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Budget Conditionality judgments: A virtuous circle of solidarity to overcome moral hazard?

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Abstract

The twin judgments in *Budget Conditionality* link the EU budget with solidarity, mutual trust and the effective implementation of EU law, marking a significant evolution in EU principles. These judgments elevate solidarity to a foundational stage in the EU's development. This article argues that solidarity is now being interpreted by the Court of Justice of the European Union (CJEU) as a practical tool to counter moral hazard and integrate solidarity into the EU legal cornerstones. The CJEU is operationalizing technically solidarity from a vague concept to one with concrete implications for EU public finances, linking it directly with the budget, rule of law and mutual trust among Member States. By doing so, the CJEU is making solidarity a central element of the EU legal order, transforming the discourse from financial allocations to a broader focus on shared responsibilities and compliance with EU law, thus reinforcing the EU's foundational values of peace, democracy and the rule of law.

Keywords

Conditionality, EU public finances, solidarity, EU budget, moral hazard, NextGenEU

1. Introduction

The twin judgments in *Budget Conditionality*[1] link the EU budget with solidarity, mutual trust and effective implementation of EU law to validate the Conditionality

1. Case C-157/21 *Poland v. European Parliament*, EU:C:2022:98, para. 147; Case C-156/21 *Hungary v. European Parliament*, EU:C:2022:97, para. 129.

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Regulation,[2] one of the key components of the financial package put together to address the consequences of the Covid-19 pandemic in Europe. By doing so, these judgments mark a new stage in the evolution of the principles acting as cornerstones of the European Union and its integration: after the freedom of movement in the internal market, democracy and the rule of law, comes solidarity between Member States. This new foundational stage may be as significant as *Van Gend and Loos*,[3] *Costa v Enel*[4] or *Cassis de Dijon*[5] have been in the project of making the EU a community of Member States thanks to integration through law.[6] However, the EU has learned some lessons over time and now knows that besides the law, the financial means to implement policies are as relevant as the legal obligation to do so. This article argues that solidarity does not come out of the blue as a foundational principle. It is not only one of the values included in Article 2 of the Treaty on European Union or a lofty component of a constitutional imaginary,[7] it can also be interpreted and used as a technical antidote, strategic argument and convincing narrative against moral hazard, as the Court of Justice of the European Union (CJEU) skilfully shifts its language to rely more explicitly on economic vocabulary. This allows for solidarity to percolate into the minute details of the EU financial architecture in its operationalization.

In economic theory, moral hazard[8] suggests the idea of opportunistic behaviour by which one person takes advantage of a collective good, such as in insurance, the field where moral hazard was first theorized. It has been used as a political argument for shaping the economic and monetary union. Solidarity is, by contrast, an overly discussed moral,[9] political philosophical[10] and legal[11] concept with no clear delineation. It indicates an idea of togetherness to face a challenge or to achieve the realization of a cause, often by opposing an enemy. Solidarity has been said to be an 'empty signifier' because it is 'lacking in a common practice that allows for a joint interpretation of the concept. It is a signifier that leaves such questions as "what to do", "how to do it" and "when to do it" essentially open, because its concrete meaning is not sufficiently clear to lead to joint answers based on a common conceptual understanding.'[12] This paper argues that the CJEU is very much trying to flesh out this 'empty signifier' by linking it to concrete practical implications in the realm of EU public finances, and hence that the *Budget Conditionality* cases provide a structure for a common practice of joint interpretation across the EU institutions and its Member States.

2. Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020, which sets a general regime of conditionality for the protection of the Union budget.
3. Case C-26/62 *Van Gend en Loos v. Administratie der Belastingen*, EU:C:1963:1.
4. Case C-6/64 *Costa v. Enel*, EU:C:1964:66.
5. Case C-120/78 *Rewe v. Bundesmonopolverwaltung für Branntwein*, EU:C:1979:42.
6. R. Byberg, 'The History of the Integration through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe' 18(6) *German Law Journal* (2017).
7. P. Leino-Sandberg, 'Constitutional Imaginaries of Solidarity: Framing Fiscal Integration Post-NGEU', in R. Weber (ed.) *The Financial Constitution of European Integration – Follow the Money* (Hart, 2023).
8. J. Marshall, 'Moral Hazard', 66(5) *The American Economic Review* (1976).
9. E.g. A. Kolers, *A Moral Theory of Solidarity* (OUP, 2016).
10. E.g. S. Wilcox, 'Review: Sally J. Scholz, *Political Solidarity*, Penn State UP, 2008, 286pp., $55.00 (hbk), ISBN 9780271034003', *Notre Dame Philosophical Reviews*, https://ndpr.nd.edu/reviews/political-solidarity/; see F. Tava, 'Justice, Emotions, and Solidarity', 26(1) *Critical Review of International Social and Political Philosophy* (2021) discussing solidarity in Habermas as a response to feminist ideas grounded in an ethics of care.
11. Often starting from Durkheim, Habermas or Hegel (see Carsten Gerner-Beuerle and Ana Bobić in this Special Issue for instance).
12. A. Grimmel, 'Solidarity in the European Union: Fundamental Value or "Empty Signifier"', in A. Grimmel and S.M. Giang (eds.), *Solidarity in the European Union* (Springer 2017), p. 166.

By linking in one single paragraph the EU budget, solidarity, common resources, mutual trust, effective implementation of the law and the rule of law, the CJEU is making solidarity one of the new cornerstones[13] of the EU legal order in a way that is similar to the role played by direct effect, primacy or mutual recognition once upon the time. Similarly to its reliance on these latter principles, the CJEU is using solidarity to the effect of ensuring the effective implementation of the law. Solidarity can be understood as a response to the fact that the common project underpinning the EU creates an interdependence between its Member States such that the capacity of one Member State to achieve the goals of the common project has an effect on the ability of others to achieve their common goals. The *Budget Conditionality* judgments were graced with the label of landmark cases immediately,[14] with the literature mostly emphasizing two aspects: their contribution to the EU as a rule-of-law-based legal order and the validity of the legal basis of the Conditionality Regulation. These two aspects are indeed important, but this paper argues that the distinctive role of the solidarity principle has been overlooked in the academic discussions of these two judgments: firstly, the CJEU articulates the meaning of solidarity by bridging the EU values (rule of law) with the technicalities of EU finances; secondly, it transforms the EU legal discourse from legal competences on which EU money is spent (EU policies) into common resources and national compliance with EU law. The CJEU proceeds with a marked language shift by expanding the budget beyond the formal act it is supposed to be: the EU finances are not only about burdens and expenses; they are also about national responsibility shouldered in solidarity for resources spent on shared goals, those of securing the rule of law and in its suit peace and democracy (in contrast to systems that are not based on such legal principles, especially in the EU neighbourhood).

This paper proceeds as follows: it starts by placing solidarity and moral hazard in the specific context of the Next Generation EU (NextGenEU) and the Resilience and Recovery Facility (RRF) (section 2), before discussing the solidarity construct in the *Budget Conditionality* judgments (section 3), as well as its institutional operationalization and practical concretization beyond the *Budget Conditionality* judgments (section 4). This will allow us to revisit the virtuous circle that solidarity facilitates so as to act as an antidote to moral hazard (section 5), before concluding on the potential development of solidarity for scholars interested in the EU budget.

2. NextGenEU: Changing gears

The Conditionality Regulation was adopted as a political component of the NextGenEU, the financial package put together to fight the economic consequences of the Covid-19 pandemic in the EU. The NextGenEU may (or may not) be a possible game-changer[15] or a Hamiltonian[16] moment for European fiscal federalism. Although the NextGenEU is temporary in nature to address the

13. The word ‘cornerstone’ is used to refer to the conditionality for the protection of the budget and its implementation in Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast), [2024] OJ L 2509, recital 9.
14. Comment 16 in H. Gaudin, J. Andriantsimbazovina, M. Blanquet and F. Fines (eds.) *Les grands arrêts de la Cour de Justice de l’Union européenne* (Dalloz 2023), p. 255–65.
15. M. Buti and S. Fabbrini, ‘Next Generation EU and the Future of Economic Governance: Towards a Paradigm Change or Just a Big One-off?’, 30(4) *Journal of European Public Policy* (2022); S. Grund and A. Steinbach, ‘Debt-financing the EU’, 61 *Common Market Law Review* (2024), p. 999.
16. P.-A. Van Malleghem, ‘NextGenerationEU: Hamiltonian Moment or European New Deal?’, 42 *Yearbook of European Law* (2023); C. de la Porte and M. Dagnis Jensen, ‘The Next Generation EU: An Analysis of the Dimensions of Conflict behind the Deal’, 55(2) *Social Policy and Administration* (2021).

consequences of the crisis,[17] the EU is for the first time allowed to borrow money on financial markets on a large scale (approximately four annual EU budgets, less than the multi-annual framework),[18] allowing it to have more financial space to implement its policy priorities. The NextGenEU is thus providing the EU with a wider distributive mechanism than it previously had.[19] The route for agreeing on this financial mechanism marks a change in how solidarity is understood at the EU level and how moral hazard can be bypassed despite raging debates on how to prevent opportunistic behaviour. Three stages prefiguring the compromise reached with the NextGenEU can be distinguished to show the evolution of the dynamic between solidarity and moral hazard over time. We turn to explaining this process.

The first stage is linked with the EMU where the debate about solidarity was framed around financial assistance under extreme financial circumstances. The main idea was that the market would be used as a disciplinary technique, so much so that to avoid moral hazard, Member States had to remain primarily responsible for their fiscal deficits, with no bail-outs either by the EU or other Member States in case of financial distress, as Article 125 TFEU seemed to mandate. However, the sovereign debt crisis illustrated the limits of this reasoning: moral hazard seemed to have taken place as some states incurred large debts they could not service.[20] Their financial predicament was perceived as self-inflicted. This showed that the maintenance of the EMU and collective financial health across the EU required some drastic interventions to organize the bailing out of countries amidst the financial crisis. In the seminal *Pringle* judgment,[21] the CJEU accepted a flexible interpretation of Article 125 TFEU as long as the conditions were linked to financial assistance to distressed Member States so that they were not disincentivized from being responsible for their debts.[22] In this sense, solidarity meant that Member States could take measures in their direct interests while helping struggling Member States along the way. Conditionality was a key mechanism to make solidarity possible under EU law. It was a way to tackle the moral hazard risk. The

17. For the importance of this feature in relation to the constitutionality of NextGenEU according to the German Constitutional Court, see S. Grund and A. Steinbach, 61 *Common Market Law Review* (2024), p. 1002–3.
18. This is not the first time that the EU borrows money in financial markets, but the previous amounts were much lower (see for a detailed analysis D. Hodson and D. Howarth, 'The EU's Recovery and Resilience Facility: An Exceptional Borrowing Instrument?', 46(1) *Journal of European Integration* (2024).
19. A.-C. Hartzén, A. Iossa and E. Karageorgiou (eds), 'Introduction', in *Law, Solidarity and the Limits of Social Europe – Constitutional Tensions for EU Integration* (Edward Elgar 2022), p. xxii; M.A. Panascì, 'Unravelling Next Generation EU as a Transformative Moment: From Market Integration to Redistribution', 61(1) *Common Market Law Review* (2024).
20. F. Bruno, 'Eurozone Policy and Crisis', in T. Biebricher, P. Nedergaard and W. Bonefeld (eds.), *The Oxford Handbook of Ordoliberalism* (OUP 2022), p. 490; H. Schepel, 'The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone', 44(1) *Journal of Law and Society* (2017). The unwillingness of Member States to activate the Stability and Growth Pact could also be mentioned as one of the causes contributing to the sovereign debt crisis. The new economic governance seeks to address this problem with more technical provisions (see N. Vander Putten and Y. Marique, 'Le nouveau cadre budgétaire européen et ses incidences sur le droit belge', in N. Vander Putten (ed.) *Actualités en matière de droit des dépenses publiques* (Larcier 2025).
21. Case C-370/12 *Thomas Pringle v. Ireland*, EU:C:2012:756, para. 137: 'Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy.'
22. P. Craig, '*Pringle*: Legal Reasoning, Text, Purpose and Teleology', 20(1) *Maastricht Journal of European and Comparative Law* (2013); H. Schepel, 44(1) *Journal of Law and Society* (2017).

antidote to moral hazard remained individual responsibility enforced by financial discipline, even if this was smoothed by financial assistance.[23]

The second stage of the dynamics between moral hazard and solidarity witnessed the discontent of some Member States, in particular the Netherlands, Austria, Denmark and Sweden – net contributors to the EU budget, also known as the 'Frugal Four' – in the face of Member States, such as Hungary and Poland, who are essentially major beneficiaries of the EU budget (in particular of the Cohesion Policy and Structural Funds),[24] challenging and weakening fundamental principles of the EU membership such as the rule of law and the functioning of the internal market. From 2013 onwards, these disgruntled Member States – with the occasional support of other states such as Germany[25] – pleaded for suspending or limiting financial transfers to Poland and Hungary. However, problems with operationalizing Article 7 TFEU appeared[26] and only slowly were judgments condemning Poland and Hungary pronounced.[27] While the European Parliament approved the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland,[28] it called on the Council to determine if Hungary was at risk of breaching Article 7[29] and accused the European Commission of lacking the willingness to use the infringement procedure[30] or to proceed with the so-called nuclear option of Article 7.[31] During this stage, solidarity was invoked in a functional manner: financial transfers suppose a community of values, and these transfers are done for the direct and indirect benefit of all Member States and not for the sole benefit of some Member States, or even worse for the benefit of some political parties in those Member States, that do not intend to play by the rules of the game. But moral hazard and opportunistic behaviour were in full swing. The rules of the game were not enforced or only in a weak and slow manner, resulting in compliance with EU fundamental principles not being guaranteed. This led to a sense of betrayal by those Member States that positively contributed to the EU budget while seeing the benefits of the EU legal order and internal market being jeopardized by a weakening of mutual trust in the functioning of the legal order of the EU budget. This showed that for solidarity not to fall prey to either cynicism (on the side of net beneficiaries) or self-contradiction (on the side

23. For a similar analysis of *Pringle* against the backdrop of the euro-crisis and its links to solidarity, see e.g. A. Bobić 'Imagining Transnational Solidarity in the EU through Hegel's Idea of Mutual Recognition' and Carsten Gerner-Beuerle, 'Competition and Redistribution in Economic and Monetary Union' in this Special Issue.
24. https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/spending-and-revenue_en; www.statista.com/chart/18794/net-contributors-to-eu-budget/ (budget 2021).
25. L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', 19 *Cambridge Yearbook of European Legal Studies* (2017), p. 44.
26. K.L. Scheppele, D. Kochenov and B. Grabowska-Moroz, 'EU Values Are Law, After All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', 39 *Yearbook of European Law* (2020).
27. A. Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence', 27(1) *Maastricht Journal of European and Comparative Law* (2020).
28. European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland (2018/2541(RSP)).
29. European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).
30. European Parliament resolution of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)).
31. L. Pech, 'Article 7 TEU: From "Nuclear Option" to "Sisyphean Procedure"?', in U. Belavusau and A. Gliszczynska-Grabias (eds.), *Constitutionalism under Stress* (OUP 2020).

of net contributors), it required good faith and goodwill among all parties: on the side of net contributors, by acknowledging that net beneficiaries were contributing in their own (non-financial) way to the stability and robustness of the EU; on the side of net beneficiaries, by self-restraining their own short-term self-interest and putting the collective long-term interest ahead of it. In a nutshell, this stage shows how the (perceived) actualization of moral hazard threatens solidarity, or how some players take the opportunity to withdraw their contributions to, and support for, the realization of the common project – i.e., the functioning of the EU.

The third stage of the dynamics between moral hazard and solidarity was reached with the Covid-19 pandemic, which was declared to be a symmetrical external shock,[32] meaning that no country was blamed for the predicament it was in or the ways in which it was more strongly affected by the health, economic or social dimensions of the pandemic. In short, moral hazard was cut short, which paved the way for the NextGenEU and the RRF to be agreed upon as a matter of principle, especially when Germany declared that the pandemic 'was nobody's fault'.[33] The NextGenEU funds were not allocated evenly, but where the crisis struck most strongly,[34] highlighting the solidarity dimension of this financial package. However, the specific role of the Frugal Four, and in particular the Netherlands,[35] in shaping the overall financial package shows that these Member States – even if they agreed on the principle – remained attentive to protecting solidarity from being reduced to shreds to avoid coming to regret their confidence in the EU redistributive machinery. This evolution resulted in the NextGenEU exhibiting three key features in terms of solidarity: with respect to the techniques of the financial commitments, to the legal basis and to conditionality.

First, at the level of the financial commitments, there is now an EU common debt of approximatively EUR 400 billion by way of borrowing on the financial market, most of which was incurred after 2020.[36] The NextGenEU debt needs to be paid back by the EU using its revenues as from 2028.[37] The revenues will either come from the EU's own resources by way of existing and new taxes still to be agreed upon or from an increase in the ceiling of national contributions.[38] If one country does not pay its contribution, the European Commission is entitled to call upon the other Member States *pro rata*, which goes in the direction of a legal form of solidarity in debt among Member States without amounting to full solidarity, as a Member State is not supposed to be paying the whole debt before calling upon its co-debtors.[39] Secondly, at the level of the

32. 'The challenge our economies are facing today is in no way similar to the previous crisis. This is a symmetric external shock. Moral hazard considerations are not warranted here. We must bear this in mind when we consider coronavirus dedicated instruments' (Eurogroup, press statement, 24 March 2020, www.consilium.europa.eu/en/press/press-releases/2020/03/24/remarks-by-mario-centeno-following-the-eurogroup-meeting-of-24-march-2020/).
33. A. Crespy and L. Schramm, 'Breaking the Budgetary Taboo: German Preference Formation in the EU's Response to the Covid-19 Crisis', 33(1) *German Politics* (2024), p. 58–9.
34. S. Grund and A. Steinbach, 61 *Common Market Law Review* (2024), footnote 25.
35. J. Krommendijk, 'Small States and Coalition Building *in Extremis*: The Netherlands and the Adoption of the Conditionality Regulation Linking Rule of Law and the EU Budget', *Journal of European Public Policy* (2024).
36. https://commission.europa.eu/strategy-and-policy/eu-budget/eu-borrower-investor-relations/eu-debt-securities-data_en.
37. https://commission.europa.eu/strategy-and-policy/eu-budget/eu-borrower-investor-relations/nextgenerationeu_en.
38. Council Decision 2020/2053 of 14 December 2020 on the system of own resources of the EU, [2020] OJ L 424/1, Articles 2 and 3.
39. See e.g. Council Decision 2020/2053, Article 9(5), which details how this should happen and what happens if one Member State is not in a position to pay its contribution, allowing the Commission to call upon the other Member States to pay even if the said Member State remains bound to honour it. For the details on the differences between a *pro rata* commitment and joint and several liability, see S. Grund and A. Steinbach, 61 *Common Market Law Review* (2024), p. 1016.

legal basis, the RRF, the main spending instrument for the NextGenEU, has Article 172 TFEU as its legal basis,[40] which is the article providing for social cohesion policies. The legal scholarship has discussed the appropriateness of this legal basis,[41] pointing out that the overall objectives of the RRF are broader than social cohesion. In this sense, the use of Article 172 in this case is diluting the notion of social cohesion and solidarity and making it lose its specificities. It is even more striking that the EU funds allocated under the Cohesion Funds were slow to be spent, highlighting the tension between the Cohesion Funds and the RRF as Member States have limited overall capacity to spend EU funds.[42] Finally, at the level of the conditionality, the Frugal Four and the European Parliament obtained concessions to the effect that the financial resources made available through the NextGenEU and the RRF and to which reimbursements all Member States may have to contribute would not be spent in a way that goes against the grain of EU membership and that does not contribute positively to EU policies. This led to using different types of conditionality: a specific conditionality in the national RRF plans includes pursuing policy objectives such as the digital and green transitions,[43] and complying with the country recommendations of the European Semester; a horizontal conditionality included in the European structural funds (and thus linked to the multi-annual framework) is linked to the respect of the EU Charter of Fundamental Rights,[44] and another horizontal conditionality is linked to the respect of the rule of law, to which we turn in the next section.

Overall, these three features at play in the NextGenEU show the legal discussions underpinning the use of 'solidarity'. It is not merely a lofty political slogan or even a geo-strategic need, solidarity is embodied in the legal provisions with varying modalities. The ways in which they come together is not clearly articulated across the legal architecture of the NextGenEU, however. The question had thus been whether solidarity would fade into the background once legal arguments mounted against the NextGenEU and its satellites, or whether conditionality would ensure effective implementation of EU law, and thus mutual trust and by implication solidarity. This question is addressed in the *Budget Conditionality* judgments.

3. *Budget Conditionality* judgments

The Conditionality Regulation provides that the EU can suspend and withdraw financial transfers to a Member State in case of breaches of the principle of the rule of law.[45] It sets out the procedure to

40. Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, [2021] OJ L 57/17.
41. Approving it, e.g. P. Dermine, *Le plan de relance 'Next Generation EU' de l'Union européenne – Analyse constitutionnelle d'une initiative historique* (Bruylant 2023), p. 67–70; contesting it, e.g. P. Lindseth and P. Leino-Sandberg, 'Crisis, Reinterpretation, and the Rule of Law: Repurposing 'Cohesion' as a General EU Spending Power' *Hague J Rule Law* (2024), see also C. Gerner-Beuerle, 'Competition and Redistribution in Economic and Monetary Union' in this Special Issue.
42. A. Novakov, 'Cohesion & NextGenerationEU: Europe's Double-act for Recovery?' 1 *ECA Journal* (2022), p. 117.
43. Council Regulation 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, [2020] OJ LI 433/23, Article 1(2).
44. Regulation 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, [2021] OJ L 231, 159–706, Article 15(1) and Annex 3.
45. Regulation 2020/2092, Article 3.

be initiated by the European Commission and decided by the Council.[46] Poland and Hungary challenged the validity of this regulation on various counts, including its legal basis and its scope. These two Member States argued that a direct link needed to exist between the infringed rules and the money withdrawn or suspended. The absence of such a link would otherwise entail that the Conditionality Regulation would allow for circumventing Article 7 TEU.

Advocate General Campos Sanchez-Bordona rejected these arguments, emphasizing that '[c]ompliance with the principles of the rule of law may be vitally important for the sound operation of public finances and proper budgetary implementation'.[47] He accepted cross-conditionality ('which means that corrective action need not be taken against all sectors affected by the breach of the rule of law or that it can be applied to ongoing expenditure from the Union budget')[48] and that 'the conditionality mechanism applies financial corrective action rather than penalties for breach of the principles of the rule of law'.[49] According to him, the techniques of the Conditionality Regulation are akin to those used in the financial regulations and not those of Article 7 TEU, meaning that there is no circumvention of this Article.[50]

The CJEU validated the Conditionality Regulation, yet it also heard the argument of Poland and Hungary about the need for a link between a breach of EU law and the funds suspended or withdrawn. If it is true that the CJEU did not set the threshold as high as argued by Poland and Hungary, it was mindful to limit the scope of action of the European Commission and to leave some room for interpretation for future case law. Three features of the judgments deserve attention from a solidarity perspective.

Firstly, the CJEU elaborates its reasoning in a principled manner in the *Polish Judgment*[51] and in the *Hungarian Judgment*,[52] and then applies the principles to the facts of the case.[53] In the principle the CJEU sets out, it notably posits 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 […], and […] 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 […] on the commitment of each Member State to comply with its obligations under EU law and to continue to comply […] with the values contained in Article 2 TEU, which include the value of the rule of law.[54]

The CJEU continues by highlighting the '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

46. Ibid., Article 6.
47. Opinion of Advocate General Campos Sanchez-Bordona in Case C-156/21 *Hungary v. European Parliament and Council of the European Union*, EU:C:2021:974, para. 143.
48. Ibid., para. 182.
49. Ibid., para. 186.
50. Ibid., para. 236.
51. Case C-157/21 Poland v. European Parliament, para. 147–149.
52. Case C-156/21 Hungary v. European Parliament, para. 129–132.
53. Case C-157/21 Poland v. European Parliament, para. 150–190; Case C-156/21 Hungary v. European Parliament, para. 134–198.
54. Case C-157/21 Poland v. European Parliament, para. 147.

interests of the Union'.[55] Indeed, the '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'.[56]

These paragraphs are a key building block in the CJEU's overall reasoning to validate the Conditionality Regulation and to accept its legal basis. Firstly, the CJEU analyses the intent and content of the Conditionality Regulation, and how it is linked to the identity of the EU legal order, EU membership and solidarity between the Member States.[57]

Secondly, the CJEU clarifies that Article 322(1)(a) TFEU is an appropriate legal basis for the Conditionality Regulation. However, this means that the Conditionality Regulation can only be used for a direct breach or a sufficiently direct breach of a rule with an impact on sound financial management and the protection of the financial interests of the Union as provided in Article 4(1) of the Regulation. The Conditionality Regulation can only be used for breaches in implementing the financial regulations, but not for protecting the rule of law in general. It is not supposed to have a punitive effect as Article 322 TFEU does not provide a legal basis for such measures.[58]

Thirdly, the CJEU specifies that the European Commission needs to act at each stage of the procedure – from assessing the sources of information up to monitoring the implementation of measures adopted by the Council on the basis of the Conditionality Regulation – in an objective, independent and fair manner, in short by complying itself with the rule of law principles and eschewing the risks of arbitrariness.

These features of the *Budget Conditionality* judgments lead to three comments. First, the European Commission has been accused in the past of being reluctant to use its power to initiate infringement proceedings in relation to breaches of the rule of law.[59] The commitment of the European Commission to ensuring the effectiveness of the Conditionality Regulation and its credibility is thus not to be taken for granted. The CJEU, however, clarifies how it expects the Commission to demonstrate its commitment to the rule of law in action and not only in words (it would otherwise risk being accused of arbitrariness in the protection of the rule of law). The role of the CJEU is to open the door to the application of the Conditionality Regulation, setting its parameters. The CJEU stands in a continuous chain of interpretation and legislative developments (see section 5). Secondly, the *Budget Conditionality* judgments mean that an open-textured principle such as 'solidarity' cannot be defined purely in political terms. A continuous process of justification is needed to flesh out its concrete implications. Thirdly, solidarity is the principle that compels and justifies legal effectiveness without falling into the forbidden territory of repression and sanction: the effective implementation of the law (here with an impact on the EU's financial interests or the principle of sound financial management) is necessary for mutual trust; the measures that can

55. Ibid., para. 148.
56. Ibid., para. 149.
57. M. Fisicaro, 'Protection of the Rule of Law and "Competence Creep" via the Budget: The Court of Justice on the Legality of the Conditionality Regulation – ECJ Judgments of 16 February 2022, C-156/21, Hungary v Parliament and Council and C-157/21, Poland v Parliament and Council', 18 *European Constitutional Law Review* (2022).
58. R. Gadbled, 'Addressing System Deficiencies in the Protection of the Financial Interests of the EU: Preventing Harm and Incentivizing Change', 24(6) *German Law Journal* (2023).
59. P. Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law', 21(1–3) *European Law Journal* (2021).

be taken on the basis of the Conditionality Regulation are supposed to encourage this effective implementation, without constituting sanctions for violating these rules. The overall objective is that being mindful of solidarity and mutual trust, Member States are encouraged to comply with the law (i.e., with an impact on the EU financial interests or the principle of sound financial management). This is a fine line between convincing a Member State to comply with the law, without the stick of sanctions for breaching interdependent financial requirements. The CJEU is cautious in limiting the types of rules breached that can justify the suspension or withdrawal of EU funds. It is also cautious in ensuring due process by the European Commission. If trust there must be in the implementation of the Conditionality Regulation, the European Commission needs to earn it from the targeted Member State, from the other Member States and from the other EU institutions.

The *Budget Conditionality* judgments thus have three far-reaching technical consequences with ramifications for the interpretation of solidarity and its implications for moral hazard. Firstly, the judgments focus on the EU budget and the responsible use of the 'common resources',[60] while the EU system refers to the EU's 'own resources' in its budget taxonomy. 'Common resources' is not a technical term defined in the EU legal instruments, which makes questions arise as to what the CJEU seeks to achieve with this reference. The two sides of the equation, 'the EU budget' and 'common resources' deserve attention. On the side of 'common resources', one may be tempted to see the resources and revenues that Member States bring together for the functioning of the EU. The term 'common resources' seems to be borrowed from the economic vocabulary and to allude to concepts such as the 'public good', 'the commons' and 'common pool resources'. The public good may refer to 'those projects that are implemented at the central level through common financing'.[61] The commons 'refer to systems, such as knowledge and the digital world, in which it is difficult to limit access, but one person's use does not subtract a finite quantity from another's use'[62] while 'the common pool resources' 'are sufficiently large that it is difficult, but not impossible, to define recognized users and exclude other users altogether. Further, each person's use of such resources subtracts benefits that others might enjoy.'[63] Budgetary decisions and EU economic governance have been understood in terms of a 'common pool problem', in the sense that there is an 'asymmetry of perceived spending benefits and costs'.[64] The literature refers to this concept when central/national/federal resources are spent to finance projects with mostly local/regional benefits and the purpose of gaining the political support of constituents for a particular politician. In the USA, this phenomenon pertains to what is known as 'pork barrel politics'. Poland and Hungary were suspected of adopting such an approach with EU funds, with the literature subsequently drawing technical distinctions between pork barrel politics and budgetary clientelism depending on the different roles that local government can play in brokering finances for their local area.[65]

60. Case C-157/21 Poland v. European Parliament, para. 147.
61. S. Grund and A. Steinbach, 61 *Common Market Law Review* (2024), p. 994.
62. E. Ostrom, 'The Challenge of Common-Pool Resources', 50(4) *Environment: Science and Policy for Sustainable Development* (2008), p. 10–11 (footnote omitted).
63. Ibid., p. 11 (footnote omitted).
64. F. Heinemann, P. Mohl and S. Osterloh, *Reform Options for the EU Own Resources System* (Springer 2008), p. 27–9.
65. S. Gherghina and C. Volintiru, 'Budgetary Clientelism and Decentralization in Hungary and Romania', 39(1) *Journal of Developing Societies* (2023). For other distinctions, see M. Banaszewska and I. Bischoff, 'Grants-in-aid and Election Outcomes in Recipient Jurisdictions: The Impact of EU funds on Mayoral Elections in Poland', 68 *European Journal of Political Economy* (2021), p. 101993.

Official[66] and academic[67] studies suggest that EU funds were spent on projects aligning with political preferences in some countries (in particular but not exclusively in Hungary) by means of corruption or collusion.[68] This was exactly the type of concern that the Conditionality Regulation sought to address.[69] The explanation before the Commission Proposal that triggered the Conditionality Regulation against Hungary and the list of recommended measures demonstrates this.[70]

The CJEU also provides a new technical meaning to the 'EU budget'. In 2013, it judged that the budget was not a legislative act but an accounting and predictive instrument.[71] The scholarship then elaborated that despite the formal procedures at EU level the EU budget remained a budget of and between Member States.[72] The EU budget is a bargaining tool between Member States and the instrument to pursue policy agendas. In this sense, one can indeed see that Member States contribute politically and financially, if not legally, common resources for the realization of EU policies and objectives. However, the NextGenEU is a complex financing instrument partly funded via the regular budget of the EU and partly outside it,[73] while the debt it creates is economically and financially, but not legally, a debt common to the EU and its Member States. This leads the CJEU not to emphasize that expenses side of the EU budget but the resource side of the budget, which under the Treaty[74] remains mostly under the control of the Member States directly and via the Council. This fits with the idea that the budget is the future of the Union cast in figures.[75] In his opinion on the *Budget Conditionality* cases, Advocate General Campos Sanchez-Bordona analyses the conditionality technique in detail: starting with a definition of the EU budget and ending on the link with solidarity. Indeed, he first writes that '[t]he budget is the instrument of EU law which, each year, translates the principle of solidarity into financial terms and it is of constitutional importance'[76] with a footnote referring to extra-judicial writings by the President of the CJEU to which section 4 below returns. Then the Advocate General moves to the role of the Commission in implementing

66. E.g. Greco reports mentioned in Proposal for a Council Implementation Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, Brussels, 18.9.2022 COM(2022) 485 final, para. 34 and 39.
67. E.g. E. Dávid-Barrett and M. Fazekas 'Grand Corruption and Government Change: An Analysis of Partisan Favoritism in Public Procurement', 26 *Eur J Crim Policy Res* (2020), p. 411–30.
68. M. Bernatt and A. Jones, 'Populism and Public Procurement: An EU Response to Increased Corruption and Collusion Risks in Hungary and Poland', 41 *Yearbook of European Law* (2022), p. 11–47.
69. Ibid.
70. E.g. Proposal for a Council Implementation Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, Brussels, 18.9.2022 COM(2022) 485 final, recital (5), section 2.1, para. 57–60 etc.
71. Case C-77/ 11, *Council v. Parliament*, EU:C:2013:559, para. 59. Cf. Article 314(9) TFEU.
72. R. Crowe, 'An EU Budget of States and Citizens', 26 *Eur Law J* (2020), p. 331.
73. The European Court of Audit distinguishes between the non-repayable support part of NextGenEU financed by loans (on budget) on the one hand and the Recovery and Resilience Facility (RRF) loans financed by NextGenEU borrowing (off budget) on the other hand (see ECA, The EU's Financial Landscape – A Patchwork Construction Requiring Further Simplification and Accountability, 2023, para. 17 and 18).
74. Article 311 TFEU.
75. Opening remarks by Commissioner Hahn at the Annual EU Budget Conference 2024 available at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_24_2361. The exact phrasing is the following: 'let us envision our future together – cast in budgetary figures!'
76. Opinion of Advocate General Campos Sanchez-Bordona in Case C-156/21 *Hungary v. European Parliament and Council of the European Union*, para. 96 (footnote omitted).

the budget, and the existence of different forms of conditionality in various international organizations, and ends with solidarity, more precisely with a link between solidarity and responsibility:

> Financial conditionality establishes a link between solidarity and responsibility. The European Union transfers funds from its budget to Member States provided that the money is spent responsibly, which means spending it in accordance with EU values, such as the rule of law. Only if the budget is implemented in accordance with EU values will there be sufficient mutual trust between Member States when it comes to providing the European Union with the financial resources required to achieve its objectives.[77]

The Advocate General recognizes that the Conditionality Regulation has significant repercussions for the relationships between the EU and its Member States. This allows for the Advocate General to provide examples where conditionality has already been accepted by the CJEU, noting that it was the case in *Pringle*,[78] in which case the CJEU explained that conditionality served the twin purposes of ensuring compliance with all relevant EU law and incentivizing prudent spending by Member States. The *Budget Conditionality* judgments are thus an opportunity for the CJEU to extend the *Pringle* case law to the respect of the rule of law.[79] In this Opinion, solidarity is closely associated with responsibility, as its counterpart. Responsibility for one's financial commitments is the very opposite of moral hazard.

Secondly, the CJEU extends the notion of the EU budget to include the RRF in a similar manner as the Conditionality Regulation does.[80] It does so through the requirement of complying with the financial regulations, in order to protect sound financial management and the financial interests of the Union. Technically the budget is a declaration adopted by the President of the Parliament.[81] However, the whole construction of the RRF actually aims to place financial commitments 'off budget' – outside the budget – and thus not on budget in terms of expenses.[82] The off-budget nature of the RRF has been challenged by the European Court of Accounts as it muddies the lines of control and accountability.[83] However, as stressed by the CJEU, the spendings under the NextGenEU – otherwise seen as a tool for debt mutualization[84] – also need to comply with the financial regulations.[85] In this sense, the CJEU expands the scope of the 'budget' to a functional notion by including commitments taken outside the formal budget and its parliamentary accountability. In this manner, it is not only the EU budget in the formal sense, which is of constitutional value, but all the spendings of the EU, widening the material scope of the resources that are

77. Ibid., para. 110.
78. Ibid., para. 113–114.
79. Ibid., para. 115.
80. Recital 7.
81. Article 314 (9) TFEU.
82. Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility. The European Court of Audit distinguishes between the non-repayable support part of NextGenEU financed by loans (on budget) on the one hand and the Recovery and Resilience Facility (RRF) loans financed by NextGenEU borrowing (off budget) on the other hand (see ECA, The EU's Financial Landscape – A Patchwork Construction Requiring Further Simplification and Accountability, 2023, para. 17 and 18).
83. ECA, The EU's Financial Landscape – A Patchwork Construction Requiring Further Simplification and Accountability, 2023.
84. E.g. L. Baccaro, B. Bremer and E. Neimanns, 'Strategic Interdependence and Preferences for Debt Mutualization in the Eurozone', 30(4) *Review of International Political Economy* (2022).
85. Regulation 2020/2094, Recitals 9 and 10, Article 3(1).

'common' and in relation to which solidarity applies. Conversely, this extensive interpretation by the CJEU shrinks the scope of the funds in relation to which moral hazard may be most unchecked as solidarity expands its reach.

Thirdly, the CJEU uses the words 'common resources' in combination with solidarity, mutual trust and effectiveness of the law. This leaves open the possibility that the effective implementation of EU law (having an impact on the financial interests of the EU or the principle of sound financial management) fleshes out the solidarity between Member States and in relation to the EU. The common resources seem to become a crossroads for the horizontal mutual responsibility (between Member States) and the vertical mutual responsibility (between Member States and the EU). The institutional machinery and practical implementation, facilitated and strengthened by the leverage the European Commission gains thanks to the Conditionality Regulation, tend to support this idea.

4. Solidarity, concrete implementation and institutional enforcement

In the *Budget Conditionality* judgments, the CJEU links solidarity with mutual trust, relying on effective enforcement of the law to protect sound financial management and the financial interests of the Union. This effective enforcement is being increasingly developed with an institutional and a concrete side, providing some insight into the actual impact of the *Budget Conditionality* judgments in the untangling of the factual circumstances that played in their background and furthermore how their solutions can shape further relations with Member States. Member States are not only interdependent on the ways resources are collected and spent, but also on how legal procedures to these effects are implemented and their respect monitored and enforced.

First, in terms of institutional enforcement, three main channels are open, and the *Budget Conditionality* judgments paved the way for their reinforcement: the European Commission, OLAF and the EPPO. Once the CJEU validated the Conditionality Regulation, the European Commission adopted a Communication[86] to implement the regulation as per the political compromise agreed at the 2020 European Council.[87] The second paragraph of the Communication copies and pastes the main paragraph of the *Budget Conditionality* judgments discussed above.[88] On this basis, the Commission details the procedure for it to recommend measures in the case of a breach of law putting sound financial management and the financial interests of the Union at risk. The Commission then followed the procedure in relation to Hungary, leading it to propose the suspension of 65% of the EU funds in September 2022.[89] The Council adopted revised measures leading to a suspension of 55% of these funds in December 2022.[90] The Commission reassessed the measures

86. 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, Brussels, C(2022) 1382 final.
87. L. Schramm and W. Wessels, 'The European Council as a Crisis Manager and Fusion Driver: Assessing the EU's Fiscal Response to the COVID-19 Pandemic', 45(2) *Journal of European Integration* (2022).
88. Case C-157/21 Poland v. European Parliament, para. 147.
89. Proposal for a Council Implementation Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, Brussels, COM(2022) 485 final.
90. Council Implementation Decision 2022/2506 of 15 December 2022. www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/. The Council decides to suspend €6.3 billion given only partial remedial action by Hungary.

a year later and decided that the situation had not been remedied.[91] Yet it also (confusingly) decided that Hungary had complied with part of the remedial measures, so it released funds frozen under the conditionality linked to the European Charter of Fundamental Rights.[92] However, the parallel suspensions of EU funds on the basis of two different overlapping procedures with no clear articulation and the lack of any procedure in relation to Poland allowed for criticisms of political volatility and a lack of objectivity,[93] which the CJEU sought to prevent from happening in requiring the European Commission to act in a fair, objective and impartial manner. The European Parliament adopted a resolution to challenge the European Commission's decision to unlock the EU funds[94] as Viktor Orban left a meeting paving the way for the European Council to decide to open the membership negotiations with Ukraine. The case is pending at the time of writing.[95] These actions and omissions by the European Commission have been criticized as they do not reflect the requirements of the rule of law. The Commission has justified its position in relation to Poland by invoking the lack of reasonable grounds to think that the requirements of the Conditionality Regulation were met, although it keeps monitoring the situation in Poland as it does for any other Member State.[96] However, the *Budget Conditionality* judgments open up the possibility for the European Commission to organize an accountable decision-making process, while other types of conditionality are co-existing without similar requirements applicable to the Commission's decision-making, leaving the question open as to whether some sort of harmonization might not be necessary to comply with legal certainty and make politically motivated leeway accountable.

The Commission Guidelines explicitly mention the role of OLAF and the EPPO, and the importance of cooperation even in cases where a Member State is not a member of EPPO. Two points can be made in relation to the effective implementation of EU law with an impact on the principle of sound financial management and the protection of the financial interests of the Union. On the one hand, one of the problems originally encountered with Poland and Hungary was their non-participation in EPPO. Poland was the non-participating country with most investigations by EPPO, although it had long refused to cooperate with the EPPO.[97] Poland has now become a member.[98] Since the Conditionality Regulation is in force, Hungary agreed to undertake a cooperation arrangement with OLAF after being at risk of losing access to EU funding in the case of non-cooperation.[99] On the other hand, the existence of parallel, overlapping but distinct instruments intended to protect the financial interests of the EU and sound financial management may be a

91. Commission Decision of 13.12.2023 on the reassessment, on the Commission's initiative, of the fulfilment of the conditions under Article 4 of Regulation (EU, Euratom) 2020/2092 following Council Implementing Decision (EU) 2022/2506 of 15 December 2022 regarding Hungary, Brussels, C(2023) 8999 final.
92. https://ec.europa.eu/commission/presscorner/detail/en/QANDA_23_6466.
93. For one possible explanation about the distinct treatment of Poland and Hungary, see e.g. G. Hernandez and C. Closa, 'Turning Assertive? EU Rule of Law Enforcement in the Aftermath of the War in Ukraine', 47(4) *West European Politics* (2024).
94. Commission Implementing Decision C(2023) 9014 of 13 December 2023 on the approval and signature of the Commission assessment, in accordance with Article 15(4) of Regulation (EU) 2021/1060, of the fulfilment of the horizontal enabling condition '3. Effective application and implementation of the Charter of Fundamental Rights' with regard to the deficiencies in judicial independence in Hungary.
95. C-225/24, *Parliament v. Commission*, application submitted on 25 March 2024.
96. Communication from the Commission to the European Parliament and the Council on the application of Regulation (EU, Euratom) 2020/2092, Brussels, COM(2024) 17 final, 7.
97. www.eppo.europa.eu/en/news/letter-sent-european-commission-regarding-polands-refusal-cooperate-eppo.
98. COM Decision (EU) 2024/807 of 29 February 2024.
99. www.eppo.europa.eu/en/media/news/eppo-signs-working-arrangement-office-prosecutor-general-hungary.

seed of confusion.[100] The Conditionality Regulation mentions the need to ensure a so-called 'complementarity test',[101] meaning that the Commission needs to assess when the instrument of the Conditionality Regulation presents added value compared to other avenues. To this end, extensive cooperation is being developed,[102] and the Commission considers that practice will inform this 'complementarity test'.[103]

Secondly, in terms of concrete implementation, the *Budget Conditionality* judgments emphasize the link between solidarity, mutual trust and effective implementation of EU law with a direct or sufficiently direct link to the principle of sound financial management and the protection of the financial interests of the Union. Two concrete examples illustrate how these links currently play out in specific European decisions: problems encountered by the Italian RRF and the EU Neighbourhood policy.

When it comes to the RRF, Italy has been one of its two biggest beneficiaries.[104] This makes sense as Italy was the first EU Member State to be affected by the pandemic and is the one that suffered most from its economic impact and death toll. In this sense, solidarity was much enacted with the RRF. The Italian RRF plan was first proposed by Prime Minister Draghi,[105] and had to be implemented by his successor, Prime Minister Meloni.[106] However, problems arose as Italy did not manage to implement the plan as agreed, missing targets.[107] The Italian Prime Minister then sought a revision of the plan.[108] Additional problems arose as EU funds appeared to have been embezzled.[109] The EPPO investigated how the Italian plan had been implemented,[110] with Italy being the country with the highest number of ongoing investigations.[111] Protection of the financial interests of the Union is indeed key to mutual trust to ensure solidarity with the victims of the Covid-19 crisis and to prevent other entities from capturing unduly EU funds for their criminal purposes.

When it comes to the EU Neighbourhood policy, the EU has also reverted to using conditionality in a way that is reminiscent of the pre-accession process of the 2004 enlargement. Just a few days after the *Budget Conditionality* judgments were decided, Russia invaded Ukraine. This prompted an

100. D. Hegedus, 'Same, Same but Different? The Pitfalls in Unfreezing EU Funds', *VerfBlog,* 21 December 2023, https://verfassungsblog.de/same-same-but-different/.
101. Regulation 2020/2092, Article 6 (1).
102. Communication from the Commission to the European Parliament and the Council on the application of Regulation (EU, Euratom) 2020/2092, Brussels, COM(2024) 17 final, 8–12.
103. Communication from the Commission to the European Parliament and the Council on the application of Regulation (EU, Euratom) 2020/2092, Brussels, COM(2024) 17 final, 9.
104. A special issue analysing the implementation trouble of the RRF in Italy is available in *Contemporary Italian Politics* (2023).
105. www.politico.eu/article/italy-italian-prime-minister-mario-draghi-recovery-plan/.
106. F. Di Mascio and A. Natalini, 'Implementing the NRRP from the Draghi Government to the Government of Giorgia Meloni: Italian Public Administration under the Pressure of Too Large a Volume of Resources', 15(2) *Contemporary Italian Politics* (2023).
107. www.euractiv.com/section/eu-institutions/news/von-der-leyen-pressures-to-unlock-italys-third-recovery-plan-payment-sources/.
108. www.euractiv.com/section/economy-jobs/news/italys-recovery-funds-saga-a-test-for-eu-fiscal-integration/.
109. www.euractiv.com/section/economy-jobs/podcast/push-for-permanent-rrf-faces-scrutiny-amidst-latest-e600m-fraud-in-italy/.
110. https://www.eppo.europa.eu/en/media/news/investigation-stop-carousel-eppo-dismantles-criminal-organisation-targeting-rrf-funds.
111. https://www.politico.eu/article/olaf-investigates-potential-fraud-involving-eu-recovery-funds/.

acceleration of initiatives already in the pipeline in terms of financial support to Ukraine.[112] Moreover, the EU and Ukraine signed a Memorandum of Understanding to bolster administrative capacity-building from the perspective of rebuilding Ukraine after the War and supporting the accession process to the EU.[113] This financial assistance follows the financial regulations[114] and the Memorandum of Understanding includes provisions to fight corruption.[115] If the need for emergency and extraordinary funding is justified by the war with Russia, the main objective of this funding is to 'support the strengthening of the capacity of Ukrainian authorities to prepare for the future post-war reconstruction and for the early preparatory phase of the pre-accession process, as appropriate, including the strengthening of Ukraine's institutions, reforming and reinforcing the effectiveness of public administration as well as transparency, structural reforms and good governance at all levels'.[116] This links back elegantly to one of the dimensions identified by Lenaerts and Adams in the paper referenced by Advocate General Campos in the key passage of its opinion in the *Budget Conditionality* cases,[117] namely the solidarity that the EU should exhibit in relation to third-party states to pursue in a sustainable manner the process of the European peoples closing together and peace on the European continent.[118]

5. A virtuous circle of solidarity and alternative interpretations as complementary antidotes against moral hazard

In the *Budget Conditionality* judgments, the CJEU left room for further interpretation in later case law, knowing that the Commission would adopt guidelines, and that further litigation was most predictable. This room can be linked with alternative interpretations of the judgments by way of lenses such as compliance and deliberative experimentalism. Combining enforcement and management[119] or coercion and persuasion is indeed seen as mutually reinforcing in organizational theories. But

112. Article 212 TFEU. Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, [2021] OJ L 102/14. Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, [2022] OJ L 60, 1–4; Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces, [2022] OJ L 61, 1–4; Council Decision (CFSP) 2023/927 of 5 May 2023 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces through the provision of ammunition, [2023] OJ L 123, 27–31. Information on the ways in which the European Peace Facility has been used in the EU neighbourhood is available at euneighbourseast.eu/tag/european-peace-facility/; www.consilium.europa.eu/en/press/press-releases/2024/03/18/ukraine-assistance-fund-council-allocates-5-billion-under-the-european-peace-facility-to-support-ukraine-militarily/; https://eu-solidarity-ukraine.ec.europa.eu/eu-assistance-ukraine/ukraine-facility_en. Regulation 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility, [2024] OJ L, 792. F. Fabbrini, 'Funding the War in Ukraine: The European Peace Facility, the Macro-Financial Assistance Instrument, and the Slow Rise of an EU Fiscal Capacity', 11(4) *Politics and Governance* (2023).
113. https://economy-finance.ec.europa.eu/system/files/2023-01/Memorandum%20of%20Understanding_EU-UA.pdf.
114. Regulation (EU) 2022/2463 of the European Parliament and of the Council of 14 December 2022 establishing an instrument for providing support to Ukraine for 2023 (macro-financial assistance +), [2022] OJ L 322/1.
115. Regulation (EU) 2022/2463, Recital 14.
116. MoU pt 12.
117. See note 75.
118. K. Lenaerts and S. Adams, 'La solidarité, valeur commune aux États membres et principe fédératif de l'Union européenne', 57 *Cahiers de droit européen* (2021), p. 414–415.
119. J. Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union', 56(3) *International Organization* (2002).

maybe more crucially, the room for interpretation exists mostly at the level of the reach that can be read in the principle at the centre of the *Budget Conditionality* judgments and the pivotal role that solidarity might be able to undertake in the future.

The *Budget Conditionality* judgments allow for suggesting a virtuous circle between the EU budget, solidarity, mutual trust, the legal effective enforcement of the rule of law and the protection of sound financial management and the financial interests of the Union. This virtuous circle is self-reinforcing in the sense that its operationalization should prevent moral hazard and thus encourage further financial commitments in the name of solidarity. In this sense, solidarity becomes the cornerstone of upward trust in the EU, downward trust in the national spending of EU money to pursue agreed EU policies and transversal (or mutual *sensu stricto*) trust between Member States that their contributions to the EU will indeed be used for the common good and that, should they be in a position of need, financial help will be forthcoming. The overall machinery does not work on blind faith: it requires rules and procedures, and guarantees that the European Commission will exercise its mandate of protection of the financial interests of the EU and not its own short-term political interest. It requires monitoring and investigations to identify breaches, report them and act upon them. This in turn strives to prevent abuse from happening.

Such a virtuous circle draws on an original mix between ordoliberalism where formal rules are ensuring fiscal discipline and law and economics where informal rules are fostering trust and cooperation between the actors. This may therefore lead to a unique governance and justification structure, where the Conditionality Regulation is called upon in particular cases directly connected to a breach of a rule with an impact on the sound financial management and the protection of financial interests of the Union, with the Commission due to provide an objective, impartial and fair decision[120] – modelling a rule-of-law-based decision-making process.

However, it is possible to provide different alternative interpretations of the *Budget Conditionality* judgments, in particular an interpretation based on rewards for compliance and good behaviour.[121] This reading is confirmed by the fact that the Commission did not wait for Poland to actually concretely take the measures necessary to comply with the rule of law and by the unlocking of the Hungarian funds when Orban showed cooperation in not actively vetoing the opening of EU membership negotiations with Ukraine.

Another alternative interpretation of the principle at the centre of the *Budget Conditionality* judgments is that provided by deliberative experimentalism, the impact of peer pressure and constant reforms.[122] What these judgments contribute to is much more attention being paid to administrative capacity-building, especially in terms of sound financial management across the whole cycle of national implementation of EU law. The European Commission is relying on numerous sources of information to monitor how Member States are complying with the Conditionality Regulation – whether that is civil society, the EPPO, OLAF, the Council of Europe or the GRECO.

120. Failing to meet these requirements might lead to drastically weaken the whole system. One possible solution would then to replace the European Commission by a less political, and possibly more technical entity (maybe the European Court of Auditors or some kinds of independent fiscal entities that are promoted by the new economic governance?) to maintain the trustworthiness of the system. I thank one of the anonymous reviewers for flagging this point.

121. M. Fisicaro, 18 *European Constitutional Law Review* (2022), p. 354.

122. J. Miró, M. Natili, and W. Schelkle, 'Money Makes the World Go Round: How Much Difference Do Recovery and Resilience Plans Make to EU Reform Governance?', 62(6) *JCMS: Journal of Common Market Studies* (2024).

6. Conclusions

This paper argues that the *Budget Conditionality* judgments make solidarity one of the cornerstones for the EU legal order, not by upholding solidarity as a lofty EU ideal, but by starting a process of making it practical, in particular by using it as a technical antidote, strategic argument and convincing narrative against moral hazard. The CJEU does this in three distinctive ways: firstly, it expands the notion of the EU budget to include funds processed off-budget; secondly, it focuses on the resources side of the EU budget that are strikingly labelled as 'common' to the Member States, while these resources belong at least partly to the own resources of the EU, so as to responsibilize all Member States in their spending; thirdly, it clarifies limits on the European Commission in its use of the Conditionality Regulation, in terms of objectives (pursuing compliance, not sanction purposes), types of breaches (pertaining to EU law impacting the principle of sound financial management and the protection of the financial interests of the Union only, not any breach) and procedure (which needs to be fair, objective and impartial).

These judgments are landmark ones because they point to the EU budget as the cornerstone of horizontal and vertical, internal and external solidarity between the EU and its Member States, between Member States and in relation to third-party states. This does not mean that the *Budget Conditionality* judgments have resolved all possible debates about how solidarity can or should inform the scope, reach and modalities of the effective implementation of laws, in particular in relation to the spending of EU funds and the financial interests of the EU. Key questions about the Commission's implementation of the regulation, with the complementarity test pertaining to overlapping instruments, implementation problems in Member States and external pressures, will arise and be asked by European institutions (e.g., the Parliament or the European Court of Auditors), some Member States with a particular stake in its implementation or civil society. The CJEU has framed the key architecture of the solidarity principle, while leaving scope for evolution and fine-tuning as cases arise. These landmark cases have the potential to link economic constraints with social objectives under constitutional (effective implementation of the law and the rule or law) and technical (financial regulation) requirements. For too long the EU budget was ignored by lawyers; now it will be much more closely analysed[123] – it is, after all, how taxpayers' money is spent and for which their consent is ultimately and historically needed.

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