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DISCUSSION PAPER

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Cohesion Policy and the Principle of Subsidiarity – A Legal Analysis

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Cohesion Policy and the Principle of Subsidiarity – a Legal Analysis

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This report addresses the legal aspects of how the EU's Cohesion Policy has changed over the past decade, exploring the legal argumentation behind its transformation. Cohesion Policy used to be understood as a policy with distinct features and clear limits, characterised by its focus on reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions (article 174 TFEU), but with Treaty-based linkages to environmental aims and trans-European networks. Cohesion Policy has relied on national co-funding and engaging local and regional actors.

The 2021-2027 MFF, and in particular the NGEU, took Cohesion Policy in a completely different direction. The first section of the Report demonstrates how this change has (in practical terms, without a formal Treaty amendment) affected the division of competence between the EU and its Member States and the application of the principle of subsidiarity. Cohesion Policy now stretches to nearly anything that the EU funds, irrespective of any pre-existing competence limitations. The Report explains in detail how the interpretation of the EU's competence in Cohesion Policy was gradually broadened in the institutions without public debate. This examination is based on previously undisclosed internal legal advice and Court pleadings used by the Commission and Council, to which the institutions have granted public access for the purposes of this Report.

The Report then analyses the scope and uses of RRF funding, its design as "money for reforms", the effect of this funding on subsidiarity and finally questions whether any legal constraints remain or are relevant after the transformation of Cohesion Policy through the NGEU. In the ongoing mid-term review of the MFF the Commission draws attention to numerous pressing funding needs of a European dimension. At the same time, the largest EU funding vehicle to a large extent ignores these broader European priorities, both in law and in practice. Finally, the Report looks at the future of EU funding and argues for the introduction of new delimiting principle for how EU funding should be used in the future, involving in particular a more fundamental consideration of the European added value of measures to be funded.

Key words: EU Treaties, Cohesion policy, NextGenerationEU, Recovery and Resilience Facility, European Commission, EU budget, subsidiarity

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1. Introduction

Cohesion policies have deep roots in European integration. From the very beginning of the European integration process, large territorial and demographic disparities have been considered a potential obstacle to integration and development. The Treaty of Rome (1957) established solidarity mechanisms in the form of two funds: the European Social Fund (ESF)[1] to mitigate the social consequences of abolishing internal barriers and the European Agricultural Guidance and Guarantee Fund (EAGGF).[2] Cohesion Policy has been a politically somewhat undefined but factually constrained EU policy. Until recently, its main purpose has been – in line with Article 174 TFEU - to reduce regional disparities and support underdeveloped regions by financing national projects. Its implementation has been tied to two key principles: additionality of Member State funding and covering direct costs of projects. These principles are not anchored into the Treaties, but have been established through secondary legislation to secure that EU financing is spent well.

Cohesion Policy has gradually developed into one of the EU's major spending objectives. It has been the subject of much criticism since its very establishment. Its task, purpose, and significance have been questioned, as has been its less advertised but nevertheless well-known use as a way to buy national support for contested integration initiatives. Evidence about the effectiveness of the policy remains unclear (Becker, 2019, p. 154). While the need to reconsider EU spending has been frequently recognised, in particular to pursue genuine European public goods, the path dependency of budgetary discussions has been strong and kept any innovations marginal.

A significant, albeit temporary, restructuring of EU spending took place in response to the pandemic crisis. The Next Generation EU (NGEU) changed the pattern of EU spending for 2021-2027 radically, though not in terms of breaking any glass ceilings for the funding of European public goods. The main spending vehicle of the NGEU, the Recovery and Resilience Facility (RRF), relies for its legal basis on Cohesion Policy, helping cohesion policies overtake agriculture as the largest EU policy area by a comfortable margin in the present MFF period. The way the NGEU recast the content of cohesion policies was radical.

The transformation has fairly little to do with the original objectives of Cohesion Policy - reducing regional disparities and supporting underdeveloped regions. Instead, the transformation, which took place in several successive stages, is closely related to the asymmetric construction of the Economic and Monetary Union (EMU). First, the Eurocrisis gave birth to the European Semester, aimed to strengthen the EU's role in shaping Member States' policies in areas that fall under their national competence. Second, the growing frustration with its perceived ineffectiveness led to increasingly determined efforts to leverage EU funds to steer Member States towards better economic policies, in particular as regards structural policies. The first manifestation of this approach was the macroeconomic conditionality of structural and investment funds introduced in the Common Provisions Regulation (Center For European Policy Studies, 2020). A few years later, the idea was developed further, in the form of a dedicated euro area budget line within the EU budget,[3]

[1] Article 123-128.
[2] Article 40.
[3] https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165 .

devoted to improving euro area Member States' economic policies. The proposal entailed two Cohesion Policy instruments of a completely new kind. The first instrument was the Reform Delivery Tool (RDT) (COM(2018) 391 final), which was to provide Member States pure grants as reward for implementing structural reforms identified in the country-specific recommendations and deemed desirable by the Commission. The second instrument was the European Investment Stabilisation Function (EISF) (COM(2018) 387 final), which sought to introduce an element of cyclical stabilisation by providing loans to euro area and ERM2 Member States from a modest financial envelope (€30 billion). In 2019, both were superseded by a new Commission proposal for a Budgetary instrument for convergence and competitiveness (BICC) that essentially merged the two instruments into one (COM(2019) 354 final). The BICC was to draw on the EU budget, and envisaged a process where Member States would submit proposals for packages of reforms and investments, linked to National Reform Programmes (COM(2020) 408 final, pp. 1-2). While none of these instruments were approved, they introduced a new understanding of the legal scope of EU Cohesion Policy, with significant consequences for how EU funding is spent. They all sought to rely – alone or to a large extent – on the flexibility clause for Cohesion Policy (Article 175, 3rd paragraph, TFEU) for their legal basis. Despite the fundamental effects on how Cohesion Policy is understood, these new readings provoked no discussion at the time (Leino & Saarenheimo, 2017).

In early 2020, the pandemic rearranged political imperatives and presented an opportunity for a far more ambitious plan in the form of the Next Generation EU package and its Recovery and Resilience Facility (RRF). The RRF is a funding programme with nearly no substantive limits. It is now difficult to see what government task could not be construed as being within the reach of cohesion policies. From a competence perspective, the new understanding of Cohesion Policy has clear implications on policy fields where EU competence is constrained under the EU Treaties.

The EU can act only if it can identify a legal basis for its action, allocating it competence to approve measures in relation to the question at hand. Such allocation can be explicit (a Treaty Article addressing the issue specifically) or implicit (see Article 3(2) TFEU on competence to conclude external agreements). Often EU acts also based on broad competence clauses (such as Article 114 TFEU relating to approximation of Member States' legislation in the area of the internal market). The legal basis is, under established Court jurisprudence, chosen on the basis of the objective and the substance of the measure, aiming at one legal basis representing the centre of gravity of the act.[4] What often influences this choice in practice is the fact that EU competence falls under three main categories: exclusive (such as monetary or commercial policy), shared with the Member States (in areas such as the Internal Market, Environment, Cohesion Policy, Trans-European Networks and selected areas of Social Policy) and supportive competence. In the latter areas EU role is limited and cannot be used to harmonise national legislation, which often makes the EU Institutions seek competence justifications elsewhere (Leino-Sandberg, 2017).

Cohesion Policy falls under the competences that are shared between the Union and the Member States (Article 4(2)(c) TFEU). In these areas,

> *the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union*

[4] See C-620/18 *Hungary v European Parliament*, ECLI:EU:C:2020:1001, para 38.

has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

In addition, in the areas of economic, employment and most aspects of social policy the role of the EU is limited to coordinating Member State policies (Article 5 TFEU). EU action in areas that do not fall under its exclusive competence are subject to a subsidiarity test: it should act only if EU action provides value added to Member States acting on their own.

In recent years, financing has become the EU's key tool for promoting its institutional agenda. While the Union does not formally legislate in areas of Member State competence, it uses its money actively to steer Member States' choices in those areas. While often explained as 'integration through funding', it is questionable whether this represents integration at all: the Member States are not steered towards a uniform model, as each of them adopts national policies that the EU funds. These developments have blurred – and intentionally so - the distinction between Cohesion Policy, on the one hand, and the coordination of fiscal and economic policy coordination, on the other hand. They also introduced a new reading of the principle of subsidiarity (Article 5(3) TEU), which generally relates to the exercise of *Union* competence. Subsidiarity argumentation has now been introduced to matters clearly falling under *national* competence, to justify Union intervention. This not innocent from a competence perspective. It is also highly problematic for the functioning of national democratic processes; for ensuring audit and accountability of how the funds are spent.

The following section will provide the legal background: it will explain the legal framework of Cohesion Policy in the EU Treaties and how the limits of this framework have been traditionally understood and applied, and how the interpretation of the EU's competence in Cohesion Policy was gradually broadened in the EU Institutions without public debate. This examination is based on legal advice used by the Commission and Council, to which I have requested public access for the purposes of this examination. In its reply, the Commission identified a small number of documents involving minor technical amendments to draft proposals from the final stages preceding their formal approval,[5] but refused to hand out any actual legal analyses concerning the legislative proposals and their legal justification;[6] in fact claims that no such analyses exist.[7] This argument is implausible, given the amount of legal rethinking that has gone into enabling the transformation of cohesion policy and EU spending that has been led by the Commission services – and that members of its Legal Service have in their academic writings described as a process where the Institutions have "turned repeatedly to the cohesion policy chapter of the Treaty (Articles 175 to 178 TFEU) when considering such measures. It has done so, in large part, because the economic policy chapter of the TFEU allows for coordination measures but is relatively restrictive when it comes to the adoption of acts of a more 'binding' character." (Flynn, 2019) The Council Legal Service identified four legal opinions that analyse Commission proposals[8] and following a confirmatory application,

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[5] Decision by the Director General of the Commission Legal Service, Ref. Ares(2023)3614045 - 24/05/2023.
[6] Commission decision C(2023) 5806 final, Brussels, 22.08.2023.
[7] Decision by the Director General of the Commission Legal Service, Ref. Ares(2023)6974568 - 13/10/2023.
[8] Decision taken by the Council Secretariat, Ref. 23/0861-em/ns identifies the following opinions: 5347/19 – Opinion of the Legal service on the Proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function; 6582/19 –Opinion of the Legal service on the Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme; 5483/20 – Opinion of the Legal service on the Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme; 13116/19 + REV1 –

provided access to them (Leino-Sandberg & Lindseth 2023). In addition, I have requested and received public access to the Court pleadings of all three institutions (Commission, European Parliament and Council) in Case C-166/07, *Parliament v. Council*, which is so far the only case dealing with the scope of Cohesion Policy and the legal basis in Article 175, 3rd paragraph, TFEU. These documents are used in the report to make the institutional legal argumentation visible and enable its critical analysis.

The third section describes the "new Cohesion Policy" introduced by NGEU and its practical implications, including instruments that have been approved until the summer of 2023. The final section is dedicated to a discussion of the future of EU funding. In the ongoing mid-term review of the MFF the Commission draws attention to numerous pressing funding needs of a European dimension (COM (2023) 336 final). This Report highlights that at the same time, the largest EU funding vehicle to a large extent ignores these broader European priorities, both in law and in practice.

2. Development of EU Cohesion Policy

2.1. Cohesion Policy in the EU Treaties and budget

The core EU budget is small, relative to the federal budgets of mature federations, just slightly over 1% of the EU gross national income. From its very beginning, it has evolved primarily as a tool for facilitating trade and economic integration. The benefits of free trade are not always shared equally, and free movement of capital and labour can lead to the agglomeration of economic activity in some geographic areas at the expense of impoverishing others. The EU budget has been a tool to deal with such tendencies, partly by supporting vulnerable regions, partly by compensating those Member States that feel threatened by free trade. As such, it has been instrumental in securing political support for integration.

In the early days, this task was performed mainly through the Common Agricultural Policies (CAP). The CAP served to facilitate agreement on the removal of internal tariffs on agricultural products, but also provided a mechanism to rebalance the perceived asymmetric benefits of trade in manufactured goods. In 1975, the European Regional Development Fund (ERDF) was created (to complement the ESF and EAGGF created already in 1957), justified with reference to how "an effective policy on regional structures is an essential prerequisite to the realization of Economic and Monetary Union" while recognising that allocation of funds should take into account both the regional and the Community perspective.[9] The ERDF introduced programming by objectives, geographical prioritisation and additionality to national investments, all intended to foster good governance in the beneficiary regions. (Cipriani, 2018, p. 143) Beyond the Treaty provisions on structural funds, there are neither general nor specific Treaty provisions that could be used to establish a large-scale transfer system between the Member States.

Contribution of the Legal Service on the Proposal for a Regulation of the European Parliament and of the Council on a governance framework for the budgetary instrument for convergence and competitiveness for the euro area.

[9] Regulation (EEC) No 724/75 of the Council of 18 March 1975 establishing a European Regional Development Fund, OJ *L 73, 21.3.1975, s. 1—7,* Preamble.

From the 1980's onward, parallel with the creation of the ambitious single market agenda and the successive accession of relatively less developed new Member States, the role of redistribution has been increasingly taken over by the Union's Cohesion Policy. It saw a massive increase in its size and started to approach CAP as the largest Union policy. In 1994, the Cohesion Fund was also created to provide a financial contribution to projects in the fields of the environment and trans-European networks.[10] With the Single European Act (1986) economic and social cohesion became an explicit competence of the European Community, defined in particular through the aim of "reducing disparities between the various regions and the backwardness of the least-favoured regions".[11] The importance of these funds further increased with the enlargement of 2004 to countries facing regional and industrial challenges Cipriani 2018, p.144).

In 2008, the Treaty of Lisbon introduced a third dimension of EU cohesion in the form of territorial cohesion, and defined strengthening the EU's economic, social and territorial cohesion as an EU objective.[12] Dirk Ahnert, Director General of DG REGIO at the European Commission, explained in 2009 that the *territorial approach* is what characterises this policy area: "The selection of regions as the basis on which Cohesion Policy is implemented not only responds to the mandate given to Cohesion Policy by the Treaty to promote regional development." (Ahner, 2019, p. 4) He goes on to spell out the reasoning why cohesion policies focus on regions rather than on Member States: "To reflect the specificities of the local context, the policy should target territories featuring sufficient homogeneity. EU countries rarely correspond to such territories." (Ahner, 2019, p.4) This encapsulates the traditional thinking of EU cohesion policies.

2.2. Competence and the EU budget

The EU budget is not just about money but a "litmus test of the European integration process"; the arrangements "reflect the balance of powers and the share of competences between the EU as territorial collectivity and its Member States". (Cipriani, 2018, p. 142) Traditionally EU funding has indeed followed EU competence. When the EU has wished to fund something, this has required not only adding the relevant entry in the budget but also approving a legal act on the matter, which requires a legal basis in the EU Treaties. For the Court, "[t]he requirement that a basic act must be adopted before an appropriation is implemented derives directly from the scheme of the Treaty, in accordance with which the conditions governing the exercise of legislative powers and budgetary powers are not the same."[13] The EU Financial Regulation repeats the same principle: "Appropriations entered in the budget for any Union action shall only be used if a basic act has been adopted."[14] Under Article 2 of the same Regulation,

[10] Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund.
[11] Article 130a: "In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion . In particular the Community shall aim at reducing disparities between the various regions and the backwardness of the least-favoured regions."
[12] Article 3(2) TEU: "It shall promote economic, social and territorial cohesion, and solidarity among Member States."
[13] Case C-106/96, *UK v Commission,* para 28. See also Case 242/87 *Commission v Council,* para 16-18.
[14] Regulation (EU, Euratom) 2018/1046 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,

'basic act' means 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 or of the budgetary guarantee or financial assistance backed by the budget, and which may take any of the following forms […]

The Article then refers specifically to legal acts approved under the TFEU, the Euratom Treaty or specific articles in the EU Treaty. In practice this has meant that the EU has been able to fund matters only to the extent they fall under EU competence, the matter has been regulated in EU legislation and to the extent it has been possible to identify an explicit or more general legal basis for the act. The Treaties include various legal bases that refer explicitly to the possibility to direct EU funds to promote a cause, (such as Article 40(3) TFEU on agricultural guidance and guarantee funds, or Article 162 TFEU on the European Social Fund), or where the idea of funding is implicit but clearly a part of the envisaged EU toolkit (such as development cooperation, economic, financial and technical cooperation or humanitarian aid).

Competence considerations are somewhat less straightforward in policy areas where the EU primarily works through funding rather than legislative action. Unlike in areas such as the internal market, agriculture or environment, where regulation is about creating substantive EU legislation that applies in the whole EU, cohesion policies are primarily about setting a legislative framework for directing funds and creating conditions for allocating Union funding to certain national projects. In other words, while Cohesion Policy has a number of Treaty-based objectives relating to 'reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions', these objectives are reached by funding measures at national or regional levels, not by exercising a substantive legislative and regulatory competence aiming at bringing national legislation in line with a uniform EU model. The modus operandi of Cohesion Policy is somewhat similar to that in development policy (Article 208 TFEU) or humanitarian aid (Article 212 TFEU) where the Treaty defines various EU objectives to be conducted in third states. However, in these areas the Treaty specifies that "the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs" (Article 4(4) TFEU). No such clause clarifying the relationship of EU funding action on national policy competence exists for Cohesion Policy; therefore, one would assume that it follows the competence division in the policy field that is relevant for the measures that are to be funded. After all, 'each provision of EU law must be interpreted in such a way as to guarantee that there is no conflict between it and the general scheme of which it is part' (Lenaerts and Gutiérrez-Fons 2013).

2.3. The legal framework of Cohesion Policy

The system of structural funds has an explicit legal basis in the Treaties,[15] which recognise a connection between economic and cohesion policies.[16] Article 174 TFEU establishes the

(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, Article 58(1).

[15] Art. 162-164, Art. 170-172, Art. 174-178 TFEU.

[16] Article 175 TFEU establishes an obligation for the Member States to "conduct their economic policies and shall coordinate them in such a way as, in addition, to attain "the Cohesion Policy objectives (Article 174 TFEU).

objectives of Cohesion Policy: "reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions", and further defines that [a]mong the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions." Article 175 TFEU establishes connections with other fields of Union policy. It first requires the Member States to conduct their economic policies and "coordinate them in such a way as, in addition, to attain the objectives set out in Article 174". In addition to the Treaty provisions, there is also a specific protocol (No 28) on economic, social and territorial cohesion annexed to the Treaties and with the same legal status (European Committee of the Regions, 2023).

The Treaties establish that the formulation and implementation its internal market policies and actions are to take into account and contribute to the objectives of Cohesion Policy. In this way, its aims have a similar characteristic to environmental protection requirements, which "must be integrated into the definition and implementation of the Union's policies and activities" in a horizontal manner (Article 11 TFEU). In planning action in other policy areas, the effect of the envisaged action on Cohesion Policy objectives must be considered. But as the Committee of Regions has pointed out, there are currently no mechanisms in place for ensuring this principle is indeed observed (European Committee of the Regions, 2023). The Union is also to support the achievement of these objectives by the action it takes through the Structural Funds,[17] the European Investment Bank and the other existing Financial Instruments. Article 176 TFEU specifies that the "European Regional Development Fund is intended to help to redress the main regional imbalances in the Union through participation in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions". Article 177 TFEU includes a legal basis for the definition of "the tasks, priority objectives and the organisation of the Structural Funds" and the "general rules applicable to them and the provisions necessary to ensure their effectiveness and the coordination of the Funds" in the ordinary legislative procedure, which is also to be used for setting up a Cohesion Fund to provide "a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure". Environmental policy and trans-European networks thus enjoy a prime place in Cohesion Policy as they are specifically integrated into the action to be taken under the Cohesion Fund.

In these areas, different EU competences and legal bases seem partially overlapping. Traditionally a great part of environmental funding has been channelled through funds in other policy areas, in particular agriculture and cohesion, while policy funds specifically dedicated to environmental policy have remained scarce.[18] The possibility of using the Cohesion Fund to finance "specific projects in Member States in the area of transport infrastructure" is also explicitly mentioned in Article 171(1) TFEU on trans-European networks. In addition, trans-European networks is also defined as self-standing shared competence in the Treaties and refers to such networks in the areas of transport, telecommunications and energy infrastructures, with explicit Treaty provisions in Title XVI of

[17] European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund.

[18] See however Regulation (EU) 2021/783 establishing a Programme for the Environment and Climate Action (LIFE), and repealing Regulation (EU) No 1293/2013, which is based on Article 192(1) TFEU.

the TFEU. The legal basis in Article 172 TFEU has been used to approve various legal acts and funding measures in these areas.[19] A topical example of this is the Rail Baltica project, which is financed by the three Baltic States and co-funded by the EU up to 85% of the total eligible costs under the Connecting Europe Facility (CEF) funding instrument on development of high performing, sustainable and efficiently interconnected trans-European networks in the fields of transport, energy and digital services.[20] CEF is not a Cohesion Policy instrument but is based on Articles 172 TFEU and Article 194 TFEU.

The Treaty provisions have been further developed into an integrated legislative framework through secondary legislation. Traditionally the legal basis in Article 177 TFEU has been used to regulate the structural funds.[21] These regulations establish the main policy objectives and the rules of (shared) management[22] but also define what kind of regions are entitled to support.[23] Regulation (EU) 2021/1058 further defines action taken by the European Regional Development Fund and the Cohesion Fund. The former is specifically aimed to

> *reducing disparities between the levels of development of the various regions within the Union, and to reducing the backwardness of the least favoured regions through participation in the structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions, including by promoting sustainable development and addressing environmental challenges (Article 2(2).*

The Cohesion Fund is to "contribute to projects in the field of environment and trans-European networks in the area of transport infrastructure (TEN-T)". Article 4 defines the specific (and broad) objectives of the two funds, and elaborates further that programmes to be supported "in each Member State shall be concentrated at national level or at the level of category of region" that is specified in the Regulation in a way where Member States are be

[19] See e.g. Regulation (EU) 2022/869 on guidelines for trans-European energy infrastructure; Directive (EU) 2021/1187 on streamlining measures for advancing the realisation of the trans-European network; Regulation (EU) 2021/1153 establishing the Connecting Europe Facility; Regulation (EU) 2021/694 establishing the Digital Europe Programme.

[20] Regulation (EU) 2021/1153 establishing the Connecting Europe Facility and repealing Regulations (EU) No 1316/2013 and (EU) No 283/2014

[21] Regulation (EU) 2021/1060 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy; Regulation (EU) 2021/1058 of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund; Regulation (EU) No 1303/2013 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; Regulation (EU) No 1300/2013 2013 on the Cohesion Fund and repealing Council Regulation (EC) No 1084/2006; Regulation (EU) 2018/1719 amending Regulation (EU) No 1303/2013 as regards the resources for economic, social and territorial cohesion and the resources for the Investment for growth and jobs goal; Regulation (EU, Euratom) 2018/1046 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; Regulation (EU) 2017/2305 amending Regulation (EU) No 1303/2013 as regards the changes to the resources for economic, social and territorial cohesion and to the resources for the Investment for growth and jobs goal and for the European territorial cooperation goal.

[22] See e.g. Regulation (EU) 2021/1060 laying down common provisions, Ibid.

[23] See e.g. Regulation (EU) 2021/1058 on the European Regional Development Fund and on the Cohesion Fund, Article 4.

classified, in terms of their gross national income ratio to three groups while regions are divided into more developed, transition and less developed regions (Article 4).

There is surprisingly little case law on Cohesion Policy and its scope. In its 1999 judgment on a case where Portugal claimed a Council Regulation violated the principle of economic and social cohesion, the Court simply stressed that while

> *the strengthening of economic and social cohesion is one of the objectives of the Community and, consequently, constitutes an important factor, in particular for the interpretation of Community law in the economic and social sphere, the provisions in question merely lay down a programme, so that the implementation of the objective of economic and social cohesion must be the result of the policies and actions of the Community and also of the Member States.*[24]

As an area of shared competence, Cohesion Policy remains subject to the principle of subsidiarity, which is about justifying why the EU in a given case not falling under its exclusive competence (i.e. matters in relation to which only the EU is competent to act) should act instead of the Member States.[25] As the Court noted in Case C-508/13,

> *Article 5(3) TEU refers to the principle of subsidiarity which provides that the European Union, in areas which do not fall within its exclusive competence, is to take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the European Union.*[26]

The application of the principle of subsidiarity presumes the existence of EU competence under the Treaties. The principle requires ”that the proposed action can, by reason of its scale or effects, be better achieved at EU level, given its objectives listed in Article 3 TEU and provisions specific to various areas”.[27] It neither limits or extends EU competence as compared to what is laid down in the Treaties, it merely requires a justification for its use. Therefore, the EU ”is to legislate only to the extent necessary and that Community measures should leave as much scope for national decision as possible, consistent however with securing the aim of the measure and observing the requirements of the Treaty […] the principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice.”[28]

Therefore, while in public debates the principle of subsidiarity is often invoked to challenge existence of EU competence, according to the Treaties the principle only comes to play when the EU is competent to act, and its competence is of another nature than exclusive. Considerations of subsidiarity are also important for EU spending, which should equally depend on

> *an assessment of the added value compared to action taken by national governments only. This requires establishing to what extent different policy options at EU level would meet their objectives, with what benefits, at what cost, with what implications for*

[24] Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, para 86.
[25] See also Protocol (No 2) on the application of the principles of subsidiarity and proportionality.
[26] Case C-508/13, *Estonia v EP and Council,* para 44.
[27] Ibid, para 53.
[28] Case C-176/09, *Luxembourg v EP and the Council,* para 77-78.

different stakeholders, and at what risk of unintended consequences. (Cipriani, 2018, p. 142)

During the recent years these kinds of considerations have received far too little attention when considering the new purposes for which Cohesion Policy funding is used.

2.4. Article 175, 3rd paragraph, TFEU

The recent transformation – or perhaps more accurately, revolution – of Cohesion Policy has been enabled by Article 175, 3rd paragraph, TFEU – an obscure, historically little-used clause within the title on economic, social and territorial cohesion. Under this provision,

> *If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.*

The paragraph has an ambiguous wording, and views diverge on whether this is a broad or a narrow enabling clause. De Witte argues that this legal basis "partakes in the broadly defined aims of cohesion" and thus "allows for a broad range of measures, namely any 'action' that would 'prove necessary'" (de Witte 2023). Read this way, one wonders if any other legal bases in the EU Treaties would ever be needed for any purpose, as de Witte's reading could plausibly be used to cover any desired action between heaven and earth.

The placement and formulation of the clause would make another reading more convincing. The provision is formulated as a flexibility clause, which means its function would normally be rather limited. "Specific action" conjures up images of something rather narrow in scope and tied to supplementing EU action under the structural funds, which rely on their own explicit legal basis. This is also the interpretation the Court took in the single case that deals specifically with using Article 175, 3rd paragraph, TFEU as a legal basis. The case concerned the Community financial contributions to the International Fund for Ireland (2009), which was set up to promote economic and social advance and to encourage contact, dialogue and reconciliation between nationalists and unionists throughout Ireland.[29] The Council had adopted the Regulation, as proposed by the Commission (COM (2006) 564 final), on the basis of the general flexibility clause (Article 308 TEC; now Article 352 TFEU), which the Parliament challenged, arguing for the Cohesion Policy legal basis that would have offered it a much stronger role in the approval process. The case is interesting as it sheds light on how the three institutions thought about the scope of Cohesion Policy in general and the legal basis in Article 175, 3rd paragraph, TFEU, in particular, in 2007-2009.

The Council defended the chosen legal basis with reference to how the concept of 'specific actions' within the meaning of Article 175, 3rd paragraph, TFEU must be understood as forming part of the Cohesion Policy objectives; therefore, specific action outside the Structural Funds was to be used for strengthening the economic and social cohesion of the Community in order to promote its overall harmonious development.[30] Contributing financially to an

[29] Case C-166/07, *Parliament* v. *Council,* EU:C:2009:213.
[30] Para 30 of the ruling.

international organisation working mainly for Irish intra-community reconciliation was clearly not a Cohesion Policy objective. Before the Court, the Council argued

> *La structure et l'économie générale des articles 158 et 159 CE sont telles que la notion d'action spécifique doit être entendue comme faisant partie des objectifs visés à l'article 158 CE. Il s'ensuit que* ***l'adoption d' "une action spécifique en dehors des fonds" constitue un moyen à utiliser, au même titre que la participation de la Communauté au travers des fonds, pour renforcer la cohésion économique et sociale de la Communauté****, et ce afin de promouvoir son développement harmonieux global.*[31]

The Council thus clearly saw the "a specific action outside the Funds" as a means to be used to promote *Cohesion Policy objectives*. What was deemed necessary for verifying the appropriateness of the legal basis was to consider whether the act and its content could be aligned with "l'esprit de l'article 158 CE et figurer donc en tant qu'action spécifique au termes du troisième alinéa de l'article 159 CE".[32]

The Commission had not provided any justification for using Article 308 TEC as legal basis in its proposal. Before the Court, its argumentation followed a different line from that of the Council, focusing on the 'general purpose' of Cohesion Policy, which could not be reconciled with specific intervention in favour of a single region.[33] The use of the legal basis required general intervention promoting the harmonious development of the whole Union, as indicated in Article 174 TFEU. "Specific actions" was not be understood as ad hoc or one-off interventions.[34] The general nature of Cohesion Policy measures did not exclude taking into consideration difficulties or challenges which do not arise in a uniform manner throughout the EU territory. After all, under the Structural Funds, the rules of intervention and the nature of EU assistance made available to Member States and regions are modulated according to local and regional conditions.[35] Therefore, adaptation to the circumstances was not in contradiction with the generalized nature of Cohesion Policy. While legislation in this area had never followed an indistinctly uniform approach, it was necessary to design the policy measures on the basis of an approach which applies to the whole of the EU territory. While there was a need to secure EU-wide effort to promote cohesion, there was no need to remain blind to specific needs. However, such differentiations are qualitatively different from an intervention limited from the outset to a single region in an ad hoc manner.[36]

In his opinion, the Advocate General was willing to see Cohesion Policy as a broad and undefined policy field. He emphasized how

> *The general wording of that task permits a degree of flexibility as well as adaptability in the aims pursued by the Community legislature when it wishes to provide for common actions. Consequently, the priority areas of action change regularly in accordance with the economic and social needs which manifest themselves in the various Member States. The protean nature of economic and social cohesion and the general nature of the tasks*

[31] Mémoire en défense déposé par le Conseil de l'Union européenne, conformément à l'article 40, paragraphe 1, du règlement de procédure dans l'affaire C-166/07, Bruxelles, le 11 juin 2007, received through access to documents request (in file with the author).
[32] Ibid., para 22.
[33] Mémoire en intervention déposé conformément à l'article 40 du Protocole sur le Statut de la Cour de justice, par la Commission des Communautés européennes, para 27.
[34] Ibid., para 28.
[35] Ibid., para 31.
[36] Para 32.

> *given to that policy mean that it is difficult to define it exactly. It thus proves difficult to lay down the limits of the area covered by the policy because economic and social cohesion emerges as a broad overall concept with imprecise contours. The Court's case-law offers no decisive guidance in that connection.*[37]

The Court did not follow the Advocate General's lead but found instead that Cohesion Policy did indeed have a specific substance; not every measure with economic effects could be defined as Cohesion Policy. The Court acknowledged that the "objectives of Cohesion Policy are to be taken into account by the Member States and the Community when formulating and implementing Community policies. The Community is also required to support the realisation of those objectives, in particular by the action which it takes through the Structural Funds" (para 45). As regards the "specific action outside those Funds" mentioned in the final paragraph of Article 175 TFEU, the Court noted,

> *It is, admittedly, true that the latter provision does not set out the form which such specific actions can take. However, […] the Community, through all of its actions, implements an independent Community policy, with the result that Title XVII of the EC Treaty provides adequate legal bases allowing for the adoption of means of action which are specific to the Community, administered in accordance with the Community regulatory framework and the content of which* ***does not extend beyond the scope of the Community's policy on economic and social cohesion****. (para 46, emphasis added)*

Contrary to what the Parliament had argued, it could not be *guaranteed* that all of the interventions of the Fund which are financed by the Community would "in fact address the *objectives that are specific to the Community's policy on economic and social cohesion*"; therefore, the Council was entitled to conclude that the range of activities financed by the contested regulation would extend beyond the scope of the Community's policy on economic and social cohesion" (emphasis added). This is because Article 175 TFEU "covers only independent action by the Community carried out in accordance with the Community regulatory framework and whose content does not extend beyond the scope of the Community's policy on economic and social cohesion" (paras 62-64). While broad in scope, Cohesion Policy was clearly not without any contours; and the elements falling outside under Cohesion Policy required another legal basis (Article 308 TEC). In other words, measures adopted on the basis of this provision must indeed "address the objectives that are specific to the [EU]'s policy on economic and social cohesion."[38] The ambiguity of the wording of the flexibility clause did not extend its scope beyond the aims of Cohesion Policy. Leo Flynn, a legal adviser working for the Commission, argues that this ruling "makes clear that while the material scope of the Cohesion Policy legal basis is broad, it is not infinitely elastic". However, he notes that, in the institutions, "the message taken from the IFI ruling focuses more on the opportunities provided by the third paragraph of Article 175 TFEU and less on its constraints" (Flynn, 2019).

Before the pandemic, the provision had indeed seen relatively little use. In addition to acting as a legal basis for limited external action, it had been used to set up the European Solidarity Fund in 2002 intended to offer rapid financial support to Member States facing major natural

[37] Opinion of AG Bot in Case C-166/07, *Parliament* v. *Council,* EU:C:2009:213, para 81-82.
[38] Case C-149/96, *Portugal* v. *Council*, EU:C:1999:92, at para. 62.

disasters,[39] to regulate actions around EU funds[40] and, more recently, to create a Fund for European Aid to the Most Deprived[41] and the Structural Reform Support Programme in 2017.[42] The general objective of the latter is, under Article 4,

> *to contribute to institutional, administrative and growth-sustaining structural reforms in the Member States by providing support to national authorities for measures aimed at reforming and strengthening institutions, governance, public administration, and economic and social sectors in response to economic and social challenges, with a view to enhancing cohesion, competitiveness, productivity, sustainable growth, job creation, and investment, in particular in the context of economic governance processes, including through assistance for the efficient, effective and transparent use of the Union funds.*

This regulation is interesting not only because it places the word "structural reforms" on the Cohesion Policy agenda, but also because it includes one of the first attempts to move beyond the purely transactional role of cohesion policies by introducing the concept of European added value in the Structural reform programme regulation.[43] Finally, it creates a link between Cohesion Policy and administrative support. In addition to the Cohesion flexibility clause Article 175, 3rd paragraph TFEU, the regulation setting up the Structural Reform Support Programme relied also on a second legal basis, Article 197(2) TFEU. According to this rather obscure and technical provision added by the Treaty of Lisbon and never previously used in any other context:

> *The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support.*

According to the Council register of documents, its Legal Service never provided legal advice on this proposal. However, the Commission argued in its proposal that the combination of these two legal bases

> *allows for a comprehensive approach in devising a Union programme supporting the capacity and endeavours of the national authorities of Member States to carry out and*

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[39] Council Regulation 2012/2002 of 11 November 2002 establishing the European Solidarity Fund, [2002] OJ, L 311/3, later amended by Regulation 661/2014 of the European Parliament and of the Council of 15 May 2014, [2014] OJ, L 189/143.

[40] Regulation (EU) 2019/1796 amending Regulation (EU) No 1309/2013 on the European Globalisation Adjustment Fund (2014-2020), OJ L 279I , 31.10.2019, p. 4–6; Regulation (EU) 2018/1671 amending Regulation (EU) 2017/825 to increase the financial envelope of the Structural Reform Support Programme and adapt its general objective, OJ L 284, 12.11.2018, p. 3–5; Regulation (EU) 2017/2396 mending Regulations (EU) No 1316/2013 and (EU) 2015/1017 as regards the extension of the duration of the European Fund for Strategic Investments as well as the introduction of technical enhancements for that Fund and the European Investment Advisory Hub, OJ L 345, 27.12.2017, p. 34–52; Regulation (EU) 2017/825 on the establishment of the Structural Reform Support Programme for the period 2017 to 2020 and amending Regulations (EU) No 1303/2013 and (EU) No 1305/2013, OJ L 129, 19.5.2017, p. 1–16; Regulation (EU) 2015/1017 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, OJ L 169, 1.7.2015, p. 1–38.

[41] Regulation (EU) No 223/2014 on the Fund for European Aid to the Most Deprived.

[42] Regulation (EU) 2017/825 on the establishment of the Structural Reform Support Programme for the period 2017 to 2020 and amending Regulations (EU) No 1303/2013 and (EU) No 1305/2013, OJ L 129, 19.5.2017, p. 1–16.

[43] Ibid.,Article 3.

implement growth-enhancing reforms (institutional – including governance aspects – structural and/or administrative reforms) to foster sustainable development and innovation and, in this context, to make more efficient and effective use of Union funds (COM(2015) 701 final).

From the perspective of legal basis, the Commission defined a three-fold objective:

i) strengthening the administrative capacity of Member States in respect of the effective implementation of Union law through administrative cooperation among national authorities of the Member States, and ii) strengthening economic, social and territorial cohesion within the Union, outside of the actions undertaken with the ESI funds; this coordinated action would ultimately contribute to iii) the attainment of a better coordination of economic policies of Member States.

The emphasis of the programme was on providing expertise: it was defined as "the most suitable means of supporting on the ground those Member States that implement growth-enhancing reforms, since the Union is in a better position than Member States to identify, mobilise and coordinate the best available expertise and to provide a coordinated approach to technical support in Member States requesting assistance". While the substantive aims of the regulation were largely in line with those defined in Article 197(2) TFEU, it aimed to build Member States' administrative capacity not just to implement Union law as defined in Article 197(2) TFEU but in fact any structural reform that usually fall substantively outside EU competence. This is likely the reason why the Commission saw it necessary to use Article 175, 3rd paragraph, TFEU as an additional legal basis. Since this proposal, Article 197(2) TFEU has served as a joint legal basis for three large-scale Cohesion Policy instruments,[44] providing the formal justification for directing funding to large projects involving the operation of national administrations and their traditional tasks, and reaching far beyond the examples of technical support mentioned in Article 197(2) TFEU.

During and after the polycrisis, Article 175, 3rd paragraph, TFEU has become the basis of a major part of the EU's total spending, either alone or in conjunction with Article 197(2) TFEU or the Article 122 TFEU emergency provision. In the absence of other quickly available EU funding there has been increasing pressure to also use cohesion funding to address the implications of various acute crises: first the financial crisis,[45] then natural disasters,[46] the immediate effects of the Covid crisis[47] and most recently the effects of Russia's war in Ukraine

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[44] Ibid.; Regulation (EU) 2018/1671 amending Regulation (EU) 2017/825 to increase the financial envelope of the Structural Reform Support Programme and adapt its general objective; Regulation (EU) 2021/240 establishing a Technical Support Instrument.

[45] See Regulation (EU) 2016/2135 amending Regulation (EU) No 1303/2013 as regards certain provisions relating to financial management for certain Member States experiencing or threatened with serious difficulties with respect to their financial stability; Regulation (EU) 2015/1839 amending Regulation (EU) No 1303/2013 as regards specific measures for Greece.

[46] Regulation (EU) 2017/1199 amending Regulation (EU) No 1303/2013 as regards specific measures to provide additional assistance to Member States affected by natural disasters.

[47] Regulation (EU) 2020/558 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; Regulation (EU) 2020/2221 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); Regulation (EU) 2020/460 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise

(see further below).[48] The ease at which this opening has been done is partly due to the nearly complete lack of jurisprudence on any of these provisions but also the fact that many states have in practice struggled to find use for their share of cohesion funds. However, as the ECA has pointed out, repeatedly using Cohesion Policy to address crises may divert the EU from its primary strategic goal of reducing disparities in development between regions (European Court of Auditors, 2023a).

2.5. Towards new EU spending priorities

Cohesion Policy counts today as the EU's main investment policy. In line with Article 194 TFEU, over the years, the EU has dedicated a significant proportion of its activities and budget to reducing the disparities among regions, with particular emphasis on rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps. But its scope has not been unlimited. The classic cohesion policies financed through the Cohesion Fund, the European Regional Development Fund and the European Social Fund finance investments in a large variety of areas such as transportation, energy, environment and digitalisation, but also including non-physical investments in education and culture. Nonetheless, while seemingly broad in scope, investments under the rubric of cohesion always retained certain key features, most importantly co-financing by Member States, (Vita, 2017) multilevel governance (empowerment of sub-national, regional, and local actors), as well as use of funding only to cover the actual costs of investments. As described by one observer,

> *Cohesion Policy is more than a 'side-payment' to buy support for other EU programmes and agendas. In public finance terms, Cohesion Policy has an 'allocative' rationale. The aim is to raise the welfare and well-being of the territories and people of the EU through growth-enhancing investment strategies and projects. Accordingly, its means and methods differ from unconditional transfer payments that lie within the policy toolkit of national social policies or, in the case of the EU, income support to farmers under the CAP. Indeed, there are many strings attached to the use of Cohesion policy resources to ensure that it is used effectively towards meeting its developmental objectives, even if the effects are disputed. […] In short, Cohesion Policy is anything but a 'blank cheque'.* (Bachtler & Mendez, 2013, pp. 12-13)

These policies have generated tangible benefits for the recipient countries but, beyond the redistributive function, there is no obvious value added to financing those policies through the European budget instead of the national one. In this sense, it is somewhat unclear how the principle of subsidiarity has ever been applied in Cohesion Policy, also given its nature as more a funding than legislative competence. Funding these measures at the EU level is purely

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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).

[48] Regulation (EU) 2023/435 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; Regulation (EU) 2022/2039 amending Regulations (EU) No 1303/2013 and (EU) 2021/1060 as regards additional flexibility to address the consequences of the military aggression of the Russian Federation FAST (Flexible Assistance for Territories) – CARE; Regulation (EU) 2022/613 amending Regulations (EU) No 1303/2013 and (EU) No 223/2014 as regards increased pre-financing from REACT-EU resources and the establishment of a unit cost; Regulation (EU) 2022/562 amending Regulations (EU) No 1303/2013 and (EU) No 223/2014 as regards Cohesion's Action for Refugees in Europe (CARE).

a political choice, deemed necessary for ensuring the acceptability and attractiveness of the integration project in all parts of the Union. The principle of subsidiarity would, however, seem to point in the direction of some kind of European added value when projects to be funded are selected. Yet, the concept has been largely absent from the design and the practical application of the legal framework.

One would think that, however sound the initial reasoning behind agricultural and cohesion policies, after many decades and with all the new common challenges facing the Union, the justification for their dominance might now be diminishing. Yet, any serious discussion on a fundamental refocusing of the EU budget remains very difficult (Becker, 2012; High Level Group on Own Resources, 2016). Member States continue to measure their success in MFF negotiations by a single figure: the difference between what each of them gets from the EU budget and what it pays in. And since in the absence of agreement the status quo will prevail, the power of inertia is immense (Becker, 2012). Funding for programmes that bring European added value but do not create calculable payouts to individual Member States tend to be the first to be squeezed. They get "treated as 'other programmes' and are allocated whatever is left under some artificial overall limit (the infamous 1%)." (Lehner, 2020, pp. 22-23)

Yet, in 2018, a little-noticed but fundamental change took place in the Financial Regulation.[49] A new sub-item was added to Article 125, first paragraph, on 'Forms of Union contribution' (emphasis added):

> *Union contributions under direct, shared and indirect management shall help achieve a Union policy objective and the results specified and may take any of the following forms:*
>
> *… (ii)* ***the achievement of results measured by reference to previously set milestones or through performance indicators;***

The Commission proposal explains this as follows:

> *More emphasis should be put on performance and results. It is thus appropriate to define an additional form of financing not linked to costs of the relevant operations in addition to the forms of Union contribution already well established (reimbursement of the eligible costs actually incurred, unit cost, lump sums and flat-rate financing). This form of financing should be either based on the fulfilment of certain conditions ex ante or the achievement of results measured by reference to the previously set milestones or through performance indicators.*

It thus became possible to provide EU financing as a pure incentive, irrespective of the actual cost of the underlying measures. This change attracted little attention and no doubt appeared technical and inconsequential to those few policy makers that paid attention. Yet it created a whole new way for the EU to project its power irrespective of competence limitations and laid the foundation for a revolution in the use EU funds (Leino-Sandberg, 2023), which the Commission developed in a series of legislative proposals preceding the RRF and is now making full use of in the context of the RRF (Leino-Sandberg & Lindseth, 2023). By 2018, Cohesion Policy had been firmly identified by the EU institutions as a way to fill the 'gaps' in the 'incomplete policy side of EMU', as a Commission legal adviser Leo Flynn explains, 'to overcome the limitations associated with Article 121 TFEU. It is perfectly proper for them to

[49] I thank Richard Crowe for pointing this out to me.

adopt such measures on another legal base if the measures in question come with the ambit of the Treaty provision used'. (Flynn, 2019) In the Commission it led to a row of proposals that were the result of strategic planning on how the 'open-ended' provisions of Cohesion Policy could be invoked to strengthen and broaden Union action in the area of the EMU, relying on a reinterpretation of what 'Cohesion Policy' can be.

3. EMU asymmetry and cohesion

The euro crisis served as a launching pad for several strands of debate on how to make use of EU common funds to improve Member States' policies and prop up the euro area. Macroeconomic conditionality had already existed since 2006, but it was substantially widened in the aftermath of the euro crisis and extended to all ESI funds (Centre for European Policy Studies, 2020). Another strand of the EMU-deepening debate revolved around various forms of common borrowing, typically in an intergovernmental setting. Usually, such proposals came with access conditions intended to serve the secondary goal of incentivising better fiscal and economic policies at the national level (Leino & Saarenheimo, 2017). Furthermore, a number of proposals envisaged the creation of an additional EU (or, more often, Euro area) vehicle, a "fiscal capacity", that would interact with Member States through a system of fiscal cross-subsidies (Juncker et al, 2017). Progress took a long time to come, but things started finally to accelerate when the decision was taken to pursue EMU deepening within the framework of the EU budget, largely based on the EU competence under Cohesion Policy. In this process, the institutions effectively reversed the Treaty-defined link between economic policies and cohesion policies. Cohesion Policy became an instrument in the service of the Institutions' economic and related fiscal policy aims, with little or no connection to the actual cohesion objectives.

3.1. RDT and the EISF – merging cohesion policies and economic policies

In his 2017 State of the Union address, President Juncker (2017) announced the Commissions intent to pursue a dedicated euro area budget line within the EU budget. Following this, in May 2018 the Commission proposed two new instruments. The first proposal involved a Reform Support Programme (RSP), the core part of it was the Reform Delivery Tool (RDT) (COM(2018) 391 final), based on Article 175, 3rd paragraph, TFEU and Article 197(2) TFEU. It was to provide Member States pure grants, from the EU budget, as reward for implementing structural reforms identified in the country-specific recommendations and deemed desirable by the Commission. As such, it represented a fundamental departure from the principles governing the use of EU funds and took full use of the 2018 amendment of the Financial Regulation described above. Up to that point, grants from the EU budget to Member States only financed actual costs of the underlying measures. Under the RDT, the amount of the grant was to be determined by the significance of the reform, not by its costs. Simply put, it was about using EU funds to buy influence in Member States' structural policies, which were under national competence. The second instrument was the European Investment Stabilisation Function (EISF) (COM(2018) 387 final), which was to provide loans to euro-area or ERM2 Member State in financial difficulties so as to allow them to maintain adequate level public investment. Like the RDT, the EISF was legally framed as a Cohesion Policy instrument, even if its primary aim was in cyclical stabilisation. It would, according to the Commission, entail no permanent transfers, and eligibility would be conditional on "strict compliance with decisions

and recommendations under the Union's fiscal and economic surveillance framework". While its proposed financial structure was modest, with a maximum revolving loan capacity of €30 billion, it was explicitly presented as a harbinger of greater things to come.

To my knowledge, the only Member State to react explicitly to the competence implications of the two proposals was Finland, which found the first proposal highly problematic from the perspective of its legal basis. The government argued that the aims of the proposal had little to do with the aims of Cohesion Policy; instead, it seemed to be aimed at deepening the EMU and promoting structural reforms that are part of economic and social policies. Any effect on Cohesion Policies was at most subsidiary to economic policy aims. The Parliament's Constitutional Law Committee shared this analysis and stressed that economic and social policies fall under national competence, which emphasized the need to clarify the competence structure of the proposal, keeping in mind also its potential negative effects on democratic legitimacy (PeVL 37/2018 vp). It also saw that the proposals would lead to an increase of the powers of the Commission, which would evaluate the need to receive support, settle its amount and conditions, and recover the sum if necessary. The proposal was of a principled nature: if its legal logic were accepted, the size of the programme could later be increased to ensure steering effect (PeVL 37/2018 vp). When settling the Finnish position the Parliament's Grand Committee underlined that the support counted as direct budgetary support without connection to the general goals of Cohesion Policy or the actual costs of reforms, and it would be allocated to States irrespective of their financial status or level of development. Overall, this turned Cohesion Policy into an instrument for gaining economic policy objectives, which fall under national competence (SuVL 8/2018 vp; SuVL 3/2019 vp).

This was the exact objective of the EU institutions, which saw things differently. The measures were planned in the Commission, which continues to refuse to grant public access to its legal preparatory work. The legal scrutiny of its proposals took place in the Council, in particular by its Legal Service (CLS), which in a set of four legal opinions approved the new reading of Cohesion Policy. In the first of these opinions, on the EISF proposal (Council Legal Service, 2019a), the CLS quoted language from the *International Fund for Ireland (IFI)* Court ruling (quoted above) and acknowledged that, per the existing case law, 'cohesion cannot be used as an instrument to achieve the Union aims in other policy areas, such as economic policy' (para 28 of the opinion). However, the CLS then moved to stress that the 'notion of cohesion policy is particularly broad and inclusive', quoting the Advocate General's opinion in the case (para 35). Instead of considering the actual wording of Article 174 TFEU, the CLS argued that the 'scope of Article 174 TFEU is not limited to specific sectors and is defined functionally - on the basis of its objectives -, rather than organically'. From this the CLS concluded that the Treaty 'leaves a large margin of discretion to the legislator as to how the cohesion aims should be achieved' (para 35). What the CLS strategically did not quote as regards the IFI case is the clear obligation of the EU institutions to 'guarantee' that cohesion funds would 'in fact address the objectives that are specific to the Community's policy on economic and social cohesion' and thus direct these funds to purposes 'the content of which does not extend beyond the scope of the Community's policy on economic and social cohesion' as required by the Court (Council Legal Service, 2019a, paras. 46, 59, 62) .

Instead, the CLS argued, a legal analysis should consider whether cohesion is 'be[ing] used with the preponderant aim' either 'to enhance the economic coordination between Member States' or 'of ensuring the stability of the euro area' (paras 29 and 31). Over a series of rather elliptical paragraphs (paras 12, 40-41, and 54-57), it found in effect that the constitutional

design of the EMU along with derivative risks of *'asymmetric shocks'* across the Member States which that structural and economic asymmetry created (paras 3, 11-13, 38-41, 44, 54-56), gave rise to 'vulnerabilities' that the Union legislator was empowered to address as a matter of cohesion under in Article 175, 3rd paragraph, TFEU (paras 39 and 48). The CLS further underlined that the EISF financial support is to be used exclusively for purposes defined 'in the future common provision regulation for the cohesion policy, or social investment into education and training' (para 43). The outcome was that the CLS found that the Union had the tools to address the constitutional design of the EMU, but without the difficult process of a Treaty change. Instead, this could be achieved through a back-door process of legally re-engineering the concept of cohesion and extend it to cover economic 'vulnerabilities'.

A month later, the CLS (2019b) issued its opinion on the Reform Support Programme (RSP) upholding Article 175, 3rd paragraph, TFEU as its appropriate legal basis. In the Commission proposal, the justification for cohesion payments for structural reforms identified in the European Semester depended on whether or not the action 'promot[ed] resilient economic and social structures in the Member States' (para 8). While approving the legal basis, the Council Legal Service made its use "subject to a number of adaptations of provisions relating to i) the eligibility of reforms, ii) the assessment and allocation criteria for funding, iii) the governance and decision making, so that they constitute a genuine instrument of cohesion" understood, now, in terms of resilience (para 64). This time, the aim was to 'to underpin the economic resilience of Member States' and hence was an exercise of Cohesion Policy as now expansively reinterpreted (para 48). This attempted distinction, of course, borders on the absurd. These two aims are really one and the same and trying to differentiate between them is rather nonsensical. The opinion went so far as to claim that, if the moneys spent under the RSP advanced any of these aims, it should '[i]n principle' be seen as 'earmarked for policies which are identified as cohesion' (para 28). Neither of the two opinions make any mention of Member State competence in economic policy or the fact that, substantively, the structural reforms to be promoted fall under Member State competence and form a core area of their democratic policies.

3.2. The BICC – from the EU to the Euro Area

In the subsequent political discussions, the two proposals faced plenty of resistance and, after several round of negotiations in the Eurogroup, they were both superseded in 2019 by a new Commission proposal for a Budgetary Instrument for Convergence and Competitiveness (BICC) (COM(2019) 354 final). The BICC inherited some features from each of its parent proposals, but it bore much greater resemblance with the RDT than the EISF (COM(2019) 354 final). Crucially, the BICC was only available to euro area Member States. The model envisaged a process where projects for reforms and investments supported by the BICC would build on the European Semester timeline. Euro area Member States would submit proposals for packages of reforms and investments, linked to National Reform Programmes (Eurogroup, 2019). The contours of what would soon become the RRF were already clearly visible.

The Commission did not adopt a new proposal on the substantive elements of the BICC; instead, the substantive content of the Eurogroup agreement was to be translated into legislative text by the relevant Council working group by modifying the existing RSP proposal and, in particular, its section on the RDT. The Commission only adopted a narrow new proposal on the 'governance framework' of the BICC (European Commission, 2019), the essential

content of which was to limit the Council decision-making process to the euro-area Member States. The legal basis for this latter proposal was found in the area of economic governance: Article 136(1)(b) TFEU authorizing legislative actions for the euro area, in combination with 121(6) TFEU (Eurogroup, 2019). This further strengthens the impression that the primary aims of the instrument were not in the field of cohesion policies but rather in the field of economic and fiscal policies and, in particular, the coordination of economic policies within the monetary union.

The CLS opinion (2020) does not discuss the legal basis proposed by the Commission at all, but the "compatibility of the proposed allocation method with the cohesion legal basis (article 175, 3rd paragraph, TFEU)." The issue of why an instrument of cohesion policies should be put in the hands of the euro area Member States only is not raised. In its analysis, the CLS argues that "as the Cohesion Policy is formulated by the Treaties in broad and programmatic terms, the EU legislator has a large margin of discretion as to how those aims should be achieved, including the establishment of the allocation criteria of the particular cohesion instrument." The case law reference included in the opinion is to specific paragraphs in the above mentioned case concerning the International Fund for Ireland, which actually do not address the issue at all.[50] From this, the CLS (2020, para 20) moves on to argue that the matter needs to be assessed based on the "overall cohesion effects of the different allocation criteria taken as a whole, i.e. on the basis of their global interplay and final outcome, and not by examining each of those criteria in an individual or isolated manner". Then it goes on to argue that while "population may constitute a possible parameter for the distribution of cohesion funds", it needs to be "accompanied by other factors linked to the relative degree of prosperity of Member States". The special convergence needs of Member States in severe difficulties, which could "clearly be regarded as a cohesion relevant approach". Overall, therefore, the proposal was "ultimately, compatible with the cohesion objectives laid down in the Treaties. In addition, the selection of those criteria fall within the large margin of discretion available to the EU legislator in the field of cohesion."

At this point, the eclipsing of the traditional regional-developmental focus of Cohesion Policy in favour of the pursuit of more general economic policy goals like '*convergence and competitiveness*' across the Euro area or the EU as a whole—which the Council legal opinions for the EISF and RDT had suggested—was now essentially complete. This is clearly evidenced by how the legal bases of cohesion and economic governance were used interchangeably by the Commission, with the blessing of the CLS, for more or less the same legislative proposal. At the same time, the focus of Cohesion Policy shifted from regions to states or indeed the EU as a whole.

3.3. Re-interpreting subsidiarity

The transformation of cohesion policies that these proposals entailed also necessitated a new reading of the principle of subsidiarity. As noted above, until now, the principle has only been invoked in matters that substantively fall under EU competence. How this argumentation would apply to Cohesion Policy, which as indicated above, is more about funding national measures than exercising a legislative competence, is somewhat unclear. However, in the context of the three proposed legislative instruments the justification for why the EU should

[50] "See paragraphs 45, 52 and 53 of the ruling".

act had nothing to do with the aims of Cohesion Policy as such. Instead, the justification related entirely to the ambitions of the EU Institutions in the area of economic and fiscal policies: because the Member States had failed to exercise their *national* competence in line with the (formally non binding) guidance of the institutions, more effective measures were needed. In the context of the Reform Delivery Tool, the Commission argued,

> *[A]ddressing reforms challenges of structural nature, which will help strengthen the resilience of the economics concerned, of the Union and the euro area…, cannot be achieved to a sufficient degree by the Member States acting alone, while the Union's intervention can bring an additional value by establishing a Programme that can incentivise financially and support technically the design and implementation of structural reforms in the Union.*(COM(2018) 391 final)

Two observations should be made regarding this justification. First, with this, subsidiarity argumentation was extended from areas of shared competence into areas of national competence. But second, and even more interestingly, subsidiarity assumed a completely new meaning. While there is a plausible case for the (small) technical-support element of the proposal fulfilling the traditional subsidiarity criteria, the same cannot be said about its main part, the provision of financial incentives for structural reforms. For the latter, the issue was clearly no more about the measures in question being such that they could not, due to their 'scale or effects', be sufficiently achieved at the national level. There was no true European action involved at all; whether or not incentivised by the EU, these remained reforms with purely national scope and implemented at the national level. The real issue was that Member-State governments had been unwilling to implement the desired reforms, presumably due to their unpopularity among the electorate. To rectify this situation, the EU considered it necessary to put its thumb on the scale in the form of financial incentives, thereby silencing the critics.

As to the EISF, the subsidiarity justification only mentioned cohesion objectives in passing, arguing that it "should be avoided that economic shocks and significant economic downturns result into deeper and broader situations of stress negatively impacting economic and social cohesion". In every other aspect, the justification relied on the need to correct the claimed deficiencies of EMU: "There is a need to reinforce the availability of tools when the EMU is confronted with critical problems whenever large economic disruptions arise in individual Member States." Therefore,

> *These observations point to the necessity to establish a common instrument at Union level to absorb such shocks with a view to avoid widening differences in macro-economic performance between euro area Member States and also non-euro area Member States participating in the exchange rate mechanism (ERM II) imperilling economic and social cohesion.*
>
> *The objective of this proposed Regulation cannot be sufficiently achieved by the Member States individually and can therefore, by reason of the scale of the action, be better achieved at Union level in accordance with Article 5(3) TEU* (COM(2018) 387 final).

Finally, as regards the BICC proposal, the Commission argued that it "respects the principle of subsidiarity, as it only takes actions whose objectives cannot be sufficiently achieved by the Member States alone ('national insufficiency test'), and where the Union intervention can better achieve those objectives compared to actions of Member States alone ('comparative efficiency test'). "For the Commission,

policy guidance, such as strategic orientations for the euro area as a whole and setting targeted individual objectives for reforms and investment, which can also foster the overall convergence and competitiveness of the euro area, are indeed actions that can better be formulated and implemented at the Union level than at Member State level. The Commission is best placed to take the initiative and the Council to decide on such matters in line with their economic policy coordination role enshrined in the Treaties.

The Commission further stressed national competence in deciding "what action is necessary or opportune to be undertaken at national, regional or local level" (COM(2019) 354). This seems more than a little misleading. Even though the Member State was indeed allowed to propose the reforms and investments to be included in its plan, the decision on which measures would be accepted under the BICC and thereby 'incentivised' with European money remained entirely for the EU and strengthened the Commission's own institutional position considerably.

Subsidiarity principle bears a close relation to the concept of European value added, and for its part, the EISF proposal did give a nod to the latter:

European value added is at the heart of the debate on European public finances. EU resources should be used to finance European public goods. Such goods benefit the EU as a whole and cannot be ensured efficiently by any single Member State alone. In line with the principles of subsidiarity and proportionality, the EU should take action when it offers better value for every taxpayer's euro compared to action taken at national, regional or local level alone.

It is not unreasonable to argue that a European facility that provides loans to Member States in times when their access to the financial markets is hampered indeed provides value added beyond what Member States alone could achieve; though one might ask whether, by insulating Member States from market signals, such a facility might also have the unfortunate side effect of reducing incentives for fiscal discipline.

Be that as it may, it is clearly far more difficult to understand how incentivising Member States' policy choice on national matters, as the RDT and the BICC were to do, could be seen as serving any European public good. Presumably, the logic has to rely on the rather trivial observation that national decisions tend to have consequences beyond the borders, and that particularly in a monetary union, bad macroeconomic policies can have costly consequences to others. Hence, European value added gets to be defined not by any inherent benefits of taking a decision jointly at the European level, but by the assumption that Europe has the will and ability to incentivise national decisions towards a better direction. Underlying this, there seem to be an assumption that Member States, due to their incompetence, short-sightedness, or cynical brinkmanship, care less about their own resilience and creditworthiness than the Union does. If this is so, then the EU has a problem of democratic decision making bigger than what EU budget can remedy.

4. The "new" Cohesion Policy: NGEU in action

The preceding sections attempted to lay down the key elements of Cohesion Policy as they were traditionally understood to flow from the Treaties and how this understanding has changed due to 'legal engineering' taking place in the EU institutions. First of all, from a legal and substantive point of view, Cohesion Policy used to be understood as a policy with distinct

features and clear limits, characterised by its focus on reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions (article 174 TFEU). Examples of policy aims that are specifically named in the Treaties to be funded and integrated through Cohesion Policy are environmental aims and trans-European networks. Finally, as regards financing and procedural aspects, Cohesion Policy has relied on national co-funding and relied on procedures engaging local and regional actors.

After Covid-19 none of this remains the same. The Commission website still describes the EU's Cohesion Policy in the traditional terms as aiming "to strengthen the cohesion among EU Member States. In this way, they reduce disparities in EU regions, within and across Member States, and promote sustainable territorial development".[51] This is clearly misleading, as the 2021-2027 MFF, and in particular the NGEU, took Cohesion Policy in a completely different direction. This section analyses the scope and uses of RRF funding, its design as "money for reforms", the effect of this funding on subsidiarity and finally questions whether any legal constraints remain or are relevant after the transformation of Cohesion Policy through the NGEU.

When the Covid-19 crisis hit the Union, Cohesion Policy instruments were adapted to emergencies through three legislative acts amending the rules of the 2014-2020 programme period: In March 2020, the Commission launched the Coronavirus Response Investment Initiative (CRII), which introduced simplifications, liquidity and flexibility measures.[52] A month later the Coronavirus Response Investment Initiative Plus (CRII+) strengthened the flexibilities further and also provided for the possibility of 100 % EU co-financing for one year.[53] In December 2020, the Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU) provided €50.4 billion to Member States as a top up to the 2014-2020 Cohesion Policy funding.[54] It was specifically designed to serve as a short and medium term instrument for crisis repair and recovery actions. As opposed to regular Cohesion Policy funds, Member States received a high degree of discretion in allocating the additional funds between Funds, regions and types of eligible investments, reducing the usual focus of Cohesion Policy on regional disparities. The resources were distributed to Member States based on a methodology that differs from that used for regular Cohesion Policy funds. While the latter largely reflects regional disparities, REACT-EU captures only national-level data on the pre-pandemic situation and on the economic impact of the crisis on Member States (European Court of Auditors, 2023). Cohesion Policy was also used to set up the Just Transition Fund, to enable "regions and people to address the social, employment, economic and environmental

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[51] https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/spending/headings_en .

[52] Regulation (EU) 2020/460 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);

[53] Regulation (EU) 2020/559 of amending Regulation (EU) No 223/2014 as regards the introduction of specific measures for addressing the outbreak of COVID-19.

[54] Regulation (EU) 2020/2221 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).

impacts of the transition towards the Union's 2030 targets for energy and climate and a climate-neutral economy of the Union by 2050".[55]

The BICC, as part of the revised Reform Support Programme, was heading towards its final legislative approval. The global pandemic rearranged political imperatives, leading to the opportunity to come forward with something far more ambitious, in the form of the Next Generation EU package and its Recovery and Resilience Facility. The BICC proposal was withdrawn in May 2020, but its legacy lived on in the RRF, which took "as a basis the latest text discussed by the co-legislators on the proposal establishing a Reform Support Programme […] and makes appropriate changes to it to reflect the revised objectives, and the adjusted delivery mode of the new instrument (COM(2020) 408 final). If the substantive content remained largely the same. What changed was the scale and, crucially, the way the facility was financed. Until 2020, there was universal agreement in the institutions that any deeper fiscal integration, particularly if it involved issuance of EU debt, would require Treaty amendment (Leino-Sandberg, 2021; Leino-Sandberg & Ruffert, 2022). This understanding was to change nearly overnight. NGEU is financed by Union borrowing rather than through own resources, which made the amount of "cohesion" funding multiple compared to any previous MFF. NGEU has been created outside the normal Union budget as an "extra-budgetary" fund, and the 750 billion it raises from the markets is channelled to the EU budget as external assigned revenues (Leino-Sandberg & Raunio, 2023).

4.1. What is funded under the RRF?

From the perspective of its legal structure, NGEU is established through a creative two-tier approach. The EU Recovery Instrument (EURI) is based on Article 122 TFEU.[56] This regulation enumerates the purposes for which the funds shall be used on a general level but does not indicate how financial assistance is distributed to Member States. The distributive work is done by the Recovery and Resilience Facility (RRF) Regulation,[57] which is based on Article 175 (3) TFEU;[58] the suitability of which for the purpose was no longer discussed. The Commission proposal argues,

> *In line with Article 175 (third paragraph) TFEU, the Recovery and Resilience Facility under the regulation is aimed to contribute to enhancing cohesion, through measures that allow the Member States concerned to recover faster and in a more sustainable way from the COVID-19 crisis, and become (more) resilient* (COM(2020) 408 final).

[55] Regulation (EU) 2021/1229 of 14 July 2021 on the public sector loan facility under the Just Transition Mechanism, OJ L 274, 30.7.2021, p. 1–19, Regulation (EU) 2021/1057 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) No 1296/2013, OJ L 231, 30.6.2021, p. 21–59; Regulation (EU) 2021/1056 establishing the Just Transition Fund, OJ L 231, 30.6.2021, p. 1–20, Regulation (EU) 2021/691 of 28 April 2021 on the European Globalisation Adjustment Fund for Displaced Workers (EGF) and repealing Regulation (EU) No 1309/2013, OJ L 153, 3.5.2021, p. 48–70; Regulation (EU) 2021/523 of establishing the InvestEU Programme and amending Regulation (EU) 2015/1017, OJ L 107, 26.3.2021, p. 30–89.

[56] Council Regulation (EU) 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, O.J. 2021, L 433I/23.

[57] Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, p. 17–75; Regulation (EU) 2021/240 establishing a Technical Support Instrument, OJ L 57, 18.2.2021, p. 1–16; Regulation (EU) 2023/435 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, OJ L 63, 28.2.2023, p. 1–27.

[58] Regulation (EU) 2021/241.

These justifications are far from fulfilling any legal basis test. Under the Court's established case law the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include the aim and the content of the measure. Moreover, "in order to determine the appropriate legal basis, the legal framework within which new rules are situated may be taken into account, in particular in so far as that framework is capable of shedding light on the objective pursued by those rules".[59] A lot could have been said about the objectives of the facility. Yet the opinion of the CLS does not engage with the issue of using Article 175, 3rd paragraph, TFEU as the legal basis of the proposal at all. Though substantively not addressing the pandemic crisis, the NGEU is justified as a part of the EU emergency response to it, while the Cohesion Policy element enables handing out the funding without the same kind of conditions that have been seen as an inseparable part of Article 122 (2) TFEU (Leino-Sandberg & Ruffert, 2022). While the RRF objectives certainly reach far beyond those of Cohesion Policy as defined in the Treaties, in legal terms it is a Cohesion Policy instrument, because it derives its competence from Article 175 TFEU in the absence of other suitable legal bases. The flexibility clause (Article 352 TFEU) would have required unanimity in the Council, but is also unavailable to circumvent explicit limitations in other, more specific Treaty articles (including those limiting EU competence in economic and fiscal policy to coordinating action).

The NGEU, through its debt funding that multiplied the means of the normal EU budget, provided the means to turn Cohesion Policy into an instrument for various broad policy objectives, only some of which fall inside established EU competence. Gone is the earlier focus of cohesion policies, flowing from Article 174 TFEU, on reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions. The RRF objectives have been defined at two different levels. The RRF has a 'general objective', which addresses

> *the resilience, crisis preparedness, adjustment capacity and growth potential of the Member States, by mitigating the social and economic impact of that crisis, in particular on women, by contributing to the implementation of the European Pillar of Social Rights, by supporting the green transition, by contributing to the achievement of the Union's 2030 climate targets … and by complying with the objective of EU climate neutrality by 2050 and of the digital transition, thereby contributing to the upward economic and social convergence, restoring and promoting sustainable growth and the integration of the economies of the Union, fostering high quality employment creation, and contributing to the strategic autonomy of the Union alongside an open economy and generating European added value (Article 4(1).*

While no doubt laudable, these objectives seem extremely wide and rather distant from those mentioned in Article 174 TFEU. Instead of making sure that EU and national policy objectives contribute to the objectives of Article 174 TFEU, as the Treaty stipulates, they reverse the hierarchy and turn Cohesion Policy into an instrument for promoting a broad spectrum of other policy objectives that have fairly little to do with Article 174 TFEU. Cohesion only serves as an accessory role in the logic of the Facility (Dermine, 2023, p. 68). In addition, the RRF provides a 'specific objective', which is to provide members states with financial support to achieve the milestones and targets in their RRPs (Article 4(2).

In reality, the 'policy areas of European relevance' (Article 3) mentioned in the RRF are so wide as to encompass almost any public policy field, some of which fall under EU competence while

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[59] *Czech Republic* v *Parliament and Council*, C-482/17, para 32.

others belong to the national competence. RRF is not about creating common European policies beyond identifying certain broad priorities for EU funding. The general obligations of the RRF are tailored individually for each Member State in their individual recovery and resilience plans that include the milestones and targets of reforms and investments. The substantive content of the plans is proposed by the Member State and refined in confidential negotiations with the Commission, prior to the formal submission of the National Recovery and Resilience Plans (NRRPs). Once the Commission and the Member State have reached a common agreement, the remaining process is mostly a formality. There is virtually no role for the European Parliament, beyond the discharge procedure (Article 319 TFEU) and a rather mysterious "recovery and resilience dialogue".[60] The extent to which national parliaments have a say in the plans depends on national solutions, but the opaque and bilateral nature of the negotiations makes it difficult for national parliaments to fulfil their normal budgetary role (Leino-Sandberg & Raunio, 2023). The usual Cohesion Policy multi-layer governance structure with local and regional actors is notably absent and replaced by executive dominance at EU and national level: the relevant decisions are taken in confidential negotiations between the Commission and national capitals, and blessed by the Economic and Financial Committee.

Even if the funding would be justified with broad policy objectives such as 'green transition', in selecting them there is no process of directing funding to projects that would be most useful from the perspective of the EU's energy, environmental or climate aims. It is about allocating a predetermined share of funds to each Member State; the Commission reports on the implementation of the facility illustrate the traditional pattern where "spending" is an "objective in itself, independently from the results achieved" (Cipriani, 2018, p. 152). RFF funds are pre-allocated to states on the basis of criteria that, for the most part, have little relevance for fighting COVID-19.[61] 70% of the funds are allocated on the basis of cohesion criteria (population, the inverse GDP per capita and the relative unemployment rate) while only 30% depend on factors that can in principle be affected by the pandemic (aggregated change in real GDP for 2020 (Article 11). The requirement of additionality of national spending has disappeared, and there is no requirement to target the funds to deprived areas. The RFF allocation criteria do not reflect the traditional allocation criteria applied in Cohesion Policy, but constitute a political deal where each Member State is promised a certain share of the funds that the Member State itself can allocate to its own political pet projects under a certain degree of Commission supervision. While RFF funding cannot, as the main rule, be spent to "substitute recurring national budgetary expenditure" (Article 5(1)), it can be spent on one-off measures that would normally be funded from national budgets. Examples mentioned by the Commission include increasing healthcare capacity in hospitals, clinics, outpatient care centres and specialised health centres, and the support given to 413 000 enterprises by the end of 2022. (European Commission, Directorate-General for Budget, 2023, p. 68)

A cursory look into the national recovery plans confirms their wide reach. They cover traditional investments, in infrastructure and energy; IT projects in a variety of different fields; reforms of budgetary planning, judicial systems, insolvency systems, taxation, pension

[60] See (RRF-)Regulation (EU) 2021/241, Art. 26. The dialogue is basically led by the competent committee of the European Parliament but leads to nothing more than an obligation of the Commission to "take into account any elements arising from the views expressed through the recovery and resilience dialogue, including the resolutions from the European Parliament if provided."

[61] The maximum contribution per Member State still partly refers to the unemployment in 2015-2019. The July 2020 European Council reduced that reference but did not fully abolish it. Art. 11 241/2021 with Annex II., A16 July, Annex I COM (2020) 408 final.

systems, labour markets; measures in the field of education, social policies and housing, to name a few. The plans do not cover projects in the field of security and defence, nor financial market policies, but almost everything else seems to be fair game.[62] Projects are planned and approved for each State individually.

The RRF entails no obligation to pursue cross-border projects, but under Article 15(3)(cc) of the RRF regulation the national plan must include "an indication of whether the measures included in the plan comprise cross-border, or multi-country projects". Under Commission guidance,

> *Member States can decide for example to include investments on cross-border projects in the digital, transport, energy or waste sectors (i.e. infrastructure projects implementing the Trans-European Transport and Energy Networks, fast-tracking long distance recharging/refueling infrastructure for zero- and low-emissions propulsion, Single European Sky and European Rail Traffic Management System, energy interconnections in the context of the Energy Union (including cross-border renewable projects), 5G corridors on roads and railways in the context of EU's Digital Strategy). If so, Member States should indicate it clearly in their recovery and resilience plans, and coordinate the preparation of their plans with the Member States that would be affected by the cross-border or multi-country project.*[63]

Green and digital transformation are the two particular policy areas of emphasis of the RRF. Both in the legislation and in implementation, the two areas are handled quite symmetrically. Both are assigned a minimum share of total spending, 37 % for green measures and 20% for digital measures. Yet, in terms of EU competence, these two objectives are quite different. Environmental and climate objectives enjoy a strong anchoring in the EU Treaties in general, and benefit from a broad and explicit legal competence both under environment policy, Union's horizontal objectives and under the Cohesion Fund. The environmental effects of measures can be more local, national or transnational, but the EU does have competence to regulate and finance them. Many measures could also be framed as environmental or climate. For example, the closing down of a coal plant or mine in a Member State could very well be justified with reference to the EU's climate objectives, while the effects of such closure could turn the area into one affected by industrial transition and thus subject to Cohesion Policy. Therefore, the matter is less about competence and more about what kind of projects the EU should fund to promote the EU (or global) public goods, where transnational effects and global climate goals would seem to be decisive. This also involves questions of framing: what kind of projects can be described as promoting as a green investment?

Digitalization is fundamentally different: it is a broad and cross-cutting phenomenon which affects Member State administration and practices – traditionally considered to fall largely outside EU competence. A recent Commission Communication explains how funding has been spent on reforms to digitalise public administration in various countries, reforms of civil and criminal justice systems to make them more efficient by reducing the length of proceedings and by improving the organisation of courts (Italy, Spain), reforms improving the quality of the legislative process (Bulgaria), the purchase of 600 000 new laptops to lend to teachers and

[62] The national plans can be found at www.ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en#national-recovery-and-resilience-plans.
[63] Commission staff working document. Guidance to Member States recovery and resilience plands. Brussels, 22.1.2021 SWD(2021) 12 final PART ½.

pupils and the selection of Digital Innovation Hubs to support companies in their digitisation efforts (Portugal, EUR 600 million) (COM(2023) 99 final). In the Netherlands, the EU is paying for a 'Groundbreaking IT' investment measure, which refers to an 'overhaul of the Ministry of Defence's internal computer systems'.[64] The German plan includes 'various measures to modernise the public administration and to support disadvantaged groups, to cap social security contributions, and to strengthen education and skills, in particular by supporting the digitalisation of education'.[65] These are no doubt useful public expenditure, but they are normal costs deriving from the operation of public sector in a Member State – it is not clear what the EU's interest is in any of these and why would it fund these types of measures in rich EU Member States. There is no evidence that, under this priority area, the EU is even attempting to provide any useful contribution beyond money, such as technical advice to Member States on matters related to digitalisation of public administration.

Since its initial adoption in the aftermath of Covid-19, the scope of RFF has been widened further. In the area of energy, the Commission's RePowerEU Communication (2022; COM(2022) 108 final) proposed to rechannel unspent COVID-19 funds to freeing Europe from its dependence on Russian oil and gas. In 2023 the RRF Regulation was amended to allow for the inclusion of REPowerEU chapters in recovery and resilience plans contributing to various RePower the objectives such as improving energy infrastructure and facilities, boosting energy efficiency in buildings and critical energy infrastructure, decarbonising industry, addressing energy poverty and incentivising reduction of energy demand.[66] In June 2023 the little that remained of the RRF funds was again proposed to be recycled in the Strategic Technologies for Europe Platform ('STEP'), aiming to help preserve a European edge on critical and emerging technologies relevant to the green and digital transitions (COM(2023) 335 final). In this search for flexibility, Cohesion Policy becomes once again an instrument for "providing flexibility in existing instruments to better support relevant investments" (COM(2023) 335 final, pp. 4-5). Unlike the original RRF Regulation, the STEP proposal relies on a broad and exceptional combination of eight legal bases, which the Commission justifies briefly with them being "relevant".[67] According to the established jurisprudence of the ECJ, the EU legislature should primarily base its actions on a single legal basis that corresponds its main objective. The high number of legal bases indicates difficulties in identifying any main objective or explicit legal basis for the act.[68]

4.2. *From reimbursing costs to rewarding performance*

[64] Council implementing decision on the approval of the assessment of the recovery and resilience plan for the Netherlands, Brussels, 27 September 2022, doc nr 12275/22, available at https://data.consilium.europa.eu/doc/document/ST-12275-2022-INIT/en/pdf .

[65] Council implementing decision on the approval of the assessment of the recovery and resilience plan for Germany, Brussels, 6 July 2021, doc nr 10158/21, available at https://data.consilium.europa.eu/doc/document/ST-10158-2021-INIT/en/pdf .

[66] Regulation (EU) 2023/435 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, Article 21c.

[67] (Article 164, Article 173, Article 175, 3rd paragraph, TFEU, Article 176, Article 177, Article 178, Article 182(1) and Article 192(1) TFEU.

[68] See for example the Whistleblower directive for which it was long thought that there was no legal basis: and also the EU-LISA thas an imporessive list of legal bases.

Apart from its large size, nearly unlimited scope, and deep tailoring for each Member State, the main innovations of the RRF are the absence of co-financing requirement and, notably, its "performance-based" disbursement policy, which makes use of the possibility included in the Financial Regulation in 2018 described above. While in the preparation phase there needs to be a reasonable link between the financial envelope available to a Member State and the total cost of its National Resilience and Recovery Plan, once the plan has been approved, this link disappears and European money is disbursed solely on the basis of the significance, as assessed by the Commission, of the targets and milestones achieved, with no reference to the actual cost and no requirement to demonstrate that any costs have actually been incurred. In the words of the Commission,

> ***"The Facility is an innovative, performance-based instrument, where payments are made to Member States, as beneficiaries, upon delivering reforms and investments pre-agreed in national recovery and resilience plans.*** *The funds are therefore disbursed solely on the basis of the progress in the achievement of the reforms and investments that Member States committed to. Focused on the timely and efficient implementation of Member States' plans, the performance logic of the RRF makes payments conditional on concrete outcomes. Disbursements thus depend on the delivery of the pre-agreed investments and reforms rather than the final costs incurred."* (COM(2023) 99 final, p. 1)

In other words, EU money is paid not to *fund* measures taken by Member States, but rather to *reward them* for taking those measures. A look at the Commission's implementing decision on the second disbursement under the Italian recovery and resilience plan illustrates this well.[69] It authorises the payment of EUR 10 bn to Italy by means of payment to the bank account indicated in the Financing Agreement as a reward for various legislative reforms. Legislative work is not free – there is an administrative cost involved – but the preparation of these laws could not have cost more than a small fraction of the money received from the EU as reward. While the Commission has less to do with the substance of the reform (which often is purely national competence), the Member State is then expected to refrain from changing the legislation until all RRF money has been paid out (Article 24(3)). Many milestones and targets involve targets of a much fluffier kind, such as a National Strategy (for mental health, as in the case of Bulgaria); a National Programme (for oncology, as in the case of Czechia), a report (of the assessment of stocks of critical drugs by the Danish Medicines Agency) or funding guidelines (for establishing new primary health care units in Austria). In those cases, EU funding does not seem to require concrete legislative measures but merely a certain degree of political commitment (COM(2023) 545 final) in matters that fall under EU legislative competence.

Many Member States seem to like the model that provides them direct budgetary support. Once the milestone or target is considered by the Commission to be completed, the money that is disbursed can be freely allocated to anything at national level. In terms of bureaucracy, although administering the plan is a heavy effort particularly for those Member States that benefit the most, at least they save the effort of providing the proofs of payment that has traditionally been part of all EU funding. With this, the Union has done away with one of the

[69] https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility/italys-recovery-and-resilience-plan_en#payments

key safeguards (alongside with national co-financing, which also has disappeared in the RRF), that once ensured prudent spending of EU money.

In addition to reaching deep into areas of national competence, the move from cost-based to performance-based disbursement has created substantial complications for the audit and control of Union funds. Neither the RRF Regulation nor the Commission Delegated Regulation on the Scoreboard explain what "performance" actually means. [70] In its first audit of the RFF, the European Court of Auditors (ECA) examined how the Commission had assessed the plans of six Member States and identified a number of weaknesses and risks. It pointed out that the Commission's assessment was based on comprehensive internal guidelines and checklists that were not systematically used and were often difficult to trace. While the Commission assessment had improved the quality of Member States' milestones and targets, some of them lacked clarity or did not cover all key stages of implementation of a measure. The same deficiencies and others identified by ECA will also make it more difficult for the EP to hold the Commission to account on how the Member States have spent the funds – a matter raised repeatedly by the EP Committee on Budgetary Control (CONT), since the Committee cannot trace the expenditure invoices like they can for traditional implementation under shared management. In its recent Special Report on the RRF's performance monitoring framework the ECA points out to how also 'common indicators' defined in the Commission delegated regulation[71]

> *do not comprehensively cover all important investments and reforms included in the RRPs. The measures that could not be linked to any common indicator mostly related to major structural reforms (economic, labour market and judicial reforms), the market for mobile telecommunications, investments in infrastructure and public transport, nature conservation and protection, and waste management and circular economy* (European Court of Auditors, 2023b).

As a result, ECA (2023b) argues, 'the common indicators do not cover adequately the RRF's general objective'. This would indeed be difficult given that this general objective (Article 4(1)) covers nearly every possible policy field and does so on a very general level.

When large amounts of public funds are used, as is the case with the RRF, their control is important both for democracy and public perception and trust. There is no sign that these complaints have caused a rethink in the Commission: the Social Climate Fund follows a similar model[72] and the proposed Ukraine Facility will also apply a similar model to Ukraine's reconstruction plan (COM(2023) 338 final).

4.3. The RRF and subsidiarity

The subsidiarity section of the Commission's RRF proposal claims that RRF funding "respects the principles of European added-value and subsidiarity. Funding from the Union budget

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[70] Commission delegated regulation (EU) 2021/2106 of 28 September 2021 on supplementing Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility by setting out the common indicators and the detailed elements of the recovery and resilience scoreboard.
[71] Ibid.
[72] See Regulation (EU) 2023/955 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060, Article 7(2).

concentrates on activities whose objectives cannot be sufficiently achieved by the Member States alone ("necessity test"), and where the Union intervention can bring additional value compared to action of Member States alone”. Enhancing cohesion is achieved “through measures that allow improving the resilience of the Member States”; therefore, the RRF ”should provide support to reforms and investments that address challenges of a structural nature of the Member States”. The Commission underlines that the RRF

> *support is provided in response to a request from the Member State concerned made on a voluntary basis. As a result, each Member State decides whether action at Union level is necessary, in light of the possibilities available at national, regional or local level. The implementation of measures linked to economic recovery and resilience is a matter of common interest for the Union.*

Further, according to the Commission, the RRF is needed

> *to coordinate a powerful response to the outbreak of the COVID-19 pandemic and for the mitigation of the huge economic fallout. Action at the Union level is thus necessary to achieve a fast and robust economic recovery in the Union. This goal cannot be achieved to a sufficient degree by the Member States acting alone, while the Union's intervention can bring an additional value by establishing a regulation that sets out an instrument targeted at supporting Member States financially as regards the design and implementation of much needed reforms and investments. Such support would contribute to also mitigate the societal impact caused by the present COVID-19 crisis.*

These claims are only partially convincing, at best. Of the various areas financed by the RRF, the one that stands out is the green transition which is clearly in the common European interest. More generally, perhaps one could argue that, at the beginning of the pandemic, there was no other way to credibly announce a substantial ramping up of public investment spending than through a Union-financed program, but even that argument is undermined by the fact that, in reality, the bulk of the RRF investment spending will only take place several years after the end of the pandemic. But when it comes to the rest of the investment projects and most of the reforms financed under the RRF, it is difficult to see how they would meet the necessity test.

As discussed in the context of the RDT and the BICC, the RRF measures financed are characteristically national and seem to have little or nothing to do with European added value. Take, for example, the digitalisation and streamlining of the Italian justice system, which is one of the flagship projects financed under the RRF.[73] There is little doubt that, if properly executed, this can be a project of substantial societal value. Yet, a functioning and effective justice system seems first and foremost to benefit Italy itself, and any broader European interest is likely to be incidental and secondary. It should also be noted that justice reform is not a new endeavour in Italy; the country has, in fact, over years embarked on several such reforms. (Esposito et al., 2014) The reason it has not done more is that it has, through its democratic processes, prioritised other uses for its public funds. The EU has now stepped in, put its finger on the scale in the form of European funding, and thereby changed the political priorities of Italy.

[73] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4025 .

Apart from green investments, where the common European interest seems rather clear, it is difficult to find elements in the RRPs that would have true European value added. The RRF is, by and large, not used to finance European public goods but rather national policy measures that primarily benefit the individual countries themselves (Corti et al., 2022). The measures focus on the Member State level. For example the European Parliament

> *criticises the lack of a territorial dimension within the RRF and reiterates the importance of the partnership principle within the territorial policies of the EU; regrets that the deployment of the RRF has been highly centralised and has lacked consultation with regions and municipalities and stresses that the formulation and implementation of the Union's policies and actions must take into account the objectives set out in Article 174 TFEU and contribute to their achievement; (2022, para 5)*

In particular, it would seem that NGEU could have provided an opportunity for a vigorous step forward on Trans-European networks, which rely on specific EU competence but are also mentioned in the Cohesion Policy title. These are in the heart of what the EU is about and, in an obvious way, could not be achieved by the States acting individually. Yet, it is very difficult to find even a trace of Trans-European networks in the RRPs. The plans, being prepared and owned nationally, are overwhelmingly about national projects. Transnational considerations do not really come into play when the projects are selected for financing, beyond perhaps the part of green investments that contribute to decarbonization. Even the latter are fundamentally incidental; there seems to be no genuine effort to steer national plans towards transnational projects. As projects are assessed individually for each Member State and on the basis of the plan proposed by the national government, there is no competition between different projects that would aim at guaranteeing that the projects that e.g. promote global climate goals most efficiently get selected. This is not directly an implementation problem, but a result of the legal design of the RRF Regulation, which derives from the wish to emphasise Member States' national ownership, which is deemed particularly important when the EU funds policy measures that fall substantively under national competence. However, the more fundamental question is why the EU should fund them in the first place.

As discussed before, the main argument for European added value of the RRF eventually relies on the general and rather trivial notion that what is good for a Member State tends also to be good for the EU. This is essentially what the Commission argues in saying that "the implementation of measures linked to economic recovery and resilience is a matter of common interest for the Union". This argument is problematic for various reasons, one of which is that as a criterion it is essentially limitless. Virtually any part of public spending can be argued to contribute to economic recovery and resilience. This raises the question of how deeply the EU should get involved in incentivising national governments in their democratic decision making without an explicit Treaty authorisation. Finally, from the viewpoint of EU budget, the value of public spending should always be assessed against alternative uses of public funds. By channelling EU funds in this way to overwhelmingly country-specific purposes, the RRF may is likely to have come at the expense of more serious efforts to identify and fund genuine European public goods. Over the longer term it may make it difficult for the EU to fund European public goods on a broader scale, particularly in view of the debt load flowing from NGEU.

5. Legal constraints – are there any?

A key overriding objective of this analysis was searching legal limits for EU spending in general, and EU Cohesion Policy, in particular. Many questions involving spending are, however, not primarily legal in nature but rather questions that involve 'value for money' or questions of accountability.

Among legal constraints, the rules that derive from the EU Treaties have a special status. Treaty provisions are intended to set constraints on the legislative institutions when approving secondary legislation. Amending them would involve a complicated process requiring broad consensus, which is often understood as making them in practice unamendable. While key decisions on the revenue side of the EU budget require unanimity of Member States (MFF and ORD), the decisions on how money is spent are based on secondary legislation, which is usually approved in the ordinary legislative procedure, by qualified majority in the Council. This setting is behind the increasing tensions between the Treaty framework and the realities of EU spending today. The NGEU is the pinnacle of this development. If there ever were any limits – or "contours" – for the use of cohesion policies, they seem to have been dissolved, to an extent that it has grown difficult to see what government task could not be construed as being within the reach of cohesion policies. Both politically and legally, the ship has already sailed, and the 'new Cohesion Policy' forms a part of the EU *acquis*. This evolution has implications beyond Cohesion Policy. It reaches to the broader, and foundational, discussion about the relevance of the Treaties in defining the EU constitutional arrangements, and even beyond that, to the proper functioning of democratic processes, scrutiny and accountability.

The legal framework for Cohesion Policy involves both Treaty provisions and established practice as laid down in many generations of secondary legislation. The latter category includes for example the demands to respect strategic evidence-based programming, and the practice of partnership and multi-level governance that the Committee of Regions has been calling for (European Committee of the Regions, 2023). These are questions where lessons learned from the attempts to secure sound use of EU financial resources have been turned into secondary legislation, which can be amended through the same procedure through which it was initially approved. For example, the introduction of 'money for reforms' is certainly 'legal' in the sense that it is anchored into an amendment of the Financial Regulation that the ECJ has not found illegal. Yet that does not answer the question whether it really is a solid way to ensure that EU funding is spent to useful objectives in a well-justified way. Nor does it resolve the fundamental tension of the unbounded reach of such measures with the Treaty-based division of competences.

It is obvious that Cohesion Policy has in recent years moved far from its traditional purpose as defined in Article 174 TFEU. Still for five years ago it would have been difficult to envisage a Cohesion Policy that can be used to finance nearly anything and everywhere; a policy that, rather than targeting underdeveloped regions, primarily operates at the state level. The new use of Cohesion Policy is justified with language that connects cohesion policy with the resilience of the Member State and places a special emphasis on realising structural reforms – the most obvious overreach in terms of EU competence, and with significant effects on democratic decision-making procedures in the Member States.

When these fundamental reinterpretations of the Treaty took place, there were very few to take a stand in defence of the established reading of the EU Treaties. While it seems apparent that many of the new funding objectives would not meet the criteria set in the Court's 2009 ruling on the *International Fund for Ireland* discussed above, this seems to be of little consequence. In the unlikely case the issue ever finds its way before the Court, the Court would almost certainly not question the right of the legislators to expand the powers of the Union (Leino-Sandberg & Ruffert, 2022).

The constitutional validity of the "new" Cohesion Policy competence has not been subject to legal challenge,[74] and hence the ECJ has never ruled on it. Outside of the ECJ, so far the main judicial challenge relating to the overall arrangement was brought before the German FCC. Even there, the main focus was on the Own Resources Decision (ORD), and the RRF was only mentioned in passing.[75] As a result, the FCC did not pay much attention to Cohesion Policy and its scope, beyond stressing that the EU's competence to engage in borrowing remained unclear and was also closely tied to what the money is spent on, and whether the purposes for spending fall under Union competence. For the FCC,

> *Authorising the European Union to borrow on capital markets as 'other revenue' does not amount to a manifest violation of Art. 311(2) and (3) TFEU* ***when the funds are used for the exercise of competences conferred upon the European Union and, to that end, are from the outset strictly assigned to such specific purposes****. The requirement that other revenue within the meaning of Art. 311(2) TFEU be assigned to specific purposes ensures that the funds are* ***used within the limits of the European integration agenda as defined in the Treaties and prevents the European Union from borrowing funds for tasks for which it lacks competence under the principle of conferral*** *in Art. 5(1) first sentence, Art. 5(2) TEU (see (1) below). While there is still doubt as to whether this is truly the case for the 2020 EU Own Resources Decision, ultimately it can not be said that Arts. 4 and 5 of the Decision manifestly exceed the competence conferred in Art. 122(1) and (2) TFEU. (para 171).*

While the FCC seems not to have been overly convinced that the RRF truly fell within the Union's Cohesion Policy competence, it did not task itself to try and pin down the vague contours of Cohesion Policy, and how cohesion policy objectives should be understood in light of the Member States' legislative competence. Yet, the logic that it presents follows the argumentation of the ECJ in its earlier case law that upholds an idea of parallelism between legislative competence and EU funding discussed above. This type of integration through planning and funding would benefit from a thorough constitutional debate where also the implications for democratic decision making and accountability for and transparency of funding would be properly examined.

The broader question of parallelism between legislative and budgetary powers has also surfaced in other contexts post-NGEU, and in at least two different ways that are both relevant for the future of EU spending. In these discussions, the EU's strong environmental competence has acted for a spearhead for new openings.

[74] There are currently five cases pending involving the allocation of RFF money to Poland before the EU Courts, but based on public information they do not seem to concern the legal basis of the instrument.

[75] Judgment of 6 December 2022, 2 BvR 547/21, 2 BvR 798/21, para 119 of the ruling.

First, in recent years there has been a broadening use of environmental measures funded from the EU budget to also address questions of social policy. The prime example is the Social Climate Fund, which enables the use of EU funds to cover Member States' social policy costs such as direct income support.[76] Even though it is justified as a measure under the environmental and climate policies, as a class of public expenditure it looks very much like social policies – something that so far has been considered falling under national competence (Article 153 TFEU), regulated through national legislation, and funded from national budgets. The justification for the model is the same as the subsidiarity argumentation invoked in the case of the RRF model and its predecessors: when funding is formally directed based on national plans, it is the Member State itself that ultimately decides whether it proposes such measures to be funded or not ("The Plan may include national measures providing temporary direct income support"). There is also a growing interest in the EU institutions to steer the allocation of funding in national budgets. Social security is a core element in the Commission's September 2022 proposal for a Council regulation on an emergency intervention to address high energy prices (COM(2022) 473 final), approved by the Council three weeks later.[77] Relying on the emergency legal basis Article 122(1) TFEU, it provides for a 'temporary solidarity contribution', which looks very much like a tax but is carefully framed as something different, as a tax would require unanimous decision making in the Council. The regulation further instructs the Member States to use the proceeds to 'provide support to households and companies and to mitigate the effects of high energy prices' (Article 17).[78]

Second, outside the question of social security, the Commission much-debated proposal on nature restoration (COM(2022) 304 final) is also interesting from the perspective of parallelism. The legal basis of the proposal is Article 192(1) TFEU and its objectives are closely tied to the Union's environmental policy: they are cross-border in character, involve the fulfilment of the Union's international climate obligations and existing EU legislation relating to for example habitat, birds and water quality. While the EU legislative competence in the matter is not in doubt, the measures would come with a potentially very sizeable cost, and the Commission proposal is nearly silent on where the money should come. The preamble to the proposed Regulation indicates that "Member States should integrate expenditure for biodiversity objectives […] in their national budgets and reflect how Union funding is used". To the extent EU legislation is approved and justified with reference to EU policy aims, should its costs not be primarily a part of EU spending?

EU competence in the Treaties is specifically focused on questions that have a transnational or cross border effect and where acting at the EU level provides value added. There is no reason why the EU budget could not be constructed in a way that would reflect better the actual competence that is being exercised, instead of agriculture or Cohesion Policy

[76] Regulation (EU) 2023/955 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060, Article 4(3)

[77] Council Regulation (EU) 2022/1854 on an emergency intervention to address high energy prices.

[78] See also the discussion on the Commission proposal on energy efficiency of buildings (COM (2021) 802 final) goes still one step further, as the European Parliament now wishes to place the Member States under an obligation to '*support compliance with minimum energy performance standards by all the following measures: (a)* ***providing appropriate financial measures, including grants, in particular those targeting vulnerable households, middle-income households and people living in social housing****, in line with Article 22 of Directive (EU).../.... [recast EED]; (Article 9(3)'*. In addition to financing national social security costs, the EU would also take a role in regulating its level in the Member States at least indirectly.

functioning as universal classes of expenditure that cover a very broad range of policy measures which, particularly in the latter case, often fall altogether outside EU legislative competence.

Even when a measure is within EU competence, the RFF experience makes it explicit that there is a difference whether it is legislated as part of a wide, programmatic umbrella under Cohesion Policy, or whether it relies on a specific legal basis, such as environment, climate, or transnational networks. In contrast to the diverse and, by and large, uncoordinated, and nationally motivated plans that are the basis of the RRF, placing funding measures formally within a specific substantive policy field such as environment would come with a very different set of criteria relating to the environmental aims of the measures and procedural aspects that would force to consider more carefully the European added value in the use of EU funding. While European added value is, or has been turned into, a political concept, it is an important element of subsidiarity and it should, properly defined, be incorporated in the European legislative frameworks both through funding criteria and procedural requirements that emphasise transparency, participation, evidentiary basis and reason-giving. The aim should be to ensure proper consideration of transnational aspects and the best possible value for money in fulfilling EU objectives.

The principle of subsidiarity has a strong status in the Treaties and should be applied in the policy areas that are relevant for the RFF automatically. The RFF experience however makes explicit that without clear provisions in secondary law incorporating the objectives of the principle, subsidiarity will remain a dead letter. Operationalising and enforcing the principle of efficiently would seem to require legislative provisions establishing procedures that make the consideration of cross border implications compulsory, forcing the relevant institutions to consider and justify how and in which way the 'objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the European Union'. The funding criteria would also need to pay attention to what specific *EU level* benefits would be achieved at what cost. Overall, the 'money-for-reforms' funding model would seem particularly difficult to reconcile with the principle of subsidiarity, since EU funding is used specifically for national reforms with little concrete and measurable outcome and with little guarantees that European tax payers' money is actually well spent.

6. Future of EU spending

In institutional argumentation, Cohesion Policy is often described as an undefined policy field, "a broad overall concept with imprecise contours", in the words of the Advocate General. Even though, back in 2009, the ECJ took a different view, the AG's view seems to have eventually carried the day. Cohesion policies have been profoundly transformed and evolved into a general-purpose tool, essentially an informal pillar of the EMU. However, the traditional objectives of Cohesion Policy were not unclear. They had a strong political dimension and focused on countering, through EU funding, fears by successive generations of new members to the Union that the internal market would lead to concentration of economic activity towards more advanced regions and to the detriment of less advantaged ones. This objective has been reflected in the vague funding objectives and the procedural requirements of decision making.

Whether the promotion of less advantaged regions is still justified and how big a budget share this requires would require political discussion; it is not a legal question, and will in any case require new consideration in light of possible EU enlargement. This Report has instead focused on the transformation of Cohesion Policy in recent years through a fundamental reinterpretation taken in the EU institutions. As a result, Cohesion Policy has lost its connection to Article 174 TFEU objectives and become a general legal basis for financing. Instead of serving as a general objective of all EU policies, as the Treaty stipulates, Cohesion Policy has become the servant of the topical institutional agenda in the field of economic and fiscal policy, reaching deep into areas of national competence. The most far-reaching example of this is the 'money-for-reforms' model, promotion of structural reforms in Member States in exchange of monetary rewards. While the reinterpration reached its culmination in RRF, it is relevant beyond the specific context of the facility. The broad new reading of Cohesion Policy and its objectives that the RRF relies on changes the character of the policy in a fundamental manner, and has now become *acquis*. Therefore, the question of the legal scope of Cohesion Policy and the scope of EU spending more generally remains central even outside the scope of the RRF.

What seems to have been lost in this quest for giving the EU more leverage in the formulation of Member States' national policies, is a vision of how to properly anchor the use of common European funds in genuine European interest. While this question seemed, in the not-so-distant past, to involve a legal aspect, that bridge has by now been properly crossed. The legal boundaries for the use of European funds have largely dissolved, and the matter is unlikely to be settled in courts. Rather, it will be settled as a political matter as part of future political debates on EU spending. Many of the claimed political objectives of the RRF could be more usefully legislated as environmental, climate, transport, energy or transnational network objectives, if the EU indeed is seriously promoting them. This would have consequences for the allocation criteria. However, the 'money-for-reforms' objectives would stand in clear tension with EU competence irrespective of what legal basis in the Treaties is used.

In the ongoing mid-term review of the MFF, the Commission draws attention to numerous pressing funding needs of a European dimension (COM(2023) 336 final). Yet, at the same time, the EU's largest funding vehicle, the RRF, is disbursing funds for purposes that mostly ignore these questions, or only touch them on a very superficial or indirect level. This is the result of deliberate choices, made in the Commission and based on the RRF Regulation, both through its objectives and the procedural provisions that have been carefully drafted to counter arguments about the limits of EU competence and the relevance of subsidiarity. As a result, much of EU funding is allocated to national projects with limited transnational value and, particularly when it comes to the 'money-for-reforms' model, in a manner that makes the usefulness of EU funding difficult to measure.

When considering the future of EU spending, subsidiarity and European added value should be given a much greater role. The objectives of the principle of subsidiarity should be fully incorporated and reflected in the relevant legislative frameworks both as regards procedure and funding objectives. EAV supports investment in public goods where the primary benefit accrues to Europe as a whole, in line with the principle of subsidiarity, which requires the EU to focus on measures that are most efficiently tackled at Union level. Such measures would certainly include infrastructure and other trans-European networks, while also allowing the EU to respond to crises with complex, transboundary effects. It might also include traditional cohesion funding as classically conceived, addressing developmental disparities among

regions. However, when the measure entails merely a domestic public good whose primary benefit accrues nationally, subnationally, or even locally, with cross-border externalities that only accrue (at best) indirectly, greater caution is warranted. There is a need, therefore, to develop an analytical framework to distinguish genuinely European from merely domestic public goods. In addition, future regulation on EU spending should include clear procedural rules and funding criteria that make the use of EU funds dependent on the usefulness of the spending at EU level and steer it to clearly defined and Treaty-based EU policy objectives.

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