§ 2 Next Generation EU
The Transformation of the EU Financial Constitution

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I. Tapping the EU's fiscal potential to attract support funds

1. Striving for Unity in Times of Pandemic

The COVID-19 pandemic has caused enormous suffering in EU Member States. The protective measures have produced one of the deepest recessions in modern history. Essential achievements of European integration, such as the freedom to travel, had to be temporarily suspended. But this describes only one side of the picture that has emerged since the outbreak of the pandemic — the distressing side. On the other side, the EU institutions and the EU Member States have developed a political will for unity in the course of the pandemic that would have been unthinkable in this form just months ago.

At first, it seemed as if the EU institutions would follow their usual course in developing financial support structures: The ECB launched new pur-

chase programmes to grant the states of the EURO zone favourable financing conditions.[1] In doing so, it accepted becoming a major creditor of individual EURO states and acquiring a blocking minority in state insolvency proceedings. The ESM lowered its financing conditions and waived a strict examination of debt sustainability as a condition for granting financial aid.[2] The European Investment Bank provided credit support.[3] The EU legislator trimmed existing funds to allow solidarity-based aid in times of pandemic.[4]

As early as April 2020, however, the picture changed. The EU Commission made it clear that it considered support to be necessary to an extent that would have seemed completely unimaginable months earlier. It also made it clear that it was in favour of tapping the EU's fiscal potential in order to deal adequately with the crisis — i.e. issuing bonds in the name of the EU in order to make the funds thus raised available to the EU Member States. On 2 April 2020, the European Commission proposed an EU legal instrument to support EU Member States in financing short-time work ('SURE'); the regulation was already adopted by the Council on 19 May 2020.[5] It provides for the EU to borrow 100 billion euros in order to be able to grant loans to EU Member States. The loans granted by the EU to the EU Member States under the 'SURE' instrument are to be backed by a system of voluntary guarantees by the EU Member States. The use of the EU's fiscal capacity was to be strengthened and underpinned in this way; this safeguard promised a (further) improvement in the EU's financing conditions. However, the issuance of EU bonds to finance loans to EU Member States or third parties ('back-to-back lending') was technically not an innovation.

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1 European Central Bank, Decision (EU) 2020/440 of 24.3.2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), OJ L 91, 1.

2 ESM instrument ECCL Pandemic Crisis Support (PCSI) on the basis of precautionary ESM credit line with extended conditions (ECCL) (cf. declaration of the Eurogroup of 8.5.2020; request of the German Federal Ministry of Finance to obtain a consenting resolution of the German Bundestag pursuant to section 4(1) of the ESM Financing Act, BT-Drs. 19/19110).

3 European Guarantee Fund (EGF) (Decision of the Board of Directors of the European Investment Bank of 26.5.2020).

4 Council Regulation (EC) No 2012/2002 of 11.11.2002 establishing the European Union Solidarity Fund, OJ L 311, 3 (as amended by Regulation (EU) No 2020/461 of 30.3.2020, OJ L 99, 9).

5 Council Regulation (EU) No 2020/672 of 19.5.2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L 159, 1.

Both the EEC and the EU have made use of this in the past.[6] The amount borrowed, however, went far beyond anything known thus far.

But this was only a first step. In May 2020, the EU Commission presented the bold and radical plan to use the financial potential of the EU to issue bonds on the credit markets to an extent that was unimaginable until recently.[7] The EU Commission itself speaks of a 'historic and unique proposal'[8]. The EU should issue bonds to the tune of 750 billion euros in order to make the funds raised available to the EU Member States as non-repayable grants, in some cases also as loans. The programme is to stand alongside the regular EU budget, which will be fixed in the Multiannual Financial Framework (MFF) 2021-2027.[9] It must be seen as an expression of the EU's growing fiscal self-confidence that the plans no longer foresee a guarantee of the loans taken out by the EU Member States. The repayment of the issued bonds was to be made from the EU budget — in the period between 2028 and 2058. The money was to flow into various funds, some existing[10] and some to be newly established[11]. To secure the construction, the EU Commission envisaged that the EU Member States would establish the competence to issue the bonds by way of a (unanimous) amendment to the EU's Own Resources Decision — an amendment that would require ratification by the EU Member States.[12] In this way, a self-binding commitment

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6 E.g. Community Loan Mechanism: *S. Piecha*, Die europäische Gemeinschaftsanleihe: Vorbild für EFSF, ESM und Euro-Bonds, EuZW 2012, 532; *S. Horn/J. Meyer/Chr. Trebesch*, Kiel Policy Brief No. 136, 04.2020, https://www.econstor.eu/bitstream/10419/215823/1/1694425932.pdf, last accessed: 18.11.2020.

7 EU Commission, Communication of 27.5.2020, Europe's moment: Repair and Prepare for the Next Generation, COM(2020) 456 final.

8 Ibid, 5.

9 EU Commission, Proposal of 2.5.2018 for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027, COM(2018) 322 final, 2; EU Commission, Amended proposal of 28.5.2020 for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027, COM(2020) 443 final.

10 E.g. Just Transition Fund; European Fund for Strategic Investments (EFSI) with a new solvency assistance instrument; European Regional Development Fund (ERDF), European Social Fund (ESF) and European Fund for Assistance to the Most Deprived (FEAD) with a new package 'Recovery Assistance for Cohesion and the Territories of Europe' ('REACT-EU'); expansion of the Neighbourhood, Development and International Cooperation Instrument (NDICI).

11 Build-up and Resilience Facility; EU4Health programme; InvestEU programme.

12 EU Commission, Amended proposal of 28.5.2020 for a Council Decision on the system of Own Resources of the European Union, COM(2020) 445 final.

was made by the EU Member States, which must ensure within the framework of future multiannual financial frameworks that the EU has the necessary own resources to service the bonds. This makes it impossible for the EU Member States to question the political legitimacy of the bond issue.

As is well known, the question of whether the EU's fiscal potential should be tapped for credit financing of expenditures has been discussed for a long time. After all, the EU has become one of the largest economic blocs in the world. Financial markets have long wanted a safe investment vehicle behind which the EU and its Member States can stand. In the financial crisis from 2008 onwards, discussions were held on whether 'Eurobonds' should be issued, guaranteed by the states of the EURO group and used to cover the financing needs of the states belonging to the group.[13] Various options were discussed at the time. For many EU Member States, however, it was unacceptable to be directly liable for the fiscal policy of other states.[14] After the outbreak of the COVID-19 pandemic, the demand for Eurobonds arose again.[15] In March 2020, nine EU Member States approached the President of the Council with a request to introduce community bonds. In April 2020, however, the EU Commission then decided to go down a new path — raising funds that would be injected into the EU Member States not only as loans but also as straight grants. An external liability of the EU Member States was not envisaged. In the internal relationship, however, there is in any case from Art. 4(3) TEU in connection with Art. 311(1) TFEU a legal obligation to enable the EU to repay the funds raised. In addition, the amended Own Resources Decision will provide that the EU Member States

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[13] *F. Mayer/C. Heidfeld*, Eurobonds, Debt redemption funds and project bonds: A dark threat, ZfRPol 2012, 129; *S. Müller-Franken*, Eurobonds und Grundgesetz, JZ 2012, 219; *W. Heun/ A. Thiele*, Verfassungs- und europarechtliche Zulässigkeit von Eurobonds, JZ 2012, 973; *P. Steinberg/C. Somnitz*, Eurobonds als Baustein einer Fiskalunion, Friedrich-Ebert-Stiftung 2013 (https://library.fes.de/pdf-files/id/ipa/09673.pdf, last accessed: 18.11.2020); *P. Sikora*, Europa- und verfassungsrechtliche Rechtsfragen der Einführung sogenannter Eurobonds, 2014; *H.-B. Schäfer*, Eurobonds aus rechtsökonomischer Perspektive, FS Köndgen, 2016, p. 479.

[14] *M. Brunnermeier/H. James/J.-P. Landau*, The Euro and the battle of ideas, 2016.

[15] *F. Giavazzi*, Covid Perspetual Eurobonds: Jointly Guaranteed and Supported by the ECB, in: Bènassy-Quéré/Weder di Mauro (eds.), Europe in the time of Covid-19, 2020, p. 235*; N. von Ondarza*, Germany and EU fiscal solidarity: Renewed calls for Eurobonds but reluctant government, in: Russack (ed.), EU Crisis Response in Tackling Covid-19: Views from the Member States, 2020, p. 8.

will be subject to certain additional funding obligations.[16] A direct (horizontal) liability of the EU Member States for the financial and economic conduct of the other states is not provided for.

2. Basic structure of 'Next Generation Europe'

NGEU is larger than anything seen in the history of the EU. The EU institutions agree that the programme should have a total volume of 750 billion euros. This sum is to be raised on the capital markets by the EU Commission on behalf of the EU in the years 2021 to 2023 and passed on to the EU Member States in the form of non-repayable grants (390 billion euros) and loans (360 billion euros) by 2026. The programme's size is substantial. According to current decisions, the regular MFF will have a spending ceiling of 1,074 billion euros for the years 2021 to 2027. The NGEU funds will increase the EU's financial capacity by approximately 70 % over this period. In the negotiations on the MFF 2021-2027, there were years of pusillanimous arguments about fractional amounts of the now agreed capacity.

NGEU is based on the idea of linking two transfer streams. On the one hand, there are vertical transfers between the EU and its Member States, mainly in the form of non-repayable grants, but also partly in the form of repayable loans. These loans are particularly interesting when the financing conditions of an EU member state on the capital markets are worse than those granted by the EU. It has quickly become apparent that many EU Member States do not need this. The vertical component is complemented by a horizontal component: it consists of transfers between EU Member States, which are caused by the fact that the distribution of funds from NGEU does not coincide with the contribution responsibility for own resources from the Own Resources Decision. These transfers are at the political heart of NGEU; they constitute its integration policy value.

NGEU is composed of a complex bundle of measures[17] that can be structurally assigned to three levels. On the first level, the preconditions for raising and repaying funds are created. This is to be done by amending the Own Resources Decision (II. below). The funds raised on the capital markets are then to be distributed to various funds and facilities in a financial

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[16] See infra IV.

[17] *F. Schorkopf*, Die Europäische Union auf dem Weg zur Fiskalunion, Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts 'Next Generation EU', 2020 (https://www.jura.fu-berlin.de/forschung/europarecht/bob/berliner_online_beitraege/Paper121-Schorkopf/BOB-121-Schorkopf.pdf), p. 9, speaks of 'legal hightech'.

instrument (III. below). The funds are then managed in a third stage in specific instruments.[18] Just under 90 % of the funds are to be managed in the newly established Building and Resilience Facility (IV. below). The design is largely depoliticised — the EU is used as a special purpose vehicle to provide funds to EU Member States. This is a regression that threatens to call into question decades of striving for political autonomy (V. below).

The political decision-making and entry into force of NGEU is complicated by the fact that they are embedded in the negotiations on the Multiannual Financial Framework 2021-2027. The European Council reached political agreement on this framework in July 2020; however, the European Parliament has formulated divergent ideas. Part of the overall package is to be a new 'conditionality rule', with the help of which the disbursement of funds from the EU budget can be stopped if it is determined that violations of the rule of law in a member state have a sufficiently direct impact on the economic management of the EU budget or the protection of its financial interests or threaten to do so. The rule is intended to cover all EU funds, including those provided under the NGEU. It has met with opposition, especially in Poland and Hungary. The acceptance of NGEU is excluded as long as one of these states refuses to agree to the amendment of the Own Resources Decision.

II. The amendment of the Own Resources Decision

1. Subject of the amendments

a. Authorisation to borrow

There is agreement among the EU institutions that the competence to raise NGEU funds on the capital markets should be anchored in the Own Resources Decision.[19] This regulatory approach is in itself novel. In the past, the authorisation to issue EU bonds was consistently found in instruments of secondary legislation. To give just two examples: The EU's power to raise funds to finance the EFSM in the 2010 financial crisis was found in

[18] In the negotiations on the Multiannual Financial Framework 2021-2027, a total of 48 legislative proposals concerning existing and new programmes and funds will be discussed.

[19] COM(2020) 445 final (supra n. 12).

Art. 2(1) of the EFSM Regulation.[20] The 'SURE' Regulation[21] authorises the EU Commission in Art. 4(2) to raise a total of 100 billion euros on the capital markets.

Never before has the EU raised funds on the capital markets on such a scale as is now envisaged in the NGEU. However, there is no legally compelling reason to provide for the authorisation to raise NGEU funds in the Own Resources Decision, despite the scope. In particular, the competence of the EU does not have to be extended or expanded for this purpose.[22] Political reasons are decisive for choosing the path via an authorisation in the Own Resources Decision — although these funds are not 'own resources' in the legal sense.[23] NGEU has a size and dimension that makes it politically prudent not to anchor the debt competence in a secondary legal act (possibly even decided by a majority). The decision on own resources is taken in a special legislative procedure.[24] The decision requires ratification by the EU Member States. The anchoring in the Own Resources Decision thus results in an increased political commitment of the EU Member States (compared to a secondary law authorisation as in the 'SURE' instrument): they must ratify the amendment of the decision and thus support it politically. A later dissociation is thus ruled out. The choice of an instrument ratified by all EU Member States legitimises the chosen path in a way that comes close to a treaty amendment.

b. Provisions for repayment

The NGEU funding is to be obtained by issuing EU bonds on the capital market. The bonds are to be repaid from the EU budget in the years 2028 to 2058. Repayment is to be spread out over time in a continuous reduction process. It is legally mandatory that no more than 7.5 % of the total amount should be repaid in any one year. The amended Own Resources Decision should also stipulate that the EU Member States may be obliged to provide

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[20] Council Regulation (EU) No 407/2010 of 11.5.2010 establishing a European financial stabilisation mechanism, OJ L 118, 1; Council Regulation (EU) No 2020/672 (supra n. 5), OJ L 159, 1.

[21] Council Regulation (EU) No 2020/672 (supra n. 5), OJ L 159, 1.

[22] See infra II. 2. a.

[23] See infra II. 2. c.

[24] Art. 311(3) TFEU.

the EU with the necessary cash resources if the EU's budgetary resources are not sufficient to repay the loan portion of the NGEU.[25]

According to the ideas of the EU Commission and the European Council, a decision on how the NGEU funds will be repaid will not be taken before 2028. Both institutions want to stick to the basic structure of the EU own resources system for the years 2021-2027. The traditional own resources,[26] the VAT-based own resources[27] and the GNI-based own resources[28] are to remain at the centre.[29] The European Council decided in July 2020 to add the revenue from a member state tax on non-recyclable plastic as a new category. The revenue from this is manageable; moreover, it will decline if the incentive approach is effective. Further sources of revenue[30] are to be negotiated in the future. The European Parliament, on the other hand, aims to make the gradual development of further sources of revenue binding in the amended Own Resources Decision.[31] In this way, it wants to ensure already today that the EU will have additional funds at its disposal from 2028 onwards to an extent that is necessary for the repayment of the debts taken on within the framework of the NGEU. However, the European Parliament cannot force the Council to adopt its ideas; it is merely consulted in the procedure for amending the Own Resources Decision (Art. 311(3) TFEU).

c. Increase in the own funds ceiling

Finally, the amendment to the Own Resources Decision provides for the ceiling for commitment appropriations and expenditure to be raised by 0.6 % of EU27 GNI over and above the amount actually provided for (1.40 % of EU27 GNI; 1.46 % of EU27 GNI). This increase is to apply until

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25 Art. 6(4) of the proposal in COM(2020) 445 final (supra n. 12); cf. Art. 322(2) TFEU.

26 Customs duties, agricultural duties and sugar levies (approx. 10 % of the revenue).

27 Share of the EU Member States' transfer tax revenue (approx. 10 % of the revenue).

28 Uniform rate of levy on Member States' GNI (introduced by Decision 88/376/EEC; now approx. 72 % of the revenue).

29 The EU also has other revenues (taxes on the salaries of EU staff; contributions from non-EU Member States; fines under competition law, etc.); in detail: *T. Oppermann/C.-D. Classen/M. Nettesheim*, Europarecht, 9th ed. 2021, § 8.

30 There are discussions about the revenues from the EU Emissions Trading System, the burden on financial transactions, an import levy on the CO_2 content of imported goods and the like.

31 European Parliament, Report of 3.9.2020 on the draft Council Decision on the system of Own Resources of the European Union, A9-0146/2020.

the repayment of the NGEU bonds, but at the longest until 2058. The argument is that this increase is necessary to demonstrate to capital market actors the EU's ability to repay the borrowed funds. The argument is skewed because raising the ceilings does not establish fiscal capacity. It is a step that opens up potential room for manoeuvre for the EU. Only a decision on the own resources to which the EU is entitled or other regulations on the financial amounts accruing to the EU will put the EU in a position to actually perform.

The opening of sufficient room for manoeuvre under the own resources ceiling is a necessary but not sufficient condition for putting the EU in a position under fiscal constitutional law to service the bonds issued. The current political discussions show that so far there is no political agreement on how the necessary fiscal capacities of the EU are to be generated. This does not seem to impress the financial markets: The bonds issued to finance 'SURE' were oversubscribed many times. The above-mentioned increase of the ceiling by 0.6 % of EU27 GNI is likely to make only a minor contribution to securing the EU's top rating in the issuance of the NGEU bonds.

The question of whether the planned increase in the own resources ceiling to cover NGEU is necessary is currently being debated. Representatives of the EU Commission emphasise that the financial leeway is necessary in case the EU does not succeed in raising the funds necessary for the continuous repayment of the NGEU subsidy and at the same time the EU Member States do not repay the NGEU loans granted to them. In this case, arrears could pile up that would require a financing volume of 0.6 % of the GNI of the EU 27 (including a safety margin). From a constitutional point of view, it should be noted in this context that NGEU would probably be unconstitutional if this scenario is so likely that it is made a practical guideline for action. It is much more likely that the repayment of the NGEU bonds will take place without any difficulties and that there will therefore be enormous fiscal policy leeway under the 0.6 % increased ceiling as early as 2028, but especially in the years from 2040 onwards.[32] We will be coming back to this.[33]

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[32] *F. Heinemann*, Das Schulden-Experiment, Handelsblatt, 5.8.2020, p. 48; *id.*, Die Überdeckung der Next Generation EU-Schulden im Entwurf des neuen EU-Eigenmittelbeschlusses, statement in the context of the hearing of the Committee on EU Affairs of the German Bundestag of 26.10.2020, BT-Drs. 19(21)112.

[33] See infra III. 3.

The main significance of raising the ceiling by 0.6 % is political. The room for manoeuvre opened up will in future be able to be treated as a 'union disposal fund'. The basic political decision to open up a fiscal policy room for manoeuvre for the EU amounting to 2 % of the GNI of the EU27 was taken with the ratification of the amended Own Resources Decision.

2. EU legal framework

The EU institutions aim to supplement the existing own resources system with a powerful parallel system of further financial resources raised by the EU and distributed (to a considerable extent) to the EU Member States. NGEU means going towards a debt-financed spending policy. The fact that the funds raised are not allocated to the EU for free political disposal but must be used for a specific purpose to 'overcome the COVID-19 crisis'[34] does not change this, nor does the reference to the fact that the borrowing is to be only temporary (until 2058 at the latest).

Does current EU treaty law permit the described fundamental transformation of the EU financial constitution? If the Own Resources Decision were to be regarded as EU primary law, it (and its amendments) could not be measured against the requirements of (other) treaty law. In the discussion on European law, some voices do indeed assume that the Own Resources Decision is of a treaty nature.[35] In justification, reference is made to the ratification requirement of an amendment under Art. 311(3) cl. 3 TFEU. Thus, the legal nature is inferred from the procedure. This conclusion appears inadmissible. The difference between primary and secondary law is not procedural, but instrumental and material: primary law has a contractual quality; secondary law is enacted by the EU institutions in the exercise of their contractual competences. Moreover, a provision such as Art. 311(3) cl. 3 TFEU would not be necessary if the decision had the quality of primary law. Accordingly, the EU Own Resources Decision, which is adopted by an EU institution on the basis of Art. 311 TFEU, has the quality

[34] Art. 3a, Art. 3b of the proposal in COM(2020) 445 final (supra n. 12).

[35] *S. Magiera*, in: Grabitz/Hilf/Nettesheim (eds.), Das Recht der Europäischen Union, 2020, Art. 311 TFEU m.no. 10; *A. v. Arnauld*, Normenhierarchie innerhalb des primären Gemeinschaftsrechts, EuR 2003, 191 (198 f.); *M. Lienemeyer*, Die Finanzverfassung der Europäischen Union, 2002, p. 207; *M. Cervera Vallterra*, El poder presupuestario del Parlamento Europeo, 2003, p. 406 f.; cf. also *I. Härtel*, Handbuch Europäische Rechtsetzung, 2006, p. 410: Art. 311 TFEU as a special treaty amendment procedure.

of secondary law.[36] This corresponds to the opinion of the EU Commission.[37] Nothing to the contrary can be inferred from the Lisbon decision of the *Bundesverfassungsgericht* (German Federal Constitutional Court).[38] Special requirements for consent, with which a decision is extraordinarily tied back into the political sphere of the Member States, do not change the legal quality of an EU measure — normative status and procedure are to be separated. It is true that since 'Lisbon' EU law has known cases in which EU institutions can change procedural rules of primary law ('bridging clauses'). However, such decisions are not taken in the special legislative procedure; nor do they concern the enactment of substantive law. The power under Art. 311(3) TFEU must therefore be exercised in a way that is compatible with the requirements of primary law.

How much political leeway do the EU institutions and the EU Member States have in this regard? The search for answers is preconditional, because constitutional questions of EU association competence, questions of legal-technical procedure and questions of compatibility with EU budgetary law arise.

a. Debt competence of the EU

In the light of the principle of conferral (Art. 5(1) TEU), the EU needs a specific power to enter into commitments on the capital market. Art. 311(1) TFEU states that the EU 'shall provide itself with the means necessary to attain its objectives'. However, this is not an association competence norm. There is no explicit authorisation to issue EU bonds in the TFEU. However, the written EU primary law does not contain any conclusive general regulation on how the EU finances itself; nor does it exclude the issuance of bonds. As early as the 1970s, it became widely accepted that the EU could issue bonds in times of crisis in order to pass on the funds

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[36] *U. Häde*, Finanzausgleich, 1996, p. 429 ff.; *id.*, in: Frankfurter Kommentar, EUV/GRC/AEUV, Art. 311 TFEU m.no. 124; *C. Ohler/R. Streinz/C. Herrmann*, Der Vertrag von Lissabon zur Reform der EU, 3rd ed. 2010, p. 88; *C. Waldhoff*, in: Calliess/Ruffert (eds.), EUV/AEUV, Art. 311 TFEU, m.no. 5; *G. Wilms*, Die Reform des EU Haushalts im Lichte der Finanziellen Vorausschau 2007-2013 und des Vertrages von Lissabon, EuR 2007, 707 (710).

[37] EU Commission, The Financial Constitution of the European Union, Office for Official Publications of the European Communities, 2002, p. 102.

[38] BVerfGE 123, 267, m.no. 52; BVerfGE 313, 412, does speak of Art. 311(3) TFEU in the context of a treatment of simplified treaty amendment procedures, but does not deal with the nature of the provision.

raised as loans to Member States in need.[39] This has already been pointed out. For borrowing operations, the EU has relied, inter alia, on Art. 122, Art. 143 and Art. 212 TFEU. This practice has been maintained for decades and must be seen as an expression of the understanding that the EU has an unwritten associative competence to issue such bonds. Individual legal acts of the EU now even provide that 'the Commission may roll over the associated borrowings contracted on behalf of the Union'.[40] It is also recognised that the EU has the implicit authority to finance the acquisition of buildings through loans. An association competence of the EU for the issuance of bonds was and is undisputed — even if it is unclear whether this competence is subject to quantitative limits (e.g. from Art. 310(1) subpara. 3 TFEU).[41] The fact that the EU is prevented *by budgetary law* from financing operational expenditure through debt (Art. 310(1) subpara. 3 TFEU) does not prevent this.

The planned authorisation of the EU Commission to issue bonds thus does not extend the EU's associational competence. It is a new form of authorisation. From a legal point of view, the significance of the chosen form lies primarily in the fact that it removes the ground from possible disputes about the scope of an (unwritten) competence. The amended Own Resources Decision also makes it clear that parallel borrowing via secondary law instruments is to be excluded in order *to combat the Corona consequences*. In this respect, the chosen path brings with it a clarification of competence and at the same time has a restrictive effect.

b. Own Resources Decision and Non-own Resources

In terms of Union constitutional law, however, the chosen path does not prove to be completely unproblematic. The existence of an EU association competence does not mean that the issuance of bonds can be anchored in the Own Resources Decision pursuant to Art. 311(3) cl. 1 TFEU. Doubts exist because the funds obtained through the issuance of bonds are, according to the general view, not own resources. Such funds do not provide the

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[39] *K. von Lewinski*, Verschuldenskompetenz der Europäischen Union, ZG 2012, 164 ff.

[40] Art. 9(3) of Council Regulation (EU) No 2020/672 (supra n. 5), OJ L 159, 1.

[41] It has never been legally or politically clarified whether other EU competences also include an implicit power to incur debt. In principle at least, it would therefore be possible to enable the debt envisaged for the financing of COVID-19 measures in a 'basic act' based on Art. 122(2) TFEU; this would also comply with Art. 310(3) TFEU, which requires the adoption of a binding legal act for the implementation of the expenditure entered in the budget.

EU with a net inflow of assets. In addition, it is inherent in the concept of own resources that the funds raised flow into the EU budget and can be freely used there for political purposes (principle of universality).[42] However, the funds raised within the framework of NGEU are explicitly to be used exclusively for COVID-19 consequence management. The funds raised through NGEU cannot therefore be declared as own resources.

According to Art. 311(3) cl. 1 TFEU, the Council has the right to give legal form to the 'system of own resources'. According to clause 2, it may create 'new categories of own resources'. The EU institutions argue that this power also includes the right to establish other (earmarked) categories of revenue in the Own Resources Decision. The wording 'provisions on a system of own resources' also covers rules on the introduction of other (earmarked) revenue. In addition, the case-law of the ECJ allows a legal act to be based on a competence basis even if it contains provisions that actually have to be assigned to another basis, but are of minor importance in the overall view.[43]

Certain doubts about the viability of this line of argument are warranted. Even if it is true that Art. 311(3) cl. 1 TFEU contains more than a provision dealing *exclusively* with the categories of EU own resources, this does not immediately lead to the conclusion that the Council is *free* to generate other EU revenue in the Own Resources Decision — especially if this also entails future burdens. From the wording alone, it seems strange that a decision to raise funds that are not to be used as own resources should be based on a competence concerning the system of own resources. Moreover, Art. 311(3) cl. 2 TFEU makes it clear that the (main) subject of the decision according to clause 1 is 'categories of own resources' — and precisely not other categories of revenue. It would also run counter to the sense and purpose of the authorisation under Art. 311(3) cl. 1 TFEU if the Own Resources Decision were to provide for a change in the EU financial constitution *'through the back door'*, as it were. Art. 311(3) TFEU does not reach out to its own circumvention. Precisely because Art. 311(3) TFEU aims at the establishment of a system of own resources that is intended to open up political freedom, there are good reasons for an interpretation that allows the extension to resources that do not provide the EU with a net increase in assets only to an insignificant extent.

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[42] Art. 2, Art. 6 of the Council Decision of 26.5.2014 on the system of own resources of the European Union, OJ L 168, 105.

[43] Council of the European Union, Opinion of the Legal Service of 24.6.2020, 9062/20, para. 75 ff.

In addition, the authorisation to borrow provided for in the draft Own Resources Decision is neither qualitatively nor quantitatively an incidental component of a 'system of own resources'. It is simply an aliud to the previous financing of the EU and its Member States.[44] Nor is this aliud of minor importance; it comprises sums that differ substantially and profoundly from the EU's previous borrowing. Borrowings will far exceed own-resources-generated funds in the financial years 2021 to 2013. Efforts to describe this as a mere continuation of the existing are legal-political 'spin'. In the proposal to amend the Own Resources Decision,[45] the EU Commission explicitly speaks of the need for a 'bold response'; and it describes the project as a 'comprehensive plan for reconstruction in Europe'. It cannot be said that this is an authorisation that would be of secondary importance in the light of the overall regulation of the Own Resources Decision.

The relevance of Art. 311(3) TFEU cannot be justified by pointing out that debt competences are *necessary* for the realisation of 'Next Generation EU'. The conclusion from the political goal of action to the necessity of the concrete instrument is popular in the EU, but it does not open up competences and cannot justify why a competence that does not actually fit may be chosen. On the basis of the argument of political necessity, the Council would be able to carry out any restructuring of the EU financial architecture under Art. 311(3) TFEU. Accordingly, it is also inadmissible to conclude from the increase in the own resources ceiling (correctly provided for in the Own Resources Decision) that a culpability ratio can also be regulated there. The necessity of increasing the own resources ceiling is a *consequence* of the primary political goal of creating a debt competence.[46] This consequence is not an argument for including the occasion under Art. 311(3) TFEU.

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[44] There are so far no clear answers to the question of how Art. 311(2) TFEU (special secondary legislation within the framework of EU fiscal constitutional law) is to be distinguished from Art. 48 TEU (amendment of the EU fiscal constitution). The Council's Legal Service believes that the construction chosen for NGEU must remain the 'exception'. This seems contradictory: if the chosen construction is really in conformity with the Treaty, there is no reason to treat it as an exceptional case. Materially, the question arises as to which of the following criteria could be decisive for the delimitation: Theory of materiality? Contradiction to existing principles? Overall view of the amount of the new own resources, type of new own resources, intensity of the (political) consequences?

[45] COM(2020) 445 final (supra n. 12).

[46] COM(2020) 445 final (supra n. 12); Explanatory Memorandum 1.4.3 (p. 10): 'This increase is necessary to cover the financial commitments and contingent liabilities arising from this extraordinary and temporary borrowing authorisation.'

However, the concerns described above can be countered by the fact that the decision requires *ratification by the EU Member States* in accordance with Art. 311(3) cl. 1, cl. 3 TFEU. One might think that nothing can be held against an expanding and creative interpretation of a competence provision by the EU institutions if it is unanimously supported by the EU Member States. In fact, this is a case in which the EU Member States suffer no disadvantage. The situation is different for the European Parliament. It has no power of co-decision on the establishment of a fault-based competence via Art. 311(3) cl. 1 TFEU. Nor can it control the use of funds laid down in the Own Resources Decision. Fundamental powers of the European Parliament, which are constitutive for the democratic structure of the EU, are thus undermined. While the European Parliament can vote to the normal extent when a power to impose guilt is established by a substantive act,[47] it is left out of the loop when Art. 311(3) TFEU is applied. It is true that the European Parliament has a power of participation at the subordinate level on the formulation of the act necessary for the concrete implementation ('basic act' according to Art. 310(3) TFEU). However, in view of the preliminary decisions taken in an Own Resources Decision enabling the debt, this has nothing to do with genuine parliamentary decision-making power.

The 'democratic argument' is certainly not compelling. The EU's system of government assigns a peculiar place to the European Parliament (Art. 10(1), Art. 14(1) TEU).[48] Against the background of the constitutional deep structure of the EU, there are indeed good reasons for securing the fundamental step into the comprehensive debt capacity of the EU in the co-member state political ('primary') spaces. Even if it is always emphasised that this is a one-off, temporary and exceptional measure: the path to a future of the EU that pursues credit-financed expenditure policy has thus been opened. It is thought-provoking when, in the process, the European Parliament's opportunities to have a say, painstakingly won over decades, fall by the wayside. The attempt to react to this through inter-institutional agreements only shows how precarious the chosen path is.

It is absolutely impossible that the ECJ will stand in the way of an expanding interpretation of Art. 311(3) TFEU. The substantive review of a new Own Resources Decision by the *Bundesverfassungsgericht* seems remote,

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47 The EU's financial instruments based on secondary law are regularly created in the ordinary legislative procedure (Art. 289(1) TFEU) (cf. e.g. Art. 175(3), Art. 176-178 TFEU).

48 *T. Oppermann/C.-D. Classen/M. Nettesheim* (supra n. 29), § 16*; M. Nettesheim*, in: Grabitz/Hilf/Nettesheim (supra n. 35), Art. 10 TFEU m.no. 1 ff.

because the justification of an EU debt competence via Art. 311(3) TFEU does not represent an extension of the EU's associative competence. It is not the function of the 'ultra vires' control to secure the rights of the European Parliament.

c. Limits of the debt competence?

In contrast, the extent to which the EU may finance itself through debt is unclear under the Union's constitutional law. Even if one assumes that it has a fundamental power to issue bonds, this does not mean that it has unlimited powers. Art. 311(3) TFEU speaks of a 'system of own resources' and indicates that the financing of the EU and its expenditure is to be carried out primarily through this form of financial resources. This is also indicated by Art. 311(2) TFEU, according to which the EU budget is to be financed 'wholly from own resources', without prejudice to other revenue. The nature of the EU's financial constitution would be fundamentally altered if the EU were to switch to a credit-financed expenditure policy. This would also be the case if the funds were channelled past the EU budget as 'external earmarked funds'.

The exceptional scope of NGEU is justified by the fact that the COVID-19 pandemic caused economic shocks on a scale that had previously only been observed in times of war. The argument of political urgency, however, cannot per se lead to an extension of the EU's association competence. Conversely, one will have to conclude that the EU institutions assume that the EU's associative competence allows for basically unlimited indebtedness if and to the extent that this is politically justified in the envisaged procedures. Indeed, all legal efforts to formulate numerical hard ceilings would stand on feet of clay.

III. European Union Recovery Instrument

The second level of the NGEU construction is a new 'recovery instrument' created by regulation (European Union Recovery Instrument – EURI[49]). The funds raised by the EU Commission in the amount of 750 billion euros

[49] EU Commission, Proposal of 28.5.2020 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 final.

are to be distributed through this instrument into operationally active facilities.

1. Structure

The instrument called the 'European Union Recovery Instrument' is not a fund. It is a mechanism by which the resources raised by the EU Commission on the basis of the authorisation in the amended Own Resources Decision are distributed among the various funds and programmes. Art. 2(2) of the EURI Regulation provides that '[t]he measures referred to in paragraph 1 shall be carried out under specific Union programmes and in accordance with the relevant Union acts laying down rules for those programmes.' According to the EU Commission,[50] the EURI Regulation is to be based on Art. 122 TFEU without specifically designating one of the two (quite different) paragraphs.

The interposition of a distribution instrument like EURI is not mandatory. One could make the distribution already in the Own Resources Decision, but then one would have to accept a considerable loss of flexibility. The choice of an intermediary instrument has a number of advantages. Firstly, on the basis of Art. 122 TFEU, action can be taken quickly — no more than a proposal by the EU Commission and the Council is needed. The Council decides by qualified majority. A co-decision of the European Parliament is not provided for. According to Art. 122(2) TFEU, the Parliament remains completely uninvolved; Art. 122(2) cl. 2 TFEU at least provides for (subsequent) information. Secondly, the decision can thus also be easily amended if it should turn out that the distribution of funds via the programmes and instruments is to be reorganised.[51]

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[50] COM(2020) 441 final (supra n. 49), 6.

[51] The Own Resources Decision alone provides for how the total amount of 750 billion euros is to be divided between loans and grants (Art. 3b(1) lit. b) Own Resources Decision (as amended)).

2. Basis of competence under Union law

According to the ideas of the EU institutions, the EURI Regulation is to be based on Art. 122 TFEU.[52] The competence conformity of the chosen approach is not completely beyond doubt. Art. 122(2) TFEU gives the Council the possibility to provide financial assistance to an EU member state which is experiencing difficulties or is seriously threatened with severe difficulties caused by exceptional occurrences beyond its control.[53] The economic 'shocks' suffered by the EU Member States in the wake of the COVID-19 pandemic can easily be subsumed under this. The application of Art. 122(1) TFEU is not precluded by the fact that it refers to 'a member state' — parallel support measures for all EU Member States are not ruled out by the wording and are even required by the meaning and purpose. The specific concerns are linked to the fact that there is no connection between the consequences of the shocks and the support granted. The support is intended to provide incentives for a reform of the Member States' economies that goes far beyond the elimination of the immediate COVID-19 damage. The pandemic damage is the reason for NGEU, but not the object of the support.

In favour of the application of Art. 122(2) TFEU, it is argued that the wording of the provision does not require a connection between the damage caused by the 'difficulties' and the objective of the support measures. This is correct. It would be difficult to reconcile the meaning and purpose of Art. 122 TFEU with an interpretation according to which the Council (on the proposal of the Commission) could take any difficulties of an EU member state as a reason to provide any (non-connected) support. Those who argue in this way turn Art. 122 TFEU into a general clause that supplements Art. 352 TFEU (in the case of 'difficulties'). Such a delimitation of the provision is prohibited above all because Art. 122 TFEU allows measures to bypass the European Parliament; the level of legitimacy of the measures taken is low against the background of the overall level of democracy that has been achieved in the meantime. Those who are concerned with the enforcement and protection of the democratic principle

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[52] On the background to this provision: *A. de Gregorio Merino*, Legal Developments in the Economic and Monetary Union, CMLRev. 49 (2012), 1613 (1633); *U. Häde*, Staatsbankrott und Krisenhilfe, EuZW 2009, 399 (402 ff.).

[53] *B. Kempen*, in: Streinz (ed.), EUV/AEUV, 3rd ed. 2018, Art. 122 TFEU m.no. 1; *R. Bandilla*, in: Grabitz/Hilf/Nettesheim (supra n. 35), Art. 122 TFEU m.no. 1 ff.; *U. Häde*, in: Calliess/Ruffert (eds.), EUV/AEUV, 5th ed. 2016, Art. 122 TFEU m.no. 2.

(Art. 10(1) TEU) will advocate a narrow interpretation of Art. 122(2) TFEU.

In concreto, there is also no need or reason to interpret Art. 122(1) TFEU extensively in order to be able to act immediately on the basis of an 'emergency clause'. Without the amendment of the Own Resources Decision and without the establishment of the RRF facility, the 'EURI' construction instrument has no function. In the case of NGEU, there is not only time to seek an amendment to the Own Resources Decision. There is also time to create a 'Build-up and Resilience Facility' in the ordinary legislative procedure under Art. 175(3) TFEU. Against this background, the argument that the 'EURI' reconstruction instrument must be established using emergency law without the participation of the European Parliament seems simply nonsensical. The EU treaty-maker did well to create competences that enable a quick reaction outside the normal procedures. However, the overall construction of NGEU makes it clear that none of its parts is an emergency measure in the sense of Art. 122(2) TFEU.

In the (right-wing) political discussion, every attempt is made to ascribe an exceptional character to NGEU.[54] The Corona-induced economic situation is ascribed emergency quality. The reaction under Union law is described as a one-off, temporary and special reaction.[55] The political impression that precedent could be ascribed to the action here and that the foundations are being laid for a new overall EU financial constitution is to be countered by all means — at least until the legal acts are in force. It corresponds to the narrative to base at least part of NGEU on Art. 122(2) TFEU. The fact that this entails circumventing the European Parliament is accepted as a side effect.

Similar questions of competence would also arise if one tried to base the instrument of construction on Art. 122(1) TFEU. This competence provision takes second place to Art. 122(2) TFEU ('without prejudice to any other procedures'). Here, too, one can assume the factual relevance: The

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[54] Cf. *U. Hufeld*, Public Hearing on Council Decisions on the EU's Own Resources System, statement at the hearing of the Committee on EU Affairs of the German Bundestag, BT-Drs. 19(21)117 of 26.10.2020; *F. Mayer*, The proposal for a new decision on the EU own resources system and the Next Generation EU (NGEU) programme, statement in the context of the hearing of the Committee on EU Affairs of the German Bundestag, BT-Drs. 19(21)118 of 26.10.2020 ('... no constitutional moment'; 'In essence, it is about a strictly earmarked and thus limited development programme in terms of content and time .... .').

[55] Cf. e.g. EU Commission, Communication of 27.5.2020, The European Hour - repairing the damage and opening up prospects for the next generation, COM(2020) 456 final, 5.

allocation of funds provided for under the reconstruction instrument can be regarded as a 'measure appropriate to the economic situation'. Although the Corona-related shocks are not a serious difficulty in the supply of goods, the TFEU makes it clear that this is only one (non-exhaustive) example. However, in order to prevent a complete delimitation of Art. 122(1) TFEU, the legal consequences side of Art. 122(1) TFEU should be narrowly defined.[56] The measures taken under Art. 122(1) TFEU should not be just any reaction to any difficulty — otherwise Art. 122(1) TFEU would develop into an all-encompassing competence that would even go beyond Art. 352 TFEU. Difficulty and measure must be related — the measure must be seen as a (re)action to combat the concrete difficulty.

One should not overestimate these doubts. It is almost a characteristic of the EU that provisions on competences are interpreted liberally and are not subject to political imperatives. Why should this be any different with Art. 122 TFEU? An attempt to persuade the ECJ to intervene is pointless from the outset. The *Bundesverfassungsgericht* will not intervene either: its 'ultra vires' doctrine does not serve to protect the intra-unional structure of jurisdiction. NGEU can be read as a paradigmatic example of how EU policy is formed in times of crisis: negotiated by the EU Commission and the European Council, supported by the Council, with the European Parliament as observer. This corresponds to the deep constitutional structure of the integration association.

3. Financial constitutional framework

The funds raised under the amended Own Resources Decision and distributed via EURI are to be managed as 'external earmarked funds' bypassing the EU budget.[57] The expenditure is not to be entered in the EU budget. The chosen construction is designed to avoid the obligations of Art. 310(1) subparas. 1 and 3 TFEU. In this way, credit-financed expenditure policy seems possible without conflicts arising with the requirement of balancing

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[56] ECJ, Judgment of 27.11.2012, Case C-370/12, EU:C:2012:756, para. 16 – Pringle: 'Art. 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States which have serious financing problems or which are threatened with such problems.' One will not be able to understand the wording in such a way that Art. 122(1) TFEU does not bear any kind of financial support (so also *C. Tietje*, ifo Schnelldienst 4/2010, 16 (19); *S. Steiner*, Die Verwirklichung des Solidaritätsprinzips im Unionsrecht, ZfRV 2013, 244 (247); differently *U. Häde*, in: Calliess/Ruffert (eds.), EUV/AEUV, 5th ed. 2016, Art. 122 TFEU m.no. 6).

[57] Art. 4(1) of the Proposal for a Council Regulation in COM(2020) 441 final (supra n. 49).

the budget. In fact, expenditure that is 'off-budget' does not have to be balanced in the budget by corresponding revenues. From a formal point of view, this is a construction that is compatible with the budget-related requirements of primary law. Things may be different if one takes into account the meaning and purpose of Art. 310 TFEU.

a. Management of the funds raised as external earmarked funds

The decision to keep the funds raised on the credit markets not as EU own resources but as external earmarked funds results in them not being subject to the political decision on the budget. According to Art. 22 of the EU Financial Regulation[58], they are budgeted but are made available 'automatically'. In principle, this is a well-known and well-rehearsed form of funds management. In the past, however, the amounts involved were comparatively small. The management of NGEU funds as external earmarked funds would have the consequence that the volume of those EU expenditures for which the EU budget legislator has no political responsibility would be significantly higher for years than the volume of those funds for which it is responsible.

The chosen construction would have another consequence. Up to now, the EU used the funds it raised on the capital market through (earmarked) bonds either to grant loans ('back-to-back lending') or to acquire tangible assets. There was no (significant) change in its net asset position. In contrast, funds borrowed by the EU to finance non-repayable grants ('borrowing for spending') are gone with the cash transfer to the recipient. The resulting debt burden continues to weigh for decades and forces political decisions (increasing future revenues, foregoing other expenditures, etc.). Debt-financed granting of subsidies creates future political decision-making and action necessities and restricts political leeway in the future. Incidentally, this is not only the case when one decides to establish a permanent 'debt union', but also when one-off commitments are made that are to last for decades.

The political costs associated with the chosen approach are extraordinarily high. Substantial financial flows will bypass the EU budget legislator without it being able to exercise any power or having to assume any political responsibility. At the same time, the (not merely political) obligation to

[58] Regulation (EU, Euratom) No 2018/1046 of the European Parliament and of the Council of 18.7.2018 on the financial rules applicable to the general budget of the Union, OJ L 193, 1.

service the repayment obligations entered into by issuing bonds is imposed on the EU budget legislator. The Council is thus making a deal at the expense of the EU budget legislator – and thus at the expense of the European Parliament. The fact that the Members of the European Parliament are prepared to accept this extraordinary burden on their future political room for manoeuvre has not only to do with the size and urgency of the political imperatives for action. One hears that they are only prepared to accept NGEU as an intermediate step on the way to a budget-supported debt authority.

However, this is not about a political assessment but about determining the legal scope for action.

b. EU budgetary treaty law

The decision on how the EU manages and spends funds raised and spent is not a decision of free political discretion. EU primary law contains detailed rules in this regard. The management of funds provided for in the EURI and implemented in the RRF must in particular be compatible with Art. 310 f. TFEU.

aa. Requirement of completeness pursuant to Art. 310(1) TFEU

Pursuant to Art. 310(1) TFEU, all revenue and expenditure of the Union must be entered in estimates for each financial year and entered in the budget.[59] The requirement of completeness aims at making the overall financial situation of the European Union transparent. *Roland Bieber* paraphrases it as follows: 'The requirement for comprehensive estimates of all revenue and expenditure is intended to ensure that the budget provides an overview of the entire financial situation of the Union at all times.'[60]

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[59] On this point ECJ, Judgment of 31.3.1992, Case C-284/90, Council v. EP, [1992] ECR I-2277, para. 26; ECJ, Judgment of 30.6.1993, Cases C-181/91 and C-248/91, EP v. Council and EP v. Com, [1993] ECR I-3685, paras. 26, 30 (cf. also GA Jacobs, Opinion of 16.12.1992 in Cases C-181/91 and C-248/91, para. 41); ECJ, Judgment of 2.3.1994, Case C-316/91, EP v. Council, [1994] ECR I-625; *T. Henze*, Aufgaben- und Ausgabenkompetenz der Europäischen Gemeinschaft und ihrer Mitgliedstaaten im Bereich der Entwicklungspolitik, EuR 1995, 76.

[60] *R. Bieber*, in: von der Groeben/Schwarze/Hatje (eds.), Europäisches Unionsrecht, 7th ed. 2015, Art. 310 TFEU m.no. 4.; cf. also *M. Niedobitek*, in: Streinz (ed.), EUV/AEUV, 3rd ed. 2018, Art. 310 TFEU m.no. 40: 'The principle of completeness supplements the principle of budgetary unity (with the prohibition of visible subsidiary and special budgets) with the prohibition of non-visible special funds or so-called black funds.'

This primary law obligation is binding for the Union institutions and cannot be removed by enacting secondary law. The primary law obligations are not removed by the fact that the EU budget legislator has created room to manage funds bypassing the EU budget. The decisive factor is therefore not (only) whether the management of funds envisaged in NGEU can be reflected in the EU budget regulation. Rather, it is decisive whether the planned path is compatible with Art. 310(1) TFEU.

(1) Back-to-back-Lending

According to previous practice, it is permissible to manage loans issued to EU Member States or other recipients bypassing the EU budget if the necessary funds have been obtained by borrowing from the EU ('back-to-back lending'). The reason given is that such operations are 'neutral' in budgetary terms. The same applies to the acquisition of real estate on credit. The obligations are offset by the tangible assets acquired. According to Art. 4(3) of the EU Financial Regulation 2002[61], therefore, it was not the cash flow from an EU borrowing and lending operation that had to be entered in the budget, but only the guarantee arising from it (so also Art. 7(2) of the EU Financial Regulation 2012[62]). From a political and legal point of view, this can be justified by the fact that the EU has no political room for manoeuvre when passing on the financial resources raised through borrowing as loans. In budgetary terms, the amounts appear as a 'transitory item' that only burdens the EU with regard to the repayment risk. Art. 35(1) of the EU Financial Regulation 2012 provided for the Union's borrowing and lending operations in favour of third parties to be listed in the annex to the budget for reasons of ensuring transparency and democratic controllability.[63] These rules are no longer included in the current EU budget regulation. However, political practice has not changed. In part, it meets with criticism from European law scholars.[64]

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61 Council Regulation (EC, Euratom) No 1605/2002 of 25.6.2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ L 248, 1.

62 Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25.10.2012 on the Financial Regulation applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ L 298, 1.

63 Further details in Art. 49(1) lit. d) EU Financial Regulation 2012.

64 *R. Bieber*, in: von der Groeben/Schwarze/Hatje (eds.), Europäisches Unionsrecht, 7th ed. 2015, Art. 310 TFEU m.no. 6: 'However, since the borrowings formally accrue to the Union in the first instance and the amounts levied are granted as loans by the Union, their inclusion in the budget appears necessary for reasons of completeness of the budget and with regard to the powers of the budgetary authority'; cf. already

This established practice can also be used for the loan portion of NGEU (360 billion euros). According to this, it is compatible with Art. 310(1) TFEU if the funds passed on as loans to the EU Member States are not entered as revenue and expenditure in the EU budget, but only as external earmarked funds.

(2) Borrowing-to-spend

In contrast, it seems problematic not to treat the share of NGEU, which is awarded as non-repayable grants and is in total 390 billion euros, as expenditure within the meaning of Art. 310(1) TFEU.

As a starting point, it should be noted that the TFEU does not define the term 'expenditure'. There is also no definition in the EU Financial Regulation. According to general financial terminology, subsidies and other non-repayable grants are 'expenditure'. The amended Own Resources Decision rightly states that subsidies are 'expenditure'.[65] In other programme areas this is also beyond question. The EEC Treaty already provided that the European Social Fund was to be managed under the financial and budgetary rules of Community law. The other funds (e.g. European Agricultural Guidance and Guarantee Fund[66]; European Regional Development Fund[67]; European Social Fund[68]) are also explicitly entered in the general budget. As is well known, there are also exceptions: the European Development Fund (EDF) for the OCTs and ACP countries[69] is still not included in the

R. Scheibe, Die Anleihekompetenzen der Gemeinschaftsorgane nach dem EWG-Vertrag, 1988, pp. 69, 161, 411.

[65] Council of the European Union, revised Presidency proposal of 29.7.2020 regarding the Council Decision on the system of Own Resources of the European Union, 10025/20, Art. 3b(1)(b) para. 14: 'For this reason, it is appropriate to authorise the Commission, on an exceptional basis, to borrow temporarily on behalf of the Union in the capital markets up to EUR 750 billion at 2018 prices for the sole purpose of financing expenditure of up to EUR 390 billion at 2018 prices and loans of up to EUR 360 billion at 2018 prices. EUR 750 billion at 2018 prices, which would be used for expenditure of up to EUR 390 billion at 2018 prices and for loans of up to EUR 360 billion at 2018 prices, for the sole purpose of addressing the impact of the COVID 19 crisis.'

[66] Art. 1(2) of the Council Regulation (EEC) No 25/62 of 4.4.1962 on the financing of the common agricultural policy, OJ L 30, 993: 'The Fund shall form part of the budget of the Community'.

[67] Art. 2(3) of the Council Regulation (EEC) No 724/75 of 18.3.1975 establishing a European Regional Development Fund, OJ L 73, 1: 'The annual budget shall include under the title of the Fund ...'.

[68] Art. 162-164 TFEU.

[69] Cf. e.g., Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the EC and its Member States, of the other

EU budget. However, the EU Commission[70] and the European Parliament[71] have been working for a long time to eliminate this deficit; the amended Own Resources Decision now provides for its inclusion. Therefore, the special position of the EDF cannot be ascribed a precedent function, especially not for an expenditure volume of 390 billion euros.

In order to justify a circumvention of the provisions of Art. 310(1) TFEU, reference cannot be made to the (amended) Own Resources Decision. This decision has the quality of secondary law and cannot amend Art. 310(1) TFEU, nor can it exempt from the obligation to comply with a provision of primary law. The fact that the EU Financial Regulation makes it possible to manage funds in the EU budget cannot determine the interpretation of Art. 310(1) TFEU either. If the grants under NGEU are 'expenditure' within the meaning of Art. 310(1) TFEU, then they must be entered in the (politically accountable) EU budget — regardless of where the funding comes from.

There are weighty reasons for a comprehensive understanding of the concept of expenditure in Art. 310(1) TFEU. Only in this way can the comprehensive political control of EU expenditure policy by the European Parliament be ensured; and only in this way can a sufficient level of responsibility and control be ensured in accordance with the model of democratic legitimacy formulated in Art. 10 TEU.[72] This is the only way to avoid non-transparent side budgets and hidden coffers. And only in this way can an adequate picture of the overall budget situation of the EU be obtained, which is incomplete without the representation of the (credit-financed) expenditures of 390 billion euros made by NGEU. The annual reports that the EU Commission produces on the EU's borrowing activity cannot replace the transparency of the EU budget.[73] Nor can the democratic argument be

part, signed in Cotonou on 23.6.2000, OJ L 317, 3; Decision No 1/2013 [2013/321/EU] of the ACP-EU Council of Ministers of 7.6.2013 adopting the Protocol on the Multiannual Financial Framework for the period 2014 to 2020 under the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the EC and its Member States, of the other part, OJ L 173, 67.

70 EU Commission, Communication of 8.10.2003, Towards the full integration of cooperation with ACP countries in the EU Budget, COM(2003) 590 final; EU Commission, Communication of 14.9.2016, Mid-term review/revision of the multiannual financial framework 2014-2010, COM(2016) 603 final, 17.

71 Resolution of 1.4.2004 on the budgetisation of the EDF, OJ C 103E, 833.

72 On the democratic linkage of the EFSM: *H. Kube*, AöR 137 (2012), 205 (220).

73 See e.g. EU Commission, Report of 15.6.2016 on borrowing and lending activities of the European Union, COM(2016) 387 final.

countered by the fact that the European Parliament's involvement will take place at a subordinate level in the decision on the concrete financing facility. First, the European Parliament has no right of co-decision, at least with regard to the 'European Union Recovery Instrument' (legal basis of NGEU), which is to be based on Art. 122 TFEU. Only in the concrete implementation in the RRF can the Parliament co-decide according to Art. 175 TFEU. Secondly, participation in the adoption of a basic legal act (Art. 310(3) TFEU) does not correspond to annual budgetary control.

The legal literature stresses the importance of the principle of completeness. *Siegfried Magiera*, for example, after dealing with the EU's borrowing and lending transactions, the European Investment Bank and the ECB, states: 'Further exceptions to the principle of completeness, however, do not appear permissible unless they arise directly from contract law.'[74]

The political reasons behind the decision to bypass the grant component of NGEU from the EU budget as external earmarked expenditure are of course obvious. If the requirement of Art. 310(1) TFEU were to be observed, the consequence would be that the expenditure entered in the budget would have to be balanced on the revenue side (Art. 310(1) TFEU). The EU institutions have always emphasised that debt financing of the budget is incompatible with Art. 310(1) subpara. 3 TFEU. In 2015, the EU Commission stated in an answer to a parliamentary question: '(...) as regards the obligation to balance the EU budget, the consistent interpretation over time of [Art. 310 TFEU] is that the EU budget cannot be balanced by issuing public debt.'[75] According to Art. 17(2) of the EU Financial Regulation, 'The Union and the ... Union bodies shall not have the power to borrow within the limits of the budget.'[76] However, this understanding of Art. 310 TFEU is not mandatory. A debt-financed budget (expenditure) policy of the EU would probably be compatible with Art. 311(2) TFEU in conjunction with Art. 310(1) subpara. 3 TFEU, but would then have to be reflected in the EU Financial Regulation.

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[74] *S. Magiera*, in: Grabitz/Hilf/Nettesheim (supra n. 35), Art. 310 TFEU m.no. 32 with further references.

[75] Questions E-001662/2015 and E-005201/2015 inquiring about the possibility for the Union to issue public debt to finance the Investment Plan.

[76] Art. 14(2) of the Financial Regulation 2002 still stipulated: '(...) the Community (...) may not raise loans'.

bb. Requirement of budgetary balance pursuant to Art. 310(1) subpara. 3 TFEU

According to Art. 310(1) TFEU, the budget of the EU must not only include all revenues and expenditures of the Union (requirement of unity and completeness of the budget); it must be balanced in terms of revenue and expenditure (requirement of budgetary equilibrium).

The construction chosen in EURI seems to avoid tensions and conflicts with this requirement. First, it can be pointed out that Art. 310(1) TFEU does not establish a fundamental prohibition of indebtedness on the part of the EU; secondly, that the chosen construction does not amount to financing budget-relevant expenditure with borrowed funds and thirdly, that the allocation of the borrowed funds as external earmarked funds does not affect the balance of revenue and expenditure in the respective concrete budget. The argument can also be formulated differently: a construction that amounts to managing the funds bypassing the budget has no budget-relevant liquidity effect and cannot affect budgetary management under Art. 310(1) TFEU.

Is it possible to make it that simple? A substantive understanding of Art. 310(1) subpara. 3 TFEU amounts to prohibiting EU policy from pursuing a programme and budget policy that incurs current burdens in the expectation of receiving the necessary funds for this purpose in the future. EU borrowing and lending transactions do not conflict with this material understanding of the requirement to balance the budget. When the EU borrows funds that are passed on to third parties as a loan ('back-to-back lending') and which must then be retained at the time the bond matures, the EU does not enter into a 'bill of exchange on the future'. Such operations are indeed neutral under budgetary law (subject to contingent liabilities arising from the repayment risk (Art. 2(9) of the EU Budget Regulation[77]: 'budget guarantee')). The same applies to the acquisition of real estate on credit. However, the situation is different for non-repayable grants that the EU finances through bonds to be redeemed in the future. By definition, the EU does not acquire *any* claims against the receiving EU member state. Nor does it acquire any claims against other EU Member States or against the entire group of EU Member States by awarding the grant. The grant is not matched by the acquisition of a counterclaim or an asset. The fact that the EU Member States are politically, and perhaps even legally via Art. 4(3) TEU, obliged to provide the EU with the funds required for

[77] Regulation (EU, Euratom) No 2018/1046 (supra n. 58), OJ L 193, 1.

the repayment of the bonds in the future does not change the burden associated with the granting of funds. The obligation of the EU Member States to make additional contributions, as provided for in Art. 6(4) of the amended Own Resources Decision, is also not a present asset. The granting of subsidies within the framework of EURI is thus *undoubtedly* not 'neutral' in budgetary terms.

In concrete terms, this means that the bond-financed funds of EURI, which are passed on to the EU Member States via loans, are indeed 'neutral' in budgetary terms and therefore do not raise any concerns with regard to Art. 310(1) subpara. 3 TFEU. Here, the EU acquires legally effective and economically substantial repayment claims against the EU Member States. The situation is different for those funds that are granted to the EU Member States as non-repayable grants.

These transactions will not be materially settled in the same budget year. Rather, as is also expressed in the amended Own Resources Decision, the EU expects to discharge these burdens in the partly distant future.

Of course, it would be conceivable to reinterpret Art. 310(1) TFEU in this situation. In particular, one could postulate that the requirement of balancing the budget does not in principle cover liabilities. This interpretation would allow the EU to take on unlimited debts without ever having to balance the budget. In fact, however, it would be an interpretation of Art. 310(1) TFEU that would lead the provision and the concern it pursues ad absurdum.

It also seems conceivable to reduce the *requirement* of balancing the budget in Art. 310(1) TFEU to a mere *principle* and to provide for exceptions. This is the direction of the claim that is heard time and again in the political arena that the granting of non-repayable subsidies financed by credit should be permissible in a crisis situation as an exception, even if it is not neutral from a budgetary point of view. Such approaches would then try to demonstrate that the debt-based grant provided for in EURI was indeed one-off, temporary and exceptional and justified by the particular circumstances. They would possibly also try to protect themselves by saying that no 'slippery slope' is discernible. Whether one believes this is then a question that can be left to political decision. What is legally decisive, however, is that Art. 310(1) subpara. 3 TFEU does not permit any exceptions from the unambiguous wording, that it is not merely a principle and that the rule does not permit 'one-off' deviations any more than it permits permanent deviations.

The realisation of EURI will result in the EU bearing financial burdens for decades that go far beyond the nature and scope of what is provided for in

the framework of the normal budget. To describe these burdens as 'neutral' or at any rate not to regard them as budget-relevant in the sense of Art. 310(1) TFEU runs counter to the sense and purpose of the provision. In a community based on the rule of law, political imperatives for action should not be a reason to accept damage to the EU budgetary constitution as collateral damage of action. On a different note, the ECJ is not expected to protect this budgetary constitution; it will not stand in the way of the measures.

cc. Safeguarding budgetary discipline pursuant to Art. 310(4) TFEU

According to Art. 310(4) TFEU, the EU may not adopt legal acts which 'may have appreciable implications for the budget without providing an assurance that the expenditure arising from such acts is capable of being financed within the limit of the Union's own resources ...'. In this way, the treaty-maker wants to ensure that the EU maintains 'budgetary discipline'. The provision makes it clear that the EU's operational expenditure may not be financed by loans but from its own resources. This is now to be explicitly provided for in the amended Own Resources Decision (Art. 3a new version.).

EURI's construction would be readily compatible with Art. 310(4) TFEU if the EU had the *assurance* that the non-repayable grants provided for in the 'Reconstruction and Resilience Facility' *could* actually be financed from own resources. A narrow and restrictive understanding of this provision would lead to the conclusion that the construction chosen by EURI is inadmissible. It is obvious that the expenditure made in the facility is not financed by own resources (but by bond issuance). However, such an understanding of the provision is not mandatory or even preferable. It must be taken into account that Art. 310(4) TFEU does not speak of the expenditure being financed 'directly from own resources' of the EU. The use of the term 'framework of own resources' allows for an understanding according to which credit financing of expenditure is permissible if it is only ensured that the repayment of the credits is possible through own resources.

If one understands the term 'ability' in the sense of an abstract possibility, this requirement is undoubtedly met. For the abstract possibility of retaining the debts taken on within the framework of NGEU until 2058 via the EU's own-resources-financed budget obviously exists. One can then also speak of the EU having the 'guarantee', since this abstract possibility exists. The price of this reading of Art. 310(4) TFEU, however, would be that the goal of securing budgetary discipline would no longer be realised. Teleologically, it seems imperative to relate the concept of 'ability' not only to

abstract possibilities, but to concrete scenarios for action. In other words: The acting EU institutions must have the 'guarantee' that the expenditure will actually be financed from their own resources. The necessary guarantee exists without doubt if the EU plans expenditure that is entered in the current budget and financed by own resources (Art. 310(1) subpara. 2 TFEU). The guarantee also exists if expenditure is planned that is included in the current Multiannual Financial Framework; after all, Art. 310(4) TFEU refers to the concept of the multiannual financial plan (Art. 312 TFEU). The situation is different when it comes to longer-term debt beyond the current Multiannual Financial Framework. The EU does not have a 'guarantee' that the (credit-financed) expenditures foreseen under the 'Reconstruction and Resilience Facility' can be financed from own resources in budgets from 2028 onwards. The Own Resources Decision can be changed at any time; it is political practice that it is redrafted at the beginning of the term of a new MFF. In this respect, there is no more than a political hope on the part of the EU that sufficient own resources will be made available in the coming decades to be able to service the bonds that fall due. The fact that the amended Own Resources Decision provides that the EU Member States are legally obliged to make up cash deficits (Art. 6(4) of the Decision as amended) is irrelevant here. This is because these obligations to make additional payments do not constitute own resources.

Art. 310(4) TFEU safeguards basic fiscal policy decisions of the treaty-making EU Member States. According to Art. 311(3) TFEU, the EU Member States retain the power to decide within which framework the EU's expenditure should move. The EU institutions are not supposed to undermine this decision-making power by creating instructions and providing for expenditures that are not covered by the Own Resources Decision. There is no direct danger to the decision-making prerogative of the Member States under Art. 311(3) TFEU if the Council and ratifying EU Member States create the basis for debt-financed expenditure by explicitly amending the Own Resources Decision. What is affected, however, is the political room for manoeuvre of future own resources decision-makers – politically, they have no choice but to make own resources available to an extent that makes it possible to service the commitments entered into. However, this is no longer a problem of EU budgetary discipline, but a problem of the possibilities and limits of a self-commitment of the Council and the EU Member States. We will have to come back to this.

c. The principle of democracy and the position of the budgetary legislator

The EU claims to base its functioning on principles of representative democratic governance (Art. 10(1) TEU). It is founded on the value of democracy (Art. 2 cl. 1 TEU). These abstract declarations are given concrete form in the special provisions of primary law. One of the fundamental design decisions of the Treaty is that the European Parliament and the Council are the holders of budgetary powers (Art. 14(1) cl. 1 TFEU, Art. 16(1) cl. 1 TFEU). This is a central element of democratic decision-making power in the EU. Impairments of this decision-making power not only change the institutional balance, but also attack the democratic foundations of the EU. Such impairments affect the constitutional foundations of the EU.

The decision of the own-resources decision-maker to provide for credit-financed flows of funds bypassing the EU budget would not affect the position of the EU budget legislator if it did not have any consequences for the EU budget. This is actually the case with back-to-back lending — here it can be assumed that the risk of default is so low that there is no relevant impairment of the budgetary legislator (including the EP) with regard to Art. 10(1) TEU. In contrast, it is inherent in the structure of NGEU that the credit financing of non-repayable grants will cause a considerable burden on future budgetary legislators (Art. 314 TFEU). Moreover, it is certain that the repayment obligation will result in a restriction of political freedom; these are not merely contingent scenarios.

The problem cannot be dismissed by pointing out that the instruments are secured by Union and constitutional law. In any case, the action of the own-resources deciding Council causes a shift in the institutional balance between the EU budgetary legislator and the Council — to the detriment of the European Parliament. In view of the fact that the Own Resources Decision constitutes secondary law, this shift in the institutional balance cannot be justified with a reference to the treaty-making power of the Member States.

There are no precedents for the restriction of the EU budgetary legislator brought about by NGEU. The budgetary dimension of the principle of democracy and the legal position of the EU budgetary legislator have not yet received any significant interpretation in the case law of the ECJ. Obviously, it will be possible for experienced lawyers to show why it can be compatible with democracy and the political decision-making prerogatives of the budget legislator that a burden of no less than 750 billion euros is imposed on future EU budgets. It would be conceivable, for example, to argue

that the current EU budget legislator cannot claim protection against future burdens, whereas future EU budget legislators would have to recognise the already existing obligations as a legacy burden. It would also be conceivable to cast doubt on the burden effect in quantitative terms and to refer to the repayment period stretched out over many years. Finally, it would be conceivable to assume that the position of the budgetary legislator (secured in Art. 10(1) TEU) is affected but not impaired.

Politics and law have a peculiar relationship to each other in the EU. Actual and supposed political needs for action determine the understanding of the constitutional foundations in a way that is not (or not everywhere) known in the state context. A court that sees itself as a 'motor of integration' cannot help but interpret constitutional law in the sense of an enabling instrument. It is therefore not difficult to predict that the ECJ could find reasons and show ways why the burdens on future EU budgets associated with NGEU are legally unobjectionable. It will emphasise the democratic importance of politically accountable and democratically bound back budgetary legislation, but then find reasons why in concreto a burden on the EU budget should be possible without this being decided, legitimised and accounted for in the political forums provided for this purpose. In all likelihood, references to the uniqueness, exceptionality and urgency of the political action will play a role. EU budgetary constitutional law would then only apply as a rule that is superseded in exceptional situations.

Such efforts are not convincing. The burdensome effect of NGEU on the EU budget legislator is unprecedented, unique in size and profound in nature. The construction laid out in NGEU amounts to a major shift in the institutional balance between the EU budget legislator and the Council. Efforts to give the European Parliament a say in the management of funds through an inter-institutional agreement do not change this shift; they are on a different (downstream) level. In view of the Union's principle of democracy, it is contradictory to prohibit the EU budget legislator from financing expenditure from the budget by borrowing, but at the same time to accept that the Council places burdens on the budget legislator that will take decades to deal with. The situation is aggravated by the fact that the EU budget legislator has not been able to participate in the determination of the purpose for which the funds are to be used, the repayment of which is to be imposed on it; this determination is also to be made, at least in principle, in the amended Own Resources Decision. At this point, the essential difference to a procedure that provides for the power to incur debt in the substantive instrument becomes apparent: here, the Council and the European Parliament are involved in the process of the substantive legislation according to the rules of the respective legislative procedure. From this

point of view, it can be assumed that the construction chosen in NGEU is not covered by the existing treaty structure as far as 'borrowing for spending' is concerned.

The lack of democratic legitimacy of this budgetary decision cannot be compensated for by the Member States, i.e. the national parliaments (Art. 311(3) TFEU), as this can only be added and does not change the fact that the European Parliament bears the budgetary responsibility of the EU.

IV. Recovery and Resilience Facility

Finally, at the operational centre of NGEU is a new financial facility ('Recovery and Resilience Facility'). Almost 90 % of NGEU funds are to be managed in this facility. The RRF will be joined by other facilities and instruments. In particular, it is planned to channel funds into the 'REACT-EU' instrument (Recovery Assistance for Cohesion and the Territories of Europe). The budget is to comprise approximately 58 billion euros, which will flow into the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Fund for Aid to the Most Deprived (FEAD) in the years 2020 to 2022. To this end, it is envisaged to amend Regulation (EU) 1303/2013 to allow for an effective and flexible response to the COVID-19 damage. The proposed amendment is accompanied by proposals to establish a Coronavirus Response Investment Initiative (CRII) and a Coronavirus Response Initiative Plus (CRII+).

1. Structure

The 'Reconstruction and Resilience Facility' (RRF) is designed to make a total of 672.5 billion euros available to EU Member States, 312.5 billion euros as non-repayable grants and 360 billion euros as loans. The RRF funds are to be distributed in the years 2021 to 2023. 70 % of the funds are to be disbursed in 2021 and 2022.

The allocation key of the RRF differs between the grant component and the loan component. With regard to the grant component, 70 % of the available funds (312.5 billion euros) are to be allocated according to a key that takes into account the population size of the member state concerned, the inverse measure of GNP per capita and the annual unemployment rate over the last five years (2015 to 2019). The key is based on the EU average in each case. For the remaining 30 % of the funds, the key is adjusted: instead of the unemployment rate from 2015 to 2019, it will be based on the GNP loss in 2020 and on the total GNP loss in 2020 and 2021. With regard

to the loan portion of the RRF, it is stipulated that the total volume of loans that may be granted to an EU member state may not exceed 6.8 % of its GNP. Under special circumstances, an increase is conceivable if funds are available. Taking into account that not all EU Member States have less favourable financing conditions on the capital markets than the EU, RRF loans are not of interest to all EU Member States.

The governance structures of at least one of these facilities ('Recovery and Resilience Facility') are currently subject to political negotiations. The question of how to ensure that the grants and loans granted are also used in a sustainable and growth-promoting manner is the subject of a primarily political-economic discussion.[78] The role of the European Parliament is also the subject of controversy.

An unresolvable tension is inherent in the construction of the RRF. On the one hand, the EU Member States are promised fixed shares of the facility's funds according to a key that is based on relative economic development. The EU Member States have long since booked 'their' shares politically. Some EU Member States use them as 'collateral' to raise funds on the capital markets. On the other hand, the funds are only to be granted to the EU Member States if they develop eligible projects in 'development and resilience plans'. Moreover, the funds are to be granted only to the extent necessary for the implementation of these plans. Overpayments and waste are to be prevented, as is corruption. According to this, there is precisely no definite entitlement to the granting of a fixed share of the RRF funds. There is much to be said for the assumption that each EU member state will receive 'its' share even if the plans drawn up are not sufficiently effective. Meanwhile, the idea that NGEU has no real conditionality and that EU Member States do not compete for the funds has long been accepted.

[78] See e.g. *G. B. Wolff*, Without good governance, the EU borrowing mechanism to boost the recovery could fail, Bruegel of 15 Sep. 2020 (https://www.bruegel.org/2020/09/without-good-governance-the-eu-borrowing-mechanism-to-boost-the-recovery-could-fail/, last accessed: 18.11.2020); *J. Pisani-Ferry*, Europe`s recovery gamble, Bruegel of 25 Sep. 2020 (https://www.project-syndicate.org/commentary/european-union-pandemic-recovery-program-gamble-by-jean-pisani-ferry-2020-09?barrier=accesspaylog); *T. Wieser*, What Role for the European Semester in the Recovery Plan? Europäisches Parlament, Referat Unterstützung der Economic Governance (EGOV), PE 651.368 – 10.2020.

2. Goals

The goals of the Recovery and Resilience Facility are vague. The only thing that is certain is that it is not about supporting the elimination of immediate pandemic damage or strengthening the health systems of Member States. The members of the European Council have formulated a plurality of goals; moreover, the description of the goals is so broad that the desired target states remain diffuse and vague. Allow me to quote:

> 'The Facility's general objective should be, in the aftermath of the COVID-19 crisis, to promote the promotion of economic, social and territorial cohesion. For that purpose, it should contribute to improving the resilience, growth potential and adjustment capacity of the Member States, mitigating the social and economic impact of the crisis, and supporting the green transition towards achieving the most recent Union's 2030 climate targets and complying with the objective of EU climate neutrality by 2050 and the digital transitions aimed at achieving a climate neutral Europe by 2050, thereby contributing to the upward economic and social convergence, restoring and promoting sustainable the growth potential and the integration of the economies of the Union in the aftermath of the crisis, and fostering employment creation.'

It is as if the overall objective of RRF is to 'promote the common good'. The formulated goals are also partly in competition; in other words, they cannot always be realised without conflict. What is required is a political concretisation of the desired target states, which can only take place on the basis of prioritisation and selection decisions.

3. Decision-making structures

The most urgent question at present is therefore in which framework and according to which criteria the allocation of RRF funds will be decided. The European Council decided that this should be decided within the framework of the 'European Semester'. The EU Commission claims that the framework of objectives in which the EU Member States formulate their 'resilience and recovery plans' should be specified ex ante in such a way that the EU Member States move within clearly defined corridors when formulating their plans.[79] The EU Commission's approach amounts to a top-down process. The EU Member States must be concerned to write their plans in a way that pleases the EU Commission. In the 'ideal case', this means that the plan can be easily written into the prescribed forms. The

[79] EU Commission, Commission staff working document of 17.9.2020, Guidance to Member States on the Recovery and Resilience Plans, SWD(2020) 205 final.

danger is that existing programmes or new projects are (re)formulated in such a way that they fit into the corridors fixed by the EU Commission without being supported by corresponding political will. At the implementation level, this could lead to inefficiency, waste or even corruption.

Of course, the EU Commission has no choice but to define the target corridors rather broadly — if only because the starting position and the challenges in the individual EU Member States are extremely different. This opens up political room for negotiation in which two strong sides meet: the EU Commission, because it has to approve the plans and thus decides whether the grants and loans will flow, and the EU Member States, which according to the basic concept of NGEU can expect to receive 'their' share in any case, no matter how good or bad the plans submitted are. The EU Commission has no choice but to wave through the vast majority of plans if it does not want to call into question the basic legitimacy of the NGEU instrument. Certainly, it will occasionally hesitate and occasionally reject a plan. In this way, it will show that it is not prepared to accept everything. However, in view of the time pressure to act, these can only be a few cases.

In the political economic debate, this approach has met with criticism.[80] Two objections are relevant: on the one hand, it is objected that the formulation of broad macroeconomic objectives on the part of the EU is not very efficient. There is a danger that RRF support is granted without it being clear what the support is for, and thus without it being possible to clearly decide whether the support has achieved its objective. The conditionality of the granting of funds cannot be meaningfully enforced in this way. On the other hand, an objection is that the approach deprives the EU Member States of the necessary leeway to decide on their own priorities (subsidiarity). The technocratic specifications of target corridors may reflect the priorities of the EU Commission: However, NGEU is an instrument to stimulate and release the political forces of the EU Member States.

In this respect, it is worth considering leaving it up to the EU Member States to define the sectors in which they want to use the RRF funds and the basic concerns themselves. They should specify whether and to what extent they would rather use the funds to which they are entitled for the climate-neutral restructuring of an economic sector, for a reform of the education system, for the promotion of clusters of the digital economy or for other purposes. The EU Commission should ask the EU member state

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[80] *J. Pisani-Ferry*, European Union Recovery Funds: Strings Attached, but not Tied up in Knots, Bruegel Policy Contribution 19, 2020 (https://www.bruegel.org/2020/10/european-union-recovery-funds-strings-attached-but-not-tied-up-in-knots/).

to explain which concrete goals it is aiming for in each case and check them for compatibility and plausibility with the Union as a whole. If necessary, it could impose conditions on the EU member state, the realisation of which seems unavoidable or at least sensible in order to achieve the goal. It should grant the funds on condition that the concrete objectives are also realised. It should reserve the right to demand repayment if it can be seen that the objectives have been sufficiently achieved.

This approach would combine two concerns: EU Member States would have the freedom and responsibility to define independently what they want to use RRF funds for; they would not have to operate within a predefined framework. The concern of being confronted with 'comprehensive' or 'strict' conditionality provisions would be unjustified at this level even in its basic approach. At the same time, however, the approach would also ensure that EU Member States would have to take their word for it: if they were to use the funds inefficiently and without results, waste them or even allow them to seep into corrupt milieus, they would have to pay them back. These funds could then be passed on to states that have managed efficiently.

V. The EU as a special purpose vehicle for borrowing and on-lending funds

The above analysis paints a thought-provoking picture. From the point of view of political efficiency, NGEU proves to be a successful project. It has three main effects:

The transition to debt-financed EU spending policy shifts burdens into the future. The (current) recipients of the grants pass on the responsibility for repaying the funds (in the future) to a future generation. So far, it is not possible to assess with certainty whether the RRF funds will have economic effects from which these generations will benefit adequately. In the meantime, political concerns are being voiced that the funds will flow into today's consumption, thus creating intergenerational equity issues.

Tapping the EU's fiscal potential also means that the EU Member States do not have to raise funds themselves on the chapter market. The rules of the Stability and Economic Pact are thus circumvented; there is no provision for the EU debt to be included in the debt of the EU Member States according to the rules of the 'six-pack'. The fiscal policy leeway is thus expanded.

Finally, there is a significant transfer element built into NGEU. The ratio between the amount of funds disbursed as a grant and the share of the EU budget burden differs significantly.

At the same time, however, NGEU is wreaking havoc in the deep constitutional structure of the EU. In an attempt to harness EU fiscal potential for the benefit of EU Member States, important structural principles of EU primary law are compromised. NGEU serves to provide capital to EU Member States — predominantly as a grant, to a lesser extent as a repayable loan. The construction makes it possible to avoid the discussions that have been going on since 2010 about EURO bonds and the like. There is no direct external liability of the EU Member States for the funds raised; nor are the EU Member States directly liable for the repayment of the loans that the EU Member States take out with the EU within the framework of the loan portion of NGEU. However, this has a not inconsiderable price: NGEU turns the EU into a *special purpose vehicle* that borrows funds over which it has no parliamentary-political power of disposal. The basic decision on which funds are raised and how they are passed on is made by the Council. The allocation of funds within the framework of RRF is administratively-technocratically answered for. Given the size of the funds, these institutional regressions weigh heavily. The fact that the EU institutions, the Commission and the European Parliament, eagerly agree to this is solely due to the fact that it sets the course for a longer-term reform of the EU's overall financial constitution ('debt union', 'transfer union').

The EU's path towards debt-financed fulfilment of tasks is obviously of fundamental importance for the development of the EU's fiscal constitution — some speak of a 'Hamiltonian moment'[81], in reference to the decision of the then US Secretary of the Treasury to have the federal government assume the debts of the US states. It is stressed everywhere that this is a one-time, earmarked and temporary measure. As early as September, however, the first EU institutions expressed the view that the measure should be made permanent.[82] In this respect, the course is currently being set for the fundamental reform of the EU's overall financial constitution. No one seriously claims that there is a way back to the time before Corona. No one seriously believes that NGEU will remain the EU's only debt-financed spending programme.

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[81] E.g., *O. Scholz*, Interview, Die Zeit, 19.5.2020.

[82] *M. Arnold,* ECB calls on Brussels to make recovery fund permanent, FT of 23.9.2020; *C. Lagarde*, Interview, Le Monde of 11.10.2020.

Discussion

Moderator: Ekkehart Reimer

Ekkehart Reimer

Thank you very much, Martin. In my view, that was a highly dense presentation, a well-structured lecture which shows so many dimensions of this topic that we will have a long discussion. Let us focus on the issue of raising money for the EU in the first place, and only thereafter look at ECB measures or at spending the money for certain policy areas. Following your presentation, perhaps it would also be good to address the European law issues, especially the questions around Art. 310, 311 TFEU. But I am sure that there will also be questions on constitutional issues and questions of whether or not we need accompanying legislation in this country.

Friedrich Heinemann

I work at the Leibniz Center for European Economic Research, Mannheim. Many thanks, Mr. *Nettesheim*, for this excellent presentation. I think you made a striking statement about the possibility that the NGEU debt could be used for other purposes than just the corona pandemic without a change of the Own Resources Decision, just through ordinary legislation. In an own study we show that the additional 0.6 % GNI margin for member state financial contributions offers extensive room of the factor of ten to what is actually needed to pay back the NGEU debt. So could you develop a bit on how the change of use of the NGEU debt could be possible? Because the defendants of that whole exercise tend to emphasize – and if you read the Own Resources Decision proposal it really is stated frequently – that this debt operation is exclusively done for the purpose of COVID-19 expenses. What will be the work around in the ordinary procedure? If you could develop that a bit more that would be really interesting to hear.

Martin Nettesheim

I should start by pointing out that it was *Friedrich Heinemann* who raised the issue of the oversaturation of NGEU by the amended Own Resources Decision in several contributions. He was the one who pointed out that what is planned is something that is not needed for NGEU and raised as a

consequence the question: Why is that done? Have these people not calculated properly? That is probably not very likely. Or is there a side agenda, a hidden agenda, or at least a political idea of saving or creating political options behind the decision of raising the own resources ceiling by 0.6 % of the GNI of the Member States?

Now to the question: The EU could of course not simply create new vehicles of funds on the basis of Art. 175 TFEU by means of ordinary legislative procedure and establish the authority of the European Commission to raise funds in the common markets with these instruments. It would need a budgetary legitimization, which is made clear by Art. 310, 311 TFEU in such a case. But that could then be included in the next Multiannual Financial Framework and the yearly budget. It would not require the ratification by the Member States and it would also not involve the national parliaments any longer. It is something that would then be decided within the rules on the Multiannual Financial Framework of the EU budget. In a certain way, by proceeding on these lines, Member States would be left out of the picture and that is why I am raising the, currently hypothetical, question: Would we need a *Begleitgesetzgebung*, i.e. some kind of parallel legislative activity ensuring the rights of the national, at least the German, parliament? That is my view on that.

Ekkehart Reimer

Thank you very much. Who is next? *Hannes Rathke* from the Administration of the German Federal Parliament. Please, go ahead.

Hannes Rathke

Thank you, it is great to speak in Heidelberg. Mr. *Nettesheim*, I guess you developed the whole picture. But if you look at the whole picture you mentioned the Own Resources Decision as well as the Recovery and Resilience Facility. Do you see any problems due to the fact that the indebtedness is linked to the crisis in the Own Resources Decision? Because of Art. 122 TFEU, the instrument is strongly linked to the crisis. But if you look at the Facility, there is no certain or special link to the crisis. Could it endanger the whole construction of this instrument, especially with regard to the different legal bases? There is Art. 175 TFEU for the Facility and the distribution of the debts by the European Union. That is my first question.

The second question at least in Germany is, and I guess that is the 'elephant in the room': Which majority do you think is needed to ratify the Own Resources Decision? Thank you.

Martin Nettesheim

Thank you. I think there is a general uneasiness about the combination of Art. 122 TFEU as the basis for the instrument, basically the way to channel these funds into the EU system with a specific provision that does not fit the purposes of the funds of NGEU, and on the other hand the normal funds structure under Art. 175 TFEU. Maybe you have seen that my dear colleague *Frank Schorkopf* has written about it and indicated that there are at least tensions in the construction. And if you read Art. 122 TFEU, you see that it is obviously not meant as a provision to channel some 750 billion euros into the system over the course of two years. We know on the other hand, Mr. *Rathke*, that these provisions, these competences, have been interpreted in a creative way in the past and even if we as academics raise these questions, I would not foresee that the EU institutions or the Court of Justice for that matter would be impressed by these kinds of doubts. So I think I am approaching that as another indication of how the EU competence provisions are being dealt with and how they are interpreted in a creative way in times of crisis. We have seen this in other areas. And this is probably the price for an effective response of the EU in times of crisis.

Given that we have the political legitimization for the Own Resources Decision I do not see any sort of constitutional problems. It is not that major Member States are the donors when you look at the transfer impacts of NGEU. Major donors are the people, the countries that donate more than they receive, that they are being outvoted or superseded. I think, this is part of crisis management. I was quickly talking about sentence three of Art. 23(1) of the German constitution, the *Grundgesetz*. I do not want to get too much into detail. We all know that this is a provision that is highly unclear and which, when you look at the discussions in the *Gemeinsame Verfassungskommission* back then in 1992, was adopted without a clear understanding of what it really meant. It is a provision that, when you look at the material aspect, was then interpreted in a different way from the *Bundesregierung*, the *Bundesrat* and the parliamentary majority. There is no common parliamentary bill behind that and it is a provision that has in the past, until quite recently in the decision of the *Bundesverfassungsgericht* on the *Europäisches Patentgericht*, never actually been interpreted by a constitutional court. Any approach to this provision is struggling with the uncertainty of what is meant by *materielle Verfassungsänderung*. Especially in a time in which we interpret everything that seems to be dear to us into the constitution which then can be meant as an expression of everything important somehow also having a constitutional dimension.

Just as my dear colleague *Friedrich Heinemann*, I will be giving a statement as an expert witness to the *Europaausschuss* on the German Federal Parliament on Monday and my statement, as the statements of other people being heard at this public hearing, will be published by the Bundestag probably in the course of the week. There you can see my view on Art. 23(1) cl. 3 GG and why I think that this is of importance. It needs a parliamentary decision, that is clear due to sentence two, a formal parliamentary legislative act. However, it does not touch upon the constitutional structures of our order. May I refer you to my statement and my explication there?

Hanno Kube

Thank you so much, Martin, for your excellent analysis of the EU law side and the constitutional law side of our questions and problems. I would like to briefly come back to the questions of the compatibility of NGEU with EU primary law, with Art. 310 and 311 TFEU. You raised this question and it seemed to me that you have doubts about the compatibility, in particular in conjunction with the question of whether the Own Resources Decision is actually secondary law or primary law. If it is secondary law, it has to be compatible with the principles set out in Art. 310 and 311 TFEU. And if it is primary law, we could argue about what the consequences of the new Own Resources Decision on the reach of Art. 310 and 311 TFEU are. That would be the first question.

Secondly, I have a very short question on Art. 23(1) cl. 3 GG. I personally see a point that the new Own Resources Decision might touch upon the constitutional structures of the *Grundgesetz*, looking at Art. 115 GG. We have constitutional law provisions on borrowing, Art. 109(3) GG and Art. 115 GG. And my question would be: Does such an Own Resources Decision not touch upon questions that are dealt with on the constitutional law level in Germany? Thank you.

Martin Nettesheim

Everybody in this chatroom is an expert of EU law, so everybody knows that the status of the Own Resources Decision is a matter of dispute. In preparation of today's talk, I went through the literature and I found probably as many statements that said that it has primary law status as statements that say that it is of the nature of secondary law. As I said in my talk, I am firmly convinced that it has the nature of secondary law. It is not just that the Commission and other EU institutions have consistently taken this view. It is also that per definition, any decision that the Council takes and

that does not change in a visible manner primary law seems to be secondary law. The importance of the decision does not qualify or determine the legal status of the decision or the hierarchy of EU instruments. It might not be important and it might come with a specific procedure, i.e. the necessity for the Member States to ratify the amendments. But it is and it will remain the decision of the Council and it is nothing that changes anything, unlike the use of the passarelle clauses or the use of the short treaty amendment procedure under Art. 48(6), (7) TEU. It does not change primary law on any indicative manner.

Of course you are right: If it were to be primary law, then no questions would arise as to the raise of the funds and the use of these funds as far as these questions are determined in the Own Resources Decision. However, and that is very important, my doubts about the use of the funds and the budgetary treatment of these funds are not related to any specific provision in the Own Resources Decision but related to provisions in the instrument and the facilities. It is there, and clearly by secondary law, that the decision is made to use this off-budget procedure. It is not something that at least currently might change and it is not something that is currently laid down in the Own Resources Decision itself. Now of course, considering Art. 23(1) cl. 3 GG, it is important to bring Art. 115 GG into the discussion. In my view however, this is something that affects and regulates only the debt operation within the German federal system, the order of the Grundgesetz. But neither directly nor indirectly does it affect the decision of the EU whether to raise funds or not. If Art. 115 GG were somehow relevant, it would have been already relevant in the past if the EU made use of the capital markets. And we all know that the EU has made use of the capital markets in the past and nobody has questioned that under Art. 115 GG. So, the powers of the German authorities under Art. 115 GG are not affected by the powers and the rights under this provision, by the fact that the Commission itself makes use of the capital markets. That is my view on this provision.

Ekkehart Reimer

Thanks, Martin. I have put myself on the list of questioners. Actually, I wonder if we took the second step before we have taken the first one. To me, the first step is the quite open question of whether or not the EU as such has the authority to take loans. In the past, I remember that many people have read Art. 310(1) TFEU, which ends: 'The revenue and expenditure shown in the budget shall be in balance', as a prohibition to levy EU debts. So, of course own resources came from the Member States and in

some instances these own resources might or might not have been debt-financed, but by the Member States. Here, however, we see Union debts. The most recent (actually, not the first) example is the SURE program in which an emission of EU loans has been placed on the capital markets quite successfully earlier this week. There were, I think, three or four different programs in the past where the EU has levied debts. On the Commission's website the Commission presents 'The EU as a borrower'[83] and to some extent it really looks like a beauty contest for the capital markets. The EU as such wants to raise loans on the capital markets and did so in the past. In an earlier version, the very first sentence of this web page had been missing, which is that the EU as such is empowered, 'by the EU Treaty', to borrow from the capital markets. This is new. This empowerment statement on the website came without any change of the text of the Treaty, without any accompanying legislature or involvement on the side of the Member States, probably not even with any discussion in the European Council or in the European Parliament. I would like to hear your view on this. Is it really covered by Art. 310 TFEU that the Union as such under the Treaty has the power to borrow from the international capital markets?

Martin Nettesheim

Thank you, Ekkehart. It would be the subject of an own separate talk to describe how the Community institutions are dealing with the issue of whether the Union has the right to raise debts, to make use of the capital markets and so on.

There have been interesting, as you pointed out and I could add to that, news on the Commission's website, from the statement earlier this year that the EU is not allowed to raise money on the capital market, especially for the funding of expenditures, to now opposing, conflicting statements. In my view, let me separate two questions. I believe that the institution European Union itself has had and has the right to raise money on the capital markets. It has the *Verbandskompetenz* to raise these funds. It has already made use of that back then under the heading of the European Economic Community. The EU has made use of this institutional power for the last 30 years and it will be highly doubtful now in the year 2020 to say 'This was all illegal, the EU does not have the Verbandskompetenz to make use of the capital markets, to operate as an actor on these markets.' And indeed, when

[83] https://ec.europa.eu/info/strategy/eu-budget/eu-borrower-investor-relations_en (last accessed: 27 October 2021).

you look at the European Community Commission's website, you see that for the last 20 or 30 years, there has been an annual report to the European Parliament on the operation of the EU on the capital markets. You see what they do, how they do it and so on. In the past, these operations have always been annexed to the European budget and been made transparent through this annexation, this annex structure. The question seems to be second now.

The question is more how to deal with these operations that are within a probably unwritten institutional Verbandskompetenz of the EU, within the budgetary law of the EU. And it is here, at the budgetary constitution of the EU, where my doubts arise. It is not that the EU cannot raise these funds but the question is rather how to deal with them. I am not sure whether this is an open breach of EU law but I see at least, which is what I wanted to describe in my talk, severe conflicts with the political self-understanding and the idea behind Art. 310 and 311 TFEU. And it is a problem of the justification or the motivation to use these off-budget channels to make these funds available. It is not a question of the Verbandskompetenz.

Ekkehart Reimer

Thanks for this answer. I am still puzzling to some extent. I remember that there is a presentation about the Commission where they show the credibility and the standing in the rating agencies. And one of the sentences I took from there is that the main budget of the EU is liable for any repayment of debts and moreover, that ultimately the budgets of the Member States are liable. There was also a short sentence in your talk where you said that the budgets of the Member States are probably not liable for EU debts any longer. I think this is also a point which is worthwhile being discussed in the future.

I have a very last question for this discussion and it comes again from *Hannes Rathke* in Berlin. Mr. *Rathke*, please.

Hannes Rathke

Thank you, Mr. *Nettesheim*. I guess, as Mr. *Reimer* said, most of the discussion primarily deals with the question of budget adjustments and focuses on Art. 310(1) TFEU. But maybe this is not the biggest problem due to the fact that it is also acknowledged by the Member States that the budget can be adjusted by debts. Another paragraph, Art. 310(4) TFEU, states that the Union shall not adopt any act 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 referred to in Art. 312 TFEU. I guess this sentence is quite heavily in the discussion and in my view, if you read this, one could think that every Union debt should need to be financed within the Multiannual Financial Framework which is only stated for at least five years. We will have debts which last until the year of 2058, so for the next several Multiannual Financial Frameworks, and this debt which the Union is in duty for cannot be financed through the next multiannual framework. Could this whole mechanism be in danger by the fact that we also have to face not only the quality but also the quantity of the debts, which is kind of the next very new instrument? And unlike former Union debts this is not some kind of a back-to-back instrument. It needs to be financed by the EU budget, which cannot be done within the next Multiannual Financial Framework. Do you see any problems in regard to this paragraph?

Martin Nettesheim

Thank you again. It was due to time constraints that I did not deal with Art. 310(4) TFEU. Please accept my apologies for not dealing with all the little details in my written presentation. I will look at that.

Shortly, Art. 310(4) TFEU has been part of the discussion, especially in internal documents. The approach of the EU institutions has been: It is a provision that protects budgetary discipline or, more precisely, it protects the budget through establishing budgetary discipline. However, if funds are not showing up in the budget but are managed through off-budget operations, there is no need to ensure budgetary discipline. It is a formalistic argument but somehow it is difficult to refute it, if you accept the general construction itself. If you say it is okay to channel these funds not through the budget but along the side of the EU budget through the means of these external assigned revenues, then you have no conflict with Art. 310(4) TFEU because they do not show up in the budget. It is not something that the EU budget authority somehow can put under pressure. In the long run, of course, you could say you would have to adopt a substantive approach to this provision, say that in the long run, these funds create the expectation that budget authorities will deal with that. But this is not the current understanding of the EU institutions. You can take a different approach, you are right.

Ekkehart Reimer

It is as it is. We have dealt with really thrilling questions. Thank you very much, Martin and everyone who contributed to this lively discussion.