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

LEGACY AND LIMITS OF NGEU

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This contribution will analyze the significance and legacy of Next Generation EU (NGEU). It will start by providing a snapshot of the state of the EU's Economic and Monetary Union (EMU) before the pandemic struck in 2020. It will then map out NGEU's likely legacy, arguing that NGEU may change the way the EU raises and spends revenues in the future. The essay will finish by reflecting on how NGEU may change our interpretation of important elements of EMU and affect the ongoing debate about the future of fiscal integration within the EU.

EMU Before NGEU

EMU was established in 1992. Its original setup included a centralized monetary policy, conducted at the EU level by the European Central Bank (ECB), and a mechanism for the coordination of economic national policies. While member states still control their economic (including fiscal) policies, they must abide by fiscal rules (limits on debt and deficit) and commit to coordinating their economic policies by following central guidelines. The cornerstone of EMU is national fiscal liability, i.e., that member states should remain responsible for their own debt. Visible manifestations of this in the treaties are the no-bailout clause (Article 125 of the Treaty on the Functioning of the European Union (TFEU)), and the prohibition on monetary financing by the ECB (TFEU Article 123). There was an understanding that the market should be the fundamental distributor of resources in this area, rather than public intervention.[1]

Thus EMU, as originally designed, was not supposed to be a "transfer union," and the EU was not given significant fiscal capacity or macroeconomic tools to prevent or address macroeconomic shocks. Fiscal rules and market discipline were supposed to ensure that national debts remained manageable even in the event of a macroeconomic shock, while economic coordination would make asymmetric shocks less likely. Finally, EMU was conceived as rules-based and "apolitical," ensuring that any political decisions would be taken at the national level, which had the required level of democratic legitimacy to do so. This so-called "Maastricht compromise" made the arrangement acceptable to actors such as the German Federal Constitutional Court.[2]

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

[2] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 Entscheidungen Des Bundesverfassungsgerichts [BVERFGE] 155.

These original features of EMU adapted through the years, especially after the global financial crisis and the euro area sovereign debt crisis. While there have been no significant treaty amendments, there have been changes in the way these provisions and the principles underlying EMU are interpreted.[3] Most significantly, it became clear that fiscal discipline and economic coordination had not been effective in the lead-up to the euro area crisis. This led to an ongoing discussion about the need to put less emphasis on fiscal discipline, or risk-limiting, and more on risk-sharing, with the creation of a significant fiscal capacity and associated macroeconomic tools at the EU level. The crisis also led to the creation of a permanent financial assistance facility to assist member states in trouble, the European Stability Mechanism, and thus a reinterpretation of the no-bailout clause that would allow it. Finally, the crisis led the ECB to adopt a variety of non-standard monetary policy measures and a much broader (and, critics would say, more political) role. None of these developments were straightforward and many of them were challenged before courts. The disagreement about the future shape of EMU—to what extent it should include sharing more resources and risk, and the creation of a fiscal capacity connected to taxing or spending powers—seemed particularly intractable, rooted in different conceptions of democratic legitimacy and the limits to EU integration.[4]

This was the situation before the COVID pandemic in 2020. EMU was in flux, with a consensus that changes were necessary, but where disagreements were so fundamental—about the acceptable nature of EMU and of the EU—that significant change did not seem possible anytime soon.

NGEU and Its Legacy

The COVID-19 pandemic and the set-up of NGEU have already been covered in this symposium.[5] While NGEU was created as an exceptional and temporary instrument, there are several reasons why it is a historical benchmark. First, because of its size and nature: the EU borrowed an enormous amount of money to be disbursed to member states, predominantly as grants. While there is performance-based conditionality, it is much less strict than the conditionality we saw, for example, in loans provided to member states during the euro area crisis.[6] It is new for the EU to borrow jointly at this scale and for the purposes of distributing grants, rather than issuing loans, and to do so with much less strict conditionality and red tape than previously. Overall, it amounts to an unprecedented pooling of resources among member states. In fact, it seems unparalleled globally, though it has been compared to the Marshall Plan in its scale and effects.[7]

Second, NGEU may strengthen the EU's budgetary autonomy in the future. This is because the EU will be responsible for paying back the money disbursed as grants, through its own budget, by 2058. To this end, it was foreseen that the EU would create, over time, new resources of its own (i.e., new sources of revenue within the EU's system of "own resources," which includes customs, duties, and levies, a portion of national value-added tax, and national contributions based on their gross national income).[8] Unless agreed otherwise, these new own

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

[4] Alicia Hinarejos, *Economic and Monetary Union: Evolution and Conflict*, *in* THE EVOLUTION OF EU LAW (Paul Craig & Gráinne de Búrca eds., 3d ed. 2021).

[5] Elena Kempf & Katerina Linos, *An Ever-Stronger Union: Introduction to the Symposium on Next Generation EU, Crisis Budgeting, and the Empowerment of Supranational Institutions*, 118 AJIL UNBOUND 139 (2024).

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

[7] *See, e.g.*, FEDERICO FABBRINI, EU FISCAL CAPACITY: LEGAL INTEGRATION AFTER COVID-19 AND THE WAR IN UKRAINE 59 (2022); Elena Kempf & Katerina Linos, *NGEU: A New Marshall Plan for Europe and a Template for Global Finance*, 118 AJIL UNBOUND 151 (2024).

[8] *See* Christian Neumeier, *Political Own Resources: Towards a Legal Framework*, 60 COMMON MKT. L. REV. 319 (2023).

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revenues would remain in place beyond the lifespan of NGEU. If adoption of these new revenues does not prove possible, member states will have to step in and pay back the borrowed money through their own, larger contributions to the EU budget.

Only one new EU own resource has been agreed to thus far—a national contribution to the EU budget tied to unrecycled plastic. This initial addition to the EU's own resources is not significant in terms of strengthening the EU's budgetary capacity: each member state's subsidiary contribution to the EU budget will decrease by whatever amount they have paid in the form of this new "plastic tax." As such, this new resource will not increase the EU's resources.[9] Other envisaged own resources may be more significant, potentially strengthening the EU's budgetary capacity, or at least increasing its budgetary autonomy by decreasing dependence on national contributions. The decision that reformed the EU's system of own resources as part of NGEU mentioned the potential introduction of a financial transaction tax, already attempted in the past without success, plus revenues raised by a carbon border adjustment mechanism, a digital levy, and an extended emissions trading system.[10] At the time of writing, the Commission has made proposals for a variety of own resources;[11] initial plans to propose a financial transaction tax seem abandoned for now.[12] Overall, little progress has been made on the Commission's package of proposals. It will not be easy for member states to agree on the creation of significant new EU own revenues, but they have an incentive to do so eventually, since they will be responsible, through their contributions to the EU budget, for whatever the EU itself cannot pay.

It should be emphasized that the addition of new own resources does not equal granting the EU fiscal autonomy,[13] as long as it continues to be dependent on member states' contributions to its budget. Much depends on the proportion of the budget that may eventually be covered by these new own resources, compared to the proportion covered by national contributions. The current EU budgetary structure, with its preponderance of national contributions and the corresponding focus of member states on ensuring they get their money's worth, curtails the EU's capacity to decide on and pursue its own policy objectives and public goods. Some have called for a "federal" budget structure with lower national contributions.[14] While this type of reform is unlikely in the medium term, a new attitude toward the creation of own resources could recalibrate the balance in the longer term.

Third, more generally, NGEU has changed our interpretation of EMU's important provisions and underlying principles. NGEU was created on the basis of two main provisions: TFEU Article 122, which allows for financial assistance to member states in exceptional situations, and TFEU Article 175(3), allowing for spending on

[9] Nevertheless, the creation of an own revenue has been tied for the first time to a policy objective (environmental protection through plastic recycling). *Id.*

[10] Decision 2020/2053 on the System of Own Resources of the European Union and Repealing Decision 2014/335, Euratom [2020] OJ L424/1, pmbl. pt. 8.

[11] In December 2021, the Commission proposed to allocate to the EU budget a portion of the revenues raised by a new carbon border control adjustment mechanism (CBAM), by a reformed and extended Emissions Trading Scheme (ETS) and, pending future agreement on details, by the adoption of Pillar One of the agreement on a reform of the international tax framework (OECD/G20 Inclusive Framework on BEPS), which would reallocate a share of residual profits of the largest and most profitable multinational enterprises. Proposal for a Council Decision Amending Decision (EU, Euratom) 2020/2053 on the System of Own Resources of the European Union, COM (2021) 570 final (Dec. 22, 2021). In June 2023, the Commission proposed a new temporary statistical own resource based on company profits rather than a Financial Transactions Tax, and made changes to the previous proposals (ETS and CBAM). Communication from the Commission: An Adjusted Package for the Next Generation of Own Resources, COM (2023) 330 final (June 20, 2023).

[12] Communication from the Commission: The Next Generation of Own Resources for the EU Budget, COM (2021) 566 final, at 5 (Dec. 22, 2021).

[13] Neumeier, *supra* note 8, at 323.

[14] *See, e.g.*, Andrew Duff & Luis Garicano, *A Two-Tier Federal Budget for the European Union*, EUR. POL'Y CTR. (2024).

economic, social, and territorial cohesion.[15] The result is a fund created in the midst of a crisis—that bears the hallmark of an emergency and exceptional measure—but that goes beyond it, as it aims to rebuild national economies while pursuing other, unrelated objectives (such as the transition to a green economy or digitalization). This understanding of "cohesion" differs from the orthodox EU interpretation of the concept, which allowed for spending to iron out regional deficiencies, within the EU's usual budget. This combination of legal bases made it possible to transcend the limits of both: TFEU Article 122 made it possible to raise the money in the way it was done and without running afoul of the general no-bailout clause,[16] while TFEU Article 175(3) made it possible to spend it on broader objectives than just addressing the economic effects of the pandemic, and with a less strict form of conditionality.[17] Arguably, therefore, NGEU will have a lasting effect on the way all of these essential EMU treaty provisions are interpreted in the future. More generally, Maria Panascì has argued convincingly that NGEU represents a constitutional transformation of EMU, from pursuing integration through markets and prohibiting public intervention in this regard to redistribution through public intervention; from a market-based paradigm to a political *telos* that changes member states' commitments to each other.[18] It is thus possible to see NGEU as a turning point in terms of the role that solidarity plays within EMU and the EU more generally.

In practical terms, much will depend on how much of this new interpretation of existing treaty provisions endures once disbursement under NGEU ends. It is easy to imagine that, once this mechanism has been built and used once, it will be used again, at least in situations deemed emergencies; the question is in what circumstances and at what scale.[19] In this respect, note that in the context of the protracted reform of fiscal rules that was agreed recently, limits on national spending will not apply to national contributions to EU spending programs.[20] This may provide an incentive for member states to agree to more joint borrowing through the EU budget, following the blueprint of NGEU.

From a more general perspective, we may see a transformation of TFEU Article 175(3) (cohesion spending) into something approaching a general EU spending power,[21] to be used outside of an emergency context for the creation of central macroeconomic tools and an ongoing fiscal capacity without the need for treaty changes. This would be a momentous transformation, but also—depending on how far-reaching—a fraught one. Arguably, one important factor would be at what level specific policy decisions about expenditure are made; in other words, to what extent the future use of this clause could lead to substantive fiscal decisions being made, and discretion being exercised, at the EU level. A strong version of this scenario would require reforms to EU fiscal governance that strengthen accountability and democratic legitimacy,[22] and would be more likely to cross national red lines. Conversely, if cohesion spending continues to follow a model where the EU offers funding for general

[15] On these legal bases, see Bruno de Witte, *The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift*, 58 Common Mkt. L. Rev. 635, 652–59 (2021).

[16] *See* Opinion of the Council Legal Service, Conclusions on Next Generation EU, June 24, 2020, Council Doc. 9062/20, 63–65.

[17] Panascì, *supra* note 1, at 24–37.

[18] *Id.* at 37.

[19] For example, consider the energy package RePowerEU, repurposing some RRF funds to reduce dependency on Russian fossil fuels and accelerate transition to renewables. While this fit within the existing NGEU framework at the time, it provides an example of the sort of reason that may prompt similar joint borrowing after. *See also* Federico Fabbrini, *From the Pandemic to the War: The EU Fiscal Response to Russia's Aggression of Ukraine, the Legacy of NGEU and the Challenge to "Promote the General Welfare,"* 118 AJIL Unbound 177 (2024).

[20] Gregorio Sorgi, *This Tiny Loophole Could Give the EU a Lot More Money*, Politico (Feb. 13, 2024).

[21] Peter Lindseth & Päivi Leino-Sandberg, *Crisis, Reinterpretation, and the Rule of Law: Repurposing "Cohesion" as a General EU Spending Power* (University of Helsinki, Faculty of Law, Legal Studies Research Paper Series No. 84, 2024); de Witte, *supra* note 15, at 655–59, 680.

[22] Jean-Claude Junker, *Completing Europe's Economic and Monetary Union*, Eur. Comm'n, at 18 (June 22, 2015).

priorities and member states that accept it remain responsible for specific policy decisions, the need for constitutional reforms seems less pressing.[23]

Final Reflections

The discussion about integrating further and building a significant fiscal capacity within EMU had reached a degree of stalemate before the arrival of COVID. This was due to fundamental political disagreements, but also to pragmatic factors: it is extremely difficult—almost impossible—to amend the EU treaties in any meaningful, far-reaching way.

NGEU, with its complicated architecture, made it possible and acceptable for the member states to build a fiscal capacity, in exceptional circumstances and for a limited period of time, without treaty amendment. The same architecture may be used in the future in a similar way, provided the political will exists. A different question is to what extent part of this mechanism may be used to create a more stable and significant fiscal capacity outside an emergency context, through the "cohesion spending" clause (TFEU Article 175(3)). Additionally, NGEU could change the way the EU raises revenues in the future through the creation of new own resources. This might strengthen the EU's nonexistent budgetary autonomy, depending on the size of these resources compared to the proportion of the budget still covered by national contributions. Importantly, we do not know what kind of political agreement on these new resources, if any, will be feasible.

Finally, it is useful to remember what NGEU did *not* change. The political disagreements on what EMU is for, and how much solidarity should underpin it, remain. So do the disagreements about how much democratic legitimacy is necessary to create a stable EU fiscal capacity. It is worth remembering that, while the German Federal Constitutional Court sanctioned NGEU,[24] its underlying views on substantive fiscal decisions having to be taken at the national level for them to have the necessary democratic legitimacy have not changed. These disagreements or red lines will continue to inform any discussion about an ongoing fiscal capacity for the EU, including through a potentially broader use of the cohesion spending clause in the future. Overall, while NGEU is a historical benchmark with a likely lasting legacy, the underlying questions about the future shape of the EU remain.

[23] In this scenario, there may still be a different expansion of EU competence, in that the Commission will enforce performance-based conditionality in areas where the EU may not have competence to regulate (as seen with previous uses of conditionality). In either scenario, there is an argument for reforms to achieve full inclusion of the European Parliament on the revenue-raising side.

[24] BVerfG, 2 BvR 547/21, 2 BvR 798/21, Dec. 6, 2022; Franz C. Mayer, *NextGenerationEU and the Future of European Integration: Foreseeing the Unforeseeable*, 118 AJIL UNBOUND 172 (2024).