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EU Next Generation-Europe's recovery and resilience plan: a revolution in economic governance of EU?

EU Next Generation-Europe's recovery and resilience plan, expresses a massive intervention in the economy of the Member States, which involves direct transfers to them, in addition to repayable loans, and the consequent recognition of the Union's ability to borrow in the financial markets and, consequently, to incur debt. A proper fiscal capacity of the EU has been created, not primarily fed by contributions of the Member States, or by new European taxes, but by the issuance of bonds. The reason of being and existing of this temporary recovery plan is the need to complement the economic and financial measures adopted by Member States, given the enormous impact of pandemic and the inability of many of them to cope with the situation on their own. Such complementary mobilisation of funding ensures that the internal market is not undermined by disparities in the ability of Member States to mobilise funding, and provides, in a spirit of solidarity, funding to those countries where fiscal space for discretionary spending is limited. In addition, it ensures that spending is carried out based on a coherent economic strategy coordinated between the Member States and promoted by the European Union's institutions.
Keywords: recovery, resilience, solidarity, transfers, loans, bonds, fiscal capacity, strategy.

1. Introduction. The COVID-19 crisis and its high impact on the EU economy

COVID-19, the most severe public health emergency for citizens, societies and economies ever known in the history of the European Union, has generated a coordinated response, initially lead by the European Commission but soon seconded by the other European institutions. Thus, after some hesitation about the significance of the pandemic, the Commission, in its statement of March 13, 2020[1], was aware of the profound and negative impact, sustained over time, caused by the lethal spread of the

[1] Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup. *Coordinated Economic Response to the COVID-19 Outbreak*. Brussels, 13.3.2020. COM(2020) 112 final. eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0112.

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coronavirus in Member States. The disruption of global supply chains; the fall of stocks markets, the impact of liquidity constraints for firms; the instability in financial markets; the uncertainty on investment plans; the shock experienced by consumer demand and the harmful consequences in key sectors like transport and tourism, required an extraordinary set of core measures, based on solidarity cooperation among all relevant actors. A clear common approach had to be developed.

2. Measures initially adopted to protect the single market and to provide financial assistance to Member States

Thus, initially, in addition to facing the public health problem raised, some initiatives, rather shy and disappointing, were envisaged to «*ensure the functioning of the internal market*» in relation to transport and access to medical supplies[2]. The guarantee of the maintenance of the free movement of goods and the free movement of people, in general, and workers, in particular, were the main objectives to preserve, despite the severe limitations established to contain the spread of the pandemic[3].

But when it comes to the availability of resources to assist affected States, the limited budget of the Union[4] explains this reduced own capacity for reaction. So, the *Coronavirus Response Investment Initiative*, consisting of 37.000 million euros by 2020, from reserves and unallocated and unused funds from cohesion policies, was earmarked for healthcare and small and medium-sized enterprises. Thus, the Commission decided not to request repayment of the unspent pre-financing corresponding to the European structural and investment funds. And, also, the Commission made 28.000 million euros available to Member States to support their health services, grant liquidity to companies and support employed and self-employed workers[5]. Likewise, the *Solidarity Fund* was expanded to

[2] Olesti Rayo, A., *La respuesta de la Unión Europea a la crisis derivada de la COVID-19*, in 89 *Rev. Cat. Dr. Publ., special issue*, 91 (2020).

[3] To mitigate the restriction of the Schengen area, see Communication from the Commission 2020/C 126/01, *On the Joint European Roadmap towards lifting COVID-19 containment measures*. (OJ EU C, no. 126, 17.4.2020). eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XC0417(06)&from=ES.

[4] *European Economic Governance. State of Play and Reform Proposals*, In-Depth Analysis, EPRS, European Parliamentary Research Service, November 2015.

[5] Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No. 1301/2013, (EU) No. 1303/2013 and (EU) No. 508/2014 *As Regards Specific Measures to Mobilize Investments in the Healthcare Systems of Member States*

allow States to request financial assistance of up 800 million euros. And at the same time, the *European Globalization Adjusted Fund* was also modified to support workers affected by the crisis, with funding of 179 million euros for 2020. Therefore, it was necessary to amend Regulation concerning the 2014-2020 Multiannual Financial Framework to increase the ceilings for commitment appropriations[6]. Even so, at the beginning of the crisis, the result was a limited total amount which soon proved insufficient[7].

Despite the scarcity of resources and some initial underestimation of the depth and duration of the crisis, the Union was gradually forced to offer a more determined supranational response, once the extraordinary magnitude of the pandemic had been appreciated. Undoubtedly, the most important step taken first, oriented to allow a rapid recovery, consisted of the decision to «*suspend fiscal and monetary rules*», considering implicitly that the crisis was not the major shock to the global and European economy that ended up being recognized, if not, rather, a temporary but profound crisis. Member States were thus allowed to use, without restrictions, public spending to mitigate the negative effects of the health crisis on their productive systems and social services. But the truth is that this limited measure clearly benefited some countries more than others, increasing differences and inequalities within the Union. Not surprisingly, the capacity of those Member States that had barely been affected by the recent past crises to provide assistance to their economies[8] was notably greater than that which the southern European States, still convalescing from those, could carry out.

It seemed thus that the Union had not learned from the mistakes made during the recent financial (2007-2008) and fiscal (2010-2012) crises, a long period of time during which the survival of the European integra-

and in Other Sectors of Their Economies in Response to the COVID-19 Outbreak (Coronavirus Response Investment Initiative) OJ L 99, 31.3.2020, 5-8. eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R0460.

[6] Council Regulation (EU, Euratom) No. 2020/538 of 17 April 2020 amending Regulation (EU, Euratom) No 1311/2013 *Laying Down the Multiannual Financial Framework for the Years 2014-2020 as Regards the Scope of the Global Margin Commitments*. OJ LI 119/1. eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020R0538.

[7] Kölling, M., *El coronavirus como catalizador para una revisión profunda del futuro marco financiero plurianual de la UE*, in *ARI*, 53, Real Instituto Elcano, 2020. www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/ari53-2020-kolling-coronavirus-como-catalizador-para-revision-profunda-futuro-marco-financiero-plurianual-ue.

[8] Larch, M., Noord, P., Jonung, L., *The Stability and Growth Pact: Lessons from the Great Recession, European Economy, Economic Papers*, 2010, 26.

tion project was seriously threatened[9]. In this regard, we should not forget that the legacy of those crises, in which austerity measures were imposed to many Member States, consisted of a significant cut in public spending on health and services for social protection[10]. As a consequence of this, some Member States of the Union, particularly those that had suffered, more severely, such adverse economic situations, prepared to face the pandemic in unfavourable conditions, compared to the others.

Thus, in accordance with that initial guidance three exceptional decisions were adopted by the European institutions to create a necessary and conducive legal framework that would facilitate the actions of the Member States:

1. *Competition law rules* were temporarily suspended in order to make possible, over all, *state aids*. According to Articles 107.2 *b*) and 107.3 *b*) TFEU, state aids, intended to repair damage caused by natural disasters or other extraordinary, temporary and unpredictable events, capable of causing significant economic consequences, are likely to be compatible with the internal market. Consequently, the Member States, in order to remedy these serious disturbances and, at the same time, to facilitate the development of certain activities (Art. 107.3 *c*) TFEU), were authorised, with extraordinary and temporary character, to use their financial resources to assist companies in difficulty, but also to readapt their production systems even through temporary nationalizations. Direct subsidies, tax advantages, short-term export credit insurances, public guarantees for loans granted to companies are part of this set of transitional measures planned, and several times revised, to support the economy during the pandemic[11].

2. The *general safeguard clause of the Stability and Growth Pact* was also considered applicable by the Council, in its formation with ministers responsible for economy and finance. So, for the countries that are part of the Economic and Monetary Union the limits of the fiscal discipline were made more flexible. Therefore, the rules that set deficit ceilings for the

[9] Carlucci, F., *La grande crisi e i suoi effetti sull'Europa*, in *Riv. st. pol. int.*, 78, 4, 2011, 489-518; Habermas, J., *Zur Verfassung Europas. Ein Essay*, Frankfurt am Main, Suhrkamp Verlag, 2011, 123; Ferrajoli, L., *Il suicidio dell'Unione Europea*, in *Eurotecnocrazia*, 6, 2016, 173-192.

[10] Canotilho, M.R., *Austerity measures under judicial scrutiny: the Portuguese constitutional case-law*, in *Eur. Const. Law Rev*, 11, 1, 2015, 155-183.

[11] Communication from the Commission *Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak* 2020/C 91 I/01, OJ C 91 I, 20.3.2020, 1-9. eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC_2020_091_I_0001.

Member States, which cannot exceed 3%, were suspended[12]. In sum, the aforementioned flexibility clause, adopted by the Council on a proposal of the Commission, allows Member States to temporarily deviate from the planned adjusted path, provided that budgetary sustainability is not jeopardized in the medium term[13]. Likewise, the Council may decide, on a proposal from the Commission, to adopt a revised budget path[14]. Such relaxation in the control of the fiscal deficit[15] seeks to facilitate the Member States that, through their budgets, they can support their weakened economy, shaken by the effects of the pandemic.

3. And in no lesser extent it is important to highlight that the rule that prohibits the European Central Bank from acting as buyer of the last resort of the public debt of the Member States was also declared temporarily out of force. The decision to implement an "unconventional measure" which goes beyond the ordinary competences in monetary policy assigned to the ECB, allowed the temporary *Pandemic Emergency Purchase Programme* to be put into operation[16], making possible for said Bank to acquire bonds from the treasuries of the countries of the Eurozone in amounts higher than those allowed by "quantitative easing"[17]. This extraordinary Programme, several times extended, so it will last until the

[12] Communication from the Commission to the Council *On the Activation of the General Escape Clause of the Stability and Growth Pact* COM (2020) 123 final, 20.3.2020. eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0123.

[13] Arts. 5.1 and 9.1 of the Council Regulation (EC) No. 1466/97 of 7 July 1997 *On the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic policies*. OJ L 209, 2.8.1997, 1-5.

[14] Arts. 3.5 and 5.2 of Council Regulation (EC) No. 1467/97 of 7 July 1997 *On Speeding up and Clarifying the Implementation of the Excessive Deficit Procedure*. OJ L 209, 2.8.1997, 6-11.

[15] Porras Ramírez, J.M., *El pacto presupuestario y el Tratado de Estabilidad, Coordinación y Gobernanza de la UEM. Balance de un instrumento ajeno al Derecho de la Unión*, in Aranda Álvarez, E. (cur.), *Las implicaciones constitucionales de la gobernanza económica europea*, Valencia, Tirant lo Blanch, 2020, 66.

[16] Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 *On a Temporary Pandemic Emergency Purchase Programme* (ECB/220/17). OJ L 91/1. 25.3.2020. eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32020D0440&from=EN.

[17] On the compatibility with EU law of the programs for purchase of sovereign debt in secondary markets by the European Central Bank, see C-62/14, *Gauweiler*, ECLI:EU:C:2015:400 and C-493/17, *Weiss*, ECLI:EU:C:2018:1000. Thus, criticizing the polemic resolution of the German Federal Constitutional Court of May, 5, 2020, see, *inter alia*, Galetta, D.U. and Ziller, J., *¿Karlsruhe über alles? La insoportable pesadez del juez constitucional alemán. (Sobre la sentencia del "zweiter Senat" del Tribunal Constitucional Federal alemán de 5 de mayo de 2020, relativa al programa PSPP del Banco Central Europeo*, in 73-74 *Riv. Esp. Der. Eur.*, 179 (2020). Also, Roca Fernández, M.J., *La sentencia del Tribunal Constitucional alemán sobre el Programa de Compra de Bonos por el Banco Central Europeo: el control ultra vires y la primacía del Derecho Europeo*, in questa *Rivista*, 2 (2020), 2845.

end of 2022, given the persistence of the "extreme economic shock", is aimed to reduce the cost of financing the expenditure made by the countries suffering from the pandemic[18]. In addition, to determine these purchases, it is not required that there must be proportion of each country's participation in the capital of the ECB, so only the financing needs presented by each of them will be addressed. Likewise, the remaining quantitative limits on purchases are eliminated, which allows ECB to acquire full debt issues, albeit for a specified period of time. The ECB thus becomes an alternative to financial markets. In this way, despite the express prohibition of the TFEU, the public debt is federalized *de facto*[19].

Despite the evidence that these three initiatives have been extraordinary relevant, their insufficiency and partiality were soon noticed. It thus seemed that the only concern of the Union consisted in creating favourable conditions for the Member States to make extraordinary expenses, without fear of incurring, but just during the limited period of suspension of the rules that affect the economic governance of the Eurozone, in a punishable public deficit, or in a lack of debt financing.

Therefore, the introduction of additional mechanisms was also demanded. So, the southern countries, initially most affected by the pandemic and without sufficient resources of their own, requested that their spending capacity to act should be matched to that of the Member States with greater spending potential, by making available instruments that allowed the internal distribution of resources. Such Member States were fully aware of the medium and long-term effects of these extraordinary expenses, once the suspension of fiscal and monetary rules is lifted. Inevitably this will mean the restoration of the pernicious cycle of imposition of sanctions and austerity, which is the consequence of the application of the orthodox economic and budgetary policy assumed by the European Union[20], as it has already been regrettably experienced in the past decade. Certainly, while some mechanisms of distribution of resources are not designed, the difference between the competing players in the "single market" will significantly increase and the risk of disintegration

[18] The Court of Justice (Grand Chamber) has considered these purchasing programs legitimate and valid, provided they are accompanied by sufficient safeguards. See C-493/17, of 11 December 2018, *Weiss and others*. ECLI:EU:C:2018:1000 eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62017CJ0493.

[19] Dani, M., Menéndez Menéndez, A.J., *El gobierno europeo de la crisis del coronavirus*, in 4 *Rev. Const. Eur.* (2020), 5.

[20] De Sadeleer, N., *The EU Fiscal and Economic Governance*, in Carrera Hernández, F.J. (Dir.), *¿Hacia una nueva gobernanza económica de la Unión Europea?*, Madrid, 2018, 63.

of the Eurozone, composed of Member States progressively unequal to each other[21].

3. Additional decisions adopted by the Eurogroup to reinforce the financial assistance in the Euro Area

However, the pressure exerted by the southern Member States, supported on this occasion by France, led the Eurogroup, at its meeting on April 9, 2020, to adopt three different measures integrated into the same financial package. They represent an expansion of the financial assistance mechanisms of the Euro Area, once the insufficiency of the existing ones has been agreed upon, given the depth and permanence of the economic crisis caused by the pandemic. When the possibility of issuing public debt of the Eurozone had been ruled out in the meeting of March, 24, 2020, with the mutualisation of risks that this entails, it was agreed, at least, in the following aforementioned meeting, the establishment of a «*triple safety net*» whose total amount rose to 540.000 million euros. It supposed:

First, the *extension of the ESM (European Stability Mechanism)* which implies that it is possible to request a precautionary line of credit to defray the direct and indirect health expenditure caused by the pandemic. The ESM acts as a safety net by ensuring Member States assistance before they encounter serious financing difficulties in the markets. In sum, it allows them to continue accessing those markets. Thus, each Member State which is part of the Euro Zone is authorized to request, until December 2022, financial assistance equivalent to 2% of its Gross Domestic Product (240.000 million euros). In addition, conditionality will be limited to controlling that the resources will be used just for the requested purpose, that is, to finance direct and indirect health expenses related to COVID-19 and produced from February 2020. Despite this, the memory of the unfortunate experience suffered by the Member States rescued by this permanent extraordinary financial instrument of assistance[22] during the past recent crisis discourages its invocation taking account the obligations involved, which consisted on the execution of a severe program of economic reforms and other requirements that guarantee the observance

[21] Gräbner, C., Heimberger, P., Kapeller, J., Shütz, B., *Is the Eurozone Deintegrating? Macroeconomic Divergence, Structural Polarisation, Trade and Fragility*, in *Camb. J. Econ.*, 44, 3, 2020, 647-669.

[22] De Gregorio Merino, A., *Legal Developments in the Economic and Monetary Union During the Debt Crisis. Mechanisms of Financial Assistance*, in *Common Mark. Law Rev.*, 49, 2012, 1615 ss.

of rigorous budgetary discipline[23]. Thus, although, apparently, this line of credit does not entail compliance with strict economic conditions, which are yet to be determined, and even benefiting from a discounted interest rate, below that set in the market, we cannot forget that, like all credit, it must be returned within a specified period, with a maximum of ten years. Undoubtedly this is a heavy burden in the medium and long-term for the requesting Member States[24]. Hence, no one to date has been tempted to apply for said line of credit.

Second, the Eurogroup has also approved the Commission's proposal, based on Article 122.2 TFEU[25], for the creation of a *European Temporary Support Instrument to Mitigate the Risks of Unemployment in an Emergency (SURE)* such as the one caused by the current pandemic[26]. 100.000 million euros are thus provisioned to grant loans refundable to the Member States that request them, which must guarantee 25% of the total granted. As a limit, the three Member States that benefit the most will not be able to obtain more than 60% of the funds. This type of job insurance is intended to sustain employment during the crisis, avoiding, as far as possible, massive layoffs. Being a modality of finalist financial assistance instrument, it consists of a loan repayable that the affected requesting Member States can only use to keep cover the amount of national decisions referring to temporary situations that involve reductions in working time, like "Kurzarbeit" in Germany, "Cassa integrazione" in Italy or "ERTE" in Spain. Therefore, it is important to notice that SURE, as «instrument of fiscal stabilization»[27], is conceived as a complementary and temporary support instrument to national measures and to subsidies

[23] About the problems generated by the application of the ESM to Member States in the previous economic and financial crisis started in 2008, vid., Chiti, E., Teixeira, P.G., *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, in *Common Mark. Law Rev.*, 50, 2013, 687 ss.

[24] Evangelisti, A., *Le Mécanisme Européen de Stabilité et sa réforme*, in *Rev. du Marche Commun et de L'Union Eur.*, 639, 2020, 340-363.

[25] Article 122.2 TFEU (Article 100 TCE): «Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken».

[26] Council Regulation (EU) 2020/672 of 19 May 2020 *On the Establishment of a European Instrument for Temporary to Mitigate Unemployment Risks in an Emergency (SURE) Following the COVID-19 Outbreak*. OJ L 159/1 20.5.2020. eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32020R0672.

[27] Claeys, G., Wolff, G., *Is the COVID-19 crisis an opportunity to boost the euro as a global currency?*, in *Policy Contribution* 11, Bruegel Institute, Brussels, 2020, 17.

from the European Social Fund in an extraordinary situation that surpasses all forecast.

Third, the Eurogroup also supported the *Decision Adopted by the Board of Directors of the European Investment Bank* (EIB) which proposed the establishment of a fund of 25.000 million euros, financed by the Member States according to their participation in the EIB. This would make it possible to make up 200.000 million euros available to requesting Member States «*to support small and medium-size companies*», especially, badly damaged by the crisis[28]. It is, therefore, a guarantee fund destined to face the consequences of the pandemic. In this way, the EIB transfers economic liquidity to local banks to stimulate the real economy. But, again, we are facing repayable loans that increase the public debt of the requesting States with lasting effects over time. And it is also important to notice that the guarantee of the States themselves is also required to be a beneficiary of these programs, which supposes an added cost for them.

Nothing is free, therefore. Thus, when the economic and monetary governance of the Eurozone recovers, it is to be expected that the intrusive supervisory procedures will reappear against violators of the established rules. It will be then when the excessive deficit and debt levels, caused by the present authorization of unlimited spending, become a source of problems for the affected Member States. This fact discourages the request for credits that are absolutely necessary for the maintenance and reactivation of economies shaken by the pandemic, something that does not happen to other Member States that face the crisis in a healthier starting situation since they have not suffered the past economic crisis with such intensity. In this way, the increase in economic differences between the States is favoured, generating positions of advantage and disadvantage within the framework of the single market. Thus, the disintegrating forces in the Eurozone are enlivened[29]. In sum, it is possible to affirm that all of these large repayable loans become a heavy mortgage for the future of the requesting Member States by increasing the weight of public debt that they will have to correct by making great sacrifices in the not too distant future[30].

Consequently, the need to propose further measures to equalize or rebalance the financial capacity of Member States to meet the extraordinary challenges caused by the pandemic was manifested soon. The soli-

[28] www.eib.org/en/about/initiatives/covid-19-response/index.htm.

[29] Dani, M., Menéndez, A.J., *El gobierno europeo de la crisis del coronavirus*, cit., 4-5.

[30] Gräbner, C., Heimberger, P., Kapeller, J., Shütz, B., *Is the Eurozone Deintegrating? Macroeconomic Divergence, Structural Polarisation*, cit., 665.

darity component should prevail in these new instruments, especially if it is borne in mind that an economic crisis like the present one has been generated by factors unrelated to the efficiency of economic policies designed and implemented by the Member States[31]. Just a terrible and unpredictable health crisis and an unequal financial situation, depending on which Member States, due to the recent exit of the last crisis and the application of austerity measures to some of them, explains the different capacity of those to face the situation. So, the possibility of reinforcing the European integration process, by the thrust of the coronavirus pandemic[32], involves forcing a substantial increase in the EU budget and not multiplying insufficient loans and subsidies subject to more or less strict conditionality.

4. The Recovery Instrument as extraordinary expression of solidarity

4.1. *Adoption process, objectives and characteristic features*

Therefore, given the magnitude of the economic consequences derived from the pandemic and the insufficiency and inadequacy of the assistance mechanisms provided, it was considered necessary to design a comprehensive recovery plan including new instruments that reinforce solidarity. So, such actions should involve *direct transfers (grants)*, not only loans requiring reimbursement. In brief, as it was commented in economic circles, a new version of the *Marshall Plan*, implemented in the political and economic sphere of the European Union, was demanded with extraordinary character[33].

Thus, the *Franco-German Initiative for the European Reactivation in the Face of the Coronavirus Crisis* was presented on May, 18, 2020[34]. This initia-

[31] Carrera Hernández, F.J., *Del Mecanismo Europeo de Estabilidad (MEDE) al nuevo Mecanismo de Reconstrucción y Resiliencia (MRR). ¿Ha sido necesaria una pandemia para reforzar la solidaridad financiera en la Unión Europea*, in *Re. Esp. Der. Eur.*, 75, 2020, 9-54; especially, 13.

[32] De Witte, B., *The European Union's COVID-19 Recovery Plan: the legal engineering of an economic policy shift*, in *Com. Mark, Law Rev.*, 58, 2021, 635-682.

[33] European Stability Mechanism. *Annual Report 2020*. www.esm.europa.eu/publications/annual-report-2020.

[34] www.diplomatie.gouv.fr/en/coming-to-france/coronavirus-advice-for-foreign-nationals-in-france/coronavirus-statements/article/european-union-french-german-initiative-for-the-european-recovery-from-the.

tive proposed the creation of a temporary and flexible fund for solidarity and growth, amounting to 500.000 million euros that would be financed, as a great novelty, through loans contracted by the European Commission in the markets on behalf of the European Union, which implies the recognition of its capability to get into debt. Such fund should represent a clear increase in next multiannual financial framework of the Union (2021-2027) and a modification of the Decision of Own Resources. And it should be subject to conditionality, expressed by the commitment assumed by the beneficiaries to adopt sound economic policies and ambitious reform programs.

The Commission accepted the Franco-German initiative as its own and presented a formal proposal for an extraordinary *EU Recovery Fund*, known as *Next Generation EU (NGEU)-Europe's Recovery and Resilience Plan*, on 28 May 2020, with a total allocation of 750.000 million euros, incorporated to a strengthen *Multiannual Financial Framework (MFF)*, combined with an amendment of the *Own Resources Decision (ORD)*[35]. Such ambitious plan advocates instruments that involve direct transfers to Member States, in addition to repayable loans. However, the so-called frugal States responded with a counter-proposal called *Non-paper EU Support for Efficient and Sustainable COVID-19 Recovery*[36], which rejected the creation of instruments that would lead to a mutualisation of debt, or a significant increase in the EU budget. Thus, even accepting the creation of an emergency fund, pointed out that it should be uniquely based on an approach "loans for loans", that is, repayable loans subject to conditionality.

Initially, the proposal of the Commission divided the total amount predicted as follows: 500.000 million euros in non-reimbursable aid; and 250.000 million euros to grant loans to Member States. The resources would be used for Union's programmes under the next multi-annual financial framework in the following most affected areas or sectors: *a*) providing support in the form of grants and loans to implement Member State recovery and resilience plans under the Recovery and Resilience Facility; *b*) providing new investment support under existing and proposed budgetary guarantees for crisis-impacted but viable companies to emerge from the crisis, in particular to accelerate the twin green and digi-

[35] European Commission. *Proposal for a Council Regulation Establishing a European Union Recovery Instrument to Support the Recovery in the Aftermath of the COVID-19 Pandemic.* COM/2020/441 final/2. Brussels 28.5.2020. eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0441R%2801%29.

[36] www.politico.eu/wp-content/uploads/2020/05/Frugal-Four-Non-Paper.pdf.

tal transition; targeted support to projects of European strategic interest for internal market supply chains to develop the EU's strategic autonomy in key sectors and capacities; *c*) enhanced support to regions and sectors hit by the crisis through reinforced cohesion policy measures; *d*) supporting research and innovation in response to COVID-19 pandemic; *e*) enhancing the level of crisis preparedness and improving the crisis resilience of Union health care systems; *f*) mitigating the impact of COVID-19 pandemic on the just transition towards a green economy in territories; *g*) supporting measures to address the impact of the COVID-19 pandemic on rural development; *h*) supporting partner countries, in particular in the Western Balkans, the Neighbourhood and Africa in their efforts to fight and recover from the impact of the pandemic and to strengthen their resilience.

It is thus the Commission insisted that the reason of being and existing of this Recovery Instrument was the need to «*complement the individual action*», that is, the economic and financial measures adopted by Member States, given the enormous impact of pandemic and the inability of many of them to cope with the situation on their own. Such complementary mobilisation of funding ensures that the internal market is not undermined by disparities in the ability of Member States to mobilise funding, and provides, in a spirit of solidarity, funding to those countries where fiscal space for discretionary spending is limited[37]. In addition, it ensures that spending is carried out based on a coherent economic strategy coordinated between the Member States and promoted by the European institutions. Anyway, such subsidiary financing is clearly circumscribed in terms of duration and way of use. It is limited to tackling the impact of an unprecedented crisis on a scale commensurate to the effects of the crisis. Accordingly, the legal base of the Recovery is found in Article 122 TFEU. Finally, taking into account these motivations the normative instrument chosen to express the established objectives and measures is a Regulation, approved by the European Parliament and the Council of the European Union, through the ordinary legislative procedure, formerly called co-decision, what implies its general character and direct and immediate applicability[38].

[37] Ferri, D., *The Role of the EU State Aid Law as a "Risk Management Tool" in the COVID-19 Crisis*, in *Eur. J. Risk Regul*, 12, 1, 2020, 176-195.

[38] Council Regulation (EU) 2020/2094 of 14 December 2020 *Establishing a European Union Recovery Instrument to Support the Recovery in the Aftermath of the COVID-19 Crisis*. OJ L 433I, 22.12.2020, 23-27. eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R2094.

4.2. *Planned measures and pillars*

As indicated, it was foreseen that the Recovery Instrument was expected to finance the following measures to tackle the adverse consequences of pandemic. So, Article 1 of Ruling 2020/2094 provides: *a*) measures to restore employment and job creation; *b*) measures in the form of reforms and investments to reinvigorate the potential for sustainable growth and employment in order to strengthen cohesion among Member States and increase their resilience; *c*) measures for businesses affected by the economic impact of COVID-19 crisis, in particular measures that benefit small and medium-sized enterprises, as well as support for investment in activities that are essential strengthening sustainable growth in the Union, including direct financial investment in enterprises; *d*) measures for research and innovation in response to the COVID-19 crisis; *e*) measures for increasing the level of Union's crisis preparedness and enabling a quick and effective Union response in the event of major emergencies, including measures as stockpiling of essential supplies and medical equipment and acquiring the necessary infrastructures for rapid crisis response; *f*) measures to ensure that a just transition to a climate-neutral economy will not be undermined by the COVID-19 crisis; *g*) measures to address the impact of the COVID-19 pandemic on agriculture and rural development.

Such measures shall be carried out under specific Union programmes and in accordance with the relevant Union acts laying down rules for those programmes respecting the objectives of the Instrument. Those measures shall include technical and administrative assistance for their implementation.

In sum, the Recovery Instrument, as a complex one has *three pillars.*

The first and more relevant is aimed at «*supporting the Member States with investments and reforms to their recover*», repairing socio-economic damage from the crisis. It includes the new *Recovery and Resilience Facility*, together with *cohesion policy* (Recovery Assistance for Cohesion and the Territories of Europe: REACT-EU package) and the *Just Transition Mechanism* to a green digital and resilience Europe. These mechanisms will be fundamental to achieve this goal. In addition, the reinforced *European Agricultural Fund for Rural Development* will support rural areas in making the structural changes necessary in line with the European Green Deal.

The second pillar aims to «*kick-starting the economy and helping private investment*». Therefore, a new *Solvency Support Instrument* is proposed to provide urgent equity support to sound companies put at risk by the crisis. Also, a strengthen *InvestEU*, Europe's flagship investment programme, will mobilise investment across the Union in areas such as sustainable infrastructure and digitalisation. And a new *Strategic Investment Facility* is created. They will support key sectors and technologies, will invest in key value chains and will offer solvency support for viable companies.

Finally, the third pillar seeks to *reinforce key EU programmes "to draw the lessons of the crisis"*, especially affecting the health sector. So, a new *Health Programme* aims to strengthen health security and prepare for future health crises. *RescEU*, the Union's Civil Protection Mechanism, will be expanded and reinforced to equip the Union to prepare for and respond to future crises. Also, *Horizon Europe* will be strengthened to fund essential research in health, resilience and the green and digital transition, supporting global partners.

The European Council held between 17 and 21 July 2020 approved the total amount allocated to the fund but, after a tense negotiation, the items were restructured, reducing non-reimbursable aid to 390.000 million euros and increasing loans to 360.000 million euros[39]. This «balanced solution catering for the interests and positions of all Member States», as the Conclusions of the European Council indicated, was «destined to tackle the effects of an unprecedented crisis in the best interest of the EU», necessarily linked to and in harmony with the Multiannual Financial Framework (MFF) that offers a long-term perspective according to the budgetary policies of the EU. That is why NGEU and MFF must go together to give an effective answer to a temporary challenge that nevertheless generates consequences that should be avoided from being profound and lasting over time[40].

The purpose is none other than to relaunch the economies of the Member States in the coming years increasing the EU's multi-annual budget by 750.000 million euros, up to 2% of the EU gross national income, without substantially increasing contributions from Member States. This way the new MFF practically doubles its precedent what it requires enhancing own resources, so modifying the corresponding EU Decision. And, also, it is demanded to anticipate extraordinary incomes, what it means to authorize the Commission to borrow for the same cost on the capital markets. The money thus obtained is transferred to the programs provided for in the recovery instrument. It is, therefore, an extraordinary and temporary increase in the EU budget that can only be used to face the social and economic consequences of the pandemic. Notwithstanding this temporary nature, the limit set for finalizing loan repayments is 2058,

[39] See Article 2.2 and 3 Council Regulation (EU) 2020/2094 of 14 December 2020.

[40] www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf.

since its beginning is set in 2028. Thus opens a perspective of indebtedness of the European Union unknown through its history. The existing precedents have been of a very limited nature, never taking the form of transfers or subsidies, but of individual loans[41]. For this reason, as F.J. Carrera points out, this new situation represents «the triumph of supporters of the creation of common debt instruments in the EU, at a time when there is still no EU treasure»[42].

We are thus witnessing a very considerable *reinforcement of the solidarity principle*, making financial aid, for the first time, not only consist of loans (how the European Stability Mechanism (ESM) carries out and the so-called frugal States postulated). In this regard, it is Article 122.2 TFEU the main rule that is taken as the legal basis to adopt the Regulation that makes the Recovery Fund a reality. Thus, in accordance with the extraordinary nature of the situation that occurred, the mechanism created will be necessarily temporary. Once again, the path followed recently with SURE and previously, during the precedent crisis, with the European Financial Stability Mechanism (EFSM) is followed[43].

This is how it is possible to place the new financial assistance mechanism within the framework of the European Union, an appreciable difference in relation to what happened in the past crisis, in which recourse to intergovernmental instruments of international law prevailed, refusing to use the EU budget. This undoubtedly deserves a very positive assessment as this innovative instrument created is fully anchored in the primary law of the Union, not raising problems of compatibility with the Treaties, as occurred during the past financial and economic crisis, especially in relation to ESM[44]. So, it establishes a decision-making procedure that is in accordance with the current European institutional architecture and the "community method". Consequently, not only is there no deepening of the Union's democratic deficit, but progress is being made on the right line.

Therefore, the discussion revolved around the volume of aid committed and the determination of some type of conditionality and monitoring of the beneficiary States, in order to preserve a healthy budgetary policy. In the latter sense, as it will be recalled, since the judgement con-

[41] In reference to those individual loans for Member States, during the previous crisis that began in 2008, see Ruffert, M., *The European Debt Crisis and European Union Law*, in *Common Mark. Law Rev.*, 48, 6. 2011, 1777-1805; especially, 1792.

[42] Carrera Hernández, F.J., *Del Mecanismo Europeo de Estabilidad (MEDE) al nuevo Mecanismo de Reconstrucción y Resiliencia (MRR)*, cit., 27-28.

[43] Lamadrid, A., Buendía Sierra, J.L., *A Moment of Truth for the EU: A Proposal for a State Aid Solidarity Fund*, in *J.E.C.L.*, 11, 2020, 121-145.

[44] De Witte, B., *Using International Law in the Euro Crisis*. Ar. Work. Papers, 4, 2013.

cerning the *Pringle* case, this point was insisted upon, as, more recently, the *Anagnostakis* judgement has reiterated[45].

4.3. *Instruments*

The Recovery Instrument is accompanied by the requirement to approve the new Multiannual Financial Framework (Article 312 TFEU); a new Decision on own resources (Art. 311.3 TFEU); and the Recovery Instrument itself, containing the Recovery and Resilience Facility (Art. 175.3 TFEU). Therefore, a final agreement of opinions was needed between the European institutions and all the Member States. In this sense, the European Parliament, even basically assuming the Commission's proposal, insisted on the need to have a Multiannual Financial Framework (MFF) in accordance with the new challenges; on the convenience of requesting loans to finance the recovery instrument; and in the urgency of modifying, improving it, the system of own resources, by introducing new incomes in the EU budget.

However, in order to reach a unanimous political agreement in the European Council, a reduction was imposed with respect to the ambitious proposal of the Commission, which required satisfying the so-called *"frugal States"* even in part of their demands[46]. In accordance with that agreement a succession of relevant standards was gradually approved.

4.3.1. *The Multiannual Financial Framework (2021-2027) and the new own resources system*

First of all, the *Multiannual Financial Framework* for the years 2021-2027[47].

In view of the COVID-19 crisis and the measures taken under New Generation EU, a certain number of changes were introduced in rela-

[45] C-370/12, *Thomas Pringle v. the Government of Ireland*. ECLI:EU:C:2012:756 and C-589/15, *Anagnostakis v. Commission*. ECLI: EU:C:2017:663.

[46] De Sadeleer, N., *Le plan de relance Next Generation EU. Du changement de cap budgétaire a l'ingénieurerie institutionnelle*, in *Ressources pour chercheurs en Droit, Working Papers*, 2020. blogdroiteuropeen.com/2020/09/11/le-plan-de-relance-next-generation-eu-un-changement-de-cap-historique-ou-un-rendez-vous-manque-pour-reformer-le-budget-de-lue-nicolas-de-sadeleer/.

[47] Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the *multiannual financial framework for the years 2021 to 2027*. OJ L 433I, 22.12.2020, 11-22. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.LI.2020.433.01.0011.01.ENG&toc=OJ%3AL%3A2020%3A433I%3ATOC.

tion to the draft European Council Conclusions of February 2020, which constituted the basis for a global compromise. So, the MFF, reinforced by NGEU, has become the main European tool to face the economic effects of the pandemic. The overall amount for commitments is EUR 1.074 billion, a lower amount that one expected in February (EUR 1,1 billion). In this way, the cost of the recovery instrument and the triple safety net were discounted. So, practically all the items in the EU budget were reduced (not only, appreciably, in the common agriculture policy, but also, among others, in the field of research policies), except for the provisions for cohesion and resilience. So, in view of the effects of the COVID-19 crisis, a second flexibility package was added concerning the implementation rules under Cohesion Policy and the CAP, as well as the thematic concentration of ERDF support. Besides, in order to reinforce the new *Health Program*, it is increased to EUR 1,7 billion in line with the proposal of the Commission to respond to COVID-19. Thus, the financial allocation for *RescEU*, the Union's Civil Protection Mechanism, will be EUR 1,1 billion, to equip the Union to prepare for and respond to future crises.

It is very important to note that concerning EU's own resources, the ceiling allocated to the Union to cover annual appropriations for payment is fixed at 1,40% of the Gross National Income (GNI) of all Member States; the total annual amount for appropriations for commitments shall not exceed 1,46% of the sum of the GNI of all Member States.

Likewise, it constitutes a significant step forward the regulation «*On a General Regime of Conditionality for the Protection of the EU Budget*». According to this, provided the Member States implement the Union budget, including the resources allocated through the EU Recovery Instrument, established in accordance with Regulation 2020/2094, and loans and other instruments guaranteed by the Union budget and whatever their mode of execution, «*respect for the rule of law will be essential precondition for complying with the principle of good financial management*» established in Article 317 TFEU[48]. Therefore, both a procedure and sanctioning measures are contemplated in this regard, which may deprive the offending Member States of access to the recovery funds budgeted[49].

[48] See, *inter alia*, Fisicaro, M., *Rule of Law Conditionality in EU Funds*, in *European Papers: A Journal on Law and Integration*, 4, 3, 2019, 695-722. Also, Kirst, N., *Rule of Law Conditionality: The Long-awaited Step towards to a Solution to the Rule of Law Crisis in the European Union?*, in *European Papers: A Journ. Law & Integr.*, 6, 2021, 101-110.

[49] Regulation (EU, Euratom) 2020/2092, of the European Parliament and the Council, of 16 December 2020, *On a General Regime of Conditionality for the Protection of the EU Budget*. OJ L 4331, 22,12,2020, 1-10. eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32020R2092. See, Lacny, J., *The Rule of Law Conditionality under Regulation No 2020/2092. Is it all about the Money?*, in *HJRL*, 13, 2021, 79-105.

Besides, the Multiannual Financial Framework advances in the purpose of «*reforming the own resources system and introducing new own*» resources. A relevant Decision was then approved[50]. A new tax based on non-recycled plastic waste is introduced and apply from 1 January 2021 and the Commission take on the task to put forward in the first semester of 2021 proposals on a carbon border adjustment mechanism and on a digital levy, with a view of their introduction at the latest by 1 January 2023. In addition, the Commission will put forward a proposal on a revised EU's Emissions Trading System (EU's ETS) scheme, possibly extending it to aviation and maritime. Finally, the Union will, in the course of the current MFF, work towards the introduction of other resources in order to increase its income and thus finance the new commitments. It will may include a Financial Transaction Tax. Such new resources introduced after 2021 will be used specifically for the early repayment of Next Generation EU borrowing.

Despite the progress made, a negative new concern with the lump-sum corrections introduced to reduce, for period 2021-2027, the annual Gross National Income (GNI)-based contribution of the so-called frugal Member States, which are Denmark, the Netherlands, Austria and Sweden. These gross reductions shall be financed by all Member States according to their GNI. Then, the "*rebates*" that were planned initially to be eliminated are thus maintained as consideration to reach the final agreement[51]. In this way, it is calculated that these countries, during the validity of the Multiannual Financial Framework (2021-2027), will see their savings increase until reaching 53.221 million euros, that is, an additional amount of 8.000 million euros in exchange of their affirmative vote.

To ensure the proper application of these standards an *Interinstitutional Agreement* between the European Parliament, the Council and the Commission «*On Budgetary Discipline, on Cooperation in Budgetary Matters and on Sound Financial Management, as Well on the New Resources, Including a Roadmap towards the Introduction of New Resources*» was signed[52]. And

[50] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 *On the System of Own Resources of the European Union and Repealing Decision 2014/335/EU, Euratom*. OJ L 424, 15.12.2020, 1-10. eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.424.01.0001.01.ENG.

[51] Crowe, R., *The EU Recovery Plan: New Dynamics in the Financing of the EU Budget*, in Barrett, G., Rageade, J.F., Wallis, D., Weil, H. (Eds.), *The Future of Legal Europe: Will We Trust in It? Liber Amicorum in Honour of Wolfgang Heusel*, Berlin, Springer, 2021, 66-98.

[52] Interinstitutional Agreement of 16.12.2020, 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 on the New Resources, Including a Road Map towards the Introduction of New Resources*. OJ L 4331, 22.12.2020, 28-46. eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2020.433.01.0028.01.ENG.

also, with a same purpose a *Joint Declaration* of the aforementioned European institutions *On Budgetary Scrutiny of New Proposals Based on Article 122 TFEU with Potential Appreciable Implications for the Union Budget* was approved[53].

4.3.2. The Recovery and Resilience Facility (RRF)

And second, a detailed reference must be made to the *Recovery and Resilience Facility (RRF)*[54], which is the most innovative and relevant mechanism of assistance of all, as well as the most abundantly endowed with funds. So, it should be defined as the key instrument at the heart of Next Generation EU to help EU emerge stronger and more resilient from the current crisis. To that end, the Facility should be established to provide effective and significant financial support to step up the implementation of sustainable reforms and related public investments in the Member States. It should be comprehensive and should benefit from the exercise gained by the Commission and the Member States from the use of the other instruments and programmes, some successful and others not, experienced in the past crisis. Its legal basis is found in Article 175.3 TFEU, as it is a program at the service of «*economic and social cohesion, while connecting with ecological and digital transition*». It is a temporary and extraordinary mechanism intended to support long-term investments. In sum, a «legal engineering of an economic policy shift»[55].

So, the Facility is aimed at «*promoting the Union's economic, social and territorial cohesion*», reversing the negative consequences that the pandemic has caused in this area, thus adversely affecting the basic productive structures, and improving the resilience, crisis preparedness, adjustment capacity and growth potential of the Member States, by «*mitigating the social and economic impact of the crisis*». So, to achieve that general goal, the *specific objective* of the Facility shall be to provide Member States with

[53] Joint Declaration of the European Parliament, the Council of the European Union and the European Commission *On Budgetary Scrutiny of New Proposals Base on Article 122 TFEU with Potential Appreciable Implications for the EU Budget* 2020/C 444 I/05 OJ 444, 22.12.2020, 5. eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.CI.2020.444.01.0005.01.ENG&toc=OJ%3AC%3A2020%3A444I%3ATOC.

[54] Regulation (EU) 2021/241 of the European Parliament and the Council of 12 February 2021, *Establishing the Recovery and Resilience Facility* OJ L 57, 18.2.2021, 17-75. eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R0241.

[55] De Witte, B., *The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift*, cit., 678.

financial support with a view to achieving the milestones and targets of reforms and investments set out in their recovery and resilience plans. A great opportunity opens to regenerate the economy of Member States most affected by the pandemic, modernizing their structures and laying the foundations for a better future in the desired directions. That requires close and transparent cooperation between the EU institutions and with the Member States concerned.

However, support under the Facility shall not, unless in duly justified cases, substitute recurring national budgetary expenditure since Member States are the initial responsible actors in the economic recovery process. Besides, the Facility shall respect the principle of additionality of Union funding[56], what means that such Facility support shall be additional to the assistance provided under other Union programmes and instruments, as long as it does not cover the same cost[57]. *Complementarity and additionality* are therefore the two main characteristics features of this extraordinary financial assistance mechanism.

According to the Regulation, recovery should be achieved through the support for *finalist measures*, therefore, aimed at satisfying certain strategic goals of the Union, which constitutes the *scope of application of the Facility*. Thus, they are referred to the *policy areas of European relevance* structured in *six pillars*[58], namely:

a) *green transition*, supporting reforms and investments in green technologies and capacities, including in biodiversity, energy efficiency, building renovation and the circular economy, while contributing to the Union's climate targets, fostering sustainable growth, creating jobs and preserving energy security;

b) reform and investments in *digital technologies*; infrastructure and processes to increase the Union's competitiveness at global level and helping the Union to be more resilient, more innovative and less dependent by diversifying key supply chains. Thus, it should be promoted the digitalisation of services, the development of digital and data infrastructure, clusters and digital innovation hubs and open digital solutions. The digital transition should also incentivise the digitalisation of SMEs;

c) reforms and investments in *smart, sustainable and inclusive growth*, including economic cohesion, jobs, productivity, competitiveness, research, development and innovation, and a well-functioning internal

[56] Article 5.1 of Regulation (EU) 2021/241.

[57] Article 9 of Regulation (EU) 2021/241.

[58] Article 3 of Regulation (EU) 2021/241.

market with strong SMEs. Such reforms should also promote entrepreneurship, social economy; the development of sustainable infrastructure and transport, and industrialisation and reindustrialisation;

d) reforms and investments in *social and territorial cohesion*, in order to create high-quality and stable jobs, the inclusion and integration of disadvantaged groups, and enable the strengthening of social dialogue, infrastructure and services; as well as for social protection and welfare systems;

e) and reforms and investments in *health and economic, social and institutional resilience*, that aim to increase crisis preparedness and crisis response capacity by improving business and public service continuity, the accessibility and capacity of health and care systems, the effectiveness of public administration and national systems, including minimising the administrative burden and the effectiveness of judicial systems as well as fraud prevention and anti-money laundering supervision;

f) reforms and investments in *the next generation*, being aware that children and the youth are essential to promote education skills, including digital skills, upskilling and requalification of the active labour force, integration programmes for the unemployed, policies of investing in access and opportunity for children and the youth related to education, health, nutrition, jobs and housing, and police that bridge the generational gap.

The Facility allows *direct transfers or subsidies and also loans* granted to Member States, especially to those Member States who has been more affected by the health crisis.

Measures aforementioned shall be implemented under the Facility:

a) through an amount of up to EUR 312.500 million, available for *non-repayable financial support*.

b) And, also, through an amount of up to EUR 360.000 million, available for *loan support* to Member States[59].

The Facility is implemented by the Commission in direct management in accordance with what is provided in Article 322 TFEU and the Financial Regulation (EU, Euratom) 2020/2092[60]. But it is necessary to insist that support under the Facility shall be additional to the support also provided under other Union programmes and instruments. Therefore, reforms and investment projects may receive support from other Union

[59] Article 6.1 of the Regulation (EU) 2021/241.

[60] Regulation (EU, Euratom), 2020/2092 of the European Parliament and of the Council of 16 December 2020, *On a General Regime of Conditionality for the Protection of the Union Budget* (OJ L 433I, 22.12.2020, 1-10).

programmes and instruments provided that such support does not cover the same cost[61].

But the question is, which kind of *sanctions* has been foreseen or, in the same terms used by Regulation 2021/241, what «measures linking the Facility to sound economic governance» have been established preventively to ensure that resources allocated to Member States are used properly? In this sense, it should be noted that the Commission shall make a proposal to the Council «*to suspend all or part of the commitments or payments*» where the Council decides, in accordance with Article 126.8 TFEU or 126.11 TFEU, that a Member State has not taken effective action to correct its excessive deficit, unless it has determined the existence of a severe economic downturn for the Union as a whole withing the meaning of Article 3.5 and 5.2 of Council Regulation (EC) 1467/97[62].

Also, the Commission may make a proposal to the Council to suspend all or part of the commitments or payments: *a*) where the Council adopts two successive recommendations in the same imbalance procedure on the grounds that a Member State has submitted an insufficient corrective action plan; *b*) where the Council adopts two successive decisions in the same excessive imbalance procedure on the grounds that it has not taken the recommended corrective action[63]; *c*) where the Commission concludes that a Member State has not taken measures[64] and decides not to authorise the disbursement of the financial assistance granted to that Member State; *d*) where the Council decides that a Member State does not comply with the macroeconomic adjustment programme[65] or with the measures requested by a Council decision adopted in accordance with Article 136.1 TFEU.

In any case, the scope and level of the suspension of commitments or payment to be imposed shall be proportionate, respect the equality of

[61] Article 9 of the Regulation (EU) 2021/241.

[62] Regulation (EU, Euratom) 1467/97, of 7 July 1997 *On Speeding up and Clarifying the Implementation of the Excessive Deficit Procedure* (OJ L 209, 2.8.1997, 6). eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31997R1467.

[63] Directive (EU) 2015/849 of the European Parliament and the Council of 20 May 2015 *On the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing* (OJ L 141, 5.6.205, 73).

[64] According to Regulation (EC) 332/2002, of 18 February 2002, *Establishing a Facility Providing Medium-term Financial Assistance for Member States' Balances of Payments*. OJ L 53, 23.2.2002. eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002R0332.

[65] Article 7 of Regulation (EU) 472/2013, of the European Parliament and of the Council of 21 May 2013 *On the Strengthening of Economic and Budgetary Surveillance of Member States in Euro Area Experiencing or Threatened with Serious Difficulties with Respect to their Financial Stability*. eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0472.

treatment between Member States and will take into account the economic and social circumstances of the Member State concerned. So, the suspension of commitments shall be subject to a maximum of 25% of the commitments or 0,25% of nominal GDP, whichever is lower, in cases of non-compliance referred. In cases of persistent non-compliance, the suspension of commitments may exceed the maximum percentages set out before. However, the Council may lift the suspension of commitments on a proposal of the Commission, which shall keep informed the European Parliament on the application of these measures in the context of a structured dialogue in order to allow the assembly to express its views[66]. It is thus intended to preserve institutional balance.

Each Member State may submit a request up to its maximum financial contribution, to implement its recovery and resilience plan[67]. The Commission shall make a pre-financial payment[68]. Upon request from a Member State, the Commission may grant the Member State concerned a loan for the implementation of its recovery and resilience plan. That will happen if a Member State has requested a loan support at the time of the submission of its recovery and resilience plan[69]. It will require to sign a loan agreement, which should be assessed by the Commission before[70]. Therefore, the Commission shall present to the European Parliament and the Council a review report, by July 2022 on the implementation of the Facility[71].

However, a central element in complying with the requirements provided by the Facility is the obligation to which the Member States shall prepare *national recovery and resilience plans* to set out the reform and investment agenda of the Member State concerned. Such plans, that are *eligible* for financing under the Facility, shall comprise «*measures for the implementation of reforms and public investment through a comprehensive and coherent package*», which may also include public schemes that aim to incentivise private investment. As an expression of *conditionality*, they must comply with the requirements set out in Regulation 2021/241, so they must pursuit the *objectives* determined in such outstanding standard. Also, national plans shall be consistent with the relevant «*country-specific challenges and priorities identified in the context of the European*

[66] Article 10 of the Regulation (EU) 2021/241.

[67] Article 12 of the Regulation 2021/241.

[68] Article 13 of the Regulation 2021/241.

[69] Article 14 of the Regulation 2021/241.

[70] Article 15 of the Regulation 2021/241.

[71] Article 16 of the Regulation 2021/241.

Semester» for economic policy coordination; as well as those identified by the Council recommendation on the economic policy of the euro area. Besides, national plans shall be consistent with the information included by the Member States in the National Reform Programmes under the European Semester, in their National Energy and Climate Plans[72], in the territorial just transition plans[73], in the Youth Guarantee implementation plans[74] and in the partnership agreements and operational programmes under the Union funds. Finally, each plan is expected to contribute to the four dimensions outlined in the *2021 Annual Sustainable Growth Strategy*, which launched this year's European Semester cycle, what they are: environmental sustainability; productivity, fairness and macroeconomic stability[75]. Thereby, it is determined that the Facility is an opportunity to create European flagship areas for investments and reforms with tangible benefits for the economy and citizens across the EU. So, the Commission strongly encourages Member States to put forward investment and reform plans in relation to specific areas.

Thus, a Member State wishing to receive a financial contribution shall submit to the Commission a recovery and resilience plan, taking account the updated maximum financial contribution calculated in accordance with the rules established in the Regulation. Each plan consists in «*a single integrated document which will be accompanied by the National Reform Programme*». It must be officially submitted, as a rule, by April 30, 2021. But a draft recovery and resilience plan may be submitted by Member States from 15 October of the preceding year. In any case, plans shall be duly reasoned and substantiated. When preparing them, Member States may request the Commission assistance, to organise an exchange of good practices in order to allow requesting Member States to benefit from the experience of other Member States, thus fostering synergies.

[72] According to Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 *On the Governance of the Energy Union and Climate Action*. OJ L 328, 21.12.2018. eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ:L:2018:328:TOC&uri=uriserv:OJ.L_.2018.328.01.0001.01.ENG.

[73] European Commission. Proposal for a Regulation of the European Parliament and of the Council *Establishing the Just Transition Fund* COM/2020/22/final. eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0022.

[74] Council Recommendation of 30 October 2020 *On A Bridge to Jobs- Reinforcing the Youth Guarantee*. OJ C 372, 4.11.2020, 1-9. eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2020.372.01.0001.01.ENG&toc=OJ%3AC%3A2020%3A372%3ATOC.

[75] Communication from the Commission. *Annual Sustainable Growth Strategy 2021*. COM/2020/575 final. eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52020DC0575.

And, also, Member States may request a specific technical support under the Technical Support Instrument[76].

Nonetheless, a recovery and resilience plan submitted by a Member State to the Commission shall contain some essential elements, which could be summarized in what has been generically provided in Article 18.4 *a*) of the Regulation: «*an explanation of how the recovery and resilience plan represents a comprehensive and adequately balanced response to the economic and social situation of the Member State, contributing to all pillars expressed in the Regulation and taking into account the specific challenges of the Member State concerned*».

To this mandate are added other elements which actually specify such determination. They require demonstrating that the plan presented by a Member State address challenges identified in the country-specific recommendations or in other documents officially adopted by the Commission in the context of the European Semester; an explanation of how the plan contributes to the promotion of social policies and, specifically, the European Pillar of Social Rights, enhancing economic, territorial and social cohesion and convergence within the Union; the way the plan does not harm to environmental objectives of the Union; how it positively contributes to the "green transition", addressing the challenges resulting therefrom, and reserving a sufficient amount allocated for this purpose; how the plan contributes to the "digital transition" and to the challenges resulting therefrom, and reserving an amount considered sufficient to achieve this goal; where appropriate, it must considers planned investments in digital capacities and connectivity; the indication of whether the measures included in the plan comprise cross-border or multi-country projects; envisaged milestones, targets and an indicative timetable for the implementation of reforms; envisaged investment projects and the related investment period; the estimated total costs of the reforms and investments covered by the recovery and resilience plan; where relevant, information on existing or planned Union financing; the accompanying measures that may be needed; a justification of the coherence of the plan, and of its consistency with principles, plans and programmes contemplated in the Regulation; an explanation of how the measures provided in the plan are expected to contribute to gender equality and equal opportunities for all and the mainstreaming of those objectives; the arrangements provided for the effective monitoring and implementation of the plan; also, it has been provided that, for its preparation and, where available, for

[76] Article 18.5 of the Regulation 2021/241.

its implementation, each plan must incorporate a summary of the consultation process followed for its preparation; an explanation of the Member State's system to prevent, detect and correct corruption, fraud and conflict of interests, when using the funds provided under the Facility, and the arrangements approved to avoid double funding from the Facility and other Union programmes; besides, where appropriate, the request for loan support and, without claiming to exhaust the expected requirements, any other relevant information that is considered necessary to submit for the consideration of the European institutions.

Once submitted the recovery and resilience plan by the corresponding Member State, the *Commission shall assess* it[77], or, where applicable, will ask for the update of that plan, demanding that it must incorporate the content required by the Regulation, within two months of the official submission. Then, the Commission will make a proposal to the Council, which will implement a decision. In order to carry out its assessment, the Commission shall act in close cooperation with the Member States concerned. Therefore, the Commission will make observations and seek additional information. The Member States will be considered obligated to provide the requested additional information and may revise the recovery and resilience plan if needed, including after the official submission of the plan. Both parts, the Member States and the Commission may agree to extend the deadline for assessment by a reasonable period if necessary. To that end, in the determination of the amount to be allocated to the Member State concerned, the Commission shall take into account the analytical information of the Member State concerned available in the context of the European Semester, as well as the justification and the elements provided by that Member State, as well as any other relevant information. In any case, the Commission shall assess the relevance, effectiveness, efficiency and coherence of the recovery and resilience plan, taking into consideration the concurrence of the criteria imposed on each plan by the Regulation 2021/241.

On a proposal from the Commission, the «*Council shall approve by means of an implementing decision the assessment of the recovery and resilience plan submitted by the Member State or, where applicable, of its update submitted*»[78]. In the event that the Commission gives a positive assessment to a plan, the Commission proposal shall set out the reforms and investment projects to be implemented by the Member State, including the mile-

[77] Article 19 of the Regulation 2021/241.

[78] Article 20.1 of the Regulation 2021/241.

stones and targets, and the financial contributions calculated[79]. Where the Member State concerned requests loan support, the Commission proposal shall also set out the amount of the loan support and the additional reform and investment projects to be implemented by the Member State covered by the loan, including the additional milestones and targets[80]. The financial contribution shall be determined on the basis of the estimated total costs of the recovery and resilience plan proposed by the Member State concerned. Where the recovery and resilience plan complies satisfactorily with the criteria of relevance, effectiveness, efficiency and coherence, and the amount of the estimated total costs is equal, or higher than the maximum financial contribution calculated for that Member State, the financial contribution allocated to that Member State shall be equal to the total amount of the maximum financial contribution calculated for that Member State. The same will happen if the amount is lower than the maximum financial contribution calculated. But where the plan does not comply satisfactorily with the expressed criteria mentioned, no financial contribution shall be allocated to the Member State concerned[81].

Once the Commission's proposal is received, the Council shall adopt the implementing decision as a rule within four weeks of the adoption of such proposal. The decision may be amended on a proposal of the Commission to include the updated maximum financial contribution without undue delay[82].

Finally, it must be indicated that where the recovery and resilience plan is no longer achievable, either partially or totally, by the Member State concerned because of objectives circumstances, the Member State concerned may make a reasoned request to the Commission to make a proposal to amend or replace the Council implementing decisions, proposing *an amended or a new plan*. After that the Commission shall assess the amended or new recovery and resilience plan and the Council shall adopt a new implementing decision. But it can also happen that the Commission may reject the request, considering that the reasons put forward by the Member State concerned do not justify an amendment of the plan previously submitted[83].

In a case, as a «*guarantee for the proper the implementation of the Facility*», the Member States shall take all the appropriate measures to protect

[79] Article 20.2 of the Regulation 2021/241.

[80] Article 20.3 of the Regulation 2021/241.

[81] Article 20.4 of the Regulation 2021/241.

[82] Articles 20.7 and 20.8 of the Regulation 2021/241.

[83] Article 21 of the Regulation 2021/241.

the financial interests of the Union and to ensure that the use of funds complies with the applicable Union and national law, regarding, in particular, the prevention, detection and correction of fraud, corruption and conflict of interests. So, they will provide an internal control system and the recovery of amounts wrongly paid or incorrectly used[84]. Specifically, loan agreements shall provide for the obligations of the Member States: *a*) to regularly check that the financing provided has been properly used; *b*) to take appropriate measures to prevent, detect and correct fraud, corruption and conflict of interests; *c*) a managed declaration that the funds were used for its intended purpose; accompanied by a summary of the audits carried out; *d*) the data necessary for the audit (name of the recipient of funds, name of the contractor and sub-contractor, the name of beneficial owner of the recipient of funds); *e*) the authorisation to the Commission and the Court of Auditors to impose obligations on all final recipients of funds paid for the measures for the implementation of reforms and investment projects included in the recovery and resilience plan; *f*) and, finally, to keep records in accordance with the Financial Regulation[85].

Anyway, once the Council has adopted an implementing decision, the Commission shall conclude an agreement with the Member State concerned constituting an individual legal commitment[86]. Which «*rules on payments regarding financial contributions and loans*» are provided? The Regulation foresees that upon completion of the agreed requirements indicated in the recovery and resilience plan, the Member State shall request the Commission for payment of the financial contribution or, where relevant, of the loan. Where the Commission makes a positive assessment, it shall provide its findings to the Economic and Financial Committee to ask its opinion and shall adopt a decision authorising the disbursement of the financial contribution and, where applicable, of the loan. But if the Commission considers that the milestones and targets set out in the Council implementing decision have not been satisfactorily fulfilled, the payment of all or part of the financial contribution and, where applicable, of the loan shall be suspended. The suspension shall only be lifted where the Member State concerned has taken the necessary measures to ensure a satisfactory fulfilment of such requirements[87].

In any event, the Regulation establishing the recovery and resilience Facility strives to «*guarantee transparency and accountability*». Hence,

[84] Article 22.1 of the Regulation 2021/241.
[85] Article 22.2 of the Regulation 2021/241.
[86] Article 23.1 of the Regulation 2021/241.
[87] Article 24 of the Regulation 2021/241.

it makes the European Parliament present, if not as a decisive actor, yes, at least, in order to facilitate the control of the actions undertaken. Thus, the Commission shall transmit the recovery and resilience plan submitted by the Members States and its proposals for Council implementing decisions, «simultaneously and on equal terms», to the European Parliament and the Council[88]. So, a constant dialogue between the EU Parliament, the Council and the Commission is promoted. Thereby, the competent committee of the European Parliament may invite the Commission each two months to discuss about all questions related to the application of the Facility. Consequently, it may express its views in resolutions which must be taken into account by the Commission[89]. In this way it is verified how, since aid to Member States who require it comes from the EU budget, the differences with the ESM are radical, since the surveillance and control of the fulfilment of the acquired commitments are incorporated into the institutional framework of the EU. Hence, it deserves a very positive evaluation compared with the situation lived during the past crisis[90].

Likewise, the «*Member State concerned shall report twice a year in the context of the European Semester*» for economic policy coordination, a framework to identify national reform priorities and monitor their implementation. Such report will refer to the progress made in the achievement of its recovery and resilience plan, including the operational arrangements and on the common indicators. The reports of the Member States shall be appropriately reflected in the National Reform Programmes, which shall be used as a tool for reporting on the progress towards completion of the recovery and resilience plans[91]. So, the Commission shall *monitor* the implementation of the Facility and measure the achievement of the objectives set out. This will undoubtedly reinforce the Commission's recognized capacity to shape national fiscal policies[92], but it is still too soon to know how intensive and effective this steering activity of the Commission will prove to be[93].

In any case, to perform such reporting competence data for monitoring the implementation of activities and results must be efficiently collected. To that end, the recipients of Union funding are obliged to pro-

88 Article 25 of the Regulation 2021/241.

89 Article 26 of the Regulation 2021/241.

90 Carrera Hernández, F.J., *Del Mecanismo Europeo de Estabilidad (MEDE) al nuevo Mecanismo de Reconstrucción y Resiliencia (MRR)*, cit., 33.

91 Article 27 of the Regulation 2021/241.

92 Dani, M., Menéndez Menéndez, A.J., *El gobierno europeo de la crisis del coronavirus*, cit., 11.

93 De Witte, B., *The European Union's COVID-19 Recovery Plan*, 676.

portionate them[94]. Besides, the Commission shall establish a recovery and resilience scoreboard, which shall display the progress of the implementation of the plans of the Member States in each of the six pillars. It constitutes the performing reporting system of the Facility[95]. Anyway, the Commission shall provide an *"annual report"* to the European Parliament and the Council on the implementation of the Facility. It shall include information on the progress made with the recovery and resilience plans of the Member States concerned under the Facility[96].

Finally, it is foreseen that by 20 February 2024, the Commission shall provide the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions with an «*independent evaluation report*» on the implementation of the Facility, and by 31 December 2028 with an «*independent ex post evaluation report*». Such *ex post* evaluation report shall consist of a global assessment of the Facility and shall include information on its impact in the long term[97].

The future will tell whether, once the immediate effects of the crisis are overcome, the Commission will enforce strict compliance with additional macroeconomic policies which goes beyond the primary purpose of spending, according to the Facility[98]. Thus, when Brussels reactivates the fiscal stability rules, probably as of 2023, the substantial increase in public debt will have to be corrected[99]. If this happens, as many fear, and a more gradual application of the deficit and debt limits is not agreed, in order for the recovery to be sustainable, the reestablishment of austerity policies will once again be a reality and the progress made will soon be weakened[100]. We trust that this does will not happen. At present, the

[94] Article 29 of the Regulation 2021/241.

[95] Article 30 of the Regulation 2021/241.

[96] Article 31 of the Regulation 2021/241.

[97] Article 32 of Regulation 2021/241.

[98] On the concept of conditionality, see Vita, V., *Revisiting the Dominant Discourse of Conditionality in the EU: The Case of EU Spending Conditionality*, in *Cambridge Yearb. Eur. Leg. Stud.*, 2017, 1-28.

[99] To this is added that, as of March 2022, there will be a de-escalation in the debt purchase program by the European Central Bank, with which the financing of the public debt of the Member States will depend, to a grater measure, of the markets, that can put pressure on the risk premiums of the most unstable countries.

[100] The *Preamble* of the Regulation 2021/241 indicates in *Recital 52* that if «one or more Member States consider that there are serious deviations from the satisfactory fulfilment of the relevant milestones and targets, they may request the President of the European Council to refer the matter to the next European Council". However, such statement is clearly against institutional balance, as the European Council has not recognized any capacity to implement EU legislation. That is why it is expressed in the Preamble, just to satisfy the petition of the frugal States, in particular, of the Netherlands. Therefore, it lacks any binding force».

Council seems open to renegotiating the strict and complex fiscal rules in force until now, including the *Stability and Growth Pact*. The aim is thus to create a more flexible system that avoids returning to the *status quo* of austerity. Current fiscal rules date back to the 1990's, as they were designed for a world that has now dissapeared. Therefore, a broad consensus must be forged to promote its reformulation, combining fiscal sustainability with the granting of a greater margin of action in favor to the Member States in the face of not only extrordinary crises such as the one created by the current pandemic.

In any case, certain elements incorporated into the recovery and resilience instrument may constitute the foundations of a permanent macro-economic stabilization mechanism. So, the recovery instrument will set the tone for EU intervention in future crisis. COVID-19 has allowed to start a very promising path, imposible to foresee before its appearance. The transformation of the economic governance of the EU is now within our grasp. However, a transformation of the architecture of the Euro zone, which involves incorporating decisions on debt and taxes, will require, sooner or later, a reform of the Treaties. The democratic legitimacy of the Union is at stake.

5. Conclusions

Next Generation EU (NGEU)-Europe's Recovery and Resilience Plan, with a total allocation of 750.000 million euros, incorporated to a strengthen *Multiannual Financial Framework (MFF),* combined with an amendment of the *Own Resources Decision (ORD),* represents an extraordinary common response to the economic consequences of the pandemic. Therefore, it is the expression of a comprehensive recovery design which includes new instruments, added to others, reinforcing solidarity. So, this massive intervention in the economy of the Member States, involves direct transfers to them, in addition to repayable loans, and the consequent recognition of the Union's ability to borrow in the financial markets and, consequently, to incur debt. A proper fiscal capacity of the EU has been created, not primarily fed by contributions of the Member States, or by new European taxes, but by the issuance of bonds.

The reason of being and existing of this temporary Recovery plan is the need to complement the economic and financial measures adopted by Member States, given the enormous impact of pandemic and the inability of many of them to cope with the situation on their own. Such complementary mobilisation of funding ensures that the internal market is not undermined by disparities in the ability of Member States to mobilise funding, and provides, in a spirit of solidarity, funding to those countries where fiscal space for discretionary spending is limited. In addition, it ensures that spending is carried out based on a coherent economic strategy coordinated between the Member States and promoted by the European Union's institutions.

However, such subsidiary financing is clearly circumscribed in terms of duration and way of use. It is limited to tackling the impact of an unprecedented crisis on a scale commensurate to the effects of such crisis. Therefore, although the plan supposes a qualitative leap in the economic governance of the EU, by establishing a joint investment effort, truly based on the existing legal order and not in intergovernmental agreements like happened during the past crisis, its extraordinary nature initially prevents it for becoming a permanent instrument of macro-economic stabilization.

Besides, the weight of assistance will be probably insufficient to maintain cohesion for a long period of time, since it has not exceeded 2% of the GDP of the EU for three years. In addition, it implies the consolidation of economic conditionality and of the supervisory power assigned to the Commission that will probably deepen in the loss of fiscal capacity on the part of the beneficiary Member States, imposing policies of renewed austerity in a not distant future.

Notwithstanding, the Union has introduced a paradigm shift, a precedent of massive joint debt issuance with which to finance its policies. Inevitably, the recovery instrument will set the tone for EU intervention in future crisis, at the time we hope that it has started the transformation of the architecture of the Euro zone. But we have to be aware that incorporating decisions on debt and taxes will require, sooner or later, a reform of the Treaties. The democratic legitimacy of the Union is at stake.

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