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The Rise of Spending Conditionality in the EU:
What Can EU Learn from the U.S. Conditional
Spending Doctrine and Policies?

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ISSN 1725-6739

© Viorica Viță, 2017
Printed in Italy
European University Institute
Badia Fiesolana
I-50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

This paper seeks to explore the synergies between budget and policy through the use of what was called ‘spending conditionality’ in the EU and ‘conditional spending’ in the U.S. It adopts a legal comparative perspective and investigates the EU's very recent practice of conditioning public spending granted to EU Member States against the U.S. long-standing experience on the matter. The paper argues that the analysis of the U.S. experience with conditional spending facilitates a better understanding of the phenomenon in the EU and may usefully enrich the EU policy-thinking on conditionality in future financial frameworks. In particular, the comparative study shows that conditionality may prove an effective governance device to advance important Union-wide policy objectives at the state level. At the same time, the study shows that when used inside established constitutional systems, conditionality is not free from constitutional contestation, and must be tailored in a way that complies with the essential constitutional principles underlying the exercise of power in a federal, multi-level government. Most important, this work shows that the eventual failures of conditionality are very hard to correct through ex-post administrative and judicial control tools. Therefore, a thoughtful ex ante policy planning of conditionality is crucial for its effective operation. The last part of the paper identifies several lessons learned in this respect.

Keywords

EU, U.S., budget, conditionality, conditional spending, regulation, enforcement

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"There are sound reasons to have each federal dollar pursue as many objectives as possible. [...] But there is a limit to the number of concurrent objectives the recipients can successfully handle."¹

Introduction

The European Union (EU) has recently experienced a massive rise of conditions attached to its internal budgetary expenditure. While the EU budget has been conditional since its first creation, the novel conditions attached to the 2014-2020 financial period are fundamentally different and deserve our special attention. In strong contrast with traditional administrative and fiscal prudence conditions, the novel spending conditions have primary a policy task. Hence, their primary goal is to promote broader EU policy objectives at the Member States' level using the EU budget as a lever toward this end. These conditions, in EU jargon *conditionality* or *conditionalities*, radically strengthen the EU's spending power and substantially enhance the policy relevance of EU spending.² Conditions may require national plans on sustainable health infrastructure development, reform of labor market institutions, effective implementation of predated EU legislation on environment or capacity building of national administrations, subject to suspension of funds in case of failure to do so.³

While the expansion of spending conditionality is so new in the EU, in the U.S. conditional spending has been widely practiced and fiercely debated for almost one century.⁴ Starting with the Supreme Court's incremental opinion in *Butler* case (1936)⁵ and ending with the most recent *Obamacare* case (Medicaid expansion, 2012),⁶ the increasing reach of the U.S. federal spending power, as well as of conditions attached to it, have mobilised immense scholarly, political and public interest.⁷ During this period, conditions linked to U.S. federal spending have been instrumental to promote important social, economic, administrative and political change. Conditions have *inter alia* supported desegregation in education and labor market,⁸ have established a national uniform highway speed limit,⁹ have persuaded states to adopt the 21 years old minimum drinking age,¹⁰ have facilitated military

* I am grateful to Harvard Law School and in particular to the conveners and participants of the 2017 Visiting Researchers and Visiting Scholars Program for the most welcoming research environment that made this work possible. My special gratitude goes to professor Mark Tushnet and professor Howell Jackson for their invaluable guidance and comments. The usual disclaimers apply.

¹ US Executive Office of the President and Office of Management and Budget, *Managing Federal Assistance in the 1980's: A Report to the Congress of the United States pursuant to the Federal Grant and Cooperative Agreement Act of 1977* (Pub. L. 95-224) (Washington, D.C., 1980), 29, <http://catalog.hathitrust.org/Record/000714046>.

² Conditions are especially valuable for strengthening EU soft policy actions, typically adopted in areas of EU shared, coordinative or supportive competences specified at Art. 4-6 of the Treaty on the Functioning of the European Union (TFEU), OJ C 306, 2007.

³ See, for the most representative conditions of the current period, Regulation (EU) 1303/2013, OJ L 347 of 20.12.2013, Arts 2 (33), 19, 22-23, Annex XI.

⁴ THEODORE SKY, *TO PROVIDE FOR THE GENERAL WELFARE: A HISTORY OF THE FEDERAL SPENDING POWER* (2003).

⁵ *United States v. Butler*, 297 U.S. 1 (1936).

⁶ Most recently, the discussion was reopened by the 2012 Supreme Court Decision in 'Nat'l Fed'n of Indep. Bus. v. Sebelius 567 U.S. (2012)', ('*Obamacare*'), *Justia Law*, accessed 15 November 2014, <https://supreme.justia.com/cases/federal/us/567/11-393/>.

⁷ The United States Constitution, Article I, Section 8.

⁸ BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION* 232-235 (2014).

⁹ Ronald F. King, *The politics of denial: the use of funding penalties as an implementation device for social policy*, 20 POLICY SCI. 307-337 (1987).

¹⁰ *Id.*

recruitment in colleges,¹¹ have contributed to the establishment of a politically independent civil service at the state level¹² and have promoted legislation on minimum wage and overtime pay in federally funded activities.¹³

Yet, why is the U.S. conditional spending relevant for the EU?

This paper argues that the comparative analysis with the U.S. conditional spending system is timely, useful and highly informative for the EU for three main reasons.

Firstly, the EU is now where the U.S. was in the mid-1900s – in an era of massive expansion of conditional spending. While the EU and the U.S. budgets are very different in spending composition and size,¹⁴ in both systems, the expenditure vested at the state level is one hundred percent conditional and the conditions of spending operate in a remarkably similar manner.¹⁵

Secondly, the European Commission has recently started the policy planning of the next multiannual financial period.¹⁶ The current conditions of spending are expected to stay and may be credibly developed to include additional EU policy areas, including structural reforms, asylum and migration *acquis*, as well as EU's founding values of democracy, rule of law and human rights.¹⁷ Such a reform might have far reaching implications for the EU's policy making and enforcement toolkit in areas where the EU lacks credible instruments to induce change at the national level.¹⁸

Lastly, and most importantly, as the author writes this contribution, the EU celebrates its sixty years anniversary in Rome, the place where a unified Europe was founded on March 25, 1957.¹⁹ Sixty years on, the EU is in search of a new start – a European New Deal.²⁰ The reform agenda is expected to heal the weaknesses exposed by the 2008 financial crisis and by the subsequent constitutional, migration and security shocks which hit the very core of the EU and questioned its underlying mission.²¹ Whatever path shall be agreed for the future of Europe, it shall necessarily be matched with correlative fiscal capacity and spending arrangements, which are already in the pipeline.²² It is highly unlikely that spending conditions will be absent from future EU fiscal policies, especially if the proposals for a

¹¹ *Id.*

¹² RICHARD B. CAPPALLI, *FEDERAL GRANTS AND COOPERATIVE AGREEMENTS: LAW, POLICY, AND PRACTICE 1801–1821*.

¹³ *Id.* at 1201–1311.

¹⁴ See pp 6-26, *infra*.

¹⁵ RONALD LAMPMAN WATTS, QUEEN'S UNIVERSITY (KINGSTON RELATIONS ONT) INSTITUTE OF INTERGOVERNMENTAL & QUEEN'S UNIVERSITY (KINGSTON STUDIES ONT) SCHOOL OF POLICY, *THE SPENDING POWER IN FEDERAL SYSTEMS: A COMPARATIVE STUDY* (1999).

¹⁶ High level group preliminary work on the post-2020 reform: http://ec.europa.eu/regional_policy/ro/policy/how/improving-investment/high-level-group-simplification/

¹⁷ The Treaty on the European Union (TEU), Art. 2. See, SPIEGEL ONLINE, 'Democracy in Europe: EU Commissioner Pushes for Hard Line on Poland', accessed 15 March 2017, <http://www.spiegel.de/international/europe/eu-commissioner-pushes-for-hard-line-on-poland-a-1137672.html>.

¹⁸ DIMITRY KOCHENOV & ANDREW TREVOR WILLIAMS, *EUROPE'S JUSTICE DEFICIT INTRODUCED* (2014), <http://papers.ssrn.com/abstract=2534812> (last visited Mar 18, 2015); Carlos Closa, Dimitry Kochenov & J. H. H. Weiler, *Reinforcing Rule of Law Oversight in the European Union*, Global Governance Programme-87 ROBERT SCHUMAN CENT. ADV. STUD.

¹⁹ Treaty Establishing European Economic Community, signed in Rome, 25 March 1957, in force as of 1958.

²⁰ European Commission, *WHITE PAPER ON THE FUTURE OF EUROPE. REFLECTIONS AND SCENARIOS FOR THE EU27 BY 2025* (2017).

²¹ DE BURCA & GRAINNE, *EUROPE'S RAISON D'ETRE* (2013), <http://papers.ssrn.com/abstract=2224310> (last visited Jun 29, 2016).

²² EU High Level Group on Own Resources, *FUTURE FINANCING OF THE EU FINAL REPORT AND RECOMMENDATIONS OF THE HIGH LEVEL GROUP ON OWN RESOURCES DECEMBER 2016*; EUROPEAN COMMISSION, *REFLECTION PAPER ON THE FUTURE OF EU FINANCES* (2017).

stand-alone budget to support the European Monetary Union, a future European defense Union or other possible European multi-speed Union configurations are agreed upon.²³ On the contrary, it may be reasonably expected that these conditions shall be further consolidated and expanded departing from the current conditions of EU spending.

Hence, the analysis of the U.S. century-long experience with conditional spending may help facilitate a deeper understanding of what the phenomenon is, how it could evolve a medium term and what are its deeper implications for the EU legal system in a long run.

Against this backdrop, the present paper shall first briefly conceptualize the conditions of spending. The following section shall lay down the essential traits of the U.S. and EU conditional spending frameworks, with a particular emphasis on conditions' legal basis, evolution, administrative implementation, enforcement and judicial review. Based on the findings, the third section shall summarize the main similarities and differences of the two legal systems. Finally, several lessons useful to the EU policy thinking on spending conditionality shall be drawn.

For the purpose of consistency, this paper shall use the term 'conditional spending' or 'conditions of spending' when referring to the U.S. legal system and 'spending conditionality' or 'conditionality' when referring to EU. The terms 'spending conditions', 'cross-cutting conditions' or 'conditions' shall be used interchangeably to refer to both the U.S. and the EU systems.

Conceptualizing spending conditions

Spending conditions as a governance device

Spending conditions are essential elements in the art of governing through budgets. As noted by Daintith, a government may choose to deploy conditional financial resources to pursue specific policy objectives – ‘government by dominium’, in complementary or in parallel to binding legal rules backed by sanctions – ‘government by imperium’.²⁴ In other words, instead of enacting traditional legal rules backed by sanctions, a government may find it more appropriate to govern through economic means and pursue a given policy goal by granting financial resources with policy conditions attached, under the threat of funding withdrawal in case of failure to comply with the said conditions.

Public spending is rich in conditions. While all of them are essential to attain the goal of financial intervention and may attract funding cut-off, only some conditions behave as governance instruments – the so-called 'spending conditionality' in the EU or 'conditional spending' in the U.S.

Various classifications have been elaborated to conceptually distinguish between conditions that put in place mere administrative or financial prudence requirements, on the one hand, and conditions designed to induce broader policy change, on the other hand.²⁵ For the purpose of this contribution we shall refer to them as *administrative* and *cross-cutting conditions*.²⁶

The administrative conditions are necessary, intrinsic elements of a spending agreement. These usually refer to fiduciary guarantees, objectives of funding, selection rules, institutional arrangements,

²³ EU High Level Group on Own Resources, FUTURE FINANCING OF THE EU: FINAL REPORT AND RECOMMENDATIONS OF THE HIGH LEVEL GROUP ON OWN RESOURCES DECEMBER 2016, *supra* note 22; EUROPEAN COMMISSION, *supra* note 22.

²⁴ Daintith, Terence ‘The Techniques of Government’ in: THE CHANGING CONSTITUTION, JL Jowell & D Oliver (eds), 1994, pp. 209–236.

²⁵ See on the distinction between classifying and coercive conditions in: CAPPALLI, *supra* note 12; Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STANFORD LAW REV. 1103–1164, 1114 (1987); WATTS, RELATIONS, AND STUDIES, *supra* note 15 at 13.

²⁶ WATTS, RELATIONS, AND STUDIES, *supra* note 15.

planning, supervision, reporting, evaluation or audit rules. These conditions are rarely contested and taken together, are seen as essential, necessary elements to ensure that the primary goal of spending is achieved – i.e. a highway.

Cross-cutting conditions are distinguished from administrative conditions as they generally tend to have a less direct link to funding and go beyond the primary and immediate goal of spending. In this sense, cross-cutting conditions are an accessory (not necessary) element of spending, pursuing related, yet distinguishable policy objectives, which go beyond the primary goal of the spending intervention. For instance, a cross-cutting condition attached to highway funds may ask a state to adopt an environmental impact assessments statute or put in place a coherent strategy to support women auto-mobility. In both cases the requirements pursue distinct cross-cutting policy goals – environmental protection and gender equality – which are not necessary to achieve the primary goal of funding (i.e. a highway), but are nevertheless successfully advanced through it. When requiring that states enforce and apply legislation on environmental impact assessments, spending internalises an additional policy goal of environmental protection. Similarly, by requiring that states adopt strategies to encourage women's equal access to and usage of cars, spending becomes a driver for gender equality policy.

As underlined by Rosenthal, administrative and cross-cutting conditions often overlap.²⁷ Take for instance a condition that requires state authorities managing public spending to be gender balanced. Such a condition has both administrative and cross-cutting elements. However, for the purpose of this contribution it is absolutely necessary to distinguish conceptually between the two, as *our concern in the next sections lies essentially with the cross-cutting conditions*.

Based on the above, one may portray cross-cutting conditions as *accessory* policy requirements attached by the U.S. federal government and the EU to financial benefits offered to states or private recipients, that aim to achieve policy goals which could not have been achieved or would have been more difficult to achieve through direct regulation or policy making process.

As a general rule, cross-cutting conditions attract funding withdrawal in case of poor compliance and exceptionally may attract additional financial incentives in case of good performance - we shall refer to them as *negative* and respectively, *positive* conditions.²⁸ Conditions may also ask for compliance with a given conduct before or after the disbursement of funds - *ex ante* and *ex post* conditions.

Cross-cutting conditions may have multiple governance functions. These may ask states to enforce pre-dating but unenforced legal or policy requirements (*enforcement function*), to pass a law or regulate a certain conduct (*regulatory function*). Conditions may also seek to implement a new policy framework (*policy implementing function*) or mandate capacity building and institutional reform (*structural function*). Irrespective of the functions pursued, it is important to stress that in all instances cross-cutting conditions touch on a wide-array of social, economic, cultural and political issues and, if fully implemented, have the potential to crucially impact our societies, our economies and individual rights enjoyment on the ground.²⁹

²⁷ Rosenthal, *supra* note 25.

²⁸ ELENA FIERRO & EUROPEAN UNIVERSITY INSTITUTE, THE EU'S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE (2001).

²⁹ JEFFREY L. PRESSMAN, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND : OR, WHY IT'S AMAZING THAT FEDERAL PROGRAMS WORK AT ALL, THIS BEING A SAGA OF THE ECONOMIC DEVELOPMENT ADMINISTRATION AS TOLD BY TWO SYMPATHETIC OBSERVERS WHO SEEK TO BUILD MORALS ON A FOUNDATION OF RUINED HOPES (3rd ed. ed. 1984).

The constitutional significance of spending conditions in the U.S. and the EU

Cross-cutting conditions have been vividly discussed in the U.S. constitutional scholarship and enjoy an increasing interest in the EU academic and institutional circles. Two general approaches to cross-cutting conditions may be identified in the U.S. and the EU: (1) a critical and (2) a functional one.

In the U.S., the first string of legal scholarship raises concerns regarding the impact of conditional spending on the balance of powers between federal and state governments, on the one hand;³⁰ and the protection of individual rights, on the other hand.³¹ In this context, cross-cutting conditions have been seen at the edge of constitutionality, characterized as "constitutionally permissible but not constitutionally required" tools.³² Other prominent scholars have argued that conditions are illegitimate and even unconstitutional attempts of the higher level of government to govern 'through the back door' of spending as opposed to the 'front door' of the legislative process.³³ A particular close attention has been paid to cross-cutting conditions requiring goals that go beyond the explicitly enumerated powers of the federal government, which could not have been achieved in absence of spending.³⁴ Similar concerns have been voiced in areas where the federal government has the power to regulate independently of spending, but nevertheless uses conditions to circumvent or avoid the often inconvenient political or legislative process.³⁵ On a more profound note, conditional spending has been seen as a tool that fundamentally changed the face of U.S. dual federalism into a cooperative one³⁶ and has helped rewrite the spirit of U.S. constitution without changing its letter.³⁷

Let us take the example of education and environmental policies to better illustrate the debate. The EU as well as the U.S. federal government do not generally have competence to decide on matters of education at state level. Yet, both the EU and the U.S. may successfully ask states receiving funding to adopt policies that influence education. This is done, for instance, by asking states to adopt active measures to reduce early school leaving,³⁸ to put in place socially inclusive education systems or to observe specific education performance goals.³⁹ Similarly, both the EU and the U.S. have the competence to adopt environmental policy and legislation.⁴⁰ Yet, in some instances legislators may find it more appealing to advance, reinforce or detail specific environmental laws and policy

³⁰ EDWARD SAMUEL CORWIN, *THE TWILIGHT OF THE SUPREME COURT; A HISTORY OF OUR CONSTITUTIONAL THEORY*. 149–199 (1934), http://nrs.harvard.edu/urn-3:hul.ebookbatch.GEN_batch:20161108ccn00303966 (last visited Feb 6, 2017).

³¹ Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *HARV. LAW REV.* 1413–1506 (1989); William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 *SAN DIEGO LAW REV.* 243–254 (1989).

³² Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 *SAN DIEGO LAW REV.* 175–188 (1989).

³³ LYNN A. BAKER, *THE SPENDING POWER AND THE FEDERALIST REVIVAL* (2001), <https://papers.ssrn.com/abstract=2672823> (last visited Feb 13, 2017); Lynn A. Baker, *Conditional Federal Spending after "Lopez,"* 95 *COLUMBIA LAW REV.* 1911–1989, 1918–1919.

³⁴ Rosenthal, *supra* note 25; Albert J. Rosenthal, *Conditional Federal Spending as a Regulatory Device*, 26 *SAN DIEGO LAW REV.* 277–288 (1989).

³⁵ BAKER, *supra* note 33.

³⁶ MICHAEL D. REAGAN, *THE NEW FEDERALISM* 13- (1972); CORWIN, *supra* note 30 at 149-.

³⁷ ACKERMAN, *supra* note 8.

³⁸ Regulation 1303/2013, Annex XI, Part I, point 10.1.

³⁹ Patrick Haney, *Coercion by the Numbers: Conditional Spending Doctrine and the Future of Federal Education Spending Note*, 64 *CASE WEST. RESERVE LAW REV.* 577–618, 590–601 (2013); Elizabeth K. Hinson, *Mainstreaming Equality in Federal Budgeting: Addressing Educational Inequities with Regard to the States*, 20 *MICH. J. RACE LAW* 377 (2014).

⁴⁰ TFEU, Art. 4 (2) e); US Constitution, Article I, section 8, Commerce clause.

requirements through spending intervention, as opposed to direct regulation.⁴¹ The use of cross-cutting conditions as a governance device may decisively shift the balance of power between the levels of government in a federal system or may *de facto* add to the competences of the federal government in areas not expressly delegated to it.

The second, more modest string of U.S. constitutional literature sees conditional spending as an opportunity to uphold and advance individual rights and national-wide goals, such as free exercise of religion or environmental protection.⁴² It has also been argued that conditional spending may support efficient government, solve federal collective action problems, attain uniformity in a multilevel governance setting, promote innovation, foster economic efficiency, and adopt imminent solutions necessary in an ever deeper and more inter-dependent federal system - captured in Justice Cardozo's notorious words: "sink or swim together".⁴³

The EU law literature on spending conditionality is scarce, but similarly polarized. On the one hand, scholars question the opportunity of conditionality as a proxy enforcement mechanism for EU policies at the national level.⁴⁴ On the other hand, conditionality is seen as a precious governance instrument to advance EU values and interests in areas where EU lacks sufficient powers, but is legitimately entitled to act.⁴⁵ In this last prevailing view, that largely reflects the EU institutional vision of conditionality,⁴⁶ cross-cutting conditions are presented as revelatory EU governance solutions, meant to promote efficiency, strengthen institutions and correct conduct of undisciplined Member States that systematically fail to fully uphold the European laws, policies, values and the European economic rules.⁴⁷

Having in mind the above constitutional portrait of spending conditions and the broader debates surrounding them, the following sections shall briefly lay out their evolution and current standing in the U.S. and EU legal systems. The sections shall pay a particular attention to the constitutional basis and historical development of conditional spending and shall further inquire on their administrative implementation, enforcement and judicial review.

⁴¹ Johan F. M. Swinnen, *The Political Economy of the 2014-2020 Common Agricultural Policy: An Imperfect Storm* (Bruxelles: Centre for European Policy Studies, 2015). See for instance on the EU's 2014 practice to reinforce its environmental goals through agricultural spending 'green payments' conditionality, at pp 16-19 *infra*.

⁴² Kimberly Sayers-Fay, *Conditional Federal Spending: A Back Door to Enhanced Free Exercise Protection*, 88 CALIF. LAW REV. 1281-1322 (2000); Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer Spending Clause Symposium*, 4 CHAPMAN LAW REV. 147-162 (2001).

⁴³ Chi Chung, *The limit of the federal spending power of the United States*, 2002; Susan Rose-Ackerman, *Cooperative Federalism and Co-Optation*, 92 YALE LAW J. 1344-1348 (1983); *Baldwin v. G.A.F. Seelig, Inc.* 294 U.S. 511 (1935), JUSTIA LAW 193, <https://supreme.justia.com/cases/federal/us/294/511/case.html> (last visited Feb 14, 2017). Justice Cardozo's Opinion: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that, in the long run, prosperity and salvation are in union, and not division."

⁴⁴ Roland Bieber & Francesco Maiani, *Enhancing centralized enforcement of EU law: Pandora's Toolbox?*, 51 COMMON MARK. LAW REV. 1057-1092 (2014); Stijn Verhelst, *Cohesion Policy and Sound Economic Governance: A Loveless Marriage*, POL. Q. INT. AFF. 113-126 (2014).

⁴⁵ Armin von Bogdandy, *Systemic deficiency in the rule of law: What it is, what has been done, what can be done*, 51 COMMON MARK. LAW REV. 59-96 (2014).

⁴⁶ EUROPEAN COMMISSION, *THE VALUE ADDED OF EX ANTE CONDITIONALITIES IN THE EUROPEAN STRUCTURAL AND INVESTMENT FUNDS* (2017); Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Guidelines on the application of the measures linking effectiveness of the European Structural and Investment Funds to sound economic governance according to Article 23 of Regulation (EU) 1303/2013 COM (2014) 0494 final; Communication From The Commission To The European Parliament And The Council Mid-term review/revision of the multiannual financial framework 2014-2020: An EU budget focused on results Brussels, 14.9.2016 COM(2016) 603 final, (2016).

⁴⁷ Bogdandy, *supra* note 45; WERNER SCHROEDER, *STRENGTHENING THE RULE OF LAW IN EUROPE: FROM A COMMON CONCEPT TO MECHANISMS OF IMPLEMENTATION* 231193 (2016).

Comparative perspectives: the U.S. and the EU

The U.S. conditional spending

The U.S. federal government transfers about 600 bln US dollars in conditional grants annually at the state and local level,⁴⁸ representing sixteen percent of the federal budget and a share of twenty percent of the overall State and local gross investments.⁴⁹ About 80 percent of the above grants are transferred directly to state and local governments; a sum that constitutes three percent of the U.S. GDP.⁵⁰ The U.S. federal grants are clustered around eight main spending areas: starting with the most generous spending items of healthcare (56%), social security (18%), education and transportation (11% each), followed by more modest allocations to regional development (2%), agriculture, energy and justice (1% each).⁵¹

All federal grants disbursed to State and local governments are conditional, however, conditions depend on the grants' type and thematic area.⁵² The categorical grants (formula and project) are generally tailored for specific actions and tend to have the most conditions attached.⁵³ Block grants are allocated to a broader thematic goal (i.e. healthcare) and are not limited to pre-determined projects, hence accompanying conditions tend to be more relaxed.⁵⁴ Finally, revenue sharing grants tend to have the least conditions attached, however these have not been disbursed since 1984.⁵⁵

The access to U.S. federal grants is in principle optional. Federal grants are a conditional offer of the U.S. Congress (or conditional gift), which *can be rejected* by the State with no legal consequences. In practice however, States find it increasingly difficult to reject federal funds even if these may be tied to uncomfortable conditions.⁵⁶ Consequently, even if not constitutionally required, States tend to be

⁴⁸ Office of Management and Budget (OMB), Budget of the United States Government, Fiscal Year 2017, Historical Tables. Table 12.2. "Total Outlays for Grants to State and Local Governments, by Function and Group: 1940–2021." Table 14.2. "Total Government Expenditures: 1948–2015." available at: <https://www.govinfo.gov/content/pkg/BUDGET-2017-TAB/pdf/BUDGET-2017-TAB.pdf>

⁴⁹ OMB, data for 2013–2015, Table 15–1. Trends In Federal Grants To State And Local Governments, 245, available at: <https://www.gpo.gov/fdsys/pkg/BUDGET-2015-PER/pdf/BUDGET-2015-PER.pdf>

⁵⁰ OMB, Budget of the United States Government, Fiscal Year 2017, Historical Tables. Table 12.2. "Total Outlays for Grants to State and Local Governments, by Function and Group: 1940–2021." Table 14.3. "Table 14.3—Total Government Expenditures As Percentages Of GDP: 1948–2015—Continued", data extracted for the years 2005–2015, available at: <https://www.govinfo.gov/content/pkg/BUDGET-2017-TAB/pdf/BUDGET-2017-TAB.pdf>

⁵¹ OMB, 2014 data, Table 12.2. "Total Outlays for Grants to State and Local Governments, by Function and Group: 1940–2021."

⁵² ROBERT JAY DILGER, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 2–3 (2015); ELOISE PASACHOFF, AGENCY ENFORCEMENT OF SPENDING CLAUSE STATUTES: A DEFENSE OF THE FUNDING CUT-OFF 271–273 (2014), <https://papers.ssrn.com/abstract=2524477> (last visited Feb 27, 2017); UNITED STATES. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CATEGORICAL GRANTS, THEIR ROLE AND DESIGN 233–268 (1978).

⁵³ JAY DILGER, *supra* note 52 at 4; UNITED STATES. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 52 at 6–9.

⁵⁴ JAY DILGER, *supra* note 52; UNITED STATES. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 52 at 6–9; STEVEN MAGUIRE, GENERAL REVENUE SHARING: BACKGROUND AND ANALYSIS.

⁵⁵ JAY DILGER, *supra* note 52 at 3–10.

⁵⁶ Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUPREME COURT REV. 85 (1988); BAKER, *supra* note 33; Lynn A. Baker, *The Spending Power after NFIB V. Sebelius*, 37 HARV. J. LAW PUBLIC POLICY 71 (2014).

increasingly involved in the legislative process of spending, often contributing in decisive ways to the final design and scope of federal spending programs.⁵⁷

2.1.1 Legal basis

Conditional spending has its fountainhead in the spending clause of the U.S. Constitution that grants the federal Congress the power "to provide for [...] the general welfare" of the country.⁵⁸ The U.S. Constitution is silent on the conditions of spending, which shape independently in grant statutes and are subsequently detailed in specific grant agreements.

The evolution of conditional spending in the U.S. legal system is closely related to the debate on the scope of federal spending power. The debate goes back to the founding years of the U.S. federation and the intellectual dispute of the U.S. founding fathers Hamilton and Madison.⁵⁹ The two held radically different views on the relationship between the federal spending power, on the one hand, and the enumerated federal legislative powers, on the other.⁶⁰ While Madison fiercely believed that federal spending must be narrowly construed in subordination of the explicitly enumerated federal legislative powers. As such, Hamilton argued that spending should be read in autonomous terms from the legislative powers,⁶¹ allowing the federal government enough flexibility to support economic growth and to address the "exigencies" of the time.⁶² This debate on the reach of the spending power is as important today as it was two centuries ago. While the balance is currently on Hamilton's side, this state of art is far from settled, especially since the Supreme Court can in principle always reconsider its 'Hamiltonian' standing and limit its current broad reading of the U.S. federal spending power.⁶³

Evolution

The evolution of conditional spending in the U.S. legal system knows four stages: development, experimentation, expansion and consolidation.

The first *development* stage dates back to the 1882 *Morril Act*, which established one of the first categorical assistance programs.⁶⁴ The program allocated land grants to state educational institutions and conditioned the latter to provide military instruction to the young people attending the establishment.⁶⁵ Subsequently, the establishment of the federal income tax by the Sixteenth Amendment to the U.S. Constitution in 1913, facilitated higher spending and consequently the development of numerous conditions of spending.⁶⁶ However, the latter were largely administrative in nature and rarely prescribed for additional national policy requirements.⁶⁷

The second *experimentation* stage was triggered by the Great Depression of the 1930s and the follow up New Deal reforms which facilitated increased federal transfers to state and local governments.⁶⁸

⁵⁷ Heather K. Gerken, *Our Federalism(s)*, 53 WILLIAM MARY LAW REV. 1549–1574 (2011); ABBE R. GLUCK, OUR [NATIONAL] FEDERALISM (2014), <https://papers.ssrn.com/abstract=2427109> (last visited Feb 8, 2017).

⁵⁸ US Constitution Article I, Section 8, states that: "The Congress shall have power to [...] provide for the [...] general welfare of the United States"

⁵⁹ For an excellent historical journey on the evolution of the US federal government power to spend, see: SKY, *supra* note 4.

⁶⁰ *Id.*

⁶¹ ALEXANDER HAMILTON, JAMES MADISON, JOHN JAY, 'THE FEDERALIST PAPERS' (1961).

⁶² SKY, *supra* note 4 at 93–108.

⁶³ Nat'l Fed'n of Indep. Bus. v. Sebelius 567 U.S. (2012), *supra* note 6.

⁶⁴ UNITED STATES. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 52 at 15.

⁶⁵ *Id.* at 15.

⁶⁶ JAY DILGER, *supra* note 52 at 16–17.

⁶⁷ UNITED STATES. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 113 at 16–17.

⁶⁸ *Id.* at 17–18.

The most notorious conditions of the period remain the *Davis-Bacon Act* of the 1931 and the *Hatch Act* of 1940, establishing a wage floor for employees of federally funded programs and requiring that state administrators of federal grants refrain from partisan political activities, respectively.⁶⁹ Both conditions have had a tremendous influence and have been continuously used up to the present days.⁷⁰

The start of the third *expansion* stage was brought by the revolutionary welfare and civil rights reforms of the 1960s.⁷¹ During the time, the number of cross-cutting conditions dramatically expanded, counting fifty nine national-wide conditions by 1980s.⁷² The conditions' thematic scope also knew an important expansion. As such, conditions were ingeniously designed to support the Civil Rights Acts of the 1960s and the subsequent legislation in the area of non-discrimination, inclusion of handicapped, alcohol and drug abuse prevention, environmental protection, economic advancement, health and human safety, minority participation, labor standards, including minimum wage requirements.⁷³ The conditions above were supplemented by fund-specific conditions in each area of funding, such as the student and teacher performance conditions of the Elementary and Secondary Education Act.⁷⁴ Other examples of thematic conditions in the area of transportation are the prohibition of highway banners (Highway Beautification Act of 1965) and a maximum driving speed of 55 miles per hour (Highway Energy Conservation Act of 1975).⁷⁵ It is worth noting that the *ex ante* enforcement of the speed limit condition (55 mph) was designed to support the national policy goal of reducing fuel consumption during the 1970s oil crisis and managed to secure compliance in a record time of two months of twenty one states opposing the measure.⁷⁶

The fourth *consolidation stage* started in the 1980s and continues to the present days.⁷⁷ During the period, we assist to a general consolidation of conditional spending practice, with little or no influence from the changing political preferences of the executive or legislative branches. As Posner showed, the use of conditions of spending is in itself a non-partisan phenomenon.⁷⁸ While the substantive policy goals of conditions may change from conservative to progressive ends, the strategy of using conditional spending to induce state behavior in line with federal preferences was rarely questioned.⁷⁹ As such, in spite of Reagan administration's deregulation efforts in the 1980s, conditions did not decrease but, on the contrary, slightly increased in numbers.⁸⁰ One famous condition enacted during the period was the National Minimum Drinking Age Act of 1984, that instructed the federal government to withhold about five per cent (now ten per cent) of highway grants from states allowing possession or consumption of alcohol at a lower age than 21.⁸¹

⁶⁹ *Id.* at 20.

⁷⁰ CAPPALLI, *supra* note 12 at 1201–1311.

⁷¹ UNITED STATES. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 52 at 21–25.

⁷² US EXECUTIVE OFFICE OF THE PRESIDENT AND OFFICE OF MANAGEMENT AND BUDGET, *supra* note 1 at 20–26.

⁷³ *Id.* at 20–26.

⁷⁴ These relate *inter alia* to English literacy, prohibition of drugs, teacher proficiency, technological advancement. see: PASACHOFF, *supra* note 52 at 613–614.

⁷⁵ US ACIR, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM 2.

⁷⁶ *Id.* at 15.

⁷⁷ US EXECUTIVE OFFICE OF THE PRESIDENT AND OFFICE OF MANAGEMENT AND BUDGET, *supra* note 1; UNITED STATES. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 52.

⁷⁸ ALICE M. RIVLIN, INTERGOVERNMENTAL MANAGEMENT FOR THE 21ST CENTURY 299–300 (Timothy J. Conlan & Paul L. Posner eds., 2008), <http://www.jstor.org/stable/10.7864/j.ctt6wphh3> (last visited Mar 3, 2017).

⁷⁹ *Id.* at 299–300.

⁸⁰ Paul Posner, 'Mandates. The Politics of Coercive Federalism', in: *Id.* at 288.; JAY DILGER, *supra* note 52 at 32; PAUL L. POSNER, THE POLITICS OF UNFUNDED MANDATES: WHITHER FEDERALISM? (1998); TIMOTHY J. CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM 143 (2010).

⁸¹ The 1984 National Minimum Drinking Age Act, 23 U.S.C. § 158

In 1990s, during the Clinton administration, the conditions of spending were further consolidated, especially in the area of education. The administration's 'school performance' conditions were signed into law through Educate America Act of 1994 which subjected low performing schools receiving federal funding to a comprehensive set of education performance results and outcomes.⁸² The reform is believed to be a turning point in federalization of the U.S. education policy, further limiting the states' power in the area.⁸³

As a push back on the expanding power of the federal government, in the 1990s the Unfunded Mandates Reform Act was passed, prohibiting federal commands addressed to state governments without matching financial allocations.⁸⁴ The act however did not manage to limit the reach of the federal spending power, as it explicitly exempts grant conditions from its scope of application.⁸⁵

In the 2000s the Bush administration continued the use of conditions, albeit with some simplification attempts.⁸⁶ Major cross-cutting conditions of the period were established by No Child Left Behind Act which reformed the Clinton era 'student performance' requirements in primary and secondary education.⁸⁷ The post-9/11 reform agenda facilitated the establishment of novel conditions of spending deployed through security and emergency preparedness directives.⁸⁸ Additionally, the conditions on minimum work requirements for welfare aid recipients⁸⁹ and those established by Help America Vote Act are worth mentioning.⁹⁰

As a novelty, *conditions waivers and super-waivers* for certain states and projects have been established in 2000s.⁹¹ Waivers were to strengthen state autonomy in federally financed policies and to accommodate state and local specificities.⁹² However, in the light of the elaborate pre-conditions states have to meet to benefit from a waiver, the power of the federal government remained strong, as federal agencies retain the last say in waiving or not the conditions of spending.⁹³

The Obama administration continued to actively design and deploy cross-cutting conditions to state and local level. The administration's signature conditions targeted the areas of education and healthcare. Conditions in education included a broader interpretation of Title IX non-discrimination conditions in education as to include transgender students⁹⁴ and combat sexual assault on campus.⁹⁵ In addition, project-tailored conditions for low performing schools were introduced through post-crisis

⁸² The Goals 2000: Educate America Act (P.L. 103-227) of March 31, 1994.

⁸³ Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legislation of Educational Policy*, 63 *FORDHAM LAW REV.* 345–382 (1994); Susan H. Fuhrman, *Clinton's Education Policy and Intergovernmental Relations in the 1990s*, 24 *PUBLIUS J. FED.* 83–97 (1994).

⁸⁴ Public Law 104-4—MAR. 22, 1995 <https://www.gpo.gov/fdsys/pkg/PLAW-104publ4/pdf/PLAW-104publ4.pdf>

⁸⁵ *Id.*

⁸⁶ Paul Posner, *The Politics of Coercive Federalism in the Bush Era*, 37 *PUBLIUS J. FED.* 390–412 (2007).

⁸⁷ RIVLIN, *supra* note 78 at 296.

⁸⁸ Posner, *supra* note 146 at 397–400.

⁸⁹ *Id.* at 393–394.; JAY DILGER, *supra* note 52 at 36.

⁹⁰ Pub.L. 107–252

⁹¹ The waivers had only a limited simplification impact, see: Posner, *supra* note 86 at 392; JAY DILGER, *supra* note 52 at 37.

⁹² David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 *COLUMBIA LAW REV.* 265–346 (2013).

⁹³ *Id.*

⁹⁴ Joint guidance of the US Department of Justice and Education, 'Dear Colleague Letter on Transgender Student' <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> See on implementation evaluation Examples of Policies and Emerging Practices for Supporting Transgender Students (May 2016), available at: <https://www.justice.gov/opa/file/850991/download>

⁹⁵ White House Task Force to Protect Students From Sexual Assault, report January 2014, https://obamawhitehouse.archives.gov/sites/default/files/docs/report_0.pdf

'School Improvement Grants' and 'Race to the Top' programs.⁹⁶ The healthcare conditions attached to Medicaid expansion program (commonly referred to as 'Obamacare' jointly with Affordable Care Act) were designed to assure a much more inclusive healthcare coverage, notably for disadvantaged and vulnerable groups.⁹⁷

The current Trump administration continues vesting conditions of spending in support of its governance program. As expected, the substantive scope of conditions has shifted from progressive to conservative policy goals, yet the use of conditions is actively continued. The conditions of spending put forwards so far ask States and local authorities to cooperate on federal immigration enforcement policies, subject to funding cut-off in case of refusal.⁹⁸ Similarly, conditions linked to the ban of transgender individuals enrolment into the U.S. Armed Services have been revised.⁹⁹ Currently, the sexual assault on campuses policy conditions are under revision, potentially leading to funding cut-off for non compliant beneficiaries.¹⁰⁰

Administrative implementation and enforcement

The U.S. record with conditional spending during the last century shows a mixed policy success. On the one hand, evidence shows that conditions have been crucial in attaining the aimed policy results when other instruments proved insufficient or inapt, as the examples of school desegregation in the 1960s¹⁰¹ or nation-wide transportation regulations in the 1970s and 1980s show.¹⁰² On the other hand, numerous conditions have proved very difficult, especially in the first implementation years, such as the early examples of inclusion of children with disabilities in education,¹⁰³ minority inclusion into labor market¹⁰⁴ or the most recent education performance conditions for lagging behind schools.¹⁰⁵

The U.S. experience shows that the policy success of conditions is context dependent. The effectiveness of conditions depends on a wide net of closely interdependent social, economic, political, cultural, administrative and institutional factors and structures at all levels of government. In this sense, Posner usefully identifies four broad external factors likely to affect the outcome of conditions,

⁹⁶ School improvement Grant (SIG) conditions came in packages depending on the reform the underperforming school opted for and included teaching and management staff replacement, standardised tests and student evaluations, adoption of Charter Schools regulations, longer school days. Ex post evaluation shows limited results of the funding initiative as a whole. See: U.S. Department of Education, School Improvement Grants: Implementation and Effectiveness, January 2017, <https://ies.ed.gov/ncee/pubs/20174013/pdf/20174013.pdf> Race to the Top program was a competitive grant program addressed to States with good prior performance committing to additional ambitious conditions. See generally: <https://www2.ed.gov/programs/racetothetop/executive-summary.pdf>

⁹⁷ Patient Protection and Affordable Care Act (Public Law 111–148)

⁹⁸ Executive Order 13768 of January 25, 2017. BRIAN T. YEH, THE FEDERAL GOVERNMENT'S AUTHORITY TO IMPOSE CONDITIONS ON GRANT FUNDS.

⁹⁹ The condition has its roots into the Solomon Amendment upheld by the Supreme Court in *Rusfeld v FAIR* (2006) <https://supreme.justia.com/cases/federal/us/547/47/> The amendment allows the suspension of funds to colleges and universities restricting military recruiting on their campuses even if the said opposition is based on non-discrimination concerns.

¹⁰⁰ CNN, DEVOS ANNOUNCES REVIEW OF OBAMA-ERA SEXUAL ASSAULT GUIDANCE, <http://www.cnn.com/2017/09/07/politics/betsy-devos-education-department-title-ix/index.html> (last visited Oct 4, 2017).

¹⁰¹ ACKERMAN, *supra* note 8 at 232–235.

¹⁰² King, *supra* note 9.

¹⁰³ CAPPALLI, *supra* note 12.

¹⁰⁴ PRESSMAN, *supra* note 29.

¹⁰⁵ U.S. Department of Education, School Improvement Grants: Implementation and Effectiveness, January 2017, <https://ies.ed.gov/ncee/pubs/20174013/pdf/20174013.pdf>

these are: political cohesion at the federal level (1), coordination at state level and between states (2), federal-state congruence (3) and public participation (4).¹⁰⁶

Additionally, we notice that outcomes of conditions are decisively influenced by conditions intrinsic factors, such as conditions' initial design, planning and substantive scope. In this respect, conditions that have most often been cited as success examples, tend to prescribe for individual or one-act measures, such as: abolition of school segregation laws, adoption of 55 mph speed limit, adoption of minimum drinking age statues or selective military service registration of men upon college enrollment.¹⁰⁷ On the contrary, conditions that proved difficult prescribed for broad, multiannual affirmative measures, often tailored to induce substantial change in human behavior and reform priority established social, economic, cultural, political or institutional structures, and even reform entire communities, as the challenging examples of inclusive regional development initiatives show.¹⁰⁸

Throughout time, conditions have been responsible for massive administrative hardship, that triggered continuous simplification and funding streamlining reforms.¹⁰⁹ A first major simplification reform was initiated at end of 1970s¹¹⁰ and led to the adoption of Federal Assistance Reform Act in 1980.¹¹¹ The latter contained a dedicated section on conditions reform and provided for detailed rules on uniform interpretation, application, institutional coordination and adjustment of conditions' budgetary costs.¹¹² Subsequent efforts of simplification, coordination and capacity building followed in 1999¹¹³ and 2006.¹¹⁴ The latter reform was revived during the Obama administration, leading to the establishment of an Inter-Agency Council on Financial Assistance Reform in 2011¹¹⁵ which was tasked to assist the Office of Management and Budget to develop uniform guidance, training and metrics, including on conditions of spending.¹¹⁶ The reform culminated with the adoption of an uniform guidance Code of Federal Funding in 2014, establishing the general obligation on federal awarding agencies to ensure full and correct compliance with the conditions.¹¹⁷ The latter are to compile a clear and transparent list of conditions applicable to spending awards in their respective area of funding and duly inform the recipients on their obligation to comply with the requirements.¹¹⁸ Continuous assessment of current

¹⁰⁶ RIVLIN, *supra* note 78 at 299.

¹⁰⁷ King, *supra* note 9 at 307.

¹⁰⁸ PRESSMAN, *supra* note 29.

¹⁰⁹ UNITED STATES. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 52; US EXECUTIVE OFFICE OF THE PRESIDENT AND OFFICE OF MANAGEMENT AND BUDGET, *supra* note 1.

¹¹⁰ Public Law 95-224, Federal Grant and Cooperative Agreement Act (1977)

¹¹¹ 96th Congress, Act S.878, <https://www.congress.gov/bill/96th-congress/senate-bill/878?r=324>

¹¹² CAPPALLI, *supra* note 12 at 11-7-11-22.

¹¹³ The Federal Financial Assistance Management Improvement Act of 1999. See on implementation United States Government Accountability Office, Grants Management (2005) <http://www.gao.gov/assets/250/246040.pdf>

¹¹⁴ Federal Funding Accountability and Transparency Act, Pub. L. No. 109-282, <https://www.frs.gov> ; Subsequent executive action: Executive Order 13563 of 2011 Improving Regulation and Regulatory Review and follow up policy action <https://www.gpo.gov/fdsys/pkg/DCPD-201100123/pdf/DCPD-201100123.pdf> The initiative led to the establishment of Council on Financial Assistance Reform (COFAR) in 2011.

¹¹⁵ OMB, Memorandum M-12-01, <https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2012/m-12-01.pdf>

¹¹⁶ <https://cfo.gov/cofar/>

¹¹⁷ Office for Management and Budget, *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, section 200.300: https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title02/2cfr200_main_02.tpl

¹¹⁸ See for instance the incredibly rich list of national statutory and policy conditions applicable to research funding: https://www.nsf.gov/bfa/dias/policy/fedrtc/appc_march17.pdf

spending practices is under way with a particular emphasis on relaxing recipient burden and increasing the efficiency of spending.¹¹⁹

Regarding enforcement, the U.S. federal agencies enjoy a high level of discretion in enforcing conditions, largely endorsed by courts.¹²⁰ As a general finding, conditions tend to be rarely enforced against states and more frequently enforced against private recipients.¹²¹ As Pasachoff shows, while funding withdrawal has been ordered on important occasions, conditions remain under-enforced compared to the overall cases of non-compliance.¹²² Four main arguments have been traditionally advanced to explain under-enforcement in case of States: the damage by ricochet to most needy private beneficiaries (1) the unconstitutional coercion of States (2) the pressure to spend money (3) and the complex inter-institutional politics of funding cuts (4).¹²³ However, as Pasachoff convincingly argues, the above four arguments are difficult to defend. First, as cuts are most often ordered precisely against individuals, arguing that cutting-off funding in case of states would hurt individuals is at least incoherent if not contradictory.¹²⁴ Second, in Pasachoff's view state sovereignty is reinforced not undermined by cuts in funds, which adds to states' accountability.¹²⁵ Third, agencies have large discretion in deciding on the effective amount of cuts, which are most of the times modest and do not interfere with the budgetary execution process.¹²⁶ Lastly, the argument that state political pressure always acts as a credible deterrent of cuts severely undermines the federal agencies' power within the overall spending construct.¹²⁷

Regardless of the arguments brought against or in favor of enforcement, for the moment, under-enforcement remains a common finding in the U.S. in case of conditions addressed to States.

Judicial review

The U.S. Supreme Court has been invited to speak on the constitutionality of conditional spending on numerous occasions during the last century and until very recently recognized virtually unlimited discretion to Congress in designing spending and the conditions attached to it.¹²⁸

The start of the doctrine was marked by the *Butler* case (1936)¹²⁹ whereby the Court embraced the Hamiltonian view of federal spending and endorsed its autonomy *vis-a-vis* other federal powers.¹³⁰

¹¹⁹ See generally COFAR website: <https://cfo.gov/cofar/>

¹²⁰ See generally, Barron and Rakoff, *supra* note 92 at 273–274.

¹²¹ PASACHOFF, *supra* note 52; STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 294–295 (1995). (observing the reluctance of administrations to order spending cut-off in the case of civil rights act conditions and the broader factors contributing to this state of art)

¹²² PASACHOFF, *supra* note 52 at 253–254.

¹²³ PASACHOFF, *supra* note 52.

¹²⁴ *Id.* section II.A

¹²⁵ *Id.* section II. B

¹²⁶ *Id.* section II. C

¹²⁷ *Id.* at 254–255.

¹²⁸ SAMUEL R. BAGENSTOS, SPENDING CLAUSE LITIGATION IN THE ROBERTS COURT (2008), <https://papers.ssrn.com/abstract=1302086> (last visited Apr 3, 2017); Samuel R. Bagenstos, *Viva Conditional Federal Spending*, 37 HARV. J. LAW PUBLIC POLICY 93 (2014); Mark Tushnet, *Judicial Review of Legislation*, (2005), <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199248179.001.0001/oxfordhb-9780199248179-e-009> (last visited Jan 25, 2017); Rosenthal, *supra* note 25; Baker, *supra* note 56; Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. LAW REV. (1988); Sullivan, *supra* note 31.

¹²⁹ *United States v. Butler* 297 U.S. 1 (1936), JUSTIA LAW, <https://supreme.justia.com/cases/federal/us/297/1/case.html> (last visited Feb 17, 2017).

Subsequently, in *Steward Machine v Davies* (1937)¹³¹ and *Oklahoma* (1947) cases the Court confirmed the ability of the Congress to set the conditions of spending binding on the states, thus affirming the constitutionality of spending conditions.¹³² In the next decades, the Court attempted to set a number of limits on the spending power.¹³³ These have been brought together under the *Dole* case (1987) doctrine which still embodies the Court's benchmark test on constitutionality of conditional spending.¹³⁴ To pass the *Dole* test conditions must meet four cumulative requirements: these must advance "general welfare" (1),¹³⁵ must be expressed "unambiguously" (2),¹³⁶ must be germane to the federal interests in the spending program (3) and must not violate any other constitutional provision (4), here comprised the unconstitutional coercion of states¹³⁷ and the constitutional rights of individuals.¹³⁸

Even if the *Dole* test seems to substantially limit the federal spending power, scholars tend to agree that *Dole* doctrine has hardly been able to meaningfully constrain the federal government conditional spending power.¹³⁹ In the years to come, the Court applied a closer scrutiny test in cases involving individual rights, however the States claiming intrusive conditional spending coercion from federal level did not enjoy the same scrutiny.¹⁴⁰ As Bagenstos shows, the "general welfare" criterion has been interpreted by the Court in Hamiltonian broad terms (1), the clear and unambiguous contractual notice of conditions has been easily fulfilled by Congress (2) and the conditions' germaneness requirement has not been much of a constraint so long as the federal government is free to set the objectives of spending in the first place (3).¹⁴¹ With regards to the fourth state coercion criterion (4), when states sovereignty and autonomy arguments were raised, the Court seemed to admit since mid-1900s that where conditions would reach a point at which financial incentives exert a high coercion on States these may be found unconstitutional.¹⁴² However, only in 2012, in *NFIB v Sebelius case (Obamacare)*, the Court found that a condition exerted unconstitutional coercion on States, by threatening to withdraw all prior and future federal health support if a state does not accept the new program conditions.¹⁴³ The Court found that such a condition did not leave the State a meaningful option to accept or reject the grant, but was rather a "gun to the head".¹⁴⁴ Yet the Court refused to define the

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¹³⁰ Rosenthal, *supra* note 34 at 277.

¹³¹ *Steward Mach. Co. v. Collector* 301 U.S. 548 (1937), JUSTIA LAW, <https://supreme.justia.com/cases/federal/us/301/548/case.html> (last visited Feb 13, 2017).

¹³² *Oklahoma v. United States Civil Service Comm'n* 330 U.S. 127 (1947), JUSTIA LAW, <https://supreme.justia.com/cases/federal/us/330/127/case.html> (last visited Feb 13, 2017).

¹³³ *Pennhurst State Sch. v. Halderman* 465 U.S. 89 (1984), JUSTIA LAW, <https://supreme.justia.com/cases/federal/us/465/89/case.html> (last visited Apr 5, 2017); BAGENSTOS, *supra* note 128 at 393–409.

¹³⁴ *South Dakota v. Dole* 483 U.S. 203 (1987), JUSTIA LAW, <https://supreme.justia.com/cases/federal/us/483/203/> (last visited Feb 13, 2017).

¹³⁵ *United States v. Butler* 297 U.S. 1 (1936), *supra* note 129; *Steward Mach. Co. v. Collector* 301 U.S. 548 (1937), *supra* note 131.

¹³⁶ *Pennhurst State Sch. v. Halderman* 465 U.S. 89 (1984), *supra* note 133.

¹³⁷ *Steward Mach. Co. v. Collector* 301 U.S. 548 (1937), *supra* note 131.

¹³⁸ *South Dakota v. Dole* 483 U.S. 203 (1987), *supra* note 134.

¹³⁹ BAGENSTOS, *supra* note 128.

¹⁴⁰ Epstein, *supra* note 128.

¹⁴¹ BAGENSTOS, *supra* note 128.

¹⁴² *Steward Mach. Co. v. Collector* 301 U.S. 548 (1937), *supra* note 131 at 590; *South Dakota v. Dole* 483 U.S. 203 (1987), *supra* note 134.

¹⁴³ *Nat'l Fed'n of Indep. Bus. v. Sebelius* 567 U.S. ____ (2012), *supra* note 6.

¹⁴⁴ *Id.* "In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that "further payments will not be made to

baselines of unconstitutional coercion through conditional spending, stating only that: "[...] wherever that line may be, [the] statute [was] surely beyond it."¹⁴⁵

Whilst one may not be certain about the exact implications of *Obamacare* case, scholarly debates suggest once again that these are most likely less significant than thought.¹⁴⁶ This is so, because first, the Court avoided to establish clear baselines for its coercion doctrine¹⁴⁷ and second, because it leaves scope for multiple 'workarounds' Congress can usefully explore to design future funding conditions.¹⁴⁸

Overall, the case law above shows that the Court finds itself highly constrained in drawing rigid doctrinal limits on conditional spending. When the Court does nevertheless intervene, the changes it introduces are incremental and leave a large discretion to the legislative and executive branches. In this sense, it is worth recalling that it took the Court about one century to adopt a standing on the spending power (*Butler* case, 1936), an additional half a century to crystalize a set of initial doctrinal limits on conditions of spending (*Dole* case, 1987) and other two decades to enforce a first limit on conditions addressing states (*Obamacare* case, 2012).

EU spending conditionality

The EU spending is planned on a multiannual basis¹⁴⁹ and is capped annually at 1,2 per cent of Member States' GDP,¹⁵⁰ that represents about 150 bln EUR yearly in the current 2014-2020 financial framework.¹⁵¹ EU disburses about 80 percent of its budget directly to Member States¹⁵² in the form of conditional grants (EU Funds) managed by Member States administrations in close cooperation with and under the close supervision of the EU executive (the European Commission).¹⁵³ EU Funds are clustered around four main spending areas: direct and structural agricultural aid (38%), social, regional

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the State." 42 U. S. C. §1396c. A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but all of it."

¹⁴⁵ *Id.*

¹⁴⁶ Taylor Bates & Tharuni Jayaraman, *NFIB v. Sebelius: A Potential Shift in the Doctrine of Conditional Spending* (Briefing Paper No. 55), HARV. LAW SCH. BRIEF. PAP. FED. BUDG. POLICY (2015); Bagenstos, *supra* note 128; Eloise Pasachoff, EDUCATION LAW AND THE NEW COERCION DOCTRINE (2013), <https://www.acslaw.org/acsblog/education-law-and-the-new-coercion-doctrine>; ELOISE PASACHOFF, CONDITIONAL SPENDING AFTER NFIB V. SEBELIUS: THE EXAMPLE OF FEDERAL EDUCATION LAW (2012), <https://papers.ssrn.com/abstract=2166933> (last visited Apr 3, 2017); Erin Ryan, ENVIRONMENTAL LAW AFTER SEBELIUS: WILL THE COURT'S NEW SPENDING POWER LIMITS AFFECT ENVIRONMENTAL STATE-FEDERAL PARTNERSHIPS? (2013), http://www.acslaw.org/sites/default/files/Ryan_-_After_Sebelius.pdf.

¹⁴⁷ Several scholars have tried to remedy for the Court's silence. See: Mitchell N. Berman, *Conditional Spending and the (General) Conditional Offer Puzzle*, PENN LAW LEG. SCHOLARSH. REPOS. (2013); SAMUEL R. BAGENSTOS, THE ANTI-LEVERAGING PRINCIPLE AND THE SPENDING CLAUSE AFTER NFIB (2012), <http://papers.ssrn.com/abstract=2128977> (last visited Oct 8, 2015).

¹⁴⁸ Bates and Jayaraman, *supra* note 146 at 31–40.

¹⁴⁹ TFEU, Art. 312.

¹⁵⁰ Council Decision of 7 June 2007 2007/436/EC, Euratom on the system of the European Communities' own resources, OJ L 163, 23.6.2007, Art. 3 (1).

¹⁵¹ Council Regulation (EU, EURATOM) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, Annex I. See also: The Multiannual financial framework 2014–2020 and EU budget 2014 The figures, .

¹⁵² The EU budget is shaped around seven main items of expenditure. In the 2014-2020 financial period, the largest EU spending envelope goes to direct and structural agricultural aid (38% of EU budget), followed by: economic, social and territorial cohesion aid for less developed regions and strategic investment (34%); EU-wide infrastructure, research and cultural projects (13%); external relations (6%); home affairs (2 %), fisheries (1%) and running costs (6%); See generally on EU budget planning and implementation: http://ec.europa.eu/budget/financialreport/2015/lib/financial_report_2015_en.pdf.

¹⁵³ regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union, 58–59.

and economic cohesion (34 %), home affairs (2%) and fisheries (1%).¹⁵⁴ It is precisely in these areas of spending that conditionality first shaped and substantially expanded during the 2014-2020 financial period.¹⁵⁵

Here, one must note that EU budget expenditure is limited when compared the overall EU-28 domestic government expenditure as a share of the EU-28 GDP (1,2 per cent compared to 47 per cent).¹⁵⁶ Nevertheless, EU spending is in no way of marginal importance to Member States. As opposed to Member States' expenditure which is largely dedicated to running costs and welfare spending, EU Funds are mainly allocated to long term capital expenditure and constitute an important source for domestic investment.¹⁵⁷ In the last financial period (2007-2013), EU cohesion spending alone constituted about 20 percent of the total domestic capital investment, with particularly high shares in at least thirteen Member States.¹⁵⁸

These figures show that EU spending power even if considerably lower than the Member States' one constitutes an important financial source for domestic economies. Hence, the conditions attached to EU spending may credibly influence state conduct, with a particular high force in about half of EU Member States.

Legal basis

EU spending conditionality finds its source in the EU spending power. However, the EU treaties contain no explicit rule on conditions attached to spending. Pursuant to Article 317 of the Treaty on the Functioning of the EU (TFEU), the Commission implements the EU budget under her own responsibility, in close cooperation with Member States according to the rules of funding regulations adopted by the EU legislators (the EU Council and the European Parliament). It is in these statutory rules of spending that conditions find their primary source. The rules governing spending conditions are adopted jointly by the EU legislators (the directly elected European Parliament and the Council formed by representatives of states) on a proposal from the EU executive (the European Commission) on a multiannual basis.¹⁵⁹ This means that conditions are first designed by the Commission, but their ultimate scope is likely to change during legislative negotiations to accommodate the Commission's progressive vision with the states' national interests and the parliament's citizen-centered position.¹⁶⁰ Subsequently, most conditions are negotiated between the Commission and the Member States during the planning stage and are ultimately implemented by Member States' administrations, acting under the close supervision of the Commission.

Therefore, in the EU legal system, the emergence, implementation and ultimately enforcement of a given conditionality must be understood departing from the dynamics of the above legal and

¹⁵⁴ The Multiannual financial framework 2014–2020 and EU budget 2014 The figures, *supra* note 49.

¹⁵⁵ See, pp 16-19 *infra*.

¹⁵⁶ Eurostat, domestic expenditure by function, 2015 data, http://ec.europa.eu/eurostat/statisticsexplained/index.php/Government_expenditure_by_function_-_COFOG#General_government_expenditure_by_function

¹⁵⁷ JORGE NÚÑEZ FERRER & MONI KATARIVAS, WHAT ARE THE EFFECTS OF THE EU BUDGET: DRIVING FORCE OR DROP IN THE OCEAN? NO. 86 / APRIL 2014.

¹⁵⁸ *Id.* EU Funds share of national capital expenditure: Hungary 68.3%, Estonia 62,4%, Slovakia 59%, Lithuania 58.3%, Malta 49.3%, Bulgaria 42,7%, Latvia 41,2%, Poland 35.5%, Czech Republic 31,7%, Romania 27.3%, Greece 26,3%, Slovenia 25.4%, Portugal 22,4%. See also the last figures for 2016 in: Court of Auditors, 2016 Audit in brief, p. 16, <http://www.eca.europa.eu/Lists/ECADocuments/auditinbrief-2016/auditinbrief-2016-EN.pdf>

¹⁵⁹ TFEU, Art. 322.

¹⁶⁰ The European Commission and the Court of Justice of the EU have been traditionally the drivers of EU integration, with the European Parliament in a supportive role and the Member States as gate-keepers of national sovereignty. See in detail: MARK A. POLLACK, THE ENGINES OF EUROPEAN INTEGRATION: DELEGATION, AGENCY, AND AGENDA SETTING IN THE EU (2003).

administrative process, characterized by a continuous push and pull between the EU and Member States.

Evolution

Until recently, spending conditionality has not been a usual presence in the EU internal policies. Traditionally, conditionality has been a tool of EU external policy, where it first shaped and prosperously developed since the late 1970s.¹⁶¹

Internally, the evolution of spending conditionality knows three stages: development, experimentation and expansion.

The *development* stage started in the mid-1990s, upon the establishment of the Cohesion Fund.¹⁶² The fund was to prepare catching up states (then: Ireland, Greece, Spain and Portugal) for the establishment of the single Euro currency area in exchange of compliance with a set of macroeconomic convergence rules established by the Treaty of Maastricht – the macroeconomic conditionality.¹⁶³

In the 2000s, the *experimentation* stage followed. Over the decade isolated cross-cutting conditions continued to shape independently in EU structural, agricultural and fisheries funds legal frameworks. The conditions developed in an uncoordinated manner, being interpreted, applied and enforced in their own area of spending. As such, the EU social and regional development funds were endowed with a EU law infringement conditionality, which allowed the Commission to suspend funding if a state was suspected for breach of EU law.¹⁶⁴ The agricultural funds included an important number of statutory and policy conditionalities requiring farmers to comply with certain minimum environmental conditions – the so-called ‘cross-compliance rules’ since the mid 2000s.¹⁶⁵ As well, the fisheries fund developed its own conditionalities aimed at reinforcing the European Common Fisheries Policy provisions through spending.¹⁶⁶

¹⁶¹ FIERRO, *supra* note 28; LORAND BARTELS, HUMAN RIGHTS CONDITIONALITY IN THE EU’S INTERNATIONAL AGREEMENTS (2005), <http://www.oxfordscholarship.com.ezproxy.eui.eu/view/10.1093/acprof:oso/9780199277193.001.0001/acprof-9780199277193> (last visited Jan 23, 2014); LORAND BARTELS, THE APPLICATION OF HUMAN RIGHTS CONDITIONALITY IN THE EU’S BILATERAL TRADE AGREEMENTS AND OTHER TRADE ARRANGEMENTS WITH THIRD COUNTRIES INTERNATIONAL TRADE EN STUDY NOVEMBER (2008), <http://www.europarl.europa.eu/committees/en/studies.html>.

¹⁶² Council Regulation (EC) No 1164/94, OJ 1994 L 130, Art. 2 and Art. 6.

¹⁶³ Treaty of Maastricht, Article 104c. Currently Articles 120-126 TFEU, and the subsequent conditionality packages adopted pursuant to Art. 121(2) Council recommendations.

¹⁶⁴ Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, Art. 32(3) f) as amended by 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, Art. 86 (1)d), 89(1)-(2).

¹⁶⁵ Regulation (EC) No 1782/2003 OJ L 270/2003, Article 2 and Annex III. The ‘Cross-Compliance’ conditionality system is split in two conditionality groups. On the one hand, farmers receiving aid are obliged to comply with a list of EU law statutory requirements (SMRs). On the other hand, they have to ensure that all agricultural land respects ‘good agricultural and environmental conditions’ in line with a set of European good practice standards. The failure to comply with conditions entailed reductions or exclusion from agricultural funds, depending on the severity of infringement. If the Commission finds that Member States failed to impose corrections on farmers, it refuses payments to Member States in the same amount.

¹⁶⁶ Regulation (EC) 2371/2002, Art.16, sending to Art. 11, 13, 15 therein and the provisions of the Council Regulation (EC) No 2792/1999. Member States had to comply with a set of *ex post negative* conditionalities on: adjustment of fishing fleets capacity, fleet entry and exit management, establishment and management of fishing registers, timely submission of information necessary for drawing the country-specific Multiannual Guidance Programmes on fisheries at the EU level.

As of 2014, the current, expansion phase started.¹⁶⁷ The expansion phase came in a post-2008 economic crisis context, at a time when eight EU Member States faced heavy bail-out financial assistance conditionality packages largely implemented outside the EU treaty framework,¹⁶⁸ and subsequently internalized in the internal EU economic governance process through the European Semester surveillance mechanism.¹⁶⁹ It also comes at a time when EU experienced a deeper constitutional crisis, expressed by the systemic failure of certain Member States to follow key EU policies, give effect to EU legislation and uphold its founding values.¹⁷⁰ These developments have stirred a generalized discourse of conditionality, better governance and efficiency of spending,¹⁷¹ promoted by the 'EU North' and reluctantly accepted by the 'EU South'; a discourse that ultimately materialized in a massive expansion of conditionality in the 2014-2020 budgetary period.¹⁷²

In the aftermath of 2014, EU funds allocated to social, regional development, cohesion, fisheries and the rural development pillar of agricultural spending (jointly, the European Structural and Investment Funds, representing about 45% of EU budget) are linked to a comprehensive set of forty-three ex ante¹⁷³ and ten macro-economic conditionalities¹⁷⁴ plus one general EU law compliance conditionality.¹⁷⁵ Under the new rules, the ex-ante conditions ask Member States to comply before the start of funding with detailed EU law, policy and structural requirements,¹⁷⁶ whereas the macro-economic conditions monitor continuous compliance with the EU economic governance

¹⁶⁷ For a comprehensive mapping of the current EU spending conditionality see, Viorica Viță, *Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality*, C.A.M.B. YEARB. EUR. LEG. STUD. (2017), [/core/journals/cambridge-yearbook-of-european-legal-studies/article/revisiting-the-dominant-discourse-on-conditionality-in-the-eu-the-case-of-eu-spending-conditionality/62609996CBCDFF2FD82089EB47594DCF](http://core/journals/cambridge-yearbook-of-european-legal-studies/article/revisiting-the-dominant-discourse-on-conditionality-in-the-eu-the-case-of-eu-spending-conditionality/62609996CBCDFF2FD82089EB47594DCF) (last visited Aug 15, 2017).

¹⁶⁸ Claire Kilpatrick, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, 10 EUR. CONST. LAW REV. EUCONST 393–421 (2014); Claire Kilpatrick & Bruno De Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, (2014), <http://ssrn.com/abstract=2428855>; Claire Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, 35 OXF. J. LEG. STUD. 325–353 (2015).

¹⁶⁹ Philomila Tsoukala, *Euro Zone Crisis Management and the New Social Europe*, 20 COLUMBIA J. EUR. LAW 31–76 (2013).

¹⁷⁰ The EU in its most serious crisis ever (and that's not the Euro crisis), VERFASSUNGSBLOG, <http://www.verfassungsblog.de/en/the-eu-in-its-most-serious-crisis-ever-and-thats-not-the-euro-crisis-2/> (last visited Mar 23, 2015); J. H. H. Weiler, *Europe in Crisis - On "Political Messianism", "Legitimacy" and the "Rule of Law,"* SINGAP. J. LEG. STUD. 248–268 (2012); Bogdandy, *supra* note 45; European Commission, *MANAGING THE REFUGEE CRISIS: OPERATIONAL AND BUDGETARY MEASURES UNDER THE EUROPEAN AGENDA ON MIGRATION 11* (2015).

¹⁷¹ Two widely influential studies shifted the attention to conditionality during budgetary planning of the 2014-2020 period: PAUL BERND SPAHN, *CONDITIONING INTERGOVERNMENTAL TRANSFERS AND MODES OF INTERAGENCY COOPERATION FOR GREATER EFFECTIVENESS OF MULTILEVEL GOVERNMENT IN OECD COUNTRIES* (2012); FABRIZIO BARCA, *AN AGENDA FOR A REFORMED COHESION POLICY. A PLACE-BASED APPROACH TO MEETING EUROPEAN UNION CHALLENGES AND EXPECTATIONS* (2009).

¹⁷² Negotiations of the 2014-2020 budgetary framework split the EU Member States wearing the hats of Council representatives in two groups: 'Friends of better spending' - led by Germany and supported the Commission; and 'Friends of Cohesion' led by Poland and supported by the European Parliament. See: Mario Kölling & Cristina Serrano Leal, *THE NEGOTIATION OF THE MULTIANNUL FINANCIAL FRAMEWORK: BUDGETING EUROPE 2020 OR BUSINESS AS USUAL?*

¹⁷³ Regulation 1303/2013, Art. 19, Annex XI.

¹⁷⁴ Regulation 1303/2013, Arts. 22-23

¹⁷⁵ Regulation 1303/2013, Arts. 43

¹⁷⁶ Regulation 1303/2013, Art. 19, Annex XI. Conditions cover a wide thematic scope, running from: non-discrimination, smart and specialized investment, public procurement, state aid, statistics, environmental protection, poverty, minority inclusion, education, health systems, public administration, transportation, internet and technology, research and development, risk prevention, plant and animal welfare, biodiversity, water and waste management, sustainable fisheries and many more. Their application is further checked against a list of detailed criteria, which are in turn developed in Commission guidance of ex ante conditionalities for 2014-2020 (2014), see: http://ec.europa.eu/regional_policy/index.cfm/en/information/legislation/guidance/

recommendations, under the sanction of funding suspension.¹⁷⁷ Moreover, at all times, all funding must comply with applicable EU law rules.¹⁷⁸

In addition, specific conditionalities have shaped in separate thematic areas of spending. As such, in 2014-2020, farmers accessing agricultural funds are subject to new 'green' conditionality, that complement the prior cross-compliance system.¹⁷⁹ Fisheries Fund is conditioned on full respect of multiple Common Fisheries Policy rules, before and after the release of funding, for both Member States and private beneficiaries.¹⁸⁰ Home Affairs Funds are conditioned ex ante on observance of Schengen rules¹⁸¹ and ex post on compliance with EU law and human rights standards.¹⁸²

These conditions bring a substantial policy load to EU budget, in an attempt to make EU spending increasingly relevant to the broader EU governance process.¹⁸³ Conditions know a rise in numbers, types, procedural design, thematic reach and functional use, especially in EU policy areas where progress proved difficult or achieved only a limited success.¹⁸⁴ A closer look into the policy areas promoted by conditions shows that each condition is instrumental in addressing particular EU general or state-specific policy interests such as: advancement of EU novel policy objectives,¹⁸⁵ maintenance of existing *status-quo*,¹⁸⁶ policy implementation, enforcement of EU laws and policies, administrative capacity building or institutional reform.¹⁸⁷

The conditions above coerce largely Member States, with the exception of agricultural and fisheries payments where conditions are also addressed to private recipients. However even in the latter case, Member States are responsible to set appropriate legal frameworks, monitor compliance and enforce the conditions on private beneficiaries, being subsequently monitored by and financially liable to the Commission for failure to do so.¹⁸⁸

¹⁷⁷ Regulation 1303/2013, Arts. 22-23

¹⁷⁸ Regulation 1303/2013, Art. 43

¹⁷⁹ Regulation (EU) No 1307/2013, Arts. 43-47. These put in place a set of compulsory practices beneficial to climate and environment in exchange of an additional 'green' payment and sanction the failure to deliver with the suspension of the reward. See further: Alan Matthews, *Greening agricultural payments in the EU's Common Agricultural Policy*, 2 BIO-BASED APPL. ECON. 1-27 (2013).

¹⁸⁰ Regulation (EU) 508/2014, Arts. 10, 100, 101, 105.

¹⁸¹ Regulation (EU) 515/2014, art. 10 (2) a): "compliance with the Union *acquis* on borders and visas;"; and (3): "Following the exchange of views, the acceptance by the Commission of budget support within the national programme of a Member State may be made conditional upon the programming and completion of a number of actions aiming to ensure that the conditions laid down in paragraph 2 are fully met by the time the budget support is provided."

¹⁸² Regulation (EU) 513/2014 art. 3 (5), Regulation (EU) 515/2014, art. 3 (4), Regulation (EU) 516/2014, art. 3(1) and Art. 19(2), OJ L 150/2014.

¹⁸³ A line of reasoning which is more evident in the recent Commission communications: European Commission, INVESTING IN JOBS AND GROWTH - MAXIMISING THE CONTRIBUTION OF EUROPEAN STRUCTURAL AND INVESTMENT FUNDS, BRUSSELS, COM(2015) 639 FINAL (2015).

¹⁸⁴ The deep failure of the common fisheries policy is a particularly telling example in this sense. See: Emily Self, *Who Speaks for the Fish: The Tragedy of Europe's Common Fisheries Policy Notes*, 48 VANDERBILT J. TRANSNATL. LAW [i]-608 (2015); COURT OF AUDITORS, SPECIAL REPORT NO 12/2011. HAVE EU MEASURES CONTRIBUTED TO ADAPTING THE CAPACITY OF THE FISHING FLEETS TO AVAILABLE FISHING OPPORTUNITIES? (2011).

¹⁸⁵ For instance, the agricultural policy 'green payment' conditionality, see note 179 *supra*.

¹⁸⁶ Schengen and human rights conditions that aim to uphold the EU border *acquis* and human rights status quo.

¹⁸⁷ Fisheries and macro-economic conditionalities, see notes 174, 180 *supra*.

¹⁸⁸ In practice the Commission applies corrections or refuses payments to Member States in breach of cross-cutting conditions.

Administrative implementation and enforcement

The responsibility to monitor the implementation and enforce the conditions falls in the vast majority of cases on the Commission and its responsible executive agencies (Directorate-Generals). Exceptionally, in case of macroeconomic conditions, enforcement requires the approval of the Council to order suspension and of the European Parliament to allocate additional benefits.¹⁸⁹ The conditions addressed to private beneficiaries are enforced by Member States under the supervision of the Commission.

Regarding implementation, first data shows that the vast majority of ex ante conditionalities have been fully complied with by mid-2016.¹⁹⁰ At the same time, one should mention that the post-2014 conditionality expansion has brought an enormous administrative burden both at the EU and at the Member States level.¹⁹¹ The often tangled rules governing the conditions, coupled with the complex rules on spending and the broader EU and national policy frameworks made implementation a much more heavier enterprise than initially anticipated.¹⁹² This is especially true in the case of ex ante conditionalities, which must be fulfilled before spending starts and often demand comprehensive affirmative actions.¹⁹³ In result, two negative consequences have been observed. First, conditions, amongst other factors, have contributed to important spending delays in the current financial framework.¹⁹⁴ Second, while the vast majority of ex ante conditionalities have been complied with in a record time,¹⁹⁵ in many instances conditions have been interpreted and implemented as formal check lists, with only marginal substantive policy outputs.¹⁹⁶ Additionally, there is evidence of overlap and divergent interpretation of conditions throughout the responsible units of the Commission in charge of thematic funds.¹⁹⁷ Evaluators have also detected inaccurate reporting by Member States on the applicability or fulfilment of certain conditions.¹⁹⁸

¹⁸⁹ Regulation 1303/2013, Arts. 22-23.

¹⁹⁰ Communication from the Commission to the European Parliament and the Council. Mid-term review/revision of the multiannual financial framework 2014-2020: An EU budget focused on results Brussels, 14.9.2016 COM(2016) 603 final, *supra* note 46 at 5; EUROPEAN COMMISSION, THE IMPLEMENTATION OF THE PROVISIONS IN RELATION TO THE EX-ANTE CONDITIONALITIES DURING THE PROGRAMMING PHASE OF THE EUROPEAN STRUCTURAL AND INVESTMENT (ESI) FUNDS (2016).

¹⁹¹ EUROPEAN COMMISSION, *supra* note 190.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Communication From The Commission To The European Parliament And The Council. Mid-term review/revision of the multiannual financial framework 2014-2020: An EU budget focused on results Brussels, 14.9.2016 COM(2016) 603 final, *supra* note 46.

¹⁹⁵ About seventy-five percent of conditions have been fulfilled by mid 2016: *Id.* at 5.

¹⁹⁶ See discussions of the EU High Level Group meeting on the post-2020, available at: http://ec.europa.eu/regional_policy/en/policy/how/improving-investment/high-level-group-simplification/ and presentation of the Commission: <https://ec.europa.eu/futurium/en/content/streamlined-more-effective-shared-management-7th-meeting-high-level-group>

¹⁹⁷ A good example in this sense is the divergent application of three equal opportunities conditions (general ex ante conditionalities in the area of gender equality, non-discrimination, disability) of the European Structural and Investment Funds. Our examination of the programming documents shows that the Commission's directorates for employment (DG EMPL) and agriculture (DG AGRI) have strongly required the observance of all equality conditions. On the contrary the conditions are not always present in regional development programs and are completely excluded from fisheries: Finding based on the analysis of the EAFRD and ESF national programmes, available at: http://ec.europa.eu/agriculture/rural-development-2014-2020/country-files/index_en.htm and <http://ec.europa.eu/esf/main.jsp?catId=576&langId=en>; EC, Draft Guidance, EMFF Specific Ex-Ante Conditionalities, Version 3 (7 March 2014), p. 12, available at: http://ec.europa.eu/fisheries/reform/emff/doc/10-guidance-emff-specific-eacs_en.pdf; Finding based on the analysis of the ESI Funds operational programmes, available at: http://ec.europa.eu/regional_policy/en/atlas/programmes/

¹⁹⁸ EUROPEAN COMMISSION, *supra* note 184.

Regarding enforcement, conditions tend to be rarely formally enforced against Member States,¹⁹⁹ but frequently enforced against private recipients.²⁰⁰ In the case of the latter, evaluations of the cross-compliance environmental conditionality attached to agricultural funds show that the system is well functioning, checks are carried out regularly and funds are withdrawn.²⁰¹ In subsidiary, where States fail to cut funds, Commission may apply correction or refuse payments - a practice regularly endorsed by the EU courts.²⁰²

Contrary to conditions addressed to private beneficiaries, conditions addressed to the Member States are rarely enforced. In case of Member States the Commission traditionally enjoys a large discretion and therefore, in cases of non-compliance, a dialogue culture is generally favoured.²⁰³

Even if formal enforcement is rare, it is interesting to note that informal enforcement tools have been *de facto* institutionalized in practice. As such, in numerous cases, Member States do not claim payments until the conditions are in place - the so-called 'self-suspension' mechanism.²⁰⁴ The mechanism allows states to avoid politically uncomfortable public suspensions of funds and is accepted by the Commission against the promise of future compliance.²⁰⁵ As we shall argue below such informal mechanisms may raise important legal concerns.²⁰⁶

Judicial review

The EU Court of Justice may rule on conditions during the judicial control of EU legislative acts or during the control of Commission's (administrative or quasi-legislative) acts.

The Court of Justice of the EU has not yet ruled on the constitutionality of conditions with regards to Member States. Hence, contrary to the U.S. Supreme Court, the EU Court has not yet assessed the conformity of cross-cutting conditions with EU treaties and did not examine the question of whether the EU may use its spending to encourage acts otherwise outside the EU conferred powers.

The Court did however review the constitutionality of conditions limiting individual fundamental rights and struck them down when these were not consistent with the EU Charter of Fundamental Rights.²⁰⁷

¹⁹⁹ Interviews, Brussels, 5-6 July, 2016. In prior financial periods the macroeconomic conditionality have been enforced only once against Hungary; the infringement conditionality was enforced once against Italy; the home affairs funds human rights conditionality was enforced once against Greece.

²⁰⁰ Alliance Environnement, Evaluation of the application of cross compliance as foreseen under Regulation 1782/2003, Prepared for European Commission, DG Agriculture, Executive Summary, 26/07/2007, pp.5-6. In case of fisheries see: Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, (entered in force from 2010), OJ L 286/2008, Art.40(3).

²⁰¹ *Id.*

²⁰² The effectiveness of conditionality addressed to individuals remains however questionable. See: COURT OF AUDITORS, SPECIAL REPORT 26/2016. MAKING CROSS-COMPLIANCE MORE EFFECTIVE AND ACHIEVING SIMPLIFICATION REMAINS CHALLENGING; COURT OF AUDITORS, IS CROSS COMPLIANCE AN EFFECTIVE POLICY? (2008).

²⁰³ Interviews, Brussels, 5-6 July, 2016.

²⁰⁴ EUROPEAN COMMISSION, *supra* note 190.

²⁰⁵ Interviews, Brussels, 5-6 July, 2016.

²⁰⁶ See p.34 *infra*.

²⁰⁷ Joined cases C-92/09 and C-93/09, Judgement of 9 November 2010, ECLI:EU:C:2010:662, Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen (*Volker*), ECR I-11063, (holding that the condition to publicly publish the data of individual farmers went against the right to data protection as enshrined in the EU Charter of Fundamental Rights); Case C-401/11 Judgement of 11 April 2013, ECLI:EU:C:2013:223 Blanka Soukupová v Ministerstvo zemědělství (*Soukupová*), nyr, paras. 28-29, (holding that a qualifying condition of spending in support of early retirement in the agricultural sector did not allow for retirement age differences between women and men, and prohibited further differences between women based on the number of children raised).

The EU Court has also reviewed on multiple occasions the validity of Commission decisions enforcing spending conditionality against states and granted in all the cases a broad discretion to the Commission, first in deciding on the existence of a conditionality breach and second on the effective amount of cuts.²⁰⁸ The vast majority of these cases deal with procedural rules of spending enforcement, however we have been able to identify one judgment that dealt in a substantive manner with a conditionality prohibiting payments to a state in breach of EU law.²⁰⁹ In *Italy v Commission*, the Court upheld the Commission's discretion and held that the Commission could refuse payments if a state is investigated for a breach of EU law,²¹⁰ so long as a '*sufficiently direct link*' may be identified between the breach of law and the spending measure in question.²¹¹ In establishing the '*sufficiently direct link*' test, the Court adopted a broad interpretation of the term '*measure*', rejecting Italy's claims that the infringement procedure and the financed '*measure*' were not related.²¹²

Since the Court has not yet reviewed reviewed the constitutionality of conditionality addressed to Member States in the light of the EU treaties, to date, the benchmark test to assess the legality of conditions remains the '*sufficiently direct link*' doctrine. The latter leaves a large scope of discretion both to the EU legislators in designing conditionality and to the Commission in enforcing it.

Similarities and differences

Similarities

The comparative analysis of conditional spending in the U.S. and EU shows that the two systems have much more in common than one could have initially presumed.

No explicit constitutional consecration

Firstly, we notice that in both systems cross-cutting conditions have their fountainhead in the constitutional spending power.²¹³ Yet, conditions know no express constitutional consecration neither in the EU founding treaties, nor in the U.S. Constitution. They shape as statutory spending rules adopted by the legislative branches and influenced to a great extent by the executives during the legislative process, but most notably during their actual implementation and enforcement.²¹⁴

²⁰⁸ See for a perfect illustration: CJEU, Case T-661/14, *Latvia v Commission*, para. 89: "Commission has a broad discretion to evaluate the risk to the Funds owing to the existence of weaknesses in the cross-compliance control systems and to the complexity of the calculation operations — *not disclosed to the Court* — underlying the calculation of the various flat-rate corrections at issue [...]. On that point, in reviewing the legality of acts under Article 263 TFEU, the Court cannot substitute its own economic assessment for that of the Commission [...]."

²⁰⁹ CJEU, Case C-385/13 P, *Italian Republic v European Commission*, ECLI:EU:C:2014:2350 (*Italy v Commission*), para. 84: "il suffit pour la Commission d'établir un *lien suffisamment direct* entre l'objet de la procédure d'infraction et celui des demandes de paiement déclarées irrecevables " In the case, the Commission ordered the suspension of funds allocated to a waste management project in the Italian region of Campagna based on the EU law infringement condition, as Italy was under investigation for breach of EU waste management legislation. The cross-cutting condition prohibited payments to a state under infringement procedures "concerning the measure(s) that is or are the subject of the [payment] application in question", the Commission refused payments.

²¹⁰ TFEU, Arts. 258-260. The infringement procedure is a separate action brought by the Commission against a Member State for failure to fulfil a EU law obligation under the treaties, under the sanction of a lump sum payment or a penalty payment specified by the Commission.

²¹¹ *Italy v Commission* note 209 *supra*

²¹² *Id.* [53-55]

²¹³ See pp 6-21 *supra*.

²¹⁴ *Id.*

In both legal systems the conditions are vested by the higher level of government on state constituencies and private recipients of funds. States nevertheless play an important role in the process. First, states are central and often decisive actors in the initial design and adoption of conditions.²¹⁵ Second, the states have an important say on conditions as they have an important discretion in choosing the areas of spending and subsequently negotiate the specific terms of financial intervention.²¹⁶ Lastly, and most importantly, states have a pivotal role in the effective implementation and actual application of conditions in each spending area.²¹⁷

Conditionality - a universal governance device

The comparative study shows that conditionality is a virtually universal governance device, highly flexible and capable of remaining conceptually intact while transcending the boundaries of various policies and even legal systems. Both in the EU and the U.S. systems conditions present remarkable similarities in conceptual design and functional use. In both systems conditions shape as *ex ante* or *ex post* requirements of spending that pursue a federal policy goal and may lead to withdrawal of funds in case of non-compliance or to additional benefits in case of good compliance (negative and positive conditions). Through conditions, the EU as well as the U.S. federal governments bring additional policy objectives under the umbrella of spending, in many instances advancing what may not be achieved or may be more difficult to achieve through direct legislative and policy making procedures.²¹⁸ The use of conditions is wide-spread throughout various policy areas, as: education, research, agriculture, home affairs, transparency, public health, environment *et al.* Conditions are ingeniously designed to help advance new policies, enforce old ones, regulate or encourage legislation and tackle institutional reforms using the leverage of budgets. Moreover, especially the U.S. example shows that conditions have high resilience over time, being almost immune to political change and highly adaptable to partisan politics.²¹⁹

Administrative under-enforcement and weak form judicial review

Beyond these highly interesting findings on the nature of conditions, our main findings rest on the tool's administrative (under-)enforcement and (weak form) judicial review in both the EU and the U.S. legal systems.

Administrative under-enforcement against States

The comparative study shows that administrative under-enforcement is very likely, and whilst under-enforcement tends to be generalized, the findings show that conditions tend to be more often enforced in case of private beneficiaries and are only very rarely enforced in the case of states governments.²²⁰

As mentioned in section 2 above, conditions are rarely enforced in the U.S. In this sense, we recall that Pasachoff identified four usual suspects blamed for the under-enforcement phenomenon in the U.S.²²¹

²¹⁵ Erin Ryan, *Negotiating Federalism*, 52 BOSTON COLL. LAW REV. 1–136, 38–40 (2011); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. LAW REV. 813–944, 858–865 (1988); McCoy and Friedman, *supra* note 56; Gerken, *supra* note 57.

²¹⁶ Gerken, *supra* note 57; GLUCK, *supra* note 57.

²¹⁷ *Id.*

²¹⁸ Rosenthal, *supra* note 34.

²¹⁹ See pp 8-11 *supra*. Rivlin, *Intergovernmental Management for the 21st Century*, 299; Bagenstos, ‘Spending Clause Litigation in the Roberts Court’, 382.

²²⁰ See pp 6-21 *supra*.

²²¹ Pasachoff convincingly rejects all four arguments in the specific U.S. context. See: PASACHOFF, *supra* note 52.

First, it is argued that funding withdrawal hurts ultimately the most needy.²²² Second, it is argued that withdrawal of funds is intrusive to states' sovereignty.²²³ Third, it is argued that withdrawal of funds delays spending as a whole.²²⁴ Fourth, it is claimed that the politics of funds denial is a sensitive issue and the bargaining process between states, executive agencies and legislative institutions is an important dissuasive factor.²²⁵

Similar arguments against conditions enforcement are also voiced in the EU.²²⁶ As such, studies preparing the last 2014-2020 EU budgetary reform claimed that suspension of funds for non-compliance with macroeconomic conditions risks to disproportionately affect less developed regions and its beneficiaries, raise questions of equal treatment of Member States, delay funding and hurt economic growth.²²⁷ Sovereignty concerns were additionally raised by Member States during negotiations.²²⁸ As to the politics behind funds withdrawal, the pressure on the Commission shall depend on a case by case basis. While the Commission could be more comfortable to suspend spending in areas of high consensus (i.e. on environmental conditions), the suspension of EU funds for non-compliance in more contentious areas (i.e. macroeconomic conditions) shall be highly difficult and would have to be firstly commonly agreed at the highest level of EU institutions.²²⁹

Weak form judicial review

Another important finding is that both the EU and the U.S. judiciary branches tend to adopt a 'weak-form judicial review'²³⁰ when ruling on conditions, granting a high level of discretion to the legislative and executive branches in the design, implementation and enforcement of conditions.²³¹

The U.S. scholarly thinking on conceptual problems the U.S. Supreme Court faces when confronted with conditional spending adjudication is enlightening in this respect.²³² As professor Bagenstos and Sunstein have argued, when dealing with conditional spending the courts are faced with deep normative choices on the scope of conditional spending, choices that are far from settled and are better suited for the democratic political deliberation in parliaments rather than for judicial scrutiny.²³³ In addition, Professor Fuller's theory on bipolar and polycentric disputes explains the limits courts face in cases that involve polycentric uncertainties²³⁴ such as cases involving questions on the

²²² *Id.* at 253–254.

²²³ *Id.* at 253.

²²⁴ *Id.* at 252.

²²⁵ *Id.* at 254.

²²⁶ EUROPEAN PARLIAMENT, MACRO-ECONOMIC CONDITIONALITIES IN COHESION POLICY 44–47 (2012).

²²⁷ *Id.* at 44–47.

²²⁸ Council Of The European Union, Presidency Report on Cohesion Policy, 18097/11, Brussels, 7 December 2011, para. 7a.

²²⁹ Interviews, EU Institutions, Brussels 5–6 July, 2016. The Macroeconomic conditions have been the most contested during the negotiations, their effective adoption was a deal decided on a last minute at the highest level of Council configurations and reluctantly accepted by the European Parliament, as opposed to other conditions that were negotiated at the level of specialised working groups.

²³⁰ Lon L. Fuller and Kenneth I. Winston, 'The Forms and Limits of Adjudication', *Harvard Law Review* 92, no. 2 (1978): 353–409, doi:10.2307/1340368.

²³¹ See pp 6-21 *supra*

²³² Bagenstos, *supra* note 128; BAGENSTOS, *supra* note 128 at 356–380; Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine*, 26 SAN DIEGO LAW REV. 337–346 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 BOSTON UNIV. LAW REV. 593–622 (1990); Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. LAW REV. 353–409 (1978).

²³³ Bagenstos, *supra* note 128 at 99; BAGENSTOS, *supra* note 128 at 356–380; Sunstein, *supra* note 232.

²³⁴ Fuller and Winston, *supra* note 232.

constitutionality or judicial enforcement of conditions. When attempting to adjudicate on conditions, the courts inevitably run into the polycentric difficulty of multiple economic, political and social preferences at stake that bring a high level of uncertainty to judicial deliberation.²³⁵ In result, a court shall more often than not find it very difficult to substitute its judgement to the legislative or administrative agencies, as the latter actors are generally better placed to balance with a higher level of accuracy the full range of considerations at stake.²³⁶ Consequently, courts shall necessarily find it easier to scrutinise conditions based on formal legality claims, such as prescription, access to justice or right to be heard, rather than examine the core of the problem of whether and to which extent a condition is constitutionally permissible.

Finally, it is worth noting that in both EU and the U.S. systems, judicial review shall be most difficult in the case of conditions that present a rather remote or indirect link to spending. Take for instance a hypothetical 'rule of law' condition in the EU or a prohibition to carry 'guns on campus' condition in the U.S. linked to disbursement of research funds. To address this concerns, both EU and the US courts, have put in place judicial doctrines to ensure that a reasonably close link between spending and the cross-cutting condition exists. In this sense, the EU Court has institutionalised a '*sufficiently direct link*' test, while the U.S. Supreme Court established the '*germaneness*' criterion in *Dole* case to examine whether conditions are reasonably related to the federal interest in a given program.²³⁷ It is worth noting that both tests have proven little bite and credible constraint in practice. To date, the EU courts have never struck down conditions based on the 'sufficiently direct link' test. Similarly, the U.S. judiciary has adopted a broad reading of the 'germaneness' criterion, some judges even wondering if the criterion is justiciable, hence fit for adjudication in courts.²³⁸

Differences

Functions: U.S. regulation v. EU enforcement

A core difference between the U.S. and EU cross-cutting conditions lies in the functions towards which their use is primarily directed. The comparative insight of the two legal systems shows that the primary function of conditional spending in the U.S. is *regulation*, while the primary function of spending conditionality in the EU is *enforcement*. In other words, whilst both in the U.S. and EU cross-cutting conditions may pursue multiple functions, in the U.S. the main goal of conditional spending has been to help expand the federal government's limited power to regulate; whereas in the EU, the aim of spending conditionality has been largely to help the EU enforce its extensive, already existent regulation and policies.

The difference has a historical explanation. The U.S. Constitution has been amended only on limited occasions to expand the federal powers.²³⁹ This meant that the U.S. federal government had to explore

²³⁵ This limit is prominent in the final paragraph of Justice Breyer opinion in *Nat'l Fed'n of Indep. Bus. v. Sebelius* 567 U.S. (2012), *supra* note 6. : "[t]he Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. *But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.*"

²³⁶ *Barron and Rakoff*, *supra* note 92 at 272–273; *Chevron U.S.A., Inc. v. NRDC* 467 U.S. 837 (1984), JUSTIA LAW, <https://supreme.justia.com/cases/federal/us/467/837/case.html> (last visited Apr 7, 2017).

²³⁷ *South Dakota v. Dole* 483 U.S. 203 (1987), *supra* note 134.

²³⁸ Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So Congressional Power in the Shadow of the Rehnquist Court: Strategies for the Future*, 78 INDIANA LAW J. 459–542, 464–469 (2003).

²³⁹ The 13th, 14th, 15th Reconstruction Amendments of 1865-1970, granting the Congress the power to enforce the guarantees enshrined therein by appropriate legislation and the 16th Amendment of 1913, granting the Congress the power to "lay and collect taxes on income".

different routes to regulate areas outside its reach, but where federal action was deemed necessary. The power to spend and adopt conditional spending programs was one of routes taken to this end.²⁴⁰ Unlike the U.S. Constitution, the EU founding treaties have been repeatedly amended to expand the powers of the EU.²⁴¹ As such, the EU treaties give the EU legislators important scope for regulation based on the EU's enumerated powers (exclusive, shared and coordinative competences), the EU's implied powers doctrine, as well as on the flexibility clause (Article 352 TFEU).²⁴² Despite its extensive power to regulate and adopt broad policy lines, the EU remains limited in the power to enforce its regulation and policy; a limitation that became increasingly acute in the last years.²⁴³ Spending conditionality is a tool largely seen as a remedy for the EU's enforcement deficit.²⁴⁴

Specificity and clarity of conditions

Another core difference is that conditions tend to be much more *individual-tailored in the U.S.* and largely *state-tailored in the EU*. The difference comes with the very different thematic purpose, amounts and subjects of U.S. and EU spending envelopes, that necessarily affect the conditionality's design and scope.

The U.S. largest spending envelopes are directed to healthcare, social security, and education; and spending in these areas is often disbursed to private beneficiaries.²⁴⁵ The EU budget is largely committed to agriculture, rural and regional development, economic and social cohesion, and funds are disbursed largely to Member States' public authorities.²⁴⁶ Given the very different areas of spending and the Member States as primary beneficiaries, cross-cutting conditions are very different in the EU and tend to be largely state-tailored.

As a result, EU conditions are often general and suggest only with a limited degree of clarity the effective conduct required, in comparison to their U.S. counterparts. There is also much less clarity for the EU citizens regarding the concrete action required by the EU spending conditions, the Member States action in response and the accountability in case of failure to achieve the prescribed result. The EU conditionality generally gains clarity and tangible social-economic impact only when translated at the national level of the EU-28 through program-specific requirements often negotiated between the Commission and the Member States. As such, at the EU level one rarely encounters conditions directly asking, for instance for: student performance or prohibition of smoking on campus. Nevertheless, such conditions may well shape at the national level during the implementation of EU-wide conditions in the area of education, inclusion of vulnerable groups or poverty reduction.

Private enforcement of conditions

The comparative study also shows that private parties and citizens in general have been much more involved in the enforcement process of cross-cutting conditions in the U.S. as compared to the EU.

²⁴⁰ The power to regulate inter-state commerce and the power to tax have also been highly instrumental in expanding the power of the U.S. federal government. It suffices to mention that the 1960s US civil rights legislation has its legal basis on the federal commerce power and not on the reconstruction amendments.

²⁴¹ J. H. H. Weiler, *The Transformation of Europe*, 100 YALE LAW J. 2403–2483 (1991).

²⁴² P. P. CRAIG, *EU LAW: TEXT, CASES, AND MATERIALS* (5th ed. ed. 2011).

²⁴³ Bieber and Maiani, *supra* note 44.

²⁴⁴ *Id.*; Roland Bieber & Francesco Maiani, *Sans solidarité point d'Union européenne Regards croisés sur les crises de l'Union économique et monétaire et du Système européen commun d'asile*, 48 RTDE (2012).

²⁴⁵ See pp 6-15 *supra*.

²⁴⁶ Some notable exceptions are EU-wide educational and research programmes as Erasmus or Horizon 2020, that are managed directly at the EU level.

This difference finds its roots partially in the U.S. judicial doctrine on remedies²⁴⁷ as well as in the explicitly enshrined possibility under certain U.S. civil rights statutes to privately enforce cross-cutting conditions.²⁴⁸ Pursuant to the latter, interested persons can file a judicial complaint against public or private beneficiaries of U.S. federal grants asking for funding cut-off in case the said beneficiaries discriminate or otherwise violate the claimant's civil rights.²⁴⁹

In the EU there is no similar decentralized private enforcement of conditionality.²⁵⁰ Hence, the compliance or non-compliance with a condition is exclusively a matter between the EU and Member States, and in case of non-compliance it is only for the EU - not for affected individuals - to enforce the conditionality and ask for funding cut-off.

Let us take the example of discrimination to better illustrate the difference. In the EU an individual cannot take a state or another entity to EU courts for failure to respect a non-discrimination conditionality.²⁵¹ After the start of funding operations, when a discrimination occurs, the individuals have access to an administrative complaint procedure at the national or EU level, which could lead to funding cut-off only if the Commission finds that the irregularity affected the selection procedure or the financial interests of the EU. However, outside these situations - for instance, if a university receiving EU funds has in place discriminatory practices - an individual cannot launch a complaint against the university or take it to court claiming funding cut-off for failure to comply with applicable non-discrimination law. The individual will have to address an administrative complaint to the Commission or, if discriminated against, seek individual relief under applicable national or EU non-discrimination law - that would lead most often to an administrative fine.

What can the EU learn from the U.S.?

The experience of the U.S. shows that in spite of significant difficulties and criticism encountered along the way, conditional spending has proven a valuable tool of government. It proved particularly useful in promoting national policy imperatives and addressing collective action problems in areas as education, healthcare, social security or environmental protection.²⁵²

Additionally, the study of the U.S. conditional spending doctrine and policies is particularly valuable as it shows that when used in federal-like and multilevel government setting, such as the one of the EU, conditionality is not simply a policy tool, but it is first and foremost a *constitutional matter*. As a consequence, the policy planning, administrative enforcement, judicial adjudication and legal study of conditionality should be conceived of only as an intrinsic part of the general principles and norms of the EU constitutional construction. In this context, the principles of conferral, legality, proportionality, equality of Member States, judicial redress, transparency, democratic accountability and fundamental rights must form an indissoluble integral part of all conditionality thinking in the EU.

²⁴⁷See generally, Lisa E. Key, *Private Enforcement of Federal Funding Conditions under 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 UC DAVIS LAW REV. 283–354 (1995).

²⁴⁸See for instance the guidance of the Department of Justice at: https://ojp.gov/about/ocr/pdfs/OCR_TitleVI.pdf or Department of Education at: <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html>

²⁴⁹See, *Pennhurst State Sch. v. Halderman* 465 U.S. 89 (1984), *supra* note 133.

²⁵⁰See CJEU, *Greenpeace International v Commission*, C-321/95 P, EU:C:1998:153 (on the difficulty for private parties to prove standing to enforce an environmental conditionality in EU Funds)

²⁵¹This is mainly due to the EU Court restrictive interpretation of 'direct and individual concern' standing rules in direct actions. See, Daniela Caruso, *Direct Concern in Regional Policy: The European Court of Justice and the Southern Question*, 17 EUR. LAW J. 804–827 (2011).

²⁵²ROBERT D. COOTER & NEIL SIEGEL, *COLLECTIVE ACTION FEDERALISM: A GENERAL THEORY OF ARTICLE I, SECTION 8* 168–175 (2010), <https://papers.ssrn.com/abstract=1692835> (last visited Apr 7, 2017); *Baldwin v. G.A.F. Seelig, Inc.* 294 U.S. 511 (1935), *supra* note 43.

Another important finding is that often conditions may fail and, as shown above, when that happens, both the administrative agencies and the judiciary have limited *ex post* tools to effectively correct under-performing conditions. This leads us to the conclusion that a much more focused policy thinking on the initial, *ex ante* design of conditions is crucial for their successful operation of conditions and attainment of intended policy goals.

Departing from the *initial good design imperative*, this section attempts to highlight a core set of lessons drawn from the U.S. experience which could be usefully considered during the next EU conditionality formulation cycle.

Focusing conditions on policy objectives

A first lesson learned from the US experience is that the full and correct fulfillment of a condition does not necessarily mean that the policy objective pursued has been actually achieved.²⁵³ The condition's policy objective relies on a clear and measurable focus on results and is not always fulfilled by a mere compliance with the condition's criteria.²⁵⁴

The current EU conditions tend to suffer from the same disconnect between the actions prescribed and policy results sought. Let us take the example of the EU *ex ante* conditionality on gender equality to better emphasize the point.²⁵⁵ The condition asks for inter-institutional arrangements with equality bodies and training of officials in charge of EU Funds on gender equality matters. Yet, even if both requirements are fully complied with, there is a clear risk that conditions turn into formal box ticking exercises with little positive impact on EU gender equality policy.²⁵⁶ To avoid this outcome, the criteria for fulfillment must constantly be assessed against the primary policy goal of gender equality.²⁵⁷ Therefore, the condition must not ask whether there is a plan, but whether the content of the plan and its actual implementation is consistent with EU equality policy. Moreover, the conditions must not ask about a training report but about the training results. Beyond asking whether there is an inter-institutional agreement with equality bodies, the condition must ask whether these have the actual capacity to turn the inter-institutional agreement into reality.

Overall, the baseline assessment revolves around a *cost-benefit analysis* and the question of whether or not the policy is better off with a condition or without it.²⁵⁸ If a given condition brings no added value to the policy goal pursued (i.e. gender equality), then spending is better off without a condition altogether. By analogy, as hard as it may be to articulate it, EU spending may be better off with no gender equality condition than with a badly designed one, as the implementation of a badly designed condition consumes important resources which could have found a more useful allocation in its absence.

²⁵³ See, section 2.1.3 *supra*

²⁵⁴ Section 2.1.3, *supra*

²⁵⁵ Regulation 1303/2013, Annex XI, Part II.

²⁵⁶ Viorica Vita, *Mainstreaming Equality in European Structural and Investment Funds: Introducing the Novel Conditionality Approach of the 2014–2020 Financial Framework*, .

²⁵⁷ For an excellent example on the difficulty of getting conditions right, see: Jeffrey L. Pressman, *Implementation: How Great Expectations in Washington Are Dashed in Oakland*, 3rd ed., The Oakland Project Series (Berkeley: University of California Press, 1984), esp. pp. 89-90, Figure 2: p. 111 compared to Figure 3 pp. 114-15.

²⁵⁸ Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA LAW REV. 509–552 (1979).

Balancing conditions and spending

The U.S. experience repeatedly underlines the importance of carefully balancing the policy objectives of conditions with the policy objectives of spending.²⁵⁹ Starting with the initial financial assistance reform of the 1970s and ending up with the most recent one, all U.S. administrations were continuously concerned with the excessive burden conditions may pose on spending itself.²⁶⁰

The EU practice with conditionality seems to follow a similar path. Here, it is interesting to recall the initial statement of the EU Commissioner for Regional Policy: “[t]his time around no money will be spent if the right conditions are not there, so there is no getting away from *ex ante* conditionalities”.²⁶¹ Whilst the EU Commissioner's statement might have appealed politically at the start of the financial period, today the serious delays in spending suggest a different discourse.²⁶² While there are many culprits to blame for the current spending delay, conditionality is beyond doubt one of them.²⁶³ The delay means that EU funds may not fully reach by the end of the financial period their primary milestones. The latter are all highly valuable policy goals, of at least comparable importance to conditionalities, such as: transportation networks, internet and technology infrastructure, shift to low carbon economy, resource efficiency, *et al.* The concern is of high priority especially in the current economic climate where EU Member States rely dramatically on EU financial resources to support domestic growth.

The EU has no interest to block EU money. EU's interest is to spend EU money in a correct and effective manner, while having the conditions complied with to the fullest possible extent. Ultimately, to ensure the well-functioning of the overall system, the trade-off between spending and the number of conditions attached shall have to be carefully reassessed.

Dealing with complexity

The U.S. experience with conditions has shown a continuous attention to the raising complexity and administrative burden.²⁶⁴ Demanding paperwork requirements and bureaucratic red-tape have been repeatedly reported as major obstacles in the effective administration of conditions.²⁶⁵ The fact that administrative simplification has been a constant goal on U.S. financial reform agenda since the 1980s and still continues today suggests that dealing with complexity may prove very difficult in a multi-level government.²⁶⁶

²⁵⁹ Section 2.1.3. *supra*. CAPPALLI, *supra* note 12; US EXECUTIVE OFFICE OF THE PRESIDENT AND OFFICE OF MANAGEMENT AND BUDGET, *supra* note 1.

²⁶⁰ UNITED STATES. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 52; US EXECUTIVE OFFICE OF THE PRESIDENT AND OFFICE OF MANAGEMENT AND BUDGET, *supra* note 1.

²⁶¹ Johannes Hahn, Commissioner for Regional Policy, speech/13/974 of 26.11.2013, available at: http://europa.eu/rapid/press-release_SPEECH-13-974_en.htm, consulted on 01.02.2014.

²⁶² Communication from the Commission to the European Parliament and the Council. Mid-term review/revision of the multiannual financial framework 2014-2020: An EU budget focused on results Brussels, 14.9.2016 COM(2016) 603 final, *supra* note 46; EUROPEAN COMMISSION, *supra* note 190.

²⁶³ European Parliament resolution of 16 February 2017 on delayed implementation of ESI Funds operational programmes – impact on cohesion policy and the way forward (2016/3008(RSP)), points A and 2, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0055+0+DOC+XML+V0//EN#def_1_1

²⁶⁴ See pp 11-13 *supra*

²⁶⁵ IMPACT OF FEDERAL PAPERWORK ON STATE AND LOCAL GOVERNMENTS: A REPORT TO THE COMMISSION ON FEDERAL PAPERWORK: AN ASSESSMENT /, (1977), <http://hdl.handle.net/2027/mdp.39015002290164>.

²⁶⁶ See pp 11-13 *supra*

The current EU experience seems to echo the same complexity concerns. Conditions brought a substantive administrative burden both for the EU and Member States administrations.²⁶⁷ While conditions were adopted in the 2014-2020 financial framework in the name of funding effectiveness and efficiency, the increased complexity, administrative burden and overlaps risk leading precisely to the opposite result. Here one could usefully mention the 'over-regulation – under-regulation' paradox voiced in the U.S. scholarship.²⁶⁸ When applied to conditions, the paradox of over-regulation tells us that more complex and demanding conditions (overregulation) tend to be more difficult to implement and are very likely to encounter strong resistance from state administrations and final beneficiaries. Such overregulated conditions risk to be self-defeating, and reach only a limited or even an opposite policy result to the one initially intended; thus, leading to under-regulation.²⁶⁹

As mentioned already, addressing complexity has not been an easy policy task in the U.S. where simplification reforms are still under way.²⁷⁰ In turn, EU shall have to undertake its own policy thinking and come up with EU-tailored simplification solutions.

The U.S. experience with *condition waivers* on the one hand, and *high risk grantees*, on the other, may provide a starting example for adjusting the conditions to the needs and capacity of their recipients.²⁷¹ The system allows for relaxing or tightening the conditions on a case-by-case basis and may facilitate simplification and a more balanced distribution of conditions in result. Waivers usually exempt recipients from certain conditions²⁷² and replace the latter with a set of principles or standards to be observed.²⁷³ On the contrary, high risk grantees are closely monitored on their performance.²⁷⁴ A differentiation between EU Funds recipients has been already proposed by professor Barca in the 2009 report on the future of EU Cohesion policy.²⁷⁵ Adjusting the volume of conditions to the need and capacity of recipients would imply that the planning process would start *not* by asking how many objectives the EU would like to see accomplished through spending conditions, but how many objectives are effectively *needed* and how many conditions *can be realistically handled* by the final beneficiary. Waivers may be considered where the States prove that equivalent and satisfactory measures are already in place. In contrast, high risk recipients with a weak track-record on conditions

²⁶⁷ Here, it is sufficient to note that the Cohesion funds ex ante conditionalities alone amount to three thousand in 2014-2020. If one multiplies this number with the criteria to be fulfilled under each ex ante conditionality the figures become exorbitant. While doing the math we must keep in mind the macroeconomic generous set of conditionality, the subsequent European Semester conditionalities they link to and the additional fund specific conditions of the fisheries, agricultural and home affairs funds. EUROPEAN COMMISSION, *supra* note 190.

²⁶⁸ JOHN M. MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA (1988); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 UNIV. CHIC. LAW REV. 407–441 (1990); CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT (2014).

²⁶⁹ Sunstein, *supra* note 268.

²⁷⁰ See pp 11-13 *supra*.

²⁷¹ <https://cfo.gov/cofar/>

²⁷² Barron and Rakoff, *supra* note 92; Martha Derthick & Andy Rotherham, *Obama's NCLB Waivers: Are they necessary or illegal?*, 12 EDUC. STANF. (2012), <http://search.proquest.com/docview/1237823824/abstract/750ADF4CCA684DCAPQ/1> (last visited Apr 8, 2017). For instance, under the Elementary and Secondary Education Act 2012 Waiver rules, states are granted waives but are still required to adopt a set of education performance standards and performance reporting rules, see: US Department of Education, ESEA Flexibility, Appendix B, available at: <https://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html>

²⁷³ For instance, under the Elementary and Secondary Education Act 2012 Waiver rules, states are granted waives but are still required to adopt a set of education performance standards and performance reporting rules, see: US Department of Education, ESEA Flexibility, Appendix B, available at: <https://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html>

²⁷⁴ Title 34 Code of Federal Regulations (C.F.R.) § 80.12 'High Risk Grantees'; See also: US Government Accountability Office, High Risk Series, available at: <http://www.gao.gov/products/HR-93-16>; US Department of Education Report on Identification and Monitoring of High Risk Grantees (2012), available at: <https://www2.ed.gov/about/offices/list/oig/aireports/i13k0002.pdf>

²⁷⁵ BARCA, *supra* note 171.

implementation would receive more technical assistance, whilst being closer monitored by the EU. This could avoid overburdening local administrations and allow for the much-needed local flexibility, experimentation and innovation. A phasing-out process must be foreseen to facilitate the transition between the two categories. Highly important, such a differentiation system must pay a close attention to the principles of equality and non-discrimination.²⁷⁶

Establishing uniform and stable legal frameworks

The U.S. experience with spending conditions highlights the importance of a uniform, stable and streamlined legal framework on spending conditions and their subsequent interpretation.²⁷⁷ As shown by past U.S. programs, a fulfilled condition is only the beginning.²⁷⁸ Achieving conditions results (i.e. civil rights promotion in education) may prove a much more complex and long lasting process of trial and error, continuous adjustments and effort.²⁷⁹ To achieve results, a condition must be governed by stable legal frameworks pursuant to which it is continuously applied, observed, enforced, reviewed and internalized to a given legal, political, administrative and institutional culture.²⁸⁰

From this point of view, the current EU legal framework is not a good fit for conditions for two main reasons. First, the current EU legal framework adopted on seven-year basis is too short to allow a sizable result for conditions. Changing the conditions' rules of the game every seven years repeatedly delays the achievement of results. The ultimate risk is that both Member States and EU administrations never get over the formal paperwork and control exercise.

Second, the EU temporary legal framework hinders the full operation of conditions. If the Commission is too active in withdrawing funding or insisting on a rigorous fulfilment of conditions, Member States will have the tendency to get rid of 'troubling' conditions in the next financial period.²⁸¹

In this sense the seven-year cycle of the EU budgetary spending may be a highly disruptive factor for conditions. The policy objectives to be achieved by the current conditions often imply large scale structural, legal and policy reforms, which cannot be but formally implemented in seven years' time. Changing the conditions together with the seven-year life span of EU budget risks jeopardizing the first progress achieved. It also makes the EU policy objectives vulnerable to polycentric, hugely diverging and often short-sighted financial interests of Member States.

For the above reasons, a stable and uniform legal framework should be preferred. Single rules shall also need one single master in charge of their consistent interpretation. Therefore, if the above proposal is taken on board, the current fragmented interpretation of conditions by each Directorate General of the Commission in charge of thematic spending should be revisited.²⁸² This would allow

²⁷⁶ TEU, Article 4 (2).

²⁷⁷ Office for Management and Budget, *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, section 200.300: https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title02/2cfr200_main_02.tpl

²⁷⁸ Section 2.1.3. *supra*

²⁷⁹ PRESSMAN, *supra* note 29; CAPPALLI, *supra* note 12 at 1964.

²⁸⁰ Robert D. Thomas & Ralph A. Luken, *Balancing Incentives and Conditions in the Evolution of a Federal Program: A Perspective on Construction Grants for Waste Water Treatment Plants*, 4 PUBLIUS 43–63 (1974).

²⁸¹ This is currently the problem of agricultural funds cross-compliance conditions, Interviews, European Commission, DG AGRI, 5-6 July, Brussels. It has also been the experience of the 2017-2013 infringement condition that was repealed in 2014-2020 after it was enforced by the Commission and confirmed by the Court of Justice of the EU in CJEU, Case C-385/13 P, *Italian Republic v European Commission*, note 101, *supra*.

²⁸² See the example of DG MARE, whose interpretation of applicable ex ante conditionalities completely excluded the non-discrimination, gender equality and disability conditionalities, contrary to the uniform guidance on ex ante conditionality prepared under the supervision of DG REGIO: European Commission, DG MARE, Draft Guidance, EMFF Specific Ex-Ante Conditionalities, Version 3 (7 March 2014), p. 12, available at: <http://ec.europa.eu/fisheries/reform/emff/doc/10->

for the much-needed coherence and legal certainty for Member States administrations in charge of implementation.

Improving institutional coordination

Another lesson from the U.S. experience, closely related to the one above, is that the good operation of conditions needs leadership and permanent institutional coordination first of all at the federal level. As such, the Office of Management and Budget (OMB) is in charge since the 1970s of coordination of awarding agencies and uniform interpretation of financial assistance rules.²⁸³ The recent reform, led to the establishment of an Council on Financial Assistance Reform (CFAR) in 2011²⁸⁴ tasked to assist the OMB, to develop uniform guidance, training material and metrics on spending in general and conditions of spending in particular.²⁸⁵ The CFAR is formed from representatives of awarding agencies and the OMB.²⁸⁶

From this point of view, the EU system shows a mismatch between the new conditions and the old institutional arrangements. While temporary inter-institutional structures on ex ante conditionality implementation and suspension are in place, no permanent inter-institutional structures are present.²⁸⁷ Moreover, there is no ultimate and stable inter-institutional authority in charge of guiding the interpretation and implementation of spending conditions across the thematic expenditure lines of agriculture, cohesion, development, social, home affairs and fisheries funding, even if those funds present very often high similarities. While, the Commission Directorates responsible for spending management take the lead in the discussions, the Directorates responsible for policy implementation have only consultative role. Therefore, the implementation and evaluation of conditionality's policy results remain strongly compartmentalized at the EU level. Revisiting the EU inter-institutional cooperation and deciding on leadership could be an additional important item of the next financial reform agenda.

Building capacity

The U.S. experience showed that advancing policy goals through spending is a highly complex enterprise which requires advanced capacity at all levels of government.²⁸⁸ Numerous U.S. case studies on non-discrimination, minority inclusion in education and labor market, inclusion of persons with disabilities or labor rights conditions vividly show how important it is to match the conditions with the real capacities on the ground.²⁸⁹ To ensure that conditions operate well and achieve the intended results, the states officials in charge of funds management and control must prove high level of expertise in multiple cross-cutting disciplines. To this end, the U.S. 2009 reform has tasked the Council on Financial Assistance Reform (CFAR) to coordinate training on effective and efficient

(Contd.) _____

guidance-emff-specific-eacs_en.pdf . compared to: European Commission, DG REGIO 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

²⁸³ Federal Grant and Cooperative Agreement Act (1977), See esp. sections 8-9, available at: <https://www.grants.gov/web/grants/learn-grants/grant-policies/federal-grant-cooperative-agreement-act-1977.html>

²⁸⁴ OMB, Memorandum M-12-01, <https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2012/m-12-01.pdf>

²⁸⁵ See: <https://cfo.gov/cofar/>

²⁸⁶ See: <https://cfo.gov/cofar/>

²⁸⁷ See on the example of green conditionality in agriculture COURT OF AUDITORS, *supra* note 202.

²⁸⁸ PRESSMAN, *supra* note 29; CAPPALLI, *supra* note 12.

²⁸⁹ PRESSMAN, *supra* note 29; CAPPALLI, *supra* note 12.

funds management at the federal level.²⁹⁰ The developed trainings are subsequently available online for the use of state administrations and grant managers.²⁹¹

In the EU, capacity building and training is still primarily designed and undertaken at the state level, by the 28 EU Member States' administrations. Moreover, training is often outsourced and presents vague or no EU-wide directions. Such a system may be counterproductive.

Let us take again the example of gender equality conditionality to support this claim. The condition requires training of state officials on EU law and policies on gender equality.²⁹² Yet, training is left entirely to the Member States. Two problems arise in this context. First, the training content and scope differ tremendously from one Member State to another, meaning that gender equality may have a different meaning throughout 28 EU administrations in charge of EU Funds management.²⁹³ Second, a quick look at training modules prepared in Italy and Romania shows that trainings were rarely linked to EU spending, basic notions of economic development or EU gender mainstreaming.²⁹⁴ Moreover, training offered participants only a few practical tools to help them give meaning to gender equality in the specific context of EU Funds.²⁹⁵ Ultimately, if one asks whether EU funds are better off with a gender equality training condition than without, the answer shall be at best a mixed feeling in this particular case.

The bottom line question is: who is the better placed actor to train national officials on correct and efficient spending management and conditions implementation: the EU or Member States? The answer must be: both, the EU and Member States. Nevertheless, the EU must necessarily take the lead by preparing EU-wide training modules easily accessible online and require that subsequent national training include essential minimum standards, necessary for a meaningful training at state level. Such minimum standards must at least include a basic understanding on what the conditions mean in the *EU context*, how they may prove useful for state-specific *EU funding* and what are the ways to actually translate the condition policy goals into the every-day practice of *EU funds operation*. General and abstract training, while interesting for participants, will add little if anything to the specific context of EU spending in a given Member State so long as officials are not given tailored advice and relevant examples on how i.e. gender, environment or any other policy goal promoted through conditionality

²⁹⁰ See: <https://cfo.gov/cofar/training/>

²⁹¹ See: <http://www.ecivis.com/omb-training-videos.html>

²⁹² Regulation 1303/2013, note 3, Annex XI, Part II

The existence of administrative capacity for the implementation and application of Union gender equality law and policy in the field of ESI Funds	— 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.
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²⁹³ Compare the case of Italy and Romania. While Italy concentrated on EU legal framework and case law on gender equality, Romania has adopted a sociological approach, with a particular emphasis on the national framework and only one page generic reference to the EU Charter listing its main titles. See: Italy training module <http://europa.basilicata.it/feasr/wp-content/uploads/2016/09/Allegato-2-Condiz-G2-Parità-di-Genere.pdf>; Romania training module: http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2016/10/MODULUL_II_proiect_POAT.pdf

²⁹⁴ While the training module for Italy briefly listed the EU funding programs relevant for gender equality in the country, the training for Romania makes no reference on how the equality may be promoted in the use of EU Funds. See: Italy training module <http://europa.basilicata.it/feasr/wp-content/uploads/2016/09/Allegato-2-Condiz-G2-Parità-di-Genere.pdf>; Romania training module: http://api.components.ro/uploads/1d3a0bf8b95391b825aa56853282d5da/2016/10/MODULUL_II_proiect_POAT.pdf

²⁹⁵ *Id.*

may be effectively reflected in their everyday work. Additionally, coordinating training from the EU level may prove more financially efficient.

Acknowledging the costs of conditions

The assumption that conditions bear no budgetary cost has been heavily criticized and ultimately well acknowledged in the U.S.²⁹⁶ Not the same is true for the EU, where spending conditions are still largely²⁹⁷ presented as cost-free governance tools that are meant to achieve fundamental reforms at no additional price.²⁹⁸ This presumption is wrong and must be necessarily revisited. Conditions do cost. The well-functioning of conditions relies greatly on year-marked human and budgetary resources meant to cover for expertise, administrative and operational costs of conditions. Only the implementation of the training criterion of gender equality, non-discrimination and disability conditions in one single Member State in the 2014-2020 period involved a cost of EUR 1,5 million EUR from EU resources and half a million in state matching funds.²⁹⁹

Indeed, not every condition will imply a high cost of implementation. Some Member States might have already committed resources and institutionalized procedures to deal with certain conditions. Others however have not. Therefore, an accurate assessment of conditions' cost at the very incipient stages of conditions planning would avoid situations where insufficient or unforeseen financial, time and administrative costs hinder the well-functioning of conditions. At the same time, a cost assessment exercise would usefully assist both the EU and its Member States in taking informed decisions concerning the conditions' necessity, potential and expected results.

Enforcing conditions in a robust and transparent manner

The U.S. general practice of under-enforcement of conditions has been challenged by constitutional scholars.³⁰⁰ In the case of EU, one must also restate that as a general finding conditions are rarely formally enforced against Member States, however informally, Member States and the Commission agreed not to spend EU funds until the conditions are fulfilled, thus a *de facto* (self-) enforcement mechanism has been put in place.³⁰¹

This state of the art is not satisfactory as it gravely hinders the principles of transparency and accountability that guide the exercise of power inside the EU. Whilst suspension of funds may certainly not always be desirable, the suspension of funds or the deferral of suspension must be transparent and dully reasoned. The enforcement or not of a condition is about much more than the suspension of money. It sends a clear political message for compliance. It allows the European citizens to hold their states accountable for failure to comply. It enables stakeholders to mobilize and actively engage with the state authorities in the process of compliance. Enforcement also encourages public participation and alternative solutions if conditions turn too intrusive or badly designed. All these benefits are eroded by the informal enforcement or by the failure to enforce the conditions altogether. Whilst the Commission may have reasonable motives not to enforce certain conditions, a generalized policy of non-enforcement or informal enforcement should be reconsidered.

²⁹⁶ RICHARD B. CAPPALLI, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS 11–10 (1979); UNITED STATES. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 52 at 316.

²⁹⁷ For a notable exception see, COURT OF AUDITORS, *supra* note 202 at 36.

²⁹⁸ See, *Id.* at 59–64. (on the need to acknowledge the additional costs brought by cross-compliance conditionality)

²⁹⁹ Romania, training on non-discrimination, gender equality and persons with disabilities. Available at: <http://cncd.org.ro/2014-05-26-proiectul-formare-in-domeniul-antidiscriminarii-egalitatii-de-gen-si-al-drepturilor-persoanelor-cu-dizabilitati->

³⁰⁰ See pp 19-21 *supra*

³⁰¹ EUROPEAN COMMISSION, *supra* note 190 at 101.

Alternatively, similar to the civil rights conditions in the U.S.,³⁰² the option of decentralized enforcement of conditions by individuals may be considered to shift the politically uncomfortable and resource limited enforcement burden from the Commission to private beneficiaries of funds. In such a scenario, individuals could also hold States liable for failure to implement spending conditionality and exert additional pressure on state governments to comply.

Conclusion

The EU funds are a crucial EU policy tool, highly visible and immediately tangible to the European citizens. The conditions attached to them in the 2014-2020 financial framework are very recent and little explored. This paper has tried to assess the conditions' impact and potential departing from the U.S. long standing experience on the matter.

The paper found that EU is where U.S. was about half a century ago in experimenting with conditionality's promise and achievements. In spite of wide constitutional debates on the use of conditions, these have been employed in a sustained manner by both progressive and conservative governments to achieve important policy goals, especially when alternative tools proved insufficient.

Findings drawn from the U.S. experience inform the EU that the use of conditional spending is above all a constitutional matter and must be used with due regards to the internal constitutional safeguards. The U.S. experience additionally informs us that administrative under-enforcement and a weak form judicial review is not only specific for the EU system, but is rather a general trait of conditional spending. This led us to the conclusion that the good initial design of conditionality is of crucial importance to its successful operation.

Departing from this conclusion the last part of the paper attempted to list some of the most relevant lessons learned that could enrich the current EU reform discussions on conditionality. The lessons learned showed that conditions must be better matched to their policy objectives, harmoniously complement the overall spending execution process, be integrated in well-coordinated administrative structures, enjoy stable legal and institutional frameworks, with due attention to the recipient's capacity and implementation costs. This paper also argued for a more transparent enforcement of conditions.

Overall, the findings above show that spending conditionality may be a highly useful, yet highly context-dependent governance device, subject to a large array of limitations. Therefore, a thoughtful ex ante policy planning of conditionality that closely observes the structural limitations and constitutional guarantees underlined above is crucial for the successful operation of the tool at the EU level.

³⁰² CAPPALLI, *supra* note 12 at 19. See also section 2.1.3 *supra*.

