Epilogue

The adoption at the European Council of 10 and 11 December 2020 of the Multiannual Financial Framework 2021–2027 and the European Union Recovery Facility (Next Generation EU) is arguably the biggest step forward in terms of solidarity which the European Union has taken in its history.[1]

The NGEU entails a substantial reinterpretation of what is possible under the Treaties.[2]

The Next Generation EU (NGEU) certainly made a big splash. It is a package of instruments that essentially allow the EU, for the very first time, to borrow money on capital markets in unprecedented amounts and use portions of it for transfers to Member States in the form of non-refundable grants.[3] Developing from the momentous Franco-German Initiative to institute a Recovery Fund with an ambitious €500 billion envelope,[4] the rationale behind the NGEU is to address the consequences of the COVID-19 crisis by supporting the recovery of Member States and improving their resilience for the future.

In this epilogue, my aim is to test the NGEU against the benchmarks of legal accountability as laid out in Chapter 1. While much ink has already dried concerning how the political institutions made use of the Treaties to justify the

[1] Opinion of Advocate General Campos Sánchez-Bordona in Case C-848/19 P *Germany v Poland* [2021] EU:C:2021:218 [61], footnote43.

[2] P Leino-Sandberg and M Ruffert, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59(2) *Common Market Law Review* 433, 437.

[3] Of the €723.8 billion, €385.8 billion pertain to loans, and €338 billion to grants. See <https://ec.europa.eu/info/strategy/recovery-plan-europe_en#documents>.

[4] See Bundesregierung, Pressemitteilung Nummer 173/20 vom 18. Mai 2020. Available at <www.bundesregierung.de/resource/blob/974430/1753772/414a4b5a1ca91d4f7146eeb2b39ee72b/2020-05-18-deutsch-franzoesischer-erklaerung-eng-data.pdf?download=1>.

novel elements of NGEU,[5] very little has happened before the courts. This makes the NGEU the perfect guinea pig for testing the framework of legal accountability aiming to ensure the political equality of citizens. In other words, I will explore what judicial avenues remain available to individuals, should they, alongside the academic community, harbour doubts as to the compatibility of the NGEU with what the Treaties and/or national constitutions allow.

To do so, I will start by presenting the legal framework of the NGEU and how it has been grounded in the Treaties by the Council and the Commission. Turning to the national level, I will present judicial developments that accompanied the ratification of the Own Resources Decision, one of NGEU's components. Third, I will look into the possible avenues of judicial review at the EU level. In the last part, I will offer some concluding thoughts on what awaits individuals in holding decision-makers in the EMU to account before courts.

THE NGEU: STRUCTURE AND CONSTITUTIONAL ISSUES

The NGEU is an umbrella term for three instruments, each of which has sparked discussions on the appropriateness of their respective legal bases. Essentially, the question is: has the EU acquired or is it on its way to acquire its own fiscal capacity that will transform it into a transfer union, in contradiction to what the Treaties currently allow? I will outline each of the instruments' main features, legal basis, and the conflicting views on their compliance with the Treaties. The focus on judicial review in subsequent sections will take as its focus precisely these debates.

The mother instrument of the NGEU is the EURI Regulation,[6] which introduced borrowing for spending based on Article 122 TFEU.[7] Thus, 'in a

[5] In addition to the critical stance taken by Leino-Sandberg and Ruffert (n 2), for a supportive analysis see B de Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58(3) *Common Market Law Review* 635. For a middle ground approach, see P Dermine, *The New Economic Governance of the Eurozone: A Rule of Law Analysis* (Cambridge University Press 2022) chapter 3.

[6] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (OJ L 433 I/23). For a presentation of the political process leading to its enactment, see de Witte (n 5) 638–644.

[7] '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

spirit of solidarity between Member States, in particular for those Member States that have been particularly hard hit',[8] coherent and unified measures are exceptionally necessary to address the 'significant disturbances to economic activity which are reflected in a steep decline in gross domestic product and have a significant impact on employment, social conditions, poverty and inequalities'.[9] The Council has obscured which paragraph of Article 122 TFEU specifically allowed for such an instrument, given that each of the two paragraphs has its own requirements: the first pertaining to financial assistance generally, and the second regulating assistance to individual Member States.[10] This approach has been touted as obfuscating and instrumentalist by some,[11] and as readily justified by others.[12] Thus the first point of contention.

The other two instruments deal respectively with borrowing and spending. Based on Article 311(3) TFEU,[13] the former is regulated in more detail by the Own Resources Decision,[14] which for the first time, exceptionally, allows the Commission temporarily to borrow on capital markets up to €750 billion,[15] which must be returned by 31 December 2058.[16] The original Commission proposal envisaged €500 billion for grants and €250 billion for loans, which was in the negotiations reduced to €390 billion for the former and increased to €360 billion for the latter. A second novelty of the Own Resources Decision was the increase in own resources ceiling, by 0.6 per cent, to ensure the

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.'

8 EURI Regulation, Recital 5.

9 EURI Regulation, Recital 2.

10 For an interpretation of the two different paragraphs of Article 122 TFEU, see Case C-370/12 *Pringle* EU:C:2012:756 [115]–[122].

11 Leino-Sandberg and Ruffert (n 2) 445–446.

12 de Witte (n 5) 655.

13 '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.'

14 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 (OJ L 424/1). The Own Resources Decision required, under Article 311 TFEU, ratification in all Member States in line with their respective constitutional requirements. This process was completed on 31 May 2021 (in five and a half months). By way of comparison, it took two years and four months to ratify the Own Resources Decision from 2014.

15 Own Resources Decision, Recital 14 and Article 5.

16 Own Resources Decision, Article 6.

coverage of the newly introduced borrowing liabilities of the Union (to the exclusion of all other liabilities).[17] No additional guarantees from the Member States for meeting these liabilities were required. Should the exceptional situation arise that the liabilities from these borrowings cannot be serviced, as a last resort, Member States can be called upon to provide the necessary resources in proportion to the estimated budget revenue.[18]

More generally, the resources necessary for eventually repaying new borrowings are, in large part, yet to be established,[19] aside from the newly established own resource of a uniform call rate to the weight of non-recycled plastic packaging waste generated in each Member State[20] and a new simplified calculation of VAT.[21] The lack of a precise assignment of income to cover the liabilities for borrowing has been seen as a breach of the balanced budget rule set out in the third sentence of Article 310(1) TFEU, which states that '[the] revenue and expenditure shown in the budget shall be in balance'. In that respect, the commentary is in dispute whether this provision outright prohibits the EU to finance its policies by incurring debt, given that each item of expenditure must have its counterpart in the income section.[22]

The debate further turned to the EU's Financial Regulation.[23] Despite being an act of secondary law, the financial regulation under Article 322(1)(a) TFEU sets out the 'procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts'. Consequently, de Witte suggests it has a higher rank in relation to all other rules concerning the organisation and implementation of the budget.[24] Yet, different provisions of the Financial Regulation have been used to determine whether the EU can use loans to cover its expenditure. While de Witte recalls its Article 220(1), which provides for a possibility of the Commission to raise loans to provide financial assistance,[25] de Gregorio Merino resorts to its Article 17(2), which prohibits Union institutions and bodies to raise loans within the framework of

[17] Own Resources Decision, Articles 3 and 6.
[18] Own Resources Decision, Recital 23 and Article 9.
[19] Interinstitutional Agreement (IIA) of 16 December 2020 between the EP, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources (OJ L 433I) 28, Annex II.
[20] Own Resources Decision, Article 2(1)(c).
[21] Own Resources Decision, Article 2(1)(b).
[22] Compare Leino-Sandberg and Ruffert (n 2) 451 with de Witte (n 5) 660.
[23] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union (OJ L 193/1).
[24] de Witte (n 5) 661.
[25] ibid.

the budget.[26] Proceeds from loans are in the Own Resources Decision labelled as 'external assigned revenue', an item that does not pertain to the budget, nor is it shown in the budget or subject to the rules on enacting the budget.[27] However, in order to prevent a formalistic abuse of the balanced budget rule by labelling debts as external revenue, de Gregorio Merino underlines that the increase of the ceilings of Member State contributions in effect represents the asset side of the equation and ensures that the budget remains balanced.[28] The definitive meaning of the balanced budget rule in the Treaties remains yet to be elucidated. Thus the second point of contention.

On the spending side of the equation,[29] the Recovery and Resilience Facility (RRF)[30] is based on Article 175(3) TFEU,[31] forming part of Cohesion Policy. The choice of legal basis equally sparked a debate. If the purpose of the RRF is exceptionally to address the consequences of the COVID-19 crisis, as the NGEU itself emphasises, what exactly should be funded to achieve this aim? The Commission itself appears to send mixed signals, stating simultaneously that '[the] Facility is a temporary recovery instrument'[32] and that it is 'more than a recovery plan'.[33] Article 3 of the RRF Regulation defines its scope in six pillars,[34] only two of which mention cohesion.

[26] A de Gregorio Merino, 'The Recovery Plan: Solidarity and the Living Constitution' EU Law Live Weekend Edition, No. 50, 6 March 2021, 6. This provision is also referred to by the Bundesverfassungsgericht in its decision on the constitutionality of the Own Resources Decision. Cases 2 BvR 547/21 and 2 BvR 798/21 *Own Resources Decision* Judgment of 6 December 2022 [151].

[27] de Gregorio Merino (n 26) 7.

[28] ibid.

[29] The RRF takes up roughly 90 per cent of the total NGEU budget, the remainder pertaining to pre-existing EU funding programmes, such as ReactEU, Horizon Europe, and the Just Transition Fund. See Conclusions of the Special meeting of the European Council (17 to 21 July 2020) para A14. Available at <www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>.

[30] Regulation (EU) 2021/241 of the European Parliament and of the council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L57/17).

[31] '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.'

[32] European Commission website on the RRF. Available at <https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en>.

[33] Website of the European Commission. Available at <https://ec.europa.eu/info/strategy/recovery-plan-europe_en>. The original Franco-German proposal calls it a 'Recovery Fund', describing it as 'ambitious, temporary and targeted'. See above n 4.

[34] 'The scope of application of the Facility shall refer to policy areas of European relevance structured in six pillars: (a) green transition; (b) digital transformation; (c) smart, sustainable

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Leino-Sandberg and Ruffert find that, with the exception of security and defence or financial market policies, plans in any and all other policy areas seem susceptible to funding under the RRF.[35] De Witte also finds the scope of the RRF broader than what might previously have been regarded as traditional cohesion policy, thus bringing about a new understanding of cohesion focused on resilience rather than recovery.[36] This debate is well-illustrated by the following example. The German plan under the RRF accords the largest part of the funding (37 per cent) to 'Climate policy and energy transition'. Even more interesting is that 22.1 per cent of that share pertains to 'Building renovation: federal funding for energy efficient buildings'. How this aim contributes to recovery from the COVID-19 pandemic remains entirely unclear, likewise its connection to cohesion.[37] This third point of contention is equally still in need of a resolution.

There is finally something to be said on the relationship between solidarity and equality in the way these three instruments are organised. That the disbursement of non-refundable grants to Member States represents an expression of solidarity and a break from the traditional forms of conditionality is certainly evident, both in its logic and public statements surrounding it.[38] The NGEU is no longer about helping an individual Member State in need, who will in return comply with conditions to ensure it continues to conduct a sound budgetary policy. Rather, the diversity of policy areas eligible for RRF funding allows us to consider it a set of 'macro-economic policy measures aiming at improving the overall balance of economic development within the territory of the European Union'.[39] A focus on the common interest, to be

and inclusive growth, including economic cohesion, jobs, productivity, competitiveness, research, development and innovation, and a well-functioning internal market with strong SMEs; (d) social and territorial cohesion; (e) health, and economic, social and institutional resilience, with the aim of, inter alia, increasing crisis preparedness and crisis response capacity; and (f) policies for the next generation, children and the youth, such as education and skills.'

35 Leino-Sandberg and Ruffert (n 2) 449.

36 de Witte (n 5) 679.

37 European Parliament Briefing, 'Germany's National Recovery and Resilience Plan: Latest State of Play'. Available at <www.europarl.europa.eu/RegData/etudes/BRIE/2021/698849/EPRS_BRI(2021)698849_EN.pdf>.

38 R Crowe, 'An EU Budget of States and Citizens' (2020) 36 *European Law Journal* 331, 340; de Gregorio Merino (n 26) 10. See also, as part of the ECB Economic Bulletin (2022) 1, M Freier, C Grynberg, M O'Connell, M Rodríguez-Vives and N Zorell, 'Next Generation EU: A Euro Area Perspective', available at <www.ecb.europa.eu/pub/economic-bulletin/articles/2022/html/ecb.ebart202201_02~318271f6cb.en.html>; Presentation by Commissioner Hahn of the NextGenerationEU, 14 April 2021, available at <https://ec.europa.eu/commission/presscorner/detail/en/speech_21_1743>.

39 de Witte (n 5) 658.

achieved even by non-repayable, possibly asymmetrically awarded grants, moves the NGEU closer to the solidarity framework proposed in Chapter 1.

Yet, there is much to be desired when it comes to more than paying lip service to solidarity that we witnessed in the context of financial assistance. The RRF Regulation refers to Articles 120 and 121 TFEU, thereby indirectly including the obligation to achieve the objectives set out in Article 3 TEU. Yet, a more specific surpassing of the narrow view of solidarity as money being transferred to the national level is missing. Equally, conditionality has not entirely disappeared from the radar, although it has metamorphosed somewhat in the process. Dermine argues that conditionality acquired an entirely new, systemic dimension that permeates the entire NGEU logic, and in particular the RRF.[40] On this view, the logic of 'cash against reforms' is exacerbated through the requirement for the Member States to submit their National Recovery and Resilience Plans to the Commission, who assesses and then accepts or rejects these plans in advance of the disbursement of funds. In addition, national plans must be in line with the country-specific recommendations made under the European Semester and other pre-existing plans and requirements.[41] Once submitted to the Commission for assessment, the national plans are checked against the standards of relevance, effectiveness, efficiency, and coherence.[42] If the Commission finds them satisfactory according to these elements, they are submitted to the Council for approval by qualified majority.[43] Finally, the implementation of all plans and financing under the RRF Regulation is, among others, subject to the newly established Rule of Law Conditionality Regulation.[44]

Overall, the constitutional footing of the NGEU laid bare debates, old and new, on the flexibility of Treaty rules as well as possible new directions in which the EU may be headed after this exceptional, and at present temporary, experiment. In what comes next, my aim is to explore the way these debates have or might in the future play out before national and EU courts.

JUDICIAL REVIEW AT THE NATIONAL LEVEL

Previous chapters dealing with judicial review at the national level showed that at the outcome level, EU measures and their national implementation

[40] Dermine (n 5) 91–94.
[41] RRF Regulation, Article 17(3).
[42] RRF Regulation, Articles 18 and 19.
[43] RRF Regulation, Recital 48 and Article 20.
[44] RRF Regulation, Article 8. See also Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ L 433I/1).

dealing with the crisis have, for the most part, been found in line with what national constitutions allow. Among the instruments of the NGEU package, only the Own Resources Decision required unanimous ratification of the Member States, in line with national constitutional requirements: a perfect occasion for judicial review.

The only national court asked to review the constitutionality of the act ratifying the Own Resources Decision was, lo and behold, the Bundesverfassungsgericht.[45] The applicants were arguing that the NGEU, and the Own Resources Decision in specific, breach Germany's constitutional identity under Article 79(3) of the Basic Law (concerning the Bundestag's overall budgetary responsibility). They claimed furthermore that it amounted to an *ultra vires* act in contravention of Article 23(1) of the Basic Law, given that the programme and its financing exceed the applicable EU integration agenda in a manifest and structurally significant manner.

We have already seen in Chapter 4 that when it comes to challenging the activities of constitutional organs for their European integration obligations, standing rules before the Bundesverfassungsgericht are fairly generous. This is evidenced also by the Own Resources Decision ratification challenge, which was initiated by 2,279 applicants no less. They have, according to the Bundesverfassungsgericht, 'sufficiently asserted and substantiated a possible violation of their right to democratic self-determination and have demonstrated that they are individually, presently and directly affected'.[46]

Primarily, the applicants sought a preliminary injunction to prevent the president from certifying the ratification. On this, the standard employed for awarding an injunction is 'if this is urgently required to avert severe disadvantage, prevent imminent violence or for other important reasons in the interest of the common good'.[47] On 26 March 2021, the Bundesverfassungsgericht issued an order that the ratification is not to be certified until the preliminary injunction is decided upon.[48] With the wounds inflicted by *Weiss* still healing, the order that included but one sentence ('Die Begründung wird nachgereicht')[49] instilled fears of yet another 'Nein'.[50] Still, there was no need to hold

[45] More information on the initiative behind the constitutional complaint is available at <https://buendnis-buergerwille.de/verfassungsbeschwerde/>.
[46] Cases 2 BvR 547/21 and 2 BvR 798/21 *Own Resources Decision* (n 26) [105].
[47] Case 2 BvR 547/21 Order of the Second Senate of 15 April 2021 [65].
[48] Case 2 BvR 547/21 Decision of the Second Senate of 26 March 2021.
[49] 'The justification will be given later' (Free translation by the author).
[50] See R Repasi, 'Karlsruhe, Again: The Interim-Interim Relief of the German Constitutional Court regarding Next Generation EU', EU Law Live, 29 March 2021. Available at <https://eulawlive.com/analysis-karlsruhe-again-the-interim-interim-relief-of-the-german-constitutional-court-regarding-next-generation-eu-by-rene-repasi/>.

one's breath for too long. On 15 April 2021, the preliminary injunction was rejected,[51] and the final judgment on 6 December 2022 rejected the challenge as unfounded, which will be the focus of the paragraphs ahead. I will specifically look at the three points of contention discussed above: Article 122 TFEU, Article 175(3) TFEU, and the balanced budget rule.

First, is the NGEU (and the Own Resources Decision forming its part) an emergency measure? In the preliminary injunction decision, the German court did not interpret Article 122 TFEU. Upon the summary examination in the preliminary injunction decision, it was of central importance that obligations arising from the Own Resources Decision are temporary in nature without containing any provisions on additional borrowing, which would in any event require an amendment of that decision.[52] It is only if the Own Resources Decision would lead to the creation of a permanent instrument (whereby Germany would assume liability for decisions of other Member States) that constitutional identity would be engaged.[53] In the final judgment, however, the Bundesverfassungsgericht, without batting an eyelid, took up the interpretation of Article 122 TFEU.

In the course of fifteen paragraphs, the German court analysed the relationship between the two paragraphs of Article 122 TFEU, offered their narrow interpretation, found that aims such as digital transformation, climate neutrality, and financing of existing programmes of the EU are difficult to reconcile with the aims of the NGEU.[54] It nevertheless concluded that, first, the exact contents of this provision have not been settled,[55] and second, the Council and the Commission have a wide margin of discretion in interpreting Article 122 TFEU[56] – both conclusions that would pertain to the Court of Justice to make – and this was enough for the Own Resources Decision to survive.

In close connection is the analysis that might shed further light on the question of Cohesion Policy and more generally the debate regarding the relationship between recovery and resilience in the NGEU package. For the Bundesverfassungsgericht, the situation could not be simpler: 'The funds in question are to be used exclusively to address the aftermath of the COVID-19 crisis.'[57] In another passage, the German court emphasised again that this is

[51] Case 2 BvR 547/21 Order of 15 April 2021 (n 47).
[52] ibid [101].
[53] ibid [103].
[54] Cases 2 BvR 547/21 and 2 BvR 798/21 *Own Resources Decision* (n 26) [172]–[187].
[55] ibid [174].
[56] ibid [183].
[57] Case 2 BvR 547/21 Order of 15 April 2021 (n 47) [100]. See also Cases 2 BvR 547/21 and 2 BvR 798/21 *Own Resources Decision* (n 26) [214].

specifically aimed at the consequences of the pandemic that are to be taken in a relatively short period of time.[58] In respect of this question, then, the arguments from academia on the use of cohesion did not reach Karlsruhe.

Finally, the applicants argued that the Own Resources Decision breaches the balanced budget rule as well as the prohibition of monetary financing under Article 125(1) TFEU, by empowering the Commission, should any of the Member States not be able to honour a call on time, to borrow additional funds or call on other Member States. This was the first time that the Bundesverfassungsgericht would decide on the 'justiciable limits regarding the assumption of payment obligations or commitments to accept liability'.[59] In *Weiss*, debt-sharing was excluded from what is currently possible under the Treaties and instituting it would amount to a breach of Germany's constitutional identity. We also know that to reach that level of a breach, the budgetary autonomy of the Bundestag must be essentially negated for an appreciable period of time.

In response, the German court offered a wide reading of the balanced budget rule: 'under exceptional circumstance, it does not appear (completely) implausible that the measure could be based on Art. 311(2) TFEU, with the borrowed funds constituting a category of "other revenue" within the meaning of that provision'.[60] Without submitting a preliminary reference, the Bundesverfassungsgericht itself interpreted the balanced budget rule, stating that it includes the following requirements:[61]

> [...] it sets out an authorisation to borrow on behalf of the European Union; it ensures that the financial means obtained be used exclusively for tasks for which the EU has competence in accordance with the principle of conferral; it subjects the borrowing to limits as to the duration and the amount of the commitments assumed; and it requires that the amount of other revenue not exceed the total amount of own resources.[62]

[58] Case 2 BvR 547/21 Order of 15 April 2021 (n 47) [106]; Cases 2 BvR 547/21 and 2 BvR 798/21 *Own Resources Decision* (n 26) [215].

[59] Case 2 BvR 547/21 Order of 15 April 2021 (n 47) [96].

[60] Cases 2 BvR 547/21 and 2 BvR 798/21 *Own Resources Decision* (n 26) [149]. It is interesting to read also how the German court understands the nature of the EU in terms of its budgetary powers: 'Over time, the European Union has transitioned from the classic model of financing international organisations, which rely on state party contributions, to a financial architecture based on own resources – although it is submitted that, in terms of financial economics, the EU's own resources are basically still 'camouflaged member contributions' ([...])' [166].

[61] It is unclear where the inspiration for these requirements comes from.

[62] ibid [149].

Although the German court could not reach a definitive conclusion that these conditions are met in the Own Resources Decision, it refrained from concluding that the chosen Treaty legal basis is manifestly insufficient. This was grounded in its temporary nature,[63] that borrowing for this purpose is, although contested, not outright prohibited, so long as it does not fund the general EU budget[64] and finally that the volume and duration of the NGEU is limited.[65] The NGEU would also not amount to a circumvention of Article 125(1) TFEU because the values underpinning Article 122 TFEU do not go against the no-bailout logic.[66]

From the point of view of access and remedies, the need for the Own Resources Decision to be ratified by all Member States, and therefore possibly be subject to constitutional review, is in my view a good thing. Access to judicial review is in the first place easier at the national level, at least in the context of the German constitutional complaint, but it may be presumed that other Member States' standing requirements are lower than those under Article 263(4) TFEU.[67] In that respect, when national courts see possible issues with the provisions of primary EU law involved, we may expect the submission of a preliminary reference to the Court of Justice. This by extension means opening up an EU-wide discussion of these matters that may otherwise not be possible due to the high threshold of direct actions before EU courts. For a programme of a magnitude such as the NGEU, access to legal accountability by all EU citizens is from a democratic legitimacy point of view a crucial necessity.

Against this view, two counter-arguments arise. First, one criticism pertains to the realities of the use of constitutional review at the national level: while the preliminary reference procedure is open to all national courts, it is the loud minority that grabs all the attention and dominates the discourse.[68] Here, of course, we cannot but think of the Bundesverfassungsgericht and its imposition of a certain understanding of EMU law.[69] From the perspective of the interpretation of the common interest, the preliminary injunction and

[63] ibid [135], [152].
[64] ibid [155]–[161].
[65] ibid [162].
[66] ibid [210].
[67] On that point, see Chapter 3, Section 3.3.1.
[68] In a similar vein, see A Guazzarotti, '"It's the (Asymmetric) Economy, Stupid!" Some Remarks on the Weiss Case of the Bundesverfassungsgericht' (2020) 6 *Italian Law Journal* 655, 664–667.
[69] With thanks to Paul Dermine for raising this point.

the judgment show reason for optimism that the German court might take a step back from the limelight: in the preliminary injunction, it stated that 'the Federal Republic of Germany cannot unilaterally shape foreign relations and related courses of events'.[70] Without reading too much between the lines, it is undeniable that the Bundesverfassungsgericht's viewpoint surpasses that of Germany alone, and it grants the Federal Government a wide margin of discretion.

This matters for two reasons. First, it promotes a reserved approach by the German court, therefore countering the criticism that courts should not be the ones meddling into the decisions of economic governance that pertain to experts or those with a more direct democratic legitimation. Second, in the full analysis in the main proceedings, considerations of solidarity under Article 122 TFEU were given more importance than Article 125(1) TFEU considerations. In other words, the post-pandemic recovery context provided the leeway necessary in achieving the common interest and somewhat reduced the equality of Member States as the guiding logic of EU action. This is not to say that a more permanent debt-sharing would be something acceptable for the German court (as the judgment itself makes clear), but rather that the financial assistance type of conditionality is no longer the only acceptable option for EU action in economic governance.

The second criticism concerns the German court not submitting a preliminary reference. It is most certainly the last instance court for the purposes of Article 267(3) TFEU and it without a doubt engaged in the interpretation of EU law, a prerogative of the Court of Justice. According to the Bundesverfassungsgericht, its interpretation of Articles 122 and 311 TFEU was generous enough to prevent the submission of a preliminary reference: 'There is no reason to assume that the Court of Justice of the European Union would interpret the competences in Art. 122 and 311(2) TFEU more narrowly'.[71] This entirely misunderstands the purpose of the preliminary reference procedure as a device ensuring the uniform interpretation of EU law: just because the Own Resources Decision did not breach those articles, a reference would help us better understand what these articles, in fact, allow.[72] Given that the NGEU is now in full motion, the preliminary reference

[70] Case 2 BvR 547/21 Order of 15 April 2021 (n 47) [107].

[71] Cases 2 BvR 547/21 and 2 BvR 798/21 *Own Resources Decision* (n 26) [236]. The same was stated by the German court in its review of the SSM and the SRM. See Cases 2 BvR 1685/14 and 2 BvR 2631/14 *Banking Union* Judgment of 30 July 2019 [317]. See also Chapter 5, Section 5.4.2.

[72] As the Bundesverfassungsgericht itself recognises in respect of Article 122 TFEU. ibid [176].

procedure should be used profusely by national courts with the aim of achieving the common interest.

JUDICIAL REVIEW AT THE EU LEVEL

As things stand, the Court of Justice has been at the margins of the NGEU developments, with only indirectly touching upon its novelties when deciding on the validity of the Rule of Law Conditionality Regulation.[73] The lack of litigation before the Court appears as both a blessing and a curse. The emergency package proceeded without judicial interference that may have thwarted the immediate economic benefits of the package, to echo the Bundesverfassungsgericht. The curse, however, is that a silence on the points of contention concerning the interpretation of the Treaties leaves open the possibility of further cavalier uses of their provisions. In this section, I reflect on the way in which the Court might resolve them in the future, given the constellations of judicial review and the existing case law in respect of the three points of contention.

Two avenues of judicial review at the EU level seem possible. First, the Council has approved all national recovery and resilience plans. In the category of 'what could have been', there is the now withdrawn action of the Parliament against the Commission for the failure to act.[74] Here, the Parliament argued that the Commission infringed the Treaties by failing fully and immediately to apply the Rule of Law Conditionality Regulation against Poland and Hungary in the process of approving their recovery and resilience plans. In a category of 'what might be' are the four actions for annulment initiated by associations of national judges against the decision of the Council on the approval of the recovery and resilience plan for Poland.[75] The trouble with this set of actions is admissibility, given that the applicants are associations of judges from other Member States, thus facing an uphill battle in proving direct and individual concern under Article 263(4) TFEU.

The second, and a more realistic, avenue for judicial review at the EU level may result from the management of funding under the national plans. What

[73] Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97 and Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98.

[74] Case C-657/21 *Parliament v Commission* Order of the President of the Court of 8 June 2022 of the Removal from the Register.

[75] T-530/22 *Medel v Council*; T-531/22 *International Association of Judges v Council*; T-532/22 *Association of European Administrative Judges v Council*; T-533/22 *Rechters voor Rechters v Council*. For more information on the actions, see <www.thegoodlobby.eu/wp-content/uploads/2022/08/TGL-Profs-Press-Release-28-Aug-2022-.pdf>.

I mean by this is that Member States may, in the years to come, challenge the Commission's assessment of milestones being reached or not and the RRF funds (not) being released accordingly. On a further micro level still, it is possible to imagine individual operators carrying out specific items in the national plans and challenging the decisions of the Commission on payments and accounts. It is unlikely though that this latter option would raise fundamental issues of Treaty compliance. What is likelier is that it will further test how rigid (or flexible) is access for individuals under Article 263(4) TFEU. A possible issue in this area will concern the nature of acts by which the Commission will assess the milestones and decide on requests for disbursement: it is likely these will fall in the category of preparatory or similar types of soft law acts. We have seen in Chapter 2[76] that challenging such acts poses a particular difficulty at the EU level and is more likely to succeed through a preliminary reference.

Another point of interest will be the implementation of national plans. We have learned in Chapter 5 that EU and national institutions operating in a composite structure brings about novel solutions in the division of work between EU and national courts. The cooperative and multilevel nature of the implementation of national recovery and resilience plans, not unlike the one in cohesion policy, will in my opinion resemble litigation in that area of EU law: the Commission will possibly participate in proceedings at the national level, and the Court of Justice will intervene to ensure compliance with the principle of sound financial management. For example, both the Commission and the national authorities are under an obligation to respect the principle of sound financial management in cohesion policy, and these are, in the absence of explicit EU rules, to be decided on before national courts in accordance with their national law.[77]

Turning to the three points of contention concerning the NGEU's constitutional backing, I will begin by looking at how the Court interpreted Article 122 TFEU up to now and how these findings may possibly be applied to the EURI Regulation. Following *Pringle*, we know, first, that Article 122(1) TFEU does not regulate the power of the Council to grant financial assistance from the Union to a Member State; and second, that Article 122(2) TFEU is not the exclusive way for granting financial assistance to an individual Member State.[78]

Article 122 TFEU was further interpreted on the occasion of the Commission's rejection to register the proposal for a European citizens'

[76] Section 2.2.3.
[77] For example, in Case C-443/21 *Avicarvil Farms* EU:C:2022:899 [32], [37].
[78] Case C-370/12 *Pringle* EU:C:2012:756 [116], [118]–[120].

initiative 'One million signatures for a Europe of solidarity', which triggered litigation before the General Court[79] and, on appeal, before the Court of Justice, in *Anagnostakis*.[80] The proposed ECI sought to introduce in EU law the principle of 'the state of necessity, in accordance with which, when the financial and political existence of a Member State is threatened by the servicing of abhorrent debt, the refusal to repay that debt is necessary and justifiable', grounding it in Article 122 TFEU. The General Court sided with the Commission and in the process provided a further interpretation of that article. The Court of Justice agreed.

As regards the first paragraph, both courts recalled *Pringle* in confirming that it cannot serve as the legal basis for financial assistance to a Member State nor for a unilateral decision of a Member State not to repay its debt.[81] The interpretation of Article 122(2) TFEU in both judgments concerned the permanent nature of the proposed ECI. Specifically, a permanent instrument based on the state of necessity could not be based on Article 122(2) TFEU.[82] Likewise, that provision could only be used for the assistance granted by the Union, but not debts owed to legal and natural persons, neither public or private.[83] Against this background, would the EURI Regulation pass muster if analysed in respect of Article 122 TFEU?

Let us begin with the first paragraph of Article 122 TFEU. The NGEU package could indeed be characterised as an EU-wide measure taken in the spirit of solidarity between Member States. But does it address a situation whereby 'severe difficulties arise in the supply of certain products, notably in the area of energy'?[84] The EURI Regulation defines its targets in such a broad manner ('significant disturbances to economic activity') that a generous reading of Article 122(1) TFEU may well turn it into a universal emergency clause in EU law.[85] In addition, given the broad reach of areas that can be financed

[79] Case T-450/12 *Anagnostakis v Commission* EU:T:2015:739.
[80] Case C-589/15 P *Anagnostakis* EU:C:2017:663.
[81] ibid [70]–[71].
[82] ibid [75]. See also Opinion of Advocate General Mengozzi in Case C-589/15 P *Anagnostakis* EU:C:2017:175 [42]–[43].
[83] Case C-589/15 P *Anagnostakis* (n 80) [76]–[77].
[84] According to the Bundesverfassungsgericht, the Commission at the hearing in the Own Resources Decision procedure argued that this reference is an illustration of 'one typical example falling within the scope of this treaty competence'. Cases 2 BvR 547/21 and 2 BvR 798/21 *Own Resources Decision* (n 26) [184].
[85] On a critique of 'elastic formats of EU emergency rule', see J White, 'Constitutionalizing the EU in an Age of Emergencies' (2022) *Journal of Common Market Studies* 1, 4. See also B de Witte, 'EU Emergency Law and Its Impact on the EU Legal Order' Guest Editorial (2022) 59 (1) *Common Market Law Review* 3.

through the NGEU, it is further unclear whether it in fact addresses only the broad 'significant disturbances to economic activity' or goes beyond them. Support for the latter conclusion can be found in the use of Article 175(3) TFEU as the legal basis for the RRF (regulating specifically how funds are distributed). As the abovementioned German recovery and resilience plan illustrated, projects with little connection to COVID-19 consequences were accepted for RRF funding. Put simply, even a generous reading of Article 122 (1) TFEU, going beyond 'severe difficulties in the supply of certain products, notably in the area of energy', may not be enough to capture the funding of national projects currently approved.[86]

The second paragraph of Article 122 TFEU focuses on assistance to individual Member States 'experiencing difficulties or a serious threat of severe difficulties caused by natural disasters or exceptional occurrences beyond its control'. Given that Article 122(1) TFEU, following the Court in *Pringle* and *Anagnostakis*, cannot be used for financial assistance to Member States, one might see the need to include also the second paragraph. The COVID-19 crisis may be interpreted as an exceptional occurrence beyond the control of a Member State without engaging in unnecessary legal acrobatics. What remains unclear, however, is the connection between the root cause (the COVID-19 crisis) and the way in which it is granted (loans and grants for an open-ended range of national projects). In sum, it appears that the NGEU is simply too big of a pot of money to be disbursed and thus sits uneasily with the rationale of Article 122(2) TFEU.

We have thus seen that the use of Article 122 TFEU is at least potentially problematic. What about Article 175(3) TFEU? Although the Court did not, to the best of my knowledge, interpret this provision after the Lisbon Treaty entered into force, it did have the chance to say something about its predecessor, Article 159(3) EC. I will therefore present that case law to offer some conclusions on how the Court might assess the legal basis of the RRF in the context of the NGEU.

In 1986, the Governments of Ireland and the United Kingdom established the International Fund for Ireland, with the aim of promoting economic and social advance and encouraging contact, dialogue, and reconciliation between nationalists and unionists. In 2006, the (then) Community enacted a regulation, based on Article 308 EC[87] (now Article 352 TFEU), to regulate

[86] de Witte argues that the inclusion of Article 122(1) TFEU was necessary given the unprecedented amounts of borrowing on capital markets granted to the Commission in the Own Resources Decision. See de Witte (n 5) 655.

[87] 'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

its financial contributions to that fund between 2007 and 2010. The European Parliament initiated an action for annulment, arguing the regulation should have been adopted based on Article 159(3) EC. The practical consequence of the choice of the legal basis was whether an ordinary legislative procedure (co-decision) should have been used, as opposed to the Council acting unanimously after consulting the European Parliament. To determine which legal basis is appropriate in that case, it was necessary to establish the aims and scope of Community action in cohesion policy.

In his Opinion, Advocate General Bot sided with the European Parliament. To reach that point, he offered a useful recap of the creation and meaning of cohesion policy: inserted into the Single European Act in 1987, its aim was to promote the overall harmonious development of the Community. An expression of solidarity between Member States, cohesion policy is a tool for restoring balance and redistribution.[88] But what exactly does it cover?

> The protean nature of economic and social cohesion and the general nature of the tasks given to that policy mean that it is difficult to define it exactly. It thus proves difficult to lay down the limits of the area covered by the policy because economic and social cohesion emerges as a broad overall concept with imprecise contours. The Court's case-law offers no decisive guidance in that connection.[89]

Well. Despite the opaque diagnosis, the Advocate General ultimately found that the contested regulation required a legal basis in cohesion policy, as it selectively focused on a region that manifested 'certain economic and social imbalances'.[90] The Court disagreed with this approach and concluded that it should have been adopted based on both Article 159(3) and 308 EC. Without entering into the discussion on institutional balance,[91] the Court stated that Article 159 EC 'covers only independent action by the Community carried out in accordance with the Community regulatory framework and whose content does not extend beyond the scope of the Community's policy on economic and social cohesion'.[92] The Advocate General and the Court did share the same elusive approach to defining cohesion policy, leaving a broad margin of manoeuvre to the co-legislators in the ordinary legislative procedure.

[88] Opinion of Advocate General Bot in Case C-166/07 *Parliament v Council* EU:C:2009:213 [85].
[89] ibid [82] (footnotes omitted).
[90] ibid [92].
[91] On this, see T Corthaut, 'Case C-166/07, *European Parliament v. Council of the European Union* Judgment of the Court of Justice (Grand Chamber) of 3 September 2009, [2009] ECR I-7135. Institutional pragmatism or constitutional mayhem?' (2011) 48 *Common Market Law Review* 1271.
[92] Case C-166/07 *Parliament v Council* EU:C:2009:499 [64].

What does that tell us about the legal basis of the RRF Regulation? If the underlying rationale of cohesion is levelling the playing field between Member States, it seems to me that the debate on the ratio between recovery and resilience in the RRF does not affect the choice of its legal basis.[93] My view is that the RRF Regulation is mainly the collateral victim of the arguments against borrowing, not spending. Cohesion policy as such regularly consists of non-refundable grants, because those are sourced in Member States' contributions to the EU's budget.[94] In that area of EU law, then, there is in a way a perfect overlap between financial input and output.[95] The RRF is instead financed through borrowing, without a final decision on how this money will be returned by 2058.[96]

This brings me to the last point of contention when it comes to the NGEU package: did the Own Resources Decision breach the balanced budget rule in Article 310(1) TFEU? In addition, given the prohibition for the Union to finance itself through loans,[97] is borrowing for spending compliant with the Treaties? There are several principles governing the management of the EU budget throughout Article 310 TFEU that are of relevance for the assessment of the NGEU's compliance with the Treaties.

First, the principle of unity of the budget means that the EU's budget ought to be one document presenting all the expenditure and revenue for a given financial year.[98] This principle prevents the establishment of different budgets within the realm of EU spending and serves to protect the institutional

[93] The European Court of Auditors's report on the proposed RRF Regulation found that it does not clearly define how the funding will address precisely the consequences of COVID-19 as they have materialised in each Member State, but rather presumes economic conditions from 2018 to guide the allocation of funding. This element remained in the final RRF Regulation and may be seen as a weakness in respect of its legal basis. See Opinion No 6/2020 concerning the proposal for a regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility (COM(2020) 408) (OJ C 350/1) [17], [25].

[94] The Member States and the Commission then manage the spending of funds. For an analysis of the multilevel nature of such management, its reforms, and challenges, see J Bachtler and C Mendez, 'Who Governs EU Cohesion Policy? Deconstructing the Reforms of the Structural Funds' (2007) 45(3) *Journal of Common Market Studies* 535.

[95] By this, I mean that the total amount of money received through Member States' contributions is then redistributed through Cohesion Policy. This of course does not mean that the redistributed amounts match the original contributions of each Member State (which would be precisely opposite to the logic of cohesion funds as a programme intended to level the playing field across the EU).

[96] See above n 19.

[97] Article 17(2) of the 2018 Financial Regulation (n 23). See also Opinion of Advocate General Trstenjak in Case C-539/09 *Commission v Germany* EU:C:2011:345 [54].

[98] The first sentence of Article 310(1) TFEU states: '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.' See also Article 7(1) of the 2018 Financial Regulation (n 23).

prerogatives of the co-legislators in the enactment of the budget under Article 314 TFEU.[99] The Court of Justice is entitled to review the proper involvement of the relevant institutions in this process.[100] Next comes the principle of budget universality reflected again in Article 310(1) TFEU,[101] requiring that all items of revenue and expenditure be made visible in the budget. Lastly comes the principle of budgetary balance of income and expenditure.[102]

The criticism directed to the Own Resources Decision, was that it does away with the balanced budget rule. This is so because it allows borrowing operations without assigning specific revenue to offset the expenditure that returning those loans will entail.[103] Another criticism concerns labelling the loans as 'external assigned revenue', which therefore does not feature in the budget itself and possibly circumvents the principle of budget universality. It also excludes the European Parliament from decision-making that it would otherwise participate in as a co-legislator.[104]

FINAL THOUGHTS

Where does this leave the individual in her quest of achieving legal accountability in the EMU? As regards the NGEU, providing an answer would require too much time spent staring into a crystal bowl. Learning from experience in financial assistance, monetary policy, and the SSM, however, some trends are visible. First, we know that national courts will not and generally do not wait for EU courts to step in before taking initiative in protecting the constitutional rights of individuals. We have witnessed wider access to national judicial review in the area of financial assistance and national courts did not shy away from awarding remedies to individuals that would not be possible before the EU courts. The preliminary reference procedure has equally produced a number of important decisions at the EU level and prompted solutions in the SSM. In some ways, one of the central findings of this book seems to me to be that individuals do not see Luxembourg as the go-to place to seek accountability of those making decisions in the EMU.

[99] See also R Repasi, 'Legal Options for an Additional EMU Fiscal Capacity' (2013) Note for the European Parliament Directorate General of Internal Policies, Citizens' Rights and Constitutional Affairs, 13.

[100] Case 34/86 *Council v Parliament* EU:C:1986:291 [12].

[101] See also Article 20 of the 2018 Financial Regulation (n 23).

[102] Article 17(1) of the 2018 Financial Regulation (n 23). See also Case C-392/02 *Commission v Denmark* EU:C:2005:683 [54].

[103] On this point, see n 19 above.

[104] In specific on this point, see Leino-Sandberg and Ruffert (n 2) 454.

Another lesson from the NGEU may be that decisive steps do not take place before courts, and are a result of political, rather than legal empowerment. In a way, the NGEU is a development that runs counter to the traditional 'integration through law' paradigm, and instead appears to be a demonstration of integration *despite* the law: the text of the Treaties was stretched to accommodate what was politically and economically seen as a sheer necessity. Paradoxically, this in the long run may grant it stronger democratic legitimacy: ratification by all Member States, who now take ownership of its implementation, may be seen as a shift from the top-down approach through which EU law usually moves forward. This dynamic also disincentivises any challenge to the NGEU to come from its political creators at either the EU or the national level.

From the perspective of the political equality of individuals and achieving the common interest, I should like to close this book with two final remarks. First, the bottom-up creation and design of national recovery and resilience plans promotes their democratic ownership, which inevitably encouraged citizens' participation and voice in defining the common interest behind the NGEU. This helps legitimise the NGEU on a more fundamental level: the selection of priorities and the design of national plans helped shape and concretise the common interest. Their subsequent approval by the Commission and the Council had a double function. In respect of the Council, it allowed for all Member States to be brought together, who then jointly learn of the various asymmetries across the EU, as well as of the interests and needs of different socioeconomic groups across the EU. For the Commission, these priorities should be an important consideration when determining the benchmarks to be met and how to assess them. Through this, national and EU institutions take up a duty towards all EU citizens to achieve the common interest.

Second, one may expect an important contribution from national and EU courts in ensuring that these institutions meet their duty of achieving the common interest. Precisely due to the multilevel nature of the NGEU's implementation, it is crucial that both national and EU courts take part in this activity. In this way, political empowerment buttresses legal empowerment. Because citizens, in their quest for legal accountability, are to access national courts first and foremost, access to justice and possible redress is more direct and possibly more efficient. The Court of Justice is in that sense a secondary actor: through the preliminary reference procedure, it ensures that the EU-wide common interest is not hampered, that EU institutions comply with the basic principles of the EU legal order, and ensures a connection between different national plans by standardising the conditions of their realisation. All the while, its duty is to ensure that the common interest as expressed in the Treaties is adhered to by those shaping public policy.