

Conditionality of European Funds: tough on Member States, laxist on third countries?

Abstract

In the last few years, the debate on the conditionality of EU funds to the principles of the rule of law topped the EU's political agenda. The EU adopted a specific *Regulation on a general regime of conditionality for the protection of the Union budget*¹ on 16 December 2020. The Court of Justice confirmed its legality on 16 February 2022, when dismissing the actions Hungary and Poland brought against the Regulation on a general regime of conditionality for the protection of the Union budget in 2021.

The EU is the world's largest development aid donor. According to the existing legal framework, these funds are also conditioned to economic or political criteria, including the rule of law. Yet, in what way, does this framework allow the Commission to hold back development funds from a third country for Rule of Law related reasons? Is “development conditionality” comparable to “domestic” conditionality applied to EU Member states? Starting with the EU's main regulation and focusing on two specific countries (The Philippines and Pakistan), this paper aims at shedding some light at the way the EU (and more specifically the Commission) apply conditionality to third countries.

1. The European Union's framework on development assistance

The European Union provides development aid mostly through four instruments²: the Development Cooperation Instrument (DCI); the Pre-accession Instrument, the European Neighbourhood Instrument, and the European Development Fund (EDF)³. These regulations as well as bilateral agreements with third countries define how the EU channels development funds, and the conditionalities they are subject to. This first section analyses the conditionality regime foreseen in all the different regulations, be they the general instruments or the bilateral agreements.

1.2. General overview on regulations and agreements

Article 236 of the Regulation on the financial rules applicable to the general budget of the Union (2018) defines the use of budget support to third countries⁴. This provision widely elaborates on conditionality. The first and second points focus on economic conditionality and stress the importance of transparency and effectiveness of public finances, credible sectoral and national policies, stability-

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02020R2092-20201222&from=EN> (date of access: 25 April 2022)

² <https://ecdpm.org/talking-points/eu-financial-framework-2014-2020-development-cooperation/> (date of access: 25 April 2022)

³ For the next seven years (2021-2027) a new instrument, the so-called NDICI-Global Europe (Neighbourhood, Development, and International Cooperation Instrument – Global Europe) came into force that unifies several former EU external financing instruments. (https://ec.europa.eu/neighbourhood-enlargement/funding-and-technical-assistance/neighbourhood-development-and-international-cooperation-instrument-global-europe-ndici-global-europe_hu - date of access: 28 April, 2022)

⁴ Financial regulation applicable to the general budget of the Union. July 2018. Article 236 (<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R1046&from=EN#d1e15138-1-1> - date of access: 28 April 2022)

oriented macroeconomic policies, and access to comprehensive and sound budgetary information⁵. In turn, Article 236 (4)(b) foresees “*a right for the Commission to suspend the financing agreement if the third country breaches an obligation relating to respect for human rights, democratic principles and the rule of law and in serious cases of corruption; [...]*”⁶.

The Regulation of the European Parliament and of the Council establishing a financing instrument for development cooperation for the period 2014-2020 also focuses on the rule of law conditionality. One of the general principles of the regulation states that “*The Union shall seek to promote, develop and consolidate the principles of democracy, the rule of law and respect for human rights and fundamental freedoms on which it is founded, through dialogue and cooperation with partner countries and regions*”⁷. According to Article 12 “*On duly justified imperative grounds of urgency, such as crises or immediate threats to democracy, the rule of law, human rights or fundamental freedoms, the Commission may adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 16(4) of Regulation (EU) No 236/2014 in order to modify strategy papers and multiannual indicative programmes referred to in Article 11 of this Regulation*”⁸. At the end of the regulation, a statement of the European Parliament is presented, specifying the conditions under which suspensions can be applied to third countries⁹.

Bilateral agreements - such as multi-annual indicative programmes, partnership cooperation agreements, or strategic engagement plans - with third countries also mention the rule of law and good governance. According to Stefano Manservigi, former EU commission director-general for international cooperation and development, there is “*no unilateral conditionality linked to the implementation of our development assistance*”¹⁰.

Hence, conditionality is not unknown to the EU’s development policy. To the contrary, it is a fully-fledged part of both the general regulations and the bilateral agreements. Yet, how does the European Union implement the rule of law conditionality in the framework of its development aid with third countries? Does it differ from the way this mechanism is applied to EU Member States?

⁵ Ibid.

⁶ Financial regulation applicable to the general budget of the Union. July 2018. Article 236 (4)(b) (<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R1046&from=EN#d1e15138-1-1> - date of access: 28 April 2022)

⁷ Article 3 (1) of the Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020. (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0233&from=EN> - date of access: 28 April 2022)

⁸ Article 12 (2) (Ibid.)

⁹ “[...] do not contain any explicit reference to the possibility of suspending assistance in cases where a beneficiary country fails to observe the basic principles enunciated in the respective instrument and notably the principles of democracy, rule of law and the respect for human rights. The European Parliament considers that any suspension of assistance under these instruments would modify the overall financial scheme agreed under the ordinary legislative procedure. As a co-legislator and cobranch of the budgetary authority, the European Parliament is therefore entitled to fully exercise its prerogatives in that regard, if such a decision is to be taken.” (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0233&from=EN> - date of access: 29 April 2022)

¹⁰ <https://www.devex.com/news/after-a-tumultuous-year-eu-aid-to-continue-in-the-philippines-92247> (date of access: 29 April 2022)

1.3. Measuring the rule of law

The definition of the concept of rule of law is somehow versatile as it depends on the organizations working in the field and establishing comparisons among countries. This paper uses the rankings and the Rule of Law index of two separate organizations, namely the World Justice Project (WJP)¹¹, and The Global Economy¹².

The figure below demonstrates the top ten recipients of DG DEVCO¹³ (Directorate-General Development and Cooperation — EuropeAid) in 2019, and the Rule of Law index of the recipients in the same year. The statistics suggest that the lower is the Rule of Law index (see the line), the higher is the commitments rate (columns) or at the very least that EU spending and the Rule of Law are not related, even less conditioned. It appears that the amount of money given by the EU is not exclusively related to the situation of Rule of Law in third countries.

In the next two sections, the paper focuses on the specific cases of the Philippines and the Islamic Republic of Pakistan. Both countries are on the list of the top recipients of the DG DEVCO budget in 2019 and rank at the very bottom of the World Justice Project’s (WJP) Rule of Law list.

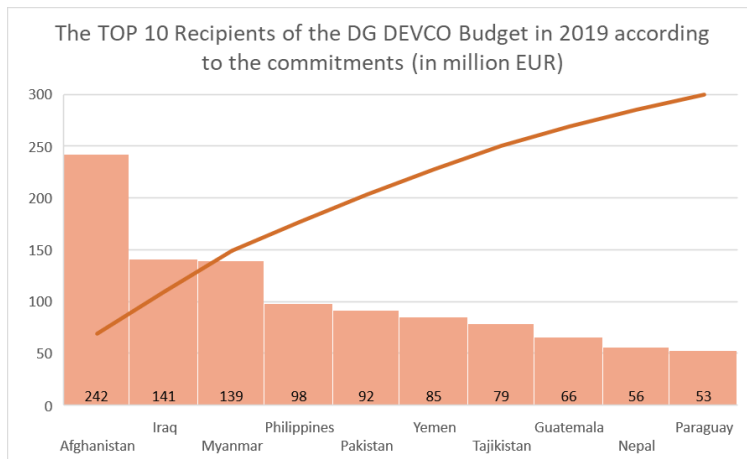


Figure 1 - The TOP ten recipients of DG DEVCO's budget in 2019, linked to the Rule of Law index. Sources: 2020 Annual Report on the implementation of the European Union's instruments for financing external actions in 2019; and WJP Rule of Law Index

¹¹ World Justice Project is an independent and multidisciplinary organization based in Washington. Founded by William H. Neukom in 2006, the organization became an independent non-profit organization in 2009. The scores and rankings of the WJP Rule of Law Index are organized around eight primary factors: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice. (<https://worldjusticeproject.org/about-us> - date of access: 29 April 2022)

¹² The Global Economy works with business and economic data for 200 countries, and from 1996, it collects data regarding the government and business environment of countries within which it specifically examines the rule of law, the government effectiveness, the control of corruption, the voice and accountability, the political rights, and many other factors. (https://www.theglobaleconomy.com/rankings/wb_ruleoflaw/ - date of access: 30 April 2022)

¹³ The DG was renamed in 2021 to DG International Partnerships (INTPA). (<https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vimjj87bjxnr> - date of access: 28 April 2022)

2. Case study – The Philippines

According to the latest WJP Rule of Law Index (2021)¹⁴, the Philippines took the 102nd place out of the 139 surveyed countries. In 2015, the country ranked 51st out of 102. Between the period of 2015-2021, the WJP index of this South Asian country saw a light decrease, as the figure below shows:

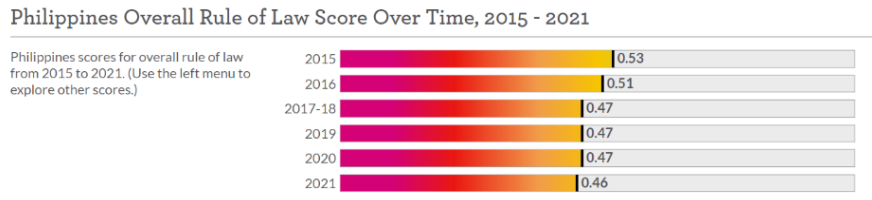


Figure 2 – Philippines’ scores for rule of law between the period of 2015-2021. Source: WJP Rule of Law Index 2021.

According to the rankings of The Global Economy in 2015, the Philippines was ranked 106th out of 192 countries, with -0,34 points. In 2020, it was placed 129th out of 192 countries with -0,55 points¹⁵.



Figure 3 - The place of the Philippines in the Rule of Law ranking in 2020. Source: The Global Economy.

The relationship between the Southern Asian country and the EU fluctuated in recent years. The two parties signed an agreement on migration, there have been negotiations for a Free Trade Agreement since 2015 and there is a cooperation regarding development assistance. The latter encountered some difficulties. In 2017, the Philippine government intended to suspend the cooperation as, it claimed, it encroached on the sovereignty of the country¹⁶. In 2018, the EU and the Philippines signed a Partnership and Cooperation Agreement (PCA) in which the principle of the rule of law is mentioned several times. The parties stress their attachment to the principle of the rule of law, and its importance regarding the “war on drugs” and in respect to justice and security cooperation. Apart from these statements, the rule of law is not explicitly mentioned in the PCA, and the reason for that was explained by Stefano Manservigi, cited in the first paragraph. He highlighted that as the PCA exists, there is no need to repeat everything: “Now we have PCA, it’s not usual to keep mentioning everything”¹⁷. Does this mean that there is no need to specify conditionality? For what reason is it enough to state the reaffirmation of the parties’ attachment to the principle of the rule of law? How can the EU make its development aid consequential to this bilateral agreement?

¹⁴ <https://worldjusticeproject.org/rule-of-law-index/global> (date of access: 29 April 2022)

¹⁵ The scale of the points is the following: -2.5 weak; 2.5 strong. (https://www.theglobaleconomy.com/rankings/wb_ruleoflaw/ date of access: 3 May 2022)

¹⁶ <https://www.reuters.com/article/us-philippines-eu-aid-idUSKCN18D273> (date of access: 30 of April)

¹⁷ <https://www.devex.com/news/after-a-tumultuous-year-eu-aid-to-continue-in-the-philippines-92247> (date of access: 29 April 2022)

The table below shows the commitments made in the framework of the Multi-annual Indicative Programme adopted by the EU and the Philippines. It is important to note that the amount of the financial support allocated to the Philippines decreased, so did the amount of money to be spent on the priority area “Rule of Law, Peaceful and Just Society, Good Governance”. But when looking at the percentages, it appears that the proportion of the funds remained stable, meanwhile the Rule of Law situation did not improve, which assumes the lack of Rule of Law conditionality.

Philippines		
First four years of Multi-annual Indicative Programmes – Indicative allocations		
	For the period of 2014-2017.	For the period of 2021-2024.¹⁸
Total	243-263 million EUR ¹⁹	147 million EUR
Rule of Law (Peaceful and Just Society, Good Governance)	85-95 million EUR	51,5 million EUR
Percentage (%)	36 %	35 %

Table 1 - Amount of money for the Rule of Law Priority Area in the two MIPs. Source: European Union²⁰

Despite the Philippines’ poor performance in rule of law, and several political disputes with the EU, even though the rule of law conditionality is clearly established and recognised, the country did not have to face any large-scale reductions in funding from the EU, not even in the Rule of Law category.

3. Case Study – Islamic Republic of Pakistan

The Constitution of the Islamic Republic of Pakistan (Pakistan) has been updated in 2018 to incorporate the 25th Amendment Act²¹. One part of the Constitution is dedicated to fundamental rights (right to fair trial, prohibition of slavery and forced labour, freedom of movements)²². According to the assessment of The Global Economy, Pakistan gets weak scores regarding political rights and civil liberties²³. The International Federation of Journalists stated that Pakistan is the 5th most dangerous

¹⁸ “Although the duration of this MIP is seven years, the indicative allocations for the Philippines and for each of the priority areas and support measures laid down in the table below are provided for the 2021-2024 period only. The indicative allocations for 2025-2027, as well as the possible modification of other substantial elements of this MIP, will be subject to a decision by the EU. This decision should be preceded by a review of the implementation of this MIP, which should include a dialogue with the authorities and other stakeholders of the Philippines. Without prejudice to the mid-term review, an ad-hoc review is foreseen in year 2022 for synchronisation with the electoral country cycle.” (MIP 2021-2027. Philippines p. 16.)

¹⁹ Total amount for the period of 2014-2020: 325 million EUR. The total amount for Rule of Law Priority Area is 95 million EUR. (MIP 2014-2020. p. 24.)

²⁰ https://www.eas.europa.eu/sites/default/files/mip20142020-programming-philippines-20140825_en.pdf ; https://ec.europa.eu/international-partnerships/system/files/mip-2021-c2021-8998-philippines-annex_en.pdf (date of access: 11 May 2022)

²¹ <https://www.pakistani.org/pakistan/constitution/> (Date of access: 10 May, 2022).

²² <https://www.pakistani.org/pakistan/constitution/part2.ch1.html> (Date of access: 10 May, 2022).

²³ https://www.theglobaleconomy.com/rankings/political_rights/ (date of access: 15 May 2022).

place for journalists²⁴ in the world. The fate of religious minorities remains a thorny issue. (As evidenced by the assault on a Hindu temple occurred in December 2021²⁵ and the case of Christian woman Asia Bibi²⁶ who was charged with death penalty on grounds of blasphemy.) Regarding corruption, Pakistan scores poorly, standing at the 147th place out of 192 countries²⁷.

According to the WJP index, the country was ranked 130th out of the 139 surveyed countries in 2021. In 2015, Pakistan scored 0.38 and was ranked 98th out of 102 countries²⁸. The ranking of The Global Economy is the following: in 2015, Pakistan was 145th out of 192 with a score of -0,77 points. In 2020, it gets the 141st place out of 192 countries with a score of -0,69 points²⁹.

137. Gabon	-0.67
138. Mexico	-0.67
139. Ukraine	-0.67
140. Azerbaijan	-0.69
141. Pakistan	-0.69
142. S.T.&Principe	-0.69
143. Papua N.G.	-0.72
144. Benin	-0.73
145. Belize	-0.76
146. El Salvador	-0.76

Figure 4 - The place of Pakistan in Rule of Law ranking in 2020. Source: The Global Economy.

The next section is dedicated to the different agreements on development cooperation between the EU and Pakistan. The first one is a *legal* framework for the partnership and development cooperation, the so-called *Cooperation Agreement between the European Community, and the Islamic Republic of Pakistan*³⁰ which entered into force in 2004. The agreement foresees different types of cooperation between the two parties. Their partnership is based on dialogue, exchanges and mutually agreed priorities. The question of rule of law and the conditionality is not mentioned in the Agreement. The second framework is more *political*. It is the EU-Pakistan 5-year Engagement Plan (2012-2017)³¹ that is built on the 2004 Cooperation Agreement. A new Strategic Engagement Plan was signed in 2019³² which reaffirmed the cooperation in the areas defined in the former plan such as security, Rule of Law, and good governance, among others. Conditionality is not explicitly mentioned. However, it does clearly state that “Both sides aim at strengthening cooperation by [...] pursuing development

²⁴ <https://www.ifj.org/media-centre/news/detail/category/health-and-safety/article/ifj-annual-killed-list-mexico-remains-deadliest-country-in-the-world.html> (date of access: 3 May 2022)

²⁵ <https://tribune.com.pk/story/2355663/why-religious-minorities-in-pakistan-live-under-fear> (date of access: 13 May 2022)

²⁶ <https://www.theguardian.com/world/2019/may/08/asia-bibi-arrives-in-canada-after-leaving-pakistan> (date of access: 13 May 2022)

²⁷ https://www.theglobaleconomy.com/rankings/wb_corruption/ (date of access: 15 May 2022).

²⁸ <https://worldjusticeproject.org/rule-of-law-index/global> (date of access: 29 April 2022)

²⁹ The scale of the points is the following: -2.5 weak; 2.5 strong. (https://www.theglobaleconomy.com/rankings/wb_ruleoflaw/ - date of access: 3 May 2022)

³⁰ [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22004A1223\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:22004A1223(03)&from=EN) (date of access: 3 May 2022)

³¹ https://www.eeas.europa.eu/sites/default/files/eu-pakistan_strategic_engagement_plan.pdf (date of access: 3 May 2022)

³² <https://reliefweb.int/report/pakistan/eu-pakistan-strategic-engagement-plan-sep> (date of access: 3 May 2022)

cooperation under the financial instruments for external action in the area of human rights, rule of law, and good governance”³³. This statement highlights that the EU provides financial support especially to improve the situation regarding the rule of law³⁴.

Pakistan’s Multi-annual Indicative Programme (MIP) for the period of 2021-2027 contains several priority areas. The MIP defines the key challenges Pakistan has to face, including institutional, macroeconomic, and security challenges, as well as problems related to regional stability, political issues, and natural disasters. The document highlights the EU’s commitment to improving the capacity building of the Pakistani government and enhancing the Rule of Law at provincial and territorial level³⁵. The MIP identifies specific objectives and expects results regarding the rule of law³⁶. Table 2 below shows the allocation of funds (commitments) under the 2014-2017 and 2021-2024 periods ³⁷. According to the data, the amount of the total commitments increased between 2014-2017, and so did the amount to be allocated under “Governance, including the Rule of Law (ROL) and Human Rights (HR)” for the period 2021-2024. Comparing the two periods, it can be seen that the proportion of funds for strengthening good governance is higher in the current period. At the beginning of this chapter, it was noted that the rule of law is still weak in Pakistan, yet the European Commission dedicates a significant percentage of its aid also to improve this situation.

Pakistan- First four years of Multi-annual Indicative Programmes – Indicative allocations		
	For the period of 2014-2017.	For the period of 2021-2024.
Total	474 million EUR ³⁸	265 million EUR
Good Governance, Human Rights and Rule of Law	40 million EUR	45 million EUR
Percentage (%)	8,4 %	17%

Table 2 - Amount of money for Rule of Law Priority Area in the two MIPs. Source: European Union

³³ EU – Pakistan Strategic Engagement Plan (SEP) (2012-2017) p. 2. Article xi. (https://www.eeas.europa.eu/sites/default/files/eu-pakistan_strategic_engagement_plan.pdf - date of access: 3 May 2022)

³⁴ It is important to note that the EU tightened sanctions regarding the GSP+, but it is not related to the development assistance covered by this paper. (<https://economictimes.indiatimes.com/news/international/world-news/eu-toughens-stance-on-compliances-with-pakistan-under-gsp-plus/articleshow/91281771.cms> – date of access: 4 May 2022)

³⁵ https://ec.europa.eu/international-partnerships/system/files/mip-2021-c2021-8992-pakistan-annex_en.pdf p. 15.

³⁶ Ibid. pp 30-36.

³⁷ “Although the duration of this MIP is seven years, the indicative allocations for Pakistan and for each of the priority areas and support measures laid down in the table below are provided for the 2021-2024 period only. The indicative allocations for 2025-2027, as well as the possible modification of other substantial elements of this MIP, will be subject to a decision by the EU. This decision should be preceded by a review of the implementation of this MIP, which should include a dialogue with the authorities and other stakeholders in Pakistan.” – Ibid. p. 38.

³⁸ Total amount for the period of 2014-2020: 653 million EUR. The total amount for Good Governance, Human Rights and Rule of Law Priority Area is 97 million EUR. (MIP 2014-2020. p. 29.) (https://ec.europa.eu/international-partnerships/system/files/mip20142020-programming-pakistan-20140811_en.pdf) (date of access: 11 May 2022).

The Constitution of Pakistan puts emphasis on the importance of fundamental rights. Yet, there are many news reports on human rights abuses; and the statistics suggest that the country is performing poorly regarding the rule of law. Despite the enumerated facts, Pakistan remains one of the top recipients of the European Union's support.

4. Conclusion

While the new Regulation on a general regime of conditionality for the protection of the European Union budget sets a strict procedure to eventually deprive an EU Member State from EU funds should it infringe the rule of law in a way that impacts the EU's budget, it seems that conditionality of EU development funds to the rule of law for third countries is far more flexible. More concretely, based on the evidence presented above, it can be argued that:

- The two case studies showed that the EU provides financial support to third countries even if the Rule of Law did not improve significantly or regressed in recent years. The level of respect for the rule of law in the Philippines and Pakistan is related neither to the amount of the development aid nor to the categories of money spending.
- The DCI regulations do not foresee any suspension of funds to third countries. This omission openly questions the credibility of the conditionality mechanism related to development aid. Again, it is in open contrast with the EU Regulation on a general regime of conditionality for the protection of the Union budget and is setting up a paradoxical situation regarding the functioning of the EU.
- The EU regulations and agreements with third countries merely provide a framework with general notions such as good governance or respect for the rule of law without a *stricto sensu* conditionality. However, the Multi-annual Indicative Programmes (MIP) tend to be more specific and display concrete benchmarks and objectives. In addition, the amount of money for the second half of the seven-year budget plan will be determined after a mid-term review by the European Commission. Yet, MIPs do not foresee a clear framework to condition the disbursement of EU funds to the respect of the Rule of Law.

About the author

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