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CONDITIONALITY AND THE MAKING OF THE EU SPENDING POWER: THE QUESTION OF COMPETENCE

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Abstract

In recent years, the European Union has increasingly leveraged its growing spending power to broaden the scope and intensity of its actions, leaving virtually no policy field untouched by the reach of EU funding. This evolution raises critical constitutional questions, particularly in light of the principles governing the system of competences. The Union's exercise of spending powers, notably through the use of conditionality mechanisms, has indeed rapidly emerged as an attractive alternative to the standard procedures for enacting and enforcing rules in the EU legal order, often without any genuine reflection on the limits posed by the principle of conferral. This article focuses on the competence issues deriving from the rise of governance through funding, identifying a set of constitutional constraints to the use of spending powers as an alternative regulatory or enforcement technique in EU internal affairs. Importantly, it goes beyond discussing, retrospectively, the legality of specific funding instruments adopted in recent years, but rather aims at providing a framework to examine, prospectively, whether and to what extent the use of spending powers remains within the realm of EU competences. The issue of 'competence creep' through funding is ever more salient nowadays, as the EU institutions enter tense negotiations on the future of EU funding under the next Multiannual Financial Framework.

1. Introduction

The expansion of competences through the use of spending powers has long been nearly absent in academic and institutional debates on the European integration process. As explained by Kilpatrick, the European Union (EU) budget has traditionally been 'too small to matter with the EU project being one of integration through law rather than integration through funding'.[1] In

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1. Claire Kilpatrick, 'Explaining and Remedying the Near Absence of the Budget in EU Law Scholarship' (2024) 61 CML Rev 623, 629, doi: 10.54648/COLA2024045.

addition, the Member States' grip over the revenue system and the Multiannual Financial Framework (MFF)[2] have long made the EU budget resemble more a 'budget for the Member States' rather than a 'budget for the Union',[3] thereby limiting its potential as a governing instrument in EU internal relations. It is no surprise, then, that the 'competence creep' controversies have almost exclusively centred on the Union's use of its legislative powers,[4] whereas the exercise of spending powers has rarely raised similar concerns.[5]

The pandemic crisis and the exceptional increase in EU expenditure resulting from the adoption of Next Generation EU (NGEU) have profoundly shaken this state of affairs, making funding an increasingly attractive alternative in the EU's regulatory and enforcement toolbox.[6] Governing through providing and withholding money has become a distinctive trait of the current phase of European integration, characterized by a greater reliance on funding as an instrument to steer normative and policy choices taken at national level.[7] This is achieved through the traditional earmarking of funds or, more prominently, through the growing use of conditionality

2. Richard Crowe, 'The European Council and the Multiannual Financial Framework' (2016) 18 CYELS 69, doi: 10.1017/cel.2016.2. See also Cristina Fasone, 'EU Budget and Spending Powers' in Alicia Hinarejos and Robert Schütze (eds), *EU Fiscal Federalism: Past, Present, Future* (OUP 2023) 233, 243–246.

3. Stefan Lehner, 'The Dual Nature of the EU Multiannual Financial Framework' in Brigid Laffan and Alfredo De Feo (eds), *EU Financing for Next Decade: Beyond the MFF 2021–2027 and the Next Generation EU* (European University Institute, 2020) 21. See also Richard Crowe, 'An EU Budget of States and Citizens', (2020) 26 ELJ 331, 332, doi: 10.1111/eulj.12398, who noted that 'in a Union of states and citizens, the Union budget remains principally a budget of, and between, states'.

4. Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 YEL 1; Theodore Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* (Wolters Kluwer 2009). A revisitation of this debate in light of the diversification of EU regulatory tools is provided in Sacha Garben, 'Competence Creep Revisited' (2019) 57 JCMS 205, doi: 10.1111/jcms.12643, where the use of funding is not listed among the new sources of competence creep.

5. See eg Alan Dashwood, 'The Limits of European Community Powers' (1996) 21 EL Rev 113, 126–128.

6. See Mark Dawson and Floris De Witte, *EU Law and Governance* (CUP 2022) 88–90, who stressed how 'the EU's reliance on law (and its aversion to using finance) to achieve policy goals is eroding' and that 'using and manipulating money is … rapidly shifting from a minor to a major instrument in the EU's regulatory toolbox'. See also Richard Crowe, 'The European Union's Public Finances in Times of Crisis: Fragmentation, Innovation, and Consolidation' in Claire Kilpatrick and Joanne Scott (eds), *New Frontiers of EU Funding: Law, Policy, Politics* (OUP 2024) 23, 59, who observed that these days the budgetary nomenclature provides at times 'a clearer indication of the Union's current policy priorities than any reading of legal texts'.

7. Bruno De Witte, 'Integration through Funding: The Union's Finances as Policy Instrument' in Ruth Weber (ed), *The Financial Constitution of European Integration: Follow the Money?* (Hart Publishing 2023) 221.

mechanisms, whereby EU institutions leverage financial resources either to incentivize the adoption of legislative measures in line with EU policy preferences or to enforce compliance with existing EU law and policies.[8]

Importantly, the use of spending powers has proven to be a particularly appealing means for expanding the reach of the Union's action beyond the strict boundaries of EU competences, which have hardly provided a bulwark against the 'flowing tide' of EU funding.[9]

On the one hand, through the back door of spending, the EU institutions have gained access to, and are increasingly able to regulate, a broad range of policy fields where the Union has only limited, if any, legislative competences. The use of spending powers with regulatory purposes is evident, for instance, in the design and implementation of the Recovery and Resilience Facility (RRF), which is imbued with a 'money for reforms' logic.[10] Indeed, the disbursement of RRF financial resources is not related to the actual costs of the underlying measures, but depends on the Member States' performance in delivering a package of reforms across a wide array of policy areas, ranging from the organization of the judiciary and public administration to education systems, pension schemes and taxation.[11]

8. As explained by De Witte, earmarking and conditionality are two distinct techniques of governance through funding, as 'the conduct prescribed by conditionality clauses pursues an additional policy objective which goes beyond the primary purpose of spending': Bruno De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 CML Rev 635, 675–676, doi: 10.54648/COLA2021046. See, along the same lines, Viorica Viţă, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) 19 CYELS 116, 122, doi: 10.1017/cel.2017.4.

9. The metaphor is borrowed from the words of Lord Denning, who famously referred to the 'flowing tide of Community law' in *Shields v E Coomes (Holdings) Ltd* [1979] 1 All ER 456, at 462.

10. On this aspect, see Päivi Leino-Sandberg, 'Recovery and Resilience Facility Two Years after – Quo Vadis EU Money?' (*Verfassungsblog*, 28 September 2023) <verfassungsblog.de/recovery-and-resilience-facility-two-years-after-quo-vadis-eu-money/> (all websites last accessed 28 January 2026). On the RRF's governance method, more broadly, see Nicola Lupo, '*Next Generation EU* e sviluppi costituzionali dell'integrazione europea: verso un nuovo metodo di governo' (2022) 30 Diritto pubblico 729; Cristina Fasone and Nicola Lupo, 'Learning from the Euro Crisis: A New Method of Government for the European Union's Economic Policy Coordination after the Pandemic' (2024) 22 I-CON 882, doi: 10.1093/icon/moae064; Federico Fabbrini, 'The Recovery and Resilience Facility as a New Legal Technology of European Governance' (2024) 47 J Eur Int 85, doi: 10.1080/07036337.2024.2361830; Paul Dermine, 'The Planning Method: An Inquiry into the Constitutional Ramifications of a New EU Governance Technique' (2024) 61 CML Rev 959, doi: 10.54648/COLA2024065.

11. The full set of reforms included in the national recovery and resilience plans, and their state of implementation, is available in the 'Recovery and Resilience Scoreboard': <ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/country_overview.html?lang=en>.

On the other hand, there is a growing tendency to exercise spending powers for enforcement purposes, particularly in those fields where the EU institutions struggle to ensure compliance with EU law through ordinary enforcement procedures.[12] A paradigmatic example of this approach is the recent and extensive use of financial leverage to enforce compliance with the founding values enshrined in Article 2 TEU. Notably, after years of difficulty in countering the constitutional backsliding unfolding in Hungary and Poland, the combined application of three distinct conditionality regimes has enabled the Commission and the Council to suspend a significant volume of funding on grounds linked to compliance with EU values.[13]

The evolution of the spending power into an alternative regulatory or enforcement instrument in EU internal governance raises delicate constitutional questions concerning the delimitation of competences between the Union and the Member States, as well as the horizontal distribution of powers within the EU institutional framework. Like any action by the EU institutions, the adoption of funding measures is not immune to the logic of conferral. At the same time, the blurred contours of EU funding legal bases – especially in the field of cohesion policy[14] – combined with the significant expansion of conditionality in the legal framework governing EU funding policies,[15] have

12. Roland Bieber and Francesco Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?' (2014) 51 CML Rev 1057, 1076–1082.

13. Louise Fromont and Arnaud Van Waeyenberge, 'Trading Rule of Law for Recovery? The New EU Strategy in the Post-Covid Era' (2021) 27 ELJ 132, doi: 10.1111/eulj.12426; Marco Fisicaro, 'Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union's Values' (2022) 7 EP 697; Kim Lane Scheppele and John Morijn, 'What Price Rule of Law' in Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (SIEPS 2023) 29; László Detre, András Jakab and Tamás Lukácsi, 'Comparing Three Financial Conditionality Regimes and Their Application to Hungary: The Conditionality Regulation, the Recovery and Resilience Facility Regulation, and the Common Provisions Regulation' (MPIL Research Paper 23/2023) <papers.ssrn.com/sol3/papers.cfm?abstract_id=4613941>; Ramona Coman and Aron Buzogány, 'The European Union's Response to the Rule of Law Crisis and the Making of the New Conditionality Regime' (2024) 62 JCMS 102, doi: 10.1111/jcms.13661; Aida Torres Pérez, 'The Constitutional Impact of Rule-of-Law Spending Conditionality' (2024) 22 I-CON 859; Pauline Thinus, 'The EU's Transactional Approach to Rule of Law Spending Conditionality in the 2020s' (2025) 63 JCMS 548, doi: 10.1111/jcms.13620.

14. Päivi Leino-Sandberg and Peter Lindseth, 'How Cohesion Became the EU's Vehicle for Economic Policy' (*Verfassungsblog*, 14 August 2023) <verfassungsblog.de/how-cohesion-became-the-eus-vehicle-for-economic-policy/>.

15. On the rise of conditionality in the normative framework governing EU funding, see Viţă (n 8); Viorica Viţă, 'The Reinforced Conditionality Approach of the 2021-27 MFF' in Laffan and De Feo (n 3) 101. A recent discussion of the challenges raised by the use of conditionality in EU internal governance is offered in Cristina Fasone and Marta Simoncini, 'Recent Trends and Ambiguities of Conditionality as an Instrument of EU Internal Governance' in Cristina Fasone, Adriano Dirri and Ylenia Guerra (eds), *EU Rule of Law Procedures at the Test Bench: Managing Dissensus in the European Constitutional Landscape* (Palgrave MacMillan 2024) 207.

greatly enhanced the ability of EU institutions, particularly the Commission and the Council, to intervene through the spending power even beyond their traditional regulatory and enforcement capacities.[16] This raises the question of whether and to what extent the spending power may be used to indirectly regulate policy fields where the Union has only limited legislative competences, specifically in sectors falling within the coordinative or complementary competences. Additionally, one may question whether and to what extent the spending power may be exploited as an alternative instrument to enforce compliance with EU law, serving as a substitute for the ordinary procedures envisaged by the Treaties to establish and, if necessary, adopt sanctions for breaches of EU law.

These questions have not been fully addressed in EU legal scholarship, whose interest has mostly been confined to the analysis of specific, yet partial, aspects of this broader phenomenon, such as those relating to the legality of NGEU's legal architecture[17] or of the so-called Conditionality Regulation.[18] As part of the growing body of literature on governance through funding in the EU,[19] some recent studies have set the stage for the discussion on the legal bases for the exercise of spending powers.[20] However, uncertainties remain, particularly concerning the critical issues of

16. See Ilaria Gambardella, 'Finanziamenti dell'Unione europea come mezzi alternativi per orientare le politiche degli Stati membri: quale impatto sulla ripartizione delle competenze?' (2024) Quaderni AISDUE 217; Martina Coli, 'A New Form of Competence Creep? Rule of Law Conditionality as a Case Study for Integration through Funding in the European Union' (2025) 50 EL Rev 619.

17. Paul Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture' (2020) 47 LIEI 337, doi: 10.54648/LEIE2020020; De Witte (n 8); Federico Fabbrini, 'Next Generation EU: Legal Structure and Constitutional Consequences' (2022) 24 CYELS 45, doi: 10.1017/cel.2022.2; Päivi Leino-Sandberg and Matthias Ruffert, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59 CML Rev 433, doi: 10.54648/COLA2022031.

18. 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 [2020] OJ L 433/1. Among the contributions more centred on the competence issues, see Antonia Baraggia and Matteo Bonelli, 'Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges' (2022) 23 GLJ 131, doi: 10.1017/glj.2022.17; Marco Fisicaro, 'Protection of the Rule of Law and "Competence Creep" via the Budget: The Court of Justice on the Legality of the Conditionality Regulation' (2022) 18 EuConst 334, doi: 10.1017/S1574019622000128; Pekka Pohjankoski, 'Of Carrots and Sticks: Constitutional Limits to Rule-of-Law Conditionality' in Allan Rosas, Juha Raitio and Pekka Pohjankoski (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Hart Publishing 2023) 157.

19. See eg the edited volumes Kilpatrick and Scott (n 6) and Lilian Tsourdi and Marijn van der Sluis (eds), *Governing through Funding in the EU* (CUP forthcoming).

20. See De Witte (n 7); Gambardella (n 16); Viorica Viță, '(Un)Constitutional Conditions: A European Perspective' in Kilpatrick and Scott (n 6) 97; Coli (n 16).

legal basis for the adoption of conditionality measures, as well as the constitutional limits to using spending powers as an alternative regulatory or enforcement technique in EU internal affairs.

The article contributes to this emerging debate by offering a broader analysis of the competence issues raised by the shift to governance through funding in the EU. Importantly, it goes beyond discussing, retrospectively, the legality of specific funding instruments adopted in recent years, but rather aims at providing a framework to examine, prospectively, whether and to what extent the use of spending powers remains within the realm of EU competences. This prospective approach is all the more significant today, as the EU institutions enter tense negotiations on the next MFF.[21]

The article devotes special attention to the competence issues connected to the increasing recourse to conditionality in EU funding policies. Long confined to the normative framework of EU external relations,[22] the use of conditionality has indeed progressively become systemic and generalized in the daily management of EU public expenditure,[23] and today constitutes a key instrument for governing through funding in EU internal affairs. Although funding has always been an instrument through which the Union pursues its policy goals, the rise of conditionality signals a growing reliance on funding as a pure incentive mechanism – an instrument to gain influence across a variety of policy fields that lie beyond the inherent objectives of the funding measure in itself and, at times, even beyond the scope of EU competences.

21. See European Commission, 'A dynamic EU Budget for the priorities of the future – The Multiannual Financial Framework 2028-2034', COM(2025) 570 final, 16 July 2025, introducing the package of proposals for the MFF 2028–2034.

22. The literature on the use of conditionality in EU external relations is vast and diversified. On conditionality in development cooperation and foreign trade policies, see *inter alia* the book-length works by Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijoff 2003); and Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP 2005), as well as, most recently, Giulia D'Agnone, 'La condizionalità economica nell'azione esterna dell'Unione europea' (2016) 21 Dir Un Eur 653; and Francesca Martines, 'EU Political Conditionality as a Tool for the Promotion and Protection of Non-trade Values in Non-EU Countries' in Samantha Velluti, *The Role of the EU in the Promotion of Human Rights and International Labour Standards in Its External Trade Relations* (Springer 2020) 97. As regards conditionality in enlargement and neighbourhood policies, see among others Karen E Smith, 'The Evolution and Application of EU Membership Conditionality' in Marise Cremona (ed), *The Enlargement of the European Union* (OUP 2003) 105; Christophe Hillion, 'The Copenhagen Criteria and Their Progeny' in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing 2004) 1; Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer 2008); Sara Poli, 'The Principle of Conditionality in the EU's Relations with its Neighbours: its Evolution and Reconciliation with the Principle of Consistency' (2018) 23 Dir Un Eur 525. For a recent analysis of the transition of (political) conditionality from the external to the internal dimension, see Andrea Circolo, 'La condizionalità politica nella dimensione esterna e interna dell'Unione europea' (2022) 27 Dir Un Eur 225.

23. See Viţă (n 8).

The article proceeds as follows. It first addresses the questions surrounding the choice of legal basis, focusing particularly on the issues arising from the incorporation of conditionality arrangements in EU funding measures (Section 2). Then it identifies further constitutional limits constraining the use of spending power as an alternative enforcement or regulatory tool in EU internal affairs (Section 3). Section 4 concludes.

2. The EU spending power and the choice of legal basis

2.1. *Setting the scene: Spending power and the principle of conferral*

It goes without saying that the Union's exercise of spending powers shall be grounded on appropriate legal bases and cannot extend beyond the limits of EU competences. In general terms, this is mandated by the principle of conferral, which governs any action by the EU institutions, including those financed by the EU budget. Furthermore, in the budgetary domain, this is specified by Article 310(3) TFEU, which subordinates the Union's exercise of its spending power to the 'prior adoption of a legally binding Union act providing a legal basis for its action' (so-called basic act).[24] By requiring the prior adoption of the basic act, which in turn shall find a legal basis in the Treaties, Article 310(3) TFEU firmly anchors the exercise of the EU spending power to the system of competences outlined in the Treaties. And even in the exceptional cases where actions financed by the budget may be adopted without a basic act, as established for pilot projects and preparatory measures, Article 58(2) of the Financial Regulation clearly stresses that these actions shall 'fall within the competences of the Union'.[25]

Given the absence of a general spending clause in the Treaties, the exercise of the EU spending power rests on specific legal bases enabling the EU institutions, either explicitly or implicitly, to undertake actions financed by the EU budget in a particular policy domain, for the attainment of certain objectives, and in accordance with the procedures prescribed therein.[26] Some legal bases explicitly authorize the adoption of funding measures.

24. Art 310(3) TFEU. A 'basic act' is defined as 'a legal act, other than a recommendation or an opinion, which provides a legal basis for an action and for the implementation of the corresponding expenditure entered in the budget or of the budgetary guarantee or financial assistance backed by the budget': Art 2(4) of Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast) [2024] OJ L 2024/2509.

25. See Art 58(2) of Regulation 2024/2509.

26. For a categorization of the legal bases enabling the adoption of funding measures, see De Witte (n 7) 222–223 and Gambardella (n 16) 224–228.

For instance, this is the case for Article 177 TFEU, which backs the enactment of regulations governing the structural funds. Other legal bases neither prescribe a specific form for the 'measures' or 'actions' to be adopted, nor explicitly exclude the possibility to adopt funding measures in that particular policy domain. An example is given by Articles 165(4) and 166(4) TFEU, which currently provide the legal bases for the regulation establishing the Erasmus+ programme.[27]

The importance of grounding the Union's exercise of spending powers on appropriate legal bases and, more generally, within the boundaries of the system of competences has been also consistently emphasized by the Court of Justice in its case law. On the one hand, the Court has significantly constrained the possibility for EU institutions to undertake actions financed by the EU budget without the prior adoption of the basic act.[28] On the other hand, the Court has shown a certain rigour when assessing whether actions financed by the EU budget were grounded on appropriate legal bases. In *Commission v Council*, the Court considered that Council Decision 87/327/EEC establishing for the first time the Erasmus programme was correctly founded on a dual legal basis, as the 'scientific research' component of the programme fell beyond the scope of the Community's competence on vocational training prior to the entry into force of the Single European Act.[29] Therefore, it determined that the additional recourse to the so-called 'flexibility clause', then enclosed in Article 235 EEC Treaty (now Article 352 TFEU), was necessary to support that component of the programme. Conversely, in *Parliament v Council*, the Court annulled Council Regulation (EC) 1968/2006 concerning the Community's financial contributions to the International Fund for Ireland, which had been grounded exclusively on the flexibility clause. It considered that the Regulation should have been based also on Article 159(3) EC, which, similarly to the current text of Article 175(3) TFEU, enabled the Community to adopt 'specific actions' in the field of cohesion policy outside the framework of structural funds. According to the Court, the Regulation should have been adopted following a mixed procedure, merging the co-decision procedure of Article 159 EC with

27. See Regulation (EU) 2021/817 of the European Parliament and of the Council of 20 May 2021 establishing Erasmus+: the Union Programme for education and training, youth and sport and repealing Regulation (EU) No 1288/2013 [2021] OJ L 189/1.

28. See, in particular, Case C-106/96, *United Kingdom v Commission*, EU:C:1998:218, with annotation by Tamara K Hervey in (1999) 36 CML Rev 1079. With this judgment, the Court substantially halted the Commission's controversial practice of using extensively the label of 'non-significant actions' to finance projects without a basic act authorizing the expenditure, and besides in fields of dubious Community's competence. On this controversial practice, see Dashwood (n 5) 126–128.

29. Case C-242/87, *Commission v Council*, EU:C:1989:217.

the requirement of unanimity within the Council demanded by the flexibility clause.[30]

These judgments reflect the Court's careful assessment of whether EU funding measures fall within or beyond the scope of the chosen legal bases. In addition, if one looks at recent practice, the mentioned judgment on the International Fund for Ireland casts doubts over the broad interpretation given to cohesion policy, primarily (but not exclusively)[31] in the RRF Regulation, and the purported feasibility of Article 175(3) TFEU as a *de facto* general spending clause within the EU Treaties framework.[32] According to the Court, that provision 'covers only independent action … whose content does not extend beyond the scope of the … policy on economic and social cohesion'.[33] Conversely, when used as a legal basis for 'money for reforms' programmes such as the RRF, Article 175(3) TFEU and cohesion policy are transformed into vehicles for intervening in a wide variety of policy fields having little if any connection to cohesion as traditionally intended.[34] As critically noted by Leino-Sandberg and Ruffert, 'if there ever were any limits – or "contours" – for the use of cohesion policies, they seem to have been dissolved', making it 'practically impossible to exclude any policy field *a priori* from the reach of cohesion

30. Case C-166/07, *Parliament v Council*, EU:C:2009:499, with annotation by Tim Corthaut in (2011) 48 CML Rev 1271, doi: 10.1055/s-0031-1289337.

31. Before the pandemic, see the legislative proposals aimed at establishing the European Investment Stabilization Function (COM(2018)387 of 31 May 2018), the Reform Support Programme (COM(2018)391 of 31 May 2018), and the Budgetary Instrument for Convergence and Competitiveness (COM(2019)354 final of 24 July 2019). For two opposite views on the suitability of cohesion policy as a basis for these initiatives, see Leo Flynn, 'Greater Convergence, More Resilience? Cohesion Policy and the Deepening of the Economic and Monetary Union' in Diane Fromage and Bruno De Witte (eds), *Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection* (Maastricht Faculty of Law Working Papers 03/2019) 48; Päivi Leino Sandberg and Tuomas Saarenheimo, 'Fiscal Stabilisation for EMU: Managing Incompleteness' (2018) 43 EL Rev 623.

32. See critically Peter Lindseth and Päivi Leino-Sandberg, 'Crisis, Reinterpretation, and the Rule of Law: Repurposing "Cohesion" as a General EU Spending Power' (2024) 16 HJRL 587, doi: 10.1007/s40803-024-00234-3.

33. Case C-166/07, *Parliament v Council*, para 64.

34. This is acknowledged also by authors supporting a broad interpretation of Art 175(3) TFEU and of cohesion policy. As De Witte notes, these instruments reflect 'a move away from the domain of cohesion in the strict sense … towards a much broader domain of macro-economic policy measures aiming at improving the overall balance of economic development within the territory of the European Union': De Witte (n 8) 658. While this evolution finds its clearest expression in the RRF, its roots run deeper, as explained in Leticia Díez Sánchez, 'Why Cohesion Policy is Not About Cohesion' (2025) 62 CML Rev 13, doi: 10.54648/COLA2025002.

policies as long as the implementation of the measure involves Union funding'.[35]

However blurred the scope of cohesion policy may be, and irrespective of one's normative preferences regarding the broadening of Union's spending capacities, this over-expansive reading is hardly reconcilable with the logic of conferral, especially if seen against the background of the limited competences allocated to the Union in the economic policy field.[36] More generally, the increasing centrality of governance through funding in the current state of European integration, and its potential repercussions on the EU's order of competences, call for a scrupulous assessment of whether and to what extent the use of spending powers in a particular policy domain is supported by appropriate legal bases. As long as the EU Treaties framework lacks a general spending clause akin to those available in some federal systems,[37] there are limits to what can be achieved by stealth via cohesion policy legal bases.

The competence issues intensify when, as often happens, EU funding measures are designed to pursue a variety of policy objectives, primarily through the inclusion of conditionality mechanisms.[38] Indeed, by their very nature, spending conditionality clauses pursue policy objectives which lie beyond, or are at least conceptually distinct from, those of the fund or programme to which they are attached.[39] This functional bifurcation may raise competence issues when the conditionality objective is not included among the

35. Leino-Sandberg and Ruffert (n 17) 449. This was also borne out by the policy developments following the pandemic. As noted by Panascì, for instance, RePower EU 'confirms how a plan that was originally intended to tackle the pandemic can be used to achieve virtually any other public objective': Maria Antonia Panascì, 'Unravelling Next Generation EU as a Transformative Moment: From Market Integration to Redistribution' (2024) 61 CML Rev 13, 32, doi: 10.54648/COLA2024002.

36. See Paul Dermine, *The New Economic Governance of the Eurozone: A Rule of Law Analysis* (CUP 2022) 166, who 'deplore[s] that the policy shifts that NGEU embodies are occurring by stealth, under the cover of cohesion policy, without clearer acknowledgement of the Treaties' insufficiencies and deeper reflection as to the sustainability of the EU's and the Eurozone's order of competences'. Similarly, see Enzo Cannizzaro, 'Editorial: Neither Representation nor Taxation? Or, "Europe's Moment" – Part I' (2020) 5 EP 703, 705, who stressed that 'measures which exceed the limits of the structural funds arguably also exceed the entire competence of the Union under Title XVIII, including actions outside the funds'.

37. See eg Art I, Section 8, Clause 1 of the US Constitution, which endows the Congress with the power to provide 'for the general welfare'. Among others, *cf* Theodore Sky, *To Provide for the General Welfare: A History of the Federal Spending Power* (University of Delaware Press 2003).

38. Conditionality arrangements are typically included in the same normative act governing the pertinent fund or programme, being the Common Provisions Regulation or the fund-specific regulations. The use of standalone normative instruments establishing conditionality mechanisms, such as Regulation 2020/2092, is exceptional.

39. On this aspect, see Viţă (n 8) 122.

set of objectives covered by the legal basis of the relative fund or programme. The critical question here is whether the incorporation of such conditionality arrangements has the effect of making the normative act governing the fund or spending programme exceed the functional scope of the chosen legal basis. The following sub-sections will focus on this critical issue.

2.2. *The 'centre of gravity' doctrine and the horizontal clauses*

In general terms, the question of accommodating the pursuit of different policy goals within a system of competences grounded on a rigid correspondence between powers and objectives is certainly not new, and the EU legal order is equipped with some tools in this regard.[40]

First of all, according to the Court's consolidated case law, as long as the policy objectives not included in the chosen legal basis remain secondary to those predominantly pursued by the pertinent normative act, the incidental pursuit of these objectives does not require recourse to additional legal bases.[41] For the purposes of this article, this case law suggests that whenever conditionalities can be qualified as 'accessory' components of the normative act governing the pertinent fund or programme, the inclusion of such arrangements does not alter the 'centre of gravity' of that act and can thus be grounded on the same legal basis supporting the predominant component or objective of the fund or programme.

Moreover, the pursuit of different policy objectives 'on the side' is ever more legitimate when they are covered by one of the 'horizontal clauses' enshrined in the Treaties, notably (but not exclusively) in Articles 8 to 13 TFEU.[42] While these clauses cannot be construed as legal bases for the

40. For a recent discussion of the inherent limits of EU's system of competences, predicated on the 'bounded world' of each individual and discrete Union act and its own legal basis, see Michael Dougan, 'EU Competences in an Age of Complexity and Crisis: Challenges and Tensions in the System of Attributed Powers' (2024) 61 CML Rev 93, doi: 10.54648/COLA2024004.

41. See *inter alia* Case C-482/17, *Czech Republic v Parliament and Council*, EU:C:2019:1035, para 31: 'If examination of the measure concerned reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component'. On the 'centre of gravity' theory, see Annegret Engel, *The Choice of Legal Basis for Acts of the European Union* (Springer 2018), particularly at 13–16.

42. On which see Francesca Ippolito, Maria Eugenia Bartoloni and Massimo Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2019), as well as the Special Section 'The Horizontal Clauses of Arts 8–13 TFEU: Normative Implications, Implementation and Potential for Mainstreaming', edited by Evangelia Psychogiopoulou in (2022) 7 EP 1357 (first part), and (2023) 8 EP 159 (second part).

adoption of EU measures, they provide a robust constitutional foundation for integrating the objectives laid down therein across the different policies and activities of the Union, including those financed by the EU budget.[43] In this vein, it can be argued that the inclusion of conditionality arrangements connected, for instance, to gender equality, social inclusion or environmental protection within EU funding policies finds a normative justification, respectively, in Articles 8, 9 and 11 TFEU, which require the Union to streamline those objectives when defining and implementing its policies and activities.

However, the 'centre of gravity' case law and the Treaties' horizontal clauses have inherent limits and are not always sufficient to justify the functional bifurcation between the conditionality objective and the set of objectives covered by the chosen legal basis. In particular, the case law on acts with dual components or objectives appears difficult to apply when, as often occurs, conditionality mechanisms are construed so that non-compliance with the relevant conditions may halt access to the whole, or a significant portion, of the financial resources mobilized through the pertinent fund or spending programme.[44] In these cases, failure to fulfil the applicable conditionalities – often pursuing policy objectives not directly related to the purposes of the pertinent fund – may hinder the realization of the entire range of projects and activities financed under the relevant funding scheme in the Member State in question. This consideration, which applies to the vast majority of spending conditionality arrangements, raises doubts as to whether conditionality can really be qualified as a secondary or accessory component of the pertinent fund or spending programme.

Where relevant, the horizontal clauses may be of help in this regard. Indeed, it may be argued that, as long as the conditionality objective matches the objective of one of the horizontal clauses enshrined in the Treaties, there is no requirement that the policy objective in question be

43. In a similar vein, De Witte (n 7) 223.

44. See eg the 'horizontal' enabling conditions included in the Common Provisions Regulation, whose non-fulfilment may in fact hinder access to the whole package of financial resources available under the eight funds covered by the Regulation. Even if one looks at the 'thematic' enabling conditions, which are narrower in scope, non-compliance may deprive the Member State in question from the entire amount of funding mobilized through the European Regional Development Fund, the European Social Fund+ and the Cohesion Fund. See Art 15, as well as Annexes III and IV of Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy [2021] OJ L 231/159.

pursued merely in an 'incidental' or 'accessory' manner.[45] However, as recalled also by the Court of Justice in *Antarctic MPAs*,[46] the recourse to horizontal clauses cannot have the effect of nullifying the requirement that any action of the Union shall be grounded on appropriate legal bases. This means that the normative act governing the fund or programme shall genuinely pursue the legal basis objectives; otherwise, the measure may still fall outside the scope of the chosen legal basis, irrespective of any reliance on the horizontal clauses.

2.3. *The 'sufficiently direct link' requirement*

As explained above, the Court's 'centre of gravity' case law and the horizontal clauses laid down in the Treaties are not always capable of backing the adoption of conditionality mechanisms whose inherent policy goal is detached from the set of objectives covered by the legal basis. This holds particularly true when the conditionality tool is designed to pursue policy objectives for which no alternative legal basis is available in the Treaties.

The most pertinent example here is given by the conditionality clauses linked to the EU founding values enclosed in Article 2 TEU and, most notably, by Regulation 2020/2092. As is well known, in the absence of specific legal bases empowering the EU institutions to enact a genuine rule-of-law sanctioning tool,[47] this Regulation was grounded on Article 322(1)(a) TFEU, which allows the Parliament and the Council to adopt 'the financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget'. The crucial and much-discussed consequence of this choice was that the instrument was limited in scope to those

45. On the relation between horizontal clauses and the 'centre of gravity' doctrine, see Evangelia Psychogiopoulou, 'The Horizontal Clauses of Arts 8–13 TFEU Through the Lens of the Court of Justice' (2022) 7 EP 1357, 1368.

46. Joined Cases C-626/15 & C-659/16, *Commission v Council (Antarctic MPAs)*, EU: C:2018:925, para 101. On which see Christina Eckes, '*Antarctica*: Has the Court of Justice Got Cold Feet?' (*European Law Blog*, 3 December 2018) <www.europeanlawblog.eu/pub/antarctica-has-the-court-of-justice-got-cold-feet/release/1?readingCollection=52ca3b00>; Susanna Villani, 'Riflessioni a margine della sentenza della Corte di giustizia nel caso *AMP Antarctica*: un approccio più morbido a favore degli Stati membri?' (2019) 4 EP 641.

47. The fact that, according to this author, Art 2 TEU cannot be qualified as a standalone basis for the enactment of values-based conditionalities does not imply that this provision has no influence on the EU's system of competences. This broader topic, however, lies beyond the scope of the present work. For a reflection on this issue, albeit primarily focused on the EU's external action, see Enzo Cannizzaro, 'The Value of the EU International Values' in Wybe T Douma and others (eds), *The Evolving Nature of EU External Relations Law* (TMC Asser Press 2021) 3–18.

instances where 'breaches of the principles of the rule of law in a Member State 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'.[48] As emerged also in the Court's twin judgments of 16 February 2022,[49] the 'sufficiently direct link' drawn between the 'horizontal' objective of protecting the rule of law and the 'financial' objective of protecting the budget was arguably key to ensure that the (rule of law) conditionality mechanism could be appropriately grounded on a purely 'financial' legal basis such as Article 322(1)(a) TFEU.[50] Indeed, a genuine rule-of-law sanctioning tool with no connection to the budget would have been difficult to reconcile with a legal basis empowering the Parliament and the Council to adopt financial rules relating to the implementation of the budget.[51]

Besides being critical in ensuring the legality of Regulation 2020/2092, the 'sufficiently direct link' criterion could become a useful benchmark for assessing the legality of conditionality clauses also beyond this piece of legislation.[52] This holds true especially in those cases where the decoupling between the conditionality objective and the legal basis objectives is not justifiable on the basis of the 'centre of gravity' doctrine or of the horizontal clauses laid down in the Treaties. In these cases, indeed, the 'sufficiently direct link' criterion may attract the exogenous objective pursued through

48. See Art 4(1) of Regulation 2020/2092. For a critique of the 'sufficiently direct link' criterion and its consequences on the actual operation of the conditionality regime, see Enzo Cannizzaro, 'Editorial: Neither Representation nor Values? Or, "Europe's Moment" – Part II' (2020) 5 EP 1101.

49. Case C-156/21, *Hungary v Parliament and Council*, EU:C:2022:97; Case C-157/21, *Poland v Parliament and Council*, EU:C:2022:98.

50. As widely recognized in the academic debate relating to the judgments: see Antonia Baraggia, 'The "Conditionality" Regulation under the ECJ's Scrutiny: A Constitutional Analysis' (2022) 47 EL Rev 687; Matteo Bonelli, 'Constitutional Language and Constitutional Limits: The Court of Justice Dismisses the Challenges to the Budgetary Conditionality Regulation' (2022) 7 EP 507; Vestert Borger, 'Constitutional Identity, the Rule of Law, and the Power of the Purse: The ECJ Approves the Conditionality Mechanism to Protect the Union Budget: *Hungary and Poland v. Parliament and Council*' (2022) 59 CML Rev 1771, doi: 10.54648/COLA2022118; Fisicaro (n 18); Pohjankoski (n 18).

51. See references in n 50. The importance of ensuring a 'sufficiently direct link' had been emphasized also before the Court's rulings. See Council Legal Service, 'Opinion 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 – Compatibility with the EU Treaties'. In literature, Marco Fisicaro, 'Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values' (2019) 4 EP 695; Iris Goldner Lang, 'The Rule of Law, the Force of Law and the Power of Money in the EU' (2019) 15 CYELP 1, doi: 10.3935/cyelp.15.2019.365; Baraggia and Bonelli (n 18).

52. Fisicaro (n 18) 352–353; Viţă (n 20) 111.

conditionality within the scope of the chosen legal basis by connecting the former to the purposes of the pertinent funding scheme.

This link can be construed in *material* terms, as in Regulation 2020/2092, whose activation depends on the assessment that the Member State's violation of the horizontal condition causes or seriously risks causing adverse effects on the integrity of EU spending. However, based on the specific features of the conditionality clause, the 'sufficiently direct link' requirement can also be understood more broadly, as a *functional* criterion requiring a genuine connection between the conditionality objective and the specific spending purposes of the pertinent fund or programme. In this sense, the 'sufficiently direct link' standard would be interpreted similarly to the 'germaneness' criterion adopted by the US Supreme Court in its 'unconstitutional conditions' doctrine, according to which the spending conditions shall be reasonably related to the purpose of federal expenditure.[53]

It remains to be seen whether and to what extent this criterion will be actually relied on by the Court in its case law beyond the twin judgments of 16 February 2022 and will influence the normative design of spending conditionality clauses in the years to come. Yet, as shown above, the creation of a material or functional connection between the conditionality mechanism and the scope of the chosen legal basis might indeed back the use of the conditional spending power even in the absence of alternative legal bases in the policy field to which the conditionality instrument relates. In these cases, indeed, the 'sufficiently direct link' ensures that the centre of gravity of the funding measure remains anchored to its own legal basis even in the presence of conditionality mechanisms relating to different policy fields.

2.4. *The combination of multiple legal bases*

When the functional detachment of conditionality from its purported legal basis cannot be otherwise justified, the only remaining possibility would be to combine the legal basis concerning the pertinent fund or spending programme with the legal basis empowering the EU institutions to act in the policy field covered by the conditionality arrangement.

As is known, the recourse to multiple legal bases is normally considered a last resort, especially due to the possible issues arising from the coordination of different procedures for the adoption of a single EU normative act. For the purposes of this article, however, it may be relevant to

53. *South Dakota v Dole* (1987) 483 US 203, 207–208. In favour of a more lenient interpretation of the sufficiently direct link criterion, Viţă (n 20) 111–113.

recall that in several policy fields where any form of harmonization is excluded, the Treaties nonetheless allow the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to adopt incentive measures to further the achievement of the Union's objectives in the relevant sectors. If one qualifies conditionality as a financial incentive, the recourse to these legal bases in addition to those supporting the pertinent funding scheme may allow a more liberal use of conditional spending as an instrument to realize the EU's objectives in fields such as education,[54] culture,[55] human health[56] or the integration of third-country nationals.[57] Importantly, since the legal bases of EU funding measures typically provide for the ordinary legislative procedure, the additional use of the legal bases empowering the adoption of incentive measures by the same procedure would not give rise to thorny procedural issues.

For the time being, the combination of multiple legal bases in the adoption of conditionality instruments has not gained traction in EU institutional practice,[58] but it might indeed represent a viable way to incentivize the achievement of EU objectives by the Member States even in fields where the Union has only limited legislative competences.

As a very last resort, recourse to Article 352 TFEU could also be considered, if necessary in combination with the legal basis supporting the pertinent fund or programme. Unlike the legal bases for incentive measures, however, the unanimity requirement within the Council prescribed by Article 352 TFEU would likely give rise to issues of coordination between different procedures, as occurred in the case *Parliament v Council* concerning the International Fund for Ireland.[59]

3. The spending power as alternative enforcement or regulatory instrument

In addition to the questions surrounding the choice of legal basis, the Union's use of its spending powers may find further constraints in the Treaties. In particular, as also shown by the Court's judgments on the legality of Regulation 2020/2092, recourse to spending powers as an alternative means

54. Art 165(4) TFEU.
55. Art 167(5) TFEU.
56. Art 168(5) TFEU.
57. Art 79(4) TFEU.
58. As critically discussed in Section 2.1 above, since the over-expansive reading of cohesion policy legal bases leaves virtually no policy field out of reach, recourse to additional legal bases may have been considered superfluous.
59. Case C-166/07, *Parliament v Council.*

of enforcing compliance with EU law raises issues of coordination with the Treaty-based procedures designed to establish and, if necessary, adopt sanctions for similar breaches of EU law. On a different level, the use of spending powers to incentivize the adoption of certain legislative or regulatory measures by the Member States may face additional obstacles in the specific nature of the competences attributed to the Union in the same policy field. These issues will be addressed separately in the following sub-sections.

3.1. *The spending power as an alternative enforcement instrument for EU law*

As anticipated, the Court of Justice was confronted with the first issue in the twin judgments on the legality of Regulation 2020/2092. Most notably, Hungary and Poland contended that this conditionality regime constituted an instrument to circumvent the onerous substantive and procedural requirements imposed by the core Treaty-based enforcement procedure devised to safeguard the founding values of the Union, that is, Article 7 TEU.

The Court dismissed the applicants' view by employing what can be defined as a 'differentiation' test:

> '167. … the EU legislature cannot establish, without infringing Article 7 TEU, a procedure parallel to that laid down by that provision, having, in essence, the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision.
>
> 168. However, it is permissible for the EU legislature, where it has a legal basis for doing so, to establish, in an act of secondary legislation, other procedures relating to the values contained in Article 2 TEU, which include the rule of law, provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU …'.[60]

Applying this test in the cases at hand, the Court concluded that Regulation 2020/2092 and Article 7 TEU are independent from each other, as they pursue different aims and have clearly distinct subject matters.[61] This holds particularly true in the aftermath of the legislative process of Regulation

60. Case C-156/21, *Hungary v Parliament and Council*, paras 167–168. See, identically, Case C-157/21, *Poland v Parliament and Council*, paras 206–207.

61. Case C-156/21, *Hungary v Parliament and Council*, para 179; Case C-157/21, *Poland v Parliament and Council*¸ para 219.

2020/2092, which rendered it more clearly a financial tool to protect the budget, rather than an instrument to penalize rule of law breaches as such.[62]

It can be argued, however, that the differentiation test may acquire relevance also beyond these specific cases, serving as a more general constitutional constraint to the use of conditional spending as an alternative enforcement device for EU law.[63] Notably, this passage suggests that the enactment of conditionality clauses having EU law enforcement functions is permissible provided that they are genuinely different and independent from the competing enforcement procedures envisaged by the Treaties.

This interpretation is also supported by the Court's reference to its previous case law concerning the relationship between, on the one hand, financial corrections adopted in response to irregularities in the use of EU funds and, on the other hand, the main centralized procedure for enforcing EU law obligations provided by the Treaties, that is, the infringement procedure.[64] Since the judgment in *France v Commission* in 1979, the Court has consistently held that these procedures are 'independent of each other as they serve different aims and are subject to different rules'.[65] In this light, financial corrections due to breaches of EU law in the management of EU expenditure cannot be equated to 'penalties' for failing to fulfil certain EU law obligations. Rather, they are designed to prevent the funding scheme from being burdened with amounts that have not served to finance the objectives identified in the relevant piece of EU legislation.[66]

In the mentioned case law, the differentiation test was employed to verify whether the Commission had misused its 'financial' powers to enforce EU law obligations, instead of resorting to the key procedure designed for that purpose, that is, the infringement procedure. With the twin judgments on Regulation 2020/2092, the same test is applied to assess *ex ante* whether the introduction of a conditionality mechanism serving (also) EU law enforcement functions is compatible with the competing enforcement procedures laid down in the Treaties.

62. On this point, see also the Opinion of AG Sánchez-Bordona in Case C-156/21, *Hungary v Parliament and Council*, EU:C:2021:974, particularly at paras 164–166.

63. Fisicaro (n 18) 353.

64. For a discussion on the potential functional overlap between financial corrections and infringement procedure, see Stine Andersen, *The Enforcement of EU Law: The Role of the European Commission* (OUP 2012) 181–186.

65. See Joined Cases 15 & 16/76, *France v Commission*, EU:C:1979:29, which concerned the Commission's clearance of accounts under the European Agricultural Guidance and Guarantee Fund (EAGGF). The approach was later extended to the financial corrections procedure in the management of structural funds: Case C-325/94 P, *An Taisce and WWF UK v Commission*, EU:C:1996:293, para 25; Case C-247/98, *Greece v Commission*, EU:C:2001:4, para 13.

66. Case C-247/98, *Greece v Commission*, para 14.

Besides being based on considerations relating to the hierarchical relation between EU primary and secondary law, this 'differentiation' requirement also seems to better preserve the institutional balance envisaged by the Treaties with regard to the enforcement of EU law. Should the EU legislature be freely entitled to create genuine enforcement procedures via the back door of spending, these could easily turn into substitutes for the relevant Treaty-based enforcement schemes while allocating powers to different institutional actors and providing for different procedural stipulations. For instance, in the infringement procedure, it is for the Court of Justice to establish whether a breach of EU law has occurred and, if necessary, to impose a lump sum or a penalty payment under Articles 260 or 279 TFEU. By contrast, in EU funding management, it is the Commission – and/or at times the Council – to verify whether the spending conditions are complied with and to restrict access to the relevant funding scheme in response to non-compliance.

This institutional deviation can be acceptable when the two procedures are clearly autonomous and independent from each other, as they serve different aims and have distinct subject-matters. For instance, this is ensured when the 'enforcement' conditionality mechanism is sufficiently connected with the implementation of the pertinent funding scheme and of its objectives. As an example, one may think of conditionality clauses linking access to the Cohesion Fund to the correct implementation of EU environmental legislation, which can be easily justified in light of the environmental objectives of this funding instrument under Article 177 TFEU.[67] Conversely, conditionality instruments aimed at enforcing EU law obligations that are entirely exogenous to the machinery and objectives of the relevant funding scheme would be more difficult to differentiate from the competing Treaty-based procedures devised for the same purpose. For instance, doubts may be raised regarding the macro-economic conditionalities included in the Common Provisions Regulation since the 2014-2020 multiannual financial period, which establish an obligation for the Commission to propose the suspension of European Structural and Investment Funds following a Council decision finding that a Member State has failed to take effective action to correct its excessive deficit.[68] Notwithstanding the flaws that emerged in the only activation of the

67. See eg the 'environmental' enabling conditions attached to the Cohesion Fund listed in Regulation 2021/1060, Annex IV, nos 2.1 to 2.7.

68. See Art 23(9) of Regulation (EU) 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

instrument against Spain and Portugal in 2016,[69] the mechanism was essentially construed as a quasi-automatic sanctioning instrument for breaches of EU economic governance rules.[70]

Against this background, establishing a 'sufficiently direct link' between the enforcement conditionality measure and the pertinent funding instrument – something that may, in any event, be necessary to ensure coherence with the chosen legal basis (see Section 2.3 above) – may also serve to differentiate the tool more clearly from the relevant enforcement procedure provided by the Treaties.

3.2. *The spending power as an alternative regulatory instrument in fields of limited EU competence*

Further issues may emerge when spending powers are deployed as an alternative means of regulation in fields where the Union has limited legislative prerogatives, such as in the sectors falling within the EU coordinating or complementary competences. The most paradigmatic example of this approach is undoubtedly the RRF, whose financial resources are disbursed on a 'money for reforms' basis that effectively enables the EU institutions to intervene in a wide array of policy areas of limited EU competence, including education, health, employment, and economic and social policy more broadly.[71] The same regulatory logic, albeit with varying degrees of intensity, is also present in the Common Provision Regulation, where access to the European Regional Development Fund, the European Social Fund+ and the Cohesion Fund is made contingent upon the fulfilment of a set of thematic enabling conditions related, for example, to the labour market, education, and health.[72]

and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L 347/320. In the current period, a similar mechanism is provided in Art 19(7) of Regulation (EU) 2021/1060.

69. On which see Martin Sacher, 'Macroeconomic Conditionalities: Using the Controversial Link between EU Cohesion Policy and Economic Governance' (2019) 15 Journal of Contemporary European Research 179, doi: 10.30950/jcer.v15i2.1005; Viorica Viţă, 'In Conditionality We Trust: What Scope for Conditionality in the Emerging European Economic Constitution?' in Herwig CH Hofmann, Katerina Pantazatou and Giovanni Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution* (Edward Elgar 2019) 199, 215–218.

70. See Stijn Verhelst, 'Cohesion Policy and Sound Economic Governance: A Loveless Marriage' (2014) 23 The Polish Quarterly of International Affairs 113, 116–117. See also Bieber and Maiani (n 12) 1081–1082.

71. See n 11. See also Dermine (n 10) 979–980, who notes that 'the planning method entails a *de facto* expansion and intensification of the EU's presence in a number of neighbouring policy fields … without genuine concern for the formal division of competences between the Union and its Member States'.

72. See, respectively, the thematic enabling conditions nos 4.1, 4.3 and 4.6 in Annex IV of Regulation 2021/1060.

The recourse to spending might indeed represent an attractive tool of indirect regulation in these fields, to the extent that the power of granting or withdrawing financial resources is exploited to incentivize the adoption of legislative or regulatory measures by the Member States in line with the Union's policy preferences. This raises the critical question of whether and to what extent the scope of the EU spending power is constrained by the scope of the EU legislative power and, more precisely, of the constitutional limits applying to indirect regulation through spending in fields where the Union has only limited legislative competences.

In general terms, provided that an appropriate legal basis is identified, the exercise of the EU spending power in these fields does not appear to be at odds with the specific nature and boundaries of the EU coordinating or complementary competences. Most notably, the prohibition of harmonization applicable in these fields should not be read as a general prohibition on adopting legislative acts. Therefore, the enactment of legislative measures which do not entail harmonization – as the basic acts authorizing EU expenditure – should be admissible under the umbrella of the coordinating or complementary competences. As outlined above (see Section 2.4), this is also confirmed by the presence of several legal bases in the Treaties which explicitly allow the Council and the Parliament, according to the ordinary legislative procedure, to adopt 'incentive measures, excluding any harmonization of the laws and regulations of the Member States', in fields falling within the EU coordinating and complementary competences.[73] In practice, these legal bases have also been employed over the years to enact programmes financed by the EU budget, such as the regulation governing the Erasmus+ programme. This funding scheme currently finds its legal bases in Articles 165(4) and 166(4) TFEU,[74] which enable the adoption of incentive measures in the areas of education and vocational training, and represents also a clear example of how the use of EU funding has shaped national policies and regulations in a field where the EU has only limited competences.[75]

73. See, with slightly different formulations, Arts 165(4), 166(4), 167(5) and 168(5) TFEU, concerning respectively education, vocational training, culture and human health. The possibility to adopt incentive measures in the form of EU legislation was already accepted before the entry into force of the Treaty of Lisbon: see Koen Lenaerts, 'Subsidiarity and Community Competence in the Field of Education' (1995) CJEL 1, 14 and fn 57, according to whom incentive measures 'may be adopted in the form of regulations, directives or decisions within the meaning of Article 189 of the EC Treaty'.

74. See Regulation 2021/817.

75. See Sacha Garben, *EU Higher Education Law: The Bologna Process and Harmonization by Stealth* (Wolters Kluwer 2011) 74–78.

At the same time, one may wonder whether the exercise of spending powers can always be classified as a mere financial incentive, or if there are instances where it may amount to an illegitimate form of regulation through the back door of spending. This issue, which has not yet been addressed by the Court of Justice, is well known in federal systems, such as the United States and Canada.[76] In these systems, in fact, the need to identify limits beyond which the use of federal spending becomes an unconstitutional means of encroaching upon the States' legislative prerogatives in fields of exclusive State jurisdiction has long been part of the academic and institutional debate.

In particular, among the set of constitutional limitations to the federal spending power, the US Supreme Court has long included the requirement for Congress not to pass the point at which 'pressure turns into compulsion, and ceases to be inducement'.[77] On this ground, despite many uncertainties and controversies,[78] the Supreme Court has then drawn a line on a case-by case basis between coercive and non-coercive conditionalities, considering the former unconstitutional instruments of indirect regulation in fields reserved to the exclusive competence of the States. For instance, in *South Dakota v Dole*, the Supreme Court deemed that Congress had offered 'relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose', thus remaining in the realm of non-coercive financial inducements.[79] By contrast, in *NFIB v Sebelius*, the use of conditional

76. For a comparative analysis of the use of spending conditionality in the EU and in federal systems, see Antonia Baraggia, *La condizionalità come strumento di governo negli Stati compositi. Una comparazione tra Stati Uniti, Canada e Unione Europea* (Giappichelli 2023). See also, with regard to the comparison with the United States, Viorica Viţă, 'The Rise of Spending Conditionality in the EU: What Can EU Learn from the U.S. Conditional Spending Doctrine and Policies?' (EUI Working Paper LAW 16/2017) <papers.ssrn.com/sol3/papers.cfm?abstract_id=3100187>; Cristina Fasone and Marta Simoncini, 'Spending Conditionality in the EU and in the US. Prospects on the EU Fiscal Integration' (2025) Journal of European Public Policy, doi: 10.1080/13501763.2025.2596119 (first view).

77. *Steward Machine Co v Davies* (1936) 301 US 548, at 590; *South Dakota v Dole*, 211.

78. On the US Supreme Court's *Dole* test, see among others Albert J Rosenthal, 'Conditional Federal Spending and the Constitution' (1987) 39 Stanford Law Review 1103, doi: 10.2307/1228790; David E Engdahl, 'The Spending Power' (1994) 44 Duke Law Journal 1, doi: 10.2307/1372866; Lynn A Baker and Mitchell N Berman, 'Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So' (2003) 78 Indiana Law Journal 459, doi: 10.2139/ssrn.395222; Mitchell N Berman, 'Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions' (2013) 91 Texas Law Review 1283; Lynn A Baker, 'The Spending Power after *NFIB v. Sebelius*' (2014) 37 Harvard Journal of Law and Public Policy 71; Daniel S Cohen, 'A Gun to Whose Head? Federalism, Localism, and the Spending Clause' (2019) 123 Dickinson Law Review 421; Douglas M Spencer, 'Sanctuary Cities and the Power of the Purse: An Executive Dole Test' (2021) 106 Iowa Law Review 1209, doi: 10.2139/ssrn.3716652.

79. *South Dakota v Dole*, 211.

spending by Congress was emphatically compared to 'a gun to the head' and was then considered unconstitutionally coercive.[80] Although the Supreme Court has never clarified precisely where the line between coercive and non-coercive conditionalities lies, the key factor tipping the balance towards coerciveness seems to be the size of federal funding that can be withheld as a result of non-compliance with the spending conditions. In other words, this criterion has been mostly assessed in quantitative terms: the larger the size of funding involved, the greater the coercive potential of the conditionality clause and, consequently, the higher the possibility that an instrument of pressure turns into one of (unconstitutional) compulsion.

Notwithstanding the controversies surrounding the *Dole* test, the US Supreme Court's case law clearly indicates the awareness that conditional spending cannot be always classified as financial inducement and highlights the importance of setting constitutional boundaries for its exercise to safeguard the repartition of competences in multilevel systems. It remains to be seen whether the Court of Justice will take the same route by identifying limits beyond which the use of spending powers with regulatory purposes ceases to be compatible with the nature and scope of the Union's competences in the relevant field.

The line might be drawn on a case-by-case basis, combining both quantitative and qualitative indicators. The use of quantitative indicators, referring to the amount of funding that can be withheld in case of non-compliance, may indeed be complemented by the recourse to indicators of a qualitative nature, centred for instance on the regulatory detail of the given conditionality mechanism or on the level of concertation between the Union and the Member States in the concrete implementation of the funding scheme and of its conditionalities. The combination of these criteria might help the Court distinguish between financial incentives and fully-fledged instruments of indirect regulation incompatible with the Treaties.

It is important to stress, however, that the use of spending powers for regulatory purposes raises several crucial constitutional questions, extending beyond those strictly related to the allocation and exercise of competences addressed in this article. This governance technique is, in fact, marked by clear executive dominance, with the Commission exercising significant regulatory functions through the back door of spending, thereby steering national decision-making processes in sensitive policy areas without meaningful parliamentary involvement.[81] Once the regulations governing the relevant fund or

80. *National Federation of Indipendent Business v Sebelius* (2012) 567 US 519, 51.

81. See Dermine (n 10) 982–986. For a recent reflection on the changing role of the Commission, including in the context of NGEU and EU economic governance more broadly, see Eleanor Spaventa, 'Some Reflections on the European Commission's Changing Roles' in

spending programme have been adopted, the European Parliament is left with limited – if any – control over the operation of the funding instrument and the way in which the Commission exercises its spending powers as alternative means of regulation.[82] Moreover, the opacity surrounding the negotiations between the Commission and the Member States not only hinders public scrutiny, but also blurs authorship and responsibility for key policy choices, thereby creating significant accountability gaps.[83] These concerns suggest caution even when the use of spending powers with regulatory purposes appears compatible with the system of competences enshrined in the Treaties.

4. Conclusions

Over twenty years ago, in a well-known article published on the pages of this journal, Armin von Bogdandy and Jürgen Bast cautioned that 'the expenditure of funds as an important instrument of influence is by no means legally neutral' from a competence perspective.[84] It is safe to say, however, that at that time the authors could have hardly expected EU funding to become so central in the trajectories of European integration and so insidious for the order of competences outlined in the Treaties. In recent years, by leveraging its growing spending powers, the Union has decisively expanded the spheres and intensity of its action beyond its traditional regulatory and enforcement capacities, leaving virtually no policy field untouched by the reach of EU funding. This evolution raises critical constitutional questions regarding its implications on the system of competences, as the exercise of spending powers has rapidly become an attractive alternative to the standard procedures for enacting and enforcing rules in the EU legal order.

Catherine Barnard, Adam Łazowski and Daniel Sarmiento (eds), *Pursuit of Legal Harmony in a Turbulent Europe: Essays in Honour of Eleanor Sharpston* (Hart Publishing 2024) 137, 142–144.

82. See Diane Fromage and Menealos Markakis, 'The European Parliament in the Economic and Monetary Union after COVID: Towards a Slow Empowerment?' (2022) 28 The Journal of Legislative Studies 385, doi: 10.1080/13572334.2022.2107811; Francesco Costamagna, 'Il *Next Generation EU* e la costruzione di una politica economica europea: quale ruolo per democrazia e solidarietà?' (2022) Quaderni AISDUE, Serie Speciale – Atti del Convegno 'L'unione europea dopo la pandemia' 47, 52–54.

83. See Dermine (n 10) 978–982; Coli (n 16) 631–633; as well as Maria-Luisa Sánchez-Barrueco, 'The Recovery and Resilience Facility: Too Complex a Governance System for Meaningful Accountability' (SIEPS Report 2023:3) <sieps.se/media/og4ewz00/sieps-2023_3-eng-webb.pdf>.

84. Armin von Bogdandy and Jürgen Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for Its Reform' (2002) 39 CML Rev 227, 232, doi: 10.54648/406262.

This article provided a systematic analysis of these issues, identifying a set of constitutional limits on the use of the spending power as an alternative regulatory or enforcement tool in EU internal affairs. First, in the absence of a general spending clause in the Treaties, the article stressed the importance of grounding the use of spending powers on appropriate legal bases, authorizing the Union to adopt funding measures in a particular policy domain and for the attainment of a defined set of objectives. The Treaties framework leaves ample room for manoeuvre for governing through funding, as there are several legal bases enabling the Union, either explicitly or implicitly, to use its spending powers. At the same time, the article highlighted the competence issues arising from the enactment of 'money for reforms' programmes, which could easily turn into a 'Trojan horse' to encroach upon the normative prerogatives of the Member States. In this vein, it identified some limits on the use of conditionality mechanisms, which certainly represent a key instrument for exercising public powers through the control of financial resources and for expanding the reach of EU funding to policy fields other than those formally covered by the given funding measure. Unless the inclusion of conditionality arrangements can be justified on the basis of the 'centre of gravity' doctrine or of the horizontal clauses established in the Treaties, the establishment of a material or functional connection between the horizontal objective pursued through conditionality and the legal basis supporting the pertinent funding scheme would be necessary to ensure that the conditionality clause does not exceed the scope of the chosen legal basis. Otherwise, the additional recourse to a legal basis enabling the Union to intervene through funding in the policy field covered by the conditionality mechanism would be required.

Second, the use of spending powers with enforcement purposes finds additional obstacles in the Treaty-based procedures devised to establish and adopt sanctions for similar breaches of EU law. In this regard, the article suggested that the 'differentiation' requirement, first envisaged in the case *France v Commission* and then revised and expanded in the twin judgments on the legality of the Conditionality Regulation, could be relied on as a more general constitutional constraint on the use of the spending power with enforcement functions. This would also allow for the better preservation of the institutional balance envisaged by the Treaties with regard to the enforcement of EU law, which would risk becoming meaningless should the spending power be turned into an easy substitute for the ordinary procedures for enforcing EU law obligations set out in the Treaties.

Third, the article argued that the use of spending powers with regulatory purposes in fields of coordinative or complementary competences may be justified in principle under the current Treaties framework, at least as long as it remains in the realm of financial inducement. Nonetheless, taking inspiration also from federal experiences, a line might be drawn beyond which the use of financial pressure becomes a coercive instrument of indirect regulation, thereby potentially conflicting with the specific nature of the competences allocated to the Union in the relevant policy field.

Reflecting on these delicate constitutional issues is increasingly important at this stage, in light of the recent opening of institutional negotiations on the next MFF[85] and the broader debate on the future of EU public finances after the end of Next Generation EU. It is worth noting that, in its package of proposals for the next MFF, the Commission controversially advanced the idea of normalizing the RRF-style governance method, making it the ordinary management technique for cohesion, agriculture, fisheries and home affairs policy funds.[86] Whether this reform proposal will ultimately be adopted is difficult to predict, not least in view of the stark opposition that has already emerged within the European Parliament[87] and the concerns expressed by the Court of Auditors on the ‘financing not linked to costs’ model.[88] Nevertheless, the proposal signals an ever-growing tendency to use funding as an incentive mechanism with regulatory and enforcement purposes, irrespective of the existence and nature of EU competences in the relevant policy fields. At this critical juncture, ensuring that the growing centrality of governing through funding within the EU’s regulatory and enforcement toolbox is accompanied by a broader reflection on its constitutional boundaries as defined by the EU’s order of competences is ever more essential.

85. See references in n 21.

86. European Commission, Proposal for a Regulation of the European Parliament and the Council establishing the European Fund for economic, social and territorial cohesion, agriculture and rural, fisheries and maritime, prosperity and security for the period 2028–2034 and amending Regulation (EU) 2023/955 and Regulation (EU, Euratom) 2024/2509, COM(2025) 565 final, Art 21 and ff.

87. See the letter sent by the leaders of the EPP, S&D, Renew Europe and the Greens/EFA to Commission President von der Leyen in October 2025, as reported in Max Griera, ‘EU Parliament Demands Changes to von der Leyen’s Budget Proposal, Document Reveals’ (*Politico*, 30 October 2025) <www.politico.eu/article/ursula-von-der-leyen-document-european-parliament-demands-changes-to-eu-budget-proposal/>. The same critical position is expressed in interim reports still to be calendarized at the time of writing: see Draft report of 10 November 2025 on control, transparency and traceability of performance-based instruments, 2025/2032(INI); Draft interim report of 27 November 2025 on the proposal for a Council regulation laying down the Multiannual Financial Framework for the years 2028 to 2034, 2025/0571R(APP).

88. European Court of Auditors, Review 02/2025, ‘Performance-orientation, accountability and transparency – lessons to be learned from the weaknesses of the RRF’, 6 May 2025.