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## **THE NEW SAFE MECHANISM TO FINANCE DEFENCE IN THE EU: ANOTHER TOOL FOR EXERTING INFLUENCE ON MEMBER STATES?**



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## 1. Executive summary

- EU institutions may suspend the disbursement of funds granted to Poland under the EU SAFE Regulation.
- The situation is, in a sense, similar to that of the National Recovery and Resilience Plan (NRRP), the Polish declension of NextGenerationEU, in which the threat of halting fund disbursements was used to coerce the Polish authorities into specific political decisions.
- The suspension of fund disbursement may, in principle, occur either on the basis of the EU SAFE Regulation, i.e., through a finding of failure to meet milestones, or on the basis of the EU Conditionality Regulation, in connection with a determination that there is a risk to the proper spending of EU funds.
- The EU Conditionality Regulation allows the Council, on the basis of a proposal from the Commission, to adopt a decision by simple majority to apply protective measures to certain Member States consisting of depriving them of access to EU funds.
- The European Commission plays the leading role in the process, having been granted a broad margin of discretion by the EU legislator (despite ongoing attempts to have it curtailed by the courts in favor of the automatic imposition of sanctions).
- Also in the context of the EU SAFE Regulation, the risk that measures provided for in the EU Conditionality Regulation will be applied to the Republic of Poland should be regarded as real for at least several reasons:
  - The regulation explicitly states that the rule of law is violated through an improper procedure for selecting judges;
  - The CJEU has consistently held that deficiencies in the procedure for selecting judges in the Republic of Poland violate EU law and lead to adjudication by 'non-courts';
  - The procedure was successfully applied to Hungary.
- The SAFE Regulation does not specify, for individual suppliers, the consequences of suspending the disbursement of funds due to failure to meet milestones. It appears that this means they will be further specified in national legislation and in individual agreements with suppliers.



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- The EU Conditionality Regulation, however, provides that the application of the sanctions provided for therein should not affect the rights of private entities.



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## 2. Introduction The EU SAFE Regulation

1. The purpose of this analysis is to consider the risks associated with suspending the disbursement of funds under the EU SAFE Regulation with respect to projects that have been awarded funding. Accordingly, the analysis of the mechanism set out below will be subordinated to that objective, rather than to a detailed analysis of the entire instrument. It should also be emphasized that, for practical application, the national provisions adopted for its implementation will be of significant importance<sup>1</sup>.
2. Council Regulation (EU) 2025/1106 of 27 May 2025 establishing the Instrument for Strengthening Europe's Security ("SAFE Instrument") by strengthening the European defense industry, OJ L, 2025/1106 ("**SAFE Regulation**") aims to provide the European Union and the Member States with greater strategic autonomy and defense capability by financing the filling of gaps and the development of their own capabilities in the European defense industry. To this end, loans are to be granted to the Member States (Article 5 of the SAFE Regulation), the total amount of which may not exceed 150 billion EUR (Article 6 of the SAFE Regulation). Funds for financing loans shall be financed from funds borrowed on the capital markets or from financial institutions (Article 9 of the SAFE Regulation).
3. Funds are to be awarded to individual Member States on the basis of applications containing an investment plan setting out, among other things, descriptions of defense-related products, a description of planned activities and estimated expenditures and resources, as well as a description of planned measures intended to ensure compliance with Article 16 and the provisions on public procurement (Article 7 of the SAFE Regulation). In the event of a positive assessment of the application, the Commission recommends to the Council a proposal for an implementing decision (Article 8(2) of the SAFE Regulation). The said decision should confirm that the application complies with

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<sup>1</sup> Currently, concerning Poland, information about the Draft Act on the SAFE Financial Instrument for Enhancing Security, being developed by the Polish Ministry of National Defense (MON), is available under number UD357 <https://www.gov.pl/web/premier/projekt-ustawy-o-finansowym-instrumencie-zwiekszenia-bezpieczenstwa-safe>



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the SAFE Regulation and specify the amount of the loan (Article 8(3)). On the basis of the Council implementing decision, the Commission concludes a loan agreement and operational arrangements setting out the availability period and the detailed conditions for support under the SAFE instrument (Article 10(1) of the SAFE Regulation). In accordance with Article 10(3), *the operational arrangements shall set out the relationship between the implementation of a plan and the corresponding financial assistance, including a tentative schedule of disbursement of the loan instalments, with yearly ceilings as appropriate. In addition, these operational arrangements shall set out types of documentary evidence and control rules related to the fulfilment of the specific eligibility rules applied by the Member States in accordance with Article 16, and the detailed elements referred to in Article 14.*

4. Subsequent installments and tranches of the loan are disbursed on the basis of the Commission's assessment of progress in implementing the plan, and a finding that plan implementation is unsatisfactory results in the suspension of payment of all or part of the loan (Article 12(3) of the SAFE Regulation). Accordingly, funds are released gradually only after the requirements specified in the submitted application and the loan agreement are met. This means that a detailed assessment of the linkage between disbursements of individual tranches of funds and the implementation of subsequent elements of the financed projects requires familiarity with the contents of the application and the individual loan agreements. Detailed issues related to the application submitted by Poland is to be over 300 pages long and contain 129 items, while under the program Poland is to receive 43.7 billion EUR in loans. As much as 89% of this amount is to go to Polish suppliers.<sup>2</sup>
5. This raises the question of the extent to which, if loan agreements were entered into, their disbursement would actually be at risk. It appears there would be a real risk of the disbursement of these amounts being suspended, on the one hand due to the failure to

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<sup>2</sup> <https://defence24.pl/polityka-obronna/polska-poza-pierwsza-grupa-w-safe-pelnomocnik-wyjasnia>, accessed January 14, 2025.



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meet the above-mentioned milestones (problems with the timely implementation of individual projects), and on the other hand due to an infringement of the Union's financial interests under the rules laid down in 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 ("**Conditionality Regulation**"). In particular, the risks associated with the latter should be considered especially important here. Unlike milestones, it concerns evaluative circumstances not directly related to the performance of the contracts for which the loan was granted, such as, for example, the level of adherence to the so-called "*rule of law*."

6. It should be emphasized that the Conditionality Regulation also applies to the SAFE Regulation. It should first be emphasized that such conclusions follow from the text of the regulation itself. First, it contains no time limits on its application *for the future*. It has also not been linked, in its content—both in the operative provisions and in the preamble—to any other specific normative act. Second, its subject matter is worded in extremely broad terms, for it covers, in accordance with Article 1, *the provisions necessary to protect the Union's budget in the event of breaches of the rule of law in the Member States*. As explained in the Preamble:

*Whenever Member States implement the Union budget, including resources allocated through the European Union Recovery Instrument established pursuant to Council Regulation (EU) 2020/2094 (10), 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 of the Treaty on the Functioning of the European Union (TFEU).*

7. The conclusions regarding the broad application of the budget are further confirmed by the chosen legal basis, namely Article 322(1)(a) TFEU, which confers the power to lay



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down, by regulation, financial rules specifying, in particular, the conditions for establishing and implementing the budget and for presenting and auditing accounts.

8. It should be emphasized that the above findings, including the compatibility with EU law of such a general, 'horizontal' conditionality not tied to specific fields or budgetary objectives, were confirmed in the CJEU's decision on the action brought by the Republic of Poland and Hungary challenging the legality of the Conditionality Regulation (CJEU judgment in case C-156/21 *Hungary v Parliament and Council* of 16 February 2022, in particular para. 133). The above understanding of the broad application of the Conditionality Regulation *rationae materiae* finds confirmation in point 25 of the Commission's Guidelines, which, on the basis of CJEU case law, states that the Regulation also applies to the collection of own resources.
9. Additionally, the EU legislator introduced **an explicit obligation to apply the Conditionality Regulation** into the SAFE Regulation in recital (35) of the Preamble:

*This Regulation should be implemented in accordance with the relevant rules adopted pursuant to Article 322 TFEU, in particular the Financial Regulation and Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council.*

### **3. Money for the rule of law: Possibility to suspend disbursements from the SAFE instrument pursuant to the Conditionality Regulation**

10. As previously mentioned, the Conditionality Regulation will apply to the spending of funds granted under the SAFE Regulation. The way it is applied is clarified in the Commission Communication of 2 March 2022, C(2022) 1382 final, Guidelines on the application of Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget ("**Commission Guidelines**"). Although the Commission Guidelines are not a source of European Union law, in practice the Commission follows such documents, particularly given that such guidance is based on



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the existing body of practice and case-law (this refers in particular to the CJEU judgments concerning the compatibility of the Conditionality Regulation with EU law in cases C-156/21 *Hungary v Parliament and Council* of 16 February 2022 and C-157 *Poland v Parliament and Council* of 16 February 2022).

11. The purpose of the Conditionality Regulation is to establish the rules necessary to protect the Union budget in the event of breaches of the rule of law in the Member States (Article 1).

12. The term "rule of law" is defined in Article 2(a) of the Conditionality Regulation and, according to the wording of that provision:

*'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;*

13. The above definition is further elaborated in the Preamble, where in point 3 it is clarified that:

*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 (3) implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty (4); prohibition of arbitrariness of the executive powers (5); **effective judicial protection, including access to justice,***



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*by independent and impartial courts (6); and separation of powers, (7) be respected (8).*

14. Numbers in footnotes indicate references to CJEU case-law, with the references also covering judgments concerning the independence of judges and of courts (of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Conta*, C-64/16, and of 25 July 2018, *LM*, C-216/18).
15. Article 3 identifies, among other things, as a violation of the principles of the rule of law *a threat to the independence of the judiciary (a); failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities... (b) and limiting the availability and effectiveness of legal remedies... (c).*
16. Article 4 allows for the adoption of appropriate measures in the event of finding **an impact or a serious risk of impact** of breaches of the rule of law on the EU budget, which concern at least one of the following elements, namely: the proper functioning of authorities implementing the EU budget and conducting financial control, monitoring and audits; investigative services and prosecution services; effective judicial review of the aforementioned tasks; the prevention and punishment of financial fraud; the recovery of unduly paid funds; the effectiveness and timeliness of cooperation with OLAF and the EPPO; and other situations or actions by authorities. It appears that, in the Polish context, the most important issue is the independence of the judiciary (Article 4(d)).
17. The Preamble dispels any doubts about this. From its perspective, point 10 implies that:  
*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*



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*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.*

In points 12, 13, and 15, one can also read that:

*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 (11). Maintaining the independence of the courts is essential, as confirmed by the second paragraph of Article 47 of the Charter (12).*

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.

***There is therefore a clear link between respect for the rule of law and the effective implementation of the Union's budget in accordance with the principle of sound financial management.***

*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***



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*are widespread or due to recurrent practices or omissions by public authorities, or to general measures adopted by such authorities.*

18. Based on the CJEU's interpretation of the above provisions in the Polish and Hungarian cases, the Commission considers that, for the application of the Conditionality Regulation, the following conditions must be met: 1) the existence of a breach of the rule-of-law principle; 2) at least one of the instances of the breach can be attributed to the authorities of the Member State; 3) the breach affects or gives rise to a serious risk of affecting the EU's financial interests (point 8).

Theoretically, rule-of-law deficits related to the functioning of the judiciary may affect the EU budget only insofar as they concern the judiciary's oversight function with respect to the bodies involved in the implementation of the budget (point 19). It is not difficult to see, however, that even in the case of general problems with ensuring access to a court within the meaning of EU law, such a link will be easy to establish. The Commission explains that *“serious risk” can be established in cases in which the effects of a given breach of the principles of the rule of law, although not yet proven, can nevertheless be reasonably foreseen, because there is a high probability of their occurrence. (...) For instance, if certain acts of national authorities implementing Union funds (...) cannot be effectively reviewed by fully independent courts, this may entail a serious risk insofar as the Union funds and the financial interests of the Union are concerned.* (Commission Guidelines, point 31). Unfortunately, the Commission does not explain what criteria would allow a finding that this relationship was "factual" or "real."

19. Article 5 contains a **catalog of measures for the protection of the Union budget**. If the Commission implements the EU budget under direct or indirect management pursuant to Article 62(1)(a) and (c) of the Financial Regulation<sup>3</sup> (i.e., funds distributed by the

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<sup>3</sup> This refers to 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



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- Commission or authorized entities, totaling about 30% of the EU budget), the list of sanctions includes (i) suspension of payments or of the implementation of the legal commitment, or termination thereof; (ii) a prohibition on entering into new legal commitments; (iii) suspension of the disbursement of installments in full or in part, or early repayment of loans guaranteed by the Union budget; (iv) 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;
20. With regard to funds allocated by the Member States (budget implementation under *shared management with the Member States*, Article 62(1)(a) and (c) of the Financial Regulation, approx. 70% of the Union budget), sanctions may include: (i) **suspension of the approval of a program** or programs, or a modification of such suspension; (ii) **suspension of commitments**; (iii) **limitation of commitments**, including through financial corrections or the transfer of funds to other spending programs; (iv) **reduction of payments** in advance; (v) **suspension of the running of payment deadlines**; (vi) **suspension of payments**.
21. Under Article 5(2) of the Conditionality Regulation, **unless the decision on the adoption of measures provides otherwise**, any finding of breaches of Union law **will not affect the rights and obligations of the final recipients of those funds**, and appropriate information on the obligations of budget implementers must be available on a dedicated website operated by the Commission, where recipients of the funds must also be informed about their rights and the possibilities for reporting breaches (Article 5(4)). The Commission shall also make every effort to ensure that funds are disbursed to final recipients (Article 5(5)). The Commission's guidelines set out this obligation even more

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223/2014 and (EU) No 283/2014 and Decision No 541/2014/EU, and repealing Regulation (EU, Euratom) No 966/2012, now replaced by 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). See also the Commission's explanations on the page [https://commission.europa.eu/funding-tenders/find-funding/funding-management-mode\\_pl](https://commission.europa.eu/funding-tenders/find-funding/funding-management-mode_pl), accessed October 5, 2025.



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firmly: *In other words, government entities or Member States can not use the appropriate measures adopted by the Council as justification to release themselves from their pre-existing obligations towards the final recipients or beneficiaries, relating to payments under the relevant applicable rules (point 90), informing beneficiaries of the funds of the possibility of lodging a complaint with the Commission in the event that the funds cannot be recovered in national proceedings (point 93).*

22. Article 5(3) sets out the rules governing the adoption of countermeasures. In accordance with this article, *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.***
23. In its Guidelines, the Commission does not provide further explanation on how to assess the proportionality of the measures adopted, except for stating that the breaches set out in Article 3 of the Conditionality Regulation (including, inter alia, the independence of the judiciary) should be treated with particular severity (point 47), and that the severity of the sanction should be greater where the established breaches of the rule of law are systemic in nature (point 49) and have not ceased despite previous recommendations or proposals from the Commission in this respect (point 51).
24. Article 6 of the Conditionality Regulation sets out the procedure for adopting measures. In accordance with Article 6 of the Regulation, when the Commission finds that there are **reasonable grounds** to consider that one of the infringements set out in Article 4 has occurred, unless it considers that other procedures ensure more effective protection of the EU budget, it sends the suspected Member State a written notification indicating the reasons and facts underlying the suspicion of an infringement. The Commission shall inform the European Parliament and the Council of any such notification, and, in



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accordance with Article 6(2), the European Parliament may invite the Commission to take part in a "structured dialogue." Paragraph 3 clarifies that, when assessing whether the conditions set out in Article 4 have been met, the Commission takes into account relevant information from available sources, including **decisions, proposals, and recommendations of the Union institutions**, other relevant international organizations, and **other recognized institutions**. The Commission may request additional information to conduct the assessment at any stage of the procedure (paragraph 4). The Commission's Guidelines (point 72) also expressly mention the possibility for the Commission to contact a Member State even before initiating the procedure to obtain clarifications.

25. The method for verifying this information is specified in section 14-16 of the Preamble:

*Finding violations of the rule of law requires **the Commission to conduct an in-depth qualitative assessment**. Such an assessment should be objective, impartial and fair, and should take into account relevant information from available sources and recognized 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 reports** and the **EU Justice Scoreboard**, reports of the European Anti-Fraud Office (OLAF), where appropriate of the European Public Prosecutor's Office (EPPO), and **the findings and recommendations of the relevant international organizations and networks**, including Council of Europe bodies such as the Group of States against Corruption (GRECO) and **the Venice Commission** – in particular its rule-of-law checklist, as well as the **European Network of Supreme Courts and the European Network of Councils for the Judiciary**. The Commission could consult the European Union Agency for Fundamental Rights and the Venice Commission, if this were necessary to conduct an in-depth qualitative assessment.*

26. In its Guidelines, the Commission leaves no doubt that, in determining infringements, the CJEU's judgments will be conclusive for the Commission (point 59).



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27. The Member State targeted by the Commission's actions may respond to the Commission's findings or propose remedial measures within one to three months of receiving the Commission's findings (paragraph 5). Upon receiving them, the Commission will decide whether to submit to the Council a proposal for an implementing decision concerning appropriate measures. Such an assessment should be carried out within an indicative period of one month from receipt of the State's explanations, or, in their absence, upon expiration of the deadline for their submission (para. 6). Where it intends to submit a proposal, the Commission shall set an additional one-month time limit for submitting comments, in particular as regards the proportionality of the proposed measures (paragraph 7). If the Commission deems this appropriate, in particular if the measures proposed by the state are inadequate, it shall submit to the Council a reasoned proposal for an implementing decision within one month of receiving the explanations (paragraph 9).
28. The Council adopts an implementing decision within one month of the Commission's request, with the possibility of extending that period by up to two months in exceptional circumstances, and the Commission is empowered to convene a meeting of the Council pursuant to Article 237 TFEU (paragraph 10). Acting by a qualified majority, the Council may also adopt amendments to the text proposed by the Commission (paragraph 11). In the absence of provisions to the contrary, it should be assumed that **the Council** decides on safeguard measures **by qualified majority** (Article 16(3) of the Treaty on European Union).
29. In principle, a decision can be changed after it has been made. A State affected by the decision may submit evidence in support of its annulment at any time (Article 7(1)). At the request of a Member State or on its own initiative, the Commission may reassess the situation for a period of one year from the Council's decision, as a rule within one month of receipt of the notification. The application may be dismissed by decision of the



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Commission or granted in whole or in part, resulting in an appropriate request being submitted to the Council (paragraph 2).

30. The regulation also provides for important reporting obligations, namely informing the European Parliament of ongoing proceedings (Article 8), as well as submitting a report on the application of the regulation by January 12, 2024 (Article 9).

31. At this point, attention should be drawn to the highly discretionary nature of the pending proceedings. First and foremost, the initiation of proceedings itself is discretionary. It is the Commission that is in charge of the proceedings – it decides on the initiation of the proceedings, the assessment of the evidence, corrective actions, the severity of sanctions, the assessment of the removal of violations, etc. Moreover, as follows from the reasoning set out above, the provisions of EU law and the Guidelines formulated by the Commission do not provide clear guidance as to the framework within which the Commission should operate. Interestingly, this state of affairs has also been noted by other EU institutions, which, while essentially affirming the Commission's discretionary power, have at the same time pointed out the overly vague wording of the criteria for applying the Conditionality Regulation and the lack of uniform criteria for its application.<sup>4</sup>

32. This discretionary nature of the Commission's powers has been criticized not only by those who support protecting the powers of member states, but also by those who advocate a more active fight for the rule of law, pointing out that the Commission's political opportunism is holding back the fight against illiberal democracy in countries such as Hungary and, in particular, Poland, as required by EU law.. The most extreme manifestation of this approach was the European Parliament's filing of an action for failure to act in connection with the Commission refraining from initiating proceedings against Poland and Hungary pending the CJEU's assessment of the Conditionality

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<sup>4</sup> Special report of the European Court of Auditors 03/2024: Rule of law in the EU – The provisions intended to protect the Union's financial interests have been improved, but not all risks have been eliminated Pkt. 98-106



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Regulation's compatibility with EU law. Ultimately, however, case C-657/21 was discontinued by an order dated June 8, 2022, following the Parliament's withdrawal of the action.

#### **4. Forecasts regarding the applicability of the Conditionality Regulation to Poland in connection with the SAFE Regulation**

##### **4.1. Practice to date in applying the Conditionality Regulation**

33. Understandably, as of the date this analysis was prepared, the disbursement of funds granted under the SAFE Regulation had not yet begun, and therefore no EU practice regarding the application of this act can yet be identified. However, there is already practice regarding the application of the Conditionality Regulation, even if this procedure has formally been applied only once, to Hungary<sup>5</sup>. There is also currently a threat to apply the Conditionality Regulation against Slovakia in connection with the introduction of constitutional amendments protecting the family and Slovakia's constitutional identity.

##### **4.1.1. Proceedings against Hungary**

34. Proceedings were initiated on April 27, 2022, following the Commission's finding that significant deficiencies exist in Hungary as regards public procurement law. On July 20, following an exchange of correspondence during which Hungary contested the merits of the allegations and ultimately submitted a proposal comprising 17 measures, which the Commission did not consider sufficient, the Commission informed Hungary of its intention to apply measures to protect the budget. Following Hungary's notification in August 2022, the Commission issued a decision containing a proposal to the Council to adopt sanctions on September 18, 2022.<sup>6</sup>

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<sup>5</sup> See information available at [https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation\\_en](https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en), accessed October 6, 2025, in particular the CORRIGENDUM to the Communication from the Commission to the European Parliament and the Council on the application of 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, Brussels, 23.2.2024 COM(2024) 17 final/2.

<sup>6</sup> Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary Brussels, September 18, 2022 COM(2022) 485 final 2022/0295 (NLE).



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35. The Council adopted a decision largely corresponding to the Commission's proposal (reducing the share of suspended program funds from 65% to 55%, prohibiting cooperation with persons under Hungarian law in the context of indirect or direct financing, and rejecting the Hungarian side's proposals to modify the sanctions as early as December 15, 2022.<sup>7</sup> The funds covered by the decision were to amount to EUR 6.3 billion for the period 2021-2027.
36. According to the available information, the Commission has not, to date, determined that Hungary has remedied the infringements that justified the application of measures against it under the Conditionality Regulation. Interestingly, in its report the Commission points to the mere establishment of 17 points and Hungary's taking steps toward their implementation, even though these were insufficient to bring an end to the application of measures to protect the budget, as positive reforms resulting from the application of the Conditionality Regulation. Currently, the legality of the decision to deprive Hungary of funds is under examination by the General Court in case T-138/25, following an action brought by Hungary against the Commission on March 28, 2025, and in case T-570/24 *Modul University Vienna v Commission and HADEA*, initiated by an action brought by an Austrian research institution concerning the inability of Hungarian entities to use EU funds. As of today, by order of September 25, 2025, the Court dismissed the action against the Commission as inadmissible, while continuing the proceedings against HADEA.

#### **4.1.2. Threats against Slovakia**

37. In September 2025, the National Council of Slovakia adopted constitutional amendments that, among other things, emphasize the supremacy of the Slovak Constitution over EU law, protect the identity of the family as a union between a woman and a man, affirm the biological nature of sex, and safeguard parents' right to choose their children's education.

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<sup>7</sup> Council Implementing Decision (EU) 2022/2506 of December 15, 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary.



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They have raised concerns with the Venice Commission<sup>8</sup> and with the bodies of the European Union. As early as November 2025, the Commission sent Slovakia a letter of formal notice initiating infringement proceedings<sup>9</sup>, while the Fundamental Rights Agency conveyed its concern.<sup>10</sup> Additionally, two months after the adoption of the aforementioned amendments, the European Public Prosecutor's Office published a statement on its website that, pursuant to recital 16 of the Preamble to the Conditionality Regulation, it had informed the European Commission that the amendment, under consideration in Slovakia, to the act implementing the whistleblower directive would jeopardize the security of the EU's finances, thereby justifying the application to Slovakia of measures under the Conditionality Regulation.<sup>11</sup> It is hard to avoid the impression that, given the circumstances of the case, the (as-yet unrealized) possibility of imposing measures against Slovakia under the Conditionality Regulation constitutes a form of pressure exerted by the EU institutions.

#### 4.1.3. Conclusions for Poland

38. It is hard to say what conclusions for Poland follow from Hungary's actions. First and foremost, it should be emphasized that the deficiencies identified by the Commission concerned systemic irregularities identified by various audits and through the application of the rule-of-law mechanism. They did not, however, address matters directly related to the structure of the judiciary or the appointment of judges. Moreover, the evidence differed from that in the Polish cases because it relied mainly on audit documents prepared by EU agencies, rather than on the case law of international and EU courts, as was the case with the Polish 'rule-of-law' cases. However, it appears that, from the Polish perspective, the most important point is that the proceedings in the Hungarian case

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<sup>8</sup> Venice Commission, Urgent Opinion no. CDL-PI(2025)011 of 24 September 2025 (hereinafter: Urgent Opinion), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2025\)011-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2025)011-e) (accessed January 14, 2026).

<sup>9</sup> [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_25\\_2481](https://ec.europa.eu/commission/presscorner/detail/en/inf_25_2481), accessed on January 14, 2026.

<sup>10</sup> FRA statement on recent developments affecting fundamental rights in the EU, 7 October 2025, <https://fra.europa.eu/en/news/2025/fra-statement-recent-developments-affecting-fundamental-rights-eu> (accessed January 14, 2026).

<sup>11</sup> <https://www.eppo.europa.eu/en/media/news/statement-regarding-legislative-amendments-proposed-slovak-government-whistle-blower>, accessed January 14, 2026.



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demonstrated that, from an institutional standpoint, using the mechanism for protecting the rule of law is a real possibility.

39. From this perspective, a more troubling example might be Slovakia, which is under fire from European institutions over the constitutional amendments it has adopted. There, the Conditionality Regulation is presented as one of many instruments of pressure, which can be triggered by errors in implementing a single directive. For the time being, however, we can only await further developments.

#### **4.2. So-called „rule-of-law dispute” as a ground for the Conditionality Regulation in the context of the SAFE Regulation**

##### **4.2.1. Decision in the Hungarian case as a possible justification for issuing a decision against Poland**

40. There should be no doubt that the decision discussed above had significant consequences for the Member State indicated therein (Hungary). However, it appears that from a Polish perspective its systemic aspect is the most important. Specifically, it fits a pattern in which international bodies first establish a precedent for far-reaching encroachment upon powers belonging to the "core" of state sovereignty in a technical, largely "apolitical" case, only to then use it as the basis for much more controversial actions.

41. This was the case with the European Court of Human Rights, which, after the outbreak of the "rule-of-law" dispute, in order to pave the way for judgments in controversial Polish cases, first established an appropriate precedent on an uncontroversial set of facts in the Icelandic case 26374/18 *Guðmundur Andri Ástráðsson v. Iceland* (Grand Chamber judgment of December 1, 2020). The CJEU also laid the groundwork for interference in the Polish judiciary as a pretext for formulating the relevant principles by using the CJEU judgment of February 27, 2018 in Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Conta*.



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#### 4.2.2. No prospects for ending “the rule-of-law dispute”

42. For the purposes of this analysis, it is not necessary to examine in detail the history of the dispute over the rule of law. At this point, it suffices to note that recent case law of the CJEU and national courts clearly indicates that it is far from over and may escalate at any time. As far as the CJEU is concerned, the judgment of September 4, 2025, in case C-225/22 “R” S.A. v AW “T” sp. z o.o. is of key importance. In this judgment, the CJEU held that the presence on the adjudicating panel of at least one person selected by Poland’s National Council of the Judiciary after the judicial reform of 2017 means that such a panel does not meet the EU criteria for the definition of a “court” and that its judgments cannot hinder the free application of EU law by other adjudicating panels of judges. This judgment can be interpreted as the CJEU moving up another rung on the escalation ladder. Such an interpretation is further strengthened by the domestic reaction to the above judgment. Already on September 24, 2025, i.e., less than three weeks after the CJEU’s ruling, a seven-judge panel of the Supreme Court issued, in case I PZP 1/25, on September 24, 2025, a resolution stating that judgments of the Chamber of Extraordinary Control in which the adjudicating panel includes even a single judge selected under the currently binding provisions on the National Council of the Judiciary (the so-called “neo-judge”) are non-existent judgments, as issued by a body that is not a court. Moreover, the Supreme Court held that the court against whose ruling an extraordinary complaint was filed may hear it itself, instead of the Chamber of Extraordinary Control. Leaving aside the numerous doubts as to the soundness of the Supreme Court’s ruling and the accompanying circumstances, it plainly demonstrates that **CJEU judgments clearly exacerbate the state of chaos in the Polish judiciary and significantly diminish the prospects of ending the so-called rule-of-law dispute.**

43. It is obvious that these rulings constituted an overreach of the CJEU’s powers, as is clearly indicated by the Polish Constitutional Tribunal’s judgments in cases P 7/20 and K 3/21, as well as by the resolution of the joined Civil Chamber and Labor Chamber of the Supreme Court dated December 3, 2025, in case I NZP 7/25. Moreover, bearing in mind the firm position of the President of the Republic of Poland, broadly consistent with the



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position of the political camp that supports him, regarding the validity of judicial appointments made under the provisions of the currently applicable Act on the National Council of the Judiciary (KRS) and the lack of grounds for interference by supranational bodies in the structure of the Polish judiciary,<sup>12</sup> it may reasonably be assumed that the case law discussed above will entrench the existing state of instability in the legal system.

## **5. The “rule of law” as a source of risks associated with Conditionality with respect to the SAFE Regulation**

44. The above analysis clearly indicates that the Conditionality Regulation entails numerous risks for the disbursement of funds to Poland under SAFE. That is the case for at least a few reasons. First, as established above, the Conditionality Regulation will apply to the SAFE Regulation. Secondly, as the foregoing analysis shows, the EU institutions have already paved the way for the application of the aforementioned. As for the Regulation, the Slovak example shows that it can be used as a means of pressuring Member States pursuing policies normally independent of the EU in a wide variety of areas. Third, the broadly worded provisions of the Conditionality Regulation create room for the Commission to intervene amid an ongoing rule-of-law dispute. Fourth, the latest judgments of the CJEU and the Polish Supreme Court indicate a desire for further escalation of the "rule-of-law" dispute on the part of the domestic and European liberal camp. Fifth, among liberal commentators and, occasionally, politicians, there are recurring calls to "starve" governments that are deemed populist by cutting off their sources of funding. Sixth, the sensitivity of the issue regulated by the SAFE Regulation (security) makes it politically very risky to oppose the threats coming from Brussels. Seventh, given that, according to press reports, the lion's share of the funds allocated under the SAFE Regulation is expected to go to suppliers from Poland, any potential

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<sup>12</sup> By way of example, see the President's speech of October 2, 2025 at the Royal Castle in Warsaw, <https://www.prezydent.pl/aktualnosci/wypowiedzi-prezydenta-rp/listy/prezydent-w-najblizszych-tygodniach-powolam-rade-ds-naprawy-ustroju-panstwa,108155>, accessed October 8, 2025.



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imposition of sanctions against Poland would not affect Western European corporations, thereby reducing the cost of imposing them.

45. Importantly, Article 6 of the Regulation grants the EU broad discretion in assessing evidence intended to demonstrate violations of rule-of-law values. There is, however, no doubt that even such *ultra vires* (i.e., outside the scope of the EU Treaties) judgments of the Court of Justice of the European Union not only can constitute such a means of proof (Article 6(3), point 14-16 of the Preamble ), but also, in light of the Commission's Guidelines, have particular value.
46. As already mentioned, the imposition of sanctions in addition to a finding of infringements further requires the existence of a sufficient link between the infringement and the EU's financial interests. It would seem that, in light of the criteria formulated by the CJEU and reflected in the Commission Guidelines, particularly those relating to the cross-cutting nature of the problems with judicial independence, this would not pose major difficulties.
47. This means that, in the event of a political dispute with Brussels, the Republic of Poland would, in effect, be at the mercy of EU institutions with respect to the disbursement of funds under the SAFE Regulation. It would be for the EU institutions to determine whether events occurred warranting suspension of the benefit payment.
48. Subsequently, one of the sanctions listed in the Regulation would be imposed. Unfortunately, neither the Regulation nor the Guidelines specify a catalog of available sanctions, merely stating that sanctions must be *proportional* and, where possible, relate to the areas to which the identified violations pertain. Given, however, that in the case of Poland the objections could relate primarily to the alleged lack of judicial independence, purportedly affecting all areas of the use of EU funds, it is impossible to make reasonable predictions regarding both the very possibility of applying safeguard measures and their anticipated magnitude. With absolute certainty, sanctions could include the suspension of



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the disbursement of further tranches (installments) of the loan, which would be onerous in at least two ways. First, this would concern sensitive projects with a high political priority. Second, as in the case of the National Recovery and Resilience Plan (NextGenerationEU), despite the lack of disbursement of funds, the Republic of Poland would have to bear the costs of repaying the enormous debt.

49. However, it would appear that, in principle, in such a situation it would be possible to continue fulfilling orders from national funds—in principle, the decision concerning the Member State should not adversely affect its obligations to final recipients. Importantly, in an individual case the Commission could, however, prohibit the disbursement of such funds, thereby jeopardizing the performance of a defense procurement contract. Accordingly, loans granted under the SAFE Regulation may serve European institutions as an excellent tool for interference in Poland's domestic policy, particularly given the European Commission's discretionary, if not arbitrary, power over the proceedings it conducts. Thus, it is essential for policymakers to become aware of this and to prudently manage the expectations arising from it.
50. When examining the issue of the required majority, it should be noted that, pursuant to Article 8 of the Commission's Rules of Procedure,<sup>13</sup> *Commission decisions are adopted if a majority of the members provided for in the Treaty vote "in favor". This majority is required regardless of the content and nature of the decision.* In practice, however, the rule, applied in particular to the initiation of infringement proceedings, is to make decisions unanimously. And so, the decision to apply measures against Hungary was adopted unanimously.<sup>14</sup> In the Polish context, however, it is important that the term of the current Commission (and thus also that of the commissioner nominated by the current government) does not end until 2029. If we add to this that the Council will take decisions on the application of measures by qualified majority, it should be assumed that, as a rule, Poland will have limited ability to block any decision that might be unfavorable to it.

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<sup>13</sup> Rules of Procedure of the Commission (C(2000) 3614).

<sup>14</sup> [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_22\\_5583](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5583), accessed on October 7, 2025



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## **6. Risks associated with failure to meet milestones**

51. Regardless of the above risks associated with the conditionality principle, it should be emphasized that, as was the case with Poland's National Recovery and Resilience Plan, there is a risk of a freeze on the allocated funds due to the implementation of the milestones (the conditions for disbursing subsequent loan tranches) being unsatisfactory to the European Commission and other EU institutions. However, for a proper assessment of this risk and its consequences, it would be necessary to know the provisions of the individual applications and the loan agreements concluded on their basis. The content of the national provisions under consideration and the agreements concluded with individual contractors on the basis thereof will also be relevant.