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THE EUROPEAN UNION'S COVID-19 RECOVERY PLAN: THE LEGAL ENGINEERING OF AN ECONOMIC POLICY SHIFT

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Abstract

The article presents a legal analysis of the EU's COVID-19 recovery plan, adopted to deal with the economic consequences of the COVID pandemic. The plan was proposed by the European Commission in May 2020 under the name "Next Generation EU", was adopted in the final weeks of 2020 and will be implemented from mid-2021. After briefly presenting the sequence of events leading to the adoption of the recovery plan and the political context at the outset of the pandemic, the article examines the main legal issues raised by the NGEU programme. The adoption of the recovery plan was not only a politically bold move but also a case of creative legal engineering. Its architects had to deal with a number of central issues of EU institutional law, including the principle of conferral and the choice of the appropriate legal basis, the constraints imposed by the EU's public finance system, the respect of the institutional balance, and the shaping of a governance mechanism for the plan's implementation.

1. Introduction

The COVID-19 crisis had, and is still having, major economic consequences, which can be described as a threefold shock hitting all European States (and of course the rest of the world too): a lockdown shock affecting supply and demand in specific sectors such as cafés, restaurants, the performing arts, tourism, travel and retail; a general demand shock affecting all economic sectors, even those not directly hit by the crisis; and a reallocation shock consisting in a reshuffling of resources between sectors and also between countries, depending on how severely they are hit by the crisis.[1] Each State

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1. Pisani-Ferry, "European Union recovery funds: Strings attached, but not tied up in knots", (2020/19) *Bruegel Policy Contribution,* 27 Oct. 2020, available through <www.bruegel.org> (all websites last visited 24 April 2021).

decided to support the economic activity in its own country through a range of measures, including direct support to economic sectors, income support for individual persons and temporary tax relief. Depending on their fiscal room for manoeuvre, some countries spent relatively far more than others.[2] Heavily indebted countries feared a return of the sovereign debt problems they had faced during the euro crisis and called, early on, for a common European response to the economic consequences of the pandemic in order to complement and support the national programmes. By April 2020, all Member State governments agreed, in principle, that some kind of common European response would be needed, since a major weakening of some EU economies would necessarily impact also on the others. In this respect, lessons were learned from the unfolding of the euro crisis, a decade earlier, when a common response came late and, arguably, with too many strings attached for the Member States in need of extra support.

In the spring of 2020, the first elements of that common European response were put in place, such as a crisis purchase programme of the ECB, a new loan facility of the European Stability Mechanism, and an EU funding programme, called SURE, aimed at co-financing the employment support schemes of the Member States. Then, at the end of May 2020, the European Commission proposed a much larger economic recovery plan, which it called *Next Generation EU* (NGEU or recovery plan). That plan was eventually agreed by the other European institutions in a slightly modified format, and is now almost ready to be rolled out in the course of 2021. NGEU is essentially a huge pot of money, viz. 750 billion euro, which is the equivalent of five times the ordinary annual budget of the EU (even though it is less than the COVID-related public expenditure in some of the largest EU Member States).

NGEU is a package consisting of three different components. The Regulation establishing the *European Union Recovery Instrument* (EURI) acts as the container instrument in which the total sum of EUR 750 billion is embedded and assigned to various spending programmes. Those spending programmes form the second component, consisting of a number of specific legal instruments. Some of them are existing EU funds,[3] but the biggest chunk of money is to be disbursed through a newly minted instrument, the *Recovery*

2. See European Court of Auditors, *Risks, challenges and opportunities in the EU's economic policy response to the COVID-19 crisis,* Review No. 06 of 2020, at p. 19. One may note that some of the most heavily indebted Member States (such as Italy, Spain and Greece) were also those whose economies suffered more from the COVID-19 crisis in 2020, due in part to their specialization in economic sectors, such as tourism, that were more severely hit than others.

3. The NGEU comprises a temporary increase of the funding of the structural and cohesion programmes, the rural development programme, the programme supporting transition to a climate-neutral economy, and the research and innovation programmes.

and Resilience Facility (RRF). Its budget amounts to EUR 672.5 billion (about 90% of the total NGEU envelope) which will be distributed to the Member States in the form of 360 billion of loans and 312.5 billion of subsidies over the next six years. The third component of the package is an amendment of the *Own Resources Decision* (ORD), which allows for the 750 billion euro to be raised by means of borrowing by the European Union on the financial markets.

The European Commission proposed these three components all at the same time, on 28 May 2020. They were discussed at a single, but almost endless, European Council meeting in July 2020, and formed the object of further negotiations among the Member States, and between them and the European Parliament, in the final months of 2020. Their formal adoption and entry into force did not, however, happen on the same day. The Council could adopt the EURI Regulation in December 2020. The RRF Regulation was adopted through codecision, and that process took some extra time, until February 2021. As for the new Own Resources Decision, it was adopted by the Council already in December 2020, but it cannot enter into force until all the Member State parliaments have approved it. That process was still ongoing at the time of writing, and was marked by an appeal before the German Constitutional Court against the approval act of the German parliament.[4] As the whole package is predicated on the amendment of the ORD, the other components remain in limbo until that time. More specifically, although the Member States can, and should, prepare plans, together with the Commission, on how to spend the money, the actual disbursements can only start after the revised ORD enters into force.

This article, after a short presentation of the sequence of events leading to the adoption of the recovery plan (section 2) and of the political context at the outset of the pandemic, to help understand the choices and constraints (section 3), will examine the main legal issues raised by the NGEU package, and also by the SURE Regulation which prefigured some of the solutions adopted in the NGEU package. The focus is thus exclusively on the economic recovery plans triggered by the pandemic, leaving aside the other important elements of the overall response of the EU to the spread of the virus.[5]

4. "Germany's highest court halts EU recovery fund ratification", *Financial Times*, 27 March 2021. For a short presentation of the main legal arguments of the complainants, see Riedl, "Corona Reconstruction Fund stopped for the time being", *European Law Blog*, 14 April 2021. On 15 April 2021, the Constitutional Court refused to order interim measures in favour of the complainants, thus paving the way for the German approval of the Own Resources Decision (Decision 2 BvR 547/21).

5. The other components of the EU's response (such as public health coordination, and rules about State aid and free movement of persons) have been addressed elsewhere. See, for a broad

The adoption of the package was not only a politically bold move but also a case of creative legal engineering. The architects of the recovery package had to deal with a number of central issues of EU constitutional law, including the principle of conferral and the choice of the appropriate legal basis (section 4); the constraints imposed by the EU's public finance constitution (section 5); the respect of the institutional balance and the shaping of a governance mechanism for the recovery plan (section 6). The key theme of this article will be how EU constitutional law influenced the economic response to the pandemic and how that response affects, in turn, the EU's constitutional system. The craftsmanship by the legal services of the EU institutions provided the tools for common action within the constraints imposed by the EU legal order as it stands today.

2. The sequence of events

The Commission, at the end of May 2020, formally proposed the Next Generation EU programme. This had been preceded by a number of other EU measures aimed at countering the economic consequences of the pandemic. Their common denominator was that they sought to facilitate the rolling out of the *national* support programmes adopted in every Member State from March 2020 onwards. The national support measures for particular companies or economic sectors were protected by the Commission's decision to adopt a temporary relaxation of its State aid rules.[6] The Member States were encouraged to spend massively and increase their budget deficits by the adoption of a general exemption from their normal budgetary obligations under the Stability and Growth Pact.[7] The massive additional expenditure incurred by the Member States required them to engage in additional borrowing on the financial markets, which was facilitated by the European Central Bank's launch of a Pandemic Emergency Purchase Programme (PEPP), with an overall envelope of EUR 750 billion to be used through

range of contributions Utrilla and Shabbir (Eds.), *EU Law in Times of Pandemic – The EU's Legal Response to -19* (EU Law Live Press, 2020).

6. Commission Communication, "Temporary framework for State aid measures to support the economy in the current COVID-10 outbreak", O.J. 2020, C 91/1.

7. Communication from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact, COM(2020)123 of 20 March 2020; Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis, Council press release of 23 March 2020. See Dermine, "The EU's response to the COVID-19 crisis and the trajectory of fiscal integration in Europe: Between continuity and rupture", 47 LIEI (2020), 337, at 338–341.

monthly purchases of corporate and government bonds, which was increased in June 2020 with a further 600 billion;[8] the PEPP decision was based on the ECB's general power "to define and implement the monetary policy of the Union".[9] In addition, the European Stability Mechanism, which had not approved any programmes of financial assistance since the programme for Greece of July 2015, decided to make loans available to all its (euro area) Member States specifically for Pandemic Crisis Support.[10]

In addition to facilitating the national recovery plans, the EU also directed some of its own, comparatively modest, financial resources towards coronavirus response uses. It allowed unspent money from the Structural Funds to be redirected towards corona-related expenditure.[11] It activated its Emergency Support Instrument, which had been put in place only a few years earlier.[12] The most important measure adopted by the EU in that early phase was the creation of an EU instrument to co-finance the national employment support mechanisms that were mobilized on a vast scale to counter the pandemic crisis.[13] This new instrument, whose acronym is SURE,[14] made 100 billion euro available in the form of loans for the Member States as a safety net for the preservation of jobs. This amount of money stretched the limits of the EU's budgetary capacity, so that an original legal construction had to be found to raise the funds. As that construction prefigures what was later done in the context of the NGEU programme, the SURE programme will be included in the legal analysis in the later sections of this article.

The NGEU package itself emerged through four key political moments in the spring and early summer of 2020.[15]

8. Decision 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme, O.J. 2020, L 91/1.

9. Art. 127(2) TFEU.

10. "ESM Board of Governors backs Pandemic Crisis Support", ESM press release, 15 May 2020.

11. Regulation 2020/460 of the European Parliament and the Council of 30 March 2020, O.J. 2020, L 99/5, and Regulation 2020/558 of the European Parliament and the Council of 23 April 2020, O.J. 2020, L 130/1; see also European Commission press release of 12 Oct. 2020, "Coronavirus dashboard: EU cohesion policy response to the coronavirus crisis".

12. Council Regulation 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak, O.J. 2020, L 117/3.

13. Council Regulation 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, O.J. 2020, L 159/1.

14. The acronym SURE stands for "Support for Unemployment Risks in an Emergency".

15. On these policy dynamics, see also Genschel and Jachtenfuchs, "Postfunctionalism reversed: Solidarity and rebordering during the COVID-19 pandemic", 28 *Journal of European Public Policy* (2021), 350, at 359–365.

The *first key moment* was a letter sent on 25 March 2020 by nine heads of State or government[16] to the President of the European Council, calling for the creation of "a common debt instrument issued by a European institution to raise funds on the market on the same basis and to the benefits of all Member States, thus ensuring stable long-term financing for the policies to counter the damages caused by this pandemic".[17] They added that the instrument "should have sufficient size and long maturity", but no figures were mentioned. As the letter was sent one day before an informal European Council meeting, that meeting could not lead to an agreement on the idea of creating "eurobonds" (as they were called). In fact, the plan met with strong opposition from the "frugal States" (including, at that time, Germany). However, a joint statement made by the European Council members invited the Eurogroup to prepare an action plan.[18]

The *second key moment* was the meeting of the Eurogroup of 9 April 2020. After unusually long discussions, the Eurogroup, meeting in inclusive format (that is, with the participation of the ministers of finance of both euro area and non-euro area States) agreed on a concise but far-reaching report calling for a "comprehensive response" to the economic consequences of the COVID-19 crisis.[19] It agreed to launch the new Pandemic Crisis Support loan programme of the European Stability Mechanism,[20] it gave the go-ahead to the SURE programme proposed by the Commission one week earlier, and agreed "to work on a Recovery Fund to prepare and support the recovery, providing funding through the EU budget to programmes designed to kick-start the economy in line with European priorities and ensuring EU solidarity with the most affected Member States". This agreement on the overall aim and content of the recovery plan was accompanied by uncertainty (and implicit disagreement between States) on how to construct the plan: "discussions on the legal and practical aspects of such a fund, including its relation to the EU budget, its sources of financing and on innovative financial instruments,

16. Those of Belgium, France, Greece, Ireland, Italy, Luxembourg, Portugal, Slovenia and Spain.

17. The text of the letter can be found on the website of the Italian Government: <www.governo.it/sites/new.governo.it/files/letter_michel_20200325_eng.pdf>.

18. Joint statement of the Members of the European Council, 26 March 2020, point 14. This document was not published as formal Conclusions of the European Council, but as an ad hoc press release: <www.consilium.europa.eu/media/43076/26-vc-euco-statement-en.pdf>.

19. *Eurogroup report on the comprehensive economic policy response to the covid-19 pandemic*, Council Press Release 223/20 of 9 April 2020.

20. Since the membership of the Eurogroup coincides with that of the Board of Governors of the European Stability Mechanism, the political agreement reached in the Eurogroup guaranteed that the ESM's Board of Governors would subsequently launch the Pandemic Crisis Support programme.

consistent with EU Treaties, will prepare the ground for a decision".[21] This elliptic sentence hid political disagreements between EU countries and legal conundrums that will be examined more closely in later sections of this article. The subsequent European Council meeting of 23 April endorsed the report of the Eurogroup and called on the Commission to develop a concrete proposal for the recovery plan. In the meantime, the European Parliament, in its resolution of 17 April, had given strong support to the recovery plan which should be financed, in its view, by an increased EU budget and the creation of what it called "recovery bonds guaranteed by the EU budget".[22]

The *third key moment* was between mid and late May 2020, when a Franco-German initiative was followed, almost immediately, by the presentation of the NGEU policy package by the Commission. The most striking passage in the Franco-German document of 18 May[23] was the proposal to allow the Commission to borrow EUR 500 billion on the markets, and to allow the EU to spend that money in the form of non-repayable subsidies for its Member States. This was a major inflection of the traditional German policy rejecting anything that could look like a "transfer union".[24] To compensate for this German concession, a sentence was added stating that the recovery plan would not be permanent but temporary (namely, targeted at the economic fallout of the coronavirus crisis) and that the exceptional character of the plan would be entrenched in the next Own Resources Decision. This would effectively give Germany (and the "frugal four"[25]) a veto against the transformation of the recovery plan into a permanent fiscal redistribution scheme, which was, and still is, taboo for some national governments. Ten days after the Franco-German document, the Commission presented its NGEU package, translating the Franco-German blueprint into a set of formal legislative proposals.[26] The Commission services had of course been

21. Both quotes in this paragraph are from the Eurogroup report, cited *supra* note 19, at point 19.

22. European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences, P9_TA(2020)0054, point 19.

23. "A Franco-German Initiative for the European Recovery from the Coronavirus", 18 May 2020, English version made available in a press release of the German Government, Pressemitteilung 173/20 vom 18 Mai 2020. For an on-the-spot comment, see "Berlin buckles on bonds in 500B Franco-German recovery plan", *Politico,* 18 May 2020.

24. On the underlying reasons for this change of heart, see Boutelet and Wieder, "Pourquoi Merkel s'est convertie au plan de relance", *Le Monde,* 18 July 2020, p. 2. Germany's rejection of the transfer union idea is discussed by Howarth and Schild, "*Nein* to 'Transfer Union': The German brake on the construction of a European Union fiscal capacity", 43 Journal Eur. Int. (2021), 211.

25. This became, in 2020, the nickname for the Netherlands, Austria, Denmark and Sweden. They are often joined by Finland too.

26. Proposal for a Council Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 pandemic, COM(2020)441 of 28

preparing those plans ever since the Eurogroup meeting of early April, but the Franco-German initiative gave much needed political support to the Commission's bold proposals.[27] In addition to the legislative proposals, the Commission published two policy documents that summarized the package and showed its connection with the overall policy agenda of the Commission, including the European Green Deal and the digital single market, which had been presented as the flagship initiatives of the Von der Leyen Commission when it started its activity towards the end of 2019.[28] The overall amount proposed by the Commission for the NGEU package was EUR 750 billion, of which 500 billion to be spent as direct EU expenditure (also called "grants") and the remaining 250 billion as loans to the individual Member States (the latter being additional to what the Franco-German document had proposed).

The *fourth key moment* was the European Council meeting of July 2020, one of the longest in the history of that institution. At 6 a.m. on 21 July, the European Council President could tweet "we did it", after a meeting that had started 90 hours before. The main points of contention between the "frugal four" and the others had been the overall size of the recovery plan, the appropriate mix of subsidies and loans in it, and the conditionality to be attached to the financial assistance. The Conclusions of the meeting contained a very detailed political agreement on the content of the NGEU package, as well as on the Multiannual Financial Framework (MFF) for 2021–2027. The essential elements of the Commission's proposals were preserved, as well as the overall NGEU budget, but the European Council reduced the part of direct expenditures to EUR 390 billion, and increased the amount of loans to 350 billion.[29] The remaining five months of the year 2020 were then spent on fine-tuning the July agreement within the Council, and negotiating its content with the European Parliament.

During the final stages of those post-July negotiations, a major political incident occurred when the governments of Hungary and Poland threatened to veto the whole package (which they could) unless one element of the MFF

May 2020; Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility, COM(2020)408 of 28 May 2020; Amended proposal for a Council Decision on the system of Own Resources of the European Union, COM(2020)445 of 28 May 2020.

27. See the reconstruction of the political dynamics between the Commission plans and the Franco-German deal in Herszenhorn, Bayer and Momtaz, "The coronavirus recovery plan that von der Leyen built", *Politico,* 15 July 2020.

28. Commission Communication, "The EU budget powering the recovery plan for Europe", COM(2020)442 of 27 May 2020; Commission Communication, "Europe's moment: Repair and prepare for the Next Generation", COM(2020)456 of 27 May 2020.

29. The figures proposed by the Commission and those agreed by the European Council can be compared in Núñez Ferrer, "Reading between the lines of Council agreement on the MFF and Next Generation EU", *CEPS Policy Insights* No. 2020-18, July 2020.

would be removed from it, namely the Regulation establishing a general conditionality for the use of EU funds – the famous Rule-of-Law Regulation. As the adoption of that Regulation was subject to codecision, the European Parliament had managed, during the trilogue, to strengthen somewhat the rule of law conditionality compared to the vague language contained in the European Council conclusions of July, and Hungary and Poland were unhappy with that. At the European Council meeting of 10 and 11 December, difficult discussions took place and eventually a compromise was found and expressed in the Conclusions, seeking to tweak the content of the Regulation so as to make it more palatable to Hungary and Poland.[30] This then paved the way for the adoption of the MFF and the various elements of the recovery package, which Hungary and Poland had threatened to veto.

The MFF Regulation was adopted on 17 December 2020,[31] accompanied, as usual, by an Interinstitutional Agreement on its implementation.[32] The European Union Recovery Instrument was adopted on 14 December 2020,[33] as was the new Own Resources Decision (ORD).[34] Whereas the former could enter into force immediately, the ORD can only enter into force after its approval by the national parliaments of all 27 Member States, a process that was still ongoing as this article was written. In the meantime, the codecision procedure for the adoption of the Recovery and Resilience Facility was completed, and the RRF Regulation was adopted in February 2021.[35] As for the other EU programmes benefiting from an NGEU allocation, they were all to be adopted according to the codecision procedure in the weeks and months after the final deal on the MFF. As long as the ORD had not yet entered into force, the RRF could not start functioning, and the subsidies and loans of that Facility will start flowing, presumably, only in the second half of 2021. As for

30. Conclusions of the European Council meeting of 10 and 11 Dec. 2020, EUCO 22/20, points 1 to 4. See "Editorial Comments: Compromising (on) the general conditionality mechanism and the rule of law", 58 CML Rev. (2021), 267.

31. Council Regulation 2020/2093 of 17 Dec. 2020 laying down the multiannual financial framework for the years 2021 to 2027, O.J. 2020, L 433 I/11.

32. The IIA has a very long name that reveals the close connection between the MFF and the NGEU package: 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, O.J. 2020, L 433 I/28.

33. Council Regulation 2020/2094 of 14 Dec. 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, O.J. 2020, L 433 I/23.

34. Council Decision 2020/2053 of 14 Dec. 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, O.J. 2020, L 424/1.

35. Regulation 2021/241 of the European Parliament and of the Council of 12 Feb. 2021 establishing the Recovery and Resilience Facility, O.J. 2021, L 57/17.

the other EU programmes, funds could be committed for the part covered by the MFF, but not yet for the additional part financed by the NGEU programme. Indeed, as will be explained below, the NGEU funding was kept separate from the MFF and from the EU's annual budget. It comes as it were "on top" of the normal MFF and normal annual budget.[36]

3. The political context at the outset of the pandemic crisis

3.1. *The new multiannual financial framework*

The pandemic crisis happened during the final stages of the negotiations on the EU's Multiannual Financial Framework (MFF) for the next seven years (2021–2027). This legal instrument, which was created in 1988 and is now (since the Lisbon Treaty) mentioned in Article 312 TFEU, was invented to ensure greater continuity in the EU's budgets. Setting the annual budget used to be a conflictual affair, both between the Member States and between the Council and the European Parliament. The MFF aims at pacifying the annual budget negotiations by setting an overall framework for a period of seven years. It does so, essentially, by setting a ceiling for the annual budget and also annual ceilings "by category of expenditure", as the text of Article 312 TFEU puts it. The annual EU expenditure is thereby pre-allocated to each of the large domains of EU policy.[37] This considerably reduces the room for manoeuvre (and for conflict) in the annual budget negotiations. In terms of legal sources, the MFF Regulation occupies a special place. It is formally an act of secondary law, but it ranks higher than the regulations containing the annual budget, which are also acts of secondary law. That higher ranking results from Article 312(1) TFEU, third sentence, stating that "[t]he annual budget of the Union shall comply with the multiannual financial framework". In practice, adoption of the MFF is accompanied by the adoption or revision of all the Union's spending programmes, most prominently the agricultural and structural funds but also the myriad other funds in policy domains such as migration, research, education, culture, and external relations. In that respect, the negotiations of the MFF are not only about EU finances but also about the content of EU spending policies. The political and legal importance of the

36. De Gregorio Merino, "The Recovery Plan: Solidarity and the living constitution", *EU Law Live – Weekend Edition,* 6 March 2021, 2, at 4.

37. The MFF for 2014–2020 distinguished 6 main categories of expenditure and 4 sub-categories (Council Regulation 1311/2013 of 2 Dec. 2013 laying down the multiannual financial framework for the years 2014–2020, O.J. 2013, L 347/884, Annex 1). The new MFF for 2021–2027 has 7 main categories and 4 sub-categories but, interestingly, most of the names of the categories have been changed (Regulation 2020/2093 cited *supra* note 31, Annex 1).

MFF is reflected in its decision-making rule: it must be adopted by the Council acting unanimously, and with the consent of the European Parliament.[38] As was shown at the time of adopting the MFF for 2014–2020, this means in practice that a decisive role is played by the European Council, where a political compromise must be reached that is acceptable to all the Member States. A number of European Council meetings took place in 2012 and 2013, and the final compromise was a very detailed document that was then turned into a formal Regulation by the Council. The consent power given to the European Parliament under Article 312 was very much blunted by the need for unanimity at the European Council.[39]

The debate on the new MFF for the period starting in January 2021 was launched early on by the Commission in a policy document of May 2018.[40] At the same time, the Commission made a formal proposal for a new ORD, including the creation of some new types of own resources for the EU.[41] Indeed, the MFF that sets out the expenditure side of the EU budget is accompanied, every seven years, by a new version of the ORD that defines the resources forming the revenue side of the budget, and which sets a ceiling to the financial contributions of the Member States to the EU budget. The discussions in the Council formations about the future MFF were, as usual, very difficult and cumbersome. As the 1 January 2021 deadline came closer, a greater sense of urgency arose. A special European Council meeting was convened on 20 and 21 February 2020, but it failed to reach agreement on the new MFF. Shortly afterwards, the pandemic crisis erupted and, from then on, the negotiations on the next MFF went hand in hand with those on the COVID-19 recovery plan. The close link between the two policy files was clearly shown by the fact that the Commission proposed its NGEU programme on the same day as its amended proposal for the new MFF, and that the European Council meeting of July 2020 dealt with both files together. This made the overall negotiations more complex, but it also, in a way, facilitated the MFF negotiations. Indeed, it soon appeared that the kind of ambitious recovery plan that all Member States agreed to support would either

38. Art. 312(3) TFEU.

39. See the detailed account of the negotiations on the 2014–2020 MFF by Crowe, "The European Council and the Multiannual Financial Framework", 18 CYELS (2016), 69.

40. Commission Communication, "A modern budget for a Union that protects, empowers and defends: The Multiannual Financial Framework for 2021–2027", COM(2018)321 of 2 May 2018. See the discussion of the content of the Commission's proposals in Laffan and De Feo (Eds.), *EU Financing for Next Decade: Beyond the MFF 2021–2027 and the Next Generation EU* (e-book, European University Institute, 2020).

41. Proposal for a Council Decision on the system of Own Resources of the European Union, 2 May 2018, COM(2028)325. See Crowe, "The EU recovery plan: New dynamics in the financing of the EU budget" in Barrett et al. (Eds.), *The Future of Legal Europe: Will We Trust in It? Liber Amicorum in Honour of Wolfgang Heusel* (Springer, 2021, forthcoming).

have to be reflected in the next MFF itself, or would at least require a major change in the ORD accompanying the MFF. When final agreement was reached on both projects, in December 2020, it appeared that, legally speaking, they were only loosely attached to each other. The NGEU programme is not formally integrated in the MFF, as one might have expected, but it is connected to it through the new ORD. The latter decision provides the necessary "ordinary" revenues for the MFF, but it also authorizes, as will be discussed in section 5, the creation of "special" revenue (namely 750 billion of EU debt on the financial markets) that will be used for the recovery plan.[42]

3.2. *Financial assistance to EU Member States*

The NGEU programme is essentially a programme of financial assistance of the European Union to its Member States. The most obvious precedent for this was the financial assistance given to *some* Member States during the euro crisis years. The TFEU provides an explicit legal basis for financial assistance in its Article 122. This provision, in its current version, entered primary law through the Maastricht Treaty, as part of the fairly detailed rules on the Economic and Monetary Union that were then included in primary EU law. As we will indicate below, the possibility for financial assistance by the Union to one of its Member States was already foreseen, prior to Maastricht, by Article 108 EEC. The fact that an updated version of this financial assistance clause was included in the Maastricht Treaty was seen by some commentators as a counterweight or complement to the no-bail-out clause then introduced in Article 125 TFEU.[43] Whereas the no-bail-out clause prohibits the EU and the Member States from becoming co-responsible for each other's debts, Article 122 allows for financial solidarity between EU countries under certain conditions. Article 122(2) states: "Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council . . . may grant, under certain conditions, Union financial assistance to the Member State concerned." Key terms in this legal basis are "exceptional occurrences" (meaning that the assistance must be of a temporary nature) and "certain conditions" (meaning that the countries benefiting from the assistance must respect certain conditions to be defined in the assistance measure). The term

42. For a useful description of the negotiation of the new MFF, see D'Alfonso, "Multiannual Financial Framework for the years 2021 to 2027 – The future of EU finances", European Parliamentary Research Service, PE 637.979, Jan. 2021.

43. Louis, "Guest Editorial: The no-bail-out clause and rescue packages", 47 CML Rev. (2010), 971, at 983.

"assistance" itself is fairly broad and can include both loans and non-repayable subsidies.

Article 122(2) had first been used at the time of the euro crisis, as the basis for the creation of the European Financial Stabilisation Mechanism (EFSM).[44] The EFSM is not an agency but a financial mechanism run by the European Commission. Under the EFSM Regulation, the Commission is allowed to access the financial markets for a maximum amount of EUR 60 billion and the Council decides, by QMV, on giving loans to a Member State needing assistance when facing a sovereign debt crisis.[45] Loans from the EFSM were granted to Ireland and Portugal[46] but the 60 billion ceiling was not entirely exhausted.

However, financial assistance has a much longer history, reaching way back to the 1970s, when the European Community provided loans to Member States in response to the oil crisis of the 1970s. A Regulation, based on Article 235 EEC Treaty (that is the "flexibility clause", now in Art. 352 TFEU), allowed the Community "to undertake a series of operations to raise funds, either directly from third countries and financial institutions, or on the capital markets, with the sole aim of re-lending those funds to one or more Member States in balance of payments difficulties caused by the increase in prices of petroleum products".[47] A separate system already existed, whereby the Member States (rather than the Community) could give each other mutual assistance in the form of loans. The EEC Treaty had provided, from the outset, an express legal basis for this in Article 108 EEC Treaty.[48] The two schemes were merged in 1988: the European Community could henceforth borrow on the financial markets in order to give financial assistance to its Member States, and that assistance was no longer limited to shocks on the petroleum market.[49] A revised version of this Balance of Payments Facility, adopted in

44. Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, O.J. 2010, L 118/1.

45. See Borger, "EU financial assistance" in Amtenbrink, Herrmann and Repasi (Eds.), *The EU Law of Economic and Monetary Union* (OUP, 2020), p. 963, at pp. 968 et seq.; "The European Financial Stabilisation Mechanism: Main Features", European Parliament Briefing PE 645.718, April 2020.

46. See, by way of example, Council Implementing Decision 2011/77 of 7 Dec. 2010 on granting Union financial assistance to Ireland, O.J. 2011, L 30/34.

47. Council Regulation 379/75 of 17 Feb. 1975 concerning Community loans, O.J. 1975, L 46/1, Art. 1.

48. Council Decision 71/143 of 22 March 1971 setting up machinery for medium-term financial assistance, O.J. 1971, L 73/15.

49. Council Regulation 1969/88 of 24 June 1988 establishing a single facility providing medium-term financial assistance for Member States' balances of payments, O.J. 1988, L 178/1. The Regulation had a double legal basis: Art. 108 EEC (for the mutual assistance aspect) and Art. 235 EEC (for the authorization to borrow on the markets).

2002, limited the beneficiaries of financial assistance to non-euro area countries.[50]

Altogether, prior to the COVID-19 crisis, the Union was running three loan programmes based on borrowed funds: the EFSM, the Balance of Payments Facility (BOP) and the macro-financial assistance programme for third countries (MFA). For the latter, the TFEU provides, since the Treaty of Lisbon, two dedicated legal bases: Article 209 TFEU for developing countries and Article 212 TFEU for other third countries. These are all back-to-back operations, as the EU borrows on the markets in order to finance specific loan operations under the three instruments.[51] The repayment of EU debt is, in principle, ensured by the repayments by the beneficiaries of the EU loans, but if a beneficiary country were to default on its repayment, the EU budget guarantees repayment of the capital and interests to the original lenders. Since it is unpredictable whether such EU guarantee repayments will be needed, they are not foreseen by the MFF. If they are needed, they must be covered by the "budgetary margin" provided by the ORD – so, in the end, the Member States may be called to help the EU to reimburse the loan by increasing their contributions to the EU budget.

This feature explains why the EFSM Regulation specified, in its Article 2(2), that the amount of Union financial assistance was limited to "the margin available under the own resources ceiling for payment appropriations". This arcane formula played a central role in the SURE and NGEU discussions. What is meant by the formula is that the EU budget should be able to repay the loans contracted by the Commission if the beneficiary States default on their own repayment obligations towards the Union. The "margin available" in the EU budget is the amount of money which is not allocated to specific policy domains under the Multiannual Financial Framework and is not already committed for other unforeseen purposes. That margin was situated at EUR 60 billion in May 2010, when the EFSM was set up.[52] If loans had been made available above that ceiling, the Member States would have had to guarantee

50. Council Regulation 332/2002 of 18 Feb. 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, O.J. 2002, L 53/1. There is (since the Maastricht Treaty) an express legal basis for this form of financial assistance in Art. 143 TFEU.

51. On 31 Dec. 2018, the EU's outstanding loans amounted to EUR 81,650 billion, of which little more than half were EFSM loans to Ireland and Portugal (Report from the Commission to the European Parliament and the Council on guarantees covered by the general budget – Situation at 31 Dec. 2018, COM(2019)484 of 23 Oct. 2019, at pp. 7–8).

52. De Gregorio Merino, "Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance", 49 CML Rev. (2012), 1613, at 1619.

the excess. This had been proposed by the Commission at the time,[53] but the Council rejected that part of the proposal on the ground that the national contributions to the EU budget are fixed in the ORD and cannot be modified (not even potentially) by some other EU act like the EFSM Regulation. Instead, it was decided at the time that the EFSM funds would be limited to 60 billion, and would be complemented by the EFSF, a much larger financial instrument created by the euro area States outside the EU legal order. The EFSF was then, a few years later, replaced by the European Stability Mechanism, based on an international treaty concluded between the euro area countries. The ESM's financial assistance to euro area States happens entirely outside the EU budgetary framework, as the resources of the ESM are provided by its Member States, and neither ESM lending nor the repayment of ESM loans affects the EU's public finances.

The three above-mentioned EU instruments and the ESM have in common that they provide generic assistance to the public finance systems of the Member States. Because of this generic nature, the EU's and ESM's loans are accompanied by conditionality, aiming essentially at a restoration of the proper functioning of the public finances in the beneficiary Member State. The assistance is, in fact, explicitly framed as being temporary in nature. This financial assistance should be distinguished from the many spending programmes of the European Union, especially the Agricultural Fund and the structural funds. Those funds do not consist of loans but of non-repayable subsidies; they are not generic but provided for specific policy aims (even though, in the case of the structural funds, these aims are fairly broad); they are not temporary measures, but permanent elements of the Union's policy. In particular, the EU's cohesion policy may well benefit some countries more than others (and, to that extent, be considered as providing financial assistance in the broad sense of that term), but it is not an exceptional or temporary policy. Instead, it corresponds to one of the Union's general policy objectives listed in Article 3 TEU. That being said, the EU funds in general, but especially the structural funds, have also become marked by the massive use of conditionality.[54] During the 2014–2020 financial period, the EU's structural funds were endowed with no less than 57 spending conditionalities,[55] including a very detailed macroeconomic conditionality which makes structural fund expenditure conditional on compliance by the beneficiary country with the country-specific recommendations under the European

53. Commission proposal for a Regulation establishing a European financial stabilization mechanism, COM(2010)2010 of 9 May 2010, Art. 3.

54. For an inventory of the use of conditionality in EU expenditure during the 2014–2020 MFF, see Vita, "Revisiting the dominant discourse on conditionality in the EU: The case of EU spending conditionality", 19 CYELS (2017), 116.

55. Ibid., at 125.

semester.[56] The possibility, created in 2013, to suspend the payment of structural funds was, however, not used when, in 2015, Spain and Portugal were found not to have taken effective action to correct their excessive deficits.[57]

3.3. *The debate on the fiscal capacity of the Eurozone*

During and after the euro crisis, an animated debate took place on whether the financial assistance mechanisms adopted during the crisis should be complemented, and eventually replaced, by the creation of a "fiscal capacity" for the Eurozone. This would enable Eurozone institutions other than the ECB to help protect the stability of the euro area and its currency against economic downturns or financial crises. One central issue in that debate was where the financial resources for such a fiscal capacity should be found.[58] For many years, the discussion focused on the creation of "Eurobonds", i.e. common debt issued by the euro area countries acting together. This, many economists argued,[59] would improve the financial and economic stability of the Eurozone: Eurobonds would be considered a safe asset by the financial markets, and the economically weakest (and/or most heavily indebted) euro area countries could thus raise funds on those markets at better conditions than when borrowing individually. The idea remained politically unacceptable for some key countries, including Germany, where the idea of a "transfer union" or "debt union" (as it was pejoratively called) was firmly rejected.[60] It also met with legal objections: it was argued that the no-bail-out clause of Article 125 TFEU prohibited Eurozone States from becoming jointly liable for common

56. Regulation 1303/2013 of the European Parliament and of the Council of 17 Dec. 2013, O.J. 2013, L 347/320, Art. 23.

57. Coman, "How have EU 'fire-fighters' sought to douse the flames of the Eurozone's fast- and slow-burning crises? The 2013 Structural Funds reform", 20 *British Journal of Politics and International Relations* (2018), 540, at 551–552.

58. For an overview of the various proposals and the legal issues involved, see among others: Leino and Saarenheimo, "Fiscal stabilization for EMU: Managing incompleteness", 43 EL Rev. (2018), 623; Crowe, "Is a separate Eurozone budget a good idea?", *ADEMU Working Paper* 2018/120; Fabbrini, "Fiscal capacity" in Fabbrini and Ventoruzzo (Eds.), *Research Handbook on EU Economic Law* (Edward Elgar, 2019), p. 107; da Costa Cabral, *The European Monetary Union after the Crisis: From a Fiscal Union to a Fiscal Capacity* (Routledge, 2021), Ch. 5.

59. See e.g. De Grauwe and Moesen, "Gains for all: A proposal for a common Euro Bond", 44 *Intereconomics* (2009), 132; Delpla and von Weizsäcker, "The Blue Bond Proposal", *Bruegel Policy Brief,* 2010/03.

60. Howarth and Schild, op. cit. *supra* note 24.

debts,[61] and even that common debts would be contrary to the German Constitution in any case.[62]

As the creation of Eurobonds did not appear a feasible option, the attention shifted to other ways of ensuring the long-term stability of the euro area, namely through the creation of dedicated funding instruments of the European Union itself. The European Parliament gave strong support to that idea in a resolution of February 2017.[63] The Commission announced plans for new Eurozone budgetary instruments in December 2017 and then, in May 2018, tabled proposals for legislation creating a Reform Support Programme and a European Investment Stabilisation Function.[64] It chose not to table a proposal for an unemployment reinsurance fund, another tool that was actively discussed in the literature and public debate.[65]

Only the former of the Commission's two initiatives found favour among the governments of the euro area States. Eventually, by the end of 2019, they agreed on setting up a new European financial instrument, called the Budgetary Instrument for Competitiveness and Convergence (BICC), which would support structural reforms in national economic policy.[66] This project was to be implemented as a hybrid action between the EU and the Member States of the euro area, as it would have consisted of an EU regulation setting out its governance,[67] and an intergovernmental agreement concluded by the Member States of the Eurozone in order to co-finance the instrument out of their national budgets.[68] The size of the programme had shrunk during the

61. De Gregorio Merino, op. cit. *supra* note 52, at 1630–1631.

62. Müller-Franken, "Eurobonds und Grundgesetz", (2012) JZ, 219.

63. European Parliament resolution of 16 Feb. 2017 on budgetary capacity for the Eurozone, P8_TA(2017)0050.

64. European Commission, Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme, COM(2018)391 of 31 May 2018; Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function, COM(2018)387 of 31 May 2018.

65. For discussion of the economic rationale and legal form of such a tool, see Steinbach, "Insurance-type cooperation mechanisms under EU law", 27 *Swiss Review of International and European Law* (2017), 19.

66. The main content of the instrument, as politically agreed in Oct. 2019, can be found in Eurogroup, "Term sheet on the budgetary instrument for convergence and competitiveness", Council press release 642/19, 10 Oct. 2019.

67. European Commission, Proposal for a Regulation of the European Parliament and the Council on a governance framework for the budgetary instrument for convergence and competitiveness for area, COM(2019)354, 24 July 2019.

68. See "Eurogroup report on a possible inter-governmental agreement for the budgetary instrument for convergence and competitiveness", Eurogroup press release of 17 Feb. 2020.

negotiations to little more than EUR 10 billion, to be spent during the course of the 2011–2017 MFF. This meant that the BICC could hardly be considered as providing the Eurozone with a true fiscal capacity. In fact, one could wonder whether an instrument aiming at facilitating structural reform of national economic policy should be limited to Eurozone countries, since that reform objective could seem equally pressing in non-Eurozone States. At any rate, the finalization of the BICC, supposed to take place in 2020, was superseded by the pandemic crisis and the elaboration of a much more ambitious NGEU programme, which includes structural economic reform as one of its many aims.

4. Legal basis issues

The legal basis requirement permeates the institutional life of the European Union. Under the principle of conferral of competences, every EU legal measure must be connected directly, or via an intermediate act, to a Treaty article allowing the Union to act in a particular domain, for a particular purpose, and in a particular manner. Since almost all EU legislation is proposed by the Commission, that institution takes the initiative of choosing the appropriate legal basis for whatever new policy objectives it seeks to achieve with that piece of legislation. The preamble of the legislative act is normally used to justify the choice of the legal basis, in other words: to explain how the content and objectives of the proposed act fall within the scope of the chosen legal basis. Discussions about the appropriateness of the proposed legal basis can form part of the decision-making process and typically involve the legal services of the various institutions and of the Member States, giving rise to a true "politics of competence".[69]

Finding a consensus on such an agreement was far from straightforward, as it caused considerable tension between, on the one hand, France and Germany, which supported it, and, on the other hand, the group of "frugal" States led by the Netherlands. See Van der Sluis, "A euro area budget: Another seedling?" in Fromage and De Witte (Eds.), *Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection*, Maastricht University, Faculty of Law Working Paper series, 2019/03, p. 18 et seq., at p. 24. On the negotiations leading to the BICC, see also Schoeller, "Preventing the Eurozone budget: Issue replacement and small State influence in EMU", 27 *Journal of European Public Policy* (2020), advance publication.

69. On the politics of the choice of legal basis, and the role of the legal services therein, see Leino, "The institutional politics of objective choice: Competence as a framework for argumentation" in Garben and Govaere (Eds.), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing, 2017), p. 210. The expression "politics of competence" is used by the author at p. 216. See also

The adoption of the NGEU did not, in fact, give rise to major competence conflicts, even though it was marked by the use of two rather obscure legal bases that were made to carry almost the whole weight (in competence terms) of the package: Article 122 TFEU and Article 175 TFEU. Both these legal bases had originally (after their inclusion in the Treaty text) been dormant, but they had been discovered in recent years, particularly in the context of the euro crisis. Their use in the pandemic crisis is vastly more ambitious than any of those earlier uses. Both are purposive competences, in that their use is defined by a broad policy objective rather than a well-defined policy domain.[70] This made them useful tools for the adoption of the broad ranging, policy overarching measures contained in the NGEU. There was no need to use the general flexibility clause of Article 352 TFEU, thus confirming the decline of its importance in the European integration process.

4.1. *Article 122 TFEU as the legal basis of SURE and EURI*

Whereas Article 122(2) had been used for the creation, in 2010, of the European Financial Stabilisation Mechanism (as was discussed above, section 3.2), this Treaty article actually contains two legal bases for EU action in economic crisis situations, a very generic one and a more specific one. Its paragraph 1 (the generic legal basis) states that the Council "may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy". It was used for emergency measures in the energy sector,[71] and, in 2016, as the legal basis for a permanent EU programme for emergency support when a State is hit by natural or man-made disasters.[72] That Regulation of 2016 was amended in 2020, still with the same legal basis, in order to allow for financial support to pandemic-related health measures taken by the Member States.[73] Article

Jacqué, "The role of legal services in the elaboration of European legislation" in Vauchez and De Witte (Eds.), *Lawyering Europe – European Law as a Transnational Social Field* (Hart Publishing, 2013), p. 43.

70. See the discussion of the distinction between purposive and sector-specific EU competences, and of the issues raised by the former in terms of democratic accountability in Davies, "Democracy and legitimacy in the shadow of purposive competence", 21 ELJ (2015), 2.

71. Council Directive 2009/119 of 14 Sept. 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, O.J. 2009, L 265/9 (as this Directive was adopted before the entry into force of the Lisbon Treaty, its legal basis was Art. 100 EC, which is now renumbered as Art. 122 TFEU).

72. Council Regulation 2016/369 of 15 March 2016 on the provision of emergency support within the Union, O.J. 2016, L 70/1.

73. Council Regulation 2020/521, cited *supra* note 12, Annex, "Eligible actions".

122(2) is then the more specific legal basis, allowing the Union to give *financial assistance* to Member States. It had, prior to the COVID-19 crisis, only been used as a legal basis for the European Financial Stabilisation Mechanism.

Article 122 was proposed by the Commission, and accepted by the Council, as the legal basis of the SURE instrument.[74] The first recital of the Regulation's preamble refers to Article 122, without specifying the first or second paragraph of that Treaty provision. The explanatory memorandum of the Commission states that both paragraphs are concerned, so that the SURE Regulation, in reality, has two legal bases even though its preamble does not disclose this. The combination of two legal bases is possible because both provide for the same decision-making rule, namely a decision of the Council by qualified majority based on a proposal by the Commission. According to the memorandum, the *financial assistance* provided by SURE is based on Article 122(2), whereas the *collective guarantee* provided by the Member States for the repayment of the loans is based on Article 122(1).[75] The reasons for including that guarantee scheme in the SURE programme is discussed below in section 5.2. The general justification for using Article 122 as the legal basis is easily found in the need to mitigate the effects of the COVID-19 crisis on public expenditures by the Member States, and in the fact that the instrument is temporary.[76]

Later on, Article 122 TFEU served as the legal basis for the EURI Regulation, the linchpin of the NGEU programme. The EURI Regulation is a very short document consisting of only six articles, but it forms a key element in the legal architecture of the NGEU programme. Article 1 lists the types of measures that can be financed by the Instrument, but it refers to the specific programmes (namely, the RRF and the smaller programmes that are part of the NGEU package) for the actual rules on how to spend the money. Its Article 2 contains the figures: the instrument as a whole shall be financed up to an amount of EUR 750 billion, of which 384 billion as direct spending and 360 billion as loans to the Member States. Again, like with SURE, reference is made in the preamble to Article 122 generally, without specifying either the first or second paragraph; this time, though, the Commission's explanatory memorandum does not explain why both legal bases are to be used simultaneously. Like with SURE, the EURI Regulation provides financial assistance to the Member States facing an emergency situation, for which

74. SURE Regulation 2020/672, cited *supra* note 13.

75. Proposal for a Council Regulation on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, COM(2020)139 of 2 April 2020, at p. 4.

76. See the preamble of the SURE Regulation, cited *supra* note 13, points 3 to 6.

Article 122(2) serves as a base, even though that assistance does not flow directly from EURI but from the funding instruments "fed" by EURI. EURI also contains a provision on the origin of the funds, namely an empowerment in the Own Resources Decision allowing the EU to borrow massively on the capital markets. This aspect of EURI requires the use of the more generic legal basis of Article 122(1) rather than Article 122(2). Unlike what happened when it was previously used, Article 122 is used in the EURI Regulation as a basis for both loans and non-repayable subsidies. From a competence perspective, this does not raise problems, since the term of "financial assistance" used in Article 122 is broad enough to cover both. What could seem more problematic, in terms of the principle of conferral, is the fact that Article 122 is clearly presented, in the TFEU, as a crisis instrument that can be used only to support countries facing exceptional circumstances. However, as we shall see,[77] the RRF is not conceived as a mere crisis instrument. It aims, as its name says, both at "recovery" and "resilience", whereby the latter includes a myriad of long-term policy objectives, such as green transition and digital transition, which transcend the immediate pandemic crisis context. Some people might regard this as problematic but, in fact, this approach can readily be justified: the amount of financial assistance covered by EURI is indeed entirely justified by the COVID-19 emergency faced by the Member States, but this should not prevent the use of that assistance to also strengthen the mid-term and long-term economic resilience of those States.

4.2. *Article 175(3) TFEU as the legal basis of the recovery instrument*

The main "implementing" instrument of the NGEU package is the Regulation on the Recovery and Resilience Facility (RRF). Its legal basis is Article 175(3) TFEU, situated in the Treaty Title on Economic, social and territorial cohesion: "If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such action may be adopted by the Council acting in accordance with the ordinary legislative procedure …"

Cohesion policy is, generally speaking, a policy with broadly defined aims. It has been the vehicle, over the years, for policy goals for which there is no clear competence elsewhere in the Treaties. It was aptly described as playing a "joker role".[78] In addition to the structural funds, whose aims have gradually become broader over the years, the cohesion policy chapter also contains its own flexibility clause in Article 175(3), which allows for cohesion measures

77. See *infra* section 4.2.

78. Tömmel, "Die Regional- und Kohäsionspolitik der EU: Strukturhilfen für Fördergebiete oder Joker der Integration?", 43 *Integration* (2020), 33.

to be adopted "outside the Funds". This legal basis thus partakes in the broadly defined aims of cohesion, and allows for a broad range of measures, namely any "action" that would "prove necessary". Financial assistance is not specifically mentioned, but is not excluded either.

Article 175(3) had been used quite frequently in the past, but never for such an ambitious instrument as the RRF.[79] The broad potential of this legal basis was first employed in 2002, when it served for the creation of the *European Solidarity Fund* (EUSF).[80] The legal basis of that Regulation was Article 159 EC, the predecessor of the current Article 175 TFEU, but the recitals of the Regulation gave no explanation or justification for the use of that legal basis.[81] The EUSF was intended to offer rapid financial support to Member States facing major natural disasters such as floods or earthquakes, but it was amended in 2020 to include major public health emergences within its scope of application,[82] and some relative small sums were allocated to a number of Member States to deal with the health emergency caused by the coronavirus pandemic.

Article 175(3) furthermore served as the legal basis for the *European Globalisation Adjustment Fund* in 2006,[83] and for the *Fund for European Aid to the Most Deprived* in 2014.[84] The latter instrument contributes to the fight against poverty and social exclusion, objectives which are thus considered to be part of the aim to improve social cohesion. Article 175(3) was also chosen by the Commission as the legal basis for some of its post-euro crisis proposals of economic policy,[85] in particular for the *Structural Reform Support*

79. For the earlier practice, see Flynn, "Greater convergence, more resilience? Cohesion policy and the deepening of the Economic and Monetary Union" in Fromage and De Witte, op. cit. *supra* note 68, at p. 48.

80. Council Regulation 2012/2002 of 11 Nov. 2002 establishing the European Solidarity Fund, O.J. 2002, L 311/3, later amended by Regulation 661/2014 of the European Parliament and of the Council of 15 May 2014, O.J. 2014, L 189/143.

81. The EUSF regulation had a second legal basis, namely the flexibility clause of Art. 308 EC (the current Art. 352 TFEU), and that additional legal basis was expressly justified as needed so as to allow the inclusion of accession candidate countries within the scope of application of the Fund.

82. Regulation 2020/461 of the European Parliament and of the Council of 30 March 2020, O.J. 2020, L 99/9.

83. Regulation 1927/2006 of the European Parliament and of the Council of 20 Dec. 2006, O.J. 2006, L 406/1.

84. Regulation 223/2014 of the European Parliament and of the Council of 11 March 2014, O.J. 2014, L 72/1. This instrument was amended in Feb. 2021 (still on the same legal basis) in order to increase its resources in response to the Covid-19 outbreak: Regulation 2021/177 of the European Parliament and of the Council of 10 Feb. 2021, O.J. 2021, L 53/1.

85. Art. 175(3) TFEU was one of the 4 legal bases of the Regulation on the European Fund for Strategic Investment (the so-called Juncker plan): Regulation 2015/1017 of the European Parliament and of the Council of 25 June 2015, O.J. 2015, L 169/1. The other legal bases of this act were Art. 172 (on trans-European networks), Art. 173 (industrial policy) and Art. 182

Programme (SRSP) established in 2017.[86] Its budget was modest, when viewed from a post-COVID perspective: EUR 0.14 billion. It had a double legal basis: Article 197 TFEU, which allows the Union to support the administrative capacity of the Member States for implementing EU law, and Article 175(3). It was considered that Article 197 would not allow for actions unconnected with the implementation of EU law and, since the SRSP had a much broader scope, another legal basis had to be found.[87] As the SRSP was to be terminated at the end of 2020, the Commission presented a more ambitious follow-up programme, called the Reform Support Programme, with an overall budget of EUR 25 billion, to be included in the programme package for the MFF 2021–2027.[88] The proposal was again based on Article 175 and Article 197 TFEU.[89] In the course of 2020, before the codecision procedure could lead to an agreement between Council and Parliament on this proposal, its aims were absorbed into those of the NGEU programme, and the proposal was withdrawn by the Commission.[90] The justification for the use of Article 175 for both the SRSP and its aborted successor programme is rather straightforward: structural reforms in the Member States will improve the performance of their national economies, which in turn will favour economic and social convergence between the Member States and thus the cohesion of the Union as a whole. This institutional practice was, however, criticized for nullifying the distinction between cohesion policy and economic policy as separate policy fields, each with its distinct nature as EU competences: "Interpreting cohesion policies in such an expansive manner so as to effectively empty the field of economic policies of independent content would seem to contravene this Treaty logic."[91]

Article 175(3) then served as the legal basis for the Commission proposal for a *Just Transition Fund*. This instrument was initially presented in January 2020 with the aim of supporting the economic diversification of territories most affected by the climate transition measures (e.g. the coal-mining region

(research and development policy). This Regulation was recently amended by Regulation 2021/523 of 24 March 2021, O.J. 2021, L 107/30 which has only two legal bases: Art. 173 and Art. 175(3) TFEU.

86. European Parliament and Council Regulation 2017/825 of 17 May 2017 on the establishment of the Structural Reform Support Programme for the period 2017 to 2020, O.J. 2017, L 129/1.

87. Flynn, "Non-fiscal surveillance of the Member States" in Amtenbrink, Herrmann and Repasi, op. cit. *supra* note 45, p. 850, at p. 873.

88. Commission proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme, COM(2018)391 of 31 May 2018. This was to be the "EU part" of the hybrid BICC project mentioned *supra* in section 3.3.

89. Flynn, op. cit. *supra* note 87, at pp. 873–876.

90. Commission work programme for 2021, COM(2020)690 of 19 Oct. 2020, Annex IV.

91. Leino and Saarenheimo, op. cit. *supra* note 58, at 639.

in Poland).[92] The Commission presented an amended proposal on 28 May 2020 in which it proposed that the Fund should be one of the elements of the NGEU package.[93] This was confirmed in the final text of the EURI Regulation which allocated EUR 10 billion to the Just Transition instrument (instead of the 30 billion proposed by the Commission in May).[94] Although the Just Transition Regulation had not yet entered into force at the time of writing, there was no dispute among the institutions or among the Member States about the fact that Article 175(3) was an appropriate legal basis. Indeed, the territorial cohesion element is particularly evident in this programme.

The fact that the *RRF Regulation* is, in turn, based on Article 175(3) is again justified by stating its objective "to promote the Union's economic, social and territorial cohesion"[95] but, within the same sentence, a dozen more objectives are added that correspond to the different policy strands of the RRF. Even more curiously, Article 3 of the Regulation (entitled "Scope") mentions "economic cohesion" and "social and territorial cohesion" as two of the six pillars of the Facility, thereby giving the impression that the other four pillars (namely, green transition, digital transformation, crisis preparedness, and policies for the next generation) are not about cohesion. This could seem to question the suitability of Article 175(3) as the legal basis, but one should maybe not read too much into the text of Article 3. One could very well consider that, whereas two constitutive elements of cohesion are explicitly highlighted as pillars of the programme, cohesion in general is still the overarching ambition of the RRF programme as a whole. Anyway, one can see a clear confirmation of a trend foreshadowed in the previous instruments based on Article 175(3), namely a move away from the domain of cohesion in the strict sense (namely, the sort of measures funded by the structural funds) towards a much broader domain of macro-economic policy measures aiming at improving the overall balance of economic development within the territory of the European Union.

On a final note, it is worth recalling a crucial difference between the two legal bases that were made to carry the NGEU programme: whereas Article 122 TFEU is clearly defined as a crisis provision, Article 175(3) TFEU is not. It could become a stable basis for an EU fiscal policy, beyond the current COVID-19 crisis. Already now, one could argue that the main tools for an active macro-economic policy of the EU are not to be found in the "Economic Policy" chapter of Title VIII of the TFEU ("Economic and Monetary Policy"),

92. Commission proposal for a Regulation of the European Parliament and of the Council establishing the Just Transition Fund, COM(2020)22 of 14 Jan. 2020.

93. Amended Commission proposal for a Regulation of the European Parliament and of the Council establishing a Just Transition Fund, COM(2020)460 of 28 May 2020.

94. EURI Regulation cited *supra* note 33, Art. 2(2)(a)(v).

95. RRF Regulation cited *supra* note 35, Art. 4(1).

but rather in Title XVIII ("Economic, Social and Territorial Cohesion"). For the time being, though, the potential use of Article 175(3) for building a true fiscal capacity of the Union is still uncertain. The financial resources of the RRF are made available through the EURI Regulation whose temporary character results from its legal basis (Art. 122 TFEU) and is re-affirmed in the Own Resources Decision. The RRF is not part of the normal EU budget but "assigned revenue" that will disappear upon termination of the NGEU programme, as will be explained in the next section. The continuation of the policies supported by the RRF, once the NGEU funds are exhausted, could still be based on Article 175(3) but that would require either new borrowing or the creation of new sources of revenue above the current MFF. Either way, the unanimous agreement of all the Member States would be required.

5. Issues of EU public finance law

5.1. *The sources of EU public finance law*

The main sources of EU public finance law are the TFEU, the Own Resources Decision and the Financial Regulation. These will first be presented in their general outline; then the specific way is discussed in which those sources of EU budget law enabled the construction of the recovery plan, but also constrained that construction in important ways.

The TFEU, in a dedicated chapter ranging from Article 310 to Article 324, contains procedural rules dealing with how the annual budget, the MFF and the ORD should be adopted, and substantive rules constraining the shape and content of the budget, both on the side of revenue and that of expenditure. Art 310 TFEU contains three such rules that are relevant for our purposes. The first rule is that "[A]ll items of revenue and expenditure of the Union shall be included in estimates to be drawn up for each financial year and shall be shown in the budget." This is called the *principle of budgetary unity*. Second, Article 310 states: "The revenue and expenditure shown in the budget shall be in balance." This *principle of budgetary balance* (also called *principle of equilibrium)* has been part of primary law since the foundation of the European Communities, and is a rather unique characteristic of the EU's public finances, compared to national public finance laws. It means that the EU budget cannot show a deficit. Third, Article 310(4) contains a rather mysterious sounding sentence, containing the *principle of budgetary discipline,* which came to play an important role in the architecture of the NGEU programme:

> "With a view to maintaining budgetary discipline, the Union shall not adopt any act which is likely to have appreciable implications for the budget without providing an assurance that the expenditure arising from such an act is capable of being financed within the limit of the Union's own resources and in compliance with the multiannual financial framework …"

The ORD is an act required by Article 311 TFEU, setting out the sources of revenue for the European Union. It is formally an act of secondary law, but it has a special legal force, as the EU institutions must comply with it when adopting the annual budget. Article 311 contains the important rule that "[w]ithout prejudice to other revenue, the budget shall be financed wholly from own resources". This rule is sometimes misunderstood as meaning that the EU cannot borrow revenue on the capital market, and it played a major role in the discussions on the NGEU package. The EU's system of own resources has not changed since a major reform in 1988, and the term "own resources" is a bit of a misnomer, since almost all the resources of the Union are in fact contributions by the Member States. The Commission made repeated attempts to introduce new resources that would increase the budgetary autonomy and room for manoeuvre of the EU, but to no avail. The Commission proposed, once again, a basket of new own resources when making its proposals for the MFF 2021–2027,[96] but the Member States were initially very reluctant to engage with those ideas.

The budgetary capacity of the Union is limited and constrained in two complementary ways: by the amounts fixed every seven years in the MFF and by the so-called ceiling included in the revised version of the ORD that accompanies the MFF. Indeed, one of the main functions of the ORD is to set a maximum amount for the direct contributions of the Member States to the EU budget. Those contributions, calculated as a percentage of the country's gross national income (GNI), form the largest component, by far, of the EU's revenues. They are a residual resource whose amount varies in accordance with the evolution of the other own resources (viz., customs duties and part of the VAT). As the MFF determines the overall amount of the annual budget, the GNI-based contributions compensate for unforeseen increases or decreases in the other resources, and may therefore vary from year to year. However, this variation is limited by the setting of a maximum amount in the ORD, called the "ceiling". There is, thus, a difference between the actual contributions by the Member States to the EU budget of any given year, and the maximum amount

96. See Crowe, op. cit. *supra* note 41. The Commission's proposals were partly inspired by the Monti Report: *Future Financing of the EU*, Final report and recommendations of the High Level Group on Own Resources, Dec. 2016.

that they could be required to contribute "under the ceiling". That difference is called the "budgetary margin" or "headroom" and allows for the funding of new policy initiatives that may occur during the seven years of the MFF.

In addition to the TFEU and the ORD, there is a third important source of EU public finance law, namely the Financial Regulation.[97] This is, like the ORD, formally an act of secondary EU law but one having a higher rank than other acts of secondary law, as the implementation of all the EU's funding instruments must comply with the detailed rules contained in the Financial Regulation.[98] One of those rules that is relevant for our later discussion is the one regulating the financial assistance to Member States or third countries. It specifies that "the Commission shall be empowered, in the relevant basic act [i.e. the act establishing the financial assistance], to borrow the necessary funds on behalf of the Union on the capital markets or from financial institutions".[99] EU law thus explicitly allows the EU to incur debt on the financial markets.

5.2. *The SURE Regulation: EU borrowing for lending*

The SURE Regulation is a loan programme of the European Union, based on the traditional technique of back-to-back operations discussed above in section 3.2. The EUR 100 billion worth of loans to the Member States provided by the SURE instrument are first borrowed by the EU on the financial markets. When looking back at the way in which the EFSM was established in 2010,[100] the question may arise why it was considered impossible for the EU to borrow more than EUR 60 billion in 2010, whereas in the Spring of 2020 it was decided that it could borrow the much larger sum of EUR 100 billion. As the budgetary margin, in the Spring of 2020, was quite low (given the existing commitments under the loans for the EFSM), it was decided to adopt a different and more complex financial construction than with the EFSM. The EU retains the primary responsibility for repaying its own loans if a Member State were to default on its repayment to the EU, but, under Article 11 of the SURE Regulation, the Member States are invited to "contribute to the Instrument by counter-guaranteeing the risk borne by the Union". These guarantees are voluntary rather than obligatory, as they are not foreseen in the ORD, which is the source of the States' binding financial commitments towards the Union. Article 12 adds that the SURE instrument

97. Regulation 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, O.J. 2018, L 193/1.

98. This is made clear by Art. 322(1)(a) TFEU.

99. Regulation 2018/1046, cited *supra* note 97, Art. 220(1).

100. See *supra* section 3.2.

becomes available only if all the Member States have agreed to counter-guarantee for an amount of at least EUR 25 billion, i.e. one quarter of the total fund, and they must do so in proportion to their GNI (like when they contribute to the normal EU budget). In this way, the SURE Regulation could be adopted already in May 2020 without the need to first revise the ORD, and without requiring upfront financial contributions by the Member States, whilst still complying with the principle of budgetary discipline of Article 310 TFEU. The Member States duly provided the required guarantees and the SURE instrument could start operating on 22 September 2020. Three days later, the Council decided to grant financial support to 16 Member States[101] and the Commission successfully issued a first series of Union bonds amounting to EUR 17 billion in October.[102]

5.3. *The NGEU programme: EU borrowing for lending and spending*

The most straightforward way for financing a massive funding programme such as NGEU would have been through an equally massive increase of the EU budget. Since the launch of the recovery plan coincided in time with the launch of the new Multiannual Financial Framework, the Member States could "simply" have agreed to increase the MFF with EUR 750 billion, and to increase the ceiling of the EU's own resources by a corresponding amount. However, the national governments were clearly not willing to accept such a drastic increase of their financial burden towards the EU at a time when they struggled to keep control of their own public finance systems. When making its NGEU proposals, the European Commission therefore decided to take the approach it had just adopted for the SURE programme, namely to resort to borrowing on the financial markets rather than requesting massively higher contributions by the Member States at a time of economic distress.

The funding mechanism proposed for NGEU was, however, different from the one used in the SURE Regulation. The amount to be borrowed by the EU was set at EUR 750 billion, which was many times the amount of SURE. Moreover, more than half of it was to be spent as direct financial support to the Member States, rather than as loans. This meant that most of the EU's debt will not be repaid by the beneficiary States (as is the case with loans) but by the European Union itself. However, it seemed unattractive to follow the SURE model and make the Member States direct guarantors for the EU's repayment

101. See e.g. Council Implementing Decision 2020/1355 of 25 Sept. 2020, O.J. 2020, L 314/55, granting a loan to Romania for an amount of slightly more than 4 billion euros, and with a maximum maturity of 15 years.

102. European Commission press release, "European Commission issues first emission of EU SURE social bonds", 21 Oct. 2020.

of that huge amount of money. The Commission instead submitted an unprecedented legal construction whereby: (a) the EU was allowed to borrow way beyond the existing budgetary margin; (b) the EU was allowed to spend more than half of that money in the form of direct support to the Member States; but (c) without imposing any immediate guarantee obligations on the Member States. The combination of these three elements raised delicate legal issues and required experimental solutions. All the Member States decided to accept this new approach at the July 2020 meeting of the European Council. They were reassured by an elaborate opinion of the Council's legal service arguing that the construction was compatible with EU primary law.[103]

The key to the acceptance by the Member States was that the authorization to borrow the EUR 750 billion would be given in the amended ORD (rather than in the EURI Regulation, as would normally have been the case) and was to be accompanied by explicit wording stressing the exceptional and temporary character of the authorization.[104] As signalled in section 2, this had been a condition for Germany's willingness to take the joint initiative with France that set the ball rolling in May 2020. In this manner, the Member States allowed a one-off operation without committing themselves to a long-term structural upgrade of the Union's fiscal capacity, since any continuation or repetition of the authorization to borrow would require a new unanimous amendment of the ORD. A further guarantee against a creeping expansion of the EU's fiscal capacity is the decision to treat the whole NGEU envelope as "assigned revenue" which cannot be used for other purposes than the ones listed in the EURI Regulation. Article 3 of the EURI Regulation, entitled "[r]ules for budgetary implementation", seems rather technical but it contains the crucial rule that the funds used for direct support to the Member States will be treated as "external assigned revenue" and will therefore not be subject to the principle of universality according to which "total revenue shall cover total payment appropriations".[105] Indeed, Article 21(4) of the Financial Regulation states that a "basic act may assign the revenue for which it provides to specific items of expenditure," whereby the term "basic act" refers to the legal act establishing an EU action that requires expenditure.[106] In this case, the basic

103. Opinion of the Council Legal Service 9062/20 of 24 June 2020. This document, unlike most legal opinions, was published, possibly in order to help convince the reluctant national governments and parliaments to back the recovery plan.

104. ORD, cited *supra* note 34, Art. 5(1).

105. Regulation 2018/1046, cited *supra* note 97, Art. 20.

106. The basic act is defined in Art. 2 of the Financial Regulation. This concept reflects the important rule, first established in the ECJ's case law and now laid down in Art. 310(3) TFEU, that every item of expenditure in the EU budget must be based on a prior legal act justifying that expenditure. See Inghelram, "Budget and finances" in Kuijper et al. (Eds.), *The Law of the European Union*, 5th ed. (Kluwer Law International, 2018), p. 313, at p. 337.

act is the EURI Regulation. Whereas this technique had been traditionally employed for Member States wishing to contribute additional amounts to certain research programmes or external aid schemes of the EU,[107] it is now being employed for "compartmentalizing" the proceeds of the loans taken by the Union on the financial markets.

This complex public finance construction could seem problematic in the light of the substantive principles of EU budget law, as laid down in the TFEU. As we saw in section 3.2, the EU has borrowed money on the financial markets before and this is, by itself, not legally problematic. What is new, this time, was the vast amount of those borrowings and the fact that much of it is to be spent as direct financial support rather than loans.

The vast amount of the debt could seem at odds with the rule stated in Article 311 TFEU that "[w]ithout prejudice to other revenue, the budget shall be financed wholly from own resources". This is generally interpreted as meaning that the "other revenue" should only cover a minor part of the EU budget, whereas in 2021 and the following years the revenue raised through borrowing may actually exceed the revenue stemming from own resources. If the EU's public finance regime is based on the allocation of resources through the ORD, decided unanimously by the Member States, then the "existence of a self-standing capacity of the EU to finance itself through the issuance of debt outside the system of own resources would threaten to deconstruct that system".[108] However, the Commission, but also the Council's legal service, accepted this as a temporary derogation from the normal budget rules. The insistence, in Article 5 of the ORD, on the temporary nature of the NGEU programme (which also results, as we saw, from the use of Article 122 as a legal basis of the EURI Regulation) serves to justify this derogation from the "normal" understanding of Article 311 TFEU. As the capacity of the EU to issue massive debt is expressly and unanimously authorized by the Member States, the latter preserve the integrity of the EU's public finance system.

As for the fact that the Union will spend most of that borrowed money as direct support for its Member States, this could seem problematic in light of the Treaty principle that the EU's budget must be balanced and should not show a deficit (Art. 310 TFEU).[109] The launch of the recovery plan will not lead to an immediate budget deficit (since the NGEU funds are treated as "assigned revenue" and kept outside the normal EU budget), but a deficit would likely arise once the EU must start repaying the interest and capital of

107. Crowe, "The European Budgetary Galaxy", 13 EuConst (2017), 428, at 441.

108. De Gregorio Merino, op. cit. *supra* note 36, at 8.

109. The argument that Art. 310 TFEU was circumvented in a dubious way by the recovery plan is made by Leino-Sandberg, "New Generation EU – A constitutional change without constitutional change", *Reconnect Blog,* 13 Jan. 2021.

its EUR 750 billion debt. A solution had to be found whereby the massive debt incurred by the Union would ultimately be repaid without causing a deficit in the Union's annual budgets of the coming years and decades. Repayments will start within the MFF 2021–2027 period but only "with a minimum amount", and will last until 31 December 2058.[110] In this way, the repayments will hardly weigh on the current MFF[111] and, from 2028 onwards, there will be ample time to spread out the repayments in manageable amounts each year, provided the EU can borrow, as expected, at very low interest rates. If, however, the EU's budget should prove to be insufficient, in any given year, to meet the EU's repayment obligations, then the Member States must provide the resources necessary to cover the shortfall, according to a complex procedure described in Article 9 ORD, and based on the usual key for their GNI-based contributions to the EU budget. This potential guarantee function accepted by the Member States leads, in turn, to what Article 6 ORD calls an "extraordinary and temporary increase in the own resources ceilings". Indeed, according to Article 3 ORD, the "normal" annual ceiling (that is, the total amount of own resources allocated to the EU) will be 1.40% of the sum of all Member States' GNIs.[112] However, the new ceiling is temporarily increased to 2% of the combined GNIs, whereby the extra 0.6% is to be used "for the sole purpose of covering all liabilities of the Union resulting from the borrowing [for the NGEU programme]"[113] and will disappear at the end of the programme. This is why Article 6 calls this an "extraordinary and temporary increase" – although the temporality is an extremely long one, since the end date of the loans is set at 31 December 2058! Thanks to this arrangement, the debt subscribed by the Union in 2021 and 2022 will not engender an operating deficit in the EU budget of later years, and the principle of budgetary balance will be respected.[114]

Whether the Member States will eventually have to contribute to the repayment of the EU's NGEU debt depends on whether, in the meantime, the EU will acquire new resources that will strengthen its own budgetary capacity. The European Council, in its July 2020 Conclusions, had been rather hesitant on that score, but the final text of the ORD is somewhat more specific. It

110. ORD cited *supra* note 34, Art. 5(2).

111. As noted by Potteau, "Le budget de l'Union européenne à la croisée des chemins", (2020) RTDE, 567, at 587.

112. This is a moderate increase compared to the previous ORD, where the ceiling was set at 1.23% of combined GNIs. The increase responds, in part, to the withdrawal of the UK from the Union, leading to a shortfall of Member State contributions to the EU budget, and to the inclusion of the European Development Fund in the EU budget (whereas it had previously been separately funded by the Member States according to a special key).

113. ORD cited *supra* note 34, Art. 6.

114. De Gregorio Merino, op. cit. *supra* note 36, at 7.

provides for the creation of a new own resource for the EU, namely national contributions amounting to EUR 0.80 per kilo of unrecycled plastic packaging waste generated in the country concerned, with a lump sum reduction for the poorer Member States.[115] This is only nominally a new own resource, as these national contributions will automatically reduce the rest category of GNI-based contributions to the EU budget. However, the preamble of the Decision recalls the commitment of the European Council meeting of July 2020 to consider the introduction of additional, and more consequential, own resources, namely a carbon border adjustment mechanism, a digital levy, an extended emissions trading system, and a financial transaction tax.[116]

In the Interinstitutional Agreement on budgetary discipline which was, as usual, concluded between Parliament, Council and Commission to accompany the new MFF, the European Parliament managed to include a "roadmap towards the introduction . . . of new own resources that are sufficient to cover the repayment of the European Union recovery instrument".[117] As Interinstitutional Agreements can be binding, depending on their formulation,[118] the Parliament can now claim that the Commission has a legal duty to come forward with proposals for the creation of those new resources, and the Council a duty to consider them. However, the actual creation of the new own resources will require a unanimous decision of the Council and the existence of the roadmap cannot force the individual Member States to approve the creation of a specific new resource. A number of potential new resources are mentioned in the roadmap. It has been argued that, from an economic perspective, revenue from the Union's emissions trading scheme (ETS) would be the best option, as it would be a genuine own resource (resulting from the Union's climate change policy) and would have the potential to deliver a significant amount of money.[119]

To sum up, the key instruments of the recovery plan from a public finance law perspective are the ORD, which will allow[120] for massive but temporary

115. ORD cited *supra* note 34, Art. 2(1)(c) and Art. 2(2).

116. Ibid., point 8 of the preamble.

117. IIA of 16 Dec. 2020 cited *supra* note 32, point 1. The roadmap is spelled out in Annex II of the Interinstitutional Agreement.

118. See Art. 295 TFEU. In fact, the institutions choose the label "agreement" whenever they aim at concluding binding arrangements, and use other denominations when they seek a softer kind of understanding. See the examples cited by De Witte and Smulders, "Sources of European Union Law" in Kuijper et al., op. cit. *supra* note 106, p. 193, at p. 215.

119. Fuest and Pisani-Ferry, "Financing the European Union: New context, new responses", Paper for presentation at the Informal Ecofin under German presidency, Bruegel and Ifo Institute, Sept. 2020.

120. It should be recalled that the ORD must be ratified by all the Member States before its new provisions can enter into force, and that this had not yet happened at the time of writing this article.

borrowing of funds on the capital markets, and the EURI Regulation, which treats those funds as "external assigned revenue", allowing them to be spent outside the EU budget and free from the constraint of budgetary balance laid down in the TFEU. The EU's unprecedented massive borrowing is ultimately backed by the financial resources of the Member States who underwrote the obligation, under the new ORD, to repay the Union's debt if the EU's normal budgetary resources do not suffice. This construction, combined with the fact that the recovery fund is explicitly presented as temporary, implies that there is still no stable fiscal capacity at the level of the Union, but there is a promise, contained in the Interinstitutional Agreement of December 2020 that further steps in that direction will be taken.

6. Issues of institutional balance and governance

6.1. *Shifts of institutional balance in the adoption of the NGEU package?*

The EU's economic response to the pandemic offers a remarkable illustration of the institutional variation that characterizes the EU's decision-making system. Some of the measures were adopted in an entirely supranational mode, without the formal participation of representatives of the Member States – most prominently, the PEPP programme adopted by the ECB and the temporary State aid framework put in place by the Commission. At the other extreme, we find a purely intergovernmental measure, namely the pandemic support line adopted by the European Stability Mechanism. In between those two institutional extremes, we find a variety of decision-making procedures under the "Community method", depending on each instrument's legal basis. The SURE and EURI Regulations were adopted by the Council acting by qualified majority on a proposal of the Commission. The RRF Regulation was adopted through the ordinary legislative procedure, as were most of the other funding programmes benefiting from NGEU allocations. These funding instruments were accompanied by the adoption of budgetary instruments according to their own, very specific, decision-making rules: the adoption of the MFF requires unanimity in the Council and the consent of the EP,[121] whereas the amendment of the ORD requires unanimity in the Council, mere consultation of the EP, and separate approval by each Member State according to its own constitutional requirements.[122]

This variety of decision-making mechanisms and institutional rules is not per se problematic from the point of view of the principle of institutional

121. Art. 312(2) TFEU.
122. Art. 311 TFEU.

balance. Indeed, the Court of Justice has consistently used the term "institutional balance" as shorthand for the set of Treaty rules that happen to apply to any EU decision or set of decisions. In several cases, the Court firmly rejected arguments that the specific Treaty rules on the division of powers between the institutions should, if necessary, be disregarded in view of an unwritten higher principle of institutional balance.[123] It even stated once that "the powers of the institutions . . . are not always based on consistent criteria",[124] and that it was not called to establish institutional consistency across policy sectors when the drafters of the Treaties had chosen not to be consistent. So, to the extent that the decision-making rules set out in the Treaties were respected, the fragmented role of the institutions in the pandemic response, and the adoption of the NGEU package more specifically, are not legally problematic.

However, two institutional anomalies are worth noting. First, although the Commission had couched its policy plans as proposals for legislation addressed either to the Council or to the Council and Parliament together, depending on the legal basis, the EU institution that took decisive action in the first instance was the European Council, an institution that was not mentioned in the Commission's proposals. One should remember, though, that the July 2020 meeting of the European Council dealt with both the recovery plan and the MFF, and that, as was shown in section 3.1 above, the European Council habitually takes an active role in MFF negotiations. The fact that the recovery plan effectively brought into being a "shadow budget" for the Union, alongside the MFF, explains the leading role taken by the European Council. The second anomaly is that the formal exclusion of the European Parliament from the process of adoption of the EURI Regulation may well have been justified by the choice of its legal basis (namely Art. 122 TFEU), but sits uneasily with the fact that EURI actually created that "shadow budget" whose amount vastly exceeds the EU's annual budget – for which the Parliament possesses a power of codecision. The modest role given to the Parliament in the adoption of measures based on Article 122 TFEU was probably based on the idea that Article 122 would always necessitate rapid action so that one should avoid complex decision-making procedures. That was certainly the case when the EFSM Regulation was adopted in 2010 in one of the hottest phases of the euro crisis: the Council adopted the act one day after the

123. Joined Cases 188-190/80, *France, Italy and UK* v. *Commission,* EU:C:1982:257, para 6; Case C-58/94, *Netherlands* v. *Council*, EU:C:1996:171, paras. 32 and 41.

124. Case 242/87, *Commission* v. *Council*, EU:C:1989:217, para 13.

Commission had proposed it.[125] But this was not at all the case with the SURE and EURI Regulations, which were prepared and discussed for many weeks. In the case of SURE, the absence of a role for the Parliament was compounded by the weak interest shown by most national parliaments during the negotiations[126] and during the post-adoption phase in which the Member States had to decide on providing the financial guarantees for the Instrument. As for EURI, the European Parliament supported its overall logic, and rather sought to influence the content of the other parts of the NGEU package, where it possessed codecision powers.[127]

The legal variation in decision-making modes was accompanied by a joint political approach to the adoption of the recovery plan which occurred in two ways: through the coordinating role undertaken by the Commission, the European Council, and the Eurogroup; and through the construction of a COVID-19 response package, as a result of which the various decision-making rules were, so to speak, bundled together. Starting with the latter, even though the adoption of SURE and EURI by means of a QMV decision in the Council, without codecision with the Parliament, makes it look like an easy procedure, that easiness evaporated because their adoption was inextricably linked to the adoption of other parts of the package requiring more complex decision-making.[128] Similarly, the weak role of the Parliament in the adoption of SURE, EURI and the ORD was compensated by its codecision role in the adoption of the largest financial instrument, the RRF, and its veto power for the adoption of the MFF, which resulted in the Parliament helping to co-decide the entire package.

The Commission played a decisive role in the overall coordination of the policy package. It possessed, unlike the other institutions, the full legal and economic expertise that was required to table concrete and detailed policy instruments. The other institutions accepted those Commission texts as the basis for their discussions. As for the Eurogroup, the informal body of the ministers of finance of the euro countries, its role during the COVID crisis offered a new illustration of the curiously hybrid role of a body that was conceived for a subset of Member States (namely those belonging to the euro

125. See Middleton, "Not bailing out . . . Legal aspects of the 2010 sovereign debt crisis" in *A Man for All Treaties – Liber Amicorum en l'honneur de Jean-Claude Piris* (Bruylant, 2012), p. 421, at p. 434.

126. See on this point Dias Pinheiro and Fromage, "National parliaments and their (limited) role in the EU in a crisis: The example of SURE", *EU Law Live – Weekend edition No. 36,* 7 Nov. 2020, 5.

127. Fasone, "The European Parliament faces up to the Recovery and Resilience Facility", *EU Law Live*, *Weekend edition* No. 36, 7 Nov. 2020, 12.

128. In the case of SURE, as was indicated earlier, its entry into force depended on the agreement by all the Member States to provide counter-guarantees. In the case of EURI, its adoption required an amendment, by unanimity, of the ORD.

area), but that occasionally adopts political decisions preparing EU measures that are applicable to *all* Member States.[129] In particular, when the European Council meeting of March 2020 proved unable to agree on the way forward, it decided to mandate the Eurogroup, rather than the Council or the Commission, with the task of imagining an EU policy response. Why did that happen? One reason may have been that the Eurogroup has a specific role which the Council, as such, cannot play, namely to coordinate the action of the European Union with that of the European Stability Mechanism. The highest decision-making organ of the ESM, the Board of Governors, is composed of the very same persons who sit in the Eurogroup, and the political reality is that decisions of the Board of Governors are pre-cooked (i.e. politically agreed) in Eurogroup meetings. The Eurogroup could thus, in the Spring of 2020, coordinate the EU's economic recovery plans with the launch of the ESM's Pandemic Crisis Support.[130] On the other hand, the fact that the pandemic affected all Member States was reflected in the fact that the Eurogroup met in inclusive format, namely with the participation of the ministers of finance of the Member States that are not part of the euro area.

As for the coordinating role of the European Council, it was quite obvious in the formation of the NGEU and deserves closer consideration. As an EU institution, the European Council is bound to respect the institutional balance established by the Treaties, i.e. it should not encroach on the powers of the other institutions. This rule is judicially enforceable where the Treaties give a formal decision-making role to the European Council, as for example when it decides simplified revisions of the Treaties under Article 48(6) and (7) TEU (this was confirmed in *Pringle,* when the ECJ accepted to review the validity of the European Council decision amending Art. 136 TFEU).[131] However, its general institutional role, as described in Article 15(1) TEU, is to "provide the Union with the necessary impetus for its development and define the general political directions and priorities thereof. It shall not exercise legislative functions". This priority-setting activity is very broad, and has no clear boundaries, but does not take the form of legally binding decisions. The European Council's Conclusions typically contain calls for action by *others*,

129. De Gregorio Merino, "The institutional architecture of Economic Union" in Fabbrini and Ventoruzzo, op. cit. *supra* note 58, p. 11, at p. 31.

130. See, on this point, the Remarks by Mario Centeno following the Eurogroup videoconference of 8 May 2020*,* Council press release 293/20 of 8 May 2020, announcing what the ESM's Board of Governors was going to decide following a Eurogroup meeting.

131. Case C-370/12, *Thomas Pringle* v. *Government of Ireland and others,* EU:C:2012:756. The Court noted (para 31): "Since the European Council is one of the Union's institutions listed in Article 13(1) TEU and since the Court has jurisdiction . . . 'to give preliminary rulings concerning . . . the validity . . . of acts of the institutions', the Court has, in principle, jurisdiction to examine the validity of a decision of the European Council."

whether the other EU institutions or the Member States. When doing this, the European Council is somehow acting outside the EU's institutional balance. It sets a political direction, but the necessary legislative or executive action that follows from there must be taken by others, who are not bound by the European Council's Conclusions.[132]

However, Article15 TEU gives only a partial and therefore distorted picture of the real role played by the European Council. As argued by Van Middelaar, the European Council plays five different roles in the EU's political system, depending on the circumstances: the European Council acts as strategist (which is the role described in Art. 15), but also as crisis tamer, as impasse-breaker, as shaper, and as spokesperson.[133] In some of these other roles, it is more likely to interfere with the EU's institutional balance. Already in the course of the euro crisis, the European Council had taken a very active role, leading to the criticism that it was usurping the Commission's treaty-based powers: "rather than set out strategic guidelines within which the Commission must act, the European Council has increasingly assumed the role of legislative initiator, both establishing detailed proposals, and securing and monitoring their implementation".[134] The European Council's Conclusions of July 2020 are a further demonstration of the prominent role it occasionally adopts in EU decision-making. The very detailed political agreement on the content of NGEU, as well as on the MFF for 2021–2027, was laid down in 65 pages of Conclusions. This can be described as an example of the European Council acting as "shaper". When using that term, Van Middelaar and others (such as Simon Bulmer in an article from 1996)[135] refer to the key role of the European Council in deciding revisions of the European treaties or accession of new Member States. These decisions shape the nature of the European integration process. The July 2020 meeting arguably fits in that category. Although no Treaty revisions were made, or even discussed, the European Council endorsed a new interpretation of some key norms of EU public finance and gave the green light to what amounts to a

132. The ECJ confirmed this in Case C-5/16, *Poland* v. *Parliament and Council*, EU:C:2018:483, when ruling (in para 89) that it was not prepared to annul a decision adopted by Council and Parliament on the grounds that it diverges from European Council conclusions. Otherwise, "the Parliament and the Council's powers would be compromised in favour of following the political will expressed by the European Council".

133. Van Middelaar, *Alarums & Excursions. Improvising Politics on the European Stage* (Agenda Publishing, 2019), at pp. 178–183.

134. Dawson and F. de Witte, "Constitutional balance in the EU after the euro-crisis", 76 *Modern Law Review* (2013), 817, at 830. See also Bressanelli and Fasano, "The shadow of the European Council: Understanding legislation on economic governance", 38 Journal Eur. Int. (2016), 509.

135. Bulmer, "The European Council and the Council of the European Union: Shapers of a European confederation", 26 *Publius: The Journal of Federalism* (1996), 17.

temporary major expansion of the EU budget in order to deal with the pandemic crisis.

Was this “shaper” act an interference with the legislative and budgetary powers of the other EU institutions? This could be argued for two complementary reasons. First, because of the way in which the Conclusions set out in great detail (including by means of tables containing precise financial amounts) the content of NGEU and MFF; and second, by the peremptory way in which this happens: the paragraphs of the Conclusions are replete with the verbs “will” and “shall”, indicating that the European Council considered that it could *decide* what the Union was going to do through the NGEU programme and through the MFF. No words were spent on even a polite reminder that the formal adoption of this political agreement would require action by the other EU institutions. What do we make of this in the light of the little sentence in Article 15 TEU that the European Council “shall not exercise legislative functions”? In those 65 pages, the European Council did something that looks very much like legislative drafting. But the formal adoption of the various elements of the package still had to happen according to the procedures set out in the various legal bases. In fact, the remaining five months of the year 2020 were then spent on fine-tuning the July agreement within the Council, and negotiating its content with the European Parliament, which had codecision or consent powers for major elements of the policy package. The European Council Conclusions of July 2020 were not the final word on the recovery plan and the MFF, and the European Parliament managed to force through a number of changes to the package, although not on the essential points.

At its December 2020 meeting, the European Council again intervened in the ongoing legislative process by adopting an interpretation of the Rule of Law Regulation and adding a gloss to it.[136] What it did in this instance was to perform another of Van Middelaar’s five functions, namely to act as “impasse-breaker”: due to the veto threat by Hungary and Poland, the other institutions had reached a dead end in their deliberations, and intervention by the Heads looked like the only way to solve the problem. Was this impasse-breaker act of the European Council a massive interference with the institutional balance, as some blog commentators argued after the meeting?[137] There was an alleged interference with the legislative power in that the

136. Conclusions of the European Council meeting (10 and 11 Dec. 2020). See Editorial comment, op. cit. *supra* note 30.

137. Alemanno and Chamon, “To save the rule of law you must apparently break it”, *Verfassungsblog,* 11 Dec. 2020; Scheppele, Pech and Platon, “Compromising the rule of law while compromising on the rule of law”, *Verfassungsblog*, 13 Dec. 2002. But see, for a different

European Council added a lengthy gloss to the text of the Regulation as it was adopted, shortly afterwards, on 16 December 2020, by the Parliament and Council.[138] There was also an alleged interference with the Commission's executive power in that the European Council Conclusions stated that the Commission intended to adopt guidelines on how to apply the Regulation and do so only after the ECJ decides the action for annulment of the Regulation that Hungary and Poland have in the meantime introduced.[139]

Several commentators, upset by this watering down of the EU's rule of law policy, encouraged the European Parliament to bring an action for annulment of the European Council Conclusions, for breach of the principle of institutional balance. However, the EP explicitly refused to do so. In a resolution which it adopted on 17 December (one week after the European Council meeting and one day after the Rule of Law Regulation had been safely adopted), it drily stated: "the content of the European Council conclusions on the Regulation on a general regime of conditionality for the protection of the Union budget is superfluous; ... the applicability, purpose and scope of the Rule of law Regulation is clearly defined in the legal text of the said Regulation; . . . any political declaration of the European Council cannot be deemed to represent an interpretation of legislation as interpretation is vested with the European Court of Justice".[140] In other words, the EP considered that the European Council simply could not have infringed the EP's legislative power by means of its Conclusions. As for the infringement of the Commission's executive power (namely to act as guardian of compliance with EU law), the exact language used in the European Council Conclusions was that "the Commission intends to develop guidelines" and that "until such guidelines are finalized, the Commission will not propose measures under the Regulation".[141] In other words, the Commission accepted to do this, not because it was ordered to do so by the European Council but out of its free political will, which was apparently conveyed by its President who, as we know, is a member of the European Council.

take on the European Council's conclusions, Nguyen, "The EU's new rule of law mechanism – How it works and why the 'deal' did not weaken it", *Hertie School Jacques Delors Centre Policy Brief*, 17 Dec. 2020.

138. Regulation 2020/2092 of the European Parliament and of the Council of 16 Dec. 2020 on a general regime of conditionality for the protection of the Union budget, O.J. 2020, L 433 I/1.

139. Case C-156/21, *Hungary* v. *Parliament and Council;* Case C-157/21, *Poland v. Parliament and Council*, both pending.

140. European Parliament resolution of 17 Dec. 2020 on the Multiannual Financial Framework 2021–2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of law Regulation, P9_TA(2020)0360, points 4 and 5.

141. Conclusions cited *supra* note 136, point 2(c).

Our conclusion of this sub-section is that the EU's institutional balance was respected during the adoption of the recovery plan. The Commission fully exercised its power of initiative once it had received the necessary political backing from the Franco-German initiative, in May 2020. The European Council played a decisive political role, which reflected the fact that key elements of the ambitious recovery plan required unanimous decision-making in the Council. The European Council had to help paving the way towards such unanimous agreement. The European Parliament had advocated, early in 2020, the adoption of a recovery plan along the lines of what the Commission proposed in May 2020. It loyally supported the adoption of the recovery plan, even though some aspects of the plan affected its own role in the institutional system (in particular, its role in the control of the NGEU budget is more reduced than its normal budgetary control role).

6.2. *The governance of the recovery instruments*

After having examined the role of the institutions in the *adoption* of the recovery instruments, this section briefly examines the institutional arrangements applying to their implementation.

The SURE Regulation provides for a simple implementation mechanism. Implementing decisions providing financial assistance are to be adopted by the Council rather than by the Commission, according to the exceptional implementation procedure foreseen in Article 291(2) TFEU. SURE follows, in this respect, the model set in 2010 by the European Financial Stabilisation Mechanism, whose loans are similarly decided by the Council rather than by the Commission. However, the Council's decisions are based on proposals by the Commission and, in fact, the Commission does all the legwork in discussing the loan with the Member States concerned. Article 3 of the SURE Regulation is entitled "Conditions for using the Instrument", but it only specifies that the loans must be used exclusively to support the short-time work schemes and similar measures of the Member States. This is the normal earmarking that one finds in all EU funds, and the SURE programme does not contain any additional conditions. The Commission published in February 2021 a report on the first months of operation of SURE, from which it appears that over 90 percent of the total envelope of EUR 100 billion has already been allocated to 18 Member States. The report does not dwell on the reasons why some States did not request loans under the SURE instrument, but one can guess, from the list of applicant countries and the absence of countries such as Germany, France, Finland, the Netherlands and Sweden, that it proved to be attractive mainly to countries for which SURE offered more favourable loan terms than the terms that they obtain under their own sovereign issuance. The

Commission estimates that the Member States have saved altogether around EUR 5.8 billion by taking SURE loans as compared to taking the same loans at the normal rates charged to them on the financial markets.[142]

The EURI Regulation, as the umbrella instrument of the recovery package, does not need further implementation. As mentioned above, the sums gathered by the European Union through borrowing are to be spent, in accordance with EURI, through separate EU instruments of which the most important by far is the RRF Regulation. Since the latter is a cohesion instrument, one would imagine its implementation to be similar to that of the EU's structural funds. On a closer look, there are indeed striking similarities between RRF governance and the governance of the structural funds, but there are also important differences that require some explanation. The first thing to note is that the entire funding of the Facility, whether loans or direct subsidies, will be absorbed by the 27 Member States, based on national recovery and resilience plans (RRPs). No portion of the Facility is reserved for the funding of projects launched by the European Union itself. The share of each State in the grants and loans of the RFF is determined by two sets of criteria. During the first phase, namely the commitments for the years 2021 and 2022, the shares are calculated on the basis of a complex formula based on the country's population, its GDP per capita and its unemployment rate. That calculation will be updated by 30 June 2022 in order to take account of the evolution of the country's GDP since the outbreak of the pandemic.[143] The resulting allocations per country are listed in Annex IV of the RRF Regulation. Since the criteria favour the countries with a lower GDP and higher unemployment rates, the RRF will have a redistributive effect among EU Member States, especially for the part devoted to non-repayable subsidies.

The RRF also contains an allocation criterion according to policy domains which each country must observe in drawing up its RRP. RRF funding should be allocated for at least 37 percent to green transition and for at least 20 percent to digital transition. The remaining 43 percent can be spent on other kinds of projects, as long as they come within the scope of one of the six "pillars" listed in Article 3 and contribute to one of the very broad objectives listed in Article 4.

One of the key controversies during the negotiation of NGEU concerned the need to subject the RRF disbursements to conditionality. Conditionality must be distinguished from the normal earmarking of the use of EU funds for the specific purposes defined by the relevant instrument (e.g. Erasmus+ funding must be used for the measures of educational mobility described in its

142. European Commission, *SURE: Taking Stock After Six Months*, COM(2021)148 of 22 Feb. 2021, at 3.

143. RRF Regulation cited *supra* note 35, Art. 11.

basic act, and not for any other purpose). Conditionality goes further. The conduct prescribed by conditionality clauses pursues an additional policy objective which goes beyond the primary purpose of spending.[144] As was mentioned earlier, the EU funds in general, but especially the structural funds, are marked by the widespread use of such conditionality. The RRF Regulation, in contrast, has more modest conditionality rules. The new Rule of Law conditionality applies to the RRF as much as to the "ordinary" EU funding instruments.[145] Furthermore, the text of the Regulation empowers the Commission to assess the national plans on whether they effectively contribute to the objectives of the RRF, but also on whether they are "expected to contribute to effectively addressing all or a significant subset of challenges identified in the relevant country-specific recommendations".[146] This reference to the European Semester and to the fiscal policy coordination in the EMU context is very cautiously formulated, and one would not expect the Commission to try and impose a strict compliance with those country-specific recommendations when assessing the national plans. In practice, the Commission has been giving general guidance on the preparation of those plans,[147] and holds bilateral discussions with each Member State about their draft plans. In this way, it can try to steer the plans towards the country-specific recommendations made for the country concerned. It is too soon to tell how effective this steering activity of the Commission will prove to be.

The Commission does not have total discretion, though, in its assessment of the national plans. That assessment must be endorsed by the Council, as the actual decisions allocating the funds to the beneficiary States are taken by the Council; like with SURE, the Treaty provision that allows the Council to be entrusted with implementing powers was used in this instance. After the initial disbursements following the approval of the national plans, the Commission will again examine whether the States fulfil the relevant "milestones and targets", and on that basis the Council can take further implementing decisions releasing additional instalments of the Facility. The Preamble of the Regulation states that if "one or more Member States consider that there are serious deviations from the satisfactory fulfilment of the relevant milestones and targets, they may request the President of the European Council to refer the matter to the next European Council".[148] This curious clause reflects the

144. Vita, op. cit. *supra* note 54, at p. 122.

145. Regulation on a general regime of conditionality, cited *supra* note 138, Recital 7 of the preamble.

146. RFF Regulation cited *supra* note 35, Art. 19(3)(b).

147. Commission Staff Working Document, *Guidance to Member States Recovery and Resilience Plans*, 22 Jan. 2021, SWD(2021)12.

148. RFF Regulation cited *supra* note 35, Recital 52.

insistence by the "frugals" (especially the Netherlands) during the July 2020 negotiations for a genuine emergency brake, allowing the European Council to intervene in the implementation of the RRF. This was rightly considered to be incompatible with the EU's institutional balance (as the European Council has no formal role to play in the implementation of EU legislation)[149] and, instead, the reference to the European Council was "hidden" in one of the recitals (rather than the operational text of the RRF Regulation) and was weakened into a simple possibility for the European Council to discuss matters without being able to block an implementing decision.

As for the European Parliament, it had no role to play in the Facility's governance under the original plan for the RRF, as proposed by the Commission in May 2020. The exclusion of the EP was linked to the public finance construction used by NGEU: normally speaking, the EP's budgetary control powers do not extend to the extra-budgetary resources and expenditure. During the negotiations in the autumn of 2020, the EP insisted on being included in the governance system. It obtained the creation of a "recovery and resilience dialogue", whereby the Commission can be called every two months to discuss the state of play of the RRF with the competent committee of the EP.[150] This was inspired by the "economic dialogue" established in the context of the EU's economic governance when it was reformed during the euro crisis.[151] The Interinstitutional Agreement accompanying the new MFF contains further arrangements for the involvement of the European Parliament in the external assigned revenue of NGEU.[152]

Given the huge amount of funding made available under the RRF, and given the complexity of the demands it puts on the administrative capacity of the Member States at a time when they also have to prepare their plans for the new generation of structural funds under the MFF 2021–2027, the question inevitably arises how well the Member States will be able to absorb the RRF funds,[153] and how much of the RRF will be actually taken up by them. While it may safely be predicted that the EUR 312.5 billion worth of *subsidies* will be very largely, and perhaps fully, taken up, it is not so obvious that the Member States will fully use the *loan* part of the RRF. Indeed, from the perspective of national public finances, borrowing from the Union will be an

149. De Gregorio Merino, op. cit. *supra* note 36, at 12.

150. RFF Regulation cited *supra* note 35, Art. 26. See Dias and Lara Miranda, "European Parliament involvement in scrutinizing the Recovery and Resilience Facility", European Parliament briefing PE 659.627, Jan. 2021.

151. On which, see Fasone, "European economic governance and parliamentary representation: What place for the European Parliament?", 20 ELJ (2014), 169, at 175–177.

152. Interinstitutional Agreement cited *supra* note 117, Annex I, points 38 to 48.

153. On the absorption issue, see also European Court of Auditors, Opinion No. 6/2020.

alternative option compared to the usual channels for borrowing on the capital markets. The EU loans are attractive if they come at lower interest rates, and have longer maturity, than alternative loans on the open market. This will be true for some countries (say, Greece and Italy) whose current interest rates on the capital markets are about 1 percent higher than the very low interest rates that the EU will charge them, but not for others (say, Germany or the Netherlands). Also, the EU loans are earmarked for specific usage, in contrast with loans on the open market. There is thus a distinct possibility that some governments may forgo the EU loans altogether, or at least take up less than their allocated share.[154]

7. Conclusion: Policy shift, legal engineering and institutional transformation?

The adoption of the recovery plan had the great merit of restoring confidence in the EU's capacity to act in the face of external challenges. The NGEU package is a major shift in EU economic policy made possible by creative legal engineering. Whether the recovery plan also operates a transformation of the EU's institutional landscape is more debatable.

7.1. *Policy shift*

The billions of euros in grants under the RRF will allow the Member States to make investments in their economy without the need to incur new public debt. At the same time, this distribution of funds through the EU does not operate a direct transfer from the richer to the poorer Member States, as the EUR 750 billion will neither be "German" nor "Greek" debt but truly common debt. Whether NGEU eventually leads to a fiscal transfer between EU countries will only become clear in the future, when the EU will start repaying the capital of its massive borrowing – depending on whether this repayment will be based on newly created own resources of the EU, or on the "old" own resource of GNI-based contributions. The adoption of the rhetoric of solidarity between the Member States was naturally prompted by the pandemic, but was also made relatively painless by the fact that there are no costs involved in the plan for the frugal States, at least not for the time being.

NGEU is more than a response to the economic downturn caused by the pandemic crisis. It rather appears to be a multipurpose plan, aiming at the longer term. One could even argue that its main aim is not to offer immediate relief from the economic downturn caused by the pandemic (as the NGEU

154. See "Bazooka blunted as EU countries snub recovery loans", *Politico,* 27 Oct. 2020.

funds will anyway start flowing too late for that) but to foster structural transformation of the national economies, with special emphasis on the green and digital transitions.[155] To use the title words of the RRF Regulation, it is more about "resilience" than about "recovery". The adoption of NGEU also confirms the flexible nature of the EU's economic constitution and its pluralist character, as it signals an ideological change from the insistence on budgetary austerity to a recognition of the need for massive public intervention in the economy.[156]

The Union now has an increased fiscal capacity, which is not based on an increase of the contributions by its Member States, nor on the creation of the EU's own taxes, but on the emission of bonds. That fiscal capacity is fragile and temporary. Time will tell whether it can be transformed into a permanent tool for common fiscal policy and macro-economic stabilization. As the NGEU programme is limited in time, the question will arise, towards the end of it, whether there is still a need for a euro area-specific reform instrument, or whether the recovery plan has marked a decline in the trend towards differentiated integration in the economic policy domain. Certainly, the development of the Eurozone into an autonomous organization, separate from the European Union, is halted by the legal evolution of 2020, as both SURE and NGEU are EU-wide programmes.[157] The adoption of the NGEU programme also calls into question the role of the European Stability Mechanism. Indeed, the pandemic crisis loan programme of the ESM has remained unused, as the euro area Member States could access funding in more appealing ways through the ECB's debt purchase programme and through the loans and grants provided by the EU through its new programmes.[158]

7.2. *Legal engineering*

In many ways, the recovery plan is marked by an orthodox EU law approach. The entire plan was enacted within the bounds of the EU legal order, and thus, unlike what happened during the euro crisis, without recourse to intergovernmental agreements between the Member States. The plan will be implemented by the Member States in cooperation with the EU's main institutions. No new European agencies or extra-EU bodies were created to

155. Pisani-Ferry, op. cit. *supra* note 1, at 9.

156. See Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart Publishing, 2016).

157. Fromage, "Towards increasing unity and continuing executive predominance within the E(M)U post-COVID?", 47 LIEI (2020), 385.

158. See Guttenberg, "Time to come home – If the ESM is to stay relevant, it should be reinvented inside the EU", *Hertie School Jacques Delors Centre Policy Brief*, 11 Nov. 2020.

assist with its implementation. There has been no need, either, to amend the European Treaties in order to establish the NGEU programme.

However, as *The Economist* noted on 25 July 2020, we saw how "[h]itherto unused, overlooked or reinterpreted rules provide the legal bedrock for renewed attempts to integrate [Europe] in ways unimaginable a few months ago".[159] Several commentators noted how the Commission's proposals of May 2020 were "masterpieces of high-tech legal engineering".[160] As was discussed in section 4 above, the use of the legal bases in Article 122 and Article 175(3) TFEU was not unprecedented but still rather daring. Their use for the purposes of the recovery plan required some stretching of their scope of application. Article 122, which had been reserved for truly exceptional situations, serves now as the legal ground for a huge funding programme that amounts to a temporary "second budget" for the EU. As for Article 175(3), its use as the legal basis for the RRF confirms its prominent place in the EU's policy toolbox. It now serves as the basis for EU macro-economic policy measures, eclipsing the modest legal resources offered by the economic policy chapter of EMU.

The legal engineering was mostly needed for the other dimension of the recovery plan, namely the changes of the institutional practices of EU public finance law. The upfront way to articulate the EU's policy shift would have been through a major increase of the national contributions to the Union's budget. This would have been perfectly possible, since the adoption of the recovery plan coincided in time with the revision of the Multiannual Financial Framework. As this was not politically (and economically) feasible, the alternative solution was to raise the resources needed for the recovery plan in a different way, namely by borrowing EUR 750 billion on the financial markets. This allowed for the postponement of the fiscal capacity question until the time when that new debt will have to be repaid. The revenue needed for that repayment will have to be raised in one of three ways: by drastically reducing the funding of other EU policies (which seems very unlikely, as the European Parliament would not consent to that), by raising the national contributions to the EU budget in order to ensure the repayment (which is guaranteed as the default option by the ORD), or by creating new resources flowing into the EU's coffers. The third option may, in fact, have become more attractive for the Member States, as it would avoid an increase of the direct

159. "Chekhov's treaty", *The Economist,* 25 July 2020, at 22.

160. Costamagna and Goldmann, "Constitutional innovation, democratic stagnation?", *Verfassungsblog*, 30 May 2020. And see the title of the following article: De Sadeleer, "Le plan de relance Next Generation EU. Du changement de cap budgétaire à l'ingénieurerie institutionnelle", (2020) R.A.E., 607.

GNI-based burden on their national budgets.[161] For now, the Member States have, in fact, agreed to create "common debt" to help them to deal with the COVID-19 crisis, whilst avoiding that this debt would weigh on their national budgets. For them it may seem like "money from heaven".[162]

7.3. *Institutional transformation?*

We are not convinced that the adoption of the recovery plan led to "unprecedented, far-reaching institutional reforms, which have the potential to transform the founding structures and templates of European integration".[163] As regards the *vertical* division of powers between the EU and its Member States, we have seen some stretching of the EU's competences in Article 122 and Article 175 TFEU, and the frank acceptance that the European Union can incur massive debt in the common interest of its Member States; but those developments were willingly accepted by all the national governments and have not affected the stranglehold of the Member States on the EU's public finance system. As regards the *horizontal* division of powers between the EU institutions, this article argued that each of the EU institutions played the role expected from them, and the institutional balance between them was not breached. This conclusion does not imply that the current vertical and horizontal division of powers is optimal, but, in the absence of a realistic possibility to revise the Treaties, the authors of the recovery plan had to work with the available legal tools. One could wish, though, that the vicissitudes of the recovery plan's adoption will convince enough Member State governments that the time has come to question the unanimity rule for the adoption of the Multiannual Financial Framework and the Own Resources Decision, so as to allow the European Union to breathe more freely when faced with new economic policy challenges.

161. Crowe, op. cit. *supra* note 41.
162. Pisani-Ferry, op. cit. *supra* note 1, at 2.
163. Dermine, op. cit. *supra* note 7, at 345.