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Budget conditionality judgments

A virtuous circle of solidarity to overcome moral hazard?

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I. Introduction

The twin judgments in *Budget Conditionality* link clearly the EU budget with solidarity, mutual trust and effective implementation of EU law.¹ By doing so, these judgments mark a new stage in the evolution of the principle acting as cornerstones of the European Union: after 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*,² *Costa v Enel*,³ or *Cassis de Dijon*⁴ have been in the project of making the EU a community of Member States thanks to integration through law.⁵ However, the EU has learned some lessons over time and knows now 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, it is not only a lofty component of a constitutional imaginary,⁶ it can also be interpreted and used as a technical antidote, strategic argument and convincing narrative against moral hazard, as the CJEU skilfully shifts its language to rely on a more explicitly on an economic dimension in its vocabulary. This allows for the solidarity to percolate into the minute details of the EU financial architecture in its operationalisation.

Moral hazard⁷ suggests the idea of an opportunistic behaviour by which one person take advantage of a collective good, such as insurance. Solidarity is, by contrast, an overly discussed moral,⁸ political philosophical⁹ and legal¹⁰ concept with no clear delineation. It indicates an idea of togetherness in the face of a challenge or to achieve the realisation of a cause, often by opposition to 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.*”¹¹ This paper argues that the Court of Justice of the

¹ CJEU, C-157/21, 16 February 2022, *Poland v European Parliament*, ECLI:EU:C:2022:98, [147]; CJEU, C-156/21, 16 February 2022, *Hungary v European Parliament*, CLI:EU:C:2022:97, [129].

² CJEU, C-26/62, 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, ECLI:EU:C:1963:1.

³ CJEU, C-6/64, 15 July 1964, *Costa v Enel*, ECLI:EU:C:1964:66.

⁴ CJEU, C-120/78, 20 February 1979, *Reve v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.

⁵ R. Byberg, ‘The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe’ 2017 (18:6) *German Law Journal* 1531–56.

⁶ 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) 161–88.

⁷ J. Marshall, ‘Moral hazard’ (1976) (66:5) *The American Economic Review* 880–90.

⁸ E.g. A. Kolers, *A Moral Theory of Solidarity* (OUP 2016).

⁹ E.g. S. Wilcox, ‘Review: Sally J. Scholz, *Political Solidarity*, Penn State UP, 2008, 286pp., \$55.00 (hbk), ISBN 9780271034003’, *Notre Dame Philosophical Reviews*, available at <https://ndpr.nd.edu/reviews/political-solidarity/>; see F. Tava, ‘Justice, Emotions, and Solidarity’ (2021) (26:1) *Critical Review of International Social and Political Philosophy* 39–55 discussing solidarity in Habermas as a response to feminist ideas grounded in an ethics of care.

¹⁰ Often starting from Durkheim, Habermas or Hegel (see Carsten Gerner-Beuerle and Ana Bobic in this special issue for instance).

¹¹ 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) 161–75, 166.

European Union (CJEU) is very much trying to flesh this ‘empty signifier’ by linking it to concrete practical implications in the realm of EU public finances, and hence that the *Budget conditionality* cases are a corner stone in providing the structure for a common practice for joint interpretation across the EU institutions and its Member States. 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 embedding solidarity as the cornerstone of the EU legal order as direct effect, primacy or mutual recognition have been once upon the time, and similarly to these concepts, to the effect of ensuring the effective implementation of the law. The *Budget Conditionality* judgments have been graced with the label of landmark cases immediately,¹² with the literature mostly emphasising 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 is often overlooked in the academic discussions of these two judgments: firstly, this principle bridges the EU values (rule of law) with the technicalities of EU finances and secondly, it transforms the EU legal discourse from legal competences on which money is spent (EU policies) into EU goods and resources. The CJEU proceeds with a market language shift; 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 responsibility shouldered in solidarity for resources spent on shared goals, those of securing the rule of law and in its suit peace and democracy (by contrast with systems that are not based on such legal principles especially in the EU neighbourhood).

This paper proceeds as follows: it starts with replacing solidarity and moral hazard in the specific context of the Next Generation EU (NextGenEU) and the Resilience and Recovery Facility (RRF) (II), before discussing the solidarity construct in the *Budget Conditionality* judgments (III) and its institutional operationalisation (IV) and practical concretisation (V). This will allow us to revisit the virtuous circle solidarity facilitates so as to act as an antidote to moral hazard (VI), before concluding.

K. Lenaerts and S. Adams, ‘La solidarité, valeur commune aux États membres et principe fédératif de l’Union européenne’ (2021) 57 *Cahiers de droit européen* 307–417 [i still need to include this a bit more into the overall narrative], referred to by Opinion of AG Campos Sanchez-Bordona, C-156/21, 2 December 2021, *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2021:974, footnote 56.

II. NextGenEU: Changing gears

The NextGenEU, the financial package put together to fight the economic consequences of the Covid-19 pandemic in the EU, may be (or not) a possible game changer¹³ or a Hamilton¹⁴ moment for European fiscal federalism. Although the mechanism is temporary in nature,¹⁵ the EU is for the first time allowed to borrow money on financial markets on a large scale

¹² 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* (Daloz 2023) 255–65.

¹³ M. Buti and S. Fabbrini, ‘Next Generation EU and the Future of Economic Governance: Towards a Paradigm Change or Just a Big One-off?’ (2022) (30:4) *Journal of European Public Policy* 676–695; S. Grund and A. Steinbach, ‘Debt-financing the EU’ (2024) 61 *Common Market Law Review* 993–1018, 999.

¹⁴ P.-A. Van Malleghem, ‘NextGenerationEU: Hamiltonian moment or European New Deal?’ (2023) 42 *Yearbook of European Law* 3–41; C. de la Porte and M. Dagnis Jensen, ‘The Next Generation EU: An Analysis of the Dimensions of Conflict behind the Deal’ (2021) (55:2) *Social Policy and Administration* 388–402.

¹⁵ For the importance on this feature in relation to the constitutionality of NextGenEU according to the German Constitutional Court, see S. Grund and A. Steinbach, ‘Debt-financing the EU’ (2024) 61 *Common Market Law Review* 993–1018, 1002–3.

(approximately four annual EU budgets; less than the multi-annual framework), allowing it to have more financial space to push its policy priorities forward. The NextGenEU is thus providing the EU with a wider distributive mechanism than it previously had.¹⁶ The route for agreeing on this financial redistribution marks a change in how solidarity is understood at 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.

The first stage is linked with the EMU and the sovereign debt crisis, where the debate about solidarity was framed around financial assistance under extreme financial circumstances. The main idea was that the market would be the disciplinary technique, so much so that to avoid moral hazard, Member States had to remain the primary 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 serviced.¹⁷ This showed that the maintenance of the EMU and collective financial health across the EU required some drastic interventions to organise bailing out countries out of the financial crisis. In the seminal *Pringle* judgment,¹⁸ the CJEU accepted a flexible interpretation of article 125 TFEU as long as conditions were linked to financial assistance to distressed Member States so that they were not disincentivised from being responsible for their debts.¹⁹ In this sense, solidarity meant that Member States could take measures in their direct interests while helping struggling Member States along the way. The antidote against moral hazard remained individual responsibility enforced by financial discipline, even if smoothed by financial assistance.

The second stage of the dynamics between moral hazard and solidarity witnesses the discontent of some Member States, in particular the Netherlands, Austria, Denmark and Sweden – Member States mostly positively contributing to the EU budget, also known as the “Frugal Four” – in the face of Member States, such as Hungary and Poland, essentially major beneficiaries of the EU budget (in particular of the Cohesion Policy and Structural Funds),²⁰ 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 pleaded for suspending or limiting financial transfers to Poland and Hungary. However, problems for operationalising article 7 of the TFEU appeared²¹ and only slowly judgments

¹⁶ 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) xxii.

¹⁷ F. Bruno, ‘Eurozone Policy and Crisis’ in T. Biebricher, P. Nedergaard, and W. Bonefeld (eds), *The Oxford Handbook of Ordoliberalism* (OUP 2022) 486–99, 490; H. Schepe, ‘The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone’ (2017) (44:1) *Journal of Law and Society* 79–98.

¹⁸ CJEU, C-370/12, 27 November 2012, *Thomas Pringle v. Ireland*, ECLI:EU:C:2012:756, [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.”

¹⁹ P. Craig, ‘Pringle: Legal Reasoning, Text, Purpose and Teleology’ (2013) (20:1) *Maastricht Journal of European and Comparative Law* 3–11; H. Schepel, ‘The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone’ (2017) (44:1) *Journal of Law and Society* 79–98.

²⁰ https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/spending-and-revenue_en; <https://www.statista.com/chart/18794/net-contributors-to-eu-budget/> (budget 2021).

²¹ 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’ (2020) 39 *Yearbook of European Law* 3–121.

condemning Poland and Hungary were pronounced,²² with the European Parliament calling the Council to determine if Hungary was at risk of breaching article 7²³ and accusing the European Commission of lacking the willingness to use the infringement procedure²⁴ or to proceed with the so-called nuclear option of article 7.²⁵ During this stage, solidarity is invoked in a functional manner by the Frugal Four: financial transfers suppose a community of values, these transfers are done for the direct and indirect benefit of all Member States and not for the only benefit of some Member States, or even worse for the benefit of some political parties in those Member States, that did not intend to play by the rules of the game. But moral hazard was in full swing, because the rules of the game were not enforced or only in a weak and slow manner so that compliance with EU fundamental principles was not guaranteed, resulting in a sense of betrayal by those Member States which positively contributed to the EU budget while seeing the benefits of the EU legal order and internal market being jeopardised by a weakening of mutual trust in the functioning of the legal order in some net-beneficiaries 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 of net contributors), it requires good faith and good will 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 to put the collective long-term interest ahead. In a nutshell, this stage shows how the (perceived) actualisation of moral hazard threatens solidarity, or gives the opportunity to some players to withdraw their contributions and support to the realisation of the common project – i.e. the functioning of the EU.

The third stage of the dynamics between moral hazard and solidarity is reached with the Covid-19 pandemic, which was declared to be a symmetrical external shock,²⁶ meaning that no country was blamed for the predicaments 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”.²⁷ The NextGenEU funds were not allocated evenly, but where the crisis struck most strongly,²⁸ highlighting the solidarity dimension of this financial package. However, the specific role of the Frugal Four, and in particular the Netherlands,²⁹ in shaping the overall financial package shows that these Member States – even if they agreed on the principle – remained attentive to protect solidarity from being reduced to shred so as to avoid coming to regret their confidence in the EU redistributive machinery. This evolution resulted in the

²² A. Torres Pérez, ‘From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence’ (2020) (27:1) *Maastricht Journal of European and Comparative Law* 105–19.

²³ 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)).

²⁴ 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)).

²⁵ L. Pech, ‘Article 7 TEU: From ‘Nuclear Option’ to ‘Sisyphian Procedure?’ in U. Belavusau, and A. Gliszczynska-Grabias (eds), *Constitutionalism under Stress* (OUP 2020) 157–74.

²⁶ “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 24.03.2020 available at <https://www.consilium.europa.eu/en/press/press-releases/2020/03/24/remarks-by-mario-centeno-following-the-eurogroup-meeting-of-24-march-2020/>).

²⁷ A. Crespy and L. Schramm, ‘Breaking the Budgetary Taboo: German Preference Formation in the EU’s Response to the Covid-19 Crisis’ (2024) (33:1) *German Politics* 46–67, 58–9.

²⁸ S. Grund and A. Steinbach, ‘Debt-financing the EU’ (2024) 61 *Common Market Law Review* 993–1018, footnote 25.

²⁹ 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’ (2024) *Journal of European Public Policy* 1–27.

NextGenEU exhibiting three key features in terms of solidarity: with respect of the level of the financial commitments, of the legal basis and of the conditionality.

At the level of the financial commitments first, there is now an EU common debt of approximately EUR 400 bio by way of borrowing on the financial market, most of which incurred after 2020.³⁰ The NextGenEU debt needs to be paid back by the EU thanks to its revenues as from 2028.³¹ The revenues will either come from the EU own resources by way of existing and new taxes still to be agreed upon or from an increase of the ceiling of national contributions.³² 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.³³ At the level of the legal basis secondly, the RRF, the main spending instrument for the NextGenEU, has article 172 TFEU as legal basis,³⁴ which is the article providing for social cohesion policies. Legal scholarship discussed the appropriateness of this legal basis,³⁵ 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 social cohesion and solidarity. At the level of the conditionality finally, the Frugal Four and the European Parliament obtained that 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,³⁶ and complying with the country recommendations of the European Semester; a horizontal conditionality is linked to the respect of the EU Charter of Fundamental Rights,³⁷ and a horizontal conditionality is linked to the respect of the rule of law, to which we turn in the next section.

Overall, these three layers 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, but various technical legal expressions of solidarity of varying intensity. The ways in which they come together is not clearly articulated across the legal architecture of the NextGenEU

³⁰ https://commission.europa.eu/strategy-and-policy/eu-budget/eu-borrower-investor-relations/eu-debt-securities-data_en.

³¹ https://commission.europa.eu/strategy-and-policy/eu-budget/eu-borrower-investor-relations/nextgenerationeu_en.

³² Council Decision [2020/2053](#) of 14 December 2020 on the system of own resources of the EU, *OJ L* 2020, 424/1, Articles 2 and 3.

³³ See e.g. The Own Resources Decision (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 between a *pro rata* commitments and a joint and several liability S. Grund and A. Steinbach, ‘Debt-financing the EU’ (2024) 61 *Common Market Law Review* 993–1018, 1016.

³⁴ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, *OJ* 18.2.2021, L 57/17.

³⁵ 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) 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’ (2024) *Hague J Rule Law*, see also C. Gerner-Beuerle, ‘Competition and redistribution in Economic and Monetary Union’ in this special issue.

³⁶ 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, *OJ L* 2020, 433/23, Article 1 (2).

³⁷ 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, *OJ L* 231, 30.6.2021, 159–706, Article 15(1) and Annex 3.

however. The question was thus whether solidarity fade in the background the legal obstacles and arguments would mounted against the NextGenEU and its satellites, or whether solidarity would gain in strength by becoming an operationalizable argumentative antidote against opportunistic behaviour and moral hazard.

III. Budget Conditionality Judgments

The Conditionality Regulation³⁸ provides that the EU can suspend and withdraw financial transfers to a Member State in cases of breaches to the principle of the rule of law.³⁹ It sets out the procedure to be initiated by the European Commission and decided by the Council.⁴⁰ Poland and Hungary challenged the validity of this regulation on various counts, including its legal basis and its scope. For these two Member States 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 of the TEU.

Advocate General Campos Sanchez-Bordona rejected these arguments, emphasising 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”⁴¹. 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”)⁴² and that “the conditionality mechanism applies financial corrective action rather than penalties for breach of the principles of the rule of law”⁴³. According to him, the techniques of the conditionality regulation are akin to those used in the financial regulations and not those of article 7 of the TEU, meaning that there was no circumvention of this Article.⁴⁴

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 does not set the threshold as high as argued by Poland and Hungary, it is mindful to limit the scope of action of the European Commission and to leave some room for interpretation in future case law. Three features of the judgements deserve especially attention from a solidarity perspective.

Firstly, the CJEU elaborates its reasoning in a principled manner in the Polish Judgment⁴⁵ and in the Hungarian Judgement,⁴⁶ and then applies the principles to the facts of the case.⁴⁷ In the principle the CJEU sets out, it notably posits that

³⁸ Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 that set a general regime of conditionality for the protection of the Union budget.

³⁹ Regulation 2020/2092, Article 3.

⁴⁰ Regulation 2020/2092, Article 6.

⁴¹ Opinion of AG Campos Sanchez-Bordona, C-156/21, 2 December 2021, *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2021:974 [143].

⁴² Ibid [182].

⁴³ Ibid [186].

⁴⁴ Ibid [236].

⁴⁵ CJEU, C-157/21, 16 February 2022, *Poland v European Parliament*, ECLI:EU:C:2022:98, [147]-[149].

⁴⁶ CJEU, C-156/21, 16 February 2022, *Hungary v European Parliament*, CLI:EU:C:2022:97 [129]-[132].

⁴⁷ CJEU, C-157/21, 16 February 2022, *Poland v European Parliament*, ECLI:EU:C:2022:98 [150]-[190]; CJEU, C-156/21, 16 February 2022, *Hungary v European Parliament*, CLI:EU:C:2022:97 [134]-[198].

“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, as is moreover stated in recital 5 of the contested regulation, with the values contained in Article 2 TEU, which include the value of the rule of law.”⁴⁸

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 interests of the Union*”.⁴⁹ 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*”.⁵⁰

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.⁵¹

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. In short, the Conditionality regulation can be used for implementing the financial regulations, but not for protecting the rule of law in general. It is not supposed to have a coercive or punitive effect as article 322 TFEU does not encompass such measures.⁵²

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.

These features of the *Budget Conditionality* judgments lead to three comments. First, the European Commission has been accused in the past of reluctance in using its power to initiate infringements proceedings in relation to breaches of the rule of law.⁵³ The commitment of the European Commission to ensuring the effectiveness of the Conditionality regulation and its credibility is not clear. The CJEU however clarifies how it expects the Commission to

⁴⁸ CJEU, C-157/21, 16 February 2022, *Poland v European Parliament*, ECLI:EU:C:2022:98, [147].

⁴⁹ Ibid [148].

⁵⁰ Ibid [149].

⁵¹ M. Fiscaro, ‘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’ (2022) 18 *European Constitutional Law Review* 334–56.

⁵² R. Gadbled, ‘Addressing System Deficiencies in the Protection of the Financial Interests of the EU: Preventing Harm and Incentivizing Change’ 2023 (24:6) *German Law Journal* 1023–43.

⁵³ P. Bárd, ‘In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU law’ (2021) (21:1-3) *European Law Journal* 185–210.

demonstrate its commitment to the rule of law in action and not only in words or risking standing accusing of arbitrariness in the protection of the rule of law. Secondly, the *Budget Conditionality* judgments mean that an open 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 punishment: the effective implementation of the law (here with impact for the EU financial interests or the principle of sound financial management) is necessary for mutual trust; the measures that can 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 mindful of solidarity and mutual trust, Member States are encouraged to comply with the law (i.e. with impact for 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. 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 Member State targeted, from the other Member States and from the other EU institutions.

The *Budget Conditionality* judgments have thus three far-reaching technical consequences with ramifications for the interpretation of solidarity and its implications on moral hazard. Firstly, the judgments focus on the EU budget and the responsible use of the ‘common resources’,⁵⁴ while the EU system refers to the EU ‘own resources’ in its budget taxonomy. ‘Common resources’ is not a term of art 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’⁵⁵. 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’⁵⁶ 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.’⁵⁷ Budgetary decisions and EU economic governance have been understood in terms of “common pool problem”, in the sense that there is an “asymmetry of perceived spending benefits and costs”.⁵⁸ The literature refers to this concept when “central” resources are spent to finance projects with mostly local/regional benefits. In the USA, this phenomenon pertains to what is called ‘pork barrel politics’. Poland and Hungary were suspected from 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

⁵⁴ CJEU, C-157/21, 16 February 2022, *Poland v European Parliament*, ECLI:EU:C:2022:98, [147].

⁵⁵ S. Grund and A. Steinbach, ‘Debt-financing the EU’ (2024) 61 *Common Market Law Review* 993–1018, 994.

⁵⁶ E. Ostrom, ‘The Challenge of Common-Pool Resources’ (2008) (50:4) *Environment: Science and Policy for Sustainable Development* 8–21, 10–11 (footnote omitted).

⁵⁷ *Ibid* 11 (footnote omitted).

⁵⁸ F. Heinemann, P. Mohl and S. Osterloh, *Reform Options for the EU Own Resources System* (Springer 2008) 27-9.

local area.⁵⁹ Official⁶⁰ and academic⁶¹ studies suggest that EU funds were spent on projects aligning with the political preferences in some countries (in particular but not exclusively in Hungary) by means of corruption or collusion.⁶² This was exactly the type of concern that the Conditionality regulation sought to address.⁶³ The explanation before the Commission Proposal triggering the conditionality regulation against Hungary and the list of recommended measures demonstrates this.⁶⁴

The CJEU also provides a new technical meaning to the other side of the equation, the EU budget. In 2013, the Court judged that the budget was not a legislative act but an accounting and predictive instrument.⁶⁵ Scholarship then elaborated that despite the formal procedures at EU level the EU budget remains a budget of and between Member States.⁶⁶ The budget then became a bargaining tool between Member States and the instrument to pursue policy agendas. In this sense, one can indeed see that Member States put politically and financially, if not legally, common resources for the realisation of EU policies and objectives. However, the CJEU does not emphasise that the EU budget is mostly based on a common debt, while this is very much what is at stake with the NextGenEU – again economically and financially, even if not legally speaking. The CJEU stresses the resource side of the budget, which under the Treaty⁶⁷ remains most 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.⁶⁸ In his opinion on the Hungarian *Budget Conditionality* case, 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”⁶⁹ with a footnote referring to extra-judicial writings by the President of the CJEU. Then the Advocate General moves to the role of the Commission in implementing the budget, the existence of different forms of conditionality in various international organisations, 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

⁵⁹ S. Gherghina and C. Volintiru, ‘Budgetary Clientelism and Decentralization in Hungary and Romania’ (2023) (39:1) *Journal of Developing Societies* 40–62. 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’ (2021) 68 *European Journal of Political Economy* 101993.

⁶⁰ 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.

⁶¹ E.g. E. Dávid-Barrett and M. Fazekas ‘Grand Corruption and Government Change: An Analysis of Partisan Favoritism in Public Procurement’ (2020) 26 *Eur J Crim Policy Res* 411–30.

⁶² M. Bernatt and A. Jones, ‘Populism and Public Procurement: An EU Response to Increased Corruption and Collusion Risks in Hungary and Poland’ (2022) 41 *Yearbook of European Law* 11–47.

⁶³ Ibid.

⁶⁴ Eg 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.

⁶⁵ CJEU, C-77/ 11, *Council v Parliament*, 17 September 2013, EU:C:2013:559 [59]. *Cfr.* Article 314 (9) TFEU.

⁶⁶ R. Crowe, ‘An EU Budget of States and Citizens’ (2020) (26) *Eur Law J* 331–44, 331.

⁶⁷ Article 311 TFEU.

⁶⁸ 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 one: ‘let us envision our future together – cast in budgetary figures!’

⁶⁹ Opinion of AG Campos Sanchez-Bordona, C-156/21, 2 December 2021, *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2021:974 [96] (footnote omitted).

*European Union with the financial resources required to achieve its objectives.*⁷⁰ The Advocate General recognises that this the Conditionality regulation has significant repercussions on the relationships between the EU and its Member States, although it has to comply with primarily law. this allows for the Advocate General to provide examples where conditionality has already been accepted by the CJEU, noting that it has been the case in Pringle.⁷¹ The Budget Conditionality is thus an opportunity for the CJEU to extend this case law to the respect of the rule of law.⁷² In this Opinion, solidarity is closely associated to responsibility, as being the counterpart of solidarity. Responsibility for one’s financial commitments is the very opposite of moral hazard.

Secondly, the Court of Justice, as the Conditionality regulation,⁷³ extends the notion of the EU budget to include the RRF through the application of the financial regulations, so as to protect sound financial management and the financial interests of the Union. Technically the budget is the document signed [check correct wording] by the President of the Parliament. However, the whole construction of the RRF is actually to place financial commitments off budget and not on budget in terms of expenses.⁷⁴ 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.⁷⁵ However, as stressed by the Court of Justice, the spendings under the NextGenEU [otherwise seen as a tool for debt mutualisation⁷⁶] need also to comply with the financial regulations.⁷⁷ In this sense, the Court of Justice expands the scope of the “budget” to a functional notion of the budget 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 that is of a constitutional value, but all the spendings of the EU, widening the material scope of the resources that are “common” and in relation to which solidarity applies. Conversely, this extensive interpretation by the CJEU shrinks the funds in relation to which moral hazard can arise.

Thirdly, it may sound strange that the CJEU uses the words of “common resources” in combination with solidarity, mutual trust and effectiveness of the law. this leaves the reader potentially wondering if by this principled paragraph, the CJEU is calling upon the ordoliberal, a law and economics approach or is seeking to break new grounds by proposing a pragmatic solution within a wider conceptual background in the making. **Indeed, ordoliberalism is replacing moral hazard -- need to complete this**

IV. Solidarity and institutional enforcement

The TFEU includes provisions pertaining to the protection of the EU financial interests and the principle of sound financial management, with both a task for the EU and the Member States: article 86 is the legal basis for the European Public Prosecutor's Office; article 310 (5) provides that ‘The Union and the Member States, in accordance with Article 325, shall counter fraud and any other illegal activities affecting the

⁷⁰ Ibid [110].

⁷¹ Ibid [113] - [114].

⁷² Ibid [115].

⁷³ Recital 7.

⁷⁴ 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, paras 17 and 18).

⁷⁵ ECA, *The EU’s Financial Landscape – A Patchwork Construction Requiring Further Simplification and Accountability*, 2023.

⁷⁶ Eg L. Baccaro, B. Bremer, and E. Neimanns, ‘Strategic interdependence and preferences for debt mutualization in the eurozone’ (2022) (30:4) *Review of International Political Economy* 1459–85.

⁷⁷ Regulation 2020/2094, Recitals 9 and 10, Article 3 (1).

financial interests of the Union'; article 325 is dedicated to combatting fraud, with the states needing to take the same measures to protect EU financial interests as their own, close and regular cooperation between Member States and the need for EU institutions to adopt the necessary measures to provide for effective and equivalent protection.⁷⁸ The financial regulation defines 'sound financial management' as meaning the 'implementation of the budget in accordance with the principles of economy, efficiency and effectiveness'.⁷⁹ During the period 2019-2024, the monitoring techniques of EU funds have received increasing attention. The RRF provides examples of this sustained attention as well as of recurring issues. In addition, institutions have been strengthened in this respect

Solidarity in the sense provided by the CJEU of mutual trust relying on effective enforcement of the law to protect sound financial management and the financial interest of the Union then takes then three institutional channels: the European Commission, OLAF and the EPPO.

Once the Court of Justice validated the Conditionality Regulation, the European Commission adopted the Communication⁸⁰ that would enable it to enforce the Regulation as per the political compromise agreed at the XXX Conference.⁸¹ The second paragraph of the Communication copies and paste the main paragraph of the Conditionality Judgments. 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 interest of the Union at risks. The commission followed the procedure in relation to Hungary, leading it to propose the suspension of 65 % of EU funds in September 2022.⁸² The Council adopted revised measures in December 2022.⁸³ The Commission reassessed the measures a year later,⁸⁴ and decided in ... 2024 that Hungary had complied with part of the recommended measures.⁸⁵ Check this and see if the Parliament adopted its resolution to challenge this decision – pending case.⁸⁶ in this sense, the Commission did not seem to apply its own procedure to revise the measures adopted against Hungary. Similarly, the lack of action in relation to Poland has been criticised for it political flavour.⁸⁷ These actions have been criticised because they do not reflect requirements of the rule of law. however, the question remains open in terms of bargaining chips. It is not only the Member States that are in a position to negotiate parts of the EU policies at the level of the Council. The European commission is also in a stronger position to undertake these political discussions. AND?

The Commission Guidelines mention explicitly the role of OLAF and the EPPO, and the importance of cooperation even in the cases where a Member State is not a member of EPPO.⁸⁸
OLAF

EPPO – now also Poland [double check] = specific recommendation in the case of Hungary to foster cooperation⁸⁹

⁷⁸ Article 325(4) is one of the articles used as the legal basis for the Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, *OJ L 305*, 26.11.2019, 17–56.

⁷⁹ Article 2(59) Regulation 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, *OJ L 193*, 30.7.2018, 1–222.

⁸⁰ 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, 2.3.2022 C(2022) 1382 final.

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⁸² 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.

⁸³ Council Implementation Decision 2022/2506 of 15 December 2022. <https://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.

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To ensure that the EPPO⁹⁰ system is efficient to combat fraud against the financial interests of the Union, coordination matters, first institutional coordination (such as with OLAF)⁹¹ and secondly national coordination for the investigation and prosecution throughout the EU, despite the many specificities at national levels.⁹² Not all Member States are party to the EPPO – Sweden, Hungary and Poland are not. However, non-members of the EPPO remain required to cooperate with the EPPO in its investigations. Poland is the non-participating country with most investigations by EPPO under way, although it has long refused to cooperate with the EPPO.⁹³ Hungary agreed to undertake a cooperation arrangement with OLAF after being at risks of losing access to EU funding in case of non-cooperation.⁹⁴

OLAF and EPPO and the NextGenEU funds

V. Solidarity and recent financial decisions

Solidarity does not exist in a vacuum or purely in terms of financial commitments. It also translates in further steps. Three examples with financial implications can be discussed here to test how solidarity is included in more specific and particularised European decisions: the case of the Italian RRP, the case of the Balkan Facility and the case of the Ukraine Facility.

First, Italy has been one of the two biggest beneficiaries of the RRF.⁹⁵ This made sense as Italy was the first EU Member State affected by the pandemic and one that most suffered from its economic impact and death toll.⁹⁶ The Italian plan was first proposed by Prime Minister Drago,⁹⁷ and had to be implemented by his successor, Prime Minister Meroni. [check the capacity building provisions]⁹⁸ However, various problems arose as Italy did not manage to implement the plan as agreed, in particular it missed deadlines. The Prime Minister then sought to negotiate an extension of the spending phase of the plan [check the exact term]. However, additional problems arose as some beneficiaries of the EU funds appeared to be either fake or connected to the mafia.⁹⁹ The EPPO is currently investigating how the Italian plan has been implemented, with at least ... cases suggesting problems.¹⁰⁰ It is the highest number of investigations against one single country at the time of writing.¹⁰¹ – link with solidarity

Check if you can extract something from the following

However, the monitoring of the implementation of these national RRF plans is challenging. Member States had to identify the relevant projects that could benefit from the EU funds and to ensure that the money is spent in compliance with EU regulations. The European Commission provided support to Member States to develop their administrative capacity for proper monitoring of the implementation of their plans. This administrative capacity building is provided by the Technical Support Instrument (TSI), managed by the European Commission's Directorate-General for Structural Reform Support¹⁰² and is

⁹⁰ Article 86 TFEU.

⁹¹ M. Bellacosa and M. De Bellis, 'The Protection of the EU Financial Interests between Administrative and Criminal Tools: OLAF and EPPO' (2023) (60:1) *Common Market Law Review* 15–50.

⁹² T. Elholm, 'EPPO and a Common Sense of Justice' (2021) (28:2) *Maastricht Journal of European and Comparative Law* 212–28, 215.

⁹³ <https://www.eppo.europa.eu/en/news/letter-sent-european-commission-regarding-polands-refusal-cooperate-eppo> .

⁹⁴ <https://www.eppo.europa.eu/en/media/news/eppo-signs-working-arrangement-office-prosecutor-general-hungary> .

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¹⁰¹ <https://www.politico.eu/article/olaf-investigates-potential-fraud-involving-eu-recovery-funds/> .

¹⁰² https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes/technical-support-instrument/technical-support-instrument-tsi_en .

part of a wider attempt to enhance the ‘European administrative space’¹⁰³ by improving administrative capacity at national, regional and local levels. Problems of implementation of the RRF arose in some Member States – such as Italy, one of the biggest beneficiaries of the plan.¹⁰⁴ In addition, the RRF regulation does not mandate the identification of funding indicators to assess the performance or the social result (short term) and impact (longer term) of the allocated money by project.¹⁰⁵ The Conditionality Regulation focuses instead on milestones and targets during the project (such as reforms or investment),¹⁰⁶ but this only shows that the funded project makes progress, not the socio-economic usefulness of the project in and of itself,¹⁰⁷ or that the policy objectives are actually met

Secondly, Check if you should not say something about **RePower and the energy crisis. Linking back to the market and the use of solidarity in the OPAL judgment**¹⁰⁸

Thirdly, the EU has also reverted to using conditionality in its neighbouring policy, in a way reminiscent to the pre-accession conditionality it applied at the time of the 2004 enlargement.¹⁰⁹ the EU signed a new partnership with the Balkan countries in 2023.¹¹⁰ This partnership includes provisions pertaining to conditionality in the following wording – **link with solidarity** [revise the link with the above], just a few days after the *Budget Conditionality* judgments were decided, Russia invaded Ukraine. This prompted an acceleration of initiatives already in the pipeline in terms of financial support to Ukraine.¹¹¹ Moreover, the EU and Ukraine signed a Memorandum of Understanding to bolster administrative capacity building in the perspective of rebuilding Ukraine after the War and supporting the accession process to the EU.¹¹² The terms of the Memorandum of Understanding are clear that “ “. The legal basis for this is financial assistance to third countries,¹¹³ in the sense that the EU may learn from the Verification Mechanism that had been set up for the accession to the EU of Romania and Bulgaria.¹¹⁴ – **link with solidarity – link with Sacha’s piece**¹¹⁵

¹⁰³ Defined in this context as the “[t]erm used to describe an increasing convergence of administrative practices among the Member States based on shared values and principles, towards common standards and approaches of operation” (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions enhancing the European Administrative Space (CompAct) COM/2023/667 final, footnote 33).

¹⁰⁴ A special issue analysing the implementation trouble of the RRF in Italy is available in *Contemporary Italian Politics*, 2023.

¹⁰⁵ Bruegel, *The EU Recovery and Resilience Facility falls short against performance-based funding standards*, 2023 available at <https://www.bruegel.org/analysis/eu-recovery-and-resilience-facility-falls-short-against-performance-based-funding>.

¹⁰⁶ Regulation 2021/241, Article 2.

¹⁰⁷ ECA, *The Recovery and Resilience Facility’s Performance Monitoring Framework – Measuring Implementation Progress but not Sufficient to Capture Performance*, 2023.

¹⁰⁸ CJEU, C-848/19, 15 July 2021, *Germany v Poland*, ECLI:EU:C:2021:598 – explicitly referred to in the Polish leg of the *Budget Conditionality* [147].

¹⁰⁹ Cremona, ELR 2005

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¹¹¹ [Council Decision \(CFSP\) 2021/509 of 22 March 2021](https://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/) establishing a European Peace Facility, *OJ L* 2021, 102/14. **Check** 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, *OJ L* 60, 28.2.2022, 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, *OJ L* 61, 28.2.2022, 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, *OJ L* 123, 8.5.2023, 27–31. *Information* on the ways in which the European Peace Facility has been used in the EU neighbourhood is available on <https://euneighbourseast.eu/tag/european-peace-facility/>.

<https://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, *OJ L*, 29.02.2024, 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’ (2023) (11:4) *Politics and Governance* 52–61.

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VI. A virtuous circle of solidarity - alternative interpretations

The Court of Justice left room for interpretation in its judgments, knowing that the Commission would adopt guidelines and that further litigation was in the cards. This room can be identified in various techniques such as fostering compliance and deliberative experimentalism – the technique of combining enforcement and management¹¹⁶ or coercion and persuasion is indeed seen as mutually reinforcing towards compliance in organisational theories. But maybe more crucially, room of 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 solidarity might be able to undertake in the future. is the focus really on solidarity as antidote for moral hazard in the broadest sense, with its institutional and rules implications? is solidarity to be mostly read in one of its legal components, either as the pre-condition for shared resources and their corollary of mutualised debts or as the reward for compliance or as requiring mutual trust and hence to procedural techniques to ensure legal effectiveness?

The principle at the centre of the *Budget conditionality* judgments allows us to suggest 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 operationalisation should prevent moral hazard and thus encourage further financial commitments in the name of solidarity. In this sense, solidarity becomes the cornerstone of upwards 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 would indeed be used to the common good and that would they be in a position of need, financial help would be forthcoming. The overall machinery does not work on blind faith: it requires rules, procedures, guarantees that the European commission exercises 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, reporting them and acting upon them. this in turn prevents abuse from happening.

Such virtuous circle would draw on a original mix between ordoliberalism where formal rules are ensuring fiscal discipline [and potentially coercion] and law and economics where informal rules are fostering trust and cooperation between the actors. This may hence 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.

However, it is possible to provide different alternative interpretation of the principle at the centre of the *Budget conditionality* judgements, in particular that of rewards for compliance and good behaviour.¹¹⁷ This reading would be confirmed by the fact that the Commission did not wait Poland to actually take concretely the measures necessary to comply with the rule of law, or that **xx**

¹¹⁶ J. Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union' 2002 (56:3) *International Organization* 609–43.

¹¹⁷ M. Fiscaro, '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' (2022) 18 *European Constitutional Law Review* 334–56, 354.

Another alternative interpretation of the principle at the centre of the *Budget conditionality* judgements is that provided by deliberative experimentalism, the impact of peer-pressure and constant reforms. [capacity building and?]

Change towards redistribution? Panasci also sees NextGenEU as a transition between market integration and redistribution;¹¹⁸

VII. Conclusions

This paper argues that the respective key paragraph in the *Budget conditionality* cases makes solidarity the new cornerstone for the EU legal order, not by upholding solidarity as a lofty EU ideal, but by making it very practical, in particular in using it as a technical antidote, strategic argument and convincing narrative against moral hazard.

¹¹⁸ M. A. Panasci, 'Unravelling Next Generation EU As A Transformative Moment: From Market Integration To Redistribution' (2024)(61:1) *Common Market Law Review* 13–54.