The EU Recovery Instrument and the Constitutional Implications of its Expenditure

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2021–2027 Recovery Plan for Europe and its Recovery and Resilience Facility have altered elements of the EU institutional equilibrium – constitutional consistency of the ensuing design – implications for the constitutional evolution of the EU – analysis of the expenditure of the Recovery and Resilience Facility – new fiscal economic stabilisation function – conditionality attached to the funds – strengthened role of the Council – nuanced multi-level financial governance – the fiscal stabilisation function enshrines a potential form of constitutional mutation – the new institutional framework for the expenditure of the EU funds seems to lean towards an intergovernmental preeminence

INTRODUCTION

In a decisive determination to support economic recovery in the aftermath of the Covid-19 pandemic, the EU formulated an ambitious countercyclical fiscal expansionary policy. The pandemic coincided in time with the elaboration of the new 2021-2027 Multiannual Financial Framework, and this allowed the shaping of the entire financial programming process on the pattern of the intended fiscal expansion. The EU Recovery Instrument was adopted in December 2020 as an exceptional, one-off initiative allowing increased budgetary payments until December 2026. The total resources available for budgetary commitments for the 2021-2027 period were raised to €1.8 trillion, almost doubling the amounts of the previous 2014-2020 Multiannual Financial Framework. This radical expansion triggered new arrangements to spend the funds, affecting the relations between the EU Institutions, and among the

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different territorial levels of government. The ensuing changes bring out important ideas underlying the way in which the constitutional checks and balances system is conceived, and supranational integration and intergovernmental cooperation are pursued.[1]

Due to its empirical importance, the Recovery Plan for Europe has been a major subject of research, especially from the economic[2] and the political perspectives,[3] with the legal-constitutional approach mostly limited to the critical doctrinal analysis[4] and the study of the specific politics leading to its adoption and setting up of its facilities.[5] There is a dearth of constitutional explanatory analyses addressing the institutional reconfiguration brought by the Recovery Plan's implementation arrangements. This is something that needs to be redressed, given the significance of public finance as a driver for constitutional transformation. In order to tackle this research deficit, this article conducts legal-doctrinal and explanatory analyses of the Recovery Plan for Europe, focusing on its expenditure side (which comprises budgetary formulation, execution and control functions). For that purpose, it reviews Council Regulation 2020/2093 laying down the 2021-2027 Multiannual Financial Framework, Council Regulation 2020/2094 establishing the EU Recovery Instrument, and Regulation 2021/241 establishing the Recovery and Resilience Facility. The article asks, from an empirical perspective, how has EU public finance architecture changed since 2021? The focus is directed in particular towards the Recovery and Resilience Facility, which concentrates the largest part of the new funds (amounting to €672.5 billion, about 90% of the total EU Recovery Instrument). From a legal-doctrinal perspective, the aim is to elucidate the constitutional consistency of the new institutional design. From an explanatory perspective, the goal is to identify and expound the implications for the EU constitutional evolution.

The first section clarifies the categorical framework, discusses the empirical and theoretical significance of public finance in the history of constitutionalism (and its particular influence on supranational constitutionalism), and sheds light on the

[1]D. Webber, *European Disintegration? The Politics of Crisis in the European Union* (Red Globe Press 2019).

[2]As an example *see* A. Botta et al., 'Fighting the COVID-19 Crisis: Debt Monetisation and EU Recovery Bonds', 55(4) *Intereconomics* (2020) p. 239. S. Watzka and A. Watt, 'The Macroeconomic Effects of the EU Recovery and Resilience Facility', *IMK Policy Brief No. 98* (2020).

[3]C. de la Porte and M.D. Jensen, 'The Next Generation EU: An Analysis of the Dimensions of Conflict behind the Deal', 55(2) *Social Policy & Administration* (2021) p. 388.

[4]M. Ruffert and P. Leino-Sandberg, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment', 59(2) *Common Market Law Review* (2022) p. 433.

[5]B. De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', 58(3) *Common Market Law Review* (2021) p. 635. R. Crowe, 'An EU Budget of States and Citizens', 26(5-6) *European Law Journal* (2020) p. 331.

fiscal economic stabilisation function that the EU Recovery Instrument sets in place. Second, the institutional changes brought about by the Recovery Instrument in the EU expenditure system (comprising budgetary formulation, execution and control) are analysed. Third, the constitutional consistency of the Recovery Plan for Europe is discussed. Fourth, the impact that the innovations introduced might have on the trends underlying the EU's constitutional evolution, is addressed. Finally, the main research arguments are summarised. The Recovery Plan for Europe *de facto* enshrines a new EU competence of fiscal economic stabilisation that conveys values of positive solidarity. The ensuing design has some features of supranational upgrading, although important institutional elements are tilted towards the intergovernmental side, with a preponderance of the Council and the member states, and a lack of multi-level governance. These aspects need to be set against the backdrop of the extraordinary situation and the policy innovation context in which they are taking place.

Categorical and theoretical framework

While it is a rather understudied subject from the constitutional scientific perspective, public finance is a major driver of constitutional transformation. The very genesis of constitutionalism connects with the power of the ruler to tax and spend, as could be glaringly seen in the 1215 Magna Carta, which sowed the seeds of the 'no taxation without representation' principle.[6] In the specific history of the EU, public finance's constitutional bearing is also evident, as shown in the 1970 and 1975 Budgetary Treaties that reinforced the European Parliament,[7] or the post-1985 steady budgetary expansion that enabled political integration and territorial enlargements.[8] The intertwining of public finance and constitutional law is a characteristic feature of the EU institutional evolution.[9]

The principle of 'no taxation without representation' is an essential element of the liberal-democratic constitutional architecture. It implies that if there is taxation, there will be demands for greater representation. The principle can also be read as 'no taxation without participation', meaning that, if there is taxation, then the existence of financial means at the disposal of the state will tend to create

[6]E.L Richardson, 'The Revolution that Began in 1215: Forces behind the War of Independence', 66(263) *The Round Table* (1976) p. 225.

[7]R. Crowe, 'The European Budgetary Galaxy', 13(3) *EuConst* (2017) p. 431.

[8]M. Shackleton, *Financing the European Community*, The Royal Institute of International Affairs (Pinter Publishers 1990); D. Strasser, *The Finances of Europe: The Budgetary and Financial Law of the European Communities*, 3rd edn. (Official Publications 1992).

[9]J. Lindeboom, 'The Transformation of the Economic and Monetary Union: Solidarity, Stability, and the Limits of Judicial Authority', 17(4) *EuConst* (2021) p. 754.

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stakeholders with vested interests on policy agendas ready to be funded, leading to a greater popular involvement in politics. Conversely, there is the principle of 'no representation without taxation', implying that the existence of a representation bond will make the taxation of the citizens more palatable, since the fiscal policy will have a greater buy-in. There is also the principle of 'no participation without taxation', meaning that, if there is participation, citizens will be more likely to accept (and even demand) taxes. This is so because citizens will actively require financial means to match their political expectations with empirical results.

This relation can also be seen from the perspective of the good financial management principle (which looks not at the taxes, but at the expenditure). From this perspective, there is 'no good financial management without representation', since, if there is good financial management, there will be less disaffection of citizens with politics, and this will increase their feeling of representation. And there is the principle of 'no good financial management without participation': good financial management will create a community of beneficiaries of the funds that will be incentivised to actively participate in politics. Again, the reverse of this relation can be seen: 'no representation without good financial management', which means that representation creates an incentive on the representatives (under the pressure of their constituencies) to properly manage the public purse. And there is 'no participation without good financial management': participation properly channels the preferences of the citizens into the policy agenda, contributing to a better financial management.

As a result, there is a total of eight combinations that link taxation, representation, participation and good financial management. These combinations connect input legitimacy (triggered by representation and participation) and output legitimacy (drawn from good financial management) with fiscal policy. This shows how taxation and public expenditure are situated, symmetrically, in a critical place for the functioning of democratic polities. In this context, public finance becomes a crucial thread of the constitutionalist state, weaving together supreme organs of political power among themselves and between them and the people,[10] articulating both input and output channels of legitimacy.

The design of the EU public finance system has an impact on the process of definition of a supranational constitutional framing. Supranationalism is a design feature whereby international organisations grow governmental structures possessing full jurisdiction over policy domains.[11] Intergovernmentalism, on the other hand, is conceptualised as a design feature whereby international

[10] A.M. Porras-Gómez, 'The Control Pyramid: A Model of Integrated Public Financial Control', 36(1) *Financial Accountability & Management* (2020) p. 73.

[11] A.S. Sweet and W. Sandholtz, 'European Integration and Supranational Governance', 4(3) *Journal of European Public Policy* (1997) p. 304.

organisations keep governmental structures in which decisions are taken by their member states, whose autonomy is not preempted.[12] Setting constitutional constraints on supranational power has been identified with a new constitutionalism.[13] This new, supranational constitutionalism is characterised by its evolving nature. Accordingly, supranational international organisations situate themselves on a gradual spectrum in which different degrees of constitutionalisation can be achieved.[14] The EU is positioned on such a spectrum, with a gradual supranationalisation of public expenditure systems that are incrementally embedded in an evolutionary constitutional framework aiming to ensure democratic legitimacy.

Supranational constitutionalism has the particularity that it articulates a multi-level system of power, where sovereignty is retained by the constituent units (the member states). In this vein, the finances of supranational organisations can be regarded from the fiscal federalism perspective. Member states keep the *kompetenz-kompetenz*, which is projected, not only towards the material range and scope of policy competences, but also to the reach of the financial power exercised. With respect to the supranational organisations' expenditure, its effective implementation and control enable the organisations to make their presence more visible, potentially starting processes of greater interaction with citizens, which might buttress democratic legitimacy. This result is crucial, since supranational organisations tend to be affected by a structural legitimation crisis, as they are ontologically situated far away from the citizenry. Thus, supranational public expenditure becomes an essential fulcrum in the balance between supranational and intergovernmental forces striving to shape constitutional designs and set institutional evolutionary lines.[15]

A special characteristic of supranational constitutionalism is that it ushers in new constitutional categories. In this new scenario, the constituent power is not the demiurge that sets the rules of the political game once and for all. It rather pushes for a continuous and gradual process of legalisation (or constitutionalisation) of politics. As a result, a particular role might be played by the constitutional

[12] G. Tsebelis and G. Garrett, 'The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union', 55(2) *International Organization* (2001) p. 386.

[13] M. Kumm, 'The Best of Times and the Worst of Times', in P. Dobner and M. Loughlin, *The Twilight of Constitutionalism?* (Oxford University Press 2010).

[14] N. Walker, 'Taking Constitutionalism beyond the State', 56(3) *Political Studies* (2008) p. 536; B. Rittberger and F. Schimmelfennig, 'Explaining the Constitutionalization of the European Union', 13(8) *Journal of European Public Policy* (2006) p. 1148.

[15] German Constitutional Court, Judgment of 30 June 2009 - 2 BvE 2/08 at 252 ⟨https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html⟩, visited 31 October 2022. Aware of this, the German Constitutional Court categorised public finance as a policy area 'particularly sensitive for the ability of a constitutional state to democratically shape itself'.

mutations, understood as situations where there is an implicit change in the sense of the constitutional norms[16] without a parallel change in their literal wording. Constitutional mutations transform the material constitution[17] without following the constituted reform mechanisms. This is a concept that has been used to refer to EU constitutional policies as a result of the transformations brought about since the Great Recession.[18] The political commitment of the member states to ensure financial stability by all means, and to allow for positive solidarity schemes in order to maintain it, has been identified as an instance of 'transformation of the founding contract'.[19] This implies an 'exercise of constitutional power outside the law' which, however, 'does receive recognition in the law',[20] connecting with the classic 'constitutional mutation' of Jellinek. Precisely one of the findings of this article is that the Recovery Plan for Europe, by legalising a new, EU-wide fiscal stabilisation function, deepens in the constitutional mutation that has been taking place in the EU public finance system since 2010.

The economic stabilisation function intends to smooth the fluctuation of economic cycles by targeting major drops in the aggregate demand. This can be done by means of monetary or fiscal policies. In the case of the fiscal economic stabilisation, an increase in public debt mobilises national and foreign savings, enabling the execution of expenditure and grant programmes (or tax rebates) in order to prompt a demand expansion that brings the national income back to its potential level.

The new financial architecture

The 2021-2027 Multiannual Financial Framework brought an exceptional growth in the funds at the disposal of the EU. The budget increased to €1,074 trillion (up from €961 billion in the previous 2013-2020 Multiannual Financial Framework), plus €750 billion from the EU Recovery Instrument. The EU Recovery Instrument is conceived as a one-off programme (Recital 6 and Article 3 Council Regulation 2020/2094) formally situated outside the

[16]G. Jellinek, *Verfassungsänderung und Verfassungswandlung: eine staatsrechtlich-politische Abhandlung* (O. Häring 1906).

[17]M. Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed during the Eurozone Crisis', 53(5) *Common Market Law Review* (2016) p. 1237.

[18]G. Martinico, 'EU Crisis and Constitutional Mutations: a Review Article', (165) *Revista de Estudios Políticos (nueva época)* (2014) p. 247; C. Closa, 'The Transformation of Macroeconomic and Fiscal Governance in the EU' in S. Champeau et al., *The Future of Europe. Democracy. Legitimacy and Justice after the Euro Crisis* (Rowman & Littlefield 2014) p. 37.

[19]V. Borger, *The Currency of Solidarity: Constitutional Transformation During the Euro Crisis* (Cambridge University Press 2020).

[20]Ibid., p. 358.

Multiannual Financial Framework, which, using as a legal basis Article 122 TFEU (as stated in the preamble of the Council Regulation 2020/2094), envisages different facilities. The Recovery and Resilience Facility, comprising up to €672.5 billion (90% of the Recovery Instrument funds), stands out among these facilities. The Council Legal Service is of the view that Council Regulation 2020/2094 is based on Article 122(1) TFEU,[21] which broadly empowers the Council to adopt 'measures appropriate to the economic situation'. While it mentions 'in particular [. . .] severe difficulties [. . .] in the supply of certain products', the Council Legal Service considers that Article 122(1) TFEU offers a *numerus apertus* of circumstances that might justify those 'measures appropriate'. The Recovery and Resilience Facility is directly delivered to the member states, who are the funds' beneficiaries under a direct management modality (Articles 8 and 22(1) Regulation 2021/241). As a result, the funds are transferred to the member states, who manage them freely for the furtherance of *broad*[22] goals and policy objectives (Article 1.2 Council Regulation 2020/2094 and Articles 3 and 4 Regulation 2021/241), and the attainment of milestones agreed with the Commission (Article 24.2 Regulation 2021/241). Regulation 2021/241 is explicitly based on Article 175 TFEU, which provides for the EU's support on the achievement of economic, social and territorial cohesion. This denotes an explicit redistributive intent, that takes for granted the asymmetric character of the economic crisis engendered by the Covid-19 (as stated in recital 6 Regulation 2021/241). The Recovery and Resilience Facility aims to repair the damage caused by the pandemic, whilst supporting the EU's long-term economic transformation (chiefly along the lines of green economy and digitalisation objectives – as per recitals 7, 10 and 12, and Article 4).

The Recovery and Resilience Facility is a combined loan and grant programme (up to €360 billion in loans and €384.4 billion in grants – Article 2 Council Regulation 2020/2094) disbursed to the member states (recital 8 and Articles 2 and 4.2 Regulation 2021/241). The inverse of the per capita Gross Domestic Product and the relative unemployment rates are the allocation keys (Article 11), denoting the redistributive goal.[23] 70% of the funds will have to be committed in the years 2021 and 2022, with the remaining 30% in 2023 (Article 12). All payments arising from these commitments shall be made by 31 December 2026 (Article 24). These tight deadlines advance the expansionary fiscal policy goal.

[21]Council Legal Service, 'Opinion on the Proposals on Next Generation EU', 9062/20, 24 June 2020.

[22]The European Court of Auditors, in its Opinion on the Regulation 2021/241, pointed out precisely the broad nature of the policy goals set. *See* ECA, Opinion 6/2020, p. IV.

[23]De Witte, *supra* n. 5, p. 675.

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To start receiving the funds, member states have to present National Recovery and Resilience Plans, which must be in line with the Recovery Instrument and the Recovery and Resilience Facility's political priorities, addressing in particular challenges identified in the European Semester (Article 17.3 Regulation 2021/241). They have to be evaluated by the Commission (Article 19 Regulation 2021/241) and approved by the Council (Article 20 Regulation 2021/241). Once they have been approved, the Commission can conclude a financing agreement with the member state concerned, which will constitute a specific legal commitment (Article 23 Regulation 2021/241).

According to Article 24.2 Regulation 2021/241, the member states can submit to the Commission a request for payment twice a year (and this submission might be aligned with the European Semester's reporting cycle[24]). The Commission checks compliance with macroeconomic fiscal balance criteria (Article 10 Regulation 2021/241) as well as with the milestones and targets set in the Recovery and Resilience Plans (Article 24.3 Regulation 2021/241). If its assessment is negative *in terms of the fiscal balance criteria*, it will make a proposal to the Council for suspension of payments (Article 10.1 Regulation 2021/241), which shall be deemed adopted unless the latter decides to reject it (Article 10.3 Regulation 2021/241). On the other hand, if the assessment is negative *in terms of the compliance with the Plan's milestones and targets*, payments will be directly suspended (Article 24.6 Regulation 2021/241), initiating a process that, if there is a persistent lack of cooperation from the member state, can lead to the withdrawal of the financial commitments and the eventual termination of the programme (Articles 24.8 and 24.9 Regulation 2021/241). If the Commission's assessment is positive, the Economic and Financial Committee (composed of member states, European Central Bank and the Commission – Article 134 TFEU) is asked for an opinion (Article 24.4 Regulation 2021/241). If at least one member state considers that there have been serious deviations from the milestones and targets, then payments would be withheld and the matter referred to the next European Council (recital 52 Regulation 2021/241). This mechanism has been labelled as the 'emergency brake'.[25]

According to Article 8 Regulation 2021/241, the Recovery and Resilience Facility is to be implemented by the Commission in direct management (a modality envisaged in Article 62 Regulation 2018/1046 – Financial Regulation), with the member states as beneficiaries (Article 22.1 Regulation 2021/241). As a result,

[24]B. Vanhercke and A. Verdun, 'The European Semester as Goldilocks: Macroeconomic Policy Coordination and the Recovery and Resilience Facility', 60(1) *Journal of Common Market Studies* (2022) p. 208.

[25]E. Salvati, 'Crisis and Intergovernmental Retrenchment in the European Union? Framing the EU's Answer to the COVID-19 Pandemic', 6(1) *Chinese Political Science Review* (2021) p. 13.

the funds will be disbursed to the member states, and it will be *entirely* their responsibility to formulate and implement the specific programmes that will channel them to the final recipients (recital 18). This choice facilitates the rapid injection of the funds into the member states' economies, meeting the fiscal expansionary goals of the Recovery Instrument. In this context, the constitutional responsibility of the Commission for the legality and regularity of the funds (envisaged in Article 317 TFEU) will stop at the gates of the member states. This means, in principle, that as long as the funds are properly delivered to the latter, the disbursement made by the Commission will, in the eyes of the EU law, be legal and regular, regardless of how they are later spent on the ground. Nonetheless, that assertion, valid for a financial programme where member states are listed as beneficiaries, has to be nuanced. This is so, first, because the member states have to describe, in the Recovery Programmes and in the financing agreements, the basic design features of the financial management and control systems (Article 18.4 Regulation 2021/241), which come to be validated when the Recovery Programmes and financing agreements are approved, respectively, by the Council and the Commission. Second, the EU Institutions are attributed the right to conduct on-the-spot controls (in conformity with Article 129.1 Financial Regulation) and to impose sanctions of proportional reduction of the funds budgeted or recovery of the funds disbursed (Article 22.5 Regulation 2021/241) if illegalities are found (or reported by the member states). This prerogative has to be acknowledged by the member states in their respective financing agreements (Article 23 Regulation 2021/241). Third, Article 22 Regulation 2021/241 envisages that member states shall provide: a summary of the audits that were carried out; management declarations assuming responsibility for the use of the funds; and a listing of the projects financed and the identities of the recipients. Fourth, with the purpose of aggregating control findings and reports and rendering a comprehensive picture of the implementation of the funds, the Commission is to make available an 'integrated and interoperable information and monitoring system' (Article 22.4 Regulation 2021/241), which the member states are invited to use. Fifth, the Recovery and Resilience Facility will fall within the scope of the discharge procedure under Article 319 TFEU, as explicitly stated in Article 22.3 Regulation 2021/241. Consequently, the European Court of Auditors will be able to audit the Facility as part of its Annual Report. These five elements of Commission's involvement in the financial control might seem to create a certain co-responsibility in the use of the funds. However, it is convenient to make at least four caveats here.

First, the beneficiaries are the member states, and thus the Commission's legal responsibility will still stop at the latter's gates. Another thing would be the political responsibility, or a potential legal responsibility created by a certain *fictio iuris* sustained on some form of *objective responsibility*, with *culpa in eligendo* or *culpa in* *vigilando*. However, this potential political (or legal) responsibility would be hard to attribute, because of the three caveats that follow. Second, it will be the member states who will design (and manage) the specific programmes that will channel the funds, remaining free to set in place a loose regulatory framework, where expenditure requirements are easy to meet, as well as a weak control system, where illegalities might easily escape the radar. This can neutralise any potential controls that the Commission might urge be set in place (or even put in place itself). Third, even if there was a case of illegality, the member states will not have an incentive to report it to the Commission.[26] Fourth, the combined Commission-European Court of Auditors financial control and audit 'firepower' will be extremely weak, since EU administrative expenditure is to grow by a meagre 10% during the 2021-2027 Multiannual Financial Framework (a small proportion in comparison with the 90% total budgetary growth). More so given the strained administrative capacities of the Commission, still affected by the post-financial crisis cuts in administrative expenditure. Without a proper control system being ensured regulatorily (since the Regulation 2021/241 does not envisage specific control obligations for the member states), and without the necessary number of controllers and auditors, the chances for the EU Institutions to find illegalities in the expenditure will be like finding a needle in a haystack.

In this setting, it seems that the situation will be similar to the indirect management of budgetary support in External Action, where funds are just wired into the recipient states' treasuries, becoming fungible. Whatever is done afterwards with those funds does not matter to EU law, and could not matter, since there are no effective means of realistically tracking them down. The Commission remains responsible for the sound financial management of EU funds (Article 317 TFEU), even under the Recovery and Resilience Facility, but in this case – as in External Action's budgetary support – its responsibility *legally* ends at the gates of the member states, where, effectively, 'the buck stops'. The Court of Auditors and the Parliament will still be constitutionally free to make the Commission *politically* responsible for the illegalities and irregularities performed on the ground. The constitutional consistency of this stance is another thing altogether, given the four caveats listed above.

The constitutional consistency of the new expenditure arrangements

The Recovery Plan for Europe has *de facto* incorporated a new fiscal economic stabilising dimension to the EU competences' list. This comes to fill a gap in

[26]G. Cipriani, *The EU Budget Responsibility without Accountability?* (CEPS Paperbacks 2010) p. 53.

the constitutional architecture: the supranationalisation of the monetary policy in Maastricht and the subsequent limitation of the member states' fiscal policy prerogatives (current Article 126 TFEU) illuminated the need for a supranational fiscal capacity to properly absorb economic shocks. This was made clear in the 1993 Maastricht decision of the German Constitutional Court.[27] With no monetary policy available, and the fiscal policy also unavailable due to the risk aversion of the financial markets, the 2010-2012 financial crisis highlighted the limitations of means available to *individual* Euro area member states to absorb the impact of *asymmetric* shocks (that is, reductions in the aggregate supply or demand affecting some member states substantially more than others). In the midst of the crisis, two emergency mechanisms were created to provide financial support to Euro countries in difficulties: the European Financial Stabilisation Mechanism (a loan facility created by Council Regulation 407/2010 on the basis of Article 122.2 TFEU); and the European Financial Stability Facility (a loan vehicle created on an intergovernmental basis by the Euro area member states). The operations conducted were back-to-back loans aimed at specific member states. In 2012, the European Stability Mechanism was set in place, a separate International Organisation that effectively took over the functions of the former facility.

The idea of having an EU-level budget for the purpose of financial assistance started to circulate in 2012, with discussions on a budgetary instrument (then named 'competitiveness and convergence instrument') expressed in documents such as the Four Presidents' Report, and the 2015 Five Presidents' Report.[28] The December 2018 European Council agreed on the need to create a 'budgetary instrument for convergence and competitiveness',[29] on the basis of the proposal of the Commission for a Regulation on the establishment of a European Investment Stabilisation Function *covering the Euro area*.[30] This would have institutionalised a loan programme of financial assistance (with a concessional part: the interest cost of the loans would be subsidised, effectively allowing to lend with a 0% interest rate). While it was called 'Stabilisation Function', this fund was to set in place a redistributive financial assistance to stabilise *individual* member states, rather than

[27]Decision of the German Constitutional Court of 12 October 1993 *In Re Maastricht Treaty* at 29-30, ⟨https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf⟩, visited 31 October 2022.

[28]I. Begg, 'What does the Five Presidents' report mean for the future of the euro?', *LSE Europe Blog* (2015), ⟨https://blogs.lse.ac.uk/europpblog/2015/06/23/what-does-the-five-presidents-report-mean-for-the-future-of-the-euro/⟩, visited 31 October 2022.

[29]European Parliament. Governance framework for the budgetary instrument for convergence and competitiveness for the euro area (BICC) 2019-07 (2019).

[30]European Commission. Proposal for a Regulaiton of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function COM/2018/387 (2018).

a fund with the potential to stabilise the entire EU economy. It is for that reason that the initiative considered Article 175.3 TFEU as its constitutional basis. It was understood that the latter allows for the creation of an instrument supporting public investment in member states that are confronted with a large asymmetric shock, with a view to strengthening cohesion. However, the proposal was not taken up.

Be that as it may, there was no EU-wide fiscal stabilisation function before the Covid-19 crisis hit. The only economic stabilisation function was the monetary one, whose room for manoeuvre was exhausted after 10 years of monetary expansion. Consequently, the Recovery Instrument was designed as a way to stabilise the entire EU economy in response to the Covid-19 crisis. Bringing with it the possibility of developing an expansionary fiscal policy in order to stimulate the aggregate demand, the EU Recovery Instrument enables the stabilisation of a downward economic cycle. The Recovery Instrument triggers a pure Keynesian economic policy at the EU-wide level that inevitably requires the issuance of debt, channelling savings to stimulate the aggregate demand. While it lasts, the new instrument will complete the arsenal of economic policies theorised by Musgrave (allocation, redistribution and *stabilisation*),[31] in line with Article 3 of the Treaty on the European Union (TEU) and its goal of having an *economic* union.

No EU-wide supranational fiscal stabilisation function is expressly envisaged in the EU Treaties:[32] this is a domain left to the member states (within the limits of Article 126 TFEU) and a potential intergovernmental coordination (Articles 5, 121 and 136 TFEU). Article 119 TFEU (which delineates the purposes of Title VIII TFEU), if taken in its literal sense, does not contemplate the possibility of a supranational fiscal policy triggering Keynesian multipliers by means of surpluses and deficits in the EU budget. And Articles 5, 121 and 136 TFEU are quite clear in their coordinative, and not operational, stance ('The Member States shall coordinate' – Article 5; 'The Council shall [. . .] formulate [. . .] guidelines' – Article 121.2 TFEU; 'The Council shall [. . .] monitor economic developments' – Article 121.3 TFEU; 'The Council shall [. . .] adopt measures [. . .] to strengthen the coordination and surveillance [. . .] to set out economic policy guidelines' – Article 136 TFEU).

Then there is Article 122 TFEU, which refers to emergency situations. Article 122.2 TFEU would be excluded for an EU-wide stabilisation function, since, as stated by the European Court of Justice in *Pringle*, it should be interpreted as a

[31] R.A. Musgrave and P.B. Musgrave, *Public Finance in Theory and Practice*, 3rd edn. (McGraw Hill 1989) p. 3-17.

[32] European Parliamentary Research Service. BRIEFING. EU Legislation in Progress 2021-2027 MFF European Investment Stabilisation Function (EISF), (2019) p. 5.

basis for assisting single member states, and not for stabilising 'the euro area as a whole'.[33] Article 122.2 provides that the EU may grant *financial assistance* to member states. One might wonder whether what the member states receive under the Recovery Instrument is not financial assistance. However, while the Recovery Instrument is delivered directly to the member states as beneficiaries in a direct management modality (and that will, by itself, help to balance the member states' public finances), there are broad policy goals for the use of the funds. It is the existence of these goals that leads the Council Legal Service to conclude that the Recovery Instrument does not grant 'financial assistance'.[34] Interestingly, the Council Legal Service seems to understand 'financial assistance' as the transfer of financial resources *solely for the purpose of* balancing the public finances of a state.

Then the only option left would be Article 122.1 TFEU – precisely the legal basis claimed for the Recovery Instrument. That article is a real 'black hole', in the sense that it could mean almost anything: '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'. Hence, an 'economic situation' would empower the Council to decide 'measures'. This can be seen as the closest to an EU 'state of emergency', which would situate the Council as a 'guardian of the constitution' (or, in this case, 'guardian of the treaty') in the Schmittian sense.[35] The Council Legal Service has already given its opinion, claiming that Article 122.1 TFEU can serve as the basis for the EU Recovery Instrument.[36] However, some precisions should be made, which bring out the possible constitutional mutation lying behind this interpretation. First, Article 122.1 TFEU starts by saying 'Without prejudice to any other procedures'. This points to the importance of the systematic interpretive method here, that would understand Article 122.1 TFEU in connection with the other Treaty provisions. One of them, Article 310 TFEU, by enshrining the principle of budgetary equilibrium, seems to go against the possibility of an EU-wide fiscal countercyclical policy of economic stabilisation. This is so, because a fiscal expansionary policy aims at expanding the aggregate demand by raising expenditure or lowering taxes, something that would inevitably require the issuance of debt.[37] Individual member states could conduct a fiscal expansion with the help of a European assistance

[33] *See* ECJ 27 November 2012, Case C-370/12, *Pringle*, para. 65.

[34] Council Legal Service, *supra* n. 21, at point 119.

[35] L. Vinx, *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) p. 12.

[36] Council Legal Service, *supra* n. 21, at point 120.

[37] A. Spilimbergo et al., 'Fiscal Multipliers', 2009(011) *IMF Staff Position Notes* (2009); D.N. Weil, 'Fiscal Policy', 18 *The Concise Encyclopedia of Economics* (2008).

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programme (as the wording of Article 122 TFEU seems to imply), with the excess in fiscal surpluses of the better-off member states funding the increase in expenditure (or decrease in taxes) of the recipient states. But, in the scenario of an EU-wide fiscal expansion, this financial capital transfer from the wealthy to the worse off member states would not create a net increase in fiscal capacity (since it would subtract from some states to add to others: the net result would be zero). To have an EU-wide fiscal expansion there needs to be a net increase in public expenditure, and this can only be done by reducing fiscal surpluses at the EU level (if there are any, which is rarely the case),[38] and subsequently, running fiscal deficits and resorting to debt. This is something that would contradict the meaning of Article 310 TFEU. Second, Article 122.1 TFEU mentions 'a spirit of solidarity between Member States'. In this respect, the General Court has clarified that this 'spirit of solidarity [. . .] indicates that such measures must be founded on assistance between the Member States'.[39] And, assistance *between* member states points to a redistributive economic function by virtue of which some member states help others to stabilise their economies, rather than an EU-wide stabilising one.

On the basis of Article 122 TFEU, the Recovery Instrument sets in place major facilities that articulate different policies, which have a paramount countercyclical stabilisation function.[40] Of course, it can be argued that the main goals are allocative and redistributive and would only tangentially have stabilisation as their secondary effect. However, we sustain that the *centre of gravity* of the policy is precisely situated on EU-wide fiscal economic stabilisation (as pointed out in recitals 4 and 5 of Council Regulation 2020/2094) – and this is something which does not fit well in the TFEU. By focusing more on the harder-hit states, the stabilisation function of the Recovery and Resilience Facility intends constitutionally to build upon the redistributive function recognised both in Article 3 TEU and in Title XVIII TFEU. Nonetheless, if stabilisation is considered as a standalone policy function (as Musgrave's economic theory suggests), surreptitiously adding a stabilisation function by arguing that in reality the Recovery Plan is about redistribution could be regarded as a creeping enlargement of competences. The ensuing constitutional mutation is ultimately justified by the Commission on the basis of a legal argumentation grounded on Article 122 TFEU, claiming that it

[38] *See* Eurostat, Government deficit/surplus, debt and associated data, ⟨https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do⟩.

[39] GC 30 September 2015, Case T-450/12, *Anagnostakis* v *Commission*, EU:T:2015:739, p. 42. This consideration was confirmed by the ECJ on appeal, 12 September 2017, Case C-589/15 P, *Anagnostakis* v *Commission* EU:C:2017:663, para. 71.

[40] P. Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture', 47(4) *Legal Issues of Economic Integration* (2020) p. 8-9.

'allows for targeted derogations from standard rules in exceptional crisis situations'.[41] As a result, Article 122 TFEU is brandished as a sort of financial 'state of emergency'.

On another hand, the financial management of the Recovery Instrument gives preeminence to the intergovernmental actors. As we have seen, the member states are the ones in charge of the execution of the funds. And the Council has an important role in the approval of the Recovery and Resilience Plans and their monitoring. From a discourse analysis perspective, the difference in the mentions of the Parliament and the Council indicates the importance granted to each of them in the institutional design. The Parliament is mentioned only 85 times in the Regulation 2021/241, well below the 138 occasions that the Council is named. And when Parliament is mentioned, it is just as a reminder that it has to be kept informed. In general, Article 25.2 Regulation 2021/241 (and recital 60) requires that the Parliament has to be provided with the same level of information than the Council. In particular, the Commission will keep it informed through a bi-monthly 'Recovery and Resilience Dialogue' (Article 26 Regulation 2021/241). Likewise, the Parliament is involved in the approval and potential revocation of Commission delegated acts (Article 33.6 Regulation 2021/241) referred to the definition of indicators and methodologies to be used by the member states in their reporting (Articles 29.4 and 30.2 Regulation 2021/241).

The elaborate process for approval of the recovery and resilience plans and its strong *ex-ante* conditionality can be seen as another consequence of the expenditure system tilted towards the intergovernmental side.[42] The *ex-ante* conditionality balances a situation of direct management with funds just handed to the member states for them to spend (on the basis of the broad targets and milestones agreed in the Recovery and Resilience Plans), where the Commission loses much of its insight and operational clout on how they are implemented on the ground. The importance of the *ex-ante* conditionality also connects with previous policy trends, following the introduction of the 'precautionary principle' to verify institutional and administrative capacities in the Operational Programmes under the 2013-2020 Multiannual Financial Framework.[43] However, in the case of the Recovery and Resilience Facility, the direct management arrangements, by just delivering the funds to the member states for them to attain broad policy goals, restricts the conditionality to general political, operational and macroeconomic requirements, falling short of determining the specifics of the implemention

[41] A. Mathis, 'Assigned Revenue in the Recovery Plan. The frog that wishes to be as big as the ox?' Briefing requested by the BUDG committee, European Parliament (2020) p. 1-2.

[42] J. Pisani-Ferry, *Europe's Recovery Gamble* (Bruegel 2020).

[43] A.M. Porras-Gómez, 'The Evolution of the Internal Control System for the Structural Funds: Between the European Commission and National Authorities' in H. Aden et al., *Financial Accountability in the European Union* (Routledge 2020) p. 145 at p. 155-156.

and control mechanisms. It should be noted that it is these broad requirements that allow the Commission to claim Article 121.2 TFEU as the legal basis, hence escaping Article 122.2 TFEU and the complications that it entails (following the requirements set by the Court of Justice in *Pringle*: Article 122.2 TFEU would allow assisting only singular member states; and it would require macroeconomic conditionality as per Article 125 TFEU).[44]

Following the intergovernmental logic, it is the Council which may suspend commitments when the Commission's assessment is negative in terms of the fiscal balance criteria (Article 103 Regulation 2021/241). Similarly, while it is the Commission that gives the green light for payments, the Economic and Financial Committee gives an opinion which the Commission must take into account in its assessment (Article 24.4 Regulation 2021/241) and, according to recital 25 Regulation 2021/241, there would be a referral to the European Council if one or more member states in the Economic and Financial Committee consider that another member state did not achieve its targets (the 'emergency brake').

The accelerated speed required for the budgetary execution, with funds having to be committed by the end of 2023 and paid by the end of 2026 (Articles 12 and 24 Regulation 2021/241, respectively) prompts the question: will the Commission be able to cope with its constitutional responsibility of ensuring good financial management, enshrined in Article 317 TFEU? Timely and correct implementation will be complicated by administrative absorption problems. Connected to this need to overcome absorption problems, there has been a radical simplification by virtue of which, as long as the funds are properly delivered to the member states' treasuries, the expenditure will be deemed legal and regular. Direct management implies a direct link between the Commission and fund beneficiaries. If the final recipients (citizens and companies who receive the money on the ground) were considered to be the fund beneficiaries, an enormous administrative effort would be required on the part of the Commission. Avoiding this, the Recovery and Resilience Facility has defined the member states as the legal beneficiaries of the funds. This effectively dissociates beneficiaries and recipients, interposing the member states as unavoidable screens between the EU and the recipients of the funds. However, direct management with the member states as beneficiaries blurs the supranational dimension of the grant programmes, leaving them to decide on their own, within the broad guidelines set in the respective Recovery and Resilience Plans and financing agreements, the implementation and control of the funds. This is very unlike the shared management of the Agricultural and Structural funds, where the Commission is involved throughout the planning, execution and control stages of the financial management; or the

[44]*Pringle*, *supra* n. 33, in particular p. 65 and p. 131-135.

indirect management prevalent in most of the External Action funds, where the Commission can shadow all the financial management stages if it deems so.[45] It is also very different from the direct management of research and innovation funds, where the Commission is engaged directly with the final recipients as beneficiaries. Under the Recovery and Resilience Facility, the Commission will have its hands tied regarding the financial management of the funds, something that can cloud the supranational interest that it embodies by virtue of Article 17 TEU.

The direct financial management design goes counter to the partnership principle, in the sense that any actor can be excluded from the financial management if the national authorities so decide. In this vein, the Recovery and Resilience Facility's Regulation has left aside the subnational governments and civil society circuits, as well as the cross-national dimension of the programmes. With respect to cross-nationality, all that is foreseen is the need to inform on whether it has been taken into account by the national plans (Article 18.4(h) Regulation 2021/241), but there is no specific obligation to plan for cross-national programmes. Subnational and civil society actors are nominally mentioned in recital 34, as well as in Article 18.4(q) Regulation 2021/241, but these provisions do not set any obligation regarding their involvement – only the need for the recovery and resilience plans to mention the consultation processes where available. In fact, attention should be paid to recital 18 Regulation 2021/241: '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'. This result-oriented institutional design carries with it an obligation on the member states to adapt their budgetary implementation arrangements to most suitably deliever the quick results required. And this might go against more complex decentralised or transnational governance arrangements. It is in this respect that the Committee of the Regions deplored that 'the new measures to enhance the flexibility and accelerate the use of cohesion policy funding bear the risk of increased centralisation at Member State level'.[46] The sidelining of the multi-level governance schemes contradicts one of the main institutional trends of the EU financial management,[47] enshrined in Article 8 of the European Structural and Investment Funds' Regulation 2021/1060. This opens the way to a potential recentralisation of the financial functions, which is something that is already happening. First, it can be seen in Germany, where the initial implementation of the Recovery and Resilience Facility is leading to a reduction in the effective involvement of subnational entities, affecting especially

[45]A.M. Porras-Gómez, 'Multi-level Governance of Grant Programmes. The Case of Cohesion and External Action in the European Union', *Public Money & Management* (2022) p. 1.

[46]Committee of the Regions, Resolution 2020/C 440/01, p. 12.

[47]Porras-Gómez, *supra* n. 43.

small and less-resourced Länder and municipalities.[48] It is also happening in Spain, where the national government has centralised the main decisions concerning the distribution of the funds,[49] as well as in Italy.[50]

Furthermore, the Recovery and Resilience Facility's direct management system creates parallel procedures that come on top of (and in practice, compete with) the Structural Funds' traditional shared management procedures. This will bring an additional workload to public administrations and fund recipients, who will have to prepare new plans, produce different indicators, monitor data and provide information in separate reports using disparate procedures. Given the easier management system for the Recovery and Resilience Facility, and the fact that the latter does not impose a co-financing requirement (something that the Structural Funds do – Article 112 Regulation 2021/1060), a substitution effect will be likely, whereby recipients will prefer to apply for Recovery and Resilience Facility funds instead of Structural Funds. This is actually something explicitly envisaged in Article 7.1 Regulation 2021/241, which provides for the possibility to transfer resources allocated under shared management to the Recovery and Resilience Facility. The result, again, will be more direct management with the member states as the protagonists, and less shared management with the subnational governments and social actors as partners.

Since the financial modality is direct management and the beneficiaries are the member states, the normal audit work of the European Court of Auditors will be distorted when it comes to reporting financial error rates in its Annual Report. This is so because, *strictu sensu*, the legal responsibility of the Commission is limited to delivering the funds to the member states' treasuries. Then it would be the responsibility of the member states to grant those funds to the final recipients. The member states' authorities symbolically assume some political responsibility via 'management declarations' envisaged in Article 22 Regulation 2021/241, but the political bearing of these declarations is dubious, to the extent that, when EU law talks about 'management declarations', it is referring to declarations signed by the civil servant responsible for the administrative unit that spends the money (*see* Article 74.1(f) Regulation 2021/1060). Most likely, these civil servants will not have domestic political accountability. Hence, the empirical repercussion of these 'management declarations' will not go beyond a potential

[48]A.S. Körner and H. Scheller, 'The EU Recovery and Resilience Facility: Federal conflicts in the Development and Implementation Process in Germany', 22 *Revista 'Cuadernos Manuel Giménez Abad'* (2021) p. 18-20.

[49]R.R. Ortega, 'La controvertida gestión de los fondos de recuperación en España: exigencias europeas y consenso futuro', 80 *Revista Española de Derecho Europeo* (2021) p. 126.

[50]S.C. Matteucci, 'A Further Twist towards Centralisation and Uniformity. Governance and Public Sector Reforms in the Italian Recovery and Resilience Plan', 63 *Revista catalana de dret públic* (2021) p. 3.

'administrative responsibility' within the member states, plus some degree of 'naming and shaming'. If the delivery of the funds to the final recipients is irregularly done, the Commission will not be legally responsible in the sense of Article 317 TFEU. Nonetheless, within the sphere of its constitutional autonomy, the European Court of Auditors might still go down to the details and audit the errors committed in the disbursement made to the final recipients. And it would be explicitly entitled to do so, since, according to Article 22.2 Regulation 2021/241, the financing agreements have to 'expressly authorise' the Court of Auditors to exert its rights. Paradoxically, this is so in a situation where the member states are not accountable to the European Parliament in the budgetary procedure (according to Article 317 TFEU). The Court of Auditors would then be auditing beyond the reach of the Commission's legal responsibility – and by doing so it would be implicitly enlarging the range of the latter's political responsibility. The Commission would be politically responsible without being legally responsible, regardless of Article 317 TFEU's responsibility ending at the gates of the member states. How would the Parliament react to an audit report highlighting hard-to-justify high error rates? Even if the Commission would not be legally responsible under Article 317 TFEU, it could still be deemed politically responsible and face the ensuing consequences (with the ultimate threat of a negative parliamentary discharge of the accounts). This might create problems: already under shared management the Commission sees how illegalities that are not directly caused by its services (but rather by the member states' services) are attributed to it.[51] Now, under the direct management mode with member states as the beneficiaries, the clout of the Commission to shape financial management procedures will be consdierably weaker. But the political responsibility will again tend to be all-encompassing. If the execution of the funds is audited at the final recipients' level, certainly the Commission will have to face damning audit reports and mounting political contention with the Parliament.

In the same vein, it is contradictory that, despite the fact that the funds are totally managed by the member states, and despite the Commission's legal responsibility stopping at the gates of the latter, the Commission will still be entitled to perform controls on the ground (Article 22.2 Regulation 2021/241) and to impose financial corrections in cases of illegal or irregular transactions (Article 22.5 Regulation 2021/241). Furthermore, it does not make much sense to recognise this prerogative without a parallel increase in the Commission's administrative capabilities – something that has not been forthcoming. The logic of funds spent by the member states and responsibility being borne by the Commission, and the

[51]A.M. Porras-Gómez, 'Metagovernance and Control of Multi-level Governance Frameworks: The Case of the EU Structural Funds Financial Execution', 24(2) *Regional & Federal Studies* (2014) p. 178.

ensuing blame deflection characteristic of the Structural Funds' shared management,[52] seems likely to be more present than ever in the Recovery and Resilience Facility. Only now, the Commission's responsibility will be purely political, while its effective control possibilities will be much diminished.

The impact on the constitutional evolution

Any measure set in place on the basis of Article 122 TFEU necessarily has to have an in-built temporary character (as made explicit in *Pringle*).[53] The emergency character of the measure, and the words 'without prejudice to any other procedures provided for in the Treaties' underscore this. The limited time scale also applies to Article 175 TFEU, which does refer to *specific* actions (specific in space and in time). The temporary character of the European Union Recovery Instrument is envisaged in Article 3 Council Regulation 2020/2094, while the temporary nature of the Recovery and Resilience Facility is contained in Articles 4 and 12 Regulation 2021/241. Nonetheless, while conceived as a one-off program, a precedent has been set that might herald lasting and structural change. In fact, a door has been opened for similar responses in cases of future economic shocks and, considering the weight of path-dependency on the trajectory of European integration,[54] the institutional changes introduced might pave the way for even more structural transformations. There is abundant historical evidence showing that increases in public expenditure tend to be maintained over time: examples range from the expenditure increases in the United States with the New Deal, to the budgetary increases that were maintained after the World Wars. In the same vein, the European Stability Mechanism – initially conceived as a temporary device to tackle the effects of the 2010-2012 financial crisis – is now finding a lasting role,[55] especially since the Stability Mechanism Treaty reform of 2021.[56]

The Recovery Plan for Europe introduces important elements in the supranational-intergovernmental institutional balance of the EU. Both supranational and intergovernmental features coexist in the design. On one hand, there is a supranational push: the very budgetary increase, the new fiscal stabilisation function,

[52]Porras-Gómez, *supra* n. 51, p. 179.

[53]*Pringle*, *supra* n. 33, para. 65.

[54]P. Pierson, 'The Path to European Integration – A Historical Institutionalist Analysis', 29(2) *Comparative Political Studies* (1996) p. 123.

[55]A. Lamassoure, 'The Awakening of the Sleeping Beauty?' in B. Laffan and A. De Feo (eds.), *EU Financing for Next Decade Beyond the MFF 2021-2027 and the Next Generation EU* (European University Institute Florence 2020) p. 17.

[56]J. Aerts and P. Bizarro, 'The Reform of the European Stability Mechanism', 15(2) *Capital Markets Law Journal* (2020) p. 159.

the enhanced redistributive function, the reinforced monitoring of national macroeconomic policies and the strong capacity of the Commission to suspend funds on its own initiative in cases of unsatisfactory fulfilment of milestones and targets, go in the supranational sense of greater European integration, a 'federal upgrading', and a more 'citizen-centered' view. In the same vein, the fact that the fiscal stabilisation function applies equally to Eurozone and non-Eurozone member states (despite the fact that the Recovery Instrument, as an expression of a fiscal power, is intrinsically connected to the Economic and Monetary Union, complementing its monetary side with a fiscal side) counters the trends towards a multi-speed Europe fragmentary institutional design. On the other hand, there is an intergovernmental pull: the configuration of member states as fund beneficiaries in direct management, with the latter playing the leading role in financial execution and control; the greater involvement of the Council to the detriment of the Parliament,[57] with the Economic and Financial Committee and the European Council[58] deeply involved in the decisions for delivering or suspending payments, all contribute to the intergovernmental dimension and a state-centric budgetary model. Notably, it is the Council which approves the national plans through implementing acts (Article 20 Regulation 2021/241). Attention should be drawn to this fact, given that, under Article 291 TFEU, the default scenario is that implementing acts are adopted by the Commission, and only exceptionally by the Council (under Article 291.2 TFEU). The accumulation of implementing power prerogatives on the Council is inserted on a broader tendency towards a *sui generis* framework for EU law implementation, with the ensuing potential for intergovernmental transformation.[59]

The strong intergovernmental dimension connects with constitutional trends: the crises that have been affecting the EU for the last 10 years have all initially triggered an intergovernmental response.[60] This is logical, since, according to Article 5.2 TEU, the EU acts on a range of determined competences that have been conferred in order to respond to actual policy problems, and these problems have to be necessarily fathomable at the time of the conferral. A new problem would require a new solution outside the toolbox of the EU, and, as a result, would call for an involvement of the member states,[61] who keep the

[57]Dermine, *supra* n. 40. De Witte, *supra* n. 5, p. 674.

[58]De Witte, *supra* n. 5, p. 676-677.

[59]M. Chamon, 'The Sui Generis Framework for Implementing the Law of EMU: A Constitutional Assessment', 3 *European Papers – A Journal on Law and Integration* (2022) p. 1463.

[60]S. Fabbrini, 'Constructing and De-constructing the European Political Identity: The Contradictory Logic of the EU's Institutional System', 17(4) *Comparative European Politics* (2019) p. 477; Webber, *supra* n. 1.

[61]L. Van Middelaar, *Alarums and Excursions: Improvising Politics on the European Stage* (Agenda Publishing 2019).

kompetenz-kompetenz. The member states will always be the ones to initially provide new solutions to new problems and, in an emergency context, they will not want to commit themselves to solutions that have long-term implications. Consequently, they will tend to favour intergovernmental designs. This is something that follows the minimalist integration pattern:[62] states are biased against competence conferrals to international organisations, and when they do confer such competences, they do not go beyond the minimum required to address immediate concerns. This minimalist integration is particularly present in scenarios with strong heterogeneity of preferences, hence having more effect on redistributive policies, such as the fiscal one. Furthermore, looking from the perspective of the policy resources mobilised, the Recovery Plan required money,[63] a resource in possession of the member states. As a result, the subsequent institutional design was marked by the intergovernmental imprint.

From a perspective that values the possibilities of institutional rupture, it should be considered that, while it is true that the intergovernmental dimension seems stronger,[64] it is a fact that the history of European integration consistently witnesses major milestones at the intergovernmental level that later spill over to the supranational realm. There are numerous examples that have followed that pattern (Schengen and Justice and Home Affairs are notable ones), also in the public finance domain: the very system of financial resources was initially intergovernmental, and later evolved towards a more supranational design with own resources (following Articles 200 and 201 of the European Economic Community Treaty). In this vein, many intergovernmental changes could be seen as heralding later processes of supranational consolidation.

Finally, from an institutional continuity perspective, the two main paradigms, supranationalism and intergovernmentalism, are simultaneously present, and no one seems to definitively gain the upper hand. This dual constitutional foundation,[65] with a Union method (intergovernmental) and a Community method (supranational) coexisting,[66] respectively grounded on the member states and the European citizens, configures the EU as a polity transcending the classic

[62]P.C. Schmitter, 'A Revised Theory of Regional Integration', 24(4) *International Irganization* (1970) p. 836; P. Pierson, 'The Path to European Integration', 26(2) *Comparative Political Studies* (1996) p. 123.

[63]S. Smeets and N. Zaun, 'What is Intergovernmental about the EU's "(New) Intergovernmentalist" Turn? Evidence from the Eurozone and Asylum Crises', 44(4) *West European Politics* (2021) p. 869.

[64]Chamon, *supra* n. 59.

[65]S. Fabbrini, *Which European Union? Europe after the Eurocrisis* (Cambridge University Press 2015).

[66]W.T. Eijsbouts and J.H. Reestman, 'In Search of the Union Method', 11(3) *EuConst* (2015) p. 425.

categories of supranational and intergovernmental organisation. Accordingly, the institutional evolution would go in the sense of expanding a complex, 'polyhedral' structure, with a constitutional design that brings together and assimilates the supranational-intergovernmental dichotomy.

Conclusion: times are a-changing?

The transformations brought about by the fiscal response to the Covid-19 crisis are impacting the EU constitutional architecture. From a legal doctrinal perspective, it is important to highlight: first, the *de facto* enlargement of the EU scope of competences, with the incorporation of a new, crucial function: fiscal economic stabilisation – a function that, following its economic logic, tends to be intrinsically centripetal, aggregated around the highest levels of government.[67] The lack of a specific competence sustaining this policy points to a possible new instance of creeping supranationalisation that pushes the constitutional limits of the EU. While it is a temporary response to an extraordinary situation of economic crisis, this 'political self-enhancement'[68] that redefines the supranational competences runs the risk of clashing with the principle of conferral (Article 5 TEU).[69] Second, the recognition of auditing powers of the Court of Auditors, and of on-the-spot control prerogatives of the Commission, seems to contradict the limited constitutional responsibility of the latter under the direct management modality, with member states as beneficiaries. This deepens the paradoxical dichotomy enshrined in Article 317 TFEU, with the Commission made politically responsible, but the member states remaining effectively at the helm of budgetary implementation and monitoring decisions.

From an explanatory perspective, we have looked at the impact of the Recovery Plan on the EU's constitutional evolution. Its supranational features have led enthusiasts to assimilate the changes to a 'Hamiltonian moment'.[70] However, the Recovery Plan's design currently seems more biased, in its institutional dimension, towards the intergovernmental side.[71] This intergovernmental slant might be a step towards a subsequent 'supranational consolidation' of the changes. In any

[67]E. Ahmad et al., 'Assigning Expenditure Responsibilities', in M.T. Ter-Minassian (ed.), *Fiscal Federalism in Theory and Practice* (International Monetary Fund 1997) p. 25.

[68]Bundesverfassungsgericht, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para. 237.

[69]Ibid., para. 238.

[70]A. Hamilton et al., *The Papers of Alexander Hamilton: Additional Letters 1777-1802 Addenda and Errata Cumulative Index* vol. 19 (Columbia University Press 1961) p. 40-42.

[71]European Parliament, Resolution on the conclusions of the extraordinary European Council of 17-21 July 2020, 23 July 2020; Dermine, *supra* n. 40, p. 15.

case, the coexistence between intergovernmental and supranational features shows a characteristic pattern of 'polyhedral institutional configuration'.

In his Mémoires, Jean Monnet made the premonition that 'Europe would be made in crises, and it would be the sum of the solutions that were provided to those crises'.[72] Following this logic of crisis-induced decision-making cycles,[73] overcoming existential threats seems to have become the main vector accounting for the EU's contemporary institutional evolution, in a context of 'politics of permanent crisis'.[74] The Recovery Plan seems to be another step in this historical record of groundbreaking EU policy responses to European crises. As such, it sketches a canvas that is a faithful reflection of the European construction's complexities and paradoxes: supranationalism and intergovernmentalism hand in hand, creeping competences, and creative interpretation that pushes the semantic boundaries of the constitutional framework to their limits. The effective implementation of the Recovery Plan, attaining its countercyclical objectives and setting the ground for renewed economic growth, is crucial to the future of Europe. The specific manner in which this is done will most certainly set the trend for the EU's constitutional structuring potential in the years to come.

[72]J. Monnet, *Mémoires* (Fayard 1976) p. 615.

[73]Schmitter, *supra* n. 62.

[74]B. Voltolini et al., 'Introduction: the Politicisation of Permanent Crisis in Europe', 42(5) *Journal of European Integration* (2020) p. 610.