Discussion
The Evolving Economic Constitution of the European Union: Eulogy to Stability?

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Introduction – The European Economic Constitution: Pictures from the Treaties (And the Big Picture behind Them)

The European economic constitution is somehow defined by article 3.3 of the consolidated Treaty establishing the European Union (TEU):

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
>
> It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
>
> It shall promote economic, social and territorial cohesion, and solidarity among Member States. [...]

On these basic – and a bit conflicting – elements of "competitive social market economy" (being the edge between competitive and social not so easy to identify), builds the art. 119.1 of the Treaty on the Functioning of the European Union (TFEU), which specifies:

> For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives and conducted in accordance with the principle of an open market economy with free competition.

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It is well clarified by the TFEU how the economic policy of the Union, bound to respect the principles of competitive market economy and with some relevant social and solidarity elements (mostly in regional and cohesion policy) lays within the competence of the Member states, which are expected to coordinate themselves. The article 5 of the TFEU, drawing the borders of this competence adds:

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.
   Specific provisions shall apply to those Member States whose currency is the euro.
2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular, by defining guidelines for these policies.
3. The Union may take initiatives to ensure coordination of Member States' social policies.

Therefore, the Member States play the role of main actors in economic policy as further clarified by articles 120 and 121. These, respectively, specify that "Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union, and in the context of the broad guidelines referred to in Article 121(2)"; and that "Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120".

The Broad Guidelines of the economic policies of the Member States and of the Union (article 121) and the guidelines for the employment (article 148) are the framework in which this coordination takes places in the Council and in the European Council. The two intergovernmental bodies therefore usefully fulfill this role of being but the institutional places where states sit around a table and discuss such coordination among themselves, supported by the European Commission (whose President is a member of the latter). The European Parliament is excluded from this procedure, except for a weak consultative role. The timing of this coordination mechanism is proceduralized in the so-called European Semester, which is based on the presentation and periodic comparison of national stability programs (for countries in the euro area) or convergence programs (for countries outside the euro area). This is the result of attracting in this coordination procedure the preventive arm of

the Stability and Growth Pact (see article 126 and the acts adopted on the legal base of article 126.14[1]).

In the title dedicated to economic policy in the TFEU there are essentially two categories of rules: the ones dedicated to the coordination of national economic policies and those aimed at directly guaranteeing the soundness and sustainability of public finances through prohibitions. Among the latter, there is the prohibition for the states to directly access financing by the ECB (article 123 TFEU), their obligation to avoid excessive debts and deficits (article 126 TFEU) and the so called "no bail out" rule (article 125 TFEU). Ultimately, this focus on stability serves to allow states to maintain (almost) full control over their national budgets without thereby posing a threat to the public finances of other member states or to the stability of the euro area. In a nutshell, this attention to stability is nothing more than a way to ensure that fiscal policy and budget management (and therefore tax and welfare policy) remain national.

The soundness of public finances is paralleled in the treaties by the stability of prices, being the two the very core of European economic constitution. We find a repetition of this "*principe axiologique de l'UEM, si l'on veut être pompeux, le méta-principe*" – as Martucci correctly points out[2] – in several articles of the TEU and TFEU.[3] The two are intertwined not just as both expressions of the ordoliberal gospel – as what could be more "in order" than a balanced budget and a stable currency? – but also because the stability of prices – the "main objective" of the European system of Central Banks – is what makes monetary policy neutral vis-à-vis the different economic policies of member states: all hopefully balanced, yet all different. In the end, the legal cathedral of economic and monetary union as set up by the treaties in the Maastricht compromise is rather a retaining wall to ensure that states are free to continue managing their national budgets almost freely.

The European approach to the "social market economy" model, as mentioned in article 3 TEU rests on the inadequate shoulders of the small European budget. The reallocation of resources operated through the structural funds, while important, must be dimensioned in the (about) 1% of the European GNI,

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1 See the Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies which introduces the preventive arm of the stability and growth pact; the preventive measures designed to ensure the budgetary discipline necessary for the smooth operation of the European Union (EU).

2 See *supra* in this volume, F. Martucci, « Les racines historiques et théoriques de l'Union économique et monétaire ».

3 See in the TEU, the Article 2 and in the TFEU the Articles 119, 127, 140, 141, 219, 282.

financed through a not so "own" European income (we will come back to this later).

Yet, this is what happened until the Covid-19 crisis broke into the scene. How this has been a game-changer will be addressed in the concluding remarks of this contribution. In fact, we couldn't agree more with the opening statement by Hjalte Lokdam and Michael A. Wilkinson:

> The decade-long Eurozone crisis, and now the Covid-19 crisis, have challenged some of the key assumptions about the European economic constitution. In particular, they have challenged two of its core ideological premises: that inflation is the primary economic problem of democratic capitalism and that markets will discipline states' fiscal practices. Price stability, it turned out, was insufficient for financial stability, and market discipline was ineffective in ensuring fiscal prudence.[4]

Before we get there, it is interesting to see how this model focused on stability has been challenged and stretched during the long years of the financial crisis. Some features of this construction contributed to generating cracks and collapses that would not have occurred if the building had been a little less "stable" and a bit more flexible. Some flaws in the legal/institutional architecture of the EMU intended for stability have been under scrutiny for years, which explains why this topic is interesting for the jurists as much as it is for the economists.

The 'constitutionalization' of the two objectives of price stability as well as of sound public finances, a heritage from the German ordoliberalism aimed at a social market economy,[5] prescribes a result that could – at least partly – have been left to the play of political forces within the Union. Political priorities

4 See *supra* in this volume, H. Lokdam & M. A. Wilkinson, « The European Economic Constitution in Crisis: A Conservative Transformation ? ».

5 See on the topic F. Böhm, W. Eucken and H. Grossman-Dorth, « Unsere Aufgabe », in F. Böhm, *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung*, Stuttgart/Berlin, Kohlhammer, 1937, pp. VII ff. And, in Italian translation, « Il nostro compito. Il Manifesto dell'Ordoliberalismo del 1936 », in F. Forte and F. Felice (eds.), *Il liberalismo delle regole*, Catanzaro, 2016, pp. 3 ff. An useful analysis in G. Contaldi, « Il significato attuale dell'economia sociale di mercato nell'ordinamento dell'Unione europea », *Ordine internazionale e diritti umani,* 2018, pp. 544–564. Ed.: regarding the ordoliberal economic constitutionalism, its evolution and its divergences and convergences with other currents of neoliberalism, see *supra* in this volume, T. Biebricher, « An Economic Constitution – Neoliberal Lineages ».

could change over time, because of electoral rounds, but also as a result of the evolving economic situation and circumstances.

So, with an easy *hindsight bias*, we could easily say that some hints in the European economic constitution predicted some level of failure. And here they are, these hints, now under the spotlight.

1 The Blurry Line between Economic and Monetary Policy: Horizontal and Vertical Implications

Two lines are drawn by the European treaties: a horizontal one, separating economic policy, embedded in the Council and in the European Council, and monetary policy attributed to the ECB; and a vertical line, dividing monetary policy managed at European level and economic policy belonging to the member States. Both are based on the definition of economic policy vis-à-vis monetary policy. Yet, not only the definition of what is meant by economic policy and by monetary policy remains extremely confused, being, at the end of the day, quite an artificial one – as monetary policy is just a tool in the economic policy toolbox – moreover, economic policy has an impact on monetary policy and vice versa, as clearly pointed out by the European Court of Justice (ECJ), lately in the Weiss case.[6] To make such dividing lines more uncertain, the secondary objective of the ECB – after the price stability – is to support the general economic policies of the Union.

The case law on the topic confirmed the fluidity of both these dividing lines: see the cases Pringle,[7] Gauweiler,[8]

6 CJUE, 11 December 2018, *Weiss*, C-493/17, ECLI:EU:C:2018:1000.

7 CJUE, 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756. See commentaries by F. Munari, « Da *Pringle* a *Gauweiler*: I tormentati anni dell'unione monetaria e i loro effetti sull'ordinamento giuridico europeo », *Il Diritto dell'Unione europea*, 2015, pp. 723–755 (and the many authors mentioned); C. Koedooder, « The Pringle Judgment: Economic and/or Monetary Union ? », *Fordham International Law Journal*, 2013, vol. 37, n°1, pp. 111–146; G. Lo Schiavo, « The Judicial 'Bail Out' of the European Stability Mechanism: Comment on the Pringle Case », *CoE Research Papers in Law*, n° 9, 2013.

8 CJUE, Gde ch., 16 June 2015, *Gauweiler*, C-62/14, EU:C:2015:400. See V. Borger, « Outright Monetary Transactions and the Stability Mandate of the ECB: Gauweiler », *Common Market Law Review*, 2016, vol. 59, n°1, pp. 139–196; P. Craig and M. Markakis, « Gauweiler and the Legality of O.M.T. », *European Law Review*, 2016, vol. 41, n°1, pp. 4–24; issue n°1 (2016) of the *Maastricht Journal of European and Comparative Law*, with contributions by F. Fabbrini, T. Tridimas, D. Sarmiento, M. Goldmann, J.V. Louis, M. Claes, C. Zilioli, S. Sciarra *e.a.*; F. Martucci, « La Cour de justice face à la politique monétaire en temps de crise de dettes souveraines : l'arrêt Gauweiler entre droit et marché: Commentaire de l'arrêt CJ, GC, 16 juin 2015, Peter Gauweiler e.a, C-62/14 (1) », *Cahiers de droit européen*, 2015, vol. 51, n° 2,

Weiss,[9] eventually the questionable ruling of the German Constitutional Court[10] – the first and the last focusing mostly on the vertical dividing line, while the other two mostly on the horizontal one (but even this subdivision is a rough one).

The European Court of Justice maintained that ECB could support indirectly states' fiscal policies through monetary tools for the sake of fiscal and monetary stability (and so for price stability) – in the Gauweiler and Weiss cases. The ECJ also stated that, being in charge of macroeconomic policy (both their own and, collectively, the European one), the States could sign and ratify an international treaty, the one establishing the European Stability Mechanism, for the same financial stability – so in the Pringle decision, adopted after request for a preliminary ruling submitted to the Court by the Irish High Court. The Court considered compatible with the Treaty those interventions, provided for by the Treaty establishing the European Stability Mechanism, indispensable for safeguarding the financial stability of the euro area as a whole and subject to strict

pp. 493–534; L.F. Pace, « The OMT case: Institution Building in the Union and a (failed) nullification crisis in the process of European integration », in L. Daniele, P. Simone and R. Cisotta (eds.), *Democracy in the EMU in the Aftermath of the Crisis*, Cheltenham, Springer, 2017, pp. 371–403; L.F. Pace, « The OMT case, the "intergovernmental drift" of the Eurozone crisis and the (inevitable) rectification of the BVerfG jurisprudence in the light of the ECJ's Gauweiler judgment », *Diritto dell'Unione europea*, 2017, n°1, pp. 153–170.

9 CJUE, 11 December 2018, *Weiss*, *loc. cit*. See. A.A. M. Mooij, « The *Weiss* judgment: The Court's further clarification of the ECB's legal framework: Case C-493/17 *Weiss and others*, EU:C:2018:1000 », *Maastricht Journal of European and Comparative Law*, 2019, vol. 26, n°3, pp. 449–465; R. Miccù, « Le trasformazioni della costituzione economica europea: verso un nuovo paradigma? », in *federalismi.it*, n° speciale 5, 2019, pp. 26–42, esp. p. 33 ff.; R. Cisotta, « Profili istituzionali della BCE e la fine (prossima?) del *Quantitative Easing* », *osservatoriosullefonti.it*, 2018, n° 3.

10 BVerfG, Judgment of the Second Senate, 5 May 2020, *PSPP*, 2 BvR 859/15. ECLI:DE:bVerfG:2020:rs20200505.2bvr085915. See M. Avbelj, « The Right Question about the FCC Ultra Vires Decision », *Verfassungsblog*, 6 May 2020; L. Bini Smaghi, « The Judgment of the German Constitutional Court is incomprehensible », *LUISS School of European Political Economy*, Policy Brief n° 25, 2020; F. Fabbrini and R.D. Keleman, « With one court decision, Germany may be plunging Europe into a constitutional crisis », *Washingtonpost.com*, 7 May 2020; M. Poiares Maduro, « Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court », *Verfassungsblog*, 6 May 2020; D. Sarmiento, « Requiem for Judicial Dialogue – The German Federal Constitutional Court's Judgment in the Weiss case and its European implications », *eulawlive.com*, 9 May 2020; H. Sauer, « Substantive EU Law review beyond the veil of democracy: the German Federal Consitutional Court ultimately acts as a Supreme Court of the EU », *eulawlive.com,* 9 May 2020; G. Tesauro and P. De Pasquale, « La BCE e la Corte di giustizia sul banco degli accusati del Tribunale costituzionale Tedesco », *Osservatorio europeo* (*www.dirittounioneeuropea.eu*), 11 May 2020.

conditions, therefore capable of not contravening the spirit of the EU Treaties, aimed at encouraging virtuous budgetary policies.

In the other two cases – started as requests for a preliminary ruling by the German Constitutional Court and raising the doubt that the ECB had crossed its borders to the detriment of the states – the Court of Justice specified that monetary policy measures may as well have economic policy consequences (unsurprisingly) and, also, that these can be consciously accepted. The same argument then led the German Constitutional Court (GCC) to question entirely the legitimacy of the ECB's intervention through the instrument of quantitative easing and of the ECJ itself for a lack of control over such *ultra vires* intervention.[11] It goes without saying that both views – the one of the ECJ and the other of the GCC – find supporting arguments in the uncertain European rules and above all in the artificiality of this distinction between economic policy and monetary policy which are not only attributed to different institutions but to different levels of government.

In a situation of exceptionality (as the global financial crisis or later the pandemic crisis) the instruments used by central banks (all of them) are much more invasive in the market economy than they would normally be. For this reason, the boundaries of monetary policy are, as we have seen, interpreted by the ECB with a certain degree of freedom to allow such interventions. Furthermore, the reasons the ECB used to justify its proactivity – financial stability and the survival of the euro – closely linked economic and monetary policy. Finally, pursuant to article 127, par. 1, TFEU and 282, par. 2, TFEU, the primary objective of the Union's monetary policy is to maintain price stability,[12]

11 We agree with Francesco Martucci, who correctly points out how "[*l*]*a règle de politique monétaire qui délimite le mandat de la BCE est donc tributaire à la fois d'un choix politique et d'un contexte économique ce qui explique sa plasticité et sa permanence. Nécessairement, les mesures de la BCE ont un effet sur l'économie, d'autant que c'est justement l'effet recherché pour lutter contre la déflation. La BCE ne devrait-elle dès lors pas répondre de ses mesures ? On se heurte alors à l'autre règle de politique monétaire que constitue l'indépendance de la banque centrale*" (see *supra* in this volume, F. Martucci, « Les racines historiques et théoriques de l'Union économique et monétaire »).

12 The Bank has its own intervention tools, necessarily aimed at maintaining price stability, a precise objective that it has itself quantified in an inflation rate close to 2%, through the adoption of the "monetary policy strategy" of 13 October 1998 and its subsequent amendment. A new strategy has just been adopted – see the Press Release, *ECB's Governing Council approves its new monetary policy strategy, 8/7/2021*, available at https://www.ecb.europa.eu/press (last consulted on 12 February 2022) – with a clear inflation target at 2% as a medium-term goal. These tools are mentioned in art. 18.1 of the ESCB Statute and are credit and open market operations. And yet it is certainly not in relation to extraordinary intervention in the event of a crisis that these instruments are envisaged, but more

but – as already noted – the same provisions also ask for the European System of Central Banks (ESCB) to support the general economic policies in the Union with a view to contributing to the achievement of its objectives as laid down in article 3 TEU. Among them, are listed the goals of economic, social, and territorial cohesion, and solidarity between Member States.

So, it is precisely the terrain of crisis management that proved capable of blasting the distinction between economic and monetary policy. Among the main consequences[13]: in the absence of a specific competence, the ECB – unlike many central banks who intervened immediately with injections of liquidity – delayed its intervention until the situation proved particularly severe for the euro area, so to require the creation of *ad hoc* instruments, in the form of market operations programs aimed at financial stability and so – indirectly – at price stability. In obedience to the mantra of stability, these interventions were accompanied by strict conditionality and well-specified exceptions to the Stability Pact. An inevitable consequence has been, in the long years of the financial crisis, austerity. Faced with an unprecedented and unforeseen crisis, in 2010, the states intervened – unanimously by the Heads of State and Government in the European Council or by the Finance Ministers in the Eurogroup – through intergovernmental solutions in the field of international law: the European Stability Mechanism[14] (and before through private law with the EFSF[15] vehicle) and the treaty known as the Fiscal compact,[16] establishing further constraints in domestic budget policies. The austerity measures adopted derive entirely from the logic of the treaties grounded on

generally in order to pursue the objectives of the system and carry out the monetary policy tasks attributed to it.

13 For more details, see F. Allemand and F. Martucci, « La nouvelle gouvernance économique européenne I », *Cahiers de droit européen*, 2012, vol. 48, n°1, pp. 17-99 ; F. Allemand and F. Martucci, « La nouvelle gouvernance économique européenne II », *Cahiers de droit européen*, 2012, vol. 48, n°2, pp. 409-457.

14 The European Stability Mechanism or ESM is an international organization created by the Eurozone member States and allowed by the addition of a third paragraph to art. 136 TFEU (to authorize them), aimed at finding resources through the issuance of securities and intervention to the aid of States based on strict conditionality. The founding Treaty was signed on February 2, 2012, the new institution entered its functions in October of the same year, again based in Luxembourg.

15 The EFSF or *European Financial Stability Facility* was a special purpose vehicle financed by members of the eurozone to address the sovereign-debt crisis created in 2010 under Luxembourg law. Its activities have been inherited by the ESM.

16 The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union; also referred to as TSCG, or more plainly as Fiscal Stability Treaty or Fiscal Compact has been signed on 2 March 2012. Its aim is to introduce stricter budget constraints for Eurozone member states in their national legislation.

price stability and excessive deficit prohibitions. Both goals are designed for times of prosperity and not of crisis, times of steadiness and not flexibility. Yet, the little room for intervention offered by the European budget for any solidarity measure had its weight in explaining the choices made.[17]

This approach has been completely reversed in the Covid-19 crisis. This would not have happened without the courage to discuss the European multiannual financial framework (MFF), the own resources of the Union and the extraordinary intervention measures as a package deal, as we shall see. In both cases, nonetheless, the emergency allowed the Union, the Eurozone bodies and the ECB to cross the confused dividing line between economic and monetary policy and to enter into a competence assigned to the states, for the simple reason that, within a monetary union, nobody saves himself alone. This is a direct consequence of interdependence, which can lead to profoundly different choices: austerity – which requires each to burden the others as little as possible – or solidarity – for which helping each other becomes the new normal. The latter approach requires a more mature and politically aware integration. It is, of course, more difficult to impose on an unwilling benefactor, but easier to accept on the beneficiary, politically more popular as it is more difficult to practice, while austerity has been as unpopular as simpler. Consequently, borders between European and national competence became increasingly confused during the financial crisis and are now more so than ever.

The paradox well pointed out by Martucci is in the illusory binding nature of the dogma of stability that can be effectively pursued by willing governments (duly encouraged by the European political bodies) yet cannot be forced through sanctions. Indeed "*les crises successives ont montré à quel point la règle s'avère tout autant immuable dans son énoncé que variable dans sa mise en oeuvre*". And we dare say more: the sanctions of the stability pact – revised again and again to renew their credibility each time that the Council of the Union failed to apply them[18] – are almost inapplicable.

17 The Union has exploited the limited room for manoeuvre offered by the Treaties by establishing the European Financial Stabilization Mechanism (EFSM), on the legal basis of the solidarity clause in art. 122.2 TFEU. The EFSM or European Financial Stabilization Mechanism was established by Regulation (EU) no. 407/2010 of the Council of 11 May 2010, in the OJ, L 118 of 12.5.2010. The role of States as main actors in the welfare policies is well explained by F. Costamagna « National Social Spaces as Adjustment Variables in the EMU: A Critical Legal Appraisal », *European Law Journal*, 2018, vol. 24, n°s 2–3, pp. 163–190.

18 See ECJ, 13 July 2004, *Commission v. Council*, C-27/04, ECLI:EU:C:2004:436. In this case, the Court "[d]eclares the action of the Commission of the European Communities inadmissible in so far as it seeks annulment of the failure of the Council of the European Union to adopt the formal instruments contained in the Commission's recommendations pursuant to Article 104(8) and (9) EC". In so doing, it defends the political discretion of the

The task of monitoring the evolution of the budgetary situation and the size of the public debt rests with the Commission. Control over national budgets is based on two reference parameters: the ratio of public deficit to gross domestic product, which must not exceed 3% ; and the ratio of public debt to GDP, which must not exceed 60% – these percentages are reported in an *ad hoc* protocol attached to the Treaty and modifiable unanimously. Yet the decision on the existence of an excessive deficit and on the possibility of applying sanctions of increasing magnitude rests within the Council of the Union in its Ecofin composition, i.e. on the majority of the Finance ministers of member states (voting by double majority of the States and of the population).

Following the decision of 3 May 1998, which admitted the first eleven countries to the third stage of EMU, it became clear what was already in the treaties: the assessment of compliance with the convergence criteria is eminently political, especially as regards the state of public finances, not only because it belongs to the Council rather than to a technical body (with no competence of the ECJ to scrutiny such decision),[19] but above all because of the relevance of the trends offered by the national budgets, as stated in Article 126 TFEU.

Moreover, even if the provision aims at preventing unmanageable crises (due to lack of tools at national level and to the little size of the EU budget), their effectiveness is seriously impaired by the political reasoning and opportunity once a crisis has occurred: if a state brings the burden of an excessive or even unmanageable deficit and debt, how can it pay a heavy penalty without the situation gets worse? At the price of which reforms and which cuts (by invading the territory of the competences of national parliaments and governments)? How will citizens react towards Europe if those cuts affect their fundamental rights, such as healthcare or public education? And how is it possible to reconcile them with the provisions in the EU Charter of Fundamental Rights?

Precisely because of the lack of or imperfect implementation, the regulations which specify the Stability and Growth Pact have been rewritten twice in 2005[20] and in 2011,[21] to try to solve the difficulties in its application as well

Council all along the stages of the procedure on excessive deficits in art. 126 TFEU (former 104 TCE).

19 According to the exception in art.126(10) TFEU.

20 Council Regulations 1055/2005 and 1056/2005.

21 Six acts entered into force in December 2011. Of the five regulations, four were adopted by the Council of the Union together with the European Parliament (1173/2011, 1174/2011, 1175/2011, 1176/2011) and one by the Council only (1177/2011). All of them apply to the 28 member states, with some specific provisions for the states whose currency is the euro, relating in particular to sanctioning profiles. The medium-term budgetary target is a cornerstone of the preventive arm of the Stability and Growth Pact. How Member States plan

as to renew their deterrent effect. The main novelty of the latest reform is in the so-called reversed majority: the assessment of sanctions remains in the appropriate political forum – the Ecofin Council, composed of the ministers of the economy and finance – but, to trigger the sanctions more easily, the Commission's proposal for imposing them is adopted unless the Council – with the suspended vote of the countries with derogation and the State subject to the procedure – turns it down by qualified majority.

However, the real sanction for the state in crises is another, and it appeared evident only in the management of the sovereign debt crisis (especially the Greek one): a reduced sovereignty of the state affected which is *de facto* put under external control – conditions applied to rescue packages are in fact coupled by greater interference in national budgets and politics, as highlighted by Hjalte Lokdam and Michael A. Wilkinson.[22] This is also the effect of the application of two more regulations adopted in 2013[23] as well as of the conditions that accompany the loan mechanisms.

The Stability Pact, enacted numerous times in the past decade, has never reached the sanction stage, always stopping a moment earlier, even though – after the most sensational failures – it was reformed with great promises of increased effectiveness. This is a clear example of a legal crisis, or the inadequacy of the regulatory instrument to pursue the goal for which it was created.

2 European Union vs Eurozone: An Identity Problem

Without any doubt, the European monetary unification is one of the most ambitious projects ever completed within the integration process of the continent, comparable perhaps only to the construction of the internal market. And, nevertheless, it stands out by its divisive implications. Not only the project itself – made up of convergence criteria and access conditions – has immediately led to differentiate the member states between who enters first and who enters later (and who does not even think of entering), but the very

to achieve this is part of the evaluation under the European Semester. This is the structural budget balance that protects the country from the risk of exceeding the threshold of 3% of GDP set out in the Treaty and aims to ensure the long-term sustainability of its public finances. Any adjustment path is specific to each country.

22 See *supra* in this volume, H. Lokdam & M. A. Wilkinson, « The European Economic Constitution in Crisis : A Conservative Transformation ? ».

23 Regulations 472 and 473/2013 of the Parliament and of the Council.

nature of monetary policy itself, indivisible and exclusive to a single level of government, prevents intermediate nuances and statuses.

There are two situations aimed at highlighting the difference in situations and positions between the member states: one, already observed in the previous paragraph, is the management of crises; the other is in the international projection of the Euro area. Yet, the euro and the monetary unification are firmly rooted within the European Union, they do not create a union within the union in pure legal terms. They just create a different degree and intensity in sharing interests and in the needed solidarity. It is nonetheless enough to open cracks in the EMU building and to invoke reforms and renovation.

Regarding crisis management, it has already been observed how, starting from 2010 and specifically from the outbreak of the Greek crisis, the countries of the euro area, the most exposed to contagion due to the integration of their financial markets, have created intervention tools that do not involve countries outside the euro area (if not on a voluntary basis). EFSM, EFSF, ESM were born as eurozone mechanisms and likewise the treaty known as the Fiscal Compact. The Eurogroup and the Euro Summit became the specific eurozone institutional dimension and the place to discuss bilateral loans and control tools, such as the Troïka.[24]

24 The Eurogroup is the informal gathering of the finance ministers of the eurozone. In 2004 the ministers decided to elect a president and in 2008, the group held a summit of heads of state and government, rather than Ministers of Finance, for the first time. After the Lisbon revision, art. 137 TFEU and a specific protocol (no.14) give to this body some kind of recognition as the *informal* meeting of Ministers of the Member States whose currency is the euro. According to its article 2, Member States shall elect a president for two and a half years, by simple majority. The Euro Summit, instead, was mentioned for the first time by the Treaty on Stability, Coordination and Governance signed in 2012, whose article 12 states "1. The Heads of State or Government of the Contracting Parties whose currency is the euro shall meet informally in Euro Summit meetings, together with the President of the European Commission. The President of the European Central Bank shall be invited to take part in such meetings. The President of the Euro Summit shall be appointed by the Heads of State or Government of the Contracting Parties whose currency is the euro by simple majority at the same time as the European Council elects its President and for the same term of office. 2. Euro Summit meetings shall take place when necessary, and at least twice a year, to discuss questions relating to the specific responsibilities which the Contracting Parties whose currency is the euro share with regard to the single currency, other issues concerning the governance of the euro area and the rules that apply to it, and strategic orientations for the conduct of economic policies to increase convergence in the euro area". Regarding the term Troïka, it has been used, especially in the media, to refer to the group formed by the European Commission (EC), the European Central Bank (ECB) and the International Monetary Fund (IMF) in the context of the "bailouts" of Cyprus, Greece, Ireland and Portugal. The origin of this informal gathering can be traced back to the Greek loan package in May 2010.

The same splitting happens in the external relations concerning monetary policy, even more so as it is even foreseen by the TFEU. The two Articles 138 and 219 of the TFUE, which regulate the matter, are unequivocal: while internal monetary policy is run by the ECB, its external dimension falls within the competence of the Council – the Council of the whole Union – even if the voting right of the non-euro countries is suspended. It is warmly encouraged, nonetheless, to find a consensus with the ECB. While Article 219 foresees the conclusion of monetary and exchange agreements of the Union (the whole), a specific provision, Article 138 TFEU, refers to the adoption of common positions and unified representation in international fora for the Eurozone (even if the Council is still the Council of the Union). This double track is not an easy one to manage, evidence of it is the lack of decisions adopted on the legal basis of Article 138.

In fact, while the Union has legal personality (Article 47 TEU) and the ECB has it too (Article 9 Statute), the Eurozone has not. So, any decision about the single representation adopted on the legal basis of Article 138 refers to the Union, not the Eurozone. In this legal framework adopting a single autonomous external representation for the Eurozone is difficult, even if needed, both from a legal as well as from a political perspective.

The most critical issue is the representation of the Euro Area inside Groups of States and the IMF, as these organizations deal specifically with monetary and financial matters (so covering at once monetary and economic policy). Conversely, how the Euro area is represented in technical bodies, such as the Bank for International Settlements or the Financial Stability Board, is not an issue, as it refers to the international role of the European Central Bank and not of the Union or the Eurozone. This falls within the typical international activity of central banking and it is regulated by Articles 6 and 23 of the Statute of the European System of central Banks.

Several official documents in the previous years – as the Five Presidents' Report, the Bresso-Brok Report on improving the functioning of the European Union building on the potential of the Lisbon Treaty,[25] the Verhofstadt Report on possible evolutions of and adjustments to the current institutional set-up of the European Union,[26] the Protocol of Frankfurt: a new treaty for the eurozone, presented by Andrew Duff in 2016,[27] as well as many think tanks' and academic contributions[28] – all point up the need to strengthen the institutional

25 2014/2249(INI).
26 2014/2248(INI).
27 Available on-line at: http://aei.pitt.edu/70878/ (last consulted on 12 February 2022).
28 Among others see the manifestos by the Glienicker Gruppe (October 2013), by the Groupe Eiffel (February 2014) and the *Manifeste pour une Union Politique de l'Euro* (May 2014).

dimension of the Euro area, which would have as a consequence, the opening of new solutions to its external representation.

Some possible evolutions are already being explored, such as the transformation of the ESM into a European Monetary Fund, a specific budget line for the Eurozone in the EU budget, the creation of a parliamentary committee for monetary policy of only Eurozone elected representatives. All these solution point at an even greater differentiation among the ins and the outs, so that there is a clear trade-off between an efficient European economic and monetary governance and the Union's cohesion.

3 The Tiny EU Budget and the *Not-So-Own* Resources

The project of European monetary unification and what we perceive as its shortcomings – the dissociation between a unified monetary policy and many national economic policies; the blurry dividing line among the two; the focus on crises prevention and the scarcity of tools for their management; the inevitable differentiation between Union and Eurozone in monetary and financial integration – all stem from the inner logic of the EU treaties, i.e. the choices related to its budget, its size and financing.

Since the very beginning of the European integration, members states agreed to keep the politically significant competences in the field of welfare and taxation, and to centralize only that small portion of the budget that responds to the needs of the cohesion ancillary to the smooth functioning of the internal market (and of its most significant exception: the common agricultural policy). In the macroeconomic policy, the intervention tools are forcibly to be dimensioned in the small Union's budget. This easily explains the focus on the crises prevention, the attention to financial stability and the importance of sound national fiscal policy. This also explains the importance assumed in the TFEU by Article 125, the no bail out clause, aimed at discouraging rescue expectations as well as preventing phenomena of the moral hazard in lower levels of government. Consequently, the choice to leave economic policy in the competence of the states is consistent with a small European budget. The result is a regulatory approach – a few common rules, codified in the treaties – within the framework of a non-binding intergovernmental coordination mechanisms.

What has worked in the first decade of the monetary union has been then questioned because of exogenous shocks: first the global financial crisis, then the Covid-19 pandemic crisis, hence the debate, since 2010, on the need to

"complete European economic governance"[29]. Important institutional documents reopened the issue after 2010, such as the Commission's 2012 "Plan for an authentic and deepened Economic and Monetary Union" or again like the October 2014 Report "Towards a genuine Economic and Monetary Union", said of the four Presidents (of the Commission, Eurosummit, ECB and European Parliament), which was followed by the report "Completing the Union economic and monetary policy of Europe" of June 2015 (of the same plus the President of the Eurogroup).

The problem to be solved, not an easy one, was the loss of sovereignty at the national level – because of European constraints – without a corresponding acquisition of sovereignty (and budget) at the European level, so that the whole system did not have the flexibility and room for manoeuvre to promote the necessary adjustments, at any level. The difference with what happened in the sphere of monetary policy, in which the sovereignty lost by the national central banks was gained by the European central bank, is quite evident. This explains why, even in the presence of a solidarity clause in Article 122 of the Treaty, the financial instrument was inadequate, and it was necessary to find extra-budgetary resources on the financial markets and creating additional instruments and funds supported directly by national budgets. Nonetheless, it is not impossible for the Union to find extra-budgetary resources to be used with specific destinations, as in the case of the SURE ('Support to mitigate Unemployment Risks in an Emergency') or the Next Generation EU, but the financial crisis of 2010 highlighted how there were different levels of involvement and interest in participating in support mechanisms. In fact, the crisis from Covid-19 is completely different, affecting eurozone and non-eurozone states in almost equal measure, and gives rise, as we shall see, to an intervention in the context of European law.

To understand the difficulties on the expenditure front, it is necessary to look at the revenue, that is, the Union's own resources. The size of the budget is a direct projection of the scarcity of the resources made available to the Union. The provision of Article 312.1 TFEU for which "The multiannual financial framework shall ensure that Union expenditure develops in an orderly manner and within the limits of its own resources" binds the discourse on the European budget to the topic of own resources. The so-called "own resources" system was established in 1976 and was based on three categories of revenue: common customs duties, agricultural import levies and a small percentage of VAT (today

29 M. López-Escudero, « La nueva gobernanza económica de la Unión Europea: ¿una auténtica union económica en formación ? », *Revista de Derecho Comunitario Europeo*, 2015, vol. 50, n°1, pp. 361–433.

0.3%), and harmonized tax in the calculation of the tax base. The solution was then innovative compared to most of the international organizations whose revenues were the result of direct transfers from the States. The collection was (and is) in any case managed by state administrations which retain a large percentage by way of reimbursement. In the 1980s a fourth resource was introduced, a percentage of the gross national product, following the decline of the first two due to the progressive liberalization of world trade. This phenomenon has progressed over time, resulting in an unstoppable growth in the GNP share of the total amount, reaching 68.9% of the total in 2015. This also explains why in the Multiannual financial framework (MFF) negotiations the States decide unanimously: after all they affect the transfer of national resources. There are therefore two related difficulties: the lack of genuinely European resources and the excessive weight of the Member States in the procedures.

In fact, although the budget is formally prepared by the Commission and approved by the Council and the Parliament through an *ad hoc* procedure (Article 314 TFEU), the revenue of the Union is the result of tiring negotiations between states on the MFF for a 7-years' time span. Both the multiannual financial framework and the own resources regime require unanimous vote in the Council of the Union and the latter also 27 national ratifications.

Concluding Remarks: Next Generation, Next Economic Constitution

Without wanting to deny the severity of the pandemic crisis that has engulfed the Union and the world, it cannot, however, be denied that only such a widespread shock could have paved the way for a reconsideration of the European budget. Moreover, this happened precisely when the Council of the Union was going to approve the new MFF 2021–2027 (which restrain the annual budget for seven years within rigid spending ceilings)[30], which is a particularly fortunate combination.

30 According to Article 312 TFEU, the multiannual financial framework shall ensure that Union expenditure develops in an orderly manner and within the limits of its own resources. The annual budget of the Union must comply with the multiannual financial framework which determines the amounts of the annual ceilings on commitment appropriations by category of expenditure and of the annual ceiling on payment appropriations. What makes this decision an especially difficult one is the need, for the Council, to adopt it unanimously after obtaining the consent of the European Parliament, which shall be given by the majority of its component members.

After a first MFF proposal in May 2018, which did not obtain the necessary consent by the Council of the Union and the Parliament, the Commission put forward a second one on January 2020, with the additional element of the Just Transition Fund, as part of the European Green Deal.[31] Following the Covid-19 crisis, an amended proposal was released on May, and the 'Next Generation EU' was born, even if on July 2020, the European Council adopted conclusions reduced the grant component from EUR 500 to 390 billion and increased the loan component from EUR 250 to 360 billion. The effort remained nonetheless at 750 billion for the years 2021–2023, so almost doubling the size of the European budget. From the expenditure side, Next Generation EU consists of a series of funds (modeled on the existing structural funds) that involve the transfer of resources to the Member States, in the form of loans or non-repayable funds, so that they can introduce certain specific economic reforms. The funds are extremely heterogeneous. They include the Recovery and Resilience Facility (RRF), which comprehends the main part (672 billion euros); ReactEU (47.5 billion); and then some other funds of minor economic impact: Horizon Europe; InvestEU; Rural Development; Just Transition Fund (JTF); RescEU.

The Next Generation EU is not only the most ambitious aid plan ever launched as well as a true act of economic policy[32] but, also, the occasion to revise the own resources system – which had been at a standstill since 2014. A first Decision on own resources, the 2020/2053 of December 2020,[33] gives the Commission the power to contract on the capital markets loans on behalf of the Union for a maximum amount of 750 000 million, intended to finance the plan, together with a new own resource from 1 January 2021 based on non-recycled plastic packaging waste.

The result is an increased size of the European budget, greater financial autonomy, and the prospect of a further review of the own resources regime. In fact, the Commission intends to propose the establishment of new resources of the EU when the time comes to repay the funds raised on the markets. Examples already offered in this regard are: additional income from a reform of the EU Emissions Trading System (ETS), a carbon border tax, a resource

31 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions the European Green Deal COM/2019/640 final.

32 I. Papadopoulos, « The EU Recovery Instrument as a European Success Story », in I. Papadopoulos (ed.), *European Economic Governance after the Eurozone and COVID-19 Crises*, Newcastle upon Tyne, Cambridge Scholar Publishing, 2022, pp. 87–116.

33 Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom.

based on the operations of companies in the EU single market and a digital tax.[34] Even if many of these innovations are only announced, the result, in terms of relaunching the value of solidarity and European political integration, can already be defined as undeniable.

Even if the package called Next Generation EU is intended to be a temporary recovery instrument dictated by the emergency, the issuance of European bonds and their maturity (up to 30 years as the ones financing the SURE mechanism) extends the effect of the decision well beyond the emergency. Furthermore, the creation of new own resources results in a structural change[35]. The result is a change of perspective in the aim of the European economic constitution: not an immutable stability, but the well-being of citizens, which means nowadays navigating through the dangerous currents of global instability and increasing environmental risks.

The risk of a future inflationary drift, as pointed out by the German Constitutional Court in its decision released on May 5, 2020, does exist. Yet, the reasoning of the ECJ in the Gauweiler and Weiss case seem to point out that what appears to be a division of competences in the treaties – economic policy to the member states, monetary policy to the ECB – is better interpreted as a functional attribution of priorities. Monetary policy decisions could have an influence on economic policy as economic policy decisions can affect monetary policy, nor could it be otherwise. In this sense, the role of the ECB in supporting general economic policies in the Union to contribute to the achievement of the Union's objectives – without prejudice to price stability – holds more political meaning.

In the end – be it in own resources, monetary policy, or rescue packages – what is surfacing is a greater political discretion in a system which had been imagined more technocratic and "stable". Both the ECB, the EU political institutions and the Eurozone ministerial gatherings have shown unexpected creativity since 2010 – as shown by the famous 'whatever it takes' speech by

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34 Such revision is so anticipated in para. 29 of the European Council Conclusion: "As a first step, a new own resource based on non-recycled plastic waste will be introduced and apply as of 1 January 2021. As a basis for additional own resources, the Commission will put forward in the first semester of 2021 proposals on a carbon border adjustment mechanism and on a digital levy, with a view to their introduction at the latest by 1 January 2023. In the same spirit, the Commission will put forward a proposal on a revised ETS scheme, possibly extending it to aviation and maritime. Finally, the Union will, during the next MFF, work towards the introduction of other own resources, which may include a Financial Transaction Tax".

35 F. Fabbrini, « The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic », *Journal of Common Market Studies*, vol. 60, n°1, 2022, pp. 186–203.

Mario Draghi in London in July 2012. Crises sparked the reflection over a crucial point, the assumed equation *stability equals resilience*. In a fast-changing and unpredictable reality, resilience is also adjustment, ability to react quickly, mutual support. These cannot be the result of static rules, but of ongoing political negotiation at all levels, resulting, in the end, in assumption of responsibility, which is the very core of sovereignty.

The concluding remarks by Hjalte Lokdam and Michael A. Wilkinson highlight the political conundrum we are in, which opens a whole new chapter in the definition of the (not just economic) constitution of the continent.

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