

INTRODUCTORY NOTE TO CASE C-156/21, HUNG. V. EUR. PARL. & COUNCIL AND  
CASE C-157/21, POL. V. EUR. PARL. & COUNCIL (C.J.E.U.)  
BY BARBARA GRABOWSKA-MOROZ\*  
[February 16, 2022]

## Introduction

The European Union's (EU) attempts to deal with the ongoing rule of law crisis in numerous member states resulted in the adoption of the so-called "rule of law conditionality" mechanism. Judicial challenges to the new tool before the Court of Justice resulted in two rulings<sup>1</sup> issued in February 2022 by the full court and livestreamed for the first time in the Court's history. The judgements might be considered the most important "rule of law rulings" in the Court's case-law, since they put the rule of law at the forefront of the European Union's identity.

## Background

Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget<sup>2</sup> was adopted in December 2020. It was the result of an ongoing debate on how to tackle rule of law backsliding in some EU member states. Despite the creation of numerous soft tools, the idea that EU member states should face financial consequences for breaching common EU values was suggested on numerous occasions.<sup>3</sup> The Commission's first proposal<sup>4</sup> of 2018 was criticized by the Council Legal Service, which argued that it established a procedure parallel to the one available under Article 7 of the Treaty on European Union (TEU).<sup>5</sup> After intensive negotiations, new sets of amendments were introduced, and Regulation 2020/2092 was adopted under the German presidency in the Council together with the multi-annual EU budget<sup>6</sup> and post-COVID recovery fund.<sup>7</sup>

The Regulation was adopted under Article 322(1)(a) of the Treaty on the Functioning of the EU (TFEU), which allows for the adoption of "financial rules" for the purpose of establishing and implementing the EU budget. Under the Regulation, the Commission can initiate the "conditionality procedure" when breaches of the rule of law "affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way." In case of ineffective dialogue with the breaching member state, the Commission can submit a proposal to the Council to adopt proper measures (within one month), such as, *inter alia*, suspension of the payments of EU funds to that member state.

Conclusions of the European Council adopted in December 2020 provided an interpretation of the Regulation, for instance stating that the Commission will adopt guidelines on how the Regulation will be applied, despite the fact that the Regulation does not mention any guidelines. The conclusions also suggested that the conditionality mechanism established by the Regulation would not be triggered until cases brought in March 2021 by Hungary and Poland under Article 263 TFEU to annul the regulation were decided by the Court of Justice. In both cases, the defendants—the Parliament and Council—were supported by numerous member states<sup>8</sup> and by the European Commission.

## Judgment of the Court

Hungary and Poland argued, *inter alia*, that the regulation lacked a valid legal basis and violated the institutional balance of the Union established by Article 7 TEU. The two states argued that there was no legal basis for the adoption of the Regulation and that Article 322(1)(a) TFEU was not an appropriate legal basis, since the established conditionality mechanism could not be considered "financial rules." In rejecting that claim, the Court found that the purpose of the contested Regulation is to protect the Union's budget and that therefore the established "conditionality mechanism" is capable of falling within the concept of "financial rules," within the meaning of Article 322(1)(a) TFEU.

Hungary and Poland also argued that the Regulation violated Article 7 TEU since Article 7 is the only procedure that allows the EU institutions to deal with violations of the rule of law by member states. The Court dismissed this argument, and held that there are numerous provisions in the Treaties that grant the EU institutions such powers, such as Article 19 TEU, which "gives concrete expression to the value of the rule of law."<sup>9</sup> The Court formulated a

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“differentiation test,”<sup>10</sup> stating that establishing a mechanism parallel to the Article 7 TEU procedure with the same subject matter, objective, and measures, but with different institutions involved or different procedural requirements, would constitute a violation of Article 7 TEU. By contrast, it would not be a violation of Article 7 TEU if a different procedure (in terms of aim and subject matter) related to values in Article 2 TEU were established.<sup>11</sup> Applying that test, the Court found that the Regulation passed, since it pursues a different purpose from that of Article 7 TEU and has a different subject matter. Consequently, both annulment actions were dismissed by the Court.

## Conclusion

The main new rule of law development resulting from the Court’s rulings is a finding that values contained in Article 2 TEU “define the very identity of the European Union as a common legal order.”<sup>12</sup> On one hand, it might be seen as a tool to protect the EU legal order against the abuse of the concept of “national identity” by some populist leaders in the EU member states.<sup>13</sup> On the other hand, such framing was criticized as simply unnecessary.<sup>14</sup> Despite such concurring perspectives, the Court has definitely strengthened the normative understanding of the rule of law under EU law.<sup>15</sup> The Court agreed on the existence of a “clear relationship: between respect for the rule of law and the efficient implementation of the Union budget,” and that the rule of law is also capable of constituting the basis of such a conditionality mechanism. Implementation of the mechanism will show how this “values-budget” link will be understood and executed in practice. In this sense, the introduction of “rule of law conditionality” might become a game-changer for rule of law protection by the EU institutions<sup>16</sup> as well as a new stage in the politics of conditionality in the European Union.<sup>17</sup>

After the Court’s rulings, the European Commission adopted the guidelines,<sup>18</sup> and in April 2022 triggered the procedure against Hungary, which resulted in the suspension of 55 percent of EU funds in December 2022.<sup>19</sup>

## ENDNOTES

- 1 Case C-156/21, *Hung. v. Eur. Parl. & Council*, ECLI:EU:C:2022:97 and Case C-157/21, *Pol. v. Eur. Parl. & Council*, ECLI:EU:C:2022:98.
- 2 2020 O.J. (L 433I) 1–10.
- 3 See letter of the Foreign Ministers of Denmark, Finland, Germany, and the Netherlands of Mar. 6, 2013, to the President of the European Commission, [https://www.eerstekamer.nl/eu/documenteu/\\_brief\\_nederland\\_duitsland/f=/vji8oh6slx9o.pdf](https://www.eerstekamer.nl/eu/documenteu/_brief_nederland_duitsland/f=/vji8oh6slx9o.pdf).
- 4 *Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union’s Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States*, COM (2018) 324 final.
- 5 *Opinion of the Council Legal Service*, 13593/18 (Oct. 25, 2018), ¶ 34.
- 6 Council Regulation 2020/2093 of Dec. 17, 2020, Laying Down the Multiannual Financial Framework for the Years 2021 to 2027, 2020 O.J. (L 433I), 11.
- 7 Council Regulation 2020/2094 of Dec. 14, 2020, Establishing a European Union Recovery Instrument to Support the Recovery in the Aftermath of the COVID-19 Crisis, 2020 O.J. (L 433I) 23.
- 8 Belgium, Denmark, Germany, Ireland, Spain, France, Luxembourg, Netherlands, Finland, Sweden.
- 9 See Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117, ¶ 32.
- 10 Marco Fisicaro, *Protection of the Rule of Law and ‘Competence Creep’ via the Budget: The Court of Justice on the Legality of the Conditionality Regulation*, 18 *EUR. CONST. L. REV.* 351 (2022).
- 11 *Hung. v. Eur. Parl. & Council*, ¶ 168; *Pol. v. Eur. Parl. & Council*, ¶ 207.
- 12 *Hung. v. Eur. Parl. & Council*, ¶¶ 127, 232; *Pol. v. Eur. Parl. & Council*, ¶¶ 145, 264.
- 13 Vestert Borger, *Constitutional Identity, the Rule of Law, and the Power of the Purse: The ECJ Approves the Conditionality Mechanism to Protect the Union Budget: Hungary and Poland v. Parliament and Council*, 59 *COMMON MKT. L. REV.* 1799 (2022).
- 14 Laurent Pech, *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law*, 14 *Hague J. Rule of L.* 118 (2022); Antonia Baraggia, *The “Conditionality” Regulation under the ECJ’s Scrutiny: A Constitutional Analysis*, 47 *Eur. L. Rev.* 694 (2022).
- 15 Baraggia, *id.* at 689, 694.
- 16 Borger, *supra* note 13, p. 1800.
- 17 Baraggia, *supra* note 14, p. 697–698.
- 18 *Communication from the Commission, Guidelines on the Application of the Regulation 2020/2092 on a General Regime of Conditionality for the Protection of the Union Budget 2022/C 123/02*, 2022 O.J. (C 123) 12.
- 19 Council of the European Union Press Release, *Rule of Law Conditionality Mechanism: Council Decides to Suspend €6.3 Billion Given Only Partial Remedial Action by Hungary* (Dec. 12, 2022).

CASE C-156/21, HUNG. V. EUR. PARL. & COUNCIL (C.J.E.U.)\*  
[February 16, 2022]

JUDGMENT OF THE COURT (Full Court)

16 February 2022\*\*

(Action for annulment – Regulation (EU, Euratom) 2020/2092 – General regime of conditionality for the protection of the European Union budget – Protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States – Legal basis – Article 322(1)(a) TFEU – Alleged circumvention of Article 7 TEU and Article 269 TFEU – Alleged infringements of Article 4(1), Article 5(2) and Article 13(2) TEU and of the principles of legal certainty, proportionality and equality of Member States before the Treaties)

In Case C 156/21,

ACTION for annulment under Article 263 TFEU, brought on 11 March 2021,

**Hungary**, represented by M.Z. Fehér and M.M. Tátrai, acting as Agents,

applicant,

supported by:

**Republic of Poland**, represented by B. Majczyna and S. Żyrek, acting as Agents,

intervener,

v

**European Parliament**, represented by F. Drexler, R. Crowe, U. Rösslein, T. Lukácsi and A. Pospíšilová Padowska, acting as Agents,

**Council of the European Union**, represented by A. de Gregorio Merino, E. Rebasti, A. Tamás and A. Sikora-Kalèda, acting as Agents,

defendants,

supported by:

**Kingdom of Belgium**, represented by C. Pochet, M. Jacobs and L. Van den Broeck, acting as Agents,

**Kingdom of Denmark**, represented initially by M. Søndahl Wolff and J. Nymann-Lindgren, and subsequently by M. Søndahl Wolff and V. Pasternak Jørgensen, acting as Agents,

**Federal Republic of Germany**, represented by J. Möller and R. Kanitz, acting as Agents,

**Ireland**, represented by M. Browne, J. Quaney and A. Joyce, acting as Agents, and by D. Fennelly, Barrister-at-Law,

**Kingdom of Spain**, represented initially by J. Rodríguez de la Rúa Puig and S. Centeno Huerta, and subsequently by J. Rodríguez de la Rúa Puig and A. Gavela Llopis, acting as Agents,

**French Republic**, represented by A.-L. Desjonquères, A.-C. Drouant and E. Leclerc, acting as Agents,

**Grand Duchy of Luxembourg**, represented initially by A. Germeaux and T. Uri, and subsequently by A. Germeaux, acting as Agents,

**Kingdom of the Netherlands**, represented by M.K. Bulterman and J. Langer, acting as Agents,

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\*\*Language of the case: Hungarian.

**Republic of Finland**, represented by H. Leppo and S. Hartikainen, acting as Agents,

**Kingdom of Sweden**, represented by O. Simonsson, J. Lundberg, C. Meyer-Seitz, A. Runeskjöld, H. Shev, M. Salborn Hodgson, H. Eklinder and R. Shahsavan Eriksson, acting as Agents,

**European Commission**, represented by D. Calleja Crespo, J.-P. Keppenne, J. Baquero Cruz and A. Tokár, acting as Agents,

interveners,

THE COURT (Full Court),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev (Rapporteur), A. Prechal, K. Jürimäe, C. Lycourgos, E. Regan, S. Rodin, I. Jarukaitis, N. Jääskinen, I. Ziemele and J. Passer, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, M. Safjan, F. Biltgen, P.G. Xuereb, N. Piçarra, L.S. Rossi, A. Kumin, N. Wahl, D. Gratsias, M.L. Arastey Sahún, M. Gavalec and Z. Csehi, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrars: M. Aleksejev, Head of Unit, and I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 11 and 12 October 2021,

after hearing the Opinion of the Advocate General at the sitting on 2 December 2021,

gives the following

## Judgment

1 By its application, Hungary claims, principally, that the Court should annul 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 (OJ 2020 L 433I, p. 1, and corrigendum OJ 2021 L 373, p. 94, ‘the contested regulation’), and, in the alternative, that the Court should annul Article 4(1) and (2)(h), Article 5(2), the penultimate and final sentences of Article 5(3), and Article 6(3) and (8) of that regulation.

### I. LEGAL CONTEXT

#### A. Regulation (EC) No 1049/2001

2 Article 2 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) states, in paragraph 1 thereof:

‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.’

3 As set out in Article 4 of that regulation:

‘...’

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

...

– court proceedings and legal advice,

...

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

...

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. ...'

4 Article 5 of that regulation provides:

'Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.'

### **B. The Council's Rules of Procedure**

5 On 1 December 2009, the Council of the European Union adopted Decision 2009/937/EU adopting the Council's Rules of Procedure (OJ 2009 L 325, p. 35). Article 6 of those rules of procedure ('the Council's Rules of Procedure'), entitled 'Professional secrecy and production of documents in legal proceedings', provides in paragraph 2:

'The Council or [the Committee of Permanent Representatives of the governments of the Member States (Coreper)] may authorise the production for use in legal proceedings of a copy of or an extract from Council documents which have not already been released to the public in accordance with the provisions on public access to documents.'

6 According to Article 10 of those rules of procedure, entitled 'Public access to Council documents':

'The specific provisions regarding public access to Council documents are set out in Annex II.'

7 Annex II to those rules of procedure, entitled 'Special provisions regarding public access to Council documents', contains Article 5, relating to 'referral of requests by Member States', which provides:

'When a Member State refers a request to the Council, it shall be handled in accordance with Articles 7 and 8 of [Regulation No 1049/2001] and the relevant provisions of this Annex. In the event of a total or partial refusal of access, the applicant shall be informed that any confirmatory application must be addressed directly to the Council.'

### **C. The Guidelines for the handling of documents internal to the Council**

8 By Note 7695/18 of 10 April 2018, the Council adopted guidelines for the handling of documents internal to the Council. Paragraphs 1, 2, 20 and 21 of those guidelines are worded as follows:

'1. This document contains guidelines on handling unclassified Council documents whose distribution is internal to the Council, its members, the Commission, the European External Action Service (EEAS) and, depending on the subject matter, certain other EU institutions (e.g. European Parliament, Court of Justice, European Central Bank) and bodies (e.g. Committee of the Regions, European Economic and Social Committee). The untimely public disclosure of such documents could adversely affect the Council's decision-making processes.'

2. The guidelines have a direct impact on the functioning of the Council and, as a consequence, are to be respected by Member States as members of the Council, in line with the principle of loyal cooperation which governs relations between the EU institutions and the Member States.

...

20. "LIMITE" documents must not be made public unless a decision to that effect has been taken by duly authorised Council officials, by the national administration of a Member State (see paragraph 21), or, where relevant, by the Council, in accordance with [Regulation No 1049/2001] and the Council's Rules of Procedure.

21. Personnel in any EU institution or body other than the Council may not themselves decide to make "LIMITE" documents public without first consulting the General Secretariat of the Council (GSC). Personnel in the national administration of a Member State will consult the GSC before taking such a decision unless it is clear that the document can be made public, in line with Article 5 of [Regulation No 1049/2001].'

#### **D. Regulation (EU, Euratom) No 883/2013**

9 Article 2(1) of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1) defines, for the purposes of that regulation, the 'financial interests of the Union' as being 'revenues, expenditures and assets covered by the budget of the European Union and those covered by the budgets of the institutions, bodies, offices and agencies and the budgets managed and monitored by them'.

#### **E. The Financial Regulation**

10 As set out in Article 2 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1, 'the Financial Regulation'), entitled 'Definitions':

'For the purposes of this Regulation the following definitions apply:

...

(7) "budget implementation" means the carrying out of activities relating to the management, monitoring, control and auditing of budget appropriations in accordance with the methods provided for in Article 62;

...

(42) "Member State organisation" means an entity established in a Member State as a public law body, or as a body governed by private law entrusted with a public service mission and provided with adequate financial guarantees from the Member State;

...

(59) "sound financial management" means implementation of the budget in accordance with the principles of economy, efficiency and effectiveness;

...'

11 Article 61 of that regulation, entitled 'Conflict of interests', provides:

'1. Financial actors within the meaning of Chapter 4 of this Title and other persons, including national authorities at any level, involved in budget implementation under direct, indirect and shared management, including acts preparatory thereto, audit or control, shall not take any action

which may bring their own interests into conflict with those of the Union. They shall also take appropriate measures to prevent a conflict of interests from arising in the functions under their responsibility and to address situations which may objectively be perceived as a conflict of interests.

2. Where there is a risk of a conflict of interests involving a member of staff of a national authority, the person in question shall refer the matter to his or her hierarchical superior. Where such a risk exists for staff covered by the Staff Regulations, the person in question shall refer the matter to the relevant authorising officer by delegation. The relevant hierarchical superior or the authorising officer by delegation shall confirm in writing whether a conflict of interests is found to exist. Where a conflict of interests is found to exist, the appointing authority or the relevant national authority shall ensure that the person in question ceases all activity in the matter. The relevant authorising officer by delegation or the relevant national authority shall ensure that any further appropriate action is taken in accordance with the applicable law.

3. For the purposes of paragraph 1, a conflict of interests exists where the impartial and objective exercise of the functions of a financial actor or other person, as referred to in paragraph 1, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other direct or indirect personal interest.’

12 Article 62 of that regulation, entitled ‘Methods of budget implementation’, provides, in the first subparagraph of paragraph 1 thereof:

‘1. The Commission shall implement the budget in any of the following ways:

- (a) directly (“direct management”), as set out in Articles 125 to 153, by its departments, including its staff in the Union delegations under the authority of their respective Head of delegation, in accordance with Article 60(2), or through executive agencies as referred to in Article 69;
- (b) under shared management with Member States (“shared management”) as set out in Articles 63 and 125 to 129;
- (c) indirectly (“indirect management”) as set out in Articles 125 to 149 and 154 to 159, where this is provided for in the basic act or in the cases referred to in points (a) to (d) of Article 58(2), by entrusting budget implementation tasks:

...’

13 Article 63 of that regulation, entitled ‘Shared management with Member States’, provides in paragraphs 2 and 8:

‘2. When executing tasks relating to budget implementation, Member States shall take all the necessary measures, including legislative, regulatory and administrative measures, to protect the financial interests of the Union, namely by:

- (a) ensuring that actions financed from the budget are implemented correctly and effectively and in accordance with the applicable sector-specific rules;
- (b) designating bodies responsible for the management and control of Union funds in accordance with paragraph 3, and supervising such bodies;
- (c) preventing, detecting and correcting irregularities and fraud;
- (d) cooperating, in accordance with this Regulation and sector-specific rules, with the Commission, [the European Anti-Fraud Office (OLAF)], the [European] Court of Auditors and, for those Member States participating in enhanced cooperation pursuant to Council Regulation (EU) 2017/1939 [of 12 October 2017 implementing enhanced cooperation on the establishment of the European

Public Prosecutor's Office (OJ 2017 L 283, p. 1)], with the European Public Prosecutor's Office (EPPO).

In order to protect the financial interests of the Union, Member States shall, while respecting the principle of proportionality, and in compliance with this Article and the relevant sector-specific rules, carry out *ex ante* and *ex post* controls including, where appropriate, on-the-spot checks on representative and/or risk-based samples of transactions. They shall also recover funds unduly paid and bring legal proceedings where necessary in that regard.

Member States shall impose effective, dissuasive and proportionate penalties on recipients where provided for in sector-specific rules or in specific provisions in national law.

As part of its risk assessment and in accordance with sector-specific rules, the Commission shall monitor the management and control systems established in Member States. The Commission shall, in its audit work, respect the principle of proportionality and shall take into account the level of risk assessed in accordance with sector-specific rules.

...

8. In order to ensure that Union funds are used in accordance with the applicable rules, the Commission shall:

- (a) apply procedures for the examination and acceptance of the accounts of the designated bodies, ensuring that the accounts are complete, accurate and true;
- (b) exclude from Union financing expenditure for which disbursements have been made in breach of applicable law;
- (c) interrupt payment deadlines or suspend payments where provided for in sector-specific rules.

The Commission shall end all or part of the interruption of payment deadlines or suspension of payments after a Member State has presented its observations and as soon as it has taken any necessary measures. The annual activity report referred to in Article 74(9) shall cover all the obligations under this paragraph.'

14 Article 129 of the Financial Regulation, entitled 'Cooperation for protection of the financial interests of the Union', provides:

'1. Any person or entity receiving Union funds shall fully cooperate in the protection of the financial interests of the Union and shall, as a condition for receiving the funds, grant the necessary rights and access required for the authorising officer responsible, for EPPO in respect of those Member States participating in enhanced cooperation . . . , for OLAF, for the Court of Auditors, and, where appropriate, for the relevant national authorities, to comprehensively exert their respective competences. In the case of OLAF, such rights shall include the right to carry out investigations, including on-the-spot checks and inspections, in accordance with [the Regulation on investigations conducted by OLAF].

2. Any person or entity receiving Union funds under direct and indirect management shall agree in writing to grant the necessary rights as referred to in paragraph 1 and shall ensure that any third parties involved in the implementation of Union funds grant equivalent rights.'

15 As set out in Article 131 of the Financial Regulation, entitled 'Suspension, termination and reduction':

'1. Where an award procedure has been subject to irregularities or fraud, the authorising officer responsible shall suspend the procedure and may take any necessary measures, including the cancellation of the procedure. The authorising officer responsible shall inform OLAF immediately of suspected cases of fraud.

...

3. The authorising officer responsible may suspend payments or the implementation of the legal commitment where:



...

(b) it is necessary to verify whether presumed irregularities, fraud or breach of obligations have actually occurred;

(c) irregularities, fraud or breach of obligations call into question the reliability or effectiveness of the internal control systems of a person or entity implementing Union funds pursuant to point (c) of the first subparagraph of Article 62(1) or the legality and regularity of the underlying transactions.

...’

16 Article 135 of that regulation, entitled ‘Protection of the financial interests of the Union by means of detection of risks, exclusion and imposition of financial penalties’, provides:

‘1. In order to protect the financial interests of the Union, the Commission shall set up and operate an early detection and exclusion system.

The purpose of such a system shall be to facilitate:

(a) the early detection of persons or entities referred to in paragraph 2, which pose a risk to the financial interests of the Union;

...

3. The decision to register information concerning an early detection of the risks referred to in point (a) of the second subparagraph of paragraph 1 of this Article, to exclude persons or entities referred to in paragraph 2 and/or to impose a financial penalty on a recipient shall be taken by the authorising officer responsible. Information related to such decisions shall be registered in the database referred to in Article 142(1). Where such decisions are taken on the basis of Article 136(4), the information registered in the database shall include the information concerning the persons referred to in that paragraph.

4. The decision to exclude persons or entities referred to in paragraph 2 of this Article or to impose financial penalties on a recipient shall be based on a final judgment or, in the exclusion situations referred to in Article 136(1), on a final administrative decision, or on a preliminary classification in law by the panel referred to in Article 143 in the situations referred to in Article 136(2) in order to ensure a centralised assessment of those situations. In the cases referred to in Article 141(1), the authorising officer responsible shall reject a participant from a given award procedure.

Without prejudice to Article 136(5), the authorising officer responsible may take a decision to exclude a participant or recipient and/or to impose a financial penalty on a recipient and a decision to publish the related information, on the basis of a preliminary classification as referred to in Article 136(2), only after having obtained a recommendation of the panel referred to in Article 143.’

## II. THE CONTESTED REGULATION

17 According to the preamble to the contested regulation, that regulation was adopted on the basis of the ‘[TFEU], and in particular point (a) of Article 322(1) thereof,’ and the ‘[EAEC] Treaty, and in particular Article 106a thereof’.

18 Recitals 2, 3, 5 to 10, 12 to 16, 18 to 20 and 26 of the contested regulation state:

‘(2) In its conclusions of 21 July 2020, the European Council stated that the financial interests of the Union are to be protected in accordance with the general principles embedded in the Treaties, in particular the values set out in Article 2 TEU. It also underlined the importance of the protection of the financial interests of the Union and the importance of respect for the rule of law.

(3) The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the “Charter”) and other applicable

instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality [(judgment of 29 April 2004, *Commission v CAS Succhi di Frutta*, C-496/99 P, EU:C:2004:236, paragraph 63)] implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty [(judgment of 12 November 1981, *Meridionale Industria Salumi and Others*, 212/80 to 217/80, EU:C:1981:270, paragraph 10)]; prohibition of arbitrariness of the executive powers [(judgment of 21 September 1989, *Hoechst v Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 19)]; effective judicial protection, including access to justice, by independent and impartial courts [(judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 31, 40 and 41, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 63 to 67)]; and separation of powers, [(judgments of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraph 58; of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 35; and of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 36)] be respected [(Communication from the Commission entitled “A new EU Framework to strengthen the Rule of Law”, COM(2014) 158 final, Annex I)].

...

(5) Once a candidate country becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the Union that implements them will be respected [(Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454, paragraph 168)]. The laws and practices of Member States should continue to comply with the common values on which the Union is founded.

(6) While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.

(7) Whenever the Member States implement the Union budget, including resources allocated through the European Union Recovery Instrument established pursuant to Council Regulation (EU) 2020/2094 [of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (OJ 2020 L 433I, p. 23)], and through loans and other instruments guaranteed by the Union budget, and whatever method of implementation they use, respect for the rule of law is an essential precondition for compliance with the principles of sound financial management enshrined in Article 317 [TFEU].

(8) Sound financial management can only be ensured by Member States if public authorities act in accordance with the law, if cases of fraud, including tax fraud, tax evasion, corruption, conflict of interest or other breaches of the law are effectively pursued by investigative and prosecution services, and if arbitrary or unlawful decisions of public authorities, including law-enforcement authorities, can be subject to effective judicial review by independent courts and by the Court of Justice of the European Union.

(9) The independence and impartiality of the judiciary should always be guaranteed, and investigation and prosecution services should be able to properly execute their functions. The judiciary, and investigation and prosecution services should be endowed with sufficient financial and human resources and procedures to act effectively and in a manner that fully respects the right to a fair trial, including respect for the rights of defence. Final judgments should be implemented effectively. Those conditions are required as a minimum guarantee against unlawful and arbitrary decisions of public authorities that could harm the financial interests of the Union.

(10) The independence of the judiciary presupposes, in particular, that the judicial body concerned is able to exercise, both under the relevant rules and in practice, its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body, and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.

...

(12) Article 19 TEU, which gives concrete expression to the value of the rule of law set out in Article 2 TEU, requires Member States to provide effective judicial protection in the fields covered by Union law, including those relating to the implementation of the Union budget. The very existence of effective judicial review designed to ensure compliance with Union law is the essence of the rule of law and requires independent courts [(judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 32 to 36)]. Maintaining the independence of the courts is essential, as confirmed by the second paragraph of Article 47 of the Charter [(judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 40 and 41)]. This is true, in particular, for the judicial review of the validity of measures, contracts or other instruments giving rise to public expenditure or debts, inter alia, in the context of public procurement procedures which may also be brought before the courts.

(13) There is therefore a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management.

(14) The Union has developed a variety of instruments and processes that promote the rule of law and its application, including financial support for civil society organisations, the European Rule of Law Mechanism and the EU Justice Scoreboard, and provide an effective response from Union institutions to breaches of the rule of law through infringement proceedings and the procedure provided for in Article 7 TEU. The mechanism provided for in this Regulation complements these instruments by protecting the Union budget against breaches of the principles of the rule of law affecting its sound financial management or the protection of the financial interests of the Union.

(15) Breaches of the principles of the rule of law, in particular those that affect the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union. This is the case for individual breaches of the principles of the rule of law and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities.

(16) The identification of breaches of the principles of the rule of law requires a thorough qualitative assessment by the Commission. That assessment should be objective, impartial and fair, and should take into account relevant information from available sources and recognised institutions, including judgments of the Court of Justice of the European Union, reports of the Court of Auditors, the Commission's annual Rule of Law Report and EU Justice Scoreboard, reports of [OLAF] and the [EPPO] as relevant, and conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the [European Commission for Democracy through Law (the Venice Commission)], in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary. The Commission could consult the European Union Agency for Fundamental Rights and the Venice Commission if necessary for the purpose of preparing a thorough qualitative assessment.

...

(18) The principle of proportionality should apply when determining the measures to be adopted, in particular taking into account the seriousness of the situation, the time which has elapsed since the relevant conduct started, the duration and recurrence of the conduct, the intention, the degree of cooperation of the Member State concerned in putting an end to the breaches of the principles of the rule of law, and the effects on the sound financial management of the Union budget or the financial interests of the Union.

(19) It is essential that the legitimate interests of final recipients and beneficiaries are properly safeguarded when measures are adopted in the event of breaches of the principles of the rule of law. When considering the adoption of measures, the Commission should take into account their potential impact on final recipients and beneficiaries. Taking into consideration that in shared management payments from the Commission to Member States are legally independent from payments by national authorities to beneficiaries, appropriate measures under this Regulation should not be considered to affect the availability of funding for payments towards beneficiaries according to the payment deadlines set out under the applicable sector-specific and financial rules. Decisions adopted under this Regulation and obligations towards final recipients or beneficiaries set out in this Regulation are part of applicable Union law with respect to implementing funding in shared management. The Member States concerned by the measures should regularly report to the Commission on compliance with their obligations towards final recipients or beneficiaries. Reporting on compliance with payment obligations towards beneficiaries set out in the applicable sector-specific and financial rules should allow the Commission to verify that decisions under this Regulation do not impact in any way, directly or indirectly, payments to be made under the applicable sector-specific and financial rules.

To strengthen the protection of the final recipients or beneficiaries, the Commission should provide information and guidance via a website or internet portal, together with adequate tools to inform the Commission about any breach of the legal obligation of government entities and Member States to continue making payments after measures pursuant to this Regulation are adopted. The Commission should follow up on such information to verify whether the applicable rules have been respected, in particular Article 69, point (b) of Article 74(1) and Article 104 of Regulation (EU) 2021/1060 of the European Parliament and of the Council [of 24 June 2021 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 (OJ 2021 L 231, p. 159)]. Where necessary, in order to ensure that any amount due by government entities or Member States is effectively paid to final recipients or beneficiaries, the Commission should recover payments made, or, where appropriate, make a financial correction by reducing Union support to a programme in line with the applicable sector-specific and financial rules.

(20) In order to ensure uniform conditions for the implementation of this Regulation and in view of the importance of the financial effects of measures adopted pursuant to this Regulation, implementing powers should be conferred on the Council, which should act on the basis of a Commission proposal.

...

(26) The procedure for adopting and lifting the measures should respect the principles of objectivity, non-discrimination and equal treatment of Member States and should be conducted according to a non-partisan and evidence-based approach. If, exceptionally, the Member State concerned considers that there are serious breaches of those principles, it may request the President of the European Council to refer the matter to the next European Council. In such exceptional circumstances, no decision concerning the measures should be taken until the European Council has discussed the

matter. This process shall, as a rule, not take longer than three months after the Commission has submitted its proposal to the Council.’

19 Article 1 of the contested regulation provides:

‘This Regulation establishes the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States.’

20 As set out in Article 2 of that regulation:

‘For the purpose of this Regulation the following definitions shall apply:

- (a) “the 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;
- (b) “government entity” means a public authority at any level of government, including national, regional and local authorities, as well as Member State organisations within the meaning of point (42) of Article 2 of [the Financial Regulation].’

21 Article 3 of the contested regulation, entitled ‘Breaches of the principles of the rule of law’, provides:

‘For the purposes of this Regulation, the following may be indicative of breaches of the principles of the rule of law:

- (a) endangering the independence of the judiciary;
- (b) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest;
- (c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.’

22 Article 4 of that regulation, entitled ‘Conditions for the adoption of measures’, states:

‘1. Appropriate measures shall be taken where it is established in accordance with Article 6 that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

2. For the purposes of this Regulation, breaches of the principles of the rule of law shall concern one or more of the following:

- (a) the proper functioning of the authorities implementing the Union budget, including loans and other instruments guaranteed by the Union budget, in particular in the context of public procurement or grant procedures;
- (b) the proper functioning of the authorities carrying out financial control, monitoring and audit, and the proper functioning of effective and transparent financial management and accountability systems;
- (c) the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union;

- (d) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a), (b) and (c);
- (e) the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities;
- (f) the recovery of funds unduly paid;
- (g) effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with EPPO in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation;
- (h) other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.’

23 Article 5 of that regulation, entitled ‘Measures for the protection of the Union budget’, provides, in paragraphs 1 to 4 thereof:

‘1. Provided that the conditions set out in Article 4 of this Regulation are fulfilled, one or more of the following appropriate measures may be adopted in accordance with the procedure set out in Article 6 of this Regulation:

- (a) where the Commission implements the Union budget in direct or indirect management pursuant to points (a) and (c) of Article 62(1) of the Financial Regulation, and where a government entity is the recipient:
  - (i) a suspension of payments or of the implementation of the legal commitment or a termination of the legal commitment pursuant to Article 131(3) of the Financial Regulation;
  - (ii) a prohibition on entering into new legal commitments;
  - (iii) a suspension of the disbursement of instalments in full or in part or an early repayment of loans guaranteed by the Union budget;
  - (iv) a suspension or reduction of the economic advantage under an instrument guaranteed by the Union budget;
  - (v) a prohibition on entering into new agreements on loans or other instruments guaranteed by the Union budget;
- (b) where the Commission implements the Union budget under shared management with Member States pursuant to point (b) of Article 62(1) of the Financial Regulation:
  - (i) a suspension of the approval of one or more programmes or an amendment thereof;
  - (ii) a suspension of commitments;
  - (iii) a reduction of commitments, including through financial corrections or transfers to other spending programmes;
  - (iv) a reduction of pre-financing;
  - (v) an interruption of payment deadlines;
  - (vi) a suspension of payments.

2. Unless the decision adopting the measures provides otherwise, the imposition of appropriate measures shall not affect the obligations of government entities referred to in point (a) of paragraph 1 or of Member States referred to in point (b) of paragraph 1 to implement the programme or fund affected by the measure, and in particular the obligations they have towards final recipients or beneficiaries, including the obligation to make payments under this Regulation and the applicable sector-specific or financial rules. When implementing Union funds under shared management, Member States concerned by measures adopted pursuant to this Regulation shall report to the Commission on their compliance with those obligations every three months from the adoption of those measures.

The Commission shall verify whether applicable law has been complied with and, where necessary, take all appropriate measures to protect the Union budget, in line with sector-specific and financial rules.

3. The measures taken shall be proportionate. They shall be determined in light of the actual or potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union. The nature, duration, gravity and scope of the breaches of the principles of the rule of law shall be duly taken into account. The measures shall, insofar as possible, target the Union actions affected by the breaches.

4. The Commission shall provide information and guidance for the benefit of final recipients or beneficiaries on the obligations by Member States referred to in paragraph 2 via a website or an internet portal. The Commission shall also provide, on the same website or internet portal, adequate tools for final recipients or beneficiaries to inform the Commission about any breach of these obligations that, in the view of these final recipients or beneficiaries, directly affects them. This paragraph shall be applied in a manner that ensures the protection of persons reporting on breaches of Union law, in line with the principles set out in Directive (EU) 2019/1937 of the European Parliament and of the Council [of 23 October 2019 on the protection of persons who report breaches of Union law (OJ 2019 L 305, p. 17)]. Information provided by final recipients or beneficiaries in accordance with this paragraph shall be accompanied by proof that the concerned final recipient or beneficiary has lodged a formal complaint with the relevant authority of the Member State concerned.'

24 As set out in Article 6 of that regulation, entitled 'Procedure':

'1. Where the Commission finds that it has reasonable grounds to consider that the conditions set out in Article 4 are fulfilled, it shall, unless it considers that other procedures set out in Union legislation would allow it to protect the Union budget more effectively, send a written notification to the Member State concerned, setting out the factual elements and specific grounds on which it based its findings. The Commission shall inform the European Parliament and the Council without delay of such notification and its contents.

2. In light of the information received pursuant to paragraph 1, the European Parliament may invite the Commission for a structured dialogue on its findings.

3. When assessing whether the conditions set out in Article 4 are fulfilled, the Commission shall take into account relevant information from available sources, including decisions, conclusions and recommendations of Union institutions, other relevant international organisations and other recognised institutions.

4. The Commission may request any additional information it requires to carry out the assessment referred to in paragraph 3, both before and after having sent the written notification pursuant to paragraph 1.

5. The Member State concerned shall provide the required information and may make observations on the findings set out in the notification referred to in paragraph 1 within a time limit to be specified by the Commission, which shall be at least one month and not more than three months from the date of notification of the findings. In its observations, the Member State may propose the adoption of remedial measures to address the findings set out in the Commission's notification.

6. The Commission shall take into account the information received and any observations made by the Member State concerned, as well as the adequacy of any proposed remedial measures, when deciding whether to submit a proposal for an implementing decision on the appropriate measures. The Commission shall carry out its assessment within an indicative time limit of one month from the receipt of any information from the Member State concerned or of its observations, or, when no information or observations are received, from the expiry of the time limit set in accordance with paragraph 5, and in any event within a reasonable time frame.

7. Where the Commission intends to make a proposal pursuant to paragraph 9, it shall, before doing so, give the Member State the opportunity to submit its observations, in particular on the proportionality of the envisaged measures, within one month.

8. When assessing the proportionality of the measures to be imposed, the Commission shall take into account the information and guidance referred to in paragraph 3.

9. Where the Commission considers that the conditions of Article 4 are fulfilled and that the remedial measures, if any, proposed by the Member State under paragraph 5 do not adequately address the findings in the Commission's notification, it shall submit a proposal for an implementing decision on the appropriate measures to the Council within one month of receiving the Member State's observations or, in the event that no observations are made, without undue delay and in any case within one month of the deadline set in paragraph 7. The proposal shall set out the specific grounds and evidence on which the Commission based its findings.

10. The Council shall adopt the implementing decision referred to in paragraph 9 of this Article within one month of receiving the Commission's proposal. If exceptional circumstances arise, the period for the adoption of that implementing decision may be extended by a maximum of two months. With a view to ensuring a timely decision, the Commission shall make use of its rights under Article 237 TFEU, where it deems it appropriate.

11. The Council, acting by a qualified majority, may amend the Commission's proposal and adopt the amended text by means of an implementing decision.'

25 Article 7 of the contested regulation, entitled 'Lifting of measures', provides in paragraphs 1 and 2 thereof:

'1. The Member State concerned may, at any time, adopt new remedial measures and submit to the Commission a written notification including evidence to show that the conditions of Article 4 are no longer fulfilled.

2. At the request of the Member State concerned, or on its own initiative and at the latest one year after the adoption of measures by the Council, the Commission shall reassess the situation in the Member State concerned, taking into account any evidence submitted by the Member State concerned, as well as the adequacy of any new remedial measures adopted by the Member State concerned.

Where the Commission considers that the conditions of Article 4 are no longer fulfilled, it shall submit to the Council a proposal for an implementing decision lifting the adopted measures.

Where the Commission considers that the situation leading to the adoption of measures has been remedied in part, it shall submit to the Council a proposal for an implementing decision adapting the adopted measures.

Where the Commission considers that the situation leading to the adoption of measures has not been remedied, it shall address to the Member State concerned a reasoned decision and inform the Council thereof.

When the Member State concerned submits a written notification pursuant to paragraph 1, the Commission shall submit its proposal or adopt its decision within one month of receiving that notification. This period may be extended in duly justified circumstances, in which case the Commission shall without delay inform the Member State concerned of the reasons for the extension.

The procedure set out in paragraphs 3, 4, 5, 6, 9, 10 and 11 of Article 6 shall apply by analogy as appropriate.'



### III. FORMS OF ORDER SOUGHT AND PROCEDURE BEFORE THE COURT

26 Hungary claims that the Court should:

- principally, annul the contested regulation;
- in the alternative, annul Article 4(1) and (2)(h), Article 5(2), the penultimate and final sentences of Article 5(3), and Article 6(3) and (8) of that regulation; and
- order the Parliament and the Council to pay the costs.

27 In addition, Hungary requested, pursuant to the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, that the Court should rule on the present case sitting in a Grand Chamber.

28 The Parliament and the Council contend that the Court should dismiss the action and order Hungary to pay the costs.

29 By application of 12 May 2021, the Parliament requested that the present case be determined pursuant to the expedited procedure provided for in Article 133 of the Rules of Procedure of the Court of Justice. In support of that request, the Parliament submitted that the adoption of the contested regulation was an essential political condition for its approval of Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 (OJ 2020, L 433I, p. 11) and that, in view of the economic urgency, the funds available under the COVID-19 recovery plan entitled ‘*Next Generation EU*’ will have to be made available to Member States within an extremely short period. In that regard, it stated, in particular, that, pursuant to Article 3(4) of Regulation 2020/2094, at least 60% of the legal commitments will have to be entered into by 31 December 2022 and that the totality of the legal commitments will have to be entered into by 31 December 2023. In addition, the Parliament stated that, following the entry into force of Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (OJ 2020 L 424, p. 1), the Commission will start borrowing funds on capital markets in summer 2022 in order to finance the abovementioned recovery plan. According to the Parliament, borrowing and making available extremely large sums of money within a very short period will inevitably entail risks for the Union budget that the contested regulation is intended to protect. Such protection is important because an inability effectively to protect the Union budget risks having negative repercussions, in particular for long-term solidarity within the Union.

30 Article 133(1) of the Rules of Procedure provides that, at the request of the applicant or the defendant, the President of the Court may, after hearing the other party, the Judge-Rapporteur and the Advocate General, decide that a case is to be decided pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time.

31 In the present case, on 9 June 2021, the President of the Court decided, after hearing the other parties, the Judge-Rapporteur and the Advocate General, to grant the Parliament’s request. That decision was based on the fundamental importance of the present case for the EU legal order, in particular in so far as it concerns the Union’s powers to protect its budget and financial interests against effects that may result from breaches of the values contained in Article 2 TEU.

32 By decision of the President of the Court of 25 June 2021, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission were granted leave to intervene in support of the forms of order sought by the Parliament and the Council.

33 By decision of the President of the Court of the same date, the Republic of Poland was granted leave to intervene in support of the form of order sought by Hungary.

34 By application of 11 May 2021, the Council requested that the Court disregard the passages of Hungary's application and of the annexes thereto, in particular those of Annex A.3, that make reference to the opinion of the Council Legal Service No 13593/18 of 25 October 2018 concerning the Proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (COM(2018) 324 final), which led to the contested regulation ('Legal Opinion No 13593/18'), or that reproduce the content or reasoning of that legal opinion. On 29 June 2021, the Court decided to reserve its decision on that application until it ruled on the substance of the case.

35 On 7 September 2021, considering that the present case is of exceptional importance, the Court decided, after hearing the Advocate General, to refer the case to the full Court, pursuant to the last paragraph of Article 16 of the Statute of the Court of Justice of the European Union.

#### **IV. THE REQUEST THAT CERTAIN PASSAGES OF HUNGARY'S APPLICATION AND ANNEX A.3 THERETO BE DISREGARDED**

##### **A. Arguments of the parties**

36 In support of its request that paragraphs 21, 22, 164 and 166 of Hungary's application and Annex A.3 thereto be disregarded in so far as they refer to Legal Opinion No 13593/18, by reproducing the content of that opinion or reflecting the analysis undertaken therein, the Council argues that that legal opinion is an unclassified internal document marked 'LIMITE'. Accordingly, the Council submits, it is covered by the obligation of professional secrecy and its production for use in legal proceedings is subject to the conditions laid down, inter alia, in Article 6(2) of the Council's Rules of Procedure and in paragraphs 20 and 21 of the Guidelines for the handling of documents internal to the Council.

37 Under Article 6(2) of those rules of procedure, only the Council or Coreper may authorise the production for use in legal proceedings of a copy of or an extract from Council documents which have not already been released to the public in accordance with the provisions of EU law on public access to documents. Furthermore, pursuant to paragraphs 20 and 21 of those guidelines, a 'LIMITE' document is not to be made public unless a decision to that effect has been taken by duly authorised Council officials, by the national administration of a Member State, after consulting the GSC, or, where relevant, by the Council, in accordance with Regulation No 1049/2001 and the Council's Rules of Procedure.

38 In the present case, to date, the Council has made public, in accordance with Regulation No 1049/2001, only the first eight paragraphs of Legal Opinion No 13593/18 and, furthermore, has not authorised Hungary to produce it for use in the present judicial proceedings.

39 In accordance with settled case-law of the Court of Justice and the General Court, it would be contrary to the public interest, which requires that the institutions should be able to benefit from the advice of their legal service, given in full independence, to allow such internal documents to be produced in proceedings before the Court of Justice unless their production has been authorised by the institution concerned or ordered by the Court.

40 The Council states that the reason it has granted only partial access to Legal Opinion No 13593/18 following requests made pursuant to Regulation No 1049/2001 is in particular because of the risk that, in proceedings concerning the lawfulness of the contested regulation, an applicant might confront it with the arguments put forward by its own legal service in that legal opinion, in breach of the requirements of a fair hearing and equality of arms between the parties to judicial proceedings. Incidentally, that risk materialised when the present action was brought.

41 Moreover, according to the Council, Hungary has always voted, on the basis of those arguments, in favour of decisions refusing public access to Legal Opinion No 13593/18. If Hungary had wanted that legal opinion to be made public, it should have made a request to that effect under Regulation No 1049/2001 or sought authorisation under the Council's Rules of Procedure and the Guidelines for the handling of documents internal to the Council.

42 The Council submits that if Hungary were authorised to use Legal Opinion No 13593/18 in the present case, even though it did not follow the procedure laid down for that purpose and the issue has not first been subject to effective judicial review, the procedures laid down by Regulation No 1049/2001 and by the Council's Rules of Procedure would be circumvented. It refers in that regard to the settled case-law of the Court, which grants an

institution's request to remove its internal documents from the file before the Court where it has not authorised the production of such documents for use in legal proceedings, and takes the view that, accordingly, Legal Opinion No 13593/18 cannot be used in the present case.

43 In addition, the Council submits that, if the production of Legal Opinion No 13593/18 were permitted in the present proceedings, it would be obliged to comment, before the EU judiciary, on an opinion that was intended for internal use and given by its own legal service during the drafting of the contested regulation, which would be contrary to the requirements of a fair hearing and would affect the Council's ability to receive frank, objective and comprehensive advice.

44 Lastly, in accordance with the Court's case-law, the fact that Legal Opinion No 13593/18 was disclosed without the Council's authorisation on a media outlet's website and its content has thus been made public has no bearing on those considerations. Moreover, the harm caused to the Council and the EU institutions as a result of the unauthorised use of that legal opinion in the present proceedings would go far beyond that caused by the publication of that legal opinion in the media. Allowing Hungary to rely on that legal opinion would threaten the public interest in the institutions being able to benefit from the advice of their legal service in full independence and would deprive the procedures intended to protect that interest of all practical effect.

45 Hungary disputes the Council's arguments.

### **B. Findings of the Court**

46 By its arguments, the Council submits, in essence, that Hungary has, by including, in paragraphs 21, 22, 164 and 166 of the application and Annex A.3 thereto, references to Legal Opinion No 13593/18 and analyses of the content of that opinion, first, infringed Article 6(2) of the Council's Rules of Procedure, secondly, infringed paragraphs 20 and 21 of the Guidelines for the handling of documents internal to the Council, thirdly, infringed Regulation No 1049/2001, fourthly, failed to have regard to the public interest in the Council being able to benefit from the advice of its legal service, given in full independence, and, fifthly, placed the Council in a situation where it might be required to take a position in the main proceedings on the analyses of its own legal service, thus breaching the principle of equality of arms.

47 As regards the alleged infringement of Article 6(2) of the Council's Rules of Procedure, it should be borne in mind that, as set out in that provision, 'the Council or Coreper may authorise the production for use in legal proceedings of a copy of or an extract from Council documents which have not already been released to the public'.

48 In that regard, it should be noted, first of all, that the application and Annex A.3 thereto make reference to paragraphs of Legal Opinion No 13593/18 other than the eight paragraphs that have been made public by the Council under Regulation No 1049/2001, next, that Hungary did not ask the Council for authorisation to produce a copy of or extracts from that legal opinion for use in legal proceedings and, lastly, that Hungary did not annex a copy of that legal opinion to its application.

49 Accordingly, it is necessary to determine whether, by referring to passages of Legal Opinion No 13593/18 in its application and Annex A.3 thereto, Hungary is to be regarded as having produced for use in legal proceedings extracts from that opinion, within the meaning of Article 6(2) of the Council's Rules of Procedure.

50 In that regard, it should be pointed out that paragraphs 22 and 164 of the application and the second to seventh and ninth paragraphs of Annex A.3 thereto contain Hungary's own arguments which Hungary claims reflect the analysis carried out in that legal opinion, while paragraphs 21 and 166 of the application contain, also in the context of Hungary's own arguments, mere references to that legal opinion. Such arguments accompanied by mere assertions of correlation with Legal Opinion No 13593/18 and references thereto – the accuracy of which, moreover, is disputed by the Council – cannot be regarded as constituting extracts from that legal opinion.

51 However, Annex A.3 to the application, in so far as its fourth paragraph contains a quotation from Legal Opinion No 13593/18, must be regarded as an 'extract' from that legal opinion, within the meaning of Article 6(2) of the Council's Rules of Procedure. Furthermore, producing such an extract in the annex to a procedural document constitutes 'production for use in legal proceedings', within the meaning of that provision.

52 Consequently, Hungary was in principle obliged, under Article 6(2) of the Council's Rules of Procedure, to obtain the Council's authorisation in order to produce before the Court the extract from Legal Opinion No 13593/18 contained in Annex A.3 to the application.

53 In that regard, it is indeed clear, as the Council states, from the Court's settled case-law that it would be contrary to the public interest, which requires that the institutions should be able to benefit from the advice of their legal service, given in full independence, to allow such internal documents to be produced in proceedings before the Court unless their production has been authorised by the institution concerned or ordered by the Court (order of 14 May 2019, *Hungary v Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 8 and the case-law cited, and judgment of 31 January 2020, *Slovenia v Croatia*, C-457/18, EU:C:2020:65, paragraph 66).

54 As the Council submits, by producing such a legal opinion without authorisation, the applicant is confronting the institution concerned, in proceedings concerning the lawfulness of a contested measure, with an opinion issued by its own legal service during the drafting of that measure. In principle, to allow the applicant to put before the Court a legal opinion from an institution the disclosure of which has not been authorised by that institution would be contrary to the requirements of a fair hearing and would be tantamount to circumventing the procedure for requesting access to such a document introduced by Regulation No 1049/2001 (see, to that effect, order of 14 May 2019, *Hungary v Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 14 and the case-law cited, and judgment of 31 January 2020, *Slovenia v Croatia*, C-457/18, EU:C:2020:65, paragraph 68).

55 Nevertheless, account should be taken of the principle of openness, laid down in the second paragraph of Article 1 and Article 10(3) TEU and Article 15(1) and Article 298(1) TFEU, which guarantees, inter alia, that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (see, to that effect, order of 14 May 2019, *Hungary v Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 13 and the case-law cited). By allowing divergences between various points of view to be openly debated, it also contributes to increasing those citizens' confidence in those institutions (judgment of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 75 and the case-law cited).

56 Admittedly, it is only exceptionally that the principle of openness will be capable of justifying, in judicial proceedings, the disclosure of a document of an institution that has not been released to the public and which contains a legal opinion. For that reason, the Court has held that the retention, in the file of a particular case, of a document containing a legal opinion from an institution is not justified by any overriding public interest where, first, that legal opinion does not relate to a legislative procedure in respect of which increased openness is required and, secondly, the interest in the document's retention consists, for the Member State concerned, in the ability to rely on that legal opinion in the context of a dispute. According to the Court, the production of such a legal opinion appears to be guided by the applicant's own interest in supporting its arguments and not by any overriding public interest, such as the interest in making public the procedure which resulted in the contested measure (see, to that effect, order of 14 May 2019, *Hungary v Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 18, and judgment of 31 January 2020, *Slovenia v Croatia*, C-457/18, EU:C:2020:65, paragraph 71).

57 In the present case, it must be noted that, contrary to the cases which gave rise to the case-law cited in the preceding paragraph, Legal Opinion No 13593/18 relates to a legislative procedure.

58 In that regard, the Court has held that the disclosure of documents containing the advice of an institution's legal service on legal issues arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the right of EU citizens to scrutinise the information which has formed the basis of a legislative measure. The Court has concluded that there is no general need for confidentiality as regards the opinions of the Council Legal Service relating to a legislative process and that Regulation No 1049/2001 imposes, in principle, an obligation to disclose them (see, to that effect, judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 67 and 68).

59 It is precisely openness in that regard which, by allowing divergences between various points of view to be openly debated, contributes to reducing doubts in the minds of citizens, not only as regards the lawfulness of an isolated legislative measure but also as regards the legitimacy of the legislative process as a whole (see, to that effect, judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 59).

and contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 TEU and in the Charter, as stated in recital 2 of Regulation No 1049/2001.

60 That openness does not, however, preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, issued in the context of a given legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of that legislative process, in which case it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal (judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 69).

61 In the present case, as the Advocate General observed in points 70 to 72 of his Opinion, the Council has failed to show that Legal Opinion No 13593/18 is of a particularly sensitive nature or has a particularly wide scope that goes beyond the context of the legislative process to which it relates.

62 Accordingly, neither Article 6(2) of the Council's Rules of Procedure nor the case-law referred to in paragraph 53 above precluded Hungary from disclosing all or part of that legal opinion in its application.

63 That finding is not undermined by the fact that Hungary has a particular interest in the disputed passages of its application and of Annex A.3 thereto being taken into consideration by the Court. Since the consideration of those passages is also likely to contribute to reducing doubts in the minds of citizens, not only as regards the lawfulness of the contested regulation but also as regards the legitimacy of the legislative process as a whole, it serves in any event the overriding public interest referred to in paragraphs 58 and 59 above.

64 Consequently, and without it being necessary to rule separately on the pleas alleging infringement of paragraphs 20 and 21 of the Guidelines for the handling of documents internal to the Council, infringement of Regulation No 1049/2001 and breach of the principle of equality of arms, since those pleas cannot, in any event, succeed, in the light of the considerations set out in paragraphs 55 to 63 above, the Council's request that the passages of Hungary's application and of the annexes thereto, in particular those of Annex A.3, be disregarded in so far as they refer to Legal Opinion No 13593/18, by reproducing the content of that opinion or reflecting the analysis undertaken therein, must be refused as unfounded.

## V. THE ACTION

65 By its action, Hungary, supported by the Republic of Poland, seeks, principally, the annulment of the contested regulation in its entirety and, in the alternative, the partial annulment of the contested regulation, namely of Article 4(1), Article 4(2)(h), Article 5(2), the third sentence of Article 5(3), the fourth sentence of Article 5(3), and Article 6(3) and (8) of that regulation.

### A. The principal claim for annulment of the contested regulation in its entirety

66 In support of its principal claim for annulment of the contested regulation in its entirety, Hungary relies on three pleas in law. It is appropriate to examine, in the first place and together, the first and second pleas, alleging, in essence, that the European Union lacked competence to adopt the contested regulation.

#### 1. *The first and second pleas, alleging that the European Union lacked competence to adopt the contested regulation*

##### (a) *Arguments of the parties*

67 By the first plea, Hungary, supported by the Republic of Poland, submits that there is no legal basis for the contested regulation. It states in that regard that Article 322(1)(a) and (b) TFEU authorises the EU legislature to adopt, respectively, 'the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts' and 'rules providing for checks on the responsibility of financial actors, in particular authorising officers and accounting officers'. It adds that, in accordance with Article 322(2) TFEU, the Council is to determine the methods and procedure whereby the budget revenue provided under the arrangements relating to the Union's own resources are to be made available to the Commission, and is to determine the measures to be applied to meet cash requirements.

68 Those provisions have previously served, in whole or in part, as the legal basis for multiple legal measures related to the annual budget of the Union or its multiannual financial framework, such as the Financial Regulation, Regulation (EU) 2020/558 of the European Parliament and of the Council of 23 April 2020 amending Regulations (EU) No 1301/2013 and (EU) No 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak (OJ 2020 L 130, p. 1), which allows an exceptional co-financing rate to be applied in the context of structural and investment funds, or Regulation (EU) 2020/2221 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU) No 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (OJ 2020 L 437, p. 30), which sets out the implementing rules for fostering the repair of damage caused by the pandemic and provides, on an exceptional basis, additional resources to help social cohesion and economic recovery.

69 As regards the Financial Regulation, the first part of that regulation sets out, generally and comprehensively, the principles and procedures for establishing and implementing the Union budget and for the control of its funds. Those principles and procedures constitute ‘financial rules’ which determine the procedure to be adopted for establishing and implementing the budget, within the meaning of Article 322(1)(a) TFEU. The same is true of Regulations 2020/558 and 2020/2221, the rules of which are effectively and directly related to the Union budget, the multiannual financial framework and the aid provided from the various EU funds.

70 Conversely, the essential elements of the provisions of the contested regulation, such as the definition of the concept of ‘the rule of law’ or the ways in which the principles of the rule of law may be breached, cannot objectively be regarded as financial rules which determine the procedure to be adopted for implementing the budget, within the meaning of that provision. A comparison of the rules on conflicts of interests contained respectively in that regulation and in the Financial Regulation in particular makes clear that Article 322(1) TFEU is not the appropriate legal basis for the contested regulation.

71 In that regard, it follows from Article 61 of the Financial Regulation that the obligation to avoid a conflict of interests applies to all methods of implementing Union funds, including to Member State authorities involved in implementing those funds, with the result that Member States are required to adopt appropriate rules to that effect. The Financial Regulation contains, to that end, appropriate procedural rules to enable conflicts of interest to be resolved.

72 It is apparent from Article 3(b) of the contested regulation that failure to ensure the absence of conflicts of interest may be indicative of a breach of the principles of the rule of law, although that regulation does not lay down any procedural rules relating to the measures that could be adopted by the Member States to prevent or remedy such conflicts. That provision therefore allows measures to be taken against Member States for failure to meet unspecified expectations, going beyond the requirements set out in the Financial Regulation.

73 More generally, Hungary submits that the provisions of the contested regulation cannot be regarded as financial rules which determine the procedure to be adopted for implementing the Union budget. The purpose of that regulation, according to Article 1 thereof, is to establish the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States. To that end, Article 2 of that regulation defines the concept of ‘the rule of law’ and Article 3 of that regulation sets out cases which may be indicative of breaches of the principles of the rule of law. The essential elements of the contested regulation are therefore the definition of the concept of ‘the rule of law’ and the ways in which the rule of law may be breached.

74 Article 322(1)(a) TFEU does not authorise the Union to define the cases in which the rule of law will be breached or even to determine the constituent elements of the concept of ‘the rule of law’. Accordingly, that provision does not constitute a legal basis for examining or establishing breaches of the principles of the rule of law or for prescribing the legal consequences of such breaches, since such rules cannot objectively be regarded as financial rules which determine the procedure to be adopted for implementing the budget.

75 The mere fact that the substantive and procedural rules laid down in the contested regulation relate to the Union budget is not sufficient for them to be classified as ‘financial rules’, within the meaning of Article 322(1)

TFEU. An interpretation of the concept of ‘financial rules’ so broad as to cover the provisions of the contested regulation would have the effect of extending that concept to virtually all EU law and to considerable parts of the legal systems of the Member States, since it would be difficult to find a provision in respect of which it is impossible to establish at least an indirect effect on an EU budgetary resource.

76 That the legal basis for the contested regulation is inappropriate also results from the fact that Article 5(2) of that regulation does not contain financial rules which determine the procedure to be adopted for implementing the Union budget. The obligation to continue to implement a given programme after irregularities, breaches or failures affecting the sound financial management of the Union budget or the protection of the financial interests of the Union have been identified does not come within the control and audit obligations incumbent on the Member States in the implementation of the budget pursuant to Article 317 TFEU, nor does it arise from the financial rules which determine the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts, provided for in Article 322 TFEU, in order to ensure compliance with budgetary principles and, in particular, the principles of sound financial management, openness and non-discrimination.

77 Those financial rules do not oblige the Member States to continue to implement a given programme after such irregularities, breaches or failures have been identified. On the contrary, Article 322(1)(a) TFEU permits the adoption of financial rules, such as the suspension of payments for a given programme, which are specifically intended to ensure that the Member State complies with the conditions laid down by the relevant financial rules in order to ensure the protection of the financial interests of the Union and the effective attainment of the objectives pursued under the programme in question.

78 It runs counter to the logic underlying those financial rules that the Union’s financial rules can require a Member State to continue to implement a programme even if the Commission has found irregularities in the implementation of that programme which affect the financial interests of the Union and the principle of sound financial management or which jeopardise the attainment of the objectives pursued.

79 It follows, according to Hungary, that the objective pursued by imposing such an obligation is not to ensure the protection of the financial interests of the Union, but to penalise a Member State in the event of a breach of the principles of the rule of law, which is incompatible with the legal basis relied on. In addition, the obligation on a Member State to finance entirely from its own budget programmes over the design of which it has only a limited influence would restrict its right to use its own budget and would introduce a requirement that places a burden not on the Union budget but on the budget of the Member State concerned.

80 By its second plea, Hungary claims that the contested regulation infringes, first, Article 7 TEU, secondly, Article 4(1) and Article 5(2) TEU and, thirdly, Article 13(2) TEU and Article 269 TFEU.

81 It submits, in the first place, that Article 7 TEU is the only article on the basis of which it may be determined that there is a risk of a serious breach by a Member State of the values contained in Article 2 TEU. The contested regulation establishes, in a specific area, a parallel procedure with the same purpose as the procedure laid down in Article 7 TEU, in breach of that article.

82 First, the Treaties do not provide that Article 7 TEU may be implemented by legislative measures relating to the finding of a breach of the values contained in Article 2 TEU and the determination of the legal consequences of such a breach.

83 Secondly, Hungary argues that the procedure laid down by the contested regulation means that the Court has jurisdiction to review decisions adopted by the Council on the basis of that regulation and, therefore, to assess whether a Member State has breached the principles of the rule of law, even where the national legislation or practice which gave rise to that breach falls outside the scope of EU law and the Court does not, therefore, have jurisdiction to examine them. The contested regulation thus extends, in breach of the Treaties and in particular by circumventing the limitations laid down in Article 269 TFEU, the powers not only of the Council and of the Commission, but also of the Court.

84 Thirdly, in the system of the Treaties, only Article 7 TEU grants the EU institutions the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the principles of the rule of law in a Member State.

85 In a manner similar to that provision, the contested regulation provides that the Commission is to decide on three elements before submitting its proposal for an implementing decision to the Council, and that the Council must then take a view on each of those elements by three successive decisions. First of all, the Commission is to determine, in accordance with Articles 3 and 4 of that regulation, that there has been a breach of the principles of the rule of law. Next, it is to be established, under Article 4(1) of that regulation, whether that breach has a sufficiently close link with the Union budget or the protection of the financial interests of the Union. Lastly, it is to be determined whether a decision should be adopted, under Article 5 of that regulation, determining the measures deemed necessary for the protection of the Union budget.

86 Of those three decisions, the first and third are covered by Article 7 TEU. The determination that there has been a breach of the principles of the rule of law, set out in Article 4(2) of the contested regulation, read in conjunction with Article 3 thereof, is identical in substance to the determination which it is for the Council and the European Council to make under Article 7(1) and (2) TEU, while the adoption of measures under Article 5 of that regulation is an option parallel to that of suspending certain of the rights of the Member State in question, provided for in Article 7(3) TEU, since such a suspension may relate to the budgetary resources payable to the Member State concerned.

87 The fact that the measures that may be adopted under the contested regulation are linked to the breach of one of the values contained in Article 2 TEU is supported by Article 5(3) and Article 6(8) of that regulation, from which it follows that the nature, duration, gravity and scope of the breach of the principles of the rule of law and the relevant sources are to be duly taken into account when assessing the proportionality of the measures. Accordingly, both the Commission and the Council are required to carry out a thorough assessment of the existence and scope of such a breach, whereas that assessment can be carried out only on the basis of Article 7 TEU.

88 Hungary, supported by the Republic of Poland, adds that Article 7 TEU lays down a sanctions procedure of a constitutional nature against an individual Member State. Furthermore, the Member States, as the constituent power of the European Union, have set out that procedure exhaustively in the TEU because of the political dimension of the areas covered by that procedure, areas which do not necessarily fall within the scope of EU law, such as those relating to the functioning of the authorities and institutions of the Member States.

89 The exclusive nature of the procedure laid down in Article 7 TEU as regards breaches of the principles of the rule of law is confirmed by paragraphs 18 and 24 of the opinion of the Council Legal Service No 10296/14 of 27 May 2014 on the compatibility with the Treaties of the Commission's Communication entitled 'New EU framework to strengthen the rule of law'. While the contested regulation endeavours to link the examination of potential breaches of the principles of the rule of law to the implementation of the Union budget, its real objective, as is apparent from the explanatory memorandum to the Commission's proposal which led to the adoption of that regulation, is to examine whether the principles of the rule of law are respected and to impose penalties where it is determined that a Member State has failed to respect those principles.

90 In the second place, Hungary submits that the contested regulation is in breach of the principles of the division and conferral of powers, as guaranteed by Article 4(1) and Article 5(2) TEU, since it allows the EU institutions to examine national situations and institutions which fall outside the scope of EU law. It is not clear from that regulation that the examination of breaches of the principles of the rule of law is limited to areas which come within the European Union's competence and, moreover, some of the situations set out in Articles 3 and 4 thereof may relate to breaches which are not limited to those areas.

91 Under those principles of the division and conferral of powers, such an examination falling outside the scope of the European Union's competence is possible only for the purposes of, and in accordance with the procedure laid down by, a provision of primary law, such as Article 7 TEU. The contested regulation, however, does not have such a provision of primary law as its basis, with the result that that regulation must be regarded as establishing a derogation from the general rules on the division of powers between the European Union and the Member States as enshrined in the Treaties. In addition, whereas the procedure laid down in Article 7(1) and (2) TEU covers only situations showing



a clear risk of a serious breach of the values contained in Article 2 TEU and a serious and persistent breach of those values, the procedure laid down by the contested regulation may apply even where the alleged breaches are neither serious nor persistent.

92 Lastly, Hungary, supported by the Republic of Poland, states that, although the examination carried out under the contested regulation may, in some respects, be linked to the sound financial management of the Union budget or the protection of the financial interests of the Union, that does not however mean that the situations examined must necessarily be regarded as coming within the scope of EU law merely by virtue of that relationship. It states that the existence of a breach of the rule of law is analysed during the first stage of the examination, whereas the relationship with the Union budget can be established only at the end of the second stage. The contested regulation therefore allows a determination that a Member State has breached the rule of law in situations which fall outside the scope of EU law.

93 In the third place, Hungary submits that the contested regulation undermines the institutional balance as established in Article 7 and Article 13(2) TEU and Article 269 TFEU, as well as the rights which the Member State concerned derives from the first of those provisions.

94 In that regard, contrary to Article 7 TEU, the contested regulation grants the Commission alone the right of initiative to determine that there has been a breach of the principles of the rule of law. For the Council's vote, it requires a different majority from that prescribed in Article 7 TEU. In addition, the contested regulation lays down an obligation only to inform the Parliament – whereas the Parliament is given a right of approval under Article 7(1) and (2) TEU – and does not grant any power to the European Council. Since a Council decision laying down measures under the contested regulation is adopted by a qualified majority, the procedural position of the Member State concerned is weakened, having regard in particular to the fact that, under Article 7(2) and (3) TEU, the adoption of measures pursuant to that provision requires a unanimous decision of the European Council.

95 The contested regulation thus responds to the EU legislature's intention, reflected in the explanatory memorandum to the Commission proposal which led to the adoption of that regulation, to provide an 'easier', 'more rapid' and 'more effective' means of establishing and penalising breaches of the principles of the rule of law. By doing so, the contested regulation, by way of derogation from Article 7 TEU, grants new powers to the Council, the Commission and the Court, allowing the Court in particular, in breach of Article 269 TFEU, to examine the merits of decisions determining that there have been breaches of the principles of the rule of law. That regulation therefore runs counter to the express intention of the Member States, as authors of the Treaties, to limit the Court's powers to procedural issues in respect of actions concerning a measure adopted by the European Council or by the Council under Article 7 TEU.

96 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute those arguments.

### **(b) Findings of the Court**

97 By its first and second pleas, Hungary, supported by the Republic of Poland, submits, in essence, first, that neither Article 322(1)(a) TFEU nor any other provision of the TFEU can constitute an appropriate legal basis for the adoption of the contested regulation, in particular of Articles 2 to 4 and Article 5(2) of that regulation. It adds, secondly, that the procedure established by the contested regulation circumvents the procedure laid down in Article 7 TEU – which, it is submitted, is the exclusive procedure for the protection of the values contained in Article 2 TEU – and undermines the limitation on the Court's powers laid down in Article 269 TFEU.

#### **(1) The legal basis for the contested regulation**

98 As a preliminary point, it should be borne in mind that, under Article 322(1)(a) TFEU, the Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, are

to adopt by means of regulations ‘the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts’.

99 Such rules are intended to regulate all aspects related to the implementation of the Union budget covered by Title II, entitled ‘Financial provisions’, of Part Six of the TFEU, relating to ‘institutional and financial provisions’ and, therefore, to regulate implementation in the broad sense.

100 Aside from the fact that Article 322 TFEU is found in Chapter 5, entitled ‘Common provisions’, of Title II, it should be noted that reference is made to that provision in Article 310(2) and (3) TFEU, which is found in the introduction to Title II, in the first and second paragraphs of Article 315 and in the first and second paragraphs of Article 316 TFEU, which are found in Chapter 3 of Title II, entitled ‘The Union’s annual budget’, and in Article 317 TFEU, which is found in Chapter 4 of that title, entitled ‘Implementation of the budget and discharge’.

101 Articles 310 and 315 to 317 TFEU all relate to the implementation of the Union budget.

102 Article 310 TFEU states, in paragraph 1, that all items of revenue and expenditure of the Union are to be included in estimates to be drawn up for each financial year and are to be shown in the budget; it provides, in paragraph 3, that the implementation of expenditure shown in the budget requires the prior adoption of a legally binding Union act providing a legal basis for Union action and for the implementation of the corresponding expenditure in accordance with the regulation referred to in Article 322 TFEU, except in cases for which that law provides. Lastly, Article 310 TFEU requires, in paragraph 5, that the budget be implemented in accordance with the principle of sound financial management and that Member States cooperate with the Union to ensure that the appropriations entered in the budget are used in accordance with that principle.

103 The first paragraph of Article 315 TFEU provides that if, at the beginning of a financial year, the budget has not yet been definitively adopted, a sum equivalent to not more than one twelfth of the budget appropriations for the preceding financial year may be spent each month in respect of any chapter of the budget in accordance with the provisions of the regulations made pursuant to Article 322 TFEU; that sum is not, however, to exceed one twelfth of the appropriations provided for in the same chapter of the draft budget. Article 316 TFEU relates to the carrying forward to the next financial year of any appropriations that are unexpended at the end of the financial year.

104 Article 317 TFEU states, *inter alia*, that the Commission is to implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322 TFEU, on its own responsibility and within the limit of the appropriations, having regard to the principle of sound financial management. It also requires Member States to cooperate with the Commission to ensure that the appropriations are used in accordance with that principle and states that regulations made pursuant to Article 322 TFEU are to lay down the control and audit obligations of the Member States in the implementation of the budget and the resulting responsibilities.

105 It follows that the financial rules which determine ‘in particular the procedure to be adopted for’ implementing the budget and for presenting and auditing accounts, within the meaning of Article 322(1)(a) TFEU read in the light of the provisions referred to in paragraph 101 above, cover not only the rules which define how expenditure shown in the budget is to be implemented as such but also, in particular, the rules which determine the control and audit obligations on the Member States when the Commission implements the budget in cooperation with them, and the resulting responsibilities. In particular, it is clear that those financial rules are intended, *inter alia*, to ensure observance of the principle of sound financial management, including by the Member States, when implementing the Union budget.

106 It is in the light of the above considerations that it is necessary to examine, in the present case, whether Article 322(1)(a) TFEU is capable of constituting the appropriate legal basis for the adoption of the contested regulation.

107 In that regard, it is settled case-law that the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include the aim and content of that measure (judgments of 3 December 2019, *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 31; of

8 December 2020, *Hungary v Parliament and Council*, C-620/18, EU:C:2020:1001, paragraph 38; and of 8 December 2020, *Poland v Parliament and Council*, C-626/18, EU:C:2020:1000, paragraph 43).

108 In addition, to determine the appropriate legal basis, the legal framework within which new rules are situated may be taken into account, in particular in so far as that framework is capable of shedding light on the purpose of those rules (judgments of 3 December 2019, *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 32; of 8 December 2020, *Hungary v Parliament and Council*, C-620/18, EU:C:2020:1001, paragraph 39; and of 8 December 2020, *Poland v Parliament and Council*, C-626/18, EU:C:2020:1000, paragraph 44).

109 In the present case, as regards, in the first place, the question whether the contested regulation, in the light of its purpose, falls within the scope of the legal basis of Article 322(1)(a) TFEU, Hungary, supported by the Republic of Poland, submits that the ultimate objective of that regulation is to enable the Commission and the Council to examine whether the principles of the rule of law are respected by the Member States and, if breaches of those principles are found, to impose penalties through the Union budget, an objective which is also apparent from the explanatory memorandum accompanying the Commission proposal which led to the adoption of that regulation.

110 In that regard, first, Article 1 of the contested regulation states that that regulation establishes ‘the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States’. It is thus apparent from the wording of that provision that the contested regulation is intended to protect the Union budget from any effects that may result from breaches of the principles of the rule of law in the Member States.

111 Secondly, it follows from a combined reading of Article 4(1) and Article 6(1) of the contested regulation that the procedure laid down for the adoption of ‘appropriate measures’ for the protection of the Union budget can be initiated by the Commission only where it finds that there are reasonable grounds for considering not only that there have been breaches of the principles of the rule of law in a Member State, but, in particular, that those breaches affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

112 In addition, under Article 5(1) and (3) of that regulation, those appropriate measures consist, essentially, in the suspension of payments, of the implementation of legal commitments, of the disbursement of instalments, of the economic advantage under a guaranteed instrument, of the approval of programmes, or of commitments; terminations of legal commitments; prohibitions on entering into new legal commitments or entering into new agreements; early repayments of guaranteed loans; reductions of the economic advantage under a guaranteed instrument, of commitments or of pre-financings; and interruption of payment deadlines, and those measures must be proportionate, that is to say, limited to what is strictly necessary in the light of the actual or potential impact of breaches of the principles of the rule of law on the financial management of the Union budget or the financial interests of the Union.

113 Furthermore, in accordance with the second subparagraph of Article 7(2) of the contested regulation, the Commission is to propose to the Council that the adopted measures be lifted where the conditions laid down Article 4 of that regulation are no longer fulfilled and, therefore, in particular where the sound financial management of the Union budget or the protection of the financial interests of the Union is no longer affected or at serious risk of being affected, with the result that, as the Advocate General observed in point 185 of his Opinion, those measures must be lifted where the impact on the implementation of the budget ceases, even though the breaches of the principles of the rule of law found may persist.

114 The types of measures which may be adopted, the criteria relating to the choice and scope of those measures and the conditions for the adoption and lifting of measures, in so far as they all relate to an effect or a serious risk of an effect on the sound financial management of the Union budget or the protection of the financial interests of the Union, support the finding that the purpose of the contested regulation is to protect the Union budget during its implementation.

115 Furthermore, it is apparent from the wording of Article 5(2) of the contested regulation, read in the light of Article 5(4) and recital 19 of that regulation, that that provision is intended not to penalise a Member State for a breach of a principle of the rule of law, as Hungary, supported by the Republic of Poland, submits, but to safeguard the legitimate interests of final recipients or beneficiaries when appropriate measures are adopted under that

regulation against a Member State. That provision thus sets out the consequences of such measures with regard to third parties. Accordingly, that provision is not such as to support the claim that the contested regulation is intended to penalise breaches of the principles of the rule of law in a Member State rather than to protect the Union budget.

116 Thirdly, as the Advocate General stated in point 130 of his Opinion, the recitals of the contested regulation confirm the objective pursued by that regulation, consisting, as apparent from Article 1 thereof, in the protection of the Union budget. Recitals 2 and 7 through 9 of that regulation indicate, in particular, that the European Council has stated that the financial interests of the Union are to be protected in accordance with the values set out in Article 2 TEU, that, whenever Member States implement the Union budget, respect for the rule of law is an essential precondition for compliance with the principles of sound financial management enshrined in Article 317 TFEU, that Member States can only ensure sound financial management if public authorities act in accordance with the law, if breaches of the law are effectively pursued and if arbitrary or unlawful decisions of public authorities can be subject to effective judicial review, and that the independence and impartiality of the judiciary and investigation and prosecution services are required as a minimum guarantee against unlawful and arbitrary decisions of public authorities that could harm the financial interests of the Union. Recital 13 of the contested regulation states that, in that context, there is therefore ‘a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management’, and recital 15 of that regulation specifies that ‘breaches of the principles of the rule of law, in particular those that affect the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union’.

117 As regards recital 14 of the contested regulation, while that recital states that the mechanism provided for by that regulation ‘complements’ the instruments that promote the rule of law and its application, it specifies that that mechanism does so ‘by protecting the Union budget against breaches of the principles of the rule of law affecting its sound financial management or the protection of the financial interests of the Union’.

118 Fourthly, it is true that, in the explanatory memorandum accompanying its proposal which led to the adoption of the contested regulation, the Commission stated that wishes had been expressed in favour of the European Union’s taking action to protect the rule of law and, consequently, adopting measures to ensure that it is respected. Nevertheless, in that explanatory memorandum, the Commission justified its proposal by the need ‘to protect the Union’s financial interests from the risk of financial loss caused by generalised deficiencies as regards the rule of law in a Member State’.

119 In the light of the foregoing considerations, it must be found that, contrary to Hungary’s submission, supported by the Republic of Poland, the purpose of the contested regulation is to protect the Union budget from effects resulting from breaches of the principles of the rule of law in a Member State in a sufficiently direct way, and not to penalise those breaches as such.

120 That purpose is in line with the requirement that the Union budget be implemented in accordance with the principle of sound financial management, laid down in particular in Article 310(5) TFEU, that requirement being applicable to all the provisions of Title II of Part Six of the TFEU relating to the implementation of the Union budget and therefore, *inter alia*, to Article 322(1)(a) TFEU.

121 In the second place, as regards whether, in the light of its content, the contested regulation falls within the scope of the legal basis of Article 322(1)(a) TFEU, Hungary, supported by the Republic of Poland, submits, in essence, that that cannot be the case for, in particular, Articles 2 to 4 and Article 5(2) of that regulation. First, Article 322(1)(a) TFEU does not enable either the concept of ‘the rule of law’ or that of ‘breaches of the principles of the rule of law’ to be defined. Secondly, the relationship between breaches of the principles of the rule of law and the Union budget is too broad and would, if accepted, enable any area of EU law and significant aspects of the legal systems of the Member States to be linked to it. Thirdly, Article 5(2) does not concern the Union budget or its implementation, but relates to the budgets of the Member States. Fourthly, Articles 2 to 4 allow the EU institutions to examine national situations and institutions which fall outside the scope of EU law.

122 In that regard, first, the parties to the proceedings agree that a ‘conditionality mechanism’, which makes the receipt of financing from the Union budget subject to compliance with certain conditions, is capable of falling within the concept of ‘financial rules’, within the meaning of Article 322(1)(a) TFEU.

123 However, while Hungary, supported by the Republic of Poland, takes the view that such a condition must be closely linked either to one of the objectives of a programme or of a specific EU action, or to the sound financial management of the Union budget, the Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, take the view that such a mechanism can also entail ‘horizontal conditionality’ in the sense that the condition in question can be linked to the value of the rule of law contained in Article 2 TEU, which must be respected in all areas of Union action.

124 In that regard, it should be pointed out that, under Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States and that, under Article 49 TEU, respect for those values is a prerequisite for the accession to the European Union of any European State applying to become a member of the European Union (see, to that effect, judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraphs 160 and 161 and the case-law cited).

125 As stated in recital 5 of the contested regulation, once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded. That premiss is based on the specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the EU law that implements them will be respected (see, to that effect, Opinion 2/13 (*Accession of the Union to the ECHR*) of 18 December 2014, EU:C:2014:2454, paragraphs 166 to 168, and judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 30, and of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 62). That recital also states that the laws and practices of Member States should continue to comply with the common values on which the European Union is founded.

126 It follows that compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State (judgments of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 63; of 18 May 2021, *Asociația ‘Forumul Judecătorilor din România’ and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 162; and of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 162). Compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession.

127 The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.

128 It follows that, in accordance with the principle of conferral of powers enshrined in Article 5(2) TEU and the principle of consistency of the European Union’s policies laid down in Article 7 TFEU, the rule of law – a value common to the European Union and the Member States which forms part of the very foundations of the European Union and its legal order – is capable of constituting the basis of a conditionality mechanism covered by the concept of ‘financial rules’ within the meaning of Article 322(1)(a) TFEU.

129 In that regard, it should be noted, first, that the Union budget is one of the principal instruments for giving practical effect, in the Union’s policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law (see, by analogy, judgment of 15 July 2021, *Germany v Poland*, C-848/19 P, EU:C:2021:598, paragraph 38), and, secondly, that the implementation of that principle, through the Union budget, is based on mutual trust between the Member States in the responsible use of the common resources included in that budget. That mutual trust is itself based, as stated in paragraph 125 above, on the commitment of each Member State to comply with its obligations under EU law and to continue to comply, as is

moreover stated in recital 5 of the contested regulation, with the values contained in Article 2 TEU, which include the value of the rule of law.

130 In addition, as recital 13 of the contested regulation states, there is a clear relationship between, on the one hand, respect for the value of the rule of law and, on the other hand, the efficient implementation of the Union budget, in accordance with the principles of sound financial management, and the protection of the financial interests of the Union.

131 That sound financial management and those financial interests are liable to be seriously compromised by breaches of the principles of the rule of law committed in a Member State, since those breaches may result, inter alia, in there being no guarantee that expenditure covered by the Union budget satisfies all the financing conditions laid down by EU law and therefore meets the objectives pursued by the European Union when it finances such expenditure.

132 In particular, compliance with those conditions and objectives, as elements of EU law, cannot be fully guaranteed in the absence of effective judicial review designed to ensure compliance with EU law; the existence of such review, both in the Member States and at EU level, by independent courts and tribunals, is of the essence of the rule of law (see, to that effect, judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraphs 219 and 222).

133 It follows from the foregoing that, contrary to Hungary's submission, supported by the Republic of Poland, a conditionality mechanism may also fall within the scope of the concept of 'financial rules' referred to in Article 322 (1)(a) TFEU where it makes the receipt of financing from the Union budget subject to horizontal conditionality which is linked to respect by a Member State for the value of the rule of law, contained in Article 2 TEU, and which relates to the implementation of the Union budget.

134 Article 4(1) of the contested regulation establishes such a horizontal conditionality mechanism, since it provides that appropriate measures are to be taken where it is established that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

135 Article 5(1) of that regulation sets out, exhaustively, the 'appropriate measures' that may be adopted, which are summarised in paragraph 112 above and which in fact all relate to the implementation of the Union budget.

136 As regards the condition laid down in Article 4(1) of the contested regulation relating to the existence of 'breaches of the principles of the rule of law', Article 2(a) of the contested regulation states that the concept of 'the rule of law' is to be understood, for the purposes of that regulation, as the 'Union value enshrined in Article 2 TEU' and that that concept includes the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, separation of powers and non-discrimination and equality before the law. That provision states, however, that the concept of 'the rule of law', as defined for the purposes of the application of the contested regulation, 'shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU'. It follows that respect for those values and principles – in so far as they form part of the very definition of the value of 'the rule of law' contained in Article 2 TEU or, as is apparent from the second sentence of that article, are closely linked to a society that respects the rule of law – may be required in the context of a horizontal conditionality mechanism such as that established by the contested regulation.

137 Furthermore, Article 3 of the contested regulation, which identifies cases which may be indicative of breaches of those principles, including a failure to ensure the absence of conflicts of interest, is intended, as the Advocate General stated in points 152 and 280 of his Opinion, to facilitate the application of that regulation.

138 As regards Article 4(2) of the contested regulation, it follows from that provision that, in order to come within the horizontal conditionality mechanism established in Article 4(1) thereof, breaches of the principles of the rule of law must concern the situations or the conduct of authorities listed in points (a) to (h) of Article 4(2), in so far as they are relevant to the sound financial management of the Union budget or to the protection of the financial interests of the Union.

139 It follows from the foregoing that Article 2(a), Article 3, Article 4(2) and Article 5(1) of the contested regulation are constituent elements of the horizontal conditionality mechanism established in Article 4(1) of that regulation, by laying down the definitions necessary for its implementation, by specifying its scope and by prescribing the measures to which it may lead. Those provisions thus form an integral part of that mechanism and therefore fall within the concept of ‘financial rules’, within the meaning of Article 322(1)(a) TFEU.

140 Secondly, that finding is not invalidated by Hungary’s argument, supported by the Republic of Poland, that Articles 2 to 4 of the contested regulation allow the EU institutions to examine situations in the Member States which fall outside the scope of EU law.

141 As stated in paragraph 111 above, it follows from a combined reading of Article 4(1) and Article 6(1) of the contested regulation that the procedure it lays down for the adoption of ‘appropriate measures’ for the protection of the Union budget can be initiated by the Commission only where it finds that there are reasonable grounds for considering not only that there have been breaches of the principles of the rule of law in a Member State, but, in particular, that those breaches affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

142 Moreover, as noted in paragraph 138 above, it follows from Article 4(2) of the contested regulation that, in order to come within the horizontal conditionality mechanism laid down in Article 4(1), breaches of the principles of the rule of law must concern the situations or conduct of authorities listed in points (a) to (h) of Article 4(2), in so far as they are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.

143 Such relevance can be presumed as regards the activities of the authorities implementing the Union budget and carrying out financial control, monitoring and audit, referred to in points (a) and (b) of Article 4(2) of the contested regulation. Regarding investigation and public prosecution services, the proper functioning of those services is caught, under point (c) of that provision, only in so far as it relates to breaches of EU law concerning the implementation of the Union budget or the protection of the financial interests of the Union. The same applies to the prevention and sanctioning, by national courts or administrative authorities, of the breaches of EU law mentioned in point (e). As regards the judicial review referred to in point (d), it is caught only in so far as it concerns the conduct of the authorities referred to in points (a) to (c). The recovery of funds unduly paid, provided for in point (f), covers only funds from the Union budget, which is also the case for cooperation with OLAF and the EPPO, mentioned in point (g). Lastly, point (h) expressly refers to any other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.

144 It follows that, contrary to Hungary’s submission, supported by the Republic of Poland, in the first place, the contested regulation allows the EU institutions to examine situations in the Member States only in so far as they are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union and, in the second place, appropriate measures can be adopted under that regulation only where it is established that such situations involve a breach of one of the principles of the rule of law which affects or seriously risks affecting that sound financial management or the protection of those financial interests of the Union in a sufficiently direct way.

145 Those situations, which are relevant to the implementation of the Union budget, not only fall within the scope of EU law, but, as found in paragraph 133 above, may also be caught by a financial rule, within the meaning of Article 322(1)(a) TFEU, in the form of a horizontal conditionality mechanism linked to respect by a Member State for the value of the rule of law.

146 Thirdly, contrary to Hungary’s submission, supported by the Republic of Poland, the fact that a horizontal conditionality mechanism that meets the criteria identified in paragraph 133 above, relating to respect by a Member State for the value of the rule of law contained in Article 2 TEU and to the implementation of the Union budget, may come within the concept of ‘financial rules which determine in particular the procedure to be adopted for . . . implementing the budget’, within the meaning of Article 322(1)(a) TFEU, does not extend the scope of that concept beyond what is necessary for the proper implementation of the Union budget.

147 Article 4 of the contested regulation limits, in paragraph 2, the scope of the conditionality mechanism established by that regulation to situations and conduct of authorities that are related to the implementation of the Union budget and requires, in paragraph 1, that the adoption of appropriate measures be subject to the existence of breaches of the principles of the rule of law which affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way. The latter condition thus requires that a genuine link be established between those breaches and such an effect or serious risk of an effect.

148 It should be pointed out, in that regard, that the application of Article 4(1) and (2) of the contested regulation is subject to the procedural requirements laid down in Article 6(1) to (9) of that regulation, which mean that, as recital 26 of that regulation states, the Commission is under an obligation, when examining whether the adoption of appropriate measures is justified, to use an evidence-based approach and to respect the principles of objectivity, non-discrimination and equality of the Member States before the Treaties.

149 As regards, more specifically, the identification and assessment of breaches of the principles of the rule of law, recital 16 of the contested regulation states that that assessment should be objective, impartial and fair. Furthermore, compliance with all of those obligations is subject to comprehensive judicial review by the Court.

150 Fourthly, as regards the issue whether Article 5(2) of the contested regulation falls within the scope of the legal basis of Article 322(1)(a) TFEU, it has been pointed out in paragraph 115 above that the objective of Article 5(2) is to safeguard the legitimate interests of final recipients and beneficiaries where appropriate measures are adopted under that regulation against a Member State. It follows that that provision concerns the legal and financial effects of measures for the protection of the Union budget, within the meaning of Article 5 of the contested regulation, which themselves relate to the implementation of the Union budget, as stated in paragraphs 112 and 135 above.

151 Furthermore, as noted in paragraph 99 above, the financial rules which determine ‘in particular the procedure to be adopted for’ implementing the budget, within the meaning of Article 322(1)(a) TFEU, are intended to regulate all aspects relating to the implementation of the Union budget covered by Title II of Part Six of the TFEU and therefore to implementation in the broad sense.

152 A provision which, like Article 5(2) of the contested regulation, concerns the legal and financial effects of measures for the protection of the Union budget, within the meaning of Article 5 of that regulation, which are measures relating to the implementation of the Union budget, must be considered as itself relating to that implementation and can therefore be regarded as determining a procedure for implementing the Union budget.

153 In the light of all the foregoing considerations, Hungary’s claims, supported by the Republic of Poland, alleging that the contested regulation has no legal basis, since it does not lay down financial rules within the meaning of Article 322(1)(a) TFEU, must be rejected.

154 However, it is still necessary to ascertain whether, as argued, in essence, by Hungary, supported by the Republic of Poland, financial rules such as those laid down by the contested regulation cannot be adopted by the EU legislature because they circumvent Article 7 TEU and Article 269 TFEU.

## (2) *Circumvention of Article 7 TEU and Article 269 TFEU*

155 In the first place, Hungary, supported by the Republic of Poland, argues, in essence, that only the procedure laid down in Article 7 TEU grants the EU institutions the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the values contained in Article 2 TEU in a Member State, since, in particular, that power covers areas which fall outside the scope of EU law, such as the functioning of the authorities and institutions of the Member States, and the Member States have, as the authors of the Treaties, regulated all aspects of that procedure in the TEU. As the Treaties do not provide for any delegation of legislative power under Article 7 TEU, neither that provision nor any other provision of the Treaties authorises the EU legislature to establish a procedure parallel to that laid down in Article 7 TEU relating to the finding of breaches of the values contained in Article 2 TEU and setting out the resulting legal consequences.

156 In that regard, first, it should be borne in mind that the founding values of the European Union, common to the Member States, contained in Article 2 TEU, include respect for human dignity, freedom, democracy, equality, the



rule of law and respect for human rights, in a society in which, inter alia, non-discrimination, justice, solidarity and equality between women and men prevail.

157 The preamble to the Charter states, inter alia, that the European Union is based on the principles of democracy and the rule of law and recognises the rights, freedoms and principles set out in the Charter. 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. Article 47 of the Charter and Article 19 TEU guarantee, inter alia, the right to an effective remedy and the right to an independent and impartial tribunal previously established by law, as regards the protection of the rights and freedoms guaranteed by EU law.

158 Furthermore, 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.

159 It follows from the two preceding paragraphs that, contrary to Hungary's submission, supported by the Republic of Poland, in addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State.

160 As regards, in particular, the value of the rule of law, certain aspects of that value are protected by Article 19 TEU, as Hungary indeed acknowledges. The same is true of Articles 47 to 50 of the Charter, contained in Title VI, entitled 'Justice', which guarantee, respectively, the right to an effective remedy and the right to a fair trial, the presumption of innocence and rights of the defence, the principles of legality and proportionality of criminal offences and penalties and the right not to be tried or punished twice for the same criminal offence.

161 More specifically, the Court has ruled that Article 19 TEU, which gives concrete expression to the value of the rule of law contained in Article 2 TEU, requires Member States, in accordance with the second subparagraph of Article 19(1), to establish a system of legal remedies and procedures ensuring that the right of individuals to effective judicial protection is observed in the fields covered by EU law (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of Judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraphs 108 and 109 and the case-law cited). Compliance with that requirement can be reviewed by the Court, inter alia in an action for failure to fulfil obligations brought by the Commission under Article 258 TFEU (see, to that effect, judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraphs 58 and 59, and of 5 November 2019, *Commission v Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraphs 106 and 107).

162 The Court has also ruled that the second subparagraph of Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, imposes on the Member States a clear and precise obligation as to the result to be achieved that is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law, with the result that it is for a national court to disapply any provision of national law which infringes the second subparagraph of Article 19(1) TEU, if necessary after obtaining from the Court an interpretation of that provision in the context of a reference for a preliminary ruling (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of Judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraphs 142 to 146).

163 It thus follows from the considerations in paragraphs 159 to 162 above that Hungary's line of argument to the effect that the value of the rule of law can be protected by the European Union only under the procedure laid down in Article 7 TEU must be rejected.

164 Secondly, as regards Hungary's claims, supported by the Republic of Poland, that only Article 7 TEU allows the EU institutions to review whether the Member States respect the rule of law in areas which fall outside the scope of EU law, including the functioning of the authorities and institutions of the Member States, it is sufficient to point out that the contested regulation authorises neither the Commission nor the Council to carry out such a review other

than in respect of conduct of an authority of a Member State or a situation attributable to such an authority which relates to the implementation of the Union budget and which, therefore, falls within the scope of EU law.

165 As noted in paragraphs 141 to 145 above, first, the contested regulation allows the EU institutions to examine situations in the Member States only in so far as they are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union and, secondly, appropriate measures can be adopted under that regulation only where it is established that such situations involve a breach of one of the principles of the rule of law which affects or seriously risks affecting that sound financial management or the protection of those financial interests in a sufficiently direct way.

166 In the second place, as regards the claim that the contested regulation has the effect of circumventing the procedure laid down in Article 7 TEU and extending the powers of the Court laid down in Article 269 TFEU, Hungary, supported by the Republic of Poland, submits, in essence, that the procedure established by that regulation gives concrete form, in defined cases, to the procedure referred to in Article 7 TEU and therefore establishes a parallel procedure for determining, following a thorough analysis, the existence of breaches of the principles of the rule of law by the Member States. That regulation, it is claimed, enables legal consequences which are identical to those provided for in Article 7 TEU to be attached to such breaches, even though neither that provision nor any other provision of the Treaties authorises the EU legislature to do so. Thus, that regulation allegedly undermines the institutional balance as established in Article 7 TEU, Article 13(2) TEU and Article 269 TFEU by granting new powers to the Council, the Commission and the Court.

167 In that regard, first, it should be stated that the EU legislature cannot establish, without infringing Article 7 TEU, a procedure parallel to that laid down by that provision, having, in essence, the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision.

168 However, it is permissible for the EU legislature, where it has a legal basis for doing so, to establish, in an act of secondary legislation, other procedures relating to the values contained in Article 2 TEU, which include the rule of law, provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU (see, by analogy, judgment of 7 February 1979, *France v Commission*, 15/76 and 16/76, EU:C:1979:29, paragraph 26; order of 11 July 1996, *An Taisce and WWF UK v Commission*, C-325/94 P, EU:C:1996:293, paragraph 25; and judgment of 11 January 2001, *Greece v Commission*, C-247/98, EU:C:2001:4, paragraph 13).

169 In the present case, as regards the respective purposes of the procedure laid down in Article 7 TEU and that provided for by the contested regulation, it follows from Article 7(2) to (4) TEU that the procedure laid down in that article allows the Council, where the European Council has determined the existence of serious and persistent breaches by a Member State of the values contained in Article 2 TEU, to suspend certain of the rights deriving from the application of the Treaties to that Member State, including the voting rights of the representative of the government of that Member State in the Council, and to decide subsequently to vary or revoke measures taken in response to changes in the situation which led to their being imposed.

170 The purpose of the procedure laid down in Article 7 TEU is therefore to allow the Council to penalise serious and persistent breaches of the values contained in Article 2 TEU, in particular with a view to compelling the Member State concerned to put an end to those breaches.

171 By contrast, as is apparent from paragraphs 110 to 120 above, it follows from the nature of the measures that may be adopted under the contested regulation and from the conditions for the adoption and lifting of those measures that the purpose of the procedure established by that regulation is to ensure, in accordance with the principle of sound financial management laid down in Article 310(5) and the first paragraph of Article 317 TFEU, the protection of the Union budget in the event of a breach of the principles of the rule of law in a Member State and not to penalise, through the Union budget, breaches of the principles of the rule of law.

172 It follows that the procedure laid down by the contested regulation pursues a different purpose from that of Article 7 TEU.

173 As regards the subject matter of each of those two procedures, it should be pointed out that the scope of the procedure laid down in Article 7 TEU covers all the values contained in Article 2 TEU, whereas the scope of the procedure established by the contested regulation covers only one of those values, namely the rule of law.

174 Furthermore, Article 7 TEU allows the assessment of all serious and persistent breaches of a value contained in Article 2 TEU, whereas the contested regulation authorises the examination of breaches of the principles of the rule of law mentioned in Article 2(a) of that regulation only in so far as there are reasonable grounds to consider that those breaches have budgetary implications.

175 As regards the conditions for initiating the two procedures, it should be noted that the procedure provided for in Article 7 TEU may be initiated, as set out in paragraph 1 of that article, where there is a clear risk of a serious breach by a Member State of the values contained in Article 2 TEU, on the initiative of one third of the Member States, the Parliament or the Commission, the threshold being, initially, that of a clear risk of a serious breach of those values and, subsequently – as regards the suspension, under Article 7(2) and (3) TEU, of certain of the rights deriving from the application of the Treaties to the Member State in question – that of a serious and persistent breach of those values by that Member State. Conversely, the procedure established by the contested regulation may be initiated by the Commission alone where there are reasonable grounds to consider not only that breaches of the principles of the rule of law have occurred in a Member State, but also, and above all, that those breaches affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

176 Moreover, the only substantive condition required for the adoption of measures under Article 7 TEU lies in the European Council's determining the existence of a serious and persistent breach by a Member State of the values contained in Article 2 TEU. By contrast, as noted in paragraph 147 above, under Article 4(1) and (2) of the contested regulation, measures under that regulation may be taken only where two conditions are satisfied. First, it must be established that a breach of the principles of the rule of law in a Member State concerns one or more of the situations or forms of conduct of authorities referred to in paragraph 2, in so far as it is relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union. Secondly, it must also be demonstrated that those breaches affect or seriously risk affecting that sound financial management or those financial interests in a sufficiently direct way; that condition thus requires that a genuine link be established between those breaches and such an effect or serious risk of an effect.

177 Regarding the nature of the measures that may be adopted under Article 7(3) TEU, those measures consist in the suspension of 'certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council' and may, therefore, relate to any right deriving from the application of the Treaties to the Member State in question. By contrast, the measures that may be adopted under the contested regulation are limited to those listed in Article 5(1) of that regulation and summarised in paragraph 112 above, which are all budgetary in nature.

178 Lastly, Article 7 TEU provides for the variation or revocation of measures adopted only in response to changes in the situation which led to their being imposed. By contrast, the second and third subparagraphs of Article 7(2) of the contested regulation make the lifting and variation of measures adopted subject to the conditions for the adoption of measures referred to in Article 4 of that regulation. Accordingly, those measures may be lifted or varied not only where breaches of the principles of the rule of law in the Member State in question have been remedied, at least in part, but in particular where those breaches, despite persisting, no longer have an impact on the Union budget. That may be the case, *inter alia*, where they no longer concern one or more of the situations or forms of conduct of authorities referred to in paragraph 2 of that article, where those situations or conduct are no longer relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union, where the breach no longer affects or seriously risks affecting that sound management or those financial interests, or where the link between the breach of a principle of the rule of law and such an effect or serious risk is no longer sufficiently direct.

179 In the light of the foregoing considerations, it is clear that the procedure laid down in Article 7 TEU and that established by the contested regulation pursue different aims and that each has a clearly distinct subject matter.

180 It follows that, contrary to Hungary's submission, supported by the Republic of Poland, the contested regulation cannot be regarded as establishing a parallel procedure which circumvents Article 7 TEU.

181 Secondly, as regards Hungary's line of argument, supported by the Republic of Poland, to the effect that the contested regulation undermines the institutional balance as established in Article 7 and Article 13(2) TEU, first, it has been held in the above two paragraphs that the procedure laid down in Article 7 TEU and that established by the contested regulation pursue different aims and each has a distinct subject matter, with the result that the contested regulation cannot be regarded as establishing a parallel procedure which circumvents that provision.

182 In those circumstances, Hungary, supported by the Republic of Poland, is not justified in maintaining that the contested regulation undermines the institutional balance established in Article 7 TEU.

183 Secondly, as regards the requirements of Article 13(2) TEU, under which 'each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out therein', it is apparent from Article 6 of the contested regulation that the Commission is to conduct that procedure and that, where appropriate, the Council is to adopt, on a proposal from the Commission, an implementing decision adopting appropriate measures; despite the reference in recital 26 of that regulation to the European Council, Article 6 does not confer any role on the European Council in the procedure established by that regulation.

184 In that regard, first of all, in accordance with the first paragraph of Article 317 TFEU, the Commission is to implement the Union budget in cooperation with the Member States on its own responsibility, having regard to the principle of sound financial management, with the result that its role in the procedure established by the contested regulation is consistent with the powers conferred on it by that provision.

185 Next, as the Council correctly contended, the Council is able to act on the basis of Article 322(1)(a) and Article 291(2) TFEU, with the result that its involvement is not in breach of the power granted to the Commission under the first paragraph of Article 317 TFEU.

186 First, as noted in paragraph 99 above, the financial rules which determine 'in particular the procedure to be adopted for implementing the budget', within the meaning of Article 322(1)(a) TFEU, are intended to regulate all aspects related to the implementation of the Union budget covered by Title II of Part Six of the TFEU and therefore to implementation in the broad sense.

187 Thus, the horizontal conditionality mechanism established by the contested regulation forms part of a conception of budget implementation that goes beyond that which – being defined in Article 2(7) of the Financial Regulation as the carrying out of activities relating to the management, monitoring, control and audit of budget appropriations – falls within the Commission's powers in cooperation with the Member States, in accordance with the first paragraph of Article 317 TFEU.

188 Secondly, Article 291(2) TFEU allows, in duly justified specific cases, implementing powers to be conferred on the Council where uniform conditions for implementing legally binding Union acts are required. In that regard, it is apparent from Article 6(9) to (11) of the contested regulation that the measures that may be adopted by the Council under that regulation are implementing decisions, and recital 20 of that regulation states that implementing powers are to be conferred on the Council in order to ensure uniform conditions for the implementation of that regulation, in view of the importance of the financial effects of those measures.

189 Those factors support the finding that the conferral on the Council of a power to adopt the appropriate measures referred to in Article 5(1) of the contested regulation is duly justified.

190 Lastly, the fact that no powers are conferred on the European Council in the procedure established by Article 6 of the contested regulation is consistent with the powers conferred on it by Article 15(1) TEU, under which the European Council is to provide the Union with the necessary impetus for its development and define the general political directions and priorities thereof, but is not to exercise legislative functions.

191 While recital 26 of the contested regulation states that the European Council may, at the request of the Member State in respect of which the procedure conducted under Article 6 of that regulation has been initiated, discuss whether, during that procedure, the principles of objectivity, non-discrimination and equality of Member

States before the Treaties have been respected, it is sufficient to note that such action by the European Council, taken on an exceptional basis, is not provided for in Article 6 or any other provision of that regulation. In those circumstances, in view of the fact that the preamble to an EU act has no binding legal force (see, to that effect, judgment of 19 December 2019, *Puppinck and Others v Commission*, C-418/18 P, EU:C:2019:1113, paragraph 76 and the case-law cited), recital 26 cannot be relied on as a ground for derogating from the actual provisions of the contested regulation or for interpreting those provisions in a manner that is contrary to their wording.

192 Thirdly, in so far as Hungary, supported by the Republic of Poland, submits that the Court will be called upon to assess, in the context of the judicial review of a decision adopted by the Council under Article 6(10) of the contested regulation, the existence of breaches by a Member State of the principles of the rule of law, and argues that the power thus granted to it constitutes an infringement of Article 13(2) TEU and Article 269 TFEU, it should be pointed out that the wording of the latter article refers only to the review of the legality of an act adopted by the European Council or by the Council pursuant to Article 7 TEU.

193 In those circumstances, and having regard to the findings made in paragraphs 179 and 180 above, the review of legality which the Court may be called upon to carry out, in particular in an action for annulment brought under Article 263 TFEU, in respect of Council decisions taken under Article 6(10) of the contested regulation does not fall within the scope of Article 269 TFEU and is therefore not subject to the specific rules laid down by that article.

194 It follows that the contested regulation does not confer any new powers on the Court.

195 Lastly, it was noted in paragraph 165 above that the contested regulation allows the EU institutions to examine situations in the Member States only in so far as they are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union and, furthermore, that appropriate measures can be adopted under that regulation only where it is established that such situations involve a breach of one of the principles of the rule of law which affects or seriously risks affecting that sound financial management or the protection of those financial interests in a sufficiently direct way.

196 Since such situations relate to the implementation of the Union budget and therefore fall within the scope of EU law, Hungary, supported by the Republic of Poland, cannot maintain that the Court lacks jurisdiction to examine determinations made by the Council in decisions adopted under Article 6(10) of the contested regulation.

197 Accordingly, Hungary's claims, supported by the Republic of Poland, alleging circumvention of Article 7 TEU and Article 269 TFEU, must be rejected as unfounded.

198 It follows from the foregoing considerations that the first and second pleas must be rejected as unfounded.

## **2. *The third plea, alleging breach of the principle of legal certainty***

### **(a) *Arguments of the parties***

199 By the third plea, Hungary, supported by the Republic of Poland, submits that the contested regulation breaches the principles of legal certainty and legislative clarity, which are recognised as general principles of EU law, on the ground that the concepts in that regulation, on the basis of which a Member State may be found to have breached the principles of the rule of law, have no uniform definition in the Member States. It takes the view, in particular, that the concept of 'the rule of law', as defined in Article 2(a) of the contested regulation, reveals serious conceptual uncertainties and serious inconsistencies which could jeopardise the interpretation of EU values and lead to that regulation being applied in a way that is contrary to those values.

200 In the first place, Hungary states that the rule of law is an ideal or, at most, a guiding standard, which is never fully achieved and respect for the rule of law should therefore be assessed in relative terms, since no State can claim to adhere to it perfectly. That ideal, which characterises modern democracy, has developed in a complex way over the centuries, resulting, as is apparent from Study No 512/2009 of 28 March 2011 of the Venice Commission, entitled 'Report on the Rule of Law', in a complex concept which cannot be precisely defined and the substance of which is constantly evolving.

201 That conception of the rule of law is also apparent from Study No 711/2013 of 18 March 2016 of the Venice Commission adopting a ‘Rule of law checklist’, a study referred to in recital 16 of the contested regulation. According to paragraphs 12 and 18 of that study, the ‘core elements’ of the concept of ‘the rule of law’ do not define that concept and are themselves theoretical categories and principles which may in turn be subdivided into several other principles. In addition, it is apparent from paragraphs 29 and 30 of that study that the rule of law checklist which it sets out is not exhaustive and cannot be converted into rules.

202 In that regard, Hungary states that, according to Article 4(2) TEU, the European Union is to respect the national identity of the Member States, inherent in their fundamental structures, political and constitutional. However, the mechanism introduced by the contested regulation is not consistent with that fundamental guarantee, since the procedure that it establishes allows the legislation or practice of a Member State to be examined even where it falls outside the scope of EU law.

203 The conceptual uncertainties affecting the concept of ‘the rule of law’ are further exacerbated by the fact that the Commission’s representatives stated on several occasions that the findings in the Commission’s annual report on the rule of law would be used in the application of the contested regulation, even though that regulation makes no reference to that report. Furthermore, in that report the Commission examined the application of the requirements of the rule of law in areas which correspond neither to the concepts employed in the contested regulation in relation to the principles of the rule of law nor to the rule of law checklist identified by the Venice Commission in its study referred to in paragraph 201 above.

204 Hungary takes the view that the Commission’s perception of the constituent elements of the rule of law differs from that of the Venice Commission and from that on which the concepts in the contested regulation are based, with the result that the Commission’s application of that regulation may become so unforeseeable as to be incompatible with the principle of legal certainty, which is itself one aspect of the rule of law.

205 In the second place, Hungary, supported by the Republic of Poland, submits that the EU legislature tried unsuccessfully, in Article 2(a) of the contested regulation, to elucidate the constituent elements of the concept of ‘the rule of law’. That provision merely reproduces the parallel elements of Article 2 TEU, which are equally abstract, such as respect for fundamental rights, the prohibition of discrimination and the principle of effective judicial protection, which are also enshrined separately in the Treaties. That circumstance confirms the fact that the values of Article 2 TEU inspire political cooperation within the European Union, but do not have their own legal content. By defining the concept of ‘the rule of law’ in a sector-specific regulation and thereby allowing other instruments of secondary legislation to use a different conception of it, the EU legislature has undermined the interpretation of that concept as a common value of the European Union, as defined by the community of the Member States pursuant to Article 2 TEU.

206 Moreover, after defining, in Article 2(a), the concept of ‘the rule of law’, the contested regulation sets out, in Article 3, cases that may be indicative of ‘breaches of the principles of the rule of law’, which, in actual fact, have only a negligible connection with the definition of that concept. Similarly, the relationship between, on the one hand, Article 4(2) of that regulation, which specifies the situations and conduct which breaches of the principles of the rule of law are to concern, and, on the other hand, the concept of ‘the rule of law’ and that of the ‘principles of the rule of law’ cannot be clearly determined. Thus, it cannot be ruled out, from the joint examination of the cases that may be indicative of breaches of the principles of the rule of law, set out in Article 3 of the contested regulation, with the definition of the concept of ‘the rule of law’ in Article 2(a) of that regulation, that penalties may be imposed in respect of situations which are not linked to the sound management of the budgetary resources of the Union.

207 Hungary, supported by the Republic of Poland, submits that the constituent elements of the rule of law are satisfied when public authorities conduct themselves in a way which is based on law, free from arbitrariness and capable of being challenged before a court or tribunal. It takes the view, however, that ‘failing to prevent . . . withholding financial and human resources affecting [public authorities’] proper functioning’, ‘failing to ensure the absence of conflicts of interest’ or ‘failing to prevent . . . unlawful decisions’, referred to in Article 3(b) of the contested regulation, have only a remote and indirect link with the concept of ‘the rule of law’, severing the link between the purpose and content of that legislation. If the EU legislature had intended to penalise such failures, which are

essentially administrative in nature, on the ground that they affect the Union budget, it could have penalised them without resorting to that concept.

208 In the third place, Hungary states that it is apparent from a study carried out by the Parliament in 2015, entitled ‘The General Principles of EU Administrative Procedural Law’, that the concept of ‘the rule of law’ is so general that its precise content can be established only by its constituent elements, including the principle of legal certainty, which requires that legal rules be clear, precise and foreseeable in their effects, so that the persons concerned can ascertain what their rights and obligations are in legal situations and relationships within the EU legal order. Those requirements should therefore also be met where a penalty mechanism is introduced for failures to adhere to the rule of law.

209 Apart from the divergence between the concept of ‘the rule of law’ and the ‘principles of the rule of law’, the contested regulation refers, in Article 3 and Article 4(2), to expressions which are not defined sufficiently precisely for it to be possible to foresee the circumstances in which a breach of the principles of the rule of law may be found. The same applies to ‘the proper functioning of the authorities’, ‘the effective judicial review by independent courts of . . . the authorities’, ‘the effective and timely cooperation with OLAF’ and ‘other situations or conduct of authorities that are relevant . . .’. Thus, the Commission and the Council have been given such a broad discretion that it is incompatible with a procedure that may lead to penalties.

210 In accordance with settled case-law of the EU judicature, EU legislation must be certain and its application foreseeable by those subject to it, and that requirement must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them. That requirement extends to the foreseeability of the means of proof and methods used in penalty procedures.

211 Hungary submits that the principle of legal certainty does not preclude the law from regulating an issue generally and in the abstract, in which case it falls to the courts, when applying that law, to interpret it. Nevertheless, it takes the view that, having regard to the obligation to ‘protect’ the national identity of the Member States, it must be possible for the rule of law and the principles of the rule of law to be assessed differently in each of the Member States, particularly as the EU institutions do not always assess different legal situations uniformly. Yet a fundamental element of the rule of law and legal certainty is that the law must be formulated in such a way that like situations are treated in the same way. Owing to the conceptual shortcomings of the contested regulation and the fact that it is impossible to define the concept of ‘the rule of law’ with precision, that regulation does not satisfy that basic condition for a uniform application of the law.

212 Hungary states, by way of example, that the Commission has not, in its annual reports on the rule of law, regarded as wrongful the fact that, in some Member States, public prosecution services may receive instructions from the executive, whereas the Court has expressed serious concerns in that regard in cases involving the execution of a European arrest warrant. It is therefore difficult to determine whether, in such a case, the requirement of the proper functioning of the prosecuting authorities is met. As regards the required degree of cooperation with OLAF, Hungary wonders, first of all, whether that could be measured by reference to prosecutions brought on the basis of OLAF’s recommendations, next, whether, in order to comply with the contested regulation, a percentage of prosecutions on the basis of those recommendations should be set and, lastly, whether, in order to reach that threshold, it should be possible to give instructions to public prosecution services in individual cases, even though the existence of such instructions may raise questions as to the impartiality and lawfulness of the prosecutions and the independence of the public prosecution services. Hungary also states that a threshold of convictions based on such recommendations casts doubt on the independence of the judiciary. In the light of those concerns, Hungary fears that a contradiction may arise between the conditions examined by the Commission in the context of the mechanism established by the contested regulation, on the one hand, and the fundamental requirements laid down by the Court and by national constitutional provisions, on the other.

213 In the fourth place, Hungary, supported by the Republic of Poland, submits that certain provisions of the contested regulation breach the principle of legal certainty, which should entail the annulment of that regulation in its entirety.

214 First, Article 4(1) of the contested regulation, in so far as it authorises the adoption of measures as soon as there is a ‘risk’ that the Union budget will be affected, permits the imposition of penalties in uncertain or unproven situations. If the Union budget has not in fact been affected, the application of penalties would be arbitrary and would breach the principle of legal certainty, since it would be impossible for the Commission to make an objective, technical and factual determination with regard to the conditions for adopting measures. In such a situation, the only objective criteria for justifying the adoption of measures would be the gravity and nature of the breach of the rule of law, which is, however, incompatible with the legal basis for the contested regulation.

215 Secondly, the fact that Article 4(2) of the contested regulation allows, in point (h), outside the cases referred to in points (a) to (g), the adoption of measures in respect of ‘other situations or conduct of the authorities’ – which are not defined – is contrary to the principle of legal certainty, according to which a rule allowing penalties to be adopted must list precisely and exhaustively the conduct that may give rise to penalties. The only specific feature of point (h), in relation to the content of Article 4(1) of the contested regulation, is the indication that the situation or conduct complained of must be attributable to ‘authorities’, but, unlike other provisions of that regulation, that point does not specify the nature of those ‘authorities’. That term could therefore cover any group of individuals with official responsibility for a given area because, in accordance with settled case-law, the term ‘authority’ is understood in a broad sense in the various acts of EU law.

216 Furthermore, it is not clear from a comparison of the English-, French- and German-language versions of the contested regulation whether, in the phrase ‘other situations or conduct of authorities’ (*‘autres situations ou comportements des autorités’* and *‘andere Umstände oder Verhaltensweisen von Behörden’*), the word ‘situations’ is linked to the word ‘authorities’. It is true that, at first sight, the phrase ‘situations of authorities’ (*‘situations des autorités’* and *‘Umstände von Behörden’*) does not seem to make sense, but the Hungarian-language version of that provision links the word ‘situation’ to ‘authorities’, with the result that that provision does not meet the requirement of legislative clarity.

217 Hungary concludes from this that Article 4(2)(h) of the contested regulation renders meaningless the list in points (a) to (g) of that provision by making it non-exhaustive, which is incompatible with the principle of legal certainty.

218 Thirdly, the third sentence of Article 5(3) of the contested regulation, in so far as it merely provides that the measures to be adopted must take into account the nature, duration, gravity and scope of the breaches of the principles of the rule of law, without defining the nature and scope of those measures precisely, also breaches the principle of legal certainty. That provision does not lay down any specific criterion for assessing whether a measure is justified, necessary or proportionate, nor does it specify the type of breach of the principles of the rule of law which serve as a basis for determining the nature and scope of a penalty.

219 Fourthly, Hungary submits that the last sentence of Article 5(3) of the contested regulation, in stating that the measures to be adopted must ‘insofar as possible’ target the Union actions affected by the breaches, does not ensure that there is a direct link between the breach of the principles of the rule of law which has been determined and the adoption of measures for the protection of the Union budget. That provision thus makes it possible for measures to be adopted in relation to a Union programme with which the breach of the principles of the rule of law that has been determined has no real link, which breaches, in addition to the principle of proportionality, the principle of legal certainty. In addition, that breach confirms the fact that the contested regulation is not an instrument for protecting the Union budget, but for imposing penalties in respect of the rule of law, an instrument not covered by the legal basis of Article 322(1)(a) TFEU.

220 Fifthly, Article 6(3) and (8) of the contested regulation, in so far as that article allows the Commission to take into account, at the various stages of its assessment, ‘relevant information from available sources, including decisions, conclusions and recommendations of Union institutions, other relevant international organisations and other recognised institutions’, does not define with sufficient precision the sources of information that are admissible in that context, since it does not reveal the basis on which the Commission is to examine and assess the existence or the risk of a breach of the principles of the rule of law.



221 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute that line of argument.

**(b) Findings of the Court**

222 By the third plea, Hungary, supported by the Republic of Poland, submits, in essence, in the first place, that the concept of ‘the rule of law’ does not lend itself to a precise definition and cannot be given a uniform interpretation, because of the obligation to respect the national identity of each of the Member States. Article 2(a) of the contested regulation includes values parallel to those contained in Article 2 TEU, which are equally abstract and which are also guaranteed separately in the Treaties, thus confirming that those values are political and not legal in nature. In addition, by defining the concept of ‘the rule of law’ in a sector-specific regulation, the EU legislature undermines the interpretation of that concept as a common value of the European Union. In the second place, the relationship between Article 2(a), Article 3 and Article 4(2) of the contested regulation cannot be clearly determined and their joint application does not rule out the possibility that penalties may be imposed in respect of situations which are not related to the sound financial management of the Union’s budgetary resources or the protection of its financial interests. Similarly, the wording used in Article 3(b) of that regulation has only a remote connection with the concept of ‘the rule of law’, which severs the link between the purpose and the content of that legislation. In the third place, that regulation contains, in Article 3 and Article 4(2) thereof, expressions which are too imprecise for it to be possible to foresee the conditions on the basis of which a breach of the principles of the rule of law may be established. As a result, the Commission and the Council have excessive discretion in a procedure which may lead to the imposition of penalties. In the fourth place, the concept of ‘risk’, used in Article 4(1) of that regulation, gives rise to the existence of a presumption which does not allow any link to be established, from a legal perspective, between the rule of law and an effect on the Union budget or the financial interests of the Union, and therefore makes it possible for penalties to be imposed in situations where no such effect has been demonstrated. Moreover, the wording of Article 4(2)(h) of the contested regulation is unclear and the list set out in paragraph 2 is not exhaustive, even though it serves as the basis for the adoption of penalties. In the fifth place, the third sentence of Article 5(3) of the contested regulation does not sufficiently define the nature and scope of the measures that may be adopted. In the sixth place, the words ‘insofar as possible’, in the fourth sentence of Article 5(3) of the contested regulation, sever the connection between the breach established and the adoption of the protective measures. In the seventh place, Article 6(3) and (8) of that regulation does not define in a sufficiently precise manner the sources of information on which the Commission may rely.

223 According to the Court’s settled case-law, the principle of legal certainty requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular, where they may have adverse consequences. That principle requires, inter alia, that legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly (judgment of 29 April 2021, *Banco de Portugal and Others*, C-504/19, EU:C:2021:335, paragraph 51 and the case-law cited).

224 However, those requirements cannot be interpreted as precluding the EU legislature from having recourse, in a norm that it adopts, to an abstract legal notion, nor as requiring that such an abstract norm refer to the various specific hypotheses in which it applies, given that all those hypotheses could not be determined in advance by the legislature (see, by analogy, judgment of 20 July 2017, *Marco Tronchetti Provera and Others*, C-206/16, EU:C:2017:572, paragraphs 39 and 40).

225 Consequently, the fact that a law confers a discretion on the authorities responsible for implementing it is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give adequate protection against arbitrary interference (see, to that effect, judgments of 17 June 2010, *Lafarge v Commission*, C-413/08 P, EU:C:2010:346, paragraph 94, and of 18 July 2013, *Schindler Holding and Others v Commission*, C-501/11 P, EU:C:2013:522, paragraph 57).

226 It is in the light of those considerations that the Court must examine the arguments put forward by Hungary, supported by the Republic of Poland, in support of its plea alleging infringement of the principle of legal certainty, by examining, in the first place, the arguments according to which the concept of ‘the rule of law’ cannot be precisely defined and cannot be given a uniform interpretation, because of the obligation to ‘protect’ the national identity of each of the Member States, the arguments according to which the concept of the rule of law, defined in Article 2(a) of the contested regulation includes other values contained in Article 2 TEU, all of which are political and not legal in nature, and the arguments according to which Article 2(a) of the contested regulation undermines the interpretation of the concept of ‘the rule of law’ as a common value of the European Union.

227 In that regard, first, Article 2(a) of the contested regulation is not intended to provide an exhaustive definition of that concept, but merely sets out, for the sole purposes of that regulation, a number of the principles which it covers and which are, according to the EU legislature, the most relevant in the light of the purpose of that regulation, which is to ensure the protection of the Union budget.

228 Secondly, as stated in paragraph 136 above, the concept of ‘the rule of law’ referred to in Article 2(a) of the contested regulation is to be understood as meaning ‘the Union value enshrined in Article 2 TEU’, and that concept includes the principles referred to in Article 2(a) of the contested regulation. It follows that that provision does not have the effect of undermining the interpretation of the concept of ‘the rule of law’ as a common value of the European Union resulting from Article 2 TEU.

229 Thirdly, contrary to Hungary’s submission, supported by the Republic of Poland, the principles set out in Article 2(a) of the contested regulation do not go beyond the limits of the concept of ‘the rule of law’. In particular, the reference to the protection of fundamental rights is made only by way of illustration of the requirements of the principle of effective judicial protection, which is also guaranteed in Article 19 TEU and which Hungary itself acknowledges to be part of that concept. The same is true of the reference to the principle of non-discrimination. Although Article 2 TEU refers separately to the rule of law as a value common to the Member States and to the principle of non-discrimination, it is clear that a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value.

230 That conclusion is supported by the fact that, in the study referred to in paragraph 201 above and referred to in recital 16 of the contested regulation, the Venice Commission stated, *inter alia*, that the concept of ‘the rule of law’ requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures. Those characteristics are specifically reflected in Article 2(a) of the contested regulation.

231 Fourthly, the obligation relating to respect for the rule of law, the breach of which may fall within the scope of the horizontal conditionality mechanism established in Article 4(1) of the contested regulation, read in the light of the principles set out in Article 2(a) of that regulation, is a specific expression of the requirements resulting, for the Member States, from their membership of the European Union, pursuant to Article 2 TEU. That obligation constitutes an obligation as to the result to be achieved which, as noted in paragraphs 124 to 127 above, flows directly from the commitments undertaken by the Member States *vis-à-vis* each other and with regard to the European Union.

232 In that regard, it must be borne in mind that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.

233 Even though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another.

234 Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of ‘the rule of law’ which they

share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times.

235 Accordingly, and notwithstanding the fact that the Commission and the Council must make their assessments taking due account of the specific circumstances and contexts of each procedure conducted under the contested regulation and, in particular, taking into account the particular features of the legal system of the Member State in question and the discretion which that Member State enjoys in implementing the principles of the rule of law, that requirement is in no way incompatible with the application of uniform assessment criteria.

236 Next, while it is true that Article 2(a) of the contested regulation does not set out in detail the principles of the rule of law that it mentions, nevertheless recital 3 of that regulation notes that the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection and separation of powers, referred to in that provision, have been the subject of extensive case-law of the Court. The same is true of the principles of equality before the law and non-discrimination, which are also mentioned, as is apparent in particular from paragraphs 94 and 98 of the judgment of 3 June 2021, *Hungary v Parliament* (C-650/18, EU:C:2021:426) and from paragraphs 57 and 58 of the judgment of 2 September 2021, *État belge (Right of residence in the event of domestic violence)* (C-930/19, EU:C:2021:657).

237 Those principles of the rule of law, as developed in the case-law of the Court on the basis of the EU Treaties, are thus recognised and specified in the legal order of the European Union and have their source in common values which are also recognised and applied by the Member States in their own legal systems.

238 In addition, recitals 8 to 10 and 12 of the contested regulation mention the principal requirements stemming from those principles. In particular, they shed light on the cases which may be indicative of breaches of the principles of the rule of law, set out in Article 3 of that regulation, and on the situations and conduct which those breaches must concern, described in Article 4(2) of that regulation, for the adoption of appropriate measures within the meaning of Article 4(1) of that regulation to be justified.

239 Lastly, the assessments of the Commission and the Council are subject to the procedural requirements specified in Article 6(1) to (9) of the contested regulation. Those requirements imply in particular, as stated in recital 26 of that regulation, that the Commission must follow an evidence-based approach and respect the principles of objectivity, non-discrimination and equal treatment of Member States before the Treaties when it conducts proceedings under that provision. As regards the identification and assessment of breaches of the principles of the rule of law, those requirements must be understood in the light of recital 16 of that regulation, according to which that assessment must be objective, impartial and fair.

240 In those circumstances, Hungary cannot maintain that the Member States are not in a position to determine with sufficient precision the essential content and the requirements flowing from each of the principles listed in Article 2(a) of the contested regulation nor that those principles are of a purely political nature and that an assessment of whether they have been respected cannot be the subject of a strictly legal analysis.

241 In the second place, Hungary, supported by the Republic of Poland, submits that the relationship between Article 2(a), Article 3 and Article 4(2) of the contested regulation cannot be clearly determined, that the joint application of those provisions does not rule out the possibility that situations which are not linked to the proper management of the resources of the Union budget may be penalised and that the concepts referred to in Article 3(b) of that regulation have only a remote link with the concept of ‘the rule of law’.

242 In that regard, first of all, it has been pointed out in paragraphs 136 to 138 and 147 above that Article 2(a) of the contested regulation defines that concept, solely for the purposes of that regulation, as including the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, separation of powers, non-discrimination and equality before the law, that Article 3 of that regulation, by citing cases which may be indicative of breaches of those principles, is intended to facilitate the application of that regulation, by explaining the requirements inherent in those principles, and that Article 4 of that regulation sets out, in paragraph 2 thereof, the scope of the horizontal conditionality mechanism established in paragraph 1 thereof, which requires that the breaches of the principles of the rule of law must concern the situations or conduct of authorities listed in points (a) to (h)

thereof, in so far as they are relevant to the sound financial management of the Union budget or to the protection of the financial interests of the Union.

243 It follows from the foregoing that Article 2(a), Article 3 and Article 4(2) of the contested regulation show sufficiently precise links between each other with regard to the principle of legal certainty.

244 Next, contrary to Hungary's submission, supported by the Republic of Poland, the joint application of those provisions in no way suggests that situations which are not linked to the sound management of the resources of the Union budget may be the subject of measures taken pursuant to Article 4 of the contested regulation. As noted in paragraph 147 above, that article limits, in paragraph 2 thereof, the scope of the horizontal conditionality mechanism solely to situations and conduct of authorities of the Member States which are relevant to the sound financial management of the Union budget or to the protection of the financial interests of the Union, and requires, in paragraph 1 thereof, that a genuine link be established, in all cases, between breaches of the principles of the rule of law, on the one hand, and effects or serious risks of effects on that sound financial management or on the protection of those financial interests, on the other hand.

245 Lastly, Hungary's claims, supported by the Republic of Poland, that the expressions 'failing to prevent . . . withholding financial and human resources affecting [public authorities'] proper functioning', 'failing to ensure the absence of conflicts of interest' or 'failing to prevent . . . unlawful decisions', contained in Article 3(b) of the contested regulation, have only a remote and indirect link with the concept of 'the rule of law' cannot be accepted. As can be seen from recitals 9 and 10 of that regulation, those situations may lead to a failure to observe the principle prohibiting the arbitrary exercise of power by the executive or the principle of effective judicial protection (see, to that effect, judgments of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraphs 210 to 214, and of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraphs 195 to 213).

246 In the third place, Hungary, supported by the Republic of Poland, submits that the contested regulation does not comply with the principle of legal certainty since it refers, in Article 3 and Article 4(2) thereof, to expressions – such as '[the] proper functioning [of the authorities]', 'effective judicial review by independent courts of . . . the authorities', 'effective and timely cooperation with OLAF' and 'other situations or conduct of authorities that are relevant' – which are too imprecise for it to be possible to foresee the situations in which a breach of the principles of the rule of law may be found and since it grants the Commission and the Council an excessive discretion in that respect.

247 Hungary, supported by the Republic of Poland, also submits, with regard in particular to Article 4(2)(h) of the contested regulation, that that provision is contrary to the requirements of the principle of legal certainty. Whereas a provision imposing a penalty must define in a precise and exhaustive manner the conduct it is intended to penalise, that provision fails to have regard to that requirement since it provides that 'other situations or conduct of authorities' may justify the adoption of measures, without defining the situations or conduct in question. Furthermore, the wording of that provision does not make it possible to ascertain whether or not the term 'situations' is linked to that of 'authorities'. Lastly, the lack of precision in the concept of 'authorities' gives rise to legal uncertainty.

248 In that regard, first, as regards the 'proper functioning' of public authorities, including law-enforcement authorities, authorities implementing the Union budget, authorities carrying out financial control, monitoring and audit, and the investigation and public prosecution services, referred to in Article 3(b) and Article 4(2)(a) to (c) of the contested regulation, it is clear from recitals 8 and 9 of that regulation that that expression refers to the ability of those authorities to fulfil properly, effectively and efficiently their functions relating to the sound financial management of the Union budget or the protection of the financial interests of the Union.

249 Secondly, the concept of 'effective judicial review by independent courts' of actions or omissions by authorities implementing the Union budget or authorities carrying out financial control, monitoring and audit or investigation and public prosecution services, referred to in Article 4(2)(d) of the contested regulation, is not only clarified in recitals 8 to 10 and 12 of that regulation, but has also been the subject, as pointed out in paragraphs 132, 161 and 162 above, of abundant case-law of the Court in the context of Article 19 TEU and Article 47 of the Charter.

250 Thirdly, as regards ‘effective and timely cooperation with OLAF’, it should be noted that the requirement of such cooperation is apparent from the EU financial rules. Article 63(2)(d) of the Financial Regulation requires Member States, when carrying out tasks related to budget implementation, to take all the necessary legislative, regulatory and administrative measures to protect the financial interests of the Union and, in particular, requires that they cooperate with OLAF, in accordance with that regulation and sector-specific rules.

251 That requirement of cooperation is specified, *inter alia*, in Article 129 of the Financial Regulation and includes the obligation to grant OLAF the rights and access necessary for it to comprehensively exert its competences, such as the right to carry out investigations, including on-the-spot checks and inspections, in accordance with Regulation No 883/2013. In addition, it follows from Article 131(1) of the Financial Regulation that, where a procedure for awarding a contract appears to have been subject to fraud, the competent person must immediately inform OLAF. Lastly, other details concerning the cooperation required may be inferred from Article 57, Article 91(2), Article 132(2), Article 187(3)(b)(ii) and Article 220(5)(c) of that regulation and from Regulation No 883/2013.

252 Fourthly, the expression ‘other situations or conduct of authorities’, which appears in Article 4(2)(h) of the contested regulation, must be interpreted in the light of Article 4(2)(a) to (g) and of Article 4(1) of that regulation.

253 In that regard, it follows from a combined reading of Article 4(1) and Article 4(2)(h) of the contested regulation that appropriate measures are to be taken where it is established that a breach of one of the principles listed in Article 2(a) of that regulation has been committed and concerns a situation attributable to an authority of a Member State or the conduct of such an authority, in so far as that situation or conduct is relevant to the sound financial management of the Union budget or to the protection of the financial interests of the Union and that that breach affects or seriously risks affecting, in a sufficiently direct way, that sound financial management or those financial interests.

254 The application of Article 4(2)(h) of the contested regulation, read in conjunction with Article 4(1) of that regulation, is not only circumscribed by all the criteria referred to in the preceding paragraph, but is also subject to the procedural requirements referred to in paragraph 239 above.

255 It cannot therefore be considered that the ‘other situations or conduct of authorities’ referred to in Article 4(2)(h) of the contested regulation, because they are defined in abstract and general terms, mean that the list of breaches of the principles of the rule of law set out in Article 4(2) is not exhaustive.

256 Furthermore, Article 4(2) of the contested regulation, in so far as it refers, in points (a) to (g) thereof, to certain authorities, including the ‘authorities implementing the Union budget’, the ‘authorities carrying out financial control, monitoring and audit’ or the ‘administrative authorities’, provides details concerning the authorities referred to in point (h) thereof.

257 In addition, it may be inferred from the definition of the concept of ‘government entity’ in Article 2(b) of the contested regulation that it refers to public authorities at any level of government, including national, regional and local authorities, and bodies governed by public law, or even bodies governed by private law with a public service mission which are provided with adequate financial guarantees by the Member State. That finding is supported by recitals 3, 8, 9, 15 and 19 of that regulation and by Article 3(b) thereof, which refer exclusively to ‘public authorities’, ‘law-enforcement authorities’ and ‘national authorities’.

258 Lastly, as stated in paragraph 164 above, the term ‘situations’ refers to situations attributable to such an authority.

259 Thus, in the light of the foregoing considerations, Hungary cannot maintain that the criticised expressions in Article 3 and Article 4(2) of the contested regulation do not enable a Member State to determine with sufficient certainty their scope or meaning, so as to enable it to foresee the circumstances in which a breach of the principles of the rule of law within the meaning of that regulation may be found.

260 Fifthly, in the light of the foregoing considerations, according to which the expressions referred to in paragraph 246 above satisfy, as such, the requirements of the principle of legal certainty, and the grounds set out in paragraphs 171 and 239 above, Hungary’s objections, supported by the Republic of Poland, relating to an alleged excessive discretion granted to the Commission and the Council by those expressions, must be rejected as unfounded.

261 In the fourth place, Hungary, supported by the Republic of Poland, submits that the concept of ‘risk’ in Article 4(1) of the contested regulation infringes the principle of legal certainty in that it will allow arbitrary penalties to be imposed in uncertain or unproven situations. It argues that that concept gives rise to a presumption, since no link can be established, from a legal point of view, between the rule of law and an effect on the Union budget or the protection of the financial interests of the Union, and because it is impossible to carry out an objective, technical and factual determination of the conditions for the application of that provision.

262 In that regard, as the Advocate General observed in point 311 of his Opinion, it would be incompatible with the requirements of sound financial management of the Union budget and the protection of the financial interests of the Union to limit the adoption of appropriate measures to cases of proven effects on that sound financial management or those financial interests. That limitation would effectively preclude the adoption of appropriate measures in cases where the effects, although not yet proven, can nevertheless be reasonably foreseen, since there is a high probability that they will occur. That limitation would therefore be liable to compromise the purpose of the contested regulation, which consists, as noted in paragraph 119 above, in protecting the Union budget against effects liable to result from breaches of the principles of the rule of law in a Member State.

263 As regards the concepts of ‘sound financial management’ and ‘protection of the financial interests of the Union’, the former is also referred to in the first paragraph of Article 317 TFEU and is defined in Article 2(59) of the Financial Regulation as the implementation of the budget in accordance with the principles of economy, efficiency and effectiveness, while the latter also falls within Article 325 TFEU and, according to Article 63(2) of the Financial Regulation, covers all legislative, regulatory and administrative measures designed, inter alia, to prevent, detect and correct irregularities and fraud in the implementation of the budget.

264 It should also be noted that Article 2(1) of Regulation No 883/2013 defines the ‘financial interests of the Union’ as ‘revenues, expenditures and assets covered by the budget of the European Union and those covered by the budgets of the institutions, bodies, offices and agencies and the budgets managed and monitored by them’. In addition, Article 135(1), (3) and (4) of the Financial Regulation provides that, in order to protect the financial interests of the Union, the Commission is to set up and operate an early detection and exclusion system.

265 The Court has also held that the concept of ‘financial interests of the Union’, within the meaning of Article 325(1) TFEU, encompasses not only revenue made available to the Union budget but also expenditure covered by that budget (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 183). That concept is therefore relevant not only in the context of the measures to combat irregularities and fraud referred to in that provision, but also to the sound financial management of that budget, since the protection of those financial interests also contributes to that sound management.

266 The prevention of effects such as those referred to in Article 4(1) of the contested regulation therefore supplements the correction of such effects, which is inherent both in the concept of ‘sound financial management’ and in that of ‘protection of the financial interests of the Union’ and must therefore be regarded as a permanent and horizontal requirement of EU financial legislation.

267 Lastly, that provision requires that the breaches of the principles of the rule of law which have been found must ‘seriously’ risk affecting the sound financial management of the Union budget or the financial interests of the Union and requires, therefore, that it be demonstrated that that risk has a high probability of occurring, in relation to the situations or to the conduct of authorities referred to in Article 4(2) of the contested regulation, and, moreover, appropriate measures may be adopted only on condition that a sufficiently direct link, namely a genuine link, is established between a breach of one of the principles of the rule of law and that serious risk. Furthermore, in adopting those measures, it is also necessary to comply with the procedural requirements referred to, most recently, in paragraph 239 above.

268 It follows that Hungary’s argument, supported by the Republic of Poland, that the concept of ‘risk’ in Article 4(1) of the contested regulation allows arbitrary penalties to be imposed in uncertain or unproven situations, must be rejected as unfounded.

269 In the fifth place, as regards the argument that the third sentence of Article 5(3) of the contested regulation does not sufficiently define the nature and scope of the measures for the protection of the Union budget that may be adopted under Article 4(1) of that regulation, it must be borne in mind, first, that Article 5(1) of that regulation lists exhaustively the various protective measures that may be adopted, as noted in paragraph 135 above.

270 Secondly, that the adoption of one of those protective measures is necessary and justified follows from the fulfilment of the conditions set out in Article 4 of the contested regulation.

271 Thirdly, as regards the criteria to be applied in order to determine the measure(s) that must be adopted in a given situation, and their scope, the first to third sentences of Article 5(3) of that regulation provide that the measures taken are to be proportionate, that they are to be determined in light of the actual or potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union and that the nature, duration, gravity and scope of the breaches of the principles of the rule of law are to be duly taken into account. It follows that the measures taken must be strictly proportionate to the impact of the breaches of the principles of the rule of law found on the Union budget or on the protection of the financial interests of the Union.

272 It follows from the foregoing that the argument that the third sentence of Article 5(3) of the contested regulation does not sufficiently define the nature and scope of the appropriate measures which may be adopted must be rejected as unfounded.

273 In the sixth place, as regards Hungary's arguments, supported by the Republic of Poland, that the expression 'insofar as possible', in the fourth sentence of Article 5(3) of the contested regulation, infringes the principle of legal certainty in that it severs the link between the breach found and the protective measures adopted, thus affecting the proportionality of those measures and conferring on them a punitive nature, it should be pointed out, first of all, that that expression does not authorise the alteration of the measures that may be adopted under Article 5(1) of that regulation in such a way that is not commensurate with the impact of the breach found on the Union budget or on the protection of the financial interests of the Union.

274 As noted in paragraph 271 above, it follows from the first to third sentences of Article 5(3) of that regulation that the measures taken must be strictly proportionate to the impact of the breaches of the principles of the rule of law found on the Union budget or on the protection of the financial interests of the Union, irrespective of whether or not the measures actually target the Union actions affected by those breaches.

275 Next, the expression 'insofar as possible' permits the adoption of measures relating to Union actions other than those affected by such a breach only where the latter actions cannot or can no longer be targeted, or can be targeted only inadequately, in order to achieve the objective of the contested regulation, which consists, as can be seen from Article 1 thereof, in ensuring the protection of the Union budget as a whole, with the result that those measures are necessary in order to achieve that objective.

276 It is therefore only in the alternative and, consequently, by way of derogation, in situations which the Commission must duly establish, that the measures taken may target Union actions other than those affected by those breaches.

277 Accordingly, the fourth sentence of Article 5(3) of the contested regulation grants the Commission and the Council discretion as to the choice of action targeted by the measure to be adopted only where that proves essential in order to ensure the protection of the Union budget as a whole. In addition, in accordance with Article 6(7) and (8) of that regulation, the Commission is required to assess, *inter alia*, the proportionality of the measures envisaged and to give the Member State concerned the opportunity to submit its observations on those measures and, in particular, on their proportionality, since those requirements must be understood in the light of recital 26 of that regulation, as noted in paragraph 239 above.

278 It follows that the expression 'insofar as possible', within the meaning of the fourth sentence of Article 5(3) of the contested regulation, does not sever the link between the breach of a principle of the rule of law which has been found and the resulting effect or serious risk of an effect on the Union budget or on the protection of the financial interests of the Union, since that expression makes it possible to target an EU action other than that affected by that

breach only where the purpose of the contested regulation, which is to ensure the protection of the Union budget as a whole, cannot be otherwise achieved. It also follows that the contested regulation circumscribes that possibility with strict procedural requirements and that that expression does not release the Commission and the Council from their obligation strictly to respect the proportionality of the measures adopted, in the light of the impact of the breach found on the Union budget.

279 In those circumstances, that provision does not have the effect of conferring on the measures for the protection of the Union budget the character of penalties for breaches of the rule of law as such, with the result that it is necessary to reject as unfounded the argument that the expression ‘insofar as possible’ in the fourth sentence of Article 5(3) of the contested regulation severs the link between a breach found and the measures adopted, in breach of the principle of legal certainty.

280 In the seventh place, as regards the argument that Article 6(3) and (8) of the contested regulation does not define in a sufficiently precise manner the sources of information on which the Commission may rely, since it does not set out the basis on which the Commission must examine and assess whether there has been a breach of the principles of the rule of law, it should be noted that, under that provision, when assessing whether the conditions set out in Article 4 of that regulation are satisfied and assessing the proportionality of the measures to be imposed, the Commission is to take into account relevant information from available sources, including decisions, conclusions and recommendations of EU institutions, other relevant international organisations and other recognised institutions.

281 In that regard, in accordance with Article 4(1) of the contested regulation, it is for the Commission to establish that the conditions set out in Article 4 of that regulation are fulfilled.

282 In addition, under Article 6(1) of that regulation, the Commission is required to set out, in a written notification to the Member State concerned, the factual elements and specific grounds on which it based its findings that there are reasonable grounds to consider that those conditions are fulfilled.

283 It follows that the Commission is required to carry out a diligent assessment of the facts in the light of the conditions laid down in Article 4 of the contested regulation. The same is true, in accordance with Article 6(7) to (9) of that regulation, as regards the requirement of proportionality of the measures, laid down in Article 5(3) of that regulation.

284 Recitals 16 and 26 of that regulation state, moreover, that the Commission must conduct a thorough qualitative assessment, which should be objective, impartial and fair, should respect the principles of objectivity, non-discrimination and equality of Member States before the Treaties and should be conducted according to a non-partisan and evidence-based approach.

285 It follows that the Commission is required to ensure, subject to review by the EU judicature, that the information it uses is relevant and that the sources of that information are reliable. In particular, those provisions do not confer any specific or absolute probative value and do not attach specific legal effects to the sources of information to which they refer, nor to those indicated in recital 16 of the contested regulation, with the result that they do not relieve the Commission of its obligation to carry out a diligent assessment of the facts which fully satisfies the requirements set out in the preceding paragraph.

286 In that regard, recital 16 of the contested regulation explains that the relevant information from available sources and recognised institutions includes, *inter alia*, judgments of the Court of Justice, reports of the Court of Auditors, the Commission’s annual Rule of Law Report and EU Justice Scoreboard, reports of OLAF, the European Public Prosecutor’s Office and the European Union Agency for Fundamental Rights, and conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies such as GRECO and the Venice Commission, in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary.

287 The Commission thus remains responsible for the information it uses and for the reliability of the sources of that information. Moreover, the Member State concerned has the option, in the course of the procedure provided for in Article 6(1) to (9) of the contested regulation, to submit observations on the information that the Commission intends to use in order to propose the adoption of appropriate measures. Accordingly, it may challenge the probative



value of each piece of evidence relied on, and the merits of the Commission's assessments may, in any event, be subject to review by the EU judicature in the context of an action brought against a Council decision adopted under that regulation.

288 In particular, the Commission must specifically inform the Member State concerned, once the procedure under Article 6(1) of the contested regulation is initiated and periodically throughout that procedure, of the relevant information from available sources on which the Commission intends to base the proposal for an implementing decision on the appropriate measures which it will submit to the Council.

289 It follows that the third plea must be rejected as unfounded.

290 Having regard to all the foregoing considerations, the principal claim for annulment of the contested regulation must be dismissed in its entirety.

**B. The claims, put forward in the alternative, for the partial annulment of the contested regulation**

**1. The claim for annulment of Article 4(1) of the contested regulation**

**(a) Arguments of the parties**

291 By the fourth plea, raised in support of its alternative claim for annulment of Article 4(1) of the contested regulation, Hungary, supported by the Republic of Poland, submits, in essence, that that provision is disproportionate and breaches the principles of legal certainty and legislative clarity, as set out in the context of the third plea, since it permits the adoption of measures for the protection of the Union budget not only when that budget or the protection of the financial interests of the Union are affected in a sufficiently direct way, but also where there is only a serious risk of such an effect.

292 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, primarily claim that the fourth plea is inadmissible and, in the alternative, dispute the merits of those arguments.

**(b) Findings of the Court**

293 According to settled case-law, partial annulment of an act of EU law is possible only if the elements which it is sought to have annulled can be severed from the remainder of the measure. That requirement is not satisfied where the partial annulment of a measure would cause the substance of that measure to be altered, a point which must be determined on the basis of an objective criterion and not of a subjective criterion linked to the political intention of the authority which adopted the measure at issue (judgment of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 38 and the case-law cited).

294 In that regard, the Parliament and the Council correctly submit that the annulment of Article 4(1) of the contested regulation would cause the substance of that regulation to be altered, since that provision sets out the conditions for the adoption of the measures set out in Article 5(1) of that regulation and, in that respect, constitutes the very core of the horizontal conditionality mechanism established by that regulation. Without the provision in question, the contested regulation would no longer meet the objective set out in Article 1 thereof, namely to establish 'the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States'.

295 It follows that the claim for annulment of Article 4(1) of the contested regulation must be rejected as inadmissible, with the result that there is no need to examine the merits of the fourth plea, raised in support of that claim.

## 2. *The claim for annulment of Article 4(2)(h) of the contested regulation*

### (a) *Arguments of the parties*

296 By the fifth plea, raised in support of its alternative claim for annulment of Article 4(2)(h) of the contested regulation, Hungary, supported by the Republic of Poland, argues that that provision is contrary to the requirement that a rule imposing a penalty must define precisely the conduct and situations which it is intended to suppress. Thus, the absence of a precise and exhaustive list of the situations concerned by the horizontal conditionality mechanism established by the contested regulation infringes the principle of legal certainty and Article 7 TEU.

297 In the first place, Hungary submits that, in its Legal opinion No 13593/18, the Council Legal Service noted that a provision laying down a conditionality mechanism must indicate precisely the conditions to be met in order to receive financing, which must be sufficiently linked to the purpose of the financing, such that, if they are not met, the financing becomes incompatible with sound financial management. Accordingly, the contested regulation, by listing in a non-exhaustive manner the cases in which the conditionality mechanism which it establishes may be initiated, does not ensure the existence of a sufficiently direct link with the protection of the Union budget and the financial interests of the Union.

298 In the second place, Hungary submits that the ‘extremely general’ wording of Article 4(2)(h) of the contested regulation breaches the requirements of clarity, precision and foreseeability and, accordingly, the principle of legal certainty, since that provision does not list precisely and exhaustively the situations in which appropriate measures may be adopted under that regulation. It submits that that provision is, in the light, in particular, of its various language versions, vague, ambiguous, unlimited and incapable of uniform interpretation and application. That gives rise to a serious risk of breach of the principle of equality of the Member States before the Treaties.

299 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute that line of argument.

### (b) *Findings of the Court*

300 In the first place, it follows from paragraphs 244 and 253 above that, contrary to Hungary’s submissions, Article 4(2)(h) of the contested regulation does not in any way derogate from the requirement that there must always be a sufficiently direct link between a breach of a principle of the rule of law and an effect or a serious risk of an effect on the sound financial management of the Union budget or the protection of the financial interests of the Union.

301 Moreover, it is apparent from paragraphs 255 and 259 above that that provision, first, does not confer a non-exhaustive character on the list of situations and conduct of authorities which the breaches of the principles of the rule of law set out in Article 4(2) of that regulation concern, and, secondly, is sufficiently precise to satisfy the principle of legal certainty.

302 In the second place, as regards the arguments relating to the purpose of the contested regulation and the alleged circumvention of the procedure laid down in Article 7 TEU, it is sufficient to refer to the analysis set out in paragraphs 98 to 196 above.

303 In the third place, as regards the allegations of a lack of precision and internal inconsistencies in Article 4(2)(h) of the contested regulation, it is sufficient to refer to the analysis carried out in paragraphs 252 to 258 above.

304 Consequently, the fifth plea must be rejected as unfounded and the claim for annulment of Article 4(2)(h) of the contested regulation must therefore be dismissed.

### 3. *The claim for annulment of Article 5(2) of the contested regulation*

#### (a) *Arguments of the parties*

305 By the sixth plea, raised in support of its alternative claim for annulment of Article 5(2) of the contested regulation, Hungary, supported by the Republic of Poland, argues that, in disregard of the legal basis of that regulation and the provisions of EU law relating to public deficits, that provision imposes constraints on the budgets of the Member States concerned, since it provides that, if appropriate measures are taken in respect of a Member State, that Member State is not released from its obligation to continue financing the final beneficiaries of the programmes concerned.

306 In that regard, Hungary notes that the EU aid provided for in the multiannual financial framework 2021-2027 laid down by Regulation 2020/2093 and in Regulation 2020/2094 is allocated under management programmes designed principally, if not exclusively, according to the priorities of the European Union. If measures adopted under the contested regulation were to suspend all or part of that aid, the Member State concerned would be required, under that provision, to fund those programmes in full.

307 In doing so, Article 5(2) of the contested regulation restricts the right of that Member State to use its own budget, makes it impossible to plan its economic policy in a predictable manner and is liable to compel it to infringe the provisions of EU law relating to public deficits. Those circumstances could lead to the imposition of additional penalties and to the structural indebtedness of the Member State concerned, in particular where that Member State has a modest budget, thereby infringing the principle of equality of the Member States before the Treaties.

308 In addition, Article 5(2) of the contested regulation calls into question the appropriateness of the legal basis chosen for that regulation, since that provision lays down requirements intended not for the Union budget but for the budget of the Member States concerned, which confirms that the measures for the protection of the Union budget which may be adopted under that regulation are intended to penalise those Member States for breaches of the rule of law.

309 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute that line of argument.

#### (b) *Findings of the Court*

310 By the sixth plea, Hungary, supported by the Republic of Poland, claims, in essence, that Article 5(2) of the contested regulation imposes constraints on the budgets of the Member States concerned, which, first, is incompatible with the legal basis of that regulation, secondly, infringes the provisions of EU law on public deficits and, thirdly, infringes the principle of equality of Member States before the Treaties.

311 In that regard, in the first place, as regards the complaint alleging that Article 5(2) of the contested regulation is incompatible with the legal basis of that regulation, it must be rejected for the reasons already set out in paragraphs 150 to 152 above.

312 In the second place, as regards the complaint alleging infringement of the provisions of EU law relating to public deficits, it should be noted that Article 5(2) of the contested regulation merely states that the adoption of measures under that regulation does not alter the pre-existing obligations of those government entities or of those Member States, arising, inter alia, from ‘the applicable sector-specific or financial rules’, and, in particular, those measures cannot constitute a ground enabling those government entities or those Member States to release themselves from those obligations. It follows that that provision does not impose any new obligation on the Member States.

313 As the Advocate General observed in points 324 and 325 of his Opinion, although Article 5(2) of the contested regulation has the consequence that the Member States must bear the costs arising from the measures imposed under that regulation, that consequence is without prejudice to their ability, within the limits of their obligations under EU law, to determine the means by which they achieve the public deficit targets set by the Treaties.

314 Thus, the effect that that provision may have on the budget of the Member States concerned is no different from that which may result from other obligations under EU law.

315 Furthermore, although the Member States may take into account, when drawing up their budgets, the financing from the Union budget which they may claim, provided that the conditions for obtaining that financing appear to be satisfied, the fact remains that, if it is subsequently found that those conditions were not satisfied or are no longer satisfied, with the result that the financing concerned is not paid or is the subject of a financial correction, a Member State cannot rely on its obligations relating to public deficits in order to circumvent those conditions. Accordingly, a Member State cannot claim that that application renders the planning of its economic policy unpredictable.

316 In the third place, as regards the alleged infringement of the principle of equality of Member States before the Treaties, it follows from Article 5(3) of the contested regulation that the appropriate measures taken under that regulation must be strictly proportionate to the impact of the breaches of the principles of the rule of law found on the sound financial management of the Union budget or on the protection of the financial interests of the Union, and that requirement of proportionality applies equally with regard to every Member State. In addition, in accordance with Article 6(7) and (8) of that regulation, the Commission is required to assess, *inter alia*, the proportionality of the measures to be imposed and to give every Member State concerned the opportunity to submit its observations on the proposed measures and, in particular, on their proportionality. Since that provision must be understood in the light of recital 26 of that regulation, it follows that the Commission must conduct its assessment according to an evidence-based approach and respect the principles of objectivity, non-discrimination and equality of Member States before the Treaties.

317 Those various requirements thus entail an objective and diligent analysis of each situation which is the subject of a procedure under the contested regulation, as well as the appropriate measures necessitated, as the case may be, by that situation, in strict compliance with the principle of proportionality, in order to protect the Union budget and the financial interests of the Union effectively against the effects of breaches of the principles of the rule of law, while respecting the principle of equality of the Member States before the Treaties. In those circumstances, Hungary's argument that the application of Article 5(2) of the contested regulation entails an infringement of that principle is unfounded.

318 In the light of the foregoing considerations, the sixth plea must be rejected as unfounded and the claim for annulment of Article 5(2) of the contested regulation must therefore be dismissed.

#### **4. *The claim for annulment of the third sentence of Article 5(3) of the contested regulation***

##### **(a) *Arguments of the parties***

319 By the seventh plea, raised in support of its alternative claim for annulment of the third sentence of Article 5(3) of the contested regulation, Hungary, supported by the Republic of Poland, argues that the criteria for assessing the proportionality of the measures which may be adopted against a Member State, laid down in that provision, have no connection with the Union budget or the financial interests of the Union and are intended to penalise breaches of the principles of the rule of law.

320 In accordance with the very wording of that provision, the nature, duration, gravity and scope of the breaches of the principles of the rule of law are to be duly taken into account in determining the measures to be adopted. Recital 18 of the contested regulation states that the assessment of proportionality for that purpose must take into account the seriousness of the situation, the time which has elapsed since the relevant conduct started, the duration and recurrence of the conduct, the intention, the degree of cooperation of the Member State concerned in putting an end to the breaches of the principles of the rule of law, and the effects on the sound financial management of the Union budget or the financial interests of the Union.

321 Hungary submits that those criteria call into question, in disregard of the legal basis of the contested regulation and Article 7 TEU, the link between the established breach of the principles of the rule of law and the actual impact of that breach on the sound financial management of the Union budget or on the protection of the financial interests of the Union.

322 First, it is apparent from a reading of Article 5(3) of the contested regulation in conjunction with recital 18 thereof that the Commission and the Council are required to take into account the intention of the ‘perpetrator of the breach’. In that regard, that regulation does not define the perpetrator of the breach of the principles of the rule of law, since the cases specified in Articles 3 and 4 of that regulation refer to situations and conduct which may be attributable either to the Member State concerned as a whole or to certain organs of that State. Hungary submits that such entities lack the capacity to carry out an act of will, with the result that the manner in which account should be taken of the intention to ‘commit’ an act when determining the appropriate measures is unclear.

323 Furthermore, the consideration of such an intention would necessarily have an impact on the nature of the measure. If the proportionality of a measure is determined, even only in part, by the intention associated with the breach which gave rise to that measure, that confers a punitive character on that measure, which is thus not intended to correct any effect on the Union budget or to protect the financial interests of the Union. That consideration of intent is therefore a clear indication that the primary purpose and object of the contested regulation are not consistent with its legal basis.

324 Secondly, that assessment is supported by the taking into account of the duration and gravity of the breach of the principles of the rule of law and of the degree of cooperation of the Member State concerned in putting an end to it, since those criteria are also unrelated to the impact on the sound financial management of the Union budget or the protection of the financial interests of the Union.

325 Thirdly, it follows from a systematic interpretation of the contested regulation that, given that the obligation on the institutions to take account of the actual or potential impact of a breach of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union is already laid down in the second sentence of Article 5(3) of that regulation, the third sentence of that provision is intended to take account of other effects.

326 Hungary submits that it follows, first of all, that the third sentence of Article 5(3) of the contested regulation does not satisfy the requirement that there be a direct link between the measures taken and the protection of the Union budget or the financial interests of the Union. Next, the taking into account of the criteria set out in that provision requires a thorough assessment of the breach of the rule of law by the Commission and by the Council, which can be done only in the context of the procedure laid down in Article 7 TEU. Finally, the application of that provision would result in the measures taken having a punitive nature, even though penalties may be imposed on a Member State only on the basis of Article 7(3) TEU.

327 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute that line of argument.

### **(b) Findings of the Court**

328 By the seventh plea, Hungary, supported by the Republic of Poland, submits, in essence, that the third sentence of Article 5(3) of the contested regulation, read in the light of recital 18 thereof, is incompatible with the legal basis of that regulation and infringes both Article 7 TEU and the principle of legal certainty, since the criteria mentioned in that sentence for the adoption of appropriate measures, relating to breaches of the principles of the rule of law, have no connection with the Union budget or the protection of the financial interests of the Union.

329 In that regard, as noted in paragraph 271 above, it follows from the first to third sentences of Article 5(3) of the contested regulation that the measures taken must be strictly proportionate to the impact of the breaches of the principles of the rule of law found on the Union budget or on the financial interests of the Union.

330 The first sentence of that provision states that the measures taken are to be ‘proportionate’, the second sentence states that they are to be ‘determined in light of the actual or potential impact’ of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union while the third sentence states that the nature, duration, gravity and scope of the breaches of the principles of the rule of law are to be ‘duly taken into account’.

331 As the Advocate General noted in points 177 and 178 of his Opinion, it follows from the order of those sentences and from the terms used therein that the proportionality of the measures to be adopted is ensured, decisively, by the criterion of the ‘impact’ of breaches of the principles of the rule of law on the sound financial management of the Union budget or on the protection of the financial interests of the Union. As regards the criteria based on the nature, duration, gravity and scope of those breaches, they may be ‘duly taken into account’ only in order to determine the extent of that impact, which may vary depending on the characteristics of the breaches found, as illuminated by the application of those criteria.

332 It is true that recital 18 of the contested regulation, while referring to the same criteria as those set out in the second and third sentences of Article 5(3) of that regulation, refers to them in a different order. That recital cannot, however, lead to an interpretation of that provision that is incompatible with its wording and structure, since, according to settled case-law of the Court, cited in paragraph 191 above, the preamble to an EU act has no binding legal force and cannot be relied on as a ground either for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner that is clearly contrary to their wording. Furthermore, in referring also to ‘the intention . . . of the Member State concerned’, that recital does not refer to the intention to breach the principles of the rule of law, but rather the intention to ‘[put] an end to the breaches’ found. That intention, like the ‘degree of cooperation’ of the Member State in that regard, also mentioned in that recital, may be relevant, *inter alia*, for the purpose of determining the duration and scope of a breach, within the meaning of the criteria referred to in the third sentence of Article 5(3) of that regulation and, consequently, in accordance with what has been set out in the preceding paragraph, for the purpose of measuring the impact of that breach on the sound financial management of the Union budget or the financial interests of the Union.

333 It follows that, contrary to Hungary’s submission, supported by the Republic of Poland, although the criteria referred to in the third sentence of Article 5(3) of the contested regulation presuppose an in-depth assessment by the Commission and by the Council of the characteristics of the breach of the principles of the rule of law in question, they are nevertheless linked to the sound financial management of the Union budget and the protection of the financial interests of the Union, with the result that they cannot be regarded as conferring on the appropriate measures adopted under that regulation the character of penalties for breaches of the rule of law as such.

334 In those circumstances, the seventh plea must be rejected as unfounded, with the result that the claim for annulment of the third sentence of Article 5(3) of the contested regulation must be dismissed.

## **5. *The claim for annulment of the fourth sentence of Article 5(3) of the contested regulation***

### **(a) *Arguments of the parties***

335 By the eighth plea, raised in support of its alternative claim for annulment of the fourth sentence of Article 5(3) of the contested regulation, Hungary, supported by the Republic of Poland, argues that that provision infringes the principles of proportionality and legal certainty in that it provides that it is only ‘insofar as possible’ that the measures adopted are to target the Union actions affected by the breaches.

336 It follows from the wording of that provision that those measures may target Union actions which are not affected by the breach of the principles of the rule of law, with the result that those measures could be adopted without a direct link being established between that breach and a specific Union action targeted by those measures. The principle of legal certainty strictly requires that the application of rules entailing financial consequences be certain and foreseeable, which is not the case where there is no actual link between breaches of the principles of the rule of law and measures adopted under the contested regulation.

337 The absence of any actual link also entails a breach of the principle of proportionality. Even if the objective of the contested regulation were to define the rules necessary for the protection of the Union budget in the event of a breach of the principles of the rule of law in a Member State, the fourth sentence of Article 5(3) of that regulation would go beyond what is necessary to achieve that objective, since it would authorise the adoption of measures in relation to EU programmes which are not affected by such a breach.

338 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of

Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute that line of argument.

**(b) Findings of the Court**

339 By the eighth plea, Hungary, supported by the Republic of Poland, argues that the fourth sentence of Article 5(3) of the contested regulation breaches the principles of proportionality and legal certainty in that makes it possible, by the use of the expression ‘insofar as possible’, to target actions and programmes which have no connection with an established breach of a principle of the rule of law.

340 In that regard, first, as regards the alleged infringement of the principle of proportionality, it should be recalled that, according to settled case-law of the Court, that principle, which is one of the general principles of EU law, requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 6 September 2017, *Slovakia and Hungary v Council*, C-643/15 and C-647/15, EU:C:2017:631, paragraph 206 and the case-law cited).

341 In the present case, it is sufficient to note, as stated in paragraphs 274 to 279 above, that, first of all, the expression ‘insofar as possible’, in the fourth sentence of Article 5(3) of the contested regulation, does not authorise the alteration of the measures that may be adopted under Article 5(1) of that regulation in such a way that is not commensurate with the impact of the breach found on the Union budget, next, that that regulation is intended to protect the Union budget as a whole and, lastly, that that expression permits the targeting of Union actions other than those affected by such a breach only by way of derogation, where the latter actions cannot or can no longer be targeted, or can be targeted only inadequately, in order to achieve the objective of that regulation, namely to protect the Union budget as a whole, such that that step therefore proves essential in order to achieve that objective.

342 It follows that the argument according to which, by using the expression ‘insofar as possible’, the fourth sentence of Article 5(3) of the contested regulation goes beyond what is necessary in order to achieve that objective must be rejected as unfounded.

343 Second, as regards the alleged infringement of the principle of legal certainty, first of all, it follows from the findings made in paragraphs 269 to 272 above that the type of measures that may be adopted under the contested regulation is set out in Article 5(1) thereof and that the scope of the measures is determined strictly, in accordance with Article 5(3) of that regulation, according to the impact of the breach on the Union budget that has been found.

344 Next, it was noted in paragraphs 273 to 279 above that the expression ‘insofar as possible’ in the fourth sentence of Article 5(3) of the contested regulation does not sever the link between a breach of a principle of the rule of law and the effect or serious risk of an effect on the Union budget or the protection of the financial interests of the Union. Furthermore, the use of that expression makes it possible, by way of derogation and to the strict extent of what is essential, to apply measures for the protection of the Union budget to actions other than those affected by the breach of the principle of the rule of law, where the purpose of the contested regulation, which is to ensure the protection of that budget as a whole or of those interests, cannot be otherwise achieved. Moreover, Article 6 of that regulation circumscribes that possibility with strict procedural requirements and does not release the Commission and the Council from their obligation to comply strictly with the requirement that the measures adopted be proportionate to the impact of the breach found on the Union budget or on the protection of the financial interests of the Union.

345 Lastly, given that the contested regulation specifies the nature and scope of the measures that may be adopted, that it grants the Commission and the Council the power to target actions other than those that the breach of a principle of the rule of law affects only in so far as it is necessary to ensure the protection of the Union budget as a whole and the financial interests of the Union, and that that power is, moreover, strictly circumscribed, in particular by the principle of proportionality, it cannot be held that the fourth sentence of Article 5(3) of the contested regulation infringes the principles of proportionality and legal certainty.

346 Consequently, the eight plea must be rejected as unfounded and the claim for annulment of the fourth sentence of Article 5(3) of the contested regulation must therefore be dismissed.

## **6. *The claim for annulment of Article 6(3) and (8) of the contested regulation***

### **(a) *Arguments of the parties***

347 By the ninth plea, raised in support of its alternative claim for annulment of Article 6(3) and (8) of the contested regulation, Hungary, supported by the Republic of Poland, submits that Article 6(3) of the contested regulation infringes the principle of legal certainty in that it allows the Commission to take into account, when assessing whether the conditions set out in Article 4 of that regulation are fulfilled, ‘relevant information from available sources, including decisions, conclusions and recommendations of Union institutions, other relevant international organisations and other recognised institutions’. The same is true of Article 6(8) of that regulation, which refers to Article 6(3) as regards the assessment of the proportionality of the measures to be imposed.

348 Article 6(3) and (8) of the contested regulation does not define in a sufficiently precise manner the relevant sources of information to which it refers, since it does not indicate the basis on which the Commission must assess the existence of a breach of the principles of the rule of law.

349 In particular, it is not precluded, in view of the expression ‘relevant information from available sources’ in Article 6(3) of the contested regulation, that the Commission might base its assessment on the individual opinion expressed by certain persons or organisations whose objectivity has not been established or that it may base its assessment on a failure to implement recommendations that are not legally binding and have been issued by international organisations outside the framework of the European Union. Such recommendations, of various kinds, cannot be regarded as reliable indicators of a generalised deficiency as regards the rule of law.

350 Article 6(3) and (8) of the contested regulation also does not indicate the manner in which the Commission must synthesise those sources. Given the broad discretion which those provisions grant to the Commission, any non-binding document relied on by the Commission could be used as a means of proving a breach, even if it were chosen arbitrarily.

351 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute that line of argument.

### **(b) *Findings of the Court***

352 By the ninth plea, Hungary, supported by the Republic of Poland, submits, first, that, in view of its imprecise wording, Article 6(3) and (8) of the contested regulation does not satisfy the requirement arising from the principle of legal certainty, secondly, that that provision permits the Commission to base its assessment on opinions the objectivity of which is not guaranteed and on non-binding recommendations issued outside the framework of the European Union and, lastly, that that provision does not specify how the Commission is to synthesise the chosen information nor how it should evaluate the relevance of that information with regard to the purpose of the contested regulation.

353 In that regard, in the first place, it should be borne in mind that, contrary to Hungary’s assertions, the contested regulation is not intended to penalise breaches of the rule of law as such, but rather, as stated in paragraphs 98 to 152 above, to ensure the protection of the Union budget, with the result that the argument that the contested regulation must satisfy the requirements allegedly applicable to penalty measures cannot, in any event, succeed.

354 In the second place, as regards whether Article 6(3) and (8) of the contested regulation allows the Commission to base its assessment on opinions the objectivity of which could be regarded as doubtful and on non-binding recommendations issued outside the framework of the European Union, first of all, it should be noted that that provision does not refer to ‘opinions’, but to ‘decisions, conclusions and recommendations’ and to ‘guidance’.

355 In any event, Hungary has not put forward any specific evidence capable of casting doubt on the objectivity of the bodies and institutions identified in recital 16 of that regulation, with the result that there is no reason to doubt the objectivity of the opinions they produce.



356 Next, Article 6(3) and (8) of the contested regulation requires the Commission to take into account – when assessing whether the conditions set out in Article 4 of the contested regulation are fulfilled and when assessing the proportionality of the appropriate measures to be adopted – relevant information for that purpose, which necessarily presupposes that that information relates to the principles referred to in Article 2(a) of that regulation, which form part of the value of the rule of law, common to the Member States, contained in Article 2 TEU.

357 Lastly, as regards the non-binding nature of the recommendations which may be taken into account by the Commission, it has been noted in paragraph 285 above that Article 6(3) and (8) of the contested regulation does not confer any specific or absolute probative value and does not attach specific legal effects to the sources of information it mentions, nor to those mentioned in recital 16 of that regulation, with the result that that provision does not relieve the Commission of its obligation to carry out a diligent assessment of the facts which fully satisfy the requirements set out in paragraph 284 above.

358 Furthermore, since, as noted in paragraph 287 above, the Commission must ensure that the information it uses is relevant and that the sources of that information are reliable, the Member State concerned may, during the procedure provided for in Article 6(1) to (9) of the contested regulation, submit its observations on that information and, accordingly, challenge the probative value of each piece of evidence relied on by the Commission, and the merits of the Commission's assessments may, if necessary, be reviewed by the EU judicature.

359 In the third place, as regards the arguments alleging that Article 6(3) and (8) of the contested regulation does not specify the manner in which the Commission is to synthesise the information used or the manner in which it is to assess, on the basis of that information, the gravity of a breach of the principle of the rule of law and its relationship with the protection of the sound financial management of the Union budget or of the financial interests of the Union, it was noted in paragraphs 357 and 358 above that the Commission is required to carry out a diligent assessment of the facts and to respect the requirement of proportionality of the measures taken under that regulation, guaranteed in Article 5(3) thereof, and the validity of a decision taken by the Council under that regulation may be reviewed by the EU judicature.

360 Consequently, the ninth plea must be rejected as unfounded and the claim for annulment of Article 6(3) and (8) of the contested regulation must therefore be dismissed.

361 In the light of all the foregoing considerations, the action must be dismissed in its entirety.

## VI. Costs

362 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

363 Since the Parliament and the Council have applied for costs to be awarded against Hungary, and the latter has been unsuccessful, it must be ordered to pay the costs incurred by those parties.

364 In accordance with Article 140(1) of the Rules of Procedure, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Finland, the Kingdom of Sweden and the Commission, as interveners, must bear their own costs.

On those grounds, the Court (Full Court) hereby:

1. **Dismisses the action;**
2. **Orders Hungary to bears its own costs and to pay the costs incurred by the European Parliament and the Council of the European Union;**
3. **Orders the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Poland, the Republic of Finland, the Kingdom of Sweden and the European Commission to bear their own costs.**

[Signatures]

CASE C-157/21, POL. V. EUR. PARL. & COUNCIL (C.J.E.U.)\*

[February 16, 2022]

JUDGMENT OF THE COURT (Full Court)

16 February 2022\*\*

(Action for annulment – Regulation (EU, Euratom) 2020/2092 – General regime of conditionality for the protection of the European Union budget – Protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States – Legal basis – Article 322(1)(a) TFEU – Article 311 TFEU – Article 312 TFEU – Alleged circumvention of Article 7 TEU and Article 269 TFEU – Alleged infringements of Article 4(1), Article 5(2) and Article 13(2) TEU, of the second paragraph of Article 296 TFEU, of Protocol (No 2) on the application of the principles of subsidiarity and proportionality and of the principles of conferral, legal certainty, proportionality and equality of the Member States before the Treaties – Alleged misuse of powers)

In Case C-157/21,

ACTION for annulment under Article 263 TFEU, brought on 11 March 2021,

**Republic of Poland**, represented by B. Majczyna and S. Żyrek, acting as Agents,

applicant,

supported by:

**Hungary**, represented by M.Z. Fehér and M.M. Tátrai, acting as Agents,

intervener,

v

**European Parliament**, represented by R. Crowe, F. Drexler, U. Rösslein, T. Lukácsi and by A. Pospíšilová Padowska, acting as Agents,

**Council of the European Union**, represented by A. de Gregorio Merino, E. Rebasti, A. Tamás and by A. Sikora-Kalèda, acting as Agents,

defendants,

supported by:

**Kingdom of Belgium**, represented by M. Jacobs, C. Pochet and L. Van den Broeck, acting as Agents,

**Kingdom of Denmark**, represented initially by M. Søndahl Wolff and J. Nymann-Lindegren, and subsequently by M. Søndahl Wolff and V. Pasternak Jørgensen, acting as Agents,

**Federal Republic of Germany**, represented by J. Möller and R. Kanitz, acting as Agents,

**Ireland**, represented by M. Browne, J. Quaney and A. Joyce, acting as Agents, and by D. Fennelly, Barrister-at-Law,

**Kingdom of Spain**, represented initially by J. Rodríguez de la Rúa Puig and S. Centeno Huerta, and subsequently by J. Rodríguez de la Rúa Puig and A. Gavela Llopis, acting as Agents,

**French Republic**, represented by A.-L. Desjonquères, A.-C. Drouant and E. Leclerc, acting as Agents,

**Grand Duchy of Luxembourg**, represented initially by A. Germeaux and T. Uri, and subsequently by A. Germeaux, acting as Agents,

**Kingdom of the Netherlands**, represented by M.K. Bulterman and J. Langer, acting as Agents,

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\*\*Language of the case: Polish.

**Republic of Finland**, represented by H. Leppo and S. Hartikainen, acting as Agents,

**Kingdom of Sweden**, represented by O. Simonsson, J. Lundberg, C. Meyer-Seitz, A. Runeskjöld, H. Shev, M. Salborn Hodgson, H. Eklinder and R. Shahsavan Eriksson, acting as Agents,

**European Commission**, represented by D. Calleja Crespo, J.-P. Keppenne, J. Baquero Cruz, A. Tokár, and by K. Herrmann, acting as Agents,

interveners,

THE COURT (Full Court),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev (Rapporteur), A. Prechal, K. Jürimäe, C. Lycourgos, E. Regan, S. Rodin, I. Jarukaitis, N. Jääskinen, I. Ziemele and J. Passer, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, M. Safjan, F. Biltgen, P.G. Xuereb, N. Piçarra, L.S. Rossi, A. Kumin, N. Wahl, D. Gratsias, M.L. Arastey Sahún, M. Gavalec and Z. Csehi, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrars: M. Aleksejev, Head of Unit, and I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 11 and 12 October 2021,

after hearing the Opinion of the Advocate General at the sitting on 2 December 2021,

gives the following

## **Judgment**

1 By its application, the Republic of Poland claims that the Court should annul 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 (OJ 2020 L 433I, p. 1, and corrigendum OJ 2021 L 373, p. 94, ‘the contested regulation’).

### **I. LEGAL CONTEXT**

#### **A. Regulation (EC) No 1049/2001**

2 Article 2 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) states, in paragraph 1 thereof:

‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.’

3 As set out in Article 4 of that regulation:

‘...’

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

...

– court proceedings and legal advice,

...

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

...

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. ...'

4 Article 5 of the said regulation provides:

'Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.'

### **B. The Council's Rules of Procedure**

5 On 1 December 2009, the Council of the European Union adopted Decision 2009/937/EU adopting the Council's Rules of Procedure (OJ 2009 L 325, p. 35). Article 6 of those rules of procedure ('the Council's Rules of Procedure'), entitled 'Professional secrecy and production of documents in legal proceedings', provides in paragraph 2:

'The Council or [the Committee of Permanent Representatives of the governments of the Member States (Coreper)] may authorise the production for use in legal proceedings of a copy of or an extract from Council documents which have not already been released to the public in accordance with the provisions on public access to documents.'

6 According to Article 10 of those rules of procedure, entitled 'Public access to Council documents':

'The specific provisions regarding public access to Council documents are set out in Annex II.'

7 Annex II to that those rules of procedure, entitled 'Special provisions regarding public access to Council documents', contains Article 5, relating to 'referral of requests by Member States', which states:

'When a Member State refers a request to the Council, it shall be handled in accordance with Articles 7 and 8 of [Regulation No 1049/2001] and the relevant provisions of this Annex. In the event of a total or partial refusal of access, the applicant shall be informed that any confirmatory application must be addressed directly to the Council.'

### **C. The Guidelines for the handling of documents internal to the Council**

8 By Note 7695/18 of 10 April 2018, the Council adopted guidelines for the handling of documents internal to the Council. Paragraphs 1, 2, 20 and 21 of those guidelines are worded as follows:

'1. This document contains guidelines on handling unclassified Council documents whose distribution is internal to the Council, its members, the Commission, the European External Action Service (EEAS) and depending on the subject matter, certain other EU institutions (e.g. European Parliament, Court of Justice, European Central Bank) and bodies (e.g. Committee of the Regions, European Economic and Social Committee). The untimely public disclosure of such documents could adversely affect the Council's decision-making processes.'

2. The guidelines have a direct impact on the functioning of the Council and, as a consequence, are to be respected by Member States as members of the Council, in line with the principle of loyal cooperation which governs relations between the EU institutions and the Member States.

...

20. “LIMITE” documents must not be made public unless a decision to that effect has been taken by duly authorised Council officials, by the national administration of a Member State (see paragraph 21), or, where relevant, by the Council, in accordance with [Regulation No 1049/2001] and the Council’s Rules of Procedure.

21. Personnel in any EU institution or body other than the Council may not themselves decide to make “LIMITE” documents public without first consulting the General Secretariat of the Council (GSC). Personnel in the national administration of a Member State will consult the GSC before taking such a decision unless it is clear that the document can be made public, in line with Article 5 of [Regulation No 1049/2001].’

#### **D. Regulation (EU, Euratom) No 883/2013**

9 Article 2(1) of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1) defines, for the purposes of that regulation, the ‘financial interests of the Union’ as being ‘revenues, expenditures and assets covered by the budget of the European Union and those covered by the budgets of the institutions, bodies, offices and agencies and the budgets managed and monitored by them’.

#### **E. The Financial Regulation**

10 As set out in Article 2 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1, ‘the Financial Regulation’), entitled ‘Definitions’:

‘For the purposes of this Regulation, the following definitions apply:

...

(7) “budget implementation” means the carrying out of activities relating to the management, monitoring, control and auditing of budget appropriations in accordance with the methods provided for in Article 62;

...

(19) “control” means any measure taken to provide reasonable assurance regarding the effectiveness, efficiency and economy of operations, the reliability of reporting, the safeguarding of assets and information, the prevention and detection and correction of fraud and irregularities and their follow-up, and the adequate management of the risks relating to the legality and regularity of the underlying transactions, taking into account the multiannual character of programmes as well as the nature of the payments concerned. Controls may involve various checks, as well as the implementation of any policies and procedures to achieve the objectives referred to in the first sentence;

...

(42) “Member State organisation” means an entity established in a Member State as a public law body, or as a body governed by private law entrusted with a public service mission and provided with adequate financial guarantees from the Member State;

...

(59) “sound financial management” means implementation of the budget in accordance with the principles of economy, efficiency and effectiveness;  
...’

11 Article 56 of that regulation, entitled ‘Budget implementation in accordance with the principle of sound financial management’, provides:

‘1. The Commission shall implement the revenue and expenditure of the budget in accordance with this Regulation, under its own responsibility and within the limits of the appropriations authorised.  
2. The Member States shall cooperate with the Commission so that the appropriations are used in accordance with the principle of sound financial management.’

12 Article 62 of that regulation, entitled ‘Methods of budget implementation’, provides, in the first subparagraph of paragraph 1 thereof:

‘The Commission shall implement the budget in any of the following ways:

- (a) directly (“direct management”), as set out in Articles 125 to 153, by its departments, including its staff in the Union delegations under the authority of their respective Head of delegation, in accordance with Article 60(2), or through executive agencies as referred to in Article 69;
- (b) under shared management with Member States (“shared management”) as set out in Articles 63 and 125 to 129;
- (c) indirectly (“indirect management”) as set out in Articles 125 to 149 and 154 to 159, where this is provided for in the basic act or in the cases referred to in points (a) to (d) of Article 58(2), by entrusting budget implementation tasks:

...’

13 Article 63 of the same regulation, entitled ‘Shared management with Member States’, provides, in paragraph 2 thereof:

‘When executing tasks relating to budget implementation, Member States shall take all the necessary measures, including legislative, regulatory and administrative measures, to protect the financial interests of the Union, namely by:

- (a) ensuring that actions financed from the budget are implemented correctly and effectively and in accordance with the applicable sector-specific rules;
- (b) designating bodies responsible for the management and control of Union funds in accordance with paragraph 3, and supervising such bodies;
- (c) preventing, detecting and correcting irregularities and fraud;
- (d) cooperating, in accordance with this Regulation and sector-specific rules, with the Commission, [the European Anti-Fraud Office (OLAF)], the [European] Court of Auditors and, for those Member States participating in enhanced cooperation pursuant to Council Regulation (EU) 2017/1939 [of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (OJ 2017 L 283, p. 1)], with the European Public Prosecutor’s Office (EPPO).

In order to protect the financial interests of the Union, Member States shall, while respecting the principle of proportionality, and in compliance with this Article and the relevant sector-specific rules, carry out *ex ante* and *ex post* controls including, where appropriate, on-the-spot checks on representative and/or risk-based samples of transactions. They shall also recover funds unduly paid and bring legal proceedings where necessary in that regard.

Member States shall impose effective, dissuasive and proportionate penalties on recipients where provided for in sector-specific rules or in specific provisions in national law.

As part of its risk assessment and in accordance with sector-specific rules, the Commission shall monitor the management and control systems established in Member States. The Commission shall, in its audit work, respect the principle of proportionality and shall take into account the level of risk assessed in accordance with sector-specific rules.’

14 Article 135 of the Financial Regulation, entitled ‘Protection of the financial interests of the Union by means of detection of risks, exclusion and imposition of financial penalties’, provides:

‘1. In order to protect the financial interests of the Union, the Commission shall set up and operate an early detection and exclusion system.

The purpose of such a system shall be to facilitate:

(a) the early detection of persons or entities referred to in paragraph 2, which pose a risk to the financial interests of the Union;

...

3. The decision to register information concerning an early detection of the risks referred to in point (a) of the second subparagraph of paragraph 1 of this Article, to exclude persons or entities referred to in paragraph 2 and/or to impose a financial penalty on a recipient shall be taken by the authorising officer responsible. Information related to such decisions shall be registered in the database referred to in Article 142(1). Where such decisions are taken on the basis of Article 136(4), the information registered in the database shall include the information concerning the persons referred to in that paragraph.

4. The decision to exclude persons or entities referred to in paragraph 2 of this Article or to impose financial penalties on a recipient shall be based on a final judgment or, in the exclusion situations referred to in Article 136(1), on a final administrative decision, or on a preliminary classification in law by the panel referred to in Article 143 in the situations referred to in Article 136(2) in order to ensure a centralised assessment of those situations. In the cases referred to in Article 141(1), the authorising officer responsible shall reject a participant from a given award procedure.

Without prejudice to Article 136(5), the authorising officer responsible may take a decision to exclude a participant or recipient and/or to impose a financial penalty on a recipient and a decision to publish the related information, on the basis of a preliminary classification as referred to in Article 136(2), only after having obtained a recommendation of the panel referred to in Article 143.’

## II. THE CONTESTED REGULATION

15 It is apparent from the preamble to the contested regulation that that regulation was adopted on the basis of the ‘[FEU Treaty], and in particular point (a) of Article 322(1) thereof,’ and the ‘[EAEC] Treaty, and in particular Article 106a thereof’.

16 Recitals 2, 3, 5 to 10, 12 to 19 and 26 of the contested regulation state:

‘(2) In its conclusions of 21 July 2020, the European Council stated that the financial interests of the Union are to be protected in accordance with the general principles embedded in the Treaties, in particular the values set out in Article 2 TEU. It also underlined the importance of the protection of the financial interests of the Union and the importance of respect for the rule of law.

(3) The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the “Charter”) and other applicable instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality [(judgment of 29 April 2004, *Commission v CAS Succhi di Frutta*, C-496/99 P,

EU:C:2004:236, paragraph 63)] implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty [(judgment of 12 November 1981, *Meridionale Industria Salumi and Others*, 212/80 to 217/80, EU:C:1981:270, paragraph 10)]; prohibition of arbitrariness of the executive powers [(judgment of 21 September 1989, *Hoechst v Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 19)]; effective judicial protection, including access to justice, by independent and impartial courts [(judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 31, 40 and 41, and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 63 to 67)]; and separation of powers, [(judgments of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraph 58; of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 35; and of 10 November 2016, *Kovalkovas*, C-477/16 PPU, EU:C:2016:861, paragraph 36;)] be respected [(Communication from the Commission entitled “A new EU Framework to strengthen the Rule of Law”, COM(2014) 158 final, Annex I)].

...

(5) Once a candidate country becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the Union that implements them will be respected [(Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 168)]. The laws and practices of Member States should continue to comply with the common values on which the Union is founded.

(6) While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.

(7) Whenever the Member States implement the Union budget, including resources allocated through the European Union Recovery Instrument established pursuant to Council Regulation (EU) 2020/2094 [of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (OJ 2020 L 433I, p. 23)], and through loans and other instruments guaranteed by the Union budget, and whatever method of implementation they use, respect for the rule of law is an essential precondition for compliance with the principles of sound financial management enshrined in Article 317 [TFEU].

(8) Sound financial management can only be ensured by Member States if public authorities act in accordance with the law, if cases of fraud, including tax fraud, tax evasion, corruption, conflict of interest or other breaches of the law are effectively pursued by investigative and prosecution services, and if arbitrary or unlawful decisions of public authorities, including law-enforcement authorities, can be subject to effective judicial review by independent courts and by the Court of Justice of the European Union.

(9) The independence and impartiality of the judiciary should always be guaranteed, and investigation and prosecution services should be able to properly execute their functions. The judiciary, and investigation and prosecution services should be endowed with sufficient financial and human resources and procedures to act effectively and in a manner that fully respects the right to a fair trial, including respect for the rights of defence. Final judgments should be implemented effectively. Those conditions are required as a minimum guarantee against unlawful and arbitrary decisions of public authorities that could harm the financial interests of the Union.



(10) The independence of the judiciary presupposes, in particular, that the judicial body concerned is able to exercise, both under the relevant rules and in practice, its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body, and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.

...

(12) Article 19 TEU, which gives concrete expression to the value of the rule of law set out in Article 2 TEU, requires Member States to provide effective judicial protection in the fields covered by Union law, including those relating to the implementation of the Union budget. The very existence of effective judicial review designed to ensure compliance with Union law is the essence of the rule of law and requires independent courts [(judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 32 to 36)]. Maintaining the independence of the courts is essential, as confirmed by the second paragraph of Article 47 of the Charter [(judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraphs 40 and 41)]. This is true, in particular, for the judicial review of the validity of measures, contracts or other instruments giving rise to public expenditure or debts, inter alia, in the context of public procurement procedures which may also be brought before the courts.

(13) There is therefore a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management.

(14) The Union has developed a variety of instruments and processes that promote the rule of law and its application, including financial support for civil society organisations, the European Rule of Law Mechanism and the EU Justice Scoreboard, and provide an effective response from Union institutions to breaches of the rule of law through infringement proceedings and the procedure provided for in Article 7 TEU. The mechanism provided for in this Regulation complements these instruments by protecting the Union budget against breaches of the principles of the rule of law affecting its sound financial management or the protection of the financial interests of the Union.

(15) Breaches of the principles of the rule of law, in particular those that affect the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union. This is the case for individual breaches of the principles of the rule of law and even more so for breaches that are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities.

(16) The identification of breaches of the principles of the rule of law requires a thorough qualitative assessment by the Commission. That assessment should be objective, impartial and fair, and should take into account relevant information from available sources and recognised institutions, including judgments of the Court of Justice of the European Union, reports of the Court of Auditors, the Commission's annual Rule of Law Report and EU Justice Scoreboard, reports of [OLAF] and the [EPPO] as relevant, and conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the [European Commission for Democracy through Law (the Venice Commission)], in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary. The Commission could consult the European Union Agency for Fundamental Rights and the Venice Commission if necessary for the purpose of preparing a thorough qualitative assessment.

(17) Measures under this Regulation are necessary in particular in cases where other procedures set out in Union legislation would not allow the Union budget to be protected more effectively. Union financial legislation and the applicable sector-specific and financial rules provide for various possibilities to protect the Union budget, including interruptions, suspensions or financial corrections linked to irregularities or serious deficiencies in management and control systems. The measures to be adopted in the event of breaches of the principles of the rule of law and the procedure to be followed to adopt such measures should be determined. Such measures should include the suspension of payments and of commitments, the suspension of the disbursement of instalments or the early repayment of loans, a reduction of funding under existing commitments, and a prohibition on entering into new commitments with recipients or to enter into new agreements on loans or other instruments guaranteed by the Union budget.

(18) The principle of proportionality should apply when determining the measures to be adopted, in particular taking into account the seriousness of the situation, the time which has elapsed since the relevant conduct started, the duration and recurrence of the conduct, the intention, the degree of cooperation of the Member State concerned in putting an end to the breaches of the principles of the rule of law, and the effects on the sound financial management of the Union budget or the financial interests of the Union.

(19) It is essential that the legitimate interests of final recipients and beneficiaries are properly safeguarded when measures are adopted in the event of breaches of the principles of the rule of law. When considering the adoption of measures, the Commission should take into account their potential impact on final recipients and beneficiaries. Taking into consideration that in shared management payments from the Commission to Member States are legally independent from payments by national authorities to beneficiaries, appropriate measures under this Regulation should not be considered to affect the availability of funding for payments towards beneficiaries according to the payment deadlines set out under the applicable sector-specific and financial rules. Decisions adopted under this Regulation and obligations towards final recipients or beneficiaries set out in this Regulation are part of applicable Union law with respect to implementing funding in shared management. The Member States concerned by the measures should regularly report to the Commission on compliance with their obligations towards final recipients or beneficiaries. Reporting on compliance with payment obligations towards beneficiaries set out in the applicable sector-specific and financial rules should allow the Commission to verify that decisions under this Regulation do not impact in any way, directly or indirectly, payments to be made under the applicable sector-specific and financial rules.

To strengthen the protection of the final recipients or beneficiaries, the Commission should provide information and guidance via a website or internet portal, together with adequate tools to inform the Commission about any breach of the legal obligation of government entities and Member States to continue making payments after measures pursuant to this Regulation are adopted. The Commission should follow up on such information to verify whether the applicable rules have been respected, in particular Article 69, point (b) of Article 74(1) and Article 104 of Regulation (EU) 2021/1060 of the European Parliament and of the Council [of 24 June 2021 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 (OJ 2021 L 231, p. 159)]. Where necessary, in order to ensure that any amount due by government entities or Member States is effectively paid to final recipients or beneficiaries, the Commission should recover payments made, or, where appropriate, make a financial correction by reducing Union support to a programme in line with the applicable sector-specific and financial rules.

...

(26) The procedure for adopting and lifting the measures should respect the principles of objectivity, non-discrimination and equal treatment of Member States and should be conducted according to a non-partisan and evidence-based approach. If, exceptionally, the Member State concerned considers that there are serious breaches of those principles, it may request the President of the European Council to refer the matter to the next European Council. In such exceptional circumstances, no decision concerning the measures should be taken until the European Council has discussed the matter. This process shall, as a rule, not take longer than three months after the Commission has submitted its proposal to the Council.’

17 Article 1 of the contested regulation provides:

‘This Regulation establishes the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States.’

18 According to Article 2 of that regulation:

‘For the purposes of this Regulation, the following definitions apply:

- (a) “the 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;
- (b) “government entity” means a public authority at any level of government, including national, regional and local authorities, as well as Member State organisations within the meaning of point (42) of Article 2 of [the Financial Regulation].’

19 Article 3 of contested regulation, entitled ‘Breaches of the principles of the rule of law’, provides:

‘For the purposes of this Regulation, the following may be indicative of breaches of the principles of the rule of law:

- (a) endangering the independence of the judiciary;
- (b) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest;
- (c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law.’

20 Article 4 of that regulation, entitled ‘Conditions for the adoption of measures’, states:

‘1. Appropriate measures shall be taken where it is established in accordance with Article 6 that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

2. For the purposes of this Regulation, breaches of the principles of the rule of law shall concern one or more of the following:

- (a) the proper functioning of the authorities implementing the Union budget, including loans and other instruments guaranteed by the Union budget, in particular in the context of public procurement or grant procedures;
- (b) the proper functioning of the authorities carrying out financial control, monitoring and audit, and the proper functioning of effective and transparent financial management and accountability systems;
- (c) the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union;
- (d) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a), (b) and (c);
- (e) the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities;
- (f) the recovery of funds unduly paid;
- (g) effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with EPPO in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation;
- (h) other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.’

21 Article 5 of that regulation, entitled ‘Measures for the protection of the Union budget’, provides, in paragraphs 1 to 4 thereof:

‘1. Provided that the conditions set out in Article 4 of this Regulation are fulfilled, one or more of the following appropriate measures may be adopted in accordance with the procedure set out in Article 6 of this Regulation:

- (a) where the Commission implements the Union budget in direct or indirect management pursuant to points (a) and (c) of Article 62(1) of the Financial Regulation, and where a government entity is the recipient:
  - (i) a suspension of payments or of the implementation of the legal commitment or a termination of the legal commitment pursuant to Article 131(3) of the Financial Regulation;
  - (ii) a prohibition on entering into new legal commitments;
  - (iii) a suspension of the disbursement of instalments in full or in part or an early repayment of loans guaranteed by the Union budget;
  - (iv) a suspension or reduction of the economic advantage under an instrument guaranteed by the Union budget;
  - (v) a prohibition on entering into new agreements on loans or other instruments guaranteed by the Union budget;
- (b) where the Commission implements the Union budget under shared management with Member States pursuant to point (b) of Article 62(1) of the Financial Regulation:

- (i) a suspension of the approval of one or more programmes or an amendment thereof;
- (ii) a suspension of commitments;
- (iii) a reduction of commitments, including through financial corrections or transfers to other spending programmes;
- (iv) a reduction of pre-financing;
- (v) an interruption of payment deadlines;
- (vi) a suspension of payments.

2. Unless the decision adopting the measures provides otherwise, the imposition of appropriate measures shall not affect the obligations of government entities referred to in point (a) of paragraph 1 or of Member States referred to in point (b) of paragraph 1 to implement the programme or fund affected by the measure, and in particular the obligations they have towards final recipients or beneficiaries, including the obligation to make payments under this Regulation and the applicable sector-specific or financial rules. When implementing Union funds under shared management, Member States concerned by measures adopted pursuant to this Regulation shall report to the Commission on their compliance with those obligations every three months from the adoption of those measures.

The Commission shall verify whether applicable law has been complied with and, where necessary, take all appropriate measures to protect the Union budget, in line with sector-specific and financial rules.

3. The measures taken shall be proportionate. They shall be determined in light of the actual or potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union. The nature, duration, gravity and scope of the breaches of the principles of the rule of law shall be duly taken into account. The measures shall, insofar as possible, target the Union actions affected by the breaches.

4. The Commission shall provide information and guidance for the benefit of final recipients or beneficiaries on the obligations by Member States referred to in paragraph 2 via a website or an internet portal. The Commission shall also provide, on the same website or internet portal, adequate tools for final recipients or beneficiaries to inform the Commission about any breach of these obligations that, in the view of these final recipients or beneficiaries, directly affects them. This paragraph shall be applied in a manner that ensures the protection of persons reporting on breaches of Union law, in line with the principles set out in Directive (EU) 2019/1937 of the European Parliament and of the Council [of 23 October 2019 on the protection of persons who report breaches of Union law (OJ 2019 L 305, p. 17)]. Information provided by final recipients or beneficiaries in accordance with this paragraph shall be accompanied by proof that the concerned final recipient or beneficiary has lodged a formal complaint with the relevant authority of the Member State concerned.'

22 As set out in Article 6 of that regulation, entitled 'Procedure':

'1. Where the Commission finds that it has reasonable grounds to consider that the conditions set out in Article 4 are fulfilled, it shall, unless it considers that other procedures set out in Union legislation would allow it to protect the Union budget more effectively, send a written notification to the Member State concerned, setting out the factual elements and specific grounds on which it based its findings. The Commission shall inform the European Parliament and the Council without delay of such notification and its contents.

2. In light of the information received pursuant to paragraph 1, the European Parliament may invite the Commission for a structured dialogue on its findings.

3. When assessing whether the conditions set out in Article 4 are fulfilled, the Commission shall take into account relevant information from available sources, including decisions, conclusions and recommendations of Union institutions, other relevant international organisations and other recognised institutions.

4. The Commission may request any additional information it requires to carry out the assessment referred to in paragraph 3, both before and after having sent the written notification pursuant to paragraph 1.

5. The Member State concerned shall provide the required information and may make observations on the findings set out in the notification referred to in paragraph 1 within a time limit to be specified by the Commission, which shall be at least one month and not more than three months from the date of notification of the findings. In its observations, the Member State may propose the adoption of remedial measures to address the findings set out in the Commission's notification.

6. The Commission shall take into account the information received and any observations made by the Member State concerned, as well as the adequacy of any proposed remedial measures, when deciding whether to submit a proposal for an implementing decision on the appropriate measures. The Commission shall carry out its assessment within an indicative time limit of one month from the receipt of any information from the Member State concerned or of its observations, or, when no information or observations are received, from the expiry of the time limit set in accordance with paragraph 5, and in any event within a reasonable time frame.

7. Where the Commission intends to make a proposal pursuant to paragraph 9, it shall, before doing so, give the Member State the opportunity to submit its observations, in particular on the proportionality of the envisaged measures, within one month.

8. When assessing the proportionality of the measures to be imposed, the Commission shall take into account the information and guidance referred to in paragraph 3.

9. Where the Commission considers that the conditions of Article 4 are fulfilled and that the remedial measures, if any, proposed by the Member State under paragraph 5 do not adequately address the findings in the Commission's notification, it shall submit a proposal for an implementing decision on the appropriate measures to the Council within one month of receiving the Member State's observations or, in the event that no observations are made, without undue delay and in any case within one month of the deadline set in paragraph 7. The proposal shall set out the specific grounds and evidence on which the Commission based its findings.

10. The Council shall adopt the implementing decision referred to in paragraph 9 of this Article within one month of receiving the Commission's proposal. If exceptional circumstances arise, the period for the adoption of that implementing decision may be extended by a maximum of two months. With a view to ensuring a timely decision, the Commission shall make use of its rights under Article 237 TFEU, where it deems it appropriate.

11. The Council, acting by a qualified majority, may amend the Commission's proposal and adopt the amended text by means of an implementing decision.'

23 Article 7 of the contested regulation, entitled 'Lifting of measures', provides, in paragraphs 1 and 2 thereof:

'1. The Member State concerned may, at any time, adopt new remedial measures and submit to the Commission a written notification including evidence to show that the conditions of Article 4 are no longer fulfilled.

2. At the request of the Member State concerned, or on its own initiative and at the latest one year after the adoption of measures by the Council, the Commission shall reassess the situation in the Member State concerned, taking into account any evidence submitted by the Member State concerned, as well as the adequacy of any new remedial measures adopted by the Member State concerned.

Where the Commission considers that the conditions of Article 4 are no longer fulfilled, it shall submit to the Council a proposal for an implementing decision lifting the adopted measures.

Where the Commission considers that the situation leading to the adoption of measures has been remedied in part, it shall submit to the Council a proposal for an implementing decision adapting the adopted measures.

Where the Commission considers that the situation leading to the adoption of measures has not been remedied, it shall address to the Member State concerned a reasoned decision and inform the Council thereof.

When the Member State concerned submits a written notification pursuant to paragraph 1, the Commission shall submit its proposal or adopt its decision within one month of receiving that notification. This period may be extended in duly justified circumstances, in which case the Commission shall without delay inform the Member State concerned of the reasons for the extension.

The procedure set out in paragraphs 3, 4, 5, 6, 9, 10 and 11 of Article 6 shall apply by analogy as appropriate.'

### III. FORMS OF ORDER SOUGHT BY THE PARTIES AND THE PROCEDURE BEFORE THE COURT

24 The Republic of Poland requests the Court to annul the contested regulation and to order the Parliament and the Council to pay the costs.

25 The Parliament and the Council contend that the Court should dismiss the action and order the Republic of Poland to pay the costs.

26 By application of 12 May 2021, the Parliament requested that the present case be determined pursuant to the expedited procedure provided for in Article 133 of the Rules of Procedure of the Court of Justice. In support of that request, the Parliament submitted that the adoption of the contested regulation was an essential political condition for its approval of Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 (OJ 2020, L 433I, p. 11, 'the multiannual financial framework 2021-2027') and that, in view of the economic urgency, the funds available under the COVID-19 recovery plan entitled 'Next Generation EU' will have to be made available to Member States within an extremely short period. In that regard, it stated, in particular, that, pursuant to Article 3(4) of Regulation 2020/2094, at least 60% of the legal commitments will have to be entered into by 31 December 2022 and that the totality of the legal commitments will have to be entered into by 31 December 2023. In addition, the Parliament stated that, following the entry into force of Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom (OJ 2020 L 424, p. 1), starting in summer 2022 the Commission will borrow funds on capital markets in order to finance the abovementioned recovery plan. According to the Parliament, borrowing and making available extremely large sums of money within a very short period will inevitably entail risks for the Union budget that the contested regulation is intended to protect. Such protection is important because an inability effectively to protect the Union budget risks having negative repercussions, in particular for long-term solidarity within the Union.

27 Article 133(1) of the Rules of Procedure provides that, at the request of the applicant or the defendant, the President of the Court may, after hearing the other party, the Judge-Rapporteur and the Advocate General, decide that a case is to be decided pursuant to an expedited procedure where the nature of the case requires that it be dealt with within a short time.

28 In the present case, on 9 June 2021, the President of the Court decided, after hearing the other parties, the Judge-Rapporteur and the Advocate General, to grant the Parliament's request. That decision was based on the fundamental importance of the present case for the EU legal order, in particular in so far as it concerns the Union's powers to protect its budget and financial interests against effects that may result from breaches of the values contained in Article 2 TEU.

29 By decision of the President of the Court of 25 June 2021, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission were granted leave to intervene in support of the forms of order sought by the Parliament and the Council.

30 By decision of the President of the Court of the same date, Hungary was granted leave to intervene in support of the form of order sought by the Republic of Poland.

31 By application of 11 May 2021, the Council requested that the Court disregard the passages of the Republic of Poland's application and of the annexes thereto that make reference to Opinion No 13593/18 of 25 October 2018 of its legal service concerning the Proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (COM(2018) 324 final), which led to the contested regulation ('Legal Opinion No 13593/18') or that reproduce the content or reasoning of that legal opinion. On 29 June 2021, the Court decided to reserve its decision on that application until it ruled on the substance of the case.

32 On 7 September 2021, considering that the present case is of exceptional importance, the Court decided, after hearing the Advocate General, to refer the case to the full Court, pursuant to the last paragraph of Article 16 of the Statute of the Court of Justice of the European Union.

#### **IV. THE REQUEST THAT CERTAIN PASSAGES OF THE REPUBLIC OF POLAND'S APPLICATION BE DISREGARDED**

##### **A. Arguments of the parties**

33 In support of its request that paragraphs 53, 75, 126, 133 and 139 of the Republic of Poland's application be disregarded in so far as they make reference to Legal Opinion No 13593/18 by reproducing the content of that opinion or reflecting the analysis undertaken therein, the Council argues that that legal opinion is an unclassified internal document marked 'LIMITE'. Accordingly, the Council submits, it is covered by the obligation of professional secrecy and its production for use in legal proceedings is subject to the conditions laid down, *inter alia*, in Article 6(2) of the Council's Rules of Procedure and in paragraphs 20 and 21 of the Guidelines for the handling of documents internal to the Council.

34 Under Article 6(2) of those rules of procedure, only the Council or Coreper may authorise the production for use in legal proceedings of a copy of or an extract from Council documents which have not already been released to the public in accordance with the provisions of EU law on public access to documents. Furthermore, pursuant to paragraphs 20 and 21 of those guidelines, a 'LIMITE' document is not to be made public unless a decision to that effect has been taken by duly authorised Council officials, by the national administration of a Member State, after consulting the GSC, or, where relevant, by the Council, in accordance with Regulation No 1049/2001 and the Council's Rules of Procedure.

35 In the present case, to date, the Council has made public, in accordance with Regulation No 1049/2001, only the first eight paragraphs of Legal Opinion No 13593/18 and, furthermore, has not authorised the Republic of Poland to produce it for use in the present judicial proceedings.

36 In accordance with settled case-law of the Court of Justice and the General Court, it would be contrary to the public interest, which requires that the institutions should be able to benefit from the advice of their legal service, given in full independence, to allow such internal documents to be produced in proceedings before the Court of Justice unless their production has been authorised by the institution concerned or ordered by the Court.

37 The Council states that the reason it has granted only partial access to Legal Opinion No 13593/18 following requests made pursuant to Regulation No 1049/2001 is in particular because of the risk that, in proceedings concerning the lawfulness of the contested regulation, an applicant might confront it with the arguments put forward by its



own legal service in that legal opinion, in breach of the requirements of a fair hearing and equality of arms between the parties to judicial proceedings. Incidentally, that risk materialised when the present action was brought.

38 Moreover, according to the Council, the Republic of Poland has always voted, on the basis of those arguments, in favour of decisions refusing public access to Legal Opinion No 13593/18. If that Member State had wanted that legal opinion to be made public, it should have made a request to that effect under Regulation No 1049/2001 or sought authorisation under the Council's Rules of Procedure and the Guidelines for the handling of documents internal to the Council.

39 The Council submits that if the Republic of Poland were authorised to use Legal Opinion No 13593/18 in the present case, even though it did not follow the procedure laid down for that purpose and the issue has not first been subject to effective judicial review, the procedures laid down by Regulation No 1049/2001 and by the Council's Rules of Procedure would be circumvented. It refers in that regard to the settled case-law of the Court, which grants an institution's request to remove its internal documents from the file before the Court where it has not authorised the production of such documents for use in legal proceedings, and takes the view that, accordingly, Legal Opinion No 13593/18 cannot be used in the present case.

40 In addition, the Council submits that, if the production of Legal Opinion No 13593/18 were permitted in the present proceedings, it would be obliged to comment, before the EU judicature, on an opinion that was intended for internal use and given by its own legal service during the drafting of the contested regulation, which would be contrary to the requirements of a fair hearing and would affect the Council's ability to receive frank, objective and comprehensive advice.

41 Lastly, in accordance with the Court's case-law, the fact that Legal Opinion No 13593/18 was disclosed without the Council's authorisation on a media outlet's website and its content has thus been made public has no bearing on those considerations. Moreover, the harm caused to the Council and the EU institutions as a result of the unauthorised use of that legal opinion in the present proceedings would go far beyond that caused by the publication of that legal opinion in the media. Allowing the Republic of Poland to rely on that legal opinion would threaten the public interest in the institutions being able to benefit from the advice of their legal service in full independence and would deprive the procedures intended to protect that interest of all practical effect.

42 The Republic of Poland disputes the Council's arguments.

## **B. Findings of the Court**

43 By its arguments, the Council submits, in essence, that the Republic of Poland, by reproducing, in paragraphs 53, 126, 133 and 139 of the application, extracts of Legal Opinion No 13593/18 and reformulating, in paragraph 75 of that application, the content of that opinion, first, infringed Article 6(2) of the Council's Rules of Procedure, secondly, disregarded the public interest consisting in the Council's being able to benefit from the advice of its legal service, given in full independence, thirdly, placed the Council in a situation where it might have to express a view in the main proceedings on the analyses of its own legal service, thus infringing the principle of equality of arms, fourthly, infringed paragraphs 20 and 21 of the Guidelines for the handling of documents internal to the Council, and, fifthly, infringed Regulation No 1049/2001.

44 As regards the alleged infringement of Article 6(2) of the Council's Rules of Procedure, it should be borne in mind that, as set out in that provision, 'the Council or Coreper may authorise the production for use in legal proceedings of a copy of or an extract from Council documents which have not already been released to the public'.

45 In that regard, it should be noted, first of all, that the application makes reference to paragraphs of Legal Opinion No 13593/18 other than the eight paragraphs that have been made public by the Council under Regulation No 1049/2001, next, that the Republic of Poland did not ask the Council for authorisation to produce a copy of or extracts from that legal opinion for use in legal proceedings and, lastly, that that Member State did not annex a copy of that legal opinion to its application.

46 Accordingly, it is necessary to determine whether, in reproducing or reformulating in the application, by referring to them, passages of Legal Opinion No 13593/18, the Republic of Poland is to be regarded as having produced

for use in legal proceedings extracts from that opinion, within the meaning of Article 6(2) of the Council's Rules of Procedure.

47 In that regard, it should be pointed out that paragraphs 55, 126 and 133 of the application contain quotes from that opinion, while paragraphs 75 and 139 of the application, but also paragraph 126 thereof, contain an argument specific to the Republic of Poland which that Member State claims reflects the analysis carried out in the said legal opinion. Such specific arguments accompanied by mere assertions of correlation with Legal Opinion No 13593/18 – the accuracy of which, moreover, is disputed by the Council – cannot be regarded as constituting extracts from that legal opinion.

48 In those circumstances, it must be considered that only paragraphs 53, 126 and 133 of the application may be regarded as containing 'extracts' from Legal Opinion No 13593/18, within the meaning of Article 6(2) of the Council's Rules of Procedure. Moreover, presenting such extracts in a procedural document constitutes 'production for use in legal proceedings', within the meaning of that provision.

49 Consequently, the Republic of Poland was in principle obliged, under Article 6(2) of the Council's Rules of Procedure, to obtain the Council's authorisation in order to produce before the Court the extracts from Legal Opinion No 13593/18 contained in paragraphs 53, 126 and 133 of the application.

50 In that regard, it is indeed clear, as the Council states, from the Court's settled case-law that it would be contrary to the public interest, which requires that the institutions should be able to benefit from the advice of their legal service, given in full independence, to allow such internal documents to be produced in proceedings before the Court unless their production has been authorised by the institution concerned or ordered by the Court (order of 14 May 2019, *Hungary v Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 8 and the case-law cited, and judgment of 31 January 2020, *Slovenia v Croatia*, C-457/18, EU:C:2020:65, paragraph 66).

51 By producing such a legal opinion without authorisation, the applicant is confronting the institution concerned, in proceedings concerning the lawfulness of a contested measure, with an opinion issued by its own legal service during the drafting of that measure. In principle, to allow the applicant to put before the Court a legal opinion from an institution the disclosure of which has not been authorised by that institution would be contrary to the requirements of a fair hearing and would be tantamount to circumventing the procedure for requesting access to such a document introduced by Regulation No 1049/2001 (see, to that effect, order of 14 May 2019, *Hungary v Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 14 and the case-law cited, and judgment of 31 January 2020, *Slovenia v Croatia*, C-457/18, EU:C:2020:65, paragraph 68).

52 Nevertheless, account should be taken of the principle of openness, laid down in the second paragraph of Article 1 and Article 10(3) TEU and Article 15(1) and Article 298(1) TFEU, which guarantees, inter alia, that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system (see, to that effect, order of 14 May 2019, *Hungary v Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 13 and the case-law cited). By allowing divergences between various points of view to be openly debated, it also contributes to increasing those citizens' confidence in those institutions (judgment of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 75 and the case-law cited).

53 Admittedly, it is only exceptionally that the principle of openness will be capable of justifying, in judicial proceedings, the disclosure of a document of an institution that has not been released to the public and which contains a legal opinion. For that reason, the Court has held that the retention, in the file of a particular case, of a document containing a legal opinion from an institution is not justified by any overriding public interest where, first, that legal opinion does not relate to a legislative procedure in respect of which increased openness is required and, secondly, the interest in the document's retention consists, for the Member State concerned, in the ability to rely on that legal opinion in the context of a dispute. According to the Court, the production of such a legal opinion appears to be guided by the applicant's own interest in supporting its arguments and not by any overriding public interest, such as the interest in making public the procedure which resulted in the contested measure (see, to that effect, order of 14 May 2019, *Hungary v Parliament*, C-650/18, not published, EU:C:2019:438, paragraph 18, and judgment of 31 January 2020, *Slovenia v Croatia*, C-457/18, EU:C:2020:65, paragraph 71).

54 In the present case, it must be noted that, contrary to the cases which gave rise to the case-law cited in the preceding paragraph, Legal Opinion No 13593/18 relates to a legislative procedure.

55 In that regard, the Court has held that the disclosure of documents containing the advice of an institution's legal service on legal issues arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the right of EU citizens to scrutinise the information which has formed the basis of a legislative measure. The Court has concluded that there is no general need for confidentiality as regards the opinions of the Council Legal Service relating to a legislative process and that Regulation No 1049/2001 imposes, in principle, an obligation to disclose them (see, to that effect, judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 67 and 68).

56 It is precisely openness in that regard which, by allowing divergences between various points of view to be openly debated, contributes to reducing doubts in the minds of citizens, not only as regards the lawfulness of an isolated legislative measure but also as regards the legitimacy of the legislative process as a whole (see, to that effect, judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 59), and contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 TEU and in the Charter, as stated in recital 2 of Regulation No 1049/2001.

57 That openness does not, however, preclude a refusal, on account of the protection of legal advice, to disclose a specific legal opinion, issued in the context of a given legislative process, but being of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of that legislative process, in which case it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal (judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 69).

58 In the present case, as Advocate General Campos Sánchez-Bordona observed in points 70 to 72 of his Opinion in *Hungary v Parliament and Council* (C-156/21, EU:C:2021:974), the Council has failed to show that Legal Opinion No 13593/18 is of a particularly sensitive nature or has a particularly wide scope that goes beyond the context of the legislative process to which it relates.

59 Accordingly, neither Article 6(2) of the Council's Rules of Procedure nor the case-law referred to in paragraph 50 above precluded the Republic of Poland from disclosing all or part of that legal opinion in its application.

60 That finding is not undermined by the fact that the Republic of Poland has a particular interest in the disputed passages of its application being taken into consideration by the Court. Since the consideration of those passages is also likely to contribute to reducing doubts in the minds of citizens, not only as regards the lawfulness of the contested regulation but also as regards the legitimacy of the legislative process as a whole, it serves in any event the overriding public interest referred to in paragraphs 55 and 56 above.

61 Consequently, and without it being necessary to rule separately on the pleas alleging infringement of paragraphs 20 and 21 of the Guidelines for the handling of documents internal to the Council, infringement of Regulation No 1049/2001 and breach of the principle of equality of arms, since those pleas cannot, in any event, succeed, in the light of the considerations set out in paragraphs 52 to 60 above, the Council's request that the passages of the Republic of Poland's application be disregarded in so far as they refer to Legal Opinion No 13593/18, by reproducing the content of that opinion or reflecting the analysis undertaken therein, must be refused as unfounded.

## V. THE ACTION

62 In support of its action, the Republic of Poland puts forward 11 pleas in law. It is appropriate to examine, in the first place and together, the first, second, fifth, sixth and eleventh pleas, alleging, in essence, that the European Union lacked competence to adopt the contested regulation.

**A. The first, second, fifth, sixth and eleventh pleas, alleging that the European Union lacked competence to adopt the contested regulation**

**1. Arguments of the parties**

63 By the first plea, the Republic of Poland, supported by Hungary, submits that the nature and extent of the competences conferred upon the Union by the Treaties do not allow the Council to establish a mechanism such as that provided for by the contested regulation, which allows the EU institutions to control the Member States' observance of the principles of the rule of law and makes payment of funds from the Union budget conditional on observance of those principles.

64 It is true that the EU legislature may lawfully establish, on the basis of Article 322(1)(a) TFEU, a mechanism making payments from the Union budget subject to the Member States' observance of the principle of sound financial management. However, it follows from that principle as defined in Article 2(59) of the Financial Regulation and from the clarifications set out in Article 56(2) of that regulation that the obligations incumbent on the Member States under that principle must be specific and stem from specific legal provisions showing a direct link between the requirements introduced and the principle of sound financial management of Union funds and protection of the Union's financial interests.

65 By the contested regulation, the EU legislature, as is apparent from Article 1 thereof, created a mechanism which makes payments from the Union budget subject not to the Member States' compliance with specific obligations under EU law, linked to observance of the principle of sound financial management, but to observance of the principles of the rule of law.

66 The Republic of Poland considers that the establishment of such a mechanism does not fall within the competences conferred on the EU legislature by Article 322(1)(a) TFEU, even if Article 4(1) of the contested regulation provides that any established breach of the principles of the rule of law must affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

67 In the first place, according to the Republic of Poland, the EU legislature, in a regulation adopted pursuant to Article 322(1)(a) TFEU, can neither define the concept of 'the rule of law' nor determine the criteria for establishing breach of the constituent principles of that concept.

68 First of all, the principles of the rule of law stem from the constitutional and political traditions of the Member States and their content is specified in the case-law of the constitutional courts. While it is true that international organisations, in particular the Council of Europe, have drawn up certain criteria for assessing whether those principles have been observed, the specific embodiment of those principles is confined, in EU law, to mentioning the aims which they pursue. In view of the differences between the Member States as regards their national identities, their constitutional and legal systems and their legal traditions, the EU legislature cannot specify, for all the principles of the rule of law, the means by which the objectives which they pursue may be achieved. Accordingly, the obligation for the Member States to observe those principles is limited to the need to guarantee their essence.

69 Next, while the European Union is founded on the values contained in Article 2 TEU, the Treaties do not specify their content and do not confer any power on the EU legislature to define their scope in secondary legislation, not even under Article 19 TEU. That latter provision does not impose any specific obligation as regards the organisation of justice in the Member States, which falls within their exclusive competence.

70 Finally, according to the Republic of Poland, exceeding the powers conferred on it by Article 322(1)(a) TFEU, the EU legislature defined the concept of 'the rule of law' in Article 2(a) of the contested regulation by broadening its scope to other values also contained in Article 2 TEU. Similarly, in addition to the fact that Article 3 of that regulation sets out criteria that may be 'indicative of breaches of the principles of the rule of law', Article 4(2) of the regulation draws up a list of the situations or conduct of the authorities that must be concerned by a breach of the principles of the rule of law for the purposes of the same regulation, but without the EU legislature specifying the relationship existing between those provisions and that list being exhaustive, in the light of point (h) of that provision.

71 In so doing, the EU legislature also conferred on the Commission and the Council the power to specify further, when applying the contested regulation, the requirements relating to respect for the rule of law. Moreover, such a power must be exercised *ex post*, by assessing an existing situation in a Member State, thereby allowing those institutions to adapt the said requirements to the breach alleged of the Member State concerned and to apply them retroactively to the situation under consideration.

72 In the second place, the Republic of Poland considers that the EU legislature could not, on the basis of Article 322(1)(a) TFEU, establish a procedure alternative to those provided for in Article 7 TEU and Article 258 TFEU, respectively, by entrusting the Commission and the Council with the power to determine breaches by the Member States of the principles of the rule of law.

73 Such a breach can be determined only by the European Council, pursuant to Article 7 TEU. That exclusive power of the European Council may be derogated from only pursuant to Article 19(1) TEU and the obligation laid down in that provision to ensure effective legal protection in the fields covered by EU law, in which case breach of that obligation may then be determined by the Court in proceedings brought under Article 258 TFEU.

74 The European Council's exclusive power to determine, pursuant to Article 7 TEU, breaches of the principles of the rule of law is justified by the fact that review of respect for that value is discretionary and may depend on political considerations. Thus, according to the Treaties, it is for the representatives of the governments of the Member States to make such determinations and the latter are not subject to any substantive judicial review. In the absence of clear requirements, the Court cannot assess whether the European Council's determinations comply with the requirements stemming from that value. For that reason, Article 269 TFEU confines the judicial review carried out by the Court solely to the 'procedural stipulations' defined in Article 7 TEU, since that review cannot relate to the determination by the European Council of 'a serious and persistent breach' by a Member State of that value.

75 The question thus arises as to whether a Council implementing decision establishing, in accordance with the contested regulation, breach by a Member State of the principles of the rule of law could be subject to substantive judicial review without affecting the European Council's exclusive power, resulting from Article 7 TEU and Article 269 TFEU, to assess whether the Member States observe the values contained in Article 2 TEU.

76 In the third place, the Republic of Poland considers that, by establishing a mechanism for imposing financial penalties on Member States, the EU legislature exceeded the powers conferred on it by Article 322(1)(a) TFEU.

77 In that regard, the Republic of Poland, supported by Hungary, points out that, in the EU legal order, a horizontal and sectoral conditionality mechanism for the payment of funds from the Union budget must meet three requirements. First of all, it must define precisely the conditions for obtaining EU funds and the criteria for assessing compliance with those conditions. Next, the conditions for obtaining payments under the mechanism must have a 'sufficiently direct link' with the objective of the mechanism, such that failure to comply with the condition directly threatens the objective of the funding, sound financial management or the financial interests of the Union. Finally, the existence of a real link between the failure to comply with the condition and the loss of funding must be proved, in particular for the purposes of assessing the proportionality of the measure for protection of the Union budget.

78 It follows from those requirements that a conditionality mechanism cannot be used to sanction infringements of EU law which have no direct impact on the attainment of the objective of the funding or on the proper use of the funds.

79 The first requirement is not satisfied in this case. The principles of the rule of law cannot be covered by such a conditionality mechanism since neither the Treaties nor secondary legislation specify those principles or the specific obligations with which the Member States must comply in this respect.

80 The European Union, moreover, has no competence with regard to numerous aspects of the rule of law as defined in Article 2(a) of the contested regulation, including the requirement of a transparent, accountable, democratic and pluralistic legislative process. What is more, since Article 3 and Article 4(2) of that regulation are expressed in very general terms, a finding of breach by a Member State of the principles of the rule of law also does not require proof of the infringement of specific obligations and is the subject of a discretionary assessment.

Consequently, it cannot be ruled out that that assessment is dependent on political considerations, that it is arbitrary or that it is carried out in breach of the principle of equality of Member States before the Treaties.

81 The second requirement is not satisfied, either. The cases of breach of the principles of the rule of law by a Member State, as are set out in Article 3 and Article 4(2) of the contested regulation, are expressed in general terms, are contained in a non-exhaustive list and do not lay down any precise legal obligation. Those various characteristics make redundant the obligation to demonstrate ‘the existence of a sufficiently direct link’ between the breach observed and the risk to sound financial management of Union funds. Thus, according to the Republic of Poland, that requirement which will, depending on the premiss applied, either automatically be fulfilled or impossible to demonstrate, will necessarily be the subject of a political assessment and will give the Commission and the Council full discretion to restrict Member States’ access to EU financing.

82 The third requirement of a conditionality mechanism is equally lacking, since it is impossible to demonstrate, in the context of an exclusively political assessment, that there is a real link between the failure to comply with the condition for obtaining financing, namely breach of the principles of the rule of law, and the loss of financing from the Union budget. Since the restriction of financing and the scope of that restriction can stem only from a political assessment, the Council’s decision cannot be proportionate and disregards the requirements of Article 5(3) and recital 18 of the contested regulation.

83 In the alternative, should the Court consider that the legislature was competent to adopt the contested regulation, the Republic of Poland, supported by Hungary, takes the view, by the second plea, that that regulation ought to have been based on the third paragraph of Article 311 TFEU, which concerns the system of the own resources of the European Union, or on Article 312(2) TFEU, which concerns the multiannual financial framework.

84 In that regard, that Member State observes that that regulation will apply, in particular according to recital 7 thereof, not only to all the budgetary commitments made under the multiannual financial framework 2021-2027, but also to the resources allocated by Regulation 2020/2094 and to loans and other instruments guaranteed by the Union budget. Therefore, that regulation is directly linked to Decision 2020/2053 and the multiannual financial framework 2021-2027, and not to the various annual budgets of the Union.

85 Since the contested regulation is applicable to subsequent annual budgets of the European Union, only the third paragraph of Article 311 TFEU or Article 312(2) TFEU, which is the legal basis for multiannual financial frameworks, can constitute an appropriate legal basis for that regulation.

86 Consequently, the adoption of the contested regulation on the basis of Article 322(1)(a) TFEU by means of the ordinary legislative procedure allowed the procedural requirements stemming from Articles 311 and 312 TFEU to be circumvented, those provisions laying down special legislative procedures.

87 By the fifth plea, the Republic of Poland, supported by Hungary, submits that the contested regulation establishes a new mechanism for controlling the Member States’ observance of the principles of the rule of law, which is not provided for in the Treaties and circumvents the procedure laid down in Article 7 TEU.

88 The purpose of that mechanism, which is not a conditionality mechanism, is comparable to that of the procedure laid down in Article 7 TEU, that procedure and the procedure laid down by the contested regulation both seeking to control the Member States’ observance of the principles of the rule of law and to impose penalties in the event of failure to observe those principles. Those two procedures are also independent of each other, the mechanism established by that regulation not being subject to the opening of a procedure under Article 7 TEU.

89 Accordingly, first of all, while the European Council, acting by unanimity, is competent to determine the existence of a breach of the principles of the rule of law under Article 7(2) TEU, the contested regulation provides that it is first for the Commission to determine the existence of such a breach, the decision of the Council imposing the measures being adopted by a qualified majority and reflecting the Commission’s assessment.

90 Next, while Article 7 TEU requires the determination of a ‘serious and persistent’ breach of the principles of the rule of law, the contested regulation merely requires the existence of a simple isolated breach, as is apparent from Article 4(1) of that regulation, read in the light of recital 15 thereof.

91 Finally, the procedure under Article 7 TEU comprises two decisions, the first, of the European Council, concerning the determination of a breach, and the second, of the Council, concerning the adoption of penalties, such that the determination of a breach does not necessarily lead to the imposition of a penalty. Conversely, the contested regulation provides for the adoption of a single decision, by the Council, concerning both the existence of a breach and the measures to be adopted for the protection of the Union budget.

92 The contested regulation, in setting procedural requirements that are less stringent than those provided for in Article 7 TEU, while allowing the same objective to be attained as the latter, deprives it of any useful effect.

93 The Republic of Poland states, in that context, that the procedure currently underway against it under Article 7 TEU has not yet given rise to a determination by the European Council of a ‘serious and persistent breach . . . of the values referred to in Article 2 [TEU]’, on the basis of paragraph 2 of that article, with the result that the Council may not, as things stand, adopt a penalty pursuant to paragraph 3 of the said article. Thus, the establishment of the mechanism provided for by the contested regulation is intended to circumvent the procedure laid down in Article 7 TEU.

94 In the absence of a revision of the Treaties under Article 48 TEU, the establishment of a mechanism for monitoring compliance with international commitments, which has no basis in the Treaties, constitutes a clear abuse of rights and a breach of the fundamental principles of international law, in particular the principles of sovereign equality of States and non-intervention in domestic matters, codified in the United Nations Charter and in United Nations General Assembly Resolution 2625 (XXV) of 24 October 1970, entitled ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’. By virtue of those principles, the procedures for engaging the responsibility of States for violations of their international commitments can arise only from norms of international law freely accepted by those States.

95 By the sixth plea, the Republic of Poland, supported by Hungary, claims that the Court, contrary to Article 7 TEU and Article 269 TFEU, could be called upon to examine the substance of the breaches of the principles of the rule of law alleged by the Commission, in the course of a judicial review of the Council decisions adopted under the contested regulation. In order to be able to carry out such a review, the Court would have to draw up criteria concerning the value of the rule of law, on the basis of a definition of that value resulting from secondary legislation, criteria which are then to be applied in proceedings brought under Article 7 TEU, even though the Court does not have jurisdiction to assess the substance of the complaints raised against a Member State under that procedure.

96 Article 7 TEU, however, plays a very specific role in the system of remedies provided for by the Treaties, since it exceptionally authorises the EU institutions to monitor compliance by the Member States with the fundamental values of the European Union in areas which fall within the exclusive competence of the Member States.

97 By the eleventh plea, the Republic of Poland, supported by Hungary, claims that the contested regulation is vitiated by a misuse of powers. It follows from the case-law that an EU act is vitiated by misuse of powers or abuse of process if it appears, on the basis of objective, relevant and consistent evidence, to have been taken solely, or at the very least primarily, for purposes other than those which it sets out or with the aim of evading a procedure specifically prescribed by the Treaty.

98 In the present case, admittedly, the stated objective of the contested regulation is, as is apparent from its title, the protection of the Union budget and recital 7 thereof states that, for the purposes of attaining that objective, compliance with the principle of sound financial management is necessary, which presupposes respect for the values of the rule of law. Similarly, according to Article 1 thereof, the purpose of the said regulation is to establish the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States.

99 However, that stated objective does not correspond to the real purpose of the contested regulation. The Republic of Poland points out, in that regard, that the proposal which led to the adoption of the contested regulation stressed that ‘a number of recent events’ had demonstrated ‘generalised weaknesses in national checks and balances’, had ‘shown how a lack of respect for the rule of law [could] become a matter of serious and common concern within the European Union’ and had prompted ‘a clear request from institutions such as the European Parliament as well as from the public at large for the [European Union] to take actions to protect the rule of law’.

100 In addition, that Member State submits, like what it has already claimed in its first plea, that the mechanism established by the contested regulation is not a conditionality mechanism designed to protect the Union budget, but a punitive mechanism designed to penalise breaches of the principles of the rule of law. That finding is corroborated both by the Biuro Analiz Sejmowych Kancelarii Sejmu RP (Bureau of Parliamentary Analysis of the Chancellery of the Lower Chamber of the Republic of Poland) and by the annual reports of the Court of Auditors, according to which the implementation of the Union budget and the management of the finances of the Union are improving. The percentage of errors, which amounted to 4.4% in 2014, fell to 3.8% and then 3.1% in 2015 and 2016. Thus, the need to protect the Union budget did not justify the adoption of the contested regulation.

101 Accordingly, the Republic of Poland agrees with the view expressed by the Council Legal Service in Legal Opinion No 13593/18 according to which the mechanism provided for in the proposal that led to the adoption of the contested regulation ‘does not show in what manner the respect of the rule of law . . . is linked to the sound implementation of the [Union] budget and the protection of the financial interests of the Union’. Although, in certain recitals of that regulation, the existence of such a link is mentioned, that link is not however made explicit, let alone proved.

102 The Republic of Poland infers from this that the real objective of that proposal is not so much to protect the Union budget as to protect the rule of law by means of measures pertaining to the Union budget. Moreover, a similar view was expressed by national parliaments and by the European Economic and Social Committee, the latter indicating that it regarded ‘the proposal more as a potential tool to protect all Article 2 [TEU] values through the vehicle of the [Union] budget’. That view is supported, moreover, by recital 14 of the contested regulation, which includes the mechanism provided for by that regulation among the instruments for protecting the rule of law.

103 The objective of that mechanism must therefore be regarded as being identical to that of the ‘political control procedure’ provided for in Article 7 TEU. In that regard, since neither Article 7(3) TEU nor any other provision of the Treaties contains substantive limits as to the rights of a Member State that may be suspended in the event of a serious and persistent breach of the values contained in Article 2 TEU, the measures for the protection of the Union budget that may be imposed on a Member State under Article 5(1) of the contested regulation could also correspond to those which the Council may take under Article 7(3) TEU when it decides to suspend ‘certain of the rights deriving from the application of the Treaties’.

104 Since measures of the kind provided for in Article 5(1) of the contested regulation could be imposed even before the entry into force of that regulation, under the procedure provided for in Article 7 TEU, recital 14 of the said regulation is wrong to state that the mechanism which it establishes complements existing legal instruments intended to combat breaches of the principles of the rule of law.

105 Furthermore, Article 7(4) TEU and the second subparagraph of Article 7(2) of the contested regulation, relating to the variation and lifting of the measures adopted, indicate that the objective of those mechanisms is to encourage the Member State concerned to respect the value of the rule of law. In not requiring a unanimous decision of the European Council, however, that regulation lays down a much less restrictive procedure for adopting penalties than that laid down in Article 7 TEU, thereby depriving the latter of its effectiveness.

106 In an opinion of 27 May 2014, the Council Legal Service indicated, first, that Article 7 TEU deliberately establishes a precise supervision framework with different phases, a high notional threshold to start the procedures, reinforced majorities within the Council and the European Council and a set of procedural guarantees for the Member State concerned, including the possibility of limited judicial review by the Court of Justice and, secondly, that that article does not provide a legal basis for further developing or amending that procedure. That position was expressly reiterated in Legal Opinion No 13593/18, which specifies, moreover, that secondary legislation may not amend or supplement the said procedure or have the effect of depriving it of its effectiveness.

107 Therefore, because the objective, principles and measures applicable are the same, the mechanism established by the contested regulation constitutes a clear and deliberate circumvention of the procedure laid down in Article 7 TEU.



108 The Republic of Poland submits that the present case displays certain similarities with the case that gave rise to the judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033, paragraphs 57 to 60). It recalls that, in that judgment, the Court, relying on recital 10 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24), held that systemic or generalised deficiencies so far as concerns the independence of the judiciary of the Member State issuing a European arrest warrant, however serious they may be, cannot justify a de facto suspension of the implementation of the European arrest warrant mechanism in relation to that Member State, until the European Council and the Council adopt the decisions envisaged in Article 7 TEU.

109 That recital 10 merely reflects the legal consequences flowing from Article 7 TEU. It is therefore apparent from the judgment cited in the preceding paragraph that rights deriving from the Treaties can be suspended in relation to a Member State, on account of the latter's breach of the values contained in Article 2 TEU, only by the Council pursuant to Article 7(3) TEU.

110 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute the merits of that line of argument.

## **2. Findings of the Court**

111 By its first, second, fifth, sixth and eleventh pleas, the Republic of Poland, supported by Hungary, submits, in essence, first, that neither Article 322(1)(a) TFEU nor any other provision of the FEU Treaty could constitute an appropriate legal basis for the adoption of the contested regulation, in particular of Articles 2 to 4 thereof. It states, in the alternative, that, should the Court find that the EU legislature was competent to adopt the contested regulation, it ought to have been adopted on the basis of the third paragraph of Article 311 TFEU or Article 312 (2) TFEU. It adds, second, that the procedure established by the said regulation circumvents that laid down in Article 7 TEU, which procedure is nevertheless exclusive for the protection of the values contained in Article 2 TEU, and adversely affects the limitation of the Court's powers provided for in Article 269 TFEU.

### **(a) The legal basis for the contested regulation**

112 As a preliminary point, it should be borne in mind that, under Article 322(1)(a) TFEU, the Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Court of Auditors, are to adopt by means of regulations 'the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts'.

113 Such rules are intended to regulate all aspects related to the implementation of the Union budget covered by Title II, entitled 'Financial provisions', of Part Six of the TFEU, relating to 'institutional and financial provisions' and, therefore, to implementation in the broad sense.

114 Aside from the fact that Article 322 TFEU is in Chapter 5, entitled 'Common provisions', of Title II, it should be noted that reference is made to that provision in Article 310(2) and (3) TFEU, which is found in the introduction to Title II, in the first and second paragraphs of Article 315 and in the first and second paragraphs of Article 316 TFEU, which are found in Chapter 3 of Title II, entitled 'The Union's annual budget', and in Article 317 TFEU, which is found in Chapter 4 of that title, entitled 'Implementation of the budget and discharge'.

115 Articles 310 and 315 to 317 TFEU all relate to the implementation of the Union budget.

116 Article 310 TFEU states, in paragraph 1, that all items of revenue and expenditure of the Union are to be included in estimates to be drawn up for each financial year and are to be shown in the budget; it provides, in paragraph 3, that the implementation of expenditure shown in the budget requires the prior adoption of a legally binding Union act providing a legal basis for Union action and for the implementation of the corresponding expenditure in accordance with the regulation referred to in Article 322 TFEU, except in cases for which that law provides. Lastly,

Article 310 TFEU requires, in paragraph 5, that the budget be implemented in accordance with the principle of sound financial management and that Member States cooperate with the Union to ensure that the appropriations entered in the budget are used in accordance with that principle.

117 The first paragraph of Article 315 TFEU provides that, if, at the beginning of a financial year, the budget has not yet been definitively adopted, a sum equivalent to not more than one twelfth of the budget appropriations for the preceding financial year may be spent each month in respect of any chapter of the budget in accordance with the provisions of the regulations made pursuant to Article 322 TFEU; that sum is not, however, to exceed one twelfth of the appropriations provided for in the same chapter of the draft budget. Article 316 TFEU relates to the carrying forward to the next financial year of any appropriations that are unexpended at the end of the financial year.

118 Article 317 TFEU states, *inter alia*, that the Commission is to implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322 TFEU, on its own responsibility and within the limit of the appropriations, having regard to the principle of sound financial management. It also requires Member States to cooperate with the Commission to ensure that the appropriations are used in accordance with that principle and states that regulations made pursuant to Article 322 TFEU are to lay down the control and audit obligations of the Member States in the implementation of the budget and the resulting responsibilities.

119 It follows that the financial rules which determine ‘in particular the procedure to be adopted for’ implementing the budget and for presenting and auditing accounts, within the meaning of Article 322(1)(a) TFEU read in the light of the provisions referred to in paragraph 115 above, cover not only the rules which define how expenditure shown in the budget is to be implemented as such but also, in particular, the rules which determine the control and audit obligations on the Member States when the Commission implements the budget in cooperation with them, and the resulting responsibilities. In particular, it is clear that those financial rules are intended, *inter alia*, to ensure observance of the principle of sound financial management, including by the Member States, when implementing the Union budget.

120 It is in the light of the above considerations that it is necessary to examine, in the present case, whether Article 322(1)(a) TFEU is capable of constituting the appropriate legal basis for the adoption of the contested regulation.

121 In that regard, it is settled case-law that the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include the aim and content of that measure (judgments of 3 December 2019, *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 31; of 8 December 2020, *Hungary v Parliament and Council*, C-620/18, EU:C:2020:1001, paragraph 38; and of 8 December 2020, *Poland v Parliament and Council*, C-626/18, EU:C:2020:1000, paragraph 43).

122 In addition, to determine the appropriate legal basis, the legal framework within which new rules are situated may be taken into account, in particular in so far as that framework is capable of shedding light on the purpose of those rules (judgments of 3 December 2019, *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:1035, paragraph 32; of 8 December 2020, *Hungary v Parliament and Council*, C-620/18, EU:C:2020:1001, paragraph 39; and of 8 December 2020, *Poland v Parliament and Council*, C-626/18, EU:C:2020:1000, paragraph 44).

123 In the present case, as regards, in the first place, the question whether the contested regulation, in the light of its purpose, falls within the scope of the legal basis of Article 322(1)(a) TFEU, the Republic of Poland, supported by Hungary, submits, in essence, that the true objective of that regulation is to enable the imposition, if breaches of the principles of the rule of law are found, of penalties through the Union budget, an objective which is apparent, in particular, from the second subparagraph of Article 7(2) of the said regulation, from recital 14 thereof, but also from the failure to demonstrate a link between the respect for the rule of law and the sound financial management of the Union budget, from the explanatory memorandum accompanying the proposal which led to the adoption of the contested regulation as well as from statistics showing that, during the adoption of that regulation, there was no need to protect the Union budget.

124 In that regard, first, Article 1 of the contested regulation states that it is to establish ‘the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States’. It is thus apparent from the wording of that provision that the contested regulation is intended to protect the Union budget from any effects that may result from breaches of the principles of the rule of law in the Member States.

125 Secondly, it follows from a combined reading of Article 4(1) and Article 6(1) of the contested regulation that the procedure laid down for the adoption of ‘appropriate measures’ for the protection of the Union budget can be initiated by the Commission only where it finds that there are reasonable grounds for considering not only that there have been breaches of the principles of the rule of law in a Member State, but, in particular, that those breaches affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

126 In addition, under Article 5(1) and (3) of that regulation, those appropriate measures consist, essentially, in the suspension of payments, of the implementation of legal commitments, of the disbursement of instalments, of the economic advantage under a guaranteed instrument, of the approval of programmes, or of commitments; terminations of legal commitments; prohibitions on entering into new legal commitments or entering into new agreements; early repayments of guaranteed loans; reductions of the economic advantage under a guaranteed instrument, of commitments or of pre-financings; and interruption of payment deadlines, and those measures must be proportionate, that is to say, limited to what is strictly necessary in the light of the actual or potential impact of breaches of the principles of the rule of law on the financial management of the Union budget or the financial interests of the Union.

127 Furthermore, in accordance with the second subparagraph of Article 7(2) of the contested regulation, the Commission is to propose to the Council that the adopted measures be lifted where the conditions laid down in Article 4 of that regulation are no longer fulfilled and, therefore, in particular where the sound financial management of the Union budget or the protection of the financial interests of the Union is no longer affected or at serious risk of being affected, with the result that, as Advocate General Campos Sánchez-Bordona observed in point 185 of his Opinion in *Hungary v Parliament and Council* (C-156/21, EU:C:2021:974), those measures must be lifted where the impact on the implementation of the budget ceases, even though the breaches of the principles of the rule of law found may persist.

128 The types of measures which may be adopted, the criteria relating to the choice and scope of those measures and the conditions for the adoption and lifting of measures, in so far as they all relate to an effect or a serious risk of an effect on the sound financial management of the Union budget or the protection of the financial interests of the Union, support the finding that the purpose of the contested regulation is to protect the Union budget during its implementation.

129 Furthermore, it is apparent from the wording of Article 5(2) of the contested regulation, read in the light of Article 5(4) and recital 19 of that regulation, that that provision is intended not to penalise a Member State for a breach of a principle of the rule of law, as the Republic of Poland, supported by Hungary, submits, but to safeguard the legitimate interests of final recipients or beneficiaries when appropriate measures are adopted under that regulation against a Member State. That provision thus sets out the consequences of such measures with regard to third parties. Accordingly, that provision is not such as to support the claim that the contested regulation is intended to penalise breaches of the principles of the rule of law in a Member State rather than to protect the Union budget.

130 Thirdly, as Advocate General Campos Sánchez-Bordona stated in point 130 of his Opinion in *Hungary v Parliament and Council* (C-156/21, EU:C:2021:974), the recitals of the contested regulation confirm the objective pursued by that regulation, consisting, as apparent from Article 1 thereof, in the protection of the Union budget. Recitals 2 and 7 through 9 of that regulation indicate, in particular, that the European Council has stated that the financial interests of the Union are to be protected in accordance with the values set out in Article 2 TEU, that whenever Member States implement the Union budget, respect for the rule of law is an essential precondition for compliance with the principles of sound financial management enshrined in Article 317 TFEU, that Member States can only ensure sound financial management if public authorities act in accordance with the law, if breaches of the law are effectively pursued and if arbitrary or unlawful decisions of public authorities can be subject to effective judicial review, and that the independence and impartiality of the judiciary and investigation and public prosecution

services are required as a minimum guarantee against unlawful and arbitrary decisions of public authorities that could harm the financial interests of the Union. Recital 13 of that regulation states that, in that context, there is therefore ‘a clear relationship between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management’, and recital 15 thereof specifies that ‘breaches of the principles of the rule of law, in particular those that affect the proper functioning of public authorities and effective judicial review, can seriously harm the financial interests of the Union’.

131 As regards recital 14 of the contested regulation, while that recital states that the mechanism provided for by that regulation ‘complements’ the instruments that promote the rule of law and its application, it specifies that that mechanism does so ‘by protecting the Union budget against breaches of the principles of the rule of law affecting its sound financial management or the protection of the financial interests of the Union’.

132 Fourthly, in so far as the Republic of Poland, supported by Hungary, submits that recitals 7 to 9, 13 and 15 of the contested regulation refer to the existence of a link between respect for the rule of law and sound financial management of the Union budget without, however, demonstrating it, it must be noted that the EU legislature was able to deduce the findings made in those recitals of the expert assessments available to it during the legislative procedure, among them Opinion No 1/2018 of the Court of Auditors concerning the proposal of 2 May 2018 for a regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States (OJ 2018 C 291, p. 1), which resulted in the contested regulation. It is apparent from paragraphs 10 and 11 of that opinion that that institution agreed with ‘the Commission’s view that unlawful and arbitrary decisions by public authorities responsible for managing funds could harm the financial interests of the Union’ and recognised that ‘the independence and impartiality of the judiciary are essential in order to ensure the sound financial management and protection of the EU budget . . . , particularly with regard to the judicial enforcement of legal claims, the fight against fraud and other legitimate interests of the EU’.

133 Similarly, in paragraphs 1.3 and 1.4 of its Opinion of 18 October 2018 on that proposal for a regulation (OJ 2019 C 62, p. 173), the European Economic and Social Committee stated that ‘effective respect for the rule of law is a prerequisite for the public to have confidence that EU spending in Member States is sufficiently protected’, that ‘the proposal [which led to the adoption of that regulation] will . . . strengthen protection of the financial interests of the EU’ and that ‘a serious, persistent and systematic threat to the rule of law, . . . by [its] very nature, may pose a direct risk to the EU’s financial interests’.

134 Fifthly, in the explanatory memorandum accompanying its proposal which led to the adoption of the contested regulation, the Commission did indeed state that wishes had been expressed in favour of the European Union’s taking action to protect the rule of law and, consequently, of its adopting measures to ensure that it is respected. Nevertheless, in that explanatory memorandum, the Commission justified its proposal by the need ‘to protect the Union’s financial interests from the risk of financial loss caused by generalised deficiencies as regards the rule of law in a Member State’.

135 Sixthly, as regards statistics demonstrating that, when the contested regulation was adopted, there was no objective need to protect the Union budget, it must be noted that those statistics concern, according to the Republic of Poland itself, the percentage of errors observed in the years 2014 to 2016. That regulation is aimed not at correcting the errors that may be made in the implementation of the Union budget, but at alleviating the adverse effects and serious risks of adverse effects on the Union budget or on the protection of the financial interests of the Union that may result from breaches of the principles of the rule of law.

136 In any event, the Republic of Poland’s line of argument seeking to call into question the very expediency of the contested regulation, on the ground that that regulation does not meet an objective need, is not sufficient to demonstrate that the EU legislature exceeded the limits of its powers.

137 In the light of the foregoing considerations, it must be held that, contrary to the assertions of the Republic of Poland, supported by Hungary, the objective of the contested regulation is to protect the Union budget from adverse effects on that budget stemming in a sufficiently direct manner from breaches of the principles of the rule of law in a Member State, and not to impose penalties, per se, on such breaches.

138 That objective is consistent with the requirement that the Union budget must be implemented in accordance with the principle of sound financial management, laid down in particular in Article 310(5) TFEU, that requirement being applicable to all the provisions of Title II of Part Six of the FEU Treaty concerning the implementation of the Union budget and, in particular, Article 322(1)(a) TFEU.

139 In the second place, the Republic of Poland, supported by Hungary, submits, in essence, that, in view of its content, the contested regulation cannot lawfully come under the legal basis of Article 322(1)(a) TFEU, in particular as far as Articles 2 to 4 thereof are concerned. Article 322(1)(a) TFEU does not make it possible to identify the values contained in Article 2 TEU or, consequently, to define the concept of ‘the rule of law’, to extend that concept to the other values contained in Article 2 TEU or even to find breaches of the rule of law, whatever their link with the Union budget. In addition, no competence is conferred on the European Union to govern certain aspects of the concept of ‘the rule of law’, such as the characteristics of the legislative process. The Republic of Poland submits that the mechanism established by the contested regulation makes payments from the Union budget subject to the observance by the Member States not of specific obligations, as regards the principle of sound financial management, but of the principles of the rule of law. A conditionality mechanism must define precisely the conditions for obtaining funds, which must have a sufficiently direct link with the objectives of the funding. The link between the infringement of one of those conditions and the loss of funding must be proved and a penalty can be imposed only where it is established that the infringement in question has a bearing on the attainment of the objectives or the proper use of the funds. Article 3 and Article 4(2) of that regulation are nevertheless expressed in very general terms, and do not provide specific criteria for assessing whether the rule of law has been observed. In particular, Article 4(2)(h) thereof allows for the addressing of situations and conduct that have not yet been identified, thereby paving the way for the *ex post* elaboration of criteria for assessing breaches of the principles of the rule of law and, therefore, for endowing the mechanism established by the contested regulation with the character of a penalty mechanism.

140 In that regard, first, the parties to the proceedings agree that a ‘conditionality mechanism’, which makes the receipt of financing from the Union budget subject to compliance with certain conditions, is capable of falling within the concept of ‘financial rules’, within the meaning of Article 322(1)(a) TFEU.

141 However, while the Republic of Poland, supported by Hungary, takes the view that such a condition must be closely linked either to one of the objectives of a programme or of a specific EU action, or to the sound financial management of the Union budget, the Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, take the view that such a mechanism can also entail ‘horizontal conditionality’ in the sense that the condition in question can be linked to the value of the rule of law contained in Article 2 TEU, which must be respected in all areas of Union action.

142 In that regard, it should be pointed out that, under Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States and that, in accordance with Article 49 TEU, respect for those values is a prerequisite for the accession to the European Union of any European State applying to become a member of the European Union (see, to that effect, judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraphs 160 and 161 and the case-law cited).

143 As stated in recital 5 of the contested regulation, once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, the common values, contained in Article 2 TEU, on which the European Union is founded. That premiss is based on the specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the EU law that implements them will be respected (see, to that effect, Opinion 2/13 (Accession of the Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 166 to 168, and judgments of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 30, and of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 62). That recital also states that the laws

and practices of Member States should continue to comply with the common values on which the European Union is founded.

144 It follows that compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State (judgments of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 63; of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 162; and of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 162). Compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession.

145 The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.

146 It follows that, in accordance with the principle of conferral of powers enshrined in Article 5(2) TEU and the principle of consistency of the European Union's policies laid down in Article 7 TFEU, the rule of law – a value common to the European Union and the Member States which forms part of the very foundations of the European Union and its legal order – is capable of constituting the basis of a conditionality mechanism covered by the concept of 'financial rules' within the meaning of Article 322(1)(a) TFEU.

147 In that regard, it should be noted, first, that the Union budget is one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law (see, by analogy, judgment of 15 July 2021, *Germany v Poland*, C-848/19 P, EU:C:2021:598, paragraph 38), and, secondly, that the implementation of that principle, through the Union budget, is based on mutual trust between the Member States in the responsible use of the common resources included in that budget. That mutual trust is itself based, as stated in paragraph 143 above, on the commitment of each Member State to comply with its obligations under EU law and to continue to comply, as is moreover stated in recital 5 of the contested regulation, with the values contained in Article 2 TEU, which include the value of the rule of law.

148 In addition, as recital 13 of the contested regulation states, there is a clear relationship between, on the one hand, respect for the value of the rule of law and, on the other hand, the efficient implementation of the Union budget, in accordance with the principles of sound financial management, and the protection of the financial interests of the Union.

149 That sound financial management and those financial interests are liable to be seriously compromised by breaches of the principles of the rule of law committed in a Member State, since those breaches may result, inter alia, in there being no guarantee that expenditure covered by the Union budget satisfies all the financing conditions laid down by EU law and therefore meets the objectives pursued by the European Union when it finances such expenditure.

150 In particular, compliance with those conditions and objectives, as elements of EU law, cannot be fully guaranteed in the absence of effective judicial review designed to ensure compliance with EU law; the existence of such review, both in the Member States and at EU level, by independent courts and tribunals, is of the essence of the rule of law (see, to that effect, judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraphs 219 and 222).

151 It follows from the foregoing that, contrary to the submission of the Republic of Poland, supported by Hungary, a conditionality mechanism may also fall within the scope of the concept of 'financial rules' referred to in Article 322(1)(a) TFEU where it makes the receipt of financing from the Union budget subject to horizontal conditionality which is linked to respect by a Member State for the value of the rule of law, contained in Article 2 TEU, and which relates to the implementation of the Union budget.

152 Article 4(1) of the contested regulation establishes such a horizontal conditionality mechanism, since it provides that appropriate measures are to be taken where it is established that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

153 Article 5(1) of that regulation sets out, exhaustively, the ‘appropriate measures’ that may be adopted, which are summarised in paragraph 126 above and which in fact all relate to the implementation of the Union budget.

154 As regards the condition laid down in Article 4(1) of the contested regulation relating to the existence of ‘breaches of the principles of the rule of law’, Article 2(a) thereof states that the concept of ‘the rule of law’ is to be understood, for the purposes of that regulation, as being the ‘Union value enshrined in Article 2 TEU’ and that that concept includes the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, separation of powers and non-discrimination and equality before the law. That provision states, however, that the concept of ‘the rule of law’, as defined for the purposes of the application of the said regulation, ‘shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU’. It follows that respect for those values and principles – in so far as they form part of the very definition of the value of ‘the rule of law’ contained in Article 2 TEU or, as is apparent from the second sentence of that article, are closely linked to a society that respects the rule of law – may be required in the context of a horizontal conditionality mechanism such as that established by the contested regulation.

155 Furthermore, Article 3 of the contested regulation, which identifies cases which may be indicative of breaches of those principles, including a failure to ensure the absence of conflicts of interest, is intended, as Advocate General Campos Sánchez-Bordona stated in points 152 and 280 of his Opinion in *Hungary v Parliament and Council* (C-156/21, EU:C:2021:974), to facilitate the application of that regulation.

156 As regards Article 4(2) of the contested regulation, it follows from that provision that, in order to come within the horizontal conditionality mechanism established in Article 4(1) thereof, breaches of the principles of the rule of law must concern the situations or the conduct of authorities listed in points (a) to (h) of that Article 4(2), in so far as they are relevant to the sound financial management of the Union budget or to the protection of the financial interests of the Union.

157 It follows from the foregoing that Article 2(a), Article 3, Article 4(2) and Article 5(1) of the contested regulation are constituent elements of the horizontal conditionality mechanism established in Article 4(1) of that regulation, by laying down the definitions necessary for its implementation, by specifying its scope and by prescribing the measures to which it may lead. Those provisions thus form an integral part of that mechanism and therefore fall within the concept of ‘financial rules’, within the meaning of Article 322(1)(a) TFEU.

158 Secondly, that finding is not invalidated by the argument of the Republic of Poland, supported by Hungary, according to which no competence was conferred on the European Union to adopt legislation concerning specific aspects of the concept of ‘the rule of law’, such as an accountable, democratic and transparent legislative process.

159 As stated in paragraph 125 above, it follows from a combined reading of Article 4(1) and Article 6(1) of the contested regulation that the procedure it lays down for the adoption of ‘appropriate measures’ for the protection of the Union budget can be initiated by the Commission only where it finds that there are reasonable grounds for considering not only that there have been breaches of the principles of the rule of law in a Member State, but, in particular, that those breaches affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

160 Moreover, as noted in paragraph 156 above, it follows from Article 4(2) of the contested regulation that, in order to come within the horizontal conditionality mechanism laid down in Article 4(1), breaches of the principles of the rule of law must concern the situations or conduct of authorities listed in points (a) to (h) of Article 4(2), in so far as they are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.

161 Such relevance can be presumed as regards the activities of the authorities implementing the Union budget and carrying out financial control, monitoring and audit, referred to in points (a) and (b) of that Article 4(2).

Regarding investigation and public prosecution services, the proper functioning of those services is caught, under point (c) of that provision, only in so far as it relates to breaches of EU law concerning the implementation of the Union budget or the protection of the financial interests of the Union. The same applies to the prevention and sanctioning, by national courts or administrative authorities, of the breaches of EU law mentioned in point (e). As regards the judicial review referred to in point (d), it is caught only in so far as it concerns the conduct of the authorities referred to in points (a) to (c). The recovery of funds unduly paid, provided for in point (f), covers only funds from the Union budget, which is also the case for cooperation with OLAF and the EPPO, mentioned in point (g). Lastly, point (h) expressly refers to any other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.

162 It follows that, contrary to the Republic of Poland's submission, supported by Hungary, in the first place, the contested regulation allows the EU institutions to examine situations in the Member States only in so far as they are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union and, in the second place, appropriate measures can be adopted under that regulation only where it is established that such situations involve a breach of one of the principles of the rule of law which affects or seriously risks affecting that sound financial management or the protection of those financial interests of the Union in a sufficiently direct way.

163 Those situations, which are relevant to the implementation of the Union budget, not only fall within the scope of EU law, but, as found in paragraph 151 above, may also be caught by a financial rule, within the meaning of Article 322(1)(a) TFEU, in the form of a horizontal conditionality mechanism linked to respect by a Member State for the value of the rule of law.

164 Thirdly, contrary to the Republic of Poland's submission, supported by Hungary, the fact that a horizontal conditionality mechanism that meets the criteria identified in paragraph 151 above, relating to respect by a Member State for the value of the rule of law contained in Article 2 TEU and to the implementation of the Union budget, may come within the concept of 'financial rules which determine in particular the procedure to be adopted for . . . implementing the budget', within the meaning of Article 322(1)(a) TFEU, does not extend the scope of that concept beyond what is necessary for the proper implementation of the Union budget.

165 Article 4 of the contested regulation limits, in paragraph 2, the scope of the conditionality mechanism established by that regulation to situations and conduct of authorities that are related to the implementation of the Union budget and requires, in paragraph 1, that the adoption of appropriate measures be subject to the existence of breaches of the principles of the rule of law which affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way. The latter condition thus requires that a genuine link be established between those breaches and such an effect or serious risk of an effect.

166 It should be pointed out, in that regard, that the application of Article 4(1) and (2) of the contested regulation is subject to the procedural requirements laid down in Article 6(1) to (9) of that regulation, which mean that, as recital 26 of that regulation states, the Commission is under an obligation, when examining whether the adoption of appropriate measures is justified, to use an evidence-based approach and to respect the principles of objectivity, non-discrimination and equality of the Member States before the Treaties.

167 As regards, more specifically, the identification and assessment of breaches of the principles of the rule of law, recital 16 of the contested regulation states that that assessment should be objective, impartial and fair. Furthermore, compliance with all of those obligations is subject to comprehensive judicial review by the Court.

168 Fourthly, as regards the objections according to which the conditionality mechanism established by the contested regulation does not make payments from the Union budget subject to the compliance by the Member States with precisely defined specific obligations, Article 3 and Article 4(2) of that regulation use general terms which do not determine specific criteria for assessing respect for the rule of law and Article 4(2)(h) thereof allows for the addressing of situations and conduct that have not yet been identified, it should be noted, first of all, that it follows from Article 4(1) of the said regulation that the condition concerning the rule of law relates to observance of the principles laid down in Article 2(a) of the same regulation.



169 Observance of the principles of the rule of law constitutes an obligation as to the result to be achieved on the part of the Member States, which flows directly, as has been recalled in paragraphs 142 to 145 above from their membership of the European Union. Recital 3 of the contested regulation recalls that those principles have been the subject of extensive case-law of the Court, while recitals 8 to 10 and 12 of that regulation recall the main requirements stemming from them. Those principles are further clarified in Article 3 of that regulation, which sets out situations which may be indicative of breaches of those principles, and in Article 4(2) of that regulation, which identifies situations and conduct of authorities which are capable of giving rise to the adoption of appropriate measures, in so far as the conditions set out in Article 4(1) are fulfilled.

170 Next, the general nature of the terms used in Article 3 and Article 4(2) of the contested regulation is not such as to call into question the choice of Article 322(1)(a) TFEU as the legal basis for that regulation.

171 First, so far as concerns Article 3 of the contested regulation, without prejudice to the question of whether the criteria for assessing observance of the principles of the rule of law set in that article satisfy the requirements of the principle of legal certainty, which is the subject of the ninth plea, the EU legislature cannot be required to specify, under such a conditionality mechanism, all situations of breach of the constituent principles of the rule of law, such breach being characterised by disregard for requirements known to Member States in a sufficiently specific and precise manner. Given that, as has been stated in paragraph 155 above, the said Article 3 does no more than cite situations which may be indicative of breaches of the constituent principles of the rule of law in order to facilitate the application of that mechanism, that same article is, as has been stated in paragraph 157 above, inextricably linked to that mechanism and is therefore not such as to call into question the choice of Article 322(1)(a) TFEU as the legal basis for the contested regulation.

172 Second, as regards Article 4(2) of the contested regulation, as has been recalled in paragraph 156 above, that provision states that, in order to come within the horizontal conditionality mechanism established in Article 4(1) thereof, breaches of the principles of the rule of law must concern the situations or conduct of the authorities that are listed therein, in so far as they are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.

173 Contrary to the assertions of the Republic of Poland, supported by Hungary, that provision, in particular point (h) thereof, is neither such as to render non-exhaustive the situations covered by the conditionality mechanism established by the contested regulation nor insufficiently precise to form part of it.

174 It follows from a combined reading of Article 4(1) and Article 4(2)(h) of the contested regulation that appropriate measures are to be taken where it is established that a breach of one of the principles mentioned in Article 2(a) of that regulation has been committed and concerns a situation attributable to an authority of a Member State or the conduct of such an authority, in so far as that situation or conduct is relevant to the sound financial management of the Union budget or to the protection of the financial interests of the Union and that that breach affects or seriously risks affecting, in a sufficiently direct way, that sound financial management or those financial interests.

175 Furthermore, Article 4(2) of the contested regulation, in so far as it refers, in points (a) to (g) thereof, to certain authorities, including the ‘authorities implementing the Union budget’, the ‘authorities carrying out financial control, monitoring and audit’ or the ‘administrative authorities’, provides details concerning the authorities referred to in point (h) thereof.

176 In addition, it may be inferred from the definition of the concept of ‘government entity’ in Article 2(b) of the contested regulation that it refers to public authorities at any level of government, including national, regional and local authorities, and bodies governed by public law, or even bodies governed by private law with a public service mission which are provided with adequate financial guarantees by the Member State. That finding is supported by recitals 3, 8, 9, 15 and 19 of that regulation and by Article 3(b) thereof, which refer exclusively to ‘public authorities’, ‘law-enforcement authorities’ and ‘national authorities’.

177 Accordingly, since it follows unequivocally from the wording of Article 4(2) of the contested regulation that exclusively situations or conduct attributable to an authority of a Member State are concerned, in so far as those situations or conduct are relevant to the sound financial management of the Union budget or to the protection of the

financial interests of the Union, the line of argument of the Republic of Poland alleging that it cannot identify, on the basis of those criteria, in a sufficiently specific and precise manner, the situations and conduct referred to and that, consequently, that provision cannot be a constituent element of the conditionality mechanism established by the contested regulation on the basis of Article 322(1)(a) TFEU must be rejected.

178 Fifthly, as regards the criticisms of the alleged absence of a requirement to demonstrate the existence of a sufficiently direct link between the breach of a principle of the rule of law and the protection of the budget or financial interests of the Union, it must be recalled that Article 4(2) of the contested regulation makes the adoption of appropriate measures under Article 4(1) conditional on the existence of a breach of the principles of the rule of law which concerns situations or conduct of the authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union. In addition, in accordance with Article 4(1) of that regulation, only breaches of those principles which affect that sound financial management or those financial interests ‘in a sufficiently direct way’ or which seriously risk affecting them ‘in a sufficiently direct way’ may justify the adoption of measures under that regulation.

179 Consequently, Article 4(1) and (2) of the contested regulation requires that a sufficiently direct link be systematically established between such a breach and an effect or serious risk of an effect on that sound management or those financial interests, and that link must, as has been noted in paragraph 165 above, be genuine. It follows moreover from paragraphs 168 to 170 above that that link attaches to a Member State’s disregard for one of the obligations as to the result to be achieved falling within the value of the rule of law contained in Article 2 TEU and which it undertook, by its accession to the European Union, to assume fully.

180 Therefore, and also taking into account what has been set out in paragraph 166 above, the Republic of Poland, supported by Hungary, is wrong to argue that such a link could be determined automatically.

181 Sixthly, concerning the allegation that the discretion conferred by the contested regulation on the Council and the Commission allows those institutions to use the conditionality mechanism established by that regulation as a mechanism for imposing penalties for breaches of the principles of the rule of law, by relying on assessments of a political nature, it cannot succeed, either.

182 In the light of the requirements recalled in paragraphs 166 and 167 above, it cannot be presumed, as the Republic of Poland does, that the discretion conferred on the Council and the Commission would allow those institutions to apply the conditionality mechanism established by the contested regulation as a mechanism for imposing penalties for breaches of the principles of the rule of law.

183 Seventhly, it is wrong of the Republic of Poland, supported by Hungary, to argue that the contested regulation ought to have been based on the third paragraph of Article 311 TFEU, relating to the system of own resources, or on Article 312(2) TFEU, relating to the multiannual financial framework.

184 First, according to the third paragraph of Article 311 TFEU, the Council is to ‘adopt a decision laying down the provisions relating to the system of own resources of the Union’, it being specified that ‘in this context, it may establish new categories of own resources or abolish an existing category’.

185 As the Council has correctly pointed out, the contested regulation does not establish a new category of own resources of the Union, nor does not it abolish any of them. In addition, it does not govern the interaction between the different types of own resources and does not establish implementing arrangements for collecting own resources.

186 While it is true that that regulation can also relate to breaches of the principles of the rule of law affecting the collection of the Union’s own resources, the fact remains that its purpose is not to adjust or adapt the collection of those resources according to the breaches determined, but to adopt appropriate measures concerning expenditure to be made from the Union budget where those breaches affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union. It follows that it concerns not the collection of the Union’s own resources but rather the implementation of its budget.

187 Secondly, Article 312(2) TFEU provides that the Council is to ‘adopt a regulation laying down the multiannual financial framework’.

188 As the Council has rightly pointed out, the objective of the contested regulation is not to plan European Union expenditure over a given period by determining the amounts of the annual ceilings on appropriations for commitment and on payment appropriations. That regulation is, moreover, conceived as a permanent conditionality mechanism applying beyond the limits of a given multiannual financial framework.

189 In the light of all the foregoing considerations, the Republic of Poland's claims, supported by Hungary, alleging that the contested regulation has no legal basis, since it does not lay down financial rules within the meaning of Article 322(1)(a) TFEU, must be rejected.

190 However, it is still necessary to ascertain whether, as argued, in essence, by the Republic of Poland, supported by Hungary, financial rules such as those laid down by the contested regulation cannot be adopted by the EU legislature because they circumvent Article 7 TEU and Article 269 TFEU.

**(b) *Circumvention of Article 7 TEU and Article 269 TFEU***

191 In the first place, as regards the exclusive nature of the procedure laid down in Article 7 TEU for the protection of the values contained in Article 2 TEU, the Republic of Poland, supported by Hungary, submits, in essence, that a breach of the principles of the rule of law can be determined only by the European Council, pursuant to Article 7(2) TEU. Only that institution can, on account of its composition, review respect for the value of the rule of law, which is discretionary in nature and may depend on political considerations. The only exception to that exclusive power of the European Council results from the Member States' obligation under Article 19(1) TEU to ensure effective legal review. That exclusive power is confirmed by the judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU: C:2020:1033, paragraphs 57 to 60), by which the Court held that, where systemic deficiencies are found so far as concerns the independence of the judiciary of a Member State, the European arrest warrant mechanism can be suspended only by the Council pursuant to Article 7(3) TEU.

192 In that regard, first, it should be borne in mind that the founding values of the European Union, common to the Member States, contained in Article 2 TEU, include respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, in a society in which, inter alia, non-discrimination, justice, solidarity and equality between women and men prevail.

193 The preamble to the Charter states, inter alia, that the European Union is based on the principles of democracy and the rule of law and recognises the rights, freedoms and principles set out in the Charter. 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. Article 47 of the Charter and Article 19 TEU guarantee, inter alia, the right to an effective remedy and the right to an independent and impartial tribunal previously established by law, as regards the protection of the rights and freedoms guaranteed by EU law.

194 Furthermore, 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.

195 It follows from the two preceding paragraphs that, contrary to the Republic of Poland's submission, supported by Hungary, in addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the values laid down in Article 2 TEU committed in a Member State.

196 As regards, in particular, the value of the rule of law, certain aspects of that value are protected by Article 19 TEU, as the Republic of Poland indeed acknowledges. The same is true of Articles 47 to 50 of the Charter, contained in Title VI, entitled 'Justice', which guarantee, respectively, the right to an effective remedy and the right to a fair trial, the presumption of innocence and rights of the defence, the principles of legality and proportionality of criminal offences and penalties and the right not to be tried or punished twice for the same criminal offence.

197 More specifically, the Court has ruled that Article 19 TEU, which gives concrete expression to the value of the rule of law contained in Article 2 TEU, requires Member States, in accordance with the second subparagraph of Article 19(1), to establish a system of legal remedies and procedures ensuring that the right of individuals to effective judicial protection is observed in the fields covered by EU law (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of Judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraphs 108 and 109 and the case-law cited). Compliance with that requirement can be reviewed by the Court, inter alia in an action for failure to fulfil obligations brought by the Commission under Article 258 TFEU (see, to that effect, judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraphs 58 and 59, and of 5 November 2019, *Commission v Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraphs 106 and 107).

198 The Court has also ruled that the second subparagraph of Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, imposes on the Member States a clear and precise obligation as to the result to be achieved that is not subject to any condition as regards the independence which must characterise the courts called upon to interpret and apply EU law, with the result that it is for a national court to disapply any provision of national law which infringes the second subparagraph of Article 19(1) TEU, if necessary after obtaining from the Court an interpretation of that provision in the context of a reference for a preliminary ruling (see, to that effect, judgment of 2 March 2021, *A.B. and Others (Appointment of Judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraphs 142 to 146).

199 It thus follows from the considerations in paragraphs 195 to 198 above that the Republic of Poland's line of argument to the effect that the value of the rule of law can be protected by the European Union only under the procedure laid down in Article 7 TEU must be rejected.

200 Secondly, even assuming that the review, by the representatives of the Member States within the European Council and the Council, of respect for the value of the rule of law in the context of a procedure under Article 7 TEU could be based on political considerations, in any event, it does not follow that any assessment of respect for that value under another provision of EU law would necessarily be of the same nature, which the Republic of Poland acknowledges, moreover, when it refers to Article 19 TEU.

201 As regards the contested regulation, as has been noted in paragraphs 168, 169 and 179 above, that the duty to respect the principles set out in Article 2(a) thereof constitutes an obligation as to the result to be achieved on the part of the Member States, which flows directly, as has been recalled in paragraphs 142 to 145 above, from their membership of the European Union, pursuant to Article 2 TEU. In addition, recital 3 of the contested regulation recalls that those principles have been the subject of extensive case-law of the Court, while recitals 8 to 10 and 12 of that regulation set out the main requirements resulting from those principles and that those principles are further clarified both in Article 3 of that regulation, by setting out situations which may be indicative of breaches of those principles, and in Article 4(2) of that regulation, by identifying situations and conduct of authorities which are capable of giving rise to the adoption of appropriate measures where the conditions set out in Article 4(1) are fulfilled.

202 Furthermore, it has been noted in paragraphs 166 and 167 above that the assessments of the Commission and the Council are subject to the procedural requirements specified in Article 6(1) to (9) of the contested regulation.

203 In those circumstances, the Republic of Poland is wrong to claim that the principles mentioned in Article 2(a) of the contested regulation are solely political in nature and that the review of observance of them cannot be the subject of a strictly legal assessment.

204 Thirdly, contrary to what the Republic of Poland argues, the judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033) in no way established the exclusive nature of Article 7 TEU, but merely determined the situations in which systemic and generalised deficiencies so far as concerns the independence of the judiciary of the Member State which has issued a European arrest warrant may justify the non-execution of that warrant.

205 In the second place, as regards the alleged circumvention by the contested regulation of both the procedure laid down in Article 7 TEU and the limitation of the Court's powers provided for in Article 269 TFEU, the Republic

of Poland, supported by Hungary, claims, in essence, that the conditionality mechanism established by that regulation and the procedure laid down in Article 7 TEU coincide in terms of the objectives, principles and measures to which their implementation is likely to lead. That regulation, it is claimed, sets more flexible procedural rules than those laid down in Article 7 TEU and that conditionality mechanism has a broader scope and can be implemented more swiftly than the procedure laid down in that article, with the result that it renders that procedure redundant, leading to a manifest circumvention of the procedure. Only Article 7 TEU allegedly authorises the European Council and the Council to review respect for the rule of law in the areas falling within the Member States' exclusive competence. Accordingly, the Court does not have sufficient models of review enabling it to assess, during the judicial review of a Council decision adopted under the contested regulation, the conformity of the action of a Member State with its obligations under EU law. The definition of the rule of law set out in Article 2(a) of that regulation thus becoming, in general, binding, both in the context of a procedure initiated under Article 7 TEU concerning a breach of that value or a serious risk of breach of it and in that of judicial review carried out by the Court of a decision imposing appropriate measures under the said regulation, in breach of Article 269 TFEU.

206 In that regard, first, it should be stated that the EU legislature cannot establish, without infringing Article 7 TEU, a procedure parallel to that laid down by that provision, having, in essence, the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision.

207 However, it is permissible for the EU legislature, where it has a legal basis for doing so, to establish, in an act of secondary legislation, other procedures relating to the values contained in Article 2 TEU, which include the rule of law, provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU (see, by analogy, judgment of 7 February 1979, *France v Commission*, 15/76 and 16/76, EU:C:1979:29, paragraph 26; order of 11 July 1996, *An Taisce and WWF UK v Commission*, C-325/94 P, EU:C:1996:293, paragraph 25; and judgment of 11 January 2001, *Greece v Commission*, C-247/98, EU:C:2001:4, paragraph 13).

208 In the present case, as regards the respective purposes of the procedure laid down in Article 7 TEU and that provided for by the contested regulation, it follows from Article 7(2) to (4) TEU that the procedure laid down in that article allows the Council, where the European Council has determined the existence of serious and persistent breaches by a Member State of the values contained in Article 2 TEU, to suspend certain of the rights deriving from the application of the Treaties to that Member State, including the voting rights of the representative of the government of that Member State in the Council, and to decide subsequently to vary or revoke measures taken in response to changes in the situation which led to their being imposed.

209 The purpose of the procedure laid down in Article 7 TEU is therefore to allow the Council to penalise serious and persistent breaches of the values contained in Article 2 TEU, in particular with a view to compelling the Member State concerned to put an end to those breaches.

210 By contrast, as is apparent from paragraphs 124 to 137 above, it follows from the nature of the measures that may be adopted under the contested regulation and from the conditions for the adoption and lifting of those measures that the purpose of the procedure established by that regulation is to ensure, in accordance with the principle of sound financial management laid down in Article 310(5) and the first paragraph of Article 317 TFEU, the protection of the Union budget in the event of a breach of the principles of the rule of law in a Member State and not to penalise, through the Union budget, breaches of the principles of the rule of law.

211 It follows that the procedure laid down by the contested regulation pursues a different purpose from that of Article 7 TEU.

212 As regards the subject matter of each of those two procedures, it should be pointed out that the scope of the procedure laid down in Article 7 TEU covers all the values contained in Article 2 TEU, whereas the scope of the procedure established by the contested regulation covers only one of those values, namely the rule of law.

213 Furthermore, Article 7 TEU allows the assessment of all serious and persistent breaches of a value contained in Article 2 TEU, whereas the contested regulation authorises the examination of breaches of the principles of the

rule of law mentioned in Article 2(a) of that regulation only in so far as there are reasonable grounds to consider that those breaches have budgetary implications.

214 As regards the conditions for initiating the two procedures, it should be noted that the procedure provided for in Article 7 TEU may be initiated, as set out in paragraph 1 of that article, where there is a clear risk of a serious breach by a Member State of the values contained in Article 2 TEU, on the initiative of one third of the Member States, the Parliament or the Commission, the threshold being, initially, that of a clear risk of a serious breach of those values and, subsequently – as regards the suspension, under Article 7(2) and (3) TEU, of certain of the rights deriving from the application of the Treaties to the Member State in question – that of a serious and persistent breach of those values by that Member State. Conversely, the procedure established by the contested regulation may be initiated by the Commission alone where there are reasonable grounds to consider not only that breaches of the principles of the rule of law have occurred in a Member State, but also, and above all, that those breaches affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

215 Moreover, the only substantive condition required for the adoption of measures under Article 7 TEU lies in the European Council's determining the existence of a serious and persistent breach by a Member State of the values contained in Article 2 TEU. By contrast, as noted in paragraph 165 above, under Article 4(1) and (2) of the contested regulation, measures under that regulation may be taken only where two conditions are satisfied. First, it must be established that a breach of the principles of the rule of law in a Member State concerns one or more of the situations or forms of conduct of authorities referred to in paragraph 2, in so far as it is relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union. Secondly, it must also be demonstrated that those breaches affect or seriously risk affecting that sound financial management or those financial interests in a sufficiently direct way; that condition thus requires that a genuine link be established between those breaches and such an effect or serious risk of an effect.

216 Regarding the nature of the measures that may be adopted under Article 7(3) TEU, those measures consist in the suspension of 'certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council' and may, therefore, relate to any right deriving from the application of the Treaties to the Member State in question. By contrast, the measures that may be adopted under the contested regulation are limited to those listed in Article 5(1) of that regulation and summarised in paragraph 126 above, which are all budgetary in nature.

217 Lastly, Article 7 TEU provides for the variation or revocation of measures adopted only in response to changes in the situation which led to their being imposed. By contrast, the second and third subparagraphs of Article 7 (2) of the contested regulation make the lifting and variation of measures adopted subject to the conditions for the adoption of measures referred to in Article 4 of that regulation. Accordingly, those measures may be lifted or varied not only where breaches of the principles of the rule of law in the Member State in question have been remedied, at least in part, but in particular where those breaches, despite persisting, no longer have an impact on the Union budget. That may be the case, *inter alia*, where they no longer concern one or more of the situations or forms of conduct of authorities referred to in paragraph 2 of that article, where those situations or conduct are no longer relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union, where the breach no longer affects or seriously risks affecting that sound management or those financial interests, or where the link between the breach of a principle of the rule of law and such an effect or serious risk is no longer sufficiently direct.

218 In the light of the foregoing considerations, it is clear that the procedure laid down in Article 7 TEU and that established by the contested regulation pursue different aims and that each has a clearly distinct subject matter.

219 It follows that, contrary to the Republic of Poland's submission, supported by Hungary, the contested regulation cannot be regarded as establishing a parallel procedure which circumvents Article 7 TEU.

220 Secondly, as regards the argument that only Article 7 TEU authorises the EU institutions to review respect for the rule of law in areas falling within the Member States' exclusive competence, it has been found in paragraphs 162 and 163 above that, on the one hand, the contested regulation allows the EU institutions to examine

situations in the Member States only in so far as those situations are relevant for the implementation of the Union budget, in accordance with the principle of sound financial management, or the protection of the financial interests of the Union and, on the other hand, that appropriate measures may be adopted under that regulation only where it is established that such situations involve a breach of one of the principles of the rule of law which affects or seriously risks affecting that sound financial management or the protection of those financial interests in a sufficiently direct way.

221 Since such situations relate to the implementation of the Union budget and thus fall within the scope of EU law, the Republic of Poland, supported by Hungary, cannot claim that only Article 7 TEU allows them to be examined by the EU institutions.

222 Thirdly, as regards the argument that there are insufficient models of review enabling the Court to assess, during judicial review of a Council decision, the conformity of the action of a Member State with its obligations under EU law, that argument must be rejected for the reasons set out in paragraphs 201 and 203 above.

223 Fourthly, in so far as the Republic of Poland, supported by Hungary, argues that the concept of ‘the rule of law’ as it is defined in Article 2(a) of the contested regulation, becomes, in general, binding, both in proceedings brought under Article 7 TEU and during judicial review by the Court of a decision establishing appropriate measures under that regulation, in breach of Article 269 TFEU, first of all, it follows from paragraphs 144 and 154 above that, without prejudice to the question of whether that definition satisfies the requirements of the principle of legal certainty, which is the subject of the ninth plea, the concept of ‘the rule of law’ referred to in that Article 2(a) is to be understood as being the value contained in Article 2 TEU, that the principles identified therein are part of the very definition of that value or are intimately linked to a society which respects the rule of law and that, by their accession to the European Union, the Member States have undertaken to respect and promote the values contained in Article 2 TEU, respect for which is a condition for the enjoyment of all the rights deriving from the application of the Treaties to the Member States.

224 It follows that observance of the principles of the rule of law mentioned in Article 2(a) of the contested regulation is already required of the Member States, irrespective of that regulation.

225 Next, it must be noted that Article 269 TFEU, according to its wording, concerns only the review of the legality of an act adopted by the European Council or by the Council under Article 7 TEU.

226 In those circumstances, and having regard to the findings made in paragraphs 218 and 219 above, the review of legality which the Court may be called upon to carry out, in particular in an action for annulment brought under Article 263 TFEU, in respect of Council decisions taken under Article 6(10) of the contested regulation does not fall within the scope of Article 269 TFEU and is therefore not subject to the specific rules laid down in that article.

227 It follows that the contested regulation does not confer any new competence on the Court.

228 Finally, judgments of the Court ruling on actions brought against Council decisions taken under Article 6 (10) of that regulation can be taken into account in proceedings brought under Article 7 TEU, without such taking into account constituting any circumvention of Article 269 TFEU.

229 Having regard to all the foregoing considerations, the claims of the Republic of Poland, supported by Hungary, alleging circumvention of Article 7 TEU and Article 269 TFEU, must be rejected as unfounded, with the result that the first, second, fifth, sixth and eleventh pleas must be rejected as unfounded.

## **B. The third plea, alleging infringement of Protocol No 2**

### **1. Arguments of the parties**

230 In the alternative to the first plea, the Republic of Poland, supported by Hungary, submits that the contested regulation was adopted in breach of the consultation obligation arising from Protocol (No 2) on the application of the principles of subsidiarity and proportionality (‘Protocol No 2’).

231 The principle of subsidiarity, which applies in areas which do not fall within the exclusive competence of the European Union, requires the European Union to intervene only if, and in so far as, the objectives pursued cannot be

sufficiently achieved by action by the Member States. Under Protocol No 2, national parliaments are to ensure respect for the principle of subsidiarity in accordance with the procedure provided for in the said protocol.

232 However, protection of the Union budget does not fall within the exclusive competence of the European Union, but within competences shared with the Member States. First, that protection is not mentioned in Article 3 (1) TFEU and, second, Article 325(1) TFEU sets out a common obligation on the European Union and on the Member States to combat fraud and any illegal activity affecting the Union's financial interests.

233 The Commission is therefore wrong to take the view, in its proposal for a regulation which resulted in the contested regulation, that the protection of the Union budget is one of the areas which falls within the exclusive competence of the Union, meaning that that institution has not fulfilled the obligations incumbent on it under Protocol No 2. In particular, that institution did not forward that proposal to the national parliaments in all the official languages of the European Union, contrary to the requirements of the first paragraph of Article 6 of that protocol. In so doing, the Commission also infringed the first paragraph of Article 7 of that protocol, according to which that institution is to take account of the reasoned opinions issued by the national parliaments.

234 The Republic of Poland, supported by Hungary, takes the view that such infringements must be treated in the same way as infringements of the rights of the Parliament in legislative procedures. In that regard, the Court has stated that participation by the Parliament in the legislative process reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly, with the result that due consultation of the Parliament in the cases provided for by the FEU Treaty constitutes an essential procedural requirement disregard of which renders the measure concerned void. Since Protocol No 2 is intended, according to its preamble, to ensure that decisions are taken as closely as possible to citizens, infringement of the obligation to consult the national parliaments which it lays down must therefore, in the present case, result in the annulment of the contested regulation.

235 Such annulment is also justified by the fact that the Commission did not observe fully its obligation under the first paragraph of Article 4 of Protocol No 2, according to which it must forward its draft legislative acts and its amended drafts to national parliaments. It is true that it sent its initial proposal for a regulation to those parliaments, but that proposal was redrafted significantly in the subsequent stages of the legislative procedure, without those parliaments having been put in a position to carry out a fresh examination. It follows from the case-law of the Court that the Parliament must be consulted again whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted, since that fresh consultation is an essential formal requirement which carries a penalty of invalidity.

236 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute those arguments.

## 2. *Findings of the Court*

237 It follows from Article 5(3) TEU that the provisions of Protocol No 2 relating to the principle of subsidiarity apply only in the 'areas which do not fall within [the] exclusive competence' of the European Union.

238 In the first place, contrary to what the Republic of Poland, supported by Hungary, claims, Article 325(1) TFEU is not relevant for the purpose of determining whether the contested regulation falls within such an area.

239 It follows from paragraphs 112 to 189 above that the contested regulation is founded, rightly, on another legal basis, namely Article 322(1)(a) TFEU, since that regulation seeks to protect the Union budget against situations or conduct attributable to the authorities of the Member States which result from breaches of the principles of the rule of law and which affect or seriously risks affecting the sound financial management of the Union budget or the protection of its financial interests, in a sufficiently direct manner.



240 In the second place, the proposal for a regulation which led to the adoption of the contested regulation is right to state, under the heading ‘Subsidiarity (for non-exclusive competence)’, that the ‘financial rules governing the Union budget under Article 322 [TFEU] could not be adopted at the level of the Member States’.

241 In that regard, as the Advocate General observed in points 40 and 45 of his Opinion, a regulation such as the contested regulation, which contains financial rules determining the procedure to be adopted for establishing and implementing the Union budget, within the meaning of Article 322(1)(a) TFEU, falls within the exercise of a competence of the European Union relating to its functioning, which, by its nature, can be exercised only by the Union itself. Therefore, the principle of subsidiarity cannot apply.

242 Consequently, the Republic of Poland’s argument alleging that the Commission failed to comply with its procedural obligations under the provisions of Protocol No 2 is unfounded, with the result that the third plea must be rejected.

### **C. The fourth plea, alleging infringement of the second paragraph of Article 296 TFEU**

#### **1. Arguments of the parties**

243 The Republic of Poland, supported by Hungary, claims that the statement of reasons for the contested regulation, as is set out in the proposal which led to that regulation, does not comply with the requirements set out in the second paragraph of Article 296 TFEU which requires that all EU acts contain a statement of the reasons which resulted in their being adopted.

244 The reasons for which it was necessary to adopt the contested regulation are not apparent from the statement of reasons set out in that proposal.

245 In addition, while the statement of reasons for that proposal referred to Article 322(1)(a) TFEU as being the legal basis for the contested regulation, that choice was neither ‘explained nor justified’, contrary to the requirements provided for in the first paragraph of point 25 of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making (OJ 2016 L 123, p. 1). Consequently, in the view of the Republic of Poland, it is not possible to review whether that regulation was adopted pursuant to an exclusive competence of the European Union or a competence shared with the Member States, which constitutes an infringement of essential procedural requirements and justify the annulment of the said regulation.

246 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute those arguments.

#### **2. Findings of the Court**

247 The Republic of Poland confirmed at the hearing that the fourth plea relates to the statement of reasons for the proposal which led to the adoption of the contested regulation and not to that of that regulation itself, as reflected in its recitals.

248 Since the present action seeks the annulment not of that proposal, but of the contested regulation, the line of argument put forward in support of that plea is ineffective, as the Parliament and the Council have rightly asserted and as the Advocate General noted in point 58 of his Opinion.

249 The settled case-law of the Court, according to which the statement of reasons for an EU measure, required by the second paragraph of Article 296 TFEU, must show clearly and unequivocally the reasoning of the author of the measure in question so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review (judgment of 11 December 2018, *Weiss and Others*, C-493/17, EU: C:2018:1000, paragraph 31 and the case-law cited), refers to the statement of reasons for the measure whose legality is being examined.

250 While observance of the duty to state reasons must, moreover, be assessed by reference not only to the wording of the measure, but also to its context and to the whole body of legal rules governing the matter in question (judgment of 11 December 2018, *Weiss and Others*, C-493/17, EU:C:2018:1000, paragraph 33 and the case-law cited), that context, which includes, inter alia, the proposal for the measure in question, cannot justify, in itself and irrespective of the statement of reasons contained in that measure, the annulment of the latter.

251 In any event, even if they related to the statement of reasons contained in the contested regulation, the complaints of the Republic of Poland as summarised in paragraphs 244 and 245 above would have to be rejected in the light of the considerations set out in particular in paragraphs 124, 130, 131, 134, 149, 159, 162, 163 and 165 above.

252 It follows that the fourth plea must be rejected as ineffective.

**D. The seventh plea, alleging infringement of Article 4(1), the second sentence of Article 4(2) and Article 5(2) TEU**

**1. Arguments of the parties**

253 The Republic of Poland, supported by Hungary, takes the view that no provision of the Treaties confers on the EU legislature competence to adopt the contested regulation, such that, in adopting it, it infringed the principle of conferral laid down in Article 4(1) and Article 5(2) TEU. In so doing, it also breached the obligation provided for in the second sentence of Article 4(2) TEU to respect the Member States' essential functions.

254 The factors on the basis of which it should be assessed whether the Member States have infringed the principles of the rule of law referred to in Article 3 and Article 4(2) of the contested regulation concern areas which fall within the exclusive competence of the Member States and which are fundamental for the exercise of their essential functions, in particular those aimed at safeguarding territorial integrity, maintaining public order and ensuring national security. They concern not only the functioning of State bodies, such as the national courts, the authorities responsible for the award of public contracts and the financial control and investigation and public prosecution services, but also their organisation, including the provision of financial and human resources necessary for the proper functioning of those authorities, and the procedural rules applicable to them.

255 Contrary to what recital 7 of the contested regulation suggests, no competence on the part of the EU legislature in that regard can be inferred from the important nature of the principles of the rule of law for the EU legal order, in particular the principle of sound financial management falling within the scope of that principle, established in Article 317 TFEU.

256 The EU legislature thus adopted the contested regulation in accordance with the logic of a 'spillover effect', namely a process at the end of which action pursuing a precise objective results in a situation in which the initial objective can be achieved only through new actions. In the present case, that spillover effect involves inferring from the legitimate objective of protecting the Union budget the need to recognise the Union's competence to assess both the procedures and the financial and staffing needs of the investigation and public prosecution services of Member States, even though such competence has no basis in the Treaties.

257 The competence of Member States to organise their investigation and public prosecution services is inextricably linked to essential State functions, such as the maintenance of law and order, which the European Union must respect, and to national security, which, according to Article 4(2) TEU, is the sole responsibility of each of the Member States.

258 The Council Legal Service moreover adopted a similar position, indicating in Legal Opinion No 13593/18, first of all, that Article 2 TEU does not confer any material competence on the European Union but lists the values that the EU institutions and Member States must observe when they act within the limits of the powers conferred on the European Union by the Treaties, next, that an infringement of the values of the European Union, including the rule of law, may be relied upon against a Member State only where that Member State is acting in an area in which the European Union has competence, and lastly, that respect for the rule of law by the Member States cannot, according to the Treaties, be the subject of an action or review by the EU institutions, regardless of whether there is a specific material competence under which that action falls, subject solely to the procedure described in Article 7 TEU.

259 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute those arguments.

## 2. *Findings of the Court*

260 By the seventh plea, the Republic of Poland, supported by Hungary, submits that the EU legislature, in adopting the contested regulation and thereby establishing, on the basis of the principle of sound financial management laid down in Article 317 TFEU, a review of the Member States' observance of the principles of the rule of law in areas of sovereign action of those Member States, which fall within their exclusive competence and are fundamental to enable them to assume their essential functions, deprived of their effectiveness both the principle of conferral set out in Article 4(1) and Article 5(2) TEU and the obligation laid down in the second sentence of Article 4(2) TEU to observe the Member States' essential functions.

261 In that regard, first, as has been held in paragraphs 112 to 189 above, the EU legislature was entitled to base the contested regulation on Article 322(1)(a) TFEU, such that the Republic of Poland's argument that, by adopting that regulation, the EU legislature wrongly inferred its competence from the principle of sound financial management established in Article 317 TFEU cannot succeed.

262 Secondly, as has been stated in paragraphs 124 to 138, 152 to 157 and 208 to 219 above, it is apparent from the aim and the content of the contested regulation that, contrary to the Republic of Poland's assertions, that regulation authorises the Council to adopt not penalties, but only measures to protect the Union budget and the Union's financial interests.

263 Thirdly, as has been pointed out in paragraphs 142 to 145, 168, 169 and 179 above, the duty to respect the principles mentioned in Article 2(a) of the contested regulation constitutes an obligation as to the result to be achieved on the part of the Member States, which stems directly from the commitments which they have undertaken vis-à-vis each other and with regard to the European Union, and which that regulation merely implements as regards action by the national authorities relating to expenditure covered by the Union budget.

264 In that regard, it must be borne in mind that Article 2 TEU is not a mere statement of policy guidelines or intentions, but contains values which, as has been set out in paragraph 145 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles comprising legally binding obligations for the Member States.

265 Even though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another.

266 Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of 'the rule of law' which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times.

267 Fourthly, the Republic of Poland's argument, supported by Hungary, that the assessment of the breach by the Member States of the principles of the rule of law concerns areas which fall within the exclusive competence of the Member States, has already been rejected in paragraphs 162, 163, 220 and 221 above, on the ground that that regulation allows only for the assessment of situations and conduct of authorities relating to the implementation of the Union budget or the protection of the Union's financial interests.

268 Admittedly, it cannot be ruled out that such situations or conduct may be attributable to an authority which a Member State considers to be involved in its sovereign action in areas fundamental to the exercise of its essential functions. The fact remains that, where such a situation or conduct adversely affects or seriously risks affecting the sound financial management of the Union budget or the protection of the Union's financial interests, the

European Union cannot be criticised for implementing, in defence of its identity, which includes the values contained in Article 2 TEU, the means necessary to protect that sound financial management or those financial interests by adopting appropriate measures which, in accordance with Article 5(1) of the contested regulation, relate exclusively to the implementation of the Union budget.

269 It should be recalled in that regard that, according to settled case-law, while the Member States are free to exercise their competences in all their reserved areas, they are nevertheless required do so in compliance with EU law, since they may not disregard their obligations deriving from that law (see, to that effect, judgments of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraph 69 and the case-law cited; of 19 September 2017, *Commission v Ireland (Registration tax)*, C-552/15, EU:C:2017:698, paragraphs 71 and 86; of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, paragraph 48 and the case-law cited; and of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596, paragraph 56 and the case-law cited).

270 Moreover, by requiring that the Member States thus comply with their obligations deriving from EU law, the European Union is not in any way claiming to exercise those competences itself nor is it, therefore, arrogating them (see, to that effect, judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraph 52).

271 In the light of those considerations, it must be held that the claims of the Republic of Poland alleging breach of the principle of conferral and of the duty to respect the essential functions of the Member States are without foundation.

272 Consequently, the seventh plea must be rejected as unfounded.

**E. The eighth plea, alleging breach of the principle of equality of the Member States before the Treaties and non-respect for their national identities, provided for in the first sentence of Article 4(2) TEU**

**1. Arguments of the parties**

273 The Republic of Poland, supported by Hungary, takes the view that the application of the contested regulation will be the source of infringements of the first sentence of Article 4(2) TEU, according to which the European Union is to respect the equality of the Member States before the Treaties and their national identities, inherent in their fundamental structures, political and constitutional.

274 In the first place, according to recital 16 of the contested regulation, identification of breaches of the principles of the rule of law requires a thorough qualitative assessment by the Commission, based on relevant information from available sources and recognised institutions, including the conclusions and recommendations of the Venice Commission. That commission stated, in its report on judicial appointments, adopted at its 70th plenary session, that it was necessary to distinguish between States which are ‘older democracies’ and those which constitute ‘new democracies’, that distinction being such as to give rise to a serious risk of the Commission treating Member States differently under that regulation.

275 The Republic of Poland, supported by Hungary, also states that the Court of Auditors, in its Opinion No 1/2018 on the proposal for a regulation which resulted in the contested regulation, criticised the fact that that proposal did not set any precise criteria as regards, inter alia, the conditions for initiating the procedure or the choice and scope of the measures to be adopted, which cannot ensure a consistent application of the relevant provisions of that regulation or, therefore, guarantee equality of the Member States before the Treaties.

276 In the second place, the Republic of Poland, supported by Hungary, submits that the introduction, in the contested regulation, of a penalty mechanism compelled the EU legislature to choose a procedure for adopting measures for the protection of the Union budget which directly breaches the principle of equality of the Member States before the Treaties. It is apparent from Article 6(10) and (11) of that regulation that decisions concerning those measures are to be adopted by the Council by the qualified majority defined in Article 16(4) TEU, which implies the participation of the Member State concerned.

277 The adoption of such punitive measures by qualified majority, with the participation of the Member State concerned, leads to direct discrimination against small and medium-sized Member States, since that majority requires the votes of at least 15 Member States representing at least 65% of the population of the European Union. 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. While such a correlation cannot be disputed as regards the adoption of normative acts having effects in all Member States, the situation is different as regards penalty measures intended to have effects on a single Member State, like those which may be taken under the contested regulation.

278 Furthermore, the provisions of the Treaties which authorise the EU institutions to impose penalties on the Member States systematically exclude from voting those Member States referred to in the proposal for an act imposing penalties. In particular, that is the case for Article 126 TFEU, relating to the excessive government deficit, and for Article 7 TEU and Article 354 TFEU, regarding the procedure referred to in Article 7 TEU.

279 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute those arguments.

## 2. *Findings of the Court*

280 By the eighth plea, the Republic of Poland, supported by Hungary, claims that the application of the contested regulation will be the source of breaches of the principle of equality of Member States before the Treaties and their national identities, which the European Union is required to respect under the first sentence of Article 4(2) TEU. Those breaches result, first of all, from the Commission's taking into account of opinions and studies from the Venice Commission, secondly, from the lack of precision in the criteria relating, in particular, to the conditions for initiating the procedure laid down in that regulation and the choice and scope of the measures to be adopted and, lastly, from the voting rule laid down in Article 6(11) of the said regulation as regards the decisions to be taken by the Council under Article 6(10) of the same regulation.

281 In that regard, in the first place, as regards the Commission having taken account of relevant information from the Venice Commission, it must be recalled that the value of the rule of law which is at the heart of the horizontal conditionality mechanism established in Article 4(1) of the contested regulation is directed at observance of the principles referred to in Article 2(a) of that regulation.

282 As has been recalled most recently in paragraph 263 above, that obligation to observe those principles constitutes an obligation as to the result to be achieved on the part of the Member States, which flows directly from their membership of the European Union, pursuant to Article 2 TEU, which no Member State may disregard and which the contested regulation merely implements as regards action by the national authorities relating to expenditure covered by the Union budget.

283 It follows from paragraphs 265 and 266 above that, although the Commission and the Council must make their assessments taking due account of the specific circumstances and contexts of each procedure conducted under the contested regulation and, in particular, taking into account the particular features of the legal system of the Member State in question and the discretion which that Member State enjoys in implementing the principles of the rule of law, that requirement is in no way incompatible with the application of uniform assessment criteria.

284 In particular, as the European Union respects the national identities of Member States, inherent in their fundamental structures, political and constitutional, it is for its institutions to take account of the characteristics of the constitutional and legal systems of those Member States, when they verify whether the Member States satisfy the obligations as to the result to be achieved which arise directly from their membership of the European Union, pursuant to Article 2 TEU.

285 In that regard, the Commission must ensure that the information which it uses is relevant and that its sources are reliable, subject to review by the EU judicature. In particular, Article 6(3) of the contested regulation does not

confer any specific or absolute probative value and do not attach specific legal effects to the sources of information to which it refers, nor to those indicated in recital 16 of that regulation, with the result that that provision does not relieve the Commission of its obligation to carry out a diligent assessment of the facts.

286 In addition, as has been recalled in paragraph 202 above, the assessments of the Commission and the Council are subject to the procedural requirements specified in Article 6(1) to (9) of the contested regulation. Those requirements imply in particular, as stated in recital 26 of that regulation, the obligation for the Commission to follow an evidence-based approach and to respect the principles of objectivity, non-discrimination and equal treatment of Member States before the Treaties when it conducts proceedings under that provision. As regards the identification and assessment of breaches of the principles of the rule of law, those requirements must be understood in the light of recital 16 of that regulation, according to which that assessment must be objective, impartial and fair, compliance with all of those obligations being subject to full judicial review by the Court.

287 The Commission thus remains responsible for the information it uses and for the reliability of the sources of that information. Furthermore, the Member State concerned has the option, in the course of the procedure provided for in Article 6(1) to (9) of the contested regulation, to submit observations on the information which the Commission intends to use with a view to proposing the adoption of appropriate measures. Accordingly, it may challenge the probative value of each piece of evidence relied on, and the merits of the Commission's assessments may, in any event, be subject to review by the EU judicature in the context of an action brought against a Council decision adopted under that regulation.

288 In the second place, as regards the alleged lack of precision in the criteria applicable to the conditions for initiating the procedure and the choice and scope of the measures to be adopted, it follows from a combined reading of Article 4 and Article 6(1) of the contested regulation that, as has been stated in paragraph 125 above, the Commission may initiate that procedure only where it finds that there are reasonable grounds for considering that at least one of the principles of the rule of law referred to in Article 2(a) of that regulation has been breached in a Member State, that that breach concerns at least one of the situations attributable to an authority of a Member State or at least one instance of conduct of such authorities referred to in Article 4(2) of that regulation, in so far as those situations or that conduct is relevant to the sound financial management of the Union budget or for the protection of the Union's financial interests, and that that breach affects or risks seriously affecting that sound management or those financial interests, in a sufficiently direct way, by a real link between those breaches and that effect or serious risk of effect.

289 So far as concerns those principles, it follows from the findings made in paragraph 169 above that the Republic of Poland cannot claim that it does not have specific and precise knowledge of the obligations as to the result to be achieved binding on it due to its accession to the European Union, in terms of respect for the value of the rule of law.

290 In that regard, while it is true that Article 2(a) of the contested regulation does not set out in detail the principles of the rule of law that it mentions, nevertheless recital 3 of that regulation notes that the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection and separation of powers, referred to in that provision, have been the subject of extensive case-law of the Court. The same is true of the principles of equality before the law and non-discrimination, which are also mentioned, as is apparent in particular from paragraphs 94 and 98 of the judgment of 3 June 2021, *Hungary v Parliament* (C-650/18, EU:C:2021:426) and from paragraphs 57 and 58 of the judgment of 2 September 2021, *Belgian State (Right of residence in the case of domestic violence)* (C-930/19, EU:C:2021:657).

291 Those principles of the rule of law, as developed in the case-law of the Court on the basis of the EU Treaties, are thus recognised and specified in the legal order of the European Union and have their source in common values which are also recognised and applied by the Member States in their own legal systems.

292 In addition, recitals 8 to 10 and 12 of the contested regulation mention the principal requirements stemming from those principles. In particular, they shed light on the cases which may be indicative of breaches of the principles of the rule of law, set out in Article 3 of that regulation, and on the situations and conduct which those breaches must

concern, described in Article 4(2) of that regulation, for the adoption of appropriate measures within the meaning of Article 4(1) of that regulation to be justified.

293 Lastly, the assessments of the Commission and the Council are subject to the procedural requirements recalled in paragraph 286 above.

294 As regards the situations and conduct of the authorities referred to in Article 4(2) of the contested regulation and their relevance to the sound financial management of the Union budget or to the Union's financial interests, it has been noted in paragraphs 171 to 177 above that they are sufficiently precise for the Republic of Poland to be able to identify in a sufficiently specific and foreseeable manner, the situations and conduct referred to in that provision.

295 As regards the concepts of 'sound financial management' and 'protection of the financial interests of the Union', the former is also referred to, *inter alia*, in Article 310(5) TFEU and in the first paragraph of Article 317 TFEU and is defined in Article 2(59) of the Financial Regulation as the implementation of the budget in accordance with the principles of economy, efficiency and effectiveness, while the latter falls within Article 325 TFEU and, according to Article 63(2) of the Financial Regulation, covers all legislative, regulatory and administrative measures designed, *inter alia*, to prevent, detect and correct irregularities and fraud in the implementation of the budget.

296 In that regard, Article 2(1) of Regulation No 883/2013 defines the 'financial interests of the Union' as 'revenues, expenditures and assets covered by the budget of the European Union and those covered by the budgets of the institutions, bodies, offices and agencies and the budgets managed and monitored by them'. In addition, Article 135 (1), (3) and (4) of the Financial Regulation provides that, in order to protect the financial interests of the Union, the Commission is to set up and operate an early detection and exclusion system.

297 The Court has also held that the concept of 'financial interests of the Union', within the meaning of Article 325(1) TFEU, encompasses not only revenue made available to the Union budget but also expenditure covered by that budget (judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 183). That concept is therefore relevant not only in the context of the measures to combat irregularities and fraud referred to in that provision, but also to the sound financial management of that budget, since the protection of those financial interests also contributes to that sound management.

298 The prevention of effects such as those referred to in Article 4(1) of the contested regulation therefore supplements the correction of such effects, which is inherent both in the concept of 'sound financial management' and in that of 'protection of the financial interests of the Union' and must therefore be regarded as a permanent and horizontal requirement of EU financial legislation.

299 What is more, that provision requires that the breaches of the principles of the rule of law which have been found must 'seriously' risk affecting the sound financial management of the Union budget or the financial interests of the Union and requires, therefore, that it be demonstrated that that risk has a high probability of occurring, in relation to the situations or to the conduct of authorities referred to in Article 4(2) of the contested regulation, and, moreover, appropriate measures may be adopted only on condition that a sufficiently direct link, namely a genuine link, is established between a breach of one of the principles of the rule of law and that serious risk. Furthermore, in adopting those measures, it is also necessary to comply with the procedural requirements referred to, most recently, in paragraph 286 above.

300 As regards the sufficiently direct link between a finding of a breach of the rule of law and the protection of the budget or of the financial interests of the Union, it is sufficient to refer to paragraphs 178 to 180 above.

301 Lastly, the choice and scope of the measures which may be adopted pursuant to the contested regulation are limited, in so far as, as has been pointed out in paragraph 153 above, Article 5(1) of the contested regulation exhaustively enumerates the various protection measures that may be adopted.

302 In accordance with Article 5(3) of that regulation, such measures must be proportionate and determined in the light of the actual or potential impact of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union. The nature, duration, gravity and scope of the breaches of the principles of the rule of law must be duly taken into account and must, in so far as possible, target

the Union actions affected by those breaches. It follows that the measures taken must be strictly proportionate to the impact of the breaches of the principles of the rule of law found on the Union budget or on the protection of the financial interests of the Union.

303 In the light of the foregoing considerations and the procedural requirements referred to, most recently, in paragraph 286 above, the line of argument of the Republic of Poland, supported by Hungary, alleging a lack of precision in the criteria concerning, in particular, the conditions for initiating the procedure and the choice and scope of the measures to be adopted, is without foundation.

304 In the third place, as regards the claim based on the alleged incompatibility with the principle of equality of Member States before the Treaties of the voting rule laid down in Article 6(11) of the contested regulation for the adoption of decisions by the Council under Article 6(10) of that regulation, it must be noted, first, that that claim is based, in part, on the argument that the measures which may be adopted under that Article 6(10) are penalties by nature, for the adoption of which the Treaties exclude the Member State in question from voting.

305 As has been stated in paragraphs 112 to 229 above, the measures which may be adopted pursuant to the contested regulation are aimed not at imposing penalties on a Member State on account of breaches of the principles of the rule of law, but solely at protecting the sound financial management of the Union budget or the financial interests of the Union.

306 Furthermore, a Member State can be excluded from the qualified majority voting procedure only in situations where it is expressly provided for by the Treaties and in which, consequently, a qualified majority is determined in accordance with Article 238(3) TFEU.

307 Second, while it is true that the EU legislature has the ability to have the provisions implementing the basic regulations adopted according to a procedure different from that followed for the adoption of the basic regulation (see, to that effect, judgment of 18 June 1996, *Parliament v Council*, C-303/94, EU:C:1996:238, paragraph 23 and the case-law cited), the fact remains that, as the Advocate General observed in point 96 of his Opinion, the voting rule laid down in Article 6(11) of the contested regulation, namely that of qualified majority with participation of all the Member States, is the rule in which Article 16(3) TEU provides for the application by default during Council deliberations, except where the Treaties provide otherwise.

308 It should be added that not only is that voting rule provided for in the Treaties themselves, but it also does not breach the principle of equality of Member States before the Treaties.

309 In particular, the fact that the interests of the Member States may diverge and that, depending on whether all the Member States or only certain of them participate in the vote within the Council, a blocking minority is relatively easy to achieve following that vote, in accordance with Article 16(4) TEU, is in no way specific to the procedure established by the contested regulation and is fully compatible with the choices made by the authors of the Treaties. In accordance with the value of democracy contained in Article 2 TEU, that provision seeks to ensure that the Council's decisions are sufficiently representative of both the Member States and the population of the European Union.

310 In the light of the foregoing considerations, the eighth plea must be dismissed as unfounded.

## **F. The ninth plea, alleging infringement of the principle of legal certainty**

### **1. Arguments of the parties**

311 The Republic of Poland, supported by Hungary, submits that the provisions of the contested regulation do not meet the requirements of clarity and precision arising from the principle of legal certainty, since that regulation does not clearly define the requirements to be met by the Member States to be able to retain the financing from the EU budget that has been granted to them and affords the Commission and the Council too much discretion.

312 First, the concept of 'the rule of law', as it is defined in Article 2(a) of the contested regulation, presents a difficulty in that respect. That concept cannot, as a matter of principle, be given a universal definition since it contains a non-exhaustive number of principles whose meaning may differ from one State to another, depending on the constitutional features or legal traditions specific to the State in question. In addition, that definition unduly extends the



scope of that concept as a value of the European Union, which is but one of the values contained in Article 2 TEU, among the other values set out in that provision.

313 Secondly, the criteria for assessing observance of the principles of the rule of law set out in Articles 3 and 4 of the contested regulation do not satisfy the requirements of clarity and precision, since the application of those principles presupposes that specific expression has first been given to them. In the absence of a universal definition of those principles and having regard to the very limited competences of the European Union to give specific expression to them, those principles have no specific substantive content in EU law. While it is true that the Court of Justice and the European Court of Human Rights have clarified certain aspects of the value of the rule of law, they have not yet, however, defined the content of the other values contained in Article 2 TEU or their relationship with the principle of respect for the national identities of the Member States found in Article 4(2) TEU.

314 Admittedly, in its judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU: C:2018:117, paragraph 32), the Court made reference to the value of the rule of law contained in Article 2 TEU, but it stated that specific expression was given to that value in Article 19 TEU. Consequently, in order to become applicable, the values contained in Article 2 TEU must be given specific expression in other provisions of the Treaties. However, as the values other than the rule of law, unduly incorporated into that latter concept by the contested regulation, are not clearly defined, the Court would be called upon to clarify, in particular, the concepts of ‘pluralism’, ‘non-discrimination’, ‘tolerance’, ‘justice’ and ‘solidarity’. The binding interpretation of those concepts by the Court, during the judicial review of decisions taken under that regulation, thus exceeds the competences conferred on the European Union.

315 The lack of precision in Article 3 and Article 4(2) of the contested regulation, in that they use expressions such as ‘the proper functioning’ of ‘authorities’ or ‘services’ and ‘the proper functioning of effective and transparent financial management and accountability systems’, as well as the non-exhaustive nature of the lists set out in those provisions, are thus going to permit the Commission and the Council to define them when applying the contested regulation, which will have the effect, in essence, of enabling the standards thereby defined to be applied retroactively.

316 Thirdly, among the sources of information which the Commission is obliged to use under Article 6(3) of the contested regulation when finding a breach of the principles of the rule of law are the ‘conclusions and recommendations’ of EU institutions, other relevant international organisations and other recognised institutions, when, under EU law, those sources are not binding on the Member States. The contested regulation cannot therefore make them binding. Even the indicative list in recital 16 of the said regulation does not sufficiently define the ‘decisions, conclusions and recommendations’ referred to therein.

317 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute those arguments.

## 2. Findings of the Court

318 By the ninth plea, the Republic of Poland, supported by Hungary, submits that the contested regulation breaches the principle of legal certainty and grants too broad a discretion to the Commission and the Council on account of the lack of precision of (i) the concept of ‘the rule of law’ as it is defined in Article 2(a) of that regulation, (ii) the criteria in Article 3 and Article 4(2) of that regulation, and (iii) the sources of information on which the Commission is required to base its assessments in accordance with Article 6(3) of the same regulation.

319 According to the Court’s settled case-law, the principle of legal certainty requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular, where they may have adverse consequences. That principle requires, inter alia, that legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly (judgment of 29 April 2021, *Banco de Portugal and Others*, C-504/19, EU:C:2021:335, paragraph 51 and the case-law cited).

320 However, those requirements cannot be interpreted as precluding the EU legislature from having recourse, in a norm that it adopts, to an abstract legal notion, nor as requiring that such an abstract norm refer to the various specific hypotheses in which it applies, given that all those hypotheses could not be determined in advance by the legislature (see, by analogy, judgment of 20 July 2017, *Marco Tronchetti Provera and Others*, C-206/16, EU:C:2017:572, paragraphs 39 and 40).

321 Consequently, the fact that a law confers a discretion on the authorities responsible for implementing it is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give adequate protection against arbitrary interference (see, to that effect, judgments of 17 June 2010, *Lafarge v Commission*, C-413/08 P, EU:C:2010:346, paragraph 94, and of 18 July 2013, *Schindler Holding and Others v Commission*, C-501/11 P, EU:C:2013:522, paragraph 57).

322 It is in the light of those considerations that it is appropriate to assess, in the first place, the line of argument based on the imprecise and overly broad nature of the concept of ‘the rule of law’ defined in Article 2(a) of the contested regulation.

323 In that regard, first, that provision is not intended to define that concept exhaustively, but is limited to setting out, for the sole purposes of that regulation, a number of the principles which it covers and which are, according to the EU legislature, the most relevant in the light of the purpose of that regulation, which is to ensure the protection of the Union budget.

324 Second, contrary to the Republic of Poland’s submission, supported by Hungary, the principles mentioned in Article 2(a) of the contested regulation do not exceed the limits of the concept of ‘the rule of law’. In particular, the reference to the protection of fundamental rights is made only by way of illustration of the requirements of the principle of effective judicial protection, which is also guaranteed in Article 19 TEU and which the Republic of Poland itself acknowledges to be part of that concept. The same is true of the references to the principles of non-discrimination and equality. Although Article 2 TEU refers separately to the rule of law as a value common to the Member States and to the principles of equality and non-discrimination, it is clear that a Member State whose society is characterised by discrimination cannot be regarded as ensuring respect for the rule of law, within the meaning of that common value.

325 That conclusion is supported by the fact that, in its Study No 711/2013 of 18 March 2016 adopting a ‘Rule of law checklist’, referred to in recital 16 of the contested regulation, the Venice Commission stated, inter alia, that the concept of ‘the rule of law’ requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures. Those characteristics are specifically reflected in Article 2(a) of that regulation.

326 Thirdly, in the light of what has been set out in paragraphs 289 to 293 above, the line of argument of the Republic of Poland, supported by Hungary, according to which the principles of the rule of law mentioned in Article 2(a) of the contested regulation do not have any specific substantive content in EU law must be rejected as entirely unfounded.

327 Fourthly, as regards the relationship between those same principles of the rule of law with that of respect for the national identities of the Member States set out in Article 4(2) TEU, it is sufficient to refer to paragraphs 282 to 286 above.

328 Fifthly, so far as concerns the line of argument according to which, in order to become applicable, the values contained in Article 2 TEU must be given specific expression in other provisions of the Treaties, first, it has been noted in paragraphs 192 to 199 above that the Treaties comprise numerous provisions, frequently implemented by various acts of secondary legislation, which grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State. On the other hand, it has been held in paragraphs 112 to 189 above that Article 322(1)(a) TFEU constitutes a legal basis enabling the EU legislature to adopt provisions concerning the finding of breaches of the

value of the rule of law and the legal consequences of those breaches, in order to protect the Union budget and the financial interests of the Union where such breaches affect or seriously risk affecting that budget and those interests.

329 Sixthly, even assuming that the Court were called upon to interpret, in an action for annulment of a decision adopted under the contested regulation, the concepts of ‘pluralism’, ‘non-discrimination’, ‘tolerance’, ‘justice’ or ‘solidarity’, contained in Article 2 TEU, in so doing, it would, contrary to the arguments of the Republic of Poland, supported by Hungary, exercise only the powers conferred on it by the Treaties, in particular by Article 263 TFEU.

330 In the second place, as regards the alleged lack of precision in the criteria used in Article 3 and Article 4(2) of the contested regulation, it follows, first, from paragraph 155 above that that Article 3 does not set out obligations for the Member States, but merely cites situations which may be indicative of breaches of the principles of the rule of law and thereby aims to facilitate the application of that regulation, by explaining the requirements inherent in those principles.

331 Secondly, as regards the allegedly imprecise concepts in Article 4(2) of the said regulation, it must be recalled, first of all, that the concept of ‘authority’ has been examined in paragraphs 175 and 176 above and that the concept of ‘services’ covers solely ‘investigation and public prosecution services’.

332 Next, as regards the ‘proper functioning’ of public authorities, including law-enforcement authorities, implementing the Union budget and responsible for supervising, monitoring and conducting financial audits, as well as investigative and public prosecution services, referred to in Article 3(b) and Article 4(2)(a) to (c) of the contested regulation, it follows from recitals 8 and 9 of that regulation that that expression refers to the ability of those authorities properly and effectively to execute their relevant functions for the sound financial management of the Union budget or the protection of the financial interests of the Union.

333 Finally, the expression ‘effective and transparent financial management and accountability systems’, used in Article 4(2)(b) of the contested regulation, refers to the concept of ‘financial management’, which falls within the concept of ‘sound financial management’ found in the Treaties themselves, in particular in Article 310(5) and the first paragraph of Article 317 TFEU, and defined in Article 2(59) of the Financial Regulation as the implementation of the budget in accordance with the principles of economy, efficiency and effectiveness. The expression ‘financial accountability’, for its part, reflects in particular the financial control, monitoring and audit obligations mentioned in the said Article 4(2)(b), while the expression ‘effective and transparent . . . systems’ implies the establishment of an ordered set of rules which ensure in an effective and transparent manner the said financial management and accountability.

334 Thirdly, the line of argument based on the non-exhaustive nature of the list of situations or conduct set out in Article 4(2) of the contested regulation has been rejected in paragraphs 171 to 177 above and, as regards the situations which may be indicative of breaches, cited in Article 3 of that regulation, it has been noted in paragraph 171 above that a specific definition of the concept of ‘breach’ is no way necessary for the needs of a horizontal conditionality mechanism such as that established by the said regulation.

335 Fourthly, as regards the discretion afforded by those provisions to the Commission and the Council, it follows from the foregoing considerations that the expressions criticised by the Republic of Poland, supported by Hungary, satisfy, as such, the requirements of the principle of legal certainty recalled in paragraphs 319 to 321 above. In addition, in order to justify adopting appropriate measures under the contested regulation, those institutions must establish in a specific manner all the conditions most recently identified in paragraphs 286 and 288 above.

336 In the third place, as regards the argument that Article 6(3) and (8) of the contested regulation does not define in a sufficiently precise manner the sources of information on which the Commission may rely, some of which is not binding on the Member States and which that regulation cannot make binding, it should be noted that, under that provision, when the Commission assesses whether the conditions set out in Article 4 of that regulation are satisfied and assessing the proportionality of the measures to be imposed, it is to take into account relevant information from available sources, including decisions, conclusions and recommendations of EU institutions, other relevant international organisations and other recognised institutions.

337 In that regard, in accordance with Article 4(1) of the contested regulation, it is for the Commission to establish that the conditions set out in Article 4 of that regulation are fulfilled.

338 In addition, under Article 6(1) of that regulation, the Commission is required to set out, in a written notification to the Member State concerned, the factual elements and specific grounds on which it based its findings that there are reasonable grounds to consider that those conditions are fulfilled.

339 It follows that the Commission is required to carry out a diligent assessment of the facts in the light of the conditions laid down in Article 4 of the contested regulation. The same is true, in accordance with Article 6(7) to (9) of that regulation, as regards the requirement of proportionality of the measures, laid down in Article 5(3) of that regulation.

340 Recitals 16 and 26 of that regulation state, moreover, that the Commission must conduct a thorough qualitative assessment, which should be objective, impartial and fair, should respect the principles of objectivity, non-discrimination and equality of Member States before the Treaties and should be conducted according to a non-partisan and evidence-based approach.

341 It follows that the Commission is required to ensure, subject to review by the EU judicature, that the information it uses is relevant and that the sources of that information are reliable. In particular, those provisions do not confer any specific or absolute probative value and do not attach specific legal effects to the sources of information to which they refer, nor to those indicated in recital 16 of the contested regulation, with the result that they do not relieve the Commission of its obligation to carry out a diligent assessment of the facts which fully satisfies the requirements set out in the preceding paragraph.

342 In that regard, recital 16 of the contested regulation explains that the relevant information from available sources and recognised institutions includes, *inter alia*, judgments of the Court of Justice, reports of the Court of Auditors, the Commission's annual Rule of Law Report and EU Justice Scoreboard, reports of OLAF, the European Public Prosecutor's Office and the European Union Agency for Fundamental Rights, and conclusions and recommendations of relevant international organisations and networks, including Council of Europe bodies such as GRECO and the Venice Commission, in particular its rule-of-law checklist, and the European networks of supreme courts and councils for the judiciary.

343 The Commission thus remains responsible for the information it uses and for the reliability of the sources of that information. Furthermore, the Member State concerned has the option, in the course of the procedure provided for in Article 6(1) to (9) of the contested regulation, to submit observations on the information which the Commission intends to use with a view to proposing the adoption of appropriate measures. Accordingly, it may challenge the probative value of each piece of evidence relied on, and the merits of the Commission's assessments may, in any event, be subject to review by the EU judicature in the context of an action brought against a Council decision adopted under that regulation.

344 In particular, the Commission must communicate, in a specific manner, to the Member State concerned, once the procedure under Article 6(1) of the contested regulation is initiated and periodically throughout that procedure, the relevant information from available sources on which the it intends to base the proposal for an implementing decision on the appropriate measures which it will submit to the Council. Moreover, contrary to the assertions of the Republic of Poland, supported by Hungary, no binding character is conferred on the recommendations which may be taken into account by the Commission, in accordance with Article 6(3) and (8) of that regulation.

345 In the light of all of the foregoing considerations, the ninth plea must be rejected as unfounded.

## **G. The tenth plea, alleging infringement of the principle of proportionality**

### **1. Arguments of the parties**

346 The Republic of Poland, supported by Hungary, argues that the EU legislature, by the conditionality mechanism established by the contested regulation, breached the principle of proportionality, since there are other provisions of EU law intended to protect the Union budget. It states that, according to Article 6(1) of that regulation, the Commission is to apply that mechanism unless it considers that other procedures set out in EU legislation allow it to

protect the Union budget more effectively. It adds that recital 17 of that regulation states that EU financial legislation already provides for various possibilities to protect the Union budget. The EU legislature did not explain why those possibilities are ineffective or how that regulation makes up for alleged inadequacies.

347 In particular, the reason why the protection of the Union budget was made subject to the finding of breaches of the principles of the rule of law and was not directly linked to observance of the principle of sound financial management – that principle already being defined in Article 2(59) of the Financial Regulation, clarified in Chapter 7 of that regulation and laid down in Article 56(2) thereof as an obligation for the Member States – is not clear. The EU legislature could thus have specified in the Financial Regulation the obligations of the Member States concerning observance of the principle of sound financial management of Union funds.

348 The reason underpinning the approach followed by the contested regulation thus appears to be the desire of the Parliament, the Council and the Commission to circumvent the restrictions in the Treaties concerning their competence to examine observance by the Member States of the principles of the rule of law. By adopting that regulation, the EU legislature conferred on the Council and the Commission an unlimited right to assess, from a political perspective, observance of the principles of the rule of law and to link any identified breach of those principles, in a general manner, to the principle of sound financial management of Union funds.

349 By failing to demonstrate the added value of the mechanism established by the contested regulation and its link with the other provisions intended to protect the Union budget, the EU legislature therefore breached the principle of proportionality.

350 Furthermore, the finding of breaches of the principles of the rule of law on the basis of political factors and in the absence of specific provisions prevents compliance with the requirement of proportionality of the measures adopted under Article 5(3) of the contested regulation. The same is true of the examination of the nature, duration, gravity and scope of that breach. It is therefore impossible to observe the principle of proportionality, which is all the more serious given that breaches of the principles of the rule of law to be understood according to Article 3 and Article 4(2) of that regulation are systematic in nature. It is difficult to accept in practice that the ‘proper functioning of the authorities’ is relevant only to expenditure under a specific fund or programme. The systematic nature of breaches established and the absence of any criterion guiding the choice and scope of the measures to be adopted enables the Commission and the Council easily to justify the adoption of extensive measures with heavy financial consequences.

351 The Parliament and the Council, supported by the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, dispute those arguments.

## 2. Findings of the Court

352 By the tenth plea, the Republic of Poland, supported by Hungary, submits that the contested regulation breaches the principle of proportionality on the grounds, first of all, that the EU legislature has not demonstrated, having regard to the pre-existing means to protect the Union budget, the need for its adoption, next, that that adoption reveals the desire of that legislature to circumvent the limits set by the Treaties on the competence of the EU institutions to examine observance of the principles of the rule of law by the Member States and, lastly, on account of the lack of precision in the criteria set out, in particular, in Article 3, Article 4(2) and Article 5(3) of that regulation.

353 As a preliminary point, it should be recalled that, according to settled case-law of the Court, the principle of proportionality, which is one of the general principles of EU law, requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 6 September 2017, *Slovakia and Hungary v Council*, C-643/15 and C-647/15, EU:C:2017:631, paragraph 206 and the case-law cited).

354 In the first place, as regards the appropriateness of adopting the contested regulation, the Court has accepted that the EU legislature must be allowed a broad discretion which applies not only to the nature and scope of the measures to be taken in areas in which its action involves political, economic or social choices, and in which it is called upon to undertake complex assessments and evaluations, but also, to some extent, to the finding of the basic facts, with the result that the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (judgments of 3 December 2019, *Czech Republic v Parliament and Council*, C-482/17, EU:C:2019:1035, paragraphs 77 and 78, and of 8 December 2020, *Poland v Parliament and Council*, C-626/18, EU:C:2020:1000, paragraphs 95 and 97).

355 In the present case, as the Republic of Poland itself has noted in its arguments relating to the fourth and eleventh pleas, the explanatory memorandum accompanying the proposal which led to the contested regulation stated that ‘a number of recent events have demonstrated generalised weaknesses in national checks and balances and have shown how a lack of respect for the rule of law can become a matter of serious and common concern within the European Union’, in particular for ‘institutions such as the . . . Parliament’.

356 In addition, it follows in particular from recitals 7, 8 and 17 of the contested regulation that the EU legislature considered that there could be situations resulting from breaches of the principles of the rule of law mentioned in Article 2(a) of that regulation, that existing legislation aimed at protecting the sound financial management of the Union budget or the financial interests of the Union could not address adequately.

357 The Republic of Poland has not put forward any evidence capable of demonstrating that the EU legislature exceeded the broad discretion available to it in that regard, when it thus considered it necessary to alleviate, by means of the contested regulation, effects or serious risks of effects on that sound management or on the protection of those financial interests that may result from breaches of the principles of the rule of law.

358 In the second place, as regards the alleged circumvention of the powers of the EU institutions to examine observance of the principles of the rule of law by the Member States, it must be stated that the EU legislature in no way conferred on the Council and the Commission an unlimited right to assess, in the light of political considerations, observance of the principles of the rule of law or to link any identified breach of those principles, in a general manner, to the principle of sound financial management of Union funds. It made the initiation of the procedure subject to all the criteria set out in paragraph 288 above, which, as has been pointed out in paragraphs 112 to 189 and 200 to 203 above, ensure that the assessments of those institutions fall within the scope of EU law and are of a legal rather than political nature.

359 In the third place, as regards the alleged lack of precision in the criteria determining the choice and scope of the measures to be adopted, provided for inter alia in Article 5(3) of the contested regulation, it has been noted in paragraphs 301 to 303 above that those criteria are sufficiently precise and that, in particular, it follows from the first to third sentences of that paragraph that the measures taken must be strictly proportionate to the effect of the breaches which have been determined of the principles of the rule of law on the Union budget or on the financial interests of the Union.

360 That provision specifies, in its first sentence, that the measures taken are to be ‘proportionate’, in its second sentence, that they are to be ‘determined in light of the actual or potential impact’ of the breaches of the principles of the rule of law on the sound financial management of the Union budget or the financial interests of the Union and, in its third sentence, that the nature, duration, gravity and scope of the breaches of the principles of the rule of law are to be ‘duly taken into account’.

361 As Advocate General Campos Sánchez-Bordona noted, in points 177 and 178 of his Opinion in *Hungary v Parliament and Council* (C-156/21, EU:C:2021:974), it follows from the order of those sentences and from the terms used therein that the proportionality of the measures to be adopted is ensured, decisively, by the criterion of the ‘impact’ of breaches of the principles of the rule of law on the sound financial management of the Union budget or on the protection of the financial interests of the Union. As regards the criteria based on the nature, duration, gravity and scope of those breaches, they may be ‘duly taken into account’ only in order to determine the extent

of that impact, which may vary depending on the characteristics of the breaches found, as illuminated by the application of those criteria.

362 Finally, in so far as the Republic of Poland, supported by Hungary, submits that breaches which have been determined of the principles of the rule of law are liable to prove to be systematic in nature, such that they also affect areas other than those relevant to the sound financial management of the Union budget or to the protection of its financial interests, it has been pointed out in paragraphs 267 to 270 above that, where such a breach is also liable to affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union, the Union cannot be criticised for implementing the means necessary to protect that sound management and those financial interests.

363 In the light of the foregoing considerations, the tenth plea must be rejected and, accordingly, the action must be dismissed in its entirety,

## **VI. Costs**

364 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

365 Since the Parliament and the Council have applied for costs to be awarded against the Republic of Poland, and the latter has been unsuccessful, it must be ordered to pay the costs incurred by those parties.

366 In accordance with Article 140(1) of those rules, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the Commission, as interveners, must bear their own costs.

On those grounds, the Court (Full Court) hereby:

1. **Dismisses the action;**
2. **Orders the Republic of Poland to bears its own costs and to pay the costs incurred by the European Parliament and the Council of the European Union;**
3. **Orders the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Republic of Finland, the Kingdom of Sweden and the European Commission to bear their own costs.**

[Signatures]