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European Treaties Do Not Authorize EU to Fall into Debt

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The legal deficit of appropriate empowerment for The European debt issue including a €750 billion recovery plan means that the treaty (TFUE) must be changed before , according to the authors—a professor of public finance and a former banker

The debate is just beginning on the €750 billion support plan known as *Next Generation EU*. The question of the aid's rationality and especially its conditionality remains unanswered. The need to find new resources is leading to lively discussions.

But one point that hasn't been mentioned so far is a particularly thorny one: What are the legal bases for the July 21 agreement? Clearly, the legality of offering grants during a major crisis is not in question. In April, Angela Merkel affirmed that Article 122 of the Treaty on the Functioning of the European Union (TFUE) applies to the pandemic. This article states that financial assistance is possible for a State "*with severe difficulties caused by natural disasters or exceptional occurrences beyond its control*".

However, the legality of the issue of EU-debt, not the legality of grants, has never been exhaustively clarified. The issue of €750 billion EU debt is quite a sizeable amount compared to past transactions. The amounts raised in 2010 by the EU for Ireland and Portugal with the European Financial Stabilisation Mechanism (EFSM) amounted to roughly only 50 billion. An extra €100 billion will be added to these 750 billion, to be raised by the Commission beginning in mid-October to finance the SURE plan (*Support to mitigate Unemployment Risks in an Emergency*).

The Commission considers these new debt issues to be an extension of the 2010 fundraising, perhaps to convince us that borrowing has become normal. It points investors to Article 323 of the TFUE, which states, "*The European Parliament, the Council and the Commission shall ensure that the financial means are made available to allow the Union to fulfil its legal obligations in respect of third parties*". Managing the EU's finances responsibly is indeed one of the Commission's obligations, but this most certainly is not an empowerment of the EU raise debt in its own name.

"A Necessary Breach of Treaty Rules"

Faced with the fragility of the legal underpinnings for the emergency instruments set up at the dramatic summit of 8 and 9 May 2010—some leaders even spoke of a "*necessary breach of treaty rules*" a few months after the summit—members quickly decided to amend the existing

texts and abandon the structures that had just been created. On 25 March 2011, Article 136 of the TFUE was amended to authorize the creation of a financial assistance mechanism—the future European Stability Mechanism (ESM). On 2 February 2012, a specific treaty authorized the ESM to “*raise funds*”.

The Commission’s problem is crystal clear. Nowhere in the Treaties Commission is empowered to raise debt on behalf of the EU. Article 5 of the Treaty on European Union states that “*Under the principle of conferral, the Union shall act only within the limits of the competences (...). Competences not conferred upon the Union in the Treaties remain with the Member States*”. In other words, a competence not conferred does not exist. In addition, two articles in the TFUE are quite explicit about prohibiting loans: “*The revenue and expenditure shown in the budget shall be in balance*” (Art. 310); “*Without prejudice to other revenue, the budget shall be financed wholly from own resources*” (Art. 311).

The European Union budget was adopted on 27 November 2019. Even its introduction reiterates the “*principle of an equilibrium*”. It states that “*Borrowing to cover any budget deficit which may arise is not compatible with the own resources system and will not be authorized*”. How can the Commission be saying something different one year later?

This legal aspect is not insignificant, given the amounts in question. Silence on the matter is so surprising that we might wonder whether Angela Merkel and Emmanuel Macron reached an agreement not to bother with Treaties amendments. They may have thought the debate over Eurobonds could re-emerge. But what about the members of parliament, who will vote on ratifying the agreement, and our fellow citizens, who will be paying back all or part of this immense debt issue? Don’t they have a right to an explanation?

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