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What EU Conditionality Says about the Rule of Law

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Abstract

The Covid-19 crisis provided an opportunity for the European Union to offer an alternative regulatory response to the crisis of values by systemically linking European funding to respect for the rule of law. A rule of law conditionality mechanism for spending was introduced in the Recovery and Resilience Facility and in Regulation 2020/2092. It is both positive – in that it encourages Member States to implement reforms and investments aimed at improving the rule of law – and negative – in that it takes the form of financial sanctions. However, the development of the rule of law conditionality is leading to an economisation of the concept of the rule of law, insofar as it mainly concerns those dimensions of the rule of law that are conducive to growth – such as justice systems and the fight against corruption. As a result, it could paradoxically exacerbate the very crisis it is designed to resolve.

Keywords: conditionality; recovery and resilience facility; rule of law

1. Introduction

During the last decade, the European Union (hereafter the “EU”) has progressively developed a European rule of law policy. The objective is to halt the systemic deterioration of the EU’s founding values in certain Member States. This “crisis of values”¹ poses an existential risk to the functioning of the EU insofar as it undermines the axiological dimension of the European integration process. It affects in particular the principle of mutual trust, which is “of fundamental importance in EU law,”² with regard notably to the areas of freedom, security and justice.³ However, the EU has been confronted with the ineffectiveness of the instruments provided for in the European treaties, namely Article 7 of the Treaty on the European Union, and the infringement procedure which can be initiated for both legal and political reasons.⁴

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¹ For an analysis of this crisis: M. Smith, “Staring into the abyss: A crisis of the rule of law in the EU” (2019) 25 *European Law Journal* 6, pp. 561–576; L. D. Spieker, “From Moral Values to Legal Obligations – On How to Activate the Union’s Common Values in the EU Rule of Law Crisis” (2018) 24 *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2018–24*, 28 p.

² Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454, para. 191.

³ On the principle of mutual trust, see C. Rizcallah, *The Principle of Mutual Trust in European Union Law: An Essential Principle Facing a Crisis of Values* (Larcier 2022).

⁴ See, for example, P. Bárd, “In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law” (2022) 27 *European Law Journal* 1–3, pp. 185–210.

The European institutions and, in particular, the Commission have therefore sought to diversify their means of action by creating, for example, a rule of law framework and a rule of law mechanism.

Since the COVID-19 pandemic, the EU has developed an alternative regulatory response to the crisis of values by systemically linking European funding to respect for the rule of law. This “new strategy”⁵ has long been envisaged by the Commission – notably in a 2018 proposal on the protection of the Union’s budget in case of generalised deficiencies regarding the rule of law in the Member States.⁶ But it was finally endorsed by the European Council in July 2020 when the European post-Covid recovery plan, Next Generation EU, was negotiated.⁷ Indeed, as a result of the European Council’s conclusions, a rule of law conditionality mechanism was introduced in the masterpiece of the EU recovery strategy, the Recovery and Resilience Facility (hereafter the “RRF”),⁸ and in Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget (hereafter the “Conditionality Regulation”).⁹

Within the framework of the RRF Regulation and the Conditionality Regulation, the rule of law conditionality takes the form of spending conditionality that is both positive and negative. This conditionality provides for EU financial support for Member States to adopt measures designed to improve the rule of law while introducing financial sanctions in the event of breaches of certain principles of the rule of law (II). This spending conditionality raises a number of legal questions – for example with regard to its legal basis.¹⁰ This contribution focuses on a risk of a different nature than the one previously identified for the European integration process that is posed by the rule of law conditionality: it could aggravate the “poly-crisis”¹¹ that the EU is facing. Indeed, the rule of law conditionality promotes an economic conception of the rule of law, focused on those dimensions of the rule of law conducive to growth, and risks failing to address the fact that the crisis in the EU’s values is also linked to a disenchantment with the EU’s social achievements and democratic legitimacy (III).

⁵ L. Fromont and A. Van Waeyenberge, “Trading Rule of Law for Recovery? The New EU Strategy in the Post-Covid Era” (2022) *European Law Review*, pp. 1–16.

⁶ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States*, COM(2018) 324 final, 2018/0136(COD). See also European Commission, *Further strengthening the rule of law within the Union: State of play and possible next steps*, COM(2019) 163 final; European Commission, *Strengthening the rule of law within the Union – A blueprint for action*, COM(2019) 343 final.

⁷ European Council, *Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions* (CO EUR 8 CONCL 4).

⁸ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (hereafter the “RRF Regulation”), (2020) OJ L 57/17.

⁹ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (hereafter the “Conditionality Regulation”), (2020) OJ L 433/1.

¹⁰ See, for example, P. Leino-Sandberg and M. Ruffert, “Next Generation EU and its Constitutional Ramifications: A Critical Assessment” (2022) 59 *Common Market Law Review* 2, pp. 433–472; B. De Witte, “EU emergency law and its impact on the EU legal order” (2022) 59 *Common Market Law Review* 3, pp. 3–18.

¹¹ J.-C. Juncker, *Speech – EP Plenary Session – Conclusions of the European Council meeting of 17 and 18 December 2015*, 19 January 2016.

II. The nature of the rule of law conditionality

Although conditionality regimes are not new under EU law,¹² the RRF constitutes a turning point.¹³ It appears to produce a new method of governance,¹⁴ considering the unprecedented combination of various conditionality regimes – covering, among other things, economic governance, the rule of law and the green and digital transitions – that apply to the internal relations between the EU and its Member States.¹⁵ The RRF provides for spending conditionality in the sense that it “is a condition attached to EU financial benefits with the aim of advancing broader EU policy objectives at Member State level.”¹⁶ In other words, “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.”¹⁷

Different taxonomies have been proposed by scholars to classify spending conditionality regimes.¹⁸ For the purpose of this contribution, the distinction between positive conditionality and negative conditionality will be used to understand the rule of law conditionality established by the RRF Regulation and the Conditionality Regulation. The former – positive conditionality – consists of using the RRF’s funds to finance reforms and investments designed to improve/ensure respect for the rule of law in the Member States (1). The latter – negative conditionality – takes the form of sanctions, such as the suspension or withdrawal of EU funding in the case of breaches of principles of the rule of law (2).¹⁹

I. Positive conditionality

The rationale behind the RRF is to provide a financial incentive for Member States to implement reforms and investments that should not only mitigate the socio-economic consequences of the Covid-19 crisis but also foster the EU model of economic

¹² It has been used, for example, by the EU in the area of accession policy (see, for example, M. Cremona, “Accession to the European Union : Membership Conditionality and Accession Criteria” (2001) *Polish Yearbook of International Law*, pp. 219–240; C. Pinelli, “Conditionality and Enlargement in Light of EU Constitutional Developments” (2014) 10 *European Law Journal* 3, pp. 354–362) and during the sovereign debt crisis (See A. Baraggia, “Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?” (2015) 4 *Cambridge Journal of International and Comparative Law* 2, pp. 268–288; M. Ioannidis, “EU Financial Assistance Conditionality after ‘Two Pack’” (2014) 74 *ZaöRV*, pp. 61–104; A. Poulou, “Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?” (2017) *Common Market Law Review*, pp. 991–1026.)

¹³ See F. Fabbrini, “Next Generation EU: Legal Structure and Constitutional Consequences” (2022) 24 *Cambridge Yearbook of European Legal Studies*, pp. 45–66.

¹⁴ See N. Lupo, “The Recovery and Resilience Facility and its effects on the Rule of Law conditionality”, in C. Fasone, A. Dirri and Y. Guerra (eds.), *State-of-the-art Working Paper on “Established Rule of Law Instruments”* (2023), p. 85. N. Lupo uses the term “government” but, considering the nature of conditionality, the term “governance” seems more appropriate.

¹⁵ It favours, for example, a contractualisation of the relationship between the EU and the Member States through national plans.

¹⁶ V. Vita, “Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality” (2017) *Cambridge Yearbook of European Legal Studies*, p. 2.

¹⁷ *Ibid.*, p. 3.

¹⁸ The most comprehensive classification was presented by V. Vita who distinguishes between the nature of conditionality (positive, negative or carrot-and-stick conditionality), the functions of conditionality (EU law or EU policy enforcement), the types of conditionality (*ex post/ex ante*, same-sector/cross-cutting/cross-over or generic, compulsory/optional) and the subjects of conditionality (active/passive). See *ibid.*, pp. 1–28.

¹⁹ The Member States can also receive technical support from the Technical Support Instrument: Regulation (EU) 2021/240 of the European Parliament and of the Council of 10 February 2021 establishing a Technical Support Instrument, (2021) OJ L 57/1.

development.²⁰ As Article 4 of the RRF Regulation states, the RRF aims “to promote the Union’s economic, social and territorial cohesion by improving the resilience, the crisis preparedness, adjustment capacity and growth potential of the Member States, by mitigating the social and economic impact of (the Covid-19 crisis), in particular on women, by contributing to the implementation of the European Pillar of Social Rights, by supporting the green transition (...) and (...) the digital transition.”²¹ It seems at first sight that the RRF does not aim to promote the rule of law.²² The term “rule of law” is not mentioned even once in the RRF Regulation. However, the RRF Regulation ensures the promotion of the rule of law in two key ways: the scope of application of the RRF and the fact that it is anchored in the European Semester.

Firstly, to benefit from financial support under the RRF, Member States first had to submit to the Commission a national recovery and resilience plan (hereafter “NRRP”).²³ The NRRP sets out the reforms and investments that a Member State commits to implementing in six policy areas: (1) green transition; (2) digital transformation; (3) smart, sustainable and inclusive growth; (4) social and territorial cohesion; (5) health, and economic, social and institutional resilience; and (6) policies for the next generation, children and youth.²⁴ The scope of application of the RRF may therefore include certain dimensions linked to the rule of law. In particular, according to the Commission, institutional resilience covers public administration, the fight against corruption, the quality of law-making, and justice systems.²⁵

Some NRRPs have included reforms and investments to increase the efficiency, quality and independence of the judicial system, such as improving the judicial infrastructure, training employees in the judicial system, encouraging hiring in the judicial system, reorganising the judicial map or reducing the length of proceedings.²⁶ Other reforms and investments comprise anti-corruption and fraud prevention measures – for example improving and strengthening the legal and institutional anti-corruption frameworks, fighting money laundering, combatting tax fraud and limiting the use of cash in large transactions.²⁷ The RRF Regulation also requires that the NRRPs participate in the implementation of the European Pillar of Social Rights (hereafter “EPSR”) and, more particularly, in ensuring gender equality and equal opportunities for all.²⁸ Therefore, NRRPs mainly include measures to tackle inequalities between men and women with regard to education, training and integration in the labour market as well as to improve the economic and social integration of vulnerable groups – for example people with disabilities, elderly people and people with a migrant background or living in marginalised Roma communities.²⁹

²⁰ Which focuses, as Art. 3(3) TEU states, on “the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”.

²¹ Art 4(1) RRF Regulation.

²² See also, A. Capati and Th. Christiansen, “The European Semester: EU Rule of Law Guidance, Monitoring and Enforcement Through Economic Governance Mechanisms” in C. Fasone, A. Dirri and Y. Guerra (eds.), *State-of-the-art Working Paper on “Established Rule of Law Instruments”* (2023), p. 72.

²³ Art 17 RRF Regulation.

²⁴ *Ibid.*, Art 3. The European Commission also defines ten flagships that the Member States were strongly encouraged to include in the NRRPs. See European Commission, *Annual Sustainable Growth Strategy 2021*, COM (2020) 575 final, pp. 9–12.

²⁵ See European Commission, *2023 European Semester – Spring Package*, COM (2023) 600 final, p. 22.

²⁶ For an overview, see European Commission, “Thematic analysis: Rule of Law – Judicial Systems”, *Recovery and Resilience Scoreboard*, April 2022.

²⁷ For an overview, see European Commission, “Thematic analysis: Anti-corruption and anti-fraud”, *Recovery and Resilience Scoreboard*, April 2022.

²⁸ Art 18(4c) and (4o) RRF Regulation.

²⁹ For an overview, see European Commission, “Thematic Analysis: Equality”, *Recovery and Resilience Scoreboard*, January 2023. See also C. Bernardo *et al.*, “Evidence to Action: Gender equality and gender mainstreaming in the COVID-19 Recovery”, European Institute for Gender Equality, 2023.

Secondly, the promotion of the rule of law is indirectly ensured by means of macroeconomic conditionality. Indeed, the NRRPs had to be “consistent with the relevant country-specific challenges and priorities identified in the context of the European Semester,”³⁰ in particular with the country-specific recommendations (hereafter “CSR”) addressed to the Member States in the 2019 and 2020 Semester cycles.³¹ Even though the European Semester is primarily an economic, budgetary and social instrument, it also includes dimensions relating to the rule of law.³² On several occasions, the European Commission has highlighted the role played by the European Semester as an early warning and prevention tool in issues relating to the rule of law in the areas of corruption, effective justice systems and reform of public administration.³³ CSRs could relate to the quality and the transparency of law-making (increased involvement of civil society and social partners in the decision-making process, for example), the principle of legal certainty (unpredictability of the legal framework, confidence in the quality and predictability of policies and institutions etc.), equality between men and women, the prohibition of discrimination and the quality, efficiency and independence of the judicial system.

In addition, the RRF Regulation puts the emphasis on respect for certain EU principles in the context of the adoption and implementation of the NRRPs. On the one hand, the preparation process for the NRRPs must include consultation with the stakeholders (local and regional authorities, social partners, civil society organisations, youth organisations and any other relevant stakeholders).³⁴ On the other hand, the NRRPs have to be implemented in conformity with the principle of sound financial management.³⁵ This requirement implies that the NRRPs have to include a “system to prevent, detect and correct corruption, fraud and conflicts of interests, when using the funds provided under the Facility.”³⁶

2. Negative conditionality

In addition to the introduction of financial incentives to promote reforms and investments in line with the principles of the rule of law, Member States are also subject to negative conditionality – in the sense that they expose themselves to financial sanctions in the event of serious breaches of certain principles of the rule of law. Negative conditionality applies in particular in two cases: when a Member State fails to correctly implement its NRRP and when a Member State breaches the principle of sound financial management.³⁷

³⁰ Recital 32 and Art 17(3) RRF Regulation.

³¹ European Commission, *Annual Sustainable Growth Strategy 2021*, *supra* note 24, p. 5.

³² M. Fiscaro, “Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union’s Values” (2022) 7 *European Papers* 2, pp. 713–714; L. Pech, “The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox” (March 2020) *Reconnect Working Paper no. 7*, pp. 26–28.

³³ See, for example, the European Commission, “Further strengthening the Rule of Law within the Union – State of play and possible next steps”, *supra* note 6, p. 4. See also: European Court of Auditors, “The European Semester – Country Specific Recommendations address important issues but need better implementation”, *Special Report 16/2020*, para. 33.

³⁴ Art 18(4q) RRF Regulation. On this issue, see, for example, the European Parliament, “Recovery and Resilience Plans: stakeholders’ involvement”, *In-Depth Analysis*, December 2021; R. Rodríguez Contreras and P. Sanz, “Involvement of social partners in the national recovery and resilience plans”, *Eurofound*, 2022; B. Vanhercke, *et al.*, “From the European Semester to the Recovery and Resilience Facility. Some social actors are (not) resurfacing”, *European Trade Union Institute Working Paper*, 2021/13.

³⁵ Recital 40 and art. 22(1) RRF Regulation.

³⁶ *Ibid.*, Art 18(4r).

³⁷ It is interesting to note that the RRF Regulation also provides for financial sanctions in the event of non-compliance with certain sound economic governance rules (see *ibid.*, Art 10 and recital 29) – but these sanctions do not directly concern the rule of law.

Firstly, Article 24 of the RRF Regulation provides for the suspension or even the termination of the EU's financial commitments to a Member State that has not implemented the promised reforms and investments. When the Commission assesses that a Member State has not satisfactorily met its "milestones and targets," it suspends all or part of the financial contribution.³⁸ The Member State concerned has one month in which to submit its observations.³⁹ At this stage of the procedure, two situations are envisaged by the RRF Regulation. Either the Member State adopts the necessary measures to ensure a satisfactory fulfilment of the milestones and the targets, and the suspension is lifted;⁴⁰ or it does not take the measures requested within a period of six months from the suspension and the Commission reduces the amount of the EU's financial contribution – after having given the Member State the opportunity to submit its observations.⁴¹ Finally, if no tangible progress has been made within a period of eighteen months from the adoption of the Council Decision approving the NRRP, the Commission terminates the EU's financial contribution and recovers any pre-financing.⁴²

Secondly, a Member State may be subject to financial sanctions in the event of breaches of the EU's financial interests. Financial sanctions may be imposed on the basis of the Conditionality Regulation.⁴³ Several conditions must be met: at least one principle of the rule of law must have been breached in a Member State; the breach must be attributable to an authority of that State; and the breach must affect or seriously risk affecting the sound financial management of the Union budget or the protection of the Union's financial interest in a sufficiently direct way.⁴⁴ Such breaches may, in particular, concern the independence of the judiciary, the failure to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, the limitation of the availability and effectiveness of legal remedies or the limitation of effective investigation, prosecution or sanctioning of breaches of the law.⁴⁵

As a horizontal instrument, the Conditionality Regulation can be applied to the RRF funds.⁴⁶ It has, however, a subsidiarity character, which is reflected in Article 6(1) and which was reaffirmed by the European Council in its conclusions of 10 and 11 December.⁴⁷ In its guidelines on the application of the Conditionality Regulation, the European Commission considers that, if the conditions for the adoption of measures under the

³⁸ It seems that the European Commission has an obligation to suspend the EU's financial contribution in that art. 24(6) of the RRF regulation uses the term "shall."

³⁹ *Ibid.*, Art 24(6).

⁴⁰ *Ibid.*, Art 24(6).

⁴¹ *Ibid.*, Art 24(8).

⁴² *Ibid.*, Art 24(9).

⁴³ On the Conditionality Regulation, see, among a vast body of literature: A. Baraggia and M. Bonelli, "Linking Money to Values: The New Rule of Law Conditionality Regulation and its Constitutional Challenges" (2022) *German Law Journal*, pp. 131–156; N. Kirst, "Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union" (2021) 6 *European Papers* 1, pp. 101–110; J. Lacny, "The Rule of Law Conditionality Under Regulation No 2092/2020—Is it all About the Money?" (2021) *Hague Journal of the Rule of Law*, pp. 79–105; T. Tridimas, "Recovery Plan and Rule of Law Conditionality: A New Era Beckons?" (2020) *Croatian Yearbook of European Law and Policy*, pp. VII–XXI.

⁴⁴ Art 4 Conditionality Regulation.

⁴⁵ *Ibid.*, Art 3.

⁴⁶ The RRF Regulation refers twice to the need to implement the RRF in accordance with the rules adopted on the basis of Art 322 TFEU, in particular with the Conditionality Regulation. See recital 71 and Art 8 RRF Regulation.

⁴⁷ For a critical assessment of the European Council conclusions, see A. Alemanno and M. Chamon, "To Save the Rule of Law you Must Apparently Break It", *VerfBlog*, 11 December 2020; K. L. Sheppele, L. Pech and S. Platon, "Compromising the Rule of Law while Compromising on the Rule of Law", *VerfBlog*, 13 December 2020. *Contra*: T. Nguyen, "The EU's new rule of law mechanism: How it works and why the 'deal' did not weaken it", *Hertie School – Jacques Delors Centre Policy Brief*, 17 December 2020, pp. 1–6; P. Lindseth and C. Fasone, "Rule-of-Law Conditionality and Resource Mobilization. The Foundations of a Genuinely 'Constitutional' EU?", *VerfBlog*, 11 December 2020.

Conditionality Regulation are met, it will examine “whether other procedures set out in Union legislation for the protection of the Union budget would not allow it to protect the Union budget more effectively.”⁴⁸ However, a specific procedure has been introduced in the RRF Regulation. Under Article 22(5), the Commission has the possibility to “reduce proportionately the support under the Facility and recover any amount due to the Union budget or to ask for early repayment of the loan, in cases of fraud, corruption, and conflicts of interests affecting the financial interests of the Union”.⁴⁹

Article 22(5) of the RRF Regulation has a narrower scope of application than the Conditionality Regulation, since it covers only cases of fraud, corruption and conflicts of interests. But the procedure for adopting financial sanctions has been simplified compared with the Conditionality Regulation. Under the Conditionality Regulation, the procedure lasts a minimum of six months, as it involves several exchanges between the Member State concerned and the European Commission; and the final decision to impose financial sanctions is left to the Council, acting by a qualified majority.⁵⁰ In contrast, under Article 22(5) of the RRF Regulation, the Commission alone takes the decision to impose a financial sanction on the Member State concerned. In addition, the Commission is only required to respect the principle of proportionality when deciding and to give the Member State the opportunity to present its observations before the sanction is implemented.

When applying Article 22(5) of the RRF Regulation, it is highly likely that the Commission will have to comply with the conditions laid down by the Court of Justice in its judgments of 16 February 2020 concerning the conformity of the Conditionality Regulation with EU law.⁵¹ Indeed, in both cases, conditionality has the same nature (negative) and the same function (ensuring enforcement of EU law). According to the Court of Justice, the objective of such financial sanctions is “to protect the Union budget from adverse effects on that budget stemming in a sufficiently direct manner from breaches of the principles of the rule of law in a Member State, and not to impose penalties, per se, on such breaches.”⁵² Consequently, on the one hand, appropriate measures can be adopted only when breaches of the principles of the rule of law “affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.”⁵³ On the other hand, the sanctions “must be lifted where the impact on the implementation of the budget ceases, even though the breaches of the principles of the rule of law found may persist.”⁵⁴

Until the Covid-19 crisis, there was no instrument providing direct financial support linked to the implementation of reforms and investments by the Member States with the aim of ensuring and promoting the rule of law and no specific instrument providing for financial sanctions in the event of breaches of certain principles of the rule of law. The positive and negative conditionality established by the RRF Regulation and the

⁴⁸ European Commission, *Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget*, (2022) OJ C 123/12, para. 34.

⁴⁹ Art 22(5) RRF Regulation.

⁵⁰ Art 6 Conditionality Regulation. This allows Hungary to obtain a 55% suspension of some Union commitments – rather than the 65% proposed by the Commission – in exchange for the lifting of its veto on a minimum tax on multinationals and on financial aid to Ukraine. See M. Steinbeis, “We are Viktor Orbán”, *VerfBlog*, 2 December 2022.

⁵¹ Case C-156/21 *Hungary v Parliament and Council* EU:C:2021:974; case C-157/21 *Poland v Parliament and Council* EU:C:2021:978. On these cases, see M. Bonelli, “Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation” (2022) 7 *European Papers* 2, pp. 507–525; M. Fisicaro, “Protection of the Rule of Law and ‘Competence Creep’ via the Budget: The Court of Justice on the Legality of the Conditionality Regulation” (2022) *European Constitutional Law Review*, pp. 334–356.

⁵² Case C-157/21 *Poland v Parliament and Council*, *supra* note 51, para. 137.

⁵³ *Ibid.*, para. 125. The “sufficiently direct way” requirement was already present in the case law of the Court of Justice. See, for example: Case C-385/13 P *Italy v Commission* EU:C:2014:2350.

⁵⁴ Case C-157/21 *Poland v Parliament and Council*, *supra* note 51, para. 127.

Conditionality Regulation fulfils several functions: ensuring the enforcement of EU law – mainly regarding the principle of sound financial management of the EU budget – and prompting Member States to adopt regulatory and legislative measures, to introduce institutional reforms and to strengthen their capacity building. While the rule of law conditionality could prove particularly effective in reversing the decline of the rule of law, it nevertheless conveys a conception of the rule of law that could undermine its promotion (III).

III. The establishment of an economic conception of the rule of law

The adoption of the EU economic recovery package marks the development of conditionality as an integral component of the European policy on the rule of law.⁵⁵ The rule of law conditionality enables the Union to prompt or even to compel Member States to adopt reforms in line with the principles of the rule of law. However, the rule of law conditionality conveys a reduced conception of the rule of law on two levels. Firstly, the rule of law conditionality essentially benefits those dimensions of the rule of law that are conducive to growth and competitiveness, while other dimensions continue to be addressed by pre-existing – and often ineffective⁵⁶ – instruments. Secondly, the dimensions covered by the rule of law conditionality are themselves protected to a limited extent because of the economic conception of the rule of law promoted by the European institutions.

Firstly, drawing on the case law of the Court of Justice of the European Union and the European Court of Human Rights as well as the work of the Venice Commission,⁵⁷ the European Commission has developed a definition of the rule of law with reference to six principles: “legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law”.⁵⁸ A closer look at the instruments of rule of law conditionality – the RRF, the European Semester and the Conditionality Regulation – shows that they were primarily designed to restore growth and competitiveness through the promotion of the rule of law.

The RRF was first and foremost designed as an economic recovery instrument that aims to deliver “a resilient EU economy fit for the (green and digital) transitions.”⁵⁹ In other words, the RRF is intended to ensure “more sustainable and inclusive GDP growth.”⁶⁰

⁵⁵ A. Baraggia and M. Bonelli, *supra* note 43, p. 141.

⁵⁶ Such as Art 7 TEU, the rule of law dialogue or, to a certain extent, infringement procedures. See on this issue, among a vast body of literature: C. Closa and D. Kochenov (eds.), *Reinforcing rule of law oversight in the European Union* (Cambridge University Press 2016); A. Jakab and D. Kochenov (eds.), *The enforcement of EU law and values: ensuring Member States' compliance* (Oxford University Press 2017); A. von Bogdandy and M. Ioannidis, “Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done” (2014) *Common Market Law Review*, pp. 59–96; K. L. Scheppele, “Enforcing the Basic Principles of EU Law through Systemic Infringement Actions”, in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016), pp. 105–132.

⁵⁷ See notably the European Commission for Democracy through Law, *Report on the Rule of Law*, CDL-AD (2011) 003rev.

⁵⁸ European Commission, *A new Framework to strengthen the Rule of Law*, COM (2014) 158 final, p. 4. This definition was reiterated on several occasions, see, for example, European Commission, *2020 Rule of Law Report: The rule of law situation in the European Union*, COM (2020) 580, p. 1. It has been well received in the literature. See, for example: D. Kochenov, L. Pech and S. Platon, “Ni panacée ni gadget : le ‘nouveau cadre de l’Union européenne pour renforcer l’État de droit’” (2015) *Revue trimestrielle de droit européen*, pp. 689–714; A. Magen, “Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU” (2016) 54 *Journal of Common Market Studies* 5, pp. 1050–1061.

⁵⁹ European Commission, *Annual Sustainable Growth Survey 2022*, COM (2022) 740 final, p. 2.

⁶⁰ *Ibid.*

Therefore, the principles of the rule of law are envisioned as a factor of growth. In its guidance to Member States for their NRRPs, the Commission notes that “reforms linked to improving the business environment, an effective public administration, the effectiveness of justice systems, and in a broader sense respect of the rule of law are essential elements of the Member States’ overall recovery strategy.”⁶¹ Within the RRF, the European Commission therefore primarily links the rule of law to the justice system, the fight against corruption and fraud and the quality of the decision-making process. Those dimensions of the rule of law are, indeed, “crucial for a well-functioning business environment and sound public finances”.⁶² In particular, “where judicial systems guarantee the enforcement of rights, creditors are more likely to lend, businesses are dissuaded from opportunistic behaviour, transaction costs are reduced and innovative businesses are more likely to invest.”⁶³ In addition, the RRF Regulation places great emphasis on gender equality and equal opportunities for all, but without linking these principles to the rule of law.⁶⁴

When the Polish NRRP was approved on 14 June 2022⁶⁵ and the Hungarian NRRP on 15 December 2022,⁶⁶ the disbursement of EU funding was made conditional on the prior implementation of a series of reforms designed to improve the rule of law. Those reforms have been linked to the improvement of the investment climate.⁶⁷ The Polish government committed to addressing “challenges related to the investment climate, in particular with regard to the Polish judicial system and to decision-making and law-making processes.”⁶⁸ This commitment implies reforms intended to, on the one hand, “strengthen certain aspects of the independence and impartiality of courts; remedy the situation of judges affected by the decisions of the Disciplinary Chamber of the Supreme Court in disciplinary cases and judicial immunity cases with a view to their reinstatement following positive review proceedings by the new Chamber, to be conducted without delay.”⁶⁹ On the other hand, the improvement in the law-making process aims to “enhance the consultation of social partners in the law-making process; increase the use of impact assessments in the law-making process; reduce the use of fast-track procedures in the law-making process; ensure the proper consultation of social partners and stakeholders.”⁷⁰ In the case of Hungary, the Commission considers that “Hungary has a number of long-standing horizontal challenges related to the robustness and functioning of the public institutions

⁶¹ Commission staff working document, *Guidance to Member States – Recovery and Resilience Plans*, SWD (2021) 12 final, p. 9.

⁶² European Commission, “Thematic analysis: Rule of Law – Judicial Systems”, *supra* note 26, p. 1.

⁶³ *Ibid.*

⁶⁴ See Art 4(1) and 18(4o) and recital 28 RRF Regulation.

⁶⁵ Council Implementing Decision of 14 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland, 9728/22. See also European Commission, “NextGenerationEU: European Commission endorses Poland’s €35.4 billion recovery and resilience plan”, *press release*, 1 June 2022, Brussels.

⁶⁶ Council Implementing Decision of 15 December 2022 on the approval of the assessment of the recovery and resilience plan for Hungary, CM 5860/22. See also European Commission, “Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds”, *press release*, Brussels, 20 November 2022.

⁶⁷ *Annex to the proposal for a Council Implementing Decision of 15 December 2022 on the approval of the assessment of the recovery and resilience plan for Hungary*, COM (2022) 686 final – SWD(2022) 686 final, “Component 9: Governance and public administration”; *Annex to the Proposal for a Council Implementing Decision of 14 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland*, COM (2022) 268 final – SWD (2022) 161 final, “Component F: ‘Improving the quality of institutions and the conditions for the implementation of the RRP’”.

⁶⁸ Council Implementing Decision of 14 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland, *supra* note 65, recital 19.

⁶⁹ *Annex to the Proposal for a Council Implementing Decision of 14 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland*, *supra* note 67, “Component F: ‘Improving the quality of institutions and the conditions for the implementation of the RRP’”, pp. 200 et seq.

⁷⁰ *Ibid.*

in general, which has implications also on economic and social processes in the country.”⁷¹ Therefore, the Hungarian NRRP includes 27 “super milestones” which have to be fully implemented before any payment under the RRF can be made.⁷² These milestones concern reforms “to reinforce the anti-corruption framework, including by improving prosecutorial efforts and access to public information, to strengthen judicial independence, to ensure effective involvement of social partners and stakeholders in the policy-making process and to improve competition in public procurement.”⁷³

Reforms linked to the rule of law in the Polish and Hungarian NRRPs reflect the rationale behind the European Semester and the CSRs addressed to the two Member States.⁷⁴ In the context of the European Semester, the Commission considers that “continued efforts to strengthen the rule of law, in particular independent, quality and efficient justice systems and well-functioning anti-corruption frameworks, are essential for the soundness of Member States’ institutional resilience and a good business environment.”⁷⁵ An analysis of the CSRs addressed to Poland and Hungary highlights that, within the European Semester, the concept of the “rule of law” is mentioned in relation to justice systems⁷⁶ – the independence, quality and efficiency of which is monitored via the EU Justice Scoreboard.⁷⁷ With regard to Poland, the Council explained that “the rule of law has deteriorated, and judicial independence remains a serious concern” since “a stable and predictable business environment and a friendly investment climate play an important role in both the post-pandemic economic recovery and sustainable economic growth.”⁷⁸ The independence of the judiciary is generally linked to a “stable and predictable business environment,” which refers to the principles of legality and legal certainty. On several occasions, CSRs addressed to Poland⁷⁹ and Hungary⁸⁰ required them to “improve the quality and transparency of the decision-making process through effective social dialogue and engagement with other stakeholders and by regular, adequate impact assessments.”⁸¹ According to the Commission and the Council, “the lack of proper public and social partners’ consultations has a detrimental effect on the stability and robustness of the business environment, as well as on the quality of legislation.”⁸² This leads to frequent and

⁷¹ Annex to the proposal for a Council Implementing Decision of 15 December 2022 on the approval of the assessment of the recovery and resilience plan for Hungary, *supra* note 67, “Component 9: Governance and public administration”, pp. 86 et seq.

⁷² European Commission, “Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds”, *press release*, Brussels, 30 November 2022.

⁷³ Council Implementing Decision of 15 December 2022 on the approval of the assessment of the recovery and resilience plan for Hungary, *supra* note 66, recital 2.

⁷⁴ Annex to the proposal for a Council Implementing Decision of 15 December 2022 on the approval of the assessment of the recovery and resilience plan for Hungary, *supra* note 67, “Component 9: Governance and public administration”; Annex to the Proposal for a Council Implementing Decision of 14 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland, *supra* note 67, “Component F: ‘Improving the quality of institutions and the conditions for the implementation of the RRP’”.

⁷⁵ Communication from the Commission, 2022 European Semester – Spring Package, COM (2022) 600 final, p. 7.

⁷⁶ Paradoxically, while the independence of the Polish and Hungarian justice systems has been at the centre of the political debate and numerous legal proceedings, Poland has received a CSR on the subject on only two occasions (in 2020 and 2022) and Hungary on three occasions (in 2013, 2014 and 2022). On other occasions, the lack of independence is mentioned in the explanations, but is not the subject of recommendations.

⁷⁷ On the growth focus of the EU Justice Scoreboard, see L. Fromont, “La mise en chiffres de l’État de droit au sein du Semestre européen” (2023) *Revue interdisciplinaire d’Études juridiques* 2023, pp. 115–135.

⁷⁸ Council Recommendation of 12 July 2022 on the 2022 National Reform Programme of Poland and delivering a Council opinion on the 2022 Convergence Programme of Poland, (2022) OJ C 334/171, recital 29.

⁷⁹ In 2018, 2019, 2020 and 2022.

⁸⁰ In 2018, 2019, 2020 and 2022.

⁸¹ Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Hungary and delivering a Council opinion on the 2018 Convergence Programme of Hungary, (2018) OJ C 320/72.

⁸² Council Recommendation of 20 July 2020 on the 2020 National Reform Programme of Poland and delivering a Council opinion on the 2020 Convergence Programme of Poland, (2020) OJ C 282/135, recital 26.

unpredictable changes in regulations⁸³ and consequently to additional uncertainty and compliance costs for business.⁸⁴ Poland⁸⁵ and Hungary⁸⁶ are therefore also asked to improve the predictability, stability and transparency of the regulatory framework. Lastly, CSRs addressed to Hungary regularly deal with challenges related to the fight against corruption⁸⁷ – even if the Council Recommendations do not explicitly make a link with the rule of law.

In just the same way as the RRF and the European Semester, the Conditionality Regulation allows sanctions to be imposed for breaches of the principles of the rule of law that have an impact on growth. On 15 December 2022, the Council decided to activate the Conditionality Regulation as regards Hungary.⁸⁸ Although the suspension of the EU's budgetary commitments does not concern the RRF funds,⁸⁹ the corrective measures requested by the EU under the Conditionality Regulation and the reforms linked to the rule of law detailed in the Hungarian NRRP partly overlap.⁹⁰ Firstly, the Commission found serious systemic deficiencies and weaknesses in public procurement procedures and the fight against conflicts of interests. Secondly, it highlighted “limitations to the effective investigation and prosecution of alleged criminal activity, the organisation of prosecution services, and the absence of a functioning and effective corruption framework.”⁹¹ These limitations also relate to “a lack of effective judicial remedies by an independent court against decisions of the prosecution service not to investigate or prosecute alleged corruption, fraud and other criminal offences affecting the Union's financial interests.”⁹²

The attention paid to economic growth implies that the concept of the rule of law promoted by the rule of law conditionality does not correspond or only partially corresponds to that officially put forward by the EU. Indeed, the rule conditionality focuses only on those dimensions of the rule of law that are considered to be growth drivers: judicial systems, the fight against fraud, corruption and conflicts of interests, the quality of the decision-making process and, to a lesser extent, gender equality. Other dimensions, however, are under-represented. One of the major gaps that exists in the rule of law conditionality is the absence of further considerations about systemic fundamental rights violations, despite a backsliding on fundamental rights standards on the rule of law record of many Member States – regarding for example the rights of the LGBT people, the people with a migration background, etc.

It is worth highlighting that this economic conception of the rule of law promoted by the rule of law conditionality is similar to the conception developed by some international institutions.⁹³ For example, since the 1990s, the World Bank has understood the rule of law

⁸³ Council Recommendation of 9 July 2019 on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary, (2019) OJ C 301/101, recital 19.

⁸⁴ Council Recommendation of 12 July 2022 on the 2022 National Reform Programme of Poland and delivering a Council opinion on the 2022 Convergence Programme of Poland, *supra* note 78, recital 30.

⁸⁵ In 2018, 2019, 2020 and 2022.

⁸⁶ In 2013, 2014, 2016, 2017, 2018, 2019, 2020 and 2022.

⁸⁷ In 2014, 2015, 2016, 2017, 2018, 2019 and 2022.

⁸⁸ Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, (2022) OJ L325/94.

⁸⁹ The suspension concerns three operational programmes in cohesion policy: (1) Environmental and Energy Efficiency Operational Programme Plus; (2) Integrated Transport Operational Programme Plus; and (3) Territorial and Settlement Development Operational Programme Plus.

⁹⁰ Annex to the proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary, *supra* note 67, “Component 9: Governance and public administration”, pp. 86 et seq.

⁹¹ Council Implementing Decision (EU) 2022/2506, *supra* note 88, recital 12.

⁹² *Ibid.*

⁹³ For example, regarding the EU Justice Scoreboard, the European Commission uses studies from the International Monetary Fund, the Organisation for Economic Co-operation and Development, the World Economic Forum and the World Bank. See European Commission, 2022 EU Justice Scoreboard, COM (2022) 234 final, pp. 4–5.

as a concept which encompasses the characteristics essential to the functioning of the globalised economy.⁹⁴ In other words, the rule of law captures “perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police and the courts, as well as the likelihood of crime and violence.”⁹⁵

Secondly, not only does the rule of law conditionality cover only certain dimensions of the rule of law, but also by considering the rule of law as a factor for growth, the dimensions covered are themselves understood in a reductive manner. This is the case, for example, with the issue of gender equality, which is one of the principles undermined by illiberal regimes.⁹⁶ By referring exclusively to principles 2 and 3 of the EPSR, the RRF Regulation promotes a labour market-oriented understanding of gender equality, mainly focusing on equal treatment and equal opportunity issues.⁹⁷ Indeed, according to its recitals, reforms “based on solidarity, integration, social justice and a fair distribution of wealth should also be introduced with the aim of creating quality employment and sustainable growth”⁹⁸ and ensure the “economic empowerment of women.”⁹⁹ Therefore, as the European Commission has indicated itself, Member States have included in their NRRPs “a wide range of measures to tackle inequalities between women and men, in particular with regard to education, training and integration in the labour market.”¹⁰⁰ The European Parliament was “deeply concerned that most recovery and resilience plans fall short of significantly contributing to mainstreaming these objectives and fail to include explicit and concrete measures to address the issue of gender inequality.”¹⁰¹

Another example is to be found in the principle of independent and impartial courts. Judicial systems are mainly monitored through the EU Justice Scoreboard that was created in 2013 as a part of the European Semester and is now used to feed other mechanisms, such as the RRF and the rule of law report.¹⁰² The Scoreboard consists of a set of indicators relevant for the assessment of the efficiency, quality, and independence of justice systems in Member States. However, these indicators focus on certain aspects of the national justice system. The EU Justice scoreboard was designed to put an end to the “negative growth spiral”¹⁰³ the EU was facing following the 2008 economic and financial crisis and “to assist Member States in their efforts to create an environment, which is more efficient, better for investments as well as business, and citizen-friendly.”¹⁰⁴ This is why it covers

⁹⁴ D. Restrepo Amariles, “The mathematical turn: l’indicateur Rule of Law dans la politique de développement de la Banque Mondiale”, in B. Frydman and A. Van Waeyenberge (eds.), *Gouverner par les standards et les indicateurs. De Hume aux rankings* (Larcier 2013), p. 201. See D. M. Trubek and A. Santos, *The New Law and Economic Development* (Cambridge University Press 2010).

⁹⁵ D. Kaufmann, A. Kraay and M. Mastruzzi, “The Worldwide Governance Indicators: Methodology and Analytical Issues” (2010) *World Bank Policy Research Working Paper* 5430, p. 4. See also World Bank, *Legal and Judicial Reform: Strategic Direction* (World Bank 2003), pp. 1–2.

⁹⁶ S. Mancini and N. Palazzo, “The Body of the Nation: Illiberalism and Gender”, in A. Sajó, R. Uitz and S. Holmes (eds.), *Routledge Handbook of Illiberalism* (Routledge 2021), pp. 403 et seq.

⁹⁷ C. Bernardo et al, *supra* note 29, p. 40.

⁹⁸ Recital 4 RRF Regulation.

⁹⁹ *Ibid.*, recital 28.

¹⁰⁰ European Commission, “Recovery and Resilience Scoreboard: Thematic Analysis – Equality”, *supra* note 29, p. 6. On equality between men and women, see the report from the Commission, *Review report on the implementation of the Recovery and Resilience Facility*, COM (2022) 383 final, pp. 26 and 27. See also C. Bernardo et al, *supra* note 29, p. 9.

¹⁰¹ European Parliament resolution of 10 June 2021 on the views of Parliament on the ongoing assessment by the Commission and the Council of the national recovery and resilience plans, P9_TA (2021) 0288, para. 26.

¹⁰² See on the rule of law report: European Commission, *European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report*, 2022, available at https://commission.europa.eu/system/files/2022-07/rolm_methodology_2022.pdf.

¹⁰³ European Commission, *The EU Justice Scoreboard – A tool to promote effective justice and growth*, COM (2013) 160 final, p. 1.

¹⁰⁴ European Commission, *The 2023 EU Justice Scoreboard*, COM(2023) 309 final, p. 2.

civil, commercial and administrative cases and certain criminal cases that could have an impact on the business environment – such as cases concerning money laundering.¹⁰⁵ In addition to its limited scope, the objective of the Scoreboard is to enhance the effectiveness of Member States' justice systems, but not the quality of the justice being done. As A. Jakab and L. Kirchmair pointed out, the EU Justice Scoreboard “only measures whether a justice system is generally *capable* of delivering justice. It does not measure, however, whether it is *actually* working as an independent judiciary. Consequently, the outcome of the (Scoreboard) for a specific Member State might be a high justice score, as the justice system is well equipped with staff and computers, despite actually not guaranteeing the rule of law due to arbitrary and biased results. (...) Or to put it directly, bad justice can be very effective.”¹⁰⁶

It seems therefore that the rule of law conditionality is not without consequences for the concept of the rule of law. Both positive and negative conditionality focuses on those dimensions of the rule of law that are conducive to growth and neglect the others – or at least those that do not have a direct impact on growth. At the same time, it conveys a narrow understanding of certain principles of the rule of law – such as gender equality and judicial independence.

IV. Concluding remarks

The development of a rule of law conditionality through economic and budgetary instruments – the RRF, the European Semester and the Conditionality Regulation – leads to two main observations.

Firstly, for some time now, the EU institutions have been clarifying the concept of the rule of law – the normative content of which had long remained indeterminate. The rule of law conditionality participates in this clarifying exercise. But, as it is anchored in instruments designed to restore growth, the rule of law conditionality promotes a reductive normative conception of the rule of law – focusing on those dimensions of the rule of law considered to be growth drivers. To put it in another way, the rule of law conditionality leads to an “economisation” of the conception of the rule of law that could be defined as the process by which the rule of law is no longer a concept designed to set limits on the exercise of public power, but instead describes the essential characteristics that a legal system must have to ensure growth.

Secondly, the economisation process of the rule of law is achieved through the use of tools based on managerial logic, such as indicators, milestones and targets in the NRRPs, recommendations, etc.¹⁰⁷ Such tools are considered by the EU institutions as technical standards enabling an objective assessment of the situation of Member States with regard to certain principles of the rule of law. In other words, they “depoliticise” European rule of law standards by reducing them to technical questions that can be dealt with by experts. This process of economisation therefore takes place largely outside European and national parliamentary assemblies.

¹⁰⁵ *Ibid.*

¹⁰⁶ A. Jakab and L. Kirchmair, “How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way” (2021) *German Law Journal*, p. 950.

¹⁰⁷ These tools are inherent in the New Public Management: see notably, C. Harlow, *Accountability in the European Union* (Oxford University Press 2002); C. Hood, “A Public Management for All Seasons” (1991) 69 *Public Administration* 1, pp. 3–19; R. Parenteau (ed.), *Management public – Comprendre et gérer les institutions de l'État* (Presses de l'Université de Québec 1992); B. G. Peters, “Nouveau management public”, in L. Boussaguët, S. Jacquot and P. Ravinet (eds.), *Dictionnaire des politiques publiques* (Presses de Sciences Po 2010), pp. 398–404.

The rule of law conditionality could be effective in prompting Member States to implement reforms in the area of the rule of law. But, at the same time, by focusing on economic growth and by escaping, to a certain extent, parliamentary oversight, it leads to the minimisation of factors that have contributed to the rule of law crisis: the lack of a social dimension and of the legitimacy of the Union.