



Exploring the Boundaries of Conditionality in the EU

Alexander Mattelaer (ed.)

Conditionality in the EU comes in many forms: legally codified and enforced by the Court of Justice, or reliant on intergovernmental bargaining and expressed by means of political or economic (dis)incentives. This European Policy Brief explores the boundaries of the conditionality debate, and assesses what varying degrees of conditionality can and cannot achieve. The overarching objective of conditionality is to foster integration and cohesion amongst the peoples of Europe and their Member States. A sound logic of conditionality must therefore set incentives in such a way that their application contributes to this intended outcome. A balanced combination of political, legal and budgetary instruments can help remedy a major lacuna in the Treaties: the effective protection of the rule of law and democracy.

INTRODUCTION

In the European Union, the notion of ‘conditionality’ is back in vogue. When the European Commission presented its ideas for the next Multiannual Financial Framework, for

instance, it proposed a new regulation linking EU spending to respect for the rule of law.¹ Deficiencies with regards to the latter, it was argued, could expose the Union to financial losses, thus warranting the Council to adopt prudential measures aimed at mitigating such risks. Irrespective of whether this proposal will survive the future budget negotiations and associated legislative procedures, one thing is clear. The European construction is set to feature the next round of debate on what constitutes appropriate – or even compulsory – policy behaviour for Member States of the EU, and what happens in cases of noncompliance with the norm. As such a debate is set to provoke substantial political controversy, fundamental questions arise regarding how the unity amongst member states can be protected whilst simultaneously avoiding the impression that ‘anything goes’.

Based on the deliberations of an Egmont working group, this European Policy Brief explores the boundaries of the conditionality debate in the EU. It does not seek to advocate specific policy outcomes, but rather to assess what varying degrees of conditionality can and cannot achieve. In many ways, conditionality has always been part and parcel of the historical

process of European integration, yet important lacunae remain. In the first section, we discuss the empirical track record of conditionality and dissect its different institutional manifestations. At the same time, substantial unease in regards to rule of law backsliding exists in many European democracies. Given that this relates to the very foundations of the EU as a legal construct, it bears little surprise that the rule of law discussion has emerged as the proverbial mother of all conditionality debates. The second section therefore reviews several of the policy proposals that have been put forward in this regard, while commenting on their merits and drawbacks. In the third and final section, the dynamic interplay between various conditionality-based mechanisms is discussed. As these mechanisms encompass political, legal and budgetary instruments, the need to ensure overall coherence is key. If European unity is to mean anything, different policy discussions must be linked together into a coherent package.

THE PROMISES AND PERILS OF CONDITIONALITY

The concept of conditionality has a long pedigree in European studies. Much of the EU *acquis* is based on the logic of conditionality: the benefits of integration come with adherence to a commonly agreed legal framework. Yet conditionality can go beyond the *acquis* and even be used as an instrument of coercion. This logic of sticks and carrots comes with its own dynamic that is not always easy to reconcile with the spirit of European integration. When discussing options to resort to greater conditionality in the EU, it is imperative to carefully delineate what sort of conditionality one has in mind, and heed not only the intended outcomes it can generate, but also the associated costs and pitfalls.

The logic of conditionality is part and parcel of compliance with the EU *acquis*. Examples of

Treaty-based conditionality abound. Under Article 122 TFEU, the Union may provide, “in a spirit of solidarity” and “under certain conditions”, financial assistance to a Member State in difficulties caused by natural disasters or exceptional occurrences. In turn, Article 136 TFEU sets the stage for budgetary and economic policy surveillance within the euro area. Under Article 328 TFEU Member States may pursue enhanced cooperation, “subject to compliance with any conditions of participation laid down by the authorising decision”. At a more general level, the logic of conditionality is also a constitutive element of the EU accession process, by means of the Copenhagen criteria, or that of becoming a Eurozone member, by means of the convergence criteria. Unsurprisingly, a rich scholarly literature exists on the different manifestations of such Treaty-based conditionality.² In case of non-compliance with EU legislation, recourse to the Court of Justice is possible for conducting infringement procedures, and enforcement mechanisms are in place.

At the same time, the notion of conditionality may also refer to a political logic of sanctions and rewards for specific policy behaviour. In some respects, such forms of coercive diplomacy do in fact relate to how the EU operates as a political entity in its external relations, for instance by imposing economic sanctions. Yet as the EU itself is defined as a contract amongst member states (Article 1 TEU) based on shared values (Article 2 TEU), Article 7 TEU offers a mechanism for suspending membership rights. This constitutes the singular stick the EU can wield vis-à-vis its own constitutive members – thus exposing an important lacuna in the Treaties. In turn, carrots are much more prevalent in intra-EU debates, be it in the form of financial incentives or other sweeteners, such as political prestige or economic activity that is associated with EU presence.

It bears emphasis that such political conditionality is by no means limited to the EU. Rather, it is part and parcel of the rough world of international relations. When US Secretary of Defence Jim Mattis attended his first NATO defence ministerial, for instance, he resorted to conditionality-based language as well: “if your nations do not want to see America moderate its commitment to the alliance, each of your capitals needs to show its support for our common defense.”³

Both legally-codified and political coercion-based forms of conditionality have their own merits and drawbacks. EU Treaty-based conditionality has a proven track-record in terms of shaping modest policy outcomes, yet only operates over a very long time horizon. Precisely because it manifests itself through long-winding democratic legislative processes, it is widely accepted by European populations. However, it may be deemed as a frustratingly slow policy instrument, and therefore unsuitable to address crisis situations.

In turn, coercive diplomacy offers the promise of realising major impact over a much shorter period of time, thus exercising great political appeal. But as coercive instruments are often blunt and crude, they may also backfire, either because their strategic design goes amiss, or because they can be portrayed by the target state as an external threat. Precisely because European integration has always been a *voluntary* process of Member States pooling competences to attain common objectives, outright coercion (that is, beyond the framework of EU law) can be seen as contradicting the values that are enshrined in the treaties – especially when based on the threat of punishment. Even positive incentives carry important downsides over the long term: as the effect of carrots will inevitably wear off over time, ever greater resources will be required to satisfy expectations.

In sum, there is no such thing as ‘good’ or ‘bad’ conditionality. Per definition, there is no constitutional democracy or social contract without some form of conditionality. Rejecting conditionality altogether would provoke our architecture of government to crumble into pieces: why would citizens accept to pay taxes if they cannot count on receiving public services in return? At the same time, conditionality ultimately embodies political power. Any recalibration of conditionality – in the EU or elsewhere – risks upsetting political equilibria in ways that cannot always be foreseen. As European citizens become increasingly aware of the impact that EU policies may have, it is fair to assume that increased conditionality will not go unnoticed. Given the double-edged sword that conditionality embodies in terms of building (or potentially fracturing) EU cohesion, it is key to recognise the different logics that are at play in the ways that conditionality can be operationalised.

WHAT MECHANISM FOR ENSURING THE RULE OF LAW

While conditionality may relate to different policy areas, it is the debate on the protection of the rule of law inside the EU that has caught the most attention in recent months.⁴ Concern over rule of law backsliding in various EU member states has prominently featured in parliamentary debate in Belgium as well as elsewhere, ranging in scope from the developments in Hungary and Poland to the way in which Spanish and Catalan authorities attempt to resolve their differences.⁵ This is not just about pointing fingers at others: there exists substantial debate over the rule of law in Belgium itself.⁶

This section reviews three distinct mechanisms that are all geared towards the protection of the rule of law and characterised by different forms of conditionality. First, we discuss the debate on the invocation of Article 7 TEU. Second, we

review the Commission's proposal of linking respect for the rule of law to the EU budget. Third, we comment on the Belgian government's proposals to establish a rule of law peer review mechanism amongst all Member States.

The constitutional foundations of the rule of law in the EU are cemented into Articles 2 and 7 TEU. Serious breaches of the values enshrined in Article 2 TEU may, after due deliberation, lead to the suspension of EU membership rights. On 20 December 2017, the European Commission for the first time triggered an Article 7 procedure against Poland in respect to concerns that legislative proposals would limit the independence of the judiciary and the separation of powers in Poland.⁷ Often inaccurately described as the so-called “nuclear option”, the Article 7 procedure has effectively catapulted the rule of law debate into the public spotlight.⁸

Without prejudice to the outcome of this debate, we can already highlight a handful of problems associated with the Article 7 mechanism. Firstly, it has provoked political backlash and further polarization in Poland itself. Secondly, any debate on concepts such as ‘judicial independence’ needs clear definitions, yet those are missing from the Treaties.⁹ While the European Court of Justice deserves applause for clarifying key issues in its ruling *Associação Sindical dos Juizes Portugueses* (Case C-64/16), more work lies ahead in spelling out the legal details whilst constantly ensuring their societal acceptability and effective application.¹⁰ Thirdly, given that Article 7 (2) presupposes European Council action *based on unanimity*, this approach may drag on in time without clear result. The political stick is unmistakable, yet can only be wielded at the cost of grave collateral damage in terms of Union cohesion.

The Commission's proposal for a regulation on the protection of the Union's budget in case of

generalised deficiencies as regards the rule of law constitutes a novel example of budgetary conditionality.¹¹ The risk posed by ineffective protection of the rule of law to the EU's financial interests is presented as grounds for suspending payments and/or the suspension, reduction or prohibition of commitments. ‘Generalised deficiencies’ include endangering the independence of judiciary, failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, or limiting the availability and effectiveness of legal remedies. What remains unclear is to what extent such deficiencies need to fully materialise before a decision by reversed qualified majority voting is triggered.

In any case, the threat of financial punishment would constitute a tangible alternative to the existing Article 7 TEU procedure. At the same time, it is unsure whether this proposal will materialize into legal reality. While it could technically be adopted by qualified majority vote on the basis of Article 322 (1)(a) TFEU, it is far from guaranteed that the Council would consent to establishing the precedent of expanding majority voting to rule of law matters based on what some would consider to be a Treaty loophole. Even when coming into effect, budgetary (dis)incentives would still be perceived by many to be a form of political coercion from Brussels, with all the associated cost in terms of cohesion – not the least because some Member States are far more dependent on EU funding than others.¹² In certain respects, one could even wonder whether this Commission proposal, irrespective of its adoption, does not constitute a clever stratagem for confronting Member States with their own responsibilities. As all policy options available to the institutions are progressively being exhausted, Member States have to act themselves.

From 2016 onwards, the Belgian government has been floating ideas to establish a peer review

mechanism on the rule of law.¹³ The evaluation of the annual rule of law dialogue in the autumn of 2016 has prompted Belgian authorities to develop ideas for strengthening political buy-in for Member State-led peer pressure.¹⁴ In May 2018, Prime Minister Charles Michel put his weight behind this proposal in his *Future of Europe* speech before the European Parliament.¹⁵ In a nutshell, the Belgian proposal revolves around the notion of a peer review mechanism amongst all Member States on the basis of equality, thus avoiding any impression of political hierarchy. Drawing inspiration from the system of UN periodic reviews as well as the European Semester, all Member States would be given a mirror reflecting encouragements as well as concerns. In effect, this would constitute a soft form of conditionality, linking EU membership to regular debate about what it means to be a democracy based on the rule of law.

Critics point out that Member States may always choose to ignore the comments received from their peers. Yet such a Council-driven approach would at least transform the current (and rather stale) rule of law dialogue into a more substantial and procedurally-anchored process. Perhaps it would not suffice to prevent rule of law backsliding, but it would enhance the mutual understanding amongst Member States of each other's positions and help bridging interpretative differences about what the rule of law entails.

TOWARDS A WIDER FRAMEWORK

Neither of the three mechanisms outlined above would individually appear to be the single magic bullet for solving the rule of law debate. In addition, even more conditionality-related debates are emerging, such as reform of the EU's cohesion policy and increased financial support for Member States hosting larger numbers of refugees.¹⁶ The general take-away may therefore reside in the notion of looking at

conditionality as a wide framework that needs to be balanced and coherent. To this purpose, it may also be required to expand the toolbox of instruments, for instance by contemplating new legal instruments based on Article 70 TFEU, or considering the degree to which private investment depends on the stable rule of law. What constitutes an appropriate balance of conditionality-based mechanisms, however, will inevitably remain the subject of permanent political debate.

Ever since the Treaty of Rome, the process of European integration has revolved around the notion of developing closer relations amongst peoples and nations through joint adaptation and approximating policies. Conditionality based on a common legal framework and based on continuous political dialogue went hand in hand. The gradual emergence and spreading remit of Euro-Atlantic institutions represented a package deal of free and democratic societies, market-based economics, commitment to the rule of law, and collective defence underwritten by the US. Today's EU budget, in turn, reflects nothing more than a balancing act between different competing policy priorities that are integrated to a greater or lesser extent in the *acquis*. Even in times when various components of this bargain are put under stress, the different strands of conditionality are not to be considered in isolation, but rather as dynamic parameters in a system that functions best when different political, legal and budgetary elements balance with one another. As the preceding discussion on the rule of law suggests, a prevailing sense of disequilibrium prompts a search for mitigating measures, which may include existing as well as novel forms of conditionality.

The proposal to establish a rule of law peer review mechanism, for instance, could be implemented as a purely political measure in the short term, yet would greatly benefit from legal and institutional codification over the medium-term. Under Article 70 TFEU, Member States

may conduct “objective and impartial evaluation of the implementation of the Union policies” relating to the area of freedom, security and justice. On this basis, a rule of law monitoring mechanism could be formalised by means of a legislative act not unlike the six-pack measures for macroeconomic surveillance adopted in 2011. This could delegate a monitoring role to the European Commission under the European Semester system, yet it could also be based on a division of roles amongst Member States, for instance by dividing them into groups and rotating monitoring and reporting requirements amongst Member States at random. Envisaging a stronger role for the Council would alleviate pressure on the Commission when the latter faces a conflict between its different roles. Such legal codification would admittedly require a substantial amount of time and institutional resources, yet it would add much procedural detail to the rule of law debate in a way that is consistent with democratic processes at the national and European level.

The rule of law could also be served by a variety of budgetary mechanisms that differ in multiple ways from the existing proposal of the European Commission. Rather than punish Member States for specific policy behaviour, sound financial management could constitute an appropriate benchmark. Member States with a good track record of financial management and accountability could thus benefit from lighter administrative procedures, and vice versa. One could even point out that this increasingly resembles the way in which market dynamics may determine private investment allocation. On 6 March 2018, the Court of Justice of the EU ruled that bilateral investment protection treaties are incompatible with EU law (*Slowakische Republik v Achmea BV*, case C-284/16).¹⁷ If intra-EU investor-state dispute settlement now needs to be pursued by resorting to local courts, future private investment will increasingly hinge on the degree of confidence

that businesses have in the independence of the judiciary in different Member States. Noteworthy in this regard is the fact that several Member State governments submitted observations in support of Slovakia’s arguments and others in support of Achmea’s claim.¹⁸

What constitutes a coherent balance across different applications of EU conditionality is not set in stone. Any body of law, or any set of political principles, will evolve in function of changing circumstances and the historical context in which it is set. Even as the Union is grappling with multiple difficulties, such as the imminent departure of the United Kingdom or the increased level of great power competition worldwide, it is possible to imagine ways that strike a balance between the concerns of all Member States. Conditionality is indeed on the rise, but this does not serve the purpose of dividing the Union. Rather, the aim behind conditionality is to bring benefits to all EU citizens and to strengthen the Union for coping with geopolitical headwinds blowing in and beyond the European neighbourhood. In effect, this is likely to remain a permanent balancing act. Yet if the EU is to survive as an area without internal borders, it is imperative to put a premium on the preservation of mutual trust.¹⁹

CONCLUSION

The overarching objective of conditionality in the EU is to foster integration and cohesion amongst the peoples of Europe and their Member States. A sound logic of conditionality must be about setting incentives in such a way that it contributes to this intended outcome. Resorting to outright political coercion is therefore not appropriate within the European Union, but rule of law backsliding is not acceptable either. If all Member States are to rely on one another in different policy areas, they need to have confidence in a level playing field guaranteed by impartial institutions and

underwritten by the citizenry. In this sense, a balanced framework for conditionality not only depends on permanent and substantial dialogue amongst governments, but also on healthy democratic debate amongst all engaged citizens of the EU. The Union can only be as strong as each of its constitutive components: united the peoples of Europe can stand, divided they will fall.

This European Policy Brief is the product of an Egmont working group on conditionality in the EU. The latter included, amongst others, Evita Armouti (Université Libre de Bruxelles), Marie De Somer (European Policy Centre), Femke Gremmelprez (Ghent University), Phedon Nicolaides (College of Europe), Basile Ridard (Egmont), Peter Van Elsuwege (Ghent University), Johan Verbeke (Egmont), Jan Wouters and the RECONNECT H2020 project team (Leuven Centre for Global Governance Studies). Alexander Mattelaer (Egmont) edited the text, and is indebted to all members for sharing their insights and comments. Additional thanks are due to Sven Biscop (Egmont) for acting as reviewer. This text does not necessarily represent the individual views of each member of the group; the responsibility for any errors lies with the editor alone.

ENDNOTES

¹ European Commission, ‘A Modern Budget for a Union that Protects, Empowers and Defends: The Multiannual Financial Framework for 2021-2027’, Brussels, 2 May 2018, COM(2018) 321 final.

² Some illustrative examples are Frank Schimmelfennig and Ulrich Sedelmeier, ‘Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe’, *Journal of European Public Policy*, 11 (4), 2004, pp. 661-679, Ulrich Sedelmeier, ‘Is Europeanisation through Conditionality Sustainable? Lock-in of Institutional Change after EU Accession’, *West European Politics*, 35 (1), 2012, pp. 20-38, Lorenzo Bini Smaghi, ‘Governance and Conditionality: Toward a Sustainable Framework?’, *Journal of European Integration*, 37 (7), 2015, pp. 755-768.

³ Quoted in Dan Lamothe and Michael Birnbaum, ‘Defense Secretary Mattis issues new ultimatum to NATO allies on defense spending’, *The Washington Post*, 15 February 2017.

⁴ See for example Nathalie Brack and Ramona Coman, ‘Conditionality for protecting the rule of law: Will it fly?’, *Euractiv*, 9 May 2018.

⁵ See e.g. Federal Advisory Committee on European Affairs, ‘Hearing on Re-energising Europe’, Brussels: Belgian Parliament, 14 May 2018, doc 54 3062/001; European Parliament, ‘Resolution on the situation of the rule of law and democracy in Poland (2017/2931(RSP)’, 15 November 2017, doc P8_TA(2017)0442.

⁶ See for example the recent interviews with Jean De Coudt, first president of the Belgian Court of Cassation, e.g. ‘De politiek respecteert haar eigen wetten niet’, *De Standaard Weekblad*, 10 February 2018.

⁷ European Commission, ‘Press release: European Commission acts to defend judicial independence in Poland’, Brussels, 20 December 2017, available from http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

⁸ See e.g. Kim Lane Scheppele and Laurent Pech, ‘Is Article 7 Really the EU’s “Nuclear Option”?’, *Verfassungsblog*, 6 March 2018, available from: <https://verfassungsblog.de/is-article-7-really-the-eus-nuclear-option/>.

⁹ Cf. European Commission, ‘A new EU Framework to strengthen the Rule of Law’, Brussels, 19 March 2014, COM(2014) 158 final/2.

¹⁰ European Court of Justice, 'Judgment of the Court (Grand Chamber) of 27 February 2018: Associação Sindical dos Juízes Portugueses v Tribunal de Contas', Luxembourg, available from <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-64/16>.

¹¹ European Commission, 'Proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States', Brussels, 2 May 2018, 2018/0136 (COD).

¹² Cf. e.g. Michael Peel, Mehreen Khan and James Shotter, 'Poland slams planned EU budget penalties for rule of law breaches', *Financial Times*, 14 May 2018.

¹³ See e.g. Didier Reynders, 'Nos valeurs communes sont le ciment de l'Etat de droit. Défendons-les', *Le Soir*, 23 February 2018.

¹⁴ On the evaluation of the rule of law dialogue, see Council of the EU, 'Outcome of the 3499th Council meeting General Affairs', Brussels, 15-16 November 2016, doc 14424/16, available from <http://data.consilium.europa.eu/doc/document/ST-14424-2016-INIT/en/pdf> and Council of the EU, 'Note from Presidency to Council on Rule of Law – Evaluation of mechanism', Brussels, 9 November 2016, doc 13980/16, available from <http://data.consilium.europa.eu/doc/document/ST-13980-2016-INIT/en/pdf>.

¹⁵ Charles Michel, 'Discours: Débat sur l'avenir de l'Europe', Brussels 3 May 2018, available from <http://www.premier.be/fr/d%C3%A9bat-sur-l%E2%80%99avenir-de-l%E2%80%99europe-0>.

¹⁶ Alex Barker, 'EU plans €30bn funding shift from central and eastern Europe', *Financial Times*, 29 May 2018; Jim Brunson and Mehreen Khan, 'Germany wants EU to reward states for taking migrants', *Financial Times*, 21 February 2018.

¹⁷ Court of Justice of the European Union, 'The arbitration clause in the Agreement between the Netherlands and Slovakia on the protection of investments is not compatible with EU law', Luxembourg, 6 March 2018, Press release No 26/18, available from: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180026en.pdf>.

¹⁸ To be precise, the Czech Republic, Estonia, Greece, Spain, Italy, Cyprus, Latvia, Hungary, Poland, Romania and the European Commission submitted observations in support of Slovakia's arguments, whereas Germany, France, the Netherlands, Austria and Finland supported the validity of bilateral investment treaties, see *ibid*.

¹⁹ Trust constitutes the single umbrella concept tying the European construction together, and is dangerously low already. Cf. Maria Demertzis, 'Trust in the EU? The key obstacle to reform', *Bruegel Blog*, 9 February 2018, available from: <http://bruegel.org/2018/02/trust-in-the-eu-the-key-obstacle-to-reform/>.