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Can the Borrowing for the "Next Generation EU" Lead to Infringement of Article 125 TFEU?

Phedon Nicolaides*

University of Maastricht and University of Nicosia

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Abstract

The Next Generation EU programme is both ambitious and controversial. Legal scholars have disagreed on whether the EU (European Union) may borrow large amounts for long periods, whether the chosen legal bases in the Treaties are correct and whether art.125 TFEU may be infringed. This article examines three possible routes by which art.125 TFEU may be infringed: Member States assume the liabilities of the EU in case of EU default; Member States assume indirectly the liabilities of other Member States in case of EU default; Member States assume directly the liabilities of other Member States in case one or more Member States default. The article argues that the risk of default of the EU is non-significant. The assumption of the EU's liabilities by Member States is not prohibited by art.125 TFEU. More importantly, there is no automatic mechanism by which default of a Member State will lead to the assumption of its liabilities by other Member States. However, Member States can provide mutual assistance, if they wish, without formally assuming the debt liabilities of another Member State.

Introduction

The European Union's (EU) ambitious programme of investing in a greener, more sustainable and more digital economy has garnered both praise and criticism. On the one hand, the so-called Next Generation EU is seen as bold initiative to prevent further climate deterioration and to restore European competitiveness, even though its legal basis in the EU Treaties may be questionable.[1]

On the other, it has been characterised as a surreptitious expansion of EU competences at the expense of Member States. Given that the Next Generation EU is to be funded through extensive borrowing by the European Commission that will reach EUR 750 billion (in 2018 prices) by 2026, doubt has also been expressed as to whether such borrowing is compatible with the principle enshrined in art.310 TEFU that the budget of the EU must always be in balance.[2] The German Federal Constitutional Court has also been

* Professor. I am grateful to comments by anonymous referees on a previous version. I alone am responsible for the contents of this article.

[1] See, for example, F. Fabbrini, "The Legal Architecture of The Economic Responses to Covid-19: EMU beyond the Pandemic" (2022) 60 J.C.M.S. 186–203; J. Echebarria Fernandez, "A Critical Analysis on the EU's Measures to Overcome the Economic Impact of the Covid-19 Pandemic" (2020) 5 *European Papers* 1399–1423; A. Hinarejos, "Next Generation EU" (2020) 45 E.L. Rev. 451–452; A. Steinbach, "The Next Generation EU" (23 June 2020) *EU Law Live*; B. de Witte, "The European Union's Covid-19 Recovery Plan: The Legal Engineering of An Economic Policy Shift" (2021) 58 C.M.L. Rev. 635–682.

[2] See, for example, P. Leino-Sandberg and M. Ruffert, "Next Generation EU and Its Constitutional Ramifications: A Critical Assessment" (2020) 59 C.M.L. Rev. 433–472; P. Lindseth and C. Fasone, "Rule-of-Law Conditionality and Resource Mobilization—the Foundations of a Genuinely 'Constitutional' EU?" (23 June 2020) *VerfBlog*; M. Nettesheim, "Legally Feasible, Constitutionally Dubious: Establishing 'Next Generation Europe' on the Basis of EU Secondary Legislation" (4 December 2020), *VerfBlog*, *https://verfassungsblog.de/legally-feasible-constitutionally-dubious/*.

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asked to consider not only whether the borrowing by the Commission infringes art.310 TFEU but also whether it may lead Member States to assume each other's liabilities in contravention to art.125 TFEU which is one of the pillars of monetary union.[3]

The purpose of this short article is to examine solely whether there is a risk of infringement of art.125 TFEU and whether infringement is avoidable. Rather unusually, the Council of the EU has made public an opinion of its own Legal Service that concludes that the Commission's borrowing on behalf of the EU and the accumulation of a very large debt by the EU is not contrary to art.310 TFEU. In addition, in the unlikely event of a risk of default by the EU, art.125 will not be violated because the EU has the right to request Member States to make additional payments into the EU budget and if such a request ever materialises each Member State will pay "pro rata" to its share of Gross National Income (GNI), i.e. according to the normal share of contributions into the EU budget.[4]

This article reaches five conclusions. First, the risk of default of the EU is miniscule. Back-of-the-envelope calculations suggest that the EU will have sufficient resources at its disposal to pay off its debt. Secondly, the assumption of the liabilities of the EU by Member States, even though unlikely, is not contrary to art.125 TFEU. Thirdly, default of the EU does not automatically imply the indirect assumption of debt liabilities of one or more Member States by other Member States. Fourthly, there no automatic mechanism by which default of a Member State will lead to the direct assumption of its liabilities by other Member States. Fifth and more broadly, if a Member State encounters difficulties, the other Member States can assist it, if they want, without formally violating art.125 TFEU.

Article 125 TFEU and case law requirements

Article 125(1) TFEU stipulates that "the Union shall not be liable for or assume the commitments of … any Member State … A Member State shall not be liable for or assume the commitments of … another Member State".

The purpose of art.125 is to incentivise Member States to pursue "sound public finances" in accordance with art.119(3) TFEU.[5] For this reason, art.125 prohibits the bail-out—i.e. relief of liabilities—of a Member State by the EU or other Member States. Please note, however, that it does not prohibit the bail-out of the EU by Member States. We will return to this issue later on.

In *Pringle*,[6] the Court of Justice made an importance distinction between the bail-out of Member States and the provision of financial assistance to one or more Member States in need. The former is prohibited,

[3] See Order of the German Federal Constitutional Court (2 BvR 547/21) 15 April 2021. For commentary on the Order see, for example, H. Kube, "A Relieving Decision: The Interim Decision of the German Federal Constitutional Court in the Procedure against the 2020 Own Resources Decision" (27 April 2021) *VerfBlog*, *https://verfassungsblog.de/a-relieving-decision/*; M. Nettesheim, "Greatness and Tragedy: On the Interim Decision of the German Federal Constitutional Court in the Constitutional Complaint Procedure against the New EU Own Resources Decision" (23 April 2021) *VerfBlog*, *https://verfassungsblog.de/greatness-and-tragedy/*; R. Repasi, "Karlsruhe, again: The interim-interim relief of the German Constitutional Court regarding Next Generation EU" (29 March 2021) *EU Law Live*, *https://eulawlive.com/analysis-karlsruhe-again-the-interim-interim-relief-of-the-german-constitutional-court-regarding-next-generation-eu-by-rene-repasi/*.

[4] Opinion of the Council Legal Service 9062/20 of 24 June 2020, available at *https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf*.

[5] For a review of the economic and legal background and objectives of art.125 TFEU, see O. Issing, *The Birth of the Euro* (Cambridge: Cambridge University Press, 2008); A. de Gregorio Merino, "Legal Developments in the Economic and Monetary Union during the Debt Crisis: The Mechanisms of Financial Assistance" (2012) 49 C.M.L. Rev. 1613–1646; P. Castillo, "The Political De-Determination of Legal Rules and the Contested Meaning of the 'No Bailout' Clause" (2017) 26 *Social and Legal Studies* 249–272; L. Flynn, "Article 125" in M. Kellerbauer et al (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford: Oxford Scholarship Online, 2021).

[6] *Pringle v Ireland* (C-370/12) EU:C:2012:756; [2013] 2 C.M.L.R. 2.

while the latter is permitted under certain conditions. For example, the TFEU allows the EU to assist a Member State facing difficulties resulting from natural disasters or exceptional occurrences (art.122(2) TFEU) or balance of payments difficulties (art.143(2) TFEU). Eurozone Member States are also allowed provide assistance when it is indispensable to safeguard the stability of the euro (art.136(3) TFEU).

More specifically, the Court of Justice held that art.125 does not prohibit all financial assistance by the EU or Member States to another Member State. It prohibits only that assistance that shelters Member States from the "logic of the market" and diminishes or undermines the incentive for "budgetary discipline" and "sound budgetary policy". In particular, the Court of Justice made the following statements which are of relevance to this article:

> "(130) That article (i.e. art.125 TFEU) is not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State."

> "(131) If art.125 TFEU prohibited any financial assistance whatever by the Union or the Member States to another Member State, art.122 TFEU would have had to state that it derogated from art.125 TFEU."

> "(135) The aim of art.125 TFEU is to ensure that the Member States follow a sound budgetary policy … The prohibition laid down in art.125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline."

> "(136) (art.125) prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished."

> "(137) art.125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy."

The Court of Justice did not explain the meaning of "logic of the market", "budgetary discipline" or "sound budgetary policy". However, as explained below, subsequent judgments have revealed what the Court had in mind.

In *Austria v Commission*,[7] the General Court rejected Austria's claim that financial assistance from Austria to German public authorities was contrary to art.125. The General Court held that "(101) even if the Republic of Austria had reduced the financial burden on Bavaria and the Federal Republic of Germany …, there would be no infringement of art.125 TFEU. The Republic of Austria has not established that those provisions would have the effect of undermining the incentive of the Member State receiving that assistance to pursue a sound budgetary policy." So, we see again the important distinction between financial assistance and other assistance that may undermine the incentive for sound budgetary policy.

The Court of Justice has shed more light on the meaning of sound budgetary policy in its judgment in *Gauweiler*.[8] Although formally that judgment examined whether ECB's "outright monetary transactions" could infringe art.123 TFEU rather than art.125 TFEU, the Court had to explain, in paras 100 to 121 of

For an extensive review of the contents and significance of the judgment in *Pringle*, see P. Craig, "Pringle: Legal Reasoning, Text, Purpose and Teleology" (2013) 20 *Maastricht Journal of European and Comparative Law* 3–11.

[7] *Austria v European Commission* (T-427/12) EU:T:2016:41.

[8] *Gauweiler v Deutscher Bundestag* (C-62/14) EU:C:2015:400; [2016] 1 C.M.L.R. 1.

For an extensive review of the contents and significance of the judgment see T. Tridimas and N. Xanthoulis, "A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict" (2016) 23 *Maastricht Journal of European and Comparative Law* 17–39.

the judgment, why the purchase of government bonds by the ECB under certain conditions did not "lessen the impetus of Member States" to follow sound budgetary policy. In particular, the Court held that "(100) the aim of art.123 TFEU is to encourage the Member States to follow a sound budgetary policy, not allowing monetary financing of public deficits or privileged access by public authorities to the financial markets to lead to excessively high levels of debt or excessive Member State deficits".[9]

The Court of Justice explained in more detail how the incentives of Member States to follow sound budgetary policy could be weakened in its landmark judgment in *Weiss*.[10] This would be the case if "(132) Member States' impetus to pursue a sound budgetary policy is reduced" as a result of assistance "in consequence of which Member States might adopt a budgetary policy that fails to take account of the fact that they will be compelled, in the event of a deficit, to seek financing on the markets".

We can infer, therefore, that the case law has laid down two tests to determine compliance with art.125 TFEU. These tests are a "form-based" test and an "effects-based" test. The form-based text examines whether responsibility for debt is shifted from the Member State that borrowed the money in the first place to other Member States. This is because in *Pringle* the Court of Justice referred to the "Member State which remains responsible for its commitments to its creditors".[11]

The second test goes beyond form and stipulates that even if responsibility is not shifted to other Member States, financial assistance from other Member States may not have the effect of lessening the impetus or undermining the incentive of the debtor Member State to implement, follow or otherwise pursue a sound budgetary policy that can enable it to access financial markets in the future.

Sound budgetary policy does not simply mean zero debt or zero deficit. It means budget deficit or public debt that is manageable or, as the Court put in *Gauweiler*, no excessively high debt or deficit.[12] This is because according to the logic of the market, governments can borrow as long as private investors are willing to buy their bonds. Investors buy bonds when the return they obtain is sufficiently high to compensate them for the risk they assume. The higher the perceived risk, the higher the rate of interest the issuing government must pay to induce private investors to hold its bonds. This necessarily implies that a government that issues bonds must have sufficient resources to redeem them and pay the promised interest. If such a government runs an increasing budget deficit, it will have to keep borrowing until its ballooning debt reaches an amount that becomes impossible for it to service by issuing new debt. At that point it will also be impossible for it to redeem maturing bonds. Therefore, the logic of the market means that the Government must pursue a sound budgetary policy in the sense that the deficit and its debt are not allowed to become so large that investors would be unwilling to lend it money to bridge its budget deficit or service its debt.

It follows that Member States may lend money to another Member State as long as it does not weaken its incentive to keep its budget deficit and public debt within manageable limits. This is what is supposed to have happened in the case of financial assistance provided by the European Stability Mechanism (ESM). That assistance helped borrowing countries to redeem their maturing bonds on condition that they would reduce their budgetary deficit and debt through cuts in spending, efficiency-increasing reforms and other means of raising extra revenue. Budgetary discipline was one of the multiple requirements in the Memoranda

[9] Article 123 TFEU is well analysed in Issing, *The Birth of the Euro* (2008); Flynn, "Article 125" in *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2021).

[10] *Proceedings brought by Weiss* (C-493/17) EU:C:2018:1000; [2019] 2 C.M.L.R. 11.

[11] See *Pringle* (C-370/12) EU:C:2012:756 at [134].

[12] For an explanation of the need to maintain manageable public debt in a monetary union, see Issing, *The Birth of the Euro* (2008).

of Understanding between the ESM and borrowing countries, intended to enforce the "strict conditionality" required by art.136 TFEU.[13]

However, it is also important to note that even if debt responsibility formally remains with the borrowing Member State, the availability of financial assistance makes it easier for the aided Member State to meet its debt obligations. ESM funds have been used to redeem maturing bonds. The private investors got their money back, but the ESM must wait many years to be repaid. ESM loans are granted with significant grace periods and have a long duration.

Let's perform a thought experiment to appreciate the implications of the rather long grace and duration periods of ESM loans. Assume my annual net income is 10, but as a result of profligate lifestyle or a series of misfortunes that have befallen me, I also have to repay debt of 15 on an annual basis. Obviously, in this situation default is inevitable, but my brother offers me financial help of 5. If he does it every year, I do not have to change my behaviour. I am effectively bailed-out every year. This is prohibited by art.125 TFEU.

Assume that instead of an unconditional non-repayable grant, I receive a loan of 10 that is released in two annual instalments of 5. This means I can cover the deficit between my net income and annual debt payments for two years. It gives me a two-year breathing period in which to increase my net income by finding new sources of revenue or by reducing my expenditure.

Further assume that my efforts are successful. My net income increases to 15, but that is not enough. I must increase my net income further in order to pay back the loan of 10. How much more I must increase my annual income depends on the duration of the loan. If it has to be paid back in, say, 10 years, the required increase is only one. If the payback period is five years, the required increase is two. The shorter the repayment period, the larger the increase and, consequently, the more painful or drastic the required adjustment on my part.

We can see now that the extent to which an aided Member State is fully exposed to the logic of the market very much depends on the terms of the financial assistance provided by other Member States. ESM loans with long grace and repayment periods cushion significantly the pain of adjustment of the aided Member States before they fully return to the logic of the market. The Court of Justice has been largely silent on the terms of the "conditions" or "strict conditionality" in the Memoranda of Understanding on the basis of which assistance is granted under art.122 TFEU, art.136 TFEU or art.143 TFEU. My conclusion is that Member States do remain subject to the logic of the market but the discipline imposed by the market is made less harsh by the granting of long-term assistance by other Member States. In reality, mutual assistance delays the full exposure of the borrower to the discipline of the market.

This delay is now generating another beneficial effect for debtor countries. Since inflation is picking up, when the aided Member States eventually pay back, the real value of their debt will be worth less than what it is today.

Admittedly, the market would not accept to lend money to highly indebted Member States at low rates of interest for long periods of time, but the market does not have an instrument that the EU or the ESM has. That instrument is "conditionality" (arts 122 and 143) or "strict conditionality" (ESM & art.136). The quid pro quo of mutual assistance is domestic reform and belt-tightening austerity measures accompanied by constant and intrusive surveillance. Does conditionality/strict conditionality imply that the imposed reform and surveillance substitute the discipline of the market for what may be called the discipline of the creditor? The answer is in the affirmative to a certain extent, but it is impossible to know to which extent. So far there is no guidance on this issue either in the case law or in the academic literature.

[13] European Stability Mechanism, "What kind of policy conditions do programme countries have to implement?" It can be accessed at *https://www.esm.europa.eu/advanced-search?keyword=What+kind+of+policy+conditions+do+programme+countries+* .

Therefore, two preliminary conclusions can be drawn so far. First, art.125 TFEU does not appear to be an insurmountable obstacle when there is a political will to provide mutual financial assistance. Long-term loans can do the trick. Secondly, it is an open question whether such long-term loans only replace or also weaken market discipline.

Financial obligations arising from Next Generation EU

The Commission has been mandated to borrow EUR 750 billion in 2018 prices from the international capital markets to finance the Recovery and Resilience Facility and the other programmes in the framework of the Next Generation EU.[14] Some EUR 390 billion in 2018 prices will be channelled to Member States in the form of grants while the remaining EUR 360 billion will be made available in the form of loans that recipient countries will have to pay back to the Commission.[15] The Commission will have to repay the total amount that it borrows plus interest. Article 5(2) of Council Decision 2020/2053 on Own-Resources stipulates that the total cost (principal and interest) will be borne by the EU budget.[16]

In principle, each Member State is solely and individually liable for the repayment of its share of the amount of EUR 360 billion of loans plus interest. However, given that Member States finance about 70% the EU budget through the GNI-based resource, it follows that Member States collectively will bear ultimate responsibility for the debt of the EU that corresponds to the amount of EUR 390 billion of grants plus interest. With respect to the latter amount, the burden on Member States will be lessened to the extent that Member States acting in the context of the Council of the EU will agree to establish a new own-resource that will enable the EU to raise the required funds to repay the EUR 390 billion plus interest.

The Commission started its borrowing in 2021 and will have to raise the total amount of EUR 750 billion by the end of 2026.[17] The repayment of the debt will start in 2027 and will have to be completed within 32 years by 2058.[18] This means that, very roughly, the Commission will have to repay on average about EUR 32 billion per year. The cost of this borrowing is as low as it can be since the EU enjoys AAA rating. There are only 10 countries in the world plus the EU that enjoy AAA rating.[19] Since the GNI of the EU is about EUR 15,000 billion, the amount of EUR 32 billion represents about 0.2 of 1% of the EU GNI in today's money.

Will the EU have sufficient resources to repay its NGEU debt?

At present, the budget of the EU is about EUR 170 billion which corresponds to 1.14% of the EU's GNI.[20] Article 3 of the Own-Resources Decision[21] provides that the maximum amount of resources "allocated to the Union" may reach up to 1.4% of GNI. The margin of 0.26% that may be committed to the EU budget corresponds to about EUR 39 billion. This amount exceeds by EUR 7 billion the estimated average annual debt repayment of about EUR 32 billion.

[14] Council Regulation 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the Covid-19 crisis [2020] OJ LI433/23.

[15] Regulation 2021/241 establishing the Recovery and Resilience Facility [2021] OJ L57/17.

[16] Council Decision 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/1.

[17] Council Decision 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/1 art.5(2).

[18] Council Decision 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/1 art.5(2).

[19] See *https://en.wikipedia.org/wiki/List_of_countries_by_credit_rating*.

[20] See European Commission, EU budget, available at: *https://ec.europa.eu/info/strategy/eu-budget_en*.

[21] Council Decision 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/1.

Nevertheless, in order to ensure that the EU has enough resources to cover the liabilities that arise from the NGEU debt, art.6 of the Own-Resources Decision raises the budgetary ceiling by an extra 0.6% to 2.0% of the EU GNI. The increase is "extraordinary and temporary". The extra 0.6% would generate another EUR 60 billion if necessary.

Article 9 of the Own-Resources Decision makes it clear that Member States are obliged to provide any additional resources that may be requested in order to discharge the EU's NGEU debt. "(4) If the authorised appropriations entered in the Union budget are not sufficient for the Union to comply with its obligations resulting from the borrowing referred to in art.5 of this Decision … the Member States … shall make the resources necessary for that purpose available to the Commission." And "(5) the Commission may call on the Member States to provisionally 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."[22]

Paragraph 5 of art.9 also foresees what the Commission may do if a Member State fails to respond to that call. "If a Member State fails, in full or in part, to honour a call on time, or if it notifies the Commission that it will not be able to honour a call, in order to cover for the part corresponding to the Member State concerned, the Commission shall provisionally have the right to make additional calls on the other Member States. Such calls shall be pro rata to the estimated budget revenue of each of the other Member States. The Member State which failed to honour a call shall remain liable to honour it."

Although it appears that the margin of 0.26% up to the ceiling of 1.4% of GNI is sufficient for the annual debt repayment, still the EU may request Member States to provide pro rata any additional funds that may be necessary up to 2.0% of GNI. Therefore, the prospect of the EU defaulting on its debt is highly unlikely. It has also been argued that the stimulus to economic growth from the NGEU/RRF will put more resources at the disposal of Member States. This reduces further any probability of default, at least by the EU.[23]

However, the optimistic scenarios that accompanied the launch of the NGEU/RRF were considered before Russia's invasion of Ukraine and the new crisis it has precipitated. The ECB is now designing a new instrument to prevent or correct "fragmentation" of the euro area.[24]

Therefore, it is still necessary to ask what may happen even in the unlikely event that the EU defaults on its debt obligations towards international investors and what may happen in the more likely event that a Member State defaults on the debt it owes to the EU. Default of a Member State is statistically more likely by the simple fact that 22 Member States have credit rating below that of the EU's. Will such eventualities necessarily lead to infringement of art.125 TFEU?

Is Article 125 TFEU infringed if the EU or a Member State defaults?

There is no provision in the Treaties on default of either the EU or the Member States. We must infer, therefore, that default is not prohibited but, like other events or policies not explicitly covered by the Treaties, if it happens it must be managed in compliance with any relevant EU law which is as yet undefined.

A default of the EU will not necessarily infringe art.125. First, Member States are not directly liable for the debt of the EU. The borrowing by the Commission is backed by a guarantee from the EU budget. A default will trigger that guarantee. A debtor that relies on its own collateral does not transfer its debt obligations to third parties which in this case are the Member States. The debtor forgoes the collateral

[22] Council Decision 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/1.

[23] For an upbeat assessment, see F. Corti et al, "The Recovery and Resilience Facility: A Springboard for a Renaissance of Public Investments in Europe?" (2022) *CEPS*, *https://www.ceps.eu/download/publication/?id=34969&pdf=RRRP-2022-06_-Renaissance-of-public-investments-in-Europe.pdf.*

[24] C. Lagarde, "Challenges for monetary policy in a rapidly changing world" (ECB Forum on Central Banking 2022) at *https://www.ecb.europa.eu/press/key/date/2022/html/ecb.sp220628~754ac25107.en.html*.

while the lender may also suffer a loss if there is a difference between the amount owed and the value of the collateral.

Secondly, as noted earlier, Member States can be called to provide extra resources to the EU in case their normal budgetary contributions are not enough to cover the redemption of maturing bonds. Hence, it should be expected that the EU will call on Member States before it reaches the point of default. Extra contributions by Member States will not amount to formal assumption of the EU's liabilities.

Third, art.125 does not prohibit Member States from assuming formally the liabilities of the EU. Even in the very unlikely event that the extra resources from Member States are provided after the EU's default, still such an eventuality would not be contrary to art.125. In terms of the "effects" test laid down in the case law, it must be noted that the EU has a right to claim extra resources as stipulated by the Own-Resources Decision. Therefore, the EU will be using its "own" money to discharge its debt while remaining subject to the "logic of the market".

However, it should also be said that it would be nonsensical for Member States not to provide the extra resources before default, let the EU default and then assume its debt obligations or offer financial support so that the EU can resume its debt repayments. Therefore, it is within the powers of Member States to prevent default of the EU by providing the needed extra resources before they have to assume any debt obligations.

A scenario that is statistically more probable is the default of a Member State either on its debt to the EU or with respect to its obligation to provide its share of the extra resources that may be called by the EU.

In this case, it should, first, be pointed out that the default of a Member State need not affect the EU's ability to repay its debt, let alone precipitate its own default. It all depends on which Member State defaults. Regardless of whether the repayment ability of the EU is affected or impaired, the relevant question for our purposes is whether uneven contribution by Member States to the EU's repayment schedule could be considered equivalent to the assumption by the other Member States of the debt liability of the non-paying Member State?

I think, following the *Pringle*, *GauweilerandWeiss* judgments, the answer to this question is negative. The extra resources provided by the other Member States will be granted to the EU. As long as the EU does not relieve the non-paying Member State from its contractual obligations, then formally it will not assume any of its debt obligations. The same applies to the other Member States. As long as they do not assume the liabilities of the non-paying Member State, they will not infringe art.125. They will only be helping the EU.

However, if the EU tolerates non-payment, surely that must be equated to de facto, implicit or indirect reduction of the liabilities of the non-paying Member State. There is no guiding case law on such an eventuality, but the principles expounded by the Court of Justice in *Gauweiler* and *Weiss* suggest that tolerance of non-payment would have the consequence of weakening the discipline of the market. By analogy with the case law on recovery of state aid that is incompatible with the internal market, the EU will be expected to use all possible remedies which are legally available to it to recover what is owed.[25] For example, it may launch infringement proceedings, withhold payment of structural funds or even lodge a claim for compensation in a court of the non-paying Member State. Otherwise, it will be deemed to implicitly or indirectly reduce the liability of the non-paying Member State.

There is also another possible outcome. The other Member States may provide assistance to the non-paying Member State so that it can meet its contractual obligations towards the EU. Again, following the *Pringle*, *Gauweiler* and *Weiss* judgments, as long as the other Member States do not formally assume the liabilities of the non-paying Member State and the assistance is predicated on strict conditionality that

[25] See, for example, the judgment of the Court of Justice in *European Commission v Spain* (C-704/19) EU:C:2021:342 at [50]–[51] and [61]–[63] and case law cited.

does not lessen the impetus of the non-paying Member State to maintain sound budgetary policy, art.125 will not be infringed. The non-paying Member State will simply become a debtor to the other Member States.

Of course, the other Member States may also provide assistance before the non-paying Member State defaults or becomes unable to meet its obligations towards the EU. Whether the other Member States would be willing to assist the non-paying Member State would depend on the prevailing politics at the time. It is unlikely that the other Member States would be eager to offer assistance, if the non-paying Member State simply refuses to make the payments that fall due for domestic political reasons. In such a case too the EU would have to resort to appropriate legal action for the immediate and effective recovery of the sums owed to it.

Will the German Federal Constitutional Court be a "spanner in the wheels" of the EU?

The Federal Constitutional Court (FCC) of Germany has demonstrated its willingness to challenge EU law and policies.[26] Regardless of one's own opinion about the correctness or not of the ruling of the FCC in the *Weiss* case, if it concludes in the pending case[27] before it that the borrowing that finances the RRF is contrary to art.125 TFEU it will make it difficult for Germany, the largest payer into the EU budget, to contribute the extra resources that will be needed for the repayment of the EUR 750 billion of loans. Therefore, before concluding this article, it is necessary to examine briefly the arguments of the applicants and consider how the FCC may respond to them.

About 2,280 applicants petitioned the FCC for a preliminary injunction against the ratification by the German Parliament of the Own-Resources Decision. In an Order issued on 15 April 2021, the FCC refused to grant the injunction on the grounds that prevention of the launch of the RRF would cause significant harm. The Own-Resources Decision did not appear to be ultra vires. However, the FCC agreed to hear the arguments of the applicants because they had demonstrated the "possibility" that the Own-Resources Decision could be contrary to certain provisions of the German constitution and because it could create an uncapped liability for Germany that went beyond the sums that would be dispensed to Germany. Analysis of the arguments concerning the German constitution fall outside the scope of this article. For our purposes the relevant issue is the extent of the monetary liability of Germany.

More specifically, the applicants argued that if a Member State were unable to provide any extra financing that was called, the other Member States would assume its liabilities. For this reason, the Own-Resources Decision violated art.125 TFEU. The Order of 15 April 2021 did not elaborate the grounds for these arguments.

The FCC has not yet ruled definitively on this case. On the basis of a preliminary examination, the FCC decided not to grant the injunction because it did not seem that Germany would be liable for an uncapped amount. While it is true that each Member State will have to repay the amount it receives from the EU in the form of loans, the amount borrowed by the EU and then dispensed to Member States in the form of grants will have to be paid back to the EU, so that in turn it can repay its creditors, by all Member States in proportion to their share of the budget. With respect to grants, Germany by being the largest payer into the budget will necessarily pay more than it receives, but the amount is neither uncapped, nor unknown

[26] See the landmark judgment of the FCC in *Weiss* (2 BvR 859/15) 5 May 2020, available at *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html*. For an assessment of the judgment, see N. de Boer and J. Van't Klooster, "The ECB, the Courts and the Issue of Democratic Legitimacy after Weiss" (2020) 57 C.M.L. Rev. 1689–1724; G. Anagnostaras, "Activating Ultra Vires Review: The German Constitutional Court Decides Weiss" (20201) 6 *European Papers* 801–830.

[27] See the Order of the FCC in 2 BvR 547/21 (15 April 2021).

in advance. Germany contributes about 20% of the EU budget. If any call for extra funds is made, the share of Germany will also be about 20% of the amount up to the ceiling of 2% of the EU's GNI.

So, the FCC has provisionally found some of the statements of the applicants to be exaggerated, but it has not said anything on possible violation of art.125 TEFU, nor has it considered the possibility that Germany, and any other Member State, may refuse to provide funding that would be contrary to a fundamental provision of the TFEU.

Conclusions

This short article has examined the controversial issue of the borrowing of unprecedented large amounts by the EU in order to finance the various programmes and action in the context of the Next Generation EU. The legal basis, the funding and the political consequences of the Next Generation EU have been debated in the literature where very different views have been expressed. Legal scholars have disagreed on whether the EU may borrow such large amounts, on the legal basis of the borrowing, on whether the amounts that are borrowed and spent should be included in the annual budget and on whether art.125 TFEU may be infringed.

This article has focused solely on possible infringement of art.125 TFEU. It has examined three possible routes by which art.125 TFEU may be infringed: Member States assume the liabilities of the EU in case of EU default; Member States assume indirectly the liabilities of other Member States in case of EU default; Member States assume the liabilities of other Member States in case one or more Member States default.

The article has argued that the risk of default of the EU is non-significant. The assumption of the EU's liabilities by Member States is not prohibited by art.125 TFEU. Although unlikely, an eventual default of the EU will not automatically lead to the indirect assumption of debt liabilities of one or more Member States by other Member States. If necessary, the EU has the right to call on Member States for extra funds within the limits set by the Own-Resources Decision. Extra contributions by Member States do not amount to transfer of the EU's debt obligations. More importantly, there is no automatic mechanism by which default of a Member State will lead to the assumption of its liabilities by other Member States.

The article has also shown how Member States can assist each other, if they want to, through long-term loans in compliance with the prohibition of art.125 TFEU. Although the assisted Member State formally remains liable for its own debt, it is also shielded to a certain extent from the harsh discipline of the market.