ISSN 2384-9169
Fascicolo n. 4 - 2020
rivista.eurojus.it

Next Generation EU: has the Hamiltonian moment come for Europe?

DI LUCA LIONELLO*

1. Introduction

Many commenters hailed the decision to establish a new EU "recovery fund", namely "Next Generation EU" (NGEU), as a turning point in the process of European integration. For the first time in its history, the Union will be allowed to borrow significant resources from the financial markets and use them to support national economies severely hit by the pandemic Covid-19. Aside from the positive effects on the stability of the euro area and the single market, such an instrument may also have a strategic relevance for the future development of the European Union. In this regard, it has been argued that the establishment of the recovery fund may represent a "Hamiltonian moment" for the EU[1], comparable to the agreement of 1790 between Alexander Hamilton, Thomas Jefferson and James Madison, which allowed the US

* Research fellow, Catholic University of the Sacred Heart, Milan, luca.lionello@unicatt.it.

[1] The German Minister of Finance, Olaf Scholz, expressly recalled the "Hamiltonian moment" in an interview to "Die Zeit" on the 19 May 2020, accessible at www.zeit.de/2020/22/olaf-scholz-europaeische-union-reform-vereinigte-staaten.

federal government to create the first stock of American public debt[2]. Notably, the latter decision has been crucial in the process of state-building of the USA, as it granted the federal government with the financial means to develop its own policies and consolidate its authority on the Member States. Accordingly, if the establishment of the European recovery fund paved the way to the creation of some form of fiscal union, the EU may gradually emancipate itself from the masters of the Treaties and create a level of government, which is able to pursue its own aims.

The article will study the project of NGEU and its significance for the process of European integration. The analysis will first recall the reasons, which led the Member States to establish the recovery fund. Second, it will clarify the main features of the project and the most important innovations, it will include. Finally, it will consider whether the establishment of NGEU fulfils the necessary conditions to represent a genuine "Hamiltonian moment" for Europe.

2. Why did the EU finally decide to create a common fiscal instrument?

2.1. The Maastricht paradigm and its adaptations.

In order to understand the meaning of Next Generation EU for the process of European integration, it is necessary to look at the longstanding opposition of Member States to give up their monopoly on fiscal power. This clearly emerged in the context of the establishment and development of the Economic and Monetary Union (EMU).

With the stipulation of the Maastricht Treaty in 1992, most Member States decided to relinquish their currency and create a monetary union committed to the pursuit of price stability. The transfer of sovereignty, however, remained partial, as national governments did not provide the Union with the competence of collecting and spending revenues, except for the little resources conferred to the EU budget. This created the notorious asymmetry between the economic and the monetary union, meaning the detachment within the euro area between monetary policy, which is an exclusive competence of the Union, and fiscal policy, which remains an exclusive prerogative for the Member States (so called "Maastricht paradigm").

The creation of the asymmetry within the EMU mainly depended on the need to preserve national sovereignty. Indeed, not only fiscal policy represents the most important instrument, governments have to reach popular consensus, but it is also strictly connected with the *Kompetenz-Kompetenz*, meaning the ability of self-determination of a political community. In fact, who has control over the resources, can also control the policies, which can be financed with the same resources[3]. At the same time, the introduction of the asymmetry within the EMU

[2] As first Secretary of the Treasury, Alexander Hamilton argued in favour of the establishment of a federal debt at full value in order to assume the debts incurred by the Member States during the war of independence. Such debt would have had to rely on a new federal system of taxation to pay for the joint debts. After a long deadlock, Hamilton managed to find a compromise in June 1790 with the leaders of the Democratic-Republican party, Thomas Jefferson and James Madison, who had long opposed the centralisation of fiscal power at federal level. On the 4 August 1790, the Congress passed the "Funding act", which allowed the establishment of the first stock of American public debt.

[3] On the possible abandoning of the conferral principle determined by the process of fiscal integration see A. HINAREJOS, *The Euro Area Crisis and Constitutional Limits to Fiscal Integration*, in *CYELS*, 2011-2012, p. 243, at p. 262.

was also legitimised by the mainstream economic doctrine of the time, which was preaching the neutrality of monetary policy and the independence of central banks[4]. So, in order to ensure some minimal economic convergence and protect national fiscal sovereignty at the same time, Member States created a governance system based only on the regulatory role of financial markets and the European supervision on national budgetary policies. Rules of economic coordination have been developed over the years in the so called "Stability and Growth Pact" (SGP).

When the sovereign debt crisis broke out in 2009 dragging several Member States towards financial collapse and undermining the existence itself of the monetary union, there was still no consensus to start a process of fiscal centralisation, for example through the introduction of common bonds or a budgetary capacity[5]. National governments did eventually agree to bailout those countries at risk of default, but under the condition that this wouldn't shift new competences to the Union, nor establish a transfer mechanism between the Member States. Accordingly, financial assistance was implemented in the form of conditional loans through a series of intergovernmental instruments, such as the European Stability Mechanism (ESM), whose intervention was financed by national budgets and authorised by domestic parliaments. Furthermore, the risks of moral hazard behaviours convinced Member States to stiffen the rules on budgetary coordination outlined in the SGP. Also, the conditionality attached to the financial assistance programmes of the ESM consisted mainly of austerity measures. In this way, the Maastricht paradigm was endured and adapted to the new objective of the "stability of the euro area as a whole", meaning protecting the survival of the monetary union, as well as its integrity[6].

While national governments were struggling to adopt effective measures in the field of economic policy, what really made the difference to overcome the sovereign debt crisis was the commitment taken by the European Central Bank (ECB) to do "whatever it takes to preserve the euro"[7]. The latter took the form of two non-conventional measures of monetary policy. The Outright Monetary Transactions (OMTs) allowed the ECB to purchase on the secondary market and without quantitative limits short term bonds of the Member States performing an assistance programme in the framework of the ESM. The aim of the programme was to reduce or even eliminate excessive risk premia on the public debt of countries hit by speculation, thus safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy[8]. The quantitative easing (QE) consisted of a wide purchase programme of public and private assets in order to fight the risks of deflation in the euro area and fulfil the objective of price stability. In particular, the Public Sector Purchase Programme (PSPP) allowed the ECB and national central banks to expand their public sector asset purchases on the secondary

[4] Since 1980s the monetarist paradigm has been prevailing especially among central bankers. See P. De Grauwe, *Economics of Monetary Union*, Oxford University Press, 2016, p. 158.

[5] See Communication from the Commission, *Green Paper on the feasibility of introducing Stability Bonds*, COM(2011) 818 final; President of the European Council, *Towards a genuine Economic and Monetary Union*, 5 December 2012.

[6] The objective was formalised in the new art. 136, para. 3, TFEU, as amended by European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.

[7] Mario Draghi, President of the European Central Bank, Speech at the Global Investment Conference, London, 26 July 2012.

[8] While the OMTs has never been activated so far, the simple announcement of the programme managed to significantly reduce speculation on the sovereign spreads of the euro area.

markets up to € 2.2 trillion between 2015 and 2020. This new way of conceiving and implementing the monetary policy mandate encountered some strong opposition, especially in Germany, where several groups of individuals brought various complaints before the German Federal Constitutional Court (GFCC) against the non-conventional measures of the ECB. This started a heated legal debate between the GFCC and the European Court of Justice, which was involved on the basis of a preliminary reference[9].

2.2. The outbreak of the Covid-19 pandemic and the risks of destabilisation for the Union.

While over the last few years the Union seemed to have left the economic crisis behind and achieved some form of stability, things rapidly changed at the beginning of 2020, when the pandemic Covid-19 reached Europe. The latter not only caused immense human losses and put under heavy distress national health systems, but also cast a new shadow on the stability of euro area and the integrity of the single market. There are different reasons to believe that the current situation may represent the most serious challenge, the European Union has ever experienced to its own survival.

Notably, the pandemic Covid-19 has heavily hit all the Member States of the Union (symmetric shock). In the attempt to contain the spread of the contagion, governments have been obliged to enforce lockdown measures for citizens and productive activities, thus paralysing national economies for months. Consequently, the EU is going to experience a record collapse of its GDP in 2020, as well as an unprecedent fall in consumptions and investments. At the same time, unemployment will rise in all the Member States especially in sectors such as tourism and travel. The situation has been made even worse by the size of the crisis, which is going to trigger a record global economic recession. While the shock has been symmetric in its effects, the ability to deal with it is asymmetric. Indeed, the enormous costs of financing social protection and supporting economic recovery is essentially falling on the shoulders of national public finances. This will represent a significant challenge for most Member States, especially for those who present a fragile budgetary situation and might soon become unable to bear the economic and social consequences of the pandemic. While the single market may experience some severe fractures, as economic performances between Member States would drastically diverge, a rapid and significant increase of public deficit might awaken fears around the sustainability of national public finances in largely indebted countries, like for example Italy. It is not a case that when the pandemic started to produce its effects in Europe, stock market became extremely volatile and sovereign spreads increased. The outbreak of a new sovereign debt crisis with its epicentre in core Member States, so called “too big to fail”, would easily spread out to the neighbours and lead to the full economic destabilisation of the Union. Clearly the survival of the single currency and the integrity of the internal market would be jeopardised.

[9] On the legality of the Outright Monetary Transactions see: German Federal Constitutional Court, order of 14 January 2014, 2 BvR 2728/13; Court of Justice, judgment of 16 June 2015, Case C-62/14, *Gauweiler (and Others) v. Deutscher Bundestag*, ECLI:EU:C:2015:400; German Federal Constitutional Court, judgment of 21 June 2016, 2 BvR 2728/13. On the legality of the Public Sector Purchase Programme see: German Federal Constitutional Court, order of 18 July 2017 2 BvR 859/15; Court of Justice, judgment of 11 December 2018, Case C-493/17, *Heinrich Weiss and Others*, ECLI:EU:C:2018:1000; German Federal Constitutional Court, judgment of 5 May 2020, 2 BvR 859/15.

2.3. The structural limits of the economic governance.

Predictably, when the Covid-19 crisis broke out, Member States could not agree on any substantial fiscal stimulus to face together the economic shocks posed by the pandemic. On the contrary, the first measure adopted by the Council on proposal by the Commission was the suspension of the Stability and Growth Pact (SGP)[10]. So, while national governments were allowed to increase public spending to the extent necessary without incurring the limits and sanctions provided by EU law, the suspension of the SGP also made clear that the cost of the crisis would have fallen in the first instance on the shoulders of each government.

With the worsening of the crisis and the collapse of the financial markets, the European Council decided between March and April 2020 to put forward all available instruments under the economic governance to support national efforts to manage the health crisis and tackle the economic and social consequences of the lockdown[11]. The EIB Group was provided with a new pan-European guarantee fund of € 25 billion in order to mobilise up to € 200 billion to finance companies with a focus on SMEs[12]. More importantly, the ESM made available to all euro area Member States precautionary credit lines up to 2% of their respective GDP with no conditionality other than using these resources to finance direct and indirect medical costs due to the pandemic[13]. An important innovation was the establishment, on proposal of the Commission, of the "European instrument for temporary Support to mitigate Unemployment Risks in an Emergency" (SURE). Based on the solidarity clause ex art. 122 TFEU, SURE consists of a € 100 billion loan-based instrument, which will provide Member States with financial assistance to cover the costs directly related to the creation or extension of national short-time work schemes and other similar measures for the self-employed[14]. In order to finance the mechanism, the Commission will be authorised to borrow on the financial markets[15].

Regardless their important contribution to tackle some of the early socio-economic consequences of the pandemic, none of these instruments measures up with the exceptionality of the ongoing crisis. The EIB for instance has never been a body designed to manage emergency situations and its contribution to European recovery will be limited and spread out

---

[10] Communication from the Commission on the activation of the general escape clause of the Stability and Growth Pact, COM(2020) 123 final; Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis, 23 March 2020.

[11] Joint statement of the members of the European Council, 26 March 2020; Eurogroup, *Report on the comprehensive economic policy response to the COVID-19 pandemic*, 9 April 2020; Conclusions of the President of the European Council following the video conference of the members of the European Council, 23April 2020.

[12] On the 26 May 2020, the EIB Board approved € 25 billion Pan-European Guarantee Fund in response to COVID-19 crisis.

[13] Eurogroup, Statement on the Pandemic Crisis Support, 8 May 2020. On the new conditionality of the ESM see E. CASTELLARIN, *L'évolution de la conditionnalité du Mécanisme européen de stabilité*, in *DUE*, 2020, p. 29.

[14] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, [2020] OJ L 159, p. 1. In particular, SURE will act as a second line of defence, financing short-time work schemes and similar measures in the Member States, once they have exhausted their own resources.

[15] For an analysis of SURE see: F. COSTAMAGNA, *La proposta della Commissione di uno strumento contro la disoccupazione generata dalla pandemia Covid-19 ('SURE'): un passo nella giusta direzione, ma che da solo non basta*, in *SIDIBlog*, 5 April 2020, available at www.sidiblog.org/2020/04/05/la-proposta-della-commissione-di-uno-strumento-contro-la-disoccupazione-generata-dalla-pandemia-covid-19-sure-un-passo-nella-giusta-direzione-ma-che-da-solo-non-basta/; M. RUFFERT, *Are we SURE?*, in *Verfassungsblog*, 5 April 2020, available at www.verfassungsblog.de/are-we-sure/.

in time. SURE represents an important political innovation, as it proves the commitment of EU institutions to protect employees and self-employed against the risk of unemployment and loss of income. At the same time, the limited size and scope of the programme will make it more of a stopgap measure, rather than a structural intervention in favour of the European labour market. With regard to the ESM, the mechanism has been created to rescue individual euro area Member States in distress, not to deal with symmetric shocks and pan-European recession. Accordingly, the funds currently available for financial assistance are not sufficient to compensate the expenses that several countries are already running to deal with the economic and social impact of the crisis[16]. The example of Italy is quite eloquent: while the lockdown measures cost around € 48 billion only in March 2020[17], the total resources available under the new credit lines of the ESM may reach just € 36 billion in total. Aside from the limited financial capability of the mechanism, another structural problem of the ESM regards its governance. The TESM requires the unanimity of all creditor countries to allow the recapitalisation of the mechanism, as well as every ordinary disbursement of resources, meaning that each government can block financial assistance or request certain conditions for it. Finally, the reputation of the ESM risks to represent another problem for its activation: even if it was agreed that the new credit lines will bear no conditionality other than using the resources to finance direct and indirect medical costs due to the pandemic, it is discussed whether enhanced surveillance – including some form of austerity measures - might still be applied *ex post*[18].

In conclusion, the scaling up of the crisis and the growing dangers for the stability of the Union helped to highlight the limits of the existing economic governance and bolstered the case for some new form of common fiscal intervention. On the 25 of March 2020 the leaders of 9 countries, including France, Italy and Spain, published a letter addressed to the President of the European Council asking for the introduction of some form of common debt instrument issued by an EU institution in order to deal with the impact of the crisis[19]. The proposal was met with scepticism from a group of northern countries, including Germany, which argued that the existing crisis management instruments, in particular the ESM, would have been sufficient to help whoever was in need. After long negotiations, on the 23 of April 2020, the European Council agreed to delegate the Commission to draft a proposal for a possible recovery instrument and find a compromise between the countries in favour of introducing common European bonds and those against[20].

[16] It should be borne in mind that, even if the loans provided by the ESM are extremely convenient in terms of both interest rate and deadlines, they will add up to the weight of public debt in the beneficiary countries.

[17] Associazione per lo Sviluppo dell'industria nel Mezzogiorno, *L'impatto Economico e Sociale del Covid-19: Mezzogiorno e Centro-Nord*, 9 April 2020.

[18] On the use of ESM without conditionality see: E. PISTOIA, *I Trattati UE e il via libera all'uso del MES senza condizionalità*, in *I Post di AISDUE*, 28 April 2020, available at www.aisdue.eu/emanuela-pistoia-i-trattati-ue-e-il-via-libera-alluso-del-mes-senza-condizionalita/.

[19] Letter to Charles Michel, President of the European Council by Sophie Wilmès, Prime Minister of Belgium; Emmanuel Macron, President of the French Republic; Kyriakos Mitsotakis, Prime Minister of Greece; Leo Varadkar, Taoiseach of Ireland; Giuseppe Conte, President of the Council of Ministers of Italy; Xavier Bettel, Prime Minister of Luxemburg; António Costa, Prime Minister of Portugal; Janez Janša, Prime Minister of Slovenia; Pedro Sánchez, Prime Minister of Spain, 25 March 2020.

[20] Conclusions of the President of the European Council following the video conference of the members of the European Council, 23 April 2020.

2.4. The ECB in action: the difficulty to repeat "whatever it takes".

While national governments were struggling to develop an adequate fiscal response to the crisis, the ECB did not sit back, but it tried to take some effective action against the rapid deterioration of the financial situation in the euro area. On the 18 March 2020 the President of the ECB, Christine Lagarde presented the Pandemic Emergency Purchase Programme (PEPP), a new quantitative easing operation aimed at «ensuring that all sectors of the economy can benefit from supportive financing conditions that enable them to absorb [the] shock» caused by the pandemic[21]. The programme is meant to continue until the coronavirus Covid-19 crisis is over and in any case not before the end of June 2021. The ECB will buy bonds by respecting in principle the capital key of the national central banks. However, flexibility will be used to allow for fluctuations in the distribution of purchase flows over time across asset classes and among jurisdictions. On the 4 June 2020 the Governing Council of the ECB decided to increase the volume of the PEPP from the initial € 750 billion up to a total of €1,350 billion[22].

The programme clearly means to reconfirm the "whatever it takes" strategy of monetary policy and formalise the commitment of the ECB to provide all necessary resources to the European financial system throughout the pandemic. The announcement managed to immediately reduce sovereign spreads in the euro area, especially for the largely indebted countries. Unfortunately, while the intervention of the ECB has been once again decisive to preserve financial stability in the euro area, it may still not be enough to help the Union overcome the challenges posed by the Covid-19 economic crisis.

Several commenters pointed out that the ECB is running out of fire power, as interest rates are at a record low and past quantitative easing operations have already pumped enormous quantities of resources into the economy. Accordingly, perpetrating this type of expansionary monetary policy might lose effectiveness over time, while weakening key sectors for the stability of the European financial system, such as banking, pension funds and life insurance[23]. More in general, central banks are not necessarily the best actors to promote sustainable recovery during heavy recessions, as they are unable to efficiently address resources towards specific priorities and sectors of the economic system. For the same reason, monetary policy has limited means to deal with the economic divergences in the euro area and address specific situations of distress in the Member States. Accordingly, in the event some countries experience some sudden deterioration of their financial situation, it may be difficult for the ECB to grant unlimited purchases of public assets on the basis of the PEPP[24].

Aside from these difficulties, another important event has challenged the ability of the ECB to deal with the economic consequences of the pandemic. On the 5 May 2020 the German

[21] European Central Bank Press Release, *ECB announces €750 billion Pandemic Emergency Purchase Programme*, 18 March 2020, available at www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html.

[22] European Central Bank Press Release, *Monetary policy decisions*, 4 June 2020, available at www.ecb.europa.eu/press/pr/date/2020/html/ecb.mp200604~a307d3429c.en.html.

[23] A. BÉNASSY-QUÉRÉ, R. MARIMON, J. PISANI-FERRY, L. REICHLIN, D. SCHOENMAKER, B. WEDER DI MAURO, *COVID-19: Europe needs a catastrophe relief plan*, in *Voxeu.org*, 11 March 2020, available at www.voxeu.org/article/covid-19-europe-needs-catastrophe-relief-plan.

[24] G. CLAEYS, G. B. WOLFF, *COVID-19 Fiscal response: What are the options for the EU Council?*, in *Bruegel.org*, 26 March 2020, available at www.bruegel.org/2020/03/esm-credit-lines-corona-bonds-euro-area-treasury-one-off-joint-expenditures-what-are-the-options-for-the-eu-council/. At the same time, the OMTs programme could be justified if the country concerned requested the financial assistance of the ESM and the correct functioning of the monetary transmission mechanism was jeopardised.

Federal Constitutional Court (GFCC) pronounced its final decision on the *Weiss* case (*EZB Urteil*), regarding the legality of the Public Sector Purchase Programme (PSPP) of the ECB[25]. According to the Court of Karlsruhe, this quantitative easing programme may violate the German constitution, as its application may be disproportional and produce substantial economic effects. Accordingly, the ECB would have acted *ultra vires* by exercising a competence, fiscal policy, which doesn't belong to the EU and is an exclusive prerogative of the German parliament. Even more disdainfully, the GFCC decided that the preliminary judgment of the CJEU on the matter was also *ultra vires*, as the Court of Luxembourg stated in favour of the legitimacy of the PSPP without considering the actual effects of the programme for the purposes of assessing its proportionality[26]. The decision of the CJEU would be therefore «objectively arbitrary from an objective perspective» and not binding for the GFCC[27]. Accordingly, the Court of Karlsruhe ordered the ECB to provide within a transitional period of no more than three months «a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB [with the PSPP] are not disproportionate to the economic and fiscal policy effects resulting from the programme»[28]. Otherwise the *Bundesbank* would have been banned from participating in the further implementation and execution of the programme.

The judgment of the GFCC has definitely caused havoc in a situation already complicated for the Union. Evidently, it is not the purpose of this article to explain how reprehensible the decision of a national court is, which openly contravenes the supremacy of EU law and challenges the exclusive authority of the CJEU to review the actions of EU institutions[29]. It is instead important to highlight how the *EZB Urteil* significantly undermined the efforts of the ECB to tackle the economic consequences of the pandemic. Even if the Court of Karlsruhe intentionally specified that the judgment only referred to the past activity of the ECB, obviously the "proportionality check" it develops may also be used to censor the PEPP[30]. In fact, the ongoing bonds purchase programme does substantially represent a continuation of the past quantitative easing operation of the ECB, also aggravated by the decision to purchase Greek securities, which had not been considered eligible in the past because they were too risky, as well as non-financial commercial paper of sufficient credit quality. Of course, the ongoing economic crisis represents an unprecedent challenge and is very different from the situation of economic stagnation and possible monetary deflation, which justified the launch of the PSPP. The Court of Karlsruhe might be therefore more indulgent in a hypothetical future judgment

[25] German Federal Constitutional Court, judgment of 5 May 2020, cit.
[26] *Ibidem* para. 123.
[27] *Ibidem* para. 112.
[28] *Ibidem* para. 235.
[29] The judgment of the GFCC started a lively academic debate on its meaning and consequences. See *inter alios:* R. ADAM *Il controlimite dell´ultra vires e la sentenza della Corte costituzionale tedesca del 5 maggio 2020*, in *DUE*, 2020, p. 9; J. ZILLER, *L'insoutenable pesanteur du juge constitutionnel allemande. A propos de l'arrêt de la deuxième chambre de la Cour constitutionnelle fédérale allemande du 5 mai 2020 concernant le programme PSPP de la Banque Centrale Européenne*, in *Eurojus*, 2020, n. 2, p. 151; P. MORI, *Riflessioni sulla possibilità e sull'opportunità di aprire una procedura di infrazione nei confronti della Germania a causa della sentenza del Bundesverfassungsgericht sul PSPP*, in *Eurojus*, 2020, n. 3, p. 112; Editorial Comment, *Not mastering the Treaties: The German Federal Constitutional Court's PSPP judgment*, in *CMLR*, p. 965.
[30] S. CAFARO *Quale Quantitative Easing e quale Unione Europea dopo la sentenza del 5 Maggio?*, in *SIDIBlog*, 8 May 2020, available at www.sidiblog.org/2020/05/08/quale-quantitative-easing-e-quale-unione-europea-dopo-la-sentenza-del-5-maggio/.

regarding the legality of the PEPP. Ultimately, however, the damage has been already done: the application of the *ultra vires* doctrine in the *EZB Urteil* challenged the "whatever it takes" approach in monetary policy and made it less credible. The ECB may not only encounter the internal resistance of the most conservative national central banks within the Governing Council, but it must also deal with the rigid conception of the GFCC regarding the nature and the limits of monetary policy, which may lead to a heated legal dispute with the CJEU.

3. Next Generation EU: main features and functioning.

3.1. From the Franco-German proposal to the agreement of the European Council.

The rapid deterioration of the crisis around the world, as well as the difficulties for the ECB to repeat the "whatever it takes" approach of monetary policy made it immediately clear that the economic and political stability of the Union would have been at stake without some important European initiative in the field of fiscal policy. The maturation of such awareness has been particularly important in Germany, where Chancellor Merkel had always rejected any possible form of fiscal centralisation in the euro area, i.e. the introduction of common bonds or the establishment of transfer mechanisms between Member States. Evidently, the risks for the stability of the Union – in particular due to the negative consequences of the *EZB Urteil* - pushed the German government to change its view on the matter.

Therefore, while the Commission was still struggling to find a solution of compromise on the possible features of a common recovery mechanism, France and Germany issued a common statement on 18 May 2020[31], where they called for the establishment of a € 500 billion recovery fund to provide EU budgetary expenditure for the most affected regions and sectors on the basis of EU budget programmes and in line with European priorities. Even more important, the statement proposed that the Commission should be allowed to borrow on markets on behalf of the EU in order to finance the instrument. This alignment between France and Germany shifted the balance of the negotiation within the Council and the Commission in favour of those willing to create some genuine fiscal stimulus based on the EU budget.

Following the Franco-German proposal, on 27 May 2020 the President of the European Commission, Ursula von der Leyen presented a project of European recovery fund, renamed "Next Generation EU", to be embedded within the new reinforced EU budget[32]. In order to finance its functioning, the Commission would have collected € 750 billion on the financial markets. These resources would have then been channelled through EU programmes in the form of grants or loans to the Member States and repaid over a long period of time through future EU budgets, which would require the introduction of new own resources.

The proposal of the European Commission represented the starting point for a heated negotiation within the European Council. While the majority of Member States led by France and Germany substantially defended it, a group of "frugal countries", namely the Netherlands, Austria, Sweden, Denmark and Finland tried to water down its content and make it less ambitious. The major sources of contrast regarded the size of the mechanism, its governance

[31] Franco-German Initiative for the economic recovery of Europe following the coronavirus crisis, 18 May 2020.
[32] Communication from the Commission, Europe's Moment: repair and prepare for the Next Generation, COM (2020) 456 final.

and the distribution key between grants and loans to the Member States. The meeting, which lasted from the 17 to the 21 of July 2020, ended with an acceptable compromise, which did not excessively depart from the original proposal of the Commission.

3.2. Next Generation EU and the new Multiannual Financial Framework.

The European Council of July 2020 reached an overall political agreement on both Next Generation EU (NGEU) and the Multiannual Financial Framework (MFF) 2021-2027. NGEU and the MFF go together: the first consists of an exceptional reinforcement of the European budget aimed at developing a recovery plan for Europe in the aftermath of the COVID-19 pandemic, while the second provides the legal tools to turn the recovery effort into long-term policies and economic transformation[33].

The recovery policy of NGEU, made possible by the temporary and exceptional empowerment of the EU budget, has been legitimised in the first instance on the solidarity clause ex art. 122 TFEU[34], according to which the Union may grant financial assistance to the Member State in exceptional occurrences beyond their control.

On the revenue side, NGEU will be financed through the emission of bonds. The Commission will borrow on behalf of the Union on the capital markets[35]. This operation will be authorised thanks to a reform of the Own Resources Decision (ORD) on the basis of art. 311 TFEU. More precisely, the Commission will be empowered to issue bonds for the amount of € 750 billion until the end of 2026 in order to finance recovery policies in the Member States in a spirit of European solidarity. Accordingly, the borrowing powers conferred to the Commission under NGEU will remain limited in size, duration and scope. The amounts channelled through the EU budget for expenditure shall constitute external assigned revenues[36].

The repayment of the debt shall be scheduled, in accordance with the principle of sound financial management, so as to ensure the steady and predictable reduction in liabilities until the 31 December 2058. The ORD may be amended to collect new revenues for this purpose, i.e. through an increase of national contributions or the creation of new genuine own resources. In this regard, the European Council has expressly suggested the establishment of new own resources based on the taxation of non-recycled plastic waste, a carbon border adjustment

[33] European Council Conclusions of 17-21 July 2020, EUCO 12/20.
[34] Commission Proposal for a Council Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 pandemic, COM(2020) 441 final.
[35] The ORD shall be amended on the basis of art. 311 TFEU in order to authorise the Union to borrow temporally and exceptionally.
[36] Assigned revenue is used to finance specific items of expenditure and is disciplined by art. 21 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union. It represents an exception to the budgetary principle of universality. See A. MATHIS, *Assigned revenue in the Recovery Plan. The frog that wishes to be as big as the ox?* in *Briefing requested by the BUDG Committee*, Directorate-General for Internal Policies, June 2020, available at www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI(2020)654526.

mechanism, a common digital levy[37], a genuine Financial Transaction Tax or an extension of the EU emissions trading system (ETS) scheme to aviation and maritime[38].

On the spending side, the € 750 billions of NGEU may be used for loans up to € 360 billion and for expenditure up to an € 390 billion in 2018 prices. The Union shall use these funds for the sole purpose of addressing the consequences of the COVID-19 crisis. Resources will be disbursed via the instruments and programmes of the MFF.

In this regard, the most important tool will be the Recovery and Resilience Facility (RRF), which is going be adopted on the basis of art. 175, para 3, TFEU[39]. The RRF will manage € 672.5 billion to finance recovery in the Member States between 2021 and 2023 through loans and grants[40]. The allocation key for the distribution of these funds shall be established according to the Commission proposal in a way to take into consideration the ongoing loss in real GDP for each country. The governance of the instrument will be hybrid. Intergovernamentalism will prevail for the definition of the investment targets. Accordingly, on the basis of the Commission's assessment, the Council will approve by qualified majority the recovery and resilience plans (RRPs) that each government will submit to clarify its reform and investment agenda[41]. The Commission will play instead a major role in the application of the recovery instrument. In particular, after monitoring the satisfactory fulfilment of the relevant milestones and targets defined in the RRPs, it will be in charge of approving the payments to the Member States in accordance with the results of the examination procedure. The decision making of the Commission may be conditioned in two ways. First, the Economic and Financial Committee must provide an opinion on the compliance with the RRPs, which shall strive to reach a consensus. Secondly, if, exceptionally, one or more Member States consider that there are serious deviations from the satisfactory fulfilment of the RRPs, they may request the President of the European Council to refer the matter to the next European Council. In this case, the Commission shall not adopt a decision concerning the compliance with the RRPs and the disbursement of resources until the next European Council has exhaustively discussed the matter.

The rest of the resources collected by NGEU on the financial markets will be given to other existing programmes under the MFF, including € 47.5 billion to the Recovery Assistance

---

[37] On the process of tax harmonisation for the Digital Single Market and the possible use of the ordinary legislative procedure outlined in art. 116 TFEU to introduce some harmonised tax on digital activities see G. CAGGIANO, *Il cantiere dell'armonizzazione fiscale per il Mercato unico digitale*, in *I Post di AISDUE*, 30 July 2020, available at www.aisdue.eu/giandonato-caggiano-il-cantiere-dellarmonizzazione-fiscale-per-il-mercato-unico-digitale/.

[38] While the Council and the Parliament have already agreed to amend the ORD by introducing a national contribution calculated on the basis of non-recycled plastic packaging waste, the establishment of new (more substantial) own resources based for example on a Common Consolidated Corporate Tax Base, national revenue stemming from the ETS, a Carbon Border Adjustment Mechanism, a digital services tax and the Financial Transaction Tax, is still debated. See European Parliament legislative resolution of 16 September 2020 on the draft Council decision on the system of own resources of the European Union (10025/2020 – C9- 0215/2020 – 2018/0135(CNS)).

[39] Commission Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility, COM (2020) 408 final.

[40] The RRF will disburse loans for € 360 billion and grants € 312.5 billion. 70% of the grants already in the years 2021 and 2022, while the remaining 30% by the end of 2023. As a rule, the maximum volume of the loans for each Member State will not exceed 6.8% of its GNI.

[41] The recovery and resilience plans shall be assessed by the Commission within two months of the submission. The Council will adopt an implementing act ex art. 291 TFEU within 4 weeks of the Commission proposal.

for Cohesion and the Territories of Europe (REACTEU), € 5 billion to Horizon Europe, € 5.6 billion InvestEU and € 10 billion to the Just Transition Fund (JTF).

4. The main innovations of Next Generation EU

4.1. European debt

In order to understand whether the EU is living a Hamiltonian moment, it is necessary to consider how the establishment of the recovery fund breaks away from the original "Maastricht paradigm", which has characterised the functioning of the Economic and Monetary Union since its conception in 1992.

Probably the most important innovation determined by NGEU is the creation of the first genuine stock of European debt in history, as the Union will be allowed to collect a significant amount of resources from the financial markets through the issue of bonds. This decision clearly challenges a political taboo of the past: going into debt was considered something possible only for the Member States, because only within the national community there is a sufficient solidarity to create joint financial obligations among its members. Furthermore, only governments own secure means to repay their debts, i.e. the power of taxation. Accordingly, the establishment of a significant stock of European bonds does not only increase the *de facto* solidarity among the Member States and their citizens, but also puts on the shoulders of the Union the big responsibility to honour its promises towards the creditors in the near future.

The creation of the first stock of European debts also brings to conclusion the heated debate on whether and how the Member States should allow the creation of "Eurobonds". Notably, in the past decade institutional and academic actors have put forward several projects in this regard: Euro-bills, Blue-Red Bonds, Stability Bonds, Redemption Pact, ESBies bonds[42]. Most of these proposals envisaged the creation of temporary financial instruments for a group of euro-area Member States (realistically on the basis of intergovernmental agreements or a Treaty change) and suggested different technical solutions regarding the type of liabilities, guarantees and issuing entity, they would have implied. NGEU is different from these proposals because it structures the creation of European debt in the framework of the EU budget. The ownership of the debt will then be of the Union only. This will have two consequences. First of all, the resources collected on the financial market will belong to the Union, whose institutions will decide how to spend them. Second, the Union will be responsible for the repayment of the obligations on the basis of the revenues that the EU budget will collect in the future, i.e. reimbursement of loans from the beneficiary Member States, higher contribution from national budgets (GNI-based resource), new genuine own resources (for example carbon tax, digital tax). National governments are not directly responsible for the debt, the Union is going to issue on the financial market, even if the EU budget remains dependent on the resources received by the Member States in order to fulfil its obligation towards creditors.

The establishment of the first stock of European debt rises several questions regarding its compatibility with some important provisions of the EU Treaties. This is the case of the no

[42] For an overall excursus of the proposals see A. DELIVORIAS, C. STAMEGNA, *Joint debt instruments: A recurrent proposal to strengthen economic and monetary union*, in *European Parliament Think Tank*, 2 April 2020, available at www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)649361.

bailout clause ex art. 125 TFEU, which aims to preserve the principle of individual responsibility for the management of national public finances. The latter might be considered an obstacle not only for the pooling of existing sovereign debts, but also for the assumption of joint liabilities through the EU budget. More precisely the creation of common debt to finance European recovery may have a distortive effects on the ability of each country to fulfil its own financial obligations[43]. From a certain perspective, as long as Member States don't receive any form of European support, the administration of their public finances may be considered an individual affair and the no bailout clause fulfilled. Investors would weigh the fiscal solidity of each government and demand an interest rate on their bonds, which is effectively proportional to the investment risk. Instead, after the creation of NGEU, since Member States will be the beneficiaries of the resources collected by the Commission on the financial market, their budgetary responsibility would be undermined, as the Union would provide sufficient resources to put each government in the conditions to repay its financial obligations. In other words, the Union might be accused to acting as *de facto* intermediary of the Member States on the financial market, by granting them resources at a cheaper interest rate than what they could get if they borrowed on their own.

Such rigid interpretation of the no bailout clause is clearly dominated by an ideologic aversion to any form of fiscal solidarity beyond the national community. It is a vision, which has found some consensus in the past, when it was still unclear the level of political and economic interdependence determined by the participation in the currency union. Today, however, it is no longer sustainable. Of course the ability of each country to fulfil its financial obligations depends on many factors: EU membership does indeed create for most Member States better conditions to pursue sustainable public finances. Definitely, the establishment of NGEU represents a decisive step forward in the direction of fiscal solidarity within the EU and will improve the financing conditions of many countries. At the same time, the Union is not going to absorb existing debts, nor it is automatically providing national governments with the resources collected on the financial markets. The € 750 billion of new fresh debt will be owned by the Union, which will decide how to use them to support economic recovery in Europe[44].

The creation of long term European debt in the framework of the EU budget makes necessary to consider its consistency also with art. 310, para 1, TFEU according to which «[t]he revenue and expenditure shown in the [EU] budget shall be in balance». Notably, the latter provision does not represent an absolute prohibition for the Union to issue debt. Other norms

---

[43] The incompatibility of external support with the no bailout clause has been argued in relation to the financial assistance of the ESM: M. RUFFERT, *Anmerkung Pringle-Urteil. JuristenZeitung*, 2013, p. 257, at p. 258; J. TOMKIN, *Contradiction, circumvention and conceptual gymnastics: the impact of the adoption of the TESM on the state of European democracy.* In: B. DE WITTE, A. HERITIER, A. TRECHSEL (eds) *The euro crisis and the state of European democracy*, 2013. European University Institute, Florence, 2013, p. 64, at p. 75; G. BECK, *The Court of Justice, the Bundesverfassungsgericht and legal reasoning during the euro crisis: the rule of law as a fair-weather phenomenon*, in *EPL*, 2014, p. 539, at pp. 547–548.

[44] See M. AVBELJ, A. BARAGGIA, J. BAST, B. BUGARIČ, E. CASTELLARIN, F. COSTAMAGNA, A. FARAHAT, M. GOLDMANN, A. MANGOLD, M. SAVINO, A. THIELE, A. VITERBO, *The Case for Corona Bonds. A Proposal by a Group of European Lawyers* in *Verfassungsblog,* 5 April 2020, available at www.verfassungsblog.de/the-case-for-corona-bonds.

of the EU Treaties, i.e. art. 122, para. 2, TFEU[45], art. 143, para. 2, TFEU[46] or art. 352 TFEU[47], have already allowed the Commission to borrow from the financial markets in the past in order to finance specific projects, such as the European Financial Stabilisation Mechanism, the facility providing medium-term financial assistance for Member States' balances of payments and lastly the SURE Programme. Of course, these legal bases allowed derogations to the balanced budget only in exceptional cases through the mobilisation of limited amount of resources, which were provided to the beneficiary country in the form of loans. Furthermore, in the case of SURE, contingent liabilities arising from the borrowing on the financial markets are backed by guarantees of the Member States, so that there is no incompatibility with the Union budget constraints outlined in the ORD decision and the MFF 2014-2020. Accordingly, the issue and the repayment of bonds, even if it was managed by the European Commission on behalf of the Union, would rely on the immediate liability of the Member States. Compared to these previous tools, NGEU is rather different. The issue of bonds will become a substantial source of revenues for the Union, almost doubling its budget to € 1824.3 billion during the MFF 2021-2027[48]. Furthermore, the resources will be disbursed not only in the form of loans, but also as grants. In order to finance the repayment of debt raised under Next Generation EU, including the interest rate thereof, the Union shall not rely solely on the reimbursement of loans from the beneficiary Member States, but also on the collection of new revenues. This will require a significant increase of the ORD ceiling and the identification of new own resources in order to gradually repay the Union debt in the coming decades. The entire operation, even if it is qualified as “exceptional”, will last several decades: the Union is going to run significant deficits until 2026, which will be compensated through the collection of significant surplus until 2058. For all this time, the balanced budget rule will be substantially disapplied.

4.2. Transfer mechanism.

Following the creation of the first genuine stock of European debt, another important innovation of NGEU is the establishment of a temporary transfer mechanism within the Union. This will mainly happen in the framework of the Recovery and Resilience Facility (RRF), which will manage most of the resources collected by the Commission on the financial markets, more precisely € 672.5 billion.

On the spending side, capitals will be transferred towards different areas of the Union depending on their needs, meaning that the regions and sectors most heavily affected by the crisis will receive stronger support. The mechanism will dispose of € 360 billion for loans and € 312.5 billion for grants. On the revenue side, the Union will first collect capitals on the financial markets to finance the RRPs, but then it shall find sufficient resources in the coming

---

[45] Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, [2010] OJ, L 118, p. 1; Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, [2020] OJ L 159, p. 1.

[46] Council Regulation (EC) 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, [2002] OJ L 53, p. 1.

[47] Regulation (EEC) 397/75 of the Council of 17 February 1975 concerning Community loans, [1975] OJ L 46, p.1.

[48] The total amount is calculated by considering the € 750 billions of NGEU and the € 1,074.3 billion of commitments under the MFF 2021-2027.

decades in order to recover its debt. As it has been already explained, this will happen in part through the reimbursement of loans from the beneficiaries Member States, in part through a reform of the ORD, which will increase the resources flowing to the EU budget and provide it with sufficient surplus in the future. The latter will be financed either through higher transfers from national budgets (GNI-based resource), meaning that some countries will contribute more than others, or through the creation of new genuine own resources, for example carbon tax or digital tax, which will be imposed on different categories of individuals. In any case, the financing of the NGEU will require differentiated fiscal efforts, as there will be no correspondence between the final beneficiaries and the final contributors of the mechanism. This means that a significant transfer of resources will take place in the coming years between either Member States or groups of individuals within the Union.

It should be borne in mind that transfer mechanisms are not exactly new to the functioning of the EU budget. In fact, the European cohesion policy already allows the movement of resources from net contributors to net beneficiaries. NGEU, however, is innovative for at least two reasons. First of all, the size of the transfers will increase considerably[49]. Accordingly, countries suffering the worst economic downturn , such as Italy and Spain, will receive hundreds of billions of Euros in the form of loans and grants[50]. The European aid will make the difference to preserve the sustainability of public finances and invest sufficient resources into economic recovery. At the same time, while the EU cohesion policy normally aims at «reducing disparities between the levels of development of the various regions and the backwardness of the least favoured [ones]»[51], the purpose of NGEU is more ambitious: it will support the recovery and resilience of the economies of the Member States throughout the pandemic financing long term processes of transformation, such as decarbonisation and digitalisation[52].

Regarding the consistency of a large transfer mechanism with the no bailout clause, it is possible to recall the same considerations developed in regards to the establishment of common EU debt. Accordingly, art. 125 TFEU should not represent an obstacle, as long as the Union owns the resources that it is collecting and spending through NGEU and Member States remain responsible for their existing financial obligations.

4.3. Shaping a common macroeconomic policy.

The conditionality policy attached to the distribution of resources under NGEU may provide the Union with a new instrument to influence macroeconomic developments in the Member States.

Most of the funds will be disbursed through the RRF. As previously explained, in order to benefit from its resources, national governments shall submit a “recovery and resilience plan” (RRP) explaining how they will spend the resources and comply with the country-specific recommendations received in the framework of the European Semester[53]. While the Council

[49] While NGEU will mobilise € 750 billion, the European cohesion policy between 2014 and 2020 amounted to € 351.8 billion.
[50] Italy, for example, will be benefit of around € 209 billion.
[51] See art. 174, para. 2, TFEU.
[52] European Council Conclusions of 17-21 July 2020, EUCO 12/20.
[53] The European semester is based on to the synchronisation of European surveillance on national budgetary, structural and employment policies, as well as the distribution of European resources for the fulfilment of specific

shall approve the final content of RRPs, the Commission will have the last word on monitoring their execution and consequently disbursing resources to the Member States. The result is a cooperative approach in the management of the resources of RFF: Member States will propose how to use the funds, while EU institutions will take the final decision and monitor the execution. At the same time, NGEU will also finance other existing tools, such as Horizon Europe and InvestEU, which will allow the Union to invest directly in the economy of Member States by granting resources to individuals[54].

In this way, the establishment of NGEU may potentially represent an important step towards the development of a European macroeconomic policy. On the one hand, funds will be allocated on the basis of need and considering the economic damage that each country suffered as a result of the crisis. This will openly contravene the *juste retour* principle, which has characterised the negotiations on the EU budget in the past decades[55]. At the same time, the conditionality policy attached to the RRF may help the Union to encourage economic recovery in the Member States in a way to pursue some EU macro-economic goals[56]. Both the Commission and the European Council have stressed that the disbursement of resources under the recovery fund shall focus on relevant projects for the green and digital transformation of the Union[57]. In particular the use of the recovery fund is meant to be connected to the implementation of the Green Deal[58], meaning the pursuit of climate neutrality by 2050 and the achievement of intermediate climate targets in 2030[59]. For the next European Semester cycle the Commission has already set out strategic guidance for the implementation of the RRF based on four EU policy criteria:[60] environmental sustainability, productivity, fairness and macroeconomic stability[61].

In conclusion, while in the past the only way to influence the macroeconomic development of the Member States where the rules of coordination under the SGP and the little resources available under the cohesion policy, NGEU will, at least temporarily, provide EU institutions with an extraordinary tool to invest in the economic and social transformation of the Member States and the Union as a whole.

---

targets. It was introduced by Regulation (EU) No 1175/2011 amending Regulation (EC) No 1466/97 on multilateral surveillance.

[54] InvestEU and Horizon Europe will finance individual projects in key policy areas.

[55] On the possible end of *juste retour* see F. COSTAMAGNA, M. GOLDMANN, *Constitutional Innovation, Democratic Stagnation? The EU Recovery Plan*, in *Verfassungsblog*, 30 May 2020, www.verfassungsblog.de/constitutional-innovation-democratic-stagnation/.

[56] The disbursements may be suspended in the event of significant non-compliance with the relevant EU rules of fiscal coordination. See Art. 9 of Commission Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility, COM (2020) 408 final.

[57] Communication from the Commission, *Europe's Moment: repair and prepare for the Next Generation,* COM (2020) 456 final; European Council Conclusions of 17-21 July 2020, EUCO 12/20.

[58] Communication from the Commission, *The European Green Deal,* (COM) 2019/640 final.

[59] For this reason, a climate target of 30% will apply to the total amount of expenditure from the MFF and NGEU and be reflected in appropriate targets in sectoral legislation. See European Council Conclusions of 17-21 July 2020, EUCO 12/20.

[60] On the 17 September 2020, the European Commission launched the 2021 European Semester cycle by adopting the Annual Sustainable Growth Strategy.

[61] The deadline for submission of the Recovery and Resilience plans is 30 April 2021.

4.4. Revitalising the community method.

The establishment of NGEU may also have the impact of modifying the institutional balance within the Union. Notably the economic governance has been characterised in the past by a strong intergovernamentalism due to the prominent role of the European Council and the Council and the use of international agreements between groups of Member States. The Commission has normally exercised executive tasks, while the Parliament only held the right to be informed on the basis of the interinstitutional dialogue. This time, however, the decision to develop the recovery plan through an empowerment of the EU budget obliged national governments to respect the prerogatives of all EU institutions under the Treaties.

The Commission will probably be the institution to benefit the most from the establishment of NGEU. Under the current legal framework, it will indeed exercise the most important tasks regarding the management of the EU funds, as it will be in charge of collecting them on the financial markets and take the final decisions regarding their distribution[62]. This prerogative has been particularly contested during the negotiation of NGEU, as some Member States preferred to confer the entire execution of the recovery fund to the Council. Such a solution, however, wouldn't have been acceptable under the existing formulation of EU primary law. As the legal service of the Council confirmed, «[a]rticle 17(1) TEU confers on the Commission the power to "execute the budget and manage programmes" and [..] Article 317, first paragraph, TFEU empowers the Commission to «implement the budget (…) within its own responsibility (…) having regard to the principles of sound financial management»[63]. Accordingly, the governance of NGEU shall respect «the power [of the Commission] to validate and authorise disbursement of payments»[64]. The inclusion of an emergency break, according to which every government can ask the European Council to discuss whether a country is effectively complying with RRPs, may only delay the decision making process of the Commission and does not provide Member States with a veto right[65].

Also the European Parliament may finally gain some (limited) relevance in the management of the recovery fund, as it will have to pass the regulation establishing the RFF under art. 175, para. 3, TFEU and approve the new MFF in accordance with the procedure outlined in art. 312 TFEU[66]. The reform of the ORD does also require its participation in the form of consultation[67].

---

[62] The Commission shall provide an annual report to the European Parliament and the Council on the implementation of the RRF. See art. 24, para. 1 of Commission Proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility, COM (2020) 408 final.

[63] Opinion of the Legal Counsel of the Council, *Paragraph A19 of the Conclusions of the Special European Council of 17 to 21 July 2020*, Brussels, 21 July 2020.

[64] *Ibidem*.

[65] The Conclusions of the European Council expressly specify that the process shall, as a rule, not take longer than three months after the Commission has asked the Economic and Financial Committee for its opinion. European Council Conclusions of 17-21 July 2020, EUCO 12/20.

[66] It should be noticed, however, that as the € 750 billions of NGEU will consists of assigned revenue to the EU Budget, the scrutiny of the European Parliament on the management of these resources will happen only at the discharge level when the accounts are closed. See A. MATHIS, *Assigned revenue in the Recovery Plan. The frog that wishes to be as big as the ox?*, cit.

[67] See European Parliament legislative resolution of 16 September 2020 on the draft Council decision on the system of own resources of the European Union (10025/2020 – C9- 0215/2020 – 2018/0135(CNS)).

4.5. Weakening the control of national parliaments on fiscal policy.

The innovations determined by NGEU can be appreciated also by considering how they challenge some legal principles developed by national constitutional courts over the last decades to regulate the process of economic integration in the euro area. Notably, it was in particular the German Federal Constitutional Court (GFCC), who created a sophisticated case law aimed at avoiding that the participation of Germany in the monetary union would undermine its sovereign rights and constitutional identity.

The main priority of the GFCC has been to make sure that the *Bundestag* would remain the place in which autonomous decisions on revenue and expenditure are made (*Budgethoheit*). Accordingly, no supranational legal obligations can be created without a corresponding decisions of the German parliament, nor budgetary responsibility can be transferred to other entities by means of imprecise budgetary authorisations[68]. In fact, «the core of identity of the constitution requires that the budget legislature makes its decisions on revenue and expenditure free of other-directedness on the part of the bodies and of other Member States of the European Union and remains permanently the master of its decisions»[69]. This legal prescription aims to protect the principle of democracy, which according to the constitutional judges is primarily expressed through the involvement of the Parliament (*Parlamentsvorbehalt*)[70]. At the same time, as the GFCC believes that democracy comes only from the national people (*Volksdemokratie*)[71], protecting the prerogatives of the *Bundestag* in the field of fiscal policy is also functional to the preservation of national sovereignty in itself[72].

On the basis of this logic, the case law of the GFCC has set some strict conditions to allow the participation of Germany in the economic governance of the euro area. This has emerged clearly in relation to the establishment of intergovernmental rescue mechanisms, such the ESM. First of all, the *Bundestag* must individually approve every large-scale financial assistance programme resulting in expenditure for the German budget and maintain sufficient influence over the manner of dealing with the funds provided[73]. The financial exposure must be limited *ex ante* and be proportional to the size of the national budget[74]. Furthermore, the German *Bundestag* must receive sufficient information concerning the decisions with budgetary implications for which it is accountable[75]. Finally, the sovereign rights of the *Bundestag* would be diminished if a rescue mechanism creating financial liabilities for the national budget could be activated without providing Germany with a veto right[76].

Now the problem is to consider whether this case law may represent an obstacle for the establishment of a recovery fund. In the past, the Court of Karlsruhe did not oppose the issue of bonds by the European Commission, as they consisted of minor operations limited in time and size, which did not risk altering the exposure of the Germany towards the EU budget[77].

[68] German Federal Constitutional Court, judgment of 7 September 2011, cit., paras 124-125.
[69] German Federal Constitutional Court, judgment of 12 September 2012, 2 BvR 1390/12, para. 213.
[70] P. M. HUBER, *The Federal Constitutional Court and European Integration*, cit., p. 83, at p. 97.
[71] F.C. MAYER, *Rebels Without a Cause?*, cit., p. 140.
[72] Accordingly, the process of European integration may represent a threat to (national) democracy. See P. M. HUBER, *The Federal Constitutional Court and European Integration*, cit., p. 98.
[73] German Federal Constitutional Court, judgment of 7 September 2011, cit., para. 128.
[74] *Ibidem* para. 125.
[75] German Federal Constitutional Court, judgment of 12 September 2012, para. 215.
[76] German Federal Constitutional Court,, judgment of 18 March 2014, 2 BvR 1390/12, para 199.
[77] German Federal Constitutional Court, judgment of 5 May 2020, cit., para. 104.

Next Generation EU, however, is different. The mobilisation of enormous resources and the creation of long term liabilities for the Union will imply decisions, which may escape the control of the *Bundestag*.

Let's consider for example the repayment of € 750 billions of European common debt. According to the Conclusions of the European Council this will be done in the coming decades on the basis of future MMFs and possibly a reform of the ORD. The adoption of these acts notably require the unanimous vote of the Council, meaning that the *Bundestag* will be able to authorise or block any disbursement of resources from Germany by giving instructions to the government. While these guarantees seem preserving the fiscal sovereignty of national parliaments, the establishment of common European debt creates an implied financial risk for the Member States, national authorities may struggle to escape. Normally, the Union will recover its obligation towards creditors drawing from essentially three sources: reimbursement of loans from the beneficiary Member States, higher contribution from national budgets (GNI-based resource), new genuine own resources (for example carbon tax, digital tax). However, as proven by some recent events, the Union may find itself in the impossibility to fully rely on these sources. For example, a government may struggle to return its loans towards the Union in time. Or a Member State could make the unfortunate decision to trigger art. 50 TEU and refuse to honour its obligations towards the EU budget before leaving the Union. Accordingly, in a situation of distress, the Commission would be obliged to request for additional resources from the other Member States, either in the form of higher contributions from the national budgets or by collecting more genuine own resources. In this case, national parliaments may feel *de facto* obliged to endorse these requests in order to allow the Union to fulfil its obligations towards the creditors. It is interesting that the European Council has already taken into consideration this scenario in its conclusions of July 2020 and tried to limit the maximum exposure national budgets may be subject to in the event of additional call of resources from the Commission[78]. Of course the practical relevance of these *ex ante* arrangements is little, because they are meant to apply to future situations of financial distress for the Union, whose gravity is difficult to predict. The fact is that, regardless of any early agreement on the future redistribution of payments towards the EU Budget, Member States will always feel compelled to intervene in order to prevent the Union from going into default. This might require a variable fiscal effort for national budgets and taxpayers that domestic parliament are not exactly able to determine *ex ante*.

Another way, NGEU determines a weakening of national parliamentary control on fiscal resources, has to do with the execution of the recovery fund. None of the programmes in charge of managing the new resources of the EU budget recognises indeed any substantial decision-making power to national parliaments. In particular, the activation of Recovery and Resilience Fund (RFF) will essentially depend on the assessment of the Commission. Of course the

[78] In this regard the European Council specified that «the Commission may provisionally call more resources from Member States than their respective relative share, without increasing the ultimate liabilities of the Member States, and set out the conditions thereof. It will provide that any such contribution will be compensated without delay in line with the applicable legal framework for the EU budget and thus on the basis of the respective applicable GNI keys, without prejudice to other own resources and other revenues [..]. The amount of additional resources which can be called annually from Member States in such circumstances shall be on a pro rata basis and, in any case, limited to their share of the temporarily increased own resources ceiling, i.e. 0.6% of Member States' GNI». European Council Conclusions of 17-21 July 2020, EUCO 12/20.

national recovery and resilience plans must be previously approved by the Council. However, decisions will be taken by the standard qualified majority, meaning that there is no national veto, domestic parliaments may demand to trigger. The only instrument at their disposal is of course the "emergency break", which, however, is not able to block the decision making process of the Commission, but only delay it.

5. Conclusive remarks.

After having analysed the main features of NGEU it is possible to answer the initial question regarding its real impact on the process of European integration. Does the establishment of the recovery fund represent a "Hamiltonian moment" for Europe? For several reasons, the response must be no, at least not yet.

It is true that the recovery fund consists of a significant and unexpected acceleration in the process of fiscal integration of the European Union. For the first time in its history, the EU will create a significant stock of common debt, which shall be repaid through the collection of new common resources. Furthermore, the mobilisation of these funds will allow EU institutions to develop some common macroeconomic policy by financing economic recovery in the Member States along the political priorities, they will decide[79]. Clearly, the Union is doing something unprecedent, whose admissibility under the existing EU Treaties has been disputed: exercising some form of fiscal power.

Despite this giant leap forward, it is still early to call for the fulfilment of a real Hamiltonian moment. While the issue of the first stock of American public debt could rely on a genuine fiscal competence of the federation, which was enshrined in the Constitution of 1787, the first stock of European common debt shall be created on the basis of a temporary and exceptional empowerment of the EU budget contained in the ORD. Accordingly, the experience of the recovery fund consists of an «exceptional response to […] extreme circumstances»[80] and the powers conferred to the Commission will remain limited in size, time and scope. Furthermore, the procedure followed for the introduction of NGEU is extremely uneven as it requires reaching the unanimity of Member States multiple times and on multiple levels. First of all, the European Council had to create the sufficient political consensus for the creation of such recovery plan, which was far from easy, as the special meeting of 17-21 July 2020 has proven. The Council shall then adopt by unanimity both the reform of the ORD and the MFF in order to expand the EU ability to collect and spend resources. Finally, the ORD requires an approval of all Member States in accordance with their respective constitutional requirements as prescribed by the procedure under art. 311, para. 3, TFEU.

In conclusion, the substantial and procedural conditions, which must be fulfilled in order to repeat or endure the experience of NGEU require a political effort and follow a legal procedure similar to the standard reform of the EU treaties, meaning a decision of national governments by unanimity at European level followed by the ratification of all domestic legislatures. Accordingly, it is not possible to identify a real transfer of fiscal competence to the Union, but only the conferral of a specific fiscal power limited in time, size and scope.

[79] Unlike the agreement between Hamilton, Jefferson and Madison in 1790, NGEU would not mutualise pre-existing debts of the Member States, but create a stock of new European debt.
[80] European Council Conclusions of 17-21 July 2020, EUCO 12/20.

Even if NGEU does not represent a Hamiltonian moment, the innovations it determined have broken some longstanding political taboos, thus giving the Union the chance to move further forward with fiscal integration. The experience of the recovery fund might indeed create some form of dependency of the Union on future borrowings in order to continue developing its macroeconomic priorities[81]. Even Chancellor Merkel admitted in a recent interview that, while the Recovery Fund is a temporary project, in the coming years discussion may start on «fundamental aspects of the way the EU budget is managed […] for instance, give it the right to raise taxes»[82], which would need a Treaty amendment. In other words, Member States and EU institutions shall decide whether the experience of Next Generation EU will remain an exception or pave the way to the establishment of some form of fiscal union.

This raises the question: what does Europe still need in order to achieve its Hamiltonian moment? It is possible to identify several challenges, which must be overcome in order to make it happen. At European level it is necessary to amend the EU Treaties. Notably, the latter has not been conceived to grant any form of fiscal competence to the Union. Even the creation of a limited fiscal instrument, such as NGEU, is rather innovative and has been made possible thanks to the flexible application of EU primary law, as the previous analysis explained. So, while the experience of the recovery fund proved that it is already possible to adopt some *ad hoc* emergency fiscal measure of the Union in a situation of distress, the conferral of a permanent fiscal competence is not conceivable without a profound transformation of the EU legal framework. At the same time, as it was already recalled in the introduction, fiscal competence exercises a strategical importance for the preservation of national sovereignty as defined in the constitution of the Member States. It is therefore comprehensible, constitutional courts may stand up to forbid transfer of fiscal powers to the Union, as this would modify the constitutional order, they are meant to protect. Aside from reforming the EU Treaties, the fulfilment of a Hamiltonian moment must necessarily deal with such opposition.

81 F. COSTAMAGNA, M. GOLDMANN, *Constitutional Innovation, Democratic Stagnation?*, cit.; E. CASTELLARIN *The European Union's Financial Contribution to the Response to the Covid-19 Crisis: An Overview of Existing Mechanisms, Proposals under Discussion and Open Issues*, in *European Papers*, 23 July 2020, p. 1, at p. 9.

82 "For Europe to survive, its economy needs to survive: Angela Merkel interview in full", The Guardian, 26 June 2020.