

Provisional text

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 2 December 2021⁽¹⁾

Case C-157/21

Republic of Poland

v

European Parliament

Council of the European Union

(Action for annulment – Article 151(1) of the Rules of Procedure of the Court of Justice – Procedural issue – Request for removal of document – Legal opinions – Regulation (EU, Euratom) 2020/2092 – General regime of conditionality for the protection of the Union budget – Protection of the Union budget in the case of infringement of the principles of the rule of law in a Member State – Legal basis of Regulation 2020/2092 – Alleged infringement of provisions of the Treaties – Principle of legal certainty – Equality between Member States – Principle of proportionality)

1. In this action, ⁽²⁾ brought under Article 263 TFEU, the Republic of Poland asks the Court of Justice to annul Regulation (EU, Euratom) 2020/2092. ⁽³⁾

2. The issue in contention in this case, the *constitutional* significance of which is undeniable, is whether Regulation 2020/2092, which creates a mechanism for protecting the Union budget against infringements of the principles of the rule of law by Member States in connection with budget implementation, was adopted on the correct legal basis and whether it is compatible with a number of provisions of primary law, in particular Article 7 TEU.

3. The Court decided that the case would be heard by the full Court, which is the composition suitable for adjudicating on cases of ‘exceptional importance’ (Article 16 of the Statute of the Court of Justice).

I. Legal framework

4. I refer to the transcription of provisions of the Treaties and of secondary EU law which I set out in my Opinion in C-156/21.

II. Procedure before the Court of Justice

5. The Republic of Poland claims that the Court should:

- annul Regulation 2020/2092 in its entirety;
- order the Parliament and the Council to pay the costs.

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

7. On 12 May 2021, the European Parliament requested that the case be heard under Article 133 of the Rules of Procedure (expedited procedure); the President of the Court agreed to that request on 9 June 2021.

8. On 12 May 2021, the Council asked the Court, pursuant to Article 151(1) of the Rules of Procedure, to disregard certain passages of the Republic of Poland's application because they reproduced or referred to an unpublished opinion of the Council Legal Service. On 29 June 2021, the Court decided, pursuant to Article 151(5), that a ruling would be given on that issue in the judgment, at the same time as the ruling on the substance.

9. At the hearing, held before the full Court on 11 and 12 October 2021, oral argument was presented by the Republic of Poland, the European Parliament and the Council, the European Commission, and the Belgian, Danish, German, Hungarian, Irish, Spanish, French, Luxembourg, Netherlands, Finnish and Swedish Governments.

10. In this Opinion, I shall follow the same order as I have used in the Opinion in Case C-156/21. I shall deal, first, with the procedural issue raised by the Council. Next, I shall look at the legal context in which Regulation 2020/2092 was drawn up and adopted. Lastly, I shall examine the 11 pleas in law advanced by the Republic of Poland in support of its claim for annulment of Regulation 2020/2092.

11. To avoid repetition, I shall refer, as far as I am able, to the Opinion in Case C-156/21 (which was received at the Registry before this case). In this Opinion, therefore, I shall address only the matters which have not already been dealt with in the Opinion in Case C-156/21.

III. Procedural issue: request for removal of an opinion of the Council Legal Service

12. The Council asks the Court 'to disregard the passages of the application and the annexes thereto which refer to, reproduce the content of or reflect the analysis conducted in the opinion of the Council Legal Service (Council document 13593/18) of 25 October 2018, and in particular the passages [in paragraphs 53, 75, 126, 133 and 139]'.

13. The Polish Government asks the Court to refuse the Council's request because its arguments are unfounded and cannot be upheld.

14. In my Opinion in Case C-156/2021, I set out my reasons for proposing the dismissal of the Council's interlocutory application, identical to that of the present case, after examining: (a) the legislation on access to and reliance before the courts on documents of the institutions; (b) the case-law relating to access to opinions of the legal services of the institutions and reliance on those opinions before the courts; and (c) the application of that legislation and case-law to those proceedings.

15. For those same reasons, I propose that the Court should dismiss the Council's interlocutory application in this case too.

IV. Regulation 2020/2092: a provision which straddles financial conditionality and the guarantee of the rule of law

16. I refer to the arguments set out in the Opinion in Case C-156/21 concerning the legislative procedure used for the adoption of Regulation 2020/2092 and concerning the financial conditionality mechanisms existing in

EU law.

V. First plea in law: Regulation 2020/2092 lacks a valid legal basis

17. The Polish Government contends that a regulation adopted on the basis of Article 322(1)(a) TFEU cannot define the concept of the rule of law or the constituent elements of infringements of the rule of law. Nor can it authorise the Commission and the Council to specify, in the application of that regulation, the requirements linked to the principles of the rule of law. Lastly, the legislature was not entitled to authorise the Council to rely on the Commission's findings regarding the infringement of those principles in order to adopt measures for the protection of the Union budget directed against a Member State.

18. The Polish Government submits that Regulation 2020/2092 provides for the imposition of *penalties* on Member States for failure to fulfil the obligations incumbent on them under the Treaties. Regulation 2020/2092 does not, therefore, satisfy the criteria that must be met by a financial conditionality mechanism. This means that it cannot have as its legal basis Article 322(1)(a) TFEU, which assigns strictly budgetary functions to the EU institutions.

19. Based on the examination of those arguments in the related points of the Opinion in Case C-156/21, I propose that the first plea in law should be dismissed.

VI. Second plea in law: the legal basis of Regulation 2020/2092 is incorrect

A. Arguments of the parties

20. The Polish Government maintains that, if the Court accepts that the European Union has competence to adopt Regulation 2020/2092, its legal basis should be the third paragraph of Article 311 TFEU, or, failing that, Article 312(2) TFEU, rather than Article 322(1)(a) TFEU.

21. The Polish Government submits that Regulation 2020/2092 concerns, and is related to, the new budget cycle, all the financial commitments achieved with respect to the multiannual financial framework ('MFF') (4) and the 'Next Generation EU' European Union Recovery Instrument, (5) as shown by the drafting process of the regulation.

22. Article 322(1)(a) TFEU does not provide a correct legal basis for Regulation 2020/2092, because it only permits the adoption of acts implementing the European Union's annual budget.

23. The use of that incorrect legal basis meant that an inappropriate legislative procedure (the ordinary procedure) and an incorrect voting system (qualified majority) were used. That infringed essential procedural requirements because the third paragraph of Article 311 TFEU and Article 312(2) TFEU require the use of a special legislative procedure and a unanimous decision.

24. The Parliament and the Council contest those arguments. (6)

B. Assessment

25. Regulation 2020/2092 creates a *permanent* financial conditionality mechanism which is not related to any annual budget or to a specific MFF.

26. The rules for budgetary implementation which may be adopted pursuant to Article 322(1)(a) TFEU apply both to multiannual financial frameworks (and the Next Generation EU Instrument) and to annual budgets. Article 310 TFEU enshrines the principle of annuality, which means that the revenue and expenditure provided for in the multiannual financial frameworks are divided and implemented on an annual basis by each budget.

27. Of the two articles invoked by the Polish Government, the first (Article 311 TFEU, third paragraph) states: ‘The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.’
28. Regulation 2020/2092 does not establish any new categories of own resources, abolish any existing categories, govern the arrangements for collection of own resources or govern the relationship between these. It is designed to apply essentially to EU expenditure rather than EU revenue. Consequently, the third paragraph of Article 311 TFEU cannot be the appropriate legal basis for the adoption of the regulation.
29. The same can be said of the second article that has allegedly been infringed (Article 312(2) TFEU), pursuant to which ‘the Council, acting in accordance with a special legislative procedure, shall adopt a regulation laying down the multiannual financial framework. The Council shall act unanimously after obtaining the consent of the European Parliament, which shall be given by a majority of its component members. ...’.
30. The multiannual financial framework is agreed for a minimum of five years; its objective is to ensure that expenditure develops in an orderly manner during that period and, to that end, it determines the amounts of the annual ceilings on appropriations for commitments by category of expenditure and of the annual ceiling on payment appropriations.
31. By contrast, Regulation 2020/2092 contains no planning of Union commitments and payments over a period of time (it will remain in force until such time as it is repealed) and cannot be categorised as an appropriate mechanism for ensuring that the annual budgetary procedure runs smoothly, for the purposes of Article 312(3) TFEU.
32. As regards the fact that Regulation 2020/2092 was adopted concurrently with the negotiations for the 2021-2027 MFF and the Next Generation EU Instrument (or the fact that it has a political connection with these), that time element has no bearing on the choice of legal basis for the regulation or the review of its legality.
33. In those circumstances, the second plea in law must be dismissed.

VII. Third plea in law: breach of Protocol No 2 on the application of the principles of subsidiarity and proportionality, annexed to the TEU and the TFEU

A. Arguments of the parties

34. The Polish Government contends, in the alternative (in the event that the Court recognises the EU legislature’s competence to adopt the regulation), that the proceedings for Regulation 2020/2092 were conducted in breach of Protocol No 2 on the application of the principles of subsidiarity and proportionality.
35. In the Polish Government’s submission, implementation of the Union budget is not one of the areas of exclusive competence mentioned in Article 3(1) TFEU but rather one of the areas of shared competence under Article 4(1) TFEU, although it is not included in the list of those areas.
36. That assertion is supported by Article 325(1) TFEU, which provides that ‘the Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article ...’
37. Referring to the Commission’s proposal for (the future) Regulation 2020/2092, (7) the Polish Government argues that, since that proposal was not forwarded to the national parliaments for verification of its compatibility

with the principle of subsidiarity, Articles 4, first paragraph, 6, first paragraph, and 7(1) of Protocol No 2 have been infringed.

38. The Polish Government contends that that omission constitutes an infringement of an essential procedural requirement which should result in the annulment of Regulation 2020/2092. That has been the Court's finding regarding failure to comply with the duty to consult the European Parliament in the legislative procedure.

39. The Council and the European Parliament contest those arguments.

B. Assessment

40. The budget enables the European Union to develop its policies and ensure the functioning of its institutions, bodies, offices and agencies. The vertical division of competences between the European Union and its Member States (Articles 3 TFEU to 6 TFEU) is not applicable to the budget because it is an area of internal competence relating to the functioning of the European Union and its institutions, which approximates to the powers that the latter hold to adopt rules of procedure, rules governing languages and the staff regulations applicable to their officials and servants. Accordingly, the implementation of the Union budget is not a matter covered by the principle of conferral of powers and is instead a power that belongs exclusively to the European Union.

41. Those assertions are not contradicted by Article 317 TFEU, which entrusts to the Commission the task of implementing the budget, on its own responsibility, 'in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322 [TFEU]'.

42. It is, therefore, possible for Member States to be involved in management of the Union budget as a result of delegation and under the control of the Commission. That is made clear by the rules on 'shared management' which the Financial Regulation (8) lays down in Article 63. (9) However, the fact that management is shared between the European Union and its Member States does not mean that the latter are entitled to adopt provisions governing the Union budget. (10) Implementation of the Union budget falls within the exclusive competence of the European Union, which may delegate responsibility in that regard to the Member States if it believes that shared management is the best way of ensuring that the budget is implemented. Naturally, where management is shared, the Commission retains control over the actions of State authorities.

43. Article 325 TFEU, in the chapter headed 'Combatting fraud', cannot be relied on either in order to grant the Member States competence with regard to the financial conditionality mechanism connected to implementation of the Union budget.

44. The immediate aim of Regulation 2020/2092 in establishing that mechanism is not to combat fraud. Moreover, that financial conditionality mechanism operates only in respect of Member States but not private operators; it is the latter at whom Article 325 TFEU and the provisions of secondary law giving effect to that article are aimed.

45. That premiss having been established, since the principle of subsidiarity governs areas where competence is shared between the Member States and the European Union (Article 5(3) TEU), it does not apply to implementation of the Union budget. However, even if that were not the case and that principle were deemed applicable, I believe that the substantial procedural defect of which the Polish Government complains has not occurred.

46. As regards the alleged breach of Articles 4, first paragraph, 6, first paragraph, and 7(1) of Protocol No 2, it should be recalled that regulations, like other legislative acts, are adopted by the EU institutions in accordance with the first paragraph of Article 288 TFEU. If an EU institution is not involved in the adoption of a regulation, where this is a binding stipulation of a provision of the Treaties, it is logical that such a procedural defect should be categorised as substantial and produce an invalidating effect. (11)

47. The role of national parliaments is limited to that set out in Article 12 TEU which, in so far as is relevant here, consists in being informed of and having draft legislative acts of the Union forwarded to them (point (a)) and of making sure that the principle of subsidiarity is respected in accordance with the provisions of Protocol No 2 (point (b)). Under Article 7 of Protocol No 2, the intervention of national parliaments does not block the adoption of a legislative act but rather requires the Commission to review the draft and then to withdraw, amend or maintain it.

48. The procedural defect of which the Polish Government complains was, in its submission, committed by the Commission when it failed to fulfil its obligation to forward the draft legislative act to the national parliaments as prescribed by Article 4, first paragraph, of Protocol No 2.

49. That initial breach led to the breaches of Article 6, first paragraph, of Protocol No 2 (the right of any national parliament to issue ‘a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity’) and Article 7(1) of Protocol No 2 (the EU institutions, ‘if the draft legislative act originates from them, shall take account of the reasoned opinions issued by national Parliaments’).

50. However, it should be recalled that:

- The preamble to Regulation 2020/2092 states that the Parliament and the Council adopted the regulation ‘after transmission of the draft legislative act to the national parliaments’. (12)
- It is clear from the Commission’s proposal that the draft was sent to the national parliaments.
- The Polish Government acknowledges that a number of national parliaments, including that of the Republic of Poland, sent their opinions to the Commission regarding the compatibility of the draft with the principle of subsidiarity. (13)

51. The Polish Government’s explicit acknowledgement that the Commission’s draft was forwarded to the national parliaments (14) does not preclude that government from asserting that the Commission should have forwarded the draft a second time in view of the fact that the draft was significantly amended during the legislative procedure.

52. In support of its position, the Polish Government relies on the Court’s case-law (15) to the effect that ‘the obligation to consult the [European] Parliament in the decision-making procedure in the cases provided for by the Treaty means that the Parliament must be consulted again whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted’.

53. However, that case-law is not applicable to the present case because Protocol No 2 does not provide for draft legislative acts to be forward to national parliaments a second (or subsequent) time if their text is amended during the procedure before the Council and the Parliament. In the case of Regulation 2020/2092, the Commission did not alter its original proposal and it was instead the Council and the Parliament which amended the draft until arriving at the text finally adopted.

54. In the light of the foregoing considerations, the third plea in law must be dismissed.

VIII. Fourth plea in law: breach of the duty to state reasons (Article 296 TFEU, second paragraph)

A. Arguments of the parties

55. The Polish Government contends, in essence, that the statement of reasons for the regulation which was set out in the Commission’s proposal did not fulfil the obligation laid down by the second paragraph of Article 296 TFEU, as interpreted by the Court.

56. The Polish Government adds, in particular, that that proposal did not explain the need for the adoption of Regulation 2020/2092 or the choice of Article 322(1)(a) TFEU as the legal basis.

57. The Parliament and the Council contest those arguments.

B. Assessment

58. First, the present plea in law is ineffective because it relates only to the Commission's original proposal and not to the final text of Regulation 2020/2092. It is that legislative act, rather than the proposal, which is being contested.

59. Although the texts considered during the legislative procedure for EU acts may be considered for the purposes of examining the reasons on which they are based, what matters is only the statement of reasons contained in the legislative act as adopted and published. Logically, the reasons on which that act is based will be those set out in the recitals in the preamble thereto.

60. Secondly, according to the Court, the statement of reasons required by the second paragraph of Article 296 TFEU (16) must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. (17)

61. In this case, the EU legislature provided sufficient reasons for the adoption of Regulation 2020/2092 throughout the 29 recitals in the preamble to the regulation. The first citation in that preamble refers, in particular, to Article 322(1)(a) TFEU.

62. Those recitals set out the reasons which led to the creation of the financial conditionality mechanism for protecting the Union budget against possible infringements of the principles of the rule of law by Member States.

63. The relationship 'between respect for the rule of law and the efficient implementation of the Union budget in accordance with the principles of sound financial management', as a key element of Regulation 2020/2092, is particularly identified in recital 13 thereof.

64. Accordingly, the fourth plea in law must be dismissed.

IX. Fifth plea in law: infringement of Article 7 TEU

65. In the Polish Government's submission, Regulation 2020/2092 establishes a new mechanism, which is not provided for in the Treaties, to monitor Member States' observance of the principles of the rule of law. It therefore produces effects that are equivalent to amendment of the Treaties, which is not possible by means of a mere provision of secondary law.

66. Furthermore, since its purpose overlaps with that of the procedure established by Article 7 TEU, Regulation 2020/2092 bypasses the application of that article, the conditions of which are more stringent and offer more guarantees for Member States.

67. The analysis of those arguments in the related points of the Opinion in Case C-156/21 leads me to propose that the fifth plea in law should be dismissed.

X. Sixth plea in law: infringement of the first paragraph of Article 269 TFEU

68. The Polish Government contends that the adoption of Regulation 2020/2092 entails de facto an infringement of the first paragraph of Article 269 TFEU, because it extends the Court's jurisdiction (which that article limits to the review of procedural rules) to any breach of the principles of the rule of law, the scope of which is defined, also without any basis, by Regulation 2020/2092.

69. The analysis of those arguments in the related points of the Opinion in Case C-156/21 leads me to propose that the sixth plea in law should be dismissed.

XI. Seventh plea in law: infringement of Article 4(1), the second sentence of Article 4(2), and Article 5(2) TEU

A. Arguments of the parties

70. The Polish Government submits that, by establishing the conditionality mechanism, which is linked to the observance of the principles of the rule of law, in Regulation 2020/2092, the EU legislature:

- infringed the principle of conferral laid down in Article 4(1) and Article 5(2) TEU;
- failed to fulfil its obligation to respect essential State functions, including ensuring the territorial integrity of the State, maintaining law and order, and safeguarding national security (second sentence of Article 4(2) TEU).

71. The Parliament and the Council contest those arguments.

B. Assessment

72. As regards the alleged infringement of the principle of conferral of powers (Articles 4(1) and 5(2) TEU), I must reiterate that no such infringement has occurred because the European Union has a legal basis under Article 322(1)(a) TFEU to adopt Regulation 2020/2092. I refer to the assessment carried out in the Opinion in Case C-156/21.

73. As regards Article 4(2) TEU, the Polish Government does not allege in the present plea (18) an infringement of the first sentence of that provision (which refers to national identity) (19) but rather only an infringement of the second sentence, which refers to respect for essential State functions. (20)

74. Contrary to what the Polish Government argues, Regulation 2020/2092 does not make crucial areas of Member States' sovereignty, such as their territorial integrity, maintaining law and order and safeguarding national security, subject to the control of the Commission.

75. It is the case that the mechanism laid down in Regulation 2020/2092 can be deployed in relation to the activities of a number of national authorities (such as those responsible for financial control and the awarding of public contracts, investigation services, public prosecution services and courts), but only to the extent that those activities affect the implementation of the Union budget or the European Union's financial interests.

76. The second sentence of Article 4(2) TEU does not permit Member States to disregard the obligations imposed on them by EU law in areas of national competence related to the exercise of essential State functions.

77. That has been confirmed by the Court in relation to areas as sensitive as internal and external security, (21) the organisation of national courts (22) and even the organisation of the armed forces, (23) where matters governed by EU law are concerned. The 'obligation to comply' with that law means that actions of the State authorities in those areas are not immune from the acts of EU institutions where the latter are legitimately exercising their powers.

78. Admittedly, as the Polish Government asserts, regulation of the organisation and functioning of the State institutions identified by Regulation 2020/2092 (including investigation services, public prosecution services and courts) is a national competence which is governed by the second sentence of Article 4(2) TEU.

79. Regulation 2020/2092 does not, however, impose any *new* obligations on Member States with regard to the organisation and functioning of such State bodies which would be liable to affect the exercise of their essential functions. The duty of the authorities referred to, and of any others, to operate in compliance with the

principles of the rule of law, as a value common to all the Member States, is, obviously, one which precedes the adoption of Regulation 2020/2092 and stems directly from the Treaties.

80. In so far as management of the Union budget and the safeguarding of the European Union's financial interests may be undermined by the conduct of those authorities which infringe the principles of the rule of law, the remedial measures permitted by Regulation 2020/2092 reflect the exercise of a competence of the European Union itself.

81. In fact, the Polish Government repeats in the present plea arguments similar to those put forward in other proceedings (direct actions and requests for a preliminary ruling) regarding the unfeasibility of relying on the second subparagraph of Article 19(1) TEU and Article 47 of the Charter to call into question measures adopted by the Republic of Poland in connection with the status of national judges or Polish courts. The Court has dismissed such arguments that relied, *inter alia*, on Articles 4, 5(1) and (2), and 13(2) TEU. (24)

82. In the light of the foregoing considerations, the seventh plea in law must be dismissed.

XII. Eighth plea in law: infringement of the principle of equal treatment of Member States (first sentence of Article 4(2) TEU)

A. Arguments of the parties

83. The Polish Government argues that Regulation 2020/2092 not only infringes the principle of equality between Member States but also contributes to perpetuating incidents of infringement of that principle.

84. In its submission, Regulation 2020/2092 does not guarantee that a finding that the principles of the rule of law have been infringed will be preceded by a 'thorough qualitative assessment' carried out by the Commission, which may be described as objective, impartial and fair.

85. In addition, the Polish Government submits that the procedure for adopting measures for the protection of the Union budget unambiguously and directly discriminates against *smaller* and *medium-sized* Member States as compared with *larger* States, since the Council adopts its decisions by qualified majority in accordance with a system where votes of larger States are calculated in a way which affords them 'disproportionate weight'.

86. The Parliament and the Council contest those arguments.

B. Assessment

87. Various questions are intermingled in the development of the present plea in law, not all of which are related to what was, in theory, supposed to be the sole subject matter of the plea (infringement of the principle of equal treatment).

88. If I have properly understood its line of argument, the Polish Government contends, first, that the Commission is unable to conduct an objective, impartial and fair assessment because one of the elements it has to take into consideration are the reports of the Venice Commission, (25) an advisory body which, on one occasion, (26) differentiated between *old* and *new* democracies when examining the compatibility of the procedure for appointing judges with the requirements of the rule of law.

89. In accordance with recital 16 of Regulation 2020/2092, the Commission must consider 'relevant information from available sources and recognised institutions'. Those sources and institutions include, *inter alia*, Council of Europe bodies like the Group of States against Corruption (GRECO) and the Venice Commission.

90. However, recital 16 also states that the Commission must conduct a thorough assessment that is 'objective, impartial and fair ...'. The Commission is not bound for the purposes of its assessment by documents

of the Venice Commission and is not required to take those documents into account if they result in unequal treatment for Member States when it comes to application of Regulation 2020/2092. (27)

91. In addition, recital 26 of Regulation 2020/2092 states that ‘the procedure ... should respect the principles of objectivity, non-discrimination and equal treatment of Member States and should be conducted according to a non-partisan and evidence-based approach.’

92. It seems logical to me that, for those purposes, the Commission should be able to gather information from all available sources, as Article 6(3) of Regulation 2020/2092 indicates. If the infringing State believes that that information is inaccurate, it is entitled to use two rounds of consultations with the Commission in order to challenge the information, before the latter proposes the measures to the Council.

93. Secondly, the Polish Government’s arguments concerning the infringement of the principle of equal treatment of Member States do not identify exactly why Regulation 2020/2092 discriminates between some Member States and others. Article 6(6) and (9) of that regulation affords all Member States, without distinction, the possibility of submitting observations to the Commission regarding the assessment carried out by it and the measures it proposes to the Council.

94. The Polish Government appears to point out a discriminatory element in the fact that *smaller* and *medium-sized* Member States do not have, in the Council, ‘the weight to adopt or reject decisions’ which larger Member States have as a result of the system of calculation for reaching a qualified majority. (28)

95. Naturally, that complaint cannot refer to the voting system itself, which is provided for in the Treaties and cannot be annulled by the Court of Justice. If I have understood properly the Polish Government’s stance, its complaint concerns the use of that voting system to adopt, by a qualified majority of the Council, decisions on the implementation of Regulation 2020/2092 (Article 6(10) and (11)).

96. As the Council points out, pursuant to Article 16(3) TEU, ‘the Council shall act by a qualified majority except where the Treaties provide otherwise.’ I can find no provisions of primary EU law which would lead to a different outcome in this case.

97. Moreover, in so far as the Polish Government reiterates in the present plea in law arguments concerning the punitive nature of the measures provided for under Regulation 2020/2092, which it argues are not aimed at protecting the Union budget but are, rather, directly aimed at safeguarding the rule of law, I refer to my Opinion in Case C-156/21 in which I explain why I do not agree with those arguments.

98. In the light of the foregoing considerations, the eighth plea in law must be dismissed.

XIII. Ninth plea in law: infringement of the principle of legal certainty

99. The Polish Government argues that Regulation 2020/2092, in particular Article 3 and Article 4(2) thereof, does not meet the requirements of clarity and precision inherent in the principle of legal certainty.

100. Once again, the examination of this plea in the related points of the Opinion in Case C-156/21 leads me to propose that it should be dismissed.

XIV. Tenth plea in law: infringement of the principle of proportionality (Article 5(4) TEU)

A. Arguments of the parties

101. The Polish Government contends that, by failing to state reasons for the connection between protection of the Union budget and infringements of the principles of the rule of law, Regulation 2020/2092 infringes the principle of proportionality enshrined by Article 5(4) TEU.

102. The Polish Government submits that the legislature failed to demonstrate the added value of the mechanism created by Regulation 2020/2092 as regards EU financial provisions already in existence.

103. The Polish government argues that ‘it will be impossible in practice’ to preserve the proportionality of measures referred to in Regulation 2020/2092, in view of the criteria included in that regulation for the purpose of their adoption.

104. The Parliament and the Council contest those arguments.

B. Assessment

105. In accordance with Article 5(4) TEU, ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’.

106. In line with the argument put forward by the Parliament and the Council, I believe that Regulation 2020/2092 does not infringe that provision; in other words, it does not infringe the principle of proportionality. (29) A number of reasons lead me to that conclusion.

107. First, the legislature has a broad discretion in the exercise of its powers (30) and I do not consider that Regulation 2020/2092 is a provision which is manifestly inappropriate for the purpose of attaining the objective that it pursues, namely, the creation of a financial conditionality mechanism for combatting infringements of the principles of the rule of law which are directly related to the implementation of the Union budget.

108. Secondly, to my mind, the EU legislature has demonstrated sufficiently the need for Regulation 2020/2092 and the added value it brings with regard to previously existing EU financial legislation. I am proceeding on the basis that the relationship between protection of the Union budget and infringements of the principles of the rule of law has been established, as I have stated in other passages of this Opinion and in the Opinion in Case C-156/21.

109. The explanation of that added value is set out in recital 17 of Regulation 2020/2092, which states that measures under the regulation ‘are necessary in particular in cases where other procedures set out in Union legislation would not allow the Union budget to be protected more effectively.’

110. The procedure under Regulation 2020/2092, which is applicable in the event of infringement of the principles of the rule of law which affect budget implementation, is, therefore, additional to previous EU financial provisions which provide for conditionality mechanisms linked to the obligations created in programmes for transfers of funds to Member States.

111. The new aspect of Regulation 2020/2092 and of its horizontal character, as compared with previous provisions, is that it permits account to be taken of infringements of the principles of the rule of law which have a sufficiently direct effect on implementation of the Union budget, where that effect is derived from actions of the national authorities.

112. In so far as those actions, which are contrary to the principles of the rule of law, are capable of affecting the proper management of the Union budget, the earlier financial provisions did not specifically lay down response mechanisms with a similar force to those under Regulation 2020/2092.

113. Regulation 2020/2092 therefore respects the principle of proportionality in that, for the legislature, the conditionality mechanism created by the regulation can be used ‘unless ... other procedures ... would allow it to protect the Union budget more effectively’ (Article 6(1)).

114. Thirdly, there is nothing to preclude future remedial measures for protection of the Union budget, as provided for in Regulation 2020/2092, from complying with the requirements of the principle of proportionality. Furthermore, such measures must do so, pursuant to Article 5(3) and recital 18 of the regulation.

115. In accordance with the reasoning set out above, the tenth plea in law must be dismissed.

XV. Eleventh plea in law: misuse of power

A. Arguments of the parties

116. The Polish Government contends that the EU legislature misused its powers in adopting Regulation 2020/2092. It frames that allegation from a twofold perspective:

- The *declared* aim of Regulation 2020/2092 differs from its *real* aim. The real aim is not the protection of the union budget, even though the title of the regulation states this, but rather the protection of the rule of law.
- The mechanism created by Regulation 2020/2092 is intended to circumvent the procedure under Article 7 TEU for penalising infringements of the principles of the rule of law, the conditions for which are stricter.

117. The Parliament and the Council contest those arguments.

B. Assessment

118. The Polish Government develops the present plea in law along the lines already set out in its previous arguments. In particular, as the Polish Government itself acknowledges, it addresses questions relating to the aim of Regulation 2020/2092 under the first plea in law. (31)

119. Indeed, there is nothing new in this line of argument which does not appear in the first, second, seventh, eighth and ninth pleas in law, which I have already examined. That is the case with regard to the aim of Regulation 2020/2092 and also the procedure which it creates, in relation to that created by Article 7 TEU.

120. According to the Court, ‘a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken solely, or at the very least primarily, for purposes other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the FEU Treaty for dealing with the circumstances of the case’. (32)

121. As I have already repeated, the aim of Regulation 2020/2092 is to create a financial conditionality mechanism which facilitates the adoption of measures for protection of the Union budget in the event of infringements of the rule of law directly related to the implementation of that budget.

122. Article 322(1)(a) TFEU confers on the EU legislature powers to create that type of conditionality mechanism, of which Regulation 2020/2092 is an example, for the purpose of protecting the Union budget.

123. Regulation 2020/2092 does not create a procedure similar (albeit with fewer restrictions) to that laid down by Article 7 TEU to penalise infringements of the principles of the rule of law. They are, I repeat, different legal instruments.

124. In those circumstances, the eleventh plea in law must be dismissed.

XVI. Costs

125. Pursuant to Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Parliament and the Council requested that the Republic of Poland be ordered to pay the costs and that its claims be dismissed, an order as to costs should be made against it.

126. In accordance with Article 140(1) of the Rules of Procedure, the European Commission, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Hungary, Ireland, the Kingdom of Spain,

the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden are to bear their own costs.

XVII. Conclusion

127. In the light of the foregoing considerations, I propose that the Court of Justice:

- (1) Dismiss the procedural issue raised by the Council, asking the Court to disregard the passages of the Republic of Poland's application and the annexes thereto which refer to, reproduce the content of or reflect the analysis conducted in the opinion of the Council Legal Service (Council document 13593/18) of 25 October 2018.
- (2) Dismiss the action for annulment brought by the Republic of Poland against 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.
- (3) Order the Republic of Poland to bear its own costs and to pay those of the European Parliament and the Council.
- (4) Order the European Commission, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Hungary, Ireland, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden to bear their own costs.

1 Original language: Spanish.

2 Hungary seeks the same form of order in Case C-156/21, *Hungary v Parliament and Council*. I am delivering my Opinions in both cases today.

3 Regulation of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ 2020 L 433I, p. 1).

4 Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 (OJ 2020 L 433I, p. 11) is the regulation currently in force.

5 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (OJ 2020 L 433I, p. 23; 'Next Generation EU').

6 To avoid repetition, I shall assume from now on that the States which participated in the hearing (with the exception, logically, of Hungary and the Republic of Poland) and the Commission agree with the arguments put forward by the Parliament and the Council.

7 Document COM(2018) 324 final of 2 May 2018, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

[8](#) Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1) ('the Financial Regulation').

[9](#) Article 63(1) provides: 'Where the Commission implements the budget under shared management, tasks relating to budget implementation shall be delegated to Member States.'

[10](#) In its proposal for a regulation, the Commission maintained, in relation to the principle of subsidiarity, that 'financial rules governing the Union budget under Article 322 of the Treaty on the Functioning of the EU could not be adopted at the level of the Member States' (Document COM(2018) 324 final of 2 May 2018, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, explanatory memorandum, section 2, second paragraph).

[11](#) It is settled case-law that due consultation of the European Parliament in the cases provided for by the Treaty constitutes an essential formal requirement, breach of which renders the measure concerned void. Effective participation of the Parliament in the legislative process, in accordance with the procedures laid down by the Treaty, represents an essential factor in the institutional balance intended by the Treaty. That function reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly (see, to that effect, inter alia, judgments of 11 November 1997, *Eurotunnel and Others* (C-408/95, EU:C:1997:532, paragraph 45); of 7 March 2017, *RPO* (C-390/15, EU:C:2017:174, paragraphs 24 and 25); and of 6 September 2017, *Slovakia and Hungary v Council* (C-643/15 and C-647/15, EU:C:2017:631, paragraph 160)).

[12](#) Article 3 of Protocol No 1 states: 'National Parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality.'

[13](#) Polish Government's application, paragraphs 44 and 45.

[14](#) *Ibid.*, last sentence of paragraph 49.

[15](#) Judgments of 13 November 1990, *Fédesa and Others* (C-331/88, EU:C:1990:391, paragraph 39), and of 6 September 2017, *Slovakia v Council* (C-643/15 and C-647/15, EU:C:2017:631, paragraph 161).

[16](#) 'Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.'

[17](#) It is not necessary for the reasoning to go into all the relevant facts and points of law. The statement of reasons must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. This is a fortiori the case where the Member States have been closely associated with the process of drafting the contested measure and are thus aware of the reasons underlying that measure. In the case of measures of general application, the statement of reasons may be confined to indicating

the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other. If the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made. See judgments of 30 April 2019, *Italy v Council (Fishing quotas for Mediterranean swordfish)* (C-611/17, EU:C:2019:332, paragraphs 4 to 42); of 22 November 2018, *Swedish Match* (C-151/17, EU:C:2018:938, paragraph 79); and of 17 March 2011, *AJD Tuna* (C-221/09, EU:C:2011:153, paragraph 58).

[18](#) It does so in the eighth plea in law.

[19](#) The clause stipulating respect for national identities, inherent in the fundamental political and constitutional structures of the Member States (which are autonomous concepts of EU law) is encapsulated in the first sentence of Article 4(2) TEU, in order to limit the effect of EU law in areas which are regarded as essential for the Member States. It operates in conjunction with the vertical division of powers between the European Union and its Member States and it is also related to the principle of sincere cooperation, which accompanies it in Article 4(3) TEU.

[20](#) ‘[The European Union] shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.’

[21](#) Judgments of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 99), and of 2 April 2020, *Commission v Poland and Others (Temporary mechanism for the relocation of applicants for international protection)* (C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraphs 143 and 170).

[22](#) According to the Court, the organisation of justice in the Member States falls within the competence of those Member States but, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU. See judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 52); of 5 November 2019, *Commission v Poland (Independence of the ordinary courts)* (C-192/18, EU:C:2019:924, paragraph 102); of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 75); of 2 March 2021, *A.B. and Others (Appointment of judges of the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 68); and of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 40).

[23](#) Judgment of 15 July 2021, *Ministrstvo za obrambo* (C-742/19, EU:C:2021:597, paragraph 40): ‘... although it is for the Member States alone to define their essential security interests and to adopt appropriate measures to ensure their internal and external security, including decisions relating to the organisation of their armed forces, the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law ... The same must apply to national measures adopted for the protection of the territorial integrity of a Member State.’

[24](#) See the judgments cited in footnote 22 of this Opinion.

[25](#) European Commission for Democracy through Law (Venice Commission) of the Council of Europe.

[26](#) Document CDL-AD(2007)028-e, of 16-17 March 2007, Judicial appointments – Report adopted by the Venice Commission at its 70th Plenary Session.

[27](#) On the force of those documents, see the Opinions of Advocate general Bobek in *Asociația ‘Forumul Judecătorilor Din România’ and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2020:746, point 170), and of Advocate General Hogan in *Repubblika* (C-896/19, EU:C:2020:1055, point 88).

[28](#) The detailed rules governing the vote by qualified majority are laid down in Article 16(4) TEU, and, by reference therein to that provision, in Article 238(2) TFEU.

[29](#) According to settled case-law, the principle of proportionality requires ‘that measures implemented through provisions of EU law should be appropriate for attaining the legitimate objectives pursued by the legislation at issue and not go beyond what is necessary to achieve them’. See judgments of 8 December 2020, *Hungary v Parliament and Council* (C-620/18, EU:C:2020:1001, paragraph 111); of 3 December 2019, *Czech Republic v Parliament and Council* (C-482/17, EU:C:2019:1035, paragraph 76); and of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 67).

[30](#) ‘The Court has recognised that, in the exercise of the powers conferred on it, the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus, the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue’ (judgments of 8 December 2020, *Hungary v Parliament and Council* (C-620/18, EU:C:2020:1001, paragraph 112), and of 3 December 2019, *Czech Republic v Parliament and Council* (C-482/17, EU:C:2019:1035, paragraph 77 and the case-law cited)).

[31](#) Paragraph 123 of its application, which refers to paragraphs 28 to 33.

[32](#) Judgments of 8 December 2020, *Hungary v Parliament and Council* (C-620/18, EU:C:2020:1001, paragraph 82); of 5 May 2015, *Spain v Parliament and Council* (C-146/13, EU:C:2015:298, paragraph 56); and of 13 November 1990, *Fedesa and Others* (C-331/88, EU:C:1990:391, paragraph 24).