

STUDY

Requested by the REGI Committee



Research for REGI Committee - Conditionalities in Cohesion Policy



Regional Development



Policy Department for Structural and Cohesion Policies
Directorate-General for Internal Policies
PE 617.498 - September 2018

EN

Research for REGI Committee - Conditionalities in Cohesion Policy

Abstract

This study discusses the evolution and experience of conditionalities in Cohesion policy and draws relevant policy recommendations on its future development in the light of the 2021-27 legislative proposals of the European Commission, including the proposal on a rule of law conditionality.

This document was requested by the European Parliament's Committee on Regional Development.

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LINGUISTIC VERSIONS

Original: EN

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Manuscript completed in September 2018

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This document is available on the internet in summary with option to download the full text at: <http://bit.ly/2MkiuYi>

This document is available on the internet at:

[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2018\)617498](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)617498)

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Please use the following reference to cite this study:

Viță, V 2018, Research for REGI Committee – Conditionalities in Cohesion Policy, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels

Please use the following reference for in-text citations:

Viță (2018)

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LIST OF ABBREVIATIONS

BoP	Balance of Payments
CAP	Common Agricultural Policy
CJEU	Court of Justice of the European Union
CSR	Country Specific Recommendation
DG	Directorate General
DG EMPL	Directorate General for Employment and Social Inclusion
DG REGIO	Directorate General for Regional and Urban Policy
DG JUST	Directorate General for Justice and Consumers
EAC	Ex Ante Conditionality
EAFRD	European Agricultural Fund for Rural Development
EDP	Excessive Deficit Procedure
EIP	Excessive Imbalance Procedure
EISF	European Investment Stabilisation Function
EMFF	European Maritime and Fisheries Fund
ERDF	European Regional and Development Fund
ESF	European Social Fund
ESF	European Social Fund
ESIF	European Structural and Investment Funds
GDP	Gross Domestic Product
IFI	International Financial Institutions
IMF	International Monetary Fund
MFF	Multiannual Financial Period
MIP	Macroeconomic Imbalance Procedure
MoU	Memorandum of Understanding
NRP	National Reform Program
OP	Operational Programme
OLAF	European Anti-Fraud Office
PA	Partnership Agreement
REGI	Committee on Regional Development
RSP	Reform Support Program
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities

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EXECUTIVE SUMMARY

Background and Aim

In the **2014-20 financial period**, the use of **conditionalities in Cohesion policy** has been **significantly extended** by the introduction of a comprehensive set of macroeconomic and ex ante conditionalities. In May 2018, the European Commission ('Commission') put forwards its **legislative proposals on the 2021-27** financial period, that consolidate prior conditionalities and introduce new ones, most notably: the rule of law conditionality.

The aim of this study is to discuss the Commission's proposals for 2021-27, in the light of the prior experience of conditionalities in Cohesion policy and draw relevant policy recommendations.

Findings

Conditionality is an established EU governance tool that may usefully assist the EU to ensure compliance and effective application of its laws and policies throughout EU spending operations at the national level (1.1). The experience of established **federal systems** shows that when used inside internal governance settings - such as the EU Cohesion policy - conditionality is **first and foremost a constitutional matter** (1.2). Consequently, all use of conditionalities in Cohesion policy must have due regards to the constitutional principles that guide the exercise of power in the EU. Particular attention should be paid to principles guiding the **division of power between the EU and Member States**, and to the **respect of EU fundamental rights** (1.2.2). The study also finds that the **type of conditionality** used is of critical importance for achievement of the policy goal sought (1.3).

During **1994-2013**, two incipient conditionalities were present in Cohesion policy: the **macroeconomic conditionality attached to the Cohesion fund** (2.1.1) and **infringement conditionality attached to Structural Funds** (2.1.2). The inconsistent enforcement of 1994-2013 macroeconomic conditionality rules, which singled out one Member State in the entire history of the tool (Hungary, 2012) showed problematic in practice (2.1.2). The infringement conditionality was successfully used to safeguard the EU financial interests (Italy, 2008), however it has not led to compliance with the breached provisions of the EU Waste Directive by 2018 (2.1.2).

The **2014-20 financial period** marks a stage of historic expansion of conditionalities in Cohesion policy (2.2). The enforcement of **macroeconomic conditionality** has proven to be highly difficult, due to shortcomings of the legal framework, fragile economic situation of the countries concerned (Spain and Portugal, 2016), late timing and strong opposition of the European Parliament (2.2.1.2). The **ex-ante conditionalities** incentivised the start of important legislative, institutional and policy reforms in an incredibly short amount of time. The sustainability and impact of the reforms remains however uncertain, as highlighted by the Court of Auditors (2.2.2).

The **2021-27** proposals **consolidate** and further **expand** the use of conditionalities in Cohesion policy (Part 3). The proposed '**macroeconomic conditionality**' **remains conceptually similar** to the 2014-20 financial period (3.1). A notable novelty is the introduction of an '**escape clause**' to acknowledge situations of deep economic downturn and avoid situations where funding would be suspended when most needed. The proposal **maintains the 'structured dialogue'** with the European Parliament. However, the Commission is no longer required to consider the 'opinions' expressed during the said dialogue in its suspension proposal. A set of 4 horizontal and 16 thematic '**enabling conditions**' replace, streamline and significantly improve the legal framework of 2014-20

ex-ante conditionalities (3.3). An '**infringement conditionality**' is (re)introduced, which is expected to usefully protect the financial interest of the EU, where Cohesion policy expenditure is negatively affected by breaches of relevant EU laws (3.3). A novel '**rule of law conditionality**' is proposed as a stand-alone, cross-cutting requirement applicable to **all EU budget expenditure**, including Cohesion policy (3.4). The study finds that a rule of law conditionality may in principle assist the EU to safeguard the **EU financial resources** from unwarranted waste and ensure **compliance** with EU rule of law principles **on a number of occasions** (3.4.1). It also argues that the **EU has the implicit competence** to adopt a rule of law conditionality (3.4.2). The study concludes that the current proposal **would need to be significantly revisited** to translate in **an effective and workable rule of law conditionality** on the ground (3.4.3).

Recommendations

Macroeconomic conditionality (Art. 15 (7)-(12), CPR proposal)

- (1) The negative mandatory suspension strand of macroeconomic conditionality attached to Cohesion spending should be **used in subsidiary to intrinsic EU economic governance enforcement tools**, and only where the latter have proven insufficient to ensure macroeconomic and fiscal stability (1), and where the said non-compliance would put at risk Cohesion policy expenditure, having regards to its seriousness, duration, extent and recurrence (2). **Under the current CPR proposal** (Art. 15 (7)-(11)), it is simply odd that **suspension of EU funds may be ordered, while sector-specific economic governance enforcement tools are not applied first**.
- (2) It is desirable that a Commission proposal on **suspension** be based on **prior and transparent impact estimates** (in the context of Art. 15 (9)), that would be timely communicated to the interested stakeholders, including to the European Parliament for the purposes of the structured dialogue (Art.15 (12)).
- (3) It would be desirable to see the **European Parliament have a clearer and greater role during enforcement**, consistent with its post-Lisbon legislative and budgetary functions and its greater European democratic legitimacy. The opinion of the European Parliament should be sought before any enforcement, and duly accounted for in the final suspension proposal (in the context of Art. 15 (9) and (12)).

Enabling conditions (Art. 11, Annex III-IV, CPR proposal)

- (4) It is critical that EU legislators maintain the important qualitative improvements of enabling conditions as reflected in the CPR proposal. **Enabling conditions should remain simple, clear, precise, meaningfully linked to spending, focused on measurable results, and continuously fulfilled, monitored and applied** throughout the financial period.
- (5) The thematic area of enabling conditions should **match the Commission internal institutional structure and policy responsibilities of its DGs**. For instance, DG Justice should be closely involved in the assessment and monitoring of EU Charter enabling condition, and its expert opinion should trigger swift action of the Commission departments in charge of spending management (i.e. DG REGIO or DG EMPL).
- (6) **Transparency, legal certainty and accountability** should guide the implementation of all enabling conditions during the 2021-27 period. Form this point of view, it is also advisable to explicitly extend the applicability of the **principle of partnership** to enabling conditions (in the context of Art. 11 and Art.6 (2), CPR proposal).

Infringement conditionality (Art. 91 (1)(d), CPR proposal)

- (7) **Enforcement of infringement conditionality should be coupled with technical assistance** (Arts. 29-30), to support the regions and Member States that struggle in compliance due to lack of sufficient administrative capacity and expert knowledge. This would ensure that the financial interests of the EU are protected by conditionality, while at the same time, the regional development objectives of Cohesion policy are achieved.

Rule of law conditionality (COM (2018)324 final, Rule of law conditionality proposal)

- (8) The rule of law conditionality proposal should undergo profound and significant legislative amendments to translate into an **effective and workable conditionality instrument**. The internal **coherence and consistency** of the proposal require special attention (see, 3.4.3.1-3.4.3.2).
- (9) It is critical that the rule of law conditionality be **focused on a set of limited and concrete rule of law components** (i.e. independence of judiciary), which demonstrate a **sufficiently direct link to spending** (Art. 3, Rule of law conditionality proposal).
- (10) The '**appropriate financial measures**' should be consistent with EU financial rules (CPR proposal) and the **extent of financial sanctions** should be determined pursuant to **clearly specified and foreseeable objective criteria** (Art. 4 (1), Rule of law conditionality proposal).
- (11) The '**reasonable grounds**' triggering the conditionality process should be **clearly stated**, in line with the principle of prohibition of arbitrariness of the executive power (Art. 5 (1), Rule of law conditionality proposal).
- (12) **Credible guarantees**, including prior impact assessments, should be foreseen to ensure that the **economic interests and legitimate expectations of final beneficiaries** are not unduly affected (Art.4(2), Rule of law conditionality proposal).
- (13) To address the concerns regarding the **equal treatment of Member States**, the conditionality **process should be held to the highest standards of transparency**, with due regards to the obligation to give reasons. A decision 'to enforce' or 'not to enforce' the conditionality should be duly reasoned, so as to allow for a meaningful democratic debate, accountability and judicial review (Art. 5, Rule of law conditionality proposal).
- (14) The **enforcement** of the rule of law conditionality **should be entrusted to the Commission, in line with its budgetary implementation functions enshrined in the EU treaties (Art. 317 TFEU)** and consistent with EU practice in external action spending. Enforcement by the Council would lead to a distortion of the current budgetary functions under the Treaty (Art. 5(6)-(7), Rule of law conditionality proposal).
- (15) It would be desirable that the **opinion of the European Parliament and of the Council** be sought before any enforcement, and duly accounted for in the final suspension proposal, to ensure a **genuine European democratic legitimacy of the process** (Art. 5, Rule of law conditionality proposal).

1. CONDITIONALITY - AN ESTABLISHED EU GOVERNANCE TOOL

KEY FINDINGS

- **Conditionality is an established EU governance tool.** It represents in essence a requirement that all EU spending comply with a set of Union policy standards subject to withdrawal of funds in case of failure to do so.
- The use of conditionality has been **practiced for decades in international relations and federal systems**, as conditions attached to disbursement of financial assistance, development aid and to federal transfers at state and local level, underpinned by economic theories and constitutional doctrine.
- When used inside established multilevel governance systems such as the EU, **conditionality is first and foremost a constitutional matter**, capable to inform the constitutional relationship between the EU, its Member States and the EU citizens. Consequently, all use of conditionality in EU Cohesion policy **must necessarily be grounded on the constitutional principles that guide the exercise of power in the EU**, including full respect of **EU fundamental rights**.

1.1. A definition

Conditionality is an established EU governance tool. It represents in essence **a requirement that all EU spending comply with a set of Union policy standards** subject to withdrawal of funds in case of failure to do so.

The **essential trait of conditionality** discussed in this study **is its intrinsic policy objective**, which is related, yet remains conceptually distinct from the immediate objective of EU spending intervention. Take, for instance, a conditionality which requires that all road infrastructure projects co-financed by the EU are fully consistent with EU environmental standards. In this case, the primary objective of the infrastructure project (the highway) is conceptually different from the primary policy objective of conditionality (environmental protection) even if the two are closely related.

From this point of view, conditionality must be distinguished from other conditions of spending, such as eligibility, management, control or similar fiduciary conditions, which, unlike conditionality, primarily pursue a spending execution objective.

1.2. Economic and constitutional underpinnings

Conditionality has been used for decades as a geopolitical tool in EU external policy¹ and international relations.² It has also been used for almost one century as a governance tool in established federations, to advance specific federal policy goals at state and local level.³

¹ L. Bartels, *The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries*, Research for the European Parliament, Policy Department for External Policies, Brussels (2008).

² World Bank, *Review of World Bank Conditionality: the Theory and Practice of Conditionality: a Literature Review* (2005); O. Jeanne, J. Ostry, and J. Zettelmeyer, *A Theory of International Crisis Lending and IMF Conditionality* (2008).

³ R. L. Watts, *The spending power in federal systems: a comparative study* (Institute of Intergovernmental Relations, Queen's University, 1999); R. Jay Dilger, *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues* (2015); K. Richer, Parliament of Canada Information and Research Service, *The Federal Spending Power* (2017).

Cohesion policy conditionality is most accurately understood as a hybrid between conditionality used in international relations and federal systems. Similar to international relations, Cohesion policy conditionality is a requirement attached to disbursement of EU financial resources, aimed to change the recipients' behaviour towards EU policy priorities. Similar to federal systems, **when used inside the EU, conditionality becomes an internal governance tool**. Three main consequences follow. First, conditionality is **addressed not only to states but also to EU citizens**, in their primary capacity of ultimate **subjects of conditionality-led measures** (i.e. strategies, laws, regulations or administrative reforms), but also in their capacity of **final beneficiaries** of EU funds.⁴ Second, the contractual position of EU and Member States is much more equal, as the latter are, together with the European Parliament, co-legislators of conditionality. Third, conditionality pursues a sound budgetary expenditure function (in addition to the behavioural one), as internally, conditionality is not attached to a 'financial gift' or loan, but to EU public funds collected from EU citizens and meant to deliver European public goods. Hence, internally, conditionality is to make sure that EU funds deliver on their promise.

In the following, the economic and constitutional underpinnings of conditionality shall be briefly presented.

1.2.1. Economic theory

The chief underpinning of conditionality resides on **economic foundations**. Initially, economic theories have argued that financial assistance and aid is conducive to growth when conditional on good policies.⁵ The validity of this theory has been challenged primarily on conceptual and empirical grounds, which did not prove to be sufficiently robust.⁶ Consequently, the theory was revisited, and somehow shifted towards the quality of governmental institutions and public policies.⁷ This conditionality vision has been widely practiced by the World Bank and the International Monetary Fund (IMF).

In the recent years, the economic foundations of conditionality have been significantly re-oriented towards good and inclusive governance and the quality of economic and political state institutions, that are arguably the prime conductors of wealth and growth.⁸ Conditionality applied to the European Structural and Investment Funds (ESIF) in 2014-20 largely embraces this theoretical assumption and departs from the premise that sound economic policies and institutional frameworks are the essential pre-requisites for any successful public investment and growth in the EU.⁹

⁴ The 2014-2020 ESIF include conditionalities addressed directly to EU fishermen and farmers in the context European Maritime and Fisheries Fund (EMFF) and the European Agricultural Fund for Rural Development (EFRD) which however do not fall under the area of Cohesion policy. In the 2021-21 financial period, pursuant to the Commission proposals, Cohesion policy conditionalities might have a greater relevance for final beneficiaries due to the obligation of the management bodies to check for consistency of the financed operations with certain conditionalities (Art. 67 (3)(b) CPR proposal). See, further section 3.2 below.

⁵ C. Burnside and D. Dollar, 'Aid, Policies, and Growth' (2000) 90 *The American Economic Review* 847-68.

⁶ W. Easterly, R. Levine, and D. Roodman, 'Aid, Policies, and Growth: Comment' (2004) 94 *The American Economic Review* 774-80.

⁷ A. C. Burnside and D. Dollar, *Aid, Policies, and Growth: Revisiting the Evidence. Policy Research Working Paper No.3251. World Bank, Washington, D.C. © World Bank. (2004).*

⁸ D. Acemoglu and J. A. Robinson, *Why nations fail* (2012); D. Acemoglu and J. Robinson, '13. Why nations fail today? Institutions Institutions' *Why Nations Fail*, (2012), pp. 368-403.

⁹ Regulation (EU) No 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 (EC) No 1083/2006, OJ L 347, 320-469 (2013) Hereinafter 'Regulation 1303/2013' or 'CPR'.

1.2.2. Constitutional doctrine

In federal systems, conditionality is mainly debated on **constitutional grounds**. On this point, federalism literature is generally split in proponents and opponents of the tool.¹⁰

Proponents of conditionality have argued that:

- conditionality assists the higher level of government to exercise its right but also its obligation to set appropriate requirements, which ensure that all spending is compliant with **federal standards**, including essential individual rights and freedoms, that must be uniformly guaranteed to all citizens at the state level;
- conditionality is conducive to harmonious development of **minimum standards** of public goods and service delivery across the federation, for instance, in the area of public infrastructure, healthcare, social markets and quality of public institutions;
- conditionality leads to closer **federal-state cooperation** and coordination of essential multi-level policies, leading to innovative governance solutions that may be ultimately extended at all levels of government;
- conditionality may support **effective government** and solve collective action problems in areas subject to high inter-dependency, externalities and free-rider problems i.e. environment or sound administrative systems;
- conditionality may ensure much needed **uniformity and consistent application** of federal standards in a multi-level government, helping states embrace imminent policy solutions in an ever-closer and deeper Union: notoriously captured by the phrase 'swim or sink together';
- conditionality is **federation-building** and **solidarity-enhancing** and may ultimately **empower citizenry**.

Opponents of conditionality have argued, in response, that:

- conditionality is **invasive to state and local competences**, and may represent a constitutional circumvention of traditional state functions, such as education, health or social policies;
- conditionality **affects the quality and transparency** of the decision-making process, as it amounts to legislation through the 'back door' of budgets as opposed to the 'front door' of ordinary legislative processes;
- conditionality is **corrosive to democratic accountability** as by attaching conditions to spending the federal government shifts political responsibility for its policy choices at the state and local level;
- conditionality addressed to individuals may **impact** on the enjoyment and distribution of **individual rights and freedoms**.¹¹

Except for some isolated subsidiarity¹² and accountability¹³ arguments voiced during the negotiations of the 2014-20 financial period, a comprehensive analysis of the constitutional foundations and potential challenges brought by conditionality has been generally lacking from the EU policy thinking.

¹⁰ For a comparative overview between EU and US conditionality, see: V. Viță, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' (2017) *EUI Working Papers* 16/2017.

¹¹ See, for a classic: K. M. Sullivan, 'Unconstitutional Conditions' (1989) 102 *Harvard Law Review* 1413–1506.

¹² EU Council, *Cohesion policy legislative package - Presidency report doc. 18097/11* (2011) para.7 a.

¹³ Egmont Institute, S. Verhelst, *Research for REGI Committee – Macro-economic conditionalities in Cohesion policy European Parliament, Policy Department for Structural and Cohesion Policies, Brussels* (2012) pp. 44–45.

On this point, it must be reminded that **Cohesion policy has an important constitutional remit**, given its significant economic redistribution effects, growth impact, and, above all, because of its immediate tangibility to EU citizens. For decades, Cohesion policy resources have built increased solidarity across EU states, regions, and citizens: thus, progressively realising the aspiration of the EU founding fathers.¹⁴ The extensive use of conditionality within Cohesion policy has the potential to further enhance its constitutional significance, as each conditionality inevitably impacts on the relationship between the EU and Member States, and ultimately informs EU citizens' rights and obligations on the ground. Consequently, any future reflection on conditionality in Cohesion policy **could tremendously benefit from a careful and comprehensive balancing of the potential constitutional advantages and disadvantages of the tool.**

1.2.3. Types

Conditionality is a highly flexible governance tool. It **may be skilfully designed by EU legislators to fit a wide-range of policy needs**, including: enforcement of EU laws, policies and soft-law recommendations, adoption of legislation and regulation, advancement of structural and institutional reforms, administrative capacity building, good governance practices, strict compliance with macroeconomic indicators or rule of law principles.

The type of conditionality chosen for each policy objective may prove essential for its success in practice. For the purpose of this study, we shall mention that Cohesion policy conditionality may be positive or negative, ex-ante or ex post, input or output, same-sector, cross-cutting or cross-over.

1.2.3.1. Positive and negative

Positive conditionalities reward good compliance with financial incentives, as opposed to negative conditionalities that provide withdrawal of funds in case of non-compliance. The carrot-and-stick conditionality has both a positive and a negative side.

Virtually all conditionalities applicable to ESIF in 2014-20 financial period are negative. Both macroeconomic conditionality (Art. 23 of the Common Provision Regulation 1303/2013 'CPR') and ex ante conditionalities (Art. 19 CPR) provide exclusively for withdrawal of funds in case of non-compliance (2.2 below).

One positive example of conditionality is Article 24 of CPR that allows for 10 % top ups for Member States in financial difficulty, subject to good compliance with economic adjustment programmes (2.2.1.1 below).

1.2.3.2. Ex ante and ex post

Ex ante conditionalities must be fulfilled before EU funds are disbursed, as opposed to ex post conditionalities that are applicable throughout the financial period.

Ex ante conditionalities applicable to ESIF in 2014-20 (Art. 19 CPR) generally correspond to the ex ante type,¹⁵ whereas the macroeconomic conditionality (Art. 24 CPR) corresponds to the ex post type.

¹⁴ Declaration by Robert Schuman (Paris, 9 May 1950).

¹⁵ With the exception of situations where ESIF resources are disbursed even if the ex ante conditionalities are not fulfilled, pursuant to Art. 19 (5) CPR, cases in which the ex ante conditionalities in name become ex post in fact.

1.2.3.3. Input and output

Input conditionality prescribes in detail the conduct to be adopted, whereas output conditionality is focused mainly on policy results.

Ex ante conditionalities (Art. 19 CPR) and the macroeconomic conditionality (Art. 23 CPR) applicable to ESIF in 2014-20 financial period are input. They prescribe in a detailed manner the conduct to be followed to achieve the aimed policy result and measure mainly deliverable check-lists i.e. existence of an Early School Leaving data-base; as opposed to results i.e. decrease in Early school leaving rates. Output conditionality is still underdeveloped in the current ESIF.¹⁶

1.2.3.4. Same-sector, cross-cutting and cross-over

Same-sector conditionalities are closely linked to the thematic area of spending. Cross-cutting conditionalities have a weaker thematic connection to spending. Ultimately, cross-over conditionalities, import entire conditionalities from other policy frameworks into spending.

An example of same-sector conditionality is the waste management ex ante conditionality (CPR, Annex XI, 6.2) which requires all ESIF investment in the waste sector to be compliant with the EU Waste Directive.¹⁷

The gender equality ex ante conditionality is cross-cutting (CPR, Annex XI, part II, 1), as it aims to mainstream the objectives of EU equality policy throughout all ESIF action.

An example of cross-over conditionality is the specific strand of macroeconomic conditionality that conditions ESIF resources on compliance with financial assistance conditionality of Member States under EU or international financial assistance (Art. 24 (1) (c) and (9) (d)-(e)).

¹⁶ The performance reserve was an unsuccessful attempt of an output conditionality in the 2014-20 financial period. CPR, note 9, Art. 20-22. Due to important delays in the start of the 2014-20 financial period, in December 2017 the Commission has proposed that the 6% performance reserve initially foreseen to reward well-performing programmes can be *optionally re-allocated* to support structural reforms in Member States in the context of the Structural Reform Support Programme. See: European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013, COM(2017)826 final/ 2017/0336 (COD), p. 1.

¹⁷ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (2008).

Box: Good practice

**GOOD PRACTICE
CONDITIONALITY TYPES**

Increasing evidence in international relations points to the finding that **conditionality performs best when based on positive incentives**, as opposed to negative sanctions.

Empirical evidence from federal systems also points to the finding that **ex-post output conditionality, focused on results, has the potential to secure higher ownership and sustainability of reforms**, as opposed to traditional ex-ante and input conditionality types.

Finally, there is growing consensus that **conditionality must have a close and meaningful link to spending**. Hence, **same-sector or very closely related cross-cutting conditionalities** that have a tangible and meaningful impact on the effectiveness of spending intervention, **are preferable to cross-over conditionalities** that usually lay beyond the responsibility and control of recipients. As a general rule, the closer the thematic link between spending and conditionality, the less contested and less difficult the conditionality turns in practice.

In the 2014-20 financial period, **Cohesion policy conditionalities are mainly negative, ex ante and input**, being very prescriptive and paying only limited attention to results. In most of the cases, conditionalities are same-sector and cross-cutting (Section 2, below).

Source: Author

2. EVOLUTION AND EXPERIENCE OF CONDITIONALITY IN COHESION POLICY

KEY FINDINGS

- The evolution of conditionality in Cohesion policy knows **three main stages** of development: **experimentation (1994 to 2013)**, **expansion (2014 to 2020)** and expected **consolidation (post-2020)**.
- During the experimentation period (**1994 to 2013**) two early conditionality forms were present: **macroeconomic conditionality** attached to the Cohesion Fund and **infringement conditionality** attached to Structural Funds (ERDF and ESF).
- The **2014-20** financial period marks a stage of **historic expansion of conditionalities in Cohesion policy**. The period introduces a comprehensive **macroeconomic conditionality** (Art. 23, CPR) and additional conditional measures linked to economic policy, namely the requirement to take relevant Country Specific Recommendation into account during programming (Art. 15 (1), (a), CPR) and the possibility to enjoy 10% top-ups in case of economic difficulty (Art. 24, CPR). In addition, a generous set of **ex ante conditionalities** (Art. 19 CPR) were introduced, that firmly tie all ESIF to a far-reaching set of legal, policy and administrative requirements.
- The 2014-20 **macroeconomic conditionality** (Art. 23 CPR) and the additional measures linked to economic policy (Art. 15 (1), (a), Art. 24, CPR) have significantly **strengthened the synergies between Cohesion policy and economic governance**. **Suspensions have proven**, however, extremely contested and increasingly **difficult**.
- **Ex ante conditionalities have incentivised the start of numerous important reforms** in an incredibly short amount of time. However, independent evaluations of the Court of Auditors show that their positive **impact on Cohesion policy performance and spending remains uncertain**.
- The **2021-27** financial period is expected to **consolidate** and further **extend the use of conditionality in Cohesion policy**, notably by the introduction of the rule of law conditionality.

2.1. Experimentation: 1994-2013

During the experimentation stage two main conditionalities were present in Cohesion policy: the macroeconomic conditionality attached to Cohesion fund (2.1.1.1) and the infringement conditionality attached to the European Regional and Development Fund (ERDF) and the European Social Fund (ESF) - jointly 'Structural Funds' (2.1.1.2).

2.1.1. Macroeconomic conditionality: 1994-2013

The macroeconomic conditionality was the **first conditionality of Cohesion policy**. It was introduced in 1994 and applied exclusively to recipients of Cohesion Fund (then, Greece, Spain, Ireland and Portugal).¹⁸ The origins of conditionality are found in the European Monetary Union Roadmap set out by Jaques Delors in 1989, which has foreseen that future financial resources would be granted "on conditions that would prompt the recipients to intensify their [economic] adjustment efforts".¹⁹ The conditionality required that Cohesion

¹⁸ Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund (1994) Art.6.

¹⁹ Committee for the Study of Economic and Monetary Union, *Report on economic and monetary union in the European Community* (1989) p. 19.

Fund beneficiaries submit an economic convergence programme and avoid excessive government deficits in line with the novel Treaty of Maastricht rules.²⁰ The conditionality was maintained with slight amendments during the subsequent financial periods (2000-06, 2007-13) to reflect new economic governance rules, and in particular the 1997 Stability and Growth Pact (SGP).²¹ As of 2004, 2007 and 2013 enlargements, its application has been extended to new Member States that joined the EU and became eligible for Cohesion Fund resources.

The macroeconomic conditionality was **enforced once** during 1994-2013 period, in 2012, against Hungary.²² This unique enforcement never led to actual suspension of payments on the ground, as it concerned future commitments and was shortly lifted (in less than 3 months).²³ It however remains a highly controversial EU enforcement act, that raised reasonable criticism regarding the even-handedness, fairness and opportunity of suspension.²⁴ The suspension singled out one Member State in the entire history of the tool, it was ordered against a background of notorious prior inconsistent application of SGP rules and conditionality,²⁵ at a time when the country was in deep austerity,²⁶ and precisely when the acts of the newly elected government raised important rule of law concerns at the EU level.²⁷

2.1.2. Infringement conditionality: 2000-2013

The EU's tendency to increasingly mainstream EU policy objectives through spending, in particular in the area of environment, gender equality and non-discrimination,²⁸ led ultimately to a first infringement conditionality introduced in 2000-06 and 2007-13 financial periods.²⁹ The conditionality demanded that all ERDF and ESF spending be compliant with applicable EU law and allowed the Commission to refuse any payments concerned by a reasoned opinion in infringement procedures.

The conditionality was successfully used in practice and upheld by the Court of Justice of the EU (CJEU) in **Italy v. Commission**.³⁰ In the case, Italy's **Campania region** was benefiting from Structural Funds for waste disposal and management, under the Campania operational programme 2000-2006. In 2007, infringement proceedings were launched against Italy for breach of the **EU Waste Directive**, which prompted the Commission to refuse the disbursement of funds for the affected payments.³¹ The Court held that, it was

²⁰ Treaty on European Union, signed at Maastricht on 7 February 1992, OJ 92/C 191/01, Art 104 c.

²¹ Council Regulation (EC) No 1264/1999 of 21 June 1999 amending Regulation (EC) No 1164/94 establishing a Cohesion Fund (1999) point 6; Council Regulation (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund and repealing Regulation (EC) No 1164/94 (2006) Art. 4 (1) b.

²² Council Implementing Decision 2012/156/EU suspending commitments from the Cohesion Fund for Hungary with effect from 1 January 2013, OJ L 78/19 (2012); Council Implementing Decision 2012/323/EU lifting the suspension of commitments from the Cohesion Fund for Hungary, OJ L 165/46 (2012).

²³ Id., EU Council, Decision 2012/323/EU.

²⁴ BBC, EU to freeze Hungary aid on debt, (2012) <http://www.bbc.com/news/business-17357626>.

²⁵ For instance, an excessive deficit procedure was launched against Portugal in 2002 and Greece in 2005 - both eligible for Cohesion funding, but a Council Decision was never adopted. In 2012, Hungary's deficit was 3,25 %, just 0,25 above the EU 3% cap, compared to Spain that reached 5,6% in 2012.

²⁶ Since 2008 Hungary was under EU/IMF financial assistance, and in 2012 it was actively seeking a second bailout.

²⁷ European Commission, Press release, 'Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary' (2012).

²⁸ V. Vita, 'Mainstreaming Equality in European Structural and Investment Funds: Introducing the Novel Conditionality Approach of the 2014-2020 Financial Framework Developments' (2017) 18 *German Law Journal* 993-1016.

²⁹ Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (1999) Art. 32(3) (f); Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (2006), Art. 86 (1) d.

³⁰ CJEU, Judgment of 19 April 2013, Italian Republic v European Commission, Joined cases T-99/09 and T-308/09 ECLI:EU:T:2013:200.

³¹ Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (2006).

sufficient for the Commission to establish a '**sufficiently direct link**'³² between the financed measure and the infringement at hand to order enforcement of the infringement conditionality which aimed to prevent an '**unacceptable loss of Community funds**'.³³

In this case, conditionality successfully pursued a sound expenditure function. It protected the financial interests of the Union and prevented a wasteful allocation of Structural Funds affected by infringement of EU environmental rules.

Not the same may be said about compliance. In 2018, the infringement against Italy is still on the way, and compliance with the Waste Management Directive has not yet been achieved.³⁴

In the 2014-20 financial period, the infringement conditionality has been discontinued.

Box: Lessons learned

LESSONS LEARNED 1994-2013

Two important lessons may be drawn from the experience of conditionalities in Cohesion policy during 1994-2013.

First, the experience of **pre-2014 macroeconomic conditionality** applicable to the Cohesion Fund recipients **showed that inconsistent enforcement** that singles out one Member State in the entire history of conditionality **may question the even-handedness, fairness and opportunity of suspension** in practice.

Second, the example of the **pre-2014 infringement conditionality** shows that even if actively enforced to secure the financial interests of the EU, **conditionality does not necessarily lead to compliance**.

Source: Author

2.2. Expansion: 2014-20

The 2014-20 financial period marks a stage of historic expansion of conditionality in Cohesion policy.³⁵ The CPR introduces a comprehensive **macroeconomic conditionality** clause (Art. 23, CPR), complemented by additional **conditional measures** linked to economic policy: namely, the requirement to take relevant Country Specific Recommendations (CPR) into account already during programming (Art. 15 (1), (a), CPR) and the possibility to enjoy 10% top-ups in case of economic difficulty (Art. 24, CPR). The CPR and other fund-specific regulations also introduce a set of **48 ex-ante conditionalities** that firmly tie all ESIF to an impressive set of legal, policy and administrative requirements.³⁶ In the following, only 36 ex ante conditionalities applicable to Cohesion policy shall be discussed (CPR, Annex XI).

³² CJEU, Italy v Commission, note 30, para. 60.

³³ CJEU, Italy v Commission, note 30, para. 50 (emphasis added).

³⁴ European Commission, Infringement number 20072195, Italy; European Parliament, Committee on Petitions, 'Petition No 1329/2014 by Bartolomeo Pepe (Italian) on the waste management plan in Campania' (2018).

³⁵ See on the expansion of conditionalities in other EU budget envelopes: V. Viță, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) *Cambridge Yearbook of European Legal Studies*.

³⁶ CPR, note 9, Art. 19, Annex XI; Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005, Annex V; Regulation (EU) 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council (2014) Annex IV.

As prior studies extensively engaged with the descriptive analysis of the 2014-20 conditionalities,³⁷ this study shall mainly focus on their performance based on the data available mid-way through the financial period (by 2018) and lessons learned.

2.2.1. Macroeconomic conditionality and conditional measures

In 2014-20, the macroeconomic conditionality (Art. 23 CPR) has known **significant changes** as compared to the prior financial periods (2.1.1). It applies to all Member States (except the UK³⁸), mandates compliance with virtually the entire set of post-crisis economic governance rules,³⁹ and is much more powerful financially, being linked to all ESIF (about 45% of the EU budget) (see, 2.2.1.2).⁴⁰

In addition, the macroeconomic conditionality (Art. 23 CPR) is **reinforced** by important conditional measures linked to economic policy, namely the requirement to take relevant Country Specific Recommendations into account during programming (Art. 15 (1), (a), CPR) (see, 2.2.1.1) and the possibility of 10% top-ups in case of economic difficulty (Art. 24, CPR) (see, 2.2.1.3). Even if these latter conditional measures are not referred to as conditionalities in the EU institutional practice, they are an important part of the macroeconomic conditionality construct and shall be addressed in the following analysis.

2.2.1.1. Conditional measures: programming and CSRs

The operation of macroeconomic conditionality (Art. 23, CPR) is informed by conditional measures on alignment of ESIF and the economic governance objectives mandatory during the programming stage (Art. 15 (1)(a), Art. 96 (2)(a), CPR). The latter ask for consistency between ESIF Partnership Agreements (PAs) and Operational Programmes (OPs) on the one hand, with the **challenges identified in the Country Specific Recommendations (CSRs)**, on the other.

These conditional measures behave in practice as real conditionalities and are extremely relevant for macroeconomic conditionality (Art. 23, CPR) as they link ESIF to economic governance priorities already during programming. Moreover, these clauses may have important financial consequences as they may lead to delays in the adoption of entire spending operations (entire PAs or OPs) if not diligently fulfilled by Member States. In addition, they may inform the need for ESIF reprogramming pursuant to the reprogramming strand of Article 23 CPR macroeconomic conditionality, as shall be shown below (2.2.1.2).

Overall, **evaluations show** that the conditional measures requiring consistency of PAs and OPs with relevant CSRs (Art. 15 (1)(a), Art. 96 (2)(a)) provided an important impetus for **closer alignment between ESIF spending and EU economic governance**.⁴¹ About two thirds of the 2014 CSRs (about 100) have been found relevant to ESIF programming documents, in particular those in the area of labour market, research, innovation, transport, energy, health, education, social inclusion and administrative reform.⁴² It nevertheless remains unclear pursuant to the Court of Auditors to which extent the alignment would be able to effectively contribute to the challenges identified in the respective CSRs.⁴³

³⁷ Egmont Institute, note 13; Centre for Industrial Studies, G. Catalano, M. Florio, J. Pellegrin, and D. Sartori, *Ex-Ante Conditionalities in Cohesion Policy* (2012).

³⁸ CPR, note 9, Art. 23 (13). The UK exception is based on its negotiation position that such suspensions may not be legally ordered in case of the UK in the light of Protocol 15 to the treaties.

³⁹ P. Berkowitz, *The impact of the economic and financial crisis on the reform of Cohesion Policy 2008-2013* (2015).

⁴⁰ European Commission, *The Multiannual financial framework 2014-2020 and EU budget 2014 The figures* (2014).

⁴¹ European Commission, 'Mid-term review/revision of the multiannual financial framework 2014-2020: An EU budget focused on results' COM(2016) 603 final, p. 27; Court of Auditors, *Special Report, 'The Commission's negotiation of 2014-2020 Partnership Agreements and programmes in Cohesion: spending more targeted on Europe 2020 priorities, but increasingly complex arrangements to measure performance'* (2017) para. 58.

⁴² *Id.*

⁴³ Court of Auditors, *Special Report 02/2017*, para. 66.

The **alignment was also variable** depending on the particular ESIF or country at stake. Structural Funds (ERDF and ESF) were found particularly open to CSRs alignment, whereas the Cohesion Fund, the European Maritime and Fisheries Fund (EMFF) and the European Agricultural Fund for Rural Development (EAFRD) less so.⁴⁴ In addition, the synergies seemed to be stronger in countries receiving more ESIF resources and particularly strong in the central and eastern Member States.⁴⁵ Moreover, the analysis of the programming documents shows that reference to CSRs has been often inconsistent and at times declarative, lacking a clear link between CSRs and funding allocations.⁴⁶ Ultimately, the **missing regional dimension of the CSRs** when linked to ESIF spending has been considered problematic by evaluators and also by the European Parliament who called for a stronger territorial dimension of the CSRs.⁴⁷

2.2.1.2. Macroeconomic conditionality

The macroeconomic conditionality regulated by Article 23 CPR is built upon two main conditionality strands: a preventive, 'reprogramming strand' and a corrective, 'mandatory suspension strand'.

Reprogramming strand

Pursuant to the reprogramming strand of macroeconomic conditionality (Art. 23 (1)-(8), CPR) the Commission may request Member States to review their programming documents by 2019 in order to: support implementation of **subsequent CSRs** (Art. 23 (1) (a), CPR), correct **macroeconomic imbalances** (Art. 23 (1) (b), CPR), support implementation of **economic adjustment programmes** in countries under financial assistance (Art. 23 (1) (c), CPR).⁴⁸

The conditionality was seen as a much-needed flexibility tool for Cohesion policy, which might have usefully shifted ESIF resources to new pressing needs on the ground. Despite its potential, the conditionality strand **has not been used during the 2014-20** financial period. The main reasons behind this passive stance relate primarily to: the concurring need to facilitate a stable spending environment,⁴⁹ the much-delayed start of spending during the 2014-20 period,⁵⁰ the reform of the European Semester that provided for fewer, more streamlined and generally stable CSRs post-2014,⁵¹ as well as national political considerations regarding spending management and planning. In addition, the conditional measures on alignment of ESIF spending with the CSRs during programming (2.2.1.1, above) have also limited the subsequent need for reprogramming.⁵²

Overall, the operation of reprogramming strand of macroeconomic conditionality points to the finding that **the Commission held good on its promise to draw a fair balance between the stability needs of Cohesion policy and reprogramming in the light of economic governance needs.**

⁴⁴ Iseri Europa, *Support of ESI Funds to the implementation of the Country Specific Recommendations and to structural reforms in Member States* (2018) p. 13.

⁴⁵ Id.

⁴⁶ L. Polverari and J. Bachtler, *Research for REGI Committee – Building Blocks for a Future Cohesion Policy – First Reflections*, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels (2017) pp. 21–22.

⁴⁷ European Parliament, Resolution of 17 April 2018 on strengthening economic, social and territorial cohesion in the European Union: the 7th report of the European Commission (2017/2279(INI)) (2018) para. 30; L. Polverari and J. Bachtler, note 46, pp. 21–22; European Parliament, Resolution of 13 June 2017 on building blocks for a post-2020 EU cohesion policy (2016/2326(INI)), (2017) para. 13.

⁴⁸ CPR, note 9, Art. 23 (1)-(8).

⁴⁹ European Commission, 'Guidelines on the application of the measures linking effectiveness of the European Structural and Investment Funds to sound economic governance according to Article 23 of Regulation (EU) 1303/2013', COM/2014/0494 final (2014).

⁵⁰ European Commission, 'Open Data Portal for the European Structural Investment Funds'.

⁵¹ European Commission, *Seventh report on economic, social and territorial cohesion* (2017) pp. 171–72.

⁵² Id.

Mandatory suspension strand

The mandatory suspension strand of macroeconomic conditionality (Art. 23 (9)-(11), CPR) have been the most debated and disputed conditionality provisions of the 2014-20 financial period.⁵³ The provisions were to lead to 'automatic' suspension of ESIF commitments or payments in case of:

- Member States failure to correct **excessive government deficits** (Art. 23 (9) (a), CPR);
- failure to submit a sufficient corrective action plan under the corrective arm of the **Macroeconomic Imbalance Procedure (MIP)** (Art. 23 (9) (b), CPR) or take recommended corrective action in the same MIP procedure (Art. 23 (9) (c), CPR);
- failure to implement and comply with **financial assistance adjustment programmes** (Art. 23 (9) (d)-(e), CPR).

In case of suspension, pursuant to Art. 23 (15) CPR, the Commission must immediately inform the European Parliament, who may invite the Commission for a 'structured dialogue'. Pursuant to Article 23 (9) CPR, when making a proposal regarding suspension the Commission must give due consideration to any elements and opinions expressed during the dialogue with the European Parliament.

The experience of the mandatory strand of macroeconomic conditionality showed that the only conditionality provision with an actual credible bite was the first conditionality concerning excessive deficit (Art. 23 (9) (a), CPR), which had already been linked to the Cohesion Fund since 1994 (2.1.1, above). In rest, the two MIP conditionality triggers were not credible (Art. 23 (9) (b)-(c), CPR), as the Commission has never to date recommended activation of the corrective arm of MIP (Excessive Imbalance Procedure (EIP)), despite the conclusion of Court of Auditors that Member States have been found to experience excessive imbalances at least on 16 occasions between 2012 and 2016.⁵⁴ A Commission or Council conclusion that a Member State has failed to comply with their financial assistance programmes (Art. 23 (9) (d)-(e), CPR) is similarly hard to imagine in practice, in the light of the very recent economic crisis experience.⁵⁵

The **excessive deficits macroeconomic conditionality** provision (Art. 23 (9) (a), CPR) was indeed triggered **in 2016 against Spain and Portugal**. The conditionality did not however lead to effective suspension of ESIF despite the tool's promised 'automaticity'. Four key factors have contributed to this result: the European Parliament's notorious opposition to the tool expressly voiced since the 2014-20 Multiannual Financial Framework (MFF) negotiations (1), shortcomings of the legal framework (2), the fragile economic situation of the two countries concerned (3) and late timing within the calendar year (4).

On 12 June 2016, the Council adopted two decisions finding that Spain and Portugal failed to take effective action to correct their excessive government deficits.⁵⁶ As requested by the CPR rules (Art. 23 (9) and (15)), the Commission informed the European

⁵³ CPR, note 9, Art. 23 (9).

⁵⁴ Court of Auditors, Audit of the Macroeconomic Imbalance Procedure (MIP), Special Report 3/2018 para. 63. *"Between 2012 and 2016, certain Member States were identified as having excessive imbalances on 16 occasions. However, the College has never sent an EIP proposal to the Council. During our audit, the Commission produced little evidence which would explain why the College did not propose the EIP"*.

⁵⁵ European Court of Auditors, *The Commission's intervention in the Greek financial crisis* (2017).

⁵⁶ EU Council, *Decision (EU) 2016/1222 of 12 July 2016 establishing that no effective action has been taken by Spain in response to the Council recommendation of 21 June 2013 OJ L 201, 27.7.2016, para. 19–22*; EU Council, *Decision (EU) 2016/1230 of 12 July 2016 establishing that no effective action has been taken by Portugal in response to the Council recommendation of 21 June 2013 OJ L 202, 28.7.2016, para. 21–23*.

Parliament regarding the possibility of imminent enforcement of conditionality and asked it to express its availability for the start of a 'structured dialogue'.⁵⁷

The **structured dialogue** was held on October 3, in a public setting, following the Parliament's summer recess, involving Commission Vice-President Katainen, Commissioner Crețu, as representatives of the Commission and Members of the European Parliament Committees on Regional Development (REGI) and Monetary and Economic Affairs (ECON).⁵⁸

It is worthwhile mentioning that by that point, a decision not to use the primary available economic governance sanctioning tools against Spain and Portugal had already been reached by the Council on 9 August 2016, endorsing the **Commission's proposal on zero fines** in case of the two countries.⁵⁹ Despite this decision, the suspension of ESIF was still discussed, as the CPR rules required the Commission to make a suspension proposal (Art. 23 (9)).⁶⁰

(1) European Parliament's opposition

The dialogue of October 3 brought into the spotlight the **Parliament's strong opposition to the tool**, dating back to macroeconomic conditionality negotiation history.⁶¹ In this context it is worth reminding that, during negotiations, the essential decisions regarding macroeconomic conditionality were made by the European Council (as opposed to the EU Council and the European Parliament, acting upon the proposal of the Commission) and kept away from the European Parliament until the very last minute.⁶² During the dialogue the Commission has also adopted a rather mixed position, justifying the need of suspension departing from formalistic arguments of the mandatory legal text of the CPR, rather than departing from its genuine conviction or empirical evidence that a suspension would remedy a serious threat posed to ESIF spending in the two Member States.⁶³

(2) Shortcomings of the legal framework

The dialogue also highlighted the shortcomings of the tool's legal framework, which allowed for **little clarity and legal certainty on what a 'structured dialogue' effectively meant**, its time-frame, potential deadlines, composition, number of sessions, and the precise legal nature of the 'elements' and 'opinions' expressed though the structured dialogue with the European Parliament, that the Commission was required to consider when formulating a suspension proposal, pursuant to Art. 23 (9) CPR.

There was also little transparency or legal certainty regarding the scope of suspension. The participation of representatives of the European Parliament REGI Committee and the Commission DG REGIO during the structured dialogue suggested that only Cohesion Fund and ERDF resources under the primary responsibility of REGI Committee and DG REGIO were at stake (as opposed to all ESIF). However, there was no clarity

⁵⁷ European Commission, *Seventh Cohesion Report*, note 51, p. 172.

⁵⁸ European Parliament, 'Joint Meeting. Committee on Regional Development Committee on Economic and Monetary Affairs. Minutes. Extraordinary joint meeting of 3 October 2016, 18.00-20.30, Strasbourg' (2016).

⁵⁹ EU Council, Press release, 'Excessive deficit procedure: Council agrees to zero fines and new deadlines for Portugal and Spain' (2016).

⁶⁰ European Commission, Press release, 'Stability and Growth Pact: fiscal proposals for Spain and Portugal.' (2016).

⁶¹ European Parliament, 'Resolution of 8 June 2011 on Investing in the future: a new Multiannual Financial Framework (MFF) for a competitive, sustainable and inclusive Europe (2010/2211(INI))' (2011) para. 75. (whereby the Parliament 'warns against' the macroeconomic conditionality).

⁶² European Council, 'Conclusions - Multiannual Financial Framework, 7/8 February 2013'; R. Crowe, 'The European Council and the Multiannual Financial Framework' (2016) 18 *Cambridge Yearbook of European Legal Studies* 69–92. Crowe discusses the legality and constitutionality of the European Council close participation during the MFF legislative process.

⁶³ HEARING WITH THE EUROPEAN COMMISSION ON THE SUSPENSION OF ESI FUNDS, AS PART OF THE STRUCTURED DIALOGUE, <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=i126703&lg=int&tin=0&tout=0&autoplay=tr ue&sublg=> (last visited mar 5, 2018).

regarding the precise share of ESIF at risk (to be calculated in line with Annex III to the CPR), or the potential adverse impact of suspension on critical EU-financed programmes in the countries concerned. In fact, the letter sent by the Commission to the European Parliament on 14 July 2016, indicated in a generic manner absolutely all ESIF programmes as being potentially at risk of suspension,⁶⁴ despite the public assertion that the Commission was only considering a *partial* (as opposed to total) suspension of *commitments* (as opposed to payments).⁶⁵ In result, the dialogue participants, EU citizens, and the public at large, were generally unaware of what the debated suspension effectively meant.

The lack of the clarity regarding the nature, limits and object of the dialogue led to a result where the discussion on suspension, turned into a very general political debate with arguments for and (mostly) against the macroeconomic conditionality itself. Members of the European Parliament voiced strong opinions regarding the 'fairness' and 'morality' of the announced suspension, seen by some as a 'disproportionate' punishment, lacking in solidarity with EU citizens that were most heavily affected by the dramatic unfolding of the 2008 global financial crisis in Europe.⁶⁶

In the aftermath of the dialogue, the Conference of Presidents of the European Parliament appreciated that further information was needed to conclude the dialogue and asked for a subsequent hearing of the competent Ministers of the Member States concerned, that would be followed by additional meetings with the Commission, as appropriate.⁶⁷

(3) Fragile economic situation of the Member States concerned

The hearing held on **8 November 2016** brought into the spotlight the fragile economic situation of the two Member States concerned, which further questioned the opportunity of suspension.⁶⁸ Spain and Portugal were two countries significantly affected by the economic crisis, which had undergone heavy economic and fiscal adjustment measures as of 2011, and whose economies were only proving first signs of economic recovery.⁶⁹ In absence of a legal 'escape clause' that could acknowledge this extraordinary economic position, Ministers argued that an eventual suspension would be 'incoherent' and 'counter-productive', harming some of the most vulnerable EU regions and citizens.⁷⁰ Against this backdrop, members of ECON and REGI committees agreed in a joint setting that Commission should propose a suspension of 0% of ESIF commitments.⁷¹ On this point, it was clear that an eventual suspension of commitments as opposed to payments would have not been immediately financially damaging, as pursuant to the n+3 rule, the Member States would have continued to receive payments for up to three years based on prior commitments. Nevertheless, it may be reasonably assumed that an eventual decision to stop part of ESIF could have raised doubts for markets and investors regarding the economic health of the two states.

⁶⁴ European Parliament, 'Exchange of views with Spain and Portugal on possible suspension of European structural and Investment Funds', REGI-ECON, 8 November 2016, p. 2.

⁶⁵ European Commission, note 60: "*Under these rules, the Commission also has to propose a suspension of part of the commitments of European Structural and Investment (ESI) Funds for 2017.*"

⁶⁶ European Parliament, video, 'Hearing with the European Commission on the suspension of ESI Funds, as part of the Structured Dialogue' (2016).

⁶⁷ European Parliament, 'Exchange of views with Spain and Portugal on possible suspension of European structural and investment funds', REGI-ECON, 8 November 2016.

⁶⁸ European Parliament, video, 'Joint meeting ECON REGI 17:09 / 19:24 08-11-2016 Hearing ESI Funds structural dialogue'; European Parliament, News, 'MEPs say no to suspending EU structural funds for Spain and Portugal' (July 2016).

⁶⁹ European Commission, 'Which EU countries have received assistance?' https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance_en.

⁷⁰ European Parliament, news item, note 68.

⁷¹ Id.

(4) Late timing

On **November 16**, following the submission of satisfactory Draft Budget Plans and corrective action reports by Spain and Portugal in mid-October, the Commission decided to **hold in abeyance the EDP** regarding the two states.⁷² In result, the legal conditions to propose a suspension of ESIF were no longer present and the dialogue with the Parliament was discontinued.⁷³

This decision might have been informed by the imminence of the year 2017, which would have significantly decreased the expected useful and timely effect of an eventual ESIF suspension. Pursuant to Article 23 (10) of the CPR, a decision on suspension of ESIF commitments could have been applied only as of 1 January of the following year. In these conditions, a suspension operative as of 1 January 2017 was hardly possible, with the structural dialogue still on the way in November 2016, whereas a suspension as of 1 January 2018 could have been late to ensure a timely response on the issue.

In sum, the four key factors explained above have rendered the conditionality process extremely difficult in practice. Namely: the lack of a full and genuine support of the European Parliament during the early stages of MFF negotiation on macroeconomic conditionality (1); the lack of legal clarity regarding the nature and scope of the 'structured dialogue' (2); the absence of an 'escape clause' exempting states in economic difficulty (3) and the late timing of the procedure (4).

On the first point, it is worthwhile reminding that the inter-institutional clash of positions in favour of and against conditionality was nothing else but an extremely telling, **real-life clash between the formality and morality of law**.⁷⁴ This remark is rather academic but deserves at least brief attention, because it goes to the core of the above enforcement difficulty. The core underpinning of our EU legal construction is that the rule of law (i.e. the rules of macroeconomic conditionality) can be legitimately enforced only when it resides on an inner conviction of its subjects that the enforced law is 'just law'.⁷⁵ In our European common constitutional tradition, a just law is the one adopted pursuant to open and participatory democratic process, which observes at all stages the fullest extent of democratic guarantees, including the respect of fundamental rights and freedoms. Hence, the trilogy: rule of law, democracy and human rights.⁷⁶ In this case, **one core element of the trilogy - democratic legitimacy - was hampered from the very early stages of the macroeconomic conditionality negotiation process**, as the tool was primarily negotiated in the European Council (as opposed to the Council and European Parliament acting as co-legislators), amid the open opposition of the European Parliament, who has accepted the tool under the tremendous time pressure and the imperative need to adopt the MFF by the end of 2013.⁷⁷ This lack of a full and genuine support of the European Parliament from the very early stages of the legislative process has backfired during enforcement of macroeconomic conditionality, as seen above. During enforcement the Commission's formal argument of legal duty to suspend ESIF based on the text of the CPR, was not accepted by the European Parliament because of its inner conviction that the enforced law is not 'just law', which duly

⁷² European Commission, 'Press release European Semester Autumn Package: Working for a stronger and more inclusive economic recovery' (2016).

⁷³ CPR, Art. 23 (12) a.

⁷⁴ L. L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630-72.

⁷⁵ J. H. H. Weiler, D. Kochenov, and C. Closa, 'Epilogue: living in a glass house: Europe, democracy and the rule of law' *Reinforcing Rule of Law Oversight in the European Union*, (Cambridge, 2016), pp. 323-24.

⁷⁶ European Commission, 'A new EU Framework to strengthen the Rule of Law', COM(2014) 158 final/2.

⁷⁷ European Council, 'Council Conclusions of 7-8 February 2013, Multiannual Financial Framework' EUCO 37/13, (2013); R. Crowe, note 62; See also: 'Letter of the German Chancellor Merkel and French President Sarkozy to the President of the European Council of 17 August 2011'.

reflected the overall European democratic will, expressed by the European Parliament during negotiations. This is the most essential part of the explanation of why macroeconomic conditionality did not work: because the weak democratic legitimacy expressed by the European Parliament during its adoption.

Regarding the tool's effectiveness, the Commission held that despite the lack of enforcement the tool provided for the right incentives that prompted the two Member States to take swift and timely corrective action.⁷⁸ On this point, it is worth noting that while both Spain and Portugal made significant progress in correcting their governmental deficits, in 2017, the countries are the only two EU Member States that have still failed to secure a level of government deficit below 3% as indicated in the 2016 commitments (by a small margin).⁷⁹

Box: Lessons learned

LESSONS LEARNED - 2014-2020 MACROECONOMIC CONDITIONALITY

Several important lessons are drawn from the 2014-20 experience of macroeconomic conditionality (Art. 23, CPR).

First, **political congruence at the EU level is a key factor for the effective functioning of conditionality, that plays out strongly during enforcement and informs to a significant extent its legitimacy.** Early and meaningful engagement of the European Parliament throughout the process of conditionality policy formulation and negotiation is critical for the tool's subsequent operation.

Second, the **shortcomings of the legal framework lead to a strong legal uncertainty on the ground** for all actors involved.

Third, the structured dialogue with the Parliament led to a **much-welcomed transparency** and accountability of the conditionality process.

Fourth, the **absence of a conditionality 'escape clause'** that would allow the Commission to defer enforcement and avoid situations where Cohesion funds would be suspended in countries that needed them most, posed important difficulties during enforcement.

Fifth, **Cohesion policy was effectively rendered the primary and only tool of economic governance enforcement**, as suspensions of ESIF continued to be considered even after the available intrinsic policy enforcement tools (fines) for the two Eurozone Members had been set aside.

Lastly, the mandatory strand of macroeconomic conditionality showed of little mandatory power, automatic or less political, as expected by commentators during negotiations.⁸⁰

Source: Author

⁷⁸ European Commission, *Seventh Cohesion Report*, note 51, p. 173.

⁷⁹ Eurostat - Table General government deficit 2017 (-) and surplus (+) - annual data. Portugal 3%, Spain 3.1%.

⁸⁰ Egmont Institute, note 13, p. 42.

2.2.1.3. Conditional measures: 10% top-ups

The conditional measures allowing for 10% top-ups (Art. 24, CPR) represent in essence an economic governance incentive intimately linked to macroeconomic conditionality (Art. 23, CPR), because they were conceived as a mirroring positive pillar of the negative macroeconomic conditionality explained above (2.2.1.2).

Pursuant to Article 24 of the CPR, Member States in financial difficulty could be exempted upon request from the ESIF additionality requirements by 10 percentage points (10% less national matching funds), without exceeding the overall ESIF allocations.⁸¹ The provision was expected to help Member States under financial assistance that struggled to absorb their ESIF allocations due to national co-funding liquidity constraints (additionality obligations), so long as they comply with their respective economic adjustment programmes. In case of non-compliance, the negative macroeconomic conditionality would kick-in (Art. 23, CPR).

The positive conditional measures of Art. 24 CPR knew an extremely limited application in practice. Due to important delays in the start of the 2014-20 spending execution, it profited only one single Member State - Greece -, after a subsequent amendment of its initial June 2016 applicability deadline.⁸² The other four eligible Member States at the time of the CPR adoption (Cyprus, Ireland, Portugal and Romania) had already exited their respective financial adjustment programmes by the start of 2014-20 expenditure.⁸³ They however benefited during 2011 to 2015 from correlative top-ups under the 2007-13 framework regulations.⁸⁴

In result, as anticipated during negotiations, the application of Art. 24 CPR positive conditional measures was extremely limited, given its exclusive application to Member States receiving financial assistance, as opposed to Member States experiencing economic and fiscal imbalances.⁸⁵

2.2.2. Ex ante conditionalities

The ex ante conditionalities were introduced as essential ESIF spending pre-requisites, meant to ensure that Member States' legal, strategic and administrative frameworks are fully prepared to effectively and efficiently implement the ESIF spending resources.⁸⁶

Overall **48 ex ante conditionalities** are applicable to ESIF in the 2014-20 financial period:

- 7 general ex ante conditionalities applicable to all ESIF (CPR, Annex XI, Part II);
- 29 thematic ex ante conditionalities applicable to Cohesion policy support allocated under specific investment priorities of ERDF, ESF and the Cohesion Fund (CPR, Annex XI, Part I);

⁸¹ CPR, note 9, Art. 24.

⁸² Commission Report to the European Parliament and the Council containing the assessment required under Articles 24(3) and 120(3) third sub-paragraph of Regulation (EU) N° 1303/2013, COM(2016) 414 final, (2016); Regulation (EU) 2016/2135 of the European Parliament and of the Council of 23 November 2016 amending Regulation (EU) No 1303/2013 as regards certain provisions relating to financial management for certain Member States experiencing or threatened with serious difficulties with respect to their financial stability OJ L 338 p. 34–36 (2016).

⁸³ COM(2016) 414 final.

⁸⁴ Id., pp. 2–3.

⁸⁵ Egmont Institute, note 13, pp. 35–36.

⁸⁶ CPR, note 9, considerations (21), Art. 2 (33), 19, Annex XI.

- 8 thematic ex ante conditionalities applicable to the second pillar of the agricultural policy through EAFRD support (Regulation 1305/2013, Annex V);
- 4 thematic ex ante conditionalities applicable to EU common fisheries policy, under EMFF support (Regulation 508/2014, Annex IV).

This study focuses exclusively on the performance of 36 ex ante conditionalities (7 general ex ante conditionalities and 29 thematic ex ante conditionalities) applicable to Cohesion policy support disbursed through ERDF, ESF and Cohesion Fund.

By the end of 2015, the 36 ex ante conditionalities examined here, significantly multiplied throughout the Member States' programming documents, reaching an overall astonishing number of more than 2000 individual conditionalities applicable to ERDF, ESF and Cohesion Fund resources in 2014-20.⁸⁷ In result, ex ante conditionalities represented by far the most voluminous, significant and demanding conditionalities of Cohesion policy in 2014-20.

Evaluation studies show that ex ante conditionalities have brought an immense amount of policy, legislative and structural implementing action at the national and regional level, incentivising the start of numerous important reforms in an incredibly short amount of time.⁸⁸ However, pursuant to the Court of Auditors their effectiveness and positive impact on the performance of Cohesion policy and related spending on the ground remain rather uncertain.⁸⁹ Overall, there is **a mixed success picture** emerging from the experience of ex ante conditionalities in 2014-20, which knew a highly variable and uneven experience on a case by case basis.⁹⁰

The **lessons learned show** that for effective operation ex ante conditionalities must enjoy a genuine shared commitment at the EU, Member States and regional levels (1), be based on clear and precise policy objectives, meticulously tailored towards measurable policy outputs, which present a close and meaningful link to spending (2) and be closely followed-up by matching EU, national and regional institutions, pursuant to open and transparent applicability, monitoring and evaluation processes (3).

In the following, the value added (2.2.2.1) and shortcomings (2.2.2.2) of ex ante conditionalities shall be briefly presented.

2.2.2.1. Value added

Commission's and other independent expert evaluations show that ex ante conditionalities have proven a useful policy instrument with important EU added-value on at least four key dimensions:⁹¹

- **improvement of investment environment** and ESIF implementation capacity: especially by supporting development of long-term investment strategies and multiannual budgeting at the national and regional level;

⁸⁷ E. C. Metis GmbH, *The implementation of the provisions in relation to the ex-ante conditionalities during the programming phase of the European Structural and Investment (ESI) Funds* (2016), p. 27.

⁸⁸ European Commission, *The Value Added of Ex ante Conditionalities in the European Structural and Investment Funds* (2017); Court of Auditors, *Special report No 15/2017: Ex ante conditionalities and performance reserve in Cohesion: innovative but not yet effective instruments*; Metis GmbH, note 89; Ismeri Europa, note 44.

⁸⁹ Court of Auditors, *Special report No 15/2017*, para. 59. "These examples also show that fulfilment of an [ex ante conditionalities] is not necessarily equivalent to better performance on the ground and raises doubts as to whether the current approach in using ex-ante conditionalities will be effective in achieving better Cohesion spending."

⁹⁰ Court of Auditors, *Special report No 15/2017*; Metis GmbH, note 89; Ismeri Europa, note 44, p. 108; European Commission, note 90; Watch, G. Quinn, A. Hillen-Moore, and N. Crowther, *Opening up communities, closing down institutions: Harnessing the European Structural and Investment Funds* (2017).

⁹¹ European Commission, note 90; Metis GmbH, note 89; Ismeri Europa, note 44.

- **implementation of EU acquis:** in particular through a fitness-check of existent regulatory frameworks, that fostered important amendments to national legislation and encouraged swift transposition of outstanding EU laws;
- **start of structural reforms:** notably by incentivizing the start of numerous structural reforms and their implementation in line with European Semester CSRs in areas of ESIF relevance;
- **increased cooperation and knowledge sharing** between the EU, Member States and regions: above all, by providing an orderly framework to assess Member States' and regions' preparedness to start the implementation of ESIF, by facilitating a better understanding of outstanding issues, and by providing a forum for knowledge sharing of most promising policy solutions.

Shortcomings

As a first-time piloted EU governance tool, ex ante conditionality has encountered a number of shortcomings during 2014-20, that may be summarised as follows:

- **Inconsistent applicability assessment:** evaluation studies show that in about 22% of the cases the ex ante conditionalities were not found applicable in spite of an evident close link and relevance to spending.⁹² Thematic ex ante conditionalities on higher education (10.2, Annex XI, CPR), lifelong learning (10.3, Annex XI, CPR), vocational education and training (10.4, Annex XI, CPR)⁹³ and general ex ante conditionalities in the area of non-discrimination (point 1, Annex XI, CPR) and gender equality (point 1, Annex XI, CPR) were in particular affected by this shortcoming.⁹⁴
- **Over-optimistic and inconsistent fulfilment assessment:** evidence also shows that Member States' and Commission's fulfilment assessment has been rather over-optimistic and oriented at minimum compliance thresholds.⁹⁵ Moreover, the Court of Auditors reported instances of variable and inconsistent fulfilment thresholds applied to different Member States, as reported compliance data was not always sufficiently corroborated with data available in other Commission departments.⁹⁶ This was for instance the case for state aid (point 5, Annex XI, CPR),⁹⁷ active labour market policies (8.1, Annex XI, CPR), labour market institutions (8.3, Annex XI, CPR) and Small Business Act (SBA) ex ante conditionalities, where Member States and the Commission found the conditionalities fulfilled despite evidence of weak performance reported by other Commission departments.⁹⁸
- **Inconsistent institutional matching of ex ante conditionalities:** ex-ante conditionalities were primarily under the responsibility of Commission DGs in charge of spending and were not always consistently matched with the policy-responsible Commission DG. This has further contributed to the gap in the quality of assessment. For instance, the ex ante conditionalities on non-discrimination, gender, disability and Roma were primarily assessed in compliance by DG EMPL responsible for spending management, as opposed to DG Justice primarily responsible for equality and Roma policy. This led in result to an important compliance deficit documented in the case of

⁹² Metis GmbH, note 89, p. 32.

⁹³ Id.

⁹⁴ Vita, note 28.

⁹⁵ Court of Auditors, Special report No 15/2017, para. 38–59.

⁹⁶ Id. para. 50–59.

⁹⁷ Court of Auditors, Special report No 24/2016, *'More efforts needed to raise awareness of and enforce compliance with State aid rules in cohesion policy'*, para. 100–101. *"Member States not fulfilling ex ante conditionalities are not those where the Commission found most problems in the past"*.

⁹⁸ Court of Auditors, Special report No 15/2017, para. 50–59.

Romania.⁹⁹ The Court of Auditors has documented similar lack of consistent institutional matching of information at the level of the Commission, which lead to a result where the conclusion on fulfilment of an ex ante conditionality did not necessarily always mean compliance with EU laws or policies on the ground.¹⁰⁰ The institutional coordination was also reported difficult on some occasions at the national level.¹⁰¹

- **Variable fulfilment effort:** evaluations clearly indicate that the fulfilment effort required by ex ante conditionalities differed, with more administrative effort and major fulfilment actions carried-out in less developed Member States and regions, as opposed to the more developed ones.¹⁰² Evidence also points towards a wide variation of Member States' approaches towards fulfilment. Whereas in some Member States one single conditionality led to genuine, country-wide reforms;¹⁰³ in others, four and more conditionalities were collapsed into one and formally reported for compliance.¹⁰⁴ There is still insufficient data regarding the exact reach of the administrative burden and effort required per region. However, it may be safely claimed based on existing evaluations that ex ante conditionalities put a higher administrative burden on regions with weaker administrative capacity, generally corresponding to the less developed regions of net beneficiary Member States.¹⁰⁵ This difference needs further close consideration, given its potential to deepen the structural gap between the EU centre and the periphery.¹⁰⁶
- **Weak shared understanding of objectives:** evidence also shows that there was generally a weak shared understanding of the concrete objectives of ex ante conditionalities, as actions for fulfilment indicated in the Annex XI of the CPR lacked at times concreteness, clarity or a genuine link to the spending intervention, necessitating often further negotiation.¹⁰⁷ From this point of view, ex ante conditionality knew a significant departure from its definition of a clear and precise, critical factor directly linked to spending (Art. 2 (33), CPR).¹⁰⁸
- **High informality, low transparency and weak accountability:** the process of ex ante conditionality was characterised by a very high degree of informality, as the formal legal framework guiding the operation of ex ante conditionality has been often informally set aside, re-negotiated and re-interpreted.¹⁰⁹ On this point, it is worthwhile noting that even if no formal ESIF suspension has been ordered in practice (see point below), informal self-suspensions have been agreed in practice with 13 Member States, affecting about 2% of ERDF, ESF and Cohesion Fund resources in 2014-20, despite the fact that no such provision was present in the CPR.¹¹⁰ The complexity of legal procedure, the limited compliance timeline, the vagueness of the PAs and OPs ex ante conditionalities action plans, and dominance of executives led to an overall low transparency of the process

⁹⁹ See: V Viță, *The Rise of Conditionality in the European Union* (PhD dissertation, EUI, 2018 forthcoming), Chapter 12.

¹⁰⁰ Court of Auditors, *Special report No 24/2016*, para. 100–101.

¹⁰¹ Metis GmbH, note 89, p. 105. *"Difficulties in coordination between regional and national levels were also often mentioned as problematic in countries with a large number of OPs (e.g. France, Greece and Italy)."*

¹⁰² Id, p. 10 *"More developed regions, mostly adapted existing strategies and action plans rather than conducting the whole development process in order to fulfil conditionalities as it happened in most of the less developed regions"*; Ismeri Europa, note 44, pp. 108–22.

¹⁰³ Metis GmbH, note 89. (i.e. higher education conditionality in Spain)

¹⁰⁴ Metis GmbH, note 89. (i.e. higher education, early school leaving, vocational education and training and life-long learning in Poland; or self-employment in Romania)

¹⁰⁵ Metis GmbH, note 89, figure 27; Ismeri Europa, note 44, Table 20.

¹⁰⁶ D. Kukovec, 'Law and the Periphery' (2015) 21 *European Law Journal* 406–28; D. Kukovec, *Economic Law, Inequality and Hidden Hierarchies on the EU Internal Market* (2015).

¹⁰⁷ Court of Auditors, *Special report No 15/2017*, Recommendation 1, p.50; Metis GmbH, note 89, p. 74.

¹⁰⁸ CPR, note 9, Art. 2 (33).

¹⁰⁹ V Viță, note 101, Chapter 10-12.

¹¹⁰ Court of Auditors, *Special report No 15/2017*, para. 62.

and weak participation of civil society organisations.¹¹¹ Furthermore, the often re-negotiated measures for fulfilment and correlative deadlines, led to a very low clarity for outside expert observers and EU citizens at large regarding the distribution and allocation of responsibility between the EU and national actors, leading to weak accountability of the implemented measures.¹¹²

- **No enforcement:** evidence points that the Commission has not proceeded to a consistent enforcement and suspension of funds, even in cases of serious lack of compliance with ex ante conditionality criteria.¹¹³ No suspension of payments have been ordered upon the adoption of the OPs even if about 800 ex ante conditionalities affecting over 57% of the Cohesion policy allocations corresponding to the ERDF, ESF and the Cohesion Fund were not fulfilled.¹¹⁴ No suspensions of payments had been ordered upon the end of 2016, even if about 380 action plans affecting about 27 % of Cohesion spending have not been fully completed.¹¹⁵ Ultimately, no suspension have been ordered by the end of 2017, for the outstanding 58 unfulfilled action plans.¹¹⁶ Instead informal self-suspensions have been agreed, as explained above.¹¹⁷
- **Uncertain impact on spending and sustainability of reforms:** ex ante conditionalities were instrumental in triggering the start of important reforms and positive change in a wide-array of policy areas, however, their concrete impact on the quality and effectiveness of Cohesion spending remains uncertain. Evaluation studies show that ex ante conditionalities often lost their direct link to Cohesion spending and pursued country-wide reforms that depend on continued national ownership, follow-up and long-term implementation to ultimately contribute to future better spending.¹¹⁸ Moreover, the CPR did not provide for an ex post monitoring and evaluation instrument for ex ante conditionalities, which makes the sustainability of reforms uncertain and essentially dependent on the genuine good will of Member States and their regions. Similarly, there was no requirement to invest the allocated ESIF resources only in line with the adopted ex ante conditionality measures, i.e. where a smart specialisation strategy was adopted pursuant to the ex ante conditionality on research and innovation (1.1, Annex XI, CPR) the CPR did not provide for the requirement to invest the allocated ESIF resources in line with the strategy, it only checked for the existence of a strategy, formally presuming that existence of a strategy already accounts for better spending.

¹¹¹ Metis GmbH, note 89, pp. 37–38, 109; Structural Funds Watch, note 92. V Viță, note 101, Chapter 10-12, with specific detailed case studies on all 36 ex ante conditionalities in the case of Romania, endorsing the claim for weak transparency, clarity and resulting weak accountability.

¹¹² Id.

¹¹³ See for instance, the case of waste management ex ante conditionality in Romania.

¹¹⁴ Court of Auditors, *Special report No 15/2017*, para. 37.

¹¹⁵ Id., para. 96.

¹¹⁶ Id., para. 29.

¹¹⁷ Id., para. 61–62.

¹¹⁸ Id., para. 63–65.

Box: The mixed success of ex ante conditionality

THE MIXED SUCCESS OF EX ANTE CONDITIONALITY

**Social inclusion and deinstitutionalisation of vulnerable groups
(CPR, Annex XI, Part I, 9.1)**

Value added

"The ex-ante conditionality 9.1 has driven billions of Euros towards reforming systems, shifting away from institutions to community-based living. The ESIF have catalysed a movement across the region that has encouraged Member States to support communities that have previously been left behind.

Evidence highlights that Member States are adopting strategies to shift away from institutional care which are starting to be translated into calls for proposals and funded projects backed by significant levels of spending."

Shortcomings

"The process for determining 'applicability' is not transparent, key sources of information about institutional care and community-based living are omitted from official guidance, and civil society is rarely involved in the process. [...]

Evidence highlights that EU funding in areas such as energy efficiency, ICT and transport is being used to support and maintain institutions, which goes against the spirit of the ex-ante conditionality."¹¹⁹

Source: Structural Funds Watch

¹¹⁹ Structural Funds Watch, note 92.

Box: Lessons learned**LESSONS LEARNED - 2014-2020****EX ANTE CONDITIONALITIES**

- The successful operation of ex ante conditionalities relies dramatically on **clearly defined and commonly shared objectives** that present a clear and concrete link to spending. On this point, the EU policy thinking should start with the question of: whether or not spending is better-off with an ex ante conditionality than without it. If the answer is uncertain or negative, the conditionality should be set aside. Similarly, the link between the ex ante conditionalities and European Semester CSRs should be made clear, where present, and their expected contribution to CSRs clearly specified.
- Ex ante conditionalities have been focused primarily on inputs (i.e. preparation of higher education strategy) without **subsequent follow-up, monitoring and evaluation of outputs** (i.e. access and quality of education). This decreased the useful effect of ex ante conditionality which translated at times in formal paperwork and deliverable lists, with only uncertain impact on the quality and performance of Cohesion policy.
- Ex ante conditionalities critically rely on a **genuine and congruent commitment of responsible stakeholders at the national and regional level**, for the latter are ultimately the conditionality masters and actors on the ground. National and regional authorities, as well as civil society actors should be actively engaged from the very early stages of the conditionality process to facilitate a bottom-up and meaningful conditionality process on the ground.
- **Institutional coordination** at the EU and national level has shown of **critical importance** for the well-functioning of ex ante conditionalities. From this point of view, the inconsistent policy match between ex-ante conditionalities and the responsible Commission DGs, led to gaps in the quality of applicability and compliance assessment. The need for diligent institutional coordination is especially acute for cross-cutting conditionalities such as the ones in the area of environment, equality or state aid, that rely dramatically on the expert knowledge of specialised departments of the Commission and the correlative national structures.
- Ex ante conditionalities may credibly put a **higher structural burden on less developed regions** as opposed to more developed ones, which could be usefully addressed though prior technical assistance and dedicated peer support during implementation.
- **Transparency risks** being weakened by the ex ante conditionality legal process. In response, specific transparency guarantees should be put in place, to ensure that the conditionality process is as open as possible to EU citizens. Transparency could usefully assist the Commission with valuable bottom-up knowledge and support a diligent follow-up of reforms under the vigilance of EU citizens, who are ultimately the subjects of all ex-ante conditionality measures.
- **Enforcement** (suspension of EU funds) may often be inappropriate to bring upon compliance or better spending. Nevertheless, a generalised culture of **complete lack** of enforcement even in cases of serious non-compliance should be revisited, for it hampers the foreseeability and **credibility of the conditionality tool**.

Source: Author

2.3. Consolidation and continued expansion: post-2020

The Commission's legislative proposals for the 2021-27 financial period exhibit a clear trend of a continued expansion and consolidation of conditionalities in Cohesion policy. The proposals show that the main conditionalities discussed above are maintained, further consolidated and developed.¹²⁰ Importantly, a horizontal rule of law conditionality is being introduced.¹²¹ Section 3 below discusses the post-2020 conditionality developments in detail.

¹²⁰ European Commission, 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, 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(2018) 375 final 2018/0196 (COD) (2018), hereinafter 'CPR proposal'.

¹²¹ European Commission, '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 2018/0136 (COD)' (2018) hereinafter 'Rule of Law Conditionality proposal'.

3. POST-2020 LEGISLATIVE PROPOSALS

KEY FINDINGS

- The **2021-27** legislative proposals ('CPR proposal'¹²² and 'Rule of Law conditionality proposal'¹²³) exhibit a clear trend of a **consolidation and continued expansion** of conditionalities in Cohesion policy. Conditionalities remain largely focused on input requirements, with only some incipient attention to results.
- The proposed '**macroeconomic conditionality**' (Art. 15, CPR proposal) remains conceptually similar to the 2014-20 financial period (2.2.1 above). An '**escape clause**' is proposed to acknowledge situations of deep economic downturn and avoid situations where funding would be suspended when most needed (Art. 15 (7), CPR proposal). The proposal **maintains the 'structured dialogue'** with the European Parliament (Art. 15 (12), CPR proposal). However, the Commission is **no longer required** to consider the 'opinions' expressed during the said dialogue in its suspension proposal (Art. 15 (9), CPR proposal).
- **Conditional measures** (2.2.1 above) requiring programme **consistency with CSRs** are maintained (Arts. 8 (a), 9 (1) and 18 (1) CPR proposal) and developed, as progress on CSRs would be continuously monitored ex post (Art. 35 (1)(c), CPR proposal) and accounted for during the mid-term review (Art. 14 (1) (a) CPR proposal). The conditional measures on **10 % top-ups** are also preserved (Art. 87 (6), CPR proposal).
- A set of 4 horizontal and 16 thematic '**enabling conditions**' (Art. 11, Annex III-IV CPR proposal) replace, streamline and qualitatively develop the 2014-20 ex-ante conditionalities (2.2.2 above). The key novelties of the proposal are: the automatic applicability of conditions (Art. 11 (1), CPR proposal), the automatic ineligibility of payments in case of non-compliance (Art. 11(5), CPR proposal), the continued ex post monitoring of fulfilment (Art. 11(5), CPR proposal), and the compulsory application of conditionality-led measures (i.e. road transport investment plan) throughout EU funds investment actions (Art. 11(5), CPR proposal).
- An '**infringement conditionality**' is reintroduced (Art. 91 (1) (d), CPR proposal), based on the example of prior conditionalities available during the 2000-06 and 2007-13 financial periods (2.1.2 above). It allows the Commission to suspend all or part of interim payments when there is a reasoned opinion in infringement proceedings (Art. 258 TFEU) that puts at risk the legality and regularity of EU expenditure.
- A novel '**rule of law conditionality**' is proposed (COM (2018) 324 final) as a stand-alone, cross-cutting requirement applicable to all EU budget expenditure, including Cohesion policy. The proposal needs **significant amendments** to translate in an effective conditionality tool on the ground.

¹²² European Commission, CPR proposal, note 122.

¹²³ European Commission, Rule of Law Conditionality proposal, note 123.

3.1. Macroeconomic conditionality and conditional measures

The proposed macroeconomic conditionality (Art. 15, CPR proposal) and the conditional measures related to economic governance (Art. 8 (a), Art. 9(1), Art. 18 (1) and Art. 87 (6), CPR proposal) of the 2021-27 financial period, **maintain a very similar legal framework** to the 2014-20CPR provisions (table 1, below).¹²⁴ Several notable **novelties include**:

- **Conditional measures - consistency with CSRs (Arts. 8(a), 9(1), Art. 18 (1) CPR proposal):** the CSRs to be taken into consideration in Cohesion policy investment shall refer, in addition to European Semester CSRs, to relevant Energy Union country recommendations (Art. 2 (1)) in line with the future Regulation on the Governance of the Energy Union (COM (2016) 759 final/2). Another novelty is the obligation of the monitoring committee to examine the contribution of EU-funded programmes to challenges identified in the CSRs throughout the financial period (Art. 35 (1)(c)). Subsequently, 2024 CSRs must be considered during the 2025 mid-term review (Art. 14 (1) (a)).
- **Macroeconomic conditionality - reprogramming strand (Art. 15 (1)-(6) CPR proposal):** the CPR proposal limits the reprogramming grounds to: (1) needs arising from implementation of subsequent CSRs (Art. 15 (1) (a)) and (2) MIP corrective action (Art. 15 (1) (b)). The possibility to ask for reprogramming to support implementation of economic adjustment programmes in countries under financial assistance is discontinued (2.2.1.2 above). The Commission maintains the possibility to suspend all or part of payments where Member States fail to take effective action ((Art. 15 (6)).
- **Macroeconomic conditionality - mandatory suspension strand (Art. 15 (7)-(11) CPR proposal):** the CPR proposal maintains the prior five grounds of mandatory suspension linked to: failure to correct the excessive government deficits (Art. 15 (7)(a)); failure to submit a corrective action plan (Art. 15 (7)(b)) or take corrective action (Art. 15 (7)(c)) in the course of excessive imbalance procedure (EIP); failure to comply with financial assistance programmes (Art. 15 (7)(d)-(e)). A novel '**escape clause**' is introduced allowing the Commission to recommend that the Council cancel suspension in case of exceptional economic circumstances or following a reasoned request by the Member State concerned (Art. 15 (7) last sub-paragraph). The Commission maintains the possibility to propose to the Council suspension commitments or payments; commitments shall have priority (Art. 15 (7)). The maximum suspension rate of commitments is limited to 25% or 0.25% of the GDP, for the first case of non-compliance, and may be exponentially increased (Art. 15 (10)). The obligation to notify the **European Parliament** and the option of a structured dialogue is maintained (Art. 15 (12)). The Commission is not however any more bound to take into account any of the opinions expressed during the said dialogue (2.2.1 above).
- **Conditional measures - 10% top-ups (Art. 87 (6), CPR proposal):** the positive incentive regarding the possibility for Member States receiving financial assistance to ask for a 10% increase in the EU co-financing rate, up to 100% is maintained.

¹²⁴ See 2.2.1 above.

Table 1: 2021-27 Macroeconomic conditionality and conditional measures

CONDITIONALITY	SPECIFIC PROVISIONS
Consistency with CSRs	<p>Member States and the Commission shall take into account relevant CSRs, in particular during:</p> <ol style="list-style-type: none"> (1) programming: relevant European Semester and Energy Union CSRs (Arts. 2 (1), 8 (1), 9(1) and 18, CPR proposal) (2) mid-term review: 2024 European Semester and Energy Union CSRs (Art. 14 (1)(a), CPR proposal) (3) implementation: the monitoring committee shall examine the programme contribution to CSRs (Art. 35 (1)(c))
Reprogramming strand	<p>Commission may suspend all or part of payments where Member States fail to take effective action in response to a reprogramming request necessary to:</p> <ol style="list-style-type: none"> (1) implement subsequent CSRs (Art. 15 (1)(a)) (2) Correct macroeconomic imbalances (Art. 15 (1)(b))
Mandatory suspension strand	<p>Commission shall propose to the Council suspension of all or part of commitments or payments, in the following cases:</p> <ol style="list-style-type: none"> (1) Council decision on failure to correct excessive deficit (EDP) (Art. 15 (7)(a)); (2) Two successive Council recommendations in the same EIP (MIP corrective arm) on failure to submit a sufficient corrective action plan (Art. 15 (7)(b)); (3) Two successive Council Decisions the same EIP (MIP corrective arm) on failure to take corrective action (Art. 15 (7)(c)); (4) Commission decision not to authorise disbursement Balance of Payments (BoP) financial assistance (Art. 15 (7)(d)); (5) Council decision finding that a Eurozone Member State has failed to comply with its financial assistance economic adjustment programme (i.e. concluded under European Stability Mechanism (ESM)) (Art. 15 (7)(e)). <p>The European Parliament shall be informed and may invite the Commission for a structured dialogue (Art. 15 (12)).</p>
Top-ups	<p>10% top ups to interim payments upon the request of Member States receiving financial assistance, without exceeding 100% (Art. 87 (6)).</p>

Source: CPR proposal, COM (2018) 375 final

The **conditional measures requiring consistency with CSRs** (Art. 8(a), Art. 9(1), Art. 18 (1) and 35 (1)(c) CPR proposal) may be expected to lead to **productive synergies** between EU economic and energy governance frameworks on the one hand, and the social, economic and territorial objectives of Cohesion policy, on the other. In line with prior positions expressed by the European Parliament, it is advisable to further tailor and carefully match the country-wide development needs underlined in CSRs with the **regional and territorial focus of Cohesion policy**.¹²⁵

The mandatory suspension strand of macroeconomic conditionality requires a closer attention (Art. 15 (7)-(11) CPR proposal). The latter conditionalities are negative, cross-cutting and cross-over (1.2.3 above). This means that enforcement always leads to negative financial penalties (negative conditionality) and that the said provisions pursue aims of distinct policy areas (cross-cutting conditionality) or enforcement of distinct conditionality packages (cross-over conditionality). Moreover, their application depends entirely on a prior enforcement decision taken in a distinct decision-making setting of EU economic policy (i.e EDP, EIP or MoU) decisions that always lie beyond the control and responsibility of spending beneficiaries.¹²⁶

On this point, it must be mentioned that the macroeconomic conditionality and conditional clauses contained in two distinct Commission proposals of the 2021-27 MFF are a development in the right direction. Notably, the conditional measures of the proposed Reform Support Program ('RSP proposal' entirely, but especially Arts. 11 (7) and 15 (5)) which conditions financial support on continued progress on agreed CSRs reform commitments.¹²⁷ Equally, the macroeconomic conditionality provisions of European Investment Stabilisation Function ('EISF proposal', Art. 3) that require continued prior compliance with economic governance rules to secure access to the financial resources therein.¹²⁸ The RSP and EISF proposals contain excellent examples of conditionalities focused on positive incentives and closely linked to the primary objective spending.¹²⁹ This is not the case for the mandatory suspension strand of macroeconomic conditionality applicable to Cohesion policy resources (Art. 15 (7)-(11) CPR proposal), which remains focused on negative sanctions and presents a rather indirect link to Cohesion policy spending.

It is also worth noting that federal jurisdictions do not generally impose negative macroeconomic conditions on intergovernmental transfers,¹³⁰ whereas good practice of conditionality in international relations has universally acknowledged that all use of conditionality must be investment critical, parsimonious and not rely on factors beyond the control and responsibility of the conditionality recipients.¹³¹ Indeed, the IMF remains the prime macroeconomic conditionality actor at the global level.¹³² Nevertheless, even the IMF has discontinued the practice of cross-conditionality since early 2000s.¹³³ In addition, one

¹²⁵ European Parliament, 'Resolution of 17 April 2018 on strengthening economic, social and territorial cohesion in the European Union: the 7th report of the European Commission (2017/2279(INI))' (2018) para. 30; European Parliament, 'Resolution of 13 June 2017 on building blocks for a post-2020 EU cohesion policy (2016/2326(INI))' (2017) para. 13.

¹²⁶ Egmont Institute, note 13.

¹²⁷ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme', COM(2018) 391 final 2018/0213 (COD), (2018), hereinafter 'RSP proposal'.

¹²⁸ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function', COM(2018) 387 final 2018/0212 (COD) (2018).

¹²⁹ European Commission, 'RSP proposal' note 129; European Commission, EISF proposal, note 130, Art. 3.

¹³⁰ P. B. Spahn, *Conditioning Intergovernmental Transfers and Modes of Interagency Cooperation for Greater Effectiveness of Multilevel Government in OECD Countries* (2012).

¹³¹ A. Shah, *Development assistance and conditionality: Challenges in design and options for more effective assistance. Conditionality for more effective public investment* (2017).

¹³² O. Jeanne, J. Ostry, and J. Zettelmeyer, *A Theory of International Crisis Lending and IMF Conditionality* (2008).

¹³³ IMF, 'Guidelines on Conditionality' (2002) para. 8 "There will be no cross-conditionality, under which the use of the Fund's resources would be directly subjected to the rules or decisions of other organizations". Pursuant to the CPR proposal, note 122, Art. 15, macroeconomic conditionality allows for Cohesion Policy resources to be subjected to conditionality rules and decisions of other international organizations, such as the IMF or European Stability Mechanism (ESM).

should note that the chief rationale of macroeconomic conditionality attached to IMF loans, is to ensure the repayment of loans. No such rationale exists in Cohesion policy spending.

Finally, the unproductive enforcement history of macroeconomic conditionality during 2014-20 (2.2.1.2), the availability of dedicated budget tools as of 2021 (RSP and EISF¹³⁴) and considering the notorious opposition of the European Parliament regarding the tool,¹³⁵ it is advisable to reconsider the use of the mandatory suspension strand of macroeconomic conditionality in Cohesion policy post-2020.

If, nevertheless, the EU legislators arrive to the conclusion that the mandatory suspension strand of macroeconomic conditionality (Art. 15 (7)-(11), CPR proposal) may have a long-term disciplining effect upon Member States and that it may be appropriate to link Cohesion policy to a limited set of critical macroeconomic criteria to ensure that imprudent government fiscal policies and serious economic shortcomings do not negatively impact on the regularity and effectiveness of EU spending, several lessons from the experience of 2014-20 macroeconomic conditionality must be carefully considered:

- **Escape clause (Art. 15 (7) last sub-paragraph):** the CPR proposal adds a much welcomed 'escape clause' which should be preserved during negotiations to avoid a scenario akin the one experienced in 2016, where a suspension of ESIF risked aggravating the already difficult economic situation of the two countries concerned (2.1.2.1 above).
- **Prior and transparent impact of the proposed suspension (Art.15 (9)):** the CPR proposal includes the obligation of the Commission to take into account the impact of the proposed suspension on 'programmes of critical importance to avoid adverse economic or social conditions' (Art.15 (9) last sentence). It is desirable that such expected impact be timely and transparently communicated by the Commission to the relevant stakeholders, including to the European Parliament for the purposes of a structured dialogue (Art. 15 (12)), to ensure a meaningful debate and facilitate a transparent enforcement process. Such a communication would have to be undertaken **before the Commission proposal on suspension**, given the limited one-month time frame provided by Art. 15(8) for the adoption of sanctions.
- **Subsidiarity of suspensions:** it is desirable that cross-sector economic governance issues are primarily dealt within their respective policy area and legal settings. As the 2014-20 experience showed, the enforcement attempt of macroeconomic conditionality in case of Spain and Portugal (2.2.1.2) de facto transformed Cohesion policy into the primary enforcement tool for EU economic governance. This finding is not satisfactory. Where the EU already disposes of appropriate economic governance enforcement tools those have to be primarily used. In line with the EU treaties (Art. 174 TFEU), Cohesion policy is to support a harmonious, balanced and equitable development of the EU, with a particular focus on lagging behind regions and territories that ultimately leads to progressive social, economic and territorial cohesion of the EU states and regions and builds solid grounds for increased solidarity within the EU. Convergence, including economic convergence, is beyond doubt an essential aim of the Cohesion policy. However, fiscal and economic discipline is certainly not its primary goal. Moreover, in line with Article 175 (1) TFEU, Member States shall conduct their economic policies in such a way as to contribute to the objectives of Cohesion policy, not vice-versa. Looking back at the 2016 enforcement attempt of macroeconomic conditionality (2.2.1.2), it is simply anomalous that that the CPR legal framework allowed for suspension of ESIF, while the primary, sector-specific economic governance enforcement tools (fines for Eurozone Member States) available to the Council and the Commission were not applied.

¹³⁴ European Commission, 'RSP proposal' note 129; European Commission, 'EISF proposal', note 130.

¹³⁵ European Parliament, 'Resolution Post-2020 Cohesion Policy', note 127, para. 13.

RECOMMENDATIONS

Macroeconomic conditionality

(mandatory suspension strand, Art. 15 (7)-(12), CPR proposal)

- The negative mandatory suspension strand of macroeconomic conditionality attached to Cohesion spending should be **used in subsidiary to intrinsic EU economic governance enforcement tools**, and only where the latter have proven insufficient to ensure macroeconomic and fiscal stability (1), and where the said non-compliance would put at risk Cohesion policy expenditure, having regards to its seriousness, duration, extent and recurrence (2). **Under the current CPR proposal** (Art. 15 (7)-(11)), it is simply odd that **suspension of EU funds may be ordered, while sector-specific economic governance enforcement tools are not applied first**.
- It is desirable that a Commission proposal on **suspension** be based on **prior and transparent impact estimates** (in the context of Art. 15 (9), that would be timely communicated to the interested stakeholders, including to the European Parliament for the purposes of the structured dialogue (Art.15 (12)).
- It would be desirable to see the **European Parliament have a clearer and greater role during enforcement**, consistent with its post-Lisbon legislative and budgetary functions and its greater European democratic legitimacy. The opinion of the European Parliament should be sought before any enforcement, and duly accounted for in the final suspension proposal (in the context of Art. 15 (12)).

3.2. Enabling conditions

The CPR proposal introduces 20 enabling conditions (Art.11, Annexes III-IV), which replace and qualitatively develop the ex ante conditionalities of the 2014-20 financial period (table 2, below). The enabling conditions demand compliance with a set of general and thematic EU legal, policy and administrative requirements that represent essential pre-conditions for effective and efficient use of Union funds.

The enabling conditions have been **significantly developed** in comparison to the 2014-20 ex ante conditionalities counterparts, in line with the recommendations of the Court of Auditors.¹³⁶ The main novelties of the CPR proposal include:

- First, the legislative framework is usefully **simplified** (Art.11, Annex III-IV).
- Second, the number of conditions is **streamlined** to a set of 20 critical horizontal and thematic conditions (Annex III-IV).
- Third, the enabling conditions no longer require a prior applicability test and **apply automatically** to each specific objective pursuant to Annex III and IV to the CPR proposal (Art.11 (1)).
- Fourth, the objectives of enabling conditions are significantly more **concrete, precise and measurable** (Annex III-IV). Nevertheless, some enabling conditions could require additional uniform and concrete guidance, in particular, the horizontal condition requiring effective application and implementation of the EU Charter of Fundamental Rights (Annex III).¹³⁷

¹³⁶ Court of Auditors, *Special report No 15/2017*. (the proposal has closely followed the 2017 recommendations of the Court of Auditors)

¹³⁷ V. Viță and K. Podstawa, *When the EU funds meet the Charter of Fundamental Rights: on the applicability of the Charter of Fundamental Rights to EU funds implemented at the national level* (2017).

- Fifth, the **cost** of their implementation is usefully acknowledged and exempted from suspension (Art. 11 (5) second sub-paragraph).
- Sixth, the conditions must be **continuously observed and monitored** by Member States and the Commission throughout the whole period of spending execution (Art. 11(6), Art. 35 (1)(h)). Moreover, Member States' managing authorities must ensure that the selected operations are consistent with the requirements of enabling conditions (Art. 67(3)(b)). This means that during the 2021-27 financial period, conditionalities are in addition **indirectly addressed to final beneficiaries**, who are also requested to comply with the conditionality-implementing acts in order to be benefit from EU funds (Art. 67(3)(b)).
- Lastly, in case of failure to meet the conditions, the **suspension is almost automatic**, as pursuant to the CPR proposal the requests for payments linked to an unfulfilled enabling condition cannot be included in the payment application (Ar. 11 (5) and (6) second sub-paragraph).

Table 2: Enabling conditions

CONDITIONALITY	SPECIFIC PROVISIONS
Defining features	Necessary pre-requisites for the effective and efficient use of Union support granted by Funds (point 17, considerations of the CPR proposal). <ul style="list-style-type: none"> • linked to each specific objective (Art. 11 (1)) • automatically applicable (Art. 11 (1)) • to be fulfilled (Art. 11 (6)), monitored Art. 35 (1)(h) and applied (Art. 67(3)(b)) throughout 2021-27 period.
Horizontal enabling conditions Annex III, CPR proposal	(1) Public procurement (2) State aid (3) EU Charter of Fundamental Rights (4) UN Convention on the Rights of Persons with Disabilities (UNCRPD)
Thematic enabling conditions Annex IV, CPR proposal	(5) Smart specialisation (6) Energy efficiency of buildings (7) Energy Union Governance (8) Renewable energy (9) Disaster risk management (10) Water and wastewater investments (11) Waste management (12) Natural habitats conservation areas (13) Broadband (14) Transport (15) Active labour market policies (16) Gender equality (17) Education and training (18) Social inclusion and poverty reduction (19) Roma integration (20) Health

Source: CPR proposal, COM (2018) 375 final

It shall be critical that EU legislators maintain these improvements in the aftermath of negotiations. The experience of the 2014-20 financial period showed that ex-ante conditionalities and their fulfilment criteria have emerged infinitely more complex, vague and diluted in the final text of the 2014-20 CPR as compared to the 2012 Commission legislative proposal.¹³⁸ These changes have proven decisive during the operation of the tool in practice, impeding the tool to develop its full potential (2.2.2). It is therefore essential that enabling conditions **remain simple, clear, precise, meaningfully linked to spending** and focused on measurable objectives in the aftermath of negotiations.

The 2014-20 financial period has also shown that policy **matching institutional structures** that follow diligently on the implementation of each conditionality is critical for its policy success. The thematic area of enabling conditions should match the Commission internal institutional structure and policy responsibilities. For instance, DG Justice should be involved in the assessment and monitoring of EU Charter enabling condition (Annex III, CPR proposal) alongside the Commission DGs responsible with spending management (i.e. DG REGIO). This need is particularly pressing for cross-cutting enabling conditions (i.e. gender, state aid, waste or water, see table 2 above), which may often reside under the policy responsibility and expertise of a distinct Commission department (i.e. DG JUST should take the lead on Gender equality thematic enabling conditions instead of DG REGIO or DG EMPL).

Transparency, legal certainty and accountability should guide the entire process of enabling conditions during the 2021-27 period. From this point of view, it is advisable to explicitly extend the applicability of the **principle of partnership** to enabling conditions (in the context of Art. 11 and Art.6 (2), CPR proposal).

RECOMMENDATIONS

Enabling conditions (Art. 11, Annex III-IV, CPR proposal)

- It is critical that EU legislators maintain the important qualitative improvements of enabling conditions as reflected in the CPR proposal. **Enabling conditions should remain simple, clear, precise, meaningfully linked to spending, focused on measurable objectives, and continuously fulfilled, monitored and applied** throughout the financial period.
- The thematic area of enabling conditions should **match the Commission internal institutional structure and policy responsibilities of its DGs**. For instance, DG Justice should be closely involved in the assessment and monitoring of EU Charter enabling condition, and its expert opinion should trigger swift action of the Commission departments in charge of spending management (i.e. DG REGIO or DG EMPL).
- **Transparency, legal certainty and accountability** should guide the implementation of all enabling conditions during the 2021-27 period. From this point of view, it is also advisable to explicitly extend the applicability of the **principle of partnership** to enabling conditions (in the context of Art. 11 and Art.6 (2), CPR proposal).

¹³⁸ European Commission, '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, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Council Regulation (EC) No 1083/2006 COM(2011) 615 final/2 2011/0276 (COD)' (2012).

3.3. Infringement conditionality

The infringement conditionality is a punctual and well-targeted conditionality re-introduced in the 2021-27 CPR proposal (Art. 91 (1) (d)),¹³⁹ which has shown useful in safeguarding the financial interests of the Union in 2000-06 and 2007-13 financial periods (2.1.1.2). The conditionality allows the Commission to suspend all or part of payments in case of a **reasoned opinion** of the Commission issued in the context of **infringement proceedings** pursuant to Article 258 TFEU, putting at risk the legality and regularity of EU expenditure (Art. 91 (1)(d), CPR proposal). The infringement conditionality is expected to productively assist the Commission in avoiding situations where the breach of applicable EU laws would hamper the effectiveness of EU spending, where a 'sufficiently direct link' between the breach of EU law and the EU spending intervention is established.¹⁴⁰

In the light of the prior experience of infringement conditionality (2.1.2), it is highly desirable that its enforcement (suspension of payments) be coupled with **technical assistance** (Art. 29, CPR proposal), to support the regions and Member States that struggle in compliance due to **lack of sufficient administrative capacity** and expert knowledge (i.e. through JASPERS initiative¹⁴¹). This would avoid situations akin to the one experienced in 2007-13 financial period (2.1.2), where even if suspension of Structural Funds was ordered in 2008, ten years on (by 2018), compliance with the EU rules on waste management has not yet been achieved by the region concerned and the much desirable policy goal of the EU spending intervention - environmentally friendly waste disposal - has been significantly delayed.¹⁴²

RECOMMENDATIONS

Infringement conditionality (Art. 91 (1)(d), CPR proposal)

- **Enforcement of infringement conditionality should be coupled with technical assistance** (Arts. 29-30), to support the regions and Member States that struggle in compliance due to lack of sufficient administrative capacity and expert knowledge. This would ensure that the financial interests of the EU are protected by conditionality, while at the same time, the regional development objectives of Cohesion policy are achieved.

3.4. Rule of law conditionality

The proposed rule of law conditionality is financially - the most powerful, legally - the most challenging, politically - the most important, and constitutionally - by far **the most significant EU conditionality ever proposed in EU internal policies**.¹⁴³ The tool is an absolute novelty of EU internal spending and could be applicable, according to the Commission proposal, to all EU budget expenditure items, throughout, but also beyond the 2021-27 financial period (table 3 below).

If adopted, the rule of law conditionality would arm the EU with an important budgetary tool that would authorise withdrawal of EU budget funds from Member States with **widespread rule of law deviations that risk affecting the financial interests of the Union**. The

¹³⁹ European Commission, CPR proposal, note 122, Arts. 67 (3) i, 91(1) d.

¹⁴⁰ CJEU, *Italy v Commission*, note 30.

¹⁴¹ 'JASPERS: Joint Assistance to Support Projects in European Regions'.

¹⁴² European Parliament, Committee on Petitions, 'Petition No 1329/2014 by Bartolomeo Pepe (Italian) on the waste management plan in Campania'.

¹⁴³ European Commission, 'RoL Proposal', note 123.

conditionality responds to the call of the European Parliament¹⁴⁴ and draws from the practice of important constitutional moments of established federal systems.¹⁴⁵ It is however highly doubtful that its goal of protecting the financial interests of the Union may be effectively achieved in the light of the current proposal.

Given the high constitutional significance and immense political importance of the rule of law conditionality, **it is critical that its future legal framework translate in an effective and workable instrument on the ground.** A badly designed or unworkable rule of law conditionality risks having tremendous legal, constitutional, political and reputational repercussions for the EU, that would be infinitely corrosive for the EU's commitment to the rule of law principles and should be avoided at all cost, in the current state of the Union.

In particular, the **coherence, consistency, clarity and foreseeability shortcomings of the Commission proposal discussed below (3.4.3) should undergo significant amendments,** if EU legislators share a genuine intention to materialise the rule of law conditionality into a workable conditionality instrument in practice.

¹⁴⁴ European Parliament, 'Resolution of 14 March 2018 on the next MFF: Preparing the Parliament's position on the MFF post-2020', para. 119.

¹⁴⁵ See 1.2.2, 3.4.1.

Table 3: Rule of law conditionality

CONDITIONALITY	SPECIFIC PROVISIONS
<p>Generalised deficiencies (Arts. 2-3)</p>	<p>A widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law (Art. 2 (b))</p> <p>which</p> <p>affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union (Art. 3 (1))</p> <p>in particular, that affects or risks affecting (Art.3 para. 1)</p> <p>(1) proper functioning of the authorities implementing the EU budget (Art. 3 (1)(a));</p> <p>(2) proper functioning of investigation or public prosecution services (Art. 3 (1)(b));</p> <p>(3) effective judicial review by independent courts (Art. 3 (1)(c));</p> <p>(4) prevention and sanctioning of fraud, corruption or other breaches of Union law relating to the implementation of Union budget and imposition of effective and dissuasive penalties on recipients (Art. 3 (1)(d));</p> <p>(5) recovery of funds unduly paid (Art. 3 (1)(e));</p> <p>(6) effective cooperation with OLAF and European Public Prosecutor's Office (Art. 3 (1)(f)).</p> <p>in particular, generalised deficiencies may be considered (Art.3 (2)):</p> <p>(7) endangering the independence of judiciary (Art. 3 (2)(a));</p> <p>(8) 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 (Art. 3 (2)(b));</p> <p>(9) 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 (Art. 3 (2)(c)).</p>
<p>Appropriate measures (Art. 4)</p>	<p>One or more of the following appropriate measures may be adopted (Art. 4):</p> <p>(1) Direct and indirect management (Art. 4 (1)(a))</p> <ul style="list-style-type: none"> • suspension of payments or suspension of implementation of legal commitments or termination of legal commitment (Art. 4 (1)(a)(1)); • prohibition to enter in new legal commitments (Art. 4 (1)(a)(2)) <p>(2) Shared management ((Art. 4 (1)(b)):</p> <ul style="list-style-type: none"> • suspension of programme approval or amendment (Art. 4 (1)(b)(1)); • suspension of commitments (Art. 4 (1)(b)(2));

CONDITIONALITY	SPECIFIC PROVISIONS
	<ul style="list-style-type: none"> • reduction of commitments, including through financial correction or transfer to other programmes (Art. 4 (1)(b)(3); • reduction of pre-financing (Art. 4 (1)(b)(4); • interruption of payment deadlines (Art. 4 (1)(b)(5); • suspension of payments (Art. 4 (1)(b)(6); <p>The appropriate measures shall not affect (Art. 4(2))</p> <p>(1) the obligation of government entities to implement the programme or fund affected by the measure; and</p> <p>(2) in particular, the obligation to make payments to final recipients or beneficiaries.</p> <p>The measures shall be proportionate to the nature, gravity and scope of the generalised deficiency (Art. 4 para. 3)</p>
<p>Procedure (Art. 5)</p>	<p>Where the Commission finds that it has reasonable grounds to believe that the conditions of Article 3 are fulfilled, the Commission (Art. 5 (1)):</p> <p>(1) shall send a written notification to Member State concerned (Art. 5(1));</p> <p>(2) may take into account all relevant information, including decisions of the Court of Justice of the European Union, reports of the Court of Auditors, and conclusions and recommendations of relevant international organisations (Art. 5 (2));</p> <p>(3) may request any additional information (Art. 5 (3)).</p> <p>The Member State concerned (Art. 5(4)):</p> <p>(1) may make observations (Art. 5 (4));</p> <p>(2) shall provide all required information within a time-limit specified by the Commission, no less than 1 month (Art. 5 (4));</p> <p>(3) may propose remedial measures (Art. 5 (4)).</p> <p>When the Commission considers that the generalised deficiency as regards the rule of law is established, it shall submit a proposal on appropriate measures to the Council (Art. 5 (6)).</p> <p>The Council shall act by reverse qualified majority voting (RQMV) (Art. 5 (7)).</p> <p>The Council may amend the proposal by qualified majority (Art. 5 (8)).</p>
<p>Lifting the measures (Art.6)</p>	<p>Once generalised deficiencies cease to exist in full or in part Commission shall submit to the Council a proposal for a decision lifting those measures in full or in part (Art. 6 (2))</p>
<p>European Parliament (Art. 7)</p>	<p>The Commission shall immediately inform the European Parliament of any measures proposed or adopted (Art. 7)</p>

Source: Rule of Law Conditionality Proposal, COM (2018) 324 final

3.4.1. Opportunity of a rule of law conditionality

Before assessing the merits of the Commission proposal, it is appropriate to place this discussion in the broader **theoretical context** of the opportunity of a rule of law conditionality in the EU and its potential effectiveness. Two main policy objectives may be pursued by the rule of law conditionality: **compliance** (3.4.1.1) and **sound expenditure** (3.4.1.2). The sections below find that a rule of law conditionality may assist the EU in pursuing sound expenditure goals and secure the financial interests of the Union (3.4.1.2). A rule of law conditionality is however expected to be less effective in securing Member States' compliance (3.4.1.1).

3.4.1.1. Compliance

It is currently universally acknowledged that economic sanctions may effectively lead to compliance only where an **extensive set of variable pre-conditions are met**.¹⁴⁶ Pre-conditions may concern amongst others: the economic leverage of the actor deploying sanctions in the targeted state, availability of alternative internal or external financial sources and time needed to procure them, vulnerability of the affected social groups, a sufficiently shared domestic public opinion, strong ideological justification and mobilisation, political costs at the EU and national level, potential counter-reactions to spending cut-off, to name just a few.¹⁴⁷

Therefore, if the primary objective of a rule of law conditionality is compliance with EU rule of law principles, it must be firmly and clearly acknowledged that, contrary to certain broadly vehiculated views,¹⁴⁸ extensive empirical evidence points to the conclusion that **withdrawal of financial incentives does not necessarily lead to automatic compliance** (see the experience of infringement conditionality 2.1.2 above) and may appear at times even counter-productive for compliance.¹⁴⁹

Compliance could be **credibly expected** only in cases where:

- the **financial leverage** of the EU budget in a given Member State is significant;
- the state concerned has **no alternative** financial resources to timely substitute for the loss;
- **appropriate guarantees** are adopted to ensure that a suspension does not punish innocent EU citizens;
- there is **sufficient ideological justification and public support** in favour of suspension;
- the **political costs** at the EU level are not higher than the expected benefits of spending withdrawal; and,
- the **potential counter-reaction** to spending cut-off would not go against the very objective of withdrawal.

¹⁴⁶ J. Galtung, 'On the Effects of International Economic Sanctions, With Examples from the Case of Rhodesia' (1967) 19 *World Politics* 378–416; R. F. King, 'The politics of denial: the use of funding penalties as an implementation device for social policy' (1987) 20 *Policy Sciences* 307–37 at 328–34; G. C. Hufbauer, *Economic sanctions reconsidered*, (2007).

¹⁴⁷ Id.

¹⁴⁸ Jasna Šelih, C. Dolan, I. Bond, and Centre for European Reform, 'Brief: Can EU funds promote the rule of law in Europe?' (2017).

¹⁴⁹ L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press, 2005) pp. 10–14; Galtung, note 148.

The experience of conditionalities in prior financial periods also points to the finding that national commitment (in the form of government or citizen's commitment) is critical to achieve full and sustainable compliance.¹⁵⁰ Only where all these critical and important considerations are carefully balanced, it may be assessed whether a rule of law conditionality may credibly lead to compliance, on a case by case basis.

On this point, the **experience of conditionality in federal systems** shows that conditionality may be effectively used to foster compliance on punctual and well targeted rule of law issues. For instance, conditionality usefully assisted the United States federal government to fight corruption practices and secure political independence of state or local government civil servants managing or primarily financed from federal funds as of 1940s.¹⁵¹ Conditionality also supported the United States federal government to enforce the prohibition of segregation in educational establishments in the Southern districts during the 1960s.¹⁵² The movement however lost momentum under subsequent conservative administrations and implementation shortcomings affected the effectiveness of conditionality.¹⁵³

To sum up, **a rule of law conditionality may lead to compliance on a limited amount of cases**, given that a number of critical pre-conditions are cumulatively fulfilled. Whereas the EU budget has a variable financial power throughout EU Member States, several pre-conditions are most likely to be present only in some Member States, most notably the leverage of the EU budget and availability of alternative financial resources (table 4, below).

Table 4: EU budget and Cohesion expenditure, % of GNI, 2016 data

Top 5

COUNTRY	EU BUDGET
LU	5.08%
BG	5%
RO	4.47%
HU	4.19%
LT	3.99%

Top 5

COUNTRY	COHESION
RO	2.68%
HU	2.52%
SK	2.5%
BG	2.45%
CZ	2.02%

Bottom 5

COUNTRY	EU BUDGET
DE	0.32%
NL	0.33%
SE	0.36%
DK	0.5%
FR	0.5%

Bottom 5

COUNTRY	COHESION
NL	0.01%
DK	0.01%
AT	0.03%
SE	0.03%
DE	0.04%

Source: European Commission¹⁵⁴

¹⁵⁰ Section 2, experience of infringement conditionality (2.1.2) and ex-ante conditionality (2.2.2).
¹⁵¹ Hatch Act. 5 U.S.C. § 1216 (a)(1)(2), see also: 'U.S. Office of Special Counsel Hatch Act' available at: <https://osc.gov/pages/hatchact.aspx>.
¹⁵² Congressional Quarterly Almanac, 'Federal Aid Cutoff Prompted Limited School Desegregation' (1965); US Civil Rights Commission, *Survey of school desegregation in the Southern and border states, 1965-66*; B. Ackerman, *We the People, Volume 3: The Civil Rights Revolution* (Harvard University Press, 2014); King, 'The politics of denial', 326, note 148.
¹⁵³ R. F. King, note 148, pp. 307–37. As King notes: "most federal departments and agencies were slow to issue their regulations for Title VI [prohibition of discrimination and segregation] enforcement and the ones produced were not uniform. Staffing was inadequate, status was low, training was insufficient, and organizationally civil rights administrators were usually placed subordinate to program officers, who were unlikely to share the same priorities."
¹⁵⁴ European Commission, 'Interactive chart: EU expenditure and revenue - Budget 2014-2020'.

3.4.1.2. Sound expenditure

A rule of law conditionality may also be used to **safeguard the Union's financial interests**. From this point of view, it has been already explained that when used in internal policies, EU funds are not simply 'gifts with strings attached', they are public funds, collected from citizens as primary taxpayers and spent on delivery of European public goods (1.2 above).

In this context, a rule of law conditionality exposes an additional public policy aim, namely: the aim of sound budgetary expenditure. Therefore, a rule of law conditionality may aim to legitimately safeguard EU financial interests and ensure that the released financial resources are protected from the risk of unwarranted use and waste, which may be posed by systemic rule of law violations in a Member State.

The effectiveness of a rule of law conditionality under this aspect **depends to a critical extent on its actual use on the ground**.

3.4.2. EU's implicit rule of law competence

In line with the principle of conferral, the EU treaties do not confer an explicit material competence upon the Union in the area of the rule of law.¹⁵⁵ The **EU does however poses an implicit competence on rule of law matters**, pursuant to which the EU institutions must ensure that all EU actions or omissions, as well as the actions or omission of its Member States, acting within the scope of EU competences, are compliant with the rule of law principles common to the constitutional traditions of its Member States.¹⁵⁶

Moreover, in line the EU treaties the EU is explicitly mandated to provide itself with the necessary financial resources to attain its objectives (Art. 311 (1) TFEU),¹⁵⁷ which pursuant to Article 3 (1) TEU, include the EU values. Consequently, the **EU can and should use its spending power in pursuance of its founding objectives**, which include the promotion and respect of the rule of law (Art. 3 (1) TEU corroborated with Art. 2 TEU).¹⁵⁸ This argument is even stronger, when the EU action materialises in a conditionality that aims to prevent that its budget contributes to a rule of law violation in a Member State or safeguard its financial interest from an imminent or potential risk resulting from such a violation.

In fact, **conditionalities with strong rule of law remit have been already long present in the EU budget and used in practice**. For instance, the EU Home Affairs Funds have long mandated that all EU financial actions comply with core EU and international human rights obligations.¹⁵⁹ In the case, the Commission ordered suspension of Home Affairs funds following serious human rights violations at EU border detention centres, financed from the EU budget, reported by civil society organisations and the UN High Commissioner for

¹⁵⁵ Art. 5 TFEU.

¹⁵⁶ If the question of the substantive competence of the EU on rule of law matters is disputed, there is no dispute regarding the EU's implicit competence on rule of law. See in this sense: EU Council, 'Opinion fo the Legal Service. Commission's Communication on a new EU Framework to strengthen the Rule of Law: - compatibility with the Treaties', p. 16.

¹⁵⁷ Art. 311 TFEU: "*The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.*"

¹⁵⁸ Art. 3 TEU: "*The Union's aim is to promote peace, its values and the well-being of its peoples.*"

¹⁵⁹ Regulation (EU) No 513/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA (2014) p. Art. 3 (5); Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC (2014) p. Art. 3 (1), 19 (2).

Refugees (UNHCR),¹⁶⁰ established repeatedly by the European Court of Human Rights¹⁶¹ and confirmed by the Court of Auditors.¹⁶² In this context, spending has been successfully upheld from the Member State concerned, based on EU financial rules which mandate that all EU spending action must comply with applicable EU law, including human rights law.¹⁶³

EU funds have also long included specific clauses mandating Member States to ensure appropriate remedies during EU funds implementation, including access to effective complaint mechanisms.¹⁶⁴ Moreover, the Court of Justice has repeatedly stressed that Structural and Cohesion Funds operations must ensure respect of the EU Charter¹⁶⁵ and access to effective judicial review¹⁶⁶ - that is the most central aspect of the rule of law in the EU pursuant to its canonical *Les Verts* judgment.¹⁶⁷ In addition, multiple ex-ante conditionalities of the 2014-20 financial period (section 2.2.2 above) have an important rule of law component in as much as they already request for effective application of EU laws, in line with recent case law of the Court of Justice.¹⁶⁸

Against this background, it is safe to claim that EU does not only poses sufficient implicit competence under the treaties to adopt a rule of law conditionality, but that it has already successfully adopted and used conditionalities with a strong rule of law component in practice. In this context, the proposed rule of law conditionality might be seen as building upon prior rule of law aspects of EU spending execution, but targeting additional aspects currently not regulated by EU financial rules, in particular systemic as opposed to individual breaches of rule of law. For instance, the Commission's proposal does not simply ask for access to judicial review but stresses the independence of judicial review and of the judiciary in general (Art. 3 (1)(c) table 3 above) and provides an explicit legal basis for EU funds suspension when such widespread breaches are present in a given Member State.

3.4.3. Addressing the legal shortcomings

Returning to the concrete **Rule of Law Conditionality proposal**, this section concludes that based on its current form, it is highly unlikely that it may effectively achieve the goals of compliance (3.4.1.1) or sound expenditure (3.4.1.2.) explained above. On this point, Opinion 1/2018 of the Court of Auditors issued at the request of the European Parliament provides additional thoughtful recommendations regarding the rule of law conditionality (in particular relating to clarity and financial impact shortcomings), which may usefully complement the analysis of this study.¹⁶⁹

¹⁶⁰ U. N. H. C. for Refugees, news, 'UNHCR delegation visits detention centre on Greek island, urges closure'.

¹⁶¹ ECtHR, Judgement of 22.07.2010, *A. A. v. Greece*, Violation of Article 3 (prohibition of inhuman or degrading treatment) violation of Article 5 §§ 1 and 4 (right to liberty and security)], ; ECtHR, *A.F. v. Greece* (no. 53709/11), judgment of 13 June 2013 violation of Article 3, ; ECtHR, *Horshill v. Greece*, Application no. 70427/11, 1 November 2013, ; ECtHR, *Khlaifia and Others v. Italy* (application no. 16483/12) a violation of Article 5 § 1 (right to liberty and security) a violation of Article 5 § 4 (right to a speedy decision on the lawfulness of detention).

¹⁶² Court of Auditors, Special Report No 15/2014: The External Borders Fund has fostered financial solidarity but requires better measurement of results and needs to provide further EU added value, p. 33.

¹⁶³ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (2012) Art. 59 (6)(b).

¹⁶⁴ CPR, note 9, Art. 74 (3).

¹⁶⁵ V. Viță and K. Podstawa, note 139.

¹⁶⁶ CJEU, *Judgement of 17 September 2014, Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007-2013 Seirekomitee (Liivimaa Lihaveis case)*, Case C-562/12, ECLI:EU:C:2014:2229.

¹⁶⁷ CJEU, *Parti écologiste 'Les Verts' v European Parliament*, Case 294/83, ECR [1986] 1339.

¹⁶⁸ CJEU, *Order of 20 November 2017, Case C-441/17 R Commission v Poland*, ECLI:EU:C:2017:877 p. [102]. "The purpose of seeking to ensure that a Member State complies with interim measures adopted by the Court hearing an application for such measures by providing for the imposition of a periodic penalty payment in the event of non-compliance with those measures is to guarantee the **effective application of EU law**, such application being an **essential component of the rule of law**, a value enshrined in Article 2 TEU and on which the European Union is founded."

¹⁶⁹ Court of Auditors, Opinion No 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.

3.4.3.1. Coherence

First, the Commission proposal exposes a **low internal coherence**. For instance, the term 'generalised deficiency as regards the rule of law' is used in distinct provisions with rather distinct connotations, being first shortly defined (Art. 2 (b)), subsequently detailed in the Article dealing with appropriate measures by six examples that are deemed to affect the financial interests of the EU (Art. 3 (1) (a)-(f)) and is further detailed in other three particular examples that, this time, do not mention any link to spending (Art. 3 (2)(a)-(c)), with little clarity of what is the relationship between these distinct situations. Furthermore, the distinction between the terms 'public authority' (Art. 2 (b)) and 'government entity' (Article (c)) defined at the outset of the regulation, and the term 'authority' used in the text of the proposal (Art. (1)(a)(c)(d)) is not entirely clear.

3.4.3.2. Consistency

Second, the Commission proposal demonstrates a **low consistency with established norms of existent and future EU financial regulations**.¹⁷⁰ For instance, certain measures indicated at Article 4 (table 3), are not also reflected in the CPR proposal (Title VII),¹⁷¹ such as the possibility to suspend the approval of programmes (Art. 4 (1)(b)(1)),¹⁷² suspension of commitments (except macroeconomic conditionality analysed at 3.1. above) or reduction of commitments. Similarly, the term 'government authority' used by the proposal (Art. 2 (c) and Art. 4 (1)(a)), has been replaced in the meantime with the term 'Member State organisation' in the adopted text of the 2018 EU Financial regulation (Art. 2 (44)).¹⁷³ The proposal exposes a similar **low consistency with EU rule of law treaty provisions**¹⁷⁴ and subsequently adopted **rule of law mechanisms**.¹⁷⁵ Notably, the key notion 'generalised deficiency as regards the rule of law' (Art. 2 (b)) is clearly distinct from the terminology of Article 7 TEU that refers to 'a clear risk of a serious breach' of Article 2 TEU values (Art. 7 (1) TEU) or a 'serious and persistent breach' (Art. 7 (2) TEU). It also differs from the Commission Rule of Law Framework that primarily refers to 'systemic threats to the rule of law'.¹⁷⁶ These examples question the compliance of the proposal with the principle of consistency which requires the EU institutions to: "ensure the consistency, effectiveness and continuity of its policies and actions" (Art. 13, TEU).

3.4.3.3. Clarity and foreseeability

Third, the proposal has **significant shortcomings in terms of legal clarity and foreseeability** - essential rule of law components - which mandate that any law providing for penalties (including administrative penalties) must have a sufficient degree of clarity regarding the conduct to be followed and clearly specify the scope of the potential penalty.¹⁷⁷

¹⁷⁰ European Commission, CPR proposal 2021-2027; Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (2012); Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (2012).

¹⁷¹ European Commission, 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, 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(2018) 375 final 2018/0196 (COD) (2018).

¹⁷² three months

¹⁷³ European Parliament legislative resolution of 5 July 2018 on the proposal for a regulation of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (COM(2016)0605 - C8-0372/2016 - 2016/0282A(COD)) (Ordinary legislative procedure: first reading). Not yet published in the Official Journal of the EU.

¹⁷⁴ Art. 7 TEU

¹⁷⁵ European Commission, 'COM (2014) 158 final/2'.

¹⁷⁶ European Commission, 'A new EU Framework to strengthen the Rule of Law' (2014), p. 7.

¹⁷⁷ ECtHR, 'Guide on Article 7 of the European Convention on Human Rights No punishment without law: the principle that only the law can define a crime and prescribe a penalty' (2018).

Reading the text of the proposed Rule of Law regulation, it is hardly possible to foresee with a sufficient degree of clarity and certainty:

- who are the objects of law ('government entity', 'public authorities' (Art.2(b)-(c)), and why are other private or international actors, or Union institutions not included as potential subjects of a rule of law conditionality?);
- what is the conduct regulated ('a generalised deficiency' (Art. 2(b) and Art.3);
- how is a 'generalised deficiency' related to the notion of 'serious deficiency' under the CPR proposal (Art.2 (30), CPR proposal);¹⁷⁸
- what are the 'reasonable grounds' for triggering the procedure (Art.5 (1)) and what 'constitutes' 'relevant information' to be considered by the Commission (Art. 5 (2)) and what 'additional information' the Commission may request (Art. 5 (3));
- what exactly is the extent of a potential penalty - 'appropriate measures', how is the proportionality of the penalty to be determined in a clear and non-arbitrary manner, in absence of clear guidance on the 'seriousness' and 'time elapsed' (Art. 4 (3));¹⁷⁹
- when does a deficiency cease 'in part' (Art. 6 (2)) and to which 'part' is the provision referring to (Art. 6 (2));
- what are the exact guarantees that the individual rights and interests of final beneficiaries or recipients shall not be affected and how can this result be credibly ensured (Art.4(2)).

3.4.3.4. Sufficiently direct link to spending

Fourth, the proposed rule of law conditionality presents a **weak direct link to spending**. From this point of view, it is highly desirable that the rule of law conditionality be focused on set of clear, precise, objective and sufficiently shared rule of law grounds, with a sufficiently direct link to EU spending (Art. 3). These may include criteria as: independent, impartial and effective judicial review of EU funded operations; integrity and independence of officials managing and controlling EU funds; transparent and accountable EU funds management and control processes; effective investigation procedures and remedies; effective prosecution and recovery of mismanaged funds, including a link to the jurisdiction of the OLAF and future EU Public Prosecutor's Office, as appropriate.

As mentioned above (3.4.1.1) the experience of conditionality in established federations, shows that conditionality may be effectively used to foster compliance and sound expenditure regarding punctual and well targeted rule of law issues (3.4.1.1).¹⁸⁰ The clarity of objectives and sufficient link to spending are also the chief lessons learned from the operation of 2014-20 round of ex ante conditionalities (2.2.2 above).¹⁸¹ Moreover, the lack of a 'sufficiently direct link' to spending may expose the conditionality to ex post judicial review in line with the well-settled case law of the Court of Justice,¹⁸² as measures adopted pursuant to Article 322 TFEU legal basis, must maintain a clear link to EU financial processes. Ultimately, a carefully tailored and precise conditionality is preferable to a conditionality

¹⁷⁸ European Commission, CPR proposal, note 122, Art. 1 (39).

¹⁷⁹ See, on application of the principle of proportionality in case of Common Agricultural Policy cross-compliance conditionality, and correlative guidance on rate of corrections: CJEU, *Judgment of 17 May 2013, Hellenic Republic v European Commission Case T-294/11 ECLI:EU:T:2013:261* para. 115.

¹⁸⁰ Such as the U.S. example of a civil rights conditionality prohibiting segregation in schools or freedom of speech, see: King, note 146; D. L. Beschle, 'Conditional Spending and the First Amendment: Maintaining the Commitment to Rational Liberal Dialogue' (1992) 57 *Missouri Law Review* 1117-56; W. P. Marshall, 'Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses' (1989) 26 *San Diego Law Review* 243-54; C. R. Sunstein, 'Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)' (1990) 70 *Boston University Law Review* 593-622.

¹⁸¹ Court of Auditors, *Special report No 15/2017*.

¹⁸² CJEU, *Italy v Commission*, note 30, para. 50.

framed in the language of extremely broad constitutional principles and desiderates, which risks hampering the concreteness, workability and practical utility of the conditionality altogether.

3.4.3.5. Prohibition of arbitrariness of executive power

Fifth, in line with the principle of prohibition of arbitrariness of the executive power, **a clear list of 'reasonable grounds'** (Art. 5 (1)) that would trigger the conditionality procedure should be clearly stated, to be followed by a transparent, impartial and accountable enforcement procedure (Art.5). Trigger mechanisms could build upon already existent EU structures, such as: no satisfactory follow-up to an EU rule of law framework recommendation, start of Article 7 TEU procedure, one or multiple decision(s) of the Court of Justice pointing to rule of law deviations (i.e. lack of effective judicial protection in the fields covered by EU law), a resolution of the European Parliament, repeated infringement procedures raising rule of law concerns, systemic investigations of the European Anti-Fraud Office (OLAF) finding breaches of EU funds management rules, systemic deficiencies documented by the future European Public Prosecutor's Office.

In all cases, to provide an additional guarantee of the objectivity and **impartiality of procedure** independent expert opinions may be sought by the Commission (Art. 5 (3)), such as an **expert opinion** of the European Union Agency for Fundamental Rights (FRA) concerning the rule of law deviation aspects that touch upon respect and protection of fundamental rights in the EU. The process should be further tailored to allow pluralistic public participation of interested EU citizens and stakeholder groups that would ultimately strengthen the process with greater legitimacy, transparency and democratic accountability. On this point, it is lamentable that the proposal lacks a prior, open, transparent and inclusive stakeholder consultation on a subject of such a critical importance for the EU.¹⁸³

3.4.3.6. Equal treatment of Member States

To address the concerns regarding the equal treatment of Member States, the process should be held to the **highest standards of transparency**, with due regards to the **obligation to give reasons**. A decision to enforce the conditionality should be duly reasoned, so as to allow a meaningful and effective democratic debate, accountability and judicial review. On this point, it is highly desirable that *a reasoned opinion not to enforce the rule of law conditionality* is also foreseen. As mentioned above, economic sanctions may not always be appropriate to secure compliance (3.4.1.1) and in such cases it is appropriate for the Commission to exercise a necessary degree of discretion. To avoid that in such cases, the decision not to enforce the tool may turn into allegations of inconsistency, blame-shift or lack of even-handedness, it is desirable that such decisions be transparently taken and duly reasoned to facilitate informed debates in the appropriate European democratic fora.

3.4.3.7. Economic interests and legitimate expectations of EU citizens

Sixth, the enforcement of conditionality does not only directly affect Member States but may also directly affect the **economic interests and legitimate expectations of EU citizens benefiting from EU spending and other final beneficiaries**, not liable for the rule of law violations. From this point of view, a decision to enforce the conditionality should provide serious guarantees to secure the individual interests potentially affected (Art. 4 (2)). On this point, Opinion 1/2018 of the Court of Auditors recommended conducting a thorough impact assessment to secure that final beneficiaries of EU funds are not adversely affected.¹⁸⁴

¹⁸³ European Commission, RoL proposal, note 123, p. 3. "No specific stakeholder consultation has taken place, but the subject matter has been widely debated, including at the European Parliament and the Council."

¹⁸⁴ Court of Auditors, Opinion No 1/2018, para. 26–29.

3.4.3.8. Enforcement by the Commission

Lastly, the **enforcement of the rule of law conditionality should be entrusted to the Commission**, in line with its budgetary implementation functions and powers enshrined in Article 317 TFEU. If the conditionality is to be adopted on the basis of Article 322 TFEU, its procedure should follow the same treaty distribution of powers and institutional functions. Under the current EU treaty provisions, the Commission implements the EU budget in cooperation with Member States, pursuant to Article 322 TFEU regulations but 'on its own responsibility' (Art. 317 (1) TFEU). Hence, the ultimate responsibility for a sound budgetary expenditure ultimately rests under the sole responsibility of the Commission. The Council has its own well-defined budgetary function, that of a co-legislator acting alongside the European Parliament. The delegation of enforcement to the Council would lead to a distortion of the treaty budgetary functions, as the Council has a prominent role in the context of Article 7 TEU procedure but has distinct responsibilities during the EU budget implementation process. Delegation of enforcement to the Council is also likely to significantly decrease the effectiveness of the tool in practice. Lastly, it should be stressed that pursuant to the 2018 Financial Regulation (Art. 236(4)(b)) it is also the Commission who decides on suspension of EU external action funds in case of rule of law violations in third countries.¹⁸⁵

3.4.3.9. Opinion of the European Parliament and Council

Ultimately, it could be desirable that the **opinion of the European Parliament and of the Council** be sought before any enforcement, and duly accounted for in the final suspension decision, to ensure a genuine European democratic legitimacy of the process.

¹⁸⁵ European Parliament legislative resolution of 5 July 2018 on the proposal for a regulation of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (COM(2016)0605 – C8-0372/2016 – 2016/0282A(COD)) (Ordinary legislative procedure: first reading). Not yet published in the Official Journal of the EU. **Commission shall "suspend the financing agreement if the third country breaches an obligation relating to respect for human rights, democratic principles and the rule of law and in serious cases of corruption"**

RECOMMENDATIONS

Rule of law conditionality (COM (2018)324 final, Rule of Law proposal)

- The rule of law conditionality proposal should undergo profound and significant legislative amendments to translate into an **effective and workable conditionality instrument**. The internal **coherence and consistency** of the proposal require special attention (see, 3.4.3.1-3.4.3.2).
- It is critical that rule of law conditionality be **focused on a set of limited and concrete rule of law components** (i.e. independence of judiciary), which demonstrate a **sufficiently direct link to spending** (Art. 3).
- The **'appropriate financial measures'** should be consistent with EU financial rules (CPR proposal) and the **extent of financial sanctions** should be determined pursuant to **clearly specified and foreseeable objective criteria** (Art. 4 (1)).
- The **'reasonable grounds'** triggering the conditionality process should be **clearly stated**, in line with the principle of prohibition of arbitrariness of the executive power (Art. 5 (1)).
- **Credible guarantees**, including prior impact estimates, should be foreseen to ensure that the **economic interests and legitimate expectations of final beneficiaries** are not unduly affected (Art.4(2)).
- To address the concerns regarding the **equal treatment of Member States**, the conditionality **process should be held to the highest standards of transparency**, with due regards to the obligation to give reasons. A decision 'to enforce' or 'not to enforce' the conditionality should be duly reasoned, so as to allow for a meaningful democratic debate, accountability and judicial review (Art. 5).
- The **enforcement** of the rule of law conditionality **should be entrusted to the Commission, in line with its budgetary implementation functions enshrined in the EU treaties (Art. 317 TFEU)** and consistent with EU practice in external action spending. Enforcement by the Council would lead to a distortion of the current budgetary functions under the treaty (Art. 5(6)-(7)).
- It would be desirable that the **opinion of the European Parliament and of the Council** be sought before any enforcement, and duly accounted for in the final suspension proposal, to ensure a **genuine European democratic legitimacy of the process** (Art. 5).

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This study discusses the evolution and experience of conditionalities in Cohesion policy and draws relevant policy recommendations on its future development in the light of the 2021-27 legislative proposals of the European Commission, including the proposal on a rule of law conditionality.

PE 617.498
IP/B/REGI/IC/2018-092

Print ISBN 978-92-846-3825-3 | doi:10.2861/82825 | QA-06-18-027-EN-C
PDF ISBN 978-92-846-3826-0 | doi:10.2861/186982 | QA-06-18-027EN-N