



Ex ante fundamental rights conditionalities – a novel fundamental rights tool in the European Structural and Investment Funds architecture

Locating it in the broader EU fundamental rights
conditionality landscape

Viorica Viță

Thesis submitted for assessment with a view to obtaining the degree of
Master in Comparative, European and International Laws (LL.M.)
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Summary

The thesis engages in a comprehensive legal study of the fundamental rights conditionalities as introduced in the 2014-2020 European Structural and Investment Funds normative framework. It focuses on three general ex ante conditionalities in the area of anti-discrimination, gender equality and disability.

Conditionality in fundamental rights is a long-standing EU policy tool, used mainly to enforce compliance with fundamental rights values on third countries. The 2013 Cohesion policy reform marks a strong transition of fundamental rights conditionality to internal policy. The development stirred a great interest as the tool addresses directly the EU Member States. It conditions the access to funding on a prior fulfilment of specifically prescribed fundamental rights criteria.

In this context, the thesis inquires what is the nature and reach of the novel fundamental rights conditionalities. To facilitate a robust understanding of the newly introduced tool, the thesis firstly undertakes a conceptual analysis of conditionality. It further takes an evolutive-comparative approach, locating the fundamental rights conditionalities in the broader context of EU conditionality policy as well as in the context of European Structural and Investment Funds framework.

Tested against the two areas, the research finds that the analysed ex ante conditionalities endorse the novelty claim, but, at the same time, they present similarities with the EU general use of conditionality in fundamental rights. Equally, fundamental rights conditionalities build harmoniously on the prior arrangements of European Structural and Investment Funds.

The thesis concludes with a general assessment of the novel fundamental rights conditionalities' potential and limits, primarily with regards to Cohesion policy and secondly with regards to the overall EU goal of promoting equality and combating status discrimination.

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TABLE OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
CPR	Common Provisions Regulation
DCI	Development Cooperation Instrument
EAFRD	European Agricultural Fund for Rural Development
EIDHR	European Instrument for Democracy and Human Rights
ERDF	European Regional Development Fund
EMFF	European Maritime Fisheries Fund
ENI	European Neighbourhood Instrument
ESF	European Social Fund
ESI Funds	European Structural and Investment Funds
EU	European Union
GSP	Scheme of Generalised Tariff Preferences
ISP	Instrument contributing to Stability and Peace
OP	Operational Programme
PA	Partnership Agreement
PI	Partnership Instrument for cooperation with third countries
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

INTRODUCTION

The present thesis addresses the 2013 Cohesion policy reform and its novel *ex ante* conditionality tool in the area of fundamental rights. It initiates an in depth legal inquiry on their genesis, nature, scope, defining features and general reach.

Cohesion policy as implemented through the European Structural and Investment Funds (the ‘ESI Funds’) has been one of the most reported and evaluated policies of the European Union (the ‘EU’ or the ‘Union’). For decades, EU’s executive and legislators have been highly concerned with the allocation and performance of ESI Funds. The academic community has also been sensitive to the subject, however the discussions have been largely dominated by economic and policy scholarly contributions. Traditionally perceived as exceeding the ‘pure’ scope of law, ESI Funds have been ‘under-reported’ by legal scholars.

Three main recent developments axes at the EU level have contributed to the conceptualization of the present thesis. First, the growing interest towards conditionality, which, especially on the background of the economic crisis, has dominated the EU political, social and legal discourse. Second, the concern with regards to the failure of several Member States to uphold the EU values to a sufficient level, including fundamental rights. Third, the much closer attention attracted by ESI Funds in times of scarce financial resources and their role in the discussion on EU values.

The attention of the present research to the ESI Funds framework is much indebted to the peculiar mechanism included by the 2013 reform, namely the *ex ante* conditionality in the area of non-discrimination, gender equality and disability (the ‘ESI fundamental rights conditionalities’).

Fundamental rights conditionality is not a new EU tool. For decades it has been the flagship instrument of the EU external policy to advance Union’s values worldwide. What is new is its use towards EU Member States *ex ante*, in the attempt to reinforce the efficiency of EU legal and policy framework on fundamental rights issues.

Conditionality as introduced in the 2014-2020 ESI Funds programming period is a highly curious tool. It intends to check *ex ante* the effective implementation and application of EU equality and non-discrimination law with the aim to foster the positive impact of ESI

Funds operations. In Kelsen's terms, the tool aims to ensure that '*the ought*' prescribed by the EU normative framework actually translates in '*is*' during the ESI Funds operations. Beyond the declared purpose, the actual practical operation of the conditionality tool however raises a degree of unknown and uncertainty. In this context, we aim to reveal the sensibilities of the tool, unwrapping its novelty, nature and scope.

The thesis follows a close reading of the relevant Regulations and other EU normative acts as primary bibliographical sources. It also looks at Cohesion policy evaluations and studies to assess the impact of the prior arrangements in fundamental rights areas. The previous research of Elena Fierro, Lorand Bartels on the EU human rights conditionality in the external policy, as well as the 2009 independent report of Fabrizio Barca on the future of Cohesion policy reform have all greatly supported the present work.

The thesis is structured in three Chapters.

The first Chapter aims to conceptualize the conditionality tool and further look at the EU practice on fundamental rights conditionality from external to internal policy. The part examines fundamental rights conditionality as employed externally, with the aim to advance and compare the findings to the context of the internal Cohesion policy and its ESI Funds.

The second Chapter tests the novelty of ESI fundamental rights conditionalities in the context of ESI Funds. It adopts an evolutive-comparative approach to the prior normative frameworks with regards to fundamental rights and conditionality arrangements.

The third Chapter engages in a detailed analysis of the nature and scope of the novel ESI fundamental rights conditionalities, locating them in the broader context of EU conditionality fundamental rights policy and assessing its possible contribution.

CHAPTER I. UNWRAPPING THE EU CONDITIONALITY POLICY

Fundamental rights¹ conditionality is a largely used EU policy tool. In 2013, fundamental rights conditionalities have been introduced in the framework of the long established EU Cohesion policy. These are found directly in the text of European Structural and Investment Funds (the ‘ESI Funds’), which are the main financial instruments for the delivery of the Cohesion policy’s goal of economic, social and territorial cohesion. The ESI Funds’ fundamental rights conditionalities require that Member States fulfil ex ante the pre-defined fundamental rights criteria in order to get access to funds thereof. The identified ex ante conditionalities in the area of fundamental rights relate primarily to the specific areas of gender equality, non-discrimination, disability, social rights, health and education. This thesis limits the scope of analysis to the first three conditionalities – the ‘ESI fundamental rights conditionalities’ (see Chapter III).

The origins of Cohesion policy date back to the 1957 founding treaties. Throughout time, the policy has known a growing importance and substantial financial support from the EU budget, especially since the 1988 landmark reform.

One of the defining goals of the Cohesion policy - operationalised through ESI Funds - is the delivery of social justice. In pursuing this goal, a long-standing feature of ESI Funds has been their strong link to overall EU law and policies on equality and non-discrimination. However, fundamental rights conditionalities have not been a familiar term within the ESI Funds framework (see Chapter II).

Even though fundamental rights conditionalities have not been an instrument of the ESI Funds until the 2013 reform, the concept is not new. Therefore, before engaging into the analysis of the fundamental rights conditionalities in the area of gender equality, non-discrimination and disability, as introduced by the 2013 ESI Funds reform, this thesis has as a first task to establish an epistemic understanding of the concept of conditionality. In undertaking this task the first Chapter of the thesis essentially asks: what is conditionality and in particular fundamental rights conditionality; and where does it come from? In subsidiary, the Chapter asks: what does the EU use of fundamental rights conditionality in other policies tell us about the new ESI Funds conditionalities in the area of fundamental rights?

¹ For the purpose of internal coherence, the present thesis uses the term ‘fundamental rights’ as referring also to human rights enshrined and protected beyond the EU legal order, without attaching any particular meaning to the term ‘fundamental rights’ as opposed to ‘human rights’.

We chose to seek the answer to the questions above by having a close look at the areas where fundamental rights conditionality's use towards state-type actors has been most common. We identified two areas: 1) The international law and relations, which offers a useful overview of conditionality in general and fundamental rights conditionality in particular; 2) At EU level, we look first at the EU external policy where fundamental rights conditionalities are being employed for a long time as an essential tool to advance the policy's core objective of upholding and promoting EU values in the 'wider world' (Article 3 paragraph 5 TEU, ex Article 2). In subsidiary, we look at the EU internal policy and analyse the few conditionality instruments, which touch upon fundamental rights.

To the ends described above, the first Chapter intends to provide a general conceptual and contextual framework of conditionality under which the thesis shall further operate. It intends to lay down the basis towards the overarching discussions on ex ante fundamental rights conditionalities in the context of 2014-2020 ESI Funds, informing us on their main features, scope and place within the overall landscape of EU fundamental rights conditionalities.

In the first part, the Chapter unwraps the concept of conditionality laying down a toolkit, which paves the way towards a deeper understanding of fundamental rights conditionality. It elaborates on the definition, essential features, types, functions and legal nature of conditionality (Section 1).

The second part contextualises the EU fundamental rights conditionality policy looking primarily at where it emerged from and how it developed (Section 2). The section finds that the 'cradle' of EU fundamental rights conditionality has been the EU external policy, where it has prosperously extended and developed. Within the limits of EU external policy, fundamental rights conditionalities were initially seen purely as an attribute of international law and employed by EU exclusively towards third countries. Progressively, under the pressure of internal EU constitutional transformations, fundamental rights conditionalities extended closer to the border of internal policy being imposed to acceding countries in the form of Copenhagen criteria. More recently, fundamental rights conditionalities reached the EU internal policies, becoming applicable to the EU Member States themselves: first, by means of Article 7 TEU, introduced by the Lisbon treaty, second, by other atypical fundamental rights conditionality tools and finally culminating with the ESI fundamental rights conditionalities, which are the subject of the present thesis.

SECTION 1. CONDITIONALITY – A CONCEPTUAL TOOLKIT

1.1. Conditionality - an attempt of definition

Conditionality is a multifaceted and continuously evolving policy tool. In spite of the large notoriety of the concept, providing an exhaustive generic definition may appear particularly difficult. The challenge of providing a strict definition of the term is further enhanced by its high flexibility and active employment in various internal and external policy areas, which are fundamentally different. The Oxford English Dictionary gives the following definition of the adverb ‘conditional’: ‘subject to one or more conditions or requirements being met; made or granted on certain terms’. The example the dictionary brings forward is worth mentioning: ‘Western aid was only granted conditional on further reform’. This phrase presents an incredible telling example of what is a very common use of conditionality in international practice. However, in international context, conditionality comprises a much larger scope, far beyond the area of development aid. It is commonly used to label the conditions linked to bilateral or multilateral loans, international trade, international relations, as well as membership to international organisations. In differentiating between the active and passive subjects of conditionality we shall onwards use the terms ‘conditionality actor’ and ‘conditionality recipient’.²

As the Roman jurist, Javolenus Priscus put it: ‘in law, every definition is dangerous: for it is rare that it cannot be overturned’.³ Nevertheless, we shall take the risk and try to define the generic meaning of conditionality.

For the purpose of this thesis, in a broad sense, conditionality might be defined as:

An economic or political requirement attached to an agreement, with a legally binding or non-binding nature, pre-established by the conditionality actor or mutually agreed between the conditionality actor and conditionality recipient, which is accessory to the agreement and must be complied with by the conditionality recipient before or after the conclusion of the

² We borrow the terms ‘conditionality actor’ and ‘conditionality recipient’ from E. Fierro, *The EU’s approach to human rights conditionality in practice*, PhD Theses, Florence, European University Institute, 2001, p. 104.

³ Javolenus Priscus, Digest 50.17.202: ‘*Omnis definitio in iure civili periculosa est: parum est ut subverti non potest*’, as cited by Peter Birks, ‘Definition and Deviation: A Meditation on Institutes 3.13.’ in: *The classification of obligations*, Society of Public Teachers of Law (London, England), P Birks (ed), Oxford : New York, Clarendon Press ; Oxford University Press, 1997, p. 6.

agreement, capable of attracting negative consequences in case of non-compliance or positive incentives in case of compliance, having as main functions to: secure and ensure the effectiveness of granted pecuniary or non-pecuniary benefits, ensure compliance or punish the non-compliance of the conditionality recipient.

In the following sub-sections we shall develop in detail each of the elements of the definition provided above.

1.2. Conditionality types

Conditionalities have known various adaptation and transformation over time. From the substantive point of view, conditionalities are classified in political and economic (Section 1.2.1.). Furthermore, based mainly on the struggle to secure higher performance and compliance, both the political and economic conditionalities have developed a wide range of sub-classifications.⁴ We shall limit our analysis to: legal and non-legally binding (hard law/soft law) (Section 1.2.2.), positive and negative (Section 1.2.3.), ex ante and ex post conditionality (Section 1.2.4.).

1.2.1. Political and economic conditionality

From the substantive and historical perspective, the literature distinguishes between two major generations of conditionality: economic and political.

The first generation - economic conditionality is understood as the practice of linking benefits - often of a pecuniary nature – to economic conditions, such as: transition to market economy⁵ or the adoption of economic policies, including conditions relating to macroeconomic variables and structural measures.⁶ These shaped at the early stages of post-bellum period. The main economic conditionality actors have been since the International Financial Institutions (the ‘IFIs’)⁷ – International Monetary Fund (the ‘IMF’) and the World

⁴ Other types of conditionalities have also been analysed in the literature: performance-based conditionality, carrots and sticks conditionality, dilaoque. For a detailed analysis on the types of conditionality see: E Fierro, *op.cit.*, note 2, *supra*.

⁵ KE Smith, *The use of political conditionality in the EU’s relations with third countries: how effective?*, EUI Working Papers, 1997/07, Florence, European University Institute, 1997, p. 4.

⁶ International Monetary Fund, ‘Guidelines on Conditionality’, September 25, 2002, available at: <<http://www.imf.org/external/np/pdr/cond/2002/eng/guid/092302.pdf>> consulted on 12.01.2014.

⁷ J Gold, ‘Use of the International Monetary Fund’s Resources: Conditionality and Unconditionality as Legal Categories’, in *Journal of International Law and Economics*, vol. 6, 1971, 1; SN Erbas & International

Bank.⁸ Both have been using purely ‘economic conditionality’, which did not touch upon, and still barely implies,⁹ sound political or fundamental rights considerations.¹⁰

The second generation - political conditionality refers to the practice of linking conditions of political nature - democracy, rule of law and fundamental rights - to benefits of pecuniary or non-pecuniary nature, granted to third countries (conditionality recipients), such as: development aid, cooperation agreements, trade agreements and preferences, accession to international organisations, loans, diplomatic contacts, security.¹¹ The political conditionality emerged in the 70’s in the context of development aid agreements. From this point of view, Tomaševski has defined political conditionality as: the “[donor states’] practice of tying aid to specific conventions whereby recipients remain eligible to aid”.¹² At the EU level, ‘political conditionality’ in international agreements emerged in the early 90’s and has known since rapid extension and dynamic transformations (Section 2.1.1. below). The conditionality has been onwards formalised under EU policy framework in 1995 by the Commission’s Communication on respect for democratic principles and human rights in agreements with third countries, endorsed by the Council.¹³ Currently, EU is one of the leading ‘exporters’ of ‘political conditionality’, which is usually strongly interlinked to various trade incentives (see Section 2 below).¹⁴

1.2.2. Legal and non-legally binding conditionality (Hard law and soft law conditionality)

From the normative point of view, the generic political and economic conditionality takes in practice the form of legal or non-legally binding conditionality. The ‘legal conditionality’

Monetary Fund, *IMF conditionality and program ownership: a case of streamlined conditionality*, IMF Working Paper, 03/98, Washington, International Monetary Fund, 2003.

⁸ For an evolutionary historical perspective of the IMF and World Bank conditionality see: OECD, *Policy Ownership and Aid Conditionality in the Light of the Financial Crisis*, Paris, 2009, pp. 27-33, available at: <<http://www.oecd-ilibrary.org/content/book/9789264075528-en>> consulted on 23 January 2014.

⁹ M Darrow, *Between light and shadow: the World Bank, the International Monetary Fund and international human rights law*, Studies in International Law, v. 1, Oxford ; Portland, Or, Hart, 2003.

¹⁰ For further discussions see: K Tomaševski, *Between sanctions and elections: aid donors and their human rights performance*, London, UK ; Washington, D.C, Pinter, 1997.; IMF, ‘Guidelines on Conditionality’, *op. cit.*, note 6, *supra*, para. 1.

¹¹ Smith, *op.cit.*, note 5, *supra*, p. 4.

¹² K Tomaševski, *op.cit.*, note 10, *supra*.

¹³ Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM (95) 216 final, 23 May 1995, endorsed by the European Council on 29 May 1995.

¹⁴ Fierro, *op.cit.*, note 2, *supra*, p. 104.

refers to the political or economic conditionality, formalised by way of a legally binding instrument (hard law). In this case, the conditionality is a legal norm, included in a legally binding and enforceable act and, as a consequence, the conditionality recipient is bound to comply with the conditionality. In case of non-compliance, the conditionality actor may appeal to the coercion force of applicable law, subject to rules thereof.

The non-legally binding conditionality refers to the economic or political conditionalities enshrined in non-legally binding instruments (soft law). In this form, the conditionality states the commitment of the conditionality recipient to a certain conduct, however there is no sanctioning regime available to the conditionality actor to enforce the commitment, in case of non-compliance with the prescribed conduct. Therefore, the non-legally binding conditionality relies heavily on the good will of the conditionality recipient, being voluntary in nature. In practice, soft-law conditionalities are often linked to other leverage instruments to ensure compliance, as it is the case of soft law EU Copenhagen criteria which are strongly linked to hard law financial incentives or trade preferences.

Similar to the substance, the normative form of EU conditionality has known tremendous transformations. From the 90s',¹⁵ EU soft law conditionality has been progressively complemented by binding hard law conditionality. Currently, EU employs both hard law and soft law conditionality in relationship to third countries. The legal instruments used have developed from traditional international agreements, to unilateral EU legal instruments – as EU Regulations on trade preferences (the 'GSP') or financial instruments - all varying greatly by actor and scope (see Section 2 below).

1.2.3. Positive and negative conditionality

From the point of view of effects – namely, the actions taken by the conditionality actor in case of fulfilment or, on the contrary, in case of failure to comply with the prescribed economic or political conditions - the conditionality is classified in: 'positive' and 'negative'.

Positive conditionality entitles the conditionality recipient to further benefits in case of good compliance. The conditionality actor rewards the behaviour of the conditionality recipient by progressively offering more incentives as a result of good performance. The incentives may concern: the release of loan tranches, development aid, grants, privileged

¹⁵ Commission Communication 'On human rights, democracy and development co-operation', SEC (61) 91, of 25.03.1991, endorsed by Council Resolution on human rights, democracy and development of 28 November 1991.

diplomatic and cultural ties or a mixture of various incentives.¹⁶

Negative conditionality, on the contrary, has a punitive nature. It punishes the misconduct of the conditionality recipient and intends to correct its behaviour by suspension or reduction of the prior awarded or promised benefits. Negative conditionality often materialises in embargoes, suspension of loans or grants, sanctions, refusal to sign the agreement, suspension of diplomatic ties or condemnation by international community.¹⁷

1.2.4. Ex ante and ex post conditionality

From the temporal point of view, economic and political conditionality is classified in ex ante and ex post.

Ex-ante conditionality refers to the conditions attached to an agreement, prior to its conclusion. As suggested by the term ‘ex ante’, mutually pre-agreed conditions have to be fulfilled before the start of a bilateral or multilateral (often contractual) relationship. The fulfilment of conditionality is usually a mandatory requirement for the valid formation or efficacy of an agreement. Per a contrario, if the conditions are not in place in the agreed time frame, the conditionality actor may refuse to conclude the agreement. In practice, depending on the area and nature of conditionality, a certain degree of flexibility might be allowed, thus the agreement might be concluded given that the conditionality recipient promises to fulfil the agreed conditions within a reasonable timeframe.¹⁸ At the EU level, the outstanding example of ex ante conditionality is the Copenhagen criteria.¹⁹

The ex post conditionality refers to conditions attached to an agreement after its conclusion. The conditionalities may prescribe a positive act of compliance with (or facilitation of) a certain prescribed behaviour; or, on the contrary a negative act to refrain from a particular behaviour. The infringement of the duty entitles the conditionality actor to suspend or terminate the agreement. The most common example of ex-post conditionality in the EU practice is the insertion of fundamental rights clauses in the agreements with third

¹⁶ Fierro, *op.cit.*, note 2, *supra*, p. 110.

¹⁷ *Ibidem*.

¹⁸ The approach has however failed in International Financial Institution’s practice, raising strong credibility issues, as the receiving countries tended not to deliver on the promised commitments, see: OECD, *op.cit.*, note 8, *supra*, p. 20.

¹⁹ European Council, Copenhagen, ‘Conclusions of the Presidency’, 1993.

countries.²⁰

One hybrid variation of ex-post conditionality is the ‘ex-post selectivity’ or ‘performance-based conditionality’ type, which determines future benefits based on the prior performance of the conditionality recipient. The ex-post selectivity combines ex post conditionality with the negative and positive conditionality schemes. In case the performance does not appear satisfactory, usually, the conditionality actor adopts a negative attitude with regards to future agreements. On the contrary, the conditionality actor may offer further incentives if the conditionality recipient shows high compliance. The ex-post selectivity was appreciated to be more successful than other forms of conditionality, because it contains performance and time benchmarks and empowers the conditionality recipient to take the lead.²¹ The EU is considered to be one of the leading actors in applying the ex post selectivity conditionality type.²²

The ex ante conditionality has been generally seen as problematic in international relations for several reasons. First, it was argued that its lack of flexibility limits extensively the scope for political manoeuvre of the conditionality actor thus restraining its possibility to react to changing realities.²³ Second, the ex ante conditionality was seen in ‘reactive’ terms by conditionality recipients because of the pressure put on national sovereignty considerations. Third, ex ante conditionality is perceived as particularly intrusive and sensitive as the conditions attached have to be fulfilled prior to the start of the agreed arrangements.

Traditionally, all the prior underlined factors led to a general tendency of the conditionality recipients to be reticent towards the ex ante conditionality. In response, conditionality actors, especially the IFIs, abandoned largely the use of ex-ante conditionality in practice.²⁴

1.3. The mutual agreement element

All conditionality types are in principle the result of mutual agreement between the

²⁰ See, in extenso: L Bartels, *Human Rights Conditionality in the EU's International Agreements*, Oxford University Press, 2005.

²¹ OECD, *op.cit.*, note 8, *supra*, p. 20

²² *Ibidem*, p. 18.

²³ Fierro, *op.cit.*, note 2, *supra*, p. 108.

²⁴ Paul Collier, *Policy-Based Lending in: Conditionality revisited: concepts, experiences, and lessons*, Washington, DC, World Bank, 2005, p. 114.

conditionality actor and the conditionality recipient. In this sense, the agreement on the content of conditionality might take two forms. Either conditionality actor unilaterally establishes the conditionalities and the conditionality recipient accedes to the proposed list – as it is the case of EU Copenhagen criteria; or the conditionalities are established as a result of direct negotiations and mutual consent between the conditionality actor and conditionality recipient.

It has been argued that the agreement on conditionality, in whatever form, is merely formal given the inequality of the parties throughout the process of negotiation and implementation of conditionality.²⁵ In case of conditionality linked to development aid, Tomaševski notes that even if the development aid is presented as a bilateral agreement, the accepted ‘gift’ is subject to conditions, for which the assessments of compliance and policy prescriptions are set in practice unilaterally by the donor state.²⁶

The content of conditionality is also an important element of the agreement. As such, the conditionality must be proportionate, meaning that the fulfilment of conditionality must not be excessively burdensome compared to the overall set of obligations and rights prescribed in the agreement. In other words, conditionality must remain an accessory element, subsidiary not the main object of the agreement.

As well, the conditionality must be possible, meaning that: first, it must fall directly or indirectly within the area of control of the conditionality recipient and second, the latter is able to reasonable comply with or fulfil the conditionality. This is a crucial point for a valid agreement. If it is not the case, the agreement is void, even if consented, as it constitutes a requirement impossible to fulfil - *obligatio ad impossibilum*.

1.4. Functions of conditionality

Several functions of conditionality have been pointed out in the literature, which we find pertinent for our further discussion. As such, we note that conditionality has as main functions to: secure the granted pecuniary or non-pecuniary benefits, to ensure the efficiency of the benefits, to influence the behaviour of the conditionality recipient and to act as a

²⁵ JT Checkel, *Compliance and conditionality*, Working Papers, 18/2000, Advanced Research on the Europeanisation of the Nation-State, Oslo, ARENA, 2000. available at: <http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2000/wp00_18.htm>, consulted on 06.02.2014.

²⁶ Tomaševski, *Between Sanctions and Elections*, *op.cit.*, note 10, *supra*, pp. 9–10.

coercive or punitive factor. We shall onwards analyse each function.

1.4.1. Securing the granted benefits

Firstly, one function of conditionality is to secure the granted benefits. It is particularly the case where conditionality is linked to pecuniary benefits as loans, development aid, financial instruments or grants. As such, the conditionality may aim to address the risks of insolvency of the conditionality recipient or it may discourage the misuse of funds.²⁷ From this point of view, conditionality highlights a certain degree of mistrust towards the conditionality recipient and subsequently a need for additional guarantees to ensure the security of deployed resources. The function is however equally valid with regards to non-pecuniary benefits, such as diplomatic relations, when the conditionality actor may seek to secure the established diplomatic ties.

1.4.2. Effectiveness function

Secondly, it has been argued that another function of conditionality is to ensure the effectiveness of the agreement.²⁸ To this aim, the conditionality actor makes sure that the necessary incentives for a successful implementation of the agreement are in place and encourages the conditionality recipient to adopt the prescribed behaviour. The conditionality, in this view, behaves as a risk-based conditionality. It anticipates the risk factors capable of hindering the effective operation of the agreement and conditions the contractual relationship on their fulfilment.²⁹

1.4.3. Behavioural function

Thirdly, a behavioural function of conditionality can be identified. This implies the commitment of the conditionality recipient to a certain behaviour, which would not have been adopted otherwise, or which would have been achieved considerable later: “requiring governments to do things they wouldn’t otherwise do, or to do things more quickly than they would choose to do”.³⁰ On the other hand, rather than intending to dramatically change the

²⁷ P Mosley, *Aid and power: the World Bank and policy-based lending*, London, Routledge, 1991, p. 66.

²⁸ Chhibber, Ajay, ‘*Policy-Based Lending, Conditionality and Development Effectiveness*’ in: *Conditionality Revisited*, *op.cit.*, note 24, *supra*, p. 111.

²⁹ See further on the effectiveness: L Bartels, ‘*The application of human rights conditionality in the EU’s bilateral trade agreements and other trade arrangements with third countries*’, study requested by the European Parliament, November, 2008, pp.10-13.

³⁰ Killick, Tony, *Did Conditionality Streamlining Succeed?* in: *Conditionality Revisited*, *op.cit.*, note 24, *supra*,

existing arrangements, behavioural function may also seek to maintain a certain status-quo – for instance, human rights protection - or progressively enhance it.³¹ To attain this function, conditionality implies a cost-benefit analysis from the part of conditionality recipients - in Bentham’s words: an analysis of ‘units of pleasure and pain’. As such, a reasonable cost-benefit analysis between the benefit of compliance and the cost of non-compliance must necessarily ‘tip the balance’ towards the former. If the cost of non-compliance is marginal, the incentives of compliance are missing, therefore compliance shall be difficult to achieve.

1.4.4. Punitive or coercive function

Lastly, the conditionality implies a punitive or coercive function.³² As discussed above, the inclusion of conditionalities usually offers conditionality actors the tools to induce compliance of the conditionality recipient and in case of misconduct to correct the deviations by imposing punitive measures.³³ As such, the conditionality recipient is first constrained to comply with the requirements resulting from conditionality given the likelihood of negative consequences - coercive function. Second, when the conditionality has not been observed, the punitive function is enforced and, in result, compliance is re-established. The two functions are very much inter-dependent, as the coercion depends to a large extent on the imminence of punitive measures. However, in practice it might not always be the case. Other factors might be used as leverage to induce coercion, for instance the willingness of the conditionality actor to impose sanctions or the economic, political, diplomatic and similar costs involved.

1.5. Legal obligation and legal condition

Another essential point in the analysis of fundamental rights conditionalities is the conceptualisation of a clear demarcation line between the obligation (or agreement as the source of obligations) and the conditionality attached to it.

As such, the legal obligation is defined as a legal bond - ‘*iuris vinculum*’ or ‘*lien de droit*’ – which ties its subject to a given conduct.³⁴ The conduct might prescribe for a positive

p. 93.

³¹ Fierro, *op.cit.*, note 2, *supra*, p. 106.

³² Mosley, *op.cit.*, note 27, *supra*, p. 68.

³³ Tomaševski, *op.cit.*, note 10, *supra*.

³⁴ H Kelsen, *General theory of law and state*, 20th Century Legal Philosophy Series, 1, New York, Russell and Russell, 1961, 40 pp. Kelsen ties the idea of a legal obligation to the notion of legal norm, delict and sanction:

action of adopting a certain behaviour (to do, to give, to follow a certain conduct or to uphold a certain policy line);³⁵ or negative action of abstaining from a given behaviour (not to do).³⁶ The obligation as legal bond may have its source directly in the letter of law *stricto sensu*, or might as well find its basis in a mutually consented agreement, which is concluded within the limits of law and public order imperatives.³⁷

In defining the condition, first a distinction must be drawn between the ‘condition’ as constitutive element of the valid formation of an agreement and ‘condition’ as a modality of an obligation.³⁸ In its first acceptation, the condition refers to the elements necessary for the validity of an agreement, including for instance: the legal capacity, competence, consent, a valid object, cause or form (the ‘condition-validity’).

In the present thesis, we examine the condition in its second acceptation, which refers to the condition as a modality of the legal obligation (hereinafter the ‘condition-modality’ or ‘condition’). In this sense, the ‘condition’ is a modality - an accessory element of the obligation, which affects the very existence or the continuation of a legal obligation.³⁹ It must be stressed that in this acceptation the condition is an accessory not necessary element of the agreement. If a condition-modality does not exist, the validity of the agreement is not impaired. Absence the condition-modality we are in presence of a pure and simple obligation. If a condition modality exists we are in presence of a conditional obligation.

Similarly to the obligation, the condition may materialise in an active or passive behaviour. The active behaviour asks for a particular action to be fulfilled accessory to the obligation, whereas the passive behaviour consists in omission or abstention from a given behaviour.

Once agreed between the parties, both the legal obligation and the legal condition have in principle binding nature. In consequence, the obligated subject must comply with both -

“to be legally obliged to a certain behaviour means that the contrary behaviour is a delict” and entails a sanction. Also in Kelsen’s view “[t]he legal duty is nothing apart from the legal norm [...] in relation to the individual [...]”.

³⁵ *Dictionnaire de la terminologie du droit international*, J Basdevant (ed), Paris, Sirey, 1960, p. 423.

³⁶ To put it into Kelsen’s words: “if the delict is a certain positive action, [the subject] is obliged not to undertake the action; if the delict is an omission of a certain action [the subject] is obliged to undertake that action”. Kelsen, *op.cit.*, note 34, *supra*, p. 40.

³⁷ G Samuel, *Law of obligations and legal remedies*, 2d ed, London, Cavendish Pub, 2001, p. 250. See also: HLA Hart, *The concept of law*, Clarendon Law Series, Oxford, Clarendon Press, 1972.

³⁸ G Marty, *Droit civil*, Les Obligations, 2e éd, Paris, Sirey, 1987, p. 63.

³⁹ In civil law terms - suspensive and resolute condition, see: Marty, *op. cit.*, note 38, *supra*, pp. 62-63.

the obligation and the condition - in their entirety.

When it comes to the differences, the first differential element is that the condition is an accessory element of the legal obligation. The condition is an additional element, which affects the existence or continuation of legal obligation, determining its legal efficacy. In other words, the condition is an element built upon a legal obligation – accessory and additional to it. Secondly, with regards to the sanctions regime, in case of the obligation, the act of non-compliance with a legal obligation has as consequence the enactment of the sanction prescribed for by law or provided for in the agreement. In the case of condition, the sanction of realisation or non-realisation of the condition is the suspension or termination of the legal obligation itself. Therefore, the realisation or non-realisation of the condition has a direct impact on the efficacy of the obligation. The reciprocal is not valid.

Going back to fundamental rights conditionality, we first note that in very simplistic terms the legally binding conditionality is, in fact, a legal condition attached to a legal obligation (agreement as source of obligations). Furthermore, if we apply the distinction above to the concept of legal conditionality, we find that the conditionality is an accessory requirement built upon the agreement between the conditionality actor and conditionality recipient prescribing for an active or passive behaviour. The non-fulfilment of a legally binding fundamental rights conditionality might impair the very efficacy of the agreement, leading to its suspension or termination.

1.6. Further reflections on the nature of the agreement

The nature of the agreement is as well an important point of reflection for our future analysis as it impacts directly on the effects of agreements (as sources of obligations) and as a consequence, on the effects of conditionalities contained therein.

1.6.1. Hard law and soft law

As seen above (Section 1.2.2.), from the normative point of view, political and economic conditionalities may be legally binding or non-binding according to the nature of the legal instrument they are included in. As a general rule, these shall follow the legal regime of the obligation they are attached to. If the obligation is binding (hard law), the sanction of non-fulfilment of the conditionality will be the suspension or termination of the agreement.

However, if the obligation is non-binding (soft law) the non-fulfilment of conditionality will have in principle no legal effects.

In principle, ‘hard law’ refers to a legally binding instrument, which bounds the subject to a given conduct and has the authority to impose compliance. Per a contrario, when we refer to ‘soft law’ we traditionally understand ‘a variety of non-legally binding instruments’.⁴⁰ Soft law guides the conduct of the legal subject, without binding the subject to the conduct and without prohibiting an opposite conduct. With regards to compliance, soft-law mechanisms require by nature voluntary compliance. Therefore they rely largely on the goodwill of the addressee and lack formal legal enforcement mechanisms.

i. Twilight areas between hard and soft law

Despite the apparent clarity, in practice it is far more complicated to draw a strict line between soft law and hard law instruments. The two types of instruments are seldom mixed and intertwined, taking the form of hybrid norms of peculiar character. As scholars noted: ‘it is not always clear where the law [hard law] ends and the non-law [soft law] begins’.⁴¹

In this sense, ‘soft law’ may often be seen as quasi-law. Even if not formally binding, soft law may create ‘certain quantum of legal normativity’.⁴² It may also ultimately lead to legally binding obligations as the regulator might take the soft law instruments into account when enacting binding law.⁴³ The opposite is also valid. ‘Hard law’ instruments are often constructed in a way that suggests the lack of intention to bind its subjects. These usually prescribe for general or broad obligations allowing for large discretion of the obliged party. The hard law instruments might also depend on further implementing procedures, which equally rely on the discretion of the obliged party. These obligations have been called ‘hard law with a soft character’.⁴⁴ They are not soft law instruments, because they are formally legally binding, Nevertheless, they do not fully meet the ‘hard law’ requirements as their

⁴⁰ Boyle, Alan, Soft law in international law-making, in: *International law*, MD Evans (ed), 3rd ed, Oxford ; New York, Oxford University Press, 2010, p. 122.

⁴¹ *Ibidem*, p. 142.

⁴² SH Nasser, *Sources and norms of international law: a study on soft law*, Mobility and Norm Change, v. 7, Glienicke [Germany] ; Madison, Wis, Galda + Wilch, 2008, pp. 126–127.

⁴³ *Ibidem*.

⁴⁴ P Wahlgren & Stockholms universitet, *Soft law*, Scandinavian Studies in Law, 58, Stockholm : Stockholm, Stockholm Institute for Scandinavian Law, LawFaculty, Stockholm University ; Jure Law Books, distr, 2013.

authority is partly neutralised by the large marge of manoeuvre of the obliged party.⁴⁵

Furthermore, it is important to stress that hard law and soft law instruments are often interlinked and tied by mutual references to each other. This means that in fact the non-legally binding instrument may produce in practice legal consequences, not per se, but via the hard law instrument that conditions the efficacy of a legally binding agreement upon compliance with the soft law instrument. Here, we reiterate again the classic example of linking the soft law Copenhagen criteria to the hard law financial instrument for pre-accession. The latter conditions the financial assistance, inter alia, on good performance towards achieving the criteria of the first (see Section 2 below).

This distinction is important for our further discussions on ESI Funds' ex ante fundamental rights conditionalities and we shall return to it when we shall analyse their nature and scope (Chapter III). The importance results from two main reasons. First, one of the specificities of the EU equality and non-discrimination law and policy is the intertwining nature between hard law and soft law mechanisms used cumulatively by a wide variety of public and private actors in pursuing the goal of equality and non-discrimination. Second, in the context of ESI Funds' implementation both, hard law instruments in the form of ESI Regulations and soft law mechanisms in the form of guidance, communications, dialogues and recommendations are used extensively by/between the EU institutions (mainly the Commission) and the Member States.

ii. Binding and enforceable law

In the context of hard law, another pertinent distinction refers to binding and enforceable norms. A binding norm is not always synonym to an enforceable norm. If a norm is binding it does not follow automatically that it would always be enforceable. On the contrary, if the norm is enforceable it is always binding.⁴⁶

As such, in order for an obligation to become enforceable the relevant procedures and bodies must be put in place. A binding norm lacking enforcement mechanisms shall be also at the crossroads between 'hard' and 'soft' law. In other words, we are in the presence of a 'hard' obligation with 'soft' enforcement instruments. The obligation prescribes for a legally

⁴⁵ For a comprehensive analysis see: F Terpan, 'Soft Law in the European Union—The Changing Nature of EU Law', in *European Law Journal*, , 2014.

⁴⁶ Marise Cremona, Structural Principles in EU External Relations Law, seminar 2014, European University Institute.

binding behaviour but does not put in place the enabling procedural framework to restore compliance in case of opposite behaviour. It follows that, even if the obligation is formally binding, from a procedural point of view, direct compliance cannot be imposed. Compliance might nevertheless be incentivized indirectly by use of the ‘soft law’ proxy mechanisms, as declarations, recommendations or condemnation in international fora, or by attaching a hard law tool to reinforce it.

1.6.2. Imperium and dominium

Besides hard law and soft law tools as methods to impose compliance with a prescribed conduct, Daintith identifies another important modern technique of government, namely the ‘dominium’ method.⁴⁷ The dominium technique supposes the deployment of public funds to attain a certain policy objective. The method differs from the traditional, purist legal conception, of ordering a conduct by linking it to a coercive act or sanction (imperium or hard law).

In the case of dominium measures, the main concern of government is not to attach a sanction to the opposite conduct, but rather to set the right criteria governing the expenditure and tools to ensure that these are respected and ultimately lead to the attainment of the proposed policy goal.⁴⁸

Daintith’s distinction, is especially topical in the context of ESI Funds. The ESI Funds are designed according to the governance by ‘dominium’ technique. By deploying EU budget resources through ESI Funds, EU strives to first achieve the Cohesion policy goals as prescribed by the treaties, which translate in reducing economic, social, and territorial disparities between EU’s regions. In any case, achieving EU Cohesion policy goals by use of ‘imperium’ measures would be particularly difficult, if not completely unfeasible. In designing the dominium action, ESI Funds prescribe for investment priorities and eligibility criteria. Moreover, they put in place mechanisms to ensure respect of the criteria as monitoring, reporting, audit and control (see Chapter II, Section 1 and 3).

Even if distinct from hard law and soft law *stricto sensu*, dominium measures may be linked to the overall set of hard law and soft law tools in a policy area, serving as a

⁴⁷ Daintith, Terence *The Techniques of Government* in: *The changing constitution*, JL Jowell & D Oliver (eds), 3rd. ed, Oxford: New York, Clarendon Press; Oxford University Press, 1994, pp. 209–236. We borrow the author’s ‘dominium’ and ‘imperium’ classification.

⁴⁸ *Ibidem*, p. 218.

reinforcement bridge between the two.⁴⁹

The dominium measures are increasingly topical beyond the internal governance borders. These are being used in international relations by states and international organisations to incentivize compliance and promote policy priorities. In the EU external policy there is an extending practice of deploying grants, financial instruments resources and non-refundable support to third countries in pursuing the goals of external policy such as the promotion of fundamental rights, democracy, rule of law, security and peace. The representative example of deploying EU budgetary resources to attain the goal of fundamental rights promotion is the external action Instrument for Democracy and Human Rights.⁵⁰

Summing up:

In this section we approached the concept of conditionality as a policy tool and laid the theoretical foundations of the concepts linked to it. From the above discussions we can form a bone-structure of the fundamental rights conditionality. As such, we have seen that from the substantive point of view, fundamental rights conditionalities feed into the political type of conditionalities. These are used by conditionality actors as soft law or hard law tools to advance commitment to fundamental rights criteria on conditionality recipients by linking them to benefits of pecuniary or non-pecuniary nature. The legally binding fundamental rights conditionalities are accessory elements to the main hard law agreement, which might be imposed before (ex ante) or after the conclusion of the agreement (ex post) and may prescribe for negative consequences in case of non-compliance (negative conditionality) – termination or suspension of the agreement prescribing benefits – or positive incentives in case of good performance (positive conditionality). Fundamental rights conditionalities have generally the aim of ensuring the security and effectiveness of the granted benefits, encouraging compliance with a prescribed conduct as well as punishing the opposite conduct. In analysing fundamental rights conditionalities an important point of departure is the legal nature of the agreement, which might have a hard law, soft law or mixed character. Dominium tools of governance are increasingly important in encouraging compliance with fundamental rights conditionality and may be often used to support hard law and soft law

⁴⁹ For an analysis on the interplay between the hard law, soft law and dominium measures in the EU Social policy see: Kilpatrick, Claire, *New EU Employment Governance and Constitutionalism*, in: De Búrca and Scott, pp. 121–152.

⁵⁰ Regulation (EU) 235/2014, OJ L77 of 15.03.2014.

measures.

SECTION 2. EU FUNDAMENTAL RIGHTS CONDITIONALITY IN CONTEXT: FROM EXTERNAL TO INTERNAL POLICY

Having established the theoretical conceptual framework of conditionality, this section intends to illustrate the contextual evolution of EU fundamental rights conditionality in practice. In doing so we ask essentially: how did EU fundamental rights conditionalities develop? and: what have been their main features and evolution both in external and internal policy? The contextual analysis is of crucial importance for our further analysis of ex ante fundamental rights conditionalities as introduced in the 2013 ESI Funds' reform (Chapter III). It is meant to provide a deep comparative understanding of EU 'modus operandi' in fundamental rights conditionality policy, its dynamic and challenges, underlining the similarities of mechanisms used and their adaptation from external to internal policy. The lessons learned shall be subsequently applied to assess the novelty, patterns and the overall potential of ex ante fundamental rights conditionalities.

To this end, we shall first provide a snapshot of fundamental rights conditionalities as applied by EU externally to third countries and candidate states. Subsequently, we shall present the EU use of fundamental rights conditionality internally, to its Member States, first prior the EU accession via Copenhagen criteria, onwards via article 7 TEU and other emerging conditionality-type mechanisms. We shall analyse the Copenhagen ex ante criteria together with the conditionality as used internally, due to the general strong link to EU internal values, non-pecuniary nature of the benefits as well as due to the recent tendency of upholding a certain degree of Copenhagen conditionality ex post.

2.1. EU External policy

In EU external policy, the legal fundamental rights conditionality is used from the early 90s' and has known ever since dynamic and rapid developments.

Two main groups of EU fundamental rights conditionality externally can be identified based on the nature of the legal instruments used. As such, fundamental rights conditionalities are included in bilateral and unilateral agreements. The first group, refers to the long-established practice of inserting a fundamental rights conditionality pursuant to the essential clause doctrine in the context of bilateral or multilateral international agreements, especially in the area of trade and development cooperation – the so called 'human rights

clause'. The clause enables any party to suspend the agreement in case of fundamental rights violations (Section 2.1.1.). The second group refers to fundamental rights conditionalities as inserted in the EU unilateral regulations, as it is the case of internal ESI Funds' ex ante fundamental rights conditionalities. The group of external unilateral instruments includes the Generalised System of Preferences (the 'GSP') and the EU Financial Instruments for external action. The GSP fundamental rights conditionality scheme links the requirement of fundamental rights protection and advancement to unilateral trade preferences (Section 2.1.2), whereas fundamental rights conditionality within the financial instruments for external action is attached to unilateral EU financial incentives (Section 2.1.3.).

The essential difference between the categories described above concern the consent element and the form of the conditionality.

In case of bilateral (or multilateral) international agreements, 'human rights clauses' are in principle commonly consented between the parties during negotiations.⁵¹ Traditionally, we identify two parts of the clause. First, the provision enshrines fundamental rights as the 'essential element' of the agreement. Second a 'non-execution' provision is attached to the essential element, allowing the suspension of the agreement in case fundamental rights' violations. The GSP fundamental rights conditionality, unilaterally prescribes a list of conditionalities, the eligible third countries having the option to accede (or not) to the proposed list by submitting an application to the Commission. In the context of external financial instruments, in 2007-2013 financial period fundamental right conditionalities were unilaterally included in the Regulation in the form of a complete 'human right clause' implicitly accepted by the third country together with the financial assistance. It must be stressed that, contrary to the 2007-2013 financial period, the 2014-2020 Financial Instruments for external action failed to maintain an express 'non-execution' provision. However the suspension may still be ordered unilaterally on the basis of the treaty.

It is worth mentioning that all three fundamental rights conditionalities are attached to financial benefits. However, if in the case of bilateral agreements and the GSP scheme the link to financial benefits is rather indirect, in the case of Financial Instruments we find a strong direct link, these being designed as 'dominium' measures. As such, in the latter case,

⁵¹ In practice, it has been argued that the third countries do not enjoy equal footing in negotiations with the EU, as such, the fundamental rights conditionality is more of a 'a take it or leave it' clause. See: Tomaševski, *op.cit.*, note 10, *supra*, pp. 9-10.

non-compliance with conditionality has as immediate result the suspension of the committed assistance to the third country.

The three conditionality areas above overlap greatly. The consequence is that the same third country may be subject to one or several conditionality schemes.⁵² In principle, fundamental rights conditionalities would be first applicable in the ambit of the general framework cooperation agreement between the EU and third country, onwards being reiterated in the content of sector agreements, unilateral GSP schemes or pursuant to financial instruments assistance programmes.

2.1.1. Bilateral agreements

In the context of EU international agreements, fundamental rights conditionality takes the form of a 'human rights clause'.

'The 'human rights clause' is an ex-post negative type conditionality. It mandates third countries to uphold fundamental rights after the conclusion of the agreement, sanctioning the lack of compliance with unilateral suspension of the agreement. These prescribe for a general and broadly framed negative requirement to abstain from fundamental rights violations (not to do) but, in principle, do not put in place monitoring mechanisms to supervise compliance.⁵³

The development emerged in response to the unrest and human rights atrocities of late 70s', in several African states⁵⁴ party to 1975 Lomé I Convention, which completely lacked any possibility of suspension based on fundamental rights considerations.⁵⁵ After more than a decade of negotiations, Lomé IV Convention of 1989 (replaced by Cotonou Agreement),⁵⁶ managed to insert an explicit and elaborate 'human rights clause',⁵⁷ which allows the parties to suspend or terminate the treaty in the event of fundamental rights violations, pursuant to the 'essential clause' doctrine of Vienna Convention of 1969.⁵⁸

The inclusion of a human rights clause was a major step in the EU external

⁵² L Bartels, *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements, study at the request of European Parliament*, February 2014, p. 8.

⁵³ *Ibidem*, p.10.

⁵⁴ Fierro, *op.cit.*, note 2, *supra*, p. 52. The human rights violations mainly occurred in states as: Uganda, Equatorial Guinea, Liberia, Central African Republic.

⁵⁵ African Caribbean Pacific (ACP)-EEC Convention of Lomé, *Official Journal L 025 of 30.01.1976*

⁵⁶ Cotonou Agreement of 23 June 2000 or "ACP-EC Partnership Agreement", subsequently revised in 2010. The human rights clause stands at article 9.

⁵⁷ Fourth ACP-EEC Convention signed at Lomé on 15 December 1989 OJ L 229 of 17/08/1991, Article 5.

⁵⁸ Vienna Convention on the law of the treaties, article 60 (3) b)

fundamental rights policy: first, because of the amplitude of the Lomé IV Convention concluded with 70 African Caribbean Pacific (APC) states and second, because the moment marked the transition from the political to legally binding fundamental rights conditionality.⁵⁹

Shortly after, a comprehensive use of the conditionality was favoured by the Council in early 90's⁶⁰ and onwards formalised by the 1995 Commission Communication, which put the basis of the EU fundamental rights conditionality policy in relationship to third countries.⁶¹ Since then, the Union has been including (almost) systematically the 'human rights clause' in all the framework agreements with third countries including development, cooperation, association, partnership and neighbourhood policy, as well as sector-specific agreements relating mainly to external trade.⁶²

From the very origins, thematically the 'human rights clauses' were primarily linked to trade or implying trade considerations. Recent, 2009 developments show a preference shift for maintaining the 'human rights clauses' solely in framework cooperation agreements with third countries, considered by the Council as better suited for political considerations.⁶³ However, the practice is still much incoherent. Whereas on the one hand the latest 'pure' trade agreements lacked a 'human rights clause', other recent sector-specific agreements on fisheries have an express reference to the 'human rights clauses' in other applicable agreements.⁶⁴ It is further important to mention that pursuant to the new EU post-Lisbon competences in the area of foreign direct investment 'human rights clauses' are further expected to shape in the future agreements currently under negotiation.⁶⁵

Notwithstanding the impressive thematic reach, in practice the 'human rights clause' has been enforced only with regards to APC countries party to Cotonou agreement, in highly

⁵⁹ Fierro, *op.cit.*, note 2, *supra*, p. 115.

⁶⁰ Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development, 28 November 1991, Bull. EC 11/1991.

⁶¹ Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM (95) 216 final, 23 May 1995, endorsed by the European Council on 29 May 1995.

⁶² For a detailed historical perspective on the evolution of human rights conditionality in the EU see: L Bartels, *op.cit.*, note 20, *supra*, and E Fierro *op.cit.*, note 2, *supra*, 105 pp.

⁶³ European Council, Discussion Document, 'Common approach on the use of political clauses' 10491/1/09 REV 1 EXT 2 of 2 June 2009, Annex. See also, Bartels, *op.cit.*, note 52, *supra*, p. 7.

⁶⁴ As it is the case of 2013 Protocols to the EU-Morocco and EU-Cote d'Ivoire Fisheries Partnership Agreements. See: Bartels, *op. cit*, note 52, *supra*, pp. 6–7.

⁶⁵ Bartels, *op. cit*, note 52, *supra*, p. 7. See further: M Jacob, 'International Investment Agreements and Human Rights', INEF Research Paper Series Human Rights, Corporate Responsibility And Sustainable Development 03/2010.

extreme cases.⁶⁶ From this point of view, Bartels argues that the clause even if legally binding has been used rather as a political than a legal instrument, as suggested also by the last 2009 Council reflection document on ‘political clauses in agreements with third countries’.⁶⁷ Moreover, The EU practical use of ‘human rights clause’ has often been criticised by scholars for lack of consistency and ‘double standards’,⁶⁸ absence of legal standards of enforcement procedure⁶⁹ and more generally inefficiency.⁷⁰

2.1.2. Unilateral Generalised System of Preferences

EU employs the GSP preferential trade scheme towards third countries since 1971.⁷¹ The practice is one of the most telling examples of EU’s use of trade to advance fundamental rights conditionality on third countries. The conditionality scheme is established through an autonomous, unilateral EU Regulation. It provides for one standard (‘GSP’) and two special arrangements (GSP+ and Everything but Arms ‘EBA’) on preferential customs tariff duties for certain products originating from developing countries.

In terms of reach, the present GSP scheme, applicable as of 1 January 2014, is a highly sophisticated conditionality system.⁷²

Similar to the ‘human rights clause’ system above, all three GSP arrangements are subject to a negative ex post conditionality, allowing for temporary withdrawal of preferences in case of ‘serious and systematic violation’ of the fifteen core human and labour rights conventions listed in the Regulation.⁷³

⁶⁶ The conditionality was enforced in twenty three cases. Bartels, *op. cit.*, note 52, *supra*, p. 12.

⁶⁷ *Ibidem.*

⁶⁸ Tomasevski, for instance, argues that the EU applies the sanctions arbitrary and inconsistently. For instance the sanctions imposed on China lasted a considerable less amount of time than the ones applied to Haiti with no particular reasonable justification. See further: K Tomaševski, *Development aid and human rights revisited*, London ; New York : New York, Pinter Publishers ; Distributed in the United States and Canada by St. Martin’s Press, 1993, p. 71.

⁶⁹ Fierro *op. cit.*, note 2, *supra*, p. 115.

⁷⁰ Smith *op. cit.*, note 5, *supra*.

⁷¹ GATT Waiver Decision on Generalized System of Preferences of 25 June 1971, BISD 18S/24. The scheme is based on the ‘enabling clause’ of the General Agreement of Tariffs and Trade (the ‘GATT 1994’) concluded between the parties of World Trade Organization (the ‘WTO’), GATT 1994, Part IV, Article XXXVI. The ‘enabling clause’ is an exception from the most-favoured-nation (the ‘MFN’) obligation and allows for deferential and more favorable treatment of developing countries (GATT Article I:1).

⁷² Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L 303/1 of 31.10.2012.

⁷³ Regulation (EU) No 978/2012, Article 19 and Annex VIII, part A.

Additionally, the GSP scheme puts in place an ex ante positive conditionality named ‘GSP+’ special arrangement. The conditionality is both positive and ex ante, as it entitles the eligible GSP+ beneficiaries to further tariff preferences once they have ratified and effectively implemented all twenty-seven conventions in the area of fundamental rights listed in the GSP Regulation (jointly, the ‘Relevant Conventions’).⁷⁴ The ratification and implementation is checked against the reports of the monitoring bodies of the relevant conventions. Once the European Commission appreciates that the compliance criteria is fulfilled, it grants the third country access to the ‘GSP+’ arrangement.

Prior to 2005, the GSP conditionality was referred to as ‘the social clause’⁷⁵ because it mainly required the ratification and enforcement of the core ILO conventions as well as the obligation not to observe social rights thereof.⁷⁶ Since 2005 we speak about a comprehensive fundamental rights conditionality, reaching far beyond the scope of social rights.

Compared to the ‘human rights’ clause, the GSP scheme is a more complex and dynamic arrangement. Indeed, similar to the ‘human rights clause’ it binds the fundamental rights conditionality to trade benefits and sanctions the violations of fundamental rights by negative ex post sanctions. However it goes further, and offers positive trade incentives for ex ante higher compliance. In contrast with the general ‘human rights clause’, the scheme is unilaterally established by the EU and does not imply any negotiations. Moreover, the GSP scheme contains a specific and clear list of conventions the third party has to observe, whereas the compliance is monitored by the Commission, which drafts a report on the status of ratification, compliance and effective implementation of the Relevant Conventions, in the attention of the Council and the European Parliament.⁷⁷

It must be stressed that under the generic GSP Regulation, autonomous unilateral trade-preferences based on the GSP+ scheme can be put in place, as for instance the stand alone Regulations concerning certain European Neighbourhood Policy (the ‘ENP’) partners. These

⁷⁴ The conventions cover the core United Nations (the ‘UN’) and International Labour Organisation (the ‘ILO’) conventions, as well as other international conventions in the area of environmental protection and good governance principles, see: REGULATION (EU) No 978/2012, Annex VIII, part A and B.

⁷⁵ Fierro *op. cit.*, note 2, *supra*, p. 352.

⁷⁶ See Council Regulation (EC) No 3281/94 of 19 December 1994 applying a four-year scheme of generalized tariff preferences (1995 to 1998), Article 7; Council Regulation (EC) No 1256/96 of 20 June 1996, Article 7; Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences, Article 14. These refer to ILO Conventions No 29 and No 105 on forced labour, No 87 and No 98 on the freedom of association and the right to collective bargaining, No 100 and No 111 on non-discrimination in respect of employment and occupation, and No 138 and No 182 on child labour.

⁷⁷ Regulation (EU) No 978/2012, Article 15.

establish the same GSP+ scheme ex ante positive conditionality and a general GSP ex post negative conditionality. Additionally, these insert another ex post negative conditionality, allowing EU to suspend unilaterally the GSP trade preferences in case of poor performance in implementing the ENP Action Plan.⁷⁸ This is a telling example of linking soft law tools, as ENP action plans, to hard law instruments and conditioning the latter on the fulfilment of the first.⁷⁹

Finally, as to the practical effectiveness of the GSP scheme, the conclusions of the mid-term evaluation report as well as the Special Report of the Court of Auditors appreciate that the GSP scheme has not attained its full potential.⁸⁰ In the particular case of GSP+ scheme, while positive impact in terms of ratification of the Relevant Conventions has been observed, the implementation of the convention was found weak.⁸¹ Nevertheless, GSP+ has proved to be an energetic and credible tool, which was actually used by EU, even in case of failure to ratify one out of the twenty-seven prescribed conventions.⁸²

2.1.3. Unilateral EU financial instruments for external action

The closest comparator to 2014 ESI Funds externally are the six 2014 EU financial instruments for external action (jointly the ‘Financial Instruments’) governed for the first time by an umbrella Common Rules Regulation.⁸³ The Financial Instruments set the rules for EU financial assistance operations in the EU external action in the framework of: enlargement policy (Instrument for Pre-accession Assistance - the ‘IPA II’); neighbourhood policy (European Neighbourhood Instrument - the ‘ENI’); development and cooperation policy (Development Cooperation Instrument - the ‘DCI’); cooperation with highly industrialised partners (Partnership Instrument for cooperation with third countries - the ‘PI’); democracy and human rights (European Instrument for Democracy and Human Rights - the

⁷⁸ Council Regulation (EC) No 55/2008 of 21 January 2008 introducing autonomous trade preferences for the Republic of Moldova, Article 2(1) and 10.

⁷⁹ The GSP+ scheme for Georgia seems as well to be increasingly linked to the ENP action plan, see: Mid-term Evaluation of the EU’s Generalised System of Preferences, CARIS, University of Sussex, p.163.

⁸⁰ The European Court of Auditors has found in its 2014 Report that the GSP policy has largely failed to attain its intended benefits. See further: Special Report 2/2014, Are preferential trade arrangements appropriately managed?

⁸¹ Mid-term Evaluation of the EU’s Generalised System of Preferences, *op. cit.*, note 79, *supra*, point 7.1.:”While there is some evidence that the GSP+ scheme may have a positive impact on the ratification of given conventions, the evidence that there is actual active implementation of the relevant conventions is much weaker”.

⁸² As the 2009 case of Venezuela shows. See: *Ibidem*, p.156-158.

⁸³ Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action.

‘EIDHR’); stability and peace (Instrument contributing to Stability and Peace - the ‘ISP’).⁸⁴ Similar to ESI Funds, these are designed as dominium measures, by which EU deploys budget resources to pursue the objectives of external policy, enshrined in each fund-specific regulation.

All the financial instruments (except ISP) put in place an ex post negative fundamental rights conditionality, entitling the EU to suspend unilaterally the assistance in case of non-compliance with fundamental rights principles. Beyond the negative ex post conditionality, each Financial Instrument adopts a highly distinct approach.

The ISP lacks a fundamental rights conditionality, as it is designed to provide assistance in case of high political instability and crisis situations. Therefore its objectives are often incompatible with fundamental rights conditionalities. Such a conditionality could not be reasonable complied with and would constitute a condition impossible to fulfil. Under the ISP, assistance shall be granted to the third country even if EU has invoked the essential-elements clause. Nevertheless the instrument mandates for active inclusion of and respect for fundamental rights standards in implementation process, which shall be closely monitored by the Commission.

The PI, supports the partnership with high and medium income countries and contains usually an incomplete conditionality clause, which states the commitment to fundamental rights but lacks a ‘non-execution’ provision. This reflects the sensibilities of highly industrialised countries towards EU fundamental rights conditionality, as well as the EU’s increased interest in maintaining healthy economic and/or diplomatic ties with the first.⁸⁵

In 2014-2020 period, as opposed to the previous financial period, the IPA II ENI and DCI, also feature an incomplete conditionality. Namely, these lack an express ‘non-

⁸⁴ Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace; Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II); Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument; Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020; Regulation (EU) No 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries; Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide; OJ 77 of 15.03.2014.

⁸⁵ As the prior attempts to include a ‘human rights clause’ in agreements with highly industrialised third countries as Australia and New Zealand failed. In case of China there is apparently a mutual unwillingness to address the fundamental rights conditionality issue, see further: Fierro, *op. cit.*, note 2, *supra*, p. 191 and p. 287.

execution’ provision allowing suspension, as the European Parliament and the Council failed to reach an agreement on the suspension procedure.⁸⁶ As such, the conditionality is limited to the essential elements clause, which mentions fundamental rights as principles of the assistance. Nevertheless, suspension can still be unilaterally enforced if the third country fails to observe the fundamental rights principles, based on the treaty.

One novelty of the financial period is a more robust and flexible positive and negative ex post conditionality for IPA II and ENI based on candidates’ or partners’ performance. The Regulations refer to it as – ‘principle of differentiation’. As such, similar to ESI Funds, the IPA II puts in place a positive conditionality in the form of performance reserve.⁸⁷ The reserve rewards the good progress of (potential-)candidate countries towards meeting the accession Copenhagen criteria – positive performance-based conditionality. If the performance is ‘significantly below the agreed levels’ the Commission may enforce the negative performance-based conditionality and adjust proportionately the assistance.⁸⁸ Similarly, the ENI puts in place a reserve amounting to 10% of the ENI financial envelope, to be awarded, inter alia, based on the partner’s ‘level of ambition’.⁸⁹ The ENI performance-based conditionality prescribes for higher financial benefits if the ENP partner showed in the previous period higher progress towards the mutually agreed reforms according to the ENP action plans. The amount of assistance can be further increased or decreased ex post, proportionately to the performance.⁹⁰ In the worst-case scenario of ‘serious or persistent regression’, support may be completely reconsidered.⁹¹

As mentioned above, the distinctive feature of the fundamental rights conditionality as provided by the Financial Instruments is a clear, better-emphasised and immediate link to pecuniary benefits. Each instrument has a financial envelope attached. It follows that the non-

⁸⁶ The European Parliament insisted that as co-legislator, post-Lisbon it should be involved on equal footing in the suspension decision. The Council, on the other hand, argued in favour of the treaty procedure (Article 215 TFEU), which allows the Council alone to take appropriate measures acting with qualified majority upon a joint proposal of the Commission and High Representative. See the Statement by the European Parliament on the suspension of assistance granted under the financial instruments Regulation (EU) No 231/2014, Regulation (EU) No 232/2014, Regulation (EU) No 233/2014, Regulation (EU) No 234/2014.

⁸⁷ Regulation (EU) No 231/2014, Article 14.

⁸⁸ Regulation (EU) No 231/2014, Article 14 (2).

⁸⁹ Regulation (EU) No 232/2014, Article 4.

⁹⁰ Regulation (EU) No 232/2014, Article 4 (1)-(2).

⁹¹ Regulation (EU) No 232/2014, Article 4 (2).

fulfilment of the conditionality necessarily impacts on the continuation of EU Funds' award.⁹² In the particular case of IPA II and ENI, the level of compliance reflects directly on the intensity of pecuniary benefits.

The variations described above do not come without reason. First, it can be easily observed that the closer the partnership with third countries or closer the candidate to the accession, the more conditionality becomes positive and dynamic, pursuing a behavioural and effectiveness function. In the case of far-away partners, the conditionality is mainly negative and static, exercising a punitive function in case of non-compliance with fundamental rights. Second, as the political ties with the third country get stronger the fundamental rights conditionalities tend to be increasingly complemented by fundamental rights specific action and fundamental rights mainstreaming, which are explicitly stated in principles, scope and objectives of financial assistance – reminding to a large extent internal ESI Funds' architecture. Equally it is only in case of privileged countries (candidates or ENP partners), where the hard law conditionality of the Financial Instruments is strongly linked to soft law conditionality as Copenhagen criteria or ENP action plans.

2.2. EU Internal policy

In contrast with external fundamental rights conditionality, the internal conditionality traditionally is not linked to pecuniary benefits. Internally, first the benefits are seen in non-pecuniary terms of acceding to the EU - a space of security, liberty and prosperity. Onwards, conditionality pursues a behavioural function of upholding the achieved status quo and securing the EU constitutional values.

2.2.1. Copenhagen ex ante conditionality

Internally, starting with early 90s', the fundamental rights performance of the Member States is secured first and foremost by fulfilment prior to EU accession of the 'Copenhagen criteria'.⁹³ The Copenhagen ex-ante conditionality states that:

“[m]embership requires that the candidate country has achieved stability of

⁹² Fierro, *op. cit.*, note 2, *supra*, p. 351. We borrow the 'dynamic' and 'static' distinction from Fierro, *op. cit.*, note 2, *supra*. Also see for instance on the suspension of all bilateral programmes founded from ENI with Syrian authorities as of 25 May 2011, Council conclusions on Syria, 3091st Foreign Affairs Council meeting Brussels, 23 May 2011.

⁹³ European Council, 'Conclusion of the Presidency', 21-22 June 1993, para. 7.

institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”⁹⁴.

The applicant countries therefore have to prove ex ante the accession a high level of commitment to fundamental rights - as cornerstone principles of the EU constitutional architecture.

The benefit – ‘golden carrot’ – is ultimately the accession to the EU, with all the rights and privileges deriving thereof. The fulfilment of Copenhagen criteria conditionality relies largely on soft law instruments and does not link any direct pecuniary benefits. Nevertheless, the progress towards Copenhagen milestones opens the third countries’ vocation to direct or indirect financial and trade benefits provided for in hard law instruments, which additionally condition and encourage compliance. As such, the performing candidate may benefit from preferential trade agreements, free access to the internal market or increased share of EU pre-accession funds’ assistance.

The Copenhagen conditionality refers both to the respect and promotion of human rights, including the rights of minorities. It materialises in dynamic and progressive conditionality benchmarks towards meeting EU values, monitored and reported by the Commission. However, Copenhagen criteria have been judged as falling short in ensuring a sound assessment of the candidate state’s performance.⁹⁵ Moreover, it has been argued that the accession criteria is based on rather economic and political grounds and lacks clear legal and judicial criteria to assess compliance with fundamental rights standards.⁹⁶

2.2.2. Article 7 ex post conditionality

The commitment to fundamental rights must be upheld also after accession. Following the enforcement of Amsterdam Treaty, the Article 7 ex-post negative fundamental rights conditionality mechanism was introduced.⁹⁷ Article 7 TEU legally binds the Member States

⁹⁴ Article 49 TEU.

⁹⁵ For a discussion on the paractical application of the Copenhagen ex ante conditionality during the last enlargements see: D Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law*, Kluwer Law International, 2008, , pp. 297–313, The author argues that the conditionality was used inconsistently by the Commission, lacking clear performance benchmarks and often leading to contradictory conclusions with respect to different candidates.

⁹⁶ Nowak, Manfred, ‘*Human Rights Conditionality in Relation to Entry and Full Participation in the EU*’ Alston, *The EU and human rights*, Oxford, England ; New York, Oxford University Press, 1999, 698 p.

⁹⁷ Article 7 TEU.

to observe the EU values committed to by joining the Union.⁹⁸ In case of a ‘risk’ or actual ‘serious and persistent breach’ of EU values, the Member State might have certain rights derived from the Treaties suspended, including voting rights in the Council. Given the vague formulation: “suspend certain of the rights”, it has been appreciated that the suspension might have a far-reaching potential, encompassing, for instance, the suspension of ESI Funds or other financial instruments.⁹⁹

However, the effectiveness of Article 7 conditionality as an operational tool in securing fundamental rights as enshrined and protected at the EU level is questionable. The enforcement of conditionality is shielded by multi-layered preliminary and alternative procedures. First, the Council may issue a recommendation addressing the Member State presumed in breach of EU values. Second, the Council may establish a ‘clear risk’ of violation acting by four-fifths quorum, after obtaining the consent of the Parliament, on the proposal of one third of Member States, the Commission or the Parliament. Third, the Council may decide on the actual ‘existence of a serious and persistent breach’ by unanimity on the proposal of one third of Member States or the Commission after obtaining the consent of the Parliament. Finally only in case of a decision finding the ‘existence of a serious breach’ the Council acting by a qualified majority may impose sanctions.

Having seen the procedure above, it is not surprising that the tool has never been used in practice. The guarantees provided by article 7 TEU set a high threshold, making it particularly hard to enforce in practice. The political nature and the need for high voting quorum are strongly deterrent factors, suggesting that the tool is rather conceived as an ultima ratio solution. The limited practical role of Article 7 conditionality has favoured in practice the use of alternative ‘soft’ tools, as dialogues or political statements.¹⁰⁰ In 2014, the Commission’s Communication on ‘A new EU framework to strengthen the Rule of Law’ provided another explicit confirmation of the limited practical impact of Article 7 procedure and the need for a complementary ‘early warning’ procedure to address the threats of

⁹⁸ Nowak, *op.cit.*, note 96, *supra*.

⁹⁹ *Ibidem*, p. 690.

¹⁰⁰ See for instance: The ‘Statement from the President of the European Commission and the Secretary General of the Council of Europe on the vote by the Hungarian Parliament of the Fourth amendment to the Hungarian Fundamental Law’, Brussels, 11 March 2013; ‘Statement by the European Commission on Romania’ Brussels, 6 July 2012.

‘systemic nature’ before an actual ‘clear risk’ or ‘breach’ has occurred.¹⁰¹

2.2.3. Emerging internal conditionality-type instruments

More broadly, recently we notice a general shift to a conditionality culture in the framework of EU internal policy. One should especially mention the conditionality mechanisms emerged in the context of the last 2007 and 2013 enlargements, as well as the extensive crisis-driven conditionalities, attached to the economic adjustment packages.

First, in 2007 a monitoring instrument – Cooperation and Verification Mechanism (the ‘CVM’) – was put in place for Bulgaria and Romania, with the aim to monitor the Member States’ post-accession performance in areas as: judicial system independence and reform, fight against corruption and administrative reforms. The mechanism acts as an ex post Copenhagen conditionality, accessory to the accession agreement and mandates the Member States to fulfil a set of unilaterally prescribed criteria. Similar to the pre-accession criteria, the CVM conditionality materialises in soft law instruments, monitored by Commission. However, the conditionality does neither envisage benefits for compliance nor does it sanction the failure to comply with the unilaterally established criteria, thus lacking a coercive enforcement element. In this sense it is interesting to note that, the ESI Funds ‘hard law’ instruments are increasingly used as leverage to reinforce the CVM ‘soft law’ targets. For 2014-2020 programming period, both Bulgaria and Romania in dialogue with Commission have identified the improvement of administrative and judiciary capacity as main ESI Funds’ investment priorities, whereas ESI Funds’ resources shall also aim at implementing the CVM recommendations.¹⁰²

In case of Croatia, the accession treaty includes a legally binding and mutually agreed fundamental rights conditionality by which, the Member State has committed ‘[t]o continue to strengthen the protection of minorities’ and to ‘to improve the protection of human

¹⁰¹ European Commission, Communication from the Commission to the European Parliament and the Council “A new EU framework to strengthen the Rule of Law”, COM(2014) 158 final/2, pp.5-7.

¹⁰² Position of the Commission Services on the development of Partnership Agreement and programmes in Romania for the period 2014-2020, 19.10.2012, p.13. Position of the Commission Services on the development of Partnership Agreement and programmes in Bulgaria for the period 2014-2020, 26.10.2012, p.13, available at: http://ec.europa.eu/regional_policy/what/future/program/index_en.cfm, consulted on 01.02.2014. European Commission, country factsheet, Cohesion Policy and Future Investment, Romania. European Commission, country factsheet, Cohesion Policy and Future Investment, Bulgaria, available at: http://ec.europa.eu/regional_policy/information/cohesion-policy-achievement-and-future-investment/index.cfm, consulted on 01.06.2014.

rights'.¹⁰³ The conditionality is applicable since the signature of the treaty in 2011, however as the text does not distinguish any time frame, it is reasonable to presume that the conditionality shall apply also after accession - ex post.

Secondly, recently, conditionality has been abundantly present in the area of crisis-driven measures, such as the economic adjustment programmes addressing Member States.¹⁰⁴ These concerned mainly economic, but also political, conditionality attached to the Memoranda of Understanding (the 'MoU'), requiring ex ante and ex post fulfilment of pre-defined criteria, which condition the disbursement of the bailout funds. The MoU conditionality is negative as it sanctions the failure of compliance with the suspension of financial assistance. Often the criteria include provisions on administrative and judicial capacity, where underperformance is seen as a major obstacle for the well functioning of the markets.¹⁰⁵

Finally, it seems that the increased conditionality use and the concern for the appropriate administrative and institutional capacities raised during the economic adjustment reforms had a spill over effect on the 2014-2020 ESI Funds framework. In this sense, the Fifth Report on Cohesion Policy states that based on the past experiences the sound regulatory framework, institutional and administrative capacities are crucial for any successful financial intervention, the newly introduced ex ante conditionalities being key to address the challenges identified in the area.¹⁰⁶ In the same line, the ESI Funds ex ante conditionalities in the area of gender equality, non-discrimination and disability which are the subject of our further analysis mandate the Member States to show sound administrative capacity to effectively implement and apply the EU law and policy in the respective areas, before the conclusion of the agreement on ESI Funds. The conditionality is negative as it conditions the disbursement ESI Funds resources, sanctioning the lack of compliance.¹⁰⁷

¹⁰³ Croatia Treaty of Accession, Act concerning the conditions of accession of Croatia Article 36 – Specific commitments undertaken by Croatia during negotiations, Annex VII, point 7-8.

¹⁰⁴ von Bogdandy, A & Ioannidis 'Systemic Deficiency in the Rule of Law', CMLR, 59–96, p. 88.

¹⁰⁵ See for instance the Economic Adjustment Programme for Portugal 28.06.2011, available at: http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp79_en.pdf, consulted on 01.06.2014.

¹⁰⁶ Fifth Report on Economic, Social and Territorial Cohesion, Conclusions, available at: http://ec.europa.eu/regional_policy/sources/docoffic/official/reports/cohesion5/pdf/5cr_en.pdf

¹⁰⁷ Regulation (EU) 1303/2014, Article 19, Annex XI, OJ L347 of 20.12.2013.

INTERIM CONCLUSIONS

This Chapter laid down the conceptual and contextual basis of the fundamental rights conditionality.

To this aim, the first part has established that a fundamental rights conditionality may be defined as a political requirement, with a legally binding or non-binding nature, accessory to the agreement, pre-established by the conditionality actor or mutually agreed between the conditionality actor and the conditionality recipient, which must be fulfilled before or after the conclusion of an agreement, capable of attracting further incentives in case of compliance or negative consequences in case of non-compliance.

The second part inquired on the EU practical use of fundamental rights conditionalities from external to internal policies.

First, the findings show that, externally, conditionality is largely linked to pecuniary benefits. As such, EU is ‘buying compliance’, with fundamental rights via trade incentives, development aid and ‘dominium’ financial assistance. Internally, conditionality has been in principle oriented towards embracing and upholding the Union’s values, by advancing reforms based on voluntary compliance. However, the use of pecuniary benefits should not be completely dismissed in the internal policy. As seen above, the late developments reveal a tendency to impose some financial pressure on the Member States to advance compliance with EU law or policy priorities.

Second, in the EU external policy the conditionality inserted in the body of bilateral agreements has generally a static and uniform nature, often symbolic. It imposes a negative ex post requirement, subject to punitive measures in case of non-compliance. On the contrary, the unilateral instruments include a more dynamic, progressive conditionality, which frequently implies incentives in case of good performance and mandates for positive action.

Third, EU largely uses a highly differentiated conditionality approach towards third countries. The closer the external ties, the higher the incentives offered but, equally, fundamental rights conditionality criteria become more demanding. As the conditionality approaches EU borders, more positive specific action, tailored on the example of ESI Funds is observed, complementing the traditional negative conditionality.

Fourth, both in external policy (notably with regards to candidates and privileged partners) and in internal policy there is a general EU effort to link, in as much as possible, hard law conditionality to soft law conditionality or measures.

Finally, it should be stressed that if externally linking fundamental rights considerations to pecuniary benefits has been the main mechanism to impose compliance, internally the EU has a broader toolkit to advance promotion of fundamental rights, ranking from binding legislation to a variety of soft law instruments. Moreover, if externally third countries are often sensitive to fundamental rights considerations, Member States should be in principle more determined to comply, given the mutual trust and common values, strong economic interests, constitutional ties and other incentivizing (or deterrent) factors. However, neither in external nor in internal policy does the EU enjoy a complete discretion. The EU still relies strongly on the good will of the third countries and its own Member States to promote fundamental rights at the national level.

CHAPTER II. ESI FUNDS AND FUNDAMENTAL RIGHTS CONDITIONALITY

The first claim of the present thesis is that the introduced ESI fundamental rights conditionalities, in the form and substance they stand today have never been present before in the ESI Funds landscape. The purpose of this chapter is therefore to test the novelty of the ex ante conditionalities in the area of gender equality, non-discrimination and disability by taking a comparative historical legislative perspective. The analysis of the precedent ESI Funds' regulatory frameworks could better inform the claim of novelty and highlight the ESI fundamental rights conditionalities' distinctive characteristics and possible added-value in the 2014-2020 reformed architecture of ESI Funds (Chapter III).

The retrospective analysis of the ESI Funds' legislative framework shows that until 2014-2020 programming period, the ex ante fundamental rights conditionalities with regards to gender equality, non-discrimination and disability were not present in the Cohesion Policy framework.

However, if we dissociate the two notions: 'fundamental rights' considerations from 'conditionalities', the ESI Funds offer an interesting perspective.

Both concepts, separately, are very much present throughout the ESI Funds normative frames. On the one hand, non-discrimination, accessibility of persons with disabilities and, notably, gender equality were promoted through ESI Funds' specific actions and mainstreamed in ESI Funds' operations. On the other hand, conditionalities have been employed as both ex ante and ex post functional tools, linked mainly to the sound implementation of the Funds.

The evolution of fundamental rights and conditionalities, as well as the newly introduced ex ante fundamental rights conditionalities, must be read alongside the legislative and political transformations towards a 'wider and deeper' Union. This is especially important in the context of Cohesion policy, which is extremely permeable towards other EU policies and highly interlinked with the EU and national developments.

The 1988 reform shall be referred to as the starting point of reference for our analysis, as it constituted the 'new era' of the EU Cohesion policy and ESI Funds. The reform – known as Delors I package – was driven by the firm treaty basis of the Single European Act

and the return to European integration idea.¹⁰⁸ It shaped to a large extent the architecture of today's policy, introducing its core principles: programming, partnership, additionality, concentration,¹⁰⁹ increasing substantially its financial allocation,¹¹⁰ enhancing the financial assistance to multi-annual programming periods and bringing for the first time the funds under a single common provisions regulation.¹¹¹

The following reforms built upon the achievements of the 1988 historical turn. As such, the 1993 reform – Delors II package – was driven by the important changes of Maastricht Treaty and the completion of the single market. It almost doubled the budgetary allocation of the policy,¹¹² established a new European Cohesion Fund¹¹³ and introduced the Financial Instrument of Fisheries Guidance.¹¹⁴ Further on, the 1999 reform responded to the envisaged enlargement and to the new objective of achieving the European Monetary Union (the ‘EMU’).¹¹⁵ The 2006 reform marked the second important turn of the policy after 1988 reform, bringing more concentration within ESI Funds priorities and consistency with relevant EU priorities, notably with Lisbon Strategy.¹¹⁶ Finally, the last 2013 reform aims to respond to the greatest recession EU has experienced over the last fifty years. It sets the ‘jobs and growth’ goal as the period’s top priority, further targets the policy action towards Europe 2020 strategy and incorporates the territorial cohesion as introduced by the treaty of Lisbon.

In the following sections we shall first provide a general overview of ESI Funds implementation procedure and the actors involved (Section 1). Onwards, we shall separately analyse the evolution of both concepts: fundamental rights promotion (Section 2) and conditionality (Section 3) in the four previous programming periods of ESI Funds, starting with the 1988 major reform.

¹⁰⁸ J Bachtler, *EU cohesion policy and European integration: the dynamics of EU budget and regional policy reform*, Farnham, Surrey, England ; Burlington, VT, Ashgate Publishing Limited, 2013, pp. 45–49.

¹⁰⁹ See on the principles: M Jouen, *La politique européenne de cohésion*, Réflexe Europe, Paris, Documentation française, 2011, pp.19-21.

¹¹⁰ MA Pollack & E Hafner-Burton, ‘Mainstreaming gender in the European Union’, in *Journal of European Public Policy*, 2000, 432–456, p. 440.

¹¹¹ Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ L 185 of 15.07.1988.

¹¹² Bachtler, *op.cit.*, note 108, *supra*, pp. 49–54.

¹¹³ Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund, OJ L 130 of 25.05.1994.

¹¹⁴ Council Regulation (EEC) No 2080/93 of 20 July 1993 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the financial instrument of fisheries guidance, OJ L 193 of 31.07.1993

¹¹⁵ Bachtler, *op.cit.*, note 108, *supra*, pp. 54–58.

¹¹⁶ C Mendez, GP Manzella, *The Turning Points of EU Cohesion Policy, Working-Paper*, 2009, p.19.

SECTION 1: THE IMPLEMENTATION OF ESI FUNDS: STATE OF PLAY

ESI Funds are the primary EU instruments to support economic social and territorial cohesion as provided by the treaties.¹¹⁷ The 2014-2020 ESI Funds' framework comprises five ESI Funds: the European Regional Development Fund (ERDF) and European Social Fund (ESF) - commonly referred to as 'EU Structural Funds'- the European Cohesion Fund, the European Agricultural Fund for Rural Development (EAFRD) and European Maritime Fisheries Fund (EMFF).

Since 1988, the ESI Funds' operation is regulated by a Common Provision's Regulation (the 'CPR'), which sets the general rules and principles applicable to all funds. Equally, each Fund's operation is regulated by a fund specific regulation, which adds to the general applicable rules. The budgetary allocations of the ESI Funds amount currently to 34% of overall 2014-2020 EU budget commitments, holding the largest budget portfolio of the Multiannual Financial Framework.¹¹⁸ ESI Funds resources are distributed to Member States and their regions according to the pre-established eligibility criteria based on GDP per capita (ESF, ERDF) or GNI per capita (Cohesion Fund), surface, population, unemployment rate, et al.

The ESI Funds have been constantly sensitive to fundamental rights concerns. Within the limits of EU competence, ESI Funds have actively integrated the EU fundamental rights agenda in the areas of social rights, gender equality, environment, public health, social inclusion of persons with disabilities, elderly, youth, migrants, asylum seekers and other vulnerable groups. The equal opportunities policy goal¹¹⁹ has been particularly visible in ESI Funds' interventions. The goal has a triple dimension (Figure II.1. below). First, equal opportunities are implemented through specific actions, following the ESI Funds' implementation cycle (Section 2.1.). Equally, Member States must mainstream and promote equal opportunities throughout all the stages of ESI Funds implementation (Section 2.2.). In addition, both, the Commission and the Member States are bound to ensure compliance with

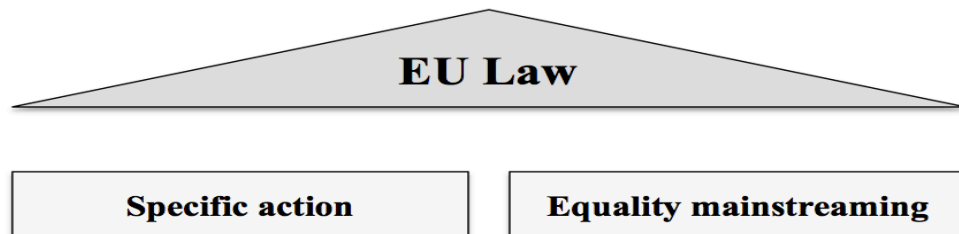
¹¹⁷ Title XI and XVIII TFEU.

¹¹⁸ The total commitment appropriations for 2014-2020 constitute 325 145 694 739 euro. See Council Regulation (EU, EURATOM) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, OJ 347 of 20.12.2013, Annex I.

¹¹⁹ Equal opportunities shall be referred to as comprising both: a positive, active (equality specific action and mainstreaming) and a negative, passive angle (equal treatment).

the EU law on equal treatment and non-discrimination of all ESI Funds' related actions pursuant to the imperatives of applicable primary and secondary law.¹²⁰

Figure II.1.: Three dimensions of equal opportunities goal in ESI Funds



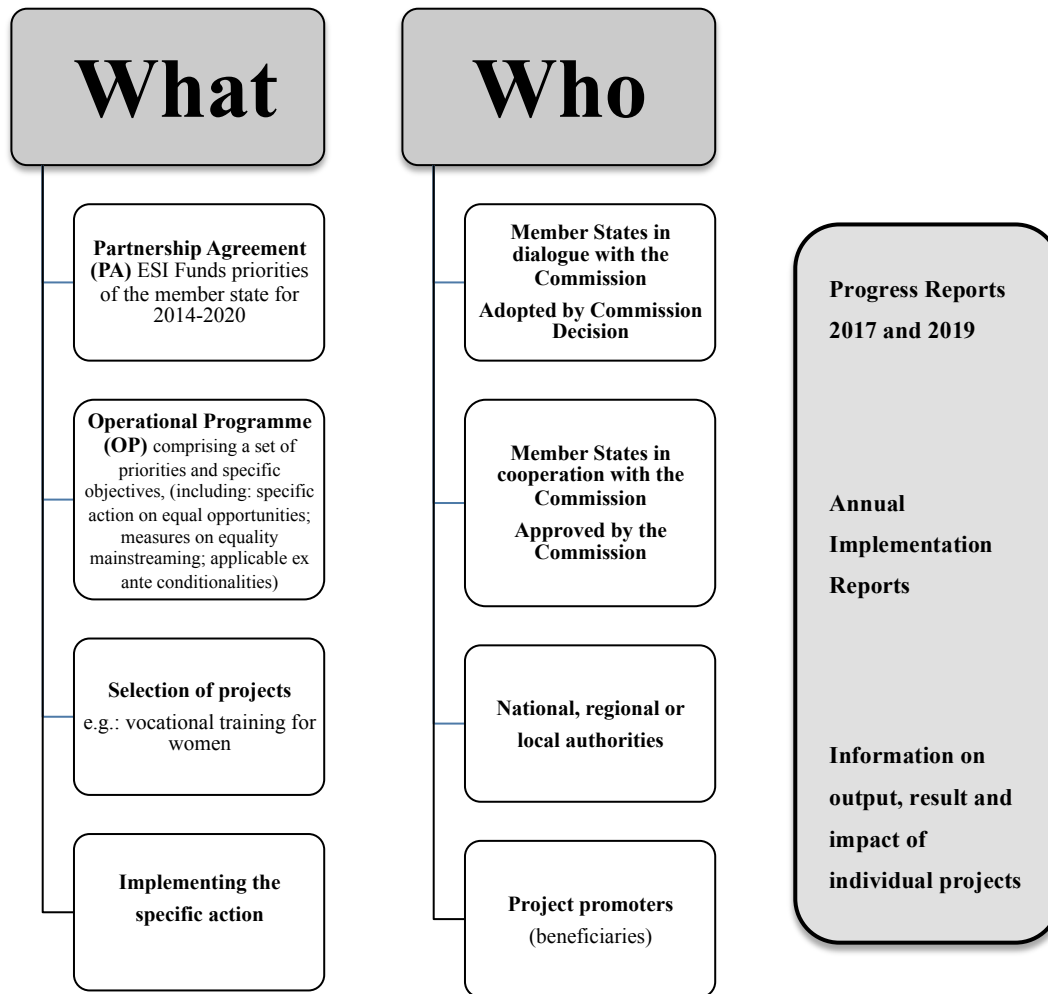
In the framework of ESI Funds, the specific action measures are first and foremost undertaken at the national, cross-border or regional level under the shared supervision of the national managing authorities and the Commission, according to the agreed programming documents - also referred to as ‘national initiatives’ (Figure II.2. below). National initiatives retain the vast majority of ESI Funds’ allocations. In subsidiary, from 5% to 10% of ESI Funds’ resources are dedicated to specific action at EU level (the ‘EU Initiatives’) designed and proposed by the Commission.¹²¹ As opposed to national initiatives, which tend to support mainly the national investment needs, the EU Initiatives address Union-wide concerns, particularly difficult to achieve at the national level.¹²²

¹²⁰ Corrections may be imposed if the ESI action does not comply with the public procurement legislation and EU law on non-discrimination and equal treatment particularly during selection and award of contracts, see: European Commission, Decision of 19.12.2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement. See also: Financial Regulation (EU, EURATOM) 966/2012 on the financial rules applicable to the general budget of the Union, Article 80(4) and Article 135.

¹²¹ EU Initiatives have been set in 1989 as special financing instruments of ESI Funds under the direct management of the Commission. The development was possible due to 1988 reform, which enabled the Commission “to propose [unilaterally] to the Member States that they submit applications for assistance in respect of measures of significant interest to the Community” by way of implementing decisions, see: Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, Article 11 and Regulation (EEC) No 4254/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Regional Development Fund, Article 3(2).

¹²² EU Initiatives must endorse three key requirements: *transnationality*, *complementarity* and *EU added-value*. Several other traits are specific for the EU initiatives, namely these: have a genuine EU dimension; are particularly flexible and, constitute a catalyst for ESI Funds innovation, as they might become an ESI funding priority in the following financing period. EU Initiatives have known a fast development in the 1994-1999 programming period. The following periods have been characterised by a continuous limitation and concentration of the EU Initiatives by the Member States. First, the direct managing role of the Commission has

Figure II.1: Implementation procedure of ESI Funds period 2014-2020¹²³



been limited as the Member States interposed themselves between the Commission and beneficiaries. In 2000-2006 we observe a considerable decrease of EU initiatives followed by a complete disappearance as a result of their inclusion in the ESI Funds operations during the 2007-2013 period. The current, 2014-2020, programming period brings a revival of the EU Initiatives. See: Green Paper, Commission of the European Communities, 'Communication of the Commission: The Future of Community Initiatives under the Structural Funds', COM (93) 282 final, Brussels, 1993, pp. 3-4. See further on EU Initiatives in: Jouen, op.cit., note 108, p. 28.

¹²³ Personal adaptation of Figure 2, Court of Auditors, Special Report 17/2009, p.11.

The implementation process of ESI Funds starts with the design and adoption of the strategic framework document on the use of ESI Funds for each Member State during the whole programming period.¹²⁴ In 2014-2020 period, the document is called Partnership Agreement (the ‘PA’).¹²⁵ The PA establishes the overall strategic allocation, investment thematic objectives¹²⁶ and national arrangements for ESI Funds’ implementation. It is drafted by each Member State in close dialogue with the Commission, involving the regional, local authorities and other relevant partners. The Commission approves the PA by means of implementing act decision.

Based on the approved PAs, ESI Funds are implemented through multiannual Operational Programmes (OPs), drafted by the Member States.¹²⁷ They detail the thematic objectives identified by the PAs into concrete investment priorities, according to each Fund-specific Regulation. Subsequently, each investment priority is further detailed into specific objectives, which are the results to be attained by the ESI Funds intervention negotiated between each Member State and the Commission.¹²⁸ The Commission approves the OPs after assessing their consistency with the ESI Funds’ Regulations, the PA, the ESI Funds’ thematic objectives and the overall EU priorities.¹²⁹

After the adoption of the programming documents (PA and OPs), Member States and their responsible national and regional authorities undertake the implementation of OPs, including the selection of the project beneficiaries. Under the principle of shared management, Member States hold the primary responsibility for sound financial management and control of the ESI Funds’ expenditure, subject to Commission’s supervision, which remains responsible for the overall implementation of the EU budget.

¹²⁴ The strategic approach to Cohesion policy was adopted in the 2006 reform, whereby Member States committed to submit a National strategic reference framework which aimed to ensure that the national strategies are consistent with the EU strategy. The 2014-2020 programming period replaces the National Strategic Frameworks with a Common Strategic Framework (CSF) for all ESI Funds actions, Member States being required to show in their PAs how the national strategy on ESI Funds investment complements the CSF.

¹²⁵ Regulation (EU) 1303/2013, CPR, Article 2 (20): ‘Partnership Agreement’ means a document prepared by a Member State with the involvement of partners in line with the multi-level governance approach, which sets out that Member State’s strategy, priorities and arrangements for using the ESI Funds in an effective and efficient way so as to pursue the Union strategy for smart, sustainable and inclusive growth, and which is approved by the Commission following assessment and dialogue with the Member State concerned’. It shall contain the list of Operational Programmes and fund-related actions.

¹²⁶ The thematic objectives correspond generally to ‘priority axes’ as defined in Art. 2 (8) and 96(1) CPR

¹²⁷ Regulation (EU) 1303/2013, CPR, Article 2 (6): ‘programme’ means an ‘operational programme’ as referred to in Part Three or Part Four of this Regulation (Article 96) and in the EMFF Regulation, and ‘rural development programme’ as referred to in the EAFRD Regulation.

¹²⁸ The sub-classification is important as the applicability of ESI Funds ex ante conditionalities shall be assessed with regards to each specific objective of an investment priority, see further Chapter III.

¹²⁹ Regulation (EU) 1303/2013, CPR, Article 29.

In case of EU Initiatives, the implementation process follows closely the steps described above. However it is the Commission alone that defines the investment priorities and proposes a detailed strategy for action at the EU level, Member States being required to design implementing documents alongside the proposed EU Initiative.

The steps of the ESI Funds implementation show that Member States play an important role in the distribution of more than 90% of ESI Funds' allocations. It is first for the Member States to define the investment priorities and include (or not) equal opportunities related action into the identified national priorities. However, the Commission and Council also have an important say. First the Commission exercises a 'shadow role', by maintaining a close dialogue with each Member State during the negotiation and design of the programming documents. Second, it holds the last decision in confirming or rejecting Member States' investment choices, making sure that Member States had duly taken into account, inter alia, the Council recommendations on economic and/or social policies pursuant to article 121(2) and 148(4) TFEU.

SECTION 2. ESI FUNDS AND FUNDAMENTAL RIGHTS: Specific action and equality mainstreaming

Fundamental rights related actions, both as EU and national initiatives, have been a constant finding in the ESI Funds architecture. Already in 1989 Commission guides the Member States on fundamental rights eligible investment actions.¹³⁰ Further on, the fundamental rights specific actions were expressly supported by ESI Funds regulations, in particular under ESF priorities.

Especially since 1999 reform, EU's 'double approach' to equality and non-discrimination policy¹³¹ was mirrored largely into the Cohesion Policy and ESI Funds' normative structure and operation.¹³² The 'double approach' combines the specific action and mainstreaming models. On the one hand, specific action materialises through ESI Funds' direct interventions explicitly targeting equality (Section 2.1.), while on the other hand, equality mainstreaming translates into the obligation for the EU and Member States to adopt an equality perspective during all ESI funds-related operations irrespective of the area of investment (Section 2.2.).

The equality mainstreaming approach has favoured a stronger 'push' of the equal opportunities goal beyond the ESF operations. Nevertheless, the actual implementation of an equality perspective in other ESI Funds, as for instance in ERDF interventions, has not achieved its full potential. Even if ERDF resources have been constantly employed to support fundamental rights related actions, these had rather an ancillary nature, being still largely seen as the main attribute of ESF.

¹³⁰ European Commission, 'Guidelines concerning European Social Fund intervention in respect of action against long-term unemployment and occupational integration of young people (Objectives 3 and 4 in the context of the reform of the structural funds)', OJ C 45, 1989.

¹³¹ Since 1996, EU has adopted a 'double approach' to attaining equality and non-discrimination policy goal, which translates into a parallel use of two models: *specific action* and *equality mainstreaming*. While *specific action* targets the achievement of more equality through dedicated initiatives, the *equality mainstreaming* bounds the competent EU and national actors to adopt an *equality perspective* into all EU activities, particularly when defining and implementing EU policies. The mainstreaming model was inspired by gender equality strategy as agreed in 1995 at the World Conference on Women, Beijing. The Beijing Platform for action and Declaration strategy was upheld as a core element of EU policy on gender equality. The double-approach strategy was taken up by Amsterdam treaty which first enforced equality between men and women as a task for the EU (Article 2) and created primary law obligations for the EU to mainstream the gender perspective into all its activities (Article 3 paragraph 2). The Lisbon treaty continues the initiative and enshrines equality between men and women as a value of the EU (Article 2) and further extends the gender-mainstreaming obligation to non-discrimination mainstreaming (Article 8 and 10 TFEU). See: 'Communication on Incorporating Equal Opportunities for Women and Men in all Community Policies and Activities, COM (96) 67 final (1996).

¹³² 'Council Resolution of 2 December 1996 on mainstreaming equal opportunities for men and women into the European Structural Funds OJ C 386 of 20.12.1996.

2.1: ESI Funds and fundamental rights: Specific action

ESI Funds' specific action in fundamental rights is pursued through national and EU Initiatives. Based on the ex-post evaluation studies, it is generally very difficult to assess the quantitative impact these had on the EU equal opportunities agenda. If one compares to the national budgetary machineries with ESI Funds financial allocation, it could be argued that the ambition of a sizeable quantitative impact is merely illusory. However, it is commonly agreed that specific actions have proved rather a positive qualitative impact, stirring innovation and 'creating conditions' for further national expenditure. This is especially true due to their spill-over effect in the national policies and action, which is particularly visible in gender equality policy.¹³³ As to budgetary allocations committed to the priority, these did not show a radical evolution. Moreover, the strong shift from specific action to equality mainstreaming in 2007-2013 period decreased considerably the specific action financial commitments for equal opportunities goal.¹³⁴

In terms of specific actions, one should also underline the important contribution of the EU Initiatives (Table II.1 below). Notwithstanding the modest financial allocation to EU Initiatives (5-10%), these have proved an important, complementary tool to the OPs' investment priorities in tackling the transversal Union's problems affecting all or the majority of the Member States in the area of equal opportunities, non-discrimination, disability and more broadly, social inclusion.¹³⁵

¹³³ See for example, European Commission, Fourth report on economic and social cohesion, 30 May 2007, p.113.

¹³⁴ Fondazione Giacomo Brodolini, European Parliament Information note PE 462.426, *The multi-annual financial framework 2014-2020 from a gender equality perspective*, 2012, p. 43.

¹³⁵ European Commission, First Cohesion Report, 1996, p.109.

Table II.1.: EU Initiatives on equality and non-discrimination 1990-2020¹³⁶

Period	EU Initiative	Target group	Fund resources	Amount
1990-1993	NOW	Women	ESF, ERDF	153 mln Ecu
	HORIZON	Disabled, minorities	ESF, ERDF	305 mln Ecu
1994-1999	EMPLOYMENT	EMPLOYMENT NOW - women	ESF	500 mln *initially 370 mln Ecu further supplemented
		EMPLOYMENT HORIZON-disabled and disadvantaged groups	ESF	730 mln Ecu
		EMPLOYMENT Youthstart-youth	ESF	300 mln Ecu
		EMPLOYMENT INTEGRA (from 1997)- persons at risk of social exclusion, racism and xenophobia	ESF	400 mln Ecu
	ADAPT	Adaptation of immigrants, refugees and persons at risk of social exclusion to the industrial change	ESF, EBRD	Total Ecu 2.9 bln of which 1.4 bln from Structural Funds
2000-2006	EQUAL	Discrimination	ESF	3 bln Euro
2007-2013	EU Initiatives internalised into mainstream Operational Programmes			
2014-2020	YEI mainstreamed into ESF OPs	Young persons under the age of 25	ESF and dedicated budget line	3 bln ESF 3 bln EU budget

¹³⁶Source: European Commission, Cohesion Policy Evaluation reports

2.1.1. Programming period 1989-1993: the reform

During 1989-1993 programming period, the direct action in fundamental rights was strongly linked to labour market integration and essentially financed from ESF resources. Whereas the ESI Funds regulations were still silent on the equality-related action, the 1989 Commission's guidelines on ESF established a list of equality-eligible interventions. These included training and occupational integration of young people, women and persons with disabilities. Member States were further incentivised to pursue operations targeting the labour market integration of migrant workers, women in under-represented sectors, persons with disabilities, which were given 'preferential treatment'.¹³⁷

EU Initiatives ('Community Initiatives' at that time),¹³⁸ promoting equal opportunities have also shaped shortly after the start of the programming period. Already in 1990, the second EU Initiatives package included two initiatives: New Opportunities for Women (the 'NOW Initiative')¹³⁹ targeting equal opportunities for women into the labour market and HORIZON Initiative, addressing labour market accessibility for persons with disabilities and minority groups.¹⁴⁰ Both initiatives were funded from the ESF and ERDF Funds resources and were designed to complement related EU action on equal opportunities, notably the third action programme on equal opportunities for men and women.¹⁴¹

With regards to gender equality, in the 1989-1993 programming period the change brought by the 1988 reform generated delays in the programmes' operation. Notably, the significant delays in start-up of the ESF specific actions and NOW operations resulted in re-distribution of gender-committed funding to other priorities. As well, unwarranted training

¹³⁷ European Commission, 'Guidelines Concerning European Social Fund Intervention in Respect of Action against Long-Term Unemployment and Occupational Integration of Young People (Objectives 3 and 4 in the Context of the Reform of the Structural Funds)'. It is interesting to note that the Guidelines call the eligible actions *general and specific conditions*, as for instance: training of women wishing to return to the labour market (specific condition) and operations addressing women (general condition). The respect for a specific conditions was "*necessary and sufficient to get access the funding*", while the respect for a general condition would entitle '*preferential treatment*'. However, the language was changed onwards from 'condition' to 'investment priorities'.

¹³⁸ Decided on 22 November 1989. The financial allocation of the five Community Initiatives amounted to 5.8 billion, nearly 10% of the ESI Funds commitments.

¹³⁹ NOW and HORIZON Community initiatives, Commission Decision of 2 May 1990, not published. Notice to the Member States laying down guidelines for operational programmes/global grants, which Member States are invited to establish, within the framework of a Community initiative to promote equal opportunities for women in the field of employment and vocational training — NOW INITIATIVE, OJ C327 of 29 December 1990, p.5.

¹⁴⁰ Notice to the Member States laying down guidelines on HORIZON INITIATIVE, *Ibidem.*, p.9.

¹⁴¹ Commission, Green paper 'The Future of Community Initiatives under the Structural Funds', Annex 1, COM (93) 282 final, 16 June 1993, p.32. Council Resolution of 21 May 1991 on the third medium-term Community action programme on equal opportunities for women and men (1991 to 1995), OJ C142, of 31 May 1991, p.1.

and lack of harmonised data were reported.¹⁴²

2.1.2. Programming period 1994-1999: the extension

During the 1994-1999 programming period, equal opportunities actions continued to address mainly gender equality, which were seen as an ESF priority, rather than an overall ESI Funds concern.¹⁴³ As a novelty, ESI regulations refer expressly to equal opportunities objective. As such, ESF has the express task to promote ‘equal opportunities in the labour market’.¹⁴⁴ Similarly, the European Agricultural Guidance and Guarantee Fund establishes support for “farmers of either sex”.¹⁴⁵

The period has known an important extension of EU Initiatives. Thirteen EU initiatives have been adopted, out of which two - Employment¹⁴⁶ and Adapt¹⁴⁷ - were dedicated to equal opportunities. The Employment Initiative was sub-divided in four investment stands: NOW designed to promote equal opportunities for women in the labour market and to complement the Fourth Equal Opportunities Action Programme 1996-2000;¹⁴⁸ HORIZON for inclusion of persons with disabilities; YOUTHSTART for integration of young people in the labour market and INTEGRA targeting people at risk of social exclusion. Later in the period ADAPT stand was set up, supporting adaptation of the workforce to industrial change.

With regards to ESF, the allocations dedicated to equality specific action during the programming period amounted to around 3.1% of the fund’s commitments, whereas the action on integration of persons at risk of social exclusion amounted to 10.8%.¹⁴⁹ The late

¹⁴² Court of Auditors, *Annual Report concerning the financial year 1991, Chapter 8, Community Action to promote equal opportunities for men and women.*, OJ C 330 of 15.12.1992, p. 161-168.

¹⁴³ European Commission, Second Cohesion Report, 2001, p. 151.

¹⁴⁴ Council Regulation (EEC) No 2081/93, Article 3(2).

¹⁴⁵ Council Regulation (EEC) No 2085/93 of 20 July 1993 amending Regulation (EEC) No 4256/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Agricultural Guidance and Guarantee Fund (EAGGF) Guidance Section

¹⁴⁶ European Commission, Communication to the Member States laying down guidelines for operational programmes or global grants which Member States are invited to propose within the framework of a Community initiative on Employment and Development of Human Resources aimed at promoting employment growth mainly through the development of human resources, OJ C 180, 01.07.1994.

¹⁴⁷ *Ibidem.*

¹⁴⁸ Council Decision of 22 December 1995 on a medium-term Community action programme on equal opportunities for men and women (1996 to 2000) OJ L 335 of 30/12/1995.

¹⁴⁹ Office for Official Publications of the European Communities, *The European Social Fund an overview of the programming period 1994-1999*, Luxembourg, 1998, p. 30.

start-up of programmes and initiatives remains a weak point.¹⁵⁰

2.1.3. Programming period 2000-2006: the concentration

In line with the Amsterdam Treaty and secondary law developments,¹⁵¹ the 2000-2006 programming period reinforced the equal opportunities goal. First, ESF included for the first time specific action on women access and participation in the labour market as a stand-alone investment priority.¹⁵² Second, the period adopted a concentration strategy for the ESI Funds assistance, limiting the EU Initiatives on equal opportunities to one – EQUAL – promoting an integrated approach to non-discrimination.¹⁵³

During the period, ESI Funds equal opportunities action of the policy was highly reported and evaluated. The studies show that the ESF specific action measures were increasingly budgeted under OPs' priorities.¹⁵⁴ The financial allocation has also known a slightly larger share.¹⁵⁵ Generally, around a half of the total national interventions committed to equal opportunities aim were supported by ESF, the rest of expenditure was complemented from national public or private resources.¹⁵⁶ In the case of gender equality specific action, the vast majority of measures were targeted at training (over 75%) whereas the rest of expenditure was directed at reconciliation of family and professional life.¹⁵⁷

EQUAL Initiative has proved particularly effective. It managed to complement harmoniously

¹⁵⁰ European Court of Auditors, 'SPECIAL REPORT No 22/98 concerning the management by the Commission of the implementation of measures to promote equal opportunities for women and men', OJ 393/24, 1998, para. 9.

¹⁵¹ Article 3(2), now article 8 TFEU: 'In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.'

¹⁵² Regulation (EC) No 1784/1999 of the European Parliament and of the Council of 12 July 1999 on the European Social Fund, Art. 2 (1) e): "specific measures to improve women's access to and participation in the labour market"

¹⁵³ Commission Decision – C(2000) 1382, not published and Decision C/2000/1221 of 12.05.2000 establishing an indicative distribution by Member State of the commitment appropriations under the Community initiative EQUAL for 2000-2006.

¹⁵⁴ ASBL ENGENDER, *Integration of Equal Opportunities Between Men and Women in Objective 1 and 2 Structural Funding Programming Documents 2000-2006*, available at: <http://ec.europa.eu/regional_policy/sources/docgener/studies/pdf/integration_equal.pdf> consulted on 02.05.2014.

¹⁵⁵ Between 2000-2006 some € 9.3 billion were affected to actions promoting gender equality, € 8.5 billion addressed the needs of persons with disabilities and € 8.5 billion were directed at social inclusion. Bernard Brunhes International, Studies at the request of European Commission under contract 'Reporting on ESF Interventions in the EU': *The European Social Fund: Women, Gender mainstreaming and Reconciliation of work & private life*, 2010, Summary Fiche p. 6. *The European Social Fund and Disability*, 2010, p. 40. *The European Social Fund and Social Inclusion*, 2010.

¹⁵⁶ *The European Social Fund: Gender*, Summary fiche, p.5. *The European Social Fund and Disability*, 2010, p. 40. *The European Social Fund and Social Inclusion*, Summary fiche, 2010, pp 7-8.

¹⁵⁷ European Court of Auditors, *Special Report 17/2009, Vocational training actions for women co-financed by the European Social Fund*, 26 January 2010, p. 9.

the European Employment Strategy, to bring EU added-value, innovation and a transnational comprehensive approach to non-discrimination and inclusion of vulnerable groups.¹⁵⁸

2.1.4. Programming period 2007-2013: the shift to mainstreaming

During the 2007-2013 programming period, we notice a general stagnation of equality specific action. The ESI Funds financial commitments targeted at direct interventions decreased under the pressure of a strong equality mainstreaming commitment (Section 2.2. below). In the specific area of gender equality, the committed finances constituted 2.6 billion from the overall ESI Funds allocation, compared to 4.6 billion committed in 2000-2006 only from ESF resources.¹⁵⁹

The equality-related EU Initiatives are completely lacking from the ESI Funds' framework. Instead, dedicated programmes financed directly from the EU budget have been set, such as PROGRESS.¹⁶⁰

2.1.5. Programming period 2014-2020

The 2014-2020 programming period adopts a targeted approach to equal opportunities. The CPR includes a dedicated thematic objective which mandates ESF to promote social inclusion, combat any discrimination and poverty. As well, gender equality specific actions are supported under the employment thematic objective.¹⁶¹ According to the initial data, over 18 out of 28 Member States are expected to include social inclusion action in their investment priorities, whereas other 3 Member States plan additionally to address poverty reduction goal.¹⁶²

The period makes a return move towards EU Initiatives in the area of equality, which target especially: youth unemployment, persons at risk of poverty and labour market

¹⁵⁸ Metis, *Ex post evaluation of the EQUAL Community Initiative (2000-2006)*, 17 March 2010, p. 16.

¹⁵⁹ Advisory Committee on Equal Opportunities for women and men, *Opinion on gender equality in the cohesion policy 2014-2020*, 2012. European Parliament, Information Note, PE 462.426, *op.cit.*, note 134, *supra*, p. 43.

¹⁶⁰ Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity — Progress, The programme was divided in five action areas: Employment; Social protection and inclusion; Working conditions; Antidiscrimination and diversity; Gender equality. See Article 3 therein.

¹⁶¹ Regulation (EU) 1303/2013, article 9. Regulation (EU) 1304/2013 on ESF, article 3.

¹⁶² European Commission, *Cohesion Policy 2014-2020, Country Factsheets*, available at: http://ec.europa.eu/regional_policy/information/cohesion-policy-achievement-and-future-investment/index.cfm, consulted on 01.06.2014.

inclusion of the vulnerable groups.¹⁶³ In the framework of ESI Funds, youth employment initiative ('YEI') targets active inclusion of young persons in the labour market.¹⁶⁴ The YEI Initiative is partially supported from ESF resources and mainstreamed in the Member States' OPs.

2.2. ESI Funds and fundamental rights: equality mainstreaming

Compared to other EU policies, Cohesion policy has been, since the very early stages, one of the policies most open to equality mainstreaming, especially in terms of gender equality.¹⁶⁵ The comparative historical perspective underlines the evolutionary change of the ESI Funds in terms of equality mainstreaming. First, one could notice the shift from the worker rationale - "women returning to labour market", "farmers of either sex"- towards the general principles of gender equality and non-discrimination as fundamental values of the Union. Second, whereas initially equality provisions were mainstreamed in the fund-specific regulations, progressively, the principle of equality has shifted horizontally becoming applicable to all ESI Funds. Thirdly, the evolution underlines a clear departure from the sole concern of gender equality towards a general principle of equality, non-discrimination, protection of persons with disabilities as enshrined in the Treaties and secondary legislation. Furthermore, the comparative perspective highlights, the evolution from the reactive 'conformity' obligation to a pro-active 'promotion' of the principles in all the ESI Funds-related activities (Annex I).

2.2.1. Programming period 1989-1993

During the financial period 1989-1993, the first Common Provisions Regulation¹⁶⁶ brought for the first time the Structural Funds: ESF, ERDF and other financial instruments under a single common legislative framework, which set the general principles and rules applying to all the ESI Funds (the 'CPR'). The CPR did not explicitly include any

¹⁶³ See, inter alia: "Agenda for New Skills and Jobs", "Youth on the Move", and the "European Platform against Poverty and Social Exclusion".

¹⁶⁴ Regulation (EU) 1303/2013, Article 92 (4) and (5).

¹⁶⁵ Pollack and Hafner-Burton, 432–456, *op.cit.*, note 110, *supra*.

¹⁶⁶ Council Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and other existing financial instruments OJ L 185 of 15.07.1988.

fundamental rights' consideration. However, in the fund-specific rules, the ESF Regulation¹⁶⁷ required for desegregated data on 'female unemployment' to be provided 'as far as possible' in the country-specific social conversion plans. As well, already in 1991, following the adoption of the Community Social Charter,¹⁶⁸ the Third Action Programme on Equal Opportunities for women and men 1991-1995,¹⁶⁹ laid the positive policy background for equality mainstreaming in the future programming period.¹⁷⁰

2.2.2. Programming period 1994-1999

In the next programming period - 1994-1999 - the newly established Cohesion Fund is added to the existing Structural Funds: ESF and ERDF. In the context of Maastricht Treaty, gender equality considerations started to shape in the ESI Funds Regulations. The first mainstreaming developments were further supported by the Council, who 'invited' Member States to observe, promote and take 'full account' of the principle of equality between men and women during all the activities financed by the Structural Funds.¹⁷¹ Equality is however limited to the gender perspective and builds very much on the functional, worker rationale. As such, the CPR refers in its considerations to 'the principle of equal opportunities for men and women on the employment market' as to a Community goal.¹⁷² Moreover, full conformity with the 'principle of equal opportunities for men and women' has to be observed.¹⁷³

2.2.3. Programming period 2000-2006

Starting with 2000-2006 programming period, the principle of equality between men and women gains a strong normative presence. Based on the high commitment from both the

¹⁶⁷ Council Regulation (EEC) No 4255/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Social Fund OJ L 374 of 31.12.1988

¹⁶⁸ The Community Charter of Fundamental Social Rights of Workers, 9 December 1989.

¹⁶⁹ Commission Communication COM (90) 449 final endorsed in the Council Resolution of 21 May 1991 on the third medium-term Community action programme on equal opportunities for women and men (1991 to 1995) OJ C 142 of 31.05.91

¹⁷⁰ J Brine, *The European social fund and the EU: flexibility, growth, stability*, Contemporary European Studies, 11, Sheffield, Sheffield Academic Press, 2002, p. 73.

¹⁷¹ Council Resolution of 22 June 1994 on the promotion of equal opportunities for men and women through action by the European Structural Funds (94/C 231/01).

¹⁷² Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments.

¹⁷³ Council Regulation (EEC) No 2081/93 of 20 July 1993, *Ibidem*, Article 7.

Council¹⁷⁴ and the Commission¹⁷⁵ and following the express mandate of the Amsterdam Treaty¹⁷⁶ the CPR Regulation of 1999 takes a better-targeted approach towards gender equality mainstreaming.¹⁷⁷ The principle is reflected in 10 out of 56 core articles of the Regulation. These require that: The ESI funds contribute to the elimination of inequalities and to the promotion of equality between men and women; the ESI Funds operations are in conformity with Community's actions and policies on gender equality; statistics broken down by sex for the purpose of monitoring where the nature of the assistance permits; ex ante evaluations on the situation of equality between men and women on the labour market; the managing authorities provide information to organisations or bodies promoting equality, the monitoring committee ensures a balanced gender representation.¹⁷⁸ Compared to the previous programming period, a shift to pro-active language was introduced. The funds were to contribute also to the 'elimination of inequalities' complementary to the 'promotion of equality between men and women'. The fund-specific provisions of ESF required Member States to describe in the content of each OP the way in which gender equality was taken into consideration during all programme-related actions.¹⁷⁹ ERDF for the first time refers expressly to gender equality.¹⁸⁰ As an innovation, the principle of non-discrimination also makes its way in the Structural Funds architecture, marking the departure from the dominating gender equality concern. Building on the newly introduced Article 13 of the Amsterdam Treaty,¹⁸¹ the Regulation recitals mention for the first time that: "the Funds' operations may also make it possible to combat any discrimination on the grounds of race, ethnic origin, disability or age."¹⁸² Non-discrimination however remained limited to the preamble. In comparison with the previous programming periods, quite extensive legislative

¹⁷⁴ Council Resolution of 2 December 1996 on mainstreaming equal opportunities for men and women into the European Structural Funds OJ C 386 of 20.12.1996.

¹⁷⁵ European Commission, 'Incorporating Equal Opportunities for Women and Men in all Community Policies and Activities', COM (96) 67 final, 21.02.1996.

¹⁷⁶ Article 3(2), now Article 8 TFEU: 'In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.'

¹⁷⁷ Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, OJ L 161 of 26.06.1999.

¹⁷⁸ Council Regulation (EC) No 1260/1999, Articles 1, 2, 3, 8, 12, 20, 29, 41, 46 thereof.

¹⁷⁹ Regulation (EC) No 1784/1999 of the European Parliament and of the Council of 12 July 1999 on the European Social Fund, OJ L213 of 13.08.1999, Article 8.

¹⁸⁰ Regulation (EC) No 1783/1999 of the European Parliament and of the Council of 12 July 1999 on the European Regional Development Fund, OJ 213 of 13.08.1999, Article 2.

¹⁸¹ The newly introduced Article 13 provided that: "[...]the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

¹⁸² Council Regulation (EC) No 1260/1999, recital 5.

progress was made. The developments were seen at that time as ‘the first major break-through for the Commission’s mainstreaming mandate’.¹⁸³

2.2.4. Programming period 2007-2013

The 2007-2013 programming period continues the positive developments.¹⁸⁴ The most important achievement is the inclusion of a stand-alone article on both, gender equality non-discrimination (Article 16).¹⁸⁵ Article 16 brings the long expected clarity and visibility to the equality principle, which before was dispersed and hard to filter from the various provisions of the ESI Funds Regulations. It reads:

“The Member States and the Commission shall ensure that equality between men and women and the integration of the gender perspective is promoted during the various stages of implementation of the Funds.

The Member States and the Commission shall take appropriate steps to prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation during the various stages of implementation of the Funds and, in particular, in the access to them. In particular, accessibility for disabled persons shall be one of the criteria to be observed in defining operations co-financed by the Funds and to be taken into account during the various stages of implementation.”

Compared to the previous programming period, the article calls for integration of a gender perspective during all Funds’ implementation stages, given the ‘need’¹⁸⁶ to promote gender equality.¹⁸⁷ Also, the grounds of discrimination have been extended to ‘religion or belief and sexual orientation’, according to the EU non-discrimination directives,¹⁸⁸ bringing the ESI Funds in line with the EU non discrimination law and policy developments. However, article 16 limited the scope of non-discrimination to ‘prevention’ of discrimination and targeted in particular the equal access to funding.¹⁸⁹ Thus, no mandate to combat discrimination is given. The equality partnerships,¹⁹⁰ sex-desegregated monitoring,¹⁹¹ ex-ante evaluation of the situation between women and men and equality-targeted information are further encouraged.

¹⁸³ Pollack and Hafner-Burton, 432–456, *op.cit.*, note 110, *supra*, p. 442.

¹⁸⁴ 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, OJ L210 of 31.07.2006.

¹⁸⁵ *Ibidem*, Article 16.

¹⁸⁶ *Ibidem*, Article 11.

¹⁸⁷ *Ibidem*.

¹⁸⁸ Council Directive 2000/43/EC of 29 June 2000, OJ L 180 of 19.07.2000; Council Directive 2000/78/EC of 27 November 2000, OJ L 303 of 02.12.2000.

¹⁸⁹ Council Regulation (EC) No 1083/2006, Article 16.

¹⁹⁰ *Ibidem*, Article 10.

2.2.5. Programming period 2014-2020

Returning to 2014-2020 programming period, two additional funds are brought under the umbrella of the CPR: the European Agricultural Fund for Rural Development (EAFRD) and the European Maritime and Fisheries Fund (EMFF). The general principles of gender equality and non-discrimination¹⁹² maintain largely a similar textual wording of the 2007-2013 period, but are better articulated in the light of the positive obligations imposed on the Member States. As such, Member States shall ensure that the PAs mention the principles' application during the implementation of the funds. As well, each OPs shall include a description of the concrete actions undertaken to take into account the principle of equality and non-discrimination.¹⁹³ Moreover, the principles are reflected in the Common Strategic Framework,¹⁹⁴ which lines up the ESI Funds to Europe 2020's targets.¹⁹⁵

2.3. Promoting equality via ESI Funds: how effective?

Cohesion policy (and ESI Funds) is probably one of the most reported and evaluated EU policy. Yet not also from the legal point of view. The multitude of reports on impact, outcome, ex ante and ex post evaluations, policy and economic analysis papers, generate a great amount of information. Nevertheless, assessing ESI Funds' impact is generally a challenging task. The ex-post evaluations and studies reveal a highly puzzled picture. The specific evaluations related to equal opportunities are not an exception.

Overall, one could safely claim that ESI Funds had a positive impact on the equal opportunities policy goal, both through specific action and equality mainstreaming measures. However, the positive developments have been balanced by challenges, especially with regards to equality mainstreaming.

When it comes to the achievements, one must stress that over the last programming periods, equal opportunities specific action interventions have been increasingly budgeted under ESI Funds programmes by the absolute majority of Member States.¹⁹⁶ Similarly, the

¹⁹¹ *Ibidem*, Article 66.

¹⁹² Regulation (EU) 1303/2013, CPR, Article 7.

¹⁹³ Regulation (EU) 1303/2013, CPR Article 15

¹⁹⁴ Common Strategic framework, Regulation (EU) 1303/2013, Annex I, point 5.3.

¹⁹⁵ European Commission, 'Communication - Regional Policy contributing to smart growth in Europe 2020', COM(2010) 553 final, 2010.

¹⁹⁶ In the 2000-2006 22 Member States have designed ESF measures to address gender equality in 2007-2013 the number raised to 25 Member States, see: *The European Social Fund: Gender, op.cit.*, note 152, *supra*, p.6.

importance of the equal opportunities and non-discrimination principle was acknowledged almost universally (equality mainstreaming) in the ESF Operational Programmes in the last programming period, 2007-2013.

Most importantly, one should stress the positive impact of the ESI Funds equal opportunity goal on the national policy developments. The obligation to integrate an equality perspective and the specific ESF interventions, have often constituted an important and essential ‘push’ on the national equal opportunities agenda.¹⁹⁷ In some Member States the ESI gender equality objectives have constituted for important time the only driving force for promoting equal opportunities, as no national equivalent agenda was present.¹⁹⁸

The added value generally translates in three core criteria: innovation, introducing gender equality national policies where these have not been in place before and reinforcing or complementing the existing policies.¹⁹⁹ As ESI Funds’ related actions couldn’t compete quantitatively with the national government’s expenditure, these have nevertheless compensated on the qualitative criteria and spill over effect. Surveys show that the ESI Funds’ equality-related actions enjoy the highest visibility and are perceived as having the greatest impact on national policies,²⁰⁰ (however, there is little evidence of a tangible impact on the public discourse and public opinion).²⁰¹ In some cases, the national institutional or administrative arrangements on gender equality have been the direct result of the ESF interventions.²⁰²

As to the challenges, first, evaluations find a constant lack of comprehensive, comparable and reliable data and indicators, which make it difficult to assess the ESI Funds direct action

¹⁹⁷ *Ex-Post Evaluation of Cohesion Policy programmes 2000-06 co-financed by the ERDF (Objective 1 & 2)*, Synthesis Report, European Commission, March 2010, p. 109.

¹⁹⁸ Fondazione G Brodolini, *Evaluation of the European Social Fund’s Support to Gender Equality*, 24 January 2011, commissioned by European Commission, pp. 138-139: "In Bulgaria, as well as the Czech Republic and Estonia, ESF interventions are the main driving force for gender equality as they do not mirror similar existing national structures/processes. In Cyprus and Latvia, the gender-equality policy development and implementation is mostly fuelled and driven by the EU agenda. In Poland, much of the discussion and actions on gender equality were initiated by the projects funded within the ESF. In Slovakia, the ESF has been important to support the adoption of the national legislation especially during the present programming period, which is paving the way for gender-sensitive policy implementation. [...] In Romania, ESF is a critical funding source for gender sensitive policies as national and local authorities are mainly concerned with the implementation of traditional social welfare policies, embracing only to a limited extent a gender perspective in their policies."

¹⁹⁹ Fondazione G Brodolini, *Evaluation of the European Social Fund’s Support to Gender Equality*, *op.cit.*, note 198, *supra*, p. 142.

²⁰⁰ European Commission, *Third Report on Economic and social cohesion*, 2004, p. 132.

²⁰¹ Metis, *Ex Post Evaluation of the EQUAL Community Initiative (2000-2006)*, p.14.

²⁰² European Commission, *Fourth Cohesion Policy Report*, p.113. Such was the case of Italy, Germany, Ireland.

contribution.²⁰³ Another persisting drawback was the weak link between the ex-ante assessment and the ESI funds operations.²⁰⁴

Second, throughout the four analysed programming periods, ESI specific action interventions and equality mainstreaming were mostly limited to gender equality and were mainly attached to ESF interventions. Equal opportunities actions have been more openly accepted in human resources development, whereas in areas attracting the highest support, as ERDF financed infrastructure operations, the equality perspective was heavily opposed.²⁰⁵ The ex-post evaluation of the ERDF even expressed doubt on the feasibility and suitability of a gender mainstreaming as a horizontal principle in the existing format.²⁰⁶

Third, in terms of equality mainstreaming, the performance of the mainstreaming approach did not show satisfactory results. Even if the OPs acknowledge almost universally the importance of equal opportunities and non-discrimination principles, the acknowledgment remains often formal. Evaluations and studies undertaken at the request of European Commission relative to 1994-1999, 2000-2006 and 2007-2013 programming periods show that good progress has been made in raising awareness of principles of gender equality and non-discrimination, accessibility of persons with disabilities during funds implementation.²⁰⁷ Nevertheless, they show a mainly 'declaratory' and inconsistent conformity with the principles and lack of a systematic approach throughout the programmes' activities. The programmes incorporated mainly 'standard clauses' declaring compliance with the EU equality law.²⁰⁸ In the last 2007-2013 period only 8% of the programmes took due account of the principles during the fund's preparation, implementation, monitoring and evaluation of

²⁰³ European Court of Auditors, *Special Report concerning vocational training actions for women co-financed by the European Social Fund*, 26 January 2010, paras. 32-44.

²⁰⁴ 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Implementation of gender mainstreaming in the Structural Funds programming documents 2000-2006 COM(2002) 748 final', , 2002;

²⁰⁵ M Braithwaite, 'Mainstreaming Gender in the European Structural Funds'. Paper prepared for the Mainstreaming Gender in European Public Policy Workshop, University of Wisconsin-Madison, October 14-15 2000.

²⁰⁶ *Ex-Post Evaluation of Cohesion Policy programmes 2000-06 co-financed by the ERDF*, op.cit. note 197, *supra*: "Simply including an issue a horizontal priority, therefore, does not ensure that it actually has a significant effect on policy unless it is perceived as being important, in which case action would probably be taken irrespective of whether it is a horizontal priority or not".

²⁰⁷ European Court of Auditors, Special report No 22/98; ASBL ENGENDER, op. cit., note 154, *supra*; Public Policy and Management Institute, *Study on the Translation of Article 16 of the Regulation (EC) N 1083/2006 on the Promotion of Gender Equality; Non-discrimination and Accessibility for Disabled Persons into Cohesion Policy Programmes 2007-2013*, 2009.

²⁰⁸ J Bachtler & S Taylor, *Objective 2: Experiences, Lessons and Policy Implications*, European Policies Research Centre University of Strathclyde, 1999, p. 195.

ESI Funds actions.²⁰⁹

In the light of the above-mentioned findings we might conclude that the attainment of equal opportunities goal through the ESI Funds' interventions has been a partially won and partially lost 'battle'.

The recently enforced 2014-2020 legislative framework seems largely responsive to the above underlined challenges. First the reform put a great emphasis on clear and reliable indicators and targets to measure performance.²¹⁰ Additional accent is put on targeting the ESI Funds assistance towards the areas most in need for each Member States, as identified in the ex-ante assessment, under the supervision of the Commission. The consistency between the EU strategy on equality and non-discrimination and national priorities must be reflected in PAs and OPs, which take the form of binding agreements. As well, the principles of equal opportunities and the specific action interventions have been reinforced by the ex ante conditionalities in the area of fundamental rights (we shall develop on these in Chapter III). It remains to be seen how the new arrangements will develop within the ESI Funds operations.

2.4. Promoting equality via ESI Funds: what obligation?

In Chapter I we have seen that the ESI Funds are by nature 'dominium' measures, by which EU deploys budgetary resources in order to pursue the Cohesion policy goal of decreasing economic, social and territorial disparities within Member States and their regions.²¹¹ In contrast with the 'imperium' legislative measures, which order a conduct and secure the compliance with a sanction, the ESI Funds' 'dominium' measures are 'buying compliance' by deploying EU budget resources to attain the Cohesion policy objectives.²¹²

In pursuing the goal of dominium measures, the main concern of a government is to set adequate criteria for expenditure and appropriate tools to ensure the attainments of the proposed result.²¹³

²⁰⁹ See: Public Policy and Management Institute, *op.cit.*, note 207, *supra*, p. 4. Out of 50 OPs only 4 (8%) contained a comprehensive integration of the principles; other 22% of the OPs contained a declaratory integration.

²¹⁰ Regulation (EU) 1304/2013, Annex 1: '*All data shall be broken down by gender*'. Regulation (EU) 1303/2013, Annex II. See also: European Court of Auditors, Special Report 25/2012, '*Are tools in place to monitor the effectiveness of European Social Fund spending on older workers?*', reply of the Commission.

²¹¹ Daintith, Terence, '*The techniques of Government*' in: *Jowell and Oliver, op.cit.*, note 47, *supra*, p. 218.

²¹² *Ibidem*, p. 214.

²¹³ *Ibidem*, p. 218.

As noticed above, the ESI Funds did not limit the policy expected results at the attainment of specific action priorities as prescribed by the ESI regulatory framework. In addition to specific investment priorities (as inclusion of women, youth, persons with disabilities into labour market), we find that ESI Funds attempted – and partially managed – to attach the EU policy on gender equality, non-discrimination and disability in the form of equality mainstreaming. As a result, ESI Funds were progressively designed to act as an engine and driving force for EU equal opportunities policy, mainstreaming the latter towards all the ESI Funds related activities.

In Chapter I, we have also defined the legal obligation as a legal bond ‘*iuris vinculum*’ that binds a subject to a certain active or passive conduct usually tied to a sanction. When applied to the obligation of equality promotion in the ESI Funds operations the question that arises is: whom does the legal bond bind?

First we note that the Union and its institutions are bound by a primary treaty obligation, to aim at ‘eliminate[ing] inequalities, and to promote[ing] equality, between men and women in all its activities’ (article 8 TFEU), as well as to combat any discrimination ‘in defining and implementing its policies and activities’ (article 10 TFEU). From the point of view of the Union and its institutions the fulfilment of obligation was satisfactory. The ESI Funds legislative framework incorporated the principle of equality and non-discrimination, further mainstreaming equality through ESI Funds’ regulations. However, when we look at the picture from the point of view of the Member States the image shapes differently. These have been bound by the general principles of equality and non-discrimination as prescribed by the ESI Funds’ Regulations. Moreover, as illustrated above, Member States accepted to a little extent the equality agenda as a priority of the ESI Funds (except ESF) and largely failed to implement in a comprehensive manner the equality and non-discrimination principles in ESI Funds related interventions.

In response, the Commission did not have any ‘*imperium*’ tools to sanction Member States for failing to mainstream the equality and non-discrimination principles. As such, the Commission exercised mainly the role of what Barca called ‘moral suasion’,²¹⁴ through soft-

²¹⁴ F Barca, *An agenda for a reformed cohesion policy. A place-based approach to meeting European Union challenges and expectations*, 2009, p.50.

law instruments as guidelines,²¹⁵ methodological and technical documents on integration of equality perspective during funds' operations, communications and working papers.²¹⁶

The limitations of equality promotion and equality mainstreaming obligations in the ESI Funds operations highlight the gap in ESI Funds effort of promoting an integrated approach towards equal opportunities and their actual delivery. The challenges in implementing the related equal-opportunities obligations should be also analysed going back to structural and contextual weaknesses, as for instance: lack of institutional capacity, social context, superficial political commitment or insufficient knowledge.²¹⁷

The 2014-2020 legislative framework adds the ex ante fundamental rights conditionalities tool. In Chapter III we shall further ask to which extent the newly introduced ex-ante conditionalities in the area of fundamental rights have the potential to fill the gap and address the limitations of the previous programming periods? Or, on the contrary, how likely is it that they are downgraded to additional administrative burdens in the process of ESI Funds implementation?

²¹⁵ 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Implementation of gender mainstreaming in the Structural Funds programming documents 2000-2006' COM(2002) 748 final, 2002; 'Commission Communication concerning the Structural Funds and their coordination with the Cohesion Fund Guidelines for programmes in the period 2000 to 2006', Official Journal of the European Union C 267, 1999; 'Communication from the Commission - The structural funds and their coordination with the cohesion fund - Revised indicative guidelines', Official Journal of the European Union C, 2003.

²¹⁶ See for instance: European Commission, Technical paper 3: Mainstreaming Equal Opportunities For Women And Men In Structural Fund Programmes And Projects, March 2000.

²¹⁷ A Woodward, 'European Gender Mainstreaming: Promises and Pitfalls of Transformative Policy', in *Review of Policy Research*, vol. 20, 2003, 65–88, pp. 70–74.

SECTION 3: THE ESI FUNDS AND CONDITIONALITY - BEFORE AND AFTER 2013 REFORM

The present section analyses the use of conditionality in the ESI Funds' framework. As mentioned above, before the 2014-2020 programming period, the ex ante fundamental rights conditionalities were not present. Nevertheless, other types of conditionalities were present and had an essential role in the ESI Funds' implementation process. Thus, the aim of this section is first to depict the existing conditionality schemes prior to the 2013 reform, highlighting at the same time their development in the 2014-2020 period and their possible interlink with fundamental rights (Section 3.1.). Second, the section intends to briefly introduce the novel ex ante conditionality spectrum as regulated in the 2013 reform (Section 3.2.) setting the scene for a broader inquiry on the newly introduced ex ante fundamental rights conditionalities (Chapter III).

For the purpose of this section, the concept of conditionality shall be similar to the one defined in Chapter I of the thesis, namely: a requirement pre-established by the ESI Regulations or mutually agreed in the programming documents (the 'agreement') between the Commission and the Member States, accessory to the agreement, which must be complied with before (ex ante conditionality) or after (ex post conditionality) the conclusion of the agreement on ESI Funds' allocations, which might be subject to negative consequences in case of non-compliance (negative conditionality) or to further incentives in case of good performance (positive conditionality).

3.1. The development of conditionalities in the framework of ESI Funds: an evolutionary overview

The ESI Funds' use is highly conditional. Since 1988, conditionality within the ESI Funds has been an ever-changing policy tool. The Commission's approach to conditionality fluctuated from strong to loose rules in an attempt find the right balance between conditionality and subsidiarity.²¹⁸ The changes in the ESI Funds' conditionality architecture have been equally much influenced by the Member States' struggle to limit the Commission's discretion in the process.

²¹⁸ F Barca, *An agenda for a reformed cohesion policy*, *op.cit.*, note 214, *supra*. For an analysis of the Principle-agent theory in the Cohesion Policy, see also: J Blom-hansen, 'Principals, agents, and the implementation of EU cohesion policy', in *Journal of European Public Policy*, vol. 12, 2005, 624-648.

During the first two programming periods from 1989 to 1999, we witness a strong empowerment of the Commission - especially during the programming stage - followed by a progressive decentralisation in favour of the Member States and a shift towards a compliance-based conditionality. The, 1988 and 1993 reforms brought more robust conditionalities mainly related to programme content, evaluation, additionality and compatibility with EU priorities. Further on, during 2000-2006 and 2007-2013 programming period Member States arrogated the main responsibility for OPs strategic design and priorities.²¹⁹ The Commission's role in the Monitoring Committee was downgraded to an advisory one from the full veto-right member. As well, we notice a decline of the EU Initiatives, which were reduced in 2000-2006 to four from thirteen under the primary responsibility of Member States and ultimately suppressed in 2007-2013 period.²²⁰ The decentralisation developments were balanced by stronger supervisory role of the Commission²²¹ and strengthened conditionalities attached mainly to monitoring, audit and control procedures.²²² The 2014-2020 programming period internalised the long debate on the need for more conditionality, bringing a strong and comprehensive set of ex ante and ex post conditionalities throughout all stages of ESI Funds' implementation.²²³

Before 2014-2020 programming period, conditionalities did not refer expressly to fundamental rights, meaning that they did neither limit before the access to ESI Funds - ex ante, nor did they demand after the adoption of Operational Programmes (OPs) fulfilment of accessory specific fundamental rights criteria subject to suspension or termination of the agreement - ex post. Equally, these did not imply negative nor positive consequences for compliance or failure to comply with specific fundamental rights requirements accessory to the main obligation of implementing ESI Funds in line with the investment priorities, in the sense we have highlighted in Chapter I.

Member States and the Commission were nevertheless (and still are), as a general rule,

²¹⁹ Barca, op.cit, note 214, pp. 75–76.

²²⁰ C Mendez & GP Manzella, *The Turning Points of EU Cohesion Policy, Report, Working-Paper*, 2009, p. 26.

²²¹ See: Communication from the Commission to the European Parliament, the Council and the Court of Auditors 'An action plan to strengthen the Commission's supervisory role under shared management of structural actions', COM/2008/0097 final. Communication from the Commission to the European Parliament, the Council and the Court of Auditors 'Report on the implementation of the action plan to strengthen the Commission's supervisory role under shared management of structural actions', COM/2009/0042 final.

²²² Barca, op.cit, note 214, pp. 75-76.

²²³ Already in 2003, Sapir Report argued in favour of strong ex ante conditionality as well as for a performance based conditionality in the ESI Funds: *An agenda for a growing Europe: the Sapir report*, A Sapir (ed), Oxford, Oxford University Press, 2004, p. 179 and pp. 181-182; As well, the consultations during the negotiation of the 2013 reform stressed the problem of conditionality, see: *Hearing on Growth, Institutions and Policy - State Of The Art and Territorial Dimension*. Report Hearing Paper 1., Brussels, 1 July 2008.

held to comply with EU law on equal treatment and non-discrimination, subject to financial corrections especially during access to ESI Funds and allocation of public procurement contracts, pursuant to public procurement Directives.²²⁴ Moreover, equal opportunities were mainstreamed in the context of some conditionalities related to ex-ante evaluations, monitoring and reporting indicators and partnership principle. These indirectly supported the progress of equal opportunities goal within the ESI Funds operations as they asked for sex-segregated data²²⁵ and inclusion of private and public actors with fundamental rights remit during the implementation of ESI Funds (see Section 2.2. above).

Generally, ESI Funds conditionalities concern: additionality, thematic concentration and consistency, partnership, monitoring and evaluation, performance review, management and control (Figure II.2). These are imposed both before (ex ante) and after (ex post) the conclusion of the programming documents - the 'agreement'. Often, the same conditionality is found both, ex ante and ex post.

Ex ante conditionalities are imposed during the programming phase, when Member States have to provide ex ante strong guarantees on conditionality fulfilment, making the corresponding indications in the programming documents. Once found fulfilled, the Commission adopts the programming documents.²²⁶ After the conclusion of the 'agreement' – PA and OPs – Member States are obliged first, to fulfil the main obligation undertaken the implementation of ESI funds according to committed priorities. Additionally, they have to comply with the ex post conditionalities according to the applicable ESI Funds provisions.

²²⁴ Commission Decision of 19.12.2013 on the setting out and approval of the guidelines for determining financial corrections to be made by the Commission to expenditure financed by the Union under shared management, for non-compliance with the rules on public procurement, Annex.

²²⁵ Regulation (EC) No 1083/2006, Article 66 (2).

²²⁶ See further on the weakness of the programming documents in the 2000-2006 and 2007-2013 programming periods, in: P Casavola, *Operational Rules and Results in Cohesion Policy Programmes: Analysis and Proposals for Conditionalities*, pp. 7–10.

Figure II.2.: Conditionality in ESI Funds implementation



3.1.1. Additionality - ex ante, ex post, negative

Additionality is a founding principle of Cohesion policy. It ensures that the ESI Funds resources do not merely replace national expenditure, but bring enhanced added value. To this aim, Member States are required to secure sufficient resources necessary to co-finance ESI Funds expenditure. The conditionality corresponds both to an ex ante and ex post negative conditionality. As such, Member States have to prove first ex ante that the national funds have been secured before the approval of programming documents. The compliance is checked also ex post, during mid-term and ex post verifications. The fulfilment of conditionality ex post entitles Member States to further interim payments and final balance. Since 2007-2013 period, the conditionality became also negative, as the Commission has been entitled to apply corrections when sufficient resources have not been secured under the convergence objective.²²⁷ In the current 2014-2020 period, the ex post corrections have been extended to three ESI Funds – ERDF, ESF, Cohesion Fund - except the territorial cooperation goal.²²⁸

3.1.2. Thematic concentration and consistency - ex ante

The thematic concentration and consistency requirement conditions ex ante the adoption of the programming documents.

Accordingly, when designing the investment priorities, Member States are required to concentrate the ESI Funds' support to the areas that ensure most added-value. In the 2014-2020 period, OPs have to feed into eleven general thematic objectives set under the Common Provisions Regulation (the 'CPR') and the subsequent investment priorities identified by the each fund-specific ESI Regulation.

Equally, ESI Funds' operations must prove consistency with relevant EU policies and create synergies with other relevant EU Instruments and national actions, especially by integrating the principles of equality, non-discrimination and sustainable development. In 2014-2020 consistency requires Member States to show ex ante in the programming documents (especially in PAs) the way they plan to implement the Common Strategic Framework of the ESI Funds, as well as the overall EU strategy for growth and jobs.

²²⁷ Regulation (EC) 1083/2006, Article 15.

²²⁸ Regulation (EU) 1303/2013, CPR, Article 95(5), Annex X.

3.1.3. Partnership - ex ante

The principle of partnership ensures that the most representative actors at the national, regional or local level have been involved in the design and implementation of the ESI Funds assistance. These actors include bodies and actors responsible for the promotion of equality, non-discrimination and social inclusion. The conditionality is checked ex ante and conditions the approval of the programming documents.²²⁹ In 2014, a European Code on partnership guides further the Member States to indicate the list, role, actions and results of the consultation with partners in the programming documents.²³⁰ Information on consultation of relevant partners is required in particular concerning the implementation of the horizontal principles of equality and non-discrimination. The code further sets as a good practice the involvement of partners during monitoring, evaluation and progress of OPs.²³¹

3.1.4. Macroeconomic conditionality - ex post, negative

Since 1994, the Cohesion Fund enforced the macroeconomic conditionality, allowing for suspension of payments in case of excessive deficit level.²³² The 2014-2020 programming period enlarged the scope of the macroeconomic conditionality to all ESI Funds when the economic disbalances of a Member State would jeopardise the impact of ESI Funds' assistance.²³³ The imperative of sound economic governance allows the Commission to request the amendment of the adopted PA and OPs in line with the Council recommendations adopted pursuant to article 148(4) TFEU. In case of non-compliance, the Commission may propose the Council to suspend all or part of the ESI Funds' commitments or payments.²³⁴

3.1.5. Monitoring and Evaluation - ex ante, ex post, negative, positive

Monitoring - ex post, negative. The ESI Funds' implementation is conditioned on the existence of sound monitoring arrangements. First, the ESI Funds' operations are supervised

²²⁹ Regulation (EU) 1303/2013, CPR, Article 5.

²³⁰ Commission Delegated Regulation (EU) No 240/2014 of 7 January 2014 on the European code of conduct on partnership in the framework of the European Structural and Investment Funds, OJ L 74/2 of 14.02.2014.

²³¹ *Ibidem*.

²³² Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund, OJ L 130 of 25.05.1994, Article 6. The Council Implementing Decision 2012/156/EU suspended for the first time since the establishment of the European Cohesion Fund in 1994 the financial commitments for Hungary, which failed to redress the excessive deficit. The suspension was shortly lifted due to satisfactory guarantee of deficit level adjustment.

²³³ The conditionality was initially proposed as an ex ante conditionality, but was amended to an ex post conditionality due to the strong opposition of the EU legislators. See further on macroeconomic conditionality: Egmont, *European Economic Governance and Cohesion Policy*, European Parliament, Information note 474.552, p. 42.

²³⁴ Regulation (EU) 1303/2013, CPR, Chapter IV, Article 23.

by the monitoring committee, which must be put in place by the Member States for each or all OPs. The Commission further supervises the performance of the OPs on an annual basis, through the annual implementation reports. In 2014-2020 period, the conditionality is also negative. As such, in case of the ‘serious deficiency’ in the monitoring system, the Commission may suspend the interim payments. As well, after the adoption of the programming documents the Commission may suspend the interim payments if it finds ‘serious deficiency’ in the quality and reliability of the data on common and specific indicators in the annual implementation reports. In 2014-2020 period all data on indicators included in the annual implementation reports on ESF operations must be broken down by gender.²³⁵

With the view to increase the democratic accountability of the policy, Member States are required additionally to submit a progress report at three-yearly intervals, describing the achievements of all programmes. The Commission summarises the progress reports in a strategic report submitted to the debate of the Council, Parliament and the European Economic and Social Committee.²³⁶

Evaluation - ex ante, negative. Impact evaluations are carried out by independent experts ex ante, during the implementation and ex post. These assess the effectiveness, efficiency and overall impact of the ESI Funds assistance also testing its coherence and consistency with ESI Funds’ tasks and overall EU strategy. Programming documents shall be approved by the Commission only if they address to a sufficient extent the challenges identified in the ex ante evaluation,²³⁷ thus corresponding to an ex ante conditionality. The on-going and ex-post evaluations do not behave as conditionalities but rather as assessment exercises meant to detect the good practices and challenges, informing the Commission on the strategic direction of the following programming period.

3.1.6. Performance review - ex post, positive, negative.

A positive ex post conditionality in the form of ‘national performance reserve’ has been further introduced, starting with 2000-2006 programming period. The tool was left at the

²³⁵ Regulation (EU) No 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006, OJ L347/470 of 20.12.2012, Annex II.

²³⁶ In 2014-2020, the Strategic reports shall be submitted in 2017 and 2019. Regulation (EU) 1303/2013, CPR, Chapter IV, Article 53.

²³⁷ Regulation (EU) 1303/2013, Article 15(1), a) ii and Article 16 (1).

discretion of the Member States and randomly used.²³⁸ In 2014-2020 programming period, the ‘performance reserve’ commitment was doubled to 6% from 3% and its allocation shifted from national to EU level, under the responsibility of the Commission, which shall award at the end of the programming period (in 2019) the reserve to the programmes and priorities that have successfully reached the priorities and milestones. The performance review may attract negative consequences in case of ‘serious failure’ to attain the milestones due to the implementation weaknesses.²³⁹ The scheme reminds us to a certain extent the ex-post selectivity conditionality scheme of EU as employed in the external policy. However, here it does not condition the conclusion of the further agreement but entails the Member State to further incentives. The outcome-based conditionality was proposed during debates on the 2013 reform, however the proposal did not make it in the final ESI Regulations.²⁴⁰

3.1.7. Management and control - ex ante, ex post, negative ²⁴¹

Before the conclusion of the programming documents, Member States have to show ex ante sufficient institutional arrangements of the management, certifying and audit authorities, in line with the pre-established criteria of the ESI Regulations and Commission’s implementing acts. After the conclusion of the programming documents, Member States have to observe the conditionalities attached to sound financial management and control. These include audits carried out by independent auditors, annual implementing reports and a final implementing report. The procedure is structured in a three-layered system. According to the principle of shared management it is first the responsibility of the Member States to ensure sound ESI Funds’ expenditure. The Commission checks at least once a year the correctness of the payments and may suspend the interim payments or apply corrections in case of ‘significant deficiencies’. Ultimately the Court of Auditors reviews the sound implementation of the ESI Funds in its annual reports. The conditionality is negative, as the Commission would refuse the release of the first interim payment until Member States prove that the designated managing and certifying authorities fulfil the criteria established by the ESI Regulations. Moreover, the release of the next interim payments is conditional upon the submission of the annual implementing reports.²⁴² In the 2014-2020 period, the conditionality has maintained

²³⁸ F Barca, *An agenda for a reformed cohesion policy*, *op.cit.*, note 214, *supra*, p.75.

²³⁹ Regulation (EU) 1303/2013, CPR, Article 21, 22, Annex II.

²⁴⁰ Barca, *op.cit.*, note 214, *supra*, p.105.

²⁴¹ Regulation (EU) 1303/2013, CPR, Article 21, 22, Annex XIII.

²⁴² Regulation (EU) 1303/2013, CPR, Article 135, paras. 3-4. The scheme of the conditionality is similar to the one in 2007-2013 period.

similar features.

3.2. Short assessment of existing conditionalities and the introduction of 2014-2020 ex ante conditionalities

Throughout the last programming periods, the lack of clear tangible objectives, broad targets and vagueness with regards to the expected results were generally seen as the main drawbacks in the ESI Funds' conditionality.²⁴³ Based on the analysis of ESI Funds framework from 1988 to 2009, Barca argues that conditionalities were generally perceived by the Member States as a mere "compliance exercise"; these "were often turned into 'homogeneous prescriptions' liable to be bypassed or downplayed".²⁴⁴ Furthermore, the balance between conditionality and subsidiarity was found unsatisfactory.²⁴⁵ The suspension and corrections were enforced in case of 'serious deficiencies', 'significant deficiencies', 'serious failure', 'serious breaches or irregularities'.²⁴⁶ It was further argued that due to the exceptional nature of the sanctions, the burdensome procedure and the lack of discretionary power, the Commission rather exercised 'moral suasion' than enforcement power.²⁴⁷ The concerns stirred a vast debate on the need for more robust conditionality and for stronger contractual commitments, which was largely reflected in the final outcome of the 2013 reform. First, as seen above, the already existing conditionalities have been reinforced and shifted progressively into the sphere of Commission discretion.²⁴⁸ In 2014-2020 period, the programming documents have a more evidenced character of binding obligation as both – PAs and OPs – have been designed as binding agreements adopted by means of implementing act decision. A general concern towards a preventive rather than reactive approach to ESI Funds delivery is noticed. In addition to the highlighted reforms, a new heavy wave of ex ante conditionalities made their way into the ESI Funds' scheme.²⁴⁹

²⁴³ P Casavola, *Operational Rules and Results in Cohesion Policy Programmes: Analysis and Proposals for Conditionalities*, p. 27.

²⁴⁴ F Barca, *op.cit.*, note 214, *supra*; for an economic perspective see also: J Blom-hansen, 'Principals, agents, and the implementation of EU cohesion policy', in *Journal of European Public Policy*, vol. 12, 2005, 624–648. Blom-Hansen argues that the loose tools at the disposal of the Commission allow the member states a large margin of maneuver to ignore the objective set, and thus by-pass the principle of additionality. He argues in favour of ex-ante contractual arrangements and a stronger accountability of the member states.

²⁴⁵ Barca, *op.cit.*, note 214, *supra*, p. 95.

²⁴⁶ *Ibidem*, p. 75.

²⁴⁷ *Ibidem*.

²⁴⁸ Fifth Report on Economic, Social and Territorial Cohesion, 9 November 2010.

²⁴⁹ Regulation (EU) No 1303/2013, CPR, Annex XI.

The ex ante conditionalities 2014-2020 – ex ante, negative

Forty-seven²⁵⁰ ex ante conditionalities have been introduced by the ESI Funds regulations, representing one of the ‘major hallmarks’ of the 2013 reform.²⁵¹ They aim at bringing higher effectiveness and efficiency to the ESI Funds investment ensuring that the right pre-requisites are in place before the ESI Funds are disbursed. The ex ante conditionalities prescribe for already existing commitments of the Member States, appreciated as crucial for the efficient ESI Funds delivery. The ex ante conditionalities are classified in: general and thematic and are clustered around three core targets: 1) effective application of EU regulatory framework, 2) administrative/institutional capacity building, 3) EU policy/strategy objectives.

The general ex ante conditionalities apply in principle to all five 2014-2020 ESI Funds. In addition to the general ex ante conditionalities, thematic conditionalities apply to each fund according to the fund-specific provisions, being attached to thematic objectives and investment priorities. The conditionalities cover a wide range of EU action areas appreciated as crucial for the efficient absorption of the ESI Funds. They address, inter alia, institutional capacity of public administrations, R&D, ICT, competitiveness of small and medium enterprises (SMEs), transport and infrastructure, water and waste management, low carbon economy, resource efficiency, state aid, public procurement, statistical and indicators systems.²⁵²

The ESI Funds ex ante conditionalities address also fundamental rights areas. The thematic conditionalities, even though more indirectly, also touch upon important fundamental rights considerations, in the area of: social rights, inclusion of marginalised communities - such as Roma, poverty reduction, environmental protection, education and health.²⁵³ Three general ex ante fundamental rights conditionalities, in the area of: non-discrimination, gender equality and disability are introduced (Chapter III, below).

²⁵⁰ Regulation (EC) No 1303/2013, Annex XI, includes *thirty six conditionalities*, out of which *seven* general and *twenty nine* thematic. The twenty-nine thematic conditionalities apply to ERDF, ESF and Cohesion Fund. Additionally, EAFRD provides for *seven* thematic conditionalities, see: Regulation (EU) No 1305/2013, Article 9, Annex V and EMFF Regulation (EU) 508/2014 introduces other *four* fund-specific conditionalities.

²⁵¹ COM (2011) 615 final/2, Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the ERDF, the ESF, the Cohesion Fund, the EAFRD and the EMFF and repealing Regulation 1083/2006.

²⁵² Regulation (EU) No 1303/2013, CPR, Annex XI, part I and II.

²⁵³ *Ibidem*.

INTERIM CONCLUSIONS

This Chapter aimed to provide a retrospective analysis of the ESI Funds legislative frameworks as of 1988 reform with respect to fundamental rights and conditionality concepts.

We did that first, by analysing the evolution of fundamental rights specific action and equality mainstreaming and second, the conditionality attached to ESI Funds' operations.

The analysis has revealed the following findings:

ESI Funds' specific actions have generally contributed positively to the EU policy goal of promoting equal opportunities and combating discrimination. The impact is rather qualitative than quantitative as the ESI Funds' financial allocations are very limited in comparison to the national budgets of the Member States. Generally ESI Funds' equality-related obligations complemented, reinforced or encouraged national policies on equal opportunities. In some cases, ESI Funds contribution to the equal opportunity goal constituted the only financial resource supporting the equality-related actions, as a national budget line was missing. Even if the equality related operations were increasingly complemented from ERDF resources, these remained substantively linked to ESF.

The legislative frameworks, as well as the programming documents, have been progressively more open to equality mainstreaming perspective. The programming period 2007-2013 reveals an almost universal acknowledgment of the importance of the principles of equality and non-discrimination in ESF programming documents. However, a general tendency to a formal acknowledgment and lack of a comprehensive equality mainstreaming approach of the equality and non-discrimination principles is characteristic for the majority of the ESI-funded actions. Also, the strong emphasis on equality mainstreaming led to a significant decrease of spending for specific action interventions, without increasing accordingly the spending for mainstreaming.

Conditionalities, before 2013 reform, were not specifically affected to any area of fundamental rights, but had as a primary aim to secure the ESI Funds sound operation. However, the equality perspective was mainstreamed in the context of several conditionalities related to ex-ante evaluations, monitoring and partnership principle, contributing indirectly to the delivery of equal opportunities goal.

CHAPTER III. THE ESI FUNDS FUNDAMENTAL RIGHTS CONDITIONALITIES

The third Chapter is the denouement of the present thesis. It first aims to respond to the long-expected question: what are fundamental right conditionalities as introduced in 2014-2020 ESI Funds? How are they different from prior arrangements? and, most importantly: what do they bring to the social inclusion and equal opportunities goal of the ESI Funds and more broadly to the EU goal of promoting equality and combating status discrimination?

Three explicit ex ante conditionalities in the area of fundamental rights have been introduced in the 2013 ESI Funds' reform package in the area of non-discrimination, gender equality and disability (the 'ESI fundamental rights conditionalities' or 'ex ante fundamental rights conditionalities').²⁵⁴ The ESI fundamental rights conditionalities are general, meaning that in principle they shall apply to all five ESI Funds and equally to all twenty-eight EU Member States.

As already mentioned in Chapter II, based on the criteria to be fulfilled, all forty-seven ESI Funds ex ante conditionalities are clustered around three main areas: 1) sound implementation and application of EU regulatory framework; 2) institutional or administrative capacity; 3) implementation of EU policies and strategies.²⁵⁵ ESI fundamental rights conditionalities address mainly the first two groups. These aim at securing a sound EU regulatory framework and administrative capacity.

Building on the previous findings, the present Chapter aims to introduce in detail the ESI fundamental rights conditionalities. It elaborates on their scope and nature; their specificity and reach compared to the existing EU conditionality policy arrangements. Finally, several concluding thoughts on ESI fundamental rights conditionalities' potential shall be briefly discussed.

To this aim, the Chapter first presents the scope of conditionalities as regulated by the ESI Funds 2014-2020 legislative framework, their applicability, criteria for fulfilment, as well as the suspension procedure (Section 1). Onwards the nature of ESI fundamental rights conditionalities is examined in the light of the conceptual toolkit presented in the first Chapter of the thesis (Section 2). The third section tests the novelty of ESI fundamental rights

²⁵⁴ In this Chapter, the term 'ex ante conditionalities' shall refer to all forty-seven ESI Funds ex ante conditionalities, including the three fundamental rights conditionalities in the area of anti-discrimination, gender equality and disability. The term 'ESI fundamental rights conditionalities' shall refer exclusively to the three general ex ante conditionalities in the area of anti-discrimination, gender equality and disability.

²⁵⁵ European Commission, Guidance on Ex Ante Conditionalities for the European Structural and Investment Funds, Part I, Draft, 13 February 2014, p.4.

conditionalities by comparing them to the existing conditionality arrangements of EU external and internal policy (Section 3.1.) as well as with the previous arrangements of ESI Funds frameworks (Section 3.2.). Finally, the Chapter intends to briefly question the potential and limits of the ESI fundamental rights conditionalities: primary, in the context of ESI Funds equal opportunities action; and, in subsidiary, in the broader context of EU law on equality and non-discrimination (Section 4).

SECTION 1. ESI FUNDS FUNDAMENTAL RIGHTS CONDITIONALITIES – WHAT SCOPE?

The three general ESI fundamental rights conditionalities had a hard journey in the 2014-2020 ESI Funds framework. These have been the object of tight disputes as to their appropriateness and necessity in the ESI Funds' context. First ESI fundamental rights conditionalities have been completely set-aside during the Danish presidency negotiations.²⁵⁶ Later on these have been re-inserted under the Lithuanian presidency compromise on ex ante conditionalities,²⁵⁷ substantially changed compared to the initial Commission's proposal.²⁵⁸

In the aftermath of long negotiations, Member States accepted ex ante conditionalities, however established a clear and well-delimited scope for their applicability and for Commission's discretion in the process.²⁵⁹ First, the 2013 Common Provisions Regulation (the 'CPR') introduces a stand-alone definition on applicable ex ante conditionalities.²⁶⁰ Second, a detailed procedure as to Commission's role in the assessment on the fulfilment and suspension of ESI Funds has been put in place.²⁶¹ Third, specific guidance have been drafted (the 'Commission Guidance') to help Member States with the correct identification of applicable conditionalities and assessment of compliance, further developing the provisions of the regulations.²⁶²

Analysing the outcome of negotiations, one cannot but notice how the apparent extensive scope of the ESI Fundamental conditionalities announced in the 2014-2020 ESI Funds proposals has been counter-balanced by the introduced applicability test. As such, the ESI Fundamental rights conditionalities shall apply only subject to multiple applicability benchmarks, given that they prove a sizeable impact on the ESI Funds' operation.

The result is much of a paradox: conditionality conditions Member States, but, at the same time, Member States have conditioned conditionality itself.

²⁵⁶ Council of the European Union, 'Cohesion Policy Legislative Package. Presidency compromise on ex ante conditionalities, no 12543/2/11 REV 2, 2012, Annex IV, p. 20.

²⁵⁷ Council of the European Union, 'Cohesion Policy Legislative Package. Presidency compromise on ex ante conditionalities', no 12383/13 ADD 2, 22.07.2013.

²⁵⁸ See: COM (2011) 615 final/2, Annex IV.

²⁵⁹ The thematic ex ante conditionalities have been as well subject to substantive changes. These have been expressly attached to specific thematic objectives and investment priorities corresponding to the relevant ESI Funds, see: Regulation (EU) 1303/2013, CPR, Annex XI, Part I.

²⁶⁰ Regulation (EU) 1303/2013, CPR, Article 2(1), point (33).

²⁶¹ Regulation (EU) 1303/2013, CPR, Article 19.

²⁶² European Commission, Guidance on Ex Ante Conditionalities for the European Structural and Investment Funds, Part I and Part II, Draft, 13 February 2014, available at: http://ec.europa.eu/regional_policy/information/guidelines/index_en.cfm#2, consulted on 01.06.2014.

1.1. Applicable ex ante conditionality - a first definition

For the first time, the 2014-2020 ESI Funds framework brings an *expressis verbis* definition of ‘applicable ex ante conditionality’, which applies equally to the ESI fundamental rights conditionalities. The definition is a novelty not only for the ESI Funds, but also for the overall EU conditionality policy. It does not define the concept of conditionality *per se*, but illustrates key features, which constitute applicability benchmarks and help us subsequently deduce the defining elements of ex ante conditionalities, in general and ESI fundamental rights conditionality, in particular.

The primary effect of the definition is that it limits the *ex officio* application of ESI fundamental rights conditionalities. This means that, in principle, any of the three fundamental rights conditionalities has the vocation to potentially apply, however, the actual applicability is decided in *concreto* on a case-by-case basis by Member States in close consultation with the Commission.

As such, Article 2 CPR, defines the ‘applicable ex ante conditionality’ as:

“a concrete and precisely pre-defined critical factor, which is a prerequisite for and has a direct and genuine link to, and direct impact on, the effective and efficient achievement of a specific objective for an investment priority or a Union priority.²⁶³

We shall onwards unfold the given definition and read it alongside the overall CPR normative framework and Commission’s Guidance to better delimit the scope and features of fundamental rights conditionalities in the context of ESI Funds’ scheme.

1.1.1. Applicability test

The introduced applicability test described below corrects the claimed extensive application of the ESI fundamental rights conditionalities and limits their scope to the areas where a substantive direct link and a direct positive impact on the financial allocation can be proven. The practical outcome is that the ESI fundamental rights conditionalities are more likely to be found applicable primarily in the areas of ESF operations rather than in interventions budgeted from other ESI Funds, continuing the trend of the previous programming periods.

According to the definition, for an actual application of any ex ante conditionality, including the ESI fundamental rights conditionalities, two consecutive applicability steps must be met.

²⁶³ Regulation 1303/2013, CPR, Article 2 (33).

i. Concrete and precisely pre-defined factor

Initially, it must be shown that conditionality is a: concrete and precisely pre-defined critical factor. This first step is substantially eased by the CPR, which has already undertaken this assessment and pre-identified in an express and precise manner the conditionalities of potential critical importance for ESI Funds.²⁶⁴ It follows that, even if other critical factors are identified at a later stage, these shall not be compulsory on the Member States unless the regulation is amended. The EU legislator is presumed to have taken a proper assessment of what are the critical factors necessary for ESI Funds successful implementation. One should note nevertheless that Member States could additionally identify further critical factors in their state-specific programming documents, however the Commission shall not require it.²⁶⁵

ii. A pre-requisite for, a direct and genuine link to, a direct impact on the effectiveness and efficiency of the ESI Funds specific objective

Secondly, once identified, such a concrete and precisely pre-defined factor should:

- constitute a pre-requisite for, and
- have a direct and genuine link to, and,
- have a direct impact on,

the effective and efficient achievement of a given specific objective for an investment priority in case of the ERDF, ESF and Cohesion Fund or a given specific objective for a Union priority, in case of the EMFF and EAFRD.

For the purpose of the ESI Funds framework, the ‘specific objective’ is defined as: “the result to which an investment priority or Union priority contributes in a specific national or regional context through actions or measures undertaken within such a priority”.²⁶⁶

In other words, the conditionality must constitute a decisive factor for the successful attainment of the result aimed by a given fund-specific investment priority or Union priority.²⁶⁷

Hence, the second step implies three additional applicability requirements. These constitute the core of ex ante conditionality applicability analysis. One should stress that the

²⁶⁴ Regulation 1303/2013, CPR, Annex XI.

²⁶⁵ Declaration of the Commission, European Parliament debates on EMFF, file 2011/0380(COD), 16 April 2014, Strasbourg.

²⁶⁶ Regulation 1303/2013, CPR Article 2, point (33).

²⁶⁷ For an overview of investment and Union priorities see Regulation (EU) No 1303/2013, CPR, Article 9, detailed in the corresponding fund-specific regulations.

conjunction ‘and’ suggests that all the above-mentioned requirements have to be met cumulatively not alternatively.

First, it must be shown that the ex ante conditionality is a prerequisite. In other words, the conditionality must be a ‘sine qua non’ factor, conditional for the effectiveness and efficiency of the ESI Funds investment. If one adopts a per a contrario reasoning, it follows that that absence the ‘concrete and precisely pre-defined critical factor’ the achievement of a specific objective shall be neither effective nor efficient, or at least one of the two results shall be seriously impaired.

Second, a direct and genuine link - must be established between the fulfilment of the ex ante conditionality and the effectiveness and efficiency of the specific objective. The direct and genuine link suggests that an immediate, clear and close link must be identifiable between the non-fulfilment or fulfilment of conditionality, on the one hand, and the efficiency and effectiveness of ESI Funds’ operations, one the other hand.

Finally, the failure to fulfil the conditionality should have a direct impact on both, the effectiveness and efficiency of a specific objective. Thus, it must be also shown that the non-fulfilment of the ex ante conditionality could impact on the effectiveness of the ESI Funds specific objective, which translates in an actual or potential risk of not achieving the result of an investment objective. At the same time, it must be proven that the non-fulfilment could impair the efficiency of investments, which translates in higher material, administrative or management costs, implementation delays or other related costs.²⁶⁸

The Commission’s Guidance recommends Member States to start the applicability assessment with the third requirement, namely the existence of a direct impact on the effective and efficient attainment of an investment priority. If no such impact is identified the conditionality should be deemed non-applicable.²⁶⁹

²⁶⁸Comission Guidance, Part I, *op.cit.*, note 262, *supra*, p. 9.

²⁶⁹*Ibidem*.

Table III.1: Applicability assessment of ESI Funds fundamental rights conditionalities²⁷⁰

Area	Ex ante Conditionality	Applicability key-questions
1. Anti discrimination	The existence of administrative capacity for the implementation and application of Union anti-discrimination law and policy in the field of ESI Funds	<ul style="list-style-type: none"> - Do the anti-discrimination directives constitute applicable Union law for the interventions which will be supported under the relevant priority of a programme co-financed by the ESI Funds? - Does the achievement of the specific objective require the effective implementation and application of anti-discrimination directives? - Is there a link between the effective implementation and application of anti-discrimination directives and the achievement of the specific objective? - Will ineffective implementation and application of anti-discrimination directives lead to a potential risk of not achieving results (effectiveness) or high costs/administrative burden/delays to implementation (efficiency)?
2. Gender Equality	The existence of administrative capacity for the implementation and application of Union gender equality law and policy in the field of ESI Funds	<p>In order to achieve the specific objectives for all or part of the investment or Union priority:</p> <ul style="list-style-type: none"> - Does the achievement of the specific objective require the effective implementation of Union gender equality law? - Is there a link between the effective implementation of EU gender equality law and policy and the achievement of the specific objectives? - Will ineffective implementation of gender equality law and policy lead to a potential risk of not achieving results (effectiveness) or high costs/administrative burden/delays to implementation (efficiency)? Examples: risk of non-achievement for certain target groups.
3. Disability	The existence of administrative capacity for the implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCRPD) in the field of ESI Funds in accordance with Council Decision 2010/48/EC	<ul style="list-style-type: none"> - Does the UN Convention constitute applicable Union law for the interventions to be supported under the relevant priority of a programme co-financed by the ESI Funds? - Does the achievement of the specific objective require the effective implementation and application of the UN Convention on the rights of persons with disability? - Is there a link between the effective implementation and application of the UN Convention and achievement of the specific objective? - Will ineffective implementation and application of the UN Convention lead to a potential risk of not achieving results (effectiveness) or high costs/administrative burden/delays to implementation (efficiency)?

²⁷⁰ As set in Commission Guidance, Part I, *op. cit.*, note 259, *supra*, pp.11-12.

iii. Applicability key-questions

Coming back to the specific case of ESI fundamental rights conditionalities, the Commission Guidance proposes several ‘operational’ key-questions to the attention of the Member States during the applicability assessment exercise (Table III.1, above).

These suggest another starting point than the ‘direct impact’ one. As such, Member States are guided to appreciate firstly whether the EU law in the area of non-discrimination, gender equality and disability constitutes applicable law in the ESI Funds operations and subsequently, whether a weak EU law implementation would result in a risk to the ESI Funds investment, in particular where EU law rules are part of the selection criteria.²⁷¹

Whereas the first recommendation can easily be fulfilled, as one could hardly think about an ESI Funds’ intervention where the EU equality law would not apply; with regards to the second, one could nevertheless argue that, for instance, the non-observance of anti-discrimination ex ante conditionality, under the waste management objective, would not lead to an inefficient and ineffective achievement of the objective’s results.

Several remarks have to be made vis-à-vis the Commission’s proposed applicability questions.

First, the given questions depart from the CPR legislative text and the ex ante conditionalities prescribed therein. As shown in Table III.1 above, in the area of non-discrimination ex ante conditionality, the applicability exercise limits the criteria from the requirement of sound implementation and application of ‘Union anti-discrimination law and policy’ to the ‘effective implementation and application of anti-discrimination directives’.²⁷² In such a way, the scope of EU law and policy in anti-discrimination area is de facto reduced to anti-discrimination directives.²⁷³ In case of gender equality ex ante conditionality, the CPR provisions require Member States to prove sound ‘implementation and application’ of ‘EU law and policy’. According to the questions, the applicability is checked solely against the ‘effective implementation of EU gender equality law’,²⁷⁴ setting aside the EU soft law and policy instruments in the area. As well, one cannot objectively justify the asymmetries

²⁷¹ Commission Guidance, Part I, *op.cit.*, note 259, *supra*, p. 10-13.

²⁷² *Ibidem*, p. 11.

²⁷³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000.

²⁷⁴ Commission Guidance, Part I, *op.cit.*, note 259, *supra*, p. 11.

between the anti-discrimination and gender equality fundamental rights conditionalities. They both ask cumulatively for efficient implementation and application of EU law and policy in the area. Departing from the legislative text, the guiding applicability questions check in the case of gender equality only the implementation and not the application of EU law in the area.

Second, a close reading of the above questions raises a degree of concern. These ask: ‘Does the achievement of the specific objective require the effective implementation and application of anti-discrimination directives?’ or ‘[w]ill ineffective implementation of gender equality law and policy lead to a potential risk of not achieving results[?] [...]’. In a per a contrario reading, they seem to admit that if no risk on the ESI Funds investment is identified, the effective implementation and application of EU law is not necessary. Maybe from an ‘operational’ point of view the questions are well framed, however, from the point of view of their conceptual implications a more cautious formulation could be considered.

1.1.2. Proportionality test

The applicability-test described above has to be read alongside other provisions of the CPR. In this sense, CPR states that the applicability assessment of all ex ante conditionalities shall take into account also the principle of proportionality.²⁷⁵ As a consequence, where an ESI fundamental rights conditionality is found applicable, a subsequent proportionality test shall be undertaken, with due consideration, to ‘the level of allocated support’ and the ‘overall aim of reducing the administrative burden on the management and control bodies’, where appropriate.²⁷⁶

The Commission’s Guidance interprets proportionality requirement in the sense that if a ‘relatively small direct impact’ can be proven on the effectiveness and efficiency of one of the ESI Funds’ specific objectives, the ex ante conditionality shall not apply.²⁷⁷ This means that the ‘direct and genuine impact’ requirement presented above (Section 1.1.1.) must also be a considerable one. If a ‘relatively small’ impact is anticipated the conditionality shall be found disproportionate, thus not applicable.²⁷⁸

As to the level of assistance, the Commission Guidance admits that the level of support shall be taken into account; however, a low level of support does not attract

²⁷⁵ Regulation 1303/2013, CPR, recital 21, Article 19.

²⁷⁶ Regulation 1303/2013, CPR, Articles 19 (3) and 4(5).

²⁷⁷ Commission Guidance, Part I, *op.cit.*, note 262, *supra*, p.8.

²⁷⁸ Commission Guidance Part I, *op.cit.*, note 262, *supra*, p.28.

automatically the disapplication of conditionality. It is further stressed that the nature of the assistance shall still constitute the primary reference in the proportionality assessment.²⁷⁹

We consider the above interpretation too straightforward. Once an ex ante conditionality is found capable of positive impact, not only the level and nature of assistance, but equally the actual actions needed to fulfil the conditionality should be taken into account. Only if these are found disproportionate should the level of assistance also be called into question. That is to say that, once a genuine link is established, even if the ESI Funds resources granted are limited, it should be checked if de facto the ex ante conditionalities' fulfilment calls for financially or administrative burdensome actions, as these may well call for rationalization of the existing resources, with no need for further financial intervention.

²⁷⁹ *Ibidem*, p.9.

Table III. 2: Fulfilment assessment of ESI Funds fundamental rights ex ante conditionalities.²⁸⁰

Area	Ex ante Conditionality	Criteria for fulfilment	Fulfilment assessment grid ²⁸¹
1. Anti-discrimination	The existence of administrative capacity for the implementation and application of Union anti-discrimination law and policy in the field of ESI Funds	<ul style="list-style-type: none"> - Arrangements in accordance with the institutional and legal framework of Member States for the involvement of bodies responsible for the promotion of equal treatment of all persons throughout the preparation and implementation of programmes, including the provision of advice on equality in ESI fund-related activities - Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of Union anti-discrimination law and policy 	<ul style="list-style-type: none"> - A national equality body under Article 13 of Directive 2000/43/EC has been set up - A plan has been elaborated to consult with and involve bodies in charge of anti-discrimination - The plan indicates steps taken to facilitate active involvement of the national equality body. - There is a plan for training in particular on Union anti-discrimination law and policy - The plan covers all staff involved in the implementation of the ESI Funds (managing authorities, intermediate bodies, certifying authorities and audit authorities) at all relevant levels.
2. Gender Equality	The existence of administrative capacity for the implementation and application of Union gender equality law and policy in the field of ESI Funds	<ul style="list-style-type: none"> - Arrangements in accordance with the institutional and legal framework of Member States for the involvement of bodies responsible for gender equality throughout the preparation and implementation of programmes, including the provision of advice on gender equality in ESI Fund-related activities - Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of Union gender equality law and policy as well as on gender mainstreaming 	<ul style="list-style-type: none"> - A national equality body under Article 20 of Directive 2006/54/EC has been set up. - A plan has been elaborated to consult with and involve bodies in charge of the promotion of gender equality. - The plan indicates steps taken to facilitate active involvement of the national equality body. - There is a plan for training in particular on Union gender equality law and policy as well as on gender mainstreaming. - The plan covers all staff involved in the implementation of the ESI Funds (managing authorities, intermediate bodies, certifying authorities and audit authorities) at all relevant levels.
3. Disability	The existence of administrative capacity for the implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCRPD) in the field of ESI Funds in accordance with Council Decision 2010/48/EC	<ul style="list-style-type: none"> - Arrangements in accordance with the institutional and legal framework of Member States for the consultation and involvement of bodies in charge of protection of rights of persons with disabilities or representative organisations of persons with disabilities and other relevant stakeholders throughout the preparation and implementation of programmes - Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of applicable Union and national disability law and policy, including accessibility and the practical application of the UNCRPD as reflected in Union and national legislation, as appropriate - Arrangements to ensure monitoring of the implementation of Article 9 of the UNCRPD in relation to the ESI Funds throughout the preparation and the implementation of the programmes 	<ul style="list-style-type: none"> - A plan has been elaborated to consult with and involve bodies in charge of protection of rights of persons with disabilities, such as independent monitoring mechanisms established under Art. 33(2) of the UN CRPD or relevant civil society representatives, in particular representative organisations of persons with disabilities, in the ESI Funds cycle; - The plan identifies the actors to be involved and their role; - The plan indicates steps taken to facilitate active involvement of these actors and participation, including in terms of accessibility measures. - There is a plan for training in particular on accessibility, equality and non-discrimination of persons with disabilities; - The plan covers all staff involved in the implementation of the ESI Funds (managing authorities, intermediate bodies, certifying authorities and audit authorities) at all relevant levels. - Monitoring mechanisms are in place to ensure notification and resolution of problems as well as, redress and enforcement mechanisms in relation to accessibility for persons with disabilities in interventions co-funded by ESI Funds; - In the area of the planned interventions, where appropriate, these arrangements address accessibility of the built environment, transport, information and communication, including new technologies, as well as services open or provided to the public. - Monitoring arrangements include clear technical guidance documents which refer to applicable Union and national rules and standards, in order to ensure consistent and objective assessment of accessibility.

²⁸⁰ Source: Regulation (EU) 1303/2013, CPR, Annex XI, Part II.

²⁸¹ Commission Guidance, Part II, *op.cit.*, note 262, *supra*, pp. 337-356.

1.2. Criteria

Once found applicable and proportionate, the assessment of compliance shall be expressly limited to the fulfilment of specific criteria exhaustively laid down in the Annex XI, Part II of the CPR (Table III.2, above).

As already mentioned, ESI fundamental rights conditionalities aim at ensuring the existence of ‘administrative capacity’ to effectively implement and apply the EU law and policy in the area of non-discrimination, gender equality and disability throughout the ESI Funds’ operations. The existence of ‘administrative capacity’ and ‘effective implementation and application’ of EU regulatory framework is checked against the fulfilment of expressly pre-defined criteria, appreciated crucial for the attainment of the investment result. These criteria are: 1) arrangements with the national bodies responsible for promotion of non-discrimination, gender equality and disability 2) arrangements for training on non-discrimination, gender equality and disability of staff involved in the ESI Funds management and control 3) arrangements for monitoring of accessibility for persons with disabilities in ESI co-founded actions.²⁸²

The CPR criteria are further detailed in the Commission’s Guidance (Table III.2, above). These demand that the ‘arrangements’ are translated into operational ‘plans’. The plans must show that equality bodies and other relevant actors are actively involved and consulted during the ESI Funds design and operation, as well as that concrete steps for training of staff involved in the implementation of ESI Funds are in place.²⁸³

The fulfilment of a given fundamental rights conditionality implies that all the corresponding criteria are completely and cumulatively fulfilled. A partial or non-adequate fulfilment shall not be considered satisfactory.²⁸⁴

1.2.1. Arrangements with the national actors responsible for promotion of equality

The criterion, common to all three fundamental rights conditionalities, checks first if an

²⁸² In the area of gender equality, the CPR proposal called additionally for: ‘effective implementation and application of an explicit strategy for the promotion of gender equality’. Equally, the criteria required: “a system for collecting and analyzing data and indicators broken down by sex and to develop evidence-based gender policies; a plan for the integration of gender equality objectives through gender standards and guidelines”, see: COM (2011) 615/2 final, Annex IV, pp. 149-150.

²⁸³ Commission Guidance, Part II, *op.cit.*, note 262, *supra*, pp. 337-356.

²⁸⁴ Commission Guidance, Part I, *op.cit.*, note 262, *supra*, p. 14.

equality body has been set-up pursuant to article 13 of Directive 2000/43/EC²⁸⁵ and article 20 of Directive 2006/54/EC²⁸⁶ in the area of gender equality and non-discrimination. In the disability area, it checks whether relevant actors and bodies responsible for the protection of persons with disabilities have been identified.

Once set-up and/or identified, a plan should be put in place to ensure that these entities are duly consulted and actively involved during all the stages of ESI Funds implementation, especially by providing expert advice during ESI Funds' design, implementation and other related activities.²⁸⁷

1.2.2. Training for staff

The second criterion mandates Member States to put in place training arrangements for staff involved in monitoring and control of ESI Funds related activities, during all stages of implementation and at various levels of competence in the area of non-discrimination, gender equality and protection of persons with disabilities. Also in this case a plan has to be drawn to show an actual training schedule, including all relevant authorities and corresponding specific actions to be taken.²⁸⁸

1.2.3. Accessibility for persons with disabilities

In the area of disability, Member States must ensure proper arrangements to monitor the accessibility of the disabled persons throughout ESI Funds preparation and implementation, according to article 9 of the UN Convention on the Rights of Persons with Disabilities.²⁸⁹ The criterion requires the existence of clear monitoring instruments to secure 'notification', 'problem resolution' and 'redress' in ESI Funds actions. Also precise technical guidance documents must be drafted which refer expressly to the applicable EU and national legal framework and standards, allowing for a transparent and objective assessment of accessibility for persons with disabilities.²⁹⁰

²⁸⁵ Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.07.2000.

²⁸⁶ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204 of 26.07.2006.

²⁸⁷ Commission Guidance, Draft, Part II, *op.cit.*, note 262, *supra*, p. 337-356.

²⁸⁸ *Ibidem*.

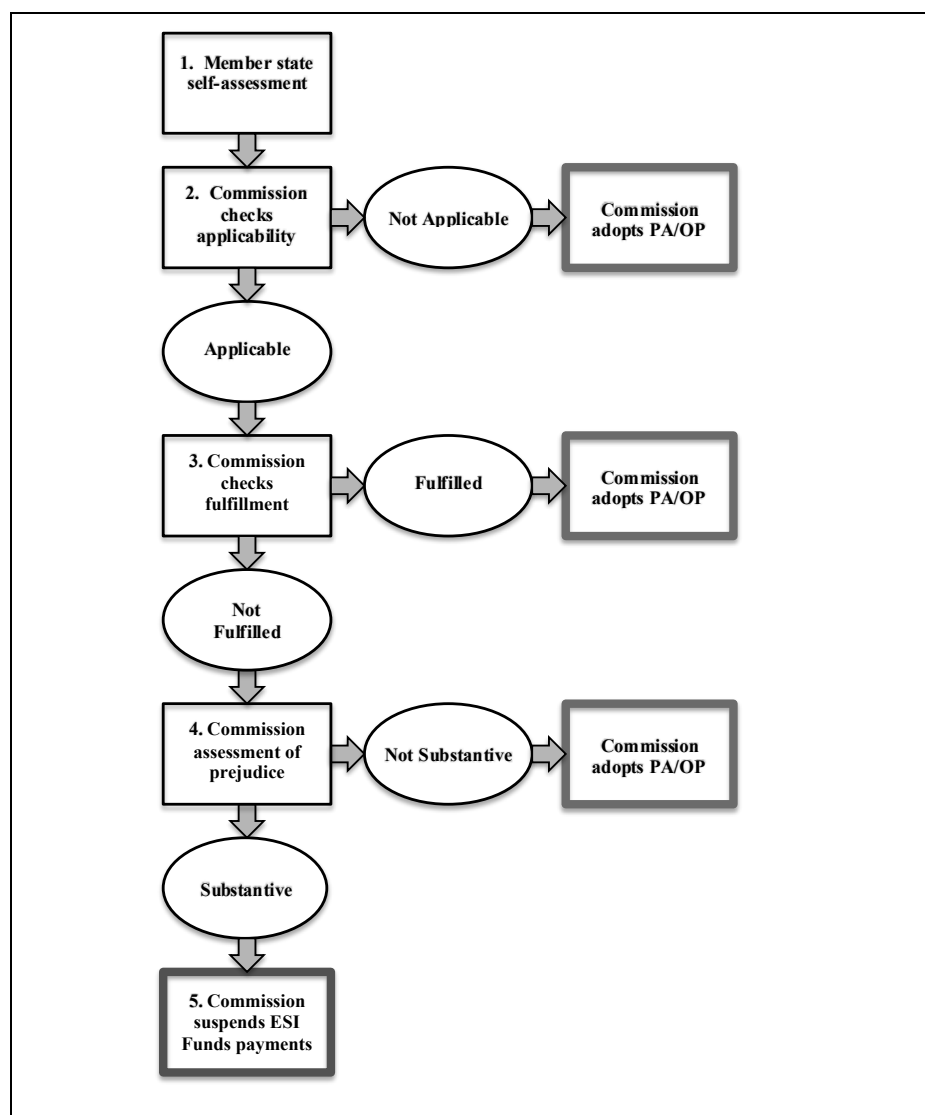
²⁸⁹ Regulation (EU) 1303/2013, CPR, Annex XI, part II, point 3.

²⁹⁰ Commission Guidance, Draft, Part II, *op.cit.*, note 262, *supra*, pp. 349-357.

1.3. Five stages of ESI fundamental rights conditionalities' implementation

The identification, assessment of applicability and finally the fulfilment of the ex ante conditionalities, including ESI fundamental rights conditionalities, is the result of close cooperation between the Member States and the Commission. It is first for the Member State to assess the applicability and fulfilment of all the ex ante conditionalities in accordance with the domestic institutional and legislative framework. In subsidiary, the Commission checks the self-assessment undertaken by each Member State, subsequently adopting the programming documents or suspending the ESI Funds payments. The process comprises five stages, which are almost totally carried out during the programming phase, thus ex-ante (see Figure III.1. below).

Figure III.1.: Five stages of ESI fundamental rights conditionality assessment²⁹¹



²⁹¹ Personal adaptation of Annex 7, Commission Guidance, Part I, *op.cit.*, note 262, *supra*, p. 25.

1.3.1. Self assessment by the Member State

In the light of the principle of subsidiarity it is first for the Member States to undertake the applicability and compliance test presented above (Section 1.1. and 1.2).²⁹² As such, each Member State shall assess in accordance with the identified thematic objectives, fund-specific investments priorities and ultimately specific objectives what are the applicable fundamental rights ex-ante conditionalities, which could impact on the effectiveness and efficiency of the ESI Funds (Table III.1, above). Once found applicable, Member States shall assess whether each criterion of fundamental rights conditionalities is fulfilled (Table III.2, above).

A summary of the applicable ex ante conditionalities, including the ESI fundamental rights conditionalities, as well as the data on the fulfilment of the criteria shall be presented in the Member State' Partnership Agreement (PA) as well as in each Operational Programme (OP). In doing so, Member States shall take into account the country-specific recommendations of the Council, adopted pursuant to article 121(2) on social policy and 148 (4) TFEU on economic policy,²⁹³ as well as the Commission's country-specific position papers for the period 2014-2020.²⁹⁴ As the PA represents the Member States' overall strategy document on the use of ESI Funds throughout the programming period,²⁹⁵ it must contain the full list of the applicable ex ante conditionalities at the Member State level. The OPs, on the other hand, must mention only the ex ante conditionalities applicable to the specific objectives of the OP and its investment priorities.

If the conditionalities' criteria are not fulfilled, both the PAs and the OPs must mention an action plan for fulfilment, the national bodies responsible and a clear implementation timeframe which shall not exceed December 31, 2016 at the latest.²⁹⁶

1.3.2. Commission's assessment of the information provided by the Member State

In the second stage, the Commission assesses the adequacy and consistency of the information provided by the Member States.²⁹⁷ If the Commission finds the Member State's

²⁹² Regulation (EU) 1303/2013, CPR, Article 19 (1).

²⁹³ Regulation (EU) 1303/2013, CPR, Article 15 (1) a) (i).

²⁹⁴ European Commission 2014-2020 position papers on the development of Partnership Agreement and programmes for the period 2014-2020, available at: http://ec.europa.eu/regional_policy/what/future/program/index_en.cfm, consulted on 02.02.2014.

²⁹⁵ Regulation (EU) 1303/2013, CPR, Article 2 (20).

²⁹⁶ Regulation (EU) 1303/2013, CPR, Article 19 (2).

²⁹⁷ Commission Guidance, Part I, *op. cit.*, note 262, *supra*, p. 18.

self-assessment satisfactory it shall adopt the PA by issuing an implementing act Decision²⁹⁸ and subsequently approving the Member States' OPs. If, however, the Commission has doubts in respect of applicability or fulfilment of the identified ex ante conditionalities it may make recommendations or continue the dialogue with the Member State.

If an agreement is not reached a new stage is launched.

1.3.3. Resolution of disagreement

Pursuant to the CPR the Commission shall bear the burden of proof in case of disagreement on the applicability or fulfilment of a given ex ante conditionality.²⁹⁹ To operationalize this provision, the Commission Guidance suggests that in case of disagreement, the Commission shall adopt a resolution of disagreement.³⁰⁰ The document shall have to prove first the applicability of the ex ante conditionality and second, the actions which the Member State failed to implement.³⁰¹

1.3.4. Suspension of the interim payments at the OP approval

The Commission is entitled to suspend totally or partly the interim payments already upon the adoption of an OP, in case it finds that the failure to fulfil the ex ante conditionality may significantly hamper the attainment of a given specific objective of an investment priority.³⁰²

It must be stressed however that once a significant prejudice is imminent, in order to prevent the suspension, the Member State can still adapt the OP's investment priorities so that the conditionality is not applicable. If that is not possible or desirable, the interim payments may be suspended until the complete fulfilment of the ex ante conditionality.

The Commission shall lift the suspensions 'without delay' if the Member State took the necessary actions for fulfilment.³⁰³ It is worth noting that also here the 'significant prejudice' shall be assessed in line with the principle of proportionality. As such, the prejudice shall be established having regards to the level of risk for the efficient implementation of the ESI Funds resources, as well as to the degree of non-fulfilment.

²⁹⁸ Regulation (EU) 1303/2013, CPR, Article 16 (1).

²⁹⁹ Regulation (EU) 1303/2013, CPR, Article 19 (4).

³⁰⁰ Commission Guidance, Part I, *op. cit.*, note 262, *supra*, p. 18.

³⁰¹ Commission Draft Guidance, *op.cit.*, note 262, *supra*, p.19.

³⁰² Regulation (EU) 1303/2013, CPR, Article 19 (5).

³⁰³ Regulation (EU) 1303/2013, CPR, Article 19.

1.3.5. Suspension of the interim payment after the expiry of exceptional extension deadline

When the Member State did not fulfil an applicable ex ante conditionality before the adoption of the OPs, it shall do so as soon as possible, but no later than 31 December 2016. In the meanwhile, as stated above, the interim payments at risk of ‘significant prejudice’ remain suspended (Section 1.3.4.).

The suspension addresses only the amount of funds at risk corresponding to the specific objective of the OP’s investment priority. It follows that the payments, which are not under a risk of ‘significant prejudice’, shall be disbursed until the end of 2016, even if the ex ante conditionality is not in place. Member States must report on fulfilment of fundamental rights conditionalities in the annual Report of 1 January 2017 and the 2017 Progress Report.³⁰⁴ In case of failure to implement the fundamental rights conditionalities until the deadline, the Commission may decide to suspend the interim payments or order the continuation of suspension for the ones suspended already upon the OP’s adoption (Section 1.3.4. above).³⁰⁵

It must be stressed that once an agreement on ex ante conditionalities has been reached there is no possibility to review it. As such, once the Commission and the Member States have agreed that an ESI fundamental rights conditionality is fulfilled or on the contrary, not applicable as indicated in the approved PA and OP; or if no opposition is made by the Commission in 60 days after the 2017 Report, concerning, inter alia, the fulfilment of ex ante conditionalities, there will be no possibility to subsequently suspend the interim payments.³⁰⁶

1.4. Fundamental rights conditionalities: what applicability?

The applicability requirements presented above leave the impression of a particularly burdensome test on ESI fundamental rights conditionalities. This is especially so given that contrary to the thematic ex-ante conditionalities, which are priory attached to a specific investment area, ESI fundamental rights conditionalities are general and, their applicability

³⁰⁴ Regulation (EU) 1303/2013, CPR Article 50 (4), Article 52 (2) (c)

³⁰⁵ The suspension shall be ordered based on Regulation (EU) 1303/2013, CPR, Article 142 para. 1 for ERDF, ESF, Cohesion Fund; Article 41 CAP horizontal Regulation (EU) 1306/2013, respectively EMFF Regulation (EU) 508/2014, Article 102.

³⁰⁶ Regulation (EU) 1303/2013, CPR, Article 19(6).

must be checked on a case-by-case basis.

Nevertheless, in practice, the applicability of ESI fundamental rights conditionalities is well balanced. Member States are in principle the ones to decide on the design and orientation of the investment priorities and assess accordingly the applicability of fundamental rights conditionalities. Equally, as mentioned above, until the final adoption of all OPs, Member States may in principle escape the impediment of a non-fulfilled ex ante fundamental rights conditionality by amending accordingly the OPs' investment priorities.³⁰⁷ However, even so, Member States do not have a large margin of manoeuvre as the OPs have to follow closely the recommendations of the Council, as well as the Commission's position papers.³⁰⁸ Moreover, the ESI Funds programming process is characterised by a continuous dialogue and negotiation between the Member States and Commission's representatives.

According to the preliminary data of the first thirteen PAs approved by the Commission, all have identified the general ex ante conditionalities on non-discrimination, gender equality and disability applicable (see Table 3, below).³⁰⁹ As to their fulfilment, it is interesting to note that even if ESI fundamental rights conditionalities have been designed to restate the existing obligations of the Member States, these are nevertheless not fulfilled in six PAs.

Once again, it must be underlined that the effective applicability of ESI fundamental rights conditionalities shall be more visible at the level of OPs, which are still to be adopted.

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³⁰⁷ Regulation (EU) 1303/2013, CPR, Article 19 para. 7 and Article 30.

³⁰⁸ European Commission 2014-2020 position papers, *op.cit.*, note 294, *supra*.

³⁰⁹ The present thesis analyses the PAs adopted until 20.08.2014.

³¹⁰ The first and only OP adopted until 20.08.2014 in the ERDF investment area does not mention any of the three fundamental rights conditionalities. See: Operational Programme "Innovation and Sustainable Growth in Businesses", Denmark, pp.80-81.

Table 3: Fundamental rights conditionalities in adopted 2014-2020 Partnership Agreements³¹¹

Member State	Applicable Yes/No	Fulfilled/Partially/Not fulfilled
Bulgaria	Yes	Fulfilled
Cyprus	Yes	Fulfilled
Denmark	Yes	Fulfilled
Estonia	Yes	All partially fulfilled (deadline 30.09.2014)
France	Yes	Fulfilled
Germany	Yes	Fulfilled
Greece	Yes	Partially fulfilled - non-discrimination- fulfilled - gender equality- fulfilled - disability- partially fulfilled (deadline 15.10.2014)
Latvia	Yes	Not fulfilled (deadline 31.12.2014)
Lithuania	Yes	Fulfilled
Poland	Yes	All partially fulfilled (deadline first half of 2014)
Portugal	Yes	Fulfilled
Romania	Yes	Not fulfilled - non-discrimination (deadline 31.12.2014 and 31.12.2015) - gender (deadline 31.07.2014) - disability (deadline 31.12.2014 and 31.12.2015)
Slovakia	Yes	Not fulfilled - non-discrimination (deadlines 01.06.2014; 31.08.2014 and 30.09.2014) - gender (deadline 01.10.2014 and 30.06.2015) - disability (deadline 31.08.2015 and 30.06.2015)

³¹¹ According to the PAs adopted until 20.08.2014, available at: http://ec.europa.eu/contracts_grants/agreements/index_en.htm, consulted on 20.08.2014.

SECTION 2: ESI FUNDAMENTAL RIGHTS CONDITIONALITIES – WHAT NATURE?

Based on the general legislative architecture of ESI fundamental rights conditionalities presented above, we shall now try to fit the concept into the conceptual toolkit identified in Chapter I. As such, this part tests to which extent the ESI fundamental rights conditionalities fit conceptually in the general existent patterns of conditionality.

2.1. ESI fundamental rights conditionalities – a definition

The ESI fundamental rights conditionalities feed largely into the definition provided in the first Chapter of the present thesis. As such, ESI fundamental rights conditionality may be defined as:

A political requirement with a legally binding nature, pre-established by the ESI Funds Regulations and further mutually negotiated and agreed between the European Commission and the EU Member States, which is accessory to the agreement on the ESI Funds expenditure - as specified in the programming documents - and must be complied with before the adoption of the programming documents or, exceptionally, within a precisely agreed time-frame, capable of limiting the access or suspending the ESI Funds in case of non-fulfilment, having as main functions to ensure that the essential regulatory framework and administrative capacity are in place before the disbursement of the ESI Funds; secure the effectiveness and efficiency of the granted fund resources; ensure compliance or deter non-compliance of the Member States.

2.2. Type - political, legally binding, negative, ex ante

Compared to the overall EU conditionality policy, the ESI fundamental rights conditionalities are particularly demanding. Not only they require that legally binding, specific conditions of political nature are in place ex ante; they also attract negative consequences in case of non-compliance. Thus, they combine the legally binding, ex ante and negative types of the conditionality.

From a substantive point of view, fundamental rights conditionalities of ESI Funds are political as they link conditions of political nature in the area of non-discrimination, gender equality and disability to ESI Funds' pecuniary benefits granted to Member States.

Normatively, these are established by legally binding provisions of ESI Funds

Regulations and are subsequently re-enforced in the country-specific programming documents adopted by Commission's decision, which are equally binding on the Member States.

As to the consequences, ESI fundamental rights conditionalities are negative. The failure to fulfil the conditionality criteria may limit Member States' access to ESI Funds' resources or may attract the suspension of interim payments. No further positive incentives are provided in case of timely and complete fulfilment.

From the temporal point of view, ESI fundamental rights conditionalities are imposed ex ante, as they condition the access to ESI Funds, granted subject to prior and cumulative fulfilment of the established fundamental rights criteria. Only exceptionally, the agreement on ESI Funds shall be concluded even if the fundamental rights conditionalities are not in place, subject to sufficient guarantees provided by the Member States, including a detailed plan indicating the time-frame and actors responsible for fulfilment of each conditionality.

2.3. Mutual agreement element

The mutual agreement is the core element of the ESI fundamental rights conditionality design. In contrast with the general pattern of conditionality (Chapter I, Section 1.3.), where the agreement has been often criticised for being formal and unilaterally imposed by the conditionality actor, in the framework of ESI Funds the decision on ex ante fundamental rights conditionality is guided by a genuine culture of negotiation and dialogue. Even if the act of agreement materialises prima facie in a unilateral EU Regulation and a unilateral decision of the Commission adopting the programming documents; in fact, we speak of a veritable 'contractual' agreement.³¹²

As such, first, the mutual agreement between the Commission, European Parliament and Member States – wearing the 'hat' of Council members – intervenes at the moment of negotiations of the ESI Funds Regulations. Second, the adopted regulations provide indeed for a unilateral list of conditionalities, but these are not automatically mandatory on the Member States. The applicability and fulfilment of ESI fundamental rights conditionalities is bilaterally negotiated between the Commission and Member States during the programming

³¹² It must be noted that the Commission proposal on the Common Provisions Regulation contained the term "Partnership Contract" which was changed to "Partnership agreement" post-negotiations. See: COM (2011) 615 final/2.

period. As such, initially having regards to the Commission's position, each Member State identifies the areas of investment mostly in need for ESI Funds intervention and the corresponding fundamental rights conditionalities. Further on, the Commission assesses the accuracy of the information provided by each Member State and may recommend further adjustments of the programming documents. Moreover, also by mutual agreement, the Commission together with the Member State may decide to adapt a specific objective of the OP, before its adoption, so that the non-fulfilled conditionalities are not applicable.

2.4. Functions

As for the functions, the ESI fundamental rights conditionalities follow the general patterns underlined in the literature.

First, they aim to secure the ESI Funds resources in case of the risk of 'significant prejudice' to the ESI Funds' efficient and effective implementation. The idea of risk is omnipresent in the overall rationale of the ESI Funds' ex ante conditionalities. Therefore, fundamental rights conditionalities aim to lower the risk of inefficient ESI funds expenditure by making sure that the pre-requisites are in place ex ante. Thus, ESI regulations presume that the effective implementation of EU law and policy in the area of non-discrimination, gender equality and disability, together with a sound administrative capacity in these areas have the potential to secure a higher impact of the ESI Funds on the ground and lower the risk of damages to EU budget resources.

Second, they pursue a behavioural function of maintaining and possibly enhancing the existent status quo in the area of non-discrimination, gender equality and disability. The ESI Fundamental rights conditionalities build upon the existent Member States' obligations. They aim to ensure that first the relevant EU regulatory framework is effectively enforced and applied; and second, that there is sufficient administrative expertise to mainstream equality into all stages of the ESI Funds implementation.

Third, a coercive and punitive function is present. As such, ESI fundamental rights conditionalities aim to induce coercion of the Member State requiring the fulfilment of corresponding criteria. If a Member State fails to comply, the punitive function corrects the Member State behaviour by limiting access or suspending the interim payments.

Finally, the ESI fundamental rights conditionalities respond to the effectiveness

function – which is the most visible one. In this sense, *ex ante* fundamental rights conditionalities are introduced to Member States by using a pure instrumental discourse of ‘effectiveness and efficiency’. This is a long-standing feature of equality related action into EU policies. As Pollack argues, the preferred term in framing the claim for gender issues within the EU policies is rather the ‘efficiency gains’ than ‘equality’ as the former is more likely to correspond to the dominant frame.³¹³ This view is also supported in the Commission’s Guidance, where the non-discrimination conditionality is presented as intending to: “limit the need to financial corrections, loss of resources and reduced effectiveness” of the financial interventions.³¹⁴ The gender equality conditionality is supported by empirical ‘strong economic argument[s]’ and is further presented as an optimal solution to address the European ‘shrinking labour force’ and ‘underused labour market potential’, which is a ‘bottleneck to growth’.³¹⁵ The social and economic participation of persons with disabilities is presented as: ‘essential to achieve the Europe 2020’s objectives of creating smart, sustainable and inclusive growth’.³¹⁶

2.5. ESI fundamental rights conditionalities and the nature of the main agreement

Building on the analysis of Chapter I, this section intends to assess the implications of the main agreement on the overall architecture of ESI fundamental rights conditionalities. To this end, the legally binding, enforceable and dominium nature of the agreement shall be reiterated below.

2.5.1. Legal obligation and legal condition

In line with the general features of conditionality, ESI fundamental rights conditionalities are accessory to the main ‘contractual’ agreement (PA and OP) on the implementation of the ESI Funds resources. They materialise in legal conditions prescribing for an active behaviour on the conditionality recipients – EU Member States – to put in place arrangements and action

³¹³ Pollack and Hafner-Burton, *op.cit.*, note 110, *supra*, p. 440. The authors provide an interesting assessment of the theory of social conduct, arguing that the Cohesion policy has enjoyed positive political factors in developing a gender mainstreaming perspective, this is not the case for EU Competition policy.

³¹⁴ Commission Guidance, Part II, *op.cit.*, note 262, *supra*, p. 345.

³¹⁵ *Ibidem*, p. 298. See also: OECD, *Closing the gender gap- act now*, 2012.

³¹⁶ Commission Guidance, Part II, *op.cit.*, note 262, *supra*, p. 303. On this point, one could bring into discussion the debate on the need to differentiate between efficiency and equity functions in the frame of EU Cohesion policy. In this sense, it has been argued that pursuing the goal of social justice and solidarity, ESI Funds should proceed to a redistribution of the fund resources subject to no conditions, similar to other federal systems. F Barca, *op.cit.*, note 214, *supra*, p.17.

plans necessary for an effective enforcement of EU law and policy on non-discrimination, gender equality and disability in all ESI Funds activities.

Being attached to the main obligation, they transform the original agreement in a conditional one, from fundamental rights perspective. At the same time, the failure to fulfil applicable fundamental rights conditionalities may hamper the very efficacy or continuation of the Partnership Agreement and OPs, limiting Member States' access to or suspending the ESI Funds payments.

2.5.2. Legally binding and enforceable conditionalities

ESI fundamental rights conditionalities are legally binding on the Member States, subject to applicability criteria presented above. These are first binding as hard law provisions of CPR laying down the general requirement to identify the applicable fundamental rights conditionalities and fulfil them before the start of ESI Funds operations. Second, the legally binding nature of ESI fundamental rights conditionalities is confirmed in the text of the programming documents which indicate a clear list of applicable ex ante conditionalities, the level of fulfilment and in case of non-fulfilment the bodies required to take the necessary actions in a precisely specified time-frame.

As well, ESI fundamental rights are enforceable. In case of non-fulfilment the CPR prescribes for a clear and transparent suspension procedure at the disposal of the Commission.

2.5.3. More than dominium instruments

We have already established that ESI Funds are dominium measures by nature. This means that EU deploys budget resources towards Member States via ESI Funds to attain the goals of Cohesion policy. As fundamental rights conditionalities are included in the structure of ESI Funds, these are linked to dominium measures, nevertheless they exceed the pure dominium sphere.

In the context of Cohesion policy and its goal of social inclusion, in line with the principle of governance by dominium, the ESI Funds deploy EU budget resources, establish thematic objectives, eligibility criteria and set rules for sound expenditure.

ESI fundamental rights conditionalities take the ESI Funds dominium model one step further, linking them to fundamental rights criteria which exceed the strict borders of Cohesion policy but are considered essential for its successful operation. The novelty of the

ESI fundamental rights conditionality is that starting with the 2014-2020 financial period, Member States are, in principle, required to test the applicability and, subsequently, the fulfilment of ESI fundamental rights conditionalities in all the ESI Funds investment actions, including the ones targeting equality and social inclusion, but not limited to them.

More than this, by requiring the observance of EU law and policy, the ESI fundamental rights conditionalities de facto bridge the ESI Funds with EU imperium legislation and soft law instruments in the area of gender equality, non-discrimination and disability. That is to say that the ESI fundamental rights conditionalities provide an additional opportunity to check the efficient implementation and application of EU regulatory framework.

2.6. Proportionality

According to the examined legislative framework the overall implementation of ESI Funds should be read alongside the proportionality principle.³¹⁷ As for ESI fundamental rights conditionalities, proportionality principle is tested in two instances. First proportionality must be taken into account by Member States when assessing the applicability of ex ante conditionalities. Onwards, the Commission must observe the principle when deciding on the suspension of ESI Funds payments.³¹⁸ However, in both instances it is not indicated how exactly proportionality shall be assessed or applied, in concreto.³¹⁹

In the EU legal order, this analysis is largely attributed to the doctrine of proportionality as enshrined in the treaties³²⁰ and further developed by the Court of Justice of EU (the ‘CJEU’). According to the well-established CJEU case-law, proportionality principle, as a general principle of EU law, prescribes that the acts of EU legislator must not exceed what is strictly necessary and appropriate to achieve a certain aim, choosing the least restrictive measure from the ones available so that the ultimate limitations caused do not outweigh the aim of the legislative action.³²¹

³¹⁷ Regulation (EU) 1303/2013, CPR, Article 4(5).

³¹⁸ *Ibidem*, Article 19.

³¹⁹ European Court of Auditors, *Opinion 7/2011 on a proposal for a Regulation laying down common provisions on ESI Funds*, OJ C47 of 17.12.2011, p. 9.

³²⁰ Article 5(1) and (4) TEU: “The use of Union competences is governed by the principles of subsidiarity and proportionality.”

³²¹ Case C-T-588/10, *Greece v Commission* [2012], para. 105 and case-law cited: “*Au regard de cette argumentation, il convient de rappeler que le principe de proportionnalité, en tant que principe général du droit de l’Union, exige que les actes des institutions de l’Union ne dépassent pas les limites de ce qui est approprié et*

Therefore, in a first instance, the conditionality recipients shall always perform a proportionality analysis. As such, ESI fundamental rights conditionalities have to prove as appropriate, necessary and least restrictive tools to ensure the effectiveness and efficiency of ESI Funds investment and ultimately achieve this aim. Also, the identified ex ante conditionalities shall not apply if these are found to be excessively burdensome compared to the overall agreement and benefits prescribed therein.

In a second instance, the principle of proportionality is read as a technique used to assess the validity of a limitation of a given right. By suspending the ESI Funds interim payments, the enforcement of ex ante conditionalities appears as a limitation to Member States' right to benefit from ESI Funds allocations. In the case of corrections imposed by the Commission in ESI Funds' expenditure, the CJEU has stated repeatedly that infringement of rules 'the observance of which is of fundamental importance to the proper functioning of a Union system may be penalised'.³²² Applied mutatis mutandis to the suspension of the ESI Funds in case of failure to fulfil the ex ante conditionalities, the suspension for failure to fulfil the ex ante conditionalities appears legitimate if these are found of 'fundamental importance' for the functioning of ESI Funds system. Additionally, the level of suspension shall take account of the degree of non-fulfilment and impact on the overall ESI Funds' operation.

nécessaire à la réalisation des objectifs poursuivis par la réglementation en cause. Ainsi, lorsqu'un choix s'offre entre plusieurs mesures appropriées, il convient de recourir à la moins contraignante et les inconvénients causés ne doivent pas être démesurés par rapport aux buts visés." See also: Case T-308/05 *Italy v Commission* [2007] ECR II-5089, paragraph 153 and case-law cited.

³²² T-384/10 *Spain v Commission* [2013] para. 134; Case T-308/05 *Italy v Commission* [2007] ECR II-5089, paragraph 153 and case-law cited.

SECTION 3: ESI FUNDAMENTAL RIGHTS CONDITIONALITIES IN CONTEXT

Building upon the prior EU use of fundamental rights conditionalities (Chapter I) and the findings on ESI Funds use of equality promotion and conditionality (Chapter II) we shall next try to delimit the place of the ESI fundamental rights conditionalities in the overall architecture of EU conditionality policy as well as in the context of ESI Funds landscape. In doing so, we shall try to highlight the common traits of the new conditionality tool, testing its specificity and contribution to the existing arrangements.

3.1. ESI fundamental rights conditionalities in the context of EU external and internal conditionality policy

Comparing the ESI fundamental rights conditionalities to our findings on the EU use of fundamental rights conditionality externally and internally (see Chapter I, Section 2), we find that ESI Fundamental rights conditionalities, differ but at the same, these endorse important common features. From this point of view, they appear as a sum result englobing traits of external and internal fundamental rights conditionalities, all adapted to the specificities of ESI Funds. We shall develop this idea below.

3.1.1. External Policy

Comparing the ESI Fundamental rights conditionalities to the EU use of conditionalities externally, several remarks are important. These relate mainly to the form of the agreement, the financial link, conditionality type, dynamics and the enforcement procedure.

Firstly, as to the form of the agreement, externally, fundamental rights conditionalities are traditionally inserted in the body of bilateral or multilateral treaties in the form of ‘human rights clause’ or promoted via unilateral EU Instruments, such as the GSP schemes or the EU financial instruments for external action. From this point of view, ESI fundamental right conditionalities embody both a unilateral and bilateral hybrid model. As briefly explained earlier (Section 2.3.), they are first enforced via unilateral EU regulations. At the same time, each of the ESI ex ante conditionalities are onwards bilaterally negotiated and approved between the Commission and each Member States in bilateral contractual agreements on the ESI Funds expenditure. This is a peculiar trait of the ESI fundamental rights conditionalities when compared to the Financial Instruments for external action, where no subsequent negotiation of the ‘human rights clause’ is allowed. Similarly the arrangement differs from

the GSP+ ex ante conditionality, where the third country beneficiaries are required to accede to the whole block of unilaterally established human right treaties, with no further bilateral negotiations on the content of the list.

Secondly, in line with the external policy pattern, ESI fundamental rights conditionalities are linked to financial benefits. Especially similar to Financial Instruments for external action, each ESI Fund has a financial portfolio attached to it. Equally ESI fundamental rights conditionalities are able to affect Member States' right to financial assistance. However, in the context of ESI Funds, the link between conditionalities and financial assistance is particularly strong. Here, conditionalities are not simply linked to financial assistance presuming that the respect of fundamental rights is an essential pre-condition of any EU action. In order to be applicable, ESI fundamental rights conditionalities have to prove a genuine and direct link and also a direct impact on the efficiency and effectiveness of fund resources, endorsing a utilitarian rationale. This feature is absent in the external policy, where fundamental rights conditionalities do not have to endorse a tangible direct impact on EU financial allocations.

Thirdly, ESI fundamental rights conditionalities endorse the finding on the intensity of conditionality in EU external policy (see Chapter I). We stated earlier that as the ties with a third state get closer the EU conditionalities tend to be more demanding. In the case of ESI Funds, fundamental rights conditionalities address the Member States themselves. These are only negative, thus penalising the lack of compliance. At the same time, they require Member States to adopt an 'ex ante' active 'to do' behaviour. No further 'carrots' or incentives are granted in case of good compliance with conditionality criteria.

On the same note, we found that in external policy, fundamental rights conditionalities are more dynamic in relation to close ENP partners or candidate countries (see Chapter I). The dynamics is particularly visible in the case of ENI and IPA II financial instruments and Copenhagen criteria conditionality. Compared to these, ESI fundamental rights conditionalities are even more dynamic. They vary substantially from one Member State to another, as well as within the programming documents of the same Member State. The list of applicable ESI fundamental rights conditionalities and the actions undertaken to fulfil the conditionality criteria may differ considerably based on the investment priorities, institutional or administrative framework of each Member State and the particular arrangements undertaken to fulfil the conditionality criteria.

It must be noted that, in contrast with external policy, here we notice an extremely cautious and detailed regulation on fundamental rights conditionalities' scope of application, criteria for fulfilment, enforcement and ultimately, suspension of funds.

As well, if externally conditionalities tend to be general, the ESI fundamental rights conditionalities are rather specific, targeted to the areas of non-discrimination, gender equality and disability.³²³ This development underlines some sensibilities of the Member States towards conditionality tool in general. ESI Funds legal framework prescribes for a clear definition, an exhaustive 'to do list' to be met in order to receive the funding, a limited time-frame and pre-defined suspension rules. At the same time, the internal development answers the critique of arbitrariness³²⁴ and inconsistency of fundamental rights conditionality as used externally.³²⁵

Finally, externally third countries do not have the possibility to appreciate which fundamental rights conditionalities are applicable. In all cases, they have to fully comply by adopting the prescribed active or passive behaviour. As well it is interesting to notice that neither unilateral nor bilateral external instruments bring into discussion proportionality as the ESI Funds do with regards to applicability and enforcement of ESI fundamental rights conditionalities (Section 2.6. above). Equally, none of the external policy instruments requiring positive actions to fulfil the fundamental rights conditionalities – as GSP+ scheme, ENI or IPA II Instruments - mention proportionality of the criteria having regards to the 'level of assistance', administrative burden or other benefits. Proportionality shall nevertheless be observed in external policy as a general principle of EU law.³²⁶

³²³ The CPR also includes other ex ante conditionalities on fundamental rights as in the area of Roma inclusion which are not addressed in the present thesis.

³²⁴ K Tomaševski, *Development aid and human rights revisited*, *op.cit.*, note 68, *supra*, p. 68.

³²⁵ See: Novak, in: P Alston, *The EU and human rights*, *op.cit.*, note 96, *supra*, p.698.

³²⁶ Article 21(1) and (3) TEU: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation [...]"

3.1.2. Internal Policy

The 2014-2020 ESI Funds ex ante conditionalities are the most visible, comprehensive set of ex ante conditionalities in EU internal policy to address Member States post-accession. As opposed to prior arrangements, ESI fundamental rights conditionalities are directly and immediately linked to financial resources, which, as seen in Chapter I, is seldom the case in internal policy.

In comparison with Copenhagen criteria, there is a strong legally binding framework, a detailed performance grid with exhaustive transparent criteria to be fulfilled and a clear enforcement procedure. At the same time, the ESI fundamental rights conditionalities overlap with Copenhagen criteria, as these mandate Member States to uphold the achieved *acquis* and maintain the status quo in the area of ESI Funds operations with respect to non-discrimination, gender equality and disability. The same goes for the emerging ‘ex post Copenhagen conditionality’ for ‘new’ Member States. In this cases, the programming documents explicitly require channelling the ESI Funds action towards post-accession special arrangements and reforms.³²⁷

Analysed against Article 7 TEU ex post conditionality, the ESI fundamental rights conditionalities have a higher enforcement potential. These are attached to explicitly clear fundamental rights areas and provide for predictable pecuniary penalties. The suspension of ESI funds is enforceable at the sole decision of the Commission – with no need for a Council decision or European Parliament implication.

At the same time, the ESI fundamental rights conditionalities borrow the general pattern of negotiations and close dialogue as noticed internally. Member States are involved in the process on a equal footing, being the first to assess the applicability and fulfilment of conditionalities. As seen above, the enforcement of conditionality is carefully shielded by preliminary soft negotiation proceedings meant to limit the suspension of ESI Funds only to thoroughly justified cases (Section 1.3. above). This recourse to dialogue goes back to the very heart of the EU law enforcement specificity³²⁸ and more broadly to the heart of EU construction, based on the principle of sincere cooperation and respect for national

³²⁷ See the Commission position papers on Croatia, Bulgaria and Romania, available at: http://ec.europa.eu/regional_policy/what/future/pdf/partnership/hr_position_paper.pdf, consulted on 01.08.2014.

³²⁸ See, Chiti, Edoardo, *The Governance of Compliance*, in: M Cremona, *Compliance and the enforcement of EU law*, The Collected Courses of the Academy of European Law, Oxford, Oxford University Press, 2012.

constitutional identity.³²⁹

3.2. Fundamental rights conditionality: how new in the ESI Funds' framework?

We have seen in the previous Chapter that the ESI Funds did not lack fundamental rights mainstreaming or specific action (Chapter II, Section 2). Similarly the ESI Funds did not lack conditionality (Chapter II, Section 3). Quite the contrary. In this context, this part analyses what do fundamental rights conditionalities bring to the policy and how are they different.

3.2.1. Specific action and fundamental rights conditionality

With regards to ESI Funds specific action directed to equality promotion, fight against discrimination, inclusion of persons with disabilities and more broadly and social inclusion, the ESI fundamental rights conditionalities are expected in principle to always apply. As such, the main contribution of ESI fundamental rights conditionalities is that additionally to prior arrangements, Member States are required to prove ex ante sound regulatory framework and administrative capacity in the three areas.

In conceptual terms, this means that the obligation undertaken by Member States in the programming documents to implement the ESI Funds towards the objective of social cohesion and equal opportunities is now conditioned also by fundamental rights ex ante criteria. Member States are not only required to implement the ESI Funds allocations but also are mandated to put in place ex ante specific inter-institutional arrangements with equality bodies for assistance and expert advice in the planned ESI Funds interventions; training of staff in charge of the ESI Funds implementation. Additionally, in the area of disability, monitoring arrangements on accessibility must be ensured.³³⁰

3.2.2. From principles to fundamental rights conditionalities

In terms of equality mainstreaming, it is interesting to notice that ESI fundamental rights conditionalities mirror exactly the general principles of gender equality, non-discrimination and accessibility for persons with disabilities as enshrined in prior ESI Funds regulations. We argue nevertheless, that they take a substantially different stand from principles, being at the same time complementary to them.

³²⁹ Article 4 (2) and (3) TEU.

³³⁰ Regulation (EU)1303/2013, CPR, Annex XI, Part II, points 1-3.

First, from the personal scope point of view, whereas the principles bound both the Commission and the Member States, ESI fundamental rights conditionalities have as exclusive addressees only the Member States.³³¹

Second, whereas similarly to the general principles of equality and non-discrimination the applicable ESI fundamental rights conditionalities are mainstreamed in the Partnership Agreements ('PA') and Operational Programmes ('OP'), in the case of conditionalities there is a stronger accountability on the Member States. As such, the documents shall make clear statement of the extent to which each of the applicable fundamental rights conditionalities is fulfilled and, if not fulfilled, an indication of a limited time-frame³³² with the concrete actions to be taken and the responsible bodies for their fulfilment shall be submitted.³³³ Therefore the observance of conditionalities is not pure 'declarative', but rather a binding contractual obligation.

Third, from the temporal point of view, whereas the principles have to be observed during the whole period of ESI Funds actions' design and implementation, ESI fundamental rights conditionalities have to be in place ex ante.

Lastly, and most importantly, contrary to the principles, the failure to fulfil the ESI fundamental rights conditionalities may lead to suspension of ESI Funds.³³⁴ Here the genuine power of the Commission lies in its capacity to unilaterally suspend, fully or partially, the interim payments if the conditionalities are not fulfilled in the agreed time frame.³³⁵ Prior, the Commission did not have the power to suspend funding in case of failure to mainstream the principles of equality and non-discrimination.

The development could be seen as a response to the weak implementation of the equality and non-discrimination mainstreaming mandate. A clear distinction in comparison to prior programming periods is observed. Whereas the previous frameworks relied on the Member States' discretion to implement the equality-mainstreaming mandate, the Commission supporting these with soft law guidelines and recommendations; the present framework limits Member States' discretion and complements the guiding instruments with legally binding fundamental rights conditionalities.

³³¹ Regulation (EU) No 1303/2013, CPR, Articles 7 and 19.

³³² Regulation (EU) No 1303/2013. According to Article 19 (2) CPR, the ex ante conditionalities shall be fulfilled at the latest by 31 December 2017.

³³³ *Ibidem*, Article 19.

³³⁴ *Ibidem*, Article 142

³³⁵ *Ibidem*.

SECTION 4: WHAT POTENTIAL FOR THE ESI FUNDAMENTAL RIGHTS CONDITIONALITIES? Final thoughts.

Based on the above picture, the present section lays down several final thoughts on ESI fundamental rights conditionalities' potential. The purpose is not to conduct a comprehensive assessment exercise, which at this point would be premature, however some preliminary remarks are already imminent.

The potential impact of the ESI Fundamental rights conditionalities is analysed primarily at the level of ESI Funds and in subsidiary at the level of EU equality and non-discrimination law. The question that arises is: what added-value are ESI fundamental rights conditionalities bringing on the two levels? and: how fit are these to the context?

4.1. Filling the ESI Funds gap

The analysis of previous ESI Funds programming periods revealed several challenges (Chapter II, Section 2). We have seen that on the one hand, equality specific actions were mainly attached to gender equality and ESF resources, the ex post evaluations showed lack of consistent, comparable and reliable data.³³⁶ On the other hand, equality mainstreaming lacked an integrated approach being mostly declaratory in the vast majority of cases. At the same time, the equality mainstreaming mandate lacked legally binding enforceability tools, relying largely on 'soft law' guidance and voluntary compliance of Member States.³³⁷

In the 2014-2020 programming period, fundamental rights conditionalities are in principle applicable to all ESI Funds. Currently it is too early to assess what would be the specific actions where ESI fundamental rights conditionalities would be found applicable. However, given the applicability test presented above (Section 1), it could be reasonably assumed that these would continue to be largely attached to ESF actions, where a direct and genuine link and a direct impact on the ESI Funds effective and efficient expenditure is more likely to be proven. If this presumption is validated, ESI fundamental rights conditionalities shall continue the trend of equality related specific action, limited largely to ESF operations.

³³⁶ Another worth-mentioning ex-ante conditionality is: the '*existence of statistical and result indicators systems*' aiming to facilitate the selection and effective monitoring of the ESI Funds action. See: Regulation (EU) CPR, Annex XI, Part II, point 7. The development of statistical bases and systems of indicators have been required for a long time in Cohesion policy, yet the requirement has not been satisfactorily fulfilled.

³³⁷ See Chapter II, *supra*.

In terms of equality mainstreaming, the potential of ESI fundamental rights conditionalities seems more tangible. The expert advice from equality bodies, training of staff holding key positions and monitoring required by fundamental rights conditionalities may constitute an effective incentive towards a better incorporation of gender equality, non-discrimination and disability matters into the ESI Funds design and implementation. Hence, these are capable of strengthening the existent mainstreaming arrangements.

It is also pertinent to remind that the unilateral enforcement power of the Commission enhances further the likelihood of compliance.

4.2. Reinforcing EU equality and non-discrimination law

The principles of equality and non-discrimination are the cornerstones of the Union's constitutional architecture. They are deeply embedded into the constitutional tradition of the Union first and foremost as general principles of EU law. The respect for the principles is therefore a pre-condition for the legality of any act or action of the EU institutions or Member States acting within the scope of EU law. This is also the case for the Cohesion policy and ESI Funds operations.

Moreover, in the light of the Treaty provisions (Article 8 and 10 TFEU), the EU legislators have incorporated the principle of equality and non-discrimination into the written provisions of ESI Funds as horizontal principles guiding the operation of all ESI Funds (Article 7, CPR).³³⁸ The Court of Justice of EU has held in *Association Belge des Consommateurs*³³⁹ case that, in the light of the cited Treaty provisions, there is also a duty that the adopted measures contribute effectively to the aimed result. Departing from the interpretation given by the Court, one may claim that the adoption of the ESI fundamental rights conditionalities is in fact a direct response to a Treaty obligation to ensure the effectiveness of the adopted measures intended to promote equality in the frame of ESI Funds. Whereas the EU legislator has repeatedly confirmed its commitment to promotion of equality during the operation of ESI Funds, the achievement of the 'intended objective' did not sufficiently deliver on expectations. Thus, fundamental rights conditionalities may be

³³⁸ The Union shall '*eliminate inequalities and promote the equality between men and women*' in all its activities (Article 8 TFEU) and combat any discrimination '*[i]n defining and implementing its policies and activities*' (Article 10 TFEU); CPR, Article 7.

³³⁹ CJEU, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, Case C-236/09, 2011 I-00773, para. 20-21.

seen as tools to correct the underperformance of the prior ESI Funds legislative action in the attempt to improve the equality specific action and mainstreaming effectiveness.

Furthermore, the Charter of Fundamental Rights of the European Union (the ‘Charter’) is another primary-law instrument of relevance to our discussion. In the context of the ESI Funds actions, the application of the Charter cannot be denied.³⁴⁰ The criteria required by the fundamental rights conditionalities – sound regulatory framework, training of staff and consultation of equality bodies - diminish the risk of fundamental rights violation, raise awareness and encourage the observance of the Charter during the ESI Funds related actions. Mainstreaming the Charter in ESI Funds operation may constitute ‘a source of institutional learning’³⁴¹ and strengthen the paradigm shift towards the ‘new modes of governance’³⁴² in the area of fundamental rights.

From the point of view of the EU non-discrimination Directives,³⁴³ which have been the key legal source stressed by anti-discrimination ex ante conditionality, there might be an increased opportunity. In line with the findings of the European Commission’s 2014 report on the implementation of the EU Equality Directives, ESI fundamental rights conditionalities could address the challenges signalled: enhancing equality bodies’ capacity and awareness raising.³⁴⁴

Equality Bodies are most likely to be the main actors engaged in the implementation of the fundamental rights conditionalities, being systematically consulted and providing tailored advice on the ESI Funds’ implementation process. As the Commission report’s conclusions underline, supporting the equality bodies to reach their full potential is a priority as it is capable of enhancing equality in an accessible, timely manner, with lower cost implications.³⁴⁵ From this point of view, there is undoubtedly an open opportunity for the ESI fundamental rights conditionalities.

³⁴⁰ Regulation (EU) 1303/2013, CPR, recital 13. However in practice questions may arise as to the universal applicability of the Charter as well as to the enforceability of specific provisions enshrined as principles thereof.

³⁴¹ De Burca, ‘*New Modes of Governance and Protection of Human Rights*’, in: *Monitoring Fundamental Rights in the EU: the contribution of the Fundamental Rights Agency*, Oxford, Hart, 2005, p. 26.

³⁴² *Ibidem*.

³⁴³ Council Directive 2000/43/EC; Council Directive 2000/78/EC; Directive 2006/54/EC; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services OJ L 373, 21.12.2004.

³⁴⁴ European Commission, *Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, Brussels, 17 January 2014, p. 12.

³⁴⁵ European Commission, *Joint Report on the Application of Equality Directives*, op.cit., note 344, p. 16.

Second, the Commission Report detected low awareness of the EU non-discrimination law.³⁴⁶ By implementing training activities required by the fundamental rights conditionalities the structural incentives are put in place. These could contribute to a greater awareness raising amongst both, the managing staff and ESI Funds' target groups. This chain-effect could be mutually re-enforcing and beneficial.

On a more general and broad note, ESI fundamental rights conditionalities could positively contribute the overall EU equality mainstreaming policy, stirring a 'spill-over' effect also at the national level. From this point of view, they may constitute catalysts for equality mainstreaming.³⁴⁷

Finally, it must be stressed that internally the EU has many more enforcement tools to advance equality and combat status discrimination. In this context, ESI fundamental rights conditionalities are an additional instrument, able to provide increased scope for dialogue and negotiations, thus inducing compliance.³⁴⁸ It would be further interesting to assess how the ESI fundamental rights conditionalities tools might interact with other EU hard law and soft law instruments in the area. Unfortunately, this analysis exceeds the scope of the present thesis.

4.3. Limits

Generally, conditionalities imposed internally are seen as tools meant to reinforce the authority of the EU law and policy. Several scholars have questioned 'how fit' are these for the purpose³⁴⁹ calling for a careful and thorough analysis of conditionality as a EU law enforcement tool.³⁵⁰ On the other hand, European Court of Auditors has welcomed ESI ex ante conditionalities as a 'key development' and means of integrating the Cohesion policy with other core EU policies, able to address the lack of integrated approach noted in the past.³⁵¹

As shown above, ESI fundamental rights conditionalities seem to enjoy favourable

³⁴⁶ *Ibidem*, p.5.

³⁴⁷ *Monitoring Fundamental Rights in the EU*, *op.cit.*, note 340, *supra*, p. 47.

³⁴⁸ Bieber and Maiani, 'Enhancing centralized enforcement of EU law: Pandora's Toolbox?', in *Common Market Law Review*, vol. 51, 2014, 1057–1092.

³⁴⁹ *Ibidem*.

³⁵⁰ *Ibidem*.

³⁵¹ European Court of Auditors, *Opinion 7/2011 on a proposal for a Regulation laying down common provisions on ESI Funds*, OJ C47 of 17 December 2011, paras. 6 and 16.

requisites for a positive impact, however these are not unlimited. It is therefore pertinent to ask: what are the limitations of the ESI fundamental rights conditionalities and how much can we expect them to deliver in terms of equal opportunities goal?

First and foremost one should not forget that ESI fundamental rights conditionalities are explicitly limited to ESI Funds. Subsequently their application is limited to the extent to which Member States' investment needs coincide with areas where ESI fundamental rights conditionalities have a tangible impact on the successful achievement of investment results.

Secondly, ESI *ex ante* conditionalities, in general, and fundamental rights conditionalities, in particular, have indeed a strong leverage to induce compliance on Member States as they are attached to the largest EU budget portfolio. However, as MEP Danuta Maria Hübner, the ex Commissioner for Regional Policy, stressed during the parliamentary debates: “we strongly oppose[d] the tendency to make cohesion policy responsible for checking the implementation of virtually all European laws. *Ex ante* conditionality will have to be truly linked to cohesion policy.”³⁵² The statement reveals a legitimate concern. It is not desirable to make Cohesion policy responsible for the shortcomings of all other policies, including the EU law and policy on equality and non-discrimination. The ESI fundamental rights conditionalities aim to do more in supporting the equality goal of the Cohesion policy, however they still remain an accessory element to it.

Thirdly, commentators have raised several concerns related to macro-economic conditionality,³⁵³ which we find equally pertinent in our discussion on fundamental rights conditionalities. The concerns address the subjects targeted by conditionality; legal certainty and fairness of suspension as far as final beneficiaries are concerned; and finally, the equality between Member States.³⁵⁴

Concerning the subjects, it has been stated that the conditionalities have a high risk to target other actors than those responsible for non-fulfilment of conditionality.³⁵⁵ As such, the failure of the central governments (usually responsible for the implementation of EU law and

³⁵² European Parliament, session of 19 November 2013, Strasbourg, debates on Common Provisions Regulation, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20131119&secondRef=ITEM-012&language=EN>, consulted on 11.01.2014

³⁵³ S Verhelst, *Macro-economic conditionalities in Cohesion policy*, Note for the European Parliament, EGDMONT, December 2012, pp. 43-48, available at: [http://www.europarl.europa.eu/RegData/etudes/note/join/2012/474552/IPOL-REGI_NT\(2012\)474552_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2012/474552/IPOL-REGI_NT(2012)474552_EN.pdf), consulted on 13.08.2014.

³⁵⁴ *Ibidem*; see also: European Court of Auditors, Opinion 7/2011, para 19-20.

³⁵⁵ *Ibidem*, p. 44.

policies) to deliver on conditionalities could be resented also by regions or final beneficiaries, constituting a ‘prejudice par ricochet’. The suspension of ESI Funds resources would also call into question fairness, legal certainty and reliability of Cohesion policy in terms of delivering the expected outputs.³⁵⁶ In external policy, the problem has been addressed by re-directing the funds from central governments to civil society organisations. A similar solution seems to be taken into account by the Commission in case of macroeconomic conditionality.³⁵⁷ No alternative route is previewed for ESI fundamental rights conditionalities.

On Member States’ equality, it has been claimed that poorer regions and countries as primary beneficiaries of Cohesion policy would be at the same time the primary targets of macroeconomic conditionality.³⁵⁸ This means that the impact of suspension would be much higher on eligible ‘poor’ regions as compared to the phasing-out ones, questioning the principle of equality between Member States. When transposed to ESI fundamental rights conditionalities, this point is equally valid. According to the adopted PAs, we see that Member States falling short in fulfilment of conditionality criteria - and by consequence at a higher risk of ESI Funds suspension - are also the ones most in need of ESI Funding (Table III.3. above).

On the other hand, fundamental rights experts have welcomed the new ESI fundamental rights conditionalities and even suggest a systematic enlargement of fundamental rights conditionalities’ reach towards other EU core policies, especially internal market.³⁵⁹

In the end, what impact should we expect from ESI fundamental rights conditionalities? It is visible from their overall architecture and rationale behind that they have not been conceived as dismantling tools, meant to radically change the existing arrangements. ESI fundamental rights conditionalities are rather directed at maintaining and enforcing the EU status quo in the area of equality promotion and non-discrimination in the specific area of ESI Funds. Moreover, the Sixth cohesion report confirms this finding, stating that the ex ante

³⁵⁶ *Ibidem*, pp. 46-48.

³⁵⁷ European Commission, Communication on enhancing economic policy coordination for stability, growth and jobs, COM (2010) 367, 30.06.2010, p.10. However one must stress that the solution of redirecting the funds has been taken into account by the Commission only with regards to macro-economic conditionality, not fundamental rights conditionality's and no further details are established under the CPR Regulation (EU) 1303/2013.

³⁵⁸ *Macro-economic conditionalities in Cohesion policy, op.cit.*, note 353, *supra*, p. 45.

³⁵⁹ I Butler, *A Fundamental Rights Strategy for the European Union*, Open Societies Institute, May 2014, pp. 8-9.

conditionalities intend to make sure that the gaps in EU law and policy implementation do not adversely affect the ESI Funds investment and that the ‘the minimum requirements’ in the respective areas are in place.³⁶⁰

Lastly, but equally important it must be stressed that one of the most powerful ‘limit’ in ESI fundamental rights potential are the Member States themselves. Much shall depend on their willingness to make use of the given tools. Unless Member States take real ownership of conditionalities, there is a risk that these are downgraded to a routine administrative exercise. From this point of view, one should be careful on the intensity of conditionality; as a too intrusive conditionality policy might ‘backfire’ both in the present, but notably in the next financial period.

Important questions as to the appropriateness of conditionality tool in the long run to advance fundamental rights goals, as well as the appropriateness of conditionality to determine compliance of Member States remain pending.³⁶¹ The Commission recognises that the implementation process of ex ante conditionalities ‘has not been easy’ and that there is still substantive space for improvement.³⁶² Meanwhile, the ‘battle’ for the fundamental rights conditionalities is still taking place as the dialogue on PAs and OPs between the Member States and Commission is underway.³⁶³

³⁶⁰ European Commission, *Sixth Report on economic, social and territorial cohesion*, 23 July 2014, p. 243.

³⁶¹ Bieber and Maiani, *op.cit.*, note 348, *supra*, p. 1057.

³⁶² European Commission, *Sixth Report on Economic, Social and Territorial Cohesion*, p. 265.

³⁶³ By the 1st of September 2014, sixteen Partnership Agreements and one Operational Programme have been adopted by the Commission.

INTERIM CONCLUSIONS

The third Chapter has analysed the scope of the ESI Fundamental rights conditionalities, their conceptual nature and specific features as compared to prior EU external and internal conditionality arrangements, as well as to prior ESI Funds regulatory frameworks.

The overall findings show that fundamental rights conditionalities are ‘new yet old’ tools. These differ from the prior arrangements, but at the same time feed harmoniously in the overall EU *modus operandi* in the area of conditionality.

Compared to conditionalities as employed externally, ESI fundamental rights conditionalities are particularly dynamic and state-tailored, designed to address the specific institutional and financial needs of the Member State. Their application and fulfilment is fenced against the discretion of the Commission by detailed legislative provisions, principle of proportionality and operational guidance.

Compared to conditionality employed internally, ESI fundamental rights conditionalities are distinguished by a genuine, intrinsic link to financial resources; exclusively *ex ante* and legally binding nature, coupled with a clear and accessible enforcement procedure.

As to their potential, we have showed that there is important open opportunity for *ex ante* fundamental rights conditionalities both in the area of ESI Funds, as well as on the broader level of reinforcing EU equality and non-discrimination law and equality mainstreaming.

Nevertheless, thoughtful consideration has to be given to the signalled limitations and intensity of the tool. It should be acknowledged that even if the ESI fundamental rights conditionalities aim to outreach policy areas beyond ESI Funds, it is still a primary attribute of Cohesion policy. At the same time, a balance in enforcement must be observed.

As it is too early in the programming period, it remains to be seen how ESI fundamental rights conditionalities will effectively shape in practice following the adoption of all Partnership Agreements and especially Operational Programmes.

CONCLUSION

The research addressed the ex ante fundamental rights conditionalities as a novel tool of 2014-2020 ESI Funds programming period. The topic feeds into the broader and continuously extending problematic of EU use of conditionality. The present contribution intended to illustrate how exactly the conditionality in fundamental rights operates in the most recent 2013 Cohesion policy reform in the areas of anti-discrimination, gender equality and disability.

This thesis embraced a legal approach to fundamental rights conditionality, which - with a few exceptions - has been a very little explored subject in the legal scholarship. As explained earlier, ESI Funds are government by dominium measures, falling in the scope of law. They materialise in legal acts by which the government prescribes in principle a social behaviour; however without attaching a *stricto sensu* sanction to the opposite conduct, but deploying budgetary resources towards tailor-made actions and goals capable to attain the result. The examined ESI fundamental rights conditionalities are attached to dominium instruments, however they make an important step beyond, facilitating the link between the dominium sphere, on the one hand and EU law and policy, on the other.

As the subject of research represented an ‘unknown’, novel concept, it was tested against proxy, ‘known’ areas capable to reveal important data on the architecture of the new tool. Accordingly, the point of departure was an analytical inquiry on the nature of conditionality. Secondly, we embraced a historical road and looked at what has been the prior EU ‘modus operandi’ in dealing with fundamental rights conditionalities until present. Thirdly, we undertook a comparative evolutionary research of the ESI Funds legislative frameworks as of 1988 to detect the ESI Funds’ prior action in fundamental rights.

Based on the data revealed, we were able to put together a comprehensive image of the ex ante fundamental rights conditionalities in the area of anti-discrimination, gender equality and disability.

The findings show that ESI fundamental rights conditionalities follow the general pattern of EU conditionality policy, but, at the same time, they stand out as robust, well developed and matured tools as compared to the prior arrangements. They are an important gravity centre of EU fundamental rights conditionality as employed towards Member States post-accession. Moreover, these are differentiated by their intensity, as they prescribe for a

legally binding active conduct on Member States, are imposed exclusively ex ante and attract solely negative consequences in case of non-compliance.

Substantively, ESI fundamental rights conditionalities feed into the political conditionality type; but, as opposed to external policy, the fundamental rights criteria is specific rather than general, targeting three key areas: non-discrimination, gender equality and disability.

From the normative stand, we find a legally binding arrangement accompanied by sound and credible enforcement mechanisms. However, the actual applicability does not operate directly; it is shielded by applicability and proportionality tests. Building on this point, we notice that ESI fundamental rights conditionalities continue the evolution from pure political to legally binding conditionality. However, the distinctive trait in ESI Funds' context is that beyond the legally binding nature, these pursue a law enforcement logic. Compared to the legally binding conditionality externally, the ESI fundamental rights conditionality is found both in unilateral and bilateral normative instruments: first, unilaterally prescribed by the ESI Funds regulations and subsequently enforced in the bilaterally agreed programming documents, leaving a large scope for dialogue and negotiations.

The examined fundamental rights conditionalities endorse the dynamism and pecuniary link characteristic found in the external policy, notably when employed towards close partners or candidate countries. However, in case of ESI fundamental rights conditionalities as applied towards Member States these characteristics are taken one step further:

The dynamic feature is particularly visible as the ESI fundamental rights conditionality may differ from one Member State to another, based on the identified investment priorities, designed Operational Programmes and national legal and administrative arrangements.

The pecuniary link is a genuine, intrinsic one, additionally complemented by the direct impact assessment, meaning that the ex ante conditionalities must prove a tangible impact on the efficiency and effectiveness of the ESI Funds allocations. The strong financial link is highly peculiar, especially when compared to the fundamental rights conditionality mechanisms priority used internally.

When analysed against the ESI Funds legal framework and operation, the ESI fundamental rights conditionalities endorse the novelty claim. However, as we have seen, fundamental rights related action and conditionality, separately, were common features of the ESI Funds. Thus, the examined conditionalities sum the two existing concepts in one -

fundamental rights conditionality tool. At the same time, these build harmoniously on the prior arrangements in fundamental rights specific action and equality mainstreaming, adding potentially to their enforceability and actual applicability.

Contrary to the conditionalities imposed on the economic crisis background, the ESI fundamental rights conditionalities do not raise stringent legitimacy questions. The three conditionalities are the result of the co-decision legislative procedure. Onwards, they are the object of equal footing negotiation and agreement between the Member States and Commission, having a strong treaty basis and most importantly re-stating the already existing obligations on the Member States. Moreover, ESI fundamental rights conditionalities mirror the general principles of equality and non-discrimination, which have been a long-standing concern of ESI Funds in general.

It is difficult to draw a clear assessment picture of the ESI fundamental rights conditionalities. Nevertheless we have underlined several possible opportunities as well as limits. The present work brought a preliminary theoretical analysis of the ESI fundamental rights conditionalities tool based on previous arrangements and lessons learned from the ESI Funds' operations. From the practical perspective, we established that all thirteen examined Partnership Agreements found the fundamental rights conditionalities applicable. On the other hand, the preliminary fulfilment picture shows a 'variable geometry': several Member States have completely fulfilled the conditionalities; others have done so partially or not at all (Table III.3., above). At this point is premature to draw a conclusion in this respect. We stress again that the effective applicability and fulfilment of fundamental rights conditionalities shall be visible after the adoption of all Operational Programmes. The practical impact, however, shall be sizeable after the mid-term and ex-post evaluations.

It will be highly interesting to observe how the examined new tools will actually shape in practice. Future research on the interplay between the ESI fundamental rights conditionalities and other available EU tools to advance fundamental rights goals would make an important contribution to the examined topic. As well a thoughtful analysis on the opportunity of linking foundational EU values, as fundamental rights to budgetary resources could be further considered. Regretfully, we have not been able to address these issues in the present research.

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Programming Period 2014-2020

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Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006, OJ L 347 of 20.12.2013

Regulation (EU) No 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006, OJ L 347 of 20.12.2013

Council Regulation (EU) No 1300/2013 of 17 December 2013 on the Cohesion Fund and repealing Council Regulation (EC) No 1084/2006, OJ L 347 of 20.12.2013

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, OJ L 347 of 20.12.2013

Regulation (EU) No 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, OJ L 149 of 20.05.2014

Programming Period 2007-2013

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, OJ L 210 of 31.07.2006

Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European

Parliament and of the Council on the European Regional Development Fund, OJ L371 of 27.12.2006

Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999, OJ L 210 of 31.07.2006

Regulation (EC) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/1999, OJ L 210 of 31.07.2006

Council Regulation (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund and repealing Regulation (EC) No 1164/94, OJ L 210 of 31.07.2006

Programming Period 2000-2006

Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, OJ L 161 of 26.06.1999

Regulation (EC) No 1783/1999 of the European Parliament and of the Council of 12 July 1999 on the European Regional Development Fund, OJ L 213 of 13.08.1999

Regulation (EC) No 1784/1999 of the European Parliament and of the Council of 12 July 1999 on the European Social Fund OJ L 213 of 13.08.1999

Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations, OJ L 161 of 26.06.1999

Council Regulation (EC) No 1263/1999 of 21 June 1999 on the Financial Instrument for Fisheries Guidance, OJ L 161 of 26.06.1999

Programming Period 1994-1999

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Programming Period 1989-1993

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GSP REGULATIONS

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Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006, OJ L 211 06.08.2008

Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences, OJ 169 of 30.06.2005

Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences OJ L 346 of 31.12.2001

Council Regulation (EC) No 1256/96 of 20 June 1996 L 160 1996

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EXTERNAL ACTION FINANCIAL INSTRUMENTS REGULATIONS 2014-2020

Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, OJ 77 of 15.03.2014

Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace, OJ 77 of 15.03.2014

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Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument, OJ 77 of 15.03.2014

Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020, OJ 77 of 15.03.2014

Regulation (EU) No 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries, OJ 77 of 15.03.2014

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ANNEX I

ESI Funds fundamental rights mainstreaming and specific action

1. Objectives/Scope/Tasks					
Period	1989-1993	1994-1999	2000-2006	2007-2013	2014-2020
CPR		Objectives [...] facilitating the adaptation of workers of either sex (Art. 1, CPR) [...] promoting equal opportunities in the labour market; The assistance from EAGGF shall address farmers of either sex (Article 3, CPR)	Objectives of [...] the development of employment and human resources, the protection and improvement of the environment, and the elimination of inequalities, and the promotion of equality between men and women. (Art. 1. CPR)		Promoting social inclusion, combating poverty and any discrimination (Art 9, CPR)
ESF	Integration of women in the labour market (Guidelines on ESF)	Scope [...] promote integration of persons exposed to exclusion; equal opportunities for men and women; The Member States and the Commission shall ensure that operations under the different objectives respect the principle of equal treatment for men and women (Art.1, ESF)	Tasks [...] promote equality between men and women (Art.1, ESF) Scope [...] equal opportunities for women and men as part of the mainstreaming approach (Art.2, ESF)	Scope [...] combating social exclusion — especially of disadvantaged groups such as people with disabilities — and promoting equality between women and men and non-discrimination [...] combating all forms of discrimination in the labour market (Art.3, ESF)	
EAGGF		Support may concern the removal of inequalities and the promotion of equal opportunities for men and women, in particular by supporting projects initiated and implemented by women (Art. 2, EAGGF)	Support may concern the removal of inequalities and the promotion of equal opportunities for men and women, in particular by supporting projects initiated and implemented by women (Art. 2 EAGGF)		
ERDF			ERDF shall support, inter alia [...] equality between women and men in the field of employment (Art.2, ERDF)	ERDF may contribute to [...] gender equality and equal opportunities, training and social inclusion (Art. 6, ERDF)	

2. Horizontal Principles					
Period	1989-1993	1994-1999	2000-2006	2007-2013	2014-2020
CPR		Measures financed by the Structural Funds shall be in conformity with [...] the principle of equal opportunities for men and women (Art. 7, CPR)	Compatibility of ESI actions with the EU law and action on promotion of equality between men and women (Art 12, CPR)	Horizontal principle of Equality between men and women and non-discrimination (Art. 16, CPR)	The Commission and the Member States shall ensure that ESI Funds assistance is consistent with the horizontal principles of equality and non-discrimination (Art 4.2, CPR) Promotion of Equality between men and women and prevention of discrimination throughout preparation, implementation, including monitoring, reporting and evaluation (Art.7, CPR) Common Strategic Framework includes horizontal principles of equality and non-discrimination (Art. 11, Annex I. CPR)

3. Programming					
Period	1989-1993	1994-1999	2000-2006	2007-2013	2014-2020
CPR					Partnership Agreements shall set out the application of horizontal principles of equality and non-discrimination and a summary of the applicable ex-ante conditionalities (Art.15, CPR) Each Operational Programme shall include a description of the actions to take into account the principles of equality and non-discrimination (Art.28, CPR) Operational Programmes under jobs and growth goals shall include in addition a description of the specific actions to promote equal opportunities and prevent discrimination (Art. 96.7, CPR) Joint action plans shall contain an analysis of its effects on promotion of equal opportunities and prevention of discrimination (Art. 106, CPR)
ESF				Operational Programmes shall describe how gender equality and equal opportunities are promoted in the preparation, implementation, monitoring and evaluation of operational programmes (Art. 6, ESF)	

4. Partnership					
Period	1989-1993	1994-1999	2000-2006	2007-2013	2014-2020
CPR			Partnerships shall take account of the need to promote equality between men and women (Art.8, CPR)		Partnership Agreements and each programme shall organise partnerships with inter alia bodies promoting social inclusion, gender equality and non-discrimination (Art. 5, CPR)
ESF				Adequate participation and access of NGOs notably in social inclusion, gender equality and equal opportunities (Art.5, ESF)	
5. Communication and Information					
Period	1989-1993	1994-1999	2000-2006	2007-2013	2014-2020
CPR			Information to bodies promoting equal opportunities between men and women (Art.46, CPR)		The managing authority shall involve in information and communication measures,[...] partners, [...] including bodies promoting social inclusion, gender equality and non-discrimination (CPR, Annex XII)
6. Monitoring and Evaluation					
Period	1989-1993	1994-1999	2000-2006	2007-2013	2014-2020
CPR			Balanced representation of women in monitoring committee (Art.35 CPR) Sex-disaggregated data (Art. 36, CPR) Ex-ante evaluations shall take into account, amongst other things, the equality between men and women (Art. 41, CPR)		Annual implementation reports shall set out information and assess the specific actions taken to promote equality between men and women and to prevent discrimination (Art. 111, CPR)
ESF				Annual and final reports shall contain data on gender mainstreaming and gender specific data (Art.10 ESF)	

7. Management and Control					
Period	1989-1993	1994-1999	2000-2006	2007-2013	2014-2020
ESF				Managing authorities shall ensure partnerships with entities in the area of social inclusion, gender equality and equal opportunities (Art 5, ESF)	
8. Ex ante conditionalities					
Period	1989-1993	1994-1999	2000-2006	2007-2013	2014-2020
CPR					General Ex ante conditionalities in the area of gender equality, anti-discrimination and disability (Art. 19 and Annex XI, CPR)