

The European Budgetary Galaxy

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EU budget – Founding vision of budgetary integration – Budget of citizens and not only of states – Corrections, rebates and national net balances – Convention on the Future of Europe – Comprehensible and transparent budget as a prerequisite for democratic legitimacy – Treaty of Lisbon reforms – Post-Lisbon fragmentation leading to a ‘budgetary galaxy’ – Differentiated budgetary integration likely to endure – Final Report of the Monti High Level Group on Own Resources – Necessity for future reforms to take account of the broader galaxy – Return to a citizen-oriented approach – The Union method

INTRODUCTION

The budgetary dimension of European integration was traditionally understood in terms of the development of a single, ‘supranational’, Community budget, which would be governed by rules concerning revenue and expenditure that would apply uniformly across all member states, and which would be subject to a single set of decision-making and accountability procedures. The story, as set out, for example, in Daniel Strasser’s *The Finances of Europe*,¹ was one of the transition from a system of financing based on contributions from the national budgets of the participating states, following the model of classical international organisations, to the creation of an autonomous Community budget financed from ‘own resources’ accruing directly to the European level. Exceptions to the principle of unity of the

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¹D. Strasser, *The Finances of Europe* (Office for Official Publications 1981).

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budget, such as the European Development Fund, were perceived as mere temporary deviations on the path towards a single, autonomous, European budgetary order.²

More than four decades on from the introduction of the own resources system, the Union's public finances have not developed along the lines originally envisaged. The member states, as masters of the Treaties, have shown themselves reluctant to relinquish their control over the procedures, methods and sources of financing, thus limiting the autonomy of the Union budget.³ Moreover, the legal framework governing the finances of the Union is increasingly characterised by fragmentation and complexity.⁴ This tendency appears to have accelerated in the post-Lisbon era, particularly in the context of the financial and sovereign debt crises and the migration and refugee crises, to the extent that the Final Report of Mario Monti's High Level Group on Own Resources of January 2017⁵ (hereinafter the 'Monti Report') observes that a 'galaxy' of funds and instruments, with variable participation of member states and a diverse range of decision-making and accountability procedures, has emerged around the Union budget to support Union policy objectives.⁶

It may be recalled, in this regard, that the new budgetary provisions introduced by the Treaty of Lisbon, whose origins can be traced back to the deliberations of the Convention on the Future of Europe's Working Group on Simplification, were intended to make the legal framework and procedures governing the budget more comprehensible and transparent. As the Working Group put it in 2002, a prerequisite for democratic legitimacy is that 'citizens must be able to understand the system so that they can identify its problems, criticise it, and ultimately

²The European Development Fund developed outside the Union budget for historical reasons, but its resources are mainly managed by the Commission and its incorporation into the Union budget has long been anticipated. See European Commission, *European Union Public Finance*, 5th edn. (Publications Office 2014) ch. 22; A. D'Alfonso, 'European Development Fund: Joint development cooperation and the EU budget: out or in?', European Parliamentary Research Service In-Depth Analysis, November 2014.

³On the notion of Union budgetary autonomy, see A. Potteau, *Recherches sur l'autonomie financière de l'Union européenne* (Daloz 2004); C.D. Ehlermann, 'The Financing of the Community: The distinction between financial contributions and own resources', 19 *CMLRev* (1982) p. 571-589.

⁴In this regard, the budgetary domain may be seen as a particular case-study of differentiation in the Union's legal framework more generally, see B. De Witte, A. Ott, E. Vos, *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Elgar 2017).

⁵The interinstitutional Monti Group was established to assess the functioning of the Union's financing system and present recommendations for reform. The Group's final report, entitled *Future Financing of the EU*, is available online at <ec.europa.eu/budget/mff/hlgor>, visited 26 June 2017.

⁶See, in particular, the diagrammatic illustration of the galaxy that appears at Annex IV to the Monti Report.

control it'.⁷ With budgetary matters returning to the forefront of the Union's policy agenda in the context of UK withdrawal from the Union, euro area reform and the preparation of the post-2020 multiannual financial framework, this article revisits the deliberations of the Convention's Working Group on Simplification and draws attention to the continued, and indeed heightened, relevance for today's circumstances of the concerns expressed then regarding the complexity of the Union's budgetary system.

The article begins by recalling the founding vision of a process of European budgetary integration proceeding through a single, 'supranational', Community budget. The evolution of the legal framework will then be traced quickly through the budgetary crises and treaty reforms of the 1980s and 1990s, before passing on to the deliberations of the Convention on the Future of Europe and the reforms introduced by the Treaty of Lisbon. Illustrative examples of budgetary fragmentation and complexity in the post-Lisbon era will then be presented. In light of those examples, it will be suggested that a complex regime of differentiated budgetary integration is likely to endure for some time to come and that, in this context, future reforms aimed at making the system more comprehensible for citizens should not address the Union budget in isolation, but should also take account of the surrounding galaxy of European-level funds and instruments that pursue Union policy objectives.

THE FOUNDING VISION OF EUROPEAN BUDGETARY INTEGRATION

The budget of the Union is, in many respects, an innovative transnational public finance experiment. The budget of the European Economic Community was initially funded through lump-sum 'national contributions' from the member states,⁸ which were calculated using the type of contribution key that was commonly used in the budgets of pre-existing international organisations, such as the United Nations.⁹ Following the political impulse given by the Hague summit of 1969,¹⁰ the adoption of the first Own Resources Decision in 1970¹¹ represented an attempt to push beyond the traditional model for financing international organisations through national contributions, with a view to

⁷ Final report of Working Group IX on Simplification, Convention on the Future of Europe, CONV 424/02, Brussels, 29 November 2002, p. 1.

⁸ Art. 200 EEC, first paragraph.

⁹ On the financing of the UN, see M. Larhant, *Le financement de l'ONU, ou la crise permanente* (Presses de Sciences Po 2016).

¹⁰ Final communiqué of the Conference of Heads of State or Government, The Hague, 1-2 December 1969, point 5.

¹¹ Council Decision 70/243/ECSC, EEC, Euratom of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, OJ 1970 L 94/19.

establishing an autonomous European budgetary order that would complement the 'new legal order' of Community law.

The transition to this 'new budgetary order' would necessitate significant institutional innovations. If certain categories of revenue were to be collected on the territories of the member states, without being processed through national budgetary decision-making processes before being transferred to the Community level, then the fundamental principle of parliamentary oversight of public expenditure, which was common to the constitutional traditions of the member states,¹² required that the loss of parliamentary oversight at national level should be compensated through increased parliamentarisation at the Community level.¹³ Thus, the two Budgetary Treaties of Luxembourg (1970)¹⁴ and Brussels (1975)¹⁵ granted genuine powers of budgetary decision-making and oversight to the European Parliament, which would soon also be directly elected.¹⁶ The 1975 Treaty further provided for the creation of a European Court of Auditors.

The initial own resources consisted of customs duties collected at the external borders of the customs union¹⁷ and levies collected within the framework of the Common Agricultural Policy,¹⁸ as well as a residual own resource calculated having regard, albeit very indirectly, to the value added tax (VAT) accruing from consumer transactions conducted in the framework of the Common Market.¹⁹ The initial sources of financing were thus linked to the policy objectives and activities of the Community, with revenue ultimately being drawn from natural and legal persons who used and benefited from the Community's common policies. Moreover, in accordance with the principles of unity and universality of

¹²D. Coombes, *The Power of the Purse in the European Communities* (Chatham House 1972) p. 62; see also the comparative study of European budgetary systems in D. Coombes, *The Power of the Purse: The Role of European Parliaments in Budgetary Decisions* (George Allen & Unwin 1976).

¹³On the rationale of compensating the loss of parliamentary influence at national level through greater parliamentary influence at European level, see Coombes (1972), *ibid.*, p. 62; *The European Communities' own resources and the budgetary powers of the European Parliament: Selected documents* (European Parliament 1972), A. De Feo, *History of Budgetary Powers and Politics in the EU: The Role of the European Parliament (Part II)* (European Parliamentary Research Service 2015).

¹⁴Treaty amending certain budgetary provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities, signed in Luxembourg on 22 April 1970, OJ 1971 L 2/1.

¹⁵Treaty amending certain financial provisions of the Treaties establishing the European Communities and of the Treaty establishing a Single Council and a Single Commission of the European Communities, signed in Brussels on 22 July 1975, OJ 1977 L 359/1.

¹⁶Act of 20 September 1976 concerning the election of the Members of the EP by direct universal suffrage, OJ 1976 L 278/5.

¹⁷Art. 2(b) of Council Decision 70/243, *supra* n. 11.

¹⁸Art. 2(a) of Council Decision 70/243, *supra* n. 11.

¹⁹Art. 4 of Council Decision 70/243, *supra* n. 11.

the budget,²⁰ all revenue flowed into a single pot, which would be used without distinction not only to cover the costs of the Community's administration, but also to finance a broad range of common economic and social policies that were of direct interest to individuals, including policies having a redistributive function, such as the European Social Fund.²¹ Decisions on the allocation of resources would be adopted through a European-level decision-making procedure in which a directly-elected European Parliament would play a fundamental role alongside a Council of national ministers.

In effect, just as the Court of Justice in *Van Gend en Loos*²² had viewed the Treaty of Rome as a treaty producing effects not only between states, but also as the source of rights and obligations for individuals, so the introduction of the system of own resources and the accompanying institutional innovations sought progressively to transform the European budget from a budget between states, similar to the budget of any traditional international organisation, into a budget of, and for, individuals, or, in post-Maastricht terminology, 'citizens'. By the end of the 1970s, therefore, structures were being put in place that might be expected to ensure a high degree of popular legitimacy for this innovative transnational system of revenue and expenditure that was being established.

BUDGETARY CRISES, REBATES AND EARLY FRAGMENTATION

The founding vision of European budgetary integration proved difficult to realise in practice. In the first instance, the combined volume of traditional own resources and the residual VAT-based own resource quickly proved insufficient to cover the growing expenditure of the Community, with the result that a new residual own resource, in the form of the gross national product-based resource, had to be introduced in 1988 to cover the shortfall.²³ In effect, the gross national product-based resource, which would later be calculated by reference to gross national income, functioned in the same way as national contributions, with each member state contributing a percentage of the amount of the annual shortfall in accordance with a gross national product contribution key. This undermined the autonomy of the Community budget, which *de facto* again became dependant on 'contributions' from the national budgets.²⁴

²⁰ On the budgetary principles, see European Commission, *supra* n. 2, ch. 11.

²¹ See Coombes (1972), *supra* n. 12, p. 23.

²² ECJ 5 February 1963, Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*.

²³ Council Decision 88/376/EEC, Euratom of 24 June 1988 on the system of the Communities' own resources, OJ 1988 L 185/24, Art. 2(1)(d).

²⁴ See European Commission, *supra* n. 2, p. 30-32.

Furthermore, the introduction of the UK rebate in 1985, and the ‘rebates on the rebate’ for certain other Member States,²⁵ meant that the Commission was once again obliged to carry out ‘net balance’ calculations to establish the difference between what each member state paid into the budget and what it received back from it.²⁶ For the purposes of those calculations, own resources had to be treated as national contributions and expenditure on common policies had to be classified along national lines, even though the budget nomenclature categorised expenditure only according to policies.²⁷ Member states, as the core ‘taxpayers’, again came to be perceived as the only interested parties in the financing system. As a result, considerations of *juste retour* would take increasing precedence over considerations of European added value and the shared benefits for individuals of common European expenditure.²⁸

This more state-centric approach to the Community’s financing system would become especially apparent in the negotiations on the multiannual financial perspectives, which established expenditure ceilings applicable over several years. The first binding financial perspectives were introduced in 1988 to provide a stable multiannual budgetary framework for the implementation of the Single Market programme in the years 1988-1992.²⁹ From 1993 onwards, successive financial perspectives would be fixed for seven-year periods. Over time, the own resources legislation and the regulations establishing Union funding programmes across all policy sectors, including agriculture and Structural Funds, would come to be aligned with the duration of the perspectives. Those sectoral regulations would fix ‘national envelopes’, by which the multiannual amounts programmed for the most financially significant policies were ‘pre-allocated’ along national lines for the seven-year period. In practice, the figures for the entire multiannual package were agreed in negotiations conducted along intergovernmental lines among the Heads of State and Government in the European Council.³⁰

Certain judgments of the European Court of Justice in the early 1990s would also prove significant for the longer-term development of the budgetary system.

²⁵ Art. 3(3)(c) of the 1985 Own Resources Decision (OJ 1985 L 128/15) granted a ‘rebate on the rebate’ to Germany. Subsequent Own Resources Decisions extended this benefit to other member states. See European Commission, *supra* n. 2, p. 134-135.

²⁶ See European Commission, *supra* n. 2, p. 29-30.

²⁷ See Monti Report, *supra* n. 5, p. 57-61.

²⁸ *Ibid.* On the notion of *juste retour*, see M. Citi, ‘EU Budgetary Politics and the Paradox of *Juste retour*’, in S. Becker, M.W. Bauer, A. De Feo (eds.), *The New Politics of the European Union Budget* (Nomos 2017) p. 83.

²⁹ Interinstitutional Agreement of 29 June 1988 on budgetary discipline and improvement of the budgetary procedure, OJ 1993, C 331/1.

³⁰ On the history of the multiannual financial framework, see European Commission, *supra* n. 2, chs. 3-7.

In its *Bangladesh* judgment of 1993,³¹ for example, the Court of Justice was called upon to examine the compatibility with the Treaties of a decision of the member states meeting in the Council to grant emergency aid to Bangladesh outside the Community budget. The aid was to be administered by the Commission and the member states agreed to make their contributions in accordance with the gross national product contribution key. The European Parliament argued that this was, in substance, Community expenditure that should be processed through the Community budget. The Court rejected this view. Recalling that the Community did not have exclusive competence in matters of humanitarian policy, it found that nothing precluded the member states from exercising their own competence collectively within the Council or outside it.³²

Moreover, the Court ruled that the member states could entrust tasks to the Community institutions in relation to a collective action undertaken outside the Community framework.³³ In that context, nothing prevented them from applying criteria, such as a gross national product contribution key, which were analogous to those applied within the Community framework.³⁴ Since the aid was granted within the framework of a collective action of the member states, and was financed directly by them, it did not constitute an expenditure of the Community within the meaning of the EC Treaty.³⁵ This approach was confirmed shortly afterwards in the *European Development Fund* case.³⁶

Around the same time, the Treaty of Maastricht introduced elements of differentiation and fragmentation in the public finances of the newly established European Union by envisaging separate, more intergovernmental, modes of financing and decision-making for expenditure under the Common Foreign and Security Policy and the justice and home affairs pillars.³⁷ Similarly, the provisions on enhanced cooperation introduced by the Treaties of Amsterdam and Nice envisaged that enhanced cooperation initiatives would, in principle, be financed by the participating states. Meanwhile, the capital of the newly-established European Central Bank would be drawn from the euro area national central banks.³⁸ Furthermore, a whole host of new Union agencies would be established,

³¹ ECJ 30 June 1993, Joined Cases C-181/91 and C-248/91 *EP v Council and Commission*.

³² *Ibid.*, para. 16.

³³ *Ibid.*, para. 20.

³⁴ *Ibid.*, para. 22.

³⁵ *Ibid.*, paras. 29-30.

³⁶ ECJ 2 March 1994, Case C-316/91, *EP v Council*.

³⁷ See D. Strasser, 'Les dispositions financières du Traité de Maastricht', *Revue française de finances publiques* (1994) p. 195 at p. 197-198.

³⁸ Art. 28.2 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank (now Protocol No 4). Similarly, the shareholders of the European

having their own 'satellite' budgets, albeit for the most part financed through annual subsidies from the Union budget.

Despite this early fragmentation and the increasingly complex nature of the Union's public finances, particularly on the revenue side, and despite the regression towards a system of *de facto* national contributions and the corresponding erosion of the link between the sources of financing and the common European policies, the prevailing vision throughout the ensuing treaty revisions of the 1990s and early-2000s remained one of a single European budget in which all member states would ultimately participate in a uniform way, subject to a limited number of exceptions for enhanced cooperation initiatives and expenditure related to certain new Union policy competences.

FROM THE CONVENTION ON THE FUTURE OF EUROPE TO THE TREATY OF LISBON

By the time Joschka Fischer was delivering his landmark speech on the quest for the 'finality' of the European integration process in May 2000,³⁹ ahead of the expected 'reunification' of the European continent through the accession of the formerly communist states of central and eastern Europe, the Union had come to enjoy a level of budgetary autonomy exceeding that accorded to other treaty-based organisations, but falling far short of the ambitions that accompanied the introduction of the own resources system in the 1970s. Perhaps surprisingly, the Laeken Declaration on the Future of the European Union of December 2001,⁴⁰ which provided for the establishment of a Convention to pave the way for the next intergovernmental conference, did not directly address the development of the Union's public finances.

Nevertheless, it was clear that the Declaration's call for the Union 'to become more democratic, more transparent and more efficient' would necessarily imply an assessment of the functioning of the Union's budget. Within the Convention, the budget was addressed principally from the angle of simplification, within Working Group IX on Simplification.⁴¹ The initial deliberations of the Working Group were further developed in two Discussion Circles, one dealing with the budgetary procedure⁴² and the other dealing with own resources.⁴³ The introduction to the

Investment Bank are the member states; see Art. 4 of the Protocol on the Statute of the European Investment Bank (now Protocol No 5).

³⁹ J. Fischer, 'From Confederacy to Federation - Thoughts on the finality of European integration', Speech at Humboldt University, 12 May 2000.

⁴⁰ Presidency Conclusions, European Council meeting in Laeken, 14-15 December 2001, Annex I.

⁴¹ See Final report of the Working Group, *supra* n. 7.

⁴² See Final report of the discussion circle on the budgetary procedure, CONV 679/03, Brussels, 14 April 2003.

⁴³ See Final report of the discussion circle on own resources, CONV 730/03, 8 May 2003.

Final Report of the Working Group IX on Simplification eloquently expressed the rationale underlying the Working Group's recommendations, as follows:

'The simplification of the Union's instruments and procedures, as sought by the Convention, is an operation with considerable repercussions and a direct bearing on the level of democracy of our Institutions.

The Union's system as we know it is not very clear or comprehensible to its citizens. However, ability to criticise the system is a key factor of democracy. Citizens must be able to understand the system so that they can identify its problems, criticise it, and ultimately control it.

To simplify therefore firstly means "to make comprehensible", but also to provide a guarantee that acts with the same legal/political force have the same foundation in terms of democratic legitimacy. The democratic legitimacy of the Union is founded on its States and peoples, and consequently an act of a legislative nature must always come from the bodies which represent those States and peoples, namely the Council and the Parliament. Procedures must therefore be reviewed to ensure that they respect this simple principle: acts which have the same nature and the same legal effect must be produced by the same democratic procedure.⁴⁴

Further on, the Final Report explains that:

'The Group believes that, as already stated in the introduction, simplification should be seen as a factor promoting democracy. The Group has therefore at all times been concerned with clarity.

Citizens must be able easily to understand not only the scope of an act, but also its legitimacy. *In fine*, they must know who does what within the Union.

It is indispensable, to guarantee democracy, that they should be able to distinguish the responsibilities of the different Institutions and of the various players on the European scene.⁴⁵

As far as the budget was concerned, the deliberations of the Working Group and the two Discussions Circles led to recommendations for new draft articles which would be incorporated, subject to minor amendments, into the final text of the Treaty establishing a Constitution for Europe, as signed at Rome on 29 October 2004. The main innovations were the codification at treaty level of the

⁴⁴ *Supra* n. 7, p. 1-2.

⁴⁵ *Supra* n. 7, p. 21-22.

multiannual financial perspectives, which would henceforth be known as the multiannual financial framework,⁴⁶ and the introduction of a simplified annual budgetary procedure, which would consist of one reading in the Council and one reading in the European Parliament, followed by a conciliation period of 21 days.⁴⁷ Further simplification would come through the abandonment of the historically contentious distinction between compulsory and non-compulsory expenditure.⁴⁸ The abolition of the Union's three-pillar structure would also have budgetary consequences, with former third pillar expenditure now incorporated into the Union budget, subject to opt-outs for certain member states.

Following the rejection of the Constitutional Treaty in 2005, the intergovernmental conference that drew up what would become the Treaty of Lisbon chose to incorporate the budgetary provisions of the Constitutional Treaty largely unchanged into the text of the new treaty.⁴⁹ Following the Treaty of Lisbon, the Union's finances are governed principally by Articles 310–324 TFEU. Overall, the budgetary reforms introduced were rather modest in scope. They served mainly to codify or simplify pre-existing procedures, but little attempt was made to fundamentally reassess or reshape the Union's public finance architecture, as it had developed over the preceding decades.⁵⁰

POST-LISBON FRAGMENTATION AND COMPLEXITY

The first budgetary procedures under the Treaty of Lisbon were conducted in a particularly challenging political and economic climate. The European Parliament and the Council failed to reach agreement on an annual budget within the 21-day conciliation period foreseen in Article 314(5) TFEU in 2010, 2012 and 2014, necessitating on each occasion a second round of crisis negotiations in December to get a budget adopted before the end of the year. Difficulties would also be encountered in adopting a first multiannual financial framework Regulation under Article 312(2) TFEU. Following the failure of a first procedure to replace the

⁴⁶ Art. I-55 and Art. III-402 of the Constitutional Treaty.

⁴⁷ Art. III-404 of the Constitutional Treaty. On the genesis of the new budgetary procedure, see G. Benedetto and B. Hoyland, 'The EU Annual Budgetary Procedure: The Existing Rules and Proposed Reforms of the Convention and Intergovernmental Conference 2002-04', 54(3) *JCMS* (2007) p. 565.

⁴⁸ See European Commission, *supra* n. 2, p. 26-27.

⁴⁹ See G. Benedetto, 'Budget Reform and the Lisbon Treaty', in G. Benedetto and S. Milio (eds.), *European Union Budget Reform: Institutions, Policy and Economic Crisis* (Palgrave Macmillan 2012) p. 40.

⁵⁰ See W.T. Eijsbouts, 'The Purse and the Power', 1 *EuConst* (2005) p. 117. On possible explanations for the modest approach, see H. Enderlein et al., 'The EU budget: How much scope for institutional reform?', *ECB Occasional Paper Series*, No. 27, April 2005.

pre-existing IIA laying down the financial perspectives for the period 2007-13 with a new multiannual financial framework Regulation for the same period,⁵¹ the subsequent procedure that led to the adoption of the multiannual financial framework Regulation 1311/2013,⁵² which lays down the framework for the period 2014 to 2020, would prove especially difficult.

An overall political agreement between the member states on ceilings and national envelopes for the new multiannual financial framework period would ultimately be achieved over two meetings of the European Council in late-2012 and early-2013.⁵³ *Juste retour* thinking continued to prevail, with UK Prime Minister David Cameron, for example, threatening a veto in order to secure a reduction in the overall payments ceiling compared to the previous programming period, while the 'net beneficiary' member states sought throughout to maximise their pre-allocated national envelopes.⁵⁴

It is against this background of budgetary crises and particularly low multiannual financial framework ceilings, which greatly restricted the potential size of the Union's annual budgets, that the fragmentation and complexity that has come to characterise the post-Lisbon era would develop. For the purposes of illustrating this fragmentation and complexity, four broad, sometimes overlapping and rather loosely-defined categories of tendencies will be examined. First of all, the crisis in the euro area will be used to illustrate the emergence of intergovernmental budgetary mechanisms that support Union policy objectives. Second, examples of *ad hoc*, hybrid, instruments that combine Union and member state contributions will be drawn from the Union's response to the migration and refugee crises. Third, examples of increased use of Union mechanisms that are financed only by participating member states will be cited. Finally, the increased internal fragmentation and complexity within the Union budget will be examined.

Intergovernmental budgetary mechanisms that support Union policy objectives

The first and most striking examples of budgetary fragmentation in the post-Lisbon era arose in the context of the sovereign debt crisis. Following an initial

⁵¹ The European Parliament refused its consent for the draft multiannual financial framework Regulation submitted to it. See European Parliament legislative resolution of 6 July 2011 on the draft Council regulation laying down the multiannual financial framework for the years 2007-2013, P7_TA(2011)0326, OJ 2013 C 33E/362.

⁵² Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020, OJ 2013 L 347/884.

⁵³ See Conclusions of the European Council of 7-8 February 2013 on the multiannual financial framework, EUCO 37/13.

⁵⁴ On the conduct of the negotiations, see R. Crowe, 'The European Council and the Multiannual Financial Framework', 18 *Cambridge Yearbook of European Legal Studies* (2016) p. 69.

response in the form of the intergovernmental Greek Loan Facility of 2 May 2010, a European Financial Stability Mechanism was established shortly afterwards within the framework of the Union budget.⁵⁵ Following the model of the pre-existing Balance of Payments Facility,⁵⁶ the European Financial Stability Mechanism Regulation, which was adopted on the legal basis of Article 122(2) TFEU, empowered the Commission to contract loans on the financial markets and then transmit them on a back-to-back basis to member states in need of assistance. In case a beneficiary member state would default on the loans, the Union budget would be liable for an amount of up to €60 billion. The necessary gross national income-based contributions would be called up to the Union budget as needed from the member states above the multiannual financial framework ceilings, but below the own resources ceiling. In effect, the European Financial Stability Mechanism was guaranteed by the own resources margin. This would later be enshrined in Article 3(3) of the multiannual financial framework Regulation 1311/2013.

The larger European Financial Stability Facility was established by the euro area member states as a special purpose vehicle under Luxembourgish law.⁵⁷ Its objective was to contribute to the preservation of financial stability in Europe by providing financial assistance to euro area states in economic difficulty. The Facility would serve as a precursor to the European Stability Mechanism, which was established by an international agreement concluded between the euro area member states in early 2012.⁵⁸ In parallel, the Treaties were amended to introduce a new paragraph 3 into Article 136 TFEU, which would expressly provide that the euro area member states could establish a stability mechanism to safeguard the stability of the euro area as a whole.⁵⁹ The authorised capital of the Mechanism amounts to a staggering €700 billion, with paid up capital totalling some €80 billion.⁶⁰

⁵⁵ Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ 2010 L 118/1.

⁵⁶ Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, OJ 2002 L 53/1.

⁵⁷ The European Financial Stability Facility was incorporated in Luxembourg on 7 June 2010.

⁵⁸ Treaty establishing the European Stability Mechanism, Brussels, 1 February 2012. On the various intergovernmental mechanisms that were created during the sovereign debt crisis, see A. de Gregorio Merinio, 'Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance', 49 *CMLRev* (2012) p. 1613. See also S. Van den Bogaert, V. Borger, 'Differentiated integration in EMU', in De Witte, Ott, Vos, *supra* n. 4, p. 209. On the current state of play, see D. Gros et al., 'The Instruments Providing Financial Support to EU Member States', CEPS Study for DG IPOL, European Parliament, January 2017.

⁵⁹ European Council Decision 2011/199 of 25 March 2011 amending Art. 136 of the TFEU with regard to a stability mechanism for Member States whose currency is the euro, OJ 2011 L 91/1.

⁶⁰ Art. 8 European Stability Mechanism Treaty, *supra* n. 58.

Although it has a clear intergovernmental foundation, the European Stability Mechanism pursues Union objectives and the European Stability Mechanism Treaty assigns tasks to the Commission, the Court of Justice and the European Central Bank. In its landmark *Pringle* judgment,⁶¹ the Court of Justice upheld the compatibility of the European Stability Mechanism with the Union Treaties and confirmed its earlier *Bangladesh* case-law to the effect that ‘the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union’,⁶² provided that those tasks ‘do not alter the essential character of the powers conferred on those institutions’ by the Treaties.⁶³ Moreover, the Court considered that, by its involvement in the European Stability Mechanism, the Commission ‘promotes the general interest of the Union’.⁶⁴ This was confirmed more recently in the case of *Ledra Advertising*,⁶⁵ where the Court ruled that the Commission must ensure that any memorandum of understanding it concludes within the framework of the European Stability Mechanism ‘is consistent with the fundamental rights guaranteed by the Charter’.⁶⁶

One of the reasons why recourse was made to intergovernmental solutions in this context, as opposed to creating new instruments within an expanded Union budget, was that non-euro area member states did not want to find themselves liable for assistance drawn from the budget of 28 that would be available only to euro area member states. This issue came to a head in the summer of 2015, when it was proposed to grant €7 billion in European Financial Stability Mechanism bridge-financing to Greece to cover the gap of a couple of months between the expiry of its second European Stability Mechanism-supported programme and the beginning of the third. The UK insisted that it should be compensated for any additional contributions it may have to make to the Union budget in the event of a default by Greece on its bridge-financing loans. As a result, a clause was introduced into the decision mobilising the European Financial Stability Mechanism bridge-financing, which made that mobilisation conditional upon the member states

⁶¹ ECJ 27 November 2012, Case C-370/12 *Thomas Pringle v Ireland*.

⁶² *Ibid.*, para. 158.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, para. 164. See further S. Peers, ‘Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework’, 9 *EuConst* (2013) p. 37; P. Craig, ‘*Pringle* and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance’, 9 *EuConst* (2013) p. 236.

⁶⁵ ECJ 20 September 2016, Joined Cases C-8/15P to C-10/15P, *Ledra Advertising v Commission and ECB*.

⁶⁶ *Ibid.*, para. 67. See further P. Dermine, ‘The End of Impunity? The Legal Duties of “Borrowed” EU Institutions under the European Stability Mechanism Framework’, 13 *EuConst* (2017) p. 369; A. Poulou, ‘The Liability of the EU in the ESM framework’, 24(1) *Maastricht Journal of European and Comparative Law* (2017) p. 126.

putting in place legally binding arrangements to ensure that member states whose currency is not the euro would be compensated by the euro area member states for any additional contributions they might have to make to the Union budget in the event of a Greek default.⁶⁷ In effect, this compensation would consist of intergovernmental payments between member states outside the budget, since the current Union budgetary rules do not provide for any kind of internal offsetting between member states' contributions within the budget.⁶⁸

The issue of how to develop separate budgetary mechanisms for the euro area remains highly topical today. In its 2013 Communication on a Eurozone Convergence and Competitiveness Instrument,⁶⁹ the Commission hinted that a dedicated euro area instrument could be financed using the external assigned revenue technique, as provided for in Article 21 of the Financial Regulation.⁷⁰ External assigned revenues are not processed through the budgetary procedure laid down in Article 314 TFEU, but are contributed directly to the Union budget by the member state or other contributor for a specified purpose. They are incorporated into the Union budget, as managed by the Commission, and are subject to the discharge procedure. Traditionally, this technique has been employed by member states wishing to contribute additional amounts to certain research programmes or external aid initiatives. However, it would also be possible for the euro area member states to agree among themselves and with the Commission to contribute external assigned revenues for a dedicated euro area instrument on top of their gross national income-based contributions to the Union budget.

The European Parliament's resolution on a Eurozone budgetary capacity of 16 February 2017 expresses support for a progressive evolution from an assigned revenue-based euro area instrument under the current treaty framework, to a dedicated euro area budget after future revision of the Treaties.⁷¹ Various further institutional and budgetary options for the euro area continue to be explored in the framework of the process of reflection launched by the

⁶⁷ See Council Implementing Decision 2015/1181 of 17 July 2015 on European Financial Stability Mechanism assistance to Greece, OJ 2015 L 192/15, Recital 9 and Art. 1(2).

⁶⁸ This solution for the Greek bridge-financing was given permanent effect by Council Regulation (EU) 2015/1360 of 4 August 2015 amending Regulation (EU) No 407/2010 establishing a European Financial Stability Mechanism, OJ 2015 L 210/1.

⁶⁹ Communication from the Commission, 'Towards a Deep and Genuine Economic and Monetary Union The introduction of a Convergence and Competitiveness Instrument', COM(2013) 165, 20.3.2013.

⁷⁰ Regulation (EU, Euratom) No 966/2012 of the EP and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ 2012 L 298/1.

⁷¹ European Parliament resolution of 16 February 2017 on a budgetary capacity for the Eurozone, P8_TA(2017)0050.

Commission's White Paper on the Future of Europe of 1 March 2017,⁷² which has since been supplemented by reflection papers on the deepening of the economic and monetary union⁷³ and on the future of the Union's finances.⁷⁴

Ad hoc, hybrid, instruments that combine Union and member state contributions

The migration and refugee crises prompted an increased use of what may be termed 'hybrid' budgetary funds and instruments, which are financed through a combination of Union budget expenditure and direct contributions from the member states. Given the urgency of the crises in 2014 and 2015 and the political difficulties involved in raising the multiannual financial framework ceilings, which would have required unanimity in the Council to amend the multiannual financial framework Regulation, creative financing solutions had to be explored.⁷⁵ In that context, the Commission would make use, for the first time, of the possibility introduced by the revision of the Financial Regulation in 2012 to establish Union trust funds for external actions.⁷⁶

The Union had long contributed to trust funds managed by third countries and international organisations. Under Article 187 of the Financial Regulation, the Commission itself is now empowered to establish and manage time-limited trust funds for 'emergency, post-emergency or thematic actions', to which the Union, member states and other international partners may then contribute. A trust fund is established by a Commission implementing act and a Constitutive Agreement is concluded with the other donors in order to define the objectives and governance structures of the pooled fund. Trust funds are managed by the Commission outside the Union budget and the contributions received from other donors are not integrated into the budget.⁷⁷ Since 2013, four trust funds have been established, dealing respectively with the Syrian crisis (the 'Madad Fund'),⁷⁸ the

⁷² European Commission, 'White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025', 1 March 2017.

⁷³ COM(2017) 291 of 31 May 2017.

⁷⁴ COM(2017) 358 of 28 June 2017.

⁷⁵ See R. Blomeyer, S. Paulo, E. Perreau, 'The budgetary tools for financing the EU external policy', Study for DG IPOL, European Parliament, January 2017.

⁷⁶ Art. 42 of the European Development Fund Financial Regulation allows the Commission also to create trust funds under the European Development Fund. See Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund, OJ 2015 L 58/17.

⁷⁷ Art. 187(6) of the Financial Regulation, *supra* n. 70.

⁷⁸ Commission Decision C(2014) 9615 of 10 December 2014 on the establishment of an EU Regional Trust Fund (the 'Madad Fund') in response to the Syrian crisis, as amended by Commission Decision C(2015) 9691 of 21 December 2015 and revised Agreement establishing the

Central African Republic (the 'Bêkou Fund'),⁷⁹ Colombia,⁸⁰ and the root causes of irregular migration and displaced persons in Africa.⁸¹ In its proposal of 2016 for a new Financial Regulation, the Commission proposes to allow for the use of trust funds also within the Union.⁸²

In the context of the migration and refugee crises, trust funds represented a quick and flexible budgetary tool to respond to fast moving events.⁸³ They also provided a way around the problem of excessively low multiannual financial framework ceilings and the political difficulties of raising fresh funds through the Union budget, as well as allowing member states to contribute funds on a 'pick and choose' basis to crisis actions.⁸⁴ However, it might be argued that resort to these *ad hoc* instruments also functions as means of circumventing the Union budgetary procedure under Article 314 TFEU. This concern appears even more pertinent with regard to the Facility for Refugees in Turkey,⁸⁵ which is not a trust fund but a 'coordination mechanism', established on the bases of Articles 210(2) and 214(6) TFEU.⁸⁶

EU Regional Trust Fund in response to the Syrian crisis, "the Madad Fund", and its internal rules Ares(2016)1329575, 16 March 2016.

⁷⁹ Commission Decision C(2014) 5019 of 11 July 2014 on the establishment of the EU Trust Fund for Central African Republic ('Bêkou EU Trust Fund'), and Agreement establishing the European Union Trust Fund for the Central African Republic ('the Bêkou Trust Fund'), and its internal rules, not published.

⁸⁰ Commission Implementing Decision C(2016) 1653 of 22 March 2016 on the establishment of a European Union Trust Fund for Colombia, not published and Agreement establishing the European Trust Fund for Colombia, and its internal rules, not published.

⁸¹ Commission Decision C(2015) 7293 of 20 October 2015 on the establishment of a European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa, not published, and Agreement between the European Commission and the Kingdom of Spain establishing the European Union Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa and its internal rules, not published.

⁸² Proposal for a Regulation of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union and amending a series of regulations, COM(2016) 605, Brussels, 14.9.2016, draft Art. 227.

⁸³ See A. D'Alfonso, B. Immenkamp, 'EU Trust Funds for external action: First uses of a new tool', European Parliamentary Research Service Briefing, November 2015.

⁸⁴ See L. den Hertog, 'EU Budgetary Responses to the Refugee Crisis: Reconfiguring the Funding Landscape', CEPS Paper in Liberty & Security, No. 93, May 2016.

⁸⁵ The mechanism was initially called the 'Refugee Facility for Turkey', but in order to accommodate certain political sensitivities, the name was later changed to 'Facility for Refugees in Turkey' so as to make clear that the assistance is intended for the refugees and not for the state.

⁸⁶ See Commission Decision C(2015) 9500 of 24 November 2015 on the coordination of the actions of the Union and of the Member States through a coordination mechanism - the Refugee Facility for Turkey, OJ 2015, C 407/8, as amended by Commission Decision of 10 February 2016 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015, OJ 2016 C 60/3. See also 'Common Understanding establishing a governance and

In the case of the Facility for Refugees in Turkey, the member states agreed to directly contribute funds amounting to €2 billion to top-up an initial contribution of €1 billion from the Union budget. The member states would make their contributions in accordance with the gross national income contribution key. The Facility for Refugees in Turkey has its own governance structure in the form of a Steering Committee, in which the Commission and member states are represented, with Turkey participating in an advisory capacity. The facility is administered by the Commission and additional contributions of the member states are integrated into the Union budget as external assigned revenues. A difficulty with this type of mechanism is that, contrary to regular own resources, the Commission lacks powers of enforcement in the event that member states do not pay their agreed contributions. Indeed, the decision establishing the Facility for Refugees in Turkey was even amended in April 2017 to make clear that member states will not be charged late payment interest if they delay their payments.⁸⁷

Another example of resort to a hybrid solution in order to overcome the rigidity of the Union's budgetary framework and to allow a non-uniform participation of member states arose in the context of a proposal made by some member states in 2011 to establish a European Endowment for Democracy, modelled on the US National Endowment for Democracy. The idea was to allow for a highly-flexible disbursement of funds at short notice and with a minimum of bureaucracy to potential agents of democratic change in troubled third countries. The European Parliament and Commission were generally supportive, but ultimately the most convenient solution to allow the most willing member states to press ahead and to facilitate a flexible financing of the endowment was to establish the European Endowment for Democracy as a public foundation under Belgian law.⁸⁸ Nominees of the Union institutions sit on the European Endowment for Democracy board and it benefits from Union financial support, granted through the Union's external financing instruments, with the participating member states also contributing directly.

Union policies and mechanisms financed only by participating member states

The Union Treaties provide for certain instances where a group of member states may undertake initiatives which should, as a general rule, be financed directly by

conditionality framework for the Refugee Facility for Turkey between the EU Member States and the Commission' of 3 February 2013 (Council document 5845/16 of 5 February 2016). On the functioning of the facility, see Communication from the Commission to the EP and the Council, 'First Annual Report on the Facility for Refugees in Turkey', COM(2017) 130 of 2.3.2017.

⁸⁷ Commission Decision of 18 April 2017 on the Facility for Refugees in Turkey amending Commission Decision C(2015) 9500 of 24 November 2015, C(2017) 2293, OJ 2017 C 122/4.

⁸⁸ See Declaration on the establishment of a European Endowment for Democracy, Council document 18764/11, 20 December 2011; see also <www.democracyendowment.eu>, visited 26 June 2017.

those member states. Defence policy is an increasingly high-profile example of the complex and fragmented budgetary framework that results from the provisions of the TEU on the financing of the Common Foreign and Security Policy. In conformity with Article 41 TEU, the costs of military and defence operations under the Common Security and Defence Policy are borne directly by the participating member states, but in practice certain common costs are also financed through a Union mechanism to which not all member states contribute, known as the Athena mechanism.⁸⁹ On 7 June 2017, meanwhile, the Commission launched a plan to create a European Defence Fund,⁹⁰ which should consist of two 'windows', having different legal structures and different sources of financing. First, a 'research' window would be based around a dedicated defence research programme, which would be financed through the Union budget. Second, a 'capability' window would focus on developing joint defence capabilities and would be financed mainly through direct contributions from the participating member states.

Another area where the Treaties provide that initiatives should, as a general rule, be financed only by the participating member states is enhanced cooperation.⁹¹ Although the Treaties are clear in specifying the conditions under which enhanced cooperation expenditure may be charged to the Union budget,⁹² a question that has so far not been settled is whether revenue deriving from an enhanced cooperation could constitute an own resource of the Union. In 2011, the Commission presented a proposal to introduce a Financial Transaction Tax,⁹³ which was accompanied by a proposal to make a share of the revenue from that tax an own resource of the Union.⁹⁴ Now that the Financial Transaction Tax proposal is being negotiated under an enhanced cooperation procedure,⁹⁵ the question arises whether Financial Transaction Tax revenue could still be made an own resource. One option could be that a share of Financial Transaction Tax

⁸⁹ Council Decision (CFSP) 2015/528 of 27 March 2015 establishing a mechanism to administer the financing of the common costs of European Union operations having military or defence implications (Athena) and repealing Decision 2011/871/CFSP, OJ 2015 L 84/39.

⁹⁰ See Communication from the Commission, 'Launching the European Defence Fund', COM(2017) 295 of 7.6.2017.

⁹¹ On the enhanced cooperation mechanism, see S. Peers, 'Enhanced cooperation: the Cinderella of differentiated integration', in De Witte, Ott, Vos, *supra* n. 4, p. 76.

⁹² See Art. 332 TFEU.

⁹³ Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC, COM(2011) 594 of 28.9.2011.

⁹⁴ See Amended proposal for a Council Decision on the system of own resources of the European Union, COM(2011) 739 of 9.11.2011, draft Art. 2(1)(b).

⁹⁵ See Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013) 71 of 14.2.2013. See also P. Van Cleyenbreugel, W. Devroe, 'The financial transaction tax project', in De Witte, Ott, Vos, *supra* n. 4, p. 282.

revenue collected in the participating member states would be made an own resource and an amount equivalent to that revenue would be deducted from the gross national income-based contributions of those member states. However, this differentiated treatment of member state's gross national income-based contributions would then further complicate the revenue side of the budget.

Increased internal fragmentation and complexity within the Union budget

Apart from the emergence of intergovernmental and hybrid instruments around the Union budget, increased budgetary fragmentation and complexity are also evident within the Union budget itself since Lisbon. In particular, a new element of complexity may be perceived in a shift from the delivery of financial assistance through grants and subsidies, which are policy-driven and disbursed on a one-off basis to beneficiaries, towards increased use of financial instruments, which are demand-driven and take the form, in particular, of loans and guarantees backed by the Union budget.⁹⁶ Such instruments are used extensively in the current programming period, for example, in the implementation of the Horizon 2020⁹⁷ and Connecting Europe Facility programmes.⁹⁸

In a related trend, the Juncker Commission has launched major investment initiatives that employ Union budget guarantees with a view to leveraging additional private sector investments. Most notably, the European Fund for Strategic Investments (or the 'Juncker Plan')⁹⁹ entails the creation of a special facility within the European Investment Bank, which makes strategic investments in the riskiest portions of eligible projects, with a view to 'crowding-in' private sector investments to cover the remaining portions. The European Fund for Strategic Investments has its own governance structures and is backed by an initial Union budget guarantee of €16 billion, which is likely to be extended.¹⁰⁰ Within the Union budget, the guarantee is backed by an European Fund for Strategic Investments Guarantee Fund, which functions in a manner similar to the existing

⁹⁶ See the definition of financial instruments set out in Art. 2(p) of the Financial Regulation, *supra* n. 70. On legal issues relating to Union loans and guarantees, see M. Vitsentzatos, 'Loans and guarantees in the European Union budget', 15 *ERA Forum* (2014) p. 131.

⁹⁷ Regulation (EU) No 1290/2013 of the EP and of the Council of 11 December 2013 laying down the rules for participation and dissemination in Horizon 2020 – the Framework Programme for Research and Innovation (2014-20) and repealing Regulation (EC) No 1906/2006, OJ 2013 L 347/81.

⁹⁸ Regulation (EU) No 1316/2013 of the EP and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, OJ 2013 L 348/129.

⁹⁹ Regulation (EU) 2015/1017 of the EP and of the Council of 25 June 2015 on the European Fund for Strategic Investments, OJ 2015 L 169/1.

¹⁰⁰ See Commission proposal for 'EFSI 2.0', COM(2016) 597 of 14.9.2016.

External Action Guarantee Fund.¹⁰¹ In 2016, meanwhile, the Commission presented a proposal for a European Fund for Sustainable Development,¹⁰² which will apply the European Fund for Strategic Investments guarantee model with a view to stimulating investments in Africa and the Neighbourhood.

This trend towards increased use of loans, guarantees and other forms of financial instruments has been underway for some time, but it appears to have accelerated in the context of low multiannual financial framework ceilings that has prevailed over recent years. If less money is available in the Union budget, then the use of financial instruments allows the budget to continue supporting a greater volume of projects, even if this shift may entail greater legal and budgetary complexity and new challenges in terms of ensuring adequate parliamentary oversight and budgetary control. Under traditional Union financing in the form of grants, a clear trail can be traced from the Union expenditure to the outcomes of the projects implemented using Union funds. In the case of complex guarantee-based instruments like the European Fund for Strategic Investments, it is not always easy to determine what budgetary risks are being taken and by whom, a concern that has been expressed by the European Parliament's Committee on Budgetary Control and by the Court of Auditors.¹⁰³

A further element of fragmentation and complexity in the post-Lisbon budgetary system concerns the mobilisation of what are termed 'special instruments' above the multiannual financial framework ceilings, such as the Contingency Margin,¹⁰⁴ the Flexibility Instrument,¹⁰⁵ the Emergency Aid Reserve,¹⁰⁶ the Globalisation Adjustment Fund¹⁰⁷ and the European Union Solidarity Fund.¹⁰⁸ Under Article 312(3) TFEU, the multiannual financial framework Regulation lays down expenditure ceilings and 'any other provision required for the annual budgetary procedure to run smoothly'. That provision has been used since Lisbon as a basis for the mobilisation of amounts above the multiannual financial framework ceilings in order to respond to unforeseen events.

¹⁰¹ Council Regulation (EC, Euratom) No 480/2009 of 25 May 2009 establishing a Guarantee Fund for external actions, OJ 2009 L 145/10.

¹⁰² Proposal for a Regulation of the EP and of the Council on the European Fund for Sustainable Development (EFSD) and establishing the EFSD Guarantee and the EFSD Guarantee Fund, COM(2016) 586 of 14.9.2016.

¹⁰³ See, for example, the remarks of Court of Auditors President Klaus-Heiner Lehne on financial instruments when presenting the ECA Annual Report for 2015 to the European Parliament on 26 October 2016 (p. 3): <www.eca.europa.eu/Lists/ECADocuments/speech-plenary-AR2015/speech-plenary-AR2015_EN.pdf>, visited 26 June 2017.

¹⁰⁴ Art. 13 of the multiannual financial framework Regulation, *supra* n. 52.

¹⁰⁵ Art. 11 of the multiannual financial framework Regulation, *supra* n. 52.

¹⁰⁶ Art. 9 of the multiannual financial framework Regulation, *supra* n. 52.

¹⁰⁷ Art. 12 of the multiannual financial framework Regulation, *supra* n. 52.

¹⁰⁸ Art. 10 of the multiannual financial framework Regulation, *supra* n. 52.

The special instruments may only be mobilised in strictly-defined circumstances and for limited amounts, as provided for in the multiannual financial framework Regulation and the residual budgetary IIA.¹⁰⁹

The Union's banks, the European Central Bank and the European Investment Bank, meanwhile, continue to have their own sources of capital, financed by the participating member states or their institutions, and the separation of their budgets from the Union budget is likely to endure, although the Monti Report does suggest that certain European Central Bank profits could potentially be used as a source of revenue for a possible future euro area budget.¹¹⁰ Meanwhile, the establishment of many new Union agencies and joint undertakings over the past couple of decades has seen the emergence of more than thirty 'satellite' budgets around the Union budget. While the majority of agencies are financed through a subsidy from the general budget, some are financed in whole or in part through direct national contributions (e.g. European Defence Agency) or obligatory contributions from national authorities (e.g. European Banking Authority, European Securities and Markets Agency). Others are financed in whole or in part through users' fees (e.g. European Medicines Agency, European Union Intellectual Property Office), which in some cases have even led to the accumulation of significant surpluses (e.g. European Union Intellectual Property Office¹¹¹).

ASSESSMENT OF THE POST-LISBON FRAGMENTATION AND COMPLEXITY

The Convention's Working Group on Simplification emphasised that 'acts which have the same nature and the same legal effect must be produced by the same democratic procedure'. Furthermore, citizens 'must know who does what within the Union' and they 'should be able to distinguish the responsibilities of the different Institutions and of the various players on the European scene'. Article 310(1) TFEU, which enshrines the principle of unity of the budget, provides that all revenue and expenditure of the Union shall be shown in the budget. Following the reforms introduced by the Treaty of Lisbon, the provisions of Article 310 to 324 TFEU can be considered to lay down, at least at the level of the Treaties, a relatively clear division of institutional competences and comprehensible rules

¹⁰⁹ Interinstitutional Agreement of 2 December 2013 between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, OJ 2013 C 373/1.

¹¹⁰ *Supra* n. 5, p. 55-56 and 68.

¹¹¹ Art. 139(8) of the EUIPO Regulation now specifies what should happen in the event of a persistent surplus. See Regulation (EU) 2015/2424 of the EP and of the Council of 16 December 2015, OJ 2015 L 341/21.

and procedures for processing Union revenue and expenditure. As the Monti Report suggests, much of the complexity within the Union budget could be addressed through revisions of secondary law, including the own resources legislation, without any need to amend the Treaties.¹¹²

However, not all European-level revenue and expenditure that is used to pursue Union policy objectives is Union revenue and expenditure that falls to be processed through those standard procedures. In the first instance, the Treaties expressly provide that in certain areas, such as defence operations and enhanced cooperation initiatives, financing should, in principle, be covered directly by the participating member states. Moreover, the Financial Regulation allows member states to contribute additional funds to Union initiatives as external assigned revenues and provides a legal basis for Union trust funds, which are managed outside the Union budget and have their own governance structures. The case law of the Court of Justice, meanwhile, has acknowledged that there are situations where the member states, in compliance with the Treaties, may undertake intergovernmental budgetary initiatives that pursue Union policy objectives and that entail new tasks for the Union institutions.

Recourse to such intergovernmental and hybrid funds and instruments, and the use of mechanisms within the Union legal framework that are financed directly by participating member states, appears to have accelerated in the post-Lisbon era, which has been characterised by low multiannual financial framework ceilings and many unforeseen crises. The overall picture that emerges over recent years is one of increasing fragmentation and complexity. Revenue ultimately drawn from Union citizen-taxpayers to support Union policies is processed according to different procedures, involving different institutional actors and governance structures, different levels of transparency and parliamentary oversight and different auditing and discharge procedures, depending on the mechanism for which the funds are raised.

In the case of the European Stability Mechanism, for example, it is left to national parliaments to provide parliamentary oversight, which is generally restricted to controlling the national contributions and decisions of national ministers.¹¹³ When it comes to hybrid mechanisms, citizens must try to understand a system in which some amounts are directed into a trust fund or facility via the Union budget, with its classical decision-making processes, and other amounts are contributed directly from the national budget, following

¹¹² Of course, revision of the Own Resources Decision would require ratification by the member states in accordance with the third paragraph of Art. 311 TFEU.

¹¹³ See Editorial comments, 'Debt and democracy: "United States then, Europe now"?', 49 *CMLRev* (2012) p. 1833; M. Ruffert, 'The European Debt Crisis and European Union Law', 48 *CMLRev* (2011) p. 1777.

authorisation of the expenditure by the national parliament. Sometimes these funds are managed by the Commission outside the Union budget, and in other instances the additional national contributions are incorporated into the Union budget as external assigned revenues, thus making them subject to the Union discharge process. The Union institutions play different roles depending on whether they are acting within the framework of Union structures or an intergovernmental mechanism, such as the European Stability Mechanism.

There is little to suggest that this current state of flux in the European-level public finances will abate any time soon. Just as some funds, such as the European Development Fund, may transit from the intergovernmental domain towards closer alignment with, or even integration into, the Union budget,¹¹⁴ so new hybrid instruments, such as a defence fund, are likely to emerge within or around the Union budget. Even the creation of a euro area budget, which some may see as a precursor to a genuine federal budget at European level, is only likely to add to the fragmentation and complexity of the Union's finances, at least in the medium term. The most common suggestion for a concrete first step to establish such a budget is to create a facility to which the euro area member states would make direct contributions as external assigned revenues, thus deviating from the standard budgetary procedure foreseen in Article 314 TFEU and adding a new element of fragmentation and complexity in the system.¹¹⁵

Just as variable geometry and differentiation may increasingly be viewed as structural features of the Union's legal order,¹¹⁶ so the time may have come to acknowledge that the founding vision of budgetary integration proceeding through a single, 'supranational', European budget is no longer sufficient and a complex regime of differentiated budgetary integration is likely to endure for some time to come. Returning to the concerns expressed by the Convention's Working Group on Simplification, the challenge today is not just to make the Union budget more comprehensible and transparent, which in itself remains an enormous task, but also to assess how the diverse component elements of the broader budgetary galaxy of European-level funds and instruments that pursue Union policy objectives could be aligned in a manner that ensures adequate coherence and respect for fundamental principles and standards of transparency, accountability and oversight.

In this respect, the Monti Report's emphasis on rekindling the somewhat forgotten vision of a European budget of citizens, where revenue is drawn from sources linked to Union policies and the abolition of rebates allows for a renewed

¹¹⁴The Commission is expected to propose the incorporation of the European Development Fund into the Union budget for the post-2020 period, following the expiry of the Cotonou Agreement. See D'Alfonso, *supra* n. 2.

¹¹⁵See for example, the EP resolution of 16 February 2017, *supra* n. 71, point i), fifth subpara.

¹¹⁶B. De Witte, 'Variable geometry and differentiation as structural features of the EU legal order', in De Witte, Ott, Vos, *supra* n. 4, p. 9.

focus on the shared benefits of Union expenditure, may be a timely one. Ideally, every euro collected from citizen-taxpayers to pursue Union policy objectives should be processed through procedures that involve clearly-defined roles for the institutional actors concerned, and which ensure respect for certain uniform European standards of transparency, accountability and budgetary control. Undertaking a Copernican shift in perspective from the dominant state-centric budgetary model of recent decades to a more citizen-centred view of the European budgetary galaxy may serve to generate useful insights on how to proceed. Indeed, mapping the galaxy from the perspective of the citizen may be a necessary first step in seeking to establish what legal, procedural and institutional realignments would be appropriate with a view to making the Union's public finances, understood in a broader sense that incorporates all European-level expenditure that pursues Union policy objectives, more comprehensible and transparent.

Those realignments might entail plotting a medium-term course towards the incorporation of certain hybrid or intergovernmental funds and instruments into the Union budget or, where appropriate, establishing new structures or forms of cooperation between national and European institutions with a view to ensuring adequate shared oversight of funds that appear likely to endure outside the budget on a longer-term basis. In this regard, reform of the European-level public finances may serve as fertile terrain on which to explore more deeply the potential of the 'Union method' of integration, as previously discussed in the pages of this journal.¹¹⁷ It may even be that national budgets and national institutional actors, including national parliaments, should also be considered to occupy a common European budgetary space, in which national and European systems of revenue and expenditure are aligned towards common policy goals and function in accordance with shared principles of European public finance law.

CONCLUSION

For over four decades, since the introduction of the own resources system, a vision prevailed of European budgetary integration proceeding in a uniform manner through a single European budget in which all member states participated in a more or less uniform manner. However, practical experience since the entry into force of the Treaty of Lisbon shows the Union's public finances instead becoming more fragmented and complex, both internally, within the Union budget, and externally, around it. In particular, the financial and sovereign debt crises and the migration and refugee crises showed the Union's legal framework in budgetary

¹¹⁷ See Editorial, 'In Search of the Union Method', 11(3) *EuConst* (2015) p. 425; see also 'Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe', Bruges, 2 November 2010.

matters to be too rigid and inflexible to accommodate the diverse budgetary responses, sometimes involving a variable participation of member states, that were required.

In light of this experience, the time may have come to acknowledge that a complex regime of differentiated European budgetary integration is likely to endure for some time to come and to embrace the challenge of shaping the medium and longer-term legal, procedural, institutional and political realignments that would be required, across the European budgetary galaxy, in order to ensure the simplicity, comprehensibility and transparency that the Convention on the Future of Europe considered so essential to the democratic legitimacy of the Union's public finances.

