



ARTICLES

RULE OF LAW CONDITIONALITY IN EU FUNDS: THE VALUE OF MONEY IN THE CRISIS OF EUROPEAN VALUES

MARCO FISICARO*

TABLE OF CONTENTS: I. Introduction – II. Defending the budget or the rule of law? – III. Why using spending conditionality? – IV. Scheme of the proposal. – V. Addressing the legal shortcomings of the proposal. – V.1. Is the proposal compatible with the principle of conferral? – V.2 The Commission's excessive discretionary power: a challenge to the rule of law? – VI. No more "Money for nothing": is there room for solidarity? – VII. Conclusions.

ABSTRACT: The *Article* critically engages with the recent Commission's proposal for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (Rule of Law Conditionality). It first considers the reasons underlying the proposal and the Commission's choice to resort to spending conditionality in the context of the rule of law crisis. In the second part, it addresses two main rule of law issues arising from the draft regulation itself: on one hand, it attempts to define the boundaries of the Union's competence to establish a Rule of Law Conditionality in the management of EU funds; on the other, it highlights the broad discretionary power the Commission reserved for itself and the relative shortcomings in terms of legal certainty, transparency and non-arbitrariness. Finally, the *Article* focuses on the complex relation between conditionality and solidarity in the EU internal dimension and analyses the proposal from this particular perspective.

KEYWORDS: rule of law – conditionality – solidarity – European Union – multiannual financial framework – budget.

I. INTRODUCTION

Prominent scholars have stressed the importance of drawing "red lines" to add "substance and bite to the European values" in the struggle against "illiberal democracies"

* Ph.D. candidate, University of Catania, marco.fisicaro@phd.unict.it. An earlier version of this *Article* was presented at the Doctoral Workshop on "The Rule of Law", co-organised by the *Università degli Studi di Milano* and the European School of Law of the *Université Toulouse 1 Capitole* (Milan, 4 July 2019). Special thanks go to Federica for her helpful observations at the revision stage and to Livia for her patience (and not only) from Rome to St. Petersburg.

within the European Union.¹ According to them, we might even witness a potential “constitutional moment”: indeed, the Union’s response to the rule of law crisis will tell us “whether illiberal democracies become part of the European public order as laid out in Art. 2 TEU, or are opposed by it”,² and this will deeply impact on the future path of the European integration process.

From this perspective, the Commission’s proposal for a regulation on the protection of the Union’s budget in case of generalised deficiencies as regards the Rule of Law in the Member States³ – aimed at introducing a form of Rule of Law Conditionality in the management of EU funds – looks much like an attempt to draw a bold “red line” in this respect.

The mechanism envisaged by the Commission is intended to strengthen the Union’s ability to enforce its founding values *vis-à-vis* recalcitrant Member States by enriching the rule of law toolbox with what appears to be a much more persuasive instrument compared to the currently available ones.

This is the main reason why Rule of Law Conditionality has been endorsed by some scholars⁴ and warmly welcomed within the EU institutional framework,⁵ especially by the European Parliament, which first encouraged the Commission to put forward the proposal⁶ and then approved it in first reading.⁷

However, as evidenced also by the Court of Auditors’ opinion on the draft regulation⁸ and by a fierce plenary debate held at the European Parliament,⁹ the proposed

¹ A. VON BOGDANDY, P. BOGDANOWICZ, I. CANOR, M. TABOROWSKI, M. SCHMIDT, *A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines*, in *Common Market Law Review*, 2018, p. 983 *et seq.*

² *Ibid.*, p. 984.

³ 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.

⁴ G. HALMAI, *The Possibility and Desirability of Rule of Law Conditionality*, in *Hague Journal on the Rule of Law*, 2019, p. 171 *et seq.*; R. D. KELEMEN, K. L. SCHEPPELE, *How to Stop Funding Autocracy in the EU*, in *Verfassungsblog*, 10 September 2018, verfassungsblog.de.

⁵ European Committee of the Regions, Opinion COR 2018/02389 of 9 October 2018, *The Multiannual Financial Framework package for the years 2021-2027*; European Economic and Social Committee, Opinion EESC 2018/02955 of 18 October 2018 on 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.

⁶ European Parliament Resolution A8-0048/2018 of 14 March 2018 on the next MFF: Preparing the Parliament’s position on the MFF post-2020, para. 119.

⁷ European Parliament Legislative Resolution P8_TA/2019/0349 of 4 April 2019 on the 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.

⁸ Court of Auditors, Opinion 1/2018 of 12 July 2018 concerning the proposal of 2 May 2018 for a regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States.

mechanism raises significant and still unresolved critical issues to be addressed both in academic debate and public discussions.

This *Article* is intended to be an attempt to stimulate further reflections on this topic in view of the current political negotiations on the Commission's package of proposals for the financial period 2021-2027,¹⁰ amongst which the Rule of Law Conditionality draft regulation is a considerable matter of dispute.

The next months will be crucial for the future of the proposal. There seems to be fairly wide agreement among Member States on the need to establish a stronger link between budget and values by making use of the conditionality tool,¹¹ but the inclusion of the draft regulation within the proposals for the next Multiannual Financial Framework (MFF) renders difficult to foresee its outcome.

The first part will focus on the reasons behind the proposal (section II) and the rationale underlying the Commission's choice to resort to the controversial conditionality tool to attain its objectives (section III).

In the second part, I will critically engage with two relevant and still unanswered rule of law questions arising from the proposal. Firstly, I will investigate if, and to what extent, such a mechanism is in line with the principle of conferral and whether Art. 322, para. 1, let. a), TFEU is a feasible legal basis for it (section V.1). Secondly, I will consider whether the discretionary powers deriving from the proposal for the Commission are compatible with some of the key components of the rule of law, such as the principles of legal certainty, transparency and non-arbitrariness of the executive power (section V.2).

In the third and last part, I will briefly consider the challenges arising from the complex relation between conditionality and solidarity in the EU *internal* dimension and I will then look at the proposal from this perspective (section VI).

II. DEFENDING THE BUDGET OR THE RULE OF LAW?

As it is clear from the proposal's title onwards, the Commission's declared aim is defending the Union's budget against the negative externalities deriving from generalised

⁹ The video of the Plenary of 16 January 2019 on the Rule of Law Conditionality Proposal is available at the following link: www.europarl.europa.eu.

¹⁰ For an overview see Communication COM(2018) 321 final of 2 May 2018, *A Modern Budget for a Union that Protects, Empowers and Defends: The Multiannual Financial Framework for 2021-2027*.

¹¹ This has been confirmed by the Member States' contributions to the Commission's initiative *Further strengthening the Rule of Law within the Union – state of play and possible next steps* available at ec.europa.eu. Indeed, leaving aside the foreseeable opposition of Poland and Hungary, the proposal has enjoyed support from Belgium, Finland, France, Germany, Netherlands, Slovenia, Spain, Sweden and Portugal. Interestingly, the Slovak Republic – member of the so-called “Visegrád group” – did not oppose the proposal, although highlighting some issues to be clarified, including the questions of competence, legal certainty and compatibility with the Treaties, as well as the use of reversed qualified majority in the decision-making process.

rule of law deficiencies in the Member States. According to the Commission, “respect for the rule of law is an essential precondition to comply with the principles of sound financial management”, which can be ensured by the Member States only if public authorities act in accordance with the law and if their decisions can be subject to effective judicial review by independent courts and by the Court of Justice.¹² If this is not the case, the Union should be able to adopt appropriate measures “in order to protect the Union’s financial interests from the risk of financial loss”.¹³

Alongside the need to protect the budget, the Commission’s proposal is evidently prompted by the growing awareness about the ineffectiveness of the available mechanisms for the enforcement of EU values, that became dramatically patent in Poland and Hungary. The Commission does not conceal this intent, acknowledging that the proposal comes as the result of a “clear request from institutions such as the European Parliament as well as from the public at large for the EU to take actions *to protect the rule of law*”.¹⁴

Facing the emersion of “rule of law backslidings”¹⁵ throughout Europe, it becomes clear that, given the nature of the EU legal order and the deep interdependence among Member States, domestic constitutional crises cannot be seen as purely internal problems anymore. Indeed, when the effective application of EU law cannot be ensured by national judges acting as independent decentralised European judges, it is also the rule of law at the Union level to be under threat. Likewise, Union’s policies are largely founded on mutual trust, that is in turn built “on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU”.¹⁶ As emerged in the *LM* case¹⁷ on the execution of a European Arrest Warrant, systemic rule of law deficiencies inside a Member State can undermine mutual trust and, thus, the correct functioning of the EU legal order as a whole.

Despite some recent successes coming from Luxembourg, the actions taken at the Union level to deal with Hungary and Poland have shown an overall weakness of the current EU rule of law toolbox, revealing a significant mismatch between the authority of the EU in protecting values within Member States and its real ability to intervene.¹⁸

¹² 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, recitals 4 and 5.

¹³ *Ibid.*, p. 2.

¹⁴ *Ibid.*, p. 1 (emphasis added).

¹⁵ L. PECH, K. L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017, p. 3 *et seq.*

¹⁶ Court of Justice, opinion 2/13 of 18 December 2014, para. 168.

¹⁷ Court of Justice, judgment of 25 July 2018, case C-216/18 PPU, *LM*.

¹⁸ J.W. MÜLLER, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, in *European Law Journal*, 2015, p. 141 *et seq.*

Art. 7 TEU, as is well known, had never been used until the 20th of December 2017, while since this date it has been triggered twice – first by the Commission against Poland¹⁹ and then by the European Parliament *vis-à-vis* Hungary.²⁰ However, this move has not led the Council to the determination of a clear risk of a serious breach of the values enshrined in Art. 2 TEU so far. Commission and Parliament busted the “nuclear” myth about the activation of Art. 7 TEU,²¹ but the Council’s inaction has unequivocally shown that this procedure can hardly play a leading role in addressing rule of law crises, due to its strict procedural threshold.

Furthermore, the 2014 Rule of Law Framework²² – created by the Commission to prevent that a systemic threat to the rule of law in a Member State could reach the level of a “clear risk of a serious breach” within the meaning of Art. 7 TEU – has revealed several limits in its first application against Poland. Despite one Rule of Law Opinion and four Rule of Law Recommendations²³ issued by the Commission, Poland has not changed its policies in a substantive manner; in addition, the length of the procedure (from 1 June 2016 to 20 December 2017) has arguably allowed Polish authorities to further consolidate the violations.

Some positive outcomes resulted very recently from the strong involvement of the Court of Justice in tackling the rule of law crisis.

Actually, the impact of the first infringement proceedings launched by the Commission against Hungary in 2012 was anything but satisfactory, mainly because of the inevitable length of the procedure and of the “creative compliance”²⁴ by Hungarian authorities with the Court’s judgments.²⁵ However, since the end of 2017 a series of fundamen-

¹⁹ Commission, Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland – Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final of 20 December 2017.

²⁰ European Parliament Resolution P8_TA(2018)0340 of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

²¹ D. KOCHENOV, *Busting the Myths Nuclear: A Commentary on Article 7 TEU*, in *EUI Working Papers*, no. 10, 2017.

²² Communication COM(2014) 158 final of 11 March 2014 from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*.

²³ Commission Opinion of 1 June 2016 regarding the Rule of Law in Poland; Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland; Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374; Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374 and (EU) 2017/146; Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.

²⁴ A. BATORY, *Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU*, in *Public Administration*, 2016, p. 685 *et seq.*

²⁵ See Court of Justice, judgment of 6 November 2012, case C-286/12, *Commission v. Hungary*; judgment of 8 April 2014, case C-288/12, *Commission v. Hungary*. In the first case, concerning the measures lowering

tal rulings revealed the willingness of the Court to act as the guardian of the “orthodoxy” of the European constitutional order.²⁶

In the *Białowieża Forest* case, the Court stated that – “[in order] to guarantee the effective application of EU law, such application being an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded” – it has power under Art. 279 TFEU to impose a periodic penalty payment on a Member State in the event of non-compliance with the interim measures ordered.²⁷ This is meant to give additional teeth to infringement proceedings because, for penalty payments to be applied, it is no longer necessary to wait until the State fails to comply with the Court’s judgment according to Art. 260 TFEU.

Furthermore, in the groundbreaking judgment *Associação Sindical dos Juizes Portugueses* of 27 February 2018,²⁸ the Court took the unexpected opportunity, coming from a group of Portuguese judges wishing to protect their wages from austerity policies, to provide the Commission with a new powerful tool to challenge domestic measures affecting the independence of the judiciary, namely the second subparagraph of Art. 19, para. 1, TEU.

To understand how, in what has been elegantly called a “judicial serendipity”,²⁹ Portuguese judges came to the rescue of the Polish judiciary, suffice it to say that the second subparagraph of Art. 19, para. 1, TEU is at the heart of the recent landmark judge-

the retirement age of legal officials (judges, prosecutors, and notaries), the Court notably treated a case on judiciary independence as a non-discrimination case and, although Hungary was found in breach of EU law, the judgment was substantially nullified by Hungarian authorities at the execution stage. Indeed, Hungary offered generous financial compensation as an alternative to the restoration of positions and did not ensure for the judges willing a restoration to return to their former positions. In the second case, concerning the independence of the data protection authority, the judgment of the Court did not prevent Hungary from prematurely ending the authority’s term of office. See Z. SZENTE, *Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them*, in A. JAKAB, D. KOCHENOV (eds), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance*, Oxford: Oxford University Press, 2017, p. 456 et seq.; K.L. SCHEPPELE, *Understanding Hungary’s Constitutional Revolution*, in A. VON BOGDANDY, P. SONNEVEND (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, London: Hart, Beck, 2015, p. 111 et seq.

²⁶ E. CANNIZZARO, *Il ruolo della Corte di giustizia nella tutela dei valori dell’Unione europea*, in *Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l’Union: Le long parcours de la justice européenne*, Torino: Giappichelli, 2018, p. 159 et seq.

²⁷ Court of Justice, order of 20 November 2017, case C-441/17 R, *Commission v. Poland (Forêt de Białowieża)*, paras 102-108 (emphasis added).

²⁸ Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses*.

²⁹ M. BONELLI, M. CLAES, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary*, in *European Constitutional Law Review*, 2018, p. 622 et seq.

ments *Commission v. Poland I*³⁰ and *II*³¹ – in which the Court found the Polish reforms of the judiciary incompatible with the principle of judicial independence.

In particular, the case *Commission v. Poland I*, concerning the independence of the Polish Supreme Court, is a paradigmatic example of the increased ability of the Court of Justice to tackle rule of law backslidings compared to the past. Indeed, following the provisional measures ordered by the Vice-President of the Court according to Art. 160, para. 7, of the Rules of Procedure³² and then confirmed by the Court,³³ Poland amended the Law on the Supreme Court on the 21st of November 2018, even before the Court's ruling of June 2019. The combination of the use of the expedited procedure with the adoption of interim measures proved to be an effective way to react through infringement proceedings to rule of law crises.

However, this tool appears to be more suited to tackling specific EU Law violations than problems of a systemic nature.³⁴ Besides, the Court can only intervene *ex post* and there are few if any instruments to react in case a State refuses to comply with the Court's judgements.³⁵

Lastly, it should be highlighted that further developments could be expected from preliminary reference procedures in light of the recent ruling on the *A. K. (Indépendance de la chambre disciplinaire de la Cour suprême)* case, in which the Court emphasised national judges' obligation of disapplying any domestic provision reserving exclusive jurisdiction to a non-independent court according to EU Law.³⁶

Undoubtedly, the situation looks way better than in May 2018, when the Commission first proposed the Rule of Law Conditionality draft regulation. Nevertheless, the proposal has lost none of its interest since the Commission seems committed to provide a political

³⁰ Court of Justice, judgement of 24 June 2019, case C-619/18, *Commission v. Poland (Indépendance de la Cour suprême)*.

³¹ Court of Justice, judgement of 5 November 2019, case C-192/18, *Commission v. Poland (Indépendance des juridictions de droit commun)*.

³² Order of the Vice-President of the Court of 19 October 2018, case C-619/18 R, *Commission v. Poland (Indépendance de la Cour suprême)*.

³³ Court of Justice, order of 17 December 2018, case C-619/18 R, *Commission v. Poland (Indépendance de la Cour suprême)*.

³⁴ Even if some scholars already suggested a way out: K. L. SCHEPPELE, *Enforcing the Basic Principles of EU Law through Systemic Infringement Actions*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, p. 105 *et seq.*; M. SCHMIDT, P. BOGDANOWICZ, *The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU*, in *Common Market Law Review*, 2018, p. 1061 *et seq.*

³⁵ M. STEINBEIS, *Now Let Him Enforce It*, in *Verfassungsblog*, 1 September 2018, verfassungsblog.de. For a general analysis on the Union's difficulties in terms of centralized enforcement see R. BIEBER, F. MAIANI, *Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?*, in *Common Market Law Review*, 2014, p. 1057 *et seq.*

³⁶ Court of Justice, judgement of 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *A. K. (Indépendance de la chambre disciplinaire de la Cour suprême)*.

response beyond the judicial avenues. Most notably, in July 2019 the Commission called the European Parliament and the Council to adopt “rapidly” the proposal, even declaring that it has been exploring whether the impact of rule of law problems on the implementation of other EU policies requires further mechanisms beyond the proposed regulation.³⁷ In addition, the Commission devised a new mechanism – the “Rule of Law Review Cycle” – intended to strengthen the monitoring of rule of law related developments in the Member States.³⁸ Therefore, the Commission is still looking for new ways to improve the enforcement of EU values against recalcitrant Member States and to protect EU policies from the negative effects produced by rule of law backslidings within Europe.

Furthermore, the Finnish Presidency of the Council publicly declared its support to the Rule of Law Conditionality proposal, showing its willingness to continue discussions “on establishing a well-balanced mechanism to protect the EU budget in case of rule of law deficiencies”³⁹ and devoting a section of the MFF negotiating box to the draft regulation.⁴⁰

In conclusion, the Rule of Law Conditionality proposal should be understood in light of the political context described above. Despite the fact that the proposal is formally built on the need to protect the budget, EU institutions seem reasonably more concerned about *defending the rule of law through the budget* than *the budget through the rule of law*.

III. WHY USING SPENDING CONDITIONALITY?

In this section, I will explain what “spending conditionality” is and why the Commission resorted to it in order to defend the budget and, most importantly, the rule of law.

Conditionality is not new on the European scenario, being a long-standing principle in the EU *external* dimension. One needs only think of the use of conditionality in development cooperation and foreign trade policies,⁴¹ as well as in neighborhood⁴² and enlargement⁴³ strategies.

³⁷ Communication COM(2019) 343 final of 17 July 2019, *Strengthening the rule of law within the Union. A blueprint for action*, pp. 15-16.

³⁸ *Ibid.*, pp. 9-12.

³⁹ Note from the Presidency to the Council of 15 July 2019, *Implementation of the Strategic Agenda*, 11187/1/19, p. 4. See also the relative section on the website of the Finnish Presidency of the Council, in which it declares its aim “to pursue negotiations on making the receipt of EU funds conditional on the respect for the rule of law”, eu2019.fi.

⁴⁰ Note from the Presidency to the Council of 5 December 2019, *Multiannual Financial Framework (MFF) 2021-2027: Negotiating box with figures*, 14518/1/19, p. 8.

⁴¹ There is an extensive literature on the so-called “human rights clauses”: see inter alia E. FIERRO, *The EU's Approach to Human Rights Conditionality in Practice*, The Hague: Kluwer Law International, 2003; L. BARTELS, *Human Rights Conditionality in the EU's International Agreements*, Oxford: Oxford University Press, 2005. For a recent account see T.P. HOLTERHUS, *The Legal Dimensions of Rule of Law Promotion in EU Foreign Policy: EU Treaty Imperatives and Rule of Law Conditionality in the Foreign Trade and Development Nexus*, in *Göettingen Journal of International Law*, 2018, p. 71 *et seq.*

However, conditionality has recently experienced an impressive development also in the EU *internal* dimension and has gradually become a powerful EU internal governance tool. Indeed, although some forms of internal conditionalities already existed in the past,⁴⁴ its remarkable expansion may be depicted as one of the most characterizing effects of the financial and sovereign debt crisis on the governance structure of the European Union. Initially, conditionality arrangements have been employed within emergency financial assistance measures (financial assistance conditionality); later on, their use has gone beyond the emergency governance and has been *normalised*, becoming today a key aspect of the EU budgetary framework and of the regulations governing European Structural and Investment Funds (spending conditionality).

Since the first bailouts of non-euro area countries under the Medium-Term Financial Assistance Facility (MTFA)⁴⁵ and of eurozone countries pursuant to the European Financial Stabilisation Mechanism (EFSM),⁴⁶ conditionality has been the distinctive feature of all the tools created, inside or outside the EU legal order, to provide financial assistance to the Member States most affected by the economic crisis.⁴⁷ The participation of the International Monetary Fund (IMF) in all the bailout interventions has undoubtedly contributed to shape this practice, conditionality being a traditional instrument of the IMF lending policies. The Court of Justice itself emphasised conditionality's crucial role in the landmark *Pringle* case,⁴⁸ where "strict conditionality" has been deemed to be necessary for the compatibility of bailout measures under the European Stability Mechanism

⁴² The European Neighbourhood Policy, launched in 2004, was reviewed in 2015: Joint Communication JOIN(2015) 50 final of 18 November 2015 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Review of the European Neighbourhood Policy*.

⁴³ On Membership Conditionality see K.E. SMITH, *The Evolution and Application of EU Membership Conditionality*, in M. CREMONA (ed.), *The Enlargement of the European Union*, Oxford: Oxford University Press, 2003, p. 105 *et seq.*; C. HILLION, *The Copenhagen Criteria and Their Progeny*, in C. HILLION (ed.), *EU Enlargement: A Legal Approach*, Oxford, Portland: Hart, 2004; D. KOCHENOV, *EU Enlargement and the Failure of Conditionality*, Alphen aan Den Rijn: Kluwer Law International, 2008.

⁴⁴ Art. 7 TEU may be actually depicted as a form of value-based conditionality. Another example is offered by the former macro-economic conditionality attached to the Cohesion Fund: see Protocol on economic and social cohesion annexed to the Treaty on European Union, signed at Maastricht on 7 February 1992; Council Regulation (EC) 1164/94 of 16 May 1994 establishing a Cohesion Fund, Art. 6.

⁴⁵ Council Regulation (EC) 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments.

⁴⁶ Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism. The EFSM's legal basis in the Treaties is Art. 122, para. 2, TFEU.

⁴⁷ M. IOANNIDIS, *EU Financial Assistance Conditionality after "Two Pack"*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2014, p. 61 *et seq.*

⁴⁸ Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*.

(ESM) with Art. 125 TFEU.⁴⁹ A significant reference to conditionality is today provided also in EU primary law, following the amendment of Art. 136 TFEU⁵⁰ adopted by the European Council in 2011.⁵¹ Furthermore, it is worth noting that the European Central Bank has developed an influential *implicit* and *explicit* conditionality policy in the context of the crisis' management.⁵²

As regards spending conditionality, the Commission supported its extension in 2010 with the main purposes of providing "fair, timely and effective incentives for compliance with the Stability and Growth Pact rules"⁵³ and making the management of EU funds more effective and results-oriented.⁵⁴ The idea was then transposed in a comprehensive manner into the proposals for the 2014-2020 financial period and represents today a cornerstone of the current budgetary framework⁵⁵ – especially in the Common Provisions Regulation (CPR) on ESI Funds,⁵⁶ but also in the budgetary regulations related to other EU policies.⁵⁷ To give an idea of the huge expansion of spending

⁴⁹ *Ibid.*, paras 129-147. See B. DE WITTE, T. BEUKERS, *The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle*, in *Common Market Law Review*, 2013, p. 805 *et seq.*

⁵⁰ Currently, Art. 136, para. 3, TFEU reads as follows: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict *conditionality*" (emphasis added).

⁵¹ European Council Decision 2011/199/EU 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.

⁵² A. VITERBO, *Legal and Accountability Issues Arising from the ECB's Conditionality*, in *European Papers*, Vol. 1, 2016, No 2, www.europeanpapers.eu, p. 501 *et seq.*

⁵³ Communication COM(2010) 250 final of 12 May 2010 from the Commission, *Reinforcing economic policy coordination*, p. 5.

⁵⁴ Commission, *Investing in Europe's future*, Fifth report on economic, social and territorial cohesion, 2010, pp. 25-27.

⁵⁵ For a detailed analysis of spending conditionality in the 2014-2020 financial period see V. VITÄ, *Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality*, in *Cambridge Yearbook of European Legal Studies*, 2017, p. 116 *et seq.*

⁵⁶ Regulation (EU) 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.

⁵⁷ For instance, see the "green conditionality" attached to Agricultural Funds (Arts 43-47 of the Regulation (EU) 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) or the "human rights conditionality" included in Home Affairs funds (Art. 3, para. 4, of the Regulation (EU) 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 re-

conditionality in the 2014-2020 financial period, suffice it to say that over 75 per cent of the EU budget is currently covered by some kind of conditionality arrangements.⁵⁸ A glance at the package of proposals for the next Multiannual Financial Framework presented by the Commission in May 2018 further confirms that this trend is not going to change in the near future.⁵⁹

Generally speaking, spending conditionality is a mechanism that links the disbursement of EU funds to the fulfilment of conditions aimed at pursuing horizontal policy goals. In other words, it exploits the potential of the budget as a tool to exercise leverage on the Member States' behaviour in order to encourage their convergence towards the policy objectives defined by the Union.

Rule of Law Conditionality, as envisaged in the Commission's proposal, would be a form of *negative* and *ex post* spending conditionality. Indeed, it would entail a *negative* and *ex post* reaction (e.g. suspension or reduction of EU Funds) should a Member State present generalised rule of law deficiencies that affect or risk affecting the principles of sound financial management or the protection of the Union's financial interests.

In my view, three main reasons lie at the roots of the Commission's choice to resort to spending conditionality.

Firstly, spending conditionality appears to be the easiest way to defend the budget, as it allows the Union to strictly control and eventually prevent the States affected by generalised rule of law deficiencies from using EU funds when there is a threat to the principle of sound financial management or to the Union's financial interests. With this in mind, Rule of Law Conditionality would primarily serve a *precautionary function*, avoiding the risk of financial loss caused, for instance, by a non-independent judicial review on EU funded operations.

Secondly, during the current financial period spending conditionality has shown good results in terms of compliance.⁶⁰ This is particularly true for *ex ante* conditionalities: according to the Commission, "around 75% of all applicable *ex ante* conditionalities were fulfilled at the time of adoption of ESI Fund programmes", while "for the non-fulfilled ones, over 800 distinct action plans were included in the programmes".⁶¹ This could have been prompted the Commission to make use of this tool to achieve analo-

pealing Decision No 574/2007/EC, in combination with Art. 47 of the Regulation (EU) 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).

⁵⁸ V. VITĂ, *Revisiting the Dominant Discourse on Conditionality*, cit., p. 124.

⁵⁹ For an overview on conditionality in the proposals for the financial period 2021-2027 see V. VITĂ, *Research for REGI Committee – Conditionalities in Cohesion Policy*, European Parliament, Policy Department for Structural and Cohesion Policies, 2018.

⁶⁰ V. VITĂ, *Revisiting the Dominant Discourse on Conditionality*, cit., p. 139.

⁶¹ Commission, *My Region, My Europe, Our Future*, Seventh report on economic, social and territorial cohesion, 2017, p. 179.

gous results in terms of rule of law compliance. From a more general point of view, EU recent practice highlights an increasing use of spending conditionality as an instrument of “centralised enforcement” in those areas where the traditional trust on “decentralised enforcement” is no longer perceived as sufficient to secure EU Law compliance.⁶² As an example, one needs only think of the enforcement of the European Monetary Union (EMU) normative framework. Indeed, alongside the EMU sanctions toolbox, since the early nineties a macro-economic conditionality has been attached to the Cohesion Fund⁶³ and it now covers all ESI Funds thanks to the 2014-2020 reform of the CPR.⁶⁴

Thirdly, constitutional crises concretely arose in some of the Member States that have traditionally benefited the most from EU Funds.⁶⁵ Therefore, “going for the wallet”⁶⁶ appears to be a persuasive way to “encourage” these countries to maintain adherence to the European values. It is unrealistic to think that the Commission has not taken into account this practical consideration before developing the proposal. Still, this element underpins one of the main concerns related to Rule of Law Conditionality, and to spending conditionality in general, that is the fear that equal treatment between Member States will not be ensured. Inevitably, the EU budget being largely aimed towards redistribution, spending conditionality has a higher impact on the poorest regions and, if not carefully used, could be “poison for the continent”, as stressed also by Jean-Claude Juncker.⁶⁷

Actually, some authors⁶⁸ argue that it would already be possible, under the current CPR, to suspend the flow of funds in case of rule of law deficiencies inside a Member State. They came to this conclusion by reading Art. 142, para. 1, let. a), CPR⁶⁹ in the light

⁶² R. BIEBER, F. MAIANI, *Enhancing Centralized Enforcement of EU Law*, cit.

⁶³ Protocol on economic and social cohesion annexed to the Treaty on European Union, signed at Maastricht on 7 February 1992; Council Regulation (EC) 1164/94 of 16 May 1994 establishing a Cohesion Fund, Art. 6.

⁶⁴ Arts 23-24 of Regulation (EU) 1303/2013, cit. For an overview on macroeconomic conditionality in cohesion policy, let me refer to M. FISICARO, *Condizionalità macroeconomica e politica di coesione: la solidarietà europea alla prova dei vincoli economico-finanziari*, in *Rivista Giuridica del Mezzogiorno*, 2019, p. 413 et seq. and the references made therein.

⁶⁵ For the 2014-2020 period, see the operating budgetary balance between EU expenditure and revenue by country: ec.europa.eu.

⁶⁶ F. HEINEMANN, *Going for the Wallet? Rule of Law Conditionality in the Next EU Multiannual Financial Framework*, in *Intereconomics*, 2018, p. 297 et seq.

⁶⁷ J.-C. JUNCKER, *German Plan to Link Funds and Rules Would Be ‘Poison’*, in *Politico*, 1 June 2017, www.politico.eu.

⁶⁸ I. BUTLER, *Two Proposals to Promote and Protect European Values Through the Multiannual Financial Framework: Conditionality of EU Funds and a Financial Instrument to Support NGOs*, *Civil Liberties Union for Europe*, in *Liberties*, March 2018, www.liberties.eu; R. D. KELEMEN, K. L. SCHEPPELE, *How to Stop Funding Autocracy in the EU*, cit.

⁶⁹ Art. 142 of Regulation 1303/2013, cit.: “1. All or part of the interim payments at the level of priorities or operational programmes may be suspended by the Commission if one or more of the following conditions are met: a) there is a serious deficiency in the effective functioning of the management and

of Art. 47 of the Charter of Fundamental Rights of the European Union and of the case-law of the Court of Justice.⁷⁰ However, I find it difficult to endorse this position, because it looks overstressing the relevant CPR provision and Court's ruling.⁷¹ Even admitting the feasibility of this interpretation, the Commission's choice to put forward a specific proposal in this respect and to stimulate a discussion in the Council and, most importantly, in the European Parliament seems appropriate in light of the legal and political implications stemming from the use of a budgetary conditionality related to the rule of law in the context of the European constitutional crisis.

IV. SCHEME OF THE PROPOSAL

Before focusing on the problematic issues arising from the Commission's proposal, it is essential to briefly explain how the mechanism would work. Thus, I will describe the *substantive requirements* to activate the mechanism (Art. 3), the *content* of the measures that may be adopted (Art. 4), and the *procedure* outlined by the Commission (Art. 5). For the sake of clarity, this section will be limited to the explanation of the Commission's proposal, while the relevant European Parliament's amendments will come into consideration in the next sections.

Starting from the *substantive requirements* to trigger the mechanism, Art. 3 of the Proposal reads as follows: "Appropriate measures shall be taken where a generalised deficiency as regards the rule of law in a Member State affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union".

Therefore, as anticipated, a "generalised deficiency as regards the rule of law" is not sufficient in itself to trigger the mechanism, being necessary to show a *concrete* or *potential* link ("affects" or "risks affecting") with the need to protect the budget. This is in line with the genuine nature of spending conditionality, that can be used to pursue horizontal policy objectives, but needs to maintain a sufficiently direct link with spending.

control system of the operational programme, which has put at risk the Union contribution to the operational programme and for which corrective measures have not been taken. [...]".

⁷⁰ Court of Justice, judgement of 17 September 2014, case C-562/12, *Livima Lihaveis*.

⁷¹ Art. 142, para. 1, let. a), CPR refers to a very specific factual situation, that is the existence of "a serious deficiency in the effective functioning of the *management and control system* of the operational programme", that is the complex administrative system envisaged at the national level according to Arts 72-74 CPR. The Court's judgement on *Livima* does not deal with conditionalities and it is related to the previous financial period (2007-2013). The case concerned a provision, contained in a programme manual adopted by a monitoring committee in the context of the 2007-2013 operational programme established by Latvia and Estonia, that precluded to appeal before a national court the decision of that monitoring committee rejecting an application for aid. In its ruling, the Court held such provision to be incompatible with Art. 47 of the Charter (*Livima*, cit., paras 57-76). However, it is not evident from the reading of Art. 142 CPR in light of *Livima* that deficiencies in the functioning of the judiciary could be considered equivalent, technically speaking, to deficiencies in the management and control system related to the use of EU funds.

Pursuant to the general definition outlined in Art. 2, let. b), a “generalised deficiency as regards the rule of law” is “a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law”. This definition should then be read in combination with Art. 2, let. a) – which attempts to clarify the “essentially contested concept”⁷² of “rule of law”⁷³ – and Art. 3 of the Proposal – which provides a non-exhaustive list of possible deficiencies that can affect the Union’s financial interests⁷⁴ and some examples of generalised rule of law deficiencies.⁷⁵

As regards the *content* of the “appropriate measures”, it differs on the basis of the method of implementation of the budget (direct, indirect or shared management), but it basically consists in the reduction or suspension of commitments or payments related to EU Funds. Importantly, Art. 4, para. 2, establishes that the imposition of the measures shall not exempt Member States from implementing the programmes and making payments to the final recipients or beneficiaries.

Turning to the criteria to be followed for the determination of the specific measures, Art. 4, para. 3, states that the measures shall be “proportionate to the nature, gravity and scope of the generalised deficiency as regards the rule of law”, and shall, “insofar as possible, target the Union actions affected or potentially affected by that deficiency”.

The Commission’s proposal provides for a swift and easy *procedure* to adopt the above-mentioned measures. The main actors are the Commission and the Council, while the European Parliament only needs to be informed by the Commission of any measure proposed or adopted.

⁷² J. WALDRON, *Is the Rule of Law an Essentially Contested Concept?*, in *Law and Philosophy*, 2002, p. 137 *et seq.*

⁷³ Art. 2, let. a), of the Proposal for a Regulation COM(2018)324, cit.: “the rule of law’ refers to the Union value enshrined in Article 2 of the Treaty on European Union which includes the principles of legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection by independent courts, including of fundamental rights; separation of powers and equality before the law”.

⁷⁴ Art. 3, para. 1, of the Proposal for a Regulation COM(2018)324, cit., that refers to generalised rule of law deficiencies affecting, in particular: *a)* the proper functioning of the authorities implementing the Union budget; *b)* the proper functioning of investigation and public prosecution services in relation to fraud, corruption or other breaches of Union law relating to the implementation of the Union budget; *c)* the effective judicial review by independent courts of actions or omissions by the authorities referred to in points *a)* and *b)*; *d)* the prevention and sanctioning of fraud, corruption or other breaches of Union law relating to the implementation of the Union budget; *e)* the recovery of funds unduly paid; *f)* the effective and timely cooperation with the European Anti-fraud office and with the European Public Prosecutor’s Office.

⁷⁵ Art. 3, para. 2, of the Proposal for a Regulation COM(2018)324, cit.: “a) endangering the independence of the judiciary; *b)* failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests; *c)* limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law”.

The *procedure* outlined in Art. 5 is composed of four different stages: notification; dialogue; proposal; adoption.

Where the Commission – taken into account “all relevant information” – finds it has “reasonable grounds” to believe that a generalised rule of law deficiency in a Member State affects or risks affecting the Union’s budget, it shall send a written notification to that Member State, which can make observations and may propose the adoption of remedial measures within a time limit specified by the Commission.

At the end of the dialogue stage, if the Commission decides that a generalised rule of law deficiency is established, it “shall” submit a proposal for an implementing act on the “appropriate measures” to the Council. The text of the draft regulation therefore suggests that the Commission enjoys a margin of discretion in assessing whether a generalised rule of law deficiency is established; while, if this is the case, it is obliged to make a proposal.

When a proposal for an implementing act on the appropriate measures is submitted, the decision would be deemed to have been adopted, unless the Council rejects the proposal within one month by qualified majority (so-called “reversed qualified majority”). The Council could also amend the proposal, acting by a qualified majority. If the Member State submits to the Commission evidence to show that the generalised rule of law deficiency has been remedied or has ceased to exist, the measures may be lifted following the same procedure.

Apparently, the proposed mechanism would allow the EU to act with greater ease in relation to rule of law backslidings affecting the budget than in the past. This is due, in particular, to the Commission’s choice to resort to reversed qualified majority. Notably, this voting mechanism has been spreading in the EMU normative framework since the outbreak of the crisis – especially following the so-called Six-Pack and Two-Pack⁷⁶ – in order to make the implementation of the relative rules and procedures quasi-automatic.⁷⁷ For the same reason, reversed qualified majority has also been employed in Art. 23, para. 10, CPR with regard to the corrective arm of the macro-economic conditionality attached to ESI Funds. Nevertheless, it has to be stressed that, despite the appeal to reversed qualified majority, neither EMU sanctions nor macro-economic conditionality have ever been *effectively* applied. Macro-economic conditionality has been actually triggered once against Hungary, but the suspension of the commitments related to the Cohesion Fund has never produced effects because the Council lifted the

⁷⁶ Art. 1, paras 9 and 13, of the Regulation (EU) 1175/2011 amending Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Art. 10 of the Regulation (EU) 1176/2011 on the prevention and correction of macro-economic imbalances; Art. 14 of the Regulation (EU) 472/2013 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.

⁷⁷ See European Central Bank, *Reinforcing Economic Governance in the Euro Area*, 10 June 2010, p. 5.

measures before their entry into force.⁷⁸ Besides, it has been shown that even if the decision was *formally* linked to the failure to address excessive deficits, it was – at least also – an attempt to use conditionality as a means of exerting pressure on Hungarian authorities after the entry into force of the new Constitution.⁷⁹

Thus, until now, practice has not offered reasonable elements to conclude that reversed qualified majority could effectively make the application of sanctions quasi-automatic. This voting mechanism, to a certain extent, shifts the *political* decision from the Council to the Commission, but there are reasons to believe that this move has not helped *depoliticise* the enforcement of sanctions.

V. ADDRESSING THE LEGAL SHORTCOMINGS OF THE PROPOSAL

The idea of linking the budget to the respect of values, if carefully framed, sounds reasonable. However, paradoxically, the proposal itself poses some rule of law issues that need to be addressed. Firstly, it has to be investigated if, and to what extent, the EU actually owns competence to provide for a Rule of Law Conditionality in EU Funds, that is if the proposal is in accordance with the principle of conferral established in Art. 5 TEU (see *infra*, section V.1). Secondly, the proposal entrusts the Commission with a wide discretionary power, that raises questions about its compatibility with the long-standing EU fundamental principle of legal certainty,⁸⁰ as well as with the principles of transparency and non-arbitrariness of the executive power (see *infra*, section V.2).

In this context, the Commission has to deal with the unclear limits outlined in the Treaties for the enforcement of values and has been moving in a largely uncharted territory where the boundary between what is compatible or not with the Treaties is very thin.

Addressing the rule of law limits of the proposal is crucial at least for two reasons. On one hand, the Union being a “community based on the rule of law”⁸¹ means that it shall respect the rule of law in its action. It is hardly conceivable that the Union could effectively pretend respect of the rule of law by the Member States, while at the same time acting outside its legal limits. On the other, it has already been stressed that one of

⁷⁸ On 13 March 2012, the Council adopted the implementing decision suspending commitments from the Cohesion Fund for Hungary with effect from 1 January 2013. Just three months later, on 22 June 2012, the Council adopted the implementing decision lifting the suspension of commitments from the Cohesion Fund for Hungary.

⁷⁹ Editorial comments, *Hungary's New Constitutional Order and “European unity”*, in *Common Market Law Review*, 2012, pp. 879-880; F. CASOLARI, *Respect for the Rule of Law in a Time of Economic and Financial Crisis: the Role of Regional International Organizations in the Hungarian Affaire*, in *Italian Yearbook of International Law*, 2013, p. 234.

⁸⁰ Court of Justice, judgment of 22 March 1961, joined cases C-42/59 and C-49/59, *SNUPAT v. High Authority*; judgment of 9 July 1981, case C-169/80, *Gondrand and Garancini*, para. 17; judgment of 14 April 2005, case C-110/03, *Belgium v. Commission*, para. 30.

⁸¹ See, famously, Court of Justice, judgment of 23 April 1986, case C-294/83, *Les Verts v. Parliament*, para. 23.

the main concerns related to the proposal is that it could become a vehicle of discrimination and further divisions between Member States, exacerbating the political conflict between Western and Eastern Europe. Ensuring legal certainty and limiting the Commission's discretionary power looks therefore essential in order to make the enforcement procedure more transparent and accountable, so as to guarantee equal treatment between Member States.

V.1. IS THE PROPOSAL COMPATIBLE WITH THE PRINCIPLE OF CONFERRAL?

At the outset, the proposal once again poses the issue of the Union's competence to provide for new tools to defend EU values beyond the one specifically established in the Treaties, namely Art. 7 TEU.

Notably, the problem already arose following the Commission's launch of the Rule of Law Framework in 2014. In that occasion, the Council Legal Service issued an opinion, stating that the new mechanism was not compatible with the principle of conferral.⁸² Basically, the Council Legal Service contended that Art. 7 TEU is the only procedure according to which the Union can address rule of law shortcomings inside Member States and that, as a consequence, "there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States [...] neither to amend, modify or supplement the procedure laid down in this Article".⁸³

The Opinion has been strongly criticised by scholars, arguing that since the Commission is entitled to trigger Art. 7 TEU, it owns an *implicit* power to investigate any potential risk of a serious breach of EU values.⁸⁴

However, the question has lost relevance since the Commission actually used the Rule of Law Framework to address the Polish case and no opposition came either from Poland or from the Council.⁸⁵

⁸² Opinion of 27 May 2014 of the Legal Service of the Council, doc. 10296/14.

⁸³ *Ibid.*, para. 24.

⁸⁴ D. KOCHENOV, L. PECH, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *European Constitutional Law Review*, 2015, p. 512 *et seq.* For the same argument see R. BARATTA, *Rule of Law 'Dialogues' Within the EU: A Legal Assessment*, in *Hague Journal on the Rule of Law*, 2016, p. 357 *et seq.*; L. BESSELINK, *The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives*, in A. JAKAB, D. KOCHENOV (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press, 2017, p. 128 *et seq.* *Contra* N. LAZZERINI, *Less is more? Qualche rilievo sulla legittimità e sul merito delle recenti iniziative delle istituzioni europee in materia di salvaguardia dei valori fondanti dell'Unione*, in *Rivista di Diritto Internazionale*, 2016, p. 514 *et seq.*; G. DI FEDERICO, *The Protection and Promotion of the Rule of Law in the European Union: State of the Art, Criticalities and Future Perspectives*, in *The Turkish Yearbook of International Relations*, 2015, p. 1 *et seq.*

⁸⁵ As is known, in the aftermath of the Opinion, the Council launched a purely intergovernmental "Dialogue" mechanism on the rule of law (See C. CLOSA, *Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, cit., p. 15 *et seq.*), but then there was no opposition to the Commission's choice to trigger the Rule of Law Framework *vis-à-vis* Poland.

The Rule of Law Conditionality proposal raised the issue again. The proposed mechanism, by means of secondary law, would indeed provide for an attractive alternative to Art. 7 TEU to be included in the Union's rule of law toolbox.

The Council Legal Service has dealt with this matter by issuing a non-public opinion,⁸⁶ in which it apparently considered the proposal incompatible with Art. 7 TEU.⁸⁷ This comes as no surprise in light of the position expressed by the Council Legal Service on the Rule of Law Framework. Indeed, according to that view, "respect for the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described at Article 7 TEU".⁸⁸

In this light, it is not far-fetched to consider Rule of Law Conditionality as a form of suspension of "certain of the rights deriving from the application of the Treaties" under the terms of Art. 7, para. 3, TEU, since secondary law is the application of the Treaties. To this extent, the mechanism would be a way to bypass the strict substantive and procedural requirements provided by Art. 7 TEU to impose sanctions against Member States infringing EU values. This is the reason why some authors deemed it to be hardly reconcilable with EU primary law.⁸⁹

Furthermore, it is at least doubtful that a strong counter-argument could stem from the combined provisions of Art. 311, para. 1, TFEU and Art. 3, para. 1, TEU, according to which "the Union shall provide itself with the means necessary to attain its objectives", and so also the promotion of its values.⁹⁰ No doubts that the Union can and should use its budget to pursue its founding objectives, but *within* the limits imposed by the principle of conferral. Indeed, the existence of a general objective does not necessarily imply the existence of a competence. In the case at hand, this is further confirmed by the Declaration no. 41 annexed to the Treaties, stating that even an action based on Art. 352 TFEU cannot be aimed to pursue *only* the objectives set out in Art. 3, para. 1, TEU.⁹¹

⁸⁶ Opinion of 25 October 2018 of the Legal Service of the Council, doc. 13593/18. The Council has been sued before the General Court for the full-disclosure of the Council Legal Service Opinion: see General Court, case T-252/19, *Pech v. Council*, pending.

⁸⁷ The Polish government, in response to the reflection period on the rule of law launched by the Commission last April, makes explicit reference to the Council Legal Service's Opinion in order to support the proposal's incompatibility with Art. 7 TEU: ec.europa.eu. In addition, some scholars have already commented the Opinion: K.L. SCHEPPELE, L. PECH, R.D. KELEMEN, *Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU Budget-Related Rule of Law mechanism*, in *Verfassungsblog*, 12 November 2018, verfassungsblog.de.

⁸⁸ Opinion of the Legal Service of the Council, cit., para. 17.

⁸⁹ M.J. RANGEL DE MESQUITA, *European Union values, Rule of Law and the Multiannual Financial Framework 2021-2027: The Commission's Proposal to Protect the EU Budget Against Threats to the Rule of Law*, in *ERA Forum*, 2018, p. 287 et seq.

⁹⁰ For this argument see V. VIŤÁ, *Conditionalities in Cohesion Policy*, cit., pp. 53-54.

⁹¹ Declaration no. 41 on Article 352 of the Treaty on the Functioning of the European Union.

However, the Commission has shown to be well aware of the problem, and it therefore chose the proposal's legal basis in an accurate manner. In particular, the Commission founded its proposal on Art. 322, para. 1, let. a), TFEU which empowers the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to adopt by means of regulations "the financial rules which determine in particular the procedure to be adopted for *establishing and implementing the budget* and for presenting and auditing accounts".⁹² This provision allows the Commission to circumvent the problem by focusing on the protection of the budget and, accordingly, framing the proposal on the link between the existence of generalised deficiencies as regards the rule of law in a Member State and the need to protect the Union's financial interests.

In my view the solution is convincing, but it does not come without a price. Using Art. 322, para. 1, let. a), TFEU as legal basis means that a sufficiently direct link with spending shall be ensured. It would therefore be desirable to improve the drafting of the proposal with regard to both the *substantive requirements* and the *content* of the measures to be adopted in order to strengthen this link.

Concerning the *substantive requirements*, I generally agree with Viorica Viță in stating that the broad conditions required to trigger the mechanism (Art. 3) should be replaced with a "set of clear, precise, objective and sufficiently shared rule of law grounds, with a sufficiently direct link to EU spending" (e.g. independent, impartial and effective judicial review of EU funded operations).⁹³

Turning to the *content of the measures*, Art. 4, para. 3, of the proposal establishes that they shall be "*proportionate to the nature, gravity and scope of the generalised deficiency as regards the rule of law*", and shall, "*insofar as possible, target the Union actions affected or potentially affected by that deficiency*". This provision looks barely coherent with the aim of protecting the budget and paves the way for the use of Rule of Law Conditionality as a pure sanctioning mechanism to be activated in case of breach of the rule of law. On one hand, the guiding parameter for the choice of the measures should not be the nature, gravity and scope of the rule of law deficiency in itself, but rather the *effects* of the rule of law deficiency on the financial interests of the Union.⁹⁴ On the other, the expression "insofar as possible" opens the door to the application of measures even in cases where those measures would not help protect the budget, and therefore acting as pure sanctions for the existence of a generalised rule of law deficiency.

Apart from that, and even more importantly, the lack of a sufficiently direct link would entail the risk of an *ex post* judicial review of the measures adopted. Indeed, in case the

⁹² Emphasis added.

⁹³ V. VIȚĂ, *Conditionalities in Cohesion Policy*, cit., p. 56.

⁹⁴ This point has been stressed also by the Court of Auditors, which stated that "proportionality should be ensured by taking into account the seriousness of the situation, its duration, its recurrence, the intention and the degree of cooperation of the Member State and the effects of the generalised deficiency on the respective EU funds" (ECA Opinion 1/2018, para. 20).

Commission fails to prove a significant link, the relative acts would likely be subjected to the scrutiny of the Court of Justice,⁹⁵ and eventually annulled for *excès de pouvoir*.

Thus, the use of Art. 322, para. 1, let. a), TFEU as legal basis arguably shifts the problem from the *competence* to the *legality* of the exercise of powers, the Commission being called to prove in the particular case the existence of a sufficiently direct link between the generalised rule of law deficiency in the Member State and the financial interests of the Union, as well as between the measures adopted and the need to protect the budget. Therefore, the Court of Justice would inevitably play a crucial role, and much would depend on how the Court would deal with cases of *potential* link between the generalised rule of law deficiency in a Member State and the need to protect the budget.

V.2. THE COMMISSION'S EXCESSIVE DISCRETIONARY POWER: A CHALLENGE TO THE RULE OF LAW?

The second rule of law issue raised by the proposal is that of the nearly unlimited discretionary power that the Commission has reserved for itself, with consequent shortcomings in terms of legal certainty, transparency and non-arbitrariness. Indeed, the criteria for some crucial decisions, such as the initiation of the procedure and the Commission's qualitative assessment, are not clearly defined; besides, reversed qualified majority voting makes the Council's rejection or amendment quite difficult. The Court of Auditors clearly highlighted the problem and made several recommendations in this regard, some of which have been followed by the European Parliament in its first reading position.

At the outset, it is not clear what a "generalised deficiency as regards the rule of law" is. As already noted (see *supra*, sections III and V.1), the proposal weaves a very broad general definition⁹⁶ with some generic examples,⁹⁷ and is vaguely drafted on the *substantive requirements* needed for the mechanism to be activated.

No further indication derives from a systematic interpretation since the Commission has apparently renounced to create a clear link with the existing rule of law toolbox. Indeed, the expression "generalised deficiency as regards the rule of law" is different from both the "systemic threat to the rule of law" required to activate the 2014 Rule of Law Framework and the "clear risk of a serious breach" or the "existence of a serious and persistent breach" needed to trigger Art. 7 TEU. Thus, the relationship between the different mechanisms is far from evident. It is known that, according to the Commission, a "systemic threat to the rule of law" is meant to be something less than a "clear risk of a serious breach". However, it is unclear whether a "generalised deficiency"

⁹⁵ E.g. the necessity of a "sufficiently direct link" has been highlighted in General Court, judgment of 19 April 2013, joined cases T-99/09 and T-308/09, *Italy v. Commission*, paras 50-53.

⁹⁶ Proposal for a regulation COM(2018)324, Art. 2, let. b): "a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law".

⁹⁷ *Ibid.*, Art. 3, para. 2.

is considered to be more or less than a “systemic threat” or a “clear risk of a serious breach”. The definition given by the Commission is hardly of help in this regard, raising therefore not only an issue of legal certainty, but also one of consistency.⁹⁸

Moreover, the Court of Auditors suggested to clarify criteria and sources of guidance for the Commission’s qualitative assessment in order to “improve the transparency, traceability and auditability of the proposed mechanism as well as legal certainty and non-arbitrariness of the executive powers proposed to be conferred to the Commission”.⁹⁹

Actually, the proposal already provides for some guidance sources. According to Art. 5, para. 2, the Commission may take into account “all relevant information, including decisions of the Court of Justice of the European Union, reports of the Court of Auditors, and conclusions and recommendations of relevant international organisations”.¹⁰⁰ Among these, the reference to the Court of Justice’s decisions is extremely helpful if we look at the recent efforts shown by the Court in defining, *inter alia*, the principle of judicial independence.¹⁰¹

However, the transparency of the proposed mechanism would undoubtedly benefit from a more specific articulation of the “relevant information” the Commission may take into account. In this context, the recourse to rule of law indicators on the model of the Venice Commission’s Rule of Law Checklist¹⁰² could be considered. Other possible guidance sources are chapters 23 and 24 applicable to EU accession negotiations¹⁰³ and the criteria adopted in the framework of the Cooperation and Verification Mechanism (CVM) on Bulgaria and Romania.¹⁰⁴

Likewise, the problems highlighted above reflect on the lifting of measures as well: if it is unclear when a generalised rule of law deficiency arises, it is also hard to assess when it has been remedied or has ceased to exist.

Besides, as the Court of Auditors stressed, while the proposal sets strict deadlines for the Member State concerned and for the Council, there are no precise deadlines for the Commission. Even if the Commission has in any case the obligation to act within a

⁹⁸ For this argument see also V. VIṬA, *Conditionalities in Cohesion Policy*, cit., p. 55.

⁹⁹ ECA Opinion 1/2018, para. 19.

¹⁰⁰ Art. 5, para. 2, of the Proposal for a regulation COM(2018)324, cit.

¹⁰¹ Court of Justice, judgement of 19 September 2006, case C-506/04, *Wilson*; judgement of 7 February 2019, case C-49/18, *Escribano Vindel*; *Commission v. Poland (Indépendance des juridictions de droit commun)*, cit.; *Associação Sindical dos Juizes Portugueses*, cit.; *LM*, cit.;. On the evolution of the principle of judicial independence in the recent Court’s case-law see C. CINNIRELLA, *Lo statuto di indipendenza del giudice nazionale al vaglio della Corte di Giustizia*, in *Ianus*, 2019, forthcoming.

¹⁰² European Commission for Democracy through Law, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016.

¹⁰³ The applicable chapters of the *acquis* are available at the following link: ec.europa.eu.

¹⁰⁴ An overview on the Cooperation and Verification Mechanism is available on the Commission’s website: ec.europa.eu.

reasonable timeframe, it would be recommendable to fix similar deadlines at least with regard to the lifting of measures.¹⁰⁵

Following some of the Court of Auditors' recommendations, the European Parliament approved relevant amendments in its first reading position.

As regards the sources of guidance for the Commission's qualitative assessment, the Parliament significantly mentioned also the accession criteria and the CVM.¹⁰⁶ In my view, referring in particular to the accession criteria is even more appropriate because as long as the Member States have already agreed to shape their domestic legal orders so as to meet the Copenhagen criteria and thus acceding to the European Union, then requiring that those criteria will be met also after the membership has been obtained cannot be regarded as arbitrary. In addition, it would give at least a partial answer to the so-called "Copenhagen dilemma",¹⁰⁷ that is the mismatch between the EU capacity to impose a political conditionality *before* accession and the difficulties faced in ensuring continued compliance *after* accession.

Furthermore, and interestingly, the European Parliament proposed the institution of a panel of independent experts in constitutional law and financial and budgetary matters operating within the scope of the Rule of Law Conditionality with advisory tasks.¹⁰⁸ One expert would be designated by the national parliaments of each Member State and five experts would be appointed by the European Parliament itself. The panel would assist the Commission in identifying generalised deficiencies as regards the rule of law in a Member State that affect or risk affecting the principles of sound financial management or the protection of the financial interests of the Union. To this end, the Panel would express an *opinion* that the Commission shall take into account during the Rule of Law Conditionality enforcement, and it would make public an *annual summary of its findings* based on the monitoring of the situation as regards the rule of law in the Member States.

It is not the first time that the European Parliament – endorsing a proposal notoriously made by Müller¹⁰⁹ – proposed the creation of the so-called "Copenhagen Commission", an independent organism that monitors the respect of values by the Member States. The Parliament has in fact recommended to create a mechanism of this kind several times already since the adoption of the Tavares Report in 2013.¹¹⁰ The Rule of

¹⁰⁵ ECA Opinion 1/2018, para. 24.

¹⁰⁶ European Parliament Legislative Resolution (2019)0349, amendment 52.

¹⁰⁷ Viviane Reding, former Vice-President of the Commission – EU Justice Commissioner, *Safeguarding the rule of law and solving the "Copenhagen dilemma": Towards a new EU-mechanism*, Speech of 22 April 2013, SPEECH/13/348, europa.eu.

¹⁰⁸ European Parliament Legislative Resolution (2019)0349, amendment 45.

¹⁰⁹ See most recently J.-W. MÜLLER, *Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, cit., p. 206 *et seq.* In the same book, see contra K. TUORI, *From Copenhagen to Venice*, p. 225 *et seq.*

¹¹⁰ European Parliament Resolution A7-0229/2013 of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, para. 70 and paras 73-83. The call for an EU monitoring

Law Conditionality Proposal gave the opportunity to the European Parliament to reiterate its proposal, but with a limited scope, the panel being tasked with monitoring and advisory functions only within the scope of application of the Rule of Law Conditionality.

Even if the creation of a panel of experts does not remove the problems of legal certainty underlined above, this proposal has to be welcomed because it would help outline parameters to assess both the political and legal accountability of the Commission with regard to the implementation of the mechanism.

The European Parliament followed also the Court of Auditors' recommendation concerning the need to fix time limits to the Commission. Indeed, it stated that the Commission shall decide whether or not to adopt and to lift measures "within an indicative time limit of one month, and in any case within a reasonable timeframe".¹¹¹ It is not formulated as a strict deadline, but it is a useful benchmark to check the Commission's action.

Lastly, the European Parliament proposed a sharp change in the decision-making process so as to play a crucial role alongside the Commission and the Council. The procedure differs from the one outlined by the Commission in the last stages. Indeed, the Commission would take a decision on the measures to be adopted and, contextually, submit to the European Parliament and the Council a proposal to transfer to a budgetary reserve an amount equivalent to the value of the measures adopted. The transfer proposal would be considered to be approved unless, within four weeks, the European Parliament by simple majority or the Council by qualified majority amend or reject the proposal. The Commission's decision would enter into force if neither the European Parliament nor the Council reject the transfer proposal within the four-week period. The new procedure would limit the powers entrusted to the Commission and give the Parliament a more decisive role also in terms of political control on the Commission's action. This would also offer a partial answer to the general problem – beautifully captured in an *Editorial* of this *Journal* – represented by the "mortal sin" of entrusting to technical organs, not directly endowed with democratic legitimacy, "a struggle against democracies that, although 'illiberal', are blessed with popular legitimacy".¹¹²

However, as some authors already underlined,¹¹³ the involvement of the Council and the European Parliament in this stage raises doubts in light of the functions and powers for budgetary implementation entrusted to the Commission by Art. 17, para. 1, TEU and

mechanism on the respect of values was reiterated in 2016 and, most recently, in 2018: See European Parliament Resolution P8_TA(2016)0409 of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights; European Parliament Resolution P8_TA-PROV(2018)0456 of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights.

¹¹¹ European Parliament Legislative Resolution (2019)0349, amendments 54 and 63.

¹¹² EDITORIAL, *Fundamental Values and Fundamental Disagreement in Europe*, in *European Papers*, 2018, Vol. 3, No 2, www.europeanpapers.eu, p. 469 *et seq.*

¹¹³ For the same argument see V. VITÁ, *Conditionalities in Cohesion Policies*, *cit.*, p. 58.

Art. 317, para. 1, TFEU. In other words, the Treaties suggest that the European Parliament and the Council should “establish” the Union’s budget,¹¹⁴ while the Commission should “implement” it.¹¹⁵ From this perspective, entrusting the co-legislators with budgetary implementation functions may result in a distortion of the institutional balance provided by the Treaties in this area. Unsurprisingly, Art. 236, para. 4, let. b), of the current Financial Regulation states that the rule of law conditionality attached to the disbursement of funds in the *external* action should be implemented only by the Commission.¹¹⁶

VI. NO MORE “*MONEY FOR NOTHING*”: IS THERE ROOM FOR SOLIDARITY?

Beyond the rule of law limits of the proposal, there is a more general and outstanding issue intrinsically related to the mechanism and, overall, to spending conditionality: the relation between conditionality and solidarity in the EU internal dimension.

The impressive development of spending conditionality has in fact challenged the long-standing paradigm based on what may be defined a *functional decoupling* between conditionality and solidarity, the former being related to the EU *external* action while the latter being the principle shaping the EU *internal* dimension.

Although in a different matter, this separation has been stressed by Marise Cremona, who argued that “the intrusive, one-sided and peremptory requirements of pre-accession conditionality can be justified precisely because, once a member, the candidate state will be a part of a community of solidarity, of mutual interdependence and trust”, that is to say that “once accession has taken place, the benefits of membership are not conditional upon keeping the rules”.¹¹⁷

Union’s recent practice with conditionalities in the internal dimension has put in doubt this paradigm, so as to agree with Viorica Vița’s view that “the influx of conditionality in the EU internal budgetary process suggests a paradigm shift towards a conditional solidarity, contingent upon Member States’ continuous performance under the treaties”.¹¹⁸ As a result, a “*de facto* conditional solidarity”¹¹⁹ would metaphorically take the place of the Schuman’s plan towards a *de facto* solidarity.

¹¹⁴ Art. 314 TFEU.

¹¹⁵ Art. 317 TFEU.

¹¹⁶ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, Art. 236, para. 4, let. b): “The corresponding financing agreements concluded with the third country shall contain [...] a right for the Commission to suspend the financing agreement if the third country breaches an obligation relating to respect for human rights, democratic principles and the rule of law and in serious cases of corruption”.

¹¹⁷ M. CREMONA, *EU Enlargement: Solidarity and Conditionality*, in *European Law Review*, 2005, pp. 21 and 19.

¹¹⁸ V. VIȚĂ, *Revisiting the Dominant Discourse on Conditionality*, cit., p. 119.

¹¹⁹ *Ibid.*, p. 143.

This is particularly true for ESI Funds: since cohesion policy is aimed at “reducing disparities between the levels of development of the various regions” so as to promote the Union’s “overall harmonious development” (Art. 174 TFEU), an unwise use of conditionality has the potential to further exacerbate existing social rifts throughout Europe.

However, conditionality and solidarity are not condemned to be always antithetic. Instead, there are cases in which these principles can be reconciled in a cross-fertilisation perspective, so that conditionality could incentivize and foster solidarity. As an example of this positive relation, one may think of the so-called green conditionalities attached to Agricultural Funds,¹²⁰ that may even promote “solidarity between generations” according to Art. 3, para. 3, TEU.

The Commission’s proposal for a Rule of Law Conditionality is unequivocally intended to strengthen the link between budget and values, making the flow of EU funds *conditional* on the respect for the rule of law. Beyond the reasons underlined above (see *supra*, section II), this comes also as the result of a more political consideration, evidenced in the public discussions on the matter. As beautifully captured by *The Economist*, the Union realised that it has been actually funding governments acting in breach of the European common values, and therefore “tolerating and enabling” these States to “campaign against the EU from Monday to Friday and collect its subsidies at weekends”.¹²¹ This disturbing finding arguably contributed to reinforce the need for the Union’s institutions to make clear that “this is not a Europe *à la carte*”¹²² – to use the words of the co-rapporteur at the European Parliament – and that taking part in the European project is not a way to make “money for nothing”.

This perspective – that appears *prima facie* reasonable in political terms – may however be focused just on solidarity in institutional relations (“sincere cooperation” in legal terms), while disregarding the impact of such a mechanism on the citizens living in the State potentially affected. In this respect, it should not be overlooked the fact that if it is true that the mechanism could hopefully stimulate a response against illiberal democracies, there are reasons to fear that it could instead enhance mistrust and skepticism against the European Union.

If we look at the proposal from this perspective, it seems that just a tiny space has been reserved to solidarity.

Of course, our analysis concerns a proposal and, therefore, we have no indication coming from practice. In addition, regrettably, no impact assessment has been undertaken

¹²⁰ Regulation 1307/2013, Arts 43-47.

¹²¹ *The EU Is Tolerating – and Enabling – Authoritarian Kleptocracy in Hungary*, in *The Economist*, 5 April 2018, www.economist.com.

¹²² Translation from the original in Spanish “Esto no es una Europa a la carta”. Extract from the intervention of Eider Gardiazabal Rubial at the Parliament’s plenary debate of the 16th of January 2019 (minute 20:30), www.europarl.europa.eu.

by the Commission, despite the potential effects on final beneficiaries.¹²³ This despite the fact that, already before the proposal, the European Parliament – calling the Commission to propose a mechanism whereby Member States that do not respect EU values can be subject to financial consequences – had warned that “final beneficiaries of the Union budget can in no way be affected by breaches of rules for which they are not responsible”.¹²⁴

As it appears from some of the proposal's provisions, the Commission took this issue into account, but in practice it proves difficult to avoid that the costs of the measures would be poured on citizens.

Art. 4, para. 2, of the proposal importantly establishes that, normally, the imposition of the measures “shall not affect the obligation [...] to implement the programme or fund affected by the measure, and in particular the obligation to make payments to final recipients or beneficiaries”. However, the Court of Auditors¹²⁵ accurately underlined that there is no provision outlining how this would be ensured and, besides, Art. 68, para. 1, let. b), of the proposed CPR makes payments to beneficiaries conditional on the availability of funding.¹²⁶

The European Parliament approved some significant amendments in this regard:¹²⁷ on the one hand, it called the Commission to appropriately inform final beneficiaries and recipients about their rights and to provide adequate tools for them to inform the Commission about any breach of the obligations imposed on Member States; on the other, it attempted to envisage specific ways for the Commission to ensure that the measures would not affect final beneficiaries.

Nonetheless, this is arguably just part of the problem. Even admitting that the mechanism would not affect payments to final beneficiaries, EU Funds are largely allocated to medium-long term investments (e.g. infrastructures, transports, research) and in some countries represent a relevant percentage of the whole package of public investments.¹²⁸ It is worth noting that the 2019 EU Justice Scoreboard shows, *inter alia*, the ESI Funds' support to some domestic justice reforms in line with the rule of law.¹²⁹ Restricting, suspending or reducing the flux of EU Funds to these countries inevitably

¹²³ This point is stressed also by the Court of Auditors (ECA Opinion 1/2018, para. 18).

¹²⁴ European Parliament Resolution A8-0048/2018, para. 119.

¹²⁵ ECA Opinion 1/2018, paras 26-27.

¹²⁶ Art. 68, para. 1, let. b) of the 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.

¹²⁷ European Parliament Legislative Resolution (2019)0349, amendments 49-50.

¹²⁸ For instance, in the period 2015-2017, cohesion policy funding covered 61,17 per cent of the public investments in Poland, 55,46 per cent in Hungary, 48,54 per cent in Bulgaria and 44,86 per cent in Romania: see cohesiondata.ec.europa.eu.

¹²⁹ Commission, *The 2019 EU Justice Scoreboard*, COM(2019) 198 final, 26 April 2019, para. 2.3.

affects the population as a whole in the medium-long term and has the potential to fuel further divisions in Europe.

VII. CONCLUSIONS

In this *Article*, I tried to provide an overview of what I consider to be the main problems arising from the Rule of Law Conditionality proposal.

If it appears legitimate and, to some extent, necessary for the Union both to effectively intervene in case of *domestic* constitutional crises and to protect the budget from the negative externalities related thereto, it has been shown that spending conditionality is a quite controversial tool which needs to be used in a very careful way.

The emersion of rule of law backslidings in Europe pushed the Union to come to terms with its constitutional limits and to look for new paths to play a crucial constitutional role *vis-à-vis* Member States. However, in a moment when the Union's *input* (process), *output* (results) and *telos* (promise) legitimacy is daily questioned¹³⁰ and domestic rule of law crises have triggered a process of fragmentation from within, respect for the European rule of law and close attention to the impact of EU policies on citizens are fundamental for the Union to play a genuine constitutional role, especially given the lack of a strong political *consensus*.

From this perspective, it is worth noting that, in the different field of the economic crisis, an EU response hardly reconcilable with these *caveats*¹³¹ has already shown its costs on the European project and some authors further suggested the existence of a linkage between economic instability, sovereign debt management and constitutional crises.¹³²

Therefore, in the context of the negotiations related to the Rule of Law Conditionality proposal, it is crucial to reconcile as much as possible the mechanism with both the EU fundamental principles of rule of law and solidarity.

¹³⁰ J. H. H. WEILER, *Europe in Crisis – On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'*, in *Singapore Journal of Legal Studies*, 2012, p. 248 *et seq.*

¹³¹ C. KILPATRICK, *Abnormal Sources and Institutional Actions in the EU Sovereign Debt Crisis – ECB Crisis Management and the Sovereign Debt Loans*, in M. CREMONA, C. KILPATRICK (eds), *EU Legal Acts: Challenges and Transformations*, Oxford: Oxford University Press, 2018, p. 70 *et seq.*; C. KILPATRICK, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, in *Oxford Journal of Legal Studies*, 2015, p. 325 *et seq.*; M. RUFFERT, *The European Debt Crisis and European Union Law*, in *Common Market Law Review*, 2011, p. 1777 *et seq.*; C. KILPATRICK, B. DE WITTE (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, in *EUI Working Papers*, no. 5, 2014; A. POLOU, *Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights*, in *Common Market Law Review*, 2017, p. 991 *et seq.*

¹³² On the mutual influences between the challenges facing the "rule of law in the Union" and the "rule of law by the Union" see Editorial Comments, *The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems*, in *Common Market Law Review*, 2016, p. 597 *et seq.* For the case of Hungary see C. KILPATRICK, *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry*, in *EUI Working Papers*, no. 34, 2015, pp. 25-28.

Acting beyond these needs does not seem the right way to “take values seriously”.¹³³ It looks at least optimistic to think that relying heavily on economic sanctions and conditionalities could help shape constitutional homogeneity throughout Europe.

¹³³ A. T. WILLIAMS, *Taking Values Seriously: Towards a Philosophy of EU Law*, in *Oxford Journal of Legal Studies*, 2009, p. 549 *et seq.*