

SYMPOSIUM ON NEXT GENERATION EU, CRISIS BUDGETING, AND THE
EMPOWERMENT OF SUPRANATIONAL INSTITUTIONS

NEXTGENERATIONEU AND THE FUTURE OF EUROPEAN INTEGRATION:
FORESEEING THE UNFORESEEABLE

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Public revenues, who decides on them, and their justification and legitimation are among the oldest constitutional issues of all. In the EU, member states ultimately control the scope of European policy and the independence of the European level via the EU's budget. This can be interpreted either as a bug or as a feature. The European Parliament reflects representation without taxation, as it has no taxation powers, and the EU does not have budgetary autonomy.

With the sovereign debt crisis in the euro zone as of May 2010, the debate on EU finances reached a new level. The dominant paradigms throughout that crisis remained the individual responsibility of member states for their own finances, enshrined in the Treaty on the Functioning of the European Union (TFEU) Article 125 and its no-bailout-clause; market discipline; strict conditionality for financial assistance organized outside the treaties (by means of the European Stability Mechanism); and no transfer union in the sense of permanent fiscal transfers between member states.¹ Suggestions such as the introduction of "Eurobonds" issued jointly by the euro zone member states never materialized due to a lack of political support. Only under the pressure of an unprecedented pandemic did a new dynamic emerge, which ultimately led to NextGenerationEU (NGEU).

Whether NGEU was a singularity, related to a worldwide pandemic, or rather a blueprint for the future financial architecture of the EU is still subject to debate. In view of the enormous financial challenges associated with the future development of European integration, the debate on EU funding will not go away.

This essay argues that with NGEU, there is a precedent of how to generate funds by means of borrowing. Under the current legal framework this approach remains exceptional. Nevertheless, it has already amplified reform pressure on Poland and Hungary, while also helping Ukraine.

Dealing with the Economic Fallout of the Pandemic

NGEU was about the EU taking economic and structural policy action in the midst of a global pandemic by financing investment programs for the member states, with EU funds.²

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¹ See Alicia Hinarejos, *Legacy and Limits of NGEU*, 118 AJIL UNBOUND 157 (2024) (comparing the response to the 2009 Euro crisis with the pandemic response).

² See *Opinion of the Council Legal Service, Conclusions on Next Generation EU*, June 24, 2020, Council Doc. 9062/20, para. 139 et seq.

NGEU was based on a joint initiative of German Chancellor Merkel and French President Macron.³ The political agreement⁴ was implemented with a Council Decision modifying the system of own resources of the EU in December 2020⁵ and a new Multiannual Financial Framework (MFF 2021–2027). The new Own Resources Decision (ORD) was ratified in all member states in 2021.

The Commission was authorized to raise funds of up to €750 billion on behalf of the Union on the capital markets.⁶ The funds generated were to be used as grants and loans to the member states, but only to deal with the consequences of the COVID-19 crisis. The funds raised to finance grants will be repaid from the EU budget by 2058.⁷

Unprecedented Complexity

The raising of and the repayment of capital are based on TFEU Article 311 and thus on the ORD, while the utilization of capital is based on TFEU Article 122. Using TFEU Article 311 with the requirement of a ratification by all member states constituted a sovereignty-preserving procedure and enhanced the legitimacy of the project, but also the potential for blockades and blackmail.⁸ NGEU resources are not to be raised as literal own resources of the EU and are not to be used to finance its general budget.⁹

In December 2020, a “recovery instrument” was created based on TFEU Article 122.¹⁰ Note that TFEU Article 122 only authorizes financial assistance if a member state is experiencing difficulties or is seriously threatened by serious difficulties as a result of a crisis situation, such as a natural disaster or an exceptional occurrence beyond its control. Obviously the pandemic was such a crisis.

The recovery instrument was financed on the basis of the ORD up to an amount of €750 billion. The use of most of the funds (€672.5 billion)¹¹ was more closely defined by the Recovery and Resilience Facility (RRF) of February 2021.¹²

To receive support, member states had to submit national Recovery and Resilience Plans (RRPs) with reform and investment projects by April 2021. Six policy areas of European scope had to be covered: green transition;

³ German Federal Government Press Release, [Franco-German Initiative for Europe's Economic Recovery After the Corona Crisis](#), 173/2020 (May 18, 2020); see also [Communication from the Commission, Europe's Moment: Repair and Prepare for the Next Generation](#), COM (2020) 456 final (May 27, 2020); [Communication from the Commission: The EU Budget Powering the Recovery Plan for Europe](#), COM (2020) 442 final (May 27, 2020); [Proposal for a Regulation of the European Parliament and of the Council Establishing a Recovery and Resilience Facility](#), COM (2020) 408 final (May 28, 2020).

⁴ [Special Meeting of the European Council \(July 17, 18, 19, 20, & 21 2020\) – Conclusions](#), July 21, 2020, EUCO 10/20.

⁵ [Council Decision 2020/2053 of Dec. 14, 2020 on the System of Own Resources of the European Union and Repealing Decision 2014/335/EU](#), Euratom, 2020 OJ (L 424) 1 (EU, Euratom).

⁶ *Id.* Art. 5.

⁷ *Id.* Art. 5(2).

⁸ Reference the [resistance of Poland and Hungary in December 2020](#), after they tried to link approval of NGEU to blocking the conditionality regulation, which aims at rule of law deficits in member states. [Regulation 2020/2092 of the European Parliament and of the Council of Dec. 16, 2020, On a General Regime of Conditionality for the Protection of the Union Budget](#), 2020 OJ (L 433) 1 (EU, Euratom).

⁹ The technical category is “other revenue.” [Consolidated Version of the Treaty on the Functioning of the European Union](#), Art. 311(2), 2012 OJ (C 326) 47.

¹⁰ [Council Regulation 2020/2094 of Dec. 14, 2020 Establishing a European Union Recovery Instrument to Support the Recovery in the Aftermath of the COVID-19 Crisis](#), 2020 OJ (L 433) 23 (EU).

¹¹ €77.55 billion were channeled through existing EU programs.

¹² [Regulation 2021/241 of the European Parliament and of the Council of Feb. 12, 2021, Establishing the Recovery and Resilience Facility](#), 2021 OJ (L 57) 17 (EU) [hereinafter RRF].

digital transformation; smart, sustainable, and inclusive growth and jobs; social and territorial cohesion; health and resilience; and measures for the next generation, children, and young people, including for education and skills. It is true that a causal link with the pandemic was not really obvious for all these topics. Following an assessment by the European Commission, the Council decided whether to approve each respective RRP. The disbursement of funds was linked to the achievement of the agreed milestones and targets.

Different Readings of NGEU

From the beginning, NGEU was interpreted in completely different ways. The most far-reaching interpretation brought it close to a “Hamiltonian moment,” an assumption of debt by the federal government that was regarded as decisive for American federalism.¹³ The opposing position criticized this reference, warned against a transfer union, and disputed NGEU’s legality,¹⁴ usually repeating standard arguments from the Eurozone crisis.

It is true that NGEU was without precedent in the EU, but this does not necessarily mean a qualitative shift toward federal statehood. There was no Hamiltonian or constitutional moment.¹⁵ The core of the measures remains largely a national responsibility because the member states decide on their respective RRP, within the framework of EU guidelines.

Although the authorization to raise funds with bonds issued by the EU Commission in the financial markets on behalf of the EU caused a considerable stir, the European financial architecture was not reorganized. Borrowing was clearly limited by the new ORD in terms of its amount, project duration, and purpose. At its core, NGEU is a strictly earmarked and therefore limited recovery program. Awarding grants to member states is not in conflict with the no-bail-out rule in TFEU Article 125, as TFEU Article 122 is an in-built exception to the no bail-out-rule, which remains the dominant paradigm. TFEU Articles 311 and 122 constitute a sound legal basis. Establishing NGEU within the existing legal framework proves that the potential of the European treaties is far from exhausted.

A New Purpose: NGEU and the Rule of Law Crisis

As of 2022, a completely new dimension of impact for NGEU emerged, in the context of the rule of law crisis in the EU. The rule of law is a value on which the EU is founded (Treaty on European Union (TEU) Article 2). Respecting it is a pre-condition to accession. Poland and Hungary are the most prominent examples of member states that backslid here. Mechanisms to react to this exist, ranging from TEU Article 7, to an involvement of the Court of Justice of the EU (CJEU), and more recently, tools that include a conditionality mechanism and horizontal enabling clauses.

The one instrument that has turned out to be the most effective though, was withholding NGEU funds. Their release was made conditional upon compliance with rule of law milestones in the RRP which forced Member States with rule of law deficits to react. Arguably this was effective because of the scale of the funds; for [Poland](#), the dimension was €40–60 billion. This is a completely different dimension compared to a fine imposed by the [CJEU](#) of up to €1 million per day.

The irony here is that the most effective tool was only available because of the pandemic and that it was never (openly) designed as an instrument to enforce the rule of law in the member states. The lesson that needs to be

¹³ Cf. [Interview by Peter Dausend and Mark Schiertz with \(then\) German Federal Finance Minister, Olaf Scholz, *Jemand muss vorangehen* \[Someone has to lead the way\]](#), DIE ZEIT No. 22/2020 (May 5, 2020).

¹⁴ See German economist, Hans-Werner Sinn, [Der-Hamilton Moment](#), FAZ (May 22, 2020).

¹⁵ See Maria Antonia Panasci, [Unravelling Next Generation EU as a Transformative Moment: from Market Integration to Redistribution](#), 61 COMMON MKT. L. REV. 13, 15 (2024).

taken from this: all future EU funds should be designed with the same level of conditionality. The Commission should have the power to withhold the approval of EU funds if rule of law standards in a member state are not met.¹⁶

The Return of NGEU?

After the pandemic, the EU faces even bigger challenges.¹⁷ Russia's brutal invasion of Ukraine, the weakening of a rule-based international order and transnational challenges such as climate change, security threats, and food and health crises have shattered the certainties on which the EU was built. With Russia's attack of Ukraine, enlargement is back on the agenda for up to ten new member states. Neither EU institutions nor decision-making mechanisms were designed for this size. The EU must reconsider its geography, institutions, competences, and funding. Even for the EU27, the current design makes it difficult to manage crises effectively and take strategic decisions. Even without enlargement, funding is among the largest EU internal political challenges. In addition, the debt issued under NGEU will need to be repaid.

Against this background, another debate on how to equip the EU with the financial means to react quickly to changing economic circumstances appears inevitable. Suggestions include modifying the governance and the negotiation process of the EU budget (more supermajority voting instead of unanimity) or the creation of truly new own resources for the EU budget. The enlargement process, greater security and defense needs, and the energy and climate transition are all expected to profoundly impact the EU budget. There is an assessment that the EU budget must grow in order to avoid a sharp reduction in EU spending. There is also a scenario of EU enlargement failing if there is no consensus on how to generate sufficient funding.

This is where the NGEU experience may play a role. NGEU is, so far, considered successful.¹⁸ But this may simply be because member states could use EU funds for domestic policy projects that would have taken place anyway. Although it is difficult to assess whether there would have always been a corresponding demand on the financial markets, enabling the EU to issue common debt in the future is part of the debate on reform. At the same time, the limits of the current legal framework can hardly be argued away.

The German Constitutional Court, after an interim decision in April 2021,¹⁹ let NGEU pass in December 2022.²⁰ But the Court insisted on limits to the NGEU approach. According to the Court, the overall financial burden imposed on German citizens needs to be decided upon by the German Parliament, as a matter of democracy. It would violate the principle of democracy if the type and level of public spending were, to a significant extent, determined at the supranational level.²¹ No permanent mechanisms may be created that would essentially entail an assumption of liability for decisions taken by other states, intergovernmental institutions, or international organizations.²² Without a treaty amendment, it would not be possible to recognize borrowing as a permanent source of financing for the EU.²³ At the same time, the Court concedes that the treaties themselves do not

¹⁶ Suggested in the report by the Franco-German Working Group on EU institutional reform, [SAILING ON HIGH SEAS – REFORMING AND ENLARGING THE EU FOR THE 21ST CENTURY 17 \(2023\)](#). For reasons of transparency, I stress that I was part of that Working Group.

¹⁷ For the following reflection, I draw on our report, [id.](#) at 11.

¹⁸ See Géraldine Mahieu, Paul Brans & Daniel Schulz, [The Recovery and Resilience Facility Under Next Generation EU: A Breakthrough in Economic Policy Coordination and Policy Programming](#), 118 *AJIL UNBOUND* 144 (2024).

¹⁹ BVerfG, [2 BvR 547/21](#), April 15, 2021. For reasons of transparency I stress that I was counsel to the German Parliament in this case.

²⁰ BVerfG, [2 BvR 547/21](#), [2 BvR 798/21](#), Dec. 6, 2022.

²¹ [Id.](#), Rec. 134.

²² [Id.](#), Rec. 135.

²³ [Id.](#), Rec. 152

expressly set out an absolute prohibition on borrowing.²⁴ For the Court, the ORD itself contains a (sufficient) authorization to borrow on the capital markets as a form of “other revenue,” to be used for specific purposes.²⁵

The Court establishes the following conditions for EU borrowing on capital markets:²⁶ the borrowing must be subject to limits as to both the duration and the amount of the commitments assumed; the amount of “other revenue” must not exceed the total amount of own resources. And the borrowed funds must be used exclusively for tasks for which the European Union has competences; for NGEU, that was addressing severe difficulties within the scope of TFEU Article 122. As to the prerequisites of TFEU Article 122, the Court is willing to grant a wide margin of appreciation and assessment to the Council and the Commission.²⁷

This is no *carte blanche*, though. Leeway made sense here because in the member states, the economic consequences of the pandemic differed considerably. But TFEU Article 122 has its limits, as it requires genuine and present emergency situations. In a domestic case, in November 2023, the German Constitutional Court blocked a government plan to use parts of the federal budget related to an emergency clause similar to TFEU Article 122, indicating that emergency exceptions must remain exceptions. The Court made a reference to TFEU Article 122 in that context,²⁸ clearly indicating a will to patrol the use of TFEU Article 122.

Considering the obstacles to simply copy-pasting the NGEU approach in the future, the question of treaty change arises. As far as amending TFEU Article 122, the debate focuses on including the European Parliament in the decision making on measures to address emergencies or crises. As this would enhance democracy, such a treaty amendment probably would not be difficult to achieve. At the same time, emergency measures are typically the realm of the executive power. Parliaments are not designed for taking quick and urgent measures.

On the other hand, a more comprehensive approach aiming at treaty change that would make it easier for the EU to issue common debt would be highly controversial not only in political, but also in legal terms. Loosening the conditions would make this a target for domestic constitutional law challenges, at least in Germany. There, the focus on austerity and financial stability has become a domestic constitutional law imperative. It is hard to imagine how to overcome these constitutional law obstacles, as part of the constitutional law arguments can only be defused with a new German constitution. Arguably it is the tight domestic constraints for borrowing that may ultimately encourage Germans to turn to EU borrowing again, although this connection is not openly made in domestic debates.

All in all, NGEU appears to be neither a solitary event nor a true blueprint. It may serve as an inspiration for creative solutions in the future. In legal terms, NGEU has shown that the treaties as a “living constitution”²⁹ contain far-reaching competences for generating solutions at the European level if the political will is there. In political terms, it was proof of the power of political will and a deliberate choice for unity in the EU, as French President Macron put it in his second Sorbonne speech in April 2024.³⁰ Whether to emphasize political will or legal framework may be one of the differences between France and Germany.

Taking lessons from NGEU is probably best captured in the idea of foreseeing the unforeseeable. For the time being, borrowing at a large scale will not become simply a standard mode of funding the EU, but in the sense of a regular exception, the EU can prepare tools and mechanisms to be ready for the next emergency.

²⁴ *Id.*, Rec. 155.

²⁵ *Id.*, Rec. 162.

²⁶ *Id.*, Headnote 2.

²⁷ *Id.*, Rec. 183.

²⁸ BVerfG, [2 BvF 1/22](#), Nov. 15, 2023, Rec. 109.

²⁹ Alberto de Gregorio Merino, *The EU Treaties as a Living Constitution of the Union in Times of Crisis*, 118 AJIL UNBOUND 162 (2024).

³⁰ Emmanuel Macron, President of France, [Discours sur l'Europe at the Sorbonne](#) (Apr. 25, 2024).