

# Rule of law conditionality in the EU budget

## A breakthrough for rule of law compliance or mere political window dressing?

---

*Corneel Debusscher*

*Onder wetenschappelijke begeleiding van:  
Prof.dr. E. Muir*

### INTRODUCTION

#### 1.1. LEGAL CONTEXT

##### *1.1.1. Rule of law crisis*

1. UNION OF COMMON VALUES UNDER PRESSURE – Article 2 TEU lists the founding values of the European Union (EU or Union) that are common to all Member States.<sup>1</sup> Several scholars point out that Article 2 TEU is not merely a symbolic declaration, but a binding legal text.<sup>2</sup> Consequently, the Article 2 values have a normative character.<sup>3</sup> This is reflected in the Treaties, *inter alia*, by

---

<sup>1</sup> Article 2 TEU states that: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

<sup>2</sup> WOUTERS describes Article 2 TEU as the grundnorm of European integration that is positioned on top of the EU’s constitution. LAVRANOS refers to it as the untouchable core of the EU legal order. See B. BAKÓ, “Hungary’s Latest Experiences with Article 2 TEU: The Need for ‘Informed’ EU Sanctions” in A. VON BOGDANDY, P. BOGDANOWICZ et al. (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (35) 61; D. KOCHENOV and L. PECH, “Better Late than Never? On the European Commission’s Rule of Law Framework and its First Activation”, *Journal of Common Market Studies* 2016, Vol. 54, No. 5, (1062) 1062-1064; N. LAVRANOS, “Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles” in P. CARROZZA, F. FONTANELLI and G. MARTINICO (eds.), *Shaping rule of law through dialogue: International and Supranational experiences*, Groningen, Europa Law Publishing, 2009, (119) 141-143; J.C. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 71-72; W. SCHROEDER, “The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?” in A. VON BOGDANDY, P. BOGDANOWICZ et al. (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (105) 112-114; J. WOUTERS, “Revisiting Art. 2 TEU: A True Union of Values?”, *European Papers - A Journal on Law and Integration* 2020, Vol. 5, No. 1, (255) 258.

<sup>3</sup> B. BAKÓ, “Hungary’s Latest Experiences with Article 2 TEU: The Need for ‘Informed’ EU Sanctions” in A. VON BOGDANDY, P. BOGDANOWICZ et al. (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (35) 61; W. SCHROEDER, “The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?” in A. VON BOGDANDY, P. BOGDANOWICZ et al. (eds.), *Defending Checks and Balances in EU Member States*, New York,

making compliance with the Article 2 values a prerequisite for EU Membership and by enabling the EU institutions to legally enforce these values vis-à-vis Member States.<sup>4</sup>

One of these founding values, as enshrined in Article 2 TEU, is the rule of law (RoL), dubbed by the European Commission (EC) as “*the backbone of any modern constitutional democracy*”.<sup>5</sup> Over the past decade, however, the Article 2 values have come under increasing pressure from illiberal tendencies within the Union’s territorial borders.<sup>6</sup> In the name of establishing a new political order based on traditional values and national sovereignty, the governments of certain Member States, such as Hungary and Poland, have begun to use their constitutional powers to counteract the proper functioning of their judiciaries and, ultimately, eliminate checks and balances.<sup>7</sup> As a result, these Member States have developed into so-called *illiberal constitutional democracies*<sup>8</sup>, sometimes – more frankly – referred to as *modern authoritarian regimes*<sup>9</sup>. The evolution of

---

Springer, 2021, (105) 112-114; A. VON BOGDANDY, “Towards a Tyranny of Values? Principles on Defending Checks and Balances in EU Member States” in A. VON BOGDANDY, P. BOGDANOWICZ et al. (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (73) 78-79.

<sup>4</sup> Article 7 and Article 49 TEU; W. SCHROEDER, “The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?” in A. VON BOGDANDY, P. BOGDANOWICZ et al. (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (105) 112-114; J. WOUTERS, “Revisiting Art. 2 TEU: A True Union of Values?”, *European Papers - A Journal on Law and Integration* 2020, Vol. 5, No. 1, (255) 258.

<sup>5</sup> EC, European Commission Communication, A new EU Framework to strengthen the Rule of Law, 11 March 2014, COM(2014) 158 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>, 2.

<sup>6</sup> Illiberalism in this context could be described as the tendency to relativise the principles of the RoL, democracy and human rights, while promoting populist nationalism and deploying methods of controlled state-level corruption. See T. DRIN’OCZI and A. BIEŃ-KACAŁA, “Illiberal Constitutionalism: The Case of Hungary and Poland”, *German Law Journal* 2019, Vol. 20, (1140) 1148-1149.

<sup>7</sup> B. BUGARIC and A. KUHELJ, “Varieties of Populism in Europe: Is the Rule of Law in Danger?”, *Hague Journal on the Rule of Law* 2018, Vol. 10, (21) 26-27; F. COSTA REIS and K. RAUBE, “The EU’s Crisis Response Regarding the Democratic and Rule of Law Crisis” in M. RIDDERVOLD, J. TRONDAL and A. NEWSOME (eds.), *The Palgrave Handbook of EU Crises*, London, Palgrave Macmillan, 2020, (627) 627-632; G. HALMAI, “Illiberalism in East-Central Europe”, *EUI Working Papers* 2019, Vol. 2019/05, (1) 1-5.

<sup>8</sup> T. DRIN’OCZI and A. BIEŃ-KACAŁA, “Illiberal Constitutionalism: The Case of Hungary and Poland”, *German Law Journal* 2019, Vol. 20, (1140) 1149-1151; G. HALMAI, “Populism, Authoritarianism, and Constitutionalism”, *German Law Journal* 2019, Vol. 20, Special Issue 3, (296) 296-313.

<sup>9</sup> Some authors, such as SCHEPPELE, HALMAI, and TÓTH, try to avoid the phrasing of illiberal constitutional democracies, arguing that these regimes are neither democratic, nor respect the principles of constitutionalism. See T. DRIN’OCZI and A. BIEŃ-KACAŁA, “Illiberal Constitutionalism: The Case of Hungary and Poland”, *German Law Journal* 2019, Vol. 20, (1140) 1149-1151; G. HALMAI, “Populism, Authoritarianism, and Constitutionalism”, *German Law Journal* 2019, Vol. 20, Special Issue 3, (296) 296-313; G.A. TÓTH, “Illiberal Rule of Law? Changing Features of Hungarian Constitutionalism” in M. ADAMS, A. MEUWESE and E. HIRSCH BALLIN (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge, Cambridge University Press, 2017, (386) 386-415.

RoL backsliding in these Member States and the inability of the EU to stop this is known among scholars as the RoL crisis.<sup>10</sup>

**2. THE METAPHORICAL TOOLBOX** – In response to this concerning development, the EU, spearheaded by the EC, has gradually but persistently created an arsenal of different legal methods – named *tools* – to ensure respect for the RoL among the Member States.<sup>11</sup> The entirety of this set of tools is known as the *RoL toolbox*.<sup>12</sup> By using the metaphor of a toolbox, the EU underlines the diversity of these tools, each of which serves a specific solution for the – equally diverse – subproblems that together constitute the RoL crisis.<sup>13</sup>

At the very heart of the EU's RoL toolbox is Article 7 TEU. The Article 7 procedure is an exceptional and last resort measure against *systemic*<sup>14</sup> breaches of the RoL by a Member State.<sup>15</sup> It consists of a preventive phase and a sanctioning phase, the latter of which may lead – at least in theory – to the suspension of the voting rights of the representative of the government of the

<sup>10</sup> C., CLOSA, “Institutional logics and the EU's limited sanctioning capacity under Article 7 TEU”, *International Political Science Review* 2021, Vol. 42, No. 4, (501) 507; R. CSEHI and E. ZGUT, “We won't let Brussels dictate us': Eurosceptic populism in Hungary and Poland”, *European Politics and Society* 2021, Vol. 22, No. 1, (53) 56-58; D. KOCHENOV and P. BARD, “Rule of Law Crisis in the New Member States of the EU The Pitfalls of Overemphasising Enforcement”, RECONNECT 2018, Working Paper No. 1, (1) 3.

<sup>11</sup> L. PECH, “The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox”, RECONNECT 2020, Working Paper No. 7, (1) 5-6.

<sup>12</sup> EC, Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union, 3 April 2019, COM(2019) 163 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>, 3-6; L. PECH, “The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox”, RECONNECT 2020, Working Paper No. 7, (1) 5-6.

<sup>13</sup> This is very graphically illustrated in certain EU policy documents. For example, see EC, The EU's Rule of Law toolbox – Factsheet, April 2019, [https://ec.europa.eu/info/sites/default/files/rule\\_of\\_law\\_factsheet.pdf](https://ec.europa.eu/info/sites/default/files/rule_of_law_factsheet.pdf), 1-4.

<sup>14</sup> The EP defines systemic breaches as breaches that “are widespread or are a result of recurrent practices or omissions by public authorities, or general measures adopted by such authorities”. They are described by VON BOGDANDY and IOANNIDIS as deficiencies that are spread throughout and affect the entire system of the Member State. LAVELLE adds that systemic breaches imply that a clear pattern of violations of fundamental values is visible. See Paragraph 9, 22 and 23 Resolution (EP) on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)), 8 July 2021, P9\_TA(2021)0348, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348_EN.html); M. IOANNIDIS and A. VON BOGDANDY, “Systemic deficiency in the rule of law: What it is, what has been done, what can be done”, *Common Market Law Review* 2014, Vol. 51, (59) 60; P. LAVELLE, “Europe's Rule of Law Crisis: An Assessment of the EU's Capacity to Address Systemic Breaches of Its Foundational Values in Member States” *Trinity College Law Review* 2019, Vol. 22, (35) 37-42.

<sup>15</sup> Paragraph 9 Resolution (EP) on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)), 8 July 2021, P9\_TA(2021)0348, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348_EN.html); EC, The EU's Rule of Law toolbox – Factsheet, April 2019, [https://ec.europa.eu/info/sites/default/files/rule\\_of\\_law\\_factsheet.pdf](https://ec.europa.eu/info/sites/default/files/rule_of_law_factsheet.pdf), 1; M. IOANNIDIS and A. VON BOGDANDY, “Systemic deficiency in the rule of law: What it is, what has been done, what can be done”, *Common Market Law Review* 2014, Vol. 51, (59) 60; P. LAVELLE, “Europe's Rule of Law Crisis: An Assessment of the EU's Capacity to Address Systemic Breaches of Its Foundational Values in Member States” *Trinity College Law Review* 2019, Vol. 22, (35) 37-42.

Member State concerned in the Council.<sup>16</sup> Due to the far-reaching sanctions that this procedure provides and the political sensitivity that it entails, the Article 7 procedure is often informally referred to as the *nuclear option*.<sup>17</sup> As a consequence, the Article 7 procedure has been heavily criticised in both the academic literature and the political discourse for being an unworkable tool.<sup>18</sup> This is demonstrated by the fact that – up until now – no sanctions have ever been imposed in practice as a result of this procedure.<sup>19</sup>

More effective in practice – but less far-reaching – is the second sanctioning tool, namely the infringement procedure of Article 258 TFEU. Article 258 TFEU allows the EC to go before the Court of Justice of the European Union (CJEU or Court) when it considers that a Member State has violated an obligation under EU law. The scope of the infringement procedure, however, is far more limited than the scope of the Article 7 procedure, since it can only be launched on the condition that a specific provision of Union law has been breached.<sup>20</sup> Although traditionally this condition was interpreted very

---

<sup>16</sup> Article 7 (1)-(3) TEU; EC, European Commission Communication, A new EU Framework to strengthen the Rule of Law, 11 March 2014, COM(2014) 158 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>, 5-6.

<sup>17</sup> The reputation of Article 7 TEU as being a nuclear option has been contested in recent years by authors such as KOCHENOV, PECH and SCHEPPELE. See D., KOCHENOV, “Article 7: A Commentary on a Much Talked-About ‘Dead’ Provision” in A. VON BOGDANDY, P. BOGDANOWICZ et al. (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (127) 135-140; L. PECH and K.L. SCHEPPELE, “Illiberalism Within: Rule of Law Backsliding in the EU”, *Cambridge Yearbook of European Legal Studies* 2017, Vol. 19, (3) 4-5.

<sup>18</sup> Scholars have given several reasons for this. CLOSA and HALMAI, for example, refer to the unanimity that is required in the European Council for the establishment of the existence of a serious and persistent breach, which allows two non-compliant Member States to team up and halt the entire procedure. Instead, PECH and SCHEPPELE, have pointed to the required supermajorities in both the Council and the European Parliament, which demands a great deal of political determination. D. SOYALTIN-COLELLA, on the contrary, argues that economic and ideological considerations are at the root of this problem. See C., CLOSA, “Institutional logics and the EU’s limited sanctioning capacity under Article 7 TEU”, *International Political Science Review* 2021, Vol. 42, No. 4, (501) 503-504; G. HALMAI, “The Possibility and Desirability of Rule of Law Conditionality”, *Hague Journal on the Rule of Law* 2018, Vol. 11, No. 1 (171) 172-174; L. PECH AND K. SCHEPPELE, “Illiberalism Within: Rule of Law Backsliding in the EU”, *Cambridge Yearbook of European Legal Studies* 2017, Vol. 19, (3) 25-26; D. SOYALTIN-COLELLA, “The EU’s “actions-without-sanctions”? The politics of the rule of law crisis in many Europes”, *European Politics and Society* 11 November 2020, (1) 1-17.

<sup>19</sup> Nevertheless, the preventive phase of the Article 7 procedure has been triggered on 20 December 2017 in relation to Polish judicial reforms by the EC and on 12 September 2018 against Hungary by the European Parliament. See Proposal (EC) for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, 20 December 2017, COM(2017) 835 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017PC0835>; Resolution (EP) of 12 September 2018 calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2017, 2017/2131(INL), [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html); P. SONNEVEND, “The Responsibility of Courts in Maintaining the Rule of Law: Two Tales of Consequential Judicial Self-Restraint” in A. VON BOGDANDY, P. BOGDANOWICZ et al. (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (155) 156-157.

<sup>20</sup> However, a minority of authors argue that that it is also possible – at least in theory – for the EC to use the infringement procedure against systemic RoL violations. See P. BOGDANOWICZ and M.

restrictively,<sup>21</sup> and the EC was reluctant to initiate proceedings in cases of *individual*<sup>22</sup> breaches of the RoL,<sup>23</sup> a shift has taken place in recent years. Most notably, in the 2018 *Associação Sindical dos Juizes Portugueses* judgment,<sup>24</sup> the Court *established*<sup>25</sup> that Article 19 (1), subparagraph 2 TEU constitutes a concrete expression of the RoL, which entrusts the responsibility for ensuring an effective and independent judicial review to both the CJEU and the national courts.<sup>26</sup> This allows the EC to bring a case before the CJEU under Article 258 TFEU for a breach of EU law, namely Article 19 (1), subparagraph 2 TEU, whenever national judges are under attack.<sup>27</sup> Nevertheless, the scope of the infringement procedure remains too limited to address the wider RoL crisis on its own. As Bakó put it: “*individual infringement procedures against some selected pieces of targeted legislation cannot solve the problem.*”<sup>28</sup>

Complementary to the Article 7 procedure and the infringement procedure, a great number of *soft* tools have been developed to counteract the RoL crisis.<sup>29</sup> These soft tools are primarily focussed on monitoring and promoting the RoL, rather than providing the EU with more sanctioning

SCHMIDT, “The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU”, *Common Market Law Review* 2018, Vol. 55, No 4, (1061) 1061-1100.

<sup>21</sup> KOVÁCS and SCHEPPELE explain that the infringement procedure has long been perceived to be limited to a specific set of technical violations. See K. KOVÁCS and K.L. SCHEPPELE, “The fragility of an independent judiciary: Lessons from Hungary and Poland—and the European Union”, *Communist and Post-Communist Studies* 2018, Vol. 51, No. 3, (189) 193.

<sup>22</sup> I.e. breaches that are not considered to be systemic.

<sup>23</sup> The EC has long held that so-called individual breaches of the RoL should be resolved by the national judicial systems and by the mechanisms established under the European Convention on Human Rights, rather than by the EU. See EC, European Commission Communication, A new EU Framework to strengthen the Rule of Law, 11 March 2014, COM(2014) 158 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>, 6-7.

<sup>24</sup> Court of Justice 27 February 2018, no. C-64/16, ECLI:EU:C:2018:117, *Associação Sindical dos Juizes Portugueses*, paragraph 32-42.

<sup>25</sup> MENZIONE, however, disputes the proposition that this line of reasoning can be truly traced back to the *Associação Sindical dos Juizes Portugueses* judgment. Instead, she argues that this judgment is a mere continuation of the case law of the CJEU since the very beginning of the EU integration process. See S. MENZIONE, “Case Note: Anything New under the Sun? An Exercise in Defence of the Reasoning of the CJEU in the ASJP Case”, *Review of European Administrative Law* 2019-20, Vol. 12, No. 2, (219) 219-236.

<sup>26</sup> The Court has repeated this reasoning in a number of cases, *inter alia*, in the *Commission v. Poland* cases: ‘C-192/18 *Commission v. Poland*’ and ‘C-791/19 *Commission v. Poland*’. See F. COSTA REIS and K. RAUBE, “The EU’s Crisis Response Regarding the Democratic and Rule of Law Crisis” in M. RIDDERVOLD, J. TRONDAL and A. NEWSOME, *The Palgrave Handbook of EU Crises* (eds.), London, Palgrave Macmillan, 2020, (627) 638-640; L. PECH and S. PLATON, “Judicial independence under threat: The Court of Justice to the rescue in the ASJP case”, *Common Market Law Review* 2018, Vol. 55, (1827) 1828.

<sup>27</sup> G., HALMAI, “The Possibility and Desirability of Rule of Law Conditionality”, *Hague Journal on the Rule of Law*, Vol. 11, No. 1, (171) 179-180.

<sup>28</sup> B. BAKÓ, “Hungary’s Latest Experiences with Article 2 TEU: The Need for ‘Informed’ EU Sanctions” in A. VON BOGDANDY, P. BOGDANOWICZ et al. (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (35) 53.

<sup>29</sup> L. PECH, “The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox”, RECONNECT 2020, Working Paper No. 7, 5-6.

capacity. They include the RoL Framework,<sup>30</sup> the EU Justice Scoreboard,<sup>31</sup> the European Semester,<sup>32</sup> the Council's Annual RoL Dialogue,<sup>33</sup> the European RoL Mechanism,<sup>34</sup> the Cooperation and Verification Mechanism,<sup>35</sup> and the Structural Reform Support Services.<sup>36</sup> While a *soft* approach of dialogue and cooperation resonates more closely with the Union's very ethos of consensus-seeking and mutual accommodation,<sup>37</sup> it does not appear to be the most adequate solution in the context of the RoL crisis. As Kochenov and Pech point out, a soft approach is bound to fail in cases where national authorities actively pursue a strategy of persistently disrespecting the principles of the RoL.<sup>38</sup> Moreover, the EU risks creating a scenario in which it *appears* to be defending the RoL, while in reality leaving malicious national governments unopposed, a phenomenon which Roth refers to as a "*façade of action*".<sup>39</sup>

---

<sup>30</sup> In 2014, the EC introduced the RoL Framework, i.e. a pre-article 7 tool which allows for a more structured dialogue with and monitoring of Member States where systemic RoL backsliding is or might be happening. See EC, European Commission Communication, A new EU Framework to strengthen the Rule of Law, 11 March 2014, COM(2014) 158 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>, 1-9.

<sup>31</sup> The EU Justice Scoreboard is a tool created in 2013 which allows the EC to present an annual report comparing the national justice systems of the EU Member States in terms of efficiency, quality and independence, in order to identify trends over time. For an overview of all reports, see [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en); A. STRELKOV, "EU Justice Scoreboard: a new policy tool for 'deepening' European integration?", *Journal of Contemporary European Studies* 2019, Vol. 27, No. 1, (15) 15-27.

<sup>32</sup> The European Semester is a framework that enables Member States to coordinate their economic and social policies, which in recent years has been considered a RoL tool as it is increasingly used by the EC to make country-specific recommendations in the areas of anti-corruption, the judicial system and public administration. See E. CRABIT, "Upholding the rule of law for the future of Europe" in W. HEUSEL and J.-P. RAGEADE (eds.), *The Authority of EU Law. Do We Still Believe in It?*, Trier, Springer, 2019, (261) 266-268.

<sup>33</sup> The Council organises an annual dialogue, where it discusses topics related to the RoL with the EU Member States. See P. OLIVER and J. STEFANELLI, "Strengthening the Rule of Law in the EU: The Council's Inaction", *Journal of Common Market Studies* 2016, Vol. 54, No. 5, (1075) 1075-1084.

<sup>34</sup> The European RoL Mechanism comprises an annual dialogue between the EC, the Council and the European Parliament together with the EU Member States and their national parliaments, civil society and other stakeholders. As part of the mechanism, an annual RoL Report is published. For an overview of all reports, see EC, Rule of law mechanism, [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en).

<sup>35</sup> The Cooperation and Verification Mechanism assists Romania and Bulgaria in addressing shortcomings in the areas of judicial reform, the fight against corruption and - for Bulgaria - organised crime, by regularly monitoring, assessing and making recommendations. See EC, The EU's Rule of Law toolbox - Factsheet, April 2019, [https://ec.europa.eu/info/sites/default/files/rule\\_of\\_law\\_factsheet.pdf](https://ec.europa.eu/info/sites/default/files/rule_of_law_factsheet.pdf), 2.

<sup>36</sup> The EC's Structural Reform Support Services provides technical know-how to Member States carrying out structural reforms. See EC, Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union, 3 April 2019, COM(2019) 163 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>, 5.

<sup>37</sup> J.W. MÜLLER, "Should the EU Protect Democracy and the Rule of Law inside Member States?", *European Law Journal* 2015, Vol. 21, No. 2, (141) 160.

<sup>38</sup> D. KOCHENOV and L. PECH, "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality", *European Constitutional Law Review* 2015, Vol. 11, No. 3, (512) 532-533.

<sup>39</sup> "There is nothing inherently wrong with dialogue and cooperation to promote human rights. Persuading a government through dialogue to genuinely cooperate with efforts to improve its human

### 1.1.2. Rule of law conditionality

**3. A NEW TOOL** – The search for adequate tools has been a key issue throughout the RoL crisis. From the outset, EU officials have stressed the need for a more diverse selection of methods to defend the RoL. As former EC President Barroso already proclaimed in 2012, an alternative should be available between political dialogue and the nuclear option.<sup>40</sup> Simultaneously, stakeholders increasingly began to highlight the economic dimension of RoL compliance, arguing that adherence to the RoL is inherently connected with economic growth in the Member States, the sound management of EU funds and a favourable investment climate.<sup>41</sup> In response to this twofold concern, the EC developed a new tool. On 2 May 2018, it submitted a proposal for the introduction of a mechanism that would make the receipt of EU funds conditional upon compliance with the RoL, named the RoL conditionality mechanism.<sup>42</sup>

In short, the RoL conditionality mechanism envisaged by the EC foresaw the possibility for the EU to suspend, cut or freeze entire funds from its 2021-2027 budget to Member States where, first, the principles of the RoL are being breached, and second, these breaches negatively affect the Union's financial interests or the sound financial management of the EU budget.<sup>43</sup> With its proposal, the EC aimed to enhance the EU's ability to respond to situations where the implementation of Union funds was at risk due to RoL violations.<sup>45</sup>

---

rights record is a key goal of human rights advocacy. [...] But when the problem is a lack of political will to respect rights, [...] the quest for dialogue and cooperation becomes a charade designed more to appease critics of complacency than to secure change, a calculated diversion from the fact that nothing of consequence is being done." See K. ROTH, "A Facade of Action: The Misuse of Dialogue and Cooperation with Rights Abusers", World Report 2011, <https://www.hrw.org/world-report/2011/country-chapters/africa-americas-asia-europe/central-asia-middle-east/north-afric-0>.

<sup>40</sup> "We need a better developed set of instruments, not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of Article 7 TEU." See J.-V. LOUIS, "Respect de l'état de droit et protection des finances de l'Union", Cahiers droit européen 2021, Vol. 1, (3) 4.

<sup>41</sup> G. WESTERWELLE, F. TIMMERMANS, V. SØVNDAL and E. TUOMIOJA, Letter to Mr. José Manuel Barroso President of the European Commission, 6 March 2013, [https://www.tweedekamer.nl/kamerstukken/brieven\\_regering/detail?id=2013Z04972&did=2013D10359\\_1-2](https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2013Z04972&did=2013D10359_1-2); J. ŠELIŠ, I. BOND and C. DOLAN, "Can EU funds promote the rule of law in Europe?", Centre for European reform 21 November 2017, (1) 3.

<sup>42</sup> Proposal (EC) 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, 2 May 2018, COM/2018/324 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0324>.

<sup>43</sup> Including the EU funds allocated to help Member States recover from the COVID-19 crisis, known as the Next Generation EU Recovery Fund. See A. BERRAMDANE, "Conditionnalité budgétaire ou conditionnalité de l'État de droit ?", RDUE 2021, No. 1, (155) 155-156; N. DE SADELEER, "Le plan de relance Next Generation EU. Du changement de cap budgétaire à l'ingénierie institutionnelle", RAE 2020, No. 3, (607) 607-608; G. TARTAGLIA POLCINI et al., "German Federal Constitutional Court Paves Way for EU's Recovery Instrument", Eucrium 2021, Vol. 2, (86) 86-87.

<sup>44</sup> Article 3 and 4 Proposal (EC) 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, 2 May 2018, COM/2018/324 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0324>.

<sup>45</sup> Title 4 of the Explanatory Memorandum of Proposal (EC) for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised

**4. CLASSIFICATION OF CONDITIONALITY** – Conditionality can be defined as an incentive instrument whereby one party attempts to induce a specific behaviour in another party by making the predetermined behaviour conditional upon a (material) benefit.<sup>46</sup> The term *political* conditionality is used when the intended behaviour concerns the observance of human rights, democracy, the RoL and/or good governance, including the prevention of corruption by public authorities.<sup>47</sup>

Traditionally, political conditionalities are classified along two dimensions. Firstly, a distinction is made between *ex ante* and *ex post* conditionalities. *Ex ante* conditionality refers to the situation where a certain behaviour has to be achieved at a certain point in time, as a precondition to receive the benefit.<sup>48</sup> In cases of *ex post* conditionality, however, the behaviour must be applied over a longer period of time, making it an objective rather than a one-time precondition.<sup>49</sup> Secondly, political conditionalities can be classified as positive conditionalities, which aim to reward and incentivise, or negative conditionalities, which have a punitive character.<sup>50</sup> The type of conditionality that will be focused on in this research is *ex post* negative political conditionality.<sup>51</sup>

**5. CONDITIONALITY AND THE EU** – Conditionality is a longstanding EU policy instrument, historically confined to the Union’s foreign policy and accession policy.<sup>52</sup> Noteworthy in this regard is the EU’s Membership conditionality, a form of *ex ante* positive conditionality that makes accession to the EU subject to the fulfilment of certain political and economic preconditions, known as the

---

deficiencies as regards the rule of law in the Member States, 2 May 2018, COM/2018/324 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0324>.

<sup>46</sup> S. KOCH, “A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union”, *World Development* 2015, Vol. 75, (97) 99.

<sup>47</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 70; G. SORENSEN, *Political Conditionality*, London, Routledge, 1993, 1-2.

<sup>48</sup> S. KOCH, “A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union”, *World Development* 2015, Vol. 75, (97) 99-100; O. STOKKE, “Aid and Political Conditionality: The Case of Norway” in O. STOKKE (ed.), *Aid and Political Conditionality*, London, Frank Cass/EADI, 1995, (162) 163; V. VIȚĂ, “Research for REGI Committee—Conditionalities in Cohesion Policy”, Policy Department for Structural and Cohesion Policies - European Parliament 2018, (1) 18.

<sup>49</sup> S. KOCH, “A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union”, *World Development* 2015, Vol. 75, (97) 99-100; O. STOKKE, “Aid and Political Conditionality: The Case of Norway” in O. STOKKE (ed.), *Aid and Political Conditionality*, London, Frank Cass/EADI, 1995, (162) 163; V. VIȚĂ, “Research for REGI Committee—Conditionalities in Cohesion Policy”, Policy Department for Structural and Cohesion Policies - European Parliament 2018, (1) 18.

<sup>50</sup> S. KOCH, “A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union”, *World Development* 2015, Vol. 75, (97) 99-100; O. STOKKE, “Aid and Political Conditionality: The Case of Norway” in O. STOKKE (ed.), *Aid and Political Conditionality*, London, Frank Cass/EADI, 1995, (162) 163; V. VIȚĂ, “Research for REGI Committee—Conditionalities in Cohesion Policy”, Policy Department for Structural and Cohesion Policies - European Parliament 2018, (1) 18.

<sup>51</sup> Note, when this research refers to ‘political conditionality’, it should always be understood as ‘ex post negative political conditionality’, unless otherwise specified.

<sup>52</sup> V. VIȚĂ, “Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality”, *Cambridge Yearbook of European Legal Studies* 2017, (116) 116-117.



Copenhagen criteria.<sup>53</sup> One of these preconditions is RoL compliance.<sup>54</sup> The Copenhagen criteria were introduced in 1993 as a response to the EC's decision to open up the way for enlargement to the Central and Eastern European countries (which had previously been part of Yugoslavia or the Soviet Union).<sup>55</sup> The existing mismatch between the EU's ability to impose political conditionality before accession and its inability to ensure continued compliance among its Member States after accession, is referred to in the academic literature as the *Copenhagen dilemma*.<sup>56</sup>

As of 1994, conditionality found its way into EU internal policy by the introduction of macro-economic conditionality.<sup>57</sup> In the following decades, the presence of conditionality in the EU budget grew as new conditionalities going beyond the macro-economic level were implemented.<sup>58</sup> Despite conditionality already being a well-established policy tool in the EU budget, the new RoL conditionality mechanism has sent shockwaves throughout the political and

<sup>53</sup> The Copenhagen criteria are named after the Copenhagen European Council in 1993. They were further developed by the Madrid European Council in 1995 and are now enshrined in article 49 TEU. See Recital 4 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, 22 December 2020, OJ L 433I, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R2092&qid=1615131825399>; F. SCHIMMELFENNIG, "The EU: Promoting Liberal-Democracy through Membership Conditionality" in T. FLOCKHART (ed.), *Socializing Democratic Norms - The Role of International Organizations for the Construction of Europe*, London, Palgrave Macmillan Ltd, 2005, (106) 118; A.F. TATHAM, "Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon" in A. BIONDI et al. (eds.), *EU Law After Lisbon*, Oxford, Oxford University Press, 2012, (128) 131-132.

<sup>54</sup> C. HILLION, "The Copenhagen Criteria and Their Progeny" in C. HILLION (ed.), *EU Enlargement: A Legal Approach*, Oxford, Hart Publishing, 2004, (1) 2-3; K.E. SMITH, "The Evolution and Application of EU Membership Conditionality" in M. CREMONA (ed.), *The Enlargement of the European Union*, Oxford, Oxford University Press, 2003, (105) 113-114; A.F. TATHAM, "Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon" in A. BIONDI et al. (eds.), *EU Law After Lisbon*, Oxford, Oxford University Press, 2012, (128) 131-132.

<sup>55</sup> F. SCHIMMELFENNIG, "The EU: Promoting Liberal-Democracy through Membership Conditionality" in T. FLOCKHART (ed.), *Socializing Democratic Norms - The Role of International Organizations for the Construction of Europe*, London, Palgrave Macmillan Ltd, 2005, (106) 120; K.E. SMITH, "The Evolution and Application of EU Membership Conditionality" in M. CREMONA (ed.), *The Enlargement of the European Union*, Oxford, Oxford University Press, 2003, (105) 113-114; A.F. TATHAM, "Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon" in A. BIONDI et al. (eds.), *EU Law After Lisbon*, Oxford, Oxford University Press, 2012, (128) 131-132.

<sup>56</sup> A. ÁGH, "The EU Polycrisis and Hard Populism in East-Central Europe: From the Copenhagen Dilemma to the Juncker Paradox", *Politics in Central Europe* 2017, Vol. 13, No. 2, (7) 7-8; S. CARRERA, E. GUILD and N. HERNANZ, "The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU", CEPS 2013, (1) 2-4; M. FISCARO, "Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values", *European Papers - A Journal on Law and Integration* 2020, Vol. 4, No. 3, (695) 715-716.

<sup>57</sup> V. VIŤÁ, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* 2017, (116) 129-130.

<sup>58</sup> With an exponential increase of conditionalities in the MFF of 2014-2020 as a response to the Eurozone crisis. See P. BERKOWITZ, A. CATALINA RUBIANES and J. PIENKOWSKI, "The European Union's experiences with policy conditionalities", OECD 2018, (1) 13-14.

academic landscape,<sup>59</sup> as it constitutes – in the words of Viță – “*financially - the most powerful, legally - the most challenging, politically - the most important, and constitutionally - by far the most significant EU conditionality ever proposed in EU internal policies*”.<sup>60</sup>

## 1.2. STATE OF THE ART

### 1.2.1. Overview

**6. THE POLITICAL BATTLE FOR CONDITIONALITY** – It was not the EC that first suggested making the EU budget conditional upon compliance with the Article 2 values. This idea can be traced back to the Foreign Affairs Ministers of four Member States,<sup>61</sup> who already in 2013 envisaged RoL conditionality in a letter addressed to the then-President of the EC, Barroso.<sup>62</sup> Several years later, in anticipation of the 2021-2027 Multiannual Financial Framework (MFF), the notion of RoL conditionality gained momentum again. Statements were issued by national governments and their senior officials, urging a reconsideration of RoL conditionality during the upcoming MFF negotiations.<sup>63</sup> The German government and Länder, for example, declared in a joint statement of 2017 that RoL conditionality “*would be worth exploring*”.<sup>64</sup>

In Brussels too, this idea began to take root. Former European Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding, stated that RoL conditionality “*would be the most effective way to influence the behaviour of a government like the Polish one [...] It’s the only thing they understand*” (emphasis added).<sup>65</sup> Following the EC’s proposal, this rhetoric only intensified. A minority of institutional actors, however, were not satisfied with the new mechanism. Most notably, former EC President Juncker called the

<sup>59</sup> For an overview of the most important novelties, cf. infra.

<sup>60</sup> V. VIȚĂ, “Research for REGI Committee—Conditionalities in Cohesion Policy”, Policy Department for Structural and Cohesion Policies - European Parliament 2018, (1) 47.

<sup>61</sup> I.e. Denmark, Finland, Germany and the Netherlands.

<sup>62</sup> “A variety of options could then be explored to foster compliance [...] As a last resort, the suspension of EU funding should be possible.” See G. WESTERWELLE, F. TIMMERMANS, V. SØVNDAL and E. TUOMIOJA, Letter to Mr. José Manuel Barroso President of the European Commission, 6 March 2013, [https://www.twedeekamer.nl/kamerstukken/brieven\\_regering/detail?id=2013Z04972&did=2013D10359](https://www.twedeekamer.nl/kamerstukken/brieven_regering/detail?id=2013Z04972&did=2013D10359), 2; J. ŠELIĤ, I. BOND and C. DOLAN, “Can EU funds promote the rule of law in Europe?”, Centre for European reform 21 November 2017, (1) 7.

<sup>63</sup> FES-EXPERT GROUP, “The Other Democratic Deficit A Toolbox for the EU to Safeguard Democracy in Member States”, Friedrich-Ebert-Stiftung 2016, (1) 13; J. ŠELIĤ, I. BOND and C. DOLAN, “Can EU funds promote the rule of law in Europe?”, Centre for European reform 21 November 2017, (1) 7.

<sup>64</sup> THE GERMAN FEDERAL GOVERNMENT, Joint statement by the German government and the German Länder on EU Cohesion Policy beyond 2020, 20 June 2017, <https://www.bmwi.de/Redaktion/EN/Downloads/S-T/stellungnahme-bund-lander-kohaesionspolitik.html>, 3.

<sup>65</sup> J. STEARNS, “Europe’s Eastern Rebels Expose Next Fault Line for EU Leaders”, Bloomberg 2017, <https://www.bloomberg.com/news/articles/2017-07-30/europe-s-eastern-rebels-expose-next-fault-line-for-eu-leaders>.

mechanism “*poison for the continent*”, arguing that he preferred “*sensible discussions [...] without moving into threatening gestures*”.<sup>66</sup>

Unsurprisingly, the Hungarian and Polish governments were equally opposed to any form of political conditionality in the EU budget.<sup>67</sup> Notwithstanding, its introduction had become a *sine qua non* for several Member States, as well as for the European Parliament (EP) and the Council.<sup>68</sup> This strong determination on both sides of the political arena led to an impasse, as the MFF had to be adopted by unanimity.<sup>69</sup> After long negotiations, which resulted in a political agreement that the mechanism would not be initiated until the CJEU had ruled on its validity,<sup>70</sup> the RoL conditionality mechanism finally drew breath, coming into force on 1 January 2021.<sup>71</sup>

**7. THE SCHOLARLY RESPONSE** – Confidence in the effectiveness of conditionality as a means to improve RoL compliance among Member States has not been confined to the political debate. A similar trend can be observed in the academic literature, where a number of authors openly express their enthusiasm towards the introduction of RoL conditionality in the EU budget. Kirst, for instance, claims that the new mechanism “*will undoubtedly have an impact on the actions of those Member State governments currently violating the [RoL]*”.<sup>72</sup> The FES-expert group calls it a “*very effective option for improving the tame procedures under Article 7*”, adding that it would provide “*a strong incentive for those member states to engage constructively with the [EC]*”.<sup>73</sup> Halmai, for his part, states that “*the threat of economic sanctions can be very effective*”, especially for Member States that are “*very dependent on EU funding*”. The same hope is repeated – sometimes implicitly – in numerous

---

<sup>66</sup> G. HALMAI, “The Possibility and Desirability of Rule of Law Conditionality”, *Hague Journal on the Rule of Law* 2018, Vol. 11, No. 1 (171) 183; F. HEINEMANN, “Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework”, *Intereconomics* 2018, Vol. 53, No. 6, (297) 297-298.

<sup>67</sup> M. FISCARO, “Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values”, *European Papers - A Journal on Law and Integration* 2020, Vol. 4, No. 3, (695) 698.

<sup>68</sup> N. KIRST, “Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?”, *European Papers - A Journal on Law and Integration* 2021, Vol. 6, No. 1, (101) 104.

<sup>69</sup> Article 312 (2) TEU; C. HILLION, “Compromising (on) the general conditionality mechanism and the rule of law”, *Common Market Law Review* 2021, Vol. 58, (267) 268-269.

<sup>70</sup> However, since this political agreement is not legally binding and because this procedure does not have a suspensory effect, the RoL conditionality mechanism could – at least in theory – be initiated as of 1 January 2021. See Motion for a Resolution (EP) to wind up the debate on the statement by the Commission pursuant to Rule 132(2) of the Rules of Procedure on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)), 17 March 2021, B9-0208/2021, [https://www.europarl.europa.eu/doceo/document/B-9-2021-0208\\_EN.html](https://www.europarl.europa.eu/doceo/document/B-9-2021-0208_EN.html), paragraph 12.

<sup>71</sup> Article 10 Regulation (EU, Euratom) 2020/2092.

<sup>72</sup> N. KIRST, “Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?”, *European Papers - A Journal on Law and Integration* 2021, Vol. 6, No. 1, (101) 110.

<sup>73</sup> FES-EXPERT GROUP, “The Other Democratic Deficit: A Toolbox for the EU to Safeguard Democracy in Member States”, *Friedrich-Ebert-Stiftung* 2016, (1) 14.

other academic contributions, yet an empirical justification for these claims is virtually non-existent.<sup>74</sup>

**8. THE ASSUMPTION** – As demonstrated by the above, an underlying assumption appears to be steering a vast proportion of the political and academic discourse. It is presumed that **the introduction of new political conditionalities in the EU budget is likely to positively affect RoL compliance in the Member States where the principles of the RoL are being breached**. This proposition forms the very foundation and starting point of this contribution and will – for the purpose of readability – be further referred to as **“the Assumption”**.

**9. CHALLENGING THE ASSUMPTION** – When looking beyond the literature on the RoL conditionality mechanism, the Assumption does not seem as self-evident as several authors seem to suggest. In fact, as Koch points out, the effectiveness of political conditionality as a means to positively affect compliance is a heavily debated topic.<sup>75</sup> This debate occupies a central position in the literature on conditionality in the areas of EU foreign aid policy, accession policy and, to a lesser extent, trade policy.<sup>76</sup> Furthermore, a similar debate has been going on for several decades outside the context of the EU, and even outside the context of conditionality, particularly in the field of international sanction law.<sup>77</sup>

Against the background of the new RoL conditionality mechanism, a small minority of scholars have pointed to the aforementioned literature to raise questions surrounding the validity of the Assumption. By doing so, these scholars bring the debate on the effectiveness of political conditionality into the realm of EU internal policy and establish a basis for future research on this topic. Viță, first of all, draws on literature on international economic sanctions to challenge the Assumption.<sup>78</sup> In this body of literature, a set of preconditions for compliance have been set out. Viță applies these preconditions to the EU context in order to examine what this implies for the plausibility of the

---

<sup>74</sup> See for example: P. BARD, B. GRABOWSKA-MOROZ et al., “The strategies and mechanisms used by national authorities to systematically undermine the Rule of Law and possible EU responses”, RECONNECT 2020, Work Package 8 – Deliverable 2, (1) 60; M. BONELLI, “Carrots, Sticks, and the Rule of Law. EU political conditionality before and after accession”, IANUS 2017, Vol. 15, (171) 190-196; G. DELLA CANANEA, “On Law and Politics in the EU: The Rule of Law Conditionality”, Italian Journal of Public Law 2021, Vol. 13, No. 1, (1) 2-3; M. KÖLLING, “Policy conditionality – a new instrument in the EU budget post-2020?”, SIEPS European Policy Analysis 2017, Vol. 1, (1) 1; A. MATTELAER, “Exploring the Boundaries of Conditionality in the EU”, European Policy Brief 2018, No. 51, (1) 4-5.

<sup>75</sup> S. KOCH, “A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union”, *World Development* 2015, Vol. 75, (97) 104.

<sup>76</sup> S. Koch, “A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union”, *World Development* 2015, Vol. 75, (97) 104.

<sup>77</sup> See e.g. B. Kingsbury, “The Concept of Compliance as a Function of Competing Conceptions of International Law”, *Michigan Journal of International Law* 1998, Vol. 19, No. 2, 345-372.

<sup>78</sup> V. Viță, “Research for REGI Committee—Conditionalities in Cohesion Policy”, *Policy Department for Structural and Cohesion Policies - European Parliament* 2018, (1) 51-52.

Assumption.<sup>79</sup> Furthermore, Blauburger and van Hüllen, adopt the same strategy as Viță, but go one step further. In addition to literature on international economic sanctions, they rely on literature on EU accession conditionality to create a more advanced framework of preconditions,<sup>80</sup> which they claim the RoL conditionality mechanism should meet if it wishes to improve RoL compliance among the EU Member States.<sup>81</sup>

Interestingly, Kochenov points to the ineffectiveness of penalties as a means to achieve compliance, yet he argues that RoL conditionality in the EU budget is “*likely to bring about speedy change [as] the populist government running out of cash will have to change its course*”<sup>82</sup>. Kochenov hereby argues that a dichotomy exists between the effectiveness of traditional international economic sanctions and the effectiveness of political conditionality in EU internal policy as a means to positively affect RoL compliance.<sup>83</sup> None of these authors, however, use empirical data to back their claims.

**10. THE GAP OF KNOWLEDGE** – The state of the art reveals a twofold gap of knowledge in the literature. First, the likelihood of political conditionality as a means to improve RoL compliance has been under-researched so far in the EU internal policy context. In other contexts, however, this is a seriously debated issue. Second, empirical data on the effects of pre-existing political conditionalities in the EU budget is currently missing in the debate.

### 1.3. METHODOLOGY

#### 1.3.1. Research objectives

**11. AN EXPLORATORY IMPACT ASSESSMENT** – The envisaged research is an exploratory impact assessment of the new RoL conditionality mechanism. To fully grasp the objectives of this research, it seems fruitful to elaborate on the notions of *exploratory* and *impact assessment*.

Exploratory research is explained by Swedberg as “*an attempt to discover something new*”.<sup>84</sup> An exploratory approach is by its nature highly

<sup>79</sup> V. Viță, “Research for REGI Committee—Conditionalities in Cohesion Policy”, *Policy Department for Structural and Cohesion Policies - European Parliament* 2018, (1) 51-52.

<sup>80</sup> **Pro memoria, EU accession conditionality is a form of *ex ante*, positive conditionality. See *supra* paragraph 5, subparagraph 1.**

<sup>81</sup> M. Blauburger and V. van Hüllen, “Conditionality of EU funds: an instrument to enforce EU fundamental values?”, *Journal of European Integration* 2021, Vol. 43, No.1, (1) 1-16.

<sup>82</sup> D., Kochenov, “Article 7: A Commentary on a Much Talked-About ‘Dead’ Provision” in A. von Bogdandy, P. Bogdanowicz et al. (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (127) 136-145.

<sup>83</sup> **A similar line of reasoning can be found in the research of the FES-expert group.** See FES-expert group, “The Other Democratic Deficit A Toolbox for the EU to Safeguard Democracy in Member States”, *Friedrich-Ebert-Stiftung* 2016, (1) 14.

<sup>84</sup> R. Swedberg, “Exploratory Research” in C. Elman, J. Gerring and J. Mahoney (eds.), *The Production of Knowledge*, Cambridge, Cambridge University Press, 2020, (17) 17.

ambitious, yet at the same time also rather modest. It tries to go beyond repeating what is already known, thereby aiming to push science forward.<sup>85</sup> Meanwhile, exploratory research does not attempt to validate a hypothesis or present any conclusive results on a question.<sup>86</sup> Instead, it aims to provide a first tentative analysis on a new problem in the academic literature.<sup>87</sup> It accepts the boundary between what *can* and *cannot* (yet) be known. An exploratory approach is best-suited for a topic that is as novel and understudied as the one covered in this research.

An impact assessment can be described as an empirical-legal study into the expected effects and side-effects of (potential) new legislation.<sup>88</sup> Conducting an impact assessment responds to the ever-growing demand of the public, politicians and legal commentators to rationalise the legislative process and to underpin new laws with empirical evidence.<sup>89</sup> Impact assessments help to improve the quality of the decision-making process, prevent tunnel vision towards a certain option,<sup>90</sup> and facilitate future research and law-making.<sup>91</sup>

As the new RoL conditionality mechanism did not enter into force until 1 January 2021, and in practice not until 2 March 2022,<sup>92</sup> it is still too early to research its effects. What can be done, however, is an exploratory impact assessment, which scrutinises the plausibility of the underlying Assumption steering the political and academic discourse.

**12. OBJECTIVES** – The primary aim of this research is to explore the plausibility of the Assumption from the perspective of previous experiences with political

---

<sup>85</sup> R. Swedberg, “Exploratory Research” in C. Elman, J. Gerring and J. Mahoney (eds.), *The Production of Knowledge*, Cambridge, Cambridge University Press, 2020, (17) 17-18.

<sup>86</sup> R. Stebbins, *Exploratory Research in the Social Sciences*, Thousand Oaks, SAGE Publications, Inc., 2001, 8-10.

<sup>87</sup> **“Exploratory studies [...] that have been the most common are [...] : a topic that has not been researched before, is given a first tentative analysis.”** See R. Swedberg, “Exploratory Research” in C. Elman, J. Gerring and J. Mahoney (eds.), *The Production of Knowledge*, Cambridge, Cambridge University Press, 2020, (17) 18-20.

<sup>88</sup> J. Verschuuren and R. van Gestel, “Chapter 1. Ex Ante Evaluation Of Legislation: An Introduction” in J. Verschuuren (ed.), *The Impact of Legislation. A Critical Analysis of Ex Ante Evaluation*, Leiden-Boston, Martinus Nijhoff Publishers, 2009, (3) 5-6.

<sup>89</sup> Ebbe J. Verschuuren and R. van Gestel, “Chapter 11. Conclusions. A Conditional Yes to Ex Ante Evaluation of Legislation” in J. Verschuuren (ed.), *The Impact of Legislation. A Critical Analysis of Ex Ante Evaluation*, Leiden-Boston, Martinus Nijhoff Publishers, 2009, (255) 256-257.

<sup>90</sup> **“Regulators usually share all kinds of assumptions about the way the addressees of the rules are going to react to intervention(s) that are aimed at a change of behaviour. Very often, however, they have little or no empirical evidence to underpin these assumptions.”** See J. Verschuuren and R. van Gestel, “Chapter 11. Conclusions. A Conditional Yes to Ex Ante Evaluation of Legislation” in J. Verschuuren (ed.), *The Impact of Legislation. A Critical Analysis of Ex Ante Evaluation*, Leiden-Boston, Martinus Nijhoff Publishers, 2009, (255) 260.

<sup>91</sup> J. Verschuuren and R. van Gestel, “Chapter 11. Conclusions. A Conditional Yes to Ex Ante Evaluation of Legislation” in J. Verschuuren (ed.), *The Impact of Legislation. A Critical Analysis of Ex Ante Evaluation*, Leiden-Boston, Martinus Nijhoff Publishers, 2009, (255) 260-261.

<sup>92</sup> See *infra* paragraph 35, subparagraph 2.

conditionalities in the EU budget. This research aims to *discover something new* by introducing empirical-legal research methods into the current debate. Furthermore, it aims to challenge existing biases, contribute to the academic debate and lay a groundwork for future research – both empirical and doctrinal.<sup>93</sup>

What this research does not aim to do, is to *predict* the effects of the RoL conditionality mechanism. Nor does it aim to present any (conclusive) results on whether the RoL conditionality mechanism will or will not lead to RoL compliance among Member States. Such objectives would be contrary to the very nature of an exploratory impact assessment, which this research intends to be.

### 1.3.2. Research questions and approach

**13. RESEARCH QUESTION** – The central research question is:

*What does empirical evidence on pre-existing political conditionalities suggest about the plausibility of the contested assumption that the introduction of new political conditionalities in the EU budget is likely to positively affect RoL compliance in the Member States where the principles of the RoL are being breached?*

The research question should be understood in conjunction with the following sub-questions. A distinction can be made between the first two sub-questions, which primarily aim to provide a doctrinal foundation, and the final two sub-questions, which constitute the actual empirical component of the research.<sup>94</sup>

#### a. Sub-question one

*What are the core obligations arising from the RoL, as defined in Regulation 2020/2092, that Member States should comply with?*

**14. DESCRIPTIVE** – The first sub-question is a descriptive one, aiming to provide a better understanding of the concept of the RoL within the EU legal order. Answering this sub-question will create more clarity on this – seemingly enigmatic – Article 2 value and establish a theoretical framework for this research.

As a starting point, the definition adopted in Regulation 2020/2092 of the new RoL conditionality mechanism will be used.<sup>95</sup> Subsequently, this

---

<sup>93</sup> As pointed out by Verschuuren and van Gestel, impact assessments play an essential role in facilitating future research on a topic. See *supra* paragraph 11, subparagraph 3.

<sup>94</sup> As Landry correctly points out, establishing a theoretical foundation is a prerequisite to any meaningful empirical-legal research, as it grounds the empirical methodology into a larger normative and doctrinal framework. See R.J. Landry III, “Empirical Scientific Research and Legal Studies Research—A Missing Link”, *Journal of Legal Studies Education* 2016, Vol. 33, No. 1, (165) 170.

<sup>95</sup> Article 2 (1)(a) Regulation (EU, Euratom) 2020/2092.

definition will have to be operationalised, since it is composed of a list of equally ambiguous principles. This will be done on the basis of the Venice Commission’s RoL Checklist. In addition, case law of the CJEU and the European Court of Human Rights (ECtHR) will be used to further clarify the obligations arising from these principles, but only to the extent that it is referenced in the Checklist.

### b. Sub-question two

*What are the objective, scope, procedure and potential sanctions of the RoL conditionality mechanism, the IACS conditionality and the ESIFs complaint conditionality, and how can they be compared?*

15. DESCRIPTIVE AND COMPARATIVE – The second sub-question) consists of a description and comparison of the three conditionalities that constitute the focal point of this research. These are, firstly, the new RoL conditionality mechanism in the current EU budget of 2021-2027, secondly, the IACS conditionality in the EU agricultural funds to Bulgaria and Romania between 2007 and 2008,<sup>96</sup> and thirdly, the ESIFs complaint conditionality in the EU budget of 2014-2020.<sup>97</sup> Special attention will be given to their objective, scope, procedure and possible sanctions.

### c. Sub-question three

*What do the observations of empirical studies on political conditionality in EU foreign aid, when applied to the IACS conditionality, the ESIFs complaint conditionality and the RoL conditionality mechanism, suggest about the plausibility of the Assumption?*

16. EU FOREIGN AID STUDIES – The first part of the empirical approach will draw on empirical studies on the effectiveness of political conditionality in EU foreign aid as a means to improve RoL compliance. These studies are interesting to include, as the *effectiveness debate* has existed for decades within the EU foreign aid context.<sup>98</sup> Consequently, empirical observations have already been made there. Based on these observations, scholars have formulated so-called *propositions of effectiveness*, i.e. factors that affect the likelihood that political conditionality will improve RoL compliance. The three conditionalities under scrutiny in this research will be applied to these propositions. This will give a first indication – yet nothing more than an indication – of the plausibility of the

---

<sup>96</sup> As explained below, IACS stands for Integrated Administration and Control System.

<sup>97</sup> As explained below, ESIFs stands for European Structural and Investment Funds.

<sup>98</sup> In contrast, the *effectiveness debate* (i.e. the question in the academic literature whether political conditionalities are likely to improve RoL compliance in the recipient states of EU funding) is still in its infancy in the EU internal policy context. See S. Koch, “A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union”, *World Development* 2015, Vol. 75, (97) 104.



*Assumption*<sup>99</sup>. To enhance the veracity of the results of this exercise (and minimise the limitations<sup>100</sup> that this approach entails), the propositions will first be *transposed* (see *infra* paragraph 45). Moreover, only studies will be included that, firstly, concern *ex post* negative political conditionality;<sup>101</sup> secondly, address the *effectiveness debate*;<sup>102</sup> and thirdly, are based on empirical evidence.<sup>103</sup>

#### d. Sub-question four

*What do empirical data on the IACS conditionality vis-à-vis Bulgaria and Romania and empirical data on the ESIFs complaint conditionality vis-à-vis Hungary and Poland suggest about the plausibility of the Assumption?*<sup>2</sup>

**17. SECONDARY DATA-ANALYSIS** -- The second part of the empirical approach consists of a secondary data-analysis<sup>104</sup> on the evolution of compliance rates after the introduction of the two selected pre-existing political conditionalities (i.e. the IACS conditionality and the ESIFs complaint conditionality).

##### 1.3.3. Relevance and originality

**18. ACADEMIC AND SOCIETAL RELEVANCE** – In light of the ongoing RoL crisis, this research has a high degree of societal relevance. In addition, this research has a strong academic relevance, as it will explore a hitherto little explored field; introduce empirical observations into the current debate; help to integrate the *effectiveness debate* into the EU internal policy landscape; and provide a foundation on which future research can build, as well as present findings that are relevant in their own right.

**19. ORIGINALITY** -- This research is original for its empirical approach, which relies upon data on pre-existing political conditionalities in the EU budget and literature on political conditionality in EU foreign aid. Neither of these are currently included in the debate.

---

<sup>99</sup> *Pro memoria*, the Assumption refers to the estimation by politicians and scholars that the introduction of new political conditionalities in the EU budget is likely to positively affect RoL compliance in the Member States where the principles of the RoL are being breached.

<sup>100</sup> The main limitation of the approach adopted in this sub-question is that the empirical studies that will be consulted relate to a different context from the one scrutinised in this research (i.e. the context of EU foreign aid instead of the context of EU internal policy). Consequently, the conditionalities under scrutiny cannot be blindly applied to the propositions derived from these empirical studies.

<sup>101</sup> This excludes *ex ante* negative conditionalities, *ex ante* positive conditionalities, *ex post* positive conditionalities and non-political conditionalities.

<sup>102</sup> I.e. the question in the academic literature whether political conditionalities are likely to improve RoL compliance in the recipient states of EU funding.

<sup>103</sup> Pi The studies that were ultimately selected are revealed below, see *infra* paragraph 44.

<sup>104</sup> A secondary data-analysis is an analysis in which existing data(sets) are used, instead of self-collected data. See R.M. Lawless, J.K. Robbenolt and T.S. Ulen, *Empirical Methods in Law*, New York, Aspen Publishers, 2010, 129.

## 2. OBLIGATIONS DERIVING FROM THE RULE OF LAW

### 2.1. THE DEFINITION OF REGULATION 2020/2092

**20. EMPTY NOTION OR PRACTICAL CONCEPT?** – Those who attempt to find a single, comprehensive definition of the RoL in the Treaties will do so in vain. The absence of a Treaty definition has left the door wide open for Eurosceptic politicians to pretend that the RoL is an empty concept, devoid of legal substance.<sup>105</sup> The Hungarian Minister of Justice, Judit Varga, for example, has reduced the RoL to a mere “*buzzword*”.<sup>106</sup> This rhetoric, however, bears no relation to the truth. Quite to the contrary, the RoL is first and foremost a practical concept that aims to protect people from an unchecked, despotic government.<sup>107</sup> As Pech points out, the lack of a Treaty definition does not imply that the EU would be exporting a vague and incoherent ideal.<sup>108</sup>

Nevertheless, a clear comprehension of the meaning of the RoL is paramount to understand what obligations it imposes on Member States. As the Treaties neglect to further explain or define this concept, the definition from Regulation 2020/2092 on the RoL conditionality mechanism will be used as a starting point.

**21. LEGAL DEFINITION** – Article 2 (a) Regulation 2020/2092 provides the following definition:

*“the [RoL] refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation*

---

<sup>105</sup> R. Csehi and E. Zgut, “‘We won’t let Brussels dictate us’: Eurosceptic populism in Hungary and Poland”, *European Politics and Society* 2021, Vol. 22, No. 1, (53) 58-59; T. Drin’oczi and A. Bień-Kacafa, “Illiberal Constitutionalism: The Case of Hungary and Poland”, *German Law Journal* 2019, Vol. 20, (1140) 1148-1149; W. Schroeder, “The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?” in A. von Bogdandy, P. Bogdanowicz et al. (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (105) 105-106; M. Smith, “Staring into the abyss: A crisis of the rule of law in the EU”, *European Law Journal* 2019, Vol. 25, No. 6, (561) 562-563.

<sup>106</sup> in the L. Pech, J. Grogan et al., “Meaning and Scope of the EU Rule of Law”, *RECONNECT* 2020, Vol. 7, No. 2, (1) 5.

<sup>107</sup> B. Grabowska-Moroz, “Understanding the Best Practices in the Area of the Rule of Law”, *RECONNECT* 2020, Vol. 8, No. 1, (1) 7-8.

<sup>108</sup> in the L. Pech, “Promoting The Rule of Law Abroad: On the EU’s limited contribution to the shaping of an international understanding of the rule of law” in F. Amtenbrink and D. Kochenov (eds.), *The EU’s Shaping of the International Legal Order*, Cambridge, Cambridge University Press, 2013, (108) 115.

*of powers; and non-discrimination and equality before the law. The [RoL] shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU;*"

**22. DISSECTING THE DEFINITION** – The definition of Article 2 (a) Regulation 2020/2092 contextualises the notion of the RoL within the wider Treaty framework. As a legally binding Article 2 value, the RoL is located at the core of the EU legal order.<sup>109</sup> Furthermore, its relationship with the other Article 2 values is emphasised. This resonates with the well-established position in the academic literature that the RoL is inherently interconnected with the notions of democracy and human rights.<sup>110</sup> As the EC stated in its 2014 Communication: “*there can be no democracy and respect for fundamental rights without respect for the [RoL] and vice versa.*”<sup>111</sup> The definition continues by indicating the six legal principles that make up the RoL.<sup>112</sup>

**23. LIST OF PRINCIPLES EXPLAINED** – Describing the RoL in relation to the legal principles of which it is composed is not unique to the Regulation 2020/2092 definition. This approach was already adopted by the EC in 2014,<sup>113</sup> when it first promulgated a comprehensive working definition of the RoL, and is still present in its most recent communication on the matter.<sup>114</sup> The definition of Article 2 (a) Regulation 2020/2092 is built on this tradition and reiterates the same list of principles.<sup>115</sup> It should be noted, however, that this list does not aim to be

<sup>109</sup> See *supra* paragraph 1, subparagraph 2.

<sup>110</sup> Recital 6 Regulation (EU, Euratom) 2020/2092; P. Bárd, S. Carrera, E. Guild and D. Kochenov, “An EU mechanism on Democracy, the Rule of Law and Fundamental Rights”, *CEPS* 2016, No. 91, (1) 3-4; S. Carrera, E. Guild and N. Hernanz, “The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU”, *CEPS* 2013, (1) 2-4; L. Pech, J. Grogan et al., “Meaning and Scope of the EU Rule of Law”, *RECONNECT* 2020, Vol. 7, No. 2, (1) 38-41; J.W. Müller, “Should the EU Protect Democracy and the Rule of Law inside Member States?”, *European Law Journal* 2015, Vol. 21, No. 2, (141) 142-143; Q. Qerimi, “Operationalizing and Measuring Rule of Law in an Internationalized Transitional Context: The Virtue of Venice Commission’s Rule of Law Checklist”, *Law and Development Review* 2020, Vol. 13, No. 1, (59) 60-62.

<sup>111</sup> EC, *European Commission Communication, A new EU Framework to strengthen the Rule of Law*, 11 March 2014, COM(2014) 158 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>, 3-4.

<sup>112</sup> As can be read in the definition, the six principles comprising the RoL are: the principle of legality, implying a transparent, accountable, democratic and pluralistic law-making process; the principle of legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law.

<sup>113</sup> EC, *European Commission Communication, A new EU Framework to strengthen the Rule of Law*, 11 March 2014, COM(2014) 158 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>, 3-4.

<sup>114</sup> See in this regard EC, *Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union*, 3 April 2019, COM(2019) 163 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>, 1-3.

<sup>115</sup> To be complete, the principle of separation of powers was absent in the original 2014 EC definition, but has been added since the 2019 EC Communication. *Cfr.* EC, *European Commission*

exhaustive.<sup>116</sup> Instead, it represents the common nucleus of the RoL in the EU legal order on which consensus has been achieved.<sup>117</sup> In other words, the six abovementioned principles constitute the bare minimum that an EU Member State should respect if it wishes to act in accordance with the RoL.<sup>118</sup>

Nevertheless, as several scholars clarify, *consensus* does not equal *uniformity*.<sup>119</sup> The implementation of these core principles can differ according to the concrete legal, historical, political, social or geographical context of each Member State,<sup>120</sup> and in particular in the light of their constitutional traditions.<sup>121</sup>

With the foregoing in mind, we later will proceed by operationalising these six core principles on the basis of the RoL Checklist of the Venice Commission, supplemented by the jurisprudence of the CJEU and the ECtHR referenced therein, in order to better comprehend the obligations arising from them.

---

*Communication, A new EU Framework to strengthen the Rule of Law*, 11 March 2014, COM(2014) 158 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>, 3-4; EC, *Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union*, 3 April 2019, COM(2019) 163 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>, 1-3.

<sup>116</sup> EC, *European Commission Communication, A new EU Framework to strengthen the Rule of Law*, 11 March 2014, COM(2014) 158 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>, 3-4; EC, *Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union*, 3 April 2019, COM(2019) 163 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>, 1-3.

<sup>117</sup> EC, *European Commission Communication, A new EU Framework to strengthen the Rule of Law*, 11 March 2014, COM(2014) 158 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>, 3-4; Venice Commission, *Rule of Law Checklist*, 18 March 2016, CDL-AD(2016)007rev, 7; EC, *Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union*, 3 April 2019, COM(2019) 163 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>, 1-3; B. Grabowska-Moroz, “Understanding the Best Practices in the Area of the Rule of Law”, *RECONNECT* 2020, Vol. 8, No. 1, (1) 8-9; L. Pech, J. Grogan et al., “Meaning and Scope of the EU Rule of Law”, *RECONNECT* 2020, Vol. 7, No. 2, (1) 38-39.

<sup>118</sup> L. Pech, J. Grogan et al., “Meaning and Scope of the EU Rule of Law”, *RECONNECT* 2020, Vol. 7, No. 2, (1) 5-6.

<sup>119</sup> Or as Grabowska-Moroz puts it, “*common, but [...] not identical*”. See B. Grabowska-Moroz, “Understanding the Best Practices in the Area of the Rule of Law”, *RECONNECT* 2020, Vol. 8, No. 1, (1) 8-9; L. Pech, J. Grogan et al., “Meaning and Scope of the EU Rule of Law”, *RECONNECT* 2020, Vol. 7, No. 2, (1) 38-39.

<sup>120</sup> Ogan Venice Commission, *Rule of Law Checklist*, 18 March 2016, CDL-AD(2016)007rev, 9-10.

<sup>121</sup> **This attentiveness for diversity clearly reflects the same philosophy that underpins Article 4 (2) TEU, which obliges the Union to respect the national identities of the Member States as enshrined in their fundamental structures. The link between RoL compliance and the respect for article 4 (2) TEU has also been made by the European Council in its Conclusions of 11 December 2020.** See European Council, *European Council meeting (10 and 11 December 2020) - Conclusions*, 11 December 2020, EUCO 22/20, <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>, 1.

## 2.2. THE VENICE COMMISSION'S RULE OF LAW CHECKLIST

### 2.2.1. Introduction

**24. CREATION** – The European Commission for Democracy Through Law, more commonly known as the Venice Commission, is the advisory body of the Council of Europe that is specialised in constitutional matters.<sup>122</sup> Its functions include, *inter alia*, providing expertise to democratising countries, assessing constitutional reforms and adjudicating internal conflicts.<sup>123</sup> Since its creation in 1990, the Venice Commission has expanded from 18 to 62 member states including all the EU Member States. It should be noted that it has more members than the Council of Europe.<sup>124</sup>

On 12 March 2016, the Venice Commission adopted the so-called RoL Checklist.<sup>125</sup> The RoL Checklist is a document consisting of concrete minimum obligations that a state should meet with regard to each of the core principles of the RoL. It enables scholars, politicians and stakeholders to assess the RoL in a given country in an objective, thorough, transparent and equal fashion.<sup>126</sup>

**25. JUSTIFICATION** – Using the RoL Checklist to operationalise the six core principles listed in Article 2 (a) Regulation 2020/2092 can be justified for three reasons. Firstly, the RoL Checklist is a highly authoritative source in the EU legal order. It is used as a point of reference by the CJEU in its judgments,<sup>127</sup> by the Advocate Generals in their opinions,<sup>128</sup> by scholars in their research,<sup>129</sup> and by the EC in relation to the RoL tools.<sup>130</sup> The notion of the RoL as interpreted by the

<sup>122</sup> P. CRAIG, “Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy”, *UC Irvine Journal of International, Transnational, and Comparative Law* 2017, Vol. 2, (57) 58-61.

<sup>123</sup> B. IANCU, “Quod licet Jovi non licet bovi?: The Venice Commission as Norm Entrepreneur”, *Hague Journal on the Rule of Law* 2019, Vol. 11, (189) 190-193.

<sup>124</sup> P. CRAIG, “Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy”, *UC Irvine Journal of International, Transnational, and Comparative Law* 2017, Vol. 2, (57) 58-61; B. IANCU, “Quod licet Jovi non licet bovi?: The Venice Commission as Norm Entrepreneur”, *Hague Journal on the Rule of Law* 2019, Vol. 11, (189) 190-193.

<sup>125</sup> See Venice Commission, *Report on the Rule of Law*, 4 April 2011, CDL-AD(2011)003rev, 3-5 and 15-16.

<sup>126</sup> Venice Commission, *Rule of Law Checklist*, 18 March 2016, CDL-AD(2016)007rev, 5-8.

<sup>127</sup> See e.g. General Court 21 February 2018, no. T-731/15, ECLI:EU:T:2018:90, *Khyuyev v Council*, paragraph 76; General Court 8 November 2017, no. T-245/15, ECLI:EU:T:2017:792, *Klymenko v Council*, paragraph 74; General Court 22 March 2018, no. T-242/16, ECLI:EU:T:2018:16, *Stavytskyi v Council*, paragraph 69.

<sup>128</sup> See e.g. Opinion of AG Tanchev delivered on 27 June 2019, Joined Cases nos. C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:551, paragraphs 71.

<sup>129</sup> L. PECH, J. GROGAN et al., “Meaning and Scope of the EU Rule of Law”, *RECONNECT*, 2020, Vol. 7, No. 2, (1) 36-38.

<sup>130</sup> Recital 16 Regulation (EU, Euratom) 2020/2092; EC, *European Commission Communication, A new EU Framework to strengthen the Rule of Law*, 11 March 2014, COM(2014) 158 final,

Venice Commission is one of the few widely accepted conceptual frameworks for the RoL in Europe.<sup>131</sup> Secondly, the core principles of the RoL Checklist are identical to those in Article 2 (a) Regulation 2020/2092, except for small discrepancies in wording and the fact that separation of powers in the RoL Checklist is not recognised as a separate key principle, but rather as an underpinning of the other components of the RoL.<sup>132</sup> Thirdly, the practical nature of the RoL Checklist corresponds well with the objective of the sub-question, namely, to provide a better understanding of the concrete obligations arising from the RoL.<sup>133</sup>

**26. CAVEAT** – The use of checklists to evaluate states’ compliance with the RoL yearns for one important caveat. Checklists can – in some cases – give a distorted picture of reality because they fail to take into account the interaction between several legal provisions.<sup>134</sup> This can lead to a phenomenon where legal or constitutional provisions in themselves meet all the formal criteria of the checklist, but when put together do not limit public power.<sup>135</sup> Legal systems where this phenomenon occurs – referred to as Frankenstates by Scheppele<sup>136</sup> – are particularly hazardous as they appear to be law-abiding at first glance, yet upon closer examination prove to be gradually eroding the principles of the RoL.<sup>137</sup>

### *2.2.2. Operationalising the six core principles*

**27. SUMMARY** – The results can be summarised as follows. For an in-depth analysis, see Annex I. However, this summary suffices as a doctrinal basis for the empirical component of this research. In order to comply with the RoL, as laid

---

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>, 4-7; B. GRABOWSKA-MOROZ, “Understanding the Best Practices in the Area of the Rule of Law”, *RECONNECT* 2020, Vol. 8, No. 1, (1) 6-10.

<sup>131</sup> S. CARRERA, E. GUILD and N. HERNANZ, “The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU”, *CEPS* 2013, (1) 17.

<sup>132</sup> L. PECH, J. GROGAN et al., “Meaning and Scope of the EU Rule of Law”, *RECONNECT* 2020, Vol. 7, No. 2, (1) 36-38-39.

<sup>133</sup> See *supra* paragraph 14.

<sup>134</sup> K. L. SCHEPPELE, “The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work”, *Governance* 2013, Vol. 26, No. 4, (559) 560.

<sup>135</sup> SCHEPPELE gives the example of the Weimar Constitution of 1920. One provision of the Weimar Constitution allowed for the President to declare a state of emergency, giving himself more powers, but which could be blocked by the Parliament. Another provision allowed the President to dissolve the Parliament. By themselves, these provisions seemed sensible, but when applied together, the President could dissolve the Parliament and subsequently declare a state of emergency without any oversight. K. L. SCHEPPELE, “The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work”, *Governance* 2013, Vol. 26, No. 4, (559) 559-560.

<sup>136</sup> SCHEPPELE qualifies the current Hungarian and Polish regimes as so-called Frankenstates. K. L. SCHEPPELE, “The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work”, *Governance* 2013, Vol. 26, No. 4, (559) 560-562; K. L. SCHEPPELE, “On Being the Subject of the Rule of Law”, *Hague Journal on the Rule of Law* 2019, Vol. 11, (465) 467-471.

<sup>137</sup> K. L. SCHEPPELE, “On Being the Subject of the Rule of Law”, *Hague Journal on the Rule of Law* 2019, Vol. 11, (465) 467-468.

down in Article 2 TEU, an EU Member State should – at the very least – adhere to the following principles<sup>188</sup>:

- I. **The principle of legality**, implying supremacy of the law and the legislature; legally limited (emergency) powers, including the positive obligation to safeguard the fundamental rights of individuals vis-à-vis private actors; the respect for obligations under international law; transparent, accountable, pluralistic and democratic law-making procedures; the proper implementation of the law; and equal accountability for private actors wielding public authority.
- II. **The principle of legal certainty**, implying the accessibility of legislation and court decisions, unless individual rights would be at stake; the foreseeability, stability and consistency of the law; the respect for legitimate expectations; the renunciation of retroactive legislation; and the adherence to the principles *of nullum crimen sine lege, nulla poena sine lege and res iudicata*.
- III. **The prohibition of arbitrariness of executive power**, implying the restriction of the discretionary powers of public authorities by sufficiently clear laws, even in exceptional circumstances; the existence of remedies against arbitrary interventions; and the public authorities' duty to state reasons.
- IV. **An effective judicial protection**, implying the independence and impartiality of judicial bodies, judges, prosecutorial authorities and Bars; the right to a fair trial, embodied by effective access to courts, the execution of judgments and respect for fair trial standards, such as the presumption of innocence, the equality of arms and the exclusion of illegally obtained evidence; and the existence of judicial review.
- V. **The separation of powers**, primarily – but not exclusively – embodied by the independence of the judiciary from the executive branch.
- VI. **Non-discrimination, equality in law and equality before the law**, also known as the principle of equal treatment.

### 2.3. LINKING BACK TO SUB-QUESTION ONE

*What are the core obligations arising from the RoL, as defined in Regulation 2020/2092, that Member States should comply with?*

**28.** As has become evident, the RoL is anything but an empty shell. By bringing together the interpretation of the EC, as reflected in its policy documents and Regulation 2020/2092; the interpretation of the Venice Commission, as reflected in its RoL Checklist; and the interpretation of the CJEU and the

---

<sup>188</sup> See Venice Commission, *Rule of Law Checklist*, 18 March 2016, CDL-AD(2016)007rev, 11-14.

ECtHR, as reflected in their jurisprudence, more transparency has been achieved on the core RoL obligations imposed on the EU Member States.

It should be repeated, however, that neither the EC, nor the Venice Commission, nor this research wish to be exhaustive in this regard.<sup>139</sup> This would be contrary to the open nature of the RoL, which is not a one-size-fits-all principle that would allow only one exclusive mode of implementation.<sup>140</sup> Furthermore, the limited scope of this research in general, and of this sub-question in particular, demands a somewhat synoptic approach.

### 3. DESCRIPTION AND COMPARISON OF THE THREE CONDITIONALITIES

#### 3.1. INTRODUCTION

29. At the core of this research stands the *Assumption*<sup>141</sup>. The plausibility of this Assumption, and the implications it might have for the RoL conditionality mechanism, will be explored in Parts III and IV by means of two pre-existing political conditionalities that can be encountered within the EU internal policy landscape. The two pre-existing conditionalities under scrutiny are:

- A. The IACS conditionality in the EU's agricultural funds to Bulgaria and Romania between 2007 and 2008; and
- B. The ESIFs complaint conditionality in the 2014-2020 MFF.

In order to justify the selection of the two pre-existing conditionalities, as well as to discover their interrelationship, the three conditionalities will be summarised and compared. Special attention will be given to their objective, scope, procedure and possible sanctions.

#### 3.2. THE COMPARISON

---

<sup>139</sup> See *supra* paragraph 23, subparagraph 1; EC, *European Commission Communication, A new EU Framework to strengthen the Rule of Law*, 11 March 2014, COM(2014) 158 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>, 3-4; EC, *Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union*, 3 April 2019, COM(2019) 163 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>, 1-3.

<sup>140</sup> See *supra* paragraph 23, subparagraph 2; B. GRABOWSKA-MOROZ, "Understanding the Best Practices in the Area of the Rule of Law", *RECONNECT* 2020, Vol. 8, No. 1, (1) 8-9; L. PECH, J. GROGAN et al., "Meaning and Scope of the EU Rule of Law", *RECONNECT* 2020, Vol. 7, No. 2, (1) 38-39.

<sup>141</sup> *Pro memoria*, the Assumption refers to the estimation by politicians and scholars that the introduction of new political conditionalities in the EU budget is likely to positively affect RoL compliance in the Member States where the principles of the RoL are being breached.



### 3.2.1. Objective and relation to the rule of law

**30. OBJECTIVES COMPARED** – The RoL conditionality mechanism is a new *tool* that aims to protect the current EU budget from breaches of the principles of the RoL in Member States in cases where this would affect (or risk to affect) its sound financial management or the Union’s financial interests.<sup>142</sup>

Instead, the IACS conditionality was specifically developed for Bulgaria and Romania as part of a series of measures to ensure their smooth accession to the Union and address remaining concerns in the fields of judicial reform, corruption and organised crime.<sup>143</sup> The purpose of the IACS conditionality was to protect Bulgarian and Romanian farmers entitled to receive EU agricultural funds from unfair and discriminatory payments made by their respective governments.<sup>144</sup> This was to be achieved by setting up an operative Integrated Administration and Control System (IACS).<sup>145</sup>

Finally, the objective of the ESIFs complaint conditionality was to protect EU citizens from violations of EU law concerning the European Structural and Investment Funds (ESIFs), including violations of the Charter of Fundamental Rights of the European Union (CFEU or Charter), by ensuring

---

<sup>142</sup> Recital 8-13 and Article 1 Regulation (EU, Euratom) 2020/2092; European Council, *European Council meeting (10 and 11 December 2020) - Conclusions*, 11 December 2020, EUCO 22/20, <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>, 3.

<sup>143</sup> EC, *Report from the European Commission to the European Parliament and the Council on Bulgaria’s progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 377 final, 2-3; EC, *Report from the European Commission to the European Parliament and the Council on Romania’s progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 378 final, 2-3; P. LEVITZ and G. POP-ELECHES, “Monitoring, Money and Migrants: Countering Post-Accession Backsliding in Bulgaria and Romania”, *Europe-Asia Studies* 2010, Vol. 62, No. 3, (461) 470; G. POPESCU, “Accompanying measures in the context of Romania’s accession to EU”, *Romanian Economic and Business Review* 2006, Vol.1, No.2, (31) 31-32.

<sup>144</sup> Recital 4-5 Commission Regulation (EC) No 1423/2006 of 26 September 2006 establishing a mechanism for appropriate measures in the field of agricultural spending in respect of Bulgaria and Romania, OJ L 269, 28 September 2006, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006R1423>; EC, *Accompanying measures in the context of Bulgaria’s and Romania’s accession*, 26 September 2006, MEMO/06/347, 3-4.

<sup>145</sup> Recital 4-5 Commission Regulation (EC) No 1423/2006; EC, *Accompanying measures in the context of Bulgaria’s and Romania’s accession*, 26 September 2006, MEMO/06/347, 3-4.

that a national complaints-handling system was in place.<sup>146</sup> This complaints-handling system had to be, *inter alia*, accessible, responsive, objective and fair.<sup>147</sup>

**31. SHARED RELATIONSHIP TO THE RoL** – Although the objective of each conditionality is inherently different and unique to its specific setting, a common resemblance can be discerned when focusing on the relationship between these conditionalities and the RoL. More specifically, each conditionality aims – in its own way – to ensure compliance with the RoL in Member States and to protect EU citizens from the financial misuse of EU funds by the national authorities.

While this is most evident in the RoL conditionality mechanism, which specifically targets a range of RoL breaches affecting the EU budget, the IACS conditionality and the ESIFs complaint conditionality equally contain a strong RoL remit. In this regard, it is fruitful to connect the IACS conditionality and the ESIFs complaint conditionality to the operationalised RoL definition of this paper. Both conditionalities play a crucial role in preventing fraud, arbitrary exercise of power and inconsistent application of the law by the national authorities (cf. *infra*). Moreover, the ESIFs complaint conditionality contributes to the protection of fundamental rights and the existence of effective legal remedies against government actions (cf. *infra*). As a result, all three conditionalities can be qualified as *political*<sup>148</sup> conditionalities.

### 3.2.2. Scope of application

#### a. Material scope

**32. RoL CONDITIONALITY MECHANISM** – Article 3 of Regulation 2020/2092 states that for the RoL conditionality mechanism to be applicable, *breaches of*

---

<sup>146</sup> Article 74 (3) Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 347, 20 December 2013, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013R1303>; EC, *Comments of the Commission on the European Ombudsman's Own-initiative inquiry*, August 2014, Ref. OI/8/2014/AN final, 9-10; EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 21; J. LACNY, “Stick works better than carrot? Suspension of EU funds paid to the Member States breaching the rule of law” in A. BOROWICZ et al. (eds.), *European Unions and its Law, Policy and Economy: Interna land External Dimension*, Warsaw, CeDeWu Sp., 2020, (61) 61-62.

<sup>147</sup> Article 74 (3) Regulation (EU) No 1303/2013; EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 21.

<sup>148</sup> *Pro memoria*, the term political conditionality is used when the objective of a conditionality concerns the observance of human rights, democracy, the RoL and/or good governance, including the prevention of corruption by public authorities. See G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 70; G. SORENSEN, *Political Conditionality*, London, Routledge, 1993, 1-2.

*the principles of the RoL*, as listed in Article 2 (a) Regulation 2020/2092,<sup>149</sup> must have occurred.<sup>150</sup> An institutional disagreement exists whether this includes *individual* as well as *systemic* breaches of the RoL.<sup>151</sup> While the EP contends that Article 3 covers systemic breaches,<sup>152</sup> the European Council, which adopted an interpretative declaration of the Regulation in its conclusions as a compromise to please the Hungarian and Polish governments,<sup>153</sup> underlines that the Regulation does not apply to “*generalised deficiencies*”.<sup>154</sup> In its March 2022 guidelines of application of Regulation 2020/2092, the EC has decided that it considers the Regulation to cover both individual and systemic breaches, as long as they meet the other criteria, as specified hereafter.<sup>155</sup>

In addition to the existence of breaches of the principles of the RoL, Article 4 (1) of the same Regulation requires that such breaches affect or seriously risk affecting the sound financial management of the EU budget or the protection of the financial interests of the Union in a sufficiently direct way. As a further clarification, Article 4 (2) lists eight situations where such an effect is

<sup>149</sup> The EC uses the RoL Checklist, among other resources, to assess whether a situation constitutes a breach of the principles of the RoL. See Recital 16 Regulation (EU, Euratom) 2020/2092; EC, *Communication from the 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*, 2 March 2022, C(2022) 1382 final, 18.

<sup>150</sup> EC, *Communication from the 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*, 2 March 2022, C(2022) 1382 final, 2-3.

<sup>151</sup> *Pro memoria*, the EP defines systemic breaches as breaches that “*are widespread or are a result of recurrent practices or omissions by public authorities, or general measures adopted by such authorities*”. They are described by VON BOGDANDY and IOANNIDIS as deficiencies that are spread throughout and effect the entire system of the Member State. LAVELLE adds that systemic breaches imply that a clear pattern of violations of fundamental values is visible. In contrast, individual breaches should be understood as breaches that are not considered to be systemic. See Paragraph 9, 22 and 23 Resolution (EP) on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)), 8 July 2021, P9\_TA(2021)0348, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348_EN.html); M. IOANNIDIS and A. VON BOGDANDY, “Systemic deficiency in the rule of law: What it is, what has been done, what can be done”, *Common Market Law Review* 2014, Vol. 51, (59) 60; P. LAVELLE, “Europe’s Rule of Law Crisis: An Assessment of the EU’s Capacity to Address Systemic Breaches of Its Foundational Values in Member States” *Trinity College Law Review* 2019, Vol. 22, (35) 37-42.

<sup>152</sup> Paragraph 9, 22 and 23 Resolution (EP) on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)), 8 July 2021, P9\_TA(2021)0348, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348_EN.html).

<sup>153</sup> European Council, *European Council meeting (10 and 11 December 2020) - Conclusions*, 11 December 2020, EUCO 22/20, <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>.

<sup>154</sup> European Council, *European Council meeting (10 and 11 December 2020) - Conclusions*, 11 December 2020, EUCO 22/20, <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>, 2; L. CODRUȚA KÖVESI et al., “Disputes over Budget Conditionality Mechanism”, *Eucri* 2021, Vol. 1, (19) 19.

<sup>155</sup> EC, *Communication from the 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*, 2 March 2022, C(2022) 1382 final, 3-4.

present.<sup>156</sup> Unlike the European Council, which considers this list to be exhaustive,<sup>157</sup> the EP maintains that this article does not prevent other situations from being taken into account.<sup>158</sup> In its guidelines, the EC does not seem to consider the list in Article 4 (2) to be exhaustive, as long as the breach is attributable to the public authority of a Member State.<sup>159</sup> The guidelines add, however, that the EC will not initiate the RoL conditionality mechanism when another tool or procedure would allow to protect the EU budget “*more effectively*”.<sup>160</sup>

In an action for annulment brought before the Court on 11 March 2021 by Hungary, it was argued that allowing a mere risk of undesirable effects to trigger the Regulation, as set out in Article 4 (1), is disproportionate.<sup>161</sup> In an action for annulment brought before the Court on the same day by the Republic of Poland, the Regulation was deemed to be illegal as Article 3 and Article 4 (2) of the Regulation were considered to infringe the principle of legal certainty.<sup>162</sup>

---

<sup>156</sup> Article 4 (2) Regulation (EU, Euratom) 2020/2092 decides: “*For the purposes of this Regulation, breaches of the principles of the rule of law shall concern one or more of the following: (a) the proper functioning of the authorities implementing the Union budget, including loans and other instruments guaranteed by the Union budget, in particular in the context of public procurement or grant procedures; (b) the proper functioning of the authorities carrying out financial control, monitoring and audit, and the proper functioning of effective and transparent financial management and accountability systems; (c) the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union; (d) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a), (b) and (c); (e) the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities; (f) the recovery of funds unduly paid; (g) effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with EPPO in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation; (h) other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.*”

<sup>157</sup> European Council, *European Council meeting (10 and 11 December 2020) – Conclusions*, 11 December 2020, EUCO 22/20, <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>, 2

<sup>158</sup> Paragraph 12 Resolution (EP) on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)), 8 July 2021, P9\_TA(2021)0348, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348_EN.html).

<sup>159</sup> EC, *Communication from the 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*, 2 March 2022, C(2022) 1382 final, 2-3.

<sup>160</sup> EC, *Communication from the 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*, 2 March 2022, C(2022) 1382 final, 2-3.

<sup>161</sup> Action brought on 11 March 2021, no. C-156/21, *Hungary v European Parliament and Council of the European Union*, paragraph 4.

<sup>162</sup> Action brought on 11 March 2021, no. C-157/21, *Republic of Poland v European Parliament and Council of the European Union*, paragraph 9.

In its judgments of 16 February 2022, the Court has rejected both pleas and dismissed these actions in their entirety.<sup>163</sup>

**33. IACS CONDITIONALITY** – The IACS conditionality could only be applied in three possible scenarios. First, where the *elements*<sup>164</sup> of the Bulgarian or Romanian IACS, which enable fair payment to the recipient farmers, were not set up according to the relevant EU legislation.<sup>165</sup> Second, where no declaration was made at the Bulgarian or Romanian ministerial level to guarantee that these elements had been established and no independent expert body had confirmed this.<sup>166</sup> Third, where the elements of the Bulgarian or Romanian IACS or any other element necessary to ensure the correct payment, although set up in accordance with EU law, were so seriously deficient as to affect the proper functioning of the overall system.<sup>167</sup>

**34. ESIFs COMPLAINT CONDITIONALITY** – Finally, under Regulation 1303/2013 on the ESIFs, Member States were required to make effective arrangements for the examination of complaints concerning the ESIFs, including those alleging a violation of the Charter.<sup>168</sup> This had to be done by establishing a national complaints-handling system.<sup>169</sup> The scope, rules and procedures of this national complaints-handling system were left to the responsibility of each Member State.<sup>170</sup> The ESIFs complaint conditionality could be activated where (there was clear evidence to suggest that) a serious deficiency in this complaints-handling system could be established.<sup>171</sup> Based

---

<sup>163</sup> Court of Justice 16 February 2022, no. C-156/21, ECLI:EU:C:2022:97, *Hungary v European Parliament and Council of the European Union*, paragraphs 293-295; Court of Justice 16 February 2022, no. C-157/21, ECLI:EU:C:2022:98, *Republic of Poland v European Parliament and Council of the European Union*, paragraphs 344-345.

<sup>164</sup> The elements that comprise the IACS are: (a) a computerised database, (b) an identification system for agricultural parcels, (c) a system for the identification and registration of payment entitlements, (d) aid applications, (e) an integrated control system, and (f) a single system to record the identity of each farmer who submits an aid application. See Article 18 (1) Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001, OJ L 270, 21 October 2003, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R1782>.

<sup>165</sup> Article 2 (1)(b) Commission Regulation (EC) No 1423/2006.

<sup>166</sup> Article 2 (1)(a) Commission Regulation (EC) No 1423/2006.

<sup>167</sup> Article 2 (1)(c) Commission Regulation (EC) No 1423/2006.

<sup>168</sup> Article 74 (3) Regulation (EU) No 1303/2013; EC, *Comments of the Commission on the European Ombudsman's Own-initiative inquiry*, 11 May 2015, OI/8/2014/AN, 9; EC, *Commission Notice – Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds ('ESIFs')*, 23 July 2016, 2016/C 269/01, 6; European Ombudsman, *Decision of the European Ombudsman closing her own-initiative inquiry OI/8/2014/AN concerning the European Commission*, 11 May 2015, OI/8/2014/AN, 4.

<sup>169</sup> Article 74 (3) Regulation (EU) No 1303/2013.

<sup>170</sup> Article 74 (3) Regulation (EU) No 1303/2013.

<sup>171</sup> Article 74 (3) *in* Article 83 (1)(a), 142 (1)(a), 144 (1)(a) Regulation (EU) No 1303/2013.

upon a 2014 judgment of the Court,<sup>172</sup> it has become evident that access to judicial review before an independent and impartial national court in accordance with Article 47 of the Charter and Article 19 (1), subparagraph 2 TEU forms an integral part of these national complaints-handling systems.<sup>173</sup> This has led some scholars to conclude that the ESIFs complaint conditionality could also be activated against Member States where the impartiality and independence of its judiciary was in danger.<sup>174</sup> Nevertheless, the EC has been reluctant to endorse this widening of the material scope – as proposed by the academic literature – and has never enforced it in practice.<sup>175</sup>

## b. Temporal scope

**35. RoL CONDITIONALITY MECHANISM** – Officially, the RoL conditionality mechanism could have been activated as of 1 January 2021.<sup>176</sup> That being said,

---

<sup>172</sup> Court of Justice 17 September 2014, no. C-562/12, ECLI:EU:C:2014:2229, *Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007-2013 Seirekomitee*, paragraphs 67-75.

<sup>173</sup> EC, *Commission Notice – Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds (ESIFs)*, 23 July 2016, 2016/C 269/01, 5; European Ombudsman, *Decision of the European Ombudsman closing her own-initiative inquiry OI/8/2014/AN concerning the European Commission*, 11 May 2015, OI/8/2014/AN, 8; Court of Justice 17 September 2014, no. C-562/12, ECLI:EU:C:2014:2229, *Liivimaa Lihaveis MTÜ v Eesti-Läti programmi 2007-2013 Seirekomitee*, paragraphs 67-75; I. BUTLER, “Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs”, *Civil Liberties Union for Europe* 2018, (1) 11-13; J. LACNY, “Stick works better than carrot? Suspension of EU funds paid to the Member States breaching the rule of law” in A. BOROWICZ et al. (eds.), *European Unions and its Law, Policy and Economy: Interna land External Dimension*, Warsaw, CeDeWu Sp., 2020, (61) 62-63.

<sup>174</sup> I. BUTLER, “Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs”, *Civil Liberties Union for Europe* 2018, (1) 11-13; J. LACNY, “Stick works better than carrot? Suspension of EU funds paid to the Member States breaching the rule of law” in A. BOROWICZ et al. (eds.), *European Unions and its Law, Policy and Economy: Interna land External Dimension*, Warsaw, CeDeWu Sp., 2020, (61) 62-63; S. PLATON, “Bringing a Knife to a Gunfight – The European Parliament, the Rule of Law Conditionality, and the action for failure to act”, *Verfassungsblog* 2021, <https://verfassungsblog.de/bringing-a-knife-to-a-gunfight/>; K. L. SCHEPPELE, L. PECH and R. D. KELEMEN, “Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission’s EU budget-related rule of law mechanism”, *Verfassungsblog* 2018, <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>.

<sup>175</sup> I. BUTLER, “Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs”, *Civil Liberties Union for Europe* 2018, (1) 8; S. PLATON, “Bringing a Knife to a Gunfight – The European Parliament, the Rule of Law Conditionality, and the action for failure to act”, *Verfassungsblog* 2021, <https://verfassungsblog.de/bringing-a-knife-to-a-gunfight/>; K. L. SCHEPPELE, L. PECH and R. D. KELEMEN, “Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission’s EU budget-related rule of law mechanism”, *Verfassungsblog* 2018, <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>.

<sup>176</sup> Article 10, paragraph 2 Regulation (EU, Euratom) 2020/2092.

some important caveats should be made. As laid down in the European Council Conclusions, the EC had pledged not to trigger the RoL conditionality mechanism before it had finalised guidelines for its application. Furthermore, it only intended to finalise these guidelines after the Court had ruled upon the Hungarian and Polish actions for annulment.<sup>177</sup>

However, under European law, an action for annulment does not have a suspensory effect.<sup>178</sup> Moreover, the EP has underlined that Regulation 2020/2092 does not require any additional interpretation in order to be applied and that the co-legislators have not delegated to the EC any powers to this effect.<sup>179</sup> Nevertheless, the EC has complied with its promises, thereby postponing the *de facto* applicability of Regulation 2020/2092 for over a year.<sup>180</sup> On 2 March 2022, the EC finally adopted its guidelines, allowing Regulation 2020/2092 on the RoL conditionality mechanism to enter into force in practice as well as in theory.<sup>181</sup>

There is, to this date, no consensus on the applicability of the RoL conditionality mechanism for events that took place prior to its enforcement.<sup>182</sup> While the EP claims that breaches committed before the entry into force of

<sup>177</sup> European Council, *European Council meeting (10 and 11 December 2020) - Conclusions*, 11 December 2020, EUCO 22/20, <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>, 2.

<sup>178</sup> Article 278 TFEU; Paragraph 12 Resolution (EP) on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)), 25 March 2021, P9\_TA(2021)0103, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103_EN.html).

<sup>179</sup> Paragraph 13 Resolution (EP) on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)), 25 March 2021, P9\_TA(2021)0103, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103_EN.html); Paragraph 1 Resolution (EP) on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)), 8 July 2021, P9\_TA(2021)0348, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348_EN.html).

<sup>180</sup> Several Members of the EP were favourable to adopt an action for failure to act before the Court pursuant to Article 265 TFEU against the EC for its omission to adopt timely guidelines and apply the RoL conditionality mechanism. See Paragraph 14 Resolution (EP) on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)), 25 March 2021, P9\_TA(2021)0103, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103_EN.html); L. CODRUȚA KÖVESI et al., “Disputes over Budget Conditionality Mechanism”, *Eucrim* 2021, Vol. 1, (19) 19; G. TARTAGLIA POLCINI et al., “German Federal Constitutional Court Paves Way for EU’s Recovery Instrument”, *Eucrim* 2021, Vol. 2, (86) 86-87.

<sup>181</sup> EC, *Communication from the 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*, 2 March 2022, C(2022) 1382 final, 1-30.

<sup>182</sup> European Council, *European Council meeting (10 and 11 December 2020) - Conclusions*, 11 December 2020, EUCO 22/20, <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>, 3; Paragraph 2 Resolution (EP) on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)), 25 March 2021, P9\_TA(2021)0103, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103_EN.html); Paragraph 10 Resolution (EP) on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)), 8 July 2021, P9\_TA(2021)0348, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348_EN.html).

Regulation 2020/2092 may also trigger the RoL conditionality mechanism,<sup>183</sup> the European Council firmly believes this to be impossible.<sup>184</sup> The EC guidelines remain silent on this question.

**36. IACS AND ESIFs COMPLAINT CONDITIONALITY** – The temporal scope of the other two conditionalities presents fewer difficulties. The IACS conditionality could have been applied as of 1 December 2007 until 30 November 2008 (with possible prolongments of 12 months once measures had been taken).<sup>185</sup> The first of December constitutes the beginning of the agricultural payment year.<sup>186</sup> The ESIFs complaint conditionality of Regulation 1303/2013 could have been applied in the Union’s financial period of 2014-2020.<sup>187</sup>

### c. Conclusion

**37. EX POST CONDITIONALITY** – To conclude, the material scope of the RoL conditionality mechanism is found to be broader than that of the two other conditionalities. The IACS conditionality and the ESIFs complaint conditionality can only be activated in cases where a problem occurs with the establishment or operability of *specific* legal systems necessary to protect the principles of the RoL (i.e. the IACS and the national complaints-handling systems, respectively). The RoL conditionality mechanism, however, can be applied in case of *any* breach of the principles of the RoL in a Member State, provided that they are attributable to a national public authority with serious risks to affect the sound financial management of the EU budget or the protection of the Union’s financial interests, and that no other procedure exists that would achieve compliance more effectively.

#### 3.2.3. Source of EU funding

**38. TO WHICH EU FUNDS IS EACH CONDITIONALITY LINKED?** – Compared to the other two conditionalities, the RoL conditionality mechanism is tied to the biggest source of EU funding. It covers all funds allocated to the Member States

<sup>183</sup> Paragraph 2 Resolution (EP) on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)), 25 March 2021, P9\_TA(2021)0103, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103_EN.html); Paragraph 10 Resolution (EP) on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)), 8 July 2021, P9\_TA(2021)0348, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348_EN.html).

<sup>184</sup> European Council, *European Council meeting (10 and 11 December 2020) – Conclusions*, 11 December 2020, EUCO 22/20, <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>, 3.

<sup>185</sup> Article 2 (2) and Article 2 (3) Commission Regulation (EC) No 1423/2006.

<sup>186</sup> “From 1 December every year, Member States can pay farmers their direct aid from the national budget of their country via a Paying Agency. This money is then reimbursed to the national budget from the Community budget.” See EC, *Farm payments: Commission decides not to apply ‘safeguard mechanism’ in Romania*, 18 December 2007, IP/07/1958, 2.

<sup>187</sup> Article 154 Regulation (EU) No 1303/2013; I. BUTLER, “Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs”, *Civil Liberties Union for Europe* 2018, (1) 4.



under the 2021-2027 MFF, as well as loans granted under this budget. Moreover, it relates to all resources of the Next Generation EU, the recovery instrument created in response to the COVID-19 pandemic.<sup>188</sup> In total, this concerns a sum of 1.8 trillion euros (in 2018 prices).<sup>189</sup>

The IACS conditionality was attached to the relatively smallest source of EU funding of the three conditionalities. It could be activated in relation to all IACS-covered direct payments to farmers and rural development expenditure, which accounted for roughly 80% of the Union's agricultural funds, and only in respect of Bulgaria and Romania.<sup>190</sup> The IACS conditionality was considered necessary as Bulgaria and Romania would receive a *substantial* amount of agricultural funds upon their accession to the Union of several hundred million euros.<sup>191</sup>

The ESIFs complaint conditionality was linked to the ESIFs in the EU budget of 2014-2020.<sup>192</sup> The ESIFs are the monetary transfers that redistribute funds between the Member States in order to reduce disparities between the levels of development of the various regions of the Union's territory and to support economic growth, job creation and environmental sustainability in the least favoured areas.<sup>193</sup> The ESIFs represent about half of the entire EU budget, which for the 2014-2020 period implied a sum of 450 billion euros.<sup>194</sup> Hungary

<sup>188</sup> Recital 7 Regulation (EU, Euratom) 2020/2092; A. BERRAMDANE, "Conditionnalité budgétaire ou conditionnalité de l'État de droit ?", *RDUE* 2021, No. 1, (155) 155-156; N. DE SADELEER, "Le plan de relance Next Generation EU. Du changement de cap budgétaire à l'ingénierie institutionnelle", *RAE* 2020, No. 3, (607) 607-608; G. TARTAGLIA POLCINI et al., "German Federal Constitutional Court Paves Way for EU's Recovery Instrument", *Eucrim* 2021, Vol. 2, (86) 86-87.

<sup>189</sup> A. BERRAMDANE, "Conditionnalité budgétaire ou conditionnalité de l'État de droit ?", *RDUE* 2021, No. 1, (155) 155-156; N. DE SADELEER, "Le plan de relance Next Generation EU. Du changement de cap budgétaire à l'ingénierie institutionnelle", *RAE* 2020, No. 3, (607) 607-608; G. TARTAGLIA POLCINI et al., "German Federal Constitutional Court Paves Way for EU's Recovery Instrument", *Eucrim* 2021, Vol. 2, (86) 86-87.

<sup>190</sup> Recital 5 Commission Regulation (EC) No 1423/2006; EC, *Accompanying measures in the context of Bulgaria's and Romania's accession*, 26 September 2006, MEMO/06/347, 3-4; EC, *Report from the European Commission to the European Parliament and the Council on Bulgaria's progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 377 final, 3-4; EC, *Report from the European Commission to the European Parliament and the Council on Romania's progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 378 final, 3-4.

<sup>191</sup> Recital 5 Regulation (EU) No 1303/2013; EC, *Accompanying measures in the context of Bulgaria's and Romania's accession*, 26 September 2006, MEMO/06/347, 3-4.

<sup>192</sup> Recital 2 Regulation (EU) No 1303/2013.

<sup>193</sup> Recital 1 Regulation (EU) No 1303/2013; K. L. SCHEPPELE, L. PECH and R. D. KELEMEN, "Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU budget-related rule of law mechanism", *Verfassungsblog* 2018, <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>.

<sup>194</sup> I. BUTLER, "Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs", *Civil Liberties Union for Europe* 2018, (1) 8-9; J. PISKORZ, "Conditionality of the EU funds. A tool to protect the Union's budget or an instrument to strengthen the rule of law?" in A. BOROWICZ et al. (eds.), *European Unions and its Law, Policy and Economy: Interna land External Dimension*, Warsaw, CeDeWu Sp., 2020, (51) 57.

and Poland were the two biggest beneficiaries of ESIFs in the 2014-2020 MFF, with Hungary receiving the largest sum *per capita* and Poland benefiting from the largest absolute amount.<sup>195</sup>

In conclusion, all three conditionalities belong to the domain of EU internal policy, as they are all linked to sources of EU funds allocated to Member States that directly concern EU citizens.

### 3.2.4. Procedure

**39. ADOPTING MEASURES** – The procedure for taking measures against a Member State on the basis of the RoL conditionality mechanism is characterised by a three-way interplay between the EC, the Council and the Member State concerned. The EC is responsible for initiating the procedure.<sup>196</sup> When the EC considers that a Member State falls within the material scope of the RoL conditionality mechanism, it will send a written notification to that Member State, after which this Member State must provide the requested information and may submit its observations.<sup>197</sup> Afterwards, the EC may submit to the Council a proposal for an implementing decision on the appropriate measures.<sup>198</sup> This gives the Council, acting by a qualified majority, the choice to either adopt the proposed measures, to amend and adopt the measures or not to adopt any measures at all.<sup>199</sup> At every stage of the procedure, the EP should be kept informed.<sup>200</sup>

Unlike the RoL conditionality mechanism, the procedure regarding the IACS conditionality involved only two actors, the EC and the Member State concerned (Bulgaria or Romania).<sup>201</sup> In a first stage, immediately after their accession to the Union, Bulgaria and Romania had to submit to the EC a declaration on the existence and functioning of their IACS, based on the report of an independent expert body.<sup>202</sup> In a second stage, the EC could rely on this declaration or on its own audit findings to adopt measures where Bulgaria or Romania fell within the scope of application as set out in Article 2 of Commission Regulation 1423/2006.<sup>203</sup> Once measures had been adopted, the

---

<sup>195</sup> I. BUTLER, “Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs”, *Civil Liberties Union for Europe* 2018, (1) 9; K. L. SCHEPPELE, L. PECH and R. D. KELEMEN, “Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission’s EU budget-related rule of law mechanism”, *Verfassungsblog* 2018, <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>.

<sup>196</sup> Article 6 (1) Regulation (EU, Euratom) 2020/2092.

<sup>197</sup> Article 6 (1)-(5) Regulation (EU, Euratom) 2020/2092.

<sup>198</sup> Article 6 (6)-(9) Regulation (EU, Euratom) 2020/2092.

<sup>199</sup> Article 6 (10)-(11) Regulation (EU, Euratom) 2020/2092.

<sup>200</sup> Article 8 Regulation (EU, Euratom) 2020/2092.

<sup>201</sup> Article 2 Commission Regulation (EC) No 1423/2006.

<sup>202</sup> Recital 7 and Article 1 Commission Regulation (EC) No 1423/2006.

<sup>203</sup> Recital 8 and Article 2 (1) Commission Regulation (EC) No 1423/2006.

EC could prolong them for further periods of 12 months, provided that the Member State concerned remained within the material scope.<sup>204</sup>

Finally, for the ESIFs complaint conditionality, each possible measure was subject to a different procedure. First, the so-called Authorising Officer by Delegation had the discretion to interrupt the payment deadline of an interim payment for a period not exceeding six months.<sup>205</sup> Second, the EC could suspend certain payments to a Member State after having given this Member State the opportunity to present its observations.<sup>206</sup> Third, the EC could, after due examination, also make financial corrections for payments that had already been made.<sup>207</sup>

When comparing the three conditionalities on a procedural level, it becomes evident that the RoL conditionality mechanism is the most difficult to deploy. Whereas for the IACS conditionality and the ESIFs complaint conditionality it was sufficient for the EC (or Authorising Officer by Delegation) to decide whether or not to take measures, the RoL conditionality mechanism equally requires the support of a qualified majority in the Council. However, for all three conditionalities, the Member State concerned is involved to some extent and has the opportunity to express its position on the alleged situation.

**40. LIFTING MEASURES** – Both the procedure of the RoL conditionality mechanism and of the ESIFs complaint conditionality allow for the adopted measures to be lifted once the Member State concerned has remedied the situation that has led to their adoption.<sup>208</sup> No similar possibility existed for the IACS conditionality, which can be explained by the fact that these measures were by definition of a provisional nature.<sup>209</sup>

### *3.2.5. Sanctions*

**41. NEGATIVE CONDITIONALITY** – The RoL conditionality mechanism allows for a whole range of suspensions, reductions and interruptions of various financial benefits of the 2021-2027 budget.<sup>210</sup> In theory, these sanctions do not have an upper limit, but each measure should be proportionate to the impact, nature, duration, gravity and scope of the breaches of the principles of the RoL.<sup>211</sup> The EC guidelines have added that other factors may also be taken into account in determining whether measures are proportionate.<sup>212</sup> The imposition of

---

<sup>204</sup> Recital 9 and Article 2 (3) Commission Regulation (EC) No 1423/2006.

<sup>205</sup> Article 83 (1)(a) Regulation (EU) No 1303/2013.

<sup>206</sup> Article 142 (1)(a)-(2) Regulation (EU) No 1303/2013.

<sup>207</sup> Article 144 (1)(a) Regulation (EU) No 1303/2013.

<sup>208</sup> Article 83 (2) and Article 142 (3) Regulation (EU) No 1303/2013; Article 7 Regulation (EU, Euratom) 2020/2092.

<sup>209</sup> Article 2 (1) Commission Regulation (EC) No 1423/2006.

<sup>210</sup> Article 5 (1) Regulation (EU, Euratom) 2020/2092.

<sup>211</sup> Recital 18 and Article 5 (3) Regulation (EU, Euratom) 2020/2092.

<sup>212</sup> EC, *Communication from the 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*, 2 March 2022, C(2022) 1382 final, 13-15.

measures does not, however, free the government entities involved from their obligations towards the intended beneficiaries of the EU funds.<sup>213</sup> Consequently, Member States have to pay the final recipients, even when they have been sanctioned under the RoL conditionality mechanism.<sup>214</sup>

Unlike the RoL conditionality mechanism, the IACS conditionality provided for no more than one possible sanction, namely a provisional reduction of 25 percent of the agricultural funds concerned.<sup>215</sup> Consequently, under the IACS conditionality, sanctions were independent from the characteristics of the infringement, whereas this is not the case under the RoL conditionality mechanism.<sup>216</sup>

The ESIFs complaint conditionality provided for three different sanctions, the interruption of a payment deadline, the suspension of payments and financial corrections for payments that had already been made.<sup>217</sup> Similarly to the RoL conditionality mechanism, Regulation 1303/2013 on the ESIFs contained several safeguards to guarantee the proportionality of sanctions.<sup>218</sup> In conclusion, while the precise sanctions of the three conditionalities display a degree of variation, all three can be qualified as *negative*<sup>219</sup> conditionalities due to their punitive character.

### 3.3. LINKING BACK TO SUB-QUESTION ONE

*What are the objective, scope, procedure and potential sanctions of the RoL conditionality mechanism, the IACS conditionality and the ESIFs complaint conditionality, and how can they be compared?*

**42.** The findings can be summarised in this table of comparison:

---

<sup>213</sup> Article 5 (2) Regulation (EU, Euratom) 2020/2092.

<sup>214</sup> However, the RoL conditionality mechanism has been criticised in the academic literature for the fact that monetary sanctions would, in practice, also have a punitive effect on the final recipients of EU funds, who are not responsible for the actions of their governments. See F. HEINEMANN, “Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework”, *Intereconomics* 2018, Vol. 53, No. 6, (297) 299-300; J. LACNY, “The Rule of Law Conditionality Under Regulation No 2092/2020—Is it all About the Money?”, *Hague Journal on the Rule of Law* 2021, Vol. 13, (79) 99-100.

<sup>215</sup> Article 2 (1) Commission Regulation (EC) No 1423/2006.

<sup>216</sup> *Pro memoria*, sanctions under the RoL conditionality mechanism should be proportionate with the impact, nature, duration, gravity and scope of the breaches of the principles of the RoL. See Recital 18 and Article 5 (3) Regulation (EU, Euratom) 2020/2092.

<sup>217</sup> Article 74 (3) iuncto Articles 83 (1)(a), 142 (1)(a), 144 (1)(a) Regulation (EU) No 1303/2013.

<sup>218</sup> Article 83 (1)(a), subparagraph 3; Article 142 (1)(a), subparagraph 2; and Article 144 (2) of Regulation (EU) No 1303/2013.

<sup>219</sup> *Pro memoria*, a negative conditionality implies that the conditionality has a punitive nature, instead of a rewarding or incentivising character. See S. KOCH, “A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union”, *World Development* 2015, Vol. 75, (97) 99-100; O. STOKKE, “Aid and Political Conditionality: The Case of Norway” in O. STOKKE (ed.), *Aid and Political Conditionality*, London, Frank Cass/EADI, 1995, (162) 163; V. VIȚĂ, “Research for REGI Committee—Conditionalities in Cohesion Policy”, *Policy Department for Structural and Cohesion Policies - European Parliament* 2018, (1) 18.

	<b>RoL conditionality mechanism</b>	<b>IACS conditionality</b>	<b>ESIFs complaint conditionality</b>
<b>Objective</b>	Ensure compliance with the RoL in Member States and protect EU citizens from the financial misuse of EU funds by public authorities = a <b>political</b> conditionality		
<b>Scope of application (material)</b>	Breaches of the principles of the RoL which (risk to) affect the sound financial management of the EU budget or the protection of the Union's financial interests in a sufficiently direct way	An incomplete IACS; or a seriously deficient IACS; or no declaration and expert body report	A seriously deficient national complaints-handling system
<b>Scope of application (temporal)</b>	MFF 2021-2027  = an <b>ex post</b> conditionality	1 December 2007 until 30 November 2008 (with possible prolongments of 12 months)  = an <b>ex post</b> conditionality	MFF 2014-2020  = an <b>ex post</b> conditionality
<b>Source of EU funding</b>	Entire MFF 2021-2027 + Next Generation EU Recovery Fund  = <b>within the domain of EU internal policy</b>	IACS-covered agricultural funds to Bulgaria and Romania  = <b>within the domain of EU internal policy</b>	ESIFs of the MFF 2014-2020  = <b>within the domain of EU internal policy</b>
<b>Procedure</b>	Decision by EC and Council	Decision by EC	Decision by EC (or Authorising Officer by Delegation)
<b>Sanctions</b>	Punitive measures = a <b>negative</b> conditionality		

The preceding analysis and comparison is necessary for two reasons. **Firstly**, its results can be used to *justify* the selection of the IACS conditionality and the ESIFs complaint conditionality for the empirical approach followed, and more generally, for the exploration of the *Assumption*<sup>220</sup>. A certain degree of similarity

<sup>220</sup> *Pro memoria*, this paper will explore the plausibility of the Assumption, i.e. the estimation by politicians and scholars that the introduction of new political conditionalities in the EU budget is likely to positively affect RoL compliance in the Member States where the principles of the RoL are

between these conditionalities – at least at the core level – is a prerequisite to make a reasoning by analogy and draw general lessons from the empirical evidence. The foregoing comparison has proven that this degree of similarity is present, since all three conditionalities can be qualified as:

- A. **A political conditionality**, due to their RoL remit;
- B. **That is *ex post***, due to their scope, as the fulfilment of certain conditions is required over a longer period of time, instead of conditions that only have to be met once;
- C. **That is negative**, due to their punitive character; and
- D. **That is located within the domain of EU internal policy**, as they are linked to sources of EU funds allocated to Member States that directly concern EU citizens.

Secondly, understanding the key characteristics of these conditionalities, will increase the *accuracy* and *veracity* of the empirical component of this research. It will allow to draw conclusions from both the empirical studies and the data under scrutiny; to identify connections between the observations made; to formulate original and well-founded propositions; and to apply political conditionalities to these propositions, as well as to propositions adopted from other studies.

---

being breached. The experiences of pre-existing political conditionalities will serve as the basis for this exploration. It will be investigated what lessons can be drawn from them and how these lessons might be relevant (by analogy) for other political conditionalities in the EU budget.

## 4. POLITICAL CONDITIONALITY IN EU AND FOREIGN AID

### 4.1. HISTORICAL OVERVIEW

**4.3. HISTORICAL OVERVIEW** – While historically, the EU’s foreign aid policy was apolitical and free from democratic demands, awareness surrounding the deplorable human rights situation in some recipient countries of development aid led to a policy shift in the 1980s.<sup>221</sup> Positive measures, promoting democracy and human rights compliance, made their introduction in the foreign aid policy and were soon accompanied by measures of a negative nature.<sup>222</sup> This evolution was most tangible in relation to the third countries of Central and Eastern Europe, where political conditionalities emerged “*first and furthest*” after the Cold War.<sup>223</sup> In the 1990s, EU foreign aid schemes became increasingly subject to political conditionalities, aimed at improving democracy, human rights and the RoL in recipient countries by threatening to suspend aid where specific political requirements were not met or fundamental liberties were under attack.<sup>224</sup> After gaining momentum in the 1990s, the use of political conditionality in the Union’s foreign aid policy seems to have dwindled with the turn of the century.<sup>225</sup> Some scholars claim a *shift in attitude* toward positive measures has taken place in the EU’s foreign aid policy, while others argue that political conditionality is

<sup>221</sup> T. BODENSTEIN and J. FAUST, “Who Cares: European Public Opinion on Foreign Aid and Political Conditionality”, *Journal of Common Market Studies* 2017, Vol. 55, No. 5, (955) 956; K. E. SMITH, “The Use of Political Conditionality in the EU’s Relations with Third Countries: How Effective?”, *EUI Working Papers* 1997, Vol. 97/7, (1) 10-11; R. YOUNGS, “The end of democratic conditionality: good riddance?”, *FRIDE Working Papers* 2010, Vol. 102, (1) 1-2.

<sup>222</sup> G. CRAWFORD, *Foreign Aid and Political Reform: A Comparative Analysis of Democracy Assistance and Political Conditionality*, London, Palgrave Macmillan, 2000, 1-3; K. E. SMITH, “The Use of Political Conditionality in the EU’s Relations with Third Countries: How Effective?”, *EUI Working Papers* 1997, Vol. 97/7, (1) 21; R. YOUNGS, “The end of democratic conditionality: good riddance?”, *FRIDE Working Papers* 2010, Vol. 102, (1) 1-2.

<sup>223</sup> T. BODENSTEIN and J. FAUST, “Who Cares: European Public Opinion on Foreign Aid and Political Conditionality”, *Journal of Common Market Studies* 2017, Vol. 55, No. 5, (955) 956; G. CRAWFORD, *Foreign Aid and Political Reform: A Comparative Analysis of Democracy Assistance and Political Conditionality*, London, Palgrave Macmillan, 2000, 1-3; K. E. SMITH, “The Use of Political Conditionality in the EU’s Relations with Third Countries: How Effective?”, *EUI Working Papers* 1997, Vol. 97/7, (1) 13; R. YOUNGS, “The end of democratic conditionality: good riddance?”, *FRIDE Working Papers* 2010, Vol. 102, (1) 1-2.

<sup>224</sup> G. CRAWFORD, *Foreign Aid and Political Reform: A Comparative Analysis of Democracy Assistance and Political Conditionality*, London, Palgrave Macmillan, 2000, 1-3; K. DEL BIONDO, “EU Aid Conditionality in ACP Countries: Explaining Inconsistency in EU Sanctions Practice”, *Journal of Contemporary European Research* 2011, Vol. 7, No. 3, (380) 380-381; N. MOLENAERS, S. DELLEPIANE, and J. FAUST, “Political conditionality and foreign aid”, *World development* 2015, Vol. 75, (2) 2-3; R. YOUNGS, “The end of democratic conditionality: good riddance?”, *FRIDE Working Papers* 2010, Vol. 102, (1) 1-2.

<sup>225</sup> G. CRAWFORD and S. KACARSKA, “Aid sanctions and political conditionality: continuity and change”, *Journal of International Relations and Development* 2019, Vol. 22, No. 1, (184) 188; N. MOLENAERS, S. DELLEPIANE, and J. FAUST, “Political conditionality and foreign aid”, *World development* 2015, Vol. 75, (2) 2-3; R. YOUNGS, “The end of democratic conditionality: good riddance?”, *FRIDE Working Papers* 2010, Vol. 102, (1) 1-2.

still considered as a valuable foreign policy instrument that is frequently implemented.<sup>226</sup>

**44. METHODOLOGICAL APPROACH** – In 1997, English scholar Gordon Crawford published an empirical-legal study on the *effectiveness* of political conditionality as a means to improve compliance with democracy, human rights and the RoL in the recipient countries of foreign aid. He examined the circumstances under which political conditionalities were favourable to a successful outcome in this regard.<sup>227</sup> The empirical basis for his assessment was a global survey evaluating the impact on human rights and democracy with respect to 29 country cases where aid sanctions had been implemented by four selected donors, including the EU.<sup>228</sup> On the basis of this global survey, Crawford examined the validity of the six *propositions of effectiveness* developed by Stokke in a 1995 study, i.e. six (contextual) factors that contribute to the success of using political conditionality in foreign aid.<sup>229</sup> This led Crawford to refute some of Stokke’s propositions and to confirm others, as well as to add three new propositions of effectiveness himself, resulting in a total of five empirically supported propositions.<sup>230</sup>

In what follows, the IACS conditionality, the ESIFs complaint conditionality and the RoL conditionality mechanism will be applied to these five propositions of effectiveness that have received empirical support in the Crawford study.

**45. MAKING THE JUMP... FROM EXTERNAL TO INTERNAL** – The propositions created by Crawford and Stokke relate to political conditionality in the EU foreign aid context, while the conditionalities under scrutiny in this research are located within the EU internal policy landscape.<sup>231</sup> To make the *jump* possible from one context to the other, and thus improve the veracity of this exercise, the propositions of Crawford and Stokke will be *transposed*. Concretely, this implies

---

<sup>226</sup> G. CRAWFORD and S. KACARSKA, “Aid sanctions and political conditionality: continuity and change”, *Journal of International Relations and Development* 2019, Vol. 22, No. 1, (184) 188; R. YOUNGS, “The end of democratic conditionality: good riddance?”, *FRIDE Working Papers* 2010, Vol. 102, (1) 1-2.

<sup>227</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 69-108.

<sup>228</sup> In nineteen of these country cases, aid sanctions were implemented by the EU. See G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 70-72.

<sup>229</sup> O. STOKKE, “Aid and Political Conditionality: Core Issues and State of the Art” in O. STOKKE (ed.), *Aid and Political Conditionality*, London, Frank Cass/EADI, 1995, (1) 41-46.

<sup>230</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 83-88.

<sup>231</sup> However, it should be noted that, first, the studies of CRAWFORD (and STOKKE) concern *ex post* negative political conditionality (like the RoL conditionality, the IACS conditionality and the ESIFs complaint conditionality). Second, their studies address the *effectiveness debate*, i.e. the question in the academic literature whether political conditionalities are likely to improve RoL compliance in the recipient states of EU funding. Third, CRAWFORD’s study is strongly embedded in empirical evidence.



that for each proposition, consideration will be given to how the EU internal policy context might affect the way they should be interpreted or adjusted.

**46. DEFINING EFFECTIVENESS AND POLITICAL CONDITIONALITY** – Both the studies of Crawford and Stokke discuss the ‘effectiveness’ of political conditionality. Although effectiveness might be a somewhat ambiguous term, it means as much as ‘the ability to positively affect compliance with the RoL’.<sup>292</sup> Therefore, when the term effectiveness is used in Parts III and IV, it should be understood as such. Furthermore, it should be reiterated that ‘political conditionality’ throughout this research should always be understood as ‘*ex post* negative political conditionality’ (unless otherwise specified). This research does not focus on other types of political conditionality.

## 4.2. FIVE PROPOSITIONS OF EFFECTIVENESS

### 4.2.1. Proposition I. Bilateral relations are limited in importance and restricted in magnitude

**47. TWOFOLD INFLUENCE?** – The first proposition, which originates from Stokke, concerns the nature of the relationship between the donor and the recipient country of foreign aid.<sup>293</sup> According to Stokke, the magnitude and importance of this relationship has a twofold, contradictory influence on the effectiveness of political conditionality. On the one hand, a close relationship between the donor and the recipient country would be likely to have a negative impact on the donor’s willingness to apply punitive measures, rendering political conditionality a less desirable policy choice when donor-recipient country ties are strong. On the other hand, Stokke argues that a close relationship between the donor and the recipient country adds gravity to any pressure exerted, thus increasing the likelihood of political conditionality to improve compliance under such circumstances.<sup>294</sup>

In his study, Crawford finds strong empirical support for the first consequence of proposition one, i.e. the reduced willingness to apply political conditionality, whereas he cannot conclude there is sufficient empirical evidence to substantiate the second consequence of this proposition, i.e. the added gravity.<sup>295</sup> In other words, the empirical evidence of Crawford’s study suggests

---

<sup>292</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 70.

<sup>293</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 85-86; O. STOKKE, “Aid and Political Conditionality: Core Issues and State of the Art” in O. STOKKE (ed.), *Aid and Political Conditionality*, London, Frank Cass/EADI, 1995, (1) 44.

<sup>294</sup> O. STOKKE, “Aid and Political Conditionality: Core Issues and State of the Art” in O. STOKKE (ed.), *Aid and Political Conditionality*, London, Frank Cass/EADI, 1995, (1) 44.

<sup>295</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 85-86.

that the restricted magnitude and limited importance of bilateral relations is likely to positively impact the *effectiveness* of political conditionality.

Stokke underlines the particular value of political and economic ties between the donor and the recipient country to indicate the quality of their bilateral relationship.<sup>236</sup> Crawford adds that historical ties should be taken into account as well.<sup>237</sup>

**48. TRANSPOSITION** -- There is, however, a marked distinction between the political conditionalities attached to foreign aid funds and those attached to the EU budget in terms of their implementation.

Foreign aid funds are usually implemented through NGOs or implementation agencies, such as agencies of the UN or the World Bank Group. These funds are rarely directly distributed to the public authorities of a third state. The influence of the authorities of a recipient country on the spending of foreign aid funds is therefore limited. In addition, there are (more) far-reaching budget guarantees to ensure the proper spending of funds.<sup>238</sup>

In contrast, the public authorities of Member States play a crucial role in the implementation of the EU budget. The EC is highly dependent on the goodwill of Member States' administrations to implement the EU budget, since this responsibility is shared between them in respect of approximately eighty percent of the EU budget. This results in an increased bargaining power for the Member States, which shifts the bilateral power balance between the EU as a donor and the Member States as recipient countries. Therefore, within the EU internal policy context, the unique relationship between the EU and its Member States in implementing the Union budget constitutes a first obstacle to the EU's willingness to enforce (political) conditionality.

**49. APPLICATION** -- On a political and economic level, the European integration process has been the most extensive example of international cooperation among nation states in recent history. Political collaboration in the EU is highly institutionalised and considerably stronger than is usually the case between independent countries.<sup>239</sup> Moreover, economic interdependence between the

---

<sup>236</sup> O. STOKKE, "Aid and Political Conditionality: Core Issues and State of the Art" in O. STOKKE (ed.), *Aid and Political Conditionality*, London, Frank Cass/EADI, 1995, (1) 44.

<sup>237</sup> G. CRAWFORD, "Foreign aid and political conditionality: Issues of effectiveness and consistency", *Democratization* 1997, (69) 85-86.

<sup>238</sup> DG ECHO, *EU Humanitarian Partnership Certificate - Guidance 2021*, 29 November 2021, <https://www.dgecho-partners-helpdesk.eu/ngo/humanitarian-partnership-2021-2027/eu-humanitarian-partnership-certificate-2021-2027>; V. LILYANOVA, "Understanding EU financing for external action", *European Parliamentary Research Service* 2021, (1) 1-6.

<sup>239</sup> M. BLAUBERGER and V. VAN HÜLLEN, "Conditionality of EU funds: an instrument to enforce EU fundamental values?", *Journal of European*

Member States is exceptionally large due to the existence of an economic and monetary union with a single currency, supervised by a European Central Bank.<sup>240</sup> Furthermore, the EU is built upon a shared European identity with common values, a somewhat shared history and a future destiny.<sup>241</sup>

With the enhanced bargaining power of Member States and the extensive integration process in mind, it is safe to conclude that the relationship between the EU as a *donor* and the EU Member States as *recipient countries*, is anything but restricted in magnitude or limited in importance. As a result, it can be concluded that neither the IACS conditionality, nor the ESIFs complaint conditionality, nor the RoL conditionality mechanism meet the first proposition.

#### 4.2.2. Proposition II. Actions are internally coordinated

**50. COORDINATED VS. UNILATERAL ACTION** – The second proposition of STOKKE that is empirically backed by CRAWFORD’s study relates to the question whether actions are internationally coordinated by multiple governments or whether policy reforms are demanded in a unilateral manner by a single donor government.<sup>242</sup> The empirical evidence in CRAWFORD’s study suggests that in the latter case, the impact is largely ineffectual.<sup>243</sup> Instead, when several governments present a united front against undesirable behaviour by the public authorities of the recipient country, better prospects can be expected.<sup>244</sup> A

---

*Integration* 2021, Vol. 43, No.1, (1) 7-8; N. FLIGSTEIN, A. POLYAKOVA and W. SANDHOLTZ, “European Integration, Nationalism and European Identity”, *Journal of Common Market Studies* 2012, Vol. 50, No. 1, (106) 106-108; F. WASSERFALLEN, “Political and Economic Integration in the EU: The Case of Failed Tax Harmonization”, *Journal of Common Market Studies* 2013, Vol. 52, No. 2, (1) 1-3.

<sup>240</sup> Article 3 (4) and Article 13 (1) TEU; M. BLAUBERGER and V. VAN HÜLLEN, “Conditionality of EU funds: an instrument to enforce EU fundamental values?”, *Journal of European Integration* 2021, Vol. 43, No.1, (1) 7-8; N. FLIGSTEIN, A. POLYAKOVA and W. SANDHOLTZ, “European Integration, Nationalism and European Identity”, *Journal of Common Market Studies* 2012, Vol. 50, No. 1, (106) 106-108; F. WASSERFALLEN, “Political and Economic Integration in the EU: The Case of Failed Tax Harmonization”, *Journal of Common Market Studies* 2013, Vol. 52, No. 2, (1) 1-3.

<sup>241</sup> Article 2 TEU; R.K. HERRMANN and M.B. BREWER, “Identities and Institutions: Becoming European in the EU” in R.K. HERRMANN et al. (eds.), *Transnational Identities: Becoming European in the EU*, Lanham, Rowman & Littlefield Publishers, 2004, 15-16.

<sup>242</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 86-87; O. STOKKE, “Aid and Political Conditionality: Core Issues and State of the Art” in O. STOKKE (ed.), *Aid and Political Conditionality*, London, Frank Cass/EADI, 1995, (1) 45.

<sup>243</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 86-87.

<sup>244</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 86-87; O. STOKKE, “Aid and Political

common purpose between multiple donor governments and a shared understanding of how and when to implement sanctions is therefore key to the effectiveness of political conditionality.<sup>245</sup>

**51. TRANSPOSITION** – When sanctions are implemented on EU level against a Member State, action is by definition coordinated. After all, the EC,<sup>246</sup> as the responsible actor, will ensure the unified and consistent application of punitive measures throughout the Union.<sup>247</sup> This is reinforced by the principle of equal treatment between Member States, which renders inconsistent action by the EC contrary to EU law itself.<sup>248</sup>

**52. APPLICATION** – The common purpose that characterises a coordinated action becomes particularly evident when looking at the *ratio legis* of each conditionality.<sup>249</sup>

First, the IACS conditionality allowed the established Member States, who had been contributing to the European initiative for years – sometimes decades – to stick together and protect the agricultural funds against improper spending by the Bulgarian and Romanian authorities.<sup>250</sup> After all, Bulgaria and Romania presented undeniable shortcomings in the fields of judicial reform and the fight against corruption.<sup>251</sup> Second, the ESIFs complaint conditionality

---

Conditionality: Core Issues and State of the Art” in O. STOKKE (ed.), *Aid and Political Conditionality*, London, Frank Cass/EADI, 1995, (1) 45.

<sup>245</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 86-87.

<sup>246</sup> **Or in some cases the Authorising Officer by Delegation.** See Article 83 (1)(a) Regulation (EU) No 1303/2013.

<sup>247</sup> Recital 7-8, Article 1 and Article 2 (1) Commission Regulation (EC) No 1423/2006; Article 83 (1)(a), Article 142 (1)(a)-(2) and Article 144 (1)(a) Regulation (EU) No 1303/2013.

<sup>248</sup> Recital 26 Regulation (EU, Euratom) 2020/2092; P. BLIZKOVSKY, “Economic governance and solidarity: A complex relationship”, *Studia Diplomatica* 2011, Vol. 64, No. 4, (69) 75.

<sup>249</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 86-87.

<sup>250</sup> Recital 4-5 Commission Regulation (EC) No 1423/2006; EC, *Report from the European Commission to the European Parliament and the Council on Bulgaria's progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 377 final, 2-3; EC, *Report from the European Commission to the European Parliament and the Council on Romania's progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 378 final, 2-3; P. LEVITZ and G. POP-ELECHES, “Monitoring, Money and Migrants: Countering Post-Accession Backsliding in Bulgaria and Romania”, *Europe-Asia Studies* 2010, Vol. 62, No. 3, (461) 470; G. POPESCU, “Accompanying measures in the context of Romania's accession to EU”, *Romanian Economic and Business Review* 2006, Vol.1, No.2, (31) 31-32.

<sup>251</sup> Recital 4-5 Commission Regulation (EC) No 1423/2006; EC, *Report from the European Commission to the European Parliament and the Council on Bulgaria's progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 377 final, 2-3; EC, *Report from the European Commission to the European Parliament*

allowed the more affluent Member States who had disproportionately contributed to the EU budget (as the ESIFs aim to relocate money to the less affluent Member States) to safeguard their contributions from maladministration and illegal conduct in these Member States.<sup>252</sup> Third, the RoL conditionality mechanism provides the numerous Member States that have consistently adhered to the principles of the RoL with a new tool to collectively counteract RoL backsliding in non-compliant Member States, such as Hungary and Poland.<sup>253</sup>

**53. CONCLUSION** – The consistent and unified approach inherent to the activation process of conditionality on EU level, as well as the collaborative undertone which is at the basis of the three conditionalities, are likely to enhance the effectiveness of political conditionality. Therefore, the IACS conditionality, the ESIFs complaint conditionality and the RoL conditionality mechanism all satisfy the second proposition.

#### *4.2.3. Proposition III. The required reforms are precisely formulated*

**54. MEASURING ‘PRECISENESS’** – The third proposition, which originates from the study by CRAWFORD, concerns the specificity of reforms that the donor requires from the recipient country in order to obtain foreign aid.<sup>254</sup> CRAWFORD makes a distinction between situations where donor demands

---

*and the Council on Romania’s progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 378 final, 2-3; P. LEVITZ and G. POP-ELECHES, “Monitoring, Money and Migrants: Countering Post-Accession Backsliding in Bulgaria and Romania”, *Europe-Asia Studies* 2010, Vol. 62, No. 3, (461) 470; G. POPESCU, “Accompanying measures in the context of Romania’s accession to EU”, *Romanian Economic and Business Review* 2006, Vol.1, No.2, (31) 31-32.

<sup>252</sup> Recital 1 and Article 74 (3) Regulation (EU) No 1303/2013; EC, *Comments of the Commission on the European Ombudsman’s Own-initiative inquiry*, 11 May 2015, OI/8/2014/AN, 9; EC, *Commission Notice – Guidance on ensuring the respect for the Charter of Fundamental Rights of the European Union when implementing the European Structural and Investment Funds (‘ESIFs’)*, 23 July 2016, 2016/C 269/01, 6; European Ombudsman, *Decision of the European Ombudsman closing her own-initiative inquiry OI/8/2014/AN concerning the European Commission*, 11 May 2015, OI/8/2014/AN, 4; K.L. SCHEPPELE, L. PECH and R.D. KELEMEN, “Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission’s EU budget-related rule of law mechanism”, *Verfassungsblog* 2018, <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>.

<sup>253</sup> B. BUGARIC and A. KUHELJ, “Varieties of Populism in Europe: Is the Rule of Law in Danger?” *Hague Journal on the Rule of Law* 2018, Vol. 10, (21) 26-27; F. COSTA REIS and K. RAUBE, “The EU’s Crisis Response Regarding the Democratic and Rule of Law Crisis” in M. RIDDERVOLD, J. TRONDAL and A. NEWSOME (eds.), *The Palgrave Handbook of EU Crises*, London, Palgrave Macmillan, 2020, (627) 627-632; G. HALMAI, “Illiberalism in East-Central Europe”, *EUI Working Papers* 2019, Vol. 2019/05, (1) 1-5.

<sup>254</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 87.

aim to correct systemic problems in the recipient country, such as an undesirable regime type, and situations where donor demands relate to more particular circumstances.<sup>255</sup> CRAWFORD argues that in the latter case, political conditionality is more likely to be associated with specific donor expectations, thus leading to an improved effectiveness. Nevertheless, his empirical findings show that specific demands can also be formulated in the case of systemic problems.<sup>256</sup> As a result, when assessing the preciseness of the required reforms, it will not suffice to look solely at the nature of the situation to be corrected, albeit that this may be an indication. It will be necessary to make an in-depth examination of the donor demands.

**55. APPLICATION: IACS CONDITIONALITY** -- The IACS conditionality was designed to address a specific – rather than a systemic – concern, namely the establishment and operationality of an IACS in Bulgaria and Romania that would ensure the fair distribution of agricultural funds among Bulgarian and Romanian farmers.<sup>257</sup> As set out earlier on, the IACS conditionality could be activated in three possible scenarios related to the establishment and operationality of the national IACS.<sup>258</sup>

Articles 18 to 26 of Council Regulation 1782/2003 give a detailed overview of the various elements that these systems should comprise, providing precise standards for each Member State to meet. In addition, Article 27 of this Regulation enabled the EC to arrange comprehensive examinations of these integrated systems, the results of which could be discussed with each Member State, as well as to assist in their implementation and application whenever a Member State would so request. Consequently, the provisions of Council Regulation 1782/2003 offered a high degree of foreseeability for the Bulgarian and Romanian authorities as to the expected actions. As a result, the required reforms of the IACS conditionality are characterised by a high level of preciseness.

---

<sup>255</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 87.

<sup>256</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 87.

<sup>257</sup> Recital 4-5 Commission Regulation (EC) No 1423/2006; EC, *Accompanying measures in the context of Bulgaria’s and Romania’s accession*, 26 September 2006, MEMO/06/347, 3-4.

<sup>258</sup> **More precisely, the IACS conditionality could be activated (i) firstly, where the elements of the Bulgarian or Romanian IACS were not set up according to the relevant EU legislation, (ii) secondly, where no declaration was made at the Bulgarian or Romanian ministerial level to guarantee that these elements had been established and no independent expert body had confirmed this, or (iii) thirdly, where the elements of the Bulgarian or Romanian IACS or any other element necessary to ensure the correct payment, although set up in accordance with EU law, were so seriously deficient as to affect the proper functioning of the overall system.** See Article 2 (1) Commission Regulation (EC) No 1423/2006.

**56. APPLICATION : ESIFs COMPLAINT CONDITIONALITY** – Similar to the IACS conditionality, the ESIFs complaint conditionality aimed to remedy a specific situation, namely the lack of protection of EU citizens from violations of EU law concerning the ESIFs by ensuring that each Member State had a complaints-handling system in place where these violations could be addressed and tackled.<sup>259</sup> However, compared to the IACS conditionality, the required reforms of the ESIFs complaint conditionality are much more opaque.<sup>260</sup>

There are no provisions in Regulation 1303/2013 on the ESIFs that impose requirements or set guidelines on how to organise such a complaints-handling system.<sup>261</sup> Article 74 (3) Regulation 1303/2013 specifically leaves the scope, rules and procedures of these complaints-handling systems to the discretion of each Member State, in accordance with their own national institutional and legal framework. Furthermore, there is no legal definition of what constitutes a complaint, as referred to in Article 74 (3) Regulation 1303/2013.<sup>262</sup> The only legal requirement for the Member States was to ensure that the complaints-handling system was not seriously deficient, as this could trigger the ESIFs complaint conditionality.<sup>263</sup> When looking beyond the legal provisions, into the assessments of these complaints-handling systems made on behalf of the EC, some requirements can be discerned, such as the obligation to be accessible, responsive, objective and fair when assessing complaints.<sup>264</sup>

In conclusion, the ESIFs complaint conditionality imposes a somewhat delineated requirement, namely the establishment of a complaints-handling system that is not seriously deficient. Nevertheless, additional legal instructions are scarce. As a result, the preciseness of the required reforms is – at best – moderate.

---

<sup>259</sup> Article 74 (3) Regulation (EU) No 1303/2013; EC, *Comments of the Commission on the European Ombudsman's Own-initiative inquiry*, August 2014, Ref. OI/8/2014/AN final, 9-10; EC, *Study on complaints-handling systems - Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 21; J. LACNY, "Stick works better than carrot? Suspension of EU funds paid to the Member States breaching the rule of law" in A. BOROWICZ *et al.* (eds.), *European Unions and its Law, Policy and Economy: Interna land External Dimension*, Warsaw, CeDeWu Sp., 2020, (61) 61-62; C. PARKER, I. BULIC COJOCARIU and N. KOKIC, "European Union Structural and Investment Funds and the Transition from Institutional Care to Community Living: Towards a More Effective Monitoring and Complaints System", *European Network on Independent Living* 2017, (1) 30.

<sup>260</sup> G. CRAWFORD, "Foreign aid and political conditionality: Issues of effectiveness and consistency", *Democratization* 1997, (69) 87.

<sup>261</sup> EC, *Study on complaints-handling systems - Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 18-19.

<sup>262</sup> EC, *Study on complaints-handling systems - Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 18-19.

<sup>263</sup> Article 74 (3) *juncto* Articles 83 (1)(a), 142 (1)(a) and 144 (1)(a) Regulation (EU) No 1303/2013.

<sup>264</sup> EC, *Study on complaints-handling systems - Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 18-19.

**57. APPLICATION: RoL CONDITIONALITY MECHANISM** – Unlike the IACS conditionality and the ESIFs complaint conditionality, the RoL conditionality mechanism aims to correct specific, as well as systemic problems concerning the RoL in the Member States.<sup>265</sup> According to the study by CRAWFORD, this already serves as a first pointer towards the non-fulfilment of the third proposition.<sup>266</sup> This is to a certain extent confirmed when looking at the specific donor demands at play in the RoL conditionality mechanism. The RoL conditionality mechanism demands that there are no breaches of the principles of the RoL that (seriously risk to) affect the sound financial management of the EU budget or the protection of the Union’s financial interests in a sufficiently direct way.<sup>267</sup> As the RoL Checklist frequently underlines, respect for the principles of the RoL can be achieved through different methods and practices.<sup>268</sup> In other words, the RoL leaves the Member States with a certain degree of freedom in organising their judiciary, limiting the power of their governments, reaching legitimate decisions, and so on. It is therefore impossible to impose precise donor demands, as this would be contrary to the RoL itself.

However, the EC has developed guidelines for the application of the RoL conditionality mechanism.<sup>269</sup> These guidelines clearly indicate when the RoL conditionality mechanism will be triggered.<sup>270</sup> While these guidelines are not legally binding, it can be expected that the EC will follow them.<sup>271</sup> As a result, a certain degree of preciseness and foreseeability regarding the application of the RoL conditionality mechanism and the required demands is guaranteed.

---

<sup>265</sup> Paragraph 9, 22 and 23 Resolution (EP) on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)), 8 July 2021, P9\_TA(2021)0348, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0348_EN.html); EC, *Communication from the 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*, 2 March 2022, C(2022) 1382 final, 3-4.

<sup>266</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 87.

<sup>267</sup> Article 3 and 4 (1)-(2) Regulation (EU, Euratom) 2020/2092.

<sup>268</sup> Venice Commission, *Rule of Law Checklist*, 18 March 2016, CDL-AD(2016)007rev, 9.

<sup>269</sup> **These guidelines decide, for example, that the EC will use the Venice Commission’s RoL Checklist to identify and assess breaches of the principles of the RoL.** See EC, *Communication from the 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*, 2 March 2022, C(2022) 1382 final, 16.

<sup>270</sup> EC, *Communication from the 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*, 2 March 2022, C(2022) 1382 final, 18.

<sup>271</sup> EC, *Communication from the 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*, 2 March 2022, C(2022) 1382 final, 1-2.



In conclusion, the degree of preciseness of the reforms required by the RoL conditionality mechanism is – by its nature – limited, but the EC has made significant efforts to delineate the demands as far as possible. The RoL conditionality mechanism thus meets the third proposition, but only to a certain extent.

#### 4.2.4. Proposition IV. Countervailing interests are overall limited

**58. OVERVIEW** – The fourth proposition relates to the existence of conflicting interests by the donor in the recipient country, in particular those of an economic and strategic nature. According to CRAWFORD, the greater the conflicting interests, the less likely the donor is to apply political conditionality, as these interests might affect the sincerity of the donor’s intent to bring about political change in the recipient country.<sup>272</sup> While STOKKE incorporates this issue into the discussion surrounding the first proposition, i.e., the magnitude and importance of bilateral relations, CRAWFORD considers it to be a proposition in its own right due to its significant role in influencing the effectiveness of political conditionality.<sup>273</sup> A number of other scholars support this proposition.<sup>274</sup> DEL BIONDO, for example, emphasises that the EU is often criticised for enforcing political conditionality only in strategically less significant countries where there are fewer competing interests.<sup>275</sup>

**59. TRANSPOSITION** – Of all propositions, proposition four requires most prudence in its application within the EU internal policy context. The EU is, after all, a political project, as well as an economic one.<sup>276</sup> Democracy, human rights and the RoL are among the Union’s founding values as listed in Article 2 TEU. As previously mentioned, these values have a normative character, insofar as they are a prerequisite for Union Membership and can be legally enforced by

---

<sup>272</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 87-88.

<sup>273</sup> G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 87-88; O. STOKKE, “Aid and Political Conditionality: Core Issues and State of the Art” in O. STOKKE (ed.), *Aid and Political Conditionality*, London, Frank Cass/EADI, 1995, (1) 44.

<sup>274</sup> G. CRAWFORD and S. KACARSKA, “Aid sanctions and political conditionality: continuity and change”, *Journal of International Relations and Development* 2019, Vol. 22, No. 1, (184) 187; K. DEL BIONDO, “EU Aid Conditionality in ACP Countries: Explaining Inconsistency in EU Sanctions Practice”, *Journal of Contemporary European Research* 2011, Vol. 7, No. 3, (380) 380-381; K.E. SMITH, “The Use of Political Conditionality in the EU’s Relations with Third Countries: How Effective?”, *EU Working Papers* 1997, Vol. 97/7, (1) 5.

<sup>275</sup> K. DEL BIONDO, “EU Aid Conditionality in ACP Countries: Explaining Inconsistency in EU Sanctions Practice”, *Journal of Contemporary European Research* 2011, Vol. 7, No. 3, (380) 380-381.

<sup>276</sup> K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 106-107; A. WILLIAMS, *The Ethos of Europe – Values, Law and Justice in the EU*, Cambridge, Cambridge University Press, 2010, 1-5.

the EU institutions vis-à-vis Member States.<sup>277</sup> The EU has proven to be deeply committed to the promotion and protection of these values on its territory.<sup>278</sup> Moreover, the Union possesses a firm legal – one might even say *constitutional* – authority to do so.<sup>279</sup> As a result, conflicting economic and strategic interests do not automatically outweigh political interests in the EU internal policy landscape.<sup>280</sup> This will have to be taken into account when balancing the competing interests at play.

**60. THE FOUR COMPETING INTERESTS OF VIȚĂ – VIȚĂ** lists four factors that the EC will take into account when deciding on the application of conditionality

---

<sup>277</sup> Article 7 and 49 TEU; B. BAKÓ, “Hungary’s Latest Experiences with Article 2 TEU: The Need for ‘Informed’ EU Sanctions” in A. VON BOGDANDY, P. BOGDANOWICZ *et al.* (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (35) 61; W. SCHROEDER, “The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?” in A. VON BOGDANDY, P. BOGDANOWICZ *et al.* (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (105) 112-114; A. VON BOGDANDY, “Towards a Tyranny of Values? Principles on Defending Checks and Balances in EU Member States” in A. VON BOGDANDY, P. BOGDANOWICZ *et al.* (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (73) 78-79.

<sup>278</sup> EC, *European Commission Communication, A new EU Framework to strengthen the Rule of Law*, 11 March 2014, COM(2014) 158 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0158>, 2; J.W. MÜLLER, “Should the EU Protect Democracy and the Rule of Law inside Member States?”, *European Law Journal* 2015, Vol. 21, No. 2, (141) 145-146; A. WILLIAMS, *The Ethos of Europe – Values, Law and Justice in the EU*, Cambridge, Cambridge University Press, 2010, 165-167.

<sup>279</sup> B. BAKÓ, “Hungary’s Latest Experiences with Article 2 TEU: The Need for ‘Informed’ EU Sanctions” in A. VON BOGDANDY, P. BOGDANOWICZ *et al.* (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (35) 61; D. KOCHENOV and L. PECH, “Better Late than Never? On the European Commission’s Rule of Law Framework and its First Activation”, *Journal of Common Market Studies* 2016, Vol. 54, No. 5, (1062) 1062-1064; N. LAVRANOS, “Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles” in P. CARROZZA, F. FONTANELLI and G. MARTINICO (eds.), *Shaping rule of law through dialogue: International and Supranational experiences*, Groningen, Europa Law Publishing, 2009, (119) 141-143; J.W. MÜLLER, “Should the EU Protect Democracy and the Rule of Law inside Member States?”, *European Law Journal* 2015, Vol. 21, No. 2, (141) 145-146; J.C. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 71-72; W. SCHROEDER, “The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?” in A. VON BOGDANDY, P. BOGDANOWICZ *et al.* (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (105) 112-114; J. WOUTERS, “Revisiting Art. 2 TEU: A True Union of Values?”, *European Papers – A Journal on Law and Integration* 2020, Vol. 5, No. 1, (255) 258.

<sup>280</sup> K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 106-107; J.W. MÜLLER, “Should the EU Protect Democracy and the Rule of Law inside Member States?”, *European Law Journal* 2015, Vol. 21, No. 2, (141) 145-146.

in the EU budget vis-à-vis Member States.<sup>281</sup> These factors could be understood as countervailing interests, as referred to by CRAWFORD.

A first countervailing interest is the EU's interest in swift budgetary execution.<sup>282</sup> VIŢĂ explains that the Union's primary budgetary objective is to spend EU money.<sup>283</sup> As a consequence, VIŢĂ argues that the enforcement of conditionalities, which necessarily delays budgetary execution, is only a last-resort measure.<sup>284</sup> However, while the objective of a swift budgetary execution might play a role in the EC's deliberation whether or not to apply conditionality, it is hard to imagine that the benefits of a swift budgetary execution would prevail over ensuring compliance with the RoL.

A second competing interest that is mentioned by VIŢĂ is the precarious economic situation of a Member State, which may further deteriorate by suspending funds.<sup>285</sup> Due to the economic interdependence between the Member States, this could negatively affect the entire European economy.<sup>286</sup> It is certainly conceivable that the EC would take this into account – at least to some extent – when considering whether to trigger the IACS conditionality, the ESIFs complaint conditionality and the RoL conditionality mechanism.

Furthermore, VIŢĂ argues that a potential negative effect on the EU's reputation, the degree of Euroscepticism, as well as the emergence of illiberal tendencies in a Member State might convince the EC to be more cautious in

<sup>281</sup> V. VIŢĂ, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* 2017, (116) 141-142.

<sup>282</sup> EC, *Mid-Term Review/Revision of the Multiannual Financial Framework 2014-20: An EU Budget Focused on Results*, 16 September 2016, COM(2016) 603 final, 8; V. VIŢĂ, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* 2017, (116) 141-142.

<sup>283</sup> V. VIŢĂ, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* 2017, (116) 141-142.

<sup>284</sup> V. VIŢĂ, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* 2017, (116) 141-142.

<sup>285</sup> V. VIŢĂ, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* 2017, (116) 141-142.

<sup>286</sup> M. BLAUBERGER and V. VAN HÜLLEN, "Conditionality of EU funds: an instrument to enforce EU fundamental values?", *Journal of European Integration* 2021, Vol. 43, No.1, (1) 7-8; N. FLIGSTEIN, A. POLYAKOVA and W. SANDHOLTZ, "European Integration, Nationalism and European Identity", *Journal of Common Market Studies* 2012, Vol. 50, No. 1, (106) 106-108; F. WASSERFALLEN, "Political and Economic Integration in the EU: The Case of Failed Tax Harmonization", *Journal of Common Market Studies* 2013, Vol. 52, No. 2, (1) 1-3.

enforcing conditionality in the EU budget.<sup>287</sup> This is particularly relevant for the RoL conditionality mechanism, as history has shown that Euroscepticism and illiberal behaviour of national authorities go hand in hand with RoL backsliding.<sup>288</sup> It feels somewhat contradictory, however, to conclude that the decision not to enforce political conditionality in the EU budget would contribute to the decline of illiberal trends in Member States.

Finally, VIŢĂ considers that a fear of harming EU citizens by enforcing conditionality, especially those in less affluent regions, might factor into the EC's deliberation.<sup>289</sup> This claim is supported by other scholars, such as HEINEMANN.<sup>290</sup> For the IACS conditionality and the ESIFs complaint conditionality, this might be a legitimate concern since no legal safeguards were adopted to protect final recipients. For the new RoL conditionality mechanism, however, Article 5 (2) Regulation 2020/2092 declares that a suspension of funds based on the RoL conditionality mechanism shall not affect the obligations of government entities towards the final recipients or beneficiaries. In other words, the Member State affected by the RoL conditionality mechanism should still pay the citizens what they are entitled to under the EU budget. Moreover, Regulation 2020/2092 provides specific safeguards for EU citizens to ensure that they are paid in case the RoL conditionality mechanism is triggered.<sup>291</sup>

**61. CONCLUSION** -- What has become evident, is that a range of different interests come into play when deciding on the application of political conditionality in the EU budget. While some of these interests might stem the EC more prudent in their approach whether or not to apply political conditionality, the Union's commitment and legal authority to promote and protect the RoL among its Member States does not seem to be an easy consideration to overshadow. Against this background, the degree of countervailing interests does seem to be rather limited, especially for the RoL

---

<sup>287</sup> V. VIŢĂ, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* 2017, (116) 141-142.

<sup>288</sup> L.H. ANDERS and A. LORENZ, "Examining Illiberal Trends and Anti-EU Politics in East Central Europe from a Domestic Perspective: State of Research and Outline of the Book" in L.H. ANDERS and A. LORENZ (eds.), *Illiberal Trends and Anti-EU Politics in East Central Europe*, London, Palgrave Macmillan, 2021, (1) 1-2; B. BUGARIC and A. KUHELJ, "Varieties of Populism in Europe: Is the Rule of Law in Danger?", *Hague Journal on the Rule of Law* 2018, Vol. 10, (21) 26-27; F. COSTA REIS and K. RAUBE, "The EU's Crisis Response Regarding the Democratic and Rule of Law Crisis" in M. RIDDERVOLD, J. TRONDAL and A. NEWSOME (eds.), *The Palgrave Handbook of EU Crises*, London, Palgrave Macmillan, 2020, (627) 627-632; G. HALMAI, "Illiberalism in East-Central Europe", *EU Working Papers* 2019, Vol. 2019/05, (1) 1-5.

<sup>289</sup> V. VIŢĂ, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* 2017, (116) 141-142.

<sup>290</sup> F. HEINEMANN, "Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework", *Intereconomics* 2018, Vol. 53, No. 6, (297) 299-300.

<sup>291</sup> **For the existing safeguards related to the RoL conditionality mechanism, see Article 5 (4)-(5) Regulation (EU, Euratom) 2020/2092.**

conditionality mechanism, but also for the IACS conditionality and the ESIFs complaint conditionality. In conclusion, all three conditionalities meet the fourth proposition.

*4.2.5. Proposition V. Overall, the donor displays a high degree of political will*

**62. A TWOFOLD LACK OF POLITICAL WILL** – The final proposition, which finds its roots in the study by CRAWFORD, concerns the degree of political will by the donor to implement the political conditionality rigorously. Where this political will is absent, the effectiveness of political conditionality is compromised.<sup>292</sup> According to CRAWFORD, the lack of political will by the donor becomes evident in two different scenarios. First, when the donor's legislature fully supports penalising measures, but the donor's government does not implement them wholeheartedly.<sup>293</sup> Second, when political conditionality is enforced by the donor, but merely as a symbolic action, because the donor desires the mere appearance of doing something.<sup>294</sup>

**63. TRANSPOSITION** – Three observations present themselves when applying proposition five to the three conditionalities under scrutiny. First, the degree of political will must be assessed in respect of the EC, as the EC is the institution responsible to initiate the enforcement of the three conditionalities.<sup>295</sup> Second, it should be taken into account that the enforcement of conditionality in the EU budget is characterised by the use of a variety of pre-enforcement tactics, such as negotiation, notification and threatening gestures.<sup>296</sup> These techniques are an integral part of the conditionalities' implementation process and often lead to a situation where there is no need for actual penalties.<sup>297</sup> As a consequence, within the EU internal policy landscape, the EC's willingness to deploy pre-enforcement tactics will be a strong indicator to assess its degree of political will to enforce conditionality. Third, the mere fact that a conditionality has never been enforced in practice does not prove that the EC has been unwilling to do so if it were necessary. After all, if the Member State concerned complied with the underlying conditions, there would have been no reason to resort to sanctions. The degree of compliance with the underlying conditions of the conditionalities is therefore paramount in this assessment. In case of Member

---

<sup>292</sup> G. CRAWFORD, "Foreign aid and political conditionality: Issues of effectiveness and consistency", *Democratization* 1997, (69) 88.

<sup>293</sup> G. CRAWFORD, "Foreign aid and political conditionality: Issues of effectiveness and consistency", *Democratization* 1997, (69) 88.

<sup>294</sup> G. CRAWFORD, "Foreign aid and political conditionality: Issues of effectiveness and consistency", *Democratization* 1997, (69) 88.

<sup>295</sup> Article 2 Commission Regulation (EC) No 1423/2006; Articles 142 and 144 Regulation (EU) No 1303/2013; Article 6 (1) Regulation (EU, Euratom) 2020/2092.

<sup>296</sup> V. VIȚĂ, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* 2017, (116) 141.

<sup>297</sup> V. VIȚĂ, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* 2017, (116) 141.

States' compliance, other indicators will have to be relied upon to determine the EC's political will.

**64. APPLICATION: IACS CONDITIONALITY** – The IACS conditionality has never been triggered in practice.<sup>298</sup> Nevertheless, the EC has made widespread use of pre-enforcement tactics, which have led to successful results.<sup>299</sup> These pre-enforcement tactics included regular audit missions, dialogues and in-depth controls of the IACS.<sup>300</sup> Most notably, the EC gave Romania a strict deadline to make specific changes to their IACS, i.e. putting in place and properly testing two key software modules.<sup>301</sup> The non-respect of this demand within the given time frame would have resulted in a 25 percent cut of the targeted EU agricultural funds to Romania.<sup>302</sup> In conclusion, the EC has demonstrated a high degree of political will to enforce the IACS conditionality.

**65. APPLICATION: ESIFs COMPLAINT CONDITIONALITY** – Like the IACS conditionality, the ESIFs complaint conditionality has never been triggered during the 2014-2020 MFF.<sup>303</sup> The complaints-handling systems in some Member States, such as Hungary, Belgium and Spain, have been shown to need improvement due to concerns over their objectivity, independence and possibility for review.<sup>304</sup> Nevertheless, all complaints-handling systems have proven to be overall satisfactory, while the ESIFs complaint conditionality could only be triggered where they were *seriously deficient*.<sup>305</sup> As a consequence, the non-enforcement of the ESIFs complaint conditionality cannot serve as an indicator for the EC's willingness to trigger the conditionality if necessary.

An indication of the EC's political will can, however, be found in its commitment to protect the proper functioning of the management and control system in the Member States. The management and control system is the

---

<sup>298</sup> See *infra* paragraph 75 and 76.

<sup>299</sup> See *infra* paragraph 76.

<sup>300</sup> EC, *Report from the European Commission to the European Parliament and the Council on Bulgaria's progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 377 final, 3-4; EC, *Report from the European Commission to the European Parliament and the Council on Romania's progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 378 final, 3-4; EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 1-2.

<sup>301</sup> EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 1-2.

<sup>302</sup> EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 1-2.

<sup>303</sup> V. VIȚĂ, "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies* 2017, (116) 127-130.

<sup>304</sup> EC, *Study on complaints-handling systems - Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 67-71 and 130-136 and 167-171.

<sup>305</sup> EC, *Study on complaints-handling systems - Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 1-284.

overarching structure consisting of several bodies that help to ensure the sound expenditure of ESIFs in the Member States.<sup>306</sup> The complaints-handling system is one of these sub-entities embedded in this management and control system.<sup>307</sup> During the 2014-2020 MFF, the EC has suspended funds to Hungary for the existence of significant deficiencies in their management and control system.<sup>308</sup> This confirms the EC's willingness to tackle deficiencies in the Member States' management and control system, which may serve as an indication of the EC's willingness to enforce the ESIFs complaint conditionality. Furthermore, it should be noted that the EC thoroughly monitored the complaints-handling system of each Member State, which may provide another indicator of their political will.<sup>309</sup> Alternatively, the broad discretion of Member States to organise these complaints-handling systems and the high threshold to activate the conditionality would probably have hampered the EC's political will to enforce the ESIFs complaint conditionality *wholeheartedly*.<sup>310</sup>

In conclusion, while there are some positive indicators of the EC's willingness to apply conditionality as a means to safeguard the management and control systems in Member States, the broad discretionary power of Member States and the high threshold would presumably constitute an impediment in

---

<sup>306</sup> I. BUTLER, "Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs", *Civil Liberties Union for Europe* 2018, (1) 4-5; J. LACNY, "Stick works better than carrot? Suspension of EU funds paid to the Member States breaching the rule of law" in A. BOROWICZ *et al.* (eds.), *European Unions and its Law, Policy and Economy: Interna land External Dimension*, Warsaw, CeDeWu Sp., 2020, (61) 62-63; J. PISKORZ, "Conditionality of the EU funds. A tool to protect the Union's budget or an instrument to strengthen the rule of law?" in A. BOROWICZ *et al.* (eds.), *European Unions and its Law, Policy and Economy: Interna land External Dimension*, Warsaw, CeDeWu Sp., 2020, (51) 57.

<sup>307</sup> European Ombudsman, *Decision of the European Ombudsman closing her own-initiative inquiry OI/8/2014/AN concerning the European Commission*, 11 May 2015, OI/8/2014/AN, 11; EC, *Comments of the Commission on the European Ombudsman's Own-initiative inquiry*, 11 May 2015, OI/8/2014/AN, 7. I. BUTLER, "Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs", *Civil Liberties Union for Europe* 2018, (1) 9; C. PARKER, I. BULIC COJOCARIU and N. KOKIC, "European Union Structural and Investment Funds and the Transition from Institutional Care to Community Living: Towards a More Effective Monitoring and Complaints System", *European Network on Independent Living* 2017, (1) 30.

<sup>308</sup> EC, *Commission Decision of XXX on the Suspension of Interim Payments for the Operational Programme for Social Renewal for Community Assistance from the European Social Fund under the Convergence and Regional Competitiveness and Employment Objectives in Hungary*, 2015, CCI No 2007HU05UPO001, 4-5 and 9; K.L. SCHEPPELE, R.D. KELEMEN and J. MORIJN, "The EU Commission has to Cut Funding to Hungary: The Legal Case", *Greens/EFA group in the European Parliament* 2021, (1) 9-10.

<sup>309</sup> See for example EC, *Study on complaints-handling systems - Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 1-284.

<sup>310</sup> Article 74 (3) Regulation (EU) No 1303/2013.

this respect. As a result, the degree of the EC's political will to enforce the ESIFs complaint conditionality is expected to have been moderate.

**66. APPLICATION: RoL CONDITIONALITY MECHANISM** – Due to the recent entry into force of the RoL conditionality mechanism (*pro memoria* 2 March 2022 in practice),<sup>311</sup> it is still somewhat difficult to assess the political will of the EC to enforce the RoL conditionality mechanism.

It could be noted that an institutional dispute existed throughout 2021 between the EP and the EC concerning the application of the RoL conditionality mechanism.<sup>312</sup> The EP threatened to initiate proceedings against the EC before the CJEU for its failure to trigger the RoL conditionality mechanism when “*the most obvious cases of breaches of the [RoL]*” had been committed within the Union territory, in particular by the Polish and Hungarian authorities.<sup>313</sup> The EC was tied, however, by its own political promise to delay the enforcement of the RoL conditionality mechanism until the CJEU had ruled on the mechanism's validity and the EC had adopted guidelines of application (which it did on 2 March 2022).<sup>314</sup> As a result, the EC's non-application of the RoL conditionality

---

<sup>311</sup> See *supra* paragraph 35, subparagraph 2.

<sup>312</sup> Paragraph 14 Resolution (EP) on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)), 25 March 2021, P9\_TA(2021)0103, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103_EN.html); Paragraphs 5-12 Resolution (EP) on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 (2021/2711(RSP)), 10 June 2021, P9\_TA(2021)0287, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0287\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0287_EN.html); L. CODRUȚA KÖVESI *et al.*, “Disputes over Budget Conditionality Mechanism”, *Eucrium* 2021, Vol. 1, (19) 19; S. PLATON, “Bringing a Knife to a Gunfight – The European Parliament, the Rule of Law Conditionality, and the action for failure to act”, *Verfassungsblog* 2021, <https://verfassungsblog.de/bringing-a-knife-to-a-gunfight/>; G. TARTAGLIA POLCINI *et al.*, “German Federal Constitutional Court Paves Way for EU's Recovery Instrument”, *Eucrium* 2021, Vol. 2, (86) 86-87;

<sup>313</sup> Paragraph 14 Resolution (EP) on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)), 25 March 2021, P9\_TA(2021)0103, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0103_EN.html); Paragraphs 5-12 Resolution (EP) on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 (2021/2711(RSP)), 10 June 2021, P9\_TA(2021)0287, [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0287\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0287_EN.html); L. CODRUȚA KÖVESI *et al.*, “Disputes over Budget Conditionality Mechanism”, *Eucrium* 2021, Vol. 1, (19) 19; S. PLATON, “Bringing a Knife to a Gunfight – The European Parliament, the Rule of Law Conditionality, and the action for failure to act”, *Verfassungsblog* 2021, <https://verfassungsblog.de/bringing-a-knife-to-a-gunfight/>; G. TARTAGLIA POLCINI *et al.*, “German Federal Constitutional Court Paves Way for EU's Recovery Instrument”, *Eucrium* 2021, Vol. 2, (86) 86-87.

<sup>314</sup> European Council, *European Council meeting (10 and 11 December 2020) – Conclusions*, 11 December 2020, EUCO 22/20, <https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf>; 2; EC, *Communication from the Commission - Guidelines on the application of the*



mechanism in the course of 2021 cannot be used to conclude that there is limited political will on the part of the EC to do so.

However, in November 2021, the EC took an informal first step towards enforcing the RoL conditionality mechanism by sending a letter to the Polish and Hungarian authorities asking questions regarding some RoL issues.<sup>315</sup> In April 2022, this was followed by a formal activation of the procedure vis-à-vis Hungary, with a formal notification from the EC stating that there were indications of breaches of the principles of the RoL in Hungary.<sup>316</sup> It remains to be seen what the outcome of this procedure will be, but its activation is already a first, convincing indication of a strong political will on the part of the EC.

#### 4.3. LINKING BACK TO SUB-QUESTION THREE

*What do the observations of empirical studies on political conditionality in EU foreign aid, when applied to the IACS conditionality, the ESIFs complaint conditionality and the RoL conditionality mechanism, suggest about the plausibility of the Assumption?*

**67. SUMMARY** – The findings can be summarised in the following table of comparison:

---

*Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget*, 2 March 2022, C(2022) 1382 final, 1-30.

<sup>315</sup> The questions concerned “*the independence of the judiciary and respect for EU law in Poland, as well as issues with public procurement, risk of conflict of interest and corruption in Hungary*”. See L. BAYER, “In major first, EU triggers power to cut Hungary’s funds over rule-of-law breaches”, *Político* 2022, <https://www.politico.eu/article/eu-european-commission-rule-law-mechanism-hungary-funds/>; Z. WANAT and L. BAYER, “Brussels takes step toward rule-of-law penalty process with Poland, Hungary”, *Político* 2022, <https://www.politico.eu/article/eu-rule-of-law-penalty-process-poland-hungary/>.

<sup>316</sup> In particular, “*systemic irregularities, deficiencies and weaknesses in public procurement procedures*” will be further examined, as well as “*possible irregular auctioning of state-owned agricultural land*” and “*limitations to effective investigation and prosecution of alleged criminal activity*”. See L. BAYER, “In major first, EU triggers power to cut Hungary’s funds over rule-of-law breaches”, *Político* 2022, <https://www.politico.eu/article/eu-european-commission-rule-law-mechanism-hungary-funds/>; J. HENLEY, “European Commission launches rule-of-law disciplinary procedure against Hungary”, *The Guardian* 2022, <https://www.theguardian.com/world/2022/apr/05/european-commission-launches-rule-of-law-disciplinary-procedure-against-hungary>.

<p>+ : <i>The conditionality evidently satisfies the proposition.</i></p> <p>- : <i>The conditionality does not satisfy the proposition in any way.</i></p> <p>+ - : <i>The conditionality satisfies the proposition to a certain extent, but some impediments present themselves.</i></p>			
	<b>IACS conditionality</b>	<b>ESIFs complaint conditionality</b>	<b>RoL conditionality mechanism</b>
<b>Proposition I. Limited relationship between donor and recipient</b>	-	-	-
<b>Proposition II. Level of coordination</b>	+	+	+
<b>Proposition III. Preciseness of reforms required</b>	+	+ -	+ -
<b>Proposition IV. Limited degree of countervailing interests</b>	+	+	+
<b>Proposition V. High degree of political will</b>	+	+ -	+

68. OBSERVATIONS EXPLAINED – The foregoing analysis provides a first insight into the plausibility of the *Assumption*<sup>317</sup>. The analysis examines whether the three conditionalities under scrutiny meet the propositions of which empirical data has proven to positively influence the *effectiveness*<sup>318</sup> of political conditionality in EU foreign aid. To improve the veracity of this analysis, each

<sup>317</sup> *Pro memoria*, the Assumption refers to the estimation by politicians and scholars that the introduction of new political conditionalities in the EU budget is likely to positively affect RoL compliance in the Member States where the principles of the RoL are being breached.

<sup>318</sup> *Pro memoria*, *effectiveness* according to CRAWFORD, as well as for the scope of this research, implies *the ability to improve compliance with the RoL*. See G. CRAWFORD, “Foreign aid and political conditionality: Issues of effectiveness and consistency”, *Democratization* 1997, (69) 70.

of the propositions was *transposed* to the EU internal policy context, by examining how this different context would affect the way these propositions should be interpreted or adjusted.

When looking at the results of this analysis, the findings are overall positive for all three conditionalities. The most promising results can be found for the IACS conditionality mechanism. The IACS conditionality clearly meets four out of five propositions. This implies that the IACS conditionality seems to be the most plausible of all three conditionalities to positively affect RoL compliance in the Member States concerned.

The next in line is the RoL conditionality mechanism, which evidently satisfies three out of five propositions and, to some extent, also satisfies a fourth proposition. The results for the ESIFs complaint conditionality are the most moderate, with only two out of five propositions that are met, and two more that are satisfied to a certain extent. All three conditionalities fail, however, for the first proposition. The closeness of the relationship between the EU as a donor and the Member States as recipients will inevitably obstruct – to some degree – the ability of political conditionality in the EU budget to improve RoL compliance in the Member States.

**69. IMPLICATIONS FOR THE ASSUMPTION** – What has become evident from this exercise with regard to the *Assumption*<sup>319</sup>, is that the ability of political conditionality to positively affect RoL compliance is not self-evident, but appears to depend on several (contextual) factors. These factors influence the likelihood of bringing about an improved level of RoL compliance in Member States.

**70. WHAT IS NEXT?** – Previous findings will serve as a steppingstone to further explore the plausibility of the Assumption. A secondary data-analysis<sup>320</sup> will be conducted to investigate the improvements made to the Bulgarian and Romanian IACS after the introduction of the IACS conditionality, and the improvements made to the Hungarian and Polish complaints-handling systems after the introduction of the ESIFs complaint conditionality.<sup>321</sup>

## 5. SECONDARY DATA-ANALYSIS

---

<sup>319</sup> *Pro memoria*, the Assumption refers to the estimation by politicians and scholars that the introduction of new political conditionalities in the EU budget is likely to positively affect RoL compliance in the Member States where the principles of the RoL are being breached.

<sup>320</sup> A secondary data-analysis is an analysis in which existing data(sets) are used, instead of self-collected data. See R.M. LAWLESS, J.K. ROBBENOLT and T.S. ULEN, *Empirical Methods in Law*, New York, Aspen Publishers, 2010, 129.

<sup>321</sup> Hungary and Poland have been selected as a case study for the secondary data-analysis regarding the ESIFs complaint conditionality. The choice for Hungary and Poland is explained below, see *infra* paragraph 81.

## 5.1. THE IACS IN BULGARIA AND ROMANIA

### 5.1.1. Methodological approach

**71. WHAT TO ANALYSE?** – As has become evident, the IACS conditionality aimed to ensure that an operational IACS was in place in both Bulgaria and Romania to safeguard the fair distribution of agricultural funds among farmers.<sup>322</sup> After all, the IACS helps to prevent irregularities, recover unduly paid amounts and support farmers to make correct applications.<sup>323</sup> According to Commission Regulation 1423/2006, the IACS conditionality could be triggered where the Bulgarian or Romanian IACS did not comprise all the following *elements* (in the manner prescribed by the law):<sup>324</sup>

- A. *computerised data base* (i.e., an IT system),
- B. *an identification system for agricultural parcels* (Land Parcel Identification System),
- C. *a system for the identification and registration of payment entitlements*,
- D. *aid applications*,
- E. *an integrated control system* (including on-the-spot checks, i.e., on-farm checks of a sample of farmers to ensure that they meet the conditions for income support),<sup>325</sup> and

---

<sup>322</sup> As previously explained, the IACS are of particular importance for the RoL as they play a crucial role in preventing fraud, arbitrary exercise of power and inconsistent application of the law by the national public authorities (in this regard, cf. *infra*). See Recital 4-5 Commission Regulation (EC) No 1423/2006; EC, *Accompanying measures in the context of Bulgaria's and Romania's accession*, 26 September 2006, MEMO/06/347, 3-4; DG AGRI, *Fact Sheet - Managing the Agricultural Budget Wisely*, 17 January 2008, K3-70-07-028-EN-C, 6; EC, *Integrated Administration and Control System (IACS)*, [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/financing-cap/financial-assurance/managing-payments\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/financing-cap/financial-assurance/managing-payments_en).

<sup>323</sup> Recital 4-5 Commission Regulation (EC) No 1423/2006; EC, *Accompanying measures in the context of Bulgaria's and Romania's accession*, 26 September 2006, MEMO/06/347, 3-4; DG AGRI, *Fact Sheet - Managing the Agricultural Budget Wisely*, 17 January 2008, K3-70-07-028-EN-C, 6; EC, *Integrated Administration and Control System (IACS)*, [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/financing-cap/financial-assurance/managing-payments\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/financing-cap/financial-assurance/managing-payments_en).

<sup>324</sup> *Pro memoria*, the IACS conditionality could also be triggered where these elements were so seriously deficient as to affect the proper functioning of the overall system. Article 18 (1) Council Regulation (EC) No 1782/2003 *juncto* Article 2 (1) Commission Regulation (EC) No 1423/2006.

<sup>325</sup> DG AGRI, *Fact Sheet - Managing the Agricultural Budget Wisely*, 17 January 2008, K3-70-07-028-EN-C, 7; EC, *Integrated Administration and Control System (IACS)*, [https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/financing-cap/financial-assurance/managing-payments\\_en](https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/financing-cap/financial-assurance/managing-payments_en).

- F. *a single system to record the identity of each farmer who submits an aid application* (Farmers' register).

The IACS conditionality could be triggered as of 1 December 2007<sup>326</sup> until 30 November 2008 (with possible prolongments of 12 months once measures had been taken, but this never happened in practice).<sup>327</sup>

With the foregoing in mind, the secondary data-analysis of this Chapter will focus on the improvements made to the Bulgarian and Romanian IACS after the introduction of the IACS conditionality on 1 December 2007.

### 5.1.2. Evolution

#### a. Before 1 December 2007

**72. EC PRE-ACCESSION REPORTS** -- On 1 January 2007, Bulgaria and Romania became EU Member States.<sup>328</sup> From 1998 onwards, the EC has made regular reports concerning the progress made by the Bulgarian and Romanian authorities towards their accession to the EU, in particular with regard to the rate at which they adopted the Union *acquis*.<sup>329</sup> As of 2001, these reports started to highlight the progress made in developing an operational IACS.<sup>330</sup> These pre-

---

<sup>326</sup> **The first of December is the beginning of the agricultural payment year. "From 1 December every year, Member States can pay farmers their direct aid from the national budget of their country via a Paying Agency. This money is then reimbursed to the national budget from the Community budget."** See EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 2.

<sup>327</sup> Article 2 (2) and Article 2 (3) Commission Regulation (EC) No 1423/2006.

<sup>328</sup> Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union, *OJ L* 157, 21 June 2005, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12005S/TXT>; G. NOUTCHEVA and D. BECHEV, "The Successful Laggards: Bulgaria and Romania's Accession to the EU", *East European Politics and Societies* 2008, Vol. 22, No. 1, (114) 116.

<sup>329</sup> EC, *Regular report from the Commission on Romania's progress towards accession 1998*, 17 December 1998, COM (98) 702 final, 4; EC, *Regular report from the Commission on Bulgaria's progress towards accession 2001*, 13 November 2001, SEC (2001) 1744 final, 6; EC, *Regular report from the Commission on Romania's progress towards accession 2001*, 13 November 2001, SEC (2001) 1753 final, 6.

<sup>330</sup> EC, *Regular report from the Commission on Bulgaria's progress towards accession 2001*, 13 November 2001, SEC (2001) 1744 final, 49; EC, *Regular report from the*

accession reports, and in particular the ones from 2006, give us valuable insight in the state of affairs of the Bulgarian and Romanian IACS prior to their accession. In addition, observations from the audit missions carried out in 2007 provide further information.

**73. BULGARIA** – The establishment and operationality of the Bulgarian IACS is identified in the 2006 reports as one of the key concerns, requiring “*urgent action*” if Bulgaria was to fully align itself with the Union *acquis* before its accession.<sup>331</sup> Great progress had already been made in 2006 regarding the required IT infrastructure and the organisation of on-the-spot checks, including the recruitment and training of staff to do these checks and the purchase of the necessary equipment.<sup>332</sup> The Bulgarian IACS presented some remaining shortcomings, however, in its Land Parcel Identification System (LPIS), i.e. a database that stores the agricultural areas in a Member State,<sup>333</sup> and the interaction between the LPIS and the Farmer’s register.<sup>334</sup> Furthermore, an audit mission to Bulgaria in June 2007 identified problems with the administrative capacity and logistics of the Bulgarian IACS and with the quality of data recorded.<sup>335</sup>

Some efforts had been made, however, throughout 2007 to resolve these problems.<sup>336</sup> As a result, by September 2007, the Bulgarian IACS was

---

*Commission on Romania’s progress towards accession 2001*, 13 November 2001, SEC (2001) 1753 final, 53.

<sup>331</sup> EC, *Communication from the Commission – Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*, 16 May 2006, COM(2006) 214 final, 5; EC, *Commission staff working document – Annex to the Report from the Commission to the Council and the European Parliament – 2005 Report on PHARE, pre-accession and transition instruments {COM(2007) 3 final} – Country sections & additional information*, 12 January 2007, COM(2007) 3 final, 8.

<sup>332</sup> EC, *Communication from the Commission – Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*, 16 September 2006, COM(2006) 549 final, 4 and 19.

<sup>333</sup> Court of Auditors, *Annual Reports concerning the financial year 2008*, 10 November 2009, 2009/C 269/01, 100.

<sup>334</sup> EC, *Communication from the Commission – Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*, 16 September 2006, COM(2006) 549 final, 4 and 19.

<sup>335</sup> EC, *Report from the European Commission to the European Parliament and the Council on Bulgaria’s progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 377 final, 3-4.

<sup>336</sup> EC, *Bulgaria 2005 Comprehensive Monitoring Report*, 25 October 2005, SEC (2005) 1352, 36-37; EC, *Communication from the Commission – Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*, 16 September 2006, COM(2006) 549 final, 4 and 19; EC, *Report from the European Commission to the European Parliament and the Council on Bulgaria’s progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 377 final, 3-4.

considered to be operational.<sup>337</sup> This led the EC to decide on 10 October 2007 that the IACS conditionality should not be triggered vis-à-vis Bulgaria.<sup>338</sup>

**74. ROMANIA** – In the same vein, the IACS constituted one of the central issues in the Romanian journey towards EU accession.<sup>339</sup> In 2006, some positive progress had already been made on the LPIS and on the interconnection between the LPIS and the Farmers' Register.<sup>340</sup> However, the required IT system of the Romanian IACS was seriously deficient, no staff was recruited and trained, no equipment was purchased and no plans had been made concerning the on-the-spot checks.<sup>341</sup> Furthermore, an audit mission in 2007 revealed that the Romanian IACS presented problems with its administrative capacity and logistics, as well as with the quality of the data recorded.<sup>342</sup> In addition, any progress on the correspondence between the LPIS and the Farmers' Register had faltered after 2006.<sup>343</sup>

The deficiencies in the Romanian IACS, and in particular the inadequacy of its IT-systems, persisted throughout 2007, creating a clear risk that the Romanian IACS would not be sufficiently operational by 1 December 2007.<sup>344</sup> This has led the EC to inform Romania on 10 October 2007 that it

---

<sup>337</sup> EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 1; X, "Romania risks losing 25% of its EU farm aid", *Europe Daily Bulletin* 2007, No. 9520, [https://agenceurope.eu/aewebsite\\_dev/en/bulletin/article/9520/27](https://agenceurope.eu/aewebsite_dev/en/bulletin/article/9520/27).

<sup>338</sup> EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 1; X, "Romania risks losing 25% of its EU farm aid", *Europe Daily Bulletin* 2007, No. 9520, [https://agenceurope.eu/aewebsite\\_dev/en/bulletin/article/9520/27](https://agenceurope.eu/aewebsite_dev/en/bulletin/article/9520/27).

<sup>339</sup> EC, *Communication from the Commission - Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*, 16 May 2006, COM(2006) 214 final, 7.

<sup>340</sup> EC, *Communication from the Commission - Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*, 16 September 2006, COM(2006) 549 final, 5-6 and 36.

<sup>341</sup> EC, *Communication from the Commission - Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*, 16 September 2006, COM(2006) 549 final, 5-6 and 36.

<sup>342</sup> EC, *Report from the European Commission to the European Parliament and the Council on Romania's progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 378 final, 4.

<sup>343</sup> EC, *Report from the European Commission to the European Parliament and the Council on Romania's progress on accompanying measures following Accession*, 27 June 2007, COM(2007) 378 final, 4.

<sup>344</sup> EC, *Communication from the Commission - Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*, 16 September 2006, COM(2006) 549 final, 11; EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 1.

would trigger the IACS conditionality in the course of December 2007 if two indispensable software modules of the IT-system were not tested and installed.<sup>345</sup>

**b. Between 1 December 2007 and 30 November 2008**

**75. BULGARIA** -- In its 2008 annual report, the Court of Auditors considered both the Bulgarian and the Romanian IACS “*not effective in ensuring the regularity of payments*”.<sup>346</sup> For the Bulgarian IACS, the LPIS, which had been its main stumbling block since 2006,<sup>347</sup> was considered unreliable as it reported faulty data.<sup>348</sup> The EC, which had come to the same findings, requested Bulgaria to set up an action plan to remedy the existing shortcomings, in particular concerning its LPIS.<sup>349</sup> The LPIS, however, remained a major weakness of the Bulgarian IACS throughout 2008, requiring “*further improvement*”.<sup>350</sup> Despite the flawed LPIS, the EC has never found it necessary to trigger the IACS conditionality vis-à-vis Bulgaria, nor has it ever formally threatened to do so.<sup>351</sup> Moreover, there is no evidence of a deterioration of the Bulgarian IACS in the course of 2008.

In conclusion, few substantial improvements seem to have been made to the Bulgarian IACS throughout 2008, although the LPIS, which constitutes an essential component of the IACS, was not up to par. As a result, there seems to be no clear impact of the entry into force of the IACS conditionality on the Bulgarian IACS.

---

<sup>345</sup> EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 1; X, “Romania risks losing 25% of its EU farm aid”, *Europe Daily Bulletin* 2007, No. 9520, [https://agenceurope.eu/aewebsite\\_dev/en/bulletin/article/9520/27](https://agenceurope.eu/aewebsite_dev/en/bulletin/article/9520/27).

<sup>346</sup> Court of Auditors, *Annual Reports concerning the financial year 2008*, 10 November 2009, 2009/C 269/01, 98.

<sup>347</sup> EC, *Communication from the Commission – Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*, 16 September 2006, COM(2006) 549 final, 4 and 19.

<sup>348</sup> Court of Auditors, *Annual Reports concerning the financial year 2008*, 10 November 2009, 2009/C 269/01, 98.

<sup>349</sup> EC, *Communication from the Commission to the European Parliament, the Council and the Court of Auditors - Synthesis of the Commission's management achievements in 2008*, 8 June 2009, COM(2009) 256 final, 12; Court of Auditors, *Annual Reports concerning the financial year 2008*, 10 November 2009, 2009/C 269/01, 99-100; EC, *Communication from the Commission to the European Parliament, the Council and the Court of Auditors - Synthesis of the Commission's management achievements in 2009*, 2 June 2010, COM(2010) 281 final, 6; EC, *Report from the Commission to the European Parliament and the Council on the follow-up to the discharge for the 2008 financial year (Summary)*, 18 November 2010, COM(2010) 650 final, 8.

<sup>350</sup> Court of Auditors, *Annual Reports concerning the financial year 2008*, 10 November 2009, 2009/C 269/01, 99-100.

<sup>351</sup> DG AGRI, *Annual Activity Report 2008*, 31 March 2009, aar 2008 dg agri – final, 96; EC, *Communication from the Commission to the European Parliament, the Council and the Court of Auditors - Synthesis of the Commission's management achievements in 2008*, 8 June 2009, COM(2009) 256 final, 12.



**76. ROMANIA** – On 10 October 2007, the EC had notified Romania that it would trigger the IACS conditionality in the course of December (after the IACS conditionality had come into force), if it did not make the required changes to its IT-system.<sup>352</sup> During the following two months, Romania presented two independent expert reports.<sup>353</sup> The second report proved that the required software modules had been implemented and no major deficiencies remained.<sup>354</sup> On 18 December 2007, the EC decided not to apply the IACS conditionality, “*following rapid progress by the Romanian authorities*”.<sup>355</sup> The European Commissioner for Agriculture and Rural Development, Mariann Fischer Boel, proclaimed in this regard that the IACS conditionality “*has clearly helped in motivating Romania to improve the situation*”.<sup>356</sup>

Nevertheless, several shortcomings to the Romanian IACS persisted.<sup>357</sup> These shortcomings include overpayments, incorrect allocation of funds and inaccurate data in the LPIS.<sup>358</sup> Notably, it has become evident that Romanian municipalities had claimed funds in their own name without redistributing the funds to the rightful beneficiaries.<sup>359</sup> The EC equally requested the Romanian authorities to set up an action plan.<sup>360</sup> The on-the-spot checks by the Romanian authorities in 2007 have revealed that funds were wrongly distributed in 12,57%

---

<sup>352</sup> EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 1; X, “Romania risks losing 25% of its EU farm aid”, *Europe Daily Bulletin* 2007, No. 9520, [https://agenceurope.eu/aewebsite\\_dev/en/bulletin/article/9520/27](https://agenceurope.eu/aewebsite_dev/en/bulletin/article/9520/27).

<sup>353</sup> EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 2.

<sup>354</sup> EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 2.

<sup>355</sup> EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 1.

<sup>356</sup> EC, *Farm payments: Commission decides not to apply 'safeguard mechanism' in Romania*, 18 December 2007, IP/07/1958, 1.

<sup>357</sup> DG AGRI, *Annual Activity Report 2008*, 31 March 2009, aar 2008 dg agri - final, 95-96; Court of Auditors, *Annual Reports concerning the financial year 2008*, 10 November 2009, 2009/C 269/01, 102.

<sup>358</sup> DG AGRI, *Annual Activity Report 2008*, 31 March 2009, aar 2008 dg agri - final, 95-96; Court of Auditors, *Annual Reports concerning the financial year 2008*, 10 November 2009, 2009/C 269/01, 102.

<sup>359</sup> **This is a prime example of how the IACS plays a role in preventing fraud, arbitrary exercise of power and inconsistent application of the law by the national authorities.** See Court of Auditors, *Annual Reports concerning the financial year 2008*, 10 November 2009, 2009/C 269/01, 102

<sup>360</sup> EC, *Communication from the Commission to the European Parliament, the Council and the Court of Auditors - Synthesis of the Commission's management achievements in 2008*, 8 June 2009, COM(2009) 256 final, 12; Court of Auditors, *Annual Reports concerning the financial year 2008*, 10 November 2009, 2009/C 269/01, 99-100; EC, *Communication from the Commission to the European Parliament, the Council and the Court of Auditors - Synthesis of the Commission's management achievements in 2009*, 2 June 2010, COM(2010) 281 final, 6; EC, *Report from the Commission to the European Parliament and the Council on the follow-up to the discharge for the 2008 financial year (Summary)*, 18 November 2010, COM(2010) 650 final, 8.

of cases.<sup>361</sup> However, a downward trend to around 8% was observable in 2008.<sup>362</sup> This can be attributed – at least to some degree – to the entry into force of the IACS conditionality and the strict monitoring of the EC.

In conclusion, a substantial change is noticeable in the Romanian IACS throughout 2008. Although several shortcomings remained, Romania has resolved the existing major deficiencies in its IACS, driven by the risk of losing funds under the IACS conditionality. In addition, a significant decline in misspending has occurred in 2008. As a result, the introduction of the IACS conditionality seems to have been an important factor in getting the Romanian authorities to comply with the legislative requirements surrounding the IACS and remedy serious shortcomings.

### c. After 30 November 2008

**77. BULGARIA AND ROMANIA** – In 2009, both the Bulgarian and Romanian authorities adopted an action plan on how to address the existing shortcomings in their IACS.<sup>363</sup> As of 2009, the Director-General for Agriculture and Rural Development made a reservation in the DG AGRI's Annual Activity Report regarding the persistent deficiencies in the Bulgarian and Romanian IACS, “*for reputational reasons*”.<sup>364</sup> In 2011, the action plans for both Member States had reached closure as the necessary measures had been taken and the situation in both Member States had improved considerably.<sup>365</sup> Nevertheless, the reservation was not lifted in regard to Bulgaria, as sufficient assurance on the operationality

---

<sup>361</sup> **By way of comparison, in Bulgaria the redistribution was erroneous in only 6,20% of cases.** See DG AGRI, *Annual Activity Report 2008*, 31 March 2009, aar 2008 dg agri – final, 95; Court of Auditors, *Annual Reports concerning the financial year 2008*, 10 November 2009, 2009/C 269/01, 98.

<sup>362</sup> DG AGRI, *Annual Activity Report 2008*, 31 March 2009, aar 2008 dg agri – final, 95.

<sup>363</sup> EC, *Communication from the Commission to the European Parliament, the Council and the Court of Auditors - Synthesis of the Commission's management achievements in 2008*, 8 June 2009, COM(2009) 256 final, 12; Court of Auditors, *Annual Reports concerning the financial year 2008*, 10 November 2009, 2009/C 269/01, 99-100; EC, *Communication from the Commission to the European Parliament, the Council and the Court of Auditors - Synthesis of the Commission's management achievements in 2009*, 2 June 2010, COM(2010) 281 final, 6; EC, *Report from the Commission to the European Parliament and the Council on the follow-up to the discharge for the 2008 financial year (Summary)*, 18 November 2010, COM(2010) 650 final, 8.

<sup>364</sup> EC, *Communication from the Commission to the European Parliament, the Council and the Court of Auditors - Synthesis of the Commission's management achievements in 2009*, 2 June 2010, COM(2010) 281 final, 6; EC, *Communication from the Commission to the European Parliament, the Council and the Court of Auditors - Synthesis of the Commission's management achievements in 2010*, 1 June 2011, COM(2011) 323 final, 6; EC, *Annexes to the Communication from the Commission to the European Parliament, the Council and the Court of Auditors - Synthesis of the Commission's management achievements in 2010*, 1 June 2011, COM(2011) 323 final ANNEXES, 2.

<sup>365</sup> EC, *Replies of the Commission to Chapter 3 of the Annual Report 2010 - Agriculture and Natural Resources*, 21 October 2011, COM(2011) 582 final, 2; EC, *Replies of the Commission to the special report of the European Court of Auditors - “The effectiveness of the single area payment scheme as a transitional system for supporting farmers in the new Member States”*, 6 November 2012, COM(2012) 657 final, 7-8.

of the Bulgarian IACS was still lacking.<sup>366</sup> The EC continued to monitor both Member States concerning their IACS.<sup>367</sup>

### 5.1.3. Results

78. The results of this exercise are interesting. On the one hand, there is no evidence that the IACS conditionality has had any effect on the Bulgarian authorities' level of compliance with the IACS legislation, even though the Bulgarian IACS did not fully satisfy the legislative requirements. On the other hand, the IACS conditionality seems to have contributed a great deal to the surge of compliance by the public authorities in Romania, where compliance was initially much lower. An explanation for this difference can be derived from the previous analysis. In the case of Romania, a swift improvement in compliance occurred once the EC had materialised a threat to cut EU funding vis-à-vis Romania by imposing a concrete deadline to resolve the existing deficiencies. In the case of Bulgaria, no substantial improvements were made, as the EC did not consider the Bulgarian IACS to be sufficiently deficient as to justify the activation of the IACS conditionality. In contrast, the EC chose to avoid threats, harsh language and possible sanctions vis-à-vis Bulgaria and opted for a *softer* approach. However, when comparing the Bulgarian and Romanian IACS over a longer period of time (i.e. until 2012), Romania demonstrated a higher level of compliance and a more operational IACS.

It is important to note, however, that it was not legally impossible for the EC to adopt a more penalising approach. The IACS conditionality could be triggered by the mere fact that the elements of the IACS were not set up according to EU law, or by the finding that any element necessary to ensure the correct payment, although set up in accordance with EU law, was so seriously deficient as to affect the proper functioning of the overall system.<sup>368</sup> Considering that neither the Bulgarian, nor the Romanian IACS were “*effective in ensuring the regularity of payments*” throughout the 2008 financial period,<sup>369</sup> the EC could have justified to activate the IACS conditionality against both Member States, or at least threaten to do so. The EC chose, however, to let Bulgaria off the hook.

The story of IACS conditionality seems to suggest some important lessons for the use of political conditionality in the EU internal policy context. First, the EC seems reluctant to trigger political conditionality vis-à-vis Member States when non-compliance is deemed not to be excessive. On the contrary, the

---

<sup>366</sup> EC, *Replies of the Commission to the special report of the European Court of Auditors - “The effectiveness of the single area payment scheme as a transitional system for supporting farmers in the new Member States”*, 6 November 2012, COM(2012) 657 final, 7-8.

<sup>367</sup> EC, *Replies of the Commission to Chapter 3 of the Annual Report 2010 - Agriculture and Natural Resources*, 21 October 2011, COM(2011) 582 final, 2; EC, *Replies of the Commission to the special report of the European Court of Auditors - “The effectiveness of the single area payment scheme as a transitional system for supporting farmers in the new Member States”*, 6 November 2012, COM(2012) 657 final, 7-8.

<sup>368</sup> See Article 2 (1) Commission Regulation (EC) No 1423/2006.

<sup>369</sup> Court of Auditors, *Annual Reports concerning the financial year 2008*, 10 November 2009, 2009/C 269/01, 98.

EC appears to favour the use of softer techniques to enforce EU law in cases where non-compliance is limited, even though it might legally adopt a more vigorous approach (see Bulgaria). Second, political conditionality in the EU budget seems unlikely to increase compliance in Member States where the threat of losing funds is too low or entirely absent (see Bulgaria). Third, the application of more vigorous techniques seems to be more effective in achieving long-term results than the mere application of soft measures (compare Bulgaria and Romania). Fourth, to achieve *full* compliance, political conditionality does not seem sufficient. Part of the success of the IACS conditionality was the fact that it was embedded in a larger system of naming-and-blaming techniques and strict EC monitoring (see Bulgaria and Romania).

## 5.2. THE COMPLAINTS-HANDLING SYSTEMS IN HUNGARY AND POLAND

### 5.2.1. Methodological approach

**79. WHAT TO ANALYSE?** – As set out earlier on, the ESIFs complaint conditionality required that an operational national complaints-handling system was in place that could address violations of EU law related to the ESIFs,<sup>370</sup> including violations of the Charter.<sup>371</sup> The establishment and operationality of such a national complaints-handling system was not a legal requirement until the launch of the 2014-2020 MFF.<sup>372</sup> Although several Member States had already provided for the possibility of making complaints regarding the ESIFs, all Member States were now obliged to make arrangements in this respect.<sup>373</sup> In addition to this new obligation for Member States, non-compliance thereof could be sanctioned with financial penalties.<sup>374</sup> This sanctioning power is referred to in this research as the ESIFs complaint conditionality. As explained earlier on, the ESIFs complaint conditionality could be triggered during the 2014-2020 MFF, when there was a serious deficiency in the national complaints-handling

---

<sup>370</sup> Article 74 (3) Regulation (EU) No 1303/2013; EC, *Comments of the Commission on the European Ombudsman's Own-initiative inquiry*, August 2014, Ref. OI/8/2014/AN final, 9-10; EC, *Study on complaints-handling systems - Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 21; J. LACNY, "Stick works better than carrot? Suspension of EU funds paid to the Member States breaching the rule of law" in A. BOROWICZ et al. (eds.), *European Unions and its Law, Policy and Economy: Interna land External Dimension*, Warsaw, CeDeWu Sp., 2020, (61) 61-62.

<sup>371</sup> **As previously explained, like the IACS, these national complaints-handling systems have a strong RoL remit as they play a crucial role in preventing fraud, arbitrary exercise of power and inconsistent application of the law by the national public authorities (in this regard, cf. supra). Moreover, the ESIFs complaint conditionality contributes to the protection of fundamental rights and the existence of effective legal remedies against government actions (cf. supra).**

<sup>372</sup> Article 74 (3) Regulation (EU) No 1303/2013; EC, *Study on complaints-handling systems - Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 10.

<sup>373</sup> EC, *Study on complaints-handling systems - Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 10.

<sup>374</sup> Article 74 (3) iuncto Articles 83 (1)(a), 142 (1)(a), 144 (1)(a) Regulation (EU) No 1303/2013.

system.<sup>375</sup> The scope, rules and procedures of these national complaints-handling systems were left to the responsibility of each Member State.<sup>376</sup>

**80. HOW TO ANALYSE?** – In this Chapter, it will be explored whether – and to what extent – the Member States have improved their national complaints-handling arrangements concerning the ESIFs after the introduction of the ESIFs complaint conditionality, by conducting a before-and-after analysis. Unlike the IACS conditionality, there is one comprehensive study publicly available that provides the necessary data to make this analysis. This study was conducted in 2018 by the independent expert body E.Y., at the request of the EC. The before-and-after analysis will be entirely based on this comprehensive study.<sup>377</sup> The 2018 E.Y. study examined the complaints-handling systems in light of eight criteria, i.e. visibility,<sup>378</sup> timeliness of the process, accessibility,<sup>379</sup> responsiveness,<sup>380</sup> objectivity and fairness, possible remedies, fit for purpose,<sup>381</sup> and possibility of review.<sup>382</sup>

**81. CASE-STUDY** – As the ESIFs complaint conditionality was applicable to all Member States,<sup>383</sup> it is necessary – in light of the scope of this research – to select a case study. To that end, the Member States of Hungary and Poland were selected. This selection can be justified for two reasons. **First**, Hungary and Poland were the two top beneficiaries of ESIFs during the 2014-2020 MFF, with Hungary receiving the largest sum *per capita* and Poland benefiting from the

<sup>375</sup> Article 74 (3) iuncto Articles 83 (1)(a), 142 (1)(a), 144 (1)(a) Regulation (EU) No 1303/2013; Article 154 Regulation (EU) No 1303/2013; I. BUTLER, “Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs”, *Civil Liberties Union for Europe* 2018, (1) 4.

<sup>376</sup> Article 74 (3) Regulation (EU) No 1303/2013.

<sup>377</sup> In the 2018 E.Y. study, the necessary data were collected through a three-phase approach. **First**, desk-research was conducted, meaning that the researchers looked for and analysed the relevant sources of information, such as national legislation, codes, guidelines, manuals, and so on. **Second**, a questionnaire was sent to the representatives of the Managing Authorities, i.e. the national entities responsible for implementing the ESIFs and selecting the final beneficiaries. **Third**, direct contact was established with the Managing Authorities in order to verify the collected data and add missing data. See Recital 42-43 Regulation (EU) No 1303/2013; EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 19-20.

<sup>378</sup> Visibility means in this regard that “the information about complaints-handling systems is easily available to the potential complainants”. See EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 42.

<sup>379</sup> Accessibility relates to whether fees are charged to complainants, whether the necessary information is available in the national languages, and so on. See EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 44.

<sup>380</sup> Responsiveness implies that sensitive cases are prioritised and that up-to-date information is available on the status of the submitted complaints. See EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 45.

<sup>381</sup> Fit for purpose implies that “the channels for lodging complaints are usually the same or better (more channels) compared to the usual communication channels between the MAs [Managing Authorities] and the beneficiaries”. See EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 31.

<sup>382</sup> See EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 30-31.

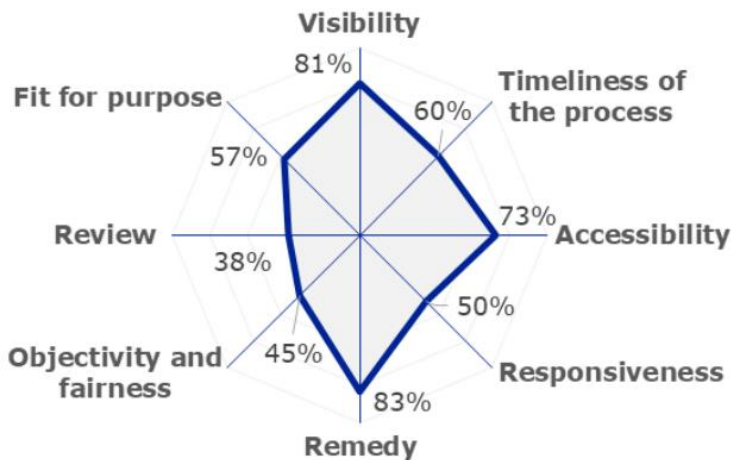
<sup>383</sup> In contrast, the IACS conditionality was only applicable vis-à-vis Bulgaria and Romania.

largest absolute amount.<sup>384</sup> Second, the *Assumption*<sup>385</sup> specifically focusses on *the Member States where the principles of the RoL are being breached*. It is widely accepted that Hungary and Poland have a problematic track record of RoL backsliding,<sup>386</sup> which makes them an interesting case study for this research.

### 5.2.2. Evolution

#### a. Hungarian complaints-handling system

82. DURING THE 2014-2020 MFF – According to the 2018 E.Y. study, Hungary is among the lowest performing group of Member States in terms of its ESIFs complaints-handling system.<sup>387</sup> Compared to all the other EU Member States, the Hungarian complaints-handling system scores relatively low when examined in light of the eight central criteria. The E.Y. study presents the following chart:



<sup>384</sup> I. BUTLER, “Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs”, *Civil Liberties Union for Europe* 2018, (1) 9; K.L. SCHEPPELE, L. PECH and R.D. KELEMEN, “Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission’s EU budget-related rule of law mechanism”, *Verfassungsblog* 2018, <https://verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>.

<sup>385</sup> *Pro memoria*, the Assumption refers to the estimation by politicians and scholars that the introduction of new political conditionalities in the EU budget is likely to positively affect RoL compliance in the Member States where the principles of the RoL are being breached.

<sup>386</sup> See for example B. BUGARIC and A. KUHELJ, “Varieties of Populism in Europe: Is the Rule of Law in Danger?”, *Hague Journal on the Rule of Law* 2018, Vol. 10, (21) 26-27; F. COSTA REIS and K. RAUBE, “The EU’s Crisis Response Regarding the Democratic and Rule of Law Crisis” in M. RIDDERVOLD, J. TRONDAL and A. NEWSOME (eds.), *The Palgrave Handbook of EU Crises*, London, Palgrave Macmillan, 2020, (627) 627-63; G. HALMAI, “Illiberalism in East-Central Europe”, *EUI Working Papers* 2019, Vol. 2019/05, (1) 1-5.

<sup>387</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 33-34.

The E.Y. study awards the Hungarian complaints-handling system high scores for its visibility, accessibility and available remedies.<sup>388</sup> Reasons for this include the fact that all information is publicly available, that there are no costs associated with filing a complaint and that a complaint can lead to a correction of the decision.<sup>389</sup> The Hungarian complaints-handling system scored merely *acceptable* for the criteria of timeliness, responsiveness and fit for purpose, due to the relatively short deadlines, its non-prioritisation of sensitive cases and the channels for complaint's submission and regular communication being the same.<sup>390</sup> The first aspect that the E.Y. finds to be needing improvement was the objectivity and fairness of the procedure.<sup>391</sup> While independence is ensured, complaints can only be presented in written form. The second aspects in need of improvement is related to the possibility of review.<sup>392</sup> While review was possible, the complainant was not always informed of this possibility.<sup>393</sup>

Overall, the Hungarian complaints-handling system qualified as “*needing improvement*” during the MFF of 2014-2020.<sup>394</sup> However, although there are several flaws, the Hungarian complaints-handling system does not seem to contain a *serious deficiency*, which was a formal requirement for the activation of the ESIFs complaint conditionality.<sup>395</sup> This vision seems to be shared by the EC, as the ESIFs complaint conditionality has never been applied vis-à-vis Hungary.<sup>396</sup>

**83. DURING THE 2007-2013 MFF** – Interestingly, the E.Y. study reveals that no (substantial) changes can be identified after the introduction of the ESIFs complaint conditionality.<sup>397</sup> In other words, the Hungarian complaints-handling system remained exactly the same,<sup>398</sup> apart from one insignificant change.<sup>399</sup> This

<sup>388</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 170.

<sup>389</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 170.

<sup>390</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 170.

<sup>391</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 170.

<sup>392</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 170.

<sup>393</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 170.

<sup>394</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 167.

<sup>395</sup> Article 74 (3) *in*uncto Articles 83 (1)(a), 142 (1)(a), 144 (1)(a) Regulation (EU) No 1303/2013.

<sup>396</sup> V. VIŢĂ, “Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality”, *Cambridge Yearbook of European Legal Studies* 2017, (116) 127-130.

<sup>397</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 171.

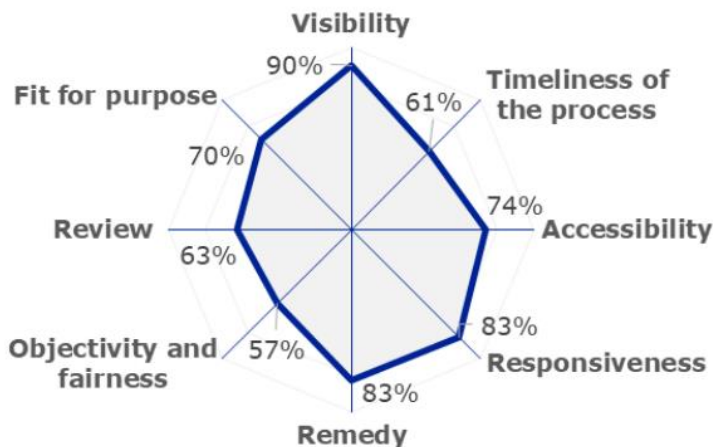
<sup>398</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 171.

<sup>399</sup> **During the MFF of 2007-2013, complaints could be sent by email or postal services, whereas during the MFF of 2014-2020 a special electronic gateway was introduced in this respect. This had no influence, however, on one of the eight central criteria.** See EC, *Study on complaints-handling*

has been confirmed by the Hungarian Managing Authorities, i.e. the national entities responsible for implementing the ESIFs and selecting the final beneficiaries.<sup>400</sup> As a result, it can be concluded that the introduction of the ESIFs complaint conditionality does not seem to have had any effect on Hungary’s level of compliance with the ESIFs legislation, and that the existing flaws in their national complaints-handling system have endured.

**b. Polish complaints-handling system**

**84. DURING THE 2014-2020 MFF** – Contrary to Hungary, Poland is ranked in the better half of Member States with regards to its ESIFs complaints-handling system, with an above-average overall score.<sup>401</sup> When examined in light of the eight criteria, the Polish complaints-handling system scores as follows:



The Polish complaints-handling system scores highest for its visibility, available remedies and responsiveness.<sup>402</sup> This can be explained by the communication that is available at all stages of the decision-making process, the possibility of correction after “structured procedures” and the detailed information that the complainant receives throughout the complaints process.<sup>403</sup> Furthermore, the Polish ESIFs complaints-handling system “scored well”

---

systems - Final Report, Luxembourg, Publications Office of the European Union, September 2018, 171.

<sup>400</sup> Recital 42-43 Regulation (EU) No 1303/2013.

<sup>401</sup> EC, Study on complaints-handling systems - Final Report, Luxembourg, Publications Office of the European Union, September 2018, 33-34.

<sup>402</sup> EC, Study on complaints-handling systems - Final Report, Luxembourg, Publications Office of the European Union, September 2018, 228-229.

<sup>403</sup> EC, Study on complaints-handling systems - Final Report, Luxembourg, Publications Office of the European Union, September 2018, 228-229.



regarding its accessibility and fit for purpose.<sup>404</sup> This can be attributed – *inter alia* – to the fact that access for persons with a disability is ensured through various barrier-reducing measures and to the large number of cases handled annually (up to 400 in some years).<sup>405</sup> The lowest scores are granted to the possibility of review, timeliness and the objectivity and fairness of the complaints-handling system.<sup>406</sup> Nevertheless, for all three criteria, the Polish complaints-handling system still scores *acceptable*.<sup>407</sup> Factors that have been taken into account for this score are the limited possibility for review, the relatively short deadline for lodging a complaint and the restricted opportunity to defend one’s position in a formal hearing.

**85. DURING THE 2007-2013 MFF** – Contrary to the Hungarian complaints-handling system, a clear improvement in the Polish complaints-handling system can be observed after the introduction of the ESIFs complaint conditionality.<sup>408</sup> This improvement can be attributed to the entry into force of the Polish Act on the rules for the implementation of the programmes of the Cohesion Policy financed under the financial perspective 2014-2020 of 11 July 2014 (hereinafter the Implementation Act).<sup>409</sup> The objective of the Implementation Act was to align Polish law with the provisions of Regulation 1303/2013 on the ESIFs, including the new obligation to establish an operational national complaints-handling system.<sup>410</sup> The main improvement brought about by the Implementation Act relates to the scenarios in which complaints can be lawfully lodged.<sup>411</sup> During the 2007-2013 MFF, the Polish legislation only provided for the possibility of

---

<sup>404</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 228-229.

<sup>405</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 228-229.

<sup>406</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 228-229.

<sup>407</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 228-229.

<sup>408</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 230.

<sup>409</sup> Act on the rules for the implementation of the programmes of the Cohesion Policy financed under the financial perspective 2014-2020 (Poland) 11 July 2014, *Journal of Laws* 2014 item 1146, <https://www.funduszeuropejskie.gov.pl/strony/o-funduszach/dokumenty/ustawa-o-zasadach-realizacji-programow-w-zakresie-polityki-spojnosci-finansowanych-w-perspektywie-finansowej-2014-2020-tzw-ustawa-wdrozeniowa/>.

<sup>410</sup> Footnote 1 Act on the rules for the implementation of the programmes of the Cohesion Policy financed under the financial perspective 2014-2020 (Poland) 11 July 2014, *Journal of Laws* 2014 item 1146, <https://www.funduszeuropejskie.gov.pl/strony/o-funduszach/dokumenty/ustawa-o-zasadach-realizacji-programow-w-zakresie-polityki-spojnosci-finansowanych-w-perspektywie-finansowej-2014-2020-tzw-ustawa-wdrozeniowa/>.

<sup>411</sup> Article 24, 25 and 53 Act on the rules for the implementation of the programmes of the Cohesion Policy financed under the financial perspective 2014-2020 (Poland) 11 July 2014, *Journal of Laws* 2014 item 1146, <https://www.funduszeuropejskie.gov.pl/strony/o-funduszach/dokumenty/ustawa-o-zasadach-realizacji-programow-w-zakresie-polityki-spojnosci-finansowanych-w-perspektywie-finansowej-2014-2020-tzw-ustawa-wdrozeniowa/>; EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 230.

lodging a complaint about the selection process for receiving funds.<sup>412</sup> Some Polish Managing Authorities had a specific internal procedure, which allowed for other types of complaints, but this varied from one Managing Authority to another.<sup>413</sup> The 2014 Implementation Act expanded the possibility to make complaints by encompassing the processing of claims, the conduct or outcome of random checks and the outcome of audits.<sup>414</sup> The Polish complaints-handling system thus became more “*unified and centralised*” as of 2014.<sup>415</sup>

### 5.2.3. Results

**86.** The observations of Chapter I and II show similarities. Like the IACS conditionality, the ESIFs complaint conditionality seems to have had a clear positive impact on the level of compliance in one of the two Member States under scrutiny (see Poland). Meanwhile, there is no indication that the introduction of the ESIFs complaint conditionality has brought about any improvement in the other Member State (see Hungary). Unlike the results concerning the IACS, however, this dichotomy between the two Member States cannot be explained by the EC’s divergent approach. For both Member States, the EC has never enforced the ESIFs complaint conditionality, nor has it ever formally threatened to do so. On the contrary, the EC has opted to apply more careful techniques, such as naming-and-blaming, for example by commissioning and publishing an independent expert report on the progress of these ESIFs complaints-handling systems.<sup>416</sup>

The preceding analysis suggests two interrelated reasons that may explain why the EC has not adopted a more vigorous approach. First, the establishment of these ESIFs complaints-handling systems was left entirely to the discretion of the Member States according to their national rules and procedures.<sup>417</sup> One might expect the EC to be more cautious in condemning the policy choices of Member States when EU law grants them such discretionary powers. This cautious approach has become evident with regard to the (lack of) enforcement of the ESIFs complaint conditionality. Second, the threshold to trigger the ESIFs complaint conditionality is exceedingly high. The ESIFs complaint conditionality can only be triggered when the EC can establish a

---

<sup>412</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 230.

<sup>413</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 230.

<sup>414</sup> Article 24, 25 and 53 Act on the rules for the implementation of the programmes of the Cohesion Policy financed under the financial perspective 2014-2020 (Poland) 11 July 2014, *Journal of Laws* 2014 item 1146, <https://www.funduszeuropejskie.gov.pl/strony/o-funduszach/dokumenty/ustawa-o-zasadach-realizacji-programow-w-zakresie-polityki-spojnosci-finansowanych-w-perspektywie-finansowej-2014-2020-tzw-ustawa-wdrozeniowa/>; EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 230.

<sup>415</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 230.

<sup>416</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 1-284.

<sup>417</sup> Article 74 (3) Regulation (EU) No 1303/2013.

*serious deficiency*.<sup>418</sup> One can assume that this is a direct consequence of the concern of the EU legislator for the EC not to interfere too powerfully in such discretionary matters. Thus, for the EC to make a case against a Member State, it would need extensive evidence of a significant impairment. Consequently, when the threshold for triggering political conditionality is too high, it seems to have a negative impact on the *effectiveness*<sup>419</sup> of political conditionality.

Although the above reasoning explains why no results were achieved in Hungary, it is not sufficient to explain the case of Poland. The Polish complaints-handling system has been seriously improved, even without any real threat of financial sanctions. The most plausible explanation is that the improvement by the Polish authorities was realised because the ESIFs complaint conditionality was attached to a new obligation under EU law. Before the 2014-2020 MFF, the existence and operability of an ESIFs complaints-handling system was not mandatory under EU law.<sup>420</sup> As has become evident, the improved level of compliance in Poland was the direct result of the 2014 Implementation Act, which constituted a comprehensive implementation of the new ESIFs legislation into Polish law.<sup>421</sup> The fact that a political conditionality is attached to a new EU obligation – as opposed to a well-established commitment – therefore seems to be a factor that can explain an improvement in compliance.

### 5.3. LINKING BACK TO SUB-QUESTION FOUR

*What do empirical data on the IACS conditionality vis-à-vis Bulgaria and Romania and empirical data on the ESIFs complaint conditionality vis-à-vis Hungary and Poland suggest about the plausibility of the Assumption?*<sup>2</sup>

**87. FINDINGS** – Previous results suggested that all three conditionalities were somewhat likely to positively affect RoL compliance, with the IACS conditionality being the most likely to improve compliance, and the ESIFs complaint conditionality being the least likely. We now sought to further refine the previous findings by looking at the actual empirical data, on the basis of which a before-and-after analysis was made.

The before-and-after analyses offer a nuanced – but interesting – perspective on the plausibility of the central *Assumption*<sup>422</sup> of this research. On

<sup>418</sup> Article 74 (3) iuncto Articles 83 (1)(a), 142 (1)(a), 144 (1)(a) Regulation (EU) No 1303/2013.

<sup>419</sup> *Pro memoria*, effectiveness in the context of this research implies *the ability to improve compliance with the RoL*.

<sup>420</sup> EC, *Study on complaints-handling systems – Final Report*, Luxembourg, Publications Office of the European Union, September 2018, 10.

<sup>421</sup> Footnote 1 Act on the rules for the implementation of the programmes of the Cohesion Policy financed under the financial perspective 2014-2020 (Poland) 11 July 2014, *Journal of Laws* 2014 item 1146, <https://www.funduszeuropejskie.gov.pl/strony/o-funduszach/dokumenty/ustawa-o-zasadach-realizacji-programow-w-zakresie-polityki-spojnosci-finansowanych-w-perspektywie-finansowej-2014-2020-tzw-ustawa-wdrozeniowa/>.

<sup>422</sup> *Pro memoria*, the Assumption refers to the estimation by politicians and scholars that the introduction of new political conditionalities in the EU budget is likely to positively affect RoL compliance in the Member States where the principles of the RoL are being breached.

the one hand, it has become evident that political conditionality in the EU budget may constitute a powerful incentive for some Member States to make rapid adjustments to increase their compliance with EU law. These adjustments proved to have a positive impact on the level of compliance, both in the short and in the long term. On the other hand, political conditionality in the EU budget has proven to be entirely ineffectual in certain other Member States, despite the fact that these Member States did not fully comply with EU law and the RoL. These observations are interesting for the following reason. Each of the political conditionalities has been evaluated as operating *within a vacuum*, resulting in a rather positive prospect for each of the conditionalities under scrutiny. This paper revealed, however, that the introduction of a political conditionality into the EU budget can lead to very divergent outcomes in each of the Member States. As a result, the effectiveness of political conditionality to increase RoL compliance seems to be dependent on some additional factors.

A number of explanations for these contradictory results between Member States have been identified in the preceding analysis. These explanations can serve as more general lessons – or perhaps even as *propositions of effectiveness* in their own right – on the likelihood that the introduction of a new political conditionality in the EU budget will increase compliance with the RoL.

**88. PROPOSITION I AND II** – The first proposition of effectiveness derived from the empirical data reads: *The non-compliant behaviour of a Member State exceeds the legal threshold to trigger the political conditionality in a significant manner*. As concluded in Chapter I, the EC seems reluctant to apply political conditionality vis-à-vis Member States where non-compliance is limited, even though the Member State might fall within the scope of application to trigger the conditionality. This proposition should be distinguished from the second proposition, although they are interconnected. The second proposition reads: *The legal threshold to trigger the political conditionality is not raised so high that it removes any real threat to non-compliant Member States*. As has become evident in Chapter II, demanding a serious deficiency as the minimum requirement to trigger the ESIFs complaint conditionality could be considered as a significant impediment for the EC to make any real use of the conditionality. Furthermore, the findings on the IACS conditionality seem to confirm that political conditionality is largely ineffectual when any threat of losing EU funds is missing.

When looking at the RoL conditionality mechanism in light of these two propositions, the double precondition<sup>423</sup> to trigger the RoL conditionality mechanism seems to constitute an important stumbling block for its ability to improve RoL compliance. Furthermore, the first proposition implies that the

---

<sup>423</sup> As mentioned earlier on in this research, the RoL conditionality mechanism can only be triggered when: 1) breaches of the principles of the RoL in a Member State have occurred that 2) 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. See Article 3 and 4 (1) Regulation (EU, Euratom) 2020/2092.

RoL conditionality mechanism would only be influential in the most severe cases of RoL breaches.

**89. PROPOSITION III** – The third proposition derived from the empirical data reads: *The political conditionality is embedded within a larger framework of techniques that pursue the same objective.* For both conditionalities, it was discussed as to how other methods were used to complement them in reaching their objective, such as naming-and-blaming techniques and close monitoring by the EC. The IACS conditionality demonstrates best how these complementary techniques are helpful – and in most cases probably essential – to achieve *full* compliance in the long term. Political conditionality alone does not seem to be sufficient to achieve this. Nevertheless, the IACS conditionality has proven that political conditionality can greatly contribute to a long-term increase in compliance (see the case of Romania). Moreover, the empirical data on the IACS conditionality has shown that these complementary techniques, without the existence of a threat of losing funds, are not likely to lead to *full* compliance on their own either (see the case of Bulgaria). A mixture of both *soft* and *sanctioning* methods thus seems to be the ideal scenario.

As demonstrated in the Introduction, the RoL conditionality mechanism is one *tool* in the EC’s wide-ranging *RoL toolbox*.<sup>424</sup> This toolbox encompasses both soft tools and sanctioning tools.<sup>425</sup> Although the EU has been criticised for introducing new tools to counteract RoL backsliding without exhausting the existing ones,<sup>426</sup> this proposition demonstrates the fundamental importance of using a variety of soft and sanctioning techniques to improve RoL compliance.

**90. PROPOSITION IV** – The fourth proposition is: *The political conditionality does not cover matters for which the Member States enjoy a broad discretionary power.* As concluded in Chapter II, the broad discretion of Member States in organising their national complaints-handling systems was presumed to constitute an important impediment to the ESIFs complaint conditionality. It seems that the EC adopted a more cautious approach in enforcing the ESIFs

---

<sup>424</sup> EC, *Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union*, 3 April 2019, COM(2019) 163 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>, 3-6; L. PECH, “The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox”, *RECONNECT* 2020, Working Paper No. 7, (1) 5-6.

<sup>425</sup> For an overview of the tools of the RoL toolbox, see *supra* paragraph 2. EC, *Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union*, 3 April 2019, COM(2019) 163 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>, 3-6; L. PECH, “The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox”, *RECONNECT* 2020, Working Paper No. 7, (1) 5-6.

<sup>426</sup> I. BUTLER, “Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs”, *Civil Liberties Union for Europe* 2018, (1) 11-12; J. LACNY, “Stick works better than carrot? Suspension of EU funds paid to the Member States breaching the rule of law” in A. BOROWICZ et al. (eds.), *European Unions and its Law, Policy and Economy: Interna land External Dimension*, Warsaw, CeDeWu Sp., 2020, (61) 63.

complaint conditionality in order to avoid condemning (and sanctioning) national policy choices falling within the discretionary power of Member States.

The RoL conditionality mechanism can be triggered in case of *breaches of the principles of the RoL*. As explained earlier on, although there is agreement on the interpretation of these core principles, consensus does not imply uniformity.<sup>427</sup> The Venice Commission's RoL Checklist explicitly states that the implementation of the RoL need not be identical between Member States, but may differ on the basis of "*the concrete juridical, historical, political, social or geographical context*" of each country.<sup>428</sup> The Member States thus enjoy a considerable discretionary power in the organisation of their judiciary, their administration, how to make legitimate decisions, and so on. This may seriously hamper the effectiveness of the RoL conditionality mechanism in influencing RoL compliance.

**91. PROPOSITION V** – Finally, there is some empirical evidence to suggest a final proposition of effectiveness, which reads: ***The political conditionality is attached to a new obligation under EU law, instead of a long-standing commitment.*** The key explanation for the sudden increase in compliance in Poland after the introduction of the ESIFs complaint conditionality is that the conditionality was attached to a new obligation under EU law. After all, the only reason this improvement of compliance had occurred was because of a national Implementing Act, which inserted into Polish law the new legal commitments Poland was subject to as of 2014. Furthermore, this improvement cannot be attributed to the existence of any threat to lose EU funding, as the EC did not consider Poland to be within the scope of application of the ESIFs complaint conditionality.

The principle of the RoL has been enshrined in EU primary law since the Maastricht Treaty of 1992.<sup>429</sup> However, respect for the RoL was already part of the EU agenda much earlier.<sup>430</sup> Most notably, in the *Les Verts* judgment of 1986, the CJEU declared the Union (then European Economic Community) to

---

<sup>427</sup> Venice Commission, *Rule of Law Checklist*, 18 March 2016, CDL-AD(2016)007rev, 9-10; B. GRABOWSKA-MOROZ, "Understanding the Best Practices in the Area of the Rule of Law", *RECONNECT* 2020, Vol. 8, No. 1, (1) 8-9; L. PECH, J. GROGAN et al., "Meaning and Scope of the EU Rule of Law", *RECONNECT* 2020, Vol. 7, No. 2, (1) 38-39.

<sup>428</sup> Venice Commission, *Rule of Law Checklist*, 18 March 2016, CDL-AD(2016)007rev, 9.

<sup>429</sup> L. PECH, "The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox", *RECONNECT* 2020, Working Paper No. 7, (1) 9; K. RAUBE, M. BURNAY and J. WOUTERS, "By way of introduction: the rule of law as a strategic priority for EU external action-conceptualization and implementation of EU law and policies", *Asia Europe Journal* 2016, Vol. 14, No. 1, (1) 1; P. VAN ELSUWEGE and F. GREMMELPREZ, "Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice", *European Constitutional Law Review* 2020, Vol. 16, (8) 12.

<sup>430</sup> L. PECH, "The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox", *RECONNECT* 2020, Working Paper No. 7, (1) 5; K. RAUBE, M. BURNAY and J. WOUTERS, "By way of introduction: the rule of law as a strategic priority for EU external action-conceptualization and implementation of EU law and policies", *Asia Europe Journal* 2016, Vol. 14, No. 1, (1) 1.

be a “*Community based on the [RoL]*”.<sup>431</sup> Over the years, respect for the RoL has evolved into one of the core *values* of the EU, with strong symbolic importance, an economic dimension, as well as a normative character.<sup>432</sup> The RoL conditionality mechanism is built upon this long-standing tradition of protecting the RoL.<sup>433</sup> Therefore, the RoL conditionality mechanism cannot be considered to be attached to a new obligation under EU law.

## 6. AFTERTHOUGHTS

*“An exploratory paper like this one has no place for “conclusions”, but it does call for a few afterthoughts.”*<sup>434</sup>

**92. SUMMARY OF THE METHODOLOGICAL APPROACH** – This research is built upon the Assumption, i.e. the estimation by politicians and scholars that the introduction of new political conditionalities in the EU budget is likely to positively affect RoL compliance in the Member States where the principles of the RoL are being breached. The absence of an empirical underpinning casts doubt on the plausibility of the Assumption. Moreover, research on political conditionality in the context of EU internal policy and its ability to positively influence compliance is scarce. Political conditionality in the EU budget has been little discussed in the academic literature and only gained momentum after the introduction of the RoL conditionality mechanism. As a result, there is an interesting gap of knowledge regarding the likelihood of political conditionality in the EU budget to affect RoL compliance in Member States.

---

<sup>431</sup> Court of Justice 23 April 1986, no. C-294/83, ECLI:EU:C:1986:166, *Parti écologiste “Les Verts” v European Parliament*, paragraph 23.

<sup>432</sup> Article 2 TEU; G. WESTERWELLE, F. TIMMERMANS, V. SØVNDAL and E. TUOMIOJA, *Letter to Mr. José Manuel Barroso President of the European Commission*, 6 March 2013, [https://www.tweedekamer.nl/kamerstukken/brieven\\_regering/detail?id=2013Z04972&did=2013D10359](https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2013Z04972&did=2013D10359), 1-2; B. BAKÓ, “Hungary’s Latest Experiences with Article 2 TEU: The Need for ‘Informed’ EU Sanctions” in A. VON BOGDANDY, P. BOGDANOWICZ et al. (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (35) 61; D. KOCHENOV and L. PECH, “Better Late than Never? On the European Commission’s Rule of Law Framework and its First Activation”, *Journal of Common Market Studies* 2016, Vol. 54, No. 5, (1062) 1062-1064; N. LAVRANOS, “Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Law Values and Principles” in P. CARROZZA, F. FONTANELLI and G. MARTINICO (eds.), *Shaping rule of law through dialogue: International and Supranational experiences*, Groningen, Europa Law Publishing, 2009, (119) 141-143; J.C. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 71-72; W. SCHROEDER, “The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?” in A. VON BOGDANDY, P. BOGDANOWICZ et al. (eds.), *Defending Checks and Balances in EU Member States*, New York, Springer, 2021, (105) 112-114; J. ŠELIŠ, I. BOND and C. DOLAN, “Can EU funds promote the rule of law in Europe?”, *Centre for European reform* 21 November 2017, (1) 3; J. WOUTERS, “Revisiting Art. 2 TEU: A True Union of Values?”, *European Papers - A Journal on Law and Integration* 2020, Vol. 5, No. 1, (255) 258.

<sup>433</sup> Recital 12-14 Regulation (EU, Euratom) 2020/2092.

<sup>434</sup> H. ZUCKERMAN and R.K. MERTON, “Age, Aging, and Age Structure in Science” in R.K. MERTON (ed.), *The Sociology of Science: Theoretical and Empirical Investigations*, Chicago, University of Chicago Press, 1973, (497) 559; R. SWEDBERG, “Exploratory Research” in C. ELMAN, J. GERRING and J. MAHONEY (eds.), *The Production of Knowledge*, Cambridge, Cambridge University Press, 2020, (17) 37.

This research has attempted to bridge this gap of knowledge – as far as a contribution of this size would allow – by using two pre-existing political conditionalities in the EU budget as the basis for an empirical-legal analysis. Furthermore, empirical studies related to a different context (namely that of EU foreign aid), which has received more attention from scholars over the past decades, have been used to explore the plausibility of the Assumption. Finally, this research sets itself apart from the existing scholarship by introducing empirical methods into the current debate on political conditionality in the EU budget. Because of its unique methodology, which is dictated by the lack of existing (empirical) literature on this topic, this research should be understood as a first, tentative analysis on which future research can build. That being said, this research has yielded some interesting results, which are relevant in their own right.

**93. SUMMARY OF THE FINDINGS** – We provided the necessary doctrinal background for the empirical component of this research, and then revealed that all three conditionalities have certain core features in common, as they can all be qualified as *ex post* negative political conditionalities in the EU internal policy context.

The first empirical part of this paper already offered an interesting indication about the plausibility of the Assumption. The results of this exercise suggested that all the three political conditionalities under scrutiny would be somewhat likely to positively affect RoL compliance in non-compliant Member States. However, the ability to improve RoL compliance did not seem to be self-evident. Instead, it appeared to depend on several (contextual) factors.<sup>435</sup>

In the second empirical part of this paper, an important refinement on what was discovered earlier on became necessary. A secondary data-analysis on the evolution of compliance rates after the introduction of the two selected pre-existing political conditionalities was conducted. One significant finding became evident from this exercise. Although the introduction of political conditionality in the EU budget significantly improved RoL compliance in some Member States, it seemed to have had no effect whatsoever in certain other (equally non-compliant) Member States. Five explanations were given for this. While these explanations are evidently specific to their particular setting, some general lessons could be drawn from them. Consequently, these five explanations have been dubbed as *propositions of effectiveness*,<sup>436</sup> echoing the studies of Stokke and Crawford.

---

<sup>435</sup> The five propositions extracted from the studies of STOKKE and CRAWFORD were:

- a. *Bilateral relations are limited in importance and restricted in magnitude.*
- b. *Actions are internationally coordinated.*
- c. *The required reforms are precisely formulated.*
- d. *Countervailing interests are overall limited.*
- e. *Overall, the donor displays a high degree of political will.*

<sup>436</sup> The five propositions formulated in this research were:

- a. *The non-compliant behaviour of a Member State exceeds the legal threshold to trigger the political conditionality in a significant manner.*



None of these propositions are black and white. Neither are they in any way exhaustive. There is absolutely no guarantee that a new political conditionality, which fulfils all of these five propositions, as well as the five propositions of Stokke and Crawford, will be effective in positively influencing RoL compliance. This would be a misinterpretation of the results of this research, which remains exploratory in nature. However, the fact that these results are merely tentative, rather than conclusive, does not mean that they are not useful. They can help answer the research question.

**94. ANSWERING THE RESEARCH QUESTION** -- This research explored the following research question:

*What does empirical evidence on pre-existing political conditionalities suggest about the plausibility of the contested assumption that the introduction of new political conditionalities in the EU budget is likely to positively affect RoL compliance in the Member States where the principles of the RoL are being breached?*

The empirical observations made in Parts III and IV suggest that the current Assumption, although somewhat plausible, is too simplistic. Several factors contribute to the likelihood that political conditionality will have a positive effect on RoL compliance in non-compliant Member States. Overall, this research identified ten factors that played a role in pre-existing political conditionalities. They have been translated into propositions of effectiveness against which current or future conditionalities may be tested. These propositions can not only help to determine why some political conditionalities are more effective than others, but also to explain a difference in effectiveness of the same conditionality between Member States. As a result, two new, more nuanced assumptions are proposed.

First, it can be assumed that **the introduction of a new political conditionality in the EU budget is more likely to positively affect RoL compliance in a non-compliant Member State when it satisfies all or most of the ten propositions identified in this research than when it does not satisfy any of them.**

Second, and more generally, it can be assumed that **the introduction of a new political conditionality in the EU budget is likely to positively affect RoL compliance in the Member States where the principles of RoL are breached (or at least in some of them), when it satisfies all or most of the ten propositions identified in this research.**

---

b. *The legal threshold to trigger the political conditionality is not raised so high that it removes any real threat to non-compliant Member States.*

c. *The political conditionality is embedded within a larger framework of techniques that pursue the same objective.*

d. *The political conditionality does not cover matters for which the Member States enjoy a broad discretionary power.*

e. *The political conditionality is attached to a new obligation under EU law, instead of a long-standing commitment.*

Although neither of these two assumptions can promise any degree of certitude and conclusiveness, they already represent a first – important – refinement of the Assumption that currently dominates a significant part of the academic literature and the political discourse. Furthermore, both assumptions are grounded in empirical observations rather than academic conjecture or political speculation. It is essential that the academic literature – and ideally also legislators themselves – seek an empirical foundation that supports legislative initiatives. This research provides a first basis for the EU legislator to further explore the possibilities of political conditionality in the EU budget.

**95. IMPLICATIONS FOR THE RoL CONDITIONALITY MECHANISM** – Now, to conclude this research, what do these results imply for the introduction of the RoL conditionality mechanism? As explained in Parts III and IV, the RoL conditionality mechanism meets three of the five propositions formulated by Stokke and Crawford, and one more proposition to a certain extent. Furthermore, it answers just two (and in certain scenarios merely one)<sup>437</sup> of the five propositions developed in this research. In other words, overall, the RoL conditionality mechanism satisfies at most five out of ten of the propositions of effectiveness identified in this research, as well as an additional one in a moderate manner.

These findings call for the following afterthoughts. First, the RoL conditionality mechanism seems to exhibit certain characteristics, which have proven to hinder other political conditionalities in their ability to positively affect RoL compliance in non-compliant Member States. Although several other factors not highlighted in this research might affect the likelihood of improving RoL compliance,<sup>438</sup> these potential hurdles should be acknowledged and taken into account. Second, it can be assumed that the RoL conditionality mechanism would be more likely to positively affect RoL compliance in non-compliant Member States if it satisfied more of the propositions identified in this research. Third, it is by no means excluded that the introduction of the RoL conditionality mechanism could (at least in some non-compliant Member States) bring about an increase in RoL compliance. While meeting all propositions is a strong indicator of a successful political conditionality, failure to meet some propositions does not necessarily render political conditionality ineffective.

Whether the RoL conditionality mechanism will be a *breakthrough* for RoL compliance in Europe remains to be seen. However, one thing is certain, political conditionality in the EU budget can amount to much more than mere political *window dressing*.

---

<sup>437</sup> Depending on whether the first proposition formulated in this research (i.e. *The non-compliant behaviour of a Member State exceeds the legal threshold to trigger the political conditionality in a significant manner*) is fulfilled or not.

<sup>438</sup> Certain factors that may be explored in future research are: the amount of funds to which the conditionality is linked, a more in-depth investigation into the material conditions to trigger the conditionality, procedural elements, the severity of possible sanctions, and so on.