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THE NEXT GENERATION EU INSTRUMENT AND THE EUROPEAN UNION NEW BUDGET CYCLE

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Abstract

The EU's most important initiatives to foster recovery after the pandemic are centred upon its budget. This article examines the scope and content of the NextGenerationEU instrument in general and the Recovery and Resilience Facility in particular, and its interaction with the EU budgetary framework for the coming seven-year period, focusing on two of its most important instruments: the 2021-2027 Multiannual Financial Framework and the Own Resources Decision. Approval of NextGenerationEU represents a substantial change in EU funding and a deepening of European integration to a degree that, prior to the pandemic, Member States had considered unattainable.

Key words: European Union; COVID-19; European Union budget; Multiannual Financial Framework; Own Resources Decision; European Union Recovery Instrument; NextGenerationEU; Recovery and Resilience Facility; Next Generation EU; NGEU.

EL PROGRAMA NEXT GENERATION EU I EL NOU CICLE PRESSUPOSTARI DE LA UNIÓ EUROPEA

Resum

Les iniciatives més rellevants de la UE per a la recuperació després de la pandèmia tenen el seu epicentre en el pressupost. En aquest treball s'examina l'abast i contingut del programa NextGenerationEU en general i del Mecanisme de Recuperació i Resiliència en particular, i la seva interacció amb el marc pressupostari de la UE per al proper septenni, centrat en dos dels seus instruments més importants: el marc financer pluriennal 2021-2027 i la Decisió sobre recursos propis. L'aprovació del programa NextGenerationEU representa un canvi substancial en el finançament de la Unió i un aprofundiment de la integració europea que ha superat límits que, amb anterioritat a la pandèmia, els Estats consideraven infranquejables.

Paraules clau: Unió Europea; COVID-19; pressupost de la Unió Europea; marc financer pluriennal; Decisió sobre recursos propis; instrument de recuperació de la Unió Europea; NextGenerationEU; Mecanisme de Recuperació i Resiliència; Next Generation EU; NGEU.

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1 Introduction: the context of the COVID-19 crisis

The crisis caused by the COVID-19 pandemic has put the European Union (EU) and its Member States in an extremely difficult situation, with highly dramatic economic consequences. The aftermath originated in the suspension of supply in certain sectors (tourism, bars and restaurants, the performing arts, leisure, etc.) as well as in a generalised drop-off in demand in all areas of the economy. The crisis has been universal, but has had a greater effect on those countries more dependent on those areas of the economy that have suffered the most.

The impact of the pandemic constituted a "perfect storm", due to the virulence, exogenous and symmetrical nature that the crisis projected on the health, social and economic system. These circumstances quickly convinced the EU and its members that they needed to come up with new answers that were very different from the actions in response to the sovereign debt crisis of 2008. Thus, there has been a change in ideology in the solutions offered: instead of insisting upon budgetary austerity as the answer to overcoming the crisis, there has been a shift to acknowledging the need for massive public sector intervention in the economy to ensure its recovery.

This response has represented a boost to fiscal integration in both the negative side (e.g., the coordination of national budgetary policies with the EU supervision and surveillance through fulfilment of the Stability and Growth Pact and the European Semester) and its positive side (such as establishing solidarity and assistance mechanisms by means of transfers).[1]

The fact is that, in response to the situation, the EU has reacted in a markedly different way compared to the economic and financial upheavals of the previous decade. From the very start, it has worked actively to look for responses to deal with this exceptional situation. Initially, the EU aimed at facilitating funding for the actions taken by Member States. It approved a temporary framework that realigned state aids in light of the new situation, and which has been amended as the States' needs have called for support for economic sectors and their operators, to alleviate the effects that the health measures to counter the pandemic were having upon their economic structure.[2]

Additionally, the EU added flexibility to the Stability and Growth Pact (SGP), invoking the general escape clause to allow Member States to deviate from budgetary requirements and authorises them to borrow more to provide resources to fund their actions. Indeed, given the unprecedented challenges raised by the pandemic, the Economic and Financial Affairs Council rapidly expressed, at their meeting of 23 March 2020, that the conditions to invoke the general escape clause were met in light of the major economic shock caused by COVID-19. Consequently, Member States were authorised to relax fiscal deficit control to facilitate their borrowing capacity and thus fund measures to alleviate the health, social and economic impact of the pandemic.[3] The need to provide support for the fiscal measures adopted by Member States to respond to the pandemic and attempt to offset the negative socio-economic repercussions justified the invocation of the general escape clause. In fact, the Commission forecasts that the general escape clause invocation will remain active during 2022. Depending on the economic recovery, it may be deactivated in 2023.

Lastly, the European Central Bank (ECB) committed itself to a public debt purchase programme to prevent some Member States from being penalised with a risk premium that would raise interest rates and make debt repayment and amortisation more expensive. So it was that, on 24 March, the ECB adopted Decision (EU) 2020/440 on a temporary emergency purchase programme for the assets of Member States affected by the pandemic.[4] This programme was known as the Pandemic Emergency Purchase Programme (PEPP) and authorised central banks of the euro area to purchase assets up to a maximum envelope of 750 billion euros

[1] Dermine, Paul (2020: 338).

[2] *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*, Commission Communication 2020/C 91 I/01, OJ C 91I of 20 March 2020. Amended on a number of occasions by the communications published in OJ C 112 of 4 April 2020, OJ C 164 of 13 May 2020 and OJ C 218 of 2 July 2020.

[3] Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis.

[4] Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), OJ L 91 of 25 March 2020.

for a limited period of time that initially ended in 2020. Subsequently, though, the envelope was increased to 1,850 billion euros and the horizon for net purchases was postponed until end of March 2022.[5]

Given this context, it is worth noting the possible impact of the decision of the German Constitutional Court (*Bundesverfassungsgericht*, "BVerfG") of 5 May 2020. This decision challenges the legality of a judgment of the Court of Justice of the European Union (CJEU) that declares the validity of the ECB's Decision of March 2015,[6] which authorises the purchase of public assets on secondary markets, known as the Public Sector Purchase Programme (PSPP), in the context of the economic crisis caused by the increased cost of sovereign debt.[7] The BVerfG questions the CJEU's preliminary judgement and considers it arbitrary from an objective perspective, describing it as an *ultra vires* act, rejecting the European Court's interpretation and declaring it non-binding. In short, it objects to the latter's authority. The German court's ruling of 5 May states that it is unsatisfied with a certain procedure of the ECB and the CJEU and links some consequences to this behaviour, which call for additional requirements for action and justification.[8]

It remains to be seen what the repercussions may be for the future of the European Union in general and the PEPP in particular, given the fact that their technical features are similar to those of the PSPP, meaning that some of the actions brought before the CJEU and the BVerfG could be repeated.[9] This has led to speculation that, if a new constitutional action on the PEPP is brought before the BVerfG in the near future, the clash between the two courts could worsen still further.[10] Another perspective points out that the clearest effect of the BVerfG pronouncement is to "block any possible progress towards public debt mutualisation models" that are not covered by a new judgement issued by it.[11]

Furthermore, a boost has been given to programmes funded with extrabudgetary resources, such as those of the European Investment Bank (EIB) and the European Stability Mechanism (ESM). The former has constituted a fund, financed by Members States, which allows it to mobilise resources aimed particularly at providing businesses with liquidity. The latter involves a line of credit equivalent to 2% of the GDP of the applicant Member State.

At its meeting of 3 April, the EIB Board of Directors decided to establish a fund of 25 billion euros, financed by Member States in proportion to their stake in the EIB, which would allow for the mobilisation of up to 200 billion euros to provide support for businesses, especially small and medium-sized enterprises (SMEs), affected by the pandemic. This decision, which was backed by the Eurogroup at its meeting of 9 April, allowed for the constitution of a pan-European Guarantee Fund (EGF) to deal with the economic impact of the pandemic.[12]

With regard to the ESM, the amount of aid contemplated would initially comprise a sum equivalent to 2% of the GDP of the Member State in 2019, approximately 240 billion euros. It took the form of a targeted credit line aimed at covering health, prevention and treatment costs of the pandemic, with the period for requesting the support ending in December 2022. Unlike other ESM interventions, beneficiaries do not have to comply with strict economic requirements to be entitled to the aid, there is no macroeconomic adjustment plan and the standard surveillance system foreseen within the framework of the European Semester[13] shall be applied. Requesting countries are only bound to dedicate the amount they receive to funding their pandemic response

[5] ECB press releases of 4 June and 10 December 2020.

[6] Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10) (OJ L 121 of 14 May 2015), which has been amended on a number of occasions, and is currently recast in Decision (EU) 2020/188 of the European Central Bank of 3 February 2020 (OJ L 39, of 12 February 2020).

[7] Judgement of the CJEU of 11 December 2018, *Weiss and others*, C-493/17, ECLI:EU:C:2018:1000.

[8] Montoro Chiner and Rodríguez Pontón (2021: 17).

[9] Claeys (2020: 7).

[10] Viterbo (2020: 683).

[11] Martín Rodríguez (2020: 40).

[12] Castellarin (2020: 7).

[13] Carrera Hernández (2020: 21).

plan, which it develops together with the ESM and the Commission, and which justifies the loan request.[14] Nevertheless, the programme has remained unused, as euro area Member States have access to more attractive forms of financing via the ECB debt purchase programme or by using other loans and grants provided by the EU.[15]

2 The instruments making up and determining the EU budget

2.1 The Multiannual Financing Framework

The pandemic appeared as the final touches were being put to the so-called Multiannual Financing Framework (MFF) for the 2021-2027 seven-year period. This budget cycle, which started with the presentation of the Commission's proposal for a Council Regulation laying down the multiannual financial framework for the 2021-2027 cycle[16] was already very complex due to the problems posed by the withdrawal of the United Kingdom.

The goal of the MFF is to smooth the road for the annual budget negotiations between the Council and the European Parliament, establishing a general framework in force for a number of years. This general framework sets a ceiling on expenditure for the annual budget and for each of its headings. This document indicates the flow of financial resources that will be required to deal with political priorities, which are established in terms of spending preferences. It is not, therefore, a multiannual budget and lacks any expenditure authorisation.

This means that budgetary expenditure is predetermined by the approval of the MFF for the associated period. The MFF establishes the sum total of usable resources as well as the maximum amounts to be annually allocated to general policies, the distribution of the obligations assumed by Member States and the pre-allocation of funds for the main spending programmes. In this way, the MFF balances Member States' demands to limit the growth of the Union's revenue with the needs of the EU institutions to furnish themselves with foreseeable and stable resources for the development of their spending policies.[17]

In practice, the adoption of the MFF is accompanied by a review of all EU spending programmes, from agricultural and structural funds to all other EU policies. This means that the MFF negotiations encompass not only the EU finances, but also the content of its spending policies.

The MFF's political and legal significance is reflected in its adoption procedure: it must be approved by a special legislative procedure, contemplated in Article 312 TFEU (Treaty on the Functioning of the European Union), in which the Commission retains its power of initiative, but with restrictions, in that Article 293 TFEU exempts the approval of the MFF from the general rule requiring unanimity in the Council to introduce amendments to Commission proposals. The European Parliament must approve it by an enhanced majority, which includes a majority of its members, and the Council must approve it by unanimity. As is traditionally the case, and as has been confirmed in the negotiations for the current seven-year period, the European Council plays a crucial role, as it is the institution where the political compromise acceptable to all Member States is reached.[18] For the current budget cycle, the consensus achieved by Member States at the European Council meeting of July 2020[19] established and specified the MFF content.

The existence of the MFF also means that any room for manoeuvre during annual budget negotiations is limited, also thereby limiting any chance of entering into institutional conflict. The MFF was established in 1988 with the adoption of the so-called Delors Package I for the 1988-1992 period, with the aim of guaranteeing and bolstering budgetary discipline and stability and of putting an end to disputes and tensions

[14] Markakis (2020: 373).

[15] Guttenberg, Lucas (2020: 2).

[16] Proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027, COM (2018) 322 final of 2 May 2018.

[17] Sánchez Barrueco, María Luisa (2021: 564).

[18] Lehner, Stefan (2020: 38-39).

[19] European Council Conclusions of 17-21 July 2020, EUCO 10/20 of 21 July 2021.

between budgetary authorities, particularly the Council and the European Parliament, which had led the latter to refuse to approve the budget for several years in the 1980s.[20]

As noted above, negotiations on the current cycle began on 2 May 2018 with the submission by the Commission of its proposal for a Council Regulation, establishing the MFF for the 2021-2027 cycle. The proposal was submitted against the backdrop of negotiations on the United Kingdom's withdrawal from the EU, where the absence of the UK's contribution represented a reduction in the EU budget of between 10 and 12 billion euros, after deducting the amount of the UK contribution and the amount of the compensation mechanisms.[21] This meant that, if the operating limits were maintained, and the EU budget should not exceed 1% of the Union's total Gross National Income (GNI), the UK's absence entailed a budgetary reduction in absolute terms, making the MFF smaller than that for the 2014-2020 period. Nevertheless, as we shall see, the outbreak of the pandemic shifted the initial goalposts of the negotiation process.

The current MFF, for the seven-year period from 2021 to 2027, was approved by Council Regulation 2020/2093 of 17 December 2020[22] and came into force on 1 January 2021.

2.2 The Own Resources Decision

The EU was initially funded by financial contributions from its Member States. However, Decision 70/243 of 21 April 1970 gave rise to a qualitative shift entailing their substitution by own resources.[23] Since then, a range of decisions have been adopted, which has modified the different categories of revenue. Initially, their adoption was aimed at resolving financial problems linked to the successive enlargements of the EU and the increase in the competences, which, in both cases, let to an extension of spending requirements. Subsequently, from 1988 onwards, the Own Resources Decisions (ORD) have reflected the result of successful negotiations between Member States on the MFF.

Generally speaking, the EU resources can be differentiated between those resulting from the functioning of the EU (from the implementation of its policies) and those that are supplementary, whose aim is to ensure a balanced budget. Initially, the impact of the former (customs duties from the common external tariff and the value-added tax (VAT) own resource) was clearly more significant and they constituted an essential part of the EU's income. However, over the course of time, the budget has shifted towards the other supplementary resources.

There are several reasons for this shift. The reduced significance of revenue from customs duties is due to tariff reductions as a result of the liberalisation of international trade after the successive rounds of trade negotiations, initially taking place within the General Agreement on Trade and Tariffs (GATT) and subsequently though the World Trade Organization (WTO). Added to this is the vast network of trading agreements that the EU has concluded with third countries to establish tariff reductions and free trade areas. Today, they represent approximately 13% of the EU budget.

As for VAT, the reduced importance of this resource is due to reasons associated with its regressive aspect, as it is an indirect tax levied on consumption that establishes a suboptimal relationship between capacity to pay and wealth, although, today, economic literature is not so consistent in ascribing it this nature and puts less stress on this regressive facet.[24] Moreover, it is a complex tool, difficult to calculate and not transparent; it is not a fiscal resource in the sense that it corresponds to a percentage of the VAT paid over by the economic operators in the Member States; rather, it is a statistical instrument for calculating States' contributions. The

[20] As can be seen in the various applications for declaring measures void brought before the Court of Justice to settle the differences and disputes between the bodies involved in formulating the budget. By way of example, the Judgement of the Court of 3 July 1986, Council v Parliament, C-34/86, ECLI:EU:C:1986:2; Judgement of the Court of 12 July 1988, Parliament v Council, C-377/87, ECLI:EU:C:1988:387 and Judgement of the Court of 12 July 1988, Commission v Council, C-383/87, ECLI:EU:C:1988:388.

[21] Kölling, Mario (2017: 5-7).

[22] Published in the OJ L of 22 December 2020.

[23] Decision Council Decision 243/70 of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, OJ L 94 of 28 April 1970.

[24] Cipriani, Gabrielle (2014: 3-4).

VAT resource is a contribution made by each Member State in proportion to its revenue and is calculated by applying a rate to a base restricted by certain variables, but is not the VAT actually paid on each purchase. It currently represents approximately 11% of budget revenue.

The supplementary resource par excellence is the contribution made by Member States based upon their Gross National Income (GNI), which represents more than 70% of budget revenue. This fact has led to the EU's own resources being perceived of as intergovernmental transfers made by Member State authorities into the Union's coffers[25] and being regarded as a more sophisticated return to funding by means of national contributions.[26] In addition to these, there are other marginal types of financing, such as the contributions and levies applied to the salaries of civil servants and other European institution agents, fines and penalties for breach of EU law and contributions by third countries for their participation in European programmes.

It should be stressed that the ORD procedure, contemplated in Article 311 TFEU, is complex and EU institutions participate by means of a special legislative procedure that requires a proposal from the Commission, unanimity in the Council and prior consultation with the European Parliament. Additionally, its entry into force requires the acceptance of all Member States pursuant to their own internal constitutional rules.

The original ORD proposal for the 2021-2027 budget cycle was submitted by the Commission on 2 May 2018 within a context dominated by Brexit.[27] The outbreak of the pandemic has forced, as noted previously, a substantial shift in its content and scope. The current ORD was adopted on 14 December 2020,[28] complemented by a set of implementing measures adopted on 30 April 2021,[29] and entered into force on 1 June 2021, after compliance with Member States' constitutional requirements, albeit with retroactive effect from 1 January 2021.[30]

3 NextGenerationEU: the economic recovery plan

3.1 Some background: exceptional and temporary financing measures

Ever since the start of the pandemic, the EU has implemented financing actions aimed at helping its Member State deal with the consequences of the pandemic. Initially, the measures were covered by budget headings, basically fed with existing instruments and funds that had not been allocated within the Cohesion Policy framework.

The best example of this is the Coronavirus Response Investment Initiative (CRII),[31] which had an envelope of 37 billion euros for 2020 and was designed to mobilise investments in healthcare systems (healthcare and protection equipment, medical devices, medicines, etc.) and to provide business liquidity to deal with the short-term turmoil caused by the coronavirus crisis. This initial package was complemented by a Coronavirus Response Investment Initiative Plus. On a more modest scale, mention has already been made of the broadening of the scope of the EU Solidarity Fund (EUSF), which had initially been designed to provide help to Member States affected by natural disasters and allowed applications for financial assistance of up to 800 million euros.[32]

[25] Olesti Rayo, Andreu (2020: 802-803).

[26] Kalfin, Ivailo (2020: 64).

[27] *Proposal for a Council Decision on the system of Own Resources of the European Union,* COM (2018) 325 final of 2 May 2018.

[28] Council Decision 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, OJ L 424 of 15 December 2020.

[29] Council Regulation 2021/768 30 April 2021 laying down implementing measures for the system of own resources of the European Union and repealing Regulation No 608/2014, OJ L of 11 May 2021.

[30] BOE no. 139, of 11 June 2021.

[31] Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative), OJ L 99 of 31 March 2020.

[32] Regulation (EU) 2020/461 of the European Parliament and of the Council of 30 March 2020 amending Council Regulation (EC)

These urgent actions also included activation of the Flexibility Instrument and the contingency margin was increased by more than 1 billion euros to finance immediate measures in response to the crisis.[33] The European Globalisation Adjustment Fund was also modified; it was designed to provide support to workers who lose their jobs as a result of the structural changes in world trade patterns due to globalisation, and it was reconducted to help workers made redundant and the self-employed affected by the pandemic, with a funding of 179 million euros for this year.[34]

Mention should be made here of the Temporary Support to mitigate Unemployment Risks in an Emergency (SURE), created by Council Regulation 2020/679 of 19 May, which provides for financial assistance of 100 billion euros in the form of loans.[35] This assistance is based upon Article 122 TFEU which, as we shall see later on, authorises the Council to grant financial aid to a Member State in difficulties due to natural disasters or exceptional events. The mission of SURE is to help finance the response to the economic disruption caused by the pandemic. Its focus is on supporting short-time working schemes or similar measures aimed at protecting both the self-employed and salaried workers (e.g. the temporary employment regulation files or ERTO by its acronym in Catalan) and, on an ancillary basis, at covering some health-related measures, particularly those in the workplace.

The innovative aspect of this action lies in the way SURE is financed, as the Council has empowered the Commission to take on borrowing on behalf of the EU on the international markets or from financial institutions. More strictly speaking, what is new is the amount of the debt requested, as the EU commonly requests financing on the capital markets, albeit for much more moderate amounts.

SURE is based on a double guarantee: the first arising from the EU's own budget, the so-called *margin for manoeuvre*, i.e. additional resources that the Commission may call upon from Member States to meet its commitments in the case of debtor default. Additionally, albeit on a subsidiary basis, the liability arising from these loans are covered by additional state guarantees of 25% of the loans granted in accordance with their share of the Union's GNI, although the contemplated guarantees could be revised if agreement is reached on the review of the own resources "ceiling".[36] It must be pointed out that the SURE regulation was approved in May, in the middle of MFF negotiations, without agreement on the maximum percentage of own resources, as a percentage of the Union's GNI, that would limit the annual budgets and against the backdrop of the United Kingdom withdrawal, with the resulting reduction in budget revenues.[37]

In any case, one should not lose sight of the fact that SURE's mission is a temporary one, as the deadline for requesting its availability is 31 December 2022, although this might be extended for a further six months if the economic disarray caused by COVID-19 were to continue.

No 2012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency, OJ L 99 of 31 March 2020.

[33] The increased expenditure of approved undertakings was implemented through the passing of the following legislation: Decision 2020/545 on the mobilisation of the Flexibility Instrument to finance immediate budgetary measures in the context of the COVID-19 outbreak and a reinforcement of the European Public Prosecutor's Office; Decision 2020/546 on the mobilisation of the Flexibility Instrument to finance immediate budgetary measures in the context of the COVID-19 outbreak, and Decision 2020/547 on the mobilisation of the Contingency Margin in 2020 to provide emergency assistance to Member States and further reinforce the Union Civil Protection Mechanism/rescEU in response to the COVID-19 outbreak. All of these were approved using the codecision procedure on 17 April and published in the OJ L 125 on 21 April 2020.

[34] Regulation (EU) No 1309/2013 of the European Parliament and of the Council of 17 December 2013 on the European Globalisation Adjustment Fund (2014-2020) and repealing Regulation (EC) No 1927/2006 (amended on a number of occasions), OJ L 347 of 20 December 2013.

[35] Council Regulation (EU) 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 outbreak, OJ L 159 of 20 May 2020 (the SURE Regulation).

[36] Articles 11 and 12, SURE Regulation.

[37] Potteau, Aymeric (2020: 580-581).

3.2 NextGenerationEU complexity

The idea of creating a recovery fund within the framework of the EU budget began to take shape in April 2020. On 21 April, the president of the European Council sent a letter to the members proposing the idea of constituting a European recovery fund that needed to be of "sufficient magnitude, targeted towards the sectors and geographical parts of Europe most affected, and be dedicated to deal with this unprecedented crisis", which suggested that the Commission had to analyse the needs to be covered and submit a proposal that should clarify the link with the MFF.[38]

More specific details came from a Franco-German initiative presented on 18 May and advocating, given the extent of the pandemic's impact, the possibility of an economic recovery fund of 500 billion euros for the MFF for 2021-2027. Its novelty consisted in the way it would be financed, as the initiative proposed that the EU borrow, and thus indebt itself, on the international markets to finance the granting of loans and aids.[39]

The initiative was quickly taken over by the Commission, which on 27 May, presented a proposal for a European Union Recovery Instrument (EURI) known as *NextGenerationEU* (NGEU), which was approved on 14 December by Council Regulation 2020/2094.[40] This is a technical tool for organising the financing of the recovery plan and the allocation of funds and constitutes the cornerstone of the EU's socioeconomic strategy for tackling the consequences of the pandemic.

The EURI foresees that between 2021 and 2026, the Commission will raise, on behalf of the EU, 750 billion euros on the international capital markets, which will then be distributed in the form of loans or grants, and through different EU funding programmes, to Member States based on their needs. Non-repayable support totals 390 billion euros, whilst loans amount to 360 billion (in 2018 prices).[41] The instrument, which has been described as "a bit of an empty shell",[42] relies on the ORD to establish financing mechanisms. Indeed, the ORD is the legal act that enables the Commission to take on mass borrowing from the capital markets on behalf of the EU.

The instrument's legal architecture is complex and based on different interrelated components. The EURI Regulation is a very brief document consisting of only six articles, but it is a key component of the legal architecture of NGEU . It lists the types of measures that can be financed and assigns them to the specific programmes forming part of NGEU. By far the most important programme is the Recovery and Resilience Facility (RRF), which will be analysed in the following section, and which has been allocated some 90% of the committed funds.

Next to the RRF, the second-most important programme is the Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU),[43] with 47.5 billion euros made available until 2022.[44] This instrument continues and expands on the crisis response and repair measures implemented through the Coronavirus Response Investment Initiative and the Coronavirus Response Investment Initiative Plus, mentioned previously. The funds made available come from the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Fund for European Aid to the Most Deprived (FEAD). Lastly, other smaller sums are

[38] Invitation letter by President Charles Michel to the members of the European Council ahead of their video conference on 23 April 2020.

[39] See the proposal for additional information.

[40] 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 433 of 22 December 2020.

[41] This amount increases to 806.9 billion euro at current prices, of which 421.1 billion are dedicated to non-repayable grants and subsidies, and 385.8 billion are loans.

[42] Dermine, Paul (2020: 343).

[43] Regulation (EU) 2020/2221 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU) No 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (REACT-EU), OJ L 437 of 28 December 2020.

[44] Article 2 of the EURI Regulation states that 47.5 billion euros in 2018 prices—i.e. 50.6 billion euros—shall be structural and cohesion programmes of the multiannual financial framework 2014-2020 as reinforced until 2022, including support through financial instruments.

allocated to programmes covering civil protection, research and innovation, support for territories in their transition towards a climate-neutral economy and the development of rural areas.[45]

The legal foundation for the EURI is provided by Article 122 TFEU which, as noted above, provides an explicit legal basis permitting financial solidarity, under certain conditions, between EU countries. The current version of this provision was incorporated into primary law by the Maastricht Treaty, as part of the provisions on Economic and Monetary Union (EMU); this inclusion has led it to be seen as a counterweight or complement to the "no bail-out clause" then introduced into Article 125 TFEU.[46]

Indeed, the general justification for using Article 122 TFEU as a legal basis is easily found in the need to alleviate the effects of the COVID-19 crisis on Member States' public spending, and in the fact that the instrument is temporary.[47] The use of this legal basis means that the EURI was constituted through a special legislative procedure, in which the proposal comes from the Commission and the adoption from the Council, thus omitting any participation by the European Parliament in the process.

Lastly, it should be noted that the execution of the EURI is subject to Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.[48] Initially, this conditionality was left very vague at the European Council of July 2020, resulting in it being the subject of strong criticism from the European Parliament.[49] However, on 5 November, the Council and the European Parliament reached an agreement that allowed the adoption of the Regulation. It entered into force on 1 January 2021, although its implementation has been suspended until the actions for annulment brought by Hungary and Poland before the CJEU are resolved.[50]

Regulation 2020/2092 has a dual, interconnected mission: to protect the Union budget and to safeguard the rule of law in the Member States. Its scope of application is limited to situations where breaches of the principles of the rule of law have a "sufficiently direct" impact and seriously affect the sound financial management of the EU budget or the protection of the financial interests of the Union.[51] The underlying idea is that there is a strong link between respect for the rule of law, on the one hand, and mutual trust and financial solidarity between the EU and its Member States, on the other.[52] The question that arises is the need for the Commission to carefully establish the causal link between democratic quality and harm to the EU budget.[53]

[45] More specifically, Article 2 of the EURI Regulation contemplates the following amounts (all in 2018 prices):

- 1.9 billion euros for programmes related to civil protection;

- 5 billion euros for programmes related to research and innovation, including support through financial instruments;

- 10 billion euros for programmes supporting territories in their transition towards a climate-neutral economy;

- 7.5 billion euros for development in rural areas;

- 5.6 billion euros for provisioning for budgetary guarantees and related expenditure for programmes aiming at supporting investment operations in the field of Union internal policies.

[46] Louis, Jean-Victor (2010: 983-984).

[47] De Witte, Bruno (2021: 654).

[48] OJ L 433 of 22 December 2020.

[49] Resolution of the European Parliament of 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020 (2020/2732 (RSP)).

[50] Both actions were filed on 1 March 2021: Hungary v Parliament and Council, case C-156/21, and Poland v Parliament and Council, case C-157/21.

[51] Article 4 of Regulation 2020/2092.

[52] Łacny, Justyna (2021: 84).

[53] Torroja Mateu, Helena (2021: 3).

3.3 The Recovery and Resilience Facility

The Recovery and Resilience Facility (RRF) was created by means of Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 (the RRF Regulation).[54] Its legal basis is Article 175 TFEU, in the field of cohesion policy, and it constitutes an *ad hoc* vehicle for channelling the majority of funds.

The RRF has a total of 672.5 billion euros, distributed as follows: 360 billion earmarked for loans and 312.5 billion for non-repayable grants and subsidies (all amounts in 2018 prices),[55] of which 70% will be committed in 2021 and 2022, whilst the remaining 30% must be committed in its entirety in 2023, on the basis of an allocation key adjusted in line with the fall in real GDP in 2020 and 2021.

The RRF pivots on the submission, evaluation, execution and monitoring of the so-called recovery and resilience plans (RRP), consisting in a package of public investment measures designed to implement structural reforms in each Member State. The discretional capacity of Member States to manage the investment is restricted in several respects. Firstly, they must focus on specific areas of action contemplated by the RRF. Specifically: a) green transition; b) digital transformation; c) smart, sustainable and inclusive growth, including economic cohesion, employment, productivity, competitiveness, research, development and innovation, and a well-functioning internal market with strong SMEs; d) social and territorial cohesion; e) health, and economic, social and institutional resilience with the aim of, inter alia, increasing crisis preparedness and crisis response capacity; and f) policies for the next generation, children and the youth, such as education and skills.[56]

Secondly, the RRP must be consistent with the macroeconomic priorities established for each country within the framework of the European Semester and must align with the recommendations made for it: otherwise, access to the funds will be difficult. The RRF may therefore be regarded as a budgetary instrument designed to provide support, albeit on a transitory basis, for investments and reforms in Member States as part of the European Semester.[57] In this sense, it is not a tool aimed at alleviating the impact of the crisis, but is instead designed to stimulate and promote the transformation of economic structures, particularly of those Member States that are less advanced and more seriously affected by the pandemic.[58] It would be desirable that this led to a revitalisation of a Europe that strengthens the European commitment to social rights, since, to date, that actual impact of recommendations addressed to the Member States has been little more than symbolic.[59]

Consistency with the EU macroeconomic priorities is also present in the execution of the RRP, such that breach of the SGP could lead to suspension of the allocated funds. The RRF Regulation establishes a mechanism to guarantee “sound economic governance”, allowing the Commission to make a proposal to the Council to suspend all or part of the funds established for a Member State. In principle, this suspension must be proposed when a Member State fails to take effective action to correct its excessive deficit, within the framework of the SGP, unless the existence of a severe economic downturn has been determined for the Union as a whole, defined as the existence of “unexpected adverse economic events with major unfavourable consequences for government finances”.[60] This obligation of the Commission does not apply when, as is currently the case, the SGP general escape clause is activated.

The suspension is limited, quantitatively, to the lower of the two following figures: 25% of allocated commitments or 0.25% of the Member State’s nominal GDP. In the case of persistent non-compliance –in other words, if the State continues to have an excessive deficit, without adopting effective corrective measures–, the suspension of commitments may exceed the maximum percentages. In this context, priority shall be given

[54] OJ L 57 of 18 February 2021.

[55] At current prices, the amounts would be a total of 723.800 billion euros, of which 385.8 billion are loans and 338 billion non-repayable grants and subsidies.

[56] Articles 3, 4 and 17 RRF Regulation.

[57] Carrera Hernández, F. Jesús (2020: 36).

[58] Pisani-Ferry, Jean (2020: 9).

[59] Grohs, Stephan (2019: 32).

[60] As defined by of Articles 3(5) and 5(2) of Council Regulation (EC) No 1467/97 of 7 July 1997 speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 209 of 2 August 1997.

to freezing credits for commitments; credits for payments shall be suspended only when immediate action is sought and in the case of significant non-compliance.[61]

The Commission shall, based on certain criteria and guidelines, assess the relevance, effectiveness, efficiency and coherence of the RRP.[62] If its assessment is positive, it shall submit to the Council a proposal for a decision including the financial contribution, which shall be paid over, in instalments, once the Member State has satisfactorily fulfilled the relevant milestones and targets (envisaged by the RRP). If the assessment is negative, the Commission must duly justify this, and no financial contributions shall be assigned. The Council shall adopt the Decision within four weeks of the submission of the proposal.[63]

In this regard, it should be noted that Spain submitted its RRP to the Commission on 30 April 2021. After giving it a positive assessment, the Commission submitted its proposed decision on 16 June 2021.[64] For its part, on 13 July, the Council, in its Ecofin configuration, definitively approved Spain's RRP.[65] The Union will make available to Spain a financial contribution in the form of non-repayable support in an amount of more than 69.5 billion euros, of which more than 46.5 billion will be disbursed by 31 December 2022. The remaining amount of close to 23 billion euros shall be disbursed during 2023.

The disbursement shall be made available in instalments: the first of 9 billion euros, has already been paid. Payment of the following instalment is dependent upon a prior positive assessment by the Commission, evaluating the degree of fulfilment of the envisaged milestones and targets. If the result is not satisfactory, payment or all or part of the committed instalment shall be suspended. This suspension shall only be lifted when the Member State concerned has taken the necessary measures to ensure a satisfactory fulfilment of the undertakings it has assumed. The Commission may terminate the agreement if, after 18 months, the Member State has not made tangible progress.[66]

However, should the preliminary assessment by the Commission on the fulfilment of milestones and targets be positive, there is the possibility of a hypothetical "emergency brake" consisting of the following procedure: the Commission must ask the Economic and Financial Committee (EFC) to issue an opinion on said fulfilment within four weeks of receipt of the Commission's preliminary report. Should one or more Member States consider that there are serious deviations from the satisfactory fulfilment of the relevant milestones and targets, they may request the President of the European Council to refer the matter to the next European Council to thoroughly debate the matter. This process should not take longer than three months after the Commission has asked the EFC for its opinion.[67] In any case, although it can delay the payments assigned to the RRF, it does not grant Member States any right to veto.

4 The interrelationship between the EU budgetary framework and NextGenerationEU

As noted above, the impact of the COVID-19 crisis and, particularly, the creation of the EURI have required a deep-rooted change in the negotiations for the MFF and the ORD. These instruments, whilst different in nature and formally independent, are intrinsically interlinked, as payment of the debt and the repayment of the loans requested by the EU within the framework of NGEU will take place by means of the allocations contemplated in the ORD and reflected in the MFF.

The constitution of NGEU has given rise to the possibility of very significantly broadening the EU financing. As briefly mentioned before, this is transitory financing, whose legal basis lies in Article 122 TFEU, but

[61] Article 10 RRF Regulation.

[62] Articles 18, 19 and Annex V, RRF Regulation.

[63] Article 20 RRF Regulation.

[64] Proposal for a Council implementing decision on the approval of the assessment of the recovery and resilience plan for Spain, COM (2021) 322 final of 16 June 2021.

[65] The same meeting also approved the RRP of Austria, Belgium, Denmark, France, Germany, Greece, Italy, Latvia, Luxembourg, Portugal and Slovakia. Please see the Outcome of the Council meeting for more information.

[66] Article 24 RRF Regulation.

[67] On the basis of Paragraph 52 of the Preamble and Article 24 to the RRF Regulation.

its effects will last over the course of several MFF, since the repayment of the borrowing requested by the Commission on behalf of the EU will be completed on 31 December 2058.

The power granted to the Commission to take on borrowing is clearly limited with regard to its extent, duration and scope and is, as we have noted above, closely linked to the ORD, which governs the revenue in the EU budget for the 2021-2027 seven-year period. The ORD authorises the Commission to take on borrowing on the capital markets up to a total amount of 750 billion euros, in 2018 prices, the majority of which will be concentrated in the 2021-2024 period. The Commission's net borrowing capacity shall cease, at the latest, by the end of 2026, to be able to start a repayment within the timeframe of the MFF. The funds collected will be repaid after 2027 and at the latest by 31 December 2058, with revenue from future EU budgets.[68]

To deal with this new situation, the ORD has increased the upper ceilings of annual appropriations for payments and annual appropriations for commitments, to 1.40% and 1.46%, respectively, of the EU's GNI, when, in previous budgetary cycles, it could not exceed 1%. Each of them has seen a temporary 0.6% increase for the sole purpose of covering all of the Union's liabilities resulting from the NGEU borrowing until its repayment.[69] In practice, this means doubling the EU's financial capacity compared with the previous MFF.

Regarding the own resources, the ORD proposes the updating of existing resources and an undertaking to create new revenue to cover the repayment of EURI, without increasing Member State contributions and to better reflect the fluctuations in Member States' economic cycles, and which would correspond with the implementation of EU policies.

As for customs duties, the Commission, in its 2018 proposal, advocated a reduction in the amount retained by Members States by way of collection costs to 10% of the amounts collected (reducing the previous margin of 20%). However, the proposal did not prosper, and the ORD has seen an increase in the Member State retention to 25%.[70]

With VAT, the Commission's initial proposal sought simplification of the resource and flexibilisation of the procedure for calculating the tax base. Based on these premises, the idea was to apply to the tax base a uniform rate not more than 2%. However, the result has been to continue with the scant transparency of its calculations, retaining the ceiling of 50% of total GNI as the limit for the tax base, to which a call rate of 0.3% is applied.[71]

Similarly, the GNI-based resource was supposed to remain as originally envisaged, that is, as a mechanism that was actually supplementary and to guarantee a balanced budget. To reduce its impact upon Europe's accounts, the proposal was to introduce a varied and flexible "basket" of own resources, directly related to the Union's competences and objectives. These new sources of funding were supposed to allow for a reduction in Member State GNI-based contributions and the Commission's initial plans were for a progressive elimination of the discounts enjoyed by some countries in calculating their GNI-based contributions up until their complete disappearance in 2026. This elimination will not now take place in the upcoming seven-year period, as negotiations saw agreement on reductions in the contributions made by Member States that are net creditors in the budget (Denmark, Germany, the Netherlands, Austria and Sweden).[72]

With regard to the basket of new revenues, the ORD solely contemplates the creation of a new call rate on non-recycled plastic packaging waste. This is a uniform rate of 0.80 euros per kilo, applied to the weight of plastic packaging waste generated in each Member State that is not recycled, although most Member States, including Spain, will benefit from an initial reduction (all except for Germany, Austria, Belgium, Denmark,

[68] Article 5 ORD.

[69] Articles 3.1, 3.2 and 6 ORD.

[70] Articles 2.1 and 9 ORD.

[71] Article 2.1 ORD

[72] Article 2.4 of the ORD establishes that, for the 2021-2027 period, some Member States shall benefit from a gross reduction in their annual GNI-based contributions. Specifically, these are: Austria (565 million euros), Denmark (377 million euros), Germany (3,671 million euros), the Netherlands (1,921 million euros) and Sweden (1,069 million euros). These amounts shall be valued in 2020 prices.

Ireland, France, Finland, the Netherlands and Sweden).[73] The weight of plastic packaging waste shall be calculated as the difference between the one generated in a Member State in a given year and the one recycled in that year that is determined pursuant to Directive 94/62/EC.[74]

The forecast for new resources is not included in the ORD. Rather, their introduction is formulated in a roadmap incorporated as an annex to the interinstitutional agreement between the European Parliament, the Council of the European Union and the European Commission of 16 December 2020.[75]This document establishes a timetable for the creation of new own resources. As a first step, over the course of 2021, the Commission must put forward proposals on a carbon border adjustment mechanism and on a digital tax, with a view to their introduction at the latest by 1 January 2023. Later, it is planned for the Commission to propose, before June 2024, additional own new resources, which could include a financial transaction tax and a financial contribution linked to the corporate sector or a new common corporate tax base, which should be approved before 1 January 2026.[76] In practice, it will be difficult to meet this planned calendar, as some of the initiatives need to have a legal basis that requires the unanimous support of the Council, and there is no generalised consensus on their adoption.[77] Proper implementation of the new revenues will require a high degree of political commitment from all participants.

5 Final considerations and reflections

The scale of the health and economic impact of COVID-19 and the experience with the measures adopted during the 2009 crisis have led the EU to react quickly to the pandemic, within the constraints of its competences. The seriousness and intensity of the crisis has opened up the door to a new financing model. Solutions to the difficulties have called for a joint response based on solidarity which, although limited over time, has been necessary to tackle the serious socioeconomic consequences. This implementation of a support programme over the course of the upcoming 2021-2027 budget cycle could represent the start of a project for more deep-seated integration.

The plan's cornerstone is the EURI, which has the great merit of restoring confidence in the EU's ability to deal with severe crises and represents a significant shift in the Union's economic policy. Unlike the sovereign debt crisis, this shift has been made possible through the use of mechanisms adopted within the limits of the EU legal order and without resorting to international agreements between Member States. NGEU will be implemented by EU institutions and Member States and not by new EU agencies, new international organisations or other undertakings external to the EU. Neither has it been necessary to revise the founding treaties.

NGEU entails a substantial increase in the Union's fiscal capacity. This has occurred by means of the issuing of public debt for which the EU is responsible, without this entailing, in principle, any transfer of capital between Member States. Whatever the case, we shall have to wait until the repayment of the borrowing to see whether this statement is true. It will depend on the success of the implementation of the new own revenues contemplated in the ORD, which are based on common EU policies. If these prove insufficient and repayment is made, principally, by means of GNI-based contributions, the plan will have failed, because, as we have noted, this resource is regarded as an intergovernmental transfer made by Member State authorities into the Union's coffers.

[73] Articles 2.1 and 2.2 ORD. The amount discounted from the overall amount for Spain is 142 million euros.

[74] European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, OJ L 365 of 31 December 1994.

[75] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources, OJ L 433 of 22 December 2020.

[76] Annex II to the Interinstitutional Agreement of 16 December 2020. Interinstitutional cooperation on a roadmap towards the introduction of new own resources.

[77] De Sadeleer, Nicolas (2020: 7-8).

This fiscal capacity is fragile, exceptional and temporary in nature and has, in theory, been designed to tackle the socioeconomic impact of the pandemic. However, NGEU not only offers alleviation to help with economic recovery, but also proposes a transformation of the economic structure of Member States. In this regard, it is an instrument that provides support for investments and reforms recommended as part of the European Semester. The fact is that the EU will have to raise the own resources required to repay the borrowing over several decades, until the end of 2058, so that, despite this exceptional and temporary nature of the instrument, there will be medium- and long-term consequences, which will impact future MFF.

In any event, here we are dealing with a qualitative leap in the process of European integration, whose consequences are yet to be seen. If the experience is positive and NGEU meets the expectations, it is reasonable to think that it will smooth the way for new initiatives aiming towards a fiscal union to complement the economic and monetary ones and in which the EU budget plays the key role.

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