



The Rise of Spending Conditionality in the European Union

Viorica Viță

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Department of Law

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To Mica Veronica

Acknowledgements

Conditionality came into my life as a file on my desk while I was a trainee at the EU Agency for Fundamental Rights (FRA). Back then, I did not suspect how dramatically that file would shift my life path. I therefore start by conveying a special thanks to my FRA supervisor, *Andreas Accardo*, for giving me the liberty to experiment with all the possible and impossible tasks, which led me to ultimately discover conditionality.

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Looking back, at the end of my PhD, I finally come to realize the obvious. Beyond an accidental file on my desk, my inexplicable interest towards conditionality has always been much more than a purely academic quest. I was deeply marked by my personal encounters with conditionality from a very early age. Growing up in Eastern Europe, I witnessed first-hand the power of conditionality. I saw conditionalities succeed. And when that happened, I witnessed the dramatic positive transformation of my home countries, on their way to European integration. I saw new constitutions adopted, judiciaries reformed, institutions built, markets freed, prosperity pouring into booming economies and growing hope in people's hearts. But I also saw conditionalities fail. I saw hundreds of laws formally adopted, reforms in regression, captive institutions, geopolitical struggles between West and East, civic unrest and 'orange revolutions', followed by the anger and despair of citizens. It is this personal experience of the creative, but above all, of the destructive power of conditionality that informed and shall continue to inform my tireless desire to understand the pre-conditions for its success - an endeavor which, I hope, this thesis managed to fulfill at least in part.

I dedicate this thesis to my mother, Veronica, who is much more than a parent to me. She is my best friend, my counselor, my soul mate, my refuge and my life model. None of this would have been possible without her unconditional love, sacrifice and support.

Abstract

As of the 2014-2020 financial period the EU has made increasing use of its budgetary resources to advance its policy objectives at the Member States' level through the use of *EU spending conditionality*. EU spending conditionality is a requirement linked to EU funds expenditure that aims primarily to induce recipients to adopt a conduct desired by the EU and secure its financial interests. This thesis examines the novel spending conditionality tool, through the lens of four distinct theoretical frameworks, metaphorically called worlds: the conceptual world (Part I), the legal world (Part II), the constitutional world (Part III) and the institutional world (Part IV). Each theoretical framework reveals important findings regarding the conceptual roots, the legal reach, the constitutional significance and institutional realities of spending conditionality in the EU. Based on empirical EU-wide data and detailed case studies, this thesis concludes that despite its sophisticated conceptual form, thick legal setting, potentially far-reaching constitutional implications and the monumental institutional effort to render the tool effective, in practice, the policy output of EU spending conditionality has so far been limited and uncertain. In response, this thesis puts forward several recommendations that may usefully inform the effective future operation of spending conditionality within the EU legal and constitutional system.

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List of Abbreviations

CFP	Common Fisheries Policy
CPR	Common Provisions Regulation
CSR	Country Specific Recommendations
DG	Directorate General of the European Commission
DG AGRI	DG Agricultural Policy and Rural Development
DG EMPL	DG Employment Social Affairs and Inclusion
DG HOME	DG Migration and Home Affairs
DG MARE	DG Maritime Affairs and Fisheries
DG REGIO	DG Regional and Urban Policy
EDP	Excessive Deficit Procedure
EIP	Excessive Imbalance Procedure
ESI Funds	European Structural and Investment Funds
ESM	European Stability Mechanism
EU	European Union
IMF	International Monetary Fund
MFF	Multiannual Financial Framework
MIP	Macroeconomic Imbalance Procedure
MoU	Memoranda of Understanding
OP	Operational Programme
PA	Partnership Agreement
TEU	The Treaty on the European Union
TFEU	The Treaty on the Functioning of the European Union

Introduction

This thesis aims to open and develop a new field of legal inquiry: the EU law of spending conditionality. It examines, problematises and critically analyses an innovative, promising and extremely curious legal phenomenon introduced in the EU legal order by the 2014-2020 budget reform, which shall be generically referred to as: *EU spending conditionality*.

EU spending conditionality is a requirement attached to the disbursement of EU funds with the aim of inducing certain conduct on the part of EU Member States and citizens, and consequently, securing sound EU expenditure that complies with a set of Union standards, such as compliance with EU laws or respect for EU values.

The focus of this thesis on the EU law of spending conditionality is academically valuable from five main perspectives.

First, spending conditionality has captured lawyers' attention in the 2014-2020 financial period due to its *historic rise in EU internal policies*. The tool is designed to be used inside the EU internal legal order, it is addressed exclusively to EU Member States and EU citizens, and is linked to the enormous financial resources of the EU budget (about 1 trillion EUR over 2014-2020), which are mandated by the EU treaties to increase the welfare of the European nations, to support EU objectives and policies, to advance the economic growth and the equitable development of the EU, and ultimately to promote cohesion and the spirit solidarity between EU countries and citizens.

Second, the analysis of spending conditionality brings the richness and diversity of the EU governance toolkit into the spotlight, which, alongside legislation and regulation, includes an important set of economic tools, such as the EU's spending power and attached spending conditionality. From this point of view, spending conditionality is a genuine tool of EU governance, which assists the EU in pursuing policy goals through the non-traditional route of the EU budget. For instance, to attain the policy

goal of inclusion of persons with disabilities in the labour market, the EU may pass a law. To achieve the same policy goal, the EU may also add a condition to its budget spending which requires all enterprises financed from the EU budget to employ a certain number of persons with disabilities, even in the absence of EU legislation on the matter.

Third, the analysis of the EU law of spending conditionality makes us conceive the hybrid, international-federal nature of the EU legal order, which includes prominent features of an international organisation and equally strong features of a federal system, through a distinct set of EU legal sources and budgetary action.

Fourth, the study of the EU law of spending conditionality gains further importance due to its impressive reach across a wide range of essential EU policies and functions. As of 2014-2020 generous spending conditionality packages have been deployed through EU funds at the national level, reaching an exorbitant number of more than 3000 spending conditionalities on the ground. These have been tasked by EU law to advance core EU objectives such as effective application of EU laws and policies, macroeconomic stability, and implementation of structural, administrative and institutional reforms. They have operated in a wide array of vital policy areas such as energy, economic policies, health, education, research and innovation, poverty reduction, business, environment, the labour market, Roma inclusion, transport, public procurement, and many more.

Fifth, and most importantly, inquiry into the EU law of spending conditionality reveals the constitutional significance of this innovative use of conditionality attached to the EU budget, and its increasing potential to inform and even incrementally change the constitutional relationship between the EU, its Member States and EU citizens.

To facilitate a sound understanding of this significant and little-researched legal phenomenon, as well as its historic rise in the 2014-2020 financial period, the present thesis proposes four distinct, but mutually reinforcing, theoretical and analytical frameworks, metaphorically called 'worlds'. Namely, this thesis is built around *four worlds* of EU spending conditionality: *the conceptual world, the legal world, the constitutional world and the institutional world*.

The choice of the term 'world' conveys in my opinion, in a most expressive and telling manner the intense analytical changes and dramatic theoretical metamorphosis known by spending conditionality when analysed from each of the four perspectives.

Part I presents the *Conceptual World* of spending conditionality. It establishes a novel conceptual toolkit that shall be used throughout the rest of the thesis to define, distinguish, analyse, problematise and understand the multiple important legal questions raised by EU spending conditionality.

Part II turns to the *Legal World* of spending conditionality. It explains how the abstract conceptual world of spending conditionality has transitioned into the tool's rise in the 2014-2020 financial period. In particular, the part walks the reader through the tool's genesis in difficult political negotiations, proceeding to a comprehensive and detailed legal mapping of the tool throughout the main EU budget envelopes. Part II concludes by validating the claim of a historic rise of spending conditionality in 2014-2020 financial period and draws lessons from the previously isolated use of the tool inside the EU budget prior to 2014.

Part III turns to the *Constitutional World* and explains how the current law of spending conditionality may be understood from a constitutional perspective. It argues that when used inside the EU legal system, conditionality gains a special constitutional importance and may be construed only as departing from the EU's constitutional foundations and the limits enshrined in the EU treaties.

Part IV shifts the focus of the thesis to the *Institutional World* and empirically documents the departure of spending conditionality from its legal framework and modest achievements seen in the practice.

The thesis concludes with a set of policy recommendations.

PART I

The Conceptual World

Introduction

Part I aims to construct the conceptual world of EU spending conditionality by departing from two key concepts that lie at its core: *EU spending* and *conditionality*. EU spending conditionality is a novel and little-researched tool of EU governance. Its underlying principles rest, however, on two rather 'old' EU governance tools: *EU spending* and *conditionality*. The novelty of *EU spending conditionality* examined in this thesis is defined precisely by the very recent *conjugation* of *EU spending* and *conditionality* inside EU internal policies, with the aim of altering the behaviour of EU Member States and EU citizens receiving EU money. To investigate the nature of this very new phenomenon, in this part I propose to build from known to the unknown. Hence, I aim to construct the unknown concept of *EU spending conditionality* departing from the known concepts of *EU spending* and *conditionality*.

An initial deep focus on these two areas is not incidental. As we shall note in the following 300 pages, the intrinsic character of *EU spending*, on the one hand, and *conditionality*, on the other, have decisively influenced EU spending conditionality in the 2014-2020 financial period, in particular its legal design, constitutional significance and institutional realities, analysed in Parts II, III and IV below. In all these instances, as we shall see, it is very difficult if not impossible to speak about the legal, constitutional or institutional issues raised by EU spending conditionality without a sound understanding of *EU spending*, or without a thorough understanding of the prior use of *conditionality* in international relations and federal systems.

Part I comprises two Chapters.

Chapter 1 lays out the essential features of EU spending and pins down their importance for the law of EU spending conditionality. It highlights the impact of the EU budgetary legal process on the legal design, coercion power and operation of EU spending conditionality and distinguishes the latter from other conditions of spending.

Chapter 2 puts together an extensive taxonomy of EU spending conditionality, departing from its definition, subjects, types and functions, and informed by prior use of conditionality in international relations and established federations. The conceptual toolkit developed in this part shall be used throughout the next Chapters to situate, contextualise and develop the law of spending conditionality pioneered by this thesis.

EU Spending and Spending Conditionality

To understand EU spending conditionality, it is essential to understand EU spending. EU spending conditionality is not a *sui generis* construct of EU law, but a legal tool deeply embedded within the inner construction of the EU budget. EU spending conditionalities form as internal elements of the EU budget - strings attached to EU funds - being deeply influenced and entirely governed by the same legal rules and procedures that govern the EU budgetary process.

Several important consequences follow for spending conditionality. First, irrespective of the policy objective pursued by a given EU spending conditionality, its legal basis and legislative process is governed by the same legal rules governing the specific budgetary instrument it is attached to e.g. the European Social Fund. Second, the coercive power of EU spending conditionality is intimately linked to the financial power of the EU budget. Third, EU spending conditionality is strongly influenced by the distributive tensions between 'net beneficiary' and 'net contributor' Member States. Fourth, similar to the EU budget, EU spending conditionality is a tool generally implemented through close cooperation between the European Commission and Member States' administrations, which both have to actively cooperate to render spending conditionality a successful policy tool. Fifth, the Court of Auditors is a key

institutional actor in the process of EU spending conditionality, as the main controller of legality and regularity of the EU budgetary execution. Sixth, EU spending conditionality is in essence a condition on spending. However, it goes beyond the strict scope of EU spending action and aims to direct, like a law, the recipients' behaviour towards a distinguishable policy objective. Lastly, EU spending conditionality is an innovative governance tool which is nevertheless strongly related to other governance techniques, notably to spending. The following sections shall develop these seven points.

1.1. The legal process of the EU budget

The legislative process of the EU budget is a core consideration for EU spending conditionality. Every spending conditionality takes shape as an EU budgetary norm and is adopted pursuant to the same legislative process pursuant to which the EU budget is approved. Consequently, the very existence of a given EU spending conditionality, its legal scope and procedural rules are all the result of the legislative bargain of the EU budget.

The spending power of the EU has its fountainhead in the EU founding treaties.¹ According to the financial provisions therein: "*The Union shall provide itself with means necessary to attain its objectives and carry through its policies*" (Art. 311 TFEU).

In line with the EU treaty mandate, the legislative process of the EU budget is structured in five main phases culminating with:

- (1) an EU Council Decision on EU Own Resources, determining the categories of EU revenues and the overall size of the EU budget, adopted pursuant to Article 311 TFEU;
- (2) a multiannual financial framework (MFF) determining the multiannual thematic projections and financial ceilings of each item of EU budget expenditure, adopted pursuant to Article 312 TFEU;
- (3) the multiannual EU Funds regulations, determining the rules of spending and national budgetary envelopes in each EU policy area, including the rules

¹ Arts. 311-334, Treaty of the Functioning of the European Union ('TFEU'), OJ C 202, of 7.6.2016

governing EU spending conditionality, adopted pursuant to their specific treaty legal bases;²

- (4) the EU financial regulations determining specific rules for EU budget implementation and control, adopted pursuant to Article 322 TFEU;
- (5) the annual EU budget adopted pursuant to Article 314 TFEU, in line with the legal acts listed at points (1)-(4) above.

The first phase culminates with the adoption of an EU Council Decision on EU's 'Own Resources' which determines the revenue side of the EU budget, and hence the EU's overall power to spend. The EU Own Resources Decision is important for EU spending conditionality because it determines the overall financial power of the EU, and implicitly informs the coercive power of EU spending conditionality attached. In section 1.2 below I shall further develop and nuance this point.

Pursuant to Article 311 (2) TFEU, a decision on the EU own resources is adopted by the EU Council acting by unanimity and must subsequently be ratified by all Member States, according to their national constitutional arrangements. The unanimity in the EU Council and the national ratification make the decision on the power of the EU budget a particularly difficult exercise, requiring a great deal of political effort and cost.

According to the last 2007 EU Council Own Resources Decision, the EU power to spend is carefully limited by the Member States at 1,2 % of the EU Gross National Income (GNI),³ amounting to about 1 trillion Euro throughout a seven-year multiannual financial period, and about 145 bln Euro annually.⁴ Pursuant to the same

² See note 10, below.

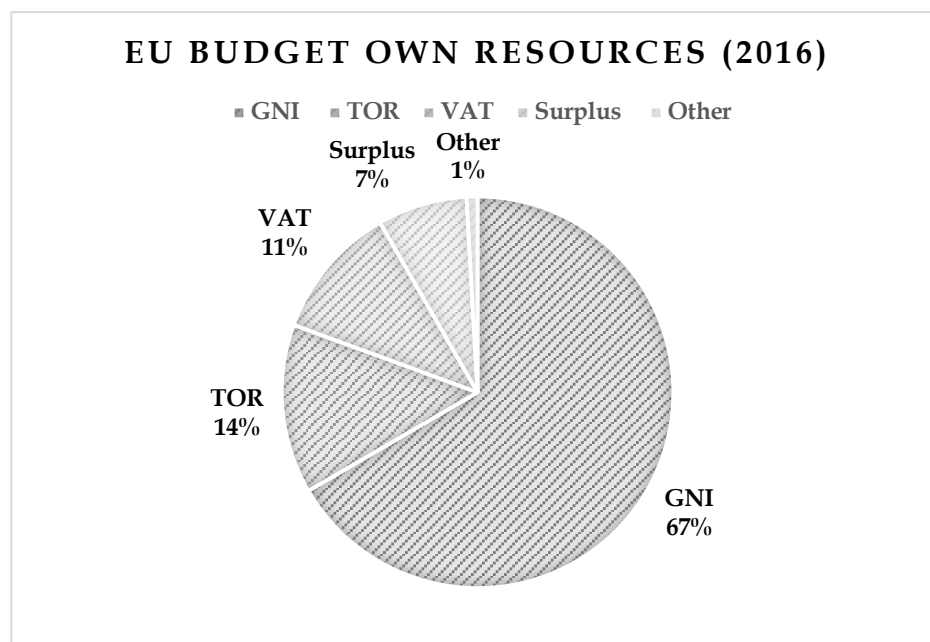
³ Similar to GDP, the GNI measures the wealth of a country's economy, representing the final value of goods and services produced. The difference is that GNI is bound by nationality, GDP by territoriality. As such, GNI excludes the economic output of non-nationals produced on a country's territory but adds the economic output of nationals produced abroad. While the GDP and GNI tend to have similar values for most EU Member States, in some Member States, notably in Ireland and Luxembourg, the difference is significant because of the large number of multinationals hosted by the two countries. See further: 2007/436/EC, EURATOM: COUNCIL DECISION OF 7 JUNE 2007 ON THE SYSTEM OF THE EUROPEAN COMMUNITIES' OWN RESOURCES, 163 OJ L (2007), <http://data.europa.eu/eli/dec/2007/436/oj/eng> (last visited Mar 9, 2018); GDP - What is gross domestic product (GDP)? - Statistics Explained, available at: [http://ec.europa.eu/eurostat/statistics-explained/index.php/Beginners:GDP_-_What_is_gross_domestic_product_\(GDP\)%3F](http://ec.europa.eu/eurostat/statistics-explained/index.php/Beginners:GDP_-_What_is_gross_domestic_product_(GDP)%3F) (last visited Apr 22, 2018). Art. 3 (1)

⁴ Interactive chart: EU expenditure and revenue - Budget 2014-2020, http://ec.europa.eu/budget/figures/interactive/index_en.cfm (last visited Mar 9, 2018).

Directive, the EU budget is made up of three main *own resources*, namely: the GNI based own resources, representing a percentage of Member States' GNI; the Traditional Own Resources (TOR), representing customs duties levied by the EU; and the Value Added Tax (VAT) based own resources, representing a percentage of VAT collected by Member States (figure 1, below).⁵

Here, one should note that even if the EU treaties label the EU budget revenue side as 'own resources' of the Union, these revenues are *de facto* formed from national budgets contributions. As has been excellently argued by Richard Crowe, the dependency of the EU budget on national contributions, have corroded the initial vision of an autonomous EU budget destined to serve the EU and its citizens, and have transformed the initial idea of 'a budget of and for the EU' into a *de facto* 'budget of and largely for Member States', concerned primarily with questions of net balance, rebates, and Thatcherian just return (*juste retour*).⁶ The dominance of Member States is therefore an essential character of the EU budgetary process.

Figure 1. EU Budget Own Resources, 2016 (Source: European Commission)



⁵ 2007/436/EC, Euratom: Council Decision of 7 June 2007 on the system of the European Communities' own resources.

⁶ Richard Crowe, *The European Budgetary Galaxy*, 13 EUROPEAN CONSTITUTIONAL LAW REVIEW 428–452 (2017).

The second phase, leading to the adoption of the EU MFF Council Regulation,⁷ is also important for EU spending conditionality, as it determines the thematic scope and size of each budgetary envelope linked to it during a given financial period. The current MFF has been agreed for a financial period of seven years and is running from 2014 to 2020.⁸ Based on the 2014-2020 MFF, the largest EU spending envelope goes to direct and structural agricultural aid (38%), 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%); justice and home affairs (2 %), fisheries (1%) and running costs (6%) (table 1 below).⁹ As we shall explain in detail in Part II below, some EU spending conditionalities apply transversally to all EU spending envelopes. However, most EU spending conditionalities are linked to a thematic EU budget envelope e.g. agriculture, cohesion, home affairs or fisheries.

It is important to stress that - similar to the Own Resources Decision (section 1.1 above) - the EU MFF Regulation is adopted unanimously by the EU Council, pursuant to Article 312 TFEU. On this occasion however, a decision on the MFF Regulation requires the consent of the European Parliament. This means that while the revenue side of the EU budget is fixed exclusively by Member States as members of the EU Council, the expenditure side is decided by the EU Council with the consent of the European Parliament, who this time has a say - in the form of 'take it or leave it' consent.

The third phase, culminating with the adoption of the multiannual EU Funds Regulations is the most important for EU spending conditionality, as these constitute the primary legal source for all spending conditionality. At the same time, EU Funds Regulations determine the national budgetary envelopes of each Member State. I shall return to the question of EU budget distribution between Member States below (section 1.3). The multiannual EU Funds Regulations are adopted by the EU Council together with the European Parliament, acting as co-legislators based on the legal

⁷ Adopted pursuant to Article 312 TFEU.

⁸ COUNCIL REGULATION (EU, EURATOM) NO 1311/2013 OF 2 DECEMBER 2013 LAYING DOWN THE MULTIANNUAL FINANCIAL FRAMEWORK FOR THE YEARS 2014-2020, 347 OJ L (2013).

⁹ *Id.*

groundings and treaty rules governing each area of EU expenditure.¹⁰ This means that the European Parliament has an equal say with the EU Council on matters of EU spending conditionality. It made use of this power during the negotiation of the 2014-2020 multiannual EU Funds Regulations (see, Part II below).

The fourth stage of the EU budgetary process leads to the adoption of EU financial regulations by the EU Council and the European Parliament, acting as co-legislators pursuant to Article 322 TFEU. The EU financial regulations are important because they lay down the financial rules for EU budget implementation (1.4) and control (1.5), but also because they may contain EU spending conditionalities allowing funding to be cut-off for breaches of applicable Union law. The current EU financial regulations date from 2012 and are expected to be revised post-2020. The new multiannual regulations will potentially introduce the first internal spending conditionality on the rule of law.¹¹

The fifth and last stage of the EU budgetary process, culminating with the adoption of the annual EU budget *per se*, does not raise significant legal questions for spending conditionality. It effectively represents a legally dry, annual arithmetic outlining of budgetary commitments that reaffirm the important decisions taken in the previous phases. Even if it may concern certain changes and shifts between the thematic and Member States' financial envelopes, these changes shall not, as a rule, have a significant effect on the law of EU spending conditionality.

Finally, one should mention that even if they are distinct in practice, the five decision-making phases presented above are treated as a single EU budgetary legislative package during negotiations. This practice is especially important for the European Parliament, which acquires additional political leverage as a result. As seen above, the

¹⁰ In practice, each sector-specific regulation on EU budgetary expenditure is adopted based on their sector-specific legal basis e.g. Structural Funds are based on Art. 177 TFEU, the EU Migration and Asylum Fund is based on Art. 78 and the following, the Agricultural and Fisheries Funds are based on Art. 42 TFEU and the following, and so on. However, they are all adopted by the EU Council and the European Parliament acting as equal co-legislators.

¹¹ REGULATION (EU, EURATOM) No 966/2012 OF 25 OCTOBER 2012 ON THE FINANCIAL RULES APPLICABLE TO THE GENERAL BUDGET OF THE UNION, ; COMMISSION DELEGATED REGULATION (EU) No 1268/2012 OF 29 OCTOBER 2012 ON THE RULES OF APPLICATION OF REGULATION (EU, EURATOM) No 966/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE FINANCIAL RULES APPLICABLE TO THE GENERAL BUDGET OF THE UNION; European Commission, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF THE UNION'S BUDGET IN CASE OF GENERALISED DEFICIENCIES AS REGARDS THE RULE OF LAW IN THE MEMBER STATES COM(2018) 324 FINAL 2018/0136 (COD) (2018).

Parliament has no say on the EU budget revenue side, which is decided by Member States with unanimity in the EU Council (1). The Parliament however, has to consent to the EU budget expenditure side, decided in the MFF Council Regulation (2), and most importantly, has an equal say on EU Funds and financial Regulations that decide on the size of Member States' spending envelopes and define the legal reach of EU spending conditionality (3)-(4). This situation provides an opportunity for the Parliament to strategically strengthen its negotiating position. As such, the Parliament may make its consent on the expenditure side of the EU budget conditional on an EU Council decision on the revenue side that corresponds to its political preferences - e.g. there will be no agreement on the expenditure side unless the revenue side is of a certain amount - a negotiating tactic already embraced with modest success by the Parliament in view of the next, post-2020 budgetary reform.¹²

¹² The Parliament requested an EU budget of at least 1.3 % of the EU GNI, the Commission however proposed an EU budget of about 1.2 % in May 2018. See: European Parliament, RESOLUTION OF 14 MARCH 2018 ON THE NEXT MFF: PREPARING THE PARLIAMENT'S POSITION ON THE MFF POST-2020 (2017/2052(INI)); European Parliament, RESOLUTION OF 14 MARCH 2018 ON REFORM OF THE EUROPEAN UNION'S SYSTEM OF OWN RESOURCES (2017/2053(INI)).

Table 1. EU budget 2014-2020 (Source, European Commission)

Legend:

(*) Shared management

(**) Direct or indirect management

COMMITMENT APPROPRIATIONS 2014-2020	mln Eur	%
1. Smart and Inclusive Growth	513,563	47%
1a: Competitiveness for growth and jobs (**)	142,130	13%
Horizon 2020 (**)		
Erasmus + (**)		
Connecting Europe Facility (**)		
Other Large Infrastructure projects (**)		
1b: Cohesion policy: Economic, social and territorial cohesion	371,433	34%
European Social Fund (ESF) (*)	96,405	9%
European Regional Development Fund (ERDF) (*)	211,636	19%
European Cohesion Fund (ECF) (*)	633,90	6%
2. Sustainable Growth: Natural Resources	420,034	39%
of which:		
European Agricultural Guarantee Fund (EAGF) CAP Pillar I (*)	308,734	28%
European Agricultural Fund for Rural Development (EAFRD) CAP II (*)	111,300	10%
European Maritime and Fisheries Fund (EMFF) (*)	5,749	1%
Life+ (**)		
3. Security and citizenship	17,725	2%
Asylum Migration and Integration Fund (AMIF) (*)		1%
Internal Security Fund (ISF) (*)		1%
4. Global Europe	66,262	6%
Instruments for External Action (IEA)(**)		
ENP Funds, IDHR, etc. excluding European Development (EDF)		
5. Administration	69,584	6%
of which: Administrative expenditure of the institutions (**)	56,224	5%
TOTAL COMMITMENT APPROPRIATIONS	1,087,197	100%
as a percentage of GNI	1.04%	
Margin available	0.25%	
Own Resources Ceiling as a percentage of GNI	1.23%	

1.2. The EU's spending power

As suggested in Section 1 above, the coercive power of EU spending conditionality is implicitly influenced by the EU spending power (the size of the EU budget). In other words, the power of EU spending conditionality to change or otherwise alter EU Member States' or private recipients' behaviour is strongly influenced by the amount of money at stake. Because the sanction of EU spending conditionality is a cut-off in EU funds, the amount of money involved is an essential consideration that informs the recipients' incentives to comply or not with the conditional conduct requested by law. In fact, as this thesis shall vividly show, money becomes an additional important element of the law of spending conditionality with crucial implications for the latter.

Currently, the EU power to spend is capped by EU Member States at 1,2 % of the EU GNI. As a consequence, at this point in time the coercive power of EU spending conditionality may only be assessed with regard to this figure.

1,2% of EU-28 GNI is not at all a negligible sum of money. In fact, this represents enormous financial resources (1 trillion for 2014-2020, representing about 145 bln EUR annually), addressed largely to Member States' investment needs and supporting a wide array of EU policy objectives.¹³ This amount remains, however, much lower than the domestic spending of EU Member States, which amounts on average to 47% of the EU-28 GDP (2016 data).¹⁴

Some clarifications are needed here to understand with greater precision the effective power of the EU budget. First, one should note that even if EU spending is much lower than the EU-28 domestic spending, the EU budget has an important impact on national economies. This is so because, contrary to national budgets that are almost entirely spent on supporting our European welfare states (i.e. social protection, health and

¹³ Eurostat, GOVERNMENT REVENUE AND EXPENDITURE, 2016 (% OF GDP), [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Government_revenue_and_expenditure,_2016_\(%25_of_GDP\)_YB17Oct.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Government_revenue_and_expenditure,_2016_(%25_of_GDP)_YB17Oct.png) (last visited Mar 11, 2018).

¹⁴ *Id.* For the distinction between GDP and GNI, see note 3 *supra*.

education),¹⁵ more than 60% of the EU budget serves as a capital investment tool dedicated to long-term infrastructure building and human capital formation, accounting for more than 20% of the EU-28 national capital expenditure.¹⁶ Second, the importance of the EU budget shall differ for each Member State based on its allocated budgetary envelope (see, Section 3 below). From this point of view, the spending power of the EU budget may be relatively weak in some Member States, such as Germany, but is beyond doubt crucial in at least half of the EU Member States that receive the most generous EU budget allocations, such as Romania (see Figure 2 below).¹⁷

Some nuance is needed here regarding the EU spending power and its effect on spending conditionality. The above rule, according to which more money determines more compliance, may encounter important exceptions in practice. While financial sanctions shall necessarily inform the behaviour of a government or individual, often, as explained in the rich literature on international economic sanctions,¹⁸ multiple other considerations of *moral, ideological, political* and *economic* nature shall be decisive in determining compliance or otherwise, on a case by case basis.

Imagine a spending conditionality that requires Member States to support the accessibility and labour market inclusion of persons with disabilities on road infrastructure projects built with EU funds. This conditionality would essentially require that the resulting highways are equipped with corresponding facilities to ensure full accessibility for persons with disabilities and that the latter would be recruited for the jobs created by the highway. Should the EU budgetary envelope

¹⁵ Eurostat, GOVERNMENT EXPENDITURE BY FUNCTION, 2015, <https://perma.cc/LM7N-S5R8> (last visited Apr 26, 2018). In 2015, more than 75% of the EU-28 budgets have been spent on social protection, healthcare and education.

¹⁶ Evaluation Network, POLICY ANALYSIS ON THE PERFORMANCE OF COHESION POLICY 2007-2013 SYNTHESIS OF NATIONAL REPORTS 2011 14-15. The EU direct agricultural payments (EAGF), part of EU external action funds and the EU running costs, are not capital investment tools, they amount to about 40 % of the EU budget - see table 1 above.

¹⁷ Evaluation Network, *supra* note 16. [Based on the 2007-2013 data, the EU cohesion spending ranges from 20 to 68% of national capital investment expenditure in 13 EU countries: Hungary 68%, Estonia 62%, Slovakia 59%, Lithuania 58%, Malta 49%, Bulgaria 42%, Latvia 41%, Poland 35%, Czech Republic 31%, Romania 27%, Greece 26%, Slovenia 25%, Portugal 22%.]

¹⁸See for leading contributions: GARY CLYDE HUFBAUER, ECONOMIC SANCTIONS RECONSIDERED (Third edition, Expanded edition. ed. 2007); Johan Galtung, *On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia*, 19 WORLD POLITICS 378-416 (1967); CLARA PORTELA, EUROPEAN UNION SANCTIONS AND FOREIGN POLICY: WHEN AND WHY DO THEY WORK? (2012).

dedicated to highways in a given Member State be too small, the power of spending conditionality is expected to be limited. On the contrary, in a Member State where highways are an important item of expenditure, the coercive power of the spending conditionality aiming to increase the number of persons with disabilities driving on EU roads and their employment in the EU road infrastructure sector is expected to be stronger.

Yet, a Member State that receives very little EU money to build highways, may still choose to comply with a spending conditionality for reasons independent of financial incentives, such as reasons of ideological, moral, political, or even considerations of an economic nature. In this case, a government may choose to comply not simply because the money is right, but because the *moral* and *ideological* cause of social inclusion is right. At the same time, a government may be animated by less moral reasons, such as the concern for *political* power. As a decision not to comply with a spending conditionality concerning the social inclusion of persons with disabilities may be costly politically, a government may choose to comply with a spending conditionality to avoid the resulting political and reputational damage. In addition, *economic* reasons may guide the decision of a government. In this scenario, even if a government may not consider the highway funds particularly attractive, it may consider that the social inclusion of vulnerable groups shall lead to long-term economic returns, due to their increased contribution to the economy.

The opposite scenario is also plausible. Suppose the EU conditions all its highway money on Member States' willingness to cooperate on a future EU asylum and migration policy. While some Member States may consider this conditionality a sufficient incentive for cooperation, others may not be willing to cooperate for *ideological* or *political* reasons hostile to migration, despite the generous amounts of money involved. *Economic* considerations shall not be absent in such a decision either. When deciding to refuse the EU money (not to respect the conditionality), a Member State shall usually consider the alternative financial resources available, and whether the cost of these alternative resources is lower or at least equal to the cost of rejecting the EU money at stake.

To sum up, money is indeed an important consideration of the law of spending conditionality that shall inevitably inform compliance. Nevertheless, money might not always be decisive, as concurrent considerations of moral, ideological, political and economic nature might prevail on a case by case basis.

1.3. 'Net contributor' and 'net beneficiary' Member States

The distinction between 'net contributor' and 'net beneficiary' Member States is important to understand political tensions around the EU budgetary legislative process leading to the adoption of spending conditionality.

Member States differ in their EU budget contributions and spending allocations. Based on net balance calculations between EU budget contributions and allocations, Member States are classified as either 'net contributors' or 'net recipients' (figure 2 below).¹⁹ Net contributors Member States contribute more to the EU budget than they receive; while net beneficiaries receive more than they contribute. As Figure 2 below shows, the net contributors generally correspond to the more developed EU Member States, whereas the net beneficiaries generally correspond to the less developed ones - referred to in EU jargon as the EU 'North' and the EU 'South'.

As a general rule, net contributor Member States are the ones supporting spending conditionality and see the tool as an additional guarantee that their tax payers' money is spent satisfactorily in net beneficiary Member States. On the contrary, net beneficiary Member States are reluctant to support spending conditionality and see it as an additional burden in the already complex process of EU funds absorption.

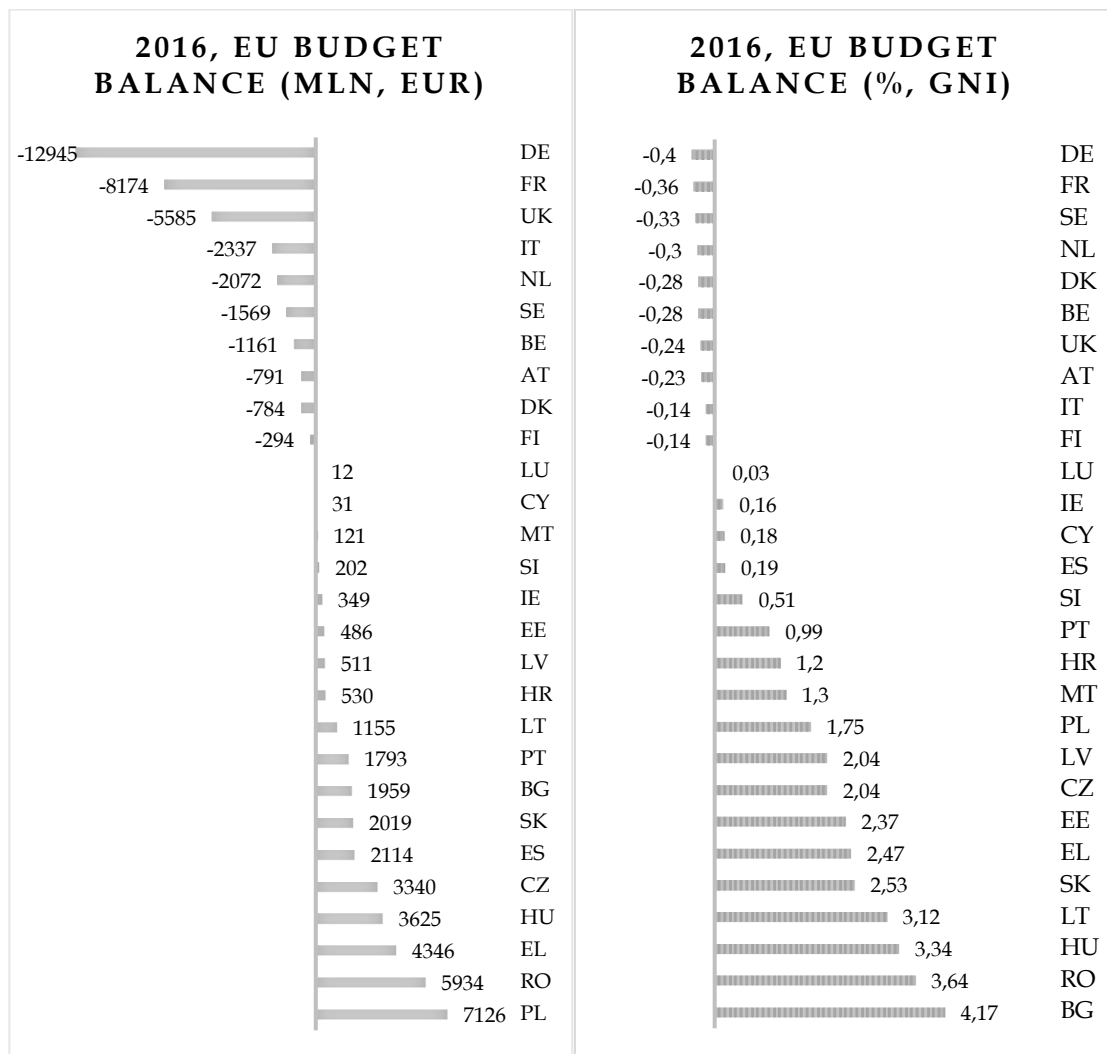
As a result, the distinction between net beneficiary and net contributor preferences towards spending conditionality becomes extremely relevant in the EU Council, where the debate on spending conditionality is collapsed with the debate on the EU

¹⁹ Operating budgetary balance, 2016, Interactive chart: EU expenditure and revenue - Budget 2014-2020, *supra* note 4. The net contributor Member States are traditionally Germany, France, the UK and Italy, followed by the Netherlands, Sweden, Belgium, Austria, Denmark and Finland (order based on 2016 data); the net beneficiaries are represented by Poland traditionally the first EU budget net recipient, followed in 2016 by Romania, Greece, Hungary, Czech Republic, Spain, Slovakia, Bulgaria, Portugal, Lithuania, Croatia, Latvia, Estonia, Ireland, Slovenia, Malta, Cyprus and Luxembourg - this order may vary on a year by year basis (based on 2016 data).

budget size, multiannual distribution and ultimately turns into a ideological battle between the 'EU North' and the 'EU South'.

In Part II below, I shall explain how this tension has played out in the EU Council negotiations on the 2014-2020 financial period and how it influenced the ultimate compromise on spending conditionality (Chapter 3).

Figure 2. Net contributor and Net beneficiary Member States (Source: European Commission)



1.4. EU budget implementation and discharge

The EU lacks the administrative capacity to implement its own budget. As a result, about 80 per cent of the EU budget is implemented by the Commission in close cooperation with Member States,²⁰ pursuant to *shared management* administrative procedures (see table 1, *supra*).²¹

Shared management has been defined as a mode of EU administration where the Commission and Member States share distinct, yet closely intertwined, administrative tasks, and where both the Commission and Member States need to fully discharge their respective tasks for the policy to function successfully.²²

In practical terms, shared management is operationalised on a multiannual, program basis. The sole exception is the first pillar of Agricultural Funds, where shared management operates on the basis of annual direct payments disbursed directly to over 7 million EU farmers, through designated national authorities, according to multiannual ceilings of EU Funds regulations. In all other areas - structural measures and cohesion, rural development, fisheries and home affairs - the principle of multiannual programming guides the implementation of EU budget under shared management procedures. Accordingly, based on EU Funds regulations, Member States draft multiannual country-specific and fund-specific programmes detailing the planned spending operations throughout the entire financial period. The programmes are subsequently negotiated with and approved by the Commission. In the 2014-2020 financial period, these documents are called Partnership Agreements (PA) and Operational Programmes (OP) as we shall further explain in Part II and IV below. Based on the approved multiannual programmes, Member States start implementing the EU budgetary expenditure, by selecting final beneficiaries, making payments and monitoring the soundness of expenditure. The Commission operates a subsidiary

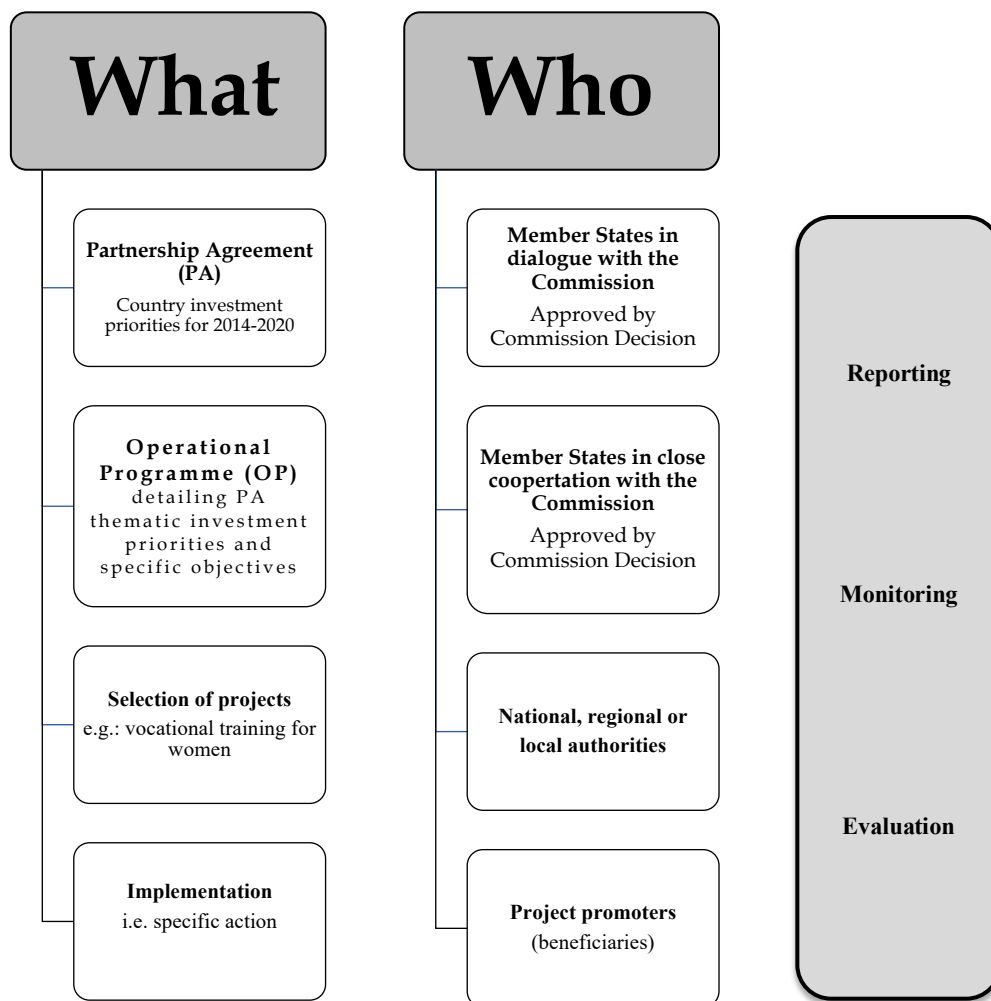
²⁰ TFEU, Art. 317

²¹ Chapter 2, FINANCIAL REGULATION 966/2012, *supra* note 11. The remaining 20 per cent is implemented either by the EU institutions alone through *direct management* procedures or by third parties delegated by the EU to do so (i.e. non-EU states or international organisations), through *indirect management*.

²² Paul Craig, *Shared Administration, Disbursement of Community Funds and the Regulatory State: Legal Challenges in EU Administrative Law Towards an Integrated Administration*, in LEGAL CHALLENGES IN EU ADMINISTRATIVE LAW: TOWARDS AN INTEGRATED ADMINISTRATION H. HOFMANN & A. TURK (EDS) (2009).

check on the regularity of expenditure based on Member States' annual reporting and independent audits, and in case of serious detected irregularities may order funding cut-off, in the form of temporary suspensions or permanent corrections (Figure 3 below).

Figure 3. Shared management implementation ESI Funds period 2014-2020



Source: Personal adaptation, Court of Auditors, Special Report 17/2009, p.11

The shared management model of EU budget implementation has tremendous consequences for spending conditionality. As we shall see in Part II below, EU spending conditionality has first been introduced and dramatically expanded in the 2014-2020 financial period precisely in the area of shared management procedures, which pertain to the implementation of the largest share of the EU budget. However, the shared management model of EU budget implementation is not without complications.

Firstly, pursuant to Article 317 TFEU, the Commission shall implement the EU budget 'in close cooperation with Member States' (in shared management), but 'on its own responsibility'. Because spending conditionality is a built-in construct of the EU budget, it follows the same implementation path. Namely, in the light of the principle of partnership, the Commission shall cooperate closely with Member States to implement spending conditionalities addressed to them. However, if a spending conditionality fails, the Commission alone is responsible in front of the European Parliament and the EU Council for the shortcomings of the budgetary execution.²³ This uneven distribution of responsibility raises important challenges for the Commission in practice, which has to come up with viable solutions to help lagging behind Member States implement their share of the EU budget and attached spending conditionality, because ultimately, it is the only institution responsible for the sound execution of the budget.

Secondly, when Member States do not comply with the applicable budgetary and spending conditionality rules, the Commission may order or propose a funding cut-off.²⁴ However, the Commission's double-responsibility of spending the EU budget and working with Member States to implement the attached spending conditionality creates additional tensions in practice. If Member States do not comply with spending conditionality, a decision to cut-off funds may be a particularly hard choice for the Commission. This is so because on the one hand the Commission is under pressure to spend the EU budget, and on the other hand it is under pressure to cut-off EU funds. As a result, the Commission must perform a difficult balancing exercise, within the

²³ TFEU, Art. 319

²⁴ Part II presents in detail the specific rules governing the powers of the Commission in cases of each conditionality type.

limits of the wide discretion traditionally granted to it in the process of EU budgetary execution.

Thirdly, because shared management is a genuine example of multilevel governance, whereby the tasks of the Member States and the Commission are closely shared and intertwined, it is very difficult to distinguish in practice who does what and to which extent. This consequence is of tremendous importance for EU spending conditionality, as the shared management model has the potential to seriously obscure the clarity, transparency and ultimately the accountability of conditionality-led actions at the national and local level.

We shall return to these tensions in Part III and Part IV below, where we shall examine the constitutional significance of EU spending conditionality and shall explain how the 2014-2020 round of EU spending conditionality unfolded in practice.

1.5. EU Budgetary Control

The European Parliament and the EU Council are the two EU institutions charged with powers of control over the implementation of the EU budget.²⁵ However, in performing this task, they shall be assisted by the European Court of Auditors.²⁶ Pursuant to Articles 287 TFEU, the European Court of Auditors examines whether "all [EU] expenditure [has been] incurred in a *lawful and regular manner* and whether the financial management has been sound". To this end, the European Court of Auditors is tasked by the treaties to submit an annual report on the accounts of the EU to the attention of the European Parliament and the Council.²⁷ Based on the Court of Auditors' report, the European Parliament, acting upon a recommendation from the EU Council, shall ultimately adopt a decision on the discharge of the Commission for its budget implementation.²⁸ In addition, the Court of Auditors may submit special

²⁵ Article 319 TFEU.

²⁶ Article 287 TFEU (4).

²⁷ Articles 287, 319 TFEU.

²⁸ Article 319 TFEU.

reports, dealing with specific matters of EU revenue and expenditure, and formulate opinions at the request of the EU institutions.²⁹

These budgetary oversight tasks make the European Court of Auditors a central actor in the law of spending conditionality. The centrality of the European Court of Auditors in the EU budgetary process is emphasised in particular by its institutional independence and technical expertise in budgetary matters. These institutional characters make the Court of Auditors a key independent controller of lawful, regular and sound EU budgetary execution, capable of triggering important budgetary reforms, including of spending conditionality as discussed in this thesis.

1.6. Conditions and conditionality

Understanding how *EU spending conditionality* relates to multiple types of *conditions of spending* and differs from them, is a key premise of this thesis.

EU spending is conditional in nature. As opposed to other established federations, such as the United States, Canada or Germany, in the EU, there are no unconditional inter-governmental transfers.³⁰ The EU cannot and does not simply send money to a given Member State and let the state decide how to best use EU money to increase citizen welfare and ultimately promote intra-EU equalisation. Therefore, virtually all transfers from the EU level of government to the national one, are conditional. This means that EU inter-governmental transfers follow a top-down approach, pursuant to which the EU prescribes - in the form of conditions - where the granted money should be spent (i.e. rural development), for what purposes (i.e. green energy), when (i.e. by 2020) and why (i.e. to achieve the EU energy policy targets). However, this approach is informed by a bottom-up perspective, as Member States first decide on the size of the EU budget and areas of spending with unanimity in the EU Council (Section 1.1.

²⁹ Article 287 (4) TFEU.

³⁰ RONALD LAMPMAN WATTS, *THE SPENDING POWER IN FEDERAL SYSTEMS: A COMPARATIVE STUDY* (1999); PIERRE ELIOTT TRUDEAU, *FEDERAL-PROVINCIAL GRANTS AND THE SPENDING POWER OF PARLIAMENT. WORKING PAPER ON THE CONSTITUTION*. (1969); PAUL BERND SPAHN & JAN WERNER, *GERMANY AT THE JUNCTION BETWEEN SOLIDARITY AND SUBSIDIARITY* (2007); Paul Bernd Spahn, *Equity and Efficiency Aspects of Interagency Transfers in a Multigovernment Framework*, in *INTERGOVERNMENTAL FISCAL TRANSFERS PRINCIPLES AND PRACTICE* 75–106 (Anwar Shah & Robin Broadway eds., 2007); KARINE RICHER, *THE FEDERAL SPENDING POWER* (2017); ROBERT JAY DILGER, *FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES* (2015).

above). Second, the shared management procedures discussed above (Section 1.4, above), allow Member States to use their discretion and grassroots expertise when implementing EU-wide spending objectives on the ground (e.g. Romania may choose to direct spending to wind power plants in Transylvanian rural areas to achieve the EU's green energy targets; whereas Spain may direct spending to solar power plants in Andalucía, for the same purpose).

As extensively shown by Shah, conditioning public expenditure is not an easy task, the success of the policy relies greatly on the right design of conditions attached.³¹ In this sense, a balance between policy objectives pursued and the conditions of spending attached must be observed. A too-stringent system of conditions would inevitably have a negative impact on effective expenditure and consequently affect the attainment of the policy goal pursued through spending. On the contrary, a system where the rules of expenditure are too lax would fail to ensure sufficient safeguards against irregular expenditure and fraud.

At the EU level, the conditions of spending take shape in the context of general rules of EU financial regulation and the specific rules of the multiannual EU Funds Regulations, adopted by the EU Council together with the European Parliament. The latter are usually fiduciary conditions on spending design, distribution, eligibility, management and control, monitoring, reporting and evaluation of EU Funds, and are essential elements of the EU budgetary execution process.³²

EU spending conditionality *resembles* the above-enumerated conditions, in as much as every EU spending conditionality is, in essence, a condition on spending. EU spending conditionality nevertheless *differs* from other conditions of spending based on the *policy objective pursued*. While the first set of conditions are in essence *administrative and fiduciary requirements* necessary to achieve the immediate objectives of EU spending (e.g. a highway) and avoid irregular spending or fraud; EU spending conditionality

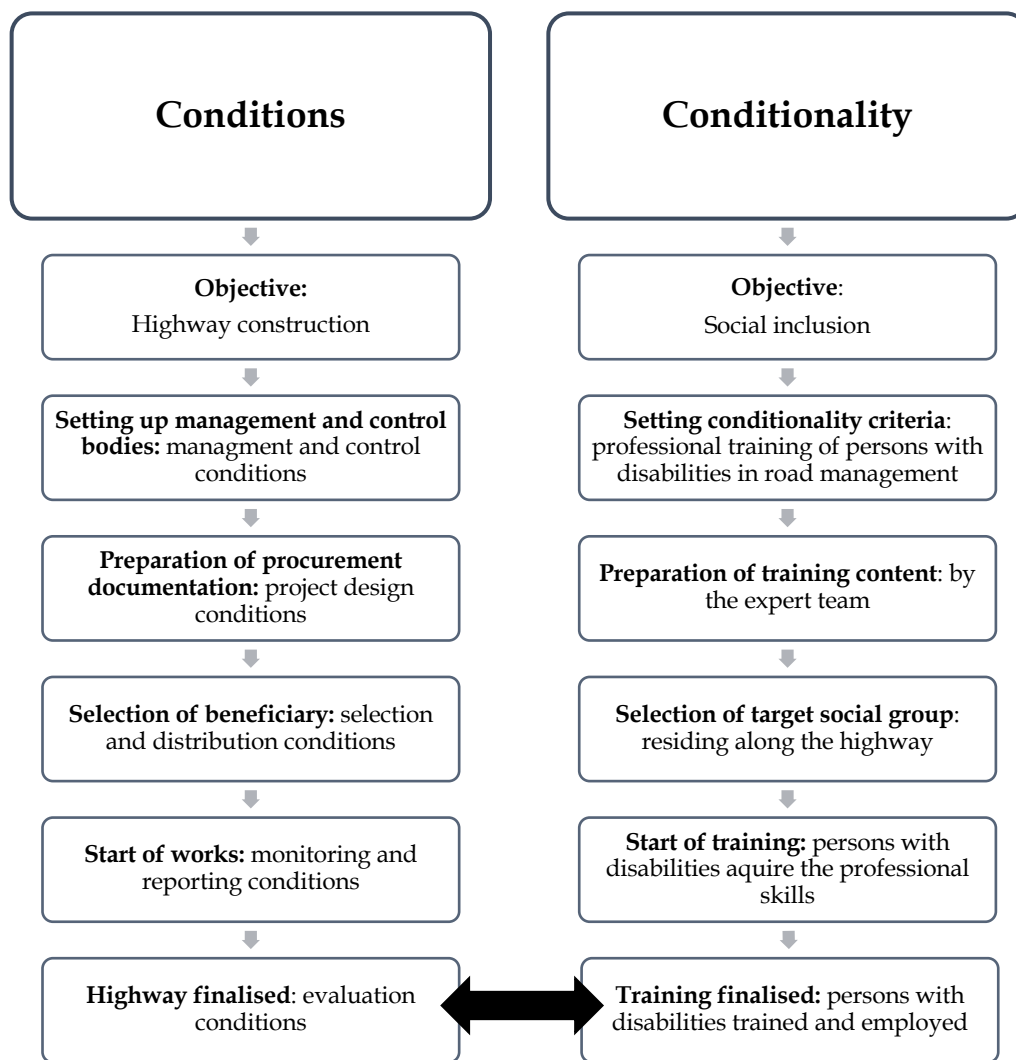
³¹ ROBIN W. BOADWAY & ANWAR SHAH, INTERGOVERNMENTAL FISCAL TRANSFERS: PRINCIPLES AND PRACTICES (2007).

³² For a comprehensive analysis of EU Cohesion policy and conditions attached since 1988 reform see: FABRIZIO BARCA, AN AGENDA FOR A REFORMED COHESION POLICY. A PLACE-BASED APPROACH TO MEETING EUROPEAN UNION CHALLENGES AND EXPECTATIONS (2009).

pursues a related, yet distinguishable *policy objective* that goes beyond the immediate goal of EU spending expenditure (e.g. social inclusion of persons with disabilities).

Take for instance the example of a social inclusion spending conditionality attached to EU Funds dedicated to highway construction, presented in Figure 4 below.

Figure 4. Conditions and conditionality



As figure 4 above clearly shows, the conditions of spending are in essence administrative requirements, tailored to achieve the policy objective of spending - in our example, development of road infrastructure, or, simply put: a highway. To this end, Member States as recipients of EU Funds shall set up management and control authorities, prepare the procurement documentation, design selection criteria, select beneficiaries, monitor and evaluate the work, pursuant to the conditions of the EU Funds regulations.

The right column of figure 4 shows that the EU spending conditionality attached has a related, yet distinct policy objective: promotion of social inclusion i.e. increased participation of persons with disabilities in the labour market, in particular regarding the jobs to be created by the road infrastructure financed with EU money. To achieve this objective, in parallel with highway investment planning and construction works, the public authorities shall set up an expert team to elaborate the content of professional training, shall design the criteria for selecting persons with disabilities to participate in trainings, shall finalise the training and shall ultimately support the trained persons in receiving their certifications and applying for a job in the road management sector. Ultimately, the achievement of the social inclusion conditionality shall ideally feed into the objective of spending, as the trained persons are expected to primarily occupy the jobs created by the highway, e.g. toll management, highway supervision or maintenance. In this case, the objective of spending conditions has a strong link to the objective of spending conditionality. However, while they are indeed related, the social inclusion of persons with disabilities is not the same as building a highway. It is precisely this additional policy goal of EU spending conditionality - the aim of doing more with less - that distinguishes a spending conditionality (policy-motivated), from a condition of spending (spending-motivated).

In this context, it is important to mention that *coercion* is another distinguishing element between conditions and conditionality.³³ As argued by Rosenthal, coercion, or the *desire to control behaviour*, is the essential distinguishing element between conditions and conditionality.³⁴ In the light of our prior discussion, it follows that an

³³ Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STANFORD LAW REVIEW 1103-1164, 1114-1118 (1987).

³⁴ *Id.* at 1114-1118. Rosenthal employs the terms *qualifying* and *coercive* conditions to distinguish between what we refer to as: conditions and conditionality.

EU spending conditionality also aims to coerce recipients' - Member States or EU citizens - behaviour in areas where it would have been more difficult or impossible to convince states or individuals to cooperate. Indeed, as Rosenthal points out, money may in itself be coercive. Hence, the EU may well use its spending power to incentivise policy action in a given field, such as releasing EU Funds for the promotion of social inclusion. In this case however, the condition to spend EU money ring-fenced for social inclusion pursuant to their destination does not aim to coerce the behaviour of the recipient but is the very object of spending: the *quid-pro-quo* of the spending agreement. When applying for social inclusion money, Member States or private recipients clearly and freely expresses its *intention* and *consent* to act on the policy objective e.g. social inclusion. On the contrary, in our example (figure 4, above), the Member State is primarily interested in the highway funds, which are conditional upon fulfilment of additional actions designed to achieve social inclusion. Hence, Rosenthal's distinction adds important nuance to our discussion on EU spending conditionality. It particularly stresses the coercive potential of an EU spending conditionality and the way in which the recipients' free consent is called into question, as opposed to other conditions of spending. Part III below returns to this discussion from a constitutional perspective.

Finally, one should stress that the above distinction between conditions and conditionality is not always straightforward. Often, conditions of spending may be designed to expose very strong coercive policy goals similar to conditionality. Returning again to our example in figure 4, EU Funds regulations may ask public authorities managing the highway project to be socially inclusive and hire persons with disabilities. Such a requirement is in essence both a condition and a conditionality, as it prescribes an administrative requirement for spending implementation and at the same time pursues a social inclusion policy goal. Further examples of borderline cases are the EU funds general principles of *EU law consistency* and *mainstreaming*. Similar to conditionality, they are policy-oriented, but remain declaratory in nature and lack an explicit enforcement mechanism.³⁵ These borderline

³⁵ Viorica Vita, *Mainstreaming Equality in European Structural and Investment Funds: Introducing the Novel Conditionality Approach of the 2014-2020 Financial Framework Developments*, 18 GERMAN L.J. 993-1016 (2017); Mark A. Pollack & Emilie Hafner-Burton, *Mainstreaming gender in the European Union*, JOURNAL OF EUROPEAN PUBLIC POLICY 432-456 (2000).

cases do not detract from the merit of distinguishing between conditions and conditionality for the purpose of this thesis.

1.7. *Dominium and imperium*

Lastly, it is important to situate EU conditionality within the broader EU governance toolkit. In particular, it is important to situate EU spending conditionality in relation to the EU spending power on the one hand, and the EU legislative powers on the other. As Daintith usefully argued as early as the 1980s in his seminal work on the modern techniques of government, a government may successfully use its economic tools to achieve a given policy goal, such as public spending (*government by dominium*) as opposed to passing a law or regulation backed by a sanction (*government by imperium*).³⁶ Daintith argues in detail that in some instances, using the government's wealth as opposed to regulation by law may prove a productive tool of governance, mainly for practical and political reasons. First, legal rules (*imperium*) may at times be impracticable and unable to achieve certain policy goals.³⁷ For instance, the goal of shifting to green energy would require high investments from citizens and industry, which may not be immediately available. In this case, passing a law (*imperium*) requiring all industry and citizens to use green energy is not likely to do much to attain the policy goal of a shift to green energy, while the release of public financial resources (*dominium*) for the same purpose may be more appropriate for the purpose. Second, legislation (*imperium*) is politically costly and lengthy, for the suitable legal and constitutional basis must be initially identified, majorities must be formed, negotiations must be undertaken, guarantees of accountability observed and compromises struck.³⁸ As Daintith argues, undertaking the burden of legislation requires enormous effort even when the issues at stake are uncontroversial. However, when there is no consensus between the main political actors and stakeholders

³⁶ T. C. Daintith, *Legal Analysis of Economic Policy*, 9 JOURNAL OF LAW AND SOCIETY 191–224 (1982); Terrence Daintith, *The Executive Power Today: Bargaining and Economic Control*, in THE CHANGING CONSTITUTION 193–218 (Jeffrey Jowell & Oliver Dawn eds., 2nd ed. ed. 1989); Terrence Daintith, *The Techniques of Government*, in THE CHANGING CONSTITUTION 209–236 (Jeffrey Jowell & Dawn Oliver eds., 3rd. ed ed. 1994).

³⁷ Daintith, *supra* note 36 at 200.

³⁸ *Id.* at 200–201.

involved, these challenges become even greater.³⁹ All these practical, political and efficiency considerations may encourage a government to switch to dominium tools that may help the government to bypass the limitations of imperium legislation. The constitutional ramifications of the switch from imperium to dominium shall be discussed in Part III below.

If we transpose Daintith's dominium-imperium distinction to our social inclusion example presented at figure 4 above, it follows that to advance the policy objective of the inclusion of persons with disabilities, the EU may simply make use of its spending power - *government by dominium* - and allocate EU Funds for the inclusion of persons with disabilities in the labour market. A curious question must be answered in this context: if the EU may use its spending power (dominium), why then use EU spending conditionality?

Three main reasons justify the opportunity for using a spending conditionality as opposed to direct spending: significantly reduced financial and political costs (1), inadequacy of spending (2) and the leverage element (3).

The first reason for using EU spending conditionality as opposed to EU spending is the significantly reduced financial and political cost involved. As explained above (Section 1.2), EU spending is currently capped at 1.2 % of EU-28 GNI. This is a significant figure, but one that remains extremely limited in comparison to Member States' domestic expenditure (on average 50% of the EU-28 GNI). At the same time, the EU is under increased pressure to act on a myriad of policy challenges from energy to defence, rule of law or migration. In this context, the EU must make strategic choices as to the most efficient allocation of its limited financial resources.⁴⁰ Spending conditionality assists the EU level of government to achieve specific policy goals at no additional, or significantly more limited financial and political cost, as a spending conditionality is a by-product of spending which assists the EU to do 'more with less'. Returning to our example above, ideally both the highway is built, and social inclusion is promoted within the limits of the same allocated budget (figure 4 above). There is therefore no necessity to allocate additional financial resources or seek political

³⁹ *Id.* at 201.

⁴⁰ See for instance, EUROPEAN COMMISSION, REFLECTION PAPER ON THE FUTURE OF EU FINANCES (2017).

support for a dedicated budgetary envelope to support the cause of social inclusion, so long as spending conditionality may be used to achieve the same policy ends.

A second reason for using a spending conditionality is simply the inadequacy of spending in solving certain policy challenges. Take again the same example of social inclusion above (figure 4). Even if the EU deploys generous financial resources for professional training of persons with disabilities, their inclusion in the labour market shall ultimately depend on the availability of jobs. By attaching a conditionality of social inclusion to a highway project, the EU creates the necessary premise of job creation for the effective social inclusion of the target social group.

A third reason for using a spending conditionality relates to its potentially increased leverage as opposed to direct spending. From this point of view, the EU may, and often does, link compliance with a given spending conditionality to a more generous budgetary expenditure item than the one dedicated to direct spending in a given policy area. In our example (figure 4), the EU may link the fulfilment of the social inclusion conditionality to all EU funds disbursed in a country. This means that if the conditionality is not fulfilled the EU may cut-off not only the direct funds allocated to training of persons with disabilities or to the highway concerned, but all other funds disbursed in the country as appropriate. This may significantly increase the leverage and ultimately the coerciveness of a given policy goal pursued through spending conditionality (see, Sections 1.2-1.3 above).

EU Spending Conditionality: A Conceptual Taxonomy

This Chapter introduces an extensive taxonomy of spending conditionality which will be used throughout this thesis to conceptually situate and contextualise EU spending conditionality. It unwraps the definition, subjects, multiple types and functions of EU spending conditionality, departing from the broader notion of conditionality and its use in international relations and established federations.

A conceptual understanding of EU spending conditionality through the lens of a broader international and federal perspective is an extremely productive method of inquiry for three main reasons. First, the method dramatically enriches our understanding of the EU's practice of spending conditionality as compared to other international organisations and federal systems. Second, the method exposes the extensive variety of spending conditionality types and informs us about the most suitable choices to be made at the EU level. Third and most importantly, the connection between the international and federal helps reveal the genuine nature of EU spending conditionality, which may be understood with the highest level of precision as a hybrid falling between the conditionality used in international relations and conditionality used in established federal systems.

As in the previous Chapter, EU spending conditionality shall be kept at the centre of the discussion. Reference to the application of conditionality in international relations

or federal systems shall be made only in so far as it develops, assists or informs our understanding of EU spending conditionality.

2.1. A first definition

The literature in international relations in general, and on EU conditionality in particular, is far from settled with regard to a common definition of conditionality. The few contributions attempting to define the tool⁴¹ usually depart from its etymological root: 'condition'; and define conditionality as: a situation that must exist to make another situation possible.⁴² Others are more specific and describe conditionality as departing from its features of political economy and practice in international relations. For instance, Smith describes conditionality as the practice whereby states or international organisations condition benefits addressed to other states on requirements of a political or economic nature, such as making the release of aid conditional on respecting human rights or making the release of loans conditional on macroeconomic indicators.⁴³ These definitions are useful in as much as they indicate the essential elements of conditionality. First, they indicate that every conditionality is at its root a condition. Second, they show that the subjects of conditionality are traditionally states and international organisations. In this sense, conditionality is presented as a post-World War II geopolitical tool, used primarily by Bretton Woods international financial institutions (i.e. IMF and World Bank) and leading Western donors (i.e. the U.S. and the EU), and addressed primarily to developing countries.⁴⁴ Third, they all indicate that the aim of conditionality is behavioural in nature - the aim to change or induce an alteration in behaviour.⁴⁵ In this sense, conditionality is an

⁴¹ See for leading contributions, ELENA FIERRO, *THE EU'S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE* (2001); LORAND BARTELS, *HUMAN RIGHTS CONDITIONALITY IN THE EU'S INTERNATIONAL AGREEMENTS* (2005).

⁴² condition | Definition of condition in English by Oxford Dictionaries, OXFORD DICTIONARIES | ENGLISH, <https://en.oxforddictionaries.com/definition/condition> (last visited Apr 30, 2018).

⁴³ KAREN ELIZABETH SMITH, *THE USE OF POLITICAL CONDITIONALITY IN THE EU'S RELATIONS WITH THIRD COUNTRIES: HOW EFFECTIVE?* EUI WORKING PAPER 07/1997 (1997).

⁴⁴ OECD, *POLICY OWNERSHIP AND AID CONDITIONALITY IN THE LIGHT OF THE FINANCIAL CRISIS* 13–17 (2009), <http://www.oecd-ilibrary.org/content/book/9789264075528-en> (last visited Jan 23, 2014); Mark Langan, *Budget support and Africa–European Union relations: Free market reform and neo-colonialism?*, 21 *EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS* 101–121 (2015).

⁴⁵ Jonathan Fisher, *'Does it Work?' – Work for Whom? Britain and Political Conditionality since the Cold War*, 75 *WORLD DEVELOPMENT* 13–25 (2015). (crucially, Fisher shows that the change of behaviour is not

application of conditional theories widely used in behavioural psychology, economy and law, whereby compliance with a prescribed behaviour is rewarded with more benefits, while instances of non-compliance are discouraged by suspension of benefits.⁴⁶ Fourth, they explain that conditionality may have a variable thematic scope, for instance being concerned with requirements of a political or economic nature. Fifth, they all stress that conditionality is linked to a benefit of some nature, be it financial assistance, development aid, trade, diplomatic relations or promised future EU membership.

These applications of conditionality in international relations are very useful, yet they are insufficient to fully define EU spending conditionality. Unlike conditionality used in international relations, EU spending conditionality is used inside the EU as a condition attached to internal EU intergovernmental budgetary spending. From this point of view, the inherent nature of the EU - a governance system initially established as an international organisation but which in time developed strong characteristics of a federal polity⁴⁷ - brings EU spending conditionality closer to the literature on fiscal federalism, and in particular on conditional federal-state spending.⁴⁸ The fiscal federalism literature analyses the federal governments' practice of conditioning funds released to federal units (i.e. states, provinces, cantons, lander) and citizens to increase the nation's general welfare, but also to incentivise a change in the recipient's behaviour i.e. advance a federal policy at the state level. This string of literature

necessarily pursued with regards to the third country upon which conditions are vested but may be targeted at the donor's own constituencies).

⁴⁶ In this form conditionality strikingly recalls Pavlov's and Skinner's foundational works on classical and operant conditioning in behavioural psychology, concerned with the study of changes in human and animal behaviour as a result of conditioning the form of positive or negative reinforcement in response to expressed behaviour; behavioural psychology has found subsequent application in behavioural economics and law, notably in the work of Thaler and Sunstein. See: B. F. SKINNER, *ABOUT BEHAVIORISM* (1974); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

⁴⁷ The debate on the nature of the EU is far from settled. See for an excellent summary of the core arguments: J.H.H. WEILER & Bruno De Witte, *Dialogical epilogue*, in *THE WORLDS OF EUROPEAN CONSTITUTIONALISM* pp 262-309, 262-270 (Graine De Búrca & J.H.H. Weiler eds., 2012).

⁴⁸ ROBIN W. BOADWAY & ANWAR SHAH, *FISCAL FEDERALISM: PRINCIPLES AND PRACTICES OF MULTIORDER GOVERNANCE* (2009); ANWAR SHAH & JOHN KINCAID, *THE PRACTICE OF FISCAL FEDERALISM: COMPARATIVE PERSPECTIVES* (2007); ANWAR SHAH, *FISCAL FEDERALISM AND MACROECONOMIC GOVERNANCE: FOR BETTER OR FOR WORSE? 1* (1998), <http://documents.worldbank.org/curated/en/708461468741368927/Fiscal-federalism-and-macroeconomic-governance-for-better-or-for-worse> (last visited Nov 2, 2017); ANWAR SHAH, *MACRO FEDERALISM AND LOCAL FINANCE* (2008); ANWAR SHAH & WORLD BANK, *PUBLIC SERVICES DELIVERY* (2005).

provides additional points of reference useful in defining EU spending conditionality. First, as opposed to international relations literature, where states and international organisations are predominantly the subjects of conditionality, in internal, federal-state transfers, the individuals - natural or legal persons - become an additional important recipient of federal spending, and hence the subjects of conditionality. Second, as opposed to international relations literature, where the subjects of conditionality - usually donors and recipients - are presented in a position of structural inequality (i.e. the donor prescribes, the recipient follows), in fiscal federalism literature the subjects of conditionality have a much more balanced, equal contractual position governed by constitutional principles. Third, as opposed to international relations, in federal systems the benefits released are not external gifts with strings attached but public funds, collected from citizens as primary taxpayers and spent on the delivery of public goods. As a result, conditionality demonstrates an additional aim (to the one of influencing the recipient's behaviour), namely the aim of sound budgetary expenditure.

Based on the above, we can conclude that, as with almost every construct of the EU legal order, the most accurate understanding of EU spending conditionality is one in which EU spending conditionality is portrayed as a hybrid tool of governance, the true nature of which is found between the two - international and national - strings of literature presented above. On the one hand, EU spending conditionality is strongly informed by the prior use of conditionality in international relations, and the EU's *modus operandi* on conditionality in relation to third countries. On the other hand, EU spending conditionality demonstrates important traits of conditionality also attached to intergovernmental transfers in established federations.

Having depicted the genesis of EU spending conditionality, this section will end with its comprehensive definition, which shall be further developed in the subsequent sections of this Chapter.

For the purpose of this thesis, *EU spending conditionality* is defined as:

A legally binding, accessory requirement applicable to an agreement on EU spending disbursement, which is vested by the EU and which must be complied with by Member States or private recipients of EU funds before or after the conclusion of the agreement, capable of attracting the

withdrawal of funds in case of non-compliance or bestowing positive incentives in case of compliance, and having as its main functions: to determine compliance with a prescribed behaviour, dissuade non-compliance, as well as to ensure the sound expenditure of the granted financial resources.

In the following sections, I will unwrap the definition of EU spending conditionality with a particular emphasis on its subjects, types and functions. Where relevant, specific reference to international relations and fiscal federalism literature shall be made.

2.2 Subjects

As anticipated in the definition above, EU spending conditionality is always vested by the EU (conditionality actor) and is addressed to all EU Member States and private beneficiaries of funds i.e. EU farmers, fishermen, researchers and other citizens receiving structural funds (conditionality recipients). The enforcement of a given conditionality (spending cut-off) shall however, be delegated by the EU to the Commission acting alone, to the EU Council acting on a proposal from the Commission, or to Member States acting under the supervision of the Commission. The above delegation of enforcement powers is largely informed by the negotiated compromise struck between the EU Council, the European Parliament and the Commission during the EU budget 'trialogues' (Section 1.1 above). As will be shown in Part II, where as a result of the triologue compromise, enforcement is delegated to the Commission alone and where spending conditionality addresses private individuals, enforcement tends to be more dynamic. On the contrary, where enforcement is entrusted to the EU Council and where spending conditionality concerns Member States, enforcement tends to be rather static and is influenced by significant political considerations. In this sense, the actor delegated with enforcement gives us a useful indication as to the perceived political sensitivity of each spending conditionality. Where enforcement is delegated to Member States and addresses individuals, spending conditionality is least problematic. Where enforcement addresses Member States and is in the hands of the Commission alone, spending conditionality is less problematic and shall be used, but with increased care. Where

enforcement addresses Member States and is in the hands of the EU Council acting upon a proposal from the Commission, spending conditionality is problematic and politically sensitive, as Member States retain the last say in cases of enforcement. Lastly, where enforcement addresses Member States and is in the hands of the EU Council alone, spending conditionality is highly sensitive, and enforcement shall be barely feasible in practice.

These findings on the enforcement of EU spending conditionality echo the extensive empirical findings in international relations⁴⁹ and fiscal federalism literature,⁵⁰ which show that as a general rule, conditionality addressed to state governments tends to be rarely enforced, as opposed to conditions addressed to private recipients of federal funds that tend to be frequently enforced.

2.3. Types

Conditionality is a highly flexible policy tool that has developed multiple classifications over time. Based on dominant classifications developed in international relations and fiscal federalism literature, EU spending conditionality may be: legally binding and soft law (2.3.1); ex-ante and ex-post (2.3.2); input and output (2.3.3); positive and negative (2.3.4); unlimited, cyclical and time-limited (2.3.5), sector-specific, cross-cutting, cross-over and generic (2.3.6); explicit and implicit (2.3.7); operation-specific, fund-specific and multi-fund (2.3.8); enforceable and non-enforceable (2.3.9); macroeconomic, structural, good governance, legal and policy (2.3.10).

⁴⁹ LORAND BARTELS, *THE APPLICATION OF HUMAN RIGHTS CONDITIONALITY IN THE EU'S BILATERAL TRADE AGREEMENTS AND OTHER TRADE ARRANGEMENTS WITH THIRD COUNTRIES*, RESEARCH FOR THE EUROPEAN PARLIAMENT, POLICY DEPARTMENT FOR EXTERNAL POLICIES, BRUSSELS 11–13 (2008); What did structural adjustment adjust?: The association of policies and growth with repeated IMF and World Bank adjustment loans, 76 *JOURNAL OF DEVELOPMENT ECONOMICS* 1–22, 4 (2005). (Bartels explains that the EU has rarely enforced its human rights conditionality during the last two decades, with the exception of extreme situations, and only against economically weak partners); (Esterly empirically proves that despite a poor track record of compliance with macroeconomic conditions, the IMF and the World Bank continued disbursing aid and loans. On this, Esterly notes: "It could be that governments failed to follow through with the conditions of each loan [...] If this is the explanation, then the question then becomes why the IMF and World Bank kept giving new adjustment lending resources to countries that had such a poor track record of compliance with the conditions").

⁵⁰ Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 *YALE L. J.* 248 (2014). (documenting the case of rare enforcement of U.S. federal spending conditions against state governments, as opposed to frequent enforcement against private recipients).

In the following, I will briefly present each conditionality type.

2.3.1 Legally binding and non-legally binding

From the normative point of view, spending conditionality may be legally binding or non-legally binding (soft-law). Where a spending conditionality is legally binding it takes the form of a legal norm, and in case of non-compliance the conditionality actor may appeal to the coercive force of applicable law, subject to applicable rules thereof. On the contrary, a non-legally binding conditionality relies on the good-will of the conditionality recipient, being voluntary in nature.

As will be shown in Part II below, all spending conditionalities attached to EU internal expenditure and analysed in this thesis are legally binding. The legally binding nature of EU spending conditionality is a crucial distinction and an essential premise of this thesis. As opposed to EU conditionality used in external action, which may be legally binding or soft law, in EU internal spending, all EU spending conditionality is a *binding* and *enforceable* EU budgetary law norm, subject to the EU treaties, constitutional principles underpinning them and redress mechanisms available inside the EU.

2.3.2 Ex ante and ex post

From the temporal point of view, spending conditionality may be ex ante, ex post or both: ex-ante and ex-post. Ex ante conditionality refers to the conditions attached to a spending agreement that must be complied with before the start of spending disbursement, subject to delay in the start of expenditure, temporary suspension of promised funds or funding cut-off. Ex post conditionality refers to conditions attached to a spending agreement that must be met after its conclusion. In case of failure to comply with ex-post conditionality, the EU may order spending cut-off or other types of administrative or pecuniary sanctions.

In international relations, it is very difficult to draw a clear dividing line between ex-ante and ex post conditionality. As a general practice, the most generous set of macroeconomic, structural, policy-specific or governance related conditions are

agreed ex-ante - and are referred to as ex ante conditionality.⁵¹ In practice however, because international assistance and aid is often provided in multiple-tranches and each subsequent tranche is conditional on compliance with another set of conditions, the ex-ante conditionality becomes also *de facto* ex-post. Hence, to be complied with afterwards (ex-post), the release of each tranche and checked again for compliance, and amended or supplemented before (ex-ante) subsequent tranches are made available.⁵²

The use of ex ante and ex post conditionality in international relations has been seen in problematic terms. Conditions have been criticised for being unnecessarily numerous and unrelated to the funding objective, ineffective, particularly rigid, paternalistic, intrusive in relation to national sovereignty and discriminatory against economically-weaker states.⁵³ The credibility of enforcement was arguably the weakest spot of conditionality.⁵⁴ Because the main incentive of conditionality actors (especially the IMF and World Bank) is to disburse large amounts money quickly (the practice of 'getting money out the door'), the credibility of enforcement is much reduced. Consequently, the recipients' incentives to fully comply with *ex-ante* conditionality (before disbursement of funds) are very weak, whereas the incentives to comply *ex-post* (after disbursement of funds) are almost non-existent. The finding that conditionality has been most successful in countries that already have good macroeconomic and policy environments and demonstrate strong commitment to reform, questions the effectiveness and even the necessity of conditionality, especially where macroeconomic and policy change was the very *raison d'être* of conditions.⁵⁵ In

⁵¹ ANWAR SHAH, DEVELOPMENT ASSISTANCE AND CONDITIONALITY: CHALLENGES IN DESIGN AND OPTIONS FOR MORE EFFECTIVE ASSISTANCE. BACKGROUND PAPER FOR SEMINAR 3. CONDITIONALITY FOR MORE EFFECTIVE PUBLIC INVESTMENT. 51-57 (2017).

⁵² *Id.* at 51-57.; OLIVIER JEANNE, JONATHAN OSTRY & JEROMIN ZETTELMEYER, A THEORY OF INTERNATIONAL CRISIS LENDING AND IMF CONDITIONALITY (2008).

⁵³ Paul Collier, *The Failure of Conditionality*, in PERSPECTIVES ON AID AND DEVELOPMENT (NELSON, BERG, GWIN EDS.) (Joan M. Nelson, Elliot Berg, & Catherine Gwin eds., 1997); WILLIAM EASTERLY, WHAT DID STRUCTURAL ADJUSTMENT ADJUST? THE ASSOCIATION OF POLICIES AND GROWTH WITH REPEATED IMF AND WORLD BANK ADJUSTMENT LOANS (2002), <https://ideas.repec.org/p/cgd/wpaper/11.html> (last visited Apr 30, 2018); THE WORLD BANK, CONDITIONALITY REVISITED: CONCEPTS, EXPERIENCES, AND LESSONS 115-116 (2005); A. Geske Dijkstra, *The Effectiveness of Policy Conditionality: Eight Country Experiences*, 33 DEVELOPMENT AND CHANGE 307-334 (2002).

⁵⁴ Tony Killick, *Principals, Agents and the Failings of Conditionality*, 9 JOURNAL OF INTERNATIONAL DEVELOPMENT 483-495 (1997); TONY KILLICK, AID AND THE POLITICAL ECONOMY OF POLICY CHANGE (1998); THE WORLD BANK, *supra* note 53 at 114.

⁵⁵ THE WORLD BANK, *supra* note 53 at 103-109; SHAH, *supra* note 51 at 46. (It was argued that if conditionality succeeds only where commitment to change is already present, then technical assistance

response, international donors and financial institutions embarked on an effort to reform, reduce and streamline the number of conditionalities, albeit with modest success in practice.⁵⁶ The EU in particular sought to completely shift away from traditional ex-ante conditionality in development aid, towards innovative solutions to increase recipients' ownership and increase the efficiency of aid.⁵⁷ This effort led to new EU conditionality types such as: 'ex-post selectivity', 'performance-based' or 'more for more' conditionality, which all condition future access to assistance on the recipients' prior history of compliance with program objectives (see, section 2.3.3 below).⁵⁸

As Part II below shows, in its internal spending the EU is not shifting away from but moving towards more spending conditionality both in its *ex-post*, but notably in its *ex-ante* form. The EU's shift towards more conditionality internally is an interesting development, as it implicitly presumes that internally, conditionality shall not encounter the same obstacles it encountered in external action. Therefore, the decision to increase the use of ex-ante and ex-post conditionality internally implicitly presumes that the EU's enforcement credibility would not be called into question, and that the Commission is under no pressure to 'get EU money out the door'. It also implicitly presumes that internally, due to the increased level of political integration and partnership, conditionality would not raise questions of national autonomy or sovereignty. Regarding Member States' ownership and commitment to change, EU spending conditionality implicitly presumes that commitment is already present, as most of the actions required have been already agreed as EU laws, soft laws, policies or recommendations. As will be shown in Part IV below, these assumptions did not necessarily always hold true during the 2014-2020 financial period.

alone would suffice, and a legally binding conditionality would not be necessary at all. A counter-argument would be that even where commitment is present, a conditionality is still necessary to make sure that the government does not defect, and monies granted are not wasted. In this case, it is always argued that governments in fragile states often change, and so does the commitment to reform.)

⁵⁶ THE WORLD BANK, *supra* note 53 at 64–66; SHAH, *supra* note 51 at 50–57. (even if reduced in numbers (from 36 to 18 on average per operation), conditions became significantly more complex, shifting from project-based to *policy-based lending conditionality* i.e. good governance reforms, privatisation of state-owned enterprise; this rendered conditionality infinitely more complex, difficult to measure and ultimately problematic.)

⁵⁷ THE WORLD BANK, *supra* note 53 at 183–185; OECD, *supra* note 44.

⁵⁸ THE WORLD BANK, *supra* note 53 at 183–185; SHAH, *supra* note 51 at 56–57; JEANNE, OSTRY, AND ZETTELMEYER, *supra* note 52.

2.3.3 Input and output conditionality

Based on the level of trust, degree of prescriptiveness and focus on results, spending conditionality may be classified in terms of *input* and *output*.⁵⁹

The *input conditionality* occurs where there is a low level of trust towards the commitment and capacity of the conditionality recipient to comply. Consequently, it tends to be highly prescriptive and indicate in detail the conduct to be adopted by the conditionality recipient.⁶⁰ The input conditionality departs from the presumption that the conditionality actor 'knows best' and leaves little discretion to the conditionality recipient, often indulging in micro-management of the funds disbursed and reforms asked for in exchange. As a result, the input conditionality focuses on delivery of detailed check-lists, and measures success in terms of the deliverable 'to-do-list', presuming that full compliance with the prescribed conduct would inevitably lead to the attainment of the policy result sought (i.e. if the to-do-list is fulfilled, the gender equality goal pursued is by default advanced).

In sharp contrast, *output conditionality* is based on a trust relationship between the conditionality recipient and actor. It is concerned primarily with setting commonly agreed results and policy performance indicators, such as indicators on public service delivery or access (i.e. increased women participation and access to public sector jobs) and departs from the presumption that the conditionality recipient 'knows best', leaving a significant degree of autonomy to the latter in choosing the appropriate means to reach the policy result sought. As mentioned above (2.3.2) output conditionality may take the form of 'performance-based' or 'ex-post selectivity' conditionality. In the latter forms, output conditionality additionally determines future funding withdrawal or benefits based on previous results and the performance of the conditionality recipient.

The input conditionality remains the dominant conditionality type in international relations, being widely practiced by the IMF and the World Bank, with the exception of some modest attempts on the part of the EU to shift towards output conditionality

⁵⁹ SHAH, *supra* note 51 at 2.

⁶⁰ i.e. to promote gender equality, Member States have to train all public officials by following an EU-wide training module to be implemented in 3 phases, monitored and reported on in line with EU-wide evaluation grids.

in its external policy.⁶¹ Input conditionality has been severely criticised for being prescriptive, significantly limiting the ownership and autonomy of the conditionality recipient, and impinging on national sovereignty. Output-based conditionality is rarely used in practice, yet it has been argued that it could bring important benefits, especially based on its potential to increase policy performance, ownership and accountability for results,⁶² while fostering competition and innovative bottom-up solutions.⁶³ Despite its potential, output conditionality may encounter great challenges in practice. The most important ones relate to decreased control over the disbursed funds, difficulty in setting clear, precise and measurable indicators, difficulty to distinguish between external factors that may negatively impact on results, as well as scarcity or reliability of data.⁶⁴ Because of the increased level of trust and integration required by output conditionality, the latter is more frequently practiced inside established federations.⁶⁵

The EU spending conditionality analysed in this thesis is largely of the input conditionality type. Despite recent efforts on the part of the Commission to focus EU spending on results and introduce an incipient form of output conditionality,⁶⁶ EU spending conditionality remains highly prescriptive and pays very limited attention to results. The current proposals on the post-2020 budget reform suggest a revived traction for some modest output conditionality.⁶⁷

⁶¹ SHAH, *supra* note 51 at 4.

⁶² SHAH, *supra* note 51.

⁶³ See for instance the spending conditionality attached to education and healthcare federal funds in Canada [cite].

⁶⁴ OECD, *supra* note 44 at 185.

⁶⁵ BOADWAY AND SHAH, *supra* note 48; INTERGOVERNMENTAL FISCAL TRANSFERS: PRINCIPLES AND PRACTICES, (Robin W. Boadway & Anwar Shah eds., 2007); Spahn, *supra* note 30.

⁶⁶ In the 2007-2013 and in the 2014-2020 financial periods, EU has attempted to put aside very modest amounts of EU Cohesion funds (4% and 6%) to reward Member States' good performance. After being criticized by the Court of Auditors, the 2014-2020 performance conditionality was abandoned and optionally set aside for structural reforms support in Member States. See: EUROPEAN COMMISSION, PROPOSAL AMENDING REGULATION (EU) 2017/825 TO INCREASE THE FINANCIAL ENVELOPE OF THE STRUCTURAL REFORM SUPPORT PROGRAMME AND ADAPT ITS GENERAL OBJECTIVE COM (2017) 0825 FINAL - 2017/0334 (COD), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0825> (last visited Jan 19, 2018).

⁶⁷ Part V, below.

2.3.4 Positive and negative

From the point of consequences - actions taken by a conditionality actor in cases of full compliance, or on the contrary in cases of failure to comply with the prescribed behaviour - a spending conditionality may be classified as 'positive', 'negative', or both positive and negative, commonly referred to as 'carrot and stick' conditionality.⁶⁸

Positive conditionality entitles the conditionality recipient to further benefits in case of good compliance. In this way the desired behaviour is rewarded by positive reinforcements in the form of additional incentives that may concern for example: the release of subsequent loan tranches; development aid; EU Funds; or a mixture of various incentives. *Negative conditionality*, on the contrary, has a punitive nature. It discourages the contrary behaviour by negative reinforcements such as: suspension or reduction of the prior funds awarded or of future benefits. *Carrot-and-stick conditionality* combines the above positive and negative conditionality, offering more incentives in case of good compliance (more carrots) and punishing non-compliance with withdrawal of benefits (the stick).

Carrot-and-stick conditionality remains the most widely practiced type of conditionality both in international relations and in established federations, where as a general rule carrots (funds) are disbursed with sticks (sanctions) attached. A common finding in the literature on international relations and fiscal federalism is that as a general rule carrots are preferred to sticks, and sticks are only exceptionally deployed in practice.⁶⁹

As shall be shown in Part II, the EU adopted a very strict approach to conditionality internally, as the vast majority of EU spending conditionality attached to the EU budget is negative.⁷⁰ In cases of compliance, Member States keep receiving their pre-allocated EU funds payments. These cannot be considered additional carrots because as a matter of EU law, EU funds are essential rights attached to membership, disbursed to all Member States pursuant to the agreed quotas, not 'gifts with strings attached'

⁶⁸ See note 46 above, on operant conditioning in behavioural psychology and its further application in law and economics.

⁶⁹ See section 2.2 and notes 49-50, above.

⁷⁰ See in Part II two exceptions: the positive macroeconomic conditionality (Chapter 4) and the CAP green payment conditionality (Chapter 5).

that can be refused.⁷¹ In case of non-compliance, as a matter of law Member States and private recipients risk funding cut-off in the form of permanent corrections, temporary suspension of funds, or administrative fines. We will see in part IV that in practice, the strictly negative approach to EU spending conditionality has not been rigorously observed. Sticks, even if legally required, proved difficult and were rarely applied. In response, the proposed post-2020 EU spending conditionality aims to depart from the negative type and towards more positive and/or carrots and sticks conditionality.⁷²

2.3.5 Unlimited, cyclical and time-limited

From the point of view of their legal effects, spending conditionalities may be classified as *unlimited*, *cyclical* or *time-limited*. An *unlimited conditionality* binds the conduct of the conditionality recipient in all spending operations irrespective of timing. *Cyclical conditionality* binds the conduct of the conditionality recipient on a multiannual basis, which usually coincides with the duration of a programme or budgetary spending cycle. The *time-limited conditionality* is binding for a particular defined period in time. In fiscal federalism and international relations literature, timing is a widely debated matter. The thrust of this debate is that timing is essential for the successful impact of any conditionality. Should a conditionality be fulfilled too early or late, or binding only before money is disbursed, it risks having no meaningful and sustainable policy impact.

In international relations, the vast majority of conditionality is as a rule *cyclical* and *time-limited*. Hence, it is binding only before, or as long as, financial resources are being disbursed. In practice this has raised severe criticism and concerns regarding legal certainty in frequently changing conditions, and severe overlaps or inconsistencies in cases of multiple subsequent programmes, lack of transparency, and most importantly, lack of sustainability of the reforms put in place.⁷³ On the contrary, in

⁷¹ Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85 (1988); WATTS, *supra* note 30. [Both in the US and Canada access to federal funds is optional, and federal funds are legally assimilated to a 'gift', or a 'donation' and treated as such. In the EU access to EU funds is not an option, but an essential membership right. A Member State may theoretically rest in passivity and refuse to absorb funds, however this never happens in practice. Moreover, when Member States experience administrative difficulties in spending the allocated funds, the Commission puts in place task forces, to help Member States absorb EU budget funds, and implement conditionality attached.]

⁷² See Part V, below.

⁷³ SHAH, *supra* note 51 at 37–38; THE WORLD BANK, *supra* note 53 at 60–62.

established federations, *unlimited* spending conditionalities tend to be included in stable legal frameworks binding for an undetermined period of time.⁷⁴ In this sense, all federal funding recipients are subject to the same stable and transparent rulebook of conditions, prescribed by law and binding before, but also after the disbursement of funds. When laws on conditionality are amended or changed, this is done in a transparent manner, pursuant to the constitutional legislative procedures in place.

EU spending conditionality is largely cyclical and time-limited (Part II). EU rules on spending conditionality change every seven years together with the multiannual budget regulations and EU spending conditionality is binding as a general rule either until the end of the financial period or for a shorter amount of time. This EU setting for conditionality may be problematic. As we shall see below, most actions required by EU spending conditionality ask for complex policy reforms and actions that necessitate long-term, sustained engagement with government and civil society stakeholders. Changing the rules of the game every seven years may be a highly disruptive factor for success, for it decreases legal certainty, the recipient's incentives to comply and ultimately the sustainability of reforms. Moreover, the practice is also corrosive for enforcement, as if the EU is too 'active' in cutting-off funds, Member States may be prone to get rid of 'troubling' conditions in the next financial period.⁷⁵ As a novelty, the post-2020 financial period proposes a *unlimited rule of law conditionality*, which would apply to all EU expenditure, irrespective of the financial period.⁷⁶ It remains to be seen whether its proposed unlimited nature shall be maintained after negotiations.

2.3.6 Sector-specific, cross-cutting, cross-over and generic

From the point of view of their thematic link to spending, spending conditionalities may be *sector-specific*, *cross-cutting*, *cross-over* or *generic*.

Sector-specific conditionality refers to legal, policy or structural requirements found in the same thematic area as the spending intervention. *Cross-cutting* conditionality refers

⁷⁴ Viorica Viță, *The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?*, EUI WORKING PAPERS 16/2017, 31–32 (2017), <http://cadmus.eui.eu/handle/1814/48644>.

⁷⁵ See, the example of infringement conditionality Chapter 4, below.

⁷⁶ European Commission, *supra* note 11. See Part V below.

to legal, policy or structural prescriptions from a different thematic area, which are nevertheless considered relevant to spending. *Cross-over* conditionality refers to compliance with conditionality packages stemming from another program or operation. *Generic* conditionalities do not have a specifically pre-determined thematic scope, they generically prescribe that recipients must comply with all applicable law, constitutional principles and values or international standards. *Cross-cutting* conditionality largely touches upon structural reforms, policy change, good governance and institutional reforms in an area related to spending, declared essential for any successful financial intervention. However, its success remains questionable in international relations and constitutionally contested in established federations.⁷⁷

In international relations and federal spending, sector-specific and cross-cutting conditionalities are most often encountered. The practice of *cross-over* conditionality was recently abandoned by international financial institutions in an attempt to streamline and reform their conditionality systems.⁷⁸ At the same time, the practice of *generic* conditionality is prohibited in established federations.⁷⁹

EU spending conditionality takes all the forms above, including the *cross-over* (e.g. macroeconomic conditionality) and *generic* (e.g. rule of law conditionality) types. The present distinction tends to be highly important for EU spending conditionality in practice (Part II). As *sector-specific* conditionality is most intimately linked to the purpose of spending and it is least contested as a consequence (e.g. macroeconomic conditionality linked to an EU/ESM economic adjustment program). In these cases, there is generally a broad consensus that there is a sufficiently strong link between conditionality and spending, and that the conditions are necessary and proportionate to the spending objective pursued. This link is not so clear in case of *cross-cutting* conditionality (e.g. macroeconomic conditionality on deficits attached to EU fisheries funds). Such a link is also particularly difficult to establish in cases of *cross-over* conditionality (e.g. macroeconomic conditionality linking EU/ESM economic

⁷⁷ SHAH, *supra* note 51 at 50–57; Viță, *supra* note 74 at 3–7; TRUDEAU, *supra* note 30.

⁷⁸ IMF, GUIDELINES ON CONDITIONALITY (2002), <http://www.imf.org/external/np/pdr/cond/2002/eng/guid/092302.pdf>; IMF, REVISED GUIDANCE ON CONDITIONALITY (2014). [Cross-conditionality was prohibited by IMF in 2002. The 2002 reform also marked the intention of a shift towards a 'parsimonious' macro-critical IMF conditionality, complemented in 2014 by macro-social conditionality]

⁷⁹ See, for instance, the US Supreme Court Dole doctrine pursuant to which conditionality must be clear, precise and priority disclosed: US Supreme Court, SOUTH DAKOTA V. DOLE 483 U.S. 203 (1987) JUSTIA LAW.

adjustment conditionalities to EU fisheries funds). The link may be increasingly vague in cases of generic conditionality (e.g. rule of law conditionality). As a result, cross-cutting, generic and cross-over conditionalities generate most political and legal contestation in EU practice.

2.3.7 Explicit and implicit

From the point of view of their legal denomination, spending conditionalities may be *explicit* or *implicit*. Explicit conditionalities are clearly named 'conditions or conditionalities' in the text of the funding agreements and the requirements prescribed are stated in clear, precise and unambiguous terms. The implicit ones refer to conditionalities that bear a different name, are framed in vague terms, but nevertheless operate as conditionalities in practice.

In international relations and federal spending, as a matter of principle conditionality must be explicit.⁸⁰ However, in practice conditionalities are not always clearly stated, nor are they precise or unambiguous. The difference is that inside federal systems, implicit conditionalities are subject to ex-post judicial control and may be declared null and void, whereas in international relations such accountability and redress mechanisms are weaker or even lacking.⁸¹

EU spending conditionality is both explicit and implicit, and this distinction is of major legal and political importance. The explicit or implicit legal consecration of a conditionality reveals much about the quality and even validity of the legal consent, level of transparency, and political acceptance. Where the conditionality is seen in particularly intrusive terms or is perceived as politically sensitive it is not explicitly referred to in the text of spending regulations as a 'conditionality', but instead proxy terms are preferred, such as 'measures' or 'principles'.⁸² Implicit conditionality may also be found in the form of grounds of funding cut-off rules based on spending

⁸⁰ IMF, *supra* note 78; SHAH, *supra* note 51 at 54–56; US Supreme Court, *supra* note 79; TRUDEAU, *supra* note 30. [Whereas in international relations]

⁸¹ US Supreme Court, *PENNHURST STATE SCH. V. HALDERMAN* 465 U.S. 89 (1984); Peter J. Smith, *Pennhurst, Chevron, and the Spending Power*, 110 *THE YALE LAW JOURNAL* 1187–1245 (2001); US Supreme Court, *supra* note 79. [See in detail, P.J. Smith on the US Supreme Court benchmark cases establishing the constitutional doctrine of conditional spending].

⁸² The 2014-2020 macroeconomic conditionality or the post-2020 rule of law conditionality are telling examples as they are both labelled 'measures' in the text of the funding regulations, see: Chapter 4, Part V, below.

'irregularities'. In this sense, the legal construction of the term 'irregularity' as relating to 'any breach of applicable Union law'⁸³ allows the Commission to use the clause as a 'hidden' conditionality and withhold or withdraw EU spending when a breach of the law may arise. Because this type of 'hidden' conditionality raises important legal and political contestation, the Commission has used the tool with extreme care in practice.⁸⁴

2.3.8 Operation-specific, fund-specific and multi-fund conditionality

From the point of view of their financial link to funds disbursed, spending conditionalities may be *operation-specific*, *fund-specific* or *multi-fund*. Depending on the funding rules, a conditionality may be applicable to operations financed from several funds, from one single fund or from a specific spending objective of a fund. In federal systems conditionality may be *operation-specific*, *fund-specific* and *multi-fund*, as opposed to international relations, where conditionality is as a rule *operation-specific* (i.e. linked to a specific loan or aid operation).

EU spending conditionality takes all of the above forms. The core implication of this classification in the EU is that a conditionality is binding on Member States or private beneficiaries only when they access spending under the specific objective, fund or multiple funds bound by conditionality. Consequently, where conditionality is not complied with, eventual sanction may concern only the amount of funds belonging to the budgetary envelope in question. Another important implication of this classification is the financial weight of the budget envelope attached to conditionality, which, as discussed in Chapter 1, shall implicitly inform its coercive power.⁸⁵

2.3.9 Enforceable and non-enforceable

As a general rule, spending conditionalities are *enforceable*. Therefore, non-compliance with their requirements may lead to the withdrawal of funds. Exceptionally, a spending conditionality may be non-enforceable even if legally binding.⁸⁶

⁸³ FINANCIAL REGULATION 966/2012, *supra* note 11 at 59–60.

⁸⁴ See Part II, Chapter 7 on the example of pre-2014 enforcement of implicit Home Affairs Funds spending conditionality in case of human rights violations.

⁸⁵ Section 1.2

⁸⁶ This is particularly the case for conditionality in international relations, which is as a general rule legally binding but may lack an enforcement mechanism after the disbursement of funds.

EU spending conditionality is always enforceable. However, its enforceability shall differ based on the institutional discretion and the frequency of enforcement.

From this point of view, one may additionally distinguish between *optional* and *mandatory* conditionalities, on the one hand, and *unenforced*, *rarely-enforced* and *frequently-enforced* conditionalities on the other.

An *optional* conditionality leaves important discretion to the conditionality actor in enforcing the sanction attached (funding cut-off), usually recognized by the qualifying word “*may*”. On the contrary, a *mandatory* conditionality leaves no enforcement discretion, imperatively prescribing for the deployment of sanctions, recognized by the use of the word “*shall*”. EU spending conditionality is by and large optional, as the Commission enjoys a very large discretion in ordering or proposing cuts or suspensions in funding. In a limited number of cases, EU spending conditionality is mandatory.⁸⁷

Even when a spending conditionality is compulsory, the frequency of its enforcement shall necessarily vary in practice. From this point of view, enforceable conditionalities may be further classified as *unenforced*, *routinely enforced* and *frequently enforced*. As already mentioned at section 2.2 above, EU spending conditionality addressed to Member States tends to be unenforced or rarely-enforced, whereas EU spending conditionality addressed to private beneficiaries is frequently-enforced.⁸⁸ These findings on State v. individual enforcement are also confirmed in the fiscal federalism literature.⁸⁹

2.3.10 Aims of spending conditionality

Based on the aim pursued, spending conditionality may include actions of a *macroeconomic*, *structural* or *good governance* nature. *Macroeconomic conditionality* is concerned with specific macroeconomic indicators such as public deficits, public debt or inflation. *Structural reform conditionality* is concerned with the efficient functioning of the public sector, often requiring privatisation or the reform of state-owned enterprises. In practice, the term is broadly used to denote holistic reforms of essential

⁸⁷ See, the mandatory string of EU macroeconomic conditionality, Part II, Chapter 4 below.

⁸⁸ See further Part II, Chapter 5.

⁸⁹ Pasachoff, *supra* note 50.

legal, social, economic, political and even judicial structures. *Good governance conditionality* is concerned with transparent, open, efficient and accountable exercise of public power, including institutional reform. In the view of the Western world powers, good governance conditionality encompasses rule of law, human rights and democratic principles.

Macroeconomic conditionality has been widely practiced by international financial institutions to achieve balance of payments adjustments and *macroeconomic* stability goals (in particular by the IMF). Structural reform conditionality has traditionally been used to promote reforms of the public sector meant to improve its effectiveness (in particular by the IMF and the World Bank). Good governance conditionality has been used to promote *good governance*, institutional and judicial reform based on principles of the rule of law, human rights and democracy (in particular by the World Bank and the EU).⁹⁰ In the view of international financial institutions, macroeconomic, structural and good governance conditionality is necessary to achieve long term economic development, because economic studies show a strong correlation between the success of financial assistance and a pre-existent sound macroeconomic, policy and governance environment.⁹¹ This justification has been strongly criticised. According to critics, if this correlation is accurate - and efficiency of aid is indeed the main consideration of conditionality - then macroeconomic, structural and good governance indicators should be set as qualifying criteria, granting access to funds, not as ex-post conditionality to be complied with after funding has been released.⁹²

In federal systems, spending conditionality is not traditionally concerned with macroeconomic stability, structural reforms or good governance *per se*. In the vast majority of cases, spending conditionality aims to advance federal *legislation* and *regulation* at the state level, *enforce* or otherwise implement a given federal *policy* or *law* in states that resist change or lag behind.⁹³ For example, the U.S. federal government may make it a condition that its states to adopt certain non-discrimination, social, environmental, healthcare and educational measures in exchange for federal funds,

⁹⁰ SHAH, *supra* note 51 at 4-5.

⁹¹ THE WORLD BANK, *supra* note 53 at 187-196. (see, in particular the contribution of Harold Bedoya).

⁹² SHAH, *supra* note 51.

⁹³ 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).

which may implement a federal law or policy preference.⁹⁴ From this point of view, spending conditionality may be further classified as pursuing legal or policy objectives. Even if a *legal* or *policy conditionality* may include measures that have a structural or good governance nature - such as actions aiming to improve the quality, access or integrity of the public service - these are traditionally part of a comprehensive federal policy (i.e. education or health), and are not, as a rule, limited to a specific funding program or operation.

EU spending conditionality takes all the above forms. EU spending conditionality advances EU *macroeconomic* objectives, for instance by requiring governments to observe strict deficit limits.⁹⁵ The tool is also used to promote the implementation of *structural reforms* recommended within the framework of the European Semester, such as the reform of the healthcare and labour market sectors.⁹⁶ It may also be used to advance *good governance* measures, such as legislative impact assessments.⁹⁷ In all these cases, EU spending conditionality may concern the transposition, effective application or enforcement of EU laws or policies, such as the correct transposition of Waste management Directive or implementation of Roma inclusion policy.⁹⁸

Lastly, one must stress that in the EU's practice, the above conditionality types are not mutually-exclusive. One conditionality may be designed to pursue macroeconomic, structural or good governance goals at the same time, whilst also aiming to advance certain pieces of EU legislation or policy preferences at the national level.

2.4 Functions

The literature on the use of conditionality in international relations and federal systems offers a myriad of justifications for the use of conditionality, which often overlap with its functions.⁹⁹ As mentioned above, conditionality is an incredibly flexible governance tool that can be creatively designed to serve a plethora of government interests, from the advancement of macroeconomic stability and

⁹⁴ *Id.*

⁹⁵ See macroeconomic conditionality, Part II, Chapter 4, below.

⁹⁶ *Id.*

⁹⁷ See the post-2020 rule of law conditionality, Part V, below

⁹⁸ See, ex ante conditionality, Part II, Chapter 4, below

⁹⁹ SHAH, *supra* note 51 at 4-5; SHAH AND KINCAID, *supra* note 48; JAY DILGER, *supra* note 30.

structural reforms to good governance and institutional reforms. In pursuit of these policy objectives, conditionality may specifically aim to enforce a given law, a policy line, to bring forward legislation or regulation, to implement a policy, or strengthen the institutions of a state. Yet at the heart of all these actions lie two core aims, and hence functions of conditionality: the aim to control, influence, change or otherwise alter state or individual behaviour (behavioural function); and the aim to control monitor, and safeguard the released financial resources from unwarranted use and waste, thus maximising their positive output on the ground (sound expenditure function). In fact, the aim of spending conditionality to control - behaviour or money - and the resistance it implicitly stimulates in response, summarises with impressive accuracy the core tension examined in this thesis.

2.4.1. Behavioural function

The primary function of spending conditionality is behavioural, in as much as it aims to control, coerce, determine, change, or otherwise alter behaviour, by *incentivising compliance* and *dissuading instances of non-compliance*.¹⁰⁰

Compliance is the essential arm of the behavioural function of spending conditionality. The tool aims to incentivise Member States and private beneficiaries to adopt and maintain an EU-prescribed conduct because the said conduct is a condition to access and use EU spending. Hence, EU conditional spending induces recipients' compliance and encourages them to cooperate on matters which they would be less likely to accept otherwise. In this way, the EU is acting as a strategic actor, tailoring and vesting spending conditionality according to its own, European objectives and interests.

The objectives of compliance shall differ on a case by case basis, depending on the conduct prescribed (see 2.3.10 above). From this point of view, we may further distinguish between spending conditionality that aims to foster macroeconomic stability, to determine compliance with an EU law or policy objective, to incentivise structural, governance or institutional reforms, to encourage legislation or regulation in a given area, or to implement a new policy line.

The correlative side of the compliance arm is the dissuasive arm of the behavioural function. To effectively achieve compliance, a dissuasive arm must be available to

¹⁰⁰ SKINNER, *supra* note 46; THALER AND SUNSTEIN, *supra* note 46.

discourage in a credible manner the instances on non-compliance by deployment of sanctions or negative reinforcements. In case of spending conditionalities, the negative reinforcement is the possibility to withdraw present or future EU spending resources. The dissuasive arm is the dormant function of spending conditionality. It shall be activated only as a subsidiary resort when the positive incentives offered for compliance did not prove effective. From this point of view, the compliance and dissuasive arm of the behavioural function are closely inter-dependent. The readiness of the conditionality actor to deploy negative reinforcements or sanctions (in short, funding cut-off) is a crucial element in informing the level of compliance. When negative reinforcements or sanctions are not deployed, their credibility is questioned, and consequently the incentives to comply are weakened.

2.4.2 Sound expenditure function

Sound expenditure is the most frequently mentioned function of spending conditionality. With one voice, EU policy makers, federal legislators and international institutions all promote spending conditionality as a cure and ultimate guarantee for sound expenditure and better-spending. This is especially the case where spending conditionality targets macroeconomic stability, good governance and structural reforms, referred to by economists as essential pre-conditions for any successful spending intervention¹⁰¹ and economic growth.¹⁰²

The efficiency gain argument was an important part of the EU's discourse in supporting the EU 2014-2020 spending conditionality package, presented as an essential pre-condition for effective and efficient EU expenditure and growth.¹⁰³

Even if the vocabulary of sound expenditure is often preferred in order to legitimise EU spending conditionality that goes beyond strict audit, control and other administrative expenditure conditions (section 1.6 above), the efficiency gains model does not always necessarily translate into the real world of conditionality. From this point of view, sound and better expenditure may rather be seen as a desired

¹⁰¹ Mariana Tomova et al., EU GOVERNANCE AND EU FUNDS - TESTING THE EFFECTIVENESS OF EU FUNDS IN A SOUND MACROECONOMIC FRAMEWORK ECONOMIC PAPERS NO 510/2013 DG ECFIN.

¹⁰² Daron Acemoglu & James Robinson, *The Role of Institutions in Growth and Development*, 1 REVIEW OF ECONOMICS AND INSTITUTIONS (2010), <http://www.rei.unipg.it/rei/article/view/14> (last visited May 4, 2018).

¹⁰³ European Commission, COM(2011) 615 final, Working Paper SEC(2011)1142 point 3.2.

conditionality function which depends on a variety of factors, including on the success of the behavioural function discussed above.

Concluding remarks

This part has laid out the conceptual toolkit of spending conditionality that shall be used throughout this thesis to further analyse, develop and problematize the rise of EU spending conditionality in the EU legal order.

For the purpose of the next Chapters we shall remember that EU spending conditionality is an EU governance tool, deeply embedded in the structure of the EU budget and fundamentally shaped by the legal processes and institutional dynamics leading to its adoption. We shall also remember that the coercive power of the law of EU spending conditionality is informed more than any other EU law by the amount of money attached and by the overall power of the EU budget purse, as compared to the budgets of Member States. Similarly, we shall note that the Court of Auditors is an additional institutional player in the law of EU spending conditionality and an important trigger for change. Most importantly, we shall note that spending conditionality differs from the administrative conditions of EU spending, as it is an *accessory* element of a spending agreement that goes beyond the agreement's primary investment objective and pursues a distinguishable, broader, policy-oriented goal.

It has been also established that spending conditionality is a legally binding, accessory requirement linked by the EU to a spending agreement, which coerces Member States or private beneficiaries to adopt a given conduct in order to access and continuously enjoy EU Funds resources, subject to the withdrawal of funds in cases of non-compliance. EU spending conditionality feeds into the legal, *ex ante* and *ex post*, negative and positive conditionality types. Additionally, EU spending conditionality may be classified as: cyclical and time-limited; same-sector, cross-cutting and cross-over; operation-specific, fund-specific and multi-fund; explicit and implicit;

enforceable, optional or mandatory; unenforced, routinely enforced or frequently enforced.

EU spending conditionality may pursue behavioural and sound expenditure functions. Its behavioural function may be further classified as: compliance functions and dissuasive functions. When EU spending conditionality pursues a compliance function, its objectives may be to determine compliance with recommended macroeconomic indicators, good governance and institutional reforms, to advance structural reforms, to enforce EU laws or policies, to encourage legislation or regulation, as well as promote a new policy line at the Member States level.

Finally, it is worth noting that whereas international actors, including the EU, have increasingly sought to depart from ex-ante and input conditionality in development aid and international financial assistance (an attempt largely sustained only on a declaratory level), and whereas good practice in established federations points in favour of output and ex-post conditionality focused on policy performance and results, the EU's spending conditionality remains by and large ex ante and input, despite some modest and largely unsuccessful Commission attempts to shift EU spending conditionality towards outputs. Part II below will further develop these last remarks.

PART II

The Legal World

Introduction

In the previous Part, I have conceptualised the notion of EU spending conditionality. I have individualised the tool within the EU budgetary process and categorised its main types and features, departing from its prior use in international relations and federal systems.

In Part II, I turn to the *legal world* of EU spending conditionality.¹⁰⁴ I show in which ways the abstract concept of conditionality presented in Part I has been appropriated, adapted, extended and ultimately effectively codified in the legal texts underpinning the EU internal budgetary framework.

In particular, Part II proposes to investigate two essential questions:

Why EU spending conditionality? And,

What is its effective legal nature?

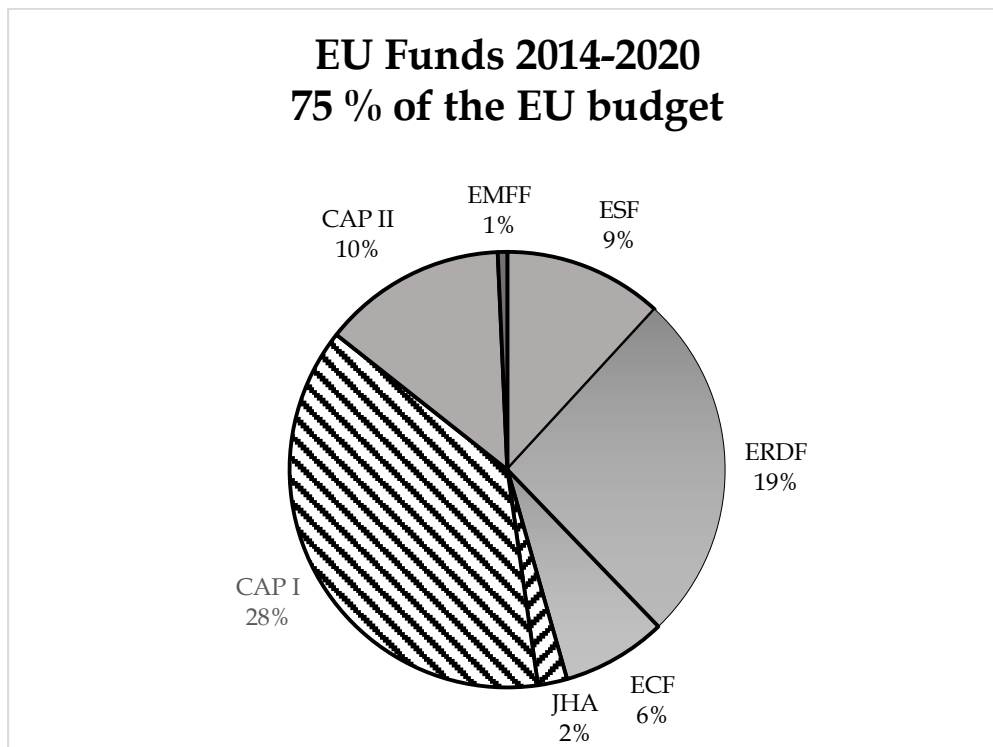
In attempting to answer these questions, I initially investigate the fundamental causes that informed the influx of spending conditionality inside the EU budget (Chapter 3). I then turn to a comprehensive analysis of the legal nature of conditionality in each area of EU spending (Chapters 4-7).

In the 2014-2020 financial period, over 75 % of the EU budget has been endowed with new and extensive spending conditionality arrangements (see figure 5, below). The latter have been primarily designed to legally bind four main areas of expenditure implemented under shared management between the Commission and Member States, namely: the European Structural Funds (jointly 34%) - reuniting the European

¹⁰⁴ This part draws in part on prior published work in: Viorica Viță, *Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality*, CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES (2017).

Social Fund (ESF), the European Regional Development Fund (ERDF), and the European Cohesion Fund (ECF); the European Agricultural Funds (jointly 38%) - built around Pillar I and II of the Common Agricultural Policy (CAP); the European Fisheries Fund (EMFF, 1%) and the Home Affairs Funds (JHA, 2%).

Figure 5. EU Funds implemented in shared management 2014-2020 (Source, European Commission)



Each fund presented above has seen an important rise in spending conditionality. However, two packages decisively stand out as the most numerous, influential, novel and contested: the 10 *macroeconomic* and 48 *ex-ante* conditionalities attached to five EU funds, jointly referred to in the 2014-2020 financial period as European Structural and Investment Funds ('ESI' Funds) - in colour, on the right side of figure 5 above. The ESI Funds account for 45% of the EU budget and include three traditional Structural Funds of the EU Cohesion Policy (ESF, ERDF and ECF), the CAP II pillar Rural Development Fund (EAFRD), and the Fisheries fund (EMFF).

Part II will show that EU spending conditionality has seen a significant rise in numbers, types, procedural sophistication, complexity, thematic scope and functional use. In addition, conditionality has been strategically designed to ensure compliance with a myriad of objectives in a wide array of EU policies and core state functions. The

latter include compliance with EU economic governance indicators, crisis-led economic adjustment packages, structural reforms, correct application and implementation of EU legislation and broader EU *acquis*. Crucially, Part II will demonstrate that all 2014-2020 spending conditionalities - with no exception - are governed by binding and enforceable EU law rules. This makes the appraisal of the EU's internal spending conditionality a particularly valuable and significant EU legal phenomenon, worth analysing in detail. Despite its novelty and impressive proportions, to date the law of EU spending conditionality has largely passed unnoticed in the legal scholarship, being under-reported, under-understood and generalised. In fact, as our investigation shows, legal thinking has been virtually absent from EU spending conditionality policy planning and negotiation, leaving conditionality entirely under the dominance of technocratic imagination, economic efficiency models and pragmatic 'realpolitik' (Chapter 3).

In response, this Part intends to focus on the legal world of EU spending conditionality. I chose to present the legal world of EU spending conditionality through a comprehensive mapping exercise of the tool in each area of EU spending, starting with the foundational 1988 EU budget reform of the Jacques Delors Commission, and ending with the most recent, 2014-2020 multiannual financial framework. The analysis is based on the conceptual toolkit of EU spending conditionality developed in Part I above. The detailed legal mapping is important for three main reasons. First, it allows us to empirically validate the claim of a revolutionary and unprecedented rise of EU spending conditionality internally, a fundamental premise of the present thesis. Second, the historical perspective provides important lessons on the operation of incipient spending conditionality arrangements developed prior to 2014. Third, detailed mapping is necessary to understand the precise legal characteristics and reach of EU spending conditionality, which shall allow us to further problematise its implications for the constitutional world and departures in the institutional world, discussed in Parts III and IV, below.

Part II is structured in five Chapters.

Chapter 3 answers the question: Why EU spending conditionality? It explains why EU institutions and Member States opted for more EU spending conditionality in EU internal affairs during the 2007-2013 EU budget planning and negotiation. It depicts

the incipient Cohesion policy roots of EU spending conditionality, which were significantly strengthened by the conditionality-intense environment caused by the global financial crisis and the difficult policy compromise on the 2014-2020 financial period, leading to the dramatic rise of EU spending conditionality adopted as of December 20, 2013.

The subsequent four Chapters present the detailed legal characteristics and evolution of conditionality in each thematic area of EU spending.

Chapter 4 examines the legal world of the EU spending conditionality attached to Structural funds (in 2014-2020, ESI funds). Its findings show that Structural funds are the legal cradle of EU spending conditionality. They have nourished two of the oldest forms of EU spending conditionality since the 1990s and have also been at the epicentre of the massive expansion of spending conditionality during the 2014-2020 financial period. The main lessons learned from the operation of EU spending conditionality attached to Structural funds prior to 2014 is that enforcement against Member States is rare, and when enforcement is effectively ordered, Member States may have the tendency to 'get rid' of the 'troubling' conditionality in the next financial period.

Chapter 5 examines the legal evolution of spending conditionality in European Agricultural Funds, where EU spending conditionality was most advanced prior to 2014. Our investigation shows that Agricultural Funds have historically been endowed with extensive spending conditionality rules since the mid-2000s, and have been further enriched, reformed and streamlined in the 2014-2020 financial period. The main lesson learned from the operation of Agricultural Funds conditionality prior to 2014 is that when addressed to private beneficiaries of EU funds (EU farmers), spending conditionality is frequently enforced.

Chapter 6 analyses the legal world of the Fisheries Fund spending conditionality. It shows that Fisheries funds have known a similarly intense pre-2014 conditionality orientation and a 2014-2020 rise. Even if the overall spending power of the fisheries envelope is very limited (1% of the EU budget), the conditionality attached remains extremely numerous, making fisheries the most conditional area of spending. The main lesson learned from the Fisheries Fund is that more conditionality is not

necessarily better. Rather, in cases of deep policy failure, conditionality is most likely to encounter similar challenges to the policy it is attached to.

Lastly, Chapter 7 resumes with the legal world of Home Affairs Funds spending conditionality. The Chapter shows that no explicit spending conditionality prior to 2014 was present in the area. Nevertheless, implicit conditionality forms were present and enforced to preserve the EU human rights *status quo*, following serious human rights violations at the EU's borders. The main lesson learned from Home Affairs Funds spending conditionality is that implicit forms of conditionality, even if difficult, may effectively be enforced in response to international and civil society requests for action that lead to a sufficiently shared consensus to act. The 2014-2020 financial period reinforced the use of border acquis and human rights conditionality against the background of increased migration pressure, security threats and human rights concerns at the EU borders.

Throughout Chapters 4-7, I discuss enforcement only in as much as it helps categorise and understand the legal dynamics of each EU spending conditionality type. For a full discussion on enforcement during the 2014-2020 financial period see Part IV below.

Why EU Spending Conditionality?

A common misconception about the rise of internal EU spending conditionality is that its origins are to be found primarily in the 2008 global financial crisis and the subsequent waves of crises that unfolded in the Union, from the European sovereign debt and the Eurozone crises, to the rule of law and migration crises that followed.¹⁰⁵ My investigation into the subject matter shows that this widely held belief is erroneous and as a consequence should be abandoned.

In this Chapter, I argue that the dramatic unfolding of the 2008 global financial crisis and the heavy bailout conditionality that shocked the social and welfare systems of at least eight EU countries, coupled with the rise of populism in Europe and the open defiance of EU values that followed from some Member States, were far from the primary roots of the rise of EU spending conditionality in 2014-2020 financial period. There is no doubt that these events significantly informed and decisively shaped the course of debates throughout the 2007-2013 timeline of conditionality policy planning and negotiation. There is also no doubt that some of these events might have informed the EU's vision for the post-2020 rule of law conditionality proposal. However, these events are not primarily responsible for the rise of conditionality in the 2014-2020 financial period. In fact, as I show in Chapters 4-7 below, EU policy makers had been

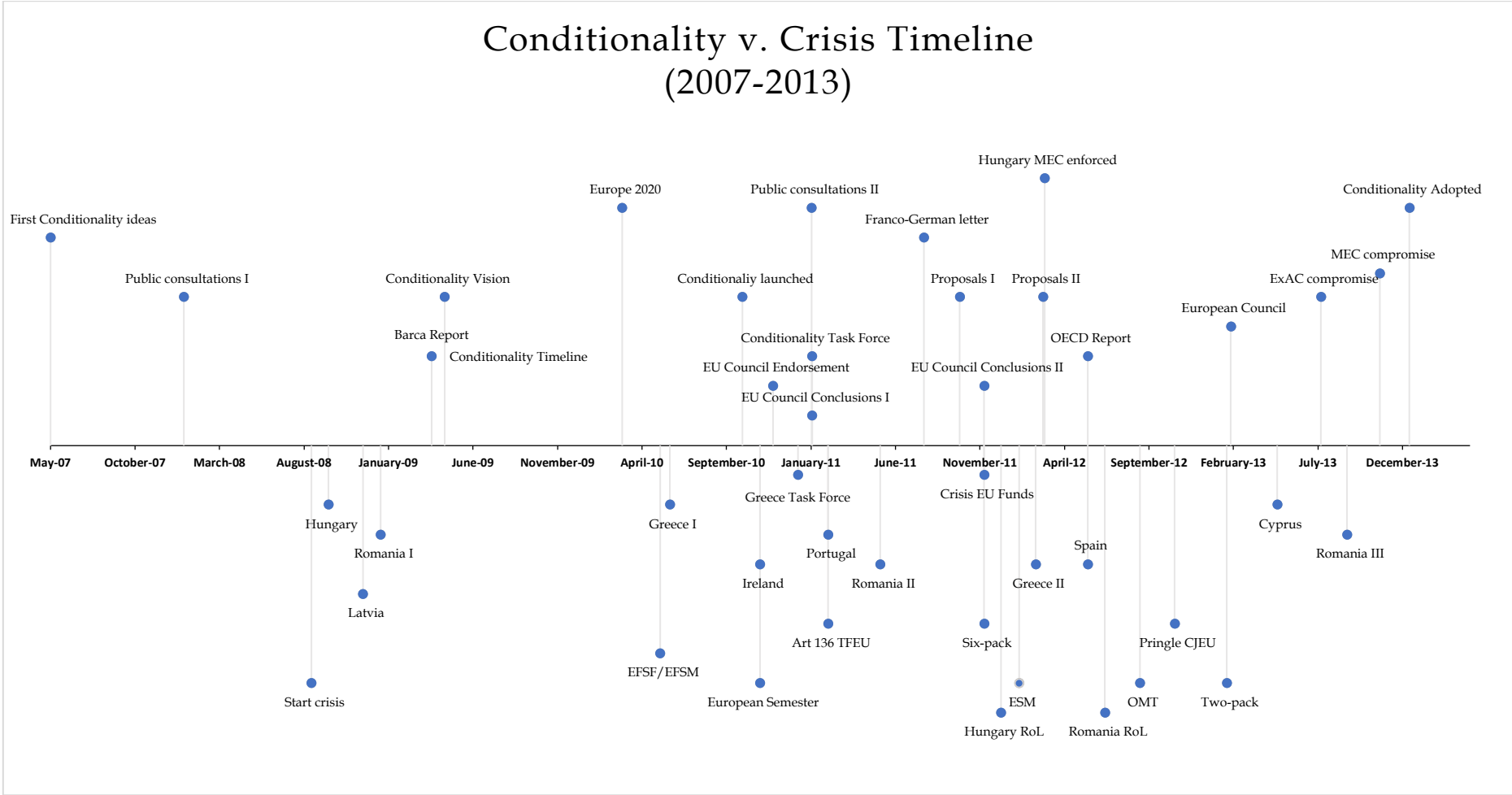
¹⁰⁵ Roland Bieber & Francesco Maiani, *Enhancing centralized enforcement of EU law: Pandora's Toolbox?*, 51 COMMON MARKET LAW REVIEW 1057-1092, 1059 (2014). See, amongst others: [suggesting that conditionality has been developed alongside other sanctions in response to the recent EU crises and the EU enforcement deficit thereby exposed].

experimenting with EU spending conditionality in the EU internal budget well before the 2008 global financial tragedy overwhelmed Europe. Moreover, regarding the policy origins of the rise of EU spending conditionality in 2014-2020, this Chapter clearly shows that they primarily arise from endogenous factors. In section 3.1 below I argue that the true roots of the rise of EU spending conditionality in 2014-2020 are to be found inside the EU, and notably inside the policy planning units of the Commission, and in particular of the Directorate General for Regional Policy (DG REGIO), responsible for Cohesion policy planning. In section 3.2 below I show that the subsequent eruption and dramatic unfolding of the financial crisis in 2008 significantly strengthened and reshaped the incipient vision of EU spending conditionality, shifting it away from a federal-type output conditionality, focused on performance, policy results and positive incentives, towards an IMF-type input conditionality, focused on EU macroeconomic indicators, structural reforms and negative sanctions in case of failure to comply.¹⁰⁶ Alongside the crisis, the decisive battle on the rise - or fall - of EU spending conditionality was joined during the extremely difficult negotiations for the adoption of the 2014-2020 EU budgetary period (3.2). The negotiations effectively split the EU into two groups of Member States, roughly denoted by the EU crisis jargon of 'EU North' and 'EU South'.¹⁰⁷ It may seem unnecessary to mention that the vision of the 'EU North' prevailed. Otherwise, the essential premise of the present thesis - the rise of EU spending conditionality - would be absent. Yet, as I explain below, this assumption is a gross generalisation of the complex EU legislative process, which at the end of the day favoured a policy compromise acceptable to all actors involved (3.3). Figure 6 below depicts the complex inter-relation between the evolution of EU spending conditionality and various crises experienced by the EU during 2007-2013. In the next sections, figure 6 shall be used as a time-map to guide the reader throughout the key events that informed the origins of EU spending conditionality and its development towards the 2014-2020 EU budget compromise.

¹⁰⁶ See Chapter 2, section 2.3 above on various conditionality types and their application in international and federal systems.

¹⁰⁷ See Part I, 1.3 for the distinction between EU net contributors ('North') and net beneficiaries (South) Member States.

Figure 6. EU Spending Conditionality v. Crisis timeline 2007-13



3.1 An endogenous origin

As illustrated in Figure 6 above, the first ideas heralding the rise of spending conditionality were already present at the EU level since May 2007, at a time when the upcoming economic crisis and the financial assistance conditionality that followed were simply unimaginable at the EU level.

The 2007 Commission Communication on the 'Fourth Cohesion Report' anticipating the debate of the future of Cohesion Policy,¹⁰⁸ followed by the January 2008 public consultations,¹⁰⁹ and in particular the Member States' answers to the Commission's questionnaire, show that Cohesion policy and the Structural Funds underpinning it nurtured the seeds of the 2014-2020 rise of EU spending conditionality well before the crisis.¹¹⁰

The identification of the origin of the rise of EU spending conditionality inside the ambit of EU Cohesion policy and its responsible executive agencies (primarily DG REGIO, supported by DG Employment 'DG EMPL'), is no accident. The EU Cohesion policy accounts on average for more than one third of the EU budget. Historically, this important budgetary allocation has been of utmost financial importance for EU national and regional economies since its establishment in 1975¹¹¹ and its major reform under the Delors Commission in 1988.¹¹² As opposed to Agricultural policy spending - which also accounts for one third of the EU budget but remains stable in the form of aid disbursed from the EU level to EU farmers - Cohesion policy is always subject to change in the face of rapidly shifting global, EU, and regional priorities. Cohesion policy is also a very peculiar EU policy, transversal in nature. Its original treaty mandate, reinforced by the Lisbon treaty, is to support harmonious development of

¹⁰⁸ EUROPEAN COMMISSION COMMUNICATION, GROWING REGIONS, GROWING EUROPE FOURTH REPORT ON ECONOMIC AND SOCIAL COHESION COM (2007) 273, 122-ss (2007).

¹⁰⁹ Public Consultation on the future of EU Cohesion Policy, (2008), http://ec.europa.eu/regional_policy/archive/conferences/4thcohesionforum/all_contrib_en.cfm?nmenu=3 (last visited May 17, 2018).

¹¹⁰ See, Chapter 4 below for a detailed presentation of the pre-2014 conditionality in Structural Funds.

¹¹¹ REGULATION (EEC) NO 724/75 OF THE COUNCIL OF 18 MARCH 1975 ESTABLISHING A EUROPEAN REGIONAL DEVELOPMENT FUND, 073 OJ L (1975).

¹¹² EUROPEAN COMMISSION, EUROPEAN UNION PUBLIC FINANCE 33-57 (2014).

the Union and its single market by strengthening the economic, social and territorial cohesion between the EU Member States, regions and citizens.¹¹³ As a result, many - if not all - EU matters may fall under its reach. In metaphorical terms we can imagine Cohesion policy to be the 'financial umbrella' or the 'pot of money' of numerous EU policies, ranging from climate change and environmental protection to gender equality, minority inclusion, business and small and medium enterprise, innovation, research and development and many more. The strategic importance of Cohesion policy and its changing financial distribution throughout Member States drastically increases its importance and puts it at the centre of each multiannual budget debate.

The aforementioned 2007 communication explicitly announced three key messages for the future macroeconomic and ex ante conditionality packages, in language strikingly similar to the 2014-2020 EU funds regulations.

The first key message of the 2007 Commission communication was that: "sound macroeconomic policies combined with structural policies are fundamental in improving competitiveness".¹¹⁴ This message recalls the Commission's prior practice of attaching macroeconomic conditionality to the European Cohesion Fund since 1994 (see Chapter 4 below) and constituted the main policy justification for extended macroeconomic conditionality in 2014-2020.¹¹⁵

The second key message concerned institutional capacity building. On this point, the 2007 communication mentions that: "sound institutional framework and effective administration in Member States and regions are preconditions for the success of cohesion policy".¹¹⁶ This phrase was the *ad litteram* policy justification for the far-reaching ex-ante conditionality package of 2014-2020.¹¹⁷ Upon closer inspection, the Commission's DG REGIO's frustration with weak institutional capacity traces back to the Court of Auditors' persistent findings that Cohesion policy was responsible for high error and irregularity rates in EU budgetary expenditure and that management

¹¹³ Articles 174-178 TFEU.

¹¹⁴ EU Council, PRESIDENCY CONCLUSIONS. INFORMAL MEETING OF THE MINISTERS IN CHARGE OF COHESION POLICY LIÈGE, 22-23 NOVEMBER 2010.

¹¹⁵ See, section 3.3 and Chapter 4, below.

¹¹⁶ EUROPEAN COMMISSION, *supra* note 108 at 59.

¹¹⁷ See, section 3.3 and Chapter 4, below.

and control institutions were weak at the national level.¹¹⁸ These findings reinforced the movement of DG REGIO's economists towards revived economics literature on institutional approaches to economic growth, literature that trace the causes of good economic performance to good performance of the governing economic and political institutions.¹¹⁹ In this sense, the Commission notes that: "high levels of corruption, red tape, low quality of the judiciary system and a large shadow economy (all symptoms of poor administrative performance) directly affect overall competitiveness" and the performance of Cohesion policy.¹²⁰ Hence, DG REGIO's policy response was a conditional EU Funds transfer based on prior sound institutional and regulatory frameworks at the national and/or regional level, which enjoyed much support during the debates on ex-ante conditionality, as we shall see further below (3.3).

A third key message of the 2007 communication that paved the way towards the rise of EU spending conditionality in 2014-2020 was the idea of increasingly using the EU budget as a lever for EU policy performance, notably for the weak-performing Lisbon Strategy adopted in 2000, and the newly tabled Europe 2020 strategy to be adopted in 2010.¹²¹ The proposal of a stronger link between EU spending and EU strategic policy goals proved very popular with Member States during the 2008 consultations¹²² and has also enjoyed enthusiastic support from the European Parliament during negotiations (see 3.3).

Interestingly, the overwhelming majority of EU officials interviewed during my 2016 fieldwork research affirmed the same findings. They asserted that from their point of view, the 2014-2020 round of conditionality was not that new.¹²³ According to them,

¹¹⁸ Court of Auditors, ANNUAL REPORT CONCERNING THE FINANCIAL YEAR 2006 OJ C 273 (2007).

¹¹⁹ Walton H. Hamilton, *The Institutional Approach to Economic Theory*, 9 THE AMERICAN ECONOMIC REVIEW 309–318 (1919); Sjeff Ederveen, Henri L.F. de Groot & Richard Nahuys, *Fertile Soil for Structural Funds? A Panel Data Analysis of the Conditional Effectiveness of European Cohesion Policy*, 59 KYKLOS 17–42 (2006); Daron Acemoglu & James A. Robinson, *Why Nations Fail* (2012); Daron Acemoglu & James Robinson, 13. *Why nations fail today? Institutions Institutions Institutions*, in *WHY NATIONS FAIL* 368–403 (2012); Peter Berkowitz, Catalina Rubianes & Jerzy Pienkowski, *The European Union's Experiences with Policy Conditionalities* (2017).

¹²⁰ EUROPEAN COMMISSION, *supra* note 108 at 59.

¹²¹ EUROPEAN COMMISSION, *supra* note 108.

¹²² 2008 Public Consultation Future of Cohesion, *supra* note 109. [notably with Belgium, France, Italy, Romania, Germany, Estonia, Portugal and Spain; with the exception of Latvia, whose government showed much reticence to the idea of 'nationalising' the regional scope of the policy].

¹²³ Interviews, DG REGIO, DG HOME, DG EMPL, DG AGRI and DG MARE, Brussels, June 2016.

spending conditionality was always there,¹²⁴ as the Commission would always ask Member States to implement certain legislation, or put in place appropriate institutional structures before the disbursement of EU funds, and could also order suspension of payments that were in breach of EU laws.¹²⁵ What truly changed, according to the interviewees, was the much more clear, explicit and detailed manner in which conditionality was formulated. This was said to reflect lessons learned by the Commission during its previous, difficult attempts to order spending cut-off in cases where Member States were late in complying or persisted in non-compliance with essential EU legislation or policies of direct relevance to EU spending (see Chapter 4-7 below).¹²⁶

Based on the above findings, one clearly sees that significant signs presaging the rise of EU spending conditionality were already present inside the endogenous EU structures in charge of the 2014-2020 conditionality reform.¹²⁷ In the next section I will show how these initial ideas gained increased traction in times of crisis.

3.2 A Union in crisis

The expansion of EU spending conditionality might have been on the minds of EU policy makers before the dawn of the 2008 financial crisis, but its announcement and negotiation took place when Europe was in the midst of the most serious economic crisis since its creation, and was closely intertwined with the dramatic events that followed (see figure 6, above).

The crisis influenced the rise of spending conditionality in the EU in two important ways. First, the crisis shifted the initial vision of conditionality from an output type towards an input type¹²⁸ specific to the IMF/EU economic adjustment programmes of

¹²⁴ See also on this topic: STINE ANDERSEN, THE ENFORCEMENT OF EU LAW: THE ROLE OF THE EUROPEAN COMMISSION 186–189 (2012).]

¹²⁵ *Id.* at 186.

¹²⁶ Interviews, DG REGIO, DG HOME, DG EMPL, DG AGRI and DG MARE, Brussels, June 2016.

¹²⁷ *Id.*

¹²⁸ See, Chapter 2, Section 2.3.3 above. (Input conditionality is focused on input deliverables e.g.: adoption of an early school leaving strategy, as opposed to output conditionality which primarily focuses on results e.g.: decrease of the children out of school by 5% by the end of the EU-financed programme).

bailed out Member States (3.2.1). Second, the crisis forced broader acceptance of EU spending conditionality, even from fierce opponents of the tool (3.2.2).

3.2.1 From output to input

The EU's initial vision for spending conditionality was announced in April 2009 in an independent Report on the future of Cohesion policy ('Barca Report')¹²⁹ and a resulting Commission Reflection Paper prepared by DG REGIO.¹³⁰ The thrust of the vision was a federal-type, ex-post, output conditionality, based on policy results (see Part I above). This vision was strongly informed by economic literature on fiscal federalism, which speaks to the expertise and background of academics and practitioners contributing to Barca Report.¹³¹ The output ex post conditionality would be complemented with limited ex ante input conditionality, to build national and regional institutional capacity in order to ensure that essential pre-conditions for ex post conditionality were present and the proposed results achieved.¹³²

As Figure 6 above illustrates, this initial vision was made public in April 2009, when three non-Eurozone EU Member States were already experiencing deep economic difficulties (Hungary, Latvia, Romania), and had signed conditionality-laden rescue packages with the EU and the IMF. Nevertheless, the Barca Report mainly proposed an *output*, federal-type conditionality as an appropriate policy tool for the EU, resisting the *input* EU/IMF type of conditionality that dominated EU public discourse at the time.¹³³

In 2010, as the crisis rapidly became aggravated and expanded towards Eurozone Member States (Greece in May 2010, then Ireland in November 2010), the initial vision of EU spending conditionality was put into economic austerity mode. Throughout 2010, a sequence of Commission communications on EU economic governance,¹³⁴ EU

¹²⁹ BARCA, *supra* note 32; Barca Report, http://ec.europa.eu/regional_policy/archive/policy/future/barca_en.htm (last visited May 18, 2018).

¹³⁰ European Commission, REFLECTION PAPER ON FUTURE COHESION POLICY INFORMAL MEETING OF MINISTERS FOR REGIONAL POLICY MARIÁNSKÉ LÁZNE – 22-24 APRIL 2009 (2009).

¹³¹ Barca Report, *supra* note 129.

¹³² BARCA, *supra* note 32; European Commission, *supra* note 130.

¹³³ BARCA, *supra* note 32; European Commission, *supra* note 130.

¹³⁴ European Commission, COMMUNICATION ENHANCING ECONOMIC POLICY COORDINATION FOR STABILITY, GROWTH AND JOBS – TOOLS FOR STRONGER EU ECONOMIC GOVERNANCE COM(2010) 367 FINAL (2010).

budget review,¹³⁵ and the future of Cohesion policy¹³⁶ all argued for a dramatically revised vision of EU spending conditionality.

In this revised vision, spending conditionality was seen as a tool that could assist the EU to close the widening EU law compliance deficit at the national level, restore fiscal discipline, foster implementation of structural reforms, and ultimately support the recovery of EU economies. Pursuant to the Commission's 2010 communications, Cohesion policy disbursements would be conditioned *ex ante* upon delivery of structural reforms (ex-ante, carrot-and-stick conditionality); while *ex post* all EU budget payments (including Agricultural, Fisheries and Home Affairs Funds) could be cut-off if states failed to comply with macroeconomic indicators and Stability and Growth Pact commitments (ex-post negative conditionality).¹³⁷ In addition, a limited amount of EU Funds could be set aside, to reward Member States' progress towards Europe 2020 policy goals - the so-called 'performance reserve'.¹³⁸

3.2.3 Acceptance under pressure

The dramatic unfolding of the crisis at the EU level created the necessary pressure for a broader acceptance of EU spending conditionality, persuading even initially reluctant stakeholders to embrace the change.

During the negotiation period, the institutional positions on EU spending conditionality may be generally seen as follows:

- the European Commission strongly supported all EU spending conditionality;
- the EU Council was initially cautious regarding ex ante conditionalities, but gradually accepted the Commission's vision, subject to important compromises. On macroeconomic conditionality, the EU Council abdicated its role to the European Council, where the negotiation on macroeconomic conditionality was primarily held;

¹³⁵ European Commission, COMMUNICATION THE EU BUDGET REVIEW BRUSSELS, 19.10.2010 COM(2010) 700 FINAL {SEC(2010) 7000 FINAL} (2010).

¹³⁶ European Commission, COMMUNICATION. CONCLUSIONS OF THE FIFTH REPORT ON ECONOMIC, SOCIAL AND TERRITORIAL COHESION: THE FUTURE OF COHESION POLICY COM/2010/0642 FINAL (2010).

¹³⁷ European Commission, *supra* note 134 at 9; European Commission, *supra* note 136 at 4–5.

¹³⁸ European Commission, *supra* note 136 at 5.

- the European Parliament strongly supported ex ante conditionalities, but entirely rejected macroeconomic conditionality. However, the Parliament was largely marginalized by the European Council from the debate on macroeconomic conditionality and found itself under pressure to accept the tool at the very last moment.

As mentioned above, the 2010 Commission communications¹³⁹ marked the start of negotiations on EU spending conditionality. In this context, the EU Council was first invited to formulate a position on EU spending conditionality. Reunited under the auspices of the Belgian presidency, in late November 2010 the EU General Affairs Council composed of Member States Ministries in charge of Cohesion policy expressed "worries" about the proposed conditionality, which was perceived as "external" to Cohesion policy.¹⁴⁰ With extreme caution, the Presidency conclusions announced "in a general way a favourable attitude towards "specific conditionality" (i.e. ex-ante conditionality), but at the same time instructed that the precise definition, feasibility and scope of such conditionality must be further discussed in detail by Member States, the Commission and the European Parliament, to be brought together in the context of a Conditionality Task Force. The results of this were to be presented to the EU Council in Spring 2011, before the Commission published its legislative proposals on the EU budget.¹⁴¹

In Spring 2011, the General Affairs Council met under the auspices of the Hungarian Presidency, only days after another Eurozone Member State - Portugal - had asked for EU and IMF financial assistance and braced for the generous bailout conditionality packages that followed.¹⁴² According to commentators participating in the debate, spending conditionality was hotly disputed, enjoying high support from the 'EU North' Member States and mixed feelings from the 'EU South'.¹⁴³ Ultimately, what remained in Spring 2011 was unanimous agreement on ex-ante conditionality, so long

¹³⁹ European Commission, *supra* note 134; European Commission, *supra* note 135; European Commission, *supra* note 136.

¹⁴⁰ EU Council, PRESIDENCY CONCLUSIONS. INFORMAL MEETING OF THE MINISTERS IN CHARGE OF COHESION POLICY LIÈGE, 22-23 NOVEMBER 2010 4.

¹⁴¹ *Id.* at 5.

¹⁴² Portugal formally requested financial assistance on 17 May 2011.

¹⁴³ Rossella Rusca, *Il negoziato per politica di coesione 2014-2020 e le prospettive per il futuro. Questioni chiave, battaglie, alleanze, obiettivi e sfide visti da un insider*, GM, 181-182 (2015).

as it was designed as a critical pre-requisite, directly linked to the effectiveness of EU spending and in line with Member States legal and administrative frameworks.¹⁴⁴ Macroeconomic conditionality also remained but it was to be dealt with at the highest political levels of EU heads of state and governments under the auspices of the European Council. In fact, in the European Council macroeconomic conditionality was deemed so sensitive that it was linked to the overall debate on the future multiannual financial perspective (MFF) and the future of EU economic governance. By Spring 2011, the European Council had repeatedly endorsed the macroeconomic conditionality as a prospective EU budget tool for economic governance enforcement.¹⁴⁵ The micro-involvement of the European Council in the EU budgetary process, roles reserved for the EU Council and the European Parliament by the EU treaties after Lisbon, was neither constitutionally consistent, nor well-received by the European Parliament.¹⁴⁶ Nevertheless, the fact of the matter remained that the actions of the European Council tacitly disinvested the EU Council and marginalised the European Parliament from dealing with macroeconomic conditionality.

As the Commission was busy drafting the EU Funds regulations,¹⁴⁷ in June 2011 the European Parliament vocally joined the debate, and "warned against" any macroeconomic conditionality linked to Cohesion policy.¹⁴⁸ In the Parliament's view, conditionality would go against the very objective of the policy, punishing less developed European regions (that are also most in need of EU assistance) for the macroeconomic mistakes of central governments.¹⁴⁹ The Parliament, however, fully

¹⁴⁴ EU Council, INFORMAL MEETING OF MINISTERS RESPONSIBLE FOR COHESION POLICY GÖDÖLLÖ "TOWARDS A MORE EFFECTIVE COHESION POLICY" 2 (2011).

¹⁴⁵ European Council, CONCLUSIONS, EUCO 13/10 13 (2010); European Council, CONCLUSIONS EUCO 25/1/10 REV 1 3 (2010); REPORT OF THE TASK FORCE TO THE EUROPEAN COUNCIL "STRENGTHENING ECONOMIC GOVERNANCE IN THE EU," (2010).

¹⁴⁶ See on an excellent discussion on the legal and constitutional implications of European Council active participation in the MFF legislative debate: Richard Crowe, *The European Council and the Multiannual Financial Framework*, 18 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 69–92 (2016).

¹⁴⁷ European Commission, A BUDGET FOR EUROPE 2020, COM(2011) 500 FINAL; European Commission, STAFF WORKING PAPER RESULTS OF THE PUBLIC CONSULTATION ON THE CONCLUSIONS OF THE FIFTH REPORT ON ECONOMIC, SOCIAL AND TERRITORIAL COHESION SEC(2011) 590 FINAL 9 (2011); Proposal for a COUNCIL REGULATION laying down the multiannual financial framework for the years 2014–2020 COM(2011) 398 final, (2011).

¹⁴⁸ European Parliament, RESOLUTION OF 8 JUNE 2011 ON INVESTING IN THE FUTURE: A NEW MULTIANNUL FINANCIAL FRAMEWORK (MFF) FOR A COMPETITIVE, SUSTAINABLE AND INCLUSIVE EUROPE (2010/2211(INI)) 75 (2011).

¹⁴⁹ *Id.* at 75.

backed the most extensive possible vision of ex ante conditionality, including preconditions linked to EU legislation, EU policy objectives, structural reforms or administrative capacity.¹⁵⁰

To make sure that the Commission remained focused on the prior instructions of the European Council on macroeconomic conditionality, on 21 July 2011 the German Chancellor and the French President sent a letter to the president of the European Council, Mr. Van Rompuy, openly advising the extension of macroeconomic conditionality to all Structural Funds.¹⁵¹

In October 2011 the long-awaited proposals for EU Funds regulations followed, with sweeping lists of conditionality packages. The latter were detailed in over 4 pages of macroeconomic conditionalities¹⁵² and 30 pages of ex-ante conditionalities, carefully laid out in the body of EU funds regulations and annexes therein.¹⁵³

As called for by the Franco-German letter,¹⁵⁴ macroeconomic conditionality would apply to all structural measures (ESI Funds), including to the three traditional Cohesion policy structural funds (ERDF, ESF and ECF) and, as a novelty, the European Fisheries Fund and the second rural development Pillar of Agricultural Funds (see figure 5 above).¹⁵⁵ On a substantive level, macroeconomic conditionalities were designed to enforce a range of new EU economic governance rules, including the soft economic and social policy recommendations issued by the EU Council in the framework of the European Semester, the excessive deficit and excessive imbalance procedures, as well as economic adjustment plans for countries under EU or international financial assistance - six at that moment (figure 6 above).¹⁵⁶

¹⁵⁰ European Parliament, RESOLUTION OF 5 JULY 2011 ON THE COMMISSION'S FIFTH COHESION REPORT AND THE STRATEGY FOR POST-2013 COHESION POLICY (2011/2035(INI)) 69.

¹⁵¹ Letter of the German Chancellor Merkel and French President Sarkozy to the President of the European Council of 17 August 2011; Van Rompuy tipped to chair new "economic government," <https://euobserver.com/economic/113336> (last visited May 15, 2018).

¹⁵² European Commission, COM(2011) 615 FINAL 2011/0276 (COD) 42-45 (2011).

¹⁵³ European Commission, *supra* note 152; European Commission, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON SUPPORT FOR RURAL DEVELOPMENT BY THE EUROPEAN AGRICULTURAL FUND FOR RURAL DEVELOPMENT (EAFRD) COM(2011) 627 FINAL/2 (2011); European Commission, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE EUROPEAN MARITIME AND FISHERIES FUND COM/2011/0804 FINAL - 2011/0380 (COD).

¹⁵⁴ Franco-German Letter 2011, *supra* note 151.

¹⁵⁵ European Commission, *supra* note 152 at 42-45.

¹⁵⁶ *Id.* at 42-45.

Ex ante conditionalities were meticulously designed to pursue three core objectives: sound administrative and institutional arrangements; sound legislative and regulatory frameworks; and sound policy and strategic frameworks.¹⁵⁷ Ex ante conditionalities were further classified as general - applicable to all ESI Funds - and thematic - applicable only to the specific spending objectives of each ESI Fund.¹⁵⁸ In practice, Member States would be bound by all general ex ante conditionalities, as well as by the thematic ex ante conditionalities applicable to the specific investment objectives as per the annexes to the EU Funds regulations.¹⁵⁹ They would report on the applicable ex ante conditionalities as well as on their stage of fulfilment in the programming documents to be approved by the Commission.¹⁶⁰ All conditionalities would have to be fulfilled by the start of spending - in principle 2014.¹⁶¹ Exceptionally, the unfulfilled ex-ante conditionalities could be fulfilled by the end of 2016 at the latest.¹⁶² The numbers, detail and breadth of ex ante conditionality was overwhelming. Seven general ex ante conditionalities were broken down into more than 35 detailed pre-conditions relating to transposition of EU laws, delivery of national strategic frameworks and training plans of national officials in non-discrimination, gender equality, disability, public procurement, state aid, environmental impact assessments and statistics.¹⁶³ Separately, 23 thematic ex ante conditionalities linked to Cohesion policy funds (ESF, ERDF and ECF),¹⁶⁴ 18 thematic ex-ante conditionalities linked to the rural development fund (EAFRD)¹⁶⁵ and 4 linked to fisheries fund (EMFF),¹⁶⁶ listed more than 150 criteria for fulfilment, running across more than 30 EU policies from green energy, statistics, waste and water, transportation, employment, research and innovation, education, administrative systems, social inclusion, poverty, sustainable agriculture, fisheries or aquaculture. Each criterion demanded onerous requirements such as adoption of national strategies, transposition, effective application and

¹⁵⁷ *Id.* at 137-154.; European Commission, *supra* note 153 at 103-108.

¹⁵⁸ European Commission, *supra* note 152 at 40; European Commission, *supra* note 153; European Commission, *supra* note 153.

¹⁵⁹ European Commission, *supra* note 152 at 40-41.

¹⁶⁰ *Id.* at 40-41.

¹⁶¹ *Id.* at 40.

¹⁶² *Id.* at 40.

¹⁶³ *Id.* at 151-154.

¹⁶⁴ *Id.* at 137-151.

¹⁶⁵ European Commission, *supra* note 153 at 102-107.

¹⁶⁶ European Commission, *supra* note 153 at 113-118.

implementation measures of EU legislation, or administrative trainings and institutional reforms.

Let us take the general ex-ante conditionality of gender equality to illustrate the significant effort that would have been required to comply with a single proposed conditionality. To fulfil the conditionality, each Member State would have to show:

"The existence of a strategy for the promotion of gender equality and a mechanism which ensures its effective implementation."

To be checked against the following criteria:

"Effective implementation and application of an explicit strategy for the promotion of gender equality is ensured through:

- a system for collecting and analysing data and indicators broken down by sex and to develop evidences-based gender policies;
- a plan and ex-ante criteria for the integration of gender equality objectives through gender standards and guidelines;
- Implementation mechanisms including involvement of a gender body and the relevant expertise to draft monitor and evaluate the interventions."¹⁶⁷

It must be borne in mind that if fully implemented, such a strategy would lead to a long-awaited overhaul of most national administrative and policy frameworks of EU Member States that previously did little to follow the EU recommendations on gender mainstreaming.¹⁶⁸

It will shortly become evident that the above proposals defined the essential shape of 2014-2020 EU spending conditionality (both macroeconomic and ex-ante), which remained broadly the same in structure but were significantly altered in scope after the negotiations (3.3).

Returning to the parallel crisis (figure 6, above), one may clearly see that by the end of 2011, the austerity-led conditionality discourse had already fully spread across the

¹⁶⁷ European Commission, *supra* note 152 at 151.

¹⁶⁸ Vita, *supra* note 35.

EU's institutional, political and legislative processes, decisively contaminating European public discourse. At the end of 2011, the EU had amended Article 136 TFEU and was preparing to set up a European Stability Mechanism (ESM) outside the EU treaty framework, to secure financial resources for Eurozone Member States in economic difficulty "subject to strict conditionality".¹⁶⁹ At the same time, in December 2011, extensive post-crisis legislation entered into force, revamping the EU economic policy toolkit with elaborate preventive procedures centralised under the framework of the European Semester and automatic sanctions - known as the 'Six-pack' legislative package.¹⁷⁰ During the same year, EU budget was increasingly used to secure critical liquidity in the EU countries hit hardest by the crisis. In this sense, the Commission set up a Task Force for Greece, meant to provide technical assistance to the country in implementing its heavy economic adjustments conditionality, including structural reforms, with EU structural and cohesion funds support.¹⁷¹ At the same time, all EU countries receiving financial assistance (Hungary, Latvia, Romania, Greece, Ireland and Portugal) were absolved of their EU funds 'additionality' obligations, meaning that they were not required to contribute with matching national funds in EU co-funded projects.¹⁷² EU institutions, and notably the Commission services were directly involved in the management of the crisis.¹⁷³ Crucially, these developments increasingly involved the Commission services in charge of Cohesion policy in the business of conditionality, and helped them acquire valuable experience on the way in which the tool could transition to EU internal spending post-2014.

¹⁶⁹ 2011/199/EU: EUROPEAN COUNCIL DECISION OF 25 MARCH 2011 AMENDING ARTICLE 136 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION WITH REGARD TO A STABILITY MECHANISM FOR MEMBER STATES WHOSE CURRENCY IS THE EURO OJ L 91, 6.4.2011, P. 1-2.

¹⁷⁰ European Commission, PRESS RELEASE MEMO/11/898 EU ECONOMIC GOVERNANCE "SIX-PACK" ENTERS INTO FORCE (2011).

¹⁷¹ Communiqué de presse - Task Force for Greece: supporting vital reforms for economic recovery and job creation, , http://europa.eu/rapid/press-release_MEMO-13-920_en.htm (last visited May 15, 2018).

¹⁷² REGULATION (EU) NO 1311/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 13 DECEMBER 2011 AMENDING COUNCIL REGULATION (EC) NO 1083/2006 AS REGARDS CERTAIN PROVISIONS RELATING TO FINANCIAL MANAGEMENT FOR CERTAIN MEMBER STATES EXPERIENCING OR THREATENED WITH SERIOUS DIFFICULTIES WITH RESPECT TO THEIR FINANCIAL STABILITY, OJ L 337, 20.12.2011, P. 5, .

¹⁷³ Claire Kilpatrick, *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, 10 EUROPEAN CONSTITUTIONAL LAW REVIEW (EUCONST) 393-421 (2014).

3.3 The compromise

As mentioned above (3.2), the extensive 2011 list of proposed conditionalities initially overwhelmed the Member States. Reunited under the auspices of the Polish presidency in December 2011, Member States delegations ultimately endorsed ex-ante conditionality in general, subject to specific recommendations, but emerged deeply divided on macroeconomic conditionality.¹⁷⁴

Regarding ex ante conditionality, serious concerns were raised regarding the lack of a 'direct link' of the long lists of conditionality criteria to the effectiveness of EU spending.¹⁷⁵ In addition, doubts were raised regarding the compliance of ex ante conditionality with the principle of subsidiarity and proportionality.¹⁷⁶ On subsidiarity, some Member States maintained that conditionalities stretched far beyond the scope of Cohesion policy, reaching into multiple areas of national competence. On proportionality, most Member States feared that the extremely large number of conditionality criteria would significantly increase their administrative burden.¹⁷⁷

Macroeconomic conditionality proved much more divisive. On this point, the report prepared by the Polish presidency mentioned that:

"some [delegations] found [macroeconomic conditionality] necessary to ensure a stable macroeconomic environment for the [Cohesion and Structural] Funds, while others believed that macroeconomic conditionalities cannot be reconciled with the Cohesion Policy's objectives".¹⁷⁸

The delegations also questioned the tool's consistency with the principles of equality between Member States and proportionality, some even advocating for the tool's extension to the first CAP pillar 'to ensure a level playing field' for all Member States, without weighing disproportionately on the less developed states that are the primary

¹⁷⁴ EU COUNCIL, COHESION POLICY LEGISLATIVE PACKAGE - PRESIDENCY REPORT DOC. 18097/11 (2011).

¹⁷⁵ *Id.* at 19.

¹⁷⁶ *Id.* at 19.

¹⁷⁷ *Id.* at 19.

¹⁷⁸ *Id.* at 24.

recipients of Structural and Cohesion funds.¹⁷⁹ At the end, no common position was reached on macroeconomic conditionality. The discussion was to continue primarily in the context of European Council negotiations on the 2014-2020 multiannual period (MFF).¹⁸⁰

The above positions permitted relatively clear expectations for future avenues of negotiation on EU spending conditionality. There was a workable tripartite alignment on ex ante conditionality. It enjoyed the full support of the European Commission and the European Parliament and a general endorsement from most Member States subject to some revisions, especially in terms of administrative burden, which should solve the proportionality concerns, and a clear link to EU spending that would address the subsidiarity worries. It was also clear that macroeconomic conditionality would be much more difficult to address.

In the following years (2012-2013), ex ante conditionality enjoyed a constructive negotiation process. The only major exception concerned several conditionalities on non-discrimination, gender, disability and social inclusion that were taken out in 2012 by the EU Council and re-inserted in 2013 upon the insistence of the European Parliament.¹⁸¹ Unlike macroeconomic conditionality, which was dealt with in the politically charged European Council, ex ante conditionality was left in the hands of the EU Council and its preparatory bodies on cohesion, rural development and fisheries policy, and in particular to the Working Party on Structural Measures. In these specialised EU Council configurations, Member States negotiated the 'technicalities' of each ex-ante conditionality for a few months, coming up with a first partial compromise in April 2012 under the Danish presidency.¹⁸² From July 2012 onwards, formal inter-institutional 'trialogues' started, including the European Parliament in the debate.¹⁸³ The latter favoured a strong ex-ante conditionality

¹⁷⁹ *Id.* at 24.

¹⁸⁰ *Id.* at 5.

¹⁸¹ EU Council, PRESIDENCY COMPROMISE ON EX ANTE CONDITIONALITY 8207/12 ADD 2 REV 2 (2012); Council of the European Union, PRESIDENCY. COHESION POLICY LEGISLATIVE PACKAGE. COMPROMISE TEXT ON EX ANTE CONDITIONALITIES, NO 12383/13 ADD 2 (2013), <http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%2012383%202013%20ADD%202>.

¹⁸² EU Council, *supra* note 181.

¹⁸³ John Bachtler & Carlos Mendez, *Cohesion Policy Reform and the Evolving Role of the Council*, in HANDBOOK ON COHESION POLICY IN THE EU 121-139, 133-134 (Simona Piattoni & Laura Polverari eds.).

approach and generally backed the position of the Commission. Ultimately, as the final text shows, in July 2013 the Parliament concurred with the EU Council on most of the essential amendments, leading to a mid-way compromise acceptable to all parties.¹⁸⁴

The compromise was extremely telling. In particular, it sent a very clear message on how much (and how little) control Member States were willing to give up via ex ante conditionality. The result is another confirmation of the particularly strong power of Member States as primary poles of EU decision-making in times of crisis.¹⁸⁵ Comparison of the initial proposals with the final compromise text shows that Member States were busy adding and scrapping conditionalities, conditionality criteria, rules on applicability and enforcement procedure.¹⁸⁶ Interestingly, there was little change in the overall structure of the tool. The generous ex-ante conditionality lists were still there, carefully arranged by annex to each EU funds regulation. The numbers of conditionality and criteria attached remained high, even if significantly reduced in rural development and fisheries.¹⁸⁷ Nevertheless, upon meticulous inspection it is clear that while nothing seemed to have changed, in fact, everything had changed.¹⁸⁸ Firstly, a brand new, extremely elaborate definition was put in place to make sure that ex ante conditionality remained a critical and directly-linked essential factor for effective and efficient ESI Funds investment. Secondly, each conditionality and conditionality criterion was re-formulated in much more vague and evasive terms, with fewer indicators, dates or concrete objectives. For instance, the requirement of 'a plan' was replaced with 'indicative plan'; the requirement of 'effective implementation of Small Business Act' was replaced with appropriate measures that would take 'into account the Small Business Act'. Thirdly, Member States were careful to indicate that any assessment of fulfilment may have regard only to the precise criteria set under the EU Funds regulations, meaning that additional Commission guidelines would have no direct bearing on the compliance assessment. Fourthly, explicit references to the

¹⁸⁴ EU Council of the European Union, *supra* note 181; Bachtler and Mendez, *supra* note 183.

¹⁸⁵ Bachtler and Mendez, *supra* note 183 at 133-134; Crowe, *supra* note 146; J. H. H. Weiler, *Europe in Crisis - On 'Political Messianism', 'Legitimacy' and the 'Rule of Law,'* SINGAPORE JOURNAL OF LEGAL STUDIES 248-268 (2012).

¹⁸⁶ European Commission, *supra* note 152; EU Council, *supra* note 181; Council of the European Union, *supra* note 181; European Commission, *supra* note 153; European Commission, *supra* note 153.

¹⁸⁷ 29 ex ante conditionalities were applicable to Cohesion funds as opposed to the initial 30. The rural development ex ante conditionalities were significantly limited to 8 out of the initial 18.

¹⁸⁸ EU Council, *supra* note 181.

principles of proportionality and subsidiarity were introduced, meaning that when assessing compliance, the Commission would have regard to the amounts of funds and administrative effort at stake and would respect the competence of Member States and their regions. Fifthly, in case of disagreement the burden of proof always rested with the Commission. Sixth, once the Commission found a conditionality to have been fulfilled and lifted it, it could not review its assessment *ex post*, even if the original findings on compliance did not hold true anymore. Lastly, the Commission may order suspension before the start of spending only if it proves a 'significant prejudice' to the achievement of a specific investment objective, again with due regard to proportionality.

In conclusion, most of the initial structure of *ex ante* conditionality stayed, as did its impressive thematic scope, its sophisticated legislative, policy and administrative requirements. What changed was that *ex ante* conditionality lost 'concreteness' in its objectives and was tempered by numerous procedural breaks. In Part IV below, we will see that these changes proved crucial in the institutional world of *ex ante* conditionality.

* * *

Macroeconomic conditionality saw a much more dramatic course of negotiations. As already mentioned, macroeconomic conditionality was primarily debated in the context of negotiations on the 2014-2020 financial period, which were *de facto* led at the level of the heads of states or governments and joined by the president of the Commission, under the institutional framework of the European Council (as opposed to the EU Council and the European Parliament as mandated by Article 312 TFEU).¹⁸⁹ Hence, the debate on macroeconomic conditionality was closely linked to the debate on the size and distribution of the EU's pot of money, in which, between 2012-2013 Member States had split into two camps: 'Friends of better spending' and 'Friends of Cohesion'.¹⁹⁰ The 'Friends of better spending' comprised eight EU budget net contributors (see figure 2, Part I above), representing the EU 'North' under the

¹⁸⁹ Crowe, *supra* note 146.

¹⁹⁰ EU budget: the trillion-euro split, FINANCIAL TIMES (2012), <https://www.ft.com/content/4b031102-3260-11e2-ae2f-00144feabdc0> (last visited May 21, 2018).

leadership of the EU's chief contributor - Germany.¹⁹¹ The latter supported an austerity budget of less than 1% of the EU GNI¹⁹² and further 'better spending' instruments, such as conditionality. The 'Friends of Cohesion' were more powerful in numbers, but not in finance. They comprised 15 net beneficiary Member States representing the EU East and South, and rejected any budget cut, especially because the cut was primarily directed at Cohesion policy.¹⁹³ Upon closer inspection, the two camps did not exactly align in preferences on MFF and macroeconomic conditionality. For instance, Italy - initially a 'friend of better spending' - changed camps and opposed macroeconomic conditionality.¹⁹⁴ The UK - initially a friend of better spending - was soon friends with no one, and started its own battle for a dramatically reduced EU budget.¹⁹⁵ Moreover, the UK was not concerned with macroeconomic conditionality at all because it managed to obtain an exemption in virtue of its Protocol 15 to the TFEU. The 'Friends of Cohesion' side had its own 'deserters', with the Baltic states and other net beneficiaries such as Bulgaria supporting the cause of macroeconomic conditionality.¹⁹⁶ The remaining Member States did not take a strong stance. This means that the division instead took shape around two institutional and Member States camps: a 'pro-macroeconomic conditionality' camp led by the Commission and supported by seven 'friends of better spending',¹⁹⁷ and an 'against-macroeconomic conditionality' camp, led by the European Parliament and backed by eight strong opponents of the tool.¹⁹⁸ Very soon however, the Member States would strike a deal in the European Council and leave the European Parliament to continue the battle against macroeconomic conditionality alone.

¹⁹¹ Including Germany, France, and The Netherlands, Finland, Austria, Sweden, and the UK.

¹⁹² Marjorie Jouen, *Cohesion policy and the role played by structural funds in austerity*, in SOCIAL DEVELOPMENTS IN THE EUROPEAN UNION 2011: THIRTEENTH ANNUAL REPORT, 117 (2011).

¹⁹³ Bulgaria, the Czech Republic, Croatia (due to join 1 July 2013), Estonia, Hungary, Latvia, Poland, Portugal, Romania, Slovenia, Cyprus, Greece, Lithuania, Malta and Spain.

¹⁹⁴ Interviews, Permanent Representation of Italy, Brussels, June 2016.

¹⁹⁵ EU states fight UK spending campaign, FINANCIAL TIMES (2012), <https://www.ft.com/content/2807ea6e-2da7-11e2-9988-00144feabdc0> (last visited May 21, 2018).

¹⁹⁶ Interviews, Brussels, June 2016.

¹⁹⁷ European Commission, PRESS RELEASE. PRESIDENT OF THE EUROPEAN COMMISSION PRESIDENT BARROSO'S REMARKS TO THE FRIENDS OF COHESION GROUP MEETING OF FRIENDS OF COHESION GROUP/BRATISLAVA 5 OCTOBER 2012, http://europa.eu/rapid/press-release_SPEECH-12-691_en.htm?locale=en (last visited May 23, 2018).

¹⁹⁸ In particular, Spain, Italy, Poland, Romania, Hungary, Greece, Malta, Portugal.

In February 2013, the European Council reached a compromise after one year of excruciating bargaining on the size of the MFF and macroeconomic conditionality, subsequently inviting the EU Council and the European Parliament to reach a "timely agreement" by the end of the year.¹⁹⁹ The compromise meant, in essence, a reasonably difficult-to-enforce macroeconomic conditionality, in exchange for a reasonably reduced EU budget. As a result, it was agreed that the EU Council - not the Commission - would have the power to decide on sanctions, adopted by reversed qualified majority voting upon a proposal from the Commission; and that the Member States' failure to correct macroeconomic imbalances or submit a corrective plan to that end would have to be established by two (not one) consecutive Council decisions or conclusions, whereas failure to correct deficits would continue to be established by a single decision. In addition, the sanctions would be 'double-capped' at a maximum of 25% or 50% of the ESI Funds²⁰⁰ or 0.25 or 0.5% of GDP, whichever lower. Ultimately, the principle of equality between Member States and further reductions due to high unemployment rates were expressly mentioned in the text.²⁰¹ In exchange, the MFF was cut for the first time ever, but not too much, ultimately being settled at exactly 1% of the EU GNI - "a sensible and nicely round number" in the view of the president of the European Council, then Mr. Van Rompuy.²⁰²

Here, one must note that the above extremely complex formula for macroeconomic conditionality was directly informed by the unprecedented enforcement of the macroeconomic conditionality linked to the Cohesion Fund of March 2012 (see Chapter 4 below). In a show of force, the Commission proposed (and the EU Council enforced) macroeconomic conditionality against Hungary for the first time in the tool's history.²⁰³ It is doubtful that this show of force terrified Member States as the decision was soon retracted and no effective suspension of funds followed.²⁰⁴ The decision was

¹⁹⁹ European Council, EUCO 36/13, PRESSE 48, REMARKS BY PRESIDENT HERMAN VAN ROMPUY FOLLOWING THE EUROPEAN COUNCIL 13 (2013); European Council, EUCO 37/13 COUNCIL CONCLUSIONS OF 7-8 FEBRUARY 2013, MULTIANNUAL FINANCIAL FRAMEWORK 13 (2013).

²⁰⁰ 25% in case of excessive imbalance procedure and 50% in excessive deficit procedure.

²⁰¹ European Council, *supra* note 199 at 31-34. Id.

²⁰² European Council, *supra* note 199.

²⁰³ EU COUNCIL, COUNCIL IMPLEMENTING DECISION 2012/156/EU SUSPENDING COMMITMENTS FROM THE COHESION FUND FOR HUNGARY WITH EFFECT FROM 1 JANUARY 2013, OJ OJ L 78/19 (2012).

²⁰⁴ EU COUNCIL, COUNCIL IMPLEMENTING DECISION 2012/323/EU LIFTING THE SUSPENSION OF COMMITMENTS FROM THE COHESION FUND FOR HUNGARY, OJ L 165/46 (2012). [The EU Council lifted the

also rather controversial, as it coincided with Hungary's sweeping constitutional reform, which raised rule of law concerns in Brussels.²⁰⁵ However, the unprecedented enforcement might have showed that the Commission and Member States were serious about macroeconomic conditionality.

As the European Council reached a deal on macroeconomic conditionality in February 2013,²⁰⁶ pressure mounted on the European Parliament to seal it by the end of the year. The clock was ticking fast. In case of no deal, a catastrophic scenario would have followed - no EU budget in times of full austerity and rising anti-EU sentiments. As Crowe shows, the European Parliament has previously exercised its power to block the EU budget, however on this occasion the circumstances called for sober reason.²⁰⁷ Until the last moment, the European Parliament insisted that it would accept only two options: a macroeconomic conditionality with European Parliament deciding on equal footing with the EU Council on sanctions, or no conditionality at all.²⁰⁸

One must again stress the extremely difficult EU economic and political context in which the Parliament was asked to act (figure 6 above). In 2012, two more Eurozone Member States entered bailout agreements (Spain and Cyprus) and a second rescue package had to be agreed with Greece amidst high social and political tensions. In the meantime, the Outright Monetary Transaction (OMT) programme was put in place by the European Central Bank and its link to "strict conditionality" was fully endorsed by the Court of Justice in the *Pringle case*: not as going against EU law; but as a tool to secure full EU law compliance.²⁰⁹ In parallel, first Hungary, then Romania shocked Europe with their open defiance of the rule of law at home, prompting the EU to

suspension in less than three months, ensured that sufficient commitments were being undertaken to correct the deficit].

²⁰⁵ European Commission, HUNGARY - INFRINGEMENTS: EUROPEAN COMMISSION SATISFIED WITH CHANGES TO CENTRAL BANK STATUTE, BUT REFERS HUNGARY TO THE COURT OF JUSTICE ON THE INDEPENDENCE OF THE DATA PROTECTION AUTHORITY AND MEASURES AFFECTING THE JUDICIARY (2012).

²⁰⁶ European Council, *supra* note 199.

²⁰⁷ Crowe, *supra* note 146 at 82-83.

²⁰⁸ Cohesion policy and macroeconomic conditionality, RADO'S BLOG (2013), <http://radogeist.blogactiv.eu/2013/11/22/cohesion-policy-and-macroeconomic-conditionality/> (last visited Mar 12, 2018).

²⁰⁹ CJEU, Case C-370/12, *Pringle v Government of Ireland*, ECLI:EU:C:2012:756, , 69."[...] the reason why the grant of financial assistance by the stability mechanism is subject to strict conditionality under paragraph 3 of Article 136 TFEU, [...] is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies."

launch infringement procedures and ask for urgent remedial action.²¹⁰ Against this background and amidst immense pressure, the European Parliament settled for a "structured dialogue" compromise in cases of macroeconomic conditionality during its second last plenary session of 2013, held in late November.²¹¹ As we shall see in Part IV below, "structured dialogue" played a crucial role in neutralising any attempt to use the macroeconomic conditionality tool during the following years.

The European Parliament vote of 20 November 2013 and the formal signing of 20 December 2013, passed EU spending conditionality into law.²¹² This event ends our inquiry into: Why conditionality?

In sum, the above Chapter has shown that the choice of EU spending conditionality was informed by internal EU policy challenges that prompted the Commission services to reflect upon the opportunity for more conditionality inside EU internal spending. The ensuing crisis served as an engine that helped the Commission's ideas on conditionality to materialise. However, the crisis significantly shifted the initial vision of conditionality, which came to be perceived primarily as an additional economic governance enforcement tool, meant to monitor Member States' fiscal discipline (macroeconomic conditionality) and promote structural reforms (ex-ante conditionality) using the financial leverage of the EU budget.

In the next Chapters, I will explain the exact features of the new law of EU spending conditionality adopted in December 2013, including - but not limited to - the macroeconomic and ex ante conditionality packages that dominated the 2014-2020 budget debate.

²¹⁰ European Commission, *supra* note 205; European Commission, ROMANIA: URGENT ACTION NEEDED TO DEMONSTRATE COMMITMENT TO RULE OF LAW AND JUDICIAL INDEPENDENCE (2012).

²¹¹ Cohesion policy and macroeconomic conditionality, *supra* note 208.

²¹² Legislative Observatory Procedure 2011/0276(COD), [http://www.europarl.europa.eu/oel-mobile/fiche-procedure/2011/0276\(COD\)](http://www.europarl.europa.eu/oel-mobile/fiche-procedure/2011/0276(COD)) (last visited May 23, 2018).

Chapter 4

Structural Funds

This Chapter analyses the legal world of spending conditionality attached to Structural funds, from a historical evolutionary perspective. It shows that the two main conditionality packages introduced by the 2014-2020 budget reform - the macroeconomic conditionality and ex ante conditionality (Chapter 3) - build upon prior conditionalities attached to Structural Funds since the mid-1990s and 2000s, namely: the macroeconomic conditionality of the 1994 Cohesion Fund²¹³ and the EU law conditionality attached to the European Social Fund and the European Regional Development Fund in the 2000-2006 and 2007-2013 financial periods.²¹⁴

This finding leads us to the conclusion that Structural funds are the legal cradle of EU spending conditionality. Although the prior incipient forms of conditionality were modest in scope, they have two important lessons to convey. A first valuable lesson drawn from the prior practice of macroeconomic conditionality is that abstention from

²¹³ COUNCIL REGULATION (EC) NO 1164/94 OF 16 MAY 1994 ESTABLISHING A COHESION FUND, 130 OJ L (1994). Arts. 2, 6.

²¹⁴ COUNCIL REGULATION (EC) NO 1260/1999 OF 21 JUNE 1999 LAYING DOWN GENERAL PROVISIONS ON THE STRUCTURAL FUNDS, 161 OJ L Art. 32 (3) (1999), <http://data.europa.eu/eli/reg/1999/1260/oj/eng> (last visited May 24, 2018); 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, 210 OJ L Arts. 86, 89 (2006).

consistent enforcement of the tool may call into question its legitimacy when it is ultimately enforced. In particular, reasonable doubts may be raised regarding the EU's impartiality, objectivity or equal treatment of Member States during enforcement, especially when the latter singles out one Member State that at the same time happens to upset EU rule of law values (4.1). A second important lesson drawn from the practice of past EU law conditionality is that enforcement against Member States is rare, and when enforcement is effectively ordered, Member States may have the tendency to 'get rid' of or significantly limit the application of a 'troubling' conditionality in the next financial period (4.2).

The evolution of Structural Funds conditionality in 2014-2020 clearly validates the claim of a rise in spending conditionality. As explained in Chapter 3 above, the idea of a rise of spending conditionality in Structural Funds was initially informed by internal policy failures. However, under pressure from the crisis, conditionality shifted predominantly to economic policy and broader EU *acquis* enforcement. The dramatic rise makes the Structural Funds spending conditionality the 'giant' spending conditionality of the 2014-2020 financial period. Two main spending conditionality groups are currently attached to Structural Funds: the macroeconomic conditionality (4.1.2), and the ex ante conditionality (4.2.2). These primarily pursue a behavioural *EU law, policy and structural reform compliance function*.

The defining trait of the 2014-2020 macroeconomic conditionality is its cross-cutting and cross-over characteristics (2.3.6, above). In virtue of its cross-cutting nature, macroeconomic conditionality firmly links all EU structural spending to the thematically distinct EU economic governance framework (e.g. a conditionality on excessive deficit linked to EU infrastructure spending). The macroeconomic conditionality is also cross-over. This means that it conditions the disbursement of structural funds upon compliance with additional conditionality packages external to EU spending regulations (e.g. a conditionality on fulfilment of present or future IMF or ESM financial assistance conditionality linked to EU infrastructure spending).

The defining trait of 2014-2020 ex ante conditionality is its immense volume and complex procedure (4.2.2). The volume of EU law, policy, institutional and structural reforms checked by ex ante conditionalities is impressive. Their substantive scope

extends to a wide-array of sector-specific and cross-sector policies found primarily under the scope of EU - but also national - actions such as: climate change, social inclusion, research and innovation, education and training, health, internet technology, enterprise, energy efficiency, transport or administrative capacity.

The procedural complexity refers to highly sophisticated rules, notably on applicability, fulfilment and enforcement, which render the legal process particularly difficult to understand and lead to an end result where ex ante conditionality may have a very different legal implication from one Member State to another.

Before turning to the comprehensive analysis of Structural Funds spending conditionality, a short introduction of Structural Funds and their implementation process is necessary.

* * *

The European Structural Funds are the main EU financial instruments tasked with promoting economic, social and territorial cohesion and other structural measures under the treaties.²¹⁵ Structural funds traditionally refer to three funds underpinning the EU cohesion policy, namely: the European Social Fund (ESF), which targets EU spending at labour market integration; the European Regional Development Fund (ERDF), which supports development of lagging regions; and the European Cohesion Fund (ECF), which supports large environmental and transport infrastructure projects in less developed Member States.²¹⁶ In 2014-2020, the three traditional Structural Funds have been reunited with the European Agricultural Fund for Rural Development (EAFRD) and the European Maritime and Fisheries Fund (EMFF), the so-called 'structural measures', and are jointly referred to as the European Structural and Investment Funds (ESI Funds). Although all five ESI Funds relate to different EU policies (economic, social or territorial cohesion, agriculture, and fisheries), they all have an important structural policy remit. All Structural Funds aim to address structural weaknesses in their respective policy area, for instance by integrating vulnerable and unemployed people into the social market (ESF); developing essential

²¹⁵ Art. 3 (3) TEU, Art. 174 ss. TFEU. “[the Union] shall promote economic, social and territorial cohesion, and solidarity among Member States”.

²¹⁶ ESF and ERDF are commonly referred to as the ‘Structural Funds’.

services in poor or remote regions (ERDF); investing in large-scale infrastructure in less developed Member States (ECF); supporting rural development initiatives (EAFRD); and assisting remote fishing communities (EMFF).

ESI Funds play a central role in the EU budget spectrum. As Figure 5 above shows, ESI Funds account for 45% of the 2014-2020 EU budget, an immense sum of money representing almost half a trillion EUR sent to Member States over a seven-years financial period. Because of their important budgetary share, their economic redistribution effects, their growth impact, and above all because of their immediate tangibility for EU citizens, ESI Funds are important instruments of EU integration. They are intended to facilitate harmonious development of the Union's single market, support the EU single currency area, cultivate European sentiments of belonging, and ultimately build increased solidarity across the states and regions of the Union. Thus, they should progressively realise the Union's founding mission and the aspirations of the European founding fathers.²¹⁷

The legal world of ESI Funds in 2014-2020 is extremely complex.²¹⁸ In the 2014-2020 financial period, ESI Funds are partially regulated under one single legislative framework by Regulation (EU) 1303/2013 - the Common Provision Regulation (CPR).²¹⁹ In addition, each fund is subsequently regulated under its own EU Funds regulation and Common Provision Regulations applicable only to their own policy area i.e. agriculture and fisheries. Spending conditionalities are regulated by all the above legal frameworks. However, their primary legal source is found in the CPR. For reasons of consistency, this Chapter shall analyse all EU spending conditionalities applicable to all five ESI Funds, including the ex ante conditionalities regulated under the separate legal frameworks of rural development and fisheries funds.

²¹⁷ Declaration by Robert Schuman (Paris, 9 May 1950), .

²¹⁸ So is the legal world of the EU budget as a whole, see: Crowe, *supra* note 6.

²¹⁹ REGULATION (EU) NO 1303/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 17 DECEMBER 2013 LAYING DOWN COMMON PROVISIONS ON THE EUROPEAN REGIONAL DEVELOPMENT FUND, THE EUROPEAN SOCIAL FUND, THE COHESION FUND, THE EUROPEAN AGRICULTURAL FUND FOR RURAL DEVELOPMENT AND THE EUROPEAN MARITIME AND FISHERIES FUND AND LAYING DOWN GENERAL PROVISIONS ON THE EUROPEAN REGIONAL DEVELOPMENT FUND, THE EUROPEAN SOCIAL FUND, THE COHESION FUND AND THE EUROPEAN MARITIME AND FISHERIES FUND AND REPEALING COUNCIL REGULATION (EC) NO 1083/2006, OJ L 347, 320-469, (2013).

4.1 Macroeconomic conditionality

4.1.1 Pre-2014 evolution and lessons learned

Macroeconomic conditionality was first introduced in 1994, upon establishment of the Cohesion Fund.²²⁰ The conditionality was the first spending conditionality arrangement of the Structural Funds, and of the EU budget as a whole - a complete novelty in EU internal policies.²²¹ The origins of this new conditionality are to be found in the 1989 Delors Roadmap on the establishment of a European Monetary Union (EMU), which would culminate in 1999 with the introduction of a single European currency - the Euro.²²² Upon transition into the second stage of Delors' EMU process, the Maastricht treaty and its 'macro-economic constitution' was signed in 1992, with particular rules on economic convergence and control of excessive deficits.²²³ At the same time, the treaty provided a new legal basis for a Cohesion Fund, to invest in large-scale transport and environmental infrastructure projects in lagging Member States.²²⁴

It is in this light that the first macroeconomic conditionality was introduced by the 1994 Cohesion fund. The conditionality marked the second step towards the establishment of the EMU and was designed as a string attached to an immense Cohesion fund carrot addressed exclusively to less developed EU economies (then Spain, Greece, Ireland and Portugal) in exchange for their *ex ante* act of adopting economic convergence programmes and *ex post* observance of the agreed macroeconomic indicators pursuant to Article 140c of the Maastricht treaty and the protocol on the excessive deficit procedure.²²⁵

²²⁰ COUNCIL REGULATION (EC) NO 1164/94 OF 16 MAY 1994 ESTABLISHING A COHESION FUND, *supra* note 213 at Art. 6 'Conditional assistance.'

²²¹ In external policies the EU has been experimenting for a long time with conditionality since 1970s, especially with the conditions linked to human rights and democracy See: ELENA FIERRO, EUROPEAN UNION'S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE (2003).

²²² COMMITTEE FOR THE STUDY OF ECONOMIC AND MONETARY UNION, REPORT ON ECONOMIC AND MONETARY UNION IN THE EUROPEAN COMMUNITY 35-36 (1989).

²²³ KAARLO TUORI & KLAUS TUORI, THE EUROZONE CRISIS : A CONSTITUTIONAL ANALYSIS (2014).

²²⁴ See in particular Treaty of Maastricht, Art. 130d, Protocol of Economic and Social Cohesion, and Article 104c.

²²⁵ COUNCIL REGULATION (EC) NO 1164/94 OF 16 MAY 1994 ESTABLISHING A COHESION FUND, *supra* note 213. Article 6, Considerations (4).

In the light of the conceptual toolkit of conditionality developed in Part I, the 1994 macroeconomic conditionality was *ex ante* and *ex post*, *negative and positive (carrot-and-stick)*, *cyclical*, *cross-cutting*, *fund-specific*, *explicit*, *enforceable and mandatory*, but remained *unenforced* during the 1994-1999 budget cycle.

In 1999, in view of the 2000-2006 financial period, the *ex post* angle of macroeconomic conditionality was amended to reflect the newly introduced 1997 Stability and Growth Pact (SGP) rules.²²⁶ The new clause provided that no new project would be financed if the Council found that Member States had failed to implement their stability or convergence programmes adopted pursuant to the SGP rules²²⁷ in such a way as to prevent excessive deficits.²²⁸ The macroeconomic conditionality remained *enforceable and mandatory*, but continued to be *unenforced* even if its beneficiaries did not abide by the set deficit rules.²²⁹ The core of the enforcement difficulty lay in the tool's *cross-cutting* nature, which meant that an eventual enforcement must be preceded by a prior enforcement decision to be taken by the EU Council in the different policy and institutional setting of the SGP. The SGP enforcement never followed.

In 2006, as part of the 2007-2013 financial period, the macroeconomic conditionality was again amended, and a higher threshold for enforcement was introduced.²³⁰ According to the new rules, Cohesion funds *commitments* could be suspended if *two consecutive* Council decisions were adopted: one establishing the existence of excessive deficits *and* a subsequent one establishing that the same Member State had failed to comply with the Council's recommendations on corrective action.²³¹

Another notable reform is that the new suspension rules concerned only suspensions of Cohesion fund *commitments* (as opposed to *payments*) - a notion that is worth

²²⁶ COUNCIL REGULATION (EC) No 1264/1999 OF 21 JUNE 1999 AMENDING REGULATION (EC) No 1164/94 ESTABLISHING A COHESION FUND, 161 OJ L point 6 (1999).

²²⁷ COUNCIL REGULATION (EC) No 1466/97 OF 7 JULY 1997 ON THE STRENGTHENING OF THE SURVEILLANCE OF BUDGETARY POSITIONS AND THE SURVEILLANCE AND COORDINATION OF ECONOMIC POLICIES, 209 OJ L Arts. 3, 7 (1997).

²²⁸ COUNCIL REGULATION (EC) No 1264/1999 OF 21 JUNE 1999 AMENDING REGULATION (EC) No 1164/94 ESTABLISHING A COHESION FUND, *supra* note 226 at point 6.

²²⁹ An excessive deficit procedure was launched against Portugal in 2002 and Greece in 2005, but a Council Decision was never adopted, see: Olivier J Blanchard & Francesco Giavazzi, IMPROVING THE SGP THROUGH A PROPER ACCOUNTING OF PUBLIC INVESTMENT MASSACHUSETTS INSTITUTE OF TECHNOLOGY (MIT) DISCUSSION PAPER NO. 4220 FEBRUARY 2004.

²³⁰ COUNCIL REGULATION (EC) No 1084/2006 OF 11 JULY 2006 ESTABLISHING A COHESION FUND AND REPEALING REGULATION (EC) No 1164/94, 210 OJ L Art. 4(1) b) (2006).

²³¹ COUNCIL REGULATION (EC) No 1084/2006, *supra* note 230.

explaining in detail because as we shall see, this time around conditionality was effectively enforced. In a nutshell, unlike suspension of payments, the suspension of commitments is not immediate and does not lead to a complete seizure of EU disbursements. EU funds commitments are future promised EU benefits, committed (booked) annually through Member States' requests sent to the Commission. Based on commitments, actual payments are made in the following financial years. Payments may be made from the committed resources until they are exhausted, usually within a limited de-commitment period, of up to three years (the so-called n+3 rule in 2014-2020). Consequently, when spending commitments are suspended, this means that Member States may still receive actual payments from the EU, based on previously committed resources for three more years. This means that a decision on suspension of commitments shall not immediately put projects financed with EU money under jeopardy on the ground, giving the government effective time to remove the uncertainty pending upon future investments by correcting its deficits.

As anticipated, macroeconomic conditionality was effectively enforced against Hungary in March 2012.²³² Pursuant to the Council decision, commitments worth more than 400 million euro were to be suspended as of the following year (2013), representing about one third of the country's 2013 planned expenditure.²³³ However, as explained, this suspension concerned future commitments, and no actual suspension of payments followed. Moreover, even the suspension of commitments was very shortly lived (less than 3 months) due to sufficient guarantees offered by the government.²³⁴ This rendered the threat of a 'cut', inconsequential from a financial point of view; but not at all inoffensive politically.

In Chapter 3 above, I have explained that this extraordinary enforcement of macroeconomic conditionality was unique in the tool's history (3.3). I have also showed that the suspension was ordered when Europe was in full crisis and when the new macroeconomic conditionality package for 2014-2020 was being hotly disputed between EU legislators. Hence, this unprecedented enforcement might have been read as a 'show of force' on the part of the Commission and of the Council; an act that may

²³² EU COUNCIL, *supra* note 203.

²³³ Interactive chart: EU expenditure and revenue 2007-2013 - Budget, Hungary Cohesion Fund, 2013, , http://ec.europa.eu/budget/figures/2007-2013/index_en.cfm (last visited May 25, 2018).

²³⁴ EU COUNCIL, *supra* note 204.

be compared to a renewal of the EU's vows of macroeconomic and fiscal prudence, made to the EU North, but also to wider world. At the same time, we have mentioned that precisely at that time the new Hungarian government greatly upset the EU with its constitutional reform overhaul, its attacks on media freedom and attacks on the independence of a range of key government institutions, including the central bank, which raised rule of law concerns in Brussels.²³⁵ This politically charged context left important room for doubt about the legitimacy of enforcement, the objectiveness of the Commission and its detachment from external political motives.²³⁶ Moreover, having regard to the previously non-existent enforcement record of the tool and the rather modest breach of the deficit margin as compared to other EU states, strong claims of a lack of even-handedness, double standards and unequal treatment were made by several Member States.²³⁷ Ultimately, pleas of lack of fairness and lack of solidarity with the EU citizens of the country were also raised, as the country was in serious financial difficulty and was actively seeking a second financial assistance agreement with the EU and the IMF.²³⁸

The above described construction and use of pre-2014 macroeconomic conditionality shows that the tool primarily pursued a *behavioural* and *compliance function*. It is doubtful however, that it effectively managed to accomplish its policy aim. The main causes for this are to be found in the inconsistent application of the conditionality trigger rules, belonging to the cross-cutting EU economic policy that conditionality sought to enforce.

All in all, the main lesson to be drawn from the history of macroeconomic conditionality concerns enforcement. As shown above, the generalised failure to consistently enforce the tool in the past stirred important political contestation, as well a reasonable degree of doubt regarding the legitimate, objective and non-

²³⁵ European Commission, *supra* note 205.

²³⁶ Stephen Castle & Palko Karasz, *Hungary Could Lose European Union Subsidies*, THE NEW YORK TIMES, February 22, 2012, <https://www.nytimes.com/2012/02/23/world/europe/eu-threatens-to-suspend-subsidies-to-hungary.html> (last visited May 24, 2018).

²³⁷ EU to freeze Hungary aid on debt, BBC NEWS, March 13, 2012, <http://www.bbc.com/news/business-17357626> (last visited May 25, 2018). [Hungary's deficit was 3,25 %, just 0,25 above the EU 3% cap, compared to Spain that reached 5,6% in 2012]

²³⁸ The agreement never followed, because of the EU's concerns regarding the central bank's independency. Ultimately Hungary was able to finance itself from the markets and did not request further financial assistance.

discriminatory nature of EU funds cut-off. More broadly, it must be noted that the overall mechanism of enforcement, relying on a proposal from the Commission to be adopted by the EU Council by qualified majority, is political in nature, and poses great difficulties for the credibility and consistency of enforcement in practice.

4.1.2 2014-2020 macroeconomic conditionality

The 2014-2020 financial period brings substantial changes to the prior forms of macroeconomic conditionality presented above (4.1.1).²³⁹

The first change concerns its subjects, as the tool extended its application from Cohesion Funds recipients (less developed EU Southern, Central and Eastern Member States) to all Member States except the UK, which negotiated an exemption based on its explicit treaty opt-out on the Euro.²⁴⁰

The second change is quantitative. The new CPR text establishes a comprehensive set of ten macroeconomic conditionalities split into: one *negative and ex ante*; three *negative, ex post and optional*; four *negative, ex post and mandatory*; and one *positive and ex post*, concerning a wide array of post-crisis economic governance rules, including consistency with European Semester country-specific recommendations (CSRs), excessive deficit procedure (EDP), macroeconomic imbalance procedure (MIP), excessive imbalance procedure (EIP), and consistency with bailout conditionality under memoranda of understanding (MoUs). This is a dramatic change from the prior requirement to submit an *ex ante* economic convergence plan and respect the excessive deficit rules (4.1.1).

The third change is financial. The conditionality has changed from *fund-specific* to *multi-fund*, as it is extended from Cohesion Fund resources (6% EU budget) to all 2014-2020 ESI Funds (45% EU budget), including the ones ring-fenced for rural development and fisheries (figure 5 above).

Fourth, the sophistication of conditionality types is impressive. The conditionality becomes both *ex ante* and *ex post*, *negative* and *positive*, *time-limited* and *cyclical*,

²³⁹ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at Arts. 23-24.

²⁴⁰ PETER BERKOWITZ, THE IMPACT OF THE ECONOMIC AND FINANCIAL CRISIS ON THE REFORM OF COHESION POLICY 2008-2013 15 (2015).

compulsory and *optional*, *cross-cutting* and *cross-over* (see 2.3, Part I above). A further novelty, the *implicit* nature of the 2014-2020 macroeconomic conditionality is presented under the CPR title of 'measures linked to sound economic governance',²⁴¹ as opposed to 'conditions of assistance' as between 1994-2013.²⁴² The implicit nature of the novel macroeconomic conditionalities reflects the negotiation hurdle described above (3.2), which was why the Commission resolved to replace the unfriendly 'conditionality' name with 'measures'.²⁴³

Lastly, the enforcement mechanism has seen important transformations, with an increased role for the Commission but the ultimate decision on funding cut-off partially remaining in the hands of the EU Council.²⁴⁴ As opposed to 2007-2013 conditionality, where the decision on spending cut-off was entirely in the hands of the EU Council, in 2014-2020 the Commission must first propose a spending cut-off which may be accepted by the EU Council by implementing act (Art. 23 (6) CPR) or rejected by qualified majority (Art. 23 (10), CPR).

The actual legal framework of the 2014-2020 macroeconomic conditionality is an extremely complex legal enterprise and very difficult to navigate even for EU lawyers. Its rules are detailed on four full pages of the CPR regulation, supplemented by a two-page annex that details the eventual funding suspension breaks based on the economic and social situation of a given country.²⁴⁵

²⁴¹ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at Arts. 23-24.

²⁴² EUROPEAN COMMISSION, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL LAYING DOWN COMMON PROVISIONS ON THE EUROPEAN REGIONAL DEVELOPMENT FUND, THE EUROPEAN SOCIAL FUND PLUS, THE COHESION FUND, AND THE EUROPEAN MARITIME AND FISHERIES FUND AND FINANCIAL RULES FOR THOSE AND FOR THE ASYLUM AND MIGRATION FUND, THE INTERNAL SECURITY FUND AND THE BORDER MANAGEMENT AND VISA INSTRUMENT COM(2018) 375 FINAL 2018/0196 (COD) (2018); COUNCIL REGULATION (EC) NO 1264/1999 OF 21 JUNE 1999 AMENDING REGULATION (EC) NO 1164/94 ESTABLISHING A COHESION FUND, *supra* note 226.

²⁴³ European Commission, *supra* note 152; European Commission, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL LAYING DOWN COMMON PROVISIONS ON THE EUROPEAN REGIONAL DEVELOPMENT FUND, THE EUROPEAN SOCIAL FUND, THE COHESION FUND, THE EUROPEAN AGRICULTURAL FUND FOR RURAL DEVELOPMENT AND THE EUROPEAN MARITIME AND FISHERIES FUND COVERED BY THE COMMON STRATEGIC FRAMEWORK AND LAYING DOWN GENERAL PROVISIONS ON THE EUROPEAN REGIONAL DEVELOPMENT FUND, THE EUROPEAN SOCIAL FUND AND THE COHESION FUND AND REPEALING COUNCIL REGULATION (EC) NO 1083/2006 COM(2011) 615 FINAL/2 2011/0276 (COD) (2012).

²⁴⁴ Despite the initial proposal of the Commission to directly enforce the conditionality, see also: BERKOWITZ, *supra* note 240 at 15.

²⁴⁵ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at Annex III, Arts. 23-24.

In practical terms, pursuant to Articles 23-24 of the CPR and Commission guidance issued in 2014,²⁴⁶ macroeconomic conditionality means that:

— before the approval of the programming documents:

1. according to the *ex-ante negative macroeconomic conditionality*, Member States must align their spending with the relevant EU economic governance priorities as set under the Council Recommendations addressed to them pursuant to Articles 121(2) and 148 (4) TFEU; in particular, to the relevant Country Specific Recommendations (CSRs) of the European Semester, as well as to the Council Recommendations issued under the preventive arm of the macroeconomic imbalance procedure. In case of failure, the Commission may request revision of the programming documents and postpone the start of spending.

— after the approval of the programming documents:

according to the first strand of *ex-post, negative and optional macroeconomic conditionality*, between 2015-2019 the Commission *may ask* Member States (except the UK) to reprogram their ESI Funds allocations, to support the implementation of:

2. subsequent Semester CSRs or Council Recommendations issued pursuant to the preventive arm of the macroeconomic imbalance procedure;
3. Council Recommendations issued pursuant to the corrective arm of the macroeconomic imbalance procedure;
4. the macroeconomic adjustment programmes adopted pursuant to EU or non-EU financial assistance agreements.

In case of a Member States' failure to follow the Commission request, the Commission may propose a suspension of up to 50% of *payments* to the EU Council, which will decide on the proposal by means of implementing act decision. The suspension may increase to 100% of payments if a Member State persists in taking no action three months from the initial decision. The European Parliament shall be immediately

²⁴⁶ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219; European Commission, GUIDELINES ON THE APPLICATION OF THE MEASURES LINKING EFFECTIVENESS OF THE EUROPEAN STRUCTURAL AND INVESTMENT FUNDS TO SOUND ECONOMIC GOVERNANCE ACCORDING TO ARTICLE 23 OF REGULATION (EU) 1303/2013 COM/2014/0494 FINAL (2014).

informed and may invite the Commission to engage in a structured dialogue on the matter.

— after the approval of the programming documents:

according to the second strand of *ex-post negative and mandatory macroeconomic conditionality*, the Commission *shall* make a proposal on suspension of ESI Funds *payments or commitments* (with the exception of the UK) in cases where:

5. the Council decides that a Member State has failed to correct its excessive deficit;
6. the Council issues two recommendations in the same excessive imbalance procedure concluding that a Member State has submitted an insufficient corrective action plan;
7. the Council issues two decisions in the same excessive imbalance procedure concluding that a Member State has failed to take the recommended corrective action;
8. the Commission concludes that a Member State under financial assistance has failed to implement its economic adjustment programmes and decides not to authorise disbursement of financial assistance;
9. the Council decides that a euro-area Member State under financial assistance failed to comply with its macroeconomic adjustment programme or with other corrective measures requested by a Council decision pursuant to Article 136 (1) TFEU.

The EU Council shall decide by reversed qualified majority voting, meaning that the decision on suspension shall be automatically adopted unless the Council rejects it by qualified majority. This in turn shifts the political burden of the decision from the Council to the Commission. The Commission shall give priority to suspension of commitments over payments. The suspension shall be double-capped, depending on the rules breached, and further reduced based on the economic situation of a given state, pursuant to the extremely detailed rules set in Annex III to the CPR. In principle, a suspension of commitments shall be capped at 25% or 50% of EU funds allocations and shall not exceed 0.25% or 0.5% of the country's GDP, which may be gradually increased if the Member State persists in non-compliance. Any decision shall give 'due consideration' to the results of the 'structured dialogue' conducted with the European Parliament.

— after the start of the financial period:

10. according to the *ex-post positive macroeconomic conditionality*, Member States under EU financial assistance may ask for a 10% increase in their ESI Funds financing rate by 30 June 2016, or after that date until 30 June of the following year in which the financial assistance programme comes to an end. This increase shall not however exceed 100% of the payments the Member State is entitled to pursuant to the EU Funds regulations rules. In sum, the conditionality acts as a very small carrot that absolves Member States of their additional obligations (national matching funds).

Needless to say, the above extraordinarily heavy macroeconomic machinery essentially pursues a *behavioural function* by seeking full compliance with the entire EU economic governance framework and seeking to dissuade the instances of non-compliance with financial sanctions. The new conditionality package helps the Commission to coerce Member States' behaviour. This is especially so since the discretion to enforce the tool stays *de facto* in all cases with the Commission.

Regarding the *sound expenditure* function of conditionality, numerous economic studies have been put forward by the Commission to show that macroeconomic discipline indeed leads to wealth and growth, increasing the *effectiveness* and *efficiency* of spending.²⁴⁷ However, these studies are careful to caution against uniform standards and advise "taking account of country-specific needs, tailored to national circumstances and owned by national policy solutions".²⁴⁸ In the particular context of Cohesion policy, it has been argued that macroeconomic conditionality may have a positive effect on EU economic policy, but it may have the opposite effect on cohesion policy, and hinder the development of Europe's poorest regions.²⁴⁹

In Part IV below, I will continue to analyse macroeconomic conditionality and its operation in the institutional world from a legal point of view, emphasising the

²⁴⁷ Tomova et al., *supra* note 101; PAUL BERND SPAHN, *CONDITIONING INTERGOVERNMENTAL TRANSFERS AND MODES OF INTERAGENCY COOPERATION FOR GREATER EFFECTIVENESS OF MULTILEVEL GOVERNMENT IN OECD COUNTRIES* (2012).

²⁴⁸ Tomova et al., *supra* note 101 at 35.

²⁴⁹ S. VERHELST EGMONT INSTITUTE, *RESEARCH FOR REGI COMMITTEE - MACRO-ECONOMIC CONDITIONALITIES IN COHESION POLICY* EUROPEAN PARLIAMENT, POLICY DEPARTMENT FOR STRUCTURAL AND COHESION POLICIES, BRUSSELS (2012); Stijn Verhelst, *Cohesion Policy and Sound Economic Governance: A Loveless Marriage*, *THE POLISH QUARTERLY OF INTERNATIONAL AFFAIRS* 113-126 (2014); STIJN VERHELST & PAWEŁ TOKARSKI, *MACROECONOMIC CONDITIONALITY IN COHESION POLICY: ADDED VALUE OR UNNECESSARY BURDEN?*

enforcement difficulties the tool has seen in 2014-2020. For the purposes of this section, we shall note that as of 2018 the tool remains *unenforced*.

4.2 EU law and policy conditionality

Structural funds have historically been very sensitive to cross-cutting EU law and policy objectives.

Especially since the mid-1990s, under the increased popularity of 'mainstreaming' at the EU level, Structural funds started to be increasingly open to integrating gender, non-discrimination or environmental aims, which appeared in the text of EU funds regulations as general principles of spending.²⁵⁰ Despite its noble intellectual aims, the mainstreaming concept remained largely declaratory and did not achieve much traction in EU spending.²⁵¹ The shortcomings of the tool were primarily its lack of enforceability and a weak monitoring framework, which rendered the tool purely symbolic in practice.²⁵²

More broadly, the EU funds regulations increasingly mentioned the principle of consistency of all EU spending with applicable EU laws and policies. The consistency clauses are a common occurrence in EU financial regulations and may be even enforced as implicit conditionalities on rare occasions (see Chapter 7 below, Home Affairs Funds).

These mainstreaming and consistency principles have gradually developed into more concrete spending conditionalities discussed below.

4.2.1 Pre-2014 evolution, 2014-2020 development and lessons learned

The 2000-2006 financial period introduced the first EU law infringement conditionality applicable to two structural funds (ESF and ERDF).²⁵³ The latter allowed the Commission to declare a payment unacceptable where an infringement procedure has

²⁵⁰ Vita, *supra* note 35; Sonia Mazey, *Introduction: Integrating gender - intellectual and "real world" mainstreaming*, 7 JOURNAL OF EUROPEAN PUBLIC POLICY 493-493 (2000).

²⁵¹ Vita, *supra* note 35.

²⁵² *Id.*

²⁵³ COUNCIL REGULATION (EC) NO 1260/1999 OF 21 JUNE 1999 LAYING DOWN GENERAL PROVISIONS ON THE STRUCTURAL FUNDS, *supra* note 214 at Art. 32(3) f).

been launched in connection with an operation financed from the two funds. During the next 2007-2013 financial period, EU Funds regulations maintained the conditionality and further extended its sanction to both refusal of payments and automatic de-commitment of final balance of payments.²⁵⁴ The conditionality was *ex post, negative, cyclical, multi-fund* and *generic* as it allowed suspension from any of the two structural funds and was not thematically limited to a given EU law or policy area. The conditionality was also *implicit, enforceable* and *compulsory*.

The above described EU law conditionality, incipient in form, was in many ways revolutionary because it complemented the general principles of mainstreaming and consistency with a far-reaching sanctioning mechanism that extended to any present and future potential infringement with relevance to EU spending.

The conditionality was *enforceable* and was successfully used in practice by the Commission and upheld by the Court of Justice in *Italy v Commission*.²⁵⁵ In this case, the Commission refused payments to a programme on waste disposal in the Italian region of Campania as infringement proceedings had been launched against Italy for incorrect transposition of the EU Waste Directive in the same region.²⁵⁶ Italy argued that the Commission decision was in breach of EU spending rules. In its view, the infringement proceedings did not relate to the spending actions of the programme, and the infringement did not affect the financial interest of the Union.²⁵⁷ Furthermore, Italy argued that even if a risk to the financial interests of the EU could have been established, a refusal of payments was to be ordered only with regards to precise “operations” – the term used in funding regulations – not the operational program as a whole.²⁵⁸ The Court however dismissed Italy’s claims and upheld the Commission’s decision.²⁵⁹ In doing so, the Court held that in declaring a payment not acceptable under the conditionality clause, it was sufficient for the Commission to establish a

²⁵⁴ 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, *supra* note 214 at Art. 86 (1)d), 89(1)-(2). [

²⁵⁵ CJEU, Judgment of the General Court (First Chamber) of 19 April 2013. *Italian Republic v European Commission. ERDF - Campania Regional Operational Programme. Infringement procedure in respect of Italy*. Joined cases T-99/09 and T-308/09 ECLI:EU:T:2013:200, .

²⁵⁶ *Id.* at paras 8-21.

²⁵⁷ *Id.* at para 34.

²⁵⁸ *Id.* at para 14.

²⁵⁹ *Id.* at para 60.

“sufficiently direct link” between the spending action on the one hand, and the infringement on the other.²⁶⁰ Moreover, the Court held that once such a direct link is established the Commission is not obliged to prove that the infringement would pose an effective risk to the EU budget.²⁶¹ The Court has further held that such a narrow interpretation “would diminish the useful effect of the provisions in question”.²⁶²

The judgement suggests that conditionality pursued both a *behavioural EU law compliance function* and a *sound expenditure function*. However, upon closer investigation, it appears that the tool has fulfilled only a *sound expenditure function*. The analysis of the infringement file suggests that the refusal of EU funds as indeed impeded wasteful expenditure of EU money in an EU country persisting in infringement of EU environmental legislation, and helped prevent - in the Court's dictum - an "unacceptable loss of Community funds".²⁶³ This is evidenced by the fact that in 2015, the infringement procedures against Italy culminated with the Court of Justice ordering fines for failure to comply with the Waste Directive.²⁶⁴ Nevertheless, even if EU money have been suspended in 2008, compliance did not follow by 2018. In fact, in 2018, the infringement procedure remains pending and the Campania region is still not complying with the EU Waste Directive.²⁶⁵

It is interesting to note in this context that conditionality had a *double punitive function*, *de facto* sanctioning a Member State for the same act of non-compliance twice: first through spending cut-off, and second with infringement fines. On this point of law the case-law of the Court suggests that infringement and conditionality enforcement procedures are not mutually exclusive, and are to be treated as two distinct procedures, pursuing two independent functions.²⁶⁶

²⁶⁰ *Id.* at para 60.

²⁶¹ *Id.* at para 50.

²⁶² *Id.* at para 50.

²⁶³ *Id.* at para 50.

²⁶⁴ CJEU, Judgment of the Court (Third Chamber) of 16 July 2015 European Commission v Italian Republic Case C-653/13 ECLI:EU:C:2015:478, . [of 120 000 euro per day]

²⁶⁵ European Commission, Infringement number 20072195, Italy. Environment. Waste management in Campania.

²⁶⁶ CJEU, *supra* note 255 at paras 68-70; CJEU, An Taisce - The National Trust for Ireland and World Wide Fund for Nature v Commission of the European Communities T-461/93, ECLI:EU:T:1994:244, ECR 1994 II-00733, paras 37-39.

The 2014-2020 legislative framework abolishes the EU law infringement conditionality. The abolishment seems to have its roots in the above case-law of the Court, as the considerations of the 2014-2020 CPR regulation clearly refer to “legal certainty for the Member States” and the need to clearly define the situations where a breach of EU law may lead to corrections.²⁶⁷ The change must also be seen in the context of an impressive rise of ex ante conditionality package, which brings a heavy legislative and policy load into the framework of ESI funds, including but certainly not limited to, the EU Waste Directive (4.2.2 below).

Another EU law conditionality replaces the tool, which resembles much more the pre-2014 EU law consistency principle. It relies extensively on a narrow vision of respect for EU law, understood as limited to EU financial rules that allow spending cut-off for reasons of irregular expenditure where a breach of applicable EU law has affected the selection of an operation or has raised a financial threat to the EU budget.²⁶⁸ The conditionality is *ex post, negative, cyclical, multi-fund, implicit, enforceable* and *compulsory*. Even if the scope of the 2014-2020 EU law of conditionality is much more limited in comparison to the pre-2014 arrangements, one may still expect both the Commission and the Court to support its application if necessary, where a “sufficient link” between the breach of applicable EU law and spending may be established.²⁶⁹ In Chapter 7 below, we shall see that such an interpretation was successfully employed by the Commission in practice, in the context of Home Affairs Funds.

For the purpose of this section, we shall conclude that the main lesson learned from the experience of the pre-2014 EU law of conditionality is that where a conditionality is successfully enforced by the Commission in line with its legislative framework and policy objective, Member States may have the tendency to repeal the conditionality during the next financial period. This is due to the cyclical character of conditionality, which generally lacks a stable set of rules like a national spending rulebook or fiscal code to guide the conduct of Member States and contribute to their legal certainty. Hence, a 'too active' Commission, consistently enforcing spending conditionalities,

²⁶⁷ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at consideration (72).

²⁶⁸ *Id.* at Arts 6, 85,144.

²⁶⁹ CJEU, *supra* note 255 at 60.

may find itself in a situation where during the next financial period, Member States oppose the development of prior conditionality forms or request its repeal altogether.

4.2.2 Ex ante conditionalities in 2014-2020

The ex ante conditionality package of the 2014-2020 financial period is an extremely advanced form of EU law and policy conditionality. The conditionalities aim to reinforce a significant amount of EU laws, policies and national institutional arrangements, acting as a lever for the correct implementation and application of EU rules, priorities or recommendations at the national level. In line with the conceptual toolkit on spending conditionality developed in Part I, the novel ex ante conditionalities feed into the following conditionality types: *ex ante and ex post, input, negative, time-limited, sector-specific and cross-cutting, operation-specific, fund-specific and multi-fund, enforceable and optional, pursuing mainly EU law, policy, structural reform and good governance objectives.*

In concrete terms, forty-eight ex ante conditionalities have been introduced by the 2014-2020 ESI Funds regulations, listed in Annex I to the present thesis. These are further classified in:

- 7 general ex ante conditionalities in the areas of: non-discrimination, gender equality, disability, environment, public procurement, state aid, and statistical systems, applicable to all ESI Funds and detailed in the second part of Annex XI to the CPR regulation;²⁷⁰
- 29 thematic ex ante conditionalities in the areas of: research and innovation, digital growth, next generation network, small business act, energy efficiency of buildings, energy co-generation, renewable energy, risk prevention and management, water, waste, road, rail and other modes of transport, smart energy distribution, active labour market policies, self-employment, labour market institutions, active ageing, workers adaptation to change, youth employment, poverty reduction, Roma inclusion, health, early school leaving, higher education, lifelong learning, vocational education and training, administrative efficiency and public administration reform; and applicable to

²⁷⁰ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219.

each thematic investment priority of the three Cohesion policy Structural Funds (ESF, ERDF and ECF) as detailed in Part I of the Annex XI to the CPR;²⁷¹

- 8 thematic ex ante conditionalities in the areas of: risk prevention and management, good agricultural and environmental conditions, minimum requirements for fertilisers, mandatory animal welfare and environmental national standards, energy efficiency, water, renewable energy, and next generation network; applicable to the investment priorities of the rural development fund (EAFRD) pursuant to Annex V of its fund-specific regulation;²⁷²
- 4 thematic ex ante conditionalities requesting for: a fishing capacity report, a national strategic plan on aquaculture, data collection capacity and administrative capacity to control, inspect and enforce fisheries policy rules, applicable to the specific objectives of the fisheries fund (EMFF) pursuant to Annex IV of its fund-specific regulation.²⁷³

In a nutshell, all these ex ante conditionalities ask Member States to fulfil a specific number of pre-defined criteria before the start of ESI Funds spending, and subject to suspension of payments in case of failure to comply.

The broad formulation and extremely wide thematic scope of ex ante conditionality is impressive. The ex ante conditionalities have been enumerated in 23 pages of annexes to CPR and fund-specific regulations, setting hundreds of criteria to be fulfilled by Member States before the start of spending. These concern a generous set of EU *same-sector* and *cross-cutting* policy areas, checking for existence, full implementation and correct application of multiple EU laws, strategic policy frameworks and sound institutional capacity measures that run through numerous EU policies. For a complete overview, see Annex I to the present thesis. The above lists have been detailed in 397 pages of Commission internal guidance, which complements the regulations with

²⁷¹ *Id.*

²⁷² REGULATION (EU) NO 1305/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 17 DECEMBER 2013 ON SUPPORT FOR RURAL DEVELOPMENT BY THE EUROPEAN AGRICULTURAL FUND FOR RURAL DEVELOPMENT (EAFRD) AND REPEALING COUNCIL REGULATION (EC) NO 1698/2005, 347 OJ L (2013).

²⁷³ REGULATION (EU) 508/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 15 MAY 2014 ON THE EUROPEAN MARITIME AND FISHERIES FUND AND REPEALING COUNCIL REGULATIONS (EC) NO 2328/2003, (EC) NO 861/2006, (EC) NO 1198/2006 AND (EC) NO 791/2007 AND REGULATION (EU) NO 1255/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, 149 OJ L (2014).

additional indicative sub-criteria and fulfilment assessment grids for each ex ante conditionality.²⁷⁴

As mentioned in Chapter 3 above, during negotiations the extensive thematic scope of ex ante conditionalities has been counter-balanced by Member States with elaborate and complex procedural rules regulating the applicability, fulfilment and enforcement of ex ante conditionalities.

On applicability, a comprehensive definition has been introduced that impresses with its complexity and attention to detail. According to the definition, an 'applicable ex ante conditionality' is:

*"a concrete and precisely pre-defined critical factor, which is a prerequisite for and has a direct and genuine link to, and direct impact on, the effective and efficient achievement of a specific objective for an investment priority or a Union priority."*²⁷⁵

This means that, for actual application each of the 48 ex ante conditionalities listed in the annexes to ESI regulations must meet ten qualifiers, namely they must be: *concrete, precise, pre-defined, critical, pre-requisite, with direct and genuine link and direct impact on the effectiveness and efficiency of a spending objective.*²⁷⁶ In other words, to apply a given conditionality must prove a link to spending that is beyond any reasonable doubt.

The primary effect of the above definition is that it limits the *ex officio* application of ex ante conditionalities. In principle, any ex ante conditionalities has the potential to apply. However, the actual applicability shall be decided on a case-by-case basis, depending on the spending priorities of each Member State.

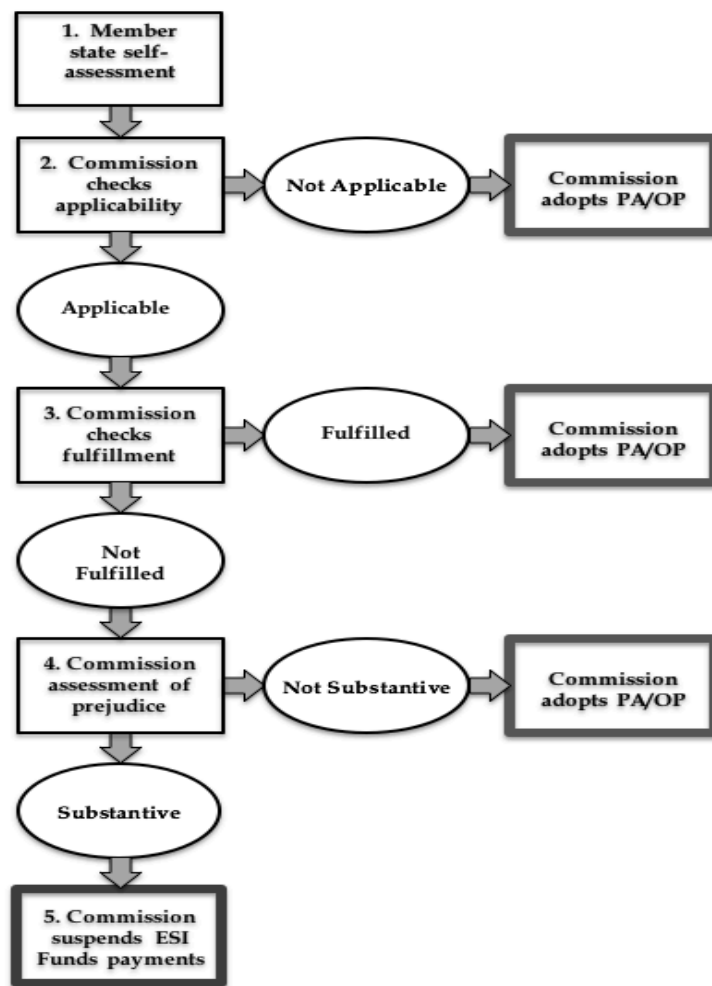
The ex ante conditionality procedure is regulated by Article 19 to the CPR. Pursuant to the article, five steps of ex ante conditionality process may be distinguished, clustered around three phases: applicability assessment, fulfilment assessment and enforcement (see figure 7 below).

²⁷⁴ European Commission, INTERNAL GUIDANCE ON EX ANTE CONDITIONALITIES FOR THE EUROPEAN STRUCTURAL AND INVESTMENT FUNDS PART II (2014).

²⁷⁵ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at Art. 2 (33).

²⁷⁶ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219. Art.2 (34): "For the purpose of the ESI Funds framework, a 'specific objective' is defined as: "the result to which an investment priority or Union priority contributes in a specific national or regional context through actions or measures undertaken within such a priority".

Figure 7. Five steps of ex ante conditionality process



Source: European Commission ²⁷⁷

The applicability and fulfilment assessment phases run largely in parallel and are structured in two main phases: member states' self-assessment and Commission consistency assessment.

During the first phase, pursuant to the principle of subsidiarity and proportionality, Member States shall be the first to (self-)assess whether a given ex ante conditionality applies to their spending priorities, in line with the definition above.²⁷⁸ They shall also be the first to (self-)assess whether a given conditionality is fully fulfilled, having regard exclusively to the limited criteria detailed in the respective annexes of the ESI

²⁷⁷ European Commission, INTERNAL GUIDANCE ON EX ANTE CONDITIONALITIES FOR THE EUROPEAN STRUCTURAL AND INVESTMENT FUNDS PART I 25 (2014).

²⁷⁸ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at Art. 19 (1)-(2).

funds regulations (see annex I). Member States shall report on self-assessment in the context of their programming documents: one country-wide Partnership Agreement (PA) and several Operational Programmes (OP). Where an applicable ex-ante conditionality is not fulfilled, Member States shall indicate in their programming documents a detailed fulfilment action plan including the responsible authority, actions foreseen, and a deadline that shall not exceed the ultimate deadline of 31 December 2016. Member States shall report on fulfilment in their 2017 implementation reports.

In the second phase, the Commission shall assess the consistency of the information provided by Member States. In doing so, the Commission has three options:²⁷⁹

- to agree with the Member State's assessment and approve the programming documents, thus authorising the start of spending;
- to disagree with the Member State, approve the programming documents, and suspend interim payments to the specific objectives that risk *significant prejudice*;
- to disagree with the Member State, but approve the programming documents, pending fulfilment of ex ante conditionality by an agreed deadline or by the end of 2016.

In addition, several important procedural brakes of Article 19 CPR are worth mentioning:

In case of disagreement, the Commission shall always bear the burden of proof. During the consistency assessment, the Commission shall have regard exclusively to the specific criteria for fulfilment set out in the annexes to the ESI Funds regulations. Moreover, once the Commission has found a conditionality fulfilled, it may not reconsider its finding ex post, even if the initial compliance finding no longer holds true. Finally, during its assessment the Commission shall have regard to the principles of proportionality and subsidiarity.

Lastly, the enforcement phase is also differentiated around two enforceability moments:

- a first enforcement moment coincides with the approval of spending programmes (PAs and OPs), and,

²⁷⁹ *Id.* at Art. 19 (5).

— a second enforcement moment that coincides with the agreed deadline specified in each fulfilment action plan or with 31 December 2016, at the latest. The Commission may decide to suspend ESI payments *ex ante* when the unfulfilled *ex ante* conditionality poses a significant prejudice to the result of spending. Alternatively, the Commission may decide not to suspend ESI Funds payments and postpone the fulfilment of *ex ante* conditionality to after the start of spending, but no later than by the end of December 2016. In the latter case, what is an *ex ante* conditionality in name becomes *ex post* in nature. In all cases, a decision on enforcement is optional and rests exclusively within the discretion of the Commission. The principle of proportionality shall be observed at all times during enforcement. In Part IV below, we shall discuss in detail the enforcement of *ex ante* conditionality and the important legal developments it has seen in practice. For the purposes of this section, we shall remember that *ex ante* conditionalities remain formally *unenforced*. Regarding its functions, *ex ante* conditionality pursues both a *behavioural* and a *sound expenditure* function. The *sound expenditure function* is designed to ensure that no ESI Funds are spent before essential EU laws, policies, institutional arrangements or recommendations are in place in order to avoid the wasteful allocation of EU funds and make sure that EU funds do not end up being spent in a manner inconsistent with EU law objectives and policy priorities in a given area i.e. waste management. The *behavioural function* is demonstrated by the impressive linking of *ex ante* conditionality to an extensive array of same-sector and cross-cutting EU policies, leaving important scope for the Commission to encourage Member States towards *compliance* and *dissuade instances of non-compliance*. The behavioural function of *ex ante* conditionality retains important potential, even in the light of the extensive procedural rules explained above. However, this potential may amount to different results in practice, based on governments' commitment to change. Let us take the example of the *thematic ex ante conditionality on administrative capacity* to better illustrate this point. Pursuant to Annex XI of the CPR (Annex I of the present thesis), the conditionality calls for:

"The existence of a strategic policy framework for reinforcing the Member States' administrative efficiency including public administration reform"

The latter shall apply to all Member States that decide to invest in institutional capacity

building actions financed from the dedicated spending lines of three Structural funds (ESF, ERDF and ECF). Once the applicability is established, assuming that the conditionality is found applicable (i.e. a *concrete, precise, pre-defined, critical, pre-requisite, with direct and genuine link and direct impact on the effectiveness and efficiency of a spending objective*), a Member State must show that:

*"A strategic policy framework for reinforcing a Member State's public authorities' administrative efficiency and their skills with the following elements are in place and in the process of being implemented:"*²⁸⁰

including:

- an analysis and strategic planning of legal, organisational and/or procedural reform actions;*
- the development of quality management systems;*
- integrated actions for simplification and rationalisation of administrative procedures;*
- the development and implementation of human resources strategies and policies covering the main gaps identified in this field;*
- the development of skills at all levels of the professional hierarchy within public authorities."*²⁸¹

If fully implemented, each and every criterion above has the potential to lead to significant reforms at the national level. The complete fulfilment of one single criterion alone, such as the 'elaboration of a strategic planning for legal reform of a Member State's administrative system' is a monumental reform endeavour, requiring extensive multilevel institutional coordination, commitment, resources and ownership. The opposite is also true. Given the broad formulation of the criteria above, many, if not any, action may pass as: "strategic planning", "development of skills" or "simplification". At the end of the day, one must expect the effective result of each ex ante conditionality to depend on the Commission's consistent assessment and the good faith commitment of Member States. In Part IV below, we shall explain that this was only partially the case in practice.

²⁸⁰ *Id.* at Annex XI, Part I, point 11.

²⁸¹ *Id.*

Chapter 5

Agricultural Funds

Chapter 5 examines the legal world of Agricultural Funds spending conditionality. Agricultural Funds have historically been endowed with the largest share of the EU budget (38% in 2014-2020, see figure 5 above).²⁸² As of the 2003 reform, they are firmly built around two spending pillars: CAP's first pillar supporting direct payments to farmers and market measures (European Agricultural Guarantee Fund – EAGF), and CAP's second pillar supporting rural development and structural measures (European Agricultural Fund for Rural Development – EAFRD).

Our analysis of Agricultural Funds pre-2014 shows that they have nurtured the most advanced forms of EU spending conditionality since the mid-2000s, the so-called *cross-compliance rules* or *règles relatives à la conditionnalité*, in the traditional French version of the term (5.1). The policy shift towards spending conditionality came at a time when the Common Agricultural Policy (CAP) was searching for a new justification in the face of increasing criticism of environmental stakeholders and threats of cuts to its significant budget share. In response, a sophisticated set of spending conditionalities

²⁸² CAP was established in 1962 with a dedicated expenditure of about 70% of the EU budget, which gradually decreased to 38% in the 2014-2020 financial framework, see: EUROPEAN COMMISSION, *supra* note 112 at 19-109.

were introduced in 2003, linking CAP spending to extensive environmental policy, food safety, plant and animal welfare EU laws and good agricultural standards.

The essential trait of Agricultural Funds conditionality is that it primarily applies to private beneficiaries of EU funds - EU farmers - who are asked to continuously comply with a detailed conditionality rulebook. The most valuable lesson drawn from the prior practice of Agricultural Funds spending conditionality is that when applied to private beneficiaries, spending conditionality is not only enforced, it is *frequently enforced*. In addition, the rich string of litigation provides valuable indications as to the Court of Justice's doctrinal approach to conditionality enforcement. The analysis of the case law shows that when enforcement concerns Member States, the Court tends to focus primarily on procedural matters. In cases of enforcement against individuals the Court engages in closer scrutiny of the substance of the case.

The legal evolution of Agricultural Funds spending conditionality in 2014-2020 validates the claim of a rise in spending conditionality put forward in the present thesis. In addition to ten macroeconomic, seven general and eight thematic ex ante conditionalities attached to the second pillar of CAP (EAFRD) in 2014-2020 (see Chapter 4), Agricultural Funds developed an important positive conditionality - the *green payment* conditionality attached to the most financially important envelope of the EU budget - the CAP's first pillar (5.2). The latter offers positive incentives to farmers willing to pursue additional environmental action in the form of a green payment, disbursed on top of the traditional agricultural aid.

5.1 Pre-2014 spending conditionality and lessons learned

Agricultural Funds have been increasingly vulnerable to environmental concerns since the early 1990s. In an effort to 'green' the CAP, important elements of the EU's sustainable development policy have gradually been mainstreamed in Agricultural Funds, such as the Member States' obligation to remind farmers of their environmental obligations or the farmers' obligation to set aside part of their arable land for

appropriate environmental measures.²⁸³ However, it was only with the 2003 CAP reform that a robust system of spending conditionality was introduced to CAP. This was called the 'Cross-compliance' system²⁸⁴ and remains present today.²⁸⁵

The 'Cross-Compliance' conditionality system coerces exclusively private beneficiaries of Agricultural Funds (farmers) to respect an extensive set of EU environmental, food-safety, plant health, animal welfare laws and land management standards subject to reductions or exclusion from CAP support (See Annex II to the present thesis).²⁸⁶ The spending conditionalities are split in two groups. On the one hand, private recipients are obliged to comply with a set of EU laws called: 'Statutory Management Requirements' (SMR).²⁸⁷ On the other hand, Member States are to ensure that all agricultural lands respect extensive 'Good Agricultural and Environmental Conditions' (GAEC) in line with standards set at the EU and national level.²⁸⁸ The specific requirements of each conditionality are extremely detailed, for instance asking for respect of precise conditions for the minimising of soil erosion, the protection of wild birds or the protection of calf welfare.²⁸⁹ Should the farmers fail to comply,

²⁸³ COUNCIL REGULATION (EEC) No 1765/92 OF 30 JUNE 1992 ESTABLISHING A SUPPORT SYSTEM FOR PRODUCERS OF CERTAIN ARABLE CROPS, 181 OJ L (1992); COUNCIL REGULATION (EEC) No 2078/92 OF 30 JUNE 1992 ON AGRICULTURAL PRODUCTION METHODS COMPATIBLE WITH THE REQUIREMENTS OF THE PROTECTION OF THE ENVIRONMENT AND THE MAINTENANCE OF THE COUNTRYSIDE, 215 OJ L (1992). [Article 2(2), Art.10 (5) regarding the obligation for farmers to set aside a part of arable land (15%) and the obligation for the Member States to remind beneficiaries of the need to respect the existent environmental legislation and encouraging Member States on a voluntary basis to ensure that end beneficiaries comply with certain minimum environmental conditions.] [Additionally, an organic farming aid-scheme was put in place at EU level by Regulation 2078/92].

²⁸⁴ COUNCIL REGULATION (EC) No 1782/2003 OF 29 SEPTEMBER 2003 ESTABLISHING COMMON RULES FOR DIRECT SUPPORT SCHEMES UNDER THE COMMON AGRICULTURAL POLICY AND ESTABLISHING CERTAIN SUPPORT SCHEMES FOR FARMERS, 270 OJ L Arts. 3-5 and Annex III and IV (2003); COUNCIL REGULATION (EC) No 1698/2005 OF 20 SEPTEMBER 2005 ON SUPPORT FOR RURAL DEVELOPMENT BY THE EUROPEAN AGRICULTURAL FUND FOR RURAL DEVELOPMENT (EAFRD), 277 OJ L (2005); COUNCIL REGULATION (EC) No 1234/2007 OF 22 OCTOBER 2007 ESTABLISHING A COMMON ORGANISATION OF AGRICULTURAL MARKETS AND ON SPECIFIC PROVISIONS FOR CERTAIN AGRICULTURAL PRODUCTS (SINGLE CMO REGULATION), 299 OJ L (2007).

²⁸⁵ REGULATION (EU) No 1306/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 17 DECEMBER 2013 ON THE FINANCING, MANAGEMENT AND MONITORING OF THE COMMON AGRICULTURAL POLICY AND REPEALING COUNCIL REGULATIONS (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 AND (EC) No 485/2008, 347 OJ L Annex II (2013).

²⁸⁶ *Id.* at Annex II.

²⁸⁷ COUNCIL REGULATION (EC) No 1782/2003 OF 29 SEPTEMBER 2003 ESTABLISHING COMMON RULES FOR DIRECT SUPPORT SCHEMES UNDER THE COMMON AGRICULTURAL POLICY AND ESTABLISHING CERTAIN SUPPORT SCHEMES FOR FARMERS, *supra* note 284. [13 SMRs in the 2014-2020 financial period]

²⁸⁸ *Id.* [7 GAEC in the 2014-2020 financial period]

²⁸⁹ See for instance a detailed explanation on Cross-compliance conditionality applicable to farmers in England: Department for Environment Food and Rural Affairs, THE GUIDE TO CROSS COMPLIANCE IN ENGLAND 2018.

administrative penalties shall be applied in the form of reductions or exclusion from Agricultural Funds.²⁹⁰

The 2014-2020 Agricultural Funds maintain the above conditionality system, further simplifying and streamlining the cross-compliance conditionality and reducing the overall number of conditions²⁹¹ in an attempt to meet the Court of Auditors recommendations on easing the administrative burden, accounting for costs and reducing the instances of non-compliance.²⁹²

The cross-compliance conditionality is *ex post, input, negative, cyclical, sector-specific and cross-cutting, explicit, multi-fund, enforceable and frequently-enforced, pursuing mainly EU legal and policy objectives*. At the same time, the conditionality pursues strong *behavioural and sound expenditure* functions (see Part I, above).

The implementation and enforcement of conditionality follows a multilevel governance model, in line with the principle of subsidiarity. It is first for Member States to communicate the appropriate compliance standards to farmers, set up national inspection and control systems, and apply administrative penalties in case of non-compliance, pursuant to EU rules.²⁹³ Adopting a subsidiary role, the Commission may carry out on-the-spot checks and apply spending corrections to Member States where irregularities in the functioning of cross-compliance systems are detected.²⁹⁴

Enforcement is the defining feature of cross-compliance conditionality. In fact, the most important lesson drawn from the pre-2014 practice of Agricultural Funds conditionality is that when addressed to private beneficiaries of funds, the conditionality is not only *enforceable*, but is actually *frequently-enforced*. According to the Court of Auditors, about 60 000 administrative penalties are ordered annually for

²⁹⁰ COMMISSION DELEGATED REGULATION (EU) NO 640/2014 OF 11 MARCH 2014 SUPPLEMENTING REGULATION (EU) NO 1306/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL WITH REGARD TO THE INTEGRATED ADMINISTRATION AND CONTROL SYSTEM AND CONDITIONS FOR REFUSAL OR WITHDRAWAL OF PAYMENTS AND ADMINISTRATIVE PENALTIES APPLICABLE TO DIRECT PAYMENTS, RURAL DEVELOPMENT SUPPORT AND CROSS COMPLIANCE, 181 OJ L (2014).

²⁹¹ REGULATION (EU) NO 1306/2013, *supra* note 285.

²⁹² COURT OF AUDITORS, SPECIAL REPORT 8/2008 IS CROSS COMPLIANCE AN EFFECTIVE POLICY? (2008); COURT OF AUDITORS, SPECIAL REPORT 26/2016. MAKING CROSS-COMPLIANCE MORE EFFECTIVE AND ACHIEVING SIMPLIFICATION REMAINS CHALLENGING.

²⁹³ REGULATION (EU) NO 1306/2013, *supra* note 285 at Arts. 96-101.

²⁹⁴ COMMISSION DELEGATED REGULATION (EU) NO 640/2014, *supra* note 290.

failure to comply with the cross-compliance rules.²⁹⁵ This finding stands in stark contrast to spending conditionality examples addressed to Member States, where as a general rule conditionality is *rarely enforced* or *unenforced* (Chapter 4, above).

A second valuable lesson is that due to its relatively frequent enforcement (unlike other areas of EU spending), Agricultural funds spending conditionality has provided important occasions for the Court of Justice begin to form a doctrinal stance on conditionality. Analysis of the long string of cases dealing with the enforcement of conditionality shows that the Court of Justice tends to adopt a stricter level of scrutiny when the plaintiffs are private beneficiaries of funds as opposed to Member States.

In particular, analysis of the Court's case law concerning the actions for annulment brought by Member States against the Commission's corrective decisions shows that the Court of Justice is primarily concerned with procedural matters²⁹⁶ such as the correct application of the rules of procedure on enforcement of conditionality, due process rights and obligation to state reasons,²⁹⁷ or with analysis of the proportionality and adequacy of the amount of fines imposed,²⁹⁸ concurring in the vast majority of cases with the audit findings and correction amounts imposed by the Commission.

On the contrary, when confronted with legal disputes involving private beneficiaries of funds, the Court of Justice tends to apply stricter scrutiny, increasingly referring to substantive constitutional rights and principles, and offering its preliminary interpretation on matters such as the constitutional nature of the penalties applied to

²⁹⁵ COURT OF AUDITORS, *supra* note 292; COURT OF AUDITORS, *supra* note 292 at 18.

²⁹⁶ See *inter alia*: CJEU, Judgment of the General Court (Third Chamber) of 13 December 2012. Hellenic Republic v European Commission. Case T-588/10 ECLI:EU:T:2012:688, ; CJEU, Judgment of the General Court (Seventh Chamber) of 17 May 2013. Hellenic Republic v European Commission Case T-294/11 ECLI:EU:T:2013:261, ; Judgment of the General Court (Second Chamber) of 3 April 2017 Federal Republic of Germany v European Commission Case T-28/16 ECLI:EU:T:2017:242, ; Judgment of the General Court (Fourth Chamber) of 28 September 2016 United Kingdom of Great Britain and Northern Ireland v European Commission Case T-437/14 ECLI:EU:T:2016:577, ; Case T-255/13: Judgment of the General Court of 12 November 2015 – Italy v Commission ECLI:EU:T:2015:838, . [See, for a notable exception in Germany v Commission T-506/15, whereby Germany alleges breach of the principles of loyal cooperation and subsidiarity].

²⁹⁷ *Id.*

²⁹⁸ *Id.*

farmers,²⁹⁹ on the principle of retroactivity of more lenient penalties,³⁰⁰ on the principle of non-discrimination,³⁰¹ proportionality or legal certainty of national implementing rules.³⁰² Given the preliminary reference procedure setting of the latter cases, in all the cases the Court leaves an important margin of appreciation to the national referring courts that are to pronounce a final decision in the dispute at hand.

5.2 The 2014-2020 “green” conditionality

The 2014-2020 financial period adds an important number of spending conditionalities to Agricultural Funds. The most extensive conditionality arrangements apply to the second pillar of CAP (EAFRD), namely 10 macroeconomic conditionalities, seven general ex ante conditionalities and eight thematic ex ante conditionalities, discussed in detail above (Chapter 4).

In addition to the above noted extensive conditionality arrangements, another novel spending conditionality is introduced to the first pillar of CAP: the “green” conditionality.³⁰³ The green conditionality is an *ex post, input, positive and negative (carrots and sticks), cyclical, cross-cutting, fund-specific, implicit and enforceable type of conditionality, pursuing mainly EU (environmental) policy objectives*. The conditionality pursues mainly a *behavioural function* by incentivising *compliance* with a new set of rules aiming to 'green' the CAP and *dissuading* non-compliance with withdrawal of funds (see Part I).

²⁹⁹ CJEU, Judgment of the Court (Grand Chamber) of 11 March 2008 (reference for a preliminary ruling from the Verwaltungsgericht Schwerin (Germany)) – Rüdiger Jäger v Amt für Landwirtschaft Bützow Case C-420/06 ECLI:EU:C:2008:152, , 64.

³⁰⁰ *Id.* at 59.[According to the Court’s case-law, the principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States].

³⁰¹ Judgment of the Court (Grand Chamber) of 16 July 2009. The Queen, on the application of Mark Horvath v Secretary of State for Environment, Food and Rural Affairs. C-428/07 ECLI:EU:C:2009:458, , 54–58.

³⁰² Judgment of the Court (Fourth Chamber) of 17 December 2015 Gergely Szemerey v Miniszterelnökséget vezető miniszter Case C-330/14 ECLI:EU:C:2015:826, , 43–51.

³⁰³ REGULATION (EU) NO 1307/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 17 DECEMBER 2013 ESTABLISHING RULES FOR DIRECT PAYMENTS TO FARMERS UNDER SUPPORT SCHEMES WITHIN THE FRAMEWORK OF THE COMMON AGRICULTURAL POLICY AND REPEALING COUNCIL REGULATION (EC) NO 637/2008 AND COUNCIL REGULATION (EC) NO 73/2009, 347 OJ L considerations (37), Arts. 43-47 (2013).

The conditionality *ex post* binds farmers receiving aid to respect a compulsory set of practices beneficial to climate and the environment, going beyond the cross-compliance conditionality system, in exchange for an additional “green” payment on the top of the first pillar basic payment.³⁰⁴ In cases of non-compliance the negative conditionality is enforced, sanctioning private beneficiaries with a partial reduction of direct payments.³⁰⁵ In fact, reductions of maximum 20% to 25% shall be deducted from the overall amount to which the farmer would have been entitled if the positive conditionality were met (basic payment plus green payment).³⁰⁶ In practice, this means that the negative conditionality sanction may often compensate with the positive “green” top-up and lead to a zero sum outcome for the non-compliant beneficiary, hence potentially neutralising the *dissuasive function* of conditionality.

The green conditionality system is currently under full implementation and the first Commission studies are able to grasp only a very limited image regarding the functioning of the tool.³⁰⁷ What is already clear is that the tool's effectiveness shall rely decisively on its implementation in Member States, which showed a wide variety of approaches towards green payment conditionality.³⁰⁸

³⁰⁴ *Id.* For instance: to adopt crop diversification practices, permanent grassland in environmentally sensitive areas and ecological focus areas.

³⁰⁵ REGULATION (EU) NO 1306/2013, *supra* note 285 at Arts. 77(6).

³⁰⁶ *Id.* Maximum 20 % in 2017 and 25% as of 2018 from the amount to which the farmer would be entitled to.

³⁰⁷ EUROPEAN COMMISSION, STAFF WORKING DOCUMENT REVIEW OF GREENING AFTER ONE YEAR SWD(2016) 218 FINAL (2016); EUROPEAN COMMISSION, REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE IMPLEMENTATION OF THE ECOLOGICAL FOCUS AREA OBLIGATION UNDER THE GREEN DIRECT PAYMENT SCHEME {SWD(2017) 121 FINAL} (2017).

³⁰⁸ EUROPEAN COMMISSION, *supra* note 307; EUROPEAN COMMISSION, *supra* note 307.

Chapter 6

Fisheries Fund

Chapter 6 analyses the legal world of Fisheries Fund spending conditionality from a historical perspective. The Fisheries Fund (the European Maritime and Fisheries Fund (EMFF) in 2014-2020) is the primary financial instrument supporting the objectives of the EU Common Fisheries Policy (CFP). The CFP aims to preserve the subsistence of fish in European waters, mainly by imposing rules on fishing quotas, reduction of fishing fleet capacity and on environmentally and socially responsible exploitation of fishing stocks. Because fish travel freely throughout international and EU waters, the policy is exclusively under the competence of the EU, as the best placed actor to effectively respond to the increasing over-fishing crisis in Europe.

This Chapter shows that even if the Fisheries Fund has the most limited share of the EU budget (1%, see figure 5 above), it has been intensely oriented towards conditionality pre-2014. The Chapter also finds that after the start of the 2014-2020 financial period, the number of conditionalities attached to the Fisheries Fund continued to increase, thus validating the claim of the rise of spending conditionality put forward in the present thesis.

The pre-2014 evolution of conditionality started in the mid-2000s and was primarily informed by the EU's international commitment to fight unsustainable exploitation of fishing resources and stop the dramatic decline in European fishing stocks. The

subsequent extremely concerning findings of the Court of Auditors concerning the limited progress of the CFP in safeguarding the future of fish in European waters exponentially intensified the traction for subsequent reforms of the policy to be accompanied by more spending conditionality (6.1). In fact, this Chapter shows that the EU's response to the weak performance of the policy took the form of a constantly reformed and extended package of rules and sanctions, complemented with spending conditionality, which was further reformed in 2014-2020 (6.2).

A valuable lesson drawn from the practice of the Fisheries Fund conditionality is that conditionality has important inherent limitations. In cases of serious policy failure conditionalities alone, no matter how numerous, extensive or tough - may simply not be enough to combat the serious shortcomings of the policy. In the particular case of the CFP, spending conditionality was not able to remedy for the significant conceptual, strategic, enforcement and commitment limitations of the policy (such as poorly set incentives, weak enforcement or control capacity and lack of political commitment at the EU or national level). As a consequence, even if conditionalities were frequently reformed to reinforce the changing CFP rules, these had limited added value to the policy goal of preserving the EU's fishing stocks, due to internal shortcomings of the CFP rules themselves. Moreover, the EU's continuous reform of conditionalities did not necessarily favour the coherent articulation of the tool. Currently, conditionalities are dispersed, tangled and overlapping throughout various regulatory frameworks, characterised by an extremely high degree of complexity and a lack of clarity.

6.1 Pre-2014 spending conditionality and lessons learned

The Fisheries Fund conditionality emerged in the context of the 2001 international efforts, led by the EU, to reinforce measures to preserve the world's fishing resources.³⁰⁹ Responding to the international agenda, in 2003 the EU endorsed a major CFP reform, meant to preserve and ensure the sustainable exploitation of fishing resources in the EU.³¹⁰

³⁰⁹ UN Food and Agriculture Organisation, INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING (IPOA) (2001).

³¹⁰ European Commission, COMMUNICATION FROM THE COMMISSION COMMUNITY ACTION PLAN FOR THE ERADICATION OF ILLEGAL, UNREPORTED AND UNREGULATED FISHING COM(2002) 180 FINAL (2002);

The CFP reform package adopted in 2003 included the first Fisheries Fund spending conditionality.³¹¹ The latter was addressed to Member States and required all EU structural assistance in fisheries to respect of the main CFP rules, such as the adjustment of fishing fleet capacity, fleet entry and exit management, establishment and management of fishing registers, timely submission of information necessary for drawing the CFP Multiannual Guidance Programmes on fisheries at the EU level.³¹²

Despite the generous 2003 reform package, the record of CFP proved disappointing. In 2007, the Court of Auditors presented a highly critical report of the national CFP inspection, control and sanctioning systems, concluding with the dramatic prediction that:

*"[i]f this situation continues, it will bring grave consequences not only for the natural resource, but also for the future of the fishing industry and the areas associated with it."*³¹³

In 2009, the Commission acknowledged that the "CFP has not worked well enough" and proposed new measures to combat the frustrating realities of Europe's fisheries.³¹⁴ In particular, the Commission adopted additional measures to fight the persistent fishing fleet overcapacity, inconsistent policy objectives, short-term focus of policy actions, and importantly, the "lack of political will to ensure compliance and poor compliance by the industry".³¹⁵

EU Council, 2476TH COUNCIL MEETING - AGRICULTURE AND FISHERIES -15636/02 (PRESSE 399) (2002); European Commission, *Reform of fisheries policy: EUR32 million earmarked for reducing the fishing fleet in the 2003 budget IP/03/283*, 2003.

³¹¹ COUNCIL REGULATION (EC) NO 2371/2002 OF 20 DECEMBER 2002 ON THE CONSERVATION AND SUSTAINABLE EXPLOITATION OF FISHERIES RESOURCES UNDER THE COMMON FISHERIES POLICY OJ L 358, 31.12.2002, Art. 16.

³¹² COUNCIL REGULATION (EC) NO 2371/2002, *supra* note 311.

³¹³ COURT OF AUDITORS, SPECIAL REPORT NO 7/2007 ON THE CONTROL, INSPECTION AND SANCTION SYSTEMS RELATING TO THE RULES ON CONSERVATION OF COMMUNITY FISHERIES RESOURCES TOGETHER WITH THE COMMISSION'S REPLIES.

³¹⁴ European Commission, GREEN PAPER REFORM OF THE COMMON FISHERIES POLICY COM(2009)163 FINAL 4 (2009).

³¹⁵ *Id.* at 13.

The 2009 reform that is currently in force brings a second wave of spending conditionality to Fisheries Funds, addressed both to Member States and to private operators.

On the one hand, the 2009 CFP control and inspection regulation adds an elaborate conditionality allowing for suspension of all or part of CFP financial support in case of Member States' non-compliance with all CFP rules, where there is a proven prejudice to the effectiveness of the measure financed, the action is attributable directly to a Member State, there is a serious threat to aquatic resources or the operation of the control and inspection systems, and the Member States has previously failed to take corrective measures.³¹⁶

On the other hand, as of 2010 additional spending conditionality arrangements are applicable to private operators, making access to Fisheries spending conditional upon a clean infringement record of CFP rules.³¹⁷ In practice, fishermen involved in illegal, unreported or unregulated fishing (IUU) are prohibited from accessing EU fisheries funding based on a points system that traces the severity of administrative and/or criminal sanctions imposed at the level of each Member State.³¹⁸

The Court of Auditors concluded in 2011 that the 2009 changes again proved insufficient.³¹⁹ Strikingly, the Court found that more than one decade of EU spending not only failed to decrease the EU's fishing overcapacity; it might have even contributed to its increase and to a constant decrease in available fishing resources.³²⁰ Furthermore, the Court noted the delayed implementation of national fishing capacity

³¹⁶ COUNCIL REGULATION (EC) NO 1224/2009 OF 20 NOVEMBER 2009 ESTABLISHING A COMMUNITY CONTROL SYSTEM FOR ENSURING COMPLIANCE WITH THE RULES OF THE COMMON FISHERIES POLICY, 343 OJ L Art. 103 (2009).

³¹⁷ COUNCIL REGULATION (EC) NO 1005/2008 OF 29 SEPTEMBER 2008 ESTABLISHING A COMMUNITY SYSTEM TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING, 286 OJ L Art. 40 (3) (2008).

³¹⁸ COUNCIL REGULATION (EC) NO 1005/2008, *supra* note 317.

³¹⁹ EUROPEAN 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).

³²⁰ *Id.* [19, 74: "Overcapacity of the fishing fleet continues to be one of the main reasons for the failure of the CFP in assuring a sustainable fishing activity. Although the reduction of fishing overcapacity has been a recurrent theme in previous reforms of the CFP, current measures have failed. This indicates that either a new approach to tackling the problem needs to be adopted, and/or existing measures have to be better enforced."]

adjustment plans,³²¹ inadequate reporting³²² weak performance indicators and control systems,³²³ and incorrect fishing registry data.³²⁴

Against this background, a massive CFP reform was introduced in 2013, accompanied by an impressive system of conditionalities addressed to states and fishermen alike.³²⁵ The first strand of 2013 spending conditionalities addressed Member States. They may be further classified as two *sector-specific* conditionalities and one *generic*. The sector-specific conditionalities explain that Member States' failure to submit the fishing capacity adjustment report³²⁶ and failure to collect or provide fisheries data in a timely manner³²⁷ may lead to suspension or interruption of financial assistance.³²⁸ At the same time, a generic spending conditionality prescribes that all spending directed to Member States is conditional on full compliance with all CFP rules, and that in cases of non-compliance Member States risk not only a temporary suspension or interruption of payments, but also permanent corrections.³²⁹ However, a closer look at these generous conditionalities shows that these are not conditionalities *per se*, but conditional obligations announcing future conditionalities to come. In this sense, the first sector-specific conditionalities explain that their exact scope shall be defined by the 2014-2020 Fisheries Fund regulation.³³⁰ In the case of generic conditionality, the uncertainty is even greater because its legal norms effectively state that financial assistance is conditional on respect of CFP rules, subject to conditions to be defined in future and unidentified "applicable Union legal acts".³³¹

The second strand of 2013 CFP conditionality addresses private operators. It states in a similar *generic* form that all EU financial assistance is conditional both *ex ante* and *ex post* on full and complete compliance with all CFP rules.³³² Member States are

³²¹ *Id.* at 38–39.

³²² *Id.* at 35.

³²³ *Id.* at 41–42.

³²⁴ *Id.* at 48–50.

³²⁵ REGULATION (EU) NO 1380/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 DECEMBER 2013 ON THE COMMON FISHERIES POLICY, AMENDING COUNCIL REGULATIONS (EC) NO 1954/2003 AND (EC) NO 1224/2009 AND REPEALING COUNCIL REGULATIONS (EC) NO 2371/2002 AND (EC) NO 639/2004 AND COUNCIL DECISION 2004/585/EC, 354 OJ L Arts. 22-25, 41-42 (2013).

³²⁶ REGULATION (EU) NO 1380/2013, *supra* note 325. Art. 22(4)

³²⁷ *Id.* Art. 25(7).

³²⁸ *Id.* Arts. 22(4), 25(7).

³²⁹ *Id.* Art.41.

³³⁰ *Id.* Arts. 22(4), 25(7).

³³¹ *Id.* Art. 41 (1)

³³² *Id.* Art.42 (1)

primarily delegated to implement and enforce the conditionality, acting under the supervision of the Commission.³³³ Similar to generic conditionality addressed to Member States, generic conditionality addressed to operators shall apply subject to conditions to be specified in future and unidentified "applicable Union legal acts".³³⁴ In the case of Member States, it will soon be clear that the future applicable legal acts in fact refer to the 2014-2020 EMFF regulation, adopted in early 2014, and subsequent implementing acts (6.2). However, the broad legal formulation does not necessarily limit this scope to the EMFF conditionality.

In the light of the expansive history of conditionality connected to the Fisheries Fund that has been presented above, the main lesson to be drawn is that more conditionality is not necessarily a better strategy to counter persistent policy failures. In fact, the example of Fisheries Funds conditionality suggests that at times the essential problem may not lie in conditionality, but in the policy itself.³³⁵ If that is the case, spending conditionality alone may simply not be enough to secure compliance in absence of appropriate policy-wide reforms.

6.2 The 2014-2020 spending conditionality

The 2014-2020 budget reform further dramatically extends the already expansive conditionality environment of the Fisheries Fund (EMFF).

As discussed in Chapter 4, under ESI Funds rules, the Fisheries Fund is linked to 10 macroeconomic, 7 general ex ante³³⁶ and four thematic ex ante conditionalities.³³⁷ In addition, the EMFF regulation adds another *generic conditionality* addressed to Member States.³³⁸

A closer look at the EMFF regulation shows that the *four ex-ante conditionalities* and the *generic conditionality* are in fact the mysterious future "applicable Union legal acts" adverted by the 2013 reform (6.1). The four thematic ex ante conditionalities mandate

³³³ *Id.* Art.42 (2)(3)

³³⁴ *Id.* Art.42 (1)

³³⁵ Emily Self, *Who Speaks for the Fish: The Tragedy of Europe's Common Fisheries Policy Notes*, 48 VANDERBILT J. TRANSNATL. LAW [i]-608 (2015).

³³⁶ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219. Annex XI

³³⁷ REGULATION (EU) 508/2014, *supra* note 273 at 201. Annex IV

³³⁸ REGULATION (EU) NO 1380/2013, *supra* note 325. Arts. 100, 101, 105.

Member States to prove before the start of spending that they have submitted satisfactory fishing capacity reports (1) and an aquaculture plan (2); that they put in place effective administrative systems for CFP data collection (3), inspection and control (4), pursuant to the detailed criteria specified in the dedicated annex to the EMFF regulation.³³⁹ The generic conditionality endows the Commission with a sophisticated set of sanctioning tools to ensure the compliance of Member States with all CFP rules, ranging from interruption of payment deadlines for a period of up to six months to temporary suspension of payments and permanent financial corrections.³⁴⁰ Moreover, a subsequent 2015 Commission implementing act further limits situations of non-compliance to a list of approximately 30 comprehensive conditionalities that may lead to interruption or suspension of payments.³⁴¹

The above far-reaching conditionality list must be complemented with the conditionality packages addressed to Member States and private operators under the 2009 and 2013 reforms that are currently still in force and fully applicable (6.1).

Overall, the number of Fisheries Fund conditionalities is impressive; especially compared to the modest budgetary allocation of the fund (1%). From this point of view, the Fisheries Fund exhibits the highest rate of conditionality per unit of expenditure. The current conditionalities are *ex ante* and *ex post*, *input*, *negative*, *cyclical* and *unlimited*, *sector-specific* and *generic*, *fund-specific*, *implicit* and *explicit*, *enforceable*, *pursuing strong legal and policy objectives*. As to the frequency of enforcement in cases of private operators, the Court of Auditors shows that the points scheme that could lead to partial or total exclusion from EU financial assistance is inconsistently applied throughout Member States, and lacks a common registry at the EU level.³⁴² Accordingly, depending on the jurisdiction and even on the region of a jurisdiction, the conditionality may be *frequently enforced*, *rarely enforced* or *unenforced*.³⁴³ This

³³⁹ REGULATION (EU) 508/2014, *supra* note 273. Annex IV.

³⁴⁰ *Id.* Arts. 100, 101, 105.

³⁴¹ COMMISSION DELEGATED REGULATION (EU) 2015/852 OF 27 MARCH 2015 SUPPLEMENTING REGULATION (EU) NO 508/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AS REGARDS THE CASES OF NON-COMPLIANCE AND THE CASES OF SERIOUS NON-COMPLIANCE WITH THE RULES OF THE COMMON FISHERIES POLICY THAT MAY LEAD TO AN INTERRUPTION OF A PAYMENT DEADLINE OR SUSPENSION OF PAYMENTS UNDER THE EUROPEAN MARITIME AND FISHERIES FUND, 135 OJ L (2015).

³⁴² COURT OF AUDITORS, SPECIAL REPORT NO 08/2017: EU FISHERIES CONTROLS: MORE EFFORTS NEEDED 89–92 (2017).

³⁴³ COURT OF AUDITORS, *supra* note 342. [The point system was functioning well in Italy, partially applied in Spain, inconsistently applied in Scotland and not applied in France]

enforcement outcome is clearly inconsistent, and may even be suspected of breaching the principle of non-discrimination between operators belonging to the same jurisdiction.³⁴⁴ To remedy this regrettable outcome, in 2018 additional harmonising measures have been proposed by the Commission.³⁴⁵ In the case of Member States, the conditionality is *rarely enforced*.³⁴⁶

The Fisheries Fund spending conditionality pursues a strong *behavioural* and *sound expenditure* function as its dedicated aim is to remedy the CFP's serious failures, reinforce compliance and avoid a wasteful allocation of EU financial resources. However, it remains questionable to what extent these functions have been effectively reflected in practice.

³⁴⁴ THE QUEEN CASE C-428/07, *supra* note 301 at 55–58. [in the case, the Court held that a mere distinct EU law implementation of a spending scheme in a Member State does not amount to discrimination, and that the same principle applies to different EU law implementation schemes chosen by administrative units with legislative powers in a national constitutional system]

³⁴⁵ European Commission, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AS REGARDS FISHERIES CONTROL COM(2018) 368 FINAL 2018/0193 (COD) (2018).

³⁴⁶ Interviews, DG MARE, June 2016.

Home Affairs Funds

Chapter 7 resumes with the legal world of Home Affairs Funds spending conditionality. Home Affairs spending is a relatively modest item of EU expenditure, representing less than two percent of the EU budget (figure 5 above). Despite the limited budget share it supports extremely important EU policies such as police and judicial cooperation in criminal matters, crime prevention, border management and control, and asylum and immigration policies within the broader policy framework of the Area of Freedom Security and Justice (AFSJ), excepting civil matters.³⁴⁷ In 2014-2020, Home Affairs spending is concentrated around two funds: the Migration Asylum and Integration Fund (AMIF)³⁴⁸ and the Internal Security Fund (ISF), regulated under one general provisions regulation.³⁴⁹ The ISF is in turn split into two financial

³⁴⁷ EU cooperation in civil matters is supported through dedicated budgetary lines managed under direct and indirect management procedures by the Commission (DG Justice and Consumer Protection).

³⁴⁸ REGULATION (EU) No 516/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 16 APRIL 2014 ESTABLISHING THE ASYLUM, MIGRATION AND INTEGRATION FUND, AMENDING COUNCIL DECISION 2008/381/EC AND REPEALING DECISIONS No 573/2007/EC AND No 575/2007/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AND COUNCIL DECISION 2007/435/EC, 150 OJ L 201 (2014).

³⁴⁹ REGULATION (EU) No 514/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 16 APRIL 2014 LAYING DOWN GENERAL PROVISIONS ON THE ASYLUM, MIGRATION AND INTEGRATION FUND AND ON THE INSTRUMENT FOR FINANCIAL SUPPORT FOR POLICE COOPERATION, PREVENTING AND COMBATING CRIME, AND CRISIS MANAGEMENT, 150 OJ L 201 (2014).

instruments: the Instrument for police cooperation (IPC)³⁵⁰ and the Instrument for Borders and Visa (IBV).³⁵¹

Analysis of Home Affairs Funds legislative frameworks prior to 2014 shows that no explicit spending conditionality was present in the area. Nevertheless, implicit forms of conditionality were present and instructed in a generic manner for 'compliance with applicable EU law'. This implicit conditionality has been enforced to preserve the EU human rights *status quo* following serious human rights violations at EU borders. In this context, the main lesson to be drawn is that enforcement of implicit conditionality may prove particularly difficult, requiring very high political capital as well as sufficient consensus both at the EU and national level.

In 2014-2020, Home Affairs Funds were endowed with two explicit conditionalities: a sector-specific Schengen conditionality and a generic human rights conditionality (7.2). These novel conditionalities were adopted in response to the policy failures identified by the Court of Auditors regarding the consistency of spending with the Schengen *acquis* and the political pressure to hold all spending action at the EU borders accountable to a high human rights standard. Therefore, the conditionalities pursue a strong *behavioural function*, being primarily informed by the EU's interest in promoting compliance with the Union's Schengen *acquis* on the one hand; and ensuring a high level of human rights protection in home affairs matters on the other.

7.1 Pre-2014 spending conditionality and lessons learned

Examination of pre-2014 spending decisions shows no instance of explicit spending conditionality.³⁵² However, all pre-2014 instruments of Home Affairs spending

³⁵⁰ REGULATION (EU) No 513/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 16 APRIL 2014 ESTABLISHING, AS PART OF THE INTERNAL SECURITY FUND, THE INSTRUMENT FOR FINANCIAL SUPPORT FOR POLICE COOPERATION, PREVENTING AND COMBATING CRIME, AND CRISIS MANAGEMENT AND REPEALING COUNCIL DECISION 2007/125/JHA, 150 OJ L (2014).

³⁵¹ REGULATION (EU) No 515/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 16 APRIL 2014 ESTABLISHING, AS PART OF THE INTERNAL SECURITY FUND, THE INSTRUMENT FOR FINANCIAL SUPPORT FOR EXTERNAL BORDERS AND VISA AND REPEALING DECISION No 574/2007/EC, 150 OJ L (2014).

³⁵² The multiple, uncoordinated Home Affairs spending legal frameworks prior to 2014 are explained by the fragmented evolution and distinct legal bases of EU home affairs policy actions. In the 2007-2013 financial period, spending was delivered through four distinct funds and two general programmes. See, European Commission, Impact assessment accompanying the document 'Building an open and secure Europe: the home affairs budget for 2014-2020', SEC(2011) 1358 final, 15 Nov. 2011, pp. 11-12. See also for each pre-2014 fund, Council Decision of 25 June 2007 establishing the European Fund for the

included implicit conditionality clauses, enshrined as general principles of consistency and compliance with EU law, and at times fundamental rights,³⁵³ which were corroborated with general rules of EU expenditure that allow spending cut-off in case of 'irregularities', understood as breaches of applicable Union law.³⁵⁴

As explained in Part I, the presence of implicit conditionalities is very frequent in practice but their enforcement is rare because it is perceived as highly intrusive by Member States.³⁵⁵ Member States prefer a narrow interpretation of the term compliance with 'applicable Union law', limiting it to financial and accounting norms of expenditure rather than breaches of other cross-sector Union legislation (see, 4.2.1 above).³⁵⁶ The Commission generally agrees with Member States and is very careful in enforcing the tool. Moreover, even on the limited occasions when the Commission chooses to enforce the conditionality, due to its implicit nature, it is very difficult to trace the enforcement in practice. Spending cut-off is ordered by a Commission decision, adopted by the Commission collegial body, or most often by delegation to the responsible Commission departments (DGs).³⁵⁷ In both cases, the detailed motives of these decisions are not public, which makes it very hard to distinguish between instances of implicit conditionality enforcement for breaches of applicable EU law (e.g. human rights law) and enforcement based on other spending rules (e.g. weakness of

Integration of third-country nationals for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' (2007/435/EC) OJ 168/18 of 28 Jun. 2006. Decision No 573/2007/EC of the European Parliament and of the Council establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' and repealing Council Decision 2004/904/EC of 23 May 2007. Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' OJ 144/22, 6 Jun. 2006. Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows'

³⁵³ See, for instance: Decision 2007/435/EC, Art 6(3); Decision 573/2007/EC Art. 7(3). 574/2007/EC, Art.8 (3); Decision 575/2007/EC Art. 8(3). Decision 575/2007/EC Art. 2(1).

³⁵⁴ FINANCIAL REGULATION 966/2012, *supra* note 11 at 59–60.

³⁵⁵ See section 2.3.7 above. (Implicit conditionalities are not explicitly referred to as 'conditionalities' in the text of the funding regulations, however they correspond in nature and behave as true conditionalities in practice).

³⁵⁶ ANDERSEN, *supra* note 124 at 181–186.

³⁵⁷ EUROPEAN COMMISSION, 034 74/55/EEC: DECISION OF 22 JANUARY 1974 CONFERRING POWERS TO CARRY OUT MEASURES OF CONTROL IN MEMBER STATES IN RESPECT OF COMMUNITY REVENUE AND EXPENDITURE OJ L (1974), <http://data.europa.eu/eli/dec/1974/55/oj/eng> (last visited May 31, 2018); EUROPEAN COMMISSION, COMMUNICATION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE COURT OF AUDITORS PROTECTION OF THE EU BUDGET TO END 2014 COM(2015) 503 FINAL (2015).

management and control systems).³⁵⁸ From this point of view, pre-2014 Home Affairs conditionality provides a valuable example of implicit conditionality enforcement, rendered public due to the involvement of international human rights bodies and the subsequent evaluation of the Court of Auditors.

The enforcement concerned External Border Fund resources³⁵⁹ (predecessor of ISF), which were cut-off by the Commission in response to degrading conditions and human rights violations at detention centres for irregular migrants at EU borders (Lesbos island, Greece).³⁶⁰ The publicity and condemnation of human rights violations caused unacceptable reputational damage for the EU. The EU was 'urged' repeatedly by the European Committee for the Prevention of Torture (CPT), the UN High Commissioner for Refugees (UNHCR),³⁶¹ the European Court of Human Rights³⁶² and the Court of Auditors to remedy the identified shortcomings.³⁶³ The particular gravity of the situation created a shared consensus at the EU level that all means, including spending cut-off, could and should be legitimately used to urgently stop the continuing violations of EU fundamental rights law.³⁶⁴ In response, as indicated by the Court of Auditors³⁶⁵ and confirmed by the Commission during interviews,³⁶⁶ the implicit conditionality attached to the External Border Fund (now ISF) was enforced and EU money used to finance the detention centres in question were deduced.

³⁵⁸ See Chapter 1, section 1.6 on the distinction between conditions and conditionality.

³⁵⁹ Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' OJ 144/22, 6 Jun. 2006.

³⁶⁰ COURT OF AUDITORS, SPECIAL REPORT N° 15/2014: THE EXTERNAL BORDERS FUND HAS FOSTERED FINANCIAL SOLIDARITY BUT REQUIRES BETTER MEASUREMENT OF RESULTS AND NEEDS TO PROVIDE FURTHER EU ADDED VALUE.

³⁶¹ United Nations High Commissioner for Refugees, UNHCR DELEGATION VISITS DETENTION CENTRE ON GREEK ISLAND, URGES CLOSURE UNHCR, <http://www.unhcr.org/news/latest/2009/10/4ae1af146/unhcr-delegation-visits-detention-centre-greek-island-urges-closure.html> (last visited May 30, 2018).

³⁶² ECtHR, Judgement of 22.07.2010, A. A. v. Greece, Violation of Article 3 (prohibition of inhuman or degrading treatment) Violation of Article 5 §§ 1 and 4 (right to liberty and security)], ; ECtHR, A.F. v. Greece (no. 53709/11), judgment of 13 June 2013 violation of Article 3, ; ECtHR, Horshill v. Greece, Application no. 70427/11, 1 November 2013, ; ECtHR, Khlaifia and Others v. Italy (application no. 16483/12) a violation of Article 5 § 1 (right to liberty and security) a violation of Article 5 § 4 (right to a speedy decision on the lawfulness of detention), .

³⁶³ COURT OF AUDITORS, *supra* note 360 at 33.

³⁶⁴ Interviews, Commission DG HOME, June 2016.

³⁶⁵ COURT OF AUDITORS, *supra* note 360 at 33.

³⁶⁶ Interviews, DG Home Affairs (DG HOME), Brussels, June 2016.

The main lesson drawn from this experience relates to the difficulty of enforcing implicit conditionalities. In particular, it explains that the magnitude and the seriousness of infringement must be of extraordinary gravity and gain massive political support and civic mobilisation to make the Commission resolve to use the tool and order funding cut-off. This may not necessarily be the case in case of alleged violation of other EU laws and principles, where spending cut-off may give rise to important contestation and polarised opinions regarding the possibility of financial sanctions. This lesson is extremely instructive not only for Home Affairs Funds but for all items of EU budget expenditure. In principle, all EU spending may be cut-off for breach of applicable Union or domestic law. Some have argued that this could also be the case for breach of EU values such as the rule of law.³⁶⁷ This might indeed be the case. However, and as shown above, in practice enforcement of implicit conditionalities demanding generic compliance with EU law tends to be much more difficult in the absence of an explicit legal basis for spending cut-off.³⁶⁸ In addition, and as seen above, such enforcement would require massive political pressure, supported by sufficiently broad public opinion and an EU consensus to convince the Commission that it may legitimately pursue spending cut-off.

7.2 The 2014-2020 spending conditionality

The 2014-2020 reform maintains the implicit EU law conditionality discussed above³⁶⁹ and in addition introduces two explicit ones: the Schengen conditionality and the human rights conditionality. Both conditionalities have emerged in response to internal policy shortcomings, namely weak consistency between EU spending and Schengen acquis³⁷⁰ and the serious human rights violations at EU borders and in home affairs matters discussed above (7.1).

³⁶⁷ Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 3–47 (2017); Armin Von Bogdandy et al., *Reverse Solange: Protecting the essence of fundamental rights against EU Member States*, 49 COMMON MARKET LAW REVIEW 489–519 (2012).

³⁶⁸ Interviews, DG HOME, Brussels, June 2016.

³⁶⁹ REGULATION (EU) NO 514/2014, *supra* note 349 at 201. Art.4.

³⁷⁰ COURT OF AUDITORS, *supra* note 360 at 40, 62. [In the report the Court of Auditors recommends an ex-ante Schengen conditionality, already foreseen by the Commission in its ISF proposal].

The Schengen conditionality makes Member States' access to 40% of funds under the Instrument for Borders and Visas dependent on good compliance with the Union visa and border *acquis*.³⁷¹ The implementation mechanism is the most curious feature of the new Schengen conditionality, which is fulfilled through a formal certification of compliance.³⁷² In fact, when submitting the programming documents each Member State is required to fill-in a declaration of compliance, whereby it states in a general manner that it complies with the Union *acquis* on visa and borders, and with the Union common border control standards including the Schengen Catalogue for border control and the handbooks on border guards and visa.³⁷³ The spending conditionality is *ex ante, input, negative, cyclical, sector-specific, explicit, enforceable and unenforced*.

The 2014-2020 human rights conditionality is a development of prior implicit conditionalities discussed above and borrows important features from these implicit versions (7.1). It applies to all Home Affairs Funds and requires that all operations financed by the EU be implemented with full respect for human rights.³⁷⁴ The conditionality represents a clear conquest of the European Parliament during negotiations.³⁷⁵ It is *ex post, negative, multiannual, cross-sector, multi-fund, implicit, enforceable and, unenforced to date*.

³⁷¹ REGULATION (EU) NO 515/2014, *supra* note 351. 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.”

³⁷² COMMISSION IMPLEMENTING REGULATION (EU) NO 800/2014 OF 24 JULY 2014 ESTABLISHING REPORTING PROCEDURES AND OTHER PRACTICAL ARRANGEMENTS ON THE FINANCING OF OPERATING SUPPORT UNDER NATIONAL PROGRAMMES AND IN THE FRAMEWORK OF THE SPECIAL TRANSIT SCHEME PURSUANT TO REGULATION (EU) NO 515/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING, AS PART OF THE INTERNAL SECURITY FUND, THE INSTRUMENT FOR FINANCIAL SUPPORT FOR EXTERNAL BORDERS AND VISA, 219 OJ L Annex I (2014).

³⁷³ *Id.* at Annex I.

³⁷⁴ REGULATION (EU) NO 513/2014, *supra* note 350 at 3 (5); REGULATION (EU) NO 515/2014, *supra* note 351 at 3 (4); REGULATION (EU) NO 516/2014, *supra* note 348 at 3(1)-19 (2).

³⁷⁵ The Commission proposals included human rights clauses only in considerations, which were further added by the European Parliament in the text of the EU funds regulations. EUROPEAN PARLIAMENT, REPORT ON THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING THE ASYLUM AND MIGRATION FUND (COM(2011)0751 - C7-0443/2011 - 2011/0366(COD)) COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS, RAPporteur: SYLVIE GUILLAUME, A7-0022/2014 OF 13 JAN. 2014 31; EUROPEAN PARLIAMENT, REPORT ON THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING, AS PART OF THE INTERNAL SECURITY FUND, THE INSTRUMENT FOR FINANCIAL SUPPORT FOR POLICE COOPERATION, PREVENTING AND COMBATING CRIME, AND CRISIS MANAGEMENT (COM(2011)0753 - C7-0445/2011 - 2011/0368(COD)) COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS, RAPporteur: SALVATORE IACOLINO, 14 JAN. 2014 15; European Parliament, REPORT ON THE PROPOSAL FOR A REGULATION OF THE

Similar to the implicit EU law conditionality above (7.1), the conditionality is not stated in a complete manner, but must be deduced and corroborated from legal norms of stand-alone EU funds regulations. First, the Instrument for police cooperation states that all spending shall be implemented with “full respect” for human rights, human dignity, shall comply with the rights and principles of the EU Charter of Fundamental Rights (the ‘Charter’), EU data protection law and the European Convention of Human Rights (the ‘ECHR’).³⁷⁶ Second, the Instrument for Borders and Visa includes a very similar conditionality clause, adding that all actions financed under IBV are also to comply with the right to asylum, the principle on *non-refoulement* and the 1951 Geneva Convention Relating to the Status of Refugees.³⁷⁷ Third, the Asylum and Migration Fund states that Member States must ensure that all actions financed under their national programmes are in full compliance with fundamental rights and human dignity and in particular “fully respect” the rights and principles of the Charter.³⁷⁸ Finally, all the above conditionalities find their sanction component under the correction rules of the common framework regulation which state that corrections may be imposed in case of expenditure in “breach of applicable law”.³⁷⁹

EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING, AS PART OF THE INTERNAL SECURITY FUND, THE INSTRUMENT FOR FINANCIAL SUPPORT FOR EXTERNAL BORDERS AND VISA (COM(2011)0750 - C7-0441/2011 - 2011/0365(COD)), COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS RAPporteur: MARIAN-JEAN MARINESCU, 14 JAN. 2014.

³⁷⁶ REGULATION (EU) NO 513/2014, *supra* note 350 at 3(5).

³⁷⁷ REGULATION (EU) NO 515/2014, *supra* note 351 at Art. 3(4).

³⁷⁸ REGULATION (EU) NO 516/2014, *supra* note 348 at Art. 19(2).

³⁷⁹ REGULATION (EU) NO 514/2014, *supra* note 349 at Art. 47(1)-(2).

Concluding remarks

In Part II, I have presented a comprehensive study of the legal world of spending conditionality. I have empirically documented the overall aggregate evidence of a rise in spending conditionality in the EU during the 2014-2020 financial period. I have also argued that the legal evolution of EU spending conditionality in 2014-2020 must primarily be seen as an endogenous phenomenon, informed by conditionality seeds dispersed throughout all EU funds envelopes and internal policy challenges in each area of EU spending prior to 2014. The global financial crisis and its dramatic unfolding across the EU has significantly increased the traction of more conditionality in the EU. It has also influenced the course of legislative negotiations, and in particular the nature, type and legal design of two major conditionality packages attached to Structural Funds in 2014-2020: the macroeconomic conditionality and the ex ante conditionality, which are characterised by a particularly close link to the EU's economic governance toolkit.

Four main lessons must be drawn from the operation of EU spending conditionality prior to 2014. Firstly, Chapter 4 has shown that inconsistent enforcement of conditionality that singles out one Member State may raise important contestation in practice. At the same time, an active enforcement of conditionality may determine Member States to repeal or amend the tool during the next financial period. Secondly, Chapter 5 demonstrated that conditionality tends to be frequently enforced when addressed to private recipients of funds, unlike the case of Member States where conditionality is rarely enforced or unenforced. Thirdly, Chapter 6 found that spending conditionalities have important inherent limitations and that conditionalities are not likely to perform in cases of dramatic policy failure. Finally,

Chapter 7 has shown that implicit conditionalities may require an increased threshold for enforcement, justified by a serious breach of EU laws and supported by a sufficiently shared consensus regarding enforcement. Further interesting details on enforcement difficulties experienced by the two main conditionality packages introduced by the 2014-2020 reform (macroeconomic conditionality and ex ante conditionality) shall be presented in Part IV below.

Part II has also empirically demonstrated that as of the 2014-2020 financial period, spending conditionality has emerged as a significantly reinforced EU legal instrument and governance tool, transcending all EU budget envelopes. As compared to prior financial periods, conditionality has seen a dramatic rise in numbers and types, in sophistication and complexity of procedural frameworks, in thematic scope and detail of the prescribed conduct, in its financial link to the EU budget and its significantly strengthened link to a wide-array of EU legislative or policy actions, recommendations and priorities.

Crucially, Part II has clearly shown that in all cases, spending conditionality is a binding and enforceable EU legal norm addressed to EU Member States and EU citizens receiving EU financial resources. EU spending conditionality pursues sound expenditure and, most importantly, behavioural functions by aiming to incentivise compliance and deter instances of non-compliance in a wide-array of EU policies that in important instances may touch on traditional state functions. This peculiar use of conditionality for behavioural ends leads to important legal effects in practice, capable of extinguishing, creating or otherwise altering rights and obligations with potentially important implications for a number of legal disciplines.

From this point of view, the increased influx and intensified use of spending conditionality in EU internal relations may raise significant constitutional law questions, worth examining in detail. To this end, in Part III below I will reflect on the constitutional significance of the rise of EU spending conditionality in the EU internal legal order.

PART III

The Constitutional World

Introduction

In the previous Part, I have shown that the rise of spending conditionality in the EU has been a phenomenon of impressive legal proportions. I have also suggested that the increased presence of spending conditionality in EU internal affairs may have strong implications for the ways in which EU legal scholars and practitioners traditionally conceive of the EU's modes of governance. In this sense, I have shown that the use of conditionality attached to the EU budget may usefully assist the EU in influencing, directing, altering, and even coercing the behaviour of Member States and individuals towards desired EU governance objectives. From this point of view, I have shown that the law of spending conditionality may be, and often is, strategically designed to advance macroeconomic, good governance, structural, legal or policy objectives directed from the EU towards the national level. In practice, the result of this novel mode of governance by conditionality may materialise in the *regulation* of state or individual conduct, or *enforcement* of already existing EU regulation or policy prescriptions on the ground. Crucially, all this regulatory or enforcement action finds its way to the national level exclusively through the EU budget, as opposed to traditional EU legislative and enforcement processes enshrined in the treaties.

As explained in Chapter 3 above, the influx of spending conditionality in the 2014-2020 period must be understood as essentially a creation of economic thinking, technocratic imagination and political bargaining. Legal and constitutional thinking was virtually absent during the course of negotiations (see, Chapter 3). This led to an outcome where EU (constitutional) law was not the foundation, but the instrument that brought the economic model of conditionality into being.

In response, Part III turns to the *constitutional world* of spending conditionality.

It argues that spending conditionality may have an important constitutional significance when used in purely internal situations that must be duly acknowledged and accounted for. Currently, EU spending conditionality is fully binding and enforceable EU law and forms an integral part of the EU legal order. This means that it may be legitimately construed only within the framework of EU constitutional law and the fundamental principles underpinning it. Unlike the use of conditionality in external relations,³⁸⁰ when used inside the EU legal system spending conditionality gains a firm and special constitutional significance, bearing upon the relationship between the EU, Member States and most importantly EU citizens. Despite its potentially important constitutional remit, the EU constitutional literature provides little guidance as to how one may understand spending conditionality from a constitutional law perspective. The present Part aims to undertake this challenging task, occasionally drawing inspiration from the rich constitutional doctrine of spending conditionality developed in other established federations, notably that of the United States and Canada.³⁸¹ However, it does this without proceeding to a detailed comparative law analysis.³⁸²

Part III is structured in two Chapters.

Chapter 8 lays out the constitutional foundations that underpin the legitimate use of EU spending conditionality as a tool of EU governance. It argues that spending conditionality may be constitutionally grounded on the EU's constitutional interest in using European public funds to reinforce European constitutional ends (8.1), on the provision of an effective government at the EU and at the national level (8.2), on theories of compliance and regime effectiveness (8.3), and on theories of necessity and implied powers (8.4). It also shows that spending conditionality may be seen as constitutionally legitimate when used to promote and prevent a potential breach of

³⁸⁰ See, for the argument that the EU is guided in external action by the same set of constitutional principles, in particular by its human rights obligations: Vivian Kube, *The EU's human rights obligations towards the wider world and the international investment regime: making the promise enforceable*, 2018, <http://cadmus.eui.eu//handle/1814/51325> (last visited May 31, 2018).

³⁸¹ WATTS, *supra* note 30; JAY DILGER, *supra* note 30; RICHER, *supra* note 30.

³⁸² Viță, *supra* note 74.

EU values (8.5), and in particular, to promote and protect the effective enjoyment of EU fundamental rights (8.6).

Chapter 9 focuses on the constitutional limits of spending conditionality. It argues that when used in internal EU governance situations, spending conditionality may be legitimately constrained by the constitutional principle of conferral (9.1), by the constitutional aspects of enforcement of certain EU norms (9.2) and by the principle of equality between Member States (9.3). It also analyses the situations in which spending conditionality may be constrained by the principle of democratic accountability (9.4), and by its potential impact on the protection and distribution of individual human rights (9.5). Ultimately, the peculiarity of judicial review of EU measures taken by conditionality is discussed (9.6).

In Part III, I do not claim, nor do I investigate whether the use of each particular type of spending conditionality in the 2014-2020 or prior financial frameworks is constitutionally legitimate or constitutionally suspect. This omission is deliberate and is informed by the incredible diversity, specific legal dynamics, frequent legislative mutation, variable normativity and enforceability of each conditionality and of conditionality criteria as applied to the specific constitutional system of each Member State. This type of analysis requires separate careful consideration that falls beyond the scope of this Part. In addition, this omission is informed by the imminent 2019 budget reform that will dramatically change all EU spending conditionality discussed in this thesis and hence its concrete constitutional implications. Against this background, Part III lays out an initial theoretical constitutional framework intended to guide legal scholars, practitioners and policy makers throughout the multiple constitutional aspects of spending conditionality. The discussion is far from exhaustive. Rather, it proposes a provisional constitutional list of 'Pros' and 'Cons' of spending conditionality that could usefully inform academic and policy debates in the present and future EU budgetary periods.

Constitutional Foundations

The present Chapter lays out the constitutional foundations that underpin the legitimate use of EU spending conditionality. It departs from the premise that the end of any constitutional construction is to enhance the overall welfare of its constituencies. In response, it argues that spending conditionality may enhance the welfare of the EU and its citizens in respect of six main constitutional foundations.

First, spending conditionality may be constitutionally grounded on the EU's constitutional interest in using EU public funds to reinforce its own constitutional mission (8.1). Second, spending conditionality may be constitutionally grounded on its potential to foster effective government at the EU and at the national level (8.2). Third, spending conditionality may be construed as constitutionally departing from theories of compliance and regime effectiveness, essential for the very subsistence of the EU (8.3). Fourth, spending conditionality can be grounded on theories of necessity and implied powers (8.4). Fifth, spending conditionality may be seen as constitutionally legitimate when used to promote and prevent the potential breach of EU values (8.5). Lastly, spending conditionality may usefully assist the EU in attaining its goal of effective protection and enjoyment of EU fundamental rights (8.6).

I will examine each of these grounds below.

8.1 Constitutional ends

EU spending conditionality does not have an explicit constitutional consecration. Nevertheless, the mere fact that conditionality lacks a constitutional consecration does not in itself lead to the conclusion that all uses of spending conditionality are unwarranted or unconstitutional.³⁸³ On multiple occasions, the use of the EU budget as opposed to legislation is not only legitimate, but also necessary.³⁸⁴ The primary constitutional legitimation for EU spending conditionality is found in the EU treaties. Under Title II, Financial Provision, Article 311 TFEU explains that:

"The Union shall provide itself with the means necessary to attain its objectives and carry through its policies."

In light of the above, all revenues raised by the EU have a clear constitutional mission: that of advancing the Union's objectives and of assisting the Union in effectively carrying through its policies as set out at Article 3 TEU.

This means that in the light of Article 3 TEU, budgetary resources shall be used by the EU to: "promote peace, its values and the well-being of its peoples"; to "offer its citizens an area of freedom, security and justice [...]" with due respect to measures on "external border controls, asylum, immigration and the prevention and combating of crime".³⁸⁵ The EU budget shall also assist the EU to establish a single market, based on a high standard of social protection, protection of the environment, scientific and technological advancement.³⁸⁶ Moreover, the EU budget shall assist the EU to promote social justice, gender equality, solidarity with later generations, and to foster economic, social and territorial cohesion and solidarity among Member States.³⁸⁷ The EU budget shall additionally support the EU in establishing a single monetary union and to promote its values and interests in its relations with the wider world.³⁸⁸

³⁸³ Daintith, *supra* note 36 at 218; Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175-188, 175-188 (1989). Daintith asks rhetorically: "Is 'negative' dominium 'unconstitutional' *per se*?"

³⁸⁴ See, 1.7 above, on the advantages of spending conditionality as opposed to spending.

³⁸⁵ TEU, Art. 3 (1).

³⁸⁶ *Id.*, Art. 3 (3).

³⁸⁷ *Id.*

³⁸⁸ *Id.* Art. 3 (4)-(5).

In order to attain the above goals, the EU may allocate the EU budget as it deems appropriate and necessary. In allocating public funds, the EU may legitimately decide to set out appropriate conditions - including conditionality provisions - to make sure that EU resources effectively reach EU constitutional and policy ends.

This argument is even stronger when EU spending conditionality is used to ensure that EU public resources do not go against its very constitutional ends. In this respect it is worth noting that the main policy legitimization of spending conditionality in the EU has been precisely its potential in protecting the EU's financial interests and preventing financial risks posed by serious spending irregularities. This includes in particular irregularities that constitute actual or potential breaches of EU law or policy objectives.³⁸⁹

In this context, spending conditionality may well appear to be a specific legal technique that aims to enhance the goals of EU constitutional construction and effectively deliver on its founding promise. From this point of view, the silence of the treaties cannot be interpreted as prohibiting the EU from employing spending conditionality in all cases. Such a formalistic interpretation could be seen as too rigid and narrowly focused, failing to grasp the overall systemic contribution of spending conditionality to the constitutional polity and the well-being of European societies as a whole. This line of reasoning is consequential and is premised on a broader formulation of the EU's constitutional mandate to allow for accommodation of its higher constitutional ends.³⁹⁰

Indeed as shall be argued below, the exercise of EU budgetary powers must also be consistent with the constitutional guarantees and specific allocation of competences under the treaties (see, 9.1 below). However, this does not contradict the above argument, pursuant to which spending conditionality may be constitutionally construed as an EU governance instrument assisting the EU in attaining and protecting its founding mission and constitutional ends.

³⁸⁹ See, Chapter 2, on the sound expenditure function of conditionality. See also Chapter 4 on EU law and policy conditionality.

³⁹⁰ See, on the idea of formal legality and constitutional transformations in: BRUCE A. ACKERMAN, *WE THE PEOPLE* (1991); BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION* (2014).

8.2 Effective government

Effectiveness is a general principle of EU law. Over time it has found various forms of consecration in treaties and judicial decisions, currently being enshrined in the treaties as a general principle of all EU policy action,³⁹¹ as a general principle guiding Member States in providing effective legal protection and remedies in fields covered by EU law,³⁹² and as a general principle guiding the effective implementation of EU law by the Member States.³⁹³

As explained in Chapter 3 above, effectiveness was the primary policy justification for an increased influx of spending conditionality in the EU budgetary framework. However, EU policy makers prioritized a narrowly-focused vision of effectiveness, whereby spending conditionality was intimately linked to effective EU spending execution and effective achievement of EU spending results.

In this section, I argue that spending conditionality may be constitutionally construed to depart from a broader constitutional ground of effectiveness; namely the EU's constitutional interest in pursuing effective government at all levels. From this point of view, I argue that spending conditionality may be seen as a constitutionally legitimate tool when used to promote an effective and workable government both at the EU and at the national level.

8.2.1 Effective EU government

Spending conditionality is a highly flexible EU governance tool that may be successfully used by the EU to legitimately pursue specific policies in a timely manner and at significantly lower political cost, thus contributing to the effectiveness of EU government.³⁹⁴ As explained above, the law of spending conditionality is subject to a very different constitutional path and decision-making guarantees than other EU legislative action. It is part of EU budgetary law that is generally characterized by

³⁹¹ TEU, Art. 13.

³⁹² TEU, Art.19.

³⁹³ TFEU, Art. 197 (1).

³⁹⁴ See, on the similar discussion in the context of the UK constitutional system: Daintith, *supra* note 36 at 201–203.

broader discretion and increased delegation of power to the executives, less complex decision-making processes³⁹⁵ and a different set of ex post accountability means.

From this point of view, spending conditionality may be successfully used by the EU to experiment and test innovative policy solutions before assuming the burden of passing binding EU-wide legislation. Spending conditionality may also prove extremely useful in providing flexible and tailored policy solutions on a case by case basis, thus encouraging various bottom-up policy solutions. Moreover, spending conditionality may be useful in assisting the EU to respond swiftly to a pressing policy need by reallocation of public funds rather than through the significantly more lengthy and complex legislative process.³⁹⁶ Most importantly, spending conditionality may assist the EU in achieving policy goals that may simply not be appropriately achieved through regulation and legislation. Consider for instance, the possibility of an EU law that mandates all EU enterprises switch to energy efficient heat installations as of 2020 subject to administrative fines, as opposed to an EU funding scheme of enterprises subject to the same conditionality. There is no doubt that the latter is more likely to effectively achieve its policy result, is less intrusive and is likely to stir less opposition from EU citizens.

In all the examples above, the overly rigid reliance on hard legislation may unnecessarily burden, slow down and constrain the EU level of government at the expense of its effectiveness. Note however, that the above efficiency argument relies on the premise of specific, well defined and legitimate use of spending conditionality, as opposed to a generalised practice of governance by conditionality that is used to systematically circumvent EU treaty guarantees (see 9.2 below).

8.2.2 Effective national government

EU spending conditionality may also be constitutionally legitimated by departing from the goal of effective government at the national level. The EU system of government is built around a quasi-federal polity model whereby public functions are exercised jointly and severally on multiple levels of governance. However, as opposed to other federal systems, the EU system of governance is not premised on a strict

³⁹⁵ See, Chapter 1 above.

³⁹⁶ See, the example of the reprogramming stand of macroeconomic conditionality, Chapter 4 above.

separation of tasks between the Union and its states, but rather promotes a cooperative model of governance whereby the EU relies heavily on its Member States to carry through its constitutional mandate and effectively achieve its policy ends. In this sense, it is worthwhile noting that the EU does not have federal administrations or federal courts at the state level. Therefore, in the vast majority of its policies, under its exclusive competence or not, the EU is dramatically dependent on the national administrative and institutional capacity of its Member States.

In this sense, the EU treaties explicitly state at Article 197 (1) TFEU that:

"Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest."

From this point of view, spending conditionality is often strategically designed to encourage and secure effective government at the Member State level, avoid government failures and deter government capture,³⁹⁷ which is an essential condition for the effective functioning of the EU as a whole. As seen above, spending conditionalities often aim to promote effective, transparent and high quality public services that function pursuant to long term strategic frameworks and innovative policy models, to be implemented by independent institutions that respond to a high standard of capacity and integrity (Part II).

As stressed by Bogdandy and Ioannidis, the maintenance of effective government, delivered through stable institutions at the Member States level is an essential pre-condition and fundamental assumption upon which the whole EU construction is built.³⁹⁸ This assumption goes back to the Copenhagen conditionality that makes membership conditional on strong and stable institutions.³⁹⁹ Hence the institutional capacity of Member States constitutes the essential core of EU membership and the founding cornerstone of effective EU government. Post-accession maintenance and

³⁹⁷ See, Chapter 4 above. In particular, ex ante conditionality.

³⁹⁸ Armin von Bogdandy & Michael Ioannidis, *Systemic deficiency in the rule of law: What it is, what has been done, what can be done*, 51 COMMON MARKET LAW REVIEW 59–96 (2014).

³⁹⁹ European Council, CONCLUSIONS OF THE PRESIDENCY COPENHAGEN SN 180/1/93 13 (1993). "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy".

development of strong, stable and well-functioning institutional structures at the Member States level, ready to effectively and loyally uphold EU commitments is as essential as before accession. Spending conditionality may therefore legitimately be used to pursue this constitutional end.

8.3 Compliance and regime effectiveness

The constitutional foundation of spending conditionality is based on its capacity to foster compliance with EU law and policy at the Member State level.

Compliance is an essential element for the effectiveness, and ultimately the subsistence of the EU system.⁴⁰⁰ According to the Court of Justice, Member States' failure to comply with EU law amounts to a "failure in the duty of solidarity" and strikes at the very heart of the EU legal order.⁴⁰¹ In the same dictum, the Court affirmed that "the effective application of EU law [is] an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded."⁴⁰²

In the absence of Member States' compliance, the EU is seriously challenged in pursuing its objectives and is consequently deprived of an important source of legitimacy from the perspective of its constituencies. If we accept that compliance supports effectiveness, effectiveness supports legitimacy and legitimacy supports the regime subsistence, ensuring full compliance with EU laws and policies is an essential pre-condition for its very subsistence.

In this context, against a recent background in which it is increasingly difficult to secure full and effective Member State compliance with its laws and policy objectives, spending conditionality may be of particularly high constitutional relevance for the EU.⁴⁰³

⁴⁰⁰ Jonas Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, 56 INTERNATIONAL ORGANIZATION 609–643 (2002); Jon Hovi, Detlef F. Sprinz & Arild Underdal, *The Oslo-Potsdam Solution to Measuring Regime Effectiveness: Critique, Response, and the Road Ahead*, 3 GLOBAL ENVIRONMENTAL POLITICS 74–96 (2003); ABRAM CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1st Harvard University Press pbk. ed. 1998).

⁴⁰¹ CJEU, *Commission v Italy* Judgment of the Court of 7 February 1973 Case 39/72, , 25.

⁴⁰² CJEU, Case C-441/17 R *Commission v Poland*, Order of 20 November 2017, ECLI:EU:C:2017:877, , 102.

⁴⁰³ Bieber and Maiani, *supra* note 105.

The literature on EU compliance identifies two core sources of weak Member State compliance: insufficient incentives (1) and capacity limitations (2).⁴⁰⁴ These may also be portrayed as the case of unwilling (1) and unable (2) Member States. In the first case, 'unwilling' Member States choose not to comply when the incentives for compliance are considerably lower than the incentives for non-compliance.⁴⁰⁵ The second case relates to 'unable' Member States, whose capacity limitations are so high that they impede their ability to comply with EU rules.⁴⁰⁶

Spending conditionality has the potential to address both the 'unwilling' and the 'unable' Member States by increasing the benefits of compliance for the first and remedying the capacity deficits of the former. The power to withdraw EU Funds adds an important incentive to carrying out the reforms and credibly increases Member States' adversity to non-compliance.

In addition to State compliance, spending conditionality has the potential to effectively advance individual, decentralised compliance with EU laws and policy objectives. As explained above, in EU internal affairs, both EU citizens and Member States may be subject to conditionality and effectively required to comply with a given conduct before or after the disbursement of EU funds.⁴⁰⁷

On this point, one must mention that the history of EU integration has witnessed multiple transformative moments which secured increased compliance with EU rules, ultimately of existential importance for the EU. These moments have been led by the EU Courts and were primarily focused on enhancing the EU law compliance and enforcement toolkit.⁴⁰⁸ The doctrines of direct effect, primacy or state liability were all developed by the EU judiciary, the least accountable branch of the EU government, without a direct mandate from Member States.⁴⁰⁹ In this context, spending

⁴⁰⁴ Tallberg, *supra* note 400; MARISE CREMONA, COMPLIANCE AND THE ENFORCEMENT OF EU LAW (2012); CHAYES, *supra* note 400; Abram Chayes & Antonia Handler Chayes, *Compliance Without Enforcement: State Behavior Under Regulatory Treaties*, 7 NEGOTIATION JOURNAL 311–330 (1991).

⁴⁰⁵ Tallberg, *supra* note 400 at 611.

⁴⁰⁶ *Id.* at 623–632.

⁴⁰⁷ See, Chapter 5, Agricultural Funds.

⁴⁰⁸ The CJEU doctrines of primacy, direct effect, loyal cooperation and state liability are but a few examples that secured historically compliance with EU law. See, inter alia: Jonas Tallberg, *Supranational influence in EU enforcement: the ECJ and the principle of state liability*, 7 JOURNAL OF EUROPEAN PUBLIC POLICY 104–121 (2000); J. H. H. Weiler, *The Transformation of Europe*, 100 THE YALE LAW JOURNAL 2403–2483 (1991).

⁴⁰⁹ Tallberg, *supra* note 408; Weiler, *supra* note 408.

conditionality may be seen an additional compliance tool in the EU toolkit, designed to support the functioning of the EU as a whole. The tool is in no way different and is hardly less legitimate than the doctrine of direct effect in the mid-1960s. Moreover, this time the tool has been adopted by the EU legislators, who currently enjoy the highest level of direct democratic accountability at the EU level.⁴¹⁰

8.4 Necessity and implied powers

The imperative of constitutional necessity may be a strong foundation for action through spending conditionality at the EU level. In the famous dictum of Justice Cardozo of the US Supreme Court, constitutional necessity is premised on 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."⁴¹¹

Necessity lies at core of EU implied powers doctrine and provides a constitutional basis for actions that are essentially or reasonably required to ensure that the EU's enumerated powers are fully effective.⁴¹²

Particularly in times of emergency, but also more generally, coordinated Member State action at the EU level becomes a matter of urgent necessity rather than an optional choice.⁴¹³ In this context pursuance of European goals often becomes impossible or redundant unless action is undertaken at the EU level. In these cases, conditionality may be usefully tailored to complement otherwise insufficient EU action. It may be particularly suitable to respond when EU policies are confronted with collective action problems that require strong leadership at the EU level for meaningful delivery of results in areas such as: migration and asylum, security, border control, environmental protection, social inclusion, poverty reduction, infrastructure building, development, or economic and monetary policy. In all these areas the necessity rationale urges centralized EU action, as opposed to uncoordinated state-centred solutions. Individual

⁴¹⁰ Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INTERNATIONAL ORGANIZATION 1-31 (2009).

⁴¹¹ US Supreme Court, *BALDWIN V. G.A.F. SEELIG, INC.* 294 U.S. 511 (1935) JUSTIA LAW 300-301.

⁴¹² P. P. CRAIG & G. DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 75-77 (5th ed. ed. 2011); Weiler, *supra* note 408 at 2415-2417.

⁴¹³ European Commission, *WHITE PAPER ON THE FUTURE OF EUROPE. REFLECTIONS AND SCENARIOS FOR THE EU 27 BY 2025* (2017).

state actions risk either fostering a race to the bottom between Member States or encouraging a free rider problem at the EU level.

8.5 Fundamental rights promotion

Spending conditionality may also find its constitutional foundation in its important potential of advancing the protection and promotion of EU fundamental rights. First, spending conditionality has the potential to reinforce the substance of rights where other legal or policy measures would simply be insufficient or ill-suited. Our earlier example of inclusion of persons with disabilities is an excellent illustration of this (see Part I, *supra*). In this case, to advance social inclusion of persons with disabilities, a infrastructure spending scheme with a conditionality attached may have significant advantages over an EU law mandating the same conduct. Second, spending conditionality has the potential to enforce some fundamental rights that do not enjoy the same 'hard' stance in EU legislation and as a consequence do not enjoy the same justiciability in courts. Prime examples of such rights are the European social rights and the best interests of the child and other Charter principles, which pursuant to Article 52 paragraph 5 of the Charter need an additional implementing legislative and executive act to become judicially cognisable. Third, spending conditionality has the potential to raise public and institutional awareness and hence promote the substance of EU fundamental rights and principles such as: sustainable development, the right to free movement or non-discrimination. Lastly and most importantly, spending conditionality may be tailored to prevent, dissuade or stop a fundamental rights violation, by ordering spending cut-off to Member States and individuals that are engaged in practices that go against the EU fundamental rights *acquis*.⁴¹⁴

In Chapter 9, we shall complement this discussion with a correlative analysis on the potential impact of spending conditionality on EU fundamental rights protection and distribution (9.6).

⁴¹⁴ See Chapter 7 above, on the example of human right conditionality in home affairs fund

8.6 Protection of EU values

The EU's limited capacity to enforce its founding values has enjoyed wide scholarly and institutional attention during recent years.⁴¹⁵ The core focus of these discussions fell on Article 2 TEU which states that:

"[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."

Faced with a deeply politicised enforcement procedure of Article 7 TFEU and the persistent failure of several Member States to uphold core EU values and principles, the EU's response has by and large been insufficient, largely limited to soft law policy frameworks, communications or monitoring mechanisms.⁴¹⁶

In this context, spending conditionality may be seen as a tool capable of correcting Member States' systemic deviations by providing a credible enforcement mechanism for the binding yet barely enforceable values enshrined in Article 2 TEU. Although the current EU Funds legal framework does not allow for direct suspension of funds based on infringement of Article 2 TEU values, prior suspensions have raised at least some reasonable doubts about this legal state of art (Chapter 4, above).⁴¹⁷

Adapting Bodgandy et al.'s Reverse Solange theory⁴¹⁸ to the case of spending conditionality, it may be argued that the complementary use of spending conditionality to reinforce EU values at the national level may enjoy important EU constitutional traction. The constitutional case of a rule of law conditionality can be argued to depart from the need to preserve the EU Member States' Copenhagen *status-*

⁴¹⁵ European Commission, *A NEW EU FRAMEWORK TO STRENGTHEN THE RULE OF LAW* (2014); Bogdandy et al., *supra* note 367; Weiler, *supra* note 185; Carlos Closa, Dimitry Kochenov & J. H. H. Weiler, *Reinforcing Rule of Law Oversight in the European Union*, Global Governance Programme-87 ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES; Kim Lane Scheppele, *WHAT CAN THE EUROPEAN COMMISSION DO WHEN MEMBER STATES VIOLATE BASIC PRINCIPLES OF THE EUROPEAN UNION? THE CASE FOR SYSTEMIC INFRINGEMENT ACTIONS*; Werner Schroeder, *STRENGTHENING THE RULE OF LAW IN EUROPE: FROM A COMMON CONCEPT TO MECHANISMS OF IMPLEMENTATION* (2016).

⁴¹⁶ European Commission, *supra* note 415.

⁴¹⁷ See Chapter 4, on the discussion of macroeconomic conditionality enforcement against Hungary in 2012.

⁴¹⁸ Bogdandy et al., *supra* note 367.

quo, in cases where systemic violations of EU founding values reverse the presumption of compliance with EU values under the treaties.⁴¹⁹

In cases of gross violation of EU values, one may even argue that the higher level of government does not only have a right, but also an obligation to restore the essence of constitutional rights threatened at the State level by all available means, including by spending conditionality.⁴²⁰ Pursuant to this argument, intervention by spending conditionality may at times not only appear constitutionally appropriate but constitutionally necessary to protect the most intimate commitment of the EU Member States towards their citizens under the EU treaties.

As we shall argue below, in the current state of the Union, such a policy is likely to raise important opposition and legitimate constitutional concerns. The example of other jurisdictions shows that spending conditionality may be an effective device to address issues of constitutional rights protection in a very specific area of public policy where other tools proved insufficient.⁴²¹ However, the use of the EU budget to reinforce systemic and persistent violations of EU values may seem both insufficient and inappropriate to address the heart of the issue (9.3).

⁴¹⁹ *Id.*

⁴²⁰ ACKERMAN, *supra* note 390. (on the US civil rights struggles and fight against racial segregation in schools and public spaces of the 1960s and 1970s)

⁴²¹ See, *inter alia*, on the case of US school and labour market desegregation: King, *supra* note 93; US CIVIL RIGHTS COMMISSION, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES, 1965-66.

Chapter 9

Constitutional Limits

The previous Chapter argued that spending conditionality may be constitutionally construed to depart from six main constitutional foundations. Chapter 9 puts forward six correlative constitutional limits of spending conditionality. The analysis departs from the key assumption that spending conditionality may credibly assist the EU to pursue regulatory or enforcement ends, and hence to determine a change in Member States or individual conduct.

In this context, the present Chapter analyses the ways in which spending conditionality may be constitutionally constrained by the principle of conferral (9.1). It also examines certain constitutional aspects of EU law and policy enforcement through conditionality (9.2). In addition, this Chapter proposes an analysis of the potential implications of spending conditionality on the principle of equality between Member States (9.3). Equally, certain aspects of the principle of democratic accountability are discussed (9.4). Another constitutional dimension proposed for discussion is the potential impact of spending conditionality on the protection and distribution of individual human rights in the EU (9.5). Lastly, this Chapter discusses several judicial review tensions potentially raised by spending conditionality (9.6).

9.1 Regulation and the principle of conferral

The potential impact of spending conditionality on the distribution of competences in a multilevel government has attracted a great deal of scholarly debate in established federations, such as the United States and Canada.⁴²² The power of the federal government to design and deploy conditional spending was referred to in these systems as an attempt to govern through the back door of the budget as opposed to the front door of regulation,⁴²³ as a Trojan horse of federalism,⁴²⁴ and even as an unconstitutional attempt to extend federal powers.⁴²⁵ In all these discussions, the core of the matter has been the constitutional question of whether, and to what extent, the higher level of government may use its conditional spending power as opposed to its legislative powers as enumerated in the constitution.⁴²⁶ The core difference between the EU and these two federal systems is that in the latter the federal expenditure at the state and local level is much more significant than in the EU (e.g. in the US, federal spending accounts on average for 20% of the states' domestic GDP as opposed to 1% in the EU).⁴²⁷ Consequently, the constitutionalism literature in these systems is interchangeably concerned with both the coercive power of conditions of spending and the coercive power of spending conditionality (see, 1.7 above). However, beyond doubt spending conditionalities ('federal standards' in Canada and 'cross-cutting statutory and regulatory requirements' in the US) have raised the most heated constitutional debates. In the vast majority of cases, it is not spending *per se*, but the

⁴²² The constitutionality of spending conditions has been examined *in extenso* in the United States and Canada. In the US the constitutional debate goes back to the US founding fathers, Madison and Hamilton. In Madison's view the spending power was to be limited to the area of enumerated legislative powers of the federal government. On the contrary, Hamilton argued for a broader construction of the spending clause, one that would allow spending beyond the limited legislative powers. Hamilton conditioned his view on two limits: first, spending must be based on appropriations approved by Congress and second, spending must be affected to "general not local, national, not state" interests. See generally: THEODORE SKY, *TO PROVIDE FOR THE GENERAL WELFARE: A HISTORY OF THE FEDERAL SPENDING POWER* (2003); Rosenthal, *supra* note 33; TRUDEAU, *supra* note 30 at 8–15.

⁴²³ Lynn A. Baker, *Conditional Federal Spending after "Lopez,"* 95 COLUMBIA LAW REVIEW 1911–1989, 1918–1919.

⁴²⁴ McCoy and Friedman, *supra* note 71.

⁴²⁵ US Supreme Court, *NAT'L FED'N OF INDEP. BUS. V. SEBELIUS* 567 U.S. (2012) JUSTIA LAW. [holding for the first time in the US history that a conditional grant constituted an unconstitutional coercion of state governments]

⁴²⁶ See note 422, above.

⁴²⁷ WATTS, *supra* note 30.

policy and regulatory 'strings attached' to it, that raise the most interesting and challenging constitutional questions and are therefore the most contested by the lower level of governments (e.g. prohibition of smoking on campuses receiving federal funds, 21 years old drinking age in states receiving federal highway funds, political independence of local government civil servants managing federal money, performance of children in schools receiving federal funds, prohibition of racial segregation in state educational establishments financed by the federal government).⁴²⁸

I do not intend to rehearse these extremely rich debates here. Suffice it to say that the issue of the exact reach of federal spending power and conditionalities attached to it remains as debated today as it was centuries ago. In the subsequent discussion I will refer exclusively to federal constitutionalism literature of relevance to spending conditionality in the EU. In so doing, I wish instead to put forward some initial thoughts on how these extremely important constitutional questions raised in other federal systems may play out in the context of the EU.

In particular, I aim to briefly analyse the potential constitutional limits that the distribution of EU competences and the principle of conferral may pose on legislation through EU spending conditionality. From this perspective, three main possible scenarios are worth analysing: a situation where the EU has the power to act through legislation but acts through spending conditionality instead, raising the constitutional question of correct *legal basis* (9.1.1); a situation where the EU has the power to act through legislation but the type of EU competence exercised would not allow it to attain the regulatory ends conditionality would, raising the constitutional question of the scope of EU competence (9.1.2); and lastly the situation where the EU has no power to act through legislation and spending conditionality is used to this end, raising the constitutional question of the *limits of EU competence* (9.1.3). In the following, I will briefly examine each situation.

⁴²⁸ King, *supra* note 93.

9.1.1 Legal basis

The discussion on the correct legal basis stems precisely from the *potential of spending conditionality to attain regulatory ends through budgetary means*. In this sense, I have suggested above that the use of EU money backed by conditionality may be instrumental for the EU to attain regulatory ends, just like any other EU law backed by sanctions. However, the crucial distinction is that *EU money backed by conditionality, is not, and does not, behave in practice just like any other EU law backed by sanctions*.

The essential constitutional distinction in this context is that EU spending conditionality comes into being through the exercise of the EU budgetary process as opposed to other legislative processes that provide distinct constitutional guarantees under the EU treaties. The distinct constitutional guarantees are not incidental. As underlined by Daintith, this difference is premised on the distinct nature of the social interest at stake that the constitution is meant to protect: individual as opposed to collective.⁴²⁹

The constitutional guarantees in place for the valid exercise of the EU's legislative functions are to safeguard the individual interests of EU citizens and Member States against unwarranted regulation from the EU that may potentially affect their pre-existing rights and sovereign powers. This explains why, when legislating in particular areas of explicit, shared, coordinative and supporting competences, specific stakeholders must be involved;⁴³⁰ or why in certain other areas the EU Council acts by unanimity.⁴³¹

In this context, the use of spending conditionality has the potential to circumvent these specific constitutional guarantees.

Unlike the exercise of EU legislative functions, the constitutional guarantees in place for the valid exercise of EU budgetary functions seek to protect a collective - not an individual - interest, that of a sound budgetary expenditure and the proper use of European financial resources. This explains why EU budget legislation is primarily

⁴²⁹ See in the same sense: Daintith, *supra* note 36 at 201.

⁴³⁰ Such as the structured participation of social partners in the legislative process leading to the adopted of EU employment law see: TFEU, Art. 153.

⁴³¹ As for instance is the case of legislative action for the establishment of a European Public Prosecutor's Office, see: TFEU, Art. 86.

concerned with laying out annual and multiannual limits on the allocation and appropriation of EU funds, and rules to ensure that the allocated financial resources are soundly implemented - as opposed to primarily laying out substantive rights and obligations. Moreover, this explains why, in EU budgetary law matters, the European Court of Auditors - not the Court of Justice - is a central institutional actor in certifying the *legality and regularity of EU budgetary revenues and expenditure*.⁴³² The same constitutional reasoning explains why the Court of Auditors assists the EU Council and the European Parliament in the exercise their respective budgetary functions, in particular during the legislative appropriation of EU funds (adoption of the annual and multiannual budget) and in giving discharge to the Commission on the implementation of the EU budget (see, Chapter 1).⁴³³

In short, our EU constitutional construction departs from the premise that money is distinct from law, even if law is the tool for legislative allocation and appropriation of EU public wealth.

EU spending conditionality bears an important constitutional significance in this context because it blurs the line between the EU's legislative and budgetary functions and processes, presented above. Spending conditionality may allow the EU to govern through the 'back door' of spending as opposed to the 'front door' of the treaty legislative or regulatory processes. Therefore, rather than inquiring into whether the EU has competence to act on a matter, the question raised in this section addresses the legislative processes pursuant to which legislation or regulation is adopted in a particular context.

It is a well settled principle of EU law that all EU action must be based on an appropriate legal basis, the choice of which rests on 'objective factors', having regard in particular to the specific aim and content of the EU act.⁴³⁴ When the EU action pursues several aims, of which one is predominant and the others incidental, the act

⁴³² TFEU Arts. 285-287.

⁴³³ TFEU, Art. 311 "The Union shall provide itself with the means necessary to attain its objectives and carry through its policies."

⁴³⁴ CJEU, Judgment of the Court of 5 October 2000. Federal Republic of Germany v European Parliament and Council of the European Union ECLI:EU:C:2000:544, , 59.

shall be based on a single legal basis corresponding to the predominant aim.⁴³⁵ In the light of the above settled case law, an EU spending conditionality attached to an EU fund shall follow the legal basis of the EU fund at stake even if it pursued a related but distinct aim, because a spending conditionality is by definition an accessory element attached to a spending agreement (Chapter 1).

However, on a case by case basis, a different legal basis may bypass important participatory procedures meant to protect the specific interests of the main target group, may lower the level of democratic scrutiny of the adopted measures and even involve different legal instruments or voting requirements in the European Parliament and the EU Council.

Let us return to our early hypothetical example of a conditionality relating to inclusion of persons with disabilities to better illustrate this point. When linking a conditionality on social inclusion of persons with disabilities to highway spending, the EU actively engages in regulation of state and individual conduct, mandating states to take action that would potentially bring legal consequences for Member States and persons with disabilities residing alongside the highway. The choice of using spending inevitably results in a *shift in the treaty legal basis* and the correlative legislative procedure for adopting a social inclusion and equality measure at the EU level.

In this case, both EU spending and EU equality action may be adopted by ordinary legislative procedure and imply equal voting rights.⁴³⁶ However, the legal instruments available are different. EU spending takes the form of a directly applicable EU regulation, whereas an eventual social inclusion and equality action would take the form of an EU directive, requiring subsequent implementation. At the same time, the level of public scrutiny and stakeholder participation during the decision-making process may be lower when the measure is adopted as an accessory element of an EU Funds regulation as opposed to stand alone equality directives. This is not to say that EU funds legislative decision-making do not allow public participation during the negotiation of conditionalities. The legislative history on conditionalities in the area of

⁴³⁵ CJEU, *Commission v Council, 'Titanium dioxide'*, C-300/89, EU:C:1991:244; CJEU, Judgment of the Court (Grand Chamber) of 14 June 2016. *European Parliament v Council of the European Union*. Case C-263/14, ECLI:EU:C:2016:435.

⁴³⁶ TFEU, Art 19 (2) as opposed to Article 177.

equality are a prime example of mobilization and active participation of the Parliament and civil rights groups (Chapter 3).⁴³⁷ Nevertheless, one should also acknowledge that the huge pressure placed on EU legislators by the need to adopt the EU spending regulations as well as the multiple compromises at stake substantially decrease the negotiating power of stakeholders on a specific conditionality or even conditionalities. At the end of the day, every conditionality is negotiated and adopted as yet another aspect of spending, alongside dozens of other conditionalities and hundreds of conditionality criteria, thousands of other spending conditions and spending arrangements. The ultimate result of the process is all (spending and conditionality) or nothing (neither spending nor conditionality). In the outcome, this process may put important constraints on the exercise of certain constitutional guarantees, mandated by the dedicated legal basis for EU social inclusion and equality measures.

In this context, one may hardly argue that all use of spending conditionality based on a spending legal basis is unconstitutional *per se*. Such a radical solution may put an excessively rigid limit on EU legislators' discretion to design EU spending in pursuit of its constitutional ends, including social inclusion (see, 8.1 above). At the same time, the circumvention of EU constitutional guarantees may raise legitimate concerns on a case by case basis. In order to address these concerns, all conditionality policy planning must start with a careful consideration of the specific action required by conditionality and the constitutional interests involved while addressing in a coherent manner the correlative treaty guarantees that would have been applicable in the absence of EU spending. This solution would allow a fair balance between the various constitutional interests at stake.

9.1.2 The scope of EU competences

Chapter 8 has argued that the EU may legitimately use spending conditionality to pursue its treaty objectives (8.1). However, pursuant to Article 3(6) TEU, in pursuit of

⁴³⁷ Ex ante equality conditionalities have been completely set-aside during the Danish presidency negotiations and re-inserted under the Lithuanian presidency compromise on ex ante conditionalities, substantially changed compared to the initial Commission's proposal. See, Council of the European Union, 'Cohesion Policy Legislative Package. Presidency compromise on ex ante conditionalities, no 12543/2/11 REV 2, 2012, Annex IV, p. 20. As compared to Council of the European Union, 'Cohesion Policy Legislative Package. Presidency compromise on ex ante conditionalities', no 12383/13 ADD 2, 22.07.2013 and the Commission proposal: COM (2011) 615 final/2, Annex IV.

its treaty objectives, the EU must act "by appropriate means commensurate with the competences which are conferred upon it in the Treaties." Hence, all use of spending conditionality must have regard to the 'commensurate' competences of the EU in each area of action.

From this perspective, the discussion on the potential impact of spending conditionality on the scope of EU competences raises increased interest. It departs from the presumption that even where spending conditionality action falls under the scope of EU competence it may allow the EU to bypass certain limitations posed by specific types of EU competences exercised. This discussion is particularly relevant for the cases where spending conditionality pursues action falling under the scope of EU economic, employment and social coordinative competence,⁴³⁸ as well as other EU coordinative, supplementing or supporting action, such as education, health or administrative capacity,⁴³⁹ where the EU legislative powers are generally limited and EU action traditionally takes the form of 'soft' coordinating measures such as recommendations or guidelines.⁴⁴⁰

From this point of view, we must start by recalling that the EU legal order is premised on the principle of limited government. Pursuant to Article 5 TEU:

"[t]he limits of Union competences are governed by the principle of conferral. Competences not conferred upon the Union in the Treaties remain with the Member States."

According to well settled CJEU doctrine, the EU's explicit competences also include a certain set of implied competences reasonably necessary to effectively attain the first.⁴⁴¹ In addition, the explicit powers of the Union are complemented by two broad treaty clauses legitimising Union action: the 'single market' or harmonization clause (article 114 TFEU), and the flexibility clause (article 352 TFEU). The first allows EU legislative measures with the goal of attaining the objectives of the single market (single market clause) to be adopted by ordinary legislative procedure. The second allows EU legislative measures with the goal of attaining other objectives of the Union

⁴³⁸ TFEU, Art. 5.

⁴³⁹ TFEU, Art. 6.

⁴⁴⁰ See for a general discussion on EU competence: CRAIG AND DE BÚRCA, *supra* note 412 at 88-92.

⁴⁴¹ *Id.* at 75-78.

as defined by the EU treaties (excluding harmonisation) to be adopted by the EU Council with unanimity and with the consent of the Parliament (the flexibility clause).

The explicit powers conferred upon the EU differ in scope depending on the type of EU competence exercised.⁴⁴² In areas of *exclusive competence*, the EU holds plenary and exclusive power to act and legislate without interference from Member States.⁴⁴³ In areas of *shared competence*, the exercise of EU powers pre-empts subsequent Member State action if the EU powers have been exercised in line with the principles of subsidiarity and proportionality.⁴⁴⁴ Ultimately, in areas of EU *coordinative, supportive and supplementary action*, EU powers are limited in scope to acts facilitating the exercise of power by Member States, excluding harmonisation acts.⁴⁴⁵

Scholars have often questioned the usefulness of the above described competence hierarchy, especially from the point of view of its legal consequences.⁴⁴⁶ First, the EU may adopt legislative acts in all areas of competence above, and as scholars have argued, the EU judiciary has rarely limited the EU legislator's discretion based on the competence type.⁴⁴⁷ Second, the largely overlapping thematic scope of various competence types makes it very difficult to discern in practice what is the precise type of competence exercised.⁴⁴⁸ Third, where harmonisation is excluded, it is not entirely clear what a harmonisation act exactly entails.⁴⁴⁹

Despite the above uncertainties, it is clear that EU action enjoys a different level of legitimacy and scrutiny depending on the type of EU competence exercised. From this point of view, the structure of EU treaty competences suggests that when the EU acts in the areas of *exclusive competence* its power is at its highest ebb. Hence, EU legislative, regulatory or soft-law acts in areas of customs, trade, fisheries conservation, competition, common monetary policy and international agreements are likely to encounter minimum resistance from Member States and be granted the largest

⁴⁴² TEU, Art. 5, TFEU, Arts. 2-6.

⁴⁴³ TFEU, Art. 2 (1).

⁴⁴⁴ TFEU, Art.2 (2), the EU has the power to act only if the objectives cannot be achieved at the national level, and if EU action does not go beyond what is necessary to achieve the said objectives

⁴⁴⁵ TFEU, Art. 2 (3) and (5).

⁴⁴⁶ CRAIG AND DE BÚRCA, *supra* note 412 at 84-89.

⁴⁴⁷ TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 183-192 (2nd ed ed. 2006).

⁴⁴⁸ CRAIG AND DE BÚRCA, *supra* note 412 at 84-89.

⁴⁴⁹ *Id.* at 87-88.

discretion by the judiciary. When the EU acts in the areas of *shared competence* its powers are in a twilight zone, blurring with the powers of the Member States. Hence, in areas of the internal market, certain aspects of social policy, cohesion, agriculture, environment, consumer protection, transport, energy, home affairs and common public health matters, the resistance to EU legislative, regulatory or soft-law acts shall depend on particular imperatives that shape the majority position of EU institutions and Member States on a given issue. Finally, when the EU acts in the *areas of coordinative, supportive or supplementing competence* its power is at the lowest ebb. EU action in economic, employment and social policy; as well as in areas such as human health, education, vocational training, and administrative cooperation is largely of a soft nature. In such areas legislative action is likely to be difficult and politically costly in practice, necessitating a high level of political agreement and being subject to a closer ex post judicial scrutiny.

Spending conditionality has the potential to incrementally challenge the above described scope of EU competence distribution.

From this point of view, it is worth stating that the EU's spending power is not subject to the same detailed treaty limitations as the EU's legislative powers are. Under the EU treaties, spending is limited in substantive scope to the attainment of the EU objectives (8.1 above). The most important limit on the exercise of the EU spending power is the financial limit imposed by Member States acting with unanimity in the EU Council, and the subsequent multiannual legislative appropriation limits imposed on each spending envelope by the EU Council, with the consent of the European Parliament (Chapter 1, above).

From this point of view, it may be argued that the distribution of EU spending conditionality along the 'soft' end of EU coordinative, supportive or supplementary competences, may incrementally help the EU 'harden' some of its powers in this area. From this point of view, spending conditionality certainly has the increased potential to mainstream the soft law measures adopted pursuant to EU coordinative competences throughout the hard law of spending.

In this reading, a strategic use of spending conditionality may usefully assist the EU to build the premises for what Ackerman has called 'constitutional transformations',

understood as constitutional acts leading to the reinterpretation of the spirit of the constitution without changing its letter.⁴⁵⁰ In this context, given the peculiar normativity and impact of spending conditionality in each Member State, it is hard to generally claim that an active use of spending conditionality in areas of 'soft' EU competences could amount to harmonization and hence the unconstitutional exercise of EU powers. Nevertheless, it is realistic to claim that continuous, and eventually increased conditional financial allocations in these areas may credibly increase the EU's influence on Member States' policy choices in these coordinative areas, traditionally reserved primarily to Member State action.

In Annex III to the present thesis, I have investigated what are the EU competence areas targeted by spending conditionality in the 2014-2020 financial perspective. The findings show that in the vast majority of cases, spending conditionality takes shape along the lines of EU shared competence (59 cases), followed by EU coordinative action (25). However, the most interesting finding is that in both areas of competence, the EU often deploys spending conditionality in support of its soft-law policy action. Hence, in this way it seeks to advance initiatives that so far did not enjoy sufficient support for legislative action. This finding supports the above claim that a strategically targeted use of spending conditionality may assist the EU in increasing its hard law presence in areas in which it found it more difficult to do before. This finding may lead us at the very least to reconsider our formal understanding of the balance of power between the EU and Member States in these areas, on a case by case basis.

9.1.3 The limits of EU competence

The most challenging discussion in the context of this section concerns the limits of EU legislative competences. In this reading, spending conditionality may be used to advance EU powers beyond the areas warranted by the treaty.

While an *ultra vires* application of conditionality has not been present in the EU to date, this functional use of conditionality is not unprecedented in established federations where the conditional spending power has been used to reach areas otherwise outside

⁴⁵⁰ See, in particular Ackerman's comments on the use of the spending power to fight racial segregation in schools as a constitutional moment: ACKERMAN, *supra* note 390; ACKERMAN, *supra* note 390.

the remit of the federal government.⁴⁵¹ A telling example in this sense is the federal healthcare system of Canada, which was entirely built using the conditional spending power.⁴⁵² Other examples are provided by the United States federal healthcare, social and welfare systems, all constitutionally grounded on the conditional spending power of the federal government.⁴⁵³

The 2021-2027 financial period may change this state of affairs for the EU and present an example where spending conditionality could potentially be used to support EU action that would otherwise fall short of sufficient support under the current EU treaty framework: e.g. the rule of law conditionality.⁴⁵⁴ It is worth noting in this context, that even if such an action would fall *prima facie* outside the explicit powers conferred upon the EU under the treaty, it shall not be always seen as illegitimate or unconstitutional *per se*. As argued in Chapter 8 above, equally compelling and at times even stronger constitutional grounds may be found in defence of spending conditionality. However, it may be reasonably expected that such a conditionality would raise important tensions with the principle of conferral, subsidiarity, proportionality and the sovereign powers of the Member States, as already illustrated by the Opinion of the Legal Service of the EU Council in the context of the establishment of an EU coordinative framework for the rule of law.⁴⁵⁵ At the end of the day, it shall be for the Court of Justice to pronounce on the matter. In this context, it is worth noting that the Supreme Courts of other federations, have imposed very limited constitutional restrictions on the use of spending conditionality in similar cases (see on judicial review, section 9.6 below).⁴⁵⁶

⁴⁵¹ See generally: SKY, *supra* note 422; Rosenthal, *supra* note 33; TRUDEAU, *supra* note 30 at 8–15.

⁴⁵² TRUDEAU, *supra* note 30; WATTS, *supra* note 30.

⁴⁵³ SKY, *supra* note 422; RICHARD B. CAPPALLI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS: LAW, POLICY, AND PRACTICE; UNITED STATES. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CATEGORICAL GRANTS, THEIR ROLE AND DESIGN (1978); JAY DILGER, *supra* note 30.

⁴⁵⁴ European Commission, *supra* note 11.

⁴⁵⁵ EU Council, OPINION OF THE LEGAL SERVICE. COMMISSION'S COMMUNICATION ON A NEW EU FRAMEWORK TO STRENGTHEN THE RULE OF LAW: - COMPATIBILITY WITH THE TREATIES.

⁴⁵⁶ In the example of the US and Canada, both the Supreme Court of Canada and of the United States upheld the use of federal conditional spending on virtually all occasions.

9.2 Enforcement

Maybe the most important constitutional discussion on spending conditionality in the EU context relates to enforcement. Unlike other models of multilevel polities, the EU is not as restrained in its authority to initiate and put in place policy frameworks as it is restrained in its ability to enforce them at the Member State level. The enforcement capacity of the EU differs based on the legal or non-legal nature of instruments adopted to implement a given policy goal. In this sense, the 2014-2020 array of spending conditionalities asking specifically for "effective and efficient" implementation of pre-existent EU law and soft policy measures across various EU policies is particularly telling (see Part II).

The active use of spending conditionality to pursue enforcement ends suggests an attempt on the part of the EU to break through the vicious circle of formal compliance and check again whether the implementing measures are in place and are meaningfully contributing to the EU policy goal pursued. It also suggests an attempt to address instances of systemic failure to comply with EU laws and policies. This is particularly so in areas where a continuous failure to comply with EU founding principles, laws and policy measures would place a great burden on the smooth functioning of the EU (see, 8.2-8.3 above).

As explained in Chapter 8 above, the use of spending conditionality to pursue EU law and policy enforcement ends is not unconstitutional *per se*. On the contrary, we have suggested that such an instrumental use of conditionality may even safeguard specific EU constitutional ends, such as effectiveness and compliance.

Nevertheless, such a use of conditionality may also raise important legal and constitutional questions relating to the validity and extent of Member States' consent when conditionality aims to enforce an otherwise unenforceable EU action (9.2.1). At the same time, it may call into question the potential doubly punitive effect of spending conditionality when it is used to enforce EU legislative action that is enforceable *via* dedicated treaty enforcement procedures (9.2.2).

9.2.1 Enforcing the unenforceable: validity and the extent of consent

As seen in Part II above, spending conditionalities often prescribe the implementation of national action plans, policies, strategic frameworks or measures that have their fountainhead in EU soft law measures. Pertinent examples are conditionalities that ask for compliance with measures agreed as part of the Europe Small Business Act, the Digital Agenda for Europe, Smart specialisation strategies, or the European Strategy Forum on Research Infrastructures, Employment Guidelines.⁴⁵⁷ At the same time, we showed that on occasion spending conditionality may be framed to safeguard compliance with future, unidentified or generic measures, sometimes yet to be adopted in the context of future EU legislation or other potential financial assistance agreements concluded by Member States.⁴⁵⁸

In all these cases, the question of the validity and extent of Member States' consent is brought into question. On the one hand, in the context of soft law measures, spending conditionality may render binding an EU act which was adopted without the intention to bind one's conduct to a binding result, and even at times due to its lack of enforcement deficit. On the other hand, spending conditionalities that mandate compliance with future action may even question the validity of one's consent.

It is true that all spending conditionality is adopted pursuant to ordinary legislative procedure and is voted upon by Member States in the EU Council. However, as illustrated repeatedly above, during the budgetary legislative process, conditionality may be far from the most important negotiation consideration (9.1). At the same time, some Member States may simply be outvoted in the EU Council (Chapter 3). In addition, in cases where the conduct mandated by conditionality is unknown or subject to future change, a valid expression of consent is placed further into question.

The constitutional relevance of the validity and extent of consent is further emphasised in cases where spending conditionality addresses private beneficiaries of EU funds. In the latter case, conditionality must state in a clear and unambiguous manner the conduct required and the consequences of non-compliance.

⁴⁵⁷ See Annex I to the present thesis.

⁴⁵⁸ Part II above. See in particular the cross-over macroeconomic conditionalities at Chapter 4 and the fisheries funds conditionality at Chapter 6.

In all these cases it is worth reflecting upon the potential impact of spending conditionality on the extent and validity of consent.

9.2.2 Enforcing the enforceable: *double penalty*

The second point addresses spending conditionalities that require compliance with EU rules that already enjoy express enforcement mechanisms under the treaty, either through EU infringement procedures or through other specific enforcement means, such as sanctions. In this case, spending conditionality reinforces, adds to and potentially substitutes the enforcement mechanisms provided for in the EU treaties and subsequent legislation.⁴⁵⁹

In this context, one may reiterate the discussion on the potential doubly punitive effect of a spending conditionality on Member States, mentioned in Chapter 4 above.⁴⁶⁰ In this sense, we have shown that the suspension of EU funds and the CJEU's decision ordering infringement fines for the same breach of EU law, constituted a *de facto* double punishment of the same Member State for the same failure to comply with EU law.⁴⁶¹ Indeed, regarding this question CJEU case law seems to suggest that the procedure of spending cut-off for failure to meet a conditionality is distinct from infringement procedures, as the first aims to safeguard the sound expenditure of the EU budget, whereas the latter primarily has an EU law compliance goal.⁴⁶² It remains to be seen whether the Court shall maintain its line of reasoning in this sense.

9.3 Equality of Member States

Each spending conditionality has the potential to *de facto* split the EU into two Member State groups: the ones that comply with its requirements and the ones that do not. This means that each conditionality may be strategically designed to address a *non-*

⁴⁵⁹ ANDERSEN, *supra* note 124.

⁴⁶⁰ See, on the CJEU doctrine on *ne bis in idem* principle in the case of natural and legal persons: CJEU, Judgment of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105, ; Judgment of the Court (Grand Chamber) of 20 March 2018 Criminal proceedings against Luca Menci Case C-524/15 ECLI:EU:C:2018:197, .

⁴⁶¹ CJEU, *supra* note 255; CJEU, *supra* note 264.

⁴⁶² CJEU, *supra* note 266.

identified but identifiable group of Member States that could be made worse off by a specific conditionality.

A similar concern about even-handedness may be raised with regard to enforcement of spending conditionality that may be used as a sanctioning mechanism targeting a particular state or group of Member States.

Most importantly, the concerted impact of the sum of all conditionalities applicable to a given Member State or group of states at a given time, may lead to the creation of complex conditionality synergies and lead to an outcome where a particular (group of) Member State(s) is impacted by conditionality in a much more pronounced manner than the others. The most extreme outcome of the concerted conditionality action would be a scenario where a Member State would end up being governed to a significant extent by conditionality. In these cases, a State may be put in a *de facto* position of systemic inequality to the others, hence placing upon the first a substantially more onerous regulatory or compliance burden than on the former.

In all these cases, spending conditionality may reasonably call into question the principle of equality between Member States.

Pursuant to Article 4 (2) TEU, the EU must treat all Member States in a like manner in the exercise of the powers conferred upon it by the treaties. Therefore, the EU must avoid situations where its acts would disproportionately profit or burden a particular state or a group of states, unless such a difference is objectively justified under the treaties.⁴⁶³

Spending conditionality may call into question the principle of equality between Member States and its practice of treating all states in an even-handed manner during the adoption, implementation and enforcement of conditionalities. As seen above, the principle of equality was frequently evoked during the negotiation of EU spending conditionality (Chapter 3). It was expressly mentioned in the text of the funding

⁴⁶³ The principle has rarely been addressed by the Court of Justice. See, however on a very recent case: Opinion of AG Wahl, Case C-44/14, Kingdom of Spain v European Parliament and the Council of the European Union, para. 35: "an unrestrained *à la carte* approach – even in this area of EU law in which some differentiation has been allowed – sit uneasily with the principles of solidarity between Member States, and of equality of Member States before the Treaties, which lie at the heart of the European project of integration".

regulations and called into question during the rare cases where spending conditionality was effectively enforced against Member States (Chapter 4). For instance, the risk perceived by certain Member States that conditionality may impact them in a disproportionate manner, prompted them to immediately create coalitions in the Council and include additional equality safeguards in the text of the adopted regulations.⁴⁶⁴ Despite these safeguards, scholars may still reasonably question the extent to which a spending conditionality may stay true to the principle of equality, given its very different applications, and the very different situations of Member States.⁴⁶⁵

From this point of view it is worth restating that spending conditionality is a highly flexible policy tool which may be creatively designed to target specific Member States. Even where a conditionality does not explicitly target a particular state or group of states, its implementation, and most importantly its enforcement may result in a situation where conditionality may lead in an indirect manner to a differentiated treatment.

For instance, looking forwards to proposals for the 2021-2027 financial period, it is not hard to identify the target Member States of an eventual EU rule of law conditionality, or refugee quota conditionality.⁴⁶⁶

The above conditionality examples may already raise reasonable concerns individually. However, the concerns may exponentially increase when ex ante, macroeconomic, financial assistance and eventually the rule of law conditionalities are all juxtaposed at the same time in the single jurisdiction of a given Member State (see Part IV, Chapter 12 below). Together, the synergy effect of concurrent conditionality packages may have the potential to put a Member State in a position of chronic

⁴⁶⁴ See Chapter 3. In particular the negotiation of macroeconomic conditionality.

⁴⁶⁵ Verhelst, *supra* note 249. [arguing that macroeconomic conditionality may hardly be used in an even-handed manner].

⁴⁶⁶ See the interview of the EU Commissioner for Justice, in: SPIEGEL ONLINE Germany Hamburg, DEMOCRACY IN EUROPE: EU COMMISSIONER PUSHES FOR HARD LINE ON POLAND - SPIEGEL ONLINE - INTERNATIONAL SPIEGEL ONLINE, <http://www.spiegel.de/international/europe/eu-commissioner-pushes-for-hard-line-on-poland-a-1137672.html> (last visited Mar 15, 2017); SCHROEDER, *supra* note 415 at 231. see also: Pech, Laurent; Scheppele, Kim Lane: *Poland and the European Commission, Part II: Hearing the Siren Song of the Rule of Law*, *VerfBlog*, 2017/1/06, <http://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/>

structural inequality, seriously questioning its capacity to benefit from the formal equality rules enshrined in the treaties.⁴⁶⁷

In this context, it must be stressed that the principle of equality between Member States is not absolute. At the same time, the traditional benchmarks of the equality principle allow for a wide margin of discretion for the EU's legislative and executive powers. In line with the well-established EU equality doctrine, a mere difference in treatment of a certain Member State is not enough to claim a breach of the equality principle. To be endorsed, such a claim would have to establish first that the state is in a comparable situation with others, and second that there are no objective reasons to justify a difference in treatment. On the first point, it is far from clear that the comparator is always the Member State status. It might be argued that a Member State under financial assistance is not in a comparable situation to another Member State free from such arrangements, hence the different types of spending conditionality applicable is justified. Similarly, it might be argued that Member States with weak administrations are not in comparable situations to the ones with fully functioning bureaucracies, and so on. Hence, there are a wide range of comparators that may serve as a base line for assessing whether a Member State is in a comparable or distinct situation as its peers. Here one may question the desirability to go along the slippery slope of various comparators between Member States. On the second point, unlike the case of discrimination against goods or persons, in the case of Member States the treaties do not expressly limit the possible justification that may legitimate a difference in treatment. This means that multiple objective reasons may be brought forward to justify some sort of differentiation between Member States. Unfortunately, the currently scarce case-law of the Court of Justice on the principle of equality between Member States does not allow for a clear understanding of what those justifications might be.⁴⁶⁸

⁴⁶⁷ Damjan Kukovec, *Law and the Periphery*, 21 EUROPEAN LAW JOURNAL 406–428 (2015); Damjan Kukovec, *Hierarchies as Law*, 21 COLUM. J. EUR. L. ONLINE SUPPLEMENT 131–193 (2014); Damjan Kukovec, *Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo*, in KOCHENOV, DE BURCA, WILLIAMS EDS "EUROPE'S JUSTICE DEFICIT" 319–336 (2015). [in this reading conditionality may raise the type of centre-periphery tensions underlined by Kukovec in relation to other areas of EU law]

⁴⁶⁸ See note 463 above.

In sum, even if not all uses of spending conditionality may amount to discrimination, almost all spending conditionality may raise questions of even-handedness in the treatment of Member States. At the end of the day, the extremely sensitive and politically charged question would be whether such a difference in treatment may be legitimately justified. In part IV below, we shall further illustrate the ways in which this differentiation between Member States takes shape in practice.

9.4 Democratic accountability

The essence of the principle of democratic accountability rests on the premise that the ultimate source of public power resides with the people - the *demos* - and that the government actors exercising public power must account to the governed for the way the power is being exercised. As argued by Scott, this traditional centralised vision of accountability is often rendered fictional on the ground, as accountability mechanisms have seen important mutations to accommodate the significant changes brought about by the rise of the regulatory state.⁴⁶⁹

Despite this evolution, the principle of democratic accountability remains an essential cornerstone of the EU's legitimacy, and the requests for more 'traditional' democratic accountability mechanisms capable of reaching EU politics has increased acutely in the recent years.⁴⁷⁰

Against this background, this section seeks to generally reflect upon the accountability difficulties that may potentially be added by spending conditionality. It explains that the principle of democratic accountability in the case of a spending conditionality may present important limitations on three main dimensions: the opacity and complexity of legal norms, blurred institutional responsibility, and limited avenues to take the responsible actors to account.

First, the complexity of the substantive and procedural norms of spending conditionality may be overwhelming. The highly technical and hardly comprehensible language of spending conditionalities, cross-references and multiple procedural

⁴⁶⁹ Colin Scott, *Accountability in the Regulatory State*, 27 JOURNAL OF LAW AND SOCIETY 38–60 (2000).

⁴⁷⁰ Weiler, *supra* note 185.

puzzles, may make it very hard in practice to discern what is the exact scope of a given conditionality, what its application would effectively entail and what are the exact consequences if it were enforced. Part IV below presents a detailed illustration of this complexity in practice. However, already here one may safely claim that spending conditionality in practice may turn out to be far from a friendly, clear and transparent governance tool that would convey a clear understanding to EU citizens of the exact conduct to be followed by Member States and individuals.

Second, spending conditionality may not always make it easy for an external observer to discern the limits of responsibility both at the EU and at the national level. Especially when a spending conditionality requires active compliance (to do obligation, as opposed to a passive conduct - not to do obligation), it may not always be clear who acts when, and to what extent. Spending conditionality is an accessory element of EU spending, institutionalized largely within EU shared management procedures - a form of cooperative multilevel governance whereby the tasks of the Commission, Member States, regional, local are inter-dependent and intertwined, and the successful implementation of the policy relies on close cooperation and mutual discharge of responsibilities between the two levels of government.⁴⁷¹ From this point of view, the principle of partnership indeed requires that all EU budget implementation is inclusive, participatory and open to all relevant stakeholders. However, the principle may not necessarily be fully reflected during the process of spending conditionality, which occurs largely *ex ante*, in parallel or *ex post* to spending.⁴⁷² Part IV shall exemplify all these concerns in a much more vivid manner.

Third, spending conditionality may in practice create a closed accountability circle between the Commission and Member States, which could significantly limit the avenues for accountability from external actors. As explained in Chapter 1, the Commission implements the EU budget and conditionality attached in cooperation with Member States, but as its own responsibility.⁴⁷³ The Commission shall give account and seek discharge for the general annual budgetary execution in front of the

⁴⁷¹ Craig, *supra* note 22 at 34.

⁴⁷² Andrea Mairate, *The 'added value' of European Union Cohesion policy*, 40 REGIONAL STUDIES 167-177, 173-174 (2006).

⁴⁷³ TFEU, Art. 317.

European Parliament and the Council, based on the annual report of the Court of Auditors.⁴⁷⁴ Consequently, if a conditionality fails, the Commission must account for this to the European Parliament and the Council, which in turn are (directly and indirectly) accountable to the EU citizens. The Commission is also accountable in front of the Court of Auditors who shall carry its annual and occasional special thematic reports on the Commission's budgetary execution. In turn, the Commission may hold Member States to account for failure to implement a conditionality and accordingly suspend EU funds. The Commission's acts in this respect are legally accountable in front of the EU Courts.

While this accountability system may seem impenetrable, it is remarkable how the substantive (as opposed to formal and economic) aspects of conditionality may manage to escape almost all the accountability filters above. In this context, it is worth mentioning that the above system is tailored primarily for financial, and not legal or policy accountability. As such, an eventual failure of a conditionality at the national level - understood as the failure to achieve the policy goal pursued through conditionality - may successfully escape the above accountability checks.

Let us take the example of a vocational education and training conditionality which mandates the existence of a national strategic policy framework to increase the quality and efficiency of vocational training at the national level.⁴⁷⁵ In this question I do not wish to inquire simply into: *who is held accountable if the strategy is not in place?* I rather ask: *who is held to account if the strategy fails?* Put in these terms, the answer suddenly becomes much more difficult. The Commission is not likely to be held liable by the European Parliament for the failure of a conditionality at the national level so long as a strategic policy is formally in place. It is also hard to imagine that the Commission is likely to hold the Member State liable for the failure of the strategy at the national level, given that the budget responsibility structure means that a Member State's failure is an implicit failure of the Commission. It is also hard to imagine a course of action in front of EU Courts for the Commission's failure to enforce a given conditionality in case the strategy fails, given the wide discretion traditionally enjoyed by the

⁴⁷⁴ TFEU, Art. 318.

⁴⁷⁵ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at Annex XI, Part.1, 10.4.

Commission in these matters. Hence, an answer could be that dissatisfied citizens may hold European or national parliaments to account. However, this answer is odd given that most effective conditionality measures are not as a rule the emanation of parliaments. In this context, the Court of Auditors accountability function has proven to have the most bite in practice, as its non-satisfactory findings may credibly trigger reform in the following financial period.⁴⁷⁶ At times however, even the Court of Auditors may find itself in difficulty when measuring specific conditionality outcomes, as we shall show in Part IV below.

9.5 Protection and distribution of fundamental rights

In Chapter 8 above it was argued that spending conditionality may be used to advance the protection of fundamental rights in the EU. This section presents a correlative part of that discussion and reflects upon the potential impact of spending conditionality upon the protection (9.5.1) and distribution of fundamental rights in the EU (9.5.2).

9.5.1 Limited applicability of the Charter

The EU Charter of Fundamental Rights ('the Charter') has limited scope of application at the national level.⁴⁷⁷ Pursuant to Article 51(1), the rights and provisions therein apply "to Member States only when they are implementing Union law".⁴⁷⁸

As explained in Part II above, in the 2014-2020 financial period, spending conditionalities are regulated by binding and enforceable EU law norms included in the text of EU Funds regulations and other EU financial provisions. It follows that the Charter must in principle apply to all Member States' acts implementing a given spending conditionality so long as the latter is clearly enshrined in EU law norms.

Nevertheless, an important constitutional problem of the Charter's applicability at the national level may potentially emerge in this context, in two main scenarios.

⁴⁷⁶ See Chapters 4-7 above, and Part IV below.

⁴⁷⁷ Allan Rosas, *The Applicability of the EU Charter of Fundamental Rights at National Level*, EUROPEAN YEARBOOK ON HUMAN RIGHTS 97-112.

⁴⁷⁸ CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION OJ C 326, 391-407 (2012).

First, an EU spending conditionality may not always be enshrined in clear and precise EU law norms, which means that the Charter may not always be applicable to national acts implementing a given conditionality. In fact, as shown by the proposals on the next 2021-2027 financial period, in future some spending conditionalities may be included in subsequent agreements negotiated between the EU and Member States (e.g. reform commitments approved by Commission decision).⁴⁷⁹ These subsequent implementing acts may potentially lose their connection to EU law, as they may primarily be concerned with the implementation of soft-law recommendations of the EU Council or other similar non-legislative EU acts.

Second, as shall be clearly demonstrated in Part IV below, the implementation of certain spending conditionalities on the ground may lead to important departures from the established EU legal framework. In this sense, Member States may adopt additional implementing action, going beyond the strict requirements of the EU law (i.e. EU funds regulations), or adopt changes to the initially established implementing actions without a clear and transparent amendment of the programming documents approved by the Commission.⁴⁸⁰ Moreover, as the example of certain spending conditionalities shows (e.g. macroeconomic conditionality at 4.1.2), the conduct required by a spending may often refer to future measures, policy recommendations or general objectives not yet specified in the EU spending regulations (e.g. compliance with future economic adjustment programmes).

In all these cases the implementation of spending conditionalities at the national level may credibly lose connection to the legal norms of the EU funds regulations.

On this point of law, the CJEU has so far held that the Charter shall apply to national acts implementing EU funds each time there is an applicable and traceable EU law obligation or where a Member State is implementing EU funds acts in derogation from an EU single market freedom.⁴⁸¹ The CJEU has nevertheless denied the Charter's

⁴⁷⁹ European Commission, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE ESTABLISHMENT OF THE REFORM SUPPORT PROGRAMME COM(2018) 391 FINAL 2018/0213 (COD) Arts. 11-12 (2018).

⁴⁸⁰ See, in particular Chapter 12, on the detailed Romania case studies.

⁴⁸¹ See for a detailed analysis on the Charter applicability to EU funds implemented at the national level: VIORICA VIȚĂ & KAROLINA PODSTAWA, WHEN THE EU FUNDS MEET THE CHARTER OF FUNDAMENTAL RIGHTS: ON THE APPLICABILITY OF THE CHARTER OF FUNDAMENTAL RIGHTS TO EU FUNDS IMPLEMENTED AT THE NATIONAL LEVEL 10–18 (2017).

applicability in situations where national acts co-financed by EU funds are implementing EU soft-law policy orientations or recommendations.⁴⁸² More specifically, in the *Nisttahuz Poclava* case, the CJEU held that the Charter provisions on the prohibition of unfair dismissal did not apply to an employment contract scheme implemented by a Member State, even if the scheme was implementing EU soft-law recommendations and may be financed from the EU budget:

"In addition, the fact that the employment contract of indefinite duration to support entrepreneurs may be financed by structural funds is not sufficient, in itself, to support the conclusion that the situation at issue in the main proceedings involves the implementation of EU law for the purposes of Article 51(1) of the Charter."

In the light of the above CJEU doctrine of Charter applicability to Member States' acts that implement EU Funds at the national level, spending conditionality is an extremely interesting case study. The latter shall inevitably add additional complexity and difficulty in discerning the situations covered by the protection of the Charter at the national level, which shall require the special vigilance of EU legislators and clarification from the CJEU in the present and future financial periods (see further 9.6 below).⁴⁸³

9.5.2 Fundamental rights distribution in the EU

Beyond the above profound questions of fundamental rights protection, spending conditionality may also raise questions of individual rights distribution in the EU. The distribution discussion is relevant primarily when analysing the power of conditionality when applied to individual recipients of EU funds and underlines the

⁴⁸² *Id.* at 18–22.

⁴⁸³ See *mutatis mutandis* on the question of Charter applicability to financial assistance conditionality: Judgment of the Court (Grand Chamber) of 13 June 2017 *Eugenia Florescu and Others v Casa Județeană de Pensii*, Case C-258/14, ECLI:EU:C:2017:448, , 48; Kilpatrick, *supra* note 173; Anastasia Poulou, *Financial assistance conditionality and human rights protection: What is the role of the EU Charter of Fundamental Rights?*, 54 COMMON MARKET LAW REVIEW 991–1025 (2017). (holding that the Charter is applicable to the Memorandum of Understanding on balance of payments financial assistance between Romania and the EU, and holding that the Charter does not guarantee a right to cumulate the pension with the salary)

increased pressure EU spending may place on individual autonomy and the free exercise of individual rights and liberties.

Currently over 40 percent of the EU budget is addressed to private natural or legal persons (primarily 30% agricultural funds, but also EU-wide research and innovation programmes addressed to individual recipients of funds such as Horizon 2020 or Erasmus; see Table 1, Chapter 1 above).

As discussed above, the power of spending conditionality to induce or coerce behaviour may not be negligible in the case of Member States. However, when applied to individuals this power increases exponentially. Individuals qualifying for aid under agricultural, fisheries, dedicated research and innovation funds are the ones in the greatest need of EU resources. They are farmers, fishermen, residents of remote or underdeveloped regions, workers in need of requalification, vulnerable groups, unemployed youth, students, migrants and asylum seekers. Their bargaining power in negotiating conditions of spending is very low. Therefore, spending conditionalities addressing private beneficiaries require increased vigilance and caution, given the structural inequality of power between the EU and Member States on the one hand, and individual beneficiaries on the other.

The discussion on spending conditions and their impact on the distribution of individual rights has enjoyed significant traction in US constitutional theory.⁴⁸⁴ In that context, it was argued that spending conditionality may be constitutionally problematic when it shifts the balance of power from private to state discretion on certain individual rights (1), when it affects the exercise of a given right in a non-neutral manner (2), or when conditionality restricts rights of a particular group which may have not been restricted in the absence of public spending (3).⁴⁸⁵

We shall bring forwards three hypotheticals to better explain the above three scenarios in the EU context.

⁴⁸⁴ Kathleen M. Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, 26 SAN DIEGO L. REV. 327–336 (1989); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARVARD LAW REVIEW 1413–1506 (1989); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARVARD LAW REVIEW (1988); Richard A. Epstein, *Unconstitutional Conditions and Bargaining Breakdown*, 26 SAN DIEGO L. REV. 189–208 (1989); RICHARD ALLEN EPSTEIN, *BARGAINING WITH THE STATE* (1993).

⁴⁸⁵ Sullivan, *supra* note 484; Sullivan, *supra* note 484.

First, suppose EU conditionalities linked to spending on rural development programmes limit the right to property or the exercise of its attributes, such as disposition or use. In particular, a spending conditionality may (and often does) temporarily prohibit the selling of property built with EU public resources or may restrict use of the property to a particular industrial or touristic activity. Such a conditionality would raise the question of a justified and proportionate limitation on the exercise of the property right and the freedom to conduct a business at the EU level, in as much as it shifts the decision on the exercise of these rights from the individual's private sphere to the EU's public sphere through the use of spending conditionality (1).

Second, EU conditionalities linked for instance to spending on research or culture may impose non-neutral limitations on freedom of speech, freedom of art, research or academic freedom by suppressing certain ideas or prohibiting research in a specific area(2).⁴⁸⁶ In this case, the limitation of freedom of speech or research may be construed in a non-neutral manner only with respect to a particular idea the EU is trying to suppress as opposed to other forms of art or academic research.

Third, EU social funds supporting tertiary education may for instance be linked to a conditionality that temporarily limits young doctoral candidates' freedom of movement in the EU by imposing a temporary residence or work requirement in a particular Member State (3). In this scenario, the conditionality targets a clearly identifiable sub-group of EU citizens - doctoral students - who are limited in the exercise of their fundamental right to free movement and whose right could not have been limited in the same manner in the absence of EU spending.

Multiple examples of conditions limiting individual and collective rights can be brought forward in this context, including freedom of establishment,⁴⁸⁷ data

⁴⁸⁶ US Supreme Court, *REGAN v. TAXATION WITH REPRESENTATION* 461 U.S. 540 (1983) JUSTIA LAW 548, <https://supreme.justia.com/cases/federal/us/461/540/case.html> (last visited May 2, 2017).

⁴⁸⁷ CJEU, Case C-523/12, Judgement of 12 December 2013, ECLI:EU:C:2013:831 *Dirextra Alta Formazione srl v Regione Puglia*, . (on the requirement of prior ten years experience in the region to access EU Funds, which was considered indirectly discriminatory for legal persons established in other Member States, but justified and proportionate to the aim pursued - high quality postgraduate educations)

protection,⁴⁸⁸ equality and non-discrimination,⁴⁸⁹ unjustified dismissals,⁴⁹⁰ access to justice,⁴⁹¹ right to strike⁴⁹² etc.

Most of the times such limitations may be found legitimate and proportionate and may not call into question the essence of individual fundamental rights. Nevertheless, the argument brought forward in this section is that such conditional limitations must be subject to a higher level of constitutional scrutiny and must not rely on the assumption that an individual receiving an EU benefit implicitly agrees fully or partially to waive the enjoyment of an EU fundamental right in exchange for financial assistance.

The above discussion opens wide avenues of academic inquiry on spending conditionalities and their role in shaping the substance of fundamental rights enjoyment in the EU. Today, the vast majority of spending conditionalities address Member States, with the exception of some conditionalities attached to Agricultural and Fisheries Funds (Chapter 5-6 above). This state of the art may not necessarily hold true tomorrow. Particularly in EU policy areas targeting change in individual - as opposed to state - behaviour such as environmental protection, education, healthcare, social security or energy efficiency, spending conditionality may be deployed in an increased manner directly on individuals to overcome state resistance, weak performance or specific aspects of the enforcement difficulty.⁴⁹³ It is precisely these potential future developments of EU spending conditionality that increase the value of discussing their distributional impact on fundamental rights enjoyment in the EU.

⁴⁸⁸ CJEU, *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 case), ECR I-11063, ; Michal Bobek, *Joined Cases C-92&93/09, "Volker und Markus Schecke GbR and Hartmut Eifert", Judgment of the Court of Justice (Grand Chamber) of 9 November 2010, 48 COMMON MARKET LAW REVIEW 2005-2022 (2011)121.* (declaring null and void the provision mandating for publication of data concerning natural persons, beneficiaries of EU agricultural Funds)*

⁴⁸⁹ CJEU, *Blanka Soukupová v Ministerstvo zemědělství (Soukupová case) Case C-401/11 Judgement of 11 April 2013, ECLI:EU:C:2013:223, .*

⁴⁹⁰ CJEU, *supra* note 100.

⁴⁹¹ CJEU, *Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007-2013 Seirekomitee (Liivimaa Lihaveis case) Case 562/12, Judgement of 17 September 2014, ECLI:EU:C:2014:2229, .*

⁴⁹² US Supreme Court, *LYNG v. AUTOMOBILE WORKERS* 485 U.S. 360 (1988) JUSTIA LAW. (holding that a condition prohibiting welfare payments to households whose members are on strike does not go against freedom of speech and right to associate guaranteed by the First Amendment)

⁴⁹³See the US example of desegregation in the private sphere and a potential EU application: Dean Kotlowksi, *With All Deliberate Delay: Kennedy, Johnson, and School Desegregation*, 17 JOURNAL OF POLICY HISTORY 155-192 (2005).

9.6 Judicial review

The EU is a Union based on the rule of law. This canonical dictum of the Court of Justice in *Les Verts* (1983)⁴⁹⁴ has served as a foundational cornerstone for the EU's constitutional construction.⁴⁹⁵ The EU rule of law definition has been substantively developed over time,⁴⁹⁶ however one of its original benchmarks articulated in *Les Verts* remains the justiciability of EU and Member States acts against the EU 'basic constitutional charter, the treaties',⁴⁹⁷ and the general principles of law that underpin them.⁴⁹⁸

The current discussion aims to usefully complement our prior analysis of the potential of spending conditionality in advancing the EU's values and rule of law principles at the national level (8.6). In particular, it highlights some potential limitations the principle of the rule of law may encounter at the EU level, with an emphasis on the difficult avenues for judicial review of spending conditionality in front of the EU courts.

Throughout the various sections of the present Part, I purposefully highlighted the constitutional ambivalence of spending conditionality. I have stressed that on a number of occasions, it will primarily fall to the Court of Justice to draw the constitutional line between a constitutionally legitimate and constitutionally suspect use of spending conditionality.

In Chapter 5, a useful distinction in the Court's case law on spending conditionality in cases addressing individuals as opposed to Member States has been made. This section maintains the distinction and examines what may be the particular avenues and constraints of judicial review for both type of claimants.

It is worth mentioning that all questions raised above may prove particularly challenging for the EU judiciary. As underlined by Daindith, the government's use of dominium economic tools to shape policy outcomes as opposed to legal imperium

⁴⁹⁴ CJEU, Parti écologiste "Les Verts" v European Parliament, Case 294/83, ECR [1986] 1339, 23.

⁴⁹⁵ See Art. 2, 7, 21 and 49 TEU.

⁴⁹⁶ See on the latest iterations of the rule of law at the EU level: European Commission, *supra* note 415.

⁴⁹⁷ CJEU, *supra* note 494 at 23.

⁴⁹⁸ CJEU, Unión de Pequeños Agricultores v Council of the European Union, Case C-50/00 P, 2002 I-06677, 38 (2002).

tools may lead to constitutional problems that courts may find particularly hard to cope with (see also, 1.7 above).⁴⁹⁹ As such, more often than not, traditional judicial review may find itself limited in tackling non-traditional governance mechanisms, such as governance by spending conditionality.⁵⁰⁰

Analysis of the Court of Justice case law endorses this difficulty. The following analysis shall distinguish between the judicial review of spending conditionality potentially affecting individual and Member States' interests.

9.6.1 Individual redress

As explained above, to date the Court of Justice has generally been careful to engage in a strict scrutiny of measures driven by spending conditionality that could encroach on the fundamental rights of individuals deriving from EU or Member State acts (but, see discussion at 9.5.1 above on the limited applicability of the Charter at the national level).⁵⁰¹ The court has been prone to examining the preliminary reference questions alleging a potentially unconstitutional limitation of EU fundamental rights through spending conditionality and has pronounced authoritative rulings of legal principle on the matter. In particular, the Court explained that a potential enforcement of Agricultural funds conditionality in cases concerning individuals that leads to a cut-off in EU funds must be regarded as an administrative penalty and must respect the general principle of retroactivity of most lenient penalties (Chapter 5, above).⁵⁰² The Court has also examined the constitutional limits imposed on spending conditionality by the principle of non-discrimination,⁵⁰³ the principle of data protection⁵⁰⁴ and the right to judicial review in trans-border spending programmes.⁵⁰⁵ However, in line with its well settled doctrine, the Court denied judicial standing to civil society organisations promoting an action for annulment or for the EU's failure to act in direct

⁴⁹⁹ Daintith, *supra* note 36 at 218–219.

⁵⁰⁰ See by analogy on the limited role of the judiciary in EU New Governance process: Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUROPEAN LAW JOURNAL 1–18, 9–15 (2002); MARK DAWSON, *TRANSFORMING INTO WHAT? NEW GOVERNANCE IN THE EU AND THE “MANAGERIAL SENSIBILITY” IN MODERN LAW*, WISCONSIN LAW REVIEW 389–439, 411–421 (2010).

⁵⁰¹ Section 9.5 and Chapter 5 above.

⁵⁰² CJEU, *supra* note 299 at 59.

⁵⁰³ THE QUEEN CASE C-428/07, *supra* note 301; CJEU, *supra* note 489 at paras 28–29.

⁵⁰⁴ CJEU, *supra* note 488.

⁵⁰⁵ CJEU, *supra* note 491.

action procedures.⁵⁰⁶ In the latter cases, the difficulty arises due to lack of private enforcement avenues for spending conditionality in the absence of direct and individual concern or a concrete human rights violation. This finding links back to our prior analysis of limited avenues of accountability in cases of conditionality failure, this time with regard to individual avenues of judicial redress (9.4). In this sense, when an EU spending conditionality fails but no EU fundamental right is violated, or no direct and individual concern is proven, the direct judicial review avenues before the CJEU are foreclosed.

Let us recall again our early hypothetical example on the social inclusion of persons with disabilities to better emphasize the point. Imagine that the conditionality aiming to increase the labour market inclusion of persons with disabilities residing alongside a highway built with EU money has failed. The highway was built, yet persons with disabilities are not sufficiently trained and have not been hired in the road infrastructure sector. This outcome is not satisfactory. However, in the absence of conditionality enforcement by the Commission, the persons with disabilities would hardly be able to claim judicial accountability in front of the EU courts. First because they have no standing, and second because the enforcement of such a spending conditionality is usually discretionary (i.e. in the vast majority of the cases the Commission has no obligation to act, it may do so).⁵⁰⁷

Alternatively, if the route of preliminary ruling procedures is taken, the persons with disabilities would find it very difficult to prove a concrete EU law (including human rights) violation and hence a direct interest to launch a suit, as there is no right to training or a job under the current EU legal framework.

In sum, whereas the avenues of individual judicial redress are sufficiently open in cases of fundamental rights violations (except for the specific situations explained at

⁵⁰⁶ CJEU, *supra* note 266; Judgment of the Court of 2 April 1998. Stichting Greenpeace Council (Greenpeace International) and Others v Commission Case C-321/95 P ; Daniela Caruso, *Direct Concern in Regional Policy: The European Court of Justice and the Southern Question*, 17 EUROPEAN LAW JOURNAL 804–827 (2011). [as Caruso showed, regional authorities may also find it difficult to prove a direct and individual concern to overcome the strict EU *locus standi* criteria]

⁵⁰⁷ CJEU, *supra* note 266. [as confirmed by the *An Taisce* case, the Commission enjoys a very wide discretion in the enforcing, or not, of a conditionality]

9.5.1 above), outside these cases avenues for judicial review of spending conditionalities affecting individuals in EU courts will be limited.

9.6.2 Member State redress

In cases concerning the constitutional relationship between the EU and its Member States, the limitations of EU judicial review shall be most severe.

Here, it is worth restating that spending conditionality takes shape and operates within the framework of the EU spending process. As explained in Chapter 1, the process is characterized by the very large discretion of the EU legislators, and most notably of the EU executive in designing and implementing spending and conditionalities attached to it. Against this backdrop, courts may be highly restrained in elaborating doctrinal (as opposed to structural or procedural) limitations on the design, use and potential impact of spending conditionality on EU constitutional architecture, and in particular on the relationship between the EU and its Member States.⁵⁰⁸

As shown above, in cases involving Member States, the EU courts have rarely attempted to pronounce authoritative rulings of legal principle, even if explicitly invited to do so.⁵⁰⁹ Instead they have focused in the vast majority of cases on formal procedural issues concerning due process of conditionality enforcement, duty to state reasons or requirements for proportionate spending cut-off, having regard to the percentage indicated in the EU funds regulations and subsequent delegated or implementing acts.⁵¹⁰ Nor, to date, have the EU Courts sought to lay out a set of clear limits on the EU's use of spending conditionality. The CJEU's judgements in *An Taisce* and *Italy v Commission*, are incremental exceptions in this sense, as they set out two

⁵⁰⁸ Mitchell N. Berman, *Coercion without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1–112 (2001); Alexander, *supra* note 383; Mitchell N. Berman, *Conditional Spending and the (General) Conditional Offer Puzzle*, PENN LAW: LEGAL SCHOLARSHIP REPOSITORY (2013). [see on the argument that the US Supreme Court has failed to impose meaningful limits on the exercise of conditional spending power in the detriment of State sovereignty].

⁵⁰⁹ JUDGMENT OF THE GENERAL COURT (SECOND CHAMBER) OF 3 APRIL 2017 FEDERAL REPUBLIC OF GERMANY V EUROPEAN COMMISSION CASE T-28/16 ECLI:EU:T:2017:242, *supra* note 296. [Germany extensively invoked the principle of sincere cooperation, subsidiarity, legitimate expectations and proportionality].

⁵¹⁰ See Chapter 5 above. See inter alia: CJEU, *supra* note 296; CJEU, *supra* note 296.

important holdings.⁵¹¹ First, in *An Taisce*, and then in *Italy v Commission*, the CJEU suggests that infringement and spending conditionality enforcement are not mutually exclusive, as according to the Court the two procedures pursue distinct aims: law enforcement as opposed to sound budgetary expenditure.⁵¹² Second, in *Italy v Commission*, the CJEU set an initial limitation on the use of spending conditionality: that of a *sufficiently direct link* between the financed measure and the presumed infringement of EU law.⁵¹³ However, it is very important to note that in both cases the CJEU deferred extensively to the Commission, explaining first that the Commission enjoys a wide discretion in deciding whether or not to order an enforcement of conditionality,⁵¹⁴ and second that the *sufficiently direct link* test is not to be read in rigid terms.⁵¹⁵

The EU court's difficulty in coping with spending conditionality and its broad deference to the Commission may be explained by reference to Fuller's theory of the limits of adjudication in polycentric disputes.⁵¹⁶ In Fullerian terms, the disputes relating to the distribution of the EU budget and attached conditionalities are a prime example of polycentric disputes.⁵¹⁷ Decisions on funding allocation and spending conditionality design, applicability or enforcements are not to be seen in isolation, but as a spider web of complex and intertwined decisions that cannot be meaningfully addressed by presentation of proof and reasoned arguments but imply a systemic analysis of the multiple inter-dependent factors and their ultimate aggregate

⁵¹¹ CJEU, *supra* note 266; CJEU, *supra* note 255.

⁵¹² CJEU, *supra* note 266 at 35; CJEU, *supra* note 255 at 50.

⁵¹³ CJEU, *supra* note 255 at 50.

⁵¹⁴ CJEU, *supra* note 266 at 38.

⁵¹⁵ CJEU, *supra* note 255 at 50. ["Although it is true, as asserted by the Italian Republic, that the second condition under point (f) of the first subparagraph of Article 32(3) of Regulation No 1260/1999 is designed to prevent the Structural Funds from being used to finance Member State operations which are contrary to EU law, it in no way follows that the attendant risk of an *unacceptable loss* of Community funds must be specifically attributed to the inherent unlawfulness or the unlawful implementation of specific operations (projects or actions) to which the payment application relates; nor does it follow that the Commission is obliged to show that that risk is a direct and specific result of such unlawful operations, contested in an infringement procedure. A *restrictive interpretation* of that kind would diminish the useful effect of the provisions in question, which confer upon the Commission, on a purely provisional basis, the power to suspend payments under financial commitments of the Structural Funds made in the context of an operational programme, where it is faced with what is presumed to be an infringement of EU law"]

⁵¹⁶ Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARVARD LAW REVIEW 353-409 (1978).

⁵¹⁷ *Id.* at 400.

implications in solving the problem at stake (i.e. enforcing or not a conditionality).⁵¹⁸ In these types of polycentric disputes a decision of an adjudicator on one side of the decisional web would inevitably distribute tension throughout the web in various complex patterns and tensions, which increases uncertainty and necessitates judgement that a reasoned principle cannot simply meaningfully grasp – akin to management.⁵¹⁹

Should a court attempt to adjudicate in a principled manner why for instance, a particular budget was allocated to infrastructure investment as opposed to research, and whether the conditionalities attached are appropriate or should be enforced, it would inevitably run into a polycentric problem that would push it into three possible scenarios.⁵²⁰

First, adjudication fails.⁵²¹ The court may not find a workable principled solution. Consequently, it simply ignores the core of the problem. In this case, the court may simply choose to ignore the question or restate the wide discretion of the Commission and EU legislators on the matter (1).

Second, the court steps beyond the proper limits of adjudication.⁵²² In this scenario, it may seek new information, adapting the adjudicatory setting to the nature of the problem, for instance by ordering studies on economic arguments, requiring expert testimony, comparing economic models and data on the opportunity of a given spending conditionality and even making policy choices, a task which is more fit for the executives and legislators than for courts (2).

Third, the court reframes the problem.⁵²³ In this scenario the court accommodates the problem to its own form of adjudication. To do that, the Court may go to the text of the funding regulation and ask for instance whether the decision was issued in a timely manner, whether the percentage quota of funds to be cut was observed, or whether

⁵¹⁸ *Id.* at 395–398.

⁵¹⁹ *Id.* at 398.

⁵²⁰ *Id.* at 401.

⁵²¹ *Id.* at 401.

⁵²² *Id.* at 401.

⁵²³ *Id.* at 401.

other due process imperatives were observed, including the obligation to state reasons (3).

To avoid these outcomes, in Fuller's view, some aspects of polycentric disputes are better addressed through managerial direction or through the political process, where the solution is reached through an expert administrative decision or a political 'deal' that accommodates the various interests at stake.⁵²⁴

However, this does not mean that not all aspects of a polycentric relationship raised by spending conditionality are inherently unsuited for adjudication.⁵²⁵ As Fuller underlines: "*[the] court gets into difficulty, not when it lays down rules about contracting, but when it attempts to write contracts*".⁵²⁶

Accordingly, whilst the EU courts may find themselves constrained to 'write' spending conditionalities, they can lay down 'rules about' spending conditionalities and layout principled solutions on the constitutional requirements such an exercise of power entails.

Returning to our discussion of the constitutional foundations and limits of spending conditionality, the Court of Justice still has to lay down multiple rules about spending conditionality that have not yet been addressed or have only been addressed in passing before.

First, the Court may usefully clarify the relationship between the EU's spending conditionality and the EU's conferred powers.⁵²⁷ In particular, the court may usefully clarify whether and to what extent the EU may use spending conditionality to reach its constitutional ends (8.1) by using processes that would lead to a switch in the treaty

⁵²⁴ *Id.* at 398–400.

⁵²⁵ *Id.* at 403–404.

⁵²⁶ *Id.* at 404.

⁵²⁷ See on the solutions adopted by the US and Canadian Constitutional courts in: US Supreme Court, *OKLAHOMA V. UNITED STATES CIVIL SERVICE COMM'N* 330 U.S. 127 (1947) JUSTIA LAW; US Supreme Court, *supra* note 79; TRUDEAU, *supra* note 30 at 12–14. (holding that the federal government may attach broad policy conditions to spending at state level so long as the state has the option to reject the conditional offer) (holding that the conditions must advance 'general welfare' in line with the constitution, be reasonably linked to the objective of spending, unambiguously framed and not violate any other constitutional provision: "[...] conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs."); Supreme Court of Canada, [1936] S.C.R. 427, at 457: "[...] it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accomplished by such restrictions and conditions as Parliament may see fit to enact."

legal basis, extend the consequences of a given competence or lead to the creation of a new legal basis for regulation (9.1).

Second, the Court may consider whether the EU may use spending to achieve compliance and effective government (8.2-8.3) in cases where the enforced acts would not otherwise be enforceable (9.2).

Third, the Court may usefully provide its reasoning on whether and under which conditions, while attempting to advance effective government at the national level (8.2), a spending conditionality may call into question the principle of equality between Member States (9.3).

Fourth, the Court may reflect upon the appropriateness of avenues of democratic accountability during the process of spending conditionality (9.4), while acknowledging that on certain occasions spending conditionality may be used to advance important EU values (8.6).

Fifth, the Court may articulate a principled standing on the Charter's applicability to EU soft law measures implemented through a hard law conditionality and gradually elaborate a holistic doctrine on the permissible impact of spending conditionality on fundamental rights protection and distribution in the EU (9.5), while balancing the former cases against the potential of spending conditionality to promote the substance of the Charter rights and principles (8.5).

Finally, it must be stressed that even if all the questions above are fully answered by the Court, the EU legislative, and above all the executive, still retain wide discretion concerning the design and operation of spending and attached conditionalities.⁵²⁸ In the subsequent Part, I will examine how this discretion has played out in practice in the 2014-2020 financial period.

⁵²⁸ 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. L. & PUB. POL'Y 93 (2014). (on the limited bite the US Supreme Court constitutional limits have had on the Congress's ability to set conditions of spending)

Concluding remarks

The constitutional paradox of spending conditionality

In Part III, I developed a nascent reflection upon the constitutional meaning of spending conditionality. In a systematic manner, I laid out the constitutional foundations that may ground and legitimise the use of spending conditionality (Chapter 8) and contrasted them with the constitutional limits that may be called into question by the tool (Chapter 9).

In a nutshell, this Part has shown that spending conditionality may be constitutionally legitimated by departing from its potential to reinforce the EU's constitutional ends; from its ability to promote effective government at the EU and national level; and from theories of compliance and necessity, protection and promotion of fundamental rights and EU values (Chapter 8). This part has also suggested that spending conditionality may be constrained by constitutional limits, namely by the principle of conferral, certain aspects of enforcement, equality between Member States, the principle of democratic accountability, certain aspects of the protection and distribution of EU fundamental rights and by the foreclosed avenues for adjudication and judicial review at the EU level (Chapter 9).

The two constitutional dimensions of spending conditionality seem unsettling. They portray an odd result whereby a spending conditionality may be found both

constitutionally legitimate and constitutionally suspect, leading to a phenomenon that I have called the *constitutional paradox of spending conditionality*. The paradox embodies the ambivalence of conditionality. On the one hand it may be employed as an effective instrument to enhance core EU constitutional foundations, but on the other hand it may potentially threaten equally important constitutional guarantees.

In attempting to provide an explanation and solution to the above paradox, I will refer in these concluding remarks to professor Tushnet's theory of constitutional workarounds.⁵²⁹ According to Tushnet, constitutional workarounds are routes followed by the legislator to escape a constitutional provision that obstructs the direct achievement of a desired policy goal, in ways that find sufficient support in the other parts of the constitution. Constitutional workarounds occur when there is a sufficiently shared political agreement to achieve a given policy goal (1), some parts of the constitution are relatively clear in prohibiting the direct achievement of the goal (2), whereas others seem to accommodate the said goals within the constitution (3).⁵³⁰

Applying Tushnet's theory to the constitutional paradox of spending conditionality, I will conclude that in practice all use of spending conditionality may not be automatically justified or discarded by departing from an isolated reading of a constitutional norm. Any constitutional analysis of spending conditionality must proceed with a careful constitutional balancing exercise between the potential constitutional foundations and limits raised on a case by case basis. The balancing exercise would also have to inquire into whether the particular measures required by a spending conditionality pursue the imperative of a sufficiently shared and legitimate policy goal. Such a conditionality balancing exercise would also need to establish and accommodate the precise nature of the individual or collective constitutional interests that may potentially be affected as a result.

As I argued above, the Court of Justice would probably be the best placed institution to adjudicate and strike the right balance between the concurrent constitutional foundations and guarantees called for by conditionality. As already explained, in pursuit of this endeavour the Court may find itself constrained by what Fuller called

⁵²⁹ Mark Tushnet, *Constitutional Workarounds*, HARV. LAW SCH. PUBLIC LAW LEG. THEORY WORK. PAP. SER. PAP. NO 09-14 (2009).

⁵³⁰ *Id.* at 5.

the 'proper limits of adjudication'. While on important occasions the Court may need to exercise judicial self-restraint in favour of the legislative and executive branches when considering specific rules governing the law of EU spending conditionality, the Court is still well placed to lay down the essential constitutional rules about EU spending conditionality that could usefully give guidance to EU legislators, executives, Member States, and most importantly EU citizens, concerning the increasingly important constitutional issues raised by spending conditionality.

PART IV

The Institutional World

Introduction

In the previous Parts, I have analysed the conceptual, legal and constitutional worlds of spending conditionality. I have explained the genesis, legal evolution and the constitutional dimension of EU spending conditionality. In each case I have provided a conceptual, legal and constitutional framework through which this peculiarly novel tool of EU governance may be usefully theorised and understood.

Part IV turns to the final dimension of spending conditionality analysed in this thesis: *the institutional world*. It engages in a legal realist study of the process of spending conditionality, seen holistically, and explains how the conditionality phenomenon unfolded in the institutional world of the EU and national bureaucracies.

The analysis focuses on two main spending conditionality packages introduced by the 2014-2020 reform: the 10 *macroeconomic* and the 36 *ex-ante conditionalities* attached to the European Structural Funds ('Structural Funds' or 'ESI Funds'). As explained in the Legal World above (Part II), they represent the newest, most voluminous, most far-reaching, most contested and in many respects revolutionary spending conditionalities of the current financial period. The analysis excludes 12 thematic ex ante conditionalities applicable to rural development and fisheries funds (see, Chapter 4-6 above).

As will be shown below, in the current financial period the macroeconomic conditionalities, and notably the ex-ante conditionalities, have significantly multiplied throughout the ESI funds programming documents, reaching an overall astonishing number of more than 2000 conditionalities at the national and regional level of Member States. These spending conditionalities have been tasked by law with the advancement of core EU objectives like securing macroeconomic stability, supporting European Semester structural reforms, implementing and transposing EU laws,

adopting strategies and policy frameworks, reforming administrative systems, institutions and promoting much needed reforms in a wide array of core EU and national sectors such as health, education, research and innovation, poverty reduction, business environment, labour market, administrative systems and judiciary, good governance, Roma inclusion, climate, environment, transport, public procurement, equality, statistics, research and innovation, and many more.

Despite the immense task entrusted to these two voluminous packages of spending conditionalities, a solid empirical understanding of how their legal norms have unfolded in practice is virtually absent in the legal scholarship and institutional circles. A notable exception is a very recent report of the Court of Auditors that sheds precious light on the operation and achievement of ex-ante conditionality in the 2014-2020 financial period, which shall be extensively drawn upon in this Part.⁵³¹

Part IV is structured in three Chapters.

Chapter 10 clearly distinguishes between the 'legal' and the 'institutional' worlds of spending conditionality and emphasises the numerous way in which the institutional practice of conditionality has departed from its legal setting.

Chapter 11 turns to the achievement of spending conditionality and confronts three baselines for measuring its impact on the ground. It explains how the Commission's deliverable-based baseline for assessing achievement departs from the Court of Auditors 'better spending' baseline, and finally proposes a third - in our view most important - baseline for measuring the achievement of conditionality: the output-based, policy performance baseline.

Chapter 12 presents the case study of Romania to study the behaviour and achievement of EU spending conditionality in a unique country environment, characterised by the increased presence of multiple conditionality types.

⁵³¹ COURT OF AUDITORS, SPECIAL REPORT NO 15/2017: EX ANTE CONDITIONALITIES AND PERFORMANCE RESERVE IN COHESION: INNOVATIVE BUT NOT YET EFFECTIVE INSTRUMENTS.

On methodology

The institutional world of spending conditionality is far from transparent and simple. It is very difficult to get a clear grasp of the real life of conditionality from outside its natural habitat: the EU and national institutional corridors. To remedy missing institutional inside knowledge, this Part complements the comprehensive desk research on conditionality with three extensive rounds of interviews conducted during 2016 and 2017 in Brussels (2016, 2017), Luxembourg (2017) and Bucharest (2017).

During this field work I have conducted over 30 semi-structured interviews with about 39 EU and national officials with direct responsibility for macroeconomic and ex-ante conditionality policy formulation, negotiation, monitoring, fulfilment, enforcement and evaluation. Interviewees included members of the legal services and high-level officials of the Commission, the Council, the Parliament, and the Court of Auditors, as well as officials of the EU Permanent Representations of Romania and Italy. At the level of the Commission, representatives of all five DGs responsible for EU funds management and conditionality have been interviewed, namely DG Regional and Urban Policy (DG REGIO), DG Agricultural and Rural Policy (DG AGRI), DG Employment Social Policy and Inclusion (DG EMPL), DG Maritime Affairs (DG MARE), and DG Home Affairs (DG HOME). These interviews were conducted with heads of units and policy officers in charge of conditionality policy formulation and negotiation, heads of units and policy officers from country units in charge of monitoring the conditionality process, heads of units responsible for conditionality coordination, and members of inter-DG structures in charge of conditionality monitoring and enforcement. In addition, I have interviewed representatives of relevant Commission DGs involved on an ad-hoc basis in the implementation and

enforcement process of conditionality, namely DG Budget (DG BUDG), DG Economic and Financial Affairs (DG ECOFIN), DG Single Market (DG GROW) and DG Environment (DG ENV).

For the national case study on Romania, officials of key Government Ministries and Agencies in charge of ex ante conditionality have also been interviewed, including officials of the Ministry of European Funds, the Ministry of Labour, the Ministry of Environment, Ministry of Education, the National Agency for Public Service and the National Agency for Public Procurement.

However, even after I conducted the relevant interviews (at the EU level and at the national level), important questions about the real life of conditionality at the Member State level remained unanswered. More specifically, the question of *what exactly happened* and *who did what*, especially during the most voluminous ex-ante conditionality process in Romania, was still far from being fully answered.

To compensate for this gap, the information gathered during the interviews was corroborated with information received as a result of more than 50 access to documents requests addressed to responsible Commission DGs (mainly DG REGIO and DG EMPL) and 10 access to information requests addressed to all the Romanian Ministries with responsibility for conditionalities, and to the General Government Secretariat of the Prime-minister's office (SGG).

On this point, it is worth mentioning that the Romanian legal framework facilitated easier access to information due to the possibility of asking for generic information from each national Ministry on the precise list of actions undertaken by the ministry or by any other body/agency subordinate to them in fulfilling the ex-ante conditionalities under their responsibility.

In the case of the Commission, access to documents proved much more challenging given the absolute lack of information on the number and dates of documents (usually formal letters sent through the EU electronic communication system) on ex-ante conditionality circulated between the Commission and the Member States. To track the numbers of EU documents dealing with each ex-ante conditionality, I had to consult the first annual implementation reports relating to each national Operational Programme (OP) published by Romania in 2017 to find the annexes reporting on applicable but unfulfilled ex-ante conditionalities, find the references to the document

number (if indicated) and request it through the Commission's access to documents request form. Once the Commission document was disclosed, I then had access to other document numbers referenced therein, which I subsequently requested. Only after three rounds of requests for access to documents from the Commission was I able to get a clearer understanding of what happened to a given unfulfilled ex ante conditionality in the case of Romania.

The most laborious (and fascinating) part of the access to documents/information exercise followed, during which I had to reconstruct the ex-ante conditionality puzzle from pieces of information disclosed by the Commission, national authorities, solve the multiple inconsistencies between the EU and national communications and ultimately corroborate this information with information publicly accessible at the EU and national level.

Concrete information on what exactly was done to fulfil an ex-ante conditionality before the approval of OPs was significantly more difficult to access, and had to be reconstructed from interviews, desk research of national programming documents, research of the legislative processes in the national Parliament and analysis of the explanatory notes (considerations) of national laws, normative Government acts (emergency ordinances), implementing acts (decisions) or delegated acts (ordinances), which would, at times, explain that their adoption was a pre-condition for accessing EU Funds in the 2014-2020 period.

As a result, access to documents and information requests corroborated with information and documents shared by the EU and national authorities during interviews, the information publicly accessible on institutional internet pages and official registries, and the information revealed by interviewees themselves provided a sufficiently clear image on the institutional world of ex ante conditionality. This image is presented in detail in this Part.

Nevertheless, even despite this detailed investigation effort it was striking for me to acknowledge that at the end of the day I cannot be fully certain of what exactly happened to a given ex-ante conditionality in practice from outside the institutional world of conditionality.

In fact, *uncertainty* - and in particular legal uncertainty - turned out to be the recurring theme and leitmotiv of this Part. Conditionality ended up creating a generalised state

of uncertainty for the EU, Member States and citizens concerning what were the exact rules to be followed and conduct to be adopted, who were the actors involved and in which ways, what were the resources allocated, what constituted fulfilment, what exactly was the consequence of non-fulfilment, what did effective achievement of conditionality mean and how was it effectively measured in practice. I will repeatedly return to this theme of uncertainty throughout the following Chapters.

The Departure of Conditionality from its Legal World

The main argument of this Chapter is that, in its institutional world, conditionality has seen multiple departures from its legal world setting.

By using the term 'departure', I do not argue that, or investigate whether the instances where the institutional world of conditionality has departed from its legal world setting have been illegal, in breach of EU law or in breach of underpinning EU constitutional principles. In this Chapter, I limit my analysis and use of the term 'departure' in a broad sense, to express the discrepancies and the tensions between the legal world expectations raised by conditionality and their ultimate materialisation in the institutional world.

A typical example of a departure from the legal world of conditionality is a legally applicable and enforceable conditionality that becomes inapplicable and is never enforced in the institutional world. In these cases, a claim of illegality or breach of EU law may be difficult to make in practice because the Commission generally has considerable discretion during the conditionality process. Such a legal claim may also prove difficult when the Commission has a clear and non-discretionary obligation to act, given the legal technicalities of each case. However, the end result where a conditionality is systemically not applied or not enforced in the institutional world creates at the very least a tension with the legal expectations raised by conditionality

by virtue of its legally binding and enforceable EU law nature. I shall refer to these types of legal tensions as 'departures', without investigating whether they can also be read as breaches of EU law.

Based on the legal world of conditionality presented in Chapter 4 above, eight characters of macroeconomic and ex ante conditionality as a legal phenomenon are of particular importance for our analysis. Namely, above we have established that:

- (1) in the legal world, the conditionality process is led primarily by Member States, and assessed in subsidiary by the Commission;
- (2) in the legal world, conditionality rules refer to one single Commission and one single set of ESI Funds;
- (3) in the legal world, conditionality rules provide specific applicability, fulfilment and enforcement procedures for each conditionality type;
- (4) in the legal world, conditionalities have an equal legal force;
- (5) in the legal world, all conditionalities are guided by formal legal rules;
- (6) in the legal world, conditionality refers to concrete and pre-defined criteria for fulfilment;
- (7) in the legal world, conditionalities address all Member States in the same way, and where exceptions apply these are expressly indicated in the text of the CPR;
- (8) in the legal world, all conditionalities are enforceable.

The main argument of this Chapter is that in its institutional world, conditionality has seen an important departure from all the above characters of its legal world. In the following, this Chapter will show that:

- (1) in the institutional world, the conditionality process has in fact been largely driven by the Commission and not by Member States;
- (2) in the institutional world, conditionality has lacked a consistent institutional approach of one single Commission across one single set of ESI Funds;
- (3) in the institutional world, additional institutionalised ad-hoc procedures to a large extent influenced the operation of conditionality in practice;
- (4) in the institutional world, each conditionality and conditionality criterion has had its own institutional prioritisation, as opposed to an equal and consistent application and fulfilment;

- (5) in the institutional world, informality was generally favoured throughout the conditionality process, as opposed to the application of formal legal rules;
- (6) in the institutional world, the conditionality requirements set were very different from the conditionality requirements set in the legal world;
- (7) in the institutional world, conditionality had very different implications for each Member State and groups of Member States, even if it was addressed to all Member States in law; and finally,
- (8) in the institutional world, the broad institutional interpretation of conditionality enforcement rules rendered the tool *in all cases de facto unenforceable*.

In the following, I will start with a brief overview of the essential underpinnings of the legal world of conditionality, followed by an overview of the tool's main departures in the institutional world (10.1). The elaborated analytical framework in section 10.1 shall help structure the subsequent detailed discussion of the departures of macroeconomic conditionality (10.2) and ex-ante conditionality (10.3) in the institutional world.

10.1 Brief overview of the legal world and of departures in the institutional world

10.1.1 Brief overview of the legal world

As explained in Chapter 4 above, Regulation (EU) 1303/2013 (the 'CPR') is the fountainhead of the legal world of EU spending conditionalities analysed here.⁵³² The CPR lays down the general and specific legal rules that form the legal world of 7 general ex-ante conditionalities⁵³³ and 10 macroeconomic conditionalities⁵³⁴ applicable to all five ESI Funds, as well as to the 36 ex-ante conditionalities applicable to three Cohesion funds.⁵³⁵

In its legal world, the conditionality process is driven mainly by the Member States during both phases of the ESI Funds process: *programming* and *implementation*. The

⁵³² REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at Art. 19, 23-24, Annex XI. Subsequent ESI fund-specific ex ante conditionalities shape in rural development and fisheries funds regulations

⁵³³ *Id.* at Arts. 2 (33), 19, and Annex XI, Part II.

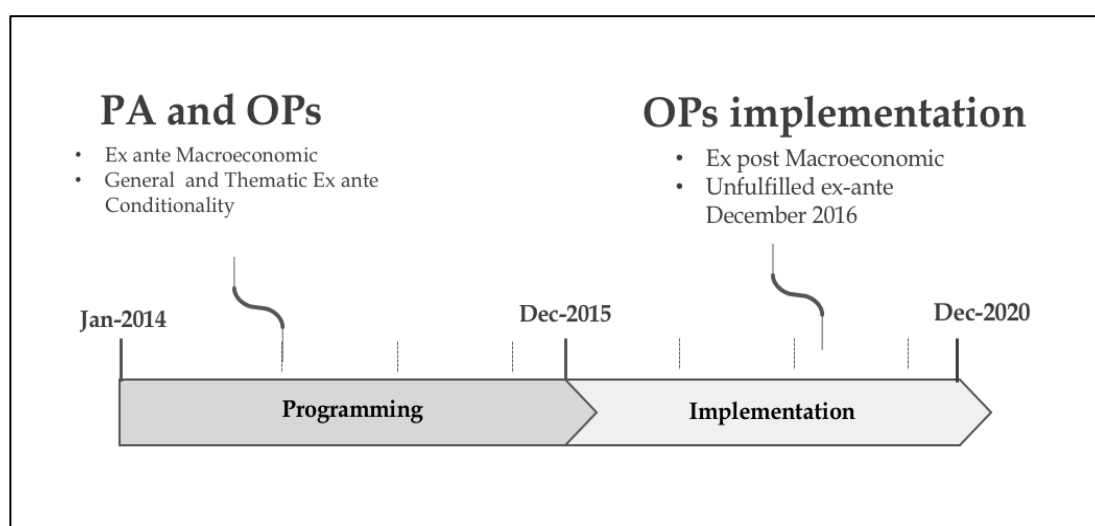
⁵³⁴ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219. Arts. 23-24.

⁵³⁵ *Id.* Arts. 2 (33), 19, Annex XI, Part I.

Commission has an important *subsidiary* role in assessing the Member States' compliance with conditionality rules and approving or suspending Member States' expenditure (see, Figure 8 below).⁵³⁶

During the programming phase, Member States as primary drivers of the conditionality process must give due consideration to one *ex-ante macroeconomic conditionality* and 36 ex-ante conditionalities (7 general and 29 thematic), and reflect them in their programming documents: one country-wide Partnership Agreement (PA) and several thematic Operational Programmes (OPs) detailing the specific investment objectives of the planned expenditure in each sector.

Figure 8. Spending conditionality and ESI Funds process



In line with the *ex-ante macroeconomic conditionality*, Member States must ensure that all their ESI Funds planned expenditure, as reflected in their PAs and detailed in the specific OPs, take into account the relevant European Semester Country Specific Recommendations (CSRs) addressed to them and other relevant Council recommendations adopted pursuant to Articles 121(2) and 148 (4) TFEU.⁵³⁷

In line with the 36 *ex-ante conditionalities*, Member States must carry out a self-assessment, determine what general and thematic ex-ante conditionalities are

⁵³⁶ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219. Art. 4(3) enshrines the general principle of subsidiarity guiding the overall ESI funds process, including conditionality.

⁵³⁷ *Id.* Art. 2 (35) Art. 15 (1)(a)(i).

applicable to their ESI Funds planned expenditure, and indicate the complete list of applicable ex-ante conditionalities in their country-wide PAs as well as in all their sector-specific OPs.⁵³⁸

During the ex-ante conditionality applicability assessment, Member States shall remember that the 7 *general* ex-ante conditionalities are applicable to all ESI Funds, whereas the 29 *thematic* ex-ante conditionalities are applicable to each fund specific objective as indicated in Annex XI of the CPR.⁵³⁹

In addition, Member States' applicability assessment shall have regard to the elaborate legal definition of an 'applicable ex-ante conditionality', which is:

*"a concrete and precisely pre-defined critical factor which is a pre-requisite for and has a direct and genuine link to, and direct impact on the effective and efficient achievement of a specific objective of a specific objective for an investment priority (...)"*⁵⁴⁰

Hence, to be found applicable, both *general and thematic* ex-ante conditionalities have to prove a direct link and impact on the effectiveness of spending.

Once Member States define the list of applicable ex-ante conditionalities, they must carry out a fulfilment assessment, guided by the specific fulfilment criteria of each ex-ante conditionality indicated in Annex XI of the CPR. After the self-assessment, Member States shall indicate in the same PAs and OPs whether their applicable ex-ante conditionalities are fulfilled or not.⁵⁴¹ In cases where the applicable ex-ante conditionalities are not fulfilled, Member States shall set out in their PA and OPs a complete list of detailed *Action Plans* to fulfil each unfulfilled ex-ante conditionality. They shall indicate the actions to fulfil, the authorities responsible and the deadlines for fulfilment.⁵⁴²

The Commission shall assess *in subsidiary* the consistency of the Member States' programming documents with the legal world provisions of one *ex-ante macroeconomic conditionality and 36 ex-ante conditionalities*, and approve the PAs and each OP if the Commission agrees with Member States' self-assessments.⁵⁴³ In case of disagreement,

⁵³⁸ *Id.* Art. 19 (1).

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* Art. 2 (33).

⁵⁴¹ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219. Art. 19 (2)

⁵⁴² *Id.* Art. 19 (2).

⁵⁴³ *Id.* Art. 16 (1)-(2), Art. 96 (10).

the Commission shall make observations on PAs and each OP and delay approval - hence the start of expenditure - until its observations are sufficiently addressed by the Member States.⁵⁴⁴

It is important to stress that once the Commission has approved the Member States' PAs and OPs and the list of applicable, fulfilled and unfulfilled ex-ante conditionalities together with the action plans for fulfilment, the Commission may not reconsider its position on applicable or fulfilled ex ante conditionalities ex-post.⁵⁴⁵ This means that the Commission may not find other conditionalities applicable ex-post, or find a fulfilled conditionality not fulfilled ex-post, even if additional information justifies such a conclusion.⁵⁴⁶

According to the CPR, ex ante conditionalities must be fulfilled as a general rule *ex ante*. Hence, before the start of spending marked by the moment of the approval of the OPs. Exceptionally, where no significant prejudice is present, Member States may also fulfil the outstanding ex-ante conditionality ex-post approval of the OP, by 31 December 2016 at the latest.⁵⁴⁷ However, where a significant prejudice to the attainment of an ESI Funds objective exists, in the legal world the Commission *may* suspend all or part of ESI Funds *payments* already at risk at the moment of approval of the OP.⁵⁴⁸ This means that the Commission may suspend ESI funds payments for unfulfilled ex-ante conditionality at the moment of approval of the OP where it finds that the unfulfilled ex-ante conditionality poses a significant prejudice to the attached spending.

The distinction between the PA and OPs is of utmost importance for the institutional world of conditionality, and we shall return to it on multiple occasions below. The essential take away on PA and OPs is that even if in the legal world all conditionalities must be reflected both in PAs and OPs, in their institutional world, it is their ultimate reflection in the OPs that effectively makes a difference for conditionality. If a conditionality is reflected in the PA but not consistently reflected in each specific OP,

⁵⁴⁴ *Id.* Art. 16 (1)-(2), Art. 96 (10).

⁵⁴⁵ *Id.* Art. 19 (6).

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.* Art. 19 (2), Art. 50 (4), Art. 52(2).

⁵⁴⁸ *Id.* Art. 19 (5).

its effective impact on the concrete expenditure on the ground risks being substantively reduced.

Let us take the general ex-ante conditionality on gender equality and its criterion on training to better explain the point. If a conditionality is found applicable in the content of the PA for a given EU Member State, but not found subsequently applicable at the level of the large infrastructure OP, the national officials involved in the management and control of large infrastructure projects shall not be trained on EU gender equality law and policy. As a result, the conditionality would most probably have no or only a marginal gender impact on large infrastructure spending in that state. In other words, if a conditionality is reflected only in the PA but not in the specific OPs, the conditionality exists only in law, but not in practice.

This is why the Commission's diligent and consistent subsidiary assessment of ex-ante macroeconomic and ex-ante conditionalities as indicated by Member States in their PAs, and most notably all OPs, is so important for conditionality in practice to correct the eventual gaps in applicability and fulfilment assessment that may be left open by Member States.

After the Commission approves all PAs and OPs (the programming documents), the implementation phase follows. During implementation, Member States are bound by the conditionalities that operate ex-post: the unfulfilled ex-ante conditionalities and 9 ex-post macroeconomic conditionalities.

Here, it is important to recall another important legal world distinction for conditionality: the distinction between *payments* and *commitments* explained in Part II above. Put very simply, ESI Funds *commitments are promised EU money*, whereas ESI Funds *payments are actual EU money paid*. During implementation, Member States start spending ESI Funds according to their annual *commitments*, sending requests for *payments* to the Commission, and ultimately receiving ESI Funds disbursements.⁵⁴⁹ An important consequence follows for conditionality. Where the conditionality sanction is a suspension of *payments*, the financial consequences are immediate and EU money flowing from the EU to national level stops at once. Yet, where the conditionality sanction is suspension of *commitments*, payments do not stop and EU monies are continuously disbursed from prior annual commitments which may be spent for 3

⁵⁴⁹ *Id.* Arts. 77, 86, 136.

more years after the commitment was made and until the committed resources are exhausted.⁵⁵⁰ Therefore, suspension of payments is financially more painful for a Member State than suspension of commitments, which shall not immediately be financially painful. We shall repeatedly return to this point when analysing the enforcement of conditionalities in practice.

During implementation, Member States must continue fulfilment of their unfulfilled ex-ante conditionalities during programming, pursuant to the Action Plans approved as part of the PAs and OPs. They shall do so no later than 31 December 2016. In line with the CPR, the non-fulfilment of ex-ante conditionalities by the 31 December 2016 deadline shall constitute a ground for the Commission to suspend *payments* for the ESI Funds priorities at risk.⁵⁵¹ Therefore, enforcement of ex ante conditionalities is optional but if ordered it shall affect payments and shall immediately be financially painful. Member States shall report on ex-ante conditionality fulfilment no later than in their annual implementation or progress reports for each OP to be submitted by 31 May 2017 or 31 August 2017 accordingly.⁵⁵²

During implementation, 9 *ex-post macroeconomic conditionalities* also operate. As explained in Chapter 4 above, macroeconomic conditionalities are grouped in three conditionality strands: 3 *reprogramming* negative conditionalities, 5 *mandatory suspension* negative conditionalities and one *top-up* positive conditionality.⁵⁵³

According to the 3 *reprogramming* negative conditionalities, the Commission may request all Member States (except the UK⁵⁵⁴) to reprogram their ESI Funds when necessary to support new CSRs (1),⁵⁵⁵ correct macroeconomic imbalances (2),⁵⁵⁶ or support implementation of macroeconomic adjustment programmes (3).⁵⁵⁷ If Member States fail to take 'effective action' in response to the Commission's request, the Commission *may* propose to the Council a total or partial suspension of ESI Funds

⁵⁵⁰ *Id.* Art. 86 and Art. 136.

⁵⁵¹ *Id.* Art. 19 (5).

⁵⁵² *Id.* Art. 19 (2), Art. 50 (4), Art. 52(2).

⁵⁵³ *Id.* Arts. 23-24.

⁵⁵⁴ *Id.* Art. 23 (13). [the UK exception is based on its negotiation position that such suspensions may not be legally ordered in case of the UK in the light of Protocol 15 to the treaties]

⁵⁵⁵ *Id.* Art. 23 (1)(a).

⁵⁵⁶ *Id.* Art. 23 (1)(b).

⁵⁵⁷ *Id.* Art. 23 (1)(c).

payments.⁵⁵⁸ Therefore, enforcement is optional but if ordered it shall affect *payments*, and shall immediately be financially painful.

According to the CPR, the 5 *mandatory suspension* negative conditionalities are automatically triggered when Member States (except the UK⁵⁵⁹) breach five sets of EU economic governance rules, namely when the Council decides that a Member State has failed to correct its excessive deficit (1);⁵⁶⁰ the Council issues two recommendations in the same excessive imbalance procedure concluding that a Member State has submitted an insufficient corrective action plan (2);⁵⁶¹ the Council issues two decisions in the same excessive imbalance procedure concluding that a Member State has submitted an insufficient corrective action plan (3);⁵⁶² the Commission concludes that a Member State under financial assistance has failed to implement its economic adjustment programmes and decides not to authorise disbursement of financial assistance (4);⁵⁶³ or the Council decides that a Euro-area Member State under financial assistance failed to comply with its macroeconomic adjustment programme or with other corrective measures requested by a Council decision pursuant to Article 136 (1) TFEU (5).⁵⁶⁴ In all these cases the Commission *shall* propose to the Council a total or partial suspension of ESI Funds commitments or payments, giving priority to *commitments*.⁵⁶⁵ In this case, enforcement is mandatory but if ordered it shall affect commitments with priority, and therefore it shall not be immediately financially painful.

In all cases the European Parliament has a soft overview power. As such, the Commission shall immediately inform the European Parliament when any of the 3 reprogramming or 5 mandatory suspension conditionalities are triggered and engage in a "structured dialogue" with the latter upon invitation from the European Parliament.⁵⁶⁶ In the case of 5 mandatory suspension conditionalities, the Commission

⁵⁵⁸ *Id.* Art. 23 (6).

⁵⁵⁹ *Id.* (on The UK see Art. 23 (13) note 554 supra)

⁵⁶⁰ *Id.* Art. 23 (9) (a).

⁵⁶¹ *Id.* Art. 23 (9) (b).

⁵⁶² *Id.* Art. 23 (9) (c).

⁵⁶³ *Id.* Art. 23 (9) (d).

⁵⁶⁴ *Id.* Art. 23 (9) (e).

⁵⁶⁵ *Id.* Art. 23 (9) sub-paragraph 3.

⁵⁶⁶ *Id.* Art. 23 (15) sub-paragraphs 1-2.

shall additionally "give due considerations" to the opinions expressed during the "structured dialogue" when proposing a suspension of commitments or payments.⁵⁶⁷ Lastly, one top-up conditionality gives Member States under financial assistance the option to ask the Commission for 10% top-up in their ESI Funds contribution by 30 June 2016.⁵⁶⁸

10.1.2 Brief overview of departures from the legal world

10.1.2.1 *Departure from a conditionality process led by Member States*

Even if the legal world suggests that the process of conditionality is driven mainly by Member States, in the institutional world the Commission has in fact been the leading actor of conditionality.

To this end, in 2012 the Commission prepared position papers addressed to each Member State that included a clear list of CSRs to be taken into account by Member States in line with ex-ante macroeconomic conditionality, as well as a list of 'critical' ex-ante conditionalities to be delivered by each Member State before the start of spending.⁵⁶⁹ These 2012 position papers were not without legal consequence. They constituted the Commission's ESI Funds negotiation mandate for each Member State, and as has been shown by evaluation studies, were largely reflected in Member States programming documents: PAs and OPs.⁵⁷⁰

This means that in practice it was the Commission, and not the Member States, that first undertook the applicability assessment and fulfilment of all conditionalities, anticipating the Member States' own assessment and *de-facto* reversing the subsidiarity premise of conditionality in favour of the Commission.

⁵⁶⁷ *Id.* Art. 23 (9) sub-paragraph 2.

⁵⁶⁸ *Id.* Art. 24 (1).

⁵⁶⁹ EUROPEAN COMMISSION PERSPECTIVES ON THE 2014-2020 PARTNERSHIP AGREEMENTS & PROGRAMMES: A COMPARATIVE REVIEW OF THE COMMISSION'S POSITION PAPERS, http://www.eprc.strath.ac.uk/eprc/documents/PDF_files/EPRP_84.pdf; European Commission, POSITION OF THE COMMISSION SERVICES ON THE DEVELOPMENT OF PARTNERSHIP AGREEMENT AND PROGRAMMES IN ROMANIA FOR THE PERIOD 2014-2020 ARES(2012)1240252 (2012). [Heading 'Success factors for delivery']

⁵⁷⁰ European Commission, INVESTING IN JOBS AND GROWTH - MAXIMISING THE CONTRIBUTION OF EUROPEAN STRUCTURAL AND INVESTMENT FUNDS, BRUSSELS, COM(2015) 639 FINAL Annex II, Country Fishes (2015); COURT OF AUDITORS, SPECIAL REPORT. THE COMMISSION'S NEGOTIATION OF 2014-2020 PARTNERSHIP AGREEMENTS AND PROGRAMMES IN COHESION: SPENDING MORE TARGETED ON EUROPE 2020 PRIORITIES, BUT INCREASINGLY COMPLEX ARRANGEMENTS TO MEASURE PERFORMANCE 9 (2017).

10.1.2.2 Departure from a consistent approach of one Commission across all ESI Funds

In the legal world, conditionality refers to one single Commission and one single set of ESI funds.

In the institutional world, there has not been one Commission, but multiple Commission DGs in charge of conditionality. There has been no unitary set of ESI Funds, but five separate funds under the responsibility of four Commission DGs in charge of EU Funds spending.

As a result, the conditionalities have been split, divided and bent to match the programming criteria of each ESI fund and the institutional ethos of each Commission DG, with important consequences for the applicability, fulfilment and enforcement of spending conditionality in practice.

In the institutional world, four Commission DGs have been responsible of the management of five ESI Fund bound by conditionality. DG Regional and Urban Policy (DG REGIO) has been responsible for the European Regional Development Fund (ERDF) and the European Cohesion Fund (ECF) and the conditionalities linked to them; DG Employment and Social Inclusion (DG EMPL) has been responsible the European Social Fund (ESF) and conditionalities linked to it; DG Maritime Affairs (DG MARE) has been responsible for the European Maritime and Fisheries Fund (EMFF) and conditionalities linked to it; and finally DG Agricultural and Rural Policy (DG AGRI) has been responsible for the European Agricultural Fund for Rural Development (EAFRD) and conditionalities linked to it.

At the level of each ESI Funds spending DG, the country-specific geographical units have taken the lead on the conditionality process with regard to each OP of the Member States. For instance, in the case of Romania this meant that the country unit for Romania in DG REGIO would assess the consistency with conditionality requirements applicable to the Romanian OPs financed from ERDF and ECF; the country unit for Romania in DG EMPL would assess the consistency with conditionality requirements applicable to the Romanian OP financed from ESF; the country unit for Romania in DG AGRI would assess the consistency with conditionality requirements applicable to the Romanian OP financed from EAFRD; the country unit for Romania in DG MARE would assess the consistency with conditionality requirements applicable to the Romanian OP financed from EMFF.

This process would continue for each ESI Fund and each Member State.

At times however, one single conditionality has been under the responsibility of two DGs responsible for ESI Funds management, as for instance, the thematic ex-ante conditionality on water was applicable to both EAFRD and ERDF and therefore was under the responsibility of both DG AGRI and DG REGIO. In these cases, both DGs were involved independently in the process of assessing fulfilment of conditionality criteria for the purpose of their funds and decided independently on lifting or not lifting the conditionality, without prejudice to the decision of the other DG.⁵⁷¹

As general rule, the four DGs in charge of ESI funds management have led on a permanent basis the discussions on applicability, fulfilment and enforcement of conditionalities. However, as interviews revealed, DG REGIO was *de facto primus inter pares*.⁵⁷²

DG REGIO traditionally holds the largest Structural Funds envelopes of ERDF and ECF, and traditionally has been the leading DG on Cohesion Policy planning. In the 2014-2020 financial period, DG REGIO's 'Policy Unit' was in charge of development and negotiation of the ESI Funds legislative proposals, including the spending conditionalities therein.⁵⁷³ After the approval of the spending regulations, it was also DG REGIO that assumed subsequent ownership of the conditionality process by putting in place dedicated structures on macroeconomic and ex-ante conditionality monitoring and coordination under its Better Implementation Unit and Policy Unit, respectively.⁵⁷⁴ DG REGIO was also perceived as the leading DG on macroeconomic and ex-ante conditionality by other DGs in charge of ESI spending.⁵⁷⁵ The same conclusion can be deduced from the documents circulated between the Commission and the Romanian authorities. As a general rule, every communication on ex-ante conditionality would inform the DG in charge of spending for a given OP, and in all

⁵⁷¹ Commission Letter on the fulfilment of ex ante conditionality 6.1 Water sector, COM Ares (2017) 368801 of 24.01.2017, lifting the water ex-ante conditionality only in as far as DG REGIO is concerned, without prejudice to DG AGRI. See also Annex IV to the present thesis, water ex-ante conditionality.

⁵⁷² Interviews, Brussels, 2016, 2017.

⁵⁷³ Interviews, Brussels, 2016, 2017.

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.*

cases DG REGIO was the focal point, responsible for all ESI Funds conditionality policy planning, coordination, monitoring and ultimate reporting.⁵⁷⁶

Moreover, interviews revealed that while all four DGs in charge of ESI Funds cooperated with each other on a regular basis on conditionality, in practice DG REGIO and DG EMPL had closer cooperation, as they are the two DGs traditionally in charge of the three Cohesion policy funds (ERDF, ECF and ESF). This led to an outcome where DG EMPL would closely follow the lead of DG REGIO in relation to conditionality in ESF; whereas DG AGRI and DG MARE saw their EAFRD and EMFF spending as more detached and independent from the conditionalities outside their strict policy area.

The above complex institutional picture became even more complicated in practice.

In addition to four DGs in charge of ESI Funds management, other policy DGs with competences on specific conditionalities would be involved, but on an ad-hoc and variable basis.

For instance, DG Economic and Financial Affairs (DG ECFIN), would be involved in the discussions on ex-post macroeconomic conditionality enforcement, but not during the assessment of ex-ante macroeconomic conditionality fulfilment (10.2, below).

On the contrary, in the case of ex-ante conditionalities, policy leading DGs would be involved during assessment of fulfilment of ex-ante conditionalities, but not during discussion of their enforcement (10.3, below). For instance, DG Internal Market, Entrepreneurship and SMEs (DG GROW) would assess the fulfilment of ex-ante conditionalities on public procurement, SMEs and the Small Business Act (SBA), whereas DG Environment (DG ENV) would assess the ex-ante conditionalities on waste and water. While these policy DGs were to conclude whether an ex-ante conditionality was or was not fulfilled, they could not decide on funds suspension, delegated only to the four DGs in charge of ESI funds management (10.3, below).

As mentioned above, the involvement of policy leading DGs was inconsistent. At times, policy DGs with essential roles in a specific policy area would not be involved or would only be marginally involved during the conditionality process, such as for instance the lack of involvement of DG Justice (DG JUST) in assessing the fulfilment

⁵⁷⁶ Conclusion based on access to documents requests from the Commission, September 2017. See also: EUROPEAN COMMISSION, SEVENTH REPORT ON ECONOMIC, SOCIAL AND TERRITORIAL COHESION (2017). [on macroeconomic conditionality pp 171-174, on ex-ante conditionality 179-182]

of gender equality, non-discrimination, disability and Roma ex-ante conditionalities, which were all under the responsibility of DG EMPL in practice (10.3, below).⁵⁷⁷

To sum up, in its institutional world conditionality did not relate only to one single Commission or one set of ESI Funds. In the institutional world, the overall conditionality process was split across four Commission DGs responsible for the management of five ESI Funds, led by DG REGIO - the DG in charge of the conditionality policy formulation, monitoring and reporting. Each of the four DGs had ownership of a certain set of sector-specific conditionalities, usually the thematic ex-ante conditionalities directly linked to their policy area. These four DGs would primarily cooperate between themselves and would involve on an ad-hoc basis other policy DGs with competence in the policy area of a given conditionality, but with important variations.

This 'old', spending-based, compartmentalised Commission institutional world did not favour a consistent approach to the 'novelty' of conditionality. In addition, at times it led to an important lack of fit between the DGs in charge of policy and the DGs in charge of conditionality.

10.1.2.3 Complementary ad-hoc procedures

In the previous section I have explained that the institutional world of the Commission was not always a good fit with the legal world of conditionality. Therefore, even if the legal world already provided for specific applicability, fulfilment and enforcement procedures for each conditionality type, additional procedures were needed to operationalise the process of conditionality in practice.

These procedures were institutionalised to facilitate a coherent inter-DG approach to ex-ante conditionality applicability, fulfilment and enforcement, or to remedy for the lack of a detailed legal procedure in dealing with the European Parliament in the context of macroeconomic conditionality (10.3 below).

However, their ad-hoc nature led to an ever-changing, more complex, and multi-layered decision-making process, raising important tensions with the expectation of

⁵⁷⁷ Interviews, Brussels, 2017.

clear, transparent and predictable rules of procedure raised by the legal world of conditionality.

10.1.2.4 Departure from the equal legal force of conditionality

Spending conditionalities might have been equal in their legal world, but not in practice. In the institutional world, each conditionality package was subject to a clear institutional prioritisation and re-classification. The Commission and the Member States simply knew which macroeconomic or ex-ante conditionalities mattered and which did not; which ones were a high priority and which ones not so much; on which conditionalities the Commission must be demanding and on which it may be softer.

The interviews revealed that in practice conditionalities saw internal institutional prioritisation on multiple levels: at the level of the Commission, at the level of each Commission DG and at the level of each country unit of each DG. Each of these levels had its own understanding of the importance of ex-ante conditionalities in line with their institutional priorities.

This institutional prioritisation led to important consequences in practice, to a large extent informing the Commission's and Member States' applicability and compliance threshold in the case of each conditionality concerning each Member State. As a result, the equal life of conditionalities in law, turned out to be highly unequal in practice, where each conditionality had its own status attributed to it by the institutional ethos under which it operated.

10.1.2.5 Departure from a formal legal setting

The formal legal world of conditionality was set aside on important occasions in the institutional world and replaced instead by *informality*. Member States together with the Commission often appealed to informal agreements that rendered the formal law of conditionality *de facto* inapplicable and unenforceable. This institutional preference for informality had important consequences for the legal world of conditionality, as it further blurred the clarity, accountability and transparency of the conditionality process in practice. The institutional preference for informality was particularly corrosive for ex-ante conditionality enforcement rules.

10.1.2.6 *Departure from conditionality criteria set in law*

In their institutional world, the most voluminous set of conditionalities, ex-ante conditionalities, turned out to have a very different scope from the one suggested by their legal world. The criteria for fulfilment of ex-ante conditionalities ended up being broader, narrower, or simply different, on a case by case basis.

However, this 'more, less or different' institutional approach to conditionality clearly departed from the 'concrete' and 'pre-defined' legal world definition of ex-ante conditionality. Most importantly, it led to situations on the ground where it was simply impossible to say how a certain conditionality requirement was related to a legal criterion; or to situations where national institutions and the public at large would perceive a non-conditionality in law as a true conditionality in practice and vice-versa.⁵⁷⁸

10.1.2.7 *Departure from a conditionality tool addressed to all Member States*

Even if in the legal world conditionalities addressed all Member States in an equal manner, conditionalities did not have the same implications for all Member States in the institutional world.

In the institutional world, each macroeconomic and especially ex-ante conditionality saw very distinct applications, fulfilment thresholds, administrative burdens and risks of suspension for *each Member State*.

As a result, each conditionality created identifiable groups of Member States for whom all or only certain conditionalities involved a higher applicability or fulfilment challenge, administrative burden or risk of suspension in practice (10.2 -10.3, *below*).

10.1.2.8 *Departure from the legally enforceable nature of conditionality*

One of the most interesting findings of this Chapter is that the legally enforceable nature of conditionality has been rendered *de facto* unenforceable in the institutional world due to the broad institutional interpretation given to conditionality enforcement rules. By January 2018, not a single euro from the EU budget has been formally suspended for failure to meet conditionality criteria, even if on an important number

⁵⁷⁸ See, Romania case study, Chapter 12 below.

of occasions Member States did not fully comply with conditionalities applicable to them. This is beyond doubt the most decisive impact that the institutional world of conditionality had on its legal world. It transformed legally enforceable conditionality in a *de facto* unenforceable legal tool.

Here, the institutional understanding of conditionality had a crucial impact on the tool's enforcement in practice. During interviews, officials of the Commission and of the EU Council would repeatedly invoke the same curious phrase: '*conditionality is not a sanction*', '*conditionality is not a punishment*',⁵⁷⁹ even if I stressed in response that conditionality is a legal norm prescribing particular conduct and punishing contrary conduct with ESI Funds suspension. In addition, Commission officials would repeatedly mention that '*conditionality is not coercive*', but is a tool that invites Member States to work together towards shared results,⁵⁸⁰ even if in response I would point out that conditionality is a legally binding EU norm, and coerciveness is an essential character of a binding and enforceable legal norm.⁵⁸¹ At the same time, all Commission officials interviewed without exception affirmed with confidence that both macroeconomic and ex-ante conditionalities are enforceable and shall be enforced if necessary.⁵⁸² Therefore, in the EU's institutional view, conditionality is not a sanction or punishment, it is not coercive, yet it is to be enforced.

There is one plausible conclusion that one can draw from the corroborated reading of these contradictory pieces of information and the EU's *modus operandi* on conditionality until January 2018:

In the EU institutional world, conditionality is not perceived as a sanctioning tool, but as a compliance tool. In the shared understanding of the EU institutions, the goal of conditionality is not suspension of EU funds, but achievement of as much compliance as possible. Indeed, EU institutions have no interest in cutting-off EU money. The EU's ultimate goal is to achieve the highest possible rate of Member States compliance and

⁵⁷⁹ Interviews, Brussels, Bucharest, 2017.

⁵⁸⁰ Interviews, Brussels, 2017.

⁵⁸¹ See *inter alia* the detailed scholarly discussions on coerciveness of law in general and coerciveness of conditional spending in the U.S.: G. Lamond, *The coerciveness of law*, 20 OXF J LEG STUD 39–62 (2000); Berman, *supra* note 508; Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283–1348 (2012); Patrick Haney, *Coercion by the Numbers: Conditional Spending Doctrine and the Future of Federal Education Spending Note*, 64 CASE W. RES. L. REV. 577–618 (2013).

⁵⁸² Interviews, Brussels, 2016, 2017.

to fully spend the EU budget by the end of the financial period. Conditionality enforcement is indeed possible, but it shall be used only as an *ultima ratio* option, when all other options for achieving compliance have been exhausted.

The term 'nuclear threat' best describes the (un)enforcement of conditionalities in their institutional world. That is: a statement of intent to enforce the conditionalities in order to end a state of non-compliance, which places significant compliance pressure on Member States but is unlikely to actually materialise because it would be mutually disadvantageous.

In these conditions, a very important consequence follows for conditionality: a fulfilled conditionality does not necessarily mean full compliance with the conduct required. Because both the Commission and the Member States know that enforcement is not likely, in cases where there is low national commitment to change, a tactic of half (or minimum) compliance is followed by Member States and eventually endorsed by the Commission. As we shall see below, this tactic of half-compliance leads to situations where the Commission's assessment that a conditionality has been fulfilled does not necessarily mean that the Member State is fully compliant with EU law or policy requirements, but that Member States are compliant with some minimum requirements, or that there is evidence that they have started to move towards compliance.⁵⁸³

Having regard to these general patterns of conditionality's departures from the legal world in its institutional world, the next sections shall detail their specific materialisation in the case of macroeconomic (10.2) and ex-ante conditionalities (10.3).

⁵⁸³ Chapter 12 below, case study Romania.

10.2 The institutional world of macroeconomic conditionality

Under pressure from the institutional world, macroeconomic conditionalities ended up having a significantly weaker bite than prescribed in their legal world.

Whereas the ex-ante macroeconomic conditionality has had some impact on programming, and the ex-post positive conditionality has been applied to one Member State, the most feared, numerous and contested eight ex-post negative conditionalities that could have led to partial or total suspensions of ESI funds have been rendered *de facto* toothless, largely inapplicable, and generally unenforceable, leading to an outcome where the vast expansion of macroeconomic conditionality in 2014-2020 had existence only in law and not in practice. In the following, the institutional world of macroeconomic conditionalities and their manifestations in that world shall be examined, clustered around four conditionality stands: programming (10.2.1), re-programming (10.2.2), mandatory suspension (10.2.3) and top-ups (10.2.4).

10.2.1 Programming

The ex-ante negative macroeconomic conditionality saw two main departures in its institutional world: a departure from a process led by Member States towards a process led primarily by the Commission; and a departure from coherent and uniform application across all ESI Funds towards a fund-specific approach variable across the Commission's DGs.

10.2.1.1 *A process led primarily by the Commission*

Even if in its legal world the ex-ante macroeconomic conditionality process was to be driven by Member States and assessed in subsidiary by the Commission, in its institutional world it was the Commission that took leadership of the process.

From 2012, the Commission was the first to issue detailed position papers for each Member State, underlining its views and expectations on ESI Funds programming and the specific challenges to be addressed, with particular regard to the Council Country

Specific Recommendations (CPRs), as necessitated by the ex ante macroeconomic conditionality.⁵⁸⁴

Member States followed in a subsidiary role by preparing their draft PAs and OPs based on the Commission 2012 position papers and submitting them to the Commission.⁵⁸⁵ During the negotiation of programming documents that lasted until December 2015,⁵⁸⁶ the Commission closely reviewed the Member States' PAs and OPs, and provided observations on relevant CSRs, reminding each Member State to take into account and make clear reference to the most recent 2014 CSRs.⁵⁸⁷

In effect, the position papers of 2012 reversed the subsidiarity logic of the CPR⁵⁸⁸ in favour of the Commission and put Member States in the *de facto* subsidiary position of following the Commission's lead on ex-ante macroeconomic conditionality.

10.2.1.1 Inconsistent approach of the Commission across all ESI Funds

About two thirds of the 2014 CSRs have been found relevant to Member States' ESI Funds 2014-2020 spending, primarily the CSRs requiring structural reforms in areas of research, innovation, transport, energy, health, education, labour market, social inclusion and administrative reform.⁵⁸⁹

However, despite the legal world promise of a common approach to ex-ante macroeconomic conditionality across all ESI Funds, this conditionality did not see consistent application. Commission reports⁵⁹⁰ and subsequent assessment studies⁵⁹¹ show that CSRs have been mainly considered in OPs financed from ERDF and ESF,

⁵⁸⁴ EUROPEAN COMMISSION PERSPECTIVES ON THE 2014-2020 PARTNERSHIP AGREEMENTS & PROGRAMMES: A COMPARATIVE REVIEW OF THE COMMISSION'S POSITION PAPERS, *supra* note 569.

⁵⁸⁵ COURT OF AUDITORS, *supra* note 570.

⁵⁸⁶ *Id.*

⁵⁸⁷ See the Commission's Observations on Partnership agreements: *Partnership agreements on the European structural and investment funds* | European Commission, , https://ec.europa.eu/info/publications/partnership-agreements-european-structural-and-investment-funds_en (last visited Jan 17, 2018).

⁵⁸⁸ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219.

⁵⁸⁹ European Commission, MID-TERM REVIEW/REVISION OF THE MULTIANNUL FINANCIAL FRAMEWORK 2014-2020: AN EU BUDGET FOCUSED ON RESULTS BRUSSELS, 14.9.2016 COM(2016) 603 FINAL 27 (2016); EUROPEAN COMMISSION, *supra* note 576 at 171; COURT OF AUDITORS, *supra* note 570 at 66.

⁵⁹⁰ European Commission, *supra* note 589 at 27.

⁵⁹¹ Support of European Structural and Investment Funds (ESI Funds) to the implementation of the Country Specific Recommendations and to structural reforms in Member States (project), WIIW.AC.AT, <https://wiiw.ac.at/pj-123.html> (last visited Dec 5, 2017); COURT OF AUDITORS, *supra* note 570.

and to a lesser extent in ECF.⁵⁹² This means that the ex-ante macroeconomic conditionality has been found applicable mainly to spending programmed from the two traditional EU Structural Funds (ERDF and ESF) under the management of DG REGIO and DG EMPL.

The similarity in name: 'structural reforms' and 'structural funds', may induce one to think that ERDF and ESF are indeed the most relevant ESI Funds for ex-ante macroeconomic conditionality, a best fit to tackle CSR structural reforms. However, a brief look at the 2014 CSRs and the investment objectives of the two ESI Funds omitted (the rural development (EAFRD) and fisheries (EMFF) funds) shows that this assumption is mistaken. An important number of CSRs are of real relevance to EU rural development and fisheries spending - such as the CSRs addressing business and enterprise, environment action, infrastructure, social inclusion, poverty reduction, training, research and innovation - that have all rarely been considered during the design of EAFRD and EMFF spending targeting similar ends.⁵⁹³ A short look at EMFF regulations shows that the largest share of EU fisheries spending in 2014-2020 is directed to enterprise and SME support in fisheries.⁵⁹⁴ Moreover, the largest EAFRD financial envelopes in 2014-2020 support enterprise and SMEs in rural areas, energy efficiency, climate change and social inclusion.⁵⁹⁵ Hence, at least the CSRs on business environments, SMEs, social inclusion and environment could have been relevant to EMFF and EAFRD, but were not in practice.

On this point, interviews revealed that the lack of consistency had its genesis in the lack of match between the legal and institutional world of conditionality. In the institutional world, DG REGIO followed by DG EMPL were the Commission DGs that adopted the most demanding approach to ex-ante macroeconomic conditionality, while DG MARE and DG AGRI did not perceive the conditionality (and the CSRs) as

⁵⁹² European Commission, *supra* note 589 at 27; Support of European Structural and Investment Funds (ESI Funds) to the implementation of the Country Specific Recommendations and to structural reforms in Member States (project), *supra* note 591.

⁵⁹³ REGULATION (EU) NO 1305/2013, *supra* note 272 at Art. 5; REGULATION (EU) 508/2014, *supra* note 273 at Art. 6.

⁵⁹⁴ Open Data Portal for the European Structural Investment Funds - European Commission | Data | European Structural and Investment Funds, SOCRATA, <https://cohesiondata.ec.europa.eu/> (last visited Feb 2, 2018).

⁵⁹⁵ *Id.*

a priority for their spending packages.⁵⁹⁶ The 2016 interviewees at DG MARE and DG AGRI confessed that even if macroeconomic conditionality were applicable in law to all ESI Funds, in their view, rural development and fisheries funds are not the primary funds targeted by the tool.⁵⁹⁷ The above evidence shows that this institutional assumption was fully reflected in practice.

10.2.2 Re-programming: *de facto* inapplicable and unenforceable

The three macroeconomic conditionalities of the re-programming strand were rendered *de facto* inapplicable and unenforceable in their institutional world due to the much-delayed start of spending execution in 2014-2020 but also due to a broad institutional interpretation on the part of the Commission that rendered the tool *de facto* unenforceable.

In their legal world, the three re-programming conditionalities were perceived as the most dynamic conditionalities, which gave flexibility to the EU budget and the legal option to the Commission to request that Member States reprogram their ESI funds allocations between 2015 - 2019 where re-allocation of funds would be necessary to support new pressing needs such as implementation of new CSRs, correction of macroeconomic imbalances or implementation of financial assistance programmes.⁵⁹⁸ Contrary to their legal world expectations, in their institutional world the conditionalities became absolutely static and have never been used in practice.⁵⁹⁹

It should be stressed again that the serious delay in the start of spending execution must be seen as the main culprit that rendered the conditionalities *de facto* inapplicable in the current financial period.⁶⁰⁰ A reprogramming request, even if needed, would have added more uncertainty and delays to the already much belated spending, which is highly undesirable in policy terms, and above all politically.⁶⁰¹ On this point Commission officials reported during interviews that the Commission cannot afford

⁵⁹⁶ Interviews, Brussels, 2016, 2017.

⁵⁹⁷ Interviews, DG MARE, DG AGRI 2016.

⁵⁹⁸ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219. [Art. 23 (1)-(2)]

⁵⁹⁹ EUROPEAN COMMISSION, *supra* note 576 at 172.

⁶⁰⁰ *Id.* at 172.

⁶⁰¹ *Id.* at 172.

more delays in spending, especially in a post-crisis environment where the lack of EU investment in Member States' recovering economies is very hard to explain.⁶⁰²

However, our investigation showed that the Commission's institutional interpretation also had an important role to play in rendering the conditionalities inapplicable and unenforceable in practice.

Regarding applicability, in 2014 in its guidance on macroeconomic conditionality the Commission announced its intention to use reprogramming conditionalities only exceptionally.⁶⁰³ It explained that: "the reprogramming powers granted to the Commission will be used carefully and [...] stability would be preferred over too frequent reprogramming".⁶⁰⁴ Moreover, the 2017 report on macroeconomic conditionality (4 pages, published as a part of the Seventh Cohesion Report), explains that the Commission understood that any reprogramming request to support new relevant CSRs must be based on an "indisputable" link between the CSR and the ESI funds.⁶⁰⁵ This interpretation clearly departs from the text of the funding regulation that defines 'relevant CSRs' as CSRs that relates to structural challenges that may be 'appropriately' - not indisputably - addressed through investment that falls directly under the scope of ESI funds.⁶⁰⁶ Furthermore, the Commission's institutional interpretation limited the three legal grounds for reprogramming to one *de facto* ground: the CSRs. In this sense, the same Commission report on macroeconomic conditionality reports only on the first CSR reprogramming ground, tacitly discarding the possibility of an eventual reprogramming request to prevent macroeconomic imbalances, to correct excessive imbalances, or to support the implementation of economic adjustment programmes even if, for instance, Greece was still under EU financial assistance until June 2018.⁶⁰⁷ In these conditions, only DG EMPL has reported during interviews that it is considering a re-programming request view of the 2018 CSRs, however without any certainty.⁶⁰⁸

⁶⁰² Interviews, Brussels, DG Budget, 2017.

⁶⁰³ European Commission, GUIDANCE ON EX ANTE CONDITIONALITIES FOR THE EUROPEAN STRUCTURAL AND INVESTMENT FUNDS PART II 4 (2014).

⁶⁰⁴ European Commission, *supra* note 246 at 4.

⁶⁰⁵ EUROPEAN COMMISSION, *supra* note 576 at 172.

⁶⁰⁶ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at Art. 2 (35).

⁶⁰⁷ EUROPEAN COMMISSION, *supra* note 576 at 171-172.

⁶⁰⁸ Interviews, Commission, September 2017

Regarding enforceability, even if the Commission would address a reprogramming request to a Member State by 2019, an eventual suspension of ESI Funds has also been *de facto* discarded by the Commission. In the same guidance on macroeconomic conditionalities the Commission stated that it may consider proposing a suspension only "in the case of no action", meaning that to trigger an eventual spending cut-off a Member State should fail to communicate any response or any re-programming proposal within the deadlines stipulated in the Commission's request.⁶⁰⁹ This 'no action' interpretation evidently departs from the text of the regulation which states that the Commission may propose a suspension where a Member State "failed to take *effective action* in response to a [reprogramming] request".⁶¹⁰ As such, the Commission's "no action" institutional interpretation as opposed to "effective action" specified in the CPR, renders suspension *virtually inconceivable* and the re-programming stand of macroeconomic conditionalities *de facto* unenforceable in practice.

At the end of the day, even if the reprogramming macroeconomic conditionalities were presented as dynamic budget tools capable of being usefully applied in practice, the delayed expenditure coupled with the Commission's institutional interpretation rendered the conditionalities in all cases *de facto* inapplicable and unenforceable.

10.2.3 Mandatory suspension

In their legal world, five mandatory suspension macroeconomic conditionalities were to have the strongest legal bite and deter grave breaches of EU economic governance rules by 'automatic' suspension of ESI Funds. At the same time, the conditionalities were to have an equal legal force, a clear enforcement procedure, were to be addressed to all Member States (except the UK), and were to be *automatically enforceable*, promising that when applicable, the Commission *shall* propose an ESI Funds suspension of commitments or payments to the Council, which shall be deemed adopted unless the Council rejects it by qualified majority.⁶¹¹

However, this was not the case in the institutional world, where the five mandatory conditionalities were subject to prioritisation (10.2.3.1), complementary ad-hoc

⁶⁰⁹ European Commission, *supra* note 603 at 9.

⁶¹⁰ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at Art. 23 (8).

⁶¹¹ *Id.* at Art. 23 (9)-(10).

procedures (10.2.3.2), addressed only to some Member States (10.2.3.3) and ultimately rendered *de facto* unenforceable (10.2.3.4).

10.2.3.1 Prioritisation

We shall start by mentioning that the five macroeconomic conditionalities were subject to an institutional prioritisation in the institutional world. This prioritisation resulted from the EU's practice of (lenient) use of cross-sector EU economic governance rules. As a result, out of five conditionalities potentially applicable in law, only one conditionality could be credibly applicable in practice: the excessive deficit one.⁶¹²

Interviews clearly revealed that in the institutional world, both the EU and national institutions simply knew that there was only one mandatory suspension conditionality that effectively mattered: failure to correct the excessive deficit established by a Council decision.⁶¹³

On the other conditionalities we shall briefly note that:

To date, the Commission has never opened an excessive imbalance procedure, and therefore has never put forward a single proposal for a Council decision either for failure to submit a corrective plan or for failure to implement the recommended corrective action.⁶¹⁴ Therefore, the applicability of two conditionalities concerning excessive imbalance procedures⁶¹⁵ is a very distant eventuality, especially because to trigger the conditionalities a Member State must receive *two successive* Council decisions in the same excessive imbalance procedure. By 2018, no EU Member State has ever received a single one.

The other two conditionalities are triggered by a Commission conclusion or Council decision on Member States' failure to comply with a financial assistance adjustment programme, followed by a Commission decision not to disburse financial assistance⁶¹⁶ - a situation which is similarly unprecedented and hardly conceivable during the current financial period. The last decade of EU economic and financial crisis history, during which eight EU Member States have been subject to EU and non-EU financial

⁶¹² REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219. Art. 23 (9) (a).

⁶¹³ Interviews, Brussels, 2017.

⁶¹⁴ Alice Zoppe & H. Copeland, IMPLEMENTATION OF THE MACROECONOMIC IMBALANCE PROCEDURE STATE-OF-PLAY - SEPTEMBER 2017.

⁶¹⁵ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219. Art. 23 (9) (b)-(c).

⁶¹⁶ *Id.* Art. 23 (9) (d)-(e).

assistance, showed that never has the Commission or the Council concluded or decided that a programme has not been successfully completed, even where serious compliance shortcomings were evident.⁶¹⁷ Moreover, at the end of 2017 only one Member State (Greece) was under financial assistance, being expected to successfully complete its adjustment programme in the third quarter of 2018.⁶¹⁸ Given the tense and painful history of the Greek bailouts, an eventual suspension of funds for Greece is politically simply inconceivable.

In conclusion, only the macroeconomic conditionality responsible for excessive deficits was credibly applicable and was treated with increased priority in practice. However, one must stress that the suspension of EU funds for breach of deficit rules had already been possible under Cohesion Fund rules since 1994.⁶¹⁹ This means that the much-expanded scope of macroeconomic conditionality in 2014-2020 had an existence only in law but not in practice.

10.2.3.2 *The case of Spain and Portugal*

The macroeconomic conditionality responsible for excessive deficits was indeed triggered in July 2016, as the Council issued two decisions addressing Spain and Portugal respectively and concluding that these Member States have not taken effective action to correct their deficits.⁶²⁰

The case of Spain and Portugal is particularly valuable because it is the second failed enforcement attempt in the history of EU macroeconomic conditionality after the 2012 enforcement attempt against Hungary (Chapter 4, above).⁶²¹ For the purposes of our study the case is also a valuable example that explains how the institutional world of conditionality departed from its legal world under pressure from a process dominated by ad-hoc procedures (i), the compartmentalised approach of the Commission (ii), the

⁶¹⁷ See for instance, EUROPEAN COURT OF AUDITORS, *THE COMMISSION'S INTERVENTION IN THE GREEK FINANCIAL CRISIS* (2017).

⁶¹⁸ *Id.* at 3.; EUROPEAN COMMISSION, *THE ESM STABILITY SUPPORT PROGRAMME GREECE, FIRST & SECOND REVIEWS*. INSTITUTIONAL PAPER 064/2017.

⁶¹⁹ COUNCIL REGULATION (EC) NO 1084/2006, *supra* note 230 at Art. 4 (1).

⁶²⁰ EU COUNCIL, DECISION (EU) 2016/1230 OF 12 JULY 2016 ESTABLISHING THAT NO EFFECTIVE ACTION HAS BEEN TAKEN BY PORTUGAL IN RESPONSE TO THE COUNCIL RECOMMENDATION OF 21 JUNE 2013 OJ L 202, 28.7.2016, P. 21-23; EU COUNCIL, DECISION (EU) 2016/1222 OF 12 JULY 2016 ESTABLISHING THAT NO EFFECTIVE ACTION HAS BEEN TAKEN BY SPAIN IN RESPONSE TO THE COUNCIL RECOMMENDATION OF 21 JUNE 2013 OJ L 201, 27.7.2016, P. 19-22.

⁶²¹ EU COUNCIL, *supra* note 203; EU COUNCIL, *supra* note 204.

institutional decision to address the tool only to some Member States (iii), and accompanied at every step of the way by a shared institutional interpretation in the sense of *not enforcing* the conditionality (iv).

— complementary ad-hoc procedures

The Council decisions of July 12, 2016,⁶²² threw conditionality into the hands of the College of Commissioners - the body brought together to decide on conditionality.⁶²³ The ad-hoc delegation of the enforcement decision to the College of Commissioners, as opposed to the Commission DGs in charge of funding, was a crucial institutional choice for conditionality which rendered an eventual decision on suspension much more political in practice. From this point of view, we have explained in Chapter 7 above that spending cut-off is traditionally the business of the Commission DGs that are delegated by the Commission's collegiate body to order decisions on spending suspension, correction or other types of cut-off.⁶²⁴ Depending on the spending area and emergency the suspension and correction packages decided by the DGs would be approved in-block by Commission decision, on an annual or semester basis. The delegation of spending cut-off in ordinary cases to the DGs renders the correction or suspension process more similar to administrative decision-making and much less political. As seen above, the case of macroeconomic conditionality enforcement has been considered rather extra-ordinary and in no way a-political. Hence, the decision on enforcement has been passed over to the College of Commissioners.

For the College of Commissioners, conditionality was not the primary institutional concern. Interviews revealed that in fact, the most pressing concern of the College were the first-time-ever fines Spain and Portugal were facing as Euro area Member States pursuant to the post-crisis rules on deficits.⁶²⁵ As reported by Commission officials involved in the enforcement discussions: *the fines* - not conditionality - consumed the institutional attention of the Commission, as well as of the Council and the Eurogroup.⁶²⁶ Only after the College of Commissioners proposed no fines for Spain

⁶²² EU COUNCIL, *supra* note 620; EU COUNCIL, *supra* note 620.

⁶²³ European Commission, PRESS RELEASE. STABILITY AND GROWTH PACT: FISCAL PROPOSALS FOR SPAIN AND PORTUGAL. (2016).

⁶²⁴ EUROPEAN COMMISSION, *supra* note 357.

⁶²⁵ Interviews, DG ECFIN, Brussels, 2017

⁶²⁶ Interviews, DG ECFIN, Brussels, 2017

and Portugal⁶²⁷ (and later the Council agreed to zero fines⁶²⁸) the discussions on conditionality were reportedly restarted.⁶²⁹

On conditionality, the College of Commissioners concluded that the CPR *requires* that the Commission propose "a suspension of *part* of [ESI Funds] *commitments*" but that the proposal shall be postponed for a later stage, following a structured dialogue with the European Parliament.⁶³⁰

Another point must be highlighted here regarding the College's institutional interpretation of the law of conditionality. Even if the legal text offers the option of "part or *all* suspension of commitments or *payments*"⁶³¹, the College of Commissioners effectively considered only a partial suspension of commitments - an option that would have no immediate financial consequences (10.1, above) and - again - an option that already existed in the 2007-2013 financial period in the case of the Cohesion Fund.⁶³²

A structured dialogue between the Commission and the Parliament followed, adding the Parliament's well-known opposition to macroeconomic conditionality since the legislative negotiations of 2013 (Chapter 3, above).⁶³³

⁶²⁷ European Commission, *supra* note 623.

⁶²⁸ Excessive deficit procedure: Council agrees to zero fines and new deadlines for Portugal and Spain - Consilium, (2016), <http://www2.consilium.europa.eu/en/press/press-releases/2016/08/09/excessive-deficit-portugal-spain/> (last visited Jan 31, 2018).

⁶²⁹ Interviews, DG ECFIN, Brussels, 2017

⁶³⁰ European Commission, *supra* note 623.

⁶³¹ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219.

⁶³² COUNCIL REGULATION (EC) NO 1084/2006 OF 11 JULY 2006 ESTABLISHING A COHESION FUND AND REPEALING REGULATION (EC) NO 1164/94 OJ L 210, 31.7.2006, P. 79-81, , <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006R1084&from=EN> (last visited Jan 31, 2018). [Art. 4 (1) which allowed a total or partial suspension of commitments]

⁶³³ Jorge Valero, MEPs OPPOSE "IMMORAL" SUSPENSION OF EU FUNDS FOR SPAIN AND PORTUGAL EURACTIV.COM (2016), <https://www.euractiv.com/section/euro-finance/news/meps-oppose-immoral-suspension-of-eu-funds-for-spain-and-portugal/> (last visited Mar 5, 2018); EUROPEAN PARLIAMENT, DEBATES, TUESDAY, 19 NOVEMBER 2013 - STRASBOURG, ON 2014-2020 COHESION FUNDS PACKAGE, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20131119+ITEMS+DOC+XML+V0//EN&language=EN>; EUROPEAN PARLIAMENT, STRUCTURED DIALOGUE WITH THE COMMISSION ON SUSPENSION OF EUROPEAN STRUCTURAL AND INVESTMENT FUNDS TO SPAIN AND PORTUGAL; HEARING WITH THE EUROPEAN COMMISSION ON THE SUSPENSION OF ESI FUNDS, AS PART OF THE STRUCTURED DIALOGUE, , <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I126703&lg=INT&tin=0&tout=0&autoplay=true&sublg=> (last visited Mar 5, 2018).

The dialogue started late, on October 3 2016, more than two and a half months after the Council decisions.⁶³⁴ The late start of the dialogue pointed to strategic delaying tactics embraced by the Parliament and aimed at avoiding any potential enforcement of conditionality. The dialogue was held in Strasbourg, in a joint hearing of the Parliament Committees on Regional Development (REGI) and on Monetary and Economic Policy (ECON), and included the participation of the Commission Vice-President, Mr. Katainer, and the Commissioner for Regional Policy (DG REGIO), Ms. Crețu.⁶³⁵

— leadership of DG REGIO

This composition of dialogue participants, and especially the exclusive participation of DG REGIO and the Parliamentary ECON and REGI Committees, clearly indicates DG REGIO's leadership on macroeconomic conditionality. However, another important consequence for the legal world of conditionality follows. The logical consequence of the involvement of DG REGIO alone is that only funds co-managed by DG REGIO (ERDF and ECF) were effectively under risk of suspension, hence not all ESI Funds as indicated in the CPR. In this sense, it is worth recalling that the possibility of ECF funds suspension had been present since 1994, as well as in the 2007-2013 financial period.⁶³⁶

— conditionality addressed only to some Member States

In line with all conditionalities, the attempt to enforce macroeconomic conditionality in the case of Spain and Portugal had very different implications for these particular Member States.

The parliamentary hearings of October 3 2016 reveal that the fierce, bipartisan opposition of the Parliament to any attempt to enforce conditionality against Spain and Portugal was not a simple institutional preference, it was an institutional choice

⁶³⁴ EUROPEAN COMMISSION, *supra* note 576 at 173. (On July 25, 2016 the Parliament responded to the Commission's letter and declared itself available for a dialogue "at the earliest opportunity [but] after the summer recess")

⁶³⁵ European Parliament, JOINT MEETING. COMMITTEE ON REGIONAL DEVELOPMENT COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS. MINUTES. EXTRAORDINARY JOINT MEETING OF 3 OCTOBER 2016, 18.00-20.30, STRASBOURG (2016); HEARING WITH THE EUROPEAN COMMISSION ON THE SUSPENSION OF ESI FUNDS, AS PART OF THE STRUCTURED DIALOGUE, *supra* note 633.

⁶³⁶ See Chapter 4 above.

informed by vocal *moral* and *fairness* concerns.⁶³⁷ The hearings in the Parliament revealed that the issue on the table was not only the enforcement of macroeconomic conditionality as a matter of formal legal obligation, but a much deeper discussion escalating on matters relating to crisis and austerity, division between the EU South and North, EU citizenship, democratic legitimacy, rising anti-European sentiments and even the future of the EU.⁶³⁸

In the institutional view of the Parliament, enforcement of macroeconomic conditionality in the case of Spain and Portugal had very different stakes from enforcement against other Member States, as it concerned two countries severely affected by the economic crisis, subject to heavy austerity packages, whose citizens made significant "sacrifices" during the last years.⁶³⁹ In the view of Parliament, suspending funds in the case of these particular Member States would have been an "immoral", "unfair", "disproportionate" punishment for these two states and above all for their citizens.⁶⁴⁰ In this context, formal legal and economic arguments desperately advanced by the Commission in the sense that an eventual suspension would not affect the countries' economies (as suspension would concern *commitments* not payments) and that the Commission had a *legal obligation to act* under CPR, fell on deaf ears in the Parliament. These arguments were further aggravated by the institutional memory of the legislative negotiations whereby macroeconomic conditionality was seen as a tool destined in practice to apply a particular group of Member States as opposed to the others (Chapter 3).⁶⁴¹ According to some interviewees, the macroeconomic conditionality was meant to level the field between non-Euro area and Euro area Member States, as the latter were subject to tougher rules after the crisis.⁶⁴² According to others, Member States leading the discussions on macroeconomic conditionality (friends of better-spending, 'EU North' group) were convinced that the tool was not destined to apply to them in practice, even if it would be formally applicable to all Member States.⁶⁴³ Irrespective of who was the ultimate addressee of

⁶³⁷ HEARING WITH THE EUROPEAN COMMISSION ON THE SUSPENSION OF ESI FUNDS, AS PART OF THE STRUCTURED DIALOGUE, *supra* note 633.

⁶³⁸ *Id.*

⁶³⁹ *Id.*

⁶⁴⁰ *Id.*

⁶⁴¹ Interviews, Brussels, September 2017

⁶⁴² Interviews, Brussels, September 2017

⁶⁴³ Interviews, Brussels, June 2016.

macroeconomic conditionality, the essential message is that it was seen from the very beginning in highly divisive and sensitive terms, and was also perceived as such during enforcement. All these background discussions fuelled even further the claims of immorality and unfairness of funds suspension in the particular cases of Spain and Portugal and fed important institutional doubt regarding enforcement.

— *de facto* unenforceable

The open opposition of the Parliament to enforcement, coupled with the specific economic situation of Spain and Portugal, favoured a shared institutional interpretation aimed at delaying enforcement, which ultimately rendered conditionality *de facto* unenforceable.

The Parliament adopted a procrastinatory strategy, asking for a structured dialogue to hear the views of the governments concerned.⁶⁴⁴ The Commission adopted its own broad institutional interpretation to explain its lack of action, reporting during interviews that even if suspension was mandatory, the Commission's legal interpretation was that the text of the CPR did not indicate a time frame for proposing a suspension and certainly did not state that a proposal of suspension must be immediate.⁶⁴⁵ In any case, the Commission appreciated that the dialogue with the Parliament should have first been concluded before a proposal could be put forward, as according to the CPR opinions expressed in the structured dialogue with the Parliament must be given due consideration.⁶⁴⁶

On this point, it must be mentioned that the Commission's institutional interpretation of enforcement was somewhat ambivalent. On the one hand, the lawyers of the Legal Service of the Commission reported during interviews that they had the suspension proposals ready.⁶⁴⁷ Similarly, other Commission DGs (DG Economy and Finance (DG ECFIN) and DG Budget) reported that they did the math, and came up with the effective amounts of commitments to be suspended as of the following year (2017), which, as requested by CPR annexes,⁶⁴⁸ were further reduced in light of high unemployment and economic difficulties in the two Member States.⁶⁴⁹ On the other

⁶⁴⁴ EUROPEAN COMMISSION, *supra* note 576 at 173.

⁶⁴⁵ Interviews, Commission, Brussels, 2017

⁶⁴⁶ Interviews, Commission, Brussels, 2017.

⁶⁴⁷ Interviews, Commission, Brussels, 2017.

⁶⁴⁸ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at Art. 23 (11).

⁶⁴⁹ Interviews, European Commission, Brussels, 2017

hand, the Commission did not put forward any concrete proposal for suspension during the hearings of October 3, and after the dialogue hesitated even more in proposing a suspension. On this point, Commission officials participating in suspension discussions reported that even if it was clear that a suspension of commitments would not have led to the immediate seizure of ESI Funds flows to Spain and Portugal, and would have not had a direct economic impact, there was a growing consensus in the Commission that a funding suspension could send the wrong message to the markets and indirectly affect the very recent positive growth and fiscal stability signs in the EU, especially the Eurozone.⁶⁵⁰

In the end, no decision on suspension followed. As the European Parliament was protracting the dialogue, the Commission expressed doubts, and the Member States concerned mobilised political pressure in the Council. In mid-November 2016 the Commission decided to *put in abeyance* the excessive deficit procedure for Spain and Portugal, as in the view of the Commission the countries undertook satisfactory action for deficit correction.⁶⁵¹ Accordingly, the College of Commissioners concluded that: "*the event that required a proposal by the Commission to suspend parts of the European Structural and Investment Funds is no longer present and there will be no such proposal.*"⁶⁵² All in all, the excessive deficit case of Spain and Portugal showed that the institutional world of macroeconomic conditionality completely reshaped its legal world expectations in practice. Even if in its legal world the tool was to apply to a wide array of EU economic governance rules, to link to all ESI Funds and lead to 'automatic' suspensions, the institutional world stirred the tool in a different direction. As a result, the most feared and tough conditionality in law was rendered inapplicable and barely enforceable in practice.

⁶⁵⁰ Interviews, European Commission, Brussels, 2017

⁶⁵¹ European Commission, PRESS RELEASE EUROPEAN SEMESTER AUTUMN PACKAGE: WORKING FOR A STRONGER AND MORE INCLUSIVE ECONOMIC RECOVERY (2016); EU Commission decides not to suspend EU funds for Spain, Portugal, REUTERS, November 16, 2016, <https://www.reuters.com/article/us-eu-deficits-spain-portugal/eu-commission-decides-not-to-suspend-eu-funds-for-spain-portugal-idUSKBN13B16Z> (last visited Dec 6, 2017).

⁶⁵² European Commission, *supra* note 122.

10.2.4 Top-ups: or 10% decrease in additionality requirements for Greece

According to the premises of the legal world, one positive ex-post macroeconomic conditionality operates ex-post and allows Member States under EU or non-EU financial assistance to ask for a 10% increase in the EU co-financing rate by 30 June 2016, or after that date until 30 June of the following year in which their financial assistance programme comes to an end.⁶⁵³ However, the 10% top-ups shall not exceed 100% of the total budget envelopes allocated to the Member State concerned under each ESI Fund.⁶⁵⁴

In fact, the positive ex-post macroeconomic conditionality is the only conditionality that did not see significant departures from its legal world in practice. However, this does not mean that it saw broad applicability, quite the contrary.

Due to important delays in spending execution in 2014-2020, the conditionality was *de facto* applied to a single Member State, Greece, even if at the beginning of the financial period, five Member States under financial assistance were eligible for top-ups: Cyprus, Greece, Ireland, Portugal and Romania.⁶⁵⁵ By June 2016, spending from the 2014-2020 financial period barely started and most of the EU funds payments were still disbursed from 2007-2013 commitments.⁶⁵⁶ Moreover, by mid-2016, all Member States eligible on December 21 2016 - except Greece - were no longer eligible as they completed and exited their financial assistance programmes.⁶⁵⁷

In mid-2016 the Commission proposed an amendment to funding regulation with the aim of prolonging the eligibility of Member States under financial assistance for top-ups" until June 30 of the year following the calendar year in which the related financial assistance comes to an end."⁶⁵⁸ As at that time the only eligible Member State was

⁶⁵³ European Commission, *supra* note 122. Art. 24 (1)-(2).

⁶⁵⁴ *Id.*; REGULATION (EU) 2016/2135 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 23 NOVEMBER 2016 AMENDING REGULATION (EU) NO 1303/2013 AS REGARDS CERTAIN PROVISIONS RELATING TO FINANCIAL MANAGEMENT FOR CERTAIN MEMBER STATES EXPERIENCING OR THREATENED WITH SERIOUS DIFFICULTIES WITH RESPECT TO THEIR FINANCIAL STABILITY OJ L 338 P. 34-36, (2016).

⁶⁵⁵ These Member States however benefited for similar 10% top-up for 2007-2013 EU funds payments, see: REGULATION (EU) 2016/2135, *supra* note 654; COMMISSION REPORT TO THE EUROPEAN PARLIAMENT AND THE COUNCIL CONTAINING THE ASSESSMENT REQUIRED UNDER ARTICLES 24(3) AND 120(3) THIRD SUB-PARAGRAPH OF REGULATION (EU) N° 1303/2013, COM(2016) 414 FINAL, 1-3 (2016).

⁶⁵⁶ European Commission, *supra* note 589; COURT OF AUDITORS, EU BUDGET: TIME TO REFORM? A BRIEFING PAPER ON THE MID-TERM REVIEW OF THE MULTIANNUL FINANCIAL FRAMEWORK 2014-2020 (2016).

⁶⁵⁷ COM(2016) 414 FINAL, *supra* note 655 at 3.

⁶⁵⁸ REGULATION (EU) 2016/2135, *supra* note 654 at 1.

Greece, the amendment meant that Greece was the only Member State to benefit from the positive conditionality until 30 June after the completion of its last macroeconomic adjustment programme, hence until June 30 2019.⁶⁵⁹

Finally, it is important to stress again that the 10% top-up does not in fact mean more budget solidarity with Member States in financial difficulty (*de facto* Greece). When conditionality is activated not an extra cent from the initially agreed EU budget allocations is released to the Member States under financial assistance. The only thing positive macroeconomic conditionality does is absolve the Member State concerned from its matching national contribution (known as the 'additionality' principle). As such, investments that would normally be subject to additionality requirements (i.e. financed 90% from EU budget and 10% from the national budget), would now be financed with 10% more from the EU budget (i.e. financed 100% from the EU budget) but without exceeding the allocated ESI funds ceiling of a Member State. This means that the overall expenditure - EU plus national matching funds - is reduced on the ground by 10%, but the capacity of Member States with liquidity constraints to absorb EU funds is increased with the same 10%. To sum up, the EU budget top-ups promised by the only positive conditionality, meant in practice 10% less co-financing from the national budget for Greece.⁶⁶⁰

⁶⁵⁹ REGULATION (EU) 2016/2135, *supra* note 654. Considerations (2) (Greece is expected to exit its last macroeconomic adjustment programme in the third quarter of 2018).

⁶⁶⁰ *Id.*

10.3 The institutional world of ex ante conditionalities

The institutional world of ex ante conditionality saw beyond doubt the most dramatic departures from its legal world.

In their institutional world, the 36 ex-ante conditionalities examined in this Chapter significantly multiplied throughout the Member States' 28 PAs and more than 500 OPs, reaching an astonishing overall number of more than 2200 applicable ex-ante conditionalities to be fulfilled by Member States ex-ante, hence before the start of spending on the ground.⁶⁶¹

The fulfilment of these ex-ante conditionalities involved significant effort from all actors involved, as they required extensive prior positive actions - 'to do' legal obligations (i.e. to adopt a transport master plan, to transpose the public procurement directives or to train public officials on EU environmental legislation) that implied active engagement from Member States and particularly close supervision from the Commission.

As a first time EU-wide piloted legal tool, ex-ante conditionality turned into a learning-by-doing exercise for all parties involved. Its implementation became much more difficult, resource intensive, time consuming and administratively burdensome than initially anticipated.⁶⁶² In this sense, even if ex-ante conditionalities were presented as building on pre-existing obligations of Member States that should have been already in place,⁶⁶³ this was in no way the case in practice. Out of more than 2200 ex-ante conditionalities applicable to three Structural Funds linked to Cohesion policy, more than half (52%) were not found fulfilled by Member States at the moment of PAs approval (end of 2014).⁶⁶⁴ In response, Member States assisted by the Commission rushed to fulfil the missing conditionalities ex-post, marking the start of a

⁶⁶¹ EUROPEAN COMMISSION METIS GMBH, THE IMPLEMENTATION OF THE PROVISIONS IN RELATION TO THE EX-ANTE CONDITIONALITIES DURING THE PROGRAMMING PHASE OF THE EUROPEAN STRUCTURAL AND INVESTMENT (ESI) FUNDS (2016).

⁶⁶² *Id.*

⁶⁶³ European Commission, *supra* note 277 at 3.

⁶⁶⁴ EUROPEAN COMMISSION, *supra* note 637 at 49.

conditionality exercise of unprecedented proportions that still continues in 2018, long after the end of the 2016 legal deadline provided for compliance.

The study of ex-ante conditionalities is particularly valuable for this Part because it provides the most complete picture of how the institutional world reshaped the legal world understanding of conditionality.

In the following pages I will show how the ex-ante conditionality process departed from a process led by Member States to a process led by the Commission (10.3.1); how the fragmented DG-specific and often inconsistent approach to ex-ante conditionalities affected their applicability and fulfilment baselines (10.3.2); how the ad-hoc inter-DG ex-ante conditionality procedures added complexity and uncertainty to the already complex process (10.3.3); how the multilevel prioritization of ex-ante conditionalities departed from their equally binding legal force and favoured differentiated baselines for the Commission's applicability and fulfilment assessment (10.3.4); how the ex-ante conditionality formal rules on enforcement and fulfilment were repeatedly set aside in favour of informal agreements (10.3.5); how the substance of ex-ante conditionalities on the ground departed significantly from the conditionalities announced in law (10.3.6); how the same ex-ante conditionalities addressed to all Member States in law had in fact very different implications for each Member State (10.3.7); and most importantly, how the broad institutional interpretation of ex-ante conditionality legal rules repeatedly delayed enforcement and rendered the legally enforceable ex-ante conditionalities *de facto* unenforceable at the end of January 2018 (10.3.8).

10.3.1 Departure from a Member States led process: a process led by the Commission

In the institutional world, the Commission, not the Member States, led the ex-ante conditionality process. Similar to macroeconomic conditionality as analysed above (10.2), as early as 2012 the Commission published a set of position papers addressed to each Member State, indicating a clear list of 'critical' ex-ante conditionalities to be fulfilled by each Member State before the start of spending.⁶⁶⁵ These 'critical' ex-ante conditionality lists *de facto* inverted the subsidiarity logic of the ex-ante conditionality process in favour of the Commission because they constituted the Commission's ESI

⁶⁶⁵ European Commission, *supra* note 544 at 14–15.

Funds negotiation mandate for each Member State.⁶⁶⁶ As a result, even if formally the Member States were still the first to draft their PAs and OPs and assess the applicability and fulfilment of ex-ante conditionalities therein, the Commission had already anticipated these steps and indicated its expectations regarding the ex-ante conditionalities it expected to see applicable as priorities.

10.3.2 Departure from a consistent approach of one Commission across all ESI Funds: inconsistency

The institutional fragmentation of the Commission had important consequences for ex-ante conditionality. In particular, the fund-centred approach of the four DGs in charge of spending, with only limited and ad-hoc involvement of the DGs in charge of conditionality policy area, departed on numerous occasions from a consistent approach to applicability and fulfilment rules of ex-ante conditionalities across all ESI Funds. As a result, even if legally applicable, a number of ex-ante conditionalities have not been found applicable to Member States' spending in 2014-2020. Equally important, the policy disconnect led to situations where even if certain conditionalities were found fulfilled, fulfilment did not necessarily mean full compliance with the conduct prescribed.

The gaps in applicability have been highlighted by assessment studies commissioned by the Commission. These specify for instance that general ex-ante conditionalities that should have been found applicable to all ESI Funds, were in practice not found applicable to specific OPs without due justification.⁶⁶⁷ The inconsistent assessment was particularly visible in the case of three general equality conditionalities on non-discrimination, gender equality and disability, which were declared universally

⁶⁶⁶ Carlos Mendez, Kaisa Granqvist & John Bachtler, *European Commission Perspectives on the 2014-2020 Partnership Agreements & Programmes: A Comparative Review of the Commission's Position Papers*, EUROPEAN POLICY RESEARCH PAPER, 13 (2013).

⁶⁶⁷ METIS GMBH, *supra* note 661 at 25-28. [This was the case for OPs financed from ECF and ERDF under the responsibility of DG REGIO, where two major OPs for Bulgaria that make up for more than 20% of the overall ESI Funds allocation in the country did not find the majority of general ex-ante conditionalities applicable, even if the general ex-ante conditionalities on gender, non-discrimination, disability, environmental assessment, public procurement, state aid or statistical systems were directly relevant to the planned expenditure. Similarly, OPs on Small and Medium Enterprise in Spain and Malta found no general ex-ante conditionality applicable except the state aid one. In France a number of OPs focusing on environmental investment did not find the general ex-ante conditionality on environmental assessment applicable. In Portugal the OP on environmental sustainability did not find the state aid general ex-ante conditionality applicable, even if investment concerns private beneficiaries.]

applicable at the level of all PAs, but their applicability was not consistently reflected in all OPs financed from ECF and ERDF under the responsibility of DG REGIO,⁶⁶⁸ and completely discarded in the case of EMFF,⁶⁶⁹ as DG MARE simply omitted the three general ex-ante conditionalities in its guidance note on applicable ex-ante conditionalities addressed to Member States.⁶⁷⁰ DG Justice (DG JUST) - the primary Commission DG in charge of equality policy - was not involved at any stage of applicability or fulfilment assessment of the three equality conditionalities.

The same finding of inconsistent applicability can be observed in the case of thematic ex-ante conditionalities, where evaluation studies of 111 OPs under the responsibility of DG REGIO, show that in 22 percent of the cases, the applicable thematic ex-ante conditionalities were not found applicable in practice.⁶⁷¹ The signalled applicability gaps mainly concerned thematic ex-ante conditionalities in the area of education, lifelong learning (LLL), vocational education and training, as well as research and innovation.⁶⁷² I.e. conditionalities in policy areas falling under the competences of DG EMPL, DG Research and Innovation (DG RTD) and DG Education and Culture (DG EAC), but which were assessed for applicability by DG REGIO.

The same inconsistency was propagated during fulfilment and was well-documented by the Court of Auditors.⁶⁷³ For instance, the Court of Auditors concluded in the case of state aid ex-ante conditionality that the Commission's finding that the conditionality was fulfilled did not draw enough on the findings of DG Competition (DG COMP) and led to situations where Member States not complying with conditionality were not necessarily the ones with most problems in the correct application of EU state aid rules.⁶⁷⁴

The Court of Auditors also challenged the Commission's account of fulfilment of employment thematic ex-ante conditionalities. The Court brought forward examples

⁶⁶⁸ Vita, *supra* note 35 at 1006–1008. [this was the case for OPs in Romania, Portugal, Italy, Bulgaria, Spain, Malta, France]

⁶⁶⁹ REGULATION (EU) 508/2014, *supra* note 273. Art. 29.

⁶⁷⁰ Vita, *supra* note 35 at 1006–1008. European Commission, DG MARE, Draft Guidance, EMFF Specific Ex-Ante Conditionalities *Version 3* (7 March 201).

⁶⁷¹ METIS GMBH, *supra* note 661 at 32.

⁶⁷² *Id.* at 32.

⁶⁷³ COURT OF AUDITORS, *supra* note 531 at 45–59.

⁶⁷⁴ COURT OF AUDITORS, SPECIAL REPORT 24/2016 MORE EFFORTS NEEDED TO RAISE AWARENESS OF AND ENFORCE COMPLIANCE WITH STATE AID RULES IN COHESION POLICY 101–102.

where the assessment of fulfilment in cases of three Member States was not consistent with subsequent European Semester country reports on the same Member States, which pointed to significant weaknesses in the active labour market policies and labour market institutions targeted by conditionalities.⁶⁷⁵

10.3.3 Complementary ad-hoc procedures: complexity

As underlined above, the entire ex-ante conditionality process was a learning-by-doing exercise for all actors involved, including the Commission. In the absence of detailed institutional world procedures on ex-ante conditionality fulfilment and enforcement, the Commission had to act on the spot and institutionalise additional procedures to suit the realities of the increasingly complex and burdensome process of ex-ante conditionality.

These procedures first concerned the process of ex-ante conditionality fulfilment, and later enforcement (suspension), as it became clear that not all ex-ante conditionalities would be fulfilled by the expected deadlines.

Based on information revealed during the 2016 and 2017 interviews carried out at the EU and at the national level, I found out that the Commission and Member States put in place an ad-hoc procedure for ex-ante conditionality, divided into three levels: *a technical level, an EU funds management level and a high policy level.*⁶⁷⁶

At the first technical level, each conditionality action was to be fulfilled by the responsible national authorities at the central or regional level according to national constitutional arrangements.⁶⁷⁷ The fulfilment reported by Member States was subsequently assessed for compliance (most of the time, but not always) by the competent Commission policy DGs responsible for the specific thematic area of a given ex-ante conditionality (i.e. DG Environment was the technical unit for assessment of waste and water ex ante conditionalities). When the policy DGs were not involved, the geographic units and desk officers of the DG in charge of the ESI Funds management were responsible for assessing the reported national fulfilment in

⁶⁷⁵ COURT OF AUDITORS, *supra* note 531 at 51–54. Box 2, p. 33, Poland, Croatia and Spain.

⁶⁷⁶ Interviews, European Commission, Brussels, Bucharest 2016, 2017.

⁶⁷⁷ METIS GMBH, *supra* note 661 at 35–36. [Most Member States fulfilled the ex-ante conditionalities at the national level, under the direction of central governments and responsible ministries. Member States with more decentralised or federal constitutional arrangements (i.e. Italy, Poland, Spain, France, Germany or Belgium) fulfilled a significant number of ex-ante conditionalities at the regional level.]

compliance (i.e. DG EMPL not DG JUST assessed the compliance of non-discrimination, gender equality, disability and Roma ex-ante conditionalities).

All information on ex-ante conditionality fulfilment would be centralised by DG REGIO, Better Implementation Unit, in charge of all ex-ante conditionality coordination.⁶⁷⁸ To deal with complexity, from 2015 to 2016 the unit had set up a dedicated electronic monitoring tool where Commission officials would count the action plans for unfulfilled conditionalities, arrange them into tables, keep track of communication with national governments and colour-label the ex-ante conditionality based on progress in fulfilment: green for fulfilled, yellow for partially fulfilled and red for unfulfilled.⁶⁷⁹ At the national level, Member States put in place similar ex-ante conditionality focal points, which were regularly informed on the result of the Commission's assessment.⁶⁸⁰

Once the technical units of the Commission DG assessed that a conditionality is fulfilled, the second *EU funds management* tier was activated.

At the second level, a decision on conditionality fulfilment was under the sole authority of the four Commission Directorate Generals (DGs) responsible for management of specific ESI Funds bound by conditionality. Hence, DG REGIO ultimately decided on fulfilment and could lift or not the ex-ante conditionalities linked to OPs financed from ERDF and CF; DG EMPL decided on ex-ante conditionalities linked to OP financed from ESF; DG MARE decided on OPs financed from EMFF and finally DG AGRI decided on OPs financed from EAFRD. This means that each of these four DGs had ultimate discretion to decide that ex-ante conditionalities linked to ESI funds under their management were fulfilled and lift them by formal letter addressed to Member States, or require further action, taking into account - but not necessarily being bound by - the assessment of the first technical tier, and the opinion of the policy leading DG, if involved. As a general rule, all communication would inform other DGs responsible for ESI funds management and the policy DGs involved. DG REGIO was always informed as the Commission's focal point for all ex-ante conditionalities.

⁶⁷⁸ Interviews, European Commission, Brussels, 2016

⁶⁷⁹ Interviews, European Commission, Brussels 2016

⁶⁸⁰ METIS GMBH, *supra* note 661 at 113.

During the 2016 round of interviews in Brussels, I have learned that the four DGs in charge of ESI Funds management put in place an ad-hoc inter-DG working group on ex-ante conditionalities, which would meet on a regular basis and brief on the progress of ex-ante conditionalities under fulfilment. The working group would also discuss a common approach to unfulfilled ex-ante conditionalities applicable to ESI Funds under management of more than one DG (i.e. water ex ante conditionality applicable to ERDF, ECF (DG REGIO) and EAFRD (DG AGRI)).

As the process of ex-ante conditionalities progressed and the possibility of enforcement was increasingly discussed, new inter-DG ad-hoc structures on ex-ante conditionality enforcement were put in place by the Commission.

The 2017 round of interviews in Brussels revealed that an inter-DG ex-ante conditionality committee on suspension (the 'Suspension Committee') had been institutionalised in the mean-time and tasked with giving a preliminary opinion on whether sufficient ground for suspension existed.⁶⁸¹ The Suspension Committee is reportedly formed by representatives of the four ESI Funds management DGs (DG REGIO, DG EMPL, DG AGRI DG MARE) who are the only members with voting rights. Other interested Commission DGs reportedly participate in the work of the Suspension Committee, but have no voting rights, hence they have an observer status. For instance, this is the case for the Commission's Service for Structural Reform Support (SSRS) which is reportedly always involved in the work of the committee, with an observer status.⁶⁸²

During the 2017 round of interviews I also learned that if the Suspension Committee were to reach a positive suspension opinion, pre-suspension letters would have to be sent to Member States, pursuant to the standard suspension of payments procedure (Article 142 CPR).⁶⁸³ The pre-suspension letters would give Member States two more months to remedy the shortcomings and report on fulfilment.

If Member States fail to submit a satisfactory answer, the third *high policy tier* would be triggered: the decision of the College of Commissioners on suspension of payments. This is perhaps the most interesting piece of information revealed during the 2017

⁶⁸¹ Interviews, European Commission, Brussels 2017.

⁶⁸² Interviews, European Commission, Brussels 2017.

⁶⁸³ Interviews, European Commission, Brussels 2017.

round of interviews. The College of Commissioners is ultimately the authority that would decide on suspension of payments for failure to fulfil an ex-ante conditionality. During the 2016 interviews enforcement had not yet been discussed, and in any case in 2016 there was no decision on the Commission's internal institutional arrangements to decide on suspension.⁶⁸⁴ Hence, similar to the macroeconomic conditionality enforcement attempt discussed above (10.2.3.2), suspension of payments for non-fulfilment of ex ante conditionality is not seen as an ordinary suspension, and would have to be legitimated by a more political College decision.

The three-tier *ad-hoc* process described above reveals important information on the institutional world of ex-ante conditionality.

First, it shows that inter-DG structures have been set up to remedy for the fragmented institutional setting of the Commission and to better accommodate the legal world of ex-ante conditionality. However, these inter-DG structures were institutionalised in an ad-hoc fashion and included the policy leading DGs only on a variable basis, with only an observer role.

Second, it shows that while the fulfilment of conditionality was perceived as a technical matter to be undertaken by the policy or geographical units of the Commission. The enforcement - hence the effective suspension of payments - was viewed in more political terms and was institutionalised through multilevel scrutiny: initial scrutiny from the inter-DG Suspension Committee and ultimate scrutiny from the assembled College of Commissioners. This ad-hoc multi-layered enforcement process, with ultimate delegation of the suspension decision to the College of Commissioners, is likely to lead to additional complexity, delays, and ultimately render an enforcement decision much more political for the few remaining unfulfilled ex-ante conditionalities at the end of 2017 (58 out of over 2200⁶⁸⁵) as we shall explain below (10.3.8).

Ultimately, it is important to reiterate that none of the above procedures have been enshrined in the text of the spending regulations. As interviews revealed, these procedures have been adopted on the way on an *ad-hoc* basis as rapid solutions to

⁶⁸⁴ Interviews, European Commission, Brussels, 2016, 2017.

⁶⁸⁵ COURT OF AUDITORS, *supra* note 531 at 29.

institutionalise the fulfilment - and at a later point the enforcement - process of ex-ante conditionality were necessary in practice.

10.3.4 Departure from equal and consistent application of ex-ante conditionality rules: prioritisation

In their legal world, all ex-ante conditionalities have an equal legal force. As a consequence, the institutional world expectation was that they would be consistently applied and once found applicable they would be consistently fulfilled by all Member States in the same manner.

Contrary to the legal world expectations, a whole new informal prioritisation and ranking of ex ante conditionalities emerged in practice at all levels of the Commission and the Member States. The most important consequences of the institutional prioritisation of ex-ante conditionalities was that it implicitly informed the applicability and compliance thresholds adopted by the Commission (see also 10.3.2 supra).

The institutional prioritisation of ex-ante conditionalities was undertaken at multiple levels.

Firstly, interviews revealed that certain conditionalities were understood as core priorities by all Commission DGs in charge of EU Funds management.⁶⁸⁶ This was notably the case for state aid and public procurement ex-ante conditionalities, as the correct application of state aid and public procurement rules are of utmost importance for sound EU expenditure and have been repeatedly flagged by the Court of Auditors as the primary source of irregular spending.⁶⁸⁷

Secondly, each Commission DG had its own internal prioritisation of ex-ante conditionalities in line with their own policy preferences and interests. The most telling example in this sense is DG MARE. In a guidance note, DG MARE instructed Member States to prioritise four EMFF thematic ex-ante conditionalities arranged in order of internal priority.⁶⁸⁸ In subsidiary, DG MARE instructed Member States to observe some - but not all - general ex-ante conditionalities, in particular the ones on

⁶⁸⁶ Interviews, European Commission, 2017.

⁶⁸⁷ EUROPEAN COURT OF AUDITORS, ANNUAL REPORT OF THE COURT OF AUDITORS ON THE IMPLEMENTATION OF THE BUDGET CONCERNING THE FINANCIAL YEAR 2016 (2017).

⁶⁸⁸ DG MARE European Commission, DRAFT GUIDANCE EMFF SPECIFIC EX ANTE CONDITIONALITIES VERSION 3 (MARCH 7, 2014).

public procurement, environmental impact assessment, state aid and statistical systems, and completely excluded three general equality ex-ante conditionalities on gender, non-discrimination and disability.⁶⁸⁹ Similar institutional prioritisations took shape at the level of DG EMPL, DG REGIO and DG AGRI, as well as other policy DGs involved in the fulfilment assessment process.⁶⁹⁰ The institutional prioritisation was so strong that during interviews, Commission officials had no trouble labelling each ex-ante conditionality under their responsibility with high importance, medium importance and low importance.⁶⁹¹

Thirdly, the Commission had a priority ranking for each Member State. In this sense, the 2012 position papers and the order of 'crucial' ex-ante conditionalities for each Member State are highly suggestive.⁶⁹² These, for instance, indicated that in the case of Romania, the Commission treated public procurement, administrative capacity, and transport with the highest priority;⁶⁹³ whereas in the case of Italy Smart Specialisation, Digital Growth and Small Business Act conditionalities were perceived as priorities.⁶⁹⁴ This prioritisation would get even more detailed at the level of the country units of each DG, where Commission officials had the most detailed and clear prioritisation understanding of each conditionality criteria.⁶⁹⁵

The Commission's institutional prioritisation had an important impact on the assessment of ex-ante conditionality applicability and fulfilment.

An excellent example of gaps in the applicability assessment is the above mentioned case of non-discrimination, gender equality and disability ex-ante conditionalities, which were not on DG MARE's priority list and ended up being completely excluded from application in all EMFF OPs during 2014-2020.⁶⁹⁶

As for gaps in the fulfilment assessment, the Court of Auditors provides several detailed examples on the Small Business Act (SBA), Statistical Systems and

⁶⁸⁹ REGULATION (EU) 508/2014, *supra* note 273 at 2.

⁶⁹⁰ Interviews, European Commission, 2017.

⁶⁹¹ Interviews, Commission, 2017.

⁶⁹² Carlos Mendez, John Bachtler & Granqvist Kaisa, EUROPEAN COMMISSION PERSPECTIVES ON THE 2014-2020 PARTNERSHIP AGREEMENTS & PROGRAMMES: A COMPARATIVE REVIEW OF THE COMMISSION'S POSITION PAPERS.

⁶⁹³ European Commission, *supra* note 544 at 14.

⁶⁹⁴ European Commission, POSITION OF THE COMMISSION SERVICES' ON THE DEVELOPMENT OF PARTNERSHIP AGREEMENT AND PROGRAMMES IN ITALY FOR THE PERIOD 2014-2020 18 (2012).

⁶⁹⁵ Interviews, European Commission, 2017

⁶⁹⁶ *Id.*

Employment ex-ante conditionalities, where the Commission considered the conditionalities fulfilled and agreed with the "overly positive (self-)assessment" of Member States even if the declared fulfilment was inconsistent and did not necessarily mean that Member States fully complied with the required conduct.⁶⁹⁷ On this point, the Court of Auditors showed that even if most Member States were found to fulfil the SBA ex-ante conditionality according to DG GROW and DG REGIO assessment, in the framework of SBA policy, the same Commission DG GROW found that at least half of EU Member States did not meet the policy targets regarding the time and money needed to set-up a business.⁶⁹⁸ When asked during the interviews, Commission DG GROW officials explained that the SBA ex-ante conditionality was seen as an 'opportunity conditionality' and did not receive the same strict approach as, for instance, the public procurement one. This internal prioritisation of conditionality led to an outcome whereby even if there was a clear policy match between the DG in charge of SBA policy and the DG in charge of SBA conditionality, the baselines for assessment differed, leading to an outcome where a fulfilled ex-ante conditionality did not also mean that its policy targets were strictly met.

A similarly interesting case is that of the statistical systems ex-ante conditionality, where the Court of Auditors found that most Member States examined that had the ex-ante conditionality fulfilled (12 out of 14) did not have fully operational electronic systems for data collection as required by the conditionality criteria.⁶⁹⁹ The Court also noted that the Commission was aware of the delays in setting up compliant data collection systems, but did not challenge Member States' self-assessment, considering the conditionality fulfilled.⁷⁰⁰ When questioned during interviews, Commission officials confirmed that the Commission did not always agree with the Member States' assessment of fulfilment but it nevertheless considered the ex-ante conditionality fulfilled and did not invoke a potential suspension of payments because in the case of statistical systems the Commission could also punish irregularities by ordering corrections ex post, based on ESI Funds sound management rules.⁷⁰¹ This finding is

⁶⁹⁷ COURT OF AUDITORS, *supra* note 674; COURT OF AUDITORS, *supra* note 531 at 38–53.

⁶⁹⁸ COURT OF AUDITORS, *supra* note 531 at 43–44.

⁶⁹⁹ *Id.* at 56–59.

⁷⁰⁰ *Id.* at 56.

⁷⁰¹ Interviews, Commission, September 2017.

interesting as it provides a new baseline for the Commission's internal prioritisation: the availability of additional tools to enforce the conditionality requirements ex-post. However, this instrumental approach of the Commission does not make up for the lack of consistent application of ex-ante conditionality legal rules that were put in place precisely to avoid the necessity of ex post corrections.

The employment conditionalities provide another interesting example.⁷⁰² In this case, the Court of Auditors noted that even if the received fulfilment assessment of two out of five audited Member States was inconsistent, the Commission (DG EMPL) did not insist on a correct assessment.⁷⁰³ This means that the Commission's assessment on fulfilment would vary within the same DG from one country unit to another, leading to an uneven fulfilment assessment on a case by case basis.

As a result, one must conclude that ex-ante conditionalities enjoyed formal equality in their legal world. However, they were subject to multiple structural inequalities in their institutional world. The institutional prioritisations were noticed on various levels and were based on multiple motives, which led to inconsistent applicability and fulfilment assessments of ex-ante conditionalities. We stress once again that the prioritisation of ex-ante conditionalities during fulfilment assessment led to a differentiated threshold of compliance from DG to DG and from one Member State to another, leading to an outcome where fulfilment of an ex-ante conditionalities did not always necessarily mean full compliance with the prescribed behaviour, contrary to expectations raised in the legal word of conditionality.

10.3.5 Departure from the formal legal setting: informality

Informality was the unwritten principle of the ex-ante conditionality process. Contrary to the formal legal setting acquired by conditionality in the 2014-2020 financial period, in the institutional world informality reigned. Recourse to informality had important consequences for ex-ante conditionality as it rendered key legal provisions on conditionality enforcement *de facto* inapplicable in practice. In addition, informality decreased the transparency and ultimately blurred the accountability of the overall ex-ante conditionality process.

⁷⁰² COURT OF AUDITORS, *supra* note 531 at 46–48.

⁷⁰³ *Id.* at 46–48.

10.3.5.1 Informal self-suspension

The first core moment where informality was preferred to formal legal rules concerned the *optional* enforcement of ex-ante conditionalities at the moment of OP approval (2014-2015) in cases where the unfulfilled conditionality would pose a significant risk to ESI Funds investment.⁷⁰⁴ Even if, as reported by the Court of Auditors, the Commission found that such a significant risk existed for at least 13 Member States and concerned ESI Funds investments under about 78 OPs,⁷⁰⁵ no formal suspensions of payments at risk have been ordered at the moment of OP approval.

Instead, as the Commission explained during interviews, informal self-suspensions have been agreed with 13 Member States concerned,⁷⁰⁶ whereby the latter solemnly promised not to send payment requests before the ex-ante conditionalities were fulfilled.⁷⁰⁷ During the 2016 interviews, I have learned that the self-suspension procedure was proposed by Member States, but it had been practiced before and was accepted by the Commission based on administrative and political arguments. First, from an administrative perspective, the Commission reported that it was unconventional to adopt a Commission decision on both ESI Funds suspension and approval at the same time. Second, a suspension ordered so early in the financial period was not seen as politically desirable due to the negative publicity caused by suspension occurring before the start of expenditure.⁷⁰⁸ One must stress that there was no clear or transparent Commission reporting on the self-suspension procedure, the OPs it concerned or the amount of ESI Funds affected. Some preliminary Commission communications and reports would mention self-suspension between the lines,⁷⁰⁹ however it was not until November 2017, together with the Court of Auditors report on ex-ante conditionality, that self-suspension was clearly brought into the spotlight.⁷¹⁰ The Court also estimated that self-suspension affected about 4,7 bln Euro from EDRF and ECF, representing about 2% of all Cohesion spending allocations

⁷⁰⁴ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219.

⁷⁰⁵ COURT OF AUDITORS, *supra* note 531 at 61.

⁷⁰⁶ Croatia, Cyprus, Czech Republic, France, Greece, Italy, Latvia, Malta, Poland, Romania, Slovenia, Spain.

⁷⁰⁷ Interviews, Court of Auditors, 2017.

⁷⁰⁸ Interviews, European Commission, Brussels, 2016.

⁷⁰⁹ European Commission, *supra* note 589; METIS GMBH, *supra* note 661.

⁷¹⁰ COURT OF AUDITORS, *supra* note 531 at 61–62.

(ERDF, ECF and ESF).⁷¹¹ Moreover, analysis of the data published by the Court of Auditors shows that the ordered self-suspensions were merely symbolic, as according to the Court's estimations about 57% - as opposed to 2% - of Cohesion spending was affected by unfulfilled ex-ante conditionalities at the start of the financial period.⁷¹²

To sum up, the informal self-suspension procedure set aside important CPR legal provisions, decreased the transparency and ultimately the accountability of the EU and of Member States before their constituencies, rendering an important legal moment of ex-ante conditionality enforcement invisible and merely symbolic in practice.

10.3.5.2 Informal renegotiation of ex-ante conditionality action plans

Informality continued after the moment of approval of OPs, when already negotiated and approved action plans for unfulfilled ex-ante conditionalities were re-opened and informally renegotiated between the Commission and Member States.

On this point, the Romanian authorities reported that some action plans have been negotiated for almost one year after the approval of OPs, with regular monthly meetings and discussions on each conditionality criteria to fulfil.⁷¹³ Equally, Commission officials would confirm that while action plans were "set in stone", often action plans for unfulfilled ex-ante conditionalities approved under the OPs were not clear enough (even if they had been already reviewed and assessed by the Commission) and necessitated further detail that led to subsequent action points or supplements.⁷¹⁴

It is important to stress that this informal re-negotiation and *de facto* amendment of action plans did not lead to subsequent formal amendment of OPs and the initial action plans therein. As a result, informality raised serious transparency and accountability concerns in practice. As I learned during the preliminary research on the Romania case study, informality meant that at times it was simply impossible to tell what exactly national authorities did, based solely on the formal information publicly available in the OPs (see, Chapter 12 below).

⁷¹¹ *Id.* at 61–62.

⁷¹² *Id.* at 96.

⁷¹³ Interviews, Permanent Representation of Romania, Brussels 2017.

⁷¹⁴ Interviews, European Commission, Brussels 2017.

10.3.5.2 Informal agreements on partial fulfilment of ex-ante conditionality

Informality also reached the ultimate enforcement moment, when after the December 31 2016 deadline, the initially set and then re-negotiated action plans were still not completely fulfilled.

As explained above, during the process of fulfilment ex-ante conditionality criteria necessitated subsequent detail and ongoing changes in Member State action plans. At times, Member States and the Commission exercised their discretion to include additional commitments that were rarely reflected back into the OP, and that at times also turned out to be too ambitious and were not fulfilled in practice.

Against this backdrop, I have learned during interviews that Commission officials did not always seem convinced that formal enforcement of every single criterion was the best avenue at the end of 2017 for the 58 outstanding ex-ante conditionalities.⁷¹⁵ Especially in areas with no hard EU *acquis* such as transport, health, education, smart specialisation (as opposed to water or waste), Commission officials were uncertain if formal enforcement could *legally*, and most importantly *legitimately* be pursued.⁷¹⁶

The Commission doubts were well founded. As the Commission invoked the rhetoric of suspension with more insistence, its relationship with Member States started to shift from a cooperative to an adversarial one, where both parties tried to anticipate their chances in case of judicial review by the CJEU.

At that point, it was almost ironic to see that at the end of 2017, suddenly all parties involved showed interest in formal legal arguments, when, as seen above, informality - not legality - had dominated to a large extent the overall ex-ante conditionality process. In a conditionality process where neither the Commission nor the Member States played by legal rules, recourse to these rules at the end of the game did not seem a feasible solution for either of the parties. Instead, informality was once again preferred, and informal settlements on half-fulfilment started to take shape in practice.⁷¹⁷

This informal renegotiation of the terms of compliance and enforcement, even if informed by good motives, once again raised important legal certainty, transparency

⁷¹⁵ Interviews, Brussels, September 2017.

⁷¹⁶ Interviews, Brussels, September 2017.

⁷¹⁷ Romania case study, Chapter 12, Waste ex-ante conditionality.

and accountability concerns. The constant circumvention of formal legal rules of ex-ante conditionality led to an outcome where if a conditionality failed, there was very little understanding of what was the exact conduct to be complied with, what were the consequences of non-compliance, who must be held accountable and on what terms. Most importantly, the circumvention of formal enforcement rules, *de facto* took conditionality away from the European courts, as in the absence of a formal Commission decision on suspension the judicial avenues for assessing the consistency of ex-ante conditionalities with EU law are substantially limited.⁷¹⁸

10.3.6 Departure from conditionalities set in law: uncertainty

In the legal world, ex-ante conditionality was to be a "concrete", "precisely pre-defined" and "critical factor" with a "direct link" to the effectiveness and efficiency of spending. This was in no way the case in the institutional world, where ex-ante conditionality was continuously reinterpreted, expanded or narrowed down on a case by case basis, informally pushed in multiple directions based on the strategic preferences of the EU and national actors involved.

This outcome was facilitated by the legal world of conditionality itself because even if the definition of ex-ante conditionality asked for concrete and precisely pre-defined factors, the criteria in CPR annexes were often generically formulated, leaving important scope for discretion to Member States.⁷¹⁹ However, our research shows that instead of limiting Member State discretion or reverting to the legal definition of ex-ante conditionality, the Commission preferred to use the vague language in favour of its own instrumental ends, notably pushing the ex-ante conditionality towards the enforcement of post-2014 CSRs of the European Semester.

As a result, all actors involved tried to pull ex-ante conditionality in their own direction. On the one hand, Member States tried to pull the ex-ante conditionality on to their side by diluting compliance criteria, narrowing down their scope, collapsing several related ex-ante conditionalities into one, or only slightly re-drafting existent strategies to fulfil a given ex-ante conditionality.⁷²⁰ Member States would also use ex-

⁷¹⁸See also the discussion in Chapter 9 above, on the constitutional limits of conditionality.

⁷¹⁹ As also observed by the Court of Auditors: COURT OF AUDITORS, *supra* note 531 at 40.

⁷²⁰ METIS GMBH, *supra* note 661 at 66–69. [see especially the measures adopted to fulfill the smart specialization and education ex-ante conditionalities]

ante conditionality as a driver for their national political agenda or for reforms sought for a long time but lacking sufficient support at the national level.⁷²¹ On the other hand, the Commission actively promoted fulfilment of relevant CSRs, adding CSR-led measures within the Member States' conditionality action plans. Our case study on Romania (Chapter 12) shows in detail that the Commission's *modus operandi* was not only to embed CSRs within action plans for unfulfilled ex-ante conditionalities but to subsequently call for their delivery under the European Semester CSRs framework, assess them within the next annual semester cycle and label them as demonstrating 'limited', 'some', or 'substantial progress'.⁷²² To reach that conclusion I had to go through all CSRs addressed to Romania from 2012 to 2017, ask the national officials to share with me their internal non-public ex-ante conditionality lists, and find out that in fact, what a conditionality asked for was not the fulfilment of criteria in the annex of the CPR regulation, but the start of a reform, implementation of a strategy or other action recommended in the CSRs.⁷²³ In 2017, when the Commission published its report on the value-added by ex-ante conditionality, it became clear that CSRs have *de facto* been a major part of the ex-ante conditionality process.⁷²⁴ As explained above, while the connection between ex-ante conditionality and structural reforms was alluded to during the 2012 preparatory documents of the 2014-2020 budgetary reform,⁷²⁵ this vision was not maintained in the subsequent proposals and final CPR text (Chapter 3).⁷²⁶ Despite the absence of an explicit legal mandate, in the institutional world ex-ante conditionality was *de facto* tasked with enforcement of CSRs, an

⁷²¹ Interviews, Italy Permanent Representation to the EU, European Commission, Brussels 2016; Bucharest 2017. See also Part III *infra*, Romania, public procurement ex-ante conditionality.

⁷²² Chapter 12 below.

⁷²³ *Id.*

⁷²⁴ EUROPEAN COMMISSION, THE VALUE ADDED OF EX ANTE CONDITIONALITIES IN THE EUROPEAN STRUCTURAL AND INVESTMENT FUNDS 8–10 (2017). See also, Chapter 11 below.

⁷²⁵ European Commission, STAFF WORKING DOCUMENT ELEMENTS FOR A COMMON STRATEGIC FRAMEWORK 2014 TO 2020 THE EUROPEAN REGIONAL DEVELOPMENT FUND THE EUROPEAN SOCIAL FUND, THE COHESION FUND, THE EUROPEAN AGRICULTURAL FUND FOR RURAL DEVELOPMENT AND THE EUROPEAN MARITIME AND FISHERIES FUND, PART ONE SWD(2012) 61 FINAL 1.

⁷²⁶ European Commission, *supra* note 243; European Commission, AMENDED PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL LAYING DOWN COMMON PROVISIONS ON THE EUROPEAN REGIONAL DEVELOPMENT FUND, THE EUROPEAN SOCIAL FUND, THE COHESION FUND, THE EUROPEAN AGRICULTURAL FUND FOR RURAL DEVELOPMENT AND THE EUROPEAN MARITIME AND FISHERIES FUND COVERED BY THE COMMON STRATEGIC FRAMEWORK AND LAYING DOWN GENERAL PROVISIONS ON THE EUROPEAN REGIONAL DEVELOPMENT FUND, THE EUROPEAN SOCIAL FUND AND THE COHESION FUND AND REPEALING COUNCIL REGULATION (EC) No 1083/2006 COM/2013/0246 FINAL - 2011/0276 (COD); REGULATION (EU) No 1303/2013 OJ L 347, *supra* note 219.

objective that was mentioned in the CPR only for the case of macroeconomic conditionality discussed above (10.2).

The continuously changing scope of conditionality criteria in practice, under a general push-and-pull process between the Commission and Member States, led to a high level of uncertainty and to a vague shared understanding on what precisely ex-ante conditionality was to achieve in practice.

Uncertainty was reported during interviews at the national level, as Member State authorities did not always have a clear understanding of what fulfilment would ultimately entail, or what were the overall resources, costs and efforts necessary to fulfil the ex-ante conditionalities.⁷²⁷

Uncertainty was also reported by the Commission, as Member States would provide insufficient and incomplete data, making it very hard to assess fulfilment.⁷²⁸ In response, the Commission was forced to insist on complete data reporting, a message that was not always received with receptivity by Member States.⁷²⁹ At times however, even when complete data was reported, the Commission officials explained that assessment was as uncertain as "reading into a crystal ball".⁷³⁰ Given the specific nature of some conditionality measures, the Commission had great difficulty in assessing the fulfilment of criteria from Brussels.⁷³¹ Measures as "professionalization of public procurement officials", reported as fulfilled by Member States, were simply impossible to credibly assess on paper by Commission officials.⁷³² In these cases Commission officials had only limited options: to ask again for more clarifications, to take the word of the Member State, to corroborate the information with general knowledge at the EU level or to simply use common sense reason and intuition. In none of the cases could the Commission inspect fulfilment on the ground, given the lack of an inspection mandate to do so and sovereignty concerns that could be raised by Member States. Nevertheless, the Commission found ways to be better informed. Officials would participate on a regular basis in sessions on conditionality fulfilment in national

⁷²⁷ METIS GMBH, *supra* note 661 at 10.

⁷²⁸ *Id.* at 74.

⁷²⁹ *Id.* at 74.

⁷³⁰ Interviews, Commission, September 2017.

⁷³¹ Interviews, Commission, September 2017.

⁷³² Interviews, Commission, September 2017.

capitals and in Brussels, from where they would get clearer insights on the realities on the ground.

Most importantly, EU citizens were faced with the same uncertainty concerns as to what an ex conditionality was, what it asked for, what exactly was delivered as a result, by whom, when or how. In a conditionality process led largely by the EU and national executives, with high levels of informality, low publicity, clarity or transparency, it was simply impossible to anticipate with sufficient clarity based on the text of the funding regulation what a given conditionality effectively meant at the end of the day: a law? a strategy? an action plan? more public officials? new institutions? all of them, or none?

As a result, what was to be a clear, precise, pre-defined factor often turned into a very unclear, imprecise and post-defined factor that was more or less related to the ex-ante conditionality criteria set in the legal world, but more often than not very different from the latter.

10.3.7 Very different implications for Member States: variable impact

The uniform legal world of ex-ante conditionality turned into a true story of variation at the national level. During the operation of ex-ante conditionality, we may distinguish between a group of Member States for whom ex-ante conditionality did not pose great difficulties in practice and another group of Member States for whom conditionality brought a substantive administrative burden and a higher risk of EU funds suspension. Even if in line with the requirements of the legal world, all Member States found some ex ante conditionalities applicable in their PA and OPs, these differed tremendously from one Member State to another based on numbers, stage of fulfilment, thematic scope, and most importantly based on effective actions put in place for fulfilment.

In table 2 below, I have attempted to reconstruct the variable impact of 36 ex-ante conditionalities based on fragmented and often fluctuating data collected from

interviews,⁷³³ Commission assessment reports⁷³⁴ and 2017 data of the Court of Auditors.⁷³⁵ As table 2 shows, Member States found 685 ex-ante conditionalities applicable at the moment of approval of PAs, out of which almost half were not fulfilled in 2014. Here one can already notice the fluctuation in numbers of ex-ante conditionalities applicable to Member States. As such, Member states like Lithuania or Romania found all 36 ex-ante conditionalities applicable, while Member States like Luxembourg or the Netherlands found only one third - 12 ex-ante conditionalities applicable to their expenditure.⁷³⁶ The number of unfulfilled ex-ante conditionalities at the moment of approval of PAs is even more interesting. Table 2 shows that in 2014, the countries with most unfulfilled ex-ante conditionalities to be fulfilled ex-post were Croatia (27 out of 29 applicable), Czech Republic (26 out of 35), Greece (23 out of 35), Hungary (23 out of 32), Romania (25 out of 36) and Slovakia (25 out of 35), as opposed to Austria (0 out of 17 applicable) and Denmark (0 out of 17) - the only EU countries that had all ex-ante conditionalities fulfilled ex-ante.⁷³⁷ The fulfilment rates give an even more accurate indication of the lagging Member States. As shown in column three of Table 2, countries with the lowest percentage of ex-ante conditionalities fulfilled out of the total ex-ante conditionalities applicable to them at the level of PA were Croatia with just 7% of applicable ex-ante conditionalities fulfilled, Czech Republic with 26% of its ex-ante conditionalities fulfilled, followed by Slovenia (28%), Slovakia (29%), Hungary (29%), Romania (31%), Malta (32%) and Greece (35%).

⁷³³ European Commission Brussels 2016. [According to Commission DG REGIO in 2016, there was a total of 1285 action plans for unfulfilled ex-ante conditionalities, out of which 716 were distinct].

⁷³⁴ METIS GMBH, *supra* note 661. [The report explains that there was a total number of 2028 thematic ex-ante conditionalities applicable to OPs out of which about 750 (250 general and 500 thematic) were not fulfilled and required subsequent action plans for fulfilment].

⁷³⁵ COURT OF AUDITORS, *supra* note 531. [Court of Auditors indicated only the number of unfulfilled ex-ante conditionalities at the level of OPs].

⁷³⁶ Partnership agreements on the European structural and investment funds | European Commission, *supra* note 587; Mendez, Bachtler, and Kaisa, *supra* note 692. [see for the thematic objectives of each Member State].

⁷³⁷ Ireland, Germany and Sweden also appear to have all ex-ante conditionalities fulfilled at the moment of the PA approval; however, this is because they did not report some unfulfilled ex-ante conditionalities in their PAs, which were subsequently reported only in the OPs.

Table 2. General and thematic ex-ante conditionalities per Member State

Member State	Applicable PA	Not fulfilled PA	% Fulfilled PA	Not fulfilled OP	Not fulfilled OP Feb 2017	Not fulfilled Sep 2017
Austria	17	0	100%	0	0	0
Belgium	n/a	n/a	n/a	4	1	0
Bulgaria	34	19	45%	17	11	1
Croatia	29	27	7%	23	18	3
Cyprus	27	14	49%	13	5	2
Czech R.	35	26	26%	27	6	0
Denmark	17	0	100%	0	0	0
Estonia	25	14	44%	15	3	0
Finland	20	3	85%	3	0	0
France	20	2	90%	68	13	3
Germany	22	0	100%	10	2	2
Greece	35	23	35%	47	26	2
Hungary	32	23	29%	25	19	4
Ireland	17	0	100%	1	1	1
Italy	34	13	62%	224	179	19
Latvia	30	14	54%	15	0	0
Lithuania	36	14	62%	14	0	0
Luxembourg	12	1	92%	1	1	1
Malta	25	15	32%	14	2	1
Netherlands	12	1	92%	2	0	0
Poland	35	12	66%	90	20	1
Portugal	34	11	68%	24	5	0
Romania	36	25	31%	30	11	7
Slovakia	35	25	29%	32	20	0
Slovenia	25	18	28%	18	4	0
Spain	35	13	63%	35	30	10
Sweden	23	0	100%	2	2	0
UK	n/a	n/a		7	2	1
Total	685	313	61%	761	381	58

Source: Own interpretation of data collected from European Commission Report on implementation of ex-ante conditionalities (2016) and Court of Auditors Special Report 15/2017.

This means that at the beginning of the financial period these seven countries were least prepared to start spending, given that a large share of compulsory ex-ante conditionalities directly relevant for their planned spending were not in place. The moment of approval of OPs dramatically changed the situation for all Member States. As shown in Table 2, in OPs the conditionality numbers have amplified significantly in cases of Member States with a regionalised approach to ESI Funds spending. This led to a result where countries like Italy, which had only 13 unfulfilled ex-ante conditionalities at the moment of PA approval, ended up leading the non-fulfilment ranking with 224 unfulfilled ex-ante conditionalities. Similarly, Poland, which previously had 12 unfulfilled ex-ante conditionalities in its PA, had reached 90 unfulfilled ex-ante conditionalities in OPs. Even more striking, France, which had only 2 unfulfilled ex-ante conditionalities in its PA, ended up with 68 ex-ante conditionalities not fulfilled. This means that for instance to fulfil the ex-ante conditionality on statistics, each of the Italian, French or Polish regions had to establish individual data collection systems in line with the requirements of the CPR. The important variation in numbers between OPs and PAs, suggests that for at least some Member States that adopted a regional approach to ex-ante conditionalities, the overall process beyond doubt required much more coordination and administrative effort in practice.

Variations between Member States continued based on the thematic scope of ex-ante conditionalities found applicable at the level of PA and OPs. From this point of view, ex-ante conditionality split the Member States into two groups: the more developed 'old' EU-15 Member States and less developed 'young' EU-13 Member States.⁷³⁸ Reportedly, the EU-15 group more often tended to find 'smart' ex-ante conditionalities applicable such as Smart Specialisation and Digital Growth, while the EU-13 group would more frequently address conditionalities in the area of research, water, waste or transport infrastructure.⁷³⁹ These differences are explained based on the variable development needs of EU 'old' Member States that prioritised the 'smart' investments, versus the EU 'young' Member States that prioritised infrastructure development.

⁷³⁸ METIS GMBH, *supra* note 661 at 39–40.

⁷³⁹ *Id.* at 29.

A similar pattern of Member State variation is observed based on fulfilment of ex-ante conditionalities ex-post, after the moment of PA/OPs approval and before the December 31 2016 deadline. From this point of view, fulfilment rather than applicability reveals the true impact of ex ante conditionality and shows clearly where the most significant ex ante conditionality action unfolded. A closer look at the number of unfulfilled ex-ante conditionalities per Member State provides a starting indication as to Member States that found fulfilment more burdensome in practice. As Table 2 shows, 22 Member States failed to meet the fulfilment deadlines reported in conditionality action plans, and most importantly, failed to meet the ultimate funding regulation deadline of December 2016.⁷⁴⁰ From these, ten Member States stand out with the highest number of ex ante conditionalities not fulfilled, representing mainly the group of EU Southern and Eastern Member States with weaker administrations and/or more complex central-regional governmental set-up.⁷⁴¹ This means that even if ex-ante conditionalities were addressed in law to all Member States, in practice ex-ante conditionalities posed a higher ESI Funds suspension risk for ten Member States, which were responsible for the vast majority (86%) of the non-fulfilled ex ante conditionalities at the end of 2016 (Table 2, supra). Interestingly, the data on fulfilment reported by the Court of Auditors in November 2017 reflects a similarly uneven non-fulfilment record throughout the remaining 15 non-compliant Member States as per September 2017. Out of 58 outstanding ex ante conditionalities, four Member States are at the top of the non-fulfilment ranking, being responsible for about 70% of the non-fulfilled ex ante conditionalities in 2017 (Table 2 supra).⁷⁴²

The effective nature of actions adopted to fulfil the ex-ante conditionalities reveal the deepest inter-state variations of ex-ante conditionality. Overall, based on the general effort to fulfil ex-ante conditionalities, evaluation studies show that fulfilment proved demanding for all.⁷⁴³ Nevertheless, fulfilment was perceived in more *difficult* terms by the 'young' EU-13 Member States with less developed administrative, regulatory, strategic and policy frameworks, and *disproportionate* by the 'old' EU-15 group

⁷⁴⁰ *Id.* at 87. [most action plans were reported in 2015].

⁷⁴¹ IT, ES, EL, PL, SI, HU, HR, FR, RO, BG.

⁷⁴² Italy (19), Spain (10) and Romania (7), followed by Hungary (4).

⁷⁴³ COURT OF AUDITORS, *supra* note 531 at 30–34.

receiving a smaller share of EU funds.⁷⁴⁴ In addition, studies commissioned by the Commission show that for instance smart specialisation ex-ante conditionality implied a substantial effort for the 'younger' EU-13 Member States groups, that reportedly put in place new strategies and action plans based on detailed Commission guidelines; as opposed to 'old' EU-15 Member States group that were reluctant to accept the Commission guidelines, slightly adapting or even merging several existing strategies into one and presenting them as new strategies to fulfil an ex-ante conditionality.⁷⁴⁵ The same studies show that often actions proposed to fulfil a single ex ante conditionality in one Member State, turned out to be worth the effort of four ex ante conditionalities in other Member States. For instance, in the area of education this was the case for countries such as Poland and Czech Republic, which decided to collapse four 'education' ex-ante conditionalities (higher education, lifelong learning, vocational education and training and early school leaving) into one single conditionality and deliver one single education strategy to fulfil all of them.⁷⁴⁶ On the contrary, countries such as Spain committed to an action plan to deliver a complete reform of their higher education system, passing a comprehensive Royal Decree, adopting implementing acts and institutional arrangements that were ultimately to be applied to all higher education establishments in the country, in response to a single higher education ex-ante conditionality.⁷⁴⁷

A much more detailed study would be required to reveal the true substantive variations of ex-ante conditionality in each of the 28 Member States and highlight with more clarity the overall inter-state differences, an inquiry that goes beyond the scope of this thesis.

Chapter 11 will provide a more tangible picture of how much - and at times how little - ex-ante conditionalities meant at the national level, stressing in addition that beyond the promised action plans, the success of each ex-ante conditionality in each Member State was highly contingent on the national political interest, EU and national congruence of goals, national ownership, capacity and commitment to change. Moreover, the in-depth case study on Romania (Chapter 12 below) will explain the

⁷⁴⁴ METIS GMBH, *supra* note 661 at 112.

⁷⁴⁵ *Id.* at 66.

⁷⁴⁶ *Id.* at 69.

⁷⁴⁷ *Id.* at 97.

very different implications ex-ante conditionalities have had in a state that has been marked by a long conditionality history, awakening long-forgotten and highly contentious crisis-led, or pre-accession conditionalities in areas as railway reform, the fight against corruption, pensions systems or administrative reform, which often took over the legal world of ex-ante conditionality and significantly reoriented its ends towards prior non-finalised or under-performing reforms, this time under the umbrella of EU spending.

10.3.8 Departure from a legally enforceable nature: *de facto* unenforceable

The legal world of conditionality raised the expectation that no EU money shall be spent before comprehensive EU policy, EU law and administrative capacity pre-conditions are in place, as the Commission already had the option to suspend all or part of ESI Funds at risk at the moment of OP approval.⁷⁴⁸ Only exceptionally could unfulfilled ex-ante conditionalities be fulfilled ex-post, after the approval of OPs. This was only possible in cases where no significant prejudice would be present, and in any case no later than December 31 2016.⁷⁴⁹

The institutional world did not meet these legal world expectations. No ESI Funds payments have been suspended upon the OPs approval (10.3.8.1); no ESI Funds payments have been suspended in December 2016 (10.3.8.2); no ESI Funds payments have been suspended by the end of 2017 (10.3.8.3) and no ESI Funds payments are credibly expected to be suspended in 2018 (10.3.8.4).

In the meantime, ESI Funds expenditure has been under way and gained increased pace as of 2017, even if not all applicable ex-ante conditionalities have been completely fulfilled, hence departing from the legal world promise that no EU money shall be spent before all ex-ante conditionalities are in place. This outcome has been facilitated

⁷⁴⁸ Commissioner for Regional Policy & Johannes Hahn, EUROPEAN COMMISSION - PRESS RELEASES - PRESS RELEASE - SPEECH - DELIVERING ON COHESION POLICY REFORM WITH QUALITY AND SPEED, http://europa.eu/rapid/press-release_SPEECH-13-974_en.htm (last visited Jan 18, 2018). "This time around no money will be spent if the right conditions are not there so there is no getting away from ex ante conditionalities".

⁷⁴⁹ Carlos Mendez, Kaisa Granqvist & John Bachtler, *European Commission Perspectives on the 2014-2020 Partnership Agreements & Programmes: A Comparative Review of the Commission's Position Papers*, EUR. POLICY RES. PAP. (2013); European Commission, POSITION OF THE COMMISSION SERVICES ON THE DEVELOPMENT OF PARTNERSHIP AGREEMENT AND PROGRAMMES IN ROMANIA FOR THE PERIOD 2014-2020 ARES(2012)1240252 (2012).

by the broad institutional interpretation given by the Commission to conditionality enforcement rules that rendered the legally enforceable nature of conditionality virtually unenforceable in practice. Beyond the *de facto* unenforceable nature of ex-ante conditionality, the end result of the unenforceability has been a generalised legal uncertainty for Member States and for the public at large, concerning the probability of enforcement as well as its effective scope. In 2018, this uncertainty is still pending.

10.3.8.1 No enforcement at OPs approval: 2014-2015

Despite the high number of ex ante conditionalities not fulfilled at the moment of approval of OPs (761 or 25% of the overall applicable ex ante conditionalities) no payments have been formally suspended by the Commission.⁷⁵⁰ I have already explained how the informal self-suspension procedure institutionalised in practice between the Commission and Member States circumvented the legal option of enforcing ex-ante conditionality at the moment of approval of OPs (10.3.5.).⁷⁵¹ Here I will additionally stress that the informal self-suspension procedure was necessarily preceded by an internal institutional decision on the part of the Commission not to apply the legal rules on conditionality enforcement. In other words, the root cause of the Member States' self-suspension was the Commission's institutional willingness to informally renegotiate legal enforcement rules and accept a self-suspension mechanism. As a result, the institutional world decision not to enforce conditionality before the start of spending meant that EU money was *de facto* spent before ex-ante conditionalities attached were in place.

10.3.8.2 No enforcement upon December 31, 2016 deadline

In the legal world, all unfulfilled ex ante conditionalities should have been fulfilled by December 31, 2016 at the latest.⁷⁵² The CPR also states that Member States shall report on fulfilment of ex-ante conditionalities no later than in their annual implementation or progress reports, hence by June 30 2017 or August 31 2017, respectively.⁷⁵³

⁷⁵⁰ COURT OF AUDITORS, *supra* note 531 at 61.

⁷⁵¹ Interviews, Brussels, June 2016

⁷⁵² REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at Art. 19 (2).

⁷⁵³ *Id.* at 19 (2).

These legal provisions have been interpreted in a permissive manner by the Commission as allowing the 22 non-compliant Member States at the end of 2016 to continue fulfilment until August 31 2017, *de facto* prolonging the conditionality fulfilment deadline by about eight months.⁷⁵⁴ It was curious to learn during the 2016 interviews, that Commission officials would refer exclusively to the August 31 2017 deadline instead of December 31 2016. Hence, in the institutional credo of the Commission August 2017 was the only deadline to be observed, a conviction that clearly departed from the legal world of conditionality.

The *de facto* extension of the fulfilment deadline by almost one year suggests once again that in the institutional world understanding of the Commission, conditionality is a compliance, not a sanctioning mechanism. The Commission did not need additional reporting information to proceed with enforcement, as it knew at each stage of the ex-ante conditionality process exactly what was the fulfilment situation of each Member State. As shown above (10.3.3), all Commission DGs in charge of spending, and in particular DG REGIO, were immediately updated on the progress of each ex-ante conditionality in each Member State, assessing fulfilment and deciding to lift or not to lift ex-ante conditionalities on a regular basis as of 2014. The compliance objective of the Commission is also supported by Court of Auditors data, which shows that fulfilment gained unprecedented pace precisely during the eight extra months granted by the Commission to the Member States.⁷⁵⁵ Therefore, under the imminence of potential suspensions, Member States managed to fulfil a vast majority of the remaining ex ante conditionalities action plans in 2017 (323 out of 381), and to increase the overall compliance rate from about 50% to 92% by mid-September 2017.

10.3.8.3 No enforcement at the end of 2017

After the reporting deadline passed (August 31 2017), in September 2017 no payments had been suspended even though 15 Member States had about 58 ex-ante conditionalities not fulfilled (table 2 above).⁷⁵⁶ In theory, the end of 2017 was the ultimate enforceability moment; a 'now or never' enforcement momentum for ex-ante

⁷⁵⁴ Interviews, Commission, Brussels, June 2016

⁷⁵⁵ COURT OF AUDITORS, *supra* note 531 at 32.

⁷⁵⁶ *Id.* at 98.

conditionality. However, the institutional world showed a continued broad interpretation of legal deadlines and no suspension decision followed.

Instead, as gleaned from interviews and national press declarations of the Directorate General for Regional Policy, Ms. Crețu, in September 2017 the Commission declared that it was preparing so-called 'pre-suspension letters' to be sent to the 15 non-compliant Member State.⁷⁵⁷ The 'pre-suspension' letters are letters of notice sent by the Commission to Member States that start the formal suspension of payments procedure, giving Member States concerned the opportunity to present their observations.⁷⁵⁸ As mentioned above, if effectively sent, pre-suspension letters would give Member States two extra months to present their observations (10.3.3).⁷⁵⁹ As shown in Chapter 12, by 2018, none of the announced pre-suspension letters reached the national governments concerned.

10.3.8.4 Low probability of enforcement in 2018

In 2018, the chances for ESI Funds suspension are increasingly slim.

First, I have learned from press reports that the Commission had not sent the pre-suspension letters to Member States in 2017.⁷⁶⁰

Second, as explained above, even if a pre-suspension letter is sent and no satisfactory reply is received within two months, an eventual enforcement would have to pass the additional multilevel ad-hoc scrutiny of the Commission's inter-DG Suspension Committee, which would then propose a total or (most likely) a partial suspension of interim payments to the College of Commissioners (10.3.3).⁷⁶¹ Ultimately, even if one assumes that such a proposal reaches the College of Commissioners, the latter is under no legal obligation or time constraint to suspend funds, but *may* or *may not* decide to do so according to the CPR.⁷⁶²

⁷⁵⁷ Corina Crețu: Comisia pregătește scrisori de pre-suspendare a fondurilor europene pe 5 domenii, CURSDEGUVERNARE, <http://cursdeguvernare.ro/corina-cretu-comisia-pregateste-scrisori-de-pre-suspendare-a-fondurilor-pe-5-domenii.html> (last visited Nov 20, 2017). Interviews, European Commission, Brussels 2017.

⁷⁵⁸ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219.[Art. 142 (2)]

⁷⁵⁹ Corina Crețu, *supra* note 757.

⁷⁶⁰ Surse din Comisia Europeana: In lunile urmatoare, vom decide fie sa ne indreptam spre suspendarea fondurilor UE pentru Romania, fie sa declaram indeplinit planul de actiune - Hotnews Mobile , <http://m.hotnews.ro/stire/22124730> (last visited Feb 14, 2018).

⁷⁶¹ Interviews, Brussels, September 2017.

⁷⁶² REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at 19–5.

Third, one should add that in 2018 things are expected to get even more complicated in a context where the much-delayed spending has only started in 2017 and reached only about 7% mid-way through the financial period.⁷⁶³ With only about 2% of Cohesion funds self-suspended, Member States have actively started to contract public works and services, commit expenditure through 2020 and send requests for payment, already accepted by the Commission.⁷⁶⁴ Even in the case of the 2% of self-suspended payments, the informal self-suspension was a gentlemen's agreement, an informal pact that cannot stop Member States from sending payments and cannot constitute a legal ground for the Commission to refuse such payments in the absence of a formal decision on suspension of payments that has not been made by January 2018.

Here the first premise is that while conditionality pursues important policy goals, so does EU spending. As we explained in Part II, spending conditionality may pursue same-sector, cross-sector or cross-over policy goals, depending on the thematic link to spending. However at all the times, even in the case of same-sector conditionality, it pursues policy goals that are distinguishable from spending.

According to the legal world, by the end of the financial period spending is expected to strengthen research and innovation while ex-ante conditionality calls for a smart specialisation strategy and multi-annual budgeting. Spending must support digital growth, while ex-ante conditionality calls for next generation network plans, e-governance strategies and measures to support private investment. Spending must invest in existing SMEs while ex-ante conditionality calls for the achievement of Small Business Act targets on time (3 days) and money (up to 100 Euro) to set up a business. Spending must support private actors and green energy producers while ex-ante conditionalities call for full and correct transposition of all EU legislation in the area. Spending must improve EU transport networks, while ex-ante conditionality calls for transport master plans and a beginning to the reform of government owned transport enterprise. Spending must support social inclusion and youth employment, while ex-ante conditionality calls for active labour market policies and reformed labour market institutions. Spending must support poverty reduction while ex-ante conditionality calls for poverty reduction strategies and de-institutionalisation action plans.

⁷⁶³ COURT OF AUDITORS, *supra* note 656; EUROPEAN COMMISSION, *supra* note 576 at 177.

⁷⁶⁴ Interviews, Bucharest, Brussels, August-September 2017

Spending must support education, while ex-ante conditionality calls for strategic frameworks on early school leaving, higher education, life-long learning and vocational training. Spending must improve healthcare infrastructure while ex-ante conditionality calls for the mapping of healthcare services and a beginning to healthcare reform with an emphasis on a shift to outpatient care.⁷⁶⁵

However, in the institutional world, ex-ante conditionalities often departed from the promised close link to spending (10.3.6 supra). For instance, even if a smart specialisation strategy has been adopted in line with ex-ante conditionality, the Commission officials confirmed during interviews that Member States have no obligation to spend EU Funds in line with it.⁷⁶⁶ Hence, in the institutional world ex-ante conditionality was often given distinguishable and independent objectives, focused on the enforcement of EU laws, policies, EU priorities or CSRs, that did not always maintain a strict and direct link to ESI Funds spending. As a result, and as the Court of Auditors reported, most Member State officials interviewed did not expect that fulfilment of ex-ante conditionalities would automatically result in better spending on the ground.⁷⁶⁷ This means that, at the end of the day the Commission must necessarily balance the achievement of spending goals against the achievement of ex-ante conditionality goals and reconsider the possibility of ex ante conditionality enforcement.

Fourth, as table 2 above shows, the first candidates for suspension (Italy, Spain, Romania, Hungary) are all Member States substantially affected by the recent economic and migration crises. Three of them in particular have been subject to important austerity programs during the last decades, and one is confronted with important migration pressure. Suspending funds in their case is not only economically questionable but politically dangerous. The case study of Spain and Portugal presented above vividly illustrates that an eventual suspension of EU funds is hardly limited to arguments about legal compliance but may quickly degenerate into a discussion on EU North and South, austerity, the fair sharing of EU burdens and even discussion on the future of the EU (10.2.3).

⁷⁶⁵ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219.

⁷⁶⁶ Interviews, European Commission, Brussels, 2017.

⁷⁶⁷ COURT OF AUDITORS, *supra* note 531 at 39.

Fifth, suspension may also be legally questionable. As already explained (10.3.5), during the process of fulfilment ex-ante conditionalities necessitated subsequent detail and ongoing changes in Member State action plans that were not always followed by formal amendment of OPs. At the same time, the criteria for fulfilment have not always been concrete, pre-defined or genuinely linked to spending. In these cases an enforcement claim may prove difficult in practice, and in any case shall require much legal talent from the Commission legal service.

Lastly, evidence from the case study of Romania and interviews shows that informal agreements on partial fulfilments have already been reached in practice, even in cases where the lack of compliance was particularly serious (Chapter 12).

All the above considerations lead to the conclusion that suspension is not credible in practice. Moreover, assuming that a decision on suspension is ultimately reached by the end of 2018, such a suspension is expected to be merely symbolic, touching upon a very limited share of funds.

10.3.8.5 Generalised legal uncertainty

Beyond the departure from the legally enforceable nature of ex-ante conditionality, the Commission's delaying tactics and the implicit institutional ethos of non-enforcement, brought about a generalised state of legal uncertainty.

First, uncertainty bears upon the question of whether or not any suspension will happen at all. Whereas everything points towards a low probability of enforcement, no one can assert with sufficient certainty whether or not a suspension will occur.

Second, important uncertainty bears upon the moment of suspension. All the odds point toward no suspensions in 2018, but here again the chances are that at least one suspension will be ordered during the year and possibly beyond that moment in time.

Third, uncertainty surrounds the actual amounts of funds to be suspended, and hence the cost of non-compliance. This remains absolutely unknown to date. Suspension rests completely in the discretion of the Commission and may range from total to only partial suspension of payments. When asked by the Court of Auditors what was the amount of funding potentially at risk of suspension at the moment of OPs approval and after the 2016 deadline for fulfilment, the Commission replied that in September 2017, about 12% of Cohesion funds are potentially affected by unfulfilled ex-ante

conditionalities.⁷⁶⁸ There is no indication on what funds are affected in January 2018 and little overall understanding of what a suspension may mean in practice.

This generalised legal uncertainty departs in important ways from the essential standards of the concept of 'law' and in particular the legal requirement of foreseeability, pursuant to which law must allow its subjects to adjust their behaviour and assess the consequences of their actions or inactions. In this case, Member States have no actual possibility of effectively assessing the cost of their lack of compliance. Most importantly, EU citizens have no clear understanding what failure to fulfil ex-ante conditionality shall mean in practice, a piece of information that could allow them to participate in an informed manner in public debates and hold their national or EU executives accountable for the results of compliance or non-compliance with a given ex-ante conditionality.

⁷⁶⁸ COURT OF AUDITORS, *supra* note 531. [Commission's replies]

Three Baselines of Achievement

"Does it work? Work for whom?"⁷⁶⁹

In the previous Chapter I have described the numerous departures manifested by spending conditionality during its transition from the legal to institutional world. I have stressed that all analysed departures must be primarily understood as departures from the legal expectations raised by conditionality by virtue of its binding and enforceable EU law nature, irrespective of whether or not these cases may raise a concrete question of breach of EU law and of the principles underpinning it.

In this Chapter, I reiterate the tension between the legal and the institutional worlds of conditionality, this time regarding the ultimate achievement of spending conditionality on the ground. 'Achievement' in this Chapter refers to the process of attainment of the specific goal pursued by spending conditionality.

There are at least three baselines for assessing the achievement of conditionality in practice:

⁷⁶⁹ Fisher, *supra* note 45.

- (1) a deliverable-based baseline on 'what was done', that corresponds to the institutional world of conditionality and was adopted by the Commission in practice (11.1);
- (2) a spending-based baseline on 'whether what was done contributed to better spending' that corresponds to the legal world of conditionality and was adopted by the Court of Auditors in practice (11.2);
- (3) and a policy-output baseline on 'whether what was done advanced the policy goal pursued by conditionality' which is an additional baseline proposed by this thesis and corresponds to the public expectations raised by the legal world of conditionality (11.3).

Depending on the baseline adopted, one may conclude that spending conditionality has had a great positive impact and fully achieved the goals pursued; or that on the contrary, the impact and achievement of spending conditionality is at best uncertain. This is precisely what happened in practice. As I show below, the Commission chose to assess the achievement of conditionality by departing from deliverable-based baseline of 'what was done', concluding that conditionality achieved a lot.⁷⁷⁰ On the contrary, the Court of Auditors adopted a spending-based baseline referring to whether 'what was done' contributed to better spending, and reached the opposite conclusion that conditionality has attained limited and uncertain achievements.⁷⁷¹

In this thesis, I propose a third, policy-output baseline to assess the achievements of conditionality in practice. This baseline is, in my view, essential for any discussion on the success or failure of conditionality, as it corresponds to the public expectations raised by the legal world of spending conditionality. In this reading, the baseline for assessment is not 'what was done': i.e. 500 officials were trained on EU state aid law and policy (11.1); or 'how what was done contributed to better spending': i.e. lower error rates (11.2); but, 'how what was done contributed to the policy goal pursued by spending conditionality': i.e. correct application of EU state aid *acquis* (11.3).

I will present each baseline in turn.

⁷⁷⁰ EUROPEAN COMMISSION, *supra* note 724.

⁷⁷¹ COURT OF AUDITORS, *supra* note 531.

11.1 The Commission's baseline: a deliverable-based politics of compliance

The Commission adopted a deliverable-based baseline to assess the achievement of spending conditionality.

From this point of view, the Commission's evaluations on conditionality proceed with an impressive deliverable list of 'what was done' - hundreds of laws and implementing acts passed, institutions built, strategies adopted, guidelines drafted, government structures re-organised, action plans approved, thousands of officials trained, sector-wide and even-national wide reforms started, measures being implemented from the highest to the lower level of Member States' government in a wide range of EU and national policy areas including education, health, security, energy, public service, governance, rail, road or water infrastructure.⁷⁷²

The deliverable-based baseline of the Commission is telling in the case of macroeconomic conditionalities, where, in the view of the Commission, the very existence of the conditionalities already accounts for sound economic governance and alignment of Structural Funds spending with the European economic governance objectives.⁷⁷³ The Commission takes the same view even in the case of Spain and Portugal presented above (10.2.3.2), concluding that the very existence of conditionality, has "*provided important incentives for Member States to take effective action in a reasonable time to correct and put an end to their excessive deficits*".⁷⁷⁴ The same view was shared during interviews, as Commission officials affirmed that even if not enforced, macroeconomic conditionality has had a positive policy impact in the cases of other Member States (no names were mentioned), because corrective actions for excessive deficits were swiftly adopted in response to discussion of possible enforcement of macroeconomic conditionality.⁷⁷⁵

The deliverable-based baseline of the Commission was extremely prominent in the case of ex-ante conditionality, where the Commission put together an impressive list of deliverables, structured around five pillars: improvement of the investment

⁷⁷² EUROPEAN COMMISSION, *supra* note 724; EUROPEAN COMMISSION, *supra* note 576 at 171–181; European Commission, *supra* note 589; METIS GMBH, *supra* note 661.

⁷⁷³ EUROPEAN COMMISSION, *supra* note 576 at 172–173.

⁷⁷⁴ *Id.* at 173.

⁷⁷⁵ Interviews, European Commission, Brussels, 2017.

environment in the EU (1), fostering compliance with the European Semester Country Specific Recommendations (2), improving implementation and accelerating transposition of EU *acquis* (3), improving the premises for EU funds spending (4), and improving the administrative capacity of Member States (5).⁷⁷⁶ On all five achievement pillars, the Commission followed its firm quantitative assessment baseline, and equated the adoption of a conditionality-led measure to the measure's result.

First, in the Commission's view, the fact that Malta, Portugal and Slovenia have adopted legislative impact assessment rules on Small and Medium Enterprise, or have adopted a first ever national transport strategy, has led already to improvement of the investment environment in the EU and to a strengthened single market that fosters growth and jobs.⁷⁷⁷

Second, the Commission stresses that ex-ante conditionality speeded up European Semester CSRs reforms. However, the Commission does not also provide for corresponding European Semester assessments on whether, for instance, a given strategy is being implemented or progress on social inclusion and poverty reduction is effectively observed. For instance, the Commission mentions that ex-ante conditionality has advanced reforms because Latvia has restructured its R&D sector and adopted a smart specialisation strategy; Romania has strengthened its labour market institutions and approved new health maps; Poland has also adopted maps of healthcare needs that are already presumed to have achieved better coordination of investments in healthcare; Slovenia has novel strategic innovation partnerships that will simplify administrative procedures and improve governance; Italy now has a single maritime and customs window, merged port authorities and a promised 600 million Euro fund on poverty reduction and social inclusion; Bulgaria has new methods to monitor Roma integration and a new data platform that will improve the implementation of the Roma National Strategy; the Czech Republic has a plan for inclusive education, including Roma children with monitoring tools meant to improve the measurability of Roma integration policy in the country; Estonia has a new strategy on Early School Leaving and Lifelong Learning which is believed to increase the relevance of education for the labour market; and Greece has a new strategy on

⁷⁷⁶ EUROPEAN COMMISSION, *supra* note 724.

⁷⁷⁷ *Id.* at 8–10.; EUROPEAN COMMISSION, *supra* note 576 at 180.

Vocational Education and Training focused on "quality placements and outcomes".⁷⁷⁸ In all the above examples, the Commission simply presumes that the existence of a strategy or the start of a reform already guarantees results.

Third, the Commission underlines that ex-ante conditionality improved the implementation, effective application and accelerated the transposition of EU *acquis* in the areas of public procurement, state aid, water, waste, energy efficiency, environmental impact assessment, non-discrimination, gender, disability and fisheries.⁷⁷⁹ However, the Commission does not corroborate its findings with the compliance data of policy leading DGs or with the EU infringement proceedings registry. For instance, the Commission states that Italy has corrected its national legislation on public procurement; the Czech Republic and Slovakia have adopted *de minimis* state aid public registries; Czech Republic, Italy, Poland, Slovenia and Spain have swiftly transposed the energy efficiency and buildings Directives; Cyprus, Italy and Spain adopted waste management plans as requested by the Waste Directive; the Czech Republic, Slovakia (and Romania as we shall see in Chapter 12), adopted river basin plans in line with the Water Directive; Bulgaria, Cyprus, Hungary, Italy, Malta and Slovakia have amended their water pricing policies in agriculture, in line with the EU water *acquis*; Finland and France have amended their fisheries control systems in line with Common Fisheries Policy *acquis*.⁷⁸⁰ Here again, the Commission anticipates 'swift' transposition, when our research shows that on at least two occasions that was not exactly the case. In case of the Czech Republic, a short look at the Commission's infringement registry shows that transposition was not 'swift', and in June 2017 a letter of formal notice and reasoned opinion for incorrect transposition of the energy efficiency of Buildings Directive were sent to the Czech Republic.⁷⁸¹ Similarly, in the case of the Netherlands even if the ex-ante conditionality on energy efficiency, and in particular the criteria on Buildings Directive, was reportedly fulfilled, infringement

⁷⁷⁸ EUROPEAN COMMISSION, *supra* note 724 at 9–10; EUROPEAN COMMISSION, *supra* note 576 at 180.

⁷⁷⁹ EUROPEAN COMMISSION, *supra* note 724 at 10–12.

⁷⁸⁰ *Id.* at 11–12.

⁷⁸¹ European Commission - PRESS RELEASES - Press release - June infringements package: key decisions, , http://europa.eu/rapid/press-release_MEMO-17-1577_EN.htm (last visited Feb 15, 2018); Infringement Decisions Registry, http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en (last visited Feb 15, 2018).

proceedings for the same directive continued in 2017, with an additional formal notice sent in June 2017.⁷⁸²

Fourth, on better EU funds spending, the Commission underlines the numerous multiannual budgetary and investment prioritisation action plans adopted by Member States that are again presumed to have already led to better spending.⁷⁸³ In the Commission's view, Portugal's investment in research and innovation was focused on a number of precisely defined areas due to conditionality; in Spain regions with no prior experience in the area of innovation developed expertise and presented high-quality smart specialisation strategies; Italy, Malta, the Netherlands and Poland developed monitoring tools for investments in research; Italy (notoriously lagging on broadband connection coverage) developed a first-time-ever central catalogue of e-resources and technical regional support; Malta has prioritised its maritime investments; Lithuania has achieved a better coordination of transport investment; Poland developed a mature project pipeline in transport and research and investment spending is expected to leverage private investment; Romania and Cyprus approved new youth employment action plans that foresee clear employment targets; Hungary and Latvia put in place databases on early school leaving, facilitating informed investments; Slovenia, Croatia, Latvia and Czech Republic adopted risk prevention and adaptation action plans with investment prioritisations.⁷⁸⁴ Again, it is interesting to note that the Commission speaks of EU funds' investments as if they were already completed, while in 2017 spending barely started on the ground.⁷⁸⁵

Fifth, Commission found that ex-ante conditionality improved Member States' administrative capacity and coordination on the ground.⁷⁸⁶ In support of its findings, the Commission shows that Estonia has reviewed its OECD governance action plan and introduced quality management systems; Bulgaria also adopted quality management systems plans and established assessment frameworks in a minimum of 48 administrations by 2018 and 80 by 2020, and a maximum target of 350 by 2020 (while

⁷⁸² Infringement Decisions, *supra* note 781; European Commission - PRESS RELEASES - Press release - June infringements package: key decisions, *supra* note 781.

⁷⁸³ EUROPEAN COMMISSION, *supra* note 724 at 12-14.

⁷⁸⁴ *Id.* at 13-14.; EUROPEAN COMMISSION, *supra* note 576 at 180-181.

⁷⁸⁵ Open Data Portal for the European Structural Investment Funds - European Commission | Socrata, <https://cohesiondata.ec.europa.eu/overview> (last visited Nov 1, 2017).

⁷⁸⁶ COURT OF AUDITORS, *supra* note 531 at 14-16; EUROPEAN COMMISSION, *supra* note 576 at 181.

the Commission report was published in 2017); the Czech Republic developed activities to guide a future strategic framework for public administration reform; Portugal developed a vocational education plan for government officials; the capacity of public procurement bodies was strengthened in Romania, Slovakia, Hungary, Czech Republic, Bulgaria and training plans are in place for Romania, Greece, Italy, Slovakia, and Bulgaria; Hungary set up a mandatory non-discrimination module for managers of EU funds; Spain and Portugal improved the availability and reliability of their fisheries data.⁷⁸⁷ Here, it is again striking that Commission speaks of action plans and future trainings in the past tense when some actions did not even start on the ground or are to be delivered only in the coming years (i.e. Bulgaria). In a similar fashion, the Commission equates administrative capacity measures with their results. However, a closer look at the Commission's evaluations reveals that the Commission baseline was not a pure and simple deliverable-based quantitative assessment. It was an assessment animated by an instrumental politics of compliance. As explained above (10.3.4) the Commission was not interested in compliance with any or all ex-ante conditionalities criteria, but rather acted strategically and made instrumental use of conditionality to facilitate the highest possible compliance with priorities it deemed essential. Here, it is important to stress again that in the understanding of the Commission, compliance was not always necessarily full or strict compliance with the EU law or policy conduct, but rather compliance with what the Commission itself understood to be sufficiently compliant. The instrumental politics of compliance was also evident in the failed attempt to enforce the macroeconomic conditionality in the cases of Spain and Portugal (10.2.3.2), in the aftermath of which the EU Commissioner for Economic and Financial Affairs, Mr. Pierre Moscovici stated:

*"These are complex but intelligent rules that must be applied in an intelligent way by the Commission and the Council. We will work with Spain and Portugal to reach a shared understanding of the policy commitments that should be made."*⁷⁸⁸

Therefore, even if not legally enforced, macroeconomic conditionality was used instrumentally, or in Commission's words 'intelligently', as credible leverage to induce

⁷⁸⁷ COURT OF AUDITORS, *supra* note 360 at 15–16.

⁷⁸⁸ COURT OF AUDITORS, *supra* note 253; EUROPEAN COMMISSION, *supra* note 52 at 171–181; European Commission, *supra* note 65; EUROPEAN COMMISSION, *supra* note 138.

Member States' compliance with the prescribed EU conduct, which did not precisely equate to the conduct prescribed by EU law.

This institutional world approach of the Commission departed from the better-spending baseline for conditionality set in its legal world. The better-spending baseline was however adopted by the Court of Auditors in its evaluations.

11.2. The Court of Auditors' baseline: better-spending

The Court of Auditors primary baseline for assessing the (uncertain) and (limited) achievement of spending conditionality was better spending.⁷⁸⁹

In the context of macroeconomic conditionality, the Court examined the impact of ex-ante macroeconomic conditionality, concluding that even where the CSRs were explicitly mentioned in the programming documents, the Court failed to identify a clear link between the CSRs and allocated ESI Funds, generally expressing uncertainty that the allocated financial resources were adequate to address Member States' needs as underlined in CSRs (10.2.1).⁷⁹⁰ On the reprogramming strand of macroeconomic conditionality, the Court notes only that the Commission intends to use the tool exceptionally (10.2.2).⁷⁹¹ The mandatory and top-up strands of macroeconomic conditionality were not assessed by the Court (10.2.3-10.2.4).

Regarding ex-ante conditionalities, the Court investigated whether the fulfilled conditions actually led to better spending on the ground and whether they were likely to lead to a better achievement of Cohesion policy objectives.⁷⁹²

The Court's findings were rather critical, labelling the tool as 'innovative' but 'not-yet-effective' and concluding that the impact of ex ante conditionalities on better spending and on Cohesion policy performance is generally uncertain.⁷⁹³

In reaching this conclusion, the Court of Auditors observed that there was virtually no spending by mid-2017.⁷⁹⁴ In the absence of spending, the Court of Auditors' audit team

⁷⁸⁹ COURT OF AUDITORS, *supra* note 570; COURT OF AUDITORS, *supra* note 531.

⁷⁹⁰ COURT OF AUDITORS, *supra* note 570 at 66.

⁷⁹¹ COURT OF AUDITORS, *supra* note 570.

⁷⁹² COURT OF AUDITORS, *supra* note 531.

⁷⁹³ *Id.* at 2.

⁷⁹⁴ Interviews, European Court of Auditors, Luxembourg, September 2017.

explained during interviews, the impact on spending could not be measured, hence the Court was not in a position to assess such an impact.⁷⁹⁵

As for the broader impact of ex-ante conditionality on Cohesion policy spending, the Court of Auditors was equally uncertain. It concluded that there was very little it could say in mid-2017.⁷⁹⁶ The Court audit team explained that in its view, there was a significant difference between having elaborate strategies and plans on paper, and having these strategies and plans implemented, monitored and evaluated.⁷⁹⁷ From this point of view, the Court's evaluation only noted that no legal enforcement, monitoring or evaluation mechanism is available to the Commission after December 2016, suggesting that there is no credible way to ensure that the voluminous strategic frameworks adopted are observed in practice.⁷⁹⁸

The Court was additionally able to conclude that in all thematic areas of ex-ante conditionality examined as samples for audit, the fulfilment of ex-ante conditionality did not necessarily lead to better policy performance on the ground. This meant that EU law state aid rules and Small Business Act policy targets were not necessarily fully complied with by Member States during spending, even if the corresponding ex-ante conditionalities were assessed as fulfilled by the Commission; ex-ante conditionalities linked to CSR reforms were found fulfilled even if limited progress was signalled by the European Semester on the same issue; and statistical and data collection systems (essential tools for better spending) have not been always fully operational in practice even if the corresponding ex-ante conditionalities were considered fulfilled.⁷⁹⁹

Moreover, the Court noted that no suspensions of funds have been ordered in case of non-compliance, even if about 700 ex-ante conditionalities and their corresponding action plans were not completed by the end of 2016, according to its estimations affecting about 27% of Cohesion policy spending.⁸⁰⁰

As a result, the Court of Auditors concluded that:

⁷⁹⁵ *Id.*

⁷⁹⁶ *Id.*

⁷⁹⁷ *Id.*

⁷⁹⁸ COURT OF AUDITORS, *supra* note 531 at 63–65.

⁷⁹⁹ *Id.* at 40–59.

⁸⁰⁰ *Id.* at 8–9.

"These examples also show that fulfilment of an [ex-ante conditionality] is not necessarily equivalent to better performance on the ground and raises doubts as to whether the current approach in using ex-ante conditionalities will be effective in achieving better Cohesion spending."⁸⁰¹

The Commission responded to the Court of Auditor's observations by firmly confirming its deliverable-based baseline, and stating that:

"In relation to the changes on the ground caused by ex ante conditionalities, the mere fact of imposing minimum conditions which had not existed in any of the former cohesion policy frameworks, should improve effectiveness and efficiency of spending."⁸⁰²

These two paragraphs best capture the tension between two diverging assessment baselines of the Commission and the Court of Auditors regarding the impact and achievement of conditionality on the ground. At the end of the day, the Court of Auditors and the Commission convey a contradictory message: the achievement of spending conditionality has been significant, yet limited and uncertain.

11.3. A third way: a policy-output baseline

The two baselines for conditionality achievement presented above are not sufficient to grasp the end result of spending conditionality on the ground. Even if they measure the impact of conditionality on paper (11.1) and attempt to quantify the impact of conditionality on the efficiency of spending (11.2), they both fail to capture the ultimate impact of a spending conditionality on the ground.

In response, in this section I propose a third, *policy-output baseline*, which includes, and at the same time usefully complements the deliverable-based (11.1) and spending-based (11.1) baselines presented above. The policy-output baseline shall be embraced in the rest of this thesis and notably in our detailed case study on Romania (Chapter 12).

⁸⁰¹ *Id.* at 59.

⁸⁰² *Id.* at 63–65.

The third baseline proposed here essentially asks whether the EU policy objective pursued by conditionality is ultimately better-off with a conditionality than without it. In our view, this third baseline is essential as it assesses a crucial aspect of conditionality achievement that the two baselines discussed above fail to grasp, namely *the conditionality's output in relation to the policy goal pursued by conditionality itself*.

I will again take a hypothetical example of social inclusion of persons with disabilities conditionality (figure 5 above) to better highlight the assessment gap left open by the two baselines presented above.

Suppose that a disability conditionality is linked to EU spending in the next financial period, which asks for a comprehensive strategy on labour market inclusion of persons with disabilities. According to the Commission's baseline, simply the adoption of the strategy would already account for significant conditionality achievement. The Court of Auditors might not be immediately convinced and in line with its better-spending baseline may inquire whether specific spending ring-fenced to inclusion of vulnerable groups or EU spending in general is better off with a conditionality than without it. In clear contrast with these two approaches, the policy-output baseline would not only ask whether a *strategy* has been adopted or whether *spending* is better off, but whether EU policy on social inclusion, and in particular persons with disabilities residing alongside the highway are better off with this particular conditionality than without it. For at the end of the day it is persons with disabilities - not spending and certainly not a strategic document - that spending conditionality sought to empower.

In a similar vein, a policy-output baseline would ask on a case by case basis whether women, Roma people, macroeconomic stability, children out of school, research and innovation, SMEs, public service, water, or the environment are better off with a conditionality than without it?

If the answer to the above question is negative or uncertain, we hold that it is insufficient to simply inquire into whether the conditionality deliverable list was formally fulfilled (11.1 above). In this sense, it will be of little help to inquire whether a Roma strategy is adopted if the outcome has been that Roma people are as discriminated against as they were before, contrary to the policy objective of conditionality. It is also of little relevance if an elaborated set of legally binding and

automatically enforceable macroeconomic conditionalities are in place, if the EU deficit rules are as disregarded as they were before, contrary to the policy objective of conditionality. It is also irrelevant whether strategies to combat youth unemployment or early school leaving are in place, if the number of youth unemployed and children out of school is rising, not decreasing, defying the policy objective of conditionality. Moreover, a public administration reform on paper will bring little added-value if the law enabling the reform is not passed and if at the end of the day the administrative capacity is as poor and inefficient as it was before.

In the light of the proposed output-based policy baseline, we also hold that it is insufficient and even confusing to assess the achievement of conditionality exclusively in light of better-spending (11.2). On this point, we hold that spending is not simply better off because data shows that when persons with disabilities are included EU Funds are better spent, but because we as Europeans have decided that our EU spending is better off when done in an socially inclusive manner.⁸⁰³ Moreover, spending is not better off simply because we may quantify the positive economic impact of environmentally-friendly spending, but because we as Europeans have decided that our EU spending is better off when done in an environmentally sustainable way. Equally, spending is better off when women are included not simply because we can quantify their contribution to spending, but because we as Europeans have decided that spending is better off when done in a gender-inclusive way. In addition, spending is better off when EU laws are complied with not because there is necessarily a quantifiable impact on spending, but because we as Europeans decided that EU money should not finance activities that go against the objectives of EU law. Moreover - even if contested - spending is better off when Member States respect fiscal prudence rules, because we as Europeans decided, at least during 2014-2020, that EU investment is better off when carried out in a sound macroeconomic environment. Finally, in the next financial period, we may decide that spending is better off when Member States observe core rule of law standards, such as independence of the judiciary, not simply because respect for the rule of law automatically leads to better spending, but because we as Europeans decided to base our entire Union on this principle, including our spending, which must be implemented at all times in full

⁸⁰³ See Chapter 8 above, on the constitutional foundations of spending conditionality.

compliance with rule of law standards.⁸⁰⁴ It is therefore insufficient, and in my opinion even confusing, to keep referring to better spending as a primary baseline for measuring the achievement of conditionality so long as the primary objective of conditionality is clearly not better spending, but the achievement of the policy goal pursued by conditionality which is *already embedded in our European understanding of better-spending*.

For all the above reasons, I adopt an output-based policy baseline in the subsequent Chapter, which assesses the achievement of spending conditionality in the case of Romania.

⁸⁰⁴ See, Chapter 8 above on the EU values discussion.

Romania: A Genuine Conditionality Hub

Romania is a unique, impressive and incredibly interesting example of the operation and achievements of spending conditionality in its institutional world. There is hardly a more suitable Member State to offer rich insight into how incredibly complex, fascinating, inspiring, strategically challenging, sobering and most importantly different the experience of spending conditionality may turn out to be on the ground. Romania is not a Member State like any other. It is an example of a genuine conditionality hub where the reach of conditionality was very different in practice compared to other Member States. The essential added value of inquiring into the operation of spending conditionality in this particular Member lies in the fact that Romania is the only EU Member State that throughout the last two decades has been a laboratory for various EU conditionality types, starting with the pre-accession conditionality, accession conditionality, post-accession conditionality, financial-assistance conditionality and ending with the most recent spending conditionality examined in this thesis. This incredibly rich conditionality history makes Romania a unique example of an EU Member State where conditionality has reached its climax and where similar to living organisms, conditionalities of all types interact, communicate, inform one another, build networks, multiply and reach out to prior or parallel conditionality packages, creating synergies and ultimately giving birth to what I call '*conditionality hubs*' at the sector and even at the country level.

In 2014-2020 financial period, Romania is bound by virtually all spending conditionalities examined in this Part, and many more conditionalities stemming from other sources. First, Romania is bound by nine out of ten macroeconomic conditionalities, with the exception of one macroeconomic conditionality applicable only to Euro-area Member States (see, 10.2 above). Second, Romania is bound by all 36 ex-ante conditionalities enshrined in the CPR regulation: 7 general ex-ante conditionalities applicable to all ESI Funds and 29 thematic ex-ante conditionalities applicable to the Cohesion funds (see, 10.3 above). Third, as an EU Member State under IMF and EU Balance of Payments financial assistance from 2009 to 2015, Romania was subject to generous packages of financial assistance conditionality. Fourth, as one of the youngest EU Members, Romania's policies are still visibly influenced by the EU pre-accession and accession conditionality. Fifth, Romania has a particular accession history, as post-accession the country is still bound by a conditionality mechanism created specifically for it (and Bulgaria) - the Cooperation and Verification Mechanism - which continuously monitors the progress of reforms on the judiciary and the fight against corruption. As I explain below, the intense interaction between these various conditionality types led to an outcome where some spending conditionalities had very different implications in the case of Romania.

Another important consideration for choosing Romania was that the spending conditionality process has been far from open, clear or transparent in practice (see 10.3). To get a clear grasp of what exactly happened in the case of Romania, I have conducted three rounds of interviews with national and EU officials in Bucharest, Brussels and Luxembourg. While the interviews revealed valuable information on the operation of conditionality in general, at the end of the day interviews offered very little information on what spending conditionality effectively meant in the case of Romania. In particular, it was unclear what exactly were the conditionalities fulfilled, non-fulfilled or how exactly fulfilment was pursued in each case. To complement for this missing information, I filed over 50 requests for access to documents addressed to the European Commission country units on Romania in DG REGIO and DG EMPL and received over 500 pages of reporting on conditionality. I had also filed over 10 requests for access to information with the main Romanian ministries in charge of spending conditionality asking generically: what exactly were the actions pursued by

each ministry and authority in their subordination to fulfil each ex-ante conditionality under their responsibility. Subsequently, I compared the documents of the Commission with the responses of the national authorities and I have confronted every action reported as fulfilled with data publicly available in national legal registries, communications of the government, presidency, national parliament and other relevant national authorities. In so far as possible, I also checked some actions for consistency. For instance, I have registered and checked whether the new online database for unemployed persons, 'ProfessionalCard.ro' reported for fulfilment, existed and was fully operational. I have also checked what exactly was the content of each law or government order adopted, and what was the content of the public, policy or legislative debates on the matter of each ex-ante conditionality. It would have been very hard to access to all this information and make an accurate interpretation of it without profound knowledge of the legal, administrative and political system, language, history, constitutional tradition, public discourse, prior conditionality experience, and every-day reality on the ground. It is only in the case of Romania that I have this deep knowledge and legal experience regarding all aspects underlined above.

In the following sections, I will briefly introduce Romania's budgetary position and conditionality history (12.1). I will then continue with a detailed analysis of the departures and achievement of spending conditionality in the case of Romania (12.2).

12.1 Romania's budgetary position and conditionality history

To fully understand the operation of spending conditionality in Romania, a few more insights into the country's EU budgetary position and conditionality history are necessary.

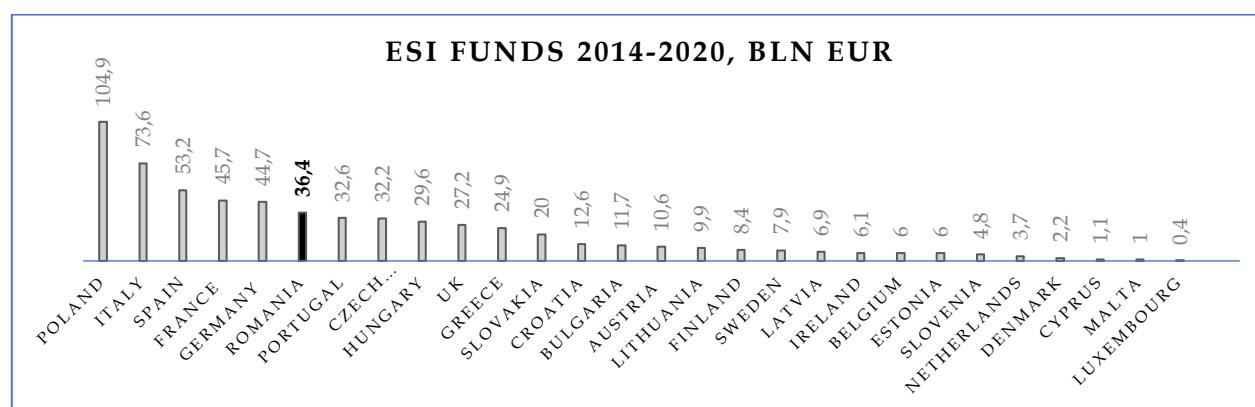
As of accession, in EU jargon Romania is a 'net beneficiary' Member State. As established in Chapter 1 above, this means that in net terms Romania receives more than it contributes to the EU budget.⁸⁰⁵ EU Funds are of utmost importance for the

⁸⁰⁵ During 2007-2013, Romania had on average a 1,8 bln EUR annual positive EU budget balance; meaning that on average its annual benefits from the EU budget surpass its annual contributions by 1,8 bln EUR. Data available at http://ec.europa.eu/budget/figures/2007-2013/index_en.cfm

national economy. Based on data from the previous financial period (2007-2013) EU Funds commitments amounted annually to about 20% of the country's general government expenditure,⁸⁰⁶ representing an estimate of about 50% of the country's capital public investment between 2015-2017.⁸⁰⁷ However, due to weak absorption capacity, the country has struggled to access EU Funds, and needed enhanced EU assistance to help it spend (about 90%) of its 2007-2013 allocated resources.⁸⁰⁸

During the current 2014-2020 financial period, Romania holds the sixth largest ESI Funds spending envelope, after Poland, Italy, Spain, France and Germany (figure 9 below). The effective ESI Funds budget allocation for Romania stands at about 30 bln EUR or about 36 bln EUR including the national co-funding (matching funds).⁸⁰⁹

Figure 9. ESI Funds 2014-2020 commitments by Member State



Source: European Commission⁸¹⁰

As indicated in table 3 below, in 2014-2020 Romania structured its overall ESI Funds allocation in eight Operational Programmes (OPs), with the highest expenditure planned under the Large Infrastructure OP financed from ECF and ERDF, and co-managed by DG REGIO (9,4 bln EUR); followed by the Rural Development OP financed from EARRD and co-managed by DG AGRI (8,1 bln EUR); Regional OP financed from ERDF and co-managed by DG REGIO (6,6 bln EUR) and Human Capital OP financed from ESF and co-managed by DG EMPL (4,3 bln EUR). A relatively lower

⁸⁰⁶ Data for 2016, EUROPEAN COURT OF AUDITORS, INTRODUCING THE 2016 ANNUAL REPORTS OF THE EUROPEAN COURT OF AUDITORS 16 (2017).

⁸⁰⁷ EUROPEAN COMMISSION, *supra* note 40 at 8.

⁸⁰⁸ 2007-2013 Funds Absorption Rate, SOCRATA, <https://cohesiondata.ec.europa.eu/dataset/2007-2013-Funds-Absorption-Rate/kk86-ceun/data> (last visited Nov 22, 2017).

⁸⁰⁹ Open Data Portal for the European Structural Investment Funds - European Commission | Socrata, <https://cohesiondata.ec.europa.eu/countries/RO> (last visited Oct 27, 2017).

⁸¹⁰ Open Data Portal for the European Structural Investment Funds - European Commission | Socrata, *supra* note 785.

share of expenditure is planned under the Competitiveness OP financed from ERDF and co-managed by DG REGIO (1,3 bln EUR), Administrative Capacity OP, financed from ESF and co-managed by DG EMPL (0,55 bln EUR), Maritime Affairs OP financed from EMFF and co-managed by DG MARE (0,22 bln EUR) and Technical Assistance OP, co-managed by DG REGIO (0,2 bln EUR).

The eight OPs direct the country's 30 bln EUR allocation to all 11 thematic objectives of the ESI Funds common provision regulation (CPR).⁸¹¹ As a consequence, all 36 ex-ante conditionalities listed in annex XI of the CPR have been found applicable to Romania in 2014-2020 (table 3 below). In addition, Romania found 6 out of 8 thematic ex-ante conditionalities applicable only to rural development spending (RD) and all 4 thematic ex-ante conditionalities applicable to fisheries (FT), which are all indicated in table 3 below, but shall not be analysed in this Chapter.

⁸¹¹ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219.

Table 3. Romania. ESI Funds Operational Programmes and ex-ante conditionality 2014-2020

Legend: G- general ex-ante conditionality (CPR, Annex XI) T- thematic ex-ante conditionality (CPR, Annex XI) RD- Rural development specific thematic conditionalities (Annex V, Regulation (EU) 1305/2013) FT - fisheries specific thematic ex-ante conditionality (Annex V, Regulation (EU) 508/2014)

Operational Programme (OP)	EU budget commitments 2014-2020	Applicable at the level of OP	Not fulfilled at OP approval (2014-2015)	Not fulfilled end 2017
Overall data per 8 OPs	30,67 bln EUR 100% ESI Funds Romania [excluding national co-funding]	36 applicable ex-ante conditionalities 7 general applicable to all ESI Funds 29 thematic applicable to the Cohesion funds	25 not fulfilled OPs approval	7 not fulfilled 2017 Public procurement (G4) R&I Research infrastructure (T1.2) Waste (T6.2) Road transport (T 7.1) Rail transport (T7.2) Other transport (T7.3) Administrative efficiency (T11.1)
Large Infrastructure (CF, ERDF)	EU Budget Commitment EUR, %	14 applicable ex-ante conditionalities	10 not fulfilled OP approval	5 not fulfilled 2017
	9,4 bln EUR [CF - 6,9 bln; ERDF - 2,5 bln] [DG REGIO] 31%	Disability (G3) Public procurement (G4) State aid (G5) Environment (G6) Statistics (G7) Co-generation (T4.2) Green energy (T4.3) Risk prevention (T5.1) Water (T6.1) Waste (T6.2) Road transport (T 7.1) Rail transport (T7.2) Other transport (T7.3) Energy transport (T7.4)	Public procurement (G4) State aid (G5) Environment (G6) Statistics (G7) Risk prevention (T5.1) Water (T6.1) Waste (T6.2) Road transport (T 7.1) Rail transport (T7.2) Other transport (T7.3)	Public procurement (G4) Waste (T6.2) Road transport (T7.1) Rail transport (T7.2) Other transport (T7.3)
Rural Development (EAFRD)	EU Budget Commitment EUR, %	13 applicable ex-ante conditionalities	5 not fulfilled OP approval	1 not fulfilled 2017
	8,1 bln EUR [EAFRD] [DG AGRI] 26%	Non-discrimination (G1) Gender (G2) Disability (G3) Public procurement (G4) State aid (G5) Environment (G6) Statistics (G7) Risk prevention (RD3.1) GAEC (RD4.1) Fertilisers (RD4.2) National Standards (RD 4.3) Water (RD 5.2) Renewable energy (RD 5.3)	Public procurement (G4) State aid (G5) Environment (G6) Risk prevention (RD3.1) Water (RD 5.2)	Public procurement (G4)
Regional (ERDF)	EU Budget Commitment EUR	18 applicable ex-ante conditionalities	12 not fulfilled OP approval	2 not fulfilled 2017
	6,6 bln EUR [ERDF] [DG REGIO] 21%	Non-discrimination (G1) Gender (G2) Disability (G3) Public procurement (G4) State aid (G5) Environment (G6) Statistics (G7) Smart specialisation (T1.1) SMEs (T3.1) Energy efficiency (T4.1) Poverty (T9.1) Roma (T9.2) Health (T9.3) Early school leaving (T10.1) Higher education (T10.2)	Public procurement (G4) State aid (G5) Environment (G6) Statistics (G7) Smart specialisation (T1.1) Poverty (T9.1) Roma (T9.2) Health (T9.3) Early school leaving (T10.1) Higher education (T10.2) Lifelong learning (T10.3) Vocational Education & Training (T10.4) Administrative efficiency (T11.1)	Public procurement (G4) Administrative efficiency (T11.1)

		Lifelong learning (T10.3) Vocational Education & Training (T10.4) Administrative efficiency (T11.1)		
Human Capital (ESF)	EU Budget Commitment EUR, %	19 applicable ex-ante conditionalities	13 not fulfilled OP approval	1 not fulfilled 2017
	4,3 bln EUR [ESF: 4,1] [ESF (Youth initiative): 0,2] [DG EMPL] 14%	Non-discrimination (G1) Gender (G2) Disability (G3) Public procurement (G4) State aid (G5) Statistics (G7) Active labour market policies (T8.1) Self-employment (T8.2.) Labour market institutions (T8.3) Active ageing (T8.4) Adaptation to change (T8.5) Youth employment (T8.6) Poverty (T9.1) Roma (T9.2) Health (T9.3) Early school leaving (T10.1) Higher education (T10.2) Lifelong learning (T10.3) Vocational Education & Training (T10.4)	Public procurement (G4) State aid (G5) Statistics (G7) Employment (T8.1) Labour market institutions (T8.3) Active ageing (T8.4) Youth employment (T8.6) Poverty (T9.1) Health (T9.3) Early school leaving (T10.1) Higher education (T10.2) Lifelong learning (T10.3) Vocational Education & Training (T10.4)	Public procurement (G4)
Competitiveness (ERDF)	EU Budget Commitment EUR %	7 applicable ex-ante conditionalities	7 not fulfilled OP approval	2 not fulfilled 2017
	1,3 bln EUR [ERDF] [DG REGIO] 4%	Public procurement (G4) State aid (G5) Statistics (G7) Smart specialisation (T1.1) Research infrastructures (T1.2) Digital growth (T2.1) Next Generation Networks NGN (T2.2)	Public procurement (G4) State aid (G5) Statistics (G7) Smart specialisation (T1.1) Research infrastructures (T1.2) Digital growth (T2.1) Next Generation Networks NGN (T2.2)	Public procurement (G4) Research infrastructure (T1.2)
Administrative Capacity (ESF)	EU Budget Commitment EUR, %	6 applicable ex-ante conditionalities	3 not fulfilled OP approval	2 not fulfilled 2017
	0,55 bln EUR [ESF] [DG EMPL] 2%	Non-discrimination (G1) Gender (G2) Disability (G3) Public procurement (G4) Statistics (G7) Administrative efficiency (T11.1)	Public procurement (G4) Statistics (G7) Administrative efficiency (T11.1)	Public procurement (G4) Administrative efficiency (T11.1)
Maritime and Fisheries (EMFF)	EU Budget Commitment EUR, %	7 applicable ex-ante conditionalities	6 not fulfilled OP approval	1 not fulfilled 2017
	0,22 bln EUR [EMFF] [DG MARE] 1%	Public procurement (G4) Environment (G6) Statistics (G7) Fishing capacity report (FT 1) Aquaculture plan (FT 2) Data reporting capacity (FT 3) Control and inspection capacity (FT4)	Public procurement (G4) Environment (G6) Statistics (G7) 4 EMFF specific Fishing capacity report (FT 1) Data reporting capacity (FT 3) Control and inspection capacity (FT4)	Public procurement (G4)
Technical Assistance (ERDF)	EU Budget Commitment EUR, %	5 applicable ex-ante conditionalities	2 not fulfilled OP approval	1 not fulfilled 2017
	0,2 bln EUR [ERDF] [DG REGIO] 1%	Non-discrimination (G1) Gender (G2) Disability (G3) Public procurement (G4) Statistics (G7)	Public procurement (G4) Statistics (G7)	Public procurement (G4)

In Romania, the central government was primarily tasked with the process of spending conditionality, similar to the majority of Member States.⁸¹² To this end, the Prime-minister's office put in place a dedicated inter-ministerial conditionality monitoring unit, including all responsible government ministries and authorities subordinate to them.⁸¹³

Contrary to the EU institutional setting (10.1.2.2 above), at the national level the ex-ante conditionalities were consistently matched with the policy responsible government ministry or agency, which took the lead on their policy-specific ex-ante conditionalities. All formal coordination and communication with the Commission was channelled through the Ministry of European Funds (now, Ministry for Regional Development, Public Administration and European Funds 'MDRAPFE'), which was the focal point for conditionality at the national level and the primary communication point for DG REGIO.⁸¹⁴ Informally, in addition each ministry or agency was regularly in touch with the leading EU policy and/or funding management DG, having frequent exchanges of information, periodic meetings in Brussels and in Bucharest, and discussions on common approaches to each conditionality.⁸¹⁵

Here one should mention that the ex-ante conditionality process in Romania was strongly influenced by the high political instability of the period. The continuous succession of four government cabinets with four different prime-ministers,⁸¹⁶ and three interim cabinets⁸¹⁷ in less than four years (2014-2017) did not lend itself to a coherent and timely approach to ex ante conditionality action plans.

Table 3 above also shows that Romania managed to fulfil only 11 ex ante conditionalities before the approval of its OPs, having 25 ex-ante conditionalities to fulfil ex post.⁸¹⁸ The 25 unfulfilled ex-ante conditionalities quickly translated into very

⁸¹² METIS GMBH, *supra* note 661 at 35–37.

⁸¹³ Interviews, Romania, August 2017.

⁸¹⁴ *Id.*

⁸¹⁵ *Id.*

⁸¹⁶ Victor Ponta (Cabinet Ponta III, 5 March 2014-17 December 2014), Dacian Ciolos (17 November 2015 - 4 January 2017), Sorin Mihal Grindeanu (4 January 2017-29 June 2017), Mihai Tudose (20 June 2017-present).

⁸¹⁷ Gabriel Oprea (22 June 2015-9 July 2015), Gabriel Oprea (29 July 2015 -10 August 2015), Sorin Cimpeanu (5 November 2015- 17 November 2015).

⁸¹⁸ The distribution of ex-ante conditionalities was not necessarily correlated to the amount of spending. The Human Capital OP financed from ESF, carrying only the fourth largest ESI Funds envelope in Romania was responsible for the largest number of applicable ex-ante conditionalities (19), and equally for the largest number of unfulfilled ones (13).

detailed action plans with voluminous lists of commitments and hundreds of actions for fulfilment in a large array of key policies such as employment, education, pensions, public procurement, transport, waste, water, and many more. These actions were instrumental in starting comprehensive reforms in their respective areas of action. All actions undertaken by Romania to fulfil its 36 ex-ante conditionalities are exhaustively presented in Annex IV to the present thesis.

Despite this monumental effort, at the end of 2017, Romania still had 7 ex-ante conditionalities unfulfilled. Notably, one general ex-ante conditionality on public procurement (G 4) was linked to all ESI Funds disbursed under all eight OPs (table 3, *supra*); as well as five other thematic ex-ante conditionalities in the areas of road, rail and water transport (T 7.1, 7.2, 7.3), research and innovation (T 1.2), waste (T 6.2) and administrative efficiency (T 11.1), putting at risk above all spending from the Large Infrastructure OP, responsible for the largest ESI Funds envelope in the country (table 3, *supra*).

It is also important to mention that Romania has seen virtually no spending in the 2014-2020 financial period before mid-2017 (with about 1% of ESI Funds effectively spent⁸¹⁹), in part due to 2007-2013 spending backlogs and delays in closing 2007-2013 spending accounts; and in part due to serious delays in the accreditation of national management authorities, which were accredited only in mid-2017.⁸²⁰ This means that the effective ESI Funds spending in the country is expected to start only in 2018, when most ex-ante conditionalities are very likely to be considered fulfilled.

Beyond this preliminary data, there is very little one could say about the operation of spending conditionality based on numbers, figures and tables. In the institutional world, each spending conditionality had its very unique conditionality story, to which we shall turn in the subsequent sections (12.2-12.3).

Before that, I will shortly explain the unique history of Romania in relation to EU conditionality, which is essential to fully understand the operation of spending conditionality in this Member State.

⁸¹⁹ Open Data Portal for the European Structural Investment Funds - European Commission | Socrata, *supra* note 809.

⁸²⁰ Prime Minister Mihai Tudose's visit to Brussels, GVERNUL ROMÂNIEI, <http://gov.ro/en/news/prime-minister-mihai-tudose-romania-is-a-serious-partner-in-the-european-union-which-will-observe-all-its-undertaken-commitments> (last visited Nov 23, 2017).

The EU conditionality history of Romania starts in 2000, together with the start of EU accession negotiations and the pre-accession Copenhagen conditionality chapters.⁸²¹ Romania had been bound by Copenhagen conditionality for five intense years, to the closure of accession negotiations in 2005.⁸²² However, five intense years did not suffice to fully address some major conditionality chapters, for which continued effort was agreed in 2005 under a detailed set of accession and post-accession conditionalities. In 2005, Romania's Treaty of Accession Conditions Act provided a new conditionality basis, specifying a long list of EU *acquis* conditionalities, and most importantly political conditionalities regarding the country's commitment to fight corruption, continue reforms in the areas of the judiciary, minority rights, mainly fulfilled before the 2007 accession, but also after that point.⁸²³ Two more years were yet again not enough to address the serious shortcomings concerning corruption, judicial reform, minority rights and the integrity of public administration. In response, a new conditionality tool was established in 2007: the post-accession Cooperation and Verification Mechanism (CVM).⁸²⁴

Applicable from January 1st, 2007, CVM monitors the country's post-accession progress on judicial reform, administrative integrity, and the fight against corruption. The CVM is an imperfect conditionality because it does not have a sanction attached. Nevertheless, it is supported largely by the EU and other international funds, funds which could be theoretically halted in case of the country's poor performance.⁸²⁵ Even

⁸²¹ EU Council, COUNCIL RECOMMENDATION OF 12 JULY 2011 ON THE NATIONAL REFORM PROGRAMME 2011 OF ROMANIA AND DELIVERING A COUNCIL OPINION ON THE UPDATED CONVERGENCE PROGRAMME OF ROMANIA, 2011-2014, OJ 2011 C 216 P. 6; EU Council, COUNCIL RECOMMENDATION OF 10 JULY 2012 ON ROMANIA'S 2012 NATIONAL REFORM PROGRAMME AND DELIVERING A COUNCIL OPINION ON ROMANIA'S CONVERGENCE PROGRAMME FOR 2012-2015 OJ C 219 P 72.

⁸²² EUROPEAN COMMISSION, ROMANIA 2005 COMPREHENSIVE MONITORING REPORT SEC (2005) 1354 COM (2005) 534 FINAL (2005).

⁸²³ PROTOCOL AND ACT CONCERNING THE CONDITIONS OF ACCESSION OF THE REPUBLIC OF BULGARIA AND ROMANIA AND THE ADJUSTMENTS TO THE TREATIES ON WHICH THE EUROPEAN UNION IS FOUNDED, OJ L 157, 21.6.2005, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2005:157:TOC>. (see in particular Annex IX)

⁸²⁴ European Commission, COMMISSION DECISION OF 13 DECEMBER 2006 (2006/928/EC) ESTABLISHING A MECHANISM FOR COOPERATION AND VERIFICATION OF PROGRESS IN ROMANIA TO ADDRESS SPECIFIC BENCHMARKS IN THE AREAS OF JUDICIAL REFORM AND THE FIGHT AGAINST CORRUPTION (NOTIFIED UNDER DOCUMENT NUMBER C(2006) 6569), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006D0928> (last visited Oct 26, 2017).

⁸²⁵ European Commission, REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL PROGRESS IN ROMANIA UNDER THE CO-OPERATION AND VERIFICATION MECHANISM (2017), <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1509005410865&uri=CELEX:52017DC0044>.

if the CVM conditionality enjoyed high popularity upon accession, ten years on it is almost universally accepted that the tool achieved only a mixed, if not a modest, result.⁸²⁶

Starting with 2009, Romania has been subject to EU and non-EU financial assistance conditionality as one of the eight bailed out EU Member States, negotiated in the context of loans contracted largely with the IMF (12 bln EUR in 2009-2013) and with the EU (5 bln EUR 2009-2015).⁸²⁷ Financial assistance conditionality mobilised major fiscal, financial and structural reforms, however they were not evenly distributed throughout the programmes. The first IMF/EU programme in 2009-2011 focused primarily on macroeconomic conditionality, a goal that was broadly achieved by 2011.⁸²⁸ The subsequent IMF (2011-2013) and especially the EU (2011-2013 and 2013-2015) precautionary assistance programmes shifted the focus towards structural reform conditionality, which should have laid prosperous grounds for growth.⁸²⁹ (See Chapter 2 on various conditionality types). Yet, the persuasion of donors that encouraged the country to keep up with structural reforms conditionality decreased substantially under the precautionary assistance programmes, as the Romanian government decided not to draw any additional loans and the joint country 'Troika' missions did not always end successfully.⁸³⁰ The reach of financial assistance conditionality was even more limited from 2015 on, in the post-program surveillance period, when the largest part of loans had been already repaid by Romania.⁸³¹ As a result, borrowers lost most leverage upon the newly elected conservative government, and the encouragements for reform fell on the deaf ears of national officials.

Nevertheless, the EU did not give up. In 2014, the EU budget brought a new spending conditionality package to the already rich conditionality history of the country.

⁸²⁶ Armin von Bogdandy, *Systemic deficiency in the rule of law: What it is, what has been done, what can be done*, 51 COMMON MARKET LAW REVIEW 59-96, 81-83 (2014).

⁸²⁷ See also Chapter 3 above. VIORICA VITA, CONSTITUTIONAL CHANGE THROUGH EURO CRISIS LAW: ROMANIA (2014), <http://eurocrisislaw.eu.eu/romania/>; EUROPEAN COMMISSION, OVERALL ASSESSMENT OF THE TWO BALANCE-OF-PAYMENTS ASSISTANCE PROGRAMMES FOR ROMANIA, 2009-2013 (2013); POST-PROGRAMME SURVEILLANCE REPORT ROMANIA, SPRING 2017 INSTITUTIONAL PAPER 054, .

⁸²⁸ VITA, *supra* note 827.

⁸²⁹ EUROPEAN COMMISSION, *supra* note 827 at 3.

⁸³⁰ POST-PROGRAMME SURVEILLANCE REPORT ROMANIA, SPRING 2017 INSTITUTIONAL PAPER 054, *supra* note 827 at.

⁸³¹ EUROPEAN COMMISSION, MACROECONOMIC IMBALANCES. COUNTRY REPORT – ROMANIA. OCCASIONAL PAPERS 223 (2015).

Virtually all ESI Funds spending conditionalities apply to Romania in 2014-2020 (table 3 supra). In an incredibly short amount of time (2014-2017) their operation on the ground brought about an immense amount of change. However, this change meant an immense bureaucratic exercise in compliance which was not always matched with a tangible output on the policy goal pursued (Chapter 11.3, Annex IV).

Having in mind this rich conditionality history of Romania, the next section will present in detail the departures and achievements of spending conditionality in this particular Member State, explaining when and how its conditionality history influenced the process of spending conditionality.

12.2. The institutional world departures and achievement

This section starts with a detailed overview of the institutional world departures and achievements of 9 macroeconomic conditionalities (12.2.1) and 36 ex-ante conditionalities (12.2.2) in the case of Romania. Subsequently, it turns to an in-depth analysis of 5 case studies that tell the real-life story of 11 carefully selected ex-ante conditionalities, which reveal the most valuable findings on conditionality in Romania (12.2.3).

It is evident from the following sections that the doctrinal classifications explained in Part I above have shown little relevance in the institutional world. In practice, EU and national bureaucracies did not seem to attribute great relevance to whether a conditionality was ex-ante or ex-post, as fulfilment deadlines were not necessarily always respected. There was also no particular observed behaviour pattern based on whether a conditionality was charged to enforce macroeconomic criteria, structural or good governance reforms, EU laws, soft-laws, policies or a simple recommendation (Chapter 2 above). The spending link to all or only to some EU funds, the optional or mandatory enforcement did not seem of equally great importance in practice as suspensions were rarely discussed (Chapter 2 above); and in any case, there seemed to be a firm belief at the national level that no suspension would be ordered, and even if ordered it would be partial.

However, what mattered in practice was the *de facto* national and EU institutional *prioritisation* of and *commitment* to a given conditionality. In this sense, all five case studies selected below (12.2.3) present an important account of diverging or congruent EU and national prioritisations of ex-ante conditionalities, which in the end had the most important impact on the success of spending conditionality. From this point of view, the operation of spending conditionality in the case of Romania is a sobering example of the tremendous power Member States hold as ultimate gate-keepers and masters of conditionality at the national level.

12.2.1 Macroeconomic conditionality in Romania

— *two departures and limited achievement*

Similar to the vast majority of Member States,⁸³² in Romania the ex-ante macroeconomic conditionality was in fact the only macroeconomic conditionality that mattered.

In the case of Romania, the ex-ante macroeconomic conditionality followed the same two institutional world departures identified above (10.2): a departure from a process led by Member States, towards a process led by the Commission; and a departure from consistent application to all ESI Funds, towards primary application to the country OPs financed from two Structural Funds under the management of DG REGIO and DG EMPL (ERDF and ESF).

However, what is peculiar in the case of Romania is that before 2013, as a country under EU and IMF financial assistance, its CSRs included one single recommendation: *full compliance with its economic adjustment programmes agreed with EU/IMF and conditionality therein.*⁸³³ This means that in the case of Romania the EU financial assistance conditionality informed already the very initial steps of ESI Funds planning in the country, as indicated in the 2012 Commission position papers on Romania.⁸³⁴

As of 2013, Romania was fully integrated under the European Semester, receiving its first detailed CSRs in 2013 and 2014, which were explicitly mentioned in its PA and eight OPs. However, similar to other Member States (10.2 above), our inquiry into eight of Romania's OPs shows that the references to CSRs were not consistently reflected throughout the OPs, without due justification.⁸³⁵ In the same vein, in the vast

⁸³² Except Spain, Portugal and Greece. See Chapter 10, Section 10.2 *supra*.

⁸³³ EU Council, COUNCIL RECOMMENDATION OF 12 JULY 2011 ON THE NATIONAL REFORM PROGRAMME 2011 OF ROMANIA AND DELIVERING A COUNCIL OPINION ON THE UPDATED CONVERGENCE PROGRAMME OF ROMANIA, 2011-2014, OJ 2011 C 216 P. 6; EU Council, COUNCIL RECOMMENDATION OF 10 JULY 2012 ON ROMANIA'S 2012 NATIONAL REFORM PROGRAMME AND DELIVERING A COUNCIL OPINION ON ROMANIA'S CONVERGENCE PROGRAMME FOR 2012-2015 OJ C 219 P 72.

⁸³⁴ European Commission, *supra* note 569. "The [ESI] Funds will be one of the most important instruments to tackle the main development challenges for Romania as identified in its EU/IMF lending programme and its Europe 2020 commitments."

⁸³⁵ Rural Development National Programme Romania 2014-2020, 2014RO06RDNP001, (2014); Operational Programme Fisheries and Maritime Affairs Romania 2014-2020, 2014RO14MFOP001, (2014); Operational Programme Human Capital Romania 2014-2020, 2014RO05M9OP001, approved by Commission Decision C(2017)1722, (2014); Operational Programme Regional 2014RO16RFOP002, (2014). The Rural Development OP, which carries the second largest ESI Funds envelope in Romania (table 2 *supra*) contains no reference to the European Semester CSRs, even if many of them are directly

majority of cases the references to relevant CSRs were formal and vague, used as additional generic justifications for the chosen ESI Funds investment objectives.⁸³⁶

12.2.2 Ex-ante conditionalities in Romania

— *Multiple departures and variable achievement*

The operation of ex-ante conditionalities in Romania provides beyond any doubt the most complete account of this conditionality's institutional world departures from its legal world, while at the same time posing some of the most intellectually engaging questions on the achievement of conditionality.

With only 11 out of 36 applicable ex-ante conditionalities fulfilled in 2014, after the approval of spending Romanian authorities found themselves with 25 ex-ante conditionalities to be fulfilled ex-post. Fulfilment lasted in practice until the end of 2017 and continues in early 2018 for at least four unfulfilled ex-ante conditionalities (table 3, *supra*).

During these years, each and every ex-ante conditionality saw very different real-life experiences which I have analysed in detail and synthesized in Annex IV to the present thesis. Annex IV explains in detail the legal world requirements, the stage of fulfilment, the actual actions delivered by national authorities for each conditionality, as well as the effective achievement in practice seen through the lens of a policy-output baseline (see, Chapter 11.3). Where available, the estimated EU or national budget

relevant. No reference to CSRs are made under the Fisheries OP. Overall, the Human Capacity and Regional OPs seem to have made a most substantive effort to internalise the relevant CSRs.

⁸³⁶ Operational Programme Technical Assistance Romania 2014RO16RFTA001 approved by Commission Decision C(2016)6794, 1 (2016); Operational Programme Administrative Capacity Romania 2014RO05SFOP001, (2014); Operational Programme Competitiveness, 2014RO16RFOP001 approved by Commission Decision C(2014)10233, 10 (2014); OP Human Capital Romania, *supra* note 835 at 23; Operational Programme Large Infrastructure 2014RO16M1OP001, 18 (2014); OP Regional, *supra* note 835 at 23–33. [For instance, the Technical Assistance OP explains at page one that the programme is designed in support of the CSR 7 of the 2014 European Semester that guides Romania to "strengthen the capacity of its public administration" and "[...] improve the quality, and efficiency of the judicial system [...]". References to the same 2014 CSR 7 are made in the Administrative Capacity and Competitiveness OPs. The Human Capital OP references extensively the 2014 CSRs 3, 4, 5 and 6 on active labour market measures, youth unemployment, poverty reduction and health sector reform and the EU Funds spending planned in response. The Large Infrastructure OP briefly mentions the 2014 CSR 8 asking Romania to "accelerate the corporate governance reform of state-owned enterprises in energy and transport sectors", as well as to improve trans-border energy networks integration. The Regional OP refers especially to the 2013 CSR 4, 5 and 7 on poverty reduction, education reform, business environment and small and medium enterprises (SMEs) throughout development challenges to be addressed by EU Funds. See also Section 10.2, *supra*.

costs for fulfilment have been indicated. In this Chapter I will present the overarching conclusion on institutional world departures and achievement of ex ante conditionality in Romania based on the information presented in Annex IV.

12.2.2.1 *A process led by the Commission*

— outsourced compliance

First, the ex-ante conditionality process in Romania was a *process led to a large extent by the Commission*, not by national authorities. While the process of ex-ante conditionality applicability and fulfilment was a genuinely joint effort of the EU and the Member States, the EU was clearly leading the process from very early stages. Commission officials described this active contribution as a form of: "helping Member States to help themselves".⁸³⁷ This view was largely, but not always, shared by national authorities with the most burdensome ex-ante conditionality 'to do' lists, who at times saw the Commission's requirements as too demanding and even intrusive.⁸³⁸

What is even more interesting in the case of Romania is that on multiple occasions the fulfilment of ex-ante conditionality was outsourced to third parties, such as the European Investment Bank (EIB) and in particular the World Bank, through costly technical assistance contracts.⁸³⁹ In these cases, the fulfilment of outstanding ex-ante conditionality was an exemplary exercise in compliance, yet not on the part of national authorities, but of third parties or expert actors.

At the end of the day, the practice of outsourcing compliance created an important ownership concern, shared by the Commission during interviews.⁸⁴⁰ The ownership problem placed serious uncertainty upon the sustainability of adopted measures, in particular where the adopted strategies or action plans were not rooted in a solid legal basis or institutional culture, only partially backed by EU funding, and contained no

⁸³⁷ Interviews, Brussels, September 2017.

⁸³⁸ Interviews, Bucharest, National Public Procurement Agency, August 2017.

⁸³⁹ Annex IV, *infra*. I was able to quantify the overall cost of outsourced ex-ante conditionality compliance at about 70 mln Euro, mainly covered from the EU budget.

⁸⁴⁰ Interviews, Brussels, September 2017. In this sense, Commission officials would confirm that the effectiveness of the large number of regulatory, strategic or institutional changes brought by ex-ante conditionality shall depend on the national ownership, which generally remained weak during the process.

legal remedies or political safeguards to ensure policy continuity after the ex-ante conditionality has been considered fulfilled and lifted by the Commission.

The ownership gap is particularly visible in the case of ex-ante conditionalities such as risk prevention (T 5.1), digital growth (T 2.1), Next Generation Network (NGN) (T 2.2), transport (T 7.1-7.3) or public procurement (G 4) - see Annex IV - where an important number of unfulfilled measures have been literally entirely outsourced to the World Bank, EIB or to the EU expert bodies, from the national strategy on climate change and accompanying action plan to spending planning on climate change risk prevention; from the national strategy on digital growth to national mapping of localities to be connected to high speed internet (NGN); from the national digital growth strategy to growth indicators and relevant government institutional arrangements; from performance indicators for state owned road and rail companies to ex-ante control systems in public procurement.⁸⁴¹

12.2.2.2 *Inconsistent approach across Commission DGs and ESI Funds*

— *variable compliance thresholds*

Second, the ex-ante conditionality process did not always see a *consistent approach from the Commission DGs* across all ex-ante conditionalities and across all ESI Funds. Interviews and our case studies reveal that often various Commission DGs would have an inconsistent approach to ex-ante conditionality applicability or fulfilment. This was the case for equality ex-ante conditionalities (G1-G3) that were not always found applicable;⁸⁴² Roma ex-ante conditionality (T 9.2) which was inconsistently assessed as fulfilled by the Commission;⁸⁴³ research infrastructure ex-ante conditionality (T 1.2), which was reported fulfilled and approved by the Commission as part of the PA, but subsequently found unfulfilled in the OP;⁸⁴⁴ or transport

⁸⁴¹ Annex IV, points 4, 11,12,17, 24-26.

⁸⁴² See section 12.2.3 below.

⁸⁴³ *Id.*

⁸⁴⁴ Partnership Agreement on the European structural and investment funds Romania 2014RO16M8PA001.1.2, 261 (2014), https://ec.europa.eu/info/publications/partnership-agreement-romania-2014-20_en; OP Competitiveness Romania, *supra* note 836 at 142.

conditionalities (T 7.1-7.3) that enjoyed only partial engagement from the policy leading DG MOVE.⁸⁴⁵

12.2.2.3 *Complementary ad-hoc procedures*

— *complexity and uncertainty*

Third, the *EU level ad-hoc procedures* on ex-ante conditionality impacted the national understanding of fulfilment and enforcement of ex-ante conditionality. Interviews revealed that the EU level ad-hoc inter-DG structures on ex-ante conditionalities also impacted national authorities, which did not always receive a message with one voice from the EU and were often unsure what constituted fulfilment or what specific actions were to be fulfilled.⁸⁴⁶

On this point, national officials in charge of public procurement ex-ante conditionality (G 4) explained that at times even if a certain course of action would be informally agreed with DG GROW and delivered, subsequently the Commission would send a letter to the Ministry of European Funds communicating that the conditionality was still not fulfilled, to their disappointment.⁸⁴⁷ The same practice of change in fulfilment baselines was reported by officials of the Permanent Representation of Romania to the EU.⁸⁴⁸

Most interestingly, regarding enforcement, the ad-hoc procedures put in place by the Commission, including the delegation of the final decision on enforcement to the College of Commissioners, reinforced the conviction of national authorities that ex-ante conditionalities would not lead to suspension of funds in the case of Romania.⁸⁴⁹

⁸⁴⁵ Annex IV to the thesis.

⁸⁴⁶ Interviews, Bucharest, August 2017; Permanent Representation of Romania to the EU, Brussels, September 2017.

⁸⁴⁷ Interviews, Bucharest, August 2017.

⁸⁴⁸ Permanent Representation of Romania to the EU, Brussels, September 2017.

⁸⁴⁹ Interviews, Permanent Representation of Romania to the EU, Brussels, June 2016, September 2017.

12.2.2.4 Prioritisation of ex-ante conditionalities

— structural inequality

Fourth, not all ex-ante conditionalities were equal in the case of Romania. Contrary to the legal world, in the institutional world the Commission and the Romanian authorities had a shared understanding on the priority ranking of each conditionality and each conditionality criterion, which was clearly communicated to me during interviews.⁸⁵⁰ From this point of view, I clearly perceived that irrespective of the long lists of conditionalities and action plans, EU and national officials simply knew which conditionalities mattered and which ones not so much, which ones were a must have and which ones could get a more lenient assessment in practice. In addition, in the context of 100 point long conditionality action plans, interviewees would refer to a narrow set of criteria perceived as the highest priorities at the EU or at the national level, information that allowed me to understand with a higher degree of clarity the real stakes of each conditionality discussed.

In the case of Romania, the top three ex-ante conditionalities were public procurement (G4), administrative efficiency (T 11.1) and transport (T 7.1 -7.3) - all not yet fulfilled in January 2018 even if they had already been identified as 'crucial pre-conditions' in the 2012 Commission position paper on Romania.⁸⁵¹

12.2.2.5 Informality

— decreased transparency and accountability

Fifth, *informality*, not formal application of legal rules, was the general state of affairs of all ex-ante conditionality processes in Romania.

As in the case of other Member States, informality started with informal self-suspensions that compensated for the lack formal suspensions (10.3.5). Interviews with Commission DG EMPL officials revealed that together with the Commission, Romanian authorities agreed on self-suspensions of ESI funds linked to employment (T 8.1, 8.3), early school leaving (T 10.1), higher education (T 10.2), lifelong learning

⁸⁵⁰ Interviews, Bucharest, Brussels 2017.

⁸⁵¹ European Commission, *supra* note 544 at 14–15.

(10.3), vocational education and training (T 10.4), healthcare (T 9.3) and administrative reform (T 11.1) ex-ante conditionalities.⁸⁵² From the same interviews I learned that pursuant to the informal suspension agreement, Romania would not send requests for payment to the Commission so long as the ex-ante conditionalities were not in place. However, it was not clear to me whether and which ESI Funds were self-suspended by agreement with DG REGIO. On this point, national authorities assured me that no such self-suspensions of funds co-managed with DG REGIO were in place for transport or public procurement ex-ante conditionalities at the end of 2017, even if these essential ex-ante conditionalities were not fulfilled.⁸⁵³ The Commission officials confirmed at the end of 2017 that payments were made by DG REGIO, even if some applicable conditionalities were not fully in place.⁸⁵⁴

Another moment of informality concerned the ex-post informal negotiation and re-negotiation of action plans for unfulfilled ex-ante conditionalities. Only in the case of the public procurement conditionality (G 4) was the action plan for fulfilment negotiated for one year after the approval of the OPs, with weekly meetings between the Commission and national authorities at all levels, and regular changes.⁸⁵⁵

Most importantly, informality reached the ultimate stage of enforcement. At the end of 2017, both Commission officials and national authorities reported during interviews that informal agreements on partial fulfilments have been or are being considered in practice in case of unfulfilled ex-ante conditionalities.⁸⁵⁶ Such informal agreements have also been explicitly mentioned in footnotes concerning access to information communications in the case of waste ex-ante conditionality (T 6.2).⁸⁵⁷ At this stage, informality once again circumvented the legal world enforcement rules of ex-ante conditionalities, replacing the latter with an informal settlement on fulfilment agreed between the Commission and the Romanian authorities.

⁸⁵² Interviews, European Commission, Brussels, 2017.

⁸⁵³ Interviews, Bucharest, 2017.

⁸⁵⁴ Interviews, European Commission, Brussels, 2017.

⁸⁵⁵ Interviews, Permanent Representation of Romania to the EU, Brussels, September 2017.

⁸⁵⁶ Interviews, Brussels, Bucharest 2017. All the above instances of informality will be clearly presented in the case study of public procurement, waste management ex-ante conditionalities at Section 12.2.3.

⁸⁵⁷ See for a detailed presentation 12.2.3.3 below.

12.2.2.6 Departure from conditionality criteria set in law

— *lack of clarity*

Sixth, Romania is an incredibly rich case study on how dramatically the scope of *conditionality in the institutional world* departs from that set in the legal world.

The case of Romania shows that the legal world of conditionality was not an end in itself, but only the beginning of a large-scale process of institutional world interpretation, redefinition and reconceptualization of each conditionality and criteria attached to match the specific priorities of the EU and the Member State concerned.

While transitioning from the EU to the national level, ex-ante conditionalities experienced a profound change, in some instances close to a complete metamorphosis. As a result, almost none of ex-ante conditionalities turned out to be exactly what they promised in the funding regulation.⁸⁵⁸ As we show in Annex II, some conditionalities proved to be much more, some substantially less, but almost none of them corresponded to what they seemed to be in the legal world. On the one hand, public procurement (G 4), health (T 9.3), transport (T 7.1-7.3), poverty (T 9.1), or active ageing (T 8.4) ex-ante conditionalities proved to be much more than what was promised in its legal world. On the other hand, self-employment (T 8.2), labour market (T 8.1 and 8.3), or workers adaptation to change (T 8.5) conditionalities often lost their identity, in practice being diluted, collapsed into one conditionality, or reported as fulfilled based on a collage of other ex-ante conditionalities.⁸⁵⁹ The departures were so great that at times, in the cases of health (T 9.3)⁸⁶⁰ or transport (T 7.1-7.3) for example, the true conditionalities in the legal world became non-conditionalities at the national level and vice-versa, non-conditionalities in the legal world were perceived as the only true conditionalities by national authorities.⁸⁶¹

Another core departure of ex-ante conditionality was its de facto integration into the European Semester process, building a mutually-reinforcing relationship with the latter. At times, the broad formulation of ex-ante conditionality in the legal world allowed the Commission to link its requirements with post-2014 CSRs. The European

⁸⁵⁸ Annex IV.

⁸⁵⁹ Annex IV, Points 23, 24, 25, 26

⁸⁶⁰ Annex IV, point 10.

⁸⁶¹ See for a detailed presentation Annex IV and 12.2.3.3 below.

Semester would then be used instrumentally to monitor the fulfilment of ex-ante conditionalities such as the ones on labour market institutions (T 8.3), active labour market policies (T 8.1), administrative reform (T 11.1) or public procurement (G 4).⁸⁶² The frequent departures of conditionalities set in the legal world meant that in practice most ex-ante conditionalities lacked a pre-defined clarity for EU citizens. Only when transposed into the national environment did each conditionality gain a concrete meaning, one that was largely influenced by the conditionality process and was far from transparent. This opacity created a serious accountability problem, as at times it was simply not clear for an outside observer, what exactly was asked by the EU, what was agreed to be delivered by the Romanian authorities, or what was fulfilled by the Romanian authorities on their own initiative.

12.2.2.7 *De facto unenforceable*

— *uncertainty*

Seventh, the case study of Romania confirmed that ex-ante conditionalities were *rendered de facto unenforceable* in their institutional world.

No ESI funds suspensions have been ordered in the case of Romania, even though two thirds of ex-ante conditionalities were not fulfilled at the approval of OP in 2015 (11 out of 36 fulfilled). Similarly, no fund suspensions had been ordered at the end of 2016, or after the submission of the mid-term implementation reports in August 2017, even though 7 ex-ante conditionalities in the area of public procurement (G4), research infrastructure (T 1.2), waste (T 6.2), transport (T 7.1, 7.2, 7.3), and administrative efficiency (T 11.1) were still not fulfilled.⁸⁶³ Instead, I have learned from interviews and press communications that pre-suspension letters had reportedly been prepared by the Commission in September 2017,⁸⁶⁴ which had not however been sent to the Romanian authorities by the end of 2017.⁸⁶⁵ When asked during interviews, no national or Commission official could confirm whether a suspension will be ordered

⁸⁶² Annex IV.

⁸⁶³ Table 3, above.

⁸⁶⁴ Corina Crețu, *supra* note 757.

⁸⁶⁵ Surse din Comisia Europeană: În lunile următoare, vom decide fie să ne îndreptăm spre suspendarea fondurilor UE pentru România, fie să declarăm îndeplinit planul de acțiune - Hotnews Mobile, *supra* note 760.

and what such suspension may mean in practice. As a result, a general state of uncertainty dominated the enforcement stage of ex-ante conditionality, whereby national authorities were concerned about suspension, did not know what a suspension could entail in practice, but at the same time were hopeful that no such suspension would occur.

12.2.2.8 *Very different implications for Romania*

Eighth, and lastly, the ex-ante conditionality process had *very different implications in the case of Romania* as compared to other EU Member States.

From this point of view, the case study of Romania showed that ex-ante conditionality does not operate in splendid isolation at the national level. On the contrary, each ex-ante conditionality feeds into pre-existent constitutional, legal, administrative, and above all political contexts of each Member State and is influenced by a wide-array of factors such as EU and national actors in charge of conditionality, the national level of commitment, spending at stake, the congruence between the EU and national priorities, the bargaining power of national authorities, political considerations or public participation.

In addition, the conditionality history of a given Member State is incredibly influential. In the case study of Romania, there was a clear distinction between a set of ex ante conditionalities pursuing the agenda of prior EU conditionality packages and all other ex-ante conditionalities pursuing their own agenda. For instance, ex-ante conditionalities on public procurement (G 4), vocational education and training (T 10.4), active ageing (T 8.4), healthcare (T 9.3) administrative efficiency (T 11.1) or waste (T 6.4) ex-ante conditionalities, were skilfully designed to connect with prior financial assistance, pre-accession or post-accession conditionalities, resuscitating and bringing to life again long forgotten conditionality discussions to the astonishment of national authorities.

From this point of view, the case study of Romania revealed a very interesting *modus operandi* of the EU on conditionality, which shall be referred to as: *rolling over prior conditionalities*. This technique denotes the EU's tendency to fight the failure of one conditionality by deploying yet another conditionality. However, this technique did not appear extremely effective in the case of public procurement (G 4) and

administrative capacity (T 11.1), and was particularly ineffective in the case of waste management (T 6.4) as we shall show below.⁸⁶⁶ In all these cases, it was interesting to note that ex-ante conditionalities deployed to save prior conditionalities have encountered very similar difficulties and political resistance, currently posing the highest risk of ESI funds suspension.

12.2.2.9 *Some or limited achievement*

As explained in Chapter 11, there are at least three baselines to measure the performance of ex-ante conditionality: a deliverable-based baseline embraced by the Commission, a better-spending baseline embraced by the Court of Auditors, and an output-based policy baseline that I adopt in the present thesis.

If one adopts the Commission's baseline, the conclusion is that the achievements of *ex-ante conditionality are significant*. It is evident from data in Annex IV that ex-ante conditionality brought about immense legislative, policy, institutional and administrative change, resulting in mountains of paperwork, dozens of laws and implementing normative acts passed, hundreds of strategies, roadmaps, guidelines, databases and plans, thousands of officials trained, tens of institutions and institutional structures formed, dissolved or reformed, in a very short amount of time. If one adopts the Court of Auditor's baseline, the conclusion is that *the achievements of ex-ante conditionality are at best uncertain*. Romania had barely started spending at the end of 2017, and there is little one can say about the contribution of ex-ante conditionality to the quality of EU spending in the country. Apart from the fact that ex-ante conditionality led to several self-suspensions of some (primarily ESF) ESI Funds,⁸⁶⁷ and that the overall cost of fulfilling the ex-ante conditionality that we could quantify was about 70 million Euro,⁸⁶⁸ very little can be added on this point. In the meantime, one should mention that the public procurement reform started by public procurement ex-ante conditionality (G 4) is not complete, statistical systems mandated by ex-ante conditionality (G 7) were not found to be fully functional by the Court of Auditors in 2017, and administrative capacity reform incentivised by ex-ante

⁸⁶⁶ See sections 12.2.3 below.

⁸⁶⁷ See 12.2.2.7 above.

⁸⁶⁸ Annex IV.

conditionality is still under important constraints.⁸⁶⁹ Even if not fulfilled, the completion of all these conditionalities is crucial to allow the country to absorb and effectively manage EU funds.

I adopt the third output-based policy performance baseline and conclude that *ex-ante conditionality had on occasion some and on occasion, very limited achievements* in practice. In Annex IV, I asked in the case of each ex ante conditionality whether and to what extent measures adopted brought, or are likely to bring, added value to the policy objectives pursued. I.e. whether poverty reduction, youth employment, gender equality or waste management are better off with a conditionality than without. I colour-labelled the answers with green for significant achievement, yellow for some achievement and red for limited achievement.

As shown in Annex IV, my overall conclusion is that the vast majority of ex-ante conditionalities have had some (16) or limited (16) achievement, and only on some occasions was the achievement significant (4).⁸⁷⁰ This means that overall, the EU policy goals pursued through ex-ante conditionality are to some or to a very limited extent better off with a conditionality than without it.

Where ex-ante conditionality had a *significant achievement* the measures adopted in response to conditionality had a credible and visible added value for the policy goal pursued. Where ex-ante conditionality had *some achievement*, most of the time the measures prompted by conditionality were indeed much needed and welcome but given the much more serious sector-wide or even nationwide structural challenges, or due to implementation shortcomings, the added value of conditionality for the policy goal pursued is expected to be very modest or at best uncertain. Where the conditionality had *limited achievements*, the actions adopted are expected to have an insignificant added value for the policy goal pursued.

I have identified four ex-ante conditionality success stories where achievement has been *significant*, namely in the area of risk prevention (T 5.1), active labour market policies (T 8.1), labour market institutions (T 8.3) and poverty reduction (T 9.1). In all these cases, the conditionality policy objective matched the EU priorities for Romania,

⁸⁶⁹ Annex IV, points 4, 7, 36.

⁸⁷⁰ Annex IV.

but most importantly matched the policy priorities of the national government, resulting in a genuine and serious national commitment to change.

On 16 occasions ex ante conditionality has had *some achievements*. This was for instance the case for public procurement (G 4), environmental impact assessment (G 6), smart specialisation (T 1.1), digital growth (T 2.1), Next Generation Network (T 2.2), transport (T 7.1-7.3), active ageing (T 8.4), healthcare (T 9.3), early school leaving (T 10.1), lifelong learning (T 10.3) or vocational education and training (T 10.4) conditionalities. In all these cases, the measures adopted are without doubt useful. For instance, the training of over one thousand officials and the adoption of 14 new guidelines on environmental impact assessments are very welcome, but their achievement is uncertain because these measures were fulfilled too late in the spending process. In other cases, such as water ex-ante conditionalities (T 6.1), conditionality had some achievement as it was used as an additional pressure tool to encourage the timely submission of the River basin management plan pursuant to the EU Water Directive, however it was not used to effectively enforce EU law and incentivise the correction of identified shortcomings, but rather as a preventive alert mechanism for potential subsequent infringement procedures.⁸⁷¹

On 16 occasions ex-ante conditionalities had *limited achievements*. In most of these cases, the measures adopted addressed or are likely to add very little to the policy goal pursued. The reasons for limited achievement were multiple. First, there was a clear lack or only a symbolic EU and/or national commitment to the policy goal pursued (i.e. equality conditionalities (G 1, G 2, G 3), Roma (T 9.2), self-employment (T 8.2) or adaptation of workers to change (T 8.5)). In response, the fulfilment process was an exemplary bureaucratic exercise of formal compliance, which is clearly not likely to address the real policy challenges on the ground. Second, ex-ante conditionality made a limited contribution because the EU law rules checked for compliance were already considered to have been correctly transposed or because the Commission did not insist

⁸⁷¹ Commission Letter on the fulfillment of ex ante conditionality 6.1 Water sector, COM Ares (2017) 368801 of 24.01.2017. [The Commission letter lifting the conditionality, notes that the Commission's positive assessment of conditionality fulfilment - submission of the River Basin Master Plan (RBM Plan), including water pricing policies chapters - is without prejudice to the Commission's subsequent assessment of the RBM Plan in line with the EU Directives. The Commission also points towards the "gap in implementation of the Urban Wastewater Treatment Directive" and urges the Romanian authorities to revise the water pricing policies and their application in practice when implementing EU funds]

on complete compliance, such as in the cases of statistical systems (G 7), co-generation (T 4.2), and green energy (T 4.3). Third, in some other cases (i.e. the Small Business Act (T 3.1) or youth employment (T 8.6)) ex-ante conditionalities were considered fulfilled, but the Commission assessment was clearly detached from the realities on the ground. The formal 3 days and 50 Euro cost to set up a business in Romania reported as part of Small Business Act conditionality are never effectively reflected in practice, as these figures do not account for the significant additional costs, the never-ending queues at the national commerce registries or for the bureaucratic nightmare that follows registration including, but not limited to registration with the fiscal authorities and obtaining a VAT code, governed by ever-changing complex rules and competent authorities. Equally, even if a youth employment registry was put in place in 2016 at an EU budget cost of 2 million Euro, youth unemployment in Romania remained high and rising, hitting a record high of 20% at the end of 2017 according to Eurostat.⁸⁷² Fourth, other ex-ante conditionalities such as waste management (T 6.2), research infrastructure (T 1.2) or administrative efficiency (T 11.1) have simply not been fulfilled and even if some actions were partially fulfilled, these are not sufficient to account to achievement.

Overall, the achievement of ex-ante conditionality in Romania is a sobering lesson that clearly shows that the power of EU conditionality, and of the EU for that matter, must not be overstated. Member States, even those receiving large shares of the EU budget, still hold a tremendous amount of power. If not committed in good faith to change promoted through EU conditionality, by the stroke of a pen Member States can easily overturn or make redundant all decisions, strategies, action plans and even laws put in place by spending conditionality.⁸⁷³ In this context, one should recall that the vast majority of the measures adopted to fulfil the ex-ante conditionalities in Romania were adopted by simple government implementing or delegated acts such as decisions, decisions of ministers or decisions of national agencies subordinated to ministries, and only occasionally by emergency government legislative acts or laws.⁸⁷⁴ Contrary to the Commission's repeated quest for the "irreversibility" of reforms brought by ex-ante

⁸⁷² Eurostat, Young people neither in employment nor in education and training by sex, age and labour status (NEET rates), <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>

⁸⁷³ As shown in the detailed case study of Active Ageing ex-ante conditionality Section 12.2.3.4 below.

⁸⁷⁴ Annex IV.

conditionality, none of the conditionality measures adopted, including laws, are irreversible at the national level. From this point of view, it was incredible for me to see how the language of "irreversibility" overwhelmingly used in the pre-accession Copenhagen conditionality and CVM post-accession conditionality for Romania has been internalised within the ex-ante conditionality process and used as an additional fulfilment baseline by the Commission.⁸⁷⁵ This is in spite of the fact that no concept of "irreversibility" is present in the CPR, and no such concept exists in the national legal and constitutional framework. Put differently, in the national constitutional order of Romania, nothing, not even the Constitution, is irreversible.

The most important conclusion drawn from the analysis of ex-ante conditionality in Romania is that: *when both EU and national priorities are met, conditionality can work*. On the contrary: when the EU or the national authorities are not fully (or only symbolically) committed to the policy objective of a given conditionality, its measures are likely to be half-fulfilled, diluted, formally complied with and even disappplied ex post, bringing no or only a very limited added value to the policy goal pursued.

12.2.3. Five detailed case studies about 11 ante conditionalities

In the following, I present 5 case studies based on the operation of 12 ex-ante conditionalities in Romania. These case studies encapsulate in the most expressive manner the most valuable findings on the departures and achievements of ex-ante conditionality in Romania. They also vividly show how prior conditionality packages influenced the ex-ante conditionality process in the country and illustrate the crucial importance of congruence between the EU and national commitment to the policy goals pursued by conditionality.

12.2.3.1 Equality and Roma

— *departure from a consistent approach of one Commission, limited achievement: symbolic EU and national commitment*

⁸⁷⁵ European Commission - PRESS RELEASES - Press release - Joint Statement of European Commission President Juncker and First Vice-President Timmermans on the latest developments in Romania, , http://europa.eu/rapid/press-release_STATEMENT-18-423_en.htm (last visited Jan 24, 2018).

The general ex-ante conditionalities in the area of non-discrimination (G 1), gender equality (G 2) and disability (G 3) - jointly referred to as 'equality ex-ante conditionalities' - and the Roma inclusion thematic ex-ante conditionality (T 9.2) are the most vivid examples of conditionalities that have seen serious departures from a common and consistent approach on the part of the Commission during their applicability and fulfilment assessment. The four ex-ante conditionalities did not enjoy a consistent applicability assessment across the four Commission DGs managing ESI Funds; and during fulfilment, were not consistently matched with the Commission's policy leading DG on equality matters (DG Justice) but were assessed for fulfilment by DG EMPL.

These departures ultimately translated to limited achievement and added value for the equality mainstreaming and Roma inclusion policy goals pursued, demonstrating purely symbolic commitment on the part of the EU and national authorities to the equality and social inclusion goals pursued by each.

i. Inconsistent applicability and fulfilment assessment of three equality ex-ante conditionalities

In the legal world, three *equality ex-ante conditionalities* were to apply across all ESI Funds to ensure that during ESI Funds management proper inter-institutional arrangements to address non-discrimination, gender and disability are in place (1), national officials are trained to promote equality across all ESI funds (2), and that proper monitoring arrangements on accessibility of persons with disability are in place in line with the UN Convention on the Rights of People with Disabilities.⁸⁷⁶

All three conditionalities were found applicable but unfulfilled in Romania's PA.⁸⁷⁷ At the moment of OPs approval, the inconsistent applicability assessment of national authorities endorsed by the Commission, their applicability was completely excluded without due justification from the OP Competitiveness and Fisheries and partially excluded the Large Infrastructure OP, to which only the disability ex-ante conditionality was found applicable.⁸⁷⁸

⁸⁷⁶ Annex I, Part II, points 1, 2, 3.

⁸⁷⁷ Partnership Agreement Romania, *supra* note 844 at 226–228.

⁸⁷⁸ Human Capacity OP, Technical Assistance OP, Regional Development OP, Administrative Capacity OP and Rural Development OP. The conditionalities were not found applicable to the OPs

In the five OPs that found the conditionalities applicable, the fulfilment assessment was carried out solely by DG EMPL without the engagement of DG Justice and turned out to be equally inconsistent. All conditionalities were declared fulfilled and lifted in 2015. However, the content of one institutional agreement and one training project outsourced by the National Equality Body to independent experts raised serious concerns about the standard of compliance adopted by the Commission.

The institutional agreement signed by four ministries in charge of management of EU funds in fact consists of four repetitive pages with a list of generic attributions, vague responsibilities, no institutionalisation, and no credible monitoring or evaluation arrangements.⁸⁷⁹ The training project led to three training modules and 1812 national officials trained⁸⁸⁰ at an EU budget cost of 2 million Euro.⁸⁸¹ However, the analysis of the contents of the training modules raised serious doubts as to whether their full observance would build the participant's capacity to "put into application" *all* EU non-discrimination, gender equality and disability law during ESI Funds implementation.⁸⁸² In this sense, all three modules contain only very generic, incomplete and at times inaccurate references to ESI Funds, EU law, CJEU case law, or EU Charter.⁸⁸³ Moreover, even if some information on equality presented may be interesting, the modules contain virtually no practical references to the relevant EU Funded programs in Romania, basic notions of equality mainstreaming in economic development or actual tools to credibly integrate equality concerns in national officials' every-day work.⁸⁸⁴ Lastly, reading through some parts of the three training modules,

Competitiveness, Large Infrastructure (except disability ex-ante conditionality) and Fisheries, even if the general principles of equality and non-discrimination are declared as guiding principles of fisheries and agricultural spending and their investment objectives often target equality-specific or equality-related actions.

⁸⁷⁹ Protocol of Collaboration between the Ministry of Labour, National Council for Combating Discrimination, Ministry of Regional Development, Ministry of Agriculture and Ministry of European Funds (2015) <https://perma.cc/5SWS-E3M4>.

⁸⁸⁰ <http://cncd.org.ro/2014-05-26-proiectul-formare-in-domeniul-antidiscriminarii-egalitatii-de-gensi-al-drepturilor-persoanelor-cu-dizabilitati->

⁸⁸¹ *Id.*

⁸⁸² Module I Non-discrimination available at: <http://cncd.org.ro/2016-10-24-modulul-1-antidiscriminare-din-cadrul-proiectului-cu-finantare-nerambursabila-cod-smis-52>, Module II Gender Equality available at: <http://cncd.org.ro/2016-10-24-modulul-2-egalitate-de-gen-din-cadrul-proiectului-cu-finantare-nerambursabila-cod-smis-52> Module III Disability available at: <http://cncd.org.ro/2016-10-24-modulul-3-drepturile-persoanelor-cu-dizabilitati-din-cadrul-proiectului-cu-finantare-nera>

⁸⁸³ *Id.*

⁸⁸⁴ *Id.*

one may reasonably wonder whether these had possibly reinforced the discriminatory stereotypes they aimed to combat in the first place.

i. Inconsistent fulfilment assessment: Roma ex-ante conditionality

The *Roma inclusion ex-ante conditionality* saw no inconsistencies in applicability as it was found applicable to poverty reduction and community led development priorities under the Human Capital OP⁸⁸⁵ and to social, health infrastructure, and integration of vulnerable communities investment priorities under the Regional OP.⁸⁸⁶

However, the fulfilment assessment of national authorities endorsed by the Commission DG EMPL - again, with no involvement from DG Justice - raises serious concerns regarding the genuine EU and national commitment to the Roma integration policy objective.

To fulfil the conditionality, Romania committed to revise its Roma inclusion strategy, to include "clear data" on disadvantaged regions and segregated neighbourhoods, to adopt "strong" monitoring tools, and to set up financial assistance support desks.⁸⁸⁷

The conditionality was considered fulfilled in early 2015 upon approval of the new Strategy on Roma Inclusion for 2015-2020,⁸⁸⁸ which was assessed by the Commission (DG EMPL) as compliant with the missing conditionality criteria.⁸⁸⁹

While the revision of the strategy is a positive measure, it is highly unlikely that this revision shall be sufficient to address the serious Roma inclusion challenges on the ground. First, there are serious questions regarding the content of the strategy, which first of all fails to identify in a clear manner the proportion of the Roma population in Romania and bases its analysis on abstract estimates of the national census (about half a million) the reality of which is universally questioned (all international organizations and EU data estimate from 1 to 2 million).⁸⁹⁰ From this point of view, the strategy fails

⁸⁸⁵ OP Human Capital Romania, *supra* note 816 at 311.

⁸⁸⁶ OP Regional, *supra* note 835 at 303.

⁸⁸⁷ Partnership Agreement Romania, *supra* note 207 at 385–386.

⁸⁸⁸ Government Decision 18/2015 approving the National Strategy for Inclusion of Romanian Citizens Belonging to Roma Minority 2015-2020, MO 49 of 21.01.2015 available at <http://www.anr.gov.ro/index.php/anr/proiecte-programe/strategia>

⁸⁸⁹ OP Regional, *supra* note 835 at 317.

⁸⁹⁰ Government Decision 18/2015 approving the National Strategy for Inclusion of Romanian Citizens Belonging to Roma Minority 2015-2020, MO 49 of 21.01.2015, Annex 1 available at <http://www.anr.gov.ro/index.php/anr/proiecte-programe/strategia>

to acknowledge the seriousness of the problem and remains, once again, an exercise of Roma inclusion in the darkness.⁸⁹¹ Second and most importantly, the revised Roma inclusion strategy comes in the context of an absolute lack of national commitment from the highest to the lowest levels of government to the policy goal of Roma inclusion. As stressed by the UN High Rapporteur for Extreme Poverty and Human Rights, Philip Alston, after his mission to Romania in 2015, the national political elites and high-ranking officials are in an "official state of denial" with regard to the question of Roma.⁸⁹² The strategy also foresees limited or no funds beyond ESI funds and the annual running cost allocations to the responsible public authorities.⁸⁹³ In addition, the indicators monitored by the strategy do not measure progress but rather constitute a data collection exercise, inquiring for instance if schools collect data on Roma, not what is the situation of Roma in the educational establishment.⁸⁹⁴

Given the substantive content of the strategy, one may reasonably inquire whether the conditionality criteria on "clear data" and on "strong monitoring" may be considered fulfilled. One may also reasonably wonder whether the lack of engagement from DG Justice - the leading policy directorate on Roma - in the conditionality process may be seen as an indication of a lack of engagement at the EU level. Most importantly, one may inquire whether the declaration of conditionality having been fulfilled in these circumstances is in fact an endorsement of weak national performance in the area.

Meanwhile, Roma notoriously remain the most discriminated against minority group in Romania, being subject to segregation, acute marginalisation, deprivation and discrimination in all areas of public and private life. The level of higher education attainment is only 0,7%, youth unemployment reaches 70%, access to healthcare, housing and other public services is extremely limited and physical abuse and hate crime are common occurrences.⁸⁹⁵ These results must be assessed against more than

⁸⁹¹ UN REPORT OF THE SPECIAL RAPPORTEUR ON EXTREME POVERTY AND HUMAN RIGHTS ON HIS MISSION TO ROMANIA, 15 (2016).

⁸⁹² *Id.* at 12-14.

⁸⁹³ *Id.* at 57. See also the relevant parts of the strategy Government Decision 18/2015 approving the National Strategy for Inclusion of Romanian Citizens Belonging to Roma Minority 2015-2020, MO 49 of 21.01.2015, Annex 1 available at <http://www.anr.gov.ro/index.php/anr/proiecte-programe/strategia>

⁸⁹⁴ Government Decision 18/2015 approving the National Strategy for Inclusion of Romanian Citizens Belonging to Roma Minority 2015-2020, MO 49 of 21.01.2015, Annex 2 of the Annex 1 available at <http://www.anr.gov.ro/index.php/anr/proiecte-programe/strategia>

⁸⁹⁵ See generally, UNSR EXTREME POVERTY AND HUMAN RIGHTS IN ROMANIA, *supra* note 375. FRA, Second European Union Minorities and Discrimination Survey Roma - Selected findings, 2016.

10 years of recurring strategies, action plans, EU and international funding, EU monitoring and constant recommendations within the framework of the European Semester CSRs, but above all against a history of 700 years of servitude and discrimination.⁸⁹⁶

ii. Limited achievement: symbolic EU and national commitment

The inconsistent applicability and fulfilment of the three Equality and one Roma ex-ante conditionalities in Romania demonstrate the symbolic commitment of national authorities, endorsed to a large extent by the Commission. In light of the above, the added value of ex-ante conditionalities for their policy objectives of promoting equality and Roma inclusion is expected to be limited.⁸⁹⁷ If one asks whether EU policies on non-discrimination, gender equality, disability or Roma inclusion are better off with the ex-ante conditionalities or without them, the answer shall at best be non-committal. To be fair, one may argue that the most credible impact of conditionalities in Romania was a very general raising of equality awareness for 1812 officials managing and controlling EU Funds, a better absorption of 2007-2013 EU funds by about 2 million Euro and yet another Roma inclusion strategy.

12.2.3.2. Public procurement

— *high EU prioritisation, departure from conditions set in the legal world, informality in fulfilment, some achievement: partial national commitment*

Romania, Government official statistics data, National Strategy for Inclusion of Romanian Citizens Belonging to Roma Minority 2015-2020, available at <http://www.anr.gov.ro/index.php/anr/proiecte-programe/strategia>

⁸⁹⁶ EU Council, COUNCIL RECOMMENDATION OF 9 JULY 2013 ON THE NATIONAL REFORM PROGRAMME 2013 OF ROMANIA AND DELIVERING A COUNCIL OPINION ON THE CONVERGENCE PROGRAMME OF ROMANIA, 2012-2016 OJ C 217 P 67 5; EU Council, COUNCIL RECOMMENDATION OF 8 JULY 2014 ON THE NATIONAL REFORM PROGRAMME 2014 OF ROMANIA AND DELIVERING A COUNCIL OPINION ON THE CONVERGENCE PROGRAMME OF ROMANIA, 2014 OJ C 247 P 109 6; EU Council, COUNCIL RECOMMENDATION OF 14 JULY 2015 ON THE 2015 NATIONAL REFORM PROGRAMME OF ROMANIA AND DELIVERING A COUNCIL OPINION ON THE 2015 CONVERGENCE PROGRAMME OF ROMANIA OJ C 272 P. 1 3; EU Council, COUNCIL RECOMMENDATION OF 12 JULY 2016 ON THE 2016 NATIONAL REFORM PROGRAMME OF ROMANIA AND DELIVERING A COUNCIL OPINION ON THE 2016 CONVERGENCE PROGRAMME OF ROMANIA OJ C 299 P. 73 2; EU Council, COUNCIL RECOMMENDATION OF 11 JULY 2017 ON THE 2017 NATIONAL REFORM PROGRAMME OF ROMANIA AND DELIVERING A COUNCIL OPINION ON THE 2017 CONVERGENCE PROGRAMME OF ROMANIA OJ C 261 P. 98 2.

⁸⁹⁷ Vita, *supra* note 35.

The public procurement ex-ante conditionality (G 4) is the most expressive example of a conditionality that enjoyed very high prioritisation in the EU institutional world, saw a dramatic departure from its legal world criteria and was guided by high informality during fulfilment. The conditionality led to some achievement on the ground - a result that was informed by only a partial national commitment to the reforms proposed by the EU.

i. Prioritisation

Public procurement is without doubt the highest priority ex-ante conditionality for the EU in the case of Romania, identified by the Commission as a top priority for the country since the 2012 position paper for Romania.⁸⁹⁸

The conditionality was found applicable but unfulfilled under the country's PA and all OPs, theoretically putting at risk access to all ESI Funds in Romania in 2014-2020 (30 bln EUR).⁸⁹⁹ Given its perceived high importance, the implementation of public procurement conditionality involved a large number of stakeholders. At the EU level, the fulfilment of conditionality was monitored by DG GROW and institutionally coordinated by DG REGIO. This means that DG GROW, as the responsible Commission agency for public procurement policy, would assess whether the substance of the measures put in place by the Romanian authorities was satisfactory. However, it was for DG REGIO to decide on lifting or not lifting the conditionality and communicating the Commission's decision to the Member State, keeping the three other Commission DGs in charge of ESI Funds co-management informed (DG AGRI, DG EMPL, DG MARE).

At the national level, the ownership for conditionality was undertaken by the newly established National Agency for Public Procurement (ANAP), whose young leadership saw conditionality as an opportunity to consolidate its position in the national political arena.⁹⁰⁰ The latter was supported by the Ministry for Public Finance and multiple other authorities concerned, such as the Supreme Council of Magistracy (CSM), National Council for Solving Contestations (CNCS), Court of Accounts (CC),

⁸⁹⁸ European Commission, *supra* note 569 at 14.

⁸⁹⁹ Commission letter, Ares (2017) 3886477, Observations regarding the fulfilment of ex ante conditionality 4: public procurement.

⁹⁰⁰ Interviews Brussels September 2017.

the Prime-Minister's Chancellery through its secretariat (SGG), and the Agency for Digitalisation (AADR).⁹⁰¹

Delegation of the main responsibility for conditionality to a governmental agency subordinated to the Public Finance Ministry placed important limitations on how far the agency could go to advance a country-wide public procurement reform of such proportions. From this point of view, it is evident that the EU's high commitment to the conditionality objective was only partially matched at the national level.

ii. Departure from conditionality criteria set in the legal world

At a first glance, the text of the CPR annex provides for the completion of four criteria to fulfil the conditionality: effective application of EU public procurement rules (1), transparent award procedures (2), training (3), and administrative capacity (4).⁹⁰² Subsequently, the four criteria are translated into about 20 generic sub-criteria to be delivered as part of the conditionality action plan approved by the Commission under the Partnership Agreement and OPs.⁹⁰³ The extremely broad formulation of the conditionality action plan allowed in practice for a country-wide reform of the entire public procurement system to begin, which translated the four criteria and 20 sub-criteria of conditionality into over 100 comprehensive actions for fulfilment, out of which 56 were still under implementation at the end of 2017.⁹⁰⁴ Here, one should underline that the one-hundred-points-list is not public.⁹⁰⁵ The list was the result of more than one year of informal negotiations and meetings between the national authorities and the Commission, diligently kept in internal records of the National Public Procurement Agency and partially shared with me during interviews.⁹⁰⁶ But there is more to the story of the 100+ conditionality list. A closer look at the document shows that the list was visibly influenced by the European Investment Bank

⁹⁰¹ Government of Romania, Cabinet of Prime Minister, Memorandum on fulfilment of ex ante conditionalities, registration no 5/952 of 15.02.2016, annex 3 - Monitoring table: fulfilment of thematic/general ex ante conditionalities.

⁹⁰² REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219 at XI.

⁹⁰³ Partnership Agreement Romania, *supra* note 844 at 348-351.

⁹⁰⁴ Interviews, Romania, 23 August 2017. Annual Reports on OP Implementation Romania, Annex on fulfilment of public procurement conditionality, (2017), not public.

⁹⁰⁵ Interviews, Romania, 23 August 2017. Annual Reports on OP Implementation Romania, Annex on fulfilment of public procurement conditionality, (2017), not public.

⁹⁰⁶ Interview, Permanent Representation Romania, September 2017.

(EIB) and is in fact a close replica of the public procurement strategy prepared for Romania in 2015.⁹⁰⁷ This means that in the case of Romania, the fulfilment of public procurement ex ante conditionality meant in fact implementing the 2015 strategy prepared by the EIB.⁹⁰⁸

An even closer look at the country's recommendations under the European Semester reveals that public procurement ex-ante conditionality is in fact enforcing the CSRs addressed to Romania from 2013 to 2017.⁹⁰⁹ With one voice, these asked the country to: "[t]ackle persisting shortcomings in public procurement"⁹¹⁰ and to: "[e]nsure timely, full and sustainable implementation of the national public procurement strategy".⁹¹¹

The fulfilment of conditionality started in 2015 and continues in 2018. The actions delivered brought about an immense amount of legislation, institutional, policy and administrative changes,⁹¹² including but not limited to the establishment of the Public Procurement Authority⁹¹³ endowed with new headquarters, new officials and higher salaries;⁹¹⁴ transposition of the three 2014 EU public procurement directives⁹¹⁵ by four national laws;⁹¹⁶ subsequent laws repealing prior laws that conflicted with EU *acquis* and dozens of implementing and delegated acts adopted, amended or repealed;⁹¹⁷ a

⁹⁰⁷ Romania: EIB strengthens support for economic growth and competitiveness, , <http://www.eib.org/infocentre/press/releases/all/2016/2016-033-eib-the-eu-bank-strengthens-support-for-economic-growth-and-competitiveness-in-romania.htm> (last visited Nov 2, 2017). Government Decision no 901/2015, MO 881 of 25.11.2015, approving the National Public Procurement Strategy available at: <http://www.anrmap.ro/ro/web/public/strategia-nationala-in-domeniul-achizitiilor-publice>

⁹⁰⁷ <http://anap.gov.ro/web/category/legislatie/legislatie-primara/?future=false>

⁹⁰⁸ Conclusion based on the comparison of the text of the strategy prepared by EIB and the non-public list of conditionality criteria shared by national authorities. National Public Procurement Strategy Romania approved by Government Decision no 901/2015, pp 38-41; 53-60; 96-108; 155-160 available at: <http://www.anrmap.ro/ro/web/public/strategia-nationala-in-domeniul-achizitiilor-publice>

⁹⁰⁹ EU Council, *supra* note 896 at 6.

⁹¹⁰ EU Council, *supra* note 896 at 7.

⁹¹¹ EU Council, *supra* note 896 at 3.

⁹¹² Annex IV.

⁹¹³ Emergency Government Ordinance 13/2015 MO 362 of 26.05.2015, approved by Law 244/2015

⁹¹⁴ Government of Romania, Cabinet of Prime Minister, Memorandum on fulfilment of ex ante conditionalities, registration no 5/952 of 15.02.2016, Annex 1, 2.12 and 2.18 public procurement ex-ante conditionality.

⁹¹⁵ Directive 2014/23/EU, Directive 2014/24/EU, Directive 2014/25/EU OJ L 94, 28.3.2014, transposed by Laws 98, 99, 100, 101 of 23 May 2016, MO 390/2016.

⁹¹⁶ <http://anap.gov.ro/web/category/legislatie/legislatie-primara/?future=false>

⁹¹⁷ Government of Romania, Cabinet of Prime Minister, Memorandum on fulfilment of ex ante conditionalities, registration no 5/952 of 15.02.2016, Annex 1, points 1-22: List of normative acts to fulfil the ex-ante conditionalities. See also ANAP legislation: <http://anap.gov.ro/web/category/legislatie/legislatie-primara/?future=false>

reform of the National Council for Conflict Resolution;⁹¹⁸ creation of an Inter-ministerial Committee for Public Procurement;⁹¹⁹ extensive actions to reform the public procurement agency through the establishment of an independent public procurement function; ex-ante control and evaluation units; one legislative screening unit tasked to continuously monitor the consistency of national laws with the EU *acquis*, including the CJEU case law;⁹²⁰ establishment of a government level centralised public procurement unit (CPPU);⁹²¹ training of judges on the new public procurement laws and the setting up of specialised public procurement Court chambers;⁹²² digitalisation of the public procurement processes; adoption of online methodological guidance and helpdesk units;⁹²³ adoption of incompatibility screening of private service providers (PREVENT) to be carried out by the National Agency for Integrity.⁹²⁴ To deliver on conditionality, Romania contracted loans for technical assistance services from the European Investment Bank (EIB) and the World Bank, amounting to 19 million Euro, to be mainly reimbursed from 2014-2020 EU Funds resources.⁹²⁵

It was simply impossible to anticipate that all the above actions would be adopted in response to 4 criteria of the CPR and 20 vague action plan points indicated in Romania's PA. For instance, it was hard for an outside observer to understand that the criterion "arrangements for effective application of Union public procurement rules" translated in the action plan to "specialisation of court of appeal judges", would ultimately mean the establishment of specialised public procurement chambers at the level of Tribunals and the Court of Appeals, subject to a Government decision on supplementation of the number of judges and clerks of the said courts. These are all related, but certainly fundamentally different criteria. 'Effective application' of EU

⁹¹⁸ ANAP, UCAP, CNSC.

⁹¹⁹ Prim-minister Decision 236/2015, MO 778 of 19 October 2015

⁹²⁰ Annual Reports on OP Implementation Romania, Annex on fulfilment of public procurement conditionality, (2017), not public.

⁹²¹ *Id.*

⁹²² *Id.* (only few courts have actually set specialised public procurement chambers)

⁹²³ *Id.*

⁹²⁴ PREVENT project financed with about 1 mln EUR from 2007-2013 EU Funds resources <https://www.integritate.eu/Comunicate.aspx?Action=1&NewsId=1961&M=NewsV2&PID=20>

⁹²⁵ Topped by 15% national matching funds. See, ANAP annual report 2016, pp.11-12, <http://anap.gov.ro/web/wp-content/uploads/2015/12/Raport-de-activitate-ANAP-2016-FINAL.pdf>, Building the capacity of ANAP project financed from ESF, <http://anap.gov.ro/web/cresterea-capacitatii-administrative-a-anap-si-a-institutiilor-publice-responsabile-pentru-implementarea-strategiei-nationale-in-domeniul-achizitiei-publice/>

public procurement rules is not the same as 'specialised judges of courts of appeal' and clearly not the same as 'conditional specialised chambers of tribunals and courts of appeals'.

iii. Informality

Generalised informality dominated the fulfilment phase of ex-ante conditionality and raised important transparency and accountability concerns in practice.

In this sense, it is worth noting that only a few points from the 100+ conditionality list were clearly mentioned in the formal PA and OPs. The vast majority of the measures delivered by conditionality were informally negotiated for one year behind the closed institutional doors of the Commission and national authorities and were not made public. To understand what happened in practice, I had to trace the criteria through thousands of pages, read between the lines of national strategies, parliamentary debates, internal working documents and non-public communication letters sent by the Commission and complemented by documents shared by national officials during interviews. Therefore, identifying the origins and actors responsible for each measure adopted at the national level proved particularly challenging in practice.

Let us take one example to better illustrate the transparency difficulty posed by informality. At Annex XI, the ESI Funds regulation asks for "arrangements for effective application of Union public procurement rules".⁹²⁶ The Partnership Agreement of Romania specifies that the conditionality criteria will be fulfilled by "transposition of the future directives".⁹²⁷ Subsequently, the national public procurement strategy commits to "transposition of the directives in (3+1) separate normative acts".⁹²⁸ Further on, the sub-sub criterion is implemented through four independent legislative acts adopted by the Parliament and reported to the Commission.⁹²⁹ To find out how one single criterion was fulfilled in practice I had to consult at least two public registries and a dozen policy and legal acts, on the premise that conditionality criteria asked for

⁹²⁶ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219.

⁹²⁷ Partnership Agreement Romania, *supra* note 844 at 348–351.

⁹²⁸ National Public Procurement Strategy Romania approved by Government Decision no 901/2015, p 38 at: <http://www.anrmap.ro/ro/web/public/strategia-nationala-in-domeniul-achizitiilor-publice>

⁹²⁹ Law 98/2016 on public procurement, Law 99/2016 on sectorial public procurement, Law 100/2016 on concession of works and services, Law 101/2016 on remedies in public procurement published in the Official Monitor Part I, no 390, 391, 392 and 393 of 23.05.2016.

laws, which are always public. To find out what exactly happened to other conditionality criteria that asked for policy or institutional arrangements was significantly more difficult.

iv. Some achievement: partial national commitment

Overall, conditionality brought about an immense amount of change in an extremely short amount of time. In less than two years substantive laws were passed, institutions erected, databases built, procedures adopted, and judges trained. The above progress was possible due to a very high priority given to conditionality at the EU level where EU institutions saw public procurement as a key solution to all the troubles of the country. In the EU's view, reform of public procurement would bring about growth, investment, eradication of corruption, integrity of the civil service and even further democratisation.⁹³⁰ However, the conditionality did not seem to enjoy the same high priority and commitment at the national level, notwithstanding monumental effort committed, generous resources and EU level pressure to fulfil the conditionality criteria. At the end of 2017 the conditionality was still not considered fulfilled by the Commission. Pursuant to the Commission's letter of August 2017, there is still inconclusive information (unfulfilled criteria) on the effective functioning of the legislative screening unit, inconclusive information on effective transition to ex ante controls, inconclusive information on the decrease of direct contract award thresholds as committed to under the National strategy, lack of information on adoption of FIDIC international public procurement contract terms, inconclusive information on the functioning of an improved electronic e-procurement data base (SICAP), lack of information on revision of the government order on preventive fiscal controls, inconclusive information on the legal framework for the independent function performed by public procurement officials, inconclusive information on public procurement online guides, inconclusive information on specific ANAP authorisations, inconclusive information on functioning of a new centralised public procurement unit and pilot units for regional authorities.⁹³¹

⁹³⁰ COURT OF AUDITORS, EFFORTS TO ADDRESS PROBLEMS WITH PUBLIC PROCUREMENT IN EU COHESION EXPENDITURE SHOULD BE INTENSIFIED 47. and considerations at (23).

⁹³¹ Commission letter, Ares (2017) 3886477, Observations regarding the fulfilment of ex ante conditionality 4: public procurement.

In this sense, one should note that the conditionality enjoyed strong commitment from the newly established Public Procurement Agency. However, this commitment was not fully matched at the higher decision-making levels. For instance, the government and the parliament still vehemently opposed the EU's conditionality suggestion to lower the thresholds for directly awarded public procurement contracts.⁹³² Similar high-level opposition seems to take shape regarding the adoption of the law on international public procurement contract terms (FIDIC).⁹³³

A governmental agency simply cannot go against this type of high level political opposition. In a context of partial national commitment, the conditionality's impact on the better functioning of the public procurement system in Romania is still uncertain. While beyond doubt the conditionality saw some achievements in practice, the changes are still very recent and incomplete. Most important, the core challenges are still very present. As the Commission put it: "Romania made progress in public procurement reform, but corruption remains a challenge".⁹³⁴

12.2.3.3. Waste management

— *departure from the legally enforceable nature; limited achievement; continuous EU law infringement: lack of national commitment*

The waste management ex-ante conditionality (T 6.2) is the most interesting and fascinating case study on the departure of conditionality from its legally enforceable nature to a *de facto* unenforceable conditionality in its institutional world. Moreover, the conditionality is an excellent example of the EU's enforcement deficit, whereby the EU has literally deployed all its enforcement arsenal with no impact in practice. As a result, the conditionality has had only limited achievements and added value for the policy goal pursued: environmentally sustainable waste management at the national level.

⁹³² *Id.*

⁹³³ Interviews, Commission, September 2017, and National Public Procurement Authority, Romania August 2017.

⁹³⁴ European Commission, COUNTRY REPORT ROMANIA 2017 SWD(2017) 88 FINAL 38 (2017).

The waste ex-ante conditionality was found applicable to waste management investment actions under OP Large Infrastructure,⁹³⁵ but has been only marginally fulfilled at the moment of its PA and OP approval.⁹³⁶ To deliver on conditionality, Romania had to fulfil its Waste Directive obligations, which ask for a waste management plan, a waste prevention plan and adoption of the necessary measures to achieve the country's 2020 waste management targets and 2014 reporting obligations.⁹³⁷ Only the last criterion was fulfilled by Romania before the OP approval, the 2014 report on the EU Waste Directive was sent.⁹³⁸ As for the Waste management and prevention plans, and actions to achieve the country's 2020 targets, these were being addressed during 2017 and were expected to be fully delivered in 2018 through an outsourced technical assistance contract.⁹³⁹

i. departure from legally enforceable nature

Despite the grave delays in meeting the 2016 conditionality deadline and the Commission's awareness of the fact that the conditionality may be credibly fulfilled only in 2018, no suspension of payments has been ordered by January 2018.

However, the waste ex-ante conditionality is much more interesting than that.

What makes Romania's non-compliance with its waste management conditionality such an interesting case is that it is an incredible example of the Commission effectively deploying all its hard, soft law, and spending power enforcement arsenal to convince Romania to remedy its EU law compliance gap, with no progress on the ground, but equally with no sanctions imposed yet - no EU Court decision imposing

⁹³⁵ OP Large Infrastructure Romania, *supra* note 836 at 266.

⁹³⁶ Partnership Agreement Romania, *supra* note 844 at 269-270; OP Large Infrastructure Romania, *supra* note 836 at 276-278.

⁹³⁷ REGULATION (EU) NO 1303/2013 OJ L 347, *supra* note 219; DIRECTIVE 2008/98/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 19 NOVEMBER 2008 ON WASTE AND REPEALING CERTAIN DIRECTIVES (TEXT WITH EEA RELEVANCE) OJ L 312, 22.11.2008, P. 3-30, 11-2, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0098>.

⁹³⁸ EU WASTE DIRECTIVE DIRECTIVE 2008/98/EC, *supra* note 937 at 11-5.

⁹³⁹ OP Large Infrastructure Romania, *supra* note 836 at 312-313. Government of Romania, Cabinet of Prime Minister, Memorandum on fulfilment of ex ante conditionalities, registration no 5/952 of 15.02.2016, annex 2.7 - Fulfilment of thematic ex ante conditionalities. Ministry of Environment. [The grave fulfilment delays that went well beyond the 2016 conditionality fulfilment deadline were caused by judicial proceedings generated by repeated contestations of the regularity of the public procurement award procedures outsourcing the delivery of the waste strategy and action plans required by conditionality]

finances in infringement proceedings and no suspension of ESI funds payments for unfulfilled conditionality (see also Chapter 4 above, on a similar pre-2014 waste management conditionality difficulty in case of Italy).

In this context, it is worth noting that Romania's failure to meet its EU waste management obligations is a continuous infringement going back to the country's accession and the unfulfilled commitments undertaken under its 2005 Conditions of Accession.⁹⁴⁰ Ten years on, the country persists in non-compliance with a general infringement saga under way since 2015. In 2015, the Commission launched two infringement proceedings against Romania for non-conforming transposition of the Waste Directive⁹⁴¹ and failure to report on the waste management and waste prevention plans.⁹⁴² The infringements continued in 2017 with the Commission's decision to refer the cases to the CJEU,⁹⁴³ as well as with the launch of a new infringement for Romania's failure to report on measures to achieve its 2020 waste management targets.⁹⁴⁴ At the same time, Romania's failure to deliver on its waste conditionality requirements was also closely monitored and reported through the European Semester process, which found in 2017 that Romania proved only "limited progress" in adopting the Waste Management and Waste Prevention Plans.⁹⁴⁵

What is most impressive is that in the face of the incredibly high gravity of this non-compliance, at the end of 2017 the Commission was still not even close to considering suspension of affected ESI funds. Even if in September 2017, during a country visit to Romania the Commissioner for regional policy, Ms Crețu, reported that DG REGIO was preparing a pre-suspension letter that may eventually open the way to a total or

⁹⁴⁰ BULGARIA AND ROMANIA ACCESSION CONDITIONS ACT, *supra* note 823 at 9–3.

⁹⁴¹ Commission Decision 20152190 of 10.12.2015, Formal notice under 258 TFEU WASTE - Non-conform transposition and implementation of Directive 2008/98/EC on waste

⁹⁴² Commission Decision 20152153 of 24.09.2015, Formal notice under 258 TFEU WASTE - Compliance with the requirements of Articles 28 - 30 of Directive 2008/98/EC on waste - Waste Management Plans and Waste Prevention Programmes.

⁹⁴³ Commission Decision 20152153 of 26.05.2016, Reasoned opinion under 258 TFEU, WASTE - Compliance with the requirements of Articles 28 - 30 of Directive 2008/98/EC on waste - Waste Management Plans and Waste Prevention Programmes. Commission Decision 20152153 of 27.04.2017, Referral to CJEU under 258 TFEU, WASTE - Compliance with the requirements of Articles 28 - 30 of Directive 2008/98/EC on waste - Waste Management Plans and Waste Prevention Programmes.

⁹⁴⁴ Commission Decision 20172051 of 17.05.2017, Formal notice under 258 TFEU, WASTE - Compliance with the reporting obligations under Directive 2006/66/EC, Directive 2008/98/EC, Commission Decision 2011/753/EU. See European Commission, MAY INFRINGEMENTS PACKAGE - PART 2: OTHER LETTERS OF FORMAL NOTICE MEMO/17/1280 (2017).

⁹⁴⁵ EU Council, *supra* note 896.

partial suspension of ESI funds committed to waste management,⁹⁴⁶ no such letters have seen the light of the day by 2018.⁹⁴⁷ Moreover, access to information letters from the Ministry of Environment reveal (in a footnote) that an *informal* mediation process started between the Commission and the Member State, pursuant to which both DG REGIO and DG ENV agreed during informal discussions with the national authorities that if the conditionality is viably fulfilled at least in part, payments may already start on the ground, even if the conditionality would not be formally lifted by the Commission.⁹⁴⁸

In the light of the above there is little one could add, other than repeating that waste ex-ante conditionality in the case of Romania is '*par excellence*' the most telling example of a conditionality that was rendered *de facto* unenforceable in the institutional world. This result is even more striking in the circumstances where the conditionality was tasked with enforcing binding EU law, where Romania is notoriously and continuously falling short of meeting its EU law obligations and where there is explicit CJEU case law ordering EU funds cut-off for failure to meet a similar conditionality pre-2014.⁹⁴⁹

ii. Limited achievement: lack of national commitment

The ex-ante conditionality has not been fulfilled in January 2018. Even if the conditionality would be fulfilled in mid-2018, to achieve their policy goal the adopted waste management action plans must also be implemented in view of their 2020 targets. Given the country's backwardness on the matter, it would take a miracle for Romania to actually meet the declared targets before 2020. In this context, it must be concluded that the conditionality made only a limited contribution to the policy objective pursued.

⁹⁴⁶ Corina Crețu, *supra* note 757.

⁹⁴⁷ Surse din Comisia Europeană: În lunile următoare, vom decide fie să ne îndreptăm spre suspendarea fondurilor UE pentru România, fie să declaram îndeplinit planul de acțiune - Hotnews Mobile, *supra* note 760.

⁹⁴⁸ Ministry of Environment, Access to information letter 52129 of 08.12.2017, footnote 3.

⁹⁴⁹ Judgment of the Court (Sixth Chamber) of 6 November 2014. Italian Republic v European Commission. C-385/13 P.

12.2.3.4. *Active ageing and Administrative efficiency*

— *Examples of conditionality hubs with very different implications for Romania; some or limited achievement: partial or lack of national commitment*

Active ageing (T 8.4) and administrative efficiency (T 11.1) are two extremely interesting examples where the ex-ante conditionality process was significantly influenced by the conditionality history of Romania. In both cases the ex-ante conditionalities have been ingeniously designed to reach out to prior pre-accession, post-accession or financial assistance conditionalities in the country, and present an example of the EU's 'rolling over prior conditionality' technique. Nonetheless, the technique did not prove very successful, as the ex-ante conditionalities had only some and limited achievements in promoting the policy goals pursued, in a context of strong national resistance and only partial commitment to change, respectively.

i. Active ageing ex-ante conditionality: some achievement, partial lack of national commitment

Active ageing ex-ante conditionality (T 8.4) is a very interesting example of a conditionality that aimed to enforce an EU soft law measure, in particular the EU Council Employment Guidelines related to inclusive labour policies for elderly, reached out to prior financial assistance conditionality on pensions system reform but encountered high national resistance in response.⁹⁵⁰

The conditionality was found applicable to employment, social inclusion and community led development investment priorities under the Human Capital OP,⁹⁵¹ and was found unfulfilled at the moment of PA and OP approval.⁹⁵²

In its legal world the conditionality asks for policy measures to promote active ageing (1) and arrangements on stakeholder consultation during the process of policy formulation and evaluation (2), and it was declared fulfilled by the Commission in

⁹⁵⁰ Hotnews, *supra* note 769.

⁹⁵¹ OP Human Capital Romania, *supra* note 835 at 311.

⁹⁵² Partnership Agreement Romania, *supra* note 844 at 293–298; OP Human Capital Romania, *supra* note 835 at 311.

early 2017,⁹⁵³ following the elaboration and adoption of a National Strategy for Active Ageing and a corresponding Action Plan for 2015-2020,⁹⁵⁴ outsourced to the World Bank in the framework of a technical assistance project supported from 2007-2013 EU funds resources.⁹⁵⁵

At first sight, the outcome of the ex-ante conditionality is a newly adopted strategic policy framework and an action plan on active ageing to guide the country's policy and EU investment in the area during 2014-2020. However, a closer look at the adopted action plan accompanying the strategy reveals that the ex-ante conditionality attempted to do more than this.⁹⁵⁶ In particular, measures in the 2015-2020 strategic action plan on consolidation of the pension system reform by *inter alia* equalising the pension age between women and men at 65 by 2035 with gradual steps in 2015-2018 and 2018-2020 are very familiar and attract special attention.⁹⁵⁷ The latter measures catch the eye precisely because they have been explicitly requested since the 2009 EU financial assistance package to Romania,⁹⁵⁸ duplicated under the subsequent EU-Romania Memoranda of Understanding⁹⁵⁹ and reiterated in each European Semester annual CSRs from 2013 to 2017 with persistent achievement of 'no progress' every other year.⁹⁶⁰ The said CSRs asked Romania to "finalise the pension reform started in 2010 by equalising the pensionable age for men and women",⁹⁶¹ and hence continue the pension reform started under the EU/IMF financial assistance programme conditionality.⁹⁶² In 2013, based on the 2015-2020 action plan, a legislative proposal on gradual equalisation of the pensionable age for men and women at the age of 65 has been tabled by the government, but it has been pending in the parliament ever since

⁹⁵³ European Commission Letter Ares (2017) 696791 of 08.02.2017 on Commission's assessment of the fulfilment of the ex-ante conditionality 8.4: active and healthy ageing for Romania

⁹⁵⁴ Government Decision 566/2015 on approval of the National Strategy and Action Plan for Active Ageing for 2015-2020, MO 619 bis of 14.08.2015

⁹⁵⁵ Agreement of the Ministry of Labour and the World Bank (IBRD) no. 321 CS of 26.02.2014.

⁹⁵⁶ Government Decision 566/2015 on approval of the National Strategy and Action Plan for Active Ageing for 2015-2020, MO 619 bis of 14.08.2015, annex II.

⁹⁵⁷ Government Decision 566/2015 on approval of the National Strategy and Action Plan for Active Ageing for 2015-2020, MO 619 bis of 14.08.2015, annex II, p.1

⁹⁵⁸ COUNCIL DECISION 2009 BOP ASSISTANCE ROMANIA, *supra* note 333 at 3.

⁹⁵⁹ EUROPEAN COMMISSION, *supra* note 827 at 36-37.

⁹⁶⁰ EU Council, *supra* note 896 at 2; EU Council, *supra* note 896 at 2; EU Council, *supra* note 896 at 2; EU Council, *supra* note 896 at 2.

⁹⁶¹ EU Council, *supra* note 896 at 2.

⁹⁶² Memorandum of Understanding between European Union and Romania 2011, 4.

with no action.⁹⁶³ Yet, the most interesting piece of information in the story of active ageing conditionality is the subsequently adopted Operational Action Plan for 2016-2020, which repeals and replaces the 2015-2020 Action Plan and the pension equalisation measures therein only *one day* after the national authorities had submitted their report to the Commission on fulfilment of ex-ante conditionality.⁹⁶⁴ The letters issued by the Commission based on our access to documents request reveal that the national authorities sent the formal letter reporting that Romania fulfilled the conditionality on 24 November 2016 but the letter did not mention the new Operational Action Plan for 2016-2020, which repeals the pension equalisation measures.⁹⁶⁵ In response, by letter of 8 February 2017 addressed to the Romanian authorities, DG EMPL agreed with the information provided and lifted the ex-ante conditionality, despite the fact that one of the two measures reported - the 2015-2020 Action Plan - was not in force anymore.⁹⁶⁶

This finding takes us back to the discussion on the power of Member States and the importance of full national commitment to render a conditionality effectively meaningful on the ground. In this case, Romania clearly opposed with high resistance the pension reforms proposed with insistency by the EU for a very long time. In response, Romania adopted the tactic of formal compliance and literally the next day repealed all conditionality-led actions on equalisation of pension age with the stroke of a pen. In this context, it is worth recalling that the "irreversibility" of conditionality-led measures was a curious concept I frequently heard during interviews at the national and the EU level, but which does not in any way reflect the constitutional reality of most Member States. In the case of Romania, irreversibility is certainly a concept with no legal, constitutional or practical meaning, as this case study clearly

⁹⁶³ Parliament of Romania, Chamber of Senate, Legislative proposal adopted L 699/2013 amending the law 263/2010 on a unitary pensions system available at <https://www.senat.ro/legis/lista.aspx#> ; Chamber of Deputies, Legislative Proposal PL-x nr. 186/2014. http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=14120

⁹⁶⁴ Government Decision 861/2016, MO 951 of 25.11.2016 amending the Government Decision 566/2015 on approval of the National Strategy and Action Plan for Active Ageing, and approving an Operational Action Plan and a Monitoring and Evaluations Mechanism, Annex 1 available at <http://gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-hg-nr-861-16-11-2016&page=7x>

⁹⁶⁵ European Commission Letter Ares (2016) 6599948 of 25.11.2016 on Romania's self-assessment of the fulfilment of the ex-ante conditionality 8.4: active and healthy ageing for Romania

⁹⁶⁶ European Commission Letter Ares (2017) 696791 of 08.02.2017 on Commission's assessment of the fulfilment of the ex-ante conditionality 8.4: active and healthy ageing for Romania

shows. The active ageing ex-ante conditionality has achieved little on the top of the enormous EU multiannual efforts to press for pension reform in Romania - yet another governmental commitment to adopt the measures, this time in the form of a strategic action plan approved by a government decision, that was subsequently repealed immediately after the conditionality was lifted. Here it is important to note that according to the CPR, once the Commission declares a conditionality fulfilled it cannot revise its decision.

Despite national resistance on pension reform, the conditionality brought some added value to the active ageing policy goal, as it managed to induce the beginning of a reform of the national system of social assistance and benefits for elderly, supported by comprehensive amendments of about ten legislative and normative acts and further government engagements under the new Operational Plan for 2016-2020.⁹⁶⁷ As there have been no further developments by January 2018, the outcome of active ageing conditionality Operational Plan for 2016-2020 shall be interesting to observe in practice.

The case study is highly instructive on the ways spending conditionality links to prior conditionality packages, creating synergies and conditionality hubs with the latter under the radar of EU spending in areas of high political sensitivity for Member States such as pension system reform.

ii. Administrative capacity conditionality: limited achievement, lack of national commitment

The administrative capacity conditionality (T 11.1) is another incredibly rich conditionality hub example that again brought to life important pre-accession, post-accession and financial assistance conditionalities that at times clashed with one another and again saw only limited national commitment, resulting in limited achievements and added value for the policy goal pursued.

⁹⁶⁷ Considerations note, Government Decision 861/2016, MO 951 of 25.11.2016 amending the Government Decision 566/2015 on approval of the National Strategy and Action Plan for Active Ageing and approving an Operational Action Plan and a Monitoring and Evaluations Mechanism, available at <http://gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-hg-nr-861-16-11-2016&page=7>

The ex-ante conditionality was the EU's second highest ranked conditionality for Romania after the public procurement one (10.2.3.2).⁹⁶⁸ It was found applicable, but unfulfilled,⁹⁶⁹ for all investment in public administration and judiciary development under the Administrative Capacity OP⁹⁷⁰ and under the cadastral system investment priority of the Regional OP.⁹⁷¹ As far as the Commission is concerned, the conditionality has not been fulfilled at the end of 2017 and no suspension of funds has been ordered for failure to meet the conditionality criteria.

The implementation of the administrative efficiency conditionality involved a range of onerous measures, delegated to the Ministry of Public Administration (responsible for regional level reform), the Cabinet of the Prime Minister (responsible for central level reform), and to the National Agency for Public Function (ANFP, responsible for public function reform) and assessed for fulfilment by DG REGIO.

According to its legal world, the ex-ante conditionality required a strategic policy framework (1) for reinforcing administrative efficiency, including a public administration reform having the following elements in place *and* under implementation: an analysis and planning of legal, organisation and procedural reform (2), quality management systems (3), actions for simplification and rationalisation of administrative procedures (4), human resources policies (5), public professionals' skills development (6), and monitoring and evaluation (7).⁹⁷²

The above criteria were fulfilled in the institutional world by satisfying a list of commitments undertaken by Romania before the Commission. The commitment list was treated at the national level as the only source of conditionality; and the link with the legal world conditionality criteria was largely lost as a result.⁹⁷³ In a nutshell, the measures adopted pursuant to conditionality led to the adoption of three national strategies, the adoption of three action plans; establishment of two institutional bodies and implementation of one EU Funded technical assistance project with an EU budget

⁹⁶⁸ European Commission, *supra* note 569 at 14.

⁹⁶⁹ Partnership Agreement Romania, *supra* note 844 at 317-319; OP Regional, *supra* note 835 at 304; OP Administrative Capacity Romania, *supra* note 836 at 129.

⁹⁷⁰ OP Administrative Capacity Romania, *supra* note 836 at 129.

⁹⁷¹ OP Regional, *supra* note 835 at 304.

⁹⁷² European Commission, *supra* note 246.

⁹⁷³ Government of Romania, Cabinet of Prime Minister, Memorandum on fulfilment of ex ante conditionalities, registration no 5/952 of 15.02.2013, annex 2.10

of about 3 million Euro.⁹⁷⁴ All the adopted strategic documents contain detailed action plans, explaining in a conditionality-like fashion and with breadth of detail the actions to be taken, the authorities responsible and the deadline for action, most of which set as a final deadline the year 2020 as a year in which "a consolidated public administration shall emerge in Romania, formed by professionals animated by a genuine *esprit de corps*".⁹⁷⁵

For a reality-check of the above enumerated strategies, a short retrospective of the 17-year history of the administrative capacity conditionality in Romania is necessary. Historical analysis shows that the administrative capacity ex ante conditionality is in fact a successor of a pre-accession administrative capacity conditionality, pursuant to which administrative reforms were initiated in 2001 and continued till the last pre-accession year - 2006.⁹⁷⁶ As of 2007, after accession, the presumption of a fulfilled pre-accession conditionality on administrative capacity proved only relative. Therefore, under its 'public administration integrity' pillar, the CVM post-accession conditionality continued to monitor and evaluate progress in the area.⁹⁷⁷ In addition, 2007-2013 EU Funds resources have been mobilised post-accession to consolidate pre-accession administrative reforms.⁹⁷⁸ With the support of the EU budget, during the period more than 40 strategies (!) on public administration reform and action plans were adopted, elaborated by local as well as international consultancy actors, such as the World Bank.⁹⁷⁹ The strategies were coupled with even more numerous training and capacity building projects supported through the Public Capacity Development OP 2007-2013.⁹⁸⁰ Yet, the positive impact of the above actions on the effective functioning of public administration proved very weak.⁹⁸¹ The main cause of the weak track-record was a highly de-centralised and fragmented financial intervention through multiple micro-projects implemented in an uncoordinated manner and with

⁹⁷⁴ Annex IV, point 36.

⁹⁷⁵ See strategy text in Government Decision 909/2014, note *supra* Annex I, p.7 [personal translation]

⁹⁷⁶ See strategy text [describing the pre-accession reform efforts] in Government Decision 909/2014, note *supra* Annex I, p.10-11

⁹⁷⁷ European Commission, *supra* note 824.

⁹⁷⁸ See strategy text [describing the pre-accession reform efforts] in Government Decision 909/2014, note *supra* Annex I, p.10-11

⁹⁷⁹ *Id.*

⁹⁸⁰ *Id.*

⁹⁸¹ *Id.*

no sound high-level political and legal backing.⁹⁸² As a result, instead of supporting administrative capacity building in Romania, the 2007-2013 EU Funds turned into a source of financing for local and international consultancy industries. The development of 40 strategies for administrative capacity building in less than six years says it all about the level of inefficiency in EU Funds spending during the period.

The economic crisis and the 2009 and 2011 financial assistance programmes again brought the public administration reform into the spotlight, prompting new reforms. However, the reform was viewed in different terms by Romania's creditors. The IMF program mostly focused on fiscal reform in public administration, and in particular on cuts in accumulated debts (arrears) of the central and local public authorities.⁹⁸³ On the contrary, the EU conditionality seemed to be more concerned by administrative efficiency.⁹⁸⁴ At the end of the day, the IMF view of conditionality prevailed, with some results in practice.⁹⁸⁵ The EU conditionality vision of administrative efficiency did not achieve much, except for *eleven additional studies* (!) and strategies outsourced to the World Bank.⁹⁸⁶

The clash between the EU and IMF financial assistance conditionality did not stop with a few strategies left on the shelf. It actually led to important inconsistencies on the ground.

The National Institute for Administration is an excellent example in this sense. The Institute was established in 2001, following an EU pre-accession conditionality, and financed from the EU budget with about 10 million Euro per year from 2001 till 2009 to help the Institute implement the administrative reform in Romania.⁹⁸⁷ In 2009, under the fiscal pressure of IMF conditionality mandating cuts in public expenses, the government decided to dissolve the Institute and establish a specialised unit within the National Agency for Public Function (ANFP).⁹⁸⁸ This decision is remarkable as the

⁹⁸² *Id.*

⁹⁸³ EUROPEAN COMMISSION, *supra* note 827.

⁹⁸⁴ Memorandum of Understanding between European Union and Romania of 2009, 5; Memorandum of Understanding between European Union and Romania 2013, 12.

⁹⁸⁵ EUROPEAN COMMISSION, *supra* note 827 at 5–7.

⁹⁸⁶ *Id.* at 6–7. [The World Bank elaborated 11 studies of then 11 Ministries of the Government during 2010-2011 as a conditionality of the 2009, 2011 and 2013 EU-RO Memoranda of Understanding.]

⁹⁸⁷ Considerations note, Government Ordinance 23/2016 establishing a National Institute for Administration, MO 658 of 29.08.2016 available at <http://gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-og-nr-23-24-08-2016&page=5>

⁹⁸⁸ *Id.*

EU conditionality asked for the opposite - increased efforts to advance (not reverse) the public administration reform.⁹⁸⁹ In 2016, under the pressure of ex ante conditionality the government re-established the National Institute for Administration, which is currently once again being organised and staffed, with strategies adopted and officials trained, hence re-starting from scratch the work of EU pre-accession conditionality dating from 2001.⁹⁹⁰

By the end of 2017, the ex-ante conditionality has brought the same limited added value to the quality of public administration policy goal as the pre-accession, post-accession, and EU financial assistance conditionalities: a number of strategies and action plans with long lists of to-be-implemented measures. The essentials are once again missing, namely a clear legal framework and a high-level political commitment to fully implement the detailed action plans. The lack of high level political commitment is indicated by the repeated delays in the implementation of (at times over-optimistic) strategy deadlines, which have been postponed from the initial 2016 targets to 2018, then to 2019 and most recently to post-2020,⁹⁹¹ to reflect a "more realistic timeline" as reported by national officials during interviews.⁹⁹² Most importantly, the highest conditionality requirement, the adoption of the legal framework that would finally provide for the necessary legal certainty to implement the long strategic action plans - the law on the Administrative Code⁹⁹³ - has not yet been adopted. The draft proposal for an Administrative Code is currently pending somewhere between the Government and the Parliament, with no clear indication of its location. Although the Administrative Code proposal passed the stage of public consultations in the Government in July 2017, and the Government was expected to send it to the Parliament by the end of September 2017, the proposal has not yet been registered with the Parliament.

⁹⁸⁹ MoU EU-Romania 2009, *supra* note 984 at 5.

⁹⁹⁰ Considerations note, Government Ordinance 23/2016 establishing a National Institute for Administration, MO 658 of 29.08.2016 available at <http://gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-og-nr-23-24-08-2016&page=5>

⁹⁹¹ Government Decision 470/2017, MO 534 of 07.07.2017, amending the annex no. 2 to the Strategy on the development of the 2016-2020 public function, approved by Government Decision no. 525/2016, and Annex no. 4 to the Vocational Training Strategy for public administration 2016-2020, approved by Government Decision no. 650/2016.

⁹⁹² Interviews, Romania, August 2017.

⁹⁹³ Ministry of Administrative Development, Proposal on the Law of the Administrative Code of 06.07.2017, available at <http://www.mdrap.ro/proiectul-de-lege-privind-codul-administrativ>

12.2.3.5 Poverty ex-ante conditionality

— a conditionality success story; significant achievement: high congruent EU and national commitment

I choose to end this section on a positive note, with the success story of poverty reduction ex-ante conditionality in the case of Romania. The poverty ex-ante conditionality tells a story of a conditionality that enjoyed very high and congruent priority both at the EU and national level, leading to significant achievement and value added to the poverty reduction goal pursued.

The conditionality was found applicable to poverty reduction and community led development priorities under the Human Capital OP.⁹⁹⁴ It was also found applicable to social and health infrastructure and development of vulnerable urban communities priorities under the Regional OP.⁹⁹⁵ The conditionality was found unfulfilled at the moment of the Partnership Agreement approval⁹⁹⁶ and only partially fulfilled at the moment of the OPs approval.⁹⁹⁷ Its criteria were subsequently fulfilled and the conditionality was lifted by the Commission at the end of 2016.⁹⁹⁸

The responsibility for conditionality was delegated to the Ministry of Labour at the national level. At the EU level, the fulfilment assessment was carried out by DG EMPL. The formal coordination and communication was ensured by the Ministry of European Funds and DG REGIO.

The poverty reduction conditionality aimed to reinforce the active inclusion objective of the Employment Guidelines and the Europe 2020 poverty reduction target.⁹⁹⁹ The conditionality was already announced in the pre-programming period by the Commission as a crucial conditionality to be fulfilled by Romania prior to the start of the financial period¹⁰⁰⁰ and has been closely monitored through the European

⁹⁹⁴ European Commission, *supra* note 14 at 14.

⁹⁹⁵ EU Council, *supra* note 57 at 14.

⁹⁹⁶ OP Human Capital Romania, *supra* note 22 at 311.

⁹⁹⁷ OP Regional, *supra* note 24 at 303.

⁹⁹⁸ European Commission Letter Ares (2016) 6358880 of 10.11.2016 on fulfilment of ex ante conditionalities.

⁹⁹⁹ European Commission, OBSERVATIONS ON THE PARTNERSHIP AGREEMENT WITH ROMANIA, ARES(2014)1785636 315 (2014); OP Regional, *supra* note 835 at 303; OP Human Capital Romania, *supra* note 835 at 311.

¹⁰⁰⁰ European Commission, *supra* note 569 at 14.

Semester processes along the way.¹⁰⁰¹ This time, the EU's priority ranking on poverty conditionality seemed to be closely matched by national commitment, leading to a success story for the conditionality on the ground.

The conditionality asked for the existence *and* implementation of a national strategic policy on poverty reduction, with a view to reaching the country's 2020 poverty reduction target of raising more than half a million people from extreme poverty.¹⁰⁰²

To deliver on conditionality, Romania elaborated and approved a National Poverty Reduction Strategy for 2015-2020, accompanied by an action plan, supported by a 2007-2013 EU funded project that benefited from World Bank technical assistance.¹⁰⁰³

The adopted strategic framework put in place for the first time a comprehensive approach to poverty. It was based on extensive background data and research studies that resulted in a well-documented, cross-cutting policy document addressing in a complete manner the multiple facets and root causes of poverty, including de-institutionalisation, education, healthcare and employment, and putting forward precise priorities and concrete plans for action.¹⁰⁰⁴ The Strategic plan for action is perhaps the most important development. It lays down a conditionality-like table of the main priorities, detailed with subsequent targets and sub-targets to be achieved, with clear deadlines and responsible authorities.¹⁰⁰⁵

One must note that in this case, even if the strategies and action plans were entirely delivered by the World Bank, there seemed to be a high level of ownership of the document on the part of national authorities and a commitment to deliver on the targets specified therein. Shortly after the adoption of the strategic documents required by conditionality, a comprehensive legislative reform on minimum

¹⁰⁰¹ EU Council, *supra* note 896 at 3.

¹⁰⁰² Europe 2020 targets, Statistics Romania available at https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/european-semester-your-country/romania/europe-2020-targets-statistics-and-indicators-romania_en

¹⁰⁰³ Government Order 383/2015 approving the National Strategy for social inclusion and poverty reduction 2015-2020 and the Strategic Action plan for social inclusion and poverty reduction 2015-2020, MO 463 of 26.06.2015, documents available at <http://www.mmuncii.ro/j33/index.php/ro/2014-domenii/familie/politici-familiale-incluziune-si-asistenta-sociala/3916>

¹⁰⁰⁴ *Id.* Annex 1, documents available at <http://www.mmuncii.ro/j33/index.php/ro/2014-domenii/familie/politici-familiale-incluziune-si-asistenta-sociala/3916>

¹⁰⁰⁵ *Id.* Annex 2, documents available at <http://www.mmuncii.ro/j33/index.php/ro/2014-domenii/familie/politici-familiale-incluziune-si-asistenta-sociala/3916>

subsistence income was proposed by the Government and approved by the Parliament, in line with the strategic action plan.¹⁰⁰⁶ The law reforms entirely the prior system of social assistance, bringing prior fragmented social benefits under one single legislative framework, linking the social subsistence allocation with labour market activation measures and doubling the committed national budget.¹⁰⁰⁷ Moreover, in line with the action plan, a major social inclusion and poverty reduction project funded from the EU budget was piloted in 2017 at the level of 100 most deprived communities, coordinated by the Ministry of Labour, the Ministry of Education and the Ministry of Health.¹⁰⁰⁸

In addition, important steps have been made in the area of de-institutionalisation of children, persons with disabilities and elderly as part of the poverty reduction strategy and the National Strategy on the Rights of the Child for 2014-2020.¹⁰⁰⁹ In 2016, in line with the EU priority of transition from institutional to community-based care, the laws on children's rights and adoption were amended, prohibiting the institutionalisation of children before the age of 3 and establishing general measures facilitating the community placement of children.¹⁰¹⁰ In the coming years, the progressive closure of placement institutions for children, the elderly and persons with disabilities shall be pursued with financial support from ESI Funds dedicated resources.¹⁰¹¹

The conditionality brought significant added value to the policy goal pursued and must be seen a success story in the case of Romania, especially because the implemented measures are accompanied by a positive impact on the ground.¹⁰¹² The 2017 European Semester praised the adopted reforms and reported 'significant

¹⁰⁰⁶ Law 196/2016 on minimum subsistence income, MO 882 of 08.11.2016, legislative history available at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=15901

¹⁰⁰⁷ Law 196/2016 on minimum subsistence income, MO 882 of 08.11.2016, legislative history available at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=15901

¹⁰⁰⁸ Order 2277/12.12.2016 approving the Protocol of Cooperation between the Ministry of Labour, Ministry of Health and Ministry of Education on prevention of social exclusion and poverty reduction

¹⁰⁰⁹ Government decision 1113/2014, MO 33 bis of 15.01.2015

¹⁰¹⁰ Law 57/2016 amending the Law 273/2004 on adoption and other normative acts MO 283 of 14.04.2016; Law 52/2016 the Law 272/2004 on children rights MO 235 of 05.04.2016

¹⁰¹¹ Government Order 383/2015 approving the National Strategy for social inclusion and poverty reduction 2015-2020 and the Strategic Action plan for social inclusion and poverty reduction 2015-2020, MO 463 of 26.06.2015, Annex 2, pp.31-35 documents available at <http://www.mmuncii.ro/j33/index.php/ro/2014-domenii/familie/politici-familiale-incluziune-si-asistenta-sociala/3916>

¹⁰¹² Interviews, Commission September 2017.

progress¹ on the country's 2020 poverty target, which was achieved and well surpassed by 2015.¹⁰¹³ The EU reports that in absolute terms about 1,5 million people have been raised above the poverty line as compared to the 2020 target of 0,5 million.¹⁰¹⁴ One must acknowledge that important problems still persist, such as deep inequalities and extreme deprivation of vulnerable groups, in particular Roma, children and persons with disabilities, yet these do not take away from the merits of the first poverty reduction reforms and progress achieved so far.¹⁰¹⁵

¹⁰¹³ European Commission, *supra* note 934 at 23.

¹⁰¹⁴ *Id.* at 50.

¹⁰¹⁵ *Id.* at 22–23.

Concluding Remarks

The fourth and last part of the present thesis has examined the institutional world of EU spending conditionality. It concluded that the law of spending conditionality has seen significant departures in the institutional world, and that its achievement on the ground is marked by deep uncertainty for all actors involved, and notably for EU citizens.

The findings of Part IV are illuminating in many respects.

Firstly, this part has illustrated in an incredibly vivid manner the multiple ways in which the institutional world of spending conditionality dramatically re-shaped its legal world nature, expectations and overall reach. Despite its hard law legal setting, the practice of spending conditionality appeared to be extremely constrained by formal legal rules and on multiple occasions shifted away towards a generalised informal process of ad-hoc prioritisation, implementation, institutionalisation, compliance negotiation and enforcement. Rather than operating within the legal straightjacket imposed by the EU funds regulations, spending conditionality often broke free to accommodate the increased need for managerial discretion, experimentation, trial and error, changing needs, and on occasion even changing realities. On this point, the example of the fiasco of macroeconomic conditionality enforcement against Spain and Portugal, which led to no application of binding and enforceable EU rules, is incredibly telling (10.2). Similarly telling is the whole process of ex ante conditionality where the law of spending conditionality was transformed in a process of bargaining over compliance with variable outcomes on a case by case basis (10.3 and Chapter 12). As seen above, Member States used their bargaining power to push back on certain requirements of ex ante conditionality that were not on the

Commission priority list and hence on which the Commission was more willing to accept concessions. Where the Commission was not willing to make concessions a mediation process would be opened, in a quest for a mutually acceptable solution. Where the Commission adopted a hard stance, Member States adopted strategies of continuous delays, incremental or half-compliance or formal compliance, pushing the Commission again into bargaining over compliance and mediating. This process translated into a true story of variation, as the negotiation outcome differed depending on the Member States' bargaining power, the specific country situation, the Commission position and the multiple stakes involved. However, as seen in Chapter 12, these findings hold true even in the case of a Member State with relatively weak bargaining power, in dramatic need of generous EU financial transfers and subject to the most intense, continuous conditionality pressure from the EU during the last decades. Crucially, the decision to transform spending conditionality into a bargaining process (from a hard law compliance tool), departed from the assumption that enforcement was a mutually disadvantageous solution for all actors involved, even in cases of particularly serious and persistent compliance failures. As a result, not one Euro from the EU budget was formally suspended in practice, even if on some cases symbolic self-suspensions were informally agreed.

Secondly, this part has vividly demonstrated that *congruence of goals and genuine commitment* at the EU and national level, as well as at the EU level, is critical, if not vital for EU spending conditionality achievement. Concerning congruence and commitment at the EU level, we have seen that its evident absence, between the European Parliament on the one hand, and the European Commission and (part of) the EU Council on the other, completely paralysed the process of macroeconomic conditionality (10.2). Regarding congruence with and commitment to the policy goals pursued by conditionality between the EU and Member States, we have seen in our detailed case studies that a purely symbolic, partial or a complete lack of it on either side proved extremely corrosive for ex ante conditionality (10.3, Chapter 12). From this point of view, one may conclude that unless the EU level is united and mobilised regarding a particular conditionality, it would be very difficult to persuade the Member States to embrace its policy objectives. Most importantly, it has been demonstrated that unless Member States are in agreement and share a genuine

commitment to the policy goal behind a conditionality proposed by the EU, conditionality may encounter great challenges at the national level. From this point of view, it may be concluded that in absence of Member States' buy-in, the effective positive impact of conditionality on the ground may be expected to be limited.

Thirdly, this part has shown that initial careful *legal planning and design* of spending conditionality in a manner that matches its institutional and administrative *implementation* realities is equally important in practice. From this point of view, the example of ex ante conditionality in particular has shown that the lack of a consistent policy match between conditionality and the Commission institutional structures in charge of it may lead to the inconsistent application of conditionality rules in practice and significantly constrain its potential. In addition, we have seen that the delegation of conditionality to the Commission structures in charge of spending put the latter in front of a very difficult choice, as they were invited to balance and at times even choose between spending and conditionality. Equally important, the lack of permanent EU and national level structures in charge of conditionality posed important policy coordination challenges and are expected to encounter even more important sustainability and follow-up difficulties. Moreover, we saw that the initial legal clarity and quality of regulation play an important role as the increasingly vague objectives, overlapping criteria for ex ante conditionality or the incredibly complex legal equations concerning macroeconomic conditionality did not make it easy to implement the tools in practice. Lastly, it is important to stress that the legal design of spending conditionality did not sufficiently anticipate its implementation costs, which at times proved significant. Taken together, all the above important mismatches between the legal design and implementation realities of spending conditionality have credibly limited the expected achievements of the tool.

Concluding this part, I could not help noticing how strikingly similar the above signalled challenges are to the ones described at length in the international relations and fiscal federalism literature on spending conditionality presented in Part I. From this point of view, it can once again be confirmed that conditionality is an extremely flexible policy tool that can pursue various substantive policy goals, but that its implementation is likely to encounter challenges and tensions that stem from the same behavioural core root: the desire of the conditionality actor to induce, control, coerce

or otherwise alter behaviour, and the conditionality recipient's resistance and even opposition to change.

In particular, our findings on the imperative of national commitment, the need for careful initial legal design of conditionality, the need for a consistent policy match with dedicated institutional structures, implementation challenges, the compliance bargaining difficulties, the policy balancing between spending and conditionality, the need for clear and congruent objectives, legal complexity and implementation costs, and finally the tendency to rarely enforce the conditions against states, have all been extensively referred to in the fiscal federalism literature (Part I, Chapter 2).

Similarly, our findings regarding the increased informality of the conditionality process, its opacity, complexity, uncertainty, frequently changing requirements, the dominance of the executives, blurred responsibility, low accountability, weak ownership, sustainability of reforms, variable binding-ness, uncertain achievement and a generalised practice of under-enforcement all strikingly resemble the experience of conditionality in the practice of international financial institutions, described in international relations literature (Part I, Chapter 2).

Against this backdrop, throughout Part IV I could not stress enough that these findings may not be viewed in satisfactory terms in an EU internal legal and constitutional setting where EU spending conditionality currently operates. This argument particularly refers to the second string of findings that point towards the conclusion that EU spending conditionality has been operating in the EU internal setting in a remarkably similar way to development aid, lending or financial assistance conditionality. As I repeatedly emphasised above, the finding that spending conditionality departed in numerous ways from its legal setting is at odds with our findings in Part II, where we have established that EU spending conditionality is at all times binding and enforceable EU law and raises corresponding legal expectations. These findings may also reasonably call into question the constitutional limits of spending conditionality analysed in Part III above, in particular with respect to the blurred legal certainty, legality, transparency, foreclosed avenues for democratic accountability and judicial review.

The above picture of how spending conditionality has effectively developed and taken shape on the ground in the 2014-2020 financial period is certainly not what I would

have hoped for when I enthusiastically started this research in 2013. Overall, Part IV invites future deep consideration of the role we as Europeans are willing to vest upon spending conditionality in our legal order and constitutional system. It also invites serious consideration of multiple reforms the tool must embrace to credibly deliver on its high legal promise in practice. These last thoughts shall be further developed in Part V below, which draws together the general conclusions of this thesis and makes some recommendations in view of the future financial period.

PART V

General conclusions and recommendations

General conclusions

This thesis proposed a new field of EU legal inquiry: the law of EU spending conditionality. To facilitate a sound understanding of the new legal tool, the analysis was split around four theoretical frameworks or 'worlds' of EU spending conditionality: *the conceptual world, the legal world, the constitutional world and the institutional world*.

Each theoretical framework provided an extremely productive lens of inquiry.

Part I was dedicated to the *conceptual world* of spending conditionality. The part laid out the conceptual toolkit of EU spending conditionality, based on the tool's definition, subjects, types and functions. It argued that EU spending conditionality must be understood as an internal construct of EU spending, deeply influenced by the legal, economic and strategic considerations governing the EU budgetary processes. Part I also argued that spending conditionality may be accurately understood only as a hybrid tool of governance, bearing important similarities to the use of conditionality in international relations, but also to the use of spending conditionality in federal systems. Interestingly, Part I has established that whereas in external relations the EU attempts (with little success) to incrementally move away from conditionality, and more generally to reform its conditionality practice *from an ex-ante and input* type towards an *ex-post and output* type; in internal relations, EU spending conditionality is not decreasing but rising precisely in the *ex ante and input* form that the EU tries to avoid in external sphere. We have concluded, that this finding rests on the EU policy makers' assumption that the relationship between the EU on the one side, and its Member States and its citizens on the other side, is different from the relationship

between the EU and a third country. It was therefore assumed that in internal relations, conditionality would not encounter the same resistance and compliance challenges identified in external relations due to increased integration, solidarity, partnership, common goals and presumed increased credibility or willingness of the EU institutions to cut-off EU money in purely internal situations.

Part II has focused on the *legal world* of spending conditionality. This part primarily investigated the genesis and mapped the legal evolution of the 2014-2020 rise in spending conditionality in EU internal policies. The Part argued that the reference to the 2008 global financial crisis and its dramatic unfolding in the EU as the moment of the genesis of EU spending conditionality is a common misconception, and that the true genesis of the rise of EU spending conditionality rests primarily in EU endogenous causes and prior conditionality 'seeds' already present in all main budgetary envelopes since the mid-1990s and early 2000s. Throughout the part, I argued that the global financial crisis and the subsequent crises that hit at the very core of the Union significantly influenced the EU budget negotiation process and reshaped the main character of planned conditionality expansion. I showed that under pressure from crisis-led events and financial assistance conditionality, the planned federal-type EU spending conditionality, focused mainly on performance and results (ex post and output), ended up predominantly resembling the international relations conditionality practiced by international financial institutions, focused on macroeconomic indicators and structural reforms (thus largely taking an ex ante and input form). The proposed extensive conditionality arrangements have been greatly supported by the 'EU North' net contributor Member States and reluctantly accepted by the 'EU South and East' net recipient Member States, subject to procedural guarantees and complex legal enforcement breaks that made a negotiation compromise possible. Part II has also put forward important lessons learned from previous, incipient and isolated pre-2014 conditionality arrangements. In this sense, Part II explained that the past of EU spending conditionality teaches us that inconsistent enforcement of the tool, which singles out one Member State may raise reasonable fairness and discrimination concerns, whereas too active enforcement may determine Member States to repeal or substantially revisit the 'troubling' conditionality in the next financial period. It also teaches us that enforcement against Member States tends to be difficult and rarely

pursued in practice, as opposed to enforcement against private beneficiaries of funds (EU citizens), which is frequently ordered. Another valuable lesson is that more conditionality does not necessarily translate into more compliance in cases of systemic policy failures, even in areas where the EU has plentiful of powers and exclusive competence (fisheries policy). Equally, we have learned that implicit conditionalities may be particularly difficult to enforce but may be credibly triggered in particularly serious situations, such as those involving human rights violations in operations financed with EU funds. Most importantly, Part II established that the 2014-2020 financial framework brought an unprecedented legal expansion of spending conditionality in EU internal spending. It showed that the novel spending conditionality arrangements are at all times binding and enforceable EU law, which aims to induce, coerce or otherwise alter EU Member States and EU citizens' conduct towards a desired outcome and to secure the sound expenditure of EU budgetary resources. This part also argued that the signalled rise has been revolutionary in many respects, primarily with regard to its significant rise in numbers, types, procedural sophistication, far reaching thematic scope, strong link to voluminous lists of EU policies, laws, soft-laws or recommendations and an expanded financial link to almost 80% of the EU budget. Part II concluded that as of 2014-2020, EU spending conditionality has emerged as a significantly reinforced legal and governance tool of the EU budgetary process that may be credibly used by the EU as a lever for EU policy objectives at the national level.

In the light of these findings, Part III moved toward analysis of the *constitutional world* of spending conditionality. It investigated the ways in which the EU's use of budgetary as opposed to EU legislative powers with the aim of regulating behaviour may be legitimated or constrained, departing from EU constitutional principles. Part III concluded that the constitutional analysis of spending conditionality leads to a constitutional paradox, pursuant to which spending conditionality may be seen at the same time as constitutionally legitimate and constitutionally suspect. On the one hand, it has been argued that the increased use of EU spending conditionality internally may appear to be grounded on important EU constitutional foundations, such as the EU's legitimate interest in supporting its EU constitutional objectives, to pursue the goal of effective government, to foster compliance, to act in cases of necessity, and to promote

compliance with fundamental rights and EU values. On the other hand, it has been argued that the EU's tendency to use its budget as a regulatory and enforcement device may be constitutionally constrained by the principle of conferral, by certain aspects of the validity of consent and the double-punitive effect of a spending conditionality during enforcement, by the principle of equality between Member States, by the principle of democratic accountability, and by certain aspects of fundamental rights protection and distribution, as well as by the tool's peculiar characteristics in the eventuality of judicial review. In response to the identified paradox, Part III proposes a constitutional construction of EU spending conditionality that would essentially depart from a constitutional balancing exercise of the potential constitutional foundations and constitutional limits of EU spending conditionality on a case by case basis. Crucially, the balancing would pay due consideration to the specific individual or collective interests at stake. The part concluded by noting that Court of Justice should be called to perform this politically charged and delicate constitutional balancing exercise. I have explained that even if on certain occasions the peculiar traits of the law of spending conditionality may call into question what Fuller called 'the proper limits of adjudication', the Court remains the best placed actor to draw the essential constitutional principles guiding the use and operation of spending conditionality in EU internal policies.

Part IV turned to the analysis of the institutional world of spending conditionality. It concluded, based on the operation of the example of two main spending conditionality packages of the 2014-2020 financial perspective, that the law of spending conditionality has seen multiple departures from its thick legal setting in the institutional world and that the achievement of spending conditionality - understood as the added value to the policy goal pursued - has most of the time been limited or uncertain. Part IV pointed to multiple legal design and institutional shortcomings that affected a consistent approach to the law of EU spending conditionality in practice. In particular, Part IV has established that the implementation of spending conditionality has been primarily led by the Commission, as opposed to Member States, and that often compliance was outsourced to third parties, generating a serious ownership gap. It also found that the institutional mismatch and lack of dedicated, permanent institutional structures in charge of spending and conditionality at times led to gaps

in consistent compliance assessment. This part also showed that the vagueness of objectives and at times increased discretion allowed by the law of spending conditionality led to a situation where the conditionality criteria departed dramatically in practice, pursuing objectives that could have not been foreseen by reading the text of the regulation. Part IV has also explained that the institutional world of conditionality was marked by a generalised informality, ad-hoc procedures and managerial prioritisation, on a case by case basis that led to very distinct implications for each Member State or groups of Member States. It was also established that spending conditionality saw a complete departure from its legally enforceable nature, even if on numerous occasions compliance was not fully achieved. It was argued that all these institutional departures did not facilitate the consistent application of conditionality rules, and led to important accountability, legal certainty and transparency gaps. The essential conclusion drawn from Part IV is that political congruence between the EU and national level, as well as at the EU level, is essential to render spending conditionality effective in practice. Most importantly, the lack of a genuine and congruent national buy-in paralyses spending conditionality in practice. Equally, the lack of a coherent and shared commitment to conditionality at the EU level or disagreement between the EU institutions regarding its objectives, renders the law of conditionality largely ineffective and obsolete. In short, Part IV has vividly shown that spending conditionality essentially works when focused on positive incentives and when the EU and Member States are on the same page regarding its specific policy objectives. When conditionality shifts to an adversarial setting because for instance, the EU's vision does not match that of one of the Member States, or even worse, when the EU's vision goes against that of one of the Member States and the conditionality process shifts to negative penalties, the conditionality process is likely to fail, and not even enforcement could credibly do much to save the policy goal pursued.

The above conclusions put the law of spending conditionality in a difficult position. The difficulty is even greater in the light of the increased EU traction for more EU spending conditionality in the next financial period to be agreed from 2021 to 2027. The post-2020 financial regulations proposed by the Commission in May 2018 consolidate, significantly upgrade and develop the 2014-2020 conditionality

arrangements.¹⁰¹⁶ Crucially, they add an infinitely more sensitive and constitutionally relevant conditionality than ever seen in 2014-2020: the EU rule of law conditionality, which would protect the entire EU budget - including agriculture spending - from the risk of Member States openly defying EU rule of law principles.¹⁰¹⁷

I will not enter into an analysis of these new spending conditionality arrangements here. They will most be probably the focus of my future work.¹⁰¹⁸ However, I will mention these new developments here because they mean that the main legal phenomenon analysed in this thesis - the rise of spending conditionality - is certainly not a temporary occurrence of the 2014-2020 financial framework: *conditionality is here to stay* and may credibly play an increasingly important role in the EU internal legal and constitutional architecture.

Against this background of continuously expanding EU spending conditionality, it is only appropriate to end this thesis with some brief recommendations and reflections on the possible future of spending conditionality inside the EU.

¹⁰¹⁶ EUROPEAN COMMISSION, *supra* note 242.

¹⁰¹⁷ European Commission, *supra* note 11.

¹⁰¹⁸ VIORICA VIȚĂ, RESEARCH FOR REGI COMMITTEE – CONDITIONALITIES IN COHESION POLICY, EUROPEAN PARLIAMENT, POLICY DEPARTMENT FOR STRUCTURAL AND COHESION POLICIES, BRUSSELS (2018).

Recommendations

This thesis did not intend to discard all use of spending conditionality in EU internal affairs. Quite the contrary. It suggested that if EU spending conditionality is based on informed conceptual choices, empowered by a thoughtful legal design, grounded on solid constitutional foundations and matched by appropriate institutional structures, spending conditionality may be and should be used as a legitimate and innovative policy tool to support effective EU government.

13.1 Conceptual choices

As explained in Part I of this thesis, as a tool of behavioural and social ordering, conditionality rightfully belongs to the field of behavioural studies as developed and applied in the fields of psychology, economics and law. Its application in the legal field of EU spending must first and foremost be informed by its incipient conceptual bases, and lessons learned from its prior applications in all the above fields, notably by centuries and decades-long history of spending conditionality in the practice of international organisations, established federations, and of the EU itself.

An informed conceptual choice of the most suitable form and proper limits of EU spending conditionality to be embraced at the EU level is crucial for the tool's successful operation. From this point of view, it is worth noting that good practice examples in all the above disciplines point to the finding that conditioning works best

when focused on incentives, rather than on punishments. Skinner's notorious operant conditioning theory teaches us that positive and negative reinforcers are preferable in inducing desired behaviour to punishments.¹⁰¹⁹ Fiscal federalism and economics literature equally points to the desirability of positive spending conditionality focusing on ex post performance and results, with credible negative reinforcers attached (carrots-and-sticks conditionality).¹⁰²⁰ Our findings in the present thesis also showed that spending conditionality did not perform well in an adversarial setting (Chapter 12).

This does not mean that EU spending conditionality must at all times be positive. The main argument made here is that the EU must make conceptually informed policy choices from the myriad of conditionality types at its disposal and choose the ones most suitable to credibly and meaningfully assist the EU level of government to effectively attain a specific policy goal.

In this context, the EU must also be aware of the limits of spending conditionality, which on occasion may simply prove to be an insufficient or unsuitable governance choice to address certain policy challenges. As vividly explained in this thesis, in cases of deep policy failure the deployment of an ever-greater number of conditionalities may prove insufficient to tackle the root cause of failures and compliance deficit (Chapter 6). This thesis has also shown that in cases of concurring or opposing ideological, policy, and even economic motives, the incentives put forward by a conditionality may simply be unsuitable to credibly coerce or induce compliance (Chapter 1).

From this point of view, this thesis holds that contrary to an international development bank and contrary to EU external action, inside the EU internal legal order, EU spending conditionality is not the only tool available to foster policy performance and state or individual compliance. The opportunity of using spending conditionality must be balanced against and conceived in conjunction with other multiple choices and governance tools available to the EU, such as legislation or spending action.

¹⁰¹⁹ SKINNER, *supra* note 46.

¹⁰²⁰ SHAH, *supra* note 51; SPAHN, *supra* note 247; BARCA, *supra* note 32.

Above all, this thesis holds that in the absence of a shared Union vision on a particular policy challenge, internally EU nations must work together to achieve shared and long-lasting policy solutions, rather than giving preference to spending conditionalities that are not the result of a shared agreement on a given policy solution.

In the light of future debates on EU spending conditionality post-2020, this final part of the thesis intends to encourage a sober reflection upon the proper conceptual bases and limits of spending conditionality inside the EU. It also suggests that spending conditionality alone may simply be ill-suited or insufficient to constitute the backbone of some of the most fundamental EU reforms under current discussion (i.e. rule of law, macroeconomic constitution), without having first built a sufficiently shared agreement on where the European project is heading to, and without having previously built a sufficiently shared understanding of where conditionality is effectively able to lead us in practice.

13.2 Legal design

Having thoroughly reflected and agreed upon the most suitable conceptual grounds for, and inherent limitations of EU spending conditionality, the tool's legal design must be subject to close examination.

A thoughtful initial legal design of EU spending conditionality is essential for its successful operation. As explained in detail throughout the present thesis, underenforcement is very likely due to structural reasons that we shall touch upon below (13.4). At the same time, we have argued that EU courts may find themselves equally constrained in overstepping their adjudication limits to tackle the underenforcement problem (Chapter 9). In the light of the above findings, the focus of policy-thinking should be on good initial legal design, because the ex post legal enforcement and judicial avenues are not likely to do much to deal with badly designed spending conditionalities.

Regarding the legal design, this thesis suggests that spending conditionality must be regulated by stable and permanent legal rules that go beyond the seven-year EU budgetary cycle. As explained above, frequently shifting legal frameworks may be

disruptive for the consistent application and operation of spending conditionality (Chapter 4) for three main reasons: Member States' tendency to alter troubling conditionality rules in the next financial perspective (1), lack of legal certainty, especially in case of multiannual and complex reforms at times sought by spending conditionality (2), weak sustainability and ownership of reforms put in place by spending conditionality (3). From this point of view a 'Code of EU spending conditionality' may be usefully considered in practice, which would - similar to other stable rules of EU spending and national financial codes - ensure the much-needed legal certainty that is largely lacking today.

Regarding the substantive content of the proposed 'Code of EU spending conditionality', the rules therein must reside on a clear and precisely defined list of spending conditionalities (1), must allow for the necessary flexibility to be carefully tailored towards the policy goal pursued in a given Member State (2) must be focused on credible, feasible, measurable, quantifiable and transparent policy outputs (3), and must, as much as possible, reside on comprehensive and simplified procedural processes, sufficiently open to civic engagement and participation (4).

13.3 Constitutional foundations

A thorough policy planning of EU spending conditionality should first and foremost reside on a powerful constitutional foundation and an equally scrupulous examination of the tool's potential constitutional limits. On this point, the present thesis has repeatedly emphasised that the EU is not yet another international organisation, an international development bank or an international monetary fund. Pursuant to the canonical and foundational dictum of the Court of Justice in *Van Gend en Loos*, the EU is a '*new legal order [...] the subjects of which comprise not only the Member States but also their nationals*'.¹⁰²¹ There is little debate regarding the fact that today the EU is an evolved political system based on a core set of underlying constitutional commitments, common to its Member States and citizens. It is therefore crucial that

¹⁰²¹ CJEU, Judgment of the Court of 5 February 1963, *Van Gend en Loos*, Case 26/62, ECLI:EU:C:1963:1.

any policy thinking on the future of EU spending conditionality departs precisely from a close examination of the EU's underlying constitutional commitments.

As argued above, a thorough constitutional examination of EU spending conditionality would first and foremost require an initial balancing exercise between the constitutional foundations and limits potentially called into question by the tool (Part III). Hence, any EU spending conditionality must be grounded on strong constitutional foundations and should be construed in a manner that ensures sufficient individual and collective guarantees in view of its potential constitutional limitations. In particular, as argued above, the principles of democratic accountability, transparency, legal certainty, legality and the protection of individual rights should be at the heart of any EU spending conditionality planning (Part IV).

This thesis holds that unless EU spending conditionality is carefully grounded on solid constitutional foundations and addresses its potential constitutional limitations in a sufficiently skilled manner, it may suffer from a serious legitimacy deficit that could inevitably backfire during the operation of the tool.

13.4 Institutional Structures

An extremely vivid finding of the present thesis has been that the success of EU spending conditionality relies dramatically on matching and sound institutional frameworks at the EU and at the national level (Part IV). It has been established that the way in which spending conditionality has been institutionally framed and operationalised in the current financial period did not always facilitate consistent and coherent application of the conditionality rules, led to a *de facto* generalised culture of informality and compliance bargaining, and ultimately led to considerable transparency, accountability and legal certainty concerns.

In particular, it has been shown that the Commission's compartmentalised involvement through multiple departments responsible for policy, spending management, budget and structural reform on an *ad-hoc* and variable basis, has led to important inconsistencies and gaps during assessment, fulfilment or interpretation of the conditionality requirements.

In the light of these findings the present thesis suggests that for the good functioning of spending conditionality, the 'old' Commission institutional arrangement must be revisited to better accommodate the 'new' legal framework of spending conditionality. This recommendation is particularly urgent in view of the next financial period, in which an increased number of horizontal, cross-cutting spending conditionalities that would apply to multiple EU funds managed by distinct Commission departments are proposed. In this sense, permanent EU institutional structures for EU spending conditionality may be desirable at the EU level - we shall call it the 'EU Spending Conditionality Unit', to be set up for instance within the existing EU Commission department for budget or within the recently-established Structural Reform Service. The new unit could be responsible for transparent coordination, close monitoring, and the unitary interpretation of spending conditionalities. Most importantly, it would be responsible for the objective assessment of conditionality output across the multiple EU spending envelopes and issue reasoned opinions that would trigger spending cut-off where necessary. This institutional structure may be usefully separated from the Commission's departments in charge of spending management and cut-off, to address in part the Commission's conflict of interests when considering enforcement for failure to achieve the conditionality objectives. Critically, such a specialised unit should be closely matched with the policy area targeted by each conditionality and staffed with appropriate human capital. For instance, in the light of the post-2020 EU Charter conditionality, the Commission's 'EU Spending Conditionality Unit' could usefully include Fundamental rights officers, who would make sure that EU financed operations are consistent with the EU Charter of Fundamental Rights.

To mirror the EU level, similar national and regional institutional structures may be foreseen, especially in the areas where spending conditionality targets complex, sector-wide or even country-wide structural reforms - in the form of, for instance, 'National Growth and Reform Councils'. Such permanent, mirroring institutional structures at the national level, could facilitate consistency, higher ownership of the conditionality process, legitimacy of EU and national reform efforts, accountability, participation and sustainability of achieved results.

13.5 Ideological and moral underpinning

Ultimately, it is crucial to note that there is a more important implied ideological and moral underpinning of the extensive use of spending conditionality internally. It is the potential act of permanent internalisation in the EU subconscious of the very recent and dramatic crisis-led conditionality memory of: 'us and them', 'good and bad', 'poor and rich', 'North and South', 'East and West'. The potential internalisation of the crisis memory of conditionality into EU's ordinary governance settings may become extremely corrosive for the EU's founding vision and objective of an ever-closer Union based on solidarity. From this point of view, any future reflection on the use and effective implementation of EU spending conditionality must be increasingly cautious not to awaken its underlying adversarial discourse and controversial crisis history, still very much alive in the European citizenry's public memory.

13.5 Final conclusion

To sum up, EU spending conditionality is likely to function as an effective EU tool of governance, subject to an important conceptual shift, meticulous legal and policy planning, strong constitutional foundations, institutional reform and due consideration to its crisis-led ideological and moral underpinning.

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Annex I

ESI Funds Conditionalities 2014-2020

Legislative texts

*Article 19***Ex ante conditionalities**

1. Member States shall assess in accordance with their institutional and legal framework and in the context of the preparation of the programmes and, where appropriate, the Partnership Agreement, whether the ex ante conditionalities laid down in the respective Fund-specific rules and the general ex ante conditionalities set out in Part II of Annex XI are applicable to the specific objectives pursued within the priorities of their programmes and whether the applicable ex ante conditionalities are fulfilled.

Ex ante conditionalities shall apply only to the extent and provided that they comply with the definition laid down in point (33) of Article 2 regarding the specific objectives pursued within the priorities of the programme. The assessment of applicability shall, without prejudice to the definition laid down in point (33) of Article 2, take account of the principle of proportionality in accordance with Article 4(5) having regard to the level of support allocated, where appropriate. The assessment of fulfilment shall be limited to the criteria laid down in the Fund-specific rules and in Part II of Annex XI.

2. The Partnership Agreement shall set out a summary of the assessment of the fulfilment of applicable ex ante conditionalities at national level and for those which, pursuant to the assessment referred to in paragraph 1, are not fulfilled at the date of submission of the Partnership Agreement, the actions to be taken, the bodies responsible and the timetable for the implementation of those actions. Each programme shall identify which of the ex ante conditionalities laid down in the relevant Fund-specific rules and the general ex ante conditionalities set out in Part II of Annex XI are applicable to it and, which of them, pursuant to the assessment referred to in paragraph 1, are fulfilled at the date of submission of the Partnership Agreement and programmes. Where the applicable ex ante conditionalities are not fulfilled, the programme shall contain a description of the actions to be taken, the bodies responsible and the timetable for their implementation. Member States shall fulfil those ex ante conditionalities not later than 31 December 2016 and report on their fulfilment not later than in the annual implementation report in 2017 in accordance with Article 50(4) or the progress report in 2017 in accordance with point (c) of Article 52(2).

3. The Commission shall assess the consistency and the adequacy of the information provided by the Member State on the applicability of ex ante conditionalities and on the fulfilment of applicable ex ante conditionalities in the framework of its assessment of the programmes and, where appropriate, of the Partnership Agreement.

That assessment of applicability by the Commission shall, in accordance with Article 4(5), take account of the principle of proportionality having regard to the level of support allocated, where appropriate. The assessment of fulfilment by the Commission shall be limited to the criteria laid down in the Fund-specific rules and in Part II of Annex XI, and shall respect national and regional competences to decide on the specific and adequate policy measures including the content of strategies.

4. In the event of disagreement between the Commission and a Member State on the applicability of an ex ante conditionality to the specific objective of the priorities of a programme or its fulfilment, both the applicability in accordance with the definition in point (33) of Article 2 and the non-fulfilment shall be proven by the Commission.

5. The Commission may decide, when adopting a programme, to suspend all or part of interim payments to the relevant priority of that programme pending the completion of actions referred to in paragraph 2 where necessary to avoid significant prejudice to the effectiveness and efficiency of the achievement of the specific objectives of the priority concerned. The failure to complete actions to fulfil an applicable ex ante conditionality which has not been fulfilled at the date of submission of the Partnership Agreement and the respective programmes, by the deadline set out in paragraph 2, shall constitute a ground for suspending interim payments by the Commission to the priorities of the programme concerned that are affected. In both cases, the scope of suspension shall be proportionate, taking into account the actions to be taken and the funds at risk.

6. Paragraph 5 shall not apply in the event of agreement between the Commission and the Member State on the non-applicability of an ex ante conditionality or on the fact that an applicable ex ante conditionality has been fulfilled, as indicated by the approval of the programme and the Partnership Agreement, or in the absence of Commission observations within 60 days of the submission of the relevant report referred to in paragraph 2.

7. The Commission shall without delay lift the suspension of interim payments for a priority where a Member State has completed actions relating to the fulfilment of ex ante conditionalities applicable to the programme concerned and which had not been fulfilled at the time of the decision of the Commission on the suspension. It shall also without delay lift the suspension where, following amendment of the programme related to the priority concerned, the ex ante conditionality concerned is no longer applicable.

8. Paragraphs 1 to 7 shall not apply to programmes under the European territorial cooperation goal.

*Article 20***Performance reserve**

6 % of the resources allocated to the ERDF, ESF and the Cohesion Fund under the Investment for Growth and Jobs goal referred to in point (a) of Article 89(2) of this Regulation, as well as to the EAFRD and to measures financed under shared management in accordance with the EMFF Regulation shall constitute a performance reserve which shall be established in the Partnership Agreement and programmes and allocated to specific priorities in accordance with Article 22 of this Regulation.

The Commission shall without delay lift the suspension of interim payments when the Member State has taken the necessary corrective action. Where the corrective action concerns the transfer of financial allocations to other programmes or priorities, which have achieved their milestones, the Commission shall approve, by means of an implementing act, the necessary amendment of the programmes concerned in accordance with Article 30(2). By way of derogation from Article 30(2), in such case the Commission shall decide on the amendment no later than two months after the submission of the Member State request for amendment.

7. Where the Commission, based on the examination of the final implementation report of the programme, establishes a serious failure to achieve the targets relating only to financial indicators, output indicators and key implementation steps set out in the performance framework due to clearly identified implementation weaknesses, which the Commission had previously communicated pursuant to Article 50(8) following close consultations with the Member State concerned, and the Member State has failed to take the necessary corrective action to address such weaknesses, the Commission may notwithstanding Article 85 apply financial corrections in respect of the priorities concerned in accordance with the Fund-specific rules.

When applying financial corrections, the Commission shall take into account, with due regard to the principle of proportionality, the absorption level and external factors contributing to the failure.

Financial corrections shall not be applied where the failure to achieve targets is due to the impact of socio-economic or environmental factors, significant changes in the economic or environmental conditions in the Member State concerned or because of reasons of force majeure seriously affecting implementation of the priorities concerned.

The Commission shall be empowered to adopt delegated acts in accordance with Article 149 to establish detailed rules on criteria for determining the level of financial correction to be applied.

The Commission shall adopt implementing acts, laying down the detailed arrangements to ensure a consistent approach for determining the milestones and targets in the performance framework for each priority and for assessing the achievement of the milestones and targets. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 150(3).

CHAPTER IV

Measures linked to sound economic governance

Article 23

Measures linking effectiveness of ESI Funds to sound economic governance

1. The Commission may request a Member State to review and propose amendments to its Partnership Agreement and

relevant programmes, where this is necessary to support the implementation of relevant Council Recommendations or to maximise the growth and competitiveness impact of the ESI Funds in Member States receiving financial assistance.

Such a request may be made for the following purposes:

- (a) to support the implementation of a relevant country-specific recommendation adopted in accordance with Article 121(2) TFEU and of a relevant Council recommendation adopted in accordance with Article 148(4) TFEU, addressed to the Member State concerned;
- (b) to support the implementation of relevant Council Recommendations addressed to the Member State concerned and adopted in accordance with Articles 7(2) or 8(2) of Regulation (EU) No 1176/2011⁽¹⁾ of the European Parliament and of the Council provided that these amendments are deemed necessary to help correct the macro-economic imbalances; or
- (c) to maximise the growth and competitiveness impact of the available ESI Funds, if a Member State meets one of the following conditions:
 - (i) Union financial assistance is made available to it under Council Regulation (EU) No 407/2010⁽²⁾;
 - (ii) financial assistance is made available to it in accordance with Council Regulation (EC) No 332/2002⁽³⁾;
 - (iii) financial assistance is made available to it that triggers a macroeconomic adjustment programme in accordance with Regulation (EU) No 472/2013 of the European Parliament and of the Council⁽⁴⁾ or that triggers a decision of the Council in accordance with Article 136(1) TFEU.

For the purposes of point (b) of the second subparagraph, each of those conditions shall be deemed to be satisfied where such assistance has been made available to the Member State before or after 21 December 2013 and remains available to it.

⁽¹⁾ Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (OJ L 306, 23.11.2011, p. 25).

⁽²⁾ Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118, 12.5.2010, p. 1).

⁽³⁾ Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments (OJ L 53, 23.2.2002, p. 1).

⁽⁴⁾ Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (OJ L 140, 27.05.2013, p. 1).

2. A request by the Commission to a Member State in accordance with paragraph 1 shall be justified, with reference to the need to support the implementation of the relevant recommendations or to maximise the growth and competitiveness impact of the ESI Funds as appropriate, and shall indicate the programmes or priorities which it considers are concerned and the nature of the amendments expected. Such a request shall not be made before 2015 or after 2019, nor in relation to the same programmes in two consecutive years.

3. The Member State shall submit its response to the request referred to in paragraph 1 within two months of its receipt, setting out the amendments it considers necessary in the Partnership Agreement and programmes, the reasons for such amendments, identifying the programmes concerned and outlining the nature of the amendments proposed and their expected effects on the implementation of recommendations and on the implementation of the ESI Funds. If necessary, the Commission shall make observations within one month of the receipt of that response.

4. The Member State shall submit a proposal to amend the Partnership Agreement and the relevant programmes within two months of the date of submission of the response referred to in paragraph 3.

5. Where the Commission has not submitted observations or where the Commission is satisfied that any observations submitted have been duly taken into account, the Commission shall adopt a decision approving the amendments to the Partnership Agreement and the relevant programmes without undue delay and in any event not later than three months after their submission by the Member State in accordance with paragraph 3.

6. Where the Member State fails to take effective action in response to a request made in accordance with paragraph 1, within the deadlines set out in paragraphs 3 and 4, the Commission may, within three months following its observations under paragraph 3 or following the submission of the proposal of the Member State under paragraph 4, propose to the Council that it suspend part or all of the payments for the programmes or priorities concerned. In its proposal, the Commission shall set out the grounds for concluding that the Member State has failed to take effective action. In making its proposal, the Commission shall take account of all relevant information, and shall give due consideration to any elements arising from and opinions expressed through the structured dialogue under paragraph 15.

The Council shall decide on that proposal, by means of an implementing act. That implementing act shall only apply with respect to requests for payment submitted after the date of the adoption of that implementing act.

7. The scope and level of the suspension of payments imposed in accordance with paragraph 6, shall be proportionate and effective, and respect equality of treatment between Member

States, in particular with regard to the impact of the suspension on the economy of the Member State concerned. The programmes to be suspended shall be determined on the basis of the needs identified in the request referred to in paragraphs 1 and 2.

The suspension of payments shall not exceed 50 % of the payments of each of the programmes concerned. The decision may provide for an increase in the level of the suspension up to 100 % of payments if the Member State fails to take effective action in response to a request made in accordance with paragraph 1, within three months of the decision to suspend payments referred to in paragraph 6.

8. Where the Member State has proposed amendments to the Partnership Agreement and the relevant programmes as requested by the Commission, the Council acting on a proposal from the Commission shall decide on the lifting of the suspension of payments.

9. The Commission shall make a proposal to the Council to suspend part or all of the commitments or payments for the programmes of a Member State in the following cases:

- (a) where the Council decides in accordance with Article 126(8) or Article 126(11) TFEU that a Member State has not taken effective action to correct its excessive deficit;
- (b) where the Council adopts two successive recommendations in the same imbalance procedure, in accordance with Article 8(3) of Regulation (EU) No 1176/2011 on the grounds that a Member State has submitted an insufficient corrective action plan;
- (c) where the Council adopts two successive decisions in the same imbalance procedure in accordance with Article 10(4) of Regulation (EU) No 1176/2011 establishing non-compliance by a Member State on the grounds that it has not taken the recommended corrective action;
- (d) where the Commission concludes that a Member State has not taken measures to implement the adjustment programme referred to in Regulation (EU) No 407/2010 or Regulation (EC) No 332/2002 and as a consequence decides not to authorise the disbursement of the financial assistance granted to that Member State;
- (e) where the Council decides that a Member State does not comply with the macro-economic adjustment programme referred to in Article 7 of Regulation (EU) No 472/2013, or with the measures requested by a Council decision adopted in accordance with Article 136(1) TFEU.

In making its proposal, the Commission shall respect the provisions of paragraph 11 and shall take account of all relevant information in that regard, and it shall give due consideration to any elements arising from and opinions expressed through the structured dialogue under paragraph 15.

Priority shall be given to the suspension of commitments: payments shall be suspended only when immediate action is sought and in the case of significant non-compliance. The suspension of payments shall apply to requests for payment submitted for the programmes concerned after the date of the decision to suspend.

10. A proposal by the Commission referred to in paragraph 9 in relation to the suspension of commitments shall be deemed adopted by the Council unless the Council decides, by means of an implementing act, to reject such a proposal by qualified majority within one month of the submission of the Commission proposal. The suspension of commitments shall apply to the commitments from the ESI Funds for the Member State concerned from 1 January of the year following the decision to suspend.

The Council shall adopt a decision, by means of an implementing act, on a proposal by the Commission referred to in paragraph 9 in relation to the suspension of payments.

11. The scope and level of the suspension of commitments or payments to be imposed on the basis of paragraph 10, shall be proportionate, respect the equality of treatment between Member States and take into account the economic and social circumstances of the Member State concerned, in particular the level of unemployment of the Member State concerned in relation to the Union average and the impact of the suspension on the economy of the Member State concerned. The impact of suspensions on programmes of critical importance to address adverse economic or social conditions shall be a specific factor to be taken into account.

Detailed provisions for determining the scope and level of suspensions are set out in Annex III.

The suspension of commitments shall be subject to the lower of the following ceilings:

- (a) A maximum of 50 % of the commitments relating to the next financial year for the ESI Funds in the first case of non-compliance with an excessive deficit procedure as referred to in point (a) of the first subparagraph of paragraph 9 and a maximum 25 % of the commitments relating to the next financial year for the ESI Funds in the first case of non-compliance relating to a corrective action plan under an excessive imbalances procedure as referred to in point (b) of the first subparagraph of paragraph 9 or non-compliance with the recommended corrective action pursuant to an excessive imbalances procedure as referred to in point (c) of the first subparagraph of paragraph 9.

The level of the suspension shall increase gradually up to a maximum of 100 % of the commitments relating to the next financial year for the ESI Funds in the case of an excessive deficit procedure and up to 50 % of the commitments relating to the next financial year for the

ESI Funds in the case of an excessive imbalance procedure, in line with the seriousness of the non-compliance;

- (b) a maximum of 0,5 % of nominal GDP applying in the first case of non-compliance with an excessive deficit procedure as referred to in point (a) of the first subparagraph of paragraph 9 and a maximum of 0,25 % of nominal GDP applying in the first case of non-compliance relating to a corrective action plan under an excessive imbalances procedure as referred to in point (b) of the first subparagraph of paragraph 9 or non-compliance with recommended corrective action under an excessive imbalances procedure as referred to in point (c) of the first subparagraph of paragraph 9.

If non-compliance relating to corrective actions referred to in points (a), (b) and (c) of the first subparagraph of paragraph 9 persists, the percentage of that GDP cap shall be gradually increased up to:

- a maximum of 1 % of nominal GDP applying in the event of persistent non-compliance with an excessive deficit procedure in accordance with point (a) of the first subparagraph of paragraph 9; and
- a maximum of 0,5 % of nominal GDP applying in the event of persistent non-compliance with an excessive imbalance procedure in accordance with point (b) or (c) of the first subparagraph of paragraph 9, in line with the seriousness of the non-compliance;

- (c) a maximum of 50 % of the commitments relating to the next financial year for the ESI Funds or a maximum of 0,5 % of nominal GDP in the first case of non-compliance as referred to in points (d) and (e) of the first subparagraph of paragraph 9.

In determining the level of the suspension and whether to suspend commitments or payments, the stage of the programme cycle shall be taken into account having regard in particular to the period remaining for using the funds following the re-budgeting of suspended commitments.

12. Without prejudice to de-commitment rules set out in Articles 86 to 88 the Commission shall lift the suspension of commitments, without delay, in the following cases:

- (a) where the excessive deficit procedure is held in abeyance in accordance with Article 9 of Council Regulation (EC) No 1467/97⁽¹⁾ or the Council has decided in accordance with Article 126(12) TFEU to abrogate the decision on the existence of an excessive deficit;

⁽¹⁾ Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 209, 2.8.1997, p. 6).

- (b) where the Council has endorsed the corrective action plan submitted by the Member State concerned in accordance with Article 8(2) of Regulation (EU) No 1176/2011 or the excessive imbalance procedure is placed in a position of abeyance in accordance with Article 10(5) of that Regulation or the Council has closed the excessive imbalance procedure in accordance with Article 11 of that Regulation;
- (c) where the Commission has concluded that the Member State concerned has taken adequate measures to implement the adjustment programme referred to in Article 7 of Regulation (EU) No 472/2013 or the measures requested by a decision of the Council in accordance with Article 136(1) TFEU.

When lifting the suspension of commitments, the Commission shall re-budget the suspended commitments in accordance with Article 8 of Council Regulation (EU, Euratom) No 1311/2013.

A decision concerning the lifting of the suspension of payments shall be taken by the Council on a proposal from the Commission where the applicable conditions set out in points (a), (b) and (c) of the first subparagraph are fulfilled.

13. Paragraphs 6 to 12 shall not apply to the United Kingdom in so far as the suspension of commitments or of payments relate to matters covered by points (a), (b) and (c)(iii) of the second subparagraph of paragraph 1 or points (a), (b) or (c) of the first subparagraph of paragraph 9.

14. This Article shall not apply to programmes under the European territorial cooperation goal.

15. The Commission shall keep the European Parliament informed of the implementation of this Article. In particular the Commission shall, when one of the conditions set out in paragraph 6 or points (a) to (e) of the first subparagraph of paragraph 9 is fulfilled for a Member State, immediately inform the European Parliament and provide details of the ESI Funds and programmes which could be subject to a suspension of commitments or payments.

The European Parliament may invite the Commission for a structured dialogue on the application of this Article, having regard in particular to the transmission of the information referred to in the first sub-paragraph.

The Commission shall transmit the proposal for suspension of commitments or payments or the proposal to lift such a suspension to the European Parliament and the Council immediately after its adoption. The European Parliament may invite the Commission to explain the reasons for its proposal.

16. In 2017, the Commission shall carry out a review of the application of this Article. To this end, the Commission shall prepare a report which it shall transmit to the European Parliament and the Council, accompanied where necessary by a legislative proposal.

17. Where there are major changes in the social and economic situation in the Union, the Commission may submit a proposal to review the application of this Article, or the European Parliament or the Council, acting in accordance with Articles 225 or 241 TFEU respectively, may request the Commission to submit such a proposal.

Article 24

Increase in payments for Member State with temporary budgetary difficulties

1. On the request of a Member State, interim payments may be increased by 10 percentage points above the co-financing rate applicable to each priority for the ERDF, ESF and the Cohesion Fund or to each measure for the EAFRD and the EMFF. If a Member State meets one of the following conditions after 21 December 2013, the increased rate, which may not exceed 100 %, shall apply to its requests for payments for the period until 30 June 2016:

- (a) where the Member State concerned receives a loan from the Union under Council Regulation (EU) No 407/2010;
- (b) where the Member State concerned receives medium-term financial assistance in accordance with Regulation (EC) No 332/2002 conditional on the implementation of a macro-economic adjustment programme;
- (c) where financial assistance is made available to the Member State concerned conditional on the implementation of a macroeconomic adjustment programme as specified in Regulation (EU) No 472/2013.

This paragraph shall not apply to programmes under the ETC Regulation.

2. Notwithstanding paragraph 1, Union support through interim payments and payments of the final balance shall not be higher than the public support or the maximum amount of support from the ESI Funds for each priority for the ERDF, ESF and the Cohesion Fund, or for each measure for the EAFRD and the EMFF, as laid down in the decision of the Commission approving the programme.

3. The Commission shall examine the application of paragraphs 1 and 2 and shall submit to the European Parliament and the Council a report with its assessment and, if necessary, a legislative proposal before 30 June 2016.

ANNEX XI

Ex ante conditionalities

PART I: Thematic ex ante conditionalities

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
<p>1. Strengthening research, technological development and innovation</p> <p>(R&D target)</p> <p>(referred to in point (1) of the first paragraph of Article 9)</p>	<p>ERDF:</p> <ul style="list-style-type: none"> — All investment priorities under thematic objective no. 1. 	<p>1.1. Research and innovation: The existence of a national or regional smart specialisation strategy in line with the National Reform Program, to leverage private research and innovation expenditure, which complies with the features of well-performing national or regional R&I systems.</p>	<ul style="list-style-type: none"> — A national or regional smart specialisation strategy is in place that: <ul style="list-style-type: none"> — is based on a SWOT or similar analysis to concentrate resources on a limited set of research and innovation priorities; — outlines measures to stimulate private RTD investment; — contains a monitoring mechanism. — A framework outlining available budgetary resources for research and innovation has been adopted.
	<p>ERDF:</p> <ul style="list-style-type: none"> — Enhancing research and innovation (R&I) infrastructure and capacities to develop R&I excellence, and promoting centres of competence, in particular those of European interest. 	<p>1.2 Research and Innovation infrastructure. The existence of a multi-annual plan for budgeting and prioritisation of investments.</p>	<ul style="list-style-type: none"> — An indicative multi-annual plan for budgeting and prioritisation of investments linked to Union priorities, and, where appropriate, the European Strategy Forum on Research Infrastructures (ESFRI) has been adopted.
<p>2. Enhancing access to, and use and quality of, information and communication technologies (ICT) (Broadband target)</p> <p>(referred to in point (2) of the first paragraph of Article 9)</p>	<p>ERDF:</p> <ul style="list-style-type: none"> — Developing ICT products and services, e-commerce, and enhancing demand for ICT. — Strengthening ICT applications for e-government, e-learning, e-inclusion, e-culture and e-health. 	<p>2.1. Digital growth: A strategic policy framework for digital growth to stimulate affordable, good quality and interoperable ICT-enabled private and public services and increase uptake by citizens, including vulnerable groups, businesses and public administrations including cross border initiatives.</p>	<ul style="list-style-type: none"> — A strategic policy framework for digital growth, for instance, within the national or regional smart specialisation strategy is in place that contains: <ul style="list-style-type: none"> — budgeting and prioritisation of actions through a SWOT or similar analysis consistent with the Scoreboard of the Digital Agenda for Europe; — an analysis of balancing support for demand and supply of ICT should have been conducted;

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
			<ul style="list-style-type: none"> — indicators to measure progress of interventions in areas such as digital literacy, e-inclusion, e-accessibility, and progress of e-health within the limits of Article 168 TFEU which are aligned, where appropriate, with existing relevant sectoral Union, national or regional strategies; — assessment of needs to reinforce ICT capacity-building.
	<p>ERDF:</p> <ul style="list-style-type: none"> — Extending broadband deployment and the roll-out of high-speed networks and supporting the adoption of emerging technologies and networks for the digital economy. 	<p>2.2. Next Generation Network (NGN) Infrastructure: The existence of national or regional NGN Plans which take account of regional actions in order to reach the Union high-speed Internet access targets, focusing on areas where the market fails to provide an open infrastructure at an affordable cost and of a quality in line with the Union competition and State aid rules, and to provide accessible services to vulnerable groups.</p>	<ul style="list-style-type: none"> — A national or regional NGN Plan is in place that contains: <ul style="list-style-type: none"> — a plan of infrastructure investments based on an economic analysis taking account of existing private and public infrastructures and planned investments; — sustainable investment models that enhance competition and provide access to open, affordable, quality and future-proof infrastructure and services; — measures to stimulate private investment.
<p>3. Enhancing the competitiveness of small and medium-sized enterprises (SMEs)</p> <p>(referred to in point (3) of the first paragraph of Article 9)</p>	<p>ERDF:</p> <ul style="list-style-type: none"> — Promoting entrepreneurship, in particular by facilitating the economic exploitation of new ideas and fostering the creation of new firms, including through business incubators. — Supporting the capacity of SMEs to grow in regional, national and international market, and to engage in innovation processes. 	<p>3.1. Specific actions have been carried out to underpin the promotion of entrepreneurship taking into account the Small Business Act (SBA).</p>	<ul style="list-style-type: none"> — The specific actions are: <ul style="list-style-type: none"> — measures have been put in place with the objective of reducing the time and cost involved in setting-up a business taking account of the targets of the SBA; — measures have been put in place with the objective of reducing the time needed to get licenses and permits to take up and perform the specific activity of an enterprise taking account of the targets of the SBA;

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
<p>4. Supporting the shift towards a low-carbon economy in all sectors</p> <p>(referred to in point (4) of the first paragraph of Article 9)</p>	<p>ERDF + Cohesion Fund:</p> <ul style="list-style-type: none"> — Supporting energy efficiency, smart energy management and renewable energy use in public infrastructure, including in public buildings, and in the housing sector. 	<p>4.1. Actions have been carried out to promote cost-effective improvements of energy end use efficiency and cost-effective investment in energy efficiency when constructing or renovating buildings.</p>	<ul style="list-style-type: none"> — a mechanism is in place to monitor the implementation of the measures of the SBA which have been put in place and assess the impact on SMEs. <p>— The actions are:</p> <ul style="list-style-type: none"> — measures to ensure minimum requirements are in place related to the energy performance of buildings consistent with Article 3, Article 4 and Article 5 of Directive 2010/31/EU of the European Parliament and of the Council ⁽¹⁾; — measures necessary to establish a system of certification of the energy performance of buildings consistent with Article 11 of Directive 2010/31/EU; — measures to ensure strategic planning on energy efficiency, consistent with Article 3 of Directive 2012/27/EU of the European Parliament and of the Council ⁽²⁾; — measures consistent with Article 13 of Directive 2006/32/EC of the European Parliament and of the Council ⁽³⁾ on energy end-use efficiency and energy services to ensure the provision to final customers of individual meters in so far as it is technically possible, financially reasonable and proportionate in relation to the potential energy savings.
	<p>ERDF + Cohesion Fund:</p> <ul style="list-style-type: none"> — Promoting the use of high-efficiency co-generation of heat and power based on useful demand. 	<p>4.2. Actions have been carried out to promote high-efficiency co-generation of heat and power.</p>	<p>— The actions are:</p> <ul style="list-style-type: none"> — Support for co-generation is based on useful heat demand and primary energy savings consistent with Article 7(1) and points (a) and (b) of Article 9(1) of Directive 2004/8/EC, Member States or their competent bodies have evaluated the existing legislative and regulatory framework with regard to authorisation procedures or other procedures in order to:

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
			<p>(a) encourage the design of co-generation units to match economically justifiable demands for useful heat output and avoid production of more heat than useful heat; and</p> <p>(b) reduce the regulatory and non-regulatory barriers to an increase in co-generation.</p>
	<p>ERDF + Cohesion Fund:</p> <p>— Promoting the production and distribution of energy derived from renewable sources.</p>	<p>4.3. Actions have been carried out to promote the production and distribution of renewable energy sources ⁽⁴⁾.</p>	<p>— Transparent support schemes, priority in grid access or guaranteed access and priority in dispatching, as well as standard rules relating to the bearing and sharing of costs of technical adaptations which have been made public are in place consistent with Article 14(1), Article 16(2) and 16(3) of Directive 2009/28/EC of the European Parliament and of the Council ⁽⁴⁾.</p> <p>— A Member State has adopted a national renewable energy action plan consistent with Article 4 of Directive 2009/28/EC.</p>
<p>5. Promoting climate change adaptation, risk prevention and management</p> <p>(Climate change target) (referred to in point (5) of the first paragraph of Article 9)</p>	<p>ERDF + Cohesion Fund:</p> <p>— Promoting investment to address specific risks, ensuring disaster resilience and developing disaster management systems.</p>	<p>5.1. Risk prevention and risk management: the existence of national or regional risk assessments for disaster management, taking into account climate change adaptation</p>	<p>— A national or regional risk assessment with the following elements shall be in place:</p> <p>— a description of the process, methodology, methods, and non-sensitive data used for risk assessment as well as of the risk-based criteria for the prioritisation of investment;</p> <p>— a description of single-risk and multi-risk scenarios;</p> <p>— taking into account, where appropriate, national climate change adaptation strategies.</p>

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
<p>6. Preserving and protecting the environment and promoting resource efficiency</p> <p>(referred to in point (6) of the first paragraph of Article 9)</p>	<p>ERDF + Cohesion Fund:</p> <p>— Investing in the water sector to meet the requirements of the Union's environmental acquis and to address needs, identified by the Member States for investment that goes beyond those requirements.</p>	<p>6.1. Water sector: The existence of a) a water pricing policy which provides adequate incentives for users to use water resources efficiently and b) an adequate contribution of the different water uses to the recovery of the costs of water services at a rate determined in the approved river basin management plan for investment supported by the programmes.</p>	<p>— In sectors supported by the ERDF and the Cohesion Fund, a Member State has ensured a contribution of the different water uses to the recovery of the costs of water services by sector consistent with the first indent of Article 9(1) of Directive 2000/60/EC having regard, where appropriate, to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected.</p> <p>— The adoption of a river basin management plan for the river basin district consistent with Article 13 of Directive 2000/60/EC</p>
	<p>ERDF + Cohesion Fund:</p> <p>— Investing in the waste sector to meet the requirements of the Union's environmental acquis and to address needs, identified by the Member States, for investment that goes beyond those requirements.</p>	<p>6.2. Waste sector: Promoting economically and environmentally sustainable investments in the waste sector particularly through the development of waste management plans consistent with Directive 2008/98/EC, and with the waste hierarchy.</p>	<p>— An implementation report as requested by Article 11(5) of Directive 2008/98/EC has been submitted to the Commission on progress towards meeting the targets set out in Article 11 of Directive 2008/98/EC.</p> <p>— The existence of one or more waste management plans as required under Article 28 of Directive 2008/98/EC;</p> <p>— The existence of waste prevention programmes, as required under Article 29 of Directive 2008/98/EC;</p> <p>— Necessary measures to achieve the targets on preparation for re-use and recycling by 2020 consistent with Article 11(2) of Directive 2008/98/EC have been adopted.</p>

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
<p>7. Promoting sustainable transport and removing bottlenecks in key network infrastructures</p> <p>(referred to in point (7) of the first paragraph of Article 9)</p>	<p>ERDF + Cohesion Fund:</p> <ul style="list-style-type: none"> — Supporting a multimodal Single European Transport Area by investing in the TEN-T. — Developing and rehabilitating comprehensive, high quality and interoperable railway systems, and promoting noise-reduction measures. — Developing and improving environmentally-friendly (including low-noise) and low-carbon transport systems, including inland waterways and maritime transport, ports, multimodal links and airport infrastructure, in order to promote sustainable regional and local mobility. <p>ERDF:</p> <ul style="list-style-type: none"> — Enhancing regional mobility by connecting secondary and tertiary nodes to TEN-T infrastructure, including multimodal nodes. 	<p>7.1. Transport: The existence of a comprehensive plan or plans or framework or frameworks for transport investment in accordance with the Member States' institutional set-up (including public transport at regional and local level) which supports infrastructure development and improves connectivity to the TEN-T comprehensive and core networks.</p>	<ul style="list-style-type: none"> — The existence of a comprehensive transport plan or plans or framework or frameworks for transport investment which complies with legal requirements for strategic environmental assessment and sets out: <ul style="list-style-type: none"> — the contribution to the single European Transport Area consistent with Article 10 of Regulation (EU) No 1315/2013 of the European Parliament and of the Council⁽³⁾, including priorities for investments in: <ul style="list-style-type: none"> — the core TEN-T network and the comprehensive network where investment from the ERDF and the Cohesion Fund is envisaged; and — secondary connectivity; — a realistic and mature pipeline for projects for which support from the ERDF and the Cohesion Fund is envisaged; — Measures to ensure the capacity of intermediary bodies and beneficiaries to deliver the project pipeline.
	<p>ERDF + Cohesion Fund:</p> <ul style="list-style-type: none"> — Supporting a multimodal Single European Transport Area by investing in the TEN-T. — Developing and rehabilitating comprehensive, high quality and interoperable railway systems, and promoting noise-reduction measures. 	<p>7.2. Railway: The existence within the comprehensive transport plan or plans or framework or frameworks of a specific section on railway development in accordance with the Member States' institutional set-up (including concerning public transport at regional and local level) which supports infrastructure development and improves connectivity to the TEN-T comprehensive and core networks. The investments cover mobile assets, interoperability and capacity- building.</p>	<ul style="list-style-type: none"> — The existence of a section on railway development within the transport plan or plans or framework or frameworks as set out above which complies with legal requirements for strategic environmental assessment (SEA) and sets out a realistic and mature project pipeline (including a timetable and budgetary framework); — Measures to ensure the capacity of intermediary bodies and beneficiaries to deliver the project pipeline.

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
	<ul style="list-style-type: none"> — Developing and improving environmentally-friendly (including low-noise) and low-carbon transport systems, including inland waterways and maritime transport, ports, multimodal links and airport infrastructure, in order to promote sustainable regional and local mobility. <p>ERDF:</p> <ul style="list-style-type: none"> — Enhancing regional mobility by connecting secondary and tertiary nodes to TEN-T infrastructure, including multimodal nodes. 		
	<p>ERDF + Cohesion Fund:</p> <ul style="list-style-type: none"> — Supporting a multimodal Single European Transport Area by investing in the TEN-T. — Developing and rehabilitating comprehensive, high quality and interoperable railway systems, and promoting noise-reduction measures. — Developing and improving environmentally-friendly (including low-noise) and low-carbon transport systems, including inland waterways and maritime transport, ports, multimodal links and airport infrastructure, in order to promote sustainable regional and local mobility. <p>ERDF:</p> <ul style="list-style-type: none"> — Enhancing regional mobility through connecting secondary and tertiary nodes to TEN-T infrastructure, including multimodal nodes. 	<p>7.3. Other modes of transport, including inland-waterways and maritime transport, ports, multimodal links and airport infrastructure: the existence within the comprehensive transport plan or plans or framework or frameworks of a specific section on inland-waterways and maritime transport, ports, multimodal links and airport infrastructure, which contribute to improving connectivity to the TEN-T comprehensive and core networks and to promoting sustainable regional and local mobility.</p>	<ul style="list-style-type: none"> — The existence of a section on inland-waterways and maritime transport, ports, multimodal links and airport infrastructure within the transport plan or plans or framework or frameworks which: <ul style="list-style-type: none"> — complies with legal requirements for strategic environmental assessment; — sets out a realistic and mature project pipeline (including a timetable and budgetary framework); — Measures to ensure the capacity of intermediary bodies and beneficiaries to deliver the project pipeline.
	<p>ERDF:</p> <ul style="list-style-type: none"> — Improving energy efficiency and security of supply through the development of smart energy distribution, storage and transmission systems and through the integration of distributed generation from renewable sources. 	<p>7.4 Development of smart energy distribution, storage and transmission systems.</p> <p>The existence of comprehensive plans for investments in smart energy infrastructure, and of regulatory measures, which contribute to improving energy efficiency and security of supply</p>	<ul style="list-style-type: none"> — Comprehensive plans describing the national energy infrastructure priorities are in place that are: <ul style="list-style-type: none"> — in accordance with Article 22 of Directive 2009/72/EC and of Directive 2009/73/EC, where applicable, and

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
			<ul style="list-style-type: none"> — consistent with the relevant regional investment plans under Article 12 and with the Union-wide ten-year network development plan in accordance with point (b) of Article 8(3) of Regulation (EC) No 714/2009 of the European Parliament and of the Council ⁽⁶⁾ and with Regulation (EC) No 715/2009 of the European Parliament and of the Council ⁽⁷⁾, and — compatible with Article 3(4) of Regulation (EU) No 347/2013 of the European Parliament and of the Council ⁽⁸⁾; — Those plans shall contain: <ul style="list-style-type: none"> — a realistic and mature project pipeline for projects for which support from the ERDF is envisaged; — measures to achieve the objectives of social and economic cohesion and environmental protection, in line with Article 3(10) of Directive 2009/72/EC and Article 3(7) of Directive 2009/73/EC; — measures to optimise the use of energy and promote energy efficiency, in line with Article 3(11) of Directive 2009/72/EC and Article 3(8) of Directive 2009/73/EC.
<p>8. Promoting sustainable and quality employment and supporting labour mobility</p> <p>(Employment target)</p> <p>(referred to in point (8) of the first paragraph of Article 9)</p>	<p>ESF:</p> <ul style="list-style-type: none"> — Access to employment for job-seekers and inactive people, including the long-term unemployed and people far from the labour market, also through local employment initiatives and support for labour mobility. 	<p>8.1. Active labour market policies are designed and delivered in the light of the Employment guidelines.</p>	<ul style="list-style-type: none"> — Employment services have the capacity to, and do, deliver: <ul style="list-style-type: none"> — personalised services and active and preventive labour market measures at an early stage, which are open to all jobseekers while focusing on people at highest risk of social exclusion, including people from marginalised communities;

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
			<ul style="list-style-type: none"> — comprehensive and transparent information on new job vacancies and employment opportunities taking into account the changing needs of the labour market. — Employment services have set up formal or informal cooperation arrangements with relevant stakeholders.
	<p>ESF:</p> <ul style="list-style-type: none"> — Self employment, entrepreneurship and business creation including innovative micro, small and medium-sized enterprises. <p>ERDF:</p> <ul style="list-style-type: none"> — Supporting the development of business incubators and investment support for self-employment, micro-enterprises and business creation. 	<p>8.2. Self-employment, entrepreneurship and business creation: the existence of a strategic policy framework for inclusive start-up.</p>	<ul style="list-style-type: none"> — A strategic policy framework for inclusive start-up support is in place with the following elements: <ul style="list-style-type: none"> — measures have been put in place with the objective of reducing the time and cost involved in setting up a business, taking account of the targets of the SBA; — measures have been put in place with the objective of reducing the time needed to get licenses and permits to take up and perform the specific activity of an enterprise, taking account of the targets of the SBA; — actions linking suitable business development services and financial services (access to capital), including reaching out to disadvantaged groups, areas, or both, where needed.
	<p>ESF:</p> <ul style="list-style-type: none"> — Modernisation of labour market institutions, such as public and private employment services, and improving the matching of labour market needs, including through actions that enhance transnational labour mobility as well as through mobility schemes and better cooperation between institutions and relevant stakeholders. <p>ERDF:</p> <ul style="list-style-type: none"> — Investing in infrastructure for employment services. 	<p>8.3. Labour market institutions are modernised and strengthened in the light of the Employment Guidelines;</p> <p>Reforms of labour market institutions will be preceded by a clear strategic policy framework and ex ante assessment including with regard to the gender dimension</p>	<ul style="list-style-type: none"> — Actions to reform employment services, aiming at providing them with the capacity to deliver: <ul style="list-style-type: none"> — personalised services and active and preventive labour market measures at an early stage, which are open to all jobseekers while focusing on people at highest risk of social exclusion, including people from marginalised communities; — comprehensive and transparent information on new job vacancies and employment opportunities taking into account the changing needs of the labour market.

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
			<ul style="list-style-type: none"> — Reform of employment services will include the creation of formal or informal cooperation networks with relevant stakeholders.
	<p>ESF:</p> <ul style="list-style-type: none"> — Active and healthy ageing. 	<p>8.4. Active and healthy ageing: Active ageing policies are designed in the light of the Employment Guidelines</p>	<ul style="list-style-type: none"> — Relevant stakeholders are involved in the design and follow-up of active ageing policies with a view to retaining elderly workers on the labour market and promoting their employment; — A Member State has measures in place to promote active ageing.
	<p>ESF:</p> <ul style="list-style-type: none"> — Adaptation of workers, enterprises and entrepreneurs to change. 	<p>8.5. Adaptation of workers, enterprises and entrepreneurs to change: The existence of policies aimed at favouring anticipation and good management of change and restructuring.</p>	<ul style="list-style-type: none"> — Instruments are in place to support social partners and public authorities to develop and monitor proactive approaches towards change and restructuring which include measures: <ul style="list-style-type: none"> — to promote anticipation of change; — to promote the preparation and management of the restructuring process.
	<p>ESF:</p> <ul style="list-style-type: none"> — Sustainable integration into the labour market of young people, in particular those not in employment, education or training, including young people at risk of social exclusion and young people from marginalised communities, including through the implementation of the Youth Guarantee. 	<p>8.6. The existence of a strategic policy framework for promoting youth employment including through the implementation of the Youth Guarantee.</p> <p>This ex ante conditionality applies only for implementation of the YEI</p>	<ul style="list-style-type: none"> — A strategic policy framework for promoting youth employment is in place that: <ul style="list-style-type: none"> — is based on evidence that measures the results for young people not in employment, education or training and that represents a base to develop targeted policies and monitor developments; — identifies the relevant public authority in charge of managing youth employment measures and coordinating partnerships across all levels and sectors; — involves stakeholders that are relevant for addressing youth unemployment; — allows early intervention and activation;

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
			<ul style="list-style-type: none"> — comprises supportive measures for access to employment, enhancing skills, labour mobility and sustainable integration of young people not in employment, education or training into the labour market.
<p>9. Promoting social inclusion, combating poverty and any discrimination</p> <p>(poverty target)</p> <p>(referred to in point (9) of the first paragraph of Article 9)</p>	<p>ESF:</p> <ul style="list-style-type: none"> — Active inclusion, including with a view to promoting equal opportunities and active participation, and improving employability. <p>ERDF:</p> <ul style="list-style-type: none"> — Investing in health and social infrastructure which contributes to national, regional and local development, reducing inequalities in terms of health status, promoting social inclusion through improved access to social, cultural and recreational services and the transition from institutional to community-based services. — Providing support for physical, economic and social regeneration of deprived communities in urban and rural areas. 	<p>9.1. The existence and the implementation of a national strategic policy framework for poverty reduction aiming at the active inclusion of people excluded from the labour market in the light of the Employment guidelines.</p>	<ul style="list-style-type: none"> — A national strategic policy framework for poverty reduction, aiming at active inclusion, is in place that: — provides a sufficient evidence base to develop policies for poverty reduction and monitor developments; — contains measures supporting the achievement of the national poverty and social exclusion target (as defined in the National Reform Programme), which includes the promotion of sustainable and quality employment opportunities for people at the highest risk of social exclusion, including people from marginalised communities; — involves relevant stakeholders in combating poverty; — depending on the identified needs, includes measures for the shift from institutional to community based care; — Upon request and where justified, relevant stakeholders will be provided with support for submitting project applications and for implementing and managing the selected projects.

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
	<p>ESF:</p> <ul style="list-style-type: none"> — Socio-economic integration of marginalised communities such as the Roma. <p>ERDF:</p> <ul style="list-style-type: none"> — Investing in health and social infrastructure which contributes to national, regional and local development, reducing inequalities in terms of health status, promoting social inclusion through improved access to social, cultural and recreational services and the transition from institutional to community-based services. — Providing support for physical, economic and social regeneration of deprived communities in urban and rural areas. — Investing in education, training and vocational training for skills and lifelong learning by developing education and training infrastructure. 	<p>9.2. A national Roma inclusion strategic policy framework is in place</p>	<ul style="list-style-type: none"> — A national Roma inclusion strategic policy framework is in place that: <ul style="list-style-type: none"> — sets achievable national goals for Roma integration to bridge the gap with the general population. These targets should address the four EU Roma integration goals relating to access to education, employment, healthcare and housing; — identifies where relevant those disadvantaged micro-regions or segregated neighbourhoods, where communities are most deprived, using already available socio-economic and territorial indicators (i.e. very low educational level, long-term unemployment, etc); — includes strong monitoring methods to evaluate the impact of Roma integration actions and a review mechanism for the adaptation of the strategy; — is designed, implemented and monitored in close cooperation and continuous dialogue with Roma civil society, regional and local authorities. — Upon request and where justified, relevant stakeholders will be provided with support for submitting project applications and for implementing and managing the selected projects.
	<p>ESF:</p> <ul style="list-style-type: none"> — Enhancing access to affordable, sustainable and high-quality services, including health care and social services of general interest. 	<p>9.3. Health: The existence of a national or regional strategic policy framework for health within the limits of Article 168 TFEU ensuring economic sustainability.</p>	<ul style="list-style-type: none"> — A national or regional strategic policy framework for health is in place that contains: <ul style="list-style-type: none"> — coordinated measures to improve access to health services;

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
	<p>ERDF:</p> <ul style="list-style-type: none"> — Investing in health and social infrastructure which contributes to national, regional and local development, reducing inequalities in terms of health status, promoting social inclusion through improved access to social, cultural and recreational services and the transition from institutional to community-based services. 		<ul style="list-style-type: none"> — measures to stimulate efficiency in the health sector, through deployment of service delivery models and infrastructure; — a monitoring and review system. — A Member State or region has adopted a framework outlining available budgetary resources on an indicative basis and a cost-effective concentration of resources on prioritised needs for health care.
<p>10. Investing in education, training and vocational training for skills and lifelong learning</p> <p>(Education target)</p> <p>(referred to in point (10) of the first paragraph of Article 9)</p>	<p>ESF:</p> <ul style="list-style-type: none"> — Reducing and preventing early school-leaving and promoting equal access to good quality early-childhood, primary and secondary education, including formal, non-formal and informal learning pathways for reintegrating into education and training. <p>ERDF:</p> <ul style="list-style-type: none"> — Investing in education, training and vocational training for skills and lifelong learning by developing education and training infrastructure. 	<p>10.1. Early school leaving: The existence of a strategic policy framework to reduce early school leaving (ESL) within the limits of Article 165 TFEU.</p>	<ul style="list-style-type: none"> — A system for collecting and analysing data and information on ESL at relevant levels is in place that: — provides a sufficient evidence-base to develop targeted policies and monitors developments. — A strategic policy framework on ESL is in place that: — is based on evidence; — covers relevant educational sectors including early childhood development, targets in particular vulnerable groups that are most at risk of ESL including people from marginalised communities, and addresses prevention, intervention and compensation measures; — involves all policy sectors and stakeholders that are relevant to addressing ESL.

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
	<p>ESF:</p> <ul style="list-style-type: none"> — Improving the quality and efficiency of, and access to, tertiary and equivalent education with a view to increasing participation and attainment levels, especially for disadvantaged groups. <p>ERDF:</p> <ul style="list-style-type: none"> — Investing in education, training and vocational training for skills and lifelong learning by developing education and training infrastructure. 	<p>10.2. Higher education: the existence of a national or regional strategic policy framework for increasing tertiary education attainment, quality and efficiency within the limits of Article 165 TFEU.</p>	<ul style="list-style-type: none"> — A national or regional strategic policy framework for tertiary education is in place with the following elements: <ul style="list-style-type: none"> — where necessary, measures to increase participation and attainment that: <ul style="list-style-type: none"> — increase higher education participation among low income groups and other under-represented groups with special regard to disadvantaged people, including people from marginalised communities; — reduce drop-out rates/improve completion rates; — encourage innovative content and programme design; — measures to increase employability and entrepreneurship that: <ul style="list-style-type: none"> — encourage the development of "transversal skills", including entrepreneurship in relevant higher education programmes; — reduce gender differences in terms of academic and vocational choices.
	<p>ESF:</p> <ul style="list-style-type: none"> — Enhancing equal access to lifelong learning for all age groups in formal, non-formal and informal settings, upgrading the knowledge, skills and competences of the workforce, and promoting flexible learning pathways including through career guidance and validation of acquired competences. 	<p>10.3. Lifelong learning (LL): The existence of a national and/or regional strategic policy framework for lifelong learning within the limits of Article 165 TFEU.</p>	<ul style="list-style-type: none"> — A national or regional strategic policy framework for lifelong learning is in place that contains measures: <ul style="list-style-type: none"> — to support the developing and linking services for LL, including their implementation and skills upgrading (i.e. validation, guidance, education and training) and providing for the involvement of, and partnership with relevant stakeholders;

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
	<p>ERDF:</p> <ul style="list-style-type: none"> — Investing in education, training and vocational training for skills and lifelong learning by developing education and training infrastructure. 		<ul style="list-style-type: none"> — for the provision of skills development for various target groups where these are identified as priorities in national or regional strategic policy frameworks (for example young people in vocational training, adults, parents returning to the labour market, low skilled and older workers, migrants and other disadvantaged groups, in particular people with disabilities); — to widen access to LL including through efforts to effectively implement transparency tools (for example the European Qualifications Framework, National Qualifications Framework, European Credit system for Vocational Education and Training, European Quality Assurance in Vocational Education and Training); — to improve the labour market relevance of education and training and to adapt it to the needs of identified target groups (for example young people in vocational training, adults, parents returning to the labour market, low-skilled and older workers, migrants and other disadvantaged groups, in particular people with disabilities).
	<p>ESF:</p> <ul style="list-style-type: none"> — Improving the labour market relevance of education and training systems, facilitating the transition from education to work, and strengthening vocational education and training (VET) systems and their quality, including through mechanisms for skills anticipation, adaptation of curricula and the establishment and development of work-based learning systems, including dual learning systems and apprenticeship schemes. 	<p>10.4. The existence of a national or regional strategic policy framework for increasing the quality and efficiency of VET systems within the limits of Article 165 TFEU.</p>	<ul style="list-style-type: none"> — A national or regional strategic policy framework is in place for increasing the quality and efficiency of VET systems within the limits of Article 165 TFEU which includes measures for the following:

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
	ERDF: — Investing in education, training and vocational training for skills and lifelong learning by developing education and training infrastructure		— to improve the labour market relevance of VET systems in close cooperation with relevant stakeholders including through mechanisms for skills anticipation, adaptation of curricula and the strengthening of work-based learning provision in its different forms; — to increase the quality and attractiveness of VET including through establishing a national approach for quality assurance for VET (for example in line with the European Quality Assurance Reference Framework for Vocational Education and Training) and implementing the transparency and recognition tools, for example European Credit system for Vocational Education and Training (ECVET).
11. Enhancing institutional capacity of public authorities and stakeholders and efficient public administration (referred to in point (11) of the first paragraph of Article 9)	ESF: — Investment in institutional capacity and in the efficiency of public administrations and public services at the national, regional and local levels with a view to reforms, better regulation and good governance. ERDF: — Enhancing institutional capacity of public authorities and stakeholders and efficient public administration through actions to strengthen the institutional capacity and the efficiency of public administrations and public services related to the implementation of the ERDF, and in support of actions under the ESF to strengthen the institutional capacity and the efficiency of public administration.	— The existence of a strategic policy framework for reinforcing the Member States' administrative efficiency including public administration reform	— A strategic policy framework for reinforcing a Member State's public authorities' administrative efficiency and their skills with the following elements are in place and in the process of being implemented: — an analysis and strategic planning of legal, organisational and/or procedural reform actions; — the development of quality management systems; — integrated actions for simplification and rationalisation of administrative procedures; — the development and implementation of human resources strategies and policies covering the main gaps identified in this field; — the development of skills at all levels of the professional hierarchy within public authorities;

Thematic objectives	Investment priorities	Ex ante conditionality	Criteria for fulfilment
	Cohesion Fund: — Enhancing institutional capacity of public authorities and stakeholders and efficient public administration through actions to strengthen the institutional capacity and the efficiency of public administrations and public services related to the implementation of the Cohesion Fund.		— the development of procedures and tools for monitoring and evaluation.

- (¹) Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (OJ L 153, 18.6.2010, p. 13).
- (²) Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC (OJ L 315, 14.11.2012, p. 1).
- (³) Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC (OJ L 114, 27.4.2006, p. 64).
- (⁴) Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ L 140, 5.6.2009, p. 16).
- (⁵) Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU (OJ L 348, 20.12.2013, p. 1).
- (⁶) Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ L 211, 14.8.2009, p. 15).
- (⁷) Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ L 211, 14.8.2009, p. 36).
- (⁸) Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ L 115, 25.4.2013, p. 39).

PART II: General ex ante conditionalities

Area	Ex ante conditionality	Criteria for fulfilment
1. Anti-discrimination	The existence of administrative capacity for the implementation and application of Union anti-discrimination law and policy in the field of ESI Funds	— Arrangements in accordance with the institutional and legal framework of Member States for the involvement of bodies responsible for the promotion of equal treatment of all persons throughout the preparation and implementation of programmes, including the provision of advice on equality in ESI fund-related activities; — Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of Union anti-discrimination law and policy.
2. Gender	The existence of administrative capacity for the implementation and application of Union gender equality law and policy in the field of ESI Funds	— Arrangements in accordance with the institutional and legal framework of Member States for the involvement of bodies responsible for gender equality throughout the preparation and implementation of programmes, including the provision of advice on gender equality in ESI Fund-related activities; — Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of Union gender equality law and policy as well as on gender mainstreaming.

Area	Ex ante conditionality	Criteria for fulfilment
3. Disability	The existence of administrative capacity for the implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCRPD) in the field of ESI Funds in accordance with Council Decision 2010/48/EC ⁽¹⁾	<ul style="list-style-type: none"> — Arrangements in accordance with the institutional and legal framework of Member States for the consultation and involvement of bodies in charge of protection of rights of persons with disabilities or representative organisations of persons with disabilities and other relevant stakeholders throughout the preparation and implementation of programmes; — Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of applicable Union and national disability law and policy, including accessibility and the practical application of the UNCRPD as reflected in Union and national legislation, as appropriate; — Arrangements to ensure monitoring of the implementation of Article 9 of the UNCRPD in relation to the ESI Funds throughout the preparation and the implementation of the programmes.
4. Public procurement	The existence of arrangements for the effective application of Union public procurement law in the field of the ESI Funds.	<ul style="list-style-type: none"> — Arrangements for the effective application of Union public procurement rules through appropriate mechanisms; — Arrangements which ensure transparent contract award procedures; — Arrangements for training and dissemination of information for staff involved in the implementation of the ESI funds; — Arrangements to ensure administrative capacity for implementation and application of Union public procurement rules.
5. State aid	The existence of arrangements for the effective application of Union State aid rules in the field of the ESI Funds.	<ul style="list-style-type: none"> — Arrangements for the effective application of Union State aid rules; — Arrangements for training and dissemination of information for staff involved in the implementation of the ESI funds; — Arrangements to ensure administrative capacity for implementation and application of Union State aid rules.
6. Environmental legislation relating to Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA)	The existence of arrangements for the effective application of Union environmental legislation related to EIA and SEA.	<ul style="list-style-type: none"> — Arrangements for the effective application of Directive 2011/92/EU of the European Parliament and of the Council ⁽²⁾ (EIA) and of Directive 2001/42/EC of the European Parliament and of the Council ⁽³⁾ (SEA); — Arrangements for training and dissemination of information for staff involved in the implementation of the EIA and SEA Directives; — Arrangements to ensure sufficient administrative capacity.

Area	Ex ante conditionality	Criteria for fulfilment
7. Statistical systems and result indicators	<p>The existence of a statistical basis necessary to undertake evaluations to assess the effectiveness and impact of the programmes.</p> <p>The existence of a system of result indicators necessary to select actions, which most effectively contribute to desired results, to monitor progress towards results and to undertake impact evaluation.</p>	<ul style="list-style-type: none"> — Arrangements for timely collection and aggregation of statistical data with the following elements are in place: <ul style="list-style-type: none"> — the identification of sources and mechanisms to ensure statistical validation; — arrangements for publication and public availability of aggregated data; — An effective system of result indicators including: <ul style="list-style-type: none"> — the selection of result indicators for each programme providing information on what motivates the selection of policy actions financed by the programme; — the establishment of targets for these indicators; — the consistency of each indicator with the following requisites: robustness and statistical validation, clarity of normative interpretation, responsiveness to policy, timely collection of data; — Procedures in place to ensure that all operations financed by the programme adopt an effective system of indicators.

(¹) Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, (OJ L 23, 27.1.2010, p. 35)

(²) Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ L 26, 28.1.2012, p. 1).

(³) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ L 197, 21.7.2001, p. 30).

Annex II

Agricultural Funds Conditionalities 2014-2020

Legislative texts

ANNEX II

RULES ON CROSS-COMPLIANCE PURSUANT TO ARTICLE 93

SMR: Statutory management requirement

GAEC: Standards for good agricultural and environmental condition of land

Area	Main Issue	Requirements and standards		
Environment, climate change, good agricultural condition of land	Water	SMR 1	Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ L 375, 31.12.1991, p. 1)	Articles 4 and 5
		GAEC 1	Establishment of buffer strips along water courses ⁽¹⁾	
		GAEC 2	Where use of water for irrigation is subject to authorisation, compliance with authorisation procedures	
		GAEC 3	Protection of ground water against pollution: prohibition of direct discharge into groundwater and measures to prevent indirect pollution of groundwater through discharge on the ground and percolation through the soil of dangerous substances, as listed in the Annex to Directive 80/68/EEC in its version in force on the last day of its validity, as far as it relates to agricultural activity	
	Soil and carbon stock	GAEC 4	Minimum soil cover	
		GAEC 5	Minimum land management reflecting site specific conditions to limit erosion	
		GAEC 6	Maintenance of soil organic matter level through appropriate practices including ban on burning arable stubble, except for plant health reasons ⁽²⁾	
	Biodiversity	SMR 2	Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010, p. 7)	Article 3(1), Article 3(2)(b), Article 4(1), (2) and (4)
		SMR 3	Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna (OJ L 206, 22.7.1992, p. 7)	Article 6(1) and (2)
	Landscape, minimum level of maintenance	GAEC 7	Retention of landscape features, including where appropriate, hedges, ponds, ditches, trees in line, in group or isolated, field margins and terraces, and including a ban on cutting hedges and trees during the bird breeding and rearing season and, as an option, measures for avoiding invasive plant species	
Public health, animal health and plant health	Food safety	SMR 4	Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ L 31, 1.2.2002, p. 1)	Articles 14 and 15, Article 17(1) ⁽³⁾ and Articles 18, 19 and 20

Area	Main Issue	Requirements and standards		
		SMR 5	Council Directive 96/22/EC of 29 April 1996 concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and beta-agonists, and repealing Directives 81/602/EEC, 88/146/EEC and 88/299/EEC (OJ L 125, 23.5.1996, p. 3)	Article 3(a), (b), (d) and (e) and Articles 4, 5 and 7
	Identification and registration of animals	SMR 6	Council Directive 2008/71/EC of 15 July 2008 on identification and registration of pigs (OJ L 213, 8.8.2005, p. 31)	Articles 3, 4 and 5
		SMR 7	Regulation (EC) No 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97(OJ L 204, 11.8.2000, p. 1)	Articles 4 and 7
		SMR 8	Council Regulation (EC) No 21/2004 of 17 December 2003 establishing a system for the identification and registration of ovine and caprine animals and amending Regulation (EC) No 1782/2003 and Directives 92/102/EEC and 64/432/EEC (OJ L 5, 9.1.2004, p. 8)	Articles 3, 4 and 5
	Animal diseases	SMR 9	Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies (OJ L 147, 31.5.2001, p. 1)	Articles 7, 11, 12, 13 and 15
Plant protection products	SMR 10	Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ L 309, 24.11.2009, p. 1)	Article 55, first and second sentence	
Animal welfare	Animal welfare	SMR 11	Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (OJ L 10, 15.1.2009, p. 7)	Articles 3 and 4
		SMR 12	Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs (OJ L 47, 18.2.2009, p. 5)	Article 3 and Article 4
		SMR 13	Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes(OJ L 221, 8.8.1998, p. 23)	Article 4

(¹) The GAEC buffer strips must respect, both within and outside vulnerable zones designated pursuant to Article 3(2) of Directive 91/676/EEC, at least the requirements relating to the conditions for land application of fertiliser near water courses, referred to in point A.4 of Annex II to Directive 91/676/EEC to be applied in accordance with the action programmes of Member States established under Article 5(4) of Directive 91/676/EEC.

(²) The requirement can be limited to a general ban on burning arable stubble, but a Member State may decide to prescribe further requirements.

(³) As implemented in particular by:

- Article 14 of Regulation (EC) No 470/2009 and the Annex of Regulation (EC) No 37/2010,
- Regulation (EC) No 852/2004: Article 4(1) and Annex I part A (II 4 (g, h, j), 5 (f, h), 6; III 8 (a, b, d, e), 9 (a, c)),
- Regulation (EC) No 853/2004: Article 3(1) and Annex III Section IX Chapter 1 (I-1 b, c, d, e; I-2 a (i, ii, iii), b (i, ii), c; I-3; I-4; I-5; II-A 1, 2, 3, 4; II-B 1(a, d), 2, 4 (a, b)), Annex III Section X Chapter 1(1),
- Regulation (EC) No 183/2005: Article 5(1) and Annex I, part A (I-4 e, g; II-2 a, b, e), Article 5(5) and Annex III (1, 2), Article 5(6), and
- Regulation (EC) No 396/2005: Article 18.

Annex III

EU Spending Conditionalities 2014-2020 and

EU Competence Comprehensive Table

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD,	EMF F	CAP I	JHA
								19%	6%	9%	10%	1%	28%	2%
Macroeconomic														
M1	Ex-ante macroeconomic (programming)	— Align all OPs to CSRs and other Council Recommendations under 121 and 146 TFEU	Cross-sector/ cross-over (economic governance)	EU soft law enforcement / structural	CPR, Art 15	Art 177 TFEU	Coordinating (Economic)	•	•	•	•	•	•	•
M2	Ex-post macroeconomic (reprogramming)	— Re-program ESI Funds to support new CSRs	Cross-sector/ cross-over (economic governance/ CSRs conditions)	EU soft law enforcement / structural	CPR, Art 23	Art 177 TFEU	Coordinating (Economic)	•	•	•	•	•	•	•
M3	Ex-post macroeconomic (reprogramming)	— Re-program ESI Funds to correct macroeconomic imbalances	Cross-sector (economic governance)	EU law enforcement	CPR, Art 23	Art 177 TFEU	Coordinating (Economic)	•	•	•	•	•	•	•
M4	Ex-post macroeconomic (reprogramming)	— Re-program ESI Funds to support economic adjustment programmes	Cross-over (compliance with economic adjustment programme conditionality)	EU and/or non-EU law enforcement / structural	CPR, Art 23	Art 177 TFEU	Coordinating (Economic)	•	•	•	•	•	•	•
M5	Ex-post macroeconomic (mandatory suspension)	— One Council Decision on failure to correct excessive deficits	Cross-sector (economic governance)	EU law enforcement	CPR, Art 23	Art 177 TFEU	Coordinating (Economic)	•	•	•	•	•	•	•
M6	Ex-post macroeconomic (mandatory suspension)	— Two Council Recommendations on failure to submit a sufficient corrective action plan in the same Macroeconomic Imbalance Procedure (MIP)	Cross-sector (economic governance)	EU law enforcement	CPR, Art 23	Art 177 TFEU	Coordinating (Economic)	•	•	•	•	•	•	•
M7	Ex-post macroeconomic (mandatory suspension)	— Two Council Decisions on failure to take the recommended action plan in the same Macroeconomic Imbalance Procedure (MIP)	Cross-sector (economic governance)	EU law enforcement	CPR, Art 23	Art 177 TFEU	Coordinating (Economic)	•	•	•	•	•	•	•
M8	Ex-post macroeconomic (mandatory suspension)	— Commission conclusion on failure to implement the adjustment programme and decision not to disburse financial assistance	Cross-over (compliance with adjustment programme conditionality)	EU and/or non-EU law enforcement / structural	CPR, Art 23	Art 177 TFEU	Coordinating (Economic)	•	•	•	•	•	•	•
M9	Ex-post macroeconomic (mandatory suspension)	— Council decision on failure to comply with a macroeconomic adjustment programme or with measures referred to in a Council decision based on Art 136 (1) TFEU	Cross-sector/ cross-over (economic policy/ macroeconomic adjustment programme conditionality)	EU and/or non-EU law enforcement / structural	CPR, Art 23	Art 177 TFEU	Coordinating (Economic)	•	•	•	•	•	•	•
M10	Ex post positive macroeconomic	— Continue complying with Macroeconomic adjustment programmes	Cross-over (economic policy)	EU and non-EU law enforcement function	CPR, Art 24	Art 177 TFEU	Coordinating (Economic)	•	•	•	•	•	•	•

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERDF	CF	ESF	EAF	EMF	CAP	JHA
								F	6%	9%	RD,	F	I	2%
								F	19%		10%			28%
General ex ante														
G1	Non-discrimination	The existence of administrative capacity for the implementation and application of Union anti-discrimination law and policy in the field of ESI Funds <ul style="list-style-type: none"> – Arrangements in accordance with the institutional and legal framework of Member States for the involvement of bodies responsible for the promotion of equal treatment of all persons throughout the preparation and implementation of programmes, including the provision of advice on equality in ESI fund-related activities; – Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of Union anti-discrimination law and policy. 	Cross-sector (all areas)	EU law enforcement /Structural reform/administrative capacity	CPR, Annex XI, Part II	Art 177 TFEU	Mainstreaming (non-discrimination)	●	●	●	●	●		
G2	Gender equality	The existence of administrative capacity for the implementation and application of Union gender equality law and policy in the field of ESI Funds <ul style="list-style-type: none"> – Arrangements in accordance with the institutional and legal framework of Member States for the involvement of bodies responsible for gender equality throughout the preparation and implementation of programmes, including the provision of advice on gender equality in ESI Fund-related activities; – Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of Union gender equality law and policy as well as on gender mainstreaming. 	Cross-sector (all areas)	EU law enforcement / Structural reform/administrative capacity	CPR, Annex XI, Part II	Art 177 TFEU	Mainstreaming (gender equality)	●	●	●	●	●		
G3	Disability	The existence of administrative capacity for the implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCRPD) in the field of ESI Funds in accordance with Council Decision 2010/48/EC (1) <ul style="list-style-type: none"> – Arrangements in accordance with the institutional and legal framework of Member States for the consultation and involvement of bodies in charge of protection of rights of persons with disabilities or representative organisations of persons with disabilities and other relevant 	Cross-sector (all areas)	EU law enforcement /Structural reform/administrative capacity	CPR, Annex XI, Part II	Art 177 TFEU	Mainstreaming (disability)	●	●	●	●	●		

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD, F	EMF F	CAP I	JHA
								19%	6%	9%	10%	1%	28%	2%
		stakeholders throughout the preparation and implementation of programmes; – Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of applicable Union and national disability law and policy, including accessibility and the practical application of the UNCRPD as reflected in Union and national legislation, as appropriate; – Arrangements to ensure monitoring of the implementation of Article 9 of the UNCRPD in relation to the ESI Funds throughout the preparation and the implementation of the programmes.												
G4	Public Procurement	The existence of arrangements for the effective application of Union public procurement law in the field of the ESI Funds. – Arrangements for the effective application of Union public procurement rules through appropriate mechanisms; – Arrangements which ensure transparent contract award procedures; – Arrangements for training and dissemination of information for staff involved in the implementation of the ESI funds; – Arrangements to ensure administrative capacity for implementation and application of Union public procurement rules.	Cross-sector (all areas)	EU Law enforcement Structural reform/administrative capacity	CPR, Annex XI, Part II	Art 177 TFEU	Internal Market (approximation of laws)	•	•	•	•	•		
G5	State Aid	The existence of arrangements for the effective application of Union State aid rules in the field of the ESI Funds. – Arrangements for the effective application of Union State aid rules; – Arrangements for training and dissemination of information for staff involved in the implementation of the ESI funds; – Arrangements to ensure administrative capacity for implementation and application of Union State aid rules.	Cross-sector (all areas)	EU law enforcement Structural reform/administrative capacity	CPR, Annex XI, Part II	Art 177 TFEU	Exclusive (competition)	•	•	•	•	•		
G6	Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA)	The existence of arrangements for the effective application of Union environmental legislation related to EIA and SEA.	Cross-sector (all areas)	EU Law enforcement Structural reform/admi	CPR, Annex XI, Part II	Art 177 TFEU	Shared (environment)	•	•	•	•	•		

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERDF	CF	ESF	EAF RD, F	EMF F	CAP I	JHA
								19%	6%	9%	10%	1%	28%	2%

— Arrangements for the effective application of Directive 2011/92/EU of the European Parliament and of the Council (2) (EIA) and of Directive 2001/42/EC of the European Parliament and of the Council (3) (SEA);

— Arrangements for training and dissemination of information for staff involved in the implementation of the EIA and SEA Directives;

— Arrangements to ensure sufficient administrative capacity.

G7	Statistical systems	<p>The existence of a statistical basis necessary to undertake evaluations to assess the effectiveness and impact of the programmes. The existence of a system of result indicators necessary to select actions, which most effectively contribute to desired results, to monitor progress towards results and to undertake impact evaluation.</p> <p>— Arrangements for timely collection and aggregation of statistical data with the following elements are in place:</p> <ul style="list-style-type: none"> — the identification of sources and mechanisms to ensure statistical validation; — arrangements for publication and public availability of aggregated data; — An effective system of result indicators including: <ul style="list-style-type: none"> — the selection of result indicators for each programme providing information on what motivates the selection of policy actions financed by the programme; — the establishment of targets for these indicators; — the consistency of each indicator with the following requisites: robustness and statistical validation, clarity of normative interpretation, responsiveness to policy, timely collection of data; — Procedures in place to ensure that all operations financed by the programme adopt an effective system of indicators. 	Cross-sector (all areas)	EU Law enforcement reform/administrative capacity	CPR, Annex XI, Part II	Art 177 TFEU	Shared (Cohesion)	•	•	•	•	•		
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NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD, F	EMF F	CAP I	JHA	
								19%	6%	9%	10%	1%	28%	2%	
Thematic ex-ante															
T1.1	Smart Specialisation Strategy (R&I)	The existence of a national or regional smart specialisation strategy in line with the National Reform Program, to leverage private research and innovation expenditure, which complies with the features of well-performing national or regional R&I systems. — A national or regional smart specialisation strategy is in place that: — is based on a SWOT or similar analysis to concentrate resources on a limited set of research and innovation priorities; — outlines measures to stimulate private R&D investment; — contains a monitoring mechanism. — A framework outlining available budgetary resources for research and innovation has been adopted.	Same-sector (R&I) TO 1 - 44 bln	Soft Law enforcement	CPR, Annex XI, Part I	Art 177 TFEU	Shared (research)	●							
T1.2	R&I Plan	The existence of a multi-annual plan for budgeting (1) and (2) prioritisation of investments. — An indicative multi-annual plan for budgeting and prioritisation of investments linked to Union priorities, and, where appropriate, the European Strategy Forum on Research Infrastructures (ESFRI) has been adopted.	Same-sector (R&I) TO 1 - 44 bln	Soft Law enforcement	CPR, Annex XI, Part I	Art 177 TFEU	Shared (research)	●							
T.2.1	Digital Growth	Digital growth: A strategic policy framework for digital growth to stimulate affordable, good quality and interoperable ICT-enabled private and public services and increase uptake by citizens, including vulnerable groups, businesses and public administrations including cross border initiatives. — A strategic policy framework for digital growth, for instance, within the national or regional smart specialisation strategy is in place that contains: — budgeting and prioritisation of actions through a SWOT or similar analysis consistent with the Scoreboard of the Digital Agenda for Europe; — an analysis of balancing support for demand and supply of ICT should have been conducted; — indicators to measure progress of interventions in areas such as digital	Same-sector (Digital growth and ICT economy) TO 2 - 14 bln	Soft Law enforcement	CPR, Annex XI, Part I	Art 177 TFEU	Shared (single market)	●							

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD,	EMF F	CAP I	JHA
								19%	6%	9%	10%	1%	28%	2%
		literacy, e-inclusion, e-accessibility, and progress of e-health within the limits of Article 168 TFEU which are aligned, where appropriate, with existing relevant sectoral Union, national or regional strategies; – assessment of needs to reinforce ICT capacity-building. The existence of national or regional NGN Plans which take account of regional actions in order to reach the Union high-speed Internet access targets, focusing on areas where the market fails to provide an open infrastructure at an affordable cost and of a quality in line with the Union competition and State aid rules, and to provide accessible services to vulnerable groups.												
T 2.2	Next Generation Network Infrastructure (NGN) [also RD]		Same-sector - (Digital growth and ICT economy) TO 2 - 14 bln	Soft Law enforcement	CPR, Annex XI, Part I	Art 177 TFEU	Shared (single market)	•						
T 3.1	Small Business Act (SBA)	Specific actions have been carried out to underpin the promotion of entrepreneurship taking into account the Small Business Act (SBA). – measures have been put in place with the objective of reducing the time and cost involved in setting-up a business taking account of the targets of the SBA; – measures have been put in place with the objective of reducing the time needed to get licenses and permits to take up and perform the specific activity of an enterprise taking account of the targets of the SBA; – a mechanism is in place to monitor the implementation of the measures of the SBA which have been put in place and assess the impact on SMEs.	Same-sector (SMEs) 63,7 bln	Soft Law enforcement	CPR, Annex XI, Part I	Art 177 TFEU	Shared (single market)	•						
T 4.1	Energy efficiency (new or renovated buildings) [also RD]	Actions have been carried out to promote cost-effective improvements of energy end use efficiency and cost-effective investment in energy efficiency when constructing or renovating buildings. – measures to ensure minimum requirements are in place related to the energy performance of buildings consistent with Article 3, Article 4 and Article 5 of Directive 2010/31/EU of the European Parliament and of the Council (1); – measures necessary to establish a system of certification of the energy	Same-sector energy efficiency (Energy efficiency in public infrastructure); High-efficiency co-generation; Production and distribution of renewables) 45 bln	- EU Law enforcement	CPR, Annex XI, Part I	Art 177 TFEU	Shared (energy)	•						

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD, F	EMF F	CAP I	JHA
		performance of buildings consistent with Article 11 of Directive 2010/31/EU; – measures to ensure strategic planning on energy efficiency, consistent with Article 3 of Directive 2012/27/EU of the European Parliament and of the Council (2); – measures consistent with Article 13 of Directive 2006/32/EC of the European Parliament and of the Council (3) on energy end-use efficiency and energy services to ensure the provision to final customers of individual meters in so far as it is technically possible, financially reasonable and proportionate in relation to the potential energy savings.								9%	10%	1%	28%	2%
T4.2	Co-generation	Actions have been carried out to promote high-efficiency co-generation of heat and power. – Support for co-generation is based on useful heat demand and primary energy savings consistent with Article 7(1) and points (a) and (b) of Article 9(1) of Directive 2004/8/EC. Member States or their competent bodies have evaluated the existing legislative and regulatory framework with regard to authorisation procedures or other procedures in order to: (a) encourage the design of co-generation units to match economically justifiable demands for useful heat output and avoid production of more heat than useful heat; and (b) reduce the regulatory and non-regulatory barriers to an increase in co-generation.	<i>Same-sector - energy efficiency</i> <i>(Energy efficiency in public infrastructure; High-efficiency co-generation; Production and distribution of renewables)</i> 45 bln	- EU law enforcement (Directive 2004/8/EC) -Regulatory function	CPR, Annex XI, Part I	Art 177 TFEU	Shared (energy)	●	●					
T4.3	Renewable energy	Actions have been carried out to promote the production and distribution of renewable energy sources (4). – Transparent support schemes, priority in grid access or guaranteed access and priority in dispatching, as well as standard rules relating to the bearing and sharing of costs of technical adaptations which have been made public are in place consistent with Article 14(1), Article 16(2) and 16(3) of Directive 2009/28/EC of the	<i>Same-sector - energy efficiency</i> <i>(Energy efficiency in public infrastructure; High-efficiency co-generation; Production and distribution of renewables)</i> 45 bln	EU Law enforcement (Directive 2009/28/EC)	CPR, Annex XI, Part I	Art 177 TFEU	Shared (energy)	●	●					

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERDF	CF	ESF	EAF RD,	EMF F	CAP I	JHA
								F	6%	9%	10%	1%	28%	2%
T5.1	Risk prevention and management	European Parliament and of the Council (4). – A Member State has adopted a national renewable energy action plan consistent with Article 4 of Directive 2009/28/EC. A national or regional risk assessment with the following elements shall be in place: – a description of the process, methodology, methods, and non-sensitive data used for risk assessment as well as of the risk-based criteria for the prioritisation of investment; – a description of single-risk and multi-risk scenarios; – taking into account, where appropriate, national climate change adaptation strategies.	<i>Same sector - risk and climate change to investment to prevent risk, disaster resilience and management)</i> 28 bln		CPR, Annex XI, Part I	Art 177 TFEU	Shared (environment)	●	●					
T6.1	Water Management	The existence of a) a water pricing policy which provides adequate incentives for users to use water resources efficiently and b) an adequate contribution of the different water uses to the recovery of the costs of water services at a rate determined in the approved river basin management plan for investment supported by the programmes. – In sectors supported by the ERDF and the Cohesion Fund, a Member State has ensured a contribution of the different water uses to the recovery of the costs of water services by sector consistent with the first indent of Article 9(1) of Directive 2000/60/EC having regard, where appropriate, to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected. – The adoption of a river basin management plan for the river basin district consistent with Article 13 of Directive 2000/60/EC	<i>Same sector - environmental protection (water sector environmental acquis and Member States needs for investment beyond requirements)</i> 63 bln	- EU law enforcement	CPR, Annex XI, Part I	Art 177 TFEU	Shared (environment)	●	●					
T6.2	Waste Management	Promoting economically and environmentally sustainable investments in the waste sector particularly through the development of waste management plans consistent with Directive 2008/98/EC, and with the waste hierarchy.	<i>Same sector - environmental protection (waste sector and environmental acquis)</i> 63 bln	- EU law enforcement	CPR, Annex XI, Part I	Art 177 TFEU	Shared (environment)	●	●					

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD, F	EMF F	CAP I	JHA
								19%	6%	9%	10%	1%	28%	2%
T17.1	Road Transport	The existence of a comprehensive plan or plans or framework or frameworks for transport investment in accordance with the Member States' institutional set-up (including public transport at regional and local level) which supports infrastructure development and improves connectivity to the TEN-T comprehensive and core networks. — The existence of a comprehensive transport plan or plans or framework or frameworks for transport investment which complies with legal requirements for strategic environmental assessment and sets out: — the contribution to the single European Transport Area consistent with Article 10 of Regulation (EU) No 1315/2013 of the European Parliament and of the Council (5), including priorities for investments in: — the core TEN-T network and the comprehensive network where investment from the ERDF and the Cohesion Fund is envisaged; and — secondary connectivity; — a realistic and mature pipeline for projects for which support from the ERDF and the Cohesion Fund is envisaged; — Measures to ensure the capacity of intermediary bodies and beneficiaries to deliver the project pipeline.	Same sector (CF:TEN-T, developing railway systems, developing transport systems; ERDF: TENT secondary nodes infrastructure) 58,3 bln	- Soft law enforcement - EU law enforcement - Structural reform / administrative capacity	CPR, Annex XI, Part I	Art 177 TFEU Shared (transport)	•	•						
T17.2	Rail Transport	The existence of a section on railway development within the transport plan or plans or framework or frameworks as set out above which complies with legal requirements for strategic environmental assessment (SEA) and sets out a realistic and mature project pipeline (including a timetable and budgetary framework); — Measures to ensure the capacity of intermediary bodies and beneficiaries to deliver the project pipeline.	Same sector (CF:TEN-T, developing railway systems, developing transport systems; ERDF: TENT secondary nodes infrastructure) 58,3 bln	- Soft law enforcement - EU law enforcement - Structural reform / administrative capacity	CPR, Annex XI, Part I	Art 177 TFEU Shared (transport)	•	•						
T17.3	Other Transport	The existence of a section on inland-waterways and maritime transport, ports, multimodal links and airport infrastructure within the transport plan or plans or framework or frameworks which: — complies with legal requirements for strategic	Same sector (CF:TEN-T, developing railway systems, developing transport systems; ERDF: TENT secondary nodes infrastructure) 58,3 bln	- Soft law enforcement - EU law enforcement - Structural reform /	CPR, Annex XI, Part I	Art 177 TFEU Shared (transport)	•	•						

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERDF	CF	ESF	EAF RD,	EMF F	CAP I	JHA
								F	%	%	%	%	%	%
		environmental assessment; – sets out a realistic and mature project pipeline (including a timetable and budgetary framework); – Measures to ensure the capacity of intermediary bodies and beneficiaries to deliver the project pipeline.	<i>secondary infrastructure</i> 58,3 bln	administrative capacity				19%	6%	9%	10%	1%	28%	2%
T7.4	Energy transport & distribution	Development of smart energy distribution, storage and transmission systems. The existence of comprehensive plans for investments in smart energy infrastructure, and of regulatory measures, which contribute to improving energy efficiency and security of supply – Comprehensive plans describing the national energy infrastructure priorities are in place that are: – in accordance with Article 22 of Directive 2009/72/EC and of Directive 2009/73/EC, where applicable, and – consistent with the relevant regional investment plans under Article 12 and with the Union-wide ten-year network development plan in accordance with point (b) of Article 8(3) of Regulation (EC) No 714/2009 of the European Parliament and of the Council (6) and with Regulation (EC) No 715/2009 of the European Parliament and of the Council (7), and – compatible with Article 3(4) of Regulation (EU) No 347/2013 of the European Parliament and of the Council (8); – Those plans shall contain: – a realistic and mature project pipeline for projects for which support from the ERDF is envisaged; – measures to achieve the objectives of social and economic cohesion and environmental protection, in line with Article 3(10) of Directive 2009/72/EC and Article 3(7) of Directive 2009/73/EC; – measures to optimise the use of energy and promote energy efficiency, in line with Article 3(11) of Directive 2009/72/EC and Article 3(8) of Directive 2009/73/EC.	<i>Same-sector (energy efficiency)</i> 45 bln	EU law enforcement (Third energy package) COM delegated acts enforcement	CPR, Amex XI, Part I Art 177 TFEU	Shared (single market) Approximation of laws (114 TFEU)	●							

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD, F	EMF F	CAP I	JHA
T8.1	Active labour market policies	Active labour market policies are designed and delivered in the light of the Employment guidelines. – Employment services have the capacity to, and do, deliver: – personalised services and active and preventive labour market measures at an early stage, which are open to all jobseekers while focusing on people at highest risk of social exclusion, including people from marginalised communities; – comprehensive and transparent information on new job vacancies and employment opportunities taking into account the changing needs of the labour market. – Employment services have set up formal or informal cooperation arrangements with relevant stakeholders.	Same-sector (access to employment of unemployed, vulnerable) 43 bln for all social action (ESF plus ERDF)	EU soft law (employment guidelines)	CPR, Annex XI, Part I	Art 177 TFEU	Coordinating (employment)	19%	6%	9%	10%	1%	28%	2%
T8.2	Self-employment	Self-employment, entrepreneurship and business creation: the existence of a strategic policy framework for inclusive start-up. – A strategic policy framework for inclusive start-up support is in place with the following elements: – measures have been put in place with the objective of reducing the time and cost involved in setting up a business, taking account of the targets of the SBA; – measures have been put in place with the objective of reducing the time needed to get licenses and permits to take up and perform the specific activity of an enterprise, taking account of the targets of the SBA; – actions linking suitable business development services and financial services (access to capital), including reaching out to disadvantaged groups, areas, or both, where needed.	Same-sector (development of business-incubators) 43 bln for all social action (ESF plus ERDF)	EU soft law (employment guidelines)	CPR, Annex XI, Part I	Art 177 TFEU	Coordinating (employment)							
T8.3	Labour market institutions	Labour market institutions are modernised and strengthened in the light of the Employment Guidelines; Reforms of labour market institutions will be preceded by a clear strategic policy framework and ex ante assessment including with regard to the gender dimension – Actions to reform employment services, aiming at providing them with the capacity to deliver: –	Same-sector (investing in employment services infrastructure) (modernisation of labour services)		CPR, Annex XI, Part I	Art 177 TFEU	Coordinating (employment/labour market)							

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERDF F	CF	ESF	EAF RD,	EMF F	CAP I	JHA
								19%	6%	9%	10%	1%	28%	2%
		personalised services and active and preventive labour market measures at an early stage, which are open to all jobseekers while focusing on people at highest risk of social exclusion, including people from marginalised communities; – comprehensive and transparent information on new job vacancies and employment opportunities taking into account the changing needs of the labour market. – Reform of employment services will include the creation of formal or informal cooperation networks with relevant stakeholders.	<i>43 bln for all social action (ESF plus ERDF)</i>											
T8.4	Active and healthy ageing	Active ageing policies are designed in the light of the Employment Guidelines – Relevant stakeholders are involved in the design and follow-up of active ageing policies with a view to retaining elderly workers on the labour market and promoting their employment; – A Member State has measures in place to promote active ageing.	Same-sector (active and healthy ageing)	EU soft law (employment guidelines)	CPR, Annex XI, Part I	Art 177 TFEU	Coordinating (employment/labour market)			●				
T8.5	Adaptation to change	Adaptation of workers, enterprises and entrepreneurs to change: The existence of policies aimed at favouring anticipation and good management of change and restructuring. – Instruments are in place to support social partners and public authorities to develop and monitor proactive approaches towards change and restructuring which include measures: – to promote anticipation of change; – to promote the preparation and management of the restructuring process.	Same-sector (adaptation of workers to change) <i>43 bln for all social action (ESF plus ERDF)</i>	EU soft law (employment guidelines)	CPR, Annex XI, Part I	Art 177 TFEU	Coordinating (employment/labour market)			●				
T8.6	Youth Employment	The existence of a strategic policy framework for promoting youth employment including through the implementation of the Youth Guarantee. This ex ante conditionality applies only for implementation of the YEI – A strategic policy framework for promoting youth employment is in place that: – is based on evidence that measures the results for young people not in employment, education or training and that represents a base to develop targeted policies and monitor	Same-sector (YEI - Youth employment initiative) <i>2.4 bln from 43 bln for all social action (ESF plus ERDF)</i>	EU soft law (employment guidelines; youth employment policy)	CPR, Annex XI, Part I	Art 177 TFEU	Coordinating (employment/labour market)			●				

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERDF	CF	ESF	EAF RD, F	EMF F	CAP I	JHA
								19%	6%	9%	10%	1%	28%	2%
		developments; – identifies the relevant public authority in charge of managing youth employment measures and coordinating partnerships across all levels and sectors; – involves stakeholders that are relevant for addressing youth unemployment; – allows early intervention and activation; – comprises supportive measures for access to employment, enhancing skills, labour mobility and sustainable integration of young people not in employment, education or training into the labour market.												
T9.1	Poverty Reduction	The existence and the implementation of a national strategic policy framework for poverty reduction aiming at the active inclusion of people excluded from the labour market in the light of the Employment guidelines. – A national strategic policy framework for poverty reduction, aiming at active inclusion, is in place that: – provides a sufficient evidence base to develop policies for poverty reduction and monitor developments; – contains measures supporting the achievement of the national poverty and social exclusion target (as defined in the National Reform Programme), which includes the promotion of sustainable and quality employment opportunities for people at the highest risk of social exclusion, including people from marginalised communities; – involves relevant stakeholders in combating poverty; – depending on the identified needs, includes measures for the shift from institutional to community based care; – Upon request and where justified, relevant stakeholders will be provided with support for submitting project applications and for implementing and managing the selected projects.	Same/ cross sector (active social inclusion) (health and social infrastructure; support for deprived communities) 43 bln <i>for all social action (ESF plus ERDF)</i>	EU soft law (employment guidelines; Europe 2020 targets)	CPR, Annex XI, Part I	Art 177 TFEU	Shared (cohesion) Coordinating (economic policy)	●	●	●				
T9.2	Roma	A national Roma inclusion strategic policy framework is in place – A national Roma inclusion strategic policy framework is in place that: – sets achievable national goals for Roma integration to bridge the gap with the general population. These	Same/ cross sector (active social inclusion) (Roma and marginalised	EU soft law (employment guidelines; Roma policy)	CPR, Annex XI, Part I	Art 177 TFEU	Shared (cohesion) Coordinating (economic policy)	●		●				

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERDF	CF	ESF	EAF RD,	EMF F	CAP I	JHA
								F	%	%	%	%	%	%
		<p>targets should address the four EU Roma integration goals relating to access to education, employment, healthcare and housing; – identifies where relevant those disadvantaged micro-regions or segregated neighbourhoods, where communities are most deprived, using already available socio-economic and territorial indicators (i.e. very low educational level, long-term unemployment, etc); – includes strong monitoring methods to evaluate the impact of Roma integration actions and a review mechanism for the adaptation of the strategy; – is designed, implemented and monitored in close cooperation and continuous dialogue with Roma civil society, regional and local authorities.</p> <p>– Upon request and where justified, relevant stakeholders will be provided with support for submitting project applications and for implementing and managing the selected projects</p>	communities inclusion (health and social infrastructure; deprived communities; education and vocational training)					19%	6%	9%	10%	1%	28%	2%
T9.3	Health	<p>The existence of a national or regional strategic policy framework for health within the limits of Article 168 TFEU</p> <p>– ensuring economic sustainability.</p> <p>– A national or regional strategic policy framework for health is in place that contains:</p> <ul style="list-style-type: none"> – coordinated measures to improve access to health services; – measures to stimulate efficiency in the health sector, through deployment of service delivery models and infrastructure; – a monitoring and review system. <p>– A Member State or region has adopted a framework outlining available budgetary resources on an indicative basis and a cost-effective concentration of resources on prioritised needs for health care.</p>	Same sector (active inclusion) (health and social infrastructure)	EU soft law (within the limits of 168 TFEU)	CPR, Annex XI, Part I	Art 177 TFEU	Supporting, coordinating, or supplementing actions	•	•	•				
T10.1	Early school leaving (ESL)	<p>The existence of a strategic policy framework to reduce early school leaving (ESL) within the limits of Article 165 TFEU.</p>	Same sector/cross-sector (Education and vocational training)	EU soft law (within the limits of 165 TFEU)	CPR, Annex XI, Part I	Art 177 TFEU	Supporting, coordinating, or supplementing actions	•		•				

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD, F	EMF F	CAP I	JHA
		<ul style="list-style-type: none"> – A system for collecting and analysing data and information on ESL at relevant levels is in place that: – provides a sufficient evidence-base to develop targeted policies and monitors developments. – A strategic policy framework on ESL is in place that: <ul style="list-style-type: none"> – is based on evidence; – covers relevant educational sectors including early childhood development, targets in particular vulnerable groups that are most at risk of ESL including people from marginalised communities, and addresses prevention, intervention and compensation measures; – involves all policy sectors and stakeholders that are relevant to addressing ESL. 	<p>(early school leaving target)</p> <p>(education and training infrastructure)</p> <p><i>34 bht overall ESF and ERDF</i></p>					19%	6%	9%	10%	1%	28%	2%
T10.2	Higher education	<p>The existence of a national or regional strategic policy framework for increasing tertiary education attainment, quality and efficiency within the limits of Article 165 TFEU.</p> <ul style="list-style-type: none"> – A national or regional strategic policy framework for tertiary education is in place with the following elements: <ul style="list-style-type: none"> – where necessary, measures to increase participation and attainment that: <ul style="list-style-type: none"> – increase higher education participation among low income groups and other under-represented groups with special regard to disadvantaged people, including people from marginalised communities; – reduce drop-out rates/ improve completion rates; – encourage innovative content and programme design; – measures to increase employability and entrepreneurship that: <ul style="list-style-type: none"> – encourage the development of "transversal skills", including entrepreneurship in relevant higher education programmes; – reduce gender differences in terms of academic and vocational choices. 	<p>Same sector /cross-sector</p> <p>(Education and vocational training)</p> <p>(tertiary education)</p> <p>(education and training infrastructure)</p>	EU soft law (within the limits of 165 TFEU)	Art 177 TFEU	Supporting, coordinating or supplementing actions			●	●				

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD,	EMF F	CAP I	JHA	
								F	6%	9%	10%	1%	28%	2%	
T10.3	Lifelong Learning	<p>The existence of a national and/or regional strategic policy framework for lifelong learning within the limits of Article 165 TFEU.</p> <p>– A national or regional strategic policy framework for lifelong learning is in place that contains measures: – to support the developing and linking services for LL, including their implementation and skills upgrading (i.e. validation, guidance, education and training) and providing for the involvement of, and partnership with relevant stakeholders;</p> <p>– for the provision of skills development for various target groups where these are identified as priorities in national or regional strategic policy frameworks (for example young people in vocational training, adults, parents returning to the labour market, low skilled and older workers, migrants and other disadvantaged groups, in particular people with disabilities); – to widen access to LL including through efforts to effectively implement transparency tools (for example the European Qualifications Framework, National Qualifications Framework, European Credit system for Vocational Education and Training, European Quality Assurance in Vocational Education and Training);</p> <p>– to improve the labour market relevance of education and training and to adapt it to the needs of identified target groups (for example young people in vocational training, adults, parents returning to the labour market, low-skilled and older workers, migrants and other disadvantaged groups, in particular people with disabilities).</p>	<p>Same sector /cross-sector (Education and vocational training)</p> <p>(LLL to all age groups)</p> <p>(education and training infrastructure)</p>	<p>EU soft law (within the limits of 165 TFEU)</p>	<p>CPR, Annex XI, Part I</p>	<p>Art 177 TFEU</p>	<p>Supporting, coordinating or supplementing actions</p>	<p>19%</p>	<p>6%</p>	<p>9%</p>	<p>10%</p>	<p>1%</p>	<p>28%</p>	<p>2%</p>	
T10.4	Vocational education and Training (VET)	<p>The existence of a national or regional strategic policy framework for increasing the quality and efficiency of VET systems within the limits of Article 165 TFEU.</p> <p>– A national or regional strategic policy framework is in place for increasing the quality and efficiency of VET systems within the limits of Article 165 TFEU which includes measures for the following:</p>	<p>Same sector /cross-sector (Education and vocational training)</p> <p>(VET, improving labour market relevance of education; facilitating</p>	<p>EU soft law (within the limits of 165 TFEU)</p>	<p>CPR, Annex XI, Part I</p>	<p>Art 177 TFEU</p>	<p>Supporting, coordinating or supplementing actions</p>	<p>●</p>	<p>●</p>	<p>●</p>	<p>●</p>	<p>●</p>	<p>●</p>	<p>●</p>	<p>●</p>

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD, F	EMF F	CAP I	JHA	
		<p>– to improve the labour market relevance of VET systems in close cooperation with relevant stakeholders including through mechanisms for skills anticipation, adaptation of curricula and the strengthening of work-based learning provision in its different forms; – to increase the quality and attractiveness of VET including through establishing a national approach for quality assurance for VET (for example in line with the European Quality Assurance Reference Framework for Vocational Education and Training) and implementing the transparency and recognition tools, for example European Credit system for Vocational Education and Training, (ECVET).</p>	<p>transition from education to work) (education and training infrastructure)</p>					19%	6%	9%	10%	1%	28%	2%	
T11	Administrative efficiency	<p>The existence of a strategic policy framework for reinforcing the Member States' administrative efficiency including public administration reform</p> <p>– A strategic policy framework for reinforcing a Member State's public authorities' administrative efficiency and their skills with the following elements are in place and in the process of being implemented: – an analysis and strategic planning of legal, organisational and/or procedural reform actions; – the development of quality management systems; – integrated actions for simplification and rationalisation of administrative procedures; – the development and implementation of human resources strategies and policies covering the main gaps identified in this field; – the development of skills at all levels of the professional hierarchy within public authorities; – the development of procedures and tools for monitoring and evaluation.</p>	<p>Same-sector / cross-sector (administrative capacity of public administrations with a view to reforms, better regulation and good governance - ESF) (enhancing institutional capacity of public authorities, of public administration and services related to the implementation of ECF) (enhancing institutional capacity of public authorities of public administration and services related to the implementation of ERDF and support actions ESF)</p>	EU soft law	CPR, Annex XI, Part I	Art 177 TFEU	Supporting, coordinating or supplementing actions (administrative coordination)	●	●	●					

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD,	EMF F	CAP I	JHA
								19%	6%	9%	10%	1%	28%	2%
Thematic ex-ante rural development														
RD3.1	Risk prevention and risk management (similar to ESI)	— National or regional risk assessment with: a description of data and methodology for assessment and indicators for investment prioritisation; description of single and multiple risk scenarios; where appropriate taking into account the national climate change adaptation strategies	Same-sector (promoting climate change adaptation TO 5)	EU soft law (climate change; risk prevention)	Regulation 1305/2013 Annex V	Art 42, 43(2) TFEU	Shared (environment)	●						
RD 4.1	Good environmental and agricultural conditions (GAEC)	— Standards for GAEC of land as referred to in Regulation 1306/2013 are established at the national level; defined in <i>by law</i> and specified in programmes	Cross-over (reinforcing GAEC conditionality in CAP; climate change and environmental protection in agriculture)	EU law (Regulation 1306/2013 common CAP funding regulation)	Regulation 1305/2013 Annex V	Art 42, 43(2) TFEU	Shared (environment)	●						
RD 4.2	Minimum requirements for fertilisers and plant protection products	— Minimum requirements for fertilisers and plant protection products as referred to at Art 28 (3) Chapter I of Regulation 1305/2016 (same EAFRD regulation) are specified in the programmes	Cross-sector (reinforcing climate change and environmental action in CAP)	EU law enforcement function (Art 28 (3) Regulation 1305/2013 - the exact same text of the RD funding regulation)	Regulation 1305/2013 Annex V	Art 42, 43(2) TFEU	Shared (environment)	●						
RD 4.3	Other mandatory national standards	— Other relevant national standards are specified in the programmes in line with Art 28 (3) Chapter I of Regulation 1305/2016	Cross-sector (reinforcing environmental action in CAP)	EU law enforcement function (Art 28 (3) Regulation 1305/2013 - the exact same text of the RD funding regulation)	Regulation 1305/2013 Annex V	Art 42, 43(2) TFEU	Shared (environment)	●						
RD 5.1	Energy efficiency (same as ESI)	— Energy performance of buildings Directive 2010/31/EU art 3, 4, 5 and 11. — Strategic planning on energy efficiency consistent with targets Art 3 Energy Efficiency Directive 2012/27/EU — Measures consistent with Art 13 Directive 2006/32/EC on end-use efficiency and meters (repealed from 4 June 2014)	Same-sector / cross-sector (supporting shift to efficiency and low carbon economy; reinforcing environmental action in CAP)	EU law enforcement function (Art 28 (3) Regulation 1305/2013 - the exact same text of the RD funding regulation)	Regulation 1305/2013 Annex V	Art 42, 43(2) TFEU	Shared (energy)	●						

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD, F	EMF F	CAP I	JHA	
								19%	6%	9%	10%	1%	28%	2%	
RD 5.2	Water sector (Same as ESI)	Water pricing policy — Adequate contribution of different water uses for the recovery of cost of water services at a rate in the approved river basin management plan	Same-sector / cross-sector (environmental protection and resource efficiency)	EU law enforcement function (Art 9 Water Framework Directive)	Regulation 1305/2013 Annex V	Art 42, 43(2) TFEU	Shared (environment)	●							
RD 5.3	Renewable energy (Same as ESI)	Actions to promote production and redistribution of renewable energy: — Transparent support schemes: - priority grid access; - rules on bearing and sharing cost of technical adaptation consistent with Art 14(1), 16(2), 16(3) Directive 2009/28/EC — Renewable energy action plan consistent with Art 4 Directive 2009/28/EC	Same sector / cross-sector (supporting shift to efficiency and low carbon economy in agriculture) (environmental action)	EU law enforcement function	Regulation 1305/2013 Annex V	Art 42, 43(2) TFEU	Shared (energy)	●							
RD 6	NGN (Same as ESI)	A national and regional NGN plan is in place	Cross-sector / Same sector (social inclusion, poverty reduction and economic development in rural areas) (Enhancing access to and use of quality broad-band technologies)	EU soft law enforcement	Regulation 1305/2013 Annex V	Art 42, 43(2) TFEU	Shared (single market)	●							
Thematic ex-ante fisheries															
FT 1	Report on fishing capacity	Report on fishing capacity has been submitted in line with Art.22(2) Regulation 1380/2013: — the report is in accordance to the Commission guidance; fishing capacity does not exceed ceiling in Annex II regulation	Same-sector / cross-sector (environmentally sustainable and resource efficient fisheries) (Enhancing competitiveness of SMEs of the fisheries and aquaculture sector) (promoting sustainable employment and labour mobility)	EU law enforcement function (Regulation (EU) 1380/2013)	Regulation 508/2014 Annex IV	Art 42, 43(2), 91(1), 100(2),17 3(3) 175, 188, 192, 194(2), 195 (2), 349 TFEU	Exclusive (fisheries)					●			
FT 2	Multianual strategic plan on aquaculture referred to at Art 34 Regulation (EU) 1380/2013	Multiannual national strategic plan on aquaculture transmitted to the (MNSPA)	cross-sector/ cross-sector (environmentally sustainable and	EU law enforcement function' effective	Regulation 508/2014 Annex IV	Art 42, 43(2), 91(1), 100(2),17 3(3) 175,	Exclusive (fisheries)							●	

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD,	EMF F	CAP I	JHA
								19%	6%	9%	10%	1%	28%	2%
	Common regulation	Fisheries Commission together with OP at the latest information on complementarities with MNSPA	resource efficient aquaculture) Enhancing competitiveness of SMEs of the fisheries and aquaculture sector) (preserving and protecting environment and resource efficiency) (promoting sustainable employment and labour mobility)	application of EU law (Regulation (EU) 1380/2013)	188, 192, 194(2), 195 (2), 349 TFEU									
FT 3	Administrative capacity to comply with requirements for data fisheries as set out in Art 25 Regulation (EU) 1380/2013 Common Fisheries regulation	Administrative capacity to prepare and apply a multiannual plan for data collection reviewed by the SIECF and accepted by the Commission — A description of the administrative capacity to prepare and implement work plans for data collection, reviewed by SIECF and accepted by the Commission — A description of the human capacity for human resources allocation to undertake bilateral and multilateral agreements with other member states	Same-sector (fostering implementation of common fisheries policy) (preserving and protecting the environment and resource efficiency)	EU law enforcement function (Regulation (EU) 1380/2013)/ Structural function	Regulation 508/2014 Annex IV Art 42, 43(2), 91(1), 100(2), 173(3), 175, 188, 192, 194(2), 195 (2), 349 TFEU	Exclusive (fisheries) Coordinating, supporting and supplementing action (administrative coordination)						●		
FT 4	Administrative capacity to comply with as set out in Art. 36 Regulation (EU) 1380/2013 Common Fisheries Regulation and further specified in the Regulation (EC) 1224/2009	A description of the administrative capacity to prepare and implement the national control programme for multiannual plans as referred to at Art 46 Regulation (EC) 1224/2009 — A description of the administrative capacity to prepare and implement common control programmes with MSs as provided at Art 94 Regulation (EC) 1224/2009	Same-sector (fostering implementation of common fisheries policy) (preserving and protecting the environment and resource efficiency)	EU law enforcement function (Regulation (EC) 1224/2009; Regulation 508/2014) / Structural function	Regulation 508/2014 Annex IV Art 42, 43(2), 91(1), 100(2), 173(3), 175, 188, 192, 194(2), 195 (2), 349 TFEU	Exclusive (fisheries) Coordinating, supporting and supplementing action (administrative coordination)						●		

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD, F	EMF F	CAP I	JHA	
								19%	6%	9%	10%	1%	28%	2%	
		<ul style="list-style-type: none"> — A description of the administrative capacity to prepare and implement specific control and inspection programmes as provided at Art 95 Regulation (EC) 1224/2009 — A description of the administrative capacity to apply a system of effective, proportionate and dissuasive sanctions for serious infringements as provided for in Art 90 Regulation (EC) 1224/2009 — A description of the administrative capacity to apply the point system for serious infringements as provided for in Art 92 Regulation (EC) 1224/2009 — — — — 													
Cross-compliance															
SMR 1	Water	<ul style="list-style-type: none"> — Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, Art 4,5 — Establishment of buffer strips along water courses 	Cross-sector (but closely related, sustainable use water in agriculture)		Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (environment)								
GAE C 1		<ul style="list-style-type: none"> — 	Cross-sector (but closely related, water pollution agricultural sources)		Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (environment)								
GAE C 2		<ul style="list-style-type: none"> — Where use of water for irrigation is subject to authorisation, compliance with authorisation procedures 	Cross-sector (but closely related, use water in agriculture)		Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (environment)								
GAE C 3		<ul style="list-style-type: none"> — Protection of ground water against pollution: prohibition of direct discharge into groundwater and measures to prevent indirect pollution of groundwater through discharge on the ground and percolation through the soil of dangerous substances, as listed in the Annex to Directive 80/68/EEC in its version in force on the last day of its validity, as far as it relates to agricultural activity 	Cross-sector (but closely related, sustainable use of ground water in agriculture)		Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (Environment)								

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERDF	CF	ESF	EAF RD,	EMF F	CAP I	JHA
								F	6%	9%	10%	1%	28%	2%
GAE C 4	Soil	— Minimum soil cover	Cross-sector (but closely related, sustainable exploitation of soil in agriculture)	Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (environment)	19%	6%	9%	10%	1%	28%	2%	
GAE C 5	—	Minimum land management reflecting site specific conditions to limit erosion	Cross-sector (but closely related, prevention of soil erosion in agriculture)	Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (environment)								
GAE C 6	—	Maintenance of soil organic matter level through appropriate practices including ban on burning arable stubble, except for plant health reasons	Cross-sector (but closely related, ban on burning arable stubble in agriculture)	Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (environment)								
SMR 2	Biodiversity	Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds Article 3(1), Article 3(2)(b), Article 4(1), (2) and (4)	Cross-sector (but closely related, protect or re-establish wild bird habitat on agricultural holdings)	Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (environment)								
SMR 3	—	Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna, Art 6 (1)(2)	Cross-sector (but closely related, flora and fauna protection in special conservation areas holdings)	Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (environment)								
GAE C 7	Landscape	Retention of landscape features, including where appropriate, hedges, ponds, ditches, trees in line, in group or isolated, field margins and terraces, and including a ban on cutting hedges and trees during the bird breeding and rearing season and, as an option, measures for avoiding invasive plant species	Cross-sector (but closely related, protection of natural landscape on agricultural holdings)	Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (environment)								
SMR 4	Food safety	Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, Articles 14 and 15, Article 17 (1)(3) and Articles 18, 19 and 20	Cross-sector (but closely related, food and feed safety rules and risk reporting)	Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (Agriculture) Approximation of laws (114 TFEU) Exclusive (Commercial policy) Coordinating, supporting, supplementing action (health)								
SMR 5	Animal identification and registration	Council Directive 96/22/EC of 29 April 1996 concerning the prohibition on the use in	Same-sector (prohibition of growth promotion)	Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (Agriculture)								

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD,	EMF F	CAP I	JHA
								19%	6%	9%	10%	1%	28%	2%
		stockfarming of certain substances having a hormonal or thyrostatic action and beta-agonists, Art 3,4,5,7	substances in stock farming, ie. hormonal											
SMR 6		— Council Directive of 15 July 2008 on identification and registration of pigs, Art 3,4,5	Same-sector (obligation of pigs registration)		Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (Agriculture)	●			●		●	
SMR 7		— Regulation (EC) No 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products, Art 4,7	Same-sector (obligation of cattle registration, including notification of births, movement and deaths)		Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (Agriculture)	●			●		●	
SMR 8		— Council Regulation (EC) No 21/2004 of 17 December 2003 establishing a system for the identification and registration of ovine and caprine animals, Art 3,4,5	Same-sector (obligation of sheep registration)		Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (Agriculture) Mainstreaming (animal welfare)	●			●		●	
SMR 9	Animal diseases	— Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies (TSE), Arts 7, 11, 12, 13, 15	Cross-sector (but closely related, 'mad cow' disease prevention, control, eradication)		Regulation 1306/2013, Annex II	Art 43 TFEU	Supportive (Health) Approximation of laws (114 TFEU))	●			●		●	
SMR 10	Plant products	— Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market, Art 55	Same/Cross-sector (but closely related, strict control and use of pesticides)	EU law enforcement	Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (Agriculture) Internal Market (approximation of laws) Supportive (Health)	●			●		●	
SMR 11	Animal welfare	— Council Directive of 18 December 2008 laying down minimum standards for the protection of calves, Art 3,4	Same-sector (calves minimum standards of care)	EU law enforcement	Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (Agriculture) Mainstreaming (animal welfare)	●			●		●	
SMR 12		— Council Directive of 18 December 2008 laying down minimum standards for the protection of pigs, Art 3,4	Same-sector (pigs minimum standards of care)	EU law enforcement	Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (Agriculture) Mainstreaming (animal welfare)	●			●		●	
SMR 13		— Council Directive of 20 July 1998 concerning the protection of animals kept for farming purposes (OJ L 221, 8.8.1998, p. 23), Art.4	Same-sector (any animal kept for farming purposes minimum standards of care)	EU law enforcement	Regulation 1306/2013, Annex II	Art 43 TFEU	Shared (Agriculture) Mainstreaming (animal welfare)	●			●		●	

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERDF	CF	ESF	EAF	EMF	CAP	JHA
								19%	6%	9%	10%	1%	28%	2%
	Green payment	— — Green farmers going beyond compliance: crop diversification, permanent grassland and ecological focus areas	Cross-sector (but closely related, environmental protection in agriculture)	EU policy enforcement	Regulation (EU) No 1307/2013, considerations (37), Arts. 43–47	Art 43 TFEU	Shared (Agriculture) (Environment)							
	Generic													
	Shengen acquis	— Declaration of compliance with the Union Schengen <i>acquis</i>	Same-sector (Instrument Borders and Visas)	EU law and policy enforcement	Regulation (EU) 515/2014, art. 10 (2) a) and c)	Art 77 TFEU (Borders and asylum migration)	Shared (area of freedom security and justice)							
		— Funds implemented in full respect with human rights, human dignity, shall comply with the rights and principles of the EU Charter of Fundamental Rights (the 'Charter'), EU data protection law and the European Convention of Human Rights (the 'ECHR'), right to asylum, the principle on <i>non-refoulement</i> and the 1951 Geneva Convention Relating to the Status of Refugees	Cross-sector (fundamental rights) (all Home affairs instruments and funds IBV, IPC and EMIF)	EU law and policy enforcement	Regulation (EU) 513/2014, Art. 3(5) 515/2014, Art. 3(4). Regulation (EU) 516/2014, Art. 19(2). Regulation (EU) 514/2014, Art. 47(1)-(2)	Art 82,84, 87 TFEU (Judicial and police cooperation)	Shared (area of freedom security and justice)							
	Common Policy	— Fisheries Private operators compliance ex ante and ex post with all Common Fisheries Policy rules	Same-sector	EU law and policy enforcement	Regulation (EU) 508/2014, Art. 10 (1)	Art 42, 43(2), 91(1), 100(2),17 3(3) 175, 188, 192, 194(2), 195 (2), 349 TFEU	Exclusive (fisheries)							
		— Member States operators compliance ex ante and ex post with all Common Fisheries Policy rules	Same-sector	EU law and policy enforcement	Regulation (EU) 508/2014, Art. 10 (2)	Art 42, 43(2), 91(1), 100(2),17 3(3) 175, 188, 192, 194(2), 195 (2), 349 TFEU	Exclusive (fisheries)							

NO	CONDITIONALITY	ACTIONS	TYPE	FUNCTION	LEGAL TEXT	LEGAL BASIS	COMPETENCE	ERD F	CF	ESF	EAF RD,	EMF F	CAP I	JHA
								19%	6%	9%	10%	1%	28%	2%
	EU Law	— All operations supported from EU funds shall comply with EU law and national law			Regulation (EU) 1303/2013, Art 6 Regulation (EU) 514/2014, 4, Art Regulation (EU) No 1303/2013, Art 85,			•	•	•	•	•	•	•

Conclusion

Most conditionalities are same sector and cross-sector. In terms of competence, they act within the area of shared and coordinating competence. Yet, there is a very high overlap between conditionality thematic reach and treaty competence.




1. Type														
	Same-sector				48*									[* 8 also cross-sector]
	Cross-sector				43*									[* 13 cross-sector, but closely linked - CAP]
	Cross-over				7*									[* 11 also same-sector; at the limit] [* 3 also cross-over]
2. Competence														[* 3 also cross-sector]
	Shared				49*									[* Environment (19); Agriculture & environment (10); Energy (5); Single Market: NGN, II, SBA (5); Transport (3), Cohesion: statistics, Roma, poverty (3); Research (2)]
	Coordinating				25*									{Economic policy (12); Employment (5); Education (4); Administrative capacity (3); Health (1)}
	Exclusive				7*									[* Fisheries (6) State aid (1)]
	Mainstreaming				5*									[* Gender, Disability, Discrimination, Animal Welfare (2)]
	Approximation of laws				4*									[* Health agriculture, food safety, energy transport, public procurement]

Annex IV


Ex ante Conditionalities 2014-2020

Romania

Annex IV: Ex ante conditionality fulfilment. Romania.

N	No	Ex ante conditionality	Criteria Regulation 1303/2013	Status	Responsible	Actions effectively fulfilled	Notes Achievement	Achievement
N	No	Ex ante conditionality	Criteria Regulation 1303/2013	Status	Responsible	Actions effectively fulfilled	Notes Achievement	Achievement
1	G1	Non-discrimination	The existence of administrative capacity for the implementation and application of Union anti-discrimination law and policy in the field of ESI Funds – Arrangements in accordance with the institutional and legal framework of Member States for the involvement of bodies responsible for the promotion of equal treatment of all persons throughout the preparation and implementation of programmes, including the provision of advice on equality in ESI fund-related activities; – Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of Union anti-discrimination law and policy.	Fulfilled 2015 Approval OP	National Council for Combating Discrimination (CNCD)	1. 637 officials trained, guide published, EU funded SMIS 52473 project, budget: 2 mln EUR 2. Inter-institutional agreement adopted between the National Non-discrimination Council, the Ministry of European Funds, Ministry of Labour, Ministry of Regional Development and Ministry of Agriculture - Protocol of May 2015 on collaboration for application of ex ante conditionality	Limited achievement. Inconsistent applicability assessment. Formal fulfilment assessment. Lack of DG JUST involvement. Cost (approx): 2 mln EUR (EU budget)	
2	G2	Gender equality	The existence of administrative capacity for the implementation and application of Union gender equality law and policy in the field of ESI Funds – Arrangements in accordance with the institutional and legal framework of Member States for the involvement of bodies responsible for gender equality throughout the preparation and implementation of programmes, including the provision of advice on gender equality in ESI Fund-related activities; – Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of Union gender equality law and policy as well as on gender mainstreaming.	Fulfilled 2015 Approval OP	CNCD	1. 568 officials trained, guide published 2. Inter-institutional agreement adopted on collaboration for application of ex ante conditionality	Limited achievement. Inconsistent applicability assessment. Formal fulfilment assessment. Lack of DG JUST involvement. Cost (approx): G1 supra	
3	G3	Disability	The existence of administrative capacity for the implementation and application of the United Nations Convention on the rights of persons with disabilities (UNCRPD) in the field of ESI Funds in accordance with Council Decision 2010/48/EC (1) – Arrangements in accordance with the institutional and legal framework of Member States for the consultation and involvement of bodies in charge of protection of rights of persons with disabilities or representative organisations of persons with disabilities and other relevant stakeholders	Fulfilled 2015 Approval OP	CNCD	1. 607 officials trained, guide published 2. Inter-institutional agreement adopted on collaboration for application of ex ante conditionality	Limited achievement. Inconsistent applicability assessment. Formal fulfilment assessment. Lack of DG JUST involvement. Cost (approx): G1 supra	

Annex IV: Ex ante conditionality fulfilment. Romania.

	<p>throughout the preparation and implementation of programmes; – Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of applicable Union and national disability law and policy, including accessibility and the practical application of the UNCRPD as reflected in Union and national legislation, as appropriate; – Arrangements to ensure monitoring of the implementation of Article 9 of the UNCRPD in relation to the ESI Funds throughout the preparation and the implementation of the programmes.</p> <p>The existence of arrangements for the effective application of Union public procurement law in the field of the ESI Funds.</p> <p>– Arrangements for the effective application of Union public procurement rules through appropriate mechanisms;</p> <p>– Arrangements which ensure transparent contract award procedures;</p> <p>– Arrangements for training and dissemination of information for staff involved in the implementation of the ESI funds;</p> <p>– Arrangements to ensure administrative capacity for implementation and application of Union public procurement rules.</p>	<p>Not fulfilled</p> <p>18 Ares (2017) 3886477</p>	<p>MFP, ANAP, CSM, CNSC, CC, AND, etc</p>	<p>Summary of the 101 criteria to fulfill</p> <p>— First actions:</p> <ol style="list-style-type: none"> 1. Establishment of ANAP EGO 13/2015 approved by Law 244/2015 2. National strategy for public procurement (PP) approved by GD 901/2015 (outsourced to EIB, 19mln EUR overall technical assistance) <p>— Effective application of EU rules</p> <ol style="list-style-type: none"> 1. Transposition of EU Directives 23,24,25/2014 through Law 98/2016, 99/2016, 100/2016, 101/2016 2. Government implementing decisions on new PP Laws 3. Public procurement impact assessments of proposed legislation methodology Government Decisions 322/2015; ANAP issue negative opinions in case of conflict (last ANAP negative opinion not followed by the Parliament) 4. Repeal conflicting legislation (EGO 34/2006 on conflict of interest, 51/2016 on guarantee) by EGO 58/2016 and transposed directives 5. Screening unit on national legislation and ECI case law Order ANAP 91/2016; Notify COM through MAE in case of national conflicting legislation 6. Remedies systems: Establishment of CNCS by law 101/2016 (free complaints procedure) and Court of Appeals specialised chambers (not really specialised) 7. Unitary interpretation of CNCS case law Order CNCS 6/2017 8. Compulsory preliminary complaint procedure before the competent authority (preliminary notification) to CNCS free of charge 9. CNCS database online http://portal.cnsc.ro/ 10. Quarterly meetings between CNCS, Court of Appeals and CSM Unitary administrative-jurisdictional practice Law 101/2016 <p>— Transparent award process (EIB technical assistance)</p> <ol style="list-style-type: none"> 11. Shift control methodology from systematic to sample 12. Ex ante verification system: creation of a ANAP ex ante directorate; staffing; guide; concept notes, checklists; mandatory automatic correction decisions (EIB) 13. PREVENT system operational and compulsory for all PPP; Government Decision 923/2014, Law 184/2016, technical assistance project for National Agency for Integrity ANI (7mln 	<p>Some achievement, but uncertain. Not all criteria fulfilled.</p> <p>By letter Ares (2017) 3866477 of 02/08/17 the COM informed Ro that the conditionality is not fulfilled and asked for additional information on:</p> <ol style="list-style-type: none"> 1. EU acquis effective implementation <p>— Effective functioning of the EU law and CJEU case law screening unit of the National Public Procurement Agency</p> <ol style="list-style-type: none"> 2. Transparent procurement procedures <p>— Effective ex ante external control based on sample error: adoption of proper legal framework, methodology, institutional structures and human capital</p> <p>— Lowering the direct public procurement thresholds</p> <p>— Adoption of international FIDIC contract conditions in national legislation</p> <p>— Improved electronic platform is not in place - SICAP</p> <ol style="list-style-type: none"> 3. Administrative capacity <p>— Revision of MFP on 923/2014 preventive financial control</p> <p>— Professionalization of public procurement officials</p>	
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	<p>EUR); Anaf-ANI collaboration protocol 6474/2017; Integrity reform ANI, and Guide. (Not fulfilled -system not operational)</p> <p>14. Lower the threshold for direct offline acquisitions (Not fulfilled) BUT the direct offline acquisitions will still be published in SEAP if their value is >=3000 EUR; The contracts below (5mln/130000/700000 EUR Art 7 (1) L 98/2016 transp. Directive 23/2014 EU) will be awarded through simplified procedure.</p> <p>15. Adoption of international <u>FIDIC</u> General Conditions of PP Contract form (Not fulfilled), replaced NOW by agreement to adopt National Framework Contract on PP (Not fulfilled).</p> <p>16. Standard PP contract conditions in intellectual services procurement (Outsourced to World Bank technical assistance)</p> <p>17. Mandatory mapping and prioritisation of public utilities in need of public investment by L 159/2016; L225/2016;</p> <p>18. Publication of all public procurement contracts on SEAP/and migration to new SICAP public database (Not launched); publication of all modifications to PP contracts that lead to minimum 5% price increase; publication of all other modification at the end of PP contract.</p> <p>19. Improved SICAP (Not yet launched)</p> <p>20. Training Training on SICAP demo - AADR 3807 users trained</p> <p>21. Create PP specialisation in universities curricula - 3 universities put in place public procurement short-programs (LLL 4-6 months at 500-800 EUR cost)</p> <p>22. 2017 Training plan in PP - 9 trainings fulfilled</p> <p>23. Professionalization of PP function - PP strategy 12 training sessions in place;</p> <p>24. preventive financial controller function: training; staff; guidance by EIB; Code of ethics by EIB.</p> <p>25. Training of judges on new PP law by CSM decision 86/2017; 6 training seminars supported by RO-SWISS fund in 2017; 6 seminars in 2016 by Freedom House; 1 Seminar Court of Appeal Bucharest; 2 seminars CNCS-ANAP; 2 seminars Minister of Home Affairs Anticorruption Directorate.</p> <p>— Administrative capacity</p> <p>26. Monitoring and Supervisions functions reform according to the NSPP approved by GD 901/2015</p> <p>27. Performance indicators to be published (Financed through EU Funds POC A)</p> <p>28. Reinforce ANAP policy making function - department of Public policy by decisions ANAP 12/2016</p> <p>29. Revised Government Order 923/2014 on financial preventive control of proposed legislation - guide published</p>				<p>— Online guide</p> <p>— Use of the online guide</p> <p>— Establishment of a functional Procurement Unit at the Central government level (CPU)</p> <p>— Establishment and piloting Centralised Public Procurement Units at the regional level</p> <p>— PREVENT reported as MCV achievement in 2017 ten years report p.7, but at the same time states that the COM does not find it appropriately to link the eligibility of EU funds on achievements in MCV. p.3</p> <p>Cost (approx): 30 mln EUR (EU budget)</p>
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5	G5	State Aid	<p>The existence of arrangements for the effective application of Union State aid rules in the field of the ESI Funds.</p> <ul style="list-style-type: none"> – Arrangements for the effective application of Union State aid rules; – Arrangements for training and dissemination of information for staff involved in the implementation of the ESI funds; – Arrangements to ensure administrative capacity for implementation and application of Union State aid rules. 	Fulfilled 2016 Ares(2016)5926 764 14/10/2016	National Competition Council (CNC)	<ol style="list-style-type: none"> 1. National register of state aid REGAS to check ex ante the compatibility with EU state aid rules (EU-funded SMIS50633) 2. Inter-institutional agreement signed 3. Acquisition of technical equipment, testing the REGAS with SMIS data 4. Change of National law (to make the use and update of REGAS compulsory but in fact change completely the legal framework - Emergency Government Ordinance 77/2014 amending the Law 21/1996 on competition and repealing the Emergency Government Ordinance 117/2006, published in MOJ 1893 of 09.12.2014) 	<p>Some achievement. Some value added to the policy goal pursued. Yet, according to the Court of Auditors fulfilment of ex ante conditionality is not consistent with DG COMP assessment on state aid (SR 24/2016).</p> <p>Cost (approx): 1,8 mln EUR (EU budget)</p>	
6	G6	Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA)	<p>The existence of arrangements for the effective application of Union environmental legislation related to EIA and SEA.</p> <ul style="list-style-type: none"> – Arrangements for the effective application of Directive 2011/92/EU of the European Parliament and of the Council (2) (EIA) and of Directive 2001/42/EC of the European Parliament and of the Council (3) (SEA); – Arrangements for training and dissemination of information for staff involved in the implementation of the EIA and SEA Directives; – Arrangements to ensure sufficient administrative capacity. 	Fulfilled Ares(2016)7131 178 22/12/2016	Ministry of Environment (MMAP) National Agency for Environmental Protection (ANPM)	<ol style="list-style-type: none"> 1. Adoption of EIA Jaspers guides by government order 2. Elaboration of 14 new general and thematic guidelines 3. Training of officials based on Jaspers and EIA/SEA guides in 2 phases <ul style="list-style-type: none"> – Jaspers core: 2015 - 30 persons trained first – Phase I: 2014-2016 - 400 participants – Phase II: 2016-2020 - 392 participants trained – Phase III: by 2020 - dissemination to 425 officials in charge of EIA and SEA Directives 	<p>Some achievement, but uncertain. Training and guidance finalised too late. After most OP and ESI Funds investment has already been planned and assessed in environmental impact.</p> <p>Cost (approx): 2 mln EUR (EU budget)</p>	
7	G7	Statistical systems	<p>The existence of a statistical basis necessary to undertake evaluations to assess the effectiveness and impact of the programmes. The existence of a system of result indicators necessary to select actions, which most effectively contribute to desired results, to monitor progress towards results and to undertake impact evaluation.</p> <ul style="list-style-type: none"> – Arrangements for timely collection and aggregation of statistical data with the following elements are in place: <ul style="list-style-type: none"> – the identification of sources and mechanisms to ensure statistical validation; – arrangements for publication and public availability of aggregated data; – An effective system of result indicators including: <ul style="list-style-type: none"> – the selection of result indicators for each programme providing information on what motivates the selection of policy actions financed by the programme; – the establishment of targets for these indicators; – the consistency of each indicator with the following requisites: robustness and statistical validation, clarity of normative interpretation, responsiveness to policy, timely collection of data; – Procedures in place to ensure that all operations financed by the programme adopt an effective system of indicators. 	Fulfilled end 2016 COM Ares (2016)7132073 22/12/2016.	MFE MA Court of Auditors	<ol style="list-style-type: none"> 1. The identification of sources and mechanisms to ensure statistical validation <ul style="list-style-type: none"> – Approval of indicators guide for each OP – Approval of OP indicators monitoring procedure – Adaptation of old SMIS system to Regulation 480/2014 - SMIS 2014+ system functional 2. Adopted common Strategic communication framework for 6 out of 8 OP (except MARE and AGRI) by each OP Monitoring Committee: <ul style="list-style-type: none"> – publication of implementation reports online MFE (not really all published); – publication of physical and financial indicators on MFE website 3. An effective system of result indicators <ul style="list-style-type: none"> – Delivered together with the digital monitoring system and procedure approved by each OP Monitoring Committee 4. Effective system of indicators 5. Bis point 3 and Multiannual evaluation plan published for each OP 	<p>Limited achievement. Did not lead to substantive change in the national statistical systems. MFE and each Management authority took the lead. Barely connected to National statistical institute. Court of Auditors identified systems were not fully operational in 2017 even if conditionality is reported fulfilled (SR 15/2017).</p> <p>Cost (approx): N/A</p>	
8	T1.1	Smart Specialisation (R&I)	<p>The existence of a national or regional smart specialisation strategy in line with the National Reform Program, to leverage private research and innovation expenditure, which complies with the features of well-performing national or regional R&I systems.</p> <ul style="list-style-type: none"> – A national or regional smart specialisation strategy is in place that: <ul style="list-style-type: none"> – is based on a SWOT or similar analysis to concentrate resources on a limited set of research and innovation priorities; – outlines measures to stimulate private R&D investment; – contains a monitoring 	Fulfilled 2017 ARES(2017)414137-26/01/2017	National Authority Scientific Research (NASR)	<ol style="list-style-type: none"> 1. Roadmaps for each 4 Smart Specialization Areas identified in the National Strategy (EU funded 5 mln EUR) 	<p>Some achievement, but uncertain. Great structural challenges of research sector and human resources.</p> <p>Cost (approx): 5 mln EUR (EU budget)</p>	


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			<p>mechanism. – A framework outlining available budgetary resources for research and innovation has been adopted.</p>			<p>2. Screening networks at national and regional level and information uploaded in Brainromania online platform created plus youtube video and FB page - NOT updated as well as in erris.ro database</p> <p>3. Establishment of 2 policy units in NASRI by Order of the Ministry 5806/2016</p> <p>4. establishment of the National Council of Innovation and Entrepreneurship CO 45/2016, replaced by National Council for Technologic Transfer and Innovation by Ministry Order 2014/2017 as a consultative body of the ministry</p>		
<p>9</p>	<p>T1.2</p>	<p>R&I Infrastructure</p>	<p>The existence of a multi-annual plan for budgeting (1) and (2) prioritisation of investments. – An indicative multi-annual plan for budgeting and prioritisation of investments linked to Union priorities, and, where appropriate, the European Strategy Forum on Research Infrastructures (ESFRI) has been adopted.</p>	<p>Not fulfilled end 2017</p>	<p>National Authority for Scientific Research (NASRI)</p>	<p>1. Multi-annual plan for budgeting Arrangements to ensure multiannual financing of Research Infrastructure from National and EU funds -Not fulfilled</p> <p>2. R&I Infrastructure. Prioritisation of investments: Roadmap Research infrastructure 2017-2025 approved by Order of the Minister of R&I; R&I infrastructure multiannual plan in line with ESFRI (European Forum Research Infrastructure) based on Horizon 2020 methodology List of national research infrastructures respecting ESFRI standards: Pan-European and National, including list of new infrastructures as part of the Roadmap Open access registry for research infrastructure https://www.errisro/index.php?</p>	<p>Limited achievement. No multiannual plan for budgeting adopted. Cost (approx): T.1.1. supra</p>	
<p>10</p>	<p>T.2.1</p>	<p>Digital Growth</p>	<p>Digital growth: A strategic policy framework for digital growth to stimulate affordable, good quality and interoperable ICT-enabled private and public services and increase uptake by citizens, including vulnerable groups, businesses and public administrations including cross border initiatives. – A strategic policy framework for digital growth, for instance, within the national or regional smart specialisation strategy is in place that contains: – budgeting and prioritisation of actions through a SWOT or similar analysis consistent with the Scoreboard of the Digital Agenda for Europe; – an analysis of balancing support for demand and supply of ICT should have been conducted; – indicators to measure progress of interventions in areas such as digital literacy, e-inclusion, e-accessibility, and progress of e-health within the limits of Article 168 TFEU which are aligned, where appropriate, with existing relevant sectoral Union, national or regional strategies; – assessment of needs to reinforce ICT capacity-building.</p>	<p>Fulfilled end 2016 ARES/2017/278 299 - 18.01.2017</p>	<p>Ministry of Communication and Information Security (MCIS)</p>	<p>1. Adoption of the National strategy on digital growth by Government Order 245/2015 Monitoring and evaluation mechanism- Contract outsourced to the World Bank</p> <p>3. A Manual for the national strategy for digital growth, including development of indicators</p> <p>4. A dashboard application</p> <p>5. Adequate and operational institutional arrangements for M&E</p> <p>6. Creation of monitoring and assessment unit for Governmental IT. Architecture at the level of the PM chancellery by <i>Government Decision HG 464/2016</i>; with Chief Information Office (CIO) and IT Steering Committee (IT SC)</p> <p>7. Elaboration of the model of Governmental IT Architecture according to the national framework of inter-operability</p> <p>8. Signature of 11 inter-institutional agreements Creation of Digital Agenda Unit in the Ministry for Internet Security by Ministry order no. 737/2016</p> <p>10. Establishment of National Agency for Digital Agenda, Government Order 1132/2013 and <u>putting it under the responsibility of the Government Secretariat by Government <i>Emergency Ordinance 40/2016</i></u> Adoption of <u>IG 36/2017</u> on specialised Digital Single Market unit of the Ministry of Information Security</p>	<p>Some achievement. Good progress on e-governance. Limited progress on e-commerce. Cost (approx): 3 mln EUR (EU budget); 0,3 USD (USIDA)</p>	


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<p>1 T 2.2</p>	<p>Next Generation Network Infrastructure (NGN)</p>	<p>The existence of national or regional NGN Plans which take account of regional actions in order to reach the Union high-speed Internet access targets, focusing on areas where the market fails to provide an open infrastructure at an affordable cost and of a quality in line with the Union competition and State aid rules, and to provide accessible services to vulnerable groups.</p>	<p>MSI ANCOM</p>	<p>Fulfilled end of 2016 ARES(2016)716 2343 - 23.12.2016</p>	<ol style="list-style-type: none"> 1. Approval of Next Generation Network (NGN) Plan by Government order 414/2015 2. Plan for national prioritisation in IT investment Evaluation of investment needs in IT consolidation - implemented through ESI Funds project - World Bank technical assistance (EU Funded 750 000 EUR) 3. A national digital map - Building on results of RO-net - a 69 Bln EU Funded 2015 project (with multiple scandals and corruption allegations; target - IT for over 800 localities, actual target under 300, with many problems) 	<p>Impact uncertain. Prior implementation major shortcomings, as while spots localities have more stringent challenges that NGN connection: some of them do not have access to basic services like electricity.</p> <p>Interesting journalist report on a corruption investigation in the RO-net project is telling in the case of Romania - people in the NGN connected villages (white spots) were asked: "are you happy you have internet?" The answer was "the ones who have light (electricity) are happy, the ones who don't are not..."</p> <p>Cost (approx): 0,7 mln EUR (EU budget)</p>	
<p>1 T 3.1</p>	<p>Small Business Act</p>	<p>Specific actions have been carried out to underpin the promotion of entrepreneurship taking into account the Small Business Act (SBA).</p> <ul style="list-style-type: none"> - measures have been put in place with the objective of reducing the time and cost involved in setting-up a business taking account of the targets of the SBA; - measures have been put in place with the objective of reducing the time needed to get licenses and permits to take up and perform the specific activity of an enterprise taking account of the targets of the SBA; - a mechanism is in place to monitor the implementation of the measures of the SBA which have been put in place and assess the impact on SMEs. 	<p>Ministry of Business and Entrepreneurship (MIMACA)</p>	<p>Fulfilled 2014 OP Approval</p>	<ol style="list-style-type: none"> 1. National Strategy for SME (20pt) adopted by Government Decision HG 859/2014 2. The national Agency for SMEs is tasked to monitor and implement the national strategy on SMEs 3. SME legislative impact assessments are required according to amended Government Decision HG 322/2015 4. A monitoring working group was put in place by Law 64/2014, amending the Law 346/2004 on SMEs, as part of the Ministry of Economy. 	<p>Cost (approx): N/A</p> <p>Limited achievement. Formal fulfilment assessment. Does not reflect realities on the ground.</p> <p>Prior legislation on setting-up a company at a low cost was in place. Although the establishment of the company takes less time and money in the last years, the data reported (3 days and 100 euro) does not absolutely correspond to the reality of effectively setting up a business.</p> <p>Licences and permits are issued in 3 months-time, as provided by the SBA. This however does not take into account the work and time to prepare the file and submit it to the authority.</p>	
<p>1 T4.1</p>	<p>Energy efficiency new buildings</p>	<p>Actions have been carried out to promote cost-effective improvements of energy end use efficiency and cost-effective investment in energy efficiency when constructing or renovating buildings.</p> <ul style="list-style-type: none"> - measures to ensure minimum requirements are in place related to the energy performance of buildings consistent with Article 3, Article 4 and Article 5 of Directive 2010/31/EU of the European Parliament and of the Council (1); - measures necessary to establish a system of certification of the energy performance of buildings consistent with Article 11 of Directive 2010/31/EU; 	<p>Ministry of Regional Development</p>	<p>Fulfilled 2015 OP approval</p>	<p>N/A</p> <p>The conditionality was fulfilled at the approval of the Operational Programme</p>	<p>The legal framework and regulation on energy efficiency when renovating or constructing new buildings is in place. The problem of energy efficiency remains with old buildings, not new or renovated ones.</p>	

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			<ul style="list-style-type: none"> measures to ensure strategic planning on energy efficiency, consistent with Article 3 of Directive 2012/27/EU of the European Parliament and of the Council (2); measures consistent with Article 13 of Directive 2006/32/EC of the European Parliament and of the Council (3) on energy end-use efficiency and energy services to ensure the provision to final customers of individual meters in so far as it is technically possible, financially reasonable and proportionate in relation to the potential energy savings. <p>Actions have been carried out to promote high-efficiency co-generation of heat and power.</p> <ul style="list-style-type: none"> Support for co-generation is based on useful heat demand and primary energy savings consistent with Article 7(1) and points (a) and (b) of Article 9(1) of Directive 2004/8/EC. Member States or their competent bodies have evaluated the existing legislative and regulatory framework with regard to authorisation procedures or other procedures in order to: <ol style="list-style-type: none"> encourage the design of co-generation units to match economically justifiable demands for useful heat output and avoid production of more heat than useful heat; and reduce the regulatory and non-regulatory barriers to an increase in co-generation. 	Fulfilled 2015 OP approval	Ministry of Energy (ME) Agency for Energy Regulation (ANRE)	N/A The conditionality was fulfilled at the approval of the Operational Programme The 2015 Report on co-generation potential of Romania was submitted to the COM pursuant Art of Directive 2012/27/EU (repealing Directive EC 8/2004)	Limited achievement. Romania scores already high on co-generation targets in the EU Cost (approx): N/A	
1	T4.2	Co-generation		Fulfilled end 2015 OP approval	Ministry of Energy (ME) Agency for Energy Regulation (ANRE)	N/A The conditionality was fulfilled at the approval of the Operational Programmes 1. Green Energy action plan 2010-2020 was adopted	Limited achievement. Romania scores already high on green energy quota targets in the EU; Romania reached already in 2016 its target planned for 2020 (24%) and stands currently at 27% (other sources indicate a rate of 35%). Cost (approx): N/A	
1	T4.3	Green energy	<ul style="list-style-type: none"> Actions have been carried out to promote the production and distribution of renewable energy sources (4). Transparent support schemes, priority in grid access or guaranteed access and priority in dispatching, as well as standard rules relating to the bearing and sharing of costs of technical adaptations which have been made public are in place consistent with Article 14(1), Article 16(2) and 16(3) of Directive 2009/28/EC of the European Parliament and of the Council (4). A Member State has adopted a national renewable energy action plan consistent with Article 4 of Directive 2009/28/EC. 	Fulfilled end 2015 OP approval	Ministry of Energy (ME) Agency for Energy Regulation (ANRE)	N/A The conditionality was fulfilled at the approval of the Operational Programmes 1. Green Energy action plan 2010-2020 was adopted	Limited achievement. Romania scores already high on green energy quota targets in the EU; Romania reached already in 2016 its target planned for 2020 (24%) and stands currently at 27% (other sources indicate a rate of 35%). Cost (approx): N/A	
1	T5.1	Risk prevention and management	<ul style="list-style-type: none"> A national or regional risk assessment with the following elements shall be in place: <ul style="list-style-type: none"> a description of the process; methodology, methods, and non-sensitive data used for risk assessment as well as of the risk-based criteria for the prioritisation of investment; a description of single-risk and multi-risk scenarios; taking into account, where appropriate, national climate change adaptation strategies. 	Fulfilled end 2016 Ares (2017) 278200-18/01/2017	Minister of Interior, General Inspectorate for Emergency Situations (IGSU) Minister of Environment	<ul style="list-style-type: none"> National Risk Evaluation Study carried out as part of EU funded project (Eu Funded Codul SMIS: 48550) Establishment of National Regulatory Framework for functioning of the National Platform of Risk Management (PNMRD), approved by Government Order HG 768/2016 Creation of RO-Risk online risk evaluation tool /portal, EU funded World Bank outsourced (EU Funded, SMIS: 48145 - 6 mln EUR) Establishment of GLERN Working group to identify and prioritise investments in risk prevention and management Adoption of the National Strategy for climate change by GO 529/2013 outsourced to World Bank (revised in 2016 HG 739/2016) Adoption of the National Plan on Climate Change Action - outsourced to World Bank Adoption of IGUSU Strategy for 2016-2025 	<ul style="list-style-type: none"> Significant achievement. Let to a comprehensive reform focused on risk prevention first and then management, including climate change risks. Cost (approx): 7 mln EUR (EU budget) 	
1	T6.1	Water Management	<ul style="list-style-type: none"> The existence of a) a water pricing policy which provides adequate incentives for users to use water resources efficiently and b) an adequate contribution of the different water uses to the recovery of the costs of water services at a rate determined in the approved river basin management plan for investment supported by the programmes. In sectors supported by the ERDF and the Cohesion Fund, a Member State has ensured a contribution of the different 	Fulfilled end 2016 Ares (2017) 368801 24/01/2017	MMAP	<ul style="list-style-type: none"> Pricing strategy is in place Finalisation of the 2nd Master Plan of Hydrographic (River) Basins pursuant to Article 13, Annex VII of Directive 2000/60/EC The Plan was reported to the COM pursuant to Directive 2000/60/EC Updated of all 43 county master plans for water investment and 11 river basins plans 	<ul style="list-style-type: none"> Some achievement. Submission of river basin master plan. Interviews revealed that the national authorities found an additional pressure mechanism. However, they 	

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1	T6.2	<p>Waste Management</p>	<p>water uses to the recovery of the costs of water services by sector consistent with the first indent of Article 9(1) of Directive 2000/60/EC having regard, where appropriate, to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected.</p> <p>– The adoption of a river basin management plan for the river basin district consistent with Article 13 of Directive 2000/60/EC</p> <p>Promoting economically and environmentally sustainable investments in the waste sector particularly through the development of waste management plans consistent with Directive 2008/98/EC, and with the waste hierarchy.</p>	<p>Not fulfilled End of 2017/2018/2019</p>	MMAP	<p>pursuant to the national Master Plan approved by Government Decision HG 80/2011</p>	<p>appreciate that the measures asked were in any case compulsory according to the Directive. Cost (approx): N/A</p>	
						<p>1. 2014 first Waste Directive implementation report art 11 (5) therein Yes. Submitted on 14 February 2014 Waste Management Plan article 28 Waster Directive</p> <p>2. NOT satisfactory. The national waste management plan (NWMP) was reviewed in 2013 in line with National Strategy for Waste Management, and the Law 211/2011 transposing the Waste Directive - approved by GO 870/2013 - an Strategic Environmental Assessment (SEA) of the Plan has to be carried out</p> <p>3. Waste Prevention Plan No. To be adopted as part of the Waste Management Plan. Outsourced study in May 2016 - 300000 EUR assistance national budget</p> <p>4. Measures to achieve the 2020 Targets are in place art 11(2) Waster Directive NOT fulfilled</p> <p>Identification of new economic instruments to reach the 2020 recycling targets. Establishment of financial instruments from EU Funds pending.</p>	<p>Limited achievement. Romania is facing <u>infringement proceedings</u> for failure to review and adopt its national waste management plan and waste prevention programme according to Directive 2012/19/EU. The much-delayed fulfilment of ex-ante conditionality is linked to public procurement procedures for outsourcing the National Waste Management Plan that have been contested repeatedly and PP proceedings could not continue before the end of legal disputes. Ultimately the contract was awarded on the day of the resignation of the technocrat Government to a company allegedly having links to former ministry employees under unclear circumstances.</p> <p>Currently a strategic environmental assessment of the plan needs to be finalised which makes its adoption before the end of 2017 impossible.</p> <p>Cost (approx): 0.3 mln EUR (RO budget)</p>	

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1	T7.1	<p>Road Transport</p> <p>The existence of a comprehensive plan or plans or framework or frameworks for transport investment in accordance with the Member States' institutional set-up (including public transport at regional and local level) which supports infrastructure development and improves connectivity to the TEN-T comprehensive and core networks.</p> <ul style="list-style-type: none"> – The existence of a comprehensive transport plan or plans or framework or frameworks for transport investment which complies with legal requirements for strategic environmental assessment and sets out: <ul style="list-style-type: none"> – the contribution to the single European Transport Area consistent with Article 10 of Regulation (EU) No 1315/2013 of the European Parliament and of the Council (5), including priorities for investments in: <ul style="list-style-type: none"> – the core TEN-T network and the comprehensive network where investment from the ERDF and the Cohesion Fund is envisaged; and – secondary connectivity; – a realistic and mature pipeline for projects for which support from the ERDF and the Cohesion Fund is envisaged; – Measures to ensure the capacity of intermediary bodies and beneficiaries to deliver the project pipeline 	<p>Not fulfilled End 2017 Access to documents communication no 32113/3 759</p>	<p>Minister of Transportation (MT)</p>	<p>1. — 2. — — — — — — — — — 3. — — — 4. — — — 5. — —</p>	<p>Master Plan adoption (EU Funded 4 mln EUR) General Transport Master Plan (GTMP) adopted by Government Decision HG 666/2015 Administrative capacity to implement the Master Plan Signature of public services contract 2016-2018 between MT and Metrorex state company by Order of MT 350/2016 in line with Regulation EU 1370/2007 Establishment and operationalisation of Romanian Railway Reform Authority (ARF) to carry out the reform of the railway sector (supported by PASSA EIB loan project) Establishment of ARF by Government Emergency Ordinance 62/2016 Adoption of ARF functions and organisation by Government Order HG 98/2017 May-August 2017 hired 40 staff members MT passed to ARF the public services contracts for 2016-2019 on 3 July 2017 Meeting workshop with CFR and CNCF SA and railway transportation operators Feasibility study 'sustainability of the railway network in Romania' - EIB prepared the ToR; to be commissioned in September 2017. Multiannual performance contracts signature between MT and main transportation beneficiary authorities: National Company for Road Infrastructure Management (CNAIR) and National Company for Railway (CNCFR CFR SA) supported by technical assistance from EIB/PASSA project (Not fulfilled) Template of performance contract with clear investment objectives elaborated and approved in principle by COM approved by Order of MT of 30 August 2017 adopted pursuant to OUG 83/2016 EIB working group on performance indicators and monitoring methodology; list of indicators agreed in principle with the Commission DG REGIO Negotiation and signature facilitated by EIB Set up and use the National Transport Model for Investment Priorities Plan The online platform was set up Support from 2014-2020 POCA OP is mobilised, calls to be launched by the end of 2017 Administrative capacity to implement the National Master Plan for Transport (MGPT) for CNAIR and CNCFR EIB technical assistance from PASSA secured Internal control systems on public procurement contracts for CNAIR, including annual evaluation methodology in place (NOT for CNCFR railway)</p>	<p>Some achievement, but uncertain. Performance contracts still to be signed. Railway reform is still at an incipient stage.</p> <p>Cost (approx): 4 mln EUR (EU budget) EIB technical assistance</p>
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Annex IV: Ex ante conditionality fulfilment. Romania.

						— Adoption of Order MT 699/2017 on financial stimulus of POIM beneficiaries under MT — Training for CNAIR and CFR carried out in the area of public procurement/FIDIC/ Risk management (As part of other ex ante conditionality)					
2	T7.2	Rail Transport	similar	Not fulfilled end 2017	MT	Same - treated as a single conditionality	Some achievement but uncertain. Id.				
2	T7.3	Water Transport	similar	Not fulfilled end 2017	MT	Same - treated as a single conditionality	Some achievement, but uncertain. Id.				
2	T7.4	Energy storage & transport & distribution	Development of smart energy distribution, storage and transmission systems. The existence of comprehensive plans for investments in smart energy infrastructure, and of regulatory measures, which contribute to improving energy efficiency and security of supply — Comprehensive plans describing the national energy infrastructure priorities are in place that are: — in accordance with Article 22 of Directive 2009/72/EC and of Directive 2009/73/EC, where applicable, and — consistent with the relevant regional investment plans under Article 12 and with the Union-wide ten-year network development plan in accordance with point (b) of Article 8(3) of Regulation (EC) No 714/2009 of the European Parliament and of the Council (6) and with Regulation (EC) No 715/2009 of the European Parliament and of the Council (7), and — compatible with Article 3(4) of Regulation (EU) No 347/2013 of the European Parliament and of the Council (8); — Those plans shall contain — a realistic and mature project pipeline for projects for which support from the ERDF is envisaged; — measures to achieve the objectives of social and economic cohesion and environmental protection, in line with Article 3(10) of Directive 2009/72/EC and Article 3(7) of Directive 2009/73/EC; — measures to optimise the use of energy and promote energy efficiency, in line with Article 3(11) of Directive 2009/72/EC and Article 3(8) of Directive 2009/73/EC.	Fulfilled 2015 OP approval	Ministry of Energy (ME) ANRE	1. 2016-2020 Plan for development of Electrical Network adopted in 2014 in line with Regulation EC 347/2013 2. 2014-2020 National plan on gas transportation was developed in 2014 in line with Directive 2009/73/EC 3. Rest of the measures enshrined in the Electricity and Gas Law 123/2012	Some achievement. Even if the conditionality was declared fulfilled at the moment of the OP approval follow-up plans have been adopted. Cost (approx): N/A				
2	T8.1	Employment Guidelines	Active labour market policies are designed and delivered in the light of the Employment guidelines. — Employment services have the capacity to, and do, deliver: — personalised services and active and preventive labour market measures at an early stage, which are open to all jobseekers while focusing on people at highest risk of social exclusion, including people from marginalised communities; — comprehensive and transparent information on new job vacancies and employment opportunities taking into account the changing needs of the labour market. — Employment services have set up formal or informal cooperation arrangements with relevant stakeholders.	Fulfilled 2016 ARES (2016) 2700727 ARES(2016)635 8880-10/11/2016	MMFPSV ANOFM	1. National Strategy for Active labour policies and employment 2014-2020 approved by Government Decision HG, EU funds (ID155259) 0,5 mln EUR 2. "Changing concept" note approved by the COM in 2015 of 3 key areas for improvement of Public Employment Service (SPOs) capacity 3. ANOFM catalogue of active labour services established for the 1st time 4. New outreach mechanisms: Employment database 'ProfessionalCard.ro' for employers and employees, access with id and password	Significant achievement. CSRs 2, European Semester 2017 signal substantive progress Cost (approx): 0,5 mln EUR (EU budget)				

Annex IV: Ex ante conditionality fulfilment. Romania.

					<p>upon registration at the regional employment agency http://www2.card-profesional.ro</p> <p>5. Calendar for ESF investment proposals approved (19 laws to be approved or amended)</p> <p>6. OUG 60/2016 modified the 76/2002 Law including multiple measures on active labour policies and incentives for employment such as 125 EUR bonus in case of employment after unemployment; Government Decisions HG 885/2016 provides for implementing measures of the new law changes.</p> <p>8. Law 207/2015 linked the Fiscal database and labour/unemployment data (ANAF-ANOFM)</p> <p>9. OUG 6/2017 provides for a rent subsidy for unemployed who get a job in a different city (>50km)</p> <p>10. National data collection and analysis system for labour market and intelligent labour market indicators: "National partnership occupation system" Platform implemented through POSDRU/180/4.1/S/155259 2007-2013 Technical assistance project. (Platform NOT responding- account suspended! The statistical data not available http://www.parteneriatinalizaocupare.ro/data-statistica/index/Arges)</p> <p>11. Reform of National Employment Agency (ANOFM)</p> <p>12. Capacity building project of ANOFM central and regional units through same POSDRU 2013-2017 EU Funds targeting 43 regional (Public Employment Services) SPOs and 90 officials</p> <p>13. Another EU 2007-2013 project on building the SPOs from Centre and West regions was put in place in 2014-2015 POSDRU/123/4.1/S/129565</p>		
<p>2 T8.2</p> <p>Self-employment</p>	<p>Self-employment, entrepreneurship and business creation: the existence of a strategic policy framework for inclusive start-up.</p> <p>– A strategic policy framework for inclusive start-up support is in place with the following elements: – measures have been put in place with the objective of reducing the time and cost involved in setting up a business, taking account of the targets of the SBA; – measures have been put in place with the objective of reducing the time needed to get licenses and permits to take up and perform the specific activity of an enterprise, taking account of the targets of the SBA; – actions linking suitable business development services and financial services (access to capital), including reaching out to disadvantaged groups, areas, or both, where needed.</p> <p>Labour market institutions are modernised and strengthened in the light of the Employment Guidelines; Reforms of labour market institutions will be preceded by a clear strategic policy framework and ex ante assessment including with regard to the gender dimension</p> <p>– Actions to reform employment services, aiming at providing them with the capacity to deliver: – personalised services and active and preventive labour market measures at</p>	<p>Fulfilled 2014 OP approval 1</p>	<p>Ministry of Labour Ministry Business and Commerce</p>	<p>1. National Strategy for Employment 2014-20 approved by Government Decision HG 1071/2013</p> <p>2. Online services implemented for business community ONRC online portal & MPP</p> <p>3. Three-day registration of a company (only after the application - takes much more time)</p> <p>4. National Agency for SMEs programmes Implementation established in 2011</p> <p>5. Tax for enterprise registration fixed at 50 EUR by Government Order HG 902/2012 (In practice because the papers to prepare a difficult, and queues are long, lawyers are hired and paid at list 250-1000 EUR fee)</p>	<p>Limited achievement. No dedicated action. Same criteria reported as for fulfilment of SBA ex-ante conditionality T3.1 and 8.1 above</p> <p>Cost (approx): N/A</p>		
<p>2 T8.3</p> <p>Labour market institutions</p>	<p>Labour market institutions are modernised and strengthened in the light of the Employment Guidelines; Reforms of labour market institutions will be preceded by a clear strategic policy framework and ex ante assessment including with regard to the gender dimension</p> <p>– Actions to reform employment services, aiming at providing them with the capacity to deliver: – personalised services and active and preventive labour market measures at</p>	<p>Fulfilled 2016 ARES/2016/6358880-10/11/2016</p>	<p>MMFPSPV</p>	<p>Treated exactly as T8.1 -all measures/actions are duplicated in fulfilment reports</p>	<p>Significant achievement. European Semester assessed as positive the reform of labour market institutions and reported "substantive progress" in 2017 Country report ad CSRs Romania</p>		


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<p>2 T9.1</p>	<p>Poverty Reduction</p>	<p>The existence and the implementation of a national strategic policy framework for poverty reduction aiming at the active inclusion of people excluded from the labour market in the light of the Employment guidelines. – A national strategic policy framework for poverty reduction, aiming at active inclusion, is in place that: – provides a sufficient evidence base to develop policies for poverty reduction and monitor developments; – contains measures supporting the achievement of the national poverty and social exclusion target (as defined in the National Reform Programme), which includes the promotion of sustainable and quality employment opportunities for people at the highest risk of social exclusion, including people from marginalised communities; – involves relevant stakeholders in combating poverty; – depending on the identified needs, includes measures for the shift from institutional to community based care; – Upon request and where justified, relevant stakeholders will be provided with support for submitting project applications and for implementing and managing the selected projects.</p>	<p>Fulfilled 2016 ARES (2015) 2937089 ARES(2) 016/635 8880-10/11/2016</p>	<p>MMFPSPV</p>	<p>1. Social inclusion and poverty reduction Strategy 2015-2020 and Strategic Action plan for poverty reduction 2015-2020 approved by Government Decision HG 383/2015 MO 463/2015 2. De-institutionalisation policy, toolkit in place, scrapping gradually the placement institutions and transitioning to community care – National project and strategy for protection of children rights approved by Government Decision 1113/2014 – Law XX amending the Law on prohibition of institutionalization of children younger than 3 years old – National project and strategy for protection of persons with disabilities.</p>	<p>Significant achievement: CSRs and 2020 targets 2017 Semester: "Substantial progress was made in reducing the population at risk of poverty or social exclusion as compared with the national target of 580 000 people. In absolute terms 1 680 000 people were lifted out of the risk of poverty or social exclusion between 2008 and 2015. " Lesson - national engagement The conditionality is considered a success by the Commission as it managed to put in place a comprehensive de-institutionalisation strategy. Success was due to change agents inside the ministry and civil society who pushed for change. Strategies were adopted, laws amended and now funding can proceed for de-institutionalisation from ESF.</p> <p>Cost (approx): N/A World Bank technical assistance</p>	
<p>3 T9.2</p>	<p>Roma</p>	<p>A national Roma inclusion strategic policy framework is in place – A national Roma inclusion strategic policy framework is in place that: – sets achievable national goals for Roma integration to bridge the gap with the general population. These targets should address the four EU Roma integration goals relating to access to education, employment, healthcare and housing; – identifies where relevant those disadvantaged micro-regions or segregated neighbourhoods, where communities are most deprived, using already available socio-economic and territorial indicators (i.e. very low educational level, long-term unemployment, etc); – includes strong monitoring methods to evaluate the impact of Roma integration actions and a review mechanism for the adaptation of the strategy; – is designed, implemented and monitored in close cooperation and continuous dialogue with Roma civil society, regional and local authorities. – Upon request and where justified, relevant stakeholders will be provided with support for submitting project applications and for implementing and managing the selected projects</p>	<p>Fulfilled end 2014/2015 OP approval 1</p>	<p>ANR POC POCU</p>	<p>1. New Strategy for Roma 2015-2020 implementing the recommendations of the EU Council semester 2. National Reform Program approved by Government Decision HG 18/2015</p>	<p>Cost (approx): N/A World Bank technical assistance Limited achievement: Formal fulfilment assessment. No involvement of DG JUST. Roma remains the most discriminated against minority group in Romania. The level of higher education is only 0,7%, high unemployment with 70% in case of youth, limited access to healthcare, housing and acute discrimination in all the areas of public life, in spite of more than 10 years of continued EU financing and external policy efforts. Symbolic commitment and engagement at the EU and national level. Cost (approx): N/A</p> <p>Cost (approx): N/A</p>	

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<p>3 T9.3</p>	<p>Health care infrastructure</p>	<p>The existence of a national or regional strategic policy framework for health within the limits of Article 168 TFEU</p> <p>1. ensuring economic sustainability.</p> <ul style="list-style-type: none"> - A national or regional strategic policy framework for health is in place that contains: - coordinated measures to improve access to health services; - measures to stimulate efficiency in the health sector, through deployment of service delivery models and infrastructure; - a monitoring and review system. <ul style="list-style-type: none"> - A Member State or region has adopted a framework outlining available budgetary resources on an indicative basis and a cost-effective concentration of resources on prioritised needs for health care. 	<p>Fulfilment end</p> <p>Ares(2017)3153 - 664 - 23/06/2017</p> <p>Ares(2017)3976 - 583 - 09/08/2017</p>	<p>Ministry of Health (MS)</p>	<p>1. National Healthcare Strategy and Action Plan 2014-2020 approved by Government Decision HG 1028/2014 [fulfilled 2014]</p> <p>2. Improvement of access to healthcare - actions in the national strategy [fulfilled 2014]</p> <p>3. Model/Mapping for sustainable development of efficient Healthcare services and infrastructure approved by Order 142/2016 listing the criteria and actions for fulfilment http://legislatie.just.ro/Public/DetaliuDocumentAtis/176137 (EU funded - 0,7 mln EUR)</p> <ul style="list-style-type: none"> - Adoption of Law (OUG) 18/2017 on community medical assistance approved by law MO 154, 1 March 2017 - Mapping of regional healthcare infrastructures and health services modulation, including management of patient flux, investment in infrastructure and equipment - Identification of available data and collecting the missing data on health service providers - Development of an electronic database to collect the data - Import of collected data in the created database - Approval of the final list with data to be collected - Approval of healthcare services plan having as example the models implemented successfully in other EU MSs by Government Decision HG 606/2016 - Definition and approval of normative criteria for planning the healthcare services at the national level - Elaboration of 5 regional plans of healthcare services; analysis of data and approval of study results approved by Order of Minister 1376/2016 - Continued collection of data on healthcare services - Amend the existing legislation in line with the strategic planning of healthcare services models - upcoming national strategy on Human Resources in Health sector - investment master plans to be drawn for each region <p>4. A comprehensive monitoring and evaluation framework of the National Healthcare Strategy 2014-2020 supported from EU Funds technical assistance 2014-2020 - 0,7 mln EUR [Fulfilled -</p>	<p>Some achievement. The conditionality led to a first time ever mapping of the healthcare services in Romania. Continuous engagement and implementation is still needed to achieve results. The fulfilment of conditionality proved highly difficult given the absolute lack of any prior centralised, comprehensive set of data on mapping of the existent healthcare services, infrastructure and equipment needs. The budgetary provisions are limited to ESF funds (ERDF) which are hardly sufficient to address the real needs on the ground.</p> <p>NB: the government now drafts an upcoming national strategy on Human Resources in Health sector. This is a response to a serious healthcare personal shortage. In result, this means that the mapping is done, and EU Funds' investments will be carried out but due to massive immigration of doctors and medical staff there is no qualified staff to work in hospitals.</p> <p>The deadline for fulfilment was informally deferred in agreement with the Commission from December 2016 until July 2017 (NRP 2017, 21).</p> <p>Cost (approx): 1,4 mln EUR (EU budget)</p>
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			<p>The existence of a strategic policy framework to reduce early school leaving (ESL) within the limits of Article 165 TFEU.</p> <ul style="list-style-type: none"> – A system for collecting and analysing data and information on ESL at relevant levels is in place that: <ul style="list-style-type: none"> – provides a sufficient evidence- base to develop targeted policies and monitors developments. – A strategic policy framework on ESL is in place that: <ul style="list-style-type: none"> – is based on evidence; – covers relevant educational sectors including early childhood development, targets in particular vulnerable groups that are most at risk of ESL including people from marginalised communities, and addresses prevention, intervention and compensation measures; – involves all policy sectors and stakeholders that are relevant to addressing ESL. 	<p>Fulfilled 2015</p> <p>ARES (2015) 2937089</p> <p>ARES(2 016)635 8880- 10/11/2 016</p>	<p>Ministry of Education (ME)</p>	<ol style="list-style-type: none"> 5. Establishment of the monitoring and evaluation technical working group approved by Order of the Minister 987 /2016 6. Adoption of the monitoring and evaluation action plan 7. Approval of first monitoring and evaluation report 8. A plan for budgeting resources and efficient investment - approved as part of the OP for regional development [Added regulatory provisions, but with no realistic budgetary provisions] 	<p>ARES (2017)1875525] approved by Order of the Minister 142/2016</p>	
<p>3 T10.1</p>	<p>Early school leaving (ESL)</p>				<ol style="list-style-type: none"> 1. A system for collecting and analysing ESL data SIIR; put in place through 2007-2013 EU Funds project https://www.siiir.edu.ro/carto/#/statistici 2. Strategy of ESL adopted by Government Order HG 417/2015 (prior OUG 177/2013 put in place some facilitation measures such as public transportation reduction by 50%) 	<p>Some achievement but uncertain. Mapping of educational infrastructure SIIR database update was a conditionality agreed btw Ro and COM before funds from the early school leaving axis of PO Regional (POIR) could be drawn. However, the database is not yet fully functional and the data on dropouts is missing.</p> <p>The mapping was carried out through Project ROSE funded by the World Bank - 200 mln EUR, including (beyond mapping), a full range of activities to combat ESL. https://www.edu.ro/etichete/proiect-rose.</p> <p>There are extensive anti-corruption investigations at the moment for irregular use of EU funds for numerous EU funded projects in 2007-2013 for ESL. Project as 'milk and corn' providing food for kids in school; or first kindergarten are now investigated. Meanwhile the school dropout has been rising not diminishing: 1 from 2 kids from the country side are dropping school, and 25% of them never return - in absolute terms 3% (about 35 000) of school aged</p>		

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				<p>ME</p>	<p>children. http://www.digi24.ro/stiri/actualitate/educatie/educatie-furata-doi-din-zecerelevi-renunta-la-scoala-796347 Cost (approx): 4 mln EUR (EU budget)</p>	<p>Limited achievement. Additional national strategies were put in place even if not asked by the Commission, with insufficient budgetary backing for the measures foreseen. Technical assistance World Bank - under the same EU Funds 2007-2013 assistance 'strategic framework for higher participation, quality and efficiency of tertiary education in Romania'</p>	<p>1. Strategy on Tertiary education approved by Government Decision 565/2015.</p>	<p>Fulfilled 2016 ARES (2016) 2309491 ARES(2 016)635 8880-10/11/2 016</p>	<p>The existence of a national or regional strategic policy framework for increasing tertiary education attainment, quality and efficiency within the limits of Article 165 TFEU. – A national or regional strategic policy framework for tertiary education is in place with the following elements: – where necessary, measures to increase participation and attainment that: – increase higher education participation among low income groups and other under-represented groups with special regard to disadvantaged people, including people from marginalised communities; – reduce drop-out rates/ improve completion rates; – encourage innovative content and programme design; – measures to increase employability and entrepreneurship that: – encourage the development of "transversal skills", including entrepreneurship in relevant higher education programmes; – reduce gender differences in terms of academic and vocational choices.</p>	<p>3. T10.2 Higher education</p>
		<p>The existence of a national and/or regional strategic policy framework for lifelong learning within the limits of Article 165 TFEU. – A national or regional strategic policy framework for lifelong learning is in place that contains measures: – to support the developing and linking services for LL, including their implementation and skills upgrading (i.e. validation, guidance, education and training) and providing for the involvement of, and partnership with relevant stakeholders; – for the provision of skills development for various target groups where these are identified as priorities in national or regional strategic policy frameworks (for example young people in vocational training, adults, parents returning to the labour market, low skilled and older workers, migrants and other disadvantaged groups, in particular people with disabilities); – to widen access to LL including through efforts to effectively implement transparency tools (for example the European Qualifications Framework, National Qualifications Framework, European Credit system for Vocational Education and Training, European Quality Assurance in Vocational Education and Training); – to improve the labour market relevance of education and training and to adapt it to the needs of identified target groups (for example young people in vocational training, adults, parents returning to the labour market, low-skilled and older workers, migrants and other disadvantaged groups, in particular people with disabilities).</p>	<p>Fulfilled 2016 ARES (2015) 2937089 ARES(2 016)635 8880-10/11/2 016</p>	<p>ME</p>	<p>Cost (approx): N/A Some achievement but uncertain. Contingent on national commitment and implementation. Merged as one single conditionality with 10.4 conditionality on VET. Cost (approx): N/A</p>	<p>— L.L. Strategy 2015-2020 approved by Government Decision HG 418/2015</p>	<p>Fulfilled 2016 ARES (2015) 2937089 ARES(2 016)635 8880-10/11/2 016</p>	<p>The existence of a national and/or regional strategic policy framework for lifelong learning within the limits of Article 165 TFEU. – A national or regional strategic policy framework for lifelong learning is in place that contains measures: – to support the developing and linking services for LL, including their implementation and skills upgrading (i.e. validation, guidance, education and training) and providing for the involvement of, and partnership with relevant stakeholders; – for the provision of skills development for various target groups where these are identified as priorities in national or regional strategic policy frameworks (for example young people in vocational training, adults, parents returning to the labour market, low skilled and older workers, migrants and other disadvantaged groups, in particular people with disabilities); – to widen access to LL including through efforts to effectively implement transparency tools (for example the European Qualifications Framework, National Qualifications Framework, European Credit system for Vocational Education and Training, European Quality Assurance in Vocational Education and Training); – to improve the labour market relevance of education and training and to adapt it to the needs of identified target groups (for example young people in vocational training, adults, parents returning to the labour market, low-skilled and older workers, migrants and other disadvantaged groups, in particular people with disabilities).</p>	<p>3. T10.3 Lifelong Learning</p>	

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<p>3. T10.4</p> <p>Vocational education and Training (VET)</p>	<p>The existence of a national or regional strategic policy framework for increasing the quality and efficiency of VET systems within the limits of Article 165 TFEU.</p> <p>– A national or regional strategic policy framework is in place for increasing the quality and efficiency of VET systems within the limits of Article 165 TFEU which includes measures for the following:</p> <ul style="list-style-type: none"> – to improve the labour market relevance of VET systems in close cooperation with relevant stakeholders including through mechanisms for skills anticipation, adaptation of curricula and the strengthening of work-based learning provision in its different forms; – to increase the quality and attractiveness of VET including through establishing a national approach for quality assurance for VET (for example in line with the European Quality Assurance Reference Framework for Vocational Education and Training) and implementing the transparency and recognition tools, for example European Credit system for Vocational Education and Training. (ECVET). 	<p>Fulfilled 2015</p> <p>ARES (2015) 2937089</p> <p>ARES(2 016)635 8880-10/11/2 016</p>	<p>ME</p>	<p>—</p> <p>—</p>	<p>LLL Strategy 2015-2020 approved by Government Decision H.G.nr. 418/2015</p> <p>National strategy for Vocational education and training (VET) 2016-2020, approved by Government Decision 317/2016</p>	<p>Some achievement but uncertain. Contingent on national commitment and implementation. Merged as one single conditionality with 10.3 conditionality on LLL.</p> <p>Cost (approx): N/A</p>	
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<p>3 T11</p>	<p>Administrative efficiency</p>	<p>The existence of a strategic policy framework for reinforcing the Member States' administrative efficiency including public administration reform</p> <ul style="list-style-type: none"> - A strategic policy framework for reinforcing a Member State's public authorities' administrative efficiency and their skills with the following elements are in place and in the process of being implemented: <ul style="list-style-type: none"> - an analysis and strategic planning of legal, organisational and/or procedural reform actions; - the development of quality management systems; - integrated actions for simplification and rationalisation of administrative procedures; - the development and implementation of human resources strategies and policies covering the main gaps identified in this field; - the development of skills at all levels of the professional hierarchy within public authorities; - the development of procedures and tools for monitoring and evaluation. 	<p>Not fulfilled end 2017</p>	<p>Ministry of national administration and EU funds (MDRAPPE) National Agency for public function (ANFP) Government Chancellery (SCG)</p>	<p>1. Strategic framework of public administration approved by Government Decision HG 909/2014 [fulfilled] 6. Adoption of the action plan and timeline ANNEX 2 and 3 — Analysis of the current situation — Adoption of action plan on current needs — Adoption of strategy 2. Institutional reforms — Establishment of National Committee for implementation of the national public administration consolidation HG 909/2014 — Strategic planning of legal organisation and procedural reform actions [not fulfilled] — Use of quality management systems (OMS) - self evaluation (ARES (2017) 3265564) — Integrated simplification and rationalisation of administrative procedures through EU funds 2007-2013 eANFP project SMIS 36675, EU funded 3 mln EUR [not fulfilled] — Electronic signature in place for 1930 public authorities — Elaboration and testing of several pilot electronic systems for ANFP such as archiving of ANFP documents etc 3. Human resources — Elaboration and implementation of human resources strategies that address main current shortcomings [not fulfilled] — Strategy for HR training elaborated by ANFP and approved by Government Decision HG 650/2016 — Strategy for development of Public Function 2016-2020 approved by Government Decision HG 525/2016 — Both Strategies revised by HG 460/2017 on new realistic deadlines for action plans for the two 2016 strategies [basically postponing for 2017-2018 all measures deadlines] — Training at all the level of professional hierarchies in public authorities [not fulfilled] — Establishment of National Institute of Administration (INA) by OUG 23/2016, approved by Law 44/2017 and put in application by Government Decision HG 1005/2016 4. Monitoring and evaluation tools — MDRAP is monitoring the reform and publishing the national implementation reports, plus Semester action plans at http://dofbi.mdrap.ro/strategie_administratie_publica.html</p>	<p>Limited achievement. CSR 3, 2017-2018 European Semester Administrative Reform. The Law enabling the reform - the Administrative Code - is currently blocked. Cost (approx): 3 mln EUR (EU budget)</p>
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