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2022
Kluwer Law International
http://hdl.handle.net/10138/349550
Leino-Sandberg, P & Ruffert, M 2022, 'Next Generation EU and its constitutional ramifications : a critical assessment', Common Market Law Review, vol. 59, no. 2, pp. 433–472. < https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/59.2/COLA2022031 >

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Common Market Law Review **59**: 433–472, 2022.
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NEXT GENERATION EU AND ITS CONSTITUTIONAL RAMIFICATIONS: A CRITICAL ASSESSMENT

PÄIVI LEINO-SANDBERG AND MATTHIAS RUFFERT*

Abstract

Following the early turmoil of the COVID-19 pandemic on societies in Europe, the foundations of financing the European Union have been overturned. In this article, we demonstrate the magnitude of change that Next Generation EU (NGEU) creates. While explained as exceptional and justified with reference to the pandemic, in substance, the NGEU is not a crisis measure. It will change the reading of EU law permanently by establishing a new type of instrument for redistribution between the Member States and funding this through debt. This article argues that consensus among large Member States and key institutional stakeholders is insufficient for disregarding key Treaty principles. We scrutinize the regulating capacity of EU constitutional law in relation to that consent and discuss the control of constitutionality by the Court of Justice, the role of national constitutional bodies, and the effect of the package on institutional balance. Finally, the role of EU scholarship is considered in relation to such a profound shift in the EU's constitutional fabric.

1. Introduction: On the way to Next Generation EU

Crises present a tempting opportunity to advance institutional ambitions that would be politically and legally impossible in normal times.[1] Fiscal

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1. The phrase "Never let a good crisis go to waste" is attributed to Winston Churchill. For an analysis of EU politics in times of crisis, cf. White, *Politics of Last Resort* (OUP, 2020).

integration has long been an area of high but largely unfulfilled EU institutional ambitions, mostly due to the universally held assumption that their fulfilment would require Treaty change. The procedural requirements for a Treaty change are heavy, to ensure proper democratic debate of the reforms and their consequences. Scarred by traumatic experiences, the past ten years demonstrate how the EU has, for all practical purposes, resolved no longer to engage in Treaty reform. Instead, it has introduced major constitutional changes through reinterpretation of the existing Treaties, with the same *de facto* effect. This process merits more fundamental discussion than has so far taken place. Therefore, the constitutional reinterpretation surrounding the EU's COVID-19 response, in particular the Next Generation EU (NGEU) package, is an interesting case study.

Deeper fiscal integration and risk sharing between Member States have been part of every authoritative EU initiative on deepening the EMU.[2] Typically, rather than providing European public goods directly to citizens like a federal budget, these have envisaged the creation of an EU (or euro area) "fiscal capacity" that would interact with Member States through a system of fiscal cross-subsidies.[3] While details have varied, these proposals have traditionally focused on smoothing cyclical shocks rather than eliminating structural differences, have avoided permanent transfers between Member States, and relied on strict conditionality. These elements were deemed necessary for both political and legal reasons.[4]

Until the spring of 2020, there was universal agreement within the institutions that any deeper fiscal integration, particularly if it involved issuance of EU debt, would require Treaty amendment. While the EU structural funds have contributed to levelling the differences between Member States, structural competitiveness gaps and budgetary imbalances have

2. See Commission Communication, "A blueprint for a deep and genuine economic and monetary union – Launching a European debate", COM(2012)777 final; Report by President of the European Council Herman Van Rompuy, "The Four Presidents' Report: Towards a Genuine Economic and Monetary Union", EUCO 120/12 (2012); Juncker et al., "The Five Presidents' Report: Completing Europe's Economic and Monetary Union", European Commission, June 2015; European Commission, "Reflection paper on the deepening of the Economic and Monetary Union", COM(2017)291; Commission Communication, "Further steps towards completing Europe's Economic and Monetary Union: A roadmap", COM(2017)821 final.

3. The Five Presidents' Report cited *supra* note 2; COM(2017)291, cited *supra* note 2; critical assessment by Ruffert, "The future of the European Economic and Monetary Union" in Bignami (Ed.), *EU Law in Populist Times* (Cambridge University Press, 2020), pp. 33–66, at p. 48 et seq.

4. These features have been discussed in Leino and Saarenheimo, "Fiscal stabilisation for EMU: Managing incompleteness", 42 EL Rev. (2017), 166.

persisted and remained difficult to address.[5] Debt levels have continued to rise, turning the limits of the Stability and Growth Pact (SGP) into a historical relic. In the absence of real convergence, the European Central Bank has stepped in through its asset-buying programmes of hitherto unseen dimensions, underwriting Member States' budgets. The full extent of economic consequences remains to be seen, but the persistent constitutional tension of its actions within the limits of its mandate is already visible.[6] These factors form an important part of the broader background of the EU's COVID-19 response.[7]

The Treaties were not amended. However, when the COVID-19 crisis hit, the political circumstances surrounding the EU Treaties changed profoundly. The pandemic became a rallying cry for further integration. Horrifying pictures of military lorries in Bergamo, Italy, transporting the corpses of the victims of the first lethal wave of infections shook audiences throughout Europe and caused calls for solidarity. Within a few days, nearly all restrictions on subsidizing national industries and borrowing money for national budgets were suspended.[8] After years of discussion on the impossibility of further fiscal integration, it only took a few weeks to find political consensus on the need to create a common budgetary response towards the economic effects of the pandemic. In this context, conditionality was considered highly toxic and particularly ill-suited.[9]

Soon thereafter, a political agreement was reached to provide support to Member States through the EU budget by means of a €100 billion SURE

5. The conflict with the Conte/Salvini Government on the Italian deficit is a particularly dark spot in this context. Consider the – partly diverging – statements by the competent Commissioners after the compromise. Vice-President Valdis Dombrovskis: College read-out and remarks on the Italian budget, 19 Dec. 2018, SPEECH/18/6886; Commissioner Pierre Moscovici: College read-out and remarks on the Italian budget, 19 Dec. 2018, SPEECH/18/6885.

6. Cf. e.g. Ohler, *Unkonventionelle Geldpolitik* (Mohr Siebeck, 2021), in particular pp. 325 et seq.

7. This is explicitly recognized in the Commission's EURI proposal (Proposal for a Council Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 pandemic, COM(2020)441 final): "the impact of the pandemic differs considerably between Member States, as does their ability to absorb the economic and fiscal shock and respond to it, depending on the specific economic structures and initial conditions of the Member States. As a result, there is a risk that the crisis will widen disparities within the Union threatening the collective economic and social resilience."

8. Commission Communication, "Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak", O.J. 2020, C 91 I/01; Commission Communication on the activation of the general escape clause of the stability and growth pact, COM(2020)123 final.

9. See the summary by Ruffert, "Le bouleversement de l'Union économique et monétaire dans la crise pandémique", 56 RTDE (2020), 915–930, at 917 et seq.

lending programme for pandemic-related costs,[10] the European Stability Mechanism (ESM) with up to €240 billion essentially unconditional loans under the Pandemic Crisis Support Programme[11] and the European Investment Bank's (EIB) commitment of close to €200 billion to European companies as liquidity, equity, and guarantees.[12] We see all of these as emergency measures providing the type of assistance that Article 122(2) TFEU was designed for: as Union assistance in the face of unexpected events. To date, the SURE programme has been almost fully subscribed and the EIB programme is disbursing steadily. In contrast, no Member State has touched the cheap money offered by the ESM. Despite the lack of the usual ESM programme conditionality, the ESM seems to carry a stigma.[13]

Against the fragile financial situation of some of the Member States most affected by the crisis, these measures proved to be insufficient from the start. The key political moment was seen in Berlin and Paris in May 2020. The French and German governments reached an agreement[14] that gave the Commission green light to propose that Next Generation EU[15] be financed through borrowing €750 billion on the financial markets and would be primarily used as grants to Member States.[16] The European Council subsequently refined the project by drawing a quantitative line between grants and loans, trying to steer the control of the spending, partially as a response to, or in anticipation of, constitutional concerns at Member State level.[17]

10. 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, O.J. 2020, L 159/1.

11. See <www.consilium.europa.eu/en/press/press-releases/2020/05/08/eurogroup-statement-on-the-pandemic-crisis-support/> (all websites last visited 6 Jan. 2022).

12. See <www.eib.org/en/press/all/2020-126-eib-board-approves-eur-25-billion-pan-european-guarantee-fund-to-respond-to-covid-19-crisis.htm>.

13. On the question whether that type of conditionality would have been compatible with either Arts. 13 and 14 ESM Treaty or Art. 136(3), 2nd sentence, TFEU see Ruffert, op. cit. *supra* note 9, at 924 et seq. On the position of the Finnish Constitutional Law Committee on the programme and its constitutional ramifications see Leino-Sandberg, "Constitutional Constraints meet Political Pressure: Finland's precarious participation in the COVID-19 solidarity measures", *Verfassungsblog,* 12 May 2020, available at <www.verfassungsblog.de/constitutional-constraints-meet-political-pressure/>.

14. Press and Information Office of the Federal Government, press release No. 173/2020, available at <www.bundesregierung.de/resource/blob/974430/1753772/414a4b5a1ca91d4f7146eeb2b39ee72b/2020-05-18-deutsch-franzoesischer-erklaerung-eng-data.pdf?download=1>.

15. Proposal cited *supra* note 7.

16. The relevant proposals are available at <www.ec.europa.eu/info/publications/mff-legislation_en>.

17. In particular, the mode of repayment in the Own Resources Decision (ORD) was changed from joint and several liability to liability in proportion ("pro rata") – a matter on which the Finnish Constitutional Law Committee expressed deep concern in opinion to the Constitutional Law Committee, PeVL 16/2020 vp, and which probably saved the ORD from the

Through the NGEU, the EU issues debt to provide grants and loans to Member States to be spent during the next few years, mostly under the framework of cohesion policies to support purely national reforms and investments. Disbursements are linked to the cost and implementation of those reforms and investments, but conditionality, in the traditional sense, does not exist. Starting from 2028, the debts are to be repaid over three decades, for the most part with as of yet unspecified means.[18] These developments take place at the same time as the requirements of the SGP have been effectively abandoned and plans for its fundamental reform are pending so as better to reflect the post-COVID-19 reality.[19] These developments represent a major constitutional shift in EU law, which is triggered and politically justified by the COVID-19 crisis, but is part of institutional ambitions that existed long before the crisis.[20]

The NGEU represents a skilful legal construction.[21] Since the legal justification for action is to a large extent found in Article 122 TFEU, it is drafted as a one-off crisis measure. Yet, the package is broadly understood – including by key stakeholders such as the President of the ECB and the German Finance Minister at the time[22] – as the beginning of a more permanent solution. The NGEU entails a substantial reinterpretation of what is possible under the Treaties.

FCC's verdict on budgetary sovereignty. On this issue also Nettesheim, "'Next Generation EU': Die Transformation der EU-Finanzverfassung", 145 AöR (2020), 381–437, at 429 et seq. See BVerfG, Order of the Second Senate of 15 April 2021, 2 BvR 547/21, paras. 102 and 103. In Dec. 2020, the European Council further addressed the question of rule of law supervision within the budgetary sphere.

18. See Art. 9, Council Decision (EU, Euratom) 2020/2053 of 14 Dec. 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, O.J. 2020, L 424/1.

19. Communication from the Commission to the Council on the activation of the general escape clause of the stability and growth pact, COM(2020)123 final; Communication from the Commission on the review of the flexibility under the stability and growth pact, COM(2018)335 final.

20. See COM(2012)777 final, cited *supra* note 2.

21. De Witte, "The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift", 58 CML Rev. (2021), 635–682; similarly Schorkopf, "Die Europäische Union auf dem Weg zur Fiskalunion", 73 *Neue Juristische Wochenschrift* (2020), 3085–3091, at 3087.

22. For example, the President of the European Central Bank (ECB) has urged discussion about keeping the NGEU "in the European toolbox so it could be used again if similar circumstances arise", and the (then) German Finance Minister sees the NGEU as a long-term measure which "we won't go back on". See interview with Christine Lagarde, President of the ECB, conducted by Marie Charrel and Eric Albert, available at <www.ecb.europa.eu/press/inter/date/2020/html/ecb.in201019~45f5cf8040.en.html>; and "Germany's Scholz sees 'no way back' from EU joint debt", available at <www.euractiv.com/section/economy-jobs/news/germanys-scholz-sees-no-way-back-from-eu-joint-debt/>.

The first question we ask is whether this method of "creative interpretation" really is a sufficient standard for the EU as a community of law. We take a closer look at the two main constitutional novelties of the NGEU: first, the distributive scheme and its main legal justification; and second, the creation of a credit-financed fund (sections 2.1 and 2.2 below). In an article on the NGEU, published in this journal, Bruno de Witte argues that:

> "… we have seen some stretching of the EU's competences in Article 122 and Article 175 TFEU, and the frank acceptance that the European Union can incur massive debt in the common interest of its Member States; but those developments were willingly accepted by all the national governments and have not affected the stranglehold of the Member States on the EU's public finance system." [23]

We disagree with this conclusion and, in particular, with the implication that political consensus is an acceptable substitute for Treaty amendment. One needs to ask whether a European Council meeting, with leaders operating under time constraints and limited parliamentary control,[24] is a suitable place for producing politically and constitutionally sustainable long-term solutions for the Union.

This leads to a second question: the scrutiny of great constitutional changes (section 3 below). Even if not every legal order works this way, a community of law depends on a supreme court that takes seriously its task of safeguarding the constitution and should not run the risk of being potentially reduced to finding justifications for constitutional shifts made in the highest political echelons. Constitutional review in the EU system is a prerogative of the European Court of Justice. By the time the NGEU finds its way before the Court,[25] its funding will already have been paid out and spent, with effects that cannot be undone. In addition, some national constitutional bodies have an important role in scrutinizing EU "grey zone operations", and the effect of such operations on questions of democracy and the role of parliaments in budgetary matters. This perspective is influenced by our involvement in national discussions in two Member States (Finland and Germany) where

23. De Witte, op. cit. *supra* note 21, at 681. In a similar sense: Iliopoulou-Penot, "L'instrument pour la relance Next Generation EU: 'Where there is a political will, there is a legal way'?", 57 RTDE (2021), 527–543.

24. Morrissey, "The role of national parliaments in the European Council", *Spotlight on Parliaments in Europe,* No. 23, Nov. 2018, <www.europarl.europa.eu/cmsdata/226101/No._23_The_role_of_National_Parliaments_in_the_European_Council.pdf>; de Wilde and Raunio, "Redirecting national parliaments: Setting priorities for involvement in EU affairs", 16 *Comparative European Politics* (2016), 310–329, at 318 and 320.

25. Probably by referral from the German FCC: BVerfG, Order of the Second Senate of 15 April 2021, 2 BvR 547/21, para 105.

constitutional questions traditionally play a considerable role.[26] In our view, national parliaments and constitutional bodies constitute an important complementary part in the composite structure of the EU (*Verfassungsverbund*),[27] reflected in the principle of democracy under the European Treaties and, in a way, confirmed by the approach of national constitutional courts.[28] Rather than seeing in this complementary contribution a distraction to be avoided, we submit that a constructive institutional dialogue could strengthen the resilience of EU constitutional law as it stands today. The issue of scrutinizing constitutional change has another important aspect: What is the role of EU legal academia in scrutinizing the institutions' (and Member States') activities? Given the constitutional importance of the reinterpretations needed in the context of NGEU, we stress the need for critical academic debate in the grey zone between creative legal engineering and illegality, and the need to bring risks and alternatives to public debate before decisions are taken.

2. Reinterpreting the Treaties

2.1. *Distribution*

2.1.1. *Allocation of competence and (re-)distribution of wealth*

The first major change brought about by the NGEU is the establishment of a large-scale and nearly unconditional redistribution of public money among the Member States. As such, it goes far beyond the traditional redistributive

26. Leino-Sandberg has been the expert most often relied on by the Finnish Constitutional Law Committee in matters relating to the NGEU and has written on its discussions in "Solidarity and Constitutional Constraints in Times of Crisis", *Verfassungsblog*, 8 April 2020, <verfassungsblog.de/solidarity-and-constitutional-constraints-in-times-of-crisis/>; "Constitutional Constraints meet Political Pressure", *Verfassungsblog*, 12 May 2020, <verfassungsblog.de/constitutional-constraints-meet-political-pressure/>; "Who is ultra vires now?" *Verfassungsblog*, 18 June 2020, <verfassungsblog.de/who-is-ultra-vires-now-the-eus-legal-u-turn-in-interpreting-article-310-tfeu/>; and "Between European Commitment and 'Taking the Law Seriously'" *Verfassungsblog*, 29 April 2021, <verfassungsblog.de/between-european-commitment-and-taking-the-law-seriously/>.

27. On this, see Habermas, "Citizens and State equality in a supranational political community: Degressive proportionality and the pouvoir constituant mixte", 55 JCMS (2017), 171–182; Scharpf, "Legitimacy in the multilevel European polity", *MPIfG Working Paper,* No. 09/1 (2009), available at <www.econstor.eu/bitstream/10419/41652/1/610149423.pdf>. The term "Verfassungsverbund" was initially coined by Pernice, "Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung" in Bieber and Widmer (Eds.), *Der europäische Verfassungsraum* (Schulthess, 1995), pp. 225–264, at 261 et seq.

28. See Arts. 2, 10, 12 and 14 TEU. See above all the *ultra vires* test applied by the German Constitutional Court.

instruments in the EU, which have been an essential element of the law governing European economic integration and an important complement to the single market. Substantive transfers have taken place in the field of the Common Agricultural Policy and the structural funds. Disputes and dysfunctionalities notwithstanding, the existence of and the justification for these funds is not generally called into question. The (mainly) receiving Member States have fought hard to establish and preserve them, while the (mainly) net contributors are aware of the advantage in having robust trade partners within the internal market. The system of structural funds has an explicit legal basis in the Treaties[29] and has been further developed in an integrated legislative framework in secondary legislation. Financial support from structural funds is tied to the requirement to fulfil the relevant aim of the funds and is subject to co-funding by the Member State concerned.[30]

Beyond these limited redistributive instruments, the EU Treaties establish a structure for economic, monetary and fiscal governance. The structure may be considered outdated and unfit for the purpose, but it is established by the Treaties and can only be modified through a Treaty change.[31] The EU system of competences is governed by the principle of conferral.[32] This principle protects Member States' competences and limits the decision-making power of EU institutions in areas where competence is not conferred on the EU.[33] The importance of this principle has been emphasized by the German Constitutional Court:

> "[F]aith in the constructive force of the mechanism of integration cannot be unlimited. If in the process of European integration primary law is amended, or expansively interpreted by institutions, a constitutionally important tension will arise with the principle of conferral and with the individual Member State's constitutional responsibility for integration. ... [I]f the institutions are permitted to re-define expansively, fill lacunae or factually extend competences, they risk transgressing the predetermined integration programme and acting beyond the powers granted to them."[34]

Several elements in the NGEU package raise questions that are relevant for this issue. Beyond the Treaty provisions on the structural funds mentioned, there are no general Treaty provisions to establish a large-scale transfer

29. Arts. 162–164, Arts. 170–172, Arts. 174–178 TFEU.

30. On this, see Vita, "Revisiting the dominant discourse on conditionality in the EU: The case of EU spending conditionality", 19 CYELS (2017), 116–143.

31. Similarly, Heber, "Europarechtliche grenzen für den wiederaufbaufonds", 56 EuR (2021), 416–453.

32. Art. 5(1), 1st sentence and 5(2) TEU.

33. See in particular Art. 5(2), 2nd sentence TFEU.

34. BVerfG, judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para 238.

system between the Member States. Economic policies are coordinated according to Article 121 TFEU, within which the Member States remain responsible for their budgetary and overall fiscal performance. For its legal and political justification, NGEU relies on Article 122 TFEU. Reaching to numerous fields beyond those specifically hit by the pandemic, it exceeds what would be a scheme of financial assistance for Member States in special need following the pandemic situation. Moreover, the reading of Article 122 TFEU is affected by the other provisions in the chapter of the TFEU relating to economic policy. In *Pringle*, the Court specifically pointed out that Article 122 TFEU does not derogate from Article 125 TFEU; therefore, "in order to determine which forms of financial assistance are compatible with Article 125 TFEU, it is necessary to have regard to the objective pursued by that article".[35] For the Court, Article 125 TFEU aims:

> "… to ensure that the Member States follow a sound budgetary policy. The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union. . . . that provision prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished. . . . the activation of financial assistance . . . is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole *and subject to strict conditions*. However, 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*."[36]

For the preservation of the stability of the Eurozone, loans have been granted through the European Financial Stabilisation Mechanism (EFSM)[37] or, under strict conditions as required by Article 136(3) TFEU, through the ESM, an intergovernmental body outside the Treaties (and its predecessor, the

35. Case C-370/12, *Thomas Pringle* v. *Government of Ireland and others,* EU:C:2012:756, paras. 131–133.

36. Ibid., paras. 135–137 (emphasis added).

37. Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, O.J. 2010, L 118/1.

EFSF[38]).[39] Conditionality has been a permanent characteristic; it has been generally accepted that in order to receive support, Member States would have to fulfil conditions to ensure debt sustainability and thereby compatibility with Article 125 TFEU.

The NGEU marks a drastic change to this. Instead of responding to a threat to the common currency, it is concerned with the more fundamental problem of economic disparities within the EU. It is a transfer from the Member States that have high GDP and low unemployment rates to Member States that have low GDP and high unemployment rates.[40] These disparities can be measured. The real GDP per capita for the whole EU was at €28,040 in the last pre-pandemic year 2019, ranging from €83,640 (Luxemburg) to €6,840 (Bulgaria), with some Member States above average (including France and Germany) and others below (e.g. Greece, Italy and Portugal).[41] This is a great discrepancy, but not unusual: in Germany, the range is from €64,000 (Hamburg) to €29,000 (Mecklenburg-Vorpommern)[42] and similar divisions exist in the United States.[43] The larger the divergence, the greater the tensions. Federations differ in their approach to whether such divergences are to be levelled in a federal or centralized entity.[44] Whereas in the latter case, it is up to the government to decide on the geographic distribution of funds,[45] in a federal structure, the scope of fiscal autonomy and responsibility of the federal subentities are decisive. Either way, these solutions are addressed and settled in the constitution.[46] The EU has so far refrained from establishing a

38. The European Financial Stability Facility (EFSF) was created as a temporary crisis resolution mechanism by the euro area Member States in June 2010. The EFSF provided financial assistance to Ireland, Portugal and Greece, but no longer provides further assistance.

39. As a certain exception to this general state of play, the Union may support Member States outside the Eurozone with limited credits; see Art. 143(2)(c) TFEU.

40. This was already evident based on the Commission proposal for an RFF and its annexes; see Annexes to the Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility, COM(2020)408 final. Summing up grants and repayments, the greatest net receivers over time are Spain, Italy and Poland (€37.6 bn, €32.6 bn and €15.1 bn respectively), the greatest net givers are Germany, France and the Netherlands (€65.9 bn, €22.7 bn, €15.0 bn respectively), calculated based on Commission data by the German Court of Auditors: *Bundesrechnungshof*, Bericht nach § 99 BHO zu den möglichen Auswirkungen der gemeinschaftlichen Kreditaufnahme der Mitgliedstaaten der Europäischen Union auf den Bundeshaushalt (Wiederaufbaufonds), 11 March 2021, p. 13.

41. Data from Eurostat (online data code: SDG_08_10), without UK.

42. Data for Germany from 2020 available at <de.statista.com/statistik/daten/studie/73061/umfrage/bundeslaender-im-vergleich---bruttoinlandsprodukt/>.

43. Consider the data available at <www.bea.gov/data/gdp/gdp-state>.

44. On the theories of fiscal federalism see Adamski, *Redefining European Economic Integration* (Cambridge University Press, 2020), pp. 153 et seq.

45. E.g. the French Government is in charge for distributing between Paris and *la province,* the Italian Government between the north of the country and *il mezzogiorno*.

46. On this see also Leino and Saarenheimo, op. cit. *supra* note 4, at 166.

large-scale and unconditional redistributive system of fiscal federalism in the Treaties and broad recovery measures have not been considered part of the EU financial and budgetary system.[47] This hitherto dominant attitude is more than comprehensible. Even in established federal States such as Germany, with its sophisticated unconditional, redistributive *Länderfinanzausgleich* – a financial equalization scheme between the Federal Government and the *Länder* – there is permanent dispute and criticism caused by its claimed ineffectiveness, the persistent existence of certain *Länder* as recipients, and the irrationalities of the system.[48]

The first months of the COVID-19 crisis witnessed a new argument in favour of redistribution in the EU: that "rich" Member States could trigger support for their industries just because State aid rules were being suspended, while "poor" and fiscally constrained Member States were short of the means to do so.[49] As a response, the NGEU adds both a qualitatively and quantitatively new element to the functioning of the Union. While its funding cannot, as the main rule, be spent to "substitute recurring national budgetary expenditure",[50] it can be spent on one-off measures that would normally be funded from national budgets.

The NGEU is established through a creative two-tier approach. The EURI Regulation sets up the Recovery Instrument based on Article 122 TFEU.[51] It enumerates the purposes for which the funds shall be used at a general level, but does not indicate how financial assistance is distributed to Member States. The distributive work is done by the Recovery and Resilience Facility (RRF) Regulation which is based on Article 175(3) TFEU.[52] By this creative two-tier combination building on financial assistance and distribution under cohesion policy at the same time, two targets are met simultaneously. First, though not addressing the acute crisis, the NGEU is justified as part of the EU emergency architecture, as the distribution of funds of that dimension would have been

47. This was also noted by the Finnish Constitutional Law Committee (PeVL 16/2020 vp; PeVL 14/2021 vp).

48. This is made very clear by Haltern, "Die künftige Ausgestaltung der bundestaatlichen Finanzordnung", 73 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2014), 103–146, at 142 et seq.

49. See Commission Communication, "Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak", para 10, available at <www.ec.europa.eu/competition-policy/system/files/2021-03/TF_informal_consolidated_version_as_amended_28_january_2021_en.pdf>.

50. See Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 Feb. 2021 establishing the Recovery and Resilience Facility, O.J. 2021, L 57/17, Art. 5(1).

51. Council Regulation (EU) 2020/2094 of 14 Dec. 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, O.J. 2021, L 433I/23.

52. RRF Regulation cited *supra* note 50.

difficult to justify as a stand-alone cohesion policy measure under Article 175(3) TFEU. Second, the cohesion policy element enables handing out the funding without conditions that have been seen as an inseparable part of Article 122(2) TFEU. Rather than discussing the merits of conditionality (which may provoke strong political sentiments among its advocates and opponents), we stress the importance of this *policy shift* enabled by the engineering that is assessed in more detail in the following.

2.1.2. *Creative legal engineering around Article 122 TFEU*

It would be unreasonable not to allow for exceptions in cases of particular hardship. Even the tightest economic constitution needs an emergency clause and in the EU Treaties this is provided by Article 122 TFEU, which creates two alternative scenarios for Union emergency action.[53] Its second paragraph establishes supranational solidarity of the *Union* towards Member States.[54] We agree that it should be applicable also in case of a pandemic, which may certainly constitute an "exceptional occurrence beyond [Member State] control" comparable to a natural disaster,[55] enabling assistance to all Member States affected by the COVID-19 crisis.[56] However, the use of Article 122 TFEU is not unlimited. As discussed above, most specifically, support under Article 122(2) TFEU cannot interfere with the no-bailout provision of Article 125 TFEU.[57] Article 122(2) TFEU is designed to provide non-permanent ad hoc financial assistance in situations of severe difficulties,[58] as also underlined by the ECJ in its core judgment on the provision, *Pringle*;[59] it cannot be used to set up a permanent mechanism. For this reason, Article 122(2) TFEU instruments[60] have been conditional, aimed at a restoration of

53. The historical insight by Pipkorn, "Legal arrangements in the Treaty of Maastricht for the effectiveness of the EMU", 31 CML Rev. (1994), 263–291, esp. 273, is revealing. Louis, "Guest Editorial: The no-bailout clause and rescue packages", 47 CML Rev. (2010), 971–986, at 982 et seq., clarifies that the predecessor to Art. 122(2) was introduced instead of a comprehensive mechanism of financial assistance.

54. Case C-370/12, *Pringle*, para 118.

55. Cf. the cases of Ireland and Portugal, Adamski, op. cit. *supra* note 44, at p. 192.

56. More sceptical: Schorkopf, op. cit. *supra* note 21, at 3088.

57. Case C-370/12, *Pringle*, para 131; Louis, op. cit. *supra* note 53, at 984.

58. This is in line with the practice in applying its predecessor, Art. 108 EEC, which was even limited to balance of payments problems. This is obvious in Council Regulation (EEC) 1969/88 of 24 June 1988 establishing a single facility providing medium-term financial assistance for Member States' balances of payments, O.J. 1988, L 178/1. Such support was never given as unconditional subsidies, but as loans.

59. Case C-370/12, *Pringle*, paras. 65 and 105 et seq.

60. See in particular Council Regulation 407/2010, cited *supra* note 37, Art. 3.

the relevant public finances of the Member State concerned, and limited to particular situations of crisis.[61]

The argumentation used by the Council Legal Service (CLS) to justify the NGEU, demonstrates a clear breach with the established reading of Article 122 TFEU. The CLS suggests that its "two paragraphs need to be read jointly and on the basis of the specific purpose of Article 122 in the system of the Treaty" and identifies a few parameters to be met by the EURI, including urgency/exceptionality and appropriateness of the reaction in light of them, the temporary and economic character of the measures, and the non-circumvention of provisions for "normal times".[62] To define the "temporary character", the CLS quotes a judgment relating to agricultural policy given in 1973 by the ECJ.[63] It then shows that the EURI Regulation can be characterized as exceptional, temporary, and economic in nature, and accepts that the COVID-19 crisis had a different impact on the economies of the Member States. The combination of selective yet obvious affirmations and confusing reference to a sole case precedent conveys the impression of legal filibustering to conceal a key point: the two paragraphs differ as to their substantive conditions.[64] Under Article 122(1) TFEU, the Council may decide "upon the measures appropriate to the economic situation", but according to the Court this may not include "any financial assistance from the Union to Member States who are experiencing, or are threatened by, severe financing problems".[65] When financial assistance is at stake, Article 122(2) TFEU applies and constitutes *lex specialis*.

61. See in particular Borger, "EU financial assistance" in Amtenbrink, Hermann and Repasi (Eds.), *The EU Law of Economic and Monetary Union* (OUP, 2020), p. 963 at para 32.34. See also de Witte, op. cit. *supra* note 21, at 649.

62. Council Legal Service, Opinion, Council Doc. 9062/20 of 24 June 2021, para 121 with note 68.

63. Case 5/73, *Balkan-Import-Export GmbH* v. *Hauptzollamt Berlin-Packhof,* EU:C:1973:109, where the ECJ allowed the Council to *temporarily* deviate from fixed exchange rates within the Common Agricultural Policy by means of a compensatory amounts system. That measure was considered to be necessary at the time to face currency speculation and distortions in the final period of the Bretton Woods System. Based on Art. 103 EEC, the predecessor to Art. 122(1) TFEU, Member States were *temporarily* allowed to charge agricultural imports with compensatory amounts. It is noteworthy that so far, academic writing did not relate the predecessors to Art. 122 TFEU, Arts. 103 and 108 EEC, to the content of the two sections of the current provision, cf. only Borger, op. cit. *supra* note 61, at para 32.10 et seq.

64. De Witte's proposal, op. cit. *supra* note 21, at 654, (following the example of the SURE Regulation) to combine the two legal bases in paragraps 1 and 2 is not viable, as the ECJ case law demands that not only their *procedural* conditions are compatible, but also their *substantive* conditions. On this see Leino, "The institutional politics of objective choice: Competence as a framework for argumentation" in Garben and Govaere (Eds.), *The Division of Competences between the EU and the Member States* (Hart/Bloomsbury, 2017), pp. 210–231.

65. Case C-370/12, *Pringle*, para 116.

The choice to leave open the specific paragraph that serves as the legal basis of the NGEU and, more broadly, to obfuscate the exact relation of the measures to Article 122 TFEU, seems intentional and instrumental. If the funding only related to COVID-19 expenses, the EU coming to the rescue would be fully in line with the emergency provisions in Article 122(2) TFEU. This is not the case. Under the RFF Regulation, the NGEU funds are mostly allocated on the basis of criteria that have little relevance for fighting COVID-19,[66] such as climate neutrality, digital infrastructure, and social cohesion. These are no doubt all good causes and relevant for many EU horizontal objectives. However, they have little to do with alleviating the consequences of the pandemic, quite simply because they exist fully independent of the pandemic.[67] Instead of a measure dealing with an immediate emergency, the RFF is a large-scale redistributive programme designed to advance various broad political goals and is as such difficult to justify with reference to Article 122(2) TFEU.

The Commission is even more frugal in its justification. It merely states that "Article 122 TFEU allows for targeted derogations from standard rules in exceptional crisis situations."[68] This argumentation does not follow from the wording of the provision, but reflects instead a classic theory of a state of emergency as a state of exception, where normal constitutional processes can be abandoned.[69] What is more, unlike the Commission suggests, EU law recognizes no general "state of emergency", beyond the provisions of Article 122 TFEU that could override the clearly worded provisions of Article 310 TFEU and the principle of sound financial management that will be discussed in the next section (section 2.2 below). Our reading of the relationship between the two paragraphs of Article 122 TFEU is also corroborated by an institutional reflection of the principle of democracy. Under the Treaties, the European Parliament shall "exercise legislative and budgetary functions" (Art. 14(1) TEU). National parliaments have certain functions under Article 12 TEU, in particular in the area of legislative acts and Treaty reform procedures. Despite their strong constitutional prerogatives, parliaments are practically not involved in Article 122 TFEU non-legislative emergency

66. The maximum contribution per Member State still partly refers to the unemployment in 2015–2019. The July 2020 European Council reduced that reference but did not fully abolish it. Art. 11 241/2021 with Annex II., A16 July, Annex I, COM (2020)408 final.

67. De Witte argues that the sheer quantity of funds is necessary to kick-start the Member States' economies after the crisis, op. cit. *supra* note 21, at 655.

68. European Commission, "Q&A: Next generation EU – Legal construction", QANDA/20/1024, 9 June 2020, sub 3.

69. Agamben, *State of Exception* (University of Chicago Press, 2005), p. 25. On Agamben's view see critically Kaiser, *Ausnahmeverfassungsrecht* (Mohr Siebeck, 2020), pp. 58 et seq. Cf. also White, op. cit. *supra* note 1.

actions, beyond the European Parliament being informed under Article 122(2) TFEU. The possible involvement of national parliaments in forming a position for the purposes of Council decision making is determined by constitutional arrangements at the national level. We have difficulty seeing that such a provision could be interpreted in any other way than narrowly, as a typical executive empowerment to fight the ongoing or imminent crisis rather than a general-purpose vehicle to bypass inconvenient legal and procedural requirements.[70] We also find it unlikely that the parties to the Treaties of Maastricht and Lisbon really wanted to create, through Article 122 TFEU, a super-competence beyond Article 352 TFEU, of which the procedural conditions are formulated far more strictly.[71]

The fragile legal foundations of building the EU response on Article 122 TFEU are also reflected in the sharply contrasting visions of what is at stake with the NGEU. Formally, the proposal was presented – and, in the Northern capitals explained to the public – as a crisis measure only: as a one-off construction, to be paid off, not as the precedent for a permanent structure. Yet, in the public debate that followed the European Council decision, the NGEU was almost universally portrayed as a "Hamiltonian moment", as a seminal step on the path towards deeper fiscal integration.[72] This schizophrenic quality of the NGEU was displayed in May 2021 during the stormy debate and shortly before the decisive vote in the Finnish Parliament. The Commissioner-in-charge, Executive Vice President Valdis Dombrovskis tweeted (in fluent Finnish) that, for the Commission, it is clear that the recovery package is one-off, unique and time limited.[73] It was on this presumption that the Finnish Parliament ultimately approved the Own Resources Decision (ORD) in a tight qualified majority vote.[74] Yet, just days before, in a hearing before the European Parliament, the same Commissioner

70. E.g. Grogan, "States of emergency: Analysing global use of emergency powers in response to COVID-19", 22 *European Journal of Law Reform* (2020), 338–354.

71. Nettesheim, op. cit. *supra* note 17, at 411, but see also Louis, op. cit. *supra* note 53, at 981 et seq.

72. See *infra* in the text to note 126.

73. See <www.twitter.com/VDombrovskis/status/1392027720721260546>.

74. When approving the package, the Finnish Parliament stressed that "Parliament requires that Finland will not accept a repetition of or the arrangement becoming permanent". It stressed – also by a 2/3 majority – that "Parliament requires that Finland does not commit itself to measures that will shape the European Union in the direction of an asymmetric transfer union. Finland requires arrangements in which the responsibility and power for taking and managing debt are in the same hands and are not separated causing moral hazard and increasing the risk of over-indebtedness. Finland does not accept arrangements that weaken Member States' incentives to rehabilitate their public finances and increase risks to financial and macroeconomic stability in Europe." Available at <www.eduskunta.fi/EN/tiedotteet/Pages/Parliament-has-approved-EUs-own-resources-decision-by-a-vote-of-134-57.aspx>.

ruminated that a successful implementation of the NGEU will open the way for a permanent instrument of a similar nature.[75]

The NGEU construction is temporary, in the sense that the money will be fully disbursed within four years. However, the debt will last far longer – nearly 40 years according to the present ORD – and even this can be extended by a new ORD, if so desired. Time will tell whether the debt will ever be repaid. While non-permanent in the strictly legal-technical sense, it is very permanent in other ways. We wonder if it can be argued in good faith that its objective is limited to fighting the ongoing crisis, given these long-term effects and taking into account the time that passed before the distribution of funds had even started? In the context of Article 122 TFEU, this is not without relevance, since its use is limited to temporary ad hoc measures to counter the ongoing crisis.

The legacy of NGEU for the interpretation of Article 122 TFEU is twofold. First, the scope of measures that can be approved following its use has expanded to cover a broad range of measures with limited connection to the crisis that initially legitimated its use. The Commission's recent proposal setting up the new European Health Emergency Preparedness and Response Author (HERA) for managing future, yet unknown, crises demonstrates exactly this point, since it builds on Article 122(1) TFEU.[76] If that is approved, Article 122 TFEU will gradually develop into a new super competence, to be used without effective democratic scrutiny, also for the purpose of setting up permanent structures. Second, as the commitment of Commissioner Dombrovskis indicates, we are heading towards a future where the use of a crisis justification will gradually become unnecessary, since fiscal measures are already an established part of the EU toolkit. This is a repetition of the powerful narrative of the operation of the state of exception, where necessity is first invoked as a ground for not following the law, but with time transforms from being the "exception" into the "new normal".[77]

2.1.3. *Stretching and redefining the structural funds: Article 175(3) TFEU*

While the EURI Regulation formally sets up the general regime, most of the funding is spent under the RRF Regulation,[78] which is based on Article 175(3) TFEU. The provision is a flexibility clause within the Title on economic,

75. See <www.reuters.com/article/us-eu-recovery-idUSKBN2CR1D9>.

76. Proposal for a Council Regulation on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, COM(2021)577 final. On this see the interview with Leino-Sandberg in "POLITICO Pro Morning Health Care: State of the Union — HERA's legality — EP voting" on 15 Sept. 2021.

77. This narrative originates from Agamben, op. cit. *supra* note 69.

78. RRF Regulation cited *supra* note 50.

social and territorial cohesion.[79] In defining the objectives of cohesion policy, Article 174 TFEU speaks about "reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions". It specifically mentions issues such as rural location, industrial transition, and geographic or demographic handicaps. It is true that these objectives are somewhat vague, "a broad overall concept with imprecise contours".[80] For the Court, the relevant provisions "merely lay down a programme".[81] Since the Commission proposal on the Reform Delivery Tool,[82] there has been a growing practice to base EU distributive measures on Article 175(3) TFEU under the ordinary legislative procedure. This has met with little resistance from the Union institutions or the Member States,[83] but also virtually no discussion from academia,[84] which seems little concerned with the developments.

How does the NGEU fit within the boundaries of EU cohesion policies? Through its main spending vehicle, the RRF, it finances a very wide variety of measures, spanning nearly all sectors of public policies.[85] A cursory look into the national recovery plans confirms their wide reach. They cover: traditional investments, in infrastructure and energy; IT projects in a variety of different fields; reforms of budgetary planning, judicial systems, insolvency systems, taxation, pension systems, labour markets; measures in the field of education, social policies and housing, to name a few. The plans do not cover projects in the field of security and defence, nor financial market policies, but almost everything else seems to be fair game.[86] If there ever were any limits – or "contours" – for the use of cohesion policies, they seem to have been dissolved with the NGEU. After this framework, it will be practically impossible to exclude any policy field a priori from the reach of cohesion policies as long as the implementation of the measure involves Union funding.

79. Art. 175(3) TFEU: "If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies…."

80. Opinion of A.G. Bot in Case C-166/07, *Parliament* v. *Council,* EU:C:2009:213, para 82.

81. Case C-149/96, *Portugal* v. *Council*, EU:C:1999:92, para 86.

82. Commission Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme, COM(2018)391 final.

83. Again, the Finnish Parliament is an exception in this regard. Its Committees have approved critical positions on the expansion of the use of cohesion policy to overcome the EU's limited economic and financial policy competence.

84. With the notable exception of Leino and Saarenheimo, op. cit. *supra* note 4, at 639, quoted in de Witte, op. cit. *supra* note 21, at 657, note 91.

85. RRF Regulation cited *supra* note 50, Arts. 3 and 4.

86. The national plans can be found at <www.ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en#national-recovery-and-resilience-plans>.

Under the RRF Regulation, 70 percent of the funds are allocated on the basis of cohesion criteria (population, the inverse GDP per capita and the relative unemployment rate), while only 30 percent depend on factors that can in principle be affected by the pandemic (aggregated change in real GDP for 2020).[87] Hence, most of the funding is distributed based on factors that have no relation to the COVID-19 crisis. This exemplifies the somewhat contradictory nature of the NGEU. While politically and legally justified as a crisis measure, in substance it does not look like one. The money spent through the vehicle is undoubtedly allocated to commendable purposes (who would oppose tackling climate change or promoting digitalization?), but the vast majority of them have little or nothing to do with the pandemic. Furthermore, it is not easy to see how the NGEU and the "conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy", as required by the Court from crisis financing, in *Pringle*.[88] In fact, the incentive might be exactly the opposite, particularly when it comes to the loan part of the RRF.[89]

To sum up, the new interpretations given to emergency measures under Article 122 TFEU and cohesion policy measures under Article 175 TFEU are likely to change the Union permanently in establishing a semi-permanent, non-conditional redistributive mechanism, yet justified with reference to an acute emergency.

2.2. *Borrowing for spending*

2.2.1. *"Breaking a taboo"*

When it comes to the second core novelty of NGEU, its funding model based on empowering the EU to incur debt to cover its current expenditure (as opposed to the established practice of back-to-back lending), the constitutional change is even more fundamental.

Article 310(1) TFEU establishes that all Union items of revenue and expenditure "shall be shown in the budget" (1st sentence) and that the "revenue and expenditure shown in the budget shall be in balance" (3rd sentence). In a chapter titled "Principle of equilibrium", the Financial Regulation further elaborates that the "Revenue and payment appropriations shall be in balance" and that the EU and its bodies "shall not raise loans within

87. RRF Regulation cited *supra* note 50, Art. 11.

88. Case C-370/12, *Pringle*, para 137.

89. The tension with Art. 125 TFEU is obvious for the loan part of the RRF, but even for the grant part, one could argue that the expectation that the EU will, also in the future, come to rescue in times of need, could undermine Member States' incentives to budgetary discipline.

the framework of the budget".[90] The meaning of these provisions seems rather obvious: the Union should finance its expenditure from its revenue rather than by borrowing. For decades, and until the summer 2020, this is exactly how Article 310 TFEU was interpreted in the EU institutions. On the Council website, it was explained that the principle of equilibrium "prevents the European Union from issuing debt to finance itself".[91] On the Commission website, it was further stated that "EU borrowing is only permitted to finance loans to countries. The EU cannot borrow to finance its budget."[92]

Many Treaty articles are vague and open to interpretation. Article 310 TFEU is not. While it does not explicitly state that "the EU shall not borrow for spending", there is no other natural interpretation for "revenue and expenditure shall be in balance" than this: if policies are funded by debt, then the budget is not in balance. Commission Vice-President Georgieva made this clear in a reply to the European Parliament: "the consistent interpretation over time of . . . Article [310] is that the EU budget cannot be balanced by issuing public debt."[93] She further explained: "The Treaty establishes the principle of a balanced budget for the EU. Filling a gap between revenue and expenditure by issuing public debt is therefore not possible. . . . The Commission is at this stage not envisaging submitting proposals to modify the Treaty."[94]

On 16 June 2020, three weeks after the Commission made its NGEU proposal, the Council website description of the Union's Own Resources system was revised.[95] The sentence quoted above, on the prohibition of EU financing itself through debt, was gone. One hardly needs to ask why. The NGEU stands in remarkable contrast to the traditional reading of the principle of equilibrium. While the relevance of past practice may be limited in case of competence that the EU has, but may not yet have exercised (as is often the case with shared competence), the setting is different in case the lack of past practice is related to a universally held belief that such action would be illegal or contrary to the Treaties. The European Commission's "Fact Check on the EU Budget", dated May 2020, expressed no doubts in this regard: it clarifies that "The EU budget is always balanced – the EU can spend only as much as

90. Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, O.J. 2018, L 193/1, Art. 17.

91. Screen shot on file with authors.

92. Screen shots on file with authors.

93. Answer given by Vice-President Georgieva on behalf of the Commission, 3 June 2015, Question reference: E-005201/2015 (Jonás Fernández (S&D)).

94. Answer given by Vice-President Georgieva on behalf of the Commission, 23 March 2015, Question reference: E-001662-15 (Jonás Fernández (S&D)).

95. Available at <www.consilium.europa.eu/en/policies/the-eu-budget/>.

it has collected. This is why it has to plan wisely how much it will spend. Unlike in the case of your family budget, borrowing is not an option."[96]

There would have been many ways to provide significant assistance to the most affected States within the established interpretations of the Treaties. The size of the multiannual financial framework (MFF) could have been increased and its duration – for which there is no legal upper limit – extended, so that the part of borrowing that is spent as grants could have been repaid within a single MFF. For the rest of the borrowing, used to finance loans to Member States, Article 310 TFEU is not considered to pose an obstacle. Public sector lending operations are generally classified as financial transactions,[97] not expenditure, and hence they have not been considered to affect the balance of expenditure and income. The Union had already borrowed €53 billion to finance various back-to-back lending programmes to beneficiary countries, and the newly created SURE programme added another €100 billion to that.[98]

It seems such options were never seriously considered. Instead, the NGEU spends the bulk of the borrowed funds as grants and thus clearly constitutes budgetary expenditure for the Union. With the NGEU, the Union is the real, final debtor, rather than merely a clearing house for affordable financing for Member States in trouble. The legal analysis by the CLS recognizes that the NGEU constitutes a departure from the "consistent Treaty interpretation", and even explicitly includes the parliamentary answer by Vice-President Georgieva quoted above.[99] Yet, the EU institutions consider that the specific features of the NGEU can be reconciled with the Treaties.

First, they stress that the NGEU has been created outside the normal Union budget as an "extra-budgetary" fund, and the €750 billion it raises from the markets is channelled to the EU budget as external assigned revenues. This way, the borrowed funds become, from the viewpoint of the EU budget, revenues which counterbalance the expenditures for the NGEU. For the CLS, from "a purely budgetary technique perspective, external assigned revenue by its very nature cannot jeopardize the budgetary balance".[100] While this alleviates the tension with the principle of budgetary balance (Art. 310(3) TFEU), it does so at the expense of increasing the tension with the principle of

96. Available in all official languages at <op.europa.eu/en/publication-detail/-/publication/6a1c56c6-f0f4-11ea-991b-01aa75ed71a1/language-de/format-PDF>. The authors thank Ruth Weber for bringing this to our attention.

97. See Eurostat, *European system of accounts ESA 2010*, available at <www.ec.europa.eu/eurostat/documents/3859598/5925693/KS-02-13-269-EN.PDF/44cd9d01-bc64-40e5-bd40-d17df0c69334>.

98. See <www.ec.europa.eu/info/sites/default/files/economy-finance/eu_investor_presentation_en.pdf>; Council Regulation 2020/672 cited *supra* note 10.

99. Council Doc. cited *supra* note 62, para 21.

100. Ibid., para 34.

universality (Art. 310(1) TFEU), which requires that all revenue and expenditure be shown in the budget. The principle of universality reflects the long-standing belief that making all public expenditures and revenues visible, rather than hiding them in an extra-budgetary fund, is essential for good fiscal stewardship and democratic control of public spending.[101] It is certainly possible that past practices may sometimes reflect an interpretation that needs to be revisited. However, such reinterpretation would need to take place in a systematic manner that respects the consistency and coherence of the Treaties and Union legal order. As Lenaerts and Gutierrez-Fons have argued:

> "Compliance with the principle of consistency requires not only that there should be a consistent interpretation among all Treaty provisions, but also that the EU legislator should consciously take account of that principle. This means that each provision of EU law must be interpreted in a way that guarantees that there is no conflict between the individual provision and the general scheme of which it is part."[102]

Second, the CLS considers that the principle of budgetary balance is respected as long as the borrowing is "duly counterbalanced by an asset". In the case of back-to-back lending, the asset consists of claims on a Member State, while in the case of borrowing for building acquisition, the asset is a real one, the building itself.[103] The CLS points to the fact that the NGEU entails a dedicated increase in the own resources ceiling earmarked for serving the NGEU debt. This, according to the CLS, constitutes an "irrevocable, definite and enforceable guarantee of payment" that can be seen as an asset, and thus alleviates the tension with the principle of budgetary balance.[104] According to the Commission, the requirements of Articles 310(4) and 323 TFEU could be fulfilled if the "Member States allocate to the Union the resources needed to cover the financial obligations and contingent liabilities stemming from this exceptional and temporary empowerment to borrow funds".[105]

In our view, while the ORD is clearly helpful from the viewpoint of the principle of budgetary discipline (Art. 310(4) TFEU), it is far less clear

101. Waldhoff, in Calliess and Ruffert (Eds.), *EUV/AEUV,* 6th ed. (Beck, 2022), Art. 310 AEUV, para 23 et seq.

102. Lenaerts and Gutierrez-Fons, "To say what the law of the EU is: Methods of interpretation and the European Court of Justice", 20 CJEL (2014), 3–61, at 17.

103. In addition, the EU has engaged in borrowing €2 bn for buildings and leases. See <www.ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/documents/consolidated_annual_accounts_of_the_european_union_and_financial_statement_en.pdf>.

104. Council Doc. cited *supra* note 62, para 43.

105. Amended proposal for a Council decision on the system of own resources of the European Union, COM(2020)445 final, at p. 3.

whether it helps in reconciling the NGEU with the principles of budgetary balance and of consistency in Treaty interpretation. Further, if the ORD constitutes a claim on Member States, and hence an asset for the Union, it would seem logical that it also constitutes a liability for the Member States. Yet, the Eurostat seems to have a different view. In its preliminary opinion, it argues that the NGEU debt is a debt of the Union and does not create a liability for the Member States.[106] This is one of the incentives behind Union borrowing in the first place – to enable debt funding for States that were already burdened by high debt levels.[107]

Third, the EU institutions see the exceptional and temporary nature of the measures as alleviating the tension with the Treaty rules. For the Commission, the "borrowed funds are exceptional and one-off amounts coming in addition to the annual budget as external assigned revenue (for the spending part), they do not form part neither of revenue nor of expenditure under the annual budget". The Commission admits that "… [s]uch way to proceed for large amounts diverges from the standard practice for the establishment of the budget and financing of the Union".[108]

Unlike the ESM, the NGEU *prima facie* belongs to the supranational framework of the EU, a fact which the institutions are happy to emphasize. We find that it sits there uncomfortably. In our view, the NGEU represents a major power shift from the parliaments to the executive. While the institutions argue that the NGEU was in line with the principle of institutional balance,[109] we tend to disagree. We would submit rather that the legal engineering around the NGEU has constitutional consequences for the horizontal division of powers in the EU. As a multi-year extra-budgetary solution, it escapes the annual budgetary negotiations. This affects in particular the position of the European Parliament, which is, together with the Council, vested with the core budgetary functions under the Treaties.[110] Its role in the process is so far from what the Treaties envisage that the matter was addressed in a separate interinstitutional agreement forming a part of the overall compromise.[111] It

106. Eurostat, Draft guidance note, available at <ec.europa.eu/eurostat/documents/10 15035/11337978/Draft_guidance_note_on_the_statistical_recording_of_the_recovery_and_re silience_facility.pdf>, paras. 40 and 41.

107. On this, see Kube and Schorkopf, "Strukturveränderung der Wirtschafts- und Währungsunion", 37 *Neue Juristische Wochenschrift* (2021), 1650–1656, at 1650.

108. European Commission Q&A cited *supra* note 68.

109. Supported by de Witte, op. cit. *supra* note 21, at 647.

110. Arts. 14(1) and 16(1) TEU. The position of the European Parliament and democratic accountability in this respect is highlighted by Lenaerts and Verhoeven, "Institutional balance as a guarantee for democracy in EU governance" in Joerges and Dehousse (Eds.), *Good Governance in Europe's Integrated Market* (OUP, 2002), pp. 35–88, at 84 et seq.

111. Interinstitutional Agreement of 16 Dec. 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on

recognizes that "the role of the European Parliament and of the Council, where acting in their capacity of budgetary authority, needs to be enhanced in relation to the external assigned revenue under the European Union Recovery Instrument, with a view to ensuring a proper oversight of and involvement in the use of such revenue."[112]

In addition to its peculiar placement within the EU budgetary system, the NGEU also affects the EU institutional power balance in another way. Following the July 2020 European Council Conclusions, the European Parliament was involved in fine-tuning the high-level criteria for the RRF as part of the ordinary legislative procedure. Yet, it is important to understand that these criteria are high level indeed. Compared with the relatively restrictive way that normal EU spending programmes target the funds, the NGEU provides remarkably few limits on how the money is used. As explained above, within the general objectives and the numerical targets for the climate and digital elements, the money can be allocated to almost any public policy field, including health, education, social and employment services, transportation, energy, environment, justice, administration, and cybersecurity. The substantive content of the plans is proposed by the Member State and refined in confidential negotiations with the Commission, prior to the formal submission of the National Recovery and Resilience Plans (NRRPs). In this process, there is virtually no role for the European Parliament, beyond a rather mysterious "recovery and resilience dialogue".[113] The extent to which national parliaments have a say in the plans depends on national solutions. Yet, the opaque and bilateral nature of the negotiations between the government and the Commission inevitably emphasizes the role of the governments and makes it more difficult for national parliaments to fulfil their normal budgetary role.

Effectively, therefore, the NGEU transfers a great deal of budgetary powers from the legislature to the executive, in particular at the EU level but likely also at the national level.[114] This transfer of power undermines the constitutional principle that decisions on public revenue and public expenditure form a fundamental part of the ability of a constitutional entity to

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, O.J. 2020, L 433I/28.

112. Ibid., para 39.

113. See RRF Regulation cited *supra* note 50, Art. 26. The dialogue is basically led by the competent committee of the European Parliament but leads to nothing more than an obligation of the Commission to "take into account any elements arising from the views expressed through the recovery and resilience dialogue, including the resolutions from the European Parliament if provided".

114. See Kube and Schorkopf, op. cit. *supra* note 107, at 1655, who argue that the Commission functionally becomes a Ministry of Finance in that process.

democratically shape itself and bring about a specific responsibility to the people. For this reason, they belong to parliamentary procedures.[115] The European Parliament may have accepted such a weak role as the price to be paid for the practical progress towards a permanent borrowing and redistributive mechanism for the EU.[116] Yet, the NGEU framework clearly dilutes the Parliament's democratic powers and, as a model for future fiscal integration, is deeply flawed.

2.2.2. *Borrowing and the principle of conferral*

Authorizing the EU to borrow for spending changes the way it operates in a fundamental way. We are doubtful about the Commission's argument that the EU needs no explicit Treaty mandate for this function. In particular, its argument that borrowing to spend is "a justified means to attain the Union's objectives"[117] seems a rather astonishing line of argumentation in terms of the principle of conferral. It is well known and accepted that the EU may "not simply take away competences from the Member States at will" and "may only interpret the competences conferred upon it; it may not create new ones".[118] True, the limits of EU competence are highly fluid and usually settled in processes that are political rather than legal in character.[119] Still, we believe that there must be some limits to interpretation, otherwise the principle of allocated powers – a principle specifically strengthened by the Treaty of Lisbon – would lose its significance.

So how is borrowing for spending defined in terms of a "power" or "competence" within the meaning of the principle of conferral?[120] There are indications in the history and in the wording of the Treaties that indicate that borrowing is considered an independent area of competence. First, Article 49 ECSC Treaty (until 2002) empowered the High Authority "to procure the funds it requires to carry out its tasks . . . by contracting loans", but at the same time Article 51(1) ECSC Treaty provided that it "… may not use the

115. This is often stressed by the FCC for Germany as a State, starting from BVerfG, judgment of the Second Senate of 7 Sept. 2011, 2 BvR 987/10, para 124: "overall budgetary responsibility" (= "haushaltspolitische Gesamtverantwortung" in the German original), but can be generalized also with respect to the supranational level.

116. On the role and objectives of the of the European Parliament in the NGEU negotiations, see Closa Montero, González de León and Herenández González, "Pragmatism and the limits to the European Parliament's strategies for self-empowerment", 9 *Politics and Governance* (2021), 163–174.

117. European Commission Q&A cited *supra* note 68, sub 1).

118. Grimm, "A long time coming", 21 GLJ (2020), 944–949, at 945.

119. See Leino-Sandberg, "The institutional politics of objective choice: Competence as a frameworkfor argumentation" in Garben and Govaere, op. cit. supra note 64, pp. 210–231.

120. On this, see von Lewinsky, "Verschuldungskompetenz der Europäischen Union", 27 *Zeitschrift für Gesetzgebung* (2012), 164–182.

funds obtained by borrowing except to grant loans". The competence to borrow and its limits were thus specifically established. Second, Article 172(4) Euratom creates a competence for the Council to raise "loans for the financing of research or investment" and establishes that:

> "The Community may borrow on the capital market of a Member State, either in accordance with the legal provisions applying to internal issues, or, if there are no such provisions in a Member State, after the Member State concerned and the Commission have conferred together and have reached agreement upon the proposed loan."[121]

In the framework of Euratom, borrowing is clearly regarded as a power to be explicitly conferred on the Community. This is also what the principle of allocated competence is about: a competence not allocated to the Union remains with the Member States.[122] The EIB is the only EU institution with an explicit mandate to borrow.[123] For a non-State entity, the power to borrow is a significant one, especially when not accompanied by a corresponding power to independently acquire the means to pay back the debt.[124]

While the shift has been downplayed by the institutions and their lawyers, its significance has not been missed by economists. One of Europe's leading economists, Jean Pisani-Ferry, called it "breaking a taboo";[125] while others have referred to it as a "Hamiltonian moment", heralding a new era for the Union. Such language alluding to US constitutional law deserves further scrutiny. The Hamiltonian moment refers to the assumption by the US federal government of the remaining part of the States' Revolutionary War debt. The

121. See also Art. 182(5) Euratom: "The Commission may freely make use of any amounts in the currency of third countries derived from loans it has raised in such countries."

122. The Finnish Constitutional Law Committee, quoting from the Treaties, stressed that while the EU Treaties do not expressly prohibit borrowing, it follows from the principle of conferred powers that the EU has the power transferred to it by the Treaties. Competence not transferred to the Union remains with the Member States (PeVL 14/2021 vp).

123. See Art. 20(1) EIB Statute: "The Bank shall borrow on the capital markets the funds necessary for the performance of its tasks." Beyond this, it appears not to be possible to deduce a general power of borrowing from the prohibition in Art. 123(1) TFEU in concluding that as any type of credit facility with the ECB or the central banks within the ESCB "in favour of Union" institutions is forbidden, other such facilities are not. This reading would reverse the purpose of Art. 123(1) TFEU (prohibition of monetary financing to enhance monetary stability). The same holds (at a lower level) for the rather technical norm of Art. 318(1), 2nd sentence, TFEU that mentions the "liabilities of the Union" that should be included in the financial statement.

124. The classic instance for this is of course the *International Tin Council* cases, cf. Ruffert and Walter, *Institutionalised International Law* (C.H. Beck/Hart/Nomos, 2015), pp. 106 et seq.

125. Pisani-Ferry, "La postérité du plan de relance européen sera une affaire d'exécution", available at <www.lemonde.fr/idees/article/2020/06/20/jean-pisani-ferry-la-posterite-du-plan-de-relance-europeen-sera-une-affaire-d-execution_6043532_3232.html>.

assumption was part of the Compromise of 1790, which also settled the location of the national capital and, crucially, a system of taxation to pay for the assumed debt.[126]

The historical conditions in today's Europe are not comparable to those of late 18th century America. Instead, one could think of a *constitutional* moment in the terminology of Bruce Ackerman – a rereading of provisions that cannot easily be changed.[127] Borrowing for a Treaty-based supranational creature such as the EU is different from borrowing by a State where the required balance between revenue and payment may be implicitly filled by incurring debt.[128] This difference between the EU and a State also lies behind the previously dominant reading of Article 310(1) TFEU, 3rd sentence, and it makes sense. The NGEU entails next to nothing in terms of providing the Union with the means to repay its debt. The Union continues to rely primarily on GNI-based contributions from the Member States' budgets. It is of course possible that new own resources may be created that eventually cover some of the costs, but for now, the plan depends fully on Member State funding. The NGEU, however, paves the way for the introduction of a number of new own resources (i.e. EU taxes) "to be used for early repayment of NGEU borrowing".[129] The road to this step in integration – also worthy of a fundamental debate – is paved by the need to repay the EU debt. As things stand, the NGEU has resulted in a mandate for the Union to incur large amounts of debt, while deferring for later the negotiations on how to repay the debt.[130] It is difficult to see this as a very stable constitutional turn.

126. Lepore, *These Truths. A History of the United States* (W.W. Norton & Company, 2018), pp. 139–140.

127. Ackerman, *We the People, Vol. I, Foundations* (Harvard University Press, 1991), pp. 58 et seq.

128. This explains the debate in German legal literature on the question whether the EU budget could be balanced by incurring debt, as this is the usual reading of the similar words in Art. 110(2), 2nd sentence, of the German *Grundgesetz* ("The budget shall be balanced with respect to revenues and expenditures."). Many authors tend to deny that question with respect to Art. 310 TFEU given the non-State character of the EU; see in particular Waldhoff, op. cit. *supra* note 101, para 29.

129. Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, EUCO 10/20, para A29. See Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, COM(2021)564 final, where the Commission notes its earlier commitment "to put forward proposals on new own resources, which would include the CBAM in the first semester of 2021", and also Proposal for a Regulation of the European Parliament and of the Council establishing a Social Climate Fund, COM(2021)568 final, which requires opening the newly approved Own Resources Decision and indicates that "part of the revenues from the emission trading for buildings and road transport will accrue to the Union budget and a percentage of it will in principle correspond to the new Fund."

130. Cf. also the critical assessment by Cannizzaro, "Neither representation nor taxation? Or, 'Europe's moment' – Part I", 5 *European Papers* (2020), 703–706.

2.2.3. *A quasi-Treaty change?*

As an Editorial Comment of this *Review* argued, "… [t]o assist Member States in protecting public health and helping the economy back on track, the EU has introduced and accepted *broad exceptions to its core principles*."[131] Dermine finds that the adoption of the recovery plan led to "unprecedented, far-reaching institutional reforms, which have the potential to transform the founding structures and templates of European integration".[132] We agree. The measures taken following the COVID-19 crisis are in tension with many of the EU's core principles and likely to have long-term impacts. Even in its present form, the long duration (until 2058) of the NGEU will make common debt a nearly permanent structure of the EU. By precedent, its consequences will likely reach far longer. The NGEU will almost certainly mark the point where Union debt became a matter of contemporary political decision rather than a constitutional question. It is likely to pave the way for a fiscal capacity for the EU, with a permanently altered division of competences.

We presume that there are few who would not consider a Treaty change as the better way for achieving a fiscal union. Yet, this is seen as too hazardous a route for achieving the ambition – after all, given too much space, electorates or national parliaments may actually veto the development. It seems commonly accepted in the EU institutions that a flexible interpretation of the existing Treaties is the only feasible route. The end justifies the means. This is the same explanation as offered by de Witte: his "conclusion does not imply that the current vertical and horizontal division of powers is optimal, but, in the absence of a realistic possibility to revise the Treaties, the authors of the recovery plan had to work with the available legal tools".[133] We are concerned about such a conclusion: general agreement is insufficient to achieve major changes. In the words of Benjamin Constant (1815), "Le concours de tous les pouvoirs ne rend pas légitime la violation des formes."[134]

Indirectly, the Commission seems to recognize the problematic nature of its proposals. It suggests that these concerns are alleviated by the "quasi-constitutional nature" of the ORD, which in its view "provides for the necessary democratic legitimacy of that innovative proposal necessary to fulfil the Union's objectives".[135] Yet, the ORD is not a mechanism for derogating from the Treaty, with the unanimous consent of national

131. Editorial Comments, "Disease and recovery in (COVID-afflicted) Europe", CML Rev. (2020), 619–630 (emphasis added).

132. Dermine, "The EU's response to the COVID-19 crisis and the trajectory of fiscal integration in Europe: Between continuity and rupture", 47 LIEI (2020), 337–341, at 338.

133. De Witte, op. cit. *supra* note 21, at 647.

134. Constant, "Principes de politique" (1815), Annexe 7, in Constant, *Écrits politiques* (Gallimard, 1997), p. 303, at p. 574.

135. European Commission Q&A cited *supra* note 68, section 2), 2nd last bullet point.

parliaments. Such a mechanism might well be desirable, but it does not exist in the Treaties, which remain unchanged despite new practices. This marks a clear difference from traditional international law where "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" has relevance for interpretation.[136] In EU law, such effect has been specifically denied by the ECJ, which has consistently held that decision-making rules do not fall under Member States' or institutional discretion, but that such rules are established by the Treaties alone.[137] While there is no formal presumption of legality for institutional practice, the factual effect of that practice will continue until found illegal by the ECJ. The quasi-constitutional shape of the ORD may bring on board national parliaments (in particular the German Bundestag)[138] in jurisdictions where this is vital for constitutionality under national constitutional law. Yet, Article 311 TFEU does not foresee parliamentary assent in all Member States. The form of ratification is a matter of national constitutional law.

While the NGEU legal construction might be drafted as a one-off solution, the funding model that it introduces is not. The NGEU model builds on the understanding that similar arrangements require a new ORD to be approved by unanimity. While necessary from the perspective of democratic legitimacy – as both the European Commission and the CLS now stress – this model of unanimity is likely to delay decision-making when responding to new imperatives, especially if the sense of crisis is not as threatening as in the context of the current crisis. Therefore, we dare to speculate that the next step in institutional thinking is to abandon the need to empower borrowing in the ORD context, as de Witte already suggests.[139]

3. Constitutional change and its control

All constitutions are "living" to a certain extent, and constitutional systems need to be able to accommodate changes and unexpected events. For this reason, they also contain internal rules on how such change takes place and is controlled. Constitutional systems also have provisions on responding to

136. Art. 3(3)(b) Vienna Convention on the Law of Treaties, 1969.

137. E.g. Case C-540/13, *Parliament* v. *Council,* EU:C:2015:224, para 32.

138. Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union (Integrationsverantwortungs gesetz –IntVG), *Bundesgesetzblatt* 2009 I, p. 3022, section 3(1).

139. This vision is built into the article by de Witte who proposes that the unanimity rule used for the MFF and ORD should be abandoned. De Witte, op. cit. *supra* note 21, at 681.

emergencies, often allocating executives considerable leeway in addressing them.[140] When emergency powers are used, mechanisms of scrutiny are particularly important. Dyzenhaus stresses the possible subsequent scrutiny and endorsement of judges and academics of crisis measures as vital, from the perspective of the substantive conception of the rule of law.[141] This section turns to judges and academics and their scrutiny of NGEU measures, which expressly derive their legal and political justification from the EU's emergency powers. When emergency powers are used, exceptional scrutiny should follow in order to ensure that rule of law is maintained and emergency powers are used for the purpose for which they exist.

European Union law forms a *sui generis* form of constitutional law, with the ECJ viewing the Treaties as the constitutional framework of the Union.[142] For a constitutional system, it is important that any foundational changes follow the path described by the text of the constitution itself. As noted above, a constitutional system needs to maintain its coherence between the interpretation (and reinterpretation) of individual provisions and the general constitutional scheme.[143] The need for systemic coherence is particularly acute when it is confronted with rapid change. A minimum level of coherence is needed in every legal system, including in international legal systems that may be more flexible due to their strong orientation towards the sovereign will of States. This was well described by Jenks as early as 1956:

> "[The] basic principles involved are simple. First, the authority of well-established law should not be impaired for partisan or transitory reasons. A high standard of respect for the existing law is an important element in enhancing the future authority of a more developed body of law. The destruction of what exists before it can be effectively replaced is a regressive and not a progressive step. Anarchy is not a satisfactory method of legal evolution."[144]

140. See e.g. Grogan, op. cit. *supra* note 70.

141. Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006), at p. 42.

142. Starting from Case 294/83, *Parti écologiste Les Verts* v. *European Parliament*, EU:C:1986:166, para 23, and further developed since Opinion 2/13, *Accession to ECHR,* EU:C:2014:2454, para 158, as in Opinion 1/17, *CETA,* EU:C:2019:341, para 110; Case C-621/18, *Wightman* v. *Secretary of State for Exiting the EU,* EU:C:2018:999, para 44. See also Pernice, "The Treaty of Lisbon: Multilevel constitutionalism in action", 15 CJEL (2009), 349–407, at 365 et seq.; Schütze, *European Constitutional Law,* 2nd ed. (Cambridge University Press, 2012), pp. 43 et seq.; Huber, "Europäisches und nationales Verfassungsrecht", 60 *Veröffentlichung der Vereinigung der Deutschen Staatsrechtslehrer* (2001), 194–240, at 196 et seq.

143. Lenaerts and Gutierrez-Fons, op. cit. *supra* note 102, at 17.

144. Jenks, "Craftsmanship in international law", 50 AJIL (1956), 32–60, at 51.

Second, he stresses the importance of legal tradition:

> "[W]hile the law is in the process of rapid evolution, it evolves, like every legal system, in accordance with its own laws of growth by the accumulation of precedent and processes of legal reasoning; the process of development is governed by legal tradition and presupposes a measure of assent at each successive stage which affords a safeguard against the danger of arbitrary or eccentric influences determining the law."[145]

Even more generally, constitutional theory insists on the formal correctness of changes in the constitution. This was first noted by Constant, quoted above,[146] followed by the classics of modern constitutionalism,[147] to contemporary authors dealing with the constitutional character of the EU.[148] To us, these considerations would seem equally valid in the EU constitutional system, where democratic deliberation of key constitutional issues remains difficult to organize or is instead avoided by means of reinterpretation, as we argued. The NGEU experience provides ample ground for an analysis of these issues.

First, in the EU there is no *ex ante* constitutional control by an independent body to scrutinize compliance of new proposals with the Treaties. To the extent such control exists, it is provided by institutional legal services who are not neutral bodies, nor is their aim to provide a complete and balanced legal analysis.[149] Their task is to promote the "Union interest"[150] and to support the broader political narrative with legal tools that maximize the chance of a successful approval process and minimize the legal risks involved, in particular the risk of the measure being annulled by the Court.[151] This requires innovative and creative solutions rather than a balanced presentation of constitutional issues at EU and national levels or the effects of proposals.[152] In their opinions, the legal services build on and refer to their earlier opinions. In

145. Ibid., at 52.

146. Constant, op. cit. *supra* note 134.

147. Kelsen, *Reine Rechtslehre* [1934] (Mohr Siebeck, 2008), at 86; Schmitt, *Verfassungslehre* [1928], 8th ed. (Duncker & Humblot, 1993), pp. 16 et seq.

148. See in particular Peters, *Elemente einer Theorie der Verfassung Europas* (Duncker & Humblot, 2001), pp. 447 et seq.

149. On the role of legal services see Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making* (Cambridge University Press, 2021).

150. See Art. 13(1) TEU, as further specified in Staff Regulations and the Rules of Procedure of each institution.

151. See Leino-Sandberg, op. cit. *supra* note 149.

152. For another recent example see Eckes and Leino-Sandberg, "The EU-UK Trade and Cooperation Agreement – Exceptional circumstances or a new paradigm for EU External Relations?" 85(1) *Modern Law Review* (2022) 164–197.

doing so, they maintain and develop a doctrine that ensures – as stated by Jenks quoted above – a continuous and coherent line of interpretation and gives their findings a sense of permanency and credibility.[153] Any changes to the doctrine need to be well justified to maintain the credibility of their work.

In the NGEU context, the function of legal services was particularly vital. Since its fragile legal structure risked becoming a liability in some national political debates, the opinion of the CLS was made public almost immediately.[154] The reason for this highly unusual disclosure was probably political and strategic. It was intended to provide support for national governments in debates concerning the legality of the envisaged scheme. Yet, their interpretation constitutes a legal U-turn, which is not convincing in terms of coherence.[155] The temporary nature and the pandemic are weak justifications for measures that eliminate long-standing Treaty limitations and in practice create quasi-permanent structures for purposes that have very little to do with the pandemic and its consequences. They appear anarchic instead of reflecting "precedent and processes of legal reasoning".[156]

Second, the supranational and autonomous legal order of the EU is characterized, according to the Court's continuous case law, by "a judicial system intended to ensure consistency and uniformity in the interpretation of EU law".[157] However, this judicial system is toothless with highly political measures such as the NGEU. Effective control by courts, such as the ECJ or national constitutional courts, is rare. Direct action against the legal instruments establishing this particular arrangement has always been unlikely.[158] In cases of smaller scale funding measures, the Court has, for reasons of legal certainty, routinely upheld the legal effects of acts found illegal.[159] Its threshold for finding European Council measures illegal seems

153. See Leino-Sandberg, op. cit. *supra* note 149, at 62. On coherence in the interpretation of EU law more generally, see Lenaerts and Gutierrez-Fons, op. cit. *supra* note 102, at 17.

154. Council Doc. cited *supra* note 62.

155. Measures such as SURE, the Just Transition Fund, or the amended regulation on emergency support that were passed within the pandemic and just weeks before the NGEU proposal (or, as in the case of the JTF, as part of the package) were presented as examples for the accepted interpretation of a certain Treaty rule. See de Witte, op. cit. *supra* note 21 at 653, 654, 657 et seq., and in particular at 658: "… there was no dispute among the institutions or among the Member States about the fact that Art. 175(3) was an appropriate legal basis." (sic)

156. In the sense of Jenks, op. cit. *supra* note 144.

157. See e.g. Opinion 2/13, *Accession to ECHR,* para 174.

158. The only appeals brought are those by Poland and Hungary that concern the mechanism aimed at ensuring the rule of law in the application of the Union budget. See Case C-157/21, *Poland* v. *European Parliament and Council of the EU*; Case C-156/21, *Hungary* v. *European Parliament and Council of the EU*.

159. See e.g. Case C-155/07, *European Parliament* v. *Council of the EU,* EU:C:2008:605; Case C-166/07, *European Parliament* v. *Council,* EU:C:2009:499.

to be particularly high, even if the European Council should not be beyond judicial control.[160] We cannot think of any case where the implementation of a deal taken in the European Council was been hindered by the Court of Justice. It is equally difficult to think of a case where the Court annulled a measure because it infringes on Member State competences, even if those competences were an expression of the constitutional settlement within the EU rather than a preservation of Member States' sovereignty. In the EMU context, the "Luxembourg Court places considerable reliance on the emergency of the situation. The use of a pragmatic approach that focuses on the consequences of the economic instability resonates the crisis language".[161] One can of course speculate that the passivity of the Court relates to how the institutions do no wrong. Yet, it is difficult to believe in the existence of stringent constitutional scrutiny if it exists only in theory, but is not applied in practice. This also broadens the institutional margin of manoeuvre quite considerably.

These considerations would seem to apply to the NGEU, which may still become subject to a preliminary reference by the German Federal Constitutional Court (FCC).[162] However, the ORD has already been ratified in 27 national parliaments. Almost all national reform plans have been prepared, most of them already inspected and approved by the EU. By the time the ECJ finally has its say, national legislation foreseen in the plans will have been adopted, investment projects started, reforms implemented, and the new EU bonds will be in the hands of investors around the world. At that point, an ECJ finding of the NGEU being illegal would put the Union in an impossible and unresolvable situation. This dilemma is similar to those faced by many supreme or constitutional courts when annulment of legislation or government action would potentially have a far-reaching impact on wider society, and they tend to calibrate their decisions carefully with a view to ensuring their own continued authority. Yet, in the context of the NGEU, it is not difficult to guess that the ECJ will find a chain of legal argumentation to justify the structure. Its challenge is different: finding a justification that also

160. Art. 263 TFEU. There are few cases against the European Council so far, the most famous being probably Case T-257/16, *NM* v. *European Council,* EU:T:2017:130 (on the EU-Turkey statement of March 2016), further Case C-504/20 P, *Wagenknecht* v. *European Council,* EU:C:2021:305. See in general Vogiatzis, "Exploring the European Council's legal accountability: Court of Justice and European Ombudsman", 14 GLJ (2013), 1661–1686.

161. Kombos, "Constitutional review and the economic crisis: In the courts we trust?", 25 EPL (2019), 105–133 at 126–127.

162. So far, the FCC has declined to issue a preliminary injunction (see *supra* note 17) – since the rules at stake are primarily EU law and not national (German) constitutional law.

satisfies the FCC and other constitutional bodies in Member States. Is this enough for a "Community based on the rule of law"?[163]

National constitutional bodies rarely engage with EU matters. When they do, it is usually too late to influence outcomes.[164] In EU political and scholarly debates, their involvement is almost categorically perceived in negative terms, as the recent debate around the *Public Sector Purchase Programme (PSPP)* judgment of the German FCC demonstrated.[165] The Finnish Constitutional Law Committee's handling of the approval process of the ORD also caused consternation,[166] even though its subject matter was not the legality of the NGEU as such but merely a domestic procedural question. The Committee established that the changes the NGEU introduced to the EU's fundamental principles could be *compared* with a considerable competence transfer to the Union (while not de facto transferring any competence, which is excluded in the ORD procedure) and thus required a qualified majority in the Parliament.[167] Yet, what should the constitutional bodies do if the EU system provided only insufficient constitutional guarantees that enjoy trust at Member State level? Kelemen argues that the ECJ can no longer take its authority as granted since also "[d]eclining public support for the project of European integration has negative implications for the Court." He specifically notes that the "delicate modus vivendi between the ECJ and national constitutional courts may also unravel as the obfuscation embodied in the

163. Case 294/83, *Parti écologiste "Les Verts"*, para 23. See also the famous formula of the "Rechtsgemeinschaft" by Hallstein, *Der unvollendete Bundesstaat: Europäische Erfahrungen und Erkenntnisse* (Econ, 1969), at p. 33; further Address by Hallstein in the debate on the Dehousse report (Primacy of Community law over municipal law of the Member States), European Parliament, 17 June 1965, available at <aei.pitt.edu/13642/1/S69-S70.pdf>.

164. With the exception of the Finnish one, see Leino-Sandberg and Salminen, "The euro crisis and its constitutional consequences for Finland: Is there room for national politics in EU decision-making?", 9 EuConst (2013), 451–479.

165. For a collection of views, see the *German Law Journal Special Collection on European Constitutional Pluralism and the PSPP Judgment*, available at <www.germanlawjournal.com/german-law-journal-special-collection-on-european-constitutional-pluralism-and-the-pspp-judgment/>.

166. See e.g. Smith-Meyer, "Recovery fund must clear Finnish supermajority vote: Media reports", available at <www.politico.eu/article/recovery-fund-must-clear-finnish-supermajority-vote-media-reports/>; Cameron**, "**Collective sigh of relief in EU as Finland narrowly approves financing of recovery plan", available at <macmillan.yale.edu/news/collective-sigh-relief-eu-finland-narrowly-approves-financing-recovery-plan>; Nitti, "Finland approves NextGenerationEurope stimulus package", available at <www.italianinsider.it/?q=node/10220>.

167. Leino-Sandberg, "Between European Commitment and 'Taking the Law Seriously': The EU Own Resources Decision in Finland", *Verfassungsblog,* 29 April 2021, available at <www.verfassungsblog.de/between-european-commitment-and-taking-the-law-seriously/>.

concept of constitutional pluralism gives way to more open conflicts over the ultimate seat of judicial authority".[168]

We fully agree that such constitutional scrutiny is a task that should be undertaken by the ECJ. Supremacy of EU law is fundamental for the EU to exist as a Union governed by the rule of law. However, supremacy should not be confused with the absence of critical questioning of what shall be supreme.[169] It is difficult to deny that the EU institutions occasionally operate in a legal grey zone, and perhaps, in particular, in the area of EMU where creative interpretations have been repeatedly needed to combat crises. As Hinarejos observes, the dialogue between the EU Court and its national counterparts is likely to continue since "[n]ew challenges will no doubt continue to be brought every time the boundaries are pushed forward in this area", illuminating "the complexity and depth of disagreements in the area of EMU".[170] In this regard, the NGEU is difficult to see in isolation from the FCC's earlier jurisprudence concerning the "tendency of political self-enhancement" in the EU institutions.[171] The formalistic low-intensity review of the ECJ in the area of EMU development has created considerable difficulty for national constitutional courts.[172] Countering this practice, Kombos observes, "crisis laws are not by definition special laws. They require intense review especially because of their lasting impact on the constitutional orders and due the interrelationship between national and supranational legal orders that coexist on the basis of a delicate balance."[173]

National courts and bodies cannot be a systemic answer. However, we agree with Ulrich Haltern's analysis that in *PSSP*, the FCC:

> "… put its finger on serious problems. Self-extension of EU competences and unchecked ECB conduct are critical challenges to both EU law and politics …. In such cases, push-back from national courts may not be a bad thing – despite the fact that it constitutes a huge risk for uniform application, and therefore for the success of European integration. It is this obvious risk which will make sure that Member State courts – who are

168. Kelemen, "The Court of Justice of the European Union in the twenty-first century", 79 *Law and Contemporary Problems* (2016), 117–140, at 140.

169. This is the shortcoming in the infringement action brought by the Commission against Germany; Karnitschnig, "German court lays down EU law", available at <www.politico.eu/article/german-court-lays-down-eu-law/>. The procedure was closed on 2 Dec. 2021: <ec.europa.eu/commission/presscorner/detail/en/inf_21_6201>.

170. Hinarejos, "The legality of responses to the crisis" in Amtenbrink and Herrmann, op. cit. *supra* note 61, at pp. 1398–1399.

171. BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para 237.

172. Kombos, op. cit. *supra* note 161, at 132.

173. Kombos, "Constitutional review and the economic crisis: In the courts we trust? – Part two" 25 EPL (2019), 229–248, at 248.

> committed to European integration – will not push back often. They will only if there is a real problem that justifies bringing up the 'real contradiction'."[174]

It is likely that national constitutional bodies engaging in questions of EU law ask the right questions here and concentrate on matters where EU institutions genuinely enter unnavigated waters. In difficult cases, "domestic constitutional organs will retain a critical role in relieving the international level from shouldering the whole legitimatory burden, contesting and accommodating authority in a normative pluriverse".[175]

Third and finally, it is against the background described that we see the role of EU legal academics to provide research-based analysis and critical scrutiny, and highlight the risks, alternatives and responsibilities involved in institutional choices to enable critical debate. This debate may create a critical counterbalance to the work of institutional legal services by spotting inconsistencies and institutional bias, and thus contributing to the goal of ensuring that the EU legal system will remain legally resilient. Previous research, however, shows up signs that call for particular attention. That research has demonstrated how often EU legal scholars see their mission more as one of facilitating the integrationist agenda than acting as a critical counterbalance and debating its limits.[176] It also demonstrates that a significant part of the EU legal community identifies with the project of European integration, both intellectually and socially. That is visible in a widely shared conception of the law and what law can and should do.[177] This has provoked Micklitz to ask:

> "What exactly is the relationship between law, legal research and European integration? . . . Why is European legal research so overwhelmingly policy driven? Why is there no 'halt', no moment of rethinking, just moving and moving towards an ever-closer Union without knowing what that could, or perhaps should, mean? Why are there so many

174. Haltern, "Revolutions, real contradictions and the method of resolving them: The relationship between the Court of Justice of the European Union and the German Federal Constitutional Court", 19 I-CON (2021), 208–240, at 239.

175. von Bogdandy and Venzke, "In whose name? An investigation of international courts' public authority and its democratic justification", 23 EJIL (2012), 7–41, at 7.

176. Schepel and Wesseling, "The legal community: Judges, lawyers, officials and clerks in the writing of Europe", 3 ELJ (1997), 165–188, at 176. See also van Gestel and Micklitz, "Methods matter in European legal scholarship", 20 ELJ (2014), 292–316, at 298, and the extensive discussion of this point in the "Debatte" in 68 *Jahrbuch des Öffentlichen Recht, Neue Folge* (2020), pp. 409–568, with contributions by von Bogdandy, Haltern, Ackermann, Classen, Ruffert, Schorkopf, Sydow and Craig. See also Ruffert, "The European debt crisis and European Unin Law", 48 CML Rev. (2011), 1777, 1804–1805.

177. Schepel and Wesseling, ibid., at 176.

> implicit assumptions in scholarly legal publications . . . Is it not an important academic responsibility for legal scholars studying EU law to test these implicit assumptions instead of taking them for granted?"[178]

While there may be differences between policy fields,[179] in the area of EMU, Micklitz' observations ring true. In an open letter published in *Verfassungsblog* in April 2020, a number of colleagues argued that:

> "Corona bonds are needed to preserve the European project, and they are feasible. They can be issued through a new public law entity and include all the safeguards required for the protection of the fundamental values of the EU. . . . Not all points of the proposal might attract high praise from the point of view of constitutional theory. . . . But this proposal is a pragmatic one to facilitate the choice European leaders now have to make: to finally show some resolve and to unite in the midst of a divided world, or to retreat along ill-perceived national lines."[180]

In other commentary, colleagues strongly vouch for the establishment of a fiscal capacity for the EU[181] – surely an economic rather than a legal point – or treat the NGEU as "creative legal engineering for a good cause".[182] While everyone – academics included – has the right to hold political views about the preferred direction of European integration, many positions expressed in EMU discussion seem coloured by a shared agenda with the institutions, which is fully legitimate, but more political than legal. Should not the determination of a "good cause" be rather left to political processes to settle? EU constitutional lawyers have a special responsibility for process and safeguarding the supranational constitution; for scrutinizing arguments used to assess political and administrative practices of the Union, without excluding any conclusion a priori.

178. Micklitz, "A European advantage in legal scholarship?" in van Gestel, Micklitz and Rubin (Eds.) *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2016), pp. 262–309 at p. 276.

179. EU migration scholars tend to be critical of the EU's track record. EU legal scholarship has also been vocal and unified in its criticism of the EU's rule of law contribution, including the (inadequate) rule of law dimensions of the Multiannual Financial Framework (MFF) package.

180. Goldmann, "The Case for Corona Bonds: A Proposal by a Group of European Lawyers", *Verfassungsblog,* 5 April 2020, <verfassungsblog.de/the-case-for-corona-bonds/>.

181. This was a point clearly made by Alicia Hinarejos in a public hearing "Reshaping the EU Fiscal Framework for a Sustainable Recovery and a Just Transition", organized by the EESC on 10 Sept. 2021.

182. See de Witte, "The NGEU – Creative Legal Engineering for a Good Cause" in *Next Generation EU – a new generation of law on financing the EU?*, I-CON Session #18, available at <mundo.icon-society.org/event/next-generation-eu-a-new-generation-of-law-on-financing-the-eu/>.

When academics remain silent, this leaves a great space for institutional lawyers, who have gained central stage in academic outlets, to defend institutional choices and explain their backgrounds.[183] The Council's leading EMU adviser, di Gregorio Merino, argues:

> "The EU's response to the COVID-19 crisis can be qualified as historic and commensurate to the gravity of the circumstances. . . . it consists of a very innovative legal architecture. Yet, however historic and unprecedented it may be, the so-called recovery plan, also known as the Next Generation EU (NGEU) is solidly founded in the Treaties."[184]

He further emphasizes that:

> "[B]orrowing for spending under NGEU comes with a large number of guarantees which make it compatible with the Treaties, be it the principle of budgetary balance, or be it the integrity of the own resources system. It is designed to be budgetary neutral and not to engender deficits. Bearing in mind its special characteristics and the very particular needs it intends to address, it can be regarded as complementary to the own resources system of the EU, and respectful of its integrity. NGEU does not constitute a new budgetary paradigm of the EU called to be consolidated throughout time."[185]

It would be irrational and unfair to expect a leading legal adviser of the Council to contradict the institutions' creations following his advice, nor would he as an EU civil servant be entitled to do so publicly.[186] EU institutional lawyers certainly possess valuable first-hand information and academic scrutiny is difficult to reconcile with their tasks as institutional legal advisers. To us, the quote reflects a fear that critical discussion will undermine

183. See also the online roundtable organized by the Europa Institute of Leiden University, on 21 May 2021 on the European Union's coronavirus relief fund NextGenerationEU, where Jean-Paul Keppenne, Principal Legal Adviser of the European Commission and in charge of the NGEU, offered a keynote on its legal construction, strongly advocating its legality: <www.universiteitleiden.nl/en/news/2021/06/llx-roundtable-on-coronavirus-relief-fund-nextgenerationeu>. In a second roundtable "Next Generation EU 2.0 – first steps towards a fiscally more integrated Eurozone?" on 21 Oct. 2021 at the same Institute, Ben Smulders, Principal Legal Adviser of the European Commission, acted as the first speaker, <www.universiteitleiden.nl/en/news/2021/11/llx-roundtable-titled-next-generation-eu-2.0---first-steps-towards-a-fiscally-more-integrated-eurozone>.

184. di Gregorio Merino, "The Recovery Plan: Solidarity and the living constitution", *EU law live,* 6 March 2021, Weekend Edition Nº 50 (2021), at 1.

185. Ibid., at 9.

186. See Leino-Sandberg, op. cit. *supra* note 149, Ch 2.

the project, and would be, as such, dangerous. The urgency of downplaying the events is urgent in itself: there is nothing to see here, please move on.

We disagree with this conclusion and see the NGEU as the most important constitutional change that has happened in the EU during at least the past ten years. The urgency of the pandemic aside, the changes it brings about directly and indirectly and the risks involved should be debated. At any rate, the debate should not be left to populists and their lawyers.

4. Conclusion: Reshaping EU law for a good cause?

We acknowledge the political background surrounding the NGEU and agree that the European Union needed to respond forcefully to the pandemic. A situation like the COVID-19 crisis should trigger European solidarity. We also see that the NGEU demonstrates the EU's capacity to respond to crises. But we worry about the form taken by this response. In the longer term, we also see the necessity of reforming the Economic and Monetary Union, particularly given the chronic tendency to leave key economic challenges on the doorstep of the ECB and its monetary policy, leading to pre-pandemic (!) purchases of €2.3 billion in Member States' debt, making the ECB the main creditor of most Member States.[187] The ECB has pleaded for a fiscal response more than just once. The variety of possible fiscal responses, ranging from transfer mechanisms to incitements, to governance reforms, has contributed to difficulties for Member States to reach an agreement on that matter. The NGEU provides a partial answer to some of these challenges. However, settling what actually counts as a "good cause" is fundamentally not a legal, but a political question, to be solved through political debate. In the ongoing crisis the package and above all its long-term consequences were subjected to very limited public debate at political level.[188] For some, the concrete short-term political result appeared to be advantageous; others gave in to the urgency of the pandemic catastrophe.

The economic and political effects of the NGEU are fraught with great uncertainty. It may bring about positive developments in many Member States, and if the NGEU indeed benefits the poor, the needy, those who suffered most from the pandemic – excellent! But one needs to recognize, to quote Pisani Ferry, that the NGEU is a high-risk gamble.[189] One idea behind

187. See the chart available at <www.ecb.europa.eu/mopo/implement/app/html/index.en.html>.

188. Cf. also Kube and Schorkopf, op. cit. *supra* note 107, at 1651.

189. Pisani-Ferry, "Europe's recovery gamble", available at <www.bruegel.org/2020/09/europes-recovery-gamble/>.

the NGEU is to use European money to incentivize national governments to engage in reforms that they have so far been unable or unwilling to do. Earlier such efforts have not worked well,[190] and it will prove extraordinarily difficult also in this case. It seems highly likely that the ambition of the NGEU exceeds the EU institutions' capacity to control Member State action, so that it will ultimately be up to the recipients to use the money wisely.

Though broadly agreeing on the need for EU solidarity, Member States disagreed on its expression. Luxembourg's Prime Minister Xavier Bettel said that in seven years of attending European meetings he "had never seen positions as diametrically opposed as this".[191] The NGEU was fiercely resisted by several Member States who insisted on the old Treaty interpretation based on "loans for loans".[192] In general, for the Northern net contributors, the NGEU needs to deliver in the beneficiary countries. If this does not happen, then the NGEU may come to symbolize a failed experiment and may mark the beginning of the end of fiscal integration.[193] The expectations of the Member States with respect to the NGEU differ. Some see it as a strictly one-off action to fight COVID-19; others prefer to think of it as a beginning of greater things to come. Given such contrasting expectations, we see a risk that rather than promoting integration, the NGEU will become a permanent source of disappointment and discord. This remains to be seen, but the risks are concrete and call for a proper constitutional debate on the limits of EU action. We share Martin Nettesheim's position that it is painful "for supporters of integration, to observe how the EU pushes aside even the most important constitutional principles when it seems politically opportune to do so".[194]

As far as EU law is concerned, the legal argumentation invoked by the institutions often seeks to downplay the effects of proposed measures on the constitutional edifice of the EU. In the case of the NGEU, we are more convinced by the commentators who see it as a "fundamental advance in

190. Leino-Sandberg and Losada Fraga, "How to make the European Semester more effective and legitimate?", Think Tank European Parliament, 24 July 2020, available at <www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_IDA(2020)651365>.

191. Gill and Chadwick with AP, "EU summit: Leaders reach landmark €1.82 trillion COVID-19 recovery deal and budget", Euro News., 21 July 2020, available at <www.euronews.com/2020/07/21/eu-summit-deadlock-see-talks-stretch-into-sunday>.

192. Grüll, "'Frugal Four' present counter-plan to Macron-Merkel EU recovery scheme", available at <www.euractiv.com/section/economy-jobs/news/frugal-four-present-counter-plan-to-macron-merkel-eu-recovery-programme/>.

193. Leino-Sandberg and Vihriälä, "The emerging fiscal union needs a solid foundation", available at <www.voxeu.org/article/emerging-fiscal-union-needs-solid-foundation>.

194. Nettesheim, "Legally feasible, constitutionally dubious: Establishing 'Next Generation Europe' on the basis of EU secondary legislation", *Verfassungsblog,* 12 April 2020, available at <www.verfassungsblog.de/legally-feasible-constitutionally-dubious/>.

European integration",[195] which "changes the contours of monetary union" and constitutes a "game changer"[196] and augurs the creation of a permanent fiscal capacity. Will the reinterpretation of legal limits be seen as a broken taboo, so that there will be little to stop the EU from resorting to similar measures again? Will this not lead to a further blurring of the delimitation of Member State and EU-level fiscal competences and responsibilities? Will all this not strengthen the understanding that when things get rough, the EU will come to the rescue, effectively reversing the Treaty-based presumption on which the EU is built?

Like many times before, a crisis provided a chance to implement institutional plans and ambitions prepared long in advance. The measures, however, leave the EU and its constitutional law in a highly fragile state. Core provisions of the Treaties were given hitherto unforeseen interpretations without any effective institutionalized control. In case of difficulties or even political and economic failure, such a shaky constitutional basis might also conceal responsibilities for the economic risks undertaken. We hold that the Treaties should matter; they are not just an impediment to be circumvented by creative legal drafting, updating an inconvenient webpage or through tweeting whatever suits a particular constituency. Replacing a sound modification of the legal foundations by diplomatic bargaining is not a sign of constitutional maturity. Constitutional change should appear unbiased, stand public scrutiny, and hold also beyond the ongoing or imminent crisis.

195. Gros, "Europe and the Covid-19 crisis: The challenges ahead", available at <www.ceps.eu/ceps-publications/europe-and-the-covid-19-crisis/>.

196. Smith-Meyer, "ECB's Lagarde denies pushing EU for permanent fund", available at <www.politico.eu/article/ecbs-lagarde-denies-pushing-eu-for-permanent-fund/>; and Gill and Chadwick with AP, op. cit. *supra* note 191.