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## 12. Milestones and targets

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### 1. INTRODUCTION

This chapter examines the evolution of conditionality in EU programmes. It initially considers ‘traditional’ conditionality which has taken place in the context of crisis lending. A key part of this evolution is the type of conditionality now seen in the context of EU spending under the EU’s Recovery and Resilience Facility (RRF) and recently reformed EU cohesion policy.

The European Union (EU) response to the Covid-19 pandemic has included an economic recovery package of EUR 750 billion. This package mainly consists of the RRF, established under Regulation 2021/241, which gives Member States access to EU grants and loans. Under the RRF, EU spending is subject to conditionality as a way of driving domestic reforms in recipient countries that align with EU priorities. In order to receive EU funding, Member States submit National Recovery and Resilience Plans (NRRPs) that set out reforms and investments to address challenges identified in the European Semester and country-specific recommendations that have been adopted by the Council. Member States’ requests for payment are subject to the satisfactory fulfilment of relevant milestones and targets (M&T) indicated in their NRRPs.<sup>1</sup> The provision of financing in exchange for the reaching of certain targets can be viewed as a form of conditionality.

This chapter examines this new type of conditionality, and compares it to other types of EU spending such as that undertaken through European structural and investment funds (ESIFs) as part of EU cohesion policy. This comparison is particularly relevant as conditionality currently applies to a majority of the EU budget including funds for agriculture and fisheries that come under cohesion policy, as well as NGEU funds. Conditionality as part of EU cohesion policy has also been considerably strengthened since the 2021 Common Provisions Regulation came into effect with the advent of ‘enabling conditions’ that Member States must apply.<sup>2</sup>

Conditionality under the RRF operates in the context of an investment package. One of the implications of this context is that the conditionality attached to loans or grants might be anticipated to be less controversial than it has been in other contexts (e.g. that of a bailout). This is because the negotiating hand of the recipient Member State is stronger and this should be reflected in the reforms agreed to in their NRRPs. This has not proven to be the case however

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<sup>1</sup> Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (RRF Regulation), Recitals 18 and 30.

<sup>2</sup> 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, 24 June 2021.

in relation to the NRRPs of Poland and Hungary as the conditionality attached to this financing seeks to address the rule of law crisis in these countries.<sup>3</sup>

This chapter is structured as follows. Section 2 examines ‘traditional’ conditionality and how it has operated in contexts such as EU bailout programmes, IMF programmes, and EU accession. Sections 3 and 4 set out conditionality under EU cohesion policy and the RRF. Section 5 looks at the potential for bargaining dynamics with this form of conditionality and issues that arise given the linkage to fundamental EU values and reflects on the lessons from the previous sections. Section 6 concludes.

## 2. ‘TRADITIONAL’ CONDITIONALITY IN EU AND OTHER PROGRAMMES

Conditionality is defined here as arising where one party grants a benefit to another party and this is linked to the latter party taking some step that has been agreed upon by the parties. In terms of the RRF, conditionality arises as funding is released (the benefit) once certain M&T have been fulfilled (the step taken that is linked to the benefit). This is a wide definition of conditionality that can be applied in a variety of contexts, from lending to spending, accession to human rights and aid conditionality.

While conditionality has traditionally taken place in the context of aid or crisis lending, it should not be seen as being limited to contexts such as Article 13 of the ESM Treaty (requiring a memorandum of understanding detailing conditionality and reflecting the severity of the weaknesses to be addressed). The use of conditionality in other contexts, such as EU accession and human rights, has been well documented.<sup>4</sup>

Conditionality also applies in the context of spending. In this context, Vita describes it as ‘the adoption of a prescribed behaviour...[as] a condition for accessing a promised EU benefit’.<sup>5</sup> Corti and Vesani describe the RRF as a new positive [form of] conditionality.<sup>6</sup> While conditionality in the context of spending may not be traditional conditionality, it is not plausible to say that it is merely ‘up to the recipients to use the money wisely’.<sup>7</sup> Indeed the Frugal Four (Austria, Denmark, the Netherlands and Sweden) demanded that there be a mechanism that could hold countries to account; some form of conditionality.<sup>8</sup>

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<sup>3</sup> See chapter 13 by Niels Kirst in this volume.

<sup>4</sup> See Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (Wolter Kluwer 2008); Viorica Vita, ‘Revisiting the dominant discourse on conditionality in the EU: The case of EU spending conditionality’ (2017) 19 CYELS; Elena Fierro, *European Union’s Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff Publishers 2003).

<sup>5</sup> Vita (n 4) 116.

<sup>6</sup> Francesco Corti and Patrik Vesani, ‘From austerity-conditionality towards a new investment-led growth strategy: Social Europe after the Recovery and Resilience Facility’ (2023) 57(4) Social Policy and Administration 513–548, 515–16.

<sup>7</sup> Päivi Leino-Sandberg and Matthias Ruffert, ‘Next Generation EU and its Constitutional Ramifications: A Critical Assessment’ (2022) 59 CMLR 437, 471.

<sup>8</sup> Bart Vanhercke and Amy Verdun, ‘The European Semester as Goldilocks: Macroeconomic policy coordination and the Recovery and Resilience Facility’ (2022) 60(1) JCMS 204–23, 206.

Section 2 examines how conditionality has operated in other contexts involving the EU as well as under the International Monetary Fund (IMF)'s Structural Adjustment Programmes (SAPs). This provides additional context for conditionality under the RRF and aims to take lessons from how conditionality has operated under these programmes.

## 2.1 Conditionality and the IMF

IMF conditionality is different to the types of conditionality seen in EU programmes for several reasons including the context in which the IMF operates. It intervenes in countries experiencing balance-of-payments difficulties as well as other financial crises. The IMF's focus is on macroeconomic performance and remedying the balance-of-payment issues of borrowers while ensuring they do not resort to measures destructive of international prosperity.<sup>9</sup> Another key motivation behind this conditionality is that the borrowing country will be able to repay the Fund. Nonetheless, the IMF has considerable experience administering controversial SAPs and its experience contains valuable lessons for the design of financial programmes.

A 2022 IMF Policy Paper outlines the principles that underly conditionality in its longer-term loans under a proposed Resilience and Sustainability Trust. These loans aim to provide 'affordable long-term financing to support countries undertaking macro-critical reforms to reduce risks to prospective balance of payment stability'.<sup>10</sup> Principles include parsimony, clarity in the specification of conditions, effective coordination with other multi-lateral institutions, linkage between conditionality and overall programme objectives, and no cross-conditionality.<sup>11</sup> The absence of cross-conditionality means that failure to comply with the requirements of one institution ought not be preclude access to financial assistance by another institution. For example, the IMF should not disburse funds based on the assessment of another organisation that the borrower has fulfilled certain conditions. These are longstanding principles that have guided IMF conditionality for decades.

A 2002 IMF Report on Real-Time Assessments of Structural Conditionality elaborates on some of these 'lessons', drawn from administering multiples SAPs. The key lessons outlined in this report include: (i) parsimony; (ii) linkage between conditionality and overall programme objectives; and (iii) that a critical mass of reforms may be required to restore market confidence.

On the first of these, there is a presumption at the IMF that the coverage of conditionality is parsimonious rather than comprehensive.<sup>12</sup> However the presumption is modified in crisis situations as well as when dealing with countries with poor records of past performance. In such cases, extensive and tighter conditionality is found to be warranted.<sup>13</sup>

Second, the 2002 Report found that structural conditionality 'must have a clearly identifiable link to the program's macroeconomic objectives, grounded in an analysis of the country's

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<sup>9</sup> Article I(V) IMF Articles of Agreement.

<sup>10</sup> IMF, 'Policy Paper Proposal To Establish A Resilience And Sustainability Trust' (April 2022) 7.

<sup>11</sup> *ibid* 25–26, paras 51–52.

<sup>12</sup> IMF, 'Lessons from the Real-Time Assessments of Structural Conditionality', Prepared by the Policy Development and Review Department. Approved by Timothy Geithner (2002) 12.

<sup>13</sup> *ibid* 3.

balance of payments problems'. Thus, measures covered by conditionality had to be clearly linked to the programme's overall objectives.

Finally, in countries undergoing a crisis, such as massive outflows of private capital, the IMF recommends 'a critical mass of front-loaded reforms may be required to restore market confidence'.<sup>14</sup>

## 2.2 EU Bailout Programmes

In the aftermath of the euro-crisis, starting in 2008, the EU implemented bailout programmes to provide financial assistance to Member States facing economic crises. The management of these programmes was overseen by the IMF, the European Commission and the ECB, in a grouping known as the 'troika'.<sup>15</sup>

These programmes were designed to stabilise the affected countries' economies and prevent the spread of financial instability to the rest of the EU. Assistance was provided via the European Financial Stability Mechanism, the European Financial Stability Facility and ultimately via the European Stability Mechanism.<sup>16</sup> As a condition of receiving assistance, the recipient countries were required to implement certain economic and fiscal reforms, constituting a form of conditionality for this lending. These reforms were intended to address the underlying causes of economic crisis and ensure that the countries were able to repay the loans provided through the bailout programmes. Conditionality was a key feature of the EU's bailout programmes during this period. It played a critical role in helping to stabilise the economies of several Member States.

## 2.3 Conditionality in EU Accession

A similar process involving conditional rewards akin to milestones is the accession process to the EU.<sup>17</sup> Kochenov describes the Commission's assessments in relation to the rule of law as having drawbacks that make 'any serious mention of the application of conditionality [for...] the Rule of Law...largely meaningless'.<sup>18</sup> The six main drawbacks included a low threshold for meeting the Rule of Law requirements, a lack of clarity about the standard required and the benchmarks for compliance, poor analysis, differentiated treatment, and a lack of connection between monitoring and progress towards accession.<sup>19</sup> Unsurprisingly, this framework did not ensure observance of the rule of law post-accession for countries such as Hungary and Poland.

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<sup>14</sup> *ibid* 11.

<sup>15</sup> Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes, Constitutional Challenges* (OUP 2016).

<sup>16</sup> See Tomi Tuominen, 'Mechanisms of Financial Stabilization' in Federico Fabbrini and Marco Ventoruzzo (eds), *Research Handbook on EU Economic Law* (Edward Elgar Publishing 2019).

<sup>17</sup> See Kochenov (n 4) 65–82.

<sup>18</sup> *ibid* 300.

<sup>19</sup> *ibid* 301.

Commission President Ursula von der Leyen recently called for an expansion of the EU to over 30 Members.<sup>20</sup> Accession talks are already underway with Albania, Montenegro, North Macedonia, Serbia, and Turkey, while Ukraine and Moldova are also official candidates for EU membership.<sup>21</sup>

What is the best way to ensure that progress made in the pre-accession phase is not discarded once EU membership is attained? As well as a serious application of conditionality in line with the lessons above, accession treaties need to explicitly address the principle of non-regression in the field of EU values. This provides a potential avenue for solving the ‘Copenhagen dilemma’ – the inability of the Union to enforce its founding values post-accession. The EU needs the tools to ensure that a repeat of the rule of law crisis will not arise in future decades with newly acceded Member States. The Accession Treaty is the time to address this, when the EU has maximum leverage rather than scrambling for votes once accession has already taken place.

### 3. CONDITIONALITY UNDER THE RRF: MILESTONES AND TARGETS

This section examines how conditionality operates under the RRF, examining the NRRPs of three Member States. Under Regulation 2021/241, NRRPs must set out ‘envisaged milestones, targets and an indicative timetable for the implementation of the reforms, and investment ...’ (Article 18) and loans shall be paid ‘subject to the fulfilment of milestones and targets’ (Article 14). As such, where funding is granted, Member States must enact agreed upon reforms and meet milestones or targets in identified areas in order to avail themselves of the funding.

The RRF Regulation lays down the objectives of the RRF, how it is financed, and the rules for the provision of financing under it. Under the RRF, Member States had the option of applying for grants, loans or both.<sup>22</sup> Grants have naturally been seen to be a more attractive option as they do not have to be paid back by the recipient Member States.

Under the RRF, ‘milestones’ refer to qualitative achievements (e.g. enacted legislation) while ‘targets’ refer to quantitative achievements (e.g. square metres of buildings that are now energy efficient).<sup>23</sup> NRRPs set out a mixture of M&T that must be met in order for the payment of loans and grants under the RRF to be disbursed. Where any of the milestones or targets are

<sup>20</sup> Matina Stevis-Gridneff, ‘Top E.U. Official Calls for Major Expansion of Bloc’ *NY Times* (13 September 2023) <<https://www.nytimes.com/2023/09/13/world/europe/ukraine-eu-von-der-leyen-expand.html>> accessed 15 November 2023.

<sup>21</sup> See European Commission, ‘2023 Enlargement Package’, including a ‘Communication on Enlargement’ and assessments on the progress of ten (potential) candidates for EU membership <[https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/strategy-and-reports\\_en](https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/strategy-and-reports_en)> accessed 19 December 2023.

<sup>22</sup> Only seven Member States sought loans under the RFF (Greece, Italy, Cyprus, Poland, Portugal, Romania, and Slovenia) although this number has increased with REPowerEU. See chapter 9 by Rosalba Famà in this volume.

<sup>23</sup> See Article 2 RRF Regulation (n 1): ‘(4) “milestones and targets” means measures of progress towards the achievement of a reform or an investment, with milestones being qualitative achievements and targets being quantitative achievements’.

not met, these payments may be suspended as per Article 24(6) of the RRF Regulation. By October 2021, 26 EU Member States had submitted their NPPRs and the Netherlands followed suit submitting the last NRRP in July 2022. The Commission initially approved the NRRPs of all Member States except Hungary and Poland, which were later approved on 5 December 2022 and 17 June 2022 respectively.

The use and continued disbursement of NGEU funds is subject to strict monitoring and reporting. Article 30 of the RRF regulation provides that the Commission shall establish a scoreboard displaying progress on implementation of NRRPs. Article 31 provides that the Commission shall provide an annual report to the EP and the Council on the implementation of the Facility.

This section now considers conditionality and how it operates under the RRF, taking the examples of Italy, Poland and Hungary. Hungary and Poland are having the most difficulty complying with conditionality as set out under their NRRPs. Yet, it is also important to consider how conditionality is operating under the NRRP of a Member State like Italy, where there is no rule of law crisis in order to give a comprehensive overview of conditionality under the RRF and the types of reforms that are recommended in this context. Italy is also the largest recipient under the RRF, with Poland being the third largest recipient.

In June 2021, the European Commission positively assessed Italy's NRRP and Italy has now received four tranches of financing. The Commission endorsed Poland's NRRP in June 2022. This was referred to by one rule of law watcher as a capitulation.<sup>24</sup> In November 2022, the Commission endorsed Hungary's plan, but the disbursement of financing is subject to meeting 'super milestones' related to the rule of law.

By late 2023, Italy had reached all the M&T set out in its NRRP (as amended in summer 2023). Neither Hungary nor Poland on the other hand had fulfilled any of the milestones or targets set out in their NRRPs. In December 2022, the Council approved an Implementing Decision on the assessment of Hungary's NRRP, following the Commission's positive assessment.<sup>25</sup> This section summarises the M&T set for Italy, Poland and Hungary that are related to the justice system under their NRRPs before analysing and comparing them.

### 3.1 M&T for Italy

Italy's NRRP contains five main areas, one of which focuses on 'justice'.<sup>26</sup> Issues identified in this area include the duration of civil and criminal proceedings and effectiveness in fighting corruption.<sup>27</sup> Broadly speaking, reforms aim to simplify existing criminal and civil procedures

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<sup>24</sup> Franz C Mayer, 'Die Kapitulation' (*VerfBlog*, 2 June 2022) <<https://verfassungsblog.de/die-kapitulation/>> accessed 5 April 2024.

<sup>25</sup> Implementing Decision (EU) 2022/2506 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, 15 December 2022.

<sup>26</sup> Federico Fabbrini, *EU Fiscal Capacity Legal Integration after Covid-19 and the War in Ukraine* (OUP 2022) 106–20. See this chapter (Ch 5) for a case study on Italy's implementation of NGEU.

<sup>27</sup> See COM (2021) 344 final, Annex to the Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Italy SWD (2021) 165 final, 1–5.

to reduce disposition time. To reduce the backlog of civil cases, proposed solutions include strengthened ADR and temporary hiring of staff like law clerks.

Of the M&T Italy has already achieved, several of them have directly related to the Italian justice system and these have fallen into three broad categories: (1) Investment in the recruitment procedures of staff for civil, criminal and administrative courts; (2) Reform of criminal justice; and (3) Reform of civil justice.

In terms of the first of these areas, investment in court recruitment procedures resulted in Italy reaching two milestones. These were reached initially in April 2022 with the entry into force of special legislation governing NRRP recruitment and subsequently with the start of the recruitment procedures for administrative courts in November 2022.

Second, in the area of reform of criminal justice, implementing legislation came into force in this area in late 2021 via Decree-Law No. 152/2021 and other secondary legislation. This reform aims to streamline criminal proceedings, strengthen monitoring of the courts, and introduce incentives to reduce the length of proceedings in all criminal courts.

Third, for reform of civil justice, enabling legislation came into force in this area in late 2021 via Decree-Law No. 152/2021 and other secondary legislation. This reform aims to ensure binding time frames for proceedings, introduce mediation and alternative dispute resolution (ADR), strengthen monitoring systems, and increase the productivity of civil courts.<sup>28</sup>

### 3.2 M&T for Poland

Milestones for Poland aim at raising the standard of judicial protection thereby improving the investment climate. They are divided into six ‘components’, with component F concerning ‘Quality of Institutions’. This contains three key milestones that attempt to go some way in addressing the rule of law crisis in Poland and these are labelled F1G, F2G and F3G. Milestone F1G is the most far-reaching and requires reform that would strengthen the independence and impartiality of courts. This milestone has five subheadings that cover:

(a) the scope of jurisdiction of the Supreme Court Chamber, other than the existing Disciplinary Chamber; (b) clarifying the scope of judicial liability, by ensuring that the right to submit requests for preliminary rulings is not restricted; (c) reform determining that the content of judicial decisions is not classified as a disciplinary offence; (d) that in proceedings, it can be verified that judges meet the requirements of being independent, impartial and ‘being established by law’, according to Article 19 TEU where a serious doubt arises on that point; and (e) that procedural guarantees are strengthened.

Milestones F2G and F3G require reforms to remedy the situation of judges affected by the decisions of the Disciplinary Chamber of the Supreme Court in disciplinary cases and judicial immunity cases. Commission President Von der Leyen had outlined the major conditions for Poland to receive funding under its NRRP in October 2021 and these included the dismantling of its disciplinary chamber, ending or reforming Poland’s disciplinary regime, and the starting of a process for reinstalling former judges.<sup>29</sup> Both the disciplinary chamber and the discipli

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<sup>28</sup> See ‘Italia Domani, the National Recovery and Resilience Plan’, Progress on the implementation of the plan: <<https://www.italiadomani.gov.it/content/sogei-ng/it/en/home.html>> accessed 3 January 2023.

<sup>29</sup> The disciplinary chamber refers to a unit established within the national prosecutor’s office in 2016 tasked with investigating judges and prosecutors, as well as a new disciplinary regime for judges.

nary regime appear to violate EU law by failing to demonstrate any degree of operational and investigative independence.<sup>30</sup> The Commission's change in stance was not brought about by concrete improvements in the rule of law in Poland but rather seems to have been a reaction to the invasion of Ukraine and the difficulties encountered by Poland in the aftermath of this. This 'capitulation' faced an unusual level of resistance with five Commissioners, including Vice-Presidents Timmermans, Jourová and Vestager, voting against or submitting written concerns against the resolution.<sup>31</sup>

On 13 December 2022, Poland reached an agreement with the Commission on legislation that if enacted would lead to the release of funds.<sup>32</sup> It appears that the invasion of Ukraine had an impact on the reaching of an agreement here. This led to an increased urgency in Poland to receive funding. While there is no legal reason for the Commission to relax its expectations in the area of the rule of law due to Russia's invasion of Ukraine,<sup>33</sup> it appears that the approval comes as an acknowledgement of Poland's efforts amidst a crisis unprecedented in modern times. While some acknowledgement of these efforts may be a good thing, the Commission must avoid any perception that the rule of law is negotiable and that cross-issue linkages can be made in a kind of bargaining process. In December 2023, EU Budget Commissioner Hahn said they will 'find ways' to unblock funds.<sup>34</sup> There is hope that a new Polish government, formed after the October 2023 elections, may be able to meet the M&T agreed with the Commission and release a first tranche of funds in 2024. That said, funds should only be released where objective criteria have been met otherwise such a decision would be viewed as political.

### 3.3 M&T for Hungary

Hungary's 'super milestones' are listed in the Annex to the proposal for a Council Implementing Decision on the approval of the assessment of Hungary's NRRP.<sup>35</sup> The Annex contains 270 M&T in total, 27 of which are rule of law related 'super milestones'. These M&T relate to the prevention of fraud and corruption (160, 166, 169, 171), transparency surrounding public

<sup>30</sup> Joined Cases C-83/19, C-127/19 and C-195/19 *Asociatia Forumul Judecatorilor Din Romania v Inspectia Judiciara*, 23 September 2020, Opinion of Advocate General Bobek, para 269. For these Joined Cases, see also [2021] 3 CMLR 27, ECLI:EU:C:2021:393.

<sup>31</sup> Lili Bayer, 'Amid Commission rebellion, von der Leyen defends Polish recovery cash plan' (*Politico*, 2 June 2022) <<https://www.politico.eu/article/amid-commission-rebellion-von-der-leyen-defends-polish-recovery-cash-plan/>> accessed 5 April 2024.

<sup>32</sup> Natalia Ojewska and Stephanie Bodoni, 'Poland Agrees With EU on Legal Changes to Free Funds' (*Bloomberg*, 13 December 2022) <<https://www.bloomberg.com/news/articles/2022-12-13/poland-says-agreed-with-eu-on-legal-changes-to-free-funds?sref=vtgjJEDZ%2520via&leadSource=uverify%20wall>> accessed 29 December 2023.

<sup>33</sup> Mayer (n 24).

<sup>34</sup> Euractiv, 'EU to find way to help Poland access frozen funds, Commission says' (14 December 2023) <<https://www.euractiv.com/section/elections/news/eu-to-find-way-to-help-poland-access-frozen-funds-commission-says/>> accessed 22 December 2023.

<sup>35</sup> The relevant milestones for the rule of law are numbers 160, 166, 169, 171, 174, 175, 195, 197, 198, 200, 201, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227 and 228. See Annex 1 of Niall Moran, 'The evolution of conditionality in EU financial assistance under the Recovery and Resilience Facility', REBUILD Centre Working Paper No. 5 (2023), for the content of these milestones.

spending and public procurement (174, 175, 195, 197, 198, 200, 201), strengthening judicial independence (213–216), reinforced legal provisions setting out implementation arrangements guaranteeing the sound use of Union support in a manner free of corruption (217–221), effective use of Commission data-mining and risk scoring tools (222, 223), enhanced audit and anti-corruption controls for Union support and the NRRP (224–228).

On 30 November 2022, the Commission presented its assessment of Hungary's performance under the conditionality procedure. It endorsed Hungary's NRRP conditional on the full and effective implementation of the 27 'super milestones'. Without attaining these M&T related to the rule of law, the Commission stated that 'no payment under the RRF is possible'.<sup>36</sup> In December 2023, the decision was taken to unblock EUR 10.2 billion in cohesion funding for Hungary while funds linked to its NRRP remained blocked.

### 3.4 Comparison

The M&T for Italy, Poland, and Hungary are very different in the areas of justice and law reform in terms of their content as well as the extent to which they are pre-requisites for the release of funding under the RRF. Some M&T are weightier than others. Milestone F1G for Poland is very broad and covers five areas of reform for Polish courts. Other M&T relate to more minor matters that can be remedied with an uncontroversial legislative provision.

Hungary's M&T in the area of justice and law reform are the most wide-ranging and they operate as pre-conditions for the receipt of funding under the RRF. Poland's M&T focus on three main areas, while Italy's relate to different areas, namely civil and criminal proceedings as well as anti-corruption. Unlike Poland, where the M&T in this area focus on judicial independence, Hungary's 27 super milestones concern a broader range of activities encompassing public spending and public procurement as well as audit and anti-corruption controls.

## 4. CONDITIONALITY UNDER COHESION POLICY

This section introduces conditionality under EU cohesion policy and sets out some major recent changes in this area. Unlike the RRF, EU cohesion policy has been a longstanding feature of EU policy existing in various forms since the Treaty of Rome in 1957, which set up the European Economic Community, and established the European Social Fund.<sup>37</sup> EU cohesion policy is currently funded through five European structural and investment funds (ESIFs) including the European Social Fund Plus (ESF+), the European Regional Development Fund (ERDF), the Cohesion Fund (CF), the European Agricultural Fund for Rural Development, and the European Maritime, Fisheries and Aquaculture Fund. This funding will account for EUR 361 billion of funds from the EU's Multiannual Financial Framework (MFF) for

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<sup>36</sup> European Commission press release, *Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds* (30 November 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7273](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7273)> accessed 29 December 2023.

<sup>37</sup> Treaty of Rome, Titre 3, Chapitre 2, 'Le Fonds Social Européen', Articles 123–128, <<https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT>> accessed 15 November 2023.

2021–27.<sup>38</sup> In total, the MMF will provide EUR 1.2 trillion in funding during this period. Cohesion policy funding is mostly distributed through grants to Member States, including directly at the sub-national level of government. This policy aims to reduce regional disparities within and among Member States across the EU. Like the RRF, cohesion policy supports key EU goals, including the green and digital transition.

A 2017 European Court of Auditors (ECA) Report lamented the fact that there was no legal provision that would permit the Commission to initiate suspension procedures where results in cohesion policy are not achieved.<sup>39</sup> In the 2014–20 MFF, a performance framework was introduced to cohesion policy that included the possibility of suspending payments. Article 142 of the 2013 Common Provisions Regulation<sup>40</sup> set out that payments may be suspended where there are serious deficiencies in the functioning of programmes. While this was a positive development, the procedure for suspending payments proved difficult to work in practice.<sup>41</sup> Until 2021, no net financial corrections had been imposed on any Member State for the 2014–20 period.<sup>42</sup>

The 2021 Common Provision Regulation strengthens the performance dimension of cohesion funding. Annex III sets out ‘enabling conditions’, which are successors to the ‘ex-ante conditionalities’ of the 2013 Common Provision Regulation. These are defined as ‘prerequisite conditions for the effective and efficient implementation of the specific objectives’ (Article 2). Specific rules apply to each Fund in line with their specific missions pursuant to their Treaty-based objectives. Unlike for the period 2014–20, Member States are required to abide by these enabling conditions and the suspension of payments (or non-reimbursement of costs) will be ‘automatic’ under Article 15.<sup>43</sup> Expenditure ‘shall not be reimbursed by the Commission until the Commission has informed the Member State of the fulfilment of the enabling condition’ (Article 15.6). Annex III contains four horizontal enabling conditions

<sup>38</sup> This is a slight increase from EUR 346 billion for the 2007–13 period and EUR 349 billion for the 2014–20 period. See European Court of Auditors (ECA), ‘Protecting the EU budget from irregular spending: The Commission made increasing use of preventive measures and financial corrections in Cohesion during the 2007–2013 period’, Special Report 4/2017 (2017) 9.

<sup>39</sup> ECA (n 38) para 25.

<sup>40</sup> Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, 17 December 2013.

<sup>41</sup> The ECA found that this was because the Commission required ‘sufficient information’ to act, while Member States were not obliged to report systematically; ‘Without a clear and measurable link in the CPR between EACs and the achievement of OP specific objectives, it was almost impossible for the Commission to justify suspension decisions.’ See ECA, ‘Performance-based financing in Cohesion policy: worthy ambitions, but obstacles remained in the 2014–2020 period’, Special Report 24/2021, paras 31–32. See also European Parliament Study, Eulalia Rubio et al. ‘The tools for protecting the EU budget from breaches of the rule of law: the Conditionality Regulation in context’, PE 747.469 (2023) 41.

<sup>42</sup> ECA (n 38) para 104.

<sup>43</sup> See Common Provisions Regulation (n 2).

on: (1) monitoring public procurement, and the application of (2) the Charter of Fundamental Rights, (3) State aid rules, and (4) the UN Convention on the rights of persons with disabilities. Member States must comply with these horizontal enabling conditions. A significant development in this area is that the Commission has referred to the enabling condition on the Charter of Fundamental Rights as part of its rule of law toolbox.<sup>44</sup>

A substantial amount of cohesion funding has been withheld from Hungary and Poland for failure to comply with this enabling condition. In its self-assessment for its operational programmes, Polish authorities indicated that Poland did not *currently comply with the enabling condition on the Charter*.<sup>45</sup> The amount withheld as a result of this is circa EUR 75 billion in cohesion funds.<sup>46</sup> It is however difficult to ascertain the exact amount of suspended cohesion funding in the absence of relevant documents being publicly available, a situation described by Pech et al. as ‘unacceptable’.<sup>47</sup> Where there is a lack of transparency with a suspension of funding on this scale, ‘there cannot be any accountability’ in the absence of relevant details on the legal basis and rationale(s) for the suspension and there is concern that the suspension could be lifted for political reasons.<sup>48</sup>

Despite the appearance that this would be a tough new form of conditionality, the Commission announced on 13 December 2023 that EUR 10.2 billion in cohesion funding would be unblocked for Hungary. This decision was met with dismay.<sup>49</sup> There was a perception that this decision was linked to the European Council vote on 14 December 2023 to open accession negotiations with Ukraine.<sup>50</sup> The Commission found that Hungary had taken measures sufficient to meet the horizontal enabling condition of the EU Charter of Fundamental Rights on judicial independence. While the Hungarian Parliament did approve certain judicial reforms in May 2023, there is a credible perception that the unblocking of funding was linked to a European Council vote. While Article 15 of the 2021 Common Provision Regulation undoubtedly strengthens the potential to apply conditionality to cohesion funding, the EU

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<sup>44</sup> European Commission Factsheet, ‘The EU’s rule of law toolbox’ (2023) <[https://commission.europa.eu/system/files/2023-07/112\\_1\\_52675\\_rol\\_toolbox\\_factsheet\\_en.pdf](https://commission.europa.eu/system/files/2023-07/112_1_52675_rol_toolbox_factsheet_en.pdf)> accessed 15 November 2023.

<sup>45</sup> European Commission press release, *EU Cohesion Policy: €3.85 billion for a just transition toward climate neutral economy in five Polish regions* (5 December 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7413](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7413)> accessed 20 December 2023.

<sup>46</sup> ‘How EU Is Withholding Funding to Try to Rein In Hungary, Poland’ *Washington Post* (2 January 2023) <[https://www.washingtonpost.com/business/how-eu-is-withholding-funding-to-try-to-rein-in-hungary-poland/2022/12/30/ba3641fc-8818-11ed-b5ac-411280b122ef\\_story.html](https://www.washingtonpost.com/business/how-eu-is-withholding-funding-to-try-to-rein-in-hungary-poland/2022/12/30/ba3641fc-8818-11ed-b5ac-411280b122ef_story.html)> accessed 15 November 2023.

<sup>47</sup> See Laurent Pech, Anna Wójcik and Patryk Wachowiec, ‘The Case For Activating The Rule Of Law Conditionality Regulation In Respect Of Poland’ (a study commission by the Greens/EFA Group in the European Parliament) (2023) 50–51.

<sup>48</sup> *ibid* 51.

<sup>49</sup> There are concerns that the proposed legislative solutions do not remedy outstanding deficiencies in the area of judicial reform and may indeed make things worse. See Erika Farkas and András Kádár, ‘Trick and Treat?: Hungary’s Game of Non-Compliance’ (*VerfBlog*, 12 December 2023) <<https://verfassungsblog.de/trick-and-treat/>> accessed 19 December 2023.

<sup>50</sup> Nicolas Camut, ‘Commission unblocks €10.2B for Hungary as EU tries to sway Viktor Orbán on Ukraine’ (*Politico*, 13 December 2023)

institutions must endeavour to avoid even the perception that a finding of compliance with the Charter can be the subject of bargaining.

For both cohesion policy and the RRF, the Commission carries out control and audit activities. For cohesion policy, this has mainly focused on the regularity of incurred expenditure,<sup>51</sup> while for the RRF the focus is on the satisfactory attainment of M&T.<sup>52</sup> Under the RRF, payments are only approved by the Commission when M&T indicated in the NRRPs have been reached. Cohesion policy differs in that there has generally been no preventive measures or financial corrections for the underachievement of results.<sup>53</sup> The performance dimension of cohesion funding has been strengthened for the 2021–27 period. Until the 2021 Common Provisions Regulation, performance had been disconnected from payments for EU cohesion policy.<sup>54</sup> If a project failed to meet its objectives, it remained eligible for EU funding under ESIFs.<sup>55</sup> In contrast, under the RRF, the Commission must suspend all or part of a payment if milestones or targets have not been satisfactorily achieved.<sup>56</sup>

Cohesion funding has been linked to outputs rather than results (i.e. outcomes and impacts).<sup>57</sup> The RRF has done likewise. There is a general view that programmes should be designed around outcomes (or results) rather than outputs.<sup>58</sup> A 2022 ECA Report found that ‘most’ M&T across a sample of six NRRPs were output-oriented (e.g. charging stations installed) and at least half of the NRRPs contained input indicators such as spending targets.<sup>59</sup> Like the MFF, the RRF has a six year timeframe (from 2021–26). It may be that output-based assessments, rather than results-based assessments, are better suited to this relatively short timeframe.

The 2023 ECA Review finds that the extent to which RRF financing is more performance-based than cohesion policy funds remains to be seen.<sup>60</sup> The incentive structure under the RRF has however provided a greater check on poor performance than that of cohesion policy, at least prior to the CPR (2021). For those seeking to unlock funding under the RRF, the mindset should be ‘is this action in furtherance of attaining a target or milestone that will unlock RRF funding?’ In contrast, for cohesion policy funds, the mindset at least up until 2021, need only have been ‘could this payment be deemed to be irregular?’<sup>61</sup> The former approach promotes stronger performance and provides more of a check where an output-based approach is employed. For cohesion policy funds, there has been a risk that funds may be used

<sup>51</sup> ECA, ‘EU financing through cohesion policy and the Recovery and Resilience Facility: A comparative analysis’, Review 1/2023, para 91.

<sup>52</sup> *ibid* para 94.

<sup>53</sup> See ECA, ‘Protecting the EU budget from irregular spending: The Commission made increasing use of preventive measures and financial corrections in Cohesion during the 2007–2013 period’, Special Report 4/2017 (2017) para 25.

<sup>54</sup> See ECA (n 38) para 77.

<sup>55</sup> See e.g. under the ERDF and CF. ECA, ‘Maritime transport in the EU: in troubled waters – much ineffective and unsustainable investment’, Special Report, 23/2016, para 80.

<sup>56</sup> See section 3 for more detail.

<sup>57</sup> ECA (n 38) para 80.

<sup>58</sup> See e.g. OECD report, ‘OECD Best Practices for Performance Budgeting’ GOV/PGC/SBO(2018)7, 22.

<sup>59</sup> ECA, ‘The Commission’s assessment of national recovery and resilience plans’, Special Report 21/2022, para 88.

<sup>60</sup> ECA (n 38) para 65.

<sup>61</sup> See ECA (n 38) paras 60, 91–93.

in a sub-optimal or futile manner so long as this fell short of irregular spending. Unfortunately, there is evidence that such spending has occurred under EU cohesion policy where EU-funded investments have not produced their intended objectives or results but remain eligible for funding.<sup>62</sup>

## 5. LEARNING FROM PAST EXPERIENCE OF CONDITIONALITY

This section considers how conditionality operates in practice under the RRF, the appropriateness of linking funding to fundamental values of EU law, and reflects on lessons in these various contexts where conditionality applies. As seen with the M&T set for Italy, for Member States that do not suffer from rule of law backsliding, further M&T are set in this area which must be achieved in order to access RRF funding. Does such a system incentivise Member States to drag their heels on certain reforms, knowing that at some point they can be used in a quid pro quo with Brussels?

If this form of conditionality represents a new system of economic governance, the Commission needs to think carefully about the incentive structures that it will bring about. Reaching the M&T agreed with the Commission translates into valuable grants and loans for governments. By late 2023, Italy had reached 150 M&T and received EUR 85.4 billion in grants and loans.<sup>63</sup> Thus reaching a M&T set out in a NRRP is very valuable. Each milestone or target reached was worth EUR 469 million for Italy during this period.

Vigilance in terms of the rule of law, or proactivity in any area where the Commission sets M&T, must be rewarded. Finding a system that does this well is complicated but may, for example, involve setting M&T that are more investment-focused rather than reform-focused for Member States that are vigilant or proactive.

The Commission has a scoreboard for each Member State where fulfilled M&T are listed as well as the step(s) taken to reach that milestone or target.<sup>64</sup> Where a Member State reaches a milestone or target, it is unclear what would happen if it were to regress in this area once funding from the RRF has been received, beyond removing it from the scoreboard. If a Member State were to undo a reform for which it had received EU funding, there should be a mechanism in place to penalise that Member State through an obligation to repay or the withholding of future payments under the RRF or another instrument such as the multiannual financial framework (MFF).

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<sup>62</sup> A 2016 ECA Special Report documents that of 37 newly examined port infrastructure projects, 12 of these were ‘not being used (empty) or were heavily underused’. See ECA (n 38) para 53 and 80.

<sup>63</sup> European Commission press release, *Commission endorses positive preliminary assessment of Italy’s request for €16.5 billion disbursement under the Recovery and Resilience Facility* (28 November 2023) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_6102](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6102)> accessed 19 December 2023.

<sup>64</sup> European Commission, ‘Recovery and Resilience Scoreboard’ <[https://ec.europa.eu/economy\\_finance/recovery-and-resilience-scoreboard/country\\_overview.html?lang=en](https://ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/country_overview.html?lang=en)> accessed 19 December 2023.

One might imagine that conditionality in the context of an investment package would be less controversial than other forms of conditionality examined in this chapter. This has not proved to be the case as conditionality in the RRF has been used as a tool to address the rule of law crisis in the EU. In 2022–23, the Commission suspended EUR 32.4 billion in EU funds for Hungary. This included EUR 27.8 billion that was suspended in 2022 made up of EUR 22 billion in cohesion funds<sup>65</sup> and EUR 5.8 billion that was linked to its NRRP. In November 2023, Hungary's REPowerEU chapter added EUR 4.6 billion to the amount linked to its NRRP. The receipt of funding linked to the Conditionality Regulation is conditional on Hungary enacting 17 reforms and anti-corruption measures.<sup>66</sup> Some of these reform measures overlap with Hungary's 27 'super milestones' under its NRRP.

While justice reforms under the RRF such as reducing the length of proceedings may be difficult to oppose, concerns have been raised where M&T relate to fundamental values of EU law, which have always been binding on EU Member States.

Alemanno argues that labelling compliance with EU law as milestones 'produces the perverse effect of providing financial incentives to comply with pre-existing and generalised legal obligations that bind all Member States'.<sup>67</sup> This raises the question of whether there can be any legitimacy to M&T relating to compliance with pre-existing obligations under EU law.

Rewarding Member States financially for complying with fundamental EU values, such as the rule of law, creates perverse incentives. Funding from the EU's post-pandemic economic recovery package certainly represents a carrot for those Member States that have regressed in relation to the rule of law. However, the rule of law crisis is arguably the most serious crisis the EU has faced among a strong list of contenders (the euro-crisis, the refugee crisis, Brexit, etc). It has been described as the only one that poses a potentially existential threat to the EU as a political and legal order.<sup>68</sup>

Aside from the question of the legitimacy of using milestones to induce compliance with the rule of law, the question of the EU's resolve to withhold funding on the basis of this fundamental issue was called into question on 13 December 2023. The Commission unblocked EUR 10.2 billion in frozen EU cohesion funds for Hungary the day before a vote on the opening of accession negotiations for Ukraine (Orbán subsequently left the room during this European Council vote). However, as Hungary's super milestones had not been fully complied with,

<sup>65</sup> EUR 6.3 billion of this EUR 22 billion was cut under the Conditionality Regulation. This was 84% of the EUR 7.5 billion amount recommended to be cut by the Commission. These measures are reversible if Hungary fully remedies the situation within two years to the satisfaction of the Commission and the Council; see press release, *Rule of law conditionality mechanism* (12 December 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism>> accessed 5 April 2024.

<sup>66</sup> See Annexes to the Explanatory Memorandum of the Commission proposal for a Council implementing decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary (18 September 2022) <[https://commission.europa.eu/system/files/2022-09/com\\_2022\\_485\\_1\\_en\\_annex.pdf](https://commission.europa.eu/system/files/2022-09/com_2022_485_1_en_annex.pdf)> accessed 5 April 2024.

<sup>67</sup> Alberto Alemanno, 'Censuring von der Leyen's Capitulation on the Rule of Law' (*VerfBlog*, 8 June 2022) <<https://verfassungsblog.de/censuring-von-der-leyens-capitulation-on-the-rule-of-law/>> accessed 5 April 2024.

<sup>68</sup> R Daniel Kelemen, Encompass, 'Europe's quiet crisis' (April 2021) <<https://encompass-europe.com/comment/europees-quiet-crisis>> accessed 5 April 2024.

around EUR 22 billion remained blocked. Where there is a credible perception that the release of funds is linked to other issues, such as the use of a veto at the European Council, this creates a perception that the rule of law is negotiable.

Withheld funds represent serious leverage in the rule of law crisis. The M&T contained in NRRPs represent a form of pragmatism that could only be considered to be a positive step if they bring about the stated goals of the M&T in an unequivocal and enduring manner. The green light for funding under the RRF or cohesion policy must only be given if reforms are brought about in this manner. Anything short of this would result in a loss of credibility for the EU and its institutions. Respect for fundamental values must be a core component of the RRF and cohesion policy. The significance of these lessons may well last into the future with calls for NGEU<sup>69</sup> to be reproduced beyond the Covid-19 pandemic.<sup>70</sup>

To reflect on some of the lessons taken from this chapter's survey of the application of conditionality in a series of different contexts, it is important to acknowledge that while each context presents lessons that may be applied across the board, there remains a fundamental distinction between conditionality in the context of lending, spending, and accession. Section 2 provided a common definition applying to all of the contexts, but the conditionality in each context differs firstly in terms of the leverage of the conditionality actor and the conditionality recipient.<sup>71</sup> The conditionality actor arguably has most leverage in the context of crisis lending. Under the RRF (concerning spending conditionality), certain northern members were permitted to 'respond shallowly' to certain recommendations or even leave them 'almost completely unaddressed'.<sup>72</sup>

In the context of accession, lessons included the importance of having binding commitments before giving up leverage (accession). The potential relevance of each of these lessons should be clear in relation to the RRF and cohesion policy.

Conditionality under cohesion policy and the RRF primarily relates to spending. Spending conditionality is relatively novel and as Vita finds, contrary to other EU conditionality arrangements, it is 'subject to the rules and principles of EU internal legal order, including the Charter, and is subject to judicial review in EU courts'.<sup>73</sup> The context of spending provides a powerful tool for the promotion of good governance and the coordination of economic and fiscal policies across the EU. Indeed an overarching lesson from the various contexts surveyed in this chapter was the requirement that conditionality be credible and that good or bad behaviour will receive an appropriate response.<sup>74</sup> In order to deliver on this, the Commission must avoid any perception that the rule of law or compliance with the Charter of Fundamental

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<sup>69</sup> It is recalled that 90% of NGEU funds are allocated to the RRF.

<sup>70</sup> See e.g. the Conference on the Future of Europe underlined the importance of endowing the EU with the financial means to back up its actions, including by reproducing the 'Next Generation EU' (NGEU) funding model beyond the Covid-19 pandemic. See Federico Fabbrini, 'Review and reform: Options for deepening EU-UK cooperation in a renewed Europe' in Federico Fabbrini (ed), *The Law & Politics of Brexit: Volume V* (OUP 2024).

<sup>71</sup> These terms are used by Fierro (n 4) 95.

<sup>72</sup> See chapter 10 by Jonathan Zeitlin, David Bokhorst, and Edgars Eihmanis in this volume.

<sup>73</sup> Vita (n 4) 28.

<sup>74</sup> See Frank Schimmelfennig, 'EU Political Accession Conditionality after the 2004 Enlargement: Consistency and Effectiveness' (2008) 15(6) *Journal of European Public Policy* 918–37, 920.

Rights is negotiable. Where funds are blocked on these grounds, the release of funds should only be possible as part of a transparent process with a clear procedure and timeline. Any deviation from this will lend credibility to the idea that the release of funds is political, and the perception that EU values are negotiable. In relation to Hungary, RRF financing remains fully blocked as the super milestones have not been fully complied with (unlike cohesion policy funds which were blocked due to Hungary's non-compliance with the Charter of Fundamental Rights). There are also potential overlaps between the M&T/ reform measures found in the RRF and those under cohesion policy linked to the Conditionality Regulation. While these sets of measures relate to separate negotiations, there may be attempts to try to create synergies between these programmes where these M&T have overlaps.

For cohesion policy, other lessons from past experience included the importance of linking funding to performance (a results-based approach) and providing checks where an output-based approach is employed. Under the RRF, while it might be early to draw lessons, the observation was made that conditionality must be employed in a way that creates the right incentive structures for Member States, rewarding vigilance in terms of the rule of law, and punishing regression on M&T for which funding has been released.

From the IMF and the context of lending, lessons included: recognising the conditions for when tighter conditionality is required; the importance of clarity between milestones and programme objectives; the questionable nature of cross-conditionality; and the question of when it is necessary to front-load a critical mass of reforms. A final difficulty underlined in this context was where these lessons appear to be conflict. The IMF practice of front-loading a critical mass of reforms in crisis situations could conflict with any attempt to deal with the rule of law crisis in Poland and Hungary in a piecemeal or gradual manner. Prioritisation is also an important principle in IMF programmes and the question may arise as to how this should be balanced against other potential solutions; should certain milestones be prioritised and addressed first or is front-loading a critical mass of reforms the appropriate solution?

## 6. CONCLUSION

The RRF's system of M&T represents a results-based approach that is similar to cohesion policy after 2021. This chapter considered the nature of conditionality in these two contexts and compared it to prior examples of conditionality in the EU and under other programmes. Both the RRF and cohesion funds employ spending conditionality. This context needs to promote good governance as well as the coordination of economic and fiscal policies across the EU. An overarching lesson from the various contexts surveyed was the requirement that conditionality be credible. If the form of conditionality under the RRF represents a new system of economic governance,<sup>75</sup> the Commission needs to think carefully about the incentive structures it will create. Systems of governance must reward the vigilant. Vigilance in terms of the rule of law, or proactivity in any area where the Commission sets M&T, must be rewarded. This may involve setting M&T that are more investment-focused rather than reform-focused for Member States that are vigilant or proactive and penalising those that regress on M&T for which they have received EU funding.

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<sup>75</sup> Fabbrini (n 26) 72.