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# SYMPOSIUM ON NEXT GENERATION EU, CRISIS BUDGETING, AND THE EMPOWERMENT OF SUPRANATIONAL INSTITUTIONS

## AN EVER-STRONGER UNION: INTRODUCTION TO THE SYMPOSIUM

*Elena Kempf* and Katerina Linos***

The European Union was in dire straits in March 2020. Faced with a global pandemic, member states retreated to national measures. They closed borders, hoarded medical equipment, and implemented domestic economic policies. Sovereign bond spreads increased and raised the specter of liquidity problems in many member states. The pandemic crisis seemed to deal yet another blow to Europe's post-war experiment in supranational governance, following on the heels of the 2009 sovereign debt crisis, the border closures of the 2015–16 refugee crisis, and the 2016 Brexit referendum.

But by July 2020, a common European answer to the pandemic had emerged. At the center of this response was an unprecedented €750 billion recovery mechanism called Next Generation EU (NGEU), running from 2021 through 2026. To fund the program, the EU issued large-scale common debt on the financial markets for the first time. The additional funds effectively doubled the EU's annual budget. The EU also spent the funds in a new way. Over half of the funds were grants rather than loans. Further, NGEU is much more redistributive than prior EU spending programs, greatly advantaging member states in the south of Europe. The EU, therefore, met the global pandemic with a supranational measure after all, and deepened integration in the process.

The new borrowing and spending capacity of the EU has global implications. We start the symposium with some early economic successes of the program's conditional grantmaking mechanisms, and some insights for global finance. We continue with implications for international organization reform, in an era when concluding new global treaties is difficult. NGEU was established without amending the EU treaties, showcasing the possibility for creativity in treaty interpretation given sufficient political will.

At the same time, NGEU has encountered resistance in national constitutional courts and raised fundamental questions about democratic legitimacy. NGEU far exceeds the public health emergency, with more than half of the funds earmarked for investments in digitization and the green transition. The German Federal Constitutional Court, a skeptic on further European integration since at least the 1990s, narrowly greenlighted NGEU by emphasizing that the program's legality depended on its exceptional character and limited scope.[1] We turn to these concerns next.

However, others see NGEU as the new model for EU financing both internally and when faced with common global challenges. Our final set of essays focuses on NGEU's implications for the Ukraine crisis and climate

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[1] Franz C. Mayer, *NextGenerationEU and the Future of European Integration: Foreseeing the Unforeseeable*, 118 AJIL Unbound 172 (2024); *see also* Elena Kempf and Katerina Linos, *Shaming the Court: The German Constitutional Court's NGEU Reversal* (working paper), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4831183.

change. A diverse group of symposium authors, including key architects of the NGEU program, leading critics of EU supranationalism, and top academics explain what lessons NGEU holds for crisis responses globally.

*Lessons for Global Finance*

The announcement of NGEU quickly delivered macroeconomic stabilization. Subsequently, the program helped avoid a dip in public investments following the pandemic and gave renewed impetus to the implementation of reforms long championed by the EU. These reforms vary significantly by member state, but two big common threads are investments in green energy and digital upgrades. Géraldine Mahieu—a European Commission Director for economic and financial affairs who was centrally involved in the creation of the program—and her coauthors demonstrate how NGEU was designed to deliver on these objectives.[2] The central feature of the instrument is the Recovery and Resilience Facility (RRF), composed of roughly equal parts grants and loans. To access funds, member states submit national plans that detail reform and investment objectives across many sectors. The funds are disbursed to states upon meeting the objectives laid out in the plans. This design has many benefits, according to Mahieu and her coauthors. NGEU has incentivized broad-ranging reforms, enabled effective public spending, balanced national ownership of reforms with EU objectives, and pushed member states to act fast. But, assessing NGEU at its halfway point, they also note critiques. The program's ambitious timeline ran up against states' absorption limits, attempts to balance accountability and flexibility raised persistent quandaries, and the administrative burden created by NGEU challenged some states' capacities.

NGEU is the largest recovery program in Europe since the Marshall Plan. Under the Marshall Plan, the United States transferred $150 billion in 2023 prices in goods to post-war Western Europe between 1948 and 1951. The grant portion of NGEU is more than twice as large, at $380 billion in 2023 prices. In their contribution, Katerina Linos, Irving G. and Eleanor D. Tragen Professor of Law at UC Berkeley School of Law, and Elena Kempf, Assistant Professor of History at MIT, compare these two recovery programs.[3] They show that NGEU shares numerous features with its famous predecessor, including conditional grantmaking, redistributive transfer of funds, and the support of a distinctive politics. But seeing NGEU in the long view also throws into relief what is new about the program. The Marshall Plan was part of a United States Cold War policy that saw a prosperous and politically stable Western Europe as key to its national interest. NGEU, by contrast, arises from a geopolitical terrain that challenges Europe to rely less on the United States for its prosperity and security. European integration, here, is fueled by EU joint borrowing rather than an infusion of resources from the United States. NGEU is also new in its design. While the Marshall Plan incentivized reforms that would balance budgets through reduced public spending, NGEU conditionality is largely anti-austerity and climate friendly. The specific reforms required of each member state are highly varied, as Mahieu and her coauthors show. That said, the NGEU and the Marshall Plan share a key feature: grants in exchange for reforms. This structure allowed governments to easily accept both the funds and the associated reform agendas. The programs' conditional grantmaking mechanism could serve as a model for global financial institutions like the International Monetary Fund and the World Bank, which instead rely heavily on loans and often face extensive hostility and pushback.

Alicia Hinarejos, Full Professor of Law at McGill University, contrasts NGEU with the European response to the 2009 sovereign debt crisis.[4] The pandemic recovery program, she argues, has softened the EU's national fiscal liability paradigm and has brought with it an unprecedented pooling of resources among member states. This

[2] Géraldine Mahieu, Paul Brans & Daniel Schulz, *The Recovery and Resilience Facility Under Next Generation EU: A Breakthrough in Economic Policy Coordination and Policy Programming*, 118 AJIL UNBOUND 144 (2024).

[3] Elena Kempf & Katerina Linos, *NGEU: A New Marshall Plan for Europe and a Template for Global Finance*, 118 AJIL UNBOUND 151 (2024).

[4] Alicia Hinarejos, *Legacy and Limits of NGEU*, 118 AJIL UNBOUND 157 (2024).

pooling of resources happens on three levels. To fund NGEU, the EU has taken on common debt at rates that otherwise would not be accessible for member states in economic distress. These funds are then in part disbursed as grants, breaking with past practices limited to back-to-back lending. There is resource pooling, too, on the repayment side. The EU has already introduced a new tax on plastics and is considering taxes on corporate profits and emissions trading, among others. These features are bound together, Hinarejos shows, by a newly broad cohesion policy. Before the recovery program, EU cohesion policy focused on helping poorer regions catch up through investment in infrastructure and environmental projects. NGEU, by contrast, aims to move the entire EU toward a shared political and economic future that is more sustainable, equal, and digital.

NGEU brought fast macroeconomic stabilization and helped avoid a reduction in public spending during the pandemic. The program was novel in raising common EU debt for grants disbursed to member states, and in the new vision of cohesion that animated the conditionality mechanism. Europe, it would seem based on the economic picture, emerged from the pandemic a stronger union. At the same time, early optimism and consensus may become more conflictual as time goes on. Debt repayment is always more challenging than borrowing. And as Hinarejos emphasizes, specific taxes have been proposed, but mostly have not yet been adopted for repayment. We turn next to the legal construction of NGEU.

*Lessons for Treaty Workarounds and Crisis Governance*

Adopting NGEU without amending the European Union treaties required legal innovation. Several essays explore the creative interpretations and combinations of existing treaty articles, and the resistance in national member states to this expansion of supranational powers. In an era in which treaty amendment and new treaty adoption is extremely difficult, working within existing frameworks to address novel crises can become essential.[5]

The competences of the European Union are based on the principle of conferral (Treaty on European Union (TEU) Article 5). According to this principle, the European Union is only allowed to exert those competences explicitly transferred to it by the EU Treaties. There is no stipulation of EU treaty law that gives the Union the power to raise common debt to finance its budget. To the contrary, there are rules that stand in the way of building out such a competence, such as the no-bailout clause (Treaty on the Functioning of the European Union (TFEU) Article 125) and the requirements that the budget be balanced (TFEU Article 310) and financed through own resources (TFEU Article 311). To overcome this impasse, NGEU is based on a complicated combination of EU treaty law.[6] Specifically, the instrument is based on the emergency clause (TFEU Article 122) in combination with clauses allowing for cohesion policy outside of regular funds (TFEU Article 175) and ratification by national parliaments (TFEU Article 311). In this way, NGEU creates an exceptional EU competence to borrow in the absence of a general stipulation to this effect in the treaties.

Alberto de Gregorio Merino, an EU Council Legal Service Director and a key legal architect of NGEU, describes the EU treaties as "a living constitution."[7] Merino emphasizes the need for a broad interpretation of the EU treaties. In addition, he calls the EU's emergency clause, TFEU Article 122, a "sleeping beauty" provision,

[5] Curtis Bradley, Jack L. Goldsmith & Oona A. Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. Chi. L. Rev. 1281 (2023) (quantifying the decline of the treaty and the rise of the non-binding agreement); Kristina Daugirdas & Katerina Linos, *Back to Basics: The Benefits of Paradigmatic International Organizations*, 14 Harv. Nat'l Sec. J. 181 (2023) (exploring treaty workarounds for the establishment of international organizations).

[6] Bruno de Witte, *The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift*, 58 Common Mkt. L. Rev. 635 (2021).

[7] Alberto de Gregorio Merino, *The EU Treaties as a Living Constitution of the Union in Times of Crisis*, 118 AJIL Unbound 162 (2024).

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resting in the treaties since the 1950s, but mobilized frequently only very recently.[8] Further, when action through the EU is not possible, member states have turned to an intergovernmental method based on international law. These strategies have increased the power of the European Council and, especially, the Commission as a "crisis manager" and sidelined the European Parliament. Finally, the Court of Justice of the European Union (CJEU) has developed a crisis case law based on an evolutive reading of the treaties, with the telos of an "ever-closer union." NGEU, Merino suggests, is emblematic of the success of these broader patterns of EU crisis governance. By interpreting the EU Treaties as a living constitution, existing primary law was successfully adapted to crisis needs in the absence of reform.

But the broad interpretation of existing treaty law has its own pitfalls. Martin Nettesheim, a law professor at Tübingen University who has represented the German government and the German parliament in cases on European integration at the German Constitutional Court, argues that the EU is at risk of becoming a "juristocracy": a system dominated by the technocratic rule of legal experts.[9] Nettesheim laments the scoreboards that are increasingly used by the European Commission to measure progress by member states, scoreboards now backed by serious financial sticks and carrots.[10] (These scoreboards reflect the reforms required in exchange for NGEU funds, which many other authors celebrate). But it is the CJEU that draws Nettesheim's greatest ire. Nettesheim focuses on the Court's rule of law decisions on Hungary and Poland, which others have praised extensively. Nettesheim instead argues that by attaching specific legal meanings to essentially contested treaty values like "justice," "solidarity," and "tolerance," the Court damages the democratic nature of the European Union. Nettesheim suggests three issues with these rulings: the non-minimalism of interpreting contested political concepts, the rise of a European constitutional identity politics, and selective application against only some member states.

But there is also support for a broad interpretation of EU Treaties among German legal academics. Franz Mayer, a law professor at Bielefeld University who has represented the German parliament in the proceedings concerning NGEU at the German Constitutional Court, shores up the legal basis of NGEU in Articles 311 and 122 TFEU.[11] The creation of NGEU and its approval by national legislatures showed that the potential of existing EU treaty law was not exhausted given the requisite political will. Because of its construction as an exceptional emergency measure, NGEU did not change the fiscal constitution of Europe, and its future use as a blueprint will be limited to cases that can be similarly based on TFEU Article 122. Mayer also clashes with Nettesheim on the European Union response to Hungary and Poland. Mayer argues that rule of law conditionality should not be backed up only by CJEU fines on the order of €1 million per day, but with threats to withhold tens of billions. He celebrates the temporary withholding of NGEU funds from Hungary and Poland and suggests that rule of law conditionality should be imposed on the disbursement of all EU funds. NGEU might also serve as a lesson in the context of EU enlargement.

With treaty reform off the table, the EU met the pandemic crisis within the existing legal framework. The result was a complicated legal construct that facilitated NGEU but also limited it to an exceptional measure. With the necessary political will, there was space for further integration within the existing treaty framework. But there are also limits to governance through law against political will. Indeed, the recovery program seems to usher in an era of crisis governance through recourse to a regular exception.

[8] *See* Elena Chachko & Katerina Linos, *Emergency Powers for Good*, Wm. & Mary L. Rev. (forthcoming 2024) (detailing the frequent uses of Article 122, comparing to analogous U.S. emergency actions, and explaining how the traditional requirements that emergency measures be necessary and proportional have been circumvented).

[9] Martin Nettesheim, *European "Frankenstein Constitutionalism": Art. 2 TEU as a Federal Homogeneity Clause*, 118 AJIL Unbound 167 (2024).

[10] For an example of such a scoreboard, see Graph 1 in Géraldine Mahieu, Paul Brans & Daniel Schulz, *The Recovery and Resilience Facility Under Next Generation EU: A Breakthrough in Economic Policy Coordination and Policy Programming*, 118 AJIL Unbound 144 (2024).

[11] Franz C. Mayer, *NextGenerationEU and the Future of European Integration: Foreseeing the Unforeseeable*, 118 AJIL Unbound 172 (2024).

*Lessons for Climate Change and Defense*

Even though NGEU is an exceptional emergency measure, it has already served as a model for subsequent instruments in response to Russia's war of aggression against Ukraine. Federico Fabbrini, a Full Professor of EU Law at Dublin City University, shows how NGEU provided a "legal technique and a policy template" for two programs designed to support Ukraine.[12] Both the Macro-Financial Assistance Instrument for Ukraine and the Ukraine Facility were financed by common debt raised on the financial markets. The Assistance Instrument provided financial relief to Ukraine through loans in 2023. The Ukraine Facility echoed NGEU even more closely by providing €50 billion in grants and loans to Ukraine for 2024 through 2027. While Fabbrini argues for a path dependency in EU policymaking toward the consolidation of an EU fiscal capacity in times of crisis, he also shows how this trend remains contested.

The transition to a greener economy was one of the central pillars of NGEU from the beginning, but it was built out after Russia's brutal invasion of Ukraine in February 2022. Each EU member state's national plan must allocate at least 30 percent of funds to green objectives. In practice, as Jorge Viñuales, Professor of Law at Cambridge University, and Ginevra Le Moli, Assistant Professor of International Law at Leiden University, show in their contribution, states have on average allocated about 40 percent to the pillar, with some countries exceeding 50 percent.[13] The focus on the transition away from fossil fuels intensified after the Russian invasion. The resulting shortage of Russian gas available in the EU newly aligned three goals of energy policy: affordability, supply security, and sustainability. To reduce energy dependency on Russia, RePowerEU was integrated into NGEU through a revision of the RRF in May 2022. A year later, the EU produced more electricity from renewables than from fossil fuels for the first time. The greening of NGEU also aims to reduce EU dependency on China, especially in the battery technology sector, and to position the EU as a competitive player in the green economy.

*Conclusion*

The recovery and resilience program has illustrated the European Union's capacity to deepen integration in response to the polycrises of the present. This integration has facilitated, at least temporarily, a move toward the "ever-closer union" invoked in the Maastricht and Lisbon Treaties. But NGEU is not just about internal integration; it is also about external strength in a fractious world. Following on the heels of China and the United States, the European Union, too, has built out progressive protectionism and fortified state subventions. In this context, NGEU is buoyed by a vision for not only an ever-closer union, but an ever-stronger one as well.

[12] Federico Fabbrini, *From the Pandemic to the War: The EU Fiscal Response to Russia's Aggression of Ukraine, the Legacy of NGEU and the Challenge to "Promote the General Welfare,"* 118 AJIL Unbound 177 (2024).

[13] Ginevra Le Moli & Jorge E. Viñuales, *The Next Generation EU Programme in the "Global Race to the (Green) Top,"* 118 AJIL Unbound 182 (2024).

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