

# Rule of law-related ‘super milestones’ in the recovery and resilience plans of Hungary and Poland

On 12 December 2022, the Council adopted the Hungarian recovery and resilience plan (RRP) based on the Commission’s positive evaluation. Compared to the original plan, a whole new component of measures has been added (Component 9: Governance and Public Administration) containing 38 measures with 111 milestones and targets. Of these, 27 milestones are referred to as ‘super milestones’ without which no payment under the RRF will be allowed. These ‘super milestones’ include some of the Key Implementation Steps of the 17 remedial measures proposed by Hungary under the rule of law conditionality mechanism, some measures concerning judicial independence included in the ongoing Article 7 procedure, recent country-specific recommendations (CSRs) and the Rule of Law Reports, and also audit and control-related measures.

The Polish RRP was adopted by the Council on 17 June 2022. It only contained two ‘super milestones’ that need to be fulfilled before the first payment request is submitted, both related to the judiciary.

## Rule of law and safeguarding the EU’s financial interests

There are a number of methods the Union can use to ensure that Member States adhere to the common values and to defend its financial interests, and the two are interlinked.

The fight against fraud and corruption and the protection of the EU’s financial interests have been in focus for a long time. The issue of breaching common values and the deterioration of the rule of law in some Member States, and in particular the democratic backsliding of some countries, including Hungary and Poland, entered public debate in the last decade. The connection between the two issues is based on the fact that the EU’s ability to act in defence of its financial interests lies with the Member States’ authorities and therefore the rule of law in these countries.

Consequently, the Rule of Law Review Cycle was established in 2019 in order to promote the rule of law and prevent breaches through the issuing of annual recommendations. However, effective implementation of the recommendations, similarly to the CSRs in the European Semester framework, could not be achieved.

After numerous attempts to achieve change via soft measures, the need to connect the aspects of the rule of law and the protection of EU financial interests was acknowledged in the wake of COVID-19. The



Conditionality Regulation<sup>1</sup>, adopted in a package with the 2021-27 MFF and the NGEU, acknowledges the connection of the rule of law to the safeguarding of the EU's financial interests and establishes the possibility to suspend or withhold payments in MFF programmes. It also requires Member States to 'effectively address all or a significant subset of challenges identified in the relevant country-specific recommendations'.

The RRF Regulation<sup>2</sup> was drawn up as an instrument linking EU funds to mutually agreed conditions, including safeguards against fraud, corruption, conflicts of interest and the protection of the EU's financial interests (Article 22). Therefore, in the case of many Member States, where the initial Commission evaluation found gaps in the audit and control systems or other aspects of protecting EU funds, the RRFs contain specific milestones and targets to remedy this situation<sup>3</sup>. As the adequacy of the control and audit systems is a precondition to the payment of any RRF money (except for pre-financing), these milestones need to be achieved before the submission of the first payment request by the Member State.

Several national plans contain rule of law or audit and control related milestones, the latter to be achieved before the first payment. The number, complexity and varied nature of 'super milestones' in the Hungarian plan, however, encompassing reforms of the judiciary, public administration and legal system, is unique.

## Country comparison

### Recovery and resilience plans

The 27 'super milestones' in **Hungary's** RRP (see Annex)<sup>4</sup> are mostly the initial steps of the different measures listed under the component added to the RRP as a result of negotiations between the Commission and the Hungarian authorities. The component is entitled 'Governance and public administration' and contains measures addressing 'long-standing horizontal challenges related to the robustness and functioning of the public institutions in general, which has implications also on economic and social processes in the country'. The major areas included are corruption, public procurement, judicial independence and decision-making, most of which featured in the Article 7 procedure and one or more rule of law reports on Hungary.

These milestones partly address the CSRs of 2019, 2020 and 2022, to 'Reinforce the anti-corruption framework' (CSR 4 of 2019 and 2022), 'Improve competition in public procurement' (CSR 4 of 2020 and 2022), 'Strengthen judicial independence' (CSR 4 of 2019 and 2022), 'Improve the quality and transparency of the decision-making process' (CSR 4 of 2019 and 2022), 'Simplify the tax system' (CSR 4 of 2019 and 2022), and 'Strengthen the tax system against the risk of aggressive tax planning' (CSR 4 of 2019 and 2020). A number of milestones correspond to remedial measures proposed by Hungary in the procedure under the Conditionality Regulation. Another set of milestones are related to setting up the audit and control system required before any payment can be disbursed under the RRF Regulation.

There is no mention of the Conditionality Regulation in the assessment of the RRP of **Poland**<sup>5</sup>, (adopted before the publication of the 2022 Rule of Law Report). The two milestones to be achieved before the first payment request are both related to the justice system, which is the main focus of the rule of law-related concerns in the country according to the Article 7 procedure, the Rule of Law Reports and the CSRs.

The following sections will review the appearance of rule of law-related concerns in different relevant EU mechanisms and identify the possible bases for the 'super milestones' in the two national plans.

<sup>1</sup> [Regulation \(EU, Euratom\) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget](#), OJ L 433 I, 22.12.2020, p. 1.

<sup>2</sup> [Regulation \(EU\) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility](#), OJ L 57, 18.2.2021, p. 17.

<sup>3</sup> [European Court of Auditors Special Report No 21/2022: The Commission's assessment of national recovery and resilience plans](#), Annex VIII, 8 September 2022.

<sup>4</sup> Annex to the [proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary](#), SWD(2022)0686, p. 87.

<sup>5</sup> [Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland](#), COM(2022)0268.

## Article 7 procedure

The mechanism based on [Article 7 TFEU](#) aims to ensure that all Member States respect the values of the EU, including human dignity, freedom, democracy, equality, the rule of law and human rights. This mechanism was launched against both Poland and Hungary on the basis of a number of concerns.

Table 1. Rule of law concerns in Hungary and Poland

Parliament listed the following concerns in its resolution triggering the Article 7 procedure against <b>Hungary</b> <sup>6</sup> :	The concerns of the Commission expressed in its reasoned proposal launching the Article 7 procedure against <b>Poland</b> <sup>7</sup> relate to:
<ul style="list-style-type: none"> <li>• the functioning of the constitutional and electoral system;</li> <li>• the independence of the judiciary and of other institutions and the rights of judges;</li> <li>• corruption and conflicts of interest;</li> <li>• privacy and data protection;</li> <li>• freedom of expression;</li> <li>• academic freedom;</li> <li>• freedom of religion;</li> <li>• freedom of association;</li> <li>• the right to equal treatment;</li> <li>• the rights of persons belonging to minorities, including Roma and Jews, and protection against hateful statements against such minorities;</li> <li>• the fundamental rights of migrants, asylum seekers and refugees;</li> <li>• economic and social rights.</li> </ul>	<ul style="list-style-type: none"> <li>• the lack of an independent and legitimate constitutional review;</li> <li>• the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland:               <ul style="list-style-type: none"> <li>○ the law on the Supreme Court; approved by the Senate on 15 December 2017;</li> <li>○ the law amending the law on the Ordinary Courts Organisation ('law on Ordinary Courts Organisation'); published in the Polish Official Journal on 28 July 2017 and in force since 12 August 2017;</li> <li>○ the law amending the law on the National Council for the Judiciary and certain other laws ('law on the National Council for the Judiciary'); approved by the Senate on 15 December 2017;</li> <li>○ the law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation and certain other laws ('law on the National School of Judiciary'); published in the Polish Official Journal on 13 June 2017 and in force since 20 June 2017.</li> </ul> </li> </ul>

<sup>6</sup> [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](#), OJ C 433, 23.12.2019, p. 66.

<sup>7</sup> [Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law](#), COM(2017)0835, 20 December 2017.

## Country-specific recommendations

In the framework of the European Semester, each year the Commission issues country-specific recommendations (CSRs) relating to the economic, financial and fiscal situation of the Member States. In order to improve the low implementation rate of these CSRs in most Member States, the RRF Regulation<sup>8</sup> stipulated that RRP had to address the outstanding CSRs.

Both Poland and Hungary had in recent years been issued with CSRs in the area of the rule of law in which no progress had been achieved until the May 2022 assessments, with some of the issues included again in the 2022 recommendations. Therefore, some of the relevant CSRs issued between 2019 and 2022 were included in the RRP as milestones.

Table 2. May 2022 Commission assessment of **Hungary's** progress concerning CSRs<sup>9</sup>

<b>CSR4 of 2019</b>	
Reinforce the anti-corruption framework, including by improving prosecutorial efforts and access to public information	No Progress
Strengthen judicial independence	No Progress
Improve the quality and transparency of the decision-making process through effective social dialogue	No Progress
Engagement with other stakeholders and through regular, appropriate impact assessments.	No Progress
Improve competition and regulatory predictability in the services sector	No Progress
<b>CSR4 of 2020</b>	
Ensure that any emergency measures be strictly proportionate, limited in time and in line with European and international standards and do not interfere with business activities and the stability of the regulatory environment	Limited Progress
Ensure effective involvement of social partners and stakeholders in the policy-making process	No Progress
Improve competition in public procurement	Limited Progress

Table 3. May 2022 Commission assessment of **Poland's** progress concerning CSRs<sup>10</sup>

<b>2019 CSR3</b>	
Improve the regulatory environment, in particular by strengthening the role of consultations of social partners and public consultations in the legislative process	No Progress
<b>2020 CSR 4</b>	
Enhance the investment climate, in particular by safeguarding judicial independence	No Progress
Ensure effective public consultations and involvement of social partners in the policymaking process	No Progress

<sup>8</sup> [Regulation \(EU\) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility](#), OJ L 57, 18.2.2021, p. 17.

<sup>9</sup> [Country Report – Hungary 2022](#), Commission Staff Working Document, SWD(2022)0614.

<sup>10</sup> [Country Report – Poland 2022](#), Commission Staff Working Document, SWD(2022)0622.

The 2022 CSRs<sup>11</sup>, very similarly to the previous ones, recommend that in the area of the rule of law **Hungary** take action in 2022 and 2023 to: ‘Reinforce the anti-corruption framework, including by improving prosecutorial efforts and access to public information, and strengthen judicial independence. Improve the quality and transparency of the decision-making process through effective social dialogue, engagement with other stakeholders and regular impact assessments. Continue simplifying the tax system. Improve regulatory predictability and competition in the services sector in particular in retail and utilities, and apply competition scrutiny systematically in business transactions. Improve competition in public procurement.’

In the case of **Poland**, the 2022 CSRs<sup>12</sup> again recommend taking action in the area of the rule of law, again, recommend to: ‘Enhance the investment climate, in particular by safeguarding judicial independence. Ensure effective public consultations and involvement of social partners in the policy-making process.’

## Rule of Law Reports

The Rule of Law Reports monitor the situation and developments concerning the rule of law in Member States. They evaluate the justice system, the anti-corruption framework, media pluralism, and institutional checks and balances.

Concerning **Hungary**, the main issues addressed in the reports are the justice system (2020<sup>13</sup>, 2021<sup>14</sup>, 2022<sup>15</sup>), including judicial independence (2020, 2022), the institutional anti-corruption framework and strategy (2020, 2021), independent control mechanisms (2020, 2021), interconnections between politics and business (2020, 2021), the lack of determined action to investigate and prosecute corruption cases involving high-level officials or their immediate circle (2020, 2022), restrictions to media freedom and pluralism (2020, 2021, 2022), a hostile environment on and pressure for civil society organisations (2020, 2021, 2022), challenges as regards transparency and access to public information (2020, 2021), insufficient transparency and quality of the legislative process (2020, 2021), questions of legal certainty (2020), political party financing (2021), lobbying and ‘revolving doors’ (2021, 2022), clientelism, favouritism and nepotism in high-level public administration (2021), checks and oversight of asset and interest declarations (2021, 2022), and newly established private trusts receiving significant public funding, managed by board members close to the current government (2021).

The recommendations issued in the 2022 Rule of Law Report for Hungary come in addition to ‘recalling the obligation to comply with the rule of law-related rulings of the ECJ and the rule of law related infringement procedures [...], the concerns raised under the conditionality regulation, the relevant concerns raised in the Article 7 TEU procedure initiated by the European Parliament, and recalling the relevant country-specific recommendations under the European Semester’.

The main concerns mentioned in **Poland’s** Rule of Law Reports are connected to the 2015 justice reforms (2020<sup>16</sup>, 2021<sup>17</sup>, 2022<sup>18</sup>), while some weaknesses are mentioned in relation to the anti-corruption framework (2020, 2021), the independence of the main institutions responsible for the prevention of and fight against corruption (2021), the asset declaration system and lobbying (2021, 2022), the independence of the media regulator (2020 with improvements in 2021), the limited consultation of stakeholders or opportunities for the opposition to play its role in the law-making process (2020), and pressure on the system of checks and balances (2021).

<sup>11</sup> [Recommendation for a Council Recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary](#), COM(2022)0614, 3 May 2022.

<sup>12</sup> [Recommendation for a Council Recommendation on the 2022 National Reform Programme of Poland and delivering a Council opinion on the 2022 Convergence Programme of Poland](#), COM(2022)0622, 23 May 2022.

<sup>13</sup> [2020 Rule of Law Report – Country Chapter on the rule of law situation in Hungary](#), SWD(2020)0316, 30 September 2020.

<sup>14</sup> [2021 Rule of Law Report – Country Chapter on the rule of law situation in Hungary](#), SWD(2021)0714, 20 July 2021.

<sup>15</sup> [2022 Rule of Law Report – Country Chapter on the rule of law situation in Hungary](#), SWD(2022)0517, 13 July 2022.

<sup>16</sup> [2020 Rule of Law Report – Country Chapter on the rule of law situation in Poland](#), SWD(2020)0320, 30 September 2020.

<sup>17</sup> [2021 Rule of Law Report – Country Chapter on the rule of law situation in Poland](#), SWD(2021)0722, 20 July 2021.

<sup>18</sup> [2022 Rule of Law Report – Country Chapter on the rule of law situation in Poland](#), SWD(2022)0521, 13 July 2022.

The recommendations issued in the 2022 Rule of Law Report for Poland also recall ‘the need to address the serious concerns relating to judicial independence, in particular those set out in the Article 7 TEU procedure initiated by the Commission, as well as the obligation to comply with the rule of law related rulings of the ECJ and the rule of law related infringement procedures [...], the commitments made under the National Recovery and Resilience Plan relating to certain aspects of the justice system and the checks and balances, and recalling the relevant country-specific recommendations under the European Semester’. The report also gives more detailed recommendations concerning the independence of the prosecution service from the government, independent and effective investigations and prosecutions, the broad scope of immunities for top executives, high-level corruption cases, the granting of operating licences to media outlets, governance and the editorial independence of public service media, the Supreme Audit Office, and the framework in which civil society and the Ombudsperson operate.

### Conditionality Regulation

In its proposal to temporarily suspend 65% of commitments for certain cohesion policy programmes for **Hungary** for the period 2021-2027, the Commission reasons that ‘the issues identified in the notification and reiterated in the intention letter are still valid and they constitute systemic breaches of the principles of the rule of law within the meaning of Article 2(a) of the Conditionality Regulation, in particular of the principles of legal certainty and prohibition of arbitrariness of the executive powers, pursuant to Article 4(1) of the Conditionality Regulation in light of Article 3(b) thereof.’ The concerns relate to public procurement procedures; financial control, monitoring and audit; transparent financial management and accountability systems; the prevention and sanctioning of breaches of EU law, and the protection of the financial interests of the Union<sup>19</sup>.

In its second response to the issues (after its first was deemed inadequate), Hungary submitted to the Commission a list of remedial measures<sup>20</sup> (see table 4). Thirteen of the remedial measures set Key Implementation Steps to be fulfilled by 19 November 2022, while the others require a longer implementation period. These proposed measures form one of the bases of the measures included in the ‘Governance and public administration’ component of the Hungarian RRP, and the 27 ‘super milestones’. Recital 38 of the Council Implementing Decision (CID) proposal finds that these remedial measures, if implemented correctly, would in principle be sufficient to address the concerns.

In its communication of 30 November 2022<sup>21</sup>, the Commission evaluated the progress made in implementing these remedial measures and found that only part of the Key Implementation Steps had been adequately undertaken (see table 4).

No Conditionality Regulation procedure has been activated against **Poland** for the time being.

<sup>19</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](#), COM(2022)0485, 18 September 2022.

<sup>20</sup> [Annexes to the Explanatory Memorandum of the Commission 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](#), COM(2022)0485, 18 September 2022.

<sup>21</sup> [Communication from the Commission to the Council on the remedial measures notified by Hungary under Regulation \(EU, Euratom\) 2020/2092 for the protection of the Union budget](#), COM(2022)0687.

Table 4. Remedial actions submitted by Hungary and their fulfilment

	Measure <sup>22</sup>	Fulfilment <sup>23</sup> (30/11/2022)	'Super milestone'
i.	Reinforcing prevention, detection and correction of illegalities and irregularities concerning the implementation of Union funds through a newly established Integrity Authority	No	160
ii.	Anti-Corruption Task Force	Yes	166
iii.	Strengthening the Anti-Corruption Framework	No	171
iv.	Ensuring the transparency of the use of Union support by public interest asset management foundations	No	174
v.	Introduction of a specific procedure in the case of special crimes related to the exercise of public authority or the management of public property	No	169
vi.	Strengthening audit and control mechanisms to guarantee the sound use of EU support	Yes	217-221
vii.	Reducing the share of tender procedures with single bids financed from Union funds	Yes	195
viii.	Reducing the share of tender procedures with single bids financed from the national budget	n.a.*	195
ix.	Development of a single-bid reporting tool to monitor and report on public procurements closed with single-bids	Partly**	195
x.	Development of the Electronic Public Procurement System (EPS) to increase transparency	Partly**	197, 198
xi.	Development of a performance measurement framework assessing the efficiency and cost effectiveness of public procurements	Partly**	200, 201
xii.	Adoption of an action plan to increase the level of competition in public procurement	n.a.*	
xiii.	Training to be provided for micro, small and medium-sized enterprises on public procurement practices	n.a.*	
xiv.	Setting up a support scheme for compensating the costs associated with participating in public procurement of micro, small and medium-sized enterprises	n.a.*	
xv.	Application of ARACHNE	Yes	222, 223
xvi.	Strengthening cooperation with OLAF;	Yes	226
xvii.	Adoption of a legislative act ensuring enhanced transparency of public spending'	Yes***	175

\* No relevant Key Implementation Step; to be continuously monitored

\*\* Key Implementation Steps taken; more time required for full implementation

\*\*\* Fulfilled with some exceptions; to be monitored.

<sup>22</sup> [Annexes to the Explanatory Memorandum of the Commission 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](#), COM(2022)0485, 18 September 2022; [Country Report – Poland 2022](#), Commission Staff Working Document, SWD(2022)0622.

<sup>23</sup> [Communication from the Commission to the Council on the remedial measures notified by Hungary under Regulation \(EU, Euratom\) 2020/2092 for the protection of the Union budget](#), COM(2022)0687.

## Conclusion

The large part of the 27 'super milestones' in the **Hungarian** RRP cover the rule of law issues, that have been on the agenda for several years and have mostly been mentioned in more than one of the EU's rule of law related mechanisms: CSRs, Rule of Law Reports, and the Article 7 procedure. Most of them correspond to the remedial measures proposed by the Hungarian government in the framework of the Conditionality procedure. The remaining 'super milestones' relate to the audit and control system of the RRF. (see Annex)

Both rule of law related milestones in the **Polish** RRP are dealing with the country's courts. Likewise, concerns about the rule of law situation in Poland, detailed in the different procedures, seem to be more focused of the issues related to the judiciary. While numerous other matters are mentioned in the EU's rule of law related reports, they appear to be less prominent.

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