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# REBUILD

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## Governance by Funding

NGEU, Solidarity and the EU  
Institutional Balance

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# **Governance by funding**

## **NGEU, solidarity and the EU institutional balance**

**Maria Patrin\***

### **ABSTRACT**

The paper examines the NGEU governance and its implementation. It argues that, by combining the features of EU cohesion policy and of EU economic governance, NGEU has shifted the regulatory practices of economic policy towards a new type of “governance by funding”. This governance enhances the solidarity-based approach to EU economic governance, by replacing hard conditionality with financial support in pre-determined areas of investment (earmarking). Thus, the availability of financial resources is used as an incentive for solidarity, compliance and policy alignment with EU priorities. However, by linking NGEU funding with economic governance objectives and procedures in the framework of the European Semester, NGEU exacerbates some structural imbalances of the EU institutional setting. For instance, it ends up significantly strengthening the power of supranational technocratic institutions, in particular of the Commission, over Member States’ economic and fiscal policies.

**KEYWORDS:** NextGenerationEU, EU economic governance, conditionality, solidarity, EU institutional balance.

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## 1. Introduction

Europe's reaction to the Covid-19 crisis was in many ways a disruptive development for European integration. The adoption of the temporary instrument NextGenerationEU (NGEU) made available an unprecedented level of funding, borrowed by the European Commission on the financial markets, *de facto* leading the way to a form of debt mutualisation between EU Member States. Thus, despite being a temporary emergency instrument, NGEU can be seen as a leap forward in terms of integration, which can significantly change the EU integration landscape, setting Europe on a new path towards increasing cooperation, mutualisation and solidarity. At the same time, however, the pandemic measures have affected the EU institutional balance and governance, reshuffling the functions of the EU institutions and endowing them with an increasing scrutiny over Member States policy agendas<sup>2</sup>. Moreover, most of the measures were adopted through soft-law and unconventional regulatory instruments, in particular leveraging funding as a means to reach coordinated policy goals. Although there is no hard conditionality attached to the disbursement of NGEU funds, their spending is embedded within a set of well-defined policy goals, also impinging on the so-called weak competences of the EU (e.g. social policy, health).

This paper focuses on the NGEU governance and implementation, and assesses how the adoption of NGEU has changed regulatory practices in the field of EU economic governance and beyond. It argues that, by combining the features of EU cohesion policy and of EU economic governance, the scheme has shifted the regulatory practices of economic policy towards a new (or rather reinvented) type of “governance by funding”. Such a governance presents two outstanding features. It borrows and enhances the solidaristic approach of cohesion policy and combines it with induced alignment in economic and social policies at the national level. Indeed, building upon an understanding of solidarity that breaks free from hard conditionality, governance by funding leverages earmarking as a tool for policy-making. Earmarking can be understood as a practice which links the provision of funds to the specific purposes for which the fund is established. In other words, it circumscribes the remit within which money can be allocated and spent. Thus, although the scheme does not seem to impose on the Member States obligations other than commitment to pre-determined spending objectives and priorities, because of the size of funding it reveals itself as a powerful instrument for compliance with EU recommendations and for aligning policy objectives at the national level. The paper aims to retrace the shifts in regulatory practices that have led to this new type of governance, the instruments that have enacted them and, eventually, the consequences for the EU governance. Eventually, it aims to uncover how the solidarity-based, cohesion-centred and money-induced NGEU governance has affected the post-covid institutional framework, both in

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<sup>2</sup> Päivi Leino-Sandberg and Matthias Ruffert, ‘Next Generation EU and Its Constitutional Ramifications: A Critical Assessment’ (2022) 59 *Common Market Law Review* 433, 433 – 472.

the vertical relationship between the Union and the Member States and in the horizontal EU inter-institutional balance.

The paper is structured as follows. The analysis starts with a descriptive examination of the legal and institutional architecture of NGEU in section 1, focusing on its general governance and on its implementation through the National Recovery and Resilience Plans (NRRPs). It shows how NGEU has favoured the emergence of a renewed understanding of cohesion policy triggering what the paper calls “governance by funding”. Section 2 examines how this governance impacts on the meaning of solidarity in the Union, shifting the focus from hard conditionality to earmarking. Section 3 looks at the impact on the institutional balance of the Union, considering in particular the large powers gained by the European Commission, which is at the steering wheel of both EU cohesion policy and EU economic governance. The last section summarises the main arguments of the paper and presents some concluding reflections.

## **2. The legal architecture of NGEU**

In reading the flourishing literature on the EU response to the Covid-19 crisis two things strike as significant. First, there is almost unanimous agreement on the fact that the pandemic has represented a turning point in the way European economic governance is conceived, organised and enacted, away from the traditional notion of supranational coordination of national policies<sup>3</sup>. The exceptional scale and features of the Covid-19 emergency pushed Member States towards unprecedented and unexpected solutions, adopted within the EU legal framework and agreed by all Member States. This pattern differs from the classical ways in which the EU managed crises in the past— that were marked by a piecemeal approach and demanded the adoption of several legal instruments, often characterized by a high level of legal and geographical differentiation. The reforms following the euro crisis were for example adopted either as secondary EU law (e.g the two- and six-Pack) or outside the EU legal framework (e.g. Fiscal Compact and the European Stability Mechanism), with some instruments only applying to eurozone members, while others to all (or most) Member States.<sup>4</sup> Yet, at the same time, the response to the Covid 19 crisis was not totally “new”, in the sense that it inherited the legacy of the eurozone crisis, and was inspired by previous attempts of reform. Suffice here to think about the previous reluctance of many Member States to the introduction of Eurobonds as a scheme of debt mutualisation. Under this perspective the EU response to the Covid-19 crisis pushed the boundaries of what was previously envisageable, while keeping in mind the non-negotiables of Member States. As observed by Dermine “Covid-19 made Europe succeed where

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<sup>3</sup> Paul Dermine, *The New Economic Governance of the Eurozone a Rule of Law Analysis* (Cambridge University Press 2022); Bruno De Witte, ‘The European Union’s COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift’ (2021) 58 *Common Market Law Review* 635; Federico Casolari, ‘Europe (2020)’ 1 *Yearbook of International Disaster Law Online*.

<sup>4</sup> T. Beukers, ‘The Eurozone crisis and the legitimacy of differentiated integration’ (EUI Working paper 2013/36).

it had failed for so long”<sup>5</sup>. Furthermore, NGEU is solidly embedded within the pre-existing economic governance framework. Precisely because NGEU is an instrument which was adopted through EU secondary legislation and not outside of it, it is inserted within the existing rules and mechanisms of economic governance.

Second, scholars also concur that, although the solutions proposed were not entirely new, they were made possible by an extraordinary use of “creative legal engineering”<sup>6</sup>. The new approach to European economic governance is the result of a flexible and ingenious interpretation of the Treaties. Such a creative use of primary law has admittedly impacted on the legal and institutional structure of the Union, unveiling new roles and functions for the institutions as well as a new way to conceive and structure the relationship between the Union and the Member States. In brief, the institutional balance of the Union was reshaped, both in its horizontal and vertical component. Opinions of scholars differ as to whether this reshaping was legitimate or not. De Witte and de Gregorio Merino for instance place it within the boundaries of primary law<sup>7</sup>. Conversely, Leino Sandberg and Ruffert maintain that NGEU illegitimately stretches the principle of conferral under EU law and undermines other EU law principles, such as the principle of budgetary balance<sup>8</sup>. This paper does not intend to enter this debate, which has been already largely addressed, but approaches the issue from a slightly different perspective. It looks at the legal instrument of NGEU and examines how it has changed the governance of the Union. In other words, it looks at how the choice of legal tools has determined a new approach to EU governance and what are the consequences for the EU institutional balance. Instead of looking at whether it is legal, the paper considers what are the challenges faced by - and consequences of - the legal solutions adopted. As a preliminary step, this section of the paper describes and analyses the legal architecture of NGEU, focusing on how NGEU has embedded cohesion policy within the current EU economic governance framework. I will first briefly sketch out the general governance of NGEU and I will then consider how it is implemented through the NRRPs at the national level.

### *I. NGEU’s general governance*

NextGenerationEU is the name of the overall temporary mechanism designed to finance Europe’s post Covid-19 recovery. By allowing the Commission to borrow massively on the financial market, it will make available a total of 750bn euros (at 2018 prices) for the economic recovery of the Member States, of which 384 billion in grants and 360 billion in loans, that will

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<sup>5</sup> Dermine (n 3) 88.

<sup>6</sup> De Witte (n 3) 638.

<sup>7</sup> *ibid* 679 ff.; Alberto de Gregorio Merino, ‘The Recovery Plan: Solidarity and the Living Constitution’ [2021] EU Law Live <<https://eulawlive.com/long-read-the-recovery-plan-solidarity-and-the-living-constitution-by-alberto-de-gregorio-merino/>> accessed 11 January 2023.

<sup>8</sup> Leino-Sandberg and Ruffert (n 2).

have to be paid back by the Member States. The novelty of the instrument relies on the fact that repayment of the borrowed funds and the related interests will happen through the Union budget but will be spread over a long time (as for now by 31 December 2058), so as not to weigh on the EU budgets of the next years. In the meantime, EU institutions and the Member States will work towards the introduction of Union's own resources that could be used on the long run to repay the debt. Eventually, Member States have committed to repay it, shall the EU resources not suffice. In a nutshell, NGEU has for the first time established a form of debt mutualisation between European Union Member States, although for the moment only running a temporary common debt with no common resources<sup>9</sup>.

As noted by several commentators, NGEU builds upon a complex and articulated legal framework, blending in acts adopted using different legal bases and via different decision-making procedures<sup>10</sup>. The two main legal instruments are the *Council Regulation 2020/2094 establishing a European Union Recovery Instrument* (EURI Regulation) and the *Regulation 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility* (RRF Regulation)<sup>11</sup>. The EURI is the legal foundation of NGEU. It sets the overall amount of funding (EUR 750 000 million in 2018 prices), it describes the type of measures that can be financed and determines where the resources will come from (an amendment of the Own Resources Decision allowing for borrowing on the capital markets – as will be explained further below). EURI's legal basis is Art. 122 TFEU of the chapter on economic policy, an emergency provision that allows to provide financial assistance to Member States under exceptional circumstances, such as natural disasters or “exceptional occurrences beyond Member States' control, or else in an economic situation where severe difficulties arise (such as in the field of energy). Art. 122(1) states that the Council may take appropriate measures “in a spirit of solidarity”, hinting to the fact that the decision to provide financial assistance is an act of solidarity between Member States. The exceptional nature of the circumstances undoubtedly fits well with the Covid-19 crisis and defines the temporary nature of NGEU, whose financial envelope is set to be fully exploited by December 2024.

With the words of the Commission's explanatory memorandum to the EURI Regulation proposal: “Article 122 of the Treaty on the Functioning of the European Union foresees the possibility of measures, decided in a spirit of solidarity between Member States, appropriate to the economic situation. The present situation is unprecedented. It is characterized by severe

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<sup>9</sup> De Witte (n 3) 667.

<sup>10</sup> For a more detailed and comprehensive analysis of the legal architecture see the analyses of: De Witte (n 3); Federico Fabbrini, ‘Next Generation EU: Legal Structure and Constitutional Consequences’ (2022) 3 REBUILD Centre Working Paper <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4121330](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4121330)> accessed 11 January 2023.

<sup>11</sup> 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 2020 (OJ L 4331); Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility 2021 (OJ L 057).

difficulties caused by exceptional occurrences beyond the Member States' control. Therefore, it is appropriate to adopt under Article 122 TFEU exceptional temporary measures to support recovery and resilience across the Union"<sup>12</sup>.

If Art. 122 TFEU provides for the possibility to adopt a temporary instrument of financial support, the exceptional amount of assistance cannot be carried out through existing EU programmes only and requires an extra borrowing of money. For this reason, the EURI Regulation also links the provision of funding to an amendment of the Own Resource Decision (ORD), that authorises the Union, and more specifically the Commission, to borrow "temporarily and exceptionally an amount of EUR 750 billion in 2018 prices, to increase the own resources ceiling to accommodate the liabilities and contingent liabilities for loans to the Member States"<sup>13</sup>. Finally, as the ORD is connected to the Multiannual Financial Framework (MFF), the total amount of funding that the EU could leverage also encompassed the spending programmes contained in the regular MFF for the period 2021-2027. On top of that the ORD and the EURI Regulation provided for the special expenditures borrowed on the financial market.

This extra funding thus made available through the EURI Regulation is regulated by the second ad hoc instrument adopted under the NGEU, the actual Recovery and Resilience Facility (RRF), which takes the form of a Regulation of the European Parliament and the Council adopted under the ordinary legislative procedure. The RRF Regulation sets out the objectives that must govern the disbursement of funds, the rules for the allocation of financing, including the policy areas in which they must be spent, as well as the conditions under which funding is provided. Finally, the RRF lays down the multi-level governance of the mechanism through National Recovery and Resilience Plans (NRRPs - see next section). The legal basis for the adoption of the RRF is Art. 175 TFEU, pertaining to the chapter on economic, social and territorial cohesion. In particular, the possibility for the adoption of an exceptional instrument such as the RRF is contained in paragraph 3 of Art. 175 TFEU, which reads:

"If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions".

This provision has been defined as the "flexibility clause" of cohesion policy, allowing broader measures to be adopted when necessary under the heading of "cohesion" beyond the ones specifically contained in the Treaty's dedicated chapter<sup>14</sup>. In other words, the provision allows for an extension of cohesion funds to unforeseen areas and situations, without putting

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<sup>12</sup> European Commission's proposal for a Council Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 pandemic 2020 2–3.

<sup>13</sup> *ibid* 1.

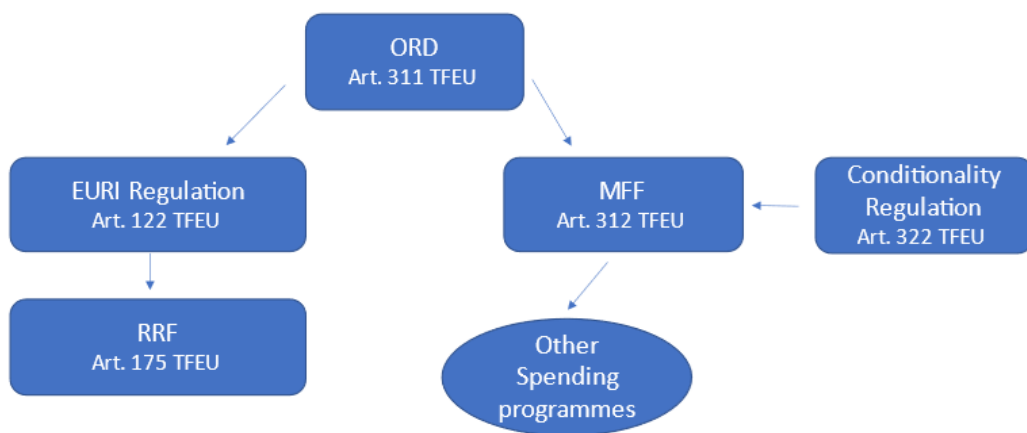
<sup>14</sup> De Witte (n 3) 655–656.



many constrains on how the meaning of cohesion policy should be defined. Indeed, the RRF puts forward a broad understanding of cohesion policy. The thematic areas in which projects should be financed through the Facility include a wide range of policies, under six pillars listed in Art. 3 RRF: (a) green transition; (b) digital transformation; (c) smart, sustainable and inclusive growth, including economic cohesion, jobs, productivity, competitiveness, research, development and innovation, and a well-functioning internal market with strong SMEs; (d) social and territorial cohesion; (e) health, and economic, social and institutional resilience, with the aim of, inter alia, increasing crisis preparedness and crisis response capacity; and (f) policies for the next generation, children and the youth, such as education and skills. This approach to cohesion policy departs from the traditional use of structural and cohesion funds, that are normally linked to a specific purpose or field of application.

Eventually, both the EURI and the RRF Regulations are based on flexibility clauses, creatively combined together: the first, in the field of economic governance, is exceptional and temporary in nature; the second, in the field of cohesion, concerns “other circumstances” broadly defined, independently from their exceptional or temporary character.

Figure 1: Legal framework of NGEU



Source: made by the author

## II. Multi-level governance: the NRRPs

The RRF regulation devotes Chapter III to explain how the money will be allocated to the Member States through National Recovery and Resilience Plans (NRRPs). According to art. 17, “those plans shall set out the reform and investment agenda of the Member State concerned.” The RRF lays out a set of 11 criteria that shall inspire the NRRPs and against which the

Commission will assess them. Some of the criteria target the thematic coherence of the Plans, such as their contributions to green transition, digital transformation and job creation. Others include more generic requirements such as the overall coherence and effectiveness of the Plans. The second criterion requires Member States to explain “how the recovery and resilience plan contributes to effectively address all or a significant subset of challenges identified in the relevant country-specific recommendations” (RRF Art 18 (4b)). Thus, it establishes a link between the projects financed under the NRRPs and the European Semester. As we have seen, the range of policies that can be funded under the scheme is fairly large, however there seems to be positive constraints attached to it, such as that it should contribute to country-specific recommendations (CSRs) developed in the framework of the European Semester or that it should follow the principle of “do no significant harm” (Art. 5 RRF)<sup>15</sup>.

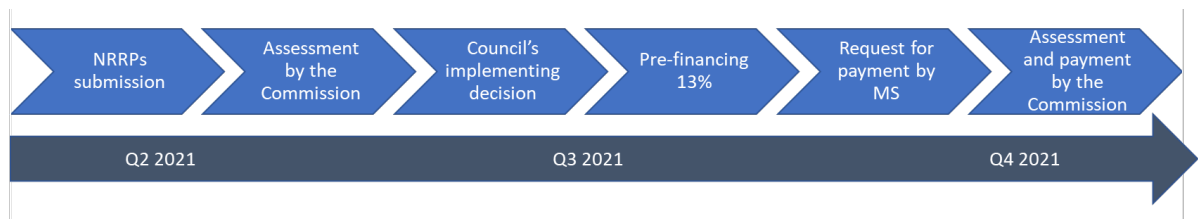
Finally, Chapter III of the RRF briefly defines the governance of the NRRPs. The process can be divided in three different stages. The first one concerned the Member State’s drafting and the Commission’s assessment of the Plan, which was conducted in close cooperation. The Commission dealt bilaterally with the different Member States to ensure compliance with the criteria set out in the RRF. It developed guidelines indicating the main elements that must be contained in the plans<sup>16</sup>. By 30 April 2022 Member States had to submit their Plans in a single integrated document together with the National Reform Programme, thus linking the submission to the European Semester process. The Plans were assessed by the Commission, and, following a positive assessment, formally endorsed by the Council via an implementing decision releasing the funding. Thus, the second phase of the procedure required a legal act adopted by the Council. Following the Council’s decision, the Commission signed with each country an Operational Agreement, setting out the modalities and timeline for the implementation of the objectives, targets and milestones of the Plan. Yet, and this was the third phase, only an advancement of payment corresponding to 13% of the expected total funding was paid to the Member States after this agreement. The rest of the sums will be paid in biannual instalments following a request for payment by the Member States and on the conditions that they have fulfilled the relevant milestones and targets (Art. 24 RRF). This performance-based approach aims to ensure that Member States keep on complying with the original Plan and allows for ongoing monitoring of the use of funds. In other words, if Member States have either made an improper use of the funds or have unjustifiably failed to achieve the agreed objectives, financing can be suspended.

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<sup>15</sup> For instance NRRPs could not support polluting industries under the heading of jobs and productivity.

<sup>16</sup> Commission Staff Working Document: Guidance to Member States’ Recovery and Resilience Plans. 2021 [SWD(2021) 12 final].

Figure 2: Timeline of the adoption of the NRRPs



Source: made by the author on the basis of the RRF

\*NB: the timeline is indicative and dependent on the actual date of submission of the NRRP

At this stage, All NRRPs have been submitted and approved. It was shown that the first phase of the process was shaped by a cooperative approach in the relationship between the Commission and the Member States. Bilateral meetings and regular exchange of information allowed for a constant dialogue during the drafting phase<sup>17</sup>.

The assessment and adoption of the NRRPs also required adaptation of the European Semester, in whose process they were embedded. The changes primarily concerned the 2021 cycle, where the NRRPs were merged with the national reform programs. The Commission did not issue country reports that year and CSRs only concerned budgetary matters so that the focus was on the assessment of the NRRPs<sup>18</sup>. However, the impact on the European Semester goes beyond 2021 and will last at least for the duration of the RRF. In 2022 the broad economic and employment policy coordination has resumed under the European Semester, yet the Commission has adapted it “to take into account overlaps and ensure that joint efforts can focus on the delivery of high-quality and ambitious recovery and resilience plans”<sup>19</sup>. There will be streamlined country reports, also considering the implementation of the NRRPs. In addition, reporting obligations will be simplified to ensure synergies between the two instruments. Finally, the ongoing dialogue with the Member States on the NRRPs will continue during the implementation phase and will be inserted in the overall dialogue of the European Semester. Figure 2 shows how the obligations under the NRRPs process have been integrated within the European Semester<sup>20</sup>.

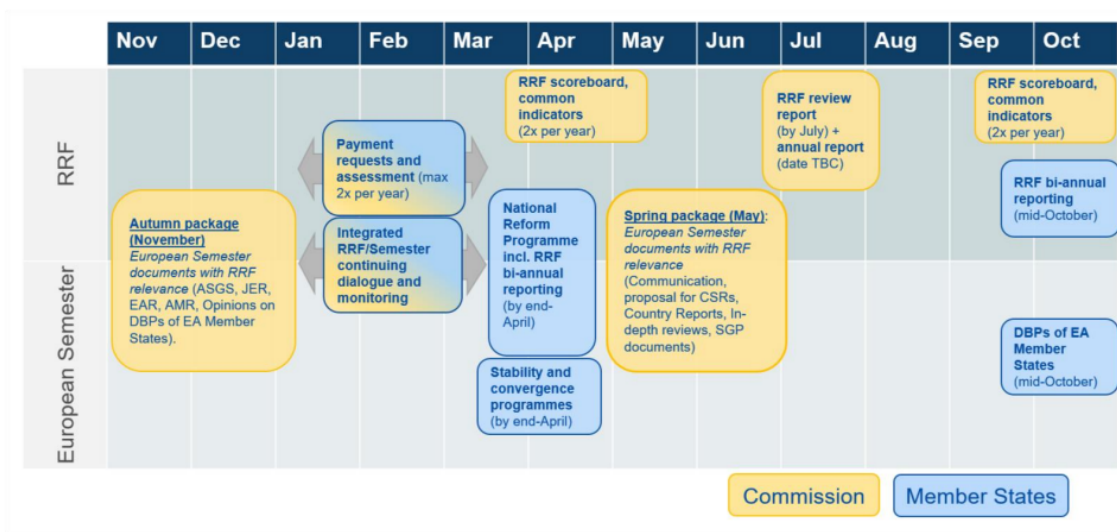
<sup>17</sup> For a complete assessment see European Court of Auditors, ‘The Commission’s Assessment of National Recovery and Resilience Plans’ (2022) Special Report 21/2022.

<sup>18</sup> Dermine (n 3) 72.

<sup>19</sup> European Commission, ‘Annual Sustainable Growth Survey 2023’ (2022) COM(2022) 780 final 14.

<sup>20</sup> For detailed description of the European Semester see Dermine (n 3) 66 ff.

Figure 3: The European Semester and Recovery and Resilience Facility integrated process



Legend: ASGS: Annual Sustainable Growth Survey, EAR: Euro Area Recommendation, JER: Joint Employment Report, AMR: Alert Mechanism Report, DBP: Draft Budgetary Plans, EA: euro area, RRF: Recovery and Resilience Facility, SGP: Stability and Growth Pact.

Source: European Commission, Annual Sustainable Growth Survey 2023

Internally, the Commission has further adjusted its structures in order to cope with the NRRPs process and workload. Responsible for the steering and management of the process is a newly established task force within the Commission’s Secretariat General, the Recovery and Resilience Task Force (RECOVER). The RECOVER task force works in close cooperation with the DG for Economic and Financial Affairs (ECFIN), as it is responsible for the RRF’s implementation but also for the coordination with the European Semester in which ECFIN plays a central role. The work of RECOVER is overseen by a high-level steering board chaired by the President of the Commission. The college of Commissioners is eventually responsible for the adoption of the final assessment and of the proposal for the Council Implementing Decision. Downstream the way the Commission has organized communication with the Member States uses and adapts existing structures within the European Semester. Horizontally “country teams” gather together all Commission DGs involved in the process; vertically the relationships with Member States are entrusted to negotiating teams, composed of officials from RECOVER and DG ECFIN as well as policy experts coming from the country teams<sup>21</sup>.

It is interesting to note that, although the RRF’s legal basis is Art. 175(3) of cohesion policy, the multi-level governance of the Facility is solidly integrated into the economic governance framework of the European Semester. Even when it comes to its internal organization, the Commission seems to deal with it rather in an economic governance perspective. The integrated approach of the NRRPs is inherited from the European Semester cycle and defies the rationale of

<sup>21</sup> European Court of Auditors (n 17).

cohesion funds, which are generally project-based and financed through calls for proposals related to each funding programme. The relationship between economic governance and cohesion policy will be the focus of the next section of the paper.

### **3. Governing by funding: unconditional solidarity at little cost**

Despite the structural integration into European economic governance, the RRF belongs to the realm of cohesion policy. The choice of a cohesion policy legal basis is a clever move of the EU legislators, as it reflects the funding nature of NGEU. Effectively, structural funds are the most similar instruments to NGEU that the EU has at its disposal. Cohesion policy is originally a solidarity tool between Member States, engendering redistributive effects aimed at the convergence of economic conditions on the territory of the Union. This convergence is fostered vehiculating investments into territorial areas through projects-financing. With the due differences - among which the homogenous territorial scope of the RRF and the exceptional amount of funding stand out - NGEU reflects this model. Under this perspective financial assistance is a form of cohesion or, the other way around, cohesion policy is a type of financial assistance.

As noted by Leino Sandberg and Rueffert, the choice of the RRF legal basis also allows the funds to be disbursed without any hard conditionality attached, which would not have been the case under Art. 122 TFEU<sup>22</sup> on financial assistance. According to the Court's interpretation in the Pringle case, Art. 122 TFEU must always respect the objectives of sound budgetary policy and financial stability enshrined in Art. 125 TFEU and as such can be used as a means of financial assistance only "subject to strict conditions."<sup>23</sup> Instead, the conditionality attached to NGEU is much weaker. The choice of a cohesion policy legal basis for the redistributive facility (RRF) allows for a degree of flexibility that would not have been possible under the Treaty rules on economic governance.

NGEU's soft conditionality was not taken for granted. Conditionality was one of the most controversial and divisive points during NGEU negotiations. The so called "frugal" Member States were keen on attaching conditions to the disbursement of funding, very much along the lines of the European Stability Mechanism (ESM), the institution established after the euro-crisis under international law, that provides financial assistance to countries on the condition that they adjust their economic policies. Since the euro-crisis conditionality has however acquired a strong stigma, particularly following the harsh conditionality imposed by the Troika in Greece. For southern countries it equals a loss in the sovereign right to decide on internal economic and social policies and is met with strong opposition. In the eyes of those countries, the principle of solidarity requires Member States to provide financial support in a spirit of mutual trust, and

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<sup>22</sup> Leino-Sandberg and Ruffert (n 2) 444.

<sup>23</sup> *Thomas Pringle v Government of Ireland and Others* [2012] Court of Justice Case C-370/12, ECLI:EU:C:2012:756 paras. 135-137.

without intruding conditions being imposed from above. The pandemic being an unexpected and symmetric shock that hit all Member States, the rhetoric of solidarity held strong convincing power. Eventually, NGEU only provides for two tiers of conditions.

The first form of conditionality is well known and is related to the rule of law. It applies to the RRF as to any other spending programme in the framework of the Multiannual Financial Framework and proved quite disruptive during the legislative negotiations on the RRF, when Hungary and Poland threatened to reject the whole NGEU package if a milder approach was not adopted<sup>24</sup>. The Regulation 2020/2092 on a general regime of conditionality eventually survived, although with some vague formulations accommodating the requests of the two countries. It targets the protection of the Union budget as a whole, be it under the normal MFF funding or under the exceptional RRF. The Regulation provides for the possibility to suspend funding in cases ‘that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way’<sup>25</sup>.

The second form is a light macroeconomic conditionality, set out in Art 10 of the RRF, containing measures linking the Facility to sound economic governance. In essence, these provisions allow for the suspension of funding if a Member State put under an excessive deficit procedure, “has not taken effective action to correct its excessive deficit”. They admittedly aimed to reassure “frugal member states of Northern Europe that NGEU funds would be used wisely and prudently”<sup>26</sup>. To apply, however, a MS must already be put under an excessive deficit procedure, and furthermore do not take any action to rectify the situation, a case that has never occurred so far.

The RRF, however, contains another form of economic conditionality which links the process for the disbursement of funds to the country-specific recommendations provided in the framework of the European Semester. We find provisions in that regard in chapter 3 of the RRF laying out the rules for the NRRPs. Art. 17.3 states that “the recovery and resilience plans shall be consistent with the relevant country-specific challenges and priorities identified in the context of the European Semester, as well as those identified in the most recent Council recommendation on the economic policy of the euro area for Member States whose currency is the euro”. And Art. 19.3 establishes that the Commission shall assess “(b) whether the recovery and resilience plan is expected to contribute to effectively addressing all or a significant subset of challenges identified in the relevant country-specific recommendations (...)”. These provisions together constitute the bridge between the governance of the RRF and the European Semester. As was already discussed in section 1.b, the projects financed by NGEU and put

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<sup>24</sup> De Witte (n 3) 643.

<sup>25</sup> Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget 2020 (OJ L), Art. 4.

<sup>26</sup> Fabbrini (n 10) 8.

forward by the Member States under their NRRPs must take account of the objectives of the European Semester and of the specific recommendations addressed to them in that framework. As noted by De Witte (p. 676), “This reference to the European Semester and to the fiscal policy coordination in the EMU context is very cautiously formulated, and one would not expect the Commission to try and impose a strict compliance with those country-specific recommendations when assessing the national plans.<sup>27</sup>” Indeed, the report of the European Court of Auditors has found several flaws in the Commission’s assessment of the Plans, highlighting that in several cases the CSRs were not effectively addressed<sup>28</sup>. The importance of these provisions, however, lie with the fact that they embed the process for the approval of the NRRPs within the European Semester, aligning the two processes not only in terms of objectives but also as far as the procedures and timelines are concerned. As it will be shown below, although the conditionality related to the European Semester is soft, it turns out to be a significant instrument in the hands of the Commission, who steers the Semester process, in order to control and align policy objectives, priorities and results.

Overall, the conditionality attached to NGEU is weaker when compared not only to past schemes of financial assistance (such as for instance the financing provided by the European Stability Mechanism, that are linked to a specific reform agenda), but also to traditional structural funds. Vita has argued that spending conditionality has become a stable feature of EU budgetary programmes: “massive packages of spending conditionality are linked to EU agricultural, cohesion, home affairs and fisheries funds”<sup>29</sup>. In this respect NGEU funding seems to depart from the normal conditions under which cohesion policy is implemented.

Different from conditionality is earmarking. Earmarking is a way to link the provision of funds to the specific purposes for which the fund is established. It defines the areas in which money can be allocated to specific projects. Again, this is a normal feature of structural funds, that must be used to finance projects in specific fields, be they research, infrastructures, or energy. NGEU is imbued with the logic of earmarking to a much more extent than traditional cohesion funds. The practice is, as it will be shown, qualitatively and not only quantitatively different. Although there are no hard conditions to be fulfilled by the Member States in order to access the financing, the funds must be used for projects pertaining to well-defined sectors and areas, defined by the Commission (and approved by the co-legislators) on the basis of its policy agenda. Green transition, digital transformation, smart, sustainable and inclusive growth, to name just the first three of the RRF priority areas, are certainly broad policy objectives that are shared by the majority of Member States. Yet, they also reflect the headlines developed by Von der Leyen at the beginning of her mandate: A European Green Deal; A Europe fit for the digital

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<sup>27</sup> De Witte (n 3) 676.

<sup>28</sup> European Court of Auditors (n 17) 20 ff. In particular see the examples provided in Table 2, P. 23. .

<sup>29</sup> Viorica Vita, ‘Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality’ (2017) 19 Cambridge Yearbook of European Legal Studies 121.

age, and an economy that works for people<sup>30</sup>. In the absence of hard conditionality, these policy priorities still act as benchmarks for the disbursement of money. Funding is vehiculated towards initiatives in these fields and a control is operated by the Commission on their use.

Thus, NGEU seems to replace the traditional hard conditionality that applied under cohesion policy with softer, yet effective, conditions under the heading of earmarking. In this sense NGEU not only inherits the tools and legal framework of cohesion policy but twists it considerably. As shown in section 1, NGEU enlarges the remit of cohesion policy by inserting the whole RRF under Art. 175 TFEU. Essentially, all reforms that the Member States will be implementing in the next years under their NRRPs are to be considered cohesion policy in the broadest sense<sup>31</sup>. Furthermore, since they are connected to the CSRs, the thematic focus of NGEU creates a strong incentive to integrate economic governance recommendations into policies aimed at cohesion, although originally the two were not necessarily connected. Yet what is interesting in this shift is that the rationale for the two kinds of policies is different. Economic governance emerged mainly as the necessity to coordinate and “control” national economic and fiscal policies. For a long time, however, it was synonymous of fiscal responsibility, its primary objective through the Stability and Growth Pact being to ensure that fiscal policies in the Member States were compliant with the EU parameters for deficit and public debt<sup>32</sup>. Conversely, cohesion policy’s original purpose is convergence and fostering economic development in the disadvantaged territories of the Union, including through redistributive instruments. As such, cohesion policy is a solidarity instrument. By placing economic policies in the framework of cohesion policies, NGEU thus also operates a significant move towards a solidaristic approach to these policies.

Significantly, NGEU goes even beyond the solidarity-based rationale of cohesion policy, by freeing it from hard conditionality. For instance, Vita has observed that the original pure sense of solidarity was getting lost in cohesion funds, in favour of a conditional solidarity, “contingent upon Member States’ continuous performance under the treaties”<sup>33</sup>. This led to a new “governance by conditionality”, whereby conditionality was at the core of the relationship between the EU and the Member States. To be sure, NGEU is no governance by conditionality, as the conditions attached to the financing are limited. It can more aptly be described as “governance by funding”, because the amount of funding provided and the way it is embedded

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<sup>30</sup> Ursula Von der Leyen, ‘A Union That Strives for More. My Agenda for Europe. Political Guidelines for the next European Commission 2019-2024’ <[https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf)> accessed 7 November 2019.

<sup>31</sup> See also De Witte (n 3) 658, who observes ‘a move away from the domain of cohesion in the strict sense (namely, the sort of measures funded by the structural funds) towards a much broader domain of macro-economic policy measures aiming at improving the overall balance of economic development within the territory of the European Union’.

<sup>32</sup> For more details on fiscal policies and the Stability and Growth Pact see Pierre Schlosser, *Europe’s New Fiscal Union* (Palgrave Macmillan 2019).

<sup>33</sup> Vita (n 29) 119.



within the overarching economic governance of the Union creates a new type of governance, where EU funding – and no longer conditionality - becomes the core of the relationship between the EU and the Member States. This type of governance marks a shift back towards a “pure” conception of solidarity, intended as non-conditional mutual support. Yet, it also slightly changes the meaning of this solidarity. In fact, it is probably misleading to call it “pure” solidarity, as it is a solidarity backed by the availability of a massive amount of funding. In other words, the incentive for solidarity comes from the fact that all Member States receive a huge amount of money under NGEU, without, for now, any obligation to pay it back. As observed by De Witte, “The adoption of the rhetoric of solidarity between the Member States was naturally prompted by the pandemic, but was also made relatively painless by the fact that there are no costs involved in the plan for the frugal States, at least not for the time being.”<sup>34</sup> The redistributive effects of NGEU are not matched by the redistribution of debt, in the sense that there is a common EU debt which however does not yet have negative redistributive consequences on national budgets. Effectively, as for now, German taxpayers are not paying for Italy’s recovery and this makes the acceptance of the whole mechanism way easier, as solidarity seems to come at little cost.

This new conception of solidarity is at the roots of the European Council’s compromise of July 2020 that came up with a double-edged legal and financial construction, the debt management side being regulated by a responsibility-driven legal basis such as Art. 122 TFEU, and the spending allocation happening under a solidarity-based legal basis such as Art. 175 TFEU. This is possibly one of the most creative and clever expedients of NGEU. It makes economic solidarity possible within the current Treaty framework, while at the same time postponing the consequences of this redistribution on national budgets indefinitely. Ideologically, however, the consequences of the debt mutualisation are long-lasting. In effect, the EU budget is being used for borrowing common money on the financial markets, even if only temporarily. The taboo of a common debt has been shattered<sup>35</sup>. The question is however to know whether this shift towards a cohesion-centred economic governance will last beyond NGEU. More importantly, we will have to see whether this solidarity-induced approach will translate in a *de-facto* more solidaristic idea of Europe, after several decades of set-back. Will this common debt unite us or divide us, once we will have to decide how to repay it back? And can this approach also spill over to other sectors, such as migration?

Only time will provide the answer to these questions. In the meantime, however, we can already start wondering how these changes have affected the EU institutional and legal system. Is it too good to be true? The next section examines the impact of the governance by funding on

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<sup>34</sup> De Witte (n 3) 678.

<sup>35</sup> Jean Pisani-Ferry, ‘La Postérité Du Plan de Relance Européen Sera Une Affaire d’exécution’ *Le Monde* (20 June 2020) <[https://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](https://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)>.

the Union's institutional balance and EU governance.

#### **4. The power of money: Governing by funding and the EU institutional balance**

One of the benefits of the governance by funding is the fact that it creates strong incentives for compliance. Member States are generally keener on following recommendations and advice if this will lead to financing. They will comply more easily with timelines and procedures, they will generally adopt a positive stance towards EU institutions and more easily align with their priorities. Achieving compliance under governance by funding is much easier and painless than, for instance, achieving it through hard conditionality as was the case for financial assistance programmes under the troika. Obviously, there must be procedures in place to ensure that funds are used wisely. But, generally, governing by funding incentivises a more positive attitude towards the donor. To mention but one example, the originally Eurosceptic right-wing party Fratelli d'Italia, that won political elections in Italy in 2022, campaigned on a much more pro-European agenda if compared with the political programme put forward by the same party for the European elections in 2019. It is no coincidence that this happened after the adoption of NGEU and the approval of the Italian NRRPs. At stake were indeed over 190 billion euros committed from the EU to Italy by the Recovery Plan. In other words, NGEU has produced a change of paradigm in how Member States see and interact with the Union, namely through the prism of money. This change is affecting in turn the vertical relationship between the Union and the Member States.

Several scholars have convincingly argued that the adoption of NGEU has upset quite substantially the balance of powers between the Union and the Member States. For some of them the choice of legal bases is not even in line with the principle of conferral, in that cohesion policy is diverted for other purposes and a crisis instrument is used to adopt a fully-fledged economic and industrial strategy going well beyond crisis-related measures<sup>36</sup>. Others point to the overwhelming role of the European Council, which encroached on the powers of the EU legislators<sup>37</sup>. This paper takes this lively scholarly debate as a point of departure, in that it agrees with the view that a shift in the EU institutional balance has in fact occurred. Yet, it aims to uncover how the solidarity-based, cohesion-centred and money-induced relationship described above has affected the post-covid institutional framework, both in the vertical relationship between the Union and the Member States and in the horizontal EU inter-institutional balance.

As it was shown, NGEU displays a new type of governance by funding predominantly based on earmarking. Conditionality, conversely, is rather soft and limited to alignment with the recommendations of the European Semester. However, given the strong incentive to follow

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<sup>36</sup> Leino-Sandberg and Ruffert (n 2).

<sup>37</sup> Julio Baquero Cruz, 'Unstable Structures: The Institutional Balance and the European Court of Justice'.

Union's recommendations and priorities when linked to the disbursement of funding, these rather soft conditions can translate into a powerful instrument of compliance. Under this perspective, earmarking represents a sort of conditionality from the backdoor. As observed by Dermine, "in a nutshell, with earmarking, the one who provides the money (the EU) determines in advance what the recipients (national authorities) might use it for, thus enabling the former to critically influence and condition policymaking by the latter"<sup>38</sup>. The way the NRRPs governance is structured gives the Commission ample margin of manoeuvre to push forward its agenda and to align policy priorities at the national level. For instance, governments of different political spectrum will have to abide by priorities set at the EU level, be they as broad as green and digital transition, and will have little room to direct funding towards their own policy priorities. Obviously, they will be (almost) free to implement their own agenda through national budgetary choices<sup>39</sup>. But, considering the size of resources deployed by NGEU, investments in the earmarked sectors are likely to make a difference and thus steer the economic policy choices of governments in that direction.

Furthermore, earmarking must be read in conjunction with the macroeconomic conditionality of the European Semester. What is relevant is not only the fact that NRRPs must be aligned with the CSRs, as shown in section 1.b, but also that the whole process for the development and control of the NRRPs is embedded within the European Semester. As a result, pre-existing idiosyncrasies in the institutional balance of EU economic governance are accentuated.

First, the European Semester is no longer about economic policy coordination. This shift was already observed by several commentators in the aftermath of the Eurozone crisis and has become even more prominent with the adoption of NGEU<sup>40</sup>. Tellingly, even the European Commission acknowledged the change. In the Annual Sustainable Growth Survey 2022, it stated that "economic policy coordination has gradually shifted to laying the foundations for a transformational and inclusive recovery and stronger resilience"<sup>41</sup>. Such a move from policy coordination to recovery and resilience, however, modifies the nature of the process and makes the whole European governance framework a much more intrusive process, although it is framed as soft-law backed up by money. Much has been written about the hard features of many allegedly soft law provisions<sup>42</sup>. Just to take one example, CSRs are not binding, yet they are a reference for the Commission's assessment of whether a Member State should be put under an excessive deficit procedure, which in turn can lead to sanctions. As it was shown in this paper,

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<sup>38</sup> Dermine (n 3) 92–93.

<sup>39</sup> In the European Semester national budgets still undergo scrutiny by the European Commission.

<sup>40</sup> Dermine (n 3) 114 ff.

<sup>41</sup> European Commission, 'Annual Sustainable Growth Survey 2022' (2021) COM(2021) 740 final 1.

<sup>42</sup> See for instance Mark Dawson, 'New Governance and the Displacement of Social Europe: The Case of the European Semester' (2018) 14 *European Constitutional Law Review*; and Mariolina Eliantonio and Oana Ștefan, 'The Elusive Legitimacy of EU Soft Law: An Analysis of Consultation and Participation in the Process of Adopting COVID-19 Soft Law in the EU' (2021) 12 *European Journal of Risk Regulation* 159.

CSRs are also a criterion for the Commission's assessment of NRRPs. If this does not amount to a negative sanction, it certainly strengthens the teeth of the CSRs. Compliance is greatly incentivized if Member States have much to lose (and by much I mean a lot of money) from non-compliance. The other way around, the long-term investment that shall build the recovery and resilience of Europe will be based, among others, upon the Commission's (and Council's) assessment of the economic and fiscal performances of the Member States. As aptly observed by Dermine "If the EU remains most often unable to legally impose economic and fiscal transformations at the national level, today it is in a much better position to forcefully induce them, by exercising various types of political, financial and administrative pressure"<sup>43</sup>.

Second, the convergence between NGEU and the European Semester strengthens the role of the Commission, who is the central institutional actor in the management of both NGEU and the European Semester. In the European Semester the Commission is responsible for reinforced surveillance of Member States' macroeconomic and budgetary policy, it conducts the full monitoring and assessment process of national budgets and drafts the CSRs, that are eventually adopted by the Council. As for NGEU, the Commission not only borrows and lends money to Member States but, as it was described in section 1, it manages the allocation of funds and monitors their use and implementation<sup>44</sup>. Ultimately, NGEU has widened the tasks of the Commission, as shown by the changes to its internal structure and the creation of the RECOVER taskforce. In both cases, despite not being the ultimate formal decision-maker (it is the Council), the Commission enjoys wide political discretion in determining the content of the recommendations or the assessment of the Plans. This provides the Commission with an unprecedented capacity to shape and control national economic and social policy. Already after the euro-crisis, it was argued that the Union had become a "redistributing political system" whereby the Commission is the "first place of account for the [national] budgetary proposals"<sup>45</sup>. This trend was only strengthened with NGEU and its huge redistributive capacity. Essentially, the RRF gives the Commission a powerful tool to bring forward its policy agenda and foster implementation in the Member States. It also offers its CSRs a more positive outlook, because they are now backed not only by the negative threat of sanctions (such as with the excessive deficit procedure) but also by the positive perspective of funding.

Elsewhere I have argued that, after the eurozone, the Commission has come to play a new function in economic governance, which can hardly be subsumed under any of the traditional ones – be it legislative, executive or guardian of the Treaties, but use them in novel

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<sup>43</sup> Dermine (n 3) 116.

<sup>44</sup> *ibid* 74.

<sup>45</sup> Damian Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *European Law Journal* 667, 667–668.

combinations<sup>46</sup>. Following the Covid-19 crisis, this new function has become even more diversified since it is merged with the Commission's powerful role in the field of cohesion policy. Essentially the conflagration of economic governance and cohesion policy has put the Commission centre-scene and has considerably strengthened its executive power. However, this shift in power did not result from an intentional attribution of competences by political leaders at the height of the crisis. It was rather the consequence of the neutral and impartial role of the Commission in the management of both cohesion policy and economic governance. Indeed, from a practical perspective it makes sense that the institution who is in charge of economic policy coordination also deals with the NGEU, so as to exploit synergies and avoid bureaucratic overload. It also makes sense that the institution who is responsible for cohesion funds is also allocating and monitoring NGEU financing. In short, who else if not the Commission as the Guardian of the Treaties can fulfil such tasks?

Because of its neutral and independent nature, the Commission is thus endowed tasks that entail a great amount of political discretion and allow it to significantly steer the policy agenda of the Member States, even in fields which go beyond the competences of the Union. Usually, however, redistributive choices must be made by national politicians because they are accountable to their electorate. At the European level, to the contrary, the logic seems to be inverted: coordination and surveillance of national economic and social policies must not be a political matter but mainly be based on the technical assessment and the recommendations of an impartial body (although of course they must also be endorsed and adopted by the Council). In practice, however, these assessments and recommendations cannot be apolitical, and the Commission would therefore need a solid democratic mandate to intervene in these fields<sup>47</sup>.

To conclude, the new governance by funding spurred by NGEU marks the move towards a solidarity-based approach to EU economic governance, which is however steered top-down by the supranational actor *per excellence*, the Commission. Effectively, the link between a cohesion-based instrument and the European Semester greatly empowers the Commission, that gains "power" in exchange for "money". In other words, the acceptance of supranational intrusion into Member States' competences is favoured by the fact that this happens for the sake of the Union's recovery and resilience. This rhetoric is however dangerous as it confines the EU to a funding provider. As powerful as it may be, it lacks the constitutional backing of a governance system with democratic credentials. The picture becomes even gloomier if one adds to that the limited involvement of the European Parliament in the adoption and implementation of NGEU. The EP could only "fine-tune" an agreed deal in the part for which it was a colegislator (the RRF and the MFF) and is only involved in the NGEU governance through a

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<sup>46</sup> Maria Patrin, 'The European Commission Between Institutional Unity and Functional Diversification: The Case of Economic Governance' (2021) 2021 6 European Papers - A Journal on Law and Integration 269, 10.

<sup>47</sup> I have elaborated on similar reflections prior to the Covid-19 crisis in Patrin (n 46).

Recovery and resilience dialogue (Art 26 RRF)<sup>48</sup>.

Finally, this supranational empowerment has happened residually and not as a conscious decision. It was not as such the intention of the European Council to empower supranational actors, yet it was the unexpected results of the deal struck by Member States in June 2020. It was a form of “covert integration”, taking place “outside the formal democratic decision-making arenas”<sup>49</sup>. In fact there was a sort of boomerang effect in the European Council’s decision on NGEU. Precisely when it seemed that Member States in the European Council were fully dominating the integration process by agreeing on a breakthrough deal and by defining all the conditions that should govern it, the balance seems to invert itself at the implementation level. There, it is the supranational Commission who gets to substantially advance its policy agenda and priorities, using NGEU as an instrument for Member States’ compliance. This covert way to accrue supranational functions and power, however, can on the long run exacerbate issues related to the democratic legitimacy of the Union and requires careful consideration as to the role that the Commission should play in the institutional architecture of the Union.

## 5. Conclusions

It would be highly surprising if a change of the magnitude of NGEU did not provoke any disruption in the EU legal and institutional landscape. Indeed, NGEU has significantly impacted both on the relationship between the Union and the Member States and on the EU institutional architecture. This paper has investigated these developments by focusing on the governance and implementation of NGEU. It has described the legal architecture of NGEU and the relationship between the EU and the Member States through NRRPs. On this basis it has assessed how NGEU has changed the notion of solidarity in the EU and affected the relationship between the Union and the Member States.

The main argument of the paper is that, by combining the features of cohesion policy and of economic governance, NGEU has unveiled a new type of “governance by funding”. This governance is characterised by a solidaristic approach to redistributive economic policies, which is backed by the availability of massive financial resources. If, therefore, NGEU has shifted the focus of economic policy from a responsibility-based to a solidarity-based approach, it has done so by creating the incentives for solidarity “through money”. In this respect the EU has mainly turned into a donor for the Member States.

Yet, as the EU is not only a donor but also, essentially, a supranational enforcer and decision-maker, NGEU also affects the way Member States relate to it in the field of economic governance. By linking up with the European Semester, NGEU exacerbates some structural imbalances in the way economic governance is operated at the EU level, significantly

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<sup>48</sup> Leino-Sandberg and Ruffert (n 2) 455.

<sup>49</sup> Adrienne Héritier, ‘Quo Vadis, Europa? Five Paths, Their Plausibility and Impact’ (2021) RSC, 2021/49 EUI Working Paper.

strengthening the power of the supranational institutions, and in particular the Commission, over Member States' economic and fiscal policy. Ultimately, the paper raises a normative question as regards the democratic legitimacy of the "governance by funding" introduced by NGEU, as it confines the EU to an – excessively powerful - funding provider, who however has also a say on crucial political and financial decisions, without however strengthening its legitimacy basis.

From the perspective of legal engineering, NGEU is indeed unprecedented for the magnitude of changes and the convergence that it brought between Member States' diverging interests. Yet, it inserts itself in a process of continuous change through adaptation, that has been progressively shifting the functions of the EU institutions according to the tasks that they are called to fulfil. This is not the first time that institutional engineering is used in a creative way. In *Pringle* the Court of Justice of the European Union (CJEU) for instance endorsed a limited borrowing of EU institutions for extra-EU cooperation.<sup>50</sup> Yet, as NGEU further stretches the power attribution of the Treaties within the EU law framework, it begs the question to know how far this process can go without redefining the roles of the institutions and their respective competences, even when the stretching may be compatible – from a strictly legal perspective – with primary law. On the long term a new constitutional settlement may be needed, both to consolidate the EMU governance framework and to provide legal underpinning to innovative uses of the Union's institutional setting. On the medium term, however, while waiting for Godot (alias Treaty change), the next couple of years will be crucial to understand how deeply this new approach to cohesion and economic governance was enshrined in, and has transformed, the EU governance framework.

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<sup>50</sup> Case C-370/12, *Thomas Pringle v Government of Ireland and Other*, ECLI:EU:C:2012:756; see further P. Craig, 'Pringle and the Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 *European Constitutional Law Review* 273.