revising and doing research for the Annual Management and Performance Report 2019² for the EU budget, and doing some other tasks, like working with the management COVID-19 risks in the Commission or in coordination meetings with the Court of Auditors. For the latter, I worked on drafting the Strategic and Management Plans (SP and MP) of the SG, as well as the leading revisor of the Strategic and Management Plans for two main policy DGs (DG Ener and DG Move). In addition, I worked in the Annual Activity Reports for 2020, and on the draft version for the AARs of 2021.

Through the Strategic Plans, each service describes how they are going to contribute to the six political guidelines of the Von der Leyen Commission, defining their specific objectives and indicators for the 5-year legislature. The Management Plans gather the main activities that will be performed in a year by each department. These set out the activities and explain how they will contribute to the objectives defined in the Strategic Plans. In the case of the Annual Activity

² European Commission (2020). Annual Management and Performance Report 2019. [PDF File] https://ec.europa.eu/info/sites/info/files/annual-management-and-performance-report-2019_en_1.pdf

Reports, services report on the progress they perform each year, on the basis of what they indicated in their Strategic Plans. Here they detail their achievements, the initiatives they have taken, and the financial and human resources spent during that year. These three reports, despite being separate, are interlinked, creating the Strategic and Management Cycle of the European Commission.

In the case of the AMPR, it is an overview of the performance, management and protection of the EU budget. This is bidding to the obligations reflected in article 318 of Treaty of Functioning of the European Union³ and article 247 of the Financial Regulation⁴, providing an integrated financial and accountability reporting package.

Lastly, with the Budget team, which worked with all aspects related to the Multiannual Financial Framework, I got the chance to perform briefings and I attended coordination meetings with the rest of the teams in charge of this in the Commission. In addition, I also performed other ad hoc tasks where my unit needed my help.

1. Multiannual Financial Framework: from 1988 to 2020

Despite what is generally believed, the Multiannual Financial Framework is a rather recent element in the budgetary procedure of the European Union. This multi-year financial planning entered into force in 1988, as an improvement that was introduced in order to overcome the annual budget adoption mechanism that had been used until that moment. The European Parliament and the Council of the European Union, who are still the “Budgetary Authority” of the EU, had frequent disagreements on the adoption of the annual budget for the Union, due to a mismatch between the available resources and the actual budgetary requirements⁵.

The adoption of what we now know as the Multiannual Financial Framework is the result of the first Interinstitutional Agreement of 29th June 1988 on budgetary discipline and improvement of the budgetary procedure. The also known as the Delors I package, in honour of the then president of the European Commission, the French politician Jacques Delors,

³ “The Commission shall submit annually to the European Parliament and to the Council the accounts of the preceding financial year relating to the implementation of the budget. The Commission shall also forward to them a financial statement of the assets and liabilities of the Union.

The Commission shall also submit to the European Parliament and to the Council an evaluation report on the Union's finances based on the results achieved, in particular in relation to the indications given by the European Parliament and the Council pursuant to Article 319.” (Source: Treaty of Functioning of the European Union)

⁴ See Annex 1

⁵ European Parliament (2020). Multiannual Financial Framework [PDF File]
<https://www.europarl.europa.eu/factsheets/en/sheet/29/multiannual-financial-framework>

contained the financial perspective 1988 to 1992, aligning the conclusions of the Brussels European Council that led to the Agreement. It was the first time all the commitment appropriations, the volume and breakdown of foreseeable Community expenditure was gathered with a 5-year prospective. The annual totals of compulsory expenditure and non-compulsory expenditure were shown in the commitment appropriations and payment appropriations, and the overall expenditure ceiling was set at 0.03% of GNP back in that moment.⁶

To this, another four Interinstitutional agreements followed: the Delors II package from 1993 to 1999, the Agenda 2000 from 2000 to 2006, the fourth IIA from 2007 to 2013 and the last one, the fifth, from 2014 to 2020. Each financial perspective had a particular goal that was at the center of the package. To cite some examples, for the first IIA, the goal was to provide the resources needed for the budgetary implementation of the Single European Act. For the second IIA, Structural Funds were enabled to be doubled and the own resources ceiling was increased. The third IIA had as a main goal to secure the necessary resources to finance the big enlargement of 2004. The last one, adopted in 2013, was the first one after the entering into force of the Treaty of Lisbon which included a provision stating that the Council, according to the special legislative procedure, will unanimously adopt the MFF Regulation after obtaining the consent of the European Parliament.

Hence the development of a mechanism that gave an overview of the priorities, divided in different headings with a maximum allocation of resources for each one. The expenditure had to fall in line with the limits of the Union's Own Resources, which will be increased for the next 2021-2027. Another important change that the EU Budget has experienced over the years came during the Juncker Commission, in which the Vice-President for Budget and Human Resources, Kristalina Georgieva, launched the EU Budget Focused on Results. The aim of this was to describe what were the milestones achieved by the 1% of GNI that was put into the Budget⁷. In fact, as a result, these milestones are gathered every year in the Annual Management

⁶ OJCE 15.07.1988, n° L 185, p.33. Interinstitutional Agreement of 29 June 1988 on budgetary discipline and improvement of the budgetary procedure.

https://www.cvce.eu/en/obj/interinstitutional_agreement_on_the_budgetary_procedure_29_june_1988-en-ac96f2a1-71e9-4840-a4ed-16069d4b63d1.html

⁷ European Commission. (2018). EU Budget Focused on Results [PDF File] -

<https://ec.europa.eu/budget/library/budget4results/bfor-conference-2016-opening-speech-vice-president-kristalina-georgieva.pdf>

and Performance Report of the EU Budget (AMPR)⁸, in which I worked during my internship in the Secretariat-General. This report is part of the Commission's integrated financial and accountability reporting package, and through it the Commission takes political responsibility for the management of the EU budget. This report is created in collaboration with BUDG, and it is revised by the Court of Auditors, which gives us an annual report with recommendations on how to improve it.

Nonetheless, it is the latest MFF that is going to be at the centre of this paper, due to the singular context it has been presented in and will be agreed on, as the European Union is currently undergoing one of the strongest crisis it has faced up to date.

1.1 MFF 2021 – 2027: pre-Covid stance

From the migration crisis that hit the bases of the Union, to Brexit and now COVID-19, among others, the Union is facing unprecedented times. Hence the first proposal on the next MFF 2021-2027 made by the European Commission on 2 May 2018. The original Commission proposal, which amounted (in 2018 prices) 1,134,583€ in commitment appropriations (around 1.11% of the EU-27's Gross National Income (GNI))⁹, envisaged an increase for border control, defence, migration, internal and external security, development cooperation and research, whereas it foresaw cuts in cohesion policy and agricultural policy. This new budget was facing one of the biggest challenges, which was increasing the appropriations having one less country as a Member. However, and despite the rest of the issues that were on the European arena, the Juncker Commission added an extra into the negotiating table: the Rule of Law. This was a pressing issue for the Juncker Commission, due to the drift some of the Member States had suffered in the previous years.

In 2010, the Parliamentary elections in Hungary led to the victory of the national-conservative party FIDESZ, which soon started to gradually apply changes in the Magyarország Alaptörvénye (the Fundamental Law of Hungary), and in the neutral institutions, such as the Ombudsman or the Audit Office, among others. This, and the drift towards this type of practices in Poland from 2015 onwards, after the Prawo i Sprawiedliwość (Law and Justice) party won

⁸ The Annual Management and Performance report for 2019, which is the one I have worked on, has already been published. https://ec.europa.eu/info/publications/annual-management-and-performance-report-2019_en

⁹ The GNI is the total income received by a country from its residents and businesses, regardless of whether they are located in the country or abroad. The EU Budget has, as its biggest source, the national contributions from the Member States. This resource is calculated and limited according to the GNI of the Member States. Sources: European Commission and Investopedia

the elections, led to an unprecedented moment in the history of the Rule of Law in the European Union. There are several measures that have been put into place in order to solve these issues, from the activation of the rule of law Framework created in 2014, to political strategies, such as social pressure or issue linkage.¹⁰ Furthermore, the European Commission has also activated article 258 TFEU, also known as the “infringement procedure”, to tackle some of these problem. The Commission has also activated the *ultima ratio* instrument created to protect the European Union against breaches of article 2 TEU, which in the case of Poland it took place the 20th December 2017. After this, the European Parliament did accordingly in the case of Hungary, the 12th September 2018¹¹.

Following these events, and before Article 7 was activated in the case of Hungary, the European Commission released the aforementioned proposal on the next 2021-2027 MFF. In the proposal, the Commission highlights the importance of linking the EU funding and the rule of law, in order to provide sound financial management. The aim was to protect the EU budget from financial risks linked to generalised deficiencies regarding the rule of law in the Member States. Hence the proposal to create a new mechanism that would allow the suspension, reduction or restriction of accessing the EU funding, always in a manner proportionate to the “nature, gravity and scope of the rule of law deficiencies” (European Commission, 2018)¹². The European Union, under the scope of the European Semester, already monitors that Member States follow the rules and procedures put in place for avoiding abuse or fraud regarding the financial management of EU money. However, there is not existent mechanism that protects EU tax payers’ money in case of deficiencies regarding the rule of law.¹³ Article 7.3 TEU includes a sanctioning mechanism that could be activated by the Commission or by one third of the Member States, but the sanction envisaged related to the voting rights of the affected Member State, and it can only be activated by unanimity of the European Council. Therefore, the most

¹⁰ Sedelmeier, U. (2014). Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession. *Journal of Common Market Studies* 52 (1), pp. 105-121. [PDF file]

¹¹ European Union. Informe sobre una propuesta en la que solicita al Consejo que, de conformidad con el artículo 7, apartado 1, del Tratado de la Unión Europea, constata la existencia de un riesgo claro de violación grave por parte de Hungría de los valores en los que se fundamenta la Unión. (2017/2131(INL)) – Informe Sargentini

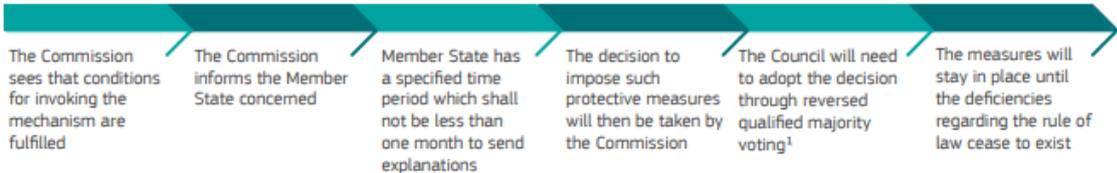
¹² European Commission (2018). EU budget: Commission proposes a modern budget for a Union that protects, empowers and defends. [PDF File] https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3570

¹³ European Commission (2018). Sound financial management and the rule of law. [PDF File] https://ec.europa.eu/commission/sites/beta-political/files/budget-proposals-financial-management-rule-law-may2018_en.pdf

powerful tool that the European Union has in order to combat the breaches on the rule of law does not count with a protective mechanism for the EU funds.

According to the 2018 proposal, the new rules to protect the Rule of Law would be applied to all EU funds in shared management (Structural Funds and Cohesion Funds¹⁴), as well as to those funds in direct and indirect management where the financial beneficiary is a government entity, whereas this is national, regional, local authority, public law body or private organisation entrusted with a public service mission. The mechanism, however, would not affect the individual beneficiaries of EU funding under the budget. In these cases, Member States would have to continue implementing the affected programmes and make the payments required to Erasmus students, researchers, civil society and any other final recipients or beneficiaries.

According to the original proposal, the mechanism would work following this scheme:



"How will it work?" European Commission's Sound financial management and the rule of law proposal (2018)

This proposal could not obtain the approval of the European Council, who met the 20th and 21st February 2020.¹⁵ However, as it will be introduced later in the paper, the position of the Council changed in the last EUCO held in July 2020.

1.2 MFF 2021 – 2027: post-Covid and the Recovery Plan

In March 2020, most Members States of the European Union faced a major outbreak due to the COVID-19 pandemic, leading to different national responses. In the European Union, the majority of Member States, with the exception of Sweden, performed a generalised lockdown, even closing borders with their fellow European countries, bringing the economic growth to a halt. The European Union is facing the biggest economic crisis that the Project has faced up to this point, with an economy that will contract sharply in 2020 and 2021. The Commission Spring 2020 European Economic Forecast suggested that the GDP in the euro area would fall around 8% in 2020, rebounding around 6% in 2021. However, these calculations may vary in

¹⁴ European Commission (n.d). Types of EU Funding. https://ec.europa.eu/regional_policy/en/policy/what/glossary/s/shared-management

¹⁵ European Parliament Think Tank (2020). Outcome of the special European Council, 20-21 February 2020 [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2020\)642815](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)642815)

the near future, mostly because of the extent and duration of the pandemic. In July 2020, the European Economic Forecast for Summer 2020 portrays the current recession as the deepest output contraction since World War II.¹⁶ Moreover, it needs to be taken into account that the outcomes of the pandemic are asymmetric, as employment and public finances will be affected the most in the countries that have been hit the hardest by the pandemic. However, the GDP level forecast has not varied since the Spring forecast.¹⁷

The interdependencies among Member States, yet their differences in the way they can respond to the economic downturn, have led to a spill over effect that could weaken the recovery of the EU. Hence the provision of creating a EU level intervention that could provide the necessary economic injection for the 27 to confront the biggest economic recession since 1930. The 27th May 2020, the European Commission released a proposal on a European Recovery Instrument for the European Union, called “EU Next Generation”, following a call from the European Parliament. This plan, which amounted 750 billion euros would borrow the money from the markets, channelling it through EU programmes. This would be added to MFF 2021-2027 and to the 540 billion euros agreed by the Eurogroup the 23rd April, with an ESM pandemic support for euro zone countries, and an EIB Guarantee Fund for Workers and Businesses, and the SURE programme for all Member States.

However, and in addition to the economic downturn that the Member States have suffered, there was an additional measure, which has contributed to the position certain Member States have taken regarding the mechanisms proposed for the Recovery Plan and the MFF 2021-2027. This additional measure was declaring the State of Emergency in Bulgaria, Cyprus, Czech Republic, Finland, Hungary, Lithuania, Luxemburg, Portugal, Romania, Slovakia and Spain. This measure is necessary in cases where there is a real threat, as COVID-19. However, and despite being foreseen in international human rights law to frame the response to an emergency, some countries have exceeded what was foreseen in this law. This was particularly notable in the case of Hungary and Poland, as other countries that had legal shortcomings in the first responses of the Pandemic, corrected their behaviour later. However, this was not the case in Hungary and Poland. In the former, and according to Democracy Reporting International (2020)¹⁸, the initial

¹⁶ European Commission (2020) European Economic Forecast – Summer 2020 [PDF file]
https://ec.europa.eu/info/sites/info/files/economy-finance/ip132_en.pdf

¹⁷ European Commission (2020). European Economic Forecast – Spring 2020. [PDF file]
https://ec.europa.eu/info/sites/info/files/economy-finance/ip125_en.pdf

¹⁸ Meyer-Resende & Fournier (2020) The Rule of Law Stress Test – EU Member States’ Responses to Covid-19
https://democracy-reporting.org/dri_publications/the-rule-of-law-stress-test-eu-member-states-responses-to-covid-19/

emergency response was limited to a 14-day period, which was followed by a Parliament law allowing the government to suspend existing laws, to adjust their implementation and to adopt new legislation that criminalises speech about the COVID-19 pandemic. The problem lies in the emergency decrees that were passed by the government, and that had no connection to the Pandemic. In the last months, the Hungarian parliament has refused to ratify the Istanbul Convention to combat violence against women¹⁹, and has outlawed changing gender on official documents after birth.²⁰

For the latter country, the polemic came after the Polish government avoided applying a constitutional provision on natural disasters in order to postpone the presidential election that was going to be held the 10th May, against the will of the opposition. There was a concern about the transparency of the presidential elections, as the head of the Postal Service's management board, who is in charge of administrating the voting by email, was appointed by the PiS. However, the Polish government finally changed the dates for the elections, which took place the 28th June and the 12th July 2020 (first and second round).

2. The legal framework of the regime of conditionality on the Rule of Law

As it has been introduced thus far, the Commission proposed the creation of a new mechanism²¹ that would ensure the principles of sound financial management. However, and due to the events that have been described in the paper up to this point, the importance given to the Rule of Law conditionality has changed.

As part of the first proposal in 2018, the Commission introduced this as a “protective approach”, an additional measure to control the financial interests of the Union. The Commission presented a Regulation composed by 8 articles, stating the definitions, measures and procedures envisaged for the application of the Regulation. In article 3 of the aforesaid proposal, the Commission establishes in which cases shall the measures be applied:

¹⁹ Didili, Zoe (2020). Hungary refuses to ratify Istanbul convention on violence against women. [Press] <https://www.neweurope.eu/article/hungary-refuses-to-ratify-istanbul-convention-on-violence-against-women/>

²⁰ Novak, Benjamin (2020). Hungary Outlaws Changing Gender on Documents After Birth. [Press]. <https://www.nytimes.com/2020/05/28/world/europe/hungary-transgender-law.html>

²¹ European Commission (2018). 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. COM/2018/324 final - 2018/0136 (COD)

- due to a non-proper functioning in the context of public procurement or grant procedures, or when carrying out monitoring and controls by the authorities of the Member State
- when it affects the proper functioning of investigation and public prosecution services in relation to the prosecution of fraud, corruption or other breaches of Union law relating to the implementation of the Union budget
- when the judicial review by independent courts is at risk
- regarding the prevention and sanctioning of fraud, corruption and other breaches of Union law related to the implementation of the EU budget
- when the recovery of funds is unduly paid
- when the effective cooperation with the European Anti-fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO) in their investigations or prosecutions is not carried out correctly.

Article 4 of the proposal contains the measures that would be adopted in case of a breach in the Rule of law. It sets a difference between the budget that is directly or indirectly managed by the Commission (gathered in Article 62 (a) (c) of the Financial Regulation²²), where a government entity is recipient, and the budget in shared management with the Member State (according to article 62 (b) of the Financial Regulation²³). In the first case scenario, there would be:

- a suspension of payments or of the implementation of the legal commitment, or a termination of the legal commitment pursuant to Article 131 (3) of the Financial Regulation²⁴.
- a prohibition to enter into new legal commitments.

On the second case scenario, where the budget is in shared management, there would be:

- a suspension of the approval of one or more programmes or an amendment
- a suspension of commitments, or a reduction of commitments, including via financial correction or transfers to other spending programmes.
- a reduction of pre-financing; an interruption of payment deadlines
- a suspension of payments.

²² See Annex I - articles 62 (a) (c) and 131 (3).

²³ *ibidem*

²⁴ *ibidem*

The proposal, published the 2nd May 2018, has been already revised by the Budgets Committee (BUDG) and by the Budgetary Control Committee (CONT) from the European Parliament. Moreover, other three committees have been sought for their opinions on the topic, these being the Civil Liberties, Justice and Home Affairs Committee (LIBE), the Constitutional Affairs Committee (AFCO) and the Regional Development Committee (REGI). The position of the European Parliament, which was adopted at first reading, was published the 4 April 2019²⁵. Moreover, on 17 August 2018, the European Court of Auditors (ECA), whose consultation is mandatory for this procedure, gave their reasoned opinions and recommendations on the proposal.²⁶ Among some of the remarks on the proposal, the ECA highlights:

- the lack of a specific stakeholder consultation done by the Commission, as it is required by Article 11 (3) TEU, and the lack of an impact assessment, according to the Interinstitutional Agreement on Better Law-Making.
- no specification of sources of guidance and criteria, that adds transparency, traceability and auditability to the mechanism.
- the lack of deadlines for the Commission, in accordance to the deadlines set for the reply by the Member State.
- the lack of an assess procedure that allows the Commission to lift the measures imposed on a Member State without a request made by the aforementioned State.
- the lack of a requirement for the Commission to perform an assessment of the impact on final beneficiaries and the national budget of the affected country.
- the provision relating to the European Public Prosecutor's Office is only applicable to 22 Member States, which creates a deficiency in the control made by this body.²⁷

There are some experts, such as Maria Schinina²⁸, that have analysed this regime of conditionality and the legal and political feasibility it has. According to her, from a legal point of view, the current Treaties do not contain a specific legal basis that allows connecting a breach in Art. 2 TEU and having financial consequences for the responsible Member State. The

²⁵ European Parliament (2019). European Parliament legislative resolution of 4 April 2019 on the 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. COM(2018)0324 – C8-0178/2018 – 2018/0136(COD)

²⁶ Court of Auditors (2018). Opinion no 1/2018 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. (2018/C 291/01)

²⁷ Portugal, Denmark, Sweden, Hungary and Poland are not part of the EPPO.

²⁸ Schinina, Maria (2020). Rule of law as integral part of the next MFF: to what extent and why? <https://www.iee-ulb.eu/en/blog/news/rule-of-law-conditionality-integral-part-mff/>

European Commission supported the idea of linking the breach in the rule of law and the EU spending in Article 322 TFEU, which gathers the financial rules determining the procedure to be adopted for establishing and implementing the budget.

However, according to the aforementioned research performed by the REGI Committee on the Conditionalities in Cohesion Policy for the MFF 2020-2021²⁹, the EU treaties, indeed, do not confer an explicit material competence in the area of Rule of Law. However, the EU treaties do explicitly provide the EU with the financial resources to attain its objectives (Art. 311 (1) TFEU), including the EU values (Art. 3 TEU). Therefore “the EU can and should use its spending power in pursuance of its founding objectives, which include the promotion and respect of the rule of law (Art. 3 TEU corroborated with Art. 2 TEU)”³⁰

Regarding the position of the Council, in the proposal for the conclusions of the European Council held on 20 February 2020, the Commission would propose the measures taken. Afterwards, the Council would approve them by a qualified majority, with a process independent to other mechanisms foreseen in the EU treaties. Despite this, no agreement was reached in that EUCO. However, in the one held the 17, 18, 19, 20 and 21 July 2020, the European Council underlined the importance of protecting the Union’s financial interests, respecting the rule of law. Here, there was a new addition to the conclusions, as the regime of conditionality was envisaged to protect the budget and the Next Generation EU. The Commission would, then, propose measures that would be adopted by the Council by qualified majority. Moreover, the Commission is invited to present further measures to protect the EU budget and Next Generation EU against fraud and irregularities.

This last remark regarding the Next Generation EU comes from the last proposal made by the European Commission in the light of the Coronavirus Pandemic and the Recovery Plan created for the European Union. In the Commission proposal³¹, the vulnerabilities in the rule of law in relation to the Covid-19 crisis are, notably, the stress on justice systems and the incapacity for effective institutional checks and balances. These events have motivated the Commission to address the new challenges on the rule of law through different instruments: an Annual Rule of

²⁹ European Parliament (2018). Directorate-General for Internal Policies. Research for REGI Committee – Conditionalities in Cohesion Policy. [PDF File]

³⁰ *ibidem*

³¹ European Commission (2020). Europe’s moment: Repair and Prepare for the Next Generation COM(2020) 456 final {SWD(2020) 98 final} [PDF File]

Law Report³², using the European Democracy Action Plan³³ and by continuing with the pursue of the rule of law mechanism proposed in May 2018.

All Member States of the European Union have had a different approach to this mechanism. This paper, however, is going to focus on the Visegrad countries, which despite having different views on it, have some similarities regarding the positions held for the rest of the package.

3. The Visegrad Group: a 29-year cooperation

On 15th February 1991, and with an aim to erase the vestiges of Communism and to eradicate the animosity among the Central European countries, the President of the Czechoslovak Republic, the President of the Republic of Poland and the Prime Minister of the Republic of Hungary held a meeting. Václav Havel, Lech Wałęsa and József Antall met in the Hungarian city of Visegrad, creating a link with the gathering that took place there in 1335 between John of Luxembourg, King of Bohemia, Charles I of Anjou, King of Hungary and Casimir III, King of Poland.³⁴ In 1993, Czechoslovakia dissolved and the Czech Republic and Slovakia became independent, forming the Visegrad group that we know nowadays. There are many theories on why this group was created, basing on the past and present Central Eastern Europe (CEE) cooperation and the cleavages that existed with the rest of countries in Europe, whether these were cultural, economic or religious. According to some scholars, on the basis of the cleavages between Western and Eastern Europe regarding borders of the CEE states, there are different tendencies pre and post Cold War. However, Poland, the Czech Republic, Hungary, Slovenia, Slovakia and Croatia have been seen as the western half of the CEE region. On the other hand, Russia, Belarus, Ukraine, Bulgaria, Rumania, North Macedonia and parts of Bosnia were the eastern part. Following this logic, the creation of the Visegrad group was a way to aim for more regional integration, so the people from Visegrad could feel connected to several identities in a local, regional, national, European and Visegrad level.³⁵ As Schmidt argues, European integration took different ways depending on which areas were targeted. The Western European integration, the origin and starting point of the European Union, focused on trade agreements,

³² This is one of the major initiatives of the Commission's Work Programme for 2020, covering all Member States with objective annual reporting made by the European Commission.

³³ It will build on the lessons learnt from the COVID-19 crisis, including regarding electoral integrity, media freedom, media pluralism and disinformation. Ensuring the participation of citizens in the democratic system via informed decision-making free from unlawful interference and manipulation too.

³⁴ Visegrad Group. (n.d.) History of the Visegrad Group. <http://www.visegradgroup.eu/history/history-of-the-visegrad>

³⁵ Schmidt, Andrea (2016). Friends Forever? The Role of the Visegrad Group and European Integration. *Politics in Central Europe* vol 12, no. 3. DOI: 10.1515/pce-2016-0019

moving later into a deeper integration that led to the creation of the common currency in the 2000's. However, the Central and Eastern Europe integration was basing in a rapid trade and political change, where their countries and markets had to open to foreign suppliers of goods and services. Thus, the creation of the Visegrad Group, which regional integration would assist these countries to adapt to this changing role, and would also help in the prospective of joining the NATO and the EU by focusing on an economic, cultural and security cooperation.³⁶

The accession procedure to the European Union began during the 90's for all of them. The 1st April 1994, Hungary applied to join, being the first of the Visegrad countries to do so. The 8th April 1994, only 7 days after Hungary, Poland applied too. These two countries were followed by Slovakia, who applied the 27th July 1995, and Czech Republic the 17th January 1996. After this, in December 1997, it was agreed during the Luxembourg summit of the European Council that Poland, Hungary and Czech Republic were ready to start the pre-accession negotiations envisaged for March 1998. The same was agreed for Slovakia, but a year later during the Helsinki Summit of the European Council in December 1999. The pre-accession negotiations started in March 2000 for this last one. However, the negotiations were not parallel for all these countries, as they tried to follow this with different aims and views, something that has also happened during the last MFF negotiations. For example, and as Schmidt mentions, Poland saw itself in a potential Warsaw-Berlin-Paris, while Hungary and Czech Republic found themselves among the medium-sized member States, and Slovakia among the small ones. Nonetheless, all 4 Visegrad countries finished the accession negotiations together, signing the Accession Treaty to the European Union the 16th April 2003 in Athens, finally accessing the Union the 1st May 2004. As part of the process of enlargement of the European Union, the accession needs to be consulted in a public referendum in the candidate Member States'. According to the data reflected in Eurostat, the public referendum in these country went as follows:

	Turnout	Voters supporting accession	Date of the referendum
Hungary	45,6%	83,76%	12/04/2003
Slovakia	52,15%	92,46%	16-17/05/2003
Czech Republic	55,21%	77,33%	13-14/06/2003
Poland	58,85%	77,45%	7-8/06/2003

³⁶ ibidem

Based on the chart made by Martin Hudec, 2016³⁷

Despite having the lowest turnout, the Hungarian and the Slovak voters were more pro-EU accession than in the Czech Republic and Poland. However, the most visible anti-EU positions within their respective governments come from Hungary and Poland, being the former the one that, as it has been mentioned earlier in the paper, began with the breaches on the Rule of Law. However, this has an explanation in other topics related to European Integration, and how national and European interests are sometimes visualized in a different way by the voters.

The importance of the Visegrad countries as part of the European project is great, as it currently has almost a 14,6% of the total population in the European Union³⁸. This translates into 63,675,585 million inhabitants³⁹

3.1 The role of the Visegrad countries in the MFF and the Recovery Plan negotiations

In order to create an accurate perspective on the position of the Visegrad countries regarding the conditionality on the Rule of Law for the MFF 2021-2027, it is important to see the political scenario in which this idea grew. Before making the proposal in 2018, there were other political leading figures who were already concerned about the breaches in the Rule of law and how these could affect the EU funding. For instance, in 2016, and after the polemic surrounding the so-called “migration-quotas” approved by the EU interior ministers, Romania, Czech Republic, Slovakia and Hungary voted against accepting these mandatory quotas. It was then when the then Italian Prime Minister Matteo Renzi stated that the EU Members who did not accept these quotas in order to cooperate with the other Member States who were at the frontline, should have their EU funding cut.⁴⁰ It is true that, despite not being a Rule of Law problem per se, the problem of migration and the respect of fundamental rights is linked to it, so it could be agreed that there were voices that were raising this problem back in the day.

The issue of cutting EU funding is a matter that is of utmost importance for all Member States. Their economies, and the path to which they develop, is strictly linked to this. In the case of the

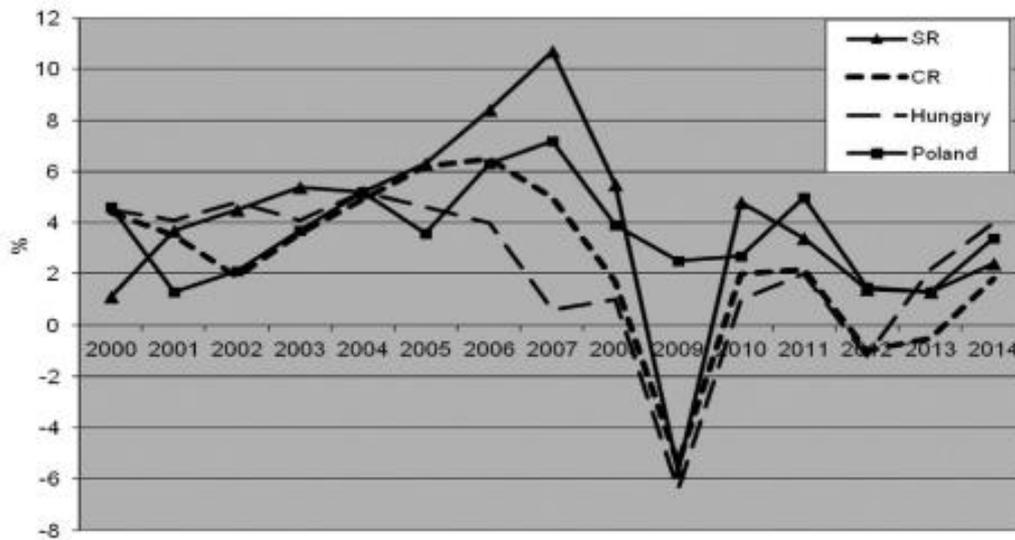
³⁷ Hudec, Martin (2016). Development of the Visegrad Group in the Context of Efforts to Accelerate the Convergence Processes by Joining the European Union. *Studia Commercialia Bratislavensia*. DOI: 10.1515/stcb-2016-0003

³⁸ EU 27 – there are currently around 446 million inhabitants.

³⁹ Basing on the data gathered by Worldometers. Last consulted on August 2020.

⁴⁰ Reuters (2016). Italy's PM Renzi calls for funding cuts for EU states which refuse to take in refugees. *Deutsche Welle*. [Press]

Visegrad countries, the development of their economies since they entered the European Union has been exponential.



Development of GDP growth in the V4 countries (%). Source: Eva Ivanová & Jana Masárová (2018)⁴¹

As it can be seen, the GDP growth in the first years of accession grew exponentially. However, the economic crisis and recession in 2008 led to a vertical drop in the GDP of the Visegrad countries. Nonetheless, the impact the EU funding has had in these countries since they entered the Union cannot be denied. For instance, the Cohesion Policy and the Common Agricultural policy are key for the development of the Member States and its regions. The former took around 32.5% of the EU Budget for 2014-2020, which translates into 351.8 billion euros⁴². As it can be seen in the pre-allocations of the 2014-2020, Poland (114,179 million euros), Hungary (35,476 million euros), Czech Republic (31,330 million euros) and Slovakia (19,538 million euros) are among the biggest beneficiaries of all Member States:

⁴¹ Ivanová, E. & Masárová, J. (2018). Performance Evaluation of the Visegrad Group countries. *Economic Research-Ekonomska Istraživanja* 31:1, pp. 270-289. [PDF File]. DOI:10.1080/1331677X.2018.1429944

⁴² 2014 prices.

(million EUR, current prices)***

	Cohesion Policy *											Common Agricultural Policy ** (6)					
	Cohesion fund	Cohesion fund: transfer to Connecting Europe Facility	Less Developed Regions	Transition Regions	More Developed Regions	Outermost and northern sparsely populated regions	European Territorial Cooperation	Youth Employment Initiative (additional allocation)	Fund for European Aid for the Most Deprived	Adjustment of cohesion policy envelopes (art. 7 MFF) ****	Total Cohesion Policy	Direct payments (1)(2)(3)(4)(5)	Rural development (7)	Total CAP	European Maritime and Fisheries Fund	Nuclear decommissioning	Total 2014-2020
Belgium	0	0	0	1,040	939	0	263	42	74	11	2,369	3,603	648	4,251	42		6,661
Bulgaria	2,278	406	5,089	0	0	0	166	55	105	0	8,099	5,106	2,367	7,472	88	293	15,953
Czechia	6,259	1,117	14,824	0	547	0	340	14	23	-115	23,008	5,985	2,306	8,291	31		31,330
Denmark	0	0	0	84	329	0	140	0	4	6	564	6,044	919	6,963	208		7,735
Germany	0	0	0	9,771	8,498	0	965	0	79	0	19,314	34,534	9,446	43,980	220		63,513
Estonia	1,073	191	2,461	0	0	0	55	0	8	-35	3,754	839	823	1,663	101		5,518
Ireland	0	0	0	0	952	0	169	68	23	4	1,215	8,507	2,191	10,697	148		12,060
Greece	3,247	580	6,816	2,591	2,450	0	232	172	281	971	17,339	14,808	4,718	19,526	389		37,254
Spain	0	0	2,040	13,399	11,074	484	643	943	563	2,132	31,280	34,634	8,297	42,931	1,162		75,373
France	0	0	3,434	4,253	6,322	443	1,115	310	499	0	16,377	51,354	11,385	62,739	588		79,704
Croatia	2,560	456	5,838	0	0	0	146	66	37	-50	9,052	1,482	2,026	3,508	253		12,813
Italy	0	0	22,200	1,350	7,568	0	1,137	568	671	1,645	35,139	26,850	10,444	37,294	537		72,970
Cyprus	270	48	0	0	421	0	33	12	4	37	824	351	132	484	40		1,347
Latvia	1,349	241	3,040	0	0	0	94	29	41	0	4,793	1,452	1,076	2,527	140		7,461
Lithuania	2,049	365	4,629	0	0	0	114	21	77	0	7,266	3,104	1,613	4,717	65	451	12,497
Luxemburg	0	0	0	0	40	0	20	0	4	0	64	234	101	335	0		399
Hungary	6,025	1,075	15,005	0	464	40	362	50	94	40	23,075	8,932	3,431	12,362	39		35,476
Malta	218	39	0	490	0	0	17	0	4	0	768	37	97	134	23		924
Netherlands	0	0	0	0	1,015	0	390	0	4	0	1,414	5,223	765	5,988	102		7,504
Austria	0	0	0	72	906	0	257	0	18	0	1,254	4,850	3,938	8,787	7		10,048
Poland	23,208	4,137	49,629	0	3,777	0	701	252	473	0	82,178	23,313	8,698	32,010	531		114,719
Portugal	2,862	511	16,642	325	1,238	116	129	161	177	0	22,159	4,105	4,058	8,163	392		30,715
Romania	6,935	1,236	14,607	0	893	0	453	106	441	0	24,671	11,638	8,128	19,766	168		44,605
Slovenia	895	160	1,260	0	847	0	63	9	21	56	3,311	960	838	1,797	25		5,133
Slovakia	4,168	743	9,199	0	329	0	223	72	55	-69	14,721	3,016	1,560	4,576	16	225	19,538
Finland	0	0	0	0	999	305	161	0	23	6	1,494	3,662	238	6,042	74		7,611
Sweden	0	0	0	0	1,512	207	342	44	8	-21	2,093	4,866	1,764	6,630	120		8,843
UK	0	0	2,635	2,635	5,595	0	866	206	4	58	11,902	22,283	5,200	27,483	243		39,628

* breakdown by category of allocations subject to transfers between categories at the request of the Member States

** Amounts are subject to changes due to the flexibility to shift amounts between the two CAP pillars

*** Excluding TA (technical assistance)

**** Allocations will be assigned to funds and objectives after the reprogramming exercise has been completed

(1) 2014: Annex IV to Regulation (EC) No 73/2009 for calendar year 2013 and Annex VIII for HR, RO, BG; 2015: Annex VIII to Regulation (EC) No 73/2009 for calendar year 2014; 2016-2020: Annex III to Regulation (EU) No 1307/2013 calendar years 2015-2019

(2) does not include direct payments for POSEI and Smaller Aegean Islands

(3) subject to financial discipline reduction as referred to in Articles 25-26 of Regulation (EU) No 1306/2013

(4) before flexibility between the pillars as referred to in Art. 136a Regulation (EC) No 73/2009 and Art 14 of Regulation (EU) No 1307/2013; after UK voluntary adjustment for calendar year 2013 as referred to in Art 10(b) of Regulation (EC) No 73/2009

(5) before demining reserve notification for HR for calendar years 2015-2019

(6) Does not include other CAP measures with preallocated Member State envelopes such as POSEI and SAI (Regulations (EU) No 228/2013 and (EU) No 229/2013), Wine national support programmes (Annex VI to Regulation (EU) No 1308/2013), Olive oil quality improvement (Art 29 of Regulation (EU) No 1308/2013) and cotton amounts referred to in Regulation (EC) No 637/2008 and Art 66 of Regulation (EU) No 1307/2013

(7) Annex I to Regulation (EU) No 1305/2013

According to the growth and the allocations that are implemented for these states, a conditionality on the Rule of Law, in case it ought to be applied, could be crucial for the future of the country. It is due to the paths some of the Visegrad countries have taken in the last years, and the proceedings they have open regarding breaches in the Rule of Law, why they are against this conditionality mechanism.

However, the Visegrad also have a defined position in other matters related to the MFF. It should be noted that, during the negotiations of the next MFF 2021-2027, the Member States polarized in two well defined groups depending on what was expected from the MFF. Hungary, Poland, Slovakia and Czech Republic, along with Bulgaria, Cyprus, Estonia, Greece, Latvia, Lithuania, Malta, Portugal, Romania, Slovenia and Spain, formed the so-called “Friends of Cohesion”. These countries held the first “Friends of Cohesion Summit” the 29th November 2018 in Bratislava (Slovakia), in order to discuss the first proposal that the European Commission had done for the next MFF back in that year. Since then, they have held another two summits, one in Prague (Czech Republic) the 5th November 2019, and another one in Beja (Portugal), the 1st February 2020. In the midst of the negotiations for the EU-UK Withdrawal Agreement, the next MFF had to be made without one of the EU’s net contributors⁴³, yet still needed to meet the objectives on climate change, digitalization and migration, among others. After the first proposal of the Commission, in which the Cohesion funding was expected to be cut by 10%, and after a second proposal made by the Finnish Presidency of the Council of the EU cutting it by 12%⁴⁴, the Friends for Cohesion signed a joint declaration⁴⁵. In this declaration, all countries agreed on:

- simplifying the functioning of the Cohesion policy, making sure that the level of the 2014-2020 MFF in real terms for Cohesion was maintained.
- keeping the current-rates of co-financing, and keeping the ones for pre-financing at sufficiently high levels.

⁴³ The UK will still contribute to the MFF 2021-2027 for the RAL (around 36 billion euros) and to the liabilities of EU staff pensioners (3.9 billion euros). Depending on the Agreement that is currently on the negotiation table, there might be changes after 2021, as the UK might still take part in certain EU programmes. Source: Zsolt Darvas. *Bruegel*.

⁴⁴ Bayer, Lili (2020). 15 Countries fight to protect EU Cohesion funding. <https://www.politico.eu/article/eu-budget-cohesion-funding-summit-portugal/>

⁴⁵ Friends of Cohesion (2020). Joint Declaration on the Multiannual Financial Framework 2021-2027. [PDF File] <https://www.portugal.gov.pt/download-ficheiros/ficheiro.aspx?v=c6825828-42dc-4090-8378-929c760c58a3>

- increasing flexibility on thematic concentration at regional and national level, in order to keep coherence between the EU requirements and the different circumstances of the Member states.
- creating new instruments, such as the Budgetary Instrument for Convergence and Competitiveness, the Convergence and Reform Instrument or the Just Transition Fund.
- simplifying the own resources system, abolishing all rebates.

It was this very last point, and the rule of law conditionality, the main two points of conflict between the Friends of Cohesion and the other group of countries, the Frugal Four, before the Coronavirus pandemic began.

The Frugal Four, formed by Austria, Denmark, the Netherlands and Sweden, are among the net contributors of the European Union. The other two net contributors, France and Germany, are not among any of these two groups, even if the former wants to safeguard the CAP and the latter was, at some moments, together with the Frugals. Finland, on the other hand, joined the position defended by the Frugals during the negotiations on the MFF and the Recovery Plan this last July. The question on the rebates were on the table during the last EUCO summit. Despite the disagreement among countries, rebates will still be in place, with an increase in the original proposal to some of the countries.⁴⁶ However, it is important to note that the Frugal Four were keen on maintaining the debate on the Rule of Law conditionality, which has helped defining the agreement finally reached by the Council the last month of July.

The topic that this paper is covering is rather sensitive, and it is still ongoing, so many of the conclusions that can be extracted by it might change in the following months. In order to create an overview and understand the stances of the Visegrad countries regarding the Rule of Law conditionality and the MFF, it is important to go through their positions one by one. They have differed from each other along the process, and their positions have helped shaping the final agreement.

3.1.1 Slovakia

Slovakia is one of the least problematic countries regarding the rule of law of the Visegrad countries. Moreover, it is the only one that during the MFF negotiations has not rejected the idea of having more financial and political integration in the European Union. This differs from

⁴⁶ The Netherlands would receive 1.092 million euros, instead of the 1.057 million euros that were originally envisaged. Germany will receive 3.671 million euros, Sweden 1.069 million euros, Denmark 377 million euros, and Austria 565 million euros.

the position held by its other three counterparts, who rejected this idea after the European Commission established that the Union was going to increase the borrowing from the markets.

As a side note, it is important to mention Slovakia adopted the Euro in 2009, which makes it the only Visegrad country that is part of the Eurozone. Poland, Hungary and the Czech Republic have a rather different approach to the Euro, which adoption is a legal obligation⁴⁷ but without a timeline for its implementation. They are sceptical to the benefits of the Euro, looking at the path the Southern European countries travelled with it after 2008.

Regarding their position on the Next Generation EU, Slovakia and Poland would be among the “winners”⁴⁸. The allocations for the Recovery Instrument, according to the simulations made by the European Commission back in May, would group countries according to their GDP. This way, a group with a GDP per capita above average would receive 24.5% of the package, the group below average (low debt), would receive 25%, and the group in the EU below average (high debt) would receive around 50.6%. All States, however, would contribute according to their GDP shares, which are 64.5% for high income, 10.7% for below average (low debt) and 24.8% for below average (high debt).⁴⁹

According to the allocation key table below, Slovakia would belong to the group of countries with the EU below average GDP per capita (low debt), receiving a 25%.

⁴⁷ Only the United Kingdom and Denmark have a “Treaty-based opt-out” for not adopting the Euro. Source: Zsolt Darvas. *Bruegel*

⁴⁸ Inotai, Edit (2020). Disguised in Solidarity. *Visegrad Insight*. <https://visegradinsight.eu/mff-disguised-as-solidarity/>

⁴⁹ Ibidem. Note 31.

Country	Allocation Key	Group	GDP bn	Share in EU 27 GDP	Recip in bn	Contr (bn)	Net (bn)	Net (% GDP)	GDP per cap
BE	1.6	H	474	3.4%	12.0	25.5	-13.5	-2.9%	35900
BG	2.0	E	61	0.4%	15.0	3.3	11.7	19.3%	6800
CZ	1.5	E	220	1.6%	11.3	11.9	-0.6	-0.3%	18000
DK	0.6	H	311	2.2%	4.5	16.7	-12.2	-3.9%	49190
DE	6.9	H	3436	24.7%	51.8	185.1	-133.3	-3.9%	35980
EE	0.3	E	28	0.2%	2.3	1.5	0.7	2.6%	15670
IE	0.4	H	347	2.5%	3.0	18.7	-15.7	-4.5%	60350
EL	5.8	S	187	1.3%	43.5	10.1	33.4	17.8%	18150
ES	19.9	S	1245	8.9%	149.3	67.1	82.2	6.6%	25170
FR	10.4	H	2419	17.4%	78.0	130.3	-52.3	-2.2%	33360
HR	2.0	E	54	0.4%	15.0	2.9	12.1	22.4%	11990
IT	20.4	S	1788	12.8%	153.0	96.3	56.7	3.2%	26860
CY	0.3	S	22	0.2%	2.3	1.2	1.1	4.9%	24250
LV	0.7	E	30	0.2%	5.3	1.6	3.6	11.8%	12490
LT	0.9	E	48	0.3%	6.8	2.6	4.1	8.6%	13880
LU	0.0	H	64	0.5%	0.0	3.4	-3.4	-5.4%	83640
HU	2.0	E	144	1.0%	15.0	7.7	7.3	5.0%	13180
MT	0.1	E	13	0.1%	0.8	0.7	0.0	0.3%	21890
NL	1.7	H	812	5.8%	12.8	43.7	-31.0	-3.8%	42020
AT	1.0	H	399	2.9%	7.5	21.5	-14.0	-3.5%	38240
PL	8.6	E	529	3.8%	64.5	28.5	36.0	6.8%	12980
PT	4.2	S	212	1.5%	31.5	11.4	20.1	9.5%	18550
RO	4.4	E	223	1.6%	33.0	12.0	21.0	9.4%	9130
SI	0.5	E	48	0.3%	3.8	2.6	1.2	2.4%	20490
SK	2.0	E	94	0.7%	15.0	5.1	9.9	10.5%	15890
FI	0.7	H	240	1.7%	5.3	12.9	-7.7	-3.2%	37170
SE	1.2	H	475	3.4%	9.0	25.6	-16.6	-3.5%	43900

Note: E, S, and H groups refer to EU below average GDP per capita (low debt), EU below average GDP per capita (high debt), and EU above average per capita income (high income), respectively.

Source: European Commission. Allocation Key.

Commission working staff document: Identifying Europe's recovery needs. SWD (2020) 98 final

It is interesting to analyse the perspective of the position of certain countries regarding the conditionality, basing on the state of the Rule of Law in their own countries. According to the Rule of Law index,⁵⁰ a ranking which gathers data from 193 countries, Slovakia holds position 52, with 0.53 points, followed by Poland in 59, with 0.43, and preceded by Hungary in the 49, with 0.56 and Czech Republic in 31, with 1.05.

However, and despite not being at the centre of the Rule of Law controversy in the European Union, Slovakia has faced problems with the rule of law in the past, as acknowledged by the Committee on Civil Liberties, Justice and Home affairs on the European Parliament. After the assassination of the Journalist Mr. Kuciak and his partner Ms. Kušnírová, a delegation was sent to the country the 8 and 9th March 2018 to assess the investigation of the case. In addition, there were suspicious regarding a possible misuse of EU Funds in the country, which was also investigated in that visit.⁵¹ A follow-up visit⁵² in November 2018 revealed that there was progress in the case on the murder of Ján Kuciak and his fiancée, in which Europol was having a role helping with the investigation. Notwithstanding, there were still problems with cases of corruption that needed a more in-depth investigation on the misuse of EU agricultural funds. In addition, the independence of the law enforcement authorities and the judiciary were suffering from public mistrust, as citizens perceived these as being politicised and lacking transparency, after having cases of corruption linked to revolving doors.⁵³ One could argue why Slovakia has not rejected the creation of the conditionality of Rule of Law mechanism, but its other two visegrad counterparts, Poland and Hungary, are the two potential targets that could be affected for the conditionality. In other words, Slovakia does not currently have reasons to worry about having the conditionality of rule of law activated in their case.

3.1.2 Czech Republic

In the case of the Czech Republic, it follows a similar path as the one done by Slovakia regarding the conditionality. However, there is an ongoing investigation from the European

⁵⁰ Index made by The Global Economy with indicators from 1996 until 2018, extracting the data from the World Bank. Indicators vary, being -2,5 weak and 2,5 strong.

⁵¹ European Parliament. (2018). Murder of journalist Ján Kuciak: EP delegation calls for thorough investigation. [Press release] <https://www.europarl.europa.eu/news/en/press-room/20180309IPR99437/murder-of-journalist-jan-kuciak-ep-delegation-calls-for-thorough-investigation>

⁵² European Parliament. (2018). Mission Report following the Ad - hoc delegation to Slovakia and Malta 17-20 September 2018. [PDF File] https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2018/11-19/1169408EN.pdf

⁵³ Senior police officials of NAKA resigned and were appointed as advisors to the Minister of Interior afterwards. Source: ibidem

Parliament on how the EU funds have been distributed, managed and audited in shared management with this country. This comes after the current Czech prime minister, Andrej Babiš had been accused of exerting control over Agrofert, a group founded in 1993 by Babiš himself, focusing on fertilizers. Nowadays, the group has more than 250 subsidiaries, ranging from chemical industry, agriculture, food processing, forestry and timbering, among others.⁵⁴ The issue lays on the fact that the Czech prime minister has allegedly continued to be the sole beneficiary of some of the subsidiaries of the company while being a primer minister. This would fall into a problem of conflict of interest, as Agrofert has access to subsidies on both, the European and the national level, which would go against Article 61 (1) of the Financial Regulation.⁵⁵

“Financial actors within the meaning of Chapter 4 of this Title and other persons, including national authorities at any level, involved in budget implementation under direct, indirect and shared management, including acts preparatory thereto, audit or control, shall not take any action which may bring their own interests into conflict with those of the Union. They shall also take appropriate measures to prevent a conflict of interests from arising in the functions under their responsibility and to address situations which may objectively be perceived as a conflict of interests.”

This case began back in 2016, when the newspaper Hospodářské Noviny wrote to the European Anti-Fraud Office (OLAF) to launch an official investigation on how Agrofert obtained 50 million crowns from the EU funds. The case, commonly known as the “Stork Nest” case, was released when Babis was still the Finance Minister under the coalition government between the then prime minister of Bohuslav Sabotka Center-left social democratic party, and Babiš’ party ANO. In 2017 Babis resigned from the government, but later that year he was appointed prime minister by President Milos Zeman after the victory in the elections of ANO. The lower house, which was dealing with the case, released him in 2019. OLAF indeed reported that irregular use of EU’s subsidies intended for small businesses had been committed, and after having closed the case, the Chief State Prosecutor has reopened the case again.

According to the rules in EU funding, the European Commission is obliged to suspend EU fund payments in cases where serious deficiency in the functioning of the management and control systems exist. In this case, in January and February 2019, DG Regio, DG Empl and DG Agri

⁵⁴ Agrofert (n.d.). About Agrofert <https://www.agrofert.cz/en/about-agrofert>

⁵⁵ See Annex I

performed a coordinated and comprehensive audit regarding the alleged conflict of interests, which was sent to the Czech Authorities in November 2019. However, as Commissioner Hahn informed to the Budgetary Control Committee, the audit is still ongoing, but no payments from the Union budget under the European Structural and Investment Funds will be made to companies which are directly or indirectly owned by the Primer Minister, and there will be no reimbursement under the Rural Development Fund to the Czech authorities on any related Agrofert Group projects.⁵⁶

Despite this, the Czech Republic, as it happens with Slovakia, wants to still be considered a pro-EU country, not following the anti-Integration approach of Poland and Hungary in these last years. Moreover, the conditionality proposed was on the Rule of Law, and not on EU compliance, which would have met a stronger opposition from Slovakia and Czech Republic⁵⁷. Hence the support of the MFF, aside from the proposals done as part of the Friends of Cohesion, and for the Recovery Plan.

3.1.3 Poland

As it has been mentioned in previous parts of the paper, Poland could be one of the most affected countries if the conditionality on the Rule of Law would be applied. However, their position has surprised many, as it is not fully against it. In the last Plenary Session on the Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, held the last 9th July, they presented their conditions to support it.

The PiS MEP Jadwiga Wiśniewska⁵⁸ presented the requirements the mechanism had to follow for Poland to support it. She highlighted that the mechanism needs to be in line with the existent legislation aligned with what she called the “spirit of the Treaties”, stressing that it needs to fall within the competences granted to the EU. According to her, this new mechanism is not precise enough, as the criteria that should be used to activate it needs to be measurable, in order to

⁵⁶ European Parliament (2020). Motion for a Resolution on the reopening of the investigation against the Prime Minister of the Czech Republic on the misuse of EU funds and potential conflicts of interest
https://publisher.pp-eu.eu/tmp/assets/doc/Babis_Resolution_Final.pdf

⁵⁷ EUROPEUM (2018). New MFF – Three Comments of the Rule of Law Provision.

<https://europeum.blogactiv.eu/2018/06/25/new-mff-three-comments-on-the-rule-of-law-provision/>

⁵⁸ European Parliament (2020). State of play of Council negotiations on the Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States. Start 16:09:40 End 16:11:09 [Video file]

<https://www.europarl.europa.eu/plenary/en/vod.html?mode=chapter&vodLanguage=EN&playerStartTime=20200709-15:50:38&playerEndTime=20200709-16:37:45#>

protect the Member State. She stated that the mechanism needed to be more economic and legal, and not political.

The breaches on the rule of law in Poland are notorious since the party Prawo i Sprawiedliwość won the national elections in 2015. After this, a series of changes have been applied to different areas that have continued to deteriorate the rule of law in the country. Among some of these are the constitutional revision powers taken on by the Parliament, the changes to the electoral law and the changes in the judiciary that are threatening the judicial independence of the country. Nonetheless, this situation has aggravated during the last few months, and during the COVID-19 crisis, with events such as:

- Criminalising sexual education in schools, by passing a law that would include sentences of up to three years for teachers and sex educators, what has been called the “Stop Paedophilia” bill.⁵⁹
- Intending to withdraw from the Istanbul Convention, an international treaty to protect women from domestic violence.⁶⁰
- Banning abortion, even on grounds of serious foetal abnormalities, and limiting access to emergency contraceptive pills.⁶¹

The list of breaches on the rule of law in the case of Poland has exponentially increased since Article 7 was activated by the European Commission in 2017. However, the process to continue with this procedure is still waiting for a resolution from the Council. Nonetheless, the European Commission, in light of the latest developments in Poland, has blocked the EU funding for the six towns in Poland that declared themselves “LGBT-Free Zones”. Blocking the funding has been possible as the call to apply for these grants stipulates that all European citizens, without any form of discrimination on gender, ethnic origin, religion or belief, disability, age or sexual orientation need to be able to access this programme.⁶² The grant gives from 5,000€ to 25,000€ under the twinning programme of the Europe for Citizens project.

⁵⁹ Savage, Rachel. (2020). Poland mulls law denouncing sex educators as paedophiles and gay activists. *Reuters*. [Press] <https://www.reuters.com/article/us-poland-lgbt-education-trfn/poland-mulls-law-denouncing-sex-educators-as-paedophiles-and-gay-activists-idUSKCN21X2ZA>

⁶⁰ Murray, Shona. (2020). Istanbul Convention: Poland's plan to quit domestic violence treaty causes concern. *Euronews*. [Press] <https://www.euronews.com/2020/07/27/istanbul-convention-poland-s-plan-to-quit-domestic-violence-treaty-causes-concern>

⁶¹ Walker, Shaun. (2020). Polish parliament delays decision on new abortion restrictions. *The Guardian*. [Press] <https://www.theguardian.com/world/2020/apr/16/polish-parliament-delays-decision-on-new-abortion-restrictions>

⁶² Euronews. (2020). EU funding withheld from six Polish towns over 'LGBT-free' zones. [Press] <https://www.euronews.com/2020/07/29/eu-funding-withheld-from-six-polish-towns-over-lgbtq-free-zones>

Nonetheless, in the last days, Poland has responded to this EU ban by granting national money to these cities. Zbigniew Ziobro, Justice Minister of Poland, gave a symbolic cheque of 150.000 zloty (57,000 euros) to the Mayor of Tuchow the 18th August.⁶³

A last point regarding the stance of Poland in the negotiation of the MFF 2021-2027 has been the pressure set on the country in order to commit to implement EU's climate neutrality objective by 2050. This was settled after the last EUCO in July, as one of the pre-requisites of obtaining the new Just Transition Fund allocation, created to help polluting regions to move into cleaner solutions for their industries, is committing to the climate neutrality by 2050 strategy. However, and until Poland commits to it, they will only receive 50% of what was envisaged for them. Poland's position to this regard was somehow expected, as they are against collecting the revenues from the Emissions Trading System into the EU budget which, right now, remains as a proposal.⁶⁴

3.1.4 Hungary

When talking about the rule of law in the European Union, it is unavoidable to think about Hungary. The country has faced a deterioration on the rule of law since the FIDESZ party won the elections in 2010. The reform of the Fundamental Law (Magyarország Alaptörvénye), that entered into force in 2012, was the beginning of this debacle: from the procedure that centralises the approval of the national budget, to the reform of the electoral law, or the reform in the system of administrative courts⁶⁵, among others. In 2018, the Green's MEP Judith Sargentini managed to trigger Article 7 in the case of Hungary, after obtaining 448 votes for, 197 against and 48 abstentions, passing her report on the existence of a clear risk of a serious breach by Hungary on the rule of law.⁶⁶

Despite the activation of article 7, the process has stagnated in the Council, and in January 2020 the European Parliament held a discussion on the worsening of the Rule of Law in Hungary and Poland since article 7 was triggered. There is a, as the Parliament called it, "imminent need"⁶⁷

⁶³ Tidey, Alice. (2020). Poland to give money to 'LGBT free' towns denied EU funding. *Euronews*. [Press] <https://www.euronews.com/2020/08/19/poland-to-give-money-to-lgbt-free-towns-denied-eu-funding>

⁶⁴ Wax, E., Guillot, L., Deutsch, J. & Kayali, L. (2020). POLITICO's guide to the EU budget deal. *Politico*. [Press] <https://www.politico.eu/article/politico-guide-to-the-eu-budget-deal-mff-2021-2027/>

⁶⁵ Venice Commission (2019) On the law on administrative courts and on the law on the entry into force of the law on administrative courts and certain transitional rules. [PDF File] [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e)

⁶⁷ European Parliament (2020). Rule of Law in Poland and Hungary has worsened [Press Release] <https://www.europarl.europa.eu/news/en/press-room/20200109IPR69907/rule-of-law-in-poland-and-hungary-has-worsened>

for the EU to implement a mechanism on democracy, the rule of law and fundamental rights that would strengthen what started back in 2014 with the Mechanism to Safeguard the Rule of Law.

In 2019, during the Finnish presidency⁶⁸, and basing on the five-year existence of the aforementioned mechanism, the Council agreed on doing an evaluation on the dialogues held since 2014 in the framework of the Rule of Law. This evaluation would be made by the General Affairs Council. The 6th November 2019, Coreper revised the draft conclusions on the evaluation of the annual Rule of Law Dialogue, but they could not reach a consensus. The 19th November 2019 the General Affairs Council met again, but they did not reach consensus either. Nonetheless, the Presidency concluded that the text was supported or not objected by 26 delegations. However, Hungary vetoed the voting.⁶⁹ It was agreed that another evaluation would be performed by the end of 2023, under the rotating presidency of Spain.⁷⁰

4. Would the conditionality on the Rule of Law help tackling the current breaches?

After having analysed the process through which the European Institutions and Member States have negotiated the next Multiannual Financial Framework, a reflection on the outcome of the negotiations and what can be expected is needed.

Many of the arguments given by some of the countries, such as it was of Hungary, was that this mechanism would give the Commission too much power over the Member State. The vision of the European Institutions and the power they should be granted has been a topic that Victor Orban has mentioned in different occasions.

“We have to return to the notion that the basis of the EU is not its institutions, but its members. The democratic feature[s] of the EU can only be reinforced through the member states, and the relationship between the institutions and member states must be improved”⁷¹

This power granted to Member States through their voting rights in the Council has been one of the reasons why Article 7 is stagnated in the Council, as it requires unanimity of all members. The problem the European Union faces is that the breaches on the Rule of Law are increasing,

⁶⁸ Finnish Council Presidency (2019). Strengthening the Rule of Law. <https://eu2019.fi/en/backgrounders/rule-of-law>

⁶⁹ Portfolio. (2019). Hungary vetoes rule of law proposal. [Press] <https://www.portfolio.hu/en/eu-funds/20191120/hungary-vetoes-rule-of-law-proposal-407647>

⁷⁰ Council of the European Union (2019). Presidency conclusions - Evaluation of the annual rule of law dialogue. <https://www.consilium.europa.eu/media/41394/st14173-en19.pdf>

⁷¹ Viktor Orbán after the EU summit in June 2016. Source: ibidem – Note 35

beyond what has happened with Poland and Hungary. As it has been proved by the communications made by the Parliament, and in light of the last events in the Visegrad countries, the inaction regarding the Rule of Law by the European Institutions is having a detrimental effect in these countries. Hence the need to develop an instrument that will require different procedures.

The final conclusions of the last EUCO, the 17th, 18th, 19th, 20th and 21st July, has concluded that the regime of conditionality to protect the budget and Next Generation EU will be introduced. However, there is a detail that might change the course of this new mechanism in comparison to the rest of pre-existent Rule of Law mechanisms: the voting procedure. The Commission, in the light of possible breaches in the Rule of Law, will make a proposal that will have to be adopted by the Council by a qualified majority. A qualified majority is reached in the council by meeting two conditions:

- That 55% of the member states vote in favour (15 out of 27)
- That the countries that vote in favour represent at least a 65% of the total EU population.

As a matter of fact, the approval of this conditionality has been perceived as a victory by both, the opponents, and the supporters of it, due to the rather vague wording chosen for it. However, from the legal perspective, this mechanism is still a reality. Yet, if its outcome is positive or not, is something that will be seen when activating it for the first time.

Conclusion

The role of the Visegrad countries in the European Project is of outmost importance, as their development since they became democratic states set an example for the rest of the countries of the former Eastern Bloc. However, and due to the last events that have taken place in Hungary and Poland, there are serious threats to democracy. The democratic backsliding caused by continuing violations on the rule of law puts in danger the future of the European Union itself. Over the last decade, there are many tools that have been created to halt these, but the one that could be the most effective is still at the negotiating table: a conditionality on the rule of law that would protect the EU tax payers' money, more specifically EU funds in shared, direct and indirect management. The impact of these funds in the Member States is substantial, and the risk of not receiving them might trigger a change in the actions made by the governments of the affected countries. However, and despite having a legal framework that supports it, it is still unknown what the real impact of such a measure would be.

Moreover, introducing such a mechanism would not only help combating the deterioration of the Rule of Law in Hungary and Poland, but would also work as a preventing mechanism with other countries that are facing the same risk in the near future. Moreover, the situation aggravates in view of the current COVID-19 pandemic, where Member States will receive a significant amount of funding to combat the economic downturn. As the Commissioner for Justice Didier Reynders said “There is currently no instrument to protect the EU budget against generalised deficiencies as regards the rule of law in a Member State. The creation of this mechanism would decidedly improve the protection of the EU budget. Filling this significant gap is more important than ever, given the increased funding and increased flexibility proposed by the Commission in reaction to the COVID-19 crisis. We need to protect this funding in the very interest of all taxpayers and all citizens of the Union”.

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