



STRENGTHS & WEAKNESSES OF EU CONDITIONALITY REGIMES

THE CASE OF HUNGARY

Edited by Hungarian Helsinki Committee

POLICY BRIEF



About the RED-SPINEL Project

The Horizon Europe research project, Respond to Emerging Dissensus: SuPranational Instruments and Norms of European Liberal Democracy (**RED-SPINEL**), seeks to shed light on the growing dissensus surrounding liberal democracy and the rule of law within and beyond the EU. RED-SPINEL examines **how policy instruments and legal mechanisms at the EU level have evolved in response to dissensus surrounding liberal democracy and its constitutive dimensions**. Bringing together academics and researchers from 7 universities (ULB, UvA, LUISS, UBB, HEC Paris, UoW, NCU) and 4 leading nonacademic institutions (PATRIR, HHC, MILEU Consult, Clingendael Institute), the project addresses key transversal questions:

- i) What is the nature of the current dissensus and how disruptive is it to the EU?
- ii) How have EU institutional actors and instruments contributed and responded to this increased dissensus?
- iii) What are the implications of this dissensus for policy instruments at EU and Member State levels?

These are the project's main questions which will also be explored empirically in relation to:

- Instruments relating to the promotion of democracy and the rule of law within the EU;
- Instruments relating to the promotion of democracy and the rule of law within the EU's neighbourhood;
- Legal mechanisms and technocratic instruments fostering citizen participation, defending fundamental rights and promoting climate justice; and
- Instruments relating to EU economic governance, notably the European Semester.

RED-SPINEL aims to produce theoretically innovative understandings of the nature and implication of the present-day dissensus; examine innovative **empirical findings** on how the EU's supranational instruments have fared in an environment shaped by increasing dissensus; and ultimately to develop recommendations and toolkits that aim to restore the legitimacy and effectiveness of European multilevel liberal democracy.

Table of Contents

Executive Summary	page i
Recommendations based on the experiences of the application of the conditionality regimes in the case of Hungary	page ii
Introduction	page 1.
State of the procedures – February 2024	page 2.
Sincere cooperation	page 3.
1. Rule of Law Conditionality Mechanism	page 3.
2. Recovery and Resilience Facility	page 5.
3. Common Provisions Regulation	page 7.
4. The connection of the conditionality regimes to the EU rule of law toolbox and other instruments in the case of Hungary	page 8.
5. Weaknesses	page 10.



Executive Summary

This policy brief reflects on the evolution of EU conditionality regimes attached to the legal framework governing the implementation of the 2021-2027 multiannual financial framework and the additional Recovery and Resiliency Facility. In five chapters, we explore the unique case of Hungary, where all conditionality tools linked to EU funds have been utilized in order to remedy long-lasting and largely unaddressed problems related to systemic corruption, the disruption of checks and balances and violations of fundamental rights. Three dedicated chapters present the application of the regulations constituting the heart of the Union's conditionality framework (i.e. the Regulation on the general regime of conditionality, the Common Provisions Regulation, and the Regulation establishing the Recovery and Resilience Facility). One chapter is dedicated to the examination of synergies between the three regulations and additional mechanisms of the wider EU Rule of Law Toolbox. The final chapter highlights the weaknesses in the application of the conditionality framework in the past two years. The conclusions reflect the experiences of human rights watchdog and anti-corruption civil society organisations involved in defending rule of law standards and tackling corruption in Hungary.¹ The set of recommendations targeting EU policy makers and legislative actors aim at contributing to the fine-tuning of EU procedures related to the promotion of fundamental rights, rule of law principles and anti-corruption standards in the EU.

¹ Hungarian Helsinki Committee, Amnesty International Hungary, Hungarian Civil Liberties Union, K Monitor, Transparency International Hungary

Recommendations based on the experiences of the application of the conditionality regimes in the case of Hungary

EU Co-legislators

(i) Common Provisions Regulation

- Introduce a preventive anti-corruption element into the CPR as a Horizontal Enabling Condition requiring Member States to maintain an anti-corruption framework capable of ensuring sound financial management of EU funds and protecting the Union's financial interests.

(ii) Conditionality Regulation

- Apply the general regime of conditionality for the protection of the Union budget, *mutatis mutandis*, to all Union funds, such as the Common Agriculture Policy.
- Introduce a compulsory reporting element on the phase of implementation of remedial measures at the end of every three months for the Member State under the general regime of conditionality procedure.

(iii) Other

- Continue to develop a European legal framework safeguarding the functioning of independent media in Member States.

European Commission

(i) Common Provisions Regulation

- Establish a mechanism for the public consultation of non-state stakeholders in the process of identifying violations of fundamental rights and freedoms as set out in the EU Charter when evaluating national operational programmes under the EU's Multiannual Financial Framework.
- Conduct an evaluation of the fundamental rights complaint mechanisms introduced in Member States related to the management of the implementation of national programmes under the EU's Multiannual Financial Framework. In case of systemic deficiencies, introduce a direct complaint mechanism to ensure compliance with the CPR.
- Establish an accessible complaint mechanism in the implementation of national programmes under the EU's Multiannual Financial Framework for non-state actors and private individuals.
- Increase efforts in raising awareness about the EU Charter of Fundamental Rights in the wider public in order to ensure that the related horizontal enabling condition under the CPR is effectively implemented.

(ii) Conditionality Regulation

- Establish a mechanism for the public consultation of non-state stakeholders in the process of defining remedial measures under the conditionality mechanism.
- Define the compulsory constitutive elements of an appropriate public consultation process in a legislative procedure as well as in the process of preparing national programmes under the EU's Multiannual Financial Framework. Develop a mechanism for the enforcement of public consultation standards in Member States.

- Make public the notification letter and the Member State's letter proposing remedial measures to address the findings in the notification, prior to the proposal for a Council Implementing Decision, in order to facilitate the restoration of mutual trust as an indispensable prerequisite to apply the principles of sincere cooperation in the framework of the conditionality mechanism.
- Increase efforts in raising awareness of the general regime of conditionality for the protection of the Union budget. Utilize the network of Commission Representations in Member States for media campaigns targeting non-state actors and groups of active citizens.

(iii) Annual Rule of Law Report

- Establish a mechanism capable of successfully safeguarding the implementation of country-specific recommendations issued in the annual Rule of Law Report.
- Set out concrete and actionable recommendations in the annual Rule of Law Report to be able to better track and assess developments.
- Increase the number of country-specific recommendations issued in the annual Rule of Law Report in order to better align the substance of the Country Chapters with the list of recommendations.
- Increase efforts in raising awareness about the Rule of Law Report in the wider public.

(iv) Other

- Include a cross-sectoral rule of law Commission priority for 2024-2029 under the portfolio of the First-Vice President responsible for the coordination as well as the facilitation of the cross-cutting work of Commissioners concerning the promotion of the rule of law and other common values listed in Article 2 TEU.
- Utilize the Union budget under direct management for capacity building as well as empowerment of civil society actors, media and academic institutions capable of monitoring the executive.
- Utilize the Union budget under direct management for capacity building of legal practitioners and legal professionals to further the potential of the EU Charter of Fundamental Rights as a human rights litigation tool.

Introduction

The rule of law stands alongside democracy and fundamental rights as founding values of the European Union. It is a core factor in Europe's political stability and economic prosperity. However, in recent years, these founding values have come under attack, testing the resilience of the EU. In some Member States, worrisome trends can be observed, such as the weakening of the independence of the judiciary, the dismantling of democratic control mechanisms, or failing to apply effective anti-corruption measures.

These developments take place among a growing dissensus over (liberal) democracy. As Coman and Brack note, 'not only rights are contested but so is the rule of law, this old normative ideal that has shaped political regimes and supranational policies to avoid arbitrary power and to guarantee individual rights.'²

The decade of ongoing disputes with two "rule breakers" – Hungary and Poland – exposed the inability of EU institutions to counter rule of law violations.

In the context of apparent rule of law backsliding, the EU has made significant efforts in expanding as well as upgrading its rule of law toolbox in order to preserve the Union as an 'area of freedom, security and justice without internal frontiers'. In the past five years, the institutional approach to breaches of rule of law principles in Member States shifted from the initiation of dialogue based "soft" measures (e.g. the procedure under Article 7(1) TEU, the annual rule of law dialogue) to a "harder" application of already existing tools (e.g. infringement procedures targeting systemic rights violations or violations of Article 2 TEU), as well as the introduction of new mechanisms at the disposal of EU institutions aiming at safeguarding the rule of law in Member States (e.g. the general regime of conditionality).

² Understanding dissensus in the age of crises: theoretical reflections, in *Debating Dissensus over Liberal Democracy*, edited by Ramona Corman and Nathalie Brack, 2023.

³ Article 4 (2e) of Regulation 2020/2090 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget as well as Recitals 39, 53, 72, and Article 22(2b) of Regulation 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility.

As part of the reconsideration of the EU's role in addressing dissensus and in safeguarding rule of law in Member States, a new legal framework has been put in place attached to the Union's multiannual financial framework, linking EU funds to the compliance with EU values. As a result, the logic of conditionality is now a constitutive element of the upgraded legal framework governing the implementation of the 2021-2027 multiannual financial framework. Member States only enjoy the benefits of receiving EU financial support if they meet certain rule of law conditions. Prior to receiving Union funds, Member States must ensure capability of national authorities to prevent, detect and prosecute corruption affecting the Union budget.³ The principles of the rule of law and the fundamental rights enshrined in the EU Charter of Fundamental Rights must also be observed while implementing projects under EU Cohesion Funds.⁴

The upgraded conditionality regime is incorporated into three regulations.

- **Regulation 2020/2092** on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation);
- **Regulation 2021/1060** laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (CPR);
- **Regulation 2021/241** establishing the Recovery and Resilience Facility (RRFR).

The three regulations bring different added values to the EU's rule of law toolbox. The Conditionality Regulation provides one of the most powerful elements in the EU rule of law toolbox as it is

⁴ Article 9(1) of Regulation 2021/1060 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy

designed to initiate comprehensive corrective measures to protect the Union's financial interests from corruption and mismanagement.

The CPR, by introducing the effective application and implementation of the Charter of Fundamental Rights as a general criterion for eligibility to use a spectrum of EU funds, brings the Charter to the middle of the rule of law conditionality regime.

The RRF opened new horizons in the implementation of rule of law related country-specific recommendations under the European Semester.

The example of the use of these tools in the case of Hungary provides a unique opportunity to explore the important synergies between the cohesion regulations, the general regime of conditionality and the RRF. While the decisions to suspend funds under the three conditionality regimes were made more than a year ago, certain weaknesses and shortcomings can be already identified, allowing for the formulation of recommendations.

State of the procedures – February 2024

Hungary's total financial eligibility for EU support amounts to EUR 22 billion from the European Structural and Investment Funds and the Home Affairs Funds of the 2021-2027 Multiannual Financial Framework (MFF) and EUR 10.4 billion from the Recovery and Resilience Facility (RRF). To date, EUR 21.8 billion of this amount remains suspended under the three conditionality regimes.

(i) Conditionality Mechanism

On 13 December 2023, one year after the adoption of the Council Decision adopting financial measures in the defense on the Union's financial interests, the Commission, on its own initiative, conducted a reassessment of the implementation of 17 remedial measures proposed by Hungary to address the shortcomings and irregularities identified in the procedure. In its assessment, the Commission

established that the situation leading to the adoption of the measures has not been remedied and the Union's budget remains at the same level of risk. Therefore, the measures should remain in place.⁵

This means that EUR 6.3 billion under the MFF and legal commitments with any public interest trust or any entity maintained by such a public interest trust (i.e. 21 publicly funded private universities in Hungary) remain suspended.

(ii) CPR

On 13 December 2023, the Commission also delivered a decision approving the Hungarian judicial reform aiming at remedying the issues related to the independence of the judiciary by the Commission. According to the decision, horizontal enabling condition '3. Effective application and implementation of the Charter of Fundamental Rights' is considered fulfilled with regard to the deficiencies in judicial independence.⁶

The approval entailed that EUR 8.8 billion funding under the MFF blocked due to the issues concerning judicial independence has become available for Hungary. However, EUR 2.7 billion blocked due to violations of fundamental rights in three remaining areas (i.e. Academic freedom, LGBTQI rights, Right to Asylum). At the same time EUR 3.3 billion remain suspended as Hungary fails to fulfill 12 thematic enabling conditions set by the CPR. Accordingly, EUR 12.3 billion remain suspended under the MFF as a consequence of the measures adopted in the conditionality mechanism (EUR 6.3 billion), violations of fundamental rights (EUR 2.7 billion) and the non-fulfillment of a set of thematic enabling conditions (EUR 3.3 billion).

(iii) RRF

On 8 December 2023, the Council adopted the upgraded recovery and resilience plan of Hungary.⁷ The modification added EUR 3.9 billion in loan and EUR 700 million in non-repayable support to the original EUR 5.8 billion funding from the RRF. The

⁵ COMMISSION DECISION of 13.12.2023 on the reassessment, on the Commission's initiative, of the fulfilment of the conditions under Article 4 of Regulation (EU, Euratom) 2020/2092 following Council Implementing Decision (EU) 2022/2506 of 15 December 2022 regarding Hungary

⁶ COMMISSION DECISION of 13.12.2023 on the approval and signature of the Commission assessment, in accordance with Article 15(4) of Regulation (EU) 2021/1060, of the fulfilment of the horizontal enabling condition '3. Effective application and implementation of the Charter of

Fundamental Rights' with regard to the deficiencies in judicial independence in Hungary

⁷ COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) (ST 15447/22 INIT; ST 15447/22 ADD 1) of 15 December 2022 on the approval of the assessment of the recovery and resilience plan for Hungary

additional financial allocations support a REPowerEU chapter introduced into the upgraded plan. In accordance with Article 21d of the RRF Regulation, 20% of the newly added financial support (EUR 900 million) shall be made available as pre-financing for Hungary.

Therefore, as a consequence of the Council decision EUR 900 million in pre-financing became available and EUR 9.5 billion remained suspended until the full implementation of the 27 rule of law related 'super milestones' in the recovery and resilience plan of Hungary.

Sincere cooperation

A key principle cutting across all three regulations is sincere cooperation, provided for by Article 4 TEU. The principle translates into the long standing practice of confidential correspondence between the Commission and Member States. The consequences of the abuse of this principle by a Member State can be observed in the case of Hungary: while the Commission continued to conduct negotiations related to the different procedures accordingly, the Hungarian government consistently communicated false claims. These included claims about the concerns the Commission raised and that the Commission is constantly changing these. The strict confidentiality of the procedures kept other stakeholders in the dark, making it difficult to provide useful analysis and impossible to debunk the false claims surrounding the procedures.

The Conditionality Regulation foresees that the Commission shall take into account information published by 'Union institutions, other relevant international organisations and other recognized institutions' in order to determine whether breaches of principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget.⁸ However, once the determination has taken place, no external parties are able to assist the assessment of either the proposed remedial measures, or their implementation. Moreover, as a result of the principle of sincere cooperation, all documents pertaining to these remain confidential until the

procedure is terminated and any potential legal remedy is exhausted.

1. Rule of Law Conditionality Mechanism

Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget is designed to protect the Union's financial interest in the event of breaches of the principles of the rule of law in a Member State that have a 'sufficiently direct' impact on, or a serious risk of impacting the sound financial management of EU funds or the Union's financial interests. It contains a definition of the rule of law for the purposes of the regulation, and gives examples of the breaches of its constitutive elements.⁹

'[T]he rule of law' refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.

The Conditionality Regulation stipulates that appropriate measures shall only be taken if the breaches of the principles of the rule of law in a Member State affect or seriously risk affecting – in a 'sufficiently direct way' – the sound financial management of the EU budget or the protection of the financial interests of the EU in cases where other procedures set out in Union legislation would not allow the Union budget to be protected more effectively. The Regulation contains a non-exhaustive list of detailed examples for breaches of the rule of law principles.

Should the Commission establish that such a situation exists in a Member State it notifies the Member State, indicating the list of identified problems (stage 1), In response to the 'notification letter', the Member State may propose remedial

⁸ Article 6(3) of Regulation 2020/2092

⁹ Articles 2(a) and 3 of Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget

measures (stage 2). If the Commission considers that the proposed measures do not adequately address the situation, it proposes proportionate measures to the Council in order to protect the EU budget (stage 3). Measures may affect funds under shared, direct or indirect management and may include, *inter alia* the suspension of payments, a prohibition on entering into new commitments, reduction of pre financing or the suspension of the approval of one or more programmes, the reduction of pre financing or the suspension of payments from the Union budget. The Council decides by qualified majority on the proposal (which it may amend as well) (stage 4).

Hungary

On 27 April 2022 the European Commission sent a written notification to the Hungarian government of the launch of the rule of law conditionality mechanism. The 'notification letter' identified structural deficiencies in four areas that put the Union's financial interests at risk.

-
- 1) *Systemic irregularities, deficiencies and weaknesses in public procurement procedures;*
 - 2) *a high rate of single bidding procedures and the low intensity of competition in procurement procedures;*
 - 3) *issues related to the use of framework agreements;*
 - 4) *issues related to the prevention and correction of conflicts of interest and to the use of EU funds by public interest asset management foundations and entities maintained by them.*

According to the Commission's assessment, these issues and their recurrence over time demonstrate a systemic inability, failure or unwillingness, on the part of the Hungarian authorities, to prevent decisions that are in breach of the applicable law, as regards public procurement and conflicts of interest, and thus to adequately tackle risks of corruption. These constitute breaches of the principles of the rule of law, in particular the principles of legal certainty and the prohibition of arbitrariness of the executive powers, and raise concerns as regards the separation of powers.

The 'notification letter' also established serious deficiencies in two additional areas that are considered to be detrimental to the detection, investigation and correction of alleged corruption, fraud and other criminal offences.

-
- 5) *Serious shortcomings in the effectiveness of investigation and prosecution of alleged criminal activity;*
 - 6) *the absence of a functioning and effective anti-corruption framework.*
-

These additional issues were also assessed to constitute breaches of the principles of the rule of law, in particular regarding legal certainty, the prohibition of arbitrariness of the executive powers and effective judicial protection.

Hungary, after engaging with the Commission, proposed seventeen remedial measures in order to address the breaches of the principles of the rule of law on the six detected areas.¹⁰

-
- (i) *Reinforcing anti-corruption framework through a newly established Integrity Authority;*
 - (ii) *an Anti-Corruption Task Force;*
 - (iii) *strengthening the anti-corruption framework;*
 - (iv) *ensuring the transparency of public interest asset management foundations;*
 - (v) *introduction of a specific procedure in the case of special crimes related to corruption;*
 - (vi) *strengthening audit and control mechanisms to guarantee the sound use of Union support;*
 - (vii) *reducing the share of tender procedures with single bids financed from Union funds;*
 - (viii) *reducing the share of tender procedures with single bids financed from the national budget;*
 - (ix) *the development of a single-bid reporting tool to monitor and report on public procurement procedures closed with single-bids;*
 - (x) *the development of the Electronic Public Procurement System to increase transparency;*
 - (xi) *the development of a performance measurement framework for public procurements;*

¹⁰ Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary COM/2022/485 final. pp. 21-22.

- (xii) the adoption of an action plan to increase the level of competition in public procurement;
- (xiii) training to be provided for micro, small and medium-sized enterprises on public procurement practices;
- (xiv) setting up a support scheme for compensating the costs associated with participating in public procurement of micro, small and medium-sized enterprises;
- (xv) application of ARACHNE;
- (xvi) strengthening the cooperation with OLAF;
- (xvii) the adoption of a legislative act ensuring enhanced transparency of public spending.

The Commission assessed that the remedial measures would in principle be capable of addressing the Commission's findings, provided that all the said measures were correctly and effectively implemented. Thirteen of the remedial measures set key implementation steps that were to be fulfilled by 19 November 2022.

On 30 November 2022, the Commission assessed that given that addressing several of the identified issues do not only require changes in the legal framework, but more prominently the effective implementation of changes in practice, a risk for the Union budget remained.

Pending the entry into force of key legislative texts that would implement many of the proposed remedial measures and taking into account the assessment contained in the explanatory memorandum accompanying the Commission's proposal, as well as the possibility that the measures might not be correctly implemented, or that their effectiveness would be weakened in the details of the measures, the Commission estimated that the level of risk for the Union budget corresponded to 65 % of the programmes concerned. It also proposed that no legal commitments be entered into with any public interest management funds.¹¹

The Council, in its decision in December 2023, adopted the Commission's proposal, with the reduction of the suspension of commitments for

operational programmes to 55%, taking into account the corrective measures adopted by Hungary after the conclusion of the Commission's assessment.

In December 2023, one year after the adoption of the measures the Commission considered that the situation leading to the adoption of measures has not been remedied. Therefore, the measures under Article 2 of the Council Implementing Decision remained in place.¹²

2. Recovery and Resilience Facility

The RRF is the core element of the *NextGeneration EU* plan, which aims to put the Union on a recovery track after the economic crisis induced by the COVID19 pandemic. The general objective of the Recovery and Resilience Facility is to advance the economic, social and territorial cohesion of the Union as well as to improve the resilience, preparedness and productivity of Member States. The RRF distributes EUR 723.8 billion. EUR 338 billion are in grants and EUR 385.5 billion in the form of loans. The regulation sets six key policy areas where common policy objectives are pursued. These include, *inter alia*, green transition, digital transformation, social and territorial cohesion.

Regarding the common policy areas Member States prepare national recovery and resilience plans. National plans set out the milestones, targets and an indicative agenda for the reforms and investments to be achieved pursuant to the main policy objectives prescribed by the RRF.

National plans shall be consistent with, *inter alia*, the partnership agreements and operational programmes adopted under the Union funds. It is also required to effectively address a 'significant subset' of the relevant country-specific challenges identified in the context of the European Semester.

The Commission may assess the relevance, effectiveness, efficiency and coherence of national plans. In the event of a positive assessment, on a proposal from the Commission, the recovery and resilience plan is approved by the Council.

¹¹ Recital (149) of Communication from the Commission to the Council on the remedial measures notified by Hungary under Regulation (EU, Euratom) 2020/2092 for the protection of the Union budget. COM/2022/687 final

¹² Commission Decision of 13.12.2023 on the reassessment, on the Commission's initiative, of the fulfilment of the conditions under

Article 4 of Regulation (EU, Euratom) 2020/2092 following Council Implementing Decision (EU) 2022/2506 of 15 December 2022 regarding Hungary. https://commission.europa.eu/system/files/2023-12/C_2023_8999_1_EN_ACT.pdf

The Commission's proposal may include measures necessary to protect the financial interests of the EU. In this respect, the Regulation prescribes that the Member States shall take all the appropriate measures to protect the financial interests of the Union and to ensure that the use of funds complies with the applicable Union and national law, in particular regarding the prevention, detection and correction of fraud, corruption and conflicts of interests.

Member States may submit requests for payments to the Commission in accordance with the advancement of the envisaged reforms, following the achievement of a set of milestones and targets set out in their national plan. The Commission examines whether the milestones and targets have been indeed met in a satisfactory manner. In the event of a negative assessment, the financial contribution and, where appropriate, all or part of the loan, may be suspended. The suspension may be lifted should the Member State concerned take the necessary measures to ensure the satisfactory fulfillment of the concerned milestone or target.

Reforms and investments supported by the RRF shall be completed by 31 August 2026.

Hungary

The Council adopted the Hungarian recovery and resilience plan on 15 December 2022. The Council decision, relying on a series of country-specific recommendations under the European Semester, identifies a number of long-standing horizontal challenges in Hungary related to the functioning of public institutions. The identified issues relate to four thematic areas.

In order to remedy the problems related to the four identified areas, the *Governance and Public Administration* component of the Hungarian national plan sets out 27 reforms containing 47 milestones and targets. Of these, 27 milestones are referred to as 'super milestones'. The set of 'super milestones' cover the 17 remedial measures adopted under the CR, as well as a set of additional milestones aim at increasing transparency in decision-making and strengthening judicial independence.

-
- 1) *Anti-corruption framework*
 - 2) *Competition in public procurement*
 - 3) *Judicial independence*

4) *Predictability, quality and transparency of decision-making*

The proper implementation of the 'super milestones' is a compulsory precondition prior to making any payment under the RRF.

3. Common Provisions Regulation

The CPR lays down common financial rules applicable for eight Union Funds under the multiannual financial framework, as well as common policy objectives for five of the Funds concerned.

With regard to five Funds, Member States prepare strategic plans for the whole programming period of the multiannual financial framework, called Partnership Agreements (PA). The PAs indicate by which of the Funds and nation programmes the common policy objectives will be pursued. The plan is evaluated and approved by the Commission.

In addition to the PAs, Member States draw up thematic national programmes, called operational programmes (OP), for the use of all the Funds covered by the CPR. OPs indicate a detailed plan for the implementation of one or more priorities stemming from the common policy objectives. Each priority set out in each OP is composed of a series of minor, specific objectives.

In addition to this, the CPR lays down four horizontal enabling conditions and associated fulfillment criteria that Member States shall meet when implementing the national OPs. The Commission assesses compliance with the horizontal enabling conditions per specific objective.

-
- 1) *Effective monitoring mechanisms of the public procurement market*
 - 2) *Tools and capacity for effective application of State aid rules*
 - 3) *Effective application and implementation of the Charter of Fundamental Rights*
 - 4) *Implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCPRD)*
-

With regard to three structural Funds covered by the CPR, there are sixteen additional thematic enabling conditions which set out the policy requirements necessary to achieve common policy objectives (e.g. effective promotion of renewable energy in all

sectors and across the EU). Similarly to the horizontal conditions, Member States shall meet the thematic enabling conditions when implementing the national OPs. The Commission assesses the fulfilment of these conditions per specific objective.

The Commission shall only execute payment requests where the horizontal and thematic enabling conditions for the specific objective concerned have been fully met.

Hungary

The Partnership Agreement and the individual programmes submitted by Hungary were approved by the Commission on 22 December 2022. The decisions approving the various programmes indicate that four established violations of the Charter, connected to certain specific objectives, may directly affect the implementation of the given programme and as such, the horizontal enabling condition of 'Effective application and implementation of the Charter of Fundamental Rights' is not fulfilled.

- 1) *Deficiencies related to judicial independence results in the violation of the right to an effective remedy and to a fair trial.*
- 2) *The operation of public interest asset management foundations results in the violation of academic freedom.*
- 3) *Various elements of the Hungarian asylum system violate the right to asylum.*
- 4) *Act LXXIX of 2021, the Hungarian anti-LGBTQI law, violates rights of persons belonging to sexual minorities.*

The violation of *the Right to an effective remedy and to a fair trial* relates to the deficiencies of the independence of the judiciary. In its decisions approving the Hungarian OPs, the Commission established that: "*[a]ccess to an independent and impartial tribunal previously established by law is a prerequisite for an effective remedy, which guarantees compliance with EU law, including the effective application and implementation of the Charter of Fundamental Rights*".¹³ Therefore,

¹³ Recital (8) of the Commission Implementing Decision approving the programme "Human Resources Development Operational Programme Plus" for support from the European Regional Development Fund and the European Social Fund Plus under the Investment for jobs and growth goal in Hungary CCI 2021HU05FFPR001

payments are suspended under all specific objectives subject to the horizontal enabling condition on the application of the Charter.

To unblock the funds, Hungary strengthened elements of judicial independence in four areas.

- I. *Strengthening the role and powers of the National Judicial Council to counterbalance the powers of the President of the National Office for the Judiciary.*
- II. *Strengthening judicial independence of the Supreme Court (Kúria).*
- III. *Removing obstacles to references for preliminary rulings to the Court of Justice of the EU.*
- IV. *Removing the possibility for public authorities to challenge final decisions before the Constitutional Court.*

The Hungarian Parliament adopted a law that prohibits or limits access to content that propagates or 'portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality' for individuals under the age of 18.¹⁴ On 15 July 2021, the Commission launched an infringement procedure regarding this legislation due to breaches of EU law.

In 2019 Hungary initiated a change of the governance model of higher education institutions, which promotes the transformation of public universities into publicly funded private universities, maintained by newly established public interest management foundations, led by a board of trustees.¹⁵ With this model change, organisational and operational competences are transferred from the institutions' former maintainer, the State, as well as from the elected autonomous body representing the institutions', to the board of trustees. Moreover, the State transferred its founder rights, including the future appointment of members of the board of trustees, to the board of trustees. Therefore, since universities undergoing this model change are brought under the exclusive control of the board of trustees, there is a serious risk that the courses and training, as well as research projects, are politically

¹⁴ Act LXXIX of 2021 on stricter action against paedophile offenders and amending certain acts for the protection of children

¹⁵ Act XIII of 2019 on Public Interest Trusts

influenced. Moreover, there is a risk that staff involved in the implementation of EU funded projects will be selected on the basis of their alignment with the university management's political views instead of merit and expertise.

The Commission established breaches of the right to asylum in three regards. The Hungarian legislation legalizing extrajudicial summary removal of unlawfully staying third-country nationals was found incompatible with EU law in the judgment of the Court of Justice of the European Union (CJEU) in case C-808/18. The Hungarian legislation criminalising the organisation of activities carried out to assist the initiation of applications for international protection was found incompatible with the EU *acquis* by the CJEU in case C-821/19. The pre-procedure introduced in Hungary in 2020 that must be completed in a Hungarian Embassy in a third country before being allowed to make an actual asylum claim is at variance with EU law.

In order to remedy the deficiencies concerning the independence of the judiciary, the Hungarian Parliament adopted a package of new legislation with the aim of reinforcing judicial independence on 3 May 2023 and submitted it to the European Commission for evaluation in July 2023. On 13 December 2023, the Commission approved the reform thereby lifting the suspension of payments under all relevant operational programmes financed by Cohesion as well as EU internal affairs funds.

Two areas (rights of asylum seekers, rights of persons belonging to sexual minorities) are cornerstones of the Hungarian government's illiberal policy priorities and as such, are regularly used for domestic political messaging purposes. Consequently, the government is unlikely to propose changes with a view to remedy rights violations in these areas.¹⁶

The government has been reluctant to address the concerns related to the operations of the public interest asset management foundations as well. Although an amendment was approved by the Parliament that clarifies that such entities fall under the scope of public procurement regulations, the Commission's finding related to the violation of

academic freedom at higher education institutions falling under the management of the boards of such public interest asset management foundations has not been addressed to date. Domestically, the government communicates that it is not aware of the precise problems the Commission expects it to address, which is clearly at variance with the publicly available correspondence.¹⁷

Further to the unfulfilled horizontal condition, 12 of the thematic enabling conditions remain unfulfilled in Hungary.

4. The connection of the conditionality regimes to the EU rule of law toolbox and other instruments in the case of Hungary

(i) Rule of Law Report

The detection of recurrent irregularities related to the anti-corruption framework and the judicial system served a basis for the initiation of all three conditionality regimes.

In the course of the procedure under the CR, the Commission based its assessment, to a large extent, on the findings of the *Anti-corruption* chapter of the annual Rule of Law reports of 2020, 2021 and 2022. The 17 remedial measures to which Hungary has committed itself to undertake under the Conditionality Regulation aim to remedy recurrent shortcomings and irregularities in the functioning of national institutions engaged in detecting, investigating and prosecuting corruption.

Country-specific recommendations addressed to Hungary for the first time under the annual rule of law cycle in 2022 are directly mirrored by remedial measures related to the reinforcement of the anti-corruption framework through a newly established Integrity Authority and by the introduction of a specific procedure in the case of special crimes related to corruption.

Similarly, the 'super milestones' under the RRF, which are designed to strengthen judicial independence, give concrete expression to the country-specific recommendations addressed to Hungary in the 2022 rule of law report. The due

¹⁶ See the Prime Minister's statement of 23 December 2023 on the new pact on migration: „A situation will arise where we will not implement what Brussels says. And once we don't do it, we face legal action.” <https://magyarnemzet.hu/belfold/2023/12/orban-viktor-rendet-kell-vagni-brusszelben>.

¹⁷ See for example the Commission's Implementing Decision approving the programme „Economic Development and Innovation Operational Programme Plus” (Hungary), recital 8, available at: [https://ec.europa.eu/transparency/documents-register/api/files/C\(2022\)10009_0/de00000001050996?rendition=false](https://ec.europa.eu/transparency/documents-register/api/files/C(2022)10009_0/de00000001050996?rendition=false)

implementation of the judicial reform is also a precondition for payments from Union funds covered by the CPR.

Free media is indispensable for democracies. Accordingly, the detection of issues related to media-freedom is one of the most prominent aim of the annual rule of law cycle. As of 2020, subsequent rule of law reports identified recurrent irregularities regarding the plurality of the media market, the independence of the Media Authority, as well as the politically biased allocation of state advertising in Hungary. However, conditionality regimes (considering their primary aims) are not designed to safeguard media freedom in Member States.

i. 2020 Rule of law report

While there is prosecution of high-level corruption in some cases, it remains very limited.

The strategic anti-corruption framework does not include actions in other areas relevant for corruption prevention.

ii. 2021 Rule of law report

Challenges remain as regards the investigation and prosecution of high-level corruption cases.

The narrowing of the scope of application of public procurement rules has heightened the risk of corruption.

Hungary has an extensive asset disclosure system, however, concerns remain regarding the lack of systematic checks and insufficient oversight of asset and interest declarations.

iii. 2022 Rule of law report

Detection tools, including asset declarations, whistleblower disclosures and registries, play a relatively minor role in corruption investigations. State bodies with supervisory functions have seen political appointments raising questions as to their impartiality in detecting corruption.

Challenges remain in establishing a track-record of investigations, prosecutions and final judgments in high-level corruption cases.

(ii) European Semester

As of 2019, a growing number of challenges related to the rule of law are addressed by the country-specific recommendations under the European Semester. This tendency gives a special role to the Hungarian recovery plan in enhancing transparency in law-making as well as strengthening judicial independence.

The RFR requires Member States to bring national recovery plans in line with the country-specific priorities identified in the context of the European Semester. As a result, the 'super milestones' of the Hungarian recovery plan are designed to remedy long-lasting shortcomings and challenges regarding judicial independence, public procurement, anti-corruption framework and the transparency of decision making.

"Reinforce the anti-corruption framework, including by improving prosecutorial efforts and access to public information"

- Country Specific Recommendation 4 of 2019
- Country Specific Recommendation 4 of 2022

"Improve competition in public procurement"

- Country Specific Recommendation 3 of 2019
- Country Specific Recommendation 4 of 2020
- Country Specific Recommendation 4 of 2022

"Improve the quality and transparency of the decision-making process through effective social dialogue, engagement with other stakeholders and regular impact assessments"

- Country Specific Recommendation 4 of 2019
- Country Specific Recommendation 4 of 2022

"Strengthen judicial independence"

- Country Specific Recommendation 4 of 2019
 - Country Specific Recommendation 4 of 2022
-

(iii) Infringement procedures

Infringement procedures are designed to address breaches of EU law, either through legal instruments and/or by practice of member states. These procedures, unlike the conditionality regimes, can target all obligations stemming from EU law. At the

same time, these procedures have traditionally been used by the Commission in less holistic ways.

Article 260 TFEU, as opposed to the various conditionality regimes, provides for the possibility to impose sanctions in the form of financial penalties for non-compliance with a judgment of the Court of Justice of the EU. In December 2020, the CJEU found Hungarian law and practice concerning the execution of collective expulsion measures to be in breach of EU law. As the Government refuses to implement the judgment and push-backs continue, the EC referred Hungary back to the CJEU, requesting the imposition of fines. This is the first such case in the history of Hungary's EU membership

In the case of Hungary, some of the findings of the Commission and the Court made in the context of infringement procedures were referred to as reasons for the application of some of the conditionality regimes.

(iv) Procedure under Article 7 TEU

A large portion of issues regarding corruption, breaches of fundamental rights and attacks against judicial independence are addressed in the framework of the three conditionality regimes. However, there are additional challenges regarding checks and balances, identified in the European Parliament's proposal of 2018 calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (the Sargentini report).¹⁸ Following a series of hearings in the Council, the European Parliament has adopted an interim report on its original proposal in 2022 (the Delbos-Corfield report), supplementing the Sargentini report with key developments on already identified and new areas of concern.¹⁹ Areas covered by the ensuing Article 7 procedure in the Council thus concerns for example media freedom, freedom of religion, the functioning of the electoral system, law-making, and social rights. Several important areas of concern that are not covered by the conditionality regimes, largely owing to the

fundamentally different purpose and scope, are in fact covered by the Article 7 TEU procedure.

5. Weaknesses

Although more than a year has passed since the decisions to suspend certain funds under the various conditionality regimes in relation to Hungary, a number of shortcomings regarding the practical modalities and the implementation of the respective regulations can be identified already.

Common to all three conditionality regimes is a lack of transparency and consequently, of potential entry points for stakeholders (be them citizens, members of the academia, expert or professional representative organisations, civil society organisations). This is not an implementation problem, but directly stems from the respective regulations and the understanding of the concept of sincere cooperation by the European institutions and Member States, including in this case, Hungary.

The lack of transparency during the procedures increases the risks of hijacking the public discourse, which not only weakens the possibilities of a constructive dialogue among the parties of the procedures and the general public in the member state concerned, but can potentially undermine the credibility of the outcome of the fulfillment of the various milestones and targets. A prime example of this from Hungary is the adoption and consecutive amendments of the judicial reform of 2023. According to third party assessments (including that of academia and civil society), the requirements set out in the four judicial super milestones have not been fully met.²⁰ It remains to be published on what basis the Commission arrived at the contrary and decided to release funds blocked under the CPR's horizontal enabling condition on the EU Charter of Fundamental Rights regarding the independence of the judiciary (see above).

Partially related to the above is the lack of materials prepared in an accessible language that explain the procedures in general, and in case these are triggered, in a country-specific manner so that the

¹⁸ European Parliament Resolution P8_TA(2018)0340, available at: https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.pdf

¹⁹ European Parliament Resolution P9_TA(2022)0324, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0324_EN.pdf

²⁰ See for example Hungarian Helsinki Committee and Amnesty International: *Last Minute, makeshift solutions cannot resolve long-standing rule of law concerns*, available at: <https://helsinki.hu/en/wp-content/uploads/sites/2/2023/12/Makeshift-solutions-cannot-resolve-RoL-concerns.pdf>

wider public can better understand the reasons behind the suspension of potentially significant amounts of funds. A prime example of this from Hungary is the reason behind the suspension of Erasmus and Horizon funds for higher education institutions under the management of the contested scheme of public interest asset management funds, as discussed above.

That the Commission does not regard this kind of communication important is also seen in relation to the Rule of Law Report, where the publication of the report was moved to the summer season and the communication of its findings in Hungary was left to civil society organisations that provide contributions to the report during the stakeholder consultations.

Specifically, regarding the horizontal condition requiring the effective application and implementation of the Charter, the lack of awareness of the rights enshrined therein as well as the

reporting possibilities of breaches of the Charter among the wider public,²¹ raises doubts about the systemic implementation of this condition.

However, civil society organisations participating at the respective monitoring committees of various EU funds have the opportunity to test and propose measures to strengthen the newly established reporting systems specifically set up in all Member States to receive complaints of violations of the Charter in relation to EU funded projects.

As in the case of Hungary, all available conditionality regimes have been applied, it is evident that both the wide scope of policy areas (from anti-corruption to rights of asylum seekers) and the different procedures (involving different Commissioners and directorate-generals, even in cases of complete overlap) can cause confusion regarding the political and professional ownership of the files.

²¹ European Commission, Directorate-General for Justice and Consumers, *Awareness of the Charter of Fundamental Rights of the*