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Solid Financing of the EU

with contributions by Martin Nettesheim, Edoardo Traversa, Franziska Brantner, Marco Buti, Clemens Fuest and Jakob von Weizsäcker

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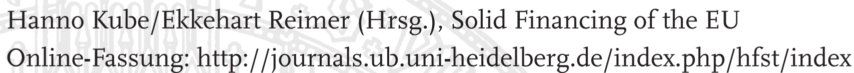
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Preface

Based on its unique system of Own Resources (Art. 311 TFEU), the European Union has always yielded tax revenue, yet mostly indirectly via the budgets of the Member States. At the same time, the EU budget as such (unlike certain parafiscal budgets) had never been fed by EU loans.

The last couple of years have challenged the traditional fiscal concepts on the level of the Union. Rescue and stability mechanisms have been established, the EU has negotiated compensation payments with the UK upon Brexit, finalized a new Multiannual Financial Framework, decided on huge extra spending under the paramount Next Generation EU program, and stimulated debates about the introduction of a truly European tax. Next to political and economic uncertainties, each of these steps triggers intricate legal questions.

Some of the most eminent questions are presented and discussed in this new volume of the *Heidelberger Beiträge*. All contributions are based on lectures and input statements during the 2020 Annual Symposium of the Institute of Public Finance and Tax Law.

We wish to thank the *Steuerrechtswissenschaftliche Vereinigung Heidelberg e.V.* for invaluable help preparing this symposium both financially and intellectually. We thank the distinguished speakers and authors for their contributions. We extend our sincere gratitude to *Susanne Röth*, *Daniel Drescher*, *Johannes Klamet*, *Daniel Reich*, *Moritz Teichmann* and all members of the Institute for the smooth and successful organization of the online conference as well as the publication of this book.

May it enrich, inspire and objectify the debate on the financial future of Europe.

Heidelberg, October 2021

Hanno Kube
Ekkehart Reimer

§ 1 Introduction

Hanno Kube

Guten Morgen, meine Damen und Herren,

Good Morning, Ladies and Gentlemen,

Just as the Vice-Rector for International Affairs, Professor *Marc-Philippe Weller*, the Institute for Public Finance and Tax Law of Heidelberg University warmly welcomes you to our annual conference. We are very happy to see you here in this virtual conference room, even though it would have been an even greater pleasure to be able to personally welcome you here in Heidelberg – which is, unfortunately, not possible these days. Nevertheless, we are looking forward to a fruitful symposium on a highly important topic: The future financing of the European Union. We will talk about the budget of the Union, but also and primarily about the revenue side; about reform options for the own resources system, about the perspectives for introducing EU taxes, about the possible scope of debt-financing of the Union and about the future role of the European Central Bank. Our topic is a truly European topic, which is also reflected by our high-ranking speakers and discussants. Therefore, we decided to use English as our working language today.

The timing of our conference could not be better. The institutions of the European Union are still intensely negotiating about the future financing of the Union. In July, the European Council agreed on a new Multiannual Financial Framework for 2021 to 2027 of just over 1,000 billion euros and on an additional massive recovery package called 'Next Generation EU' (NGEU), which aims at providing the Union with the necessary means to address the challenges posed by the COVID-19 pandemic. Under NGEU, the European Union will be able to borrow up to 750 billion euros on the markets that will then be allocated to a number of programs. The biggest one is the Recovery and Resilience Facility (RRF), providing more than 670 billion euros in loans and grants. In September this year, the Commission set out further strategic guidance for the implementation of the Recovery and Resilience Facility in its 2021 Annual Sustainable Growth Strategy.

However, already in the end of July 2020, the European Parliament adopted a resolution criticizing the European Council conclusions for a number of

reasons. First, Parliament deplores the cuts made to future-oriented programs as originally proposed by the Commission and requires substantive budget increases, in particular with regard to the Green Deal and the Digital Agenda. Secondly, Parliament demands the implementation of a meaningful rule of law mechanism in the framework of MFF and NGEU. Thirdly, Parliament criticizes the governance of the Recovery and Resilience Facility, which moves away from the Community method and endorses an intergovernmental approach. And forth and finally – and this will be a major focus of our conference – the European Parliament emphasizes that it will not give its consent to the MFF without an agreement on a substantive reform of the EU's own resources system, which plays a certain role in the European Council conclusions, but not a very big one. Therefore, Parliament calls for a binding agreement on the introduction of a basket of new own resources by the end of the MFF period, which should aim to cover at least the costs related to NGEU and which should also aim to reduce the share of the gross national income-based contributions.

The German Council Presidency has recently come up with a proposal for a compromise between the European Council conclusions and the position of the European Parliament, but a solution is not yet in sight.

And just a few days ago, the President of the European Central Bank, *Christine Lagarde*, announced that the ECB will look at whether its massive asset purchase programs should abandon market neutrality in order to foster the transition towards a greener economic model. Furthermore, she proposed that EU governments should consider the possibility of making EU debt a permanent fixture of the Union's economic response to crises. She suggests that the Union or the Euro-zone might set up a permanent debt-financed program for stimulating the economy.

To sum up, we can say that the European Union finds itself in a very difficult situation, in which big revenue- and budget-related decisions have to be taken. Decisions that will be crucial for the future path and shape of the Union and also for the Union's capabilities to cope with the enormous challenges that undoubtedly lie ahead. To name just a few of these challenges that the Union – and only the Union – can effectively tackle (in full compliance with the principle of subsidiarity): climate change and energy, migration and a policy for Africa, elements of a common economic policy complementing the common monetary policy, defining the relations to the US and China, a framework for the digitalization of the economy, society and government and effective health management.

In today's conference, we want to concentrate on the legal and policy questions related to generating the financial means that will enable the European Union to face these challenges, i.e. on questions related to the revenue side. How can the own resources system be reformed in order to make it fit for the future – either under the existing Treaties or by amending the Treaties? What are the perspectives for the GNI-based and the VAT-based contributions? Are truly European taxes conceivable and desirable in the framework of the own resources system? Can they promote a new Union-wide solidarity? To what extent are provisions like Art. 113, 115 or 192 TFEU sufficiently solid foundations for genuine EU taxes, or do we need – and do we want – new EU competences for levying EU taxes? Should we change from unanimity to majority voting in the area of taxation, as proposed by the Commission in 2019? Can the passerelle clause in Art. 48(7) TEU be used to this end – and is this compatible with the constitutional law of the Member States? What are possible candidates for EU taxes and how should they be designed? Can we draw from the Final Report of the Monti Group from 2016 in this respect, or from the recent Commission Proposal for a Council Decision on the system of own resources?

Then, an additional topic of similar significance and urgency: Is the European Union actually allowed to borrow money on the markets? How should the complicated construction of NGEU be assessed in light of the general provisions of the Treaties? And are perennial debts of the Union a good idea in economic and political terms?

And finally: What is the future role of the ECB and its massive asset purchase programs in the context of the asymmetry between the EU competences in the field of monetary policy and the largely lacking EU competences in the field of economic policy? Are the NGEU program and similar debt-financed programs suitable means to reduce the burden, which right now rests on the ECB with regard to the aim of economically rescuing Member States?

These are many challenges with big legal and political question marks.

Therefore, we are extremely happy to have excellent speakers and discussants with us today, who will share their insights and assessments of the current situation with us. In the morning, we will hear a lecture by Professor *Martin Nettesheim*, who will introduce us to the own resources system, the MFF and the debt-financed NGEU in particular. Afterwards, Professor *Edoardo Traversa* will focus on the legal bases, constitutional requirements and design proposals for possible EU taxes. In the afternoon, we will then turn to the perspectives for the German Council Presidency. To this end, we have invited outstanding representatives of the institutions involved

and additionally an equally outstanding economist. We will have with us: *Jakob von Weizsäcker*, Director-General for Economic and Fiscal Policy and Global Economy at the German Federal Ministry of Finance; *Marco Buti*, Head of Cabinet of the Commissioner for Economic and Financial Affairs at the European Commission; Dr. *Franziska Brantner*, Member of the German Federal Parliament and its Committee on European Union Affairs and Professor *Clemens Fuest*, President of the ifo Institute in Munich.

I am extremely confident that this will be a great and rich day on a topic of crucial importance for the future of Europe.

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

Martin Nettesheim

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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

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

[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

[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.

[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.

§ 3 The long and winding road towards a tax-financed EU budget
Constraints and design proposals from a legal prospect

Edoardo Traversa

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I. Introduction

When addressing the topic of EU taxes from a legal perspective, it is important from the outset to distinguish between two situations. On the one hand, it may refer to the creation of genuine European taxes by EU institutions, whose revenues would flow in the EU budget. This would require a major overhaul of the EU Treaties, by granting the EU level a constitutional power to tax and would de facto but also de iure transform the European Union in a fully-fledged federation, like the United States of America. On the other hand, it may also refer to a broader range of options for reform within the current Treaty framework through which the proportion of EU own resources deriving from tax-based revenues would be significantly increased. Genuine EU taxes are not indeed the only way to make the own resources system more dependent on tax resources. On this premise, the recent developments at the EU level as to the adoption of a new Multiannual Financial Framework for the period from 2021 to 2027 and the Next Generation EU instrument leave some room for cautious optimism.

This contribution is divided into three parts. First, it addresses the reason why the debate on the reform of EU tax-based own resources is important today. It is not just a matter of timing and of the need to compensate for the cost of the EU recovery program. There are other issues that have been pending for years, sometimes decades now, that justify opening this debate again. Then, it discusses legal-constitutional issues, such as the appropriate

legal basis to reform EU tax-based own resources. Art. 311 TFEU, which entrusts the EU with the capacity to be funded by self-defined own resources and not by mere voluntary contributions of Member States, like other, more traditional, international organisations, is indeed not suitable to adopt legal instruments in the area of tax policy and tax harmonization, which are regulated by other provisions, with other procedures. The third part is a small policy contribution from a legal perspective regarding the discussion of the different options of new EU taxes on the table.

II. Constitutional reasons to reform the own resources system

So why should one discuss the reform of tax-based own resources now? A first reason is conjectural. The Next Generation EU (NGEU) program was politically approved, together with the new Multiannual Financial Framework 2021-2027, after a marathon of negotiations in July 2020, and finally adopted on 17 December 2020[84]. To finance this program, the EU Commission will issue bonds up to 750 billion euros. The repayment of NGEU will require additional own resources to the EU budget.

According to the 2020/2053 decision on own resources:[85]

> 'The economic impact of the COVID-19 crisis underlines the importance of ensuring that the Union has sufficient financial capacity in the event of economic shocks. The Union needs to provide itself with the means to attain its objectives. Financial resources on an exceptional scale are required in order to address the consequences of the COVID-19 crisis without increasing the pressure on the finances of the Member States at a moment where their budgets are already under enormous pressure to finance national economic and social measures in relation to the crisis. An exceptional response should therefore take place at Union level. For that reason, it is appropriate to empower the Commission on an exceptional basis to borrow temporarily up to EUR 750 000 million in 2018 prices on capital markets on behalf of the Union. Up to EUR 360 000 million in 2018 prices of the funds borrowed would be used for providing loans and up to EUR 390 000 million in 2018 prices of

[84] Council Regulation (EU, Euratom) 2020/2093 of 17.12.2020 laying down the Multiannual Financial Framework for the years 2021 to 2027, OJ LI 433, 11–22.

[85] Council Decision (EU, Euratom) 2020/2053 of 14.12.2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 1–10.

> the funds borrowed would be used for expenditure, both for the sole purpose of addressing the consequences of the COVID-19 crisis.'

As a consequence, 'to bear the liability related to the envisaged borrowing of funds, an extraordinary and temporary increase in the own resources ceilings is necessary.' However, since the funds borrowed will have to be reimbursed, other measures to strengthen the financial capacity of EU institutions, such as a reform of the own resources system, need to take place. This needs to be done even if Member States agree on a modification of the original agreement as to the duration of loans, for example by authorizing a rollover. The commitment of the EU institutions and the Member States to increase and diversify the basket of EU own resources is indeed unconditional.

From a constitutional perspective, such a reform could require important changes to the current EU constitutional framework, despite the fact that Art. 311 TFEU allows – through a rather cumbersome but democratic procedure – the establishment of 'new categories of own resources or abolish an existing category'.

Unlike the exercise of taxing powers in Member States, there is no parliamentary involvement at the EU level in the area of tax policy. There is therefore no real link between the EU regulatory action of the European institutions – in particular the Council – in tax matters and the representative body, which is generally associated with the adoption of tax laws in domestic constitutional orders.

Then, there is the question of the legitimacy of the requirement of European unanimity in tax matters. It is very much like any type of international organization. When it comes to decisions that have a direct impact on citizens like taxes or tax policies, we should take the arguments put forward by the European Commission in 2019 seriously, in its attempt to move gradually to qualified majority voting in taxation. This is not an issue of efficiency, because as we have seen from the last years, many acts in the area of taxation have been adopted at the EU level despite the unanimity requirement. It is an issue of democracy and of legitimacy. Although the democratic legitimacy of the European Parliament may be questioned in the light of the differences in the electoral processes in the various Member States used to elect their MEPs, the current procedure according to which the tax directives and regulations are currently adopted by the Council alone do not guarantee effective democratic control despite the limited control mechanism by national parliaments on draft legislative act's non-compliance established by the Protocol on the application of the principles

of subsidiarity and proportionality (Protocol No 2)[86]. In 2019, the Commission has proposed to move progressively towards a qualified majority voting in taxation matters, a reform that would be possible without changing the Treaties under the so-called 'passerelle clause' (Art. 48(7) TEU); the Commission's arguments seem to be even more compelling regarding the adoption of a truly EU tax or even of new tax-based EU own resources.[87]

But there is also a stringent argument from an efficiency perspective to reform the EU own resources system. One should not just look at the number of acts that have been adopted by the Council within the area of taxation, but also consider which level of government carries the budgetary consequences, at least partly, of tax policy choices made at the EU level. Tax policy decisions are indeed split between the EU and the Member States while the budgetary consequences of those decisions lie exclusively with the Member States.

Finally, another reason to justify a reform towards more tax-based EU own resources is solidarity. Only EU taxes can achieve solidarity, which is an essential component for the internal stability of the European Union. In an internal market where economic factors are free to move from one member state to another, the increase of inequality between regions as well as between people can only be compensated by vertical intergovernmental transfers from the EU central level to the Member States. But solidarity is a difficult goal to achieve because as soon as it becomes too visible, or when it is presented as a single direction mechanism (from some clearly identified 'contributors' to other clearly identified 'beneficiaries'), it loses legitimacy. This consideration is to be found in the famous Spaak report[88] which paved the way towards the Treaty of Rome in 1957. The report recommended among other things the institution of a European fund that was about helping in certain areas and industries in Europe to meet the transition of the economies. And it explicitly specified that '[f]or the European Fund to be worthy of its name and to be able to play the part expected of it, there must be no territorial link between the origin of the funds and their utilisation'. Interestingly enough, in a much more recent report written for

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86 Protocol (No 2) on the application of the principles of subsidiarity and proportionality, OJ 2008 C 115, 206-209.

87 EU Commission, Communication of 15.1.2019, Towards a more efficient and democratic decision making in EU tax policy, COM(2019) 8 final.

88 Report of the Heads of Delegation to the Foreign Ministers 'Spaak report' (Brussels, 21.4.1956).

the 2020 German presidency about the future of the EU own resources reform, *Clemens Fuest* and *Jean Pisani-Ferry* also address the relationship between Member States regarding contributions to and benefits from the EU: 'Dominance of GNI contributions encourages thinking about the EU budget in terms of net balances, though EU spending creates added value that benefits the EU economy as a whole.'[89]

In conclusion, reform towards new tax based own resources is certainly necessary, today more than ever. However, at the same time those resources should have a strong link with the European Union policies and – having an eye at the recent international debates on the digital economy[90] – with the European territory, but not a too tight link with the territory of single Member States in order to avoid fostering resentments between Member States.

III. Legal basis for tax-based own resources

In the political discussion on future EU own resources, the issues of the legal bases play an important role, since they significantly limit the room for maneuver of EU decision-makers. In some cases, they seem to even preclude the possibility of adopting certain types of EU taxes without changing the Treaties.

1. Legal basis and typology of EU own resources

According to Art. 311 TFEU

> 'The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.
>
> Without prejudice to other revenue, the budget shall be financed wholly from own resources.
>
> The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it

[89] *C. Fuest/J. Pisani-Ferry* 'Financing the European Union: new context, new responses', Policy Contribution 2020/16, Bruegel 2020.

[90] See in particular the ongoing work of the OECD on the BEPS Action 1 and the Pillar I and II proposals (https://www.oecd.org/tax/beps/beps-actions/action1/).

> is approved by the Member States in accordance with their respective constitutional requirements.
>
> The Council, acting by means of regulations in accordance with a special legislative procedure, shall lay down implementing measures for the Union's own resources system in so far as this is provided for in the decision adopted on the basis of the third paragraph. The Council shall act after obtaining the consent of the European Parliament.'

The determination of the EU own resources is a matter reserved for the Council acting unanimously with a mere consultation of the Parliament except for the adoption of implementing measures. It is on the expenditure side that the Parliament's powers have increased over time and it is now placed on an (almost) equal footing with the Council regarding the establishment of the Multiannual Financial Framework[91] and of the annual EU budget[92].

The first Own Resources Decision dates from 1970, and no major substantial changes to the system have been made since the 1980s (with the addition of the GNI-based own resource).[93] The current system provides for four main sources of revenues: Traditional own resources, a Value Added Tax-based own resource, the Gross National Income-based own resource, and since 2021, a plastic contribution.

Moreover, an overall cap for resources and expenditures has been established: Under the rules agreed to for the period 2014-2020, the EU could mobilize own resources for payments up to a maximum amount of 1.2 % of the sum of all Member States' gross national income (GNI). The cap will

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91 Art. 312 TFEU.

92 Art. 310 and 314 TFEU. However, it could be argued that the abolition of the distinction between compulsory expenditures and non-compulsory expenditures in the EU budget by the Treaty of Lisbon has reduced the autonomy of the European Parliament as regards the latter type of expenditures (over which the EP used to have the final say).

93 Seven own resources decisions have been adopted since 1970. The first six were Council Decisions: Council Decision of 21.4.1970 on the Replacement of Financial Contributions from Member States by the Communities' own Resources, OJ L 94/19, 224; Council Decision of 7.5.1985 on the Communities' system of own resources, OJ L 128, 15; Council Decision of 24.6.1988 on the Communities' system of own resources, OJ L 185, 24; Council Regulation No 2729/94 of 31.10.1994 amending Regulation (EEC, Euratom) No 1552/89 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources, OJ L 293, 5; Council Decision of 29.9.2000 on the Communities' system of own resources, OJ L 253, 42; Council Decision of 7.6.2007 on the Communities' system of own resources, OJ L 163, 17; see EU Commission, Commission Staff Working Paper of 27.10.2011 on Financing the EU budget: Report on the operation of the own resources system, SEC(2011) 876 final, 2.

be raised to 1.4 % for 2021-2027, with temporary increases allowed, to be determined at a later stage according to a formula contained in Art. 3 of Council Decision (EU, Euratom) 2020/2053.[94]

Traditional own resources are customs duties. Customs duties are currently the closest thing to a genuine EU tax. The EU has exclusive competence regarding the determination of the scope and structure of customs duties, and the revenues that are collected accrue directly to the EU budget after a 25 % (since 2021) deduction, which is supposed to remunerate for collection costs. Moreover, as an essential element of the internal market and the external commercial policy, legislation in the area of customs duties, like the Union Customs Code and its implementing regulations[95], is not considered as having a fiscal nature and is therefore jointly adopted by the Council (with a qualified majority) and the Parliament under ordinary legislative procedure. Customs duties represent 158,6 billion euros, which is around 12,7 % of the total EU resources (2018).

The other two EU resources take the form of compulsory national contributions by the Member States to the EU budget.

The VAT-based own resources are calculated on the basis of a uniform rate of 0.3 % applied to the corrected Value Added Tax base of each member state with the VAT base capped at 50 % of each country's GNI.

According to the Commission

> ‘the VAT based contribution is complex, requires an important administrative work necessary to harmonize the calculation basis, and offers little or no added value compared to the GNI based own resource. Furthermore, due to the statistical nature of the basis, the resource is fully independent of- and does not support VAT policies at EU or Member States level.’[96]

Its financial relevance has steadily declined since the 1980s, and it accounts for approximately 12 % of total EU own resources. Despite proposals from

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[94] Council Decision (EU, Euratom) 2020/2053 (supra n. 2), OJ L 424, 1–10.

[95] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9.10.2013 laying down the Union Customs Code, OJ L 269, 1; Commission Delegated Regulation (EU) 2015/2446 of 28.7.2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, OJ L 343, 1; Commission Implementing Regulation (EU) 2015/2447 of 24.11.2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, OJ L 343, 558.

[96] EU Commission, SEC(2011) 876 final (supra n. 10), 4.

the Commission,[97] the Council has not seized the opportunity to transform it into a truly tax-based own resource, which would, at least in part, directly accrue to the EU budget.[98]

The Gross National Income-based own resource – which was originally supposed to have a purely complimentary role – currently accounts for more than 70 % of the EU budget. It is calculated by applying a uniform rate to Member States' gross national income. This rate is adjusted each year in order to achieve a balance between revenue and expenditure. Several exceptions have been established; in the wake of rebates for the United Kingdom, which is no longer a member state, some other EU Member States benefit from flat-rate corrections: for the period 2021-2027 there will be benefits of 565 million euros for Austria, 377 million euros for Denmark, 3,671 million euros for Germany, 1,921 million euros for the Netherlands and 1,069 million euros for Sweden.[99]

2. Interaction with existing EU legal bases in taxation matters

Although the Union has legislative powers in the area of taxation, these powers do not pursue a financial or budgetary objective. They are exercised with a legal and economic objective which is the achievement of the internal market. As Art. 113 TFEU on the harmonization of indirect taxation explicitly states – similarly to Art. 115 TFEU which serves as a legal basis to adopt acts in the area of direct taxation – the Union may adopt acts 'to the extent that [they are] necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition in a way that is functional to the completion of the internal market'[100].

Both provisions provide for a special legislative procedure with the Council acting unanimously as the sole legislative body and a mere consultative role for the European Parliament. Therefore, a clear separation exists – with

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[97] See EU Commission, Proposal of 29.6.2011 for a Council Decision on the system of own resources of the European Union, COM(2011) 510 final and EU Commission, Proposal of 2.5.2018 for a Council Decision on the system of own resources of the European Union, COM(2018) 325; see also EU Commission, Report of 14.7.2004 on the Operation of the Own Resources System, Volume I and II, COM(2004) 505 final.

[98] The relation between the EU budget and the taxpayer is not direct, but indirect, since the VAT-based resource is a contribution of the Member States.

[99] Council Decision (EU, Euratom) 2020/2053 (supra n. 2), OJ L 424, 1–10.

[100] See *G. Kofler*, in: C. Panayi/W. Haslehner/E. Traversa (eds.), Research Handbook on European Union Taxation Law, 2020, p. 11.

minor overlaps – between the rules defining the extent of the powers in the area of taxation and those determining the own resources through which the EU budget is financed. The nature of these own resources and their relationship to taxation is quite different. Customs duties are the closest thing that we know today to a genuine EU tax. Because, also from a constitutional perspective, customs duties remain national taxes, the EU has exclusive competences regarding the structure of the customs duties, the rates, the way they are collected and the revenues generated by customs duties and by different Member States to the EU budget. Moreover, there is a clear link between customs duties and the competence transferred to the EU, in particular trade policy, the customs union and the internal market. Customs duties currently represent approximately 12 % or 13 % of the total EU budget. Then there is the VAT-based resource, which has little to do with VAT. It is not part of the VAT revenue collected by the Member States and it is fully independent from EU or domestic VAT policies. Furthermore, GNI-based resources have nothing to do with European taxation.

As the precedent of customs duties shows, nothing in the Treaty prevents a new EU own resource from being tax-based. However, this would require the adoption of common, if not identical, rules on the structure of the tax at the EU level, which could only be achieved by using legal bases existing in the Treaties. Art. 311 TFEU is indeed not a valid legal base to harmonize or to create taxes; it merely deals with the attribution of financial means to the European Union.

Currently, those are Art. 113 TFEU for indirect taxes, Art. 115 TFEU for direct taxes and Art. 192 TFEU for environmental taxes, which all provide for unanimity of the Council and a mere consultation of the European Parliament. The question may however be asked whether such a procedure is appropriate for establishing the base and the rate of a future EU tax, since Art. 113 and 115 TFEU enable the Council to adopt tax legislation for a specific purpose. Indeed, Art. 115 TFEU confers powers to the Council to 'issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market'. Moreover, such directives should comply with the subsidiarity and proportionality principles laid down in Art. 5 TEU. It appears legitimate to raise the question whether new legislation aiming at harmonizing the structure of a future EU tax

would help to attain the objective of the achievement of the internal market, and whether their adoption at the EU level would meet the subsidiarity and proportionality criteria.[101]

We should be careful about using these legal bases to create a new tax that would be justified only because its revenues would fund the EU budget. There must always be a link with the internal market. The only exceptions are environmental levies because, in that case, there is a specific legal basis with Art. 192 TFEU, which also provides for unanimity, but which does not require a connection with the internal market.

Anyway, it seems clear that a move towards EU tax based own resources should be accompanied by introducing qualified majority voting for the adoption of harmonization measures. If there would be drawn a clearer link between tax harmonization and the own resources system, the argument based on the 'No taxation without representation' principle would be even more stringent, more compelling. That shows that the path towards EU tax-based own resources is a relatively complicated one.

IV. Assessment of potential options

Previous studies[102] have discussed the pros and cons of introducing new own resources based on existing or new taxes, such as Value Added Tax,

[101] Similar doubts have been expressed as regards the adoption of the ATAD, which can be seen as an empowerment to Member States to strengthen their domestic tax systems and to adopt anti-abuse measures even in a EU cross-border context without harmonizing or coordinating their corporate tax systems. Under such a perspective, the question may be asked as to whether the ATAD really services the purpose of achieving the internal market. See *E. Traversa*, The prohibition of abuse of rights in European Tax Law: sacrificing the internal market for the fight against base erosion and profit shifting?, Studi Tributari Europei, Vol. 9, no. 1 (2019), p. 1-14, in particular p. 13 (https://ste.unibo.it/Art./view/10682/11222).

[102] See European Parliament, Working Document of 30.10.2015 on improving the functioning of the European Union building on the potential of the Lisbon Treaty, para. 42 and the works of The High-level group on own resources established in 2014 by Monti (EU Commission, High-level group on own resources, http://ec.europa.eu/budget/mff/hlgor/index_en.cfm, last accessed: 27.05.2020); among scholarly literature, see *F. Heinemann/P. Mohl/S. Osterloh*, Reform options for the EU own resource system, Research project 8/06 commissioned by the German Federal Ministry of Finance (18.1.2008); *I. Begg/H. Enderlein/J. Le Cacheux/M. Mrak*, Financing of the European Union Budget, Study for the EU Commission, Directorate-General for Budget (29.4.2008); *Linde,* in: Lang et al. (eds.), Introduction to European Tax Law on Direct Taxation (2008); *Ph. Cattoir*, Options for an EU financing reform, Notre Europe (2009);

customs duties and other border levies, excise duties and special taxes on certain goods and services, corporate tax, transport tax, especially car taxes and air transport taxes, financial transaction tax and carbon tax. Some scholars have also argued for the introduction of a Pan-European wealth tax[103]. In a resolution of 15 May 2020, the European Parliament reaffirmed its position supporting the Commission's previous proposals regarding the list of potential candidates for new own resources. Those were 'a common consolidated corporate tax base, digital services taxation, a financial transaction tax, income from the emissions trading scheme, a plastics contribution and a carbon border adjustment mechanism.'[104]

From a lawyer's perspective, future EU tax-based own resources should have certain characteristics that would ensure that they respect constitutional and legal principles whether based on EU law or on the common constitutional tradition of the Member States and that can be easily implemented, limiting legal uncertainty.

First, as the French saying '*Un bon impôt est un vieil impôt*' ('A good tax is an old tax') tells, creating a completely new tax has always been quite a difficult task and was usually made possible by extraordinary events, such as wars.[105] Moreover, besides the – rather understandable – natural aversion that people and countries could show against the introduction of new levies (which prompted several revolutions), the administrative costs associated with the introduction of a new tax in 27 states should not be overlooked,

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M. Schratzenstaller/A. Krenek/D. Nerudová/M. Dobranschi, EU Taxes as Genuine Own Resource to Finance the EU Budget: Pros, Cons and Sustainability-oriented Criteria to Evaluate Potential Tax Candidates, FairTax Working Paper 3 (6.2016), (http://ec.europa.eu/budget/mff/Library/hlgor/selected-readings/40-DOC-COMM-EuTaxes-Schratzenstalle.pdf, last accessed: 27.05.2020); *A. De Feo/B. Laffan*, EU Own Resources: Momentum for a Reform? European University Institute (2016), (http://ec.europa.eu/budget/mff/hlgor/library/selected-readings/01-DOC-COMM-EUORMomentumForReform-EUIDeFeoLaffan-Feb2016.pdf, last accessed: 27.05.2020).

[103] *C. Landais/E. Saez/G. Zucman*, A progressive European wealth tax to fund the European COVID response, VOX (3.4.2020), (https://voxeu.org/Art./progressive-european-wealth-tax-fund-european-covid-response, last accessed: 27.05.2020).

[104] European Parliament, Resolution of 15.5.2020 on the new Multiannual Financial Framework, own resources and the recovery plan, P9_TA-PROV(2020)0124; see also European Parliament, Interim report of 14.11.2018 on the Multiannual Financial Framework 2021-2027 – Parliament's position with a view to an agreement, P8_TA(2018)0449.

[105] See, for example, the adoption of the income tax in the United Kingdom in 1799 as a temporary tax to finance Napoleonic wars or in France in 1914 to support the WWI effort.

also considering the significant disparities due to the different tax cultures. It should be borne in mind that the Commission, over the years, has unsuccessfully proposed a carbon tax[106], a CO_2-based car taxation[107], a financial transaction tax (including under enhancement cooperation)[108] and, more recently, two types of digital taxes[109]. In this context, it would seem wise not to add administrative implementation hurdles to the already considerable political obstacle to the introduction of a direct transfer of tax revenue from the Member States to the Union and to adapt models already existing at the level of the Union or at least inspired by experiences common to all or at least a majority of Member States.

In addition, as already mentioned earlier, the resource should be able to provide the European budget with significant and stable revenue, to reimburse the loans taken by the Commission in the framework of the Next Generation EU, and there is always a haze of uncertainty regarding the revenue-raising capacity of 'untested' taxes.

A last element to be taken into consideration is the fact that a truly European tax-based own resource, by its very nature, cannot create territorial divisions that would foster resentments between Member States, as it is currently the case when it comes to determining the net contributors and the net beneficiaries to the budget of the European Union.

Therefore, trying to use an existing tax to transform it totally or partially into an EU tax-based own resource seems to be the safest way forward from a legal perspective. For these reasons, plastic taxes, financial transaction taxes, digital taxes, but also corporate taxes (which, given the disparity between Member States' corporate income taxes, would require a considerable harmonization effort) cannot reasonably be first (and not even second) -best choices in the short-term: before they can be considered workable options, significant issues as to the EU competence to adopt them, but also

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106 EU Commission, Proposal of 2.6.1992 for a Council Directive introducing a tax on carbon dioxide emissions and energy, COM(1992) 226 final.

107 EU Commission, Proposal of 5.7.2005 for a Council Directive on passenger car related taxes, COM(2005) 261 final.

108 EU Commission, Proposal of 28.9.2011 for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC, COM(2011) 594 final and EU Commission, Proposal of 14.2.2013 for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013) 71 final.

109 EU Commission, Proposal of 21.32018 for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final.

as regards their implementation and administration will have to be properly addressed.

The two candidates that offer more reliability from a legal viewpoint are a (truly) VAT-based own resource and own resources based on an excise tax on certain services connected to the digital economy.

Value Added Tax is besides customs duties the most European tax and is already used as a basis to calculate one of the own resources. In comparison with all the other taxes, not much would be needed to it becoming the most significant own resource, both in terms of yield and visibility for EU citizens. It is certainly worth remembering the solution devised in the Commission's 2011[110] proposal, which unfortunately remained a dead letter by the Member States. The idea concerned a slight modification of the current system of own resources in addition to a single innovation, which the Member States were not ready to discuss at the time, namely that of transforming the VAT resource into a (quasi) European tax, with the establishment of a specific European rate on top of the national one, with a maximum of 2 %. This proposal by the Commission has merits in terms of simplicity, feasibility and the link with the internal market. The EU VAT system is indeed largely harmonized, instruments for cooperation between Member States exist, and a common VAT culture between national administrations is slowly developing. Moreover, the impact in terms of revenue of such a solution can be precisely estimated. This solution would certainly require changes, such as further harmonization as regards exemptions and exclusions (which could be achieved by amending the 2006/112/CE Directive) and increased cooperation between Member States' VAT administrations and the Commission, as well as a modification of the structure of the VAT-based own resource in the Own Resources Decision. But this would not constitute a legislative revolution, rather an evolution in a process that started decades ago. And last but not least – and even if that argument is often used against such a solution – VAT is a tax that is paid by everyone: every consumer, rich or poor, but also every business, in one way or the other. A VAT-based own resource could give a stronger sense of European citizenship, in comparison to other, more sectoral, levies that would give the impression that the EU has been created for large businesses, such as digital companies or banks.

The second option would be an excise tax on certain services. Digital taxes are in the air. While some Member States have already adopted the digital

[110] COM(2011) 510 final (supra n. 14).

service tax, intense discussions are taking place at the international level (Pillar 1 and Pillar 2 OECD initiatives). If there is no agreement at the OECD level, the Commission has announced that it would introduce a digital levy. The structure of that levy could be a top-up tax on certain transactions already subject to VAT, without a right to deduct so as to cover both B2B and B2C services (there to be considered as a sort of excise on digital transactions), with a threshold for smaller providers. Alternatively, if the determination of the services subject to this new levy would prove to be too difficult, a small percentage of the total turnover of large multinational firms (which are those who benefit the most from the EU single market) could also be an option. There would also be a precedent: for almost 50 years, the European Coal and Steel Community, which was created in 1951 and then later absorbed by the European Economic Community, has been financed through a levy on the production of coal and steel, at a rate (less than 1%) fixed by the High Authority – the forerunner of the European Commission – and directly collected by it from undertakings active in those sectors.[111]

And if at the end, due the constitutional and legal constraints described above and/or political factors, a compromise on tax-based own resources would prove too difficult to achieve or if it would not yield enough revenues, it would be wise not to cast all the EU eggs in the same tax basket, and to also develop other forms of EU financing. Alternatives outside the field of taxation exist, like resources based on the Emission Trading System[112] or the setting-up of obligations to contribute to Pan-European funds aiming at protecting against specific risks, such as those linked to climate change, along the lines of the EU regulatory bank levy in the framework of the Single Resolution Fund.[113]

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[111] Art. 49 of the Treaty establishing the European Coal and Steel Community (ECSC), signed in Paris on 18.4.1951. See also High Authority Decision No 2-52 ECSC of 23.12.1952 determining the mode of assessment and collection of the levies provided for in Art. 49 and 50 of the Treaty and High Authority Decision No 3-52 ECSC of 23.12.1952 on the amount of and methods for applying the levies provided for in Art. 49 and 50 of the Treaty, available on www.cvce.eu.

[112] This appears to be the solution favored by *C. Fuest/J. Pisani-Ferry*, 'Financing the European Union: new context, new responses', Policy Contribution 2020/16, Bruegel.

[113] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15.7.2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 1. In 2019, the Single Resolution Fund (SRF) received 7,8 billion euros from 3,186 institutions and investment firms. It is important to stress that

The road towards a more sold financing of the European Union has never been straight, and side paths could turn out to be the smartest manner to continue the journey, waiting for the right time to go back on the main track.

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the calculation and collection of the contributions by the Single Resolution Board is subject to review by EU Courts: see for example GC, Judgment of 23.9.2020, Cases T-411/17 Landesbank Baden-Württemberg v Conseil de résolution unique (CRU), T-414/17 Hypo Vorarlberg Bank AG v CRU and T-420/17 Portigon AG v CRU.

Discussion

Moderator: Ekkehart Reimer

Ekkehart Reimer

Thank you, Edoardo, that was really an unorthodox ending. It seems no one is considering VAT although it has been so close, so common and so customary to EU tax law since the late 1960s. For these reasons it is just astonishing to me that we have not been talking more about VAT as an EU tax in the past. Again, thank you very much for this well-structured lecture.

We will now enter into a discussion with everyone. Once again, I would like to encourage all participants of our worldwide audience to join the discussion and to intervene on any topic that may or may not have been addressed by *Edoardo Traversa*.

I may start with just a short question myself. There is one EU tax already and this is the tax on income of public servants of the EU, of all the people in Brussels, Luxembourg and Strasbourg who earn their money from EU budgets as civil servants or employees of the Union. Can we learn anything from those EU own resource taxes or is it something that you just not find helpful from an academic viewpoint to compare, for instance regarding assessment and enforcement of those taxes, with your six candidates?

Edoardo Traversa

Yes, you are right to mention that there is at least this tax. Well, there are two reasons why it is not really relevant to the debate. First, unless we transform the EU into a super state which would integrate most of the existing administration of the Member States – I am not sure that this is a perspective that is particularly rejoiced – the volume of the revenue collected will remain quite negligible. We can also certainly increase the taxes on the existing civil servants, but it will remain a negative source of revenue.

And the second element is more, let's say, legal. I am not really sure that this levy has the constitutional nature of a tax in the EU legal order. It is of course something that the EU does but the question is whether this model can be used to adapt other types of levies. Actually, I do not think it can. So it is a precedent that can be used in order to say we are ready for a new tax,

but I am not sure that we can use something from it to expand and enlighten the debate on future forms of own resources.

Ekkehart Reimer

I am afraid you are right, Edoardo. Any other questions, any points? *Matthias Valta* from Düsseldorf, the floor is yours.

Matthias Valta

Thank you very much, Edoardo, for this very nice presentation. If I understood you correctly, you said that there is no need for a further general legal basis for raising taxes besides the *Eigenmittelbeschluss* and the specific legal bases you mentioned, and I would generally agree with that. But if I remember correctly, this has been disputed in the German discussion. And beyond this discussion there is some unease because of the alleged lack of democratic legitimation of the European Union, especially with regard to the restricted role of the European Parliament. Could you elaborate a little bit on that? Not from the German point of view, but from a general, institutional point of view? How would the European Parliament, how would the principle of democracy, how would democratic legitimation play out in your assessment of the constitutional setting of the European Union?

Especially if we think of 'No taxation without representation'. Do we have enough representation for taxation? I very much liked your example with Wendy. Because 'No taxation without representation' can also be turned around: 'No representation without taxation'. Like Wendy felt herself more as a part of society because of being taxed, collecting a European VAT on our everyday bills could make us all feel more like European citizens. If we are burdened with visible European taxes and thus feel more like European citizens, does this amount to a new awareness that leads to more democratic legitimation and representation? Thank you.

Edoardo Traversa

Yes, thank you, Matthias. Well, from an EU constitutional perspective you could always strive towards more clarity and add provisions in the Treaty for the possibility to adopt a new tax. But since we have this precedent of the customs duties which seems to work in the sense that, according to even the most optimistic scholars asking for a budget of the EU, this budget would be around 4 or 5 % of the European GDP. So we do not need – except if there is an institutional big bang – to reach these figures or half of them,

to have true European taxes, in the sense of a new personal income tax or a new corporate tax. The way it works for the customs duties is a relatively acceptable arrangement, as long as we are dealing with smaller taxes or shared taxes, because advocated are taxes that collect shared revenues between the Member States and the European Union.

As regards the democratic argument, it is true but that is more of a purely constitutional issue. It is true that the issue whether the European Parliament can be considered as the European equivalent of the national parliaments is a real issue. Particularly the fact that the way Members of the European Parliament are chosen varies depending on the different Member States. Do we have true European representation in the European Parliament? That is clearly an open question and it is something that probably should be addressed somehow. The situation that we now have is a problem not only as regards democratic involvement of the European Parliament: it is the fact that there are no bodies, whether domestic bodies or the European Parliament, with representatives of the citizens which are directly affected by European tax provisions. There is no democratic body that has its say in the process and on the adoption of tax rules. That is not something that can last, if we go forward with the tax integration process.

When it is just about adopting coordination measures, for example to make sure that we avoid double taxation, or certain cross-border operations, it is something that can be accepted, even if we could argue about it. But when it comes to the entire structure of the tax, discussing even raids, it is something that I personally think we should have in mind for the debate and use that as a justification to have more transparent approaches in the adoption of tax rules.

Irene Burgers

Of course, VAT is a very good candidate and I fully agree with you that people on the street will feel that Europe comes closer to them and that is always good as one of my old professors once told me. He was professor in tax law and history and he said you really need a tax as a clue between people. You make a country function because it has a tax. If you want the EU to move forward, we need a tax, an EU levy.

But do we also need an EU tax administration or would it be preferable to keep going on the way we are doing it right now, with a percentage of VAT going to the budget of the European Union and keeping a separate tax administration. Because if you want to have an EU tax administration, then

you should also try to come up with all those procedurals which would require again new legislation and harmonized legislation also in the procedural field. So how do you feel about that?

Edoardo Traversa

I perfectly agree. At the moment, we are in a very uncomfortable situation when it comes to taxpayers' protection as regards VAT, because we have the common rules. We are supposed to have a coordinated system where there is no discrimination between cross-border transactions and domestic transactions.

What we observe is, first of all, that there is no efficient and quick procedure in order to avoid double taxation between Member States. We have to go to the Court of Justice and there is a lack of coordination regarding assessment, collection and the criminal prosecution of VAT-related crimes. However, we are moving towards a more coordinated approach concerning the procedural aspects. When it comes to the criminal prosecution of VAT cases, we now have the European Public Prosecutor's Office which is oddly competent for VAT crimes. There are principles in the Treaties. The equivalence principle requires Member States' tax administrations to pursue VAT crimes and ensure VAT collections as if it was a purely national tax, but we should probably go further. This is independent from the fact that VAT finances the EU budget. There is a more compelling argument to go in that direction, if it would be the case to have a kind of a VAT taxpayer charter, to have some common framework for collection and sanctions. The level of harmonization of VAT is currently so high at the EU level that things cannot remain like this from a purely procedural perspective.

As for the European VAT administration, I am not sure that we need a fully-fledged EU VAT administration, but we need something more than what we have now. We need a tax administration in charge of coordinating the domestic administration. Probably, looking at the German model which has tax authorities that are at the level of the *Länder* with a coordinating body at the federal level. That could be a source of inspiration.

Ekkehart Reimer

Thanks very much, Edoardo, for the answers. For the time being, I would like to give the floor to *Aikaterini Pantazatou* from Luxembourg for a short intervention.

Aikaterini Pantazatou

Thank you very much, Edoardo, for the presentation. I have a question on spending. How would an EU tax, no matter the form, affect the spending? We have talked about democratic legitimacy: It is very likely that if people feel they are paying to the EU and the spending is invested as it is now when it comes to distribution policies, people will not want this money to be spent on a remote region, for example in the north of Greece or somewhere else. Could this very much affect the spending process as well? And the way the revenue of the EU budget is spent in terms of procedure and also in terms of substance? Thank you very much.

Edoardo Traversa

Shortly, I am not sure that a change of structure in the VAT own resource, which would be calculated on each transaction with top rates, would affect rules on spending and the way money is spent or the legitimacy of spending because we would have probably the same arguments that we have today as regards potential net contributors. But I think that the VAT resource is linked more to the internal market, to cross-border dimensions and hence could raise less issues than a purely national resource calculated on the GNI, but that is with a maybe only. I am not sure to have fully answered your question. I do not think that there will be money spent in all Member States. It will not exactly be in the same proportion to the money that is collected and so the situation would not change. It would be interesting to see how using VAT much more than the GNI own resource would impact the distribution between Member States as regards the proportion of the VAT collected between Member States.

Ekkehart Reimer

Well thanks, Edoardo. Next one in our line is *Gianluigi Bizioli* from the University of Bergamo. And then we hope to have *Frans Vanistendael*, followed by *Christoph Wicher*.

Gianluigi Bizioli

Thank you, Ekkehart, and thank you, Edoardo, for this really challenging presentation. I have two brief questions. The first one goes back to the legal basis for an EU tax. I wonder whether Art. 311 TFEU provides the sufficient competence to the Council and the Member States. I support this position, although I am fully aware that paragraph 2 of this provision is

rather generic. The decisive issue is that the procedures that regulate EU own resources do not wholly belong to the realm of EU law but they require the domestic ratification of the Council decision, according to the Member States' constitution. In this sense, my first point is whether Art. 311 TFEU is a sufficient legal basis for an EU tax.

Secondly, I would like to know your position about the Commission's statement in the Next Generation document in which the EU calls for a connection between the new EU taxes and the competences of the European Union. Is this requirement between the EU tax and the competences of the EU a necessary link or not? Thanks in advance for your answers.

Edoardo Traversa

Thank you. Shortly, I do not think Art. 311 TFEU can serve as a legal basis. Nonetheless, this can be formulated in a very close way so that the additional resources can be established. I do not think it can be reasonably interpreted as allowing the EU to establish EU taxes. I think it would be an interpretational revolution, it would be too much. I think a change to the Treaty is needed.

To answer your second question: As long as there is no general EU competence to establish EU taxes, you have to rely on other legal bases and those legal bases are constrained by the objective to which they can be used, whether for the internal market or for environmental policy purposes. That is why the Commission draws the link. It can also be a political reason, an argument in order to enhance the acceptance of the general public or of the Member States of those taxes, but I think there is also a legal reason to stress the link between EU competences and potential new EU taxes and EU own resources.

Christoph Wicher

Thank you very much, a very warm 'Hello' to Heidelberg and thank you to Professor *Traversa* for this very interesting presentation. I keep pondering about a question regarding the digital levy. Why did the European Council use the phrasing of a digital levy rather than a digital tax? Should we directly jump on to the idea of reducing it to a digital tax rather than continue thinking on what such a levy could also be, especially in regard to the very tight time frame? The European Council expects legislative action enforced by 1 January 2023. I would be very keen to know what your ideas on this issue are. Thank you very much.

Edoardo Traversa

Thank you very much for the question, it is a fundamental one. My first answer would be jesuitical, it is not because you call something a levy that it is not a tax from a legal perspective. My second answer is that it is true if we use the term levy, it opens up some possibilities, but I believe only if you try to link the levy with the destination of the funds collected which is basically the idea of the EU banking levy. Basically, the objective is a general interest to protect the EU against a collapse of the banking system. It is not really an insurance premium that single banks pay to be insured, they are rather contributing to something that is linked to them. That is why banks pay the levy and other actors do not.

However, you could imagine a digital levy that would be levied on digital companies with a general interest objective which is related to the activities of those undertakings. For example a levy to fund a digitalization fund at the EU level. This would maybe also be in the interest of companies, especially in times of COVID-19 and teleworking: to make sure that every European citizen gets access to a stable internet connection and to digital devices. If you would be able to build such kind of program, you could maybe escape the definition of the tax because of this link. Even if the link between the levy and the spending is not a direct one in the sense that the taxpayer or the companies on which the levy is levied gain a direct benefit from paying that levy.

Ekkehart Reimer

Thanks very much, Edoardo. I think we have had a really fruitful and colorful morning session. I wish to express my thanks again to *Edoardo Traversa* for his statement, to *Martin Nettesheim* for his lecture of great analytic insight and to all those who have contributed to the discussions.

§ 4 Panel Discussion

Moderator: Hanno Kube

I. Introduction

Hanno Kube

We hope that everyone has had an enjoyable lunch break and is ready for our afternoon session. We had an excellent session this morning during which we analysed legal foundations and where we looked at possible future perspectives with regard to own resources, genuine EU taxes and debt financing. We now have the great chance to discuss the legal framework and in particular the policy options that are on the table with experts who are directly involved in the decision-making processes and the current negotiations. We are very grateful to have outstanding representatives of the respective institutions with us today. Let me briefly introduce them to you in the order of their introductory statements.

Jakob von Weizsäcker is Head of the Directorate-General I of the German Federal Ministry of Finance, the chief economist if I may say so. He is responsible for economic and fiscal policy strategy, international economy and finance. He is a former Member of the European Parliament and before that he has worked among others for the World Bank, for the think tank Bruegel and for the Ministry of Economic Affairs in Thuringia. He will tell us about the German Council presidency from the perspective of the German government's position. Thank you very much, Jakob, for being with us.

Marco Buti is Head of Cabinet of the Commissioner for Economic and Financial Affairs, *Paolo Gentiloni*, at the European Commission. He was the former Director-General for Economic and Financial Affairs and as a Florence and Oxford graduate in economics he has written extensively on macroeconomics and fiscal policy, on the Economic Monetary Union (EMU), the Stability and Growth Pact (SGP) and the EU budget. He is also professor at the EUI in Florence and in Brussels. Thank you, Marco, for illustrating the position of the Commission.

Then, she is not with us yet but will hopefully be with us in a second, Dr. *Franziska Brantner*, Member of the German Federal Parliament from the constituency of Heidelberg. She is a spokeswoman for EU politics for her party, Bündnis 90 - Die Grünen, the green party, and she is a member

of the parliamentary Committee on European Union Affairs. She has studied politics and international relations at Sciences Po, Paris, and Columbia. She wrote her Ph.D. thesis on the United Nations, taught international politics and she has been involved in many projects and processes with the United Nations, the EU and the German Parliament. We hope to hear Ms. *Brantner's* position from the perspective of the German Federal Parliament that is just now very much involved with the implementation of the decisions that have been taken.

Last but not least, I am very happy to introduce Prof. Dr. *Clemens Fuest*. Mr. *Fuest* is professor at the University of Munich and president of the highly regarded and influential Munich based ifo Institute. He is one of the most prominent economists today and among others member and former chairman of the Advisory Board to the Ministry of Finance. Just recently, we have heard about that from *Edoardo Traversa*, Mr. *Fuest* together with *Jean Pisani-Ferry* presented a study on the financing of the EU to the informal ECOFIN meeting in September in Berlin. Mr. *Fuest*, thank you for sharing your insights and for taking the time to participate in our conference.

We have a great panel and we will see different points of view. Unfortunately, *Franziska Brantner* is not with us yet but I think we can start with introductory statements by *Jakob von Weizsäcker*, followed by *Marco Buti* and *Franziska Brantner*, as soon as she is available, as well as *Clemens Fuest*. Please spend ten to 15 minutes each on your statements after which we will have a short break and we will then continue with a second round of statements and a discussion.

I invite you to remain connected with your cameras so that everyone can see you as this is a panel discussion. Jakob, the floor is yours. Thank you.

II. Introductory Statements

1. Jakob von Weizsäcker

Thank you very much, Hanno. It is a pleasure to be here and I am delighted to be back in Heidelberg – even if only virtually – since Heidelberg is my city of birth. It also gives me a particular pleasure to display my views in this distinguished panel. I have known every panelist for a long time and I very much admire them for their expertise. We have already worked together very closely in different situations. Let me reveal the secret, Hanno, that we first met in Wales a very long time ago, when we were not even

adults yet. We had a wonderful time there and our hair was still a bit stronger and Britain was still in the EU back then.

In the beginning, I would like to point out that, since this is a public event, I am not an official spokesperson of the German Ministry of Finance. The only thing I can offer are my personal views on these matters.

I am delighted about the title of the event, which is 'Solid Financing *of* the EU' (respectively *'Tragfähige EU-Finanzierung'*). For many years now, German economists and German lawyers have talked a lot about solid financing *within* the EU. This does make a lot of sense since we created the euro from which derives a 'common pool problem' that should not get out of hand. But unfortunately, at some point, this became a bit of a national obsession and for a while this was the only thing, as it seemed to me, that German lawyers and economists were able to talk about, although there are many other important and pressing EU problems and challenges. Sometimes it is also forgotten what an enormous achievement the EU is for the whole of Europe and for Germany in particular. I think financing *of* the EU is a topic that I very much like.

Now, before I say a couple of things about what might be suitable channels of funding, I want to first emphasize the objectives of funding. I think it is very useful to go back to *Richard Musgrave*'s idea of identifying the three reasons the fisc, at whatever level, might want to spend money. One is allocation, the second is distribution and thirdly, stabilization.

Regarding allocation, I believe it is becoming increasingly clear that there is enormous value added in many areas if we organize things at the European rather than at the national level. To give you some examples, this is the case in foreign security policy, in development and in climate policy, in some aspects of digitalization, in many aspects of research and development, concerning humanitarian treatment of refugees and border protection in the Schengen Area and so on. In many areas, if we were to pool our resources and our decision-making powers, there could be much better outcomes than if every member state tries to address these issues by itself. I believe this to be a very important point. It is quite fundamental but I think we are increasingly realizing that we cannot or rather should not go on in many of these areas as we have been in the past. If we were to do that, it would not require a lot of extra taxes. In fact, there is value added, so maybe even the overall funding in some areas could shrink. But we would need to use our resources more efficiently and to move certain funds from the national to the European level in order to being able to achieve that.

The second objective of funding is distribution. While it is true that in a number of federations, the welfare state is organized at the federal level –

in the US, for example, there are social security, Medicare and Medicaid as large welfare programs at the national level – I believe that in Europe, for the time being, we feel that resources are channelled more to help countries converge upwards, to develop faster structural funds and so on. That is probably the main distribution program that we have. Closely linked with this is the question of design, which is big enough.

Thirdly, there is stabilization, regarding which we have certainly learned the hard way in the last crisis and I am of the opinion that we are learning a little bit faster in this crisis. When the euro was created, the challenge to stabilize it was underestimated to some extent. In the financial crisis, we saw the questions of financial stability and of multiple equilibria for government debts needed to be addressed. That is why the Banking Union and the ESM were created. Now we are in a very special situation, which nobody had expected when the euro was created, which is that we are at the Zero lower bound. As a consequence, monetary policy has a much harder time to do the 'heavy lifting' in terms of stabilization. This is why fiscal policy needs to play a more important role than previously at the Zero lower bound and it is quite relevant in the current crisis. I believe having this in mind is important for setting the stage a little bit.

Now, luckily, there is still some time left. The most important project of the German Council presidency was not only to get Next Generation EU in principle politically off the ground, but to now also find a suitable compromise between the European Parliament and the European Council so that we can actually move ahead with it. The major project in a unique crisis like that is to show an important element of solidarity with the most affected Member States and to mobilize resources beyond the current budget's limits, therefore having a rather large volume of European debts. We have had European debts before, as I am sure *Marco Buti* will be able to tell you, but this time it is of a greater magnitude – funding future oriented programs, not least in the areas of climate change and digitalization, but also creating the fiscal space for health responses and generally having an economic response to the crisis situation.

Of course, one can do that without having own resources, one can just use GNI-related revenues in order to service those debts. But if we do that exclusively, it is questionable whether it is a satisfactory solution and whether it is going to move the EU institutionally forward. My view early on in that debate is that we should also look at the current situation as an 'Hamiltonian moment' or an 'Hamiltonian opportunity'. *Alexander Hamilton* was, of course, Secretary of the Treasury who created the modern US treasury. The idea is to look at a number potential sources of funding. I am not sure if the plastic tax is going to be the main source of funding for the EU but

there are many more ideas, also on carbon related revenues. I congratulate *Clemens Fuest* and, unfortunately he is not here, *Jean Pisani-Ferry* who I think wrote an excellent report for the informal ECOFIN on how to use carbon related revenues to collect own resources. There are other ideas as well, like the Financial Transaction Tax, the idea of digital taxation and so on. I am sure we will go into the details in our discussion, but the important point is that this is an opportunity to upgrade the European fisc to a more modern setup. It is going to be an incremental process and I do not think there will be a big bang.

However, I think we are well advised to make the best use of that opportunity. In the long run, due to the European public goods challenges mentioned earlier and mainly because of the difficulty to have a stable currency union without a working European fisc, I think we are well advised to do what we can, not only to show the solidarity that is required to individual Member States in the dire situation of the present crisis, but also to use this crisis to develop our institutional architecture further. I believe this process is starting to work. One of the earlier programs that was agreed on before Next Generation EU was the unemployment reinsurance scheme, SURE, which emitted its debt. I believe the emission was ten times oversubscribed. There was a lot of demand for that paper, which I think bodes well into borrowing in the future and I think puts a lot of pressure on us discussing the solid financing of the EU, because of course, if somebody lends you money, they want to understand exactly how they are going to get it back.

That was my introductory statement. Thank you very much.

Hanno Kube

Thank you so much, Jakob, for setting the stage with your very clear and emphatic statement. Marco, can we hear your view on the situation?

2. *Marco Buti*

Thank you very much, Hanno. I am happy to be here – actually, I am not happy to be *here* in Brussels as I am not in a very comfortable situation given the surge of positive cases, but I am virtually with you. I am very glad to speak after Jakob, since we are good friends and have known each other for many years during his several stays in Brussels.

The issue of a brand new tax-based own resource is being discussed since the beginning of this century. The advent of the COVID-19 pandemic and the financial crisis linked to it may have changed some political elements

in the game. With the EU's recovery package, and the vital support that it will provide to our citizens, we are breaking entirely new grounds. It means that the old arguments related to own resources or national sovereignty cannot be re-hashed. A lot has been discussed on the legal background for financing the EU. Let me focus on the economic aspects and political dimension of a solid EU budget.

A few years ago, the report of the High Level Group on Own Resources chaired by *Mario Monti* devoted equal time and consideration to the spending and financing sides of the EU budget. The two, indeed, cannot be separated neither in theory nor in practice. From a fiscal federalism perspective, it is generally first decided what policies or priorities to spend on, then at what level and only once those issues are settled, how to finance it. Of course, there are questions we have been asking ourselves for years: Should tasks related to EU public goods and corresponding expenditure by Member States be shifted to the European level in the future? Should current expenditure be more closely aligned to the principle of subsidiarity in return? Now is the time, and your input is certainly very valuable, for substantial advances in answering these questions. As for the Commission, both at political and technical level, we are fully engaged, but nothing is set in stone at this stage. The exact design of the potential new or revised own resources is still to be determined while we are exploring various options.

From a public finance perspective, any new own resource should ideally be stable, non-discriminatory and simple to calculate. It is very difficult to meet all these requirements together. Nonetheless, we have candidates, even good candidates, which can overlook today's unprecedented window of opportunity… and unprecedented needs! Any rise in own resources must aim at improving the capacity of the EU budget to support macroeconomic stabilisation. In particular, it must strengthen the EU's capacity to deal with shocks. The responsiveness of the EU budget to changing economic conditions was very small in the past. With the reforms recently adopted we made a first step so that EU finances could also allow us to respond better to economic shocks in the future, therefore supporting Member States' stabilisation efforts and contributing to the smooth implementation of EU fiscal rules. However, while the Commission will issue common debt to finance the Recovery and Resilience Fund, we are not considering mutualisation of EU countries' legacy debts. This rubicon is not and will not be passed. Our objective is rather to ensure the EU budget is stable and capable of making good on what Member States and citizens have asked of us.

Over time, contributions based on Member States' gross national income (GNI) have become the predominant source of funding for the EU budget,

covering about 70 %. While this mechanism may have some advantages, it is not a true own resource and produces certain challenges. Its limitations are particularly evident in crisis situations. In July 2020, our leaders agreed to replace the existing VAT-based own resource with the Commission's simplified and refined alternative method. They have also agreed to introduce a new own resource based on a contribution calculated on the weight of non-recycled plastic packaging waste. These are an excellent outcome. But it is not enough. Europe can only provide the solutions to support Member States' recovery if it is also empowered on the revenue side. This must come from swift, ambitious and effective proposals for new own resources. The level of ambition set by our Heads of State and Government means that we cannot remain bogged down in old issues and arguments. This is a new day and we must address this issue with new fervour.

The most promising candidates are likely to be options that are clearly in line with the EU's overarching policy priorities. This is particularly true for areas where Member States have already expressed their general support. Such examples include environmental and green policies, or the need to address challenges related to the fair taxation of the digitalised economy. The conclusions of the special European Council (17-21 July 2020) have mandated the Commission to put forward in the first semester of 2021 proposals on a 'digital levy' and a Carbon Border Adjustment Mechanism (CBAM), and to progress on the Financial Transaction Tax (FTT) and other forms of contribution from the corporate sector, which all shall or can serve as new own resources. The German presidency has played a key role to reach the political agreement on 10 November 2020 between the European Parliament and the Council, which includes a detailed roadmap towards new own resources to help repay the borrowing, clearly in line with the EU's overarching policy priorities.

The Commission is committed to table a proposal for a Carbon Border Adjustment Mechanism by June 2021, to be presented at the same time as a revised proposal for the Emissions Trading System. The main purpose is to reduce global emissions by pushing third countries to act on climate change objectives. First of all, the introduction of a Carbon Border Adjustment Mechanism must be a way to reduce global greenhouse gas (GHG) emissions in the pursuit of the Paris Agreement objectives. As long as our international partners do not share the same ambition as the EU, there is a risk of carbon leakage – namely a risk that production is transferred from the EU to other countries with lower ambition for emission reduction, or that EU products are replaced by more carbon-intensive imports. By this, the effort of the EU would be offset by third countries resulting in an overall increase of emissions. Indeed, the EU had reduced its domestic GHG

emissions by 23.2 % below 1990 levels in 2018, while at the same time its GHG emissions embedded in international trade have been constantly rising, thereby undermining the Union's efforts to reduce its global footprint; the net imports of goods and services in the EU represent more than 20 % of the Union's domestic CO_2 emissions.

Therefore, let us state it unequivocally: The Carbon Border Adjustment Mechanism (CBAM) aims at better incentivising climate action both within the Union and by our trading partners, but it cannot and will not be an instrument for protectionism; it must be in full compliance with the World Trade Organisation, the Paris Agreement and other EU international commitments such as Free Trade Agreements and customs union. Conversely, even if the Carbon Border Adjustment Mechanism is primarily put forward as a climate policy instrument, it might also have revenue raising potential. In addition, the CBAM as an instrument to fight carbon leakage might also reinforce the revenue raising potential also of another own resource put forward by the European Council – the auctioning of EU ETS allowances. Our impact assessment of the CBAM is ongoing. It will cover a wide range of policy options, while focusing on priorities and needs such as avoiding risks of relocation of downstream industries, defining the sectors to be covered by the measure or identifying objective criteria to assess the level of ambition of third countries.

The current international corporate tax framework is lagging behind the realities of the digital economy and is not equipped to ensure the fair taxation of digital giants. This is why the *Von der Leyen*-Commission has emphasized the need to ensure fair taxation of the digital economy and to benefit strongly from the single market (e.g. its consumers, infrastructures). Therefore, the Commission will table a proposal by June 2021, with the aim to make it operational from 2023 onwards and to make good on what Member States and the Parliament have asked of us.

The exact design of this potential new own resource is still to be determined and the Commission services are exploring various options in line with current business models, where enterprises can operate in markets without a significant physical presence there, and with the new realities of value creation, where user data and user contributions play a fundamental role. The Commission will ensure a level playing field and will design the digital levy in such way that it is compatible with the EU key policy objective of the digital transition. The Recovery and Resilience Facility will dedicate 20 % of the funds to measures supporting digital objectives, a digital levy shall not prevent the effectiveness of these investments nor further development of digitalisation in the EU.

It is not an easy task and it has many international implications. Let me reassure you that finding a global solution in the Inclusive Framework remains a key priority for the Commission. This is why the Commission is working to develop a design that does not undermine, and is not intended to impede the OECD process. There are ways to do this so that we still meet the EU's objectives and actively support the OECD. Moreover, we are working hard to ensure that the design of such digital levy is not discriminatory and does not fuel trade tensions in any way. Many different design features have still to be measured against key criteria such as their political impact/viability, revenue generation, WTO compatibility, economic impact etc. For the success of both the CBAM and the digital levy, and also to avoid tensions and any trade disputes and retaliations, it will be essential not to be perceived as discriminatory or in violation of our international commitments with global partners.

On the Financial Transaction Tax (FTT), the Commission will continue to support the Council in its efforts to achieve an agreement under enhanced cooperation. This certainly offers the best chance for compromise. Agreeing on a FTT with ten participating Member States may be a first step towards a fully-fledged FTT. Later on the scope of the tax could be gradually broadened, as well as the number of participant Member States. Nonetheless, from an economic point of view, while if applied at EU27 it could provide significant revenues, if the basis were the current discussions under enhanced cooperation, the parameters currently discussed are not likely to generate much resources. Moreover, it is not sure that an own resource based on only a subset of Member States is legally possible. The roadmap on new own resources agreed by the European Parliament and the Council, also mentions 'a financial contribution linked to the corporate sector or a new common corporate tax base' as a possible way forward for a new own resource to be tabled in 2024 in view of its introduction in 2026.

In conclusion, work is ongoing and nothing is set in stone at this stage. The exact design of these potential new or revised own resources is still to be determined. It is important that we use this opportunity so that the seeds that we plant today for a renewed system of own resources do not happen in a vacuum but represent a step towards a renewed fiscal architecture for the 21st century that takes into account social, environmental and economic concerns of European citizens and caters for the delivery of the European common goods they will demand us to provide. This needs to be done step by step, finding our own way to strike the right balance in a pragmatic and democratically accountable way, but without ignoring the insights that history and reason have to offer us, just as we have learned

thehard way that we cannot ignore the insights of epidemiology and biology in the context of a pandemic. Thank you.

Hanno Kube

Thank you very much, Marco, for your introduction on horizontal and vertical coordination, and then in particular on the concrete ideas that are on the table, namely Carbon Border Adjustments, Digital Tax and maybe also a Financial Transaction Tax. I am sure we will come back to those in a minute, in the discussion. But let us hear the other two panelists first.

Now, I wonder whether we can hear *Franziska Brantner* at this time. Let us try to see whether we can connect to her

3. Franziska Brantner

I am very happy to be with you, even in this weird way via phone. I believe that my security standards on my devices are too high. I just wanted to start by going back a bit more and *just look at* where we come from, what the

EU budget is about and how it has been financed and then to look into where we need to go in the future. And when you look at what the EU budget originally funded: it was food security. Today, many are surprised why such a high part of the EU budget is going into agriculture. The objective was to guarantee food supply especially after the Second World War and still is to guarantee our food security as a joint good.

The second part of EU funding is cohesion to help economically weak regions to catch up with the rest of the EU acknowledging that we need transfer funding within the EU to help certain regions to improve economically and socially. Those regions and countries have benefited from the internal market due to transfer funding. Some say we do not want the EU to become a transfer union. In my view, the EU has been a transfer union for many years now. Germany has been benefitting from that transfer union as especially East Germany has received transfer funding in the last 30 years. So, transfer in terms of giving funding from one part of the EU to another one has been present in the EU since its creation. The transfer has been mainly West to East in the past and might be now turning a bit towards the South. However, the transfer has been largely West to East or even South to East in the last thirty years. For instance, Italy has been a main net contributor to the EU budget for the last decade. In my view, it is important to bear in mind that the EU is and always has been a transfer union helping economically less developed regions to catch up.

Lastly, the third category of spending are joint EU projects like Erasmus or the research program Horizon. The peculiarity of these funds is that when introducing each program, one is not able to predict how much each member state will receive from it. When introducing a research program it is not yet sure how much German, French, British or Hungarian universities will receive. Usually, the largest countries receive more funds but it is not defined in the beginning how much return each country will get by contributing to the research program, or to Erasmus, or to a joint space program or to joint research in any other area. I think most of us would agree that this third category of joint investments, joint research, funding of the European energy infrastructure, funding of infrastructure in terms of connectivity, but also trains, high-speed network etc. have a transnational effect and is not supporting only certain regions. So, this is the third category of funding. Now, we must have a look at where the resources of the EU have been coming from for the last decades.

There have been EU own resources since the beginning of the EU stemming from customs duties. Of course, the more we have enlarged our free trade area – for various reasons – the smaller these revenues have become. However, the idea is that we do collect money for funding at our joint border. This funding goes at least for some part into the EU budget. Still, Member States where allowed to keep a certain proportion of these customs duties as a fee for the collection of them. However, the main part went into the EU budget. As we see that logic of saying what we collect due to our joint rules goes into EU budget is not a new idea at all.

Over the last years, we have seen that the proportion of the national contribution to the funding coming directly from Member States has been increasing. As a result, we have seen, even in July, that that part has increased despite the vigorous debate on new own resources. In the last budgetary debate or rather negotiations in July, the 'Frugal Four' managed to increase the proportion that they retain for collecting customs duties. As the Netherlands have an important port where a lot of products enter the EU, the increase in the proportion of what the Netherlands can retain from customs duties has of course lowered contribution of the Netherlands but has at the same time lowered the own resources in the EU budget. So, while everybody has been discussing how to create new own resources in the future, the existing own resources have been decreased. I think this is important to bear in mind when assessing the current situation.

At the same time, we have seen that the debate on who is a net contributor and who is a net beneficiary from the EU budget has been poisoning the debate and has led to drastic cuts in the public goods projects, the third category of funding that I mentioned earlier. For instance, the funding of

the EU health program has been cut from 10 billion euros to under 3 billion euros, although everybody would agree that we have to invest more in joint research, research coordination, and cooperation. Also Horizon, the research program, has been cut by 20 % and the funding of Erasmus has been cut. Basically, all the programs by the EU where the return to the national budgets cannot be predicted have been cut drastically.

I think that this shows that the current method is not fit for purpose and for the future as we really need to finance more projects in the third category. Obviously, the dynamics between Member States lead to them being cut since there is no single member state standing up for them. As always, Member States only stand up for what they get back. Germany has been doing that as well. So, we also were able to reduce our net contributions in July. This dynamic we observe is most definitely not a good one. In a Sunday speech, we all no matter what our political tendency is emphasize how important it is to create a European added value, but when European leaders sit down on Monday they cut funding for European added value.

So – how to get out of it? The funding of Next Generation EU has started a debate on how to pay back the debts in other ways then just national contribution. We have heard from my previous speakers of the criteria on how to define categories of new income. First, it is better to collect resources at the European level when the national level cannot collect them any longer or was never able doing so. The second criterion is the positive impact on the market; not to forget of course the climate question and the digital question. For example, the Emission Trading System and the Carbon Border Adjustment Mechanism: the Emission Trading System has a long-term option and a very desirable impact. The other criteria are important as well, for example, when it comes to digital taxation. You can argue that we did not need a good digital tax before Trump, as the companies at least paid taxes in the US, but under the Trump administration, they do not have to pay taxes in the US either. It becomes ever more urgent to find a solution in this area. We have not given up yet, maybe we get there sometime.

And a final word on something which has been really worrying me the last couple of weeks. We are of course depending on the Next Generation EU fund which depends on unanimity in Council. In return, we will not have a strong rule of law conditionality, as *Victor Orban* will block it, as Hungary depends less on it than Italy or Spain or other Member States. *Orban* is sort of blackmailing us. I am wondering – and that is really the question I also wanted to put out for further discussion: Imagine we have another euro crisis and we need to stabilize the Euro and finance it via the EU budget and again we would depend on unanimity in Council, we would again de-

pend on the approval of *Orban*, even though Hungary is not even a member of the eurozone. *Orban* would have no interest at all to help us. I think we really have to go back to the idea for a eurozone budget as we simply cannot put the stability of the euro in the hands of *Orban*. That would mean giving up the stability of the euro at the detriment of the rule of law and I think that is something the European Union cannot afford.

I am looking forward to your questions.

Hanno Kube

Thank you so much *Franziska Brantner*. I hope that you can hear us too and that you can hear that we are very grateful for your words on the funds, on the budget side and on the revenue side. I am sure we will come back to your points in a second. The fourth in this round, *Clemens Fuest*, would you add your introductory statement, please?

4. Clemens Fuest

Yes, thank you for the invitation. It is great to be on this very distinguished panel. Let me offer a few words and maybe a slightly different perspective on what we spend the money on and then on our own resources.

As previous speakers have said, there is a significant potential for EU spending that would benefit all Member States. The European added value that has been mentioned that we all know includes border protection of foreign policy, transport infrastructure networks within Europe, energy policy and climate policy. So there are many policies where we see a lot of potential to work together to have common policies where spending one euro at the European level means we, all of us, gain more than one euro collectively. This is what European added value means. Now, if we compare this to the reality of the European budget, I think the result is sobering. Currently, the European budget is dominated, as has been said, by agricultural spending and regional policies. And these spending categories by many countries are seen as spending of the past, not something that prepares us for the future and not something that generates a lot of added value. Maybe the truth is a bit better than that if you think about regional policies or cohesion spending. There certainly is a common interest in having cohesion in the union, not letting economic differences become too large. But generally there is a disappointment that a bit, but too little has been changed in the spending structure. This is of course, as *Franziska Brantner* just said, because the Member States are more interested in money they can get out of the common pool and are less interested in the

provision of public goods which benefits the collective. Now, we are adding the Next Generation EU fund to this where I believe the question of how this money will be spent is open. It is something we can maybe discuss.

My understanding is that it is a mixture of an insurance mechanism and redistribution along the lines we already know. I do not think there will be much that is particularly European in this spending. My understanding is that maybe one third of it is insurance going to the countries most affected while the other two thirds is money going to countries that have had problems before or are poorer. You can call it solidarity in crisis or insurance. I think it is a good political and an important decision for Europe to show solidarity.

This opens up a renewed debate about how we finance all of it, the old budget and the new budget. If we discuss this, I think it is important to remind ourselves of what the EU is and is not. It is not a federation but it may become one in the future and I think at this point we know this is an important discussion. I believe most countries, at least my own country, are not very clear on what they want the EU to become. As Jakob mentioned, we have had this debate about the 'Hamiltonian moment', the idea to transform the EU into some kind of federation in the longer term. It is a possible perspective but you could also say: 'No, let us invent something else.' There is not much clarity in most countries about where they really want to go.

We currently have a system in which there is no centralized power to tax. Instead, we have some EU own resources like tariffs that are collected based on European policies since it does not make sense to have them as national taxes because they are collected at the external border. However, we mostly have GNI-based contributions and the question is, if we think about the financing of the future, why should we move away from those GNI-based contributions? They come along with many advantages – they are simple, they are fair, their distribution is fair and so on.

However, there are two political arguments why we maybe want to move away from them. One is that people say it emphasizes national contributions and thinking in terms of net balances. This is debatable to some extent but it certainly does emphasize the role of each member state in the financing of the EU, which is acceptable insofar as that the European budget is purely redistributive, a zero sum game. If you consider regional policies, at least in richer countries, you could say it is indeed purely redistributive. To this extent, net balance thinking is appropriate. But as soon as we think about European public goods or the common interest in cohesion, it does not make sense to take this net balance perspective – it is thus

maybe good to get away from it. The second issue is that by focusing on GNI contributions, we forget that there are genuinely European resources like for example the tariffs.

This takes me to our proposal. As it was mentioned earlier, jointly with *Jean Pisani-Ferry*, I took up the proposal – in fact made by the Member States themselves – to use the ETS revenues as an own resource. And why do we think that this is appropriate? I personally do not think GNI-based resources are so bad, but ETS is related and in the future should be even more related to genuinely European policies. If we think about the future of climate policies, what we would like to see as economists is an extension, a development of the European Emission Trading System into a system that includes all sectors and all countries.

This would allow us to achieve our climate objectives, our CO_2 reduction objectives, efficiently. If we achieve that, it will technically be a major success. However, it does not make sense to then allocate the revenues nationally. We do this currently on the basis of past emissions. But if there really is a European system, ETS revenues will be allocated to where we have CO_2 emissions. Leaving this money in the Member States will only create incentives for the Member States to host CO_2 emissions and this is inefficient. Climate policy should be a European policy.

In my view, the main argument for making ETS more European is really that this would be linked to a very good, joint climate policy. It would really be an opportunity that not just raises a lot of money, but it also brings along and favors European added value in achieving climate objectives. This is so important, it really is at the heart of the Green New Deal, that I think it would help us all.

As Marco mentioned, it can be tricky to have resources that disappear. If we are climate neutral in 2050, this resource will disappear. However, what we show in our study is that there is a lot of time between now and 2050 in which we will collect a lot of revenue from ETS. It will be enough to pay back the Next Generation EU debts and between now and 2050, it is the next generation that can think about new own resources after 2050. I believe that using the ETS for the remaining years would be a very, very good idea. Thank you very much.

Hanno Kube

Thank you so much for your statement, and again, for all your statements. What I found very striking compared to the discussion we had this morning is that in the morning we very much concentrated on the revenue side

and on the legal basis regarding the revenue side. What we have seen nowis that we widened the horizon with these four input statements in so far as we really saw, or we are seeing, the connection between the revenue side and the spending side with regard to the acceptance of policies and with regard to the acceptance of revenue generated. I think that is an important point.

The second issue that I found very interesting and remarkable in all statements is the question of whether and to what extent the Own Resources Decision should be linked to EU policy decisions or whether own resources should be seen only with the aim of financing the Union and then judge the policy decisions by themselves. Or to put it differently: Is it right to rely on the legal bases that are already in the Treaties in order to use them for generating revenue, like Art. 192 TFEU and others? Or should we think about new legal bases for generating revenue? As a tax lawyer, I would think of income tax, of VAT etc. But we now very much talked about ETS, we talked about carbon tax and so on.

So there are certainly points to discuss: The relation between revenue and spending and the question to what extent resources decisions should be linked to EU policy decisions. Thank you very much for your very interesting input statements.

Now, let us take a very short break and then have a second round on the panel and go into the discussion with the audience. I would suggest that we actually keep it the way we had originally planned and come back together here at quarter past five in just around ten minutes. Just leave your cameras on so that we can be virtually together and continue in ten minutes time. Thank you.

III. Follow-up Statements

Hanno Kube

Let us get together again and continue with a short second round on the panel if the panelists want to react to the other introductory statements. Jakob, do you see something you would like to react to, with regard to the other statements?

1. *Jakob von Weizsäcker*

I think I want to briefly say something about one of the last points that Clemens made and I think it popped up before. To some extent, it is not so important that there is a functional connection between the funding and the expenditures. That is in a way a characteristic of the modern states, that one can fund things, for example expenditures for the environment, with all kinds of taxes that have nothing to do with the environment. That is a principle and it is a very good thing. So I would caution a little bit against the logic that says we need to have a European tax in one area just because it is an area where we want to spend money.

But I think one of the advantages of the proposal by *Clemens Fuest* and *Jean Pisani-Ferry* is that with CO_2, it is a little bit similar to a tariff. Say, if a lot of tariff revenue is collected in Rotterdam – which is the case – we do not know where the goods will finally be consumed. The single market is, of course, the reason why we have the tariffs as a European revenue and it is a good thing. This is similar to the situation where you have a large power plant in one part of Europe and the power is being used somewhere else to manufacture goods and, following that, the manufactured goods are then consumed in another country. There is an analogy as well, as in it is not so clear why the revenues should accrue to the place where the power plant sits. So I think that is an important argument.

Secondly, it is a question of the incentives, also for Member States. If in fact the revenues accrue to a particular fisc in one country, it has different incentives effects compared to the revenues of CO_2 levies or ETS revenues accruing at the European level. The consequence is not that your national fisc receives less money but that somebody else in Europe needs to fund the European fisc. Overall, I think it is important to not think so much about what we do want to fund in order to find the right sort of revenues. GNI is a perfectly legitimate way of doing it, but we should rather think if there are good reasons for why the revenues should accrue at the European level.

There is an interesting story and Clemens can tell it in much more detail than I can, on corporate taxation. In the US, they have a good model to collect these taxes but then there is the big puzzle regarding which area you give it back to. They have something called formula apportionment in order to decide how to allocate the revenues. But this is not an exact science – in fact, it is very difficult to know which may be surprising to some of the lawyers present. I think most economists will be aware of the problem that it is not so clear where the revenue should exactly end up. The US have this

pragmatic formula, but there may also be certain corporate related taxes where it would probably be quite natural, provided that the funds are needed at the European level, to simply keep them if it is too difficult to decide where the money should go, geographically speaking. I think if we talk about own resources in the proper sense, it is useful to think about the European merit of collecting that particular resource and not another one. And that is, of course, what people are doing who are reflecting on own resources. That is a remark that I wanted to make.

Hanno Kube

Thank you. Marco, please.

2. Marco Buti

Thank you very much. First of all, I find the initial presentations were pretty much aligned, although I do not know if this is due to a sampling bias. We were still taking certain different perspectives, but I think we were broadly on the same page highlighting similar strategies. I think this is pretty comforting overall.

Secondly, what has been indicated as one of the main points is the fact that we tended to look both at the revenue and the expenditure side. I think this is an important element with the qualification that Jakob made. The issue of own resources is not a purely technical one. We have plenty of very clever technical solutions but there is also an issue of political legitimacy which is very important. Looking at the expenditure side of the budget is vital in constructing this coherent system that I have emphasized before.

The issue that Clemens referred to concerning the GNI contribution is very efficient and very simple. It however has this element of net balances which is elemental. One could see this effect at work when it came to the final night of negotiations at the European Council. Member States narrowly took this type of approach and what was sacrificed in the final negotiations were some of the proposals on non-allocated resources as it has been mentioned by Clemens. These proposals concerned more genuine European public goods compared to the transfer of Member States' contributions. The Commission has subsequently been giving guidance to the Member States in the preparation of the national reform, recovery and resilience programs with the object to bottom-up and to recreate these European public goods by virtue of the seven so-called flagships. These are three on the environmental side, three on the digital side and one on the social side.

The Commission has in a sense by way of aggregation been trying to come to similar objectives whilst accepting the political reality, curtailing some of the resources directly allocated to that.

My final point is the question of whether one should go for *one* new or old resource or whether we want to have a multiplicity of resources and of policies. In particular, Clemens and I had some exchanges with *Jean Pisani-Ferry* when we were preparing the paper for the informal ECOFIN. In that paper, we basically agreed upon the ETS, so essentially on only one resource. I think it is a legitimate question whether we should have a plurality of resources. That increases the complexity, obviously. At the same time, we know that there are trade-offs and the issue of equal treatment and non-discrimination may be alleviated by having more than one resource. We have not made up our mind yet. We are going to go forward based on the mandate of the European Council to look at the three sources, being the ETS, Carbon Border Adjustments and a digital levy. Provided it can be rescued, there is a bit of a question mark here, the Financial Transaction Tax is also a possibility.

Hanno Kube

Thank you, Marco. I hope *Franziska Brantner* can hear us well. Let us see whether we can have a second statement from her. Can you hear us?

3. Franziska Brantner

Thank you so much. I would like to comment on a few points, also on a few points of the moderator, regarding what we discussed this morning and what we are discussing now.

I think for us it is a nice saying in German '*Steuern sind da zum Steuern.*' which means that you have taxes to also direct financial flows in your society. One important aspect of that is whether taxes do allow to finance public goods and I think European public goods hold the key to the future. We know that we need to invest in our joint digital infrastructure, that we need to build a joint energy infrastructure with green hydrogen. It is too big for one nation and we will not be able to achieve it alone and then we will not be able to reach our climate targets. We really need to invest jointly in the energy area, we need to invest jointly in batteries and we are partially starting to do it but not yet at the level that we would need. We need it for an alternative infrastructure for trains, you can name more public goods projects. The public goods we need to upgrade are big, they are important and we need them fast.

Obviously, we do not get there by GNI, by national contributions, because every time, and Marco just said it again, when Member States are together, what they cut are exactly these European public goods. When it comes to what we need to achieve at the European level and we acknowledge that with the current financing methods we do not get there, it is important to think about a new one that will primarily allow to finance it and maybe even have an effect that goes into the same direction. That is what we like about the Emission Trading System, because it also allows you to make a higher price on CO_2 emissions and thereby protect the climate. It is positive if the revenue side has the same political objective as the expenditure side. But of course, it does not have to be linked necessarily.

The second point is that some panelists spoke about VAT and there have been VAT reform proposals from the Commission for how many years now? Three, four years? The Member States are losing billions every year by not reforming our joint approach to VAT and I think that is something which is often not discussed publicly. Maybe it is not as sexy – I do not know – but I think it is quite incredible that we have not yet achieved that and our German government is blocking it too since it is skeptical about Cyprus. I believe that as public authorities we overall lose a lot of funds because we are not reforming the VAT system. Maybe Jakob or Marco can say something about it but I think it is quite a shame that we are not getting there.

The last point that we observe with worry is that the competition we have seen over the last decades on corporate taxes is moving into the income tax area. This is a quite worrying trend since we are still trying to fight against competition on the corporate tax level and we would probably have to do more now to stop the competition when it comes to income taxes. We see this process starting all across Europe and we get the impression that it will not be bearable for our tax collection systems in the future. So we have to start worrying not just about corporate taxes but also about income taxes.

Hanno Kube

Thank you very much. Everybody could hear you very well, thank you very much for your statement. *Clemens Fuest*, I think you wanted to say something as well.

4. Clemens Fuest

Yes, thank you. On the link between taxes and spending, I completely agree that in most cases it is not very smart to draw this link. Politicians sometimes love to draw this link to justify taxes but it is misleading the public. If we think for instance about the solidarity surcharge in Germany, this is money just going into the general budget as we all know and it was justified 30 years ago with the financing of the German reunification. Today, it is justified with the tax system otherwise being unjust and so forth and so on. It is completely arbitrary and governments invent nice names, like companies for their products, to justify taxes and this is misleading.

Why do I say that I think ETS is a good source of financing for the EU? This is because it is linked to an EU policy and not because I think it will lead to the effect that the money will be spent wisely. How the money is spent is an open question, money is fungible. But I am really interested in the environmental policy side to this. *Franziska Brantner* mentioned this idea that we should steer with taxes. In fact we as economists think that this is the exception for taxes rather than the rule, but in this case we want to steer. I personally think that it is a unique opportunity to get to a good climate policy in Europe. This is not trivial. We have many other policy fields where we are moving towards very bad climate policies. Steering capital flows via sustainable finance in our example – I think the Taxonomy is a bad idea, it is central planning style. Using the CO_2 prices is a very good idea, which is why I am interested in it. We should remember that this is not about financing additional spending. The money is already spent, it is the Next Generation EU. The question is, now that the money is spent, how do we finance it? We could finance it by cutting other spending in the EU budget.

If I understand it correctly, this is maybe an interesting question also to you, Marco: What would happen if no new resources were introduced? One scenario would be that it is going to be GNI contributions in that case. The other scenario would be to say that we have the decision on own resources and we would have to cut other spending in the EU budget. Maybe it is an academic question but I think it is quite interesting politically. What do we lose if we do not introduce additional new taxes? It is not like we are doubling spending in the current EU budget. If that was the problem, I would be against introducing new resources because I do not think the spending is so attractive that we would want to repeat it. But we have already spent the money and using the ETS now is giving us an opportunity to do something in the area of climate policy. Otherwise I would be against making this link between spending and the taxing side. Thank you.

IV. Discussion with the audience

Hanno Kube

Thank you. I think it was a good idea to have the second round on the panel. Let us now open the discussion to our audience.

Just one remark: If you have questions for *Franziska Brantner*, we will collect those questions so she can dial in one more time and then answer to all the questions posed to her. I have the first question from our speaker in the morning, *Edoardo Traversa*. I am sure that he will ask an interesting question to the panel. Edoardo, are you there?

Edoardo Traversa

Yes, I am here, I hope you can see me. Thank you very much for the various input statements. I must say that even if I am not an economist, I agree with almost all what you said. It is a fact that there is a need to expand the EU budget, that we should focus more on creating a new architecture to making this new borrowing capacity of the European Union possible and it is not about making revolutions on the revenue side. By the way, between the 'Hamiltonian moment' and the introduction of a genuine income tax on the federal level in the US, it took more than 120 years.

I carefully analysed the various proposals that are on the table and are mentioned in the various reports. I must admit that I can see there is one big absence, and I am very happy that *Franziska Brantner* mentioned it, which is actually VAT. Because from a purely economic perspective and also from a legal perspective, it is a stable and robust source of income. There is a high degree of harmonization, it does not carry the uncertainties and the risks linked to new taxes, like the Digital Tax or the Financial Transaction Tax, it is non-discriminatory, it is not as regressive as it is often presented, there is a clear link with EU policy and the internal market and there is a large base as it is paid by all EU citizens and companies and not just by polluters and multinationals. It is not a sanction, it is a true tax which is good for the democratic aspect of it and the legitimacy argument. Moreover as you know, it is already, although imperfect, an own resource. It was in 2011, almost ten years ago, that the Commission proposed that a share of the VAT collected on each taxable transaction in the Member States, with a ceiling of 2 %, would directly accrue to the EU budget.

It seems to me that this is still a sensible, simple and coherent idea which could be perfected, for example by including special VAT regimes for financial transactions or digital services or by improving collection at the EU level. There are certain changes that could be made to the VAT Directive to make it a much more robust own resource. All those elements seem to indicate, at least to me personally, that there is room for some discussion as regards the place of VAT as a reinvented own resource. This does not exclude the fact that for example ETS, or special contributions from certain sectors for certain objectives, could also be on the table. It is not the only solution but I am really wondering: If we want to show that there is some European added value why should we not start with the European Value Added Tax?

Hanno Kube

Thank you, Edoardo. Does anyone from the panel want to react to this intervention? Clemens, please.

Clemens Fuest

Yes, thank you. I certainly think the VAT is a candidate worth discussing. There are a couple of issues. First of all, I think the VAT is considered as regressive. It is probably not really as regressive as most people think or maybe other taxes like corporate income taxes and other income taxes are not as a progressive as people think because the burden is passed on etc. But still, I think there is a concern that this is a regressive tax. Of course, it could be used less at the national level and I believe that maybe then it has less of this property we discussed earlier that it is a tax which is hard to allocate to individual countries. It is not ideal but you do target national consumption through the Value Added Tax as it works today, so maybe it does make a little more sense to leave this tax at the national level.

I have a little anecdote to conclude. Some time ago, I was at a discussion in Brussels and I made a suggestion a similar to yours. This was also a discussion about own resources during which I proposed, let's say 2 %, go to the EU and we put it on every receipt: '2 % are going to the EU'. I said: 'It is very democratic, it is transparent, people see they are funding the EU'. And I was surrounded by people from European institutions, they were unanimously, really brutally and completely against it, because they were worried about the idea that people see that they fund the EU. So one of them said: 'Look, those who do not like EU spending' – I think she said *Marine Le Pen* – 'will hold up this receipt and say: 'Let's get rid of this tax.' I replied:

'Well, that is what democracy is. If people do not want the spending, it is fine, we get rid of it.'

I think we should not forget that we are also looking at a game of power. The European institutions want more power, national governments do not want to give them power and that is why institutions, national as well as European, love taxes that citizens do not see and do not feel. They do not like taxes that are very transparent and are felt strongly. I think that is a challenge for this VAT idea. I think it would be great if we had the European stars and '2 % to the EU' on every receipt. That does include being critical, we need critique of European spending as we need critique of national spending. Currently, we have a mentality in many countries that more public spending is always better, but it is not. But that does not apply just to European spending, it also applies to national spending. Thank you.

Hanno Kube

Marco, please.

Marco Buti

Thanks, Hanno. The convergent positions of the first round are starting to crumble, especially after the intervention by Clemens. First of all, I think, having new own resources to finance the EU budget needs to be integrated in the balanced approach we discussed before. It is obvious that for example in those types of surveys where you ask whether one wants to pay less taxes, everybody would in a very populist way react with: 'Yes, I want to pay less taxes.' You then have to spell out what this implies in terms of spending. I think in going back to what we indicated before, namely the need to provide for EU public goods, the effects of spillovers and the arguments of a minimum critical mass motivate the action at the EU level. Based on that, we can discuss where the resources are coming from. Simply putting the taxes on the bill with the EU flag is clearly not going to help. So this was a bit of a side argument.

Instead, I tend to agree on the first part of your response to Edoardo. I think the element of regressivity is a concern. Secondly, the considerations about the net balances also come into play. To be clear, we are not standing still on the VAT. The Commission has made proposals in July, the leaders agreed to replace existing VAT-based own resources with the Commission having simplified and refined alternative methods. There is some progress on that. The feeling is that it is very difficult to simply take decisions which would move a chunk of revenue accruing at the national level and put it on

the European level and thereby in a sense creating a hole in the national budget. I think all this militates towards considering VAT as part of a global package where you have an ancient resource like the VAT together with other resources which have this element of connection with new EU priorities.

Hanno Kube

Thank you. I have one more statement by Jakob. At the same time, I would like to invite the audience to ask questions if you want to by sending a message, an exclamation mark for example, to the open chat, so we can see you. Jakob, please.

Jakob von Weizsäcker

Yes, thank you Hanno. I want to add another dimension to the discussion, using VAT as an example. If we talk about a genuine own resource, we would be talking about something where the tax rate could then be decided by qualified majority in one way or another. That is true for tariffs. I would feel reasonably comfortable at this stage, and we are doing it, to decide on the ETS. We have the legal basis to do it and we decided that with qualified majority we can increase the prize, we can reduce the quantity and that is something where I think we feel comfortable. Regarding the VAT, giving the European level unlimited access to the tax base of VAT would be quite another step and I am not certain whether at this stage of the evolution of the European Union there would be a consensus possible about something like that. I rather doubt it. It is of course possible that with unanimity one decides to let us use one or two percentage points. But I think for this kind of genuine own resource, where the tax base is in fact subject to genuine European decision making, I really doubt that VAT would be the right way to go, certainly at this stage and for some time to come. I believe that is another important aspect to bear in mind.

And just as an anecdote, and Clemens of course knows this, the people who generally are against taxes in the US – if you are in the US, there are sales taxes, there are state taxes or local taxes – they were very keen to make sure that on every receipt it shows up, in order to increase what they call the 'tax resistance'. Unfortunately, this has led to a not very efficient tax system when it comes to sales or VAT taxation in the US which is a bit of a problem. I think in Japan they are also not very developed on the VAT front.

I believe that VAT in principle is a pretty good tax from an economic perspective, so we should think about it very carefully if we want to go down the US route on this.

Hanno Kube

Now, I see a question by Professor *Matthias Valta* from Düsseldorf. Matthias, please.

Matthias Valta

Thank you very much. My remarks go into the same direction. I am very intrigued by the concept of European public goods. The problem with European public goods is that, if I understand the concept correctly, that they are first in line to be subject to cuts and budget negotiations. I understand that it is important to have a source of revenue that is not seen as a membership fee to avoid a thinking like Margaret Thatcher's 'I want my money back'. There should be other sources which are easier to distribute without an immediate reference to the national benefit.

But I wonder, is not the underlying problem that the real European added value and the real European public common goods are not visible enough, especially on the national political level? The problem we have seen with the Brexit debate is that the people do not know what the European Union does for them in the broad range. And as it has been pointed out, it might be problematic if the people get to know, learn to know the European public goods, the European common policies and the European value added only by tax receipt. Perhaps, tax resistance increases interest but maybe there should be a two-tier approach, not only increasing taxation for European public goods but also making them visible. Thank you.

Hanno Kube

I will collect some questions and add *Irene Burgers*' question and then maybe even one more, so we are more efficient, even though I have seen your hand, Jakob. *Irene Burgers*, University of Groningen. Irene, can you hear us?

Irene Burgers

My question goes to Clemens. The Emission Trading System has been a subject of survey in our department for over 20 years now, I guess. Some

of my colleagues are pro, others are contra emission trading and would argue that you rather could have a carbon tax. Personally, I have seen movements from many colleagues being very much in favor of this emission trading system too. But we really need carbon taxes because the Emission Trading System is not as effective as we thought it would be, it does not really reduce pollution. Did you, in your survey or investigations for your article, also say something about this instrumental function or did you solely focus on the question whether it could be a good own resource?

Hanno Kube

Considering that this question is one for *Clemens Fuest* and that, if I understand it correctly, he will have to leave us at four o´clock, I would like to ask him to answer to this question first. Then we have Jakob and also *Franziska Brantner*, provided that she wanted to say something. *Clemens Fuest*, please.

Clemens Fuest

Yes, thank you. I am sorry, I have to go to another meeting soon. This is a very important question. In this paper, we did not go very deeply into this instrument discussion. But I think there is at least some agreement that the current ETS system does have things that need to be changed. One issue is price fluctuations in booms and busts. I think most concepts foresee that you have some smoothing mechanism which, in fact, transforms this ETS system into a mixture of a pure ETS system and a tax. There are different ways of doing this, it is very technical. I think what we have suggested could also be achieved by a carbon tax. The difficulty with a carbon tax is that you cannot make sure you reach the climate objective because the quantity is not fixed. Somehow, you need to fix the quantity and that is the advantage of the Emissions Trading System. But I agree, there are many technical problems with extending this everywhere, there are measurement issues.

My reading, and I am not an expert in this area, is that in the end you probably need a mixture of taxes or tax-like instruments but I would still think that the backbone in the end is the quantity of CO_2 you would like to restrict and how do you achieve that with a tax only? I think that is difficult. But I see that our argument could also be made for CO_2 taxes. Thank you.

Hanno Kube

Great, thank you very much, *Clemens Fuest*. And if I am correct, this is the right time now to thank you for your participation in this conference. It is an ongoing discussion and we are very grateful that you shared your insights with us. We are looking forward to any kind of future communication and exchange on these issues with you. Thank you, Clemens.

We will nevertheless continue with the rest of the panel. Thank you. So, *Franziska Brantner* indicated that she wanted to say something too and she also has time constraints. Jakob, if you allow, I would like to take her first. *Franziska Brantner*, we cannot see you, but you are extremely present here on the panel, so, if you can hear us, the floor is yours for the answer to the question posed by *Matthias Valta*.

Franziska Brantner

Thank you for the question. Just briefly on the last question by Irene. There are many ways to combine ETS and some sort of a CO_2 price. We argue that in the ETS you would need a minimum price. So, in a way, you can combine it. It is not either or, there are many ways you could do that, so it is a technical question but it would be feasible and we consider that a mixture of both would be possible and probably the most efficient way to achieve the climate target.

To the question of European public goods and that they are not as visible. Yes, unfortunately not. But I was really surprised that in the middle of a health crisis, the Corona crisis, where you have so many surveys in all Member States and one that was just done by the European Council of Foreign Relations showing that up to a two-third majority of European citizens were calling for cooperation on the vaccination issue, cooperation on strategies, cooperation on buying medicine, not being as dependent on China and India – all of them saying we need to become more resilient as Europeans, we should do it together. In every single survey you get a solid majority in every single member state. And at the same time, at the end of July, Member States cutting the EU budget for health from 10 billion to under 3 billion euros. I do not necessarily think it is a question of public perception, seriously, on that you have solid evidence of the need for it. It has been made clear for everybody that you cannot count on the US, on Trump, anymore to provide a public good, which is health, to the EU and that it is difficult to do that as a nation state alone. There was so much evidence but Member States still cut the budget. I wish it would be different.

But I agree with you in general. We have to argue more for climate being a European public good, that investments in technology, infrastructure are worth it. If we invest together, we get more out of it than if we would do it alone. Often, we would not even be able to achieve the target alone.

Thank you so much for having me.

Hanno Kube

Thank you very much, *Franziska Brantner*. We could perfectly understand you. If I am correct you have to leave in a second as well, so thank you for being with us. If you can still stay, please do, and signal to us, if there is another intervention from your side. Whatever is feasible for you. Thank you very much. Now, Jakob.

Jakob von Weizsäcker

Yes, thank you very much. I wanted to make an economic observation on public goods. The definition of public goods is that it is non-rival in its use and that it is non-excludable. For example public broadcasting in the days before we could somehow by electronic means make it difficult for people to receive a broadcast message was pretty much a pure public good. If you think about it, it is really hard to know how much people wanted it, because, of course, they had no incentive at all to tell you the truth. They may say: 'No, no, no, never ever am I listening to public radio or am I watching public television.' because they know that if they say that their price would be zero, they could afterwards still listen to it, they could still watch it. So that is very much the characteristic of a public good. It is impossible to price and therefore it is impossible to really measure very well how much people want it and that is a disadvantage. Because, of course, the things you can measure come often first in politics and the things you cannot measure so well come second. You are right that in political processes, and that has been described by pretty much all the panelists, it is a huge problem.

On the other hand, this characteristic is a big advantage. If, for example, we have European investments in climate, in security, or in research, nobody can really measure very accurately afterwards who was a net beneficiary and who was a net payor. Because, by definition, it is almost impossible for public goods to know. Regarding this whole talk about a transfer union with public goods – if they are really good public goods and the spending goes well, one has hardly any argument on who is the net beneficiary and who is the net contributor, which is a good thing. In other words, once we

manage to fund these public good, chances are it will not be very controversial because people will say: 'It seems to be working, it seems to be a good thing, let´s keep it.'

Getting there is hard, because we cannot measure it, but keeping it once we have it is relatively easy because one will not have discussions about winners and losers, since probably everybody wins in the end. Thank you.

Hanno Kube

Great, thank you very much. *Marco Buti* also wanted to say something.

Marco Buti

Thank you very much. I find this latest round enlightening. First of all, I will continue a bit on the approach put forward by Jakob. In the economics arena there is a lot of talk about the optimal currency area, whether Europe is an optimal currency area or not and whether there is endogeneity or exogeneity, etc. A few years ago, the late *Alberto Alesina* together with *Guido Tabellini* and others asked whether Europe was the optimal political area. They did so by looking at the preferences of citizens and found there was more variability within countries than between countries on preferences for what has been called in the panel 'European public goods'. In the non-economic area you have defense and security policies and policies for immigration. In the economic area there is transnational investment and other types of internal investments and goods where you have a critical mass and large spillovers.

In the European barometer that we run every month on the question of preferences, we find there is a lot of convergence on what European citizens really want. Therefore, it is not a question of disagreement between countries and between what we should do on the European level and what citizens require. The dynamic, unfortunately, when it comes to European negotiations is a question of what one may call the 'discount rate' of politicians. They often want to go back to Rome, Berlin or The Hague and say 'I gained so much of 750 billion euros of Next Generation EU in the European Council negotiations' or: 'We have saved so much compared to the proposal of the Commission'. This very short-term–horizon prevails in the negotiations rather than national governments reflecting the preferences of the citizens. I think if you lengthen somehow the time horizon, lower your discount rate, you will find better coherence between governmental preferences and preferences of citizens. The outcome of what I think was nonetheless a very courageous and important decision back in July at the

European Council concerning the 750 billion euros for Next Generation EU was that 90 % fell under the Recovery and Resilience Facility. This took precedence over components which were more directly related to EU public goods. What was cut was the Solvency Support Instrument, i.e. the help for recapitalization of enterprises, which is a clear priority arising from the current crisis. What was curtailed was the private investment support by InvestEU. But also, as it has been mentioned before, the EU Health Program was slashed. These were programs whose resources were not directly allocated to countries. This is why, when we stress the issue of the net balances, the natural reflex of politicians is to cut programs with an EU added value instead of transfers to Member States. This dynamic was at work also at the July European Council, even within a historically strategic decision which led to the creation of Next Generation EU. I repeat, the natural political reflex is to look at how much they (the national governments) get directly rather than the focus on common goods. In economic terms, one could say that policy makers in EU negotiations, instead of optimizing overall EU welfare, optimize the sum of national welfare functions.

Hanno Kube

Thank you, Marco. Are there any more questions from the audience to our panelists? Anything else we might discuss in this context? If this is not the case, then we should slowly finish this round.

Again, as I already said in the beginning of our discussion, what I found very interesting to see in the afternoon session compared to what we discussed in the morning is that we really widened the horizon and opened up. We saw how much the funding side has to be seen in conjunction with the expenditure side with regard to legitimacy, with regard to the acceptance of the decisions taken. What I also found striking is to what extent this thinking in net contributions and net benefits has to be taken into account and has to be overcome sooner or later but still seems to be very dominant.

Just one last observation from my side: I still wonder whether in the long run it is right to think about new own resources only in terms of EU policies. Of course, it is good to have this connection to some extent and we do have the legal bases for these EU policies. But as a constitutional and tax lawyer, I would say, as *Clemens Fuest* has said, that taxes are not only there for steering. Steering taxes are an exception from a tax lawyer's point of view. Taxes should have the primary aim of financing. So the question is: Should we not rather think about solid bases for taxes aimed at financing the Union instead of thinking of taxes and levies as a sort of side effect in

the context of EU policies? If we want to finance the Union properly in the long run, we need solid taxes that are real taxes and as a tax lawyer I think that the ETS system, plastic and carbon taxes are not traditional solid taxes. But I am not a panelist, I am only moderating here and this is all I should say at this stage.

I would very much like to express my thanks in the name of the whole Institute for the contributions of our panelists. I think it was an excellent, high-ranking panel and we have seen that throughout. Thank you so much, *Franziska Brantner*, if you can still hear us. Thank you, *Jakob von Weizsäcker*. Thank you, *Marco Buti*. Thank you, *Clemens Fuest*. Thank you so much for being with us.

If you have time, please do stay for a final statement, for a conclusion by my co-director *Ekkehart Reimer*. Thank you, and I hope to see you all soon. The discussion is, as I said, an ongoing discussion. Thank you.

§ 5 Concluding Remarks

Ekkehart Reimer

Hamiltonian moments trigger mixed feelings. This is particularly true within the legal community, given that not all of us are convinced about the admissibility and reasonableness of EU debts. What we do know after this symposium are the cornerstones and paramount structures of a highly relevant area of European law. We witnessed how fruitful today's connection of political, economic and legal expertise was.

Yet, the momentousness of the NGEU program has remained somewhat open. I understand *Frans Vanistendael's* remark in the public chat as being entirely aware of the very special character of this moment. In turn, *Jakob von Weizsäcker* said it is not a big bang. From a constitutional theory perspective the fiscal union comes close to what does constitute a federal state. During the last months, we have exceeded all traditional debates on EU tax law, as far as these debates concerned not less, but not more than an approximation and harmonization of national tax laws, thus issues on the legislative design of national taxes. We have started to discuss a tax revenue entitlement of the EU itself as well as the authority of the EU to run into debts. The EU is far from being sovereign (i.e., the holder of a *Kompetenzkompetenz*). But it resembles a non-sovereign Federation to which its members have transferred comprehensive fiscal authority – viz. legislative powers, revenue entitlement, debt-taking authority, and budgetary (spending) powers.

From the legal perspective of EU law, the EU is a Union constituted by treaties, based on the principle of conferral (Art. 4 and 5 TFEU). Any analysis on the admissibility and range of these powers takes the wording and structure of the Treaties as a starting point. To this day, the TFEU mentions neither EU taxes nor EU debts. *Martin Nettesheim* and *Edoardo Traversa* have accepted this challenging starting point. They have pinpointed the two concepts – EU debts and EU taxes. In their hermeneutic laboratory, the two concepts and their legal framework have obtained some contours. In a political perspective, both might become quite probable in the not too far future. Both of them, EU taxes and EU debts, might constitute own resources of the Union, indirectly or even directly. As regards GNI-based contributions as traditional EU own resources, we are on the level of Art. 310 TFEU as it stands today. Art. 310 TFEU is disconnected on the

one hand from the common market rules of Art. 113 and 115 TFEU concerning the approximation of national tax laws, and from the rules on budgetary discipline of the Member States on the other hand – rules which *Jakob von Weizsäcker* called the rules on solid financing *in* the EU. These rules are laid down in the framework connected to the EMU, most notably Art. 122, 125 and 136 TFEU. All of this has been left aside to a large extent today, since we have focused on real EU funding as such in the context of Art. 310 TFEU.

Edoardo Traversa showed us in a very colorful matrix six candidates for a proper EU-own tax. Astonishingly, but convincingly to me, Edoardo put forward the use of VAT for strengthening EU own resources. By contrast, emission trading schemes and other types of non-tax levies seem to be only second-best candidates. Surprisingly, the Common Consolidated Corporate Tax Base (CCCTB) ranks last.

To some extent, *Edoardo Traversa*'s assessment has then been confronted with reality in the afternoon. It was *Marco Buti* who did not announce anything like a direct participation of the EU budget in which portion whatsoever in the VAT revenue. Rather, Marco confirmed that the Commission will come up with three proposals on taxes or levies by the first half of 2021. While some being old friends of EU tax law (e.g., the Financial Transaction Tax), we have until the very last moment also talked a lot about the Carbon Border Adjustment Mechanism, connected to the EU Green Deal and/or a special carbon tax. Especially *Clemens Fuest* has spotted this option under an ETS system within the EU. Secondly, we talked about a digital services tax. It was prominently *Franziska Brantner* who has put forward this idea. She has further elaborated on taxation of the digital economy, also with a very global perspective on tax justice and fairness under the G20/OECD Pillar 1 project.

In all, we have seen a symposium on solid EU finances that has focused on raising funds for the EU. At the same time, several speakers have stressed the other side of the coin. In a sense, there are actually two other sides of the coin.

First, the 'other side of the coin' of EU revenue is national revenue and/or national liability for EU debts. Are the Member States involved in EU funding, or are they just spectators off the playing field? Are they ultimately liable for EU debts? Regarding the tax side, are they in a better position to safeguard equal taxation of multinationals, also across the Atlantic, compared to the EU? Are all Member States willing to enforce equal taxation on global digital and/or financial services? It was again *Franziska Brantner* who, at least between the lines, has rightly pointed to the BEPS project of

G20 and OECD. This is a very interesting point from a consequentialist perspective.

Second, 'the other side of the coin' of raising revenue is spending the money and/or pursuing non-tax policy objectives. Our topic is indeed connected to European, maybe global solidarity. It goes far beyond health issues. More significant is the stop of climate change, a truly global common good. I am again referring to *Franziska Brantner* as well as to *Jakob von Weizsäcker* and *Clemens Fues*t. Much is open for political discussion. From a legal perspective, however, my impression is that all those spending issues are less delicate than the issues on the input side of the budget. Although one might add a lot on the discussion on ecological levies: Is it really wise to use one and the same Euro both for fighting climate change and for funding the EU budget? Is it possible at all? 'Can you have the cake and eat it?' *Clemens Fuest* is aware of all these dilemmas and any eco-tax or any ETS levy will not provide any revenue once the EU is emission-free in two or three decades. It would not be wise to disincentivize ecological behavior or climate policy on the EU level just because EU politicians or the public service have a strong and legitimate interest in EU funding. There has been a huge political, economic, public finance and legal discussion in the 1990s on these EU taxes and on tax expenditure in general.

The day was vibrant and inspiring. Many questions have come up today. In order to find answers, we have had a profound look into the rules of law and some rules of public finance in the course of this day. Let us keep in touch during these 'Hamiltonian moments' but hopefully also in more normal moments in the times to come.

Speakers

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