

BEYOND CONFIRMING VALIDITY: IMPLICATIONS OF THE CJEU RULE OF LAW CONDITIONALITY CASES ON THE SCOPE OF EU VALUES

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Abstract

In its two landmark rulings from mid-February 2022, the European Court of Justice put another nail in the coffin of Hungary and Poland's attempts to undermine the EU rule of law toolbox thereby confirming the validity of the 'EU Conditionality Regulation'. The cases are instrumental not only in that they provide the organisation with another mechanism to curtail rule of law backsliding, but in that they reshape the normative understanding of EU values. After having briefly analysed the legal arguments brought forward by Hungary and Poland, and their subsequent dismissal by the Court, this article aims to go beyond the 'validity discussion' by reflecting on the cutting-edge aspects of the Court's reasoning and how they translate into stretching the scope of EU values. It concludes that, by laying the groundwork for such extension of scope and competence, the Court may have created further confusion when it comes to adjudicating the latter.

Keywords

EU Values, Rule of Law, Conditionality Regulation, Hungary, Poland

I. Introduction

On 16 February 2022, the European Court of Justice (CJEU) delivered its two long-awaited rulings in the so-called 'EU Conditionality Cases' (*C-156/21 Hungary v Parliament and Council*, 2022; *C- 57/21 Poland v Parliament and Council*, 2022) in response to Hungary and Poland's attempts to invalidate the EU Regulation on a General Regime of Conditionality for the Protection of the Union Budget (Regulation 2020/2092, 2020) through an action for annulment. The latter action had come, without much surprise, virtually upon the Regulation's entry into force² and in the context of a heated bargaining over the EU's Multi-Annual Financial Framework and COVID-19 emergency relief package (Progin-Theuerkauf & Berger, 2022), which gave Poland and Hungary the upper hand in the negotiations (Apelblat, 2020; Baraggia & Bonelli, 2022). While the cases were pending before the CJEU, the Regulation had to be suspended, and was thus unable to fulfil its original purpose – to protect the EU's financial interests by suspending funding of Member States where it threatens to impair the 'sound financial management of the EU budget' (Regulation 2020/2092, 2020, para. 7).

Much has been said and done about the ongoing rule of law crisis in Hungary and Poland,³ two EU Member States which have 'gone rogue' in their assessment of the rights and obligations bestowed upon them through their membership in the organisation (Bárd, 2020; Closa & Kochenov, 2016; Pech et al., 2021; Pech & Scheppele, 2017). The mechanisms on which the European Commission – and other EU institutions for that matter – had relied on to curtail their course of action had been, however, peer-review based for the most part (Konciewicz, 2021; Pech & Kochenov, 2019; Renáta, 2019). Having engaged in various forms of dialogue to little avail (Halmai, 2018; Pech et al., 2021), and after a rather challenging legislative process (Eder, 2017), the EU has thus been prompted to 'hit where it hurts' by adopting an economic-based 'Conditionality Regulation' (Baraggia

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² Please note that the Regulation has come into force on 16 December 2020 while both actions for annulment had been brought on 11 March 2021, thus within a relatively short timeframe.

³ This is not to assert that Hungary and Poland are the only European Union Member States who are suffering from deficiencies in the area of rule of law but given the point of focus of the article which concerns the 'EU Conditionality Cases' brought specifically by these two States, its scope will be limited accordingly.

& Bonelli, 2022; Łacny, 2021). The logic behind this kind of mechanism is that the respect for rule of law must be observed throughout all EU policies, including those of a financial nature, otherwise the common resources may not be used meaningfully and/or may in fact end up undermining the Union's other activities (Łacny, 2021). Namely, the EU financial interests are threatened in instances where the Member State in question can no longer ensure that all its public powers act within the constraints set out by law, in line with the principle of legality, legal certainty, effective judicial protection and separation of powers, or where it cannot guarantee that its judiciary remains independent and impartial (Regulation 2020/2092, 2020, paras 3, 8).

Under such circumstances, the Regulation provides a legal basis for the EU institutions to, as a matter of protection of the common budget and following strict conditions and procedural guarantees (Regulation 2020/2092, 2020, para 17), suspend in one way or another the payments to the Member State concerned. Possibly entailing significant economic ramifications for Hungary and Poland, large per-capita recipients of EU funds notoriously known for their decreasing rule of law record (Baraggia & Bonelli, 2022), the action for annulment was followed closely. In particular, many hoped that the Court's judgments would rule out any ill-intended legal arguments that could be invoked to cripple the Regulation's use. In its two separate rulings, the CJEU did exactly that. Not only did it confirm the validity of the Regulation, hence listing it among the tools which the EU institutions may be encouraged to use given the chance (European Parliament Press Release, 2022), but arguably went a long way in shaping the very content and scope of the previously static EU values (Coghlan, 2022). This bold move towards increased accountability has, in many respects, changed our normative understanding of EU law and the CJEU's competence, yet only a few authors have reflected on the scale of its possible implications (Coghlan, 2022; Groussot et al., 2022).

By means of this short article, an attempt will be made to contribute to the rule of law and values discussion which remains unequivocally up-to-date in the EU, and especially how it could be informed by the reasoning adopted by the CJEU in the 'EU Conditionality Cases'. After having briefly examined the legal arguments brought forward by Hungary and Poland, as well as their subsequent dismissal by the Court in Chapter II, this contribution will then go beyond the 'validity discussion' by reflecting on the cutting-edge aspects of the Court's reasoning and how they, in theory, translate into stretching the constitutional meaning of Article 2 of the Treaty on the European Union (TEU). Chapter IV will then offer some concluding observations, outlining how this 'good news' could be turned into 'bad news' instead, and how this may impact EU values adjudication.

II. Confirming Validity: The CJEU's Dismissal of the Hungarian and Polish Arguments

In its rulings, the CJEU followed the line of reasoning of Advocate General Manuel Campos Sánchez-Bordona, who delivered an Opinion in the cases in early December 2021 (CJEU Press Release, 2021). Through its first plea, Hungary and Poland questioned the legal basis of the 'Conditionality Regulation', namely that the relevant provisions of the Treaty on the Functioning of the European Union (TFEU) stipulating financial rules relating to budget, as well as specifying checks on responsibility of financial actors (Articles 322(1)(a) and (b) and 322(2)), do not provide the EU with sufficient legal grounds to set up a general regime of conditionality with respect to rule of law because the provisions of the impugned Regulation cannot be regarded as "financial rules" within the meaning of the TFEU (*C-156/21 Hungary v Parliament and Council*, 2022, paras 67–89). In particular, Hungary submitted that the TFEU does not authorise the EU to determine what constitutes a breach of rule of law nor does it define it, therefore in consequence the TFEU cannot provide legal basis for establishing such breach or prescribing its legal consequences (para 74).

It is true that neither the TEU nor the TFEU explicitly delineate the exact scope and meaning of EU values. However, in response to Hungary's submission, the CJEU emphasised the constitutional value of Article 2 values as one identifying the 'very identity' of the EU as a 'common legal order', which in turn warrants that the EU possesses appropriate means to defend these values (para 127). Moreover, the existence of a direct link between the EU budget and the principle of solidarity,

the implementation of which conforms to the principle of mutual trust “between the Member States in the responsible use of the common resources included in that budget” (para 129) further supports this legal doctrine. According to the Court, those situations in Member States which touch upon rule of law guarantees are thus relevant for the management of the EU budget and clearly fall within the scope of EU law not only by way of EU values but also from a financial standpoint. Hence, rule of law can form the basis for horizontal (financial) conditionality (paras 145–146).

Second, both Hungary and Poland submitted that Article 7 TEU – a provision which is supposed to determine the risk of, or the existence of a ‘serious breach’ of the values stipulated in Article 2 TEU – already puts forward a parallel procedure to prevent and sanction the breaches of EU values, including rule of law. As a result, the Regulation infringes Article 7 in that it duplicates the purpose of the original procedure as well as the substantive procedural steps pertaining to it (*C-156/21 Hungary v Parliament and Council*, 2022, paras 81, 85–86). Moreover, as the Regulation stands, Hungary and Poland claim that the jurisdictional competence of the Court extends beyond matters that would otherwise fall outside of its scope. This is because the Court has jurisdiction to review decisions of the Council taken on the basis of the Regulation, i.e., power to determine whether an action or actions of the Member State amount to a breach of the principle of rule of law (para 83). Such extension of power of the Council, Commission and the Court allegedly runs against the provisions of the Treaties and circumvents the limitations laid down in Article 269 TFEU, let alone circumvents the Article 7 TEU itself as the sole provision establishing the “power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the principles of the rule of law” (para 84). The limit imposed on the CJEU’s jurisdiction in relation to Article 7 proceedings via Article 269 TFEU clearly attests that, as does the limit on division and conferral of powers as it stems from Articles 4(1) and 5(2) TEU. In an analogous vein, Hungary submitted that even in the event that the examination carried out under the Regulation is linked to the ‘sound management of the EU budget’, that does not necessarily bring the domestic situations assessed thereby under the scope of EU law solely by virtue of that relationship. Because the establishing of relationship only comes in the second phase of the procedure, the existence of a breach is in fact examined at a stage where such relationship had not yet existed, and thus allows for a determination of breach in situations which are clearly outside the scope of EU law (para 92).

However, this line of reasoning was rejected by the Court. While Article 7 TEU grants EU institutions with a power to examine areas which may otherwise fall outside of its jurisdiction, and this legislative power cannot be transferred (*C-156/21 Hungary v Parliament and Council*, 2022, para 155), there are other Treaty provisions which in fact have the same legal effect (para 160). Therefore, rule of law can be, too, protected under other procedures than Article 7 (para 163). This is not to say that the EU legislature can introduce parallel procedures to the latter in terms of the subject matter, objective and measures concerned (para 167). However, the purpose of each instrument must be distinguished (paras 175–179). While Article 7 is meant to prevent and/or sanction serious breaches of all EU values, not limiting itself to rule of law, the Regulation only applies to breaches of rule of law relating to the implementation of the EU budget (para 164). In fact, the CJEU held that there must be ‘reasonable grounds’ for establishing a link between a breach of rule of law and its budgetary implications (paras 173–174), which rules out arbitrary use of the instrument. In any case, the subject matter of each of the instrument differs, and so does the institutional power of initiative (paras 169–175).

Hungary and Poland further claimed that due to differences in the political and constitutional traditions of the Member States and their distinct national identity, which include different legal systems, the principle of rule of law and its constituent elements cannot be interpreted uniformly (*C-157/21 Poland v Parliament and Council*, 2022, para 68). Since the meaning of rule of law was not explicitly defined in the Treaties in the first place, and was instead confined through the means of ‘aims’ they pursue, it follows that the particular manner in which Member States seek to achieve

it cannot be specified. Instead, Member States can be only expected to ensure ‘their essence’. This holds true even though some international organisations may have attempted to draw up certain criteria for assessing the meaning of rule of law (para 68).

In response, the Court highlighted the need for a ‘real link’ between the rule of law violation and its budgetary implications (*C-156/21 Hungary v Parliament and Council*, 2022, para 244). It stated, in particular, that the Regulation requires a situation or conduct to be ‘attributable to a public authority’ and be of relevance either to the sound financial management of the EU budget or the Union’s financial interests in that it affects or seriously risks affecting the latter, in a ‘sufficiently direct way’ (para 253). In fact, there must be a ‘sufficiently direct link’ with high possibility of occurring. In the Court’s words, this must be a ‘genuine link’ between the breach of rule of law and the serious risk of impairing the EU financial interests or the sound management of its budget, while an emphasis is put on the relevant procedural requirements that the Commission must adhere to (paras 267, 280–288). Similarly, the measures taken on the basis of the Regulation must be strictly proportionate to the budgetary implications of the breach, bearing in mind the limit of strict necessity as regards the objective of protecting the EU budget (paras 271–275).

A separate argument raised by Poland relates to an alleged breach of the principle of equality of Member States before the Treaties and non-respect for their national identities as laid down in Article 4(2) TEU. Namely, the qualified majority voting (QMV) system, which lies at the heart of the penalty mechanism to which the Regulation gives rise, implies the participation of the Member State concerned and thus directly discriminates against small and medium-sized States (*C-157/21 Poland v Parliament and Council*, 2022, paras 276–277). That is because “the larger Member States, representing a greater percentage of the population of the European Union, are thus favoured in votes involving the adoption of measures for the protection of the Union budget, particularly of those which concern them directly, compared to small and medium-sized Member States, representing a lower proportion of the population” (para 277). According to Poland, while QMV represents the standard voting procedure when it comes to the adoption of normative acts, it cannot be equalled with a procedure of punitive nature such as that designed by the Regulation, especially since the effects of the latter are intended to impact a single Member State (para 277).

The Court disputed this reasoning whilst repeating the strict procedural requirements on the part of both the Commission and Council. Namely, pursuant to the Regulation, both institutions have to follow an ‘evidenced-based approach’ and duly respect the principles of objectivity, non-discrimination and equal treatment of Member States before the Treaties (*C-157/21 Poland v Parliament and Council*, 2022, para 286). The assessment of the particular situation in the Member State concerned must “be objective, impartial and fair, compliance with all of those obligations being subject to full judicial review by the Court” (para 286). Additionally, since the Council’s QVM voting has its legal basis in Article 16(3) TEU, it cannot constitute a violation of Article 4(2) TEU as per the Court’s assessment (paras 307–308).

The legal value of the two judgments lies, *prima facie*, in dismissing all of the arguments of Hungary and Poland, respectively, and thereby confirming the legality of the Regulation. Indeed, this may hold true for many lawyers as the Regulation can now be used in practice, if deemed necessary (European Parliament Press Release, 2022). This may in turn have practical implications for the manner in which Member States frame and go about their rule of law agenda – be it judicial reforms, the adoption of new legislative acts or other activities which may raise rule of law considerations. It cannot be disputed that, in that sense, the rulings mark another victory in the EU’s long ‘rule of law backsliding saga’ (Wouters & Ovádek, 2021). According to some scholars, in fact, the ‘EU Conditionality Cases’ not only confirm the possibility of introducing other parallel instruments to Article 7 TEU without undermining the latter, but also open the pathway for further conditionality instruments with horizontal effect, which may become increasingly relevant in the EU’s future endeavours (Progin-Theuerkauf & Berger, 2022). The rise of conditionality in the EU law and policy-aking has, however, already become quite pervasive (Baraggia & Bonelli, 2022), and it is

especially in light of this conditionality that similar mechanisms should have a sound justification. The CJEU rulings have laid down a thorough legal reasoning in support of such conditionality.

In spite of this assumed victory, some scholars may be tempted to engage in a more substantive discussion on what the particular limits set out in the Court's reasoning, namely the need of a 'genuine link' between the breach of rule of law and the serious risk of impairing the EU financial interests or the sound management of its budget, may mean in practice. Would it significantly limit the scope of application of the regulation, and are the prospects of its use even meaningful in reality? (Progin-Theuerkauf & Berger, 2022). In other words, will it become another mechanism of primarily symbolic value? In particular, observers argue that even before the CJEU judgments were delivered, the wording of the Regulation was toned down by Hungarian and Polish diplomatic efforts, making the text only a compromise of its previous draft in the face of a threatening veto (Baraggia & Bonelli, 2022). Other conceptually-oriented researchers may inquire into whether financial incentives can restore compliance with the rule of law in the first place, and whether a financial conditionality is desirable as a mechanism to fight rule of law backsliding, if that is what is essentially at the core of this Regulation (Halmai, 2018; Łacny, 2021).

However, this contribution aims to go beyond these discussions in emphasising other aspects of the rulings which, albeit lacking the spotlight, may have tremendous impact on the normative understanding of Article 2 TEU, and thus bring in questions of constitutional importance.

III. ...And beyond?: Stretching the Constitutional Meaning of Article 2 to Better Facilitate Adjudication, or to Create More Confusion?

From an EU constitutional standpoint, the most striking aspect of the rulings is not the fact that the CJEU dismissed all the arguments brought by Hungary and Poland, nor that it may have clarified the reasoning behind, and the legal justification of, a mechanism for horizontal accountability (Progin-Theuerkauf & Berger, 2022; Baraggia & Bonelli, 2022; Wahl, 2022). Rather it is that they designate all the twelve 'notions' laid out in Article 2 TEU as equivalent (Coghlan, 2022). The term 'notions' is used expressly here since the EU law labels these terms as both "values" and "principles" in the TEU provisions and the Court's previous case-law, which naturally creates some level of ambiguity as to their legal standing and structural relationships vis-à-vis themselves and other provisions. Even those who are not extensively familiar with the academic discussions on the scope of Article 2 TEU and its legal enforceability (Klamert & Kochenov, 2019, p. 2; von Bogdandy & Spieker, 2019), mostly depart from the basic assumption that there is a distinction between 'values' and 'other concepts' in the wording of Article 2 (Amato et al., 2007).

Namely, the first six terms which appear in the text of Article 2 ('respect for human dignity; freedom; democracy; equality; the rule of law; and respect for human rights') are explicitly referred to as "values" ("The Union is founded on the *values*..." [emphasis added] (European Union, 2007 Article 2)). On the other hand, the following six terms seem to only supplement the former, intentionally missing the same kind of designation ("...in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" (European Union, 2007 Article 2)). Indeed, it can be noted that the word "values" does not appear in respect to the other six terms as opposed to another reference to "values" at the beginning of the sentence referring to the first six terms ("These *values* are common..." [emphasis added] (European Union, 2007 Article 2)). This seemingly linguistic difference, or distinction, is by no mean inconsequential. In fact, it is of great importance for the EU *acquis* and comes with important legal implications (Coghlan, 2022). In particular, it brings questions relating to the use of Article 7 TEU – the already mentioned sanctioning mechanism which can be only activated when there is a serious risk, or a breach of, EU "values" (European Union, 2007 Article 7).

Notably, in contradiction with this underlying assumption distinguishing between 'values' and 'other concepts' in the text of the TEU, and also in contradiction with its own previous jurisprudence (*see e.g. C-848/19 P Germany v Poland*, 2021, para. 39), in the cases at hand, the CJEU asserts that

“Articles 6, 10 to 13, 15, 16, 20, 21 and 23 of the Charter define the scope of the *values* of human dignity, freedom, equality, respect for human rights, non-discrimination and equality between women and men, contained in Article 2 TEU.” [emphasis added] (*C-156/21 Hungary v Parliament and Council*, 2022, para. 157; *C-157/21 Poland v Parliament and Council*, 2022, para. 193).

Interestingly, ‘non-discrimination’ and ‘equality between women and men’, which arguably appear among the ‘other six’ terms, are listed here along with the values of ‘human dignity’, ‘freedom’, ‘equality’ and ‘respect of human rights’ from the ‘first six’. This inclusion of two terms previously understood as part of the other group virtually erases the line between ‘values’ on one hand, and ‘other concepts’ on the other (Amato et al., 2007). It depicts all twelve terms as of equal value – equal in terms of hierarchy and legal enforceability, laying the groundwork for the CJEU to adjudicate on all Article 2 notions in their capacity as ‘values’ and for all of them to be potentially considered on the basis of Article 7 TEU (Coghlan, 2022). Albeit this may seem like a clarification of technical nature, it accounts for an important expansion of both the scope of the EU values and the CJEU’s own competence (Coghlan, 2022). This puts the institutional balance into question, undermining the Commission’s role as the ‘guardian of the Treaties’ (Alemanno & Chamon, 2020), as the new *status quo* paves the way for an increased role of the Council and the CJEU in matters which traditionally concern the Commission’s sphere of initiative.

It is also worth mentioning here that the concept of ‘EU values’ has been commonly considered somewhat *less law* in comparison to other, more straightforwardly legally enforceable provisions of the EU *acquis* (Kochenov, 2017; Kozlová, 2021; Scheppele et al., 2021). This contribution argues along the lines of it being so wrongly since this belief stands in stark contrast with the purpose of the EU founding Treaties and the social reality which attests to the constitutional importance of EU values as undergirding the very functioning of the Union (Scheppele et al., 2021; *C-156/21 Hungary v Parliament and Council*, 2022, para 127). At the same time, what can be seen as a failure of Article 7 TEU (Kochenov, 2021) clearly indicates that this development will not lead to a radical change following which the EU institutions would initiate Article 7 proceedings – or at least its first institutionally viable part – on a regular basis. It is thus not submitted that substantial changes as regards Article 7 are to be expected. In any case, the prospect of the CJEU adjudicating all twelve Article 2 notions on an equal footing, and for Article 7 to be able to respond not only to the first six, but all twelve notions, remains important for the discussion on enforcement of EU values. The bottom line seems to be simple – does this really mean that all Article 2 notions are equally-binding and equally legally enforceable values within the meaning of EU law? Should all the relevant actors, legal and political, depart from this assumption in their future considerations?

On a different note, as has been pointed out in the Court’s previous case-law, including in the present rulings (*C-157/21 Poland v Parliament and Council*, 2022, para 68), and as is widely known among scholars, the TEU does not provide an explicit definition of either of the terms contained in Article 2. This fact remains undisputed. While some of the Article 2 terms may have a more universally accepted definition – for example, ‘equality between women and men’ may be understood in a more narrow and straightforward manner than ‘human dignity’ or ‘rule of law’, which imply a higher level of ambiguity, the Treaty drafters in any case remained silent as to what establishes these particular terms. Whatever the particular reasons for it, be it the differences in the constitutional traditions and fears of undermining legal certainty (Miettinen & Kettunen, 2015), or a somewhat naïve belief that there already is a common understanding of what the EU values represent (Kochenov, 2021), the absence of definition had created room for interpretation. On one hand, this led to a difficult legal position with a lot of uncertainty. On the other, it also established the possibility to frame different social phenomena within the scope of the terms, i.e., ruled out over narrowing of their scope.

The ‘EU Conditionality Cases’ broke with this long-standing tradition in an unprecedented move to define six (and clarify the meaning of one) of the Article 2 notions. This has resulted in both narrowing and expanding their scope, paradoxically creating further confusion. If we were to look

at the previously mentioned verbatim citation again, it is put forward that “Articles 6, 10 to 13, 15, 16, 20, 21 and 23 of the Charter define the scope of the values of human dignity, freedom, equality, respect for human rights, non-discrimination and equality between women and men” [emphasis added] (*C-156/21 Hungary v Parliament and Council*, 2022, para. 157; *C-157/21 Poland v Parliament and Council*, 2022, para. 193). In other words, a cluster of Charter rights are used here to provide the definitions of six previously (and most likely purposefully so) vague, non-exhaustive terms. The Court does so somewhat in passing, content with defining six values in one paragraph (Coghlan, 2022). In para 158, it goes on by stating that

“Articles 8 and 10, Article 19(1), Article 153(1)(i) and Article 157(1) TFEU define the scope of the values of equality, non-discrimination and equality between women and men and allow the EU legislature to adopt secondary legislation intended to implement those values” (*C-156/21 Hungary v Parliament and Council*, 2022).

Importantly, this attempted definition of the six terms seems to be in contrast with the Court’s approach to the concept of ‘rule of law’, for which much more complex and lengthier references to Article 19 TEU, Article 47 to 50 of the Charter and other standards including the work of the Council of Europe’s Venice Commission (*C-156/21 Hungary v Parliament and Council*, 2022, para. 160, *C-157/21 Poland v Parliament and Council*, 2022, paras 196, 229) were required. This may, of course, signify that the definitions provided in the Court’s reasoning were not meant to be exhaustive. After all, this is an assumption that would be supported by the language version discrepancies, namely the fact that other language versions tend to rather use the word ‘clarify’, ‘indicate’ as opposed to the stricter English ‘define’ (Coghlan, 2022). Notwithstanding, even if the definitions were supposed to only provide authoritative guidance for the Member States, EU institutions and other actors, the confusion created by the different language versions, one which could have been duly anticipated, only adds fuel to the rule of law discussion. Arguably, instead of clarifying and simplifying the meaning and scope of the Article 2 terms and thereby better facilitating the adjudication of EU values, the Court may have created unintended consequences which may negatively reflect on the latter. In any case, it remains unclear what the Court’s incentive to make such a bold step was, and it comes as rather surprising that it even attempted to provide definitions to these politically charged concepts.

Another dimension of the ‘EU Conditionality Cases’, which will not be discussed in detail in this contribution, but which may be of even more significant constitutional importance, is the question of whether and under what circumstances can all the twelve notions listed under Article 2 TEU acquire the normative status of legal norms whilst becoming so-called ‘founding’ principles with corresponding legal enforceability (Groussot et al., 2022). After all, the Court made it clear that the concept of rule of law retains operational functionality as a ‘founding’ principle which has more than a prominent role in the EU’s legal order. What is more, however, it is suggested from the Court’s reasoning that the principle of solidarity – which has been particularly underlined in the rulings – has, too, become one. This creates further uncertainty as regards the adjudication of EU values in that it truly opens the door to further discussions on the possibility of the twelve notions to acquire such ‘founding principle’ status within the EU constitutional framework (Groussot et al., 2022).

IV. Conclusion

The very idea of a horizontal conditionality mechanism sets the EU on a certain constitutional path, which may prove sometimes fortuitous and other times ruinous (Baraggia & Bonelli, 2022). In a practical sense, the legal value of the two CJEU rulings lies in their dismissal of the arguments brought by Hungary and Poland, respectively, and thereby the confirmation of legality of the ‘EU Conditionality Regulation’. Since the Guidelines aimed to clarify the functioning of the Regulation have been already published on the Commission’s website (Rule of Law Conditionality Regulation, 2021), the Regulation can be invoked from now on. In spite of what Hungary or Poland may claim

(Progin-Theuerkauf & Berger, 2022), this will likely have practical implications on the manner in which Member States frame and go about their rule of law agenda. It should be thus asserted that the rulings put another nail in the coffin of Hungary and Poland's attempts to undermine the EU rule of law toolbox, as well as strengthening the credibility of the EU's activities. Not only does the Court confirm the possibility of introducing other parallel instruments to Article 7 TEU, but it also lays the groundwork for further conditionality instruments with horizontal effect which – albeit they bring their own political, legal and ethical questions – may become increasingly relevant in the future (Halmai, 2018; Progin-Theuerkauf & Berger, 2022).

However, at the same time, the judgements seem to have gone further than simply confirming the validity of the Regulation. In fact, they seem to have opened a much deeper discussion of constitutional value. Namely, the expansion of scope of EU values to all twelve notions stipulated in Article 2 TEU along with the corresponding expansion of the CJEU's competence in this context, is of essence. The further attempt at defining the content of the values, or to clarify the scope thereof, arguably both narrows and expands their scope. From a lawyer's perspective, ruling out over-expansive interpretation of the concepts by defining them may prove helpful when it comes to legal clarity of the terms, and may lead to a more uniform adjudication. It may, nevertheless, make it more difficult for certain social phenomena to be considered within the scope of the terms (Coghlan, 2022). Even though this move may have come as an attempt to better facilitate adjudication, and for the Court to respond more flexibly to deviations from the Union's most basic values, the fact that the CJEU did so only in passing and in contrast with its previous jurisprudence, leads to a somewhat controversial and ambiguous state of legal terrain. Moreover, since different language versions use different terminology, it seems that the Court successfully created more confusion than legal certainty. In conclusion, the fact that there may have been expansion and restriction of scope of some particular notions, should be approached with caution and likely be interpreted as guidance for how the Court generally views the concepts rather than an exhaustive definition thereof. The judgments offer room for interesting reflections on the constitutional meaning of Article 2 values, as evidenced by the opening of discussion on the establishment of threshold for becoming a 'founding' principle of EU law (Groussot et al., 2022).

In any case, this is only the beginning of, or rather the latest addition to, the rule of law backsliding crisis. The CJEU judgments do an important job of confirming the legality of an instrument which, despite its own challenges, has definitely a much more viable chance of bringing about a positive change in rule of law backsliding Member States than Article 7 TEU as a result of its lower decision-making thresholds (Baraggia & Bonelli, 2022). It is essential to keep in mind that discussions surrounding rule of law – and constitutional backsliding more generally – remain strikingly important for Europe. Despite the volatile political and security context to which the European continent woke up on the 24th of February 2022 – one which has the ability to adversely impact the values conversation through diverting attention from it altogether – the EU should not lose sight of its importance (Bard & Kochenov, 2022). It is clear that the rulings provide a basis for stretching the constitutional meaning of Article 2. On the other hand, it remains to be seen in what ways it will influence the rule of law discussion and the CJEU's adjudication of EU values.

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