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**Will Next Generation EU require a change in the
European Economic Constitution?**

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Index

Introduction	9
Chapter 1 The economy of the Eurozone, the ECB and its legal framework	11
1.1 From health crisis to economic crisis.....	11
1.2 Macroeconomic projections of the Euro Area for 2020	12
1.2.1 Real Economy	12
1.2.2 Inflation and income.....	14
1.2.3 Public finances	15
1.3 The reaction of the European Authorities.....	16
1.4 The European System of Central Banks	19
1.5 The ECB and its legal basis	21
1.5.1 The independency of the ECB	22
1.5.2 The decision-making bodies of the ECB.....	23
1.5.3 The supervisory function of the ECB.....	25
1.5.4 The monetary function of the ECB	26
1.6 The monetary policy in the Euro Area.....	28
1.6.1 Role and limitations of monetary policies.....	30
1.6.2 The advantages of price stability.....	31
1.6.3 Tasks and responsibilities assigned by the TFEU to the ECB	33
1.6.4 Transmission mechanism of monetary policy.....	34
Chapter 2 Towards a transformation of the European Economic Constitution	41
2.1 A new ‘paradigm’ of the interpretation of the European Economic Constitution	42
2.1.1 From the Maastricht paradigm to the current transformation	43
2.1.2 Transformation of the ECB to ensure monetary soundness of the EU	45
2.1.3 Criticism to the ECB interventions	46
2.2 Thomas Pringle v. the Government of Ireland.....	48
2.2.1 Reaction of the ECJ with regards to the ESM Treaty and the Chart of Fundamental Rights of the European Union	49
2.3 The Gauweiler Case	54
2.3.1 The speech of Mario Draghi.....	54
2.3.2 Peter Gauweiler v Deutscher Bundestag, case C-62/14.....	58
2.4 The Bundesverfassungsgericht declares Quantitative easing ‘ultra vires’	63
2.4.1 Case C-493/17, Weiss and others.....	65

2.4.2 Implications of the declaration ‘ultra vires’ addressed to a European Institution by the BVerfG.....	69
2.5 Problems and prospects on the democratic nature of multi-level economic governance	71
2.6 Analogies with NGEU	74
Chapter 3 The Pandemic Crisis and Next Generation EU	75
3.1 The impact of the crisis on the socio-economic level.....	75
3.2 An ambitious and innovative EU budget for European recovery	76
3.3 A budget for European recovery and resilience.....	78
3.4 Next Generation EU.....	79
3.4.1 The structure of NGEU	81
3.4.2 Economic phases to be financed	83
3.4.3 Redistributive effect	86
3.4.4 The approval process of NGEU	89
3.4.5 The European Commission's guidelines	90
3.5 Focus on Resilience and Recovery Facility and its legal basis.....	97
Conclusions.....	102
Is NGEU within the mandate of the ECB?	102
The impact of NGEU on the European Economic Constitution.....	105
Bibliografy	108
Sitography	114

Abbreviations

AG Advocate General

BVerfG Bundesverfassungsgericht

CJEU Court of Justice of the European Union

EA Euro Area

EC European Commission

ECB European Central Bank

ECCL Enhanced Conditions Credit Line

EIB European Investment Bank

EIF European Investment Fund

EP European Parliament

ESCBs European System of Central Banks

ESFSs European System of Financial Supervisors

ESM European Stability Mechanism

EU European Union

GDP Gross Domestic Product

GNI Gross National Income

HICP Harmonized Index of Consumer Prices

MFF Multi-Year Financial Framework

NCA National Competent Authorities
NCB National Central Bank
NECP National Energy and Climate Plan
NFC Non-Financial Corporation
NGEU Next Generation EU
NRP National Recovery Plan
NRRP National Recovery and Resilience Plan
OMO Open Market Operations
PCCL Precautionary Conditional Credit Line
PEPP Pandemic Emergency Purchase Program
PMI Purchasing Managers Index
PSPP Public Sector Purchase Program
QE Quantitative Easing
RRF Resilience and Recovery Facility
SEA Single European Act
SME Small and Medium Enterprises
SMP Securities Market Program
SPP Security Purchase Program
SSM Single Supervisory Mechanism
SURE Support to Mitigate Unemployment Risks in an Emergency
TEU Treaty of the European Union
TFEU Treaty of Functioning of the European Union
VAT Value Added Tax

European Commission President Ursula von der Leyen: « *The recovery plan turns the immense challenge we face into an opportunity, not only by supporting the recovery but also by investing in our future: the European Green Deal and digitalization will boost jobs and growth, the resilience of our societies and the health of our environment. This is Europe's moment. Our willingness to act must live up to the challenges we are all facing. With Next Generation EU we are providing an ambitious answer.* »

Commissioner Johannes Hahn, in charge of the EU budget: « *Our common budget is at the heart of Europe's recovery plan. The additional firepower of Next Generation EU and the reinforced multiannual financial framework will give us the power of solidarity to support Member States and the economy. Together, Europe will arise more competitive, resilient and sovereign.* »

Vice-President Maroš Šefčovič, in charge of interinstitutional relations and foresight: « *The recovery will need strong policy direction. The adapted Work Programme, reflecting the new reality, shows that we will focus all our actions on overcoming the crisis, jumpstarting our economy and putting the European Union firmly on a resilient, sustainable and fair recovery path. It will help us rebound stronger.* »

Introduction

This Thesis in an attempt to present the impact of a power legal instrument ‘NGEU’ on the European Economic Constitution. In a period heavily influenced by the pandemic crisis induced by COVID-19 the need of an immediate and effective deployment of resources to support the EA is primary in order to allow a fast recovery and to project it in a more sustainable future.

Despite the undeniable need of a coordinated European intervention, European Authorities are designed on a deep and complex legal framework that force each intervention to undergo a complex legal process that has to respect all the Regulations and Treaties on which the EU was built on.

During a deep economic crisis, like the one we are currently facing since early 2020, the effectiveness of European Authorities is heavily criticized because of the inability to act rapidly we employing legal instruments with the objectives to ease or sustain economic activities. NGEU is another to chance to resume the discussion on the European Economic Constitution, its structure and its impact in the law-making process of the EU. This Dissertation attempts to highlight some useful elements to argue whether the time has come for a rethinking of the European Economic Constitution, to allow European Authorities, to be more incisive when they intervene to support the EA.

The first Chapter starts with an accurate macroeconomic snapshot of how the Pandemic Crisis has affected the EA. The numbers show the severity of the situation and reason behind the quickness of a coordinated European intervention. Then the focus moves macroeconomic data to the legal framework of the ECB, a crucial player involved in the deployment of resources provided by NGEU.

After an explanation of the main legal instruments designed to face the Pandemic Crisis (MFF, ESM, PEPP, SURE and NGEU) the monetary nature of ECB intervention in presented in order to clarify the actual capabilities of the ECB within its mandate.

The second Chapter starts with a reasoning on the motives behind a possible rethinking of the European Economic Constitution, in terms of ‘new paradigm’. To corroborate

such ‘need of change’ the well-known sentences, ‘T. Pringle case’ ‘Gauweiler case’ and ‘Weiss case’ are reviewed. They constitute the starting point from a which a ‘new paradigm’ to interpret the European Economic Constitution should be embraced.

The final Chapter is focused on NGEU its structure, the magnitudes of funds involved and the conditionalities to be respected to able to obtain such funds. The last paragraph has a legal focus with the objective of to present the legal framework on which NGEU relies upon.

Chapter 1 The economy of the Eurozone, the ECB and its legal framework

1.1 From health crisis to economic crisis¹

The global impact of the pandemic COVID-19, at an economic, social, historical, institutional and scientific level is profound. After the first emergency phase, the debate began on the economic and social repercussions of the crisis and on the most appropriate measures to mitigate its impact. Although it allows the contagion to be contained, social distancing determines heavy repercussions on the economic and financial activity of the country that enforce it. As a matter of fact the main economic impact of the pandemic COVID-19 has been determined by the combination of the necessary lockdown measures imposed by governments with stringent confinement measures.

The unexpected contraction of supply (negative supply shock) is a direct effect of the lockdown, that is, the interruption of production chains considered non-essential. Where possible, the physical presence at work has been substituted through remote working (smart working). However, this organizational solution is not generally applicable: the industrial sector for example, is excluded, since lockdown would determine the closure of plants and establishments. The consequences of the interruption of production in one sector and in a given geographic area may also extend to other sectors and to other geographic areas, depending on the level of vertical integration of the activities and geographical connections, thus amplifying the initial shock.

A shock on the demand side unavoidably triggers a shock on the supply side: the restrictive measures to individual mobility, cause, in the immediate future, a drop in consumption, that added to the slowdown or temporary closure of some activities (income effect), lead to a decline in household income as many workers suffer a reduction in wages or lose their jobs in the worst cases.

Further amplifications of the effects of the crisis are spreading through the financial system. The development of the pandemic and its economic consequences have repercussions on the performance of the financial markets, causing a decrease in the value

¹ Cinzia Caporale and Alberto Pirmi, *Pandemia e resilienza - Persona, comunità e modelli di sviluppo dopo la Covid-19*, ISBN 978 88 8080 390 4.

of securities which directly reduces the financial wealth of investors and their propensity to consume. Furthermore, the negative trend of the markets reduces the ability of borrowers to raise resources on the market because the propensity of potential investors to take on risk is reduced (high risk aversion). Finally, the crisis could also have negative effects on banks, that would affect their ability to grant credit to households and businesses in order to avoid potential risks.

1.2 Macroeconomic projections of the Euro Area for 2020²

In the above-described scenario the Eurozone³ is suffering a significant decrease in the overall production of Member States. According to Eurostat⁴, the GDP is decreased by 11.8% in the second quarter 2020, continuing the downward trend observed in the first quarter. Evidence shows that the decline mostly affected companies in the sectors of motor vehicle production, capital goods and transport, artistic, entertainment and recreational activities, although to a different extent in the various countries.

The macroeconomic data that are going to be presented, will show the urgency of an intervention from the European Authorities, the ECB in particular, in order to face one of the worst crises of the century.

1.2.1 Real Economy

The composite PMI⁵ for output, rose to an average of 53.4 in July and August, from a low of 13.6 in April. High-frequency indicators such as electricity consumption, GPS-based mobility indicators and credit card payments have begun to convert back to pre-crisis levels with the lifting of confinement measures in various countries of the Euro Area.

² *'ECB staff macroeconomic projections for the Euro Area'*, September 2020 (ISSN 2529-4466, QB-CE-20-002-EN-N).

³ A monetary union of 19 Member States of the European Union (EU) that have adopted the Euro (€) as their primary currency and sole legal tender.

⁴ The Statistical Office of the European Union (Eurostat) is a Directorate-General of the European Commission that collects and processes data from the Member States of the European Union for statistical purposes, promoting the process of harmonizing the statistical methodology between the States themselves.

⁵ An indicator of economic health for manufacturing and service sectors. The purpose of the PMI is to provide information about current business conditions to company decision makers, analysts and purchasing managers. The composite PMI is a number from 0 to 100. A PMI above 50 represents an expansion when compared with the previous month. A PMI reading under 50 represents a contraction, and a reading at 50 indicates no change.

Private consumption records an unprecedented decrease of 8.0%. In the first half of this year, private consumption suffered a very strong decline and the most affected components were: sales of motor vehicles and shopping for holidays and meals in restaurants. Although the fall in real disposable income related to the confinement measures was largely mitigated by public transfers, the decline in consumption was amplified by the combined effect of forced and precautionary saving. Households whose income has remained unchanged have not been able to purchase non-essential goods and services, inducing forced savings. Precautionary savings have increased also because of a sharp deterioration in consumer confidence and an unprecedented increase in uncertainty regarding the prospects for the economy and employment.

Investments in real-estate is undergoing a strong contraction, especially for countries where confinement measures have been stricter. Adverse effects on housing demand are expected to lead to persistently subdued developments in residential investment, more than 2% below the pre-EU level crisis on account of falling disposable income, deteriorating consumer sentiment and rising unemployment.

Investments in business are recording a collapse. Data show a drastic decline in the first half of 2020 in the face of confinement measures and also in the presence of the very strong contraction of global and domestic demand and the considerable increase in uncertainty.

Gross debt of NFCs⁶ is increasing significantly. The increase is attributable to the marked decline in corporate earnings in the first half of the year and the consequent increased use of debt financing to compensate for the shortcomings of liquidity. Nonetheless, gross interest spending by NFCs has fallen to historic lows in recent years, easing possible fears over debt sustainability.

EA exports have been more affected by the COVID-19 pandemic than imports due to the global collapse in sectors to which the EA is particularly exposed, leading to negative net exports in 2020. The spread of the pandemic has caused particular disturbances along the

⁶ Corporations that are engaged in the production of market goods and non-financial services and their financial transactions are wholly distinct from those of their owners. Non-financial corporations can be private and public corporations, holding companies, non-profits or associations.

supply chains of the automotive sector and those of machinery and chemicals oriented towards exports, weighing on the main exporting sectors of the EA more than on those of other regions. Travel and tourism restrictions have led to a collapse in exports of hospitality and transport services.

Export recovery will be in line with foreign demand, although lower than the June projections given the lower price competitiveness due to the recent strengthening of the Euro exchange rate.

Job market conditions have definitely deteriorated, the unemployment rate has increased, together with a decrease of the number of employees. If such conditions were to persist the unemployment rate would rise from 7.3% in the first quarter of 2020 to 9.5% in 2021, following economic movements.

1.2.2 Inflation and income

Inflation, which is among the main concerns of the ECB, measured on the HICP⁷ will rise from 0.3% in 2020 to 1.0%.

The low level of inflation in 2020 reflects in particular, the sharp decline in the prices of energy goods included in the HICP, attributable to the fall in oil prices since the start of the COVID-19 pandemic, as well as the appreciation of the Euro and the lowering of the VAT rate in Germany for six months starting from July 2020. Despite the partial recovery of oil prices in recent months, the energy component will provide a strongly negative contribution to overall inflation in the current year.

The food component of the HICP, which had experienced a temporary surge in April as a consequence of the COVID-19 pandemic, began to moderate on a monthly basis as early as May with the easing of confinement measures and constraints.

The twelve-month rate of change in food prices is expected to decrease during this year, and then gradually increase in the rest of the period considered.

Inflation measured on the HICP net of energy and food goods is expected to moderate to 0.8% on average in 2020 and to recover from the second half of 2021. In the coming months, generalized disinflationary effects on the prices of goods and services are expected, as the demand will remain modest or will be held back by the measures

⁷ An indicator of inflation and price stability for the European Central Bank (ECB). It is a consumer price index which is compiled according to a methodology that has been harmonized across EU countries.

introduced to contain the spread of the virus. With regard to supply factors, if on the one hand the upward pressures exerted by the negative supply effects related to the pandemic are attenuated, on the other hand the exit of companies from the market could lead to increases in profit margins higher than those economic conditions in some markets. The growth of core inflation will also be supported by the indirect effects of the hypothesized increase in oil prices.

The increase in income per employee should become negative in the short term. Earnings per employee declined sharply in the second quarter of 2020, reflecting the massive and sudden drop in the number of hours worked per employee during confinement and the only partial compensation of income losses offered by schemes supporting the reduction of working hours in most countries. After confinement, income per employee is expected to rise again, albeit not to the level prior to the start of the restriction measures, and to continue to gradually increase over the rest of the period under review.

The growth in labour costs per unit of product would be subject to strong fluctuations in the projection time horizon, reflecting the abrupt movements in labour productivity. In the second quarter of 2020, the decline in labour productivity, due to a decline in GDP more marked than that of employment, exerts significant upward pressure on unit labour costs.

Import prices would decrease significantly in 2020, and then recover slightly in 2021 and 2022. This element is significantly affected by fluctuations in oil prices, implying a strongly negative growth rate in 2020 and positive from the second quarter of 2021 and 2022. The positive rate of change in import prices from 2021 also reflects the slight upward pressures deriving from both non-raw material prices oil and more generally by the greater underlying dynamics of prices at the international level.

1.2.3 Public finances

Budget support aimed at mitigating the macroeconomic impact of the COVID-19 crisis is playing a crucial role in the recovery. The orientation of fiscal policies will be extremely expansionary in 2020. This is mainly favoured by the extraordinary fiscal measures adopted by all the countries of the EA in response to the pandemic. For the area as a whole, these measures correspond to approximately 4.5% of GDP and are largely

made up of additional expenditure in the form of transfers and subsidies to businesses and households, including in the context of support schemes for reducing working hours. Budget support is currently expected to reduce considerably in 2021, even though, less than expected in the year last June due to the extension of some measures and the adoption of other new intervention packages for that year. Based on the measures launched or approved by governments at the date of updating the assumptions on public accounts, most of the measures related to the pandemic are of a temporary nature.

The EA fiscal deficit⁸ and debt-to-GDP ratio are expected to increase significantly in 2020, and then decline slightly in 2021 and 2022. The increase in the budget deficit in 2020 is due to emergency fiscal measures. The improvement in 2021 is mainly connected to the partial disappearance of the aforementioned measures.

The strong growth in debt in 2020, at over 100% of GDP, is attributable to the expansionary effect exerted by the differential between the interest rate and the growth rate (snowball effect)⁹ and the high primary deficit. Compared to the year of last June, the projections for the public accounts of the EA show a larger deficit in the period 2020-2021 for reasons mainly attributable to the easing of budgetary policies reflected by the adjusted balance for the economic cycle.

The severity of the economic impact of the pandemic crisis have induced European Authorities to intervene to preserve the growth and well-being of the economy of the EA.

1.3 The reaction of the European Authorities

Significant monetary, budgetary and labour market policy measures will help support incomes, limit job losses and the number of bankruptcies; in addition, they will largely manage to contain negative feedback effects for the real economy and the financial sector. The most relevant instruments adopted to contrast the worsening of the economic outlook in Europe are the PEPP, a new credit line of the ESM, the temporary instrument SURE, additional EIB funds, the new MFF and the temporary instrument NGEU.

⁸ The difference between total revenue and total expenditure of the government.

⁹ A process that starts from an initial state of small significance and builds upon itself, becoming larger (graver, more serious), and also perhaps potentially dangerous or disastrous (a vicious circle), though it might be beneficial instead (a virtuous circle).

The PEPP¹⁰ is a non-standard monetary policy measure approved in March 2020 to counter the compelling risks to the monetary policy transmission mechanism and the outlook for the EA posed by the COVID-19 outbreak. It is a temporary asset purchase programme of private and public sector securities.

On 4 June 2020 the Governing Council of the ECB decided to increase the original 750 billion Euros envelope for the PEPP by 600 billion Euros, to a new total of 1,350 billion Euros. On 10 December 2020 it decided to increase the envelope by a further 500 billion Euros, to a total of 1,850 billion Euros. The Governing Council of the ECB will terminate net asset purchases under the PEPP once it judges that the COVID-19 crisis phase is over, however not before the end of March 2022. The maturing principal payments from securities purchased under the PEPP will be reinvested until at least the end of 2023.

The ESM¹¹ was established by an intergovernmental treaty, outside the legal framework of the EU, in 2012. Its fundamental function is to grant, under specific conditions, financial assistance to member countries that, despite having a sustainable public debt, struggles in financing through financial markets. Conditionality varies according to the nature of the instrument used: for loans it takes the form of a macroeconomic adjustment program, specified in a specific memorandum; it is less stringent in the case of precautionary lines of credit, intended for countries in fundamentally sound economic and financial conditions but hit by adverse shocks. The ESM is led by a ‘Council of Governors’ made up of 19 EA finance ministers. The Council unanimously takes all major decisions (including those relating to the granting of financial assistance and the approval of memoranda of understanding with the receiving countries). There are two types of available credit lines: PCCL and ECCL. Both can be drawn via a loan or primary market purchase and have an initial availability period of one year. They are renewable twice, each time for six months. The new credit line, so called ‘Pandemic Crisis Support’, is designed to face the uprising costs related to health issues; as a matter of fact its only cross compliance is the financing of direct and indirect health costs related to the ongoing crisis.

¹⁰ Official Journal of the European Union L91/1, Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17).

¹¹ Treaty T/ESM 2012-LT.

The SURE¹² is an instrument of temporary support, until 31 December 2022, outlined to mitigate the risks of unemployment in the emergency situation; is designed to help protect the jobs and workers most affected by the pandemic. It will provide financial assistance for a total of 100 billion Euros in the form of loans, granted by the EU to Member States on favourable terms. The loans will help Member States to cope with sudden increases in public spending on maintaining employment: specifically, they will help cover costs directly related to the establishment or extension of national working time reduction schemes and other similar measures for self-employed workers.

The EIB¹³ is the credit institution of the EU. It is the world's leading multilateral lending institution and provides the bulk of climate finance with great focus on supporting the economy, creating jobs and promoting equality. The EIB Group consists of the EIB and the EIF. The EIF is specialized in financing for midcaps and small businesses, thus it has allocated 40 billion Euros in financing, which will be directed at bridging loans, suspension of credit repayments and other measures designed to ease the working capital restrictions faced by SMEs and the midcaps.

The MFF 2021-2027¹⁴, is a multiannual spending plan, based on the European Union budget, that transforms the EU's priorities into financial terms and limits Union spending for a specified period. The MFF must be defined for a term of no less than 5 years and currently working with agreements on financial frameworks for periods of 7 years. In order to effectively face the economic challenges derived from the COVID-19 crisis the European Council has allocated 1100 billion Euros.

NGEU consists in a 750 billion Euros temporary recovery tool that will allow the EC to raise funds on the capital market and distribute them via the ECB. This tool will help repair the immediate economic and social damage caused by the coronavirus pandemic, to create a greener, digital, resilient and more resilient post-COVID-19 Europe, adapted to present and future challenges. It is based on three pillars which defines the areas of intervention: 'Supporting Member States to recover', 'Learning the lessons from the crisis' and 'Kick-start the economy and helping private investment'. The most relevant

¹² Council of the EU, Press release 299/20 15/05/2020.

¹³ *'La BEI in sintesi'*, QH-02-19-008-IT-N ISBN 978-92-861-4063-1 doi: 10.2867/231934.

¹⁴ *'EU next long-term budget'*, ISBN 978-92-76-25312-9, doi: 10.2761/567087.

component of the first pillar is ‘The mechanism for recovery and resilience’ the major building block of the whole instrument that will provide 672.5 billion Euros in loans and grants to support reforms and investments made by Member States. The goal is to mitigate the economic and social impact of the coronavirus pandemic and make the economies and societies of European countries more sustainable, resilient and prepared for the challenges and opportunities of the ecological and digital transition.

This instrument is the latest among the measures to counter the economic slow-down induced by the pandemic crisis; the funds pledged by NGEU will be distributed by the European Central Bank, with the strict supervision European authorities.

The severity of the conditions of the main economies of Member States, despite the unprecedented magnitude of the funds that have been allocated in NGEU, are drawing away the attention from the institution that is playing a crucial role in the recovery of the Euro Area, the ECB. The ECB has a very well-defined legal framework, within which it can operate and, together with the NCBs of the 27 Member States of the Union form the ESCBs can monitor and intervene, when deemed necessary, to sustain the EU economy. It is therefore essential to define clearly the regulatory field of such institution in order to assess whether they are legally entitled to allocate the credit budgeted by the above-described legal instruments, especially NGEU which is the latest one and it has been a subject of media interests.

1.4 The European System of Central Banks

The ESCBs consists of the NCBs participating in the Eurozone and the NCBs of those EU Member States that have not yet introduced the single currency. These countries are Bulgaria, Croatia, the Czech Republic, Denmark, Hungary, Poland, Romania, Sweden and the United Kingdom. The TEU¹⁵, the Statute of the ESCBs and the ECB¹⁶ and the TFEU¹⁷ assign specific objectives and tasks to the ESCBs. In order to ensure greater

¹⁵ The Maastricht Treaty, known formally as the Treaty of the European Union, is the international agreement responsible for the creation of the EU signed in 1991 and which became effective in 1993. It formally states the objective of the Union is the strengthening of economic and social cohesion and through the establishment of economic and monetary union, including a single currency.

¹⁶ Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, outlays the monetary functions and operations of the ESCBs.

¹⁷ The Treaty of Rome, known under the name of ‘Treaty on the Functioning of the European Union’, was signed in 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany, brought about the creation of the European Economic Community.

transparency and to facilitate the understanding of the complex institutional structure that performs the functions of the central bank in the EA, the term ‘Eurosystème’ has been adopted to indicate more specifically the body that performs the fundamental tasks related to the single monetary policy of the EA, while the ESCBs carries out tasks and pursues objectives that affect the EU as a whole.

« The primary objective of the European System of Central Banks (hereinafter referred to as ‘the ESCBs’) shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCBs shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCBs shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources. The basic tasks to be carried out through the ESCBs shall be: to define and implement the monetary policy of the Union, to conduct foreign-exchange operations consistent with the provisions of Article 219, to hold and manage the official foreign reserves of the Member States, to promote the smooth operation of payment systems. the governments of Member States of foreign exchange working balances. The European Central Bank shall be consulted: on any proposed Union act in its fields of competence, by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 129.4. The European Central Bank may submit opinions to the appropriate Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence. » (Article 127 TFEU)

Unlike the ECB and the NCBs, the ESCBs, e.g. ‘Eurosystème’ has no legal personality and no decision-making body of its own; such element pertains to the decision-making bodies of the ECB: the Governing Council, the Executive Board and the General Council. While decisions relating to the ESCBs’ objectives and tasks must be taken centrally, operational activity is decentralized to the extent deemed possible and appropriate. In deciding on monetary policy, the members of the Governing Council of the ECB do not

The treaty proposed the progressive reduction of customs duties and the establishment of a customs union. It proposed to create a single market for goods, labour, services, and capital across Member States. It also proposed the creation of a Common Agriculture Policy, a Common Transport Policy and a European Social Fund and established the European Commission.

act as National representatives, but in a personal capacity with full independence; this is reflected in the ‘one person, one vote’ principle.

The ESCBs enjoys full constitutional independence; in particular, neither the ECB nor any member of its decision-making bodies is allowed to seek or accept instructions from Community institutions or bodies, from governments of Member States or from any other body.

« In accordance with Article 127.1 and Article 282.2 of the Treaty on the Functioning of the European Union, the primary objective of the ESCBs shall be to maintain price stability. Without prejudice to the objective of price stability, it shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCBs shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119 of the Treaty on the Functioning of the European Union. » (Article 2 of Protocol No 4 on the Statute of the ESCBs and the ECB)

1.5 The ECB and its legal basis

In principle the ECB relies upon two articles, one of the TEU and another one of the TFEU.

« The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions. The Union's institutions shall be: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors. » (Article 13.1 TEU)

« The Union's aim is to promote peace, its values and the well-being of its peoples. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. 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. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced. » (Article 3 TEU)

The ECB is the central institution of the economic Union of the EU and since January 1st 1999 has been responsible for the monetary policy of the EA, whose main objective is to maintain price stability. Since 4 November 2014, the ECB has been competent to carry out also specific tasks relating to the prudential supervision of credit institutions within the framework of the SSM¹⁸. As a banking supervisor, the ECB also plays an advisory role in assessing the resolution plans of credit institutions. According to the treaties, monetary policy in the Euro Area is one of the main responsibilities of the ECB; since November 2014, the SSM Regulation¹⁹ has conferred on the ECB certain supervisory tasks for credit institutions.

1.5.1 The independency of the ECB

In order to fulfill the aforementioned tasks, the ECB enjoys a strong independence, both from the Member States and from the European political institutions. In fact, the purpose is precisely that of removing monetary policy decisions from any form of conditioning or political pressure coming from bodies or institutions, both in Europe and in Member States. The Article 7 of the Statute of the ESCBs and the ECB²⁰, clearly states that the

¹⁸ The Single Supervisory Mechanism (SSM) refers to the system of banking supervision in Europe. It comprises the ECB and the national supervisory authorities of the participating countries. The main aims of European banking supervision are to: ensure the safety and soundness of the European banking system, increase financial integration and stability, ensure consistent supervision.

¹⁹ Regulation (EU) No 468/2014, EU mechanism for banking supervision that has the objective to set out the legal framework on the practical arrangements for implementing the SSM (first pillar of the Banking Union), in order to support the supervisory responsibilities which are given to the ECB and the national bank supervisors.

²⁰ « *In accordance with Article 130 of the Treaty on the Functioning of the European Union, when exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and this*

decision-making process of the ECB should seek or take instructions from anyone involved in the EU.

Neither the ECB itself, nor the NCBs, as well as the members of their respective decision-making bodies can in any way solicit or collect instructions from the institutions or bodies of the EU, from the governments of the Member States or from any other body.

The TFEU in the Article 130²¹ specifies that the institutions and bodies of the EU as well as the governments of the Member States are required to honor this principle and not to try to influence the members of the decision-making bodies of the ECB. Another element of autonomy is linked to the financial management of the ECB, which is kept distinct from that of the EU, in fact, the it has its own budget and its own capital which is subscribed and paid up by the NCBs of the EA. Precisely in order to protect the ‘Eurosystem’ from any interference by public authorities, it cannot grant loans to EU bodies or to national public bodies.

1.5.2 The decision-making bodies of the ECB

The most relevant authorities within the ECB are the Governing Council, the Executive Board and the General Council. The Governing Council of the ECB comprises the members of the ECB Executive Board as well as the governors of the NCBs of the EA Member States.

Pursuant to Article 12.1 of the Statute of the ESCBs and the ECB²², the Governing Council adopts the guidelines and takes the decisions necessary to ensure the fulfillment of the

Statute, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks. » (Article 7 of Protocol No 4 on the Statute of the ESCBs and the ECB)

²¹ « *When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCBs and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks. » (Article 130 TFEU)*

²² « *The Governing Council shall adopt the guidelines and take the decisions necessary to ensure the performance of the tasks entrusted to the ESCBs under these Treaties and this Statute. The Governing*

tasks outlined in the Articles. It formulates monetary policy and establishes the necessary guidelines for its implementation. It also adopts the ECB's rules of procedure, exercises advisory functions and, in the field of international cooperation, decides how the ESCBs is to be represented.

The Board of Directors usually meets two times a month. The accession of Lithuania to the EA on 1 January 2015 led to the implementation of a system whereby NCBs governors hold voting rights for the governing council on a rotating basis. Governors of Countries ranked first to fifth on the basis of the size of their economies and financial sectors are divided up four votes. All the others, currently 14, share eleven votes. Governors exercise voting rights in turn, based on a monthly rotation. The members of the Executive Board of the ECB have permanent voting rights. The Executive Committee includes the President, Vice President and four other members. They are appointed by the European Council acting by a qualified majority, on the recommendation of the Council and after consulting the EP and the Governing Council of the ECB. Their term of office shall be eight years and shall not be renewable and only nationals of Member States may be members of the Executive Board according to Article 283.2 TFEU²³.

The Executive Board implements monetary policy according to the decisions and guidelines adopted by the Governing Council, providing instructions to the NCBs. The Executive Board is responsible for managing the day-to-day business and day-to-day business of the ECB. The Executive Committee prepares the meetings of the Board of Directors.

Council shall formulate the monetary policy of the Union including, as appropriate, decisions relating to intermediate monetary objectives, key interest rates and the supply of reserves in the ESCBs, and shall establish the necessary guidelines for their implementation. The Executive Board shall implement monetary policy in accordance with the guidelines and decisions laid down by the Governing Council. In doing so the Executive Board shall give the necessary instructions to national central banks. In addition the Executive Board may have certain powers delegated to it where the Governing Council so decides. » (Article 12.1 of Protocol No 4 on the Statute of the ESCBs and the ECB)

²³ « *The Executive Board shall comprise the President, the Vice-President and four other members. The President, the Vice-President and the other members of the Executive Board shall be appointed by the European Council, acting by a qualified majority, from among persons of recognised standing and professional experience in monetary or banking matters, on a recommendation from the Council, after it has consulted the European Parliament and the Governing Council of the European Central Bank. Their term of office shall be eight years and shall not be renewable. Only nationals of Member States may be members of the Executive Board. » (Article 283.2 TFEU)*

The General Council²⁴ is the third decision-making body of the ECB, as stated in Article 141 TFEU²⁵. It comprises the President and Vice-President of the ECB and the NCBs governors of all EU Member States. The other members of the Executive Board can attend the meetings of the General Board but do not have the right to vote.

1.5.3 The supervisory function of the ECB

Since November 2014, the ECB has been responsible for supervising all credit institutions in the Member States participating in the SSM, directly, in the case of the largest banks, or indirectly for other credit institutions. It collaborates closely with the other entities that make up the ESFS²⁶. The ECB constitutes, together with the NCAs of the EA Member States, the SSM. The ECB directly supervises the major banks while the remaining banks continue to be supervised by the NCAs. The main tasks of the ECB and national supervisors are to check that banks comply with Banking Union rules and to address any issue immediately.

The Supervisory Board of the ECB is composed of a President, a Vice-President, four representatives of the ECB and a representative of the NCA of each Member State participating in the SSM. The decisions of the Supervisory Board are taken by simple majority. The Supervisory Board is an internal body charged with planning, preparing and executing the supervisory tasks assigned to the ECB. It elaborates and submits drafts of supervisory decisions to the Board of Directors, which are deemed to have been adopted if they are not rejected by the board within a set deadline. If a non-Euro Area Member State does not agree with a draft Supervisory Board decision, a special procedure

²⁴ « Without prejudice to Article 129.1 of the Treaty on the Functioning of the European Union, the General Council shall be constituted as a third decision-making body of the ECB. The General Council shall comprise the President and Vice-President of the ECB and the Governors of the national central banks. The other members of the Executive Board may participate, without having the right to vote, in meetings of the General Council. The responsibilities of the General Council are listed in full in Article 46 of this Statute. » (Article 44 of Protocol No 4 on the Statute of the ESCBs and the ECB)

²⁵ « If and as long as there are Member States with a derogation, and without prejudice to Article 129.1, the General Council of the European Central Bank referred to in Article 44 of the Statute of the ESCBs and of the ECB shall be constituted as a third decision-making body of the European Central Bank. If and as long as there are Member States with a derogation, the European Central Bank shall, as regards those Member States: strengthen cooperation between the national central banks, strengthen the coordination of the monetary policies of the Member States, with the aim of ensuring price stability, monitor the functioning of the exchange-rate mechanism, hold consultations concerning issues falling within the competence of the national central banks and affecting the stability of financial institutions and markets and, carry out the former tasks of the European Monetary Cooperation Fund which had subsequently been taken over by the European Monetary Institute. » (Article 141 TFEU)

²⁶ The European System of Financial Supervision (ESFS) is a network centered around three European Supervisory Authorities (ESAs), the European Systemic Risk Board and national supervisors. Its main task is to ensure consistent and appropriate financial supervision throughout the EU.

applies and the Member State concerned may also request that the close cooperation be terminated.

As a banking supervisor, the ECB is responsible, inter alia, for granting and withdrawing authorization to credit institutions, ensuring compliance with prudential requirements, carrying out prudential reviews and participating in the supplementary supervision of financial conglomerates; it is also called upon to address systemic and macroprudential risks. In order to exercise its supervisory role, the ECB has investigative powers (inquiries, general investigations, on-the-spot inspections) and specific supervisory powers (e.g. licensing of credit institutions). It even has the power to impose administrative penalties and may also require credit institutions to hold higher capital buffers.

1.5.4 The monetary function of the ECB

Monetary policies are the main instruments the ECB uses to pursue its well-defined purposes. In accordance with Article 127 TFEU, the main objective of the ESCBs is the maintenance of price stability. Without prejudice to this objective, the ESCBs support general economic policies in the Union in order to contribute to the achievement of the Union objectives referred to in Article 3 TEU. The ESCBs act in accordance with the principle of an open market economy with free competition and in accordance with the principles set out in Article 119 TFEU²⁷.

The key tasks performed by the ESCBs under Article 127 TFEU and Article 3 of the Statute of the ECB are as follows: to define and implement the monetary policy of the Union; conduct foreign exchange operations in line with the provisions of Article 219 TFEU; to hold and manage the official foreign reserves of the Member States and, lastly, to promote the smooth functioning of payment systems.

²⁷ « 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. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments. » (Article 119 TFEU)

The ECB has the exclusive right to authorize the issuance of Euro banknotes. Member States may issue Euro coins with the approval of the ECB as regards the volume of the minting, as stated in Article 128 TFEU. The ECB establishes the regulations and takes the decisions necessary to carry out the tasks attributed to the ESCBs under the Treaties and the ECB Statute. Furthermore, it issues recommendations and opinions as defined in Article 132 TFEU²⁸. The ECB must be consulted on any proposed Union act falling within its competence, and by NCAs on draft legislative provisions falling within its competence.

The ECB may submit opinions on matters on which it is consulted. It is consulted, aside for the standard issues, on decisions defining common positions and on measures affecting the unified representation of the EA in international financial institutions as specified in Article 138 TFEU.

Assisted by the NCBs, the ECB collects the necessary statistical information from the competent national authorities or directly from economic operators, in order to have all the available and most reliable information to define its future deeds, as mentioned in the Article 5 of the Statute of the ESCBs and the ECB²⁹.

The statute of the ECB lists the various instruments that it may use in order to fulfill its monetary functions. Chapter IV Protocol No 4 on the Statute of the ESCBs and the ECB

²⁸ « *In order to carry out the tasks entrusted to the ESCBs, the European Central Bank shall, in accordance with the provisions of the Treaties and under the conditions laid down in the Statute of the ESCBs and of the ECB: make regulations to the extent necessary to implement the tasks defined in Article 3.1, first indent, Articles 19.1, 22 and 25.2 of the Statute of the ESCBs and of the ECB in cases which shall be laid down in the acts of the Council referred to in Article 129.4, take decisions necessary for carrying out the tasks entrusted to the ESCBs under the Treaties and the Statute of the ESCBs and of the ECB, make recommendations and deliver opinions. The European Central Bank may decide to publish its decisions, recommendations and opinions. Within the limits and under the conditions adopted by the Council under the procedure laid down in Article 129.4, the European Central Bank shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.* » (Article 132 TFEU)

²⁹ « *In order to undertake the tasks of the ESCBs, the ECB, assisted by the national central banks, shall collect the necessary statistical information either from the competent national authorities or directly from economic agents. For these purposes it shall cooperate with the Union institutions, bodies, offices or agencies and with the competent authorities of the Member States or third countries and with international organisations. The ECB shall contribute to the harmonisation, where necessary, of the rules and practices governing the collection, compilation and distribution of statistics in the areas within its fields of competence.* » (Article 5 of Protocol No 4 on the Statute of the ESCBs and the ECB)

addresses such concerns especially in Articles 18³⁰ and 21. The ECB and NCBs can open accounts in the name of credit institutions, public bodies and other market participants and accept assets as collateral. It can conduct credit operations and OMO³¹ and require minimum reserves. The Governing Council may also decide, by a two-thirds majority of voters, on the use of other monetary control tools. However, Article 123 TFEU prohibits monetary financing and sets limits for the use of monetary policy instruments.

In order to ensure efficient and reliable clearing and payment systems, the ECB may provide infrastructure and establish oversight policies. It may also establish relations with central banks and financial institutions of third countries, as well as with international organizations.

1.6 The monetary policy in the Euro Area

A monetary policy is the set of instruments, objectives and interventions adopted by the ECB to influence capital flows and credit and financing activities within the EU, in order to achieve pre-established economic policy objectives. A monetary policy takes on the task of ensuring the stability of internal as well as external prices.

This objective cannot be achieved through direct price control, but with operations that, by influencing the demand and supply of goods and services, inducing prices in the desired direction. In particular, if, as often happens, the problem to be faced is the excessive increase in prices, the task of a monetary policy is to slow down the dynamics of demand in order to contain the increase in prices within the pre-established limits.

³⁰ « *In order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national central banks may: operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in Community or in non-Community currencies, as well as precious metals; conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. The ECB shall establish general principles for open market and credit operations carried out by itself or the national central banks, including for the announcement of conditions under which they stand ready to enter into such transactions.* » (Article 18 of Protocol No 4 on the Statute of the ESCBs and the ECB)

³¹ An OMO is an activity by a central bank to give (or take) liquidity in its currency to (or from) a bank or a group of banks. The central bank can either buy or sell government bonds in the open market or, in what is now mostly the preferred solution, enter into a repo or secured lending transaction with a commercial bank: the central bank gives the money as a deposit for a defined period and synchronously takes an eligible asset as collateral. The Eurosystem's regular open market operations consist of one-week liquidity-providing operations in euro (main refinancing operations, or MROs) as well as three-month liquidity-providing operations in euro (longer-term refinancing operations, or LTROs). MROs serve to steer short-term interest rates, to manage the liquidity situation and to signal the monetary policy stance in the euro area, while LTROs provide additional, longer-term refinancing to the financial sector.

Since monetary authorities cannot directly influence the final targets (GDP growth, inflation, exchange rates) they must aim to achieve intermediate targets (interest rates, monetary circulation expressed through monetary aggregates) which in turn influence the final aims. To achieve such objectives, the ECB, carries out OMO which, through the purchase and sale of securities, modify interest rates. In turn, changes in rates affect the supply and demand for money and credit and, in this way, the demand and supply of goods and services.

The ECB can then influence the compulsory reserve and the discount rate which, through the banks' refinancing mechanism³², serves to regulate the credit granted by banks to customers. A monetary policy can either be expansive or restrictive depending on the stage of the economic cycle and the economic needs of the EU. Expansive is defined as a monetary policy which, through the reduction of interest rates, aims to stimulate the money supply of banks to businesses, and therefore investment and the production of goods and services. On the contrary, a monetary policy is defined as restrictive which, by raising interest rates, reduces the money supply and therefore makes it less convenient to invest and produce. The restrictive monetary policies have the objective of reducing inflation, or reducing the public deficit, by slowing down the growth of the economy³³.

The legal basis of the single monetary policy is defined by the TEU and the Protocol No 4 on the Statute of the ESCBs and the ECB, where the ECB holds a central role, supported by the NCBs³⁴. Maintaining monetary stability is the main objective of the monetary policies of the EU. The Protocol No 4 on the Statute of the ESCBs and the ECB reads in fact: the main objective of the ESCBs is to maintain stability Furthermore, the objective of monetary, in the Article 2, and it is explicitly stated in Article 141 and Article 282 of the TFEU³⁵ that the ECB is assigned the primary task of ensuring price stability.

With the purpose to clarify the quantitative definition of 'monetary stability' in October 1998, the Governing Council of the ECB supplemented this gap with a precise quantitative definition: « *The primary objective of price stability is to be defined as a*

³² Refinance, also called refinancing or refi, is the process by which one loan is replaced by another loan, in most cases with more favorable terms. The new loan is used to pay off the original loan. Refinancing is done to take advantage of lower interest rates, to reduce monthly payments, to consolidate debt, or to free up cash.

³³ Sandra Antoniazzi, *La Banca Centrale Europea tra politica monetaria e vigilanza*, ISBN/EAN 978-88-348-8824-7

³⁴ ECB Monthly bulletin, *Asset price bubbles and monetary policy revisited*, November 2010.

³⁵ Article 282, TFEU

year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2% and is to be maintained over the medium term; a prominent role will be assigned to money, with a reference value for the growth of a broad monetary aggregate; in parallel, a broadly based assessment of the outlook for price developments will play a major role in the monetary policy strategy. » (ECB Annual Report 1998)³⁶. This approach corresponds to the general vision of European politics, inclined to attenuate, as far as possible, national borders to consider the entire EU as a whole. This is an approach that has a political character in itself, which, on the other hand, also has a more strictly economic foundation. In fact, to the extent that European countries form an authentic unified market, not only by virtue of the common currency but also by the removal of customs barriers and the progressive reduction of transport costs, the level and trend of prices should really tend to unify³⁷.

1.6.1 Role and limitations of monetary policies³⁸

The economy is influenced by monetary policies. The ECB has exclusive competence to issue banknotes and provide bank reserves; it holds a monopoly position in the monetary base supply that allows it to influence the conditions of the money market³⁹ and control short-term interest rates.

In the short term, a change in money market interest rates induced by the ECB triggers a series of mechanisms and reactions from market participants that will ultimately affect the performance of economic variables such as output production or prices. Also known as the ‘transmission mechanism of monetary policy’, this process has a complex nature, despite its clearly define scopes and means, has no unambiguous and undisputed interpretation of all its aspects.

A widely accepted proposition in economic doctrine, however, is that in the long-run, after the economy has made all the necessary adjustments, a change in the quantity of money (other things being equal) will change the general level prices but will not permanently affect real variables, such as output production and unemployment.

³⁶ ‘European Central Bank Annual Report 1998’, ISSN 1561-4573

³⁷ Graziani Augusto ‘La politica monetaria della banca centrale europea’, article from ‘Rivista Italiana Economisti’ No. 1/2004, page 47.

³⁸ ‘La politica monetaria della BCE’ 2004, page 43 ISBN 92-9181-714-7 (online version).

³⁹ It refers to trading in very short-term debt investments. At the wholesale level, it involves large-volume trades between institutions and traders. At the retail level, it includes money market mutual funds bought by individual investors and money market accounts opened by bank customers. In all of these cases, the money market is characterized by a high degree of safety and relatively low rates of return.

Ultimately, a change in the quantity of money in circulation represents a change in the unit of account (thus in the general price level) that leaves the other variables unchanged, as does the adoption of a different unit of measurement. This fundamental principle, defined as the ‘long-run neutrality of money’, is commonly accepted in theoretical and applied macroeconomics.

In an economic system, real income or employment levels are substantially determined in the long term by real factors acting on the supply side. These are technological progress, population growth, the preferences of economic operators and the economic-institutional framework in all its articulations (in particular property rights, tax and social security policies and the regulations that they act both on the flexibility of the markets and on the incentives to offer labor and capital and to invest in human capital).

In the long run, the ECB cannot affect economic growth by changing the money supply. Connected to this is the assumption that inflation is fundamentally a monetary phenomenon. Indeed, protracted periods of high inflation are usually associated with strong monetary growth. Although other factors (such as changes in aggregate demand, technological changes or commodity price shocks) may affect price dynamics in the short term, their effects may be offset over time by some degree of adjustment of the money stock. In this perspective, the trend level of prices, or inflation, can be controlled over the longest period by the ECB.

The strong link between monetary expansion and inflation in the economy and the neutrality of monetary policy in the long run is corroborated in a large number of economic studies covering different time periods and countries. At the same time, since it is demonstrated by theoretical and empirical research that the costs of inflation (and deflation) are considerable, it is now widely recognized that price stability contributes to increasing the economic well-being and the growth potential of an economy.

1.6.2 The advantages of price stability⁴⁰

The objective of price stability refers to their general level and consists in avoiding both protracted inflation and protracted deflation. Price stability contributes to raise the level of economic activity and employment in various ways.

⁴⁰ ‘*La politica monetaria della BCE*’ 2004, page 44 ISBN 92-9181-714-7 (online version).

First, price stability makes it easier for the public to detect changes in relative prices, as these are not clouded by fluctuations in the general price level. As a result, businesses and consumers are not led to misinterpretation of the type of variation and can base their spending and investment decisions on better information; in this way the market can direct resources towards the most productive uses. By contributing to this more efficient allocation of resources, price stability ultimately increases the welfare of families and the growth potential of the economy.

Second, if creditors can be assured of the future maintenance of price stability, they will not require an "inflation risk premium" to offset the potential losses associated with holding nominal assets to longer term. By reducing the incidence of such premiums on the real interest rate, the credibility of monetary policy promotes the efficiency of the capital market⁴¹ in allocating resources, thus stimulating investment activity. This in turn favors economic well-being.

Third, confidence in the maintenance of price stability reduces the likelihood that private individuals and companies divert resources from productive uses to protect themselves from inflation. For example, in a context of high inflation there is an incentive to stock up on real assets since, in such circumstances, they retain their value better than money or certain financial assets. However, this is not an efficient investment choice and therefore hinders economic growth.

Fourth, tax and benefit systems can generate perverse incentives that distort economic behavior. In most cases, these distortions are exacerbated by inflation and deflation, since normally these systems do not provide for the indexation of tax rates and social security contributions to the inflation rate. Price stability eliminates the real costs that arise when inflation increases the distorting effect of tax and social security systems.

Fifth, inflation acts as a tax on the availability of cash, reducing the demand for it from families and consequently increasing settlement costs, for example the so-called 'shoe leather costs'⁴².

⁴¹ They are venues where savings and investments are channeled between the suppliers who have capital and those who are in need of capital. The entities that have capital include retail and institutional investors while those who seek capital are businesses, governments, and people. Capital markets are composed of primary and secondary markets. The most common capital markets are the stock market and the bond market. Capital markets seek to improve transactional efficiencies. These markets bring those who hold capital and those seeking capital together and provide a place where entities can exchange securities.

⁴² The suggestion that one of the real costs of expected inflation is that it increases transaction costs by inducing people to economize on their money holdings. The shoe-leather concerned was worn out making

Sixth, the maintenance of price stability avoids the considerable and arbitrary redistribution of wealth and income, for example from creditors to debtors, associated with both inflationary and deflationary situations, which are characterized by unpredictable changes in the dynamics of prices. Typically, it is the weakest social groups that are most affected by inflation, since they have limited opportunities to protect themselves against it. As numerous examples have shown in the twentieth century, the presence of high rates of inflation or deflation tends to generate social and political instability, therefore the prevention of these phenomena helps to safeguard social cohesion and peace.

On the basis of the previous arguments, by ensuring price stability, the ECB makes a substantial contribution to the achievement of broader economic objectives, such as raising the standard of living, high levels of activity, production and better employment prospects.

1.6.3 Tasks and responsibilities assigned by the TFEU to the ECB⁴³

The TFEU establishes that the primary objective of the ‘Eurosystème’ and of the single monetary policy for which it is responsible is the maintenance of price stability.

« The European Central Bank, together with the national central banks, shall constitute the European System of Central Banks (ESCB). The European Central Bank, together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy of the Union.

The ESCB shall be governed by the decision-making bodies of the European Central Bank. The primary objective of the ESCB shall be to maintain price stability. Without prejudice to that objective, it shall support the general economic policies in the Union in order to contribute to the achievement of the latter's objectives.

The European Central Bank shall have legal personality. It alone may authorise the issue of the Euro. It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of

more frequent trips to the bank to avoid carrying large stocks of cash. A similar effect applies to other transaction costs.

⁴³ ‘La politica monetaria della BCE’ 2004, page 45 ISBN 92-9181-714-7 (online version).

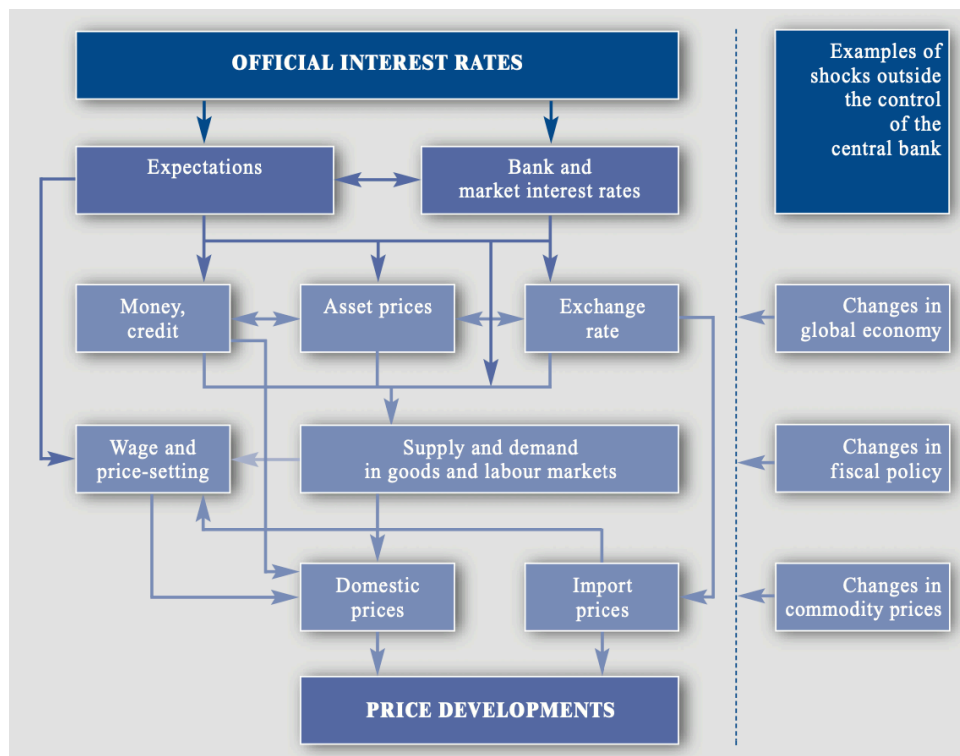
the Member States shall respect that independence. » (Article 282.1, 282.2, 282.3 of the TFEU)

The TFEU assigns paramount importance to the ‘Eurosystem’ objective of maintaining price stability for valid economic reasons. Since, ultimately, monetary policy can only affect the level of prices, price stability becomes the ECB’s only natural objective. On the other hand, it would have been problematic to assign it a real income or employment objective since, regardless of the positive consequences of price stability, monetary policy has no effect in lastingly impacting real magnitudes. Other economic operators, in particular those responsible for fiscal and structural policies, have the task of improving the growth potential of the economy. At the same time, in accordance with the Protocol No 4 on the Statute of the ESCBs and the ECB and without prejudice to the achievement of the objective of price stability, the ‘Eurosystem’ should take into account the broader economic objectives of the Eurozone in the effective implementation of monetary policy decisions. In particular, given that monetary policy can affect real activity in the short term, the ECB should normally avoid generating excessive fluctuations in output and employment levels, where this is compatible with the pursuit of its primary goal.

1.6.4 Transmission mechanism of monetary policy ⁴⁴

As the Governing Council is responsible for making decisions that aim to preserve price stability, it is essential that the ECB have a clear view of how monetary policy affects such dynamics. The process by which the decisions of the monetary authorities influence the economy in general, and the price level in particular, is known as the transmission mechanism of monetary policy, while the individual links through which monetary policy impulses are carried out are called ‘transmission channels’ (figure No. 1).

⁴⁴ *‘La politica monetaria della BCE’* 2004, page 46 ISBN 92-9181-714-7 (online version).



[Figure No. 1] A stylized illustration of the transmission mechanism from interest rates to prices⁴⁵

The chain of causal links connecting monetary policy decisions to the price level begins with the change in the reference interest rates applied by the ECB to operations through which it normally disburses funds to the banking system. The banking system requires money issued by the ECB ('monetary base') to meet the public's demand for cash, settle interbank balances and meet reserve requirements with the ECB.

Given its monopoly in the creation of the monetary base, the ECB can freely set the interest rates applicable to its operations. In this way it determines the financing costs of the credit institutions which, in turn, will have to pass them on to the credit granted to customers. By means of this process, the ECB is able to exert a decisive influence on the conditions of the money market and thus guide its interest rates. Changes in interest rates affect, albeit to varying degrees, other market returns, such as the rates applied by banks to short-term loans and deposits. Any expectations of an upcoming change in official rates also affect medium-term market rates, since they reflect expectations on the future evolution of short-term rates. On the other hand, the impact of a change in money market rates on interest rates for very long maturities (such as ten-year government bond yields

⁴⁵ 'The monetary policy of the ECB' 2004, ISBN 92-9181-480-6 (online version)

and long-term bank lending rates) is less direct because longer term maturities depend largely on market expectations about the long-run trends of growth and inflation in the economy.

Through the impact exerted both on financing conditions in the economy and on market participants' expectations, monetary policy can also affect other financial variables, such as asset prices, where exchange rates have the most impacting role.

The changes in interest rates and in the prices of financial assets have an impact in turn on the savings, spending and investment decisions of households and businesses.

For example, all other things being equal, an increase in interest rates tends to make it less profitable for these sectors to finance consumption and investments through debt. Households will find it more convenient to save current income rather than spend it, as these savings will yield higher returns. A change in the reference rates can also affect the credit offer. In the event of an increase instead, the risk that some borrowers will no longer be able to meet their debt obligations on a regular basis could become such as to dissuade banks from granting them credit, forcing them to postpone loans, consumption or investment plans.

Fluctuations in the value of financial assets can also affect consumption and investments through the effects of income and wealth. For example, a rise in prices increases the wealth of households holding shares, which may decide to increase their consumer spending, while a fall may induce them to reduce it. Another channel through which asset prices can affect aggregate demand is the value of collateral posted by borrowers to obtain additional credit or to reduce the risk premium required by lenders.

Within an economic area, the changed dynamics of consumption and investments change the relationship between the level of demand for goods and services and that of supply, ensuring that, all other conditions being equal, when demand exceeds supply, upward pressure on prices may emerge. Furthermore, the changes in aggregate demand could translate into more or less tense conditions on the labor market and on that of intermediate goods, influencing their respective processes of wage and price formation.

Exchange rate fluctuations typically affect inflation in three ways. The first relates to their direct impact on the domestic prices of imported goods; in fact, following a strengthening of the exchange rate, these prices will tend to decrease and, if the corresponding products are intended for consumption, the decline will directly contribute to lower inflation. The second concerns imported goods used as factors of production, the lower cost of which

may over time translate into a fall in the prices of final products. The third is the impact on the international competitiveness of internally produced goods: an appreciation of the exchange rate that makes these goods less competitive in terms of price on the world market will tend to limit their foreign demand and therefore reduce the pressures. of overall demand in the economy.

All other conditions being equal, an appreciation of the exchange rate therefore tends to moderate inflationary pressures. The magnitude of these effects depends on the degree of openness of the economy to international trade and will generally be smaller for a large and relatively closed currency area, such as the Euro area, than for a small one. the open economy. In addition to monetary policy, movements in the exchange rate, as well as movements in the prices of financial assets, can clearly depend on numerous other factors.

Other channels through which monetary policy can influence price dynamics are essentially linked to its influence on the long-term expectations of the private sector. If the central bank enjoys ample credibility in pursuing its objective, monetary policy can have significant direct effects on price developments since, by guiding the inflation expectations of economic conditions, it will also influence the behavior that determines wages and prices. In this sense, the credibility of the action aimed at maintaining lasting price stability is of paramount importance: only having full confidence in the ability and commitment of the central bank to achieve this objective will operators be firmly anchored to price stability. This in turn will positively affect the price and wage formation processes in the economy as traders will not have to raise prices for fear of higher future inflation. Credibility therefore makes it easier to conduct monetary policy.

The dynamic process outlined involves, in its various stages, a whole series of mechanisms and actions on the part of the operators. For this reason, a monetary policy maneuver normally takes a considerable amount of time to influence the price trend. The extent and incisiveness of the individual effects may also vary depending on the state of the economy, making it difficult to accurately estimate the global impact. Overall, central banks usually have to contend with long, variable and uncertain delays in implementing monetary policy.

Determining precisely the transmission mechanism of monetary policy is complicated by the fact that, in practice, economic developments are constantly affected by shocks from multiple sources. For example, a change in oil prices, others raw materials, or

administered prices can have direct repercussions on inflation in the short term. Developments in the world economy or in budgetary policies can also affect the dynamics of prices, through aggregate demand. Then there is the fact that financial asset prices and exchange rates react not only to monetary impulses, but also to a number of other factors. Monetary policy therefore, in addition to carefully monitoring the unfolding of its effects, must take into account all other circumstances relevant to the future trend of prices, so as to avoid that these have undesirable repercussions on trends and expectations longer-term inflation. Consequently, the appropriate direction to be given to monetary policy depends on the timing of the nature, extent and duration of the shocks affecting the system. In this perspective, the ECB must constantly grapple with the arduous task of understanding the determinants of price trends, in order to identify the appropriate monetary policy response. The ECB therefore typically face a complex web of economic interactions. Given such complexity, to guide or submit to crossed verification of its actions, it also to take into account simple empirical rules. One of these is based on the fact that inflation is always a monetary phenomenon in the medium to long term; the ECB therefore advises constant attention to monetary dynamics in order to assess inflation trends. Despite the important contribution provided by empirical methodologies in recent decades in quantifying the mechanism and transmission channels, to date this complex process has not yet been fully understood. In the case of the ECB, it is also possible that, having assumed responsibility for an entirely new currency area, it will have to face an uncertainty even greater than that of many other central banks.

The complexity of the operativity of the ECB makes it necessary to perform an adequate investigation, with the purpose of assessing whether the implementation of NGEU relies within its mandate.

In the recent past the monetary role of the ECB has been questioned different times, among the most relevant legal cases: ‘The Pringle Case’, ‘The Gauwelier Case’ and ‘The Weiss Case’.

Such cases might be a symptom of a need of a deep rethinking of the economic constitution of the EU in order to allow the ECB to perform its activities without room of interpretation by other legal entities. The previously mentioned ‘leading cases’ constitutes the latest inputs that inducing a transformation of the European Economic Constitution, a fundamental transition that has been taken under consideration in order to whether a monetary measure such as NGEU is legally acceptable.

Chapter 2 Towards a transformation of the European Economic Constitution⁴⁶

In the debate on European constitutional law at the beginning of the 21st century, several authors argued that the economic and financial crisis has produced a profound constitutional change or, less dramatically, a fundamental transformation in the constitutional equilibrium of the EU⁴⁷.

The pandemic and economic crisis has brought to light all the limits of a constitutional organization and equilibrium designed in Maastricht⁴⁸ and characterized by a fundamental asymmetry between a Union and a monetary policy centralized at the European ‘federal’ level and an economic policy left to the mere coordination of the competences of the Member States. For this reason, with the architecture conceived essentially in the Maastricht Treaty, the EU was not only unprepared but unable to face the risk of a ‘failure’ of one or more of its member states or to face severe economic recessions, the ‘no-bail’ clause is envisaged in Article 125.1 TFEU⁴⁹.

In doctrine, there has been a widespread opinion in recent years that believes that the recent crisis has brought with it at least a change in the interpretative paradigm of the European Economic Constitution⁵⁰.

⁴⁶ W. Sauter, ‘*Economic Constitution of the European Union*’.

⁴⁷ A. Baraggia and Giappichelli ‘*Ordinamenti giuridici a confronto nell’era della crisi. La condizionalità economica in Europa e negli Stati nazionali*’, Torino, 2017, page 5 and following.

⁴⁸ The Maastricht Treaty, concluded in 1992 between the 12 member states of the European Communities, is the foundation treaty of the European Union (EU). Formally the Treaty on European Union, it announced ‘a new stage in the process of European integration’ chiefly in provisions for a shared European citizenship, for the eventual introduction of a single currency, and (with less precision) for common foreign and security policies.

⁴⁹ « *The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.* » (Article 125.1 TFEU)

⁵⁰ G. Martinico, ‘*EU Crisis and Constitutional Mutations: a Review Article*’, of ‘*Revista de Estudios Políticos*’ 2014, pages 247-280.

Such transition in the interpretation of the ECB legal framework has become particularly evident following some judgments of the CJEU⁵¹ on ‘The Pringle Case’⁵², ‘The Gauweiler Case’⁵³ and the latest ‘The Weiss Case’⁵⁴, which marked a fundamental economic-institutional change that took place after 2010 and onwards. It can be summarized in the abandonment of the idea that the financing of the Member States should be governed exclusively by market logic in favor of a logic of intervention by the public authorities, should prevail in the name of public financial assistance. The same three fundamental judgments, mentioned above, provided the fundamental legal legitimacy for this change in the economic-constitutional paradigm, allowing the ECB to execute extraordinary measures.

2.1 A new ‘paradigm’ of the interpretation of the European Economic Constitution

The relationship with the European - Communitarian legal order thorough financial market, together with the transformations resulting from the wider phenomenon of globalization of law, have marked the definitive loss of the link between State Law and territory⁵⁵.

The transition from one paradigm to another, can be viewed as, the passage from the ‘intervention state’ to the ‘regulatory state’ and, due to recent economic developments related to the pandemic crisis a ‘saving state’. In fact, the quality and quantity of public

⁵¹ The Court of Justice of the European Union (CJEU) interprets EU law to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions. It can also, in certain circumstances, be used by individuals, companies or organisations to take action against an EU institution, if they feel it has somehow infringed their rights. The most common types of case are: interpreting the law (preliminary rulings), enforcing the law (infringement proceedings), annulling EU legal acts (actions for annulment), ensuring the EU takes action (actions for failure to act) and sanctioning EU institutions (actions for damages). It is divided into 2 courts: Court of Justice (deals with requests for preliminary rulings from national courts, certain actions for annulment and appeals) and General Court (rules on actions for annulment brought by individuals, companies and, in some cases, EU governments. In practice, this means that this court deals mainly with competition law, State aid, trade, agriculture, trademarks). Each judge and advocate general is appointed for a renewable 6-year term, jointly by national governments. In each Court, the judges select a President who serves a renewable term of 3 years.

⁵² C-370/12 ‘Pringle v. Government of Ireland and the Attorney General’, November 27th 2012.

⁵³ C-62/14 ‘Gauweiler v. Deutscher Bundestag’, June 16th 2015.

⁵⁴ C-493/17 ‘Weiss and others’, December 11th 2018.

⁵⁵ A. di Martino ‘Il territorio: dallo Stato-nazione alla globalizzazione. Sfide e prospettive dello Stato costituzionale aperto’, Milano, Giuffrè, 2010.

intervention in the economy seem to depend more on long-term cyclical dynamics than on a unilinear evolutionary path, according to historical courses and recourses⁵⁶.

The term ‘paradigm’, referring to the regulatory state and to a new ‘intervention state’ required from the ongoing crisis, implies the idea that a single element or a coherent set of elements of the new discipline of economic facts and relations becomes « *a common example, replaces explicit rules and allows us to define a particular and coherent tradition of research* »⁵⁷.

2.1.1 From the Maastricht paradigm to the current transformation

Until the approval of the Maastricht Treaty, the doctrine was still deeply marked by the problem of compatibility between the national constitutional discipline on economic matters and the so-called ‘European Economic Constitution’.

Before the modern economic, financial and pandemic crises the meaning of the internal economic constitution, is effectively summarized in the book ‘La Costituzione Economica: Italia, Europa’⁵⁸: « *The fact that, up to the 1970s, in many countries, deficit spending policies were associated with the construction of the welfare state acquired particular significance in Italy from a juridical-constitutional point of view. If only in some countries, building the welfare state was equivalent to implementing the Constitution (not for example in the United Kingdom), among these only Italy had given itself, in the immediate post-war period, a Constitution that directly recognized social rights in the text, unlike France and Germany. In the political-constitutional debates of Constituent Assemblies the idea that prevailed was the one linking the element of public performance to social rights. It prevailed over the thesis of the pluralists, who saw in social rights the rights to the integration of the individual in the groups or in the social formations to which they belong, according to a notion of citizenship that is richer, but less compact than that based on public service: apart from any other consideration, similar theses were more suited to an era of widespread prosperity* ».

⁵⁶ A. O. Hirschman ‘*Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*’, Harvard University Press, 1970.

⁵⁷ C. Crosato, ‘*Una forma inaudita di resistenza*’, ‘*Etica & Politica / Ethics & Politics*’, XXI, 2019, 1, pages 265-298, ISSN 1825-5167.

⁵⁸ C. Pinelli, ‘*I rapporti economico-sociali fra Costituzione e Trattati europei*’, from the book of C. Pinelli-T. Treu, ‘*La costituzione economica: Italia, Europa*’, Bologna, 2010, pages 24-25.

It is no coincidence that Maastricht Treaty itself marks a moment of awareness of the change that has taken place. In fact, up to that moment it could have been argued that in the relations between the design of the European Communities as ‘functional communities of law’ to the integration of the markets and an internal constitutional system in which the implementation of constitutional provisions on rights social was conceived mainly in terms of public interventions in support of the most diverse social purposes, a sort of ‘division of labor’ had worked.

In such ‘division of labor’, however, according to what was the original intent of the founding Treaties of the European Communities, the growth and spread of wealth brought by the opening of markets and competition at the level of the ‘Single European Market’ had to some extent serve as a ‘guarantee’ for the autonomous management of national welfare by member countries⁵⁹.

This phase undoubtedly ends with the 1992 Treaty, especially in the SEA⁶⁰. It ends both because the Treaty sets itself unquestionable political objectives and because the illusion of the opening of national markets, thanks to which Welfare had grown, with the predetermination of budgetary constraints and very stringent macroeconomic compatibility, could have not fail to destabilize or affect the social balance.

The most recent evolution, following the economic-financial crisis that has affected the sovereign debts of the Member States of the Union and the pandemic crisis induced by COVID-19, marks a further new phase that presents new characteristics: based on the market-oriented paradigm resulting from the compromise translated into the Treaty of Maastricht, the Eurozone member states generally financed themselves both through taxation and through loans in the capital markets. This double source of public support was connected to two essential modalities of control of national economic policies: on the one hand, taxpayers expressed their approval or disapproval through their respective national democratic political processes, on the other hand actors of financial market

⁵⁹ S. Giubboni, *Diritti sociali e mercato. La dimensione sociale dell'integrazione europea*, Bologna, 2002, pages 17 and following.

⁶⁰ The Single European Act sought to revise the Treaties of Rome setting up the European Economic Community (EEC) and the European Atomic Energy Community. This was in order to add new momentum to European integration and to complete the internal market (an area with no internal borders and in which there is free movement of goods, persons, services and capital) by 1 January 1993. The SEA amended the rules governing the operation of the European institutions and expanded the powers of the then European Community in a number of policy areas. By creating new Community competencies and reforming the institutions, the SEA opened the way to further political integration and economic and monetary union that would be enshrined in the Treaty on European Union (the Maastricht Treaty).

resorted to variable interest rates, thereby expressing their preferences through a similar but different tool from voting.

2.1.2 Transformation of the ECB to ensure monetary soundness of the EU

The new forms of financial assistance emerged during the crisis, in synergy with a third source of financing, the ECB, have upset the paradigm and triggered a series of constitutional changes.

Since national budgetary procedures and interest rates manipulation, were no longer sufficient control mechanisms, the political institutions of the EU and the CJEU had to develop new tools to eliminate the danger of ‘moral hazard’⁶¹.

Conditionality, the provision of political requirements to finance transfers, has become a new, fundamental control tool, dictated precisely by the risks of moral hazard in the Eurozone by some Member States⁶². A new discipline or regulation, raise the question of democratic legitimacy from a different perspective: since the new instruments of control are neither market-based nor placed in national political procedures, they require a form of democratic government in the transformation of Europe.

It was the need to ensure the survival of the single currency during the sovereign debt crisis that transformed the role of the ECB from guaranteeing price stability to guaranteeing the solidity of the monetary Union as a whole. The ECB has gained a new role as a conditional lender of last resort in the banking system and in the Euro area sovereign debt market⁶³. Subsequently, various measures were taken during the crisis, particularly unconventional ones, which contributed to the development of a new model of European economic governance, which aims to detect, prevent and correct problematic economic trends such as public deficits or economic levels of excessive public debt that can slow growth and create risks for economies.

⁶¹ In economics, moral hazard occurs when an entity has an incentive to increase its exposure to risk because it does not bear the full costs of that risk. For example, when a corporation is insured, it may take on higher risk knowing that its insurance will pay the associated costs. A moral hazard may occur where the actions of the risk-taking party change to the detriment of the cost-bearing party after a financial transaction has taken place.

⁶² E. Paparella Napoli *‘Il fondo monetario internazionale nell’Eurozona. La stretta condizionalità e la sovranità condizionata’*, Jovene, 2018, pages 78 and following.

⁶³ W.H. Butther, E. Rahbari, *‘The ECB as Lender of Last Resort for sovereigns in the Euro area’* CEPR Discussion Paper n. 897.

2.1.3 Criticism to the ECB interventions

The transformation, did not happen without numerous criticisms being raised, above all the issue that the ECB was performing functions beyond its competences. Such criticisms culminated, in some important legal cases, with the resignation of important institutional offices, and with the appeal before the CJEU and the national constitutional courts, in particular the German Federal Constitutional Court.

True ‘leading cases’ have therefore become three judgments, ‘Pringle’, ‘Gauweiler’ and ‘Weiss’, which marked a fundamental step in the transformation of the economic-legal paradigm of the Maastricht Treaty. They emphasized the relevance of the distinction between monetary and economic policy, the former being the responsibility of the ECB, the latter of the Member States; they established the presence of public interventions in sovereign debt, such as financial assistance, provided by specific mechanisms such as the ESM; they introduced unconventional monetary measures and debt restructuring.

This was also possible thanks to a new interpretation and the overcoming of the prohibitions contained in Article 125 TFEU and Article 123 TFEU, which are taken into consideration from a different point of view.

However, even if the efforts supported by the ECB have so far been necessary to avoid the worst, they cannot be considered sufficient to get the Euro zone out of the pandemic crisis. This is because the ECB only acted as a substitute for a still structurally weak economic union that has not yet completed the transformation process.

The Maastricht model was mainly based on a clear distinction among economic and monetary policy; the latter was the exclusive responsibility of the ECB, whose main objective, as mentioned before, is to ‘maintain price stability. On the matter of economic policy, on the other hand, wide discretion was delegated to the Member States, despite the obligation to keep the financial statements within the pre-established parameters; the prohibition of financial assistance by the ECB and other European institutions, as well as provided in art. 123.1 TFEU; and the ban on bail-out, sanctioned by Article 125 TFEU. According to this logic, the financing of the States had to be left to financial markets as primary source, to avoid the generation of phenomena of ‘moral hazard’, that is the possibility that the member countries behave recklessly, trusting in aids provided by the ECB or other States. However, the economic governance reform has made a structural

change, removing, albeit partially, the asymmetry characterized by the split between monetary and economic policy, which has not withstood the onset of the crisis⁶⁴.

The ESM for example, was introduced due to the default of Greece and the instability of interest rates on securities, was an exception to the aforementioned Article 125 TFEU, thus representing a clear example of overcoming this subdivision.

Therefore, since the measures included in the Maastricht Treaty proved to be ineffective in countering financial crisis, it was necessary, to introduce new instruments such as, financial assistance mechanisms and unconventional monetary instruments mentioned before, supplied by ECB, which have actually changed the structure of European constitutional principles.

The transformation of the Maastricht economic paradigm did not occur in relation to a linear and pre-established project, but because of the need to fill the gaps present within it. In fact, formal revision is not the only way by which it is possible to introduce new constitutional objectives. These can also be established through a process of transforming the meaning of existing provisions without any modification of the text⁶⁵. The body that put in motion this transformation, is the CJEU, which has the power to indicate the methods of acceptance of the new interpretation.

Over the last few years, the CJEU has ruled several times on the legitimacy of acts introduced to defend against the financial crisis, especially through 'Pringle', 'Gauweiler' and most recently, 'Weiss' judgments, in which it was questioned whether the transition from market-based Maastricht paradigm to that of cross-border transfers and financial assistance was constitutionally acceptable.

⁶⁴ S. Cafaro, *Unione monetaria e coordinamento delle politiche economiche. Il difficile equilibrio tra modelli antagonisti di integrazione europea*, Milano, 2001.

⁶⁵ M. Ioannidis, *Europa: diritto della crisi e crisi del diritto*.

2.2 Thomas Pringle v. the Government of Ireland

In the ‘Pringle’ judgment, the ECJ was asked to rule on the applicability of the ‘Charter of Fundamental Rights’⁶⁶ to the ESM Treaty⁶⁷.

In his appeal the Member of Irish Parliament Thomas Pringle, by not accepting the involvement of his country in the new permanent financial aid mechanism, had brought before the Irish Supreme Court in order to denounce the contrast of the ESM financial aid scheme with the rules of the Treaties.

First of all, Mr. Pringle set out to know if the ESM Treaty was compatible with the ban on bail-out pursuant to Article 125 TFEU and if it were equally compatible with the possibility of the Union to grant, under certain conditions, financial assistance « *to a Member State in difficulty due to exceptional circumstances beyond its control* », pursuant to Article 122.2 of the TFEU. Secondly, Mr. Pringle noted the impossibility of applying the ‘Charter of Fundamental Rights’ to the ESM Treaty, as the latter is placed outside the legal system of the Union, with prejudice to the application of its Article 47 whose title is ‘Right to an effective remedy and to a fair trial’⁶⁸, which guarantees the right to effective judicial protection.

The Irish Supreme Court decided to suspend the trial and to refer the preliminary question to the Luxembourg Judge, in particular submitting the questions relating to the validity

⁶⁶ The Charter of Fundamental Rights of the European Union (the Charter) brings together the fundamental rights of everyone living in the European Union (EU). It was introduced to bring consistency and clarity to the rights established at different times and in different ways in individual EU Member States. The Charter sets out the full range of civil, political, economic and social rights.

⁶⁷ The agreement for the establishment of a permanent stability mechanism for the euro area was reached during the European Council of October 28th and 29th 2010, replacing the previous financial assistance instruments (EFSM and EFSF, the first of general application for all EU countries and based on art.122 TFEU, the other established only among the countries of the Euro zone); to this end, the European Council decided to intervene directly on the TFEU through the simplified procedure pursuant to art. 48 TFEU. With the decision of the Council of 25 March 2011 it was thus added to art. 136, the third paragraph, according to which: « *Member States whose currency is the euro can establish a stability mechanism to be activated where indispensable to safeguard the stability of the euro area as a whole. The granting of any necessary financial assistance under the mechanism will be subject to strict conditionality.* ».

⁶⁸ « *Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.* » (Article 47 of the Charter of Fundamental Rights of the European Union)

of decision no. 2011/199⁶⁹ amending Article 136 TFEU, which introduces a third paragraph; and to the legitimacy of adhering and ratifying the ESM Treaty for a Eurozone country on the basis of Articles 4.3⁷⁰ and 13 TEU and Articles 2.3⁷¹, 3.1⁷², 3.2⁷³, 119, 123, 125 and 127 TFEU as well as the general principle of effective judicial protection. The final question concerned the need, in the event of a positive outcome of the previous questions, to await the entry into force of the 2011/199 decision so that the states could accede to and ratify the ESM Treaty.

2.2.1 Reaction of the ECJ with regards to the ESM Treaty and the Chart of Fundamental Rights of the European Union

The CJEU did not accept the reservations of Mr. Pringle relating to the incompatibility of the ESM Treaty with EU law and with the provisions of the EU Charter of Rights, in particular with Article 47 concerning the right to an effective remedy.

In fact, the Luxembourg Judges affirmed that the EU Treaties allow individual states to enter into other international law agreements, as long as these are not contrary to EU law. The reconstruction carried out by the Court comes to the conclusion that EU law is not incompatible with the ESM Treaty for the following reasons.

The decision to revise Article 136 TFEU does not violate the exclusive competence of the Union in matters of monetary policy, since this decision makes the financial assistance provided, under the ESM Treaty, subject to strict conditionality, which is fully compliant with Article 122⁷⁴ TFEU. This article aims to ensure that Member States remain subject

⁶⁹ ‘European Council Decision’ of March 25th 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.

⁷⁰ « Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. » (Article 4.3 TEU)

⁷¹ « The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide. » (Article 2.3 TFEU)

⁷² « The Union shall have exclusive competence in the following areas: customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; common commercial policy. » (Article 3.1 TFEU)

⁷³ « The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope. » (Article 3.2 TFEU)

⁷⁴ « Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial

to the logic of the market when they contract debts and that they are therefore forced to respect a rigorous fiscal policy by virtue of the higher monetary policy objective of maintaining financial stability of the monetary union.

Article 122 TFEU is therefore complied with, contemplating the impossibility to let it be assimilated to an instrument for the coordination of economic policies.

Regarding the question of the compatibility of the ESM Treaty with Article 125 TFEU, on the matter of ‘no bail-out’ clause, the Court affirmed that the rationale of this rule consists in ensuring compliance with virtuous budgetary policies as well as maintaining a market logic. These objectives are also common to the logic of the ESM Treaty, therefore it is not possible to find any incompatibility between its provisions and the prohibition of no bail-out pursuant to Article 125 TFEU.

The rescue of the Euro and the safeguarding of monetary stability in the EA are objectives of the Lisbon Treaty, for this reason it would not be possible to say that the Treaties entered into on the subject are contrary to EU law.

With reference to the issue relating to the application of Article 47 of the Charter of Fundamental Rights to the ESM Treaty, the Court denies this possibility and rules that, pursuant to Article 51 of the same legal instrument⁷⁵, its provisions apply to Member States only when they apply EU law.

In the present case, it is noted that the ESM Treaty falls outside EU law and therefore the Charter of Rights, according to the Court, is inapplicable since there is no link between

assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken. » (Article 122 TFEU)

⁷⁵ As regards the scope of application, Article 51 establishes that the provisions of the Charter apply primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity, as well as to the Member States, exclusively in implementation of Community law, as already sanctioned by the jurisprudence of the Court of Justice on Community fundamental rights. It is then clarified that the Charter does not introduce new competences or new tasks for the Union, nor does it modify those defined by the Treaties. In light of these provisions, the Charter of Rights should not overlap the national Constitutions, since they are entrusted with the discipline of the activity of the Member States for all the parts that do not concern the implementation of European Union law. There is also the problem, relating to the distinction of the activity of the Member States implementing EU law from the rest of the activity of the national States: it is known that public administrations and judges are required to apply both domestic law than to the community one, giving the latter prevalence in the event that the former is incompatible with it. It is also quite evident that, placing oneself in the perspective of the citizen, it is far from easy to identify, on the one hand, a bundle of rights, governed by the Charter of Rights of the European Union, which he would be the holder of towards the members when they act in the implementation of European Union law and, on the other hand, another bundle of rights, governed by the Constitutions of the member states, which he would be the owner of vis-à-vis the member states when they act ‘independently’ from Community law .

any measures adopted in the light of the International ESM Treaty and the Union law, which remains extraneous to that international agreement.

This interpretation was not without criticism, since in reality a link with EU law exists: the measures adopted by the ESM are aimed at safeguarding the Euro, which is an institution specific to the Union, and are implemented also by a body such as the Commission which is part of the Union institutions. The assertion that the measures relating to the ESM cannot be questioned in the light of the Charter of Rights, as they do not fall within the scope of EU law, leads to a downsizing of the role of parameter of substantive legitimacy entrusted to the Charter for the entire Union action.

Since the requirements of strict conditionality seem to escape the Charter of Rights, the Court allowed the restrictions aimed at debt relief to also sacrifice the essential core of social rights recognized in the Charter of Rights and in the national constitutional charters⁷⁶.

The Court has, moreover, 'legitimized' the Treaty, linking it to EU law, through the enhancement of the principle of solidarity (based on the will of the States to create a financial stability mechanism in the EA) and specified that, even if the treaty does not interfere with the competences of the Union, States must scrupulously respect the law of the EU when they act within the ESM.

An objection could be that the ESM, although it is an international treaty stipulated outside the Treaties, is in a certain sense linked to the legal system of the European Union and, for this reason subject to the scrutiny of the CJEU when it finds itself having to guarantee respect for the fundamental rights provided for by the Charter of Rights, with respect to any decisions of the Member States of the Union and of the European institutions involved in it, that are harmful to social rights. Indeed, the ESM tends to safeguard the stability of the Euro area through the concerted management of risk situations of sovereign debt crisis and, therefore, in close connection with the objectives of the common monetary policy. This link is also confirmed by the change made to Article 136 TFEU, the third paragraph of which provides that « *Member States whose currency is the Euro can establish a stability mechanism* ».

⁷⁶ C. Pinelli 'Il discorso sui diritti sociali all'epoca della crisi economica'.

Nonetheless, the CJEU clarified that the establishment of the ESM took place outside the scope of European Union law, concerning the exercise of economic (and non-monetary) policy competences of the Member States and, consequently, it stated that the rights enshrined in the Charter of Fundamental Rights do not apply to the action taken by Member States in that area⁷⁷. On the other hand, the Court recognized that the modification of Article 136, paragraph 3, TFEU was « *aimed at ensuring that, in its functioning, this mechanism complies with Union law, including the measures adopted by the Union in the context of the coordination of the economic policies of the Member States* » and therefore acknowledged the risk negative impact of the ESM on EU law, of which fundamental rights standards are part of the first of all 13 of them.

The arguments used by the Court to exclude its control over the compatibility of the action of the ESM with respect to fundamental rights, have been subjected to severe criticism⁷⁸. First of all, in stating that « *Member States do not implement EU law pursuant to art. 51, par. 1, of the Charter when establishing a stability mechanism such as the ESM* », the CJEU adopts a restrictive interpretation of the concept of « *scope of application of European Union law* ». Indeed, as is clear from the subsequent ‘Fransson’⁷⁹ judgment, a state measure falls within the scope of EU law not only if it constitutes a measure transposing a directive but also only by virtue of a direct link between its application and the implementation of other Union provisions and purposes.

Using an extensive interpretation, therefore linked to the purposes of the Union, especially in areas relating to the common monetary policy, it would be possible to extend the notion of the scope of application of Union law also to the measures adopted by the States involved in the ESM. It would allow the legislator and the national courts to apply national standards for the protection of fundamental rights « *provided that such*

⁷⁷ B. De Witte and T. Beukers ‘*The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle*’, in CMLR, 2013.

⁷⁸ Paragraph 69 of ‘*Pringle*’ sentence.

⁷⁹ Court of Justice, sentence February 26th, 2013, C-617/10, Åkerberg Fransson. In the ‘*Fransson case*’, the relevant link concerned the circumstance that a surcharge for contributory irregularities was necessary to make the sums corresponding to the VAT (value added tax) resources available to the Union budget, sanctioning conduct harmful to the financial interests of the Union.

application does not compromise the level of protection provided for by the Charter, as interpreted by the Court, nor the primacy, unity and effectiveness of EU law »⁸⁰.

It should also be noted that the Court has not provided any clarification regarding the configurability of one of its trade unions on the work of the European Union institutions involved in the implementation of the ESM.

The need for ‘allotment’ is the logical consequence of the principle of the transfer of sovereign powers from the States to the Union that characterizes the constitutional structure of the complex made up of the EU and the Member States.

From this statement it is possible to deduce that the division concerns exclusively the action of the Member States as it only lies between the two systems of protection of fundamental rights, the constitutional one and that of the EU, while it does not concern the action of the institutions which, if removed from the scope of the Charter, would operate in an area without protection.

Ultimately, the CJEU therefore comes to note that the ESM Treaty is compatible with the EU Treaties and that it does not enter into conflict with the ban on bail-out pursuant to Article 125 TFEU, using, a teleological interpretation and proceeding, in fact, to a ‘constitutionalization’ of the principle of conditionality⁸¹.

This principle therefore performs a function of connection and guarantee of the regulatory framework of the Union, governing the multilateral relationship between the country requesting financial assistance; the contracting countries acting under the ESM Treaty and the EU institutions, in light of the principle of solidarity.

From the foregoing analysis, it emerges that in the only delicate operation of balancing between the application of anti-crisis measures and the application of rights, an individual would not be entitled to invoke the fundamental rights of the Union in relation to these measures, essentially imposed by the EC in cooperation with the ECB, adopted by the signatory states in their capacity as members of the ESM⁸².

⁸⁰ Court of Justice, sentence February 26th, 2013, C-399/11, Melloni, paragraph 28. On the role of the Court of Justice in the ‘multilevel’ protection of social rights in the situation of economic crisis.

⁸¹ G. Fontana ‘I giudici europei di fronte alla crisi economica’, in WP CSDL ‘Massimo D’Antona’, int. – 114/2014.

⁸² The weakening of the Charter of Rights is actually a very bright indicator of the conservatism of the states, which with art. 51 intended to prevent any possible enlargement of the competences of the E.U. (Guazzarotti, 2013). Fundamental rights are relevant, as Bin caustically observes, when the compatibility

With the ouster of the Charter from the scope of the ESM treaty, the Court substantially removes the possibility of control over these acts with respect to the paradigm, mentioned before, of the Union, thus degrading the rule of law. A clear example of the blurred boundaries of the European Economic Constitution.

2.3 The Gauweiler Case

The CJEU on June 16th 2015, declared the compatibility of the measures envisaged by the ECB within the announced, but never implemented, OMT (Outright Monetary program Transactions) with Articles 119, 123 and 127 TFEU and with Articles 17 to 24 of Protocol No 4 on the Statute of the ESCBs and the ECB. It confirmed the overall the position expressed by the AG⁸³ Pedro Cruz Villalón in his conclusions of January 14th 2015. The Court was able to appropriately seize the opportunity granted to dwell and better specify some important aspects of the Union law relating the dialogue between Courts, the discretionary range of powers of the ECB in the exercise of its mandate, and more generally the reference legislative framework for the economic and monetary policy of the Union, continuing an interpretative line started by the Pringle Case (C-370/12) of 2012.

The measures challenged and submitted to the Court of Luxembourg consist, broadly speaking, of purchase transactions on the secondary markets of short-term government bonds of Eurozone countries with particularly high interest differentials. The program was conceived in response to the 2012 sovereign debt crisis which had effectively paralyzed the monetary policy transmission mechanism, rendering ineffective the ECB's both short-term and medium-term efforts to pursue its stability maintenance mandate.

2.3.1 The speech of Mario Draghi

The OMTs therefore represented the concrete intervention referred to by Governor Mario Draghi in his famous London speech in July 2012, when he affirmed the ECB's

of national norms with European ones is in question and « *they are not preached as bulwarks that confront and limit the powers of the European legislator* » (Bin, 2014).

⁸³ An advocate general is a magistrate who assists the ECJ in the performance of its functions. An advocate general is responsible for presenting an 'opinion' on the cases assigned to them with complete impartiality and independence.

willingness to put into practice « *whatever it takes to preserve the Euro* »⁸⁴. During the meeting of 6 September 2012, the ECB Governing Council had officially approved the adoption of these open market operations, subject to the commitment of the recipient State of the measures to macroeconomic adjustment programs agreed in the EFSF⁸⁵ and the ESM framework.

Since the ‘minutes’⁸⁶, are not made public either in full or in the form of a report, the operating procedures of the program were disclosed in a press release, published online the same day. It outlined the nature and main characteristics of the program, without any mention of the implementing legislation, which would obviously have been better specified at a later stage. There was no need, however, to go to the facts: the mere announcement of the measures generated the desired effect of calming the speculative storm, while reassuring investors and restoring the spreads of securities to normal values.

Since no formal regulatory act was followed to the press release, the latter represents the order for reference on which the CJEU was in fact called to rule. Some parties involved in the proceedings, mainly Member States and European institutions, presented numerous objections of admissibility, motivated precisely by the alleged inadmissibility of the preliminary question due to the non-existence, or in any case lack of legal effects, of the act subject to review of compliance with EU law.

In this regard, the CJEU could have grasped some of these profiles of inadmissibility of the referral, avoiding the responsibility of the implications that a ruling on economic policy would have had on the state of uncertainty in the Eurozone. On one hand, the CJEU would in some ways have betrayed the spirit of active cooperation with national judges, of which it has always hoped for greater development and which is also at the basis of the institution of the reference for a preliminary ruling. On the other hand, it would have left its side open to the ECB, if in the future it would have been forced by the recurrence of a new sovereign debt crisis to put the OMT program into practice. In this perspective,

⁸⁴ Mario Draghi ‘*Verbatim of the remarks made by Mario Draghi*’, President of the European Central Bank at the Global Investment Conference in London July 26th 2012.

⁸⁵ The European System of Financial Supervision (ESFS) is a multi-layered system of micro- and macro-prudential authorities that aims to ensure consistent and coherent financial supervision in the EU. It includes the European Systemic Risk Board (ESRB), the three European supervisory authorities (EBA, ESMA and EIOPA) and the national supervisors. The ESFS has continuously evolved to take account of the changing context in which it operates, notably the introduction of the Banking Union, the goal of developing a Capital Markets Union and the withdrawal of the United Kingdom from the EU.

⁸⁶ Minutes of the fortnightly meetings of the ECB’s main decision-making body, shall not be made public or made in full.

beyond the assessments regarding the principle of loyal cooperation, the decision to proceed with the examination of the disputed measures is certainly judicious, also in light of the role that the CJEU plays within the system for resolving disputes between EU institutions and Member States.

Before going further into the field of preliminary questions, it is relevant to note another singularity of the sentence in question concerning the referring court and the order for reference. The ruling originates from a preliminary question from the BVerfG⁸⁷, the first ever in the history of the Karlsruhe Court, which had included the new grounds of appeal relating to the OMT program in the wider proceeding concerning the legitimacy of the ESM and the Fiscal Compact (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union)⁸⁸, which the federal judges were already dealing with. The plaintiffs criticized the ‘failure to react’ by the federal government and the Bundestag to an act that exceeded the budgetary power of the federal parliament, as well as the Bundesbank's participation in a program with possible effects on inflation. It should also be noted that in 2011 the Karlsruhe Court had ruled inadmissible an entirely similar appeal relating to the measures to support the liquidity of states in difficulty, in this case Greece, provided for by the SMP⁸⁹, because it did not concern an act of German public authority. It is certainly to be welcomed that in this case the BVerfG accepted the appeal

⁸⁷ The Federal Constitutional Court (German: Bundesverfassungsgericht; abbreviated: BVerfG) is the supreme constitutional court for the Federal Republic of Germany, established by the constitution or Basic Law (Grundgesetz) of Germany. Since its inception with the beginning of the post-World War II republic, the court has been located in the city of Karlsruhe, which is also the seat of the Federal Court of Justice. The main task of the Federal Constitutional Court is judicial review, and it may declare legislation unconstitutional, thus rendering them ineffective.

⁸⁸ The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union; also referred to as TSCG, or more plainly the Fiscal Stability Treaty is an intergovernmental treaty introduced as a new stricter version of the Stability and Growth Pact, signed on 2 March 2012 by all member states of the European Union (EU), except the Czech Republic and the United Kingdom. The treaty defines a balanced budget as a general budget deficit not exceeding 3.0% of the gross domestic product (GDP), and a structural deficit not exceeding a country specific Medium-Term budgetary Objective (MTO) which at most can be set to 0.5% of GDP for states with a debt-to-GDP ratio exceeding 60% or at most 1.0% of GDP for states with debt levels within the 60% limit.

⁸⁹ It is intended to ensure depth and liquidity in malfunctioning segments of the debt securities markets and to restore an appropriate functioning of the monetary policy transmission mechanism.1 As the purchases of debt securities conducted in the context of the SMP are sterilised, they do not change central bank liquidity. Importantly, the SMP does not alter the stance of monetary policy as determined by the Governing Council. This box discusses different concepts of liquidity and, in particular, explains to what extent there could be direct or indirect effects of the programme on monetary liquidity as measured in broad monetary aggregates.

by raising the preliminary reference and thus breaking the historical reluctance to use the instrument provided for by Article 267⁹⁰ TFEU.

The contestability of the act, object of the referral and the feared possibility that the referring court may subsequently rule contrary to the CJEU's review, are the two issues around which the preliminary questions mainly revolve. Precisely on this aspect, a preliminary observation by the Italian government, aimed at having the CJEU declare its incompetence, instead offers the pretext for the Luxembourg judges to further reaffirm the binding nature for the national court of the judgment given for a preliminary ruling. The Court's argument in this regard is part of a consolidated jurisprudence which sees Article 267 TFEU based on a rigid division of competences between the referring court, which is responsible for assessing the disputed facts, and the CJEU, which is instead called upon to rule on the validity of the act.

This is a reasonable attempt to settle the potential conflict between courts by assigning a 'presumption of relevance' to the referring court for the issues it submits to the judge 'ad quem'. Based on the wide margin of discretion of the referring court in the preparation of the preliminary ruling, the Court resolves the objections of inadmissibility due to the hypothetical nature of the dispute. It is therefore not for the Luxembourg Court to assess the necessity or compliance with national rules of the order for reference, nor to assess the relevance of the questions themselves; just as, implicitly, it is not within the competence of the national court to proceed with a second interpretative review of the preliminary ruling.

⁹⁰ « *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: the interpretation of the Treaties; the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.* » (Article 267 TFEU)

2.3.2 Peter Gauweiler v Deutscher Bundestag, case C-62/14⁹¹

The case consists in a request for a preliminary ruling under Article 267 TFEU from the BVerfG, made by decision of 14 January 2014, received at the Court on 10 February 2014.

« This request for a preliminary ruling concerns the validity of the decisions of the Governing Council of the European Central Bank (ECB) of 6 September 2012 on a number of technical features regarding the Eurosystem's outright monetary transactions in secondary sovereign bond markets ('the OMT decisions') and the interpretation of Articles 119 TFEU, 123 TFEU and 127 TFEU and of Articles 17 to 24 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (OJ 2012, C 326, p. 230; 'the Protocol on the ESCB and the ECB'). » (Paragraph 1, Case C-62/14)

« The request has been made in the context of a series of constitutional actions and dispute resolution proceedings between constitutional bodies, which concern the participation of the Deutsche Bundesbank (German Central Bank) in the implementation of the OMT decisions and the alleged failure, of the Bundesregierung (Federal Government) and the Deutscher Bundestag (Lower House of the German Federal Parliament), to act with regard to those decisions. » (Paragraph 2, Case C-62/14)

To the risky recognition of legal effects in preparatory acts, the ECJ has preferred to opt for the admissibility of the preliminary request if it corresponds: *« the fact that the OMT decisions have not yet been implemented and that their implementation will be possible only after further legal acts have been adopted is not a ground for denying that the request for a preliminary ruling meets an objective need for resolving the cases brought before that court »* (Paragraph 28, Case C-62/14), even if it concerns measures not yet implemented. Furthermore, the authorization to appeal on the basis of German law and the jurisdiction of the referring court must be seen once again with a view to promote a positive division of roles, in the wake of the principle of loyal cooperation.

In conclusion, the CJEU notes that the formulation of the reference is structured in terms of an 'interpretative' question that assesses the conformity of the adoption of a program

⁹¹ Judgment of 16. 6. 2015 – Case C-62/14 Gauweiler and others

for the purchase of government bonds on secondary markets such as the one announced in the press release in Articles 119, 123 Par. 1 and 127 Par. 1 and 2, TFEU as well as Article 17 to 24 of the Protocol (No 4) on the Statute of the ESCBs and of the ECB (Paragraph 30, Case C-62/14).

As regards the questions of merit, the Court reduces the numerous and complex questions of the referring judge into two broader questions. The first relates to the compliance of the OMT program with the ESCB's powers on monetary policy. The second concerns more specifically the compatibility of the purchase of securities on secondary markets with the prohibition of monetary debt financing contained in Art. 123, Par. 1, TFEU.

Answering the first question, the CJEU reviews extensively the competences of the EU institutions in the field of monetary policy, noting that it is up to the ESCBs to define it and to the ECB to implement this policy in practice, pursuant to Art. 127, Par. 2, TFEU. Even if the TFEU does not contain any precise definition of monetary policy, it must still be directed to the main objective of maintaining price stability, within the limits and powers provided for by primary law. This is the specific 'clear mandate' referred to by the Court in Paragraph 44⁹² of the judgment. The detailed listing of monetary policy prerogatives is functional to frame the question in its general scope, namely whether the adoption of measures such as those contained in the press release can fall within the functions of defining and implementing monetary policy, attributed by the Treaties to the ESCBs-ECB system.

In judging whether the OMT program falls within monetary or economic policy, the Court applies the test of the Pringle Case which provides for the analysis of the conformity of objectives and instruments of the measure in question to the ultimate aims of monetary policy (Pringle, C- 370/12, Paragraph 55). In this sense, the main objective of the program, namely the reactivation of the monetary policy transmission mechanism, pursues the broader aim of preserving the 'uniqueness' of this policy, provided for by Art. 119, Par. 2, TFEU (Paragraph 47, Case C-62/14)⁹³. Similarly, the means provided for in

⁹² « *The Protocol on the ESCB and the ECB is thus characterised by a clear mandate, which is directed primarily at the objective of ensuring price stability. The tightly drawn nature of that mandate is further reinforced by the procedures for amending certain parts of the Statute of the ESCB and of the ECB.* » (Paragraph 44, Case C-62/14)

⁹³ « *In the first place, as regards the objectives of a programme such as that at issue in the main proceedings, it can be seen from the press release that the aim of the programme is to safeguard both 'an*

the program, namely the purchase of securities on secondary markets, are among the operations envisaged for the ESCB by primary law, aimed at fulfilling the mandate to maintain price stability pursuant to Art. 18, Par. 1 of the Protocol (No 4) on the Statute of the ESCBs and of the ECB (Paragraph 54, Case C-62/14). In this regard, the comparison with the objectives of the ESM that is the subject of the judgment in the Pringle case is significant. Unlike the OMT program, the aims of the ESM were expressly aimed at preserving the stability of the 'Eurosystème', an objective unquestionably linked to the Union's economic policy. The CJEU recognizes that a government bond purchase program may have incidental effects on economic policy but, excludes that such 'indirect incidences' allow such a measure to be equated with an economic policy measure (Paragraph 59, Case C-62/14). The outcome of the Pringle test is therefore positive, in the sense that the objectives and instruments of the program are consistent with the objectives of monetary policy (Paragraph 56, Case C-62/14).

In this regard, the CJEU does not follow the opinion of the AG regarding the irreconcilability between the two positions of the ECB, that of an active part of the Troika⁹⁴ within the Union assistance programs, which fall within the of economic policy, and that of the authority that would carry out the purchase of securities envisaged by the OMT program, exercising instead monetary policy powers. The CJEU has decided to remain silent on the issue, probably not sharing the opinion of the violation of the impartiality of the monetary authority proposed by the AG. Such a position is also evident from the positive judgment of the CJEU on the conditionality of the program and from the frequent reference to the ESCB's support for the general economic policies of the Union pursuant to Articles 119 Par. 2 TFEU, 127 Par. 2 TFEU and 282 TFEU.

appropriate monetary policy transmission and the singleness of the monetary policy'. » (Paragraph 47, Case C-62/14)

⁹⁴ In the context of EU economic policy, the term troika, from the Russian тройка (transl: triplet) refers to all official creditors during negotiations with countries, as defined by the portal of the European Parliament. Specifically, the triplet, rather than individuals, is made up of institutions: the European Commission, the European Central Bank and the International Monetary Fund, each with its own representatives. A fundamental task of the Troika is to draw up and enforce bailout plans in eurozone countries in serious difficulty due to public debt and thus avoid their default. Usually these are projects with a high austerity rate for the countries affected by the Troika's interventions, but, on the other hand, the required austerity is the only way they have to obtain loans that allow them to get out of the crisis. The interventions and economic policies requested and enforced on behalf of the Troika never pass without triggering controversy and, often, there are also street clashes with accusations of undemocratic attitudes by the Troika itself.

Before dealing with the other question, the CJEU allows itself an interlude on compliance with the principle of proportionality, pursuant to Art. 5, Par. 4, TEU. This principle, as is well known, requires an examination of the actions of EU institutions, so that they do not exceed the limits of what is necessary to achieve these objectives (Paragraph 67, Case C-62/14). The examination of proportionality must however take into account the wide discretion granted by the Treaties to the ECB and justified on the basis of the highly technical nature of the matter in question (Paragraph 68, Case C-62/14)⁹⁵. The ECB is in any case subject to compliance with certain procedural guarantees, such as the clear explanation of the logical process of the decision and the obligation to motivate it (Paragraphs 68 and 69, Case C-62/14). The ECJ actually accepts the ECB's argument, stating that the Governing Council was well aware at the time of the adoption of the act that it would contribute to the objective of reactivating the monetary policy transmission mechanism, and therefore of maintaining stability of prices (Paragraph 80, Case C-62/14). This assumption would in a certain sense be empirically demonstrated by the fact that the simple announcement then obtained the desired effect (Paragraph 79, Case C-62/14)⁹⁶.

The real critical issue regarding proportionality is rather the potentially unlimited scope of the SPP, the main cause of concern for the applicants and the German Government. The CJEU, again accepting the ECB's position, notes on the contrary that there are limits within the contested measures, namely those restrictions on the purchase of the securities contained in the press release. The subject of open market operations are in fact the only government bonds with a maturity of less than three years, while the recipients are the only countries subject to macroeconomic adjustment programs within the EFSF / ESM Framework⁹⁷, and which still have access to the market despite the precarious economic

⁹⁵ « As regards judicial review of compliance with those conditions, since the ESCB is required, when it prepares and implements an open market operations programme of the kind announced in the press release, to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion (see, by analogy, judgments in *Afton Chemical*, C-343/09, EU:C:2010:419, paragraph 28, and *Billerud Karlsborg and Billerud Skärblacka*, C-203/12, EU:C:2013:664, paragraph 35). » (Paragraph 68, Case C-62/14)

⁹⁶ « Moreover, the ECB's assertion that the mere announcement of the programme at issue in the main proceedings was sufficient to achieve the effect sought - namely to restore the monetary policy transmission mechanism and the singleness of monetary policy - has not been challenged in these proceedings. » (Paragraph 79, Case C-62/14)

⁹⁷ EFSF refers to the European Financial Stability Facility, the 'special purpose vehicle', founded on 7 June 2010 by the member countries of the Eurozone. The EFSF was created following the Ecofin summit on May 9, 2010, with the aim of safeguarding the financial stability of the EU through assistance to the member countries of the Eurozone. The EFSF is a Luxembourg company and is chaired by Klaus Regling. Known to most as the bailout fund, the EFSF is authorized to act as a lender for countries in financial difficulty, operating on primary and secondary debt markets. However, intervention on the

situation (Paragraph 87, Case C-62/14)⁹⁸. The overall volume of operations leads the CJEU not to judge the OMT program as disproportionate to the legitimate objectives pursued, also on the basis of the fact that conditionality requires a targeted and non-arbitrary selection of the Member States that benefit from the action of the ESCBs / ECB system.

The last question concerns, as mentioned above, the disputed circumvention of the ESCB's prohibition on financial assistance to Member States. The BVerfG argued in the order for reference that the purchase of bonds, even if on the secondary market, would constitute a violation of this prohibition. The CJEU first of all specifies how the operations on the financial markets of the ECB are permitted by Art. 18, Par. 1 the Protocol (No 4) on the Statute of the ESCBs and of the ECB (Paragraph 96, Case C-62/14)⁹⁹.

Although the ESCBs would not purchase government bonds only on secondary markets, and not directly, it is also true that such transactions could have effects equivalent to direct purchase, thus revealing a strong doubt as to the legitimacy of the measures (Paragraphs 102 and 103, Case C-62/14). The Court is therefore called upon to verify that the program actually avoids this risk. To do this, it adopts a particular compatibility test for the compliance union with Art. 123, Par. 1, TFEU. It is precisely the ECB that has to put forward solid arguments in its written observations to reassure the CJEU: the application of the program, and therefore the intention to buy securities by the ECB, would not be announced too early and in the same way it would be expected; a certain reasonable

secondary market can only be planned following an analysis by the ECB. The Central Bank must recognize the existence of financial circumstances of an exceptional nature that could jeopardize financial stability. The EFSF can also intervene through recapitalization operations of financial institutions, by means of loans to their governments, and can carry out activities aimed at preventing the occurrence of situations of instability. The Fund is supported by guarantees from the countries of the euro area for a total of 780 billion and has a lending capacity of 440 billion. To raise the necessary funds to finance loans to Eurozone countries in financial difficulty, the EFSF issues short, medium and long-term bonds.

⁹⁸ « *It follows from those considerations, first, that a programme such as that announced in the press release ultimately concerns only a limited part of the government bonds issued by the States of the euro area, so that the commitments which the ECB is liable to enter into when such a programme is implemented are, in fact, circumscribed and limited. Secondly, such a programme can be put into effect only when the situation of certain of those States has already justified EMS intervention which is still under way.* » (Paragraph 87, Case C-62/14)

⁹⁹ « *Thus, Article 18.1 of the Protocol on the ESCB and the ECB permits the ESCB, in order to achieve its objectives and to carry out its tasks, to operate in the financial markets, inter alia, by buying and selling outright marketable instruments, which include government bonds, and does not make that authorisation subject to particular conditions as long as the nature of open market operations is not disregarded.* » (Paragraph 96, Case C-62/14)

period of time between from the sale of securities on the primary market by the State and the purchase of them on the secondary market by the ECB (Paragraph 106 and 107, Case C-62/14). These guarantees offered by the ECB join the one ensured by the aforementioned conditionality of the provision. The rationale of the funding ban rule is to discourage Member States from pursuing imprudent budgetary policies.

The link between the OMT program to the EFSF / ESM Framework, in addition to the aforementioned limited nature of the contested measures, would not prevent the Member States from conducting a prudent budgetary policy. It should also be noted that, in response to the BVerfG's remark regarding the high risk of losses to which the ECB would be exposed if the program was applied, the Court acknowledges that, by virtue of the delicate task entrusted to it, the monetary institution of the EU is sometimes authorized to take such risks, as long as they are always aimed at fulfilling its mandate (Paragraph 125, Case C-62/14)¹⁰⁰.

The CJEU's ruling is particularly wise in avoiding the provocative confrontation that instead seemed to be deliberately sought by the German Federal Court. Overall, it shows considerable openness to active cooperation between courts and, in this context, this ruling could mark an important stage capable of inaugurating a new season of collaboration between national judge and judge of the Union.

2.4 The Bundesverfassungsgericht declares Quantitative easing 'ultra vires'

The BVerfG, with its judgment¹⁰¹ of May 5th, 2020, declared for the first time in the history of its jurisprudence, acts of European institutions 'ultra vires' and as such not binding on the public authorities of the Federal Republic of Germany. The decision of the BVerfG partially upheld a number of questions raised in individual direct appeals concerning the purchases made by the ECB within the framework of the PSPP, also known as QE. The program involved massive purchases of government securities and

¹⁰⁰ « It should also be borne in mind that a central bank, such as the ECB, is obliged to take decisions which, like open market operations, inevitably expose it to a risk of losses and that Article 33 of the Protocol on the ESCB and the ECB duly provides for the way in which the losses of the ECB must be allocated, without specifically delimiting the risks which the Bank may take in order to achieve the objectives of monetary policy. » (Paragraph 125, Case C-62/14)

¹⁰¹ 2 BvR 859/15 - 2 BvR 1651/15 - 2 BvR 2006/15 - 2 BvR 980/16, May 5th2020.

bonds by the ESCBs with the aim, at least in the ECB's assertions, (which are the real point of contention) of stimulating inflation to bring it back to the 2% target.

A number of direct appeals had been lodged with the BVerfG, seeking a declaration of the non-applicability of that program in Germany (in other words by the Bundesbank) and the obligation of the German constitutional bodies to take an active part in preventing its application in the Federal Republic of Germany.

In the applicants' view, the programmes in question infringed the prohibition on monetary financing laid down in Article 123 TFEU and exceeded the limits of the mandate of the ECB and the ESCBs laid down in Articles 119 and 127 TFEU and Articles 17 and 24 Protocol (No 4) on the Statute of the ESCBs and of the ECB. Once again, the basis of the appellants' allegations was the idea that the decisions taken 'ultra vires' violated the democratic principle and thus undermined German constitutional identity.

In the context of these appeals, the BVerfG had made a reference to the CJEU for a preliminary ruling by order on July 18th 2017¹⁰².

The very fact that the BVerfG was making a reference for a preliminary ruling was not unprecedented, as the Karlsruhe Regional Court had already taken the same route in a case that similarly concerned a different program of unconventional acquisitions announced by the ECB, the OMT program. However, the two programs differ significantly for various reasons: the OMT program, in fact, had substantially different characteristics, but, above all, did not lead to any purchases by the ESCBs, in large part because the mere announcement of its possibility had made it possible to achieve the desired effects. Moreover, from the point of view that is of most interest here, the program had passed through a preliminary reference that had brought out important points of tension between the BVerfG and the CJEU, yet it had not led to the use of instruments commonly considered as 'nuclear options', such as the declaration of acts 'ultra vires'. In fact, the two courts had reached an interpretative settlement of the subject matter of the dispute, which did, however, suggest different views on the limits of the mandates of the ECB and the ESCBs, as well as on the boundary between monetary and economic policy. However, on that occasion, the showdown was ultimately postponed to the future, as has often been the case in the history of 'European Case Law' of the BVerfG.

¹⁰² P. Faraguna, *'Da Karlsruhe un nuovo rinvio pregiudiziale contro la BCE: inutile o dannoso?'*.

2.4.1 Case C-493/17, Weiss and others

On the occasion of the second referral of the BVerfG the CJEU had held that the PSPP did not violate EU law, and that the measures put in place did not exceed the mandate of the ECB and the ESCBs (Case C-493/17, Weiss, December 11th 2018). In particular, the CJEU had found that the program was part of the monetary policy actions incumbent on the ECB and the ESCBs.

« This request for a preliminary ruling concerns the validity of Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (OJ 2015 L 121, p. 20), as amended by Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 (OJ 2017 L 16, p. 51) ('Decision 2015/774'), and the interpretation of Article 4(2) TEU and Articles 123 and 125 TFEU. » (Paragraph 1, Case C-493/17)

« The request has been made in the context of four constitutional actions brought by Mr Heinrich Weiss and others, Mr Bernd Lucke and others, Mr Peter Gauweiler and Mr Johann Heinrich von Stein and others, concerning the applicability, in Germany, of various decisions of the European Central Bank (ECB), the participation of the Deutsche Bundesbank (German Central Bank) in the implementation of those decisions or its alleged failure to act with regard to those decisions, and the alleged failure of the Bundesregierung (Federal Government, Germany) and the Deutscher Bundestag (Lower House of the German Federal Parliament), to act in respect of that participation and those decisions. » (Paragraph 2, Case C-493/17)

With its judgment of May 5th, 2020, the BVerfG closed this long jurisdictional path, considering, for the first time in the history of its jurisprudence, that both the measures at issue and the judgment of the CJEU were rendered 'ultra vires'. In the ultimate decision of the BVerfG, it was held that neither the ECB (in adopting the decisions underlying the programs in question) nor the CJEU (in addressing the preliminary reference in the Weiss judgment) had made proper use of the principle of proportionality. The BVerfG does not actually challenge the violation of the principle of proportionality, but rather a serious failure to state reasons that prevents a judicial review of compliance with this principle. In the final analysis, by basing the decision on the defective motivation of the proportionality of the measures adopted, rather than on the violation of the same principle,

not everything seems to be compromised as regards the survival of the acquisitions under the programs in question. On the contrary, using a decisional technique quite common in the German legal system, the BVerfG assigns a transitional period of three months within which to remedy the lack of motivation of proportionality (Paragraph 3, Case C-493/17)¹⁰³. Within this period, the judgment places a constitutional obligation on the German constitutional bodies to put in place all possible coordination measures with the ESCBs in order to remedy the specific defects, mainly motivational, raised by the detailed grounds of the BVerfG judgment.

As far as the alleged violation of the prohibition on monetary financing pursuant to Art. 123 TFEU is concerned, the BVerfG excluded that the measures in question, by virtue of the specific characteristics of the contested programs, constitute a violation of this prohibition, albeit it raised very serious objections and constitutional perplexities on this front as well. If, in fact, the BVerfG considers that the perplexities are not sufficient to find a clear violation of the prohibition of monetary financing set forth in Art. 123 Par. 1,

¹⁰³ « On 4 September 2014, the Governing Council decided to initiate a third covered bond purchase programme (hereinafter the “CBPP3”) and an asset-backed securities purchase programme (ABSPP). Alongside the targeted longer-term refinancing operations introduced in September 2014, these asset purchase programmes are aimed at further enhancing the transmission of monetary policy, facilitating credit provision to the euro area economy, easing borrowing conditions of households and firms and contributing to returning inflation rates to levels closer to 2%, consistent with the primary objective of the ECB to maintain price stability.

On 22 January 2015, the Governing Council decided that asset purchases should be expanded to include a secondary markets public sector asset purchase programme (hereinafter the “PSPP”). Under the PSPP the [national central banks], in proportions reflecting their respective shares in the ECB’s capital key, and the ECB may purchase outright eligible marketable debt securities from eligible counterparties on the secondary markets. This decision was taken as part of the single monetary policy in view of a number of factors that have materially increased the downside risk to the medium-term outlook on price developments, thus jeopardising the achievement of the ECB’s primary objective of maintaining price stability. These factors include lower than expected monetary stimulus from adopted monetary policy measures, a downward drift in most indicators of actual and expected euro area inflation both headline measures and measures excluding the impact of volatile components, such as energy and food towards historical lows, and the increased potential of second-round effects on wage and price-setting stemming from a significant decline in oil prices.

The PSPP is a proportionate measure for mitigating the risks to the outlook on price developments, as it will further ease monetary and financial conditions, including those relevant to the borrowing conditions of euro area non-financial corporations and households, thereby supporting aggregate consumption and investment spending in the euro area and ultimately contributing to a return of inflation rates to levels below but close to 2% over the medium term. In an environment where key ECB interest rates are at their lower bound, and purchase programmes focusing on private sector assets are judged to have provided measurable, but insufficient, scope to address the prevailing downside risks to price stability, it is necessary to add to the Eurosystem’s monetary policy measures the PSPP as an instrument that features a high transmission potential to the real economy. Thanks to its portfolio re-balancing effect, the sizable purchase volume of the PSPP will contribute to achieving the underlying monetary policy objective of inducing financial intermediaries to increase their provision of liquidity to the interbank market and credit to the euro area economy. » (Paragraph 3, Case C-493/17)

TFEU, the detailed analysis of the individual objections raised by the plaintiffs seems to cast not indifferent shadows on other procurement programs that are constructed in a different manner.

Such point is of fundamental importance, because if it is true, as the BVerfG takes care to clarify in the press release announcing the decision, that the judgment does not apply to the purchasing programs in the framework of which the situation following the health crisis, still in progress, was dealt with, it is quite evident that the motivations of the BVerfG judgment will be read by the interested parties taking into account also those new programs.

In the apparently more innocuous part of the judgment, that illustrates the reasons for the rejection of the questions based on the prohibition of monetary financing, the BVerfG in fact sets out what are the most insidious points for the near future, drawing up a veritable list of conditions that make it possible to consider the prohibition in question, not violated: these include the limited volume of purchases from the start of the program; the publication of only aggregate information on the characteristics of the purchases; the limit whereby the central banks of the 'Eurosystem' cannot hold more than 33% of a given issue of securities of the central government of a member state or more than 33% of the outstanding securities of one of these governments (Paragraph 124, Case C-493/17)¹⁰⁴; the proportion of purchase volumes to the share of capital; limitations on the purchase of securities from public entities only if the assignor has a minimum certification of credit quality that allows access to the market; the limited and discontinuous nature of purchases that must cease, and indeed be sold, when they are no longer necessary in relation to the objective of bringing inflation back to 2% (Paragraph 10, Case C-493/17)¹⁰⁵.

¹⁰⁴ « Lastly, under Article 5(1) and (2) of Decision 2015/774, the Eurosystem central banks cannot purchase more than 33% of a particular issue of bonds of a central government of a Member State or more than 33% of the outstanding securities of one of those governments. » (Paragraph 124, Case C-493/17)

¹⁰⁵ « On 3 December 2015, the Governing Council decided, in line with its mandate to ensure price stability, to revise certain of the PSPP's design features, to secure a sustained adjustment in the path of inflation towards levels that are below, but close to 2%, over the medium term. The revisions are in line with the Governing Council's monetary policy mandate and duly reflect risk management considerations. Accordingly, in order to achieve the PSPP's objectives, the Governing Council decided to extend the intended horizon of purchases under the PSPP until the end of March 2017, or beyond, if necessary, and in any event until the Governing Council sees a sustained adjustment in the path of inflation that is consistent with its aim of achieving inflation rates below, but close to, 2% over the medium term. The Governing Council decided to extend the intended horizon of the purchases under the CBPP3 and the ABSPP accordingly. » (Paragraph 10, Case C-493/17)

This list seems to determine the conditions absolutely necessary to guarantee the legitimacy of the purchase programs, including those programs recently arranged to deal with the crisis triggered by the pandemic. Necessary conditions, taken from an interpretation of the Weiss ruling of the CJEU, which put liens on the most recent purchase programs arranged by the ECB itself, which do not necessarily comply with the conditions in question.

In any case, returning to the area of the ‘immediate’ effects of the BVerfG's ruling, the Court upheld the questions which envisaged a violation of the limits to the competences attributed to the ECB and the ESCBs, and in doing so also struck at the Weiss judgment of the CJEU, which had held that those limits had not been violated.

In the articulated passages of its reasoning, the Karlsruhe Court focused on the respect and functioning of the principle of proportionality, underlining how it is originated from the German constitutional tradition, to demonstrate how both the ECB and the CJEU had mishandled a Teutonic instrument. In particular, there would have been insufficient consideration of the indirect effects that the implementation of the monetary policy measures in question would have produced in the economic and fiscal field. On this front, the judgment gives rise to various perplexities. It seems that the BVerfG both reaffirms and betrays the monetarist dogma: on one hand, it urges the ECB to deal only with monetary policy and, on the other hand, requires its Governing Council to exercise greater care in economic and fiscal considerations in order to assess the indirect effects of measures which undoubtedly in themselves are among the instruments available to the ECB and ESCBs. In addition, it will be allowed to doubt, even for those who live and work outside the borders of the homeland of the proportionality principle, that the scrutiny of the respect of the proportionality principle can be carried out taking into account only the negative effects on the economic and fiscal dimension, and without even remotely taking into account the positive indirect effects of those actions¹⁰⁶.

¹⁰⁶ M. Poiares Maduro, ‘*Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court*’, in *VerfBlog*, May 6th 2020.

Additionally, any choice of monetary policy inevitably produces economic policy effects¹⁰⁷, so the use of the principle of proportionality in ‘watertight compartments’ raises methodological perplexities. Finally, the fierce criticism directed at the CJEU does not appear to be well-founded in substance, given that the CJEU, in the Weiss judgment, had dedicated no less than 29 paragraphs to the objections raised by the BVerfG on the respect of the principle of proportionality (Paragraphs from 71 to 110, Case C- 493/17).

It is very difficult to trace the decision of the BVerfG to declare the measures of the ECB, the ESCBs and the CJEU ‘ultra vires’ to the framework that the Court of Karlsruhe itself had traced in its most recent case law to activate a control with such disruptive effects. As a matter of fact the BVerfG had gradually softened its position with respect to the control of ‘ultra vires’ acts, outlining a procedural framework that committed the Court itself to activate such control in a friendly manner with respect to EU law.

From a procedural point of view, this meant first of all giving the CJEU the opportunity to defuse in advance the possible conflict in the field of interpretation, and on the other hand to take action only to remedy manifest violations of a structural nature.

2.4.2 Implications of the declaration ‘ultra vires’ addressed to a European Institution by the BVerfG

The declaration ‘ultra vires’ of BVerfG addressed to a European institution poses epochal challenges to the principle of the primacy of EU law, as well as to the very authority and independence of the EU institutions, in particular the ECB and the CJEU, which were the recipients of a very heavy affront due to the tone used in the grounds of the judgment, as the reasons for the decisions of the European institutions in question are defined as absolutely untenable such as to render the principle of proportionality inadequate and devoid of any function emptied of meaning.

The entire argumentative path of the CJEU is defined as ‘methodologically unjustifiable’. Such words place a very heavy liens on the image, probably overestimated for a long time, of the dialogue between the Courts, leading many to rejoice at this.

¹⁰⁷ O. Chessa ‘*Perché il tribunale costituzionale tedesco sbaglia nel censurare gli «effetti di politica economica» della BCE?*’, lacostituzione.info, May 8th 2020.

Paradoxically, in fact, the decision has a very good chance of further fuelling a specific channel of ‘horizontal dialogue’ between the Courts of the Member States, and this is one of the most worrying scenarios that could emerge from the case in question.

In fact, the pronouncement can only be assessed within a broader framework, which is perhaps even more important than the framework itself.

The BVerfG obsessively focuses on the indirect effects of the ESCBs’ purchase programs, it is legitimate to ask oneself about the indirect effects of the BVerfG’s decision, rendered, moreover, in such an unfavorable political-institutional context as to have induced, as we learn, the German judges themselves to postpone the decision, so as not to make it in the middle of the political storm that the European Union is going through in order to find an agreement on the instruments with which to finance the needs determined by the most serious health crisis of the post-war period.

It is certainly true that the ruling does not apply to the purchasing programs more recently outlined to address the health crisis, as this is a different subject matter. And yet, the clarification sounds like an ‘excusatio non petita’, first of all for the very fact that it calls into question the solidity and institutional independence of the ECB: this can only have repercussions on the effectiveness of the new measures ordered by the ECB. Moreover, the specific compatibility with the conditions set by the BVerfG for considering the prohibition not violated of monetary financing do not seem easily applicable to the new PSPP.

In any case, a relevant indirect effect is that the BVerfG strongly weakens, one of the main instruments through which the EU could face the extraordinary needs related to the ongoing health crisis. This effect can only bring the alternative channels, i.e. the ESM, even more to the center. The effect is indirect, but very clear to the BVerfG, insofar as it is specified that the PSPP could have the same effects as the financial assistance instruments adopted under Article 12 of the ESM Treaty and that notwithstanding the safeguards mentioned by the ECJ, the volume and duration of the PSPP could make the effects of the programme disproportionate, even if initially the effects in question were in accordance with primary law, if they discourage Member States from adopting their own measures in pursuit of sound budgetary policies, resulting, in general, in monetary domination.

In these terms, the only sure effect of the BVerfG ruling is not so much to guarantee respect for the principle of attributed competences, the democratic principle, the responsibility of integration, as simply to strengthen the ESM, given that the further response to the crisis arising from the current pandemic, the establishment of recovery funds, is still an ongoing process, which, moreover, could paradoxically be strengthened by the ruling in question, but this is all to be verified. The legitimacy of the objective of strengthening the ESM can be debated, hopefully on the basis of a sufficiently precise legal framework. On the fact that this objective can be pursued by a national constitutional court, hiding it behind the high principles just mentioned, it is even more legitimate to doubt, given that it is the BVerfG itself that clarifies, in the few words of the ruling, that we feel we can agree without hesitation that the distinction between economic policy and monetary policy is a fundamental political decision with implications that go beyond specific cases and have significant consequences on the distribution of powers within the EU.

2.5 Problems and prospects on the democratic nature of multi-level economic governance

On a general level, there is no doubt that from the point of view of internal sovereignty, the community method, especially in its technocratic accentuation¹⁰⁸, contributes to widening the gap with classic representative democracy¹⁰⁹.

The normative and institutional structure of the single currency from Maastricht onwards has brought to light, above all because of the contextual breakdown of the balance of embedded liberalism, or rather of the original model inherited from ‘ordoliberalism’¹¹⁰ written into the Treaties, is the question of the Union's democratic deficit, which translates

¹⁰⁸ M. Goldmann and S. Steininger *‘Democracy and Financial Order: Legal Perspectives’*, Springer, Berlin, 2018, pages 1 and following.

¹⁰⁹ E. Paparella, *‘Il fondo monetario internazionale nell’Eurozona. La stretta condizionalità e la sovranità condizionata’*, Jovene, 2018, pages 50 and following.

¹¹⁰ The ordoliberalism was born in 1936 with the founding of the journal *Ordo* by Franz Böhm, Walter Eucken and Hans Grossmann-Dörth. The ordoliberalism was born in contrast to the fatalism typical of the German historical school and Marxism, which pushes the scientist to surrender in front of the necessity that governs the historical process, and for this has as its premise the free market, in the belief that it is up to the economic constitution to identify a dividing line between unfair competition and real competition, or to regulate, order precisely the market so that it is actually free.

into a renewed need to identify the subjects responsible for formulating the policies that the individual member states can no longer support due to budgetary restrictions.

It would be a question, therefore, of reconstructing the seat of the formulation of that political direction which has lost its place in the States or, in a broader sense, to identify a possible conception of democracy that is adapted to the asymmetrical distribution of sovereign powers between Member States and the Union, through a rearrangement of competencies and ownership of political action, which can guarantee a social protection, as dictated by the constitutional systems of Member States.

All this would require a rethinking of a series of fundamental questions, including, first of all, that of the identification of a political community of reference that can adopt a specific conception of democracy capable of adapting to the asymmetry of the Union¹¹¹.

It is precisely this latter aspect that is the greatest difficulty of the European constitutional process in the current post-crisis phase of the break-up of the ‘post-war institutional compromise’, i.e. the identification of a demos that can find a common understanding of the ways in which powers are exercised at the supranational level. This would require the complete overcoming of the community method centered on the rule of unanimity, and a greater approach to forms of exercising democracy that take into account the need to establish procedures for consensus formation, whether it be a compromise model or a more competitive model.

On the other hand, in terms of the more recent aspects linked to the development of the new post-crisis European economic governance, criticism is concentrated above all on the participation of parliaments. In particular, with regard to the consequences of conditionality applied to the new instruments of government of the Eurozone, the only rights recognized to the EP and national parliaments are the rights to information and discussion.

¹¹¹ M. Goldmann and S. Steininger, *‘A Discourse Theoretical Approach to Sovereign Debt Restructuring: Towards a Democratic Financial Order’*.

In theory national parliaments retain the right to refrain from adopting implementing measures necessary to transpose conditionality into national legislation, but this in practice is a fictitious power, as the case of the Greek referendum has shown.

A more sophisticated way to address these issues and recover at the national level the democratic legitimacy of post-2010 economic decision-making processes has been to strengthen the internal democratic procedures of individual member states. Two historical events that occurred during the crisis are emblematic of this effort and must be read together: the German Constitutional Court's jurisprudence on the ESM and the OMT program, the Greek referendum of 2015 and later on the QE.

The crisis has brought to the forefront the ability/incapacity of democratically organized collectivities - such as the German or Greek ones - to concretely and reciprocally influence the conditions of life in individual countries, on a social, economic and moral level. In other words, it could be seen that how the Greeks organize their public spending has also become a problem for the Germans, since that it was partly financed by German public money. And, conversely, whether and under what conditions the Germans decide to grant the loans becomes a question that affects the stability of the Eurozone and the social conditions of the beneficiary countries.

Both of these examples testify to the limits of the attempt to trace the legitimacy of decisions back to national procedures alone and to the obsolescence of any view according to which democracy and the transformations of European economic governance continue to be linked only to the nation-state. Therefore, a stronger involvement of national democracies alone is unlikely to be the answer to the legitimation of the European economic constitution as it has actually been transformed.

Despite the fact that the crisis has led to radical shifts in the architecture of the monetary union, these moves have not been supported by adequate reflection on how responsibility for economic policymaking should be allocated among the different demos of the Eurozone.

The problem by economists has often been framed in terms of moral hazard and economic rationality, whereas, instead, it is an essentially constitutional problem: it refers to the crucial disconnect that Eurozone transformations have produced between Eurozone decision makers and those who bear the risk.

Among other things, it would seem that viewing the problem through the lens of moral hazard has led both decision-makers and the public to view the conditionality associated with public assistance more in terms of establishing counter-incentives, impolitic,

technical, punitive, to the assistance itself, rather than as a form of making public decisions about common affairs.

Instead, the point that becomes crucial is to open up a constitutional narrative that emphasizes discussion of transformations that have not yet been accomplished: the redefinition of the limits of political accountability for economic decision-making and the establishment of a new institutional framework that adequately reflects it.

2.6 Analogies with NGEU

The similarities between NGEU and the above-addressed instruments, are quite intuitive: monetary instruments designed to face economic or financial crisis coordinated through the EC and implemented by the ECB.

Despite the strong arguments brought by the counterparties in the ‘Pringle Case’, the ‘Gauweiler Case’ and the ‘Weiss Case’ suggesting the legal framework of the ECB does not envisage the actions required by legal instruments such as the PEPP, the CJEU has always ruled against such position.

The nature of NGEU might bring out more doubts regarding the legal capabilities of the ECB because of the arrangements designed to supply the funds set out by NGEU.

An accurate analysis of NGEU is the starting point in order to identify critical Articles and Treaties which might suggest a conflict between the economic and monetary nature of the policies of the ECB.

Chapter 3 The Pandemic Crisis and Next Generation EU

3.1 The impact of the crisis on the socio-economic level¹¹²

The COVID-19 pandemic has produced and is producing very serious effects on the economic and social level, it is the most serious crisis since the second post-war period, on a scale far greater than the that of the financial and economic crisis that erupted in 2007.

According to the EC's most recent economic forecasts (July 2020), EU GDP as a whole is expected to contract by 8.3% in 2020, rebounding in 2021 to a growth rate of 8.3% mostly due to the huge drop of 2020.

The unemployment rate of the Eurozone based on Eurostat data moved from 7,4% to 7,9% and forecasts does not suggest any significant improvement in the incoming months.

A scenario that presents such marked and worrying elements of criticality has induced the European Institutions and Member States to an in-depth discussion, also in the light of the initiatives light of the initiatives taken in other economic areas (in particular the United States, China and Japan), in order to identify possible remedies and allow for rapid economic recovery of the economy.

It has been asserted that the need to tackle such a dramatic crisis can be an opportunity to implement a series of structural measures aimed at allowing the economies of European countries to place themselves in a less vulnerable position with respect to an increase in global competitiveness, given the rapid growth of some emerging economies in recent years. The first issue taken under analysis was the order of magnitude of the resources to be allocated for this purpose. At a national level, this has translated into the adoption of measures to support disposable income and economic activity, such as to ensure that the economic and social situation of the country is maintained; leading to a significant increase in both private and public debt.

¹¹² *‘Principali iniziative dell’Unione europea per fronteggiare l’impatto economico-sociale della pandemia COVID-19’*, document for the Commissions on the activities of the EU, Senato n. 89 and Camere n. 39, published October 5th 2020.

At European level it resulted in the European Council agreeing on the need for a new budget line, specifically it agreed on the need for a wide-ranging package of measures capable of using a variety of instruments and commit substantial financial resources.

A substantially increase 'EU Multiannual budget 2021-2027' thanks to NGEU, an instrument through which the EU will collect funds in order to channel them towards programs designed to foster economic and social recovery.

On such decision, before the outbreak of the crisis, very different attitudes had been displayed by member states. The so-called 'frugal' countries (Austria, Denmark, the Netherlands and Sweden) wanted to limit overall spending to 1% of the GNI of the 27 Member states, funding new priorities and sectors that can best support European competitiveness through greater cuts in traditional policies, while other countries, including Italy, albeit with different degrees of gradualness, were asking for sufficient resources to adequately finance not only the new priorities, but also existing ones. Despite initial strong disagreements the severity and the worsening of the pandemic crisis forced Member States to set aside dissimilarities for the common good.

3.2 An ambitious and innovative EU budget for European recovery

The EC has set out an ambitious comprehensive plan for European recovery based on solidarity and fairness, it is firmly anchored in the shared principles and values of the Union. The plan outlines ways to support the European economy, promote the green and digital transition and make it more equitable, sustainable and inclusive, digital transition, with the objective build a more resilient and more sustainable economy for future generations.

The COVID-19 pandemic has reached everywhere in the Union and around the world, the social and economic impact, however, varies greatly across Member States, as do their capacities to absorb and respond to the shock. Such differences are causing dangerous divergences between the economies of Member States and puts a strain on the Single European Market.

Implementing the recovery plan will require significant public and private investment. Resources need also to be directed to reduce the investment gap, between public and

private investment, which totals at least 1.5 trillion Euros, in order to repair the economic and social damage caused by the pandemic and to put the Union on a sustainable pathway to a better future.

The EC proposes to use the full potential of the EU budget to mobilize investment and focus financial support in the early years, which will be crucial for recovery. These proposals focus on: an emergency European Recovery Facility (NGEU) worth 750 billion Euros, which will temporarily supplement the EU budget with new funding from the financial markets.

The funds raised, channelled through EU programmes, will support urgent measures needed to protect livelihoods, protect the environment and support the development of new technologies with the objective to rebuild the economy and support sustainable and resilient growth.

A reinforced MFF for the period 2021-2027 relies on a mix between the creation of new instruments and the strengthening of existing programs, using NGEU to rapidly direct investment to where it is needed most, strengthen the single market, intensify cooperation in areas such as health and crisis management, and provide the Union with a long-term budget to drive the green transition. Along with three major safety nets for workers, businesses and sovereign entities endorsed on April 23 by the European Council, with a EUR 540 billion package, these exceptional measures taken at the EU level would bring to 1,290 billion Euros the amount anticipated specifically to support European recovery.

Based on conservative estimates of the leverage effect of the MFF and NGEU, the total investment that this package of measures could generate amounts to 3.1 trillion Euros. The measures are a strong response to the EP's call for a « *massive investment package for recovery of appropriate size, targeted at the sectors and geographical areas of Europe most affected and designed to tackle this unprecedented crisis* ».

This unity of purpose lays the groundwork for a swift and comprehensive agreement between the institutions. The EC will encourage co-operation between the EP and the Council on all elements of this Recovery Plan and invites them to review, on a regular basis, the implementation of the Recovery Plan.

It will also review on an annual basis the expenditure financed by external assigned revenues in the framework of the NGEU.

An early agreement on Next Generation EU and an ambitious long-term budget will send a clear signal that the EU is on the right track, with strong determination and solidarity.

3.3 A budget for European recovery and resilience

The EU's long-term budget, complemented by NGEU, has a very good chance of driving the European recovery. In fact, it provides a transparent and reliable framework, based on the Community decision-making and governance method, in which to insert the massive program of investments looming on the horizon. In addition to strengthening the single European market, the budget EU has proved to be a valuable catalyst for investment, cohesion and solidarity. In recent weeks, the EC has used all the flexibility allowed by the current one EU budget to allocate every single Euro available to the protection of human lives. While these interventions have shown that the current budget EU is able to provide concrete and timely support to Member States in situations crisis, on the other hand they have exhausted its flexibility, highlighting the urgent need for prepare new measures to guide the next crucial stages of the recovery.

The basic elements of the EC's proposals aimed at forming a long-term budget modern and flexible term, strictly oriented to the priorities of the Union, remain still valid today; the EC is now proposing to adapt and strengthen these proposals so that can drive the European recovery. The significant progress already made can be leveraged by the EP and the Council to pave the way for a timely agreement. The decisive challenge for this generation remains the double transition to a green Europe and digital, a point that is reflected in all the EC's proposals. Invest in a wave of large-scale renovations, in renewable energy and solutions based on clean hydrogen, clean transport, sustainable nutrition and an economy circular and smart has enormous potential to stimulate European economic growth. The support should be consistent with the Union's climate and environmental objectives. Bet on digital infrastructure and skills will help improve competitiveness and technological sovereignty, while investing in resilience to health challenges and autonomy strategic will allow the Union to better prepare for future crises.

NGEU will provide the EU budget with the additional capacity it needs to face the most pressing challenges in an incisive way. It will be an emergency tool *one tantum*, activated for a limited period and exclusively for the purpose of responding to the crisis's measures for recovery. Funds, disbursed to Member States through the EU budget, they will support investment and reform priorities and serve to strengthen programs financial essentials for the recovery until 31 December 2024. Raising funds on the markets financial costs will dilute the financing costs over time, so that Member States do not have to pay large additional contributions to the EU budget over the period 2021-2027.

The EC will also propose new own resources which could facilitate reimbursement of the funds raised on the market as part of NGEU. To change the economic crisis NGEU will have to be made operational as soon as possible. In order to make the necessary funds available as soon as possible to respond to the more pressing needs, the EC also proposes to change the current MFF for the period 2014-2020, making 11.5 billion Euro available already in 2020 of additional funding for REACT-EU¹¹³, the support tool for solvency and the European Fund for Sustainable Development¹¹⁴, given the urgency of these needs.

3.4 Next Generation EU¹¹⁵

The proposal that the EC made public on May 27, 2020 strengthens and articulates the plan launched by Macron and Merkel about ten days earlier (May 18). This proposal, which is called NGEU, confirms the disbursement by the EU of 500 billion Euros in the form of transfers, including guarantees, and adds 250 billion Euros in the form of long-term loans of the member states of the EU. These resources will be raised through issuance of securities on financial markets by the EC on behalf of the EU. These

¹¹³ REACT-EU (Recovery Assistance for Cohesion and the Territories of Europe) will be one of the largest programmes under new instrument Next Generation EU amounting to EUR 47.5 billion. This funding is entirely new: it is a top up to 2014-2020 programmes and additional to the cohesion allocations 2021-2027, bringing the total envelope of the Structural and Investment Funds higher than current levels and becoming the highest single-policy grant instrument in the EU budget.

¹¹⁴ The European Fund for Sustainable Development (EFSD) is one of the EU financial instruments that promote a pro-active development aid policy. It is part of the complex European external investment plan to support investments primarily in the EU neighbourhood and Africa. The EFSD applies the same financial model as the European Fund for Strategic Investments. By 2020, it is expected to generate €44 billion in investments (based on an initial EU contribution of €4.1 billion) to help create jobs and economic opportunities, address the socio-economic causes of migration, and contribute to the achievement of the UN sustainable development goals

¹¹⁵ M. Buti and M. Messori 'Next Generation EU: Una guida ragionata' Policy Brief, 29/2020 Luiss Business School.

emissions will be functional to the increase in the margin between own resources and disbursements from the Community budget. The connected European debt, which has a long-term duration (the first maturities will mature in 2028, the last ones in 2058), is guaranteed by

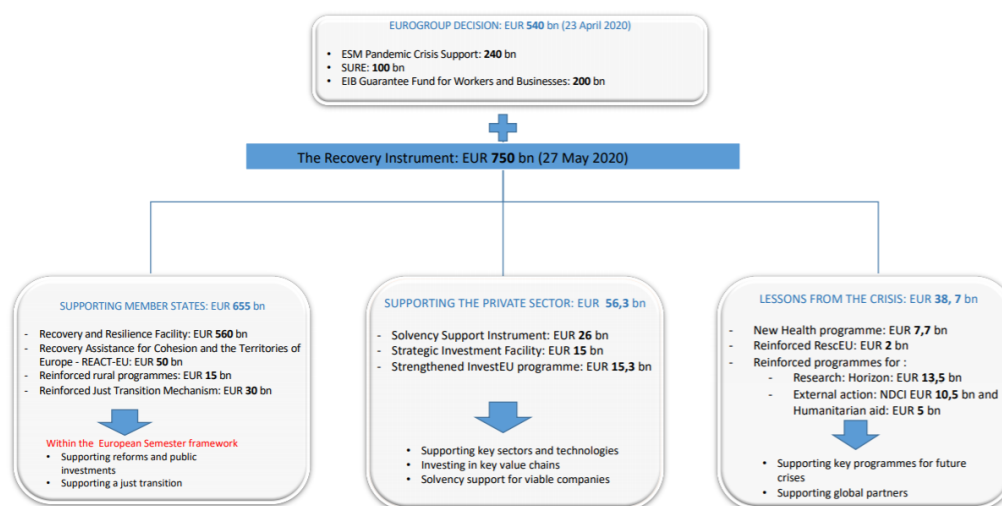
next MFFs and will be repaid, including interest, through increases in the revenue of these same MFFs, too through the introduction of new own resources and, for the component relating to 250 billion Euros of loans, from payment of financial charges and reimbursements by the beneficiary countries.

The few data recalled show that, combined with the large injection of liquidity by the ECB through the monetary transmission channel, almost 1,700 billion Euros up to mid-2021, is banking a potential of 3,000 billion Euros by the end of 2021, and with substantial but more limited loans from the Eurogroup and other institutions in the Euro area, around 540 billion Euros by the summer, NGEU opens up the possibility of a lasting economic recovery of EU member states. In particular, also thanks to the suspension of the adjustments required by the 'Stability and Growth Pact' and the enhanced purchases of public debt securities of EU countries, made by the ECB on secondary financial markets, national initiatives of economic policy have stemmed the pandemic emergency phase. The decisions of the Eurogroup and the further strengthening of the ECB's expansionary monetary policy are accompanying the transition phase that will last until autumn 2020. Starting from 2021, the NGEU will offer adequate quantitative support to the phase shooting.

A qualitative feature of the EC proposal allows us to add that NGEU also provides ingredients for a decisive leap in quality in the European integration process. It is true that, similarly to the Macron and Merkel's scheme, NGEU stands as a one-off initiative, that is, it is an extraordinary intervention relating only to flows of European expenditure or national public expenditure between 2021 and 2026 instead of pre-existing stock of public debt. However, NGEU is also an initiative with significant redistributive effects, as transfers of each EU member state to the MFF are roughly determined by the weight of the GDP compared to the EU total gross product; vice versa, the 750 billion Euros of transfers or loans they are allocated among the member states of the EU on the basis of a distribution mainly dictated by their fragility and the asymmetric and temporal intensity with which their economies have been hit by the coronavirus. The NGEU proposal, being

inscribed in the launch of the MFF 2021-2027, must be examined by the ECOFIN Council¹¹⁶ and, above all, it must obtain the approval of the European Council and the EP. In addition, providing for an increase in the ceiling of the Union's own resources, final approval requires not only the unanimity of the member states but also the ratification of the national parliaments.

3.4.1 The structure of NGEU



[Figure No. 2 Pillars of NGEU]

NGEU is divided into three pillars (see the figure taken from the European Commission website). The first pillar, called ‘Supporting Member States’, represents the largest part of the initiative as it provides for the disbursement of approximately 655 billion Euros to member states of the EU, approximately 87% of the total of NGEU, by the end of 2024. A part of this amount will be allocated under form of non-repayable transfers, which will be added to the transfer items present for some time in the MFFs the EU, cohesion funds and structural funds, the remainder will take the form of long-term loans term at very low interest rates because they are guaranteed by the Union budget. The most important component of the first pillar is the RRF that is endowed with resources of 560 billion Euros, equivalent to over 85% of ‘Supporting Member States’ and approximately 75% of the entire NGEU initiative. The destination of these resources, which will take the form of both transfers, for about 56%, and loans, for the remaining 44%, will be broad-

¹¹⁶ The Economic and Financial Affairs Council (ECOFIN) is one of the oldest configurations of the Council of the European Union and is composed of the economics and finance ministers of the 27 European Union member states, as well as Budget Ministers when budgetary issues are discussed.

spectrum. Indeed, the RRF aims to protect employment, to strengthen education and training of human resources, to support research and innovation, to improve health, to facilitate the evolution of the financial sector, to increase the efficiency of the public administration and the social and economic environment as expressed in articles 9¹¹⁷ and 10 of the Regulation EU 2021/241. However, it is mainly intended to accompany the recovery phase

of member states by supporting those investments and reforms that will be the foundation of the NRRP to be submitted for approval of European institutions in the context of the European Semester¹¹⁸. In its proposal, the EC emphasizes that such investment support aims to build a solid link between the economic recovery of individual states members of the EU and the objectives of digital innovation and implementation of the Green Deal, with the progressive reduction of emissions. The RRF is, therefore, strictly connected to the original objectives, stated by the President of the new EC, Ursula von der Leyen, at the time of her inauguration before the pandemic. In this sense, it represents an essential step for the realization of a development of the EU that is sustainable and long-term.

A second component of ‘Supporting Member States’, the ‘React-EU’, also aims to support green investments and digital innovations. It is expected to provide resources for around 50 billion Euros, is however, it is mainly intended for the countries and sectors most affected by the pandemic shock. In addition to encouraging innovations sustainable, it must therefore allocate a large part of the funds available to small and medium-sized enterprises and their employees and to activities related to tourism and culture. Finally, the first pillar of NGEU is complemented by additional funds, amounting to approximately 45 billion Euros, for the mechanisms and reforms needed to pass from the transition phase to the recovery phase. It is interesting to note that a portion of these funds will be used as leverage for EIB interventions.

¹¹⁷ « *Reforms and investments under the Facility should help make the Union more resilient and less dependent by diversifying key supply chains and thereby strengthening the strategic autonomy of the Union alongside an open economy. Reforms and investments under the Facility should also generate European added value.* » Article 9 Regulation EU 2021/241

¹¹⁸ The European Semester of the European Union was established in 2010 as an annual cycle of economic and fiscal policy coordination. It provides a central framework of processes within the EU socio-economic governance. The European Semester is a core component of the Economic and Monetary Union (EMU) and it annually aggregates different processes of control, surveillance and coordination of budgetary, fiscal, economic and social policies. It also offers a large space for discussions and interactions between the European institutions and Member States.

The second, 'Supporting the Private Sector' and the third pillar 'Lessons from the Crisis' of NGEU are destined to disburse a more limited amount of resources, 95 billion Euros, they are, however, called to play relevant roles.

The second pillar (with a budget of just over 56 billion Euros) will be dedicated to strengthening that 'Invest-EU' program, which, in the EC's approach, should ensure continuation strengthened by the Juncker Plan, and a new instrument for the recapitalization of companies located in the most important countries affected by the pandemic 'Solvency Support Instrument'. The three main programs, which substantiate the pillar, are in fact intended to provide the public financial basis for the 'Invest-EU' leverage for incentives to mobilize private resources and for the selection of efficient companies but with capitalization problems. Therefore, at least in the Commission's expectations, the limited financial commitment of the second pillar of NGEU should be able to activate, directly or indirectly, much larger loans and guarantees for European companies.

The third pillar, with a budget of just under 39 billion Euros, aims to finance 'European public goods' which emerged as priorities during the crisis; in particular, it launches a new health program at the level community. Furthermore, it pursues the aim of safeguarding relations between the EU and European economic partners in the new international context, which will tend to be characterized by value chains more internal to each of the large economic areas (China, United States, India, parts of Central and South America, as well as the EU) and that therefore, will urge a partial re-internalization in the single European market of specializations and sectors a intermediate technology. Finally, the third pillar also aims to support and strengthen funding for research named 'Horizon'.

3.4.2 Economic phases to be financed

EU member states will have to commit 60% of most of NG-EU's resources by 2022 and 40% residual by 2024; moreover, they will be called to account for the investments and reforms achieved thanks to them to these resources by 2026. This time frame of NGEU is important for several reasons.

Various commentators have criticized the delay, arguing that European economic systems are like this exposed to a high risk of falling into hysteresis phenomena during 2020.

At first glance, the criticism appears justified by the severity of the pandemic crisis. Compared to the recent financial crisis international (2007-09), which also produced the ‘great recession’ and then resulted in a European crisis (2010-13) which appeared to be the longest and heaviest of the new millennium, the depression induced by pandemic is causing an even more drastic drop in the average GDP of the EA and promises a delayed recovery and partial by all Member States. Yet despite the dramatic intensity of the crisis that we are experiencing, preliminary and aggregate empirical evidence is sufficient to instill doubts about the existence of a causal link between delayed allocation of NGEU resources and increased risks of hysteresis in the EA and in the EU.

EU has a need for additional financial needs in the two-year period 2020-21, attributable to the pandemic shock, the estimates are just under 2,000 billion Euros in a baseline scenario and exceed 2,500 billion Euros in an adverse scenario.

A reasonable way to identify the different phases are initial one ‘phase of the pandemic emergency’, the following one ‘phase of transition from peaks of the pandemic to recovery’ and the last one can be addressed as ‘phase of a sustainable recovery’.

Which can be substituted with different and related needs: above all in phase one and partially in phase two, that the need to bridge the investment both public and private, manifests itself in the transition phase but it becomes a problem to be solved only in the last phase. The need for productive recapitalization is spread between phases two and three, as both of them concern survival more than the strengthening and expansion businesses.

A translation of those in words into numbers, in a worst-case scenario: the coronavirus emergency phase would lead to financial needs slightly below 800 billion Euros, the financial needs of the transition phase around 500 billion Euros and the recovery phase of residual needs for around 1,200 billion Euros.

In the EA, alone the Eurogroup and other European Institutions have allocated about 540 billion Euros, attributable to phase two. In particular, the SURE should ensure funding to EA countries of about 100 billion of Euros to support the incomes of temporarily unemployed workers; the ESM offers financing of around 240 billion Euros for direct or indirect expenses related to the national health sector; the EIB should guarantee or lend loans to European companies for around 200 billion Euros. It follows that the huge

resources of NGEU do not necessarily finance the emergency and transition phases. Instead, they will be used to support that recovery which, in the next few years, will also have to ensure the convergence of the economies of more fragile Members towards a stronger EU.

Taking into account the national recovery initiatives undertaken by the countries stronger and by the leverage effects of NGEU, the latter's resources should be sufficient to purpose. The example of a 'fragile' country and heavily hit by the pandemic, is Italy. Between March and May 2020, the Italian government issued three decrees that mobilized more than 80 billion of resources that led to increases in public debt of approximately 130 billion Euros. Also, between March 2020 and June 2021, the ECB will end up buying around 220 billion Italian public debt securities in the Secondary financial Market. Added to the additional public spending in support of families and businesses that will be disbursed in the second half of 2020, these liquidity inflows are quantitatively sufficient to stem the impacts of the pandemic emergency without making the management of the Italian public budget unsustainable in the short term.

In addition, it has already been said that the Eurogroup and other European institutions have implemented various programs to support the economic transition of the EA countries in the post-pandemic phase. These programs will make available more than 100 billion Euros to Italy since the summer of 2020: the SURE for which Italy has made a request equal to 29 billion Euros, the ESM which makes available loans of around 37 billion Euros if the Italian authorities decide to request them, the EIB which should guarantee to grant loans to Italian companies for approximately 35 billion Euros. Finally, the 2014-2020 MFF offered to Italy, without co-financing, residual resources of more than 7 billion Euros.

The overall result is that Italy would already have more than 230 billion Euros available today to get out of the shock pandemic and to finance the transition phase. This is about 13.5% of the national GDP. This confirms that it seems rational to allocate the new resources, which should come from NGEU, to consolidate the recovery phase rather than the current phases of emergency or transition phase.

3.4.3 Redistributive effect¹¹⁹

As it is now widely recognized, the pandemic crisis has been a typical exogenous shock that has produced asymmetrical consequences on individual Member States and because of the different industrial structure and fiscal capacity. Furthermore, the pandemic shock was temporally ‘out of phase’ meaning that it struck at different times and with different duration in each country. The last aspect has created, in relatively less involved countries, a moral push to help the countries that were affected sooner and more heavily.

The reasons for the greater acceptability towards redistributive policies are linked to the awareness of the lack of aid to countries more affected that would in turn jeopardize the integrity of the Single Market.

Without ad hoc corrections, the post-pandemic would therefore be characterized by the strengthening of divergences between EU countries: the strongest countries, which tend to coincide with those with the largest fiscal capacity, would become even stronger in relation to the rest of the EU. Without a robust intervention aimed at supporting the countries most affected by the crisis, the risk would be to go through the Great Recession following the financial crisis of 2008 to the ‘Great Fragmentation’ of 2021, a consequence of the COVID-19 crisis, aggravated by the various powers of focus of European countries. Furthermore, a lack of solidarity with the countries most affected it would take on a negative ethical value. Being allocated in proportion to the fragility of the individual Member States due to the impact of the pandemic, NGEU resources are a potential tool to correct divergences, they will be particularly effective in a recovery phase rather than in an emergency phase, characterized by unselective public spending.

The redistributive effect is particularly relevant in the case of Italy. At the end of 2019, the Italian GDP accounted for about 11.3% of the European one; and, for the period 2014-2020, the Italian contributions to the MFF amounted to about 13.7% of the total national contributions, roughly equal to 70% of the overall size of the aforementioned seven-year budget; vice versa, according to the EC’s proposals, Italy could obtain over 170 billion Euros, just under 10% of its GDP at the end of 2019, divided into approximately 90 billion of long-term loans and 80 billion of subsidies; which would amount for the 22.7% of NGEU resources.

¹¹⁹ Clemens Fuest, ‘*The NGEU Economic Recovery Fund*’.

The other more fragile countries of the EA (Greece, Portugal, Spain) will be able to benefit from figures similar to those of Italy in relation to the intensity and temporal delays of the shock suffered from pandemic and the size of their economies.

The analysis carried out so far highlights an important aspect from the point of view of European economic governance: the redistributive effects between Member States, induced by NGEU, are activated by an initiative of the EC and are made possible thanks to the use of the MFF.

Since the first financial crisis, the EU Governance has been moving towards a more intern-governmental cooperation to reduce the qualitative leap in EU integration.

The actual payments to the member states of the largest components of NGEU require the formulation of national strategies that incorporate the priorities identified in the unique recommendations to each country. In particular, the individual beneficiary states are called upon to formulate a strategy to define specific investments, reform and policies to be financed with those resources. These specific national plans must obtain approval from the EC and the other European Institutions involved.

A concern, which NGEU will bring during 2021, will not be related to possible delays but, it will concern the strategies of the countries that will benefit from those resources from 2021 and 2024.

The description of the contents of 'Supporting Member States' and, in particular, of RRF confirms such concern: the actual access to the most relevant component of NGEU involves countries that will have to present a preliminary definition of a set of strategic investments and reforms, inscribed in a coherent high-profile programmatic and organizational framework. In particular, the use of the broader program, RRF, must be substantiated with concrete projects that have to be able to satisfy the priorities assigned by the European Semester to each of the requesting countries and that, above all, mark a national progress in terms of 'green' and 'digital' transition.

In other words, every of the Euro Area must justify the access to RRF resources through the development of an appropriate NRRP. In addition, each of these NRRPs must be consistent with the corresponding National Energy and Climate Plan, linked to the Green Deal and, therefore, developed within the 'Fund for a Just Transition', with specific

partnerships and with national operational programs with respect to the use of other EU funds. These considerations show that, for each of the EU member states, NRRPs plays a crucial role in order to access NGEU resources¹²⁰.

Each NRRPs must at least provide an explanation on how the country intends to:

- (a) address the challenges and priorities identified in the context of the European Semester;
- (b) strengthen its growth potential, the creation of new jobs and its resilience economic and social;
- (c) mitigate the impact of the crisis on the production system and access to resources, contribute to economic, social and territorial cohesion of the European Union;
- (d) contributing to green and digital transitions, managing the resulting challenges;

Each of these Plans must justify its internal consistency and specify which are:

- (e) the final objectives and expected milestones, also defining an indicative timetable for implementation of reforms, within a maximum period of four years, and investments, within a period of a maximum of seven years;
- (f) the individual investment projects envisaged and the related investment period;
- (g) the indicators to measure the stages of their implementation and full realization;
- (h) the total costs, estimated on the basis of appropriate justifications, for carrying out the reforms and investments included in the Plan;
- (i) the correspondence between the costs and the expected impacts on the economy and employment;
- (j) if provided, Union funding that is already in place or is in the process of being disbursed;

¹²⁰ « Past experiences have shown that investment is often drastically cut during crises. However, it is essential to support investment in this particular situation to speed up the recovery and strengthen long-term growth potential. A wellfunctioning internal market and investing in green and digital technologies, in innovation and research including in a knowledge-based economy, in the clean energy transition, and in boosting energy efficiency in housing and other key sectors of the economy are important to achieve fair, inclusive and sustainable growth, help create jobs, and reach EU climate neutrality by 2050. »
Article 7 Regulation EU 2021/241

- (k) the necessary accompanying measures with respect to the various projects related both to reforms and investments;
- (l) the different procedures followed for the monitoring and implementation of the Plan itself.

The complexity of drafting, submission and approval of the NRRP of each Member State is an excellent example of the fact that, even if the NGEU is approved by the European Council and other EU institutions, countries' access to related resources would be neither easy nor without conditionality.

In confirmation of what has already been said, such access would in fact require at least three steps. First, an effort preventive and systematic to define a strategic destination of the resources, made available by EC to individual member states through the specific programs included. Secondly, the translation of this strategy into concrete projects by submit for approval by the European Institutions and, then, to be carried out in fixed time periods. Finally, the implementation of individual projects through the effective transfer of the various flows of resources to their beneficiaries.

3.4.4 The approval process of NGEU

The agreement that reaches the European Council must be approved by the EP, while the decision on the EU's own resources will have to be ratified by all Member States in accordance with their constitutional procedures.

In the event that the new budget should not be adopted in time, Article 312 TFEU provides for a temporary extension of the EU own resources ceiling.

The EP (resolution of 23 July 2020 on the conclusions of the extraordinary meeting of the European Council of 17-21 July 2020¹²¹) has, among other things, criticized the cuts on the long-term EU budget made in particular to future-oriented programs; mostly related to climate, digital transition, health, youth, culture, infrastructure, research, border management and solidarity.

¹²¹ Council Conclusions: Special European Council, 17-21 July 2020. EU leaders agreed a recovery package and the 2021-2027 budget that will help the EU to rebuild after the pandemic and will support investment in the green and digital transitions. We have reached a deal on the recovery package and the European budget.

On September 16, 2020, the EP adopted a legislative resolution on States' resources management; it is now up to the Council of the EU to make a final decision, thus enabling the national ratification procedures to be initiated.

According to the resolution, new sources of revenue must be introduced into the EU budget to cover at least the costs related to NGEU and, to this end, calls for the approval of a binding timetable for the introduction of these new sources of revenue.

Finally, the resolution calls for the recovery to be financed in a sustainable way, for example by taxing cross-border polluters and multinationals without burdening the next generation.

On August 27, 2020, trilateral talks began between the EP, the German Presidency of the EU Council and the EC on the package approved by the European Council.

On the budget it would appear that the EP will be able to give its consent at the end of October.

As for the various sectoral regulations, their finalization depends on the consensus on the overall budget. Regarding, in particular, the RRF, it is currently being examined by the BUDG¹²² and ECON¹²³ committees and the trialogues could already take place in October.

3.4.5 The European Commission's guidelines

The EC has provided a clear guidance on the drafting of the NRRPs and on the projects to be submitted for funding in the communication 'Annual Strategy for Sustainable Growth 2021'.

« The European Semester provides a well-established framework for the coordination of the economic and employment policies to guide the Union and the Member States through the challenges of the recovery and twin transition. Member States' recovery and

¹²² The Committee on Economic and Monetary Affairs (ECON) is a committee of the European Parliament which is responsible for the regulation of financial services, the free movement of capital and payments, taxation and competition policies, oversight of the European Central Bank, and the international financial system.

¹²³ The Committee on Economic and Monetary Affairs (ECON) is a committee of the European Parliament which is responsible for the regulation of financial services, the free movement of capital and payments, taxation and competition policies, oversight of the European Central Bank, and the international financial system.

resilience plans should effectively address the policy challenges set out in the country-specific recommendations adopted by the Council. It will be our common interest to address reform and investment needs in parallel; both need to work hand in hand to achieve a mutually reinforcing impact. The recovery and resilience plans will need to reflect the relevant country-specific challenges and be aligned with the EU priorities. This includes the country-specific recommendations addressed to the Member States in recent years and in particular in the 2019 and 2020 Semester cycles. When translating those recommendations into specific reforms and investments, Member States should focus on those challenges and priorities that will generate the most lasting impact and will strengthen the growth potential, job creation, health systems and economic and social resilience and regional cohesion of the Member State. » (COM(2020) 575 final, Paragraph on European Semestre focus)¹²⁴

It reiterates the close link that will exist between the Plans and the European Semester: the project presented should respond to the challenges identified in the country-specific recommendations approved by the Council and be aligned with European priorities. Reforms and investments should be addressed in parallel, focusing on the challenges and priorities that will generate the most lasting impact and strengthen growth potential, job creation, and the resilience of health systems, economic and social resilience, and regional cohesion.

The Communication also outlines how some procedural steps of the Semester will be temporarily adapted to meet the needs of the Facility.

The key principle of the NRRPs is the green transition, with a view to achieving climate neutrality by 2050, and a significant reduction in gas emissions by 2030. In each national plan, climate-related spending must amount to at least 37%, with reforms and investments in energy, transport, decarbonization of industry, circular economy, water management and biodiversity.

The acceleration of emissions' reductions is urged through the rapid deployment of renewable energy and hydrogen, more action towards the energy efficiency of buildings,

¹²⁴ Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, 'Annual Sustainable Growth Strategy'.

investment in sustainable mobility, promotion of environmental infrastructure and protection of biodiversity;

Proposed reforms and investments should: improve connectivity; develop digital skills at all levels to support a labor market in transition and shape Europe's digital future, impacting public administration and businesses; build cutting-edge digital capabilities for example artificial intelligence, cybersecurity and microelectronics; promote equity, with desirable interventions aimed at ensuring equal opportunities, inclusive education, equitable working conditions and adequate social protection for young people, women and vulnerable groups like low-skilled, disabled and migrants; and macroeconomic stability. Member states should continue to provide in 2021 temporary fiscal support, in a context where the general safeguard clause of the 'Stability and Growth Pact' is activated and budgetary adjustment has been suspended.

Budget adjustments have been suspended. However, the safeguarding of medium-term fiscal sustainability is urged, stressing that as soon as conditions allow, fiscal policy should aim to ensure debt sustainability while increasing investment.

A reference is made to private debt, which is on the rise, and to the importance of ensuring its orderly development, including through the adoption of the orderly development, involving the establishment of insolvency frameworks.

« The COVID-19 crisis is taking its toll on employment and the profitability of the corporate sector. Private debt is increasing and the prospects for the timely repayment of outstanding debt are worsening. Against this background, it will be important to provide the right conditions to ensure speedy and effective remedies, including as regards the insolvency frameworks, while ensuring that lending to businesses and households continues in line with the best practices agreed between the financial sector, consumers and businesses. » (COM(2020 575 final, Paragraph on Private Debt)

Moreover 'European flagships'¹²⁵ have been defined. There are seven flagship projects that address issues common to all member states, they require significant investment,

¹²⁵ Flagships are visionary, science-driven, large-scale research initiatives addressing grand Scientific and Technological (S&T) challenges. They are long-term initiatives bringing together excellent research teams across various disciplines, sharing a unifying goal and an ambitious research roadmap on how to achieve it.

create jobs and growth, and are instrumental to the dual green and digital transition. They consequently would bring tangible benefits not only to a member country but to all Union citizens, and the EC strongly encourages their submission. This category includes any projects in:

- 1) clean technologies, development and use of renewables and their integration through modernized networks and enhanced interconnectivity;
- 2) improving the energy efficiency of public and private buildings;
- 3) acceleration of the use of sustainable, intelligent and accessible transportation, with charging stations and refueling and the extension of public transportation;
- 4) access to rapid broadband services, including fiber, 5G networks, and the development of communication with quantum cryptography;
- 5) making electronic identification and digital public services more modern and accessible, also with reference to justice and health;
- 6) a digital transition characterized by the strengthening of the industrial capacity of data cloud and the ability to develop powerful, cutting-edge and sustainable processors;
- 7) development of skills, with particular reference to digital skills and to education and vocational training for all ages.

The EC will encourage investments that benefit the Single market. They can also reinforce the strategic autonomy of the EU economy.

The EC has announced its active role in ensuring that all Member States interested can have access to these projects. It has also declared its willingness to play a coordinating role, especially when other European programs are involved.

In light of this element, it may be appropriate to consider strengthening the transnational and multinational dimension of EA, to which the Government's guidelines for the definition of the NRRP refer to in the paragraph dedicated to research and development.

In order to increase the capacity to absorb funds, it is also stated the importance of implement those aspects of the country-specific recommendations that can create a favorable environment for investments and reforms.

With specific reference to Italy, the recommendations for the years 2020 and 2019 have made reference to the need to reference to the need to *'improve the efficiency of the*

judicial system and the functioning of the public administration', in particular through the reduction of the length of civil trials at all levels of justice and improving the effectiveness of the fight against corruption, reforming the fight against corruption by reforming procedural rules in order to reduce the length of criminal trials.

The Guidelines foreshadow, in this regard this regard a reform of the justice system aimed, among other things, at reducing the length of the civil and criminal proceedings. Finally, it is specified that it will be possible for the member states to combine different sources of from the Union, as long as there is no double financing and the different contributions are indicated in the NRRPs. In such case, the importance of creating appropriate coordination mechanisms is crucial.

When evaluating projects, the EC will give great importance to the fact that specific, measurable, achievable, realistic and time-bound milestones and objectives are indicated with clear deadlines. The related indicators should be relevant and robust.

The Guide, structured in four parts, outlines additional and more specific guidance and a standard template for preparing plans.

In the first part (general objectives and coherence of the Plan): Member States are invited to prepare an introductory summary of the Plan, accompanied by key elements and figures quantifying the estimated overall impact. After the introductory summary, they are invited to provide information on which European flagship projects, among those identified in the 'Annual Strategy for Sustainable Growth 2021', will benefit from the funding of the Plan. In this regard, Member States are invited to describe, for each flagship project, the status quo and how they can be further developed instead to meet the 2025 ambitions at the EU level. Member States are also invited to describe planned reforms and investments. Finally, Member States are asked to provide a detailed explanation of how the proposed measures address the 2019 and 2020 country-specific recommendations and to submit Plans that demonstrate consistency across components and between reforms and investments.

In the second part (description of reforms and investments): Member States are required to submit a Plan divided into separate components and detail the investments and reforms included in each component, as well as the expected contribution, related targets, objectives and timelines, and their financing and cost. Components are supposed to be covered by a loan must be shown separately, including the same elements.

Member States are then asked to explain the extent to which the component will contribute to transitions that are green and digital, and how each investment and reform contributes to the goal of dedicating at least 37% of spending on climate goals and 20% on digital. Member States must also explain the extent to which the Plan will contribute to the achievement of climate neutrality and the 2030 goals for energy and climate set forth in the NECPs¹²⁶. Finally, Member States are required to provide interim and final targets and a timeline that will reflect progress in implementing the component's reforms and investments, and that will be linked to disbursements semi-annually. Clear and realistic targets are recommended and linked to a timeline for their achievement. In addition, it is required to provide information on the total cost estimated of each component.

In the third part (complementarity and implementation of the Plan): Member States are required to ensure that the Plan is consistent with: the relevant country-specific challenges and priorities identified in the context of the European Semester; the NRPs¹²⁷; the NECPs; the Partnership Agreements¹²⁸ and the programs that will be adopted as part of sectoral legislation related to EU funds (e.g. Cohesion Funds¹²⁹, Invest

¹²⁶ To meet the EU's energy and climate targets for 2030, EU countries need to establish a 10-year integrated national energy and climate plan (NECP) for the period from 2021 to 2030. Introduced under the Regulation on the governance of the energy union and climate action (EU/2018/1999), the rules required the final NECP to be submitted to the Commission by the end of 2019.

¹²⁷ National Reform Programmes (NRPs) are documents issued by EU Member States to the European Commission on an annual basis (since 2011), detailing the specific policies they will implement to boost jobs and growth and prevent/correct imbalances, and their concrete plans to comply with the EU's country-specific recommendations and general fiscal rules. NRPs are key instruments in the EU's European Semester process, which is a cycle of economic and fiscal policy coordination within the EU and part of the European Union's economic governance framework. The NRPs are based on the European Commission's Broad Economic Policy Guidelines, which set out common priorities and targets for national employment policies. The Commission's Employment Guidelines are intrinsically linked to the economic guidelines: together, they form the integrated guidelines that underpin the Europe 2020 strategy for smart, sustainable and inclusive growth.

¹²⁸ For the programming period 2014-20 each Member State has produced a Partnership Agreement (PA) in cooperation with the European Commission. This is a reference document for programming interventions from the Structural and Investment Funds and link them to the aims of the Europe 2020 growth strategy. It defines the strategy and investment priorities chosen by the relevant Member State and presents a list of national and regional operational programmes (OPs) which it is seeking to implement, as well as an indicative annual financial allocation for each OP.

¹²⁹ For the 2014-2020 period, the Cohesion Fund concerns Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia and Slovenia. The Cohesion Fund allocates a total of € 63.4 billion to activities under the following categories: The first one concerns trans-European transport networks, notably priority projects of European interest as identified by the EU. The Cohesion Fund will support infrastructure projects under the Connecting Europe Facility; the second one concerns environment: here, the Cohesion Fund can also support projects related to energy or transport, as long as they clearly benefit the environment in terms of energy efficiency, use of renewable energy, developing rail transport, supporting intermodality, strengthening public transport, etc. The financial assistance of the Cohesion Fund can be suspended by a Council

EU, Horizon Europe¹³⁰, Just Transition Fund¹³¹, Space Programme¹³², Connecting Europe Facility¹³³, Digital Europe¹³⁴, European Defence Fund¹³⁵ and Creative Europe¹³⁶).

In addition, given that public administration will play a central role in the implementation of the Plan, the Member States are called upon to provide the necessary administrative capacity to ensure that the reforms and investments are proceeding as planned. Member States are required to report on progress at least semi-annually, at the time of submission of payment requests. The information, provided through reports, will be used by the EC to monitor the Plans, to make decisions about payment requests, and to report on the progress and results of the report on the progress and results of the Facility. Finally, Member States are required to describe their national management and control systems

decision (taken by qualified majority) if a Member State shows excessive public deficit and if it has not resolved the situation or has not taken the appropriate action to do so.

¹³⁰ Horizon Europe is the research and innovation framework programme running from 2021-2027.

The EU institutions reached a political agreement on Horizon Europe on 11 December 2020. On this basis, the European Parliament and the Council of the EU proceed towards the adoption of the legal acts. The first Horizon Europe Strategic Plan (2021-2024) is expected to be adopted in February 2021.

The first work programmes are expected to be published by April 2021. It is possible that the work programmes for the European Research Council (ERC) and European Innovation Council (EIC) will be published earlier. The first calls will open once the work programmes have been published.

¹³¹ The Just Transition Fund is a new instrument with an overall budget of €17.5 billion, of which €7.5 billion are coming from the Multiannual Financial Framework (MFF) and €10 billion from the NextGenerationEU. The JTF is a key element of the European Green Deal and the first pillar of the Just Transition Mechanism (JTM). It aims to alleviate the social and economic costs resulting from the transition towards a climate-neutral economy, through a wide range of activities directed mainly at diversifying the economic activity and helping people adapt in a changing labour market.

¹³² The Commission welcomes the political agreement between the European Parliament and the EU Member States on the European Union Space Programme proposed by the Commission in June 2018. Trilogue negotiations have now concluded with the political agreement, pending the final approval of the legal texts by the European Parliament and the Council. The EU Space Programme will bring all existing and new space activities under the umbrella of a single programme.

¹³³ The Connecting Europe Facility (CEF) is a key EU funding instrument to promote growth, jobs and competitiveness through targeted infrastructure investment at European level. It supports the development of high performing, sustainable and efficiently interconnected trans-European networks in the fields of transport, energy and digital services. CEF investments fill the missing links in Europe's energy, transport and digital backbone.

¹³⁴ As part of the next long-term EU budget – the Multiannual Financial Framework – the Commission has proposed Digital Europe, a programme focused on building the strategic digital capacities of the EU and on facilitating the wide deployment of digital technologies. With a planned overall budget of €7.5 billion (in current prices), it will shape and support the digital transformation of Europe's society and economy.

¹³⁵ The European defence fund supports the cross-border cooperation between EU countries and between enterprises, research centres, national administrations, international organisations and universities. This applies to the research phase and in the development phase of defence products and technologies. It has 2 strands. Under the research strand, the EU budget will provide funding for collaborative defence research projects. Under the capability strand, the EU will create incentives for companies and EU countries to collaborate on the joint development of defence products and technologies through co-financing from the EU budget.

¹³⁶ The Creative Europe programme aims to support the European audiovisual, cultural and creative sector.

and related bodies established and sufficiently robust to provide assurance that interim and final targets are reliable, including control mechanisms and that the principles of sound financial management are respected.

In the fourth part (overall impact): Member States are asked to provide an overview of the impact macroeconomic and social impacts of the Plan along with an assessment of the macroeconomic outlook. In particular, the Plans should include, among other things, an estimate of their quantitative impact on GDP, employment, and other key macroeconomic variables, as well as an estimate of how the various components of the Plan will contribute to mitigating the economic and social consequences of the crisis and to strengthen economic, social and territorial cohesion; it would be necessary to explain how and to what extent the component is expected to improve over the status quo, including through quantitative indicators. Finally, Member States are asked to provide evidence that the previous level of public investment, excluding the Plan's grant, will at least be maintained for the horizon of the program.

3.5 Focus on Resilience and Recovery Facility and its legal basis

« The proposed Recovery and Resilience Facility (the 'Facility') will offer large scale financial support for public investments and reforms that make Member States economies more resilient, and better prepared for the future. It will help Member States to address the economic and social challenges they are facing, in an even more critical manner in the aftermath of the crisis, in various areas such as social, employment, skills, education, research and innovation, health issues, but also issues related to the business environment, including public administration and the financial sector. Crucially, it will also ensure that these investment and reforms focus on the challenges and investment needs related to the green and digital transitions, thereby ensuring a sustainable recovery. Investing in green and digital technologies, capacities and processes aimed at assisting clean energy transition, boosting energy efficiency in various key sectors of the economy will help create jobs and sustainable growth and allow the Union to make the most of the first-mover advantage in the global race to recovery. It will also help make the Union more resilient and less dependent by diversifying key supply chains. The identification and preparation of pipelines of relevant projects in line with the priorities

presented in the European Semester of economic policy coordination ('European Semester') is of utmost importance. »

As stated in the communication COM(2020) 408 final, regarding the proposal for a regulation of the EP and the European Council establishing a RRF, the RRF will play a central role in the recovery of EA. Valdis Dombrovskis, Executive Vice-President for an Economy that Works for People, said: *« This Facility provides EU countries with a unique chance to rebuild and revamp their economies for the post-COVID world. It is an opportunity build resilience and to embrace a more digital and greener future. That requires both the right investments and the right reforms. To recover from the crisis and meet the challenges of the 21st century, Member States should seize the opportunity of the RRF funding to free their economies of bottlenecks and refresh outdated policies and practices. We call on Member States to continue working closely with the Commission on compiling robust and credible recovery and resilience plans so we can start disbursing the funding as soon as possible. I thank the European Parliament for its support and the speed with which it has approved the RRF. »*

As mentioned before the most important program foreseen under the NGEU is the device for RRF which, with an endowment of 672.5 billion Euros (360 billion in loans and 312.5 billion in grants), would have the objective of supporting Member States' investments and reforms under the European Semester in order to facilitate a lasting recovery, improve the resilience of EU economies and reduce divergences between Member States.

The general objective of the Device would in fact be to promote economic cohesion as stated in its regulation, social and territorial Union by improving the resilience and adjustment capacity of Members States, mitigating the social and economic impact of the crisis and supporting green transitions and digital, thus helping to restore the growth potential of the Union's economies, to incentivize job creation in the post-Covid-19 crisis period and to promote sustainable growth.

« The COVID-19 outbreak in early 2020 changed the economic, social and budgetary outlook in the Union and in the world, calling for an urgent and coordinated response both at Union and national level in order to cope with the enormous economic and social consequences as well as asymmetrical effects for Member States. The COVID-19 crisis as well as the previous economic and financial crisis have shown that developing sound, sustainable and resilient economies as well as financial and welfare systems built on

strong economic and social structures helps Member States respond more effectively and in a fair and inclusive way to shocks and recover more swiftly from them. A lack of resilience can also lead to negative spill-over effects of shocks between Member States or within the Union as a whole, thereby posing challenges to convergence and cohesion in the Union. Reductions in spending on sectors, such as the education sector, cultural sector and creative sector, and on healthcare can prove counterproductive to achieving a swift recovery. The medium and long-term consequences of the COVID-19 crisis will critically depend on how quickly Member States' economies and societies will recover from that crisis, which in turn depends on the available fiscal space of Member States to take measures to mitigate the social and economic impact of the crisis, and on the resilience of their economies and social structures. Sustainable and growthenhancing reforms and investments that address structural weaknesses of Member State economies, and that strengthen the resilience, increase productivity and lead to higher competitiveness of Member States, will therefore be essential to set those economies back on track and reduce inequalities and divergences in the Union. » Article 6 Regulation EU 2021/241 of the European Parliament and of the Council of February 2021 establishing the Recovery and Resilience Facility.

The agreement reached in the European Council outlined the main features of the Device. On 17 September 2020, the EC defined the strategic guidelines for its implementation in the 'Annual Strategy for Sustainable Growth 2021' and presented the guidelines for the Member States and a standard model for submitting plans recovery and resilience¹³⁷.

¹³⁷ « *The types of financing and the methods of implementation under this Regulation should be chosen on the basis of their ability to achieve the specific objectives of the actions and to deliver results, taking into account, in particular, the costs of controls, the administrative burden, and the expected risk of non-compliance. Non-repayable financial support under the Facility should take the form of a sui generis Union contribution to be determined on the basis of a maximum financial contribution calculated for each Member State and taking into account the estimated total costs of the recovery and resilience plan, which should be paid based on the achievement of results by reference to milestones and targets of the recovery and resilience plans. Therefore, such contribution should be established in accordance with the sector-specific rules provided in this Regulation, pursuant to the rules on simplification relating to financing not linked to costs laid down in Article 125(1) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (6) (the 'Financial Regulation'). Specific rules and procedure should therefore be laid down in this Regulation, subject to the general principles of budgetary management under the Financial Regulation, concerning the allocation, implementation and control of non-repayable financial support under this Regulation. Financing not linked to costs should apply at the level of payments from the Commission to Member States as beneficiaries, irrespective of the reimbursement in any form of financial contributions from Member States to final recipients. Member States should be able to use all forms of financial contributions, including simplified cost options. Without prejudice to the right of the Commission to take action in the event of fraud, corruption, conflicts of interests or double funding from the Facility and other Union programmes, payments should not be subject to controls on the costs actually incurred by the beneficiary. » Article 18 Regulation EU 2021/241*

The implementation of the Device will be coordinated by a specific task force of the EC for the recovery and resilience in close cooperation with the Directorate-General for Affairs Economic and Financial. A steering committee chaired by President Ursula von der Leyen will provide political guidance to the task force to help ensure that the Device is implemented consistently and effectively.

« To ensure that the financial support is frontloaded in the initial years after the COVID-19 crisis, and to ensure compatibility with the available funding for the Facility, the funds should be made available until 31 December 2023. To that end, it should be possible for 70 % of the amount available for non-repayable financial support to be legally committed by 31 December 2022 and 30 % between 1 January 2023 and 31 December 2023. By 31 December 2021, upon request of a Member State to be submitted together with the recovery and resilience plan, an amount of up to 13 % of the financial contribution and, where applicable, of up to 13 % of the loan of the Member State concerned can be paid in the form of a pre-financing within, to the extent possible, two months after the adoption by the Commission of the legal commitments. » Article 46 Regulation 2021/241

The 70% of the grants (218.7 billion Euros) are expected to be committed in 2021 and 2022 according to predetermined allocation criteria (population, inverse of GDP per capita and average rate unemployment in the last 5 years compared to the EU average 2015-2019), while 30% would be committed in 2023 taking into account the decline in GDP in 2020 and the cumulative period 2020-2021, criterion that would replace that of unemployment.

The maximum loan volume for each Member State should not exceed 6.8% of its own GNI, but this limit could be increased in exceptional circumstances to be assessed on a case-by-case basis. The EC has estimated for Italy a share of grants equal to 65.4 billion Euros, based, for 30% of the resources that will be committed in 2023, on summer 2020 economic forecast. Among the major European economies, Germany would resources equal to 22.7 billion Euros, France to 37.4 billion Euros and Spain to 59.1 billion Euros.

Conclusions

The last chapter explain in the detail the need behind the funds that are going to be disbursed by NGEU, they will not just support the recovery of the EA but they will project it towards in a more sustainable and green future, in order to increase its competitiveness and attractiveness with respect to all other major economies.

Is NGEU within the mandate of the ECB?

Because of the monetary nature of NGEU, the similarities with previously analyzed instruments such as the PEPP, the ESM and the OMT are prominent. The debate of NGEU legitimacy being inside or outside the legal framework is legit: the legal cases described and analyzed in previous has highlighted the criticalities of deploying such complex legal instruments, that may arise with treaties that constitute the legal framework of the ECB.

The pivotal articles that were brought to the ECJ in the Weiss case, the Gauweiler case and the Pringle case, are article 123, 119 and 127.

« 1. 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.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments. »

Article 119 TFEU entails the adoption of economic policies by member states.

« 1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions. » Article 123 TFEU prohibit any form of any form of credit facilitation by the ECB or other EU institutions.

« 1. The primary objective of the European System of Central Banks (hereinafter referred to as 'the ESCB') shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

2. The basic tasks to be carried out through the ESCB shall be:

- to define and implement the monetary policy of the Union,*
- to conduct foreign-exchange operations consistent with the provisions of Article 219,*
- to hold and manage the official foreign reserves of the Member States,*
- to promote the smooth operation of payment systems.*

3. The third indent of paragraph 2 shall be without prejudice to the holding and management by the governments of Member States of foreign-exchange working balances.

4. The European Central Bank shall be consulted:

- on any proposed Union act in its fields of competence,*
- by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 129(4).*

The European Central Bank may submit opinions to the appropriate Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.

5. The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

6. The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings. »

Article 127 TFEU lays down unequivocally the activities that are with mandate of the ECB.

In the above-mentioned legal cases the CJEU has always ruled against the un-legitimacy of European monetary instruments, in a scenario where some other legal entity would bring to the CJEU, NGEU would reasonably face the same outcome because of the sound legal basis expressed in Articles 1, 2 and 3 of the Regulation (EU) 2021/241 of the EP and of the Council of 12 February 2021 establishing the RRF.

« In accordance with Articles 120 and 121 of the Treaty on the Functioning of the European Union (TFEU), Member States are required to conduct their economic policies with a view to contributing to the achievement of the objectives of the Union and in the context of the broad guidelines that the Council formulates. Article 148 TFEU provides that Member States are to implement employment policies that take into account the guidelines for employment. The coordination of the economic policies of the Member States is therefore a matter of common concern. »

Article 1 Regulation EU 2021/241

« Article 175 TFEU provides, inter alia, that Member States are to coordinate their economic policies in such a way as to attain the objectives on economic, social and territorial cohesion set out in Article 174 TFEU. »

Article 2 Regulation EU 2021/241

« Article 174 TFEU provides that, in order to promote its overall harmonious development, the Union is to develop and pursue actions that lead to the strengthening of its economic, social and territorial cohesion. It further provides that the Union shall, in particular, aim to reduce disparities between the levels of development of the various regions and the backwardness of the least favoured regions. Efforts to reduce disparities should in particular benefit islands and outermost regions. The different starting positions and specificities of regions should be taken into consideration in the implementation of Union policies. »

Article 3 Regulation EU 2021/241

The legal framework of NGEU is solid and does not leave any room to interpretation.

A final perspective as an inheritance could rather consist in encourage a new interpretation of the European Economic, not only to allow European policies to be more immediate and effective but to allow the EU to structure and nurture a strong Single Market in terms competitiveness and sustainability.

The impact of NGEU on the European Economic Constitution

The European Economic Constitution is concerned with the systematic relationship between the economic system and the legal system, where the microeconomic and macroeconomic aspects are held together. The former refers to the internal market and competition law, the latter to economic, fiscal and monetary policy measures. At the beginning, while the internal market and competition were fully within the Community's remit and ultimately addressed to private individuals, macroeconomic measures were essentially the responsibility of the States. However, the idea that, in order to be effective, the two aspects had to complement each other should be translated into an economic Union soon took hold. The internal market was at the heart of the European economic constitution.

More than sixty years after its foundation, the relationship between the European Union and its member states is still critical.

The object of the analysis, does not concern the level of feasible choices which, is governed by the principles of subsidiarity and proportionality, guaranteeing the decision-making and action powers of Member States in areas that do not fall within the exclusive

competence of the EU Authorities, but, more specifically, the ‘legal domain’ of decision-making powers exercised in the EU, including National legal systems. NGEU is another opportunity to assess whether a change in such ‘legal domain’ i.e. European Economic Constitution might be necessary.

This concern is crucial since « *it also affects other citizens residing in the 'illiberal regime' and, indirectly, all residents in the EU through the participation of these regimes in the European decision-making processes and in the adoption of rules that are binding for all* »¹³⁸

The European Council, in its extraordinary meeting of July 21 2020, approved, as mentioned before, in its conclusions (EUCO 10/20, extraordinary meeting of the European Council), an important plan for the recovery of the EU from the economic crisis generated by the pandemic that still afflicts the European continent and the entire world. It is a rather detailed package of measures and significantly large in its amount, which combines the traditional MFF with the new NGEU.

It has been rightly observed that the symbolic value of wanting to distribute, through the implementation of the NGEU, the most significant part of the financial resources, to modernize and relaunch the economy of the Member States through subsidies, is high because it « *refers to an idea of European solidarity, including inter-state solidarity, which has long been lacking in the Union despite the fact that the Treaties are not without references to the principle-value of solidarity* »¹³⁹

In this way, a fundamental and inalienable relationship emerges between the ‘rule of law’¹⁴⁰, all EU principles, and the appropriate and efficient use of resources for both public and private investments supported by the budget of the EU; in terms of the purpose of the underlying budget policies, and in terms of the Union's legal system in its

¹³⁸ L. Pech - K.L. Scheppele, *‘Illiberalism Within: Rule of Law Backsliding in the EU, in Cambridge Yearbook of European Legal Studies’*, 19, 2017.

¹³⁹ C. Fasone, *‘Le conclusioni del Consiglio europeo straordinario del 21 luglio 2020: una svolta con diverse zone d’ombra’*, from diritticomparati.it, July 29th 2020

¹⁴⁰ The rule of law is one of the fundamental values of the Union, enshrined in Article 2 of TEU. It is also a prerequisite for the protection of all the other fundamental values of the Union, including for fundamental rights and democracy. Respect for the rule of law is essential for the very functioning of the EU: for the effective application of EU law, for the proper functioning of the internal market, for maintaining an investment-friendly environment and for mutual trust. The core of the rule of law is effective judicial protection, which requires the independence, quality and efficiency of national justice systems.

relationship with the constitutional systems of the Member States. Such relationship embodies a turning point on the interpretation of the European Economic Constitution, it won't represent a boundary within which to operate but rather a building block from which to start the design of monetary policies meant to sustain the EA economy and project it into the future in a sustainable way.

Regarding the role that the budget policy can play in the construction of the area of freedom, security and justice, the European Commission's 'Reflection Paper on the future of EU finances', COM(2017)358 of June 28th 2017, has already expressed its opinion, with regard to the need to link the disbursement of funds, provided for in the budget, to the respect by the Member States of common European values, such as democracy, freedom, the rule of law, fundamental rights, equality, solidarity, sustainability and peace.

As a matter of fact, a system based on legal rules to be observed, good governance and democracy, not only can correspond to the expectations of European citizens but, at the institutional level, it is an indispensable condition to promote entrepreneurial initiative, innovation and investment, which can only be safeguarded in the supranational dimension if the legal and institutional framework, present in the member states, fully reflects and embodies those fundamental common values.

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