



ARTICLES

THE SHAPE-SHIFTING DEFINITION OF THE EU'S FINANCIAL INTEREST AND ITS PROTECTION IN CONTEMPORARY EUROPE

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THE FINANCIAL INTERESTS OF THE EU: IMPLICATIONS ON THE EUROPEAN RULE OF LAW IDEA

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ABSTRACT: This *Article* examines the significance of the Rule of Law as a common value in the European Union, focusing especially on the decisions of the European Court of Justice concerning the EU Conditionality Regulation. It considers the role of mutual trust among Member States in fostering an ever-closer union and investigates the so-called “macroeconomic dimension” of the EU Rule of Law. The *Article* concludes that the EU Rule of Law should not be understood as a tool for asserting political dominance by EU institutions or for expanding Union-conferred legal competencies beyond the limits established by the Treaties.

KEYWORDS: European Law – rule of law – EU financial interests – conditionality mechanism – soft law – conferred powers clause.

I. INTRODUCTION

As recently observed in a key research project, “the way in which evolving Rule of Law conditionalities and associated institutional discourses influence the operation of national constitutions of the EU Member States and, conversely, contribute to the shaping of European constitutionalism at the interface between legal orders” is treated as a core

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issue in contemporary EU institutional and political transformations.¹ If the Rule of Law is the indisputable core of the founding principles of European integration, it is also true that financial conditionalities, together with other tools for implementing this “ever closer union” among European peoples, can generate a range of conceptual and practical complexities in much legal practice and in many institutional mechanisms.

The implementation of Rule of Law tools in the European Union legal system is indeed eliciting varied reactions at the political level and in academic circles. These are sometimes – and perhaps too often – contentious, frequently revolving around the interpretation of the conferred powers clause.²

Building on this point, the main issue addressed in this short contribution is whether, as some studies have suggested,³ the use of soft law tools has perhaps placed undue pressure on the conferred powers principle by extending the material integration of the EU legal system beyond the limits established by the Treaties. Might the call for the so-called ‘financialisation’ of the Rule of Law, alongside the emphasis on the EU’s financial interests in relation to compliance with Rule of Law values, be viewed as interconnected with the purported implementation of soft law tools as integration mechanisms that extend beyond the limits of conferred powers? This question may arise from the impression that the expansion of the EU’s spending powers through the implementation of the NGEU programme might also have consequences on the exercise of legal powers beyond the legislative competence of the EU institutional system.⁴

Let us begin by considering how these spending programmes have actually been able to reinforce the legitimisation process of European integration. First, if we pause for a moment to consider the political attitudes of EU citizens towards the European institutions over the last two decades, we can observe the strength of the critical narrative based on a process of (de)legitimising European integration itself. In just a few years, we moved from times of great political engagement to a period characterised by intense critical opposition, when popular support for the EU institutions reached its lowest ebb, eventually followed by today’s vast transformation, marked by a shift of public feeling in a very positive direction once again. This is probably due to the implementation of new political functions designed by States and European institutions to address the economic crisis following the pandemic, creating, if not a new institutional system, then a new European economic framework to

¹ See B Iancu, *Rule of Law at the European Periphery: (Dis)incentive Structures and Conceptual Shifts*, nec.ro.

² An interesting critical approach has recently been adopted by A Guazzarotti, *Neoliberalismo e difesa dello Stato di diritto in Europa. Riflessioni critiche sulla costituzione materiale dell’UE* (FrancoAngeli 2023) 22 ff.

³ See, for instance, M Fiscaro, ‘Protection of the Rule of Law and “Competence Creep” via the Budget: The Court of Justice on the Legality of the Conditionality Regulation’ (2022) *EuConst* 334; M Fiscaro, ‘Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union’s Values’ (2022) *European Papers* www.europeanpapers.eu 697. See also the various contributions to the *Special Section*, introduced by M. Bonelli, M. Claes, B. De Witte, K. Podstawa, ‘Usual and Unusual Suspects in Protecting EU Values: An Introduction’ (2022) *European Papers* www.europeanpapers.eu 641.

⁴ See, again, M Fiscaro, in his works quoted above at fn. 3.

sustain the needs of both business and people. As we have already discussed in recent works,⁵ the question of populism and its narratives against the EU system soon faded, and almost all the Member States' governments (and oppositions) – with some exceptions, of course – abandoned anti-Europe rhetoric in their political discourses and actions immediately after the NGEU policies were implemented along with other economic recovery strategies across the European economic and social systems.

While the new economic and social approach of the European integration process has partly succeeded in addressing the needs of corporations and citizens for financial protection through the expansion of public expenditure, we must also consider how the use of informal acts and instruments by European institutions may have been misinterpreted as innovative tools of hegemony. Without undergoing a Treaty amendment procedure, all these mechanisms are somehow viewed as “a centripetal force of traction”, driven and governed by EU and national executive powers.⁶ This seems to be the case when considering the many new informal normative acts and documents outside the formal legal system, such as recommendations, guidelines and communications from the EU Commission. If we only examine the formal structure and effects of mechanisms such as the European Semester, or the country-specific Reports issued by the Commission – especially those related to breaches of the Rule of Law – alongside the Temporary Frameworks on State aid policies,⁷ it becomes difficult not to also question the concrete and effective shifting of powers resulting from these evolving issues and policies.⁸

As recently highlighted in a major research project, significant consequences for the institutional and legal framework of the EU system arise from the coordinated efforts to protect the EU's financial interests within individual Member States.⁹ In particular, we should focus on the question of whether the instruments used to combat fraud, corruption, conflict of interests, and similar issues,¹⁰ designed to safeguard the EU's financial interests

⁵ F Bilancia, 'Indirizzo politico e nuove forme di intervento pubblico nell'economia in attuazione del *Recovery and Resilience Facility*, tra concorrenza e nuove politiche pubbliche' (2022) *Costituzionalismo.it* 1; F Bilancia, *Integrazione giuridica e Funzione di governo. Autorità e legalità in Europa* (Editoriale Scientifica 2022) 104 ff., 111 ff., 128 ff.

⁶ On these questions see D Sarmiento, 'Killing me softly... with soft law. Non-binding acts, judicial review and the limits of the rule of law in European Union Law', Conference held at LUISS-Guido Carli, Rome, 15 November 2022.

⁷ *Ibid.*

⁸ A Benz and J Broschek (eds), *Federal Dynamics. Continuity, Change, and the Varieties of Federalism* (Oxford University Press 2013) 355 ff. Although in a different context, they discuss the phenomenon of “authority migration”.

⁹ I refer to the international research project BETKOSOL – *Better Knowledge for Better Solutions*, part of the HERCULE III 2020 Program. All the information is available on the official project website: betkonext-betkosol.luiss.it. See also A Sandulli, 'The Protection of EU Financial Interests within Next Generation EU' (10 January 2022) EU Law Live eulawlive.com.

¹⁰ A set of possible deficiencies to be addressed by the conditionality mechanism are analysed in R Gadbled, 'Addressing System Deficiencies in the Protection of the Financial Interests of the EU: Preventing Harm and Incentivizing Change' (2023) *German Law Journal* 1023.

at both EU and national levels, may lead to problematic overlaps between legal orders.¹¹ From this perspective, as Alessandro Nato and Aldo Sandulli aptly note in their contribution to this issue, a crucial question also arises when considering the foundation and content of the Rule of Law principle in the EU legal system and, once again, within the legal orders of the Member States. Due to the reciprocal interference between the Rule of Law principles and the legal framework established to protect sound finances and the budget through Rule of Law conditionality, we must also ask whether this could act as a tool for integration in itself, bridging the EU and national orders, functioning as a potential vehicle for greater legal integration and extending beyond the core principles and values of the EU system, allowing for more intensive financial conditionality within the States' constitutional orders. In other words, could these tools aimed at strengthening the protection of the Rule of Law lead to compromising its traditional principles and values through financial conditionalities? As will be discussed further, we do not share these ideas.

II. STARTING FROM THE END: THE RULE OF LAW CONDITIONALITY MECHANISM

Rule of Law conditionality has become a central issue in European integration, having become particularly relevant after the ECJ decisions on the *Hungary and Poland v Parliament and Council* cases.¹² The fundamental position and reasoning of the Court of Justice have since been implemented by the EU Commission, with its Communication on the Guidelines on the Regulation on a general regime of conditionality for the protection of the Union budget, with the specific aim of protecting the Union budget against breaches of the principles of the Rule of Law. Both these pieces of EU legislation and ECJ case law connect “breaches of the principles of the rule of law in a Member State” and the risk of “affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way”.

The aim, briefly discussed in this *Article*, is to carefully demonstrate that these facts do not lead to a “financialisation” of the Rule of Law, although the respect and protection of Rule of Law principles, on the one hand, and the European financial interest, on the other, have become linked, with the first serving as an implementation tool for the latter. That having been said, it is absolutely necessary to consider, however, that some important questions arise: what should “Rule of Law” be understood to mean in this specific field? Does this “value” – as it is referred to in art. 2 TEU – have a specific meaning when

¹¹ As we will see, this is the analytical approach followed by F Losada and K Tuori, ‘Integrating Macroeconomics into the EU Single Legal Order: The Role of Financial Stability in Post-crisis Europe’ (2021) European Papers www.europeanpapers.eu 1367.

¹² Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97; case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98. See, among others, M Fiscaro, ‘Protection of the Rule of Law and ‘Competence Creep’ via the Budget: The Court of Justice on the Legality of the Conditionality Regulation’ cit.; A Holesh, E Rutynowska and C Portela, ‘Too Little, but Not Too Late? Assessing the Role of Sanctions in the EU’s Rule of Law Conflict with Poland’, in L Antonioli and C Ruzza (eds), *The Rule of Law in the EU. Challenges, Actors and Strategies* (Springer 2024) 111.

considered within the context of EU financial interests other than its traditional significance? Has the Rule of Law changed its legal prescriptive content once related to the Union budget and the financial interests of the EU? Do the national States' points of view (deliberately) interfere with the traditional shared legal meaning of the principles of the Rule of Law? Issues also arise regarding the question of whether the Member States' "constitutional identity" is somehow relevant to misconstruing the Rule of Law question, both at the European and national levels. Overall, these questions are fundamental, as they represent the main challenge to the Rule of Law, with misinterpretations of its meaning and the new mechanism of Rule of Law conditionality undermining compliance with the protection of the EU's sound budget and financial interests by some national governments. The hypothesis is that, having become linked to the EU's financial interest, this funding principle has been misconstrued and transformed into a financial tool, losing its original normativity. This would appear to be a confusing and unacceptable approach, lying outside the normative content of the conditionality Regulation and the reasoning of the Court of Justice on this topic.

Of course, we have to take as given the relationship between the Rule of Law and the protection of the EU's financial interests as established by the EU Regulation on a general regime of conditionality,¹³ ECJ case law and confirmed by the Commission's Communication on the *Guidelines*. This also means that breaches of the Rule of Law are only relevant within the framework of Regulation 2092/2020, where they meet the financial condition set by EU law. As the ECJ has pointed out, in order to protect the EU budget and the EU's financial interests, "effective judicial review designed to ensure compliance with EU law" is required at the national level, as "the existence of such review, both in the Member States and at EU level, by independent courts and tribunals, is of the essence of the Rule of Law". We might add in its "traditional meaning and legal reasoning".

The main question arising here is where – and whether – the obligation to respect the (EU) Rule of Law is to be understood as mere compliance with EU fiscal rules by each national legal system, a compliance that is, of course, fundamentally owed as a general principle of European integration through the founding Treaties.

From the particular perspective of the Rule of Law Conditionality Regulation, we learn that a breach of the principles of the Rule of Law will only fall within its scope "insofar as it is relevant for the sound financial management of the Union budget or for the protection of the Union's financial interests". As Nato and Sandulli remark,¹⁴ at least in principle, this Regulation is not an instrument to protect the Rule of Law through the budget but, on the contrary, a tool aiming to protect the budget through the Rule of Law.¹⁵ This is implied by

¹³ M Blauberger and V van Hüllen, 'Conditionality of EU funds: an instrument to enforce EU Fundamental values?' (2021) *Journal of European Integration* 1.

¹⁴ A Sandulli and A Nato, 'EU Financial Interests Within the Financialisation Process of the European Legal Order' (2024) *European Papers* www.europeanpapers.eu 1068.

¹⁵ See, also, F Bilancia, *Integrazione giuridica e Funzione di governo* cit. 104 ff., 111 ff., 128 ff.

the fact that the legal basis of this Regulation is art. 322 TFEU,¹⁶ not to be confused with the provisions of arts 2 and 7 TEU. Without discussing this normative connection further, we must take as given that this Regulation is not founded on art. 7 TEU but rather has its legal basis in art. 322(1) TFEU. Again, and with due emphasis, it is not a tool to implement Rule of Law values as such, nor an instrument defining the contents of the principle, but a mechanism designed solely to protect the budgetary dimension and the EU's financial interests. The focus of this essay is therefore limited to questioning the legal meaning of this important connection between the EU's financial interests and the Rule of Law, on the one hand, and further exploring some national position statements that risk undermining the Rule of Law as a shared value within the EU and the Member States' legal systems, as its principles and values are already binding under art. 2 TEU. What is also at issue is that the legal meaning of the Rule of Law, particularly when understood as a democratic principle, has, on occasion, paradoxically been reassessed by some national governments as a tool to reinforce and preserve their authoritarian regimes. Some Member States have even amended their constitutions to neutralise the very effectiveness of Rule of Law principles, thus limiting any counter-majoritarian guarantees and often eliminating the real substance of constitutional and judicial review of legislation and administrative acts, respectively. This is often done to undermine it at the core, primarily by challenging the independence of the judiciary¹⁷ and the judges of the Constitutional Courts.

III. RULE OF LAW, MUTUAL TRUST, AND THE MACROECONOMIC DIMENSION

Let us now return to the main consequences of the financial interest issue, particularly in relation to the political meaning of the European Rule of Law. It is worth considering that this connection appears to have some important political consequences for mutual trust among Member States, particularly when viewed as a tool for "ever-closer integration".¹⁸

¹⁶ As observed by the EU Commission in its *Guidelines*, "the Conditionality Regulation can also relate to breaches of the principles of the rule of law affecting the collection of the Union's own resources", 25. See, also, I Staudinger, 'The Rise and Fall of Rule of Law Conditionality' (2022) *European Papers* www.europeanpapers.eu 721, 728 ff.

¹⁷ E.g., case C-204/21 *Commission v Poland* ECLI:EU:C:2023:442. M Coli, 'Don't try to discipline your judges (and prevent them from applying EU law): the Court of Justice's judgment in *Commission v. Poland* (C-204/21)' (12 July 2023) *Diritti comparati* www.diritticomparati.it. See, also, A Wojcik, 'Defiance of EU Law by the Polish Constitutional Tribunal' (1 December 2023) *IACL-IADC Blog* blog-iacl-aidc.org. On the question in general see, at least, R Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary' (2021) *ELJ* 211, and, on this question, the following *Online Symposium 'The Rule of Law and the Independence of the Judiciary: a European Perspective'* held on the website of the journal *Diritti comparati*, with the contributions by R Spano, K Kowalik-Bańczyk, R Sabato, G Pitruzzella, K Caunes and G Martinico, O Pollicino and D Sarmiento. See also C Zygmunt, 'The rule of law in Poland – crisis or a new reality?' (2021) *Academia Letters*.

¹⁸ On the importance of this principle for EU integration, focusing especially on criminal justice, see the in-depth analysis driven through the ECJ case-law by T Marguery, 'Confiance mutuelle, reconnaissance

Let us focus, for instance, on the contemporary crisis regarding mutual trust among States as a presumption of compliance with the Rule of Law, as Birgit Aasa suggests.¹⁹ We should also consider whether the concept of ‘the Rule of Law’ – in the context of a horizontal conditionality mechanism as a common value – is currently facing a serious lack of effectiveness in the European political scenario.

However, it must also be considered whether, today, this mutual trust is strong enough to legitimise the political journey towards an ever-closer union – “an ever-closer integration”²⁰ – among European Peoples, beyond the States’ institutions. A lack of effectiveness in this regard appears, in fact, sufficiently pronounced to explain and justify the contemporary crisis of mutual trust, through which each Member State could still recognise the others as being guided by, and respectful of, the Rule of Law. This is often referred to as the horizontal dimension of the Rule of Law effects within the context of the conditionality mechanism, raising questions about the capacity of this principle to generate a system of shared values across all Member States.²¹ From this perspective, it is also possible to discern the symptoms of the crisis and the concurrent decay of those principles and values. Do all Member States, governments, and national political systems still trust one another and their commitment to effectively respecting the Rule of Law in their national institutional systems?

If we look back to the post-2008 crisis, the issue of a mutual trust crisis among the States was already evident, stemming from the increasingly complex transformation of fiscal rules and their effects, as they gradually became part of the EU’s Rule of Law, strengthening its economic (more accurately, “macroeconomic”) dimension.²² This shift represents a transformative concept of the Rule of Law, particularly when considering the specific legal sources governing the Economic and Monetary Union (EMU). Over the last few decades, a vast number of new rules, procedures, and legal prescriptions (whether formally qualified as legal sources of law or as part of so-called soft law), have

mutuelle et crise de valeurs: la difficile équation entre justice pénale européenne et diversité nationale’ (2020) European Papers www.europeanpapers.eu 1271.

¹⁹ She speaks of a “Crisis of the States’ mutual trust as presumption of compliance with the Rule of Law” in ‘Mutual Trust and the Rule of Law’, speech given at the conference on *The Rule of Law Crisis in Europe - Historical and Procedural Aspects* (Lund University, 28-29 September 2021).

²⁰ See, for instance, A von Bogdandy, ‘European Law Beyond ‘Ever Closer Union’. Repositioning the Concept, its Thrust and the ECJ’s Comparative Methodology’ (2016) *ELJ* 519; A von Bogdandy, ‘Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace’ (2018) *EuConst* 675.

²¹ See P Eleftheriadis, ‘The Primacy of EU Law: Interpretive, not Structural’ (2023) *European Papers* www.europeanpapers.eu 1255.

²² On the existence of a macroeconomic European constitution and its relevance for the definition of the content and significance of the Rule of Law, of interest the findings of K Tuori and K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014), on which, see F Bilancia, ‘Economic Crisis and territorial asymmetrical effects on the guarantee of Social Rights within the European Economic and Monetary Union (EMU)’, in S Civitarese Matteucci and S Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge 2017) 257, 259 ff.

been addressed by EU fiscal institutions to the Member States. This is due to the need to safeguard the financial stability of the EU and the Member States, as well as ensuring sound national budgets, taking into due consideration the varied circumstances of each State.²³ As some scholars have observed, the question arises whether this system of 'fiscal rules' within the EMU, as part of the macroeconomic European Constitution, can be considered a form of prescriptive "fiscal" Rule of Law.²⁴

This argument would be quite convincing, were it the case, though I do not believe it to be so. If the normativity of the fiscal rules were part of the E(M)U's Rule of Law, violation of these rules would raise very different issues compared to the violation of those established by the EU to combat financial fraud, corruption, and conflicts of interest, as well as threats to the independence of the judiciary.²⁵ The latter concerns are particularly relevant for reducing corruption and fraud, as set out in the previously quoted Regulation on the conditionality mechanism.

On the contrary, we should consider these normative commitments as two very distinct questions: on the one hand, the fiscal rules system within the EMU and its governance,²⁶ and, on the other, commitments and prohibitions banning the States from implementing legislative reforms and constitutional amendments through a violation of the Rule of Law intentionally designed to reduce their legal capacity to protect the EU's financial interests from misappropriations of funds or fraud, thereby reducing or hindering the proper legal use of the financial resources provided for by the European Union. This is because the new financial measures have been implemented and reinforced with the aim of addressing the economic crisis and its consequences after the pandemic.²⁷

In considering the financial dimension of the new system of rules, as pointed out earlier, there is one more question to consider. After the Maastricht Treaty came into

²³ This is the analytical approach of F Terpan and S Saurugger, 'Does Soft Law Trigger Differentiation and Disintegration?' (2022) European Papers www.europeanpapers.eu 1229, moving from the tensions brought by the problematic legal differentiation between national legal orders, economic-financial systems, and the "integration through-law narrative".

²⁴ See my previous works F Bilancia, 'Crisi economica, decisioni finanziarie ed istituzioni democratiche nazionali. Considerazioni di sintesi' (2016) *Federalismi*, as well as F Bilancia, '*Juridification*, società civile e identità nazionali nel processo di integrazione europea' (2016) *Diritto pubblico* 937.

²⁵ On the importance of this principle in the EU legal order see, among others, K Lenaerts, 'The Two Dimensions of Judicial Independence in the EU Legal Order', in R Spano, I Motoc, B Lubarda, P Pinto de Albuquerque and M Tsirli (eds), *Fair Trial: Regional and International Perspectives. Liber Amicorum Linos-Alexandre Sicilianos* (Anthemis 2021) 333; P Bárd, 'In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law' (2021) *ELJ* 185.

²⁶ See C Fasone and M Simoncini, 'Next Generation EU and Governance by Conditionality. A Transformation of the European Economic Constitution?' (2024) European Papers www.europeanpapers.eu 1148.

²⁷ See the EU Commission Communication on the *Guidelines*, which clearly sets out the goal of avoiding "national law precluding effective judicial review of administrative decisions to implement the Union budget or obstructing referrals of relevant cases to the Court of Justice of the European Union, or due to lack of independence of national courts" (recital 43).

force, a new normative paradigm was slowly enforced, reducing the margin of political discretionary powers of national governments, especially regarding economic and social matters, while simultaneously implementing the material influence of soft directing and controlling powers of the EU Commission and ECOFIN²⁸ on the national political systems.

The Member States of the Eurozone are also bound by strict legal (and even constitutional) constraints on economic decision-making, particularly following the sovereign debt crisis of 2008. This is especially true with regard to budgetary constraints.

When discussing conditionality and conditional spending, it is necessary to broaden one's perspective on interpreting the meaning and role of Rule of Law conditionality, considering whether and how this specific financial dimension relates to the normativity of the Rule of Law today. Must we view both the fiscal and anti-fraud rules as being part of the EU Rule of Law? Can we conceptualise the financial sustainability of spending policies as part of the EU Rule of Law on economic issues? The so-called Rule of Law conditionality could affect every Member State, and not only those facing issues related to the independence of their judiciary, for instance. Of course, the EU lacks the competence to implement the Rule of Law within national legal and constitutional systems through legislative powers²⁹ and can only counter violations through the mechanism established by art. 7 TEU.³⁰ Its institutional system cannot adopt legislation on the "organisation of justice" within national systems. In order to ensure the protection of the EU's financial interests, however, national governments must address the relevant country-specific challenges and priorities identified in the context of the European Semester, as well as the recommendations issued by the Commission and approved by the Council.

Whether these powers and rules can be considered part of a normative system *lato sensu*, according to the parameters of the Rule of Law, is questionable, and somewhat difficult to resolve. It might be easier to link them to the distinct notion of the "principle of legality",³¹ which is, of course, just one element of the Rule of Law. This perspective could also enable a better investigation and understanding of the core legal questions of the Euro Area's economic system and how it contributes to implementing the macroeconomic dimension of the European economic constitution or, as we have already termed

²⁸ See F Losada and K Tuori, 'Integrating Macroeconomics into the EU Single Legal Order: The Role of Financial Stability in Post-crisis Europe' cit.; M Chamon, 'The Sui Generis Framework for Implementing the Law of EMU: A Constitutional Assessment' (2021) European Papers www.europeanpapers.eu 1463.

²⁹ See the interesting critical analysis by J Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) European Papers www.europeanpapers.eu 255.

³⁰ On the implementing tools to enforce the democratic principle and the Rule of Law beyond art. 7, see Y Bouzora, 'The Value of Democracy in EU Law and Its Enforcement: A Legal Analysis' (2023) European Papers www.europeanpapers.eu 809; A. Holesh, E. Rutynowska and C. Portela, 'Too Little, but Not Too Late? Assessing the Role of Sanctions in the EU's Rule of Law Conflict with Poland' cit. 114 ff.

³¹ S Civitarese Matteucci, 'The Formal Meaning of the Ideal of the Rule of Law' (2011) Italian Journal of Public Law 5, 14 ff.; JNE Varuhas, 'The Principle of Legality' (2020) Cambridge Law Journal 578.

it, the EU's "constitution of macroeconomics".³² This approach could assist in analysing and describing the system of rules formed and implemented merely to regulate the financial and economic aspects³³ of the EMU's integration framework. Some of these rules have then been formalised and introduced into legal systems at the national level as constitutional amendments, as happened in Italy in 2012.³⁴

This is where the EU Rule of Law issue intersects with the legal dimension of financial conditionalities. If we were to assume that the commitment of national governments to respect financial targets and budget rules is part of the Rule of Law principles, we might risk distorting the fundamental values of that very principle since all these new commitments, prohibitions, targets and governance tools do not traditionally belong to the core notion of Rule of Law. To consider these conditionalities, concerning financial issues and public budgets within the Euro system, in order to regulate and stabilise deficit spending (which we might begin to call "conditional spending"), as part of the Rule of Law, would lead to contradictions and open up the interpretive perspectives of its principles. This would involve giving it, in a creative form, a new legal shape and political version, which we might reconsider as a Rule of Law conditionality that includes financial targets, rules, and mechanisms as normative in itself. This perspective, which we might consider legally inconsistent, has often been exploited, however, to criticise the Rule of Law conditionality mechanism as a tool for the EU's financial dominance over the Member States instead of considering it in terms of its intended purpose.

However, when we examine Regulation 2020/2092, the theoretical question is actually somehow different and probably much more limited. At the core of the Regulation lies the more focused issue of combatting fraud and corruption.³⁵ Could we consider these principles, albeit part of EU law, as also constituting part of the EU Rule of Law?

I think we can set aside the question at hand, as the important issue is to distinguish the meaning and content of this Regulation from the broader context of the financial and budget Regulations. In other words, from the entire set of rules, restrictions, obligations, and parameters that we collectively refer to as "fiscal rules". In this case, it is merely a question of a wider activity of public financial Regulation, governed by a broader spectrum of political and legal instruments, some of which are not always formally binding.

³² Among the first scholars to address the concept and normative significance of the "economic constitution", looking to the German legal tradition, see K Tuori and K Tuori, *The Eurozone Crisis* cit. and T Prosser, *The Economic Constitution* (OUP 2014), 1 ff., 58 ff., 240 ff.

³³ This is the idea, I believe, through which K Tuori, K Tuori, in *The Eurozone Crisis* cit., approach the Eurozone crisis as a crisis of the Maastricht "economic constitution".

³⁴ On this subject, see my previous work, F Bilancia, 'Spending review e pareggio di bilancio. Cosa rimane dell'autonomia locale?' (2014) *Diritto pubblico* 45.

³⁵ In order to prevent "national law precluding effective judicial review of administrative decisions to implement the Union budget or obstructing referrals of relevant cases to the Court of Justice of the European Union, or due to lack of independence of national courts", as the EU Commission puts it in its *Guidelines*, recital 43.

While it is important to acknowledge interpretations that view the financial sustainability of spending policies as part of a hegemonic notion of the European Union's Rule of Law, at least as far as the economy is concerned, we do not endorse this position here. However, it would probably be useful to address this contentious viewpoint as a topic deserving of deeper analysis, at least to answer the question of whether and "how EU primary law's provisions regarding economic constitutionalism are related to the 'values' of article 2 TEU".³⁶ This is particularly relevant for understanding the related issue of the manner and form in which the so-called EMU macroeconomic governance has been implemented and legally formalised within the States' constitutional systems, an issue that space does not allow us to address in this *Article*³⁷

IV. THE EU RULE OF LAW AS AN INSTRUMENT OF POLITICAL DOMINANCE

Some critical positions, as we have seen, stem from the idea that the EU Rule of Law may be exploited as a tool of political dominance over the political autonomy of national governments: a hegemonic instrument enabling EU (financial) institutions to override States' constitutions and democratic governments. These critics raise the question, which must be addressed, of whether – in fact – the EU Rule of Law is based on a substantially democratic framework. Through these questions, we seek to highlight and understand some instances of national opposition to the Rule of Law conditionality Regulation in contemporary European politics³⁸ framed within a different critical perspective, often associated with anti-systemic views characteristic of populist approaches.

What must be addressed, in essence, is the political and legal conundrum of the material role and function of the EU Rule of Law. Can we consider it a form of EU positivism, understood as EU legalism, as though the EU institutions, beyond their conferred powers,³⁹ might impose from outside, as the "EU Rule of Law", new normative content legally binding on the Member States, to be simply accepted by their governments and legal systems? It should be clear that this is not just about the supremacy of EU law in areas where it has legal competence under the Treaties, a fundamental principle of EU law, as we know. Instead, we are dealing with a very different notion: that the principle of the

³⁶ C Pinelli, 'Conditionality and Economic Constitutionalism in the Eurozone' (2019) *Italian Journal of Public Law* 22, 39.

³⁷ On these topics see the analysis and reasoning set out by F Losada and K Tuori, 'Integrating Macroeconomics into the EU Single Legal Order: The Role of Financial Stability in Post-crisis Europe' cit.

³⁸ See J Bornemann, 'Judicial Responses to Autocratic Legalism: The European Court of Justice in a Cleft Stick?' (2022) *European Papers* www.europeanpapers.eu 651, 655 ff.

³⁹ This question went viral after the implementation of the European Stability Mechanism (ESM) tools, an issue we are unable to address in this paper. See, among others, F Vanackère and Y Kaspiarovich, 'European Institutions Acting Outside the EU Legal Order: The Impact of the Euro Crisis on the EU's "Single Institutional Framework"' (2022) *European Papers* 481.

Rule of Law as such could bring with it an overarching normativity, especially in financial and economic matters, extending beyond its traditional meaning.

This would imply a system of values, principles, and rules not originally shared among the Member States' constitutional orders but rather newly and differently implemented, now imposed by a transforming legal system akin, we might say, to a federal State. The real issue is that we cannot overlook the fact that, in the perception of some individuals and scholars, the EU Rule of Law is increasingly viewed as an instrument effectively granting of EU law supremacy over national legal orders.⁴⁰ A new form of legal supremacy, even on constitutional matters (national *identities?*), mediated through the case law of the ECJ and even national courts.

This interpretation of the UE Rule of Law as an instrument of legal positivism has a marked political impact on the EU legal framework and the conferred powers doctrine. It arises from opposition to fiscal rules, their content, and their role. This doctrine is further reinforced by a misinterpretation of "conditionality, as an instrument of EU law and policy making", a tool for implementing policies through means other than legal rules; even beyond the conferred powers. As Baraggia and Bonelli state,⁴¹ this could be seen as "a valid alternative form of exercise of public power and authority [...] posing constitutional questions", particularly if it emerges as a federalising instrument. They further observe that the "centripetal effect may be highly problematic given the embedded tension between EU centralization and national powers in key policy fields that may be attracted via conditionality in the EU regulatory sphere".⁴²

These approaches raise at least one further question: does the EU's financial conditionality elevate new, often informal, rules to the rank of binding legislation, effectively establishing a hierarchy of norms?⁴³ Does this signify a level of formalisation in the actions of a new or, at least, reinvigorated EU authority?⁴⁴

Following the analysis and theoretical perspective outlined in these short notes, it should now be clear that we do not consider the EU Rule of Law and EU legislation to overlap. Instead, we find it more useful and realistic to view the EU Rule of Law as one of

⁴⁰ This was aptly observed by K. Lenaerts, 'New Horizons for the Rule of Law Within the EU' (2020) German Law Journal 29.

⁴¹ A Baraggia and M Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022) German Law Journal 131, 142 ff., 144.

⁴² *Ibid.* 151.

⁴³ See, again, the interesting critical analysis set out by F Terpan and S Saurugger, 'Does Soft Law Trigger Differentiation and Disintegration?' cit.

⁴⁴ I am grateful to T Tridimas for his speech on this issue at the EUI Conference, *Rule of Law in the EU: Consensus and Discontent* (European University Institute, 10-11 June 2021). I found most stimulating the analysis presented by D. Sarmiento, 'Killing me softly... with soft law. Non-binding acts, judicial review and the limits of the rule of law in European Union Law' cit.

several instruments aiming to achieve, in the future, an “ever closer union” among Member States and Peoples, acting through law and according to law.⁴⁵ Here, “law” should be understood as the shared legal framework of the European Union and the Member States, at least when reflecting on the basic values and principles of the Rule of Law,⁴⁶

It is, of course, also evident that this overlapping effect is sometimes reinforced by the perception of the EU Commission as a political authority. For instance, this perception arises when considering the role of the Commission in monitoring, analysing, and addressing national breaches of the Rule of Law, initiating the procedure set out in the conditionality Regulation, conducting preliminary assessments, or proposing to the Council measures under the conditionality Regulation to protect the Union budget or its financial interests. In reality, however, this is not the case, at least if we refer to the Commission's Communication defining its competence in implementing the conditionality Regulation. This act was introduced specifically to restrict the Commission's actions through a more detailed system of rules and limits, thus ensuring transparency and accountability.

If we examine Regulation 2020/2092 in depth,⁴⁷ especially following the decisions of the Court of Justice on the Hungarian and Polish cases,⁴⁸ and then consider the integration and application rules outlined in the Communication defining the Guidelines “on the Regulation on a general regime of conditionality for the protection of the Union budget”, we may find solid corroboration of this different view.

These new measures have been adopted with the intent of better protecting the EU budget in the event of violation of the Rule of Law principles. The most important consequence of these provisions is that now those violations of the Rule of Law principles by a

⁴⁵ See F Peirone, ‘The Rule of the Present, Not the Past’ (2021) *Jus Cogens* 229, 242 ff.

⁴⁶ For a broader analysis of the same issue, see F Bilancia, ‘Gli interessi finanziari dell’Unione europea e il mutamento della concezione (europea) della *Rule of Law*’ (2022) *Diritto pubblico* 677, 695 ff.

⁴⁷ On problems of application, see N Kirst, ‘Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?’ *European Papers* (European Forum Insight of 22 April 2021) www.europeanpapers.eu 101; J Łacny, ‘The Rule of Law Conditionality Under Regulation No 2092/2020 - Is it all About the Money?’ (2021) *Hague Journal on the Rule of Law* 79. And already on this issue, the previous analysis of G Halmay, ‘The Possibility and Desirability of Rule of Law Conditionality’ (2018) *Hague Journal on the Rule of Law* 171; G della Cananea, ‘On Law and Politics in the EU: The Rule of Law Conditionality’ (2021) *Italian Journal of Public Law* 1.

⁴⁸ *Hungary v Parliament and Council* cit.; *Poland v Parliament and Council* cit. See N Lupo, ‘Next Generation EU e sviluppi costituzionali dell’integrazione europea: verso un nuovo metodo di governo’ (2022) *Diritto pubblico* 729; L Pech, ‘No More Excuses. The Court of Justice Greenlights the Rule of Law Conditionality Mechanism’ (16 February 2022) *Verfassungsblog* verfassungsblog.de; P Faraguna and T Drinóczi, ‘Constitutional Identity in and on EU Terms’ (21 February 2022) *Verfassungsblog* verfassungsblog.de; W Sadursky, ‘The European Commission Cedes its Crucial Leverage vis-à-vis the Rule of Law in Poland’ (6 June 2022) *Verfassungsblog* verfassungsblog.de; R Cisotta, ‘Rigidità e flessibilità del sistema delle competenze dell’UE alla luce della prassi recente’ (2022) *Diritto pubblico* 702; A Guazzarotti, ‘Tutela dei valori e democrazie illiberali nell’UE: lo strabismo di una narrazione “costituzionalizzante”’ (2022) *Costituzionalismo.it* 1; T Drinóczi and A Bien-Kacała, *Illiberal Constitutionalism in Poland and Hungary. The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2022); G de Búrca, ‘Poland and Hungary’s EU membership: On not confronting authoritarian governments’ (2022) *ICON* 13.

Member State's institutions are no longer relevant solely as breaches of the Rule of Law. They must now also be considered in a different dimension, particularly if they could jeopardise the Union's financial stability or the protection of its "financial interests", especially if this occurs "in a sufficiently direct way".

All the critical questions recently raised regarding the contents and meaning of the EU Rule of Law as addressed here stem from this very connection. The point is that, in order to be considered relevant, a violation of the Rule of Law values within this specific legal framework must present a concrete and direct risk to the sound financial management of the Union. This is no longer the case with violations of art. 2 TEU, which trigger proceedings as provided for under art. 7 TEU. The mechanism here is quite different, not designed with the intent of protecting the Rule of Law, as is the case with the latter. The Regulation on a general regime of a Rule of Law conditionality for the protection of the EU's financial interests provides for various sanctions specifically designed to protect the Union's financial stability. The means to achieve this goal include withholding funds and other financial provisions already approved in order to prevent Member States benefitting from breaches of the Rule of Law, such as in cases of misconduct, misappropriation, or corruption.

In so doing, the EU institutions, particularly the Commission, are themselves bound by the Rule of Law framework, as has been the case when acting as the legislative authority during the adoption procedure of the Regulation itself.⁴⁹ This is most evident when comparing the Commission's initial proposal for this piece of legislation with the final version, the one ultimately approved and entered into force.⁵⁰

V. SOME PROVISIONAL CONCLUSIONS

It is probably too early to determine the real legal strength of the Rule of Law principle within the EU system and the Member States in these times of crisis.⁵¹ What still requires serious discussion is, indeed, how the values set out in art. 2 could be better enforced, either through a formal and justiciable legal mechanism⁵² or via the more accessible but

⁴⁹ A Baraggia, 'The New Regulation on the Rule of Law Conditionality: a Controversial Tool with Some Potential' (22 December 2020) IACL-AIDC Blog blog-iacl-aidc.org; T Tridimas, 'Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?' (2021) *Croatian Yearbook of European Law and Policy* VII; A Baraggia and M Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' cit.; M Fiscaro, 'Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values' (2019) *European Papers* www.europeanpapers.eu 695, 710 ff.

⁵⁰ See A Baraggia and M Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' cit.

⁵¹ See P Craig, 'The Rule of Law and EU: Responsibility, Independence and Rights', in A Rosas, J Raitio, P Pohjankoski (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Hart 2023) 29; L Antoniolli and C Ruzza (eds), *The Rule of Law in the EU. Challenges, Actors and Strategies* cit.

⁵² I am especially grateful to Elisa Cavasino for having drawn my attention to this very important issue, recently highlighted and debated by S Bartole, *The Internationalisation of Constitutional Law. A View from the*

much weaker procedure of art. 7 TEU.⁵³ Of course, the latter is far less enforceable than a binding judicial decision as it must go through a political negotiation process. The former, on the other hand, could lead to much greater political tension among the Member States by strengthening centrifugal forces during a period of intense political difficulty and distrust.

As we have seen, while calling for a distance from the EMU's dominance over financial and economic issues, national populist currents have questioned the very connection between the EU Rule of Law and democracy. In terms of the EU institutions' ability to address decisions made by national governments on political matters, these critics have also emphasised the importance of the States' constitutional identity.⁵⁴ They advocate for a stronger role for each national government as the interpreter of an idea of a "democratic Rule of Law", a set of principles grounded in national social values and constitutional norms for its legitimation. These critics refuse to speak (could we too?) of a European People. The core of this critical view is to regard European Law as primarily serving the interests of *élites* – an instrument of institutional power – rather than being democratically oriented.⁵⁵

This reference to its purported democratic foundation is misleading. The question of the Rule of Law, in our view, should not be considered to be overshadowed by the democratic dilemma as the former must still be understood primarily as a limit on political power. This means that it must also be seen as a legitimising tool for the political institutions, with the law and the constitution serving as legal limitations on the will of the people, just as they once constrained the will of the monarch. What is particularly worrying is that the expression "will of the people" is frequently misused to mask "government power", with all the consequences that arise when we address the national "identity" issue in populist discourse. It is not merely the implementation of the EU Rule of Law with a specific political content that is at stake here, but the protection of the Rule of Law in its traditional meaning, function, and content.⁵⁶ The legal foundation of democracy is

Venice Commission (Hart 2020); P Bárd, 'In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law' (2021) ELJ 185.

⁵³ Even weaker now, if we consider the effects of the Ukraine war, as remarked by P Bárd and DV Kochenov, 'War as a pretext to wave the Rule of Law goodbye? The case for an EU constitutional awakening' (2021) ELJ 39.

⁵⁴ As noted by J Bornemann, 'Judicial Responses to Autocratic Legalism: The European Court of Justice in a Cleft Stick?' cit. 654 ff., this sometimes represents a threat to the authority of the European Court of Justice, as it advocates for a State's autocratic legalism instead.

⁵⁵ Paul Blokker speaks of "a part of power game", in P Blokker, 'Populist Understandings of the Law: A Conservative Backlash?' (2020) PACO - PArtecipazione e CONflitto 1433 ff.; P Blokker, 'Populism as a constitutional project' (2019) ICON 535, 548 ff.

⁵⁶ Of particular interest is the analytical approach to the historical dimension of EU law, with a specific focus on the EU Court of Justice, by M Rasmussen, 'Towards a Legal History of European Law' (2021) European papers www.europeanpapers.eu 923.

strictly dependent on the Rule of Law as a defining feature of constitutionalism. Indeed, the Rule of Law emerged in Western political systems long before democracy,⁵⁷ and the legitimisation of democratic authority in the contemporary constitutional context must itself be grounded precisely in the form and substance of the Rule of Law.⁵⁸

That is why political conflict over Rule of Law issues brings with it deep-rooted tensions between political institutions and social structures, creating significant divides among fractions of the populace on social, political, or economic questions, and leading to a marked decay in the effectiveness of the legal framework. A strong emphasis on the “will of the people” as a tool of government power, without a legal framework, results in alienation from constitutional democracy itself. In other words, we cannot accept a regression to restate an immanent idea of political power, based solely on the will of a political leader who claims legitimacy simply from “the people” as a unified political body. Democracy, as a common value in contemporary legal civilisation, must bring with it the principle of legality, the separation of powers, the independence of the judiciary⁵⁹, judicial protection of rights, and judicial review, among others. One of the main political reasons, in the aftermath of WWII, for bringing together the European national States to build a regional legal order inspired by the principles of peace and justice, was indeed the need to frame State sovereignty within a Rule of Law system.⁶⁰ This must be understood, as it was in its original context (and still is) as a constitutional common core that drives politics within a legal framework. These principles were initially chosen as the legal foundation by the European national constitutions, later shared by the Member States through the European Communities, and they now form the foundation of the European Union.⁶¹ It is not a matter of legal transplantation or legal dominance, but rather a shared system of values.⁶² This system is now also essential for achieving, among many other objectives,

⁵⁷ I have already addressed this issue in F Bilancia, ‘Constitutional Roots of Democracy’ (2019) *Costituzionalismo.it* 33.

⁵⁸ On the specific issue of the international protection of individuals, see the significant judgment of the ECJ in case C-123/22 *European Commission v Hungary* ECLI:EU:C:2024:493, on which, also quoting many relevant precedents of Hungary rule of law violations, G Barrett, ‘Rule of Law Chickens Coming Home to Roost the Ruling in Case C-123/22 *European Commission v Hungary*’ (21 June 2024) *Verfassungsblog* verfassungsblog.de.

⁵⁹ A very interesting analysis of the ECJ case law on this issue is provided in the work of M Leloup, ‘The Untapped Potential of the Systemic Criterion in the ECJ’s Case Law on Judicial Independence’ (2023) *German Law Journal* 995.

⁶⁰ A particularly meaningful analytical perspective relates to the concept of “autonomy”, examining the political foundations of EU law vs. States’ sovereignty. For a challenging approach, see E Cannizzaro, ‘Nine Theses on Autonomy: Making Sense of a Controversial Doctrine’ (2023) *European Papers* www.europeanpapers.eu 1317. See also, on the specific topic of the ECJ case law, D Kukovec, ‘Autonomy: The Central Idea of the Reasoning of the Court of Justice’ (2023) *European Papers* www.europeanpapers.eu 1403 ff.

⁶¹ P Lindseth and C Fasone, ‘Rule-of-Law Conditionality and Resource Mobilization – the Foundations of a Genuinely “Constitutional” EU?’ (11 December 2020) *Verfassungsblog* verfassungsblog.de.

⁶² This is very much the position of R Uitz, ‘The Rule of Law in the EU: Crisis, Differentiation, Conditionality’ (2022) *European Papers* www.europeanpapers.eu 929.

the protection of sound financial interests through the law. Addressing the issue of the Rule of Law, even in financial matters, involves dealing with legal constraints on State sovereignty, and the misuse of the constitutional identity issue cannot justify the erosion of Rule of Law principles, as these principles are common to the constitutional systems of States, shared among them, and embedded within the EU legal order.⁶³

⁶³ “Legal systems do not conflict (or) overlap”, see P Eleftheriadis, ‘The Primacy of EU Law: Interpretive, not Structural’ cit. 1269 ff.

