

# Integration through Funding? The Union's Finances as Policy Instrument

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## Integration Through Funding

### *The Union's Finances as Policy Instrument*

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BRUNO DE WITTE

### 1. Introduction

The European Union does not have an army or a police force. Its budget is small. It achieves its integration aims mainly by regulating – by making laws that apply throughout Europe. It is often noted that ‘what the EU lacks in terms of material capacity, it partly compensates for by regulation.’<sup>1</sup> This contrasts with federal systems where the ‘power of the purse’ of the federal state plays an important role in governance, in two different ways: by operating direct transfers to the member states for their general use; and by funding the member states or local authorities for specific purposes decided at the federal level. The latter is often described as the ‘federal spending power’. By spending money, the federal level exercises power, in that it can force or at least encourage the member states or local authorities to pursue the policy preferences set at the federal level. In the European Union, general financial transfers from the European to the member state level do not exist (quite the opposite, in fact); however, there are various ways in which the European Union uses its ‘spending power’ to try and steer the policy choices made at the national or local level. Such integration through funding forms the object of this chapter. As is the case with European-level law-making, the question whether a given policy requires spending at EU level depends on an assessment of the added value compared to action taken by national governments alone.<sup>2</sup> However, public expenditure by the EU is not only subject to such a subsidiarity test. It is also subject to other constraints of EU constitutional law that will be discussed in the next sections: it should remain within the limits of the competences conferred

<sup>1</sup> Philipp Genschel and Markus Jachtenfuchs, ‘More Integration, Less Federation: The European Integration of Core State Powers’ (2016) 23 *Journal of European Public Policy* 42, 45.

<sup>2</sup> Gabriele Cipriani, ‘The EU Budget’ in Nikolaos Zahariadis and Laurie Buonanno (eds), *The Routledge Handbook of European Public Policy* (London, Routledge, 2018) 142–54, 142.

on the Union by the Treaties (section 2); and it must respect the rules and limits imposed by EU public finance law (section 3). After that, section 4 will give a general overview of the main policy areas in which integration through funding is happening. Section 5 will explore the way in which instruments for emergency funding have recently been turned into instruments to achieve the EU's general policy goals, and section 6 will show how cohesion policy has now become the institutional seat of broadly based integration-through-funding mechanisms.

## 2. The Legal Basis Requirement

The legal basis requirement permeates the institutional life of the European Union. Under the principle of conferral of competences, every EU legal measure must be connected directly, or via an intermediate act, to a Treaty article (the legal basis) allowing the Union to act in a particular domain, for a particular purpose and in a particular manner. Since almost all EU legislation is proposed by the Commission, that institution takes the initiative of choosing the appropriate legal basis for whichever policy objectives it seeks to achieve with the legislation, and the other institutions usually follow the Commission's lead when adopting the act. The preamble of the legislative act is normally used to justify the choice of the legal basis; that is, to explain how the content and objectives of the proposed act fall within the scope of the chosen legal basis.

There was a time, in the 1970s and 1980s, when the annual EU budget set aside some money for what were called pilot actions, that is policies which the budgetary authorities (especially the European Parliament) wanted to support even in the absence of a clear EU competence. The Court of Justice put an end to that in a judgment from the 1990s.<sup>3</sup> Since then, the EU's Financial Regulation states that every item on the EU budget must refer to a 'basic act',<sup>4</sup> which is defined in its Article 2 as 'a legal act, other than a recommendation or an opinion, which provides a legal basis for an action and for the implementation of the corresponding expenditure entered in the budget'.<sup>5</sup> That basic act must in turn have a legal basis in the Treaties, that is, it must fall within the scope of a competence conferred on the EU.

In the many legal basis provisions spread all across the Treaties, the use of funds is either denied, expressly permitted, implicitly permitted or simply not

<sup>3</sup> Case C-106/96 *United Kingdom v Commission* ECLI:EU:C:1998:218.

<sup>4</sup> Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] OJ L193/1, Art 58(1): 'Appropriations entered in the budget for an Union action shall only be used if a basic act has been adopted.' Paragraphs 2 to 5 of the same Article contain some exceptions to this rule.

<sup>5</sup> The key content of that provision is repeated in Art 310(3) TFEU, which makes it into a true constitutional requirement.

envisaged. The first of these four categories comprises legal bases specifying that the Union should only act by means of ‘rules’ or by means of directives,<sup>6</sup> which excludes the adoption of EU funding measures. The second category consists of legal bases where financial expenditure is expressly named as one of the policy tools that is available for the EU institutions. Examples include Article 40(3) of the Treaty on the Functioning of the European Union (TFEU) allowing for setting up ‘one or more agricultural guidance and guarantee funds’ and, in the domain of external relations, Article 212 TFEU allowing for financial assistance to third countries. The third category comprises those Treaty articles that imply the use of funds by stating that the Union is able to ‘support’ member state action in a given policy domain, or to adopt ‘incentive measures’ for a particular purpose. Thus, Article 196 TFEU states that the Union shall ‘support and complement’ member state action in the field of civil protection, and this article could thus serve as a basis for the adoption of a Union Civil Protection Mechanism with a financial expenditure component.<sup>7</sup> Several legal bases allow for the European Union to adopt ‘incentive measures’ – a generic term which has been interpreted consistently as allowing for the adoption of funding programmes in fields such as education and culture.<sup>8</sup> The fourth category consists of the many legal basis provisions that refer generically to the adoption of ‘measures’, ‘actions’ or ‘provisions’ by the EU institutions. This generic description leaves open the possibility to adopt funding measures alongside regulatory measures. The generic wording has, in EU institutional practice, served as a sufficient basis for funding mechanisms in the field of the environment, energy policy, and asylum and migration policy, to name just the more prominent examples.

As any EU legislation must have a legal basis in the Treaties, and as these legal bases define a limited set of objectives, it is questionable whether the EU legislator may pursue other objectives ‘on the side’, beyond those defined in the legal basis. The ‘mainstreaming clauses’ or ‘integration principles’, mostly contained in the Articles 8 to 13 TFEU, help to remove such doubts; they clarify, beyond discussion, that it is perfectly legitimate for agricultural policy measures to include an environmental dimension, or for migration policy measures to have a gender equality dimension, to give just some examples of such mainstreaming.<sup>9</sup> Apart from the application of these mainstreaming clauses, EU legislation can also pursue other policy objectives laid down elsewhere in the Treaties, as long as those other objectives are ancillary to the main objectives that correspond to the chosen legal basis. If those other objectives are more than ancillary, they should be reflected by adding

<sup>6</sup> eg Art 16(2) TFEU on data protection (‘rules’) or Art 23 TFEU on diplomatic protection (‘directives’).

<sup>7</sup> The basis act creating the Mechanism was last amended by Regulation (EU) 2021/836 of the European Parliament and of the Council amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism [2021] OJ L185/1.

<sup>8</sup> See, for instance, Art 165(4) TFEU, which is the legal basis for the Erasmus+ programme.

<sup>9</sup> See Francesca Ippolito, Maria Eugenia Bartoloni and Massimo Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Abingdon, Routledge, 2019).

a supplementary legal basis for the act. This phenomenon can be illustrated by the changing legal bases of the European Social Fund. Whereas the ESF Regulation of 2013 had the sole legal basis of Article 164 TFEU (which mentions the Social Fund explicitly), its successor, the ESF+ Regulation of 2021, had multiple legal bases, reflecting the fact that the new fund had absorbed some smaller funds with partially different policy objectives.<sup>10</sup>

### 3. The Constraints of Public Finance Law

The possibility for the Union to spend money for the pursuit of European public goods is not only constrained by the principle of conferral and the legal basis requirement, but also by the rules of EU public finance law laid down in the Treaties. Among the latter, there is an overall constitutional constraint, expressed in Article 310(4) TFEU, namely that ‘the Union shall not adopt any act which is likely to have appreciable implications for the budget without providing an assurance that the expenditure arising from such an act is capable of being financed within the limits of the Union’s own resources and in compliance with the Multiannual Financial Framework’. The Multiannual Financial Framework (MFF) is indeed a major feature of EU public finance law. The annual budget of the Union is to a large extent pre-ordained by the seven-yearly MFF. In practice, the adoption of each new MFF is accompanied by the adoption or revision of all the Union’s spending programmes, most prominently the agricultural and structural funds but also the myriad of other funds in policy domains such as migration, research, education, culture and external relations. For this reason, the negotiations of the MFF are not only about the amount of EU expenditure but also about the content of EU spending policies. The political and legal importance of the MFF is reflected in its decision-making rule: it must be adopted by the Council acting unanimously, and with the consent of the European Parliament.<sup>11</sup> As was shown at the time of adopting the MFF for 2014–20, this means in practice that a decisive role is played by the European Council, where a political compromise must be reached that is acceptable to all the member states. A number of European Council meetings took place in 2012 and 2013, and the final compromise was a very detailed document that was then turned into a formal regulation by the Council. The consent power given to the European Parliament under Article 312 was very much blunted by the need for unanimity at the European Council.<sup>12</sup> Something similar happened

<sup>10</sup> Regulation (EU) 2021/1057 of the European Parliament and of the Council establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013 [2021] OJ L231/21. The legal bases of this regulation are Art 46(d), Art 149, Art 153(2)(a), Art 164, Art 175(3) and Art 349, all of the TFEU.

<sup>11</sup> Art 312(3) TFEU.

<sup>12</sup> See the detailed account of the negotiations on the 2014–20 MFF by Richard Crowe, ‘The European Council and the Multiannual Financial Framework’ (2016) 18 *Cambridge Yearbook of European Legal Studies* 69.

in July 2020, when the negotiations of the 2021–27 MFF culminated in a long European Council meeting whose conclusions spelled out, in rather great detail, the amounts allocated to the various EU funds.<sup>13</sup> The budgetary capacity of the Union is thus limited and constrained by the overall ceiling of EU expenditure, determined every seven years in the MFF, and by the consequent setting of financial envelopes for each of the EU's spending programmes for the next seven years, with, for some of the larger programmes, a further splitting of these financial envelopes in separate allocations for each member state.

However, the EU's funding capacity can be expanded beyond the limits of the MFF in three different ways. A first, rather exceptional, way is for the MFF to be amended during its term. As the MFF is adopted by means of a regulation, it is possible to amend it by means of another regulation, as happened recently to allow for the mobilisation of a financial assistance guarantee for Ukraine.<sup>14</sup> A second way to expand the EU's financial capacity is through borrowing operations by the EU on the financial markets. Traditionally, such borrowing was limited in size and served for loans to the member states or to third countries, so that the EU's debt would, normally speaking, be repaid by the end-recipients of the loans at no budgetary cost for the Union. More recently, in the framework of the EU's pandemic response, the proceeds of EU borrowing have been used to fund non-repayable expenditure rather than loans – an innovative practice whose compatibility with EU public finance law is contested.<sup>15</sup> A third way to expand the EU's financial capacity beyond the EU budget is by setting up funds in which Union expenditure is combined with contributions by the member states, private actors or third states. An important example of such hybrid or 'blended' funding is the so-called Juncker Plan adopted in 2015,<sup>16</sup> now renamed as the InvestEU programme. Blended finance has become a major general tool of the EU's external relations, through the European Fund for Sustainable Development (EFSD+),<sup>17</sup> and was also used for

<sup>13</sup> After further negotiations in the second half of 2020, the MFF was adopted through Council Regulation (EU, Euratom) 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L1433/11.

<sup>14</sup> Council Regulation (EU, Euratom) 2022/2496 amending Regulation (EU, Euratom) 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027 [2022] OJ L325/11.

<sup>15</sup> Päivi Leino-Sandberg and Matthias Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) 59 *CML Rev* 433, 450–60.

<sup>16</sup> Regulation (EU) 2015/1017 of the European Parliament and of the Council on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 – the European Fund for Strategic Investments [2015] OJ L169/1. The European Fund for Strategic Investments is now replaced by Regulation (EU) 2021/523 of the European Parliament and of the Council establishing the InvestEU Programme and amending Regulation (EU) 2015/1017 [2021] OJ L107/30.

<sup>17</sup> The EFSD+ is based on Arts 31 to 40 of the Regulation (EU) 2021/947 of the European Parliament and of the Council establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation (EU) 2017/1601 of the European Parliament and of the Council and Council Regulation (EC, Euratom) No 480/2009 [2021] OJ L209/1. On blended finance as a policy tool of the EU's external relations, see Andrea Prontera and Rainer Quitzow,

ad-hoc projects such as the Emergency Trust Fund for Africa, set up on the basis of an international agreement concluded between the EU, its member states, and two other countries.<sup>18</sup> By contrast, expenditure under the Common Foreign and Security Policy is off-budget, and EU mechanisms of foreign policy such as the European Peace Facility are entirely funded by the member states.<sup>19</sup>

#### 4. The Policy Steering Role of EU Funding: A General View

For many years now, the EU has had two main spending programmes absorbing the bulk of the EU's overall budget that, because of their sheer volume, could act as policy steering tools: the agricultural funds and the structural funds.

The *common agricultural policy* (CAP) contained, right from its origins, a funding dimension which quickly became its dominant component and overshadows the EU's regulatory activity in this field. The concrete funding mechanisms and priorities have evolved over time, in order to steer agricultural activity in particular directions, by subsidising certain activities rather than others. The most prominent inflection in spending priorities is the growing emphasis on the protection of the environment. This has, in the current version of the agricultural funds, become one of the three general objectives of the CAP, despite the fact that it is not mentioned in the TFEU as one of the goals of the EU's agricultural policy.<sup>20</sup> This inclusion of the environment as one of the three 'pillars' (alongside agricultural sector economy and rural development) of the CAP is justified, in legal terms, by the strong environmental integration clause in Article 11 TFEU which states that environmental protection requirements '*must* be integrated into the definition and implementation of the Union's policies and activities.' However, the potential for agricultural funding to be turned to the achievement of 'new' policy goals is hindered by the fact that existing agricultural spending patterns serve important vested interests. Agricultural funding is therefore an important potential instrument of integration through funding, but it is not easily adaptable to new policy priorities.

'Catalytic Power Europe: Blended Finance in European External Action' *Journal of Common Market Studies* (early view article, 2022).

<sup>18</sup> Agreement establishing the European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, done at La Valletta on 12 November 2015.

<sup>19</sup> Council Decision (CFSP) 2021/509 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528 [2021] OJ L102/14.

<sup>20</sup> Regulation (EU) 2021/2115 of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013 [2021] OJ L435/1, Art 5: 'to support and strengthen environmental protection, including biodiversity, and climate action'.



The *structural funds* serve, according to the Treaty text (Article 174 TFEU), to strengthen the economic, social and territorial cohesion of the Union. Those overall objectives form a very capacious umbrella for a host of more fine-grained policy aims. The structural funds can be seen as half-empty shells that can be filled with new policy goals every seven years, when the revised fund regulations are being adopted, and occasionally even within the seven-year period, in order to address new needs. The latter happened in response to the Covid-19 pandemic, when the EU legislator created the REACT-EU programme which provided additional resources (stemming from the NextGenerationEU (NGEU) programme) to the structural funds, in particular in order to support investment in the social and health sectors.<sup>21</sup> Apart from their broadly defined cohesion goals, the structural funds have also been marked, over the past 10 years, by the growing importance of conditionality. Funding is made conditional on compliance by the member states with a large number of so-called enabling conditions, and EU funding can be stopped in the course of a programme for failure to comply with certain conditions. In this manner, the European Union seeks to use these funds to achieve other policy objectives apart from cohesion, including for instance gender equality and the fight against corruption.<sup>22</sup>

In addition to agricultural and cohesion funding, the EU has adopted an increasing number of so-called ‘action programmes’, especially in areas of supplementary competence such as education, culture and the integration of migrants. Supplementary competences are legally characterised by the fact that the harmonisation of national laws is prohibited,<sup>23</sup> and spending is thus an alternative policy tool to be used instead of rule-making. In those policy areas, EU funding is implicitly authorised by the fact that the Treaty text allows for the adoption of ‘incentive measures’: by providing money for specific purposes, the EU creates an incentive for the recipients (states and non-state organisations) to pursue European policy goals even in the absence of European law-making powers. Well-known examples of such action programmes are the Erasmus+ programme in the field of education and the Creative Europe programme in the field of culture. The amounts allocated to those programmes are relatively small, in terms of their share of the overall EU budget, but they nevertheless form interesting examples of integration through funding.

In other policy fields, spending has gradually developed as an ancillary policy instrument alongside rule-making and in combination with it. The most obvious

<sup>21</sup> Regulation (EU) 2020/2221 of the European Parliament and of the Council amending Regulation (EU) No 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (REACT-EU) [2020] OJ L437/30.

<sup>22</sup> See Marco Fisicaro, ‘Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union’s Values’ (2022) 7 *European Papers* 697.

<sup>23</sup> See Art 2(5) TFEU. The no-harmonisation rule is repeated in the specific legal bases for each of the policy areas where the EU has supplementary competences.

example is *environmental policy*, where the main emphasis of EU action, over the years, had been rule-making and standard setting, but the possibility to promote the Union's environmental goals by means of the Cohesion Fund was expressly recognised by the text of the TFEU, in both Article 177(2) and Article 192(5). Additional funding mechanisms were gradually developed, thereby contributing to a new 'policy mix' in the field of environmental and climate policy.<sup>24</sup> In particular, the directive of 2003 creating the Emissions Trading Scheme (EMS) contained a provision establishing an Innovation Fund,<sup>25</sup> whose operation was laid down in a delegated regulation of the Commission.<sup>26</sup> It subsidises the development of business solutions that help to achieve the decarbonisation objective of the EMS scheme, and its amount has grown over the years. Today, there is still no 'flagship' funding programme for environmental policy, but substantial funding now comes from a number of sources, including agricultural policy, the structural funds, and (for the next few years) the Recovery and Resilience Facility.

A similar, though still weaker, trend has emerged in the field of *migration and asylum* policy, where the EU originally acted exclusively through rule-making but in recent years EU expenditure in this field has grown,<sup>27</sup> through a substantial increase of the Asylum Migration and Integration Fund and also through unorthodox financial mechanisms such as the EU–Turkey Facility. That financial instrument has a hybrid nature, in that it combines contributions from the EU budget and from the member states.<sup>28</sup> The funding serves to improve the reception conditions of refugees in Turkey but its underlying policy goal, from an EU perspective, is to convince the Turkey government to try to discourage migrants and refugees from crossing the Turkey–EU border.

As a final example, the EU's *external relations* field is characterised by the use of funding programmes that seek to advance the EU's external policy objectives which, by their nature, tend to be very broad. They do so by earmarking the use

<sup>24</sup> For a discussion of the way the EU's climate policy has 'thickened' through a stepwise addition of new policy tools, including funding mechanisms, see Sebastian Oberthür and Ingmar von Homeyer, 'From Emissions Trading to the European Green Deal: The Evolution of the Climate Policy Mix and Climate Policy Integration in the EU' (2023) 30 *Journal of European Public Policy* 445.

<sup>25</sup> Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32, Art 10a(8) of the consolidated version.

<sup>26</sup> Commission Delegated Regulation (EU) 2019/856 supplementing Directive 2003/87/EC of the European Parliament and of the Council with regard to the operation of the Innovation Fund [2019] OJ L140/6.

<sup>27</sup> See Leonhard den Hertog, 'EU Budgetary Responses to the "Refugee Crisis": Reconfiguring the Funding Landscape' (*CEPS Paper in Liberty and Security in Europe* no 93, 2016); Evangelia Tsourdi and Philippe De Bruycker, 'The Evolving EU Asylum and Migration Law' in Evangelia Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Northampton, Edward Elgar, 2022) 1–56, 30–34.

<sup>28</sup> Richard Crowe, 'The European Budgetary Galaxy' 13 *European Constitutional Law Review* (2017) 428, 444.

of the funds for particular purposes, such as the support of fundamental rights and good governance, and by imposing conditionality on the receipt of financial support.<sup>29</sup>

## 5. Emergency Funding and its Use During the Covid-19 Crisis

From an EU constitutional law perspective, funding mechanisms for dealing with emergency situations are not fundamentally different from ordinary funding programmes, as they too must have a legal basis in the Treaties and be implemented in accordance with EU public finance law.

Starting with the constraints imposed by public finance law, the Multiannual Financial Framework mechanism implies that unforeseen funding needs that might arise within the seven-year period covered by the MFF must somehow be integrated into the mechanism. This happens essentially in three different ways. First, the MFF provides for a general reserve that is not allocated to any of the pre-defined policy headings and can be used for unforeseen purposes; in the current 2021–27 MFF, this flexibility has been used especially for funding to support Ukraine and to help the member states with the reception of Ukrainian refugees. The second way has taken the form of special emergency funds, which are part of the MFF framework, even though actual expenditure is not pre-programmed (as for the other funds) but depends on the occurrence of events during the seven-year period. One example is the European Globalisation Adjustment Fund, first created in 2006, whose financial means are mobilised in response to a sudden loss of jobs in a particular company, sector or region.<sup>30</sup>

The third way is to address emergencies in the member states (or third countries) by means of loans to their governments that are kept off-budget. There have been, for many years now, financial assistance schemes for member states facing special economic difficulties. The distinctive element of this funding mechanism is that the disbursements are not earmarked for specific policy objectives, but are aimed at buttressing the general fiscal situation of the beneficiary state. This mechanism was put in place at the time of the first oil crisis of the early 1970s.<sup>31</sup> The funds did not figure as an item on the regular EU budget, but were borrowed by the EU on

<sup>29</sup> See, for a recent example, the macro-financial assistance for Ukraine, for an amount of €18 billion, adopted with Art 212 TFEU as its legal basis: Regulation (EU) 2022/2463 of the European Parliament and of the Council establishing an instrument for providing support to Ukraine for 2023 (macro-financial assistance +) [2022] OJ L322/1.

<sup>30</sup> The fund's current version is in Regulation (EU) 2021/691 of the European Parliament and of the Council on the European Globalisation Adjustment Fund for Displaced Workers (EGF) and repealing Regulation (EU) No 1309/2013 [2021] OJ L153/48.

<sup>31</sup> See the account of the historical development since the 1970s by Moritz Rehm, 'Shocks and Time: The Development of the European Financial Assistance Regime' (2022) 60 *Journal of Common Market Studies* 1645.

the financial markets and transferred in the form of general loans to the member state treasuries. These were relatively small loans but they became larger during the euro crisis, when the EU created the European Financial Stabilisation Mechanism (EFSM) with a total volume of €60 billion, to assist euro area states facing a sovereign debt crisis,<sup>32</sup> even though most of the financial assistance was not channelled through the EFSM but through funds created by the euro states acting together under international law (namely, first the European Financial Stability Facility (EFSF) and later the European Stability Mechanism (ESM)).<sup>33</sup>

In terms of legal bases for emergency funding, a central role is now played by Article 122 TFEU. This Treaty article contains two legal bases for EU action in economic crisis situations – a very generic one and a more specific one. Its paragraph 1 (the generic legal basis) states that the Council ‘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’. It was used for emergency measures in the energy sector, which is what this provision was written for in the first place,<sup>34</sup> but was then employed, in 2016, as the legal basis for a broader and permanent EU programme for emergency financial support when a state is hit by natural or man-made disasters.<sup>35</sup> This regulation of 2016 was amended in 2020, in order to allow for financial support to pandemic-related health measures taken by the member states.<sup>36</sup>

As for Article 122, paragraph 2 (the more specific legal basis), it allows for the Council to decide to grant financial assistance to a Member State ‘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 assistance is granted ‘under certain conditions’ – a clause that opens the door for the European Union to use the assistance for advancing its own policy objectives in addition to helping the beneficiary state. Prior to the Covid-19 crisis, Article 122(2) had been used in the early stages of the sovereign debt crisis as the legal basis for the EFSM, but it made an impressive comeback in the context of the pandemic crisis. It was proposed by the Commission, and accepted by the member states, as the legal basis

<sup>32</sup> Council Regulation (EU) 407/2010 establishing a European financial stabilisation mechanism [2010] OJ L118/1. See Vestert Borger, ‘EU Financial Assistance’ in Fabian Amtenbrink, Christoph Herrmann and René Repasi (eds), *The EU Law of Economic and Monetary Union* (Oxford, Oxford University Press, 2020) 963–78, 968–73.

<sup>33</sup> Ulrich Forsthoff and Jasper Aerts, ‘Financial Assistance to Euro Area Members (EFSF and ESM)’ in Amtenbrink, Herrmann and Repasi, *The EU Law of EMU* 979–1024.

<sup>34</sup> Council Directive 2009/119/EC imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products [2009] OJ L265/9 (as this directive was adopted before the entry into force of the Lisbon Treaty, its legal basis was Art 100 EC, which is now renumbered as Art 122 TFEU).

<sup>35</sup> Council Regulation (EU) 2016/369 on the provision of emergency support within the Union [2016] OJ L70/1.

<sup>36</sup> Council Regulation (EU) 2020/521 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak [2020] OJ L117/3. See its Annex, ‘Eligible actions’.

of the Support to mitigate Unemployment Risks in an Emergency (SURE) instrument, offering €100 billion worth of temporary financial support to the national employment support programmes.<sup>37</sup> Later on in 2020, Article 122 TFEU served as the legal basis for the European Union Recovery Instrument (EURI) Regulation, which is the formal basis of the whole NGEU programme.<sup>38</sup>

SURE was created for providing financial assistance in the form of cheap loans to all its member states, for the specific purpose of helping them to address the sudden increase of public expenditure for the preservation of employment during the pandemic. Access to the EU loans presupposes that the member states had preservation of employment schemes in place, but the SURE Regulation did not seek to impose the creation of new schemes or to harmonise existing schemes. Therefore, it did not seek to steer the content of national employment policies and it rather resembles the earlier financial assistance schemes of the EU even if the loans are earmarked for use in a specific policy domain.

NGEU could seem similar to old-style financial assistance, in that the funds are raised by the EU on the financial markets and passed on to the member states to face the economic downturn caused by the pandemic. But, unlike the earlier emergency assistance programmes, it also, and even primarily, serves as a tool for integration through funding. Indeed, the funds assembled for NGEU are spent in loans and grants allocated to the member states through a number of spending programmes that have their own policy objectives, of which the Recovery and Resilience Facility is the largest (see the next section). NGEU is thus more than a response to the economic downturn caused by the pandemic crisis. It rather appears to be a multipurpose plan, aiming to foster structural transformation of the national economies, with special emphasis on the green and digital transitions. It is a true instrument of strategic spending for the European Union.<sup>39</sup>

## 6. Expansion of the Scope of Cohesion Funding: From the European Solidarity Fund to the RRF and to REPowerEU

Article 175, third paragraph, allows for cohesion measures to be adopted by the Union ‘outside the Funds’. This legal basis thus partakes in the broadly defined aims of cohesion, which were mentioned in a previous section. It allows for a broad

<sup>37</sup> Council Regulation (EU) 2020/672 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak [2020] OJ L159/1. The crisis-related nature of the instrument is underscored by its limited duration, namely until 31 December 2022.

<sup>38</sup> Council Regulation (EU) 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L1 433/23.

<sup>39</sup> See Luuk van Middelaar’s chapter in this volume (ch 12).

range of measures, namely any ‘action’ that would ‘prove necessary’. Financial assistance is not specifically mentioned but is not excluded either. The broad potential of this flexible legal basis was first employed in 2002, when it served for the creation of the European Solidarity Fund (EUSF).<sup>40</sup> The EUSF was intended to offer rapid financial support to member states facing major natural disasters such as floods or earthquakes, but it was amended in 2020 to include major public health emergencies within its scope of application,<sup>41</sup> and some relatively small sums were allocated to a number of member states to deal with the health emergency caused by the coronavirus pandemic. This practice indicates that emergency funding by the EU could also be established on legal bases that do not refer to the existence of an emergency.

Article 175(3) furthermore served as the legal basis for the European Globalisation Adjustment Fund, mentioned above, and for the Fund for European Aid to the Most Deprived in 2014. The latter instrument contributed to the fight against poverty and social exclusion, objectives which are thus considered to be part of the aim to improve social cohesion. The same legal basis was mobilised for the Commission proposal for a Just Transition Fund. This instrument was initially presented in January 2020 with the aim of supporting the economic diversification of territories most affected by the climate transition measures (such as, for example, the coal-mining region in Poland). The Commission presented an amended proposal on 28 May 2020 in which it proposed that the Fund should be one of the spending programmes of the NGEU package. The Just Transition Regulation was adopted in June 2021, and it was accepted, apparently without discussion, that Article 175(3) was an appropriate legal basis. Indeed, the territorial cohesion element is particularly evident in this programme.

The Recovery and Resilience Facility (RRF), the main spending programme of NGEU, was, in turn, established on the basis of Article 175(3).<sup>42</sup> In this case, cohesion policy was given a much wider meaning than in the previous cases. Article 3 of the RRF Regulation mentions ‘economic cohesion’ and ‘social and territorial cohesion’ as two of the six pillars of the plan, but adds four other pillars, namely green transition, digital transformation, crisis preparedness, and policies for the next generation. The EU legislator thus adopted a very broad conception of what the cohesion objective enables the European Union to do. It signals a move away from cohesion in the traditional sense (namely, the sort of measures funded by the

<sup>40</sup> Council Regulation (EC) 2012/2002 establishing the European Solidarity Fund [2002] OJ L311/3, later amended by Regulation (EU) 661/2014 of the European Parliament and of the Council amending Council Regulation (EC) No 2012/2002 establishing the European Union Solidarity Fund [2014] OJ L189/143.

<sup>41</sup> Regulation (EU) 2020/461 of the European Parliament and of the Council amending Council Regulation (EC) No 2012/2002 in order to provide financial assistance to Member States and to countries negotiating their accession to the Union that are seriously affected by a major public health emergency [2020] OJ L99/9.

<sup>42</sup> Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility [2021] OJ L57/17.

structural funds) towards a much broader domain of macroeconomic policy measures aiming at improving the overall balance of economic development within the territory of the European Union, by making it more sustainable.

The range of policy goals which the RRF seeks to advance is quite broad: in addition to the environmental and digital ‘flagships’, the recovery money is intended to achieve the social policy goals contained in the European Pillar of Social Rights, and, depending on the country, a substantive portion of the recovery money is being allocated to social investment and the improvement of healthcare systems in the member states.<sup>43</sup> Also, ‘Pillar 6’ of the RRF, called ‘Policies for the next generation’, encourages investment in education and training.<sup>44</sup> As mentioned in a previous section, education and training are policy areas for which the EU does not possess law-making competences. In fact, one could say that RRF money here serves, to some extent, for the pursuit of purely national policy objectives, meaning that the steering potential of EU funding is largely absent. Generally though, the RRF possesses strong integration-through-funding features, stronger even than in the case of the structural funds. It does so for a number of reasons: (i) the strong earmarking of the expenditure towards the pursuit of Europe-wide policy priorities, namely more than half of it for green and digital transitions; (ii) the possibility offered to the Commission to impose the implementation of certain Country-Specific Recommendations (CSRs) (ie, EU-level macroeconomic policy goals) in the national plans – thereby making those CSRs better enforceable than they used to be;<sup>45</sup> (iii) the governance mechanism, and especially the targets and milestones which must be met before the successive instalments of the grants or loans will be paid, which allows the EU to take a harder look at whether the beneficiary state complies with the terms of the funding; those terms may include, in some cases, demanding rule-of-law reforms.<sup>46</sup>

It is therefore possible to see the NGEU programme as a major development of integration through funding, but at this moment in time, its policy steering effect still needs to be demonstrated. Its potential to further the policy goals of the

<sup>43</sup> On the social policy dimension of the recovery plans, see Silvia Rainone and Philippe Pochet, ‘The EU Recovery Strategy – A Blueprint for a More Social Europe or a House of Cards?’ (2022) *ETUI Working Paper* 2022.18 [www.etui.org/sites/default/files/2022-11/The%20EU%20recovery%20strategy-a%20blueprint%20for%20a%20more%20social%20Europe%20or%20a%20house%20of%20cards-2022.pdf](http://www.etui.org/sites/default/files/2022-11/The%20EU%20recovery%20strategy-a%20blueprint%20for%20a%20more%20social%20Europe%20or%20a%20house%20of%20cards-2022.pdf).

<sup>44</sup> A recent study for the European Parliament examines the extent to which the national RRFs of eight member states incorporate measures under the ‘policies for the next generation’ heading: Manuela Samek Lodovici and Flavia Pesce, ‘Addressing the challenges of the policies for the next generation, children and the youth, such as education and skills in national Recovery and Resilience Plans – A preliminary assessment’ (*Economic Governance Support Unit at the Directorate-General for Internal Policies of the European Parliament*, PE 733.738, December 2022) requested by the ECON Committee.

<sup>45</sup> Louise Fromont, ‘La conditionnalité des financements octroyés par la Facilité pour la reprise et la résilience’ (2021) *Revue des affaires européennes* 771.

<sup>46</sup> In particular, rule of law reforms are included among the milestones in the national plans of Hungary and Poland. See Niall Moran, ‘The Evolution of Conditionality in EU Financial Assistance under the Recovery and Resilience Facility’ (2023) *REBUILD Centre Working Paper* No 5 <https://rebuildcentre.eu/publication/the-evolution-of-conditionality-in-eu-financial-assistance-under-the-recovery-and-resilience-facility>.

EU (its ‘integration effect’) depends on whether the states will be able to absorb the vast amounts of money allocated to them in the form of grants and loans; on whether the money will actually be used for the purposes described in the national plans; and, if they are, whether the expenditure will effectively produce the policy goals (such as green and digital transition) which are set out in the programme.

Policy integration by means of the RRF acquired a new dimension in 2022. Little more than a year after the adoption of the RRF, the European Commission presented its REPowerEU Plan which involved, as it announced, ‘a targeted and swift amendment of the Recovery and Facility Regulation’ [*sic*].<sup>47</sup> The proposed reform was not linked to any deficiencies in the original RRF scheme that would have come to light during its first year of application. Rather, what prompted the reform was the need to address a new crisis, unrelated to the pandemic, namely the energy market disruption caused by the Russian invasion of Ukraine. That crisis was analysed as requiring major investments to turn around the energy sector in the member states and, in the Commission’s view, needed an EU-wide financial response similar to the one enacted during the Covid-19 crisis. It so happened that the RRF had unused funding which could be made available. Indeed, it had become clear by May 2022 that the loans part of the RRF (in contrast to the grants part) would not be entirely used. Only seven member states had decided to apply for the RRF loans, whereas the others either did not need that extra funding or could borrow at better or equivalent rates directly on the financial markets (or with the European Central Bank (ECB)). The REPowerEU document of the Commission proposed that the €225 billion of loans not requested so far would be made available for the purpose of strengthening the resilience of the EU’s energy system, as delineated in the REPowerEU plan.<sup>48</sup>

Given the origin of its funding, REPowerEU will share the time-bound nature of RRF, as all the funds stemming from the RRF must be spent by 2026. Also, the funding will mainly consist of loans, although the Commission also proposed to add a smaller component of non-reimbursable expenditure (‘grants’), to be repurposed from the cohesion funds (€26.9 billion) and CAP funds (€7.5 billion) and also to be drawn from the auction of Emissions Trading System allowances (€20 billion). The REPowerEU regulation therefore required an amendment to the

<sup>47</sup> Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – REPowerEU Plan’, COM (2022) 230 final, 17.

<sup>48</sup> Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulation (EU) 2021/1060, Regulation (EU) 2021/2115, Directive 2003/87/EC and Decision (EU) 2015/1814’, COM (2022) 231 final. The Council and the European Parliament reached political agreement on its adoption in December 2022, and the Regulation was formally enacted on 27 February 2023: Regulation (EU) 2023/435 of the European Parliament and of the Council amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC [2023] OJ L63/1.



legal instruments of cohesion and CAP, and the relevant legal bases were added to Article 175(3) but this did not affect the decision-making procedure, since all the legal bases provide for the ordinary legislative procedure.

## 7. Conclusion

This chapter has sought to show that there is indeed, as EU scholars have started to notice, a ‘shift towards using financing rather than rule-making to influence how European Member States work.’<sup>49</sup> That shift is still tentative, as the overall amount of the EU budget remains limited, and the recent expansion of its volume through massive borrowing on the financial markets for the purpose of the NGEU programme is presented as a one-off initiative that should not (necessarily) lead to a stable expansion of the EU’s financial capacity. However, independently from whether the NGEU and REPowerEU schemes will be continued or inspire similar schemes in the future, the current EU funding landscape is marked by the increased eagerness of the European institutions to use EU funding in a strategic way so as to advance Europe-wide policy objectives rather than (or in addition to) redistribution among the member states.

<sup>49</sup> Mark Dawson and Floris de Witte, *EU Law and Governance* (Cambridge, Cambridge University Press, 2022) 89.

