



„Next Generation EU“: Legal Construction, Legitimacy, Efficiency

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1. The COVID 19 pandemic has caused enormous suffering in the EU Member States. The protective measures have caused one of the deepest recessions in modern history. Essential achievements of European integration, such as the freedom to travel, had to be temporarily suspended. But the picture is not only bleak. In the wake of the pandemic, EU institutions and EU Member States have developed a political will for unity that would have been unthinkable in this form months ago.

2. In July 2020, the European Council reached political agreement on a pandemic-related support package of EUR 750 bn (“Next Generation EU”/“NGEU”). This sum is considerable. The “Corona” funds will increase the financial capacity of the EU by about 70%.

3. The program does not serve the reconstruction of broken down economic structures. It will take effect at a time when the restrictions imposed by the pandemic will (hopefully) have already been removed. The danger is that it will have a pro-cyclical effect. The distribution of the funds does not exclusively or primarily focus on the losses that the EU Member States have suffered as a result of the pandemic. Other factors, such as unemployment before the pandemic, are of higher importance. In terms of the program, the aim is to promote the future restructuring of Member States’ economies, increasing their growth potential and incentivizing certain transformations (digital, ecological).

4. The debt financing of large EU programs is a novelty. NGEU is nothing less than a fundamental transformation of the overall EU financing system. It is to take place within the framework of the current EU treaty law. However, any amount of legal creativity cannot preclude tensions with the primary law framework.

5. NGEU consists of three levels.

- In the amended Own Resources Decision, the EU Commission is to be authorized to raise funds on the capital markets to the amount of EUR 750 bn. These funds are to be repaid via the EU budget from 2027 onwards. To enable the necessary volume of expenditure, the own resources ceiling is to be raised by 0.6% of the GNI of the EU member states by 2058 at the latest. Ratification of the amendment (Art. 311 (3) TFEU) provides for a political legitimization of the decision in a way that is close to a treaty amendment.

- The funds are to be allocated via an instrument called “European Union Recovery Instrument”. The legal basis should be Art. 122 TFEU, without differentiating between the two subparagraphs. The interposition of an “emergency instrument” is intended to symbolize the exceptional character of

NGEU financing. In addition, it later allows for a flexible reallocation of funds between the various facilities in case political priorities shift or operational difficulties arise.

- Finally, the actual management of funds is to be carried out partly in new (Recovery and Resilience Facility) and partly in existing facilities. The relevant changes will be dealt with in the ordinary legislative procedure.

6. In order not to come into conflict with the prohibition of indebtedness in Art. 310 (2) TFEU, the NGEU funds are managed as external assigned revenues—according to Art. 21 (5) of the EU Financial Regulation—, thus bypassing the EU budget as an “off-budget operation”. There will be no political decision by the EU budget legislator on the borrowing decision or on the use of the funds. This concept does not fit seamlessly into EU primary law.

- According to Art. 310(1) TFEU, all revenue and expenditure of the EU must be entered in the budget. It can be assumed from previous practice that EU borrowing and lending operations (“back-to-back lending”) need not be regarded as “expenditure” in a budgetary sense. Here, the funds raised on the capital markets are passed on in a *budget-neutral manner*. By contrast, the subsidies provided under NGEU are undoubtedly expenditure. They are not neutral because they are not balanced by any legal asset growth of the EU. It is incompatible with the principle of the completeness of the EU budget not to integrate such expenditure in the budget. The need to adhere to Art. 310 (1) TFEU cannot be called into question by referring to the fact that the EU Financial Regulation *allows* funds to be managed as external assigned revenues. Nor can the amended Own Resources Decision, which has the quality of secondary law, or the “European Union Recovery Instrument” regulation change primary law.

- The chosen construction of NGEU makes it formally possible to comply with the requirement for budgetary balance during the period of NGEU (Art. 310 (3) TFEU). If one understands this provision in a material sense, tensions arise between Art. 310 (3) TFEU and NGEU. In contrast to “back-to-back-lending” or the acquisition of tangible assets, the EU does not acquire any asset-relevant equivalent value when granting subsidies. Expecting to have the necessary (own) resources to repay the loans taken out from 2027 onwards is not an equivalent value in the budgetary sense.

- As a result of the chosen construct, about 70% of the EU’s expenditure volume in the period between 2021 and 2027 will not be legitimized by the EU budget legislator. Conflicts with the principle of democracy (Article 10 (1) TEU) are obvious: the EU budget legislator’s political responsibility for EU expenditures is one of the central components of the principle of democracy. The European Parliament may have a political interest in not getting in the way of NGEU. It may also welcome the transition to a future of debt financing of EU tasks. However, the democratic order of the EU is not (even in times of need) politically disposable.

- Should the CJEU be asked to rule on the primary law conformity of the chosen construct, the result would be obvious: it would find justification. The *ultra vires* doctrine of the Federal Constitutional Court cannot be applied to protect the decision-making prerogatives of the EU budget legislator. At best, one might question whether Article 23 (1) 1 of the German Grundgesetz is violated if the EU budget administration takes a direction that is not compatible with democratic principles.

7. In the meantime, discussions are already underway about a “stabilization” or “extension” of the NGEU financing model. It is unclear whether the “temporary” increase of the own resources ceiling by 0.6% of the GNI of the EU Member States might serve as a foundation. On the one hand, the Own

Resources Decision, as amended, stipulates that the ceiling shall be increased “for the sole purpose of covering all liabilities of the Union resulting from its borrowing” for NGEU (Art. 3c Own Resources Decision). Additionally, Art. 3b (1) of the Decision sets forth that “(t)he Union shall not use funds borrowed on the capital markets for the financing of operational expenditure.” It is not completely unthinkable that in the future, one will try to interpret these restrictions away. Moreover, one could argue that the stipulations in the Own Resources Decision can be superseded by later secondary legislation. If such attempts were successful, the EU could raise funds for expenditures on the capital market by using facilities already available or by creating specific ones. If the basic act is adopted by ordinary legislative procedure, individual Member States have no veto right. However, there is no legal liability arising from the EU bonds.

#### 8. NGEU raises questions under German constitutional law.

- The amendment of the Own Resources Decision requires Member State approval (Art. 311 (3) TFEU). In Germany, a formal parliamentary statute is required (Art. 23 (1) 2 GG, § 3 IntVG). The special quorum of Art. 23 (1) 3 GG will not have to be satisfied because the EU Own Resources Decision is not part of primary law and because its amendment does not change or supplement the material contents of the constitutional order established by the Grundgesetz. The political-democratic autonomy (“politisch-demokratische Selbstgestaltungsfähigkeit”) of the German constitutional institutions is not tangibly impaired. Nor does the increase of the Own Resources ceiling fall under Article 23 (1) 3 GG: the mere opening of a scope of action, which must first be filled out by concrete decisions, does not directly affect the constitutional order.

- No legislative precautions need to be taken to give the German Bundestag a say in the raising of NGEU funds.

- The Own Resources Decision, as amended, will provide for an obligation of the EU Member States to make additional resources available to the Commission where the authorized appropriations entered in the budget are not sufficient for the Union to comply with its obligations resulting from borrowing for NGEU. Details are currently being negotiated between the Commission, the Council and the Parliament. This obligation affects the budgetary powers and prerogatives of the German Bundestag (“haushaltspolitische Gesamtverantwortung”). However, a concrete involvement of the German Bundestag in the decision on the granting of loans is constitutionally not required and politically not expedient.

- Absolute constitutional limits of a future budgetary burden (Article 23 (1) 3 in conjunction with Article 79 (3) GG) are not reached by NGEU.

- It is an open question whether and how the political responsibilities of the German Bundestag within the context of European integration (“Integrationsverantwortung”) will be affected by the launching of other debt-financed expenditure programs in the future. If the restrictions in the Own Resources Decision, as amended, stand (supra No. 7), this is a hypothetical question. If they are to be interpreted away, the question becomes relevant. One could imagine that the German Bundestag would have to grant prior approval before the German Council representative may consent to passing bills that provide a basis for debt-funded EU expenditure.

9. There is currently an intensive debate on how to ensure that EU Member States use funds effectively. The decision-making process is to be linked to the “European Semester”, which has so far been less

effective. In the meantime, the EU Commission has presented a "staff working document" that describes the conditions for funding and formal requirements for application. The EU member states will have to develop the fine art of describing their projects in the specific semantics of this document. NGEU promises EU Member States a fixed allocation of funds. If the instrument is not to delegitimize itself, the money will ultimately be spent, regardless of the extent of the effects in the areas of growth, ecology, digital, etc.

10. NGEU was created on the occasion of the pandemic, but not to cope with the consequences of the pandemic. No one will seriously claim that the fundamental transformation of the EU financing system that is set up in NGEU will be temporary. A return to times "before Corona" is impossible.