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

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"

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Introduction

As the European Union (EU) was slowly re-emerging from the COVID-19 pandemic, it faced another unprecedented shock: Russia's large-scale military invasion of Ukraine. In responding to Russia's invasion, however, the EU was able to build on the legal and policy measures that it had developed to address the COVID-19 pandemic. In particular, NextGenerationEU (NGEU) and the use of common debt provided a template that the EU could use to mobilize financial resources to support Ukraine against Russia's aggression.

This essay examines the key tools the EU deployed in 2022–2024 to finance Ukraine, discussing how the EU responded to the challenge of the war in the field of economic and fiscal policy. In particular, the essay reviews three instruments: first, the European Peace Facility (EPF),[1] a fund for the common purchase of weapons initially worth €5.6 billion, and subsequently increased to €17 billion; second, a temporary government support fund, the Macro-Financial Assistance Instrument for Ukraine (MFA+) for 2023, worth €18 billion;[2] and third, a long-term support fund, called the Ukraine Facility (UF), amounting to €50 billion from 2024 to 2027.[3]

The war in Ukraine quickly prompted the EU to replicate some of the novelties it used to respond to COVID-19. To address the devastating socioeconomic consequences of the pandemic, the EU agreed in 2020 to establish groundbreaking instruments, such as a €100 billion unemployment reinsurance system (SURE),[4] and the €750 billion NGEU.[5] The latter, in particular, endowed the EU with a fiscal capacity by empowering the Commission to raise

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[1] Council Decision (CFSP) 2021/509 of Mar. 22, 2021 Establishing a European Peace Facility and Repealing Decision (CFSP) 2015/528, 2021 OJ (L 102) 14.

[2] Regulation 2022/2463 of the European Parliament and the Council of Dec. 14, 2022 Establishing an Instrument for Providing Support to Ukraine for 2023 (Macro-Financial Assistance +), 2022 OJ (L 322) 1 (EU).

[3] Regulation 2024/792 of the European Parliament and of the Council of Feb. 29, 2024 Establishing the Ukraine Facility, 2024 OJ (Series L) 1 (EU).

[4] Council Regulation 2020/672 of May 19, 2020 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 (L 159) 1 (EU) [hereinafter SURE Regulation].

[5] Council Regulation 2020/2094 of Dec. 14, 2020 Establishing a European Union Recovery Instrument to Support the Recovery in the Aftermath of the COVID-19 Crisis, 2020 OJ (LI 433) 23 (EU); Regulation 2021/241 of the European Parliament and of the Council of Feb. 12, 2021, Establishing the Recovery and Resilience Facility, 2021 OJ (L 57) 17 (EU) [hereinafter RRF].

funds by issuing common debt on the financial markets, to transfer these amounts to the member states as grants and loans, and long term to levy new taxes to repay the debt.[6] Formally, these tools were designed to be temporary. Yet, they provided a legal technique and a policy template that the EU promptly reused when facing the war in Ukraine.[7] In fact, the MFA+ and the UF entail once again common borrowing and spending, which highlights the legacy of the NGEU model and suggests a trend toward consolidating a centralized fiscal capacity at the EU level of government.

Nevertheless, structural weaknesses in the EU constitutional system challenge the EU's ability to consolidate a centralized fiscal capacity that can "promote the general welfare."[8] From a governance perspective, in the EU all decisions related to revenues and expenditures must be taken unanimously by all twenty-seven member states. This gives every member state's government a right to veto crucial financial decisions—a power that can be abused to obtain concessions on other unrelated issues. This is exactly what happened in response to the war in Ukraine: the approval of the MFA+ in 2022, and of the UF in 2023, was delayed for several months by Hungary, which vetoed the measures as leverage to obtain disbursement of EU funding withheld for breaches of the rule of law. These difficulties confirm that several constitutional and governance shortcomings still limit the EU's ability to mobilize resources and leverage power on the international stage. Hence, while the war in Ukraine proved correct the insight from historians, political scientists, and sociologists that war is a powerful driver of state building and institutional change,[9] at the moment the effort to establish a permanent fiscal capacity in the EU remains a work in progress.

The Core Measures

The weapons purchase fund is a novel funding mechanism that the EU created in 2021 as part of the financial package for 2021–2027, which is centered on the MFF and also includes NGEU. The EPF was specifically established as a special fund to finance the common costs of military operations by EU member states under the EU Common Security and Defense Policy (CSDP), as well as actions to improve the military and defense capabilities of third states and partners. From a financing viewpoint, the EPF is entirely resourced through member states' transfers determined on the basis of Gross National Income (GNI). Moreover, as a further guarantee of member states' discretion, on the basis of Article 27 "[a] Member State which has indicated its intention to abstain from the adoption of an assistance measure . . . may identify other assistance measures to which it will make an additional contribution." This means that while the EPF is a common financial pot, each member state still maintains full control on which measures its share of the funding is directed to. Following Russia's aggression of Ukraine, the EU quickly decided to mobilize the EPF, initially worth €5.6 billion, to provide financial support to the Ukrainian military.[10] Spending under the EPF to support Ukraine was so rapid that the Council decided in December 2022 for a €2 billion increase in the EPF for 2023;[11] in June 2023, it agreed to a further €3.5 billion top-up of

[6] *See* Federico Fabbrini, EU Fiscal Capacity: Legal Integration After COVID-19 and the War in Ukraine 59 (2022).

[7] *See* Federico Fabbrini, *Funding the War in Ukraine: The European Peace Facility, the Macro-Financial Assistance Instrument and the Slow Rise of an EU Fiscal Capacity*, 11 Pol. & Governance 52 (2023).

[8] U.S. Const., pmbl.

[9] *See* Miguel A. Centeno & Elaine Enriquez, War and Society (2016); Margareth McMillan, War: How Conflict Shaped Us (2020); and famously The Formation of National States in Western Europe (Charles Tilly ed., 1975).

[10] Elena Chacko & Katerina Linos, *Ukraine and the Emergency Powers of International Institutions*, 116 AJIL 775 (2022).

[11] Council Decision (CFSP) 2023/577 of Mar. 13, 2023 Amending Decision (CFSP) 2021/509 Establishing a European Peace Facility, 2023 OJ (L 75) 23.

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the EPF, bringing its size to €12 billion,[12] and ultimately in March 2024 it further increased the EPF envelope to a total of €17 billion.[13]

Yet, given the limited resources available under the EPF, and as the war in Ukraine worsened, in late 2022 the European Commission proposed to establish the MFA+ in the form of a regulation of the European Parliament (EP) and Council. This temporary fund, worth €18 billion, was designed to provide financial relief to Ukraine in 2023, thus supporting its rehabilitation and reconstruction and prospectively its preparation for EU membership.[14] From a financing viewpoint, moreover, the MFA+ is based on the issuance of common EU debt, rather than member states' transfers as the EPF. To achieve this end, the Commission proposed to amend the spending ceiling of the EU budget—the Multi-Annual Financial Framework—to enable the Commission to issue common debt. Yet, under Treaty on the Functioning of the European Union (TFEU) Article 312, this change required unanimity among EU member states, and Hungary for many months vetoed the revision, to the point that the other twenty-six member states took steps to enable the Commission to issue debt through bilateral guarantees pro-quota. In the end, though, Hungary yielded, and the MFA+ was approved in December 2022. The MFA+ empowers the Commission to transfer the money to Ukraine as loans, subject to favorable interest rates, and standard conditionality.

The MFA+ proved to be a successful instrument to support Ukraine, but its duration was limited to 2023. The Commission therefore put forward a new financing tool, modeled on the temporary fund, but designed for a longer period and with a bigger envelope: the UF, worth €50 billion for 2024–2027. In a European Council meeting in December 2023, twenty-six EU member states expressed their support for a revision of the EU budget spending ceiling and the establishment of a long-term fund.[15] However, in the same summit that blessed the opening of EU accession negotiations with Ukraine,[16] Hungary once again vetoed the approval of the UF.[17] As a result, a special European Council summit was convened on February 1, 2024, in which Hungary eventually yielded and the EU set up the UF.[18] This consists of €17 billion of grants and €33 billion of loans, which again are funded by empowering the Commission to issue common debt. Resources raised on the financial markets are then transferred to Ukraine, subject to conditionality, in accordance with a national plan approved in April 2024.[19]

Consequences

The EU financial response to the war in Ukraine reveals a trend toward the consolidation of a fiscal capacity in the EU, highlighting the dynamic nature of the EU integration process.[20] The unprecedented geopolitical threat posed by the Russian military aggression at Europe's eastern borders forced the EU to resort to funding mechanisms analogous to those rolled out in response to the COVID-19 pandemic. As pointed out in the prior section,

[12] Council of the EU Press Release, European Peace Facility: Council Agrees on Second Top-Up of the Overall Financial Ceiling by €3.5 Billion (June 26, 2023).

[13] Council Decision (CFSP) 2024/890 of Mar. 18, 2024 Amending Decision (CFSP) 2021/509 Establishing a European Peace Facility, 2024 OJ (Series L) 1.

[14] European Council Conclusions June 23–24, 2022, EUCO 24/22, para. 11 (granting candidate status to Ukraine).

[15] *See* European Council Meeting (Dec.14 and 15, 2023) – Multiannual Financial Framework 2021–2027 Negotiating Box, Dec. 15, 2023, EUCO 23/23.

[16] European Council Conclusions, Dec. 14–15, 2023, para. 15, EUCO 20/23.

[17] *See id.*, para. 24.

[18] European Council Conclusions, Feb. 1, 2024, paras. 1–2, EUCO 2/24.

[19] European Commission Press Release, Commission Endorses Ukraine Plan, Paving the Way for Regular Payments Under the Ukraine Facility (Apr. 15, 2024).

[20] 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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at the start of the war in Ukraine, the EU deployed the EPF for the first time. Nevertheless, its limited size—and arguably its complicated governance arrangements—quickly led the European Commission to propose an alternative funding instrument, in the form of the MFA+. The MFA+ enabled the Commission to raise €18 billion on the financial markets on behalf of the EU, and to transfer these to the Ukrainian government in 2023 as loans. The MFA+, in turn, served as the model for the UF, which had a longer duration and a larger size—with an envelope for the period 2024–2027 of €50 billion, to be partially disbursed also as grants.

While the EPF presents features which resemble the traditional EU budget, the MFA+ and the UF track the solution that the EU adopted to tackle the COVID-19 pandemic. The EU budget is mostly funded by member states' transfers, based on GNI.[21] To address the pandemic the EU engineered a policy shift and set up SURE and NGEU.[22] Under SURE, the European Commission was empowered to raise €100 billion on the financial markets by issuing common debt on behalf of the EU, subject to €25 billion of member states' guarantees.[23] In the case of NGEU, instead, the Commission was empowered to raise €750 billion by issuing common debt on behalf of the EU, with the general EU budget serving as a single guarantee through an increase of the spending ceiling.[24] From this point of view, the MFA+ and the UF follow in the footsteps of SURE and NGEU. In particular, like SURE, the MFA+ provides loans, while, like NGEU, the UF provides both loans and grants. Moreover, like SURE, the MFA+ envisioned a mechanism of states' guarantees to empower the issuance of EU debt, in case Hungary vetoed raising the EU spending ceiling—although this was ultimately approved in December 2022.[25] Like NGEU, instead, the UF directly enables the issuance of common debt through an amendment of the EU budget ceiling, which occurred in February 2024.[26]

The adoption of the MFA+ and the UF, therefore, reveals the importance of path dependency in the functioning of the EU. As political science literature on historical institutionalism,[27] and legal scholarship research on emergency legislation[28] have both pointed out, once norms are adopted in time of emergency and become entrenched, they set a precedent for future action. Formally, all measures enacted by the EU to address the COVID-19 pandemic were designed to be temporary. Yet, SURE and NGEU offered the policy template and legal technique to which the EU could resort in order to address a new crisis. At the same time, the Commission has now set up a unified funding strategy, whereby EU bonds to fund NGEU and the various Ukraine-related programs are now part of a bundled issuance, thus creating the bulk of a new EU treasury function in Brussels.

Challenges

Nevertheless, the road toward the consolidation of a fiscal capacity in the EU remains fraught with challenges. Indeed, as the difficult approval of both the temporary and long-term funds highlight, the EU is hampered by

[21] Features and Challenges of the EU Budget: A Multidisciplinary Analysis (Luca Zamparini & Ubaldo Villani-Lubelli eds., 2019).

[22] 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).

[23] SURE Regulation, *supra* note 4, Arts.11–12.

[24] Council Decision 2020/2053 of Dec. 14, 2020 on the System of Own Resources of the European Union and Repealing Decision 2014/335/EU, Euratom, 2020 OJ (L 424) 1, Art. 5(1) (EU, Euratom).

[25] *See* Council Regulation 2022/2496 of Dec. 15, 2022 Amending Regulation (EU, Euratom) 2020/2093 Laying Down the Multiannual Financial Framework for the Years 2021 to 2027, 2022 OJ (L 325) 11 (EU, Euratom).

[26] *See* Council Regulation 2024/765 of Feb. 29, 2024 Amending Regulation (EU, Euratom) 2020/2093 Laying Down the Multiannual Financial Framework for the Years 2021 to 2027, 2024 OJ (Series L) 1 (EU, Euratom).

[27] *See* Kurt Dopfer, *Toward a Theory of Economic Institutions: Synergy and Path Dependency*, 25 J. Econ. Issues 535 (1991).

[28] *See* Oren Gross & Fionnuala Ní Aoláin, Law in Times of Crisis: Emergency Powers in Theory and Practice (2006).

constitutional constraints and institutional shortcomings that limit its ability to provide for the general welfare, in the ways in which a central authority in a federal system of government does, and therefore to rise to the geopolitical threats it is facing.

To begin with, from a substantive viewpoint, there are a number of constitutional constraints on the EU's ability to raise fiscal resources. On the one hand, Treaty on European Union (TEU) Article 41(2) explicitly prohibits charging to the EU budget "expenditure arising from operations having military or defense implications"—which means that CSDP expenses must be covered by separate funds, like the EPF, set up outside the MFF. On the other hand, the TFEU lays out daunting rules. According to TFEU Article 310(1), the revenues and expenditures of the EU budget "shall be in balance." Moreover, TFEU Article 312 states that the MFF, which is to be approved by the Council unanimously with the consent of the EP, must set "the amounts of the annual ceilings on commitments appropriations . . . and of the annual ceilings on payment appropriations." Finally, TFEU Article 311 requires the EU budget to "be financed wholly from own resources," but the Own Resource Decision (ORD) must be approved by the Council unanimously and ratified by each member state in accordance with its constitutional requirements. The combined effect of the above-mentioned provisions is therefore to require a cumbersome amendment to the MFF and ORD every time the EU wants to increase spending or borrow money.[29]

Moreover, from an institutional viewpoint, there is a key structural obstacle toward the development of a permanent EU fiscal capacity: the complex EU governance system. As noted, EU member states must unanimously approve (or amend) EU expenditures and revenues—which must also be ratified by each member state in accordance with its constitutional requirements (usually parliamentary procedure). A single member state can veto key actions, which happened in the case of both the MFA+ and the UF, as described above. The dependence on the consent of twenty-seven member states for any EU financial operation is bound to continuously create challenges for the EU in the long term, fundamentally weakening its ability to respond to unforeseen events that require urgent fiscal responses. If one adds to this that the EP finds itself largely in an inferior position to the Council and European Council in deciding fiscal issues, it appears that the governance infrastructure for decision-making on funding is democratically inadequate.[30] In this context, a number of institutional reforms are clearly needed to increase the EU's capacity to act.[31]

Conclusion

As the EU was re-emerging from the COVID-19 pandemic, it faced another unprecedented challenge due to the war in Ukraine. In response to the illegal Russian aggression, the EU mobilized financial resources to support Ukraine, building on the model of NGEU. Nevertheless, the process of fiscal integration in the EU remains a work-in-progress. Constitutional constraints and governance problems hamper the ability of the EU to raise resources and rise to the geopolitical challenges it faces. In conclusion, it remains to be seen if the war will strengthen the EU's ability to promote the general welfare.

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

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

[31] Fabbrini, *supra* note 6, at 141–44.