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# 10. Next Generation EU: its meaning, challenges, and link to sustainability\*

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ToC: 1. Introduction. – 2. What is Next Generation EU (and what it is not). – 3. Financing Next Generation EU & RRF, and constitutional and political issues. – 4. Next Generation EU, RRF, and sustainability. – 5. A provisional conclusion.

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## 1. Introduction

A previous related Article<sup>1</sup> started with Mario Draghi's statement,<sup>2</sup> comparing the financial consequences of the

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\* The views expressed herein are those of the authors and not of the institutions with which they are affiliated.

<sup>1</sup> See Marco Lamandini, Guido Ottolenghi and David Ramos Munoz, 'What Recovery Fund for Europe? (For a dedicated equity line for business, and sound fiscal policy)' in Christos V Gortsos and Wolf-Georg Ringe (eds), *Pandemic Crisis and Financial Stability* (European Banking Institute 2020). Such article, in turn, was a follow up of Marco Lamandini, Guido Ottolenghi and David Ramos Munoz, 'Preparing for Safe and Sensible Economic Recovery! One daunting Thought and Three "Simple" Strategies to Bridge European and Italian Action?' (*EU Law Live*, 2 April 2020), [eulawlive.com/op-ed-preparing-for-safe-and-sensible-economic-recovery-one-daunting-thought-and-three-simple-strategies-to-bridge-european-and-italian-action-by-marco-lamandini](https://eulawlive.com/op-ed-preparing-for-safe-and-sensible-economic-recovery-one-daunting-thought-and-three-simple-strategies-to-bridge-european-and-italian-action-by-marco-lamandini).

<sup>2</sup> Mario Draghi, 'Draghi: we face a war against coronavirus and must mobilise accordingly' (*Financial Times*, 25 March 2020), [ft.com/content/c6d2de3a-6ec5-11ea-89df-41bea055720b](https://ft.com/content/c6d2de3a-6ec5-11ea-89df-41bea055720b).

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COVID-19 crisis with those of wars, and thus calling to mobilise responses accordingly. Draghi weighed potential monetary and fiscal responses and subtly called to exercise solidarity between Member States (MSs). The monetary stimulus did not seem to be enough, and a different response was needed.

Things can move swiftly in a short time, for since the previous article was written, the EU has adopted a COVID-19 response, the COVID-19 response included Next Generation EU (NGEU), a fiscal stabilisation mechanism<sup>3</sup> inspired by solidarity<sup>4</sup> and transformational ambition, and Mr Draghi is no longer a central banker, but the prime minister of the largest recipient of NGEU funds, and widely seen as a welcome, safe pair of hands to ensure that EU's Hamiltonian moment lives up to its promise. The current ECB President, for her part, has praised NGEU's novelty<sup>5</sup> and possibly breathed a sigh of relief,

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<sup>3</sup> Although monetary policy is handled at EU level, fiscal policy remains in the hands of MSs. Hence, fiscal shocks are ultimately born by national economies. This fact is indeed expressly mentioned in the so-called state aid Temporary Framework (TF) put in place by the European Commission (Commission) in the prelude of the COVID-19 crisis: 'Given the limited size of the EU budget, the main response will come from Member States' national budgets. EU State aid rules enable Member States to take swift and effective action to support citizens and undertakings, in particular SMEs, facing economic difficulties due to the COVID-19 outbreak'. cf Commission, 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (Communication from the Commission) C/2020/1863 OJ C 91/1.

<sup>4</sup> The European Economic and Social Committee characterised NGEU as 'An unprecedented exercise in solidarity' in a press release published on 3 June 2020, [eesc.europa.eu/en/news-media/press-releases/next-generation-eu-recovery-plan-unprecedented-exercise-solidarity](https://eesc.europa.eu/en/news-media/press-releases/next-generation-eu-recovery-plan-unprecedented-exercise-solidarity).

<sup>5</sup> Christine Lagarde (2021). Europe's response to the crisis: Blog post by Christine Lagarde, 'Europe's response to the crisis' (*The ECB blog*, 2020), [ecb.europa.eu/press/blog/date/2020/html/ecb.blog200723~c06fafabb6.en.html](https://ecb.europa.eu/press/blog/date/2020/html/ecb.blog200723~c06fafabb6.en.html).

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seeing that the attention turns to the Commission and MS, leaving the ECB space to concentrate on its own strategic review. On top of that, on the other side of the Atlantic, the President of the United States has changed and promoted massive stimulus measures, raising questions about the suitability of NGEU to accomplish its goals.

Thus, NGEU's absolute novelty in the EU policy toolkit deserves a careful look at its basic features to understand where it fits within the broader scheme of COVID responses and what it is and what it is not (Section 2). Then, we will focus on the funding structure and sources of NGEU and the constitutional issues it raises (Section 3). In the third place, we will briefly discuss the tools (and challenges to bridge the gap between the aims of post-COVID 'recovery and resilience' and NGEU's transformational ambition), with a special focus on sustainability (Section 4). Finally, we will offer some tentative conclusions (Section 5).

## **2. What is Next Generation EU (and what it is not)<sup>6</sup>**

### ***2.1. Next Generation EU and the broader umbrella of COVID responses***

The EU's broader response to the COVID-19 outbreak has been unprecedented, demanding a coordinated response not only between the EU and MS but also between EU Institutions and bodies. Such response has focused on four priorities:<sup>7</sup> (i)

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<sup>6</sup> The cut-off date of this article is 1<sup>st</sup> June 2021, so any potential development occurring after that date could not be taken into account.

<sup>7</sup> See response to Parliamentary question [E-001156/2020](https://www.europarl.europa.eu/doceo/document/E-9-2020-001156-ASW_EN.html) (22 June 2020), [europarl.europa.eu/doceo/document/E-9-2020-001156-ASW\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-001156-ASW_EN.html); European Council, 'COVID-19 coronavirus pandemic: the EU's response', [consilium.europa.eu/en/policies/coronavirus](https://www.consilium.europa.eu/en/policies/coronavirus).

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limiting the spread of the virus,<sup>8</sup> (ii) ensuring the provision of medical equipment,<sup>9</sup> (iii) promoting research for treatments and vaccines<sup>10</sup> and (iv) supporting jobs, businesses and the economy.<sup>11</sup>

NGEU is incardinated under the fourth priority, forming the fiscal response to enhance the economic resilience of jobs and markets. This axis comprises a wide variety of measures, among others: (i) the Pandemic Purchase Programme set up by the

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<sup>8</sup> EU initiatives comprised Recommendations and Guidelines on restraining non-essential mobility and on coordinated EU approach to COVID-19 travel measures launching Re-Open EU website to offer updated information on travel restrictions. More recently, in March 2021, the Commission presented two proposals: (i) Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to facilitate free movement during the COVID-19 pandemic COM (2021) 130 final, and (ii) Proposal for a Regulation of the European Parliament and of the Council on a framework for the issuance, verification and acceptance of interoperable certificates on vaccination, testing and recovery to third-country nationals legally staying or legally residing in the territories of Member States during the COVID-19 pandemic COM (2021) 140 final (all together, the *Digital Green Certificate initiative*).

<sup>9</sup> Which included the creation of the rescEU, a stockpile of medical equipment (as part of the EU Civil Protection Mechanism) back in March 2020, the EU Solidarity for Health Initiative and waiving customs duties and VAT on the import of medical equipment from non-EU countries by means of Commission Decision (EU) 2020/491 of 3 April 2020 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020 (C/2020/2146) OJ L 103/1 (as subsequently extended by means of further Commission Decisions).

<sup>10</sup> Which includes the approval of COVID-19 vaccines by the European Medicines Agency (EMA), the execution of agreements with vaccine providers to secure them, and further financial support from the programme Horizon 2020 (amounting to 1 billion euros) to support coronavirus research.

<sup>11</sup> Economic measures will be referred immediately after. Also, it is to be noted that hand in hand with the measures associated to these four priorities, some horizontal initiatives can be spotted. Those include fight against disinformation and wider communication strategy.

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ECB as a temporary asset purchase programme to mitigate the risks affecting the monetary policy transmission, (ii) the Temporary Framework for state aid resources put in place by the Commission to flexibilise the provision of state aid to mitigate COVID-19 related shocks in the market,<sup>12</sup> (iii) the temporary Support to mitigate Unemployment Risks in an Emergency (SURE),<sup>13</sup> (iv) the Coronavirus Response Investment Initiative (CRII and CRII+)<sup>14</sup> allowing Structural

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<sup>12</sup> Articulated through a Commission communication and amended subsequently five times. Its validity is extended until 31 December 2021 (allowing the conversion of certain repayable instruments into grants until December 2022). For a consolidated version of the text and further information, see European Commission, ‘The State Aid Temporary Framework’, [ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework\\_en](https://ec.europa.eu/competition-policy/state-aid/coronavirus/temporary-framework_en).

<sup>13</sup> Established Council Regulation (EU) 2020/672 of 19 May 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.

<sup>14</sup> To this end, the Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L 347 (Common Provisions Regulation) was subsequently modified by Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative) OJ L 99 and by Regulation (EU) 2020/558 of the European Parliament and of the Council of 23 April 2020 amending Regulations (EU) No 1301/2013 and (EU) No 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak OJ L 130. For a detailed analysis on the previous regulation and the use of European Structural

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Funds to be repurposed to fight COVID-19 shocks and the mobilisation of additional support from them, and (iv) the European Guarantee Fund managed by the European Investment Bank (EIB), funded out of MSs' commitments<sup>15</sup> targeting companies<sup>16</sup> which are finally viable in the long-run but are experiencing shortages due to COVID-10 outbreak.

Under this fiscal response, reference must also be made to the InvestEU Programme,<sup>17</sup> established as the successor of the so-called *Juncker plan*.<sup>18</sup> Aiming at leveraging from the lessons learnt from EFSI implementation and established as a single

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Funds Financial Instruments to respond to the COVID-19 financial crisis, see Fi-Compass, 'Responding to the COVID-19 crisis through financial instruments in the framework of the Coronavirus Response Investment Initiative' (European Commission and European Investment Bank, May 2020), [www.fi-compass.eu/sites/default/files/publications/Responding%20to%20the%20COVID-19%20crisis%20through%20financial%20instruments\\_0.pdf](http://www.fi-compass.eu/sites/default/files/publications/Responding%20to%20the%20COVID-19%20crisis%20through%20financial%20instruments_0.pdf)

<sup>15</sup> Having a targeted size of 25 billion euros, it expects to mobilise up to 200 billion euros of additional financing. The European Guarantee Fund is funded by participating countries in proportion to their share in the EIB or other institutions. See European Investment Bank, 'European Guarantee Fund', [eib.org/en/products/egf/index.htm?q=&sortColumn=boardDate&sortDir=desc&pageNumber=0&itemPerPage=25&pageable=true&language=EN&defaultLanguage=EN&abstractProject=true&orabstractProject=true&orCountries=true&orBeneficiaries=true&orWebsite=true](http://eib.org/en/products/egf/index.htm?q=&sortColumn=boardDate&sortDir=desc&pageNumber=0&itemPerPage=25&pageable=true&language=EN&defaultLanguage=EN&abstractProject=true&orabstractProject=true&orCountries=true&orBeneficiaries=true&orWebsite=true).

<sup>16</sup> The majority of them (65%) has been destined for SMEs.

<sup>17</sup> Established by Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017 [2021] OJ L 107 (InvestEU Regulation).

<sup>18</sup> The Investment Plan for Europe under which the European Fund for Strategic Investments (EFSI) was set up. See Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 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 [2015] OJ L 169.

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fund (InvestEU Fund) <sup>19</sup> intends to ‘provide more efficiently functioning support to final recipients by integrating and simplifying the financing offered under a single budgetary guarantee scheme’.<sup>20</sup>

## ***2.2. Next Generation EU allocation and main purposes (what it is and what is not)***

NGEU is not a *shock absorber* nor an instrument to provide liquidity to the economy.<sup>21</sup> On the contrary, NGEU tries to provide financial resources allowing MS to implement sustainable reforms with a view to tackling the undesired consequences of the COVID-19 outbreak.<sup>22</sup> This makes it a remarkable instrument with unique features, which is worth discussing, even briefly.

Even if it is not our purpose to minutely discuss all the RRF legal features, but to examine its links with sustainable finance, to achieve that purpose, we must look at the basic features encompassing the set-up and implementation of the RRF.<sup>23</sup>

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<sup>19</sup> InvestEU Regulation, ch II, Arts 8-10.

<sup>20</sup> InvestEU Regulation, recital 2.

<sup>21</sup> For those purposes, other instruments were devised. Among those, the already cited CRII and CRII+ initiative as well as the EGF.

<sup>22</sup> Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57 (RRF Regulation), recital 8. It is acknowledged that crises, such as the COVID-19, may entail cutting (public) investments, in particular in sectors perceived as less relevant or profitable (e.g. cultural and research sectors). RRF aims at tackling such adverse effects, providing resources that allow MSs to build up resilience.

<sup>23</sup> For a thorough analysis of the Facility, including its preparatory works, see Jonathan Echebarria Fernández, ‘A Critical Analysis on the European Union's Measures to Overcome the Economic Impact of the COVID-19 Pandemic’ (2021) 5 European Papers 1399.

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*First*, one needs to look at the RRF *time horizon*. RRF is conceived as a temporary recovery instrument,<sup>24</sup> and its duration is established accordingly, in line with the provisions of Regulation 2020/2094. In this vein, the investments and reforms supported by it should be completed by 31 August 2026.<sup>25</sup>

*Second*, the RRF refers to relevant EU policy areas, which are structured in six pillars for the purposes of the RRF Regulation. Those are (a) green transition; (b) digital transformation; (c) smart, sustainable and inclusive growth; (d) social and territorial cohesion; (e) health, and economic, social and institutional resilience; and (f) policies for the next generation, children and the youth.<sup>26</sup> Those pillars define the scope of the facility and serve to attain a general objective: to build up EU resilience in the aftermath of the pandemic<sup>27</sup> and a specific objective, which is to provide the necessary financing to MSs to attain the objectives foreseen in the national recoveries plan.<sup>28</sup>

*Third*, the keystone that sits in the middle of the RRF implementation process and sustains the whole architecture is

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<sup>24</sup> Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L319, recital 6. The Regulation established the upper limits of the resources aimed to support the recovery in the aftermath of the COVID-19 crisis in Art 1(1) and Art 2(2). Concerning the allocation of funds, the amounts foreseen in Art 2(2)(a)(ii) (312,500 million euros in the form of non-repayable assistance) and 2(2)(b) (360,000 million euros in loans to MSs) are allocated to the RRF. See RRF Regulation, Art 6(1).

<sup>25</sup> Where, in principle, by 31 August 2026, the investments and reforms should be completed. See RRF Regulation, Arts 18(4)(i), 20(4)(d) and recital 53.

<sup>26</sup> RRF Regulation, Art 3.

<sup>27</sup> RRF Regulation, Art 4(1).

<sup>28</sup> RRF Regulation, Art 4(2).

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national recovery and resilience plans (NRRP). Those are prepared by MSs in accordance with their national laws and must explain, in detail, how the state aims at attaining the different pillars and broader RRF objectives,<sup>29</sup> detailing the specific measures and reforms to be carried out within the relevant plan. The Commission is expected to assess those NRRP<sup>30</sup> weighing their relevance, effectiveness, efficiency, and coherence.<sup>31</sup> Should the Commission's positively assess the NRRP, it will submit a proposal to the Council, which must approve the Commission assessment by means of an implementing decision.<sup>32</sup>

*Four*, the RRF Regulation does not establish a limitative type of measures that can be supported through NRRP. Those are simply presented as measures intended to attain the pillars indicated in Article 3 of RRF Regulation, and the specific challenges for MSs, contributing to enhance resilience and tackle the impact of the COVID-19 crisis.<sup>33</sup> The facility could also be deployed via investment schemes, which should act as

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<sup>29</sup> RRF Regulation, Art 18 provides prolific details of the different elements that must be covered in the NRRP.

<sup>30</sup> Which are expected to be submitted by 30 April 2021 (Art 18(3) RRF Regulation), although the RRF Regulation also contemplated the submission of *draft* NRRP. The purpose of allowing the submission of those draft NRRPs is to speed up the approval of an implementation process (Recital 38 of RRF Regulation). However, it is not clear whether the Commission may provide informal feedback on those or they may be simply considered, after the entry of the RRF Regulation into force, as *final* NRRP (or they became such upon MS's confirmation).

<sup>31</sup> Those assessment criteria are further detailed in Art 19(3) RRF Regulation.

<sup>32</sup> RRF Regulation, Art 20. It seems that the Council is not given discretion (not even grounds) to reject the Commission's assessment and must approve the assessment as a kind of *rubber stamp* exercise.

<sup>33</sup> RRF Regulation, Art 18(4)(a) and recital 8.

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a catalyst of private investments, such as financial instruments, subsidies and non-repayable assistance.<sup>34</sup>

The Commission Guidance on Recovery and Resilience Plans (NRRP Guidance)<sup>35</sup> provides further guidance regarding the type of investments that can be financed by the NRRPs. Under this NRRP Guidance (and, thus, the RRF Regulation) ‘investments’ is broadly conceived ‘as capital formation in areas such as fixed capital, human capital, and natural capital’.<sup>36</sup> Those include direct and indirect schemes, financial instruments,<sup>37</sup> subsidies, support schemes, and similar facilities. The facility can also finance reforms with a view to complement the effect of investments.<sup>38</sup>

*Five*, and final, sustainability language is embedded in the instrument. On the one hand, the RRF is expected to contribute to attaining an overall 30% EU budget expenditure supporting climate objectives.<sup>39</sup> In this regard, the measures included and supported in the NRRP should contribute to a green transition in a share that represents at least 37% of the total allocation.<sup>40</sup>

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<sup>34</sup> Ensuring in such cases that State aid rules are complied with (Recital 8 of RRF Regulation).

<sup>35</sup> European Commission, ‘Guidance to Member States Recovery and Resilience Plans’ (Commission Staff Working Document) SWD (2021) 12 final Part 1/2, [ec.europa.eu/info/sites/default/files/document\\_travail\\_service\\_part1\\_v2\\_en.pdf](https://ec.europa.eu/info/sites/default/files/document_travail_service_part1_v2_en.pdf), and Part 2/2 [ec.europa.eu/info/sites/default/files/document\\_travail\\_service\\_part2\\_v3\\_en.pdf](https://ec.europa.eu/info/sites/default/files/document_travail_service_part2_v3_en.pdf).

<sup>36</sup> NRRP Guidance pt 2/2 5-9.

<sup>37</sup> Including also venture capital investments and equity financial instruments.

<sup>38</sup> It must be noted that reforms may not entail funding, but are, nevertheless, included in the NRRP as long as they are linked to other reforms and investments.

<sup>39</sup> RRF Regulation, recital 23.

<sup>40</sup> Following the tracking methodology defined in Annex VI of RRF Regulation. See RRF Regulation, Recital 23 and Art 18(4)(e).

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On the other hand, and as a horizontal principle,<sup>41</sup> the RRF should also support measures that respect the principle of *do no significant harm* as defined in the Taxonomy Regulation.<sup>42</sup>

### ***2.3. Complementarities and differences with InvestEU***

InvestEU, as indicated above, can also be incardinated under the overall EU response to tackle the effects produced by the COVID-19 pandemic and provide funding to support EU response in the long run.<sup>43</sup>

The InvestEU Fund,<sup>44</sup> the centrepiece of the InvestEU Programme, serves a different purpose and is set up under a different logic, which is to support the objectives of EU internal policies,<sup>45</sup> although some of the objectives pursued by the RRF and the InvestEU Fund are similar, when not purely complementary.<sup>46</sup> Both instruments also differ in the manner

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<sup>41</sup> RRF Regulation, Art 5(2).

<sup>42</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L 198. See RRF Regulation, Art 2(6).

<sup>43</sup> See European Commission, ‘Questions and Answers: The proposed InvestEU Programme’ (*European Commission*, 29 May 2020), [ec.europa.eu/commission/presscorner/detail/pt/qanda\\_20\\_947](https://ec.europa.eu/commission/presscorner/detail/pt/qanda_20_947).

<sup>44</sup> InvestEU Regulation, ch II, arts 8-10.

<sup>45</sup> InvestEU Regulation, Art 1(1).

<sup>46</sup> For instance, the InvestEU programme aims at contributing to sustainable and inclusive recovery, in the aftermath of the COVID-19 crisis (Art 1(1)(g) InvestEU Regulation). This aim constitutes also the general objective of the RRF (Art 4(1) RRF). Digital transformation (Art 8(1)(a) InvestEU Regulation and Art 3(b) RRF Regulation), inclusion (Art 3(1)(c) InvestEU Regulation and Art 3(c) RRF Regulation) and territorial and social cohesion (Art 3(1)(f) InvestEU Regulation and Art 3(d) RRF Regulation), among others, constitute common areas of regulatory scope for both instruments.

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they are implemented, the form of funding and the manner they interact with each other:

*First*, whereas RRF is implemented under direct management by the Commission,<sup>47</sup> InvestEU Fund is implemented under indirect management.<sup>48</sup> This means that the InvestEU Fund is implemented by the implementing partners selected by the Commission,<sup>49</sup> and the RRF is, in principle, directly managed by the Commission. The distinction may be more formalistic than real since the RRF is ultimately implemented via NRRPs drafted out by MSs. Yet, those NRRPs must first be positively assessed by the Commission, and the payment of instalments is ultimately subject to the achievement of the milestones contemplated therein, on which MSs must periodically report to the Commission.<sup>50</sup>

InvestEU differs from RRF also in its structure. InvestEU contemplates the set-up of two main fund compartments: an EU

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<sup>47</sup> Pursuant to Art 62(1)(a) Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, 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 L 193 (Financial Regulation). See Art 8 RRF Regulation and Art 6(1) InvestEU Regulation.

<sup>48</sup> Art 62(1)(c) Financial Regulation.

<sup>49</sup> With the exception of the European Investment Bank Group that, pursuant to Art 13(4) InvestEU Regulation, constitutes a privileged partner for the implementation of the 75% of the EU Compartment of the InvestEU Fund (see recital 50 InvestEU Regulation). Implementing partners encompass financial institutions (including national promotional banks) and other financial intermediaries selected by the Commission for the purposes of implementing the InvestEU Fund, entering into a guarantee agreement for that end (Art 2(13) InvestEU Regulation).

<sup>50</sup> RRF Regulation, Arts 20(5)(a) and 23(2).

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compartment<sup>51</sup> and a MS compartment to be set up voluntarily (up to one per MS).<sup>52</sup> The RRF, for its part, is implemented via NRRP, in principle, one per each MS, tackling their specific resilience issues.

*Second*, another difference is in the form of support backing each instrument. The EU compartment of the InvestEU Fund is backed by an EU irrevocable guarantee in an amount of 26.2 billion euros,<sup>53</sup> expecting to mobilise more than 372 billion euros.<sup>54</sup> The RRF, on its side, is allocated with 312 billion euros dedicated for non-repayable financial support,<sup>55</sup> plus 360 billion euros in the form of loans available to MSs,<sup>56</sup> if they so request.<sup>57</sup>

*Third*, from the perspective of the complementarities and interconnection, it is foreseen that MS can contribute RRF resources to the MS Compartment of the InvestEU Fund.<sup>58</sup> However, contributing resources from the InvestEU Fund to the NRRP is not contemplated in the applicable framework and hence, does not seem possible.

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<sup>51</sup> InvestEU Regulation, Art 9. In principle addressing EU wide market failures or suboptimal investment situations (see Recital 32 InvestEU Regulation).

<sup>52</sup> InvestEU Regulation, Art 10. Addressing specific MS's market failures or suboptimal investments situations.

<sup>53</sup> InvestEU Regulation, Art 4(1) and 40 Recital.

<sup>54</sup> See Council of the EU, 'InvestEU programme adopted by Council' (Press Release, 17 March 2021), [consilium.europa.eu/en/press/press-releases/2021/03/17/investeu-programme-adopted-by-council](https://consilium.europa.eu/en/press/press-releases/2021/03/17/investeu-programme-adopted-by-council).

<sup>55</sup> RRF Regulation, Art 5(1)(a).

<sup>56</sup> RRF Regulation, Art 5(1)(b).

<sup>57</sup> See below, section 3.

<sup>58</sup> In the form of cash contributions (Art 7(2) RRF Regulation and Art 10(1) InvestEU Regulation).

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The design and targets of NGEU show some similarities and some differences, with different academic proposals that were floated and discussed before it was even a project, including by some of us.<sup>59</sup>

In terms of similarities, the RRF shows pragmatism and ambition. One can dispute whether the ambition is commensurate with the challenge, but it is an example of problem-solving-based thinking, which is refreshing. This is also shown in a structure, which, with its own intricacies, could certainly have been much more complicated. Another similarity is the focus not on covering past costs but on investing in the future, and an explicit emphasis on innovation and sustainability, which is most welcome.

Among the differences is a lack of emphasis on equity funding. RRF funds will be allocated to MSs and then distributed in accordance with their NRRPs, and there is no stated preference in the NRRP Guidance about the kind of instruments to be used. There is an emphasis on the ‘crowding in’ of private investments,<sup>60</sup> or the need to finance ‘capital’, understood as assets, or human capital,<sup>61</sup> but this investment can be funded via

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<sup>59</sup> Lamandini, Ottolenghi and Ramos Muñoz (n 1a) 245; (n 1b). Consonant views were voiced, in parallel, from influential economists. Cf Arnoud WA Boot et al., ‘Corona and Financial Stability 3.0: Try equity-risk sharing for companies, large and small’ (2020) SAFE Policy Letter No. 81; Arnoud WA Boot et al., ‘Corona and Financial Stability 4.0: Implementing a European Pandemic Equity Fund’ (2020) SAFE Policy Letter No. 84; Giorgio Gobbi, Francesco Palazzi and Anatoli Segura, ‘Unintended effects of loan guarantees during the Covid-19 crisis’ in Agnès Bénassy-Quéré and Beatrice Weder di Mauro (eds), *Europe in the Time of Covid-19* (VoxEU.org & CEPR Press 2020).

<sup>60</sup> See NRRP Guidance pt 1/2 17, 43.

<sup>61</sup> ‘The Regulation is therefore consistent with a broad concept of investment as capital formation in areas such as fixed capital, human capital, and natural capital. This would also cover for instance intangible assets such as R&D,

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equity lines, venture capital, loans,<sup>62</sup> etc. For example, the EU policy approach focuses on the ‘asset side’, but it is neutral (or blind) towards the liability side. In our view, although understandably deferential towards MSs, this approach is questionable: given that levels of private (and corporate) debt in the EU are high and growing,<sup>63</sup> and capital markets remain below potential, and are a marginal source of funding for SMEs.<sup>64</sup> Thus, absent other considerations, a suitable way to ‘crowd in’ private investment and promote capital markets integration in the process would be to shift the focus away from debt (especially bank debt) financing, and towards equity financing, with a decisive boost to venture capital. This has not been done, and even though we are in no way naysayers and praise NGEU for its significance, it still has blind spots, and this may be the biggest one. A similar blind spot is present in the InvestEU context, despite the fact that one of its six pillars is devoted to solvency support, also through investment in equity or quasi-equity, for undertakings that were sound and safe at the unfolding of the Corona crisis. It remains thus to be seen how this line of intervention shall be engineered in practice

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data, intellectual property and skills. Investments should also respect the “do no significant harm” principle’. See NRRP Guidance pt 1/2 16.

<sup>62</sup> ‘This would include inter alia, guarantees, loans, equity and venture capital instruments and the setting-up of dedicated investment vehicles. See NRRP Guidance pt 1/2 17.

<sup>63</sup> See Eurostat, ‘Private sector debt, consolidated - % of GDP’, [ec.europa.eu/eurostat/databrowser/view/tipspd20/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/tipspd20/default/table?lang=en).

<sup>64</sup> ‘The proportion of new equity risk capital as a share of total funding for EU SMEs declined from 2.5% in 2019 to 1.8% in H1 2020 (and from 2.0% in 2015) [...] Bank lending to EU27 SMEs totalled EUR 573bn in H1 2020 compared with only EUR 14.1bn in risk capital investment (venture capital, private equity, business angel and equity crowdfunding).’ See Association for Financial Markets in Europe, ‘Capital Markets Union Key Performance Indicators – Third Edition European 2020’.

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### **3. Financing Next Generation EU & RRF, and constitutional and political issues**

Amounts related to the financial contribution<sup>65</sup> allocated to RRF are made available to MSs depending on the positive assessment their NRRPs<sup>66</sup> receive from the Commission.<sup>67</sup> Where the NRRP is assessed positively and the estimated costs associated are higher than the maximum financial contribution it can receive, the financial contribution will be equal to that maximum financial contribution.<sup>68</sup> In the same case (positive assessment), where the estimated costs of the NRRP are lower than the maximum financial contribution it can receive, then the financial contribution allocated will amount to the estimated costs of the NRRP.<sup>69</sup> Where MSs consider that they may need additional financial support,<sup>70</sup> they may request and justify additional funds in the form of a loan<sup>71</sup> to be applied to carry out the measures contemplated in the respective NRRP.

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<sup>65</sup> Meaning non-repayable financial support (Art 2(2) RRF Regulation). The total amount of the financial contribution allocated to the RRF is 312 billion euros.

<sup>66</sup> Should the assessment be negative, the Commission will not grant any financial contribution to the MS at stake (Art 20(4)(c) RRF Regulation).

<sup>67</sup> The maximum financial contribution a MS can receive is calculated, pursuant to Art 11 and Annexes II and III RRF Regulation, based on: ‘(a) (...) the population, the inverse of the GDP per capita and the relative unemployment rate of each Member State (weighting 70%) and (b) (...) the population, the inverse of the GDP per capita and, in equal proportion, the change in real GDP in 2020 and the aggregated change in real GDP for the period 2020-2021’ (weighting the remaining 30%).

<sup>68</sup> Ibid.

<sup>69</sup> RRF Regulation, Art 20(4). In the latter case, this would not impede the relevant MS to revise its NRRP with a view to get it amended, potentially increasing the amount of the financial contribution.

<sup>70</sup> RRF Regulation, Arts. 14, 15, 18(4)(s) and 20.

<sup>71</sup> RRF allocates up to 360 billion euros available for loans to be granted to MSs upon request and justification.

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How is this extraordinary fiscal support financed? The Own Resources Decision<sup>72</sup> provides the answer. Article 5 of this Decision authorises the Commission, as an extraordinary mechanism, (i) to borrow from capital markets up to 750 billion euros, and (ii) to grant loans in up to 360 billion euros to fund the RRF (and also the sectoral initiatives tackling the consequences of the COVID-19 pandemic). As per the chunk not comprising loans (750 billion euros), the Commission is entrusted with the task of managing the issuances in capital markets, ensuring that and remaining periodically accountable to the European Parliament and the Council.<sup>73</sup>

The Own Resources Decision entry into force is subject to its adoption by all MSs, in accordance with their respective constitutional requirements.<sup>74</sup> In the process of adoption by national parliaments and institutions, the package of reforms has also been subject to court challenges, which have resulted in different responses, which, in turn, reflect different approaches to the relationship between EU Law and national constitutional law. Although such a topic well deserves a dedicated study, for present purposes, we will limit ourselves to simply offer some context of the developments so far related to it.

On 26 March 2021, the German Constitutional Court (GCC) prevented the German President, Frank-Walter Steinmeier, from signing – and enacting – the relevant German legislation

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<sup>72</sup> Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L 424.

<sup>73</sup> Own Resources Decision, Art 5(3).

<sup>74</sup> Own Resources Decision, Art 12.

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approving the Own Resources Decision.<sup>75</sup> The reason? A claim filed by a group of German citizens together with one of the spokespersons of the right-wing Eurosceptic party Alternative for Germany (AfD). They pleaded that the Own Resources Decision constitutes a flagrant violation of the Treaties, as it increases the ceiling of own resources to allow funding RRF and sectoral approaches put in place to tackle the effects of COVID-19,<sup>76</sup> and that this is at odds with the principle of maintaining a balanced budget.

The episode was prelude as being a second part of the clash on 5 May 2020, when the GCC found that the Public Sector Purchase Programme (PSPP) exceeded the ECB's mandate.<sup>77</sup> Yet, the complaint did not precipitate a(nother) crisis, as the GCC dismissed the applicants' request for a preliminary injunction that would have prevented Germany from ratifying the legislative instrument to approve the Own Resources Decision.<sup>78</sup> However, the GCC did not find the constitutional

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<sup>75</sup> Journals soon echoed this news. See, among other, Michael Nienaber, 'German constitutional court stops ratification of EU recovery fund' (*Reuters*, 26 March 2021), [reuters.com/article/us-health-coronavirus-eu-debt/german-constitutional-court-stops-ratification-of-eu-recovery-fund-idUKKBN2B12FR](https://www.reuters.com/article/us-health-coronavirus-eu-debt/german-constitutional-court-stops-ratification-of-eu-recovery-fund-idUKKBN2B12FR). In addition, it seems that the GCC, at the very first moment, did not issue an injunction, but published and communicated a statement.

<sup>76</sup> See Cruz Vilaça Advogados, 'The German Constitutional Court calls into question the Recovery and Resilience Plan' (1 April 2021), [cruzvilaca.eu/en/news/The-German-Constitutional-Court-calls-into-question-the-Recovery-and-Resilience-Plan/138](https://cruzvilaca.eu/en/news/The-German-Constitutional-Court-calls-into-question-the-Recovery-and-Resilience-Plan/138).

<sup>77</sup> See FCC judgement of 5 May 2020 (2 BvR 859/15). For an English version of the judgement, see [bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505\\_2bvr085915en.html](https://bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html).

<sup>78</sup> See Bundesverfassungsgericht, 'Unsuccessful application for preliminary injunction against promulgation of the domestic act ratifying the EU Own Resources Decision ("EU Recovery Package")' (Press Release No. 29/2021, 21 April 2021), [bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-029.html](https://bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-029.html).

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complaint to be fully unfounded or inadmissible from the outset and, thus, still needs to adjudicate on the substance of the case.

Yet, once again, the GCC continues pursuing the path of examining the legality of EU acts from the prism of its constitutional framework. The EU may hold its breath during the upcoming months. The GCC includes some indications of its way of thinking, by stating that: (i) in principle, ‘the Council Decision does not envisage any additional borrowing on behalf of the European Union,’ (ii) the Federal Government enjoys wide discretion in this area, to which the GCC must abide, and (iii) anticipating that it would be keen to ask the Court of Justice to rule on the validity of the Own Resources Decision.<sup>79</sup> Nevertheless, previous experience shows that the GCC is unpredictable. We can only hope that should doubt arise on the compatibility of the Own Resources Decision with the German Constitution, the GCC would engage in a more constructive dialogue with the Court of Justice and with the EU Institutions.<sup>80</sup>

As of 1 June 2021, all MSs have ratified the Own Resources Decision.<sup>81</sup> As the German case illustrates, this ratification

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<sup>79</sup> Ibid. For some preliminary analysis, see Benedikt Riedl, ‘La décision sur les ressources propres et le fonds de développement “Next Generation EU”, un acte ultra vires et/ou une violation de l’identité constitutionnelle?’ (2021) *Blogdroiteuropeen Working Paper 3/2021*.

<sup>80</sup> See Marco Lamandini, David Ramos Muñoz and Violeta Ruiz Almendral, ‘The EMU and its Multi-Level Constitutional Structure: The Need for More Imaginative “Dialogue” Among and Across EU and National Institutions’ (2020) 47 *Legal Issues of Economic Integration* 311.

<sup>81</sup> See Council of the EU, ‘Green light from all member states for EU recovery spending’ (Press Release, 31 May 2021), [consilium.europa.eu/en/press/press-releases/2021/05/31/green-light-from-all-member-states-for-eu-recovery-spending](https://consilium.europa.eu/en/press/press-releases/2021/05/31/green-light-from-all-member-states-for-eu-recovery-spending).

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process has not been easy. For instance, on 20 May 2021, five MSs were still pending to ratify the Own Resources Decision.<sup>82</sup>

With the largest EU economies on board, the process of ratification gained momentum, although some constitutional tensions remained until the very end (mainly regarding Poland and Hungary). The last episode of the tortuous entry into force of the Own Resources Decision took place in Romania, where a Parliamentary blockage put the Own Resources Decision approval on hold.<sup>83</sup>

#### **4. Next Generation EU, RRF, and sustainability**

Funding RRF (and overall NGEU) requires raising an unprecedented amount of funds from capital markets. The Commission raising funds from capital markets is nothing new. For instance, it borrowed in 2020 to fund SURE.<sup>84</sup> However, considering the high total and yearly volumes to be raised – Euros 150 billion approx. –, the Commission has put in place a new approach trying to minimise execution risks and with a view to ensuring cost-efficiency.

The basis for such a new funding strategy is the *Communication on a new funding strategy to finance NextGenerationEU*

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<sup>82</sup> Alessandro D’Alfonso, ‘National ratification of the Own Resources Decision’ (European Parliament Briefing, June 2021), [europarl.europa.eu/RegData/etudes/BRIE/2021/690520/EPRS\\_BRI\(2021\)690520\\_EN.pdf](https://europarl.europa.eu/RegData/etudes/BRIE/2021/690520/EPRS_BRI(2021)690520_EN.pdf).

Those MSs are the Netherlands, Poland, Austria, Hungary and Romania.

<sup>83</sup> See Bogdan Neagu, ‘Romania’s PSD blocks approval of EU’s own resources decision’ (*Euractiv*, 11 March 2021), [euractiv.com/section/politics/short\\_news/romania-psd-blocks-approval-of-eus-own-resources-decision](https://euractiv.com/section/politics/short_news/romania-psd-blocks-approval-of-eus-own-resources-decision).

<sup>84</sup> In an amount of circa 75 billion euros (out of 100 billion euros, which constitute the ceiling of SURE).

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(Commission Communication)<sup>85</sup> and builds upon diversification.<sup>86</sup> The basic features of this strategy can be summarised as follows:

- (i) Defining periodically the volumes to be raised. To this end, the Commission will adopt an annual framework borrowing decision.<sup>87</sup> Further, via *funding plans*, the indicative targets for the funds to be raised shall be established.<sup>88</sup> This would enhance predictability and transparency, allowing interested investors to be timely prepared to make their investment decisions.<sup>89</sup>
- (ii) The fundraising will be executed via a pan-European Primary Dealer Network. European supervised credit institutions and certain investment firms meeting the eligibility criteria<sup>90</sup> and requesting to participate in the

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<sup>85</sup> European Commission, ‘A new funding strategy to finance NextGenerationEU’ (Communication from the Commission to the European Parliament and the Council) COM (2021) 250 final.

<sup>86</sup> In line with common practices undertaken by sovereign issuers. See Udaibir S Das, Michael G Papaioannou and Magdalena Polan, ‘Strategic considerations for first-time sovereign bond issuers’ (2008) IMF Working Paper WP/08/261.

<sup>87</sup> European Commission (n 85) s 2.1. See, also, Art 3 Commission Implementing Decision establishing the necessary arrangements for the administration of the borrowing operations under Council Decision (EU, Euratom) 2020/2053 and for the lending operations related to loans granted in accordance with Article 15 of Regulation (EU) 2021/241 of the European Parliament and of the Council C (2021) 2502 final (Implementing Decision).

<sup>88</sup> On a six-months basis.

<sup>89</sup> European Commission (n 85) s 2.1 and Implementing Decision, Art 5.

<sup>90</sup> European Commission (n 85) s 2.4 and Commission Decision of 14.4.2021 on specific internal rules on the implementation of borrowing, debt management and lending operations and of the primary dealer network established by Commission Decision C (2021) 2500. The relevant eligibility criteria are established in the Commission Decision (EU, Euratom) 2021/625 of 14 April 2021 on the establishment of the primary dealer network and the definition of eligibility criteria for lead and co-lead mandates for syndicated

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network,<sup>91</sup> upon Commission's acceptance, will be part of the network, enjoying the rights and bearing the obligations such membership entail. The selected institutions will act as placers, allocating debt securities in the primary market and promoting the liquidity of the mechanism.

- (iii) Bond issuance will cover, as it may be needed, a wide range of maturities, from three to thirty years. The foregoing ensures flexibility so as to avoid liquidity shortfalls.

The foregoing will be coupled with cost-efficient pricing strategies, relying on auctions, syndications transactions, or private placements as well as including taps bonds,<sup>92</sup> as it may be appropriate considering the size and nature of the operations.<sup>93</sup>

The Commission has managed to fit a sustainability dimension within this complex framework, as it envisages funding 30% of NGEU by means of *green bond issuance*.<sup>94</sup> To achieve that, the

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transactions for the purposes of the borrowing activities by the Commission on behalf of the Union and of the European Atomic Energy Community C (2021) 2500 OJ L 131/170. The foregoing Commission Decision has been further amended by Commission Decision (EU) 2021/857 of 27 May 2021 amending Decision (EU, Euratom) 2021/625 as regards the inclusion of certain investment firms in the eligibility criteria for membership of the Union primary dealer network C (2021) 3739 OJ L 188/103.

<sup>91</sup> For the Call for Applications and related documents see European Commission, 'EU funding strategy for NextGenerationEU' (Legal Texts), [ec.europa.eu/info/strategy/eu-budget/eu-borrower-investor-relations/legal-texts\\_en#eu-funding-strategy-for-nextgenerationeu](https://ec.europa.eu/info/strategy/eu-budget/eu-borrower-investor-relations/legal-texts_en#eu-funding-strategy-for-nextgenerationeu).

<sup>92</sup> They entail a portion of an issued bond that is held back and later issued based on the existing bond. See European Commission (n 88) s 2.

<sup>93</sup> European Commission (n 85) s 2.4 and Implementing Decision, recital 4.

<sup>94</sup> In line with the objective of reorienting capital flows to sustainable finance included in the Action Plan.

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Commission contemplates adopting an NGEU Green Bond Framework,<sup>95</sup> aligning to the furthest extent possible with the EU Green Bond Standard.<sup>96</sup> Those bonds should finance climate-related investments contemplated in the NRRP. That climate-related expenditure, eligible for the purposes of NGEU *green bond issuance*, should be identified based on the methodology for climate tracking foreseen in Annex VI of the RRF Regulation.<sup>97</sup>

This aim of the NGEU fits within the broader interest at an EU level in ensuring that EU funds are used for attaining sustainability principles or implemented in accordance with ESG principles.<sup>98</sup> This interest has become more evident after

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<sup>95</sup> Expected to be published by early summer.

<sup>96</sup> ‘Our NGEU Funding Strategy will include a Green Bond issuance programme of up to €250 billion to meet the 30% target. The European Commission is working on a green bond framework and we are confident that Member States will live up to their responsibility as well. Once adopted, a Green Bond programme of this scale will make the EU the biggest issuer of sustainable bonds on the financial markets’. See European Commission, ‘Presentation by Commissioner Hahn of the NextGenerationEU – Funding strategy to finance the Recovery Plan for Europe’ (Speech, 14 April 2021), [ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_21\\_1743](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_1743).

<sup>97</sup> Yet, one may expect the Commission to provide further guidance on this matter. For instance, technical guidance is expected to be provided on how the ‘Do No Significant Harm’ principle applies in the context of the RRF (see NRRP Guidance s 8).

<sup>98</sup> It is broadly understood (in the academia, among policy makers as well as in the private sector) that *sustainable finance* encompasses (a) the provision of financial services (or more generally, performing investments); (b) integrating Environment, Social and Governance (ESG) criteria in the final business decisions; (c) aiming to make a long-term/durable for investors, investees, the society and broadly, all the concerned stakeholders. See, for a short overview, Carlos Bosque, ‘[Putting sustainable finance at the very centre of EU development \(and beyond\)](#)’ (2020) EBI BrieFin #3 Sustainable Finance.

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the ratification of the Paris Agreement,<sup>99</sup> the decarbonisation objectives for 2050,<sup>100</sup> and the ‘European Green Deal’.<sup>101</sup> These initiatives at a broader policy level have taken shape in the context of financial markets through the EU Commission Action Plan on Sustainable Finance (Action Plan),<sup>102</sup> which envisages fostering investment in sustainable projects, using EU funds to catalyse and attract private investments,<sup>103</sup> or *reorienting capital flows towards a more sustainable economy*. Post-2020, the EU is committed to transition to a more sustainable economy and has pledged to make at least 25% of its budget directly climate-relevant.<sup>104</sup>

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<sup>99</sup> United Nations Framework Convention on Climate Change (The Paris Agreement) [2015].

<sup>100</sup> European Commission, ‘A Clean Planet for all: A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy’ (Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank) COM (2018) 773 final, [eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52018DC0773](https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52018DC0773).

<sup>101</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions, ‘The European Green Deal’ COM (2019) 640 final, [eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN).

<sup>102</sup> European Commission, ‘Action Plan: Financing Sustainable Growth’ (Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions) COM (2018) 97 final, [eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097).

<sup>103</sup> Action Plan, s 2.3. See, also, Commission short explanation of the Action Plan, European Commission, ‘Commission action plan on financing sustainable growth’ (Publication, 8 March 2018), [ec.europa.eu/info/publications/sustainable-finance-renewed-strategy\\_en](https://ec.europa.eu/info/publications/sustainable-finance-renewed-strategy_en).

<sup>104</sup> European Green Deal, s 2.2.1 (further updated to 30%). See also RRF Regulation, recital 23.

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Having made such pledges, it was relatively natural for the NGEU to openly embrace sustainability. It is important to note that sustainability's importance goes beyond the specific obligations and reaches the level of the principles underpinning the relevant regulations. The RRF Regulation is embedded in sustainability principles. It stems from the preamble that the objective of the Facility is to contribute to building up resilience *through sustainability*, thus not acting as pure shock or fiscal absorber. Its aim is (i) to contribute to attaining global EU climate commitments<sup>105</sup> by turning those commitments into General objectives,<sup>106</sup> together with goals such as sustainable recovery, and (ii) to support sustainable growth.<sup>107</sup> More specifically, NRRPs are expected to contribute in a share of at least 37% to climate targets.<sup>108</sup>

Although there are many references to sustainability principles, there are less to specific tools (a) to ensure that measures implemented are actually respectful with those principles or (b) to track such compliance. Nevertheless, it is worth also noticing that RRF Regulation is only the regulation *enabling* the implementation of the RRF: it is for MSs through their NRRPs to ensure that measures implemented out of RRF support comply with those principles and objectives.

This opens an important gap between the EU policy level and the MSs' implementation level. However, in this sense, the reference to the funding via green bonds has been a smart way to enlist the aid of capital markets in putting pressure on the Member States to comply with internationally accepted

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<sup>105</sup> RRF Regulation, recitals 4, 7 and 11.

<sup>106</sup> RRF Regulation, Art 4(1).

<sup>107</sup> RRF Regulation, recital 11.

<sup>108</sup> RRF Regulation, Art 16(2)(b).

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standards as to the use of funds. Furthermore, there are mechanisms in the relevant regulations to facilitate such compliance.

For starters, measures included in the NRRP must comply with the principle of *do no significant harm*, contemplated in the Taxonomy Regulation,<sup>109</sup> with several references in the RRF Regulation,<sup>110</sup> a point that is also stressed in the European Commission Guidance to national plans,<sup>111</sup> which can be assessed *ex ante* through the approval process undertaken by the Commission itself.

In addition, MSs must also define in the NRRPs the modalities of reporting and monitoring. Furthermore, additional reporting can be envisaged in the context of the European Semester,<sup>112</sup> and an annual overall reporting is to be prepared by the Commission,<sup>113</sup> plus climate tracking can also be used<sup>114</sup> to *prove* to the Commission that the overall target is attained.

Some of us have tried to provide a framework to analyse the legal measures adopted to attain sustainability across financial markets (to ‘mainstream’ it, beyond a niche investment), distinguishing between ‘Exit’, ‘Voice’, and ‘Coercion’ mechanisms.<sup>115</sup> Drawing an analogy with the private sector, most mechanisms within NGEU (and the RRF) are

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<sup>109</sup> Regulation 2020/852, Article 17.

<sup>110</sup> RRF Regulation, recital 25 and Arts 18(4)(d) and 19(4)(d).

<sup>111</sup> NRRP Guidance, s 8.

<sup>112</sup> RRF Regulation, Art 27.

<sup>113</sup> RRF Regulation, Art 31(3)(a).

<sup>114</sup> RRF Regulation, Annex VI.

<sup>115</sup> David Ramos Muñoz, Elia Cerrato and Marco Lamandini, ‘The EU’s “green” finance. Can “exit”, “voice” and “coercion” be enlisted to aid sustainability goals?’ (2021) European Banking Institute Working Paper Series - no. 90.

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‘transparency-based’ (and, thus, ‘exit-based’). There are disclosure and reporting requirements on an *ex ante* and *ex post* basis. These are accompanied by potential ‘voice-based’ mechanisms, which force potentially reluctant actors to explain how exactly they plan to meet sustainability objectives.

The hardest, as usual, is to accompany these by ‘coercion-based’ mechanisms. In principle, if the reforms and investments funded by the RRF are improperly implemented, the Commission could retain or suspend payments.<sup>116</sup> Whether it would be plausible for this possibility to be used in a case where a MS does not contribute to attaining the sustainability principles enshrined in the RRF Regulation and/or does not respect the principle of *do no significant harm* is another matter. In practice, this would be rendered quite difficult by the fact that some ulterior guidance would be needed to understand what it would mean to ‘not comply’ or ‘not attain’ those objectives, guidance that should be, in turn, inspired by the Taxonomy Regulation and its developing Delegated Act.

Furthermore, the mechanisms contemplated in the Taxonomy Regulation seem to be designed for bonds and bond-like products (financial instruments). How they may actually work as regards *physical* investments and schemes remains open.

Yet, as we also said in our paper, this conclusion is achieved by looking at green finance solely from the perspective of the ‘bad man’.<sup>117</sup> From that perspective, even if every cent that should be used for sustainable activities is so used, the EU would still be far away from achieving its transition. Yet, this could still underestimate the power of publicly led investment to change

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<sup>116</sup> RRF Regulation, Art 24.

<sup>117</sup> Ramos Muñoz, Cerrato and Lamandini (n 118) 2-3.

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the language and market ‘social norms’. There is uncertainty in the language as to what is truly ‘sustainable’, and in the norms as to how acceptable are ‘green’ and ‘brown’ investments. If there is a massive (or even sizeable) chunk of green investments, this can help to achieve a common language of sustainability, which can then be used to change the expectations about the behaviour of public (and then private) issuers, which can then be used to change the normative expectations of market players. A broader consensus about what is normatively expected can, in turn, pave the way for more pungent, coercion-based mechanisms to be used against the hopeless cases, which can then reinforce the normative expectations. Thus, the uncertainties and limited size of NGEU’s sustainable investments should not obscure the fact that their main impact may lie in changing the nature and content of the conversation.

## **5. A provisional conclusion**

‘A camel is a horse designed by a committee’, so the cynical saying goes. Yet, the EU entered the COVID crisis needing a ‘horse’ in the form of a decisive response, which could overcome past tensions by looking into a more modern, digital, sustainable future; and, after going through several such ‘committees’ (if we broadly include the Commission, Council, EP, and national levels), NGEU still largely, refreshingly (and, to many, surprisingly), like a horse. Plenty could still go wrong, but there are reasons to believe that the EU can, in its own peculiar way, get things done. Thus, at the time of writing, we have the luxury of being able to criticise some aspects, or discuss what could be improved to ensure that the plan’s ‘humps’ are smoothed over, instead of weeping over the ‘n<sup>th</sup>’ missed opportunity, as we stare into the abyss.

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To make sure that NGEU does not disappoint, it is important to have realistic expectations, which begin by properly understanding what the fund is and what it is not. It is a temporary measure, not a permanent one (which could lead to expect broader burden-sharing); it is not intended as a broad-based stimulus measure focused on consumption (which puts money into the citizens' pockets) but as a transformational measure focused on investment in specific areas; it is not an initiative fully directed by the EU, but largely delegated to the Member States through NRRP, which means that the Commission must approve, but the responsibility for their success largely lies at a national level; and it is also not the same as the InvestEU Fund, the centrepiece of the InvestEU Programme, which is instead aimed at supporting the objectives of EU internal policies, although with complementarities with the NGEU. In our view, NGEU should have also included fostering capital markets funding through equity lines or venture capital as one of its instrumental goals. However, adding one more constraint could have overloaded the proposal, and one must also acknowledge political realities.

Another aspect that needs to be understood is that, although the transformation and dynamisation of EU economies is the NGEU's ultimate goal, the procedures for its adoption are not particularly dynamic, as they are anchored in the Treaties, and national constitutional rules.

A final consideration is the potential of NGEU to give a boost to sustainable finance. There, it is important to understand the context. As an investor, the EU has an important role to play, but the size of its investment is still small compared with the size of capital markets. However, sustainable finance is also partly a language of expectations and duties: 'green'

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instruments need to be defined, and those definitions need to be tested through market practice in order to become the norm. In that respect, NGEU provides a uniquely large lab to test green bonds, which can then change the expectations about financial instruments across the board.

Like every experiment, NGEU offers plenty of uncertainties but also plenty of promise. Granted, Member States may still squander the opportunity with half-baked, more-of-the-same plans, but some may take advantage of the opportunity to come out of the crisis with a new normal. In any event, NGEU promises to be faithful to its ‘next generation’ name in making a decisive contribution to mainstream sustainability. Suppose it manages to do that, by finding the right balance and all needed transitory adjustments, accelerating digital and environmental transition without too abruptly disrupting the more traditional, path dependent, labour intensive pillars of our economies. In that case, it will be a visionary gate for the future.

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