5. Governing the EU's environmental transition through spending? Loopholes and rule of law concerns in the recovery funds

Paul Dermine and Norman Vander Putten

1. INTRODUCTION

Because of its scale and its institutional architecture, the EU's recovery plan, NextGenerationEU (NGEU), and its main operational channel, the Recovery and Resilience Facility (RRF) set up by Regulation No. 2021/241,[1] constitute a decisive instrument for the future of the EU.[2] Adopted to address the socio-economic fallout of the COVID-19 pandemic, NGEU is an ambitious macro-economic recovery initiative designed to stimulate consumption, investment and economic activity through massive public spending and investment. The green transition being one of the founding pillars of the initiative, it may arguably have a substantial impact on the 'greening' of the EU. The Facility indeed includes a number of mechanisms designed to ensure that it can serve the transition and support climate and environmental sustainability. They reflect the growing importance of a relatively new and complementary form of environmental governance through spending in the EU.

While the significance of requirements tied to the use of EU funds is receiving increasing academic attention in general, their 'green' features have so far

[1] Regulation 2021/241 of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17 ('RRF Regulation').

[2] Bruno De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 Common Market Law Review 635; Paul Dermine, *Le Plan de Relance 'Next Generation EU' de l'Union Européenne. Analyse Constitutionnelle d'une Initiative Historique* (Bruylant 2023).

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remained rather understudied in the relevant literature.[3] This chapter intends to bridge this gap. As it will demonstrate, this new environmental governance through spending rests on novel policy processes involving plans, approvals, indicators and ex post evaluations. It presents distinctive features, but also raises legal concerns of its own, most notably regarding the rule of law. In particular, issues related to access to justice, public participation, democratic scrutiny and transparency are heightened by existing loopholes in the greening mechanisms of the recovery framework.

The chapter starts by providing an in-depth characterisation of the green conditionalities of the RRF in Section 2. On this basis, Section 3 will discuss the distinctive features of environmental governance through spending, in contrast to other, more traditional forms of environmental governance (traditional standards such as target setting or specific bans, or market-based instruments such as the European Emissions Trading Scheme).[4] It argues that although environmental spending conditionalities offer several opportunities to complement existing environmental law, they also generate concerns regarding the rule of law. Section 4 concludes.

2. NGEU'S GREEN CONDITIONALITY AND THE GREEN DEAL: LEVERS AND LOOPHOLES

NGEU is a typically Keynesian initiative, pursuing a macroeconomic objective and seeking to respond to a systemic shock, in this case a pandemic affecting both demand and supply, with a commensurate public spending shock. Through a multiplier effect, it is to support the recovery of private consumption and investment, and preserve the integrity of the common market and the single currency.

NGEU is endowed with 750 billion EUR of common European debt to be redistributed, over a five-year period (2021–6),[5] to national authorities as

[3] An analysis of papers published between January 2021 and September 2024 in five major environmental law journals (*Transnational Environmental Law*, *Journal for European Environmental & Planning Law*, *European Energy and Environmental Law Review*, *RECIEL* and *Journal of Environmental Law*) shows that none of them has focused on (environmental) conditionalities or on the RRF.

[4] On this typology, see David Driesen, 'Instrument Choice' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, OUP 2021) 102, 103–8.

[5] As a crisis initiative, NGEU is a temporary instrument, set to end. NGEU has however set a precedent, and established a model of a dedicated EU, debt-financed fiscal capacity, which could be replicated in other contexts. See Sebastian Grund

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grants (non-repayable financial support) and loans (financial support to be paid back in the medium to long run), to finance vast investment projects and structural reforms in the Member States. The allocation and disbursement of NGEU funds, as operated by the RRF, is based on national recovery and resilience plans (NRRPs).[6] Each plan includes a list of proposed reforms and investments, a detailed timeline for their implementation and related milestones and targets against which funds will be progressively released. While they are formally authored by the Member States, the EU, through the Commission, is intensely involved in their design. Draft NRRPs must be positively assessed by the Commission[7] and endorsed by Council implementing decisions,[8] incorporating the plans' most central elements. The implementation of NRRPs is continuously monitored and periodically assessed when Member States submit payment requests.[9]

While a multidimensional initiative, NGEU is closely related to the green transition. What is more, the RRF, adopted by the EU legislator in February 2021, and the European Green Deal, launched 14 months earlier, are inherently connected and reinforce one another, in at least two different ways. First, beyond the extraordinary context of the pandemic, the urgency of the green transition, and the necessity to unleash unprecedented investment capacities, proved central in building political momentum in favour of NGEU and the expansion of the EU's budgetary and economic powers.[10] Second, the RRF may be understood as an instrument that implements the Green Deal. While the Facility pursues objectives of its own, the green transition indeed constitutes a core aspect of the initiative.[11]

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and Armin Steinbach, 'Debt-Financing the EU' (2024) 61 Common Market Law Review 993.

6 RRF Regulation, art 18.

7 RRF Regulation, art 19.

8 RRF Regulation, art 20.

9 RRF Regulation, art 24.

10 On the interplay between NGEU and the Green Deal, see Christakis Georgiou, 'Federal Fiscal Capacity and the Challenge of the Green Transition in the EU' (2024) 45 Journal of European Integration 871; Sandra Eckert, 'The European Green Deal and the EU's Regulatory Power in Times of Crisis' (2021) 59 Journal of Common Market Studies 81.

11 RRF Regulation, art 3. See also Regulation, recital 23 ('the Facility is to contribute to the mainstreaming of climate action and environmental sustainability […]'); and European Council conclusions, July 2020.

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2.1 The RRF's Green and Grey Ex Ante Conditionalities Unpacked

There are four main environmental entry points in the RRF Regulation. First, national plans must be consistent with the Member States' National Energy and Climate Plans under the Regulation on the Governance of the Energy Union and Climate Action.[12] Second, NRRPs should be consistent with the country-specific recommendations issued in the context of the European Semester.[13] These first two conditions do not constitute clear-cut spending objectives. They leave considerable scope for interpretation by the Member States and therefore have a more diffuse impact on the environmental design of the national plans. For this reason, they are not further examined in this chapter. Third, the Facility may only support measures that comply with the Do No Significant Harm (DNSH) principle and are not significantly harming any of the six major environmental objectives of the EU, as defined in the Taxonomy Regulation.[14] This principle, and the 'grey' spending conditionality it establishes, occupy a central position in the Facility's architecture. It is extensively analysed by De Bellis' chapter in this book, and is therefore not subject to further investigation here. Last, and most fundamentally, the Regulation requires that Member States fund 'green transition' activities and earmark at least 37 per cent of their envelope for climate activities. This crucial green spending conditionality is at the core of this chapter.

In their plans, Member States must substantiate how they 'contribute[d] to the green transition, including biodiversity, or to addressing the challenges resulting therefrom',[15] while the Commission must consider whether the NRRPs contain measures effectively contributing to this green transition when evaluating them. This general requirement is accompanied by a specific quantitative spending objective: Member States have to explain whether their green projects and reforms amount to 37 per cent of their envelope, and the Commission must evaluate whether this target is reached.[16] No financial contribution shall be allocated to plans that do not 'comply satisfactorily' with a

[12] RRF Regulation, art 17(3); and Regulation 2018/1999 of 11 December 2018 on the Governance of the Energy Union [2018] OJ L328/1.

[13] RRF Regulation, art 17(3). See eg, European Commission, '2020 European Semester: Country-specific recommendations' (Communication) COM (2020) 500 final, point 2.3.

[14] See RRF Regulation, arts 5(2), 18(4)(d) and 19(3)(d); and Regulation 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment [2020] OJ L198/13.

[15] RRF Regulation, art 18(4)(e).

[16] RRF Regulation, art 19(3)(e).

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given list of criteria, which include these green conditionalities.[17] Although the evaluation methodology is ambiguous about the precise consequence of failing to meet the 37 per cent target if the other criteria are fulfilled, this has had a limited impact in practice, as the Commission considered in its evaluations that this condition was met for all national plans.[18]

To provide a common green tagging methodology, Annex VI of the RRF Regulation lists 180 'types of intervention' relating, among others, to mobility, energy, biodiversity and building renovation. For each of them, the Regulation specifies if, and under which conditions, they can be considered as contributing to the green transition, and with what ratio (0, 40 or 100 per cent).[19] Although Member States may finance investments and reforms related to biodiversity and other non-climate environmental objectives under the first pillar given the broad terminology used, the methodology applicable to calculating the 37 per cent green spending target focuses on climate change. Indeed, Annex VI codes contributions both to climate and to non-climate environmental objectives, but only the climate contributions are considered for the purposes of the 37 per cent green spending objective.[20]

It should be noted, however, that, contrary to what might be intuitively expected and to what is often assumed,[21] the Regulation does not contain an explicit requirement for the RFF to finance only national plans reaching this percentage. In contrast, the prohibition on financing measures violating the DNSH principle is a horizontal principle of the Facility, with Article 5(2) of the Regulation stipulating that '[t]he Facility shall only support measures respecting the principle of "do no significant harm"'. Similarly, conditionalities related to sound economic governance and its financial consequences are explicitly addressed and spelled out in Article 10 of the RRF Regulation, which refers, where appropriate, to the relevant legislation. This has implications for

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[17] See RRF Regulation, art 20(4), referring to the criteria listed in art 19(3).

[18] See RRF Regulation, Annex V and, for the documents related to NRRPs, <https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility/country-pages_en> accessed on 11 March 2025.

[19] For a critical appraisal of the inevitable approximation associated with these coefficients, see European Court of Auditors, 'Green Transition – Unlcear Contribution from the Recovery and Resilience Facility' (Special report 14/2024) 16.

[20] See RRF Regulation, arts 18(4)(e) and 19(3)(e), which ultimately refer to Annex VI and the 'methodology for climate tracking'. See also art 16(2) referring to 'the climate target of at least 37%'.

[21] See for instance the Commission's mid-review communication: European Commission, 'Strengthening the EU through ambitious reforms and investments' (Communication) COM (2024) 82 final, 6.

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the consequences, or absence thereof, for States that inadequately execute the environmental aspects of their plan, as explained in the next sub-section.

2.2 From a Spending Objective to a Performance-based Conditionality

After the Council's approvals, the *ex ante* green and grey spending targets in the NRRPs evolve. Each reform or investment is translated into qualitative milestones or quantitative targets proposed by the State, then negotiated with the Commission and included in a Council implementing decision. The indicators contained in the latter condition the progressive delivery of funds in an *ex post* and performance-based manner.[22]

2.2.1 From macro- to micro- conditionality

In total, 1,300 environmentally contributive measures (that is, both investments and reforms), were included in NRRPs, translated into approximately 2,500 milestones and targets. They mainly relate to sustainable mobility (31 per cent), energy efficiency (29 per cent) and renewable energy production or networks (14 per cent).[23] In July 2023, 10.1 per cent of the milestones and targets had been evaluated by the Commission as being satisfactorily fulfilled.[24] In a study supporting the mid-term RRF evaluation published in December 2023, the authors note that the implementation of national plans led to 22 million MWh/year savings in annual primary energy consumption.[25]

In the absence of a direct cross-cutting clause formally requiring Member States to comply with a 37 per cent climate target (it is only a point to take into account at the approval stage: see 2.1), the *macro* objective relies solely on the *micro* verifications of the performance indicators: once the plan is approved,

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[22] See RRF Regulation, arts 18(4) and 20(1). These indicators are further specified in an operational agreement between the Commission and the Member State, see art 20(6).

[23] Francesco Corti, Daniel Nigohosyan, Chiara Pancotti and Stephen Millard, 'Study Supporting the Mid-Term Evaluation of the Recovery and Resilience Facility' (European Commission 2023) 93.

[24] Ibid 56.

[25] Ibid. The study does not contain quantified indicators related to biodiversity, because out of the 14 common indicators on which Member States must report under Article 29 of the RRF Regulation, none concern biodiversity (see Commission Delegated Regulation 2021/2106 of 28 September 2021 on supplementing Regulation 2021/241 establishing the Recovery and Resilience Facility by setting out the common indicators and the detailed elements of the recovery and resilience scoreboard [2021] OJ L429/83).

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only the milestones and targets remain legally relevant, not the aggregate share of green spending. Indeed, because the green spending objective does not appear in the payment conditions, the Commission does not check (nor does it have to check) on this occasion whether the 37 per cent target is reached.[26] Furthermore, the financial arrangements between the Member States and the Commission stipulate that while Member States must declare the state of their 'total cumulative expenditure' on climate activities in their payment requests, the failure to achieve the 37 per cent target cannot be considered during the evaluation of payment requests.[27] In other words, although the Commission's payments may be suspended and, in the end, proportionately reduced if milestones and targets have not been satisfactorily fulfilled,[28] the consequence of falling below the 37 per cent target may not be sanctioned as such. Payments to Member States that did not ultimately reach the climate spending target – either because they dropped environmentally contributive measures or because projects are, in the end, not green enough to be tagged as 'green'[29] – are, on this point, legally valid.

2.2.2 Environmental loopholes in the performance-based conditionality

Such reliance on *micro* verifications reinforces the importance of using milestones and targets guaranteeing that 'climate' activities are in practice sufficiently environmentally contributive. The above-mentioned Council implementing decisions should, for instance, ensure that milestones and targets related to renovations tagged as 100 per cent climate contributive rest on proof of the achieved level of energy performance. This is especially important when considering the fact that five States are at between 37 and 38 per cent of green spending, that is, close to the lower threshold.[30]

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[26] See RRF Regulation, art 24. The European Court of Auditors confirms this understanding of the Regulation: European Court of Auditors, 'Design of the Commission's Control System for the RRF' (Special report 7/2023).

[27] See eg, art 7 of the Financing agreement between the Commission and the Kingdom of Spain signed on 29th July 2021 and 6th August 2021. See more generally Eulalia Rubio, 'From Words to Action. Analysing Possible Scenarios and Political Dynamics in the Process of Disbursing the European Recovery and Resilience Facility Funds' (Jacques Delors Institute Policy Paper 2022).

[28] RRF Regulation, art 24(6) and (8).

[29] See ECA special report 17/2024 (n 19) 30 and 36.

[30] See Italy, Lituania, Latvia, Greece and Portugal in European Commission, 'Recovery and Resilience Scoreboard' <https://ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/index.html> accessed on 11 March 2025.

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Yet, both legal scholarship and reports by the European Court of Auditors demonstrate that this is far from being systematically the case. Two types of loophole typically emerge.

First, performance indicators are often limited to completed projects and do not systematically guarantee the environmental quality of the end-result. Eulalia Rubio takes the example of French subsidies for investments in insulation, heating, ventilation or energy audits of private dwellings. To be tagged as 100 per cent climate-contributive they should lead to a 30 per cent reduction in energy consumption, at least.[31] Yet, the French NRRP Council implementing decision does not require such minimum efficiency gain, as it only refers to the quantity of renovated buildings.[32] Similar loopholes may be found for industrial decarbonisation projects: some NRRPs have quantitative targets limited to a number of completed projects, while others have an additional requirement for a 30 per cent reduction in greenhouse gas emissions. Regarding sustainable transport, the number of vehicles purchased is sometimes used, while the number of vehicles *replaced* by electric vehicles or pollution reduction targets would be more compatible with the logic of green conditionality.[33]

Second, milestones and targets may refer to the subsidies granted by public authorities without guaranteeing that the considered projects are realised. Based on a comparative analysis, the European Court of Auditors notes that of the 740 measures that were examined in five NRRPs, 1 out of 20 was not tied to outcome indicators, with a rate ranging from 1 per cent (Greece) to 16 per cent (France).[34] Some EU grants for forestry support, for instance, have been relying on the surface for which subsidies were provided, with no indicators related to the implementation of the project in se.[35]

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[31] See RRF Regulation, Annex VI, which also refers to the notion of 'medium-depth level renovation' defined by the Commission Recommendation 2019/786 of 8 May 2019 on building renovation or, for biomass projects, the links established with Directive 2018/2001 on the promotion of the use of energy from renewable sources [2018] OJ L328/82.

[32] Rubio (n 27). See also European Court of Auditors, 'The Recovery and Resilience Facility's Performance Monitoring Framework – Measuring Implementation Progress but not Sufficient to Capture Performance' (Special report 26/2023) 15.

[33] ECA special report 26/2023 (n 32) 15.

[34] Ibid 17.

[35] Ibid 17–18.

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3. GOVERNANCE THROUGH SPENDING AS THE NEXT CHANNEL OF THE ECOLOGICAL TRANSITION? OPPORTUNITIES AND LEGAL RISKS

The EU has recently shown a strong tendency towards a more strategic use of its budget and financial resources. This has been characterised as European 'integration through funding',[36] or as 'governance through spending'.[37] This tendency is embedded in a wider logic of conditionality. Favouring certain types of economic activities over others and/or pushing certain political objectives in exchange for funding (be it principally or incidentally) necessarily requires tying the disbursement of monies to conditions.[38] Accordingly, Viorica Vita has thoroughly documented this 'rise of spending conditionality' in the EU.[39]

The emergence of governance through spending in the EU is clearly discernible in the environmental field. The developments examined above suggest an emerging consensus on the growing role of public spending in the ecological transition.[40] This is also visible in the establishment of general climate and

[36] On this notion, see Bruno De Witte, 'Integration through Funding – The Union's Finances as a Policy Instrument' in Ruth Weber (ed), *The Financial Constitution of European Integration – Follow the Money?* (Hart Publishing 2023) 221.

[37] While 'governance through funding' and 'governance through spending' are generally understood as synonyms, we use the latter expression to signal that the RRF is not entirely cost-based. Indeed, although the size of submitted NRRPs is initially based on the anticipated costs of investments and reforms (art 20(4) of the RRF Regulation), the progressive disbursement of funds is based solely on the achievements of milestones and targets. This leads to decoupling payments from the costs incurred by Member States, and makes the former sensitive to how their 'proportionate reduction' (see above, 2.2.1) is established in cases of shortcomings.

[38] See, among others, Mariana Mazzucato and Dani Rodrik, 'Industrial Policy with Conditionalities' (Institute for Innovation and Public Purpose Working Paper 2023/07).

[39] Viorica Vita, 'The Rise of Spending Conditionality in the European Union' (European University Institute 2018).

[40] Legal Issues of Economic Integration Board, 'From the Board: Finalising the Sustainable Finance Regulatory Agenda' (2022) 49 Legal Issues of Economic Integration 1.

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biodiversity spending targets in the Union's budget,[41] as well as in initiatives aimed at greening public finances more generally.[42]

Below we characterise this environmental 'governance through spending', embodied by the RRF. In contrast to other modes of environmental governance, and most notably governance through traditional standards (target setting or specific bans) or market-based instruments (such as the EU Greenhouse gas emissions trading schemes), we seek to identify the defining features of governance through spending. We show that each of these features offers policy opportunities, but also entails a number of related legal risks.

3.1 'Governance through Spending' as a Tool of (Selective) Mainstreaming: The Pitfalls of Climate-centrism and Second-orderness

If the RRF promotes and supports environmental objectives, it is not – unlike the LIFE Fund[43] or the Social Climate Fund[44] – an environmental fund based on Article 192 TFEU. It derives from another Union policy (namely cohesion policy and Article 175(3) TFEU), and is only indirectly connected to environmental policy, in a similar way as the Just Transition Fund,[45] the European Regional Development Fund[46] or the funds related to the Common Agricultural Policy (CAP).[47] More precisely, the Facility's pecuniary benefits

[41] See Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources [2020] OJ L4331/28, 16(d) and (e).

[42] See Regulation (EU) 2023/2631 of 22 November 2023 on European Green Bonds and optional disclosures for bonds marketed as environmentally sustainable and for sustainability-linked bonds [2023] OJ L2631/1.

[43] Regulation 2021/783 of 29 April 2021 establishing a Programme for the Environment and Climate Action (LIFE) [2021] OJ L172/53.

[44] Regulation 2023/955 of 10 May 2023 establishing a Social Climate Fund [2023] OJ L130/1.

[45] Regulation 2021/1056 of 24 June 2021 establishing the Just Transition Fund [2021] OJ L231/1.

[46] See art 4(6) of Regulation 2021/1058 of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund [2021] OJ L231/60, which provides that Member States should ensure that 30 per cent of their national envelope should be dedicated to environmentally related projects referred to in Annex II.

[47] Regulation 2021/2115 of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural

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are made conditional upon certain constraints that pursue an agenda that goes beyond the primary objective of the expenditure. As such, the Facility, and the 'governance through spending' approach it embodies, form a vehicle of mainstreaming, as it seeks to integrate environmental considerations into adjacent Union policies and activities (in this case, post-COVID recovery pursued in the framework of cohesion policy under Article 175(3) TFEU) and to therefore foster consistency between Union policies (Article 7 TFEU) and fulfil the spirit of Article 11 TFEU and Article 37 of the Charter of Fundamental Rights.[48] Although a wider phenomenon, the scale of the RRF makes environmental mainstreaming potentially more decisive if one compares the approximately 5.4 billion euros of the LIFE Programme for the 2021–7 period to the 312.5 billion euros of grants allocated to Member States under the RRF.[49]

Under the RRF, mainstreaming happens in two ways: generally, by having recourse to the green and grey spending conditionalities discussed above, and specifically, by relying on EU environmental law to define these conditionalities, which presumably enhances alignment with the EU environmental acquis and overall consistency in the legal system. Regarding this last element, Annex VI of the RRF Regulation establishing the so-called climate tracking methodology entails numerous references to climate-related regulatory instruments, closely connecting eligibility towards the RRF's 37 per cent target and respect for environmental legislation.[50] Along similar lines, the Commission's technical guidance on the application of the DNSH principle also refers to several pieces of environmental legislation, with which compliance is prescribed.[51]

If governance through spending may foster green mainstreaming and compliance with EU environmental law, it also generates the related risk that, since

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policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) [2021] OJ L435/1.

[48] Quite tellingly, according to Recital 23 of the RRF Regulation, 'the Facility is to contribute to the mainstreaming of climate action and environmental sustainability'.

[49] See RRF regulation, art 6 and Regulation 2021/783, art 5.

[50] See eg, on energy efficiency of buildings, the multiple references to Commission Recommendation 2019/786 of 8 May 2019 on building renovation or, for biomass projects, the links established with Directive 2018/2001 on the promotion of the use of energy from renewable sources [2018] OJ L328/82.

[51] This concerns both procedural instruments, such as Directive 2011/92 of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L26/1, or substantive texts, such as Directive 2008/98 of 19 November 2008 on waste [2008] OJ L312/3 or Directive 2012/27 of 25 October 2012 on energy efficiency [2012] OJ L315/1.

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the environmental imperative only enjoys a second-order status, it may end up subsumed into the logic of the funding programme to which it is attached and the founding objective it serves (in the case of the RRF, economic recovery embedded in a cohesion logic).

The significance of that risk may be highlighted by looking at assessments of past CAP funding cycles, which share with the RRF the characteristics of organising the spending of a substantial part of the EU budget through national plans and of having environmental protection as a secondary yet key objective. In a nutshell, and without entering into the history of the environmental aspects of the CAP,[52] under the 2013–18 CAP regulations direct income support related to the first pillar (the European Agricultural Guarantee Fund) was conditioned upon the observance of three 'agricultural practices beneficial for the climate and the environment' or their equivalent,[53] while the second pillar financed, among others, environmentally contributive projects or transitions.[54] However, reports from the European Court of Auditors are very critical both regarding climate[55] and biodiversity[56] impacts.

In that line of reasoning, it is striking that the RRF sets out a particularly climate-centric vision of environmental mainstreaming. Indeed, the RRF Regulation does not define the 'green transition', but mentions on several occasions that this 'includes biodiversity'.[57] Yet, different elements emphasise the climate-centric nature of the instrument. First, as explained above, notwithstanding the ambiguity of the Regulation and its recitals, only projects that

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[52] For an overview, see eg, Claude Blumann, 'L'écologisation de la Politique agricole commune' in Francette Finest and Hubert Delzangles (eds), *La conditionnalité environnemental dans les politiques de l'Union européenne* (Bruylant 2019) 41.

[53] See art 43 and Annex IX of Regulation 1307/2013 of 17 December 2013 on establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy [2013] OJ L347/608.

[54] For an overview, see Annex II of Regulation 1305/2013 of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) [2013] OJ L347/487.

[55] European Court of Auditors, 'Common Agricultural Policy and Climate. Half of EU Climate Spending but Farm Emissions Are Not Decreasing' (Special report 16/2021) 3: 'Overall, we found that the €100 billion of CAP funds attributed during 2014–2020 to climate action had little impact on agricultural emissions, which have not changed significantly since 2010. Most mitigation measures supported by the CAP have a low potential to mitigate climate change. The CAP rarely finances measures with high climate mitigation potential.'

[56] European Court of Auditors, 'Biodiversity on Farmland: CAP Contribution Has Not Halted the Decline' (Special report 13/2020) 5.

[57] See eg, RRF Regulation, arts 18(4)(e) and 19(3)(e) and recital 24.

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contribute to the EU's *climate* objectives are considered when assessing the 37 per cent green spending target. Second, NECPs are the only EU-mandated national environmental plans or strategies with which NRRPs are required to be consistent. National marine strategies, water programmes, waste management and prevention programmes, conservation management plans and waste reduction programmes required by EU environmental law, just to name a few, are set aside. Third, in practice, as the online scoreboard set up by the Commission under Article 30 of the RRF Regulation shows, climate-related projects make up the vast majority of the green pillar funds. Energy efficiency, sustainable mobility, renewable energy and networks, other climate change mitigation or adaptation activities account for 80 per cent of the envelope dedicated to the green transition, while biodiversity or pollution prevention and control merely concentrate 2 per cent and 1 per cent of it, respectively.[58]

Admittedly, the legislator benefits from significant discretion regarding the actions to be taken to 'aim at a high level of protection' of the environment under Articles 191 and 192 TFEU.[59] It could nonetheless be argued that setting aside non-climate aspects of environmental protection is at odds with the broad understanding of environmental protection under these provisions and the general mainstreaming clauses consecrated in Article 11 TFEU and Article 37 of the Charter.

3.2 The Incentive- and Performance-based Nature of 'Governance through Spending'

The RRF, and the 'governance through spending' model, is incentive- and performance-based. Relying on a logic of responsibility and self-commitment,[60] and a transactional and performance-based approach to policy-making, it

[58] See European Commission, 'Green Transition' <https://ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/green.html> accessed 23 September 2024. The other categories that were not mentioned are 'R&D&I in green activities', 'sustainable use and protection of water and marine resources', 'transition to a circular economy' and 'green skills and jobs', which account for 6, 6, 4 and 1 per cent of the green pillar, respectively. See also in the above footnote 25 on the absence of biodiversity indicators among the common indicators defined by the Commission under Article 29 of the RRF Regulation.

[59] Sacha Garben, 'Article 191 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019) 1516, 1518.

[60] See David Bokhorst and Francesco Corti, 'Governing Europe's Recovery and Resilience Facility: Between Discipline and Discretion' (2024) 59 Government & Opposition, 718, at 728–32.

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strives for a higher level of effectiveness and compliance, a more optimal enforcement of EU rules and a stronger supranational capacity to steer and shape national priorities. From this perspective, it has been noted that governance through spending constitutes a way out of the blockages created by traditional regulatory policies that authorise, order or prohibit, or that price environmentally detrimental behaviour.[61]

Enhancing environmentally contributive behaviour through public spending is therefore related to – yet distinct from – the polluter pays principle, on which EU policies should be based to achieve a high level of environmental protection under Article 191 (2) TFEU. While the polluter pays principle follows the idea that economic actors must internalise the costs of the pollution they generate, governance through spending and the RRF rely on a different logic, which aims to fund actors on the basis of the benefits they supposedly provide to society. Both logics constitute forms of (negative and positive) economic incentives.

Initial institutional appraisals tend to indicate that governance through spending is delivering positive results. For example, the mid-term evaluation of the RRF concludes that, if NGEU is not without its own practical challenges and difficulties, the initiative, and its underlying methodology and performance-based logic, have overall been effective. It has supported green investment and prompted the implementation of long-awaited reforms in the Member States in support of the green transition, thanks to the financial incentives provided by the recovery funds, the bottom-up nature of its governance and the consolidated ownership it enables.[62]

But the performance-based, outcome-focused nature of governance through spending, according to which money is disbursed to Member States against the fulfilment of pre-agreed reform and investment commitments, also involves risks. Its effectiveness indeed depends on the seriousness and independence of the performance assessment, along with monitoring conducted by the EU and by the European Commission. The approach has been criticised, most notably by the European Court of Auditors, as highly formalistic, and insufficiently systematic and transparent.[63] Performance assessments under the RRF moreover entail a discretionary element. Under these circumstances, environmental governance through spending could be conducive to 'greenwashing'

[61] Louis de Catheu and Ruggero Gambacurta-Scopello, 'Un Etat pour la planification écologique' (Le Grand Continent, 5 May 2022) <https://legrandcontinent.eu/fr/2022/05/05/un-etat-pour-la-planification-ecologique/ > accessed on 11 March 2025.

[62] Commission, 'Strengthening the EU through ambitious reforms and investments' (Communication) COM (2024) 82 final, especially 44–7.

[63] See above-mentioned ECA special report 26/2023 (n 32).

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if the genuine environmental benefits of the reforms and investments tagged as green are not meaningfully assessed. Such risk is further exacerbated by the deeply administrative and executive nature of governance through spending and performance-based financing, and the limited external scrutiny to which it is subject, by parliamentary actors, social partners or civil society (see below). More fundamentally, the highly technical, managerial philosophy which underpins governance through spending also embodies a certain type of output-based legitimacy, at the expense of others, and disrupts pre-existing institutional balances.

3.3 'Governance through Spending' and Planning as its Implementation Technique: The Rule of Law under Pressure?

Environmental governance through spending is implemented through national plans. In a spirit of subsidiarity and ownership, this preserves national margins of appreciation, and allows for adjustments to the specific needs, challenges and internal constraints of Member States. Against this background, the NRRPs are the result of a hybrid, 'Euro-national'[64] policy process, marked by bilaterality, negotiation and co-construction, and Member States exert a meaningful influence on their content. Such country-specificity entails increased tailoring and bilateralisation, and translates EU rules, principles and objectives set in general instruments into country-specific sets of commitments, targets and – ultimately – obligations, adjusted to particular national situations, needs and vulnerabilities. This pushes normative differentiation to unprecedented levels and promotes a transactional approach to policy making ('cash against reform').

As a consequence, from a environmental policy perspective, compliance with certain environmental rules on which the green tagging of certain measures was premised may not fully materialise in practice. More fundamentally, from a rule of law perspective, as explored in this section, environmental 'governance through spending', as operationalised through the technique of the plan, also creates a number of challenges, and contributed to putting this cardinal constitutional principle of the EU under strain. To a large extent, what contributes to the distinctiveness and added value of 'governance through spending' is also conducive to legal disruption.

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64 Nicola Lupo, 'Next Generation EU e sviluppi costituzionali dell'integrazione europea: verso un nuovo metodo di governo' (2022) 3 Diritto Pubblico 729, 739.

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3.3.1 Access to justice: the judiciability of the RRF Regulation

In contrast to other modes of environmental governance, governance through spending complicates legal accountability and judicial scrutiny. Some of its inherent features put the traditional canvasses of judicial review and legal accountability in the EU under strain, thereby harming access to justice.[65] We identify certain difficulties and uncertainties which governance through spending raise.

First, governance through spending is operationalised through national plans and relies on Euro-national, hybrid policy processes, which closely intertwine the European and national levels. This is a strength, as it enables higher levels of national ownership and policy efficiency. But at the same time, such hybridity contributes, as one of these authors has observed, to obscuring accountability lines, and complicates the attribution of paternity, responsibility and blame for policy changes prompted under it.[66] Moreover, the highly sequenced nature of 'governance through spending', and the multiplicity of acts which punctuate its operationalisation, further blur the legal picture, and complicate the task of potential litigants in setting the timing and object of their action.

Such blurring effect is reflected by the specificity of the plan as a policy instrument, and the doubts it raises as to its authorship. Under the RRF, national plans, and the many environmental measures they include, are formally authored by Member States, and included in national instruments. But their content is the result of close negotiations with the supranational level, and is largely co-constructed with the Union. Moreover, those plans need to be assessed by the Commission, and their content is later partly reincorporated in a distinct Council implementing decision, as well as in an operational arrangement signed both by the Commission and the Member States. Should they therefore be considered as a unilateral act solely attributable to individual Member States, or should they somehow qualify as bilateral acts, collectively imputable to both the Member State and the EU? Should they be litigated, would they solely lie within the jurisdiction of national courts, or would they warrant the intervention of the Court of Justice?

Second, the above-mentioned uncertainty, and the difficulty it raises for litigants and for access to justice more generally, is further exacerbated by another form of uncertainty, which pertains to the type of legal effects which governance through spending produces. The inherent hybridity of plans,[67] the

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[65] Overall, see Paul Dermine, 'The Planning Method: An Inquiry into the Constitutional Ramifications of a New EU Governance Technique' (2024) 61 Common Market Law Review 978.

[66] Ibid 981–2.

[67] As both a national and a European instrument which, in national legal orders, comes in different forms, sometimes requiring legislative validation, sometimes

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complexity of regulatory sequences which governance through spending relies upon and the mix of instruments they produce – some soft, others hard – certainly add to the confusion. Formally, reform and investment commitments and the milestones and targets which operationalise them do not constitute firm, binding obligations, but only stand as conditions to which the release of EU funds is subject. Under this quasi-contractual template, Member States remain free not to abide by these commitments, if they are ready to suffer the political and financial consequences attached to such non-implementation. Reality might feel different (and more constraining), however, and for many Member States, heavily dependent on EU funding, such possibility will remain theoretical.

Governance through spending also raises doubts as to the legal effects it produces. The relevant reforms and investment commitments contained in Council implementing decisions are only addressed to the Member States and do not constitute generally opposable legal provisions. Such configuration significantly complicates the ability of NGOs and citizens to challenge the acts structuring governance through spending. More specifically, they will struggle to prove standing and establish that they are, as required by Article 263(4) TFEU, directly and individually concerned by those acts. As a telling illustration of this difficulty, several European organisations of judges have sought to challenge the Council decision approving the Polish NRRP,[68] arguing that the milestones related to the reform of the Polish judicial system it contains did not comply with EU law and the Court's case-law on Article 19 TEU. In an important order, the General Court dismissed these cases as inadmissible for the main reason that the litigants were not directly affected by the contested decision[69] as the milestones are of a mere 'budgetary conditionality nature' (§ 74) and their relevance is 'confined to the process of releasing funds under the Facility' (§ 72). Hence, the Council decision approving the Polish NRRPs did not impose specific obligations on Poland in its relationship with the judges potentially affected by the contemplated reforms and directly alter their situation (§§ 87–92).

While there has been no equivalent litigation regarding the environmental conditionalities, private applicants, be they individuals or environmental non-governmental organisations (ENGOs), would in all likelihood meet a similar fate in challenging RRF-related EU acts, such as Council decisions approving national plans or Commission decisions on the release of funds. The budgetary nature of conditionalities and the necessary intermediation of national

being of a pure executive or administrative nature.

[68] Council Interinstitutional File 2022/0181 (NLE) doc no 9728/22.

[69] Cases T-530/22 to T-533/22 *Medel et al. v Council of the European Union* ECLI:EU:T:2024:363. An appeal is currently pending before the Court of Justice.

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authorities would indeed bar private litigants from triggering direct review by EU courts.

The revised Aarhus Regulation may, however, overcome that barrier by offering the possibility for ENGOs, under certain conditions, to request internal reviews of administrative acts (or omissions) by EU institutions or bodies allegedly contravening environmental law.[70] Our argument is that the Council and Commission decisions approving the NRRPs and assessing payment requests may be subjected to such reviews. This is because they constitute 'administrative acts' within the meaning of the (revised) Aarhus Regulation as they are 'non-legislative act[s] adopted by a Union institution or body which has legal and external effects and contains provisions that may contravene environmental law'.[71] Furthermore, a violation by the Commission or the Council of the RRF Regulation related to environmental protection may be considered as 'contravening to environmental law'. Indeed, the Aarhus Regulation defines 'environmental law' broadly as referring to 'legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Union policy on the environment'.[72] The RRF Regulation's environmental conditionalities and its explicit aim to contribute to the EU environmental objectives mean it fulfils this criteria. As a result, ENGOs may request an internal review of the decisions under the Aarhus Regulation. A refusal to adapt the relevant decision may then be subjected to an action of annulment under Article 12 of the Aarhus Regulation.[73] While no internal review requests have been made concerning RRF-related decisions, ENGOs have done so in other fields, including concerning the Commission decisions approving common agricultural policy national plans.[74]

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[70] Regulation 1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/12 ('the Aarhus Regulation') art 10. While this Regulation also offers standing to individuals under strict conditions, we concentrate on ENGO's in this Chapter.

[71] Aarhus Regulation, art 2(1)(g).

[72] That is 'preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems', see Aarhus Regulation, art 2(1)(f).

[73] For a recent case introduced by an NGO against a refusal to adapt a decision after an internal review, rejected on the merits, see Case T-536/22 *Pesticide Action Network Europe* ECLI:EU:T:2024:98.

[74] ENGOs have for example introduced internal review requests for the Commission's decision to approve the French common agricultural policy strategic plan, arguing it did not comply with all environmental requirements of

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3.3.2 Public participation, democratic scrutiny and transparency

'Governance through spending' also creates tensions regarding public participation, democratic scrutiny and transparency, therefore affecting the openness, inclusiveness, representativity and, *in fine*, quality of policy-making.

Article 7 of the Aarhus Convention requires Parties to 'make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public'. The terms in 'plans and programmes relating to the environment' are to be understood broadly. According to the Convention's implementation guide, this is to include 'land-use and regional development strategies and sectoral planning in transport, tourism, energy, heavy and light industry, water resources, health and sanitation, etc., at all levels of government'.[75] The Aarhus Regulation, implementing this provision for Union institutions, broadly defines the notion as 'plans and programmes […] which are subject to preparation and, as appropriate, adoption by a [Union] institution or body; which are required under legislative, regulatory or administrative provisions; and which contribute to, or are likely to have significant effects on, the achievement of the objectives of [Union] environmental policy […] or in any subsequent general environmental action programme'.[76]

NRRPs, given their environmental dimension and contribution to the Union's policies and objectives, belong to that category, and are, as a matter of principle, subject to the participation requirements set by the Aarhus Convention.[77] Yet, it is questionable whether the RRF Regulation meets the requirements of the Aarhus Convention in terms of public participation, as

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the applicable CAP regulations. The requests were rejected, leading to litigation (see Case T-399/23 *Client Earth and Collectif Nourrir v Commission* ECLI:EU:T:2025:1002).

[75] UNECE, *The Aarhus Convention: An Implementation Guide* (2nd edn, 2014) 176.

[76] Aarhus Regulation, art 2(e). See also art 2 of Directive 2001/42 of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30. However, financial or budget plan and programmes, 'namely those laying down how particular projects or activities should be financed or those related to the proposed annual budgets', are excluded from the scope of application of Article 9 of the Aarhus Regulation requiring the provision by EU institutions of opportunities for the public to participate in decisions concerning plans or programmes relating to the environment (see Aarhus Regulation, art 2(e)).

[77] For a similar line of reasoning regarding the just transition plans (Regulation 2021/1056, art 11), see Chiara Armeni, 'What Justice? The Scope for Public Participation in the European Union Just Transition' (2023) 60 Common Market Law Review 1043.

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there are important discrepancies between the pledges made in the legislation and the reality on the ground. Indeed, the RRF Regulation does require consultation with relevant stakeholders (starting with local and regional authorities, social partners and civil society organisations), and mandates national authorities to explain how their input is reflected in their plans.[78] However, the actual conduct and meaningfulness of such consultations may not be part of the Commission's assessment of national plans.[79] Even more importantly, experience has revealed that both the scope and intensity of such consultations varied greatly, and several observers have considered them superficial and unlikely to influence the content of the plans.[80] In a letter sent to the Council in March 2021, ten major ENGOs deplored the limited involvement of civil society in the design and implementation of NRRPs.[81]

These deficient participatory structures are all the more troubling given that they are not compensated by meaningful democratic scrutiny. Literature has indeed demonstrated the relative marginalisation of parliamentary assemblies, both at the national and at the EU level, in the context of the RRF, and the dominance executive actors exert over the whole structure.[82] In parallel, one must however observe that another institutional actor, namely the European Court of Auditors, maybe in reaction to such limited parliamentary control, and to the legitimacy issues it inevitably raises, has proven very active in scrutinising the implementation of the RRF and subjecting this emerging 'governance through spending' to intense financial oversight.

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[78] RRF Regulation, art 18(4)(q). See also European Commission, 'Guidance to Member States – Recovery and Resilience' (Staff Working Document) SWD (2021) 12 final, 47; European Commission, 'Guidance on Recovery and Resilience Plans in the context of REPowerEU' (Notice) [2023] OJ C80/1, 42–43.

[79] See RRF Regulation, art 19.

[80] In the case of social partners, see: Eurofound, 'Involvement of Social Partners in the Implementation of National Recovery and Resilience Plans' (Publications Office of the European Union 2023).

[81] The letter is available here: <https://eeb.org/wp-content/uploads/2021/03/G10-letter-Ensuring-Recovery-and-Resilience-plans-deliver-the-European-Green-Deal.pdf> accessed on 11 March 2025.

[82] See Diane Fromage and Menelaos Markakis, 'The European Parliament in the Economic and Monetary Union After COVID: Towards a Slow Empowerment?' (2022) 28 The Journal of Legislative Studies 389; Päivi Leino-Sandberg and Tapio Raunio, 'From Bad to Worse – The Continuous Dilemma Facing Parliaments in European Economic and Fiscal Governance' (2024) 59 Government & Opposition, 718, at 724–8. This marginalization takes place in spite of the establishment, by art 26 of the RRF Regulation, of a recovery and resilience 'dialogue', allowing the European Parliament to invite the Commission every two months to discuss the implementation of the Regulation.

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On a more positive note, it must be noted that the RRF has been marked by a fairly high level of transparency. All final documents, be they national plans or financial arrangements associated with said plans, are available to the public, and in a deliberate effort of communication, the EU has sought to provide clear and updated information about the implementation of national plans and the disbursement of NGEU monies, thereby enabling a certain form of (*ex post*) public scrutiny. The Commission has however refused access to work documents related to policy negotiations, such as draft national plans, in the name of the integrity of the EU's economic and financial policy.[83]

4. CONCLUSION

The way in which public authorities interact with the economy has gradually shifted towards more direct interventions and selective public spending in investments and reforms. NGEU embodies this turn: it takes advantage of the need to counter the socio-economic impacts of the COVID-19 pandemic through scaling up EU spending in order to orient Member States' and economic actors' activities towards select policy areas and sectors. Although the disbursement of RRF funds will end in 2026, various actors are calling for the perpetuation of this model of debt-based investment tool.[84] In the context of the preparation of its next multiannual financial framework, the EU has initiated a reflection process concerning the future of its cohesion policy, and is contemplating further aligning it with the experiences from the RRF.[85] Furthermore, many economists have called for massive public investment in the greening of the economy[86] and for a green industrial policy. To be effective, however, such an endeavour must rely on well-designed environmental conditionalities and compliance therewith.

Contributing to that debate, this chapter has described the environmental dimensions of the RRF. On this basis, we have argued that, in a context where

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[83] In the case of Spain, see Case T-77/22 *Asesores Comunitarios* ECLI:EU:T:2023:69.

[84] See for instance Mario Draghi, 'The Future of European Competitiveness Part B. In-Depth Analysis and Recommendations' (European Commission 2024) 296.

[85] See High Level Group on the Future of Cohesion Policy, 'Forging a Sustainable Future Together: Cohesion for a Competitive and Inclusive Europe' (Publications Office of the European Union 2024) 28. See also European Commission, 'A dynamic EU budget for the priorities of the future - The Multiannual Financial Framework 2028-2034' (Communication) COM(2025)570.

[86] See Jean Pisani-Ferry and Selma Mahfouz, 'Les incidences économiques de l'action pour le climat' (Rapport à la Première Ministre 2023).

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compliance with environmental law remains a substantial source of concern,[87] the RRF embodies a relatively new mode of environmental 'governance through spending', which could usefully complement other traditional modes of environmental governance. This 'governance through spending' offers clear advantages and opportunities, but also entails a number of legal risks and rule of law concerns. It stands as a powerful tool of mainstreaming investments with environmental goals, but also entails related risks of second-orderness and climate-centrism. As an incentive- and performance-based approach, 'governance through spending' raises challenges of its own, but can encourage higher levels of compliance with environmental standards. Last but not least, 'governance through spending', and its reliance on NRRPs, embody a bilateral, negotiated and co-constructed type of governance, which can enable increased ownership and, ultimately, effectiveness. However, this puts a number of constitutional principles under strain, and creates rule of law-related challenges. It complicates legal accountability and judicial scrutiny of EU or national acts, and brings tensions regarding public participation, democratic scrutiny and transparency.

These elements underline the importance of scrutinising carefully not only the content of future EU financial instruments but also the details of their governance, also in relation to environmental law. However, regardless of the legal design of environmental conditions that will be tied to European funds, a much deeper, more sensitive and far-reaching question remains, namely the compatibility of massive stimulation of consumption and investments by future EU funds in the name of competitiveness with mitigating environmental pressures. While addressing this highly sensitive issue of a sustainable economy–environment nexus falls evidently outside the scope of this chapter, future interdisciplinary research may investigate to what extent EU funds containing environmental conditionalities suffer, because of their very nature, from a limited transformative potential in light of the degradations that have until now been associated with growth-oriented policies.[88]

[87] Violations of environmental law take up the biggest share of infringement proceedings initiated by the Commission (559 legal proceedings, amounting to 17.2 per cent of cases opened under the first von der Leyen Commission), see Giovanna Coi and Louise Guillot, 'Ursula von der Leyen Has Taken Green Enforcement Behind Closed Doors' (Politico, 27 August 2024) <www.politico.eu/article/ursula-von-der-leyen-green-enforcement-environmental-law-policy-lack-transparency/> accessed on 11 March 2025.

[88] For a discussion, see Jason Hickel and Giorgos Kallis, 'Is Green Growth Possible?' (2020) 25 New Political Economy 469.

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