

Grund, Sebastian; Steinbach, Armin

Working Paper

European Union debt financing: Leeway and barriers from a legal perspective

Bruegel Working Paper, No. 15/2023

Provided in Cooperation with:

Bruegel, Brussels

Suggested Citation: Grund, Sebastian; Steinbach, Armin (2023) : European Union debt financing: Leeway and barriers from a legal perspective, Bruegel Working Paper, No. 15/2023, Bruegel, Brussels

This Version is available at:

<https://hdl.handle.net/10419/278706>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.

EUROPEAN UNION DEBT FINANCING: LEEWAY AND BARRIERS FROM A LEGAL PERSPECTIVE

SEBASTIAN GRUND AND ARMIN STEINBACH

We explore legal leeway for two approaches to debt-financing European Union spending: creation of extra budgetary, one-off and temporary EU funds to finance European public goods (similarly to NextGenerationEU), and debt-financing the EU's regular budget, hence creating an on-budget, permanent borrowing capacity at EU level.

We find that NGEU could in principle be replicated. This would require an amendment to the Own Resources Decision (ORD) – a unanimous Council decision that designates the main sources of EU financing and requires ratification by each member state – to authorise borrowing and specify how the borrowing proceeds are to be used. However, this approach would be constrained by the legal requirement that financing EU spending through ‘other revenues’ (as opposed to ‘own resources’ designated as such in the ORD) remain exceptional. As a result, no permanent EU tasks could be financed through NGEU-like funds and NGEU-like financing could not exceed financing through ‘own resources’.

We also find that, while EU primary law does not stop the EU from debt-financing its budget, the scope for EU borrowing would remain severely limited compared to a sovereign state. The permissible amount of borrowing must be specified in the ORD and the EU must be able to meet its debt service in any year, which must be secured by a sufficient amount of (non-borrowed) own resources.

Finally, considerable flexibility exists for the spending of borrowed funds, regardless of whether this occurs through new NGEU-like extrabudgetary funds or on budget. Borrowed funds could be allocated to climate funding, cohesion policy, infrastructure or research. In the event that borrowing proceeds are established as an ‘own resource’ in an appropriately amended ORD, borrowed funds could even be used for general financing of the EU budget.

Sebastian Grund (sgrund@imf.org), Legal Counsel, International Monetary Fund (IMF). The views expressed in this paper do not necessarily represent the views of the IMF, its Executive Board, or IMF management.

Armin Steinbach (armin.steinbach@bruegel.org) is a Non-resident Fellow at Bruegel and Jean Monnet Professor of Law and Economics, European Law and International Law at HEC Paris.

The authors thank Grégory Claeys, Lucio Pench, Nicolas Veron and Jeromin Zettelmeyer for their valuable comments and suggestions.



Recommended citation:

Grund, S. and A. Steinbach (2023) ‘European Union debt financing: leeway and barriers from a legal perspective’, *Working Paper 15/2023*, Bruegel

1 Introduction

Policymakers appeal increasingly to the concept of European public goods. The European Commission has evoked European public goods in the energy and security sectors by building on the Support to mitigate Unemployment Risks in an Emergency (SURE) mechanism – introduced to tackle some of the labour-market consequences of the pandemic – and to support Europeans and industrial ecosystems in the current energy crisis¹. The International Monetary Fund (Arnold *et al*, 2022) and the European Central Bank (Abraham *et al*, 2023; Freier *et al*, 2022) have called for the establishment of a fiscal capacity at EU and euro-area level to fund certain public investment categories (particularly climate-related). The EU's need to galvanise resources for critical and emerging green and digital technologies led the European Commission in 2023 to propose a Strategic Technologies for Europe Platform, which would, according to Commission president Ursula von der Leyen be a “precursor to a fully-fledged Sovereignty Fund”. Meanwhile, EU funding remains dependent on member states, which provide it with resources, as emphasised in 2022 by the German Federal Constitutional Court (GFCC, 2022).

This paper is not concerned with determining the scope of EU public goods, nor does it address the question which (if any) additional own resources should be given to the EU (Schratzstaller and Krenek, 2019). Rather, we investigate the legal feasibility of the EU borrowing on the capital market to finance these goods. EU debt issuance is far from novel (Claeys *et al*, 2023). But the pandemic recovery fund, NextGenerationEU (NGEU) has changed EU borrowing in terms of magnitude and in terms of legal design. The pandemic bolstered the view that unforeseen shocks hitting the EU may give rise to a solidarity mechanism such as NGEU. Financing other EU public goods may become equally compelling, given the magnitude of potential funding gaps in the areas of climate, security and social policy.

We explore the legal leeway for two possible avenues for debt financing EU public goods, without determining the scope of these goods or discussing the own resources that may be created to finance them:

1. Debt financing EU public goods through replicating the NGEU model, ie creating a temporary, ‘one-off’ and ‘off-budget’ fund that allows the EU to borrow (and spend) for a specific purpose.
2. Borrowing funds within the EU's regular budget, thus creating a permanent, ‘on-budget’ debt-financing capacity. This avenue has been employed occasionally on a small scale by exploiting the budgetary headroom or margin under the EU budget, although only featuring a back-to-back funding mechanism (the European Financial Stability Mechanism's (EFSM) is the most important example).

We conclude that the NGEU (‘off-budget’) model could essentially be replicated by amending the EU Own Resources Decision (ORD), which sets out the EU's budget main revenues, and raising funds as ‘other revenue’. However, this off-budget construction would always be limited in volume by the primary law requirement that other revenue remains marginal compared to ‘own resources’. In turn, raising funds for general debt financing (on-budget) is feasible as a matter of primary EU law, subject to conditions: the ORD would have to specify the permissible amount of borrowing, and the EU must have adequate means to meet its debt service in any year, which must be secured by a sufficient amount of (non-borrowed) own resources.

¹ See European Commission press release of 20 June 2023, ‘EU budget: Commission proposes Strategic Technologies for Europe Platform (STEP) to support European leadership on critical technologies’, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3364.

2 EU budget law: a primer²

The EU budget system is based on a web of primary and secondary EU laws, and the budget amounts to about 2 percent of total EU public spending. EU revenues, which finance the EU budget, are divided into ‘own resources’ and ‘other revenue’ (Article 311 TFEU):

- ‘Own resources’ are the main sources of revenue and are defined as income streams that are expressly enumerated and described in an Own Resources Decision (ORD), a unanimous European Council decision adopted by special legislative procedure under Article 311 TFEU. It must be approved by *all* EU countries in line with their respective constitutional requirements before entering into force, which for the majority of countries means ratification by their national parliaments³. This is why the ORD procedure has been described as a ‘quasi-constitutional’ or ‘quasi-Treaty’ procedure. The European Parliament is only consulted on the ORD. By contrast, EU expenditure is regulated in the multiannual financial framework (Article 312 TFEU) and the EU’s annual budget (Article 314 TFEU), which are adopted by the Council and the European Parliament.
- ‘Other revenue’ has in the past included debt-issuance proceeds, unused balances from the previous year and current income not explicitly listed as own resources (eg from third countries for participating in EU programmes, taxes paid by EU staff, competition fines, and interest on late payments). Hence the concept of ‘revenues’ under EU primary law is broader than the terminology typically used in national budgets and by the IMF. The latter typically refers only to current income, while the former also uses what the IMF would call ‘financing items’ (proceeds from debt creation, or running down an unused balance).

National contributions were the main source of financing for the EU until the 1980s when the current own resources system was introduced. The objective was to bolster the EU’s fiscal autonomy, with resources accruing to the EU without any additional decision by EU countries. In 1988, the GNI-based own resource was created and gradually exceeded revenue from traditional own resources (especially value-added tax-based resources) (Schatzenstaller, 2013). Initially created to cover the shortfall from traditional own resources, the GNI-based contributions now amount to more than 70 percent of the entire budget revenue (Bundesbank, 2020). From a legal perspective, the ORD creates an obligation for EU countries to provide traditional own resources as well as the GNI-based contributions, up to the own-resources ceiling. The own resources ceiling sets the absolute limit for member-state contributions to the budget⁴.

A central principle of EU budget law is enshrined in Article 310 TFEU, which requires “*the revenue and expenditure shown in the budget to be in balance*” (balanced budget principle). While this requirement rules out EU countries running into arrears with the EU, it does not rule out EU debt. This is because ‘revenue’ can include proceeds from debt issuance, which are balanced by the claim the EU has either against its borrower(s) (back-to-back funding) or member states (diversified funding). Indeed, there is a long history of EU debt issuance (Meyer *et al*, 2020). A different question is whether EU debt can only be issued in limited amounts and for specific spending purposes (rather than to finance the general EU budget). We return to this question in section 4.

² See the annex for an overview of the relevant EU Treaty provisions mentioned in this paper.

³ As a result, the adoption of the ORD tends to take more time than ordinary EU legal acts (usually more than two years). In Czechia, Ireland, Cyprus, Latvia, Malta, Slovenia and Slovakia, approval by the national parliament is not required. See D’Alfonso (2021).

⁴ In the context of NGEU borrowing, it was further clarified that the Commission can call on EU countries to provisionally make available the relevant cash resources. If a country does not comply with its obligations, the Commission can *temporarily* call on other countries to step in to ensure that the EU would never default on its debt obligations.

Another pillar of the EU budgetary framework is the principle of universality, according to which revenue cannot be used for specific expenditure, ie there must not be any earmarking of revenue⁵. However, there are exceptions to this principle. 'Assigned revenues' constitute a type of 'other revenue' that are used to finance specific items of expenditure rather than the general budget⁶. Assigned revenues are further divided into internal and external assigned revenues. External assigned revenues are not subject to the budgetary procedure in Article 314 but are contributed to the budget directly for a specific purpose (Crowe, 2017)⁷.

Finally, when it comes to the liability of EU countries for repayment of the debt instruments issued by the EU, different types of guarantees have been discussed. For instance, the most far-reaching Eurobonds proposals suggest that the EU would issue securities guaranteed by a 'joint and several' liability. This implies that if the EU cannot or refuses to service a bond, creditors could request *full* payment from one or several EU countries. A several guarantee, or pro-rata guarantee, would mean that EU countries remain liable for their respective shares of common debt issuance⁸. Both the European Stability Mechanism and EU debt instruments provide for pro-rata liability. Article 8(5) of the ESM Treaty makes clear that "*the liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price*". For NGEU bonds, EU countries are required to provide their shares of the GNI-based own resources, while the Commission may also call on them to provide the difference between the overall assets and the cash resource requirements, in proportion (pro rata) to the estimated budget revenue of each of them (Article 9(5) ORD).

3 The NGEU legal architecture: a replicable model?

The NGEU's legal framework is both complicated and ingenious. It rests on three pillars anchored in EU primary law and translated into sources of secondary law:

1. A debt issuance mechanism, laid out in the Council's 2020 amended ORD, based on Article 311 of the Treaty of the Functioning of the EU (TFEU).
2. Linking the use of the funds to the economic emergency caused by the COVID-19 pandemic. This is based on Article 122 TFEU and the implementing European Recovery Instrument Regulation (EURI, Regulation (EU) 2020/2094).
3. A pillar containing the various programmes that specify the spending and investment, notably the Recovery and Resilience Facility (RRF). This is based on Article 175 TFEU (enabling the EU to pursue and finance cohesion policy) and the RRF Regulation.

3.1 Debt-financing NGEU funds

As a first step, the EU had to establish the legal basis to issue roughly €750 billion (in 2018 prices) of common debt that would subsequently be channelled to its members. Of the €750 billion, €360 billion

⁵ The principle of universality is anchored in secondary EU law (Article 20 of the EU Financial Regulation) and may therefore be amended by the EU legislators.

⁶ See Article 21 of the EU Financial Regulation.

⁷ Crowe (2017) noted that "[t]raditionally, this technique has been employed by member states wishing to contribute additional amounts to certain research programmes or external aid initiatives". However, the Commission has in the past considered that external assigned revenues could be used for a dedicated EU budget instrument. Debt raised under the NGEU was defined as external assigned revenue.

⁸ Joint liability exists when a plurality of debtors has a liability and creditors can look to one member state to recover 100 percent of the outstanding amount. See Waibel (2016).

can be paid out as loans to EU countries that will have to be repaid at low interest rates (back-to-back financing) while the remainder can be provided as non-repayable grants (borrowing for spending).

Based on a proposal by the European Commission, the Council's 2020 ORD empowered the EU to issue instruments in capital markets, backed by the EU budget and thus ultimately EU countries. Notably, member states are obliged to step in if no other own resources are created when the EU's debts become due (Blaya, 2022). To provide investors with the necessary confidence in the EU's ability to repay its bonds in full and on time, the 2020 ORD temporarily and exceptionally increased the own resources ceiling by 0.6 percent of EU GNI⁹.

NGEU was a game changer in at least three other crucial aspects:

- First, its volume was far greater than any of the debt issuance activities before; its €750 billion dwarfed the EFSM size of €60 billion, the hitherto biggest EU financial assistance programme.
- Second, NGEU shifted away from back-to-back lending – whereby both the proceeds of EU debt issuance and the associated debt service are immediately passed on to the country requesting a loan from the EU – towards a diversified funding model that makes the EU a regular bond issuer. This has two important implications. On the funding side, similar to what the ESM has done for years, or sovereign states for even longer, the EU will issue securities between 2021 and 2058 across the entire maturity curve, rather than only when a country asks for a loan (Grund and Waibel, 2023). With regard to expenditure, roughly half of all NGEU expenditure that is passed onto EU countries does not have to be paid back by the recipient EU countries. Such borrowing-for-spending brings the EU budgetary setup, at least temporarily, closer to traditional sovereign finance operations.
- Third, the EU will have to repay NGEU bonds up to 2058 that were issued to finance spending between 2021 and 2026, epitomising a long-term structural shift in how the EU finances itself.

3.2 Using NGEU funds

The expenditure side is regulated by EURI (Regulation (EU) 2020/2094), based on Article 122 TFEU. This regulation identifies the measures to facilitate the recovery from the pandemic, allocates the borrowed funds to the EU's recovery programmes and clarifies that funds are raised as external assigned revenue (Council Legal Services, 2020). Article 122 TFEU, which is also referred to as a 'solidarity clause', justifies the financing of targeted and temporary economic measures in exceptional situations. The legal provision underpinning the expenditure side of NGEU was deemed necessary because raising EU debt as 'other revenue' under Article 311 makes an 'earmarking' of the debt-issuance proceeds legally compelling (as we will show, EU budget financing through own resources leaves more flexibility in this regard)¹⁰.

The requirement that proceeds raised through other revenue need to assign the borrowed funds to particular items of expenditure is enshrined in the 2020 ORD. At the Treaty and constitutional levels, it emanates from Article 122 TFEU and the German Federal Constitutional Court's (GFCC) December 2022 ruling on NGEU¹¹. The allocation of NGEU funds is further specified through sectoral legislation, notably

⁹ The 0.6 percent increase in the GNI ceiling was considered necessary to convince markets that EU countries will provide sufficient funds to repay NGEU borrowing. The exact reasoning behind the 0.6 percent figure was not disclosed.

¹⁰ An important reason for such earmarking is that there are no claims against the borrower for NGEU grants, which requires a ringfencing of the headroom according to the Council Legal Services (2020).

¹¹ German Constitutional Court Judgement of the Second Senate, 2 BvR 547/21, 2BvR 789/21 (6 December 2022), available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/12/rs20221206_2bvr054721en.html.

the RRF Regulation (Regulation (EU) 2021/241). As noted above, the RRF Regulation builds on the EU's competence to strengthen economic cohesion in line with Article 175 TFEU, underscoring a broader trend in European economic policymaking (Steinbach, 2017; Fabbrini, 2022). If they wanted to access loans or grants under the RRF, EU countries had to submit recovery plans in which they committed to reforms or investments in common priorities – money is delivered upon verification of compliance with milestones and targets (de Gregorio Merino, 2021).

3.3 Repeating NGEU?

There is no general barrier to adopting an NGEU-type approach for the purposes of financing specific future expenditures of the EU. This would require an amended ORD in accordance with Article 311 TFEU, which would authorise borrowing up to a maximum amount and for a specific purpose, and adjust the own resources ceiling to ensure the borrowing can be repaid.

However, replication could raise concern on at least two levels, depending on the volume of an off-budget fund as well as its *raison d'être*:

1. Article 311 TFEU unambiguously identifies own resources as the primary instrument to finance the EU budget. This primacy would be challenged if a large and increasing portion of EU expenditure were to be financed off-budget via other revenue, including borrowing, rather than own resources.
2. NGEU expenditure is justified by the occurrence of an exceptional event (the COVID-19 pandemic) and the need to address the consequences without increasing the pressure on the finances of EU countries when their budgets are already under pressure. The key legal question is whether an NGEU-like mechanism must operate within the (relatively) narrow confines of Article 122 TFEU (exceptional occurrences or natural disasters), or if other primary law bases may also be relied on.

a) *The maximum permissible magnitude of other revenues relative to own resources under Article 311 TFEU*

A major concern results from the predominant view that other revenues should be small in relation to the own resources, as a source of EU revenues under Article 311(2) TFEU¹². For example, the GFCC held that *“the financing through own resources [must not be] undermined by revenue obtained from other sources”* (GFCC, 2022). It further clarified that the amended ORD respects this requirement because it is *“limited in terms of both volume and duration”* and since *“the borrowed funds may not considerably exceed the amount of own resources”*. The GFCC majority opinion reluctantly accepted that the multiannual financial framework (MFF), rather than the annual budget, should be the basis for ascertaining whether NGEU respected this relationship: while NGEU was considered *“significant”* at €750 billion and allowed for frontloaded debt issuance in 2021, it did not exceed the seven-year MFF (2021-2027), which amounted to €1.07 trillion, thus *“not manifestly [giving] rise to a violation of Article 311 TFEU”* (GFCC, 2022)¹³.

Against this backdrop, a budgetary framework in which off-budget financing in the form of other revenue exceeds the financing from own resources would certainly exceed both the limits of EU law and of German constitutional law. Consequently, even if the bunching of NGEU revenue and expenditure into two years appeared economically warranted, the rule-exception relationship between own resources and other revenues would require a marked decline in NGEU debt issuance in the

¹² This provision states that the EU must be wholly funded through its own resources, *without prejudice to other revenue*.

¹³ The GFCC further elaborated that, *“[b]ased on this standard, the exception to the rule relationship mandated in the Treaty is only dispensed with for two out of the seven budget years in question; for the overall intended period of the NGEU, there is no deviation from the general rule”*.

subsequent years. If debt issuance was classified as an own resource, as discussed below, this restriction would no longer be binding.

This has major implications for the repeated use of the off-budget structure. The legal expectation is that after the initial large impulse of NGEU, other revenues would decline to a fraction of own resources until NGEU is repaid entirely in 2058. Consequently, if the NGEU model were to be replicated to finance public goods in the coming years – as proposed, for example, by the ECB in the form of an EU Climate Fund (Abraham *et al*, 2023) – the quantitative limit postulated by the GFCC becomes binding. Accepting the principle that other revenues are capped at the size of the MFF, or even below, would suggest that for the budgetary period until 2027 very little space is left for debt financing programmes.

b) The exceptional character underpinned by a suitable legal basis

The second point of contention in repeatedly using the NGEU model is its frequently invoked ‘exceptional’ character¹⁴. The chief legal concern is whether the ORD, itself based on Article 311 TFEU, was by itself sufficient to justify NGEU borrowing *or* whether it should be read in conjunction with Article 122 TFEU, which would limit such borrowing operations to address exceptional circumstances or natural disasters. The issue is complicated by the fact that previous EU borrowing programmes operated outside the own resources framework using the budgetary headroom of the EU budget, relying on Article 122 TFEU (EFSM) or other primary law provisions (such as the predecessor of Article 175 TFEU¹⁵ in the case of the early balance-of-payments facilities or Article 352 TFEU¹⁶ in other cases).

In this context, it is critical to distinguish between borrowing and spending (Mayer and Lütkemeyer, 2020). Since NGEU, there is a broad consensus that the central legal authority for the Commission to borrow on the EU’s behalf is the ORD. By contrast, spending of the funds raised needs to have a distinct legal anchor, which, in the case of NGEU, was the EURI (based on Article 122 TFEU). Article 122 TFEU serves as the justification for the temporary and exceptional flow of money from the EU budget (or, more specifically, other revenues) to EU countries (Blaya, 2022; GFCC, 2022). It also establishes important safeguards that increase the political expediency of borrowing for spending programmes. Notably, as the GFCC made clear, the financing of EU countries’ pandemic recovery programmes from NGEU funds is limited in duration, volume and substance. The last requirement requires linking the use of borrowed funds to addressing the “*exceptional occurrence*” within the meaning of Article 122 TFEU. This was key to the GFCC ruling, which held that the EURI “*remains strictly limited to the historically exceptional case of supporting the recovery in the aftermath of the COVID-19 crisis*” (GFCC, 2022).

There are practical and legal grounds to allow other Treaty provisions than the emergency clause in Article 122 TFEU to offer ground for ‘spending’ the financial resources that the EU ‘borrows’ under Article 311 TFEU and the ORD as externally assigned revenues (with the caveats described in section 3.3a). The past practice of relying on a diversity of primary law provisions (Articles 175 or 352 TFEU in addition to Article 122 TFEU), which has largely been approved by legal scholarship and has not triggered successful judicial challenges, indicates leeway. Legally, as is the case for ‘borrowing’, ‘spending’ operations must comply with the general principle of conferral¹⁷. This implies that borrowing requires ratification by EU countries in line with domestic constitutions (as required by the Article 311 TFEU), while spending should not be treated differently from regular spending by the EU. Thus, to the

¹⁴ Article 5 of the Own Resources Decision stipulates that NGEU constitutes an exception to the general prohibition on borrowing for spending.

¹⁵ Article 175(3) TFEU allows for actions in support of cohesion policy outside the Structural Funds.

¹⁶ Article 352 TFEU, also referred to as the ‘flexibility clause’, may be a legal basis under certain circumstances for the EU to take actions where, according to the Treaties, it lacks competence.

¹⁷ Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the member states in the Treaties to attain the objectives set out therein.

extent that a Treaty norm offers a competence for the EU to allocate common funds to EU countries, there should be no discrimination between the origin of the financial resources as debt-financed resources or regular own resources.

This means that the EU has discretion to design spending programmes of debt-financed resources raised as other revenues under the narrow conditions of Article 311 (see section 3.3a). Programmes pursuing objectives of cohesion, akin to macroeconomic programmes addressing cross-border smoothening, may be justified under Article 175 TFEU. The climate emergency may justify a spending programme under Article 122 TFEU. Environmental spending programmes more generally could be initiated under Article 192 TFEU. Transnational infrastructure can be financed on the basis of Article 171 TFEU, and trans-European research can be financed on the basis of Articles 179 and 173(3) TFEU¹⁸. No matter which primary law basis one invokes to justify a spending programme, any spending of debt-financed resources must be fully aligned with the ambit of the primary law legal basis (Leino-Sandberg and Ruffert, 2022).

Finally, every (re)distribution of EU funds must be held against the benchmark of the no-bailout clause in Article 125 TFEU (GFCC, 2022). Any significant debt-financed spending programme may create tension with this provision. Under NGEU, the redistributive effect has been significant, as the centrally coordinated debt-financing offers relief to EU countries' budgets, especially when grants (rather than loans) are allocated. Article 125 TFEU was a key concern during the EU debt crisis when financial aid was set up to address imminent liquidity (and solvency) issues in some EU countries, as its function was primarily to support national budgets. By contrast, the no-bailout clause appears less problematic where the spending programmes of debt-financed EU resources do not seek to offer immediate and urgent budgetary relief. Similarly, borrowing for spending without redistributive effects is of lesser concern.

Though politically less appealing, policy conditionality linked to loans or grants may also help avoid running into Article 125 TFEU constraints, as is for instance the case with ESM financial assistance. In any event, the allocation of commonly financed resources should serve Treaty-based goals rather than constituting solvency aid, and the size of resources and degree of redistribution must be determined in accordance with the intention of the no-bailout clause not to release the state from market pressure and discipline (Louis, 2010).

4 Debt-financing as an own resource?

This section discusses the (legal) merits of a potential alternative to the NGEU model: rather than borrowing funds for specific purposes as other revenue, debt financing could be integrated into the general EU budget. The proposal would mark a step forward in EU fiscal integration, building on two previous critical steps in the history of EU borrowing: the decades-old decision to issue EU debt in international markets to finance (small-scale) assistance programmes, and the NGEU, which showed that the balanced-budget rule in Article 311 TFEU can be reconciled with a massive borrowing programme, as long as the necessary counterbalancing asset is created through an increased own resources ceiling (Steinbach and Grund, 2023; Blaya, 2022).

4.1 There is no general prohibition preventing the EU from borrowing to finance its budget

While borrowing under the EU budget is not a new practice, scholarship and jurisprudence are divided on whether the EU may finance its *general* budget with debt (Leino-Sandberg and Ruffert, 2022). Some scholars, as well as the Legal Services of the Council and the Commission, have voiced doubts about

¹⁸ See annex for the text of the relevant Treaty provisions.

whether debt as own resources would be compatible with the principle of budgetary balance in Article 310 TFEU (Council Legal Services, 2020; European Commission, 2020), while others consider it legally feasible (Nettesheim, 2020b; Blaya, 2022). The Council Legal Services Opinion on NGEU noted in this context that, due to Article 3a of the ORD, borrowing for spending cannot become a permanent feature of the budgetary landscape. However, by invoking the ORD, rather than a Treaty provision, it effectively concedes that there is no absolute prohibition under EU primary law. Similarly, the EU Financial Regulation (Regulation 2018/1046)¹⁹ in Article 17 (2) stipulates that the EU is not permitted to raise loans within the general budgetary framework²⁰. Again, as noted by the GFCC, the EU Financial Regulation is “*an instrument of secondary law rather than a part of the Treaties*” (GFCC, 2022).

The Treaties neither deny nor explicitly empower the EU to finance its budget with debts. While the ORD and the EU Financial Regulation reflect the preferences of the EU legislators at the time of their adoption, it is undisputed that the Treaty does not contain an *absolute* prohibition against raising debts (GFCC, 2022)²¹. For instance Article 318 TFEU obliges the Commission to “*submit to the Parliament and the Council annual financial statements of the assets and liabilities of the Union*”. Suggesting that the EU cannot incur liabilities when the Treaty creates a specific obligation to report on them seems spurious. Moreover, Article 311 TFEU makes clear that the EU may create new categories of own resources and “*shall provide itself with the means necessary to attain its objectives*”. The Treaty is thus explicitly open to accommodate an evolution of the EU budgetary system. An historical anecdote bolsters the argument for a general borrowing capacity: as part of the negotiations of the Rome Treaties, the German delegation proposed that the Council could unanimously allow the Community to issue common debt securities with a maturity of more than one year²². The historical sources do not say how this proposal was perceived by other member states, but it was ultimately not adopted.

4.2 Designation of borrowing proceeds as an own resource category

The EU could finance public goods through the proceeds of borrowing by adding a new category of own resources in Article 2 of the ORD. Such a scheme would go beyond previous debt-financing programmes: in principle, there would be no quantitative limit on the borrowing, there would no need for a hard repayment deadline or sunset clause and the EU could directly spend the proceeds from borrowing (rather than indirectly through the member states). However, the ORD, which requires ratification by all EU countries, must specify the permissible amount of borrowing and the EU must have adequate means to meet its debt service in any year, which must be secured by a sufficient amount of (non-borrowed) own resources.

Moreover, debt financing the (general) EU budget comes with a number of legal and institutional advantages compared to the NGEU-model discussed above.

- First, as the EU budget is approved by the co-legislators, the European Parliament is directly involved by virtue of Article 314 TFEU²³. Integrating debt in the ordinary budgetary procedure

¹⁹ Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018R1046>.

²⁰ The EU Financial Regulation provides the principles and procedures governing the establishment, implementation and control of the EU budget; it was last revised in 2018. A proposal for some targeted adjustments by the European Commission is at time of writing under legislative review.

²¹ However, the GFCC (2022) also held that “*without an amendment of the Treaties, it would not be possible to recognise borrowing as a permanent source of financing for the European Union*”. However, it did not further substantiate the issue, as it was not directly relevant to the assessment of NGEU’s legality.

²² See Conseil des Communautés Européennes, CM 3, No. 0260, ‘Conférence intergouvernementale: Historique de l’article 199 à 209 du traité instituant la CEE’.

²³ Note that the Parliament does not decide on the use of external assigned revenue, even if it makes up a significant part of the budget, as is the case with NGEU.

significantly boosts the democratic legitimacy and restores the institutional balance that the NGEU's Council-focused process has arguably dented.

- Second, given that Article 310 TFEU requires all revenue and expenditure to be shown in the budget, there would be full transparency, including oversight by the European Court of Auditors [Blaya, 2022].
- Third, NGEU has distorted the budgetary preference for own resources (on-budget) over other revenue (off-budget) stipulated in Article 311 TFEU (requiring that “*without prejudice to other revenue, the budget shall be financed wholly from own resources*”). Integrating debt funding in the budget by making it an own resource would re-align the relationship between other revenue as the secondary source and own resources as the main element of EU budget financing. Off-budget financing could assume its pre-COVID-19 role, allowing for limited borrowing to finance very specific expenditure (as defined in Article 21 of the EU Financial Regulation).

Additionally, as was the case for NGEU, EU countries, including their parliaments, will remain in full control of the EU's revenue from borrowing operations via the ORD. The Commission would only be authorised to borrow up to a pre-defined limit. This would alleviate concerns consistently uttered by the GFCC throughout a series of judgements during the EU debt crisis. Drawing on national constitutional law, only foreseeable and sufficiently quantifiable liabilities of the German budget vis-à-vis the EU would be permissible under the narrow German legal benchmarks.

To avoid constitutional and EU law obstacles, the debt instruments issued by the Commission could, like NGEU bonds, provide for *pro-rata* (several) rather than joint and several liability of EU countries [Waibel, 2016]. This means that in the event that a country fails to comply with its obligation to provide the EU with the necessary resources to repay securities holders, other EU countries may only be called on exceptionally and temporarily to cover a larger repayment share than they are liable for under the ORD.

Critically, the Commission may never decide that one country is (legally) liable for the entire outstanding amount, thereby steering clear of a fully mutualised EU budget that would likely violate the no-bailout clause in Article 125 TFEU. This also means that the liability created by the Commission is not a ‘Eurobond’ in the narrow sense – it would be a safe asset backed by the EU budget, but a creditor may not look to a single debtor for payment or recover 100 percent of the principal and interest from it. As a consequence, the German Bundestag's liability would always be capped by the amount it has agreed to contribute under the ORD [Nettesheim, 2020a]. Its budgetary sovereignty would stay fully intact, accommodating the GFCC's standard.

This said, there are a number of legally challenging issues associated with the general debt financing option. Nevertheless, they should be resolvable within the bounds of the existing Treaty framework, as explained below.

a) Requirement to balance the EU budget

The balanced budget rule, enshrined in Article 310(1) TFEU, has often been invoked as a key impediment to debt funding of the EU budget [European Commission, 2020]. However, NGEU, and the GFCC's analysis of it, have opened the door for a more flexible approach. As the Council Legal Services [2020] noted, “*borrowing by the Union would be budgetarily neutral if the resulting debt is matched by a claim allowing the Union to cover the principal, interests and costs associated with that borrowing and where sufficient assets are dedicated for that purpose*”. In the case of NGEU, this counterbalancing asset or claim is increased budgetary headroom, which is an “*irrevocable, definitive and enforceable*

guarantee of payment” provided by the member states (Council Legal Services, 2020). There is no easily discernible reason why replicating this approach in the context of debt as a new own resource would be incompatible with EU primary law. Both borrowing as other revenue (NGEU model) and borrowing as own resources would be captured in the ORD, and the relevant own-resources ceiling would in either setup be calibrated to ensure the budget is balanced.

An important yet contentious issue is whether outstanding EU debt may be re-financed by issuing new EU debt. As discussed above, the NGEU model allows for borrowing and spending that is limited in duration and volume – EU countries have only empowered the EU to raise the debt for the specific purpose described in the ORD, but not to re-finance the liabilities with new debt. This seems less clear with respect to borrowing proceeds that are categorised as own resources. What if EU countries, via an amended ORD, provide the EU with the (permanent) competence to issue debt up to a pre-determined ceiling and thereby finance general expenditure (such as repaying outstanding EU debt)? Such a decision would undoubtedly raise a number of challenging political, financial and accounting questions that would go beyond the scope of this paper. Moreover, the current focus of the Commission and other EU institutions lies, in any event, on the creation of new (non-borrowed) own resources to pay off existing (NGEU) debt.

Without prejudice to a more elaborate analysis of this aspect, it appears plausible to distinguish the issue of revolving debts between the ‘off-budget’ and ‘on-budget’ setup. As mentioned above, other revenues must generally be marginal in quantitative terms relative to the own resources, which would preclude revolving debt generated as other revenue on a large scale. For this reason, it would be difficult for an amended ORD to allow all NGEU debt proceeds to be rolled over into new debt. This quantitative restriction does not exist in relation to debts raised as own resources. In this respect, as discussed above, what matters from an EU primary law perspective is that member states create sufficient headroom in the own resources ceiling to repay the liabilities.

b) Budgetary principle of universality and the non-assignment rule

The principle of universality requires that all revenue must cover all payment appropriations and, importantly, that revenues from borrowing must be used without distinction to finance all expenditure entered into the EU’s annual budget²⁴. Under the NGEU off-budget construction, other revenue is considered an exception to this principle, which means that the borrowing must be used to finance specific items of expenditure (ie spending for the COVID-19 recovery). While this requirement limits the allocation of borrowed funds, it also serves as a politically convenient guardrail. Debt financing as an own resource would, in principle, require the raised money to be available for all tasks that have been conferred on the EU. The GFCC expressed strong reservations about this, positing that no general competence to finance general budgetary expenditure has been conferred (GFCC, 2022).

As noted above, however, given that any such borrowing would have to be regulated via the ORD, EU countries (including their parliaments) would maintain their prerogatives over the EU’s finances. That NGEU proceeds were integrated into the ORD may not have been legally necessary but was certainly an important safeguard for hesitant EU countries. When the proceeds of debt financing become a new category of own resource, there is no other way than regulating the amount that will be issued in the ORD.

Concerns about a lack of conferral for the EU to use borrowed funds are alleviated by the fact that the Commission may, in any event, only employ funds from the EU for tasks covered by primary law. This

²⁴ The principle of universality is a general budgetary principle that is however not anchored in primary law (but in secondary law, namely Article 6 of the EU Financial Regulation as well as in Article 7 of the ORD).

could be Article 122 TFEU, but other primary-law provisions are conceivable, such as Article 175 TFEU that allows action in support of cohesion policy (Fabbrini, 2022). Finally, the spending must comply with the no-bailout provision in the Treaties (Article 125 TFEU). This means that the EU must not employ budgetary resources to provide financial assistance to member states. In the euro area, such stability support is provided through the European Stability Mechanism (ESM) under strict conditionality; in the EU, financial assistance may be justified within the narrow confines of Article 122 TFEU, as the NGEU model shows.

	NGEU model	Debt as own resource
Borrowing	<ul style="list-style-type: none"> - 'Borrowing' is established as 'other revenue' by the Council and upper limit of debt financing is defined in the ORD (ratified by EU countries) - European Commission issues debt as 'other revenue', which is backed by an irrevocable, definitive and enforceable guarantee of payment provided by EU countries through an increased GNI-ceiling 	<ul style="list-style-type: none"> - 'Borrowing' is established as a new 'own resource' by the Council and an upper limit of debt financing is defined in the ORD (ratified by EU countries) - European Commission issues debt as an 'own resource' after a new own resource category is created in the ORD by the Council, backed by an irrevocable, definitive and enforceable guarantee of payment provided by EU countries through an increased GNI-ceiling
Spending	<ul style="list-style-type: none"> - Expenditure is qualified as 'external assigned revenue' and must be earmarked for specific expenditure purposes 	<ul style="list-style-type: none"> - Expenditure follows principle of budgetary universality and non-assignment rule and funds raised may be spent for purpose foreseen in the Treaties - Alternatively, expenditure could be earmarked for specific expenditure purposes (provided a change of the EU Financial Regulation, notably Article 21)
Legal bases	<ul style="list-style-type: none"> - Article 311 TFEU (borrowing) - Article 122 TFEU, and sectoral legislation, such as Articles 175(3), 192, 212, and 352 TFEU, but within the limits of the marginal character of 'other revenues' (spending) 	<ul style="list-style-type: none"> - Article 311 TFEU (borrowing) - Article 314 (establishing budget) - Sectoral legislation, such as Articles 175(3), 192, 212, and 352 TFEU (spending)
Governance	<ul style="list-style-type: none"> - Council unanimously approves Commission proposal to amend the ORD approved by EU countries' parliaments - European Commission issues debt securities and allocates spending in line with specific purposes - European Parliament has only a consultative role 	<ul style="list-style-type: none"> - Council unanimously approves Commission proposal to amend the ORD - European Commission issues debt securities and allocates spending without earmarking constraints but in line with principle of conferral - European Parliament and Council establish the EU annual budget
Benefits	<ul style="list-style-type: none"> - Legal constructions endorsed by EU institutions and German Federal Constitutional Court - Fast and efficient mechanism to provide financial assistance in crisis situation 	<ul style="list-style-type: none"> - No earmarking of funds necessary, expenditure can be based on general EU competences (subject to the limits of Article 125 TFEU) - Revolving debt may become a possibility - Creates a long-term EU safe asset

Shortcomings	<ul style="list-style-type: none"> - Generally limited to crisis situations - Size constraints, as 'other revenue' must be marginal relative to 'own resources' - Limited in duration (no refinancing of outstanding debt) - Spending must be earmarked - European Parliament only involved through consultations 	<ul style="list-style-type: none"> - Untested and potentially controversial, with risk of legal challenges
---------------------	--	---

5 Conclusions

We reviewed from a legal perspective two options for financing European public goods through the issuance EU common debt: first, repeating the NGEU model of raising funds as other revenue and, second, integrating debt financing into the EU budget by making it a new category of own resource (Table 1).

With regard to the first option, there is no general barrier against repeating NGEU under EU primary law. It would require an amendment to the ORD to borrow other revenue (external assigned revenue) and create an off-budget item. However, with every NGEU-like financing, the legal space for repeating NGEU-like constructions shrinks. Given that NGEU-type debt financing creates a large off-budget liability, it challenges the relationship between other revenue and own resources. Similarly to NGEU, any future fund must likewise demonstrate it is a one-off and temporary measure.

Certainly, such funding must not lead to other revenues generated outside the EU budget taking on a permanent nature. By magnitude, they must remain significantly smaller than the EU budget. The Treaty-based assumption that other revenues are an exception implies that no permanent EU tasks may be pursued via this avenue.

While 'borrowing' must comply strictly with the requirements of Article 311 TFEU (ratification by EU countries, in particular), there is more leeway on 'spending'. The NGEU choice of using the emergency solidarity clause (for a climate emergency, for example) is replicable, if the norm's requirements are met. However, the EU may build spending programmes on alternative legal bases for expenditure (eg in the fields of environment (Article 192 TFEU), energy (Article 194 TFEU), cohesion policy (Articles 175(3) and 177(2) TFEU), research (Article 173 TFEU)); it can pursue the NGEU approach provided that the borrowing is strictly limited to expenditure under the relevant legal basis.

There are no absolute primary law constraints to prevent the EU from debt-financing its EU budget. A new ORD would have to be adopted, subject to the approval requirements under Article 311 (3) TFEU, thus requiring a Council resolution and ratification by EU countries. Moreover, the European Parliament's involvement in establishing the EU budget would bolster the democratic legitimacy of on-budget debt-financing options.

At the same time, important caveats would limit EU borrowing compared to a fully-fledged sovereign state. Given the EU cannot autonomously raise taxes (for which a Treaty amendment would be necessary), and because of the balanced budget requirements laid down in Article 310 TFEU, the EU must have in any year sufficient means to meet its debt service. The ORD must specify the maximum permissible amount of borrowing and secure the EU's ability to repay *ex ante*. The debt-financing space the EU enjoys must be backed by other own resources (eg through an increased GNI-ceiling like under NGEU). This also means, however, that as long as borrowing has been added as a new own resources

category in the ORD and stays within the limits of the own resources ceiling, revolving debt issuance may become an option.

On the expenditure side, borrowed funds may be used to finance any regular EU budget expenditure, though direct financial assistance is constrained by the no-bailout provision (the ESM remains the vehicle to channel financial assistance to EU countries under strict conditionality). Given that all EU expenditure must comply with EU primary law (built on secondary EU legislation), there is no need for an additional legal basis for spending borrowed resources. Alternatively, if politically desired and to address residual legal concerns, earmarking of borrowed debt to certain on-budget EU expenditure is feasible, but would require modification of the EU Financial Regulation.

Bibliography

- Abraham, L., M. O'Connell and I. Arruga Oleaga (2023) 'The legal and institutional feasibility of an EU Climate and Energy Security Fund', *Occasional Paper Series* No 313, European Central Bank
- Allemand, F., J. Creel, N. Leron, S. Levasseur and F. Saraceno (2023) *Making Next Generation EU A Permanent Tool*, Recovery Watch Policy Study, Foundation for European Progressive Studies, available at <https://feps-europe.eu/wp-content/uploads/2023/03/Making-Next-Generation-EU-a-permanent-tool.pdf>
- Arnold, N., R. Balakrishnan, B.B. Barkbu, H. R Davoodi, A. Lagerborg, W.R. Lam ... J. Zettelmeyer (2022) 'Reforming the EU Fiscal Framework: Strengthening Fiscal Rules and Institutions', *Departmental Paper* DP/2022/014, International Monetary Fund, available at <https://www.imf.org/en/Publications/Departmental-Papers-Policy-Papers/Issues/2022/08/31/Reforming-the-EU-Fiscal-Framework-Strengthening-the-Fiscal-Rules-and-Institutions-The-EUs-518388>
- Bundesbank (2020) 'The EU budget and its financing: looking back and ahead', *Deutsche Bundesbank Monthly Report* 45, available at <https://www.bundesbank.de/resource/blob/831226/a569592c0a71b7c5c2494f6acace6a75/mL/2020-04-eu-haushalt-finanzierung-data.pdf>.
- Claeys, G., C. McCaffrey and L. Welslau (2023) 'The rising cost of European Union borrowing and what to do about it', *Policy Brief* 12/2023, Bruegel, available at <https://www.bruegel.org/policy-brief/rising-cost-european-union-borrowing-and-what-do-about-it>
- Council Legal Services (2020) 'Opinion of the Legal Service on Proposals on Next Generation EU', 9062/20, available at <https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf>
- Crowe, R. (2017) 'The European Budgetary Galaxy', *EU Constitutional Law Review* 13(3): 428-452, available at <https://doi.org/10.1017/S1574019617000219>
- D'Alfonso, A. (2021) 'National ratification of the ORD: Procedure completed on 31 May 2021', European Parliamentary Research Service, 8 May, available at <https://epthinktank.eu/2021/05/08/national-ratification-of-the-own-resources-decision-state-of-play-on-5-may-2021/>
- De Gregorio Merino, A. (2021) 'The Recovery Plan: Solidarity and the Living Constitution', *EU Law Live* No. 50, available at <https://www.law.kuleuven.be/eur/en/files/paper-presented-by-director-alberto-de-gregorio-merino>
- European Commission (2020) 'Q&A: Next Generation EU – Legal Construction', QANDA/20/1024, 9 June, available at https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1024
- Fabbrini, F. (2022) 'Next Generation EU: Legal Structure and Constitutional Consequences', *REBUILD Centre Working Paper* No. 3, available at <https://dx.doi.org/10.2139/ssrn.4121330>
- Freier, M., C. Grynberg, M. O'Connell, M. Rodríguez-Vives and N. Zorell (2022) 'Next Generation EU: a euro area perspective', *ECB Economic Bulletin* Issue 1/2022, European Central Bank, available at <https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op291~18b5f6e6a4.en.pdf>
- GFCC (2022) 'Judgement of the Second Senate—2 BvR 547/21, 2BvR 789/21', 6 December, German Federal Constitutional Court, available at

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/12/rs20221206_2_bvr054721en.html

Grund, S. and M. Waibel (2023) 'European Safe Assets: Past, Present, and Future', in A. Hinarejos and R. Schuetze (eds) *Fiscal Federalism in the European Union*, Oxford University Press, forthcoming

Heber, C. (2016) 'Europarechtliche Grenzen für den Wiederaufbaufonds', *Europarecht* No. 4, 416

Leino-Sandberg, P. and M. Ruffert (2022) 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment', *Common Market Law Review* 59(2): 433-472, available at <https://doi.org/10.54648/cola2022031>

Louis, J.-V. (2010) 'Guest Editorial: The No-Bailout Clause and Rescue Packages', *Common Market Law Review* 47(4): 971–986

Mayer, F. and P. Lütkemeyer (2020) 'Hamilton in Brüssel? Europa- und verfassungsrechtliche Aspekte der Reform des EU-Eigenmittelsystems und des Next Generation-Programms der EU', *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*

Meyer, J., C. Trebesch and S. Horn (2020) 'Coronabonds: The forgotten history of European Community Debt', *VoxEU*, 15 April, available at <https://cepr.org/voxeu/columns/coronabonds-forgotten-history-european-community-debt>

Nettesheim, M. (2020a) 'Legally Feasible, Constitutionally Dubious – Establishing “Next Generation Europe” on the Basis of EU Secondary Legislation', *Verfassungsblog*, 4 December, available at <https://verfassungsblog.de/legally-feasible-constitutionally-dubious/>.

Nettesheim, M. (2020b) "'Next Generation EU": Die Transformation der EU-Finanzverfassung', *Archiv des öffentlichen Rechts* 145, 381

Schratzenstaller, M. (2013) 'The EU Own Resources System – Reform Needs and Options', *Intereconomics* 48(5): 303–313

Schratzenstaller, M. and A. Krenek (2019) 'Tax-based Own Resources to Finance the EU Budget', *Intereconomics* 54(3): 171–177

Steinbach, A. and S. Grund (2023) 'Der EU-Corona-Aufbaufonds – nächste Etappe in die Fiskal- und Transferunion?', *Neue Juristische Wochenschrift* 7: 405-410

Steinbach, A. (2017) 'Insurance-type Cooperation Mechanisms Under EU Law', *Swiss Review of International and European Law* 28: 19-40

Waibel, M. (2016) 'Eurobonds: Legal Design Features', *Legal Studies Research Paper Series* No. 37/2016, University of Cambridge

Annex: Relevant EU Treaty articles

Article 122 TFEU

1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.

Article 125 TFEU

1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.

2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.

Article 171 TFEU

1. In order to achieve the objectives referred to in Article 170, the Union:

— shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest,

— shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation,

— may support projects of common interest supported by Member States, which are identified in the framework of the guidelines referred to in the first indent, particularly through feasibility studies, loan guarantees or interest-rate subsidies; the Union may also contribute, through the Cohesion Fund set up pursuant to Article 177, to the financing of specific projects in Member States in the area of transport infrastructure. The Union's activities shall take into account the potential economic viability of the projects.

2. Member States shall, in liaison with the Commission, coordinate among themselves the policies pursued at national level which may have a significant impact on the achievement of the objectives referred to in Article 170. The Commission may, in close cooperation with the Member State, take any useful initiative to promote such coordination.

3. The Union may decide to cooperate with third countries to promote projects of mutual interest and to ensure the interoperability of networks.

Article 175 TFEU

Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain the objectives set out in Article 174. The formulation and implementation of the Union's policies and actions and the implementation of the internal market shall take into account the objectives set out in Article 174 and shall contribute to their achievement. The Union shall also support the achievement of these objectives by the action it takes through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund), the European Investment Bank and the other existing Financial Instruments.

The Commission shall submit a report to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions every three years on the progress made towards achieving economic, social and territorial cohesion and on the manner in which the various means provided for in this Article have contributed to it. This report shall, if necessary, be accompanied by appropriate proposals.

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.

Article 192 TFEU

1. 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, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

(b) measures affecting: — town and country planning, — quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, — land use, with the exception of waste management;

(c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph.

3. General action programmes setting out priority objectives to be attained shall 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. The measures necessary for the implementation of these programmes shall be adopted under the terms of paragraph 1 or 2, as the case may be.

4. Without prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environment policy.

5. Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, such measure shall lay down appropriate provisions in the form of:

- temporary derogations, and/or
- financial support from the Cohesion Fund set up pursuant to Article 177.

Article 310 TFEU

1. All items of revenue and expenditure of the Union shall be included in estimates to be drawn up for each financial year and shall be shown in the budget. The Union's annual budget shall be established by the European Parliament and the Council in accordance with Article 314.

The revenue and expenditure shown in the budget shall be in balance.

2. The expenditure shown in the budget shall be authorised for the annual budgetary period in accordance with the regulation referred to in Article 322.

3. The implementation of expenditure shown in the budget shall require the prior adoption of a legally binding Union act providing a legal basis for its action and for the implementation of the corresponding expenditure in accordance with the regulation referred to in Article 322, except in cases for which that law provides.

4. With a view to maintaining budgetary discipline, the Union shall not adopt any act which is likely to have appreciable implications for the budget without providing an assurance that the expenditure arising from such an act is capable of being financed within the limit of the Union's own resources and in compliance with the multiannual financial framework referred to in Article 312.

5. The budget shall be implemented in accordance with the principle of sound financial management. Member States shall cooperate with the Union to ensure that the appropriations entered in the budget are used in accordance with this principle.

6. The Union and the Member States, in accordance with Article 325, shall counter fraud and any other illegal activities affecting the financial interests of the Union.

Article 311 TFEU

The Union shall provide itself with the means necessary to attain its objectives and carry through its policies. Without prejudice to other revenue, the budget shall be financed wholly from own resources.

The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own

resources or abolish an existing category. That decision shall not enter into force until it is

approved by the Member States in accordance with their respective constitutional requirements.

The Council, acting by means of regulations in accordance with a special legislative procedure, shall lay down implementing measures for the Union's own resources system in so far as this is provided for in the decision adopted on the basis of the third paragraph. The Council shall act after obtaining the consent of the European Parliament.

Article 312

1. The multiannual financial framework shall ensure that Union expenditure develops in an orderly manner and within the limits of its own resources.

It shall be established for a period of at least five years.

The annual budget of the Union shall comply with the multiannual financial framework.

2. The Council, acting in accordance with a special legislative procedure, shall adopt a regulation laying down the multiannual financial framework. The Council shall act unanimously after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

The European Council may, unanimously, adopt a decision authorising the Council to act by a qualified majority when adopting the regulation referred to in the first subparagraph.

3. The financial framework shall determine the amounts of the annual ceilings on commitment appropriations by category of expenditure and of the annual ceiling on payment appropriations. The categories of expenditure, limited in number, shall correspond to the Union's major sectors of activity.

The financial framework shall lay down any other provisions required for the annual budgetary procedure to run smoothly.

4. Where no Council regulation determining a new financial framework has been adopted by the end of the previous financial framework, the ceilings and other provisions corresponding to the last year of that framework shall be extended until such time as that act is adopted.

5. Throughout the procedure leading to the adoption of the financial framework, the European Parliament, the Council and the Commission shall take any measure necessary to facilitate its adoption.

Article 314 TFEU

The European Parliament and the Council, acting in accordance with a special legislative procedure, shall establish the Union's annual budget in accordance with the following provisions.

1. With the exception of the European Central Bank, each institution shall, before 1 July, draw up estimates of its expenditure for the following financial year. The Commission shall consolidate these estimates in a draft budget, which may contain different estimates. The draft budget shall contain an estimate of revenue and an estimate of expenditure.

2. The Commission shall submit a proposal containing the draft budget to the European Parliament and to the Council not later than 1 September of the year preceding that in which the budget is to be implemented. The Commission may amend the draft budget during the procedure until such time as the Conciliation Committee, referred to in paragraph 5, is convened.

3. The Council shall adopt its position on the draft budget and forward it to the European Parliament not later than 1 October of the year preceding that in which the budget is to be implemented. The Council shall inform the European Parliament in full of the reasons which led it to adopt its position.

4. If, within forty-two days of such communication, the European Parliament:

(a) approves the position of the Council, the budget shall be adopted;

(b) has not taken a decision, the budget shall be deemed to have been adopted;

(c) adopts amendments by a majority of its component members, the amended draft shall be forwarded to the Council and to the Commission. The President of the European Parliament, in agreement with the President of the Council, shall immediately convene a meeting of the Conciliation Committee. However, if within ten days of the draft being forwarded the Council informs the European Parliament that it has approved all its amendments, the Conciliation Committee shall not meet.

5. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the representatives of the European Parliament within twenty-one days of its being convened, on the basis of the positions of the European Parliament and the Council. The Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

6. If, within the twenty-one days referred to in paragraph 5, the Conciliation Committee agrees on a joint text, the European Parliament and the Council shall each have a period of fourteen days from the date of that agreement in which to approve the joint text.

7. If, within the period of fourteen days referred to in paragraph 6:

(a) the European Parliament and the Council both approve the joint text or fail to take a decision, or if one of these institutions approves the joint text while the other one fails to take a decision, the budget shall be deemed to be definitively adopted in accordance with the joint text; or

(b) the European Parliament, acting by a majority of its component members, and the Council both reject the joint text, or if one of these institutions rejects the joint text while the other one fails to take a decision, a new draft budget shall be submitted by the Commission; or

(c) the European Parliament, acting by a majority of its component members, rejects the joint text while the Council approves it, a new draft budget shall be submitted by the Commission; or

(d) the European Parliament approves the joint text whilst the Council rejects it, the European Parliament may, within fourteen days from the date of the rejection by the Council and acting by a majority of its component members and three-fifths of the votes cast, decide to confirm all or some of the amendments referred to in paragraph 4(c). Where a European Parliament amendment is not confirmed, the position agreed in the Conciliation Committee on the budget heading which is the subject of the amendment shall be retained. The budget shall be deemed to be definitively adopted on this basis. 8. If, within the twenty-one days referred to in paragraph 5, the Conciliation Committee does not agree on a joint text, a new draft budget shall be submitted by the Commission.

8. If, within the twenty-one days referred to in paragraph 5, the Conciliation Committee does not agree on a joint text, a new draft budget shall be submitted by the Commission.

9. When the procedure provided for in this Article has been completed, the President of the European Parliament shall declare that the budget has been definitively adopted.

10. Each institution shall exercise the powers conferred upon it under this Article in compliance with the Treaties and the acts adopted thereunder, with particular regard to the Union's own resources and the balance between revenue and expenditure.



© Bruegel 2023. All rights reserved. Short sections, not to exceed two paragraphs, may be quoted in the original language without explicit permission provided that the source is acknowledged. Opinions expressed in this publication are those of the author(s) alone.

Bruegel, Rue de la Charité 33, B-1210 Brussels
(+32) 2 227 4210
info@bruegel.org
www.bruegel.org