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Study | 09.07.2021

The EU Commission has to cut funding to Hungary: the legal case

A study commissioned by the Greens/EFA Rights & Democracy Cluster

INTRODUCTION

Today, we are calling for the European Commission to trigger the new Rule of Law Conditionality Regulation (EU, Euratom) 2020/2092 with respect to Hungary. Specifically, we are calling on the Commission to issue a written notification to the government of Hungary pursuant to Article 6(1) of the Regulation, the first step in a process that that could eventually lead to the suspension of EU funds.

In its resolution of 25 March 2021 (1), the Parliament gave the Commission a deadline of 1st June 2021 to respond to our call for immediate application of the Regulation, which entered into force on 1 January 2021. We maintain that no guidelines are necessary for application of the Regulation because the Regulation itself does not require any. We also maintain that the Commission need not wait for the Court of Justice to rule on the actions for annulment lodged by Hungary and Poland challenging the legality of the Conditionality Regulation. An EU regulation does not cease to be applicable simply because it is subject to a pending annulment action; it ceases to be applicable only if and when the Court of Justice finds the action to be well founded and declares the nullity of the contested act. We now call upon the Commission to fulfil its duty as the Guardian of the Treaties and to apply the regulation against Hungary immediately.

To facilitate this process, we have done the Commission's work for it. We have prepared a model of the written notification under the Conditionality Regulation that the Commission should send to the Hungarian government immediately, documenting A) the lack of transparent management of EU funds, B) the lack of an effective national prosecution service to investigate and prosecute fraud, and C) the lack of guarantee of independent courts to ensure that EU law is reliably enforced, including measures affecting the Union's budget and financial interest.

We have also performed an analysis of the various EU legal instruments designed to ensure the proper spending of EU funds and have determined that the problematic stewardship of EU funds in Hungary is best addressed through the immediate application of the Conditionality Regulation.

Because the Rule of Law Conditionality Regulation applies only to EU funds awarded after 1 January 2021, some observers have assumed that it cannot be triggered until and unless specific instances of fraud against these new EU funds are detected. This is plainly incorrect. Rather, the Regulation explicitly demands the Commission take a proactive, risk-based approach to protect the EU budget. This does not require the Commission to wait until specific instances of fraud or abuse of EU funds under the new budget can be documented, but instead requires the Commission to act to address serious risk of such fraud or abuse created by existing breaches of rule of law principles enumerated in the Regulation.

The model notification we are publishing today demonstrates that this serious risk already exists in Hungary because Hungary has already engaged in grave breaches of the rule of law as defined in the Regulation, which requires that Member States ensure:

> *… 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. (2)*

Risks generated by a failure to honour the rule of law constitute a threat to the sound financial management of the Union budget, and these are risks that the Commission must confront and insist on being remedied by Hungary before it can responsibly release funds to it. Indeed: remedy first, release later.

While some of the rule of law breaches we identify in the model notification are of recent origin, many of them are long-standing violations that have not been addressed, despite repeated criticisms from many European Union institutions, international organisations, as well as civil society actors. The fact that some breaches are longstanding and persistent does not make them any less threatening to the responsible management of EU funds. Indeed, they may be even more threatening because they are more entrenched.

New streams of EU funds will soon be released to Member States under the Multi-Annual Financial Framework (MFF) and through the Recovery Fund, based on plans currently being submitted to the Commission. Now is the time for the Conditionality Regulation to be activated to ensure that proper accountability mechanisms are in place before funds allocated to Hungary are authorized and committed.

The European Commission frequently tells both the Parliament and the European public that it is serious about protecting the rule of law. Now is the time to show it.

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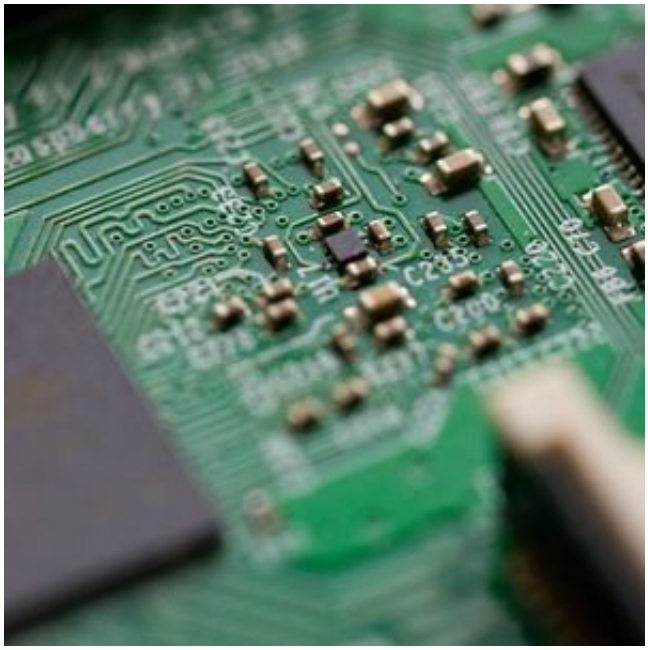
(1) European Parliament Resolution of 25 March 2021 on the Application of Regulation (EU, Euratom) 2020/2092, the Rule of Law Conditionality Mechanism (2021/2582/(RSP), P9_TA(2021)0103, at www.europarl.europa.eu/doceo/document/TA-9-2021-0103_EN.html.
(2) Regulation (Eu, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December

2020 on a General Regime of Conditionality for the Protection of the Union Budget, Article 2(1).

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