

Combating the COVID-19 Crisis within the European Union: A Critical Assessment of the 'Next Generation EU' in the Context of the Budgetary Balance



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ARTICLE

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ABSTRACT

The paper contains a critical analysis of the new system of own resources of the European Union, established to address the consequences of the COVID-19 crisis. Analysis is mainly from the perspective of the balanced budget rule. Under Council Decision 2020/2053 of 14 December 2020, the Commission is to be, inter alia, empowered to borrow an unprecedentedly huge amount of funds on capital markets on behalf of the EU. This means that, for the first time in history, common budgetary commitments on the part of the EU will be on such a scale that repayment will be spread over many years and will be charged to future generations of EU citizens (known as the 'Next Generation EU' programme). The research aims to compare these innovations with the long-term financial policy of the EU, as a result of the provisions of the Treaty on the Functioning of the European Union and the Fiscal Compact. It also elaborates on the limits of societal debt issued by their representatives who form public authorities.

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The COVID-19 pandemic has affected almost every country in the world and led to radical changes in national and international economic policies. It has also caused enormous economic suffering in EU Member States.¹ Due to the extensive protective measures imposed by authorities, national economies have faced the most severe recessions in modern history.² In the wake of the crisis, the EU has decided to strengthen its sufficiency in terms of financial capacity in the event of economic shocks. To ensure an effective response to the economic downturn caused by the coronavirus outbreak, a number of new instruments have been introduced at the EU level.

At the end of 2020, the EU institutions and particular Member States reached a political agreement on a fiscal package containing a reinforced long-term EU budget for the years 2021 to 2027, as well as on the new recovery plan called 'Next Generation EU' (hereinafter: NGEU). The package raises money by temporarily lifting the maximum amount that the EU can request from Member States to cover its financial obligations. This allows the Commission to use its strong credit rating to borrow EUR 750 billion on financial markets. Additional funding will be repaid over a long period of time through future EU budgets between 2028 and 2058.

NGEU will provide the EU with the necessary means to attain its objectives. Financial resources on an exceptional and unprecedented scale are intended to address the economic consequences of the COVID-19 crisis without increasing the pressure on the finances of Member States at a moment when their budgets are already under enormous pressure to finance national economic and social measures in relation to the crisis. Under NGEU, the EU is planning to issue a debt to be spent during the next few years as recovery grants and loans, mostly under environmental, agricultural and cohesion policies.

This considerable support package aims at mobilising investment and frontload financial support in the first years of recovery. This way, it will contribute to the rapid development of the common economy. At the same time, it establishes another (apart from the existing European Structural and Investment Funds) instrument for increasing the public debt in commercial banks. This time, however, it bypasses the existing constitutional barriers.

The present article contains a critical analysis of the new financial system of the EU, introduced by the Own Resources Decision,³ from the point of view of the balanced budget rule. The core regulation of the Own Resources Decision is the empowerment of the Commission to borrow funds on capital markets on behalf of the EU, whose repayment will be spread over many years and will be charged to future generations of EU citizens. Although borrowing money on the markets to provide assistance is nothing new to the EU,⁴ the volume and probable permanence of such borrowing is certainly historic. Moreover, never before has recourse been had to borrowing for spending in such large amounts.

The research aims to examine in depth the ongoing changes and then juxtapose them with the long-term financial policy of the EU, resulting from the provisions of the TFEU and the Fiscal Compact, and to elaborate on the limits of societal debt issued by their representatives who form public authorities. The economic downturn caused by the COVID-19 crisis has revealed an urgent need to conduct in-depth legal research on structures and mechanisms that guarantee financial stability and constitute concrete barriers to actions undertaken by those in power.

¹ See eg 'Real GDP Growth Rates – volume' (Eurostat Database, TEC00115) <<https://ec.europa.eu/eurostat/databrowser/view/tec00115/default/table?lang=en>> accessed 8 March 2022.

² See S Russack (ed), *EU Crisis Response in Tackling Covid-19. Views from the Member States* (European Policy Institutes Network 2020).

³ 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 [2020] OJ L424/1.

⁴ See B de Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 *Common Market Law Review* 635, 647–648.

2.1. BACKGROUND

The European Council of 17–21 July 2020 reached an agreement on the new Multiannual Financial Framework covering the years 2021 to 2027, which was finally confirmed on 10 December 2020.⁵ Until the agreement was reached, there had been several political discussions during negotiations.⁶ The negotiation of the EU long-term budget is a fairly standard procedure opened by the Commission and has become routine, taking place every seven years within the EU.⁷

One element of the achieved compromise is an update of the Commission's initial proposal for a decision on the system of own resources of the EU, which regulates the financing of the EU budget.⁸ While discussion on reforming the system of own resources commenced many years ago, the system has not fundamentally changed since 1988. This comes as a result of its stagnation and the so-called path dependency, which are hallmarks of EU public finance law.⁹

Following the negotiations in the framework of the Working Party on Own Resources (WPOR) and the Committee of Permanent Representatives (COREPER II), the Economic and Financial Affairs Council (ECOFIN) adopted, in a simple written procedure ending on 14 December 2020, the final Own Resources Decision. It was a turning point in the reform of the EU financial system, especially considering the size of the new long-term budget perspective.¹⁰

2.2. NEW CATEGORIES OF OWN RESOURCES

The Own Resources Decision governs the collection of revenue for the EU budget from the beginning of 2021. At a structural level, it establishes a completely new system of own resources and, therefore, substantially modifies the existing way of financing the EU budget. The past system of own resources has been in place since 1988, with only minor variations.¹¹ In the medium term, the Decision is aimed at a conceptual readjustment of the entire system of own resources and a meaningful change in the way that EU actions are financed.¹²

First of all, the Own Resources Decision modifies the rules for calculating almost all categories of own resources, except for the Gross National Income (GNI)-based contributions of Member States, which are, nonetheless, to be successively reduced in this way. As foreseen therein, the new financing mode would better align the EU financing instruments with its policy priorities and more clearly reflect the role of the budget in the functioning of the single market, as well as facilitate the objectives of EU policies.¹³

Furthermore, alongside the 'traditional' own resources (consisting of customs duties, agricultural duties and sugar levies), the VAT- and GNI-based own resources as well as other minor ones, the

⁵ U Krotz and L Schramm, 'Embedded Bilateralism, Integration Theory, and European Crisis Politics: France, Germany, and the Birth of the EU Corona Recovery Fund' (2022) 60 *Journal of Common Market Studies* 526.

⁶ See, among others, Z Truchlewski, W Schelkle and J Ganderson, 'Buying Time for Democracies? European Union Emergency Politics in the Time of Covid-19' (2021) 44 *West European Politics* 1353 <<https://doi.org/10.1080/01402382.2021.1916723>>; W Schelkle, 'Fiscal Integration in an Experimental Union: How Path-Breaking Was the E's Response to the COVID-19 Pandemic?' (2021) 59 *Journal of Common Market Studies* 44 <<https://doi.org/10.1111/jcms.13246>>; de Witte (n 4) 638–644.

⁷ See R Kaiser and H Prange-Gstühl, *The European Union Budget in Times of Crises* (Nomos 2019) 11 <<https://doi.org/10.5771/9783845298115>>.

⁸ See eg B Busch, *Die Finanzierung der EU nach 2020: Zeit für Reformen* (Institut der deutschen Wirtschaft 2018).

⁹ Kaiser and Prange-Gstühl (n 7) 27–42.

¹⁰ See B Laffan and A De Feo (eds), *EU Financing for Next Decade. Beyond the MFF 2021–2027 and the Next Generation EU* (European University Institute 2020); P Dermine and M Markakis, 'EU Economic Governance and the COVID-19 Crisis: Between Path-Dependency and Paradigmatic Shift' (2020) 6 *International Journal of Public Law and Policy* 326 <<https://doi.org/10.1504/IJPLAP.2020.114808>>.

¹¹ See R Crowe, 'An EU Budget of States and Citizens' (2020) 26 *European Law Journal* 331, 333–336 <<https://doi.org/10.1017/S1574019617000219>>.

¹² C Waldhoff in C Colliees and M Ruffert (eds), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar* (C.H. Beck 2022) 2523.

¹³ See the fourth and the sixth recital of the Own Resources Decision.

Own Resources Decision anticipates, inter alia, a new category of own resources within the EU budget. This category consists of own resources linked to EU policies, including environmental taxes related to the EU Emissions Trading System and plastic packaging waste. Thus far, only the plastic packaging waste system has been established. It includes national contributions on the basis of the quantity of non-recycled plastic packaging waste generated in each Member State, with a uniform call rate of EUR 0.80 per kilogram.¹⁴ The rest is to be introduced according to the roadmap proposed in the new budgetary interinstitutional agreement.¹⁵

The Own Resources Decision states that the Commission would put forward proposals on a carbon border adjustment mechanism and on a digital levy, with a view to their introduction at the latest by 1 January 2023 (still not introduced). Additionally, it is forecast that a revised proposal on the EU Emissions Trading System might be extended to aviation and maritime sectors. The EU will also work towards the introduction of other own resources, which may include a Financial Transaction Tax.¹⁶ It must be mentioned here that, in light of the Treaty regulations in force, the introduction of taxes as a new element of own resources is highly unlikely to occur.¹⁷

On 22 December 2021, the Commission submitted a proposal concerning the introduction of three completely new sources of revenue: the first based on revenue from the EU Emissions Trading System, the second drawing on the resources generated by the proposed EU carbon border adjustment mechanism, and the third based on the share of residual profits from multinationals that are to be re-allocated to EU Member States.¹⁸ The Commission estimates the total new revenue for the EU stemming from these three new resources at between EUR 12 and 13.5 billion annually, which would not entirely cover the annual repayments due by the EU under its NGEU debts, but still could make an important contribution to those repayments.

2.3. 'NEXT GENERATION EU'

2.3.1. Function

In light of the COVID-19 pandemic and the economic situation caused by restrictions introduced in particular Member States, the Own Resources Decision has been supplemented with regulations that provide the EU with additional resources.¹⁹ A broad scope of the legislative package has been negotiated that will enable Member States to face the existing circumstances. For this reason, the Commission has been authorised, on an exceptional and temporary basis, to borrow on behalf of the EU up to EUR 750 billion (in 2018 prices) on capital markets.

The sum is immense and will increase the financial capacity of the EU by about 70%. Funds on such a scale have never been spent in the EU in a single budget year or in any programme.²⁰ However, despite the fact that the sum is anchored in the Own Resources Decision and in this way is connected to it, it is not integrated in the budgetary own resources, which are to finance the Multiannual Financial Framework. This specific mechanism is, instead, a part of extraordinary and temporary additional means to address the consequences of the COVID-19

¹⁴ See Article 2(1)(c) of the Own Resources Decision. See also the seventh recital of the Decision.

¹⁵ See Annex II to the 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 L 433I/28.

¹⁶ See the eighth recital of the Own Resources Decision.

¹⁷ cf U Häde in M Pechstein, C Nowak and U Häde (eds), *Frankfurter Kommentar zu EUV, GRC und AEUV*, vol 4 (Mohr Siebeck 2017) 1199–1204; Waldhoff (n 12) 2527.

¹⁸ See press release: 'The Commission proposes the next generation of EU own resources' (*European Commission*, 22 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7025> accessed 16 March 2022.

¹⁹ See especially Article 5 of the Own Resources Decision.

²⁰ See F Schorkopf, 'Die Europäische Union auf dem Weg zur Fiskalunion. Integrationsfortschritt durch den Rechtsrahmen des Sonderhaushalts „Next Generation EU“' (2020) 73 *Neue Juristische Wochenschrift* 3085, 3085–3086.

crisis through the EU Recovery Instrument Regulation.²¹ The legal basis should be Article 122 TFEU, without differentiating between the two paragraphs of this Article.²²

The funds are to be allocated via the EU Recovery Instrument to finance particular policy programmes. They will be used for providing loans to EU Member States in the back-to-back-lending system (up to EUR 360 billion) and for non-repayable support expenditure from the EU budget (up to EUR 390 billion). This pandemic-related support package, namely NGEU, is aimed to be an exceptional response to the consequences of the COVID-19 crisis and make it possible to avoid its re-emergence.²³ The interposition of an ‘emergency instrument’ is intended to symbolise its exceptional character for both the public and private sector. In addition, it later allows for a flexible reallocation of funds between the various facilities in the event that political priorities shift or operational difficulties arise.

In fact, the funds within the EU Recovery Instrument do not serve the reconstruction of broken-down economic structures, since the distribution does not exclusively or primarily focus on the losses that EU Member States have suffered as a result of the pandemic. Other factors, such as unemployment or economic prosperity before the outbreak of the COVID-19 crisis, are of higher importance. Even before the pandemic emerged, it had been expected that the Multiannual Financial Framework for the post-2020 period would become ‘the key operational tool providing financial means to meet challenges and to achieve the objectives’.²⁴

The real allocation objective of NGEU is the promotion of the future restructuring of Member States’ economies, increasing their growth potential and incentivizing certain long-term ecological and digital transformations. According to the Council’s assumptions, the programme will contribute to improving the resilience, growth potential and adjustment capacity of Member States. It would mitigate the social and economic impact of the crisis, support the green transition towards achieving the most recent EU 2030 climate targets and comply with the objective of EU climate neutrality by 2050 and the digital transition. This would, in turn, contribute to the upward economic and social convergence, restoring and promoting sustainable growth and the integration of the economies of the EU and fostering employment opportunities.²⁵

These purposes, which evidently transcend the immediate pandemic crisis, are, however, unlikely to have proper legal grounding in the context of Article 122 TFEU.²⁶ Article 122 is conceived as a mere crisis instrument that can be used only to support countries facing exceptional circumstances, whereas the pandemic damage was solely the reason why NGEU was established, and not the object of the assistance. The package does not respond to calls for bolder actions in the realm of public health (it does not directly provide for funds for the improvement of public health), nor does it offer an immediate relief from economic losses caused by the health emergency. It includes, instead, a myriad of long-term policy objectives, with emphasis on the green and digital transition.²⁷

Commentators have spotted that NGEU does not follow the logic of a well-targeted macroeconomic stabilising function. Although it aims to facilitate the EU fiscal union, it has

²¹ 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 [2020] OJ L433I/23.

²² Waldhoff (n 12) 2514; critically to the ‘EU-disaster-control-clause’ as a legal basis of the EU Recovery Instrument see M Ruffert, ‘Europarecht für die nächste Generation. Zum Projekt Next Generation EU’ (2020) 39 *Neue Zeitschrift für Verwaltungsrecht* 1777, 1778; D Meyer, ‘Next Generation EU – Neues Eigenmittelsystem weist in eine Fiskalunion’ (2021) 32 *Europäische Zeitschrift für Wirtschaftsrecht* 16, 19–20.

²³ W Wessels, L Schramm and T Kunstein, *The European Council as a Crisis Manager: The EU’s Fiscal Response to the COVID-19 Pandemic* (Nomos 2022); L Schramm and W Wessels, ‘The European Council as a Crisis Manager and Fusion Driver: Assessing the EU’s Fiscal Response to the COVID-19 Pandemic’ (2022) *Journal of European Integration* 1 <<https://doi.org/10.1080/07036337.2022.2111418>>.

²⁴ Kaiser and Prange-Gstöhl (n 7) 43.

²⁵ See the document: Council, 7 October 2020, 11538/20.

²⁶ M Nettesheim, ‘„Next Generation EU“: Die Transformation der EU-Finanzverfassung’ (2020) 145 *Archiv des öffentlichen Rechts* 381, 409–411 <<https://doi.org/10.1628/aoer-2020-0019>>; Schorkopf (n 20) 3088.

²⁷ cf de Witte (n 4) 653–655.

the nature of a transfer system with all its drawbacks.²⁸ From this point of view, NGEU may be characterised as a continuation and expansion of the old cohesion policy from rich to poor, and not as some kind of entry into the EU stabilisation policy. It disregards many crucial areas such as migration, defence and foreign affairs, so that it is claimed that it lacks a focus on policies with added value.²⁹

2.3.2. Legal concept

NGEU is based on the concept of two transfer streams.³⁰ On the one hand, there are vertical transfers between the EU and its Member States, mainly in the form of non-repayable support expenditure from the EU budget (which is just borrowing for spending), but also partly in the form of repayable loans (in the back-to-back lending system). On the other hand, the vertical component is supplemented by the horizontal one that consists of transfers between EU Member States. These transfers result from the fact that the distribution of funds from NGEU does not coincide with the responsibility for contributing to own resources, as stated in the Own Resources Decision. They are in fact the political heart of NGEU and make up its 'integrational' value.³¹

To enable the availability of adequate resources and the necessary volume of expenditure, the budget volume has been noticeably increased to 1.40% of the sum of all the Member States' GNIs, whereby own resources' ceiling (for appropriations for both payments and commitments) is to be raised by an additional 0.6 percentage points of the GNI of EU Member States by 2058 at the latest. The increase should be temporary and set to expire when all borrowed funds have been repaid and all contingent liabilities relating to loans provided on the basis of those funds have ceased.³² At the same time, available simulations show that an extra margin of own resource payments represents a large excess coverage that creates a repayment potential far above the magnitude needed to redeem the NGEU debt.³³

The majority of the funding should be provided in the immediate aftermath of the crisis, so that legal commitments of the programme financed by these additional resources should be made by 31 December 2023. Liabilities incurred by the empowerment of the Commission to borrow funds are to be managed in such a way that no new net borrowing takes place after 2026 and refinancing operations will only be allowed to ensure an efficient debt management. The funds are to be repaid via the EU budget from 2027 onwards, whilst the full repayment should terminate by 31 December 2058.³⁴

The Commission will issue securities on international capital markets by means of its diversified funding strategy. When implementing the operations, the Commission should make best use of the capacity of the markets so as to absorb the borrowing of such significant amounts of funds with different maturity dates, including short-term financing for the purpose of cash management and, at the same time, to ensure the most advantageous repayment conditions.³⁵ In fact, the Commission applies a borrowing strategy that covers the issuance of long-term bonds, green bonds and short-term bills sold by syndication and auctions, combined with

²⁸ F Heinemann, 'Der europäische Wiederaufbauplan „Next Generation EU“ – eine finanzwissenschaftliche Bewertung' (2020) 2 Jahrbuch für öffentliche Finanzen 29, 35–37.

²⁹ *ibid* 38–39.

³⁰ On the legal architecture of NGEU see also A de Gregorio Merino, 'The Recovery Plan: Solidarity and the Living Constitution' (2021) 50 EU Law Live 2, 3–5.

³¹ Nettesheim (n 26) 386.

³² See Article 3(1) and Article 6 of the Own Resources Decision. See also the sixteenth and the seventeenth recital of the Decision. For critical comments on these provisions see Nettesheim (n 26) 389–390; Hanno Kube and Frank Schorkopf, 'Strukturveränderung der Wirtschafts- und Währungsunion. Normativer Grund der Legitimation und Akzeptanz' (2021) 74 Neue Juristische Wochenschrift 1650, 1654.

³³ F Heinemann, 'Die Überdeckung der Next Generation EU-Schulden im neuen EU-Eigenmittelbeschluss: Ausmaß und Haftungskonsequenzen' (2021) 47 List Forum für Wirtschafts- und Finanzpolitik 133, 138–139 <<https://doi.org/10.1007/s41025-021-00234-3>>.

³⁴ See the fifteenth and the twentieth recital of the Own Resources Decision.

³⁵ See the eighteenth recital of the Own Resources Decision.

2.3.3. Borrowing operations

NGEU is nothing less than a fundamental transformation of the overall EU finance system. The debt financing of large EU programmes sets a new precedent, being a kind of novelty, as the recent EU budgets have been balanced.

The question whether to tap the fiscal potential of the EU for financing expenditure through loans has long been discussed, at least since the financial crisis of 2008. Although many Member States could not accept being charged for the fiscal policy of others,³⁷ the EU was borrowing money on the capital markets to provide special assistance through the European Financial Stabilisation Mechanism, the balance-of-payments facility, and the macro-financial assistance programme for third countries.³⁸

The idea of introducing EU bonds returned at the time of the COVID-19 crisis.³⁹ NGEU is by far the largest EU bond programme ever. It does not involve a direct joint and several liability of EU countries, nor a specific guarantee. The guarantee is, instead, the EU budget through a temporary 0.6 percentage points increase in the headroom. Due to the high payment credibility of the EU, EU bonds may receive a high rating (potentially higher than if the bonds were issued by individual countries),⁴⁰ which is then likely to translate into their low interest rates.⁴¹

The capital adequacy of the EU and the necessity to demonstrate it to capital market actors has been made a reason why the previously mentioned own resources ceiling is to be raised. It is criticised in the legal literature, as it only increases the potential scope for activity and thus does not serve as a sufficient guarantee of the fiscal capacity of the EU.⁴² However, a different argument can also be made. Namely, that the yearly increase of the ceiling works as a compartment which is exclusively allocated to the repayment of NGEU borrowings. As ‘a credible and solid asset (a definitive, irrevocable and enforceable commitment of payment by Member States)’ it will ensure the budget neutrality of the operation and hence guarantee that an operating deficit will not arise.⁴³

In spite of the fact that a direct external (horizontal) liability of EU Member States for the financial and economic conduct of other Member States is not provided for, in the internal relationship there is a legal obligation under Article 4(3) TEU in conjunction with Article 311(1) TFEU to enable the EU to repay the funds raised on the markets. Therefore, the Own Resources Decision contains special provisions for making own resources available to the Commission by Member States.⁴⁴

If the authorised appropriations entered in the budget are not sufficient for the EU to comply with obligations resulting from the borrowing, and the Commission cannot generate the necessary liquidity by activating other measures provided for by the financial arrangements applying to such borrowing in time to ensure compliance with the EU obligations, Member States, as the Commission’s last resort, will have to make the resources necessary for that purpose available to the Commission. If a Member State fails, even partly, to honour (on time) a call of the Commission to provisionally provide the difference between the overall assets

³⁶ A Schwarcz, ‘The Union’s revenue’ (*European Parliament*, December 2021) <<https://www.europarl.europa.eu/factsheets/en/sheet/27/the-union-s-revenue>> accessed 16 March 2022.

³⁷ See MK Brunnermeier, H James and J-P Landau, *The Euro and the Battle of Ideas* (Princeton University Press 2016) <<https://doi.org/10.1515/9781400883332>>.

³⁸ See eg de Witte (n 4) 648.

³⁹ See D Ehnts, ‘Europa als Haftungsunion – Europa scheitert an deutschen „Juristen“’ (*Verfassungsblog*, 18 April 2020) <<https://verfassungsblog.de/europa-als-haftungsunion-europa-scheitert-an-deutschen-juristen/>> accessed 14 April 2022.

⁴⁰ Heinemann (n 33) 144–145.

⁴¹ Nettesheim (n 26) 386.

⁴² *ibid* 389–391.

⁴³ de Gregorio Merino (n 30) 6.

⁴⁴ See Article 9 of the Own Resources Decision.

and the cash resource requirements to cover for the part corresponding to the Member State concerned, the Commission will provisionally have the right to make additional calls on the other Member States.

The actual management of funds is to be carried out partly in new facilities, ie EU4Health, InvestEU as well as (approximately as to 90%) Recovery and Resilience Facility,⁴⁵ and partly in existing facilities, eg European Fund for Strategic Investments (EFSI), European Regional Development Fund (ERDF), European Social Fund (ESF), Fund for European Aid to the Most Deprived (FEAD), here with the completely new package called Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU), or Neighbourhood, Development and International Cooperation Instrument – Global Europe (NDICI – Global Europe). The relevant changes are to be dealt with in the ordinary legislative procedure.

2.3.4. Consequences for the EU public finance system

Debt financing of current EU expenditure is supposed to have long-term consequences for the whole public finance system. Expanding the debt within the EU budget seems to be highly attractive and politically cost-effective to national governments as, for them, it is an almost perfect substitute for national debt financing.⁴⁶ Due to the adopted construction of NGEU, the debt of the EU is indifferent to the national deficit quotas for public budgets stipulated in the Stability and Growth Pact.⁴⁷ It may almost seem, though erroneously, like ‘money from heaven’.⁴⁸

Furthermore, requirements of the distribution of the resources are vague and the monitoring leaves EU Member States a broad margin of appreciation, so that the politicians may freely allocate expenses for selected purposes. It poses a danger that the spending will not be free of corruption and embezzlement, hence delegitimised if wasted. Even if the grants and loans were to be allocated in a sustainable and growth-promoting manner, NGEU lacks a clear strategy to ensure the funding achieves its goals and boosts inclusive, sustainable growth.⁴⁹

All these factors lead to some kind of ‘repoliticization’ of the EU budget and fiscal policy,⁵⁰ whilst political accountability is clearly needed. However, the fact that the EU institutions do not scrutinise the allocation of funds and thus do not micromanage national affairs (in contrast to programmes within the European Stability Mechanism) can be perceived as a positive aspect. At the same time, at the national level, many restrictions are imposed on an increase in public debt. This is, on the one hand, due to the binding rules of the Stability and Growth Pact that refer to the excessive deficit procedure. On the other hand, this is due to the ailing creditworthiness of particular Member States. In contrast, the scope for the EU budget is initially not limited.⁵¹

2.3.5. Prospects for the future

In the meantime, discussions are already underway about a kind of ‘stabilisation’ or ‘extension’ of NGEU financing model. It is unclear whether the ‘temporary’ increase of the own resources

⁴⁵ See Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17.

⁴⁶ See P Dermine, ‘The EU’s Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture’ (2020) 47 *Legal Issues of Economic Integration* 337, 338–341 <<https://doi.org/10.54648/leie2020020>>.

⁴⁷ See Resolution of the European Council of 17 June 1997 on the Stability and Growth Pact [1997] OJ C236/1; Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1; Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L 209/6.

⁴⁸ J Pisani-Ferry, ‘European Union recovery funds: strings attached, but not tied up in knots’ (*Bruegel*, 27 October 2020) <<https://www.bruegel.org/policy-brief/european-union-recovery-funds-strings-attached-not-tied-knots>> accessed 30 December 2022.

⁴⁹ cf eg GB Wolff, ‘Without good governance, the EU borrowing mechanism to boost the recovery could fail’ (*Bruegel*, 15 September 2020) <<https://www.bruegel.org/2020/09/without-good-governance-the-eu-borrowing-mechanism-to-boost-the-recovery-could-fail/>> accessed 28 April 2022; J Pisani-Ferry, ‘Europe’s recovery gamble’ (*Bruegel*, 25 September 2020) <<https://www.bruegel.org/2020/09/europes-recovery-gamble/>> accessed 28 April 2022.

⁵⁰ See Kube and Schorkopf (n 32) 1652.

⁵¹ Heinemann (n 28) 40–41.

ceiling by 0.6 percentage points of the GNI of EU Member States might serve as a foundation.⁵² Article 6 of the Own Resources Decision, as amended, stipulates that the ceiling is to be increased for the sole purpose of covering all liabilities of the EU resulting from the borrowing for NGEU. Additionally, Article 4 establishes that the EU must not use funds borrowed on capital markets for the financing of operational expenditure. It is not completely unthinkable that an attempt will be made to interpret these restrictions away in the future.⁵³

Moreover, one can argue that the stipulations in the Own Resources Decision can be superseded by later secondary legislation. If such attempts were successful, the EU could raise funds for expenditure on the capital market using facilities that are already available or creating specific ones. If a basic act is adopted in the ordinary legislative procedure, individual Member States have no veto right. However, there is no legal liability arising from EU bonds.⁵⁴

From the politico-economic perspective, it is unrealistic to expect a return to budgetary policy without any debt instruments over the coming decades.⁵⁵ The issued debt would be repaid over three decades starting from 2028, so far with unspecified means. Therefore, it seems to be the beginning of a permanent credit financing for EU expenditure. If so, the question of the EU own taxation rights would arise with renewed urgency. In any case, historically debt financing has been followed by an introduction of taxation.⁵⁶

The duration of the debt operation is planned for almost 40 years, whereas the term ‘temporary’, often used in the official documents in relation to the new EU debt competence, is inadequate for the period of more than one generation.⁵⁷ This period will certainly bring new challenges, struggles over distribution and crises which are unlikely to be resolved without any additional EU debt ceilings.

In this context, it is necessary to mention the currently ongoing Russian war against Ukraine and the effect on energy prices. Despite the fact that the Own Resources Decision frequently underlines the exceptionality of the COVID-19 situation and the sole use of the funds to combat the consequences of that particular crisis, some of the funds have already been reallocated to the costs of the war. From the political perspective, it may be justifiable, but from the legal point of view, it is obviously inconsistent with the purpose of NGEU.⁵⁸ This example reveals how illusory the belief in the uniqueness of the COVID-19 crisis may prove.

For these reasons, the declared ‘temporality’ of the debt financing may become permanent. Alternatively, NGEU might serve as a blueprint for further and more permanent EU funding schemes. Another point is the extensive excess repayment capacity of the EU budget, which can be understood as a signal that the new EU debt window can be rapidly used in the following decades whenever it is needed.⁵⁹

3. BUDGETARY BALANCE IN THE CONTEXT OF EU BUDGET LAW

3.1. GENERAL REMARKS

The financial provisions on the EU budget are contained in Title II TFEU, ie in Articles 310–325. They include the definition of the budget, basic budget principles, the process of creating, implementing and controlling the EU budget, accounting and reporting issues, as well as responsibility for violating budgetary discipline. There is also a broader understanding of EU budget law which, apart from the issues related directly to the functioning of the budget,

⁵² Nettesheim (n 26) 390, 405.

⁵³ *ibid* 397.

⁵⁴ *ibid* 434.

⁵⁵ See Meyer (n 22) 21; F Fabbrini, ‘The Legal Architecture of the Economic Responses to COVID-19: EMU Beyond the Pandemic’ (2022) 60 *Journal of Common Market Studies* 186, 195.

⁵⁶ Schorkopf (n 20) 3090; Waldhoff (n 12) 2529; R Bieber and M Kotzur ‘Finanzverfassung’ in R Bieber, A Epiney, M Haag and M Kotzur (eds), *Die Europäische Union. Europarecht und Politik* (14th edn, Nomos 2021) 184 <doi.org/10.5771/9783845293523>.

⁵⁷ Heinemann (n 28) 40.

⁵⁸ cf L Schramm, U Krotz and B de Witte, ‘Building ‘Next Generation’ After the Pandemic: The Implementation and Implications of the EU Covid Recovery Plan’ (2022) 60 *Journal of Common Market Studies* 114, 121.

⁵⁹ Heinemann (n 33) 145–146.

includes regulations on the financial economy of Member States. These regulations are contained in Article 126 TFEU, which orders Member States to avoid excessive government deficits, and Articles 127–144, which regulate monetary policy and establish convergence criteria.

The applicable regulations of the TFEU are similar to the ones anchored in national financial law. Despite the traditionally state provenance of the term ‘budget’,⁶⁰ it also applies to the EU, being a supranational organisation (*Staatenverbund*), and does not deviate from the generally accepted understanding. In terms of objectives and scope, the EU budget is increasingly approaching its national original. It may be described as a statement of all items of revenue and expenditure for a predetermined period, whilst the amounts contained therein are of an indicative and predictable nature. While the amount of revenue may differ from the estimated value, the upper limit of expenditure may not be exceeded. Furthermore, its reallocation is not permitted.

The EU budget plays a slightly different role from a state budget, which is a basic instrument for carrying out the socio-economic policy of a particular state. National budgets cover the most expensive costs of public life, such as healthcare, pensions, education and defence. Average revenues of national budgets constitute about 40% of the EU GNI and come from taxes and non-fiscal charges established by Member States. In contrast, the EU budget covers expenses only in those areas for which Member States have decided to finance them within the EU. Moreover, the revenue of the EU budget may not cross the threshold set by the Member States and comes from resources made available to the EU by them.

3.2. PRINCIPLES OF BUDGET LAW

The EU budget is established, implemented and accounted for in accordance with budgetary principles that generally (with some minor variations) also apply in particular Member States.⁶¹ The observation of them is considered essential for a good management of public funds. Despite their undoubtedly legally binding nature, these principles may be subject to (narrow) exceptions, as well as adaptations to the specific needs of the EU.⁶²

The provisions of the TFEU do not provide a complete catalogue of budgetary principles, but they do contain provisions specifying their content. Such a catalogue is, instead, to be found in Article 6 of the Financial Regulation,⁶³ stating that the EU budget must be established and implemented in compliance with the principles of unity, budgetary accuracy, annuality, equilibrium, unit of account, universality, specification, sound financial management and transparency, whilst Articles 7–38 elaborate on these principles in greater detail.

3.2.1. The principles of unity and of budgetary accuracy

The principles of unity and of budgetary accuracy, rooted in Article 310(1)(1) TFEU, express the mandatory content of the EU budget. All items of revenue and expenditure of the EU must be included in estimates to be drawn up for each financial year and must be shown in the budget. This is confirmed in the first sentence of Article 7 and in Article 8(1) of the Financial Regulation, which state that the budget must forecast and authorise all revenue and expenditure considered necessary for the EU and these should be booked to a budget line. All these provisions require, on the one hand, that a single EU budget is established and, on the other hand, that resources of this budget are the sole basis for financing all activities carried out by the EU.

At the same time, the principles of unity and of budget accuracy are not of an absolute nature, as there are some regulations of the Treaties that exclude their application. These are, inter

⁶⁰ As for the development of budget law in Germany see S Strube, *Die Geschichte des Haushaltsrechts vom Mittelalter bis zur Gegenwart. Eine ökonomische Analyse im Lichte der Budgetfunktionen* (Duncker & Humblot 2002) <<https://doi.org/10.3790/978-3-428-50763-4>>.

⁶¹ J Schoo in U Becker, A Hatje, J Schoo and J Schwarze (eds), *EU-Kommentar* (4th edn, Nomos 2019) 3161.

⁶² D-E Khan and R Geiger in R Geiger, D-E Khan and MKotzur (eds), *European Union Treaties: Treaty on European Union, Treaty on the Functioning of the European Union* (CH Beck, Hart Publishing 2015) 986.

⁶³ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] OJ L193/1.

alia, Article 41 TEU and Article 332 TFEU that concern the financing of the common security and defence policy as well as enhanced cooperation. There are also special rules for the legal entities established within the EU, eg the European Central Bank, the European Investment Bank and numerous agencies, which create the situation that the EU budget does not really show all the financial assets of the EU.⁶⁴ Another exception was the European Development Fund, which was previously financed by Member States outside the EU budget. Now, it has been incorporated into the budget, responding to a decades-old request of the European Parliament.⁶⁵

Borrowing and lending operations conducted by the EU on international capital markets are still dealt with separately. Apart from the fact that such transactions lack a sufficient legal basis, the revenue and expenditure resulting from them are not entered in the budget, but only acknowledged to the Commission.⁶⁶ This can actually be perceived as a violation of the principles of unity and of budgetary accuracy⁶⁷ or at least as a significant limitation to them.⁶⁸

3.2.2. Principle of annuality

Pursuant to Article 310(1) TFEU, the EU estimates are drawn up for each financial year and the EU annual budget must be established by the European Parliament and the Council in accordance with Article 314 TFEU. Pursuant to Article 310(2) TFEU, the expenditure shown in the budget must be authorised for the annual budgetary period only. This period runs from 1 January to 31 December (Article 313 TFEU).⁶⁹ The budget must be adopted before the budgetary year has started and, in case of failure, an emergency budget is to be applied (Article 315 TFEU).

Also on an annual basis, the Commission submits to the European Parliament and to the Council the accounts of the preceding financial year relating to the implementation of the budget (Article 318 TFEU) and the Court of Auditors submits a report evaluating the implementation process by the Commission. Taking this into consideration and acting on a recommendation from the Council, the European Parliament must give a discharge to the Commission in respect of that implementation (Article 319 TFEU). The principle of annuality applies, therefore, throughout the entire cycle of adopting, implementing and accounting for the EU budget. Its purpose is to ensure that the measures taken by the EU with a financial impact are audited at regular intervals.⁷⁰ Together with the principle of unity, it has been recognised by the Court of Justice of the EU as a fundamental budgetary principle.⁷¹

3.2.3. Principle of equilibrium

3.2.3.1. Background

The principle of equilibrium has originally been associated merely with the state finance system and hence referred to as the principle of state budget balance. So as to clarify the terminology, the principle of equilibrium is one of the budgetary principles of EU budget law and serves as a legal means to achieve and maintain the budgetary balance within public finances. The difference between both terms, namely ‘principle of equilibrium’ and ‘budgetary balance’, is that where the former has rather a technical (legislative) nature, the latter can be perceived as a more general concept, implying a desirable state or just a legal consequence of the former.

Nowadays, the budgetary balance is recognised worldwide as an inherent constitutional (constitutionally guaranteed and protected) value. Both in the well-established case law and in the literature of constitutional law, it is even addressed as a separate constitutional principle, derived from a number of provisions of a particular constitution. It is also derived from the principle of social justice, to which most contemporary democratic states refer. In this context,

⁶⁴ Schoo (n 61) 3162; Bieber and Kotzur (n 56) 188.

⁶⁵ Crowe (n 11) 338.

⁶⁶ Häde (n 17) 1179.

⁶⁷ See eg S Storr, ‘Die Bewältigung defizitärer Haushaltslagen in der EU’ (2001) 36 *Europarecht* 846, 858.

⁶⁸ See eg R Bieber, ‘Die Ausgaben der Europäischen Gemeinschaften’ (1982) 17 *Europarecht* 115, 118–119.

⁶⁹ See also Article 9 of the Financial Regulation.

⁷⁰ J Inghelram, ‘Finances of the EU’ in Paul JG Kapteyn and others (eds), *The Law of the European Union and the European Communities: with Reference to Changes to be Made by the Lisbon Treaty* (4th rev edn, Kluwer Law International 2008) 373.

⁷¹ Case C-284/90 *Council of the European Communities v European Parliament* [1992] ECR I-02277, para 26.

the budgetary balance covers one of the main elements of an ‘economic constitution’, which is a well-established concept in modern legal systems, especially throughout Europe.⁷² It includes the constitutional framework for economic regulation of a state or, *mutatis mutandis*, an international organisation. It expresses an obligation of authorities to plan the public budget in such a way that the expenses generated by the statutory provisions adopted by the parliament are fully covered (or even exceeded) by the anticipated income.

There is general consensus regarding the need to protect and maintain the budgetary balance as well as to prevent an excessive indebtedness.⁷³ Nonetheless, it does not mean that the budget balance is of an absolute nature. Namely, most financial provisions express it in relativized wording, which shows an acceptance to some, albeit limited in size, budget deficit and, consequently, public debt (which actually constitutes the sum of accumulated deficits from the previous years). Their existence seems to be exactly the opposite of the generally postulated budgetary balance, yet it turns out to be rational. Economic processes are not easily prone to subordination of strict legal restrictions. Moreover, both budget deficit and public debt have become almost universal in the contemporary world. However, these can only reach a certain level, which, if exceeded, may turn out to be highly detrimental to the condition of public finances.

3.2.3.2. Normative construction

The budgetary balance may also be applied to an international organisation, especially to the EU. The EU budget provides an overview of the EU estimated revenue and expenditure for the forthcoming fiscal year and shows how these are to be brought into balance.⁷⁴ The principle of equilibrium is anchored in Article 310(1)(3) TFEU, stating that the revenue and expenditure shown in the budget must be in balance. Therefore, it is required that the revenue of the budget planned for a given financial year is equivalent to the expenditure estimated for this period.

The principle of equilibrium has been specified in the regulations of primary and secondary law. The financial provisions of the TFEU, notably Article 310(4), prohibit the adoption of any act which is likely to have appreciable implications for the budget without providing an assurance that the expenditure arising from such an act is capable of being financed within the limit of own resources and in compliance with the Multiannual Financial Framework, referred to in Article 312 TFEU. The limit of own resources determines the latitude of the legislature with regard to legal acts which may have a significant impact on the budgetary discipline.

Pursuant to Article 314(10) TFEU, budgetary authorities are also bound to exercise their powers to establish the EU budget, respecting and maintaining the budgetary discipline. The budgetary discipline must be respected in the process of adopting and implementing the EU budget, which is to prevent a situation that activities provided for in a legal act adopted by the EU legislature cannot be carried out due to the inability to finance them from the revenue of the EU budget. Breaches of the principle of equilibrium, especially in the 1970s and 1980s, resulted in the increasing costs of the common agricultural policy implementation and were eliminated by adopting an interinstitutional agreement establishing the maximum threshold for the increase in agricultural expenditure (the Delors I Package).⁷⁵

EU constitutional law does not open up the possibility of general budget financing through loans, since both of the Treaties do not allocate any competence for the EU to borrow funds. Provisions of Article 17 of the Financial Regulation require the revenue of the EU budget and payment appropriations to be balanced. The principle of budgetary balance prevents the EU from issuing debt to finance its budget. The EU budget cannot run a deficit and funding

⁷² See KW Nörr, ‘Economic Constitution’: On the Roots of a Legal Concept’ (1994–1995) 11 *Journal of Law and Religion* 343 <<https://doi.org/10.2307/1051638>>; Tony Prosser, *The Economic Constitution* (Oxford University Press 2014) <<https://doi.org/10.1093/acprof:oso/9780199644537.001.0001>>.

⁷³ See F Amtenbrink and J de Haan, ‘Economic Governance in the European Union – Fiscal Policy Discipline Versus Flexibility’ (2003) 40 *Common Market Law Review* 1057, 1089–1095 <<https://doi.org/10.54648/cola2003050>>.

⁷⁴ Khan and Geiger (n 62) 985.

⁷⁵ See Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF) [1999], OJ L136/15.

its expenditure through borrowing is not permitted.⁷⁶ The actual balance of the EU budget, depending on the individual situation, is entered in the estimations for the following year as a surplus or a deficit.

In the event of a deficit, the negative balance must be entered in the budget for the following financial year as a payment appropriation, whereas the positive balance is to be entered as a revenue (Article 18(1) of the Financial Regulation). With regard to a surplus, the Court of Justice of the EU ruled that, in the case of excluding it from the budget for the following year, the planned budget cannot fully reflect the available own resources. This results, in turn, in an infringement of the principles of universality and annuality and thus makes the entire budget invalid.⁷⁷

It must be noted that financing the EU budget through bonds is permitted only within narrow limits. The borrowing and lending operations may be used only for providing guarantees in the budget. In recent years, the borrowing activity of the EU has significantly increased. For example, the interinstitutional agreement of 2006 envisaged new financing instruments as a catalyst for public and private investors.⁷⁸ The European Investment Bank issued bonds and guarantees in the field of research and development in the amount of up to EUR 10 billion in the period 2007–2013. In this context, the EU financial stabilisation mechanism⁷⁹ should also be mentioned, through which a financial support up to an amount of EUR 60 billion was granted in the context of the financial crisis of 2008.⁸⁰ However, many legal aspects and doubts arise around this issue.⁸¹

3.2.4. Principle of universality

While the TFEU does not explicitly refer to this principle, it has been established in Article 20 et seq of the Financial Regulation. It states that total revenue planned in the EU budget is intended to cover total payment appropriations, whilst the revenue is detached from a specific purpose. Basically, all revenue and expenditure must be entered in the budget in full without any adjustment against each other ('no-netting principle' or 'gross budget rule').⁸²

The principle of universality marks a legal separation between the revenue and expenditure. Furthermore, it does not allow for any deductions to be made between them. It is also not allowed for the expenditure for the earmarked purpose to be financed from predetermined sources of revenue. It is intended to ensure the EU ability to act within the financial sector and to guarantee the transparency of the budget, so that budgetary authorities as well as citizens are kept informed about the state of public finances.⁸³ From this perspective, any revenue or expenditure that is not recorded in the main budget, but in a special or ancillary one, conflicts with EU law.⁸⁴

4. DISCUSSION

4.1. ADMISSIBILITY OF BORROWING OPERATIONS CARRIED OUT BY THE EU

For many state authorities, borrowing funds has been one of the usual forms of financing budgetary expenditure. The EU may only take out loans if such competence has been conferred upon it by Member States. Under the principle of conferral, resulting from Article 5(2) TEU,

⁷⁶ Häde (n 17) 1175.

⁷⁷ Case C-284/90 *Council of the European Communities v European Parliament* [1992] ECR I-02277, paras 32–33.

⁷⁸ See Interinstitutional Agreement of 17 May 2006 between the European Parliament, the Council and the Commission on budgetary discipline and sound financial management [2006], OJ C139/1.

⁷⁹ Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L118/1.

⁸⁰ Schoo (n 61) 3163.

⁸¹ See eg K Faßbender, 'Der europäische „Stabilisierungsmechanismus“ im Lichte von Unionsrecht und deutschem Verfassungsrecht' (2020) 39 *Neue Zeitschrift für Verwaltungsrecht* 799.

⁸² Khan and Geiger (n 62) 987.

⁸³ W Schenk, *Strukturen und Rechtsfragen der gemeinschaftlichen Leistungsverwaltung* (Mohr Siebeck 2006) 60; Inghelram (n 70) 353–354.

⁸⁴ See Schoo (n 61) 3162.

competences not conferred upon the EU in the Treaties remain with Member States. Every legal measure taken within the EU political system must be based on the particular competence allowing the EU to act in a particular domain, for a particular purpose and in a particular manner.

In any event, EU law does not contain any written ban on debt, nor is there an explicit authorisation for the EU institutions to develop borrowing funds.⁸⁵ This also applies to Article 122(2) and Article 212 TFEU, which enable the EU to take up financial activities, since they do not directly prohibit or allow the raising of necessary funds by means of loans.⁸⁶ Article 311(1) TFEU states only that the EU must provide itself with the means necessary to attain its objectives and carry through its policies. This provision lacks, however, any empowerment. Nonetheless, the view has prevailed that, in times of crisis, the EU could issue bonds in order to pass on the funds raised as loans to Member States in need.⁸⁷

The actual wording of Article 20 of the Statute of the European Investment Bank is not aligned with the general debt competence of the EU.⁸⁸ It contains explicit empowerment to take out loans, but only for the European Investment Bank as a financial institution which does not have the status of a public organ. Moreover, this permission applies only to loans and guarantees within the scope of tasks undertaken by the Bank, and does not extend to grants (Article 309 TFEU).⁸⁹

With regard to the fact that the Council and Member States determine the scope of own resources themselves, it is perceived as possible to introduce loans as another category of own resources, under the procedure of Article 311(3) TFEU. Pursuant to the second sentence of this provision, the budgetary authorities are empowered to change the existing system of own resources and to introduce new categories. Such an operation requires an appropriate change of the Own Resources Decision (or of the Treaty respectively), otherwise borrowing operations carried out for general budget purposes are not allowed.⁹⁰ In this context, the EU derives its competence to use the Own Resources Decision to authorise, by means of NGEU, the issue of EU bonds. At the same time, this financial instrument is of a secondary law nature and, as such, it is to take place within the framework of the current EU Treaty law. However, no amount of legal creativity can preclude tensions with the primary law framework.⁹¹

The revenue from NGEU will not constitute own resources. Instead, it will constitute external assigned revenue,⁹² which, unlike own resources, is not subsequently subject to the normal budgetary procedure. Under Article 22 of the Financial Regulation, external assigned revenue is introduced in the budget and is made available automatically. Pursuant to Article 311 TFEU, the budget will be financed wholly from own resources, without prejudice to other revenue, and the Council, acting in accordance with a special legislative procedure, must unanimously, and after consulting the European Parliament, adopt a decision laying down the provisions relating to the system of own resources of the EU.

Although the Council may establish new categories of own resources or abolish any existing category, the wording used seems to relate directly to the EU decision in laying down the provisions merely on own resources and, thus, not to NGEU, which consists of external assigned revenue.⁹³ Nevertheless, the Own Resources Decision is, from a systematic perspective, the right place to regulate the issuance of bonds. Ratification of this Decision by Member States in accordance with Article 311(3) TFEU provides for a political legitimisation in a way that is close to a Treaty amendment. Moreover, it ensures that the empowerment to borrow funds on

⁸⁵ Häde (n 17) 1206.

⁸⁶ U Häde, *Finanzausgleich. Die Verteilung der Aufgaben, Ausgaben und Einnahmen im Recht der Bundesrepublik Deutschland und der Europäischen Union* (Mohr Siebeck 1996) 488–489; de Gregorio Merino (n 30) 6.

⁸⁷ See K von Lewinski, 'Verschuldungskompetenz der Europäischen Union' (2012) 27 *Zeitschrift für Gesetzgebung* 164.

⁸⁸ Protocol no 5 to TFEU on the Statute of the European Investment Bank [2016] OJ C202/251.

⁸⁹ Ruffert (n 22) 1778.

⁹⁰ Häde (n 17) 1206.

⁹¹ See Nettesheim (n 26) 391–392.

⁹² See Article 3(1) of the EU Recovery Instrument Regulation (n 21).

⁹³ See de Witte (n 4) 664–665.

4.2. DOUBTS IN THE CONTEXT OF PRINCIPLES OF BUDGET LAW

4.2.1. In the context of the principles of unity and of budgetary accuracy

The legal construction of NGEU raises serious budgetary concerns from the perspective of the principles of unity and of budgetary accuracy. According to Article 310(1) TFEU, all revenue and expenditure of the EU must be entered in the budget. From the previous practice, it can be assumed that EU borrowing and lending operations ('back-to-back-lending') need not to be regarded as 'expenditure' in a budgetary sense. The funds raised on capital markets are passed on in a budget-neutral manner. By contrast, the subsidies provided under NGEU are undoubtedly expenditure, and are not neutral, given that they are not balanced by any legal asset growth of the EU. It is inconsistent with the principle of completeness of the EU budget not to integrate such expenditure into the budget.⁹⁵ It would in fact be more reasonable if the whole NGEU operation were to be carried out within the EU budget.

Furthermore, even if one disregards the loans of EUR 360 billion passed on directly to Member States, a multiple of the current budget volume is still spent under NGEU outside the usual budgetary procedure. In addition, the asymmetrical integration into the budget is striking: while the revenue side and the use of funds are not entered into the budget, the repayment of the EU bonds is to be financed from the general budget.⁹⁶ The need to adhere to Article 310(1) TFEU cannot be called into question by referring to the fact that the Financial Regulation allows funds to be managed as external assigned revenue. Neither the amended Own Resources Decision, which has a quality of secondary law, nor the EU Recovery Instrument Regulation can change primary law.

4.2.2. In the context of the principle of annuality

Following a new trend of financial policy, the EU budget is now embedded in a system of medium-term fiscal planning.⁹⁷ An increasing number of projects implemented under EU policies and financed from the EU budget are planned and carried out on a multiannual rather than on an annual basis, which is difficult to reconcile with the requirements of the principle of annuality. An example includes infrastructure projects implemented under the cohesion policy or multiannual research framework programmes. NGEU undoubtedly fits into this trend.

4.2.3. In the context of the principle of equilibrium

Article 310 TFEU is a provision that prohibits the EU from borrowing. The EU may not raise loans, since the principle of budget equilibrium, in its material aspect, excludes borrowing funds to cover expenditure. NGEU does not formally affect this principle, because the funds are to be separated from the budget and managed as external assigned revenue within the meaning of Article 21(5) of the Financial Regulation. Namely, the revenue from borrowing will be used as 'other revenue' for the operation costs of the EU Recovery Instrument and posted as external assigned revenue, thus bypassing the EU budget as an 'off-budget operation'. This is to avoid conflict with the prohibition of debt and to keep the budget nominally balanced in terms of the revenue and expenditure shown therein (Article 310(1)(3) TFEU).⁹⁸

In fact, Article 311(2) TFEU states that, without prejudice to other revenue, the EU budget must be financed wholly from own resources. In recent practice, all that results from the fulfilment of certain of the EU tasks, eg cartel fines or taxes of employees of the EU institutions, has been

⁹⁴ Waldhoff (n 12) 2524; Nettesheim (n 26) 388.

⁹⁵ See Nettesheim (n 26) 415–416.

⁹⁶ Waldhoff (n 12) 2516–2517.

⁹⁷ Khan and Geiger (n 62) 985.

⁹⁸ See critical analysis by P Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU' (*Verfassungsblog*, 18 June 2020) <<https://verfassungsblog.de/who-is-ultra-vires-now-the-eus-legal-u-turn-in-interpreting-article-310-tfeu/>> accessed 12 April 2022.

marked as ‘other revenue’.⁹⁹ It should be secondary and have previously covered only a minor part of the budget. However, this is dramatically changing now. The volume (‘other revenue’) of EUR 750 billion is to be compared with an annual budget of approximately EUR 150 billion, so that the category of ‘other revenue’ becomes the main source of revenue.¹⁰⁰ The exception prevails against the principle. Should the loans be regularly fed into the EU budget as own resources, it is debatable whether Article 311(3) TFEU comprises a sufficient legal basis for the borrowing competence.¹⁰¹

Insofar as NGEU does not form part of the annual or long-term EU budget, the majority of the expenditure volume in the period between 2021 and 2027 will not be legitimised by the EU budget legislature, since there will be no political decision on the borrowing or use of the funds. This cannot be covered for by the legislative instruments adopted to set up NGEU and the involvement of the Council and the European Parliament in their adoption or even the necessary Commission approval of the recovery and resilience plans submitted by Member States. As for the Commission, it is argued that NGEU transforms it merely into a debt agency for Member States, without strengthening the connection between the EU and its citizens.¹⁰² Although such characterisation may be perceived as somewhat overstated, as the Commission does possess certain discretion within the confines of NGEU, there is a grain of truth in it.

The most obvious problems are conflicts with the principle of democracy (Article 10(1) TEU),¹⁰³ since the EU budget legislature’s political responsibility for expenditure is one of the central components of democracy.¹⁰⁴ One of the fundamental Treaty decisions is that the European Parliament and the Council bear the budgetary powers (Article 14(1) and Article 16(1) TEU).¹⁰⁵ The exclusion of the European Parliament cannot be justified, given the principle of ‘no taxation without representation’.¹⁰⁶ The Parliament may have a political interest in not getting in the way of NGEU. It may also welcome the transition to a future of debt financing of EU tasks. However, the democratic order of the EU is not (even in times of need) politically disposable.¹⁰⁷

The legal form of NGEU makes it formally possible to comply with the requirement of budgetary balance during the period of NGEU (Article 310(3) TFEU). If one understands this provision in a material sense, tensions arise between Article 310(3) TFEU and NGEU. In contrast to ‘back-to-back-lending’ or the acquisition of tangible assets, the EU does not acquire any asset-relevant equivalent value when granting subsidies. Expecting to have necessary (own) resources to repay the loan taken out from 2027 onwards is not an equivalent value in the budgetary sense. These transactions are just not balanced within the annual budget.¹⁰⁸ Not only does it not seamlessly fit into EU primary law, but it also heads in the opposite direction from that expressed in the

⁹⁹ Waldhoff (n 12) 2526.

¹⁰⁰ Schorkopf (n 20) 3088–3089; cf de Witte (n 4) 664.

¹⁰¹ Ruffert (n 22) 1779.

¹⁰² E Cannizzaro, ‘Neither Representation Nor Taxation? Or, “Europe’s Moment” – Part I’ (2020) 5 *European Papers* 2 703, 706 <<https://doi.org/10.15166/2499-8249/435>>. See also H Kassim, ‘The European Commission and the COVID-19 Pandemic: A Pluri-Institutional Approach’ (2022) *Journal of European Public Policy* 1 <<https://doi.org/10.1080/13501763.2022.2140821>>.

¹⁰³ On the principle of democracy, as envisaged in the case law of the Court of Justice of the EU, see K Lenaerts, ‘The Principle of Democracy in the Case Law of the Court of Justice’ (2013) 62 *International and Comparative Law Quarterly* 271 <<https://doi.org/10.1017/S0020589313000080>>.

¹⁰⁴ R Youngs, ‘Democracy is the Missing Link in EU Coronavirus Recovery Plans’ (Carnegie Europe, 13 May 2020) <<https://carnegieeurope.eu/2020/05/13/democracy-is-missing-link-in-eu-coronavirus-recovery-plans-pub-81821>> accessed 29 December 2022; C Fasone, ‘Fighting back? The Role of the European Parliament in the Adoption of Next Generation EU’ (2022) 28 *The Journal of Legislative Studies* 368 <<https://doi.org/10.1080/13572334.2022.2107824>>; D Fromage and M Markakis, ‘The European Parliament in the Economic and Monetary Union After COVID: Towards a Slow Empowerment?’ (2022) 28 *The Journal of Legislative Studies* 385 <<https://doi.org/10.1080/13572334.2022.2107811>>.

¹⁰⁵ See Nettesheim (n 26) 396.

¹⁰⁶ G Della Cananea, ‘No Representation without Taxation in the European Union’ in Lina Papadopoulou and others (eds), *Legitimacy Issues of the European Union in the Face of the Crisis* (Nomos 2017) 95. In this context see also C Fasone, ‘European Economic Governance and Parliamentary Representation. What Place for the European Parliament?’ (2014) 20 *European Law Journal* 164 <<https://doi.org/10.1111/eulj.12069>>; E Bressanelli, N Chelotti, ‘The European Parliament and Economic Governance: Explaining a Case of Limited Influence’ (2018) 24 *The Journal of Legislative Studies* 72 <<https://doi.org/10.1080/13572334.2018.1444627>>.

¹⁰⁷ Nettesheim (n 26) 396.

¹⁰⁸ *ibid* 419.

regulations that constitute the core of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, also known as the Fiscal Compact, and which has a foothold in the financial provisions of the TFEU. What is demanded of contracting parties of the Fiscal Compact in terms of balancing state budgets, is not equally demanded of the EU.

In legal literature, there is no consensus as to whether the principle of equilibrium in EU law is to be understood only in terms of technical accounting or whether it should also be assigned material content, being a ban on debt for the operational budgetary expenditure.¹⁰⁹ The latter is supported by the fact that borrowing activities of the EU are subject to greater problems than borrowing under the national constitutions. This is because the EU, unlike its Member States, cannot ensure covering its borrowing through taxation. What is more, the material content is dictated by the provisions on budgetary discipline (Article 310(4) and Article 312 TFEU), as they require that the estimated expenditure must be financially viable.¹¹⁰

From another point of view, the material understanding of the budgetary balance may have contributed significantly to the chosen construct of NGEU. Otherwise, without violating Article 310(1)(3) or without its thorough reinterpretation, credit financing by the EU would not have been possible. Nevertheless, the programme raises the substantive problem of borrowing without simultaneous taxation rights in a new and more severe form.¹¹¹

4.2.4. In the context of the principle of universality

In light of the principle of universality, all expenditure planned in the EU budget must be covered from the entirety of the revenue. If so, any assigned revenue, which is assigned to finance specific items of expenditure, must remain an exception within the EU financial system. Moreover, such exceptions must be limited in volume and range so as not to prevail against other financial activities of the EU. The list of exceptions is provided for in Article 21 of the Financial Regulation, with regard to external assigned revenue (paragraph 2) and internal assigned revenue (paragraph 3).

The Own Resources Decision constitutes another exception which is not included therein. It would not necessarily pose a legal problem itself, but the issue is that, after NGEU has been established, the share of external assigned revenue will have significantly increased.¹¹² This structural change which NGEU will cause within the EU financial system, including the sheer size of the external assigned revenue, may raise legitimate objections.

5. CONCLUSIONS

While explained as exceptional and justified with reference to the pandemic, NGEU is actually not, in substance, a crisis measure. It permanently changes the reading of EU law by establishing a completely new type of instrument for redistribution between Member States and by funding this through debt.¹¹³ It breaks with the principles of no major common debt issuance and no major redistributive fund in the case of crisis at the EU level. Moreover, the extensive excess repayment capacity of the EU budget over the coming decades can be understood as a sign that the newly-opened debt window can be rapidly used in the next decades when needed. The programme is also historic, as it affects the institutional balance within the EU.

However, it is impossible to transform NGEU into a permanent mechanism within the framework of the current Treaties. It has consistently been accepted without argument that it is not permitted for the EU to issue debt to finance itself. Such an interpretation has been presented both by the Council and the Commission. Yet, everything changed when the COVID-19 crisis hit the EU, including the political circumstances. The only thing which has remained the same is the Treaties. Unexpectedly, according to the EU institutions, it has now turned out that the

¹⁰⁹ See Case C-284/90 *Council of the European Communities v European Parliament* [1992] ECR I-02277, para 31.

¹¹⁰ Waldhoff (n 12) 2518.

¹¹¹ *ibid.*

¹¹² *ibid* 2517.

¹¹³ See P Leino-Sandberg, M Ruffert, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59 *Common Market Law Review* 433.

prohibition of debt financing is no longer valid and that the EU is allowed to issue debt on a massive scale to finance itself, which is exactly what the EU was prevented from doing by the Treaties.¹¹⁴

NGEU represents a skilful, high-tech legal construction designed to circumvent Article 310 TFEU. It is drafted as a one-off crisis measure and classified as ‘extra-budgetary’, meaning that EUR 750 billion is hidden from sight under external assigned revenue. This sits poorly with the explicit requirement that all revenue and expenditure should be shown in the budget. All in all, it has enabled the EU institutions to play a legal trick, which can be described as real constitutional change without formal constitutional change.¹¹⁵ In this context, it must be noted the EU is frequently seen to infringe the boundaries of its powers and it risks eroding its legitimacy.¹¹⁶ This may, in turn, prove problematic for the EU project in the future.

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¹¹⁴ P Leino-Sandberg, ‘Next Generation EU – A Constitutional Change without Constitutional Change’ (Reconnect, 13 January 2021) <<https://reconnect-europe.eu/blog/new-generation-eu-a-constitutional-change-without-constitutional-change/>> accessed 12 May 2022.

¹¹⁵ *ibid.*

¹¹⁶ See VA Schmidt, *Europe’s Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press 2020).

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