

EU Finances in 2019-2024

Incremental Constitutional Reshaping?

by Yseult MARIQUE*

ABSTRACT

During the period 2019-24, one development among others is likely to have lasting consequences for the legal architecture of EU public finances, namely the decision to boost the European economy thanks to the Next Generation Europe package, and in particular the Recovery and Resilience Facility. This package allows the EU to borrow on financial markets to an unprecedented extent: it provides new fiscal capacity to the EU and it has the potential to shape European common debts in a new iteration, in particular in the light of the defence and security needs that the European Union has to address. Although the EU Treaties have not been amended, the legal and administrative techniques deployed both at EU institutions' and Member States' levels to ensure the sound financial management of EU resources and the effective reimbursement of EU debts have constitutional ramifications for the relationships the Next Generation Europe package foreshadows between the EU, Members States and EU citizens in the making of a European future. Even if the EU becomes incrementally better equipped to protect its financial interests, it remains that no step change has been made so far in relation to the weak democratic accountability of EU spending.

INTRODUCTION

In Summer 2019 — after a decade of crises, first the sovereign debt crisis, then the migration crisis and Brexit — the recently elected European Commission with Ursula von der Leyen at its helm could look optimistically at the future: the worst was behind, the eurozone had survived its most intense test thus far, the EU had managed to take in an unprecedent influx of migrants and its external borders seemed to have been reasserted; and if the Brexit negotiations were not over, the whole process of exiting the EU had been demonstrated to be so painfully complicated that any velleity of exiting would be successfully quelled for some time, bringing discipline to the most turbulent members of the EU club.

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Rather confidently the European Commission thus set six substantive priorities (a European Green Deal, an economy that works for people, a Europe fit for the digital age, protecting our European way of life, a stronger Europe in the world, a new push for European democracy),¹ even though the key question of how to proceed with further European integration remained broadly unanswered. Yet, events shifted the European action to bring it back to the “nerve of the war”, and revealed — if that was necessary — the importance of the power of the purse in steering the course of the EU. As academics have long pondered the true nature of the EU — a supranational, intergovernmental, federal, or *sui generis* body?² — the scholarship has mooted the idea that the EU needs to choose between centralised and decentralised fiscal federalism,³ even though the political and institutional discourse avoids pronouncing the f-word. If part of the literature considers fiscal federalism well on its way,⁴ another part remains cautious in particular due to the temporary nature of the NextGenEU,⁵ which was presented

¹ U. VON DER LEYEN, *Political Guidelines for the Next European Commission 2019-2024*, available at <https://op.europa.eu/en/publication-detail/-/publication/62e534f4-62c1-11ea-b735-01aa75ed71a1> (accessed 11th December 2024).

² Among a wealth of discussions in political science and legal literature: A. VON BOGDANDY, “The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty”, *Colum. J. Eur. L.*, 2000, Vol. 6, p. 27; R. SCHÜTZE, “On ‘Federal’ Ground: The European Union as an (Inter)national Phenomenon”, *Common Market Law Review*, 2009, (46:4), pp. 1069-105; D. JÖRKE and J. SONNICKSEN, “Towards an Antifederalist Theory of the EU: Democratic Federal Lessons for the European Union”, *JCMS*, 2020, (58:2), pp. 217-34; S. REHLING LARSEN, *The Constitutional Theory of the Federation and the European Union*, Oxford, Oxford University Press, 2021; P. ELEFTHERIADIS, *A Union of Peoples*, Oxford, Oxford University Press, 2020; F. LAURSEN (ed.), *The EU and Federalism. Politics and Policies Compared*, London and New York, Routledge, 2016; W. VAN GERVEN, *The European Union. A Polity of States and Peoples*, Oxford, Hart Publishing, 2005; L. FRIEDMAN GOLDSTEIN, *Constituting Federal Sovereignty. The European Union in a Comparative Context*, Maryland, John Hopkins University Press, 2001.

³ Eg B. GORDON, *The Constitutional Boundaries of European Fiscal Federalism*, Cambridge, Cambridge University Press, 2022; R. SCHÜTZE, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford, Oxford University Press, 2009; S. PIATTONI, “Federalism and its Competitors: Which Template for Contemporary Europe?”, *L’Europe en formation*, 2012, (1:363), pp. 9-20; P. DIOP, “La souveraineté, pierre d’achoppement pour une fédération politique européenne”, *L’Europe en formation*, 2012, (1:363), pp. 63-71; N. WALKER, “Federalism in 3D: The Reimagination of Political Community in the European Union”, *Catolica Law Review*, 2017, pp. 67-90; R. SCHÜTZE, “Tax Barriers to Intra-Union Trade: American ‘Federalism’, European ‘Internationalism’?”, *YEL*, 2016, (35:1), pp. 382-409; J. SONNICKSEN, “Can the EU Be a Federal Democracy? Assessing the Horizontal and Vertical Dimension of the EU Government from a Comparative Perspective”, *Comp Eur Polit*, 2021, (20:1), pp. 114-33; J. E. FOSSUM, “European Federalism: Pitfalls and Possibilities”, *ELJ*, 2017, (23:5), pp. 361-79.

⁴ Eg F. FABBRINI, “Next Generation EU: Legal Structure and Constitutional Consequences”, *CYELS*, 2022, Vol. 24, pp. 45-66; F. FABBRINI, *EU Fiscal Capacity: Legal Integration after Covid-19 and the War in Ukraine*, Oxford, Oxford University Press, 2022; N. DA COSTA CABRAL, “Borrowing in the European Union: from a Pure National Model to the Antechamber of a European Fiscal Federal Solution”, *Journal of European Integration*, 2021, (43:8), pp. 939-54. For an explanation of the choices the EU faced in the early 2010s and the implications of those choices, see A. HINAREJOS PARGA, “Fiscal Federalism in the European Union: Evolution and Future Choices for EMU”, *Common Market Law Review*, 2013, (50:6), pp. 1621-42.

⁵ Eg N. DA COSTA CABRAL, “Borrowing in the European Union: From a Pure National Model to the Antechamber of a European Fiscal Federal Solution”, *Journal of European Integration*, 2021, (43:8), pp. 939-54; A. VAN RIET, “The Rise of Common Public Debt in Europe: A New Chapter in Fiscal Integration?”, *Econ Polit*, 2024.

as a Marshall plan for Europe by President von der Leyen.⁶ The NextGenEU allows the EU to borrow on financial markets to an unprecedented extent, hence creating a debt that will need to be repaid over thirty years. Would it be possible for the cumulative effects of the momentous crises of the Covid-19 pandemic, the Ukraine war, the energy crisis, the threat of Chinese disloyal competitive practices, and the lingering health effects of climate change to all come together to form a critical juncture,⁷ reframing path dependency⁸ and leading to tailored institutionalised solutions across the peculiarities of the EU and its members as they stood in 2024, on the eve of a new European Commission for 2024-29? De la Porte and Dagnis Jensens consider that NextGenEU could be a “Hamilton moment” for EU integration;⁹ De Witte writes that it is a “bold move” and “a case of creative legal engineering”;¹⁰ Fabbrini considers that NextGenEU “represents a significant break with respect to previous EU responses to economic crises”;¹¹ Leino-Sandberg and Ruffert assert that NextGenEU is not merely a “crisis instrument” but that it will permanently affect the reading of EU law “by establishing a new type of instrument for redistribution between Member States and funding this through debt”;¹² Panasci also sees NextGenEU as a transition between market integration and redistribution;¹³ Amtenbrink and Markakis highlight that the consequences of the crisis are not so much an extension of the EU fiscal capacity but the potential future that the temporary solutions to the Covid-19 paved the way towards.¹⁴ Hodson and Howarth argue that the Recovery and Resilience Facility (the RRF, i.e. the main bulk of NextGenEU) “shows signs of layering, but limited evidence

⁶ U. VON DER LEYEN, “Ein Marshallplan für Europa”, *Welt am Sonntag*, 5 April 2020, Vol. 13, in E. KEMPF and K. LINOS, “NGEU: A New Marshall Plan for Europe and a Template for Global Finance”, *Am. J. Int. L. Unbound*, 2024, Vol. 118, pp. 151-6.

⁷ V. SCHMIDT, “Theorizing Institutional Change and Governance in European Responses to the Covid-19 Pandemic”, *Journal of European Integration*, 2020, (42:8), pp. 1177-93; G. CRUZ-MARTÍNEZ, S. PELLISSERY and R. VELÁZQUEZ LEYER, “State of the Art: Have Social Policy Responses to Covid-19 Been Institutionalised?”, *Social Policy & Society*, 2023, (22:3), pp. 475-94, p. 477.

⁸ P. DERMINE and M. MARKAKIS, “EU Economic Governance and the Covid-19 Crisis — Between Path Dependency and Paradigmatic Shift”, *International Journal of Public Law and Policy*, 2020, pp. 339-41.

⁹ C. DE LA PORTE and M. DAGNIS JENSEN, “The Next Generation EU: An Analysis of the Dimensions of Conflict behind the Deal”, *Social Policy and Administration*, 2021, (55:2), pp. 388-402.

¹⁰ B. DE WITTE, “The European Union’s Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift”, *Common Market Law Review*, 2021, (58:3), pp. 635-82.

¹¹ M. BUTI and S. FABBRI, “Next Generation EU and the Future of Economic Governance: Towards a Paradigm Change or Just a Big One-Off?”, *Journal of European Public Policy*, 2023, (30:4), pp. 676-95.

¹² P. LEINO-SANDBERG and M. RUFFERT, “Next Generation EU and its Constitutional Ramifications: A Critical Assessment”, *Common Market Law Review*, 2022, (59:2), pp. 433-72.

¹³ M. A. PANASCI, “Unravelling Next Generation EU as a Transformative Moment: From Market Integration to Redistribution”, *Common Market Law Review*, 2024, (61:1), pp. 13-54.

¹⁴ F. AMTENBRINK and M. MARKAKIS, “Never Waste a Good Crisis? On the Emergence of an EU Fiscal Capacity”, in A. HINAREJOS and R. SCHÜTZE (eds), *EU Fiscal Federalism — Past, Present, Future*, Oxford, Oxford University Press, 2023, pp. 171-204.

of displacement or path dependence”;¹⁵ Kilpatrick “reconstructs the path dependencies through the [Open Method of Coordination], the sovereign debt crisis and the initial pandemic response [i.e. SURE]”;¹⁶ Mayer asserts that Member States remain mainly in control of the final destination of the EU money.¹⁷ How one assesses NextGenEU depends on whether one understands institutions as rooted in the past or as springboards for the future.

As this piece contributes to a special issue dedicated to an overview of the activities of the European Commission during the period 2019-24, its modest objective is not to answer the question of whether the European fiscal governance is federal in nature. Focusing on NextGenEU and especially the RRF as the financial instrument that most directly emerged from the need to respond to the economic consequences of the Covid-19 crisis,¹⁸ as such a defining event, this contribution asks whether the common debt created by NextGenEU represents a rupture with previous European approaches to crises,¹⁹ as it forces the EU to strengthen its techniques to protect its financial interests and sound financial management. It argues that the answers developed incrementally in the period 2019-2024 to address the Covid-19 crisis built on the previous experience gathered by the EU. This observation not only applies to the technical expertise relied upon but also to the limited attempts to respond to some, but by no means all, of the criticisms voiced against the previous financial instruments.²⁰ Overall, more attention is devoted to the administrative and coercive side than the democratic side of these financial instruments. Efficiency seems to be given priority in the techniques developed over the legitimacy of public finances at this point in time, although both are needed for the EU’s credibility on financial markets.²¹

This contribution is organised as follows: the first section provides an overview of the main financial instruments used to redistribute European money across the

¹⁵ D. HODSON and D. HOWARTH, “The EU’s Recovery and Resilience Facility: an Exceptional Borrowing Instrument?”, *Journal of European Integration*, 2024, (46:1), pp. 69-87.

¹⁶ C. KILPATRICK, “Explaining and Remediating the Near Absence of the Budget in EU Law Scholarship”, *Common Market Law Review*, 2024, (61:3), pp. 623-54, p. 626.

¹⁷ F. C. MAYER, “NextGenerationEU and the Future of European Integration: Foreseeing the Unforeseeable”, *Am. J. Int. L. Unbound*, 2024, Vol. 118, pp. 172-6.

¹⁸ Council Regulation 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, *OJ L 433I*, 22 December 2020, Recitals 1 to 6, Art. 1(2).

¹⁹ A question also asked by P. DERMINE, “The EU’s Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe — Between Continuity and Rupture”, *LIEI*, 2020, (47:4), p. 337, without the benefit of insights the present contribution benefits from.

²⁰ A. CRESPIY, T. MASSART and V. SCHMIDT, “How the Impossible Became Possible: Evolving Frames and Narratives on Responsibility and Responsiveness from the Eurocrisis to NextGenerationEU”, *Journal of European Public Policy*, 2024, (31:4), pp. 950-76.

²¹ On the complementarity between efficiency and legitimacy, see eg V. VIȚĂ, “(Un)Constitutional Conditions: A European Perspective”, in C. KILPATRICK and J. SCOTT (eds), *New Frontiers of EU Funding: Law, Policy, Politics*, Oxford, Oxford University Press, 2024, pp. 97-132, 107-108.

European space following the Covid-19 pandemic and the Ukraine war. The following sections then highlight that EU borrowing is a game changer for fiscal integration (section 2), with conditionality increasingly systemic and embedded (section 3), increased institutional monitoring of national spending of EU money (section 4) and some attempts at supporting stronger accountability (section 5). The conclusions end with some consideration about the extent to which these incremental changes are reshaping the content of the constitutional principles governing EU public finances.

SECTION 1 — EU SPENDING AND MAIN FINANCIAL INSTRUMENTS IN 2019-2024

As of 2020, several initiatives had been tabled to deepen EU fiscal integration without changing the European treaties.²² These proposals mostly sought to limit shocks, were temporary in nature and included conditionality as a core component.²³ They were continuing the broad features of the practice established when the EU had to address the sovereign debt crisis in 2008 and thereafter. However the Covid-19 crisis was different in nature than the sovereign debt crisis: The Eurogroup labelled it as a “symmetric external shock”.²⁴ This label transformed the risk of moral hazard in the case of financial assistance, a risk that Germany in particular²⁵ had been eager to mitigate during the sovereign debt crisis. The Covid-19 pandemic placed Member States in a different situation as their economic troubles were not due to any fault of their own however.²⁶ Solidarity was called upon.²⁷ The von der Leyen Commission (2019-2024 period) diversified EU

²² LEINO-SANDBERG and RUFFERT (above 12), p. 434.

²³ *Ibid.*

²⁴ “The challenge our economies are facing today is in no way similar to the previous crisis. This is a symmetric external shock. Moral hazard considerations are not warranted here. We must bear this in mind when we consider coronavirus dedicated instruments” (Eurogroup, *Press statement*, 24 March 2020, available at www.consilium.europa.eu/en/press/press-releases/2020/03/24/remarks-by-mario-centeno-following-the-eurogroup-meeting-of-24-march-2020/, last accessed on 11th December 2024).

²⁵ Germany was at first reluctant to embrace a large financial package but changed its mind during the Summer 2020. Various explanations have been advanced such as the need for Germany to respond to the Weiß judgment rendered by the Bundesverfassungsgericht (see P. DERMINE, *Le plan de relance “Next Generation EU” de l’Union européenne — Analyse constitutionnelle d’une initiative historique*, Bruxelles, Bruylant, 2023, footnote 84).

²⁶ L. PIERRET and D. HOWARTH, “To Play or Not to Play the ‘Moral Hazard Card’: Germany and the European Union’s Response to the Covid-19 Crisis”, *Journal of European Public Policy*, 2024, (31:4), pp. 1075-99.

²⁷ The Eurogroup mentioned expressly solidarity in its early press releases pertaining to the Covid-19 (such as on 16th March 2020, available at www.consilium.europa.eu/en/press/press-releases/2020/03/16/statement-on-covid-19-economic-policy-response/ and on 24th March 2020, available at www.consilium.europa.eu/en/press/press-releases/2020/03/24/remarks-by-mario-centeno-following-the-eurogroup-meeting-of-24-march-2020/). K. LENAERTS et S. ADAMS, “La solidarité, valeur commune aux États membres et principe fédératif de l’Union européenne”, *Cah. dr. eur.*, 2021, vol. 57, pp. 307-417; P. LEINO-SANDBERG, “Constitutional Imaginaries of Solidarity: Framing Fiscal Integration Post-NGEU”,

spending thanks to the multiannual financial framework (MFF) and new financial instruments, such as SURE, NextGenEU and the European Peace Facility.

First temporary and emergency measures were adopted: the coronavirus response investment initiatives, ESM pandemic funding (€200 billion available but not used) and SURE, which authorised the European Commission to borrow up to €100 billion primarily to help Member States with the costs of work furlough schemes (60% used by Italy, Spain and Poland).²⁸

More structural measures — NextGenEU, the MFF and the Own Resources Decision — were subsequently adopted as part of one single package, although they were not adopted on the same Treaty basis and do not have the same objectives. The EU budget is divided into two parts, expenses and revenues, and includes a long-term and an annual component. First, the MFF sets the ceiling for EU expenditure and is approved by the Council unanimously with the Parliament's consent.²⁹ It identifies the policies and priorities the EU will spend its resources on. While the Common Agriculture Policy (CAP) was once the most important budget item with ca. 60% of the expenses in 1988-92, the Social and Economic Cohesion has steadily increased from ca. 22% in 1988-92 to become level with CAP and so-called reinforced priorities (i.e. support to Ukraine, migration, technologies) at 30% in 2021-2027.³⁰ In practice some countries are net contributors (such as Germany, France, the Netherlands, Italy, Sweden, Denmark, Austria, Finland and Ireland) to the EU budget and some countries are net beneficiaries (such as Malta, Cyprus, Slovenia, Estonia, Spain, Belgium, Portugal and mostly Romania, Hungary, Greece, and Poland).³¹ Overall, the MFF amounted to

in R. WEBER (ed), *The Financial Constitution of European Integration — Follow the Money*, Oxford, Hart Publishing, 2023, pp. 161-88. See also E. KÜÇÜK, T. KONSTATIDINES and Y. MARIQUE (eds), "A Response to External and Internal Threats of Division and Fragmentation? — Revisiting European Solidarity in the Aftermath of Crises", *MJ*, 2024 (31:6), pp. 665-787.

²⁸ Art. 4 Regulation 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the Covid-19, *OJ L* 2020, 159. F. CORTI and R. HUGUENOT-NOËL, "Towards a Re-insurance Union? SURE as an EU Response to Preserve Jobs in the Covid-19 Pandemic", *Journal of European Social Policy*, 2024, (34:2), pp. 237-52; KILPATRICK (above 16), pp. 634-36.

²⁹ Art. 312 TFEU.

³⁰ Council Regulation 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, *OJ L* 2020, 433/11; M. KÖLLING and J. HERNÁNDEZ-MORENO, "The Multiannual Financial Framework 2021-2027 and Next Generation EU — A Turning Point of EU Multi-Level Governance?", *Journal of Contemporary European Studies*, 2024, (32:2), pp. 459-73. A more detailed breakdown is available at European Commission's website dedicated to *The 2021-2027 EU budget — What's new?* Available at https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/whats-new_en (accessed on 11th December 2024).

³¹ European Commission's website dedicated to spending for 2023 https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/spending-and-revenue_en; K. BUCHHOLZ, "Which Countries are EU Contributors and Beneficiaries", *Statista*, 27 June 2023, available at www.statista.com/chart/18794/net-contributors-to-eu-budget/ (budget 2021).

€1,074 trillion in 2018 prices (or 1.11% of EU gross national income,³² or €1,270 trillion in 2024 prices), which is roughly in line with the previous 2014-2020 MFF, which amounted to €959.51 billion (in 2011 prices or €1,138 billion or 1.03% of EU gross national income) in commitments.³³ The difference is mainly due to Brexit and the fact that the UK is no longer included in the MFF as a consequence. Within the MFF, the EU adopts an annual budget. For the first time, the EU approved a revised budget in February 2024 to factor in the consequences of the Ukraine war with retrospective effect on 1st January 2024.³⁴

Second, the Own Resources Decision sets the revenues of the EU budget and needs to be approved by Member States according to their constitutional requirements to enter into force.³⁵ The EU Own Resources have evolved over time to include a part of VAT, custom taxes and a national contribution calculated in proportion to their gross national income and the other EU revenues, with a ceiling of 1.40% of the EU gross national income.³⁶ These are so-called traditional own resources. However, these own resources have not been sufficient to address the financial needs created by recurring crises (such as climate change or security threats) so the EU needed to develop new resources to respond to these challenges.³⁷ In 2016, the Monti Report identified possible new own resources such as CO₂ levy / carbon pricing, EU Emission Trading System proceeds, a motor fuel levy, electricity tax-based own resource, EU corporate income tax, financial transaction tax, a bank levy or financial activities' tax, and seigniorage.³⁸ During the negotiations for the MFF 2021-2027, the principle that new resources needed to be agreed upon was accepted and one specific new own resource was formalised in the Own Resources Decision: a contribution based on non-recycled plastic packaging waste.³⁹ The own resources also include national contributions up to a certain ceiling. This ceiling can rise from 1.40% to 2%, with the 0.60% difference being earmarked for reimbursing the bonds issued by the EU to finance NextGenEU.⁴⁰ The preamble of the

³² European Commission's website dedicated to *The 2021-2027 EU budget — What's new?* Available at https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/whats-new_en (accessed on 11th December 2024).

³³ Council Regulation 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, *OJ L* 347, 20 December 2013, pp. 884-891.

³⁴ Council Regulation 2024/765 of 29 February 2024 amending Regulation (EU, Euratom) 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027, *OJ L*, 29 February 2024.

³⁵ Art. 311 (3) TFEU.

³⁶ Council Decision 2020/2053 of 14 December 2020 on the system of own resources of the EU, *OJ L* 2020, 424/1, Art. 2 and 3.

³⁷ M. MONTI, *High Level Group in Own Resources*, December 2016, p. 15.

³⁸ *Ibid.*, pp. 41-56.

³⁹ Council Decision 2020/2053 of 14 December 2020 on the system of own resources of the EU, *OJ L* 2020, 424/1, Art. 2 (a), c.

⁴⁰ Council Decision 2020/2053 of 14 December 2020 on the system of own resources of the EU, *OJ L* 2020, 424/1, Art. 6. C. NEUMEIER, "Political Own Resources: Towards a Legal Framework", *Common Market Law Review*, 2023, (60:2), pp. 319-44.

Own Resources Decision mentions that new resources will be introduced and that a political agreement has been reached on “a carbon border adjustment mechanism and on a digital levy” and that other own resources such as a financial transaction tax may also be introduced during the period 2021-2027.⁴¹ The European Parliament adopted a resolution highlighting that the European Union needed more own resources than are currently available to finance the repayment of NextGenEU and to undertake its policies.⁴² The European Commission has so far adopted a proposal for new resources.⁴³ At the time of writing no Council Decision has been adopted to amend the 2020 Decision.⁴⁴ Finally, the Own Resources Decision also allows the Commission to borrow to address the consequences of the Covid-19 pandemic.⁴⁵

Third, the EU incurs expenses for carrying out its day-to-day administration and its policies. The EU budget is notably very limited as it only represents ca. 1% of the budget of the EU Member States. Over the years and across the various crises the EU has faced, mechanisms have been developed outside the EU budget to spend money on EU priorities (a technique known as “off budget”).⁴⁶ Here NextGenEU⁴⁷ is peculiar as the package straddles on-budget and off-budget spending.⁴⁸ On the one hand it provides the canvas for channel-

⁴¹ Council Decision 2020/2053, Recital 8. See for the first steps in the direction of developing new own resources: Regulation 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, *OJ L* 130, 16 May 2023; Directive 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, *OJ L* 130, 16 May 2023. This directive establishes the so-called ETS2 system which will contribute to financing the Social Climate Fund (Regulation 2023/955 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060 *OJ L* 130, 16 May 2023).

⁴² European Parliament resolution of 10 May 2023 on own resources: a new start for EU finances, a new start for Europe.

⁴³ European Commission, *The Next Generation of EU Own Resources*, 20 June 2023; Amended proposal for a Council Regulation on the methods and procedure for making available the own resources based on the Emissions Trading System, the Carbon Border Adjustment Mechanism, reallocated profits and the statistical own resource based on company profits and on the measures to meet cash requirements COM(2023)333, 20 June 2023.

⁴⁴ Article 311 TFEU provides for the procedure to lay down the system of Own Resources. It only enters into force after approval by the EU Member States according to their respective constitutional requirements (art. 311, al. 2).

⁴⁵ Council Decision 2020/2053 of 14 December 2020 on the system of own resources of the EU, *OJ L* 2020, 424/1, Art. 5.

⁴⁶ R. CROWE, “The European Union’s Public Finances in Times of Crisis: Fragmentation, Innovation, and Consolidation”, in C. KILPATRICK and J. SCOTT (eds), *New Frontiers of EU Funding: Law, Policy, Politics*, Oxford, Oxford University Press, 2024, pp. 23-72, 37-45.

⁴⁷ Council Regulation 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, *OJ L* 2020, 433/23.

⁴⁸ On the multiple ambiguities of the NextGenEU and in particular the RRF, see F. REIMER, A. GUTER-SANDU, A. HAAS and S. MURAU, “Schrödinger’s Off Balance-Sheet Fiscal Agency: The Recovery and Resilience Facility and the Limits to Incremental Fiscal Integration in Europe”, *OBFA-TRANSFORM Working Paper*, September 2024, No 3-EN (Berlin: Global Climate Forum).

ling EU money through various policies (such as for instance Horizon Europe, rural development, and the Just Transition Fund) — broadly on budget. On the other hand, NextGenEU's biggest share (€724 billion) is spent through the RRF ⁴⁹ — broadly off budget. The RRF is broken down into grants (€357 billion) and loans (€291 billion) to fund six types of policy priorities, such as a green transition; digital transformation; social and territorial cohesion; smart, sustainable and inclusive growth; health and economic, social and institutional resilience; and, policies of the next generation (education). ⁵⁰ The money is not allocated directly by the EU but by Member States: they submit their plans to the EU in line with EU priorities and the national recommendations made during the European Semester. National plans are negotiated with the Commission and adopted by the Economic and Financial Affairs Council (ECOFIN), which awards decisions by means of a Council implementing decision adopted by a qualified majority vote. ⁵¹ A timeline is agreed upon for awarding funds and for them to be spent. The NextGenEU is partly based on money raised on the financial markets (up to €750 billion in 2018 prices). However, the European Court of Accounts has identified problems with delays and institutional procedures for awarding the RRF money, resulting in final recipients not having received the promised money in time. ⁵² Some Member States have only received grants (e.g., Austria, Croatia, France, and Germany) while others have received grants and loans (e.g., Greece, Italy, Portugal, and Romania). ⁵³ To obtain loans, Member States have to demonstrate the need for additional reforms and investments and pursue milestones and targets other than those for obtaining grants. ⁵⁴ Member States have to reimburse the EU the loans they have contracted, and the EU has to reimburse its borrowing from 2028 to 2058. The Draghi report

⁴⁹ Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, *OJ L* 2021, 57/17 (further referred to as the “RRF Regulation”). Other funds include REACT-EU, Just transition fund, Rural Development, Horizon Europe, InvestEU and RescEU — see <https://eur-lex.europa.eu/EN/legal-content/glossary/nextgenerationeu.html>, accessed on 15th December 2024.

⁵⁰ European Union's website dedicated to the Recovery and Resilience Facility available at https://next-generation-eu.europa.eu/recovery-and-resilience-facility_en (accessed on 11th December 2024). The breakdown by priorities and countries is available on this website.

⁵¹ RRF Regulation, Art. 14.

⁵² ECA, *Absorption of Funds from the Recovery and Resilience Facility — Progressing with delays and risks remain regarding the completion of measures and therefore the achievement of RRF objectives*, 2024.

⁵³ EUROPEAN COMMISSION, *Study supporting the mid-term Evaluation of the Recovery and Resilience Facility*, 2023; ECA, *Absorption of Funds from the Recovery and Resilience Facility — Progressing with Delays and Risks Remain Regarding the Completion of Measures and Therefore the Achievement of RRF Objectives*, 2024, Figure 3. For an analysis of the problems in the country which received the highest contribution under the RRF, Italy, see F. DI MASCIÒ and A. NATALINI, “Implementing the NRRP from the Draghi Government to the Government of Giorgia Meloni: Italian Public Administration under the Pressure of too Large a Volume of Resources”, *Contemporary Italian Politics*, 2023, (15:2), pp. 237-51.

⁵⁴ RRF Regulation, Recital 48.

notes that the repayment will “account for EUR 30 billion per year” and that “[w]ithout a decision on new own resources, effective spending power at the EU level would be mechanically reduced by interest and principal repayments”⁵⁵. In addition, as Russia invaded Ukraine, the EU set up the REPowerEU plan to phase out Russian fossil fuel imports in the EU. The REPowerEU plan amounts to €300 billion, most coming out the RRF⁵⁶ complemented by funds coming either from the Brexit Adjustment Reserve (BAR)⁵⁷ or from the revenues generated by the Emissions Trading System allowances.⁵⁸

Finally, financial decisions taken at the EU level seek to prepare the EU for major future challenges by replicating some of the techniques used in the RRF⁵⁹ or by developing channels for funnelling money for pursuing European priorities. In the MFF 2021-2027, security and defence were the smallest items, amounting to less than 1.5% of the budget.⁶⁰ However, the stakes for European security have rarely been as high as they are in 2024 with the Ukraine war in particular.⁶¹ This has led to increasing the money available for defence. The European Peace Facility was first proposed by the High Representative of the EU for Foreign and Security Affairs, Federica Mogherini, in 2017 as an off-budget facility. It was set up in March 2021 and includes two aspects, one for the delivery of military support and one for assistance measures.⁶²

⁵⁵ Draghi Report, *The Future of European Competition*, 2024, 60.

⁵⁶ RRF Regulation, Art. 21a-21d (amendments resulting from Regulation of 27 February 2023, JO, 28 February 2023, art. 1).

⁵⁷ Regulation 2021/1755 of 6 October 2021 of the European Parliament and of the European Council establishing the Brexit Adjustment Reserve, OJ L 2021, 357/1; European Commission, *Guidance on Recovery and Resilience Plans in the Context of REPowerEU*, February 2023. Annex to Commission Implementing Decision amending Implementing Decision (EU) 2021/1803 setting out the provisional amounts allocated to each Member State from the resources of the Brexit Adjustment Reserve and the minimum amount of support to local and regional coastal communities, Brussels, 17 April 2023, C(2023) 2459 final. For Belgium, the transferred amounts to the Recovery and Resilience Facility are 228 850 088, making it the third beneficiary of these transfers after France and the Netherlands.

⁵⁸ The Innovation Fund (see here https://climate.ec.europa.eu/eu-action/eu-funding-climate-action/innovation-fund/what-innovation-fund_en).

⁵⁹ F. FABBRINI, “The Recovery and Resilience Facility as a New Legal Technology of European Governance”, *Journal of European Integration*, 2024, vol. 47, n° 1, pp. 85-103, identifies that the RRF is characterized by a five-step process (definition of EU priorities, design of national plans, EU assessment of national plans, national implementation of the plans, and EU monitoring). These five steps have been replicated across a number of new initiatives such as RePowerEU, the EU Social Climate Fund, the Macro-Financial Assistance+ Instrument for Ukraine 2023, the Ukraine Facility and the Stability and Growth Pact.

⁶⁰ European Commission’s website dedicated to spending categories available at https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/spending/headings_en (accessed on 11th December 2024).

⁶¹ The War triggered economic decisions in relation to mitigating its adverse consequences on European firms. For instance, Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, 2023/C 101/03, C/2023/1711, OJ C 101, 17 March 2023, pp. 3-46.

⁶² Council Decision 2021/509 of 22 March 2021 establishing a European Peace Facility, OJ L 2021, 102/14.

The European Council adopted its integrated methodological framework laying down the conditions for assistance measures, namely compliance with international and national law, the protection of the EU and local populations, proportionality and post-delivery controls.⁶³ The facility is contributed to directly by Member States every year and the money has been spent on a range of assistance measures in Africa (e.g. Benin, Congo, Ghana, Ivory Coast, Mozambique) and in the EU neighbourhood (Moldovia, Georgia and Ukraine in particular). The Facility has a total financial ceiling of more than €17 billion for the period 2021-2027. The European Commission manages it and acts as the accounting officer. The Facility also has a committee that issued its rules of procedure (among other the confidentiality of its deliberations).⁶⁴ Since the start of the war in Ukraine in February 2022, Ukraine has been the main beneficiary of financial assistance for procuring lethal force,⁶⁵ including more than €5 billion allocated to it through its Ukraine Assistance Fund.⁶⁶ In addition, the EU has committed €50 billion for the period 2024-2027 for reconstructing Ukraine after the war and supporting the enlargement process — in the event that it would be agreed — through the Ukraine Facility.⁶⁷ The Ukraine Facility includes loans (through the EU budget) and grants (thanks to borrowing on financial markets *via* a central funding pool used for financing its policy programmes). This all concurs with the slow rise of the EU fiscal capacity.⁶⁸

⁶³ EUROPEAN UNION EXTERNAL ACTION, “Questions and Answers on the European Peace Facility’s Integrated Methodological Framework”, 22 March 2021, available at www.eeas.europa.eu/eeas/questions-and-answers-european-peace-facility%E2%80%99s-integrated-methodological-framework-0_en (accessed on 11th December 2024).

⁶⁴ General Secretariat of the Council, Brussels, 9 November 2021 (OR. en) 13672/21.

⁶⁵ Council Decision 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, *OJ L* 60, 28 February 2022, pp. 1-4; Council Decision 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces, *OJ L* 61, 28 February 2022, pp. 1-4; Council Decision 2023/927 of 5 May 2023 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces through the provision of ammunition, *OJ L* 123, 8 May 2023, pp. 27-31. Information on the ways in which the European Peace Facility has been used in the EU neighbourhood is available on <https://euneighbourseast.eu/tag/european-peace-facility/> (accessed on 11th December 2024).

⁶⁶ COUNCIL OF EUROPE, “Press Release: Ukraine Assistance Fund: Council allocates €5 billion under the European Peace Facility to support Ukraine militarily”, 18 March 2024, available at www.consilium.europa.eu/en/press/press-releases/2024/03/18/ukraine-assistance-fund-council-allocates-5-billion-under-the-european-peace-facility-to-support-ukraine-militarily/ (accessed on 11th December 2024).

⁶⁷ European Commission’s website dedicated to the Ukraine Facility available at https://eu-solidarity-ukraine.ec.europa.eu/eu-assistance-ukraine/ukraine-facility_en (accessed on 11th December 2024), Regulation 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility, *OJ L*, 29 February 2024, 792.

⁶⁸ F. FABBRI, “Funding the War in Ukraine: The European Peace Facility, the Macro-Financial Assistance Instrument, and the Slow Rise of an EU Fiscal Capacity”, *Politics and Governance*, 2023, (11:4), pp. 52-61.

SECTION 2 — A COMMON DEBT, A GAME CHANGER FOR FISCAL INTEGRATION

Until the Covid-19 pandemic broke out in 2020, article 310 (1) alinea 3 of the TFEU requiring a balanced budget had been interpreted as preventing the EU from borrowing. Borrowing for mutualised debts through Eurobonds was discussed however.⁶⁹ When the Covid-19 pandemic created the need for funding, the heads of state or government of Belgium, France, Italy, Luxembourg, Spain, Portugal, Greece, Slovenia and Ireland signed an open letter to European Council President Charles Michel calling for the creation of a “common debt instrument issued by a European institution ... to counter the damages caused by this pandemic”.⁷⁰ Despite political resistance from some states such as the Netherlands, agreement was found among Member States once Germany supported the idea.

NextGenEU was mainly designed as an off-budget fund.⁷¹ The money raised on financial markets by NextGenEU is earmarked for the EU budget. In that way, borrowing becomes revenue so that the overall budget remains balanced.⁷² As such, off-EU budget techniques are not new. The European Court of Auditors has questioned the whole financial landscape of European public finances, mapping how numerous instruments (such as the European Stability Mechanism and the European Financial Stability Facility) are linked to EU policies in some manner but are administered outside the official EU budget with its legislative procedure and accountability mechanisms (both parliamentary and audit).⁷³ The scholarship has identified eleven such borrowing instruments between 1952 and 2021.⁷⁴ Euratom also includes loans for instance.⁷⁵ The RRF is particular how-

⁶⁹ See F. AMTENBRINK, R. REPASI and J. DE HAAN, “Is there Life in the Old Dog Yet? Observations on the Political Economy and Constitutional Viability of Common Debt Issuing in the Euro Area”, *Review of Law & Economics*, 2016, (12:3), pp. 605-633. The article highlights that such technique may result in a stricter fiscal discipline than the requirements of the Growth and Stability Pact but that it does not go without constitutional questions.

⁷⁰ S. MICHALOPOULOS, “Nine Member States Ask for Eurobonds to Face Coronavirus Crisis”, *Euractiv*, 26 March 2020.

⁷¹ To complicate matters, the European Court of Audit distinguishes between the non-repayable support part of NextGenEU financed by loans (on budget) on the one hand and the Recovery and Resilience Facility (RRF) loans financed by NextGenEU borrowing (off budget) on the other hand (see ECA, *The EU's Financial Landscape — A Patchwork Construction Requiring Further Simplification and Accountability*, Special Report 05/2023, §§ 17 and 18).

⁷² LEINO-SANDBERG and RUFFERT (above 12), pp. 450-456.

⁷³ ECA, *The EU's Financial Landscape — A Patchwork Construction Requiring further Simplification and Accountability*, Special Report 05/2023.

⁷⁴ HODSON and HOWART (above 15), table 1.

⁷⁵ Council Decision of 29 March 1977 empowering the Commission to issue Euratom loans for the purpose of contributing to the financing of nuclear power stations, *OJ L* 088, 6 April 1977, pp. 9-10, Art. 1. Council Decision of 21 March 1994 amending Decision 77/270/Euratom, to authorize the Commission to contract Euratom borrowings in order to contribute to the financing required for

ever because it is the most expansive borrowing authorisation and the funds can be used for loans and grants.

The scholarship argues that the NextGenEU borrowing — although temporary in nature — is opening up the possibility for EU borrowing powers on a more permanent basis in the future.⁷⁶ Before the elections in June 2024, President von der Leyen explicitly confirmed that she was open to new borrowing should there be the need.⁷⁷ Different factors may consolidate the need for permanent borrowing powers. The first one is that one or more crises may arise, requiring additional funding so that, taken as a whole, the multiple borrowing streams add to each other. Another scenario relates to the current Ukraine war and the new awareness that the EU needs to be in a position to defend itself. Should the USA confirm their willingness to withdraw their military from the EU and NATO following the presidential election in November 2024 and should Russia pursue its belligerence at the EU borders, a European army would be needed.⁷⁸ Currently, the EU provides lethal and non-lethal assistance to Ukraine with the European Peace Facility. Technically, the funds are not EU money but national money channelled through a European off-budget instrument, however. Military personnel and weaponry require a large fiscal capacity for their maintenance.⁷⁹ Should this European army be effectively deployed and engaged in a conflict even more fiscal capacity would be required. It would be ironic if the EU, which has been developing for 60 years as a peace project but failed in its integrative attempts, were to succeed in finding a consensus to organise a genuine budgetary capacity in a war.⁸⁰ The third

improving the degree of safety and efficiency of nuclear power stations in certain non-member countries, article 1. One of the main beneficiaries has been Ukraine which benefitted from loans in 2017-2021 for improving its nuclear facilities.

⁷⁶ Eg P. LEINO-SANDBERG, “Constitutional Imaginaries of Solidarity: Framing Fiscal Integration Post-NGEU”, in R. WEBER (ed), *EU Integration through Financial Constitution: Follow the Money*, Oxford, Hart Publishing, 2023, pp. 161-88, 176; F. AMTENBRINK and M. MARKAKIS, “Never Waste a Good Crisis? On the Emergence of an EU Fiscal Capacity”, in A. HINAREJOS and R. SCHÜTZE (eds), *EU Fiscal Federalism — Past, Present, Future*, Oxford, Oxford University Press, 2023, pp. 171-204; F. ALLEMAND *et al.*, *Making Next-Generation EU a Permanent Tool*, Recovery Watch, Policy Study, 2023.

⁷⁷ J. PACKROFF, “German Liberals Slam von der Leyen for not Ruling out New EU Debt”, *Euractiv*, 21 May 2024, available at www.euractiv.com/section/economy-jobs/news/german-liberals-slam-von-der-leyen-for-not-ruling-out-new-eu-debt/ (accessed on 11th December 2024).

⁷⁸ P. LEINO-SANDBERG and H. OJANEN, “Time for Military Integration in the EU? Armed Aggression and the Scope of Article 42 TEU”, *Verfassungsblog*, 3 March 2022.

⁷⁹ For instance the budget for defence represents £54.2 billion on defence or 2.3% of GDP in 2023 in the United Kingdom (E. KIRK-WADE, *UK Defence Spending*, London, House of Commons Library, 3 May 2024); €43 billion or 1.9% in France (www.defense.gouv.fr/ministere/loi-programmation-militaire-2019-2025/projet-loi-finances-armees-2023-lpm-annee-5), \$816.7 billion or 3.8% in the USA (www.defense.gov/Spotlights/FY2023-Defense-Budget/), and 1.3% in Belgium. Even if a European army might be modest at a start, the whole trajectory here sketched does not indicate how small or big this army might end up being.

⁸⁰ For the role wars play in shaping state bureaucracies, see eg R. BENSEL, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877*, Cambridge, Cambridge University Press, 1991.

— less dramatic — scenario revolves around the fact that agreement remains to be found to ensure that enough new own resources provide new income to finance the reimbursement of the money borrowed on the financial market under NextGenEU.⁸¹ If these new resources are not agreed upon, the EU is entitled to set the national contributions in such a way as to balance its budget up to a ceiling of 2% of the gross national income.⁸² Some Member States may be happy with this solution, but others may prefer to accept that the EU keeps borrowing on the financial market to reimburse its debts. In theory, regardless of the factor(s) which would justify the need for permanent EU borrowing powers, treaties will need revision.⁸³

A major criticism of NextGenEU revolves around its legal basis and justification.⁸⁴ The Own Resources Decision explicitly allows the European Commission to borrow to address the consequences of the Covid-19 pandemic. This is a broad mandate as these consequences are not detailed much in the Decision: the only yardsticks provided in the preamble pertain to the economic nature of the shocks, the prevention of Covid-19 from re-emerging and the limitation in time to the immediate aftermath of the crisis.⁸⁵ However, the concrete projects that have been funded show that the money has been spent on prior and more general priorities identified by the European Commission such as the twin transitions, components of the social pillar and administrative capacity building. As the RRF is based on articles 174, 175 and 177 of the TFEU relating to social and economic cohesion, the scholarship has criticised this competence creep by pointing out that it weakens cohesion to the benefit of the periphery, EU democratic legitimacy and the rule of law.⁸⁶ This criticism makes it even more complex to locate in these articles a possible legal basis for permanent financial instruments akin to NextGenEU in their design (but for their permanency).⁸⁷

⁸¹ R. CROWE, “An EU Budget of States and Citizens”, *ELJ*, 2020, (26:5-6), pp. 331-44, 333. Draghi Report, *The Future of European Competition*, 2024, p. 60.

⁸² The Own Resources Decision (art. 9 (5)) details how this should happen and what happens if one Member State is not in a position to pay its contribution, allowing the Commission to call upon the other Member States to pay even if the said Member State remains bound to honour it.

⁸³ CROWE (above 81), p. 342.

⁸⁴ As illustrated by the litigation leading to Bundesverfassungsgericht 2 BvR 547/21 and 2 BvR 798/21, Own Resources Decision Judgment of 6 December 2022 (see P. DERMINE and A. BOBIĆ, “Of Winners and Losers: A Commentary of the Bundesverfassungsgericht ORD Judgment of 6 December 2022: Cases 2 BvR 547/21 and 2 BvR 798/21, Own Resources Decision Judgment of 6 December 2022”, *EuConst*, 2024, 1/20, pp. 163-90; G. ANAGNOSTARAS, “Acquitted on the Benefit of Doubt... but not Proven Innocent! The Judgment of the German Federal Constitutional Court on the Next Generation EU Program”, *German Law Journal*, 2024, (25:4), pp. 578-596).

⁸⁵ Own Resources Decision, Recitals 8, 9 and 18.

⁸⁶ P. LINDSETH and P. LEINO-SANDBERG, “Crisis, Reinterpretation, and the Rule of Law: Repurposing ‘Cohesion’ as a General EU Spending Power”, *Hague J Rule Law*, vol. 16, 2024.

⁸⁷ *Ibid.*

SECTION 3 — CONDITIONALITY AS A RECURRING AND SYSTEMIC FEATURE

Conditionality is not new: it is well known in international arrangements,⁸⁸ and in federal systems such as Canada and the USA,⁸⁹ and is a recurring feature across EU financial instruments.⁹⁰ It appears under various guises such as *ex ante* (before funding is awarded) or *ex post* (in the implementation of the payments), and it can be general (e.g., broad systemic reforms) or specific (directly connected to the project financed).⁹¹ Conditionality was already included in the enlargement mechanisms for the Eastern and Central European countries in 2004 and in particular Romania and Bulgaria in 2007.⁹² It has been defined as linking “the granting of certain benefits, especially financial aid, with the implementation of specific policies and reforms or the fulfilment of concrete conditions. The behaviour of the recipient of financial aid can be influenced by rewards or, conversely, by the full or partial withdrawal of aid, that is, by positive or negative conditionality.”⁹³ Conditionality was also key in the financial assistance and the sovereign debt programmes entered into during the financial crisis.⁹⁴ When the financial crisis struck, the European Central Bank intervened to provide financial assistance to the ailing eurozone Member States. Again, conditionality was part of the assistance as it was a way for it to be deemed to be in compliance with the “no bail out clause” provided for in article 125 of the TFEU. Indeed, the CJEU judged that the fact that the financial assistance was conditional meant that the Member States were encouraged not to be complacent and not to hope that the EU or its Member

⁸⁸ R. COLLINGTON, “A Thousand Cuts: Social Protection in the Age of Austerity”, *International Affairs*, 2024, (100:3), pp. 1331-33; A. BARAGGIA and M. BONELLI, “Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges”, *German Law Journal*, 2022, (23:2), pp. 131-56.

⁸⁹ V. VIȚĂ, “(Un)Constitutional Conditions: A European Perspective”, in C. KILPATRICK and J. SCOTT (eds), *New Frontiers of EU Funding: Law, Policy, Politics*, Oxford, Oxford University Press, 2024, pp. 97-132, 99-101.

⁹⁰ C. BRIÈRE, “Chapter 13: Treat Your Neighbour as Yourself — Rule of Law Spending Conditionality within and outside the EU”, in L. M. HINOJOSA-MARTÍNEZ and C. PÉREZ-BERNÁRDEZ (eds), *Enhancing the Rule of Law in the European Union's External Action*, Cheltenham, Edward Elgar, 2023, pp. 288-312.

⁹¹ P. BECKER, “Conditionality as an Instrument of European Governance — Cases, Characteristics and Types”, *JCMS*, 2024, (63:2) pp. 1-18.

⁹² Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, *OJ L* 2006, 354. *Add.* CJEU, 21 December 2021, C-357/19, C-37-9/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034. E. GATEVA, *European Union Enlargement Conditionality*, London, Palgrave, 2015; R. EPSTEIN and U. SEDELMEIER (eds), “Beyond Conditionality: International Institutions in Postcommunist Europe after Enlargement”, *Journal of European Public Policy*, 2008, (15:6), pp. 795-955.

⁹³ BECKER (above 91), p. 1.

⁹⁴ KILPATRICK (above 16), pp. 632-633.

States would endlessly intervene to save the euro.⁹⁵ This meant that a certain discipline was instilled on the Member States, resulting in the financial market regaining confidence in the whole eurozone.

During the period 2019-2024, conditionality gained new grounds in two ways that are relevant for the present discussion:⁹⁶ firstly, by being spread more generally across financial arrangements benefiting all Member States (such as green and social spending in the NextGenEU and the RRF) and secondly, by becoming explicitly linked to the rule of law and general principles of action.

Firstly, the link between EU funding and specific policy objectives of an economic or social nature is at the heart of the RRF:⁹⁷ the national RRF plans need to be aligned with the European Semester and its country-specific recommendations. Furthermore, a monitoring system has been set up so that the EU funds are not disbursed as long as the agreed targets have not been reached.⁹⁸

Secondly, conditionality is transversally provided for by Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020, which set a general regime of conditionality for the protection of the Union budget and Regulation 2021/1060 on the structural funds,⁹⁹ which includes horizontal principles that need to be complied with in the implementation of the Funds such as the respect of fundamental rights as recognised in the Charter of Fundamental Rights, the principles of non-discrimination and the no-harm-principle.¹⁰⁰

A political concession made to the European Parliament, the Conditionality Regulation was part of the overall package of legal instruments adopted to address the Covid-19 pandemic (with the MMF, the NextGenEU, and the Own Resources Decision). Worried about the rule of law crisis in Poland and Hungary, the European Parliament called “on the Commission to propose a mechanism whereby Member

⁹⁵ CJEU, 27 November 2012, C-370/12, *Thomas Pringle v. Ireland*, ECLI:EU:C:2012:756, § 137: “Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy”.

⁹⁶ For a more systematic presentation of how constitutionality has been spread across a number of instruments since 2020, see V. VIṬĀ, “(Un)Constitutional Conditions: A European Perspective”, in C. KILPATRICK and J. SCOTT (eds), *New Frontiers of EU Funding: Law, Policy, Politics*, Oxford, Oxford University Press, 2024, pp. 97-132, 102-105.

⁹⁷ RRF Regulation, Recital 4.

⁹⁸ BECKER (above 91), p. 7.

⁹⁹ Regulation 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30 June 2021, pp. 159-706.

¹⁰⁰ Regulation 2021/1060, Art. 9. M. BLAUBERGER and V. VAN HÜLLEN, “Conditionality of EU Funds: An Instrument to Enforce EU Fundamental Values?”, *Journal of European Integration*, 2021, (43:1), pp. 1-16.

States that do not respect the values enshrined in Article 2 TEU can be subject to financial consequences” in March 2018.¹⁰¹ This call echoed the demands that Germany, the Netherlands, Finland, Denmark and France had already expressed since 2013 for EU funding to be suspended when the rule of law was breached.¹⁰²

This Conditionality Regulation purports to protect the values enshrined in Article 2 of the Treaty on European Union (pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men)¹⁰³ and in particular the respect for the rule of law;¹⁰⁴ sound financial management;¹⁰⁵ an independent and impartial judiciary;¹⁰⁶ and legal certainty. When the protection of the EU’s financial interests is endangered in a Member State, the EU is enabled to suspend the disbursement of European funding.¹⁰⁷ The list of possible breaches to the rule of law includes problems with the proper functioning of the authorities implementing the EU budget, with the proper functioning of financial control, with monitoring and audit, with the proper functioning of investigation and prosecutions, in relation to tax fraud corruption and breaches of EU law or the protection of the financial interests of the Union, with effective judicial review in relation to the previous points, with the prevention and sanction of fraud recovery of funds unduly paid, with cooperation with OLAF and other situations relevant for the sound financial management of the EU budget and with the protection of the financial interests of the Union.¹⁰⁸ In those cases, measures can be adopted to protect the Union budget such as the suspension of payment, the termination of a legal commitment, the prohibition on entering into new legal commitments, the suspension of instalments, or the reduction of economic advantages.¹⁰⁹ The adoption of these measures starts with the Commission initiating the measure, notifying it to the Member State and informing the European Parliament and the Council. The Member State then provides information or observations. The Commission makes

¹⁰¹ European Parliament, Resolution of 14 March 2018 on the Next MFF: Preparing the Parliament’s Position on the MFF Post-2020, 2017/2052(INI).

¹⁰² M. BLAUBERGER and V. VAN HÜLLEN, “Conditionality of EU Funds: An Instrument to Enforce EU Fundamental Values?”, *Journal of European Integration*, 2021, (43:1), pp. 1-16; R. COMAN, *The Politics of the Rule of Law in the EU Polity: Actors, Tools and Challenges*, London, Palgrave, 2022.

¹⁰³ Recital 1.

¹⁰⁴ Recitals 6 and 11. The rule of law is defined in Article 2 (a) of the Conditionality Regulation as “principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU”.

¹⁰⁵ Recital 7.

¹⁰⁶ Recitals 9 and 10.

¹⁰⁷ BECKER (above 91), p. 7.

¹⁰⁸ Art. 4 (2) of the Conditionality Regulation.

¹⁰⁹ Art. 5 of the Conditionality Regulation.

a proposal to the Council that adopts it in principle within a month. However, the Council may amend the proposal by a qualified majority.¹¹⁰

Poland and Hungary challenged the Conditionality Regulation before it entered into force. One of their arguments was that conditionality should be linked more clearly to the funds suspended and not be used in a sweeping and general manner. The CJEU upheld the legality of the Conditionality Regulation, deciding that “*the Union budget is one of the principal instruments for giving practical effect, in the Union’s policies and activities, to the principle of solidarity, mentioned in article 2 TEU, [...], and, secondly, that the implementation of that principle, through the Union budget, is based on mutual trust between the Member States in the responsible use of the common resources included in that budget. That mutual trust is itself based, [...], on the commitment of each Member State to comply with its obligations under EU law and to continue to comply, as is moreover stated in recital 5 of the contested regulation, with the values contained in Article 2 TEU, which include the value of the rule of law*”.¹¹¹

Thereafter the Commission adopted guidelines on the application of the Conditionality Regulation¹¹² and applied them to Hungary,¹¹³ but not Poland.¹¹⁴ The Council decided to suspend payments to Hungary amounting to €6 billion in December 2022 for breach of the Conditionality Regulation.¹¹⁵ In addition both in relation to Hungary and Poland, funds were withheld on the basis of breaches of

¹¹⁰ Art. 6 of the Conditionality Regulation.

¹¹¹ C-156/21, *Hungary v. Parliament and Council*, § 147; M. FISICARO, “Protection of the Rule of Law and ‘Competence Creep’ via the Budget: The Court of Justice on the Legality of the Conditionality Regulation — ECJ Judgments of 16 February 2022, C-156/21, *Hungary v. Parliament and Council* and C-157/21, *Poland v. Parliament and Council*”, *EuConst*, 2022, 18(2), pp. 334-56; Y. MARIQUE, “*Budget Conditionality: A Virtuous Circle of Solidarity to Overcome Moral Hazard?*”, *MJ*, 2024, (31:6), pp. 709-727. In political sciences: R. COMAN, “The European Council’s Role in Day-to-Day Decision-Making: Increasing the EU’s Authority through a General Regime of Conditionality (Regulation 2020/2092)?”, in R. COMAN (ed), *The Politics of the Rule of Law in the EU Polity*, London, Palgrave, 2022, pp. 195-240; V. BORGER, “Constitutional Identity, the Rule of Law, and the Power of the Purse: The ECJ Approves the Conditionality Mechanism to Protect the Union Budget: Hungary and Poland v. Parliament and Council”, *Common Market Law Review*, 2022, (59:6), pp. 1771-802.

¹¹² Communication from the Commission, *Guidelines on the application of the Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget*, Brussels, 2 March 2022 C(2022) 1382 final.

¹¹³ Proposal for a Council Implementation Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, Brussels, 18 September 2022, COM(2022) 485 final.

¹¹⁴ Funds were withheld by the EU but not on the basis of the Conditionality Regulation, but the horizontal conditionality and respect of the EUCFR, see Commission assessment in accordance with Article 15(4) of Regulation 2021/1060, of the fulfilment of the horizontal enabling condition “3 Effective application and implementation of the Charter of Fundamental Rights”, 29 February 2024, C(2024) 1441 final.

¹¹⁵ Council Implementation Decision 2022/2506 of 15 December 2022. www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/ (last accessed on 11th December 2024). The Council decided to suspend €6.3 billion given only partial remedial action by Hungary.

horizontal conditions such as the respect of the European Charter for Fundamental Rights (in particular article 47 on effective judicial protection). Parts of the funds were released subsequently, in the case of Poland when a new Government was elected ¹¹⁶ and in the case of Hungary when the Commission decided to free the funds relating to horizontal conditionality ¹¹⁷ whilst the Hungarian Prime Minister Viktor Orban (literally) left the room so that the European Council could agree unanimously on opening up accession negotiations with Ukraine. ¹¹⁸ Thereafter, the European Parliament adopted a resolution to challenge this strategy and filed a case against the Commission asking the CJEU to annul the decision to free the EU funds. ¹¹⁹ Proceedings are pending at the time of writing.

Regardless of the outcome of this case, these events illustrate that in the diversity of its manifestations, conditionality is not purely a technical, transactional ¹²⁰ or managerial ¹²¹ issue. It has a constitutional dimension where law and politics keep interplaying. Conditionality is by no means automatic: it makes the interplay between law and politics more apparent and shapes it providing leverage and bargaining ships to the EU in ways that it would not have had otherwise, shifting the legal and political positions of the EU and Member States alike.

SECTION 4 — PROTECTING THE EU FINANCIAL INTERESTS THROUGH MONITORING AND ENFORCEMENT

The previous sections have highlighted the development of common debts at EU level and conditionality as a technique to ensure that the EU financial interests are protected. The TFEU includes provisions pertaining to this protection and the principle of sound financial management, with both a task for the

¹¹⁶ European Commission, Press Release: Poland's efforts to restore rule of law pave the way for accessing up to €137 billion in EU funds, 29 February 2024, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1222 (accessed on 11th December 2024).

¹¹⁷ Commission Implementing Decision C(2023) 90141 of 13 December 2023, Commission Decision of 13 December 2023 on the reassessment, on the Commission's initiative, of the fulfilment of the conditions under Article 4 of Regulation (EU, Euratom) 2020/2092 following Council Implementing Decision (EU) 2022/2506 of 15 December 2022 regarding Hungary.

¹¹⁸ European Council's webpage dedicated to the enlargement of the EU to Ukraine: www.consilium.europa.eu/en/policies/enlargement/ukraine/; N. CAMUT, J. BARIGAZZI and P. DALLISON "Toilet Diplomacy: How Many Bathroom Breaks can the EU force Viktor Orbán to Take?", *Politico*, 1 February 2024, available at www.politico.eu/article/toilet-diplomacy-bathroom-breaks-force-viktor-orban-hungary-council-eu-budget/ (accessed on 11th December 2024). For a critical assessment, see K. SCHEPPELE and J. MORIJN, "Money for Nothing? EU Institutions' Uneven Record of Freezing EU Funds to Enforce EU Values", *Journal of European Public Policy*, 2024, 32(2) pp. 1-24.

¹¹⁹ C-225/24, *Parliament v. Commission*, application submitted on 25 March 2024.

¹²⁰ P. THINUS, "The EU's Transactional Approach to Rule of Law Spending Conditionality in the 2020s", *JCMS*, 2025, (63:2), pp. 548-563.

¹²¹ L. FROMONT and A. VAN WAAYENBERGE, "Trading Rule of Law for Recovery? The New EU Strategy in the Post-Covid Era", *ELJ*, 2022, (27:1-3), pp. 132-47.

EU and the Member States: article 86 is the legal basis for the European Public Prosecutor's Office; article 310 (5) provides that "[t]he Union and the Member States, in accordance with Article 325, shall counter fraud and any other illegal activities affecting the financial interests of the Union"; article 325 is dedicated to combatting fraud, with the states needing to take the same measures to protect EU financial interests as their own, and the need for close and regular cooperation between Member States and for EU institutions to adopt the necessary measures to provide for effective and equivalent protection.¹²² The financial regulation defines "sound financial management" as meaning the "implementation of the budget in accordance with the principles of economy, efficiency and effectiveness".¹²³ During the period 2019-2024, the monitoring techniques of EU funds have received increasing attention, due in part to the funds that were released with the RRF. The RRF indeed provides examples of this sustained attention as well as of recurring issues. While the EU's financial interests have been highly exposed, institutional mechanisms have been operational so as to increase the protection of those EU financial interests and sound financial management.

The growing awareness of the need to monitor EU funds is illustrated by the preparation of the various RRF national plans, which require compliance with conditionality, in particular that the national plans align with the European Semester.¹²⁴ However, the monitoring of the implementation of these national RRF plans has been challenging. Member States have had to identify the relevant projects that could benefit from the EU funds and to ensure that the money is spent in compliance with EU regulations. The European Commission has provided support to Member States to develop their administrative capacity for proper monitoring of the implementation of their plans. This administrative capacity building is provided by the Technical Support Instrument (TSI), managed by the European Commission's Directorate-General for Structural Reform Support¹²⁵ and is part of a wider attempt to enhance the "European administrative space"¹²⁶ by improving administrative capacity at national, regional and local levels. Problems of implementation of the

¹²² Article 325(4) is one of the articles used as the legal basis for the Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, *OJ L* 305, 26 November 2019, pp. 17-56.

¹²³ Article 2(59) Regulation 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, *OJ L* 193, 30 July 2018, pp. 1-222.

¹²⁴ B. VANHERCKE and A. VERDUN, "The European Semester as Goldilocks: Macroeconomic Policy Coordination and the Recovery and Resilience Facility", *JCMS*, 2022, (60:1), pp. 204-23.

¹²⁵ European Commission's webpage dedicated to the Technical Support Instrument (TSI) available at https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes/technical-support-instrument/technical-support-instrument-tsi_en (accessed on 11th December 2024).

¹²⁶ Defined in this context as the "[t]erm used to describe an increasing convergence of administrative practices among the Member States based on shared values and principles, towards common standards and approaches of operation" (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions enhancing the European Administrative Space (CompAct) COM(2023) 667 final, footnote 33).

RRF arose in some Member States — such as Italy, one of the biggest beneficiaries of the plan.¹²⁷ In addition, the RRF Regulation does not mandate the identification of funding indicators to assess the performance or the social result (short term) and impact (longer term) of the allocated money by project.¹²⁸ The identification of indicators has been delegated to the Commission.¹²⁹ The milestones and targets pertain to aspects such as policy reforms or investment,¹³⁰ but this only shows that the funded project makes progress, not the socio-economic usefulness of the project in and of itself,¹³¹ or that the policy objectives have actually been met.¹³²

As the principle of sound financial management and the protection of the financial interests of the EU have increasingly gained traction in the financial regulations — and the need to be respected also in the case of RRF disbursements even if they are not on the balance sheet¹³³ — the EU has developed an institutional architecture seeking to monitor their respect. First OLAF was set up as an entity from the European Commission¹³⁴ and a Convention on the protection of the financial interests of the Union (PIF Convention) was signed in 1995.¹³⁵ Then the Commission adopted an Anti-Fraud Strategy in 2011,¹³⁶ which was followed

¹²⁷ A special issue analysing the implementation trouble of the RRF in Italy is available in *Contemporary Italian Politics*, 2024, (16:1).

¹²⁸ BRUEGEL, “The EU Recovery and Resilience Facility falls short against performance-based funding standards”, 2023, available at www.bruegel.org/analysis/eu-recovery-and-resilience-facility-falls-short-against-performance-based-funding (accessed on 11th December 2024).

¹²⁹ RRF Regulation, Art. 29(4).

¹³⁰ RRF Regulation, Art. 2.

¹³¹ ECA, *The Recovery and Resilience Facility's Performance Monitoring Framework — Measuring Implementation Progress but not Sufficient to Capture Performance*, 2023.

¹³² A mid-term evaluation was required and has been published (EUROPEAN COMMISSION, *Study Supporting the Mid-Term Evaluation of the Recovery and Resilience Facility — Final Report*, 2023).

¹³³ RRF Regulation, Recitals 18, 71-72 and Art. 6(1).

¹³⁴ Council Regulation 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, *JO* L 312, 23 December 1995, pp. 1-4, completed by regulation 2185/96; M. LUCHTMAN and J. VERVAELE (eds), *Report — Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with Other EU Law Enforcement Authorities (ECN/ESMA/ECB)*, 2017; M. LUCHTMAN and M. WASMEIER, “The Political and Judicial Accountability of OLAF”, in M. SCHOLTEN and M. LUCHTMAN (eds), *Law Enforcement by EU Authorities — Implications for Political and Judicial Accountability*, Cheltenham, Edward Elgar, 2017, pp. 221-246; K. BOVEND'EERDT, *The Role of Fundamental Rights in OLAF Composite Enforcement Procedures*, New York, Springer, 2024, chapter 2. *Add.*, OLAF website (available at https://anti-fraud.ec.europa.eu/index_en accessed 11th December 2024); C. HARDING, “EU Criminal Law under the Area of Freedom, Security, and Justice”, in A. ARNULL and D. CHALMERS (eds), *The Oxford Handbook of European Union Law*, Oxford, Oxford University Press, 2015, pp. 837-866, 857-858; Y. MARIQUE, “Missions de contrôle : un système fragmenté en voie de développement”, in J. B. AUBY and J. DUTHEIL DE LA ROCHÈRE (eds), *Traité de droit administratif européen*, Bruxelles, Bruylant, 2022, pp. 263-294.

¹³⁵ Convention on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995.

¹³⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and the Court of Auditors on the Commission Anti-Fraud Strategy {SEC(2011) 791 final}, 24 June 2011. An update was adopted: Communication from the Commission to the European Parliament, the Council, the European Economic and Social

by the adoption of a Directive seeking to protect the financial interests of the Union (PIF Directive)¹³⁷ and replacing the PIF Convention. The PIF Directive requires Member States to take all measures to ensure that fraud against the Union's financial interests constitutes a criminal offence. Other offences include corruption and misappropriation of public funds. The PIF Directive sets the scope for the material competence of the European Public Prosecutor Office (EPPO),¹³⁸ which was seen as a much-needed step towards more European integration and creating a "common sense of justice" for all the EU citizens.¹³⁹ The EPPO was made operational during the 2019-2024 period with the appointment of the first EPPO in 2019 and the appointment of national European prosecutors in 2020. It started its operations in 2022. By the end of 2023 (last available figures at the time of writing) the EPPO had 1,927 active investigations, for estimated damage of over €19.2 billion and freezing orders worth €1.5 billion.¹⁴⁰ Various forms of coordination matter to ensure that the EPPO system is efficient to combat fraud against the financial interests of the Union: firstly, institutional coordination (such as with OLAF)¹⁴¹ and secondly national coordination for the investigation and prosecution throughout the EU, despite the many specificities at national levels.¹⁴² Not all Member States are party to the EPPO — Denmark, Ireland and Hungary are not. Poland¹⁴³ and Sweden¹⁴⁴ joined only in the course of 2024. However, non-members of the EPPO remain required to cooperate with the EPPO in its investigations. Poland was the non-participating country with most investigations by EPPO underway, although it has long refused to cooperate with the EPPO.¹⁴⁵ Hungary agreed to undertake a cooperation arrangement with OLAF after being at risk of losing access to EU funding in the case of non-cooperation.¹⁴⁶ The

Committee, and the Committee of the Regions and the Court of Auditors on the Commission Anti-Fraud Strategy enhanced action to protect the EU budget, Brussels, 29 April 2019, COM(2019) 196 final.

¹³⁷ Directive 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *OJ L* 198, 28 July 2017, pp. 29-41.

¹³⁸ Council Regulation 2017/1939 of 12 October 2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, *OJ L* 283, 31 October 2017, pp. 1-71, Art. 22.

¹³⁹ T. ELHOLM, "EPPO and a Common Sense of Justice", *MJ*, 2021, 2/28, pp. 212-228.

¹⁴⁰ See www.eppo.europa.eu/en/documents/2023-numbers (accessed 11th December 2024).

¹⁴¹ M. BELLACOSA and M. DE BELLIS, "The Protection of the EU Financial Interests between Administrative and Criminal Tools: OLAF and EPPO", *Common Market Law Review*, 2023, (60:1), pp. 15-50.

¹⁴² T. ELHOLM, "EPPO and a Common Sense of Justice", *MJ*, 2021, 2/28, pp. 212-228, 215.

¹⁴³ Commission Decision (EU) 2024/807 of 29 February 2024 confirming the participation of Poland in the enhanced cooperation on the establishment of the European Public Prosecutor's Office, C/2024/1444, *OJ L*, 2024/807.

¹⁴⁴ Commission Decision (EU) 2024/1952 of 16 July 2024 confirming the participation of Sweden in the enhanced cooperation on the establishment of the European Public Prosecutor's Office C/2024/4894, *OJ L*, 2024/1952.

¹⁴⁵ EPPO, "Letter sent to European Commission regarding Poland's refusal to cooperate with the EPPO", 16 February 2022.

¹⁴⁶ EPPO, "EPPO signs working arrangement with the Office of the Prosecutor General of Hungary", press release, 9 April 2021, <https://www.eppo.europa.eu/en/media/news/eppo-signs-working-arrangement-office-prosecutor-general-hungary> (accessed 31st October 2025).

development of this institutional architecture allows the EU to monitor and investigate how the grants and loans provided under the RRF are spent.¹⁴⁷ Indeed, this large amount of European money has been especially vulnerable to fraud.¹⁴⁸

Overall, attention to the monitoring of the EU spending existed prior to the period 2019-2024, but this period inaugurated a new phase with an increasing number of technical and institutional arrangements being operational to scrutinise how the sound financial management and the protection of the EU financial interests are complied with. In addition, the disbursement of large sums of EU money, such as through the RRF, increases the relevance of an effective monitoring and investigation system to protect the financial interests of the Union.

SECTION 5 — ACCOUNTABILITY ON THE HORIZON?

Accountability is multifaceted and ranges from political, to financial and legal.¹⁴⁹ The EU decision-making is vulnerable to the claim that too many decisions are taken in a black box,¹⁵⁰ being in trilogues, comitology, troika or other fora.¹⁵¹ The role of national parliaments in the oversight of EU funding has been minimal in general and in relation to RRF in particular as national RRFs are drafted by national governments, negotiated with the Commission and adopted by the Council. This makes it an executive matter with little input from the national parliaments.¹⁵² Specific issues differ depending on the type of accountability considered and some improvement may be noticed.

¹⁴⁷ RRF Regulation, Recitals 55, 71-72 and Art. 6(1).

¹⁴⁸ Eg: EPPO, Investigation “Stop the Carousel”: EPPO dismantles criminal organisation targeting RRF funds, 18 June 2024; EPPO, Austria: 15 arrests in €3.5 million fraud investigation involving RRF funds, 21 November 2024; EPPO, Italy: Civil servants suspected of corruption with RRF funds and involvement in criminal organisation, 24 October 2024; EPPO, Italy: €114000 in RRF funds seized in fraud investigation involving wholesale company, 24 September 2024.

¹⁴⁹ Eg M. FLINDERS, *The Politics of Accountability in the Modern State*, London and New York, Routledge, 2017; M. BOVENS, “Analysing and Assessing Accountability: A Conceptual Framework”, *ELJ*, 2007, Vol. 13, p. 447. More generally the democratic deficit at EU level is well documented: see C. NEUHOLD, “Democratic Deficit in the European Union”, *Politics*, 2020, available at <https://doi.org/10.1093/acrefore/9780190228637.013.1141> (accessed 11th December 2024). For an analysis of accountability mostly pre-Covid-19, D. HODSON, D. HOWARTH, I. MUGNAI and L. SPIELBERGER, “Accountability in Pan-European Borrowing: Mind the Gap”, *West European Politics*, 2024, (48:3), pp. 696-722.

¹⁵⁰ For an explanation of the decoupling between representative government and multi-level governance such as the EU, Y. PAPADOPOULOS, “Accountability and Multi-Level Governance”, in M. BOVENS, R. GOODIN and T. SCHILLEMANS (eds), *The Oxford Handbook of Public Accountability*, Oxford, Oxford University Press, 2014, pp. 273-88.

¹⁵¹ Eg G. BRANDSMA, J. GREENWOOD, A. RIPOLL SERVENT and C. ROEDERER-RYNNING, “Inside the Black Box of Trilogues: Introduction to the Special Issue”, *Journal of European Public Policy*, 2021, (28:1), pp. 1-9.

¹⁵² P. LEINO-SANDBERG, “Constitutional Imaginaries of Solidarity: Framing Fiscal Integration Post-NGEU”, in R. WEBER (eds), *EU Integration through Financial Constitution: Follow the Money*, Oxford, Hart Publishing, 2023, pp. 161-88, 174.

First, transparency mechanisms allow citizens and the wider public to have a sense of the decisions taken at EU level;¹⁵³ citizens can scrutinise these decisions and initiate questions if they spot problems.¹⁵⁴ However, the revision of the Regulation on access to EU documents¹⁵⁵ has long been overdue but so far has not been done. The EU is mandated to actively provide information on its public website under the form of scoreboards to inform the public about the use of the NextGenEU money.¹⁵⁶ This brings into the public domain useful information that can prompt discussions and scrutiny to a limited extent as the information is not very granular. Scoreboards are not ideal as they oversimplify data, but they build on indicators listed in EU legal instruments. Once taxpayers have access to this type of information, they can pursue active requests for information at national or EU level. However, this technique has limits as it is not clear how well armchair taxpayers are equipped (in terms of time, expertise, or otherwise) to do the necessary interpretation of the data.

Secondly, political accountability is weak as national parliaments are not included much in the allocation of funds under the national RRF and the EU Parliament is not formally included in the decision-making process either as the RRF falls outside the annual budgetary discussions. The EU Parliament is instead involved in a “recovery and resilience dialogue” with the European Commission,¹⁵⁷ but this happens only through an *ad hoc* committee with purely informative powers.¹⁵⁸ The EU Parliament has signalled the importance of strengthening parliaments in the budgetary decisions of the EU.¹⁵⁹ The scholarship advocates increasing the

¹⁵³ For critical discussions of transparency see I. KOIVISTO, *The Transparency Paradox*, Oxford, Oxford University Press, 2022, and E. FISHER, “Transparency and Administrative Law: A Critical Evaluation”, *CLP*, 2010, (63:1), pp. 272-314.

¹⁵⁴ Transparency requirements can also apply in the inter-institutional relationships such as between the Commission and the Parliament. For one example see RRF Regulation, Art. 25.

¹⁵⁵ Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ L* 145, 31 May 2001, pp. 43-48; CJEU, 15 February 2023, T-77/22, *Asesores Comunitarios*, ECLI:EU:T:2023:69.

¹⁵⁶ The transparency requirement applies first and foremost to Member States, and the European Commission centralises the data (Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility art. 25a). The Commission publishes a scoreboard to follow the progress of the implementation of the national RRF plans (RRF Regulation, Art. 30). See European Commission’s webpage dedicated to a country overview available at https://ec.europa.eu/economy_finance/recovery-and-resilience_scoreboard/country_overview.html?lang=en (accessed on 11th December 2024).

¹⁵⁷ RRF Regulation, Art. 26.

¹⁵⁸ C. DIAS, *European Parliament involvement in scrutinizing the Recovery and Resilience Facility*, Economic Governance Support Unit at the Directorate-General for Internal Policies of the European Parliament, PE 659.627, October 2022.

¹⁵⁹ European Parliament resolution of 10 May 2023 on own resources: a new start for EU finances, a new start for Europe, at 39: the European Parliament “is convinced that a more pronounced role of the European Parliament as the legislative and budgetary authority in the underlying legislation, as well as in the annual budgetary procedure concerning the revenue side and debt levels, should be granted; considers, furthermore, that the European Parliament should play an enhanced role in the decision-making process for own resources to ensure the visibility, legitimacy and democratic accountability of Union public finances”.

involvement of national and European Parliaments in financial matters, for instance through strengthened interparliamentary cooperation.¹⁶⁰ The European Court of Audit has expressed its concern regarding the fragmentation and diversification of the applicable accountability mechanisms, leading to possible confusion.¹⁶¹

Thirdly, legal accountability, especially access to judicial review, is limited. The problem has been flagged several times as individuals and private associations are non-privileged claimants who most often need to demonstrate that the challenged decision is of direct and individual concern to them according to Article 263(4) of the TFEU.¹⁶² This is a very high threshold.

If accountability is far from optimal, some improvement may be on its way especially as a result of the more sophisticated monitoring techniques mentioned above under Section 4. These can indeed provide the setting for decisions to which the duty to give reason applies hence contributing to a stronger legal justification of the decisions and triggering accountability and public scrutiny from a legal perspective, even if not in a judicial forum. Related to this point, academics are becoming more attentive to financial decisions and acting as civil society members with relevant expertise, and some availability: they may start calling the EU to account more, in a manner that cannot be dismissed easily. Furthermore, these monitoring techniques provide the Commission with opportunities to initiate proceedings in a more technical manner. The caseload needs to be watched, but examples start to drip in, such as the *European Commission v United Kingdom* case¹⁶³ where the United Kingdom was found to be in breach of its obligations under the Custom Duty Code by allowing fraud in textile imports from China, and of its obligations under Article 4(3) of the TEU by failing to provide the Commission with all the information necessary to determine the amount of traditional own resources losses, namely custom duties. Moreover, the national frameworks to monitor sound financial management and the protection of the financial interests of the EU have been strengthened, in particular with techniques of criminal law. It is not far-fetched to think that some of these investigations could lead to preliminary references. Judicial accountability will be extended and depend not only on the EU requirements but be equivalent to the proceedings available for protecting national financial interests.

¹⁶⁰ D. FROMAGE and M. MARKAKIS, “The European Parliament in the Economic and Monetary Union after COVID: Towards a Slow Empowerment?”, *The Journal of Legislative Studies*, 2022, (28:3), pp. 385-401.

¹⁶¹ ECA, *Design of the Commission’s Control System for the RRF*, Special report 07/2023.

¹⁶² For illustrations of failed actions brought by associations of judges against the Polish RRF, see GC, 14 November 2024, T-116/23, *Magistrats européens pour la démocratie et les libertés*, ECLI:EU:T:2024:832; GC, 4 June 2024, T-530/22 to T-533/22, *Magistrats européens pour la démocratie et les libertés (Medel)*, ECLI:EU:T:2024:363.

¹⁶³ CJEU (Grand Chamber), 8 March 2022, C-213/19, *European Commission v. United Kingdom* ECLI:EU:C:2022:167.

CONCLUSIONS — CUMULATIVE CONSTITUTIONAL RESHAPING

As of Summer 2024 — after five years of the Covid-19 pandemic, the Ukraine war, soaring energy prices and external competitive pressures — the European Union has not changed its Treaties and its formal constitutional design. However, the EU budgetary toolkit has made some progress. The first type of progress is that the EU has consolidated the trends that were already in the making before 2019. Overall, the cumulative effects of these incremental changes and consolidation have reshaped the European constitutional principles governing public finances in four ways. Firstly, the interpretative interdiction of borrowing has been set aside paving the way to the possibility of more extensive and possibly permanent borrowing on financial markets by the European Union; secondly, some of the legal bases for EU spending have been stretched extending the notion of “social cohesion” to policy areas only thinly connected to the traditional rebalancing of regional socio-economic disparities; thirdly, the systemic respect of the rule of law has been linked to EU funds on the basis of the solidarity principle; and fourthly, the institutional machinery monitoring how EU funds are spent had been strengthened, including thanks to the operationalisation of the EPPO, hence touching the delicate articulation of criminal enforcement at national and European levels. Overall, this provides leverage for the EU and the EU Commission to pursue their priorities and nudge Member States to follow suit, without giving them a blank check. A new constitutional narrative of effective resourcing for pursuing EU priorities according to EU constitutional values and procedures is slowly emerging from those cumulative changes. Efficiency however seems to be given priority in the techniques developed to spend and monitor EU funds over the legitimacy of this spending at this point in time. Yet, both efficiency and legitimacy are needed for the EU’s credibility on financial markets and for taxpayers/electors to support the creation of new own resources that they will directly or indirectly contribute to pay at some point. The link between taxation, spending and representation remains to be worked out in administrative practice as in constitutional balance. The constitutional reshaping is not yet completed.

In the background of this first kind of progress, a second type of progress can be identified, one that has happened at the administrative level of national budgetary discipline. When the Covid-19 pandemic started, the European Commission activated the general escape clause to the stability and growth pact in March 2020,¹⁶⁴ which was subsequently extended twice, with the growth and stability pact being

¹⁶⁴ Commission Communication on the activation of the general escape clause of the stability and growth pact, COM(2020) 123 final; A. ESTELLA, “The ‘Muting’ of the Stability and Growth Pact”, *CYELS*, 2021, Vol. 23, pp. 73-90.

reinstated fully only in January 2024.¹⁶⁵ The general escape clause is intended to provide a solution when Member States face events outside their control or in the case of severe economic downturn for the euro area or the Union as a whole. During its activation, Member States continued to report to the European Commission on their national budget and policies, but the European Commission did not recommend any measures in the case that a Member State did not comply with the European budgetary discipline.

The suspension of the system for nearly four years, the economic and budgetary consequences of many Member States after this period,¹⁶⁶ the urgent need to invest in areas such as climate change and the digital transition all made it difficult to resume the European budgetary discipline where it had been left in March 2020. Member States have thus agreed on a new European economic governance, which should be in place by January 2025.¹⁶⁷ This new system maintains the need for Member States to have a balanced budget and to take measures to move in that direction when their budget is not yet balanced. However, the new system will leave more space for tailored trajectories and for Member States to provide a rationale as to why public investment in specific policy areas are warranted.¹⁶⁸ It will also take place in a different financial environment where the EU has to reimburse its borrowing on the financial markets and ensure it has the necessary revenue to do so.

Overall, the EU fiscal capacity — EU fiscal governance and a EU/eurozone common budget — is a work in progress, but constitutional and administrative changes are appearing to converge to slowly (but surely?) shift the centre of gravity from Member States to the European Union and to equip the European Union with the resources to shape its own policies and ensure they are delivered on the ground.

¹⁶⁵ EUROPEAN COMMISSION, “Press Release: Fiscal policy guidance for 2024: Promoting Debt Sustainability and Sustainable and Inclusive Growth”, 8 March 2023, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1410 (accessed on 11th December 2024).

¹⁶⁶ EUROPEAN COMMISSION, *Report under Article 126(3) of the Treaty on compliance with the deficit and debt criteria*, 19 June 2024.

¹⁶⁷ European Commission’s webpage dedicated to the new economic governance framework available at https://economy-finance.ec.europa.eu/economic-and-fiscal-governance/new-economic-governance-framework_en (accessed on 11th December 2024). The legal instruments include the Regulation 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) 1466/97, *OJ L*, 30 April 2024; the Council Regulation 2024/1264 of 29 April 2024 amending Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, *OJ L*, 30 April 2024; and the Council Directive 2024/1265 of 29 April 2024 amending Directive 2011/85/EU on requirements for budgetary frameworks of the Member States, *OJ L*, 30 April 2024.

¹⁶⁸ For a much more in-depth analysis of the New Economic Governance and its possible impact on the Belgian legal order and public finances, see N. VANDER PUTTEN and Y. MARIQUE, “Le nouveau cadre budgétaire européen et ses incidences sur le droit belge”, in N. VANDER PUTTEN (éd.), *Actualités en matière de droit des dépenses publiques*, Bruxelles, Larcier, 2025, pp. 105-141.