



ARTICLES

USUAL AND UNUSUAL SUSPECTS: NEW ACTORS, ROLES AND MECHANISMS TO PROTECT EU VALUES

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BEYOND THE RULE OF LAW CONDITIONALITY: EXPLOITING THE EU SPENDING POWER TO FOSTER THE UNION'S VALUES

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ABSTRACT: In recent years, the EU budget has emerged as an attractive instrument to foster compliance with the fundamental values enshrined in art. 2 TEU. Especially following the exceptional increase in EU expenditure, the power of the purse seems to provide indeed more persuasive arguments compared with the existing EU rule-of-law toolbox. While most of the attention has focused exclusively on the rule-of-law conditionality regime ultimately introduced with Regulation (EU, Euratom) 2020/2092, this *Article* argues that the EU budget offers further, and arguably more promising, avenues to protect, promote and enforce the EU common values through financial means. Most notably, this *Article* explores the potential and challenges of the EU budget as a values-oriented policy instrument focusing on three elements of the new budgetary framework: *i)* the set of fundamental rights “enabling conditions” attached to the European Structural and Investment Funds, among which stands out an horizontal enabling condition related to the EU Charter of Fundamental Rights; *ii)* the “Justice, Rights and Values Fund”, with special attention to the reforms concerning the financing of civil society organisations; *iii)* the “Recovery and Resilience Facility”, which provides valuable instruments to police compliance with rule of law and fundamental rights standards thanks to its connection with the European Semester and the European Pillar of Social Rights.

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KEYWORDS: EU budget – EU values – rule of law crisis – conditionality – European Structural and Investment Funds – Next Generation EU.

I. INTRODUCTION

The tough negotiations leading to the approval of the rule-of-law conditionality regime,¹ and the failure to swiftly enforce it, have captured the attention in the scholarly debate on the ongoing process of constitutional backsliding facing the European Union.² For a long time an “unusual suspect” in the rule-of-law battlefield, the EU budget has indeed emerged as an attractive instrument to foster compliance with the fundamental values enclosed in art. 2 TEU³ and suspending the flow of funds to recalcitrant Member States is widely considered today the “dose of tough love needed”.⁴

Without ignoring the legal and political value of Regulation 2020/2092,⁵ it is however difficult to consider the new conditionality regime as a game changer in the ongoing crisis, even more so in light of the “double” compromise agreed in the second half of 2020.⁶ The mechanism was indeed first watered down by designing a highly politicised⁷ and rather cumbersome enforcement procedure,⁸ and then *de facto* suspended at the end of the controversial European Council’s meeting of December 2020.⁹ Despite harsh criticism from the European Parliament, which has even sued the Commission before the Court of Justice,¹⁰ the mechanism is unlikely to produce meaningful results in the short term.

¹ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

² See, *inter alia*, the Editorials of some leading journals in the field: Editorial, ‘Budget and Recovery Funds, Rule of Law, and an Unfortunate Standoff’ (2020) ELR 755; Editorial, ‘Neither Representation nor Values? Or, “Europe’s Moment” – Part II’ (2020) European Papers www.europeanpapers.eu 1101; Editorial Comments, ‘Compromising (on) the General Conditionality Mechanism and the Rule of Law’ (2021) CMLRev 267.

³ G Halmaj, ‘The Possibility and Desirability of Rule of Law Conditionality’ (2019) Hague Journal on the Rule of Law 171; M Fisicaro, ‘Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values’ (2019) European Papers www.europeanpapers.eu 695.

⁴ The expression is borrowed from A von Bogdandy and J Łacny, ‘Suspension of EU Funds for Breaches of the Rule of Law: A Dose of Tough Love Needed?’ (2020) SIEPS European Policy Analysis www.sieps.se.

⁵ For a more optimistic account of the newly-established conditionality regime, see N Kirst, ‘Rule of Law Conditionality: The Long-Awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?’ (2021) European Papers www.europeanpapers.eu 101. For an analysis of the Regulation, see I Staudinger, ‘The Rise and Fall of Rule of Law Conditionality’ (2022) European Papers www.europeanpapers.eu 721.

⁶ For the whole story, see Editorial Comments, ‘Compromising (on) the General Conditionality Mechanism and the Rule of Law’ *cit.*; 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, 133-141.

⁷ Art. 6 and Recital 26 of the Regulation 2020/2092 *cit.*

⁸ *Ibid.* arts 4 and 6.

⁹ European Council Conclusions EUCO 22/20 of 10-11 December 2020 paras 1–4.

¹⁰ Case C-657/21 *European Parliament v European Commission* pending.

This *Article* argues that the new EU budget offers yet further, and arguably more promising, ways to defend and foster the EU common values through financial means, especially considering the exceptional increase in EU expenditure resulting from the agreement of the “Next Generation EU” package. Most notably, the *Article* explores the potential and challenges of the EU budget as a values-oriented policy instrument focusing on three elements of the new EU budgetary framework: *i)* the set of fundamental rights “enabling conditions” attached to the European Structural and Investment (ESI) Funds (section 2); *ii)* the Justice, Rights and Values Fund (section 3); and *iii)* the Recovery and Resilience Facility (section 4).

II. PROTECTING EU VALUES THROUGH ESI FUNDS: THE NEW FUNDAMENTAL RIGHTS “ENABLING CONDITIONS”

The new Regulation laying down common provisions on the management of European Structural and Investment Funds (Common Provisions Regulation)¹¹ establishes a set of so-called “enabling conditions”, the fulfilment of which is a necessary requirement for the Member States to obtain reimbursement of expenditure operations under ESI funds.¹²

In general terms, such instrument is intended to ensure that the allegedly critical prerequisites for efficient and effective spending are in place before the disbursement of funds and remain operative throughout the entire financial period. However, one cannot but be struck by the extreme variety of the 20 enabling conditions set out in the new Common Provisions Regulation, which are rather heterogeneous as regards scope, content, and functions. As for the scope, the Regulation draws a distinction between “horizontal” and “thematic” enabling conditions – the former being applicable to all specific spending objectives, while the latter being relevant only for the European Regional Development Fund (ERDF), the European Social Fund Plus (ESF+) and the Cohesion Fund.¹³ Turning to the content, the enabling conditions relate to various policy areas, ranging from public procurement market and state aid rules to gender equality and fundamental rights. Lastly, they serve a diverse range of functions: for instance, some enabling conditions require compliance with relevant EU law and policy in a particular field and thus perform an enforcement function, while others incentivise the implementation of administrative and structural reforms or the adoption of legislative and regulatory arrangements at national level.

¹¹ Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

¹² Art. 15 and Annexes III and IV Regulation (EU) 2021/1060 cit.

¹³ Art. 15(1) Regulation (EU) 2021/1060 cit.

For the purposes of this work, it is sufficient to focus on the following enabling conditions: *i*) the “horizontal” enabling conditions related to the effective application and implementation of the EU Charter of Fundamental Rights (CFR enabling condition) and of the UN Convention on the Rights of Persons with Disabilities;¹⁴ *ii*) the set of “thematic” enabling conditions regarding the policy objective “A more social and inclusive Europe implementing the European Pillar of Social Rights”, which make access to the ERDF and ESF+ conditional on a number of requirements concerning gender equality, social inclusion and poverty reduction, integration of Roma people, health and long-term care.¹⁵ These enabling conditions are meant to reinforce the fundamental rights dimension of the Union’s budget and to ensure a more values-based use of EU financial resources on the ground. An objective whose importance can hardly be overestimated, given the “visibility” of the Union in EU-financed projects and the recurrent concerns regarding the respect for fundamental rights in the management of ESI funds.¹⁶

These arrangements are not entirely new in the normative framework governing ESI funds. Indeed, the recourse to enabling conditions fits into the progressive expansion of spending conditionality in EU post-crisis internal governance¹⁷ and, more specifically, takes up the legacy of the *ex ante* conditionalities in force over the last financial period.¹⁸ In a rather similar way, the 2014–2020 *ex ante* conditionalities made in fact access to ESI funds dependent upon prior compliance with a set of conditions concerning, *inter alia*,

¹⁴ Annex III Regulation (EU) 2021/1060 cit.

¹⁵ See the enabling conditions n. 4.2, 4.4, 4.5 and 4.6 listed in Annex IV Regulation (EU) 2021/1060 cit.

¹⁶ See, in particular, the contributions to the European Ombudsman’s own-initiative inquiry OI/8/2014/AN on ‘Respect of fundamental rights in the implementation of the EU cohesion policy’, available at europa.eu. The inquiry was closed in 2015 with a set of policy recommendations addressed to the Commission: see European Ombudsman, Decision closing the own-initiative inquiry OI/8/2014/AN concerning the European Commission (11 May 2015).

¹⁷ See, *inter alia*, V Viță, ‘Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality’ (2017) CYELS 116; J Bachtler and C Mendez, ‘Cohesion and the EU Budget: Is Conditionality Undermining Solidarity?’ in R Coman, A Crespy and VA Schmidt (eds), *Governance and Politics in the Post-Crisis European Union* (Cambridge University Press 2020) 121.

¹⁸ Regulation (EU) 1303/2013 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) 1083/2006, art. 19 and Annex XI; Regulation (EU) 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) 1698/2005, Annex V; Regulation (EU) 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) 2328/2003, (EC) 861/2006, (EC) No 1198/2006 and (EC) 791/2007 and Regulation (EU) 1255/2011 of the European Parliament and of the Council, Annex IV.

non-discrimination, gender equality, and disability.¹⁹ Most notably, Member States needed to fulfil the applicable *ex ante* conditionalities before the disbursement of funds or, exceptionally, by 31 December 2016. Failure to fulfil the relevant conditionalities in time constituted ground for suspending interim payments by the Commission.²⁰

Whether the *ex ante* conditionalities actually delivered on their promises is open to debate. The Commission considers the 2014-2020 experience with such policy tool an overwhelming success at many levels, including in terms of strengthening administrative capacity, fostering structural reforms, accelerating the implementation of the EU *acquis*, and improving the overall investment climate in the Member States.²¹ In essence, as the Commission concludes, “had it not been for *ex ante* conditionalities, reforms and changes might not have happened or they might have happened at a much slower pace”.²² However, the rather triumphal assessment made by the Commission was met with scepticism by the Court of Auditors, which identified a number of shortcomings both in the design and in the actual implementation of *ex ante* conditionalities, depicting them as “innovative, but not yet effective instruments”.²³ As regards the design, the Court of Auditors underlined that the *ex ante* conditionalities were often generic in nature and poorly targeted, and that there were no mechanisms designed to ensure continuous compliance by the Member States after the early-stage assessment and throughout the whole programming period. As for the implementation, the Court of Auditors detected *inter alia* an “overly positive and inconsistent self-assessment by the Member States”²⁴ and even cases of lack of compliance which were not followed by enforcement by the Commission.²⁵ Moreover, as noticed by Viorica Viță, the general *ex ante* conditionalities on anti-discrimination, gender and disability have hardly had a positive impact also from the perspective of equality mainstreaming due to the cumbersome applicability rules and assessment procedure, which resulted in greater room for manoeuvre for the Member States and the Commission and, ultimately, in poor compliance.²⁶

¹⁹ For the general *ex ante* conditionalities related to anti-discrimination, gender and disability see, in particular, Annex XI, Part II of the Regulation 1303/2013 cit.

²⁰ For the functioning of *ex ante* conditionalities, see art. 19 of the Regulation 1303/2013 cit.

²¹ Commission, *My Region, My Europe, Our Future: Seventh Report on Economic, Social and Territorial Cohesion* ec.europa.eu (hereinafter “Seventh Cohesion Report”); Staff Working Document SWD(2017) 127 final from the Commission of 31 March 2017, ‘The Value Added of Ex Ante Conditionalities in the European Structural and Investment Funds’.

²² Staff Working Document SWD(2017) 127 cit. 19; Seventh Cohesion Report cit. 179.

²³ Court of Auditors, Special Report 15/2017, ‘Ex-ante Conditionalities and Performance Reserve in Cohesion: Innovative but Not yet Effective Instruments’. See also, most recently, Court of Auditors, Special Report 24/2021, ‘Performance-based Financing in Cohesion Policy: Worthy Ambitions, but Obstacles Remained in the 2014-2020 Period’ paras 16–38.

²⁴ ECA Special Report 15/2017 cit. paras 38-49.

²⁵ *Ibid.* paras 60-62.

²⁶ V Viță, ‘Mainstreaming Equality in European Structural and Investment Funds: Introducing the Novel Conditionality Approach of the 2014–2020 Financial Framework’ (2017) German Law Journal 993.

The current shape of the 2021-2027 enabling conditions seems to remedy, at least on paper, the most important flaws in the design of *ex ante* conditionalities emerged over the last financial period.

Firstly, all the enabling conditions immediately apply to the specific objectives listed in Annexes III and IV of the new Common Provisions Regulation, without being dependent upon reaching an “applicability threshold” as it was the case for the *ex ante* conditionalities.²⁷ In the previous regime, an *ex ante* conditionality was indeed “applicable” – in the meaning of art. 2(33) of the former Common Provisions Regulation – only when deemed to be “a concrete and precisely pre-defined critical factor, which is a *prerequisite for* and has a *direct and genuine link to, and direct impact on, the effective and efficient achievement of a specific objective for an investment priority or a Union priority*”.²⁸ In addition, even when satisfying all these criteria, the application of an *ex ante* conditionality could be in any case excluded *in concreto* on the basis of the principle of proportionality referred to in art. 19(1) of the Regulation, meaning that the Member States were entitled not to fulfil those conditionalities which appeared to have a relatively small impact on the achievement of the specific spending objectives, considering also the level of support allocated.²⁹ In essence, the applicability of *ex ante* conditionalities was assessed on a case-by-case basis, depending on the conditions being strictly instrumental and proportionate to the pursuit of the relevant spending objectives. The assessment was first carried out by the Member States and then double-checked by the Commission, which was entrusted with the (not easy) task of evaluating the consistency and adequacy of the information provided.³⁰ Besides rendering the whole process rather cumbersome, the inclusion of such applicability threshold entailed in practice that certain *ex ante* conditionalities had a much more limited scope than initially expected.³¹ For instance, despite being *in abstracto* applicable, the general *ex ante* conditionalities on anti-discrimination, gender equality and disability have found no application in the measures financed under the European Maritime and Fisheries Fund (EMFF) over the 2014-2020 period.³² More generally, the applicability test provided the Member States with the formal opportunity to have a say on the application of *ex ante* conditionalities to them, with the paradoxical result that an

²⁷ See arts 19(1) and 2(33) Regulation 1303/2013 cit. For more on the 2014-2020 applicability threshold, see Commission, *Internal Guidance on Ex ante Conditionalities for the European Structural and Investment Funds - Part I* ec.europa.eu (hereinafter: ExAC Guidance).

²⁸ Art. 2(33) of the Regulation 1303/2013 cit. (emphasis added).

²⁹ *Ibid.* art. 19(1); ExAC Guidance I cit. 7.

³⁰ Art. 19(1) and (3) of the Regulation 1303/2013 cit.

³¹ For a screening on the applicability of *ex ante* conditionalities based on the analysis of the Member States' programming documents, see M Whilborg and others, *The Implementation of the Provisions in Relation to the Ex-Ante Conditionalities during the Programming Phase of the European Structural and Investment (ESI) Funds - Final Report* (Study for the European Commission DG REGIO 2016) 24–40.

³² On the point, see V Viță, 'Mainstreaming Equality in European Structural and Investment Funds' cit. 1007.

instrument designed to condition Member States' behaviours ended up being conditioned itself by the Member States' assessment.³³ The removal of the applicability test in the design of the 2021-2027 enabling conditions is thus meant to avoid that the Member States could "pick and choose" the applicable conditionalities and greatly eases the Commission's *ex post* assessment tasks.

Secondly, the Commission has taken up the Court of Auditors' suggestion to require the fulfilment of conditionalities throughout the entire financial period, instead of limiting the assessment only to the state of the art at the programming stage.³⁴ This is probably the most important innovation in the design of enabling conditions, since it mitigates the risks of cosmetic compliance and gives the Commission a more meaningful instrument to address eventual steps back by the Member States occurring after the assessment carried out at the very start of the programming period. In the previous regime, indeed, the assessment of *ex ante* conditionalities ended up being a one-off exercise and, as recently stressed by the Court of Auditors, it is at best "unclear whether the achievements reported in this process had been sustained throughout the entire 2014-2020 period".³⁵

Turning to the content, the 2021-2027 fundamental rights enabling conditions largely match the corresponding *ex ante* conditionalities, with only some clarifications to be made on the enabling condition concerning gender equality.³⁶ By comparing the relevant pieces of legislation, it might be inferred that the scope of the new enabling condition is more limited than the corresponding *ex ante* conditionality since the former is "thematic" and applies only to the ERDF and ESF+, while the latter was "general" and thus covered all ESI funds. However, as anticipated, one should consider that in practice the gender equality *ex ante* conditionality has found no application in some ESI funds in 2014-2020, particularly regarding the EMFF, due to the onerous applicability test envisaged in the previous financial period.³⁷ Most importantly, as lastly confirmed by the Commission, the new CFR enabling condition "includes gender equality as one of its key principles and applies to all the investments under this regulation [i.e., the Common Provisions Regulation]".³⁸ The "residual" role of the CFR enabling condition, which largely absorbs fundamental rights issues not covered by specific conditionalities, is also relevant with regard to the former *ex ante* conditionality on anti-discrimination, which is not present among the new enabling conditions but is definitely a cornerstone of the Charter.

³³ Such paradox is highlighted in V Viță, *Ex Ante Fundamental Rights Conditionalities – A Novel Fundamental Rights Tool in the European Structural and Investment Funds Architecture: Locating in the Broader EU Fundamental Rights Conditionality Landscape* (European University Institute 2014) 83.

³⁴ Art. 15(6) of the Regulation 2021/1060. Cf. ECA Special Report 15/2017 cit. para. 111, recommendation 1(d).

³⁵ ECA Special Report 24/2021 cit. para. 26.

³⁶ See the enabling condition n. 4.2 included in Annex IV Regulation 2021/1060 cit.

³⁷ V Viță, 'Mainstreaming Equality in European Structural and Investment Funds' cit. 1007.

³⁸ Communication COM(2020) 152 from the Commission of 5 March 2020, 'A Union of Equality: Gender Equality Strategy 2020-2025' 16.

That said with regard to the design and content of the fundamental rights enabling conditions, it is worth focusing now on the CFR enabling condition, which represents a distinctive novelty of the new package of conditionalities covering the machinery of ESI funds in 2021-2027.

This is not to say that the Charter played no role in the Union's budget before. The funding instruments of EU home affairs policy in 2014-2020³⁹ contained indeed some conditionality arrangements related to the Charter.⁴⁰ In addition, over the last financial period the Charter has acquired increasing significance also in the overall administration of ESI funds. In particular, it has gained "indirect" – though admittedly limited⁴¹ – relevance as a benchmark for assessing the fulfilment of the fundamental rights *ex ante* conditionalities at the start of the 2014-2020 programming period. Moreover, prompted by the European Ombudsman's inquiry on the respect for fundamental rights in EU cohesion policy,⁴² the Commission issued a specific "Guidance" aimed at strengthening compliance with the Charter in the implementation of ESI funds.⁴³ The document usefully describes how the Charter becomes relevant in the different phases of implementation of ESI funds at national level and contains also a "Fundamental Rights Checklist" with a view to "help Member States screen ESIF implementing measures against the Charter".⁴⁴

Built upon previous practice, the CFR enabling condition is therefore meant to expand the role of, and add teeth to, the Charter in the normative framework governing ESI funds. Being a "horizontal" enabling condition of the new Common Provisions Regulation, it applies to all ESI funds operating in 2021-2027. Therefore, its scope has been significantly extended compared to the previous financial period, where it was confined only to

³⁹ Art. 3(5) of the Regulation (EU) 513/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for police cooperation, preventing and combating crime, and crisis management and repealing Council Decision 2007/125/JHA; art. 3(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 repealing Decision 574/2007/EC; arts 3(1) and 19(2) of the Regulation (EU) 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions 573/2007/EC and 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC.

⁴⁰ Suffice it to read the mentioned provisions of the fund-specific regulations with the general financial corrections clause of 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.

⁴¹ The EU Charter is barely mentioned as a benchmark in the Commission's guidelines for the assessment on the fulfilment of *ex ante* conditionalities: see Commission, *Guidance on Ex ante Conditionalities for the European Structural and Investment Funds – Part II* ec.europa.eu. The only exception is a reference to art. 21 of the Charter in the part concerning the general *ex ante* conditionality on non-discrimination (p. 341).

⁴² European Ombudsman Decision on the case OI/8/2014/AN cit. para. 48(i).

⁴³ Commission, *Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds* europa.eu.

⁴⁴ *Ibid.* 1.

home affairs policy funds. In addition, the possibility to check compliance with the Charter throughout the entire programming cycle offers the Commission a more persuasive instrument to ensure respect for the Charter in all phases of implementation of ESI funds at national level. Besides, the CFR enabling condition may offer a new unexpected opportunity to revive the role of the Charter in the rule of law crisis, which has long been advocated by scholars.⁴⁵ In the “revolutionary” Court of Justice’s case-law on rule of law backsliding⁴⁶ the Charter has indeed played a rather limited role so far. This holds particularly true if one considers the block of cases on judicial independence, where the Charter has been mostly⁴⁷ eclipsed by the prominent “reinvention” of art. 19(1) TEU,⁴⁸ while some counter-examples are offered by the few rule-of-law infringement proceedings not related to judicial independence⁴⁹ and the relevant European Arrest Warrant’s case-law.⁵⁰ The 2021-2027 EU budget might have added a new dimension to the classic deployments of the Charter, making it also a shield against the use of EU financial resources in utter disrespect of fundamental rights. The potential relevance of such a new instrument is

⁴⁵ A Jakab, ‘The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States’ in C Cloas and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 187; J Morijn and D Kochenov, ‘Strengthening the Charter’s Role in the Fight for the Rule of Law in the EU: The Cases of Judicial Independence and Party Financing’ (2021) EPL 759.

⁴⁶ For an overview of the Court’s relevant case-law see L Pech and D Kochenov, ‘Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments Since the Portuguese Judges Case’ (SIEPS 2021:3) SIEPS Report.

⁴⁷ The most notable exception is the Court’s judgement in joined cases C-585/18, C-624/18, C-625/18 *AK and Others v Sąd Najwyższy (Indépendance de la chambre disciplinaire de la Cour suprême)* ECLI:EU:C:2019:982.

⁴⁸ For a recent account on the relation between art. 19 TEU and art. 47 of the Charter, see K Lenaerts, ‘The Role of the EU Charter in the Member States’ in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) 23–25. For a critique of the Court’s approach on the matter, see N Lazzarini, ‘Inapplicabile, ma comunque rilevante? La Carta dei diritti fondamentali nella giurisprudenza recente della Corte di giustizia sull’indipendenza dei giudici nazionali’ in *Temi e questioni di diritto dell’Unione europea. Scritti offerti a Claudia Morviducci* (Cacucci Editore 2019) 171. On the “indirect” effects of the Charter in art. 19-based cases, see A Rasi, ‘Effetti indiretti della Carta dei diritti fondamentali? In margine alla sentenza Commissione c. Polonia (Indépendance de la Cour suprême)’ (2019) *European Papers* www.europeanpapers.eu 615.

⁴⁹ Case C-78/18 *Commission v Hungary (Transparence associative)* ECLI:EU:C:2020:476; case C-66/18 *Commission v Hungary (Enseignement supérieur)* ECLI:EU:C:2020:792. On the use of the Charter in the former case and, more generally, in rule-of-law infringement proceedings, see M Bonelli, ‘European Commission v Hungary (Transparency of Associations) (C-78/18): The “NGOs Case”: On How to Use the EU Charter of Fundamental Rights in Infringement Actions’ (2021) ELR 258.

⁵⁰ Case C-216/18 *PPU Minister for Justice and Equality (Deficiencies in the System of Justice)* ECLI:EU:C:2018:586; joined cases C-354/20 *PPU* and C-412/20 *PPU Openbaar Ministerie (Indépendance de l’autorité judiciaire d’émission)* ECLI:EU:C:2020:1033. It is however worth reminding that the suitability of using the Charter in the EAW case-law is questioned by scholars: see, most recently, J Morijn and D Kochenov, ‘Strengthening the Charter’s Role in the Fight for the Rule of Law in the EU’ cit. 772–774.

best exemplified by the recent discriminatory practices occurred in some Polish cities which declared themselves “LGBTIQ-free zones”⁵¹ and, at the same time, applied for funding under the “Town Twinning” programme. In the case at hand, the Commission rejected the relative funding applications at the outset,⁵² while it is unclear whether it would have been possible to suspend payments at a later stage under the regime in force at that time. Against this background, as recently confirmed by the Commission, the new CFR enabling condition provides a more stable basis for the adoption of these kind of measures throughout the 2021-2027 period and, as already said, it applies to all operations financed by ESI funds and is enforceable at every stage of implementation.⁵³

There are however some challenges ahead for the Commission to make effective use of the new enabling conditions, and especially of the one concerning the Charter.

Firstly, while the new Common Provisions Regulation seems to address effectively the main problems in design emerged over the last financial period, it is up to the Commission to fully exploit the potential of these conditionality mechanisms at the enforcement stage. The experience with spending conditionality so far suggests that the Commission essentially relies on voluntary compliance by the Member States, leaving the exercise of its enforcement powers as a very last resort. In practice, in 2014-2020 the Commission has suspended payments for failure to fulfil the *ex ante* conditionalities only in two cases and well after the expiry of the (allegedly) final deadline of 31 December 2016,⁵⁴ although there are reported cases of temporary “self-suspensions” by the Member States on selected investment priorities.⁵⁵ Since it is implausible to expect loyal cooperation by Member States blatantly disrespecting the EU basic values, the Commission will definitely need to make use of its enforcement powers to avoid that the new tools remain on paper. Despite taken under different funding instruments,⁵⁶ the decision to reject grants to Polish cities and regions declaring themselves “LGBTIQ-free zones” is a promising sign in this respect and appears

⁵¹ The matter is also the subject of an infringement procedure launched by the Commission on 15 July 2021: INFR(2021)2077.

⁵² The decision was announced by Commissioner Helena Dalli on Twitter on 28 July 2020 [twitter.com](https://twitter.com/HelenaDalli) and later confirmed, despite more cautiously, in a written response to the Parliamentary question E-0044332020 on “Refusal to grant EU funds to cities in Poland which have established so-called LGBT-free zones” (19 October 2020).

⁵³ Communication COM(2020) 698 final of 12 November 2020 from the Commission, ‘Union of Equality: LGBTIQ Equality Strategy 2020-2025’ 20–21. See also the written answer given by Commissioner Ferreira to Parliamentary question E-003512/2021 on “So-called LGBT-free zones in Poland violate the principle of non-discrimination in EU cohesion policy” (21 October 2021).

⁵⁴ The Commission suspended payments against Spain (2018, then lifted in 2019) and Italy (2019): see ECA Special Report 24/2021 cit. paras 33–34.

⁵⁵ ECA Special Report 15/2017 cit. paras 61–62.

⁵⁶ As said above, the Commission rejected funding applications under the “Town Twinning” programme in 2020. More recently, in September 2021, the Commission threatened to refuse the disbursement of resources under “REACT-EU”: see A Włodarczak-Semczuk and others, ‘EU Warns Polish Regions They Could Lose Funding over “LGBT-Free” Zones’ (6 September 2021) Reuters www.reuters.com.

to have produced some results in the specific case.⁵⁷ Importantly, as anticipated above, the Commission has already confirmed that the new CFR enabling condition might cover this kind of situation⁵⁸ and that it is ready to enforce it, if necessary.⁵⁹

Secondly, the CFR enabling condition is formulated in fairly broad terms, as it “only” requires effective application and implementation of the Charter. This element could impact on the effective deployment of the new tool, especially considering its “attractive power” for all fundamental rights issues emerging in ESI funds’ implementation. The Commission usually develops guidelines concerning the application of conditionality⁶⁰ and this might be the case also for the new enabling conditions. Alternatively, the Commission could explore the possibility of updating the above-mentioned 2016 Guidance as to include a new section on the CFR enabling condition, with a view to guide Member States in ensuring compliance with the Charter when implementing ESI funds.

Finally, somehow backed by the Court of Justice,⁶¹ the Commission has adopted a rather strict interpretation of the Charter’s scope of application against national measures financed by ESI funds,⁶² while the potential of the “obligation to promote” the rights and principles enshrined in the Charter has remained untapped to date.⁶³ A greater emphasis on the “positive” dimension of the Charter would definitely make the CFR enabling condition a more significant tool to advance the discourse of fundamental rights in the framework of ESI funds.

⁵⁷ A Charlish and A Włodarczyk-Semczuk, ‘Three Polish Regions Repeal “LGBT-Free” Declarations’ (27 September 2021) Reuters www.reuters.com.

⁵⁸ Communication COM(2020) 698 cit. 20–21.

⁵⁹ S Fleming and H Foy, ‘Poland and Hungary Face Threat to EU Regional Aid over Human Rights Concerns’ (22 September 2021) Financial Times www.ft.com.

⁶⁰ For instance, this was the case for the 2014–2020 macro-economic conditionalities and the *ex ante* conditionalities.

⁶¹ See, in particular, para. 42 of the Court’s judgement in case C-117/14 *Grima Janet Nisttahuz Poclava v Jose María Ariza Toledano* ECLI:EU:C:2015:60, where the Court held that “the fact that the employment contract of indefinite duration to support entrepreneurs may be financed by structural funds is not sufficient, in itself, to support the conclusion that the situation at issue in the main proceedings involves the implementation of EU law for the purposes of Art. 51(1) of the Charter”.

⁶² In the Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds, cit. paras 2(2)(2) and 3, the Commission seems to follow the Court’s approach when identifying the scope of application of the EU Charter in the implementation of ESI funds. As emerges from the Guidance, the fact that a national measure is financed by EU funds is not *per se* a triggering factor for the application of the Charter, being necessary to show that the national measure is intended to implement an obligation stemming from EU law.

⁶³ On the point, see V Viță and K Podstawa, ‘When the EU Funds Meet the Charter of Fundamental Rights: On the Applicability of the Charter of Fundamental Rights to EU Funds Implemented at the National Level’ (Global Campus Working Paper 2017).

III. DECENTRALISING THE “POLITICS OF VALUES”: THE POTENTIAL OF THE JUSTICE, RIGHTS AND VALUES FUND

More attention should be paid on the potential of the newly established “Justice, Rights and Values Fund” (JRVF), comprising the “Citizens, Equality, Rights and Values” programme (CERV)⁶⁴ and the “Justice” programme.⁶⁵ The relative regulations were adopted almost unanimously in April 2021, with only Hungary and Poland (unsurprisingly) voting against in the Council.⁶⁶

The JRVF is part of the “Cohesion, resilience and values” heading of the 2021-2027 Multiannual Financial Framework (MFF)⁶⁷ and will be implemented under *direct or indirect* management.⁶⁸ Hence, JRVF financial resources will not be channelled through governmental bodies of the Member States (*shared* management) and will be managed by the Commission either directly or indirectly⁶⁹ – an element of crucial importance in light of the objectives and features of the new instrument, as will be detailed below.

The CERV programme has four different strands reflecting distinct policy objectives: *i)* the *Union values* strand, which upholds the protection and promotion of EU values with a particular focus on the empowerment of civil society organisations; *ii)* the *Equality, rights and gender equality* strand, aiming at promoting non-discrimination and equality, including gender equality, and the mainstreaming thereof; *iii)* the *Citizens’ engagement and participation* strand, which is designed to promote exchanges between citizens of different countries and to raise awareness of their common European history; *iv)* the *Daphne* strand, that is intended to prevent and combat violence and especially gender-based violence, in line with the Istanbul Convention.⁷⁰ The Justice programme, instead, focuses essentially on supporting judicial cooperation and training, as well as on facilitating effective and non-discriminatory access to justice and effective remedy, with a view to “contributing to the further development of a European area of justice based on the rule of law”.⁷¹

⁶⁴ Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014.

⁶⁵ Regulation (EU) 2021/693 of the European Parliament and of the Council of 28 April 2021 establishing the Justice Programme and repealing Regulation (EU) No 1382/2013.

⁶⁶ The relative voting results are available at www.consilium.europa.eu (CERV programme) and www.consilium.europa.eu (Justice programme).

⁶⁷ Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027.

⁶⁸ Art. 9(1) of the Regulation (EU)2021/692 cit.; art. 7(1) of the Regulation (EU)2021/693 cit.

⁶⁹ The different methods of budget implementation are laid down in arts 62 and 63 of the 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.

⁷⁰ Arts 2-6 of the Regulation 2021/692 cit.

⁷¹ Art. 3 of the Regulation 2021/693 cit.

To be accurate, the JRVF is not an entirely new heading in the EU budget, deriving partly from the repackaging of previous programmes. Most notably, the CERV programme incorporates the “Rights, Equality and Citizenship”⁷² and the “Europe for citizens”⁷³ programmes operating in 2014-2020, while the Justice programme replaces the homonymous programme in force over the last financial period.⁷⁴ However, while the initial Commission’s proposals were essentially in line with the 2014-2020 predecessors both in financial size and substantive arrangements, some fundamental ameliorative amendments have been adopted at the final stages of the institutional negotiations.

To start, the JRVF financial size was almost doubled compared to the Commission’s proposals. In particular, the CERV financial envelope of 641 million euro was increased by an additional allocation of 800 million euro (in 2018 prices) financed through revenue from competition fines.⁷⁵ By adding the Justice programme’s allocation of 305 million euro,⁷⁶ the overall funding available under the JRVF reaches the total amount of around 1,8 billion euro in current prices, which represents a considerable increase if compared with the initial proposal of 946 million euro.

Moreover, thanks to the decisive impulse of the European Parliament,⁷⁷ the *Union values* strand was added alongside the other specific objectives of the CERV⁷⁸ and was allocated almost half of the overall CERV financial envelope, becoming the first heading of the programme in financial terms.⁷⁹ As anticipated, the *Union values* strand is primarily aimed at providing financial support to civil society organisations which are active at local, regional, national and transnational level in protecting and promoting the EU founding values.⁸⁰ The strategic role of civil society organisations in fostering EU values on the ground is also supported by the earmarking provision set out in art. 7(5) of the Regulation, according to which at least 50% of amounts devoted to the *Union values* and *Equality, rights and gender equality* strands shall be allocated to civil society organisations, of which at least 40% to the local and regional ones.⁸¹

⁷² Regulation (EU)1381/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Rights, Equality and Citizenship Programme for the period 2014 to 2020.

⁷³ Council Regulation (EU)390/2014 of 14 April 2014 establishing the “Europe for Citizens” programme for the period 2014 to 2020.

⁷⁴ Regulation (EU)1382/2013 of the European Parliament and of the Council of 17 December 2013 establishing a Justice Programme for the period 2014 to 2020.

⁷⁵ Art. 7(2) of the Regulation 2021/692 cit.; art. 5(1) and Annex II of the Regulation 2020/2093 cit.

⁷⁶ Art. 5(1) of the Regulation 2021/693 cit.

⁷⁷ European Parliament resolution P8_TA(2019)0407 of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the Rights and Values programme, art. 2(a).

⁷⁸ Art. 2(2)(a) of the Regulation 2021/692 cit.

⁷⁹ *Ibid.* art. 7(3)(a) and (4)(a).

⁸⁰ *Ibid.* art. 3.

⁸¹ *Ibid.* art. 7(5).

The creation of such an instrument, which was long advocated by civil society organisations⁸² and then found fertile ground in EU institutional circles,⁸³ is of critical importance. The shrinking of funding is indeed one of the most pressing challenges facing civil society organisations over recent years, as highlighted *inter alia* by the EU Agency for Fundamental Rights.⁸⁴ As is known, the problem is even more evident in Member States experiencing democratic backsliding and especially in Hungary,⁸⁵ where the chances of gaining external funding have been drastically curtailed⁸⁶ while governmental funding has become ever more politicised over the last decade.⁸⁷ At the end of his mission in Hungary, the UN Special Rapporteur on the Situation of Human Rights Defenders expressed concern for the lack of access by Hungarian civil society organisations to independent funding, noting also that the EU's practice of channelling its financial resources through governmental agencies could even exacerbate the issue, as "the discontinuation of funding can be used as a tool to silence dissent or encourage self-censorship".⁸⁸ For this reason, already in 2017 the Special Rapporteur urged "the European Union [to] review its policy on funding civil society organizations exclusively through the State budget and explore alternative sources and means of funding for independent civil society, with a view to ensuring free and non-politicized access to funding, including small grants, for all civil society organizations".⁸⁹

⁸² Among the various initiatives, it suffices to remind that in December 2017 more than 70 civil society organisations from different EU countries called for the establishment of the so-called 'European Values Instrument' (EVI): see 'Towards a Value-Driven European Policy: European CSOs Call for The Instrument to Support European Values in Europe' (2017) www.europuls.ro.

⁸³ See, *inter alia*, Opinion of the European Economic and Social Committee of 19 October 2017 on 'Financing of civil society organisations by the EU' para. 6(8); Resolution P8_TA(2018)0184 of the European Parliament of 19 April 2018 on the need to establish a European Values Instrument to support civil society organisations which promote fundamental values within the European Union at local and national level.

⁸⁴ EU Agency for Fundamental Rights, *Challenges Facing Civil Society Organisations Working on Human Rights in the EU* fra.europa.eu 29-37. Most recently, EU Agency for Fundamental Rights, *Protecting Civic Space in the EU* fra.europa.eu 39-45.

⁸⁵ CoE Commissioner for Human Rights, 'Report on Hungary Following Her Visit to the Country in February 2019' (21 May 2019) CommDH(2019)13 paras 45-86. See, most recently, Staff Working Document SWD(2021) 714 final from the Commission of 20 July 2021, '2021 Rule of Law Report – Country Chapter on the rule of law situation in Hungary' 25-27.

⁸⁶ In February 2021, the Commission sent a letter of formal notice under art. 260(2) TFEU to Hungary for failing to comply with the so-called 'Lex NGO' judgement (*Commission v Hungary (Transparence associative)* cit.). In April 2021, a new law repealing the "Lex NGO" law was adopted, but it is at least questionable whether it has brought substantial improvements: L Gall, 'Hungary's Scrapping of NGO Law Insufficient to Protect Civil Society' (23 April 2021) Human Rights Watch www.hrw.org.

⁸⁷ Report of the Special Rapporteur on the Situation of Human Rights Defenders on His Mission to Hungary (2017) A/HRC/34/52/Add.2.

⁸⁸ *Ibid.* paras 102-103.

⁸⁹ *Ibid.* paras 113.

Under this lens, one cannot but appreciate the choice of administering CERV resources under direct or indirect management, as it allows to provide civil society organisations with access to funding without further involvement of national governmental authorities. Yet, it remains to be seen whether the new funding instrument will adequately address the difficulties facing civil society organisations, and especially smaller grassroots organisations, in accessing EU funding. As emerged in the 2021 FRA Report “Protecting Civic Space in the EU”, the high level of bureaucracy and the provision of strict eligibility criteria, including in terms of co-financing requirements,⁹⁰ are still significant hurdles to cope with.⁹¹

On a different level, the Regulation witnesses an increasing awareness of the particular challenges facing civil society organisations committed in areas – such as gender equality, gender-based violence, sexual and reproductive health, and LGBTIQ rights – which have become the target of conservative agendas in backsliding Member States. To give a few examples, the Fundamental Rights Agency stressed how “organisations involved in litigation and advocacy in the fields of domestic violence, women’s rights and gender equality did not receive any direct government funding other than the 1% contributions from personal income tax” in Hungary.⁹² At the end of her visit in Poland, the CoE Commissioner for Human Rights noticed with concern that “the abrupt and/or unexplained interruption of access to central government funding which affected several well established and reputable women’s rights organisations has led these to limit the scope of their activities, close offices, increase reliance on volunteer or pro bono work, and increase the average waiting time for victims to obtain counselling or therapeutic support”.⁹³ Hence, it is no coincidence that Recital 12 of the CERV regulation emphasises the importance of granting funding to civil society organisations working in these fields, stating in a crystal-clear manner that “all those activities seek to promote key values of the Union and *ought therefore to be supported throughout the Union, without exception*”.⁹⁴

Lastly, it is worth emphasising how the decision to grant direct financing to civil society organisations working in challenging contexts may signal a growing acknowledgment of the often overlooked “societal dimension” of rule of law and democratic backsliding in the EU, which demands greater attention on bottom-up forms of engagement and promotion of the rule of law rather than on top-down monitoring and enforcement by EU

⁹⁰ Actually, the CERV co-financing rate is set pretty low – *i.e.*, no more than 10 per cent of total eligible costs (see Commission Implementing Decision C(2021) 2583 of 19 April 2021, 12) – but may still represent an obstacle especially for smaller civil society organisations.

⁹¹ EU Agency for Fundamental Rights, ‘Protecting Civic Space in the EU’ cit. 42.

⁹² EU Agency for Fundamental Rights, ‘Challenges Facing Civil Society Organisations Working on Human Rights in the EU’ cit. 30.

⁹³ CoE Commissioner for Human Rights, ‘Report on Poland Following Her Visit to the Country in March 2019’ (28 June 2019) CommDH(2019)17 para. 125.

⁹⁴ Recital 12 of the Regulation 2021/692 cit. (emphasis added).

institutions, however important it may be.⁹⁵ The CERV programme may in fact contribute to shaping a more proactive role for the EU institutions, especially for the Commission, in empowering civil society and enabling domestic *contre-pouvoirs* to act as a bulwark against democratic decline. In addition, it may pave the way for a more direct “channel of dialogue” between the EU institutions and civil society, unmediated by national authorities, and supports a greater decentralisation of the politics of values, which is crucial to stimulate genuinely democratic changes at domestic level.

IV. THE RECOVERY AND RESILIENCE FACILITY: SHAPING EUROPE’S RECOVERY IN LINE WITH EU VALUES

Finally, also considering its exceptional volume⁹⁶ and the delicate moment facing European economies in times of pandemic, the Recovery and Resilience Facility (RRF) may prove an extremely powerful instrument to stimulate compliance with, and support the advancement of, the Union’s values through financial incentives – and the Commission is already testing its potential, as will be said below.

As is known, in order to be eligible for financial support under the RRF, Member States are required to submit a “Recovery and resilience plan” (RRP)⁹⁷ detailing the set of measures to be financed under the mechanism, which are then subject to assessment by the Commission and finally approved by the Council by means of an implementing decision.⁹⁸ Payments of financial contributions and loans are conditional upon the previous fulfilment of the milestones and targets set out in the Council’s implementing decision.⁹⁹ Hence, although the RRF and other NGEU-related instruments mark at least a temporary departure from the controversial vocabulary of “strict conditionality” in vogue during the Eurozone crisis,¹⁰⁰ RRF financial resources are anything but “*blank cheques*” and can only be used to support the implementation of measures which are consistent with the policy objectives set by the Union.

⁹⁵ On the “societal dimension” of democratic backsliding, see P Blokker, ‘The Democracy and Rule of Law Crises in the European Union and Its Member States’ (RECONNECT Deliverable 2021). See also the Special Issue edited by A Buyse and others, ‘Rule of Law from Below’ (2021) *Utrecht Law Review* 1.

⁹⁶ The RRF is allocated the overall amount of 672,5 billion euro, covering almost 90 per cent of the whole NGEU’s financial envelope of 750 billion euro: see art. 2(2)(a)(ii) and (c) of the Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.

⁹⁷ National RRP’s and related documents are available at ec.europa.eu.

⁹⁸ Arts 18-20 of the Regulation (EU)2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

⁹⁹ *Ibid.* art. 24.

¹⁰⁰ P Dermine, ‘The EU’s Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture’ (2020) *LIEI* 337 and 350–352.

For our purposes, two main elements need to be considered: *i)* the embedment of the RRF in the European Semester cycle; *ii)* the link between the RRF and the European Pillar of Social Rights (EPSR), with special regard to the gender equality dimension.

As regards the first element, suffice it to remind here that since 2013 the European Semester has increasingly included considerations over issues related to the principles of the rule of law,¹⁰¹ so that it is frequently presented as part of the EU rule-of-law toolbox.¹⁰² According to the Commission, the combination of the European Semester and the EU Justice Scoreboard constitutes indeed a “good framework to develop country-knowledge relating to rule of law”.¹⁰³ In fact, topics such as the organisation of national judiciaries and judicial independence,¹⁰⁴ the functioning of public administration systems and anti-corruption frameworks,¹⁰⁵ as well as media freedom and the independence of academic and research fora,¹⁰⁶ have become ever more present among the lines of the Country-Specific Recommendations (CSRs) issued annually by the Council, contributing to shape a growing rule-of-law dimension of the European Semester.

That said, the overall rate of implementation of CSRs has remained very low over the years¹⁰⁷ and the picture does not change if one looks at the rule-of-law related ones. For instance, the 2020 Country Report on Hungary indicates that “no progress” was made to reinforce the anti-corruption framework, strengthen judicial independence, and improve prosecutorial efforts and access to public information, as to meet the 2019 CSRs.¹⁰⁸ The low level of compliance by the Member States is one of the elements prompting the Commission to enhance the link between the EU budget and the European Semester, as to develop a framework of sanctions and incentives to stimulate CSRs’ implementation. As examples of this tendency, one may refer to the CSRs-related macroeconomic conditionality included in the 2014-2020 Common Provisions Regulation,¹⁰⁹ as well as to the Structural Reform

¹⁰¹ The 2013 Annual Growth Survey first referred to the improvement of the quality, independence and efficiency of national judicial systems as a growth factor: Communication COM(2012) 750 final from the Commission of 28 November 2012, ‘Annual Growth Survey 2013’.

¹⁰² L Pech, ‘The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox’ (RECONNECT Working Paper 7/2020) 26–28.

¹⁰³ Communication COM(2019) 163 final from the Commission of 3 April 2019, ‘Further strengthening the Rule of Law within the Union: State of play and possible next steps’ 9.

¹⁰⁴ See, in particular, the CSRs addressed to Hungary (2019), Malta (2019-2020), Poland (2020), and Slovakia (2019-2020). The 2019 CSRs are available in OJ C-301 of 5 September 2019, while the 2020 CSRs are included in OJ C-282 of 26 August 2020.

¹⁰⁵ CSRs Hungary (2019), Malta (2019), and Slovakia (2019).

¹⁰⁶ CSRs Hungary (2019); Commission Staff Working Document SWD(2020) 516 final of 26 February 2020, ‘Country Report Hungary 2020’.

¹⁰⁷ Court of Auditors Special Report 16/2020, ‘The European Semester – Country Specific Recommendations address important issues but need better implementation’.

¹⁰⁸ Commission SWD(2020) 516 cit. 17.

¹⁰⁹ Art. 23(1)(a) of the Regulation 1303/2013 cit.

Support Programme.¹¹⁰ In line with the recommendations of the Court of Auditors,¹¹¹ the architecture of the emerging EU budgetary framework for the coming years further confirms this trend, and the RRF is undoubtedly the most important instrument in this regard.

The RRF is indeed fully ingrained in the European Semester cycle. The effective contribution to address the challenges identified in the context of the European Semester, and especially in the CSRs issued in 2019 and 2020, represents a key element in the design of the national RRFs¹¹² and will be subject to specific assessment by the Commission.¹¹³ As further detailed in the relevant Guidance, “unless the Commission has assessed the progress with these recommendations as ‘substantial progress’ or ‘full implementation’, all country-specific recommendations are considered to be relevant”.¹¹⁴ Most importantly, the Guidance stresses that “reforms linked to [...] the *effectiveness of justice systems*, and in a broader sense *respect of the Rule of Law* are essential elements of the Member States’ overall recovery strategy”.¹¹⁵

Under this lens, it is hardly necessary to explain why early commentators have celebrated the RRF’s embedment in the European Semester, crystallised in the political agreement reached at the end of the European Council’s marathon-meeting of July 2020,¹¹⁶ as a potentially big step forward for the rule of law, even “Christmas in July”.¹¹⁷ For instance, according to the very wording of the Regulation and related documents, Hungary should describe how the national RRF contributes to address effectively longstanding issues such as the controversial reshaping of the justice system, the country’s high exposure to corruption, the increasingly polarised media environment, or the legislation undermining the independence of academic and research bodies. Along the same lines, to access RRF funding Polish authorities should take effective action to restore judicial independence and to guarantee the efficiency and quality of the justice system, as required by the 2020 CSRs. In other words, the Regulation provides a legal basis – albeit, admittedly, a rather subtle one – for linking RRF spending to rule-of-law compliance, at least in so far as national challenges to the rule of law are reflected in the relevant CSRs.

¹¹⁰ Regulation 2017/825 of the European Parliament and of the Council of 17 May 2017 on the establishment of the Structural Reform Support Programme for the period 2017 to 2020 and amending Regulations 1303/2013 and 1305/2013.

¹¹¹ ECA Special Report 16/2020 cit. paras 41-44 and 63 (Recommendation 3).

¹¹² Arts 17(3) and 18(4)(b) of the Regulation (EU) 2021/241 cit.

¹¹³ *Ibid.* art. 19(2) and (3)(b).

¹¹⁴ Commission Staff Working Document SWD(2021) 12 final of 21 January 2021, ‘Guidance to Member States - Recovery and Resilience Plans, Part I’ 8.

¹¹⁵ *Ibid.* 9 (emphasis added).

¹¹⁶ European Council Conclusions of 17-21 July 2020, EUCO 10/20 para. A19.

¹¹⁷ J Morijn, ‘Op-Ed: “The July 2020 Special European Council, the EU Budget(s) and the Rule of Law: Reading the European Council Conclusions in Their Legal and Policy Context”’ (23 July 2020) EU Law Live eulawlive.com.

At the time of writing, the Commission is already exploiting the RRF's firepower against the two countries. While most Member States have already received the first tranche of payments,¹¹⁸ Hungary and Poland are still waiting for the Commission's approval of the RRFs submitted in May 2021 and, as time goes by, it has become apparent that the delay primarily relates to rule of law concerns.¹¹⁹ Most notably, it appears that the approval of the Hungarian RRF has been halted mainly due to fears over the reliability of the anti-corruption framework, while judicial independence and the questioning of the primacy of EU law are the key issues at stake for Poland.¹²⁰ At the moment, it is not clear what the next steps will be, especially following the much-controversial ruling of the Polish Constitutional Tribunal of 7 October 2021.¹²¹ In any case, the eventual approval of the plans is likely to come with strict milestones and targets attached, so that the Commission could retain leverage over the two countries should the agreed reforms not be implemented.¹²² Be that as it may, the Commission's delay in giving the green light to the plans can already be considered the most serious, if not the first real, financial sanction ever proposed to counter democratic backsliding in Hungary and Poland.¹²³

Beyond the link with the European Semester, the second element to be briefly outlined here is the connection between the RRF and the European Pillar of Social Rights, with special regard to gender equality – which is listed among the EPSR principles and whose relevance is emphasised in the Regulation and related documents.

According to art. 18 of the Regulation, the national RRFs should indeed detail how the proposed measures would contribute to the implementation of the European Pillar of Social Rights, as well as to gender equality and equal opportunities for all and the mainstreaming of those objectives.¹²⁴ On this last point, as further specified in the Commission's Guidance, Member States are thus not only required to explain “how the reforms and investments supported by the plan will be instrumental in overcoming the equality challenges identified”, but also to “demonstrate that the objectives of gender equality and equal opportunities for all are mainstreamed into the plan, i.e. that the plan promotes the integration of gender equality and equal opportunities for all across the six pillars [of the RRF]”.¹²⁵

¹¹⁸ By the end of December 2021, the Commission had already disbursed pre-financing payments to 18 Member States: see ec.europa.eu.

¹¹⁹ Euronews, ‘Brussels Admits Link between COVID Cash Delays and EU Values Respect’ (10 September 2021) Euronews www.euronews.com.

¹²⁰ *Ibid.* See also the answers of Commissioner Dombrovskis at the press conference of the informal meeting of economy and finance ministers of 6 September 2021, available at video.consilium.europa.eu.

¹²¹ Constitutional Tribunal of Poland judgment of 7 October 2021 n. K3/21.

¹²² Euractiv, ‘EU Mulls Approving Hungary, Poland Recovery Plans, with Conditions’ (1 October 2021) www.euractiv.com.

¹²³ See also T Nguyen, ‘How Much Money is a Lot of Money?’ (17 September 2021) [Verfassungsblog verfassungsblog.de](https://verfassungsblog.de).

¹²⁴ Art. 18(4)(c) and (o) of the Regulation (EU) 2021/241 cit.

¹²⁵ Commission SWD(2021) 12 cit. 11.

The *liaison* with the European Pillar of Social Rights and the focus on equality mainstreaming enriches the values-based dimension of the RRF by promising closer attention on civil and social rights, which are hardly considered within the European Semester. This takes on further relevance in a moment when the pandemic has exacerbated existing inequalities and the path towards the green and digital transition may have non-negligible social costs in the short-term. Yet, the promise of greater consideration of gender equality and, more generally, equality mainstreaming needs to be thoroughly scrutinised over coming years. In a recent report on gender mainstreaming in the EU budget, the Court of Auditors has indeed evidenced a significant mismatch between the longstanding commitments at high level and the relatively poor record when it comes to budgetary implementation.¹²⁶ Echoing the findings of the report, the European Parliament has recently advocated for real and meaningful gender budgeting, calling the Commission “to systematically collect, analyse and report on existing sex-disaggregated data for the implementation of the RRF”.¹²⁷

This is definitely one of the most difficult, and yet pressing, challenges facing the Commission. In the same resolution of 10 June 2021, the European Parliament has shown to be “deeply concerned that most recovery and resilience plans fall short of significantly contributing to and mainstreaming these objectives and fail to include explicit and concrete measures to address the issue of gender inequality”.¹²⁸ In addition, it is hardly necessary to remind that gender equality and the protection of sexual and reproductive rights and the rights of LGBTIQ persons are not a priority for illiberal forces governing in backsliding Member States,¹²⁹ and this is already affecting the EU’s approach on the matter. Suffice it to mention the case of the European Council’s declaration issued at the end of the Porto Social Summit,¹³⁰ where any reference to gender equality was avoided following pressures from Hungary and Poland.¹³¹ The attempt by these countries to shape the Union’s agenda from within is further confirmed by a set of unilateral statements attached to various budgetary instruments, including the Common Provisions Regulation¹³² and the Justice programme,¹³³

¹²⁶ Court of Auditors, Special Report 10/2021, ‘Gender mainstreaming in the EU budget: Time to turn words into action’.

¹²⁷ Resolution P9_TA(2021)0288 of the European Parliament of 10 June 2021 on the views of Parliament on the ongoing assessment by the Commission and the Council of the national recovery and resilience plans para. 26. Cf. also Resolution P9_TA(2021)0276 of the European Parliament of 9 June 2021 on the gender dimension in Cohesion Policy para. 24.

¹²⁸ Resolution P9_TA(2021)0288 of the European Parliament cit. para. 26.

¹²⁹ S Mancini and N Palazzo, ‘The Body of the Nation: Illiberalism and Gender’ in A Sajó, R Uitz and S Holmes (eds), *Routledge Handbook of Illiberalism* (Routledge 2021) 403.

¹³⁰ European Council Press release, ‘The Porto Declaration’ (8 May 2021).

¹³¹ G Baczyńska, ‘Poland, Hungary Block “Gender Equality” from EU Social Summit’ (8 May 2021) Reuters www.reuters.com.

¹³² Interinstitutional File 2018/0196(COD), Doc. 8851/21 ADD 1 REV 1 of 25 May 2021.

¹³³ Interinstitutional File 2018/0208(COD), Doc. CM 2773/21 of 19 April 2021.

where Hungary and Poland held to specify that they will interpret “gender equality” merely as equality between women and men. Actually, the use of “gender equality” by the EU institutions is anchored to the man-woman dichotomy as well,¹³⁴ but the unilateral statements mentioned above are only the latest expression of the anti-LGBTIQ rhetoric in vogue in illiberal countries and call for greater attention on the part of the Commission in the assessment of the relative RRP. Drawing clear “red lines” is of the utmost importance here,¹³⁵ as to avoid that EU financial resources would finance discriminatory practices.

The RRF undoubtedly offers the Commission and the Council a great opportunity for advancing compliance with the CSRs and contributing to implement the European Pillar of Social Rights, including the principles of gender equality and equal opportunities. To this end, as lastly evidenced by the European Parliament,¹³⁶ it is crucial to scrupulously assess RRP at the beginning – setting out clear milestones and targets as regards rule-of-law related CSRs, the European Pillar of Social Rights, and equality mainstreaming – and to rigorously monitor the implementation of national plans in the coming years, as to avoid deviations not in line with the EU basic values. The risk is that, also due to time pressures, the design and actual implementation of RRP downgrade the ambitions of the mechanism, transforming the RRF template in a futile “box-ticking” exercise.¹³⁷ Moreover, further challenges may derive from the pitfalls of the RRF governance structure: the required approval of RRP by the Council and the possible activation of the emergency brake before the European Council may indeed pave the way for undue politicisation in the scrutiny of national plans.¹³⁸ In this light, albeit probably coherent with the features of the NGEU legal architecture,¹³⁹ the failure to envisage a more meaningful role for the European Parliament beyond the “right of information”¹⁴⁰ is regrettable not only in terms of democratic legitimacy,¹⁴¹ but also in that it greatly reduces the Parliament’s bargaining

¹³⁴ *E.g.*, the very first lines of the Commission’s Gender Equality Strategy for 2020-2025 confirm that “gender equality” is intended as equality between men and women: Communication COM(2020) 152 cit.

¹³⁵ A von Bogdandy and others, ‘Guest Editorial: A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines’ (2018) CMLRev 983; most recently, A von Bogdandy, ‘Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States’ (2020) CMLRev 705 and 732-734.

¹³⁶ Resolution P9_TA(2021)0288 of the European Parliament cit. para. 39.

¹³⁷ On the point see J Pisani-Ferry, ‘European Union Recovery Funds: Strings Attached, but Not Tied up in Knots’ (2020) Bruegel www.bruegel.org 5.

¹³⁸ See F Corti and J Núñez Ferrer, ‘Steering and Monitoring the Recovery and Resilience Plans: Reading between the Lines’ (CEPS 2-2021) 13-14.

¹³⁹ B De Witte, ‘The European Union’s COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift’ (2021) CMLRev 635, 677.

¹⁴⁰ Cf. Resolution P9_TA(2021)0257 of the European Parliament of 20 May 2021 on the right of information of the Parliament regarding the ongoing assessment of the national recovery and resilience plans.

¹⁴¹ The problems of “democratic stagnation” were already clear at the very beginning: F Costamagna and M Goldmann, ‘Constitutional Innovation, Democratic Stagnation? The EU Recovery Plan’ (30 May 2020) Verfassungsblog.verfassungsblog.de.

power when acting as a “watchdog” on the respect for EU values in the implementation of the largest stimulus package ever adopted by the European Union.

V. CONCLUSIONS

According to Daniel Kelemen, EU funding is one of the three pillars underpinning the “authoritarian equilibrium” where the EU has become trapped.¹⁴² Notwithstanding the EU’s alleged commitment to liberal democratic values, its financial resources have ended up supporting the consolidation of hybrid autocratic rule in the very map of Europe, the author argues.¹⁴³

This *Article* showed that the new EU budgetary framework offers valuable instruments to reverse this tendency. Even leaving aside the much-debated rule of law conditionality regime introduced at the end of 2020, the EU institutions – and especially the Commission – have now several tools at their disposal to protect, promote and enforce the Union’s values through financial means.

First of all, there are more effective instruments to *protect* the EU common values in the management of EU financial resources by national authorities. Most notably, the new fundamental rights enabling conditions are definitely better crafted than the analogue *ex ante* conditionalities in force during the 2014-2020 financial period, being immediately applicable to all measures financed under ESI funds and enforceable at every stage of implementation. Among them, the “horizontal” enabling condition related to the EU Charter is a particularly worthy addition as it provides the Commission with a versatile tool to manage virtually all fundamental rights issues emerging in the implementation of ESI funds at national level. It is regrettable, however, that similar mechanisms have not been envisaged for the management of the RRF, where the protection of fundamental rights is ensured only indirectly, and to a limited extent, through the connection with the European Pillar of Social Rights.

Secondly, the EU budget appears to be better equipped also from the perspective of the *promotion* of the Union’s values. This holds particularly true following the creation of the Justice, Rights and Values Fund, which has been double-sized in financial terms compared with initial proposals and is mostly devoted to the financing of civil society organisations. Specifically, the *Union values* strand of the CERV programme may prove of critical importance by providing much-needed financial support to civil society organisations working in backsliding Member States and by stimulating greater decentralisation and bottom-up engagement in the “politics of values”. This initiative usefully complements the top-down political and judicial actions in defence of the EU values and reveals an increasing acknowledgment of the “societal dimension” of democratic backsliding occurring in some EU Member States. On a different level, *i.e.* in the relations between the

¹⁴² RD Kelemen, ‘The European Union’s Authoritarian Equilibrium’ (2020) *Journal of European Public Policy* 481.

¹⁴³ *Ibid.* 490-491.

Union and the Member States, the potential of the Union's budget as a tool to promote the EU common values is also reinforced by the other instruments discussed in this *Article*. Most notably, the RRF conditionality toolbox may help the Commission steer the use of financial resources towards addressing rule-of-law structural issues in the Member States and towards the implementation of the European Pillar of Social Rights, including in terms of gender equality. In addition, the CFR enabling condition might be usefully exploited to give substance to the obligation to promote the rights and principles enclosed in the Charter, as required by the less-known part of art. 51(1) of the Charter.

Thirdly, the EU budget is an ever more powerful instrument to *enforce* compliance with the EU common values, especially in light of the exceptional increase in EU public expenditure resulting from the agreement of the NGEU package. As seen above, albeit of course intended also to preserve the integrity of EU spending, the Commission's decision to delay the approval of the Hungarian and Polish RRFs seems to be primarily a way to enforce respect for the principles of the rule of law against recalcitrant Member States. Considering also the huge volume of financial resources at stake, the Commission wields enormous leverage by controlling access to the RRF, much more than that exerted even as a result of the highest penalty payment ever imposed by the Court of Justice in a single case.¹⁴⁴ As explained, the Commission's approach finds a justification in the text of the Regulation which, by embedding the RRF in the European Semester's machinery, provides a legal basis for linking RRF spending to the implementation of relevant country-specific recommendations, including those concerning rule-of-law structural issues. However, one may wonder whether this prolonged use of the RRF as a rule-of-law tool *in lieu* of an instrument – *i.e.* the conditionality regime laid down in Regulation 2020/2092 – which was (at least also) created for that purpose but is to date controversially halted by the Commission, is actually reasonable. It is also worth considering, in this respect, that the Commission's choice is not without "costs" for the Union, to the extent that the use of the RRF as an instrument to "buy" compliance with rule-of-law principles may entail the sacrifice of the important EU policy objectives pursued through this funding scheme – *e.g.* mitigating the economic and social impact of the pandemic crisis or supporting the green transition.¹⁴⁵

To conclude, the financial tools discussed above, each with its own specific aim and features, all contribute to shape the Union's budget as a more values-oriented policy instrument for the coming years. This is certainly positive, especially in a moment when the EU budget is entering an era of increasing centrality in the trajectories of European integration. It is now up to the Commission – as the guardian of the Treaties as well as the main institution in charge for the implementation of the budget and the management of EU funds – to make effective use of the growing financial means at its disposal.

¹⁴⁴ I refer to the Order of the Vice-President of the Court in the case C-204/21R *Commission v Poland* ECLI:EU:C:2021:878, which imposed a daily penalty payment of 1 million euro as an interim measure in the context of the pending infringement procedure concerning the disciplinary regime for judges in Poland.

¹⁴⁵ The general and specific objectives of the RRF are listed in art. 4 of the Regulation 2021/241 *cit.*

