SANT'ANNA LEGAL STUDIES

Cristina Fasone and Nicola Lupo

Learning from the Euro-crisis.

A new method of government for the EU's economic policy coordination after the pandemic?

Scuola Superiore Sant'Anna

Pisa

http://stals.sssup.it

ISSN: 1974-5656

Now published in International Journal of Constitutional Law 22(3) 2024

This page was intentionally left blank

Learning from the Euro-crisis.

A new method of government for the EU's economic policy coordination after the pandemic?

Cristina Fasone and Nicola Lupo

Abstract

Has the EU been able to learn from the experience of the Euro crisis to shape its economic response to the pandemic? This contribution is aimed at showing that an effective learning process was in fact set in motion in the aftermath of the pandemic emergency, although it is still incomplete. In order to address the economic consequences of the Covid-19 outbreak, and drawing on the past experience of the Euro-crisis, through Next Generation EU (NGEU) a new method of government has been forged. Grounded on a creative interpretative of the legal bases and characterized by a procedure that it is partly national and partly European and involving both domestic and supranational institutions, the governance of the Recovery and Resilience Facility (RRF) proceeds through the setting of EU-wide priorities, their articulation in national medium-term and performance-based plans, and a continuous monitoring process carried out by the Commission to ascertain the compliance with multiple conditionality regimes. The first two years of implementation of the RRF have proved successful not only for the use of the Fund by the Member States, but also for the spread of the RRF method of government in other areas of EU law, including the European Semester, RePowerEU, and the ongoing reform of the Stability and Growth Pact, despite the uncertainties surrounding the temporary nature of the instrument and some weaknesses in terms of democratic accountability.

Keywords: Next Generation EU - Method of Government - Euro crisis - Conditionality - European Semester - Stability and Growth Pact

1. Introduction

The overlapping and intertwinement of several crises within the European Union during a limited timeframe has been highlighted by many observers.[1] Usually, one is tempted to think that the addition of a new crisis will multiply and intensify the effects of any unresolved, pre-existing crises.[2] Thus, when the Covid-19 pandemic hit Europe, and the rest of the world, in 2020, it looked as though it might aggravate the legacy of the Euro-crisis: the asymmetry between a supranational monetary policy, based on a common currency, on the one hand, and a predominance of national fiscal policies, on the other,[3] was at risk of being exacerbated by purely domestic, uncoordinated economic recovery responses.[4]

This contribution is aimed at showing that an effective learning process was in fact set in motion in the aftermath of the pandemic emergency, although it is still incomplete. In order to address the economic consequences of the Covid-19 outbreak, and drawing on the past experience of the Euro-crisis (section 2), through *Next Generation EU* (NGEU) (section 3) a new method of government has been forged. Characterized, as in the Euro-crisis, by a "Euro-national procedure",[5] this method of government presents innovative elements both at the European level and within each Member State's (MS) legal order: founded on a rather creative interpretation of the legal bases embedded in the Treaties, it is instrumental to the allocation of EU common resources, partly as grants and partly as loans, in compliance with recovery and resilience plans (NRRPs) proposed by MS and approved by the Commission and the Council.[6] The implementation of "spending conditionality"[7] is meant to

[1] Jonathan Zeitlin, Francesco Nicoli & Brigid Laffan, *Introduction: the European Union beyond the polycrisis? Integration and politicization in an age of shifting cleavages*, 76 JEPP 963 (2019).
[2] Not by chance, in 2019, JONATHAN WHITE, POLITICS OF LAST RESORT: GOVERNING BY EMERGENCY IN THE EUROPEAN UNION, 64-105 (2019), spoke of the politics of emergency as the new normal in Europe and a sign of its weakness.
[3] On this enduring asymmetry, see David Howarth & Amy Verdun, *Economic and Monetary Union at twenty: a stocktaking of a tumultuous second decade: introduction*, 40 JEI 287 (2020).
[4] Peter Lindseth & Cristina Fasone, *The Eurozone Crisis, the Coronavirus Response, and the Limits of European Economic Governance*, *in* THE IDEA OF ECONOMIC CONSTITUTION IN EUROPE 528-537 (Guillaume Grégoire & Xavier Miny eds, 2022).
[5] On this notion see Cristina Fasone & Nicola Lupo, *Conclusion. Interparliamentary Cooperation in the Framework of a Euro-national Parliamentary System*, *in* INTERPARLIAMENTARY COOPERATION IN A COMPOSITE EUROPEAN CONSTITUTION 345 ff. (Nicola Lupo & Cristina Fasone eds., 2016).
[6] See Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, p. 17–75.
[7] See VIORICA VITA, THE RISE OF SPENDING CONDITIONALITY IN THE EUROPEAN UNION (2018), Antonia Baraggia & Matteo Bonelli, *Linking Money to Values: The New Rule of Law Conditionality Regulation and Its Constitutional Challenges*, 23 GLJ 131, 143 (2022), Louise Fromont & Arnaud Van Waeyemberg, *Trading rule of law for recovery? The new EU strategy in the post-Covid era*, 27 ELJ 127 (2021).

ensure the coexistence between priorities common to the Union and economic policies proposed by each MS.

The new method of government has been working rather well during its first two years of implementation, in coordinating reforms and investments across the Union. This is demonstrated not only by the fact that all the MS, although according to different timeframes and terms, decided to make use of the funds by presenting their own NRRP and have thus adhered to such a method of government, but also by two further factors. First, according to the European Commission, a similar, though not identical, method of government, based on medium-term plans, is also likely to be adopted during 'ordinary times', through the reform of the European Semester (ES) and, in particular, of the Stability and Growth Pact (SGP) (section 4).[8] Second, the same method of government has been used to face the economic consequences of the war in Ukraine, through a new program of investments aimed at increasing the autonomy of the EU in the field of energy production (*REPowerEU*) (section 5), and will be in operation for the management of the European Social Climate Fund.[9]

2. The Euro-crisis of the past decade: The rise and fall of the European Semester

The Euro-crisis that hit Europe in 2010 led many to question whether it had triggered a constitutional "mutation" in the EU or just "increased institutional variation".[10]

Although its most acute phase had declined by 2015, the Euro-crisis left long-lasting cleavages within the Union and structural consequences for the mechanisms and procedures of European economic governance. Such cleavages and divisions were triggered by the several asymmetries characterizing the economic governance regime: between monetary and fiscal policies and, consequently, between countries inside and outside of the Euro area and between creditor and debtor

[8] European Commission, Communication on orientations for a reform of the EU economic governance framework, COM(2022) 583 final, Brussels, 9.11.2022.
[9] See, respectively: Regulation (EU) 2023/435 of the European Parliament and of the Council amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755 and Directive 2003/87/EC, OJ L 63, 28.2.2023, p.1-27; and Regulation (EU) 2023/955 of the European Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060, OJ L 130, 16.5.2023, p. 1–51.
[10] On the two opposing sides, see Augustín J. Menéndez, *Editorial: A European Union in Constitutional Mutation*, 20 ELJ 127 (2014) and Bruno De Witte, *Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?*, 11 EUCONST 434 (2015).

countries;[11] between supranational and (new) intergovernmental methods;[12] and between technocratic and democratic institutions.[13]

The Euro-crisis led to strengthen the coordination of national fiscal policies under the SGP via the introduction of the ES annual cycle,[14] one of the most innovative and controversial interplays between domestic and EU institutions in terms of its design, practice and effects on the (domestic) budgetary process.[15]

The ES was intended to remain in place well beyond the end of the Euro-crisis to ensure predictability and reassurance regarding the stability and fiscal sustainability of national public accounts under the close supervision of the EU institutions, in particular the Commission.[16] While the domestic and supranational executive bodies lead the ES, parliamentary institutions – both the European Parliament and domestic legislatures – remained significantly marginalized.[17]

Before the start of the fiscal year, the Commission offers an outlook of the economic situation in the MS. The European Council then sets the strategic priorities for the Euro Area and for the Union as a whole. By April every year national governments transmit to the Commission their National Reform Programmes (NRPs) (on macroeconomic indicators) and Stability or Convergence Programmes (on the fiscal variables), which are assessed by the Commission in light of the medium-term budgetary objective (MTO) previously identified. Country-specific recommendations (CSRs) are then drafted by the Commission, endorsed by the European Council, and adopted by the Council in July. They form the basis for the 20 countries of the Euro-area to prepare and send to the Commission by mid-October their draft budgetary plans, to be approved by national parliaments by the end of December, together with any revisions suggested by the Commission.

---

11 See Claire Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, 35 OJLS 333 (2015).

12 CHRIS J. BICKERTON, DERMOT HODSON & UWE PUETTER (EDS.), THE NEW INTERGOVERNMENTALISM: STATES AND SUPRANATIONAL ACTORS IN THE POST-MAASTRICHT ERA (2015).

13 STEPHÁNIE HENNETTE, THOMAS PIKETTY, GUILLAUME SACRISTE & ANTOINE VAUCHEZ, DRAFT TREATY ON THE DEMOCRATIZATION OF THE GOVERNANCE OF THE EURO AREA – T-DEM (2017) and HOW TO DEMOCRATIZE EUROPE, CAMBRIDGE MA, HARVARD UNIVERSITY PRESS (2019).

14 See, in particular, the Proposal for a Regulation of the European Parliament and of the Council on the effective coordination of economic policies and multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97 (COM(2023)240 final).

15 Ramona Coman, *The legitimacy gaps of the European Semester: who decides, what and how*, 2-3 L'EUROPE EN FORMATION 47 (2017); James D. Savage & David Howarth, *Enforcing the European Semester: the politics of asymmetric information in the excessive deficit and macroeconomic imbalance procedures*, in 25 JEPP 212 (2018); Vivienne A. SCHMIDT, EUROPE'S CRISIS OF LEGITIMACY. GOVERNING BY RULES AND RULING BY NUMBERS IN THE EUROZONE (2020), 95 ff.; ADINA AKBIK, THE EUROPEAN PARLIAMENT AS AN ACCOUNTABILITY FORUM. OVERSEEING THE ECONOMIC AND MONETARY UNION 97 ff. (2022).

16 Camilla Mariotto, *The Implementation of Economic Rules: From the Stability and Growth Pact to the European Semester*, 60 JCMS 40 (2022).

17 See Deirdre Curtin, *Challenging Executive Dominance in European Democracy*, 77 MLR 1 (2014).

Despite this sophisticated procedure, the practice of the ES has been largely disappointing.[18] Notwithstanding the extensive oversight powers granted to the EU institutions and to the Commission in particular,[19] these policing mechanisms have not operated effectively. Indeed, from the perspective of the impact on national constitutional systems, the ES has been criticized both for becoming too intrusive on national democratic processes[20] and for being yet another soft governance tool unable to trigger a real change in fiscal policies.[21]

The MSs' rate of compliance with the CSRs is very low (and decreasing)[22] and, while all EU countries have been subjected to the excessive deficit procedure, and to in-depth reviews within the framework of the macroeconomic imbalance procedure, or to both, the corrective arm has never issued any sanctions. Thus, the ES has not been perceived as an actual deterrent to the violation of the economic and fiscal rules nor has it provided a concrete mechanism for remedying any deviations from the MTOs.

On the one hand, national institutions, including legislatures, have taken the ES to be a bureaucratic exercise, with little political appetite, understanding the CSRs as mere guidelines offered by "external" actors.[23] Often, following their approval by the Council, the CSRs were not even examined by the national parliaments.[24] On the other hand, prescribing very high fiscal standards (for some countries, at least), like the balanced budget or the surplus, and overly detailed numerical fiscal rules, while allowing for generous "escape rooms", turned the ES into a sort of empty box, in so far as the Commission was keen to authorize deviation from the MTO almost every time a national government requested that it do so.[25] In other words, the flexibility, inaugurated by the Juncker Commission,[26] to

---

[18] See e.g. Konstantinos Efsthatiou & Guntram B. Wolff, *Is the European Semester: effective and useful?*, 9 BRUEGEL – POLICY CONTRIBUTION 1 (2018) and CJEU, Commission v Council, C-27/04, Judgment of the Court (Full Court) of 13 July 2004.

[19] For a comparative perspective, see Federico Fabbrini, *The Fiscal Compact, the 'Golden Rule' and the Paradox of European Federalism*, 36 B.C. INT'L & COMP. L. REV. 1(2013).

[20] Mark Hallerberg, Benedicta Marzinotto & Guntram B. Wolff, *Explaining the Evolving Role of National Parliaments under the European Semester*, in 25 JEPP 250 (2018).

[21] Kenneth Armstrong, *The New Governance of EU Fiscal Discipline*, 38 EUR. LAW REV. 601 (2013) and Mark Dawson, *The Legal and Political Accountability Structure of "Post-crisis" EU Economic Governance*, in 53 JCMS 976 (2015).

[22] For instance, see European Commission, 2020 European Semester: Country-specific recommendations, COM (2020)500 final, Brussels, 20.5.2020 and Z. Darvas, L. Welslau, *First lessons from the Recovery and Resilience Facility for the EU economic governance framework, European Parliament*, Economic Governance and EMU Scrutiny Unit (EGOV) In-Depth Analysis, European Parliament, Bruxelles (2023).

[23] Ben Crum, *Parliamentary accountability in multilevel governance: what role for parliaments in post-crisis EU economic governance?*, 25 JEPP 268 (2018).

[24] See the comparative analysis and the national reports provided in the framework of the "Constitutional Change through Euro-crisis Law" Project, EUI Law Department, 2013-2015.

[25] SCHMIDT *supra note* 15, 98-116 and Augustín Menéndez, *The Sleep of Numbers Produces Monsters: The Case of «Numerical Rules»*, *in* GOVERNING WITH NUMBERS. ECONOMIC INDICATORS AND THE BUDGET DECISION IN THE CONSTITUTIONAL STATE (Corrado Caruso & Marta Morvillo, eds., 2020).

[26] See European Commission, Communication on making the best use of flexibility within the existing rule of the Stability and Growth Pact, COM (2015) 12 def., 13 January 2015 and Communication on the review of the flexibility under the Stability and Growth Pact, COM (2018) 335 def., 23 May 2018.

depart from the austerity mantra shaping the debate in the most acute phase of the crisis[27] gave significant leverage to MS to pursue their own policies at the expenses of coordination. Unsurprisingly, it has been noted in this regard that, within the ES framework, a persistent tension arose between the effort to limit the autonomy of national budgetary authorities (*limiting*) and the perception that those authorities in fact had license to exercise new powers or broader discretion (*licensing*).[28]

Taking stock of these limits, the process of revision of the SGP, preceded by a period of reflection on the completion of the EMU,[29] was launched by the Commission in early 2020, just before the Covid-19 pandemic arrived, changing plans and priorities and leading to the SGP's suspension.[30]

3. The COVID-19 crisis and NGEU as a turning point

Hitting the entire continent, the economic consequences of the Covid-19 pandemic required a reaction at every level of government. After some initial hesitation, the EU decided to not only relax or suspend the fiscal rules that were in force, thereby allowing each MS to make use of its fiscal leverage. It also originated a common action comprising new investments carried out at the national level, using EU funds and framed according to supranational priorities and targets.

As so often happens, a crisis offers the opportunity to overcome veto powers, in this case the powers regarding EU debt issuance as a tool for financing the EU budget and the expansion of EU spending conditionality across various sectors. Relatedly, it was this unprecedented shock, felt equally across all MS, which triggered the design of a new method of government for the definition and implementation of the RRF. Given its good start in the years 2021 and 2022, the same method of government has been extended to address new emergencies, such as the energy crisis arising from the war in Ukraine, and also is likely to inspire the reform of the SGP, still ongoing at the time of writing.

By the time the approval of the RRF was finalised, the last signs of resistance, which had been particularly strong in Germany and in the so-called "frugal countries", [31] had been overcome, at least

[27] See MICHAEL WILKINSON, AUTHORITARIAN LIBERALISM AND THE TRANSFORMATION OF MODERN EUROPE part IV (2021) and CLEMENS KAUPA, THE PLURALIST CHARACTER OF THE EUROPEAN ECONOMIC CONSTITUTION 337 ff. (2016).
[28] Turkuler Isiksel, *Constitutionalism as Limitation and Licence*, *in* CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS 187, 198 ff. (Tom Ginsburg, Mark D. Rosen & Georg Vanberg, eds., 2019).
[29] See, in particular, The Five President's Report: Completing Europe's Economic and Monetary Union, 22 June 2015, 13 ff.
[30] European Commission, Economic governance review - Report on the application of Regulations (EU) No 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013 and on the suitability of Council Directive 2011/85/EU, COM (2020) 55 final, 5.2.2020.
[31] David Howarth, Joachim Schild, Nein *to 'Transfer Union': the German brake on the construction of a European Union fiscal capacity*, 43 JEI 209, 281 ff. (2021)

in relation to the EU common debt and the structure of the new fund.[32] For the first time, the Union has borrowed large quantities of resources from the markets to finance, through grants and loans, a series of reforms and investments in each MS, co-determined with them. The disbursement of these resources to each MS has been made conditional on the satisfactory achievement of a series of measures, defined through milestones and targets, to be implemented over a five-year period, until 31 December 2026, in accordance with a precise timetable, codified in the individual NRRPs and in the operational arrangements that accompany them.

This method of government has been designed according to mechanisms of spending conditionality, which began to be tested as tools of EU internal governance in the second half of the previous decade[33] but which, under NGEU and the RRF, fundamentally depart from the problematic standard of strict conditionality experienced during the Euro-crisis and the rescue programmes.[34] The new method, instead, has considerable potential to ensure the coexistence of and complementarity between EU-wide and domestic priorities .[35]

What had not happened for years, namely that the Union borrowed resources to fund investments in individual MS, was promoted in order to address the economic consequences of the COVID-19 pandemic and to foster recovery, making use of a creative interpretation of Treaty provisions.

3.1. The creative interpretation of the legal bases

The adoption of NGEU has been described as an exercise in "creative legal engineering", aimed at allowing "a major shift in EU economic policy".[36] Due to the substantial impossibility of revising the Treaties, an evolutive interpretation had to be quickly devised to enable the Union to financially support the recovery. This time, unlike during the Euro-crisis, all the MS were keen to agree on a common objective, once the initial reluctance of the frugal countries was overcome.

For this reason, intergovernmentalism did not entirely dominate the EU's response to the pandemic. In the design of NGEU, the European Commission and the Parliament played a leading

[32] See, in particular, Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433I, 22.12.2020, 23–27 and Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, 17–75.
[33] Antonia Baraggia, *Conditionality Measures within the Euro Area Crisis: A Challenge to the Democratic Principle?*, 4 CJICL 268 (2015).
[34] See Court of Justice, case C-370/12, Thomas Pringle v Government of Ireland and Others, 27 November 2012, paras. 69 ff. Cf also MENELAOS MARKAKIS, ACCOUNTABILITY IN THE ECONOMIC AND MONETARY UNION: FOUNDATIONS, POLICY, AND GOVERNANCE 66 ff. (2020).
[35] Viorica Vita, *Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality*, 19 CYELS 116, 120 ff. (2017).
[36] See Bruno De Witte, *The European Union's covid-19 recovery plan: the legal engineering of an economic policy shift*, 58 CMLR 635, 670 ff (2021).

role[37], while intergovernmental institutions, in particular the European Council, were endowed with the task of overcoming any stalemates in the negotiations (e.g. on the rule of law conditionality) and with detailing and finalising the terms of the agreement reached.[38] Due to the general consensus on the desirability of NGEU, on this occasion intergovernmental agreements were not adopted outside EU law, nor were any new intergovernmental bodies created. Relatedly, the many asymmetries we saw emerging in the aftermath of the Euro-crisis, starting from the sharp Eurozone vs. non-Eurozone divide, pale into insignificance when looking at the Union's reaction to the Covid-19 crisis. The differences in the MS' positions were certainly acknowledged in the criteria set to distribute funds under the RRF,[39] but procedurally all MS were on an equal footing with respect to the conditions for requesting grants and loans.

The adoption of NGEU could take advantage of an institutional situation which may be favourable in many respects. Indeed, following the European elections of May 2019, the Multiannual Financial Framework 2021-2027 had still not yet been adopted. This allowed to affect the overall amount and the ceilings of the so-called EU own resources and expenditures. Hence, for example, in addition to the traditional categories of EU revenues, the new own resources Decision authorised the EU to borrow from capital markets for the purpose of financing the RRF, by providing for "extraordinary and temporary additional means to address the consequences of the COVID-19 crisis".[40]

The European Commission based NGEU on a multi-faceted legal constellation.[41] More specifically, the legal basis for the first two Regulations adopted to deal with the Covid-19 pandemic was identified as being Article 122 TFEU. This provision is referred to by both Council Regulation (EU) 2020/672 of 19 May 2020, which, in the very first months following the Covid-19 outbreak, established a European instrument for temporary support to mitigate unemployment risks in the state of emergency (SURE), and Council Regulation (EU) 2020/2094 of 14 December 2020, which established the EU recovery instrument, as well as determining the amount of resources mobilized for that purpose.

[37] See, in particular, the resolution adopted by the European Parliament on 17 April 2020 on coordinated Union action to combat the pandemic (2020/2616(RSP)).
[38] See the European Council, Conclusions of 21 July 2020, EUCO 10/20, Special meeting on 17-21 July 2020, and Conclusions of 11 December 2020, EUCO 22/20, meeting of 10-11 December 2020.
[39] Annex I, Regulation (EU) 2021/241.
[40] Article 5, Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union.
[41] See Federico Fabbrini, *The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic*, in 60 JCMS 186, 191 (2022).

To this end, an innovative interpretation of Article 122 TFEU was proposed, relying on the joint reading of both its paragraphs.[42] On the one hand, paragraph 1 recalls the "spirit of solidarity between Member States" in order to enable the Council (under Article 289(2) TFEU) to adopt "measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, in particular in the area of energy". A deliberately generic formula, coined for cases rather different from a pandemic, notably for energy supply problems: this legal basis lacked any concrete effect in the legislative practice until 2020.[43]

On the other hand, paragraph 2 of Article 122 TFEU has been interpreted broadly in so far as it allows the European Union, via the same procedure, to grant "financial assistance", under certain conditions, to a MS which "is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control". This last clause, which had already been used in 2010 as a legal basis for the regulation establishing the European Financial Stabilization Mechanism (EFSM)[44], has now been very extensively re-interpreted and referred to all MS.[45] It has been recognized that Covid-19 constituted an exceptional situation that "is beyond the control of Member States", and thus "calls for a coherent and unified approach at Union level" (Whereas no. 5 of Regulation 2020/2094).

The legal basis of Regulation (EU) 2021/241, which established the RRF, is provided, instead, by Article 175(3) TFEU. Unlike the other two Regulations, this one was adopted in accordance with the ordinary legislative procedure.

Article 175 TFEU is the provision on which the structural funds are based, and paragraph 3 thereof allows for specific actions other than those implemented through those funds, which are also aimed at strengthening economic, social and territorial cohesion. The RRF falls within the scope of Article 175, para 3: financed in part by resources allocated to the structural funds, but – as has already been mentioned – mainly through borrowing. This debt is justified by the exceptional nature of the measure and the governance of the RRF follows procedural rules which are largely different from those featuring the structural funds, despite sharing with them both general and specific objectives.

---

[42] Enzo Cannizzaro, *Neither Representation nor Taxation? Or, "Europe's Moment" – Part I*, 2 *European Papers* 703, 705 (2020).
[43] Leo Flynn, *Article 122 TFEU*, *in* THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin,eds., 2019) and Merijn Chamon, *The use of Article 122 TFEU. Institutional implications and impact on democratic accountability*, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 753.307, September 2023.
[44] Council Regulation (EU) No 407/2010 of 11 May 2010, establishing a European Financial Stabilisation Mechanism (EFSM).
[45] Chamon, *supra note* 43, at 25 ff.

Precisely the exceptional nature of the circumstances surrounding the adoption of NGEU led the German Constitutional Tribunal, on 6 December 2022, to reject allegations as to the *ultra vires* nature of the Act ratifying the EU own resources Decision.[46] While excluding the possibility of establishing a fiscal union through NGEU, the Court considered the relevant borrowing operations to legitimately fall within Article 311, para 2 TFEU as "other revenues" (not as "own resources") for the Union. A series of conditions must be fulfilled in this regard, one of which refers specifically to the constraints as to the volume and time of lending, thereby hinting at the necessarily temporary nature of NGEU and the RRF.[47]

Such an innovative and creative use of the legal bases has aroused criticisms by scholars who have questioned the respect for the principles of financial responsibility (art. 125 TFEU) and of balanced budget (art. 310 TFEU). Indeed, it has been argued that, in order to legitimize such a paradigm shift, a Treaty reform is needed, so as to transparently strengthen the Union's fiscal integration and to create an autonomous fiscal capacity.[48] At the same time, other scholars have defended the legitimacy and correctness of this interpretative effort, which has first been carried out by the legal services of the EU institutions.[49]

3.2. New financing and spending mechanisms

At first glance, neither the financing nor the spending mechanisms devised through NGEU appear to be completely new. However, what is unprecedented is their combination, the scope and the *finalité* of the EU action, aiming to overcome the traditional detachment between the EU and national budgetary procedures.[50]

[46] BVerfG, Judgment of the Second Senate of 6 December 2022 - 2 BvR 547/21 -, paras. 1-47. The ruling was preceded by a decision of 26 March 2021, BVerfG, Beschluss des Zweiten Senats vom 26. März 2021- 2 BvR 547/21 -, Rn. 1-1 (available only in German) and by BVerfG, Order of the Second Senate of 15 April 2021 - 2 BvR 547/21 -, paras. 1-112, rejecting a request for temporary injunction against the Act. Eigenmittelbeschluss-Ratifizierungsgesetz, ERatG allowing the President of the Republic to sign the Act of ratification into law.
[47] Thu Nguyen & Martijn van den Brink, *An Early Christmas Gift from Karlsruhe? The Bundesverfassungsgericht's NextGeneration EU Ruling*, in VERFASSUNGSBLOG, 9 December 2022.
[48] Païvi Leino-Sandberg & Matthias Ruffert, *Next Generation EU and its Constitutional Ramifications: A Critical Assessment*, 59 CMLR 433 (2022).
[49] De Witte, *supra note* 36, 638; Id., *EU emergency law and its impact on the EU legal order. Guest Editorial*, in 59 CMLR 3 (2022) and Richard Crowe, *The EU Recovery Plan: New Dynamics in the Financing of the EU Budget*, in THE FUTURE OF LEGAL EUROPE: WILL WE TRUST IN IT? LIBER AMICORUM IN HONOUR OF WOLFGANG HEUSEL 117 ff. (Gavin Barrett at al., eds., 2021).
[50] Richard Crowe, *An EU budget of states and citizens*, 26 ELJ 336 (2020).

It is not the first time that the EU budget has been financed through borrowing. Indeed, this occurred during the Euro-crisis, for the European Financial Stabilisation Mechanism.[51] Yet, the size of the common debt created (750 billion euro in 2018 prices) is a novelty, as is the time frame for its settlement. The borrowing operation, begun in 2021, will keep going until 2026, with repayment occurring between 2028 and 2058. Yet, as already clarified, borrowing is certainly not the usual method through which the EU own resources are retrieved.[52] The prohibition on debt financing the EU budget has been sidestepped by characterizing the resources devoted to the RRF as externally assigned funds.[53] This trick had previously been used several times,[54] although never for such a large amount.

Despite the speculation as to whether or not the financing of NGEU triggered a "Hamiltonian moment in the EU", comparable to that which occurred in the US soon after the American revolution,[55] the details of the spending mechanisms surrounding NGEU and the RRF in particular are perhaps even more intriguing.[56] Unlike the rescue funds established in the aftermath of the Euro-crisis, as already clarified, the RRF is established under EU law (Regulation no. 2021/241), guaranteed by the EU budget and administered by EU institutions (together with those of the MS). Moreover, its resources are given to (all) MS through loans (up to 360 billion euro) and grants (up to 312, 5 billion euro), according to the national choice. Indeed, most countries, with the notable exceptions of Italy, Greece, Portugal and Romania, have asked for non-repayable financial support only. Furthermore, the RRF appears to be linked to a clear redistributive effort by the Union between MS, policy sectors, and citizens' groups by financing investments and reforms aimed at reducing inequality. If one excludes cohesion funds which, in any event, mobilize significantly less EU money, this is the first time the EU budget has genuinely pursued redistribution of resources as its key function alongside allocation and stabilization.[57]

---

[51] And even before, see Gian Luigi Tosato, *The Recovery Fund: Legal Issues*, 23 LUISS SCHOOL OF EUROPEAN POLITICAL ECONOMY, POLICY BRIEF 1, 3, (2020) and Josefin Meyer, Christophe Trebesch, Sebastian Horn, *Coronabonds: The forgotten history of European Community debt*, in VOXEU CEPR, 15 April 2020.
[52] See Cristina Fasone & Nicola Lupo, *The Union Budget and the Budgetary Procedure*, *in* OXFORD PRINCIPLES OF EUROPEAN UNION LAW 815-816 (Robert Schütze & Takis Tridimas, eds., 2018).
[53] Leino-Sandeberg and Ruffert, *supra note* 48.
[54] Richard Crowe, *The European Budgetary Galaxy*, 13 EUCONST 441 (2017).
[55] TOMASZ P. WOŹNIAKOWSKI, FISCAL UNIONS. ECONOMIC INTEGRATION IN EUROPE AND THE UNITED STATES 22 ff. (2022).
[56] Antonio-Martín Porras-Gomez, *The EU Recovery Instrument and the Constitutional Implications of its Expenditure*, 19 EUCONST 1 (2023).
[57] On the three functions of the public budget, see RICHARD MUSGRAVE, THE THEORY OF PUBLIC FINANCE (1959).

Yet, also due to the massive volume of borrowing taking place, the distribution of the RRF is subject to a series of conditions (from green standards to rule of law principles) and to a bundle of spending conditionality tools (Article 24).

Regulation (EU) no. 2021/241 also establishes conditions connected to the development of the ES. Indeed, to be eligible the NRRPs were to be consistent with the CSRs, with the priorities set in the Council recommendation on the economic policy of the Euro area and with the information contained in the NRPs (Article 17, para 3).

The RRF can also be used to enforce the corrective arm of the SGP in relation to countries experiencing fiscal and economic troubles (Article 10). In such cases,[58] the Commission submits to the Council a proposal for total or partial suspension of commitments and payments under the RRF. Any suspension, which is always reviewable, is accompanied by a number of safeguards, such as giving priority to the suspension of commitments over payments, respecting the principle of proportionality and equality among MS. Any proposal by the Commission to suspend payments on the ground of economic governance concerns can only be rejected by the Council with a reverse qualified majority (Article 10, para 3). It is, therefore, in theory, difficult to circumvent. On the other hand, the NRRPs are approved and amended by the Council through an implementing decision by a qualified majority. However, changing NRRPs is not so straightforward, having regard to the somewhat cumbersome procedure prescribed by Article 21 of the Regulation, and the requirement for "objective circumstances" to trigger the amendment.[59]

Article 10 of this Regulation thus fulfils a very important function, namely to tie the governance of national budgets, through the EU's coordination of economic policies, to the EU budget's spending. Amendment of the Common Provision Regulation was unsuccessfully attempted in 2013 (see *supra* section 2.2), but in that case the stakes were much lower both in terms of the funds and credibility in question.

That said, the real impact of these articles in the current context remains to be determined, given that the SGP has been suspended since March 2020[60] and continues to be so throughout 2023 (see *infra*, section 4).

---

[58] The detailed circumstances are provided for in Article 10, para 2, of the Regulation.

[59] Considering the addition of a RePowerEU chapter into the NRRPs following the adoption of Regulation 2023/435 (on which see, briefly, infra, sections 3.3. and 5), the Commission adopted a specific Guidance on how to amend NRRPs in the context of REPowerEU, on 1 February 2023.

[60] See the European Commission Communication on the activation of the general escape clause of the Stability and Growth Pact, Brussels, COM (2020) 123 final, 20 March 2020. See also the Statement of EU Ministers of Finance on the Stability and Growth Pact in Light of the COVID-19 Crisis, 23 March 2020.

3.3. The promising start of the new method of government

The RRF has given rise to a new method of government between the EU and the MS, which has drawn some elements from the ES while also featuring significant novelties. The innovative elements of this new method of government can be summarized as follows: a) the design of the RRF relies on an evolutive interpretation of the legal bases (especially Articles 122 and 175, para 3 TFEU); b) the NRRPs are performance-based plans, the actual funding being linked to the (at least) satisfactory achievement of milestones and targets; c) the drafting and implementation of the NRRPs are dependent upon the respect of macro-objectives of various kinds (cohesion, green, rule of law principles, etc.) set by the EU on a general level and, then, detailed by every MS according to the domestic context and deployed over a medium-term timespan; d) the measures enshrined in the NRRPs are originally proposed by the MS, but the EU institutions – namely the Commission and the Council – need to agree on them, according to a procedure centered on the European Commission and the national executives and aimed at accompanying the implementation of the Plans and their assessment.

This method has had a promising start.[61] As it has been remarked, "the process so far has evolved smoothly, and both EU officials and national civil servants appear confident of further development".[62]

By the end of 2022, the plans of all 27 MS had been submitted, positively assessed by the European Commission and approved by the Council as annexes to Council implementing decisions. The last one to be submitted was the Dutch Plan, on 8 July 2022, while the last one to be approved, due to problems relating to respect of the rule of law, was the Hungarian Plan, on 16 December 2022. By November 2023, the Commission had positively assessed the milestones and targets connected to the first three instalments by 2 countries (Spain and Italy), had paid two instalments to 5 MS (Croatia, France, Greece, Portugal and Romania) and the first instalment to 12 MS (Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Latvia, Lithuania, Luxembourg, Malta, Slovakia, and Slovakia).[63] Lithuania and Romania are, for the time being, the only two countries where the

[61] See European Commission, Recovery and Resilience Facility: Two years on. A unique instrument at the heart of the EU's green and digital transformation, COM(2023) 99 final, 21.2.2023, 3 ff.
[62] Lucas Schramm, Ulrich Krotz & Bruno De Witte, *Building 'Next Generation' after the pandemic: The implementation and implications of the EU Covid Recovery Plan*, 60 JCMS 114, 124 (2022).
[63] See *On the implementation of the Recovery and Resilience Facility: Moving forward*" – COM(2023) 545 final, 19.9.2023 and further updates.

achievement of milestones and targets has been assessed as partially positive, with two milestones each not yet "satisfactorily fulfilled".[64]

Of course, these positive assessments of the initial payment requests do not necessarily mean that the substantial and ambitious objectives of each Plan will all be accomplished. Indeed, milestones and targets are often vaguely defined or overly aggregated and in several cases include reforms and investments that had already been planned for some time at the domestic level, without being fully implemented. Thus, the disbursement of the RRF's funds by the Commission can have a triggering effect on the prompt and effective fulfilment of the targets supporting the reform agenda.[65] Nevertheless, even having regard to the formal satisfactory achievement of the milestones and targets, rather impressive improvements are evident when compared with the ordinary mechanism of fiscal policy coordination, mainly centered on CSRs, which are usually viewed as an external constraint on national policy making and very rarely followed by MS. Likewise, the inclusion in the NRRPs of recently attempted national reforms seems to confirm the added value of the RRF method of government, as it manages to ease and accelerate the reform process by weakening the veto powers that, in the previous years, had been able to hamper their achievement or implementation.

Of course, as the enforcement of the NRRPs is still halfway through, it remains to be seen whether this overall positive assessment of the new method of government will endure over time. Most NRRPs require the fulfilment of their quantitative targets within the second half of the 5-year period (2024-2026). Satisfying this type of target is more challenging than achieving the approval of legislative reforms, which, by contrast, has more frequently been completed during the first half of the RRF period (2021-2023). If one adds the difficulties arising from the war in Ukraine, with the rise in the energy price and the shortcomings in some supply chains, it is understandable why a major update of the Plans has been carried out in 2023, together with the addition of a new chapter, aimed at increasing the EU independence and security in energy production (REPowerEU chapter).

Exactly two years after the entry into force of Regulation no. 2021/241, in an attempt to cope with the energy crisis, Regulation no. 2023/435 was approved on 27 February 2023, amending the former, in order to extend the same method of government to further reforms and investments in the energy sector, financed partly with unused RRF funds (in particular from the loan component) and partly with new funds. It follows that, not only the same method of government but also the same actors, at

[64]See Commission implementing decision of 28.4.2023 on the partial suspension of the disbursement of the first instalment of the nonrepayable support for Lithuania, C(2023) 2956 final; and Commission implementing decision of 21.9.2023 on the partial suspension of the disbursement of the second instalment of the loan support for Romania, C(2023) 6466 final .

[65] See Francesco Corti & Tomás Ruiz de la Ossa, *The Recovery and Resilience Facility. What Are We Really Monitoring With A Performance-Based Approach?*, 1 CEPS EXPLAINER (2023).

the EU as well as at the national level, have been called upon to undertake challenging new tasks, which must also be accomplished by August 2026. To further confirm that the method of government applied to the RRF has become a benchmark, also the management of the newly established Social Climate Fund under Regulation no. 2023/255 that will become fully operational in 2025, is anchored to a very similar scheme as the RRF, centered on National Social Climate Plans.

In any event the launch of the new method of government has already triggered some effects with respect to the actual functioning of the ES and in driving the debate about the reform of the SGP.

4. Applying the lessons learned (so far) from the Euro-crisis and from NGEU to the reform of the Stability and Growth Pact

4.1. The transformed nature of the European Semester

Whether NGEU and the RRF are here to stay or, as seems to be the case, they are temporary, these instruments have already transformed the ES, without any formal amendment of the SGP and despite its suspension.

On the one hand, the "EU institutional response to the Covid-19 pandemic built on, and further cemented, the EU's socio-economic governance architecture".[66] Indeed, some of the reporting obligations set under the RRF draw on requirements and documents which are already demanded to the MS within the framework of the EU fiscal and macroeconomic coordination. On the other hand, by incorporating the implementation of the RRF into the setting of the ES, the nature of the latter is somewhat enriched and transformed, moving away from the strict austerity logic that had inspired the adoption of the "six-pack" and the "two-pack". Indeed, the ES combined with the RRF is making the former a vehicle to guide and channel national investments and reforms.[67] This is already quite a

[66] Bart Vanhercke & Amy Verdun, *The European Semester as Goldilocks: Macroeconomic Policy Coordination and the Recovery and Resilience Facility*, 60 JCMS 204 (2022).
[67] David Bokhorst, *The Influence of the European Semester: Case Study Analysis and Lessons for its Post-Pandemic Transformation*, 60 JCMS 101, 114 (2022) and Amandine Crespy, Tom Massart & Vivien Schmidt, *How the impossible became possible: evolving frames and narratives on responsibility and responsiveness from the Eurocrisis to NextGenerationEU*, early view JEPP 1 (2023).

remarkable innovation, considering that the ES had never previously been conceived as a governance framework for the allocation and monitoring of funds.[68]

The Commission and the European Council made their intention to move in this direction clear at the outset of the EU's response to the pandemic.[69]

The choice to embed the governance of the RRF into the timeline of the ES could not be taken for granted at first, given the mixed reaction to this procedure after almost ten years of implementation (see section 2 above). What made the Semester the most suitable candidate for this purpose, according to the Commission, was its consolidated and predictable timeframe as well as its capacity to identify the priorities in the reform agenda. These are important advantages considering that the implementation of the NRRPs follows a very tight schedule to reach the promised milestones and targets in a timely manner. Thus, the format of the ES gives the MS "a chance to get reform and investment priorities 'right' from the very beginning, especially given the one-off nature of the formulation of the RRP".[70] At the same time, the ES format ensures the MS enjoy an appropriate margin of manoeuvre to pursue the most suitable policy options for the domestic context. This is particularly relevant in the use of the RRF in relation to "purely" internal matters (e.g. the organization of the public administration, the effectiveness of the judicial system, etc.).[71]

The intertwinement between the RRF and the ES was eventually sealed by EU Regulation 2021/241 itself, which refers to the ES in a number of ways (some highlighted in section 3.3.), for example with regard to the spending conditionality attached to the economic governance requirements and to the use of NRPs for the national reporting system on the NRRPs (Article 27). To this end, Article 31, para 4 of the RRF Regulation, dealing with the Commission's annual report to the Parliament and the Council on the progress made by the various MS to achieve milestones and targets, allows the Commission to use "the relevant documents officially adopted by the Commission under the ES, as appropriate." For example, the Euro Area Recommendation for 2021 was

[68] Ben Crum, *How to provide political guidance to the Recovery and Resilience Facility?*, STUDY FOR THE ECONOMIC GOVERNANCE SUPPORT UNIT (EGOV), DIRECTORATE-GENERAL FOR INTERNAL POLICIES, EUROPEAN PARLIAMENT 13 (2020).

[69] European Commission, Communication on 2020 European Semester: Country-specific recommendations, Brussels, COM(2020) 500 final, 20.5.2020, 15-16 and European Council, Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020). Conclusions, Brussels, 21 July 2020, EUCO 10/20, para 17.

[70] Vanherecke & Verdun, *supra note* 66, 209. See also Manuela Moschella, *What role for the European Semester in the recovery plan?*, STUDY FOR THE ECONOMIC GOVERNANCE SUPPORT UNIT (EGOV), DIRECTORATE-GENERAL FOR INTERNAL POLICIES, EUROPEAN PARLIAMENT 9 AND 20 (2020).

[71] Vanherecke & Verdun, *supra note* 66, 208.

instrumental in providing guidance as to the implementation of the NRRPs by identifying the key areas for the MS to focus on for the use of the RRF's funds.[72]

According to many, the relationship between the ES and the RRF is mutually beneficial.[73] Due to the RRF's implementation aligning with the reporting mechanisms and the procedures of the ES, the latter has gained visibility and new prominence thanks to the NRRPs. In other words, the character of the Semester has been fundamentally altered: "from being a non-binding structure for policy coordination to a vehicle for the allocation of a major economic impetus (…) which is to have more teeth".[74] If the enforcement of the strict numerical fiscal rules and macroeconomic indicators has shown several weaknesses in the economic governance post-Euro crisis, the 'recipe' now applied, through the RRF, aims to revamp the ES by offering financial incentives for structural reforms and investment expenditures, stimulating growth and, thus, more sustainable and reliable budget accounts. Moreover, the spending conditionality introduced by the RRF Regulation with respect to the CSRs encourages the MS to take those recommendations more seriously, to foster a real political debate about them and, overall, to increase the domestic ownership and effectiveness of the Semester.[75]

Undoubtedly, NGEU – especially the RRF – and its connection to the ES can "lead towards a major rebalancing between the economic and the monetary elements of EMU"[76] and alleviate the traditional asymmetry between Eurozone and non-Eurozone countries. However, it cannot be assumed that the potential benefits stemming from this construction will manifest themselves,[77] particularly in circumstances in which the SGP is suspended. For example, in its 2022 special report on the RRF, the European Court of Auditors highlighted that significant gaps still persist in the implementation of the CSRs, such that the leverage of the new funds has been insufficient to foster enhanced compliance with the fiscal and macroeconomic targets.[78]

---

[72] European Commission, Recommendation for a Council Recommendation on the economic policy of the euro area. COM (2020) 746, 18.11.2020, 7.
[73] Crum, *supra note* 68,10 ff.; Reinout Arthur van der Veer, Walking the Tightrope: Politicization and the Commission's Enforcement of the SGP, 60 JCMS 81 (2022).
[74] Vanhercke & Verdun, *supra note* 66, 217-218.
[75] Jean Pisani-Ferry, *European Union Recovery Funds: Strings Attached, But Not Tied Up in Knots*, 19 BRUEGEL POLICY CONTRIBUTION (2020).
[76] Fabbrini, *supra note* 41, 187.
[77] For a critical appraisal, see Berthold Rittberger, *Democratic control and legitimacy in the evolving EU economic governance framework*, STUDY FOR THE ECONOMIC GOVERNANCE AND EMU SCRUTINY UNIT (EGOV), DIRECTORATE-GENERAL FOR INTERNAL POLICIES, EUROPEAN PARLIAMENT 28 ff. (2023)
[78] European Court of Auditors, The Commission's assessment of national recovery and resilience plans. Overall appropriate but implementation risks remain, Special Report, no. 21, 2022, pp. 40-53.

Another issue concerns the timespan of the "marriage" – as it has been described[79] – between the RRF and the ES. Although there have been pleas to convert the RRF into a permanent instrument,[80] under the present circumstances and given the national constitutional obstacles raised (see section 3.1. above), its duration is limited to five years. Thus, one may legitimately wonder what will become of the expected revamping and politicization of the ES once the RRF funds depleted.[81] Conversely, given the common debt created in order to finance NGEU, which is ultimately backed by national budgets (indeed, truly EU taxes to support the EU debt repayment are still lacking), the enhancement of the ES effectiveness and budgetary sustainability in the MS should be seen as key achievements.

4.2. The proposed revision of scope, object and targets of the stability and convergence plans

Taking stock of the *de facto* update of the ES following the RRF and of the new method of government stemming from it, the European Commission outlined the content and path for the reform of the SGP in its Communication of November 2022 and in a package of legislative proposals aiming to amend the "six pack" tabled in April 2023.[82] After the three-year suspension of the Pact and using the governance of the RRF as a benchmark, the Commission has proposed to focus the revised system on a medium-term perspective with a forward-looking approach, including reforms and investments to promote counter-cyclical fiscal policies, and to adopt debt sustainability and multiannual net expenditure as the main standards.

While the legal basis for the reform does not pose specific problems here – legislative amendments are necessary for the change of fiscal rules, whereas the existing legal provisions can be used for the macroeconomic imbalance procedure[83] – the new medium-term fiscal-structural plans will be performance-based (like the NRRPs), will be implemented over a period of at least four years, which can be extended to mirror the duration of the legislative term. To make those plans more comprehensible and transparent, the previously used indicators – like the output gap and the structural balance – will be replaced by a focus on debt and the quality of the expenditure. Likewise, the new fiscal-structural plans are proposed by the MS, assessed by the Commission and endorsed by the Council and can be amended only in specific circumstances, e.g. if their adjustment is needed in order

[79] Thu Nguyen and Nils Redeker, *How to make the marriage work: Wedding the Recovery and Resilience Facility and European Semester*, HERTIE SCHOOL – JACQUES DELORS CENTRE POLICY BRIEF, Berlin, 1 ff. (2022).
[80] Elisabetto Cornago and John Springford, *Why the EU's recovery fund should be permanent,* in CENTER FOR EUROPEAN REFORM POLICY BRIEF 11 ff. (2021).
[81] Moschella, *supra note* 70, 22.
[82] European Commission, Communication on orientations for a reform, *supra note* 8 and, in particular, the Proposal COM(2023)240 final, *supra note* 14.
[83] European Commission, Communication on orientations for a reform, supra note 8, 21.

to redress macroeconomic imbalances or in case of a change of the national executive (Article 14, COM(2023) 240).

Just as the drafting and implementation of NRRPs must follow a series of conditions related to the green and digital transitions and to the respect of the rule of law principles, amongst other things, the new medium-term fiscal plans will have to comply with similar conditions identified as targets at the EU level and subsequently detailed by each MS according to the domestic priorities. Indeed, the plans "should also be consistent with the National Energy and Climate Plans (which are to be aligned with the targets of the EU Climate Law) as well as with the National Digital Decade Roadmaps."[84]

Although the debt/GDP ratio (60%) and deficit/GDP ratio (3%), as enshrined in the Treaties, are not going to be altered,[85] the reform aims to move away from stringent numerical rules imposed on each and every MS regardless of its fiscal situation. Rather, the "medium-term approach would allow for differentiation between MS, within a revised common EU framework that has sustainable growth and risks to debt sustainability as a common basis."[86]

The greater discretion that the Commission would enjoy under the proposed SGP revision would probably need to be balanced via a more predictable and credible national monitoring system. To this end, both national fiscal councils and the European Fiscal Board will be reinforced by empowering them to evaluate "the adequacy of the plans with respect to debt sustainability and country-specific medium-term goals", and to monitor "compliance with the plan".[87] Indeed, the enforcement mechanisms of the revised governance are key to its success, given the deficiencies experienced under the previous regime.

4.2. Changes to the enforcement system

One of the weaknesses of the economic governance framework established in the aftermath of the Euro-crisis derived from the difficulty of enforcing the tight numerical fiscal rules and applying the various corrective and sanctioning measures. As part of the ongoing reform, the Commission intends to simplify and lessen the fiscal constraints, while making them more certain and effective. Although financial penalties have not entirely been eliminated, they will no longer be at the centre of the enforcement system. The excessive deficit procedure will be maintained. Yet, for MS with a

---

[84] Ivi, 7.

[85] On the legal and political sustainability of the present Treaty arrangements, see critically, Marco Dani et al., *"It's the political economy . . .!" A moment of truth for the eurozone and the EU*, 19 ICON 309, 326 (2021).

[86] European Commission, *supra note* 8, 7.

[87] See e.g. Stefano Micossi, *On the Commission's orientations for a revised economic governance in the EU*, in VOXEU.ORG, 23 February 2023.

substantial debt challenge (with debt above the 60% of the GDP) to depart from the multiannual adjustment path will entail – by default – the commencement of an excessive deficit procedure.[88]

At the same time, the reputation sanctions will be enhanced. Under the excessive deficit procedure, the Ministers of MS can be asked to appear before the European Parliament to explain publicly the measures planned and adopted to comply with the Commission's recommendations under the corrective procedure.

Given its performance-based approach, the enforcement of the reform and investment commitments underpinning a more gradual adjustment path will be closely monitored.

However, the most important novelty as it concerns the enforcement mechanisms deals with spending conditionality. As anticipated, both *ex ante* and, since 2013, also *ex post*, macroeconomic conditionality already applied to structural funds. *Ex ante* macroeconomic conditionality was triggered in 2012 vis-à-vis Hungary, suspending the cohesion funds due to its persistent violation of the rules of the SGP, at a time of austerity and of the start of a dangerous illiberal drift. By contrast, *ex post* macroeconomic conditionality has never been applied. Now, thanks to Regulation 2021/241, macroeconomic conditionality will also operate in relation to the RRF – thereby providing an important incentive for compliance, at least until 2026 – and "EU financing could also be suspended when MS have not taken effective action to correct their excessive deficit."[89] This is particularly significant from the perspective of debt sustainability, given that the macroeconomic conditions here are attached to spending financed through EU common borrowing.

Moreover, the logic of spending conditionality is spreading from the realm of economy and fiscal policies to that of the monetary policy, possibly further contributing to their alignment (and approximation). The RRF, once again, is a tool for achieving that. Indeed, it is now well-known that the Transmission Protection Instrument (TPI), launched by the ECB in July 2022, makes the purchasing of national bonds by the ECB conditional upon the compliance by the MS with the conditions set by the RRF Regulation and with the CSRs.[90]

5. Conclusion

[88] Proposal for a Council Regulation amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (COM(2023)241 final).
[89] European Commission, *supra note* 8, 17.
[90] Nils Redeker, *Wielding the Big Gun. What the ECB's New Bond Purchasing Program Means for EU Governance*, in JACQUES DELORS POLICY BRIEF, 2 August 2022.

“Europe will be forged in crises, and will be the sum of the solutions adopted for those crises” Jean Monnet predicted.[91] Indeed, the EU has been in crisis mode for years now, trying to learn from each of them. The COVID-19 crisis, like the Euro-crisis, has been a fast-burning crisis, but the learning process has worked differently this time. The Euro-crisis prompted a process of contingent learning, which took years to pave the way for a new governance architecture. In 2020, the possibility of relying on well-established feedback that had been properly ‘digested’ prompted a process of inferential learning tested at the outset of the pandemic.[92] Unsurprisingly, it took only a few months for the EU institutions to come up with NGEU.

The learning process has been effective in many ways. This time, the EU has promoted a common response that went beyond the traditional dichotomy between Eurozone and non-Eurozone MS, and which has resulted in the use of the recovery plan to redistribute resources across the Union in a solidarity effort.[93] Additionally, the response has been framed under the auspices of EU law without having to resort to questionable intergovernmental agreements.

Moreover, the reaction to the pandemic was able to draw upon and refine existing procedures designed in the aftermath of the Euro-crisis, the most important of which was the ES. Moving away from the exceedingly numerical targets and constraints which characterized the original ES, and from its sanction-oriented scheme, which was almost too rigid to be applied, the RRF has been embedded into the ES to transform it from within through a performance-based mechanism of assessment and rewarding, which uses more “carrots” than “sticks”. What has resulted from the design and first implementation of the RRF is a new method of government for the EU anchored to "spending conditionality" and to performance-based national plans drafted taking into account macro-objectives and priorities set by the EU but then specified by each MS to be fulfilled within a five-year period and according to a schedule agreed between national and EU institutions.

This new method of government has not only been inserted in the framework of the procedures, timeline and conditions defined under the ES, in order to revamp it and to increase the sense of ownership of the related reforms at the national level, but it can also be applied, with adaptations, beyond the RRF. Over the course of 2023, Regulation 2023/435 on RePowerEU has prompted the update of the NRRPs and the addition of a new chapter devoted to fostering EU and domestic autonomy in the field of energy supply while still pursuing, in this case with some adjustments, the

[91] JEAN MONNET, MÉMOIRES (1976).
[92] Claudio Radaelli, *Policy Learning and European Integration*, 60 JCMS 12, 16ff (2022).
[93] Amandine Crespy, Tom Massart & Vivien Schmidt, *supra note* 67.

milestones and targets already set.[94] The same method of government has also inspired, very clearly although more indirectly, the design of the management of the Social Climate Fund.

To some extent the ongoing reform of the SGP itself appears inspired by the RRF model of government. The process of drafting and implementing the new medium-term national fiscal plans mirrors the procedures on the NRRPs in terms of interplay between national executives and EU institutions. Moreover, the new plans will also refer to a medium-term perspective, and will assume a forward-looking and performance-oriented approach focused on debt sustainability. Furthermore, spending conditionality will also be used as leverage to strengthen the enforcement mechanisms of the Pact: macroeconomic conditionality will continue to apply to structural funds and to the RRF, "EU financing could also be suspended when MS have not taken effective action to correct their excessive deficit,"[95] and the TPI will be managed by the ECB considering if and how the CSRs are followed.

Notwithstanding this, there are several uncertainties surrounding the operation of this new method of government and the complex relationship between the RRF and the SGP. Even though the marriage between the RRF and the ES has been celebrated, it is difficult to predict how it is going to work and for how long. Indeed, unless the RRF is turned into a permanent instrument and the EU is eventually endowed with fiscal capacity, it looks like this fixed-term relationship will expire at the end of 2026.

Also, the legal construction of NGEU is anything but straightforward. Although the ultimate aim of NGEU was certainly desirable, "the adoption of the recovery plan was not only a politically bold move but also a case of creative legal engineering".[96] Indeed, without a Treaty change, the solution devised, which revolves around Articles 122 and 175, para 3, TFEU, could be questionable in the long term from a constitutional standpoint.[97]

At the same time, the intertwinement between the RRF and the ES has not contributed to rectifying the democratic shortcomings which emerged after the Euro-crisis. Problems of democratic oversight and accountability persist, and some have argued that technocratic governance,[98] on the one hand, and proceduralism,[99] on the other, have actually been strengthened by the RRF.

[94] European Commission, *supra note* 61, 16 ff.
[95] European Commission, *supra note* 8, 17.
[96] De Witte, *supra note* 36, 636.
[97] Païvi Leino-Sandberg & Peter Lindseth, *How Cohesion Became the EU's Vehicle for Economic Policy. Tracing the Hidden History of Article 175(3) TFEU*, in VERFASSUNGSBLOG, 14 August 2023.
[98] Dani et al., *supra note* 85, 326.
[99] Rittberger, *supra note* 77, 31.

From this perspective, one of greatest constitutional challenges relates to the enforcement of spending conditionality as a specific feature of the new method of government. The RRF is based on multiple conditionality regimes. Now that it is entering the second half of its life, when most reforms have to be carried out at the national level in order to reach the expected milestones, the way conditionality is managed can make the difference, including in terms of democratic perception.

Next to the "carrots", the "sticks" have also gradually become more visible two years after the entry into force of the RRF Regulation. The Commission eventually published the payment suspension methodology applicable to the Fund.[100] Partial (or full) suspension of payments to address implementation shortcomings on the NRRP is indeed an option that the Commission has pursued for the first time with regard to Lithuania and, then, to Romania in 2023. When the relevant milestones and targets remain unmet six months after the suspension, "the respective amount will be permanently suspended and deducted from the budget of the plan".[101]

Ad hoc mechanisms of democratic control and oversight for the implementation of spending conditionality have not been devised. Moreover, the issue of the EU debt repayment from 2028 onward has not yet been seriously addressed, despite being a matter of the utmost importance for the overall sustainability of the NGEU architecture.[102] Thus, from this perspective, the learning process has a long way to go.

[100] European Commission, *supra note* 61 at 10 ff.
[101] Ibid.
[102] Maria Kendrick, *NextGenerationEU: will the Debt be Repaid by EU Own Resources or Member State Taxpayers?* 48(1) ELR 29 (2023).