

# *Next Generation Eu: Legal Structure and Constitutional Consequences*

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## **Abstract**

The article examines the legal structure and constitutional consequences of ‘Next Generation EU’ (NGEU)—the innovative recovery fund that the European Union (EU) established to address the socio-economic consequences of the COVID-19 pandemic. The article sheds light on the complex normative constellation that was used to erect NGEU, and explains how this was satisfactorily done within the existing Treaty framework, by resorting to current legal bases. At the same time, however, the article underlines the profound constitutional consequences that NGEU has on the EU’s architecture of economic governance. To this end, the article contrasts the strategy chosen to respond to the COVID-19 pandemic to that embraced to tackle the euro-crisis a decade ago, and concludes emphasising how NGEU significantly contributes to the federalisation of the EU, endowing its fiscal union with a fiscal capacity analogous to that of other federal regimes.

**KEYWORDS:** Next Generation EU, fiscal capacity, COVID-19, recovery, budget, fiscal union

## I. INTRODUCTION

The COVID-19 pandemic has been a watershed moment for the European Union (‘EU’). In particular, the multiple legal and institutional measures adopted to tackle the socio-economic consequences of the COVID-19 pandemic have profoundly altered the EU’s architecture of economic governance. Thanks to the initiatives taken during the pandemic emergency, the process of European integration has experienced in 2020–2021 an unprecedented leap forward, with the EU now enjoying fiscal powers which would have been unthinkable until recently.<sup>1</sup> The centrepiece of the EU responses to COVID-19 is the ‘Next Generation EU’ (‘NGEU’) Recovery Fund—proposed by the European Commission in May 2020,<sup>2</sup> approved by the European Council in July 2020,<sup>3</sup> and operationalised in 2021. NGEU

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<sup>1</sup> See F Fabbrini, ‘The Legal Architecture of the Economic Responses to Covid-19: EMU beyond the Pandemic’ (2022) 60 *Journal of Common Market Studies* 186.

<sup>2</sup> See COM(2020) 456 final, *Europe’s Moment: Repair and Prepare for the Next Generation*.

<sup>3</sup> See European Council Conclusions, 17-18-19-20-21 July 2020, EUCO 10/20.

represents a historical development for the EU.<sup>4</sup> First, the European Commission has been authorised for the first time to issue common debt for a significant amount—equal to 750bn euros at 2018 prices, which corresponds to 809bn euros at current prices—raising directly resources, on behalf of the EU, on the financial markets. Second, the EU has acquired the capacity to finance member states through loans and especially grants, ie non repayable support, to boost the economic recovery after the health crisis. Third, the EU has also agreed an action plan to repay its common debt through the introduction of new, real, European taxes.

The purpose of this article is to examine NGEU from a legal and constitutional perspective. In particular, the article endeavours to shed light on the complex legal constellation that was used to establish NGEU, and to discuss its constitutional consequences, also for the functioning of Europe's Economic & Monetary Union ('EMU'). As the article explains, from a legal viewpoint, NGEU is structured on a series of secondary acts of EU law, which empower the EU to issue common debt, institute this novel funding instrument and its financial size, and govern the disbursement of resources to the member states and their control—including for compliance with the rule of law. At the same time, NGEU is connected to the EU Multiannual Financial Framework ('MFF'), and complemented by commitments to introduce new EU taxes with the aim to repay the capital and interests of funds raised on the financial markets. This legal constellation, which combines a plurality of legal bases, is entirely erected within the existing EU Treaties, but has profound constitutional consequences for the EU architecture of economic governance.

As the article maintains, in fact, NGEU increases the level of solidarity between member states, and leads towards an embryonic federalisation of economic policy at supranational level. As such, NGEU contributes greatly to rebalance the original asymmetry of EMU, endowing it with a fiscal capacity, ie an integrated public budget which the EU can use to stabilise the economy during a cyclical crisis and to invest in European public goods. Since the creation of EMU, the EU had a single monetary policy but, contrary to all other federal systems, lacked a common fiscal capacity. And this had not changed in the euro-crisis' aftermath. From this viewpoint, therefore, NGEU represents a paradigm change: by enabling the EU to run a sizable budget, funded through resources raised on the financial markets, and to be repaid in years to come through new, truly European taxes, NGEU endows the EU with a fiscal capacity independent from the transfers of its member states, and suitable both to favour the economic recovery after the pandemic and to promote the EU resilience according to long-term EU strategic priorities.

This constitutes a turning point in the process of European integration, which goes well beyond what happened in response to the euro-crisis.<sup>5</sup> While the measures adopted a decade ago had only strengthened the European institutions' control powers of the budgetary policy of the member states, the measures adopted in response to the pandemic have strengthened the European institutions budgetary

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<sup>4</sup> See F Fabbrini, *Next Generation EU* (Il Mulino, 2022), particularly ch 5, from which this article draws.

<sup>5</sup> See further F Fabbrini, *Economic Governance in Europe* (Oxford University Press, 2016).

powers *tout court*. Through NGEU, the EU now has a new fiscal instrument to invest on transnational strategic priorities, such as environmental protection, digitalisation, and the promotion of social inclusion—and the European Commission is empowered to mobilise EU own resources, managing a supranational economic policy. Otherwise, by strengthening the economic pillar of EMU with the establishment of a fiscal capacity, NGEU has also ended the institutional isolation of the European Central Bank, which until now was the only supranational institution in the European architecture of economic governance. As the article suggests, there are a number of political and economic explanations for why the EU responses to the COVID-19 crisis differed so sharply from the responses to the euro-crisis. But the bottom line is that EMU in the aftermath of COVID-19 presents now features of fiscal union which resemble those of more mature federal regimes.

The article is structured as follows. Part II examines the legal structure of NGEU, shedding light on the complex normative constellation that underpins this novel instrument. Specifically, Section II.A analyses the EU Recovery Instrument ('EURI') and the EU Own Resource Decision ('ORD'); Section II.B zooms into the Recovery and Resilience Facility ('RFF'); and Section II.C overviews the rule of law conditionality regulation. Part III, instead, discusses the constitutional consequences of NGEU. Specifically, Section III.A considers how NGEU is solidly established on the existing EU Treaties, and explains the choice of legal bases used. Section III.B reflects however on how NGEU reshapes the EU constitutional architecture of economic governance; and Section III.C contrasts the response to the COVID-19 crisis to that followed to address the euro-crisis, and advances several explanations for that. Finally, Part IV concludes suggesting that NGEU makes the EU's system of economic governance more alike that of mature federal regimes worldwide.

## II. LEGAL STRUCTURE

NGEU is established through a complex legal constellation, summarised in Table 1. On the one hand, there is the EURI, adopted through a Council regulation based on Article 122 of the Treaty on the Functioning of the European Union ('TFEU'), which sets the overall financial envelope of NGEU and the general allocation of resources between its various programs. The EURI is then completed by the RRF, which regulates the objectives and the governance of the main component of NGEU—that is directly addressed to financially support member states. The RRF is adopted in the form of a European Parliament ('EP') and Council regulation, based on Article 175 TFEU, on economic, social, and territorial cohesion. On the other hand, NGEU depends on the ORD—the legal act of the Council, adopted on the basis of Article 311 TFEU, which established the revenues of the EU budget, increasing the spending ceilings and authorising the Commission to issue debt. At the same time, NGEU is connected to the MFF 2021–2027—the general EU budget, which is approved by the Council, with the consent of the EP, according to Article 312 TFEU—and, just like the latter, is subject to the regulation on the general regime of conditionality for the protection of the Union budget—jointly adopted by the EP and the Council on the basis of Article 322 TFEU on financial matters—which

**Table 1:** Legal structure of NGEU

LEGAL ACT	LEGAL BASIS	PURPOSE
Council Regulation (EU) 2020/2094, of 14 December 2020, establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis	Art. 122 TFEU	Establishes NGEU and defines its size
Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027	Art. 312 TFEU	Establishes the MFF 2021–2027 and defines its size
Council Decision (EU, Euratom) 2020/2053, of 14 December 2020, on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom	Art. 311 TFEU	Authorises the funding of the MFF and NGEU, in this case through the issuance of common debt
Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility	Art. 175 TFEU	Defines in detail the governance of NGEU and the specific criteria for the use of funds by the member states
Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget	Art. 322 TFEU	Sets the requirements of respect for the rule of law as a pre-condition to access EU funds under NGEU and the MFF
Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources	Art. 295 TFEU	Sets among others a road map towards the introduction of new EU taxes to repay capital and interests of NGEU

is designed to fight rule of law backsliding and misappropriation of EU funds. The last piece of the puzzle then is an interinstitutional agreement (‘IIA’) between the Council, Commission, and EP, concluded on the basis of Article 295 TFEU, which sets out among others a roadmap for the introduction of new European taxes to repay the capital and interests of NGEU.

#### *A. The EU Recovery Instrument and the Own Resource Decision*

The EURI,<sup>6</sup> which is a fairly short legal text, establishes an EU fund to support the recovery in the aftermath of the COVID-19 crisis. The regulation instituting the

<sup>6</sup> Council Regulation (EU) 2020/2094 [2020] OJ L433 I/23, of 14 December 2020, establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.

instrument, clarifies, in Article 1, that the subject matter and the scope of this fund is to finance measures ‘to restore employment and job creation’, to support ‘reforms and investments to reinvigorate the potential for sustainable growth’, to back-up ‘businesses affected by the economic impact of the COVID-19 crisis’, to promote ‘research and innovation in response to the COVID-19 crisis’, to increase ‘the level of the Union’s crisis preparedness’, as well as to ensure ‘a just transition to a climate-neutral economy’. To this end, Article 2 of the regulation sets the total amount of the EURI at 750bn euro at 2018 prices, states that the instrument is funded ‘on the basis of the empowerment provided for in Article 5 of the Own Resources Decision’, and allocates the corresponding resources among the various programs that make up NGEU. Among these, the RFF has by far the lion’s share, as this facility is assigned 312,5bn euros of grants and 360bn euros of loans—for a total of 672,5bn euros, hence almost 90% of the total NGEU envelop. These resources will need to be employed in a short time-frame, because, as foreseen by Article 3 of the regulation ‘the related legal commitments shall be entered into by the Commission by 31 December 2023’.

As mentioned, the European Commission power to issue common debt to finance NGEU is then specifically attributed in the ORD<sup>7</sup>—which simultaneously enables the funding of the entire MFF 2021–2027.<sup>8</sup> The ORD foresees in its Article 6 an extraordinary and temporary increase in the own resources ceilings for the allocation of the resources necessary for addressing the consequences of the COVID-19 crisis. Moreover, its Article 5(1)(a) states that ‘the Commission shall be empowered to borrow funds on capital markets on behalf of the Union up to EUR 750 000 million in 2018 prices’. The same provisions, at the same time, also states that ‘[t]he repayment of the principal of the funds borrowed [...] and the related interest due shall be borne by the Union budget’<sup>9</sup> and clarifies that: ‘All liabilities incurred by the exceptional and temporary empowerment of the Commission to borrow funds referred to in paragraph 1 of this Article shall be fully repaid at the latest by 31 December 2058’.<sup>10</sup> This confirms that the EU will need to equip itself with new own resources to repay capital and interests on the debts incurred to finance NGEU. The EU institutions have committed in an IIA,<sup>11</sup> concluded at the same time of the ORD, to work on a precise roadmap towards the introduction of new own resources, thus reforming the EU revenues’ system. In particular, this IIA envisions in its Annex II the introduction, as a first step,

<sup>7</sup> Council Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1, of 14 December 2020, on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [hereinafter ‘ORD’].

<sup>8</sup> Council Regulation (EU, Euratom) 2020/2093 [2020] OJ L433 I/11, of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027.

<sup>9</sup> ORD, note 7 above, Art 6(2).

<sup>10</sup> Ibid.

<sup>11</sup> Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources [2020] OJ L433 I/28.

of ‘a new own resource [...] to apply as of 1 January 2021 composed of a share of revenues from national contributions calculated on the weight of non-recycled plastic packaging waste’,<sup>12</sup> and the roll out of a carbon border adjustment tax, ‘with a view to their introduction at the latest by 1 January 2023’.<sup>13</sup> Moreover, longer term, beyond 2023, the IIA indicates also the introduction of ‘additional new own resources, which could include a Financial Transaction Tax and a financial contribution linked to the corporate sector or a new common corporate tax base’.<sup>14</sup>

### *B. The Recovery and Resilience Facility*

The precise legal terms that govern the expenditures of NGEU funds are instead spelled out in another EU regulation, which is much longer and more complex: the RFF regulation.<sup>15</sup> This legal act, which includes 36 articles and several annexes, defines in great detail the ways and means in which member states receiving financial support from NGEU must use the available resources. Generally speaking, the RFF pursues three main functions. First, it sets out the goals and objectives that must be pursued by the member states with NGEU money. Second, it spells out the rules and procedures to assign resources to the member states, and to ensure that they respect the commitments that they have undertaken as a condition to receive NGEU funding. Third and finally, the RFF also includes coordination rules between NGEU and other pre-existing mechanisms of economic policy governance, notably the European semester, and final provisions to assess the program and its accounting. Overall, what emerges is a new system of economic governance in which the EU defines the strategic objectives, designed to strengthen the ecological and digital transition, inclusive growth, and economic resilience, and the member states commit to reach these priorities as a condition to receive significant amounts of EU funds.

More in detail, Chapter I of the regulation indicates in Article 3 that the RFF operates in six main areas—green transition, digital transformation, smart, sustainable, and inclusive growth, social and territorial cohesion, health, and policies for the next generation. As clarified in Article 4, the general objective of the Facility shall be to promote the EU’s economic, social, and territorial cohesion by improving the resilience, crisis preparedness, adjustment capacity, and growth potential of the member states, by mitigating the social and economic impact of that crisis in particular on women, by contributing to the implementation of the European Pillar of Social Rights, by supporting the green transition, by contributing to the achievement of the EU’s 2030 climate targets and of the digital transition, thereby contributing to the upward economic and social convergence, restoring and promoting sustainable growth and the integration of the economies of the EU, fostering high quality employment creation, and contributing to the strategic autonomy of the EU alongside

<sup>12</sup> Ibid, Annex II, para 4.

<sup>13</sup> Ibid, Annex II, para 5.

<sup>14</sup> Ibid, Annex II, para 10.

<sup>15</sup> Regulation (EU) 2021/241 [2021] OJ L57/17 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [hereinafter ‘RFF’].

an open economy and generating European added value. To achieve these general objectives, ‘the specific objective of the Facility shall be to provide Member States with financial support with a view to achieving the milestones and targets of reforms and investments as set out in their recovery and resilience plans’.<sup>16</sup>

Chapter II of the regulation establishes the calculation methods to set the maximum value of EU financial contribution that each member state can receive, both in grants and in loans. Specifically, with regard to grants, Article 11 states that the ‘maximum financial contribution shall be calculated for each Member State [...] for 70% [...] on the basis of the population, the inverse of the GDP per capita and the relative unemployment rate of each Member State [and] for 30% [...] on the basis of the population, the inverse of the GDP per capita and, in equal proportion, the change in real GDP in 2020 and the aggregated change in real GDP for the period 2020–2021’. This complicated calculation method endeavours to keep into consideration at the same time the size of the member state, its macro-economic condition before the pandemic, and the impact that COVID-19 had on its economy. The same provision states that ‘[t]he calculation of the maximum financial contribution [...] shall be updated by 30 June 2022 for each Member State by replacing the data from the Commission Autumn 2020 forecasts with the actual outturns in relation to the change in real GDP 2020 and the aggregated change in real GDP for the period 2020–2021’.<sup>17</sup> As foreseen in Article 12, then, the Commission shall make available for allocation 70% of the abovementioned amount ‘[u]ntil 31 December 2022’—hence frontloading the largest share of financial support, with a view to immediately support the economic recovery. Moreover, Article 13 of the regulation empowers the Commission to ‘make a pre-financing payment of an amount of up to 13% of the financial contribution’ already in 2021.

With regard to loans, instead, Article 14(5) states that ‘the maximum volume of the loan support for each Member State shall not exceed 6,8% of its 2019 [gross national income (‘GNI’)] in current prices’. As a consequence, the RFF introduces different mechanisms to calculate the precise amount that each EU member state will receive in grants and loans. For grants, this support depends predominantly on the impact of the COVID-19 pandemic on the national economy, and Annex IV to the regulation lists precisely the specific sums that each member state is due to receive as non-repayable support. For loans, instead, the calculation is based on a member state’s GNI, through a simple mathematical calculation, irrespective of the impact of COVID-19. Nevertheless, the assumption of the EU institutions is that member states that have lower financing costs than the EU itself will not request loans to the EU. Hence, while the European Commission has prepared for internal purposes a table of allocation of amounts for member states, this is not effectively going to be implemented in the same way as the allocation of grants.

In order to access the grants and loans of NGEU, member states must prepare National Recovery and Resilience Plans (‘NRRP’), whose terms are regulated in

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<sup>16</sup> Ibid, Art 4(2).

<sup>17</sup> Ibid, Art 11(2).

Chapter III of the regulation. Article 18 states that member states wishing to receive a financial contribution shall submit to the Commission a recovery and resilience plan, ‘as a rule, by 30 April [2021]’.<sup>18</sup> Each NRRP must be ‘duly reasoned and substantiated’<sup>19</sup> and must reflect a number of features, including: ‘an explanation of how the recovery and resilience plan, taking into account the measures included therein, represents a comprehensive and adequately balanced response to the economic and social situation of the Member State’;<sup>20</sup> ‘envisaged milestones, targets and an indicative timetable for the implementation of the reforms, and investments to be completed by 31 August 2026’;<sup>21</sup> and ‘the estimated total costs of the reforms and investments covered by the recovery and resilience plan submitted’.<sup>22</sup> Furthermore, the same provision foresees—coherently with the EU ambitious objective to reach climate neutrality, which is a political priority for the EU Commission’s Green Deal<sup>23</sup>—which ‘at least 37% of the recovery and resilience plan’s total allocation’<sup>24</sup> must be devoted to support the environmental transition. At the same time, ‘at least 20% of the recovery and resilience plan’s total allocation’<sup>25</sup> must contribute to the digital transition. Finally, the same clause also requires member states to explain ‘how the recovery and resilience plan contributes to effectively address all or a significant subset of challenges identified in the relevant country-specific recommendations’, which the EU institutions address annually to the member states in the framework of the European Semester.<sup>26</sup> In fact, as underlined in Article 17, ‘the recovery and resilience plans shall be consistent with the relevant country-specific challenges and priorities identified in the context of the European Semester’,<sup>27</sup> and this is a condition for eligibility of the NRRP. This significantly strengthens the ability of the Commission to influence national economic policies, favouring specific reforms and investments.

From a governance viewpoint, according to Article 19 of the regulation, it is for the Commission to assess the NRRP, evaluating their ‘relevance, effectiveness, efficiency and coherence’.<sup>28</sup> In particular, for each of these criteria, the Commission must assess each NRRP, within two months from its submission, and also has the possibility to reject it, and ask the member state to rewrite it. If the Commission positively assesses the NRRP, it proposes to the Council an implementing decision, which ‘shall set out the reforms and investment projects to be implemented by the

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<sup>18</sup> Ibid, Art 18(3).

<sup>19</sup> Ibid, Art 18(4).

<sup>20</sup> Ibid, Art 18(4)(a).

<sup>21</sup> Ibid, Art 18(4)(i).

<sup>22</sup> Ibid, Art 18(4)(k).

<sup>23</sup> See COM(2019) 640 final, *The European Green Deal*.

<sup>24</sup> RFF, note 15 above, Art 18(4)(e).

<sup>25</sup> Ibid, Art 18(4)(f).

<sup>26</sup> Ibid, Art 18(4)(b).

<sup>27</sup> Ibid, Art 17(3).

<sup>28</sup> Ibid, Art 19(3).

Member State, including the milestones and targets, and the financial contributions'.<sup>29</sup> According to Article 20 of the regulation, the Council shall adopt the implementing decisions, 'as a rule, within four weeks of the adoption of the Commission proposal'.<sup>30</sup> Once the Council has adopted the implementing decision, on the basis of Article 23, 'the Commission shall conclude an agreement with the Member State concerned constituting an individual legal commitment'. This agreement—which in case of loans is for all practical purposes a contract—sets 'the financial contribution to be paid in instalments',<sup>31</sup> 'the description of the reforms and of the investment projects and the amount of the estimated total costs of the recovery and resilience plan',<sup>32</sup> and 'the time limit, which should be no later than 31 August 2026, by which the final milestones and targets for both investment projects and reforms must be completed'.<sup>33</sup> Pursuant to Article 21, a member state may make a reasoned request to amend a NRRP. Yet, the punctual respect of targets and milestone is a condition for member states to continue receiving NGEU support: as stated in Article 24 (6), if 'the Commission establishes that the milestones and targets set out in the Council implementing decision [...] have not been satisfactorily fulfilled, the payment of all or part of the financial contribution and, where applicable, of the loan shall be suspended'.

Otherwise, precisely to guarantee that the resources made available by NGEU will not be wasted, the RFF recognises also a sort of emergency break procedure. As indicated in Recital 52 of the regulation '[i]f, exceptionally, one or more Member States consider that there are serious deviations from the satisfactory fulfilment of the relevant milestones and targets, they may request the President of the European Council to refer the matter to the next European Council. [...] In such exceptional circumstances, no decision authorising the disbursement of the financial contribution and, where applicable, of the loan should be taken until the next European Council has exhaustively discussed the matter. That process should, as a rule, not take longer than three months after the Commission has asked the Economic and Financial Committee for its opinion'. Although this extraordinary control mechanism is not regulated in the substantive text of the regulation, but only in the opening recital—whose legal efficacy is dubious—this reflects the political agreement reached within the European Council in July 2020:<sup>34</sup> At the time when the European Council approved the Commission's NGEU proposal, the abovementioned proviso was agreed to reassure the frugal member states of Northern Europe that NGEU funds would be used wisely and prudently. In fact, Article 10 of the regulation, which introduces measures linking the RFF to pre-existing EMU rules on sound economic governance, states that the Commission shall suspend

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<sup>29</sup> Ibid, Art 20(2).

<sup>30</sup> Ibid, Art 20(7).

<sup>31</sup> Ibid, Art 20(5)(a).

<sup>32</sup> Ibid, Art 20(5)(c).

<sup>33</sup> Ibid, Art 20(5)(d).

<sup>34</sup> European Council Conclusions, note 3 above.

payments to a member state ‘where the Council decides in accordance with Article 126(8) or (11) TFEU that a Member State has not taken effective action to correct its excessive deficit’: hence a violation of the Stability & Growth Pact excessive deficit rule will lead to suspension of funding under the RFF.

In addition, the RFF also introduces a set of rules to secure the transparency and continuing monitoring of the use of NGEU funds. In the regulation there are at least half a dozen provisions— Articles 16, 25, 27, 29, 30, and 31—which impose: on the one hand, on the member states to ‘report twice a year in the context of the European Semester on the progress made in the achievement of its recovery and resilience plan’;<sup>35</sup> and on the other, on the Commission, to ‘present to the [EP] and the Council a review report on the implementation of the Facility’ by 31 July 2022;<sup>36</sup> to ‘transmit the recovery and resilience plans officially submitted by the Member States, [...] simultaneously and on equal terms to the [EP] and the Council without undue delay’;<sup>37</sup> to ‘monitor the implementation of the Facility and measure the achievement of the objectives’;<sup>38</sup> to ‘establish a recovery and resilience scoreboard [...], which shall display the progress of the implementation of the recovery and resilience plans of the Member States’;<sup>39</sup> and to ‘provide an annual report to the [EP] and the Council on the implementation of the Facility’.<sup>40</sup> The regulation finally clarifies in Article 22, that in ‘implementing the Facility, the Member States, as beneficiaries or borrowers of funds under the Facility, shall take all the appropriate measures to protect the financial interests of the Union and to ensure that the use of funds in relation to measures supported by the Facility complies with the applicable Union and national law, in particular regarding the prevention, detection and correction of fraud, corruption and conflicts of interests’.

### *C. The Rule of Law Conditionality Regulation*

The issue of respect for the rule of law in the use of EU funding (both NGEU and the RFF) is then specifically at the heart of a new regulation, which is part of the package deal of norms constituting the architecture of post-pandemic EU economic recovery: the regulation on a general regime of conditionality for the protection of the EU budget.<sup>41</sup> This regulation deals with one of the thorniest problems that the EU is experiencing, namely the growing rule of law backsliding at play in a several EU member

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<sup>35</sup> Ibid, Art 27.

<sup>36</sup> Ibid, Art 16(1).

<sup>37</sup> Ibid, Art 25(1).

<sup>38</sup> Ibid, Art 29(1).

<sup>39</sup> Ibid, Art 30(1).

<sup>40</sup> Ibid, Art 31(1).

<sup>41</sup> Regulation (EU, Euratom) 2020/2092 [2020] OJ L I 433/1, of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [hereinafter ‘Conditionality Regulation’].

states, particularly in Eastern Europe.<sup>42</sup> Its aim is to halt that authoritarian trend, using the threat of the suspension of EU funding as a leverage to induce national policy changes in those member states which no longer fully respect the founding principles of the European constitutional order, such as the independence of the judiciary, freedom of the press, and societal pluralism. Indeed, the opposition against the rule of law conditionality regulation by the illiberal governments of Hungary and Poland had almost caused in Fall 2020 the failure of NGEU.<sup>43</sup> Both countries had posed their veto against the ORD and MFF in order to block the regulation's approval. Nevertheless, the EP and Council had ultimately reached an agreement on the rule of law conditionality regulation, which entered into force on 1 January 2021 and is—despite the ambiguities caused by the European Council December 2020 conclusions<sup>44</sup>—immediately and fully legally binding.<sup>45</sup>

The rule of law conditionality regulation was also subject to legal challenges before the Court of Justice of the EU ('ECJ') by Hungary and Poland—as fully anticipated by the European Council.<sup>46</sup> However, following the advise of the Advocate General,<sup>47</sup> and building on its precedents,<sup>48</sup> the ECJ in February 2022 rejected the challenges against the regulation.<sup>49</sup> In a major ruling, the ECJ, acting as a Full Court, held that the regulation was adopted on the appropriate legal basis, and ruled that the mechanism was compatible with the procedure established by Article 7 TEU. The ECJ clarified that the common values enshrined in Article 2 TEU constitute the constitutional foundations of the EU, and that '[c]ompliance with

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<sup>42</sup> See in particular A Sajo, *Ruling by Cheating* (Cambridge University Press, 2021) and T Ginsburg, *Democracy & International Law* (Cambridge University Press, 2021).

<sup>43</sup> See Joint Declaration of the Prime Minister of Poland and the Prime Minister of Hungary, 26 November 2020.

<sup>44</sup> See European Council Conclusions, 10–11 December 2020, EUCO 22/20.

<sup>45</sup> See also European Parliament resolution of 17 December 2020 on the Multiannual Financial Framework 2021–2027, the Inter-Institutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation, P9\_TA(2020)0360

<sup>46</sup> European Council Conclusions, note 44 above, para 2.c

<sup>47</sup> See Opinion of Advocate General Sanchez-Bordona in Case C-156/21, C-157/21 *Hungary v Parliament and Council, Poland v Parliament and Council*.

<sup>48</sup> See among a long list of cases especially, Case C-64/16 *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117 (affirming the principle of judicial independence as a core feature of the rule of law), Case C-78/18 *Commission v Hungary*, ECLI:EU:C:2020:476 (declaring incompatible with EU law Hungarian legislation restricting the financing of civic organizations), Case C-650/18 *Hungary v Parliament*, ECLI:EU:C:2021:426 (rejecting a challenge by Hungary against the European Parliament determination against Hungary under Article 7 TEU), Case C-791/19 *Commission v Poland*, ECLI:EU:C:2021:596 (declaring incompatible with EU law Polish legislation setting up a Disciplinary Chamber concerning judges). But see also the jurisprudence of the European Court of Human Rights, *Guðmundur Andri Ástráðsson v Iceland*, Application No 26374/18, Judgment of 1 December 2020 (affirming that judicial independence constitutes the loadstar of the rule of law), and *Xero Flor v Poland*, Application No 4907/18, Judgment of 7 May 2021 (ruling that the removal of guarantees of independence of Polish judges is a breach of the European Convention on Human Rights)

<sup>49</sup> Case C-156/21, C-157/21 *Hungary v Parliament and Council, Poland v Parliament and Council*, Judgment of 16 February 2022.

those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession'.<sup>50</sup> As such, the ECJ upheld the regulation and rejected the claim that this constituted a breach of the principle of legal certainty, emphasising that member states are in 'a position to determine with sufficient precision the essential content and the requirements flowing from each of the principles listed in [...] the contested regulation'.<sup>51</sup>

In further detail, Article 1 of the rule of law conditionality regulation states that the purpose of this legal act is to establish 'the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States'. Article 2 defines the notion of rule of law, recalling the values enshrined in Article 2 TEU, including 'the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law'.<sup>52</sup> In light of this—and drawing lessons from the illiberal measures adopted by authoritarian governments in Hungary and Poland—Article 3 of the regulation clarifies for the avoidance of doubt that action 'endangering the independence of the judiciary', 'failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities' and 'limiting the availability and effectiveness of legal remedies' constitute 'breaches of the principles of the rule of law'.<sup>53</sup>

Where it is established, as stated in Article 4, 'that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way', then the EU can adopt measures to protect its own budget. These measures, which must be proportionate, are mentioned in Article 5, and among these the most important one is the possibility of a suspension in full or in part of the EU payments. From a procedural viewpoint, Article 6 foresees that the adoption of a measure to protect the budget of the EU shall be decided on the basis of a specific procedure. This tracks the pre-litigation stage of the infringement procedure enshrined in Article 258 TFEU and gives powers both to the Commission—which, as guardian of EU law is invested with the duty to assess member states' compliance with the *acquis communautaire*—and to the Council—to whom it belongs ultimately to decide. Instead, no role is attributed by the rule of law regulation to the EP:<sup>54</sup> this, according to Article 8, is only 'inform[ed]' by the Commission of any measures proposed, adopted or lifted.

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<sup>50</sup> Case C-146/21, para 126.

<sup>51</sup> *Ibid.*, para 240.

<sup>52</sup> Conditionality Regulation, note 41 above, Art 2(a).

<sup>53</sup> *Ibid.*, Art 3.

<sup>54</sup> See further N Kirst, 'Rule of Law Conditionality' (2021) 6(1) *European Papers* 101.

More specifically, Article 6 states that where the Commission ‘finds that it has reasonable grounds to consider that the conditions set out in Article 4 are fulfilled, it shall [...] send a written notification to the Member State concerned’.<sup>55</sup> At this point, ‘[t]he Member State concerned shall provide the required information and may make observations’.<sup>56</sup> If however the Commission considers that the breach of the rule of law persists, ‘and that the remedial measures, if any, proposed by the Member State under paragraph 5 do not adequately address the findings in the Commission’s notification, it shall submit a proposal for an implementing decision on the appropriate measures to the Council’.<sup>57</sup> It is then for the Council to adopt the Commission’s proposal, ‘within one month of receiving [it]. If exceptional circumstances arise, the period for the adoption of that implementing decision may be extended by a maximum of two months’.<sup>58</sup> Otherwise, the Council, ‘acting by a qualified majority, may amend the Commission’s proposal and adopt the amended text by means of an implementing decision’.<sup>59</sup> Finally, on the basis of Article 7, ‘[a]t the request of the Member State concerned, or on its own initiative and at the latest one year after the adoption of measures by the Council, the Commission shall reassess the situation in the Member State concerned’<sup>60</sup> and may propose the lifting of the adopted measures.

Following the ECJ’s decision upholding the legality of the rule of law conditionality regulation and its compliance with the EU Treaties, the European Commission has eventually started giving effect to the act. While the Commission’s delay had been the object of recurrent complaints by the EP—which had even taken the Commission to court under Article 265 TFEU for failure to act<sup>61</sup>—in early March 2022, the Commission published detailed guidelines, as requested also by the European Council,<sup>62</sup> outlining the terms of application of the regulation.<sup>63</sup> Nevertheless, questions quickly arose about the commitment of the Commission to abide by the strict letter of the regulation. In May 2022, in fact, the Commission eventually recommended the approval of Poland’s NRRP, which had been kept on hold for almost a year, on the basis of the serious concerns for rule of law breaches in that member states.<sup>64</sup> However, the timing of this decision in the aftermath of the Russian military aggression of Ukraine, made it look much

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<sup>55</sup> Conditionality Regulation, note 41 above, Art 6(1).

<sup>56</sup> *Ibid*, Art 6(5).

<sup>57</sup> *Ibid*, Art 6(9).

<sup>58</sup> *Ibid*, Art 6(10).

<sup>59</sup> *Ibid*, Art 6(11).

<sup>60</sup> *Ibid*, Art 7(2).

<sup>61</sup> See European Parliament resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation, P9\_TA(2021)0287.

<sup>62</sup> European Council Conclusions, note 44 above, para 2.c

<sup>63</sup> C(2022) 1328 final, Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget.

<sup>64</sup> See European Commission press release ‘NextGenerationEU: European Commission endorses Poland’s €35.4 billion recovery and resilience plan’, 1 June 2022, IP/22/3375.

more a reward for Poland's effort in dealing with the influx of refugee from neighboring Ukraine, rather than a genuine assessment of improvement of the state of the rule of law in Poland. As such, the Commission proposal was strongly criticized by the EP.<sup>65</sup> While eventually the Council endorsed the Polish NRRP with caveats, including a demand for progress in domestic reforms relating to the independence of the judiciary,<sup>66</sup> it remains to be seen whether the conditionality embedded in NGEU will lead to real policy changes at the national level, and therefore whether values will be a real, rather than cosmetic, component of the RRF's execution.

### III. CONSTITUTIONAL CONSEQUENCES

NGEU has been established without any need to amend the EU Treaties. Nevertheless, NGEU has significant constitutional consequences for the EU generally, and the EMU specifically. In particular, NGEU increases the level of solidarity within the EU, and contributes to completing EMU, by endowing the European Commission with the authority and means to steer the EU economy. In fact, NGEU marks a difference from the strategy that was pursued in response to the euro-crisis, as it goes beyond a logic of fiscal surveillance<sup>67</sup> towards one of more genuine fiscal federalism.<sup>68</sup> This constitutes a profound overhaul for the EU architecture of economic governance. Whereas the process of constitutionalisation of the EU continues to face obstacles, engrained in ideas of *demos*, *civitas*, and *ius*,<sup>69</sup> NGEU has greatly advanced the federalisation of the EU, endowing it with a fiscal capacity, besides tools of fiscal regulation. Thanks to NGEU the EU's fiscal union presents features which are akin to those of mature federal regimes worldwide.<sup>70</sup>

#### A. Existing Legal Bases

The legal structures of NGEU are constitutionally grounded in the EU Treaties. This contrasts with what had happened in response to the euro-crisis.<sup>71</sup> While admittedly several of the measures adopted in 2010–2012, such as the Six-Pack, the Two-Pack, and the Banking Union were taken within the existing EU treaty framework, at that

<sup>65</sup> See European Parliament resolution of 9 June 2022 on the rule of law and the potential approval of the Polish national recovery plan (RRF), P9\_TA(2022)0240.

<sup>66</sup> See Council of the EU press release 'NextGenerationEU: Ministers approve the assessment of Poland's national plan by the European Commission', 17 June 2022, 550/22.

<sup>67</sup> See A Hinarejos, 'Fiscal Federalism in the European Union' (2013) 50 *Common Market Law Review* 1621.

<sup>68</sup> See B Gordon, *The Constitutional Boundaries of European Fiscal Federalism* (Cambridge University Press, 2022).

<sup>69</sup> See M Ghering, *Europe's Second Constitution* (Cambridge University Press, 2020).

<sup>70</sup> See T Woźniakowski, *Fiscal Unions: Economic Integration in Europe and the United States* (Oxford University Press, 2022).

<sup>71</sup> See eg S Baroncelli, 'The Euro-crisis and Differentiated Governance in European Economic and Monetary Union' (2022) *European Papers*.

time member states had repeatedly acted outside the EU legal order through the use of intergovernmental agreements. In particular, the main components of the responses to the euro-crisis, such as the Fiscal Compact,<sup>72</sup> the financial stabilisation mechanisms, and the Single Resolution Fund supporting Banking Union<sup>73</sup> were adopted via separate treaties. In fact, member states also revised EU primary law in 2011, although the ECJ ultimately ruled in *Pringle* that this amendment was unnecessary to allow the establishment of the European Stability Mechanism (ESM).<sup>74</sup> Specifically member states modified Article 136 TFEU to add a new Section 3 stating that ‘The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality’.

The responses to the COVID-19 pandemic instead have taken place within the framework of EU law and have been designed for the benefits of all 27 EU member states, rather than for the 19 Eurozone countries only.<sup>75</sup> At the same time, the existing legal bases of the Treaties proved sufficiently solid to erect the architecture of NGEU. As mentioned in Part II, current primary EU law offered a plurality of legal bases for this purposes. In particular—besides the ORD and the MFF, which are enshrined in Articles 311 and 312 TFEU respectively, and the rule of law regulation, which was grounded on Article 322, empowering the EP and the Council to ‘determine [...] the procedure to be adopted for establishing and implementing the budget [...] and] rules providing for checks on the responsibility of financial actors’—two EU Treaty clauses proved central to build NGEU: namely, Article 122 TFEU, on financial assistance, and Article 175 TFEU, on cohesion policy. Nevertheless, as Bruno de Witte has pointed out, both these provisions were subject to ‘fresh interpretation [...] in the light of changing circumstances, thereby putting in place a new tool for fiscal integration’.<sup>76</sup>

On the one hand, the use of Article 122 TFEU as a linchpin to NGEU reveals a willingness by the EU institutions to use this provision as more than a simple crisis management tool.<sup>77</sup> Article 122(1) TFEU allows ‘the Council, on a proposal from the Commission, [to] decide, in a spirit of solidarity between Member States,

<sup>72</sup> See Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 March 2012, [http://www.eurozone.europa.eu/media/304649/st00tscg26\\_en12.pdf](http://www.eurozone.europa.eu/media/304649/st00tscg26_en12.pdf).

<sup>73</sup> See Agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, 21 May 2014, <http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%208457%202014%20INIT>.

<sup>74</sup> See Case C-370/12, *Pringle*, ECLI:EU:C:2012:756

<sup>75</sup> See also P Dermine, *The New Economic Governance of the Eurozone* (Cambridge University Press, 2022)

<sup>76</sup> B De Witte, ‘The Innovative European response to COVID-19: Decline of Differentiated Integration and Reinvention of Cohesion Policy’ in *Continuity & Change: How the Challenges of Today Prepare the Ground for Tomorrow: ECB Legal Conference 2021* (Publication Office of the EU, 2022), 394, 402.

<sup>77</sup> See also Council of the EU, Opinion of Legal Service on Proposals on Next Generation EU, 24 June 2020, Doc 9062/20.

upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy'. Moreover, Article 122(2) TFEU states that '[w]here a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned'. Article 122 TFEU had already been used at the time of the euro-crisis to temporarily establish a European Financial Stabilisation Mechanism,<sup>78</sup> and at the start of the pandemic to set up SURE, the European instrument for temporary support to mitigate unemployment risks in the COVID-19 emergency.<sup>79</sup>

With EURI, however, Article 122 TFEU was used to directly mobilise an unprecedented amount of resources, which the EU raised on the basis of the empowerment provided by the ORD. Moreover, Article 122 TFEU was used to set up a funding scheme for both recovery and resilience, hence going beyond the COVID-19 emergency to support the rebuilding of the EU economy in a longer time-span. In fact, on 16 December 2020, the EP, Commission, and Council also signed a Joint declaration—published in the EU official journal on the side of the EURI, ORD, and MFF—in which they outlined a shared understanding of budgetary scrutiny of new proposals based on Article 122 TFEU with potential appreciable implications for the EU budget.<sup>80</sup> In this Joint declaration the three EU institutions 'acknowledge[d] that Article 122 TFEU constitutes a legal basis for adopting measures to address specific crisis situations that may entail potential budgetary implications, which are capable of impacting the development of the Union expenditure within the limits of its own resources'.<sup>81</sup> As a result, they agreed to establish a procedure on budgetary scrutiny whereby the 'the [EP] and Council will engage in a constructive dialogue with a view to seeking a joint understanding of the budgetary implications of the envisaged legal act'.<sup>82</sup>

On the other hand, also the use of Article 175 TFEU to set up the RFF is a salient development in EU law. This provision states that 'Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article 174' and enables the EP and Council acting in accordance with the ordinary legislative procedure to take measures 'if specific actions prove necessary' outside the Structural Funds to progress towards achieving

<sup>78</sup> Council Regulation (EU) No 407/2010 [2010] OJ L118/1, of 11 May 2010, establishing a European financial stabilisation mechanism.

<sup>79</sup> Council Regulation (EU) 2020/672 [2020] OJ L 159/1, of 19 May 2020, on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.

<sup>80</sup> Joint Declaration of the European Parliament, the Council and the Commission on budgetary scrutiny of the new proposals based on Article 122 TFEU with potential appreciable implications for the Union budget [2020] OJ C444 I/5.

<sup>81</sup> *Ibid.*, Rec 1.

<sup>82</sup> *Ibid.*, para 5.

economic, social and territorial cohesion. Cohesion policy is a long standing EU competence with broadly defined aims. Yet, by interpreting this competence dynamically, ‘the pandemic recovery plan has allowed for the reinvention of cohesion policy, making it into the main tool for the EU’s intervention in the macroeconomic domain’.<sup>83</sup> Therefore, the use of Article 175 TFEU signals a growing importance of this clause as the legal basis to develop an EU economic policy—a trend visible in the adoption of the European Globalisation Adjustment Fund,<sup>84</sup> the Just Transition Fund,<sup>85</sup> and now also the Brexit Adjustment Reserve,<sup>86</sup> all of which were based on Article 175 TFEU.

If the adoption of NGEU through Articles 122 and 175 TFEU demonstrates that the EU Treaties are a living instrument, whose interpretation can be adjusted in light of changing circumstances, it also revealed the politics behind the establishment of a bulk EU fiscal capacity. In fact, because Article 122 TFEU is predominantly regarded as an emergency provision, the choice of this legal basis could be seen as the political signal that NGEU is an exceptional, one-off, measure, exclusively designed to deal with the COVID-19 pandemic. Nevertheless, as explained by Bruno de Witte ‘whereas Article 122 TFEU is clearly defined as a crisis provision, Article 175(3) TFEU is not. It could become a stable basis for an EU fiscal policy, beyond the current Covid-19 crisis’.<sup>87</sup> Therefore, in the future one could conceive of Article 175 TFEU as a self-standing legal basis to enact another fiscal stimulus program at EU level—perhaps in conjunction with other legal bases (such as Article 170 TFEU on trans-European networks, Article 173 TFEU on industry, and Article 179 on research) as I had suggested in the past.<sup>88</sup>

### B. Novel Governance Arrangements

Despite being based on existing EU Treaty provisions, NGEU establishes an innovative system of economic governance, premised on the idea that it is the EU’s task to lead the economic recovery through new mechanisms to financially support the member states. In the architecture of NGEU, the EU defines the strategic objectives—in line with long-term political priorities, which it had already championed for a number of years, such as the environmental and digital transitions—and

<sup>83</sup> De Witte, note 76 above, 398

<sup>84</sup> See Regulation (EU) No 1309/2013 [2013] OJ L347/855 of the European Parliament and of the Council of 17 December 2013 on the European Globalisation Adjustment Fund (2014-2020) and repealing Regulation (EC) No 1927/2006.

<sup>85</sup> See Regulation (EU) 2021/1056 [2021] OJ L231/1 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund.

<sup>86</sup> See Regulation (EU) 2021/1755 [2021] OJ L357/1 of the European Parliament and of the Council of 6 October 2021 establishing the Brexit Adjustment Reserve.

<sup>87</sup> B De Witte, ‘The European Union’s Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift’ (2021) 58(3) *Common Market Law Review* 635, 658.

<sup>88</sup> See F Fabbrini, ‘Economic Policy in the EU After the Crisis’ (2016) *Diritto dell’Unione europea* 529, 544.

makes available new financial resources, which help the member states rebuild and reform their economies after COVID-19. Crucially, with NGEU, the EU finances itself on the financial market through the issuance of common debt, and therefore acquires autonomous resources: this overcomes the key problem of the EU budget.<sup>89</sup> As it is well known, even though the letter and the spirit of the EU treaties foresee that the EU budget is funded by own resources, in reality the MFF has since the 1980s been mainly funded by member states' transfers.<sup>90</sup> As a consequence, EU countries consider their contributions to the EU budget as their money, and measure like accountants how much they pay into and receive from the MFF. This has created an embarrassing spectacle, visible at each new MFF, negotiations, in which member states quarrel on how much they spend for, and benefit from, the EU budget. NGEU breaks this politically and economically unsustainable logic.<sup>91</sup> The 750bn euros of NGEU are not money of a given member state that are transferred to another member state: rather, they are common debt which the EU incurs to support the recovery and the resilience of all its member states.

This has important consequences for EMU, which are likely to reverberate beyond COVID-19: while NGEU is designed as a temporary instrument, it is questionable whether it would be possible to disband it, or whether NGEU is destined to become the new normal for the EU architecture of economic governance.<sup>92</sup> From a legal viewpoint, NGEU vests the Commission with a power it previously lacked, namely issuing common debt on behalf, and in the name of the EU. At the same time, NGEU also empowers the Commission, with the Council, to support the member states with grants and loans, subject to a number of conditions. From an institutional viewpoint, therefore, NGEU strengthens the Commission's authority to steer the European economic policy: although this power is subject to the control of the Council, this constitutes a step forward compared to the simple coordination of national economic policies undertaken by the Eurogroup. In fact, despite the obvious intergovernmental dynamics at play in the EU, visible in the ever-growing role of the European Council, the connection between NGEU and the MFF have contributed to solidify the role of the Commission as the core of a real EU Treasury department.<sup>93</sup> The problematic aspect of the post-pandemic architecture of economic governance is however the negligible role of the EP, which is cut off from the mobilisation of EU resources and their control. From a constitutional viewpoint, this state of affairs is unjustifiable and will have to be addressed, for instance within the framework of governance reforms to be discussed by the Conference on the Future of Europe.<sup>94</sup>

<sup>89</sup> See R Crowe, 'An EU Budget of States and Citizens' (2020) 26(5–6) *European Law Journal* 331.

<sup>90</sup> See L Zamparini and U Villani-Lubelli (eds), *Features and Challenges of the EU Budget* (Elgar Publishing, 2019).

<sup>91</sup> See M Maduro, 'A New Governance for the European Union and the Euro' (study commissioned by the European Parliament Constitutional Affairs Committee, Sept 2012).

<sup>92</sup> See on this Fabbrini, note 1 above.

<sup>93</sup> See COM(2017) 823 final, *A European Minister of Economy and Finance*.

<sup>94</sup> See F Fabbrini, 'The Conference on the Future of Europe: Process and Prospects' (2020) 26(5–6) *European Law Journal* 401.

From the economic viewpoint, moreover, through NGEU, the EU acquires the ability to stabilise the macro-economic cycle, intervening with own resources there where it is more necessary to ensure stable growth, high level of unemployment, and economic convergence between member states. At the same time, NGEU allows the EU to pursue a number of European public goods—such as the protection of the environment, digitalisation, or social inclusion—even though this is done practically through member states' actions, funded by EU money. Otherwise, by empowering the European Commission to issue debt on behalf of the EU, NGEU de facto leads to the creation of eurobonds, ie supranational debt instruments, which can constitute a liquid safe asset, easily tradable on the international financial markets. This contributes to strengthen EMU, including the international role of the euro.<sup>95</sup> From a political viewpoint, NGEU increases the weight of the EU institutions, both globally, and in their relations with member states' governments, because through a system of significant financial incentives they can influence national economic policies, favouring virtuous behaviours such as reforms and investments.

### C. *Contrasting the Responses to the Euro-Crisis and to COVID-19*

The strategy put together by the EU and its member states to address the COVID-19 pandemic crisis is therefore strikingly different from the strategy that was followed to respond to the euro-crisis, a decade ago.<sup>96</sup> Back then, the EU institutions and the member states addressed the crisis through a tightening of fiscal rules, and the establishment of new financial support mechanisms. The core policy instrument put forward was the ESM.<sup>97</sup> The ESM was established through an intergovernmental treaty concluded by the Eurozone member states outside the EU legal order. The ESM, moreover, was based on budget transfers and guarantees from the member states—with each country contributing *pro quota* on the basis of its economic power, and enjoying a corresponding unequal decision-making power. The ESM, finally, provided loans (but not grants) to countries facing financial difficulties—but subject to harsh conditionality, enshrined in a macro-economic adjustment program which de facto imposed austerity. On the contrary, NGEU is established within the EU legal order. It is based on resources which are raised on the financial markets through the issuance of EU common debt, and which are transferred to the member states both as loans and grants. In NGEU no member state has more decision-making powers than the others, regardless of its size or economic might. Finally, in NGEU, conditionality is not imposed as a penalty for having breached EU fiscal rules, but rather is deployed to incentivise reforms and investments that will favour growth in the future. Figuratively speaking, one could say that while a stick was used to address the euro-crisis, a carrot was used to deal with the pandemic health crisis.

<sup>95</sup> See COM(2018) 796/4, *Towards a stronger international role of the euro*.

<sup>96</sup> Fabbrini, note 5 above.

<sup>97</sup> See Treaty Establishing the European Stability Mechanism, 25 March 2011, <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>.

How to explain the difference in the responses to the euro-crisis and the COVID-19 pandemic? There are several explanations. First, the euro-crisis had had asymmetrical effects, hitting to different degrees the economies of Northern Europe and Southern Europe. On the contrary, the pandemic hit all member states indiscriminately—even though the health policy measures adopted across the EU were not identical, and the socio-economic costs varied from one member country to another. Second, the euro-crisis was blamed on the irresponsible behaviour of some member states—the Southern countries.<sup>98</sup> On the contrary, no member states could be blamed for causing the pandemic, a wholly exogenous shock entirely outside the control of any public authority. Otherwise, the risks that the economic consequences of the pandemic—worsening the damages left by the euro-crisis—could cause an unbridgeable economic divergence within the Eurozone, potentially disintegrating it, pushed especially Germany to change its political position, opening the door towards greater financial solidarity.<sup>99</sup> Finally, the humanitarian toll caused by COVID-19—emblematically pictured in the piles of coffins in Bergamo, Italy in spring 2020—moved public opinion, even in the more austere Northern member states, on the need to create new instruments of mutual aid to face the pandemic.

Indeed, the political change of stance by Germany was essential to secure the approval of NGEU.<sup>100</sup> As Luuk van Middelaar has pointed out, ‘the Federal Republic freed itself from a certain hypocrisy that accompanied its European leadership until recently. The political leadership frankly admitted that aid for the South was partly a matter of self-interest, of export markets and economic stability’.<sup>101</sup> At the same time, the change of approach in Germany was also complemented by a broader power realignment within the EU resulting from Brexit, the United Kingdom (UK) decision to leave the EU.<sup>102</sup> The UK had traditionally been hostile to greater EU fiscal integration, and given its size had been able to represent successfully a view shared across smaller Northern European member states. With the UK out, Northern EU countries had less clout to resist against the Commission’s recovery plan, which was jointly backed by France and Germany, and the large Southern member states. As such, it has been argued that NGEU is also a dividend of Brexit, as the UK withdrawal from the EU removed a veto player who would most certainly have opposed such a dramatic transfer of spending and taxing power from the national to the supranational level.<sup>103</sup> Be that as it may, the EU managed in 2020–2021 to make a big leap forward with the establishment of NGEU.

<sup>98</sup> See K Dyson, *States, Debt and Power: ‘Saints’ and ‘Sinner’ in European History and Integration* (Oxford University Press, 2014).

<sup>99</sup> See French-German Initiative for a European Recovery from the Coronavirus Crisis, 18 May 2020.

<sup>100</sup> See D Howarth and J Shield, ‘Nein To “Transfer Union”’: The German Break on the Construction of a European Union Fiscal Capacity’ (2021) 43 *Journal of European Integration* 211.

<sup>101</sup> L van Middelaar, *Pandemonium* (Agenda Publishing 2021), 126.

<sup>102</sup> See U Puetter, ‘Brexit and EU Institutional Balance’ in F Fabbrini (ed), *The Law & Politics of Brexit* (Oxford University Press 2017), 247.

<sup>103</sup> See ‘The EU’s Recovery Fund is a Benefit of Brexit’, *The Economist* (30 May 2020).

With that said, NGEU still sets precise conditions on the use of EU funds. It is wrong, therefore, to suggest that in NGEU ‘conditionality, in the traditional sense, does not exist’.<sup>104</sup> Indeed, as underlined in Section II.B, the RFF creates a pervasive web of rules and controls, which impose on the member states precise targets, specific objectives, and timely milestones as a condition to receive EU money. Moreover, as explained in Section II.C, this is now also complemented by rule of law conditionality. Yet, this is in line with what also happens in other federal systems worldwide, where the financial intervention of central authorities to support federated states is always conditioned on the respect for several pre-defined criteria.<sup>105</sup> For instance, it suffices to mention here the case of the United States (US). The federal act sponsored by President Joe Biden to rescue the US economy and rebuild it in response to the COVID-19 pandemic—the American Rescue Plan Act of 2021<sup>106</sup>—established among others an ad hoc fund worth 350bn dollars (ie just below roughly half the value of NGEU) to support states and local authorities: the so-called ‘Coronavirus State and Local Fiscal Recovery Fund’. As clarified by the US Department of the Treasury, however, these funds were subject to a stringent set of conditions.<sup>107</sup> In particular, the states and local authorities receiving federal money have to spend the resources for specific objectives—including fighting the pandemic and supporting families and businesses struggling with its public health and economic impacts, and maintaining vital public services, even amid declines in revenue resulting from the crisis—and are subject to clear reporting and accounting duties.

#### IV. CONCLUSION

This article has examined the legal structure and constitutional consequences of NGEU. As the article explained, NGEU is built on a complex legal constellation, including the EURI and the RFF, which are empowered by the ORD, and connected to the MFF, and the IIA on new own resources. Yet, despite being based on the current EU Treaty framework, NGEU has profound constitutional consequences for EMU. As this article pointed out, NGEU creates novel arrangements in the EU architecture of economic governance. It contributes to correct the original asymmetry of EMU. And it makes the EU more akin to a federal regime, in which the central government has a fiscal capacity to stabilise the economy and support member states in fiscal crisis. Needless to say, NGEU still requires commitments from the member states, which must respect precise milestones and targets to receive EU money. In the new EU post-pandemic system of economic governance, therefore, solidarity

<sup>104</sup> P Leino-Sandberg and M Ruffert, ‘Next Generation EU and its Constitutional Ramifications’ (2022) 59(2) *Common Market Law Review* 433, 437.

<sup>105</sup> See S Yilmaz and F Zahir (eds), *Intergovernmental Transfers in Federations* (Elgar Publishing, 2020).

<sup>106</sup> American Rescue Plan Act 2021, Public Law No: 117-2.

<sup>107</sup> See US Department of the Treasury, ‘Coronavirus State and Local Fiscal Recovery Funds’, Interim Final Rule, 10 May 2021, RIN 1505-AC77.

and responsibility continue to go hand in hand, as it happens in mature federal systems. In fact, a key development to monitor in the future will be the ability of member states to implement successfully their NRRP.<sup>108</sup>

Yet, NGEU constitutes a paradigm change in the functioning of EMU, with long-term consequences for the future of the EU. As Europe and the world were slowly re-emerging from the pandemic in Spring 2022, a new unprecedented crisis has erupted: namely the war in Ukraine, caused by Russia's military aggression. The return of the war on the European continent has shocked the EU, and exposed its weaknesses in the fields of defence, energy, and food policy. Nevertheless, in this context, NGEU has been looked at as a template that the EU could use again, to address new financial urgencies such as the need to increase military expenditures and to cushion the economic consequences of transitioning away from Russian oil and gas.<sup>109</sup> In fact, speaking before the EP on 3 May 2022, Italian Prime Minister Mario Draghi stressed how: 'With regard to long-term investments in areas such as defence, energy and food and industrial security, the [NGEU] programme is the model to be used. The system of scheduled payments, linked to specific checks into whether milestones and targets have been reached, offers a virtuous mechanism to ensure quality spending'.<sup>110</sup> As this article has pointed out, NGEU rests on solid legal foundations, but projects the EU towards the future, strengthening its federalisation process.

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<sup>108</sup> See further Fabbrini, note 4 above, especially ch 6 which examines the Italian NRRP—by far the most relevant among all EU member states, as Italy alone receives almost one third of the total NGEU financial envelope.

<sup>109</sup> See further F Fabbrini, 'The Future of the EU beyond the War in Ukraine', in A Cygan and A Lazowski (eds), *Research Handbook on Legal Aspects of Brexit* (Elgar Publishing, 2020), 524.

<sup>110</sup> M Draghi, address at the EP, 3 May 2022, <https://www.governo.it/en/articolo/prime-minister-mario-draghi-s-address-european-parliament/19748>.