FROM THE NEXT GENERATION EU TO THE STABILITY AND GROWTH PACT REFORM: CONSTITUTIONAL IMPLICATIONS FOR THE EMU

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Abstract (It): Il saggio, prendendo le mosse dall'assetto pre-pandemico della costituzione economica europea, esamina le recenti innovazioni introdotte nella governance economica con l'avvio del *Next Generation* EU e la revisione del Patto di Stabilità e Crescita. Sulla base di questa analisi, l'articolo si dedica alla seguente domanda di ricerca: di fronte alla crisi sanitaria da Covid-19, l'Unione economica e monetaria ha compiuto soltanto un temporaneo cambio di passo, dovuto alla contingenza emergenziale, oppure ha inaugurato un'effettiva inversione di paradigma destinata a consolidarsi nel tempo?

Abstract (En): *The article, taking as its starting point the pre-pandemic order of the Economic and Monetary Union (EMU), examines the recent innovations introduced with the launch of the Next Generation EU and the revision of the Stability and Growth Pact. Based on this analysis, the article addresses the following research question: in the face of the Covid-19 health crisis, has the EMU made only a temporary change of pace, due to the emergency contingency, or has it ushered in an effective paradigm shift that is destined to be consolidated over time?*

1. Foreword

This article analyses the post-pandemic configuration of the *European economic constitution*, understood as the set of rules contained in the Treaties, the apex and rigid source of the European Union's legal system, which regulate the relations between public power and the economic sphere[1], shaping the space of discretion of national democratic-representative

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Without entering into the debate on whether the notion of a 'European economic constitution' can be understood in a prescriptive sense – which would imply the recognition of the existence of a real EU constitution comparable to those of the member States –, in this paper this notion will be used in a descriptive sense. That is,

bodies in their political and financial policy decisions[2].

The objective of this analysis is to verify whether an epoch-making event such as the Covid-19 health crisis triggered a genuine overcoming of the pre-existing economic paradigm, or whether, on the contrary, it only determined a temporary deviation from the latter, motivated by emergency contingencies[3]. In other words, it is a question of assessing whether the pandemic phase should be interpreted, from a constitutionalist perspective, as a moment of real caesura or, rather, of tendential continuity within the framework of the overall constitutional process of European economic integration.

In order to answer such a basic question, we will first recall the constitutional framework of the pre-pandemic economic order, outlined by the Maastricht Treaty and consolidated by the subsequent Treaties (section 2), with specific regard to its concrete declination and implementation (sections 2.1 and 2.2). Subsequently, attention will focus on the two main recent developments in the European economic governance: the establishment of the *Next Generation Eu* programme (section 3) and the reform of the *Stability and Growth Pact* (section 4). In the light of the analysis carried out, some concluding reflections will then be offered on the degree of innovation introduced into the European economic constitution, the essential pieces of which – it should be pointed out at the outset – seem to have substantially survived the pandemic phase unscathed (section 5).

2. The economic paradigm of the Maastricht constitutional order

The constitutional architecture of the Economic and Monetary Union (EMU), defined in the Maastricht Treaty of 1992 and inherited by the Lisbon Treaty of 2007, presents a

it will be used to indicate the way in which the Treaties, as a source of constitutional level for the European Union, deal with economic matters. It should, moreover, be emphasised that, in the italian doctrinal debate, there is no shared meaning of the notion of 'economic constitution': M. LUCIANI, *Economia nel diritto costituzionale*, in *Digesto delle discipline pubblicistiche*, V, Torino, 1990, 374-375 rejects the use of the concept; S. CASSESE, *Introduzione*, in ID. (ed.), *La nuova costituzione economica*, Roma-Bari, 2021, 3 uses the category in a descriptive sense; G. BOGNETTI, *La Costituzione economica italiana. Interpretazione e proposte di riforma*, Milano, 1993 makes use of a prescriptive conception of the notion. For an overall reconstruction of the debate, F. SAITTO, *Per una critica della "Costituzione economica" nel prisma delle trasformazioni della democrazia rappresentativa*, in *DPCE Online*, No. 1, 2020, 395 ff.; M. GOLDONI, *Costituzione economica*, in C. CARUSO, C. VALENTINI (eds.), *Grammatica del costituzionalismo*, Bologna, 2021, 173 ff. With specific reference to the notion of 'European economic constitution', see M.P. MADURO, *We the Court: the European Court of Justice and the European Economic Constitution*, Oxford, 1998; C. KAUPA, *The Pluralist Character of the European Economic Constitution*, Oxford, 2016; K. TUORI, *The European Central Bank and the European Macroeconomic Constitution. From Ensuring Stability to Fighting Crises*, Cambridge, 2022.

2 On the notion of political-financial policy, for all, G. RIVOSECCHI, *L'indirizzo politico finanziario tra Costituzione italiana e vincoli europei*, Padua, 2007. On the impact of the constitutional process of European integration on the state's financial-political policy, see G. GUARINO, *Pubblico e privato nell'economia. La sovranità tra Costituzione e istituzioni comunitarie*, in *Quad. cost.*, 1, 1992, 21 ff.; P. BILANCIA, *Modello economico e quadro costituzionale*, Torino, 1996; G. DELLA CANANEA, *Indirizzo e controllo della finanza pubblica*, Bologna, 1996, 42 ff. Lastly, also F. SALMONI, *Indirizzo politico economico e forma di governo*, in *Riv. AIC*, No. 1, 2024, 65 ff.

3 Following the principle of strict separation between 'economic policy' and 'monetary policy' established by the European Union Treaties, the analysis will focus exclusively on the first of these two functions: economic governance. The manoeuvre of monetary levers, on the other hand, will not be examined here; for an in-depth look at the evolution of this area following the pandemic phase, please refer to A. CONZUTTI, *Il governo della moneta nella prospettiva del diritto costituzionale*, Torino, 2024.

structural asymmetry: the supranational centralisation of monetary policy, entrusted to the European Central Bank (ECB), a technical institution with full independence from the democratic-representative circuit (Article 3(1)(c) and 119(2) TFEU), corresponds to a substantial national decentralisation of economic policy, which is left to the democratic choices of the constitutional policy-making bodies of the various Member States (Article 2(3) and 119(1) TFEU)[4].

To mitigate such an asymmetry, the result of the necessary compromise between the Member States of the Union, known as the "Maastricht settlement"[5], European primary law has codified a framework of rules (Article 120-126 TFEU)[6] aimed at fostering the convergence of the various national budgetary processes, orienting them in a manner congruent with the management of the single monetary policy and, above all, with the overriding goal of maintaining price stability (Article 119(3) and 127(1) TFEU)[7]. This regulatory framework, at its core, can be summarised as follows.

First of all, the reservation of competence to the Member States in economic matters is tempered by a macroeconomic coordination mechanism at European level (Article 121(1) TFEU)[8]. The latter does not take the form of formally binding acts, but of *soft law*, the "broad guidelines", which take the form of recommendations adopted by the Council of the European Union, in Economic and Financial Affairs (Ecofin) formation, on a proposal by the European Commission and in the light of the conclusions of the European Council (Article 121(2) TFEU)[9]. The consistency of the economic policies of the Member States with these guidelines is verified within the framework of the "multilateral surveillance procedure" (MSP), conducted by the Commission and the Council (Article 121(3) TFEU). A detected inconsistency does not, however, give rise to sanctions, but, at most, to the publicity of recommendations not complied with by States (Article 121(4) TFEU). This is, after all, a rather weak form of coordination, entrusted to bodies of a political nature, which aims to preserve the sovereignty of European States, which are allowed to maintain, at least formally, control over decisions concerning the real economy[10].

4 On this point, recently, S. SILEONI, *Giovane e maturo: l'euro compie venticinque anni*, in *Quad. cost.*, No. 1, 2024, 206.

5 P. CRAIG, *Pringle and the Nature of Legal Reasoning, in Maastricht J. Eur. & Comp. L.*, Vol. 21, No. 1, 2014, 206.

6 It should be noted that specific provisions applicable only to euro States are laid down in Articles 136-138 TFEU.

7 In these terms P. DE IOANNA, *Regole fiscali e democrazia europea: un tornante cruciale nello sviluppo dell'Unione*, in *Rivista delle Politiche Sociali*, No. 1, 2014, 125.

8 This provision also enshrines that Member States "shall regard their economic policies as a matter of common concern".

9 Since 1998, the broad guidelines have been divided into two categories: the 'general' broad guidelines, addressed to all Member States, and the 'individual' broad guidelines, addressed to individual Member States, expressed in the *Country Specific Recommendations*. For a more in-depth analysis, see the analyses by F. BILANCIA, *Sistema delle fonti ed andamento del ciclo economico: per una sintesi problematica*, in *Oss. fon.*, No. 3, 2020, 1433-1434; G. MENEGUS, *Gli indirizzi di massima per il coordinamento delle politiche economiche ex art. 121 TFUE nel quadro del semestre europeo*, in *Oss. fon*, No. 3, 2020, 1458; R. IBRIDO, *Coordination of budgetary decisions and public debt sustainability: reasoning on the changing economic constitution*, in *Riv. trim. dir. ec.*, No. 1, 2020, 130.

10 In this sense E.C. RAFFIOTTA, *Il governo multilivello dell'economia. Studio sulle trasformazioni dello Stato costituzionale in Europa*, Bologna, 2013, 48.

Second, the Treaties impose specific constraints on national economic policies. In particular, Member States are called upon to ensure "sound public finances" (Article 119(3) TFEU), avoiding "excessive government deficits" (Article 126(1) TFEU)[11] . This implies compliance with two precise quantitative criteria for limiting public expenditure (the so-called 'Maastricht criteria'), specified in Protocol No 12 annexed to the Treaties[12]:

(i) a deficit-to-GDP ratio not exceeding 3%;

(ii) a debt-to-GDP ratio not exceeding 60%[13].

However, the principle of sound public finances is not assumed in absolute terms, but rather in relatively flexible terms, by the constitutional level source of the European Union[14].

In fact, on the one hand, the Treaties provide for express exceptions for each of the two parameters described above, allowing for the deficit-to-GDP ratio to be exceeded if exceptional, transitory and close to the reference threshold (Article 126(2)(a) TFEU), and for the debt-to-GDP ratio to be exceeded if the ratio is sufficiently diminishing and approaching the reference threshold at an adequate pace (Article 126(2)(b) TFEU)[15]. On the other hand, according to the Treaties, the detection and possible sanctioning of Member States' non-compliance with the aforementioned public finance parameters, within the framework of the special "Excessive Deficit Procedure" (EDP) – in which the Commission, as the body representing the general interest of the Union, plays a central surveillance role (Article 126(2) to (5) TFEU) –, is not reduced to a mechanical accounting exercise, entrusted to the jurisdiction of the Court of Justice (Article 126(10) TFEU), but is a matter for the political decision of the Council, the body par excellence representing the instances of the governments of the Member States (Article 126(6) et seq., TFEU)[16]. This is on the assumption that the latter are the only actors that are genuinely legitimised to decide on economic policies, with the related allocative and distributive choices, capable of responding to their citizens' welfare expectations[17].

Finally, the constitutional framework of EMU is completed by a closing provision, designed to make the above-mentioned fiscal rules more credible and solid: the *no bail-out*

11 On closer inspection, this framework treats public debt not so much as an ordinary economic policy lever, but rather as a problem to be kept under control. This aspect is highlighted by E. MOSTACCI, *Fedele a se stessa: UEM, coordinamento delle politiche economiche e processi democratici*, in *Dir. pubbl. comp. eur*., No. 4, 2020, 1068. On this topic, see also M.P. CHITI, *La finanza pubblica e i vincoli comunitari*, *in Riv. it. dir. pubbl. com.*, No. 2, 1997, 1178 ff.

12 Article 1 of Protocol No. 12, on the Excessive Deficit Procedure, annexed to the Treaties.

13 P. DE GRAUWE, *Economics of Monetary Union* (2018), transl. it.: *Economia dell'unione monetaria*, Bologna, 2019, 160-161 pointed out the lack of a solid scientific basis to support such numerical values. Regarding the effects of the use of macroeconomic indicators on public policies, see the various contributions collected in C. CARUSO, M. MORVILLO (eds.), *Il governo dei numeri. Indicatori economico-finanziari e decisione di bilancio nello Stato costituzionale*, Bologna, 2020.

14 Hints, in this regard, in M. LUCIANI, *Costituzione, bilancio, diritti e doveri dei cittadini*, in AA. VV., *Scritti in onore di Antonio d'Atena*, III, Milano, 2015, 1695.

15 On this point, B. GORDON, *The Constitutional Boundaries of European Fiscal Federalism*, Cambridge, 2022, 131 ff.

16 From the outset, this has given the fiscal rules under consideration not only technical, but also, and above all, political significance. This observation is made by C. BUZZACCHI, *Bilancio e stabilità. Oltre l'equilibrio finanziario*, Milano, 2015, 3.

17 F. LOSURDO, *Lo stato sociale condizionato. Stabilità e crescita nell'ordinamento costituzionale*, Torino, 2016, 30.

clause[18]. This clause excludes, in peremptory terms, the possibility of the Union and the Member States assuming responsibility for the financial commitments of another Member State (Article 125(1) TFEU)[19]. By establishing a clear separation between national budgets and excluding solidarity constraints between them[20], this provision is mainly aimed at preventing the risk of *moral hazard*, i.e. the pursuit by Member States of excessively expansive fiscal policies, fuelled by the expectation that an external intervention, by the supranational level of government or by the other Member States, can always make up for a possible failing budget[21].

In essence, the logic of the provision in question and, more generally, of the entire EMU architecture rests on the postulate according to which each State, as the sole party responsible for keeping its public finances in balance, must only be able to finance itself on the markets, which are the ultimate judges of its economic policy choices[22]. From this perspective, the *no bail-out* principle represents the most significant limitation, inscribed in the Treaties, to the mutualisation of Member States' debts, to genuine supranational solidarity and, ultimately, to the creation of a European fiscal union[23].

Having outlined, therefore, the cornerstones of the economic constitution designed in Maastricht, it is now appropriate to examine how they have been subject, over time, to an evolutive interpretation, partly implemented by sub-constitutional sources, the European secondary law, and partly influenced by the onset of the sovereign debt crisis in the Eurozone.

2.1. The Stability and Growth Pact

The aforementioned evolutive reading of the European economic constitution concerned, first and foremost, the fiscal rules in charge of coordinating Member States' budgetary policies as well as limiting national indebtedness. These rules, fixed by the Treaties in a tendentially flexible manner and entrusted to the discretionary assessment of a supremely political body such as the Council, have undergone a gradual, but clear-cut, hardening, conveyed by secondary European law, which has sought to prevent any watered-down interpretations of these same rules[24].

18 For an examination, R. DICKMANN, *Governance economica europea e misure nazionali per l'equilibrio dei bilanci pubblici*, Napoli, 2013, 12.

19 Next to Article 125 TFEU is Article 124 TFEU, which prohibits Member States from obtaining privileged access to financial institutions that is not based on prudential considerations.

20 M. BENVENUTI, *Democrazia e potere economico*, in *Riv. AIC*, No. 3, 2018, 296.

21 This is pointed out by A. PISANESCHI, *Bilancio dello Stato e condizionalità*, in C. BERGONZINI (ed.), *Costituzione e bilancio*, Milano, 2019, 153.

22 On the subject, C. CARUSO, *Le prospettive di riforma dell'Unione economico-monetaria e il mito dell'unità politica europea*, in *Dir. comp.*, No. 1, 2018, 97.

23 The point was emphasised by A. LUCARELLI, *Principi costituzionali europei tra solidarietà e concorrenza*, in *Consulta online*, *Liber Amicorum per Pasquale Costanzo. Diritto costituzionale in trasformazione*, III, *Nuovi scenari per la giustizia costituzionale nazionale e sovranazionale*, 7 July 2020, 22.

24 G. DELLA CANANEA, *Dal vecchio al nuovo Patto di stabilità*, in *Giorn. dir. amm.*, No. 2, 2004, 223; I. CIOLLI, *I Paesi dell'Eurozona e i vincoli di bilancio. Quando l'emergenza economica fa saltare gli strumenti normativi ordinari*, in *Riv. AIC*, No. 1, 2012, 2.

Along this ridge was the approval in 1997 of the *Stability and Growth Pact* (SGP), consisting, in its original version (SGP I), of the Amsterdam European Council Resolution of 17 June 1997 and Regulations Nos 1466/97 and 1467/97, both of 7 July 1997.

Regulation 1466/97, on the so-called *preventive arm*, considerably strengthened the multilateral surveillance procedure and the coordination of Member States' economic policies, with the aim of preventing the formation of excessive public deficits[25]. In particular, the regulation in question added to the respect of the Maastricht criteria the obligation to present a "stability programme"[26], for euro area countries, and a "convergence programme"[27], for non-euro area countries, both of which are calibrated on the need to achieve a medium-term budgetary objective "close to balance or in surplus"[28]. Through an integration, rather than an implementation, of European primary law by a subordinate source, a much stricter financial target was thus introduced with respect to the macroeconomic parameter of the 3% *deficit* on GDP envisaged by the Treaties[29], which called on European States to plan increasingly significant restraint in their public expenditure policies, significantly reducing their room for manoeuvre in relation to the different phases of the economic cycle.

25 Article 1 of Regulation 1466/97.
26 Article 3(1) of Regulation 1466/97.
27 Article 7(1) of Regulation 1466/97.
28 Articles 3(2)(a) and 7(2)(a) of Regulation No 1466/97.
29 In this regard, R. PEREZ, *Il Patto di stabilità e crescita: verso un Patto di flessibilità?* , in *Giorn. dir. amm.*, n. 9, 2002, 999 described the rules of the SGP as "substituting" some of those provided for by the Treaties; G. DELLA CANANEA, *Il Patto di stabilità e le finanze pubbliche nazionali*, in *Riv. dir. fin.*, No. 4, 2001, 568-569 defined as "innovative" the rule of the medium-term budget balance close to balance or in surplus. In a more critical perspective, G. GUARINO, *Saggio di verità sull'Unione e sull'euro,* II, Firenze, 2014, 29 argued that Regulation No. 1466/97, a source subordinate to the Treaties, has in fact modified the latter, in particular Article 104c TEC (now Article 126 TFEU) and its Protocol No. 5 (now Protocol No. 12), qualifying this intervention as a real "coup d'état". On a similar position is F. LOSURDO, *Lo stato sociale condizionato. Stabilità e crescita nell'ordinamento costituzionale*, cit., 33, who reasoned of a 'tear in the Community legality'. However, it should be pointed out that, strictly speaking, a violation by Regulation No 1466/97 of the aforementioned 104c TEC must be ruled out. In fact, the regulation in question did not entail a formal tightening of the *deficit* parameter provided for by the Treaties and their Protocol, since only the exceeding of that parameter could have triggered the sanction procedures provided for by the SGP. Therefore, the new and more stringent medium-term objective of a balanced budget or budget surplus, far from having introduced a formal quantitative constraint, was essentially instrumental in dissuading "the formation of excessive deficits and in ensuring the concrete operation of multilateral surveillance mechanisms in order to favour convergence paths": G. RIVOSECCHI, *Procedure finanziarie e vincoli del Patto di stabilità e crescita*, in *Amm. camm.*, 6 October 2004, 12. Notwithstanding this, perplexity remains as to the legitimacy of the legal basis of Regulation 1466/97, identified in Article 103(5) TEC (now Article 121(6) TFEU). This provision of primary law provides for the possible approval, through the ordinary legislative procedure, of an implementing regulation, but limited to the adoption of the "rules for the multilateral surveillance procedure" concerning the coordination of economic policies by the Commission and the Council. On closer inspection, it seems a stretch to include the obligation for Member States to converge to balanced or surplus budgets in the above-mentioned notion of "rules for the multilateral surveillance procedure" for economic policy coordination. For a similar consideration, A. GUAZZAROTTI, *La riforma delle regole fiscali in Europa: nessun "Hamiltonian moment"*, in *Riv. AIC*, No. 1, 2023, 6.

On the other hand, Regulation 1467/97[30], on the so-called *corrective arm*, strengthened the sanctioning apparatus of the excessive deficit procedure, with the intention of restricting the Council's discretionary powers[31]. In this regard, the regulation under review has set a timeframe in stages[32], without, however, introducing a real automatism in the imposition of any sanctions[33]. In fact, although the Council had to comply with peremptory procedural deadlines, it retained a significant margin of political choice as regards the assessment of the exceptional circumstances[34] justifying the exceeding of the macroeconomic benchmarks and the decision whether or not to sanction the States[35].

In essence, it can be said that, with the approval of the SGP, the fiscal constraints imposed by the supranational level on national ones became more stringent[36]. However, these constraints were configured in such a way as to always reserve the final say on the admissibility of any deviations or deviations to the Council, as the political and representative body of the States, on the basis of basically discretionary assessments. This was explicitly demonstrated in 2003, when the Council decided against the European Commission's request to activate the excessive deficit procedure against France and the Federal Republic of Germany[37]. This decision even led to an institutional conflict between the two European institutions before the Court of Justice[38].

The Pact was, therefore, reformed in 2005 (SGP II), through Regulations No. 1055/2005 and 1056/2005[39], which amended Regulations No. 1466/97 and 1467/97 respectively[40]. In particular, the new SGP, in order to take into account the extreme economic and financial

30 Regulation 1467/97, based on Article 104c(14) TEC (now Article 126(14)(2) TFEU), was adopted, according to a special legislative procedure, unanimously by the Council, after consultation of the European Parliament. However, the regulation in question did not provide for the discipline to replace the Protocol on *deficit* and debt parameters, as it should have done under the aforementioned Article 104c(14) TEC. On the contrary, it established a sort of supplement, with both procedural and substantive aggravation, to that Protocol. This is what A. GUAZZAROTTI, *La riforma delle regole fiscali in Europa: nessun "Hamiltonian moment"*, cit., 6.

31 Article 1(1) of Regulation 1467/97. For further discussion, H.J. HAHN, *The Stability Pact for European Monetary Union: Compliance with Deficit Limit as a Constant Legal Duty*, in *CML Rev.*, Vol. 35, No. 1, 1998, 77 ff.

32 Article 3 of Regulation 1467/97.

33 These are essentially pecuniary sanctions. See Articles 11-16 of Regulation 1467/97.

34 Article 2 of Regulation 1467/97.

35 G. CAPORALI, *Patto di stabilità ed ordinamento europeo*, in *Dir. soc*., No. 1, 2004, 98-99. See Articles 4-8 of Regulation 1467/97.

36 In this regard, G. DELLA CANANEA, *Il nuovo MES: ex crisibus Europa oritur*, in *Quad. cost.*, No. 1, 2021, 207 reasoned of "the yielding of the Commission and the other national governments to the reckless German demand to tighten the rules of public finance, within the framework of the Stability and Growth Pact".

37 It is worth remembering that, only a year earlier, in 2002, the excessive deficit procedure had actually been initiated against Portugal. This proves, as O. CHESSA, *Dall'ordine di Maastricht al Next Generation EU*, in G.P. DOLSO (ed.), *Governare la ripresa. La Pubblica Amministrazione alla prova del Recovery Plan*, Trieste, EUT, 2022, 21 points out, that the SGP "can be relativised in relation to the geopolitical weight of the actors in play".

38 Court of Justice, judgment of 13 July 2004, *Commission v. Council*, Case C-27/04. Commenting on the decision, L. CASSETTI, *La Corte di giustizia invoca il rispetto delle regole procedurali sui disavanzi pubblici eccessivi*, in *Federalismi.it*, No. 15, 2004, 1; M. BARBERO, *La Corte di giustizia "flessibilizza" il Patto europeo di stabilità e crescita e ne suggerisce la riforma*, in *Federalismi.it*, No. 16, 2004, 1 ff.; P. DIMAN, M. SALERNO, *Sentenza Ecofin: gli equilibri della Corte tra tensioni politiche, Costituzione economica europea e soluzioni procedurali*, in *Dir. pubbl. comp. eur*, No. 4, 2004, 1842 ff.; G. RIVOSECCHI, *Patto di stabilità e Corte di giustizia: una sentenza (poco coraggiosa) nel solco della giurisprudenza comunitaria sui ricorsi per annullamento*, in *Giur. it.*, No. 5, 2005, 899 ff.

heterogeneity within the Union, introduced a differentiated "medium term budgetary objective" (MTO) for each individual Member State, allowing for the possible divergence of this objective from the "close to balance or in surplus" requirement, provided that a "safety margin with respect to the 3 % of GDP government deficit ratio" was ensured[41]. The reform in question also broadened the list of reasons that a Member State may invoke to justify a deviation, on an exceptional and temporary basis, from the adjustment path towards the medium-term budgetary objective, emphasising, above all, the adoption of "structural reforms"[42]. The rigidity of the Pact has thus been tempered.

Shortly afterwards, however, there was a further change in philosophy. Indeed, in response to the sovereign debt crisis in the Eurozone, which began in 2010 and affected the Member States asymmetrically, the Pact was again revised (SGP III), this time in restrictive terms, in order to make its mechanisms more stable and predictable. The revision took place on the basis of two packages of secondary legislation measures, known as the *Six-Pack*, consisting of five regulations (No. 1173/2011, 1174/2011, 1175/2011, 1176/2011 and 1177/2011) and one directive (Council Directive 2011/85/EU), and the *Two-Pack*, consisting of two more regulations (No. 472/2013 and 473/2013)[43].

The *Six-Pack*, adopted in 2011, brought about a number of significant innovations, including: the "European Semester", i.e. a form of enhanced coordination of national budgetary decisions[44]; a new surveillance procedure for the "prevention and correction of excessive macroeconomic imbalances" (Macroeconomic Imbalance Procedure, MIP)[45]; the

39 Underlying these regulations was the endorsement by the Brussels European Council of 22 and 23 March 2005 of the Ecofin Council report entitled "Improving the implementation of the Stability and Growth Pact", which updated and complemented the Amsterdam European Council resolution of 17 June 1997.

40 On this point, see the observations of G. DELLA CANANEA, *La pseudo-riforma del patto di stabilità e crescita*, in *Quad. cost.*, No. 3, 2005, 668 ff.; R. PEREZ, *Il nuovo patto di stabilità e crescita*, in *Giorn. dir. amm.*, No. 7, 2005, 777 ff.; L. PATRUNO, *Il "nuovo" patto di stabilità e crescita tra rilegittimazione istituzionale europea e consenso nazionale*, in *Dem. dir.*, No. 2, 2005, 225 ff.

41 Article 2*a* of Regulation 1466/97, introduced by Regulation 1055/2005. Article *2a*(2) also states that, for euro area countries, "the country-specific mediumterm budgetary objectives shall be specified within a defined range between – 1 % of GDP and balance or surplus, in cyclically adjusted terms, net of one-off and temporary measures". This provision marked an important evolution: from the nominal budget balance as a benchmark, there was a shift to the structural balance, which takes into account the structural nature of financial transactions, excluding contingent factors related to fluctuations in the economic cycle, which cannot be imputed to the discretionary action of governments. The point was underlined by E. MOSTACCI, *La sindrome di Francoforte: crisi del debito, costituzione finanziaria europea e torsioni del costituzionalismo democratico*, in *Pol. dir.*, No. 4, 2013, 491.

42 The regulation pays particular attention to reforms related to the social security system. See Articles 5 and 9 of Regulation 1466/97, as amended by Regulation 1055/2005.

43 For an overview on this point, see R. IBRIDO, *Fiscal rules e decisione di bilancio*, in *Diritto costituzionale*, No. 1, 2021, 82, who points out that the main ideological matrices of this second revision of the SGP are *constitutional economics* and ordoliberalism.

44 Article *2-a* of Regulation 1466/97, introduced by Regulation 1175/2011. This provision stipulates that the European Semester shall include, in addition to the presentation and assessment of stability or convergence programmes (Article *2-a*(2)(c)), which are necessary for the purposes of multilateral surveillance, also the presentation and assessment of "*National Reform Programmes*" (NRP), which indicate the main reform actions that Member States intend to adopt (Article *2-a*(2)(d)). On this topic, G. RIZZONI, *Il "semestre europeo" fra sovranità di bilancio e autovincoli costituzionali: Germania, Francia, Italia a confronto*, in *Riv. AIC*, No. 4, 2011, 1 ff.

45 Introduced by Regulation No. 1176/2011.

"reverse majority voting rule", i.e. a deliberative method aimed at essentially securing the sanctions proposed by the Commission under the excessive deficit procedure, since they are considered adopted in the absence of a timely vote against by a simple or qualified majority, depending on the case, by the Council, so as to avoid a repetition of the aforementioned situation that occurred in 2003 in relation to France and Germany[46].

On the other hand, the *Two Pack*, launched in 2013, established a common budgetary framework[47] and strengthened the surveillance of Member States that are in financial difficulties, with the risk of jeopardising the stability of the Eurozone[48].

The second SGP reform was, moreover, accompanied in 2012 by the conclusion of the *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union* (TSCG, better known as the *Fiscal Compact*)[49]. This international treaty, which was signed outside the framework of European primary law to overcome the opposition of the United Kingdom, committed the 25 contracting States to transpose the *balanced budget rule* into their national legal systems "through provisions of binding force and permanent character, preferably constitutional"[50]. This rule imposed, specifically, the maintenance of an annual structural balance[51] equal to that defined, every three years, in the MTO, with a lower limit on the structural deficit of 0.5 per cent of GDP; a limit that rises to 1 per cent of GDP in the presence

46 See Articles 4(2), 5(2) and 6(2) of Regulation 1173/2011; Article 3(3) of Regulation 1174/2011; Article 6(2) of Regulation 1466/97, as amended by Regulation 1175/2011; Article 10(4) of Regulation 1176/2011. The intention of the amendment was, in essence, to depoliticise the corrective arm of the SGP, without, however, fully succeeding. In this regard, C. KAUPA, *The Pluralist Character of the European Economic Constitution*, cit., 330 ff. expressed doubts about the compatibility of the reverse majority voting rule with Article 126 TFEU.

47 See Regulation No. 473/2013.

48 See Regulation No. 472/2013.

49 A. SAITTA, *Fiscal Compact tra Costituzione, Trattati e politica*, in *Riv. AIC*, No. 4, 2017, 1 ff.

50 Article 3(1)(a) of the *Fiscal Compact*. This provision has led to a transformation of the economic constitutions of the Member States, especially those inspired by an 'open' model, introducing a true fiscal constitution in the national legal systems. In this sense R. IBRIDO, *Fiscal rules e decisione di bilancio*, cit., 83-84. In Italy, the balanced budget rule envisaged by the *Fiscal Compact* was implemented through Constitutional Law No. 1/2012, which intervened on the text of Article 81 of the Constitution, also amending Articles 97, 117 and 119 of the Constitution. On the subject, see F. BILANCIA, *Note critiche sul c.d. "pareggio di bilancio"*, in *Riv. AIC*, No. 2, 2012, 1 ff.; G. RIVOSECCHI, *Il c.d. pareggio di bilancio tra Corte e legislatore, anche nei suoi riflessi sulle regioni: quando la paura prevale sulla ragione*, in *Riv. AIC*, No. 3, 2012; M. LUCIANI, *L'equilibrio di bilancio e i principi fondamentali: la prospettiva del controllo di costituzionalità*, in AA. VV., *Il principio dell'equilibrio di bilancio secondo la riforma costituzionale del 2012*, Milano, 2014, 1 ff.; A. MORRONE, *Pareggio di bilancio e Stato costituzionale*, in *Riv. AIC*, No. 1, 2014, 1 ff. For an overview of *Fiscal Compact transposition solutions, see* R. BIFULCO, *Le riforme costituzionali in materia di bilancio in Germania, Spagna e Italia alla luce del processo federale europeo*, in R. BIFULCO, O. ROSELLI (eds.), *Crisi economica e trasformazioni della dimensione giuridica. La costituzionalizzazione del pareggio di bilancio tra internazionalizzazione economica, processo di integrazione europea e sovranità nazionale*, Torino, 2013, 139 ff. It is also worth noting that the adoption of the balanced budget rule in domestic law, possibly constitutional, was also among the commitments, albeit not formally binding, of the so-called *Euro Plus Pact*, a political agreement signed in March 2011 by the euro area States, together with six non-euro area States. For an in-depth study, F. CORONIDI, *La costituzionalizzazione dei vincoli di bilancio prima e dopo il patto Europlus*, in *Federalismi.it*, No. 5, 2012, 25 ff. Finally, it should not be forgotten that, as highlighted above, the balanced budget rule was already in force in European Union law, by virtue of Regulation No. 1466/97, with precedence over the law of the Member States, in accordance with the principle of the primacy of European law.

51 According to Article 3(3)(a) of the *Fiscal Compact*, "annual structural balance" means the "annual cyclically-adjusted balance net of one-off and temporary measures".

of a public debt significantly lower than 60 per cent of GDP[52]. In addition, with this Treaty, the signatory States have bound themselves, in the event that the debt ratio exceeds 60% of GDP, to reduce the surplus at an average rate of 1/20 per year[53].

On the whole, the adoption of the SGP, as well as the *Fiscal Compact*, has led to a radicalisation of supranational constraints on public accounts, further reducing the margins of democratic autonomy of the Member States in the definition of their budgetary choices with respect to what was originally foreseen by the economic constitution contained in the Treaties, and imposing essentially pro-cyclical fiscal policies, i.e. restrictive in phases of economic slowdown, which, as such, have hindered recovery in crisis situations[54]. In spite of this radicalisation, the SGP nevertheless continued to offer some room for political assessments, with the result that its rules were repeatedly violated without a concrete sanctioning response. However, it was not the overall effectiveness of the regulatory framework that suffered. Indeed, the lack of bite of European fiscal forecasts and the non-application of formal sanctions were compensated for by the disciplining role of financial operators, who redirected their investments in response to budgetary decisions that did not comply with SGP requirements, thus contributing to the effectiveness of the latter[55]. Ultimately, the financial markets have become the true guardians of the Pact's cogency and the authentic sanctioners of its fiscal rules.

2.2. Conditional financial assistance during the sovereign debt crisis

The evolutive interpretation of the European economic constitution has not only concerned the rules dedicated to the coordination of national budgetary policies as well as the limitation of the space for the creation of public deficits and the expansion of debt by Member States, but has also involved the cardinal principle of *no bail-out*. The latter, although stated in peremptory terms in European primary law, has been subject to a progressively more restrictive reading, endorsed, to some extent, by an amendment to European primary law itself[56].

52 Article 3(1)(b) and (d) of the *Fiscal Compact*. See also Articles 5(1) and 9(1) of Regulation No 1466/1997, as amended by Regulation No 1175/2011, which set, as part of the adjustment path to the MTO, an annual improvement benchmark for the structural budget balance *equal to* 0.5 percent of GDP; a benchmark that becomes *at least* 0.5 percent for Member States with a debt level above 60 percent of GDP.

53 Article 4 of the *Fiscal Compact*. This rule had already been included in Article 2(*1a*) of Regulation 1467/1997, as amended by Regulation 1177/2011. Moreover, it should be noted that the budgetary discipline in force with the *Fiscal Compact* substantially follows that of the *Six-Pack* with slight modifications. On this point, L. BARTOLUCCI, *La sostenibilità del debito pubblico in Costituzione. Procedure euro-nazionali di bilancio e responsabilità verso le generazioni future*, Padova, 2020, 188. It should also be noted that, since a strict application of the '1/20th rule' would have required annual primary surpluses that would have been difficult for the most indebted States to sustain, Italian governments, until the suspension of the Stability and Growth Pact (SGP) in 2020 (*infra*, section 3), constantly negotiated with the Commission temporary derogations to postpone its full implementation. This is pointed out by A. GUAZZAROTTI, *La riforma delle regole fiscali in Europa: nessun "Hamiltonian moment"*, cit., 9.

54 F. LOSURDO, *Il governo europeo della crisi pandemica. Un cambio di paradigma?*, in E. MOSTACCI, A. SOMMA (curr.), *Dopo le crisi. Dialoghi sul futuro dell'Europa*, Roma, 2021, 136.

55 M. DANI, *Verso nuove regole fiscali europee: le proposte della Commissione per la riforma della governance economica europea*, in *Riv. giur. lav.*, No. 3, 2023, 480.

56 In this regard, see F. DONATI, *Crisi dell'euro, governance economica e democrazia nell'Unione europea*, in *Riv. AIC*, No. 2, 2013, 3 ff.

From this angle, it should be pointed out that, in the initial phase of the aforementioned sovereign debt crisis in the Eurozone[57], when it proved necessary to provide economic support to Member States at risk of insolvency, in order to overcome the possible tensions with Article 125(1) TFEU that such interventions could have generated, recourse was made to an extensive reading of Article 122 TFEU[58]. This provision, similar to an emergency clause, provides for the possibility of adopting, in a spirit of solidarity, measures to support Member States in the event of serious difficulties in the supply of certain products (Article 122(1) TFEU), as well as of granting Union financial assistance to a Member State experiencing severe difficulties caused by exceptional circumstances or natural disasters beyond its control (Article 122(2) TFEU)[59].

In particular, the second paragraph of this article was used as the legal basis for the establishment, in 2010, of an extraordinary instrument to allow financial assistance to European States on the brink of default: the *European Financial Stabilisation Mechanism* (EFSM)[60]. However, in order to ensure that, in the creation of this first 'bailout fund', at least the spirit of the constitutional principle of *no bail-out* was respected, supranational financial assistance was strictly conditional on the implementation of a framework of structural adjustment measures specifically negotiated between the assisted Member State, on the one hand, and the Commission together with the ECB, on the other hand[61].

In the subsequent phase of the 'normalisation' of the economic crisis, an attempt was therefore made to bring the contingent legal instruments just mentioned back into the constitutional framework of the Treaties. In this perspective, by virtue of the simplified revision procedure *under* Article 48(6) TEU, a third paragraph was added to Article 136 TFEU[62], which authorised the Member States whose currency is the euro to set up a permanent crisis management mechanism to safeguard the financial stability of the Eurozone

57 The doctrine on the Eurozone economic and financial crisis is extensive. Limiting ourselves to a few references, here we would like to point out: G. GRASSO, *Il costituzionalismo della crisi. Uno studio sui limiti del potere e sulla sua legittimazione al tempo della globalizzazione*, Napoli, 2012; G. NAPOLITANO (ed.), *Uscire dalla crisi. Politiche pubbliche e trasformazioni istituzionali*, Bologna, 2012; F. ANGELINI, M. BENVENUTI (ed.), *Il diritto costituzionale alla prova della crisi economica*, Napoli, 2012; C. BERGONZINI, S. BORELLI, A. GUAZZAROTTI, (ed.), *La legge dei numeri. Governance economica europea e marginalizzazione dei diritti*, Napoli, 2016. In foreign literature, K. TUORI, *The Eurozone crisis: a constitutional analysis*, Cambridge, 2014; A. HINAREJOS, *The Euro Area Crisis in Constitutional Perspective*, Oxford, 2015.

58 J.-V. LOUIS, *Guest Editorial: The no-bailout clause and rescue packages*, in *CML Rev.*, Vol. 47, No. 4, 2010, 971 ff.

59 On the subject, M. RUFFERT, *The European debt crisis and European Union law*, in *CML Rev.*, Vol. 48, No. 6, 2011, 1777 ff.

60 The EFSM was established by Regulation 407/2010. In addition to this 'bailout fund', the Ecofin Council decided at its extraordinary meeting on 9 May 2010 to also create the *European Financial Stability Facility* (EFSF), in the form of a *public limited liability company* under Luxembourg law, set up by the Eurozone Member States. The functioning of the EFSF was regulated through an intergovernmental agreement, which provided for the possibility of issuing bonds guaranteed by the Eurozone Member States and granting loans to States in difficulty, subject to compliance with conditions negotiated with the Commission, in collaboration with the ECB and the International Monetary Fund (IMF), and subject to the approval of the Eurogroup. For an examination, G. PITRUZZELLA, *Chi governa la finanza pubblica in Europa?*, *in Quad. cost.*, No. 1, 2012, 24 ff.

61 Article 3(3)(b) of Regulation No 407/2010.

62 The amendment of Article 136 TFEU was ordered by the European Council with Decision 2011/199/EU of 25 March 2011. This was the only, and very limited, amendment made to the Treaties in the context of the European Union's response to the sovereign debt crisis.

as a whole[63]. Consequently, by means of an international treaty, concluded outside the legal framework of the Union but closely linked to it, a new 'bailout fund' was created: the *European Stability Mechanism* (ESM)[64]. That is, an institution designed to provide financial assistance to Member States in difficulty, based on the principle of "*strict conditionality*", expressly codified in the new Article 136(3) TFEU[65]. Any form of economic support provided by the ESM is, in fact, subject to the beneficiary State's compliance with a detailed "macroeconomic adjustment programme", established in a special *Memorandum of Understanding* (MoU) and subject to monitoring by a hybrid body, the so-called *Troika*, composed of representatives of the European Commission, the ECB and the International Monetary Fund (IMF)[66]. This conditionality basically aims at preventing assisted States from being disincentivised to pursue sound fiscal policies, thus avoiding the temptation of moral hazard.

In a nutshell, it can be concluded that the constitutional principle of *no bail-out* has undergone a significant tempering[67]. Originally enshrined in the Treaties as an *absolute* limit to budgetary solidarity between Member States, this principle was first tempered through a broad interpretation of another provision of constitutional rank for EU law, Article 122 TFEU, and subsequently derogated from with the introduction of Article 136(3) TFEU into

63 On this point, A. GIOVANNELLI, *Vincoli europei e decisione di bilancio*, in *Quad. cost.*, 4, 2013, 933 ff.

64 The ESM founding treaty was revised in January 2021, with the signing of an amendment agreement by the then 19 eurozone Member States, to which Croatia was subsequently added. On this agreement, L. GIANNITI, *La riforma del Trattato istitutivo del MES e la governance economica dell'eurozona*, in *Dir. pubbl.*, No. 1 of 2020, 305 ff.; G. ANTONELLI, A. MORRONE, *La riforma del MES: una critica economica e giuridica*, in *Federalismi.it*, No. 34 of 2020, iv ff.; O. CHESSA, *Il nuovo MES: razionalità e misticismo nella garanzia della stabilità finanziaria*, in *Quad. cost.*, No. 1 of 2021, 203 ff. The revised Treaty will enter into force once ratified by all ESM States. At the moment, Italy is the only Member State that has not signed the amending agreement: A. FERRARI ZUMBINI, *Mancata ratifica alle modifiche del MES: problemi e prospettive*, in *Quad. cost*., No. 1, 2024, 169 ff. It is also worth noting that, in October 2022, the German Federal Constitutional Court declared inadmissible the appeal lodged by some *Bundestag* members against this amendment agreement. See BVerfG, 2 BvR 1111/21, 13 October 2022. Commenting on the pronouncement, M. BONINI, *Tornare alla separazione dei poteri e alla tutela dei diritti: il patriziato giurisdizionale del Bundesverfassungsgericht tedesco alla prova del NGEU e del MES*, in *DPCE Online*, No. 2, 2023, 1579 ff.

65 Article 12(1) of the Treaty establishing the ESM. See also Court of Justice, judgment of 27 November 2012, *Pringle v. Government of Ireland and others*, Case C-370/12, paras. 129-147, which recognised the fundamental scope of the principle of conditionality, compliance with which is essential to ensure the compatibility of the rescue measures envisaged by the ESM with the *no bail out clause* enshrined in Article 125(1) TFEU. Commenting on the decision, R. CALVANO, *Il meccanismo di stabilità e la perduta sensibilità costituzionale della Corte di Giustizia dell'Unione europea alla luce del caso Pringle*, in *Giur. cost.*, No. 3, 2013, 2426 ff.; B. DE WITTE, T. BEUKERS, *The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle*, in *CML Rev.*, Vol. 50, No. 3, 2013, 805 ff. In general, on the European approach to conditionality before the economic crisis, see C. PINELLI, *Conditionality and Enlargement in Light of EU Constitutional Developments*, in *ELJ*, Vol. 10, No. 3, 2004, 354 ff.; in the context of the crisis, see D. SICLARI, *"Condizionalità" internazionale e gestione delle crisi dei debiti sovrani*, in *Federalismi.it*, No. 1, 2015, 2 ff. For a recent reconstruction, see also A. BARAGGIA, *La condizionalità come strumento di governo negli Stati compositi. Una comparazione tra Stati Uniti, Canada e Unione Europea*, Torino, 2023, 155 ff.

66 Article 13 of the ESM Treaty. In doctrine, for a critical reading: A. MANGIA, *Il Trattato MES, la costituzione economica europea, le Costituzioni nazionali*, in ID. (ed.), *MES. Europe and the Impossible Treaty*, Brescia, 2020, 11 ff.

67 R. MICCÙ, *Le trasformazioni della costituzione economica europea: verso un nuovo paradigma?*, in *Federalismi.it*, No. 5, 2019, 31-32.

the same Treaties. In this way, the banning of bail-outs was converted into a limit only on financial solidarity interventions, which admits exceptions justified by the 'quid pro quo' of compliance with the principle of strict conditionality of the economic support measures to be adopted[68].

3. The response to the Covid-19 pandemic: between the suspension of the Stability and Growth Pact and the launch of the Next Generation EU

Having described the essential traits of the European economic constitution, as concretely interpreted and declined in the pre-pandemic period, it is now necessary to examine the impact on them of the economic crisis induced by the Covid-19 epidemic.

Simplifying a great deal, it can be said that the Union's strategy, aimed at preventing the implosion of social and economic systems bent by the health emergency – characterised, unlike the sovereign debt crisis, by a symmetrical nature, since it affected all the Member States, albeit with varying intensity[69] –, was articulated along two main lines, distinct but closely interconnected.

First of all, in March 2020, it was decided to temporarily suspend the constraints imposed by the SGP on national fiscal policies[70], extended until the end of 2023, due to the further economic downturn brought about by the conflict in Ukraine[71]. More in detail, at the proposal of the Commission, the Council activated the *general escape clause* of the Pact, introduced by the *Six Pack*[72], which, in the face of an exceptional event such as the pandemic, characterised by significant repercussions on European public finances and capable of provoking a deep economic recession in the Union, allowed the redefinition of the fiscal

68 From this angle, A. MORRONE, *Crisi economica e diritti. Appunti per lo Stato costituzionale in Europa*, in *Quad. cost.*, No. 1, 2014, 84 observed that, in the European legal system, "an original principle of responsible inter-state solidarity has taken shape". For a broader analysis of the principle of solidarity at the European level, see G. COMAZZETTO, *La solidarietà necessaria. Metamorfosi di un principio nell'orizzonte costituzionale europeo*, Napoli, 2023.

69 On the main differences between the two crises, A. PISANESCHI, *Dalla crisi Lehmann Brothers alla crisi Covid. Istituzioni europee e regolazione bancaria alla prova dello stress test*, in *Federalismi.it*, No. 7, 2022, 240 ff.

70 EUROPEAN COMMISSION, *Communication from the Commission on the activation of the general escape clause of the Stability and Growth Pact*, COM(2020) 123 final, 20 March 2020. On this point, G. GIOIA, *Il Patto di stabilità e crescita tra sospensione e proposte di riforma. Un'occasione per ripensare le fiscal rules?*, in *Dir. comp.*, 10 May 2021. The suspension of the SGP rules was accompanied by a parallel suspension of the rules of the competitive market, namely those related to the prohibition of state aid. See EUROPEAN COMMISSION, *Communication from the Commission. Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*, COM(2020) 1863 final, 19 March 2020, as amended. In doctrine, M. PREVIATELLO, *Tra flessibilità e ortodossia economica: la valutazione di incompatibilità degli aiuti di stato al tempo dell'emergenza covid-19*, in G.P. DOLSO, M.D. FERRARA, D. ROSSI (eds.), *Virus in fabula. Diritti e Istituzioni ai tempi del covid-19*, Trieste, Eut, 2020, 147 ff.

71 EUROPEAN COMMISSION, *Economic policy coordination in 2021: overcoming COVID-19, supporting the recovery and modernising our economy*, COM(2021) 500 final, 2 June 2021; EUROPEAN COMMISSION, *Communication from the Commission on the 2022 European Semester - Spring Package*, COM(2022) 600 final, 23 May 2022.

72 The general escape clause of the SGP is contained in Articles 5(1), 6(3), 9(1) and 10(3) of Regulation No 1466/1997, as well as in Articles 3(5) and 5(2) of Regulation No 1467/1997.

consolidation paths required of Member States, adapting them to such an exceptional circumstance[73].

This choice of field was mainly motivated by the need to create adequate margins for public intervention, allowing recourse to deficit spending in an anti-cyclical function, to the extent necessary to tackle the crisis[74]. Moreover, in all the European States affected by the pandemic, the conviction had been established that robust public deficit spending was indispensable to strengthen health systems, to support the reduction in production and aggregate demand, and to guarantee the income and employment of workers during the most critical phases of the emergency[75].

However, even with the suspension of the Pact, recourse to public debt to revive European economies, damaged by the prolonged effects of the epidemic, was not easy, as the financial situation of the States with higher levels of debt made it difficult for them to access the capital markets. To cope with this situation, the European Union therefore decided to intervene directly by providing a massive injection of resources[76]. In this context, an extraordinary programme to stabilise national economies in the short term and boost them in the medium term was approved at the European Council of 17-21 July 2020, following intense negotiations: the *Next Generation EU* (NGEU)[77]. This financial aid programme has three main components, which form its constitutional basis[78].

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73 COUNCIL OF THE EUROPEAN UNION, *Statement of EU Ministers of Finance on the Stability and Growth Pact in Light of the COVID-19* Crisis, 23 March 2020. It is worth noting, in particular, that with the activation of the Pact's *general escape clause*, both the achievement of the MTO, under the preventive arm, and the correction of excessive deficits, under the corrective arm, have been suspended until the end of 2023. On this, see A. MANZELLA, *Nell'emergenza, la forma di governo dell'Unione*, in *Astrid*, No. 5, 2020, 1 ff.

74 O. CHESSA, *La governance economica europea dalla moneta unica alla emergenza pandemica*, in *Lav. dir.*, 3, 2020, 410.

75 By virtue of the suspension of the SGP, Italy was able to go into debt to cope with the pandemic, resorting to the procedure provided for in Article 81(2) of the Constitution, which allows recourse to debt in the case of exceptional events, subject to authorisation by the Houses of Parliament adopted by an absolute majority. L. BARTOLUCCI, *Piano nazionale di ripresa e resilienza e forma di governo tra Italia e Unione europea*, Torino, 2024, 95.

76 With this in mind, an *ad hoc* ESM credit line, called "*Pandemic Crisis Support*", was set up first of all, which made available to each Member State financing equal to 2% of national GDP, tied to support the direct and indirect costs of healthcare: F. SALMONI, *L'insostenibile 'leggerezza' del Meccanismo europeo di stabilità. La democrazia alla prova dell'emergenza pandemica*, in *Federalismi.it*, No. 20, 2020, 280 ff. Moreover, Regulation No. 2020/672, based on Article 122(1) and (2) TFEU, introduced the *European Instrument for Temporary Support to Mitigate Unemployment Risks in an Emergency* (SURE), i.e. a form of financial assistance with which the Union supported, through loans totalling up to one hundred billion euro, the redundancy schemes and other income support measures implemented by Member States to safeguard workers and jobs. On this point, F. CAPRIGLIONE, *Covid-19. Quale solidarietà, quale coesione nell'UE? Incognite e timori*, in *Riv. trim. dir. ec.*, No. 2, 2020, 206. Finally, the European Investment Bank (EIB) has taken significant measures to support European economic actors, with a focus on small and medium-sized enterprises. Initially, a plan was launched to mobilise financial resources amounting to EUR 40 billion. Subsequently, a guarantee fund, the *Pan-European Guarantee Fund*, was set up to provide loans of up to EUR 200 billion. For an in-depth discussion, L. MELICA, *"Whereas this is a moment of truth for the Union that will determine its future". Tra atti e parole delle istituzioni europee nella lotta contro la pandemia*, in *DPCE Online*, No. 2, 2020, 2282.

77 Some references in this regard can be found in C. BERGONZINI, *L'Europa e il Covid-19. Un primo bilancio*, in *Quad. cost.*, No. 4, 2020, 761 ff.; C. FASONE, *Le conclusioni del Consiglio europeo straordinario del 21 luglio 2020: una svolta con diverse zone d'ombra*, in *Dir. comp.*, 29 July 2020.

The first component of the NGEU is represented by Decision No 2020/2053 on the European Union's own resources, which, in order to raise the necessary liquidity to finance the supranational action of fiscal support to the Member States, authorised the Commission to borrow on the capital markets on behalf of the Union, through the issuance of joint public debt securities (so-called *Eurobonds*), for an amount of EUR 750 billion[79]. This decision was adopted on the basis of Article 311(2) TFEU, which provides that, "without prejudice to other revenue", the European budget "shall be financed wholly from own resources"[80]. Although this legal basis does not contain an explicit authorisation of the Union's borrowing on the markets, it has been interpreted in an evolutive manner in order to legitimise the Commission's loan proceeds, making them fall under the category of "other revenue"[81].

In order to enable the repayment of the funds borrowed by the Commission, Decision No. 2020/2053 provided for an increase in the resources that make up the *Multiannual Financial Framework* (MFF), i.e. the budget of the European Union, for the period 2021-2027[82]. In this perspective, on the one hand, a new revenue was introduced based on the application of a uniform levy rate on the weight of non-recycled plastic packaging waste generated in each Member State[83]. On the other hand, an increase in the Member States' share of the

78 F. FABBRINI, *Next Generation Eu: Legal Structure and Constitutional Consequences*, in *Cambridge Yearbook of European Legal* Studies, Vol. 24, 2022, 58.

79 Article 5(1)(a) of Decision No. 2020/2053. These common debt securities have proved particularly attractive to the financial markets (so-called *safe assets*), as they are endowed with a high degree of solvency, especially thanks to the ECB's role as informal buyer of last resort. This is highlighted by F. LOSURDO, *Il debito comune europeo, da Maastricht alla guerra*, in M. BARONE, O.M. PALLOTTA (eds.), *La nuova fase dell'integrazione europea. Stato e società alla prova del Next Generation EU*, Napoli, 2024, 308.

80 The revenue of the European budget is essentially made up of revenue from the customs tariff, levies of agricultural origin, a percentage of value added tax (VAT) collected at national level, as well as direct contributions from Member States based on Gross National Income (GNI). For an in-depth discussion, A. SOMMA, *Il bilancio dell'Unione europea tra riforma del sistema delle risorse proprie e regime delle condizionalità*, in *DPCE Online*, No. 4, 2018, 873 ff.

81 On this point, G. CONTALDI, *Il Recovery Fund*, in *Stud. int. eur*., No. 3, 2020, 598, who recalls, moreover, the historical precedent of Regulation No. 397/75, based on the flexibility clause *under* Article 235 TCEE (now Article 352 TFEU), with which the Council, in response to the oil crisis of the early 1970s, authorised the issue of bonds in favour of the then European Economic Community.

82 The MFF 2021-2027 was approved by Regulation No 2020/2093 and subject to the conditionality regime provided by Regulation No 2020/2092. The latter stipulates that financial disbursements from the European budget are conditional on compliance with the principle of the rule of law. For an analysis of this conditionality mechanism, E. CASTORINA, *Stato di diritto e "condizionalità economica": quando il rispetto del principio di legalità deve valere anche per l'Unione europea (a margine delle Conclusioni del Consiglio europeo del 21 luglio 2020)*, in *Federalismi.it*, No. 29, 2020, 43 ff.; R. CALVANO, *Legalità UE e Stato di diritto, una questione per tempi difficili*, in *Riv. AIC*, No. 4, 2022, 166 ff. It is worth noting, however, that the Court of Justice, in twin judgments, rejected the appeals of Hungary and Poland, with which the two Member States had challenged the legality of Regulation 2020/2092, requesting its annulment. See Court of Justice, Judgment 16 February 2022, *Hungary v. European Parliament and Council of the European Union*, Case C-156/21; Court of Justice, Judgment 16 February 2022, *Poland v. European Parliament and Council of the European Union*, Case C-157/21. For a commentary on the two decisions, see S. BARTOLE, P. FARAGUNA, *La condizionalità nell'Unione, i carrarmati fuori dell'Unione*, in *Dir. comp.*, 17 March 2022.

83 Article 2(1)(c) and (2) of Decision No 2020/2053. See also Regulation No. 2021/770, concerning the calculation of the own resource based on non-recycled plastic packaging waste, the methods and procedure for making this resource available, measures to meet cash requirements, and certain aspects of the own resource based on gross national income. The introduction of this new source of revenue for the European budget appears particularly relevant when one considers that, in the face of numerous European rules affecting public

contribution was set at 1.46% of the Union's Gross National Income (GNI) for commitment appropriations and 1.4% of GNI for payment appropriations[84] . At the same time, the European institutions undertook to submit proposals for the introduction of new types of EU own resources[85]. However, the decision under review provides that, should a reform of the European financing system[86] not be approved, the repayment of the loans contracted by the Commission would ultimately be borne by the Member States[87]: in such a scenario, the Commission could request a further increase in the Member States' share of the contribution not exceeding 0.6% of the Union's GNI[88].

Finally, it should be emphasised that the repayment obligation is not apportioned according to the amount of financial aid received by each Member State, but according to their share of the contribution to the Union budget, determined by their GNI[89]. This represents an undeniable solidarity profile of the NGEU, as there is no symmetry between the funds obtained by individual European States and the contributions they are required to pay to the supranational level[90].

The second component of the NGEU is Regulation No 2020/2094, which established *the European Union Recovery Instrument* (EURI), under which revenues from market borrowing by the Commission were allocated to various European programmes aimed at mitigating the negative economic consequences of the Covid-19 crisis[91].

This instrument was based on an innovative interpretation of the two paragraphs of Article 122 TFEU[92]. On the one hand, the first paragraph, although referring specifically to

expenditure, the regulation of tax revenues has remained almost entirely within the discretion of the Member States. This is pointed out by F. LOSURDO, *L'ordine di Maastricht e l'economia di guerra. Il nodo gordiano del debito*, in *Ist. fed.*, No. 1-2, 2022, 124.

84 Article 3(1) and (2) of Decision No 2020/2053.

85 *Recital* 6 of Decision No 2020/2053. See also the *Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources*.

86 It is worth mentioning that such a reform will in any case require a unanimous decision of the Council, after consultation of the European Parliament, and subsequently ratification by all Member States. As can be seen, an intergovernmental logic prevails in the area of own resources, since the Council acts as sole legislator and not as co-legislator with the European Parliament. According to O. CHESSA, *Dall'ordine di Maastricht al Next Generation EU*, cit., 29, this shows that the principle '*no taxation without representation*' and its palindromic inversion, '*no representation without taxation*', do not apply to the European Union.

87 F. SALMONI, *Recovery fund, condizionalità e debito pubblico. La grande illusione*, Padova, 2021, 77. See Article 9(4) of Decision No 2020/2053.

88 Article 6 of Decision No 2020/2053. In doctrine, G. CONTALDI, *Il programma NextGenEU e (l'antico) problema del deficit democratico dell'UE*, in G. DI COSIMO (ed.), *Curare la democrazia. Una riflessione multidisciplinare*, Padova, 2022, 92.

89 Article 9(6) of Decision No. 2020/2053.

90 G. PITRUZZELLA, *Identità, linguaggio e integrazione europea*, in *Riv. AIC*, No. 1, 2023, 118.

91 Article 2(2) of Regulation 2020/2094. For an in-depth study, E. VERDOLINI, *La pianificazione multilivello di Next Generation EU: note preliminari per un inquadramento teorico-giuridico*, in *Oss. fon.*, 2, 2024, 220 ff.

92 In this regard, E. CANNIZZARO, *Neither Representation nor Taxation? Or, "Europe's Moment" - Part I*, in *European Papers*, Vol. 5, No. 2, 2020, 705 pointed out that neither of the two paragraphs of Article 122 TFEU, taken individually, seemed suitable as a legal basis for the above-mentioned European instrument for recovery. See also A. MANGIA, *L'Europa dell'emergenza perenne*, in E. MOSTACCI, A. SOMMA (eds.), *Dopo le crisi. Dialoghi sul futuro dell'Europa*, cit., 149, who observed how Article 122 TFEU has now become a *passe-partout* used to circumvent the Treaties and adapt them to situations of financial instability.

energy supply issues, thus to a different matter from the pandemic, was used for its reference to the "spirit of solidarity between Member States", which allowed the adoption of "measures appropriate to the economic situation" generated by the health crisis. On the other hand, the second paragraph was used insofar as it allowed the Union to grant "financial assistance", under certain conditions, to a Member State that "is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control". Although this second paragraph was originally designed to apply to a single Member State, it has been read in an evolutive way, extending its scope to all Member States, as the pandemic has led to an exceptional situation in each of them[93].

The third component of the NGEU is defined by Regulation No. 2021/241, which established the *Recovery and Resilience* Facility (RRF), the most relevant of the programmes financed by the Union through funds raised on the markets under Decision No. 2020/2053 and allocated through Regulation No. 2020/2094[94] . The legal basis for the RRF lies in Article 175(3) TFEU. This provision, although not explicitly designed to cope with economic shocks, has been used to the extent that it allows for additional measures aimed at strengthening economic, social and territorial cohesion[95] beyond the existing structural funds[96].

In particular, the scheme provides for a financial provision of EUR 672.5 billion, of which EUR 312.5 billion is to be disbursed in the form of *grants* and EUR 360 billion in the form of low-interest *loans*[97]. The allocation of these resources to the Member States is based on a number of variables, including population, GDP *per capita*, unemployment rate and economic impact of the pandemic[98], which give the NGEU a marked redistributive effect at European level. Resources are not, however, distributed unconditionally: on the contrary, conditionalities are rather strict, in order to prevent the risk of moral hazard[99].

93 For an analysis of the potential of this legal basis, M. CHAMON, *The EU's Dormant Economic Policy Competence: Reliance on Article 122 TFEU and Parliament's Misguided Proposal for Treaty Revision*, in *ELRev*, Vol. 49, No. 2, 2024, 166 ff.

94 It should be noted that Regulation No. 2021/241 was first amended by Regulation No. 2023/435, concerning the *REPowerEU* plan aimed at making the Union independent of Russia's fossil fuels, accelerating its transition to clean energy (N. LUPO, *L'aggiornamento e l'integrazione del PNRR, tra crisi energetica e (parziale) mutamento di indirizzo politico*, in *Quad. cost*, No. 2, 2023, 435 ff.), and subsequently by Regulation No. 2024/795, which established the Strategic Technologies Platform for Europe (STEP), in order to allow member States to introduce measures to support investment operations in digital technology sectors (G. SGUEO, *Il Regolamento UE 2024/795 e la piattaforma per le tecnologie strategiche per l'Europa*, in *Giorn. dir. amm.*, No. 3, 2024, 339 ff.).

95 S. BARONCELLI, *Recovery and Resilience Facility*, in F. FABBRINI, C.A. PETIT (eds.), *Research Handbook on Post-Pandemic EU Economic Governance and NGEU Law*, Cheltenham, 2024, 111. See also P. DERMINE, *The EU's Response to the COVID-19 crisis and the trajectory of fiscal integration in Europe: between continuity and rupture*, in *Legal Issues of Economic Integration*, Vol. 47, No. 4, 2020, 346, who, reasoning on the innovative reading given to Article 175(3) TFEU, underlined how the NGEU is "*much more than cohesion policy. It stands as the core vehicle of a new pan-European economic and industrial strategy*".

96 On the European structural funds, see G.P. MANZELLA, *Europa e "sviluppo armonioso". La strada della coesione europea: dal Trattato di Roma al Next Generation EU*, Bologna, 2022, 137 ff.

97 Article 6(a) and (b) of Regulation No. 2021/241.

98 Article 11(1)(a) and (b) of Regulation No. 2021/241.

99 M. DANI, *L'invadente condizionalità macroeconomica del dispositivo per la ripresa e la resilienza*, in *Dir. pub. comp. eur.*, 1, 2023, 285 ff.

The allocation of funds is conditional, in fact, on the preparation of *National Recovery and Resilience Plans* (NRRPs) agreed between the European institutions, the Council and the Commission, and the governments of the Member States[100]. These Plans must be in line, on the one hand, with the economic policy strategies defined at supranational level[101] and, on the other hand, with the *Country Specific Recommendations* for 2019 and 2020[102]. In this way, the NGEU procedures are integrated within the established multilateral surveillance of national economic and budgetary policies, represented by the European Semester[103]. The verification of compliance with the aforementioned macroeconomic conditionalities is, moreover, subject to periodic evaluation by the Commission: each tranche of direct transfers and subsidised loans is disbursed only on the condition that satisfactory achievement of the milestones and targets set in the NRRPs is demonstrated[104].

Overall, the logic of pandemic governance can be summarised as follows.

A cornerstone of EMU's economic constitution, that based on fiscal rules designed to contain public deficits and debts, as progressively tightened by the SGP, was 'quarantined'. This choice, with a strong political value, plastically marked a datum: the implicit admission of the ineffectiveness of the stringent fiscal discipline envisaged by the Pact in the face of unforeseen and particularly serious economic crises, such as the one caused by the pandemic[105].

At the same time, another cornerstone of the European economic constitution, the one rooted in the *bail-out* ban, was reinterpreted in an innovative way. The confirmation of the traditional exegesis of Article 125(1) TFEU, consolidated during the sovereign debt crisis and based on the idea that the conditionality mechanism represents the essential building block to justify forms of financial assistance to Member States in compliance with the principle of *no bail-out*[106], has been flanked by an experimental application of three other Treaty

100 Articles 17-21 of Regulation 2021/241. For an overview on the point, E. CAVASINO, *Il PNRR e le sue fonti. Dinamiche dei processi normativi in tempi di crisi*, Napoli, 2022; E. CATELANI, *P.N.R.R. e ordinamento costituzionale: un'introduzione*, in *Riv. AIC*, No. 3, 2022, 210 ff.; G. PICCIRILLI, *Il PNRR come procedimento euro-nazionale e la "fisarmonica" governativa*, in V. DI PORTO, F. PAMMOLLI, A. PIANA (eds.), *La fisarmonica parlamentare tra pandemia e PNRR*, Bologna, 2023, 137 ff.; F.S. MARINI, D. DE LUNGO (eds.), *Scritti costituzionali sul Piano Nazionale di Ripresa e Resilienza*, Torino, 2023.

101 In particular, it is envisaged that European funds will be allocated predominantly to so-called '*twin transitions*': 37% to investments for ecological transition and 20% to digitisation. See Article 16 of Regulation No. 2021/241. In doctrine, F. BILANCIA, *Le trasformazioni dei rapporti tra Unione europea e Stati membri negli assetti economici-finanziari di fronte alla crisi pandemica*, in *Dir. pubbl.*, 1, 2021, 59.

102 See *supra*, section 2, nt. 9.

103 Article 10 of Regulation No 2021/241. For an in-depth discussion, L.R. PENCH, *The new Stability and Growth Pact: innovation and continuity in the light of Next Generation EU*, in F. FABBRINI, C.A. PETIT (eds.), *Research Handbook on Post-Pandemic EU Economic Governance and NGEU Law*, cit., 299 ff.

104 Article 24(3) of Regulation 2021/241. On the role played by the Commission in the *Recovery and Resilience Facility,* see M. DE BELLIS, *Il ruolo di indirizzo e controllo della Commissione europea nel dispositivo per la ripresa e la resilienza: la trasformazione della condizionalità*, in *Dir. cost.*, No. 2, 2022, 37 ff.

105 This is observed by M.A. WILKINSON, H. LOKDAM, *The European Economic Constitution in Crisis. A Conservative Transformation*, in G. GRÉGOIRE, X. MINY (eds.), *The Idea of Economic Constitution in Europe*, Leiden-Boston, 2022, 458 ff. On the same wavelength, C. DOMENICALI, *La Commissione europea e la flessibilità "temporale" nell'applicazione del Patto di Stabilità e Crescita*, in *Federalismi.it*, No. 19, 2020, 462.

106 In these terms F. LOSURDO, *Pandemia e costituzione economica europea*, in E. BENEDETTI, A. PIACQUADIO, L. FABRIZI (eds.), *Scritti in onore di Gian Luigi Cecchini. Liber Amicorum*, Milano, 2023, 583.

provisions. Firstly, Article 311 TFEU, read in such a way as to include, among the revenues of the European budget, also those deriving from borrowing on the markets. Second, Article 122 TFEU, used not only in its second paragraph, as in the past, but also in its first, to provide for solidarity instruments to deal with economic crisis situations. Third, Article 175 TFEU, which was used to shape unprecedented instruments of economic and social cohesion[107]. It was, therefore, this overall exercise of "creative legal engineering"[108] that provided the Union with a valid instrument to legitimise a public intervention with equalising effects, aimed at healing the economic and social rifts that emerged during the pandemic, without, however, violating the constitutional principle of *no bail-out* [109].

On the other hand, such creative use of the legal bases provided by the Treaties, on which the NGEU is based, is not surprising. This practice is, in fact, a direct consequence of the apex and rigid nature of the European Treaties. Similarly to what happens with national Constitutions, also in the context of European primary law, when the constitutional revision procedure[110] proves to be complex and difficult to follow at a particular historical juncture, especially one of crisis, political and institutional actors inevitably end up adapting the existing constitutional provisions to the new requirements[111]. This happens, as especially taught by United States constitutional doctrine, through evolutionary interpretations of these provisions, exploiting their intrinsic elasticity, i.e. their semantic potential[112].

4. The reform of the Stability and Growth Pact

Having analysed the Union's economic responses to the health crisis, the latest innovation in the European economic constitution that deserves attention in this analysis is the recent revision of the SGP.

107 Hints, in this regard, in E. VERDOLINI, *Mano ferma nel guanto di velluto: l'uso del soft law nell'Unione Europea di «Next Generation»*, in *Oss. fon*., No. 2, 2023, 130 ff.

108 B. DE WITTE, *The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift*, in *CML Rev.*, Vol. 58, No. 3, 2021, 678. On this point, see also N. LUPO, *Il Piano Nazionale di Ripresa e Resilienza: un nuovo procedimento euro-nazionale*, in *Federalismi.it*, 15 February 2023, 12, who underlined how the above-mentioned interpretative work was carried out, first and foremost, by the legal services of the European institutions, which were able to respond to a precise political will, ensuring the appropriate instruments to allow for common action, within the constraints imposed by the Treaties. See COUNCIL OF THE EUROPEAN UNION, *Opinion of Legal Service on Proposals on Next Generation EU*, 24 June 2020.

109 For such a reconstruction, M.A. PANASCÌ, *Unravelling Next Generation EU As A Transformative Moment: From Market Integration To Redistribution*, in *CML Rev.*, Vol. 61, No. 1, 2024, 21 ff.

110 See the revision procedure under Article 48 TEU for amending European primary law.

111 The remark is by N. LUPO, *I fondamenti europei del Piano Nazionale di Ripresa e Resilienza*, in F.S. MARINI, D. DE LUNGO (eds.), *Scritti costituzionali sul Piano Nazionale di Ripresa e Resilienza*, cit., 10, according to whom the evolutionary interpretation of the legal bases on which the NGEU is based seems to "represent a further confirmation of the constitutional nature of the European Treaties".

112 For all, B. ACKERMAN, *We the People. Volume 1: Foundations*, Cambridge, 1991; ID., *We the People. Volume 2: Transformations*, Cambridge, 1998; ID., *We the People. Volume 3: The Civil Rights Revolution*, Cambridge, 2014. Also recently, R. ALBERT, R.C. WILLIAMS, Y. ROZNAI (eds.), *Amending America's Unwritten Constitution. Comparative Constitutional Law and Policy*, Cambridge, 2022. In Italian doctrine, see S. BARTOLE, *Considerazioni in tema di modificazioni costituzionali e Costituzione vivente*, in *Riv. AIC*, No. 1, 2019, 34 ff.

Since its last reform more than a decade ago, the SGP has been at the centre of a heated debate, fuelled by a growing sense of dissatisfaction: coming both from those who have denounced its ineffectiveness in regimenting national budgetary policies and from those who, from the opposite perspective, have criticised its excessive rigidity[113]. In this context, the discontinuation of the SGP represented a propitious opportunity to rethink its structure, before its return in force, with its associated dysfunctions, as of 2024.

The need for an umpteenth reform of the Pact – the third in its 27 years of existence – has been interpreted by the Commission, which, after presenting a communication on the orientations of the reform design[114] in November 2022, formalised, in April 2023, three proposals aimed at introducing significant innovations to the Union's economic governance framework. Subsequently, in December of the same year, the Ecofin Council reached agreement on these proposals, making significant changes[115]. Finally, at the end of the inter-institutional negotiations (so-called 'trilogue'), on 30 April 2024, the process of revising European economic governance reached its epilogue with the entry into force of three pieces of legislation: Regulation No. 2024/1263, repealing Regulation No. 1466/97 on the preventive arm of the SGP; Regulation No. 2024/1264, amending Regulation No. 1467/97 on the corrective arm of the SGP; and Directive No. 2024/1265, amending Directive No. 2011/85 on requirements for national budgetary frameworks[116].

The new version of the Pact (SGP IV), formed by the above-mentioned supranational legal acts, overcomes the rule on the speed of debt reduction, which envisaged an annual

113 This is highlighted by C. FASONE, *La riforma del Patto di Stabilità e Crescita: un compromesso al ribasso?*, in *Quad. cost.*, No. 2, 2024, 442.

114 EUROPEAN COMMISSION, *Communication on orientations for a reform of the EU economic governance framework*, COM(2022) 583 final, 9 November 2022. Moreover, it should be noted that, already in February 2020, the Commission recognised the need to review the SGP fiscal rules: EUROPEAN COMMISSION, *Communication on the economic governance review*, COM(2020) 55 final, 5 February 2020.

115 ECOFIN COUNCIL, *Economic governance review: Council agrees on reform of fiscal rules*, Press release, 21 December 2023. On this subject, L. VIOLINI, *Vincoli costituzionali al bilancio e spese emergenziali. Il BVerfG impone la linea del rigore*, in *Quad. cost.*, No. 1, 2024, 186 underlined how the Council's amendment of the Commission's initial proposal, largely influenced by the rigorist approach adopted at European level by German Finance Minister Christian Lindner, was also conditioned by the German Federal Constitutional Court's ruling of 15 November 2023. In fact, the Author read this decision, which declared the second supplementary budget law 2021 (*Zweites Nachtraghaushaltsgesetz 2021*) null and void for violation of the so-called 'debt brake' (*Schuldenbremse*), i.e. Articles 109(3) and 115(2) of the German Basic Law (*Grundgesetz*, GG), which prohibit the recourse to borrowing except in exceptional circumstances, as a sort of "warning from Germany to the negotiations on the changes to the Stability Pact being finalised in December at the European level". See BVerfG, 2 BvF 1/22, 15 November 2023. On the pronouncement, A. ZEI, *Le manovre espansive in Germania in tempo di crisi: il tribunale costituzionale federale si pronuncia sui vincoli di cassa e di forma*, in *Nomos*, No. 3, 2023, 1 ff.; F. MUSSO, *La sentenza del 15 novembre 2023 del Bundesverfassungsgericht, tra vincoli costituzionali e ruolo della politica nella definizione del bilancio dello Stato*, in *Dir. comp.*, 7 February 2024. For a reconstruction of the German constitutional reform that introduced a brake on public debt: R. BIFULCO, *Il pareggio di bilancio in Germania: una riforma costituzionale postnazionale?*, in *Riv. AIC*, No. 3, 2011, 1 ff.

116 It should be noted that the three legislative acts followed different procedural paths due to their different legal basis. Regulation 2024/1263, under Article 121(6) TFEU, followed the ordinary legislative procedure, which provides for a co-legislative role for the European Parliament and the Council, with the latter acting by qualified majority. Regulation 2024/1264, based on Article 126(14)(2) TFEU, followed a special legislative procedure, requiring a unanimous vote of the Council and an advisory role of the European Parliament. Finally, Directive No. 2024/1265, as a non-legislative act, was adopted, pursuant to Article 126(14)(3) TFEU, by qualified majority vote of the Council, after consultation of the European Parliament.

reduction of 1/20 for States with a debt/GDP ratio above 60%[117]. This rigid formula, considered pro-cyclical and unrealistic, has been replaced by customised fiscal adjustment paths for each Member State, aimed at ensuring compliance with the Maastricht criteria[118]. These paths are to be defined within special "National Medium-Term Fiscal-Structural Plans" (MTP)[119], lasting four or five years, depending on the national legislature[120], extendable up to seven years, if the State concerned chooses to include an additional programme of reforms and investments that favour a gradual and sustainable reduction of the debt stock in the long run[121].

The structural budget plans, which are at the heart of the preventive arm of the new European economic governance, must be negotiated by the Member States with the Commission and approved by the Council[122]. For States with public deficits or debts exceeding the Maastricht criteria, these plans are developed from a "reference trajectory" drawn up by the Commission[123] . Whereas, for States with a debt and deficit below these parameters, the Commission merely provides some "technical information"[124]. In particular, the reference trajectory, based on a '*Debt Sustainability Analysis*' (DSA)[125], defines annual ceilings of "net expenditure" that can be financed at national level[126]. The latter is understood

117 It is worth noting that, although the '1/20th rule' has been expunged from the new SGP, it still remains in the *Fiscal Compact* (see section 2.1 *above*). However, the latter should adapt to the new regulation without the need for a formal amendment. In fact, the *Fiscal* Compact, with a floating reference in Article 2, States that its legal framework "shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law".

118 Article 6 of Regulation No. 2024/1263.

119 Article 11 of Regulation 2024/1263. These structural budget plans replace the stability (or convergence) programmes and national reform programmes, which are incorporated, in Italy, in the Economic and Financial Document (DEF).

120 Structural budget plans may be revised before the end of the period in the event of objective circumstances that make their implementation impossible. See Article 15(1) of Regulation 2024/1263. There is also provision for a new government to revise the national plan when it takes office. However, it should be emphasised that the new national plan may not provide for a lower tax adjustment than previously established. See Article 15(2)-(5) of Regulation 2024/1263. In any case, the new SGP's focus on coordination with the political-electoral cycles of the individual Member States is certainly appreciable. In the past, in fact, European fiscal rules had remained formally indifferent to changes in the political scenario brought about by elections or government crises. With this new approach, an attempt is instead being made to reduce the "arrhythmias" of European representative democracy by improving the coordination, especially in time, between supranational and national democratic dynamics. For a similar observation, N. LUPO, *Gli adeguamenti dell'ordinamento costituzionale italiano conseguenti al nuovo patto di stabilità e crescita. Prime riflessioni*, in *Diritto & Conti*, No. 1, 2024, 180.

121 Article 14 of Regulation No. 2024/1263.

122 Articles 16 and 17 of Regulation No. 2024/1263.

123 Article 5 of Regulation No 2024/1263. On this point, F. SALMONI, *Commissione UE e "nuovo" Patto di stabilità e crescita: quali altri vincoli?*, in *Federalismi.it*, No. 33, 2022, vii.

124 Article 9(3) of Regulation 2024/1263. The distinction between States subject to a reference trajectory and States receiving mere technical information inevitably leads to the creation of two groups of Member States with different public finance obligations. This consequently leads to a different impact of European economic governance on national public authorities in the definition of budgetary policies. In these terms F. MUSSO, *L'ambivalenza della condizionalità nella governance economica europea: dalla crisi dei debiti sovrani alla travagliata riforma del Patto di Stabilità e Crescita*, in *DPCE Online*, No. 3, 2023, 3382.

125 Article 10 of Regulation No. 2024/1263.

126 In this regard, M. DANI, *Verso nuove regole fiscali europee: le proposte della Commissione per la riforma della governance economica europea*, cit., 485 pointed out that, for States with high public debt, it will be difficult to disregard the reference trajectory. This, in fact, is not merely an indicative proposal, but represents

as total public expenditure, net of debt interest expenditure, cyclical expenditure for unemployment benefits, expenditure financed by additional discretionary revenue, expenditure for investments fully financed by the Union as well as expenditure for national co-financing of European programmes[127]. In essence, therefore, the medium-term budgetary objective, based on a balanced structural budget balance, which was a central plank in the previous version of the SGP[128], is exceeded with this forecast.

The new Pact also introduces a system of quantitative constraints with minimum parameters common to all Member States, which serve as numerical safeguards for debt and deficit reduction as part of the fiscal adjustment path envisaged in the structural budget plans[129]. First, a reduction in the debt ratio of at least 1 per cent per year is required for States with a ratio above 90 per cent, and 0.5 per cent for those with a ratio between 60 per cent and 90 per cent[130]. Second, the deficit is required to fall below 1.5% of GDP[131]. To achieve this, Member States must improve the structural primary deficit by 0.4% of GDP per year, on average, in the case of a four-year plan, and by 0.25% of GDP per year, on average, for a seven-year plan[132].

In addition to defining the above-mentioned fiscal adjustment targets, the structural budget plans must also include the economic reforms and strategic investments, including those envisaged in the NRPs, that each Member State commits to undertake in the medium

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the default rule in case national proposals are not approved. That is, in the absence of an agreement between the Member State and the Commission, the public finance constraints will be those derived directly from the debt sustainability scenario prepared in advance by the Commission. As a result, it is difficult not to suspect that the Commission will end up acting, de facto, as a de facto policy-making body for the Member States' budgetary policies. See Article 19 of Regulation 2024/1263.

127 Article 2 of Regulation No. 2024/1263.

128 The replacement of the structural budget balance by net expenditure as a reference indicator for fiscal surveillance is to be welcomed, as it eliminates the need to calculate the so-called *output gap*. The latter, which indicates the gap between potential GDP (the output that would be obtained under conditions of full use of the factors of production) and actual GDP, is considered a highly controversial parameter and tends to be hostile to economic policies of a countercyclical nature. However, it should be pointed out that the calculation based on net expenditure is not without risk, since it is based on a technically complex methodology, the aforementioned *Debt Sustainability Analysis*, which in turn depends on elaborate estimates of virtual quantities, including potential GDP itself. For an in-depth discussion, A. SCIORTINO, *Sostenibilità del debito pubblico e proposta di riforma del Patto di stabilità e crescita*, in *La Lettera AIC*, No. 7, 2023, 1 ff. On the other hand, it is worth noting that the setting aside of the structural budget balance indicator could pave the way for a rethinking or a reinterpretation, albeit a complex one, of the financial procedures of the Italian legal system, such as to involve the constitutional text (in particular, Articles 81 and 97 of the Constitution) and the related implementing sources, including the reinforced Law No. 243/2012 and Law No. 196/2009 on accounting and public finance, in which the structural budget parameter is central. This is highlighted by C. FORTE, *La nuova governance fiscale europea: quali possibili riflessi sull'ordinamento interno?*, in *Oss. AIC*, No. 1, 2023, 235, who, referring to the 2012 constitutional reform that introduced the objective of balanced budgets into the Republican Charter, emphasises how particular "prudence is needed in amending the Constitutional Charter, whose changes cannot chase after the emergencies of the moment". On the effects of the new SGP on the Italian constitutional order, see N. LUPO, *Perché non occorre modificare la Costituzione a seguito del nuovo Patto di stabilità e crescita*, in *Dir. comp.*, 6 June 2024; C. FORTE, M. PIERONI, *Nuove regole fiscali europee e Costituzione*, in *Oss. AIC*, No. 5, 2024, 55 ff.

129 A. FRANCESCANGELI, G. GIOIA, *The New Stability and Growth Pact. Much Ado About (Almost) Nothing?*, in *Dir. comp.*, 27 May 2024.

130 Article 7 of Regulation No. 2024/1263.

131 Article 8(1) of Regulation No. 2024/1263.

132 Article 8(2) of Regulation No. 2024/1263.

term[133]. In formulating these commitments, an indispensable reference is the *Country Specific Recommendations*[134]. Finally, once the structural budget plans have been approved by the Council on the recommendation of the Commission, the Member States are called upon to implement the planned measures, following a path that is continuously monitored within the European Semester[135].

As regards the corrective arm of the new set of fiscal rules, it should be noted that compliance with the commitments agreed in the structural budget plans is guaranteed by a strengthened sanctioning apparatus[136]. In fact, in the event of the opening of the excessive deficit procedure due to the deficit exceeding the 3 per cent of GDP limit, the rule providing for a minimum annual adjustment of 0.5 per cent of GDP in the corrective path of net expenditure is automatically triggered[137]. At the same time, the Commission's discretion to open an excessive deficit procedure for exceeding the 60% of GDP debt limit is reduced, making the activation of such procedure essentially compulsory when deviations from the agreed expenditure path exceed 0.3% of GDP on an annual basis or 0.6% of GDP on a cumulative basis[138]. Moreover, to make the enforcement procedure more incisive than before, potential sanctions are reduced, thus making them more politically acceptable[139].

Ultimately, the basic philosophy underlying the new configuration of the SGP seems to reflect an exchange between greater nationalisation or, rather, individualisation in the definition of public debt reduction programmes – according to a procedure that recalls, in its

133 Article 13(c) and (g) of Regulation No 2024/1263. See, e.g., MINISTRY OF ECONOMY AND FINANCE, *Medium-Term Budgetary Structural Plan, Italy 2025-2029*, 27 September 2024, 101 ff.

134 Article 13(c) of Regulation No. 2024/1263.

135 Article 22 of Regulation No. 2024/1263. Deviations from the established route, whether general or relating to an individual state, are, however, permissible in the case of exceptional situations. See Articles 25 and 26 of Regulation No. 2024/1263.

136 In addition to the provisions introduced by the new corrective arm of the SGP, there are additional external *enforcement* mechanisms of the Pact, related to the *Recovery and Resilience Facility* and the *Transmission Protection Instrument* (TPI), the new unconventional monetary measure approved by the ECB in July 2022. In fact, both the disbursement of the financial resources envisaged by the NRPs under the *Recovery and Resilience Facility* (Article 10 of Regulation No. 2021/241) and the possibility of purchasing, on the secondary market, public debt securities issued by Member States under speculative attack in the context of the TPI are bound to respect the fiscal rules contained in the SGP. On this point, L. BARTOLUCCI, *Il nuovo Governo e il "triangolo di ferro" tra PNRR, Bce e disciplina di bilancio*, in *Luiss School of Government*, No. 17, 2022, 1 ff., who highlights how a real "iron triangle" has been created between budget discipline, PNRR and the actions of the Frankfurt Institute.

137 Article 3(4), of Regulation 1467/97, as amended by Regulation 2024/1264 . It should, however, be pointed out that the Council stipulated that the Commission, when determining the correction of the government accounts envisaged over the three-year period 2025-2027, may take into account the increase in interest expenditure over that period. See *recital* 23 of Regulation 2024/1264. In essence, as L. BARTOLUCCI, *Il percorso della riforma del Patto di Stabilità: il compromesso raggiunto peggiora la buona proposta della Commissione (ma è comunque un passo avanti rispetto al "vecchio" Patto)*, in *Dir. comp.*, 8 January 2024 observes, the political acceptability of the SGP reform was achieved by postponing the application of the relevant discipline to future legislatures.

138 Article 2(2) of Regulation 1467/97, as amended by Regulation 2024/1264. In this regard, it has been observed that such an automatism would not be consistent with the discipline of the Treaties, which provides for a series of steps before the opening of the excessive deficit procedure: A. SCIORTINO, *Le proposte di riforma del patto di stabilità e crescita: il profilo della sostenibilità del debito pubblico*, in *Dir. ec.*, No. 3, 2023, 366-367.

139 Article 12 of Regulation 1467/97, as amended by Regulation 2024/1264.

'method of governance', the elaboration of the PNRR in the framework of the RRF[140] – and greater rigour in heteronomous enforcement by European institutions, with the almost automatic activation of the sanctioning procedure. In other words, a wider margin of manoeuvre and political discretion granted *ex ante* to the Member States in defining their trajectories of adjustment of public accounts, including greater flexibility in terms of time, is matched by stricter *ex post* enforcement by the executive apparatus[141].

If this is true, the scope of the predominantly country-tailored approach of the revised framework, which aims to tailor national budgetary efforts, taking into account the peculiarities of each State's position, should not be overestimated. In fact, this approach coexists, as seen, with annual numerical constraints for the reduction of public debt and deficits, aimed at armouring the adjustment path to certain parameters that are the same for all Member States[142]. These constraints, in deference to the '*one size fits all*' principle that governed the old Pact[143], introduce rigidities that are hardly compatible with adjustment trajectories calibrated to the heterogeneous initial debt situation of each State, penalising the enhancement of '*national* ownership'[144]. On closer inspection, these constraints tend to be pro-cyclical in nature and, with slight variations, re-propose the same logic of inflexibility underlying the fiscal rules of the previous Pact.

It is, therefore, difficult to escape the impression that this is anything but a revolutionary reform. Beyond a few *maquillage* measures and a few systemic adjustments, it appears to be mostly in continuity with the previous legal framework. After the temporary relaxation of the constraints on national budgets during the emergency phase, the centre of gravity of the European strategy for governing public accounts once again revolves around a regulatory framework characterised by a tightening of the more tolerant fiscal rules provided for by the economic constitution enshrined in the Treaties[145].

140 We take up here the expression of N. LUPO, *Next Generation EU e sviluppi costituzionali dell'integrazione europea: verso un nuovo metodo di governo*, in *Dir. pubbl.*, No. 3, 2022, 729 ff., who identified the *Recovery and Resilience Facility* and the PNRR, considered in the framework of the NGEU, as a "new method of government" for the European Union, which would straddle the Community method and the intergovernmental method. See, on the same wavelength, also P. DERMINE, *The planning method: An inquiry into the constitutional ramifications of a new EU governance technique*, in *CML Rev.*, Vol. 61, No. 4, 2024, 959 ff.

141 In these terms M. BURSI, *On the hobbled reform of the Stability and Growth Pact*, in *Forum of Quad. cost.*, No. 2, 2024, 164 ff.

142 E. CAVASINO, *Sostenibilità, stabilità finanziaria e crescita: il linguaggio della Costituzione*, in *Dir. cost.*, No. 2, 2024, 116-117.

143 In this regard, see F. LOSURDO, *Lo stato sociale condizionato. Stabilità e crescita nell'ordinamento costituzionale*, cit., 34, who has highlighted how the claim to manage European fiscal policy by means of absolute rules, valid for all member States and in all situations, has proved illusory in the test of time.

144 The new economic governance re-proposes, in essence, the dilemma between rules and discretion, which has characterised the SGP since its introduction. On this point, see the reflections of L. BARTOLUCCI, *Piano nazionale di ripresa e resilienza e forma di governo tra Italia e Unione europea*, cit., 163.

145 F. SALMONI, *Debito pubblico e Patto di stabilità e crescita. Le nuove regole sulla governance economica europea*, in *Consulta online*, No. 2, 2024, 855. In the context described, the strategy adopted by the Italian government, which apparently linked the revision of the SGP to the ratification of the ESM reform, already approved by all the other Member States (*supra*, section 2.2, nt. 64), deserves some attention. However, this strategy, aimed at obtaining less restrictive budget rules in exchange for the approval of the new ESM, did not produce the desired results. The Italian executive was, in fact, forced to accept, at the Ecofin Council, the Franco-German agreement that stiffened the Pact. It is, moreover, significant to note that on the same day that the agreement on the new SGP was reached, the Italian Parliament rejected the ratification of the ESM reform: a

5. Concluding remarks

The path followed so far makes it possible to try to answer the question posed at the beginning of the contribution: faced with the health crisis, has EMU only made a temporary change of pace, due to the emergency contingency, or has it inaugurated a clear paradigm shift destined to be consolidated in the long term?

In the aftermath of the outbreak of the pandemic, the European economic response, which moved, as we have seen, along the lines of the suspension of the SGP rules and the approval of the NGEU, was interpreted by many as a true '*Hamiltonian moment*'[146]. That is to say, a significant change in the constitutional architecture of the EMU[147], which, by attenuating the previous logic of austerity, would have brought about a qualitative leap in inter-state solidarity[148]. This change would, in fact, have paved the way for a stable mutualisation of debt for equalisation purposes, thus laying the foundations for the creation of a para-federal fiscal capacity[149], capable of imparting a decisive interventionist orientation to economic policies in the Union[150].

A few years later, although it is undeniable that the response to the crisis provoked by the pandemic outbreak represented a major innovation in the European approach to economic matters, such an enthusiastic judgement raises doubts for two reasons[151].

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gesture interpreted by some commentators as a form of political 'retaliation'. For more on the links between the SGP reform and the ESM reform, see PRESIDENCY OF THE COUNCIL OF MINISTERS, *European Council, President Meloni's concluding press point*, 27 October 2023. In doctrine, C. BASTASIN, *The Meloni government's budgetary policy and the reform of European Economic Governance*, in *Luiss Working* Papers, No. 12, 2023, 1 ff.

146 It is worth mentioning, in this regard, the statement of the then German Vice-Chancellor and Finance Minister Olaf Scholz, who, in an interview with the weekly *Die Zeit* in May 2020 (O. SCHOLZ, *Jemand muss vorangehen*, in *Die Zeit*, 19 May 2020), imagined that through the issuance of joint public debt securities by the European Commission, i.e. through a pooling of the debt needed to finance the NGEU, the European Union was experiencing a kind of Hamiltonian moment. Scholz referred, in particular, to the proposal of Alexander Hamilton, US Treasury Secretary, to mutualise the debt accumulated by the 13 former British colonies during the struggle for independence from the United Kingdom; a proposal that, approved in 1790, laid the foundation for the fiscal unity of the nascent Federation of the United States of America. For an in-depth discussion, C. GEORGIOU, *Europe's 'Hamiltonian moment'? On the political uses and explanatory usefulness of a recurrent historical comparison*, in *Economy and Society*, Vol. 51, No. 1, 2021, 138 ff.

147 A-M. PORRAS-GÓMEZ, *The EU Recovery Instrument and the Constitutional Implications of its Expenditure*, in *Eu Const. L. Rev.*, Vol. 19, No. 1, 2023, 23.

148 G. PITRUZZELLA, *Next Generation Eu, the Principle of Solidarity and the Responsibility of the Member States*, in *Pass. cost.*, No. 2, 2021, 11 ff. On the same wavelength, S. CECCHINI, *L'Europa aspira a diventare uno Stato sociale?*, in *Riv. AIC*, No. 4, 2021, 103 ff.

149 F. FABBRINI, *EU Fiscal Capacity: Legal Integration After Covid-19 and the War in Ukraine*, Oxford, 2022. See also E. CAVASINO, *L'esperienza del PNRR: le fonti del diritto dal policentrismo alla normazione euro-governativa*, in *Riv. AIC*, No. 3, 2022, 248, who, in relation to the NGEU, referred to the experimentation of a "*proto-federal* model of economic *governance*".

150 G. AMATO, *Bentornato Stato, ma*, Bologna, 2022; A. MORRONE, *Sul «ritorno dello Stato» nell'economia e nella società*, in *Quad. cost.*, No. 2, 2023, 269; M. DANI, *Activist government redux: exceptional or structural?*, in *ELO*, Vol. 2, No. 1, 2023, 1 ff.

151 For a recent reconstruction, see the various contributions in L. LORENZONI (ed.), *Continuità e discontinuità nella finanza pubblica italiana nel contesto post-pandemico. Opportunità di riforma o risposte contingenti?*, Napoli, 2024.

The first reason is of a strictly *legal* nature. The German Federal Constitutional Court (*Bundesverfassungsgericht*, *BVerfG*) has recognised a licence of legitimacy to the unprecedented European economic recovery process only because it is not permanent, but rather entirely occasional and only functional to finance emergency measures. In particular, according to the Court of Karlsruhe, although the Treaties do not explicitly provide for an authorisation of the Union's borrowing on the markets, it is nevertheless not implausible that, under exceptional circumstances, such an operation can be carried out, by virtue of Article 311(2) TFEU, in order to secure additional revenue ("other revenue"), limited to a *one-off* dimension, to the European budget[152]. Furthermore, the German Constitutional Court argued that, despite the indirect alleviation of the pressure on the sovereign debts of the Member States brought about by the NGEU, a manifest breach of the *no bail-out* clause of Article 125(1) TFEU should be excluded. This is because the European financial programme does not establish any mechanism involving a direct assumption of responsibility by the Federal Republic of Germany for the choices of other Member States, and in any case circumscribes in amount and time the possible financial risks for the Federal Republic of Germany itself[153].

In a nutshell, the Court of Karlsruhe, in its usual work of 'authentic interpretation' of supranational law in the light of the German Basic Law (*Grundgesetz*, GG)[154], expressly denied that the NGEU could abstract itself from the albeit understandable contingent pandemic reason for its adoption and lend itself to providing a new tax paradigm that could be replicated in the future[155]. This is in perfect continuity with the constant German constitutional jurisprudence, which excludes the compatibility of the current Treaty framework with the creation of a stable European fiscal union[156].

The second reason is of an eminently *political* nature. The compromise reached between the Member States, which led to the establishment of the NGEU, proved possible precisely because, from the outset, this instrument was conceived as extraordinary, intimately linked to the pandemic emergency and destined to exhaust its propulsive force by 2026[157], as

152 BVerfG, 2 BvR 547/21, 6 December 2022, paras. 147-202.

153 BVerfG, 2 BvR 547/21, 6 December 2022, paras. 203-210. On this point, G. NAGLIERI, *Il Bundesverfassungsgericht tra paradossi e ragion di Stato. Le strade dell'integrazione europea alla luce della Eigenmittelbeschluss-Urteil*, in *Forum di Quad. cost.*, No. 4, 2022, 312 ff.

154 M. BONINI, *Fra riforma del MES e piano Next Generation EU. La svolta (apparente?) del Bundesverfassungsgericht*, in *Quad. cost.*, No. 1, 2023, 165.

155 P. DERMINE, A. BOBIĆ, *Of Winners and Losers: A Commentary of the Bundesverfassungsgericht ORD Judgment of 6 December 2022*, in *Eu Const. L. Rev.*, Vol. 20, No. 1, 2024, 189.

156 Indeed, ever since the *Maastricht-Urteil* of 1993, which authorised the German ratification of the Maastricht Treaty, the Court of Karlsruhe has equated the European economic architecture with a Community of stability (*Stabilitätsgemeinschaft*), conceptually opposed to a Community of solidarity *(Solidargemeinschaft*), which is the indispensable pivot of an effective fiscal union. See BVerfG, 2 BvR 2134/92, 12 October 1993, paras. 138, 144-145, 147-148. On the opposition between *Stabilitätsgemeinschaft* and *Solidargemeinschaft*, see F. SAITTO, *Economia e Stato costituzionale. Contributo allo studio della "Costituzione economica" in Germania*, Milano, 2015, 322 ff.

157 Such a conclusion emerges from the analysis of the regulatory acts adopted for the creation of the NGEU. In particular, Decision No 2020/2053 states, in Article 4, that "The Union shall not use funds borrowed on capital markets for the financing of operational expenditure", while, in Article 5(1), it empowers the Commission to borrow on the capital markets on behalf of the Union for "the sole purpose of addressing the consequences of the COVID-19 crisis", specifying that "no new net borrowing takes place after 2026". Moreover, Regulation No

confirmed by one of the legal bases on which it is based, Article 122 TFEU, applicable only in exceptional circumstances. At the expiry of the deadline, in the absence of reform measures aimed at incorporating the innovative instrumentation of the NGEU programme into the text of the Treaties, transforming it into a mechanism of permanent financial solidarity, we will therefore return to the previous regime[158]. As of today, moreover, this programme does not seem to have realistic prospects of consolidation in primary European law, since no political consensus has matured among the Member States (Germany and northern European States, first and foremost) to re-propose it in structural form.

Evidence of this is, among other things, the fact that the recent reform of European economic governance has, methodologically speaking, merely consisted of amendments to the secondary legislation contained in the SGP, without any amendments to the existing Treaties[159]. Moreover, in the new SGP, although the importance of preserving public investment in the debt reduction path is taken into account[160], any reference to a centralised fiscal and spending capacity of the European Union is missing[161]. Not only that. Not even a so-called *golden* rule, i.e. a rule that, by decoupling investment expenditure from the net primary expenditure aggregate, would help to channel public policies in such a direction, has not been included in the revised legal framework[162]. Consequently, the basic philosophy of the old Pact resurfaces, according to which public spending should be regarded primarily as a cost to be contained, rather than as a useful instrument to fuel economic growth.

Ultimately, after the hopes fuelled by the activation of the *general escape clause* and the approval of the NGEU, which had hinted at an inclination towards a greater centrality of public intervention in the economy[163], both at supranational and national level, the fact that now turns the clock back four years, to the pre-pandemic period, is that of total silence with

2020/2094 provides, in Article 3(9), that payments in respect of legal commitments entered into, decisions adopted and financial operations approved are to be "made by 31 December 2026". Similarly, Regulation No. 2021/241, in Article 24(1), clarifies that payments of financial contributions and loans to the Member States concerned are to be "made by 31 December 2026". In doctrine, see M. DANI, *La scossa della pandemia e l'Unione europea: rottura o mutamento costituzionale?*, in E. MOSTACCI, A. SOMMA (eds.), *Dopo le crisi. Dialoghi sul futuro dell'Europa*, cit., 79.

158 In these terms P. LEINO-SANDBERG, M. RUFFERT, *Next Generation EU and its constitutional ramifications: A critical assessment*, in *CML Rev.*, Vol. 59, No. 2, 2022, 433 ff.

159 The observation is by M. DANI, *La riforma della governance economica europea nella prospettiva del diritto costituzionale*, in *Quad. cost.*, No. 3, 2022, 631.

160 As seen above, section 2.1, in fact, the possibility of extending the duration, from four to seven years, of the fiscal adjustment path envisaged by the budget structural plans is linked to the forecast, in addition to a series of reforms, of investments that the State intends to implement (Article 14 of Regulation No. 2024/1263). In this way, a form of indirect investment incentive is determined: G.G. CARBONI, *La riforma del Patto di stabilità e crescita: sostenibilità economica vs sostenibilità politico-costituzionale*, in *Federalismi.it*, No. 21, 2023, 5. Moreover, it is important to stress that in the new SGP the increase in public investment in the defence sector is considered a relevant factor in the assessment of the existence of an excessive deficit. See Article 2(3)(e) of Regulation 1467/97, as amended by Regulation 2024/1264.

161 This is why C. BUZZACCHI, *La nuova proposta sul debito pubblico: l'occasione perduta per un bilancio europeo*, in *laCostituzione.info*, 8 January 2023 described the recent reform of European economic *governance* as a "missed opportunity".

162 This is underlined by A. SCIORTINO, *Le proposte di riforma del patto di stabilità e crescita: il profilo della sostenibilità del debito pubblico*, cit., 372.

163 M. DANI, *Costituzione economica e ordine materiale dell'economia nell'Unione europea: verso un interventismo post-politico?*, in *Giur. cost.*, No. 6, 2022, 3029.

respect to this scenario. The impression one gets is that the phase of the health emergency, far from having triggered a 'Hamiltonian moment' for the European Union[164], should rather be interpreted as a window of temporary suspension of the pre-existing economic order, to which it is gradually, but inexorably, coming back into line[165]. In other words, the economic consequences of the epidemic crisis do not seem to have led to an alteration of the basic architecture of the European economic constitution, as defined in Maastricht and concretely declined before the pandemic: if, at first, it was necessary to loosen its cornerstones – constraints on the governance of public accounts and a ban on bail-outs – to the point of foreshadowing its possible overcoming, in the current phase, with the discourse on the centrality of the lever of public expenditure being archived, we are witnessing its substantial reaffirmation[166].

Assuming the correctness of this reading key, one cannot ignore the danger inherent in the path taken. On the one hand, the absence of a centralised fiscal capacity, supported by permanent forms of common indebtedness, and on the other, the constraints imposed by the new SGP, which require a reduction in national public debt – which has increased considerably as a result of the financial commitments made by the Member States in order to access the funds of the European recovery plan – through a drastic reduction in expenditure, risk marking the end of the brief period of public interventionism experienced during the health crisis. All this is happening, moreover, precisely at a time when European economies are facing geo-economic challenges of inescapable scope, which would require, more than ever, an increase in public spending to support European strategic investments[167]. Among these, as recently emphasised by Mario Draghi in his report on the future of European competitiveness[168], are the ecological and digital transition, autonomy in energy supply, security and defence, and a European industrial policy capable of facing global competition with other economic powers, such as the United States and China, which do not place restrictions on borrowing to pursue their priority objectives[169].

In order to finance all these indispensable investments, the European Union should, therefore, pursue a different direction than the current one, which is centred on the public debt-public expenditure pair. In this perspective, the federalisation, on a structural basis, of part of the Member States' investment expenditure would certainly be the desirable option. However, as has already been pointed out, this solution appears difficult to implement, since

164 In this sense G. RIVOSECCHI, *Legge di bilancio e controllo di costituzionalità, spunti dalla decisione del Tribunale costituzionale federale tedesco*, in *Dir. pub. comp. eur*., No. 2, 2024, 469.
165 F. MEDICO, *La costituzione economica europea oltre la pandemia: verso una Restaurazione?*, in *Giur. cost.*, No. 2, 2023, 922.
166 For an overview on the point, M. DANI, *Costituzione economica e ordine materiale dell'economia nell'Unione europea: verso un interventismo post-politico?*, cit., 3027.
167 On the subject, S. GRUND, A. STEINBACH, *Debt-financing the EU*, in *CML Rev.*, Vol. 61, No. 4, 2024, 993 ff.
168 M. DRAGHI, *The future of European competitiveness - A competitiveness strategy for Europe*, 9 September 2024. See also E. LETTA, *Much more than a market - Speed, Security, Solidarity*, 18 April 2024. For an examination, in doctrine, F. LOSURDO, *Riforma del patto di stabilità e finanziamento dei beni pubblici europei*, in *Diario di Diritto pubblico*, 27 August 2024.
169 For an in-depth analysis, from a critical perspective, see the monographic analysis by F. SALMONI, *Guerra o pace. Stati Uniti, Cina e l'Europa che non c'è*, Napoli, 2022.

it would imply a significant constitutional leap for the still unfinished supranational federalisation process[170], destined to clash with the Gordian knot of the revision of the current Treaties[171]. Alternatively, a more realistic and pragmatic approach could consist in the expansion, coordinated by the central European level, of national investments by expanding the scope of manoeuvre granted to the fiscal policies of the Member States. This would simply require a reworking of the framework of European secondary legislation, with the aim of 'going back to the Statute'[172], i.e. to the more flexible spirit of the fiscal rules laid down in the Treaties.

Moreover, the considerations made above have highlighted how, in the face of a constitutional economic discipline – contained in the Treaties – that offers margins of flexibility, deriving from the interaction between rules that grant a certain space to national budgetary choices[173] and the political discretion reserved to the Council in applying these rules, it has been the sub-constitutional discipline – i.e. European secondary law – that has actually reduced this flexibility[174]. It follows that the recent tightening of the fiscal rules, implemented with the new SGP, does not embody an imposed and necessitated result, directly deriving from the Maastricht order, but represents only one of the various legislative interpretations of that order, certainly not the only possible one[175].

From this point of view, if the pandemic had one merit, it was that it brought to light the potential reversibility of the European economic constitution. It has, in fact, demonstrated, especially with the suspension of the Pact, how the constitutional process of economic integration is not shaped by inevitable and unchangeable outcomes, but by historical-material developments that can well be changed, provided that the political-institutional actors choose to do so.

170 B. CARAVITA, *Trasformazioni costituzionali nel federalizing process europeo*, Napoli, 2012.

171 The scenario of a revision of the Treaties was recently discussed by B. DE WITTE, *Towards a Reform of the European Treaties?*, in *Quad. cost*, No. 3, 2024, 727-729, who pointed out that "the current political situation is one in which most national governments are reluctant to engage in a process of Treaty revision, and the outcome of the recent European elections is not likely to convince the reluctant governments, quite to the contrary", also concluding that "it is unlikely that a Treaty reform process will succeed in the foreseeable future, or will even be formally launched".

172 The famous title of Sidney Sonnino's writing is taken up here: S. SONNINO, *Torniamo allo Statuto*, in *Nuova antologia*, 151, 1897, 9 ff.

173 Budget that, it is worth recalling, due to its constitutional relevance, is expressly qualified by the Italian Constitutional Court as a "public good". See Constitutional Court, judgments no. 184/2016, 80/2017, 247/2017; 49/2018, 115/2020; 39/2024. In doctrine, most recently, F. SUCAMELI, *Il "bene pubblico" bilancio come concetto*, in *Dir. cost.*, No. 2, 2024, 129 ff.

174 It was precisely because of its rigidity that the SGP was called "stupid" by the then President of the European Commission, Romano Prodi. See R. PRODI, *La France sera en minorité si elle n'est pas le levain de l'Europe*, in *Le Monde*, 17 October 2002, who stated: "*Je sais très bien que le pacte de stabilité est stupide, comme toutes les décisions qui sont rigides*". P. DE IOANNA, M. DEGNI, *Il vincolo stupido. Europa e Italia nella crisi dell'euro*, Roma, 2019.

175 In these terms, G. RIVOSECCHI, *Procedure finanziarie e vincoli del Patto di stabilità e crescita*, cit., 12, who pointed out that "if the Stability Pact translates into subjecting the budgetary decisions of the Member States to a more stringent procedural regime, the Community constraints could then well be placed within the broader framework of the principles of the Treaties combined with the values of the common constitutional traditions and the constitutional charters of the individual Member States".