Limiting Commission Discretion in EU Funding Conditionality

Protecting Conditionality Under the Next EU Budget

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18.03.2026 doi: 10.59704/304a672059e33ee1

When the Commission sets the criteria for releasing EU funds, can it later decide not to follow them? Advocate General Ćapeta's Opinion in *Parliament v Commission* observes that the Commission prematurely released funds despite Hungary not fulfilling many pre-established conditions. The Commission itself had set these criteria. This is part of a broader pattern of conditionality compliance not always being taken particularly seriously, as seen also in relation to enlargement.

Limiting discretion and boosting accountability are two ways to address this problem. This matters especially because the Commission's proposal for the National and Regional Partnership Plans (NRPP) Regulation leaves important gaps in its new conditionality mechanisms.

Commission discretion and the standard of judicial review

The degree of discretion afforded to the Commission in assessing compliance with horizontal conditions is crucial. It determines whether the Court can conduct a full or more limited review of the Commission's relevant act. A full review implies that findings of mere errors of assessment are sufficient to trigger annulment. By contrast, *manifest* errors of assessment are necessary where the Commission enjoys discretion. This distinction therefore goes to the institutional balance between the Commission and the Court. Where Commission discretion is broad, judicial review becomes largely deferential; where it is narrow, the Court effectively becomes the ultimate guarantor of compliance.

The Advocate General distinguishes between the degree of Commission discretion in the two stages of the procedure for suspending funds. The first step is the Commission's initial decision to suspend funds and to lay down concrete requirements that must be satisfied for their release. The second step is the Commission's assessment of whether those conditions have been met. According to the Advocate General, the Commission enjoys "certain discretion" in the first step, whereas it does not have any discretion in the second step.

Thus, the Advocate General constructs a bifurcated model of discretion. At stage one, the Commission defines the content of compliance. At stage two, it simply verifies whether those requirements have been met. This separation implies that once the Commission has concretised the horizontal conditions into specific benchmarks, it is bound by them, with the second stage becoming a verification exercise.

Stage one: boundaries and legal constraints

The Advocate General acknowledges that there are certain "boundaries" to stage-one discretion, though these are unspecified. It is hence worth exploring these boundaries.

Where the Commission suspends certain funds and establishes criteria for their release, it is bound by the limits of the horizontal conditions themselves. These are further detailed in a Common Provisions Regulation (CPR) annex. It goes beyond requiring the mere existence of rules that are formally Charter-compliant. Instead, it requires their "effective application and implementation". The NRPP proposal lays down similar requirements, namely i) putting in place

and maintaining effective mechanisms to ensure the measures and their implementation are compliant with the Charter; and ii) respect for the rule of law throughout the fund's implementation. These requirements ensure that, when laying down the conditions for the release of funds, the Commission must demand practical compliance. It cannot provide for the mere adoption of laws or amendments thereto but must instead require that they are actually applied by authorities. Indeed, a "formalistic compliance logic" is not enough.

This has important implications for the Commission's stage two discretion. Several of Parliament's pleas would have failed if the Commission had been allowed to lay down conditions that required only formal compliance. For instance, the Advocate General advised upholding several objections precisely on the grounds that certain measures adopted by Hungary were only applicable *after* the Commission decision approving the release of funds (e.g. reforms to university laws, the national judicial council, and rules related to preliminary references).

Stage two: verification without discretion

However, according to the Advocate General, there was another critical factor that made a full review of the Commission's decision approving the release of previously suspended funds possible. This was the explicit inclusion of a clause in the CPR stating that "An enabling condition is fulfilled where all the related criteria are met". Indeed, the Advocate General directly connected the lack of discretion to this statement, which she interpreted as including "the specific Charter [horizontal enabling condition] requirements established for a particular Member State in approval decisions".

By contrast, the conditionality provisions of the proposed NRPP Regulation do not contain a comparable clause. In fact, nothing in the current proposal expressly requires the Commission to ensure the conditions it had initially laid down have been met. This leaves the door open to arguments that the Commission maintains a margin of appraisal when assessing compliance. It could claim that progress is sufficient, even if the benchmarks are not fulfilled. That would reintroduce discretion at stage two and thus reduce the intensity of judicial review.

Of course, a teleological interpretation of the Regulation (as done by the Court in relation to the Conditionality Regulation) would lean in favour of the implied existence of such a requirement. The purpose of the conditionality rules as set out in the NRPP Regulation is to ensure that EU funds are implemented in compliance with EU values. This would be undermined if the Commission were able to deviate from the conditions it had set when reassessing whether to release funds. Moreover, the principle of effectiveness also supports interpreting the Regulation as requiring strict compliance with the predefined benchmarks.

Still, for the avoidance of doubt, it would be preferable to include an explicit clause making the release of funds conditional upon the full fulfilment of the Commission's own pre-established criteria. Such a clause would codify the Advocate General's logic and a rule-based model of conditionality.

A further way to strengthen the obligation of the Commission and limit its discretion in this respect would be to amend the proposed Article 7 on horizontal principles. At present, Article 7 requires the Member States to design measures in a way that respects the Charter and the rule of law. In comparison, its counterpart in the CPR obliges the Member States as well as the *Commission* to ensure respect for the Charter in the implementation of the funds. Including such a clause in the NRPP Regulation would ensure that the Commission acts as a co-guarantor of compliance and is required to ensure full respect for EU values when laying down conditions and when reassessing compliance.

Transparency as a structural constraint on Commission discretion

As can be seen, the intensity of review at stage two depends on how rigorously the Commission frames the stage one conditions. To ensure that the Commission continues to require sufficiently strong benchmarks, further mechanisms are required to help ensure the creation of sufficiently strong benchmarks. Trans-

parency is central among these mechanisms in its ability to act as a disciplining device that is both *ex ante* and *ex post* in nature. It works *ex ante* by incentivising the drafting of robust and defensible benchmarks, and *ex post* by enabling scrutiny of whether those benchmarks reflect the horizontal conditions.

The Advocate General rightly criticises that "many steps relating to the use of the EU funds and the implementation of different forms of conditionality in that respect are not sufficiently transparent". She notes that this is "at odds with the principle of democracy as it makes it difficult for EU citizens to understand how and why many of the budgetary decisions are taken". She is therefore in favour of the publication of the Commission approval decisions.

Under the proposed NRPP, the rule of law horizontal condition provides that the Commission shall inform Parliament of any decision related to non-fulfilment of the condition or any repeals thereof. The proposal does not include such a requirement for the Charter condition. This implicit hierarchisation is a critical oversight. Parliament would be unable to effectively exercise its traditional scrutinising role, undermining proper inter-institutional balance. There is no clear reason for this omission that is capable of normative justification. Fundamental rights and the rule of law are interdependent and attributed equal importance as values on which the Union is founded.

Moreover, there are currently no plans to publish acts laying down the specific criteria to be met for the release of suspended funds and the acts subsequently releasing the funds. This directly contradicts the principle of openness contained in Articles 10(3) TEU and 15(1) TFEU. It also prevents civil society from serving its watchdog function. Without access to their content, it is impossible to assess whether the Commission has translated abstract requirements into sufficiently concrete and measurable obligations that are subsequently fulfilled by the Member State. Transparency strengthens indirect accountability by enabling civil society to provide vital inputs and insights to actors who *can* hold the Commission accountable. I refer here in particular to the European Parliament in its ability to legally challenge such decisions, but also to the European Ombudsperson.

For transparency to fulfil its intended purpose, it must also be ensured that the Commission provides duly justified reasons for its decisions. While this obligation is implied by the budgetary framework, as noted by the Advocate General, it would benefit from explicit codification in the NRPP Regulation. Indeed, reason-giving is an indispensable complement to publication. Mere disclosure without explanation of how each benchmark has been assessed cannot meaningfully constrain discretion.

Conclusion

The strength of the NRPP's conditionality architecture is fundamentally dependent on the limits placed on Commission discretion and on the incorporation of accountability mechanisms. The NRPP Regulation should require full compliance with pre-established benchmarks, extend horizontal obligations to the Commission, and embed robust requirements of transparency, the duty to give reasons, and publication. This would ensure a governance model that is itself grounded in rule of law principles and would simultaneously reinforce the EU's commitment to its values.

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SUGGESTED CITATION

Veraldi, Jacquelyn D.: Limiting Commission Discretion in EU Funding Conditionality: Protecting Conditionality Under the Next EU Budget, Verfassungsblog, 18.03.2026, doi: 10.59704/304a672059e33ee1.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260319-145521-0.