I *Post* di AISDUE, IV (2022), *aisdue.eu*
Sezione "Atti convegni AISDUE", n. 32, 26 luglio 2022
Quaderni AISDUE

Financial solidarity in EU law: an unruly horse?

Claudia Cinnirella*

SUMMARY: 1. Introduction. – 2. Financial solidarity in EU budget: preliminary remarks. – 2.1. Solidarity within the EU revenue system. - 2.2. Solidarity within the EU expenditure. – 3. Next Generation EU: a new paradigm of financial solidarity? – 3.1. NGEU: innovations on the revenue side. – 3.2. NGEU: innovations on the spending side. – 4. Concluding remarks: solidarity as a driven force for the interpretation and development of EU budgetary law.

1. Interstate solidarity lies at the very heart of the EU budget, raising questions about the origin of resources and how to allocate them. On the revenue side, solidarity involves expectations on the right size and optimal revenue structure of the Union budget. On the spending side, solidarity challenges the allocation of financial resources across the

* Research Fellow in EU Law at University of Catania, Department of Law. The contribution is part of the research project "ExTemPoRe: Exceptionally Bad Times. Memory, Policy and Regulation of Transnational Crisis" (2020-2022), financed by the University of Catania, Law Department.

Union, the setting of expenditure priorities as well as recurrent concerns over "net balance" calculations.

Financial solidarity deals with issues as fiscal transfers and the mutualisation of common debt, which are a long-standing bone of contention between Northern and Southern Member States. For a long time, the taboo of the "Transfer Union" – meaning the fear of long-term, direct and horizontal transfers between European countries, primarily between the EMU countries – has hindered reforms of the EU fiscal capacity – meaning a budgetary capacity at EU level funded by genuine own resources that can be deployed by the EU to support its spending programme and stabilize the economy in case of asymmetric shocks.[1] Confrontations between those countries supposedly benefiting and losing from mutualising the debt have repeatedly called into doubt the need and the legitimacy of stronger forms of financial solidarity within the EU.[2] Net payer States traditionally perceived solidarity as a way to carry other States on their shoulders and rewarding moral hazard rather than as an instrument to redistribute the Union wealth.[3]

Multiple crises hitting the European Union, e.g., the sovereign debt crisis, the migration and refugee crises, the Covid-19 pandemic, pushed the EU toward creative financing solutions in order to better adapt the common action to new challenges. They also served as wake-up calls

[1] D. HOWARTH, J. SCHILD, *Nein to 'Transfer Union': the German brake on the construction of a European Union fiscal capacity*, in *Journal of European Integration*, n. 2, 2021, p. 209 ss.; N. DA COSTA CABRAL, *The European Monetary Union after the Crisis: From a Fiscal Union to a Fiscal Capacity*, London, 2021; F. FABBRINI, *Fiscal capacity* in F. FABBRINI, M. VENTORUZZO (eds.), *Research Handbook on EU Economic Law*, 2019, p. 107 ss.; F. FABBRINI, *A Fiscal Capacity for the Eurozone: Constitutional Perspectives*, 2019, available at www.europarl.europa.eu; P. D'APICE, *Cross-border flows operated through the EU budget: an overview*, Progress office of the European Union, 2015, available at www.ec.europa.eu/economy_finance/publications/; A. HINAREJOS, *Fiscal Federalism in the European Union: Evolution and Future Choices for EMU*, in *Common Market Law Review*, n. 50, 2013, p. 1621 ss.; M. POIARES MADURO, *A New Governance for the European Union and the Euro: democracy and Justice*, in *RSCAS Policy Papers*, n. 11, 2012; N. HEINEN, *A European transfer union-how large, how powerful, how expensive*?, in *Deutsche Bank Research*, 2011, available at www.dbresearch.com, p. 3.

[2] E. EISL, M. TOMAY, *European Debt Mutualisation. Finding a Legitimate Balance between Solidarity and Responsibility Mechanisms*, Jacques Delors Institute, Notre Europe Policy Paper n. 255, July 2020.

[3] M. POIARES MADURO, *op. cit.*, p. 13.

to reconceive the institutional setting in fiscal and financial matters, emphasizing the relevance of an ever-closer cooperation in budgetary terms. Most recently, the EU budget has been called upon to develop its capacities. *Next Generation EU* (NGEU) has opened the door to a new form of fiscal integration resembling a "Fiscal Union", increasing solidarity and redistribution among the Member States. It has been conceived as "arguably the biggest step forward in terms of solidarity which the European Union has taken in its history".[4]

EU Institutions have repeatedly stressed the need of solidarity in order to face the current economic turmoil. However, at this stage, it is not clear enough if solidarity has been invoked as a simple rhetorical device to promote a massive reform of the EU budget or it may also deploy a proper normative function within the EU budgetary law. The question seems to be more relevant than ever since the Court of Justice has recently recognised interstate solidarity as a general principle of Union's Law, clarifying its normative value within the EU legal order.[5]

Against this background, the paper aims to explore the constitutional role and legal standings of financial solidarity, searching for fundamental rules guiding its deployment within the EU budgetary system. For this purpose, the work tries to identify elements of interstate solidarity within the EU budgetary system, both on the revenue and on the expenditure sides. It then reflects over the paradigm shift brought by the adoption of NGEU, trying to assess the normative role of solidarity within the renewed EU budgetary order.

2. Solidarity pertains to the capacity of the EU budget to perform its functions in the common interest, managing the level of financial interdependence between the Member States and their conflicting interests.[6]

---

[4] Opinion of AG Campos Sánchez-Bordona delivered on 18 March 2021, case C-848/19 P, *Germany v Poland*, footnote n. 43.

[5] Judgment of the Court of 15 July 2021, case C-848/19 P, *Germany v Poland*, para 41. See also General Court, 10 September 2019, case T-883/16, *Poland v Commission*.

[6] C. SAUNDERS, *Financial Autonomy vs. Solidarity: A Dialogue between Two Complementary Opposites*, in A. VALDESALICI, F. PALERMO (eds.), *Comparing Fiscal Federalism*, Leiden-Boston, 2018, p. 40 ss.

On the revenue side, solidarity concerns the ways the EU raises or receives funds.[7] It is of great importance for the EU and for its independence to ascertain whether the budget is financed by financial contribution from the Member States or whether it lives on its own resources, having its own income.[8]

National contributions – meaning financial transfers from the Member States due because of their Membership – have the merit to act as a reliable source of financing of the current budgetary system since they cover any shortfalls in revenue.[9] However, the predominance of this resource in the current financing system has fostered the common perception that EU revenues just reflect the Member States capacity to pay, and it has fueled the expectation that the EU should return a "fair share" of its spending to each Member State.

By contrast, genuinely own resources tend to confer autonomy to the EU budget, increasing the room for manoeuvre of EU Institutions in setting expenditure priorities in the common interest and long-term policy goals (e.g., addressing market/government failures, correcting negative externalities and addressing sustainability gaps). These resources are collected by the Member States in the Union's account, paid in full into the Union budget, and their amount is not stipulated in advance.[10]

On the expenditure side, solidarity concerns issues related to redistribution of common resources, to the design of mechanisms for addressing financial challenges at EU level and to the level of risk-sharing across the Union. On this ground, solidarity confronts itself

---

[7] M. POIARES MADURO, *op. cit.*, p. 13.

[8] On this distinction see A. D'ALFONSO, *Own Resources of the European Union. Reforming the EU's financing system*, European Parliamentary Research Service, 2021, available at www.europarl.europa.eu; M. MONTI, D. DAĬANU, C. FUEST, K. GEORGIEVA, I. KALFIN, A. LAMASSOURE, P. MOSCOVICI, I. ŠIMONYTĖ, F. TIMMERMANS, G. VERHOFSTADT, *Future Financing of the EU. Final report and recommendations of the High Level Group on Own Resources*, Luxembourg, December 2016, p. 22 ss.; A. POTTEAU, *Recherches sur l'autonomie financière de l'Union européenne*, Paris, 2004; C. D. EHLERMANN, *The Financing of the Community: The distinction between financial contributions and own resources*, in *Common Market Law Review*, n. 19, 1982, p. 571 ss.

[9] R. CROWE, *An EU Budget of States and Citizens*, in *European Law Journal*, 2021, p. 1 ss.

[10] Judgment of the Court of 18 December 1986, case 93/85, *Commission v United Kingdom.*

with the dual nature of the EU Budget, as "a vehicle for the Union to invest jointly in European Value Added projects" and as "a legitimate and effective tool for the Member States to rebalance the actual and perceived costs and benefits of EU Membership for each of them".[11]

On the one hand, the EU is still to an important extent a Union of Member States which have quite different motivations for EU Membership. They consider the EU budget as a tool to weigh costs and benefits deriving from their Membership, both real and perceived.[12]

On the one hand, the EU budget is a common budget, and it must be operational to face common challenges that cannot be financed by single Member States because of their scale (i.e., stabilizing the economy in time of crisis or supporting economic convergence within the single market).

The following paragraphs will try to explore the development of financial solidarity within the revenue (2.1) and expenditure (2.2) sides of the Union's budget.

2.1. On the revenue side, the EU budget has originally been conceived as a transition from a system of financing based on contributions from the national budgets of the Member States to the creation of an autonomous European budget financed from "own resources" accruing directly to the European level.[13] In the founding project, the attainment of a genuine financial autonomy at Community

---

[11] S. LEHNER, *The Dual Nature of the EU Multiannual Financial Framework*, in B. LAFFAN AND A. DE FEO (eds.), *EU Financing for the Next Decade: Beyond the MFF 2021–2027 and the Next Generation EU,* Fiesole, 2020, p. 21 ss.; A. SAPIR, I. BEGG, J. ERIKSSON, *The purse of the European Union: Setting priorities for the future*, Stockholm, 2008.

[12] S. LEHNER, *op. cit*.

[13] C. SCIANCALEPORE, *Le risorse proprie nella finanzia pubblica europea*, Bari, 2021; N. DA COSTA CABRAL, *op. cit.*, p. 180 ss.; G. ROSOLILLO, *The financing of the European Union: a proposal for treaty reform to give the EU true fiscal capacity*, in *The Federalist, A political review*, 2020, p. 135 ss.; R. CROWE, *The European Budgetary Galaxy*, in *European Constitutional Law Review*, n. 13, 2017, p. 428 ss., spec. p. 428; G. ISAAC, *La notion de ressource propre*, in G. ISAAC (sous la direction de), *Les ressources financiers de la Communauté européenne*, Paris, 1986, p. 70 ss.; C. D. EHLERMANN, *The Financing of the Community*, cit.; D. STRASSER, *The Finances of Europe*, Luxembourg, 1981; G. OLMI, *Les ressources propres aux Communautés*, in *Cahier de Droit Européen*, 1971, p. 379 ss.; G. TESAURO, *Il finanziamento delle organizzazioni internazionali*, Napoli, 1969.

level would have allowed the Communities to identify expenditure priorities based on authentic common interests.[14] However, this system never functioned as initially intended.

The 1957 European Economic Community budget was initially funded on "national contributions" from the Member States, calculated through a contribution key typically used within the pre-existing models of international organizations, such us the United Nations.[15]

The adoption of the Own Resources Decision (ORD), in 1970, represented a first attempt to establish an autonomous European budgetary order that would have complemented the "new legal order" of the European Economic Communities.[16] The ORD altered the financial basis of the Communities by progressively substituting existing budgetary resources with Community own resources consisting of customs duties collected at the external borders of the customs union, levies collected within the framework of the common agricultural policy, as well as the residual VAT-based own resource, accruing from consumer transactions conducted in the framework of the common market.[17]

Further on in the late 1980s, the enlargement of the EU and the appearance of the cohesion policy called for new resources. The "Delors I" package complemented the own resources system with a new resource calculated by reference to gross national product – later replaced by the gross national income resource ("GNI-based resource") – which would automatically cover any shortfalls in revenue.[18] The

[14] See D. COOMBES, I. WIEBECKE, *The Power of the Purse in the European Communities*, London, 1972.
[15] Article 200 TEEC. By contrast, the Coal and Steal Community was completely financed by a truly own resource, a leavy imposed on coal and steel production paid directly by the companies rather than by the Member States' budgets (Artt. 49-50 TECSC). Compare G. ROSSOLILLO, *Applying the ECSC model to give the EU fiscal power*, in *The Federalist, A political review*, 2020, p. 131 ss. and G. TESAURO, *op. cit.*
[16] Council Decision 70/243/ECSC, EEC, Euratom of 21 April 1970, on the replacement of financial contributions from Member States by the Communities' own resources, OJ 1970 L 94/19. See R. CROWE, *op. cit.*, p. 431; G. CLEMENTE, *Commento all'art. 311 TFUE*, in A. TIZZANO (a cura di), *I Trattati dell'Unione Europea,* Milano, 2014, p. 2390 ss.
[17] See Council Decision 70/243, Art. 2 (a), (b) and Art. 4.
[18] Council Decision 88/376/EEC, Euratom of 24 June 1988, on the system of the Communities' own resources, Art. 2 (1) (d). See also European Commission,

progressive overreliance on the GNI-based resource undermined the original project of an autonomous EU budget, marking a regression toward a system *de facto* based on national contributions.

Conflicts over the redistribution of EU-level resources progressively led some of the Member States, first among others the UK, to negotiate a number of "correction mechanisms" allowing a reduction over the amount of revenue they transfer to the EU.[19] During budgetary negotiations, the *juste retour* rule[20] took increasing precedence over the genuine pursue of Union's policy objectives and the shared benefits from common European expenditure.[21]

Under the present system, there are three main categories of own resources. Traditional own resources, consisting of custom duties on imports from outside the EU, agricultural levies as well as anti-dumping and countervailing duties, accounting for roughly 11% of the budget (they are closely linked to the Union's powers, are paid in full into the Union budget, and their amount is not stipulated in advance); the Value Added Tax-based resource accounting for 10% of the budget (it is not linked to the exercise of the Union's powers, and in fact Member States pay only a share of their VAT revenue into the EU budget); the GNI-based resource accounting for 70 % of the total revenue (resembling the financing system of International Organizations); other revenues, including tax on EU staff remunerations, interest on late payments and

European Union Public Finance, Office for Official Publications, Luxembourg, 5th edition, 2014.

[19] See A. D'ALFONSO, *The UK 'rebate' on the EU budget: An explanation of the abatement and other correction mechanisms*, *European Parliamentary Research Service*, 2016.

[20] The concept of *juste retour* is based on the assumption that the part of the revenue paid by each Member State to complement the EU's Own Resources should be proportional – or at least have a strong degree of proportionality – to the amount of benefits received by the same Member State. See M. CITI, *EU Budgetary Politics and the Paradox of Juste retour*, in S. BECKER, M.W. BAUER, A. DE FEO (eds.), *The New Politics of the European Union Budget*, 2017, p. 83 ss.

[21] R. CROWE, *op. cit.*, p. 433; R. KAISER, H. PRANGE-GSTÖHL, *Reforming the own resources: perspectives on the revenue- side of the EU budget,* in *ID*, *The European Union Budget in Times of Crises*, Baden-Baden, 2019, p. 91 ss. See also Joint Declaration of the European Parliament, the Council and the Commission on Own Resources, December 2013, published as Annex I to the report 'Future Financing of the EU: Final Report and Recommendations of the High Level Group on Own Resources', December 2016.

fines on companies for breaching competition law accounting, in 2020, for 8,2%.[22]

Since the EU budget cannot run a deficit, the GNI-based resource plays the budget-balancing role, financing the annual expenditure not covered by the other EU own resources and revenue. The Commission has made repeated attempts to introduce new resources with a view to increase the autonomy of the common budget and to enhance its link to EU policies.[23] Several voices support the need of a reform and the introduction of new, genuine, own resources linked to EU policies accruing directly and automatically to the EU budget, without passing through the national budgets of the Member States.[24] The need to fill the "Brexit gap" together with the pandemic outburst recently provided some impulses for reform. Council Decision 2020/2053/EU has recently introduced a new contribution based on non-recycled plastic packaging waste that will generate about EUR 7 billion per year. Despite the modest amount it will raise, the introduction of a new own resource represents a significant change into a system remained untouched since 1988.

2.2. On the spending side, the EU budget performs financial solidarity across several policies instruments. They can be classified in relation to their planned objectives, even if the distinction is not clear-

[22] See data updated in 2020 available at www.ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2014-2020/spending-and-revenue_en.

[23] See Commission Staff Working Paper "Financing the EU budget: Report on the operation of the own resources system", SEC(2011) 876 final of 29.06.2011; Joint Declaration of the European Parliament, the Council and the Commission on Own Resources, December 2013, published as Annex I to the report 'Future Financing of the EU: Final Report and Recommendations of the High Level Group on Own Resources', December 2016, p. 8; European Commission, Directorate-General for Communication, Reflection paper on the future of EU finances, Publications Office, 2017; Proposal for a Council Decision on the system of Own Resources of the European Union, 2 May 2018, COM(2028)325; Proposal for a Council Decision on the system of Own Resources of the European Union, COM (2018) 325, 2.5.2018; subsequently amended by the Amended proposal for a Council Decision on the system of Own Resources of the European Union, COM(2020) 445, 28.5.2020.

[24] R. CROWE, *The EU Recovery Plan: New dynamics in the Financing of the EU Budget*, in G. BARRETT, J.-P. RAGEADE, D. WALLIS, H. WEIL (eds.), *The Future of Legal Europe: Will We Trust in It?* Cham, 2021, p. 117 ss., spec. 119; A. D'ALFONSO, *Own resources of the European Union Reforming the EU's financing system*, *European Parliamentary Research Service*, June 2021; M. POIARES MADURO, *op. cit.*

cut: distribution of incomes, allocation of resources and stabilization of the economy.[25]

During the very first years of the European Coal and Steel Community (ECSC) and the European Economic Community (EEC), the budget's almost exclusive function was to provide the necessary resources for the ordinary functioning of the emerging supranational institutions.

Following the adoption of the common agricultural policy (CAP) in 1962, the EU budget started performing also a *redistributive* function. In this context the EU budget started redistributing among the Member States the accrued welfare at community level in order to compensate those States disadvantaged by allocation. The declaration of Stresa (1958) defined the basic functioning of financial solidarity within the CAP as follow: "[i]n the name of financial solidarity, all the Member countries of the EEC take part in the financing of the burdens of the Community such as guaranteed prices for farmers, the export of surpluses or even the policy of aid and improvement of structures. All the costs engendered by the CAP must be borne in common".

In this policy field, financial solidarity finds its normative reference especially within art. 40(3) TFEU, which is the legal basis of the European Agricultural Guarantee Fund (EAGF), financing market expenses, and the European Agricultural Fund for Rural Development (EAFRD), financing the development of rural areas.[26]

Until the first enlargement, the greatest part of the budget (almost 70%) was devoted to CAP, conceived as a supporting tool for farmers and a stimulus for agricultural production in the newly established common market.[27] Diversification of European expenditure

---

[25] N. HEINEN, *op. cit.*; C. DELON DESMOULIN, *Le destin du budget de l'Union européenne* (2021) *Gestion et organisation administrative*, n. 3, 2021, p. 64 et ss. The tripartition was drawn by R. A. MUSGRAVE, *The Theory of Public Finance: A Study in Public Economy*, New York, 1959.

[26] Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005.

[27] A. JURCEWICZ, P. POPARDOWSKI, *Article 40 [Common Organisation of Agricultural Markets]*, in H. J. BLANKE, S. MANGIAMELI (eds.), *Treaty on the Functioning of the European Union – A Commentary*, vol. I, Cham, 2021, p. 879 ss., spec. p. 901 ss., para 60; C. FASONE, N. LUPO, *The Union Budget and the Budgetary Procedures*, in

progressively reduced the share for CAP and some of these resources were diverted toward regional and social policies.[28] Within the 2021-2027 MFF, the CAP counts for almost one-third of the total budget of the EU while financing a sector generating only 1.3 per cent of the EU GDP (in 2020).[29]

The cohesion policy pursues an *allocative* function, aiming to create good general conditions for free competition to take place.[30] The idea at the center of this policy is that economic integration alone is not sufficient to reduce disparities.[31] Convergence between Member States and regions should therefore be achieved by creating appropriate general conditions alongside convergence process within and toward the Economic and Monetary Union.[32]

R. SCHÜTZE, T. TRIDIMAS (eds.) *Oxford Principles of European Union Law. Volume I.,* Oxford, 2018, p. 809 ss., spec. 817; M. KÖLLING, *How much Solidarity is in the EU Budget?* in *Perspective on Federalism*, n. 7, 2015, p. 78 ss.; N. CHAMBON, *Is the CAP a ground for European disunion? An assessment of the solidarity mechanisms created by the CAP and their relevance after 2013*, Notre Europe, policy paper 45, 2012; A. DE LA FUENTE, R. DOMÉNECH, *The Redistributive Effects of the EU Budget: An Analysis and Proposal for Reforms*, in *Journal of Common Market Studies*, n. 39, 2001, p. 307 ss.; M. *BLANQUE*, *L'Union européenne en tant que système de solidarité: la notion de solidarité européenne*, in M. HACQUAR D. THÉRON (sous la direction de), *Solidarité(s): Perspectives juridiques*, Actes de colloques de l'IFR, Presses de l'Université de Toulouse 1 Capitole, 2009, para 101 ss.

[28] N. NUGENT, *The Government and Politics of the European Union*, Oxford, 2006, p. 469.

[29] See *www.ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2021-2027/spending/headings_en*; *www.ec.europa.eu/eurostat/statistics-explained/index.php?title=Performance_of_the_agricultural_sector.*

[30] K. LENAERTS, S. ADAM, *La solidarité, valeur commune aux états membres et principe fédératif de l'Union européenne*, in *Cahier de droit européen*, n. 57, 2021, p. 307 ss., spec. p. 409 ss.; M. BLANQUE, *L'Union européenne en tant que système de solidarité: la notion de solidarité européenne*, *op. cit.*; C. CALLIESS, *Perspektiven des euro zwischen Solidarität und Recht: eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms*, in *Zeitschrift für europarechtliche Studien*, 14, 2 2011, p. 213 ss.; C. TOMUSCHAT, *Solidarität in Europa*, in F. CAPOTORTI, C. D. EHLERMANN, J. FROWEIN, F. JACOBS, R. JOLIT, T. KOOPMANS, R. KOVAR (Hrsg), *Du Droit international au droit de l'intégration. Liber Amicorum Pierre Pescatore*, Baden Baden, 1987, p. 729 ss.

[31] On this topic see D. ADAMSKI, *Redefining European Economic Integration*, Cambridge, 2018, p. 265 ss.; A. CAPPELEN, J. FAGERBERG, F. CASTELLUCCI, *The Impact of EU Regional Support on Growth and Convergence in the European Union*, in *Journal of Common Market Studies*, n. 41, 2003, p. 640 ss.

[32] N. HEINEN, *op. cit.*, p. 5.

At present, the five structural and investment funds represent the main spending instruments of the cohesion policy. In this context, financial solidarity finds explicit legal bases within the Treaties (Art 3 TEU, Arts. 162–164, 170–172, 174–178 TFEU) and has been further developed in an integrated legislative framework.[33] Within the 2021-2027 MFF, cohesion policy accounts for another one-third of the EU budget.[34]

The third task of financial solidarity is to *stabilize* the economic cycle.[35] Countries that have adopted the single currency – thus refraining from using the exchange rate instrument – no longer have the means to stabilize their own economies and they need instruments performing as insurance against cyclical shock.[36] Thus, EU Treaties have progressively been equipped in order to set up financial mechanisms – this is the case of Art. 122(2) TFUE and Art. 143 TFUE– assisting at EU level Member States in financial distress under exceptional and temporary circumstances.

The most recent example of financial solidarity with a stabilization task is the SURE Instrument sets out under article 122 TFUE as a second line of defense to support Member States' expenditure for short-time work schemes and similar measures, including health-related ones,

[33] Regulation (EU) No 1303/2013 of the European Parliament and of the Council, of 17 December 2013, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

[34] See *www.ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2021-2027/spending/headings_en*.

[35] E. RUBIO, *Budget de la Zone Euro: 3 Fonctions, 3 Instruments*, *Notre Europe Policy Paper*, 15 November 2021; R. KAISER, H. PRANGE-GSTÖHL, *The Union in a state of emergency: the financial and economic crisis and its repercussions*, in *ID*, *The European Union Budget in Times of Crises*, Baden-Baden, 2019, p. 43 ss.; R. CISOTTA, *Disciplina Fiscale, stabilità finanziaria e solidarietà nell'Unione europea ai tempi della crisi: alcuni spunti ricostruttivi*, in *Il diritto dell'Unione europea*, n. 1, 2015, p. 57 ss. See also European Commission, Reflection Paper on the Deepening of the Economic and Monetary Union, 31 May 2017, COM (2017) 291.

[36] *Ibidem.*

during the pandemic.[37] Precedents could be traced back to the "Community loans" of the 1970s and 1980s, set up in response to the negative effects of the first oil shock on Member States' balance of payments.[38] Furthermore, during the Euro area sovereign debt crisis, the EU performed financial solidarity through the European Financial Stabilization Mechanism (EFSM) – built on Article 122 TFUE – and the Balance of Payments Facility ("BoP Facility") – built on article 143 TFEU – .[39] Under these instruments, the EU uses its triple-A credit rating to borrow on the capital markets at favorable rates, but the beneficiary Member State is liable for the repayments to creditors. The EU budget only becomes liable if the beneficiary Member State defaults on its repayments. In such a case, additional GNI-based contributions are called up from all the Member States to cover the costs of the repayments.[40] Rather than pooling any past or future debt, all these mechanisms are built on the tried-and-trusted logic of mutualization of borrowing costs ("borrowing for lending"), providing emergency credit access to struggling economies.[41]

---

[37] Council Regulation (EU) 2020/672, of 19 May 2020, on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.

[38] In this context, the Commission was empowered to issue bonds backed by the Community budget and national guarantees, borrowing funds and lending them on to struggling countries. See D. STRASSER, *The Finances of Europe*, Luxembourg, 1992, p. 100 ss.

[39] Council Regulation (EU) 407/2010, of 11 May 2010, establishing a European financial stabilization mechanism. Council Regulation (EC) 332/2002, of 18 February 2002, establishing a facility providing medium-term financial assistance for Member States' balances of payments. The regulation was amended by Council Regulation (EC) 431/2009, of 18 May 2009, amending Regulation (EC) 332/2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments. See, among others, A. ANTONIADIS, *Debt Crisis as a Global Emergency: The European Economic Constitution and other Greek Fables*, in A. ANTONIADIS, R. SCHÜTZE, E. SPAVENTA, *The European Union and Global Emergencies: A Law and Policy Analysis*, Oxford, 2011, p. 167 ss.; A. VITERBO, R. CISOTTA, *La Crisi della Grecia, l'attacco speculativo all'euro e le risposte dell'Unione Europea*, in *Il diritto dell'Unione europea*, n. 4, 2010, p. 961 ss.

[40] I. KALFIN, *The Importance of Own Resources in The EU Budget*, in B. LAFFAN, A. DE FEO, *EU Financing for Next Decade*, Fiesole, 2020, p. 61 ss., spec. 62.

[41] E. EISL, M. TOMAY, *European Debt Mutualisation. Finding a Legitimate Balance between Solidarity and Responsibility Mechanisms*, *Notre Europe Policy Paper*, n. 255, July 2020, p. 6.

In contrast with national budgets, the EU budget has a reduced capacity to fully perform the three mentioned functions since it accounts only for 1% of the EU Gross Domestic Product (GDP). The EU budget is primarily an investment budget, and its focus mostly falls on resource allocation and redistribution.[42] The Multiannual Financial Framework (MMF) fixes the maximum level of expenditure on a multiannual basis - to counter the growth of European expenditure and indirectly preserve the budgets of the Member States- while the ORD regulates the revenues for the same period.[43] The pre-allocation of most expenditure on a multiannual period confers rigidity to the system and weakens the flexibility for short-term crisis intervention at EU level.[44] This budgetary structure, which is mainly the result of the will of the Member States, constrains the EU emergency capacity and prevents the Union budget to perform a real macroeconomic stabilization function.[45]

3. Over the last two decades, the combined effect of multiple crises and low MFF ceilings has led to the emergence of several EU funds and instruments with variable participation of the Member States. The Covid-19 economic related crisis has recently brought some changes, pushing the EU toward new financing solutions. In order to face the economic consequences produced by the pandemic, EU Institutions have been called to boost the solidarity-based functions of the EU budget with an unprecedented *de facto* increase of the EU budget through borrowing not only for lending operations but also for grants. Under *Next Generation EU* (NGEU), the center piece of the EU responses to Covid-19, the Commission is raising, on behalf of the EU,

[42] Future Financing of the EU. Final report and recommendations of the High Level Group on Own Resources December 2016, p. 6; I. KALFIN, *The Importance of Own Resources in the EU Budget*, in B. LAFFAN, A. DE FEO, *EU Financing for Next Decade*, European University Institute, 2020, p. 61 ss.
[43] *Ibidem*, p. 6.
[44] The MFF contains some special instruments outside its ceilings (e.g., the Flexibility Instrument, the Emergency Aid Reserve and the European Union Solidarity Fund) and flexibility provisions, to allow room for manoeuvre in case of unexpected events. The challenge is to strike the right balance between predictability of investments and the capacity to address the unforeseen events and new priorities that can emerge during a rather long programming period.
[45] See M. MONTI, D. DAĬANU, C. FUEST, K. GEORGIEVA, I. KALFIN, A. LAMASSOURE, P. MOSCOVICI, I. ŠIMONYTĖ, F. TIMMERMANS, G. VERHOFSTADT, *op. cit*.

EUR 750 billion at 2018 prices (EUR 806.9 billion in current prices) on the international capital markets, which will then be redistributed in the form of loans or grants through different funding programs. NGEU will not lead to an immediate budget deficit. The deficit will arise once the EU will start repaying the interest and capital. Only a minimum amount of repayments will start within the MFF 2021-2027 period and it will last until December 2058.[46]

NGEU is a package consisting of three different inter-related instruments.

The European Union Recovery Instrument (EURI), the "control room" of NGEU,[47] formally finances NGEU but substantially it delegates the borrowing of the fund to the ORD. The choice of Art. 122 TFEU as legal basis has provided a justification for the introduction of a new "emergency and temporary" borrowing mechanism within the EU legal framework.

The Recovery and Resilience Facility (RRF), the core of NGEU, is the vehicle through which the greater portion of the funds collected from capital markets (EUR 672.5 billion) are disbursed and managed.[48] Though various spending programs, funds will be used for non-repayable financial support (EUR 312.5 billion) and loans (EUR 360 billion) to Member States.

The RRF is built on Article 175(3) TFEU, a legal basis allowing for action that is necessary to strengthen the economic and social cohesion of the Union outside the structural funds. The Commission justified the choice of this legal basis by emphasizing the RRF's aim "to contribute to enhancing cohesion, through measures that allow the Member States concerned to recover faster and in a more sustainable way from the COVID-19 crisis and become (more) resilient".[49]

This instrument pursues three main functions: it sets out the goals and objectives of the EU funding under NGEU; it defines rules and procedures for the allocation of resources and for ensuring that the

[46] ORD Article 5 (2) and Article 6 (2).
[47] 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.
[48] Regulation (EU) 2021/241 of the European Parliament and of the Council, of 12 February 2021, establishing the Recovery and Resilience Facility.
[49] See draft RRF Regulation, at 4.

Member States respect the related commitments; it includes coordination rules between NGEU and pre-existing mechanisms of economic policy governance.[50]

The ORD, which establishes the revenues of the EU budget, has been amended in order to increase the spending ceilings and enable the EU to borrow and reimburse funds.[51] The amendments also set up an additional rule allowing the Commission to call a basket of new own resources from the Member States.[52]

NGEU is formally outside of the EU budget, since the money raised on the markets will be placed "off budget" and funds to be later distributed as grants are treated as "assigned revenue".[53] However, NGEU also is strongly anchored with the EU budget since funds raised will be distributed through the Union budget as well as the reimbursement of borrowed money will happen via its system of own resources. Consequently, its innovations are strongly intertwined with the EU budgetary structure. Overall, two constitutional novelties introduced by NGEU mark a strong solidarity-based twist within the EU budgetary order: the creation of a credit-financed fund and the innovative distributive scheme. They will be analyzed by the next two paragraphs.

3.1. On the revenue side, NGEU will be entirely financed from money borrowed by the Commission on behalf of the EU on international capital markets. This choice marks a momentum of the solidaristic paradigm of the EU budgetary policy, moving from the mutualization of borrowing costs ("borrowing for lending", as in case of the EFSM and the BoP facility) to the mutualization of the debt repayment ("borrowing for spending"). On this point, suffice it to say

[50] See F. FABBRINI, *Next Generation EU. Legal Structure and Constitutional Consequences*, in *Rebuild Working Paper*, n. 3, 2022, p. 5.

[51] Council Decision (EU, Euratom) 2020/2053, of 14 December 2020, on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, Art. 5 (1) a, Art. 6.

[52] See ORD, Art. 2.1, let. c).

[53] EURI Regulation, Art. 3. See B. DE WITTE, *The European Union's Covid-19 Recovery Plan*, *op. cit.*; A. MATHIS, *Assigned Revenue in the Recovery Plan. The Frog that wishes to be as bis as the ox?*, 15 June 2020, available at *www.europarl.europa.eu.*

that almost half of the funds collected by NGEU will be spent as non-repayable financial support in favor of the Member States. This means that almost half of the EU's debt (EUR 338 billion out of EUR 723.8 billion) will not be repaid directly by the recipient States (as is the case of loans) but by the EU itself. This choice represents a clear departure from the "juste retour" logic and a strong demonstration of interstate solidarity.

In order to repay the common debt without weighing on national contributions, the EU is calling for new own resources linked to EU policies. As a first step in a broader reform,[54] the ORD has introduced a new plastic own resource linked to environmental objectives.[55] The Commission has also called for a new basket of own resources, by putting forward three new sources respectively based on the Carbon Border Adjustment Mechanism, on the revised EU Emission Trading System (ETS) and a third based on the share of residual profits from multinationals that will be re-allocated to EU Member States under the recent OECD/G20 agreement.[56] Furthermore, a proposal for a second basket of new own resources will be presented by the end of 2023, potentially including a Financial Transaction Tax and an own resource linked to the corporate sector.[57]

A basket of new own resources, accounting approximately for 17 billion per year, will increase the EU budgetary autonomy in the refund of the common debt. It will also reduce the share of the GNI-based own resource for the debt repayment, remarking its "balancing" role – i.e., the revenue item whose call rate is adjusted depending on the overall revenue need to cover expenditure after taking account of other revenue

[54] Conclusions of the European Council of 17–21 July 2021, para 146.

[55] ORD, Art. 2 (1).

[56] Proposal for a Council Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union. See European Court of Auditors, Opinion 03/2022 concerning the Commission's proposal for a Council Regulation on the methods and procedure for making available own resources based on the Emissions Trading System, the Carbon Border Adjustment Mechanism and reallocated profits, and on the measures to meet cash requirements [2022/0071(NLE)].

[57] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The next generation of own resources for the EU Budget, 22.12.2021 COM (2021) 566final.

– while ensuring a certain degree of burden sharing among the Member States within the strict framework of budgetary discipline.[58]

3.2. On the spending side, the key innovations of the recovery instrument lie in its disbursement logic.

As "a one-off emergency instrument, put in place for a temporary period and used exclusively for crisis response and recovery measures",[59] NGEU acts as a macroeconomic stabiliser. The use of the emergency clause set up on Article 122 TFEU as a legal basis for the EURI regulation provides for a certain level of continuity with the past.[60]

In the medium term, NGEU is designed to act as a catalyst for the modernisation of the EU economies, with positive effects on their growth, resilience and convergence. To achieve these objectives, NGEU offers financial support to the EU Member States conditional on the implementation of concrete investment and reform projects over the period 2021-26. In some ways, it may be compared to other spending programs of the cohesion policy.[61] This is suggested by the RRF legal basis - Art. 175 (3) TFEU - as well as from its general objective of "contributing to the upward economic and social convergence, restoring and promoting sustainable growth and the integration of the economies of the Union, fostering high quality employment creation, and contributing to the strategic autonomy of the Union alongside an open economy and generating European added value".[62]

[58] See Proposal for a Council Decision on the system of Own Resources of the European Union {SWD (2018) 172final}, p. 5.

[59] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The EU budget powering the recovery plan for Europe*, 27 May 2020, COM (2020) 442final, p. 3.

[60] Art. 5 (1) ORD.

[61] See B. DE WITTE, *op. cit.* p. 642; P. LEINO-SANDBERG, M. RUFFERT, *Next Generation EU and Its Constitutional Ramifications: A Critical Assessment*, in *Common Market Law Review*, n. 59, 2022, p. 433 ss., spec. p. 446; P. DERMINE, *The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: op. cit.*, p. 346; F. COSTAMAGNA, M. GOLDMANN, *Constitutional Innovation, Democtaric Stagnation?* in *verfassungsblog.de*, 30 May 2020.

[62] Art. 4 (1), RRF Regulation. See B. DE WITTE, *op. cit.*, p. 655.

The allocative function of the instrument appears also from the allocation keys of the greater portion of grants that will be disbursed through the RRF, having little relevance with the aim of alleviating the consequences of the pandemic.[63] Under the RRF Regulation, 70 percent of the funds will be allocated according to cohesion criteria (population, the inverse GDP per capita and the relative unemployment rate), while only 30 percent of the funds will be allocated on the basis of impact of the pandemic on national economies (as the aggregated change in real GDP for 2020).[64]

NGEU pursues also a redistribute function that appears from its financing program. Through RRF the EU is disbursing €312.5 billion at 2018 prices in non-repayable subsidies to 27 Member States, over a three-years period.[65] This amount is comparable with the budget assigned to the whole cohesion policy within the entire 2021-2027 MMF (392 billion).[66] Two-thirds of RRF funding requested (in grants and loans) in the euro area is currently allocated to Italy and Spain.[67] Furthermore, 50 per cent of the maximum grant allocation disbursed through the RRF has been recognized mainly to three countries (Italy 20,45 %, Spain 19,88%, France 10,38 %).[68] Common resources will not equally share among the Member States. Rather they will be addressed to those countries mostly needing structural reforms and changes.

---

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

[64] P. LEINO-SANDBERG, M. RUFFERT, *op. cit.*, p. 450.

[65] RRF Regulation, Art. 6.

[66] See *www.cohesiondata.ec.europa.eu/stories/s/2021-2027-EU-allocations-available-for-programming/2w8s-ci3y/.*

[67] M. FREIER, C. GRYNBERG, M. O'CONNELL, M. RODRÌGUEZ-VIVES, N. ZORELL, *Next Generation EU: a euro area perspective*, ECB Bullettin, 1/2022, available at *www.ecb.europa.eu*.

[68] See the Annexes to the Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility, COM (2020) 408final. Recovery and Resilience Facility: Maximum grant allocations *www.ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/recovery_and_resilience_facility_.pdf.* The State of play on the process of implementation of the RRF is reported by Report from the Commission to the European Parliament and the Council on the implementation of the Recovery and Resilience Facility, 1st March 2022, COM (2022) 75final.

4. The strong relationship between solidarity and the EU budget has been emphasized by EU Institutions multiple times. In the aftermath of the pandemic, the Commission stressed that the EU budget is "designed for cohesion, convergence and solidarity".[69] The Council Legal Service has then suggested to use solidarity as a principle for the interpretation of NGEU legal architecture.[70]

The intertwined relationship between the EU budget and the principle of solidarity has more recently been emphasized within the seminal case *Hungary v European Parliament and Council*,[71] where the Court clarified that "the Union budget is one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law".[72] Despite this statement has remained isolated and it has not been further articulated within the reasoning of the Court, it seems to express the idea that solidarity is a driving force for the interpretation and development of EU budget.

More specifically, as a general principle of Union law,[73] solidarity catalyzes what the EU budget is used for and choices about how the EU budget is funded. Solidarity links the own resources system to EU key policies and priorities, and it assists their development in terms of ever closer interdependence and mutual sharing among the Member States. It supports the prevalence of common interests and goals over the

[69] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Empty, Europe's moment: Repair and Prepare for the Next Generation, 27 May 2020, {SWD (2020) 98 final}.
[70] Council Legal Service, Opinion on the Proposal on Next Generation EU, 24 June 2020, 9062/20.
[71] Judgment of the Court of 16 February 2022, case C-156/21, *Hungary v European Parliament and Council*.
[72] See judgment of the Court of 16 February 2021, case C-157/21, *Poland v European Parliament and Council*, para 147. Similarly, AG Campos Sánchez-Bordona in his opinion delivered on 2 December 2021 within the case C-156/21, *Hungary v European Parliament and Council of the European Union*, para 96, stated that "The budget is the instrument of EU law which, each year, translates the principle of solidarity into financial terms and it is of constitutional importance".
[73] Judgment of the Court of 15 July 2021, case C-848/19 P, *Germany v Poland*, para 41. See also P. PESCATORE, *International Law and Community Law. A Comparative Analysis* in *Common Market Law Review*, n. 7, 1970, p. 167 ss.

pursuing of national interests. In the context of NGEU, solidarity finds its expression within the responsibility concerning the EU recovery as a common one, resulting in the issuance of common debt financed at EU level by the establishment of new own resources.

The analysis conducted above shows that financial solidarity may deploy its normative function in two complementary ways.

On the one hand, interstate solidarity may require that, in structuring common actions and policies, the contribution of some Member States exceed the contribution of others, due to the different economic capacities or different means available[74]. This is the case of the GNI-based own resource, roughly reflecting a country's economic capacity[75]. On this ground, the complex system of rebates and correction stands in striking contrast with the full implementation of this principle.

On the other hand, the principle of solidarity may address the contribution of some Member States or of the whole Union in favor of other States, or even only one, in order to balance or re-establish the level playing field for pursuing common policies and actions. This dynamic is specifically reflected by the structural and investment funds, agricultural funds and financial assistance mechanisms. More recently, this solidarity-based dynamic has been deployed by the EURI and the RRF regulations, respectively allowing the issue of common debt at EU level (through which the EU to share among the Member States the costs of the crisis) in order to mainly support the recovery of those Member States hit hard by the coronavirus economic-related consequences.

Far from being an "unruly horse", financial solidarity finds a room within the EU budgetary architecture. This principle of law is grounded

[74] R. WOLFRUM, *Solidarity among States: An Emerging Structural Principle of International Law*, in *Indiana journal of international law*, 49, 1, 2009, p. 8 ss.

[75] Over the years, Member States introduced several budgetary corrections or rebates in order to compensate some of the prosperous Member States for their financial contributions to the EU budget. See G. BENEDETTO, *How the EU Budget has developed and changed in the last 10 years?*, *Brussel: European Parliament – Policy Department for Budgetary Affairs*, 2017, available at www.europarl.europa.eu/studies; Directorate General for Budget (European Commission), *European Union Public Finance*, Luxembourg: Luxembourg Publication office of the European Union, 2014, spec. p. 134, available at www.op.europa.eu/s/oM4g.

on specific normative references, and it unfolds its normative functions within the EU budgetary structure following its proper dynamics. The influence of the solidarity on the development of Union budget has become increasingly evident. NGEU has broken the taboo of the "Transfer Union", formally allowing economic transfers among the Member States through the EU budget and has bolstered the discussion over the building of an EU Fiscal capacity.

These considerations do not overlook the temporary and emergency nature of NGEU within the EU budgetary architecture. Nevertheless, NGEU related innovations represent a *momentum* on the development of financial solidarity within the EU budget. They constitute a precedent for future exigencies, a new "normalcy" from which departing for facing future challenges and emergencies. Furthermore, some solidarity-based developments brought by NGEU, as changes of the revenue system, will outlive its temporal scope. Overall, the strong use of the solidarity translates the current political choice to strengthen the necessary interdependence between the Member States in budgetary terms and the need to manage consequences of this choice.