*German Law Journal* (2022), **23**, pp. 131–156
doi:10.1017/glj.2022.17

CAMBRIDGE
UNIVERSITY PRESS

ARTICLE

# Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges

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(Received 13 March 2021; accepted 19 April 2021)

**Abstract**
In December 2020, the EU institutions finally approved the new Rule of Law Conditionality Regulation after a controversial legislative process. The new Regulation allows the Commission and the Council to suspend EU funds in case of breaches to the rule of law that have negative effects on the EU budget and financial interests. This article analyses the new Regulation against the background of the rise of conditionality as a tool of EU governance. It argues, in contrast to some of the first analyses of the new Regulation, that the amendments adopted during the legislative process cannot simply be seen as a watered-down compromise, but were crucial to ensure the legality of the new instrument. At the same time, the EU's growing reliance on conditionality continues to raise profound constitutional questions that still needs to be adequately addressed in the institutional and academic debate.

**Keywords:** European Union; rule of law; conditionality; EU budget; constitutional crises

## A. Introduction

After a long and complex legislative process that started back in 2018, the European Parliament and the Council finally approved the new Regulation "on a general regime of conditionality for the protection of the Union budget"[1] in December 2020. The final result remains in many ways controversial and the debate on the new Regulation continues, as the Court of Justice of the European Union (CJEU) will be called in the first months of 2022 to decide on the legality of the new piece of legislation in an action for annulment brought by Hungary and Poland.[2] Even if the Regulation ultimately adopted is certainly less ambitious than the original Commission's proposal, the

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[1]Regulation 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, 2020 O.J. (L 433I) 1, 1. For brevity, we will often use the expression "Rule of Law Conditionality Regulation," even if the expression "rule of law" does not appear anymore in the title of the legislative instrument.

[2]On March 11, 2021, the Court of Justice confirmed that Hungary and Poland brought two actions for annulment under Article 263 of TFEU. The two files are C-156/21 (*Hungary v European Parliament and Council*) and C-157/21 (*Poland v European Parliament and Council*), still pending before the Court at the time of writing. Advocate General Campos Sánchez-Bordona delivered his Opinions on the cases in December 2021, when this article had already been finalized.

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https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

introduction of this new instrument marks another important step in the strengthening of the Union's toolbox to fight cases of rule of law or constitutional backsliding[3] in the Member States. More broadly, it can be seen as another key contribution to the constitutional evolution of the European Union (EU),[4] especially considering the link between the Regulation and the NextGen EU (NGEU) Recovery Plan, which we will discuss below.

The idea of creating a new instrument allowing for the suspension of EU funds in cases of rule of law deficiencies in Member States has been on the agenda for several years, and was, from the very beginning, a controversial proposal. In Spring 2017, Jean-Claude Juncker, then President of the Commission, when asked to comment on the German government's suggestion of linking EU funds and the rule of law, surprised some observers with his initial opposition to the proposal, which he defined as "poison for the continent."[5] His Commission nonetheless presented a draft Regulation the following year, but the legislative process proved to be extremely difficult, starting from a negative opinion on the Commission's proposal by the Council's Legal Service,[6] and moving to the difficult negotiations between the Council and the European Parliament.[7] Then, most visibly, when the Hungarian and Polish opposition to the Regulation risked derailing the adoption of the 2021–27 Multi-Annual Financial Framework (MFF) as well as the NGEU Recovery Plan. The veto was resolved by the (in)famous compromise reached at the European Council of December 2020,[8] which, most importantly, *de facto* froze the concrete implementation of the Regulation until the Court of Justice will have the possibility to say the final word on its legality.

The compromise—which perhaps should be defined as a compromise on the compromise, considering that it works on top of the already difficult agreement reached by the European Parliament and the Council—has been criticized by many for various reasons. Some have argued it further undermines the effectiveness of the Regulation and diminishes its concrete impact on the Hungarian and Polish crises.[9] Others have questioned, in particular, its compatibility with the principle of institutional balance, *inter alia* as the European Council Conclusions would affect the prerogatives of the Commission to act as the "guardian of the Treaties."[10] At the same time, different voices have, to some extent, defended the compromise, which, while not perfect, was instrumental in unlocking the historical Recovery Plan,[11] and pointed out more generally that

We have, however, added a couple of references to his Opinion, which in broad terms rejects all arguments raised by Hungary and Poland and confirms the legality of the new instrument.

[3]On the notion of rule of law backsliding, see Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMBRIDGE Y.B. EUR. LEGAL STUD. 3 (2017).

[4]*See* Peter Lindseth & Cristina Fasone, *Rule-of-Law Conditionality and Resource Mobilization – the Foundations of a Genuinely 'Constitutional' EU?*, VERFBLOG (Dec. 11, 2020), https://verfassungsblog.de/rule-of-law-conditionality-and-resource-mobilization-the-foundations-of-a-genuinely-constitutional-eu/.

[5]Florian Eder, *Juncker: German Plan to Link Funds and Rules Would Be 'Poison,'* POLITICO (June 1, 2017), https://www.politico.eu/article/juncker-german-plan-to-link-funds-and-rules-would-be-poison/.

[6]Opinion of the Legal Service 13593/18, Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union´s Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States (Oct. 25, 2018).

[7]For a summary, see Aleksejs Dimitrovs & Hubertus Droste, *Conditionality Mechanism: What's In It?*, VERFBLOG (Dec. 30, 2020), https://verfassungsblog.de/conditionality-mechanism-whats-in-it/.

[8]Conclusions EUCO 22/20, European Council (Dec. 11, 2020).

[9]Kim Lane Scheppele, Laurent Pech & Sébastien Platon, *Compromising the Rule of Law while Compromising on the Rule of Law*, VERFBLOG (DEC. 13, 2020), https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/ (arguing that "the form of the Conditionality Regulation as it has emerged through the law-making process is a shrunken version of its previous self").

[10]Alberto Alemanno & Merijn Chamon, *To Save the Rule of Law you Must Apparently Break It*, VERFBLOG (Dec. 11, 2020), https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/ (concluding that the European Council acted *ultra vires*).

[11]Thu Nguyen, *The EU's New Rule of Law Mechanism: How it Works and Why the 'Deal' Did Not Weaken It*, JACQUES DELORS CENTRE (Dec. 17, 2020 https://hertieschool-f4e6.kxcdn.com/fileadmin/2_Research/1_About_our_research/2_Research_centres/6_Jacques_Delors_Centre/Publications/20201217_Rule_of_law_Nguyen.pdf.

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

the adoption of the Regulation, together with the NGEU, has put the EU towards a genuine constitutional path and has thus been a moment of constitutional transformation.[12]

In this article, we are, however, interested in analyzing the Regulation and exploring the controversies surrounding its adoption from a different perspective. We look at the Rule of Law Conditionality Regulation as another example of the rise of conditionality[13] in Union law, which further demonstrates how the use of conditionality tools is becoming truly pervasive in the Union legal and political framework. We believe this phenomenon raises several constitutional questions that are still unresolved, and the Rule of Law Regulation well shows these underlying tensions. From this perspective, we argue that the amendments adopted during the legislative process and, to a much lesser extent, even the final compromise reached by the European Council, where it anticipates the intervention of the Court of Justice, may be at least less negative than what they seem, if one primarily concentrates on the protection of the rule of law and in general on the potential effectiveness of the instrument. In fact, the legislative process contributed to addressing some of the more questionable elements that were present in the original proposal presented by the Commission, which had already been highlighted by the Opinion of the Legal Service of the Council on the Commission proposal.[14] Furthermore—again seen from this perspective—the promised involvement of the Court of Justice is certainly positive. It will be one of the first opportunities for the Luxembourg Court to broadly reflect on the use of, and eventual limits to, conditionality tools under EU law. Ultimately, we sketch some suggestions on what the adoption of the new Regulation means for the future of conditionality, as an instrument of EU law and policy making. In particular, whether it may be a sign of a new and more positive conditionality—one better aligned with the basic values of the EU integration project.

The article is structured as follows. Section B describes how the conditionality Regulation came about, illustrating the Commission's original proposal, the key steps of the legislative process and its final outcome after the European Council's compromise. Section C puts the adoption of the Regulation in the context of the growing popularity of conditionality tools in the EU law and shows how the rise of conditionality has not yet been adequately problematized in the institutional and academic debate. Section D will then look at how the legislative process finally brought some of those questions—in particular those related to legal limits to the use of conditionality in EU law and respect for the principle of attributed competence— to light, and how they have been addressed by the legislators. In this sense the process that led to the adoption of the Regulation can be seen in a more positive light. Yet, as will be explained in Section E, broader questions on the desirability of relying on conditionality as a tool of EU integration remain to be addressed and will likely remain relevant even after the future CJEU intervention. This section will reflect on these questions, but also consider whether the adoption of the Rule of Law Regulation, as well as a series of other developments including those linked to the NextGenEU plan, might ultimately be a positive turning point for conditionality in the EU.

## B. The Adoption of the Rule of Law Conditionality Regulation: A Controversial Process

As briefly mentioned in the introduction, the possibility to introduce a new instrument allowing for the suspension of EU funding in cases, to put it generally, of rule of law problems in a Member

[12]Lindesth & Fasone, *supra* note 4.

[13]See Viorica Viţă, The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?, (Eur. Univ. Inst. Dep't of L., Working Paper No. 16, 2017). See also Viorica Viţă, Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality, 19 CAMBRIDGE Y.B. EUR. LEGAL STUD. 116 (2017).

[14]On the importance of the amendments for ensuring the legality of the Regulation, see Opinion of Advocate General Sánchez-Bordona, Case C-156/21, Hungary v. European Parliament and Council (Dec. 2, 2021).

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

State started emerging in at least 2017,[15] in the context of the first debates on the new MFF for the period 2021–27 and of the ongoing discussions provoked by the Hungarian and Polish crises.[16] Germany and Italy were among the first Member States to explicitly mention the idea of linking EU funds with respect for the rule of law in their positions papers on the future of cohesion policy and the MFF.[17] A reflection paper of the Commission of June 2017, despite President Juncker's perplexities, offered a similar view.[18] From the very early phases, there was at least a degree of ambiguity in the real goal of those proposals: Protecting the EU budget and the sound financial management of EU resources—or rather ensuring respect for the rule of law *tout court*. But the latter objective was certainly prevalent in the public debate where creating a link between EU funds and the rule of law was seen as an instrument to tackle the Hungarian and Poland crises and break what has been defined as the EU "authoritarian equilibrium"[19] where EU funding helps sustain the same regimes that are threatening democracy and the rule of law.

### *I. The Commission's Original Proposal*

The Commission's proposal presented in May 2018 reflected that ambiguity. In the more political debate,[20] but also—and perhaps more significantly—in the Explanatory Memorandum to the proposal,[21] the new Regulation was presented as an instrument to protect the rule of law. But then, in view of the limited competences the EU has in the field of rule of law oversight, the Commission was forced to use a more technical legal basis: Article 322(1)(a) of the Treaty on the Functioning of the European Union (TFEU). The latter allows the Parliament and the Council to adopt "the financial rules which determine in particular the procedure to be adopted for establishing and

[15]For an earlier and partially different suggestion, see Scheppele's proposal to suspend EU funding as a measure under Article 260 of TFEU after a so-called systemic infringement action: Kim Lane Scheppele, Enforcing the basic principles of EU law through systemic infringement actions in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION (Carlos Closa & Dimitry Kochenov, eds., 2021).

[16]On the first debates, see Gábor Halmai, *The Possibility and Desirability of Rule of Law Conditionality*, 11 HAGUE J. RULE L. 171 (2019). Note also that some authors suggested that the procedures in place at the time already allowed for the suspension of funding in the case of rule of law problems, referring in particular to Article 142(a) of Regulation 1303/2013 (the previous 'Common Provisions Regulation') which stated that: "All or part of the interim payments at the level of priorities or operational programmes may be suspended by the Commission if one or more of the following conditions are met: (a) there is a serious deficiency in the effective functioning of the management and control system of the operational programme, which has put at risk the Union contribution to the operational programme and for which corrective measures have not been taken." *See* R. Daniel Kelemen & Kim Lane Scheppele, *How to Stop Funding Autocracy in the EU*, VERFBLOG (Sept. 10, 2018), https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/.

[17]FEDERAL GOVERNMENT OF GERMANY, JOINT STATEMENT BY THE GERMAN GOVERNMENT AND THE GERMAN LÄNDER ON EU COHESION POLICY BEYOND 2020 (2017) https://www.bmwi.de/Redaktion/EN/Downloads/S-T/stellungnahme-bund-laneder-kohaesionspolitik.pdf?__blob=publicationFile&v=2; Italian Government, 'Il Quadro Finanziario Pluriennale: uno strumento strategico al servizio degli obiettivi dell'Unione Europea (2017), https://www.ifelcampania.it/wp-content/uploads/2018/04/Paper_QFP_FINAL_ita.pdf.

[18]Reflection Paper on the Future of EU Finances, COM (2017) 358 final (June 28, 2017).

[19]R. Daniel Kelemen, The European Union's Authoritarian Equilibrium, 27 J. EUR. PUB. POL'Y 481 (2020). See also Renáta Uitz, Funding Illiberal Democracy: The Case for Credible Budgetary Conditionality in the EU (BRIDGE NETWORK, Working Paper No. 7, 2020).

[20]*See, e.g.*, Vera Jourová, Vice President, European Commission, Speech at the High-level Seminar: Finland 100 Years – Finnish and European Perspectives to the Rule of Law (Oct. 31, 2017).

[21]In the Explanatory Memorandum to the proposal, the Commission explained that it was taking action following "a clear request from institutions such as the European Parliament as well as from the public at large for the EU to take actions to protect the rule of law," following "a number of recent events" that "have shown how a lack of respect for the rule of law can become a matter of serious and common concern within the European Union." *See Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States*, COM (2018) 324 final (May 2, 2018) [hereinafter Draft Regulation].

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implementing the budget and for presenting and auditing accounts."[22] There was, therefore, an instrumental logic in the Commission's plan, which justified the introduction of what was, first and foremost an instrument of rule of protection, by arguing that it was necessary in order to protect the EU's own financial interests and guarantee sound financial management[23] of the EU budget.[24]

In this sense, Article 3 of the original proposal clarified that the Commission would adopt measures "where a generalised deficiency . . . affects or risks affecting *the principles of sound financial management or the protection of the financial interests of the Union*."[25] The proposed Regulation offered a brief definition of deficiency as "a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law,"[26] and offered some concrete examples of what could constitute a generalized deficiency.[27] In any case, those references to the financial interests of the Union and the sound financial management of the EU budget could not conceal what was the true goal of the Regulation: The protection of the rule of law.[28]

The Commission proposed a bold decision-making procedure for the adoption of measures, partially inspired by the enforcement system of EU macro-economic governance.[29] The Commission itself was at the center of the system, with two key powers: monitoring Member States' rule of law performances and then proposing to the Council to suspend EU funds when it identified a generalized deficiency. According to the Commission's original design, the proposal containing the measure to be adopted would have been then sent to the Council, which would have been called to decide on the basis of the principle of "reversed qualified majority," meaning that a Commission's proposal would have been adopted unless a qualified majority decided to reject it within one month.[30]

### *II. The Legislative Process in the European Parliament and the Council*

The proposal was soon endorsed by the European Parliament,[31] which however decided to introduce several amendments to the original text[32] also with the aim to bolster its own role in the mechanism, which was minimal under the framework presented by the Commission.

[22]Consolidated Version of the Treaty on the Functioning of the European Union art. 322(1)(a), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[23]On sound financial management, see TFEU art. 317.

[24]*See* Draft Regulation, *supra* note 21, at point 4 of the preamble.

[25]Emphasis added.

[26]*See* Draft Regulation, *supra* note 21, at art. 2(b).

[27]*See* Draft Regulation, *supra* note 21, at art. 3(b) ("(a) endangering the independence of judiciary; (b) failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests; (c) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law").

[28]*See* Iris Goldner Lang, *The Rule of Law, the Force of Law and the Power of Money in the EU*, 16 CROATIAN Y.B. EUR. L. & POL. 1, 10 (2020) ("The dominant motive and target of the Rule of Law Proposal is not the protection of the Union's budget, but the protection of the rule of law itself"); Marco Fisicaro, *Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values*, 4 EUR. PAPERS 695, 698, 702 (2019).

[29]*See* Regulation 1173/2011, of the European Parliament and of the Council of 16 November 2011 on the Effective Enforcement of Budgetary Surveillance in the Euro Area, 2011 O.J. (L 306) 1.

[30]*See* Draft Regulation, *supra* note 21, at art. 6.

[31]European Parliament Resolution of 14 November 2018 on the Need for a Comprehensive EU mechanism for the Protection of Democracy, The Rule of Law and Fundamental Rights, 2020 O.J. (C 363) 45.

[32]Legislative Resolution of 4 April 2019 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 Generalised Deficiencies as regards the Rule of Law in the Member States, EUR. PARL. DOC. (COM 0324) (2018) [hereinafter Legislative Resolution]. For an overview, see Justyna Łacny, *Suspension of EU Funds Paid to Member States Breaching the Rule of Law: Is the Commission's Proposal Legal?*, *in* DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES 269 (Armin von Bogdandy et al., eds., 2021).

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

Most importantly, the EP proposed the introduction of a "Panel of independent experts," which, in the view of the EP, should have helped the Commission with identifying the relevant generalized deficiencies.[33] The Parliament designed then a different decision-making procedure where the EP would also formally participate in the vote, together with the Council, on the Commission's proposal to suspend funding.[34] And it also introduced further clauses on the protection of the final beneficiaries of EU funding, something already envisaged in the Commission's plan.

The reaction of the Council was much less enthusiastic. An Opinion of the Council's Legal Service[35] (CLS) questioned the compatibility of the proposal with EU law, and in particular with Article 7 of the Treaty on European Union (TEU), which contains the procedures that allow the EU to intervene in case of a serious breach of EU values, or a clear risk of a serious breach, in a Member State.[36] The starting point of the Council was the "specific role" of Article 7 in the Treaties, and the fact that it exceptionally empowers the Union institutions to review Member States' respect of the founding values of the Union in areas that would otherwise fall outside the scope of EU law, and would thus normally be considered as "purely internal."[37] According to the CLS, secondary legislation cannot amend, supplement or circumvent that procedure, and a new instrument would only be allowed if it pursued different aims. In that light, the CLS assessed whether the proposed Regulation was truly a tool to protect the EU budget and sound financial management,[38] or whether it was actually an instrument to protect the rule of law, and thus whether it ultimately had the same aims of Article 7 TEU.[39]

It checked, specifically, whether there was a "sufficient link"[40] between the "compliance failure"—i.e., the rule of law deficiency—and the "loss of entitlement"—i.e., the suspension of funding. According to the CLS, the proposal failed this test: It did not show how respect for the rule of law was linked to the sound implementation of the EU budget and the protection of the financial interests of the Union. The CLS found the reference to the concept of "generalised deficiencies" too vague, neither necessary nor sufficient to show the required connection, also because the procedure designed did not require the Commission to show real evidence that the financial interests of the Union were at risk.[41] Another critical aspect identified by the CLS was that the conditionality mechanism and Article 7 would ultimately envisage a common result—the finding of a systemic rule of law failure, as a "generalised deficiency" under the Regulation or as a "serious and persistent breach" under Article 7—and could have entailed common consequences, as Article 7(3) TEU also allows for financial sanctions and consequences.[42] The Legal Service therefore concluded that "the conditionality regime envisaged in the proposal cannot be regarded as independent or autonomous from the procedure laid down in Article 7 TEU, as its respective aims and consequences are not properly distinguished and risk overlapping with each other,"[43] with the result that the Regulation was considered not to be compatible with the Treaties, as it would have established an unlawful parallel mechanism to protect

[33]*See* Legislative Resolution, *supra* note 32, at amend. 45.

[34]*See* Legislative Resolution, *supra* note 32, at amend. 58.

[35]Opinion of the Legal Service 13593/18, *supra* note 6.

[36]On Article 7 of TEU, see Wojciech Sadurski, Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement and Jorg Haider, 16 COLUM. J. EUR. L. 3 (2010).

[37]Opinion of the Legal Service 13593/18, *supra* note 6, at para. 11.

[38]And there the CLS acknowledged, as we will discuss *infra*, that the EU legislator can make funding conditional upon compliance with certain obligations and objectives.

[39]Opinion of the Legal Service 13593/18, *supra* note 6, at para. 19.

[40]For more on this concept, see Section D of this article.

[41]Opinion of the Legal Service 13593/18, *supra* note 6, at para. 28.

[42]On financial sanctions and Article 7, see Leonard Besselink, *The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives*, *in* THE ENFORCEMENT OF EU LAW AND VALUES 128, 129 (András Jakab & Dimitry Kochenov eds., 2017); Tomas Dumbrovsky, *Beyond Voting Rights Suspension: Tailored Sanctions as Democracy Catalyst Under Article 7 TEU* (Eur. Univ. Inst. Dep't of L., Working Paper No. 12, 2018).

[43]Opinion of the Legal Service 13593/18, *supra* note 6, at para. 34.

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

the rule of law, where Article 7 is, according to the scheme of the Treaties, the correct procedure.[44]

The Opinion of the Legal Service, combined with the politically motivated reluctance by the Member States in the Council to create a strong rule of law protection mechanism, which mirrored their general hesitation to take formal action to protect EU values and tackle the Hungarian and Polish crises,[45] represented a formidable obstacle to the negotiations. The discussions slowed down significantly in 2019 when Member States also had to continue their difficult negotiations on the next MFF and only restarted in 2020. In February 2020, the European Council President, Charles Michel, presented a first compromise proposal, accepting the idea of a general rule of law conditionality regime but on the condition that it could be seen as a "genuine conditionality" that only tackled rule of law deficiencies that affected the budget or the EU financial interests in a sufficiently direct way, and suggesting a switch to ordinary qualified majority voting in the Council for the adoption of measures.[46] The arrival of the COVID-19 pandemic further complicated the discussions, as Member States fought hard on many fronts: The health emergency; the fate of the Schengen area; as well as economic recovery plans. The German Presidency of the Council had the challenging task to drive the different dossiers forward in the second part of 2020.

The European Council Conclusions of July 2020 were the next key step of the process. Crucially, in the Conclusions, the Member States committed to adopting the NGEU plan, but also found a general—and perhaps even generic—agreement on introducing "a regime of conditionality to protect the budget and Next Generation EU."[47] The Conclusions were instrumental in advancing the discussion on the conditionality mechanism and also provided for a significant expansion of the scope of application of the instrument, which from that moment onward became linked not only to "ordinary" EU funds, but also to the new Recovery Fund. In the July meeting, the Member States also agreed on the key features of the mechanism, namely that it would be for the Commission to propose measures, and for the Council to adopt them at qualified majority, thus already calling for an amendment to the original Commission proposal that foresaw the use of a reversed qualified majority system. The Conclusions also added a confusing final sentence on the conditionality regime —"The European Council will revert rapidly to the matter"[48]—which was interpreted by some—perhaps even in Budapest and Warsaw—as requiring the need for further approval by the European Council (at unanimity?), though the European Council, under the Treaties, has no right to veto or modify legislative proposals, and in general does not play a role in the legislative process, as clarified by Article 15 TEU. In any event, that enigmatic clause showed once more the complexity of reaching an agreement on the new tool and in general the sensitivity of the topic.

In fact, despite the agreement of the European Council, the two legislative chambers —the EP and the Council—remained in significantly different positions. It was not only a matter of specific points of contention, even if there were many, including the voting system for the adoption of measures, and in particular whether a reverse or ordinary qualified majority should be introduced.[49] More fundamentally, the two institutions started from different perspectives: Protecting the rule of law via the budget—the EP's view —or protecting the budget via the rule of law—the Council's view, aligned with the CLS Opinion. Consequently, the EP called for

[44]For a different view, arguing that Article 7 and the conditionality procedure originally designed by the Commission are parallel and independent, not a circumvention, see Łacny, *supra* note 32.

[45]See generally Peter Olvier & Justine Stefanelli, Strengthening the Rule of Law in the EU: The Council's Inaction, 54 J. Common Mkt. Stud. 5 (2016).

[46]*See* Draft Conclusions EUCO 5846/2020, European Council (Feb. 14, 2020). *See also* Ralf Drachenberg, The European Council and the 2021–27 Multiannual Financial Framework, Eur. Parl. Doc. PE 631.732 (2020), https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/631732/EPRS_BRI(2020)631732_EN.pdf.

[47]Conclusions EUCO 10/20, European Council (July 21, 2020) at 15–16, paras. 22–23.

[48]*See id.* at 16, para. 23.

[49]On the points of contention, see Eulalia Rubio, *Rule of Law Conditionality: What Could an Acceptable Compromise Look Like?*, Institut Jacques Delors (Oct. 2020).

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

maintaining a broad scope of application of the Regulation,[50] while the Council argued for a much more limited instrument, and in particular for ensuring a direct link between the breach of the rule of law and the concrete negative effects on the EU budget.[51] Once again, the Council relied on the CLS Opinion that a conditionality mechanism could not purse the same aim of Article 7 TEU, while at the same time, the Opinion did not exclude that a horizontal regime of conditionality could have been introduced, and that the legitimate legal basis for such a mechanism was Article 322 TFEU. The Council, led by the German Presidency, then presented a new compromise proposal in September 2020, integrating the important novelty that the regime applies also to the new NextGenEU funds. But in October 2020 the positions were still quite distant, and the EP made that clear in a new Resolution,[52] expressing regret for the European Council conclusions that, according to the Parliament, weakened the mechanism proposed by the Commission. The EP once again pleaded in favor of a reverse qualified majority voting system, but, most importantly, the EP made clear that its key concern was still the protection of the rule of law, and not safeguarding the budget and the EU's financial interests.[53]

### *III. The Outcome of the Legislative Process and the Hungarian and Polish Veto*

With the two institutions on the clock, considering the need to finalize the MFF before the end of 2020, an agreement on the new Regulation was only and finally reached on November 5, 2020. The text of the Regulation, as resulted from the approved amendments, was then officially confirmed—if not for some numerical adaptations—in December, and entered into force in January 2021. The final version of the Regulation presents significant novelties compared to the original Commission's proposal, starting from the title, which no longer contains a reference to the rule of law: The Regulation is now entitled "Regulation ... on a general regime of conditionality for the protection of the Union budget."[54] While, of course, changing the title of a legislative instrument does not produce immediate legal consequences, the amendments well show how the Regulation was refocused from an instrument whose first goal was the protection of the rule of law, to a true budgetary tool.

This re-focusing, which was pushed by the Council also following the Opinion of its Legal Service, is evident in the actual text of the regulation. Crucially, the Council and the EP agreed to amend what is now Article 4 of the Regulation, setting the conditions for the adoption of measures. The original text of that provision allowed for the suspension of funding when a "generalised deficiency" in a national rule of law system would affect or risk affecting "the principles of sound financial management or the protection of the financial interests of the Union."[55] The final version removed the references to the concept of "generalised deficiency," replaced by "breaches of the principles of the rule of law,"[56] and then added that those breaches must affect or seriously risk affecting the financial management of the EU budget or the protection of the financial interest of the Union "*in a sufficiently direct way*."[57] This last addition—as will be discussed more in detail in Section D of this article—was particularly crucial for ensuring that the Regulation could effectively be seen as a tool for the protection of the budget, and not an implicit

[50]*See, e.g.*, European Parliament Resolution of 7 October 2020 on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, 2021 O.J. (C 395) 2.

[51]*See* Dimitrovs & Droste, *supra* note 7.

[52]*See* European Parliament Resolution of 7 October 2020, *supra* note 50.

[53]See *id.* at point 15 (reiterating EP's call "to ensure that systemic breaches of the values referred to in Article 2 TEU are made incompatible with Union funding").

[54]Compare with the Title proposed by the Commission: "Regulation ... on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States."

[55]*See* Draft Regulation, *supra* note 21, at art. 2.

[56]*See also* Regulation 2020/2092, *supra* note 1, at arts. 1, 3 (offering examples of what breaches of the rule of law may look like).

[57]Emphasis added.

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alternative to the Article 7 TEU system. In the paragraph of Article 3, the Regulation also clarifies —with a closed list formula—what specific areas must be affected by the breach of the rule of law in order to potentially trigger the adoption of measures.

Other key changes concerned the procedure for the adoption of measures, now provided in Article 6. First, the Regulation added a new step in the procedure, where, according to Article 6(7), the Member State concerned has the possibility to intervene and present its observations not only after the Commission starts the procedure,[58] but also when it proposes measures, thus stressing the procedural rights of the Member State. Then, the Council managed to convince the EP to amend the voting procedure: the reverse qualified majority system was removed, and according to Article 6(10) of the Regulation, the Council now decides at qualified majority on the Commission proposal to adopt measures. The EP, however, is not involved in the decision-making process. Other amendments concerned the measures protecting the ultimate beneficiaries of the funds,[59] the system to lift measures,[60] and stressed the "subsidiary" nature of the mechanism, which should be used only where "other procedures set out in Union legislation" would not allow the Commission "to protect the Union budget more effectively."[61] Furthermore, Article 5(3) of the Regulation made clear that measures must be proportionate to the impact on the EU budget, and not to the "nature, gravity and scope of the generalised deficiency" as originally proposed by the Commission.[62] Finally, a "light" emergency break mechanism appeared in the preamble: Consideration 26 allows the Member State concerned to bring the matter before the European Council "exceptionally" if it believes that the procedure has not respected the principles of objectivity, non-discrimination, and equal treatment. The procedure can thus be halted and referred to the European Council for "discussions," which can take no longer than three months. It must be highlighted, however, that in any case the European Council has no formal role in the procedure and can only discuss the matter, while formal decisions are taken by the Council. As with the decision to introduce a new step in the procedure, the intention was to strengthen the procedural rights of the Member States—perhaps at the expense of a swifter decision-making procedure.

The November agreement between the Council and the EP did not, however, close the debate on the new Regulation. Hungary and Poland continued to oppose the adoption of the instrument, and while they could not veto the Regulation itself because the legal basis of Article 322(1) TFEU —chosen by the Commission and confirmed by the legislators—only requires qualified majority, they threatened to derail the process of adoption of the MFF and NextGenEU which instead required unanimity.[63] The question on how to proceed was left to the European Council meeting of December 2020.

### *IV. The European Council's Compromise*

The meeting was successful, insofar as it gave the green light to the new Regulation and the next MFF and the NextGenEU Plan.[64] Yet, the compromise reached by the Member States has been harshly criticized by many, most importantly because it would have undermined the effectiveness and impact of the new Regulation as well as breached the EU institutional balance.[65] The first four

[58]*See* Regulation 2020/2092, *supra* note 1, at Article 6(5). This step was already foreseen by the original proposal.

[59]*See* Regulation 2020/2092, *supra* note 1, at art. 5.

[60]*See* Regulation 2020/2092, *supra* note 1, at art. 7.

[61]*See* Regulation 2020/2092, *supra* note 1, at art. 6(1).

[62]*See* Draft Regulation, *supra* note 21, at art. 4.

[63]*See* TFEU arts. 311–12 (providing that the "Own Resources Decision" and the MFF Regulation are to be adopted at unanimity).

[64]For a broad overview, see Takis Tridimas, *Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?*, 16 Croatian Y.B. Eur. L. & Pol. VII (2020).

[65]*See, e.g.*, Scheppele et al., *supra* note 9; Alemanno & Chamon, *supra* note 10.

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paragraphs of the European Council Conclusions dealt with the new Regulation and strived to find "a mutually satisfactory solution" addressing the concerns expressed in the debate.[66] The Conclusions both reaffirmed substantive and procedural guarantees that are already expressed in the Regulation, and, more problematically, as the European Council does not have any formal role in the lawmaking process, seems to also add new elements to the Regulation or at least offer a "genuine" interpretation of the meaning and scope of the Regulation.

First, the European Council reaffirmed that the main objective of the Regulation "is to protect the Union budget, including Next Generation EU, its sound financial management and the Union's financial interests."[67] This is not a new nor surprising element, as the text of the Regulation itself—in contrast to the original Commission's proposal—already made clear that the new tool should not be seen as a general rule of law oversight tool—following the amendments pushed by the Council—but a true budgetary instrument. In this respect, the European Council only underlined the change of perspective of the new instrument. Similarly, points 2(e), affirming that measures under the Regulation should be proportionate to the impact on the sound financial management of the budget or the EU financial interests and that the Commission must show a direct causal link between rule of law breaches and the negative budgetary consequences,[68] and point 2(f), stating that the triggering factors of the Regulation are to be read as a closed list and that the Regulation does not relate to generalised deficiencies, simply restated the results of the negotiations between the EP and the Council. The same goes for several points that stress the procedural rights of the Member States possibly concerned by measures under the Regulation, as well as the emergency break mechanism inserted in the preamble.[69]

Point 2(d), in which the European Council highlighted the "subsidiary character" of the new Regulation, and that "Measures under the mechanism will be considered only where other procedures set out in Union law, including under the Common Provisions Regulation, the Financial Regulation or infringement procedures under the Treaty, would not allow to protect the Union budget more effectively" is however more questionable. While it is true that Article 6(1) of the Regulation, after the amendments adopted, states that the Commission should start the procedure "unless it considers that other procedures set out in Union legislation would allow it to protect the Union budget more effectively."[70] The language of the European Council Conclusions is much stricter and includes a reference to the infringement procedure which is absent in the legislative text. Here, the European Council clearly went beyond the legislative text. In order to preserve the EU institutional balance, which, once again, excludes any legislative role for the European Council, and to avoid the conclusion that the European Council acted *ultra vires*, that statement should arguably not be perceived as legally binding on the Commission. The concrete legislative procedure does not force the Commission to show that other procedures could be more effective and the Conclusions simply cannot add that procedural step.

The most discussed part of the European Council Conclusions is however point 2(c). There the European Council entrusted the Commission with developing "guidelines" on how it will apply the Regulation, "including a methodology for carrying out its assessment". Even more controversially, it then stated that, should there be an action for annulment against the Regulation, the Commission should only finalize the guidelines after the judgment.[71] Furthermore, the Conclusion stated that the Commission should not propose measures until the Guidelines are completed. As already noted in the immediate aftermath of the European Council meeting, the Conclusions *prima facie* seem to interfere with the Commission's prerogatives as the guardian

[66] *See* European Council Conclusions, *supra* note 8, at point 2.

[67] *See* European Council Conclusions, *supra* note 8, at point 2(a).

[68] Or in other words, that "The mere finding that a breach of the rule of law has taken place does not suffice to trigger the mechanism." *See* European Council Conclusions, *supra* note 8, at point 2(e).

[69] *See* European Council Conclusions, *supra* note 8, at point 2(j).

[70] *See* Regulation 2020/2092, *supra* note 1, at art. 6(1).

[71] In the meantime, Hungary and Poland have launched their annulment actions. *See supra* text accompanying note 2.

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of the Treaties and challenge the principle of institutional balance. Yet, a political reading of the broader context[72] leads to more nuanced conclusions. The European Commission, as it then confirmed in the next days,[73] participated and agreed to the compromise, which it arguably saw necessary to bring the process forward. When taking that factor into consideration, it becomes more difficult to talk of a true curtailment of its prerogatives by other institutions, considering that the Commission itself contributed to the political agreement. In other words, while elements of the compromise could be seen as legally problematic at first sight, the Conclusions could perhaps best be seen as the expression of a non-legally binding political compromise between the EU institutions.

Ultimately, the compromise convinced Hungary and Poland to lift their vetoes, even if they still voted against the Regulation in the Council. The whole package—the Regulation under discussions, the MFF, and the NextGenEU Recovery Plan—could be finally approved in December. The EP formally approved the Regulation on December 16, just before adopting a critical resolution on the European Council Conclusions, defining them as superfluous and not legally binding and pointing out that the "applicability, content and scope of the Rule of Law regulation is clearly defined in the legal text of the said Regulation."[74] It, however, decided not to start a legal challenge against those European Council Conclusions.[75]

## B. The Rule of Law Conditionality and the Rise of Conditionality

Having discussed the steps that led to the adoption of the new "Rule of Law Conditionality Regulation"—although, as seen earlier, the concept of the rule of law does not appear in the title of the final Regulation—this article puts it in the broader context of the rise of conditionality as an instrument of EU governance. The idea of linking "EU money" and the rule of law did not come out of the blue. In fact, it is part of a broader trend of using the—still limited, at least before the NGEU—EU spending powers to achieve a wide range of policy and enforcement objectives, a trend which has accelerated in the last decade and will be discussed in the next pages.

Before doing that—and in order to analyze the rise of conditionality in the EU as a general phenomenon regarding the exercise of power in a multilevel legal context—we offer a brief definition of conditionality. We prefer to define conditionality in broad terms as the linking of benefits to the fulfilment of certain conditions or of a given behavior.[76] The benefits in question are often economic, as was the case for EU financial assistance conditionality during the Eurocrisis, or for forms of "spending conditionality",[77] but not necessarily so. For example, in the EU enlargement conditionality, the key benefit available is EU membership, though financial "carrots" are also available throughout

[72]*See also* NGUYEN, *supra* note 11.

[73]*See* Draft Regulation 14018/20, of the European Parliament and of the Council on a General Regime of Conditionality for the Protection of the Union Budget (Dec. 14, 2020) ("The Commission takes note of the European Council's conclusions of 10-11 December 2020 with regard to the draft Regulation on a general regime of conditionality for the protection of the Union budget. It confirms the European Council's understanding that the Commission, in the application of the Regulation, is committed to the elements referred to in paragraph 2 of the conclusions of 10-11 December 2020 to the extent that they fall within the remit of its responsibilities, in accordance with the Treaties.").

[74]*See* European Parliament Resolution of 17 December 2020 on the Multiannual Financial Framework 2021-2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation, 2021 O.J. (C 445) 15, 15–17.

[75]For a critical analysis of that decision, see Alberto Alemanno, *The EU Parliament's Abdication on the Rule of Law (Regulation)*, VERFBLOG (Feb. 25, 2021), https://verfassungsblog.de/the-eu-parliaments-abdication-on-the-rule-of-law-regulation/.

[76]In similar fashion, though limited to the external relations of the EU, see Karen E. Smith, *The Evolution and Application of EU Membership Conditionality*, *in* THE ENLARGEMENT OF THE EUROPEAN UNION 105, 109 (Marise Cremona, ed., 2003) ("[T]he linking, by a state or an international organization, of benefits desired by another state to the fulfilment of certain conditions"). For another broad understanding of conditionality, see Stefano Sacchi, *Conditionality by Other Means: EU Involvement in Italy's Structural Reforms in the Sovereign Debt Crisis*, 13 COMP. EUR. POLITICS 77, 79 (2015) (explaining that conditionality can be defined, according to the author as the "granting of some good by a party . . . to a second party that deems such a good valuable, linked to the latter party's compliance with some behavior valued by the former party").

[77]*See* Viță, *supra* note 13.

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the accession process. Or in the context of the Cooperation and Verification Mechanism (CVM), it is Bulgaria and Romania's participation to the Schengen area that has been made informally conditional upon progress in the areas monitored by the mechanism.[78]

Conditionality is thus a tool for the exercise of public power via other means than the traditional enactment of legal rules or the exercise of pure coercion, and where obedience is achieved thanks to the "power of the purse." Just like other regulatory devices that have emerged in the last decades, such as nudging or soft law, conditionality departs from the classical "command and control" paradigm. The growing reliance on these instruments is an exemplary case of the need to think about new forms of governance in a context characterized by the metamorphosis of state sovereignty and the growing influence of international and supranational actors within the constitutional domains of States.

Conditionality proved to be popular in the international arena,[79] as well as in federal systems,[80] and even in the EU it has been used for decades. Originally, conditionality was mainly an external relations tool, where mechanisms of political conditionality have been deployed since the 1990s in trade agreements and development policies.[81] In the 1990s, the Union put in place a robust conditionality structure in its enlargement policy. Both membership itself and financial and technical assistance throughout the accession process have become conditional upon the candidate countries' continuous progress under the Copenhagen criteria, including the political one, which demands respect for democracy, the rule of law, and human rights.[82] Still in the external relations' field, the European Neighbourhood Policy (ENP) also contains conditionality elements.[83]

However, especially in the last decade, there has been a crucial shift in how conditionality is used by EU institutions. The EU has increasingly relied on conditionality tools also in the internal scene in relation to its own Member States. It has done so in several areas: To maintain the benefits of pre-accession conditionality—constant monitoring of the states concerned and the possibility of sanctioning lack of progress in the relevant areas—even after the moment of accession, for example, the EU designed conditionality clauses in accession agreements.[84] Then, as already mentioned, it has informally linked Schengen membership to progress under the Cooperation and Verification for Bulgaria and Romania. While these conditionality mechanisms have a limited geographic scope and they are linked to the specific context of the enlargement process, the more generalized use of mechanisms of spending conditionality—which apply to all Member states without distinction—is even more significant.

Spending conditionality tools link disbursement of most EU funding programs to the fulfilment of a wide set of rules and standards. The first mechanisms of spending conditionality were introduced already in the 1990s, in particular in the context of the Common Agricultural Policy

[78]See, e.g., Milada Anna Vachudova & Aneta Spendzharova, The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession, 1 SIEPS: EUR. POL'Y ANALYSIS 1 (2012).

[79]Axel Dreher & Roland Vaubel, *The Causes and Consequences of IMF Conditionality*, 40 EMERGING MKTS. FIN. & TRADE 3 (2004); Sarah L. Babb & Bruce G. Carruthers, *Conditionality: Forms, Function, and History*, 4 ANN. REV. L. & SOC. SCI. 1 (2008).

[80]See Frederick Schauer, Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency, 72 DENV. L. REV. 4 (1995); Mitchell Berman, Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions, 91 TEX. L. REV. (2013); Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413 (1989).

[81]*See, e.g.*, Elena Fierro, The EU's Approach to Human Rights Conditionality in Practice (2002); Lorand Bartels, Human Rights Conditionality in the EU's International Agreements (2011).

[82]*See, e.g.*, Smith, *supra* note 76; Cesare Pinelli, *Conditionality and Enlargement in Light of the EU Constitutional Developments*, 10 EUR. L. J. 3 (2004). More critically, see DIMITRY KOCHENOV, EU ENLARGEMENT AND THE FAILURE OF CONDITIONALITY (2008).

[83]Paivi Leino & Roman Petrov, Between "Common Values" and Competing Universals: The Promotion of the EU's Common Values through the European Neighbourhood Policy, 15(5) EUR. L. J. 654 (2009). See also Marise Cremona, The European Neighborhood Policy, in 50 YEARS OF EUROPEAN INTEGRATION: FOUNDATIONS AND PERSPECTIVES (Andrea Ott & Ellen Vos eds., 2008).

[84]Marise Cremona, EU Enlargement: Solidarity and Conditionality, 30 EUR. L. REV. 1 (2005); Adam Łazowski, European Union Do Not Worry, Croatia Is Behind You: A Commentary on the Seventh Accession Treaty, 8 CROATIAN Y.B. EUR. L. & POL. (2012).

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where the EU linked funding to fulfilment of certain environmental objectives. Since then, spending conditionality mechanisms have greatly grown both in terms of their scope of application, in the sense that they apply to more funding programs and substantive content, as more and more conditionalities have been attached to funding disbursement. After the already significant steps taken under the previous "Common Provisions" Regulation (CPR)[85] for the 2014–20 MFF,[86] which introduced several *ex ante* conditions that Member States needed to fulfil in order to get access to EU funding, the new CPR,[87] which was approved in Summer 2021, goes even a step further. It transforms the *ex ante* conditionality regime into an "enabling conditions" system, with four horizontal and sixteen thematic conditions to be monitored throughout the entire budgetary period, and the possibility to suspend funding at any stage of the process. It also reinforces conditions related to respect for fundamental rights in the use of EU funds.[88]

Conditionality was then a fundamental tool during the Eurocrisis.[89] Memoranda of Understanding concluded by EU Member States experiencing economic and financial troubles in order to receive financial assistance were underpinned by a strong conditionality regime. Conditionality became also a defining feature of the European Stability Mechanism (ESM)[90] and was officially sanctioned by the Court of Justice in *Pringle*.[91] Furthermore, it is in the specific field of macro-economic governance that conditionality has found its first formal recognition in the Treaties: Article 136(3) TFEU—amended in 2011—states that EU financial assistance should be made subject to "strict conditionality."[92] More generally, in the field of Economic and Monetary Union (EMU) law conditionality has emerged "as the most effective tool for enforcing fiscal constraints."[93]

If we look at the broader picture, we can see that today the use of conditionality in EU law is becoming systemic,[94] "a well-established practice,"[95] and has been defined even as a "defining element of the European integration … process."[96] In other words, and as Viță put it, we are in an era of "absolute trust in the conditionality's promise to answer some of the deepest, most

[85]*See* Regulation 1303/2013, of the European Parliament and of the Council of 17 December 2013 laying down Common Provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down General Provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and Repealing Council Regulation 1083/2006, 2013 O.J. (L 347) 320.

[86]See for example the "mainstreaming" of equality objectives in the funding system, Viorica Viță, Mainstreaming Equality in European Structural and Investment Funds: Introducing the Novel Conditionality Approach of the 2014–2020 Financial Framework, 18 GERMAN L.J. 993 (2019).

[87]*See* Amended Proposal for a Regulation of the European Parliament and of the Council 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 and Fisheries Fund and Financial Rules for Those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM (2020) 450 final (May 28, 2020) [hereinafter CPR Proposal].

[88]*See id.* at annex III, art. 11. The clause is further discussed *infra* in Section E.

[89]For an overview, see KAAARLO TUORI & KLAUS TUORI, THE EUROZONE CRISIS: A CONSTITUTIONAL ANALYSIS (2014); Michael Ioannidis, *EU Financial Assistance Conditionality after 'Two Pack'*, 4 ZAÖRV 61 (2014); Antonia Baraggia, *Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?*, 4 CAMBRIDGE INT'L L.J. 2 (2015).

[90]*See* Treaty Establishing the European Stability Mechanism art. 3, Feb. 2, 2012 [hereinafter ESM Treaty] (stating that the aim of the organization "shall be to mobilise and provide stability support under strict conditionality" to states experiencing severe financial problems).

[91]*See* CJEU, Case C-370/12, *Pringle v. Ireland*, ECLI:EU:C:2012:756 (Nov. 27, 2012).

[92]*See* TFEU art. 136(3).

[93]*See* Francesco Costamagna & Alberto Miglio, *Sanctions in the EMU Economic Pillar*, *in* EU LAW ENFORCEMENT: THE EVOLUTION OF SANCTIONING POWERS 139, 153 (Stefano Montaldo, Francesco Costamagna & Alberto Miglio eds., 2020).

[94]*See* Roland Bieber & Francesco Maiani, *Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?*, 51(4) COMMON MKT. L. REV. 1057, 1073 (2014).

[95]*See* Opinion of the Legal Service 13593/18, *supra* note 6 (acknowledging this).

[96]See Friedrich Heinemann, Going for the Wallet?: Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework, 53 INTERECONOMICS 297, 299 (2018).

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painful and pressing challenges touching the very core of the EU construction."[97] The rule of law conditionality system under discussion is an excellent example of the trend, but we have seen forms of conditionality introduced—or at least suggested—to deal with other open issues, such as migration, asylum challenges[98] and the climate transition.

In particular, forms of "enforcement conditionality"[99]—conditionality mechanisms whose goal is to enforce other obligations of EU primary or secondary law—are often proposed for areas in which using other ordinary instruments of institutional or individual enforcement is not possible or will not produce adequate results, such as compliance with macro-economic requirements and now with the rule of law and the common values of Article 2 TEU.[100] These are often questions with a strong "federal" dimension insofar as they concern the relationship between the two main levels of government in the EU, which once again the EU struggles to tackle with its traditional enforcement mechanisms, while at the same time still lacking other coercive instruments typical of federations. In these situations of limited authority, where a regulatory entity does not possess the power to make and enforce decisions over another subject authoritatively, conditionality provides a valid alternative form of exercise of public power and authority.

Yet, our argument is that the use of conditionality as a tool of EU governance is not simply a technical choice, but one that raises constitutional questions and that has an impact on key principles and paradigms of EU law—as we will explain in the next paragraphs. In this respect, a clear distinction must be drawn between "internal" and "external" conditionality. Reliance on conditionality in EU external relations can be considered a standard tool of foreign policy, which is used also by other international organizations as well as individual states. While also in this respect the use of conditionality has been challenged and criticized, both procedurally and in terms of the substantive conditions posed for example by the IMF and the World Bank,[101] it is when conditionality is used on the internal scene that real questions arise, as the relationship between the EU and third countries is in fact not governed by the same constitutional framework that is applicable to EU Member States' relationship. So far however, the institutional and academic[102] debate seems to have overlooked the impact of conditionality on the basic principles and structures of EU law, and the EU still lacks a clear "conditionality doctrine," in contrast with what happens in established federal systems.

To draw a quick comparison with the United States, for example, there the debate on conditionality has been vibrant and the literature is highly polarized on the constitutional status and legitimacy of this tool of governance.[103] In general, the use of conditionality by the federal government finds its base in Article I, Section 8 of the U.S. Constitution and the "general welfare" spending power of the federal government.[104] In the leading case on conditional spending, *South Dakota v. Dole*,[105] the Supreme Court established a four-part test for assessing the constitutionality of spending conditions. First, the federal spending must be in the "general welfare." This is because

[97]Viorica Viță, *In Conditionality We Trust: What Scope for Conditionality in the Emerging European Economic Constitution?*, *in* The Metamorphosis of the European Economic Constitution (Herwig C.H. Hofmann, Katerina Pantazatou & Giovanni Zaccaroni eds., 2019).

[98]For an overview, see Lang, *supra* note 28.

[99]On different types of conditionality, and in particular the distinction between "regulation" and "enforcement" conditionality, see Viță, *supra* note 13.

[100]*See* Bieber & Maiani, *supra* note 94 (presenting conditionality as a way to reinforce centralized enforcement in areas where individual enforcement is not adequate or possible).

[101]*See* Toni Killick, Conditionality: The Political Economy of Policy Change (1998); Daniel Zormelo, *Is Aid Conditionality Consistent with National Sovereignty?* (Overseas Dev. Inst., Working Paper No. 95, 1997).

[102]For two significant exceptions, see Cremona, *supra* note 84. *See also* Viță, *supra* note 13.

[103]See, e.g., Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion), 70 Bos. Univ. L. Rev. 593 (1990); Richard A. Epstein, Foreword: Unconstitutional Conditions, State Power and the Limits of Consent, 102 Harv. L. Rev. 4 (1988); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989).

[104]U.S. Const. art. I, § 8, cl. 1.

[105]South Dakota v. Dole, 483 U.S. 203 (1987).

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Congress has authority under Article I, Section 8, to spend for the "general welfare" and not to impinge on the States' legislative competences. Second, the condition must be clear and unambiguous so that States can "exercise their choice knowingly cognizant of the consequences of their participation."[106] Third, the condition must be related to the purpose of the federal spending program. Finally, the condition cannot violate some other provision in the Constitution. For federalism purposes, the condition cannot violate federalism principles that the Court has read into the Tenth Amendment. In particular, the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion."[107] At this point, the program goes too far, and it is unconstitutional. While the Supreme Court's decision has not closed the discussion, and the doctrine of unconstitutional spending conditions remains quite controversial—as the recent cases of *NFIB v. Sebelius*,[108] and the Sanctuary Cities Litigation clearly show[109]—there is no doubt that the question of the limits to the use of conditionality and to the central government's spending powers is very much present in the debate, and the Supreme Court has set a series of conditions that frame the discussion.

In the EU, the debate is much less advanced. Despite the severe critiques addressed to how conditionality was used during the Eurocrisis—mostly concerned with the substantive content of the conditions imposed[110] or with the opaque regime deployed[111]—EU institutions seemingly have continued to almost blindly trust conditionality with little reflection on whether and what limits may exist, or even on the real effectiveness of conditionality.[112] Conditionality has been used in an expansive manner, often to expand the reach of the central level over areas where the competence of the EU is at the very least limited, and without considering the possible effects that the rise of conditionality has on the EU's vertical—between the EU and the Member States—and horizontal—between EU institutions—balance of powers. There has been little attention also on its impact on key principles of EU law, including for example the principle of Member States' equality,[113] or on how the "benefits in exchange of good behavior" logic may influence the idea of a Union governed by the principle of loyalty and solidarity, where Member States are asked to "mutually trust" each other. As for the Court of Justice—other than plainly sanctioning the use of strict conditionality in the ESM Treaty in its *Pringle* judgment and accepting the overall logic that it can improve compliance with EU law[114]—it has had very few opportunities to also reflect more broadly on the legitimacy of conditionality tools in the EU structure.

Against this background, we will argue in the next section that the legislative process that led to the adoption of the Rule of Law Conditionality Regulation has finally brought to light at least some of these concerns, in particular those related to the competence to adopt conditionality tools and to the concrete design of conditionality mechanisms. While the amendments adopted during the legislative process may have, regrettably, undermined the potential effectiveness of the instrument, the legislative process as well as the future involvement of the Court of Justice may stimulate the reflection on the use of conditionality in the EU constitutional framework that has so far been

[106] *Id.* at 207.

[107] Steward Machine Company v. Davis, 301 U.S. 548, 590 (1937).

[108] NFIB v. Sebelius, 567 U.S. 519 (2012).

[109] See Peter Margulies, Deconstructing Sanctuary Cities: The Legality of Federal Grant Conditions That Require State and Local Cooperation on Immigration Enforcement, 75 WASH. & LEE L. REV. 1507 (2018).

[110] See Anastasia Poulou, Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?, 54 COMMON MKT. L. REV. 991 (2017).

[111] See Claire Kilpatrick, On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts, 35 OXFORD J. LEGAL STUD. 2 (2015)

[112] Viță, *supra* note 13.

[113] See *infra*, section E.

[114] *Pringle*, Case C-370/12 at para. 69 ("[T]he reason why the grant of financial assistance by the stability mechanism is subject to strict conditionality under paragraph 3 of Article 136 TFEU, the article affected by the revision of the FEU Treaty, is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies.").

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

missing and help to identify the first clearer limits to the use of conditionality in EU law. As we will point out in Section E, in any event, even after the adoption of the Regulation significant questions on the use of conditionality in the EU remain and need to be addressed in the future.

## C. The Regulation's Legislative Process: Compromising on the Rule of Law or Addressing Real Concerns?

As noted in the first pages of this article, the outcome of the legislative process that led to the adoption of the Rule of Law Regulation and then—and even more strongly—the compromise of the European Council that ultimately gave the green light to the Regulation have been received very negatively in the academic debate. What prevails is a critical view of how the amendments adopted during the legislative process affected the bold Commission's proposal, and the prevailing perception is that the final instrument lost much of its promises and will be less effective.[115] Ultimately, the compromises reached would be a further illustration of the EU institutions' inability and, even worse, unwillingness to firmly tackle cases of constitutional backsliding in the Member States.

In this respect, we certainly agree that the amendments adopted led to the adoption of a Regulation that is weaker compared to the original proposal, or in other words that the rule of law conditionality lost some of its bite. Any decision to suspend funding is evidently more difficult—and arguably less likely—under the new Regulation, considering, first and foremost, that the Regulation now requires a qualified majority to vote *in favor* of the Commission's proposal to adopt measures. The burden of sanctioning the Member State is shifted on its peers in the Council, and the events of the last decade have already demonstrated that the Member States are reluctant to act against their peers, most notably under Article 7 TEU. The system introduced, more politicized and less "technocratic" than the original proposal,[116] leave the key decision-making powers firmly in the hands of the Council and the Member States. Furthermore, the Commission will now be forced to demonstrate that there is a sufficiently direct link between the breach of the rule of law and the effect on the sound financial management of the EU budget or the EU financial interests. This is certainly a cumbersome requirement for the Commission.

Yet, our argument is that the Commission's proposal, at a closer look, was problematic, as also pointed out by the Council Legal Service Opinion, and the next steps of the legislative process, while possibly limiting the effectiveness of the new tool, adequately addressed some of the questions and tensions that had been raised by that proposal. In other words, the negotiations should not be seen as a compromise "selling" the rule of law, but as a way to address real concerns generated by the Commission's proposed Regulation. In particular, the Opinion of the Legal Service put on the forefront questions of conferral, legal basis, and compatibility with Article 7 TEU, which are a clear example of how conditionality may be used to expand the reach of the central level at the expense of the Member States.[117]

The Commission's proposal was based on an instrumental logic. The form of conditionality it suggested to introduce allowed to transform what is a fairly technical and specific legal basis—Article 322 TFEU—into a platform for a broad, horizontally-applicable rule of law protection mechanism. While, as the Council made clear, Article 322 TFEU is the correct legal basis for a general regime of budget conditionality, in the Commission's proposal, the legal basis was used instead for creating a broad monitoring framework of national rule of law systems—covering even

[115]*See* Scheppele et al., *supra* note 9. *See also* Enzo Cannizaro, *Neither Representation nor Values? Or, "Europe's Moment" – Part II*, 5 Eur. Papers 1101, 1102 (2020) (arguing that by imposing a causal link between the breach of the rule of law and the damage to the financial interests of the Union, the European Council has de facto blocked the operation of the mechanism and deprived the Regulation of its *effet utile*).

[116]*See* Tridimas, *supra* note 64, at XIX.

[117]See also Maria José Rangel de Mesquita, European Union Values, Rule of Law and the Multiannual Financial Framework 2021-2027: The Commission's Proposal to Protect the EU Budget Against Threats to the Rule of Law, 19 ERA Forum 287, 291 (2018); Fisicaro, supra note 28, at 695.

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

areas where the EU lacks any type of legislative competences, such as for example on rules concerning the independence of the judiciary[118]—and introducing a new tool for tackling breaches of this common value parallel to, but independent from, Article 7 TEU. It is difficult to maintain that these were truly "financial rules"—the type of norms that Article 322(1)(a) TFEU allows to create. As we noted earlier, there was an evident tension in the Regulation as proposed by the Commission. While presented as a tool to "protect the Union's budget" and reinforced with references to the principle of sound financial management and the protection of the Union's own financial interests, what the Regulation, as proposed by the Commission, actually aimed to do was to provide a system for protecting the rule of law implicitly meant to address crises such as the Hungarian and Polish ones.[119] Conditionality strategically supported this expansion of EU competences and could thus be critically seen as a platform for a possible "competence creep" on behalf of the EU institutions.

Furthermore, as the CLS also made clear, the proposal of the Commission was in clear tension with the Article 7 system. Article 7 TEU already contains a procedure for the adoption of sanctions in case of a rule of law breach, and those sanctions—considering the open formulation used in Article 7(3) TEU—which allows the suspension of "certain of the rights deriving from membership"—include the adoption of financial measures and the suspension of EU funds.[120] The adoption of the Regulation as designed by the Commission would have amounted to the creation—via secondary law—of a parallel procedure to Article 7 TEU for sanctioning the same, or at least very similar, types of concrete problems—breaches of the rule of law—which could have possibly resulted in the same sanction, the suspension of EU funds.[121] Yet, the new procedure would have applied a different logic and envisaged a different role for EU institutions, bypassing entirely the Article 7 system,[122] escaping its strict boundaries and requirements.[123]

The main way in which these questions—use of the legal basis of Article 322 TFEU and compatibility with Article 7 TEU—were tackled was introducing the "direct link" criterion. It was the Legal Service of the Council that first stressed the need to ensure a "sufficient link" between the compliance failure—the rule of law breach—and the loss of entitlement—the suspension of EU funding. According to the CLS,[124] if that sufficient link is ensured, then what is created is a genuine spending conditionality. If not, the loss of funding would actually be a new form of sanction, and in turn incompatible with the Treaties, as the Treaties provide an exhaustive list of procedures for remedies and sanctions against Member States. In order to reach this conclusion, the CLS referred to some of its previous opinions and to the case law of the CJEU, in particular in the area of the Common Agricultural Policy. In one of the few sets of decisions dealing with spending

[118]While the Court of Justice has affirmed that ensuring judicial independence is an obligation deriving from Article 19 TEU, see CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117, (Feb. 27, 2018), it remains that the EU does not have general legislative competences in the field. *See also* CJEU, Case C-619/18, *Commission v. Poland*, ECLI:EU:C:2019:531 (June 24, 2019), para. 52 (acknowledging that the organization of justice falls within the competence of the Member States, though even though they exercise that competence the Member States must respect EU law obligations, including that of protecting judicial independence).

[119]See again the Explanatory Memorandum to the Draft Regulation, *supra* note 21, but also the fact that the Regulation was mentioned in the 2019 Commission Communication summarizing the state of play of the rule of law protection initiatives. *See Communication from the Commission to the European Parliament, The European Council, The Council, The European Economic and Social Committee and the Committee of the Regions Strengthening the Rule of Law within the Union: A Blueprint for Action*, COM (2019) 343 final (July 17, 2019). *See also* Fisicaro, *supra* note 28, at 702 ("Despite the fact that the proposal is formally built on the need to protect the budget, EU institutions seem reasonably more concerned about defending the rule of law through the budget than the budget through the rule of law.").

[120]*See* Besselink & Dumbrovsky, *supra* note 42.

[121]In contrast, the macro-economic conditionality included in the EU funding system *is* linked to the specific EMU procedures, and can be activated only after the relevant institutions took decisions there.

[122]*See also* Rangel de Mesquita, *supra* note 117, at 291.

[123]*See* Halmai, *supra* note 16, at 14 (while arguing in favor of the proposal, he admitted that the procedure "circumvent[ed] the 4/5 and unanimity requirements of Article 7(1) and (2) respectively").

[124]*See* Opinion of the Legal Service 13593/18, *supra* note 6, at paras. 20–21.

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

conditionalities, the Court had in fact already endorsed forms of conditionality, including same-sector conditionalities—that is to say conditionalities that link funding to fulfilling certain obligations that relate to the objectives and purpose of the funding at stake[125]—or procedural horizontal conditionalities, where national authorities are required to show that they have sufficiently established conditions for the sound financial management of the EU budget.[126] Crucially, the CJEU, in two joined cases concerning Italy,[127] had also accepted that where there are indications of a breach of EU law, as for example a decision to open an infringement action, the Commission may decide to suspend funding when there is "a sufficiently direct link"[128] between the alleged infringement and the operations to which the fund concerned relate.

According to the Legal Service's reading of the CJEU case law, ensuring a direct link between the breach of EU law and the use of the funds is a necessary condition for any conditionality regime.[129] In the case of the Commission's Rule of Law proposal, however, that direct link was missing, according to the CLS, essentially for two reasons. First, the proposed Regulation did not show how respect for the rule of law was linked to sound financial management or the protection of the EU financial interest. Second, the fact that the measures to be adopted—i.e., the suspension of funding—were meant to be proportionate to the rule of law deficiency, rather than to the effect on the EU budget—as in the final text of the Regulation—showed how the real aim of the proposal was to create a sanctioning mechanism for rule of law breaches.[130] To be clear, the Council Legal Service did not exclude that a general horizontal regime of conditionality could be created, but it could not simply be limited to an assessment of the Member States' compliance with rule of law principles. For the regime to be introduced and measures to be adopted, it was necessary to show that the rule of law breach affected, or risked affecting, the sound financial management of EU funds or the protection of the financial interests of the Union.[131]

Under the impulse of the Council—and as seen in Section B—the criterion of a sufficiently direct link was included in Article 4 of the final version of the Regulation. It now reads that measures shall be taken where a breach of the rule of law affects the sound financial management of the EU budget or the protection of the EU financial interests "in a sufficiently direct way," borrowing the language of the CJEU cases.[132] The choice of the Council could not simply be ascribed to an alleged desire to water down the new instrument. If we look back at the original proposal of the Commission, it was evident that the link between the breach—then defined as a "generalised deficiency"—and the funds was much more tenuous and less direct in comparison to other forms of conditionality under EU law. For example, in comparison to macroeconomic conditionalities linked to financial assistance, where the certainly far-reaching measures required to Member States seeking assistance still showed a fairly robust and direct link to the purpose of the funding.[133] Arguably, under the Regulation as proposed by the Commission, even a rule of law problem not directly connected with the use of EU funds could have nonetheless led to a Commission's decision to initiate the process to suspend funding. The legal basis of Article 322 TFEU could hardly support such a measure. Introducing the direct link criterion, and more

[125]*See* CJEU, Case C-247/98, Greece v. Commission, ECLI:EU:C:2001:4 (Jan. 11, 2001).

[126]*See* CJEU, Joined Cases T-65/10, T-113/10 & T-138/10, Spain v. Commission, ECLI:EU:T:2013:93, Judgement of 26 Feb. 2013.

[127]*See* CJEU, Joined Cases T-99/09 & T-308/09, Italy v. Commission, ECLI:EU:T:2013:200, Judgement of 19 Apr. 2013.

[128]*Id.* at para. 53.

[129]*See* Opinion of the Legal Service 13593/18, *supra* note 6, at para 24.

[130]*See* Opinion of the Legal Service 13593/18, *supra* note 6, at para. 33. For critical observations on the original proposal, see also Opinion 1/2018, Concerning the Proposal of 2 May 2018 for a Regulation of the European Parliament and of the Council on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States, 2018 O.J. (C 291) 1.

[131]*See* Opinion of the Legal Service 13593/18, *supra* note 6, at paras. 35–36. The CLS also require further clarity on the precise standards and criteria to assess whether there was a breach of the rule of law.

[132]*See also* Scheppele et al., *supra* note 9.

[133]*See also* Lang, *supra* note 28.

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generally transforming the Regulation from an instrument to protect the rule of law via the budget, to an instrument that primarily aims to protect the budget via the rule of law, make it possible to rely on Article 322 TFEU[134] and placates the concerns of conditionality becoming a platform for a significant expansion of EU competences. Cross-sector conditionalities may still be included, but the institutions need to show a sufficient connection between the objectives pursued by those conditionalities and the core underlying EU policy.

There is then a second aspect of the outcome of the legislative process worth underlining. In addition to the legal basis and the compatibility with Article 7 TEU, another concern with the original Commission's proposal was the lack of precision of the conditions triggering the activation of the mechanism.[135] As explained earlier, the Commission used the notion of "generalised deficiencies" as a threshold for the possible application of measures. The draft Regulation only used a short definition of the notion of generalized deficiencies: "a widespread or recurrent practice or omission, or measure by public authorities . . . affects the rule of law."[136] When looking at the concept developed by the Commission, it was not clear, in the first place, how the notion differed from that of "systemic threat" to the rule of law that was used in the Commission Rule of Law Framework, or even "clear risk of a serious breach" that instead is the concept used in Article 7(1) TEU. Even more importantly, however, the use of such a vague clause left to the Commission a very wide discretion both in identifying the relevant national practices, omissions, and measures, and in determining whether they may affect the rule of law.[137] While it is true that in Article 3 of the draft Regulation the Commission was somehow more specific, identifying certain areas where its scrutiny would concentrate, those fields were presented as merely illustrative, and the same went for the examples of generalized deficiencies identified in the second paragraph of the article. The vague concept of generalized deficiency risked undermining legal certainty and even promoted a degree of arbitrariness.[138] In more general terms, it seems to replicate again what has been a major concern in the design of conditionality schemes under EU law, and namely that the content of those conditions have not been designed following a democratically legitimate process.[139] The Commission would have acquired a broad competence to determine the substantive content of the conditionalities, even in an area that is traditionally outside the conferred competences of the Union.

Even in this respect, the Council Legal Service expressed its objections, where it held that in order to qualify as a genuine—and legitimate—conditionality, the mechanism needed to "identify with sufficient precision the conditions that have to be complied with."[140] The Legal Service called therefore to identify clearly defined rules and explicit standards and criteria. The final version of the Regulation contains improvements in this respect, moving from an open list of general deficiencies to a closed list of breaches and the identification of specific areas that must be affected by breaches. First, the final version of the Regulation replaced the concept of generalized deficiencies with that of "breaches" of the rule of law, and in doing so it illustrated three situations that may indicate the existence of a breach, including endangering the independence of the judiciary, failing to prevent, correct, or sanction arbitrary or unlawful decisions by public authorities, and limiting

[134]In his December 2021 Opinion, *supra* note 14, on the annulment action brought by Hungary and Poland, Advocate General Sánchez-Bordona also insisted on the importance of the direct link criterion. According to the Advocate General, in fact, Article 322 of TFEU only allows for the creation of true 'financial conditionality' mechanisms, not pure rule of law conditionalities.

[135]See Łacny, *supra* note 32, at 299 (arguing that, in the Commission's proposal, the "lack of precision in formulation of premises to apply the conditionality mechanism is problematic").

[136]*See* Draft regulation, *supra* note 21, at art. 2(b).

[137]The EU Court of Auditors, in his Opinion on the Commission's Proposal, shared the same concern. *See* Opinion 1/2018, *supra* note 130.

[138]*See also* Łacny, *supra* note 32, at 282.

[139]This was certainly the case in the macro-economic conditionality. *See, e.g.*, Fritz Scharpf, *After the Crash: A Perspective on Multilevel European Democracy*, 21 EUR. L. J. 384, 389 (2015).

[140]*See* Opinion of the Legal Service 13593/18, *supra* note 6, at para 21.

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

the availability and effectiveness of legal remedies.[141] Then, in Article 4, it indicated that in order to potentially trigger the application of measures, the breaches must concern one of eight well-defined areas linked to the EU budget. The negotiations thus limited the discretion of the Commission and offered more clarity and certainty in terms of triggering conditions for the activation of measures. Doing so might actually contribute to make the Regulation more effective, as political science studies have shown that ensuring the "determinacy" of conditions may have a positive impact on the effectiveness of the conditionality.[142]

When considered all together, it is evident that the amendments approved by the Council and the EP narrowed down the scope of application of the Regulation and made the decision-making process more cumbersome. If analyzed from the perspective of the protection of the rule of law and the need to find urgent answers to the Polish and Hungarian crises, this might certainly be regrettable. At the same time, we should acknowledge that the original proposal raised several questions in terms of its legality and legitimacy, as the Council Legal Service—largely correctly—pointed out in its Opinion. The amendments adopted in the legislative process positively addressed those concerns by ultimately designing an instrument that, while more limited in scope, is more robust and better placed to withhold the scrutiny of the Court of Justice in the action for annulment that Hungary and Poland will bring.

For our discussion, what is crucial is that the legislative process finally started to bring to light the question of the limits to the design and use of conditionality tools. The Commission's proposal implied a broad understanding of what may constitute a conditionality under EU law. According to the Commission, even using a specific legal basis like Article 322 TFEU, it was possible to condition EU money, in broad terms, to an objective external to the policy such as respect for the rule of law. The Legal Service of the Council kicked back by asking that this additional objective—respect for the rule of law—must be still linked to the concrete funding policy, and the introduction of the "sufficiently direct way" criterion successfully translates that point of view. The intervention of the Court in the first months of 2022 might help in clarifying, if indeed the criterion of the direct or specific link is a necessary condition for any-type of cross-sector conditionality, as argued by the CLS when it held that "a specific link between an identified deficiency and the inability to satisfy the objectives of a given measure is at the core of any conditionality attached to EU funding".[143] Furthermore, the legislative process and the CLS Opinion affirm another important principle: that conditionality cannot be used as a way to provide for alternative forms of sanctions when there are specific mechanisms provided by the Treaties. While forms of conditionality can contribute to the enforcement of Union law or EU values, they cannot pursue the same aim and purposes of other enforcement tools provided in the Treaties, in the context of the rule of law protection particularly of Article 7 TEU, but also the infringement procedure.

The debate is certainly not over, not least because the CJEU will still have to determine whether the new Regulation is ultimately compatible with the Treaties. Considering the growing trust in conditionality as an instrument of EU law, future discussion will arguably make clear whether the "direct link" criterion is a necessary element for introducing future conditionalities, as is also the case in the United States.[144] Moreover, as the debate on the rule of law conditionality only concerned a form of "enforcement" conditionality, it will have to be seen whether similar logics apply for forms of "regulatory" conditionality, where the objective of the condition is not ensuring compliance with other obligations of EU law but introducing new policy goals. Furthermore, from a broader constitutional perspective, the desirability of the phenomenon we have defined as rise of conditionality is still to be addressed as regards the possible tensions we will investigate in the next section.

[141] *See* Regulation 2020/2092, *supra* note 1, at art. 3 (a–c).

[142] *See* Michael Blauberger & Vera Van Hüllen, *Conditionality of EU funds: An Instrument to Enforce EU Fundamental Values?*, 43 J. EUR. INTEGRATION 1, 4, 9–10 (2021).

[143] *See* Opinion of the Legal Service 13593/18, *supra* note 6, at para 35.

[144] *See supra* Section C.

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

## D. Expanding the Conditionality Toolbox: Remaining Tensions and Possible Developments

The new Rule of Law Regulation has thus both expanded the EU "rule of law toolbox" and what could be defined as the growing "conditionality toolbox." The adoption of the Regulation further showed that EU institutions continue to trust conditionality as an instrument to tackle complex challenges and key points of fractures of the Union's legal order.[145] Much suggests that conditionality is likely destined to play an increasingly important role in the EU architecture in the foreseeable future. In this sense, it is worth underlining again that the new Regulation applies not only to "traditional" EU funds, as in the Commission's original proposal, but also to the new NGEU funds. Thus, while the scope of application of the regulation in terms of triggering conditions has diminished with the introduction of the direct link criterion, when it comes to the scope of funds covered, this was greatly expanded during the legislative process. In turn, the NextGenEU scheme itself makes use of conditionality-like tools, as the national recovery and resilience plans must be submitted to the Commission and ultimately approved by the Council and must be in line with the country-specific recommendations under the European Semester. Under the Recovery and Resilience Facility Regulation, the concrete disbursement of grants will depend upon fulfilment of specific milestones and tasks, and can be suspended in case a Member State is breaching EU macro-economic requirements.[146] While it is true that these forms of conditionality differ from mechanisms of strict conditionality that were in place under the ESM,[147] the package of NextGenEU and new rule of law conditionality regulation certainly "advance conditionality as a constitutional virtue."[148]

Considering the growing relevance and popularity of conditionality, we believe a broader reflection on its impact on the EU constitutional framework and ultimately its legitimacy remains very much needed. The process that led to the adoption of the Rule of Law Conditionality Regulation that we have explored in this article is a first contribution to that process. In particular, it may have started drawing clearer boundaries to the use of conditionality under EU law. The Council Legal Service Opinion began elaborating on the criteria that make conditionality mechanisms compatible with other control and sanction mechanism under EU law—in the specific case, most importantly Article 7 TEU. A criterion the CLS elaborated is that the two procedures—conditionality and the "ordinary" sanction mechanism—must be governed by different rules and pursue different aims. Enforcement conditionality cannot simply bypass other enforcement and sanctioning mechanisms provided by the Treaties. Furthermore, the "direct link" criterion that the Council asked to introduce, following the Opinion of its Legal Service, may prove to be a crucial element for ensuring the legality of conditionality tools. Taken together, these two criteria may address some of the concerns related to the use of conditionality as a tool to expand EU competences, or in other words limit possible "competence creeps via conditionality". As is well known in federal systems, in fact, the use of conditionality produces an almost inevitable expansion of central intervention, in the sense that it is always the central level of government who uses conditionality to influence the behavior and the policies of the other levels of government. Within the EU such centripetal effect may be highly problematic given the embedded tension between EU centralization and national powers in key policy fields that may be attracted via conditionality in the EU regulatory sphere. The Regulation under discussion, especially as proposed by the Commission, was a clear example as it concerned an area—national rule of law systems—where the EU has only limited competences and in any event no clear-cut legislative competences. The EU by virtue of Article 7 TEU undoubtedly has the power to oversee respect for the rule of law, but cannot adopt, for example, norms harmonizing the organization of the national judiciaries.

[145]*See* Viță, *supra* note 97.

[146]See Article 10 of the Regulation 2021/241, of the European Parliament and of the Council of 12 February 2021 Establishing the Recovery and Resilience Facility, 2021 O.J. (L 57) 17, 33 (entitled 'Measures linking the Facility to sound economic governance').

[147]*See* ESM Treaty, *supra* note 90.

[148]*See* Tridimas, *supra* note 64, at VII.

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If competence concerns were at least partially tackled during the legislative process, from a more normative perspective broader issues with the possible transformative effects of conditionality on the EU constitutional order remain relevant. And it is crucial and necessary to identify criteria that may also guide future discussions on the introduction of new and other conditionality mechanisms. In the first place, reflection is needed on the impact of conditionality tools on the principle of equality between Member States.[149] Spending conditionality is inherently an asymmetrical tool of governance and has a disproportionate impact in the Member States, in the sense that it has more bite over those Member States that receive larger amounts of EU funds compared to those states that are net contributors to the EU budget.[150] After all, this was precisely the idea behind the rule of law conditionality proposal, although, for obvious reasons, it could not be made explicit in the Regulation: Forcing Hungary and Poland—two of the biggest receivers of EU funds—to comply with EU 'rule of law demands' by threatening them with the suspension of EU funding. In other words, while formal equality is always guaranteed because the Regulations containing conditionality clauses, including the Rule of Law Regulation[151] or the Common Provisions Regulation apply to all Member States, from the point of view of substantive equality the situation is different. Funds are distributed unevenly between Member States in order to fulfill their goals of promoting, inter alia, solidarity and cohesion,[152] and linking other objectives—for example, the protection of the rule of law, or compliance with macro-economic requirements—to those funds comes with some risks. In the first place, using EU funding in such an instrumental way might have ultimately led to a misunderstanding of what these funds stand for. They are not a form of charity from "Western" Member States towards "Eastern" Members, but a crucial support for the functioning of the internal market and for the balanced and fair functioning of economic governance.[153] Furthermore, as noted by Goldner Lang, attaching additional objectives to those funds can "indirectly change and expand the objectives of EU funds" and could even contribute "to the continued lagging behind of underdeveloped regions, thus resulting in further divergence among EU Member States and regions—instead of promoting cohesion".[154] Measures suspending funds could therefore have even reached the completely opposite objective of the underlying policy, and further broadened the distance between more and less developed regions in the EU,[155] ultimately undermining substantive equality between Member States.

Furthermore, spending conditionality lacks a mechanism to re-balance potential biases against less wealthy Member States that is present in the system of Article 260 TFEU, the provision which allows the CJEU to impose financial sanctions against those Member States that do not comply with a ruling of the Court after an infringement action. In the latter system, the richer Member States, in comparison, pay more if they do not comply with a Court's decision: The Court of Justice determines the amount of the sanctions based on three criteria—duration of the infringement, seriousness of the infringement, and 'ability to pay'—which are calculated on the basis of a combination of the Member States' GDP and population. The system is designed precisely in order to promote equal treatment and avoiding punishing less wealthy Member States in a disproportionate manner.[156] In the case of spending conditionality, there is no mechanism to balance

[149] *See* Consolidated Version of the Treaty on European Union art. 4(2), Feb. 7, 1992, 2012 O.J. (C 326) 13 [hereinafter TEU].

[150] *See also* Bieber & Maiani, *supra* note 94, at 1082 (arguing, with reference to macro-economic conditionality in the structural funds regime, that "it has the potential to generate considerable leverage against a clearly delimited subset of Member States").

[151] *See also* Conclusions EUCO 22/20, *supra* note 8, at point 2 (emphasizing that the new Regulation will respect the principle of equal treatment between Member States).

[152] Or to put it differently, the unequal distribution of funds promotes substantive equality between Member States.

[153] *See also* Benedek Jávor & László Andor, *Of Funds and Values: Conditionality in EU Cohesion Policy*, EURACTIV (Dec. 13, 2018), https://www.euractiv.com/section/economy-jobs/opinion/of-funds-and-values-conditionality-in-eu-cohesion-policy/.

[154] Lang, *supra* note 28, at 17–18.

[155] On the risk that cross-sector conditionalities may derail objective underlying policy, see also Bieber & Maiani, *supra* note 94, at 1081 (referencing macroeconomic conditionality in structural funds).

[156] *See* Bieber & Maiani, *supra* note 94, at 1069.

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the impact of the funding suspension. Thus, the measures end up affecting in a stronger manner the less developed Member States, which receive a higher percentage of EU funds. Thus, while spending conditionality formally respects the principle of equality in the sense that it applies to all Member States, in substance it has a stronger impact on a specific class of members. This is possibly what former President Juncker had in mind when he defined the idea of a rule of law conditionality "poison for the continent," pointing out the risk of bolstering divisions between different states and different parts of the continents, and most importantly between "Eastern" and "Western" Europe.[157]

To go even a step further, the widespread use of conditionality may be the symptom of a more radical shift in the EU constitutional culture: From a legal order based on the keystones of loyalty, solidarity, and mutual trust, to a legal order based on a new "conditionality culture," which introduces a "donor-recipient" logic in the EU legal order, considering the inherent asymmetry of conditionality tools.[158] Borrowing from the language used in the field of judicial cooperation, conditionality may contribute to the shift from mutual trust to mutual distrust between Member States.[159] In this respect, Cremona suggested a neat distinction between internal and external conditionality: Before accession of a Member State, conditionality actually "underpins" the solidarity that can be expected once a candidate country becomes a Member State, in the sense that candidates need to show compliance with specified conditions and common values in order to then "deserve" post-accession solidarity.[160] But that idea is based on limiting conditionality to the pre-accession phase, and excluding after it: "[O]nce accession has taken place, the benefits of membership are not conditional upon keeping the rules."[161] Looking at 2004 acts of accession,[162] Cremona had criticized conditionality clauses therein contained as they challenged the EU integration framework: "The intrusive, one-sided and peremptory requirements of pre-accession conditionality can be justified precisely because, once a member, the candidate state will be a part of a community of solidarity, of mutual interdependence and trust."[163]

The context of the Rule of Law Conditionality or spending conditionalities in general are not perfectly comparable to those accession clauses, as they apply to all Member States. Nonetheless, Cremona's arguments show that the growing reliance on conditionality could bring trust within the EU system logics that were foreign to the Union method developed over the years. Participation in Union policies, including EU funding, has never been seen as a reward for good compliance and good behavior, but a key membership right. Furthermore, the Court of Justice has always rejected any logic of reciprocity, typical of the international law arena: under the traditional "community of law" framework, breaches of EU law do not lead to the suspension of membership rights or retaliation by other Member States,[164] but are managed at the supranational level through legal proceedings before national and EU courts. Finally, financial sanctions are not a typical tool

[157]This was the risk underlined by Commission President Juncker when he defined the proposal for funding suspension "poison for the continent." *See* Eder, *supra* note 5.

[158]*See* Viță, *supra* note 13, at 120. *See also* Cremona, *supra* note 84.

[159]See Iris Canor, My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust Among the Peoples of Europe," 50 COMMON MKT. L. REV. 383 (2013).

[160]Cremona, *supra* note 84, at 17.

[161]Cremona, *supra* note 84, at 19.

[162]Similar clauses were also added to the 2007 Acts of Accession of Bulgaria and Romania, which also set up the Cooperation and Verification Mechanism, and to the 2013 Act of Accession of Croatia. *See also* Łazowski, *supra* note 84.

[163]Cremona, *supra* note 84, at 21.

[164]The CJEU always excluded any form of 'reciprocity' similar to the WTO system. For a clear summary of the CJEU position and making explicit reference to the lack of reciprocity, see Opinion of Advocate General Sharpston at para. 113, Cases C-715/17, Commission v. Poland; C-718/17, Commission v. Hungary; C-719/17, Commission v. Czech Republic, (Oct. 31. 2019) ("In the EU legal order, the implementation of EU law by the Member States cannot be made subject to a condition of reciprocity. Articles 258 and 259 of TFEU provide the appropriate remedies in cases where Member States fail to fulfil their obligations under the TFEU.").

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

of enforcement of EU law, even if admittedly the use of sanctions is on the rise.[165] In contrast, for example, to an international development bank, in the EU money is not the only tool to bring about change and compliance at the Member State level. The fact that it might now be necessary to use conditionality—that there might be "no alternative" to conditionality, to borrow a language often used during the Eurocrisis—might be a worrying sign for the integration process, showing a structure that struggles to keep Member States together: A community of economic interests, rather than a true Union of Values?[166]

Considering the picture sketched above, we believe that further reflection is needed on the position and role of conditionality among the EU regulatory tools, and the desirability of the shift towards conditionality we seem to be witnessing. It is evident that conditionality represents an appealing solution especially where ordinary tools of EU law enforcement cannot ensure adequate compliance with EU values, law and objectives, and it can contribute to ensuring the smooth functioning of key EU policies. At the same time, conditionality could exercise a divisive impact on the EU integration structure, and it also seems to push the EU back on the trail of international organizations rather than of a composite constitutional space. However, this is not the whole story. If the increasing use of conditionality has of course exacerbated its controversial effects, it has also marked new positive developments. The use of conditionality in the rule of law crisis but also in the new programs to deal with COVID-19 crisis envisage a new, more "positive" conditionality, inherently different—for example, from the bailout "austerity" conditionality deployed in the past.

Indeed, in the case of the rule of law, the aim is to protect the core and funding values of the EU against the challenges posed by Member States, which are themselves implementing divisive and controversial reforms. As argued, conditionality may exert "a function different from that of its macroeconomic version, aimed at hopefully connecting together the dispersed paths of EU constitutionalism."[167] Even if we look at the conditions of the NextGenEU scheme, there is a clear shift beyond austerity conditionality, in the new programs "loans-cum-conditionality no longer represents the default option."[168] The Resilience Recovery Facility's (RRF) conditionality is based on a system of conditional transfers according to a set of objectives and long-term policy priorities put down in the RRF Regulation. The nature of the objectives marks the difference with the austerity conditionality. The latter presented an inherent disciplining character—resembling the traditional conditionality schemes deployed by international financial institutions—and it was aimed at achieving medium term objectives dealing with the reduction of public expenditure and the sovereign debt restructuring. On the contrary, the regime of conditionalities envisaged by the new RRF Regulation aims at fostering the Member State's action in key sectors—identified by the EU as priorities for the future of the EU itself. This application of conditionality is closer to the practice of federal states in managing federal grants with strings attached in the name of the general policy goals set by the central government.

Such "federalizing" force of conditionality can be seen also in a new interesting field of application. The recent Communication on the "Strategy to strengthen the application of the Charter of Fundamental Rights in the EU" has linked the implementation of EU funded programs with the respect of the relevant provisions of the Charter of Fundamental Rights. In particular, the proposal for the Common Provisions Regulation (CPR), which defines the rules for the next EU budget for

[165]*See generally* EU LAW ENFORCEMENT: THE EVOLUTION OF SANCTIONING POWERS (Stefano Montaldo, Francesco Costamagna & Alberto Miglio eds., 2020). For a more general observation, see also Armin von Bogdandy, *Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace*, 14 EUR. CONST. L. REV. 675, 682 (2018) (speaking of a "coercive turn" of the EU).

[166]But for a different and perhaps more optimistic view, see Bieber & Maiani, *supra* note 94, at 1091 (arguing that the emphasis on penalties and conditionality may actually reveal the "maturing of a legal system" more strongly concerned with compliance and enforcement).

[167]Cesare Pinelli, Conditionality and Economic Constitutionalism In the Eurozone, 11 ITALIAN J. PUB. L. 1, 41–42 (2019).

[168]Matthias Goldmann, The European Economic Constitution after the PSPP Judgment: Towards Integrative Liberalism?, 21 GERMAN L.J. 1058, 1072 (2020).

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2021–27, contains an 'enabling condition' relating to the Charter, this means that for all programs supported by the EU funds covered by the CPR, there must be effective mechanisms in place to ensure their compliance with the provisions of the Charter.[169] While the scope of this Charter conditionality is narrower than the horizontal rule of law conditionality clause, it is a further sign of how conditionality may not only be used as a disciplining tool, but as a key instrument for the protection and promotion of the EU "fundamentals."[170]

The most recent applications of conditionality, therefore, on the one hand confirm the growing expansion of the instrument in the EU governance in sensitive issues, such as the rule of law and EU fundamental rights protection. On the other hand, they seem to address some of the problematic features of conditionality, fostering a conditionality regime more in line with the key principles and values of the EU composite constitution. Conditionality continues to serve as a "nexus" between solidarity and responsibility,[171] but compared to the Eurocrisis austerity conditionality, the new forms of conditionality better balance the two sides of the coin, perhaps even emphasizing solidarity over responsibility. This turn may pave the way for a new understanding of conditionality as an effective tool of managing conflicts and differences in a multi-layered constitutional system.

## E. Conclusion

The picture emerging from the adoption of the new Rule of Law Conditionality Regulation is a complex one. There is no doubt that the compromises reached during the legislative process weakened the instrument as opposed to the original Commission's proposal, and this is disappointing considering the urgency to find effective responses to the constitutional backsliding processes in Hungary and Poland. As described in Section B, while the original aim was the protection of the rule of law *tout* court, now the core objectives are the protection of the Union budget and the EU's financial interests *via* the rule of law. At the same time, this more limited Regulation can still be seen as an important addition to the rule of law toolbox[172] that may contribute to increasing the credibility of actions to protect the founding values of the Union.[173] All considered, despite its more limited scope of application, the Regulation remains far easier to use than Article 7, as it has—even after the amendments—significantly lower decision-making thresholds, but also has additional bite compared to Rule of Law Framework and other Rule of Law instruments of the Commission, and can nicely support infringement actions under Article 258 TFEU.

Furthermore, as we have argued in earlier sections, the limitations introduced during the legislative process cannot be simply seen as a sign of the Member States' unwillingness to take action to protect the rule of law and as watered-down compromises. Some of the amendments adopted during the legislative process may have been crucial for ensuring the legality of the final Regulation, as also pointed out by the Opinion of the Legal Service of the Council. Introducing the direct link—between the breach of the rule of law and the impact on the EU budget and financial interests—criterion ensured that the new regulation represents a genuine conditionality and not a hidden sanctioning mechanism in conflict with Article 7 TEU, and addresses the concerns that conditionality can be used as an instrument for centralizing competences not conferred to the EU.[174] The future intervention of the Court of Justice on the actions for

[169]*See* CPR Proposal, *supra* note 87, at annex III, art. 11.

[170]*See also* Uitz, *supra* note 19, at 12.

[171]*See* Alberto De Gregorio Merino, *The Recovery Plan: Solidarity and the Living Constitution*, 50 EULawLive Weekend Edition 2, 12 (2021).

[172]*See* Tridimas, *supra* note 64 (arguing that "[t]he Regulation is a step forward in protecting the rule of law, albeit more timid than might have been hoped").

[173]*See* Blauberger & Van Hüllen, *supra* note 142, at 8. *See also* Nguyen, *supra* note 11 (arguing it may have significant deterrent effect).

[174]On the other hand, the move from reverse to ordinary qualified majority voting [QMV] was arguably not strictly necessary and can be seen more critically as a sign of the Member States' reluctance to create truly robust mechanisms.

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press

annulment brought by Hungary and Poland will further contribute to identifying a clearer framework for the use of conditionality under EU law.

From a broader point of view, we have also pointed out the possible constitutional tensions emerging from the rise of conditionality in EU law, of which the rule of law conditionality is an excellent example. While conditionality is often an appealing answer to many of the key challenges facing the EU, it may also put the principle of equality between Member States under stress and introduce logics that are in contrast with traditional principles and structures of EU law. Our critical observations presented in Section E are not, however, meant to imply that all forms of EU conditionality are dangerous and should be abandoned. Different mechanisms of conditionality can be more or less legitimate and well designed and should be assessed on a case-by-case approach. As we have seen in Section E, it is, for example, positive that recent types of conditionalities seem better aligned with the basic values of the EU project and serve to protect and promote them. These critical considerations, however, point to the fact that a broader reflection on the use of conditionality in the EU legal system and its position among the EU regulatory tools is needed. To put it in clear terms, conditionality is not a panacea; it cannot be the one-size-fits all solution to any new challenge the EU is facing and cannot simply replace other enforcement mechanisms. Looking at the experience of federal states such as Canada or the United States where conditionality is also extensively used but often faces clearer constitutional limits could be beneficial for the EU.[175] Considering that the spending powers of the EU are on the rise, also as a result of the NextGenEU plan, reflecting on the limits and legitimacy of conditionality linked to those spending powers is of paramount importance.

[175]For a brief discussion of the US system, see *supra* Section C.

**Cite this article:** Baraggia A, Bonelli M (2022). Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges. *German Law Journal* **23**, 131–156. https://doi.org/10.1017/glj.2022.17

https://doi.org/10.1017/glj.2022.17 Published online by Cambridge University Press