



POSITION PAPER

The rise of conditionality as an instrument for enforcing the rule of law in the European Union

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1. Introduction

Compared with that of any Member State, the spending capacity of the European Union is surprisingly limited: for the year 2024, the EU annual budget amounts to only €189.4 billion in commitments and €142.6 billion in payments.¹ The EU budget is also based mainly on the contributions from the Member States. Notwithstanding the introduction of a system of own resources since the 1970s, the most relevant category of revenues – amounting to around 60% of the EU's revenue – comes from a percentage of Member States' annual GNI.²

Despite these structural limitations, the EU has always carried out regulatory power through finance.³ However, in recent years, there has been a significant increase in the use of financial instruments to achieve policy objectives and push the Member States to adopt several reforms. This phenomenon is better known as “integration through funding”, meaning the “various ways in which the European Union uses its ‘spending power’ to try and steer the policy choices made at the national or local level”.⁴ In short, the Union is increasingly relying on financial conditionality to influence the conduct of the Member States, also preferring this route over the more traditional regulatory activity.

Conditionality has also become increasingly relevant as an instrument for enforcing EU values enshrined in Article 2 TEU, particularly the rule of law.⁵ Different forms of rule of law-based conditionality have indeed emerged as a new instrument for enforcing the rule of law *vis-à-vis* the Member States.

2. The rule of law as a testbed for integration through funding

In the context of the well-known Union's difficulties in protecting its founding values,⁶ financial conditionality has emerged as a privileged tool for reacting to Member States' systemic violations of

¹ Definitive adoption (EU, Euratom) 2024/207 of the European Union's annual budget for the financial year 2024, OJ L, 2024/207.

² Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom OJ L 424.

³ Historically, the Common Agricultural Policy and Cohesion Policy have been the main Union spending programmes acting as drivers of policy change.

⁴ B. De Witte, 'Integration Through Funding: The Union's Finances as Policy Instrument' in R. Weber (ed.) *The Financial Constitution of European Integration: Follow the Money?* (Hart Publishing 2023) p 221.

⁵ According to Article 2 TEU “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

⁶ The literature on the EU rule of law crisis is very broad. See, among others: A. von Bogdandy and P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area* (Hart Publishing 2015); A. Jakab, D. Kochenov (eds.), *The enforcement of EU law and values: ensuring member states' compliance* (OUP 2017); L. Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies; M.

the rule of law. Indeed, the Union is increasingly demanding Member States various reforms to strengthen (or, in most cases, restore) the rule of law as a primary condition for obtaining or unblocking EU funding. To do so, the EU recently equipped itself with different instruments.

In the context of the last revision of the Multiannual Financial Framework (MFF) 2021-2027,⁷ the Union has introduced in its financial rules some new tools capable of interrupting the flow of money to those Member States that systematically violate the rule of law. Notably, the MFF is the EU's long-term budget, which sets the maximum amounts for the various expenditure categories over a seven-year period. On the occasion of the MFF revision, the Union adopted a legislative package comprising both the regulation establishing the MFF and the decision on the own resources system, as well as sectoral legislation relating to the various EU funds.

Furthermore, together with the adoption of the MFF 2021-2027, the Union adopted an extraordinary financing plan to help Member States in the economic recovery from the Covid-19 pandemic. The Next Generation EU (NGEU) provides for the first time a large amount of money raised independently from the Member States,⁸ and it also represents a turning point in the way to influence national governments: it prefers finance rather than rule-making.⁹ This unique funding programme also provides for conditionality, which can be used also to demand compliance with the rule of law

The use of financial instruments to protect the rule of law is thus becoming systemic or, better yet, an element of the system. This phenomenon is still evolving, but it already shows a pattern for greater involvement of finance in the enforcement of EU values.

3. Different instruments, similar purposes

As anticipated, three instruments have emerged to date as the chief examples of conditionality relating to the rule of law.

The first and most famous example is Regulation 2020/2092, better known as the “Conditionality Regulation”.¹⁰ It establishes a horizontal mechanism that allows the Union to adopt measures concerning all EU funds against a Member State where breaches of the rule of law are ongoing, if such breaches “affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way”.¹¹ Accordingly, the activation of the mechanism requires a sufficient direct link between the rule of law

Bonelli and M. Claes, ‘Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juízes Portugueses’ (2018) 14 *European Constitutional Law Review*; L. Pech, P. Wachowicz and D. Mazur, ‘Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action’ (2021) 13 *Hague Journal on the Rule of Law*; G. De Búrca, ‘Poland and Hungary’s EU membership: On not confronting authoritarian governments’ (2022) 20 *International Journal of Constitutional Law*.

⁷ Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 2020 (OJ L 433I)

⁸ M. Dawson and F. De Witte, *EU Law and Governance*, (CUP 2022).

⁹ B. De Witte, ‘The European Union’s Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift’ (2021) 58 *Common Market Law Review*.

¹⁰ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I.

¹¹ *Ibid*, Article 4(1).

violations and damage (or the risks thereof) on the proper spending of the EU budget. The measures that can be taken –proposed by the Commission and then adopted by the Council by a qualified majority – include the suspension and reduction of payments, the suspension or termination of legal commitments and the prohibition on entering into new legal commitments or new agreements. In a nutshell, those measures allow interrupting the flow of money from the EU budget to the Member State responsible for rule of law violations. They are thus based on the premise that “the EU may wield financial regulatory power not just by providing money but by withholding it”.¹²

The second form of rule of law conditionality is part of the NGEU package. In particular, Regulation 2021/241 establishing the Recovery and Resilience Facility (RRF) – that is, the main instrument for disbursing the NGEU resources – makes funding conditional on the fulfilment of reforms concerning, *inter alia*, the rule of law.¹³ To gain access to the grants and loans available under NGEU, each Member State had to submit a National Recovery and Resilience Plan (NRRP), which was first assessed by the Commission and then adopted by the Council.¹⁴ The NRRP sets out each Member State’s program of reforms and investments, which are measured against a set of milestones (qualitative objectives) and targets (quantitative objectives). Once the Member State has achieved a series of objectives, it can submit a payment request to the Commission.¹⁵ The NRRP also includes a series of “super milestones”, whose compliance is necessary to obtain the first-ever tranche of payment or loans. Among the reforms that Member States must achieve, some have a clear rule of law component. The RRF Regulation provides that the NRRPs “shall be consistent with the relevant country-specific challenges and priorities identified in the context of the European Semester”.¹⁶ The European Semester is the EU policy coordination cycle on national economic and social policies. Every year, the Council issues country-specific recommendations (CSRs) addressed to each Member State concerning its economic, financial and fiscal situation and, more recently, the rule of law developments.¹⁷ By integrating the RRF with the European Semester, the EU has made the latter a biting instrument, developing a powerful incentive for complying with the CSRs.¹⁸

The third rule of law conditionality mechanism is contained in Regulation 2021/1060, known as the “Common Provisions Regulation” (CPR), as it lays down the financial provisions applicable to eight EU funds implemented under shared management.¹⁹ These funds cover cohesion, fisheries and asylum policy under the current MFF 2021-2027. In order to obtain such funds, each Member State

¹² M. Dawson and F. De Witte, *EU Law and Governance*, cit, p. 89.

¹³ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57.

¹⁴ Ibid, Articles 18 and 20.

¹⁵ The disbursement of the various tranches of payments and loans thus depends on the Commission’s positive assessment on the achievement of the corresponding milestones and targets.

¹⁶ Ibid, Article 17(3). See also N. Moran, ‘The Evolution of Conditionality in EU Financial Assistance under the Recovery and Resilience Facility’, (2023) REBUILD Centre Working Paper No 5.

¹⁷ See in this respect L. Fromont, ‘La conditionnalité des financements octroyés par la Facilité pour la reprise et la résilience’, (2021) *Revue des affaires européennes* 771.

¹⁸ M. Fisicaro, ‘Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union’s Values’ (2022) 7 *European Papers*.

¹⁹ Regulation (EU) 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 (Common Provisions Regulation) 2021 (OJ L 231).

has to fulfil a number of “enabling conditions”. These include *horizontal enabling conditions* (HEC), applicable to all CPR funds, and *thematic enabling conditions*, which only concern certain funds.²⁰ Compared with its predecessor – namely, Regulation 1303/2013 – the current CPR includes the key novelty of a horizontal enabling condition related to the “effective application and implementation of the Charter of Fundamental Rights”.²¹ This condition requires establishing “effective mechanisms” to ensure compliance with the Charter and, in particular, “arrangements to ensure compliance of the programmes supported by the Funds and their implementation with the relevant provisions of the Charter”.²²

4. Can money save the rule of law?

By introducing conditionality mechanisms, the Union hopes to react more effectively to the challenges posed by the rule of law crisis without the need to start lengthy procedures that shall lead to Court before real sanctions are involved. But is conditionality the silver bullet for reacting to rule of law violations by the Member States?

The three conditionality instruments did not remain on paper for long. The EU triggered them against both Hungary and Poland. Regarding the conditionality regulation, it has been activated only once, against Hungary, due to the deficiencies and irregularities in public procurement and the fight against corruption. In December 2022, the Council suspended around 6.3 billion euros in budgetary commitments to Hungary, corresponding to 55% of the budgetary commitments of three operational programs under the cohesion policy.²³ Such programs were selected since they are implemented mainly through public procurement and thus are those with higher financial risk.²⁴ In the context of its annual reviews, the Commission confirmed the suspension of funds in December 2023 and 2024, where it found that, due to the persistence of rule of law violations, the conditions for lifting the measures are not yet met.²⁵

Funds were also suspended in Hungary through the two other conditionality mechanisms. According to the Commission, Hungary does not fulfil the horizontal enabling condition on the Charter for certain asylum and cohesion funds because of the violations of academic freedom and the rights of LGBTQ+ people and asylum seekers.²⁶ In the past, the Commission had considered enabling

²⁰ Ibid, Article 15.

²¹ Ibid, Article 15 and Annex III.

²² Ibidem.

²³ Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary.

²⁴ Ibid, recitals 20 and 21.

²⁵ Commission Press Release of 13 December 2023: “Commission Considers that Hungary’s judicial reform addressed deficiencies in judicial independence, but maintains measures on budget conditionality”, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6465 and Commission Press Release of 16 December 2024: “Commission considers that Hungary has not sufficiently addressed breaches of the principles of the rule of law and therefore maintains measures to protect the Union budget”, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6465.

²⁶ See, for instance, Commission Implementing Decision of 22 December 2022 approving the programme “Digital Renewal Operational Programme Plus” for support from the European Regional Development Fund and the European Social Fund Plus under the Investment for jobs and growth goal in Hungary, C(2022)10007, and Commission Implementing Decision approving the programme of Hungary for support from the Asylum, Migration and Integration Fund for the period from 2021 to 2027, C(2022)10022.

conditions not fulfilled also as regards Article 47 of the Charter because of the violations of judicial independence. Yet, the Commission reversed that decision in December 2023, when it unblocked 10.2 billion euros of CPR funds to Hungary.²⁷ As regards NGEU funds, they are currently frozen for Hungary pending fulfilment of the 27 super milestones identified in the Hungarian recovery plan, many of which have a strong rule of law component.²⁸

Similar decisions had been taken in the past for Poland, whose CPR and RRF funds were suspended for the whole of 2023 due to violations of judicial independence.²⁹ Yet, the situation was unblocked after the Polish election of December 2023 and the subsequent judicial reforms and commitments undertaken by the new government led by Donald Tusk.³⁰

Against this background, conditionality can praise some success. It appears indeed to have been somehow effective in the Hungarian and Polish cases. In particular, it is the only instrument that so far has prompted Hungary to implement some reforms that, although partial and insufficient to restore the rule of law, brought some first concrete results.³¹ Compared with judicial instruments for values enforcement, such as infringement procedures and preliminary rulings, rule of law conditionality is much more rapid. At the same time, it offers flexibility on the range of measures to be adopted. Furthermore, the conditionality has the merit of sending a signal that obtaining EU money goes hand in hand with respecting EU values.

That said, we must not make the mistake of believing that conditionality is the panacea to solve the rule of law crisis. First, it bites only for certain Member States, namely, those more in need of EU funding, while it would be much less effective for countries that are net contributors to the EU budget. Second, conditionality instruments, particularly the CPR and the NGEU, are technical mechanisms that generally suffer from a lack of transparency and accountability of the Commission's action. This cast a shadow over their suitability to protect EU values effectively.

Accordingly, conditionality should not be considered a substitute for other instruments, such as infringement actions or political procedures under Article 7 TEU. Conditionality is a relevant but more tailored instrument that can shield the EU budget from certain adverse effects of rule of law deficiencies and exert pressure on the Member States. Yet, it cannot fully restore compliance with Article 2 TEU or solve the rule of law crisis, which is a much bigger phenomenon that results from a combination of political, economic, and societal problems.

²⁷ Commission Press Release of 13 December 2023, *cit supra* note 25.

²⁸ Council Implementing Decision (EU) (ST 15447/22 INIT; ST 15447/22 ADD 1) of 15 December 2022 on the approval of the assessment of the recovery and resilience plan for Hungary 2022 (15447/22).

²⁹ Council Implementing Decision (EU) (ST 9728/22 INIT; ST 9728/22 ADD 1) of 17 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland 2022 (9728/22).

³⁰ Commission Press Release of 29 February 2024: "Poland's Efforts to Restore Rule of Law Pave the Way for Accessing up to €137 Billion in EU Funds", available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1222.

³¹ N. Morucci, 'Budapest relents in tug-of-war with Brussels over Erasmus+ and Horizon Europe programs', EUnews, 1 October 2024.