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RULES ENFORCEMENT IN THE EU: "CONDITIONALITY" TO THE RESCUE?

Executive Summary

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- Since the 1990s, the EU has used its budget not just to implement policies, but also to influence member state behaviour. Payments to governments and regions can be increased as an incentive or suspended as a punishment. In EU circles, this is called "budget conditionality". It is a little-known but common instrument. Today, budget conditionality covers such diverse areas as fiscal policy rules, economic reforms, human rights standards and environmental protection.

- Recent years have highlighted the EU's weak position vis-à-vis member states that refuse to implement EU rules and decisions, for example on fiscal policy, refugees and democratic standards. Budget conditionality is now being discussed as one way to remedy this problem.

- In preparation of the next long-term budget (MFF) starting in 2021, the European Commission has published proposals to strengthen existing conditionality mechanisms and to introduce a new procedure aimed at suspending EU payments to those countries that do not respect the rule of law.

- We review the proposed instruments and evaluate whether they are likely to help the EU achieve its goals. We argue that, in principle, the EU budget can be useful as a carrot or stick to influence member state behaviour but it cannot fully make up for a lack of political will.
  - Budget conditionality is a promising instrument for influencing member state behaviour in areas of consensus-based soft governance, i.e. where there are uncontroversial common goals but no legally enforceable common rules. For example, making the disbursement of funds for growth and convergence conditional on measures that support the jointly agreed strategy for those goals (currently Europe 2020) helps the Commission nudge member states in the desired direction.
  - In contrast, budget conditionality is unlikely to be a comprehensive solution to high-profile political conflicts, and added value is especially small in areas where the rules already envision other kinds of sanctions. The reason is that the EU does not lack instruments to enforce its policies; rather, it lacks credibility. The political process of deciding to implement sanctions, be it soft or harsh, has proven to be easy to obstruct. Using the EU budget to make sanctions more painful does little to address this problem. Therefore, provisions to cut funding for countries that do not respect fiscal rules carry high symbolic but only minor practical value.
  - The decision-making process could be changed in a way that makes sanctions harder to block and thus improves credibility. The proposal on the protection of democratic values represents a significant improvement in this regard. However, reluctant member states are likely to try and tie the issue to the broader negotiations about the long-term budget, which must be adopted by all EU member states. On topics touching the core of national sovereignty, consensus is hard to establish. This leaves the EU in a dilemma: in areas where it faces the greatest resistance, its ability to strengthen its position through (more) budget conditionality is the most limited.

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1. INTRODUCTION

The EU has long struggled to enforce its rules and values against reluctant member states. Whether the row in question concerns public debt, macroeconomic imbalances, the distribution of refugees or democratic deficits, the European Commission and the Council of Ministers often seem unwilling or unable to punish even the most glaring infractions – even if they have the formal instruments to do so. One tool frequently discussed as a remedy is budget conditionality, that is, cutting payments from the EU budget to offending member states or, conversely, increasing them as a reward for good behaviour.

The debate over conditionality will intensify as the decision on the next Multiannual Financial Framework (MFF), the EU's long-term budget framework, draws nearer. In general, net contributors to the EU budget want to see conditionality strengthened and extended to new areas. "The principle of macroeconomic conditionality ought to be retained and developed further"[1], the German government has stated, while the Dutch government has argued that, in the interest of "cooperation and solidarity", further increasing "the conditionality of EU funding (...) should be explored in the fields of the rule of law and migration."[2] In contrast, net recipient countries tend to be sceptical regarding more conditionality. For example, the Polish government will "not accept any discretionary mechanisms which would enable using EU funds as an instrument of political pressure".[3] The European Parliament (EP) has adopted an intermediate position[4], voting in favour of a rule-of-law conditionality but against macroeconomic conditionality.[5]

This paper addresses two concrete questions: First, what are we talking about when we refer to conditionality? And second, is more budget conditionality likely to improve the EU's enforcement of its rules and values?

> "IN THE CONTEXT OF THE EU BUDGET, "CONDITIONALITY" IS LARGELY A MISNOMER

We find that in the context of the EU budget, "conditionality" is largely a misnomer: The term generally implies that a country voluntarily decides to act in exchange for a reward. Yet, in the EU, rules exist for many policy areas, and compliance with them is mandatory rather than optional. Thus, the threat to suspend access to EU funds if rules are broken is in reality just a different form of sanction to enforce rules, and not conditionality in the original (voluntary) sense of the term.

We also find that the problems that plague rule enforcement in the EU are very likely to remain, even with more budget conditionality. When member states' resistance to compliance is strong, suspending EU funding is no less difficult than imposing a fine. Simply using conditionality as a fashionable substitute for traditional rule enforcement is therefore unlikely to work. However, conditionality does show some promise when it is used in areas where the EU has few other instruments to encourage compliance.

1. See Joint statement by the German government and the German Länder on EU Cohesion Policy beyond 2020, 06.2017
2. See Dutch position paper on new MFF, 02.2018
3. See Visegrad Insight survey reaction to new EU budget, 04.2018
4. See REPORT on the 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, 12.2018
5. See EURACTIV Don't link EU regional funds with budget deficit rules, Parliament insists, 02.2019

2. "CONDITIONALITY" IN THE EU BUDGET

First of all, what do we mean when we talk about conditionality? It commonly means that one actor tries to change the behaviour of an other in exchange for some form of benefit. Conditionality is thus well-suited to the loosely institutionalised context of global politics because it does not formally rely on a hierarchical, coercive relationship between the parties involved. If the recipient country chooses not to agree with the conditions attached to, say, an IMF programme, it will not receive any funds (but will not face any sanctions either).

When conditionality understood in that sense is used within nation states, it is usually a way for central governments to exert power where they do not have competence. In the United States for example, the federal government sometimes attaches conditions to its grants to states to incentivise policy changes that do not lie within its (limited) regulatory powers. It thus "purchases" compliance with its preferred policies. The best-known example is the US federal government's 1984 decision to make additional funding for highways conditional on the introduction of a legal drinking age in the recipient states even though it has no competence for regulating the drinking age.

In contrast, hierarchical systems within most nation states ensure compliance with rules through sanctions (and, as ultima ratio, the use of force) rather than having to rely on incentives for voluntary compliance. As a supra-national entity, the European Union does not have traditional means of state coercion such as a police force or army. But it has several coercive instruments at its disposal to ensure that member states comply with EU rules and regulations. In particular, the European Court of Justice can sanction member states when they do not apply Union law properly.

Still, recent years have seen a proliferation of "conditionality clauses" that affect the EU's European Structural and Investment (ESI) funds. There are two main types of EU conditionality. The first one is similar to the United States' approach. In areas where the EU has few means to regulate member state behaviour, it defines policy criteria that must be fulfilled in order to receive EU support. Ex-ante conditionality is one such example: it provides incentives for member states to comply with the otherwise toothless Europe 2020 agenda. The second type of conditionality reinforces already binding rules. A member state that does not adhere to the Stability and Growth Pact (SGP) or the Macroeconomic Imbalances Procedure (MIP) can not only be fined, but it can additionally be denied access to certain ESI funds. This is not conditionality in the original sense of the concept. Addressees of conditionality always have a choice. Under binding rules, however, authorities have a mandate to punish rule-breakers until compliance is (re-)established.

For the next financial cycle of the EU, the MFF 2021–2027, the Commission has proposed the following steps in its proposals for a new Common Provisions Regulation (CPR) and a "rule of law mechanism"[6]:

- Largely keep rules as they are for "macroeconomic conditionality", i.e. where conditionality links the EU budget to fiscal and economic policy rules;
- Introduce new rules linking the EU budget to adherence to EU "fundamental values" and in particular the respect of the rule of law;
- Streamline the already-existing incentives to nudge member states to work towards common policy goals in areas where the EU has no or little regulatory competence.

6. See Box 1 for further explanation. The CPR proposal can be found here. The EP Briefing Common Provisions Regulation: New rules for cohesion policy for 2021–2027 (2019) provides an overview over the current proposal. The proposal for a rule of law mechanism can be found here.

In the remainder of this paper, we assess these proposals. We base our analysis on two main criteria:

- **Rule Design:** Are the objectives, the requirements and the process clear?
- **Rule Enforcement:** Are the possible sanctions painful enough to make compliance seem worthwhile? Are they credible in the sense that rule-breaking will likely lead to a suspension of EU funds, for example because the decision-making process is hard to obstruct?

Rule design and enforcement are often mutually dependent: If the pathway to sanctions is not stated clearly, then the sanctions become harder to enforce against resistance.

In our analysis, we will first look at the two instances where conditionality is used to strengthen the enforcement of binding rules: macroeconomic conditionality and the proposed new rule-of-law/fundamental values conditionality. Subsequently, we will discuss the use of conditionality as an incentive to work towards common policy goals. Since the term "conditionality" is well-established in the EU debate, we use it in this text even in cases where the term is clearly understood to be a euphemism for punitive sanctions.

BOX 1 ■ MFF glossary

Common Provisions Regulation (CPR): The CPR defines common rules for all EU structural funds (with the exception of the ones linked to agriculture). Among other things, it determines where and when member states' access to the funds can be suspended. In principle, the CPR is adopted under the EU's ordinary legislative procedure – i.e., by (qualified) majorities in both Council and European Parliament. In practice, however, its main provisions have recently been agreed by the European Council along with its main decision on the MFF. Since the MFF decision is taken by unanimity, the key CPR provisions, including conditionality, also de facto require unanimity among member states.

Programming: Before the new MFF starts, member states will need to set out in advance for the period 2021–2025 how they will use the EU money that is under so-called shared management – i.e., funds not managed by the Commission directly. The Commission has to approve the spending plans ("programmes") before any money can flow. This phase is called "programming". For the period between 2025 and 2027, the Commission proposal foresees a second programming phase.

Mid-term review: In 2024, the Commission will review the allocation of funds under the upcoming MFF and, if necessary, will make proposals for change. Each member state will also need to review their programming for the structural funds halfway through the budget period.

Commitments and payments: Commitments refer to the sums that member states can commit to paying when they e.g. procure an infrastructure project. Payments refer to actual flows of money from the EU (administered by the Commission) to the member state in question.

3 . BUDGET CONDITIONALITY AS A TOOL TO STRENGTHEN RULE ENFORCEMENT

In the Commission's proposals, there are two examples of conditionality being used to strengthen rules that are legally binding, but have proven impossible to enforce: The long-established but still highly contested rule to suspend EU payments when member states break economic governance rules, and the more recent idea of cutting funding to countries that jeopardise the rule of law.

3.1 Enforcing economic governance rules

The link between the EU budget and the binding rules of the economic governance framework (SGP & MIP) is often labelled "macroeconomic conditionality". This form of conditionality is applied on top of other sanctions foreseen by the SGP and MIP.

Under the current rules, the Commission has to propose to the Council to suspend commitments (or payments, but the former is preferred) if

1. Member states fail to make sufficient progress in improving their budgetary position under the fiscal rules (in SGP lingo: failure of countries in the corrective arm to take "effective action");
2. Member states repeatedly do not abide by their obligations under the Excessive Imbalances Procedure (EIP), the corrective arm of the MIP; or
3. Member states do not comply with their obligations under an EU-led adjustment programme.

Commission proposals in these cases are deemed adopted if the Council does not reject them by qualified majority within a month ('reverse qualified majority').

The only notable change introduced by the CPR proposal is that it lets the Commission ask the Council to cancel any suspension in "exceptional economic circumstances" or when the country in question asks for it in a "reasoned request", even if the original reasons for the suspension are still valid.

The proposed design of macroeconomic conditionality is clear. There is very little ambiguity: if a member state fails to cooperate with the EU at certain levels of escalation under the SGP, MIP or an adjustment programme, the Commission will propose a suspension of EU funds alongside "corrective arm" measures. Even though a proposed clause allowing for a cancellation of sanctions slightly complicates matters, it seems fair to say that conditionality is neither better nor worse designed than the sanctions under the SGP and MIP.

Enforcement is likely to be ineffective. The suspension of funds is directly linked to decisions by the Commission and the Council under the MIP and the SGP. However, these decision-making procedures are dysfunctional – and the added budget conditionality does not fix them. The

IMPROVING THE ENFORCEMENT […] IS NOT A MATTER OF MAKING SANCTIONS MORE PUNITIVE BUT OF IMPROVING THEIR CREDIBILITY

Commission very rarely proposes an escalation under either of the procedures, most probably because it takes into account member states' positions in the Council when it takes decisions in the college of Commissioners. If there is little hope that member states will agree to sanctions, the Commission avoids proposing them in the first place. Even when the rules of the SGP and macroeconomic conditionality gave the Commission no other choice than to take steps against Portugal and Spain in 2016, it found a way around both recommending sanctions and proposing a suspension of EU funds. What does this tell us? Improving the enforcement of the limits on debt and macroeconomic imbalances is not a matter of making sanctions more punitive but of improving their credibility, possibly by reforming the decision-making process under the SGP and MIP.

3.2 Protecting the rule of law

The extent to which all member states respect the rule of law has received increased scrutiny in recent years as existing tools have proved to be rather ineffective in protecting the EU core values. For example, both Poland and Hungary have been criticised for years by other member states and EU institutions for violating the rule of law, but none of the existing proceedings has been concluded so far and, accordingly, there have been no sanctions. The Commission now wants to add the potential suspension of EU funds to its toolbox (see Box 2).

BOX 2 ▪ Key tools for rule of law protection in the EU

Rule of law framework: The existing mechanism is a process of dialogue between the Commission and a member state to protect the values of the EU (such as freedom, democracy, equality and the rule of law) as stated in Article 2 TFEU. The Commission can instigate a dialogue when it identifies "systemic threats" to the rule of law in a member state. "Systemic threats" are only broadly defined as "situations where the authorities of a member state are taking measures or are tolerating situations which are likely to systematically and adversely affect" the rule of law. Therefore, the Commission has ample discretion in its assessment, which can also draw on the expertise of other EU and non-EU institutions. It then sends recommendations on how to counteract these tendencies to the member state concerned. The process can include an unlimited number of exchanges of views between the two but does not provide for any sanctions. Thus, the framework is more about persuading the countries to address rule of law issues and a "naming-and-shaming" effect: the fact that rule of law deficiencies in a member state are discussed publicly is supposed to put it under pressure to comply with EU rule of law requirements.

Article 7 procedure: The procedure prescribed in Article 7 of the Treaty on European Union (TEU) is often seen as the most important tool against rule of law deficiencies and is thus called the "nuclear option". It consists of two strands: the "preventive mechanism" (Article 7 (1) TEU) and the "sanctioning mechanism" (Article 7 (2) & (3) TEU). The preventive mechanism kicks in if either the Commission, the European Parliament (EP) or one third of the member states find a "clear risk of a serious breach" of the rule of law. "Clear risk" and "serious breach" are not, however, further specified. If they do identify a clear risk, the Council (after obtaining the EP's consent with a two-thirds majority) can adopt a decision with a four fifths majority of the member states. This decision does not entail sanctions but can be seen as a preliminary stage to the so-called "sanctioning mechanism", which can e.g. suspend a member state's voting rights

in the Council. However, the application of sanctions is a difficult undertaking: it can be triggered through a proposal by one-third of member states or the Commission when they find that rule of law violations have already occurred systemically and persistently – "systemic and persistent" again not being explicitly defined. The European Council of the heads of states and governments (again with the EP's consent) then needs to unanimously adopt this proposal. Only after the European Council has determined the violations as described can the Council of Ministers, acting by qualified majority, impose the sanctions mentioned above. Thus, the determination of the breach through the European Council represents a bottleneck in this procedure.

Infringement proceedings: In contrast to the political procedures described above, infringement proceedings are purely juridical and guarantee that EU law in general is correctly applied in the member states. Infringement proceedings can be called upon for all breaches of EU law (and not only when a core EU value is affected), for example when EU legislation on air quality is ignored or public procurement rules are breached. Core EU values are enshrined in Article 2 TEU and guarantee, for example, democracy, freedom and the rule of law. The core values form the normative basis for all actions by EU institutions, which also have a duty to protect them. For the infringement procedure to be used as an instrument for protecting values, the breach of values must be associated with a clear violation of EU law. Only if this is the case may the Commission or another member state (which then brings the matter before the Commission) launch the procedure. This restricts the scope of its application. The procedure itself prescribes a dialogue addressing the breaches identified and possible countermeasures between the country concerned and the Commission. If the member state in question does not appropriately react to the allegations, the Commission can forward the case to the European Court of Justice (ECJ). If the ECJ rules that there is a breach of EU law, it can impose a fine upon the proposal of the Commission. The procedure is widely used but is only of limited use for the protection of EU values, because it only applies if any violation can be linked to a breach of EU law.

What are the hurdles faced in forcing countries into complying with the rule of law? Why are existing tools only rarely used?

- The majority requirements of the Article 7 sanctioning mechanism have proven to be a problem, mainly because the determination of breaches requires unanimity in the European Council. Particularly where two or more member states must together fear actions against them, they are likely to veto the European Council's decisions. Fearing the inability to escalate provisions and anticipating a possible loss of face, the Commission and others have been reluctant to even start proceedings.

- Assessments of the qualitative status of the rule of law in a member state are ambiguous and highly political because the legal concepts of Article 7 are ill-defined. This makes it easy for member states under pressure to taint "Brussels" decisions against them as arbitrary and fuel anti-European sentiments.

For the Commission's proposed new budget conditionality tool to be effective and to force member states into complying with the rule of law, it must therefore overcome the political hurdles of existing rules before beginning to take action. The Commission's proposal now fore-

sees that in the event of non-compliance and in order to suspend payments, the Commission must first identify "rule of law deficiencies" in a member state. The proposal (in contrast to Article 7 and the rule of law framework, see Box 2) specifies in more detail what needs to be at risk to count as "deficiency", for example the "effective judicial review by independent courts". For its assessment, the Commission shall take "all relevant information" into account, without further specification of the mandatory sources it has to draw on. If the member state fails to correct deficiencies, the Commission can propose the suspension of funds. This decision is then approved if the Council does not reject the proposal by qualified majority.

The proposal has drawn some criticism. In its resolution from January 2019, the European Parliament voted for a more detailed definition of "general deficiencies" as well as for a Panel of Experts to assist the Commission in its assessment. It also asked the Commission to ensure that final recipients or beneficiaries in sanctioned member states are not affected by payment cuts. The European Court of Auditors raised similar points in its opinion published in mid-2018. It pointed in particular at the wide margin of discretion given to the Commission.

However, as regards the rule design, there are improvements in the proposal. The concept of rule of law deficiency is more clearly defined than under existing rules, which makes assessments less arbitrary and thereby potentially overcomes a major weakness of current rules. As the Commission alone monitors and evaluates the member states' rule of law performance and proposes possible sanctions, an even-handed procedure could be expected. Uncertainty remains as regards the Commission's administrative capacity to constantly monitor the rule of law situation in all member states.

The proposed procedure of reverse qualified majority voting in the Council also makes the decision-making process harder to obstruct and the suspension of funds a credible threat. Depending on the amount of funds suspended, sanctions can make non-compliance particularly painful for member states where gross EU spending is high; the effect in member states that are less dependent on EU spending is yet to be discovered, but "naming-and-shaming" effects should not be underestimated. This makes it in principle more likely that member states will think twice before starting to dismantle their rule of law.

> "MEMBER STATES ARE VERY RELUCTANT TO GIVE THE COMMISSION THE MARGIN OF DISCRETION

Defining in more detail what constitutes a rule of law deficiency and lowering the majority thresholds for sanctioning such deficiencies makes the proposal likely to succeed where existing rules fail. However, we doubt that the measure will ever see the light of day. Although the EP voted in favour of a report largely supportive of the Commission's proposal, the final decision will likely be tied to the decision on the next MFF, which gives the European Council a decisive role. But early political reactions made clear that the member states are very reluctant to give the Commission the margin of discretion it proposes in an area of their core sovereignty, and they are unlikely to lower majority thresholds in a meaningful way. France, Finland and the Netherlands support the Commission, while Poland and Hungary have already signalled their opposition. This puts adoption in jeopardy.

4 . BUDGET CONDITIONALITY AS AN INCENTIVE TO ACHIEVE COMMON GOALS

The EU's powers are limited when it comes to influencing national economic and social policies. Consequently, long-term growth strategies such as Europe 2020 and many of the EU's reform recommendations issued under the European Semester are effectively voluntary in that member states cannot be punished for failing to follow them. The EU therefore uses budget conditionality as an incentive.

4.1. Overall EU policy goals

Not every policy objective agreed on by EU member states is legally binding. A good example is the Europe 2020 framework, which formulates a growth strategy for EU members. In order to make sure that member states nevertheless move in the jointly agreed direction, the EU has come to make access to structural funds conditional on the fulfilment of minimum standards in several policy areas ("ex-ante conditionalities"). Compliance with these standards is verified by the Commission during the programming period.

The Commission's proposal for a new CPR rebrands the minimum standards for receiving EU funds as "enabling conditions". It reduces the number of standards from 41 to four overarching ("horizontal") and 16 fund-specific ("thematic") conditions. The proposed enabling conditions cover a wide range of topics, such as reducing CO2 emissions, improving the availability of fast internet connections, promoting gender equality and ensuring the application of state aid rules.

TABLE 1 . Examples of enabling conditions as proposed by the European Commission

Condition	Criteria
Effective application and implementation of the EU Charter of Fundamental Rights *(horizontal condition)*	Effective mechanisms are in place to ensure compliance with the EU Charter of Fundamental Rights including: **1.** Arrangements to ensure verification of compliance of operations supported by the Funds with the Charter **2.** Reporting arrangements to the monitoring committee on compliance with the Charter of the operations supported by the Funds
Effective promotion of the use of renewable energy across sectors and across the EU *(thematic condition, only ERDF and Cohesion Fund)*	Measures are in place which ensure: **1.** Compliance with the 2020 national renewables binding target and with this baseline up to 2030 in accordance with the recast of the Directive 2009/28/EC2 **2.** An increase in the share of renewables in the heating and cooling sector by 1 percentage point per year up to 2030

The enabling conditions included in the CPR proposal are mostly well-designed, especially in contrast to the current legislation. Several provisions aim to ensure that the rules are hard to circumvent. For example, member states are not allowed to even apply for EU payments as long as the relevant conditions are not met. Compliance is monitored on an ongoing basis and funds can be suspended if criteria are no longer met. While it remains to

be seen how feasible it is for the Commission to continuously monitor some 120 regions in 24 languages, it certainly puts more pressure on governments to deliver on their promises.

Enforcement credibility is favoured by the clear wording of the conditions and the Commission's ability to suspend funds unilaterally at any time when member states start backsliding on meeting these conditions. This process is also easy to communicate because there is often a direct link between the conditions and the objectives they are supposed to safeguard. A country that wants to improve its digital connectivity with EU funds will be hard-pressed to justify not having a broadband strategy.

THE REQUIREMENT THAT GOVERNMENTS MOVE TOWARDS A JOINTLY AGREED DIRECTION BEFORE EU FUNDS START FLOWING IS A POWERFUL INCENTIVE

Overall, enabling conditions can help nudge member states to work toward EU policy goals in areas where EU competences are limited. The EU has few alternative tools to do so, and the requirement that governments move towards a jointly agreed direction before EU funds start flowing is a powerful incentive.

4.2. Country-specific recommendations

The success of the EU's efforts at economic policy coordination via the European Semester largely depends on the goodwill of its members. Some of the annually-issued country-specific recommendations (CSRs) are connected to hard rules like the SGP and the MIP, whose enforcement problems are discussed above. Others are not backed up by any sanctions. When member states choose not to implement them, the EU can do little more than re-issue the same recommendation the following year. However, there are two budget conditionality instruments that are meant to promote CSRs by ensuring that EU funds are used in a way that supports them: programming conditionality and reprogramming conditionality.

Programming conditionality

During programming (see Box 1), member states are supposed to take into account CSRs addressed to them. The idea is that the way member states use EU funds should not counteract the reforms that the Commission and the Council have recommended. In theory, the Commission could reject a country's programming it ignores CSRs. However, it has never done so.

The CPR proposal makes almost no changes to the status quo. This is unfortunate, because current rules are not convincing. The sanction itself is clear and painful. But enforcement is hampered by imprecise wording. It is unclear what taking a CSR into account means in practice. The proposal leaves ample room for interpretation here. Furthermore, while the MFF is a multi-year framework, CSRs are issued annually. Thus, the Commission might have a hard time arguing that a multi-year investment programme must be adapted to accommodate the reform recommendations for a single year (2019 and, in the second programming stage, 2024). This limits credibility. The annex on "investment guidance" the Commission has recently started to include in its annual country reports[7] has the potential to solve the problem if it adopts a longer-term perspective. However, the relationship between the guidance and other parts of the European Semester remains to be clarified.

7. As a part of the European Semester, the framework for economic coordination across the EU, the European Commission publishes so-called Country Reports. Country Reports review economic and social developments in each country and serve as a basis for policy recommendations (Country Specific Recommendations) adopted by the Council.

Re-programming conditionality

Even if the Commission initially accepts a member state's programming, new priorities can come up in later years. The Commission can then ask member states to re-programme funds to better support the implementation of CSRs or of recommendations made under the MIP's corrective arm. If member states fail to comply, the Commission can propose a suspension of payments to the Council. The Commission proposal includes one important change to these rules: it allows the Commission to unilaterally suspend payments if a member state fails to re-programme after being asked to do so.

The design of the proposed conditionality is marked by broad phrasing that leaves the Commission much room for interpretation. It may demand changes to ESI programmes whenever it is "necessary" to implement certain Council recommendations. As in the case of programming conditionality, there is also a mismatch between the short-term focus of CSRs and the long-term focus of structural funds.

Enforcement in its proposed form would be very effective: If the Commission asks for changes and is not satisfied by a member state's response, it can simply suspend payments without consulting the Council. Member states are traditionally extremely reluctant to enforce economic governance rules against their peers for fear of being targeted themselves at some point. In contrast, having the sole authority to enforce changes to programmes would grant the Commission considerable power. The content of CSRs would suddenly become much more important if deliberately ignoring them could realistically lead to a suspension of EU funds. However, it remains to be seen whether member states will accept this kind of power increase on the side of the Commission.

BETTER RULE DESIGN COULD MAKE THE VARIOUS INSTRUMENTS DISCUSSED CONSIDERABLY MORE EFFECTIVE

To sum up, using budget conditionality has the potential to nudge EU member states towards pursuing common policy goals. It allows the EU a degree of influence over member state behaviour in areas of consensus-based soft governance, i.e., where there are uncontroversial common goals but no legally enforceable common rules. That being said, better rule design could make the various instruments discussed considerably more effective. Programming conditionality in particular is clearly flawed in its current form. The Commission appears to be aware of this and has proposed the "Reform Delivery Tool"[8], a new form of incentive that is designed as a stand-alone instrument in the MFF.

5 . CONCLUSION

Supposedly binding EU rules in areas like fiscal policy or the rule of law have proven very difficult to enforce in recent years through established levers such as sanctions. It comes as no surprise then that the European Commission is looking for new instruments to enact EU policies and enforce rules. For the next MFF, it is proposing stronger and more extensive budget conditionality. The idea is that suspension of EU funds will be more effective in changing member states' behaviour. From a conceptual perspective, this is counter-intuitive. Binding rules are usually considered more effective than conditionality because they rely on coercion, while conditionality is a soft governance instrument based on choice.

8. See European Commission press release on A Reform Support Programme and an Investment Stabilisation Function to strengthen Europe's Economic and Monetary Union, 05.2018

In our case studies of different EU objectives, we find that budget conditionality is unlikely to succeed where rules enforcement via traditional sanctions mechanisms fails. At best, it can make it costlier to break rules. Then again, the sanctions already available today are in theory enormously powerful. Fines worth up to 0.5 percent of GDP or the loss of the right to vote in the Council are very heavy weapons. If they fail to deter rule-breakers, it is because no one expects them to be used in the face of determined political resistance. EU members have proven very adept at obstructing the enforcement of rules that touch upon their core interests. Consequently, politically controversial sanctions are not credible if they depend on a vote in the Council, and rules that circumvent voting by member states are unlikely to be adopted. The problem lies in the political process and it cannot be solved by introducing additional sanctions labelled "conditionality."

To the extent that budget conditionality uses a different decision-making process, it can make sanctions harder to block and thus help improve enforcement. However, this has nothing to do with conditionality per se. Reforming the traditional sanctions mechanisms would be a simpler solution. Furthermore, any reform attached to the long-term budget must be adopted by all EU member states. Such consensus is precisely what is lacking on topics such as fiscal policy and democratic values. This leaves the EU in a dilemma: in areas where it faces the greatest resistance, its ability to strengthen its position is at its most limited.

The best-performing examples of conditionality in our case studies were those that promote coherence between structural funds and the broader EU economic policy agenda: enabling conditions as well as provisions for programming and re-programming structural funds in accordance with country-specific recommendations (CSRs). One reason might be that these are low-stakes issues where the rules give plenty of leeway and the Commission has so far not openly confronted member states. But it is also worth noting that all three govern an area where EU governance capabilities are mostly limited to recommendations based on a few vague Treaty articles. In these cases, conditionality does not add another layer to an already complex sanctions regime but is rather an instrument to nudge member states towards jointly agreed goals even in the absence of binding rules. In such areas, conditionality might work as a useful incentive.

This is not to say that the proposals using conditionality to encourage reforms and harmonisation are flawless. Their technical deficiencies need to be addressed. What matters here is timing and a sense of realism. For example, it makes sense that the programming of structural funds takes into account economic policy priorities. But the CSRs currently used as indicators are designed for the very short term (one year) and programming is inherently longer-term. For programming conditionality to make sense, either the nature of CSRs or the Commission's proposal will have to change. From a political point of view, it remains to be seen whether the dynamics change if and when conditionality becomes more stringent and the Commission insists that the planned criteria must indeed be implemented.

ON THE SAME TOPIC

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