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Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality

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Abstract
This article maps the rise of EU spending conditionality in the 2014–20 financial period and shows how the study of this novel type of conditionality adds to the dominant legal discourse on conditionality in the EU. It also suggests that the rise of conditionality may signal more profound transformations in the deep tissue of the EU, expressed by a transition towards a conditionality-based culture within the EU internal relationships.

Key words: European Union, conditionality, spending, internal policies, governance, compliance

I. INTRODUCTION

Conditionality is a long-standing EU policy tool. It refers to the adoption of a prescribed behaviour by state governments or private actors because the said behaviour is a condition for accessing a promised EU benefit. Conditionality first emerged in EU external policies where it has been actively developed since the late 1980s.[1]

Today, the EU is the world's largest trade power and development aid donor.[2] Together with its Member States, the EU spends about $74 billion in development and humanitarian aid across the globe.[3] To ensure that trade and aid are consistent with the EU's founding values, the EU typically attaches a human rights conditionality to its international agreements.[4]

[1] In external policy, EU conditionality has seen a strong development especially in the post-Cold War period with the most significant first human rights conditionality developed by the Fourth ACP-EEC Convention, (Lomé Convention) [1991] OJ L229/3. The Lomé Convention was replaced by the Cotonou Convention in 2000 and subsequently revised in 2010. The human rights clause currently stands at Article 9.

[2] COM(2017) 2025 final, *Reflections and Scenarios for the EU 27 by 2025*, White Paper, p 9.

[3] Ibid.

[4] Treaty on European Union (TEU), Art 21 para 1. See *inter alia* E Fierro, *European Union's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff Publishers, 2003); L Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press, 2005). See note 1 above.

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The EU is also open to accession for all European states.[5] European states may join the EU if they so desire and only if they prove a functioning market economy, a successful reception of the EU *acquis* and stable institutions guaranteeing democracy, rule of law and human rights – in short, if they fulfil the Copenhagen conditionality.[6]

In 2003, the EU launched its European Neighbourhood Policy, aiming to create a 'ring of friends' around the EU's eastern and southern borders.[7] The better the friends perform on their Neighbourhood Action Plans conditions, the more financial incentives they get, including aid, free trade and visa free regimes – referred to as the neighbourhood policy conditionality.[8]

In 2005, the EU established a new approach to cooperation with third countries in the field of migration – the Global Approach to Migration and Mobility – substantially reformed in 2016 to answer the unprecedented migratory pressure faced by the EU.[9] The better the third countries deliver under their migration compacts, the more support they receive, including diplomatic, technical and financial support – a practice known as migration conditionality.[10]

Finally, in 2008, the EU was hit by the most severe economic crisis since its creation, which shortly evolved into the European sovereign debt crisis (or the Euro crisis).[11] Seven Member States entered into full (and one into partial) bailouts, largely outside the EU treaty framework, subject to comprehensive conditions, also known as the sovereign debt conditionality.[12]

This article does not speak to the above-identified conditionality packages. It introduces a new conditionality type, which has tremendously developed in the aftermath of EU 2014–20 budgetary reform: EU spending conditionality.[13] EU spending conditionality is a condition attached to EU financial benefits with the aim of advancing broader EU policy objectives at the Member State level. A spending conditionality may ask funding beneficiaries to adopt an active conduct – for

[5] Art 49(1) TEU.

[6] European Council in Copenhagen, Conclusions of the Presidency, 21–22 June 1993, p 13

[7] Council of the European Union in Thessaloniki, Conclusions of the Presidency, 19–20 June 2003.

[8] Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Review of the European Neighbourhood Policy, JOIN (2015) 050 final, p 4.

[9] European Council in Brussels, Presidency Conclusions, 15–16 December 2005, point 4, Annex I; COM(2011) 743, *The Global Approach to Migration and Mobility*; COM(2016) 385, *A New Partnership Framework with Third Countries Under the European Agenda on Migration*.

[10] P García Andrade et al, 'EU Cooperation with Third Countries in the Field of Migration', *European Parliament study* (2015) PE 536.469.

[11] M Ruffert, 'The European Debt Crisis and European Union Law', (2011) 48 (6) *Common Market Law Review* 1777.

[12] C Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 (2) *Oxford Journal of Legal Studies* 326.

[13] M Kölling and C Serrano Leal, 'The Negotiation of the Multiannual Financial Framework: Budgeting Europe 2020 or Business as Usual?', *Centre of Political and Constitutional Studies* (Real Instituto Elcano, 19 November 2012).

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instance, by requiring Member States to implement EU civil rights legislation – or to abstain from a given conduct – for instance, by prohibiting EU farmers from engaging in environmentally unfriendly practices. However, in all instances, conditionality aims to alter Member State or individual conduct in exchange for EU spending resources, subject to funds' withdrawal in case of failure to comply.

In this contribution, I argue that the analysis of this novel EU conditionality type provides valuable insights into the nature, operation and functioning of EU conditionality in general. At the same time, it suggests that the rise of EU spending conditionality internally points towards deeper transformations within the EU, with potential strong implications for the relationship between the EU, its Member States and the EU citizens.

The current discourse on conditionality in the EU legal scholarship is based on four dominant narratives:

- Conditionality is mainly a tool of EU external policy and is largely used outside the EU treaty framework: hence, it is not an EU internal matter[14]
- Conditionality has a soft-law nature, being inserted into action plans, recommendations, memoranda of understanding and similar political instruments: hence, it is not EU law[15]
- Conditionality generally shows poor compliance, as states systematically fail to fulfil its requirements: hence, it is not complied with[16]

[14] The European legal scholarship narrative on conditionality concentrates almost exclusively on the operation of the tool in EU external policy. See *inter alia* K Tomaševski, *Development Aid and Human Rights Revisted* (Pinter, 1993); K Tomaševski, *Between Sanctions and Elections: Aid Donors and Their Human Rights Performance* (Pinter, 1997); Fierro, see note 4 above; Bartels, see note 4 above; D Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International, 2008); S Weber, 'European Union Conditionality', in B Eichengreen et al (eds), *Politics and Institutions in an Integrated Europe* (Springer, 1995), pp 193–220. Recent contributions, developed in the aftermath of the 2008 economic crisis, concentrate on sovereign debt conditionality, criticizing its non-EU nature and highlighting the problems caused by this state of art. See *inter alia* C Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10 (3) *European Constitutional Law Review* 393; Kilpatrick, see note 12 above; M Ioannidis, 'Financial Assistance Conditionality after "Two Pack"', *ZaöRV 74* (2014); S Sacchi, 'Conditionality by Other Means: EU Involvement in Italy's Structural Reforms in the Sovereign Debt Crisis', (2015) 13 (1) *Comparative European Politics* 77; H Wallace et al (eds), *Policy-Making in the European Union*, 7th ed (Oxford University Press, 2015), p 433.

[15] EU conditionality in all the above areas is usually translated into soft-law action plans, memoranda of understanding, dialogues and negotiations which generally have a non-legal nature. Even if conditionalities may have a legal nature sometimes, this is diluted in similar soft-law action plans and chapters of conditions. See Kilpatrick note 14 above. See also H Grabbe, *A Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants* (European University Institute, 1999) Working Paper http://cadmus.eui.eu//handle/1814/1617; K Featherstone and C Maria Radaelli, *The Politics of Europeanization* (Oxford University Press, 2003); J Kapanadze, *Human Rights Conditionality in European Union's External Affairs* (Verlag Dr Müller, 2010).

[16] The few comprehensive studies on conditionality compliance largely fail to find a strong causation between conditionality and compliance. The success of compliance is positively correlated with conditionality, yet together with multiple other economic, political and contextual factors. See generally:

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- As a rule, conditionality is not enforced; enforcement is politically inconvenient and highly undesirable even in case of systematic poor performance: hence, it is not enforced.[17]

This article shows that EU spending conditionality as introduced in the 2014–20 budgetary framework challenges all of the four accounts above. Firstly, the study shows that EU spending conditionality is a purely internal EU matter. It applies exclusively to EU Member States and EU private beneficiaries, directly linking over 80% of EU internal budget to a vast array of EU internal policies. Secondly, spending conditionality has a hard EU law nature, being firmly rooted in binding EU norms of spending regulations. Thirdly, spending conditionality is largely complied with in all Member States, with more than three quarters of conditions fulfilled by the end of 2016. Lastly, in comparison to other types of EU conditionality, spending conditionality is enforced against Member States and may credibly lead to EU budgetary resource suspension or cut-off. At the same time, spending conditionality is frequently enforced against private beneficiaries of EU budgetary resources who are important subjects of conditionality in EU internal spending.

These findings are important as they suggest an ongoing transformation in the relationship between the EU and Member States. Namely, the findings above seriously challenge our widespread ideological belief that post-accession, the relationship between the EU and its Member States is non-conditional but rather guided by common values and pure solidarity.[18] 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. This shift towards governance by conditionality internally raises significant questions with high potential implications for the EU constitutional architecture.[19]

(F'note continued)

J Checkel, *Compliance and Conditionality*, (ARENA Centre for European Studies, 2000) Working Paper 18/2000 http://www.sv.uio.no/arena/english/research/publications/arena-working-papers/1994-2000/2000/wp00_18.htm; K Featherstone, 'The Greek Sovereign Debt Crisis and EMU: A Failing State in a Skewed Regime', (2011) 49 (2) *JCMS Journal of Common Market Studies* 193; R Bieber and F Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?', (2014) 51 (4) *Common Market Law Review* 1057; A Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', (2014) 51 (1) *Common Market Law Review* 59; P Mosley, 'Conditionality as Bargaining Process: Structural-Adjustment Lending, 1980-86' (1987) 168 *Essays in International Finance* 1; R Epstein and U Sedelmeier, 'Beyond Conditionality: International Institutions in Postcommunist Europe after Enlargement' (2008) 15(6) *Journal of European Public Policy* 795.

[17] The actual enforcement of EU conditionality can be counted on fingers. The enforcement of human rights conditionality has been enforced on about twenty occasions in two decades only in extreme scenarios of major political instability, or human rights atrocities and has been criticized for arbitrariness. The same holds true for the enforcement of sovereign debt conditionality which is virtually not enforced in cases of non-compliance, but rather adjusted to meet the poor performance of the debtor state.

[18] M Cremona, 'EU Enlargement: Solidarity and Conditionality' (2005) 30(1) *European Law Review* 3.

[19] There are multiple constitutional discussions that fall beyond the scope of this contribution. They relate in particular to the impact of spending conditionality on distribution of EU competences, principle of conferral and *ultra vires* action, legal basis, the principle of equality between Member States, democratic principles of accountability, legitimacy and transparency of EU action, judicial review, applicability of the Charter, etc.

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The most important ones relate to the opportunity of promoting a permanent conditionality culture inside the EU, and the donor–recipient, transactional discourse it inevitably brings with it. While in the short-term conditionality may prove an effective governance tool to promote compliance and advance broader EU interests at the national level, in the long-term it is worth reflecting upon the cost of a generalised conditionality culture inside the EU and its potential impact on a reformed Europe of tomorrow.[20]

This article starts by conceptualising the EU spending and spending conditionality as an EU governance tool (Part II). Subsequently, it maps the new spending conditionality packages of 2014–20 budget reform (Part III). Finally, it returns to the four dominant narratives presented above and shows why, in light of the novel EU spending conditionality, they must be revisited (Part IV).

II. EU SPENDING AND SPENDING CONDITIONALITY

A. EU spending

The EU budget is agreed on a multiannual basis.[21] Its overall allocation for 2014–20 financial period is about €900 billion (€145 billion annually) amounting to one per cent of Member States' GDP.[22] Even if considerably lower than the EU-28 average domestic expenditure (which amounted to 47% of the EU-28 GDP in 2015),[23] EU spending has a significant positive impact on national economies.[24] This is so, as EU spending is primarily a capital (long-term) investment tool, as opposed to national budgets which are allocated almost entirely to operational (on-going) expenditures. On average, more than two thirds of Member States' budgets are pre-allocated to healthcare, education and social protection expenditure.[25] In contrast, the EU budget is largely dedicated to rural development, transport and infrastructure, environment, regional development, research, innovation and human capacity investment. Of course, the EU budget share of national capital investment rates will vary from state to state. In 2015, EU spending represented on average 20% of the total national capital expenditure, ranging from 0.2% in Luxemburg to 68% in Hungary.[26] Hence, even if modest in some Member States, EU spending is in no way marginal in its

[20] See note 2 above. See M Monti et al, *Future Financing of the EU* (European Commission, 2016) http://ec.europa.eu/budget/mff/hlgor/index_en.cfm.

[21] Treaty on the Functioning of the European Union, Art 317. See also, R Crowe, 'The European Council and the Multiannual Financial Framework', (2016) 18 *Cambridge Yearbook of European Legal Studies* 69.

[22] Council Regulation (EU) No 1311/2013 [2013] OJ L347/884, Annex I.

[23] Eurostat, EU-28 expenditure by function (2015) https://perma.cc/LM7N-S5R8

[24] J Núñez Ferrer and M Katarivas, *What Are the Effects of the EU Budget: Driving Force or Drop in the Ocean?* (CEPS, 2014) Special Report 86 https://perma.cc/4UKD-HYJN.

[25] Ibid.

[26] T Ward et al, *Expert Evaluation Network Delivering Policy Analysis on the Performance of Cohesion Policy 2007–2013: Synthesis of National Reports 2011* (European Commission, 2012) https://perma.cc/6QFS-V9FJ.

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average impact, and is beyond any doubt crucial in at least 13 net beneficiary Member States.[27]

The EU budget is shaped around seven main items of expenditure. In the 2014–20 financial period, the largest EU spending envelope goes to direct and structural agricultural aid (38% of EU budget), followed by: economic, social and territorial cohesion aid for less developed regions and strategic investment (34%); EU-wide infrastructure, research and cultural projects (13%); external relations (6%); justice and home affairs (2%), fisheries (1%) and running costs (6%).[28]

As the EU lacks the administrative capacity to implement its budget, about 75% of EU spending is channelled at the national level and is primarily managed by national authorities, under the close supervision of the European Commission (Commission).[29] It is precisely in these shared management areas that spending conditionality was first introduced and has been dramatically expanded in the aftermath of the 2014 reform.

The expansion of spending conditionality came at a time when the EU public sphere was dominated by the Euro crisis conditionality, which was subsequently internalised by the European economic governance reform.[30] It also came in a context of increased concern regarding the failure of certain Member States to uphold core EU treaty commitments and rule of law principles.[31] These developments stirred a generalised discourse on governance efficiency and conditionality during the negotiations on the EU budget, promoted by the 'EU North' and reluctantly accepted by the 'EU South'.[32]

Currently, massive packages of spending conditionality are linked to EU agricultural, cohesion, home affairs and fisheries funds (EU Funds), representing by far the largest EU spending envelopes in the 2014–20 financial period. This contribution will explain the specificity of each spending conditionality type in Part II. First, however, the concept of spending conditionality will be explained.

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[27] Ibid. EU cohesion spending ranges from 20 to 68% of national capital investment expenditure in 13 EU countries: Hungary 68.3%, Estonia 62.4%, Slovakia 59%, Lithuania 58.3%, Malta 49.3%, Bulgaria 42.7%, Latvia 41.2%, Poland 35.5%, Czech Republic 31.7%, Romania 27.3%, Greece 26.3%, Slovenia 25.4%, Portugal 22.4%.

[28] European Commission, *The Multiannual Financial Framework 2014–2020 and EU Budget 2014* (2014) https://doi.org/10.2761/9592

[29] P Craig, 'Shared Administration, Disbursement of Community Funds and the Regulatory State' in H Hofmann and A Turk (eds), *Legal Challenges in EU Administrative Law* (Edward Elgar, 2009).

[30] P Berkowitz et al, *The Impact of the Economic and Financial Crisis on the Reform of Cohesion Policy 2008–2013*, (Commission, 2015) Working Paper 3/2015, https://perma.cc/62R8-2EM5. M Tomova et al, *EU Governance and EU Funds – Testing the Effectiveness of EU Funds in a Sound Macroeconomic Framework* (Commission, 2013) Economic Paper 510, https://perma.cc/ZP9H-CAER. P Tsoukala, 'Euro Zone Crisis Management and the New Social Europe' (2013–14) 20 *Columbia Journal of European Law* 31.

[31] D Kochenov, 'The EU in its most serious crisis ever (and that's not the Euro crisis)' (*Verfassungsblog*, 13 June 2013).

[32] For an influential study during negotiations, see P Spahn, *Conditioning Intergovernmental Transfers and Modes of Interagency Cooperation for Greater Effectiveness of Multilevel Government in OECD Countries* (OECD, 2012) https://www.oecd.org/cfe/regional-policy/Conditioning-Intergovernmental-Transfers-paper.pdf. See note 13 above.

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B. Spending conditionality

In the context of EU internal spending, a spending conditionality is generally defined as a condition attached by the EU to an agreement on disbursement of EU Funds used to coerce the conduct of Member States or final beneficiaries. A few clarification points are needed here on the tool's nature, types, subjects and functions.

As to the tool's nature, a spending conditionality is always a condition. However, not all conditions are spending conditionalities. Two core elements distinguish a condition from a spending conditionality: the conduct prescribed and the financial sanction or additional benefit attached.

First, the conduct prescribed by a conditionality must pursue a policy objective which goes beyond the primary purpose of spending. For instance, a spending conditionality may ask Member States receiving highway funds to adopt appropriate legislation on protection of people with disabilities and to show a national plan on accessibility for people with disabilities in all national infrastructure planning. Such a spending conditionality goes beyond the primary goal of spending (the highway) and brings under the umbrella of infrastructure development an additional policy goal: the integration of people with disabilities. Given this specificity of spending conditionality, multiple other spending conditions of administrative nature (ie planning, reporting, monitoring, evaluation, audit) do not behave as spending conditionalities, as they do not pursue a conceptually different policy objective.

The second element of a spending conditionality is the financial sanction or additional financial incentive attached. The sanction may consist in postponement, suspension or permanent withdrawal of funds (negative conditionality). In limited cases, a conditionality may provide for additional financial benefits (positive conditionality). Similarly, both financial sanctions and additional benefits may be attached (carrot-and-stick conditionality).

This last distinction anticipates our discussion on conditionality types, but certainly does not exhaust it.[33] For the purpose of this article we shall add three additional classifications. First, based on the temporal scope, we may distinguish between an ex ante and ex post conditionality. If the required conduct is to be fulfilled before the disbursement of EU funds, the conditionality is ex ante. If, however, the condition is binding after the disbursement of funds we speak of an ex post conditionality type. Second, based on their thematic link to spending we shall distinguish between same-sector, cross-cutting, cross-over and generic conditionality. Where the conditionality requirements and funding correspond to the same thematic area we are in the presence of a same-sector conditionality. On the contrary, where the conditions are specific to a distinct thematic area they are cross-cutting. When a spending conditionality links spending to other conditionality packages from distinct EU spending programmes or distinct EU policies, the conditionality is cross-over. Lastly, where the conditions prescribe generically for respect of EU law or policy, these shall be labelled generic. Take for instance the highway example above. If the EU requires that Member States put in place a national strategic policy on land

[33] See Fierro, note 4 above.

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transportation development before or after the disbursement of the highway funds, the conditionality is same-sector. If the EU requires that a Member State show compliance on EU law on accessibility for people with disabilities as a condition for highway funds release, the condition is cross-sector. If the EU asks Member States to prove that their sovereign debt conditionality packages are complied with to proceed with highway funds payments, the conditionality is cross-over. If the EU specifies generally that at all stages the highway project shall comply with all applicable EU law and policy, the conditionality is generic. Third and finally, from the point of enforcement we distinguish between compulsory and optional conditionality. A compulsory conditionality leaves no enforcement discretion in case of poor compliance, usually recognised by the use of the verb 'shall' (eg Commission shall suspend payments). An optional conditionality leaves important enforcement discretion recognised by the use of the modal verb 'may' (eg Commission may suspend payments).

In all instances, the active subject of spending conditionality is the EU, acting largely through the Commission. In a limited number of cases the EU acts through the EU Council, the European Parliament, or its Member States. The passive subjects of spending conditionality are mainly the Member States, followed by private recipients of EU Funds.

The functions of conditionality are essential for getting conditionality right. To date, the most emphasised function of spending conditionality has been its legal enforcement function (EU law enforcement function).[34] Based on theories of compliance and regime efficiency, it has been argued that compliance with EU law is essential for the very subsistence of the EU as a supranational regime, and that conditionality is a tool increasingly employed to enforce EU law and hence promote compliance at the national level.[35]

However, presenting spending conditionality exclusively as a legal enforcement tool tells only part of the story. In practice, spending conditionality may be additionally ingeniously designed to pursue legislative, regulatory, policy implementing and/or structural functions. Therefore, a spending conditionality may check not only whether a particular EU law is complied with before or after the disbursement of EU Funds, but also whether specific EU policies or soft law recommendations are in place at the national level (EU policy enforcement function). It may also effectively ask a state to adopt a law (legislative function) or regulate a particular conduct (regulatory function). A spending conditionality may additionally aim to implement a new policy line (policy implementing function) or require institutional reforms and capacity building (structural function). One should note that the above functions are not mutually exclusive and that a spending conditionality may successfully pursue

[34] See Bieber and Maiani note 16 above, pp 1076–80.

[35] J Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union', (2002) 56(3) *International Organization* 609; J Hovi et al, 'The Oslo-Potsdam Solution to Measuring Regime Effectiveness: Critique, Response, and the Road Ahead', (2003) 3(3) *Global Environmental Politics* 74; A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, 1st ed (Harvard University Press, 1998). See Bieber and Maiani note 16 above; also A Bogdandy and M Ioannidis note 16 above, pp 85–90.

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all of the above functions at once. The only limit to what conditionality can do is the imagination and talent of legislators to carefully tailor spending conditionality criteria.

These specific functions lead us to the conclusion that spending conditionality is a highly flexible EU governance device that may be designed to pursue various policy ends, including, but not limited to, law enforcement. Daintith referred to this technique of governance as 'government by dominium' whereby a government chooses to pursue a policy objective by deploying conditional financial resources alternatively, or complementary to, enacting binding norms backed by sanctions – 'government by imperium' technique.[36] In other words, instead of adopting a law backed by sanctions, the government may find it more suitable to grant public resources and attach conditions deemed necessary to attain the aimed policy result, under the pressure of funding withdrawal.

Having in mind these specific features of EU spending conditionality, this article shall now turn to a mapping exercise of the 2014–20 spending conditionality packages attached to EU Funds. Particular attention shall be paid to their nature, type, subjects, functions, link to EU internal policies, fulfilment and actual enforcement.

III. MAPPING THE EU SPENDING CONDITIONALITY

The 2014–20 budgetary period has brought an enormous influx of spending conditionality in EU Funds committed to support EU internal policy matters. As of 2014, the prior localised and incidental use of spending conditionality became generalised and systemic.[37] Conditionality has actively spread and intensified across the spectrum of all EU Funds implemented under shared management procedures between the Commission and the Member States.[38] In this sense, it is worth noting that in the 2014–20 financial period, over 75% of the EU budget is endowed with new spending conditionality arrangements.[39]

The EU Funds bound by spending conditionality may be clustered around four broad policy areas: Cohesion Funds (European Regional and Development Fund (ERDF), European Social Fund (ESF), European Cohesion Fund (ECF));[40] Agricultural Funds (European Agricultural Guarantee Fund (EAGF) first pillar

[36] T Daintith, 'Legal Analysis of Economic Policy' (1982) 9(2) *Journal of Law and Society* 191; T Daintith 'The Techniques of Government' in JL Jowell and D Oliver (eds), *The Changing Constitution* (Oxford University Press, 1994), pp 209–236.

[37] V Vita, 'In the shadow of sovereign debt conditionality: the rise of spending conditionality in the EU' (*Verfassungsblog*, 30 June 2016).

[38] Regulation (EU) 966/2012 [2012] OJ L298/1, Art 59.

[39] The remaining 25% of EU budget is committed to competitiveness for jobs and growth budgetary sub-headings comprising EU-wide programmes in the areas of: research (Horizon 2020), transport, energy, education (Erasmus) et al (13.1%); Global Europe heading for external action spending (6.1%); and EU administration (6.5%). See note 28 above, p 9.

[40] The European Social Fund (ESF) was established by the EU founding treaties, the European Regional Development Fund (ERDF) was established in 1975 in the context of the UK accession (jointly the 'Structural Funds') and the Cohesion Fund was established in 1994 to support the completion of the European Monetary Union. Regulation (EU) 1303/2013 [2013] OJ L347/320, and subsequent fund specific regulations.

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and European Agricultural Fund for Rural Development (EAFRD) second pillar);[41] Fisheries Funds (European Maritime and Fisheries Fund (EMFF); [42] and Home Affairs Funds (Asylum and Migration and Integration Fund (AMIF) and Internal Security Fund (ISF)).[43] The Cohesion Funds, together with the second pillar Agricultural Funds and the Fisheries Fund are partially regulated under a single legal framework and are commonly referred to as European Structural and Investment Funds in 2014–20 (ESI Funds).[44]

I shall briefly present each conditionality package below.

A. ESI Funds spending conditionality

In the 2014–20 financial period, ESI Funds are endowed with 57 spending conditionalities, carrying by far the heaviest conditionality load of the EU internal expenditure. The spending conditionalities are further classified into: 7 general ex ante conditionalities;[45] 39 thematic ex ante conditionalities, sub-classified into 27 applicable only to Cohesion Funds, 8 applicable to the Rural Development Fund, 4 attached to the Fisheries Fund;[46] 10 ex ante and ex post macroeconomic conditionalities;[47] and 1 ex post EU law conditionality.[48]

All the above spending conditionality packages are expressly inserted in the legally binding text of the ESI Funds common regulation and the subsequent fund-specific regulations.[49]

1. General ex ante conditionality

The general ex ante conditionality attaches seven cross-cutting policy requirements to all five ESI Funds. It asks Member States to prove that specific legal, policy and administrative capacity requirements are in place in the area of non-discrimination, gender equality, disability, public procurement, state aid, environment and statistical systems, before the disbursement of spending.[50]

As suggested by their name, the conditionalities are ex ante meaning that, in principle they should be fulfilled before the disbursement of EU financial resources, and in exceptional cases, before the end of 2016.[51] The conditionalities are also negative as the failure to meet the prescribed requirements attracts suspension of

[41] European Agricultural Guarantee Fund (EAGF, 1st CAP pillar) established in 1962, and the European Agricultural Fund for Rural Development (EAFRD, 2nd CAP pillar) established in 2005. Regulation (EU) 1306/2013 [2013] OJ L347/549 and subsequent fund specific regulations.

[42] Regulation (EU) 508/2014 [2014] OJ L149/1.

[43] Regulation (EU) 514/2014 [2014] OJ L150/112 and subsequent fund specific regulations.

[44] Regulation (EU) 1303/2013, see note 40 above.

[45] Ibid, Art 19, Annex XI, part 2.

[46] Ibid, Art 19, Annex XI, part 1; Regulation (EU) 1305/2013 [2013] OJ L347/487; Regulation (EU) 508/2014, see note 42 above.

[47] Regulation (EU) 1303/2013, see note 40 above, Art 19, Annex X1.

[48] Ibid, Art 6 corroborated with Art 85.

[49] Ibid.

[50] Ibid, Annex XI, part 2, points 1–7.

[51] Ibid, Art 19.

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affected payments. [52] In addition, the conditionality is cross-cutting as it reaches out to thematically distinct EU policy areas such as equality or statistics and brings them into all ESI Funds spending action. Finally, the enforcement of conditionality is optional as the Commission 'may' order suspension of funds before the start of the operations, whereas non-fulfilment by the end of 2016 'shall' constitute a ground for suspension.[53]

From the point of view of its subjects, the general ex ante conditionality addresses all EU Member States. It applies each time a sufficiently direct link and beneficial impact on Member States planned spending is present.[54] In practice, however, the overwhelming majority of Member States found all general ex ante conditionalities applicable to their planned expenditure.[55] The Commission is the active subject of conditionality.[56] It monitors the fulfilment of conditionality requirements and also decides on funds suspension as appropriate.[57] In both instances, the Commission enjoys broad decisional discretion.

The general ex ante conditionality pursues mainly structural and enforcement functions. First, its criteria ask for training, institutional reform and detailed administrative arrangements in all seven of the thematic areas mentioned above (structural function).[58] Second, they check for correct implementation and application of relevant EU law and policy (enforcement function).[59]

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[52] Ibid.

[53] Ibid, Art 19(5), states that the Commission 'may decide' to suspend interim payments upon the adoption of the programme. At the same time, the failure to fulfil an applicable ex ante conditionality by the end of 2016 'shall constitute a ground for suspending [affected] interim payments.'

[54] Ibid, Art 2(33).

[55] European Commission, *The Implementation of the Provisions in Relation to the* Ex-Ante *Conditionalities During the Programming Phase of the European Structural and Investment (ESI) Funds* (2016) Final Report, p 26.

[56] Regulation (EU) 1303/2013, see note 40 above, Art 19.

[57] Ibid.

[58] See for instance the example of non-discrimination conditionality, Regulation (EU) 1303/2013, Annex XI, Part 2, point 1, see note 40 above:

Ex ante Conditionality	Criteria for fulfilment
The existence of administrative capacity for the implementation and application of Union anti-discrimination law and policy in the field of ESI Funds	— Arrangements in accordance with the institutional and legal framework of Member States for the involvement of bodies responsible for the promotion of equal treatment of all persons throughout the preparation and implementation of programmes, including the provision of advice on equality in ESI fund-related activities — Arrangements for training for staff of the authorities involved in the management and control of the ESI Funds in the fields of Union anti-discrimination law and policy

[59] See for instance the example of state aid conditionality, Regulation (EU) 1303/2013, note 40 above, Annex XI, Part 2, point 5.

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The general ex ante conditionality shows a high rate of compliance with almost 70% of conditions already fulfilled in 2015, before the start of 2014–20 expenditure.[60]

As to the conditionality's enforcement, there are no formal suspension of payments ordered by the Commission to date.[61] Nevertheless, an informal self-suspension mechanism was put in place at the initiative of Member States to avoid the politically sensitive suspension of funds.[62] This means that, where the Commission declared itself ready to suspend funding, Member States offered instead not to draw any payments until the conditions are properly fulfilled. As a result, no funds are disbursed to states until the policy requirements are in place. This mechanism appears satisfactory to be from the point of view of enforcement. However, from a legality point of view, questions may be legitimately asked.[63] We shall not enter into legality and legitimacy debates here. For the purpose of this contribution, it suffices to establish that the general ex ante conditionality is largely fulfilled and on a number of occasions credibly self-enforced.

2. *Thematic ex ante conditionality*

The thematic ex ante conditionality follows closely the characteristics of the general ex ante conditionality presented above. It is a negative, ex ante conditionality type, binding on Member States and optionally enforced by the Commission according to the same rules.[64] The main difference however is that the thematic ex ante conditionality is a same-sector conditionality, matching the policy requirements from policy areas closely connected to the area of investment. The conditionality is also the most numerous one (39 conditionalities) and hence was responsible for most of the ESI Funds policy load in the current financial period.[65]

The thematic ex ante conditionalities are clustered around each fund and within the fund around specific investment priorities.[66] Hence, the conditionality is applicable to ESI Funds investment priorities chosen by the Member States in close consultation with the Commission.[67]

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[60] See note 55 above, p 26.

[61] Ibid, p 103.

[62] Ibid.

[63] Here one should mention that self-suspension has never been mentioned as a conditionality enforcement mechanism in any of the funding regulations. Nevertheless, it is good law today as both Member States and the Commission concerted in this sense. The result is not satisfactory as the self-suspension does not correspond in any way to the basic standards of legality, transparency and accountability.

[64] See Part II.A.1 above.

[65] Cohesion Funds (27), Rural Development (8) and Fisheries Fund (4).

[66] Regulation (EU) 1303/2013, see note 40 above, Art 2 (33).

[67] C Mendez et al, *European Commission Perspectives on the 2014-2020 Partnership Agreements & Programmes: A Comparative Review of the Commission's Position Papers* (European Policies Research Centre, 2013) European Policy Research Paper 84.

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The three Cohesion Funds have 27 thematic conditionalities attached, ranging from smart regional specialisation, small and medium enterprise, energy efficiency, digital growth, research and infrastructure; to labour market institutions, educational systems, active ageing, smart energy infrastructure, institutional capacity and many more.[68] The Rural Development Fund counts 8 conditionalities in the area of energy efficiency, green energy, environment, animal welfare, risk prevention and good agricultural conditions, water and high speed internet networks.[69] Finally the Fisheries Fund brings 4 more conditionalities in the area of fishing capacity, aquaculture, data collection and control and inspection capacity.[70]

The functions of the thematic ex ante conditionality are extremely diverse. The criteria for fulfilment pursue most often a regulatory function, an EU law and policy implementing function, an EU law and policy enforcement function, a structural function and to a lesser extent a legislative function.[71]

Similar to the general ex ante conditionality, the thematic ex ante conditionality is largely complied with. [72] By mid-2016, over 75% of thematic ex ante conditionalities had been fulfilled, leaving around a quarter of conditions unfulfilled.[73] For the unfulfilled conditionalities, detailed action plans are in place, indicating for each unfulfilled criteria the actions sought, a deadline for fulfilment and the responsible national authorities.[74]

The thematic ex ante conditionality has been also self-enforced. Similar to the general ex ante conditionality funding has been informally suspended in case of at least three Member States based on the self-suspension mechanism.[75] As such, Member States opted for self-suspension of EU Funds until outstanding ex ante conditionalities are fulfilled.[76]

3. Macroeconomic conditionality

The ESI Funds macroeconomic conditionality package introduced in 2014 builds on the 1994 macroeconomic conditionality of the European Cohesion Fund.[77] The 1994 macroeconomic conditionality was the first EU spending conditionality, tasked to support the achievement of the European Monetary Union established by

[68] Regulation (EU) 1303/2013, see note 40 above, Annex XI, Part 1. See also note 55 above, p 27.

[69] Regulation (EU) 1305/2013, see note 46 above, Annex V.

[70] Regulation (EU) 508/2014, see note 42 above, Annex IV.

[71] European Commission, see note 55 above, p 64.

[72] COM(2015) 639 final, *Investing in jobs and growth - maximising the contribution of European Structural and Investment Funds*, p 5.

[73] European Commission, interviews, Brussels, 5–6 July 2016.

[74] See note 72 above, Annex II, Country fiches.

[75] Ibid, p 26. (In the case of Greece, conditionality has been self-enforced on three occasions. This is also the case for Portugal and Romania.) See also Commission note 60 above, p 64.

[76] See note 55 above, p 103.

[77] Regulation (EU) 1303/2013, see note 40 above, Arts 23–24; Regulation (EC) No 1164/1994 [1994] OJ L130/1.

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the 1992 Maastricht Treaty.[78] It conditioned access to Cohesion Fund resources of less developed Member States (then Greece, Ireland, Spain and Portugal) on adoption of economic convergence plans and compliance with the treaty deficit rules.[79]

In 2014–20, the macroeconomic conditionality is quantitatively updated to a set of ten conditionalities split into one negative and ex ante, eight negative and ex post, and one positive and ex post.[80] The macroeconomic conditionality is also qualitatively updated to support the post-crisis EU economic governance rules. Moreover, the conditionality scope of application has been extended to cover all ESI Funds and all Member States.

Therefore, ex ante the conditionality asks all Member States to align their spending priorities with the Country Specific Recommendations adopted in the framework of the European Semester.[81] Ex post, the Commission may ask only Member States under financial assistance to adapt their expenditure to subsequent European Semester recommendations, to correct eventual cases of excessive deficit or macroeconomic imbalances;[82] or to help implement financial assistance economic adjustment programmes.[83] The failure to comply with the prescribed macroeconomic behaviour may lead to suspension of funding.[84] Good compliance entitles Member States under financial assistance to a modest benefit of ten percent increase in the EU co-financing rate.[85]

The active subject of conditionality differs in case of each conditionality type. The ex ante negative conditionality is enforced by the Commission.[86] The negative ex post conditionalities are formally enforced by the Council which shall decide on suspension by reverse qualified majority voting, leaving *de facto* the decision on enforcement to the Commission.[87] The positive ex post conditionality is enforced by the Council together with the European Parliament, on a proposal from the Commission preceded by a formal request of the Member State.[88]

The new macroeconomic conditionality keeps its cross-sector nature, linking extensive EU economic policy requirements to EU spending. The new macroeconomic conditionality is also cross-over as it links EU spending to heavy conditionality packages of EU economic governance policy as well as to the sovereign debt conditionality packages of bailed out states.[89] Based on enforcement, conditionality is both compulsory and optional.[90]

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[78] Art 104c TEU.

[79] Regulation (EC) 1164/1994 [1994] OJ L130/1.

[80] Regulation (EU) 1303/2013, see note 40 above, Arts 23–24.

[81] Ibid, Art 96(2).

[82] Ibid, Art 23.

[83] Ibid.

[84] Ibid.

[85] Ibid, Art 24.

[86] Ibid, Art 96.

[87] Ibid, Art 23(10).

[88] Ibid.

[89] Ibid, Art 23–24.

[90] Ibid, Art 23(9a–e) (compulsory); Art 23(6) (optional).

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As to its functions, macroeconomic conditionality pursues mainly an EU law and policy enforcement function, as it asks for compliance with EU economic governance legal rules and soft-law recommendations. However, given its cross-over nature, depending on the subsequent economic governance conditionality package of each Member State, it may also pursue legislative, policy implementing and structural functions.

The macroeconomic conditionality has been enforced only once since its first establishment, against Hungary in 2011, without leading to actual funding cut-off.[91] The current macroeconomic conditionality remains unenforced and, insofar as its negative types are concerned, its enforcement remains highly unlikely. This pathology of macroeconomic conditionality has its origins in the pathologies of the European economic governance, where conditionalities (soft or strong), as well as sanctions (automatic or not) remain generally unenforced.[92] An eventual enforcement of the negative macroeconomic conditionality is also likely to encounter strong contestation from the European Parliament, which heavily opposed the macroeconomic conditionality during negotiations and is likely to exert high political pressure in case of enforcement.[93]

4. EU law conditionality

The EU law conditionality is another spending conditionality arrangement attached in principle to all ESI Funds.[94] The conditionality is ex post, negative, generic and

[91] Council Implementing Decision 2012/156/EU [2012] OJ L78/19. Council Implementing Decision 2012/323/EU [2012] OJ L165/46.

[92] Z Darvas and Á Leandro, *The Limitations of Policy Coordination in the Euro Area under the European Semester*, Bruegel Policy Contribution 2015/19, https://www.econstor.eu/handle/10419/126693; D Gros and C Alcidi, 'Economic Policy Coordination in the Euro Area Under the European Semester' (2015) 123 *CEPS Special Report*, https://papers.ssrn.com/abstract=2715501. For discussion of unenforced conditionalities and sanctions, see *inter alia* Gros and Alcidi, ibid; J Creel et al, ' Euro Area Policies and Macro Economic Performance, Ten Years On: Institutions, Incentives and Strategies' in JP Fitoussi and JL Cacheux (eds) *Report on the State of the European Union* (Palgrave Macmillan, 2010); Ruffert, see note 11 above, pp 1802–03; R Bieber and F Maiani, 'Sans Solidarité Point d'Union Européenne Regards Croisés Sur Les Crises de l'Union Économique et Monétaire et Du Système Européen Commun D'asile'(2012) 48 *Revue trimestrielle de* droit européen, pp 306–12.

[93] European Parliament, Debates on 2014–20 Cohesion Funds Package, 19 November 2013; European Parliament, 'The European Structural and Investment Funds and Sound Economic Governance: Guidelines for the Implementation of Article 23 of the Common Provisions Regulation', Briefing Note, http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/529088/IPOL_BRI(2014)529088_EN.pdf. The negotiation hardship is also reflected in the complex suspension rules. To enforce a macroeconomic conditionality, the Commission may choose between suspension of payments or commitments, with a preference for the latter. This means that even if future commitments are suspended, payments are still disbursed from previous commitments for a maximum period of three years. Moreover, the actual suspension rates are quantified in maximum thresholds depending on a Member States' GDP, unemployment rate and further criteria, including the general principles of proportionality and equality between Member States. Regulation (EU) 1303/2013, see note 40 above, Art 23(9–12). See also, S Verhelst, 'Cohesion Policy and Sound Economic Governance: A Loveless Marriage', (2014) 3 *The Polish Quarterly of International Affairs* 113.

[94] Regulation (EU) 1303/2013, see note 40 above, Art 85.

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optional. It is enforced by the Commission and addresses both Member States and private beneficiaries. As such, all operations financed from ESI Funds must comply with 'applicable EU law and the national law relating to its application'.[95] Subsequent specific provisions allow the Commission to impose corrections and exclude from financing 'expenditure which is in breach of EU law'.[96]

The conditionality pursues an EU law enforcement function. However, even if the text of EU law conditionality suggests a broad application, subsequent rules limit its scope from all breaches of EU law to breaches of EU law that affect the selection of an operation or imply a prejudice to the EU budget.[97] Hence, an actual financial prejudice or selection error must be proven first, which leaves in all the cases a high discretion to the Commission.

As to enforcement, the EU law conditionality has never been enforced in the 2014–20 financial period. Nevertheless, it was enforced in the previous 2007–2013 financial period in the case of Member States that faced infringement proceedings for breach of EU law in areas closely connected to EU Funds investment.[98]

B. Agricultural Funds spending conditionality

The Agricultural Funds spending conditionality is almost entirely dedicated to advancement of EU environmental policy objectives, in the attempt to 'green' the Common Agricultural Policy. It includes two main conditionality packages: 20 cross-compliance conditionalities and 1 green conditionality. The latter complements the conditionalities applicable to agricultural policy via the Rural Development Fund discussed above.[99] However, contrary to spending conditionalities discussed in Part A above, these remaining conditionalities address exclusively private beneficiaries – hence, farmers. Another notable distinction is that the Agricultural Funds spending conditionality packages discussed here are enforced by Member States (not by the EU) under the close supervision of the Commission.

The cross-compliance conditionality is an ex post, negative and largely cross-cutting conditionality type, which builds on the cross-compliance rules developed in previous financial periods.[100] It asks EU Member States to comply with certain minimum environmental conditions and EU law on farming, irrigation management, animal and plant health, food safety, land management, preservation of wild bird species or protection of natural habitats.[101] The cross-compliance conditionality is subsequently split in two conditionality groups. On the one hand, aid beneficiaries accessing structural funding are conditioned to comply with 13 EU law statutory

[95] Ibid, Art 6.

[96] Ibid, Art 85.

[97] Regulation (EU) 966/2012, see note 38 above, Art 135(3).

[98] *Italy v Commission*, T-99/09, EU:T:2013:200, para 60; see also note 142 below.

[99] See Part III.A.1–4 above.

[100] Regulation (EU) 1306/2013, see note 41 above, Annex II, SMR 2, 3.

[101] Ibid.

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requirements (SMRs). [102] On the other hand, farmers must ensure that all agricultural activities respect seven 'good agricultural and environmental conditions' (GAEC) in line with the standards set at the national level following the EU guidelines.[103] Failure to comply with the cross-compliance conditionality entails reductions or exclusion from agricultural support, depending on the severity of infringement.[104]

The 'green' conditionality is a novel 'carrot-and-stick' (positive and negative) and ex post conditionality type in the Agricultural Funds in 2014–20.[105] It binds ex post farmers receiving aid to respect several compulsory practices beneficial to climate and environment in exchange of an additional 'green' payment on the top of Agricultural Funds basic payments.[106] In case of non-compliance, the farmers lose the green payments, as of 2017.[107]

Overall, the Agricultural Funds spending conditionality reveals a strong cross-cutting nature, especially strongly connected to the EU agenda on environmental protection and sustainable development. On several occasions, the conditions are same-sector, being closely linked to EU agricultural policy. The conditionality in the area exposes a strong EU law and policy enforcement function aiming to support the advancement of EU environmental law and policy through agricultural spending. A legislative and policy implementing function is also observed.

Enforcement is the defining feature of Agricultural Funds spending conditionality. According to ex post evaluation reports, the conditionality is a genuine example of a frequently-enforced spending conditionality on private recipients.[108] Evaluation data of prior financial periods show that the cross-compliance conditionality is well functioning in most of the Member States, checks are conducted regularly and corrections applied.[109] This finding is in high contrast with spending conditionalities systems addressed to Member States, which, as seen above, are enforced much more rarely. As the green conditionality is fully operational from 2017, its enforcement is still to be observed in practice.

C. Fisheries Fund spending conditionality

The Fisheries Fund takes less than 1% of the EU budget. It was established to support the EU Common Fisheries Policy (CFP) which has as its primary goal prevention of overexploitation of fishing resources and promotion of sustainable fishing in EU waters.[110] The spending conditionality of the Fisheries Fund reinforces this goal linking strongly any funding measure to full compliance with all CFP rules.

[102] Ibid, Art 93, Annex II.

[103] Ibid.

[104] Ibid.

[105] Regulation (EU) 1307/2013 [2013] OJ L347/608, Arts 43–47.

[106] See ibid Rec 37, Arts 43–47.

[107] Regulation (EU) 1306/2013, see note 41 above, Art 77(6).

[108] Alliance Environnement, 'Evaluation of the application of cross compliance as foreseen under Regulation 1782/2003', Prepared for the European Commission, 26 July 2007, pp 5–6.

[109] Ibid.

[110] Regulation (EU) 508/2014, see note 42 above.

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In addition to the ESI Funds conditionalities applicable to Fisheries Fund fisheries spending is bound by two generic CFP conditionalities: one addressed to Member States and one to private beneficiaries.[111] Both conditionalities are same-sector, requiring states and private recipients to fully comply with all CFP rules.

The CFP conditionality addressed to Member States is ex post and negative. It is enforced by the Commission, which is endowed with a sophisticated set of sanctioning tools to guard the compliance of Member States with all CFP rules, ranging from interruption of payments deadlines for a period of up to six months to suspension of payments and financial corrections.[112] To ensure clarity, subsequent implementing rules have been adopted by the Commission limiting the situations of non-compliance to a list of 30 comprehensive conditionalities.[113]

The CFP conditionality addressing private operators is negative, ex ante and ex post.[114] Similar to Agricultural Funds conditionality above, CFP conditionality is enforced by Member States under the close supervision of the Commission.[115] In practice, fishermen in breach of EU fisheries rules are sanctioned and are banned from EU aid, according to an EU point system.[116]

Overall, the Fisheries Fund spending conditionalities have a strong EU law and policy enforcement function. This is so, as their design is primarily a response to the serious under-performance of EU fisheries policy reported by the European Court of Auditors.[117]

The CFP generic conditionality is frequently enforced when it addresses private beneficiaries.[118] As to the Member States, the 2014 CFP conditionality has not yet been enforced.

D. Home Affairs Funds spending conditionality

EU Home Affairs Funds are structured around two funds: the Asylum and Migration Fund (AMIF) and the Internal Security Fund (ISF), supporting border control (IBV pillar) and police cooperation (IPC pillar) operations.[119] Three spending conditionalities are attached to Home Affairs Funds in the 2014–20 period: the Schengen *acquis* conditionality, the human rights conditionality and the EU law conditionality. In all cases, the Home Affairs conditionalities are enforced by the Commission and are addressed exclusively to Member States.

The Schengen *acquis* conditionality is an ex ante and negative conditionality type, which conditions Member States' access to 40% of border and visa funds (the IBV

[111] See Part III.A.–4 above. Regulation (EU) 508/2014, see note 42 above, Arts 100–101, 105.

[112] Ibid.

[113] Commission Delegated Regulation (EU) 2015/852 [2015] OJ L135/13.

[114] Regulation (EU) 508/2014, see note 42 above, Art 10(1–2).

[115] See Part III.B above. Regulation (EU) 508/2014, see note 42 above, Art 10(2).

[116] Commission Delegated Regulation (EU) 2015/288 [2014] OJ L51/2.

[117] Court of Auditors, Special Report 7/2007 and Special Report 11/2012. See *inter alia* E Self, 'Who Speaks for the Fish: The Tragedy of Europe's Common Fisheries Policy Notes' (2015) 48 *Vanderbilt Journal of Transnational Law* 577.

[118] Interviews, Brussels, 5–6 July, 2016.

[119] Regulation (EU) 514/2014, see note 43 above.

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pillar) on prior good compliance with the EU Schengen *acquis*.[120] The conditionality has an interesting enforcement mechanism translated in a declaration of compliance filled in by Member States. In practice, Member States declare that they comply with the EU *acquis* on visa and borders as well as with the EU common border control standards, including the Schengen Catalogue on external border control, the Handbooks on border guards and visa applications.[121]

The human rights conditionality is ex post, negative and generic. It is restated under both Home Affairs funds and requires that all financed actions are implemented in full compliance with international human rights standards, as well as with the Charter of Fundamental Rights of the European Union (Charter).[122] In case of serious human rights violations, corrections may be ordered under the general Home Affairs Funds correction clause.[123]

EU law conditionality is ex post and generic. Similar to the EU law conditionality analysed above it requires that all financed actions comply with applicable EU law, subject to corrections in case of failure to do so.[124]

All three Home Affairs Funds conditionalities are optional. As to their function, they largely pursue an EU law and policy enforcement function and are strongly informed by EU policy makers' interest to promote a high level of compliance with the Union's Schengen *acquis* and human rights standards at the EU external borders.

Whilst the very new Schengen conditionality has not been enforced to date, the generic EU law conditionality has been enforced in prior financial periods in case of human rights violations at EU borders.[125] In this case, funds have been suspended due to serious allegations of degrading and inhuman conditions reported at the EU border detention centres.[126]

IV. REVISITING THE DOMINANT DISCOURSE ON EU CONDITIONALITY

This Part revisits the dominant discourse on EU conditionality in light of the EU spending conditionality findings above. First, I argue that EU conditionality is not only a tool of EU external policy, but also a powerful internal governance device of important significance for the EU internal constitutional architecture (Part IV.A). Second, I highlight that contrary to other EU conditionality arrangements, the EU spending conditionality is governed exclusively by binding EU law norms and is therefore subject to the general principles and rules of the EU internal legal order,

[120] Regulation (EU) 515/2014 [2014] OJ L150/143, Art 10(2a), (3).

[121] Commission Implementing Regulation (EU) 800/2014 [2014] OJ L219/10, Annex I.

[122] Regulation (EU) 513/2014 [2014] OJ L150/93, Art 3(5). Regulation (EU) 515/2014, see note 120 above, Art 3(4). Regulation (EU) 516/2014 [2014] OJ L150/168, Arts 3(1), 19(2).

[123] Regulation (EU) 514/2014, see note 43 above, Art 47.

[124] See Part III.A.4 above. Regulation (EU) 514/2014, see note 43 above, Art 4.

[125] Court of Auditors, Special Report 15/2014, p 33. Interviews, Brussels, 5–6 of June 2016. Bieber and Maiani, see note 92 above, p 324.

[126] Ibid.

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including judicial review (Part IV.B). Third, contrary to other EU conditionality types, the evaluations of EU spending conditionality show that it tends to be largely complied with internally in a record amount of time (Part IV.C). Lastly, enforcement data suggest that internally spending conditionality is likely to be enforced against Member States. Highly important, spending conditionality is frequently enforced against private individuals, who are also direct subjects of EU law internally (Part IV.D).

A. Spending conditionality is a purely EU internal matter

In sharp contrast with other EU conditionality types, the EU spending conditionality is a purely EU internal matter. The conditionality is designed exclusively by the EU, explicitly for EU Member States and individuals, entirely on EU internal law and policy objectives and concerning over three-quarters of EU internal budgetary expenditure. As of the 2014–20 financial period conditionality emerges as a substantially strengthened internal governance device used to enforce internal EU law and soft-law provisions, to advance numerous regulatory frameworks, implement EU policy objectives, encourage structural reforms, foster a higher level of compliance and ultimately assert the authority of the EU level of governance at the national level. EU spending conditionality prescribes for hundreds of requirements running from areas of exclusive, shared and coordinative competences of the EU such as: green energy, energy efficiency, environmental protection, risk prevention, digital markets, fisheries, plant and animal welfare, regional smart specialisation, small and medium enterprises, internet and technology, research and development, gender equality, non-discrimination, disability, human rights, integration of minorities, poverty reduction, employment, economic policy, education, social market institutions, Schengen *acquis*, and many more.

With regard to the current thematic breadth of spending conditionality, its impressive numbers, its link to three-quarters of the EU budget and applicability to all Member States, the 2014–20 EU spending conditionality is a significant presence in EU internal policies. Moreover, upcoming reforms are expected to further consolidate this trend. In this sense one should note that EU institutions have already started the policy thinking on post-2020 EU spending conditionalities, with new proposals of negative spending conditionalities already in the pipeline.[127] Here one should mention the envisaged EU values conditionality, meant to discipline the recent systemic deviations of certain Member States from the EU's foundational values of democracy, rule of law and human rights.[128] It has also been repeatedly argued that negative conditionality may be introduced to encourage Member States'

[127] European Commission, 7th meeting of high level group (focus on post 2020), 24 January 2017, https://perma.cc/P6GC-W5UW.

[128] EU Commissioner for Justice, 'Democracy in Europe: EU Commissioner pushes for hard line on Poland', (Spiegel online, accessed 15 March 2017, https://perma.cc/T87F-5X4T. If adopted, such a policy may be problematic in the absence of a correlative reform of EU's own democratic, human rights and rule of law performance. See eg JHH Weiler, 'Europe in Crisis – On "Political Messianism", "Legitimacy" and the "Rule of Law"' (2012) *Singapore Journal of Legal Studies* 248; JHH Weiler and N Lockhart, '"Taking Rights Seriously" Seriously: The European Court and its Fundamental Rights

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compliance with the EU migration and asylum *acquis*, and in particular with the refugee quotas.[129]

Against this backdrop, it appears not only unproductive, but also inaccurate to continue the scholarly debates on EU conditionality exclusively in the area of EU external affairs.

Discussing internal EU conditionality is even more important as its increased use announces a shift towards a generalised conditionality culture in the relationship between the EU and its Member States. The current expansion of EU conditionality contrasts with the long-standing EU practice of conditioning primarily third countries, neighbourhood partners and acceding countries. It also contrasts with the prior EU practice of conditioning Member States only in exceptional circumstances, such as in cases of economic emergency.

This paradigm shift is in no way insignificant. It is of tremendous importance as it constitutes the strongest proof of a radical change in the normative underlying assumption on the relationship between the EU and its Member States: solidarity.[130] As Marise Cremona noted in the aftermath of the 2004 enlargement, the general assumption that the EU's external policy is governed by conditionality, whereas its internal affairs are governed by solidarity does not hold true anymore in the case of the 'new' Member States.[131] The analysis of spending conditionality strongly reinforces this conclusion, this time, however, concerning all Member States.

In EU internal affairs, solidarity in its vertical dimension finds its most intimate expression in the duty of loyal cooperation between the EU and Member States and in the non-reciprocal nature of EU obligations.[132] This is a core aspect that differentiates EU internal relationships from EU external relationships.[133] As explained by Cremona in detail, internally, in the case of a breach of EU obligations, solidarity is the cornerstone value that does not allow for Member States' retaliation or withdrawal of EU benefits.[134] Compliant Member States must continue to comply in solidarity with EU obligations, whereas non-compliant states are taken to court and risk financial sanctions, not withdrawal of EU membership benefits.[135]

(F'note continued)

Jurisprudence – Part I' (1995) 32 (1) *Common Market Law Review* 51; Kilpatrick, 'On the Rule of Law and Economic Emergency', see note 12 above.

[129] 'Austria Threatens EU Funding Cuts over Hungary's Hard Line on Refugees' (*The Guardian*, 8 March 2017); 'Italy Threatens Hungary: EU Countries Who Reject Migrant Quota Should Have Funding Cut' (*Express.co.uk*, 12 October 2016); 'Germany supports cutting EU funds to countries that refuse refugee quotas' (*Business Insider*, 15 September 2015).

[130] Robert Schuman, Declaration of 9 May 1950: 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity.'

[131] Cremona, 'EU Enlargement: Solidarity and Conditionality', see note 18 above.

[132] Ibid.

[133] Ibid, p 19.

[134] Ibid.

[135] Ibid.

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The present contribution shall not dwell too much on the regrettable recent cracks in the EU's underlying solidarity principle.[136] Rather, the key argument brought forward is that the initial normative standard of pure solidarity between the EU and Member States is now effectively changing towards a *de facto* conditional solidarity. Hence the message is: EU Funds, which are essential EU solidarity instruments, are disbursed in full solidarity by the EU only if Member States prove the same solidarity stance by continuously upholding and respecting key EU treaty commitments. Should Member States fail to comply, EU Funds – core membership benefits – may be withdrawn. This development introduces an instrumental, *quid pro quo* aspect to the relationship between the EU and its Member States, the latter being rewarded or punished based on their performance. The synergy of this conditional relationship becomes even more powerful when spending conditionality links to pre-accession conditionality narrative in the 'younger' Member States, or to heavy sovereign debt conditionality packages in bailed-out Member States, or both.[137]

From this point of view, the influx of conditionality in EU internal policy not only constitutes a departure from the prior EU practice, but may also mark a point of profound transformation in the EU inner structure. The potential constitutional implications of the conditionality phenomenon are too broad to examine here.[138] For the purpose of this contribution I shall nevertheless note that the conditionality logic strongly departs from the most intimate ethical convictions of the European construction which was meant to be built – in Schuman's words – through the common and sincere efforts of all Member States, and lead to common achievements that would create in time a '*de facto* solidarity' (not conditionality).[139]

B. Spending conditionality is EU law

Spending conditionality is in all cases EU law. Contrary to other EU conditionality types, spending conditionality is always rooted in binding EU law rules. All conditionalities are defined and their specific criteria are detailed in the black letter law of the EU funding regulations. Equally, EU law fully governs their applicability, fulfilment and enforcement in each area of EU spending.

The explicit consecration in binding EU law rules is the major qualitative improvement of spending conditionalities in the 2014–20 financial period. As opposed to the general principles of consistency and legality mentioned in prior funding regulations, the 2014–20 funding regulations explicitly state: what is the

[136] See *inter alia* A Sangiovanni, 'Solidarity in the European Union' (2013) 33(2) *Oxford Journal of Legal Studies* 213; D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52(1) *Common Market Law Review* 17; LM Langford, 'The Other Euro Crisis: Rights Violations under the Common European Asylum System and the Unraveling of EU Solidarity Note' (2013) 26 *Harvard Human Rights Journal* 217.

[137] For a critique, see W Jacoby and J Hopkin, 'Drunk on Conditionality: The Move to Coercive Conditionality in the EU Periphery', Conference paper (2016), http://centreurope-montreal.ca/fr/activites-nouvelles/activites/articles/drunk-on-conditionality-how-the-eu-went-from-eas/index.html

[138] See note 19 above.

[139] See note 130 above.

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conduct to be observed, when, how, by whom and at what price. Equally important, the funding regulations detail the procedural rules of enforcement for each conditionality type, making it much easier to claim compliance and order funding cuts. This clarity of the legal framework and enforcement is especially valuable for the Commission who found it much more difficult previously to claim compliance.[140]

There are also other significant consequences of the EU legal nature of spending conditionality. First, as an EU law construct, spending conditionality is subject to the applicable rules and general principles of the EU legal order. Second, and most importantly, spending conditionality is subject to judicial review in national, and above all, EU courts. This is a major departure from the recent EU sovereign debt conditionality, which proved virtually immune to legal challenges at the EU level, stirring serious legal criticism and a generalised public outcry.[141]

While the 2014–20 spending conditionality has not yet made it to EU courts, the Court of Justice of the EU has already had the chance to speak on spending conditionality in prior financial periods. In *Italy v Commission*, the Court endorsed the enforcement of a generic EU law conditionality and held that the Commission could order funds withdrawal where a 'sufficiently direct link' was present between the financed measure and the alleged breach of EU (waste management) law.[142] The Court has additionally held that funding withdrawal for breach of EU law is an autonomous procedure with no consequences for eventual infringement procedures based on Article 258 TFEU.[143] The Court also upheld on numerous occasions the Commission's subsequent enforcement of Agricultural Funds conditionality where Member States failed to correctly enforce the conditionality on farmers.[144] Very importantly, the Court has reviewed the consistency of spending conditionalities with the Charter and struck them down where fundamental rights were not observed.[145]

While acknowledging the qualitative legal improvements, one should stress that similar to other areas of EU action, the applicability of the Charter and especially the justiciability of its social principles remains problematic.[146] At the same time,

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[140] Interviews, Brussels, 5–6 July 2016.

[141] Kilpatrick, see notes 12, 14 above; O Gerstenberg, 'The Justiciability of Socio-Economic Rights, European Solidarity, and the Role of the Court of Justice of the EU' (2014) 33(1) *Yearbook of European Law* 245.

[142] *Italian Republic v European Commission*, C-385/13 P, EU:C:2014:2350, para 84; see also note 98 above.

[143] *An Taisce and WWF UK*, C-235/94 P, EU:C:1996:293, para 25.

[144] *Latvia v Commission*, T-661/14, EU:T:2016:412.

[145] *Liivimaa Lihaveis,* C-562/12, EU:C:2014:2229, paras 71–73 (holding that access to justice must be ensured during the implementation of EU Funds, as guaranteed by Art 47 of the Charter); *Blanka Soukupová*, C-401/11, EU:C:2013:223, paras 28–29 (holding that selection conditions set by a Member State cannot discriminate on the basis of sex); *Volker*, joined cases C-92/09 and C-93/09, EU:C:2010:662 (declaring null and void a EU Agricultural Fund provision mandating for publication of data concerning natural persons).

[146] *Nisttahuz Poclava*, C-117/14, EU:C:2015:60, para 42 (holding that Art 30 of the Charter on protection against unjustified dismissal did not apply in absence of EU law implementation, even if the

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individual standing in front of EU courts may also prove difficult for actors seeking enforcement of a particular conditionality.[147] For instance, a person with disabilities seeking the annulment of a Commission's decision on EU funds disbursement may not be successful in proving standing in front of EU courts in a case where a public highway is not accessible to her. However, it is important to note that internally other legal remedies are available to individuals, including legal challenges in domestic courts, the preliminary reference procedure in interpretation or legality, as well as the administrative avenue of complaints in front of national authorities, the Commission and the European Ombudsman.[148] In future financial periods the opportunity of decentralised judicial enforcement, which could grant individuals the right to hold non-compliant Member States to account may be further examined.

C. Spending conditionality is complied with

The EU spending conditionalities discussed in this contribution are largely complied with. Compliance with 2014–20 ex post conditionalities is very hard to assess in absence of infringement procedures or fund suspensions. However, based on the early data available on ex ante conditionalities, and data available from prior financial periods, the overall compliance rates appear high.

Internally, Member States have a higher tendency to comply with conditionality attached to EU budgetary resources, especially since the vast majority of actions required have already been agreed upon at the EU level as a matter of soft-law policy or hard law. Moreover, internally, Member States themselves determine to a large extent the substance of conditionality wearing the hat of EU Council representatives during the legislative procedure. In this context, it is not surprising that the compliance rates tend to be higher than in other areas where EU conditionality is traditionally prescribed in a top-down fashion.

The ex ante conditionalities attached to ESI Funds were complied with in 75% of cases before the start of spending operations.[149] The compliance rate is impressive if one considers that this represents by far the most numerous and burdensome conditionality package of the financial period. The ex ante conditions imported an enormous EU law, policy, regulatory and structural load to EU spending in the current financial period.[150] The finding that three quarters of conditionalities have

(F'note continued)

national measure was implementing a EU soft-law social policy and even if EU Funds might have been used to financed it).

147 *Greenpeace International v Commission*, C-321/95 P, EU:C:1998:153; D Caruso, 'Direct Concern in Regional Policy: The European Court of Justice and the Southern Question', (2011) 17(6) *European Law Journal* 804.

148 Art 74(3) Regulation 1303/2013, see note 40 above, states that: 'Member States shall ensure that effective arrangements for the examination of complaints concerning the ESI Funds are in place.' European Ombudsman, *Respect of fundamental rights in the implementation of the EU cohesion policy*, Case OI/8/2014/AN, Decision of 11 May 2015, https://www.ombudsman.europa.eu/en/cases/decision.faces/en/59836/html.bookmark

149 COM(2015) 639 final, see note 72 above.

150 Ibid.

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been complied with within two years is in no way a small achievement.[151] Moreover, first evaluations also report that ex ante conditionalities have served as strong leverage for Member States to put in place national wide reforms, pass laws, transpose EU rules, adopt strategic policies or establish completely new national institutions.[152] As such, the finding of compliance must also be assessed with regard to the highly burdensome and intrusive requirements Member States were asked to deliver.

Prior evaluations of agricultural and fisheries spending conditionality addressed to private recipients also reveal a high level of compliance.[153]

As for the case of macroeconomic conditionality, the internal compliance problems of the EU economic governance framework do not allow for an accurate evaluation.[154] The macroeconomic conditionality is cross-over. This means that compliance with conditionality implies prior compliance with the corresponding economic governance rules, which is by far not yet the case.[155]

Lastly, one must mention that full formal compliance with a conditionality does not mean effective achievement of the policy result sought. In other words, the fact that a conditionality is complied with does not mean that its policy objective has been achieved. Let us return to our early example of highway funds and disability conditionality. Even if Member States show full and correct implementation of EU law on accessibility for people with disabilities, this is no guarantee that people with disabilities are actively included in that particular Member State. Much more is needed to ensure that the policy objective of conditionality is reached. As such, people with disabilities may encounter administrative barriers to obtaining driving licenses, suffer from systemic exclusion from the labour market or face particularly acute discrimination in all sectors of public life. If that is the case, even if the highway facilities are fully fit for use for people with disabilities, these would most probably not be used by the latter. As a result, the policy goal of integrating the people with disabilities will most probably not be attained.

The latter yardstick of effectiveness should be subject to a much broader and complex inquiry. From a formal compliance point of view however and based on the data available, it is worth noting that the major spending conditionality packages of EU Funds tend to be largely complied with. Having regards to the immense regulatory burden of these conditionality packages, the extremely short time available for fulfilment, as well as the monumental effort required at the national level, the above finding of compliance is in no way an insignificant achievement.

D. Spending conditionality is enforced

All spending conditionality types attached to EU Funds have been enforced against Member States at least once in the current or previous financial frameworks.[156]

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[151] Ibid.

[152] See note 55 above.

[153] See eg *Greece v Commission*, T-588/10, EU:T:2012:688.

[154] See Part III.A.3 above and literature cited therein.

[155] Ibid.

[156] See Part III above.

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The general and thematic ex ante conditionalities of ESI Funds have been self-enforced and led to informal suspension of funds already before the start of spending operations on more than ten occasions.[157] Future enforcement may be reasonably expected by the end of 2017 if outstanding ex ante conditionalities are not fulfilled.[158] Home Affairs Funds have been previously successfully withheld on at least one occasion.[159] Even the highly contested macroeconomic conditionality has been enforced once in the previous financial framework.[160]

Most importantly however the novelty brought by spending conditionally is that it is enforced frequently in the case of private beneficiaries.[161] This finding radically changes the core narrative on EU conditionality which has been understood to date as a non-enforceable tool, having at large a mere suasion role.

The difficulty of enforcing spending conditionalities in case of Member States has several explanations. Firstly, spending conditionality is constantly balanced against the primary objective of budgetary execution: simply put, the pressure of spending EU money.[162] In this context it is important to stress that conditionality is a by-product of spending, not its inner essential part. Hence, its implementation and – above all – enforcement necessarily leaves a large scope for negotiations, bargaining, concessions and a high discretion to the Commission for an effective implementation of the EU budget. As a consequence, enforcement against Member States is generally ordered only as a last resort solution, when no other compliance tools, such as negotiations, notification or pre-enforcement notice proved effective. To put it in the words of a high-level EU official: 'when conditionality is enforced, something went terribly wrong.'[163] Secondly, the Member States' strong bargaining power and the multiple externalities involved also explain why enforcement is much more rarely encountered in the case of Member States. As opposed to private beneficiaries, the Commission currently heavily relies on the good will of Member State administrations to assist it with the implementation of almost 80% of the EU budget. This considerably strengthens the Member States' bargaining position in cases of enforcement. At the same time, in the case of Member States the Commission is faced with multiple concurrent externalities of social, political and economic (hence, non-legal) nature which make the decision on enforcement much more difficult altogether.

Let us take a hypothetical case of macroeconomic conditionality to illustrate the enforcement difficulty in case of Member States. Suppose Greece has failed to fulfil the conditionality criteria. Should the Commission suspend EU Funds? In this case any decision taken by the Commission shall not be a simple 'yes' or 'no' exercise on

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[157] See Part III.A.1–2 above.

[158] Interviews, Brussels, 5–6 July 2016.

[159] See Part III.D above.

[160] See Part III.A.3 above.

[161] See Parts III.B–C above.

[162] COM(2016) 603 final, *Mid-Term Review/Revision of the Multiannual Financial Framework 2014-20: An EU Budget Focused on Results*; see note 55 above, pp 117–19.

[163] Interviews, Commission, July 5–6 2016.

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compliance. An enforcement decision will involve what Fuller called a 'polycentric difficulty'; that is, a polycentric judgment on multiple subsequent scenarios and ramifications which a 'yes' or 'no' decision may ultimately cause.[164] All these scenarios shall ultimately feed back into the Commission's judgment and shall decisively influence the final enforcement decision. As such, before deciding to withdraw or not withdraw EU funds, the Commission may or may not remember that Greece is in desperate need of liquidities and that suspension of EU Funds will have a tremendous negative impact (which may not be the case for other Member States). The Commission may or may not consider that Greece is already under strict EU and non-EU economic, financial and fiscal supervision. It may or may not consider that Greece has been subject to heavy austerity policies for almost a decade. Additionally, the Commission may or may not be alerted by the domestic political situation and the rising power of illiberal democratic leaders. The Commission may or may not also be concerned by the EU's reputational damage and the growing Euro-scepticism in the country. Not least, the Commission may or may not be particularly concerned by the constantly degrading socio-economic conditions of the population and the increased rate of poverty, which EU Funds are primarily tasked to combat. Against this high uncertainly, the Commission may consider it rational to postpone a funding cut. It may also seek to ensure compliance by other means. At the same time, it may seek the advice of a better placed expert body, which could assess more precisely the overall implications of a funding cut-off. In all cases, a decision to cut EU Funds will be a last resort measure.

Yet, even against this hypothetical backdrop, in practice, enforcement was ordered in the case of Greece and funds have been effectively suspended or self-suspended on at list four occasions during the last three years.[165]

Beyond the peculiarity of enforcement against Member States explained above, we stress again that a valuable finding of this contribution is that in the case of private beneficiaries spending conditionality is not only enforced, it is enforced frequently. This finding is important as it suggests that internally EU conditionality has a private enforcement avenue available in cases where state enforcement may prove challenging. Within the EU, private beneficiaries are also subjects of EU law and may enjoy EU conditional rights and bear EU conditional obligations in a similar manner to Member States. Especially in the case of EU policies that target change in private (as opposed to state) behaviour (eg environment protection, energy efficiency, green energy, enterprise or sustainable fishing) the EU may find it easier to vest conditionalities on private parties as opposed to states to avoid the enforcement difficulties underlined above.

V. CONCLUSION

The rise of spending conditionality in EU internal policies is an unprecedented development of EU law. In spite of its novelty and impressive proportions, EU

[164] COM(2016) 603 final, see note 162 above.

[165] See Part III.D above; COM(2015) 639 final, see note 72 above, Annex II.

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spending conditionality remains under-researched and far too little discussed in scholarly debates. This article has attempted to fill this gap, showing that the study of spending conditionality qualitatively adds to our understanding of EU conditionality in general and usefully broadens our perspective on the potential implications of its active use in the EU internal context.

This contribution has shown that conditionality is increasingly an EU internal governance mechanism, actively used to foster compliance, change domestic regulatory frameworks, implement EU policies, encourage structural reforms and advance a wide array of EU objectives at the national level through the route of EU budget. It has also shown that contrary to other EU conditionality arrangements, spending conditionality is a EU hard law construct, which is subject to rules and principles of EU internal legal order, including the Charter, and is subject to judicial review in EU courts. Moreover, this contribution found that internally Member States generally tend to comply with the prescribed spending conditionality and that even if enforcement is difficult, spending is still credibly withdrawn from Member States. Another interesting finding is that in internal spending, the EU actively vests spending conditionality also on private beneficiaries of EU Funds, who experience funding cuts much more frequently.

This means that internally, spending conditionality may be credibly used to reinforce the authority of EU laws, advance policy objectives and support broader interests at the national level, in the pursuit of effective EU government.

While the pursuit of effectiveness is a legitimate goal of EU government, this article has stressed that the extended use, intensity and most importantly the announced future development of conditionality internally seems to depart from the founding principles and ethical convictions upon which the entire European construction was built. In the view of the EU's founding fathers, the achievements of a unified Europe were to lead towards an increased solidarity (not conditionality) within the EU. In contrast, what we see today is an increased influx of conditionality in the EU internal affairs which often informs the limits and meaning of solidarity – a *de facto* conditional solidarity.

This conclusion invites deeper reflections upon the meaning and opportunity of a permanent conditionality culture within the EU. Today, the EU is at the crossroads of deep transformations. Many decisions taken in the next few years will decisively shape the EU of tomorrow. In this context it is crucial to reflect upon the constitutional implications of a generalised governance by conditionality within the EU and the implicit transactional character it gives to the relationship between the EU, its Member States and most importantly the EU citizens.

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