Articles

The Shape-shifting Definition of the EU's Financial Interest and Its Protection in Contemporary Europe

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Next Generation EU and Governance by Conditionality: A Transformation of the European Economic Constitution?

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Abstract: The adoption of Next Generation EU (NGEU) has revamped the use of conditionality tools in the EU. Although conditionality is not a new instrument under EU law, before the NGEU, and the Recovery and Resilience Facility (RRF) in particular, we had never witnessed the interplay and intertwinement of so many conditionality regimes at the same time. Such a development triggers significant questions as to the constitutional implications of the rise of conditionality in the EU internal governance. This *Article* aims at understanding the nature and the legal effects of conditionality, which so far remain unsettled. It first reviews the use of conditionality regimes in the EU and the types of conditionality mechanisms deployed. It then focuses on the multiple conditionality regimes in the NGEU and in particular in the RRF and analyses the design and the initial functioning of the thematic, the macroeconomic and the rule of law conditionality regimes. Finally, the reach and the limits of the effects of conditionality post-NGEU are assessed with a view to the EU budget and the European economic constitution.

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I. Introduction

The adoption of the Next Generation EU (NGEU) package has revamped the use of conditionality tools in the European Union (EU). Although conditions and more in general conditionality regimes are not new instruments under EU law, the NGEU created an unprecedented combination of so many cross-over conditions, revolving around economic governance, the rule of law, the European Pillar of Social Rights, and the green and digital transitions, and shaping a new method of government.[1] This method has been consolidating beyond the package, in other policy domains, to ensure (conditional) resources. This is the case of the instrument for the support of Ukraine,[2] which uses the same rationale of the NGEU and makes financial assistance contingent upon the fulfilment of a series of conditions which should bring Ukraine closer to the EU *acquis* and should favour its accession even beyond the Copenhagen criteria. Likewise, the enforcement of conditionality instruments has also spread to the field of energy, through RePowerEU,[3] and to social investments with an environmental impact.[4]

However, the exact scope and legal effects of conditionality remain unsettled. What kind of legal effects are expected from the conditionality instruments provided under the broad NGEU's umbrella? These tools may potentially affect the European economic constitution, intended as the division of powers and responsibilities on economic decisions within the Union, according to the EU Treaties, as shaped by the internal market and by the economic governance post-Maastricht.[5] Has the NGEU triggered a shift in the conceptualisation and the practice of conditionality thereby altering the consolidated *status quo*?

[1] On the main features of this "method", see C Fasone and N Lupo, 'Learning from the Euro Crisis: A New Method of Government for the European Union's Economic Policy Coordination after the Pandemic' (2024) ICON 882.

[2] Regulation (EU) 2022/2463 of the European Parliament and of the Council of 14 December 2022 establishing an instrument for providing support to Ukraine for 2023 (macro-financial assistance +) and Regulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility

[3] Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC, PE/80/2022/REV/1, on which see M De Bellis, 'The NGEU and the Energy Crisis: The Shifting Boundaries of Conditionality' (2024) European Papers www.europeanpapers.eu 1114.

[4] Regulation (EU) 2023/955 of the European Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060.

[5] Since the Eurozone crisis the notion of "European economic constitution" has been the object of various studies, mostly focusing on fiscal rules: see K Tuori and K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014); C Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart Publishing 2016); G Gerapetritis, *New Economic Constitutionalism in Europe* (Oxford University Press 2019); C

On the one hand, the implications of conditionality instruments tend to be minimised and to be ascribed to the area of soft law tools. Conditions would provide non-binding guidance to the relationship between the EU and the Member States and would nudge the latter to put in place virtuous conduct according to supranational standards, typically in favour of policy implementation or institutional convergence.

At the other extreme, there is the position of those who see EU conditionality as a threat to national sovereignty, as a very intrusive instrument into the domestic realm and used by EU institutions to illegitimately expand their powers.

Indeed, scholars highlight a series of advantages and disadvantages in the use of conditionality at the national level,[6] which can be easily referred to in the supranational context too and contribute to polarising the debate on conditionality tools. Regarding the advantages, conditionality guarantees minimum standards of unity and uniformity in the supply of public services, in the guarantee of rights and the enjoyment of public goods; it ensures cooperative, negotiated and generally shared solutions to problems of an economic and institutional nature, given the inherent asymmetry that governs its application; it allows the effective management of some critical issues, such as in cases of interdependence, externalities and free-riders; it promotes forms of vertical and horizontal solidarity and enhances the role of citizens.[7]

With respect to the disadvantages, as already emphasised, conditionality can lead to an encroachment of competences by the "higher" level of government towards the "lower" ones; can undermine the quality and transparency of decision-making processes; can diminish or alter the value of democratic accountability channels, shifting the responsibility of choices and decisions on a level of government other than the one that actually takes them; can surreptitiously limit or modify the enjoyment and distribution of rights and goods among citizens.[8]

The co-existence of multiple views on the desirability of conditionality – an issue that will remain outside the scope of this *Article* – depends on the fact that not all conditionality regimes are alike, even though the common denominator is provided by the attachment

Pinelli, 'Conditionality and Economic Constitutionalism in the Eurozone' (2019) Italian Journal of Public Law 22, 39; HCH Hofmann, K Pantazatou, and G Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution* (Edward Elgar 2019); G Grégoire and X Miny (eds), *The Idea of Economic Constitution in Europe* (Brill 2022).

[6] See V Viță, 'Research for REGI Committee – Conditionalities in Cohesion Policy' (European Parliament 2018) 17.

[7] The constitutional debate has so far been animated mainly by the US doctrine on conditional spending, in which the positions in support of conditionality are typically in a minority: cf. S Rose-Ackerman, 'Cooperative Federalism and Co-Optation' (1983) YaleLJ 1344; K Sayers-Fay, 'Conditional Federal Spending: A Back Door to Enhanced Free Exercise Protection' (2000) CalLRev 1281.

[8] Drawing on the rich US literature, see KM Sullivan, 'Unconstitutional Conditions' (1989) HarvLRev 1413; WP Marshall, 'Towards a Non-unifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses' (1989) SanDiegoLRev 243; LA Baker, 'Conditional Federal Spending after "Lopez' (1995) ColumLRev 1911.

of requirements to the use of EU resources or public goods (e.g., becoming a Member State). The coexistence of conditionality instruments does not occur only in the EU but characterises the evolution of classic federal systems with regard to conditional spending[9] and reflects the level of mutual commitment and trust between the Member States and between them and the EU or federal authority.[10]

To anticipate some of the findings, NGEU does not appear to have triggered a paradigm shift on conditionality but has changed, at least temporarily, the understanding of the EU budget, traditionally very marginal in its size,[11] as a crucial instrument to direct the European economic constitution. It has put collective responsibility and sustainability at the centre of the EU spending which, for the period 2021-2027, is more oriented toward stabilisation and redistributive functions than it used to be. By the same token, the combination of various conditionality mechanisms within NGEU has given the EU the chance to expand its authority and policies further and to select from the various conditionality instruments the mechanisms more convenient to the situation in terms of opportunity and reputational costs. This may come at the expense of criticism of the (too broad) discretion that EU institutions enjoy, which also results in the lack of clarity and predictability on the effects of the multiple conditions as well as of appropriate democratic accountability mechanisms governing the shift of responsibilities between levels of government.

The *Article* will proceed as follows. Firstly, it reviews the use of conditionality instruments in EU law (section II) and the types of conditions deployed (section III). It then focuses on the RRF as a key tool of the NGEU programme (section IV) and analyses the design and the initial functioning of thematic (section IV.1), macroeconomic (section IV.2) and rule of law conditions (section IV.3). Finally, the reach and the limits of the effects of conditionality in the NGEU new method of government are assessed with a view to the EU budget and the European economic constitution (section V).

[9] See, *e.g.*, AJ Rosenthal, 'Conditional Federal Spending and the Constitution' (1987) StanLRev 1103. For a comparison between the EU, the US and Canada, see A Baraggia*, La condizionalità come strumento di governo negli Stati compositi. Una comparazione tra Stati Uniti, Canada e Unione Europea* (Giappichelli 2023).

[10] With this regard, see, *e.g.*, House of Commons, Parliament of Canada, 'Government Response To The Standing Committee on Public Accounts: "Chapter 1, A Study of Federal Transfers to Provinces and Territories of the December 2008 Report of the Auditor General of Canada"', August 2009, www.ourcommons.ca, Recommendation 1.

[11] See B Laffan, *The Finances of the European Union* (Macmillan 1997) 5 ff. Here and in the remaining of the text "EU budget" is not used in a strictly legal understanding. Indeed, the resources mobilized for the NGEU are external assigned revenues that do not follow the EU traditional budgetary procedures for the approval and the accounting: on this point see R Crowe, 'The EU Recovery Plan: New Dynamics in the Financing of the EU Budget', in G Barrett, J-P Rageade, D Wallis and H Weil (eds), *The Future of Legal Europe: Will We Trust in It? Liber amicorum in honour of Wolfgang Heusel* (Springer 2021) 117 ff. and C Kilpatrick, 'Explaining and Remedying the Near Absence of the Budget in EU Law Scholarship' (2024) CMLRev 623, 636. This is because of the need to circumvent the prohibition of financing the EU own resources through borrowing under art. 311 TFEU, as emphasized by P Leino-Sandberg and M Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) CMLRev 433.

II. The use of conditionality instruments in EU law

For decades conditionality has been an instrument used to govern the EU's external action. For example, in bilateral agreements negotiated by the EU, clauses that make the granting of financial assistance or development aid conditional upon the respect of human rights, in different sectors, have regularly been codified.[12]

When conditionality began to be handled by the Union along the ridge of the external-internal dimension of its borders, for the accession of new Member States during the fifth enlargement process, the constitutional tone of the mechanism emerged in its most evident nature, by affecting the substance of the national Constitutions. Never before the accession to the Community had meant not only to timely adapt the domestic legal system to the *acquis communautaire,* but also to introduce, practice and develop democratic and the rule of law principles.[13] The initial situation of those countries, which until then had belonged to the communist bloc, and the "democratic distance" separating them from the Western states within the Union, justified the provision of new entry conditions. After all, conditionality always assumes a certain level of mistrust or limited trust in the subject on which the conditions are placed. Thus, conditionality was needed precisely to guarantee, in principle, a "*win-win*" solution: namely to allow, on the one hand, the Eastern European countries to proceed in parallel with the democratic transition and consolidation and with the accession and, on the other hand, the Union to oversee the transition process, on its own terms, predefining the path to the entry and avoiding a destabilizing effect on the integration process.[14] It appears, then, that in all cases where conditionality is applied a certain degree of asymmetry between the parties is in place: the actor requiring conditions has the final say on both setting the conditions and on the monitoring of their implementation.

Many have pointed out that a major change in the Union's interpretation of conditionality took place with the conclusions of the Luxembourg European Council in 1997, when a sort of "hierarchy" was established among the Copenhagen criteria, giving the primacy to the "block" of political criteria, the fulfilment of which became a prerequisite for the opening of any negotiations on accession.[15] This has led to a number of enforcement issues, the consequences of which are perhaps still being faced today.

While the European Commission, the institution entrusted with monitoring the progress of countries towards the Copenhagen criteria, had no problem in defining and detailing technical standards for the implementation of the *acquis communautaire*, it did not set

[12] G De Búrca, 'The Road Not Taken: The European Union as a Global Human Right Actor' (2011) AJIL 649

[13] M Cremona, 'Accession to the European Union: Membership Conditionality and Accession Criteria' (2002) PolishYIL 219; C Pinelli, 'Conditionality and Enlargement in Light of EU Constitutional Developments' (2004) ELJ 354.

[14] S Bartole, *The Internationalization of Constitutional Law. A view from the Venice Commission* (Hart Publishing 2020) 24 ff.

[15] European Council Conclusions of 12-13 December 1997, para. 25. See E Tucny, *Elargissement de l'Union Europeenne aux Pays d'Europe Centrale et Orientale* (L'Harmattan 2000) 78 ff.

clear guidelines and parameters on the overarching political criteria, which have been considered even more vague than those developed, for instance, by the Venice Commission.[16]

The weakness of conditionality in the accession stage is probably linked to the dilemma that traps the instrument. To avoid any direct violation of national sovereignty and the risk of any political or societal backlash at domestic level, the supranational institution setting the conditions needs to be quite cautious about what it can do, especially if the constitutional architecture is at stake. Normally the bargaining nature of conditionality is used to emphasise that the conditions are not imposed but are rather negotiated between the parties.[17] Yet, sometimes the line between negotiation and imposition is blurred. As the experience of the financial assistance during the Eurozone crisis has shown, when conditionality is implemented in a very strict manner, without leaving any margin of manoeuvre to one of the parties, lacking any leverage in the negotiations, it can be turned into a severe constraint on national autonomy.[18]

This is related to the fact that conditionality may impinge on the distribution of competences between levels of government. Indeed, there is a general expectation for the EU to act where there is a competence attributed to that end, according to the principle of conferral (art. 4 TEU). In federal systems, like the US, this presumption also applies to the design and enforcement of conditionality to prevent that conditional spending is used as a coercive tool from the "centre" against the Member States to encroach upon the competences of the latter and, thus, becoming *ultra vires*.[19] In the EU, we can expect conditionality to help policy enforcement and regulation in the fields where the Union has the competence to act under a solid legal basis. In fact, unlike the US, the EU lacks a general welfare clause that covers the supranational spending powers, thereby this making the use of EU's conditional spending in domestic matters controversial. This is especially the case where conditionality aims at regulating the functioning of national institutions and constitutional bodies, which fall into the remit of the Member States. The effectiveness and usefulness (*effet utile*) of the EU conditionality instrument may thus need to be balanced with other principles, including the principle of conferral and the respect of national identity (art. 4 (2) TEU).

This reasoning, however, is purely speculative as, with a very few exceptions, the CJEU has not yet had the opportunity to provide a definitive answer on the complex relationship between conditionality and limits of EU competence. What we know for sure is that

[16] D Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008) 85 ff.

[17] S Bartole, *The Internationalization of Constitutional Law* cit. 21 ff.

[18] C Kilpatrick 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) OJLS 325; M Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford University Press 2020) 134 ff.

[19] See US Supreme Court, *South Dakota v. Dole*, 483 U.S. 203 (1987) and *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)

just for very specific procedures, notably art. 7 TEU,[20] EU institutions claim that they can intervene beyond the remit of their competences and in the recent case law on the so-called "Rule of Law conditionality Regulation" the Court of justice has recognised that at least some of the EU fundamental values, including the rule of law, may trump considerations related to protection of national identity.[21]

III. Varieties of conditionality instruments

The flexible nature of conditionality makes it applicable to a wide variety of sectors and policies. Drawing in particular on conditionality in cohesion policy – the first case of systematic application of this instrument as a means to directing the EU internal action since the 1990s – scholars have identified different types of conditionality.

First of all, conditionality can be positive, when incentives are provided to meet the criteria laid down, or negative, when the final effect is punitive, such as when funds that otherwise would have been disbursed to the beneficiary are withheld.[22] The conditionality linked to the 2014-2020 European Structural and Investment Funds tended to be negative (Arts. 19 and 23 of the EU Regulation on common provisions no. 1303/2013), given that the "sanction" in case of violation of the requirements was the freezing or the withdrawal of funds allocated to the country under review.[23] Art. 24 of Regulation no. 1303/2013, however, also introduced a positive conditionality, allowing countries experiencing financial difficulties to benefit from an increase of up to 10 per cent of the allocated funds if they effectively implement the macroeconomic adjustment programme.[24]

[20] Communication COM (2014) 158 final from the Commission of 11 March 2014, A new EU Framework to Strengthen the Rule of Law, section 3, and Opinion of the Council of the European Union's Legal Service on the Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States, 13593/18, 25 October 2018.

[21] See case C-156/21 *Hungary v European Parliament and Council* ECLI: EU: C: 2022: 97, paras 127 and 232 ff. See also section IV.3 for further details. See, on the democratic principle, recently, case C-808/21 *Commission v Czech Republic* ECLI:EU:C:2024:12 and case C-814/21 *Commission v Poland* ECLI:EU:C:2024:963.

[22] E Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (M Nijhoff 2003) 100.

[23] Now 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, art. 19. For the first time, the Charter's enabling condition under the new Common Provisions' Regulation (art. 15 and Annexes III and IV) has been triggered against Cyprus, Hungary and Poland. See M Fisicaro, 'Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union's Values' (2022) European Papers www.europeanpapers.eu 697, 699-707, and C Fasone and M Simoncini, 'Recent trends and ambiguities of conditionality as an instrument of the EU internal governance', in C Fasone, A Dirri and Y Guerra (eds), *EU Rule of Law Procedures at the Test Bench* (Palgrave 2024) 207.

[24] Confirmed also by art. 20 Regulation 2021/1060 cit.

Secondly, conditionality can operate either ex-ante or ex-post.[25] Conditionality is ex-ante when the Member State has to be in line with the conditions set prior to disbursement of the funds, as it is with structural funds; it is ex-post, instead, as in the case of macroeconomic conditionality under the European Semester, when compliance with the conditions is verified and monitored during the financial period under review or after the fiscal year.

Thirdly, input-oriented conditionality is based on inputs provided when the actions and steps to be followed are predetermined in detail in order to obtain a series of results (according to the so-called "checklist method"): the rule for all structural and investment funds. In contrast, output-oriented conditionality is not yet followed in cohesion policies (but it applies to the RRF, instead, being performance-based) and predetermines, not only a certain purpose constraint but also concrete results in terms of policies.[26]

Fourthly, conditionality may affect the same sector in which the expenditure is made, as it is for Structural Funds' investment expenditure in the waste sector, which must be in compliance with the provisions of the Waste Framework Directive, no. 2008/98/EC (Regulation no. 2021/1060, Annex IV). It can come across several sectors, for instance, the respect of gender equality as a condition for the promotion of non-discrimination in the Union has to be followed in all the actions of the structural and investment funds (see Annex IV). Or, finally, conditionality can be "diagonal" as it is the case where macroeconomic conditionality makes the possibility of spending the structural funds conditional on the compliance with the criteria set for the financial assistance at EU and international level (art. 19 (8) d), Regulation no. 2021/1060).[27] That said, the conditions set usually remain conceptually distinct from the specific objectives that the EU spending action envisages: this is the case, for example, for infrastructural investments, such as the strengthening of a country's motorway network, which must be subject to environmental sustainability conditions.

The Eurozone crisis paved the way to a transformation in the understanding of conditionality in the EU, focusing on strict conditionality.[28] Compared to the ordinary management of conditionality in the framework of the European external action and of cohesion funds, the financial crisis that hit Europe in 2010 has somehow let to an *upgrade* in the use of emergency conditionality as a tool to respond to asymmetric shocks, since the European Treaties do not provide clear legal bases to intervene.[29]

[25] V Viță, 'Research for REGI Committee – Conditionalities in Cohesion Policy' cit.18.

[26] *Ibid.* 19.

[27] On the effectiveness of this type of conditionality and the problems of violation of competence that it can create, cf. R Bieber and F Maiani, 'Enhancing Centralized Enforcement of EU law: Pandora's Toolbox?' (2014) CMLRev 1057.

[28] An expression that was endorsed and further refined by the Court of Justice in case C-370/12 *Thomas Pringle v Government of Ireland* ECLI:EU:C:2012:756 while reviewing, amongst other things, the Decision amending art. 136 TFEU, in particular the addition of a third paragraph.

[29] For example, on the "overstretching" of art. 122 TFEU as a legal basis, see P Leino-Sandberg and M Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' cit.; M Chamon,

In general terms, strict conditionality is not different from the other types of conditionality mechanisms, but the implementing rules were tighter and it served to accept that public financial assistance could be offered to Eurozone countries.[30] Just think of the various *Memoranda* of Understanding (MoU) concluded between the Government of the rescue country (i.e. Greece, Portugal, Ireland, Spain, Cyprus), the Board of Governors of the European Stability Mechanism (ESM) and the European Commission where the reforms envisaged in exchange for financial assistance were set out in a very detailed manner, to a degree that had never emerged before in the context of domestic conditionality, and on issues that were not necessarily linked to EU matters (e.g. wage and pension reforms, in particular in the public sector).[31] Often targets and reforms were to be achieved within very tight deadlines in order to continue to benefit from the loans, with review missions on the territory of the beneficiary States at least every six months (the well-known Troika missions, composed of representatives of the IMF, the ECB, and the Commission). Certainly, the conditions set were not the result of an arbitrary imposition by the Troika. They were proposed by the requesting country, carefully examined by those who managed the funds and by the EU institutions, revised if necessary, and finally co-determined in the MoU whose legal nature has raised more than one doubt, between those who have argued for their binding force[32] and those who speak of soft law.[33] However, it cannot be neglected that the negotiating capacity of a bailout country is quite limited and it may be inclined to accept whatever condition is imposed under the risk of the collapse of the economic and financial system. Furthermore, the conditions of the rescue package extended well beyond the loan period to the ex-post surveillance phase, which can last for decades, until at least 75 per cent of the debt incurred (and the interests on the debt) has been paid off.[34]

The implementation of strict conditionality regimes and the backlash it triggered have certainly fostered a reconsideration of the mix of conditions and procedures in the new funding instruments, with a view to balance between positive and negative conditionality and the negotiation scheme. NGEU and the RRF thus represent the first and most important test bench for a revised approach to conditionality.

'The rise of Article 122 TFEU. On crisis measures and the paradigm change' (1 February 2023) Verfassungsblog verfassungsblog.de.

[30] M Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed during the Eurozone Crisis' (2016) CMLRev 1237.

[31] P Faraguna, C Fasone and D Tega, 'Greece, Ireland, Portugal and Spain ten years later. Introduction to a study of the Eurocrisis in the constitutional perspective' (2019) Quaderni Costituzionali 199.

[32] See, for example, E Correia Baptista, 'Natureza Jurídica dos Memorandos com or IMF and com at União Europeia' (2011) Revista da Ordem dos Advogados 477

[33] Such as G Katrougalos, 'The Greek Austerity Measures: Violations of Socio-Economic Rights' (29 January 2013) ICONnect Blog www.iconnectblog.com.

[34] Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on strengthening the economic and budgetary surveillance of Member States in the euro area which are or are in danger of experiencing serious difficulties with regard to their financial stability, art. 14

IV. The Governance by conditionality under the RRF

The RRF introduces a new framework for funding investments and reforms in the Member States, to foster the EU model of economic development and to give impetus – much more convincingly than in the past – to the redistributive function of the Union budget. Building upon the cohesion flexibility clause provided by art. 175 (3) TFEU,[35] the Facility should "promote the Union's economic, social and territorial cohesion by improving the resilience, crisis preparedness, adjustment capacity and growth potential of the Member States, by mitigating the social and economic impact of that crisis, in particular on women, by contributing to the implementation of the European Pillar of Social Rights, by supporting the green transition [...]".[36]

The appropriateness of this residual legal basis to achieve such policy goals has been discussed in the literature. In the absence of a more specific legal basis, some authors consider art. 175 (3) TFEU an acceptable legal basis,[37] while others have been criticising the extensive interpretation of this flexibility clause to "convert cohesion policy, via article 175 (3) TFEU, into an instrument of general economic policy".[38]

When specifically focusing on the need to strengthen social and economic resilience to crisis, the RRF Regulation aligns with the key tenets of the European economic constitution as defined by art.3 (3) TEU but better pursue such objectives through an expanded EU budget. For the first time, in fact, the EU has raised extra-budgetary resources from the markets and issued common debt as big as 750 billion euros. These new resources are channelled to the EU budget as external assigned revenues to provide the Member States with financial support for the implementation of national recovery and resilience plans (NRRPs) aimed at national reforms and investments.

Access to funding is remarkably based on the compliance with multiple conditionality regimes, according to which the EU budget should serve specific EU law and policy goals and spending should protect the EU's financial interests. Scholars have provided different taxonomies to define the several conditions that govern access to funding.[39] Building upon

[35] According to this provision, "If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such action may be adopted by the Council acting in accordance with the ordinary legislative procedure [...]".

[36] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, art. 4(1).

[37] See B De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) CMLRev 635; F Fabbrini, 'Next Generation EU: Legal Structure and Constitutional Consequences' (2022) CYELS 45.

[38] P Lindseth and P Leino-Sandberg, 'Crisis, Reinterpretation, and the Rule of Law: Repurposing "Cohesion" as a General EU Spending Power' (2024) Hague Journal on the Rule of Law 587.

[39] V Viță, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) CYELS 116, 125 ff.; J Pisani-Ferry, 'European Union Recovery Funds: Strings Attached, but not Tied Up in Knots' (Bruegel Policy Contribution 19-2020) 6 ff.; E Domorenok and I Guardiancich, 'The Italian National Recovery and Resilience Plan: Coordination and Conditionality' (2022) Contemporary Italian Politics 192.

those taxonomies, three main kinds of conditionality instruments can be identified. Firstly, thematic conditions aim at the implementation of EU public goods in fields like green, digital, inter-generational, gender policies[40] and, after the REPowerEU reform of the RRF regulation, the security of energy supply.[41] Under this regime, environmental goals assume specific relevance, as the principle of "do no significant harm" applies as a stringent limit to any economic activity pursued under the programme[42] and prioritises environmental protection over other relevant public interests. Only the need to meet immediate security of gas supply allows for derogation from the principle, under the control of the Commission.[43] In addition, the macroeconomic conditions exist with the aim of implementing the Countries Specific Recommendations (CSRs) adopted in the European Semester.[44] On top of these conditions, another general conditionality instrument assists the implementation of the RRF.[45] This is the general regime for the protection of the Union budget through the rule of law, which applies to all the sector where the EU exercises spending powers and aims at the enforcement of EU law values as a means to protect the EU's financial interests.[46] The co-existence of these different regimes shall guide national reforms and investments towards specific goals fostering EU environmental, fiscal and democratic sustainability. Despite the relevant differences in their scope of application and functioning, all these regimes identify predetermined qualification requirements which operate ex-ante and whose fulfilment is a necessary condition for disbursement. Governance by conditionality allows the EU to control whether the performance of Member States under the NGEU achieves EU policy goals. The EU enforcement of such conditions however is highly differentiated.

Member States identify in their plans the investments and reforms to pursue and the means to measure their achievements. National plans are organised around milestones and targets, which respectively cover intermediate qualitative and final quantitative performance objectives. The Commission adopted a delegated regulation to monitor the implementation of the plans by setting out common indicators.[47] Scholarship has identified different kinds of indicators:[48] output indicators measure the quantitative deliverables of

[40] Art. 18 Regulation 2021/241 cit.; points 2.5 and 2.6, Annex V, Regulation 2021/241 cit.

[41] Regulation (EU) 2023/435 introducing amendments to Regulation (EU) 2021/241 as regard the REPowerEU chapters within the National Recovery and Resilience Plans (NRRPs). It also amends Regulation (EU) No 1303/2013, Regulation (EU) 2021/1060, Regulation (EU) 2021/1755 and Directive 2003/87/EC adopted on 27 February 2023.

[42] Art. 5 (2) Regulation 2021/241 cit.

[43] Recital 23 Regulation 2023/435 cit.

[44] Art. 17 (3) and 18 (4)(b) Regulation 2021/241 cit.; point 2.2., Annex V, Regulation 2021/241 cit..

[45] Art. 8 Regulation 2021/241 cit.

[46] 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.

[47] Commission delegated regulation (EU) 2021/2106 of 28 September 2021 on supplementing Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility by setting out the common indicators and the detailed elements of the recovery and resilience scoreboard.

[48] E Rubio, 'From words to action. Analysing possible scenarios and political dynamics in the process of disbursing the European Recovery and Resilience Facility funds' (2022) Notre Europe 3

the interventions, such as the number of refuelling/recharging points for clean vehicles (indicator 1) or the adoption a new law in a specific policy field; outcome indicators measure the effects directly attributed to the intervention, such as the number of users of the digital public services, products and processes (indicator 7); impact indicators measure the long-term intended effects on the whole society and economy, such as reduction of vulnerability to flood, wildfire and other climate-related natural risks (indicator 4). Such a mixture of indicators clearly aims at grasping different thresholds of implementation, showing the increasing complexity in the accomplishment of reforms and investments.

Member States are thus asked to limit their own discretion in light of the conditionality governance, so that their plans embed thematic, macroeconomic and EU values-based conditions. It is then up to the Commission to assess the submitted NRRPs in an intense negotiation with the individual Member States. Likewise, disbursement follows the request of the Member States to be assessed by the Commission on the achievement of the qualitative milestones and quantitative targets fixed in the NRRPs. Member States may also update, revise and amend their plans and ask the Commission for a new assessment.[49]

"Close and transparent cooperation" between States and the Commission is crucial[50] and the information flow between the two levels is at the core of the financing procedure.[51] The novelty in the information exchange is that it includes issues of national law and policy, which are not directly aimed at the enforcement of EU law. In substance, this means that EU institutions evaluate the national reforms and the industrial policies that States should introduce with a view to implementing their NRRPs. By going beyond the close coordination of Member States' economic policies, the internal market policies and the definition of common objectives as expressed in art. 119 (1) TFEU, this new mode of cooperation between the Member States and the EU introduces a remarkable turn in the European economic constitution especially from a procedural perspective. Strategic choices of economic policy become the outcome of the bilateral negotiation between the EU and individual States, enhancing and potentially transforming the coordination of national economic policies with a view to contributing to the achievement of the Union's economic objectives in the context of the broad guidelines of the Council as provided under arts 120 (1) and 121 (2) TFEU. The negotiated decision-making also changes the idea of external control that characterised the Maastricht economic constitution and the management of the Eurozone crisis.[52]

[49] Art. 14 (2), art. 18 (2) and art. 21 (1) Regulation 2021/241 cit.

[50] Art. 4 (2) Regulation 2021/241 cit.

[51] See European Court of Auditors, Special Report 21/2022: The Commission's assessment of national recovery and resilience plans. Overall appropriate but implementation risks remain, para 37.

[52] H Lokdam and MA Wilkinson, 'The European Economic Constitution in Crisis: A Conservative Trasformation?', in G Grégoire and X Miny (eds), *The Idea of Economic Constitution in Europe. Genealogy and Overview* (Brill Nijhoff 2022) 458, 464.

As Lokdam and Wilkinson pointed out, this approach "reflects a desire to increase the capacity of the EU level (*potentia*) to direct economic developments across the Union in a particular direction and gives the Commission significant means for doing so (...), thus further narrowing the space for democratic control of economic policy-making decisions (in the sense of *potestas*)".[53] At the same time, the RRF broad scope – covering prospectively all public policies but security and defence and financial market's regulation-[54] is a testament to a "pluralist" understanding of the European economic constitution,[55] which is not serving only, as some scholars have argued, the furthering of an ordoliberal project,[56] but can also be instrumental to promote growth and redistribution of resources.

The Commission guides negotiations through internal guidelines and checklists, which aim to standardise the assessment process and favour equal treatment of the different national plans.[57] However, the assessment criteria as provided under Annex V of the RRF Regulation grant relevant discretionary powers to the Commission, so that bilateral negotiations can effectively influence the evaluation of national performance. Regulation is therefore the result of the conditions-based negotiation between individual States and the EU.

This is particularly problematic when it comes to the assessment of the total costs of the NRRPs. According to the assessment criteria, the estimated total cost should be "reasonable and plausible and is in line with the principle of cost efficiency and is commensurate to the expected national economic and social impact".[58] As the European Court of Auditors observed, despite the fact that the Commission developed a rating system and internal guidelines on costing assessment, the payment of instalments is not based on actual spending but on the proportion of milestones and targets achieved and their importance.[59] This means that negotiations determine the final amount of disbursement at the expense of transparency in the allocation of resources. The European Court of Auditors noted significant heterogeneity in disbursement in terms of both total funding for each instalment and the number of milestones and targets achieved for each instalment.[60]

In addition, Member States have an incentive to choose their investments and reforms strategically with a view to getting funds. As it has been observed, to tackle the risk

[53] *Ibid.* 484.

[54] According to P Leino-Sandberg and T Raunio, 'From Bad to Worse: The Continuous Dilemma Facing Parliaments in European Economic and Fiscal Governance' (2023) Government and Opposition (first view) 9

[55] See C Kaupa, *The Pluralist Character of the European Economic Constitution* cit., ch. 4.

[56] M Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press, 2021); M Dani et al., '"It's the political economy . . .!" A moment of truth for the eurozone and the EU' (2021) ICON 309, 312 ff.

[57] Commission guidelines to Member States Recovery and Resilience Plans of 14 December 2021, SWD (2021) 12.

[58] Point 2.9, Annex V, Regulation 2021/241.

[59] Special Report 21/2022 paras 73-75 cit.

[60] Id., para 76.

of non-disbursement, Member States might commit to reforms and investments that had already been planned as well as to vague and ambiguous milestones and targets, including aggregated milestones and targets which hide local asymmetries and do not disclose non-performing regional or local authorities.[61]

If the Commission gives a negative assessment on the satisfactory fulfilment of objectives, it should make a proposal to the Council to suspend all or part of payments according to a new methodology devised to calculate the unit values for each milestone and target in the plans and weight them by allocating different coefficients on the basis of their significance within the plans.[62] For example, reforms are generally assigned higher coefficients than investments, in what seems to be a political choice of the Commission.

As Rubio pointed out, whereas decisions to approve payments are subject to comitology procedure – as they require the involvement of the Economic and Financial Committee[63] – suspension of payments as well as the lift of suspension are an exclusive competence of the Commission after hearing the Member State concerned.[64] Such wide discretion appears to be a device to manage the economic and political risks connected to the functioning of the RRF. As Rubio emphasised, the suspension of payments brings the risk of reputational costs for the Commission, as it might be perceived as a sign of failure of the RRF and affect the fiscal position of the relevant country on the markets.[65] For the time being, there have been two very specific cases of payment suspension. The first one concerned Lithuania. On 28 February 2023, the Commission published a positive assessment of the country's implementation of the NRRP thereby giving the green light to the payment of the first instalment, but two milestones concerning tax exemptions and the special tax regime for Parliament (milestone 142) and the expansion of environmental taxation (milestone 144), respectively, were not considered to have been satisfactorily fulfilled because of the transmission of insufficient information for the positive and conclusive assessment by the Commission.[66] As a consequence, the Commission activated the procedure to suspend the relevant funds under Art.24 of the RRF Regulation, but did not target any systemic deficiency and did not encompass any relevant reputational costs.

[61] F Corti and T Ruiz de la Ossa, 'The Recovery and Resilience Facility. What are we really monitoring with a performance-based approach?' (CEPS Explainer 1-2023).

[62] Communication COM (2023) 99 final from the Commission of 21 February 2023 on the Recovery and Resilience Facility: Two years on A unique instrument at the heart of the EU's green and digital transformation, Annex II.

[63] Art. 24(4) Regulation 2021/241 cit.

[64] E Rubio, 'From words to action. Analysing possible scenarios and political dynamics in the process of disbursing the European Recovery and Resilience Facility funds' cit. 12

[65] *Ibid.* 13.

[66] Preliminary assessment of the satisfactory fulfilment of milestones and targets related to the first payment request submitted by Lithuania on 30 November 2022, transmitted to the Economic and Financial Committee by the European Commission, C(2023)1516 – 1, 28 February 2023.

The second case regarded Romania, which on 16 December 2022 had requested the payment of the second instalment for both grants and loans. The Commission considered that two milestones (129 and 133)[67] were not satisfactorily fulfilled and, hence, suspended the relevant instalment of the loan on 29 September 2023.[68] Especially in the assessment of milestone 129, however, the Commission relied on the evaluation of the Romanian Audit Authority, which had publicly warned about the lack of an accurate domestic control on the compliance of the bids received for construction of new electrolysers capacity with the requirements set by the call for tenders, leading to a breach of the principles of non-discrimination and equal treatment. As the same national authorities disclosed the problem on their own, the Commission had only to take it into account such indication and to allow the State to fix the problem.

Beyond these two cases, the adoption of the new methodology for the calculation of the suspended amounts has been able to infuse higher predictability in the procedure and the review by the Commission.

IV.1. Thematic conditions and the implementation of EU policy goals

The RRF commits NRRPs to the pursuit of public interests of supranational relevance and requires national industrial policies to engage with EU policy goals. The RRF identifies six different fields where the facility should be used; that is, (a) green transition; (b) digital transformation; (c) smart, sustainable and inclusive growth, including economic cohesion, jobs, productivity, competitiveness, research, development and innovation, and a well-functioning internal market with strong SMEs; (d) social and territorial cohesion; (e) health, and economic, social and institutional resilience, with the aim of, inter alia, increasing crisis preparedness and crisis response capacity; and (f) policies for the next generation, children and the youth, such as education and skills.[69] These policy fields represent the pillars of the European economic constitution beyond the principles of an open market economy with free competition and price stability. They point to a precise model of economy oriented to the satisfaction of pre-defined public goods, in line with the allocation and redistribution functions of public expenditures identified by the Musgrave's theory of public finance.[70] Insofar as the internal market cannot ensure such public goods on its own, the RRF provides the resources to pursue such these collective objectives. The NRRPs shall contribute to these policy fields "in a comprehensive and ade-

[67] Milestone 129 concerns the signature of contracts for the construction of at least 100 MW of new electrolysers capacity, while milestone 133 the signature of contracts for high-efficient gas cogeneration and district heating projects.

[68] Commission implementing decision C(2023) 6466 final of 21 September 2023 on the partial suspension of the disbursement of the second instalment of the loan support for Romania.

[69] Art. 3 Regulation 2021/241 cit.

[70] RA Musgrave, *The theory of public finance: a study in public economy* (McGraw-Hill 1959)

quately balanced manner" with a view to "considering the specific challenges of the Member State concerned and taking into account the financial contribution of the Member State concerned and the requested loan support".[71]

To avoid potentially conflicting measures in the implementation of these policies, the RRF sets general priorities and addresses the most evident challenges. For instance, the principle of "do no significant harm" protects environmental objectives horizontally through the different policy fields.[72] Until the adoption of the REPowerEU regulation, any action that would negatively impact action for climate change mitigation and adaptation has been prohibited. The REPowerEU instead admits some room for the emergency derogation of the principle to address the specific challenges of the current international crisis.

Guidelines for action within the different fields aim to reconnect economic and social goals, so "to foster economic growth and economic cohesion in an inclusive manner" and "to strengthen social cohesion and social protection systems, including policies for children and youth, by reducing social vulnerabilities".[73] The Facility requires national plans to measure the impact of the proposed policies and the Commission is then expected to rate the performance in the evaluation of the plans.[74]

In addition, quantitative thresholds target the relevant extent to which the green and digital transitions need to be promoted. As a result, every national plan shall contain "measures that effectively contribute to the green transition, including biodiversity, (…) for an amount which represents at least 37 per cent of the recovery and resilience plan's total allocation", with the goal "to have a lasting impact" and to contribute to the achievement of the climate neutrality goal by 2050.[75] Likewise, national plans shall cover "measures that effectively contribute to the digital transition (…) for an amount which represents at least 20 per cent of the recovery and resilience plan's total allocation", which shall have a lasting impact and "significantly contribute to" addressing either "the digital transformation of economic or social sectors" or "the challenges resulting from digital transition".[76] According to the Commission's assessment, all NRRPs exceeded targets, showing that "a number of Member States have used more than half of their allocation towards climate objectives".[77]

[71] Point 2.1, Annex V, Regulation 2021/241 cit.

[72] Point 2.4, Annex V, Regulation 2021/241 cit.

[73] Point 2.3, Annex V, Regulation 2021/241 cit.

[74] In the first mid-term review of the RRF implementation, the Commission expresses a very positive assessment of the impact of the Fund for the period 2021-2023 and of the performance of the national plans: Commission Staff Working Document SWD(2024) 70 final of 21 February 2024, 'Mid-Term Evaluation of the Recovery and Resilience Facility: Strengthening the EU through ambitious reforms and investments', 75 ff.

[75] Point 2.5, Annex V, Regulation 2021/241 cit.

[76] Point 2.6, Annex V, Regulation 2021/241 cit.

[77] Report COM (2022) 383 final from the Commission of 29 July 2022 to the European Parliament and the Council, 'Review report on the implementation of the Recovery and Resilience Facility', and Commission Staff Working Document SWD(2024) 70 final cit.

Financing agreements further shape the implementation of thematic conditions. In fact, the progress towards the attainment of the 37 per cent climate target "shall not be taken into account by the Commission for the assessment of the milestones and targets under the request for payment".[78] Insofar as delays do not affect disbursement, they may affect the implementation of climate-related measures.[79]

Thematic conditionalities thus identify wide policy fields which leave broad discretion to the Member States and the Commission to negotiate on investments and reforms that are in line with the EU economic priorities. Such broad policy-based conditions make the identification of the criteria for compliance particularly ambiguous. On the one hand, this ensures that "the EU retains strong leverage" on the coherence of NRRPs and their capability to satisfy the EU public interests.[80] On the other hand, the transactional nature of policy implementation confers on the EU flexible tools to negotiate beyond the competence restrictions set in the Treaties. In fact, NRRPs significantly cover strategic industrial policies, which are partly defined at the EU level and need to be compatible with the EU economic priorities. This strengthens the vertical dimension of policy-making, showing that the new governance by conditionality is somewhat "federally conceived". Thematic conditionality schemes thus favour the "federalisation" of the European economic constitution insofar as they indirectly enable the EU to expand its scope of action.

In the aftermath of the EU post-pandemic governance, the choice of the cohesion flexibility clause as legal basis for the RRF questions the EU competence to act in the different domains touched by the various thematic conditions. On the one hand, it is true that the RRF clearly goes beyond cohesion policy objectives covered by art. 174 TFEU, including Union's harmonious development, the strengthening of economic, social and territorial cohesion, and the reduction of disparities between regions.[81] However, if we move from a literal and originalist interpretation of the clause to a more teleological interpretation, in the context of the "poly-crisis" the RRF has clearly helped to prevent the worsening of territorial asymmetries within and between the Member States and it fulfilled a function comparable to the protection of the legal and economic unity recognised in national constitutions to the national/federal level of government.

Nevertheless, one can question whether the use of art.175 (3) TFEU is to remain one-off and temporary only or can be generalized for the future. This also requires understanding whether art. 175 (3) TFEU can ordinarily work as stand-alone clause or should

[78] Art. 7 (2), RRF financing agreements.

[79] E Rubio, 'From words to action. Analysing possible scenarios and political dynamics in the process of disbursing the European Recovery and Resilience Facility funds' cit. 9

[80] J Pisani-Ferry, 'European Union Recovery Funds: Strings Attached, but not Tied Up in Knots' cit. 8.

[81] As acknowledged also by B De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' cit. 655 ff., though the same legal basis had been already used in the past for other funds different from structural funds, less ambitious than the RRF in terms of amount of resources.

be reinforced by other legal bases.[82] Considering the variety of thematic conditions provided under the RRF, it might be relevant to strengthen the legal basis with more policy-based provisions. This has happened with the RePowerEU Regulation, which paradoxically has a narrower focus than the RRF, but relies on the cited art. 175 (3) as well as on arts 177 (1) on structural funds, 192 (1) on environmental policy, 194 (2) on security of energy supply, and 322 (1) TFEU for the implementation of the EU budget. In prospect the diversification of the legal bases, to account for the variety of policy areas and conditions touched upon by the relevant Fund appears as a more sustainable and legitimate solution within the limits set by the case law of the Court of Justice.[83]

IV.2. Macroeconomic conditions as the leverage of reforms

The RRF requires the Member States to implement the structural reforms identified in the CSRs. This creates a direct link between the coordination of fiscal policies in the European Semester and the recovery and resilience planning of the EU economy. More precisely, by providing additional support and different incentives to the implementation of macroeconomic objectives, the RRF is expected to reinforce other instruments of economic governance and strengthen the achievement of the economic coordination goals under arts 119, 120 and 121 TFEU.

By attaching the implementation of a soft law instrument into the macroeconomic conditionality to funding, CSRs acquire further enforceability as the Member States have stronger incentives to commit to structural reforms. Macroeconomic conditions should thus help stabilise European economy and contribute to performing another enabling function of public expenditures.[84] As emerged in the 2020 Special Report of the European Court of Auditors, the rate of full or substantial implementation of CSRs from 2011 to 2017 was low.[85] Compared to the commitment to structural reforms achieved in the framework of the European Semester, the funding leverage of the RRF should be able to better pursue compliance with the EU demand for fiscal coordination. National Reform Programmes adopted by Member States in the context of the European Semester shall report on the progress made in the achievement of the NRRPs.[86] By tying the two instruments, this approach strengthens the

[82] See P Lindseth and P Leino-Sandberg, 'Crisis, Reinterpretation, and the Rule of Law: Repurposing "Cohesion" as a General EU Spending Power' cit.

[83] For the Court, when a EU measure has a twofold component of which one is clearly predominant and the other only incidental, the measure shall be grounded on the legal basis linked to the predominant policy area only: see e.g. case C-137/12 *Commission v Council* ECLI:EU:C:2013:675, para 52; case C-411/06 *Commission v Parliament and Council* ECLI:EU:C:2009:518, para. 46 and the case-law cited therein.

[84] RA Musgrave, *The theory of public finance: a study in public economy* cit.; AM Porras-Gómez, 'The EU Recovery Instrument and the Constitutional Implications of its Expenditure' (2022) EuConst 23, who insists on this point as one of the main novelties of NGEU.

[85] European Court of Auditors, Special Report, 16/2020: The European Semester – Country Specific Recommendations address important issues but need better implementation, 22.

[86] Art. 27 Regulation 2021/241 cit.

current system of EU economic governance and makes Member States accountable on different levels for their performance on structural reforms.

Under the RRF, macroeconomic conditions operate on two complementary levels. On the one hand, NRRPs shall address "all or a significant subset of challenges identified in the relevant country-specific recommendations, including fiscal aspects thereof and recommendations made pursuant to art. 6 of Regulation (EU) No 1176/2011 where appropriate, (...) or challenges identified in other relevant documents officially adopted by the Commission in the context of the European Semester".[87] The Commission assesses the implementation of conditions through a rating system. On the other hand, if a Member State does not take effective action to correct its excessive deficit, the Commission shall make a proposal to the Council to suspend all or part of the commitments or payments.[88]

The proportionality principle applies to both levels. The implementation of CSRs shall take into account "the financial contribution of the Member State concerned and the requested loan support as well as the scope and scale of country-specific challenges and the information included in the National Reform Programme".[89] Likewise, suspension of commitments and payments shall have regard to the equal treatment of Member States and the economic and social circumstances, like the level of unemployment, the level of poverty or social exclusion and the impact of the suspension on the economy of the Member State concerned.[90] Moreover, the new Commission methodology for the determination of payment suspension values significantly the lack of satisfactorily achievement of reforms linked to the CSRs.[91]

Transferring key instruments of economic governance into the financing facility, the macroeconomic conditionality creates a new leverage for the coordination of European economic policies through the EU budget at large. The flexibility followed so far in the application of macroeconomic conditions then favours the negotiation of the structural reforms between the Member States and the EU. It allows to keep into account the political feasibility of national reforms, while potentially enhancing their effectiveness. Yet by co-deciding with the Member States, the EU strongly participates in the definition of the substance of reforms and makes the funding of the NRRPs a decisive instrument to implement (pre-)existing EU law. The reform of public procurement in Italy is a clear example of that. If public procurement rules and procedures have been so far required by EU directives, the NRRP is driving the latest wave of reforms in the sector.[92] To reach one of

[87] Art. 17(3) and 19(2) Regulation 2021/241 cit. and Point 2.2, Annex V, Regulation 2021/241.
[88] Art. 10(1) Regulation 2021/241 cit.
[89] Point 2.2, Annex V, Regulation 2021/241 cit.
[90] Art. 10(4) Regulation 2021/241 cit.
[91] Communication COM (2023) 99 final cit.16
[92] Piano Nazionale di Ripresa e Resilienza, available at www.governo.it, 69-71.

NRRP's milestones and to get funded, Italy has thus committed to simplifying public contracts' rules based on the implementation of the 2020 CSRs.[93]

Yet the effective implementation of CSRs through national reforms also requires multilevel enforcement procedures within national legal orders. Alongside the adoption of the relevant legislation, administrative implementation in fact represents a key challenge in the realisation of the proposed reforms.[94] The enforcement, monitoring and assessment of policies require strong administrative capacity and effective management skills.[95] This means that performances under the NRRPs are subject to different levels of complexity, which also include internal negotiation amongst the various (domestic) levels of governments as well as with social partners that may delay the achievement of milestones and targets. With the specific view of implementing national plans and getting funds, the ordinary distribution of responsibilities and tasks might thus be expressly changed to ensure the swifter implementation of reforms. This however may entail huge costs on the functioning of national legal orders and their constitutional features, which may be difficult to justify especially if the governance by conditionality would continue after the NGEU experience.

A first test bench is represented, after the suspension of the Stability and Growth Pact (SGP) has come to an end, by the entry into force of the reformed Pact in May 2024. The macroeconomic conditionality in fact is going to apply to investment plans both under the new preventive and the corrective arms of the SGP.[96] For example, in terms of positive conditionality, as long as the RRF and the NRRPs will be in operation, for the Member States with a debt/GDP ratio above 60 per cent, the new medium term fiscal structural plans, in accordance with the reference trajectory, will benefit, upon request by national authorities, from an extended net expenditure adjustment path up to seven years (instead of just four

[93] Recital 27, Recommendation COM (2020) 512 from the Commission of 20 May 2020 for a Council Recommendation on the 2020 National Reform Programme of Italy and delivering a Council opinion on the 2020 Stability Programme of Italy.

[94] On the issues of administrative capacity and multilevel implementation of EU law see C Knill, 'European Policies: The Impact of National Administrative Traditions' (1998) Journal of Public Policy 1; A Héritier and C Knill, 'Differential Responses to European Policies: A Comparison' (Max-Planck Project Group Preprint 7-2000); J Paasch, 'Revisiting Policy Preferences and Capacities in the EU: Multi-level policy implementation in the subnational authorities' (2022) JComMarSt 783

[95] On the relevance of administrative capacity in the EU cohesion policy see K Pantazatou, 'European Union Funds', in HCH Hofmann, GC Rowe, AH Türk (eds), *Specialized Administrative Law of the European Union* (Oxford University Press 2018) 539; C Mendez and J Bachtler, 'Prospects for Cohesion Policy in 2014-20 and Beyond: Progress with Programming and Reflections on the Future' (European Policy Research Paper 88-2015) 23; C Fasone and M Simoncini, 'Fighting with hands tied? The European Social Fund and the promotion of social inclusion' (2021) Italian Journal of Public Law 504.

[96] See Regulation (EU) 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97; Council Regulation (EU) 2024/1264 of 29 April 2024 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure; and Council Directive (EU) 2024/1265 of 29 April 2024 amending Directive 2011/85/EU on requirements for budgetary frameworks of the Member States.

years) justified by the implementation of an investment programme (like the NRRP).[97] Here the relevant legal basis is art. 121 (6) TFEU, on the multilateral fiscal surveillance, which finds no reference in the RRF Regulation. By the same token for the reasons explained above (in section 4.2), also negative macroeconomic conditionality, in case of macroeconomic imbalances, excessive deficits or a macroeconomic adjudgment programme, is somehow absorbed by the "catch-all" legal basis of art. 175 (3) TFEU, "repurposing cohesion policy"[98] also to serve the objective of macroeconomic convergence and fiscal discipline.

IV.3. The rule of law conditionality at the test bench

Regulation (EU) n. 2020/2092 within NGEU represents one of the most distinctive features of the new governance by conditionality and the potential transformation of the European economic constitution. Indeed, for the first time this Regulation links the European budget to the safeguard of the rule of law in the relationship between the Union and Member States,[99] albeit in a less direct manner than expected.[100] In other words, the rule of law conditionality Regulation connects together one of the new elements of the European economic constitution after NGEU, notably the EU's (temporary) capacity to mobilise resources on its own, to one of the fundamental functions of constitutionalism, to tame public powers; in the present circumstances the abuse of power by national authorities.[101]

Unlike the other conditionality instruments reviewed so far, which are activated only with reference to a "targeted" fund, the conditionality provided for by this Regulation applies to all existing European funds and to those which will be established in prospect unless provided otherwise.[102]

The complex and questionable procedure leading to the entry into force of the regulation has been widely commented.[103] From a procedural standpoint, the process to trigger this conditionality is very cumbersome and not easy to lead to a "sanction" as per the

[97] Regulation 2024/1263 cit. art. 14.

[98] To use the expression by P Lindseth and P Leino-Sandberg, 'Crisis, Reinterpretation, and the Rule of Law: Repurposing "Cohesion" as a General EU Spending Power' cit.

[99] As anticipated, after the approval of this Regulation, also the new Common Provisions' Regulation 2021/1060, has tightened the protection of fundamental rights, through the EU Charter, to all the ESI funds.

[100] See, critically, KL Sheppele, L Pech and S Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' (13 December 2020) Verfassungsblog verfassungsblog.de; A Baraggia and M Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022) German Law Journal 131.

[101] P Lindseth and C Fasone, 'The Eurozone Crisis, the Coronavirus Response, and the Limits of European Economic Governance', in G Grégoire and X Miny (eds), *The Idea of Economic Constitution in Europe: genealogy and overview* (Brill 2022) 537

[102] E Rubio, T Kiss Gálfalvi, T Nguyen, T Ruiz de la Ossa, F Corti and A Forns, 'The tools for protecting the EU budget from breaches of the rule of law: the Conditionality Regulation in context' (European Parliament 2023) 60 ff.

[103] See A Alemanno and M Chamon, 'To Save the Rule of Law You Must Apparently Break It' (11 December 2020) Verfassungsblog verfassungsblog.de; E Cannizzaro, 'Neither Representation nor Values? Or,

Regulation's provisions (art. 6). The whole procedure is based on an adversarial logic and on the "right" of the Member State at stake to be heard and to explain its reasons at every stage; a further confirmation of the emphasis posed on negotiated procedures in the revised European economic constitution implemented through conditionality governance. The abundant procedural guarantees for the State concerned can lead to question whether, in the event of a breach of the rule of law so serious as to prejudice the financial interests of the Union, all the procedural steps envisaged are really necessary, thereby creating too excessive cautions, which risk undermining the effectiveness of the instrument. Moreover, the Member State can always challenge the implementing decision on conditionality before the European Court of Justice to assert its reasons.

At the end of the review and monitoring carried out, the Commission adopts its conclusions to be notified to the State in question, which can submit its observations from one to three months after their receipt. It is only at this point, if the Commission persists in its intention, that it can consider tabling a proposal for a Council implementing decision for the adoption of the necessary measures, taking into account the State's observations received, which may also pave the way to corrective measures. If the Commission is willing to propose the activation of conditionality, it allows the Member State to submit further comments within one month, in particular on the proportionality of the measures envisaged. Only at this point, if the Commission confirms its position, it transmits the proposal of implementing decision, duly justified and providing evidence for its choice, to the Council, which decides to adopt or amend the proposal by qualified majority (arts 6 (10) and (11). The mechanism of the reverse qualified majority, included in the original draft Regulation, was overcome while it would have probably guaranteed greater autonomy to the Commission, against the risk of intergovernmental dominance on the conditionality's activation.

The procedure is expected to be potentially quite long, unlikely to end before 6 months from its start. Hence, one can doubt whether it is really desirable and convenient to offer all these procedural guarantees to a country that does not respect the rule of law rather than trying to end the violations as soon as possible. In addition, it should be recalled that Recital n. 26 of the Regulation, although it is not part of the binding provisions,[104] ensures that the Member State at the centre of the procedure is also assisted by political guarantees at the highest level: in fact, it can even involve the European Council, asking its President to postpone the question of the application of conditionality measures to the next meeting of the institution when, in the State's opinion, the princi-

"Europe's Moment" – Part II' (2020) European Papers www.europeanpapers.eu 1101; KL Scheppele, L Pech and S Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' cit. See also, in this *Special Section*, F Bilancia, 'The Financial Interests of the EU: Implications on the European Rule of Law Idea' (2024) European Papers www.europeanpapers.eu 1096.

[104] A recital in some ways similar on the involvement of the European Council on an exceptional basis, however, is also found in Recital 52 Regulation 2021/241 cit.

ples of objectivity, non-discrimination, equal treatment between Member States and impartiality are not respected in the process. Pending the adoption of a position by the European Council, "no decision concerning the measures should be taken". This sort of "extraordinary appeal" can extend the procedure up to three more months after the Commission has presented its proposal for implementing the decision.

However, if the imposition of "sanctions"[105] is subject to this complex set of procedural guarantees, the same cannot be said for their lifting, which can take place at the request of the country concerned or at the initiative of the Commission itself which in any event, within one year of the adoption of the measures by the Council, re-examines the national situation (art. 7). If the conditions set out in art. 4 of the Regulation are met, a proposal for an implementing decision is tabled to revoke the measures; if the situation is only partially resolved, the implementing decision may concern an adjustment of the imposed measures; otherwise, if no tangible progress has been made, the Commission informs the Council and sends a reasoned decision to the State.

As to the contents, art. 4(2) of the Regulation is one of the key provisions setting out the conditions for the activation of the rule of law conditionality mechanism. Amongst the triggering conditions, there are the malfunctioning of the national authorities implementing the EU budget and of the national services responsible for the control, monitoring and audit as well as for the prosecution of frauds against European funds; the deficiencies or lack of judicial review against the omissions made by these national authorities; the absence or deficiencies in preventing and sanctioning frauds, corruption or other violations of Union law affecting its financial interests; the failure to recover the funds duly paid and the lack of effective collaboration with the European Anti-Fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO). As for art. 4(1), the fulfilment of these conditions must compromise or seriously risk compromising "in a sufficiently direct manner" the sound financial management or the protection of the financial interests of the Union.

The relationship between the conditions of art. 4 and the types of violation of the rule of law tentatively listed in art. 3 – *e.g.* the lack of effective remedies, threats to the independence of the judiciary, the failure to prevent, amend and sanction unlawful or arbitrary decisions taken by national authorities, failure to allocate financial and human resources to the authorities to combat fraud or failure to guarantee against cases of conflict of interest – is not easy to understand.[106] In fact, on the one hand, that the European Commission could well identify further relevant cases falling under the remit of the Regulation; on the other,

[105] "Sanctions" is used here in a non-technical understanding as conditionality is typically alternative to the command-and-control and the sanction logic. See F Costamagna and A Miglio, 'Sanctions in the EMU Economic Pillar', in F Costamagna, A Miglio and S Montaldo (eds), *EU Law Enforcement. The Evolution of Sanctioning Powers* (Routledge 2020) 153-156.

[106] J Łacny, 'Suspension of EU Funds Paid to Member States Breaching the Rule of Law: Is the Commission's Proposal Legal?' in A von Bogdandy, P Bogdanowicz, I Canor, C Grabenwarter, M Taborowski and M Schmidt (eds), *Defending Checks and Balances in EU member States: Taking Stock of Europe's Actions* (Springer 2021) 269.

the Commission would still have to prove the existence of a sufficiently direct link to prejudice to the European budget. Once the conditionality mechanism is activated, the measures that can be adopted under the Regulation refer to present and future funds subject to direct, indirect or joint management regime between the EU and the Member States and can entail, for example, the suspension of payments, the prohibition to enter into new commitments, and the reduction of pre-financing (art. 5).The assessment of the severity of violations or threats to the rule of law principles and the existence of an unequivocal link between them and the damage caused to the European budget is left to the discretionary assessment by the Commission (and the Council), as there are no precise parameters in the Regulation.[107] The Commission must take into account, as mentioned above, the proportionality of the interventions, the actual and potential impact of the rule of law violations on sound financial management, their nature, duration and scope, and, as far as possible, the measures must be related to the actions of the Union that have been affected by the violations, so that a link between transgression and "sanction" is clear.

The European Council's conclusion of December 2020 *de facto* put the enforcement of the Regulation on a standstill, as the Commission decided to wait for the results of the two actions of annulment brought by Hungary and Poland on 11 March 2021.[108] The application of conditionality linked, albeit indirectly, to the safeguard of the rule of law was addressed only after the intervention of the European Court of Justice, which upheld the validity of the Regulation.[109] In the action by Poland it was objected that "by establishing a mechanism that allows for the imposition of financial sanctions on Member States", the Regulation goes beyond the competences of the Union under art. 322 (1) TFEU, the legal basis.[110] More specifically, the Regulation would not comply with any of the three requirements established by EU law for the validity of a horizontal and sectoral conditionality mechanism on the payment of European funds: firstly, the conditions to be met must be strictly and clearly stated. Secondly, these conditions for obtaining the disbursement of the funds must have a sufficiently direct link with the objectives of the mechanism, in this case the protection of the Union's financial interests or sound financial management. Thirdly, there must be an effective (and proportionate) link between the breach of the condition committed and the suspension or loss of EU funds. In the "twin rulings" the Court clarified (para 105, judgment in case C-156/21) that art. 322 (1) TFEU not only lays down the rules on the implementation of

[107] M Fisicaro, 'Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values' (2019) European Papers www.europeanpapers.eu 714.

[108] In particular, the actions contested the alleged *ultra vires* action of the EU: the appellants challenged both the violation of art. 7 TEU, claiming for the creation of a parallel and overlapping mechanism circumventing the procedural difficulties of the former and its exclusive nature, and of art. 269 TFEU and, finally, the lack of legal basis.

[109] *Hungary v European Parliament and Council* cit.; case C-157/2021 *Poland v European Parliament and Council* ECLI:EU:C:2022:98.

[110] *Poland v European Parliament and Council* cit. para. 76.

expenditure entered in the EU budget, but also the conditions for carrying out the control and review of such expenditure and the obligations incumbent on both Member States and the Commission to this end, including the compliance with the principle of "sound financial management" (Arts. 310 (5) and 317 TFEU).

The choice of this legal basis, indeed, had been the object of careful scrutiny in 2018 by the Council's Legal Service on the initial version of the draft Regulation. In particular the Legal Service had warned against the risk of overlapping between the "rule of law conditionality" and other EU tools, especially the art. 7 TEU procedures, which remain exceptional insofar as authorize the Union to intervene on purely internal matters.[111] Because of the need to design a different and self-standing rationale for the new Regulation toward art. 7 TEU, it made sense not to refer to art. 2 TEU, which entrenches the rule of law among the EU fundamental values.

If we acknowledge that the new Regulation introduces a genuine mechanism of conditional spending for the protection of the EU financial interests (not the rule of law *sic et simpliciter*), then the choice of the general implementing clause for the EU budget under art. 322 (1) TFEU represents a suitable legal basis. By referring to an EU exclusive competence, it also provides EU institutions with a wide margin of manoeuvre. In this case additional legal bases, like art. 325 (4) TFEU on the prevention and fights against frauds to EU funds, would have appeared redundant as the guarantee of sound financial management in the execution of the EU budget is already meant to safeguard against frauds.[112]

If no one excludes, for the Court (for the reasons just outlined), that such a mechanism can be regulated by art. 322 TFEU, the parties however disagreed on the recognition of the objectives that the Regulation was aimed to pursue. In other words, for Hungary and Poland, the setting of conditions for the use of European funds and the activation of conditionality must be linked to the achievement of the aims of a well-identified EU action or programme or to the sound financial management only; for the Parliament and the Council, on the other hand, there is nothing to prevent the application of the so-called "horizontal conditionality" according to which a certain condition – in this case respect for the value of the rule of law pursuant to art. 2 TEU – can be applied to all sectors of EU action to get funds (para 123).

For the Court, the EU budget represents an essential tool for the fulfilment of the values referred to in art. 2 TEU, and in particular of the principle of solidarity, but at the same time the conditionality linked to the rule of law can be used to ensure a sustainable level of mutual trust between countries for a shared and responsible use of common resources (para 129). In other words, according to the Court, if the lowest common denominator amongst EU countries represented by the guarantee of the rule of law at the national level is missing (an entry condition to the Union based on art. 49 TEU), it is not even possible to keep a sufficient degree of mutual trust at the supranational level for

[111] Council Legal Service Opinion 13593/18 cit. para. 11.

[112] *Ibid.* paras 41-43.

the co-management of the budget and the enjoyment of Europeans funds. It follows that conditions can be established for the financing of EU expenditures and that the control over compliance with these conditions requires, even at the level of Member States, effective judicial review by independent courts, as well as an audit and control system and the prevention of situations of conflict of interests.

Likewise, for the EU judges, the claims according to which it would not be possible to determine with certainty the situation of "risk" of compromising the European financial interests that art. 4 of the Regulation mentions as sufficient grounds to activate conditionality must be dismissed. As pointed out by Advocate General Campos Sánchez-Bordona (para 311 of the Opinion), the limitation of the scope of the Regulation only to situations affecting the EU financial interests could jeopardize the sound financial management and, therefore, the Regulation's enforcement shall be extended also to violations of financial interests which, "though not yet proven, can nevertheless be reasonably foreseen, since there is a high probability that they will occur".[113]

The two judgments received mixed reactions.[114] On the one hand, in fact, one can clearly read between the lines the Court's attempt to "save" the Regulation, an integral part of NGEU and of the new Multiannual Financial Framework 2021-2027, even at the risk of becoming somewhat redundant in its arguments, where the instrumental nature of a breach of the rule of law to the threat caused to the sound financial management is emphasized.[115] Thus, the Court ruled that the conditionality clauses in the Regulation and the measures that may be adopted in turn do not have "the character of penalties for breaches of the rule of law as such".[116]

On the other hand, the legacy of the rulings cannot be underestimated. This is certainly not the first case in which the Court of Justice has addressed the issue of conditionality. In the past, the Court had endorsed conditionality clauses linking the financing of EU expenditures to the compliance with substantive obligations by the Member States for the purposes pursued by the fund in question.[117] Likewise, horizontal conditionality clauses of a procedural nature, which helped to set conditions for the sound management of the EU budget, had been upheld. Thus, for instance, conditionality mechanisms linked to the national management and control system of the funds have been approved.

[113] *Hungary v European Parliament and Council* cit. para. 262.

[114] Among the first comments, see L Pech, 'No More Excuses: The Court of Justice greenlights the rule of law conditionality mechanism' (16 February 2022) Verfassungsblog verfassungsblog.de, and M Bonelli, 'Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation' European Papers (European Forum Insight of 25 July 2022) 507.

[115] On this point, see I Staudinger, 'The Rise and Fall of Rule of Law Conditionality' (2022) European Papers www.europeanpapers.eu 721.

[116] *Hungary v European Parliament and Council* cit. para 279.

[117] See joined cases 15 and 16/76 *France Government v Commission* ECLI:EU:C:1979:29 paras 21 ff. Another example is provided by case C-247/98 *Greece v Commission* ECLI:EU: C:2001:4 paras 11 ff. as well as para 22 of the Council Legal Service Opinion 13593/18 cit.

Through these 2022 rulings, however, the Court has offered an innovative reading of the constitutional role of the EU budget and the related conditionality linked to the use of European resources.[118]

Yet, the actual margin of intervention for the EU and the degree of discretion the EU institutions enjoy in the management of the new horizontal conditionality mechanism remains to be seen. Some clarity has been brought by the interpretative guidelines eventually adopted by the Commission on 2 March 2022, more than a year after they were recommended by the European Council.[119] For example, given the subsidiary nature of the mechanism, the new conditionality regimes can be used together with or after other tools have been employed (for example under Arts. 101 (8) and 135 of the Financial Regulation and the infringement procedure).

However, looking at the developments over the last two years, one cannot fail to detect ambiguities in the attitude of the EU institutions. Indeed, despite the lack of progress on the reform of the judiciary and, in particular, on the independence of the judiciary by the Polish government, first, on 1 June 2022, the Commission provided a positive evaluation of the NRRP and, then, on 17 June 2022, the Ecofin Council adopted the implementing decision proposed by the Commission for the financing of 35.4 billion euro (23.9 in grants and 11.5 in loans) to Poland.[120] The European Parliament's warning of 9 June 2022,[121] following the Commission's position, not to approve the Polish plan went unheard. The only substantial condition set by the Commission, also by means of "super milestones" in the NRRP and not yet fulfilled, concerned the reform of the self-governing system of the judiciary in the country, after the purely fictitious move to abolish the unlawful disciplinary section of the Supreme Court and to transfer its disciplinary functions to another section of the Supreme Court, on whose independence, however, there is no guarantee.[122]

On the contrary, after repeated postponements on the examination of the national plan, the Commission decided to activate the mechanism on horizontal conditionality against Hungary a few days after the parliamentary elections in the country on 3 April 2022. On 27

[118] On this point, see P Lindseth and C Fasone, 'Rule-of-Law Conditionality and Resource Mobilization – the Foundations of a Genuinely "Constitutional" EU?' (11 December 2020) Verfassungsblog verfassungsblog.de.

[119] See Communication C (2022) 1382 final from the European Commission of 2 March 2022, Guidelines on the application of Regulation (EU, Euratom) 2020/2092 on a general cross-compliance regime for the protection of the Union budget.

[120] Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, COM (2022) 268 final, 1 June 2022. Very critical on this point is L Pech, 'Covering Up and Rewarding the Destruction of the Rule of Law One Milestone at a Time' (21 June 2022) Verfassungsblog verfassungsblog.de.

[121] See European Parliament resolution P9_TA(2022)0240 of 9 June 2022 on the rule of law and the potential approval of the Polish National Recovery Plan (PNR), approved with 411 votes in favor, 129 against and 31 abstentions.

[122] See, again, critically, L Pech, 'Covering Up and Rewarding the Destruction of the Rule of Law One Milestone at a Time' cit.

April the Commission formally sent the written notification to the Hungarian government under art. 6 of the EU Regulation no. 2020/2092 citing systemic irregularities, the lack of willingness by national authorities to collaborate and the extreme fragility of public procurement and tender procedures, the absence of investigative activities aimed at countering frauds against EU funds as well as the lack of effectiveness in the criminal prosecution.

At the end of the preliminary investigation, on 18 September 2022, the Commission proposed to freeze the Hungarian funds and, in particular the cohesion funds up to 65 per cent.[123] On 15 December 2022, the ECOFIN Council took two (intertwined) implementing decisions.[124] The first one, grounded on the rule of law conditionality Regulation, suspended 55 per cent of the EU economic commitments toward the country related to three operative programmes of the cohesion funds and prevented the Commission from taking new commitments with public trusts established in Hungary. In the framework of art. 6 of the Regulation, indeed, the corrective measures put in place by the national government were not considered adequate by the Commission to address the deficiencies detected. Building on this, the Council decided to trigger the new conditionality mechanism for the first time at the end of a procedure that indeed took more than 6 months to be concluded. The scope of the freezing was lowered compared to the Commission proposal though, also because the decision was included in the bargaining for other dossiers, whose adoption required the unanimity in the Council, thereby giving the Hungarian Government a significant leverage in the negotiation. For example, Hungary could threat to veto the approval, occurring at the same time, of the Council Regulation amending Regulation (EU, Euratom) 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027, for which unanimity is needed under art. 312 TFEU. With the second decision, instead, the Council gave the green light to the Hungarian NRRP, initially tabled in May 2021, but whose assessment had remained suspended since then. The decision was somewhat unexpected as many had thought that the Hungarian NRRP would have been the test bench for the first application of the rule of law conditionality Regulation.

A couple of considerations are needed here. First, the approval of the plan does not mean automatically that the grants (and loans) are requested and, if so, that then they are ever disbursed. This depends on the fulfilment of milestones and targets (according to the timeframe agreed), many of which refer precisely to the well-known rule of law weaknesses and, indeed, not having been satisfactorily achieved, the national authorities have not asked for the payment of any instalment. Second, the amount of the funds suspended (estimated around 6,3 billion euro) was not very different, but it was higher, than the total volume of expected resources mobilized from the EU through the NRRP (5,8 billion euro).

[123] Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, COM (2022) 485 final, 18 September 2022.

[124] 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 and Council Implementing Decision of 15 December 2022 on the approval of the assessment of the recovery and resilience plan for Hungary.

When looking at the decisions on Hungary in the broader context, it appears that the Commission has applied a "double standard" between the Hungarian and Polish cases, probably also due to the different geopolitical positioning of the two countries with regard to the Ukrainian conflict. Of course, it is not a question of contesting a discriminatory attitude of the Commission towards Hungary, but Poland would probably have "deserved" as much as Hungary to receive at least a notification pursuant to art. 6 of the Regulation, in other circumstances. It is no by chance that on 18 August 2022 four associations of European judges sued the Council in front of the General Court for having approved the Polish NRRP despite the persistent lack of compliance with the Court of Justice's rulings against Poland and the rule of law violations.[125]

The following political developments in Poland, however, go in the direction supported by the European Commission. As a result of the national elections on 15 October 2023, the loss of the absolute majority of seats in Parliament for the incumbent autocratic government seems to reward the Commission's strategy to refrain from suspending EU funds to the country. Polish voters have chosen for a political shift, moving back to a democratic government hopefully committed to the rule of law much needed reforms and that could eventually lead citizens to take advantage of the NRRP, approved by the Commission but never used by the PiS government due the unwillingness to implement the super milestones. If correct, this interpretation is in line with the view of those scholars that see other EU budgetary instruments, including the RRF, as more effective in the fight for the rule of law than Regulation 2020/2092.[126] With a clear political move in support of the new Tusk Government – which further confirms how broad (and questionable) the Commission's discretion is on conditionality – this institution gave the green light to the disbursement of the first payment to Poland in April 2024 under a request that had been filed by the Polish Prime Minister only four days after his appointment, thus when little could have been done in terms of reforms despite the clear engagement and commitment of the new Cabinet to implement the first set of milestones (or, rather there were efforts carried out in continuity with the previous Government).[127]

Such a reading on the political use of conditionality has triggered some legal questions[128] and has been further confirmed following the partial unfreezing of the EU funds

[125] See case T-530/22 *Medel v Council*; case T-531/22 *International Association of Judges v Council*; case T-532/22 *Association of European Administrative Judges v Council*; and case T-533/22 *Recthers voor Rechters v Council*.

[126] See, for example, I Staudinger, 'The Rise and Fall of Rule of Law Conditionality' cit. and M Fisicaro, 'Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union's Values' cit.

[127] See the detailed assessment of the payment request provided by the Commission, in particular under Milestone F1G, no. F 1.1, on the strengthening of the independence of the Judiciary, which refers to measures taken in the course of 2021 and 2022 except for an Action Plan and an Order of the Minister of Justice, both of February 2024: commission.europa.eu.

[128] See the action for annulment brought in front of the CJEU by the Parliament on 25 March 2024, case C-225/24 *Parliament v Commission*, against the Commission Implementing Decision C(2023) 9014 of 13 December 2023.

for Hungary, in December 2023, one year after the activation of the rule of law conditionality Regulation and the Charter's enabling condition. While the Commission treated the enacted judicial reforms as sufficient evidence of some re-establishment of the rule of law in Hungary, it is apparent that the Commission implementing decision to unblock funding was taken under the threat of the Hungarian veto on the revision of the Multiannual Financial Framework and on the aids to Ukraine.[129]

V. Final Remarks

The NGEU introduces a range of conditionality instruments, which for the first time have been widely used as a means of internal economic governance. This *Article* pointed out the key features of such instruments with the aim of understanding the nature and the effects of the conditions to access to funding under NGEU and their impact on the European economic constitution. Indeed, the intensive use of conditional spending is expected to ensure a sustainable level of mutual trust between the EU countries and between them and the EU institutions for the shared and responsible fulfilment of common priorities. This will affect the fiscal and constitutional functions performed by the EU budget, including its extra-budgetary borrowing capacity.

The analysis has demonstrated that conditions pursue various objectives enshrining different tenets of the European economic constitution. In short, thematic conditions reach out to EU public goods, while macroeconomic conditions pursue the stabilisation of the European economic area, and the rule of law condition aims at protecting the EU budget and financial interests. Conditions trigger interdependencies between the NGEU and other instruments of European governance while contributing to transforming the traditional understanding of the European economic constitution. In fact, the model of economic development that emerges from the programme is not centred on the guiding principles of stable prices, sound public finances and monetary conditions and a sustainable balance of payments as set in art. 119 (3) TFEU, but pursues positive objectives of financial, democratic and environmental sustainability. Conditions are the vehicle of such change.

Yet it is very difficult to detect the legal effects of the use of conditions under the NGEU. There are many reasons for that. Firstly, as demonstrated, conditions are designed as flexible instruments susceptible to political manoeuvre. Significant political discretion encompasses the application of all the conditionality regimes, so that their enforcement may become unpredictable and subject to wider economic and political considerations (if not contestation). Rather than the technical implementation of the legislation, the application of conditions reflects the negotiation between the Member States and the EU institutions, mainly the Commission, on a bilateral basis about their performance in the

[129] D Hegedus, 'Same, Same but Different? The Pitfalls in Unfreezing EU Funds' (21 December 2023) Verfassungsblog verfassungsblog.de.

achievement of milestones and targets. This makes the production of legal effects uncertain. Such wide discretion is a double-edge sword because it makes enforcement strongly dependent on the negotiation power of the parties, namely the Commission and the Member State, and may bring about issues of unequal treatment among the Member States. The outcome of the saga surrounding the implementation of the rule of law conditionality regulation so far illustrates such a risk.

The EU is more and more willing to balance "sticks and carrots" in the use of the conditionality regimes as compared to the dominant focus on the "sticks" during the Eurozone crisis. After the NGEU the EU can play with an array of conditions and conditionality instruments devised by a variety of legal measures. From this array, the Commission can select and deploy the "conditionality weapon" that is more in line with its objectives (e.g., penalisation or reward), while lifting the assessment of other conditions. As it was advocated for and has already occurred vis-à-vis Hungary, in the future the Commission (and the Council) might become more keen on triggering multiple conditionality instruments at the same time to prompt more effective results.[130] However, in order not to be accused of abuse in the exercise of their discretionary powers, if not of arbitrariness, EU institutions should always justify their decisions and give clear and transparent reasons for the selection of a certain conditionality instrument or of a specific conditionality mix, and for their revocation.

Secondly, the governance by conditionality may blur the framework of tasks and responsibilities as defined both in the Treaties and in the individual national legal orders. As the analysis showed, conditions in fact trigger compliance effects including in areas where the EU has no or very limited competence. The transactional negotiation dimension in fact makes conditions able to operate beyond the competence limits envisaged in the Treaties. The strong "federal" dimension in the approval of NRRPs makes the EU able to infuse its own supranational interests in the industrial policies and institutional reforms of the Member States. This means that through conditions the EU gets a new voice in key policy domains of the Member States, orienting national economic development as well as the functioning of the state machine, and, in turn, suggesting a more careful consideration of the legal bases justifying EU action.

In addition, the implementation of reforms under EU law requires significant adjustments in the national rules and procedures. To produce lasting impact, RRF-induced reforms in fact not only need to be adopted through the relevant legislation but also to be implemented at the administrative level, including by sub-national authorities. As a result, the NRRPs embed different levels of complexity in the achievement of milestones and targets, which take into account the specific constitutional features of the national legal systems and may also change the ordinary allocation of responsibilities and tasks

[130] E Rubio, T Kiss Gálfalvi, T Nguyen, T Ruiz de la Ossa, F Corti and A Forns, 'The tools for protecting the EU budget from breaches of the rule of law: The Conditionality Regulation in context' cit. 74

to ensure smoother implementation. In particular, the evaluation of the results of reforms and investments through the application of conditions and indicators is subject to negotiation within domestic legal orders and, hence, it is difficult to predict. The establishment of multilevel procedures, mainly between executive bodies, is precisely one of the features of the governance by conditionality. They set the conditions for spending by policy instrument or horizontally and then monitor and evaluate their enforcement. The consequence of these new procedures is that the allocation of responsibilities for the fulfilment of the conditions remains somewhat unclear, particularly from the perspective of democratic control and accountability.