

# LAW AND ECONOMICS YEARLY REVIEW

ISSUES ON FINANCIAL  
MARKET  
REGULATION,  
BUSINESS  
DEVELOPMENT AND  
GOVERNMENT'S  
POLICIES ON  
GLOBALIZATION

*Editors*

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*in association with*



# LAW AND ECONOMICS YEARLY REVIEW

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The “Law and Economics Yearly Review” is an academic journal to promote a legal and economic debate. It is published twice annually (Part I and Part II), by the Fondazione Gerardo Capriglione Onlus (an organization aimed to promote and develop the research activity on financial regulation) in association with Queen Mary University of London. The journal faces questions about development issues and other several matters related to the international context, originated by globalization. Delays in political actions, limits of certain Government’s policies, business development constraints and the “sovereign debt crisis” are some aims of our studies. The global financial and economic crisis is analysed in its controversial perspectives; the same approach qualifies the research of possible remedies to override this period of progressive capitalism’s turbulences and to promote a sustainable retrieval.

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## PRESENTATION

Francesco Capriglione\*

1. After few months from the spread of *coronavirus* around the world, the record of deaths and suffers continues to increase the number of victims. The reactions of States in which the virus displayed the main effects have not been uniformed: the measures of containment imposed to reduce the diffusion of infection have been applied differently and unfortunately have determined an evident detriment to countries that adopted late responses. The fear characterises the behaviours of part of the civil society, marking our life with a huge sense of loss: the humankind perceives its own fragility and seems disoriented when look at the future, and gradually coming back to normal routines.

An inevitable and severe economic crisis related to the health emergency that is posing further questions in relation to the lack of adequate medical structures, necessary to contrast the Covid-19. The epidemic seems locking the world: the stagnation of productivity has translated in loss of employment, limited commercial transactions, crisis of entire industrial sectors and, in particular, of tourism hospitality. In this context, there are symptoms of an imminent phase of recession directed to damage the financial global system, whose consequences cannot be estimated at the moment, therefore, the unforeseen outcomes. Indeed, there is a risk to experience new forms of poverty, inequalities, and conflicts in the sphere of politics!

As a result, there is need to initiate a change that can be directed to the solution of current problems through the promotion of the value of solidarity. This permits to develop a society founded on the awareness that «we cannot go ahead along its own interests, but together only», as has been affirmed by Pope Francis in a recent speech *urbi et orbi* (that took place at St. Peter's Basilica in Rome on 27

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\*Editor in Chief.

March 2020) in which during the pandemic he sent to the world a message of release and hope.

2. In light of these considerations, the *coronavirus* has evidenced the fragility and weaknesses that are questioned from various voices e.g. scholars and certain political representatives who criticised the *austerity* measures of the global financial crisis and the provisions of the European treaties, therefore the need to request exceptional waivers (advanced many times by some EU members).

On this view, it is necessary to set more accountability of political class that should recognise the limits of its actions, more often oriented to carry out detrimental *spending cuts* (as in the health sector) and useless interventions of public assistance. As a result, there has been a general discussion on the effectiveness of causes that determined disparity within the EU; it is important at this stage to develop strategies among member states to pursue common policies in order to abandon the sentiment of self-interest.

At the European level there is a belief by which the *coronavirus* can represent a *tombstone* for the Union because of its negative effects displayed on a compromised situation. Consequently, it is responsibility of the EU institutions the delicate decision to enhance adequate innovation of the forms of integration; therefore a necessary change of perspective based on the paradigm of solidarity.

Will ever be possible such change? It is very difficult to predict. But it is our hope! Perhaps it can be of help, in this matter, the fact that the change is related to the burden of a calamity that has damaged and damages without any differences, leaving behind a past made of hegemonic attempts, craftiness and shallowness, arrogant positions. We are, therefore, into an important game to play...knowing that to its own victory is linked the future of Europe.

3. In the light of this scenario, the board of Review has considered appropriate to join the debate that in the academic circle has inflamed in order to identify the possible ways to follow for starting a new rebirth in the aftermath of Co-

vid-19.

This Issue collects the reflections of various scholars, who consent to examine the different regulatory responses given to pandemic, pointing the analysis on the destiny of Europe. From these contributions it is possible to draw useful discussions to understand the future after the pandemic crisis: this collection offers some arguments to think a common pathway of proposals and practices of change, to modify a global reality that cannot be as in the past anymore.



## COVID – 19. WHAT SOLIDARITY, WHAT COHESION IN THE EU? UNCERTAINTIES AND FEARS

Francesco Capriglione\*

*«Beyond the horizon there is a vale of gloom»  
F. O'Hara, Lines for the Fortune Cookies*

**ABSTRACT:** *This paper offers a reconstructive analysis of the European integration process and - within it - focuses on the different interpretation of the concept of stability given by the Member States, with the aim to clarify the reasons why the current structure of the Union prevents the transition to a more advanced political form.*

*It is highlighted the different view underlying the participation to the EU by the Member States, and therefore the shortage in most of them of the spirit of solidarity and cohesion that was at the basis of the original project of the founding fathers. We face the configuration of a geopolitical scenario in which the predominance of selfish interests founded easy explanatory modalities in the intergovernmental method and in the comitological mechanism, which have allowed the sacrifice of the ideals of integration and union in the name of economic interests, regardless of the fact that totalitarian logics can grow up, in contrast with the liberal democratic principles underlying the aforementioned project.*

*The Covid-19 emergency acted as a catalyst for a generalized reflection on the effectiveness of the causes that widen the gap existing within the EU. Hence the need to identify the operational strategies that can offer to the Member States the possibility of pursuing common development lines. Therefore, the interventions put in place by the institutional leaders of the Union (from those on monetary policy carried out by the ECB to the German and Dutch proposal to use the ESM, to the planned implementation of the Recovery Fund) are analyzed, highlighting that they do not reflect a solidarity change of the action of the EU. Conversely, it is ob-*

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\*Editor in Chief.

*served that they indicate the persistence (of the northern European States) of a lack of trust towards the Mediterranean ones and, therefore, once again the priority ascribed to the individualistic logic, which finds complete expression in the refusal of the Eurobonds and, more recently, in the judgment of 5 May 2020 issued by the German Constitutional Court.*

*The analysis ends by representing that the Union, having renounced specifically to all forms of political realization, will continue on its path (littered with compromises and renunciations), increasingly orienting itself towards a return to a “mere single market”. A panorama of unknowns follows, which in all probability will go beyond this point of arrival, especially if one abdicates the single currency. And in any case, even assuming that this solution may persist over time, it will not be sufficient to protect the European area from the political interference of the other foreign powers that stand out on the global scenario. This is perhaps the greatest unknown.*

**SUMMARY:** 1. Preamble. - 2. The origin of the European *project*. - 3. *Follows:* ...and its ideal motivation (*i.e.* an integration based on solidarity). - 4. The difficult construction of a ‘common home (economic misalignment and fear of the *free riding*)’ - 5. Diversity in the European geopolitical framework: the low propensity for unity. - 6. The EU in the face of the 2007 financial crisis...- 7. *Follows:* ...and the *coronavirus* emergency. - 8. The end of a “dream” ... 9. *Follows:* ... the judgment of the German Constitutional Court of 5 May 2020...- 10 *Follows:* ... and the uncertainties of the future.

1. The difficulties of Covid-19, as well as manifesting themselves in the serious health and economic emergency that has affected most of the countries of the western area, reveal their negative effects at the political level. From this situation a heated debate took place in which consolidated principles concerning the democratic order and the Europeanist view – that has animated the hopes of many citizens of the ‘old’ continent for half a century, are being questioned.

The search for remedies and solutions to the negative consequences of the coronavirus has an impact on the interpretation of the Treaties, highlighting the

need for a flexible interpretation of certain provisions and the need to define a new order of relations between the Member States, which is essential for the very continuity of the Union. A scenario is therefore identified in which the principles of sharing, cohesion, and solidarity – traditionally advocated by those who over time have hoped for convergence, primarily economic and then political, can finally be put into practice. To many people seems possible to hypothesize the opportunity of modifying old and consolidated selfish attitudes that characterize the *agere* of some countries and constitute the primary cause of a «euro sclerosis» process which consequently produced anti-European movements and generated doubts about the real will to reach the goal indicated by the *founding fathers*.

As I have pointed out on my previous work, the Covid-19 pandemic acts as a catalyst for a general reflection on the effectiveness of the causes of the widening gaps within the EU and, therefore, on the need to identify behavioural strategies that allow «the Member States to pursue common lines of development, based on a logic of solidarity and, therefore, on the abandonment of individualism that has prevailed until now»<sup>1</sup>. In fact, according to the most widely held opinion, the difficulties – at present hindering the recovery in some States, make it essential to change the logic which, until now, has prevented more accentuated forms of integration – a change linked to the very prospect of political unity.

It is therefore necessary to clarify the identification of new forms of relations between the EU countries. There is a need to proceed in the direction of an appropriate review of the process of Europeanisation to try to focus on the reasons that have prevented the realisation of the relevant project. There is no doubt that the events connected with Covid-19 have demonstrated, on the one hand, the inadequacy of the *stability* and *growth* parameters set out in the Treaties and, on the other hand, the inappropriateness of preserving an «intergovernmental structure», in which broad emphasis is placed on national interests that end up

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<sup>1</sup>See CAPRIGLIONE, *The EU finance during the COVID-19 pandemic (La finanza UE al tempo del coronavirus)*, in *Riv. trim. dir. econ.*, 2020, first section, p. 38.

prevailing over the collective interests resulting from participation in the EU<sup>2</sup>.

More specifically, consideration is given to the geopolitical and cultural reasons underlying the failure of the nominated authorising officers – first and foremost solidarity – to affirm the lines of convergence referred to above. In fact, on closer examination, the Union seems to qualify itself essentially as a mere economic cooperation (also characterised by an uneven distribution of beneficial effects), but not also as a prodromal model aimed at the creation of a federalist type of State.

In this context, they identify appropriate indicators for the survey – which is here proposed, not only the institutional path of the European bodies, but also the *modus operandi* adopted by the EU institutions during the Covid-19 pandemic. In fact, from the reference to the evolutionary forms of the European summit architecture, it is possible to deduce the reasons for some options of *politics* which, over time, has ended up giving way to *technique*, conferring to the process of integration a *vector* that distances it from its final objective. The action of these bodies shows the persistence of individualistic positions that certainly hinder the hypothesis of a ‘common house’, thus allowing a glimpse of the possible end of the «European dream» or, at least, a downsizing of it in a narrower sphere.

2. I omit here to retrace the main stages of the long process of European integration, from the constitution of the *Coal and Steel Community* (1955) to the *EEC*, established by the Treaty of Rome (1957), to the development of the ‘common market’, to the creation of the ‘single currency’, established by the Treaty of Maastricht (1992), finally reaching the realization of the EU, implemented by the Treaty of Lisbon (2007), and finally to that of the European Banking Union (2012).

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<sup>2</sup>See GOBBI, PALAZZO and SEGURA, *Financial support measures for post-covid-19 enterprises and their medium-term implications (Le misure di sostegno finanziario alle imprese post-covid-19 e le loro implicazioni di medio termine)*, available on [www.bancaditalia.it /media/ notizie/ 2020/Gobbi-et-al-15042020.pdf](http://www.bancaditalia.it/media/notizie/2020/Gobbi-et-al-15042020.pdf), where the need to respond to the economic emergency caused by the pandemic is highlighted with action by governments to set up extensive programmes of public guarantees on credit provided by banks to businesses and appropriate measures taken at international level.

The analysis of this process shows the succession of evolutionary phases of a complex reality in which the technique supervises the final rationality of the choices. Therefore, in line with the ideological clash of the post-modern age, we could say that the *political/technical* dichotomy takes priority in the definition of the «European project» and becomes a guiding criterion in the interpretation of the events that have affected Europe. However, without disregarding the fascination of such a reading of the events that characterized the history of the 'old continent' since the middle of the last century, it is certainly reductive to limit the evaluation of the meaning (and effective scope) of the socioeconomic design – which seemed revolutionary to the young people who lived in the 1950s, to the aforementioned field.

I therefore consider inappropriate and restrictive to take an approach to the problem we are dealing with in which the intertwining of social and financial policies, which underlies the vague ideal of a united Europe, is not recognised as sufficiently important. This intertwining is the driving force behind the transformations of the integration model adopted, as we can see in the course of time; it shows a sort of inability to overcome the conflict between the «national identities» of countries that have fought each other for centuries (and which, at present, show that they have not yet achieved an adequate degree of cohesion). Truly, the reference to a socio/political constitutive matrix helps to understand the original *input* that, after the Second World War, was given by a European demoliberal *elite*, contrary to any form of totalitarianism, to the realization of the project in question. This also explains the many *contradictions* that can be found, especially in recent decades, within the EU (due, in most cases, to the underestimation of social conflicts existing in some Member States, as well as the growing gap that has been created between them, resulting in the impoverishment of large sections of the population).

After a more careful observation appears evident, however, that every process of aggregation between ethnic groups, social classes and, more generally, historically different peoples has always taken place in a conflictual context. For ex-

ample, we may consider the French Revolution and the Italian Risorgimento during which the struggle between social classes, which characterizes the French Revolution, reflected in the *Risorgimento* as the irredentist request of a people who sought its unity by fighting for independence. It follows that Rousseau's contract theory – according to which a pact, a convention, is the foundation of the birth of States<sup>3</sup>, must not be accompanied by a *narrative* that represents an “origin of nations” implemented in an *irenica* manner. A complete evaluation of the nature of constitutionalism must not conceal history, overlooking the fact that the State is born as a result of conflicts, contrasts, victories and defeats, which have occurred over time, with a view to achieving a final goal that is not always achieved.<sup>4</sup>.

Well, even the idea of a «free and united Europe», proposed in 1941 by Altiero Spinelli, Ernesto Rossi and Eugenio Colomi, signatories of the famous *Manifesto of Ventotene*, was born as a reaction to the ideological crisis induced by authoritarian dogmatism at the time<sup>5</sup>. It focuses on the «post-war tasks» and takes into account the dangers of the «restoration» of the nation-states, which could be followed by an inevitable «return of power» in reactionary hands, with obvious loss of the beneficial effects resulting from the end of the war. Hence the need for a «definitive abolition of the division of Europe into sovereign nation-states», to be achieved by implementing a «federal reorganisation» of the latter.

We are in the presence of a programmatic construction that - in reference

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<sup>3</sup>See, in particular, the well-known writings entitled *On the Social Contract; or, Principles of Political Rights* published in 1762 in which is formulated the political proposal of this illustrious philosopher for the ‘re-foundation of society’ on the basis of a ‘fair pact’; to this end it is (and must be) the unitary will of the people to determine its actions, since it is the repository of all sovereignty..

<sup>4</sup>See extensively on the subject LUCIANI, *Irenic constitutionalism and polemical constitutionalism (Costituzionalismo irenico e costituzionalismo polemico)*, in *Giur. cost.*, 2006, p. 1644 ss.

<sup>5</sup>The first edition of the Manifesto published under the title *For a free and united Europe. Draft of a manifesto (Per un’Europa libera e unita. Progetto d’un manifesto)* was lost; later in 1944 a new edition, edited by Colomi, was printed in Rome in a book entitled *Problems of the European Federation (Problemi della Federazione Europea)*, with the addition of two other essays by (*The United States of Europe and various political trends (Gli Stati Uniti d’Europa e le varie tendenze politiche)*; *Marxist and federalist politics (Politica marxista e politica federalista)*) written between 1942 and 1943..

to the historical moment of its formulation - is to be defined *revolutionary*, even if it may appear *utopian*, as it is propositional of a social and political emancipation at the time certainly not conceivable. In fact, the creation of a *European Federation*, as a suitable organizational modality to solve with simplicity «the many problems that poison the international life of the continent: [...] mixed population, defence of non-allogeneic minorities, sea outlet of inland countries, Balkan question, Irish question, etc.»<sup>6</sup>. It is understandable, however, how difficult the «balance of independent European states with the coexistence of militaristic Germany [...] (i.e. hegemonic)» can be, as well as «the end of the sense of security in the unassailability of Great Britain, which advised the British to splendid isolation».

The serious uncertainty that, in the immediate post-war period, characterizes international relations - and, therefore, the difficulty of pooling national policies on the federalist-constituent vision, outlined by Ernesto Rossi and Altiero Spinelli - leads us to opt for the method proposed by Jean Monnet, inspired by the «functionalism» of Mitrany<sup>7</sup> and the neo-functionalism of Haas and Lindberg<sup>8</sup>. Therefore, the theoretical orientation according to which the start of functional integration processes (in which some States pool certain activities and economic resources) would tend to encourage and encourage further integration (in line with an overflow mechanism, the so-called *Spill Over*) with a political value, is affirmed.

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<sup>6</sup>This document has been analysed by FROSIO RONCALLI, *The origin of an idea: the link between federalism and European unity in the manifesto of Ventotene*, in *World History (L'origine di un'idea: il nesso tra federalismo e unità europea nel manifesto di Ventotene)*, in *Storia del Mondo*, n. 12, 2003; LEVI, *Altiero Spinelli, founder of the movement for European unity (Altiero Spinelli, fondatore del movimento per l'unità europea)*, in appendix to a re-edition of *The Manifesto of Ventotene (Il Manifesto di Ventotene)*, Milan 2006, p. 179 ss.; NAPOLITANO, *Altiero Spinelli and Europe (Altiero Spinelli e l'Europa)*, Bologna, 2007, a work in which, speaking of the Manifesto, it is stated: «it would be arbitrary and wrong to reduce it to a summary appeal for the liquidation of the national States. And it is worth recalling and highlighting the finesse and modernity of that federalist approach» (p. 77); VASSALLO G., *For a critical edition of the Ventotene Manifesto: first evaluations on the state of research (Per un'edizione critica del Manifesto di Ventotene: prime valutazioni sullo stato delle ricerche)*, in *Eurostudium*, October-December 2008, p. 61 ss.

<sup>7</sup>See MITRANY D., *A working peace system*, London, 1943.

<sup>8</sup>See HAAS E.B., *The Uniting of Europe – Political, Social and economic Forces, 1950-1957*, London, 1958; Id. *Beyond the Nation State*, London, 1964; LINDBERG, *The Political Dynamics of European Economic Integration*, London 1963.



This opened the way to a phase of international cooperation which would lead on 9 May 1950 to the well-known Schuman Declaration, which stressed that the «fusion of coal and steel production» would ensure «the establishment of common bases for economic development, the first stage of the European federation»<sup>9</sup>. It marks the beginning of the process of integration which saw the establishment of the *European Coal and Steel Community* (ECSC) in 1951, considered in doctrine «the first example of a supranational community to which sovereignty in the field of coal mining, production and trade in steel and coal was transferred by the six European States signatory to the Treaty (France, West Germany, Italy, Belgium, the Netherlands and Luxembourg)»<sup>10</sup>. This functionalist approach will then find further implementation in subsequent steps towards progressive integration, which should have «achieved an almost painless [...] depletion [...] of national sovereignty [...] (finding) [...] in the end [...] logical crowning in a federal constitution»<sup>11</sup>.

This is the context in which the Treaties of Rome of 1957, establishing the *European Economic Community* (EEC) and the *Atomic Energy Community* (EURATOM), were signed, which - when linked to the ECSC - highlight the reference to a unified logic in the definition of a European regional system capable of ensuring peace and security objectives<sup>12</sup>. It should be pointed out, however, that the path begun in the 1950s proved, from the outset, to be undermined by obstacles which, as one distinguished scholar pointed out, have been a distinctive feature of the history of European integration «for fifty years in constant movement

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<sup>9</sup>See PISTONE, *The federal perspective in the Schuman Declaration* (*La prospettiva federale nella Dichiarazione Schuman*), available on [www.eurobull.it](http://www.eurobull.it).

<sup>10</sup>See DECARO, *European integration and constitutional law* (*Integrazione europea e diritto costituzionale*), in Aa.Vv., *Elementi di diritto pubblico dell'economia*, by Pellegrini, Padova, 2012, p. 51

<sup>11</sup>See PISTONE, *The federal perspective in the Schuman Declaration* (*La prospettiva federale nella Dichiarazione Schuman*), cit.

<sup>12</sup>See PAPA, *History of European unification. From the idea of Europe to the Treaty for a new European Constitution* (*Storia dell'unificazione Europea. Dall'idea di Europa al Trattato per una nuova Costituzione europea*), Milan, 2006, *passim*.



and adjustment»<sup>13</sup>. And indeed - starting from the failed attempt, in 1954, to create the *European Defence Community* (EDC), whose proposal was rejected by the French National Assembly - there is a series of accelerations and slowdowns in the process that (through agreements aimed at strengthening economic cooperation) should have led to a political unification also among the States participating in the processes in question; alternations that generate doubts about the validity of the methodological choice made and, more generally, about future expectations regarding a possible, more intense unification.

3. The course of more than half a century has shown how difficult it has been to overcome the many critical issues that have emerged as a result of the events that made it necessary to modify the original European integration project or, more precisely, to adapt it to the changes imposed by a diversified reality of reference. From here the evidence of various phases in the evolutionary process of a path that, over time, has highlighted the advantages and limitations of the construction in question.

I refer, in particular, to the emergence of some dystonic factors resulting from a substantial alteration of the original Community design on the basis of which, as I pointed out earlier, there is the intention to combine the prospect of mere economic cooperation with the pursuit of objectives of greater importance, which can be traced back to the «political sphere». Significant, in this regard, is the vision of a «political organization» based on the “social ethics of freedom and equality», clearly represented in the *Manifesto di Ventotene*; it is underpinned by the condemnation of the affirmation of the «hegemony of the State stronger than all other servitude», as well as the awareness that «even a compromise solution between the parties now in struggle would mean a further step forward of totalitarianism».

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<sup>13</sup>See AMATO, *The Lisbon Treaty and the prospects for 21st century Europe* in *The new European institutions. Commentary on the Lisbon Treaty*, by Bassanini e Tiberi, in *Quaderni di Astrid*, Bologna, 2010, p. 441 ss.

The design, to which we have regard, focus on the «post-war tasks», pointing out the dangers of the «restoration» of nation states, which would inevitably be followed by a «return of power» in reactionary hands, with obvious loss of the beneficial effects resulting from the end of the war events. Hence the need for a «definitive abolition of the division of Europe into sovereign nation-states», hence the proposal for a «federal reorganization» of the latter indicated as primary objectives of the integration project to be pursued. Therefore, the primacy of politics is identified in the identification of the aims (and the relative modalities of implementation) which should have allowed the realisation of a more united and cohesive Europe, in which the values of 'democracy' are fully recognised, in this sense attributing significant importance to the essence and the «triumph of democratic tendencies» in the European sphere<sup>14</sup>.

It follows that the reference to *demos* is at the basis of community construction, which is focused on the principles of equal participation in the exercise of power by the countries that join it. There is a political/social conception that is the bearer of ethical ideals that are identified in the guarantee of freedom and equality, both sacrificed by the totalitarian regime that had oppressed the authors of the *Manifesto*. This conception is extrinsic - in addition to the well-known form of government exercised by the people<sup>15</sup> - a principle of solidarity, which is the founding criterion of the project under consideration, indicating the willingness of the acceding countries to make a joint commitment to the others in order to achieve their objectives in a spirit of participatory unity, so as to meet the needs and discomforts of those (among them) who find themselves in such difficult conditions as to be in need of help.

Political, economic, and social solidarity therefore identifies an essential

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<sup>14</sup>Apart from a few isolated critical voices on the federalist thinking expressed by the Manifesto, the prevailing orientation of the doctrine agrees that reference to the Manifesto and to democratic bodies is essential for the interpretation of this political proposal; see among others VOIGT, *Ideas of the Italian Resistance on the Postwar Order in Europe*, in LIPGENS e LOTH, *Documents on the History of European Integration*, Berlin-New York, 1985, vol. I, p. 456 ss; PAOLINI, *Altiero Spinelli, Notes for a biography (Altiero Spinelli, Appunti per una biografia)*, Bologna, 1988.

<sup>15</sup>See among others SARTORI, *Democracy: what is it (Democrazia: cosa è)*, Milano, 2007; ID., *The democracy in thirty lessons (La democrazia in trenta lezioni)*, Milan, 2009.

component in the formation of the future European Union, introducing into its constituent structure the values that this phrase traditionally expresses. These values, already at the heart of the intentions of the founding fathers, will then be incorporated into the Charter of some Member States, which incorporate the cornerstones of the social doctrine of the Catholic Church, the essence of which is the foundation of every form of coexistence which seeks to be respectful of human *dignity*<sup>16</sup>. In this sense, the Italian Constitution is, in fact, oriented, whose Article 2, according to a consolidated interpretation of the Council, provides that «social coexistence [...] must be built on the basis of the principle of solidarity», as «the ultimate goal of social organization [...] (is) [...] the development of every single human being»<sup>17</sup>.

It follows that the specific scope of the duties of political solidarity in this area focuses on the issue of compliance with behaviour which is intended to be in line with the civic value of European citizenship<sup>18</sup>. It is clear, therefore, that action in solidarity must transcend the individual interests (or more precisely: the individualisms) of the individual countries belonging to the Union by opening up to an active and responsible commitment to others in view of the higher purpose of the 'common good'. It also distinguishes the sense of belonging to a unitary socio-political body and ensures that the well-being of all its citizens is safeguarded through the fulfilment of certain obligations which, going beyond national links, should ensure the removal of inequalities and the convergence of Member States towards common interests.

In the case of the EU, solidarity and stability find their point of composition in the principle of responsibility; this implies the need for all countries to cooperate in order to strengthen the relationship of mutual *trust* that is the basis of an

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<sup>16</sup>See PELLEGRINI, 'Enterprise and finance' in the light of the social doctrine of the Church ('Impresa e finanza' alla luce della dottrina sociale della Chiesa), in AA.vv., *Finanza impresa e nuovo umanesimo*, Bari, 2007, p. 31 ss.

<sup>17</sup>See Constitutional Court judgment n.167/1999

<sup>18</sup>See LIPPOLIS, *European citizenship (La cittadinanza europea)*, Bologna, 1994, 184. On the institution of European citizenship, See also PINELLI, *European citizenship (La cittadinanza europea)*, in *Enc. dir.*, Annali, I, Milan, 2007, p. 181 ss.

interventionist action against those in need carried out without hesitation and/or perplexity of any kind. It goes without saying that this relationship can be undermined by behavioural lines which, as in the case of Italy, reflect at the same time the typical virtues and the limits by which it is marked; where they allow us to glimpse for Germany a country characterized by a presumed *virtue* which tends to turn into *hegemony* and, finally, for France the vain attempt to compensate, in a logic of *grandeur*, with the possibility of influential political action, the lower economic strength with which, compared to the German State, it contributes to the process of growth of the Union. In relation to the above, I believe that, in terms of practicality, our country may find obstacles in achieving an openness of solidarity on the part of the other Member States when it proves necessary. And indeed, as I have already pointed out on other occasions<sup>19</sup>, the Italian reality reveals a sort of basic ambivalence appearing, on the one hand, reactive in the face of crises, capable of identifying the right way forward, facing serious sacrifices and renunciations, and on the other hand, reluctant to abandon the road paved with short-lived opportunism that has guided its political choices in recent years; defects, these, which are translated into draining factors of an action in solidarity with our country due to the loss of credibility that, unfortunately, the above mentioned conduct has caused.

That said, it is significant that the Union, at the beginning of this millennium, has adopted the spirit of solidarity which, as I said, has characterised the process of European integration from the outset and has incorporated its essence in legislation. As is well known, the *Treaty on the Functioning of the EU* of 2007 introduced, in the provision of Article 222, a specific «solidarity clause» which specifies that «Member States shall act jointly [...] when one [...] (of them) [...] is the subject of a terrorist attack or the victim of a natural or man-made disaster». The provision of a specific obligation for Member States to intervene in the event of a situation of need for a component of the Union identifies solidarity as an appro-

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<sup>19</sup>See CAPRIGLIONE - SACCO GINEVRI, *Politics and finance in the European Union (Politica e finanza nell'Unione europea)*, Padova, 2015, p. 229 ss.

priate way of resolving certain of their problems.

On balance, however, the legislation sets certain limits for the application of the solidarity clause referred to above. In particular, it identifies the cases in which action may be taken (i.e. terrorist threat or attack, natural or man-made disaster) (Article 222(1)), specifying that the *arrangements* for the implementation of the clause by the Union must be «defined by a decision adopted by the Council on a joint proposal from the Commission and the High Representative of the Union for Foreign Affairs and Security Policy» (third paragraph). It is clear that the decision to grant joint and several aid is subject to assessments (on which the credibility of the State in need of aid is likely to interact) in which the *quantum* of the assistance, the terms of any disbursements and their cost can be determined.

Thus, in spite of the express provision in the Treaties for a dutiful act of solidarity within the Union, there are still a number of reservations as to its actual effectiveness. These doubts have increased, for the reasons set out in the following paragraphs, following the financial crisis of 2007 and even more recently, on the occasion of the economic health emergency caused by Covid-19. This has obvious repercussions on the stability of the European systemic structure, hence the inevitable uncertainties and fears about the future of the EU; the question must be asked whether the implementation of «a genuine process of constitutional integration does not require a more advanced balance [...] between demands for solidarity and stability»<sup>20</sup>.

An analysis of the clause introduced by the *Treaty on the Functioning of the EU* shows that, contrary to what its nominalist definition would suggest, the EU may not be the bearer of a solidarity-based logic in the traditional sense, but rather of a demand to take account of the need for aid which a country may incur, for reasons beyond its control.

In fact, the measures provided for in it do not take place entirely where there is a proven need in one of the Member States, but rather as a result of deci-

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<sup>20</sup>See CAPRIGLIONE - IBRIDO, *Brexit between finance and politics (La Brexit tra finanza e politica)*, Milan, 2017, p. 88.

sions taken by European summits which, having ascertained that the conditions justifying the request for aid are met, determine the practical arrangements in which the measures can be carried out. We are, therefore, far from the spirit that must move the «solidarity action», put in place in the belief that it is necessary because it is carried out in favour of an integral part of the nation state. Europe, from this point of view, is in no way comparable to the USA which, on the occasion of Hurricane Katrina, helped without any condition (or verification of any kind) the southern states affected by its violence; this, without any critical positions on the part of those in the north. There is no doubt that the unity (also political) of the country had an easy game in promoting the line of solidarity practiced! Conversely, on closer examination, it can be said that the intervention provided for in the EU Treaty meets the latter's need to ensure that the emergency of a country in difficulty, for reasons not attributable to it, does not reverberate to the detriment of others, where appropriate creditors of the former. This leads us to reflect on the possibility of seeing the 'original objectives' of the European project realised in the future, and first and foremost that of reaching a federal solution. In all probability, over time, this result has been arrived at by considering the hypothesis of a political conclusion to the integration process obsolete; an aim distorted, in terms of the concrete aspects, by the logic of the interest and selfishness of the countries which, by their virtue and strategic capacity, have assumed a leading role in the Union. On the other hand, it could also be assumed that some Member States consider that the design of the *founding fathers* has already been achieved, the scope of which is reduced to the mere achievement of a lasting period of peace, which has lasted for over half a century.

4. In order to fully assess certain attitudes that Member States have taken in recent decades in the face of the crises that have upset the Union's financial balances and economic stability, it is necessary to look at the most significant stages in the process of European integration.

It is important to start from the consideration that, following the Treaty of

Rome, the Community has a long period of prosperity, due on the one hand to the fervour of the entrepreneurial initiatives of the post-war period, and on the other hand to the monetary policy implemented by the individual States, at the time free to support economic growth with public finance interventions. As far as Italy is concerned, the paths followed are *a)* the issue of government bonds bought by the Bank of Italy by beating new money; *b)* recourse to indebtedness on the market with a gradual increase in interest rates (correlated to the overall exposure and general riskiness of the country). These are the years that see the long season of 'competitive devaluations' aimed at favouring exports<sup>21</sup>, which ended with the stop to unlimited monetary financing implemented by the so-called Treasury-Bank-of-Italy-divorce<sup>22</sup>.

In legal terms, there is regulatory *harmonisation* within the Community, with the obvious beneficial effect of facilitating the creation of a *common market* and, with it, the achievement of satisfactory levels of economic development. Indeed, the regulation of the freedom of movement of persons, capital, goods and services has created the conditions for increased competition and more profitable trade; access to banking has been liberalised<sup>23</sup> and other measures have been in-

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<sup>21</sup>This is a monetary policy strategy by which one depreciates one's own currency in order to promote exports and, consequently, the country's economy. It can be implemented through various manoeuvres such as interest rate cuts or unconventional expansionary measures.; See MARZOVILLA, *The evolution of the international monetary system: from a hegemonic regime to a "non-system"* (*L'evoluzione del sistema monetario internazionale: da un regime egemonico a un "non sistema"*), in AA.VV., *The multinational monetary system: from the hegemonic to the multi-currency approach* (*Il sistema monetario multinazionale: dall'approccio egemone a quello multivalutario*), Milano, 2016, p. 138

<sup>22</sup>See ANDREATTA, *The divorce between Treasury and Bankitalia and the dispute of the wives* (*Il divorzio tra Tesoro e Bankitalia e la lite delle comari*), in *Il Sole 24 Ore* del 26 luglio 1991; MORCALDO, *The role and size of the public sector* (*Il ruolo e le dimensioni del settore pubblico*), in the volume edited by the Ente Einaudi, *The public deficit in Italy* (*Il disavanzo pubblico in Italia*), Il Mulino, vol. I, 1992; AA.VV., *The autonomy of monetary policy. The Treasury - Bank of Italy divorce thirty years later* (*L'autonomia della politica monetaria. Il divorzio Tesoro - Banca d'Italia trent'anni dopo*), Roma, 2011 where contributions from Carlo Azeglio Ciampi, Mario Draghi, Mario Monti, Maria Teresa Salvemini can be found.

<sup>23</sup>In this respect, they note the profound innovations already made in the first banking directive (No 77/780), which changes the procedure for access to the exercise of credit and lays the foundations for a change in the structural controls on members of the sector.; see *ex multis* DESIDERIO L., *The rules transposing Community Directive No 780/77 in the field of credit* (*Le norme di recepimento della direttiva comunitaria n. 780/77 in materia creditizia*), in *Legal Research Papers of the Legal Consultancy of the Bank of Italy* (*Quaderni di ricerca giuridica*



troduced which are also in line with the logic of market liberalisation<sup>24</sup>. Hence the legitimate expectation - of those who, like me, have stubbornly continued to believe in the 'European dream' - to see the «common home» of the peoples of the 'old continent' finally come true. Unfortunately, we did not realize that we were in the presence of a *wishful thinking*, which has failed in the face of the events that have occurred in factual reality!

The knots came to the fore when, in the second half of the 1980s, in the face of an initial stagnation in the integration process, the preparation of the Single European Act (which came into force in 1987) introduced a number of significant changes to the Community system and laid the foundations for the definitive removal of the legal barriers to the freedom of establishment and the freedom to provide services in the financial field<sup>25</sup>. In that regard, *inter alia*, the examination of the contents of Directive 1989/646 is important, which is defined in doctrine as «the cornerstone of the entire Community building» in financial matters<sup>26</sup>; such Directive introduces the principle of mutual recognition and, therefore, the full validity (at European regional level) of the authorisation granted to a bank by the competent authority in its home country. In the wake of this innovation in the regulatory system, in 1992, the Maastricht Treaty gave rise to the "single currency" which will mark a turning point in the path of integration between the Mem-

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della Consulenza Legale della Banca d'Italia), n. 6, Roma, 1986; CAPRIGLIONE, *Establishment of banks and bankindustry relationship (Costituzione di banche e rapporto banca-industria)*, in AA.VV., *Studi in onore di M.S. Giannini*, Milan, 1988, III, p. 235 ss.; PATRONI GRIFFI, *Access to banking (Accesso all'attività bancaria)*, in *Banca e borsa*, 1990, I, p. 457 ss.; MEZZACAPO V., *Comment sub art. 1 del d.p.r. n. 350 del 1985*, in AA.VV., *Commented code of the bank*, cit., II, p. 1402 ss.; COSTI, *The banking system (L'ordinamento bancario)*, Bologna, third edition, p. 69 ss.

<sup>24</sup>See Directives No 1983/350 on the «supervision on a consolidated basis of credit institutions»; No 1986/635 on the «annual accounts and consolidated accounts» of banks and other financial institutions; No 1989 /299 on the «own funds» of credit institutions; No 1989/647 on the «solvency ratio» of credit institutions..

<sup>25</sup>See PADOA SCHIOPPA T., *Towards a European banking system (Verso un ordinamento bancario europeo)*, in *Economic Bulletin of the Bank of Italy (Bollettino economico della Banca d'Italia)*, no. 10, 1988, p. 57 ss.

<sup>26</sup>See PATRONI GRIFFI A., *Reflections on the Second Community Directive (Riflessioni sulla seconda direttiva comunitaria)*, in *Bank enterprise company (Banca impresa società)*, 1991, p. 419.



ber States<sup>27</sup>.

Indeed, the complex regulatory apparatus with which this objective has been achieved, if it interacts positively with the development of financial relations within the Community, leaves the economic misalignment between the Member States untouched. Thus, the fear immediately emerges that a monetary policy, characterised by interest rates set without reference to the «expenditure» of each individual State, could prompt an «unbridled» increase in the public finances of those countries that wish to take advantage of the lack of impact - which can be seen in the situation outlined above - of the latter on interest rates (and on the real economy). In other words, there is a danger, caused by a lack of equality of position among the Community countries and a sense of distrust (sometimes justified) towards some of them which could engage in *free riding*, expanding their spending without fearing the negative effects of such a behaviour.

In this context it is explained why, in the creation of the European Monetary Union (EMU), the process of substantial self-limitation of national sovereignty, which is achieved in this way, is based not on reference to self-regulating market theory, but on criteria of rigid dirigisme. The formalisation of the Maastricht Treaty opts for a surveillance mechanism on the excessive deficit procedure. It introduces a precise deficit/GDP ratio, supplemented by the constraint imposed on the deficit (by the Amsterdam Protocol of June 1997) not to exceed 3% of gross domestic product. In this way, an attempt is made to avoid the problem of free riding resulting from the disconnection, which would have occurred since those years, between the public debt policies of each individual Member State and the interest rates set by the ECB.

As I have pointed out in the past, a political reading of the creation of monetary union has been suggested from many quarters, perhaps with a view to anticipating the process of the political union of the European States as the ultimate objective. In this connection, the *meta-economic* significance of this stage of the

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<sup>27</sup>See for all CAPRIGLIONE, *Coin*, (entry) in *Enc. dir.*, third update, Milan, 1999, p. 747 e ss.

current construction was highlighted, hence the affirmation in this case of common values of freedom, equality, and solidarity<sup>28</sup>. Even the thesis of an intervening transformation of the European Community into a «monetary federation, with the obvious related question of what it means to create a federation based on a single sovereign function» was supported<sup>29</sup>. On the other hand, «the structural differences between the participating States and the different levels of development between them» seemed to me to be limiting factors in the effectiveness of the Treaties<sup>30</sup>, a consideration which, when assessed *ex post*, is confirmed by the events of the last two decades.

On balance, it was the difficulty of following the path towards «joint statehood» that made it possible to pursue the different objective of a restriction of national sovereignty, such as self-limitation (on the part of the countries participating in the EMU) with regard to monetary policy decisions. This has led to a breakdown of «sovereignty», which has ceased to symbolise the «unity of the state» with regard to its constituent elements. As a consequence, currency is outside the monopoly of the ‘political decision’ of the States and, in view of its peculiar technical consideration, it performs its functions according to criteria of *neutrality*.

Moreover, the concentration of the monetary sovereignty of the Member States at the ECB has not resulted in a real cohesion of the Union’s institutional set-up, as was stressed in the doctrine in the aftermath of the Maastricht Treaty<sup>31</sup>. But there is more. Apart from the fact that, nowadays, there is no evidence of any neutral level of solidarity between the public finances of the Member States, it should be borne in mind that the creation of the EMU has shifted the centre of

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<sup>28</sup>See PADOA SCHIOPPA, *The Euro between God and the devil (L’euro fra Dio e il diavolo)*, in *Il corriere della sera* of 2 January 1999.

<sup>29</sup>See MERUSI, *Governance of money and independence of the Central Bank in the monetary federation of Europe*, in *European Union law (Governo della moneta e indipendenza della Banca centrale nella federazione monetaria dell’Europa)*, in *Diritto dell’Unione europea*, 1997, no. 1-2, p. 89.

<sup>30</sup>See CAPRIGLIONE, *Currency*, cit. p. 756.

<sup>31</sup>See JOCHIMSEN, *Economic and Monetary Union: a German Central Banker’s Perspective*, in *Economic and Monetary Union: Implications for National Policy Makers*, edited by GRETSCHMANN, Dordrecht, 1993, p. 196.

gravity of the management of European 'interests' from politics to technique. It follows that, as time goes by, the governance of the currency will become increasingly important in its own right, and will end up becoming a 'value' worthy of protection; that is, separately from the reference to political action which through it is extrinsic.

In this way, the conditions are determined for a process that increasingly distances the goal of political union between the Member States; in its place, as will be said below, a different, more limited design is emerging, the location of which certainly seems far removed from the vague federalist ideal of the founding fathers. In this context, solidarity loses its original value as an essential component of the European project and takes on a more limited instrumental function, aimed at the stability and continuity of a common economic development programme.

5. The beginning of this millennium sees a European Community which, although oriented towards increasing forms of collaboration, presents a geopolitical situation characterised by economic and financial imbalances and the lack of identity of a «European citizenship».

The limitations of the integration process can be seen in the fact that it has been based primarily on the harmonisation of the rules governing relations between the Member States; this has not made it possible to achieve complete homogenisation between the Member States, since disciplinary uniformity does not in itself imply the implementation of a geopolitical osmosis, nor does it reduce the cultural divide within the Union, which often leads to different levels of economic development. The disparity of positions referred to above continues to exist; hence the failure to develop a spirit of cohesion and solidarity, which is an essential prerequisite for progress towards the goal of convergence of intentions, towards a desirable political union!

In this respect, the specificity of the scenario under observation is the same, where the particular composition of the Euro Area in itself is a cause of presumed systemic imbalance. One need only think of the concomitant presence of

Germany, which is increasingly oriented (with the consensus of some Member States, in particular: The Netherlands, Austria, Slovakia, Finland) to play a hegemonic role, and all the countries of Southern Europe (whose criticalities are caused by previous organizational and functional deficiencies) destined to suffer the consequences.. This reality reflects the contents of a design on the basis of which there is an intent to exercise a role and a 'guiding function' within the EU, to which Germany presumes to be legitimized for having achieved significant economic objectives<sup>32</sup>. There is no doubt that such a plan - even if it can be shared on the basis of a rational meritocratic evaluation of what this country has achieved - certainly reveals significant shortcomings in terms of its compliance with the principles of sharing, tolerance, solidarity, which are indispensable for a programme of "union" which, albeit in perspective, assumes a political conclusion<sup>33</sup>.

It is therefore understandable why Germany tends to adopt an attitude which - silently on the other hand - denotes a lack of flexibility, which is, on the other hand, indispensable in the work of coordination, first, and homogenisation afterwards, which is referred back to the Community bodies which take action with the agreement of the individual Member States. This is an attitude which - by omitting to take account of the diversity (including cultural diversity) existing between the different EMU countries - represents the negative side of the ostentatious virtue and exasperated rigour which, since time immemorial, have been characteristic features of the German stereotype.

Conversely, France believes in the need for a construction aimed at eliminating the contrasts that exist within Europe and is particularly careful to act as a guarantor of the autonomy and liberal prerogatives that characterise the development of the Union. This attitude, however, presents contradictory aspects,

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<sup>32</sup>See in this regard, Speech by Mario Draghi, at Wirtschaftstag 2012 « *Kapitalismus in der Krise? Die Zukunft der Marktwirtschaft* » der Volksbanken Raiffeisenbanken organised by Genossenschaftsverband e.V., Frankfurt am Main, 7 November 2012, Read more: <http://www.businessinsider.com/mario-draghi-germany-speech-november-7-2012-11>, where it is specified: «Financial developments in Germany are the mirror-image of financial developments in the rest of the euro area [...] the stability of the euro area as a whole will also be to the benefit of Germany».

<sup>33</sup>See CAPRIGLIONE, *Market rules democracy (Mercato regole democrazia)*, Milanofiori Assago, 2012, p. 181.

since the French *agere* is divided between a strong tendency towards self-determination (hence the limited tolerance of the constraints imposed by the Treaties) and the activation of interventions that highlight full adherence to the integration process and the intent not to give up the role of Germany as a leader of the EU.

In this premise, therefore, we understand certain traits of French policy which are not consistent with European commitments. In particular, if, on the one hand, France is struggling to maintain levels of productivity and financial self-sufficiency which enable it to be included among the «*core countries*», on the other, it does not disdain asking the Commission to «more time to reduce its budget deficit»<sup>34</sup>, i.e. it is not concerned about breaching the so-called *Stability and Growth Pact* put in place in 2003 by exceeding the limits set in the regulation (hence the opening of an infringement procedure against it by the European Commission, which was then blocked by the ministers participating in the Ecofin Council)<sup>35</sup>.

On the other hand, the United Kingdom has frequently taken attitudes towards the rest of the continent due to its cultural characteristics, which often reveal a sort of detachment from the rest of the continent. More precisely, the way in which it maintains relations with the EU suggests that it does not want to become fully involved in the affairs of a Europe whose reality is perhaps perceived as foreign, too far removed from the domestic one, considered to be a priority in every respect. The accession to the European Economic Community, which has

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<sup>34</sup>See the editorial entitled «*In Germany's shadow*» published in *The Economist* on March, 28, 2015, available on [www.economist.com/news/europe/21647363-germany-coming-terms-messy-world-germanys-shadow](http://www.economist.com/news/europe/21647363-germany-coming-terms-messy-world-germanys-shadow), in which is pointed out that such decision was taken after «the French government insisted that this was not the time to close off its fiscal space».

<sup>35</sup>See COLLIGNON, S. *The End of the Stability and Growth Pact? International Economics and Economic Policy*, vol. 1, n. 1, January 2004; See also the speech held in Strasbourg by MARIO MONTI in November 2011, in which he recalled the above-mentioned breaches of the Stability Pact by France and Germany, which remained unpunished thanks in part to the mediation role played in 2003 by the Italian Presidency of the Union, See the editorial entitled «*Support for Italy by Merkel and Sarkozy. But the summit leaves the Euro crisis unresolved*» («*Sostegno all'Italia di Merkel e Sarkozy. Ma il vertice lascia insoluta la crisi dell'euro*»), published in *Corriere della sera. Economia* on November, 24, , available on [www.corriere.it/economia/11\\_novembre\\_24/monti-merkel-sarkozy](http://www.corriere.it/economia/11_novembre_24/monti-merkel-sarkozy).

been repeatedly requested and for a long time hampered by vetoes imposed by France on its entry, is taking place in a climate of little empathy for the rest of the continent<sup>36</sup>, a climate which reflects the difficulties encountered by British policy in overcoming the obstacles underlying the transition from a global reality (in which the United Kingdom has traditionally been linked) to a regional one (in whose decision-making contexts it had wanted to participate)<sup>37</sup>.

It follows the particular position of this State in relation to the countries of the «six» Europe, characterized by the intention not to achieve a totalizing participation. In fact, there has always been little favour for economic integration as a prelude to political integration; where the aim of benefiting from participation in the *common market* activated by the Union seemed to prevail (in the logic of EU membership). On the other hand, a traditional attachment to national sovereignty (with its various components) is at the basis of political choices which, in concrete terms, transform the “empathic detachment”, mentioned above, into a sort of ideological “separation”; for this reason the United Kingdom has *excluded itself* from those forms of progressive integration which, according to Jean Monnet’s indications, could/should have led to the achievement of a political union<sup>38</sup>. The natural consequence of these choices was the decision to withdraw from the Union in the 2016 referendum.

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<sup>36</sup>It is necessary to recall that an authoritative politician, Sir Teddy Taylor, resigned as minister in the Heath government as soon as he became aware of the decision to sign the Treaties of Rome; See CACOPARDI and others, *UK entry into the Cee. Great Britain in the EEC (Ingresso del Regno Unito nella Cee. La Gran Bretagna nella Cee/Ue)*, available on [www.geocities.ws/osservatore\\_europeo/approfondimenti/semi07.htm](http://www.geocities.ws/osservatore_europeo/approfondimenti/semi07.htm).

<sup>37</sup>It follows that the intention to benefit from Community mechanisms based on intergovernmental methods seems to have prevailed in the accession to the Community.; See CHARTER, *Au Revoir, Europe: What If Britain Left The Eu?*, London, 2012, where was pointed out that «The organisation that Britain joined in 1973 was very different from the European Union of today and therefore, at that time, the true political and constitutional implications of the Treaty of Rome were not clear».

<sup>38</sup>In literature, the analysis of this reality is summarized in assessments that now refer to a gatekeeper action of the British central government towards the European Union (to safeguard national sovereignty), now to a manifesto “semi detachment” of the United Kingdom of Great Britain from the construction of the EU., See among others GEORGE, *Britain and the European Community: The Politics of Semi-Detachment*, Oxford, 1992; MORAVCSIK, *Preferences and power in the European Community: a liberal intergovernmentalist approach*, in *Journal of Common Market Studies*, 4, 1993, p. 473 ss.

Conversely, Italy highlights the limits of a country in which intrinsic capabilities (found in the most diverse sectors: from industrial production of excellence, to the sciences, to the arts) are opposed to endemic shortcomings, to irresponsibility of the ruling class, to rampant corruption (which gives discredit and, because of the *'malum agere'* of a few, ends up overshadowing the commitment and goodwill of many).

Basically, it identifies the negative implications of a litigious political class that is unable to ensure the necessary stability, let alone to provide the disciplinary *humus* that will allow the timely adoption of appropriate measures to promote sustainable development. Moreover, the spirit of solidarity, the cornerstone of the Italian Constitution, is absent; it is enough to think of the battle of the Northern regions to obtain differentiated autonomy under Art. 117 of the Constitution, as well as the recent disputes between the Presidents of the Region on the management of Covid, from which a picture of deep divisions in the country can be deduced. To this is added, then, a bureaucratic apparatus that hinders, delays and makes difficult any form of undertaking, as well as a «modest culture of rules», a characteristic feature of a system in which «information is considered a necessary evil by a large part of the ruling class», as written by an authoritative publicist<sup>39</sup>.

Hence the lack of credibility that this country has in the European context, despite its creative capacity and the excellence of some of its products recognized in large parts of the planet. A need for renewal, however, is strongly felt by the population, eager for a return to order, transparency, a proper exercise of public authority, a party structure that ceases to disappoint it, exposing the country to the bad weather of a growing populism (which takes advantage of the discontent and often manages to assert itself by leveraging on the blatant racist sentiments and the cultural shortage of large states of the electorate).

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<sup>39</sup>See the editorial «*Ferruccio de Bortoli's greeting to Corriere della Sera's readers*» («*Il saluto di Ferruccio de Bortoli ai lettori del Corriere della Sera*»), published in *Corriere della sera* on April, 30, 2015, available on [http://www.corriere.it/cronache/15\\_aprile\\_30/saluto-lettori-direttore-de-bortoli](http://www.corriere.it/cronache/15_aprile_30/saluto-lettori-direttore-de-bortoli)



It is clear that in such a situation the possibility of pursuing the objective of a cohesive convergence of intentions appears problematic in the Union, hence the spread of serious doubts about the prospect of succeeding in implementing an intense process of integration and unification, hypothesized in the EU Treaties!

In the first place, the reality described above is rooted in the inadequacy of the very technical forms with which the Member States cooperated in order to achieve this objective; the mechanisms adopted for this purpose appear contradictory or, at the very least, unsuitable for the purposes for which they were intended. This is clear from the application, in European institutional bodies, of the *intergovernmental* method, which, since it is designed to ensure that the interests of the individual countries prevail in their relations with each other, has been an impeding factor in bringing them closer together and in their osmosis<sup>40</sup>.

In addition to this, the use of the comitology mechanism (allowing national administrations to be involved in the exercise of functions at European summits) is unbalanced in favour of domestic situations<sup>41</sup>. Furthermore, the prevalence ascribed to ‘technique’, in the definition of the Union’s policy lines, has determined a sort of ‘democratic disconnection’, due to the lack of legitimation of supranational regulatory power, which is disjointed from the constitutional democratic reality of the individual nation-states<sup>42</sup>. Hence the assumptions of certain political and ideological protests induced by the doubt that the Europe of peoples and nations has been replaced by the Europe of technocracies and financial capital!

Equally relevant in identifying the causes that have hampered the integration process is the lack of willingness on the part of some Member States to ac-

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<sup>40</sup>See AMATO, *The Lisbon Treaty and the prospects for 21st century Europe (Il Trattato di Lisbona e le prospettive per l'Europa del XXI secolo)*, in AA.VV., *The new European institutions. Commentary on the Lisbon Treaty (Le nuove istituzioni europee. Commento al trattato di Lisbona)*, in Astrid Books (*Quaderni di Astrid*), Bologna, 2010, p. 441.

<sup>41</sup>See SAVINO, *Comitology after Lisbon: in search of lost balance (La comitologia dopo Lisbona: alla ricerca dell'equilibrio perduto)*, in *Journal of administrative law (Giornale di diritto amministrativo)*, 2011, p. 1041.

<sup>42</sup>See LINDSETH, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford University Press, 2010; Id., *The Eurozone Crisis, Institutional Change, and 'Political Union'*, Wharton Financial Institutions Center Press 2013.



cept the «realisation of a genuine constitutional integration process» based on an «advanced balance at European level between the demands of solidarity and stability»<sup>43</sup>.

The examination of German constitutional case law offers interesting insights in this respect.

I refer, in particular, to the indications that can be inferred from the judgment of the German Federal Constitutional Court (BVerfG) known as Maastricht-Urteil, in which the distinction between “community of solidarity” and “community of stability” is delineated, specifying that while the nation-state can be traced back to the former, the European Union should be classified in the latter<sup>44</sup>. It is clear that the Bundesverfassungsgericht sought to clarify the terms of Germany’s participation in the European integration process by identifying the essence of this participation in the establishment of «an association of states» and not «a state founded on a European people». This also implies permanent ownership in the German Parliament of “functions of substantial political weight»<sup>45</sup>.

At the basis of this position is an individualistic logic related to the fact that this country, being able to financially support possible situations of difficulty, does not intend to be involved in the support actions that can be activated by European summits in favour of member countries in need of help. It outlines a reality in

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<sup>43</sup>See CAPRIGLIONE - IBRIDO, *Brexit between finance and politics (La Brexit tra finanza e politica)*, cit., p. 88.

<sup>44</sup>See CAPRIGLIONE - IBRIDO, *Brexit between finance and politics (La Brexit tra finanza e politica)*, cit., p. 89, where reference is made to the decision of the German Federal Constitutional Court in which the compatibility of the Maastricht Treaty with the Basic Law of Bonn was confirmed (2BVerfG 12 October 1993, n. 2159/92, in 89 Entscheidungen des Bundesverfassungsgerichts, 1994, 155 ss.).

<sup>45</sup>The Federal Constitutional Court’s decision to set the limits for the compatibility of monetary union with the Charter of Fundamental Rights and the basic principles of national law is expressed in these terms; see the text in *Constitutional Jurisprudence (Giurisprudenza costituzionale)*, 1994, p. 677 ss and, for critical evaluations, RESCIGNO G.U., *The German Federal Constitutional Court and the constitutional knots of the European unification process (Il tribunale costituzionale federale tedesco e i nodi costituzionali del processo di unificazione europea)*, ivi, p. 3115 ss.; EVERLING, *Zur Stellung der Mitgliedstaaten der Europäischen Union als “Herren der Verträge”*, in Beyrling, Bothe, Hofmann Petersmann, *Rechts zwischen Umbruch und Bewahrung-Volkr-recht- Europarecht-Staatrecht. Festschrift für R. Bernhardt*, Berlin, 1995, p. 1161 ss.; HERDEGEN, *Germany’s Constitutional Court and Parliament: Factors of Uncertainty for the Monetary Union?*, in *European Monetary Union Watch*, XIX, 1996, p. 8 ss.

which convenience (*rectius*: the opportunistic interest) rewards virtue, since the latter is peacefully set aside in view of economic advantages, the attainment of which certainly appears to be connected to a will of primacy.

6. The crisis of 2007 et seq. has hit a Europe that cannot find a proper settlement and sometimes goes beyond the narrow limits of the strict regulatory requirements adopted following the Maastricht Treaty. The aforementioned constraint to respect the principle of budgetary balance and, more generally, the *fiscal rules* contained in the «Stability Pact» expose the member countries to infringement procedures that undermine their credibility; in 2004 even France and Germany, for excessive deficits, risked being subject to sanctions, a result avoided by the Italian Presidency of the EU. Hence the representation of a Union that, in the first years of this millennium, appears to be in the balance between «risks and opportunities», being left with the appropriate choices to ‘turn the critical issues related to the observance of a strict regulation into a positive one’, so as to overcome the uncertainties of a situation that we can define as ‘double value’<sup>46</sup>.

This crisis, of an eminently financial nature, puts the construction that has seen the creation of the ‘single currency’ as the technical form to accelerate the path towards economic convergence and political unity, to the test. And indeed, the application difficulties of the ‘delegation’ contained in the Maastricht Treaty to the ECB for the management of the currency and the exchange rates emerge: and this with regard to the provisions of both Article 123 of the EU Treaty (which prohibits the granting of credit facilities to the banks of the Union, and in particular the purchase of securities, by the ECB and the national central banks), and the subsequent Article 125 (which sanctions the so-called ‘no bail out’, i.e. the prohibition for a member State to purchase the debt of another State of the Union).

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<sup>46</sup>See CAPRIGLIONE - SEMERARO, *Financial and sovereign debt crisis. the European Union between risks and opportunities (Crisi finanziaria e dei debiti sovrani. l’Unione europea tra rischi ed opportunità)*, Torino, 2012, *passim*.

The turbulence - which initially affected financial assets issued by the private sector - from the second half of 2010 onwards extended its effects to the sovereign debt market, putting the *Eurosystem's* resilience at risk. The tensions on this debt - exacerbated by speculation in the markets and the sad phenomenon of "capital flight" outside the Eurozone<sup>47</sup> - highlight the inadequacy of the 'unconventional' interventions adopted by the ECB, which have intensified since spring 2010<sup>48</sup>. The latter, in fact, perform a function that is necessarily limited to the contingent; so it is clear that for the assumption of lasting and resolute remedies, an *agere* is needed that is not limited only to the action of the Central Bank, hence the widespread conviction that these interventions will not be able in the long run to *buffer* the growing difficulties of a crisis that affects the foundations of the EU.

The precipitation of the Greek situation in the second half of 2011 and the resulting rapid contagion to other countries with high public debt (primarily Italy and Spain)<sup>49</sup> leads to a strong Eurosceptic trend and questions the validity of the mechanisms activated by the ECB. The limits of a Europe based on the assumption that certain levels of economic and legal convergence may be sufficient to support common lines of development made possible by the *single currency* are therefore highlighted. There are many questions as to what the correct solution might be to prevent the financial crisis, and with it the sovereign debt crisis, from overwhelming the *Euro*<sup>50</sup>, as it cannot support the ability of Member States to "manage to stay together" without the glue of a political union. The recessionary phase affecting much of the Union at the time is fuelling the forecast for further deterioration in GDP, followed by an expectation of states' inability to reduce their debt. This is

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<sup>47</sup>See among others BONINI, *Evasion, the great capital flight 11 billion abroad illegally (Evasione, la grande fuga dei capitali 11 miliardi all'estero illegalmente)*, in *La Repubblica* of 28 December 2011.

<sup>48</sup>See CAPRIGLIONE - SEMERARO, *Financial and sovereign debt crisis (Crisi finanziaria e dei debiti sovrani)*, Milano Assago, 2012, *Introduction*.

<sup>49</sup>See CAPRIGLIONE, *Greece: a tragedy of the new millennium (Grecia: una tragedia del nuovo millennio)*, in *Apertacontrada* of 23 July 2015.

<sup>50</sup>See among others ALESINA e GIAVAZZI, *There is only one way out (C'è una sola via d'uscita)*, editorial of *Corriere della sera* of 24 November 2011.

negatively affected by destabilising *speculation*, exacerbated by often inappropriate interventions by rating agencies and a growing weakness of the banking sector forced to recapitalise as a result of the downgrading of public debt securities held in the portfolio<sup>51</sup>.

The emergence of significant differences between member countries and, above all, their different ability to respond to the recession are a stimulus to the need to seek a new 'way of being together'. Thus, in order to remedy the negative effects of the crisis, a review of the relational mechanisms that existed at the time was carried out, which proved to be unsuitable to counteract the pathological events in question. The significant opportunity offered by the financial turmoil to force a balance sheet of the benefits of participation in the EU, with reference to certain persistent gaps that prevent growth momentum, is therefore clear.

The request for more intense forms of coordination in the economic-financial field leads to the start of a process of revision of the «top management architecture» of the sector; the need to overcome, in the supervision of intermediaries, the previous risk analyses in view of a planning of the supervisory activity that takes due account of the implications of globalization and, therefore, of the cross-border operations of the large banking groups is understood<sup>52</sup>. On the other hand, in terms of political understanding, there is no similar tendency towards the implementation of relations based on the awareness of a *dutiful agere* in which ideals of commonality and solidarity find adequate space. Therefore, there are still significant shortcomings in the definition of a unitary and timely government of

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<sup>51</sup>See CAPRIGLIONE - SEMERARO, *Financial and sovereign debt crisis (Crisi finanziaria e dei debiti sovrani)*, cit., p. 23.

<sup>52</sup>See among others, RESCIGNO, *The product is toxic: keep out of reach of children (Il prodotto è tossico: tenere lontano dalla portata dei bambini)*, in *Legal Analysis of the Economy (Analisi Giuridica dell'Economia)*, 2009, n. 1, p. 145 ss.; SICLARI, *Financial market crisis, supervision, regulation (Crisi dei mercati finanziari, vigilanza, regolamentazione)*, in *Rivista trimestrale di diritto pubblico*, 2009, n. 1, p. 45 ss.; TARANTOLA, *European supervision: structures, implications, open issues (La vigilanza europea: assetti, implicazioni, problemi aperti)*, lezione tenuta il giorno 8 aprile 2011 presso l'Università degli studi di Roma Tre; DRAGHI, *Final considerations of the Governor of the Bank of Italy of 31 May 2011 (Considerazioni finali del Governatore della Banca d'Italia del 31 maggio 2011)*, in *The Italian Court (Il Foro italiano)*, 2011, fasc. 6, p. 173 ss.; ROSSI, *Process to finance (Processo alla finanza)*, Bari, 2013, *passim*, and in particular, p. 44 ss.

the Union, which is an expression of reciprocity and concord; the isolation of countries in difficulty is not avoided and they suffer the burden of this as an unfair punishment<sup>53</sup>.

In this context, on the basis of the indications of a 'Working Group' led by J. de Larosi re (who has been given the task of redesigning the way in which banking supervision is carried out), the ESFS has been created, with a number of supervisory bodies made up of the European Systemic Risk Board (ESRB), headed by the President of the ECB, and three new European authorities (EBA, EIOPA and ESMA), flanked by a network of national authorities cooperating with them. These bodies are responsible for issuing inputs and guidelines for the prevention of macro-systemic risks (ESRBs), developing supervisory standards (EBAs) or ensuring the orderly functioning of financial markets and insurance and pension markets (ESMA and EIOPA), which are separate functions on the basis of a criterion that takes account of the specific nature of the entities to be supervised<sup>54</sup>.

Subsequently, the awareness of the need to continue on the path of change promotes a further modification of the forms of intervention, allocating their exercise in a '*single mechanism*' (SSM, governed by EU Reg. 1024/2013 and ECB Reg. 468 of 2014) operationally entrusted to the European Central Bank (which during the crisis has proved its worth by carrying out operations aimed at stabilizing liquidity in the markets)<sup>55</sup>.

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<sup>53</sup>See CAPRIGLIONE - TROISI, *The EU financial order after the crisis (L'ordinamento finanziario dell'UE dopo la crisi)*, Milano Assago, 2014, p. 53.

<sup>54</sup>On this field See among others PELLEGRINI, *The leading architecture of the European financial order: functions and limits of supervision (L'architettura di vertice dell'ordinamento finanziario europeo: funzioni e limiti della supervisione)*, in *Riv. trim. dir. ec.*, 2012, I, p. 54; FERRAN, *Understanding the New Institutional Architecture of Eu FinancialMarket Supervision*, in *Legal Studies Research. Paper Series*, University of Cambridge, Faculty of Law, n. 20/2011, p. 34 s., available on <http://ssrn.com/abstract=170147>; GUARRACINO, *European Banking Supervision (System of sources and theoretical models) (Supervisione bancaria europea (Sistema delle fonti e modelli teorici))*, Padova, 2012, *passim*; CAPRIGLIONE, *Globalisation, financial crisis and markets: a reality to think about (Globalizzazione, crisi finanziaria e mercati: una realt  su cui riflettere)*, in *Competition and market (Concorrenza e mercato)*, 2012, p. 867 ss.; TROIANO, *Interactions Between EU and National Authorities in the New Structure of EU Financial System Supervision*, in *Law and Economics Yearly Review*, n. 1/2012, p. 104 ss. available on [www.laweconomicsyearlyreview.org.uk](http://www.laweconomicsyearlyreview.org.uk).

<sup>55</sup>Cfr. tra gli altri WYMEERSCH, *The European Banking Union. A first Analysis*, Universiteit Gent, Financial Law Institute, WP, 2012-07, October 2012, p. 1; AA.VV., *From the Banking*

This process is completed with the introduction of significant disciplinary changes to ‘banking crisis management’ (previously left to the different rules in force in the Member States), as well as to ‘deposit guarantee schemes’; changes aimed at bringing the subject of the reorganisation of credit institutions back into line with the new methods of intervention put to Union bodies.

The creation of the EBU is based on Article 127 of the Treaty on the Functioning of the EU (which provides that the Council may act unanimously, after consulting the European Parliament and the Central Bank, to entrust the ECB with specific tasks of prudential supervision of credit institutions). This is a *challenge* which gives this innovative reform project the possibility of strengthening the process of European integration; indeed, the restoration of the credit agency to unity is aimed at uniformity and equality between intermediaries, hence the expectation of higher levels of competition and, therefore, the possibility of improving co-ordination and cooperation between Member States<sup>56</sup>.

The attribution to the ECB of new functions (intended to complement those of monetary policy) is an explicit recognition of the centrality of the role of *technique* in defining the measures needed to deal successfully with the hardships caused by the crisis. It was intended, in fact, to give the economic and financial system the government of stability that the absence of politics has made evanescent and, more generally, to reassure the markets (which in the era of globalization have become, in some ways, arbitrators and regulators of the events of the peoples of the planet). This in the awareness that the achievement of more cohesive forms of integration inevitably corresponds to a surrender of sovereignty. As one authoritative doctrine has pointed out, it cannot be overlooked that, in such a

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*Single Text to the Banking Union: regulatory techniques and allocation of powers (Dal testo unico bancario all'Unione bancaria: tecniche normative e allocazione di poteri)*, in *Legal research notebooks of the Bank of Italy (Quaderni di ricerca giuridica della Banca d'Italia)*, n. 75; CAPRIGLIONE, *L'unione bancaria europea*, Torino, 2013; IBRIDO, *The European Banking Union. Constitutional profiles (L'unione bancaria europea. Profili costituzionali)*, Roma, 2017.

<sup>56</sup>See BANCA D'ITALIA, *Reports (Relazione) for years 2013, Final Considerations (Considerazioni finali)*, cit., p. 20, which stresses that «the new European surveillance system shares the fundamental principles of the approach followed in Italy: the emphasis on the close integration between remote controls and inspections, the quantitative and qualitative assessment of risks, the close link between the results of the analysis and corrective action».

scenario, «very little [...] has been built [...] (in the) [...] direction» of the United States of Europe<sup>57</sup>. The anti-crisis measures activated by European summits have been accompanied by a request to countries in difficulty to proceed urgently with the rehabilitation of sometimes seriously deteriorated domestic situations. The demands made in this regard by the so-called virtuous states (and in particular by Germany) have given a vector to the EU's action oriented to the *rigour* of the interventions activated. Moreover, tax measures (in which linear forms of taxation were often preferred to reducing expenditure) and changes to the pension system (with solutions often disregarding workers' rights) have been perceived by the population as heavy taxation, so as to generate widespread opposition to the European «austerity policy»<sup>58</sup>.

Hence the importance attributed to the assessment of the 'constraints' that have marked the 'ways out' of the climate of difficulty in which many Member States were experiencing. They contradict the ideals of solidarity and cohesion at the basis of European construction, as was clearly pointed out by the Nobel Prize winner Paul Krugman who, evaluating the case of Greece, wondered how it had been possible for the public opinion of that country to accept «the arguments of the political institutions for which the suffering was necessary and would lead to the recovery»<sup>59</sup>.

This firstly includes the creation, as from 2010, of structures of a provisional nature, and then of a permanent nature, aimed at complying with countries' requests for aid from countries at risk of *default*. I am referring, in particular, to the *European Financial Stabilisation Mechanism* (established through the enactment of Regulation (EU) No 407/2010), as well as the European Financial Stability Fund (known as the 'state saving fund') and, lastly, the European Stability Mechanism which, since 2012, has incorporated the two interventionist structures mentioned

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<sup>57</sup>See PANEBIANCO, *Behind the choice of a president (Dietro la scelta di un presidente)*, editorial published on *corriere.it* of 7 June 2014.

<sup>58</sup>See CAPRIGLIONE - TROISI, *The EU financial order after the crisis (L'ordinamento finanziario dell'UE dopo la crisi)*, cit., p. 122.

<sup>59</sup>See the editorial entitled *Mad as Hellas*, published by *New York Times* of 11 December 2014.



above<sup>60</sup>. The provision of loans or credit lines limited to a certain ceiling and a limited period of time, as well as the obligation for applicants to draw up a macroeconomic adjustment plan, show, in the complete absence of any spirit of solidarity in the interventions in question, the intention to proceed with the *receivership proceedings* of the States which have benefited from these funds. Basically, as I have had the opportunity to point out in the past, one glimpses - with regret - a grudging position or, at least, the desire to inflict a punishment, to be used as a fearsome 'pillory', with obvious deterrent effects, against those who have de-merged<sup>61</sup>.

This is confirmed by the strict supervision of the so-called *troika* (i.e. the representatives of the ECB, the European Commission and the International Monetary Fund) which does not leave free from criticism the action of those Member States that, as in the events of Greece, have influenced the choices made within the Eurosystem. The firm reactive intransigence (inspired by the preservation of individualistic interests), the surprisingly blackmailing impositions appear decidedly opposite to the «logic of sharing» that should have qualified the relations between Member States

This situation is fully indicative of its dramatic nature when one considers that the appropriate solution in the event of a crisis in some Member States could be the creation of *Eurobonds*, which are bonds whose issuance is supported by the issuance of guarantees by the Member States of the Euro area<sup>62</sup>.

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<sup>60</sup>A further limitation characterizes the intervention of the ESM, since it can only be activated with regard to countries that have ratified the Fiscal Compact Treaty, which places a series of constraints (of an economic nature) on the member states to contain possible forms of expansion of public debt; See....

<sup>61</sup>See CAPRIGLIONE, *Greece: a tragedy of the new millennium (Grecia: una tragedia del nuovo millennio)*, cit., where the words of the President of the Bundesbank Jens Weidmann are reported, who, after the news of the results of the vote, reiterated the need that "Greece must adhere to the conditions of the rescue", harsh words (which reflect the utilitarian and hegemonic logic with which Germany is present in European affairs).

<sup>62</sup>Eurobonds have been taken into account several times in EU affairs, linking their function to the achievement of a variety of objectives; See DELIVORIAS - STAMEGNA, *Joint debt instruments. A recurrent proposal to strengthen economic and monetary union*, European Parliamentary Research Service, 2020. In this respect, it is recalled the prospective hypothesis formulated by J. Delors in 1993, aimed at attracting large projects of common interest (hence the name given to them as *project bonds*). Also significant is the consideration that "the issue of European public



It is clear that a hypothetical solidarity-based mechanism for the distribution of debt at European level is being envisaged in this way, the aim of which is to promote stability and economic integration in the whole of Europe (hence the orientation towards common logics of growth and higher levels of mutual trust). It is therefore significant that Germany has consistently opposed the implementation of such projects, rather than taking a positive view of such a measure, for reasons that are probably due more to a fear of moral hazard than to the intention not to give up the possibility of financing oneself individually at rates close to zero.

7. The health emergency caused by the Covid-19, as referred to it in the introduction, has as a consequence a serious economic crisis that is bound to result in a heavy reduction in the GDP of European countries. Individual national governments are engaged in efforts to contain the current recessionary phase, but these efforts will remain ineffective in the absence of common measures adopted by EU political leaders. They are responsible for decisions to overcome the constraints on the financial sector arising from the 'Stability Pact' and the 2013 Convention on «State aid». Hence the need to avoid at the present juncture interpretations of the rules of the Treaties that are unwilling to allow the Member States room for flexibility, so as to have a negative impact on the prospect of consolidation of the Union, based on sharing and solidarity.

Therefore, the attitude of the institutional authorities in the Eurozone that seem willing to agree to greater economic flexibility in the management of Member States' public accounts is particularly important. The reference to the 'general crisis clause' in the *Stability Pact*, which legitimises Member States to deviate from the budgetary targets assumed before the outbreak of the *coronavirus* contagion, is in this sense. Therefore, the increase in expenditure related to the health emer-

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debt securities allows Member States to obtain financing at uniform rates", hence the elimination of differentials between the yields on the public debt securities of the different States; See on this point DONATI, *Euro crisis, economic governance and democracy in the European Union (Crisi dell'euro, governance economica e democrazia nell'Unione europea)*, in *Telematic legal journal of the Italian Association of Constitutionalists (Rivista telematica giuridica dell'Associazione Italiana dei Costituzionalisti)*, 2013, n. 2, p. 7.

gency and the economic support of those who have lost their jobs (or, in any case, have seen them suddenly reduced) must be considered an extraordinary intervention and, therefore, not to be counted for the purposes of calculating the structural *deficit*.

An opening position in this respect was adopted by the Commission which, in its Communication of 20 March 2020, activated this clause<sup>63</sup>, and subsequently reached an agreement on the *suspension* of the strict rules laid down in the *Pact*. The occasion seemed propitious not only to have the financial means to eliminate the shortcomings of public health (particularly significant in some countries, such as Italy), but also to induce Europe to redefine fiscal rules and budgetary procedures as part of a unified response to the emergency caused by the crisis. The statements made in this regard by the German Chancellor, Angela Merkel, seemed not to give rise to any doubts about the prospect of a necessary change in EU regulation<sup>64</sup>.

Naturally, the hypothesis of such a disciplinary change would presuppose that the German Federal Constitutional Court would abandon its view that the principles of stability of the euro and the autonomous responsibility of each State for its own debts are 'unavailable'<sup>65</sup>. It is hardly appropriate to point out that this interpretative approach has so far prevented Germany from accepting within the Union's legal framework «permanent instruments» which identify a high level of participation by the Member States in the needs of other components of the Un-

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<sup>63</sup>EUROPEAN COMMISSION, Communication from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact, COM(2020) 123.

<sup>64</sup>See the editorial entitled *Ready to revise the balanced budget rule, said Angela Merkel* (*Pronti a rivedere la regola del pareggio di bilancio, ha detto Angela Merkel*) available on <https://www.agi.it/estero/news/2020-03-11/coronavirus-germania-merkel-7435183>, editorial in which the text states: «We will do what we need to do to get out of this situation [...] Putting an end to the spread of the epidemic is the priority, above and beyond compliance with the budgetary rules»

<sup>65</sup>See *Bundesverfassungsgericht - Pressestelle -Pressemitteilung Nr. 37/2011* vom 9. Juni 2011, visionabile su [www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-055en.html](http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-055en.html). For a comment on this jurisprudential orientation See TOSATO, *The German Constitutional Court and the future of the Euro* (*La Corte costituzionale tedesca e il futuro dell'euro*), in *Affarinternazionali*, 2011, [www.iai.it](http://www.iai.it).

ion<sup>66</sup>. It seemed, therefore, that the time had finally come for that Member State to withdraw from the position it had taken in the past with regard to the issue of *Eurobonds*, which it opposed on the grounds that they were substantially pooling national debt or part of it<sup>67</sup>.

Conversely, this country has not succeeded in freeing itself, in its political choices, from the incidence of the so-called *sonderweg*, to be understood as a conviction of 'following a particular path', at the basis of which is found the reference to a rigid «having to be», which distinguishes the conduct and options followed<sup>68</sup>. Hence the German specificity which, since the time of the Lutheran reform, has been expressed in different forms and directions: from the well-known principle 'duty is the expression of a moral necessity', enunciated by Kant in the well-known writing '*Foundation of the metaphysics of costumes*' (*Grundlegung zur Metaphysik der Sitten*), to the romantic ideal of Novalis (Friedrik von Hardenberg) «the more alone, the more powerful»<sup>69</sup>; hence the thread of continuity that has marked the greatness and, at the same time, the limit of the 'Germanic legend' over the centuries. It is clear, therefore, that in this logical context, which orients the *Volksgeist*, there is little room for the affirmation of the *spirit of union and solidarity* with the countries that are part of the EU.

It is surprising, however, how the wake of pain and death that accompanied the Covid-19 emergency did not interact positively on a "turnaround" of Germany, leading it to revise its traditional position towards countries in need of help because of the difficulties in which it placed them called a natural disaster. And indeed, in the face of unexpected interventions by the Republic of China, the Russian Federation and the U.S.A. in support of the collapsed speed of some European countries, the only concrete form of EU intervention in the first phase of the

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<sup>66</sup>It should be noted that Germany has been able to accept the ESM as a permanent instrument because it is provided for by a separate international treaty.

<sup>67</sup> On this point, See CAPRIGLIONE - SACCO GINEVRI, *Politics and finance in the European Union (Politica e finanza nell'Unione europea)*, cit., p. 150 ss.

<sup>68</sup>See PONSO, *A particular story. German "Sonderweg" and European identity (Una storia particolare. "Sonderweg" tedesco e identità europea)*, Bologna, 2011, *passim*

<sup>69</sup>See *Fragments by NOVALIS*, in Abbagnano - Ferrero, *Protagonists and texts of Philosophy (Protagonisti e testi della Filosofia)*, 1996, vol. 3, p. 28.

anti-Covid-19 measures was by the ECB, which made itself available to provide liquidity after an increase in Quantitative Easing and the adoption of a massive long-term loan programme, the so-called TLTRO III<sup>70</sup>; measures which immediately appeared to be insufficient in view of the seriousness of the situation<sup>71</sup>.

Faced with the spread of contagion, the governments responsible understood that it was necessary to avoid a possible misalignment between an indispensable monetary expansion and the constraints of restrictive regulation. In this scenario, the need to find the financial means to get the European economy back on track because of the lockdown - to arrive, therefore, at «higher levels of public debt», as suggested by Mario Draghi<sup>72</sup> - has prompted the ECB to step up its action; this has led to a change in the programme *Pandemic Emergency Purchase Programme* (PEPP)<sup>73</sup> of EUR 750 billion «to counter the serious risks to the monetary policy transmission mechanism and the prospects for the euro area posed by the epidemic and the increasing spread of the coronavirus, COVID-19»<sup>74</sup>. This was followed by the decision to «widen the control loop» - by giving banks more flexibility on capital requirements and the application of accounting standards - to allow easier and quicker access to credit for businesses and households<sup>75</sup>. Also, of significant importance in this context was the *recommendation* to banks not to distribute dividends during the COVID-19 pandemic, as well as the 'prudent and

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<sup>70</sup>This programme is complemented by the planned purchase of assets for an additional EUR 120 billion until the end of 2020, while no changes are made to interest rates; a decision of immobility that the markets did not like. On this subject, See <https://www.soldionline.it/notizie/economia-politica/diretta-bce-12-marzo-2020#001?cp=1>

<sup>71</sup>See the editorial edited by PENATI entitled *Madame Legarde and the unpaired exposures* (*Madame Lagarde e le sofferenze*), in *Milano Finanza* of 16 March 2020.

<sup>72</sup>See the editorial by *Financial Times* cited in note no. 7.

<sup>73</sup>See STAMEGNA - DELIVORIAS, *Developing a pandemic emergency purchase programme: Unconventional monetary policy to tackle the coronavirus crisis*, European Parliamentary Research Service, 2020.

<sup>74</sup>See BANCA D'ITALIA, *ECB announces a new Pandemic Emergency Purchase Programme (PEPP) to counter the serious risks posed by the coronavirus*, visionabile su <https://www.bancaditalia.it/media/notizia/ecb-announces-a-new-pandemic-emergency-purchase-programme-pepp-to-counter-the-serious-risks-posed-by-the-coronavirus/>

<sup>75</sup>See MASSARO, *Coronavirus, the ECB "free" 1,800 billion for loans to households and businesses* (*Coronavirus, la Bce «libera» 1.800 miliardi per prestiti a famiglie e imprese*), available on [https://www.corriere.it/economia/finanza/20\\_marzo\\_20/coronavirus-bce-libera-1800-miliardi-prestiti-famiglie-imprese-b000a0ac-6abf-11ea-b40a-2e7c2eee59c6.sht](https://www.corriere.it/economia/finanza/20_marzo_20/coronavirus-bce-libera-1800-miliardi-prestiti-famiglie-imprese-b000a0ac-6abf-11ea-b40a-2e7c2eee59c6.sht).

forward-looking' approach in establishing remuneration policies<sup>76</sup>.

The ECB itself, however, has made it clear that monetary policy cannot tackle the crisis on its own, but that the most important decisions are taken by those who determine budgetary policies<sup>77</sup>. This has led to the widespread belief that the instruments used during the 2007 crisis, of financial origin and, therefore, linked to asymmetrically reactive forms, are now obsolete<sup>78</sup>. More generally, there seems to be an awareness of the need to break down the ambiguous bastions of positions of interest and/or hegemony, which are an obstacle in the «determination of common intentions» aimed at achieving objectives, until then accepted only at a formal level by some countries.

In view of this, the need to supplement the measures adopted by the ECB with the issuance of bonds, guaranteed by the Union, seems to prevail; hence the emphasis given by the specialist press to the news that President Lagarde has declared «to seriously consider the idea of a joint *one off issue of coronabonds* to stem the effects of the coronavirus pandemic»<sup>79</sup>. This is without prejudice to the fact that the *one-off* nature of this intervention and the declared opposition of Germany, the Netherlands and other northern European countries (which have always been opposed to such emissions) reduce expectations of a change of perspective and enliven the climate of uncertainty about the future of the Union.

On the other hand, another mechanism on which the Ministers of the Union have agreed, the so-called “European Union”. SURE (Support to mitigate unemployment risks in emergency) presents a «firepower» (to use an expression of

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<sup>76</sup>See BCE, *recommendation of the european central bank of 27 March 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation (ECB/2020/1)*, to which reference is made for further detailed measures. This recommendation was followed by a similar measure of the Bank of Italy addressed to non-significant banks, which can be viewed on the Bank's website.

<sup>77</sup>See PANETTA, *Why we all need a joint European fiscal response*, Contribution by Fabio Panetta, Member of the Executive Board, European Central Bank, published by Politico on 21 April 2020

<sup>78</sup>See BEDA, *We can't make it with the anti-crisis tools of 10 years ago (Non possiamo farcela con gli strumenti anti crisi di 10 anni fa)*, in *IlSole24Ore* of 22 March 2020.

<sup>79</sup>See the editorial entitled *Yes of the Lagarde to the coronabond, but a one-off (Sì della Lagarde ai coronabond, ma una tantum)*, available on [www.milanofinanza.it/news/si-della-lagarde-ai-coronabond-ma-una-tantum-202003251339293985](http://www.milanofinanza.it/news/si-della-lagarde-ai-coronabond-ma-una-tantum-202003251339293985).

Prime Minister Giuseppe Conte) quite limited, being able to unblock up to 100 billion euros to support both the ‘Italian redundancy fund’ and the German *kurzarbeitergeld*. A possible classification as «the first form of Eurobonds with [...] mutualisation of the related debt» appears to be of little significance, either because of the small amount of funding that can be obtained or because of the specific functional use of this intervention for the creation of a «European unemployment insurance fund»<sup>80</sup>. In confirmation of this interpretation, it should be noted that Ursula von der Leyen, President of the Commission, to whom the proposal for such an instrument is owed<sup>81</sup>, promptly declared her support for Germany’s positions on *Eurobonds* and expressed her intention to withdraw from support for the measure<sup>82</sup>.

There is a strong debate in Europe on this issue, which is causing considerable tension at European summits, to the extent that the Prime Minister Count is critical of the «very foundation of the Union»<sup>83</sup> and to reject, together with Spain, the ‘draft agreement discussed by the Council of the European Union’ on the *coronavirus* (document identifying the aid to be provided to the Member States

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<sup>80</sup>In this respect, it should be noted that the activation of this measure foresees that Member States will have to provide national guarantees of up to €25 billion, which will be used by the Commission to issue triple A bonds (very secure and therefore low interest rate bonds) which are then turned over to Member States through long-term loans. It is clear, therefore, that the amount that Member States will be able to benefit from is rather small, even if it is higher than the commitment required from them through the guarantees. See in this respect VILLAFRANCA, *The European X-ray agreement between ESM, Sure and EIB (L’accordo europeo ai raggi X tra MES, Sure e BEI)*, available on [www.ispionline.it/it/pubblicazione /laccordo-europeo-ai-raggi-x-tra-mes-sure-e-bei-25752](http://www.ispionline.it/it/pubblicazione/laccordo-europeo-ai-raggi-x-tra-mes-sure-e-bei-25752)

<sup>81</sup>See the document *Questions and answers: Commission proposes SURE, a new temporary instrument worth EUR 100 billion to help protect jobs and workers (Domande e risposte: La Commissione propone SURE, un nuovo strumento temporaneo del valore di 100 miliardi di EUR per aiutare a proteggere i posti di lavoro e i lavoratori)*, available on [https://ec.europa.eu/commission/presscorner/detail/it/QANDA\\_20\\_572](https://ec.europa.eu/commission/presscorner/detail/it/QANDA_20_572).

<sup>82</sup>See the editorial entitled *Coronavirus Italy, the EU leaves us alone. Von der Leyen is Italy’s worst enemy (Coronavirus Italia, la Ue ci lascia soli. Von der Leyen è la peggiore nemica dell’Italia)*, available on <https://www.iltempo.it/politica/2020/03/29/news/coronavirus-vonder-leyen-italia-coronabond-unione-europea-commissione-ue-1304633>

<sup>83</sup>See the editorial CIRIACO e D’ARGENTO entitled *Conte asserts “without the coronabonds the Union risks collapse” (Conte assisa “senza i coronabond l’Unione rischia il tracollo”)*, in *laRepubblica* of 26 March 2020.



affected by the emergency)<sup>84</sup>. French Minister Le Maire's alarm in this regard is significant: «If there is no solidarity in the EU, there is no political interest in building the Eurozone. And believe me, for certain countries, I'm thinking in particular of Italy, the fact that there is no solidarity makes the European project ridiculous»<sup>85</sup>. We are taking a courageous and consistent approach to the objective of drawing inspiration from the economic and health crisis in order to change the current system of regulation which, under German influence, insists on not wanting to understand that the Europe of *rules* must be replaced by the Europe of *solidarity*, giving rise to interventions which should not be confused with those of charity, the basis of which is different; hence their classification in a social and economic context in line with the principles on which the European community was built.

Similar considerations should be made with regard to the possibility to benefit from ESM funding, the action of which (when assessed without an appropriate elaboration of the modalities of the funds to be allocated to the applicants) evokes the forms of intervention implemented in the past and, therefore, the automatic submission of the beneficiary countries to an enhanced surveillance regime, which takes the form of the “*receivership proceeding*” of their economic policy. Therefore, with regard to this measure, Italy's proposal to agree «to discuss an ESM without conditions» seems fully legitimate<sup>86</sup>; and this in a logic that would like it to be open to all Member States, so as to help them combat the consequences of the Covid-19 outbreak.

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<sup>84</sup>See the editorial VALENTINI entitled *The move by Conte (La mossa di Conte)*, available on [www.ilfoglio.it/politica/2020/03/26/news/la-mossa-di-conte-307245](http://www.ilfoglio.it/politica/2020/03/26/news/la-mossa-di-conte-307245).

<sup>85</sup>See the editorial entitled *Even Paris renounces the Mes. Towards the Recovery Fund's postponement (Anche Parigi rinuncia al Mes. Verso lo slittamento del Recovery Fund)*, available on [https://www.huffingtonpost.it/entry/anche-parigi-rinuncia-al-mes-slitta-il-recovery-fund-che-pero-tenta-la-lega\\_it\\_](https://www.huffingtonpost.it/entry/anche-parigi-rinuncia-al-mes-slitta-il-recovery-fund-che-pero-tenta-la-lega_it_)

<sup>86</sup>See the editorial entitled *Conte: “We will fight to the end for Eurobonds.” And on the Mes: “It's not adequate, Italy doesn't need it. Falsity from Salvini and Meloni.” (Conte: “Lotteremo fino alla fine per gli eurobond”. E sul Mes: “Non è adeguato, l'Italia non ne ha bisogno. Falsità da Salvini e Meloni”)*, available on [www.repubblica.it/politica/2020/04/10/news/mes\\_m5s\\_reazioni\\_governo\\_eurogruppo](http://www.repubblica.it/politica/2020/04/10/news/mes_m5s_reazioni_governo_eurogruppo). It should be noted that Italy is the third largest creditor of the ESM, with, inter alia, a sufficient number of shares to exercise an autonomous right of veto in emergency procedures.

In this situation of uncertainty about the future of the EU, European summits have decided to consider a 'new proposal' which seems to attest to the 'good will' of some Member States to resolve the tension<sup>87</sup>. This is a project that appears to be inspired by the belief that Europe cannot follow the strategy of individualism, nor can it rely on interventions of limited duration, being related only to overcoming emergencies of exceptional gravity, in order to get out of the current *impasse*. Once again, there is a need for long-term remedies, such as the creation of «a common debt instrument» which, overcoming the reluctance of some States, shows the entire community of the planet that, albeit with difficulty, the real foundations of a unitary statehood have been laid.

A solution in this sense was found in the agreement reached at the European Council of 23 April 2020 on the constitution of the so-called Recovery Fund, whose activity should be linked to the EU budget for the next seven years.

The Commission's proposal submitted to the European Parliament at the end of May 2020 for the creation of an instrument called the *Next Generation EU* was enthusiastically welcomed by the Italian banking authorities; the provision to set up a fund of €750 billion for transfers and loans to Member States (€500 billion and €250 billion respectively) was, in fact, considered suitable to «strengthen cooperation in the health field» as well as a common response to the crisis<sup>88</sup>. It has been hailed by the European Commissioner for Economic Affairs as a "turning point" in EU relations, a view partly shared by Ursula von der Leyen, who in stating that «the point here is to lay the foundations for our future together», has pointed out that however «tomorrow the cost of inaction in this crisis will be far more ex-

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<sup>87</sup>See the editorial by GAGLIARDUCCI entitled *EU: because in reality no agreement has been reached against the coronavirus (UE: perché in realtà non è stato trovato alcun accordo contro il coronavirus)*, available on <https://www.money.it/accordo-UE-su-coronavirus-non-e-stato-trovato>.

<sup>88</sup>See BANCA D'ITALIA, *Report for the year 2019, Final considerations (Relazione per l'anno 2019, Considerazioni finali)*, p. 17 of the press drafts, where it is stressed that «this is an important opportunity to prepare a common response which, like monetary measures, is proportionate to the severity of the crisis».



pensive for us»<sup>89</sup>; hence the emergence of a logic that seems to give priority to the objective of sound management of EU finances, rather than to the intention of reversing relations between Member States in a spirit of solidarity.

This instrument - on which there will certainly be a convergence of consensus among the countries most affected by Covid 19 - is currently not defined in its concrete operational aspects (i.e. with regard to its actual mode of operation). In particular, there is as yet no agreement on the methodology to be used for financing, so it remains to be clarified what technical forms will be envisaged for non-repayable loans, which will be combined with loans subject to repayment (with interest)<sup>90</sup>. Furthermore, the extent of the necessary contribution by the Member States to the project in question has not been identified, hence the difficulty of assessing «the concrete amount of resources actually made available for our country», as has been duly pointed out<sup>91</sup>.

It is clear that the question of the acceptance (by Germany and its satellite States) of solidarity-based remedies does not appear to have been resolved at present, since it is linked, on the one hand, to the definition of the Fund's intervention procedures and, on the other, to the line of conduct followed by the Union at the end of the pandemic. Doubts remain, therefore, regarding a «change of pace» of the northern European countries, traditionally reluctant to acts of generosity towards the other members of the Union; hence the conceivable prospect of requests, formulated in the future by the EU summits, regarding the *control* of the investment programmes to be carried out with the non-repayable disbursements granted by the *Recovery Fund*. Virgil's words to Laocoonte come back to mind: «timeo Danaos et dona ferentes»!

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<sup>89</sup>See *EU Commission proposes €750 billion recovery fund in wake of Covid-19 crisis*, available on [www.france24.com/en/20200527-eu-commission-proposes-%E2%82%AC750-billion-recovery-fund-in-wake-of-covid-19-crisis](http://www.france24.com/en/20200527-eu-commission-proposes-%E2%82%AC750-billion-recovery-fund-in-wake-of-covid-19-crisis).

<sup>90</sup>See the editorial entitled *Italy in the EU has failed: the words of Germany and Austria prove it* (*L'Italia nell'UE ha fallito: le parole di Germania e Austria lo dimostrano*), available on [www.money.it/L-Italia-nell-UE-ha-fallito](http://www.money.it/L-Italia-nell-UE-ha-fallito).

<sup>91</sup>See CAPUTI, *If Europe risks throwing away the winning ticket* (*Se l'Europa rischia di gettare via il biglietto vincente*), available on <https://loccidentale.it/recovery-fund-se-leuropa-rischia-di-gettare-via-il-biglietto-vincente>.

It follows that, while recognising the unequivocal positive nature of the instrument in question, it can only be said to attest to the current awareness on the part of the Member States of having to react *together* to the situation brought about by Covid 19, as perceived by the European community in its dramatic profiles. Hence the conviction, punctually represented by the Governor of the Bank of Italy, that «only a common, strong and coordinated action will be able to protect and relaunch productive capacity and employment throughout the European economy»<sup>92</sup>.

8. In one of my writings, written during the years of the financial crisis, I wondered «how long will this technical progress last, what is the time needed for a return to a constitutional era, for the end of indeterminacy, with the cessation of abdication and the restoration of a real presence of politics?»<sup>93</sup>. I looked for an answer in the analysis of the conditions which, from the point of view of practicality, would make it conceivable to move to a different European Union, more harmonised and finally inspired by the principles of cohesion and solidarity; this in the knowledge that this objective would be achievable only if the Member States were willing to confront diversity, accepting its implications in the conviction that the *union* allows them to overcome hostilities, practice uniform lines of operation and reduce inequalities.

At the time, it immediately seemed difficult to make predictions: the shortcomings of a common policy, the sovereign tendencies that were becoming established, the quarrelsomeness that never ceased at the level of the individual national realities gave a glimpse of a situation that for a long time to come would be characterised by gaps and lack of cohesion between the members of the European project. Hence the perplexities and justified doubts about the realisation of the latter; doubts which, however, were dispelled by the need to hope, to continue to believe in a dream nourished over time by the prospect of a «common home»,

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<sup>92</sup>See BANCA D'ITALIA, *Report for the year 2019, Final considerations*.

<sup>93</sup>See *Market rules democracy (Mercato regole democrazia)*, cit., p. 222.

awaited with confidence and without fear!

After almost two decades since the written one, the examination of the European integration process conducted so far shows that, unfortunately, there are no factual conditions to give content to the 'project' in which a large part of the EU population has believed. The prospect of a strong, cohesive and united Union, capable of successfully facing the challenges of globalisation and possible natural disasters, seems to have been relegated to the sphere of unfulfilled dreams; it has been fled by Covid-19, which - as has been said - acted as a catalyst in highlighting the limitations and shortcomings of such a construction, which has long been denounced not only by scholars but also by representatives of civil society<sup>94</sup>.

A substantial lack of willingness on the part of some Member States to activate the tools and procedures that make it possible to «stay together» and face adversity in a spirit of solidarity has emerged. Similarly, one of the causes of the failure to upgrade the integration project is the financially irresponsible behaviour of some States, which have claimed to burden others (future generations, virtuous EU States, etc.) with the unseemly pre-electoral economic policies lacking any medium-long term vision, thus fuelling a climate of distrust and suspicion on the part of countries that, on the other hand, had oriented their behaviour towards respect for the principle of financial responsibility. This explains the reason why, in the case of Italy, certain critical conducts of its politicians - which, for a long time, have negatively characterized its *agere* - are held to be unjustifiable in a supranational context and prevent this Country from being looked at with indulgence.

The origins of the European project were, admittedly, also attributable to a

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<sup>94</sup>See among others DI TARANTO, *The problematic foundations of the European currency (Le basi problematiche della moneta europea)*, in *Aspenia, The futures of capitalism (I futuri del capitalismo)*, 2012, n. 56, 176-183; ID., *The temporary rescue of Athens? Only advantageous for Berlin (Il salvataggio temporaneo di Atene? Vantaggioso solo per Berlino)*, in *Milano Finanza* of 16 March 2012; ID., *Europe betrayed (L'Europa tradita)*, Roma, 2014, *passim*; ID., *So Italy can change the Euro (and earn) (Così l'Italia può cambiare l'euro (e guadagnarci))*, interview published online on 19 January 2014, in the section of *Economia e Finanza* de *ilsussidiario.net*; SAVONA, *You need a plan B to get out of the Euro. I expect a lot from Renzi (Serve un piano B per uscire dall'Euro. Da Renzi mi aspetto molto)*, interview released on 9 March 2014, available on [www.forexinfo.it](http://www.forexinfo.it); RINALDI, *Europa kaput (S)venduti all'euro*, with introduction by SAVONA, Rome, 2013.

variety of shortcomings; at the time, these were certainly due to the initial difficulties encountered in the process of amalgamation between different countries, which had been at war with each other for centuries; a situation which at present, seventy years after the beginning of a common path, there is no justification for this. But there is more. The passage of time has made it possible to understand the ineffectiveness of a method which, having regard to the positive effects of a gradual rapprochement, is today emptied, in practical terms, of the operational techniques practised in the Union; these, in fact, have allowed the distinct interests of the Member States to prevail, as the case may be, leading to an obvious competitive attitude between them. Similarly, it has become clear that 'currency alone' does not fulfil the clotting function necessary for countries with different histories, cultures, religions and languages to converge towards 'unity'.

Every renunciation is painful, sometimes it even seems impossible! Perhaps this is the reason why many citizens of the 'old continent' (including myself) - even though they had long ago understood the limits of the design in question - stubbornly continued to hope, trying to diminish some obvious contrasts between culturally different nations and the contradictions (sometimes obvious) that should have advised them to reduce the positive aspects of the construction in which they believed in a "fideistic" spirit. This has been a long struggle, in which the defence of one's own ideals, of an ambitious dream has put to the test the firmness of some convictions in order to find new justified motivations not to give up, not to surrender in front of a reality that, for a long time, should have made one reflect and accept the sad consequences of a socio-political experimentation with a doubtful outcome.

Well, in the face of an epochal disastrous event, such as the pandemic that is hitting the entire planet, the expectation of seeing all mental reservations fall, as well as the obstacles that in the past (in particular during the financial crisis of 2007) had prevented the expression of solidarity, the identity expression of a common belonging to Europe, had reasonably been determined. Unfortunately, this was not the case! Appeals from leading academics, personalities from the

world of culture and even the Supreme Pontiff seem destined to fall on deaf ears; appeals in which the EU (and its institutions) have been denounced for the substantial fragility of the measures taken and the need for EU leaders to take note of their mistakes<sup>95</sup>. Particularly significant, in this regard, are the considerations of Massimo Cacciari on the post-coronavirus: «it seems to me that it will be a tombstone [...] (for the Union) [...], although hope is the last to die. [...] I think we have to put the European dream away now. The coronavirus was the coup de grâce for an already compromised situation. I sincerely hope I'm wrong, but...»<sup>96</sup>.

Hence the need to take note that the European Union, in its current configuration, denotes the lack of the socio-political prerequisites for the construction of a «common home», which is the inescapable premise of a future federal state! Moreover, possible changes to the Treaties, with a view to putting such a constitutional hypothesis into practice in the future, seem to me to lack credibility, not least in view of the pretext that the German Chancellor's recent postponement of the drafting of such changes has clearly used this expedient to postpone the question of *Eurobonds* until the future<sup>97</sup>.

Significant, in this regard, is the opposite refusal of Merkel - at the meeting of the European Council of 23 April 2020 - to resolve the financial problems of countries in serious difficulties through the issue of *Eurobonds* or similar instru-

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<sup>95</sup>See the editorial entitled *EU and ECB, that's no way to overcome the crisis*". *The appeal of 67 economists (Ue e Bce, non è così che si supera la crisi*". *L'appello di 67 economisti*), available on <http://temi.repubblica.it/micromega-online/ue-e-bce-non-e-cosi-che-si-supera-la-crisi-appello-di-67-economisti>. In this appeal, the reference to the *exceptional* nature of the measures taken by the European authorities to the measures they have ordered reveals a tacit intention to recover the previous regulatory regime after the storm has ended, whereas only a decisive «change of pace» can preserve the process of European integration from a sad end!

<sup>96</sup>See the interview of BEDINI CRESCIMANNI entitled *Massimo Cacciari: the coronavirus is the tombstone of European integration, it will be China that will raise Italy up again (Massimo Cacciari: il coronavirus è la pietra tombale sulla integrazione europea, sarà la Cina a risollevare l'Italia)*, available on <https://it.businessinsider.com/massimo-cacciari-il-coronavirus-e-la-pietra-tombale-sullintegrazione-europea-sara-la-cina-a-risollevare-litalia/>

<sup>97</sup>See the editorial entitled *Merkel: "Ready for more EU contributions in a spirit of solidarity against the pandemic"* (*Merkel: "Pronti a maggiori contributi Ue in spirito di solidarietà contro la pandemia"*), available on [www.repubblica.it/esteri/2020/04/23/news/angela\\_merkel\\_l\\_ue\\_non\\_e\\_niente\\_senza\\_la\\_solidarieta](http://www.repubblica.it/esteri/2020/04/23/news/angela_merkel_l_ue_non_e_niente_senza_la_solidarieta), in which the Chancellor's words that debt mutualisation should "amend the Treaties" and this requires time and the involvement of parliaments.

ments; this despite the fact that in a previous statement by Merkel, said senior politician had committed himself to a behavioural line of solidarity to solve the economic health emergency caused by Covid-19<sup>98</sup>. It is clear that this is indicative of a clear unwillingness to accept risk *mutualisation* measures, which is obviously also underpinned by the prospect of fiscal unification.

9. This situation of objective unavailability of Germany towards the activation of solidarity-based behavioural lines of behaviour finds its epicentre in the interventionist system based on the decision of 5 May 2020 of the German Federal Constitutional Court. In fact, it states that the latter is entitled to disregard all disciplinary innovations and activities implemented in the EU (including the work of the ECB) if it is not deemed to comply with the authorising criteria (prohibitions, restrictions, etc.) laid down in the Basic Law of Germany.

In particular, that Court claims for itself the power to review and disregard a judgment of the European Court of Justice<sup>99</sup>. Indeed, the abovementioned decision of 5 May 2020 substantially undermines a judgment of the latter in which it recognised «the validity of Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a programme for the acquisition of public sector assets on secondary markets, as amended by Decision (EU) 2017/100 of the European Central Bank of 11 January 2017»<sup>100</sup>. That was on the assumption that the German Government and the German Parliament had not checked compliance with the principle of *proportionality* in the decision on *Quantitative Easing* taken by the

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<sup>98</sup>See the editorial entitled *Ready to revise the balanced budget rule, said Angela Merkel (Pronti a rivedere la regola del pareggio di bilancio, ha detto Angela Merkel)* available on <https://www.agi.it/estero/news/2020-03-11/coronavirus-germania-merkel-7435183/>

<sup>99</sup>This is clear from points 111 et seq. of the Decision, which are summarised in point 2 of the official summary: “2. *The Court of Justice of the European Union exceeds its judicial mandate, as determined by the functions conferred upon it in Article 19(1) second sentence of the Treaty on European Union, where an interpretation of the Treaties is not comprehensible and must thus be considered arbitrary from an objective perspective. If the Court of Justice of the European Union crosses that limit, its decisions are no longer covered by Article 19(1) second sentence of the Treaty on European Union in conjunction with the domestic Act of Approval; at least in relation to Germany, these decisions lack the minimum of democratic legitimation necessary under Article 23(1) second sentence in conjunction with Article 20(1) and (2) and Article 79(3) of the Basic Law*”.

<sup>100</sup>See CGUE, Judgment of 11 December 2018, C-493/17, Heinrich Weiss et al.

ECB, which consequently acted *ultra vires*. Consequently, the Bundesverfassungsgericht, considering itself not bound by the decision of the Court of Justice, gave the ECB a de facto three-month *ultimatum* in order to clarify compliance with the principle of proportionality between the programme and the objectives underlying the operations in question, after which the *Bundesbank* would have to withdraw from the ECB's intervention plans if the above condition had not been satisfied<sup>101</sup>.

It is not necessary, here, to examine the problem, posed by the decision in question, of the legitimacy in the case of recourse to a trade union that considers an *ultra vires* activity (i.e. the so-called *counterlimits* of the Italian legal system) claimed by the constitutional body in question to resolve - in the presence of a role of primacy of the Community sources - the antinomies that can be determined with respect to the fundamental and inalienable rights of the domestic system<sup>102</sup>.

Likewise, I do not intend to go into the merits of identifying these rights, which can certainly be traced back to those of the person (and, therefore, respect for human dignity, the moral and legal equality of all, freedom of opinion, of the press, of religion, etc.) which give content to the values on which modern civil societies are built; hence the dubious reference to these rights to economic interests, which it has, instead, with regard to the judgment of the German Constitutional Court.

Moreover, I do not agree with the contents and the conclusions reached in that judgment; and this in the field of monetary policy, of which it is the bearer, even before in the management of inter-orderly relations. In fact, a restrictive no-

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<sup>101</sup>For a commentary on the decision of the German Constitutional Court See LOMBARDO, *Quantitative Easing: the judgment of the German Constitutional Court (Quantitative Easing: la sentenza della Corte Costituzionale tedesca)*, in *dirittobancario.it* of 6 May 2020; BASSAN, *The primacy of German law (Il primato del diritto tedesco)*, in *dirittobancario.it* of 7 May 2020.

<sup>102</sup>The Italian Constitutional Court has on several occasions reiterated that the fundamental principles of the constitutional system operate as a *counterlimits* to the entry of European Union rules, arriving in 2014, with sentence no. 238, at the conclusion that the international rules to be introduced into the domestic system must be made compatible with the «qualifying and indispensable principles of the constitutional system and, therefore, with the principles that oversee the protection of fundamental rights»



tion of monetary policy based on the equivocal belief that «conventional» operations are the rule and «non-conventional» operations are the exception. On the other hand, it is well known that from 2010 onwards the latter has been a priority for the ECB's operations<sup>103</sup>; the same *quantitative easing* was adopted in the United States before its introduction in the Euro area<sup>104</sup> and never, in this country, has the violation of the fiscal policy/monetary policy boundary been questioned. Today, the world's most important central banks implement *unconventional* monetary policies<sup>105</sup>.

The old manoeuvre on the 'discount rate' - which is obviously the yardstick of the German Constitutional Court when it comes to defining the concept of monetary policy - is of little significance in the face of the financial shocks of recent decades, almost as if it were to cure with aspirin not influenza, but *corona-virus* lung diseases.

It should be noted that the affirmation of the principle of *autonomy* of central banks, now generally recognized, is indicative of a need to defend democratic systems from attacks from within their structure; it finds its *ratio* in the intent of removing from the democratic-representative circuit the decisions of monetary policy to give them to central banks which, in fact, are characterized by their independence. Therefore, it is up to the central banks - and they alone - to manage monetary policy! The European Court of Justice appears to be aware of this, moreover, and its interventions - implemented after the application of minimum forms of control on non-standard operations (non-standard measures) - are lim-

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<sup>103</sup>For a more detailed description of how this action is to be carried out, See BANCA CENTRALE EUROPEA, *Bollettino Mensile*, July 2011, pp.57-72, where the various technical forms in which the ECB's intervention has taken place are specified.

<sup>104</sup> See BEN BERNANKE, *The Crisis and the Policy Response*, Federal Reserve, 13 January 2009. MARTIN FELDSTEIN, *Quantitative Easing and America's Economic Rebound*, Feb 24, 2011, available on [www.project-syndicate.org/commentary/quantitative-easing-and-america-s-economic-rebound?barrier](http://www.project-syndicate.org/commentary/quantitative-easing-and-america-s-economic-rebound?barrier); RAMPINI, *The U.S. recipe that generates jobs (La ricetta Usa che genera posti di lavoro)*, available on <http://temi.repubblica.it/micromega-online/la-ricetta-usa-che-genera-posti-di-lavoro>.

<sup>105</sup>See HEATHER STEWART, *Japan aims to jump-start economy with \$1.4tn of quantitative easing*, available on [www.theguardian.com/business/2013/apr/04/japan-quantitative-easing-70bn](http://www.theguardian.com/business/2013/apr/04/japan-quantitative-easing-70bn); MICHAEL JOYCE, MATTHEW TONG AND ROBERT WOODS, *The United Kingdom's quantitative easing policy: design, operation and impact*, in *Quarterly Bulletin* 2011, p. 200 SS.



ited to the syndication of only ‘manifest violations’ of the ECB; obviously not to endorse any decision of the latter, as in a simplistic vision could be considered, but in accordance with the actual areas of its competence.

Conversely, the German Constitutional Court claims plenary jurisdiction extended to ‘any form of violation’. It did not consider that it lacked the *technical legitimacy* to carry out an intervention on a matter which, due to its specificity, falls within the competence of the ECB; it therefore disregarded the fundamental ordinary law criterion of not exceeding the limits which are assigned to each institutional body according to its role. The cornerstones of contemporary legal culture, dating back to the teachings of Adam Smith (principle of the division of labour)<sup>106</sup> and even more to those of Montesquieu (principle of the separation of powers)<sup>107</sup>. It follows that the judgment of the German Court is outside the tradition of constitutionalism, which is made up of limits and balances, certainly not of “juristocracies”.

In this context, it seems to me that the impact of this decision on the system of counterbalances that currently characterise the EU, whose Member States, following the Covid-19, see the programme of purchases of government bonds by the ECB, amounting to EUR 750 billion (PEPP), as an essential intervention to overcome the pandemic emergency, is relevant to this investigation. And indeed, as has been sharply observed, «even if the ruling refers to 2015 purchase programmes, it casts a shadow over the purchases underway today, in which the Italian share is by far the largest of all countries»<sup>108</sup>. There is no doubt that the German courts have put a brake on any form of intervention that would meet the need, felt by many Member States, for risk and debt sharing. The *conditions* indi-

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<sup>106</sup>See the well-known book entitled *The Wealth of Nations* (1776), Newton Compton Editori, Roma, 1976 which marks the beginning of the classical political economy, providing the framework of the forces that promote growth and development, from Adam Smith brought back to the theory of ‘work-value’, as opposed to the thesis of the physiocratics.

<sup>107</sup>I refer to the theory set out in the volume *De l’esprit des lois* of 1748, Italian edition Milan, 1967, in which the idea that «anyone who has power is led to abuse it» is based on the principle that in order to avoid such an eventuality «power must [...] stop power»; hence the well-known distinction between the three functions of the legislative, executive and judicial State.

<sup>108</sup>See the editorial by BASTASIN, *BCE, the judge and the Bazooka* (*BCE, il giudice e il Bazooka*), published in *laRepubblica* of 6 May 2020.

cated by them for the action of the ECB introduce new uncertainties in the scenario of a Europe in distress, which is reminded by the leaders of the country with greater economic strength that the latter is able to ‘undermine’ or, in any case, oppose any plan that is not considered consistent with the German system (or, more simply, economically convenient for it).

What makes us reflect is the overall content - almost a warning - of the decision which reprimands the ECB’s actions *tout court*, regardless of the fact that it had already been validated by the Court of Justice. This is a mechanism which, if we consider it correctly, reflects a selfish logic, which does not take into account the real needs of the countries benefiting from these interventions, but is concerned to prevent EU countries from obtaining financing from the ECB in excess of their weight in the capital of the latter (thus avoiding that the latter may hold more than 33% of the debt on the market of each Member State).

From another point of view, the involvement of the German Government in the matter (for failure to monitor compliance with the principle of proportionality) is indicative of a reprimand for its fiscal action, which otherwise would not have required such extensive intervention by the ECB. This gives the reading of the judgment a new vector of an exquisitely political nature<sup>109</sup>, which is reflected in the criticism (in the interests of the independence of the ECB) of the position taken by the Bundesverfassungsgericht, chaired by a well-known member of the CDU (Christian Democratic Union)<sup>110</sup>.

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<sup>109</sup>See. CARAVITA, *The arrogance of the German court playing sovereignist (L’arroganza della Corte tedesca che fa la sovranaista)*, available on [https://www.federalismi.it/nv14/articolo\\_documento.cfm?hpsez=Primo\\_Piano&content=L%27arroganza%2Bdella%2BCorte%2Btedesca](https://www.federalismi.it/nv14/articolo_documento.cfm?hpsez=Primo_Piano&content=L%27arroganza%2Bdella%2BCorte%2Btedesca).

<sup>110</sup>Significant in this regard are the words of Ursula von der Leyen’s spokesperson, Eric Mamer: “We reaffirm the primacy of EU law and the fact that the judgments of the EU Court of Justice are binding on all national courts”, reported in the editorial entitled *A chasm opens between Berlin and Brussels (Si apre una voragine tra Berlino e Bruxelles)*, available on <https://it.insideover.com/politica/si-apre-una-voragine-fra-berlino-e-bruxelles.html>, which states, *inter alia*, «the Commission has always respected the independence of the ECB in the implementation of its monetary policy».

In addition, the President of the European Commission issued a letter in which he threatened to initiate infringement proceedings against Germany, stating that the decision in question ‘touches on European sovereignty’; see the editorial in this respect entitled *EU, von der Leyen threatens infringement proceedings against Germany over the Karlsruhe judgment on the ECB purchases (Ue, von der Leyen minaccia procedura d’infrazione contro la Germania per la sentenza di*

It goes without saying that, in the face of such a case-law approach, there is no doubt as to whether Germany can expect to behave in solidarity in the future. Such an attitude seems to have to be excluded in the presence of a generalized conviction of the exponents of that country that ‘yielding’ towards the other Member States (regardless of their state of need) is not admissible, so as to allow the monetary financing of their *deficit*. The ECB’s firm response to the German Constitutional Court - in which it reiterated «its commitment to do whatever is necessary in its mandate to ensure that inflation rises to levels consistent with its medium-term objective»<sup>111</sup> - it certainly reassures the Member States that the trade union’s review of the correctness of its activities is subject to exclusive review by the Court of Justice.

In conclusion, it is worth pointing out that the general ‘raising of shields’ against the judgment in question has also seen the Court of Justice take the field, which has not failed to reaffirm its operational autonomy vis-à-vis the Federal Supreme Court with words that do not give rise to doubt: «only a European institution can judge whether an act is contrary to Union law»<sup>112</sup>.

This does not exclude, however, that new conflicts may arise in the future with regard to possible repetitions of the aforementioned interpretative orienta-

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*Karlsruhe sugli acquisti della Bce*), available on [https://www.repubblica.it/esteri/2020/05/09/news/ue\\_von\\_der\\_leyen\\_minaccia\\_procedura\\_d\\_infrazione\\_contro\\_la\\_germania\\_per\\_la\\_sentenza\\_di\\_karlsruhe\\_sugli\\_acquisti\\_della\\_bce-256190613](https://www.repubblica.it/esteri/2020/05/09/news/ue_von_der_leyen_minaccia_procedura_d_infrazione_contro_la_germania_per_la_sentenza_di_karlsruhe_sugli_acquisti_della_bce-256190613).

<sup>111</sup>See the editorial entitled *Bce, the reply to the German Council*: “The commitment remains to do whatever is necessary. EU Court has ruled that we act in the mandate (Bce, la replica alla Consulta tedesca: “Resta l’impegno a fare qualunque cosa necessaria. Corte Ue ha stabilito che agiamo nel mandato)”, available on <https://www.ilfattoquotidiano.it/2020/05/05/bce-la-replica-alla-consulta-tedesca-resta-limpegno-a-fare-qualunque-cosa-necessaria-corte-ue-ha-stabilito-che-agiamo-nel-mandato/5792585>.

Also significant is the recent statement by President Lagarde reaffirming the independence of the ECB, stating that the ECB is answerable only to the European Parliament under the legal authority of the European Court of Justice; see the editorial by BUFACCHI entitled *Lagarde at the German Court*: “The ECB goes ahead undaunted, is independent and responds to the European Parliament” (Lagarde alla Corte tedesca: «La Bce va avanti imperterrita, è indipendente e risponde al Parlamento europeo»). available on [https://www.ilsole24ore.com/art/lagarde-corte-tedesca-la-bce-va-avanti-imperterrita-e-indipendente-e-risponde-parlamento-europeo-ADGoB2O?refresh\\_ce=1](https://www.ilsole24ore.com/art/lagarde-corte-tedesca-la-bce-va-avanti-imperterrita-e-indipendente-e-risponde-parlamento-europeo-ADGoB2O?refresh_ce=1)

<sup>112</sup>See the editorial entitled *The EU Court against German judges*: “Only we can decide on the ECB.” (La Corte Ue contro i giudici tedeschi: “Sulla Bce possiamo decidere solo noi”) available on [https://www.repubblica.it/economia/2020/05/08/news/corte\\_di\\_giustizia\\_ue\\_bce\\_germania\\_confitto\\_di\\_competenze-256051899](https://www.repubblica.it/economia/2020/05/08/news/corte_di_giustizia_ue_bce_germania_confitto_di_competenze-256051899).

tion of the German judges, who (in a conservative logic) work in the conviction that, thanks to the economic primacy of their country within the EU, they are able to influence the technical and political choices of the Union.

The events of the last months show how similar reflection should be made also with regard to the closing behaviour of the satellite states of Germany. Significant, in this regard, is the Dutch *favour* for the recourse to the ESM interventions only, proposed with insistence by that country. In this regard, it should be noted that this insistence has led to concerns, despite assurances given at EU level, about the lack of *cross-compliance* in this case, with the exception of the functional destination of the payments made in this way to the health emergency. Hence the uncertainties that have animated the political debate, which has seen a split between the majority parties and the opposition itself<sup>113</sup>. The memory of the ESM's critical operating problems, sadly experienced in the past by Greece, has been accompanied by the prospect of uncertainties (perhaps little justified) related to hypothetical negative consequences of this operation, due to the possibility of delaying the implementation of other financial interventions to which it is more important (both for their quantitative dimension, both for the technical methods of implementation).

A recent document by the Dutch Minister of Finance, Wopke Hoekstra, confirmed these concerns, highlighting a complete alignment of that Member State with Germany's lack of solidarity<sup>114</sup>. Moreover, the agreement recently reached between the euro area Finance Ministers on the activation of the ESM «unconditionally» - except for the mentioned functional allocation of funding to health care and treatment needed to overcome the Covid-19 emergency - seems to be able to reasonably allay the fears mentioned above. In fact, each Member State is now al-

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<sup>113</sup>See PERRONE - TROVATI, *Mes, 5 Stelle Movement against Count The premier insists: more instruments (Mes, Cinque Stelle contro Conte Il premier insiste: più strumenti.)* in *IlSole24Ore* of 21 March, where the words of the political leader of the 5 Stelle Movement are quoted "A un Mes without conditions I do not believe", surprisingly aligned with the position of the Lega and FdI.

<sup>114</sup>See the editorial entitled *MES: tick the document with the conditions of the Netherlands. What are they? (MES: spunta il documento con le condizioni dell'Olanda. Quali sono?)* available on <https://www.money.it/MES-condizioni-Olanda-fondo-salva-Stati-quali-sono>.

lowed to ask for funds up to 2% of its GDP with a 10-year loan at rates close to zero<sup>115</sup>.

The achievement of this positive result (overcoming the danger of imposing a particularly short loan period) has, however, not been well received in some countries. This, in all probability, due to a persistent fear that the request for its use would hinder (or at least delay) the adoption of other suitable instruments to support countries in difficulty; a plausible hypothesis if the EU summits affirmed the belief that such a measure could be considered sufficient to buffer the health emergency, so as to delay in time the concrete constitution of the so-called *Recovery Fund*, whose operation should be guaranteed by the EU budget (from 2021 to 2027)<sup>116</sup>.

And indeed, the realization of this Fund, as already anticipated, although it is attributable to an initiative shared by the countries of the Mediterranean area, will have to face the process of a complex *procedure* of content specification, during which - after the specification of its total amount and of the loans to be repaid against the non-repayable concessions, already arranged<sup>117</sup> - the other operational peculiarities will have to be defined; verifications that, as I have previously pointed out, could negatively affect the beneficial effects of the same, diminishing the positive results. This, obviously, apart from the 'sword of Damocles' represented by a possible new ruling of the German Constitutional Court, which could impose structural changes or a redefinition of the Recovery Fund to make it meet the criteria

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<sup>115</sup>See the editorial entitled *Agreement found on the Mes at the Eurogroup (Trovato l'accordo sul Mes all'Eurogruppo)*, available on [https://www.huffingtonpost.it/entry/accordo-sul-mes-allegrogruppo\\_it\\_5eb57c05c5b6a6733541a603](https://www.huffingtonpost.it/entry/accordo-sul-mes-allegrogruppo_it_5eb57c05c5b6a6733541a603).

<sup>116</sup>Significant in this regard is the position of the Italian Premier, See the editorial entitled *Eurogroup, found agreement on the Mes: only requirement the use of funds for health expenses. Conte: "Insufficient without Recovery Fund". Majority divided in the government, Cinque stelle Movement: "Inadequate". Pd: "This is an opportunity"* (Eurogruppo, trovato l'accordo sul Mes: unico requisito l'uso dei fondi per spese sanitarie. Conte: "Insufficiente senza Recovery Fund". Maggioranza divisa, M5s: "Inadeguato". Pd: "Così è un'opportunità"), available on <https://www.ilfattoquotidiano.it/2020/05/08/eurogruppo-trovato-laccordo-sul-mes-unico-requisito-luso-d-ei-fondi-per-spesa-sanitarie-durata-media-massima-prestiti-di-10-anni/5795662/>

<sup>117</sup>See the editorial entitled *Von der Leyen Plan: Recovery Fund of 750 billion of which 500 billion non-refundable. 82 billion in aid and 91 billion in loans planned for Italy (Piano Von der Leyen: Recovery Fund da 750 miliardi di cui 500 a fondo perduto. Per l'Italia previsti 82 miliardi di aiuti e 91 di crediti)*, available on <https://www.ilsole24ore.com/art/piano-von-der-leyen-recovery-fund-750-miliardi-cui-500-fondo-perduto--ADydiZT>.

(*rectius*: interests) of the German legal system.

10. Faced with this scenario, I believe it is essential that the Member States should send out a strong signal that they do not want the Union to be able to solve it. This is an extremely difficult undertaking because it cannot be separated from the renunciation, by the hegemonic countries of the eurozone, of the management of a leading role, as well as from the acceptance of the limits and criticalities (especially behavioural ones) long ascribed to some States of the Mediterranean area. On the other hand, it is equally necessary for the latter to take a different, more responsible line of conduct in fulfilling their commitments, so as to acquire greater credibility and trust on the part of the countries of northern Europe.

In the difficult expectation of seeing such a genetic modification of the EU reality realised, there seems to be no doubt that the European project is at present teleologically scaled down. Consequently, the original design of the founding fathers could be traced back to a mere customs union which, through the free movement of people, capital and services, would ensure a common market of proven utility. In the same way, the possibility of maintaining a monetary union by modifying the current parameters of its sustainability could be analysed, so as to mitigate its constraints after recovering the original interventionist autonomy of the national institutions currently involved in the structural structure of the Union.

This is a programme which, although it may seem clear in its logical simplicity, seems to me to be difficult to implement. In fact, it is likely that such a reconstructive hypothesis - in line with the overcoming of the authorising criteria that today make it possible to contain the disconnections of fiscal policies within predetermined limits - will *not* be accepted by all EU countries with a similar *favour*; since it is linked either to the loss of certain advantages achieved to the detriment of the general interest of all participants in the Union or to the costly demobilisation of the administrative bureaucratic apparatus of the latter.

Therefore, it is my conviction - and I hope to be wrong - that, at the end of

the pandemic, the Union, despite the proven lack of cohesion and solidarity on the part of some of its members, will survive as a «union of States» which, having abandoned the objective of political convergence, pursues common economic and financial objectives, proceeding in an individualistic (albeit undeclared) spirit and often on the basis of compromise solutions. It goes without saying that the use of the latter will allow the EU to continue on a formal level, whereas on the substantive level, having lost the possibility of achieving the goal of a «political union», the Community seems destined to become an *imago sine re* with respect to its original aims.

There are many unknowns in the not too distant future, starting with those concerning the difficult relations between the countries of the Mediterranean and those of northern Europe. These relations will be increasingly poised between the attempt of the former to defend themselves against the hegemonic tendencies of the latter and the affirmation of a leading role for Germany, supported by Holland, Austria and Finland. In all probability, the history, already known, of a few moments of revival of a dormant solidarity (as in the recent example ascribable to Ursula von der Leyen), as well as of *good intentions* that cannot be delivered on (as often happens for those formulated during great difficulties), is destined to repeat itself over time. Perhaps, the credibility gained by some politicians at the international level will succeed in tempering the conflictual situations that, in the future, may arise between countries that show a serious desire to recover and those that - accustomed to facing the rigour of an inflexible 'having to be' - judge their actions without making any concessions whatsoever! It is to be expected that there will once again be unheeded threats to «leave the EU»<sup>118</sup> and heartfelt appeals to the united spirit of Europe made by those who continue to believe in a possible political union of Europe!

At the end, therefore, it seems that we must sadly recognize that no room

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<sup>118</sup>See the editorial entitled *Conte: "let's get out of the EU" in case of bilateral agreements on tourism* (Conte: "usciamo dall'UE" in caso di accordi bilaterali su turismo), available on <https://www.money.it/conte-usciamo-da-UE-se-accordi-bilaterali-stati-turismo>.



will be given to the *right* belief that, within a community, solidarity must induce to help those in difficulty; on the contrary, we will witness the obstinate proposition of the thesis that the road to recovery is ‘conquest’ to be achieved through sacrifice and cannot be the result of donations. The encounter/clash between different cultures will therefore be perpetuated over time, indicative of an abysmal difference in relating to others, the result of an experience that gives content to the history that has distinguished the different peoples of Europe. This, in my opinion, is the scenario that follows from the decision of the Member States to ensure the EU’s resilience in any case; a scenario in which various motivations are reflected (all related to the interests and conditions in the field).

In this context, it should be pointed out that the fear of some countries still being judged as *ants* (compared to others that would play the role of *cicadas*), will be matched by a growing demand for the exit from the Union by Member States, such as Italy, characterized by political *conflict*; this, with the further obvious consequence of a possible affirmation of sovereigntist movements.

Recent events in Hungary - in which the fight against the *coronavirus* was considered to be a justifiable cause for giving Premier Orbán *full powers* - set a dangerous example in this respect. This Prime Minister has become, in fact, the recipient of a sort of ‘messianic investment’, which in concrete terms allows him to suspend «democracy» in that country<sup>119</sup>. The Union’s silent attitude to this event - which can be seen from the fact that the European Commission has merely ‘assessed’ the measures adopted by the Hungarian Parliament ‘in relation to fundamental rights’ instead of promptly activating the procedure laid down in Article

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<sup>119</sup>See the editorial entitled *Hungary, parliament gives full powers to Prime Minister Orbán to fight the coronavirus* (*Ungheria, parlamento dà pieni poteri al premier Orbán per combattere il coronavirus*), available on [www.repubblica.it/esteri/2020/03/30/news/ungheria\\_parlamento\\_pieni\\_poteri\\_premier\\_orban](http://www.repubblica.it/esteri/2020/03/30/news/ungheria_parlamento_pieni_poteri_premier_orban), where it is specified that the exceptional superpowers conferred on Orbán are renewable without limit; he is allowed to govern by decree, close the Parliament for a period of time at his discretion, impose that only official source information on the pandemic be accepted, where those who will be accused by the executive of spreading fake news - i.e. potentially also critical of the management of the health alarm and the disastrous state of public health or other decisions of the power - may be sentenced to up to 5 years in prison.



7 TEU<sup>120</sup>- is puzzling, waiting for the Court of Justice to make its *voice* heard, as it did recently in the case of Poland<sup>121</sup>, calling on Hungary to immediately suspend the measures taken. In the meantime, the Magyar affair once again attests to the lack of interest on the part of the EU in holding together countries that share ideals of democracy, which are the foundation of the construction of a united Europe.

One acquires the melancholic perception that the ideals of integration and union have been sacrificed in the face of economic interests, regardless of the fact that they may find new totalitarianism logic, contrary to the liberal democratic principles that, in the last century, had moved the *founding fathers*. It is clear that the disappointment of a vanished dream risks being accompanied by social upheavals and inconsistent political reactions<sup>122</sup>; in all probability, these will end up making all the EU Member States regret not having had the courage to dare to go all the way to break the bonds of a selfishness that has made them lose the possibility of achieving a greater good.

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<sup>120</sup>See the editorial entitled *Coronavirus, the Hungarian parliament gives full powers to Prime Minister Orban* (*Coronavirus, il parlamento ungherese dà pieni poteri al premier Orban*), available on <http://www.rainews.it/dl/rainews/articoli/coronavirus-parlamento-ungherese-pieni-poteri-premier-orban-3ab4e05d-8e58-470d-91a4-31520fd4f817.html>

<sup>121</sup>See the editorial entitled *EU Court in Poland: "Immediate suspension of Supreme Court reform"* (*Corte UE a Polonia: "Sospendere immediatamente la riforma della Corte suprema"*), available on [www.eunews.it/2020/04/08/corte-ue-polonia-sospendere-immediatamente-la-riforma-della-corte-suprema/128820](http://www.eunews.it/2020/04/08/corte-ue-polonia-sospendere-immediatamente-la-riforma-della-corte-suprema/128820)

<sup>122</sup>See the editorial entitled *Coronavirus and social anger, group on Fb: "Let's break all the supermarkets."* (*Coronavirus e rabbia sociale, gruppo su Fb: "Rompiamo tutti i supermercati"*) available on <https://www.lasicilia.it/news/palermo/332926/coronavirus-e-rabbia-sociale-gruppo-su-fb-rompiamo-tutti-i-supermercati.html>.

# FOR A RESILIENT, SUSTAINABLE AND INCLUSIVE RECOVERY IN EUROPE: CHALLENGES AND PROPOSALS IN RESPONSE TO THE PANDEMIC CRISIS \*

Rainer Masera \*\*

**ABSTRACT:** *A corollary of the pandemic crisis and the unprecedented contraction of economic activity in Europe is the inevitable increase in public debt, and the need for active support of the European Central Bank (ECB), centred on the emergency purchase programme of government bonds. There is broad agreement on the general thrust of fiscal and monetary policies, but significant differences exist on the appropriate implementation and efficacy of policy impulses, notably between “Nordic” and “Peripheral” countries. This paper starts by reconsidering the dogma of balanced budgets as a general principle. A different approach is based on the taxonomy of deadweight and (re)productive debt. If government bonds finance capital expenditure (infrastructures broadly defined) with net returns higher than the cost of borrowing, the debt is fundamentally self-financing. More broadly, by reason of the huge warranted public investments (as documented by the European Investment Bank, EIB and the European Commission, EC), it is argued that “good” infrastructure capital accumulation represents a solution not only to the economic consequences of the pandemic crisis, but also to the issue of the savings glut.*

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*On the basis of this approach an assessment is offered of the responses to the crisis. Special attention is devoted to the EC proposal of the Recovery Fund. The model proposed here dovetails with the Recovery approach, and suggests a structural scheme to finance European Union (EU) infrastructures (monitored at EU level) through the issue of EU Real Infrastructure Securities (EURIS). The securities would comprise not only debt but also equity and equity-related instruments. The emphasis would be on Public-Private-Partnership initiatives. These real infrastructure securities would form the basis of a new European debt at Union level. The need to ensure rigour in public finances would be satisfied in two concurrent ways: the quality and net returns of the assets financed and a gradual move to a new fiscal pact, whereby national public deficits would be exclusively allowed for the financing of sound public investments, agreed and monitored at European level. Safety clauses would be introduced for exceptional events and to cope with cyclical developments (with full reversal in upturns).*

**SUMMARY:** 1. Introduction. - 2. The Dogma of the Balanced Budget. - 3. A different taxonomy (and analysis) of public debt. - 4. The response of the EU to the crisis and the EC Recovery Fund Proposal. - 5. Reconstruction, infrastructures and EU Real Infrastructure Securities (EURIS). - 6. Concluding remarks and proposal for a new European Recovery Program.

1. In German and in Dutch the words debt and guilt are the same (Schuld). The aversion of the two Nordic countries to debt, and notably public debt, has deep and widespread roots which must be taken in due account<sup>1</sup>. Fears and pre-occupation emerged after the article written by Mario Draghi for the Financial Times on March 25 2020<sup>2</sup> which made history as in the case of his speech on July 26 2012. We all recall his “whatever it takes” with which he broke the doom loop between sovereign debt and banks and saved the euro<sup>3</sup>.

The message in 2012 was positive and captivating and overwhelmed some

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<sup>1</sup>In 2019 the public debt to income ratio was 60% in Germany and 49% in the Netherlands.

<sup>2</sup>See DRAGHI (2020), “We face a war against coronavirus and must mobilize accordingly”, Financial Times, March 25.

<sup>3</sup>See DRAGHI (2012), “Speech at the Global Investment Conference”, London, July 26.

initial opposition. The password of 2020 “a significant increase in public debt” inevitably connected to the global pandemic was clearly comprehensible for the grasshoppers but did not convince the ants. The contraposition explained by Aesop (in any event not listened to in his own country) 2500 years ago continues.

The coronavirus crisis represents a very serious risk for Europe, but can become an opportunity to face unresolved issues in a different and more satisfactory way. A crucial role in this respect is posed by the problems of public debt and of a new stability and growth pact. The two citations in the epigraph represent a thread in the analysis developed below.

2. Economics is not an exact science. Manifold theories, models and policy prescriptions can be found. At the cost of perhaps excessive simplification some debated issues on public debt are summarized below. According to analytical schemes which have roots in the “classical” authors of economics (Say, Ricardo, Smith) the supply of goods and services always creates a corresponding demand. The problems of effective demand and structural unemployment do not therefore present themselves. The economic system and market forces lead automatically to equilibrium and full employment. According to these schemes public debt can be justified to finance wars and/or the consequences of exceptional events; it must be in any event reimbursed with taxes (among which the inflation tax, undesirable on many accounts). It is therefore possible to temporarily finance public expenditure by borrowing, but later taxes will have to be increased to repay the debt, as would be understood by citizens immune to fiscal illusion; for them debt would not therefore represent net wealth but only deferred taxation. The equilibrium standard is therefore represented by balanced budgets.

This approach can be questioned under different perspectives<sup>4</sup>. However, it

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<sup>4</sup>Beyond the Keynesian critique the scheme can be criticized also on the basis of the analytical frameworks of “secular stagnation” and “savings glut”. For a survey of these approaches see MASERA (2020), “L’eccesso di risparmio in Europa: per un approccio diverso di politica economica”, in PAGANETTO, a cura di (2020), “Europa e sfide globali. La svolta del Green Deal e del Digitale”, Eurilink, University Press, Roma.

cannot be forgotten that the model was put as a pillar stone of the EU and of the Monetary and Economic Union (EMU). The Treaties and the Pacts that all contracting countries shared and subscribed hinge on these principles. In the first place, the EU itself corresponds to this proposition: revenues and expenditures should as a rule be balanced. These concepts are consubstantial to the Union. With reference to national budgets, the Maastricht Treaty - enacted in 1993 - and the adhesion to the EMU - created in 1999 - put constraints to public debt in terms of both flows and stocks with respect to GDP (the famous criteria of 3 and 60 per cent). The Maastricht framework had been elaborated looking backwards to decades of sustained growth after the war. The two criteria had not been conceived as particularly stringent<sup>5</sup>. They had become so with current and perspective growth declining. In spite of this, it was decided in 2012, with an Agreement between Contracting Member States, to make the common rules on national budgets much more stringent. This decision followed a budgetary constitutional change enacted in Germany in 2011<sup>6</sup>. The aspect of “apparent” stability was privileged with respect to growth. The Fiscal Compact (or Fiscal Stability Treaty) was approved in 2012 and put in place much stricter rules. The principle of budget balance was adopted also at national level with certain degrees of flexibility, notably in respect of cyclical adjustment and in the presence of exceptional events. For growing economies this implied that the ratio between debt and income would tend to zero: the ultimate objective of the system<sup>7</sup>.

Many eminent Nobel Prizes and more modest economists as the current author criticized this approach, but remained unheeded. Italy was among the first countries to introduce the Fiscal Compact, as it had forced (with mutual consent)

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<sup>5</sup>According to the Domar model (see DOMAR (1944), “The ‘Burden of the Debt’ and the national income”, American Economic Review, 34, 4) if deficits, real growth and inflation are constant the public debt/income ratio converges to a limit. If deficits are equal to 3%, the nominal rate of growth is 3%+2% -i.e. the target inflation plus the rate of growth recorded on average during the twenty years preceding Maastricht – the ratio asymptotically tends to  $3/(2+3)=60\%$ .

<sup>6</sup>The Schuldenbremse constitutional measure was introduced in Germany on January 1 2011. The Federal Government and the sixteen Federal States were required to gradually reduce deficit spending.

<sup>7</sup>According to Art.3a of the Fiscal Compact the budgetary position of each country will be balanced or in surplus. It must not exceed as a rule 3%.

the Delors Report and the Maastricht Treaty to enter from the beginning in the monetary union even if the debt/income ratio was significantly out of line<sup>8</sup>.

With the Fiscal Pact, a monetary union devoid of a “central fiscal capacity” and not yet endowed with a capital market union (where the two fundamental instruments to absorb shocks and play the role of macroeconomic stabilization were – and still are – lacking) was made even more rigid. The preconditions were posed for a mix of economic policies unbalanced toward the monetary instruments (whatever it takes) and ultimately destabilizing, also because ultra-low interest rates caused moral hazard.

3. A different approach to public debt is based on the criterion of the purpose of the government borrowing. The taxonomy is introduced according to which debt can be classified productive (or reproductive) as against deadweight. This distinction makes reference, with the necessary caveats, to a scheme of enterprise finance. If the debt incurred by the government finances capital expenditures, and more precisely investments in broadly defined infrastructures which are characterized ex ante and ex post by net (social) returns higher than the cost of finance, the net yields generate over time flows of resources which allow self-financing of the debt created. Beyond the impulse on effective demand, these public investments create a stream of income which is directly connected to the expenditures. This is not the case for deadweight indebtedness. Productive accumulation increases short term demand, with a multiplicative effect on income and does not collide with the budget constraint if effective demand is lacking. The positive effects of investments in good infrastructures not only have an impact on supply as a consequence of the higher human and physical capital, but can also lead to processes of augmenting total factor productivity; permanent surpluses (dynamic effect) are therefore created. The work of Arrow and Kurz (1970)<sup>9</sup> repre-

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<sup>8</sup>On these points see MASERA (2019), “EMU: an Italian perspective”, PSL Quarterly Review, Vol. 72, N.288.

<sup>9</sup>See ARROW and KURTZ (1970), “Public Investment, the Rate of Return, and Optimal Fiscal Policy”, J. Hopkins Press, Baltimore.

sents still now a relevant analytical framework on these issues.

The considerations developed here are especially relevant if the hypothesis is made that the economy of the Euroarea was and continues to be characterized by structural features of excess savings. This was the model adopted by the ECB which concurred to justify the policy of negative interest rates. The then President Draghi explained this in very simple terms: “There is a temptation to conclude that since very low rates generate these challenges they are the problem. But they are not the problem. They are the *symptom* of an underlying problem, which is insufficient investment demand, across the world, to absorb all the savings available in the economy. It is this phenomenon – the global excess of savings over profitable investments – that is driving interest rates down to very low levels. And so the right way to address the challenges raised by low rates is not to try and suppress the symptoms, but to address the underlying cause”<sup>10</sup>.

The approach outlined here shows the fallacy of the mantra according to which it is always desirable to reduce the ratio of public debt to income. The issue is more complex and requires intertemporal cost benefit analyses. It is however true that due account must be taken of the “fiscal space” which is available for a given country. The basic objection to the Fiscal Compact remains and should take into account both the de facto inefficacy to foster the virtuous behaviour in grasshopper countries and the observation that some countries augmented excess savings with structural current account surpluses. The approach presented also suggests that the simplistic thesis according to which public debt always represents a “poisoned legacy” for future generations is not necessarily true. If the debt is matched by physical and human capital, research&development, social infrastructure, public utilities and programmes to mitigate environmental risks, the heritage which is transmitted is positive, fruitful and indeed necessary for sustainable growth<sup>11</sup>.

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<sup>10</sup>See DRAGHI (2016), “Addressing the causes of low interest rates”, ECB, Frankfurt, May 2.

<sup>11</sup>A seminal contribution to these issues was offered by the Report of the Commission of the European Communities, “Growth, competitiveness, employment: the challenges and ways forward



4. The arguments developed can represent a thread for analysis and policies in the economic/political/institutional debate which took place in the EU in the first half of 2020. This led to important decisions of the Council of Heads of State and Government, of the European Commission and significant proposals from Members of the European Parliament. In June 2020 the process should be completed and defined on fundamental aspects. The highly simplified approach adopted in this paper allows to focus on the nature of the problems and to consider the hypotheses for solutions with regard to the emergency but also to the need for rapid reconstruction and lasting recovery.

Following the crisis the Stability Pact was correctly suspended. It is however necessary to reshape it in a structural way with a different declination of the links between stability, growth and rigour in public finances, as will be clarified below. During the first months of 2020 it was often maintained that Coronabonds – suggested by many countries not only as a response to the immediate needs, but also as an instrument to reform fiscal rules – are in reality a revisitation of the model (in any event not implemented) of the so-called Eurobonds. According to these arguments both instruments would represent mechanisms for mutualization of the new public debts imposed by the coronavirus emergency. Debts would therefore be utilized not only to finance the immediate requirements - to sustain incomes for families and enterprises in difficulty - but would project themselves to finance needs for reconstruction and the Green Deal itself.

The scheme presented in this paper suggests that a distinction must be made. While it is recognized that new current debt is necessary in this phase, it also indicates that countries in the past closer to grasshoppers than to ants have

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into the 21st century”, generally referred to as the Delors White Paper (COMMISSION REPORT, 1993, Bruxelles, December).

The document made a clear case for reducing current public spending to make room for investment in “good” infrastructures, to foster innovation, interconnectedness and competitiveness. It was also indicated that, by forging effective public-private partnerships, overall investment should be augmented to foster durable growth. The financing model set out in the White Paper envisaged the creation of a European Investment Fund which would be empowered to raise funds in domestic and international markets to finance specific projects by issuing EU bonds. The scheme was blocked in the European Council of June 1996, notably as a result of the opposition of the German Chancellor Helmut Kohl and the British Prime Minister John Major.

improperly used up their fiscal space and meet with difficulties which must be overcome rapidly. To request a mutualization of new current public debts is not realistic, even if the cohesion and solidarity of Europe are a common good also for “ant” countries<sup>12</sup>.

The deficiency of effective demand in the current conditions of crisis is so significant that it can also affect expected returns from investments in good infrastructures. Even the anticipated returns from the Green Deal appear to be compressed, while those from social infrastructures seem higher.

Much has been done and much is under way, beyond the suspension of the Fiscal Pact. A key role is played by the ECB: to recall, the Pandemic Emergency Purchase Programme (PEPP) until the end of 2020 but probably prolonged in the first months of the following year; the introduction of the Pandemic Emergency Longer-Term Refinancing Operation (PELTRO); the cut of interest rates on TITRO 3. The EC created the fund Support to Mitigate Unemployment Risks in Emergency (SURE). The ESM introduced financing facilities without conditionality for the sanitary emergency. The EIB set up facilities for the financing of enterprises. Above all, the EC outlined a path-breaking proposal to introduce a Fund/Instrument for Recovery, considered in detail below. After some initial hesitation President Lagarde has taken up Draghi’s model also from a semantic point of view (everything necessary).

A shadow cone was projected on this positive scenario by a judgement of the German Constitutional Court on 5 May 2020<sup>13</sup>. The ruling of the Constitutional Court affirmed that both the Court of Justice of the EU and the ECB acted outside the scope of their powers (*ultra vires*) in relation to the Public Sector Purchase Programme (PSPP) enacted by the ECB. These considerations more strongly apply to the PEPP initiative mentioned above. This economic, legal and institutional conflict could have significant consequences. The ECB itself has been asked to clarify

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<sup>12</sup>These points are developed by CAPRIGLIONE (2020), “Which cohesion and solidarity in the EU?”. Forthcoming in *Law and Economics Yearly Review*.

<sup>13</sup>See Proceedings initiated by Heinrich WEISS and Others (December 2019), Bundesverfassungsgericht, Karlsruhe.

its position and the Bundestag and the German Government are required to consider the revision of the mechanism. The German Court does not have jurisdiction over the ECB. The challenge is therefore posed for German authorities to take measures to reverse the policies and not to take implementing acts.

This debate could therefore at least partially cast doubts on the PEPP and therefore recreate the conditions for the heated debate on ESM/OMT conditional interventions and indeed reopen the fundamental issue of cohesion and solidarity in Europe. President Lagarde has immediately given assurances and positive responses; but the evolution of balances in the mechanism for creation on monetary base (Target 2) could rekindle discussions and tensions in the market. This could have very serious adverse consequences, because the confidence of citizens and operators in the full support of the ECB is fundamental: Italy in particular has an absolute need for faith and trust with a ratio of debt to income which is heading towards 160% -twice as high than in the Netherlands and in Germany – and with huge needs of liquidity for enterprises and households.

The ECB itself<sup>14</sup> recognised that “the fiscal measures help mitigate the economic fallout...but the associated increase in public debt levels could also trigger a reassessment of sovereign risk by market participants and reignite pressures on more vulnerable sovereigns going forward”.

According to indications of authoritative commentators and specialized newspapers the ECB might consider schemes whereby the Bundesbank could unilaterally exit the Quantitative Easing (QE). Scenarios might therefore be considered in which the ECB and the Eurosystem would continue to operate even without an active role of the most important National Central Bank of the Union. The primacy of EU law and the authority of the European Court of Justice are not under discussion, but this cannot imply to refuse to acknowledge the danger of these scenarios. Institutional and/or internal conflicts in the Eurosystem would inevitably create distrust and mistrust in the markets with unforeseeable consequences

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<sup>14</sup>See ECB, Financial Stability Review, May 2020, Frankfurt.

for the very existence of the system. The issue at stake is not only to open an institutional crisis: the decentralized implementation of monetary policy through the Target 2 mechanism makes the bonds de facto indissoluble. It may be recalled that currently, on the one hand the Bundesbank registers a positive balance of nearly € 1 trillion, while a corresponding negative balance is subdivided in broadly similar amounts between the Banca d'Italia and the Banco de Espana.

The completion of the ambitious and coordinated actions of political economy in Europe requires a rapid implementation of the Recovery Initiative which should be defined by end-June 2020 to be activated at the beginning of next year.

The model outlined here is meant to offer a contribution to this debate with a view to a Recovery Plan capable of overcoming the constraints of the savings glut and of the inadequate economic policies adopted in the past.

Schemes and models of Eurobonds are distinct and separate from those of Coronabonds, which are concerned with the immediate requirement to sustain the loss of income for households and enterprises. The heated but confused debate intertwined and inevitably wore out both terms. The Recovery Fund can represent a model capable of evolving toward the creation of a new and different European public debt, intimately linked with the relaunch of investments in the private sector. It would be geared to the huge productive infrastructures required in the EU: from the Green Deal to the Digital Economy, to Research & Development, to expenditures in human, physical and social capital<sup>15</sup>.

The EC proposal on the Recovery Fund presented on May 27 2020<sup>16</sup> to the Council and to the European Parliament<sup>17</sup> has highly innovative features. The re-

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<sup>15</sup>See EIB (2019), "Retooling Europe's economy", Luxembourg, and PAGANETTO a cura di (2020), "Europa e Sfide Globali". La svolta del Green Deal e del Digitale", Eurilink, University Press, Roma.

<sup>16</sup>See EC (2020), "Europe's moment: Repair and prepare for the next generation", EC Europa EU, Bruxelles, May 27.

<sup>17</sup>The Commission Plan had been preceded by a Resolution of the European Parliament (see WEBER et al. (2020), "Motion for a Resolution", European Parliament, Bruxelles, May 12), presented by many European M.P.s belonging to and on behalf of different political groups. The resolution underlined the need for solidarity and efficacy in the transformation of the economies of the EU countries. It asked to reinforce the resiliency of the economic system through a common approach to undertake strategic investments. The underlying objectives are fully consistent with

construction plan represents a move along lines suggested in this paper. For the first time the Commission proposes to tap financial markets for an amount as high as €750 md. This would require the activation of the common guarantees deriving from the budget of the EU. The recovery instrument would meet the needs of EU countries both with grants and loans. The main recipient country would be Italy with €173 md (82 grants and 91 loans). There is no mutualization of past debts, but, looking forward, the conditions are created for a common financial capacity. The Recovery Fund is renamed “next generation EU”. An argument developed in this paper can be underlined: “reproductive” debt is not a poison for future generations. On the contrary it can be the most important heritage that the current generation bequests to the following.

The envelope of proposed interventions is very relevant. It is necessary to add to the €750 md indicated above the proposal to utilize the next EU budget 2021-2027 amounting to €1100 md, as well as the package already approved (ESM, SURE, EIB) equivalent to €540 md, The total amount for what has been defined as an EU Marshall Plan reaches €2400 md, and can be further increased up to €3000 md through internal multipliers.

Technically the €750 md are obtained by increasing “temporarily” the ceiling on own resources of the common budget to 2% of the Union GDP. By changing the difference between commitments and disbursements through an increase of the former, a “cushion” of exigible resources is created, which represents the basis to permit the issue of bonds in the markets. The debt should be reimbursed between 2028 and 2058 through the common post-2017 budget. This mechanism reduces immediate strains on national budgets and makes it possible to cover debt issues through future European budgets (taxes on CO2 emissions, infor-

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those elaborated in this article and those presented in Paganetto (2020) *op. cit.* and VELO (2020), “Towards a Constitutional Federal Order in Europe”, forthcoming. The following citation is especially relevant: “Calls therefore for investments to be prioritized into the Green Deal, the digital agenda and achieving European sovereignty in strategic sectors, with a consistent industrial strategy and while shortening and diversifying supply chains and reorienting trade policies; calls for the creation of a new standalone European health programme....considers it crucial that these efforts have a strong social dimension ....so as to ensure that the recovery strengthens territorial cohesion and competitiveness”.

mation multinationals, plastic and digital transactions are envisaged).

President Von der Leyen affirmed that “the more courageous proposals are also the safer ones”. The resources made available would be utilized for priority objectives, such as climate change, the digital economy and health and would be divided according to a key which is based also on the need of the countries more hardly hit. Resources would be made available from 2021 with a gradual activation of leverage.

The ambitious project will be subject to debate, as has been anticipated by political reactions in “frugal countries”. An important theme will be represented by the requirement, underlined by many observers, to maintain the AAA rating of the EU, which depends on many factors, first and foremost the institutional framework which ensures de facto a joint and several liability. The impact of the Fund on “peripheral high debt countries” – as Italy – will depend on the proportion between grants and loans, the capability to utilize rapidly and efficiently the funds available and the growth multiplier, to sustain the recovery and the reabsorption of the debt/income ratio.

5. The model presented in this paper of a “real” European public debt is consistent with the Recovery Fund proposal: it can be viewed as a hypothesis of institutional development aimed at the consolidation of sustainable and cohesive growth in the Union and to a structural and rigorous reformulation of the Fiscal Pact. The Recovery Initiative could be seen as the first fundamental step of a process for the construction of new infrastructures at area level. The projects would be presented by a single country, or group of countries, or the Commission itself: they would be subject to common scrutiny and specific monitoring to be undertaken by the Commission, the EIB group and the InvestEU Fund<sup>18</sup>. According to the

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<sup>18</sup>The InvestEU Programme will become operational in 2021 and cover the period of the EU budget 2021-2027. It will bring together various EU financial instruments to support investment. It is built on the European Fund for Strategic Investments (EFSI) and provides EU guarantees. The main policy areas covered are: traditional infrastructures, research and innovation, digitization, small and medium sized businesses and social investment. See EC (2019), “What’s next? The

scheme outlined the process would be financed through the creation of EU Real Infrastructure Securities (EURIS), with the security of enduring productive assets and their real returns. An additional guarantee could be offered by the EU and its member states. EURIS would comprise debt, equity and combined instruments. The debt component should satisfy the criteria for a triple-A rating. The scheme outlined links new public debt to the financing of new capital infrastructure in the EU. This is the challenge to which all countries would be called. “Frugal” countries should be reassured that the new debt would represent the basis for a reconstruction of a Union based on rigour, growth and preservation/enhancement of the value of savings. According to different, flexible modalities – which have been successfully experienced by the EIB and by the EFSI – the infrastructural projects would be able to attract private co-financing, which is vital for the success of the scheme. The support of National Development Banks and of banking and insurance firms (with less rigid capital and regulatory constraints) would contribute to the lasting recovery of the economy in Europe.

In the past decade public and private investment activity in the Euroarea was subdued. Negative interest rates did not have the hoped-for results. The EIB documented this unsatisfactory performance<sup>19</sup>. In Italy the negative effects from the contraction of the flows were magnified by the insufficient quality of the investments, often polluted by phenomena of corruption. The challenges in Europe to foster good infrastructures are extremely relevant.

The phenomena of digitization and servitization, the Cyber Physical Systems (CPS), the Artificial Intelligence (AI), the Big Data represent global megatrends which reshape business models and value creation chains in all sectors of economic systems, notably in the public sector. The global pandemic crisis is already leading to critical analyses of the very process of globalization. Attention focuses on “Glocal” models and on more resilient value chains compared to those which have

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InvestEU Programme 2021-2027”, Bruxelles. The operation of the programme will be coordinated with the broader Recovery Fund Initiative.

<sup>19</sup>See EIB (2019), “Retooling Europe’s Economy”, Luxembourg.



been broken during the crisis. Physical and human capital become more deeply intertwined. Lifelong education and (re)training - drawing on the opportunities of distance work - represent key instruments to cope with these processes, to sustain competitive employment and social growth. Comparative advantage gives way to competitive advantage. The huge effort of adapting to the new work modalities imposed by the coronavirus epidemic represents a solid basis to reshape more efficient productive networks.

Radical changes are remodelling - in all fields and sectors - “good” infrastructure investments, both public and private. Technology leads to the bundling of activities, goods and services and transforms/interlaces universities, research centres and enterprises. There is greater awareness in societies of the risks from weaknesses in social capital and from insufficient measures to cope with climate and environmental risks. Traditional physical infrastructures - notably transport networks and the housing stock – are subject to rapid obsolescence. This is also true for another critical infrastructure: defence. Demographic factors impact migration, aging and urbanization, with corresponding new infrastructure needs. The rapid obsolescence of public capital would require larger flows of gross new investments to keep the stock intact. But, after the Great Financial Crisis of 2007-2008, the accumulation in economic and social infrastructure showed instead a constant decline.

In the EU investments in infrastructures foreseen before the Commission proposal for the Recovery Fund would have been half of those warranted for the next decade, which are estimated in the order of €900 md per year<sup>20</sup>. Closing this gap would permit the reconstruction to start on a solid basis, to overcome the restraints of the savings glut by addressing its fundamental cause, to restart the process of virtuous integration in Europe with a sustainable and inclusive growth.

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<sup>20</sup>Analytical and quantitative references on these phenomena are offered in MASERA (2018), “The new infrastructures challenges in the EU and the need for a deepened PPP paradigm”, *The European Union Review*, Vol 23 No. 1.2.3. An update of the public investment needs in the EU over the next few years, with focus on delivering the green transition and the digital transformation is offered in the COMMISSION STAFF WORKING DOCUMENT (2020), “Identifying Europe’s recovery needs”, Bruxelles, May 27.

Good infrastructure investments, beyond the impact on effective demand, augment the growth rate of total factor productivity and contribute to shelter the economies from the risks of climate change which have acquired both real and financial (Green Swan) dimensions.

The accumulation of infrastructures broadly defined and the financing scheme proposed, with market based schemes and Private/Public initiatives – with a view to crowding-in private investments - can become the key to bring the EU on a resilient growth path and to start the solution of the debt problem through growth, without the need for an exceedingly tight financial straight-jacket<sup>21</sup>. These goals are especially relevant in the Euroarea where budget constraints in many countries negatively affect the important requirements of accumulation of net public capital. New compelling evidence on these issues has been painstakingly gathered in the Commission Staff Working Document (2020 op. cit.). Already before the Corona-virus crisis net public investment in the EU was not sufficient to keep the public capital stock/GDP ratio: “Net public investment, i.e. gross fixed capital formation less consumption of fixed capital, amounted to only 0.3% in the EU 27 in 2019, a level which would – if maintained – result in a declining public capital stock as a share of GDP”. In addition econometric documentation is provided indicating that, as a percentage of GDP, public sector net fixed capital formation was lower in countries with higher gross government debt <sup>22</sup>.

It is not suggested that EMU countries adopt – through changes in treaties or intergovernmental accords – a traditional “golden rule” for public capital investments on a national basis<sup>23</sup>. It is instead proposed to create and rapidly enact a framework for the construction of new infrastructures on a common basis. Pro-

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<sup>21</sup>On these points see DOMAR (1993), “On deficits and debt”, *American Journal of Economics and Sociology*, 52, 4.

<sup>22</sup>The challenges are especially relevant in Italy to overcome the structural gap of low growth of product and productivity. See VISCO (2020), “Considerazioni Finali”, *Relazione Annuale Banca d’Italia*, Roma, 29 maggio.

<sup>23</sup>An interesting proposal of a combination of expenditure rules for public non-investment expenditure and a golden rule for public investment is presented in SCHUSTER (2020), “Draft Report on economic policies of the euro area 2020”, European Parliament, Committee on Economic and Monetary Affairs, Bruxelles, June 16.

ject proposals by the various countries would be subject to joint scrutiny and specific monitoring of the investments to be undertaken by European institutions. The traditional GDP key would be the primary element of reference for the creation of the new real EU debt, but due regard would be given to the quality of the investments proposed and to the specific relative needs of the various countries (a mechanism of this type has been envisaged in the EC Reconstruction Proposal). Investments would be in principle characterized by economic returns higher than both growth rates in GDP and rates of interest paid on debt instruments. Selected projects should have a cost-benefit ratio higher than unity, with the appropriate adaptations that policy models identify and require<sup>24</sup>. If the market return promised by the project is lower than the cost of market finance each country could finance the gap, but through the issue of national (current) debt. The large and complex portfolios of projects could be managed for instance by the EIB and the InvestEU. The projects could be bundled and securitized. They would be accompanied by appropriate forms of segregation of market returns.

The model outlined in this paper comprises financial securities which would also use equity and equity related instruments. After the crisis, risks of excess leverage will inevitably manifest themselves also as a consequence of ultralow interest rates<sup>25</sup>. It is therefore necessary to consider appropriate support to equity-based financial instruments. The EURIS approach would represent a move in this direction. The need for rigour in public finances would be ensured by the gradual adoption of a system where national public deficits would be allowed (except for exceptional circumstances and cyclical developments) only for the finance of “good” public investments, subject to common European monitoring.

The overcoming of the pandemic crisis from a sanitary point of view will not take us back to preceding conditions. A paradigm shift is inevitable and necessary,

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<sup>24</sup>On these points see EC (2014), “Guide to cost-benefit analysis of investment projects”, EC Europa EU, Bruxelles and INSTITUTE FOR GOVERNMENT (2018), “How to value infrastructure”, London, UK.

<sup>25</sup>These points are examined in MASERA (2020), “L’eccesso di risparmio in Europa: per un approccio diverso di politica economica”, in Paganetto, a cura di, 2020.

as has been argued in this article<sup>26</sup>. Above all a new balance must be found between monetary and fiscal policies, unless we fall into the promises of the syren song which suggests that the response lies in the unlimited creation of money and the inevitable submission of central banks to political power.

The approach outlined here would count on the active support of the ECB not only for the purchase of EURIS, but also – in collaboration with the ESM – to activate policies of (reverse) debt management. This would overcome the inherent weakness of the nineteen sovereign yield curves in the Euroarea. A term structure of “safe” yields would be created which would allow a more efficient transmission of monetary impulses of the ECB and would permit a gradual reversal of the negative interest rate policy. The creation of safe assets would permit to overcome a major unresolved problem in the workings of the EMU.

6. Before drawing some concluding remarks three flashbacks may be helpful. The first one takes us to the end of the Second World War, when European countries, exhausted by the war events and also by famine and starvation, could count on a forward-looking help from the United States. Between 1946 and 1947 American policy was marked by profound changes. The conventional wisdom elaborated by the “hawk” Henry Morgenthau, Treasury Secretary, envisaged the break-up of Germany and a plan based on war repayments and the prohibition for the German regions to undertake industrial reconstruction. Germany should have become an agricultural and pastoral country. President Truman, who took the heritage and the vision of President Roosevelt, drew with some close collaborators in his government a completely different program. In the first place a moratorium was introduced to the repayment of war damages. A Hope Plan was outlined which criticised the Morgenthau project. In 1947 an operational scheme was adopted: the European Recovery Program (ERP), which was known as the Marshall Plan from the name of the Secretary of State George Marshall, a former General

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<sup>26</sup>These issues are cogently treated in de LAROSIERE (2020), “Reflections on the health and financial crisis”, Eurofi, Bruxelles, March 30.

who was awarded the Nobel Peace Prize in 1953. The Reconstruction Plan – beyond the immediate interventions of humanitarian character – was based on reconstruction projects and support to public and private investments for all European countries – notably Germany and Italy. The resources made available by the United States represented the catalytic trigger for capital expenditures largely financed through the savings rapidly created inside the European countries, notably through bank credit creation processes. Investment projects were initially monitored by the United States but were gradually left to the decisions of European countries and to the scrutiny of selected, commonly agreed, financial institutions.

The second flashback brings to Paris, where on 18 April 1951, with an International Treaty, six European countries (Belgium, France, Western Germany, Italy, Luxembourg and the Netherlands) created the European Coal and Steel Community (ECSC). The common market for coal, iron and steel was created as a result of an initiative of Jean Monnet and Robert Schuman, with the full support of Chancellor Konrad Adenauer and of Prime Minister Alcide De Gasperi. The purposes of the ECSC were to put in common the production of these key goods for the reconstruction and to foster a cohesion process in Europe. The ECSC and later the Euratom and the European Economic Community (EEC) - instituted in 1957 with the Treaty of Rome - were the “Communities” which opened the way to the EU. The Communities approach was shaped on the basis of the economic and political theories of the social market economy developed in Germany, notably by Alfred Muller Armack and Ludwig Erhard<sup>27</sup>.

The third flashback goes back to 24 August 1953 when an International

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<sup>27</sup>Many authoritative economists, jurists and politicians believe that this scheme can be resumed as a model for the creation of new European Communities. Contributions along these lines have been elaborated with a view to presentation at the Conference on the Future of Europe proposed by the EC and the European Parliament with the full support of President Emmanuel Macron and of Chancellor Angela Merkel. The Conference should have taken place in May 2020 but was postponed because of the pandemic crisis. It should have examined also the conditions for the creation of a European State according to a federal approach and going back to the principles of the social market economy. For a contribution to this debate reference is made here to VELO (2020), “Towards a Constitutional Federal Order in Europe”, forthcoming. The model elaborated in this article and that proposed by Velo are different but could become consistent once the dogma of budget balance as the basis of the economic and political reconstruction in Europe is reconsidered.

Treaty was signed in London (participating states comprised European countries, including Greece and Italy, and the United States). The Treaty allowed Western Germany to halve war debt from \$23 md (equivalent to 100% of the German GDP in those years) to \$11,5 md, which was deferred by 30 years. This second amount should have been reimbursed after the eventual reunification of the two Germanies, but in 1990 no agreement was reached.

The EURIS project outlined here takes some inspiration from the three flashbacks just recalled. The reconstruction which can and must be started in Europe on the basis of the Recovery Initiative can be consolidated according to the framework for the creation of a European public debt, exclusively accounted for by good public investments, which should represent the flywheel for a broader process of productive accumulation by private enterprises. The process for infrastructure accumulation would be based on proposals and projects presented by the various countries with the monitoring and supervision of the EIB and of the InvestEU. Beyond the immediate interventions required to cope with the emergency, public budgets would gradually be constrained to balance for non reproducible expenses. This model would also allow the ECB to free itself from the need of securities purchases more and more related to the financing of public expenditures and debts. This would inevitably thwart its independence. Looking even more forward, on these premises a follow up could be given to the vision not only of Delors<sup>28</sup> but also of President Mitterrand and Chancellor Kohl to transform the Economic and Monetary Union in a Political and Fiscal Union<sup>29</sup>.

Statesmen, politicians, entrepreneurs and European citizens are called to decisions consistent with those of Founding Fathers, to farsighted choices in the common interest. The solidarity of ant countries must be accompanied by clear evidence that grasshopper countries are taking concrete steps to modify previous

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<sup>28</sup>See DELORS (1989), "Report on Economic and Monetary Union", EU Commission W.D., Bruxelles, 17 April.

<sup>29</sup>This had been openly and officially indicated by the two Statesmen. See KOHL and MITTERRAND (1990), "Letter by the German Federal Chancellor Helmut Kohl and French President Francois Mitterrand to the Irish Presidency of the EC", Agence Europe, Bruxelles, April 20.

behaviour, notably with cuts to unproductive public expenditures and with the severance of reins and restraints to virtuous growth. If these conditions are met the crisis can become an opportunity. Otherwise, in the absence of vision (without illusion) of all parties, the danger side may prevail.



## IMPLICATIONS OF COVID-19 CRISIS FOR REGULATORY REGIME IN RUSSIA \*

Ilya A. Goncharenko \*\* - Gennadi P. Tolstopyatenko\*\*\*

**ABSTRACT:** *This article provides an overview of the regulatory measures adopted in Russia to address the negative effects of the Covid-19 crisis. It includes an analysis of three packages of measures carried out by the Federal Government to support business. The aim of the article is to examine a complete set of regulatory solutions for business offered in the past several months. It also offers statistical data and summary of the Nationwide Action Plan securing recovery for employment and population's income, economic growth, and long-term structural changes.*

**SUMMARY:** 1. First package of measures. – 2. Second package of measures. – 3. Third package of measures. – 4. The National Action Plan.

1. The COVID-19 pandemic has become a serious test for the global economy. In Russia restrictions imposed by the state and self-isolation regime have a huge impact on every business and the situation encourages taxpayers to quickly learn a variety of remote services. Russian Federal Government has so far offered three packages of anti-crisis measures to support business and individuals. The first package of measures to combat economic consequences of the spread of coronavirus infection was adopted by the Russian Federal Government on 17

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\*This article is a result of joint and common research. Sections 1-2 have been drafted by Ilya Goncharenko, sections 3-4 have been written by Gennadi Tolstopyatenko.

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March 2020. It was primarily aimed at delaying current payments due by businesses. In total, the delayed payments amounted to more than UK 4.76 billion pounds sterling<sup>1</sup>. More than 500 thousand companies that employ more than 5 million people took advantage of such deferrals<sup>2</sup>.

This first package of measures covered several areas of economy. One of the main areas was healthcare, where for the period from March 20 and until July 1, Federal Government introduced temporary rules for processing sick leave and payment of sick benefits for the period of Covid-19 self-isolation, including:

- individuals who have arrived from countries where the coronavirus was detected and those who live with them were remotely issued electronic sick leave for 14 calendar days;
- each Subject of Federation determined no more than three health care organizations to issue such medical certificates;
- citizens were allowed to send applications for a sick leave through personal accounts on the Social Insurance Fund (SIF) website;
- employers were obliged to submit data to SIF for the assignment and payment of sick benefits (according to the rules of a Pilot project “Direct payments”). This was to be done within two business days from the date of a request from SIF or the date that employee provided his/her electronic sick leave medical certificate number.

To calculate sickness benefits rules were also changed. Those were to be calculated based on the amount of at least one minimum wage<sup>3</sup> per month

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<sup>1</sup>Specifically, 410 billion roubles at the Central Bank of Russia’s exchange rate valid on 04.06.2020.

<sup>2</sup>Official data from the official COVID-19 site of the Russian Federal Government, available at: <<http://covid.economy.gov.ru/itogi-realizacii-pervogo-antikrizisnogo-paketa>> (accessed 4 June 2020).

<sup>3</sup>In accordance with section 3 of the Federal Law of the Russian Federation dated 19.06.2000 N82-FZ “On minimal wages”, “Minimum wage” is used to regulate wages and determine the amount of benefits for temporary disability, pregnancy and childbirth, as well as for other mandatory social insurance purposes. Application of the minimum wage for other purposes is not allowed.

(amount fixed annually by a Federal Law<sup>4</sup>, starting January 1, 2020 it is approximately UK 140 pounds sterling per month<sup>5</sup>). New rules will remain in effect at least until the end of 2020.

To support the healthcare system Federal Government has allocated UK 117.5 million pounds sterling<sup>6</sup> towards incentive payments for medical workers, who provide assistance to people infected with coronavirus. Another UK 18.5 million pounds sterling<sup>7</sup> were allocated to incentivize payments for the employees of Rospotrebnadzor<sup>8</sup> divisions. Besides, a simplified state registration procedure was established for 36 types of medical devices, including masks and respirators, allowing them to be brought to market faster.

In addition to healthcare, Federal Government adopted measures to postpone rental payments for small and medium-sized businesses (SMEs)<sup>9</sup>. SMEs were allowed to conclude additional lease agreements in relation to state property to provide for deferred rental payments. Federal Executive Authorities were instructed to notify SMEs of a possibility to conclude such additional agreement to defer payment of rent within three business days from March 19 and to conclude this additional agreement, providing for 2020 rental payments to be effected in equal parts in 2021, within three business days after receiving a relevant request from SMEs. Subjects of Federation and municipalities were recommended to take similar measures.

On March 2020, the Federal Government approved a list of sectors of the Russian economy mostly affected by the spread of new coronavirus infection to

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<sup>4</sup>Federal Law of the Russian Federation dated 19.06.2000 N82-FZ (as last amended on 27.12.2019), “On minimal wages” available at <<http://www.consultant.ru>> (accessed 7 June 2020).

<sup>5</sup>In particular, 12,130 roubles per month at the Central Bank of Russia’s exchange rate valid on 05.06.2020.

<sup>6</sup>10.2 billion roubles at the Central Bank of Russia’s exchange rate valid on 05.06.2020.

<sup>7</sup>1.6 billion roubles at the Central Bank of Russia’s exchange rate valid on 05.06.2020.

<sup>8</sup>Federal Authority for supervision over consumer rights’ protection and human welfare.

<sup>9</sup>Ordinance of the Russian Federation Government dated 19.03.2020 N 670-p “On measures to support small and medium-sized businesses” available at <<http://www.consultant.ru>> (accessed 7 June 2020).

provide priority targeted support. Such sectors included air transportation, airport activities, road transport; culture, leisure and entertainment; sports and recreation activities; activities of travel agencies and other organizations in the field of tourism; hotel business; catering, organizations of additional education and non-governmental educational institutions; activities in the sphere of organizing conferences and exhibitions; activities in the sphere of providing household services to citizens (repair, laundry, dry cleaning, hairdressing and beauty salons)<sup>10</sup>. In total the list covers 11 industries and 526 thousand enterprises, which employ 5.3 million people<sup>11</sup>. Following assistance was to be provided to these industries:

- payments of all taxes to be deferred by 6 months (excluding VAT);
- payments of insurance contributions to the state social security funds to be deferred by 6 months (only for microenterprises<sup>12</sup>);
- loan payments by SMEs to be deferred by 6 months;
- additional measures to ensure sustainable lending, including provision of state guarantees and subsidies;
- a 6 months moratorium for creditors to file applications to bankrupt companies and collect debts and fines from enterprises;
- expanding the ability of SMEs to obtain loans at a discount rate of no more than 8.5% per annum;
- moratorium on carrying out test purchases, scheduled and random

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<sup>10</sup>Official data from the Ministry of economic development of the Russian Federation web-site, available at: [https://economy.gov.ru/material/news/ekonomika\\_bez\\_virusa/pravitelstvo\\_opredelilo\\_22\\_otrasli\\_kotorye\\_pervymi\\_poluchat\\_gospodderzhku.html](https://economy.gov.ru/material/news/ekonomika_bez_virusa/pravitelstvo_opredelilo_22_otrasli_kotorye_pervymi_poluchat_gospodderzhku.html) (accessed June 07, 2020).

<sup>11</sup>Inna Artemjeva, "The cost of two packages of anti-crisis measures by the government is announced", 21.04.2020, Moskovsky Komsomolets newspaper, available at < <https://www.mk.ru/economics/2020/04/21/ozvuchena-stoimost-dvukh-paketov-antikrizisnykh-mer-pravitelstva.html>>.

<sup>12</sup>Current Russian legislation requires microenterprises to have an average number of employees of no more than 15 and the turnover to be no more than UK 1.382 million pounds sterling per annum. Restrictions on the structure of chartered capital are the same as for small businesses.

inspections of businesses<sup>13</sup>.

In order to fulfil the first package of measures to support Russian economy the Federal Government spent approximately UK 3.45 billion<sup>14</sup> pounds sterling<sup>15</sup>.

2. The second package of measures was announced by Russian President Vladimir Putin at a meeting with the members of the Federal Government on 15 April 2020. The list of sectors of the Russian economy mostly affected by the spread of new coronavirus infection was extended to include in particular retail car trade, electronics, furniture and other types of non-food products' retail. All SMEs from the affected sectors (not just microenterprises) became entitled to defer their insurance contributions to the state social security funds. Arrears on taxes and contributions during the period of deferral could be paid in equal parts over the course of a year. In addition to that companies and entrepreneurs from the list of mostly affected industries could receive funds from the federal budget to partially compensate for their losses. This subsidy should be calculated based on the number of employees and the minimum wage.

Acceptance of applications for payment began on May 1, 2020. To obtain the subsidy, it was necessary to meet certain criteria. Among the most important of those were the following:

- to be in the register of SMEs as of March 1;
- not to be in the process of liquidation, in bankruptcy proceedings etc.;
- as of March 1, 2020, not to have arrears on taxes and insurance contributions in excess of apprx. UK 35 pounds sterling<sup>16</sup>;
- keep at least 90% of the staff compared to the number of employees in

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<sup>13</sup>Official data from the Ministry of economic development of the Russian Federation web-site, available at: <[https://economy.gov.ru/material/news/ekonomika\\_bez\\_virusa/pravitelstvo\\_opredelilo\\_22\\_otrasli\\_kotorye\\_pervymi\\_poluchat\\_gospodderzhku.html](https://economy.gov.ru/material/news/ekonomika_bez_virusa/pravitelstvo_opredelilo_22_otrasli_kotorye_pervymi_poluchat_gospodderzhku.html)> (accessed June 07, 2020).

<sup>14</sup>300 billion roubles at the Central Bank of Russia's exchange rate valid on 05.06.2020.

<sup>15</sup>Inna Artemjeva, "The cost of two packages of anti-crisis measures by the government is announced", 21.04.2020, Moskovsky Komsomolets newspaper, available at: <<https://www.mk.ru/economics/2020/04/21/ozvuchena-stoimost-dvukh-paketov-antikrizisnykh-mer-pravitelstva.html>>

<sup>16</sup>3,000 roubles at the Central Bank of Russia's exchange rate valid on 09.06.2020.

March, or less than 90%, if the difference in the number of employees in absolute terms is only one unit.

To determine the amount of such federal subsidy, it is necessary to multiply minimum wage, i.e. UK 140 pounds sterling per month<sup>17</sup>:

- for organizations - by the number of employees in March;
- for individual entrepreneurs with employees - for the number of employees in March, increased by one;
- for the individual entrepreneurs with no employees – by one.

Besides that, taxable basis for the income tax on enterprises would no longer include subsidies received from the federal budget in connection with the spread of coronavirus. “Sanitary” expenses became deductible for the income tax on enterprises purposes.

They also adopted a very interesting tax measure. Generally, companies have to pay income tax every month in Russia. But if a company’s turnover does not exceed UK 173,000 pounds sterling<sup>18</sup> in every one of the preceding 4 quarters of the year, then such company may pay income tax on a quarterly basis rather than monthly<sup>19</sup>. Relatively, the second package of measures increased the threshold to around UK 288,000 pounds sterling<sup>20</sup> of turnover per quarter, but only for 2020. In addition to the mentioned above new measures were introduced to facilitate obtaining federal guarantees for business<sup>21</sup>. For instance, they limited cases when the guarantee could be revoked by the guarantor. There were only two of them left:

- modification of certain conditions of the main obligation without the prior

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<sup>17</sup>12,130 roubles per month at the Central Bank of Russia’s exchange rate valid on 09.06.2020.

<sup>18</sup>15 mln. roubles at the Central Bank of Russia’s exchange rate valid on 05.06.2020.

<sup>19</sup>Section 286(3) of the Russian Tax Code (part two) dated 05.08.2000 N117-FZ (as amended on 08.06.2015), available at <<http://www.consultant.ru>> (accessed June 7, 2020).

<sup>20</sup>25 mln. roubles at the Central Bank of Russia’s exchange rate valid on 05.06.2020.

<sup>21</sup>Federal Law dated 22.04.2020 N120-FZ “On amendments to the Budget Code of the Russian Federation and Federal Law “On suspending certain provisions of the Budget Code of the Russian Federation and establishing peculiarities of execution for the budgets of budgetary system of the Russian Federation in 2020”“, available at <<http://www.consultant.ru>> (accessed June 8, 2020).

written consent by the guarantor;

- misuse of credit funds.

On April 2020 Russian Government adopted an Ordinance<sup>22</sup>, which provided for a 12-month extension of licenses that expire (expired) between March 15 and December 31, 2020. The list of licenses to be automatically extended includes inter alia:

- licenses for the production and turnover of ethyl alcohol, alcoholic and alcohol-containing products (including licenses for the retail sale of alcoholic products);

- licenses for the use of mineral resources;

- licenses for communication services, television broadcasting and (or) radio broadcasting;

- licenses for private detective (detective) activities and private security activities;

- state registration of medical products for veterinary use;

- state registration of a medical product for medical use.

Final measures from the second package related to public procurement<sup>23</sup>. Among those one should highlight more opportunities to conduct a small purchase, i.e. the limit to sign a contract with a single supplier was doubled to reach UK 7,000 pounds sterling<sup>24</sup>. The annual percentage limit for such purchases was also increased: it became 10% instead of 5% of the total annual volume of procurement. However, in monetary terms, the limit remained the same – UK 577,000 pounds sterling<sup>25</sup>. Besides, the requirement to provide warranty

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<sup>22</sup>Ordinance of the Russian Federation Government dated 03.04.2020 N 440 (as amended on 22.04.2020) “On extending the validity of permits and other features in relation to licensed activities in 2020”, available at <<http://www.consultant.ru>> (accessed June 9, 2020).

<sup>23</sup>Federal Law of 24.04.2020 N 124-FZ “On amending certain legislative acts of the Russian Federation on ensuring sustainable economic development in the context of a deteriorating situation due to the spread of a new coronavirus infection”, available at <<http://www.consultant.ru>> (accessed June 8, 2020).

<sup>24</sup>600,000 roubles at the Central Bank of Russia’s exchange rate valid on 08.06.2020.

<sup>25</sup>50 mln. roubles at the Central Bank of Russia’s exchange rate valid on 08.06.2020.



obligations became a subcontractor's right, and not a duty, as it had been earlier, i.e. meaning less contract obligations.

In order to fulfil the second package of measures to support Russian economy the Federal Government has already allocated appx. UK 20.713 billion<sup>26</sup> pounds sterling in April 2020<sup>27</sup>. First and second packages together amount to 2.8% of GDP (including tax deferrals and state guarantees)<sup>28</sup>.

3. The third package of measures was announced by Russian President at a meeting on sanitary and epidemiological situation held on 11.05.2020. Among the suggested measures special attention shall be paid to new tax breaks. For instance, it was proposed to completely write off taxes and insurance contributions for the second quarter 2020, except for VAT. This measure would affect individual entrepreneurs, SMEs from the mostly affected industries as well as socially oriented NCOs. Those who became self-employed in 2019 were offered a full return of income tax paid in 2019. To do so, they provide a subsidy in the amount of the professional income tax paid. In accordance with the Federal Tax Service data these self-employed paid UK 11.5 million pounds sterling<sup>29</sup> in professional income tax in 2019<sup>30</sup>. According to the Federal Tax Service, no actions or documents would be required from the self-employed. Starting from June, money would be transferred to bank cards that are linked to the "My tax" App or are in the same personal account<sup>31</sup>.

It was also proposed to provide all self-employed citizens with a so-called "tax capital" in the amount of one minimum wage, which they would be able to

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<sup>26</sup>1.8 trillion roubles at the Central Bank of Russia's exchange rate valid on 09.06.2020.

<sup>27</sup>Inna Artemjeva, "The cost of two packages of anti-crisis measures by the government is announced", 21.04.2020, Moskovsky Komsomolets, available at < <https://www.mk.ru/economics/2020/04/21/ozvuchena-stoimost-dvukh-paketov-antikrizisnykh-mer-pravitelstva.html>>.

<sup>28</sup>Ibid.

<sup>29</sup>1 billion roubles at the Central Bank of Russia's exchange rate valid on 10.06.2020.

<sup>30</sup>Inna Artemjeva, "The cost of two packages of anti-crisis measures by the government is announced", 21.04.2020, Moskovsky Komsomolets newspaper, available at: < <https://www.mk.ru/economics/2020/04/21/ozvuchena-stoimost-dvukh-paketov-antikrizisnykh-mer-pravitelstva.html>>

<sup>31</sup>Ibid.

use to make tax payments in 2020.

For the individual entrepreneurs, involved in the most affected industries, it was suggested to provide a tax deduction in the amount of one minimum wage in respect of insurance contributions in 2020. Russian President suggested launching a special credit program to support employment starting June 1, 2020. All enterprises from the mostly affected industries, as well as socially oriented NCOs, would be able to use it. The loan amount would be calculated using a formula: one minimum wage per employee per month based on six months.

The loan repayment period is April 1, 2021. Final loan rate for the recipients would be preferential - 2% per annum. Everything above that preferential loan rate would be subsidized by the state. The interest on this loan would not have to be paid monthly: it would be capitalized. In addition, 85% of such loan would be secured by a state guarantee. Most important is that if during the entire term of the loan program, a company would maintain employment rate at the level of 90% or higher of its current staff, then at the end of the loan term, the main debt and interest would be completely written off. In case the employment rate is maintained at a level not lower than 80% of the full-time staff, then half of the loan and interest would be written off. The state would bear the cost of such writing off. On May 18, Federal Government established detailed rules for issuing the mentioned above loans. In addition, the Government allocated money from its reserve Fund for the implementation of this support measure, expecting the total volume of these loans to be at least UK 2.854 billion<sup>32</sup> pounds sterling<sup>33</sup>.

In addition to the mentioned above, they once more extended the list of affected industries. This time other retail trade in non-specialized stores, as well as trade through vending machines and production of Handicrafts were added. These changes came into force on May 21, 2020. Federal Government has also

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<sup>32</sup>248 billion roubles at the Central Bank of Russia's exchange rate valid on 09.06.2020.

<sup>33</sup>Analytical data by ConsultantPlus company, available at <<http://www.consultant.ru>> (accessed June 9, 2020).

introduced subsidies, as one of the measures to support airlines, which became effective May 14, 2020<sup>34</sup>. Such subsidies are aimed at partially compensating expenses due to a decrease in revenue due to a drop in the volume of passenger air transport. Government has established to whom, in what amount and under what conditions funds should be provided. Special attention should be paid to the fact that these subsidies should result in:

- passenger transportation activities should not be terminated/suspended;
- the number of fired civil aviation personnel should not exceed 10% of the number of such employees as of January 1, 2020.

If the results are not reached by September 1, 2020, then the subsidy received would have to be returned. Besides the mentioned above, Federal Government also decided to grant individual deferrals for property tax on enterprises, land tax, property tax on individuals and relevant advance tax payments to the organizations and individual entrepreneurs<sup>35</sup>. The following are among the main conditions to be entitled to the deferrals:

- such organizations and individual entrepreneurs should own commercial real estate;
- such organizations and individual entrepreneurs should be included in the list of taxpayers who granted rental holidays to their tenants. Such lists are formed by regional authorities and passed on to the regional branches of Federal Tax Service.

Such deferrals only apply to payments that are due in 2020. It is possible to get deferrals due to additional reasons: a decrease in income by at least 10% or a loss. The maximum duration of the deferral is one year. Applications should be

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<sup>34</sup>Ordinance of the Russian Federation Government dated 13.05.2020 N 661 “On granting subsidies to Russian airlines from the Federal budget in 2020 for partial compensation of expenses due to a decrease in the income of such airlines as a result of a drop in passenger air traffic due to the spread of a new coronavirus infection”, available at <<http://www.consultant.ru>> (accessed June 10, 2020).

<sup>35</sup>Ordinance of the Russian Federation Government dated 16.05.2020 N 699 “On amending the Rules for granting deferrals (installments) for the payment of taxes, advance payments for taxes and insurance contributions”, available at <<http://www.consultant.ru>> (accessed June 10, 2020).

submitted by December 1, 2020.

Federal Government<sup>36</sup> also changed rules for granting preferential loans to the system-forming organizations<sup>37</sup>. Preferential loans may now be obtained by subsidiaries of the system-forming organizations. The borrower must confirm a 30% reduction in turnover and meet other specified terms. Maximum period for the loan has been extended from 12 to 36 months. In this case, the preferential interest rate period should be not more than 12 months from the date of concluding the contract and should end by no later than December 31, 2021. The maximum loan amount and the preferential rate have not been changed — UK 34.5 million pounds sterling<sup>38</sup> and no more than 5% per annum, respectively.

Implementing measures from the third package would cost Russian federal budget around UK 9.206 billion<sup>39</sup> pounds sterling<sup>40</sup>. This new program to support Russian economy may add up to 1.5% to GDP. Russian Finance Minister, Siluanov, estimates that the economy may fall by 4% in 2020. Central Bank of Russia's estimate is 4-6%<sup>41</sup>.

4. To give a complete overview of the Federal Government efforts to revive Russian economy, it is necessary to mention a Plan to overcome the economic consequences of the new coronavirus infection released on 26.05.2020<sup>42</sup>, which

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<sup>36</sup>Ordinance of the Russian Federation Government dated 20.05.2020 N 712 "On amendments to certain acts of the Government of the Russian Federation", available at <<http://www.consultant.ru>> (accessed June 10, 2020).

<sup>37</sup>Main criterion to include a legal entity into the list of system-forming organizations is exceeding the minimum values of industry indicators defined separately for each industry by the Federal Government. In addition, such a list may include city-forming enterprises that have significant impact on the development of the region, organizations developing and implementing critical technologies, developing critical software etc.

<sup>38</sup>Specifically, 3 billion roubles at the Central Bank of Russia's exchange rate valid on 10.06.2020.

<sup>39</sup>800 billion roubles at the Central Bank of Russia's exchange rate valid on 09.06.2020.

<sup>40</sup>Elizabeth Bazanova, Philip Sterkin, "The third anti-crisis package of measures costs 800 billion rubles", 11.05.2020, Vedomosti newspaper, available at: < <https://www.vedomosti.ru/economics/articles/2020/05/11/829961-tretii-antikrizisnii-paket-mer> >.

<sup>41</sup>Ibid.

<sup>42</sup>Available at the Russian Federal Government's official website: <<http://government.ru/static/main/GOV-COVID-HELP3.html>>.

was transformed into Nationwide Action Plan (NAP) securing recovery for employment and population's income, economic growth and long-term structural changes on May 31, 2020<sup>43</sup>. NAP is an extensive and detailed document of some 140 pages. NAP's activities are aimed at further reducing the administrative burden on businesses, improving corporate governance and insolvency procedures, at digitalising enforcement proceedings, notary services, and other procedures. The following are among the key initiatives of the NAP related to business:

- to limit scheduled inspections of business in 2021 to only three highest risk categories;
- to cancel scheduled inspections of SMEs in 2021;
- to limit the grounds for unscheduled inspections of businesses in 2021;
- to exclude a need to reissue licenses due to address changes, organization renaming, and other similar circumstances;
- to automatically renew certain licenses and permits that expire in 2021;
- to implement a mechanism for obtaining licenses and permits in electronic form;
- to opt out of paper permissions by implementing a registry model. It is already provided for licenses starting from 2021;
- to cancel permissions that are set by departmental orders;
- to reduce the period for obtaining licenses by 1.5 – 3 times, the list of which will be determined by the Government;
- to provide electronic access to complete information about the course of enforcement proceedings;
- to switch notary services into electronic form. Partially this is already provided for by the law, which comes into force at the end of 2020;
- to create a unified register of digital powers of attorney;

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<sup>43</sup>Available at <<http://www.consultant.ru>> (accessed June 10, 2020).

- to create conditions for switching to only electronic document management in the execution of contracts etc.

To conclude it is necessary to emphasise that the pandemic crisis has intensified governmental regulatory activities to smooth negative consequences for the economy. This is a road of up and down that nobody has ever gone through before. At the end of this road the regulatory framework in Russia would not be the same. Part of the changes are already generating positive effects for the economy, but at the end only time will tell. In total, the cost of all anti-crisis state support in Russia has already amounted to approximately UK 46.03 billion<sup>44</sup> pounds sterling so far<sup>45</sup> and would definitely continue to go up.

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<sup>44</sup>Specifically, 4 trillion roubles at the Central Bank of Russia's exchange rate valid on 10.06.2020.

<sup>45</sup>Analytical data from Rambler Finance, 17.05.2020, available at <<https://finance.rambler.ru/other/44192095-tretyi-paket-putina-milliony-kompaniy-ischeznut-polstrany-poteryaet-rabotu/?updated>>.

# THE GREAT LOCKDOWN: THE UK REGULATORY RESPONSES TO THE PANDEMIC CRISIS

Andrea Miglionico \*

***ABSTRACT:** The unprecedented spread of pandemic crisis has changed the paradigm of banking and financial regulation worldwide. Specifically, the Covid-19 has imposed emergency regulatory measures to contain the risk of default for businesses and households. Liquidity support and loans guarantees have been adopted by public authorities to mitigate the deterioration of debt market and commercial paper. However the policy makers and regulators have concentrated their attention on temporary and short-term ad hoc interventions that leave discretion in decision-making process. This article examines the UK regulatory responses to the pandemic outbreak addressing the challenges of “monetary financing” and the impact of exceptional lending schemes for consumers borrowers. It also discusses the regulatory toolkit adopted by the Financial Conduct Authority and Prudential Regulation Authority for keeping credit lines flowing and funding the marketplace (e.g. mortgages and payment holidays). The Bank of England has launched operations intended to release the banking sector of pressures in the time of coronavirus and reduce the economic contraction although this regulatory package seems a frenetic reaction to the unexpected risk of systemic collapses.*

SUMMARY: 1. Introduction: the global response to the threat of Covid-19. – 2. The UK strategy for dealing with the pandemic crisis. – 3. The “monetary financing” of Bank of England. – 4. The prudential regulatory policies to support loan market and lending schemes. – 5. Conclusive remarks.

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1. In the midst of unprecedented Covid-19 pandemic crisis, regulatory authorities and policy makers have adopted emergency measures to contain the economic shock and address the liquidity risk of financial firms.<sup>1</sup> The global regulators introduced various toolkit directed to ensure the stability of markets, at the macro level, and the confidence of investors, at the micro level. The G20 has suspended the debt payments and interest for the world's poorest countries in order to bolster health services to confront the coronavirus.<sup>2</sup> The aim is to create a process that involves private creditors, banks and other commercial creditors to offer debt relief. The International Monetary Fund (IMF) forecasted a huge economic depression and reinforced the intervention through special concessional lending.<sup>3</sup> The IMF provided loan resources for the Poverty Reduction and Growth Trust and concentrated both lending and policy support to reduce the scarring of the economy caused by bankruptcies and unemployment in order to support a speedy recovery.<sup>4</sup> In parallel, the Basel Committee on Banking Supervision has deferred the implementation of the Basel III standards by one year to 1 January 2023 and the implementation date of the revised Pillar 3 disclosure requirements to 1 January 2023.<sup>5</sup> Same prudential actions have been taken by IOSCO that granted regulatory flexibility to support market participants addressing the

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<sup>1</sup>Tobias Buck and Guy Chazan, 'Coronavirus declared a pandemic as fears of economic crisis mount', *Financial Times*, 11 March 2020, available at <https://www.ft.com/content/d72f1e54-6396-11ea-b3f3-fe4680ea68b5>.

<sup>2</sup>See 'G20 Suspends Debt Payments for Poor Countries As the Coronavirus Spreads', 15 April 2020, available at [https://www.jubileeusa.org/pr\\_imf\\_g20\\_debt\\_relief\\_stmnt](https://www.jubileeusa.org/pr_imf_g20_debt_relief_stmnt).

<sup>3</sup>See IMF Executive Board Approves a US\$109.4 Million Disbursement to Rwanda to address the COVID-19 Pandemic, 2 April 2020, available at <https://www.imf.org/en/News/Articles/2020/04/02/pr-20130-rwanda-imf-executive-board-approves-disbursement-to-address-covid19>.

<sup>4</sup>See the remarks of Kristalina Georgieva during the G20 Finance Ministers and Central Bank Governors Meeting, 15 April 2020, available at <https://www.imf.org/en/News/Articles/2020/04/15/pr20160-remarks-managing-director-kristalina-georgieva-g20-fin-min-cen-bank-gov-meeting>.

<sup>5</sup> Basel Committee on Banking Supervision, 'Measures to reflect the impact of Covid-19', April 2020, available at <https://www.bis.org/bcbs/publ/d498.pdf>. See also Jean-Philippe Svoronos and Rastko Vrbaski, 'Banks' dividends in Covid-19 times' (May 2020), BSI FSI Briefs No 6, available at <https://www.bis.org/fsi/fsibriefs6.pdf>.



challenges posed by COVID-19 while ensuring that market integrity and investor protection principles are maintained.<sup>6</sup>

Domestic interventions have been characterised by temporary suspensions of regulatory structures (e.g. capital buffers, payment holidays, mortgage and loans relief) that supported in the short time businesses and households. However, the responses of national regulators showed a frenetic reaction to the negative consequences of coronavirus, in particular discretionary decisions have been adopted outside the institutional framework leaving room for different interpretation of guidance and policies.<sup>7</sup> In this context, the US Congress approved 'The Coronavirus Aid, Relief, and Economic Security (CARES) Act'<sup>8</sup>, which is the largest economic stimulus with over \$2 trillion economic relief package providing economic assistance for workers, families and small businesses. Under the CARES Act, the Federal Reserve performs as a state bank engaging in the sensitive allocation of credit to nonfinancial firms, as well as to state and local governments, although this raises some concerns on the legitimacy and lack of transparency of its regulatory actions.<sup>9</sup> The Fed's new facilities lend directly to private and public bond issuers, including state and local governments as well as provide loans to medium and large firms. It is observed that the CARES Act has delegated the Fed the role to allocate credit to the nonfinancial sectors of the economy which means deciding who should receive subsidised credit and who should not.<sup>10</sup> The US central bank announced confidence-restoring measures to

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<sup>6</sup>IOSCO, 'Securities regulators coordinate responses to COVID-19 through IOSCO', 25 March 2020, available at [IOSCO/MR/06/2020, https://www.iosco.org/news/pdf/IOSCONEWS559.pdf](https://www.iosco.org/news/pdf/IOSCONEWS559.pdf).

<sup>7</sup>Alistair Milne, 'A Critical COVID-19 Economic Policy Tool: Retrospective Insurance' (March 2020), available at <https://ssrn.com/abstract=3558667>.

<sup>8</sup>See <https://home.treasury.gov/policy-issues/cares>.

<sup>9</sup>John C. Coffee, 'Wall Street CARES!: Who Gets the Hidden Subsidies Under the CARES Act?', Oxford Business Law Blog, 8 May 2020, available at <https://www.law.ox.ac.uk/business-law-blog/blog/2020/05/wall-street-cares-who-gets-hidden-subsidies-under-cares-act>.

<sup>10</sup>Steve Cecchetti and Kim Schoenholtz, 'The Fed Goes to War: Part 3', 12 April 2020, available at <https://www.moneyandbanking.com/commentary/2020/4/12/the-fed-goes-to-war-part-3>. The authors argue that the Fed should limit its involvement in the allocation of credit to the private nonfinancial sector.

relieve strain in the trading of US Treasuries, agency mortgage-backed securities and commercial paper, as well as municipal and corporate bonds.<sup>11</sup> Further, the Federal Reserve has taken a step to meet the global demand for dollars, setting up a facility that would allow central banks and international monetary authorities to enter into repurchase agreements with the US central bank.<sup>12</sup> The temporary facility for foreign and international monetary authorities (FIMA) allows central banks and international organisations with accounts at the New York Fed to temporarily exchange their US Treasury securities held with the Federal Reserve for dollars, which can then be made available to institutions in their jurisdictions. On this point, it can be argued that financing corporate credit and commercial paper already moved the Fed into uncharted territory.<sup>13</sup>

At the EU level, regulators have lowered banks' capital requirements and urged them to freeze dividends and rein in bonuses to give them more headroom to absorb the losses, as part of a global move to free up almost \$500bn of capital on bank balance sheets. It has been reported that the Governing Council of the ECB is committed to playing its role in supporting households the euro area through this extremely challenging time and the European Central Bank (ECB) will ensure that all sectors of the economy can benefit from supportive financing conditions that enable them to absorb this shock.<sup>14</sup> The ECB policy response aims to allow banks to use capital buffers and to get relief in the composition of capital for Pillar 2 Requirements (the additional capital a bank needs to hold over the

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<sup>11</sup>Kathryn Judge, 'Congress Should Endorse the Federal Reserve's Extraordinary Measures' (24 March 2020), Columbia Law School's Blog on Corporations and the Capital Markets, available at <https://clsbluesky.law.columbia.edu/2020/03/24/congress-should-endorse-the-federal-reserves-extraordinary-measures/>.

<sup>12</sup>The Federal Reserve introduced facilities to support the flow of credit as follows: (i) Commercial Paper Funding Facility; (ii) Primary Dealer Credit Facility; (iii) Money Market Mutual Fund Liquidity Facility; (iv) Primary Market Corporate Credit Facility; (v) Secondary Market Corporate Credit Facility; (vi) Term Asset-Backed Securities Loan Facility; (vii) Paycheck Protection Program Liquidity Facility.

<sup>13</sup>Financial Times, 'The Fed's radical policies are uncharted territory', 9 April 2020, available at <https://www.ft.com/content/70a0d2ca-7987-11ea-af44-daa3def9ae03>.

<sup>14</sup>See <https://eulawlive.com/op-ed-the-european-central-banks-pandemic-bazooka-mandate-fulfilment-in-extraordinary-times-by-rene-smits/>.

statutory capital under the Capital Requirements Regulation as a result of the Supervisory Review and Evaluation Process). Specifically, the ECB would ‘consider operational flexibility in the implementation of bank-specific supervisory measures’ to permit ‘flexibility in prudential treatment of loans backed by public support measures’ and by ‘introducing supervisory flexibility regarding the treatment of non-performing loans (NPLs)’.<sup>15</sup> The ECB prudential measures are intended to support banks avoiding the procyclical effects of capital requirements and financial reporting. More importantly, the ECB has postponed the enforcement of major supervisory decisions, such as deadlines for remedial actions imposed as a result of on-site inspections, in the context of the review of internal models to calculate banks’ risk-weighted assets.

In terms of monetary actions, the ECB adopted a Pandemic Emergency Purchase Programme (PEPP)<sup>16</sup> to expand the range of eligible assets under the corporate sector purchase programme (CSPP) and to ease the collateral standards.<sup>17</sup> According to this PEPP, the ESCB will purchase ‘private and public sector securities’ in amounts of up to 750 billion euros: eligible securities are the marketable instruments that can be purchased under the current Asset Purchasing Programmes (APP). The PEPP would generate a bigger impact on investment-grade corporate bond spreads within the eurozone, as it would help to close the ETF discount and reduce the selling pressure ETFs are exerting on bond markets.<sup>18</sup> This would improve corporate funding rates and preserve the integrity of ETFs to

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<sup>15</sup>See ‘ECB Banking Supervision provides temporary capital and operational relief in reaction to coronavirus’, 12 March 2020, available at <https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200312~43351ac3ac.en.html>.

<sup>16</sup>See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2020:091:TOC>.

<sup>17</sup>See Sebastian Grund at <https://www.delorscentre.eu/en/publications/detail/publication/legal-compliant-and-suitable-the-ecbs-pandemic-emergency-purchase-programme-pepp/> and the speech by President Lagarde on 19 March 2019 available at <https://www.ecb.europa.eu/press/blog/date/2020/html/ecb.blog200319~11f421e25e.en.html>.

<sup>18</sup>Agnès Bénassy-Quéré et al., ‘A proposal for a Covid Credit Line’, 21 March 2020, available at <https://voxeu.org/article/proposal-covid-credit-line>.

the end-investor, breaking the doom loop.<sup>19</sup> However, criticisms have been expressed by some European members about the necessity of launching a new dedicated asset categories eligible under the APP<sup>20</sup>, and a clear preference for employing the existing toolkit of the governing council, such as scaling up the current APP or considering Outright Monetary Transactions<sup>21</sup> (a controversial measure that permits to buy an unlimited quantity of a country's bonds as part of an official EU bailout). The EU crisis regulatory responses<sup>22</sup> also include: (1) the Emergency Support Instrument; (2) the pan-European guarantee fund of EUR 25 billion; (3) the Pandemic Crisis Support, based on the existing Enhanced Conditions Credit Line and adjusted in light of this specific challenge; (4) the temporary loan-based instrument for financial assistance under Article 122 of the Treaty on the Functioning of the European Union; (5) the Recovery Fund<sup>23</sup>. A controversial debate around EU countries raised on the use of Eurobonds: despite they are not the only instrument of sharing the financial burden of the coronavirus pandemic, they have been advocated as the best way to express solidarity (the ill-named corona-bonds).<sup>24</sup> Some in Germany after opposing the issuance of common bonds as a way of condoning some European countries' lack of budgetary discipline, with the onset of the Covid-19 pandemic, have started to support such joint 'European

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<sup>19</sup>See 'The liquidity 'doom loop' in bond funds is a threat to the system', *Financial Times*, 25 March 2020, available at <https://www.ft.com/content/b7c15426-6e1b-11ea-89df-41bea055720b>.

<sup>20</sup>See <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>.

<sup>21</sup>Jana Randow and Piotr Skolimowski, 'ECB's Pandemic Program Means Most Powerful Tool Stays in Reserve' (26 March 2020), available at <https://www.bloomberg.com/news/articles/2020-03-26/how-italy-and-others-can-use-the-ecb-s-most-powerful-tool>.

<sup>22</sup>European Council, 'A Roadmap for Recovery. Towards a more resilient, sustainable and fair Europe', 21 April 2020, available at <https://www.consilium.europa.eu/media/43384/roadmap-for-recovery-final-21-04-2020.pdf>.

<sup>23</sup>Kajus Hagelstam, Alice Zoppè and Cristina Sofia Dias, 'An EU Recovery Fund: How to square the circle?', SUERF Policy Brief, No 5, May 2020, available at [https://www.suerf.org/docx/f\\_f2d34fcd37e85f9867708bf71782cda6\\_12945\\_suerf.pdf](https://www.suerf.org/docx/f_f2d34fcd37e85f9867708bf71782cda6_12945_suerf.pdf).

<sup>24</sup>Guy Chazan, Sam Fleming, Victor Mallet and Jim Brunsten, 'Coronavirus crisis revives Franco-German relations', *Financial Times*, 13 April 2020, available at <https://www.ft.com/content/69207155-6ca8-43b1-bb08-1385d3656090>.

Crisis bonds’ to help the countries worst affected by coronavirus.<sup>25</sup> Some others consider resorting to the European Stability Mechanism, point that since this is a natural disaster, this could attach very light conditions to the loans, e.g. to some IMF facilities designed for this type of events. Others have suggested the European Investment Bank or disaster aid – grants not loans – to deal with consequences of pandemic.<sup>26</sup> Recently, the German Constitutional Court held that the European Court of Justice (ECJ) has no jurisdiction on the ECB’s Public Sector Asset Purchase Programme (PSPP) raising concerns on the limits of ECJ power.<sup>27</sup> The German court ruled that the ECJ had only conducted a limited review of the effects of the PSPP programme and could not assess if the ECB had breached the principle of proportionality, under which the content and form of any EU action must be limited to what is necessary to achieve the pursued aim.<sup>28</sup> The German judges’ decision poses the problem whether the hierarchy of EU law is clearly demarcated as it seems the ECJ judgment being ultra vires in Germany.<sup>29</sup>

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<sup>25</sup>Guy Chazan, ‘Coronavirus crisis prompts German rethink on eurobonds’, *Financial Times*, 6 April 2020, available at <https://www.ft.com/content/8da39299-b257-4e8f-9b83-a84a8930f1c1>. See also Ingobert Waltenberger, ‘The range of different opinions and moods in Germany on collective ‘corona bonds’, SUERF Policy Note Issue No 155, April 2020, 3-4, available at <https://www.suerf.org/policynotes/11983/the-range-of-different-opinions-and-moods-in-germany-on-collective-corona-bonds>.

<sup>26</sup>Gideon Rachman, ‘Eurobonds are not the answer’, *Financial Times*, 6 April 2020, available at <https://www.ft.com/content/b809685c-77de-11ea-af44-daa3def9ae03>. Rachman suggests that if Eurobonds are adopted, “they should be backed by giving the European Commission a larger budget, underpinned by a dedicated EU tax. Armed with more capital and its own resources, the commission could then borrow from the markets”.

<sup>27</sup>Martin Arnold and Tommy Stubbington, ‘German court calls on ECB to justify bond-buying programme’, *Financial Times*, 5 May 2020, available at <https://www.ft.com/content/a1beda5e-5c2d-429e-a095-27728ed2d72b>.

<sup>28</sup>Jorge Valero, ‘German court gives ultimatum to ECB on bond-buying programme’, 5 May 2020, available at <https://www.euractiv.com/section/economy-jobs/news/german-court-gives-ultimatum-to-ecb-on-bond-buying-programme/>. See also Matthias Lehmann, ‘The End of ‘Whatever it takes’? – The German Constitutional Court’s Ruling on the ECB Sovereign Bond Programme’, Oxford Business Law Blog, 6 May 2020, available at <https://www.law.ox.ac.uk/business-law-blog/blog/2020/05/end-whatever-it-takes-german-constitutional-courts-ruling-ecb>.

<sup>29</sup>Dimitrios Kyriazis, ‘The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango’, European Law Blog, 6 May 2020, available at <https://>

However, the emergency time of pandemic requires exceptional measures in public finance, monetary and fiscal policy although the various regulatory responses of “whatever it takes” should follow a consultation process within a justified institutional framework.

2. The UK strategy for dealing with Covid-19 crisis has been characterised by a vast package of monetary measures that modified existing legal obligations for banks and financial institutions.<sup>30</sup> The great lockdown imposed by the coronavirus has affected the prudential policies of regulators and central bank with the result of unprecedented interventions in key areas of capital markets (dividends, capital buffers, payment holidays and company audit reporting). The UK government has adopted a number of schemes to support the domestic economy: (a) the Coronavirus Job Retention Scheme under which employers can claim a grant covering 80% of the wages for a furloughed employee, subject to a cap of £2,500 a month<sup>31</sup>; (b) the Self-Employed Income Support Scheme under which self-employed people, who have been adversely affected by the coronavirus, will receive a taxable grant worth 80% of their average monthly profits over the last three years, up to £2,500 a month.<sup>32</sup> The UK central bank has committed with Treasury to “monetary financing” policy which enables the government to borrow in the short-term as much as it needs to meet its commitments.<sup>33</sup> Despite the laudable initiative, this macro-economic response to Covid-19 can translate in the long-term in high inflation and resurgence of non-

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europaenlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/.

<sup>30</sup>Bank of England, ‘Our response to Coronavirus (Covid-19)’, available at <https://www.bankofengland.co.uk/coronavirus>.

<sup>31</sup>See <https://www.gov.uk/government/publications/coronavirus-job-retention-scheme-step-by-step-guide-for-employers>.

<sup>32</sup>See <https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme>.

<sup>33</sup>Silvana Tenreyro, ‘Monetary policy during pandemics: inflation before, during and after Covid-19’, 16 April 2020, 5-6, available at <https://www.bankofengland.co.uk/speech/2020/silvanatenreyro-speech-monetary-policy-during-pandemics>.

performing exposures.<sup>34</sup> Even if this support will be temporary and transitional with balances repaid as soon as possible and before the end of the year, the uncertainty of pandemic raises concerns on increased moral hazard and insolvency scenario.

Generally, moral hazard prompts governments to introduce rules that constrain risk taking by financial institutions, such as rules on minimum capital ratios, rules on liquidity, structural rules separating retail from investment banking activities and rules relating to their corporate governance and senior management accountability. To mitigate the risk that public funds will be required if major banks fail, governments introduce rules that require banks to plan their own resolution and structure their liabilities in a way that there have sufficient loss-absorbing liabilities that can be written-down or converted to equity if a bank faces difficulties. The immediate response of UK government to pandemic crisis was the provision of liquidity support through the central bank<sup>35</sup> and the setting up of deposit insurance schemes that guarantee bank deposits (up to a limit) to prevent creditors' runs on banks.<sup>36</sup> These tools of crisis management protect the financial system from immediate collapse, but come at the cost of exacerbating the problem in the long run, as explicit or implicit state support strengthens the incentives of financial institutions' managers and clients to take excessive risks.

The legislative emphasis on financial stability and market integrity in the UK is relatively recent and has clearly been a response to the 2007-09 global crisis.

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<sup>34</sup>Stephen Morris and David Crow, 'European bank investors brace for loan-loss provisions', *Financial Times*, 27 April 2020, available at <https://www.ft.com/content/1d9d862a-df05-47c1-8245-cf798127165f>.

<sup>35</sup>For an analysis of the lender of last resort function of the Bank of England, its history and its recent evolution, see Andrew Campbell and Rosa Lastra, 'Revisiting the Lender of Last Resort - The Role of the Bank of England' in Iain MacNeil and Justin O'Brien (eds), *The Future of Financial Regulation* (Oxford and Portland, OR, Hart Publishing 2010) 161-162.

<sup>36</sup>For a critical discussion of the relationship between deposit protection and moral hazard, see Jenny Hamilton, 'Depositor Protection and Co-insurance after Northern Rock: Less a Case of Moral Hazard and More a Case of Consumer Responsibility?', in Johanna Gray and Orkun Akseli (eds), *Financial Regulation in Crisis? The Role of Law and the Failure of Northern Rock* (Cheltenham, Edward Elgar 2011) 19-24.



The macro-prudential objective of liquidity support aims to limit the costs to the economy from financial distress, including those that arise from any moral hazard induced by the policies pursued, whereas the micro-prudential objective of loan assistance aims to limit the likelihood of failure of individual institutions. The Covid-19 pandemic can have detrimental effects on the real economy. In a typical crisis scenario, the bank lending is curtailed as ailing banks seek to reduce their loan portfolios. The resulting credit outbreak undermines the ability of firms to raise debt and expand, and can thus cause the economy as a whole to enter into a recession<sup>37</sup> and unemployment to rise.<sup>38</sup> It is likely that the UK government spending to prevent the failure of businesses and households (and thus the collapse of debt market) and to stimulate the economy leads to increasing public debt with serious long-term economic consequences.<sup>39</sup>

3. The Bank of England (BoE) has expanded the overdraft facility to aid the UK economy raising concerns about potential strains in the state debt market brought on by the Covid-19 emergency.<sup>40</sup> The current limit of the central bank's overdraft for the Treasury is £400m but it will effectively be able to borrow unlimited amounts, although this support will be transitional with balances repaid as soon as possible and before the end of the year.<sup>41</sup> The Monetary Policy Committee voted unanimously to increase the Bank of England's holdings of UK government bonds and non-financial investment-grade corporate bonds by £200 billion, financed by the issuance of central bank reserves; and to reduce Bank Rate

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<sup>37</sup>For instance, in 2009, UK GDP declined by 4% as a result of the 2008 financial crisis.

<sup>38</sup>For example, the UK unemployment rate increased dramatically from around 5.3% in 2007 to 8% in 2011. See European Economic Forecast Autumn 2013 (Commission, August 2013) 101, available at [http://ec.europa.eu/economy\\_finance/eu/forecasts/2013\\_autumn\\_forecast\\_en.htm](http://ec.europa.eu/economy_finance/eu/forecasts/2013_autumn_forecast_en.htm).

<sup>39</sup>The UK national debt to GDP ratio increased from 43.3% at end of the 2007-08 fiscal year to 88.1% at the end of 2012-13.

<sup>40</sup>Gertjan Vlieghe, 'Monetary policy and the Bank of England's balance sheet', Speech given at the Bank of England, London, 23 April 2020, 10, available at <https://www.bankofengland.co.uk/speech/2020/gertjan-vlieghe-speech-monetary-policy-and-the-boes-balance-sheet>.

<sup>41</sup>See <https://www.independent.co.uk/news/business/news/coronavirus-bank-of-england-treasury-ways-means-overdraft-borrowing-a9457071.html>.



by 15 basis points to 0.1%.<sup>42</sup> The Committee also agreed that the BoE should enlarge the Term Funding Scheme with additional incentives for SMEs (TFSME).<sup>43</sup>

The BoE adopted provision of liquidity to the banking sector and purchase of commercial paper in the new Covid Corporate Financing Facility, a new lending scheme designed to provide financial assistance among larger groups.<sup>44</sup> The BoE's Corporate Bond Purchase Scheme is designed to buy a balanced portfolio of bonds across eligible issuers and sectors without affecting the allocation of credit to particular companies.<sup>45</sup> The BoE also launched operations that are temporary but are intended to have an impact on monetary conditions in the medium term, i.e. Quantitative Easing (QE) where the BoE purchases bonds. QE increases bond prices and therefore reduces yields, which in turn lowers borrowing costs and support spending.<sup>46</sup> Most importantly, the BoE engaged with the "monetary financing" of government, which means that the bank would directly finance its ballooning operations although on a "temporary and short-term".<sup>47</sup> The BoE agreed to a Treasury demand to directly finance the state's spending needs on a temporary basis. The monetary financing allows the government to bypass the bond market until the Covid-19 pandemic subsides, financing unexpected costs such as the job retention scheme. The "monetary financing" is highly controversial because if a government keeps spending without limit and gets the central bank to pay for this assistance, more money will be spent than goods and services can be

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<sup>42</sup>See <https://www.bankofengland.co.uk/markets/market-notice/2020/apf-asset-purchases-and-tfsme-march-2020>.

<sup>43</sup>See 'The Bank of England's Term Funding Scheme with additional incentives for SMEs will open to drawings on 15 April 2020', available at <https://www.bankofengland.co.uk/news/2020/april/the-tfsme-will-open-to-drawings-on-april-15-2020>.

<sup>44</sup>See <https://www.bankofengland.co.uk/news/2020/march/the-covid-corporate-financing-facility>.

<sup>45</sup>Bank of England, 'Asset Purchase Facility (APF): Additional Corporate Bond Purchases', 1 May 2020, available at <https://www.bankofengland.co.uk/markets/market-notice/2020/apf-additional-corporate-bond-purchases-may-2020#footnotes>.

<sup>46</sup>Charles Goodhart and Manoj Pradhan, 'Future imperfect after coronavirus', 27 March 2020, available at <https://voxeu.org/article/future-imperfect-after-coronavirus>.

<sup>47</sup>Chris Giles and Philip Georgiadis, 'Bank of England to directly finance UK government's extra spending', *Financial Times*, 9 April 2020, available at <https://www.ft.com/content/664c575b-0f54-44e5-ab78-2fd30ef213cb>.

produced, generating impossible to resist pressure for higher prices.

The UK authorities extended the size of the government's bank account at the central bank, known as the "Ways and Means Facility".<sup>48</sup> It is a mechanism to account for more direct lending of electronically created money from the BoE to the Treasury.<sup>49</sup> This helps take the pressure off those processes at a time when large volume of liquidity in cash is being handed out to businesses and to workers, and at a time when tax revenues are likely to stall alongside an economic contraction.<sup>50</sup> The "Ways and Means Facility" had long been used as a financing means of government for day-to-day spending before the BoE would sell government bonds to the market. In terms of rescue plan, the BoE has approved a £330bn package of bailout loans alongside an extraordinary offer of wage subsidies. Within the rescue plan the regulatory authorities have introduced the Coronavirus Business Interruption Loan Scheme (CBILS)<sup>51</sup> that provides financial support for small businesses with loans of up to £5m. The government-backed guarantee for the loan repayments is designed to encourage more lending, rather than bail out the borrower, who remains fully liable for the debt.

4. The Prudential Regulation Authority (PRA) set out supervisory expectations that banks should not increase dividends or other distributions, such as bonuses, in response to policy actions.<sup>52</sup> This measure is directed to strengthen the core equity capital for banks and financial institutions although the decision to

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<sup>48</sup>See <https://www.bankofengland.co.uk/news/2020/april/hmt-and-boe-announce-temporary-extension-to-ways-and-means-facility>.

<sup>49</sup>See <https://www.bankofengland.co.uk/-/media/boe/files/news/2020/april/hmt-and-boe-announce-temporary-extension-to-ways-and-means-facility.pdf?la=en&hash=974CAE1A89719CFB8CAAC7233C95842E2B763895>.

<sup>50</sup>The UK government has already tripled the amount of debt it wanted to raise in financial markets from £15bn to £45bn.

<sup>51</sup>See <https://www.gov.uk/guidance/apply-for-the-coronavirus-business-interruption-loan-scheme>.

<sup>52</sup>See 'Bank of England announces supervisory and prudential policy measures to address the challenges of Covid-19', 20 March 2020, available at <https://www.bankofengland.co.uk/news/2020/march/boe-announces-supervisory-and-prudential-policy-measures-to-address-the-challenges-of-covid-19>.

stop banks' dividends came late and only as a reaction of the pandemic crisis.<sup>53</sup> The PRA has also incentivised firms to absorb losses and provide an additional layer of capital above minimum requirements. The UK regulatory authorities have relaxed banks' constraints in the use of liquidity and capital buffers, e.g. the banks' countercyclical capital buffers allowing them to support bank lending capacity.<sup>54</sup> In this context, the PRA has modified the calculation of the total exposure measure of the leverage ratio: firms may calculate their exposure value of regular purchases and sales awaiting settlement according to Article 429g of the Capital Requirements Regulation (CRR II).<sup>55</sup> The release of capital requirements reflects the Commission's Proposal for amending the CRR and CRR II which aims to address the emergency situation triggered by the Covid-19 pandemic.<sup>56</sup> The Commission reinforced that these proposed changes will not fundamentally alter the prudential regulatory framework which would facilitate mitigating the impact of the crisis.<sup>57</sup> It is interesting to note that the EU legislator as well as the UK supervisory authorities emphasised the greater flexibility given to banks in the forward-looking approach to report loans that can deteriorate due to the economic shock.<sup>58</sup>

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<sup>53</sup>Jonathan Ford, 'Coronavirus exposes illusion of UK bank capital strength', *Financial Times*, 5 April 2020, available at <https://www.ft.com/content/31e9e474-1398-430e-92fa-ef4e43c4e0ac>.

<sup>54</sup>Countercyclical capital buffers aim to absorb losses in times of crisis: prudential authorities can determine the use of capital buffer during financial shocks.

<sup>55</sup>Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012.

<sup>56</sup>European Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 575/2013 and (EU) 2019/876 as regards adjustments in response to the COVID-19 pandemic' COM(2020) 310 final, 28 April 2020.

<sup>57</sup>See 'Commission Interpretative Communication on the application of the accounting and prudential frameworks to facilitate EU bank lending. Supporting businesses and households amid COVID-19' COM(2020) 169 final, 28 April 2020.

<sup>58</sup>Stephen Morris and Olaf Storbeck, 'Banks to book more than \$50bn against bad loans', *Financial Times*, 3 May 2020, available at <https://www.ft.com/content/c31db8ab-9a90-4680-bf13-b0a859e7e1b4>.

In the same line of prudential actions, the Financial Conduct Authority (FCA) introduced temporary measures to support customers and firms affected by the coronavirus.<sup>59</sup> These measures introduced transitional arrangements to freeze payments for regulated firms within high-cost short-term credit loans.<sup>60</sup> Specifically, the Coronavirus Business Interruption Loan Scheme has approved loans to small firms with turnover of less than £45mn.<sup>61</sup> The scheme is administered by the government-owned British Business Bank and allows accredited lenders to provide loans and overdraft facilities of up to £5 million, to be repaid over up to six years. It is a requirement of the scheme that for loans above £250,000 lenders must take security over available assets with the government's 80 per cent guarantee covering those residual losses remaining after any recoveries. For loans up to £250,000 approved lenders and the scheme are required to apply their normal lending criteria. Lenders must judge that such government-guaranteed finance will help these businesses trade through the short- to medium-term revenue loss of the lockdowns and then be repaid. However, the loans on offer should have been based on revenue loss and focused on a reasonable estimate of essential costs.

The small and medium sized enterprises (SMEs) will also benefit from the Bounce Back Loan Scheme (BBLs) provided by the British Business Bank that grants loan facilities guaranteed at 100% by the government to be repaid over up to six years with no payments in the first twelve months.<sup>62</sup> The BBLs is a welcome measure providing breathing space for SMEs even if it is a temporary intervention

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<sup>59</sup>FCA, 'FCA information for firms on coronavirus (Covid-19) response', 24 April 2020, available at <https://www.fca.org.uk/firms/information-firms-coronavirus-covid-19-response>.

<sup>60</sup>FCA, 'High-cost short-term credit and coronavirus: temporary guidance for firms', 24 April 2020, available at <https://www.fca.org.uk/publications/finalised-guidance/high-cost-short-term-credit-and-coronavirus-temporary-guidance-firms>. See also FCA, 'Coronavirus: information for consumers on personal loans, credit cards, overdrafts, motor finance and other forms of credit', 24 March 2020, available at <https://www.fca.org.uk/consumers/coronavirus-information-personal-loans-credit-cards-overdrafts#other-credit>.

<sup>61</sup>See <https://www.gov.uk/guidance/apply-for-the-coronavirus-business-interruption-loan-scheme>.

<sup>62</sup>See <https://www.gov.uk/guidance/apply-for-a-coronavirus-bounce-back-loan>.

and loans have to be paid back.<sup>63</sup> By freezing loan repayment, the FCA has suspended the terms of agreement between banks and customers. This relaxation of contractual obligations can trigger requests by lenders to customers demanding repayment of their debts because they will have gone into arrears, even though the loan holidays will have been agreed in advance.<sup>64</sup> The loan market has benefited of the low rate designed primarily to give relief to businesses and help mortgage consumers borrowers with their monthly payments. However, banks and mortgage lenders are trying to discourage customers from taking advantage of a government offer of mortgage holidays, warning that unclear advice from the regulators risks pushing customers into more debt.<sup>65</sup> The borrower remains liable for the loan which has caused criticism from business owners who are reluctant to add to their long-term debt burden. The FCA did not provide clear guidance to lenders on how to deal with requests of payment holidays leaving to borrowers the option to renegotiate their payments affected by the crisis. In this context, non-bank specialist lenders play a key role in financing small businesses and providing consumer finance such as point of sale credit.<sup>66</sup> It can be observed that the marketplace has been excluded from state measures to support lending schemes and it seems that the warehouse sector (credit lines facilities and mortgages) has been ignored in the FCA prudential regulator's assessment.<sup>67</sup>

The UK government did not include non-bank lenders in the emergency

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<sup>63</sup>Alistair Milne, 'UK "bounce back loans" ... a welcome short term measure', 7 May 2020, available at <https://alistairmilne.com/uk-bounce-back-loans-a-welcome-short-term-measure/>.

<sup>64</sup>Nicholas Megaw and Matthew Vincent, 'UK loan freeze plan leaves customers still open to arrears letters', *Financial Times*, 5 April 2020, available at <https://www.ft.com/content/7a533dc5-8cd8-4ef3-9963-d1f43e76ff47>.

<sup>65</sup>Nicholas Megaw and Matthew Vincent, 'Lenders sound warning on mortgage holidays', *Financial Times*, 25 March 2020, available at <https://www.ft.com/content/3a6b82b0-6e77-11ea-89df-41bea055720b>.

<sup>66</sup>Non-bank mortgage lenders tend to cater to customers who are turned down by mainstream banks, such as buy-to-let landlords, customers with impaired credit histories, and self-employed and contract workers with unpredictable or irregular income streams.

<sup>67</sup>Peter Lee, 'CBILS faulty: Sunak's flagship UK lending scheme looks unfit for purpose', *Euromoney*, 24 April 2020, available at [https://www.euromoney.com/article/b1lbgfwrx\\_72nn3/cbils-faulty-sunaks-flagship-uk-lending-scheme-looks-unfit-for-purpose](https://www.euromoney.com/article/b1lbgfwrx_72nn3/cbils-faulty-sunaks-flagship-uk-lending-scheme-looks-unfit-for-purpose).

measures. It has been noted that ‘specialist lenders stop offering new loans, customers may find themselves unable to switch to new deals at the end of their fixed terms, even if they have kept up with repayments’.<sup>68</sup> The wholesale and capital markets were effectively closed to non-bank lenders limiting the ability of them to continue lending. To address the problem the BoE strengthened the “Term Funding Scheme”<sup>69</sup>, which provides cheap funding to help maintain credit volumes if wholesale funding markets dry up, but it is only open to banks and building societies. In addition, the FCA has provided temporary relief for listed companies to publish their audited annual financial reports.<sup>70</sup> The FCA approach includes: (1) delaying the filing of accounts by companies; (2) postponement of auditor tenders and audit partner rotation; (3) reduction of FRC demands on companies and audit firms; and (5) extension of reporting deadlines for public sector bodies.<sup>71</sup> Following the EBA’s recommendations to delay the submission of regulatory reporting, the FCA requested banks to observe a two-week moratorium on issuing preliminary results.<sup>72</sup> These regulatory responses raise concerns for the degree of flexibility in taking prudential actions given the risk that existing legal structures will be relaxed or suspended in the future. On this view, the PRA and FCA have modified certain regulatory obligations which can create distortions in

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<sup>68</sup>Stephen Morris, Nicholas Megaw and Daniel Thomas, ‘Non-bank lenders push for access to emergency state funding’, *Financial Times*, 24 March 2020, available at <https://www.ft.com/content/51340b70-6d28-11ea-89df-41bea055720b>.

<sup>69</sup>Bank of England, ‘Updating the TFSME to reflect HMT’s new Bounce Back Loans Scheme’, 2 May 2020, available at <https://www.bankofengland.co.uk/news/2020/may/updating-the-tfsme-to-reflect-hmt-new-bounce-back-loans-scheme>.

<sup>70</sup>FCA, ‘Delaying annual company accounts during the coronavirus crisis’, Statement of Policy, 26 March 2020, available at <https://www.fca.org.uk/news/statements/delaying-annual-company-accounts-coronavirus>.

<sup>71</sup>See ‘FCA requests a delay to the forthcoming announcement of preliminary financial accounts’, 22 March 2020, available at <https://www.fca.org.uk/news/statements/fca-requests-delay-forthcoming-announcement-preliminary-financial-accounts>.

<sup>72</sup>EBA, ‘Statement on supervisory reporting and Pillar 3 disclosures in light of COVID-19’, 31 March 2020, available at <https://eba.europa.eu/eba-provides-additional-clarity-on-measures-mitigate-impact-covid-19-eu-banking-sector>. See also Matthew Vincent, ‘Regulators tackle concerns over companies’ coronavirus reporting’, *Financial Times*, 26 March 2020, available at <https://www.ft.com/content/e8e7caa9-a48f-408e-b082-5bc276f4e061>.

the financial markets due to negative externalities (e.g. overreliance to temporary measures) and asymmetric policies in the interpretation of new rules.

5. The Covid-19 pandemic has demonstrated the limited ability of regulators to forecast crises and the frenetic responses of governments of the most developed countries that were largely unprepared to face the spread of the contagion and the combined supply and demand shock.<sup>73</sup> This means the public authorities have not capitalised the experience of 2007-09 global financial crisis that involved systemic failures and massive state aid to support the banking and financial sector. The too-big-to fail policies created the premises for an improved supervisory system that imposed higher capital requirements, new resolution tools and macro-prudential interventions. On a different side, the inability of financial markets to distinguish between sound and unsound banks in times of crisis can paralyse the inter-bank lending market and make it more difficult for banks to raise equity capital. Similarly, the general inability of depositors to distinguish between good and bad banks affects confidence in case of systemic collapses.<sup>74</sup> To assess the magnitude of the threat that the coronavirus poses to financial stability it is relevant to note that the heavy reliance on debt financing of credit institutions can create perverse incentives to market participants in terms of speculative actions (undercapitalisation of banks and missing recognition of loan losses) when regulatory structures are temporary suspended.<sup>75</sup>

The regulatory package adopted by the UK government to mitigate the shrink of the lending system in this time of uncertainty and to stimulate the

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<sup>73</sup>David Simchi-Levi and Edith Simchi-Levi, 'We Need a Stress Test for Critical Supply Chains', *Harvard Business Review*, 28 April 2020, available at <https://hbr-org.cdn.ampproject.org/c/s/hbr.org/amp/2020/04/we-need-a-stress-test-for-critical-supply-chains>.

<sup>74</sup>Una Okonkwo Osili and Anna Paulson, 'Bank Crises and Investor Confidence: An Empirical Investigation' (2009) Federal Reserve Bank of Chicago Policy Discussion Paper PDP2009-9, available at [http://www.chicagofed.org/webpages/publications/policy\\_discussion\\_papers/2009/pdp\\_9.cfm](http://www.chicagofed.org/webpages/publications/policy_discussion_papers/2009/pdp_9.cfm).

<sup>75</sup>See 'Pandemic is putting banks' resilience to the test', *Financial Times*, 3 May 2020, available at <https://www.ft.com/content/c7beb584-8bae-11ea-a01c-a28a3e3fbd33>.

economy can lead to increasing public debt with serious long-term economic consequences. Further, transitional deviations of certain regulatory obligations in the bank management can generate distortions and potential market failures such as the illusion of both strengthening capital and containing liquidity risk. The consequences of Covid-19 can be severe and it is unlikely that any benefits accruing from profitable risk taking during the period leading up to a crisis outweigh the cost of a distress scenario. The UK regulatory responses to coronavirus have been concentrated in rescuing businesses and households, however the effects of these measures need to be tested in the long-term whether the adopted temporary arrangements will avoid bank bail-out plans and firms debt restructuring.



## REFLECTIONS ON THE ITALIAN EMERGENCY REGULATION IN SUPPORT OF BUSINESSES

Diego Rossano \*

**ABSTRACT:** *This paper aims to analyse the financial measures adopted to support businesses in Italy for dealing with the emergency of Covid-19. Specifically, it advances few solutions to the critical issues of the regulatory measures. The absence of any specific indications by the legislator raises doubts that, should the guarantee be enforced, the credit claimed by SACE S.p.A., as assignor, vis-à-vis the debtor company may enjoy pre-emption according to Article 9 of the Legislative Decree No 123 of 1998.*

**SUMMARY:** 1. The regulatory framework. - 2. Provisions in support of businesses in the “Liquidity Decree” (*Decreto Liquidità*): critical issues . - 3. The provisions in support of the companies contained in the “Relaunch Decree” (*Decreto Rilancio*). - 4. Final remarks.

1. We are in the midst of a global systemic crisis, which, as doctrine observed, is shaping an emergency regulatory framework for managing the economic impacts of COVID-19<sup>1</sup>. We should immediately highlight that the *hectic* legislative activity of the last few months may lead - perhaps inevitably, due to the emergency circumstances - to an *uncontrolled regulatory hyperplasia*, to use a typical medical terminology.

We should also note that, due to the contingent emergency, the existing traditional ways of operating have been altered . By way of example, we refer to corporate law, which, as we know, has implemented specific provisions introduced to regulate the procedures for holding the meetings and capital stock reductions due to

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<sup>1</sup>See ANNUNZIATA, *La distribuzione di prodotti di investimento e l'emergenza sanitaria. Una proposta*, in *dirittobancario.it*, editorial of 4 May 2020.

losses<sup>2</sup>. Further, the application of the Code of Business Crisis (*Codice della crisi d'impresa*), considered a “miracle cure of all evils”, has been postponed<sup>3</sup>.

There are some significant exceptions provided for the legislation on State aids, which the European Commission has resorted to authorise the public financial support measures adopted by the Member States. The provisions of Article 107, para 2 lett. b) and para 3 lett. b) are particularly relevant, as they outline specific conditions under which state interventions must (or can) be considered in line with the internal market. The doctrine has long called for the European Commission to grant greater flexibility in the area of state aid to the banking sector; certainly, no one was expecting an economic crisis due to pandemic, to experience a relaxation of the strict criteria adopted by the EU Authority. Also, this change of direction will be temporary and, in any case, limited to the current emergency.

It is also necessary to take into consideration the non-application of the so-called *burden sharing mechanism* for banks. If, due to the Covid-19 pandemic, a bank needs extraordinary public financial support in the form of liquidity, recapitalisation or measures for impaired assets, it may receive extraordinary public financial support, without this being considered for the purposes of ascertaining the risk of insolvency. If the conditions for the application of Article 32 BRRD (Directive 2014/59/EU) are met, and to the extent that support measures are adopted to remedy the damage caused by the Covid-19 pandemic, point 45 of the Communication of the European Commission of 2013 on State aid to banks provides for an exception to the ap-

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<sup>2</sup>See, on this point, Article 106 of the law decree 17 March 2020, No 18 “*Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19*” and Article 6 of the law decree of 8 April 2020, No 23, converted into Law, No 40, dated 5 June 2020 “*Misure urgenti in materia di accesso al credito e di adempimenti fiscali per le imprese, di poteri speciali nei settori strategici, nonché interventi in materia di salute e lavoro, di proroga di termini amministrativi e processuali*”. On this point, see PALAZZO, *Ex facto oritur ius. A proposito delle nuove disposizioni in tema di svolgimento delle assemblee di società*, in *giustiziacivile.com*, 7 april 2020.

<sup>3</sup>Article 5 of the law decree of 8 April 2020, No 23, converted into Law, n. 40 of 5 June 2020 provides for the deferral of the entry into force of Legislative Decree No. 14 of 2019 - originally scheduled for 15 August 2020 - to 1 September 2021

plication of the burden-sharing rule by shareholders and subordinated creditors<sup>4</sup>.

In compliance with the state aid criteria and the provisions contained in the various temporary frameworks put in place by the European Commission, the Italian government has adopted certain emergency measures. We refer specifically to the Law Decree No 34 of 19 May 2020 (the so-called “Relaunch Decree” – *Decreto Rilancio*). Together with the so-called “Cura Italia” (Cure Italy) Law Decree No 18 of 17 March 2020 (converted into Law No 27 of 24 April 2020) and Decree No 23 of 8 April 2020 (“Liquidity Decree” - *Decreto Liquidità*) (converted into Law No 40 of 5 June 2020), it completes the regulatory framework to ensure the recovery of the national economy, deprived by the health emergency.

2. We should quickly refer to the relationship between the economy and the pandemic in the seminal volume *I Promessi Sposi* (The Betrothed). In illustrating the Great Plague that spread between 1629 and 1633 in different areas of Northern Italy, Alessandro Manzoni underlined how ‘Towards the end of the month of March [...] deaths began to be more frequent [...] the magistracy were aroused [...]. The Tribunal of Health called on them to enforce their directions [...] the decurions tried to make money by way of loans’.

On close consideration, it can be noted that the methods used by the competent Authorities to contain the damage caused by the plague are not that different from those adopted by the Italian government in providing the necessary financial support to businesses. Indeed, the complex legislative framework outlined by the “Liquidity Decree”, as converted into law, clearly aims at addressing the contingent liquidity shortage by granting loans - at particularly favorable conditions and with specific limitations - in favour of businesses meeting the specific subjective and ob-

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<sup>4</sup>See the Commission Communication of 20 March 2020 introducing a *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak* (2020/C 91 I/01).

jective requirements set forth by the legislation<sup>5</sup>.

A concrete risk, indeed, looms in the request for loans by distressed companies that could contribute to further aggravating their debt position *vis-à-vis* banks and, therefore, to increasing the stock of NPLs<sup>6</sup>. The recent remarks by the Bank of Italy's Director of the Directorate General for Financial Supervision and Regulation and by the Chair of the Financial Stability Board seem to go in this direction: the macroeconomic shock generated by the Covid-19 pandemic, all other things being equal, could lead to a strong increase in Non-Performing Loans.

In particular, the legislative provisions on moratorium and on the suspension of house mortgage installments, as well as measures in support of household income and business continuity 'will manage to contain, even significantly, the flow of NPLs' in the short term. However, in the medium term the fallout of the epidemic on credit quality 'will depend on the duration of the recession and the speed of the recovery'<sup>7</sup>. Hence, the need, in our opinion, for specific measures to allow for a more flexible management of NPLs. In addition, it is no coincidence that, as reported by the press, there is again a discussion on the establishment of a *European bad bank* to collect

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<sup>5</sup>On this point, see, *ex multis*, DOLMETTA, *Prospettive e problemi del credito pandemico coperto da garanzia statale*, in *Riv. dir. banc.*, April/June 2020, p. 253 ff. and LEMMA, *Le implicazioni del decreto legge 8 aprile 2020, n. 23, sullo shadow banking system*, in *Riv. dir. banc.*, April/June 2020, p. 221 ff.

<sup>6</sup>Finally, see, an article by Il Sole 24 ore of 23 June 2020 entitled *Npl, sulle banche una nuova valanga dal virus conto da 100 miliardi*, p. 17. The Italian economy in 2020 could register a contraction of 9.5%, a drop which could follow a rebound of 6.5% in 2021. According to the Pwc report, in a year and a half it is to be put on account of a heavy increase in the deterioration rate, or in the percentage of entry of performing and impaired loans. In the best case, Pwc estimates an increase in net flows in the next 18 months of around 60 billion. In the worst case scenario, however, the estimate is 90-100 billion new NPE, with a decay rate that is expected to be higher than that recorded in 2013. Furthermore, numbers that are still provisional and that do not count on the numerous government measures implemented - such as moratoriums and guarantees - with the outbreak of the pandemic.

<sup>7</sup>See Paolo Angelini and Giorgio Gobbi in the Audition on "Iniziative della Task Force per la liquidità del sistema bancario nell'emergenza sanitaria" during the Parliamentary Commission of Inquiry into the Banking and Financial System, available on <https://www.bancaditalia.it/pubblicazioni/interventi-vari/int-var-2020/Angelini-Gobbi-1505-2020.pdf>

the banks' NPLs, backed by the MES guarantee<sup>8</sup>.

More generally, what raises concerns is the possibility to turn to banks to provide businesses with the necessary liquidity to restore the viability of their activities. This needs to take into account particularly for certain issues arisen in relation to the operating methods through which credit institutions provide resources to businesses, *i.e.* the difficulties associated with the formal preliminary verifications carried out by the banks to check that businesses meet the requirements to be granted loans.

We should note, on this point, that banks have shown - especially in the early application of the regulations - some reluctance to grant loans to businesses, even for amounts lower than those for which the guarantee coverage is maximum.

Considering the most appropriate operating ways, together with concerns related to the possible difficulties associated with the enforcement of guarantees, as well as risks about the foreseeable bureaucratic delays with reference to the procedure in question, the banks have adopted a conservative wait-and-see approach. It can be observed that also regarding the adjustment of the amount of loans with 100%-coverage - which, at the time of conversion, was raised from € 25,000 to 30,000 - the bank may retain the right to disburse the additional loan or not<sup>9</sup>.

We should also point out the problem relating to the significant difference in the interest rate applied among the various credit institutions with reference to the loans in question; nevertheless, the presence of public guarantees should encourage banks to contain rates.

In conclusion, the question at stake is: to ensure greater speed in the

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<sup>8</sup>See, the interview with Giuseppe Di Gaspare of 17 June 2020 available on <https://www.ilsussidiario.net/news/finanza-bce-e-progetto-bad-bank-come-evitare-il-default-delle-banche-italiane/2037227/>. The bad bank would probably be a finance company under Luxembourg law which, assisted by the Mes guarantee, would issue bonds that euro area banks would purchase in exchange for bad debt portfolios.

<sup>9</sup>The guaranteed financing cannot however alternatively exceed: a) double the beneficiary's annual salary expenditure for 2019 or for the last year available; b) 25% of the beneficiary's total turnover in 2019, as resulting from the last financial statements filed or from the tax return submitted on the date of submission of the application or by self-certification.

measures put in place, is it possible to use fintech platforms? In the forms of *peer-to-peer lending*, they provide investors with access to instruments that guarantee a high return on their capital and ensure that borrowers receive loans that would be difficult to grant for a bank in distress <sup>10</sup>.

Banks and fintech platforms entering into specific agreements, so to combine the entrepreneurs' knowledge of the areas where the banks operate with the speed of the operations to implement, may lead to the same results. Indeed, the agreement signed by Banco Desio and the "Credimi" platform, as reported by the press, is significant. Its objective is to grant loans backed by the SME Fund guarantee<sup>11</sup>.

3. With specific reference to the measures introduced in the so called "Re-launch Decree" – *Decreto Rilancio*, the regulatory interventions that introduce non-refundable payments from public resources (art. 25 of the -Law Decree, No 34 of 19 May 2020) are relevant in order to provide a financial assistance to companies with a turnover of less than € 5 million. On this point, however, it should be noted that the criteria used to identify the beneficiaries of this form of state aid, appear particularly complicated. For example, a company had a turnover of 11,000.00 euros in April 2019 and only 1000.00 euros in April 2020 and, therefore, an amount less than 2/3 compared to the previous one. In this circumstance, the public support must be calculated on the basis of the percentage - which in the specific case is equal to 20% - on the difference between the two turnovers (and, therefore, in the hypothesis mentioned above the difference is 10,000 euros).

The provisions of art. 26 of the aforementioned -Law Decree has the clear intention of contributing to the strengthening of the assets of certain companies and introduces tax benefits aimed at favoring capital increases, as well as specific measures aimed at ensuring adequate financing for companies through the use of public in-

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<sup>10</sup>See, for all, on this point, CAPOBIANCO, *Il "peer to peer lending"*, in *Fintech, Regole e Mercati*, Università Mercatorum, by Fimmanò e Falcone, p. 227.

<sup>11</sup>See Sole 24 ore 16 June 2020 p. 22: Banco Desio e Credimi, liquidità per Pmi in un click

tervention. We are referring to the creation of the “SMEs Patrimony Fund” - *Fondo Patrimonio PMI*, managed by Invitalia, aimed at subscribing, by 31 December 2020, newly issued bonds or debt securities with specific characteristics indicated by the regulation. It should be noted, however, that the manager will not participate in the business risk and, consequently, will not be able to affect the strategic choices in reference to the use of the resources granted, having only control tasks regarding the actual destination of the resources for the purposes established by law.

On the other hand, the provision, introducing a new form of capital allocation of public resources, is more relevant than the previous one. We refer to the provisions of art. 27 of the “Relaunch Decree” authorising CDP S.p.A. (Cassa Depositi e Prestiti) to constitute a destined asset vehicle consisting of assets and legal relationships transferred by the Ministry of Economy and Finance.

We are in the presence of a form of segregation of assets. Indeed, the obligations assumed by the net worth capital will be satisfied by the latter within the limits of the assets and legal relationships (i.e. generated or deriving from management). Furthermore, the creditors of CDP S.p.A. will not be able to benefit from the resources of the aforementioned assets; in the same way, the creditors of this asset will not be able to benefit from the assets of CDP S.p.A.<sup>12</sup>.

The resources of the Asset must be used to favour the recapitalisation (also through the underwriting of bonds convertible into shares without complying with the rules of the Italian civil code) for joint stock company (*società per azioni*) that have entered into difficulties due to the current pandemic. We should note that the measure could be extended also to limited liability company (*Società a responsabilità limitata*). This company issues debt securities<sup>13</sup>.

Therefore, in order to fully appreciate the measures contemplated in this pro-

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<sup>12</sup>In general, with reference to the phenomenon of the capital destination, please refer to ROSSANO, *Fondo patrimoniale e patrimoni destinati: spunti di riflessione*, in *Notariato*, 4, 2003, p. 423 ff. and M. BIANCA, *Vincoli di destinazione e patrimoni separati*, in *Biblioteca giuridica*, Padova, 1996.

<sup>13</sup>See, on this point, *ex multis*, the maxim I.J.3 of the notary committee of the triveneto (2019), available on [https://www. notaitriveneto.it/massime-triveneto.php](https://www.notaitriveneto.it/massime-triveneto.php)

vision, it will be necessary, however, to wait for the numerous implementing decrees to verify the concrete modalities by which the provisions contained therein will be applied. More generally, it is desirable that new and more incisive forms of intervention identified are suitable for ensuring greater capitalisation of companies. This is confirmed by the considerations recently expressed by the President of Consob, on the occasion of the presentation of the Consob Report for 2019. He considers appropriate to adopt strategies to strengthen the capital of companies, without indebting companies, avoiding burdens for the state budget, making use of private savings. Moreover, as has been observed on that occasion, exports and private savings are the strengths of the Italian economy and society. Hence the need for the new institutional architecture to be structured according to the strengthening of these production factors, framed in the new technological and geopolitical context.<sup>14</sup>

4. In light of the above considerations, there are numerous critical aspects to the emergency legislation which depend on the need to identify suitable measures for businesses in distress due to Covid-19.

In conclusion, however, we should dwell on one last critical aspect, which the legislative framework has underestimated. We refer to the possibility that, should the guarantee be enforced, the credit claimed by SACE S.p.A., as assignor, vis-à-vis the debtor company may enjoy pre-emption according to Article 9 of the Legislative Decree No 123 of 1998. In the absence of indications by the “Liquidity Decree” (and of the conversion law), we should therefore ascertain whether, as to the measures contained therein, the provisions of the mentioned decree may apply. Let us remind that the Decree should be the reference to regulatory framework on public measures for production activities.

The provisions of Article 1, para. 1 of the Legislative Decree No 123 of 1998

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<sup>14</sup>See SAVONA, *Incontro annuale con il mercato finanziario*, 16 June 2020, Rome, available on <http://www.consob.it/documents/46180/46181/dsc2020.pdf/20ceafb6-ddb1-45f0-9063-6a9c605a590b>



seem to take a positive direction. The provisions state that such Decree ‘governs the administrative procedures concerning public support measures for the development of production activities, including incentives, contributions, concessions, subsidies and benefits of any kind (...) granted by public administrations, also through third parties’. Article 1, para. 3, as well as Article 12, para. 2, confirm the systematic relevance of such measure. According to Article 1, para. 3 and Article 12, para. 2, the principles of the measure are ‘general principles of the rule of law’. We can infer that the discipline pursuant to the Legislative Decree No 123 of 1998 has a general scope, suitable for finding cross application to all the support measures granted by public administrations for the development of production activities, also through third parties<sup>15</sup>.

This latest aspect is particularly debated in doctrine<sup>16</sup> and case law, although the recent judgments of the Italian Supreme Court<sup>17</sup> seem to assert that the Legislative Decree No 123 of 1998 should find general application even in the absence of a specific explicit reference in the loan agreements or in the legislation authorising a specific measure for public support.

This is not the place to dwell on the reasons (which we think are perfectly shareable) on which the legitimacy case law based its arguments. We should note, though, that the withdrawal of public support measures leading to the privileged credit of SACE S.p.A. could be justified, for instance, by improper use of resources, in defiance of the limitations set forth by the “Liquidity Decree” (enhanced upon con-

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<sup>15</sup>In these terms, *ex multis*, the Court of Rimini, 22 March 2016 e the Court of Milan no. 1032, 23 January 2009.

<sup>16</sup>See, DOLMETTA, *Prospettive e problemi del credito pandemico coperto da garanzia statale*, in *Riv. dir. banc.*, cit. and DELLE MONACHE, *Garanzie rilasciate da SACE S.p.a. e privilegio ex art. 9 d.lgs. n. 123 del 1998*, in *giustiziacivile.com*, 24 april 2020. He clarifies how SACE operates within the framework of the provisions of Legislative Decree No 269 of 2003 and by the Legislative Decree No. 143 of 1998, as well as today within the framework of the new discipline dictated by the legislative decree No 23 of 2020: regulatory sources which in no way refer, with respect to the interventions of SACE S.p.a., the Legislative Decree No. 123 of 1998.

<sup>17</sup>See Court of Cassation 4 February 2020, no. 2536, Court of Cassation 30 January 2019 no. 2264 and Court of Cassation 13 may 2020, no. 8882.

version)<sup>18</sup>.

A business that has obtained the facilities illegally and without meeting the requirements could be affected in a similar scenario; such case could be ascertained when checking the self-declarations of the business' legal representatives issued according to Article 1-*bis* introduced with the conversion of the "Liquidity Decree".

The problem is clearly not only theoretical, but also specifically practical. Indeed, the privilege referred to in Article 9 of the Legislative Decree No 123 of 1998, as the Italian Supreme Court has repeatedly pointed out, is enforceable against the creditors, even if the revocation occurred after the publication of the beneficiary's bankruptcy judgment<sup>19</sup>. Furthermore, criminal liability is uncertain, which could be attributed to the legal representatives of banks and businesses in distress due to the current emergency, which have thus worsened their financial situation by resorting to the support measures<sup>20</sup>.

In conclusion, we can state that, due to the doubts and concerns raised in this regard by legal scholars, it is important to provide specific legislative indications. As this is a sensitive issue, its solution will hopefully not be entrusted to the decision of the judges.

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<sup>18</sup>According to art. 1, paragraph 2, lett. n) of the Law, No 40 of June 5, 2020, the financing covered by the guarantee must be intended to support personnel costs, leasing or rental costs of a business branch, investments or working capital used in production plants and business activities that are located in Italy. A portion not exceeding 20 per cent of the amount disbursed, must be used for the payment of installments of loans, expired or expiring in the emergency period or from 1 March 2020 to 31 December 2020, for which the repayment is objectively returned impossible as a consequence of the spread of the COVID-19 epidemic.

<sup>19</sup>Cass. SS.UU., 20 July 2011, no. 15867; Cass., 3 July 2015, no. 13763; Cass., 12 May 2017, no. 11928; Cass., 31 maggio 2017, no. 13751; Cass., 26 February 2018, no. 4510; Cass., 23 May 2018, no. 12853; *contra* Cass., no. 16870/2017.

<sup>20</sup>In this case, BRIOLA, CUCCHIELLA, *Profili di responsabilità in capo agli istituti bancari per l'erogazione dei finanziamenti da Covid-19*, envisage the possible occurrence of the preferential fraudulent bankruptcy crime, available on <https://www.diritto24.ilsole24ore.com/> del 15 maggio 2020.

# THE ITALIAN FOREIGN DIRECT INVESTMENTS SCREENING IN TIMES OF COVID-19: TRENDS AND PERSPECTIVES

Andrea Sacco Ginevri \*

**ABSTRACT:** *The spread of Covid-19 worldwide negatively affected the price of the shares listed in regulated markets, thus making speculative and predatory acquisitions of strategic targets more appealing for foreign speculative investors.*

*In order to safeguard the strategic interests of each Country, new rules on foreign direct investments screening have been adopted in times of Covid-19. Such rules are particularly strict and significantly limit the free movement of capital worldwide. The Italian regulation on FDI (golden powers) clearly shows this trend and thus raises several issues from a legal point of view.*

*This paper summarizes trends and perspectives connected to the FDI evolution in Europe and addresses certain issues such as, among others, the consistency of the new measures with the European fundamental freedoms as well as with the basic principles governing market players.*

**SUMMARY:** 1. FDI recent trends worldwide. – 2. The EU Regulation on FDI. – 3. The main principles of the Italian golden powers' regulation. – 4. The new FDI temporary measures introduced by the Italian emergency regulation and its consistency with the European freedoms. – 5. Final thoughts.

1. *“Is it possible to reconcile the objective of attracting foreign investments and thus promoting economic development with the need to protect national security and strategic interests?”*<sup>1</sup>. Few months ago, such a question opened one of most important Italian conferences dedicated to the legal issues raised by an uncontrollable

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<sup>1</sup>See NAPOLITANO, *Foreign direct investment screening: open questions and future challenges*, in *Foreign direct investment screening*, directed by Napolitano, Bologna, 2019, 10 ff.

development of foreign direct investments screening mechanisms worldwide (“FDI”).

Actually, notwithstanding the EU Regulation No. 2019/452 clearly states that FDI contribute to the Union’s growth - by enhancing its competitiveness bringing in capital, technologies, innovation and expertise - several Member States, consistently with other foreign Countries, started to enact strict national FDI regulations aimed at protecting their respective strategic companies and assets from possible hostile acquisitions.

Such a trend highlighted an increased tension between globalization and national sovereignty in many of the most developed Countries <sup>2</sup>.

Almost one year later, the environment significantly changed because of the Covid-19 pandemic. The Guidance to the Member States concerning FDI, published by the European Commission on 26 March 2020, pointed out that the coronavirus emergency was having pervasive effects on the economy of the European Union, increasing potential risk to strategic industries and their capacity to continue to respond to the needs of EU citizens. Consistently, the EU Commission recently suggested to rebalance the EU’s traditional openness to foreign investment needs by implementing appropriate FDI screening tools.

In times of Covid-19, among the EU Member States, Italy assumed a pivotal role in enacting new rules in the FDI field. Indeed, the Italian legislator confirmed its traditional attitude to strengthen its golden powers’ framework in times of crisis, for the purpose of safeguarding its strategic assets from foreign take-overs in a market scenario in which Italian companies suffered a temporary underpricing of their value as a consequence of the outstanding emergency.

More in particular, as illustrated below, in order to increase the protection over its strategic companies - which now include also financial institutions, such as

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<sup>2</sup>See CAPRIGLIONE, *The globalization paradox. Reflections and findings from Dani Rodrik’s work*, in *Open Review of Management, Banking and Finance*, 2018, 1 ff.; LOCCI, *Foreign Direct Investments*, in *Commentaries and Cases on Italian Business Law*, directed by Sacco Ginevri, Cedam, 2020, 131 ff.

banks, insurance companies and other financial intermediaries <sup>3</sup> - the Italian Government has been granted with wider special powers to scrutinize, and potentially veto, foreign direct investments.

In a nutshell, on the one hand the Italian State may now monitor foreign investments also in the economic sectors referred to in Article 4 of the above mentioned EU Regulation No. 2019/452. On the other hand, until 31 December 2020 a notification *vis-à-vis* the competent political body is mandatorily required either in case of acquisition of a controlling stake also by an EU purchaser or in case of acquisition of a stake exceeding 10% of the target corporate capital by a non-EU investor <sup>4</sup>.

The race to the strictest FDI screening mechanism is currently ongoing worldwide (U.S.A., U.K., Australia, Russia, India, Germany, Spain, France, etc.) and, in this context, Italy has good chances to compete for the leading positions <sup>5</sup>.

However, the words of the EU Advocate General Mr. Ruiz-Jarabo Colomer pronounced on 6 November 2008 - in the case against the Italian golden share - should be carefully taken into account when the Covid-19 emergency will end - and the most developed Countries will face the risk to be transformed into modern King Midas - considering that *“In the sphere of ‘golden shares’, that adage ought to have percolated deep into the minds of the Member States, determined to transmute into a substitute for that most prized of metals shareholdings in undertakings operating in strategic sectors or providing public services”*.

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<sup>3</sup>The role of the financial institutions in times of Covid-19 has been investigated, among others, by See SCIARRONE ALIBRANDI and FRIGENI, *Restrictions on Shareholder's Distributions in the COVID-19 Crisis: Insights on Corporate Purpose*, in *Pandemic Crisis and Financial Stability*, European Banking Institute, available at [www.ebi-europea.eu](http://www.ebi-europea.eu), May 2020, 429 ff.; LEMMA, *From the health emergency to the economic drift. Which challenges for European banks?*, available at [www.ssrn.com](http://www.ssrn.com), March 2020.

<sup>4</sup>For the purpose of the golden powers regulation non-EU entities are not only people or companies located outside the EU, but also any people or company that albeit formally located within the EU is controlled directly or indirectly by a person or an entity located outside the EU or shows the intention to elude the golden power regulation.

<sup>5</sup>In general terms, on the EU Regulation No. 2019/452, see VELLUCCI, *The new regulation on the screening of FDI: the quest for a balance to protect EU's essential interests*, in *Dir. comm. int.*, 2019, 142 ff.; BARIATTI, *Current trends in foreign direct investment: open issues on national screening systems*, in *Foreign direct investment screening*, directed by Napolitano, Bologna, 2019, 39 ff.

2. In the European Union, foreign direct investments are part of the common commercial policy (Article 207 TFEU). Anyway, the screening of foreign direct investments used to be conducted at a national level, since national security falls under the responsibilities of each Member State according to Articles 4 and 346 of the Lisbon Treaty <sup>6</sup>.

As mentioned above, the European Union issued in 2019 a common framework for the screening of foreign direct investments into the Union, trying to strike a balance between its tradition of free trade and the protection of its critical economic sectors.

Pursuant to the EU Regulation, openness to foreign investment is an important factor for the success of the European economy and must be achieved with a transparent framework for the screening, as well as with the principles of judicial accountability of the national authorities and the EU Commission.

In other words, on the one side, Member States may maintain, amend or adopt mechanisms to screen foreign direct investments in their own countries taking into account security or public order and implementing the applicable rules and procedures on a non-discrimination basis.

On the other side, the EU Regulation provides now a cooperation among Member States, and between Member States and the EU Commission (starting from 11 October 2020), with regard to foreign direct investments, including the possibility for the Commission and for other Member States to issue non-binding opinions on such investments.

More in particular, Member States shall notify the Commission and the other Member States of any foreign direct investment in their territory, that is undergoing screening, as soon as possible <sup>7</sup>. Whenever a Member State considers that a foreign

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<sup>6</sup>In general terms, on the EU Regulation No. 2019/452, see VELLUCCI, *The new regulation on the screening of FDI: the quest for a balance to protect EU's essential interests*, in *Dir. comm. int.*, 2019, 142 ff.

<sup>7</sup>The notification may include a list of Member States whose security or public order is deemed likely to be affected.

direct investment undergoing screening in another Member State is likely to affect its security or public order, or has information relevant for such screening, it may provide comments directly to the Member State undertaking the screening, and to the EU Commission, which in turn will inform the State conducting the screening.

In any case, the EU Commission is entitled to issue an opinion addressed to the Member State undertaking the screening, and the issuance of such opinion is mandatory if at least one third of Member States consider that a foreign direct investment is likely to affect their security or public order. However, even though the Member State has to take the Commission's opinion and the other comments into due account, it is possible not to follow the opinion and the comments and thus the final decision on the foreign investment stays with each national body.

Therefore, in order to fully understand which degree of FDI screening applies in a single Country, the applicable national framework shall be deeply and carefully investigated.

3. In case a strategic target is located in Italy, the Italian regime on FDI (so-called "golden powers") applies and its provisions are particularly strict for several reasons.

First, such regulation applies to a wide range of strategic assets and companies, which are not individually listed in public sources or registers and, therefore, shall be identified at the end of a case-by-case analysis and due diligence carried out by the market players involved in relevant transactions. Such assets or companies would be considered strategic for the purpose of the golden powers on the basis of their connections with the strategic sectors' perimeter, which includes defense and national security, 5G technology, energy, transports, communication as well as the other assets mentioned in the EU Regulation No. 2019/452 and in the Italian law decree No. 21 dated 15 March 2012 (including its implementing decrees).

The law decree No. 21/2012 has been significantly amended by the law decree No. 23 dated 8 April 2020, which recently widened the scope of application of the

Italian foreign direct investments screening mechanisms in order to address the take-over risks arising from the market volatility linked to the Covid-19 pandemic.

In general terms, law decree No. 21/2012 – as recently amended and integrated - mainly defines the perimeter of the strategic sectors, the triggering events enabling the Government to exercise its golden powers and the administrative process starting from the notification of a relevant transaction.

Strategic companies are both public and private, regardless of a shareholding held – or previously held – by the Italian public bodies in such entities. Moreover, different rules apply to companies involved in the national defense and security sectors (which are considered highly strategic pursuant to Article 1 of the above mentioned law decree) compared to those applicable to the remaining strategic companies (which are regulated by Articles 1-*bis* and 2 of the law decree).

However, the events triggering the possible exercise of the golden powers – as well as the reviewing process followed by the competent public bodies – are similar in all the circumstances. Indeed, golden powers may be exercised by the Italian Government mainly in the following cases: (a) corporate resolutions concerning certain extraordinary transactions, and/or substantial disposal of control over the strategic assets owned, by the relevant strategic company, and/or (b) transfer of significant participations to the corporate capital of strategic companies.

Should a threat of serious prejudice to national interests occur, the Italian State may veto a relevant transaction or impose specific prescriptions and conditions to its completion. For such a purpose, the existence of a threat of a serious prejudice to the essential interest of the State takes into account the purpose of the transaction, the strategic relevance of the assets involved, and other relevant factors in accordance with the principles of proportionality and reasonability.

In order to allow the Italian Government to evaluate whether to exercise or not the special powers, relevant transactions or acquisitions shall be communicated in accordance with the provisions set forth under the applicable regulations either by the potential purchaser of a significant stake in the strategic target company (in case



of transfer of shareholdings) or by the strategic company itself in case of corporate transactions planned by the latter. The public authority could exercise its golden powers within 45 days starting from the notification <sup>8</sup>.

Article 16 of law decree No. 23/2020 recently extended the scope of golden powers granting the Government with the possibility to begin *ex officio* FDI screening proceedings in the event that any notification obligations provided under the applicable is breached. Both civil and administrative (pecuniary) sanctions apply in case of breach of the notification obligations.

Since the Government may impose any kind of prescription or condition to the potential transaction, M&A agreements generally address such a risk providing for condition precedent provisions which require a satisfactory clearance by the competent authority, to be evaluated by the interested party.

4. As anticipated above, in the context of the Covid-19 national measures, law decree No. 23 / 2020 introduced significant amendments to certain key aspects of the Italian golden powers regulation, including its triggering conditions and the scope of the special powers granted to the Italian Government in the event of threat to national interests. The new provisions can be split into permanent and temporary rules.

With regard to the provisions in force until 31 December 2020 (*i.e.* the expected duration of the Covid-19 emergency), the Italian legislator clarified that: (i) also strategic assets and companies operating in the above-mentioned sectors referred to in Article 4, par. 1, of the EU Regulation are immediately subject to the Italian FDI screening without any need to formally implement such a EU regulation <sup>9</sup>, and (ii) ac-

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<sup>8</sup>In the event of incomplete notifications, the afore-mentioned 45-days term starts upon receipt of the required integrations.

<sup>9</sup>Article 4 of the EU Regulation includes the following strategic sectors: (i) critical infrastructures, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructures, and sensitive facilities, as well as investments in land and buildings essential for the use of such infrastructures (in Italy the financial sector also expressly includes the credit and insurance sectors); (ii) critical technologies and dual use products as defined in Article 2, no. 1, of Council Regulation (EC) No. 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage,

quisitions planned by foreign entities (both EU and non-EU entities) of controlling stakes in strategic companies - as well as acquisitions of shareholdings carried-out by non-EU purchasers “*which grant voting rights or a portion of the corporate capital of at least 10 per cent, taking into account shares or quotas already directly or indirectly held and [whose] overall investment value is equal to or higher than Euro 1 Million*”, or those resulting “*in the exceeding of 15 per cent, 20 per cent, 25 per cent and 50 per cent thresholds*” (see Art. 15, par. 1 of law decree No. 23/2020)- are temporarily subject to the FDI screening as well <sup>10</sup>.

The restrictions to the European fundamental freedoms impacted by the FDI regulations (*i.e.* free movement of capital and right of establishment) could be justified, in addition to the circumstances referred to in Article 65 TFEU, only in case of *mandatory reasons of general interest* and if the principles of necessity and proportionality of such measures are complied with<sup>11</sup>.

In this perspective, the improvement of national FDI screening mechanisms occurred in times of Covid-19 should be deemed consistent with the above-mentioned framework given the temporary nature of such emergency measures, which aim at mitigating the negative consequences of the current pandemic and, thus, are based on the relevant mandatory reasons of general interest.

Such considerations also apply to companies operating in the financial, banking and insurance sectors, given that – consistently with the ECJ jurisprudence – the extension of FDI restrictions to such players could be reasonable if its goals are not of a “*purely economic nature*”<sup>12</sup>, but “*of an economic nature pursuing an objective of general interest*”. Such a feature seems to be triggered in the current scenario, con-

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quantum and nuclear technologies, as well as nanotechnologies and biotechnologies; (iii) security of supply of critical inputs, including energy and raw materials, as well as food security; (iv) access to sensitive information, including personal data, or the ability to control such information; (v) media freedom and pluralism.

<sup>10</sup>For the exercise of the special powers above mentioned, as extended by law decree No. 23/2020, the Italian Government may also take into consideration whether the purchaser is directly or indirectly controlled by the public administration of an EU State (including by any State-related entity and by the military) also by way of the shareholder structure or significant funding.

<sup>11</sup>See, for instance, ECJ, judgment in the case C-106/16 (Polbud) of October 25<sup>th</sup>, 2017, point 52.

<sup>12</sup>See ECJ, judgment in the case C-388/01 of January 16<sup>th</sup>, 2003, point 22.

sidering that the FDI recent empowerment is intended to protect entities which, in the COOVID-19 economic situation, represent *“an essential source of funding for companies active in the various markets”*<sup>13</sup> and therefore play a key role for the whole system.

Even during the Greek crisis, for instance, the European Commission stated that, in emergency circumstances, *“the stability of the financial and banking system is a matter of overriding public interest and public policy which seems to justify the temporary application of restrictions on capital flows”*<sup>14</sup>.

Finally, Article 15 of the law decree No. 23/2020 specifies that the golden powers concerning the new strategic sectors (i.e., critical infrastructures and technologies) can be exercised only should *“the protection of the essential interests of the State, i.e. the protection of security and public order, ... not be already adequately guaranteed by the existence of a specific regulation of the relevant sector”*. This clarification takes into proper account certain concurrent special regulations such as those covering banking, finance and insurance undertakings as well as utilities and media.

In light of the above, a large number of transactions and resolutions in several sectors of the Italian economy now falls within the scope of the new golden powers’ regulation<sup>15</sup>. This implies an high level of self-responsibility for investors and strategic targets, now required to carry out tailor-made assessments of the scope of application of the golden power regulation and its impact on the envisaged deals, plans, agreements and transactions.

5. The above-mentioned considerations suggest the concluding thoughts briefly illustrated below.

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<sup>13</sup>See ECJ, judgment in the case C-526/14 (Kotnik) of July 19<sup>th</sup>, 2016, point 50.

<sup>14</sup>See *Statement on behalf of the European Commission by Jonathan Hill on the capital controls imposed by the Greek authorities*, June 29<sup>th</sup>, 2015, available at [www.ec.europa.eu](http://www.ec.europa.eu).

<sup>15</sup>Moreover, it should be noted that the relevant assets for those sectors lastly included within the scope of the above mentioned law decree (e.g. high-tech and critical infrastructures) still have to be defined in detail through implementing decrees of the President of the Council of Ministers.

There is no doubt that market transactions, at today, necessarily involve an additional player, who is no longer moved by a shareholder interest - as happened in the times of the State-public ownership of the strategic industries - but now acting, instead, as gatekeeper of the essential interests of the Country.

However, in order to protect domestic target companies from hostile takeovers different legal tools could be activated <sup>16</sup>. More in particular, amendments to the current EU corporate law - aimed at providing target companies with poison pills or other defensive measures for the purpose of protecting the company's value and its sustainable growth during adverse economic contingencies - should be seriously evaluated and possibly adopted. Such alternative legal path would avoid an artificial proliferation of "strategic" companies – as well as an increase of FDI screening proceedings sometimes not justified by the public interests protected – preserving, at the same time, relevant national assets from hostile take-overs. <sup>17</sup>.

In this perspective, national economic barriers should be proportionate and commensurate with the constraints that domestic players meet to enter into foreign

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<sup>16</sup>As stated by DROBETZ and MOMTAZ, *Antitakeover Provisions and Firm Value: New Evidence from the M&A Market*, in *Journal of corporate finance*, 2020, 1 ss., anti-takeovers measures do not necessarily depress the value of the company which introduce them, but rather in particular contexts they "may increase firm value when internal corporate governance is sufficiently strong" also taking into account the fact that "takeover threats can induce myopic investment decisions, which ATPs can mitigate. They lead managers to engage more often in value-creating long-term and innovative investing and increase a firm's sensitivity to investment opportunities".

<sup>17</sup>See also ENRIQUES, *Extreme times, Extreme Measures: Pandemic-Resistant Corporate Law*, April 2020, available at [www.law.ox.ac.uk/business-law-blog](http://www.law.ox.ac.uk/business-law-blog), who, after having observed that it is hard for EU target companies (differently from the U.S. ones) to protect themselves against hostile takeovers - which are extremely favored by the stock markets values distorted by systemic crises - highlighted that "companies may have to heavily rely on Governments to fend off hostile bids. That gives them an incomplete and potentially costly defence: the target may not hold 'strategic assets' that trigger government vetting powers"; but such defensive measure is not the most appropriate since "the bidder may better connected with the Government than the incumbent: geopolitics may even get in the way and lead the Government to acquiesce to a hostile bid from a foreign company to maintain good relations with a foreign government. In addition, political capital may have to be spent in order to secure the Government's veto, which may then come with formal or informal strings attached", with the consequence that a protection should be found in company law (better if transitional), for instance by making use of "a temporary default rule granting boards the right to approve purchases of share blocks above a given threshold. In addition, one could think of a temporary default rule requiring a supermajority for the removal of directors if a bid is on the table. Finally, temporary tenured voting shares could be facilitated through a default rule doubling the voting rights of shares held for a certain time, but only until a pre-set date or the date when the Government declares the emergency over".

markets, according to the traditional *reciprocity* rule <sup>18</sup>. On the other hand, foreign bidders should invest according to purely entrepreneurial logics - in fair and transparent competition with other industrial and financial players <sup>19</sup> - and not as an “armed wing” of political forces or representing foreign public interests <sup>20</sup>.

In conclusion, also in this emergency context, national measures should aim at enhancing structural changes to the respective own legal frameworks, for the purpose of rebuilding the basis of a renewed and constructive cooperation at the European and international level <sup>21</sup>.

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<sup>18</sup>The *reciprocity* principle in this specific field is provided by Article 3, paragraph 1, of law decree No. 21 / 2012.

<sup>19</sup>See GORDON and MILHAUPT, *China as a “National Strategic Buyer”: Towards a Multilateral Regime for Cross-Border M&A*, in *Columbia Business Law Review*, 2019, 192 ff., who suggest the adoption of multilateral international commitments which allow the purchasers of foreign strategic assets - which are influenced by public property or control - to operate in other legal systems without excessive constraints where they demonstrate the existence of organisational and governance requirements that protect sound and prudent management and independent decision-making.

<sup>20</sup>See SACCO GINEVRI, *L’espansione dei golden powers fra sovranismo e globalizzazione*, in *Riv. Trim. Dir. Econ.*, 2019, 172 ff.

<sup>21</sup>See CAPRIGLIONE, *The EU seeking a new balance between regulatory harmonization, economic convergence and sovereignty*, in this *Review*, 2018, 167 ff.

## BANKS' BALANCE SHEET IN THE TIME OF COVID-19

Valerio Lemma \*

**ABSTRACT:** *An early reflection on the accounting of the effects of COVID-19 and the anti-contagion measures suggests specific actions to be taken by the regulator in order to adapt the accounting rules to the emergency.*

*It has become clear that the regulatory interventions of recent months interact directly with the activities and assets of credit institutions, hence the expectation that this interaction will have a deep impact on bank balance sheets. Hence, there is the need for a disciplinary solution to proceed both with the revision of the values posted in previous years, and with the introduction of new accounting criteria. Finally, it is also envisaged an evolution of the function assigned to the reporting of banks and, therefore, of the accounting criteria. This would allow banks capture and compute additional elements with respect to changes in assets and liabilities or the economic performance of banking activities, in order to make the bank's financial statements representative that the exercise of the latter takes place in a sustainable manner and, therefore, adequate to promote a 'new normality'.*

**SUMMARY:** 1. Foreword. - 2. The first interventions in 2020 emergency. - 3. The constraints of the reporting rules and international accounting standards. - 4. Applicable perspectives.

1. The epidemiological experience of 2020 is likely to be recorded in bank balance sheets marking discontinuities and dyscrasies. <sup>1</sup> Actually, the relevant economic and financial effects on banks run along two lines, respectively related to

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<sup>1</sup>See LAGARDE, President of the ECB, speech of March 19 2020, who stated that “Extraordinary times require extraordinary action. There are no limits to our commitment to the euro. We are determined to use the full potential of our tools, within our mandate.”. See also Visco, Speech of the Governor of Bank of Italy, “Le prospettive e le necessità di riforma dell’economia italiana” at Villa Pamphilj, Rome, 13 June 2020

their relationships with companies and to their nature as enterprises. These are routes traced by the economic dynamics and the consequences of emergency regulation; all of them occurred after the end of the calendar year 2019, but before the approval of the related financial statements.

It is clear that the effects mentioned above affect both the economic and capital profiles, raising doubts that undermine not only the current accounting strategies, but also the choices that preceded the Covid-19 period and determined the current conditions of the banks and their clients.<sup>2</sup> On a more careful examination, further uncertainties are weighing on the future prices of assets and liabilities since the evolutionary trends affecting the social conditions of the world's population are not yet foreseeable. Hence, a point of observation that leads us to reflect on the accounting rules that govern the representation of credit institutions' balance sheet entries and their external disclosure under specific supervisory duties.<sup>3</sup>

It is useful to carry out a regulatory analysis aimed at highlighting the consequences of reporting based on the principle of fair value, where unexpected events lead to discontinuity in the conduct of banking and industrial activities to which the latter is instrumental.<sup>4</sup>

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<sup>2</sup>See Visco, Governor's Final Considerations. Annual Report 2019, Rome, 29 May 2020, where it should be noted that, in the first quarter of this year 2020, the capital conditions of the banking sector have further improved; the decision not to distribute dividends, following the recommendations of the supervisory authorities, contributed to this. This follows the consideration that, since the beginning of the year, the rapid spread of the new coronavirus around the world has caused a very serious health emergency, as millions of people have been affected and hundreds of thousands have lost their lives. The Governor highlighted also that the containment of the pandemic has made it necessary to introduce drastic measures to limit freedom of social and economic interaction, the suspension of teaching in schools and universities, the temporary closure of many productive activities. In brief, he pointed out that this is an unprecedented crisis in recent history, which is putting the organisation and stability of the economy and society to the test.

Similar contents are provided by Consob, Report for the year 2019, Rome, 31 March 2020.

<sup>3</sup>See CALABRESI - BOBBIT, *Tragic Choices*, New York, 1978 about the relevant political devices of the decentralization, as this global pandemic disease cannot be faced by a sole intervention, but it requires the action of several sovereign authorities. This takes one or two forms, depending on whether a central authority bases the standards for the intervention on a local community or these standards are determined locally.

<sup>4</sup>It seems appropriate to recall the path for introducing the regulation of *fair value*, see point LEMMA, L'applicazione del Fair Value alle banche: problematiche giuridiche e soluzioni, in



Hence, it comes - first of all - the need to verify the meaningfulness of a representation based on this principle. Then - if unacceptable limits arise - it comes also the opportunity to introduce corrective measures and filters to allow determinations based on reasonable criteria, oriented to represent the resilience of intermediaries to the challenges posed by the health emergency, social distancing and the economic difficulties resulting from it.<sup>5</sup>

After all, there is the awareness that intermediaries are called upon to carry out - against their will - active coordination of the intervention policies envisaged by the Government, being at the centre of legal relations that give content to the monetary, economic and regulatory policy actions adopted to meet the previously mentioned challenges.<sup>6</sup>

2. In the light of the above foreword, it seems possible to take the opportunity of a disciplinary intervention that modifies both IAS/IFRS and the relevant reporting regulation. On the one hand, the changes in the IAS/IFRS may support the analysis of stakeholders in the observation of business dynamics. On the other hand, the restatement of the rules relating to annual reports may support a new role of the

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Banca borsa e titoli di credito, 2006, I, p. 723 ff.

See also DE ANGELIS, IAS e l'unfair value, in *Le Società*, 2006, p. 5 ff.; STRAMPELLI, Gli IAS/IFRS dopo la crisi: alla ricerca dell'equilibrio tra regole contabili non prudenziali e tutela della stabilità patrimoniale della società, in *Rivista delle società*, 2010, p. 395 ff. TROISI, Gli assetti gestionali e contabili delle banche dopo la crisi finanziaria, in *La Nuova giurisprudenza civile commentata*, 2012, II, p. 190 ff.; DI GABRIELE - QUARANTA - ZIGIOTTI, Un'indagine sui bilanci delle banche italiane: "impairment test" degli intangibili e "disclosure", in *Banca impresa società*, 2017, file 2, p. 255 ff.

<sup>5</sup>See CONTE, "Progettiamo il Rilancio", meetings on Sunday 21 June 2020, Rome, available on [Governo.it](http://Governo.it) site

<sup>6</sup>In this context, the role assigned to credit institutions by the emergency regulations of early 2020 appears to be significant, as they were called upon to intervene in support of businesses with the assistance of state guarantees and monetary resources (made available by the ECB and other supranational bodies); see in CAPRIGLIONE, Covid-19. Quale solidarietà, quale coesione nell'UE? Incognite e timori, in *Rivista Trimestrale di Diritto dell'economia*, 2020, p. 167 ff.; ID. La finanza UE al tempo del coronavirus, in *Rivista Trimestrale di Diritto dell'economia*, 2020, p. 1 ff.



information provided to the market by of banks and other financial institutions.<sup>7</sup>

In taking into account the differences between the disclosure style of the IAS/IFRS and the prudential approach of the supervisory rules, it seems necessary to point out that these differences may amplify as a result of the stress caused by social distancing. This may alter the truthfulness of a forward-looking perspective based on probabilistic estimates (such as the current one, aimed at providing a dynamic representation of the current values of the company's assets and liabilities).<sup>8</sup>

On the earnings side, the 'social distancing' interacts on the operating modalities of the banks, where the urgent measures to face the epidemiological emergency from Covid-19 have determined the limitation of the circulation of people and, therefore, of business.

We refer, in particular, to Law Decree no. 6 of 23 February 2020, converted with amendments by Law no. 13 of 5 March 2020, to the Prime Ministerial Decree “#IoRestoaCasa” of 9 March 2020, and to Law Decree no. 19 of 25 March 2020, art. 1.2; in fact, these interventions were followed by delays in the granting of credit and the supply of financial instruments, with incremental effects on liquidity (as a result of the reduction in loans and the increase in deposits).<sup>9</sup>

This obviously affects the profitability of the bank, which will record lower interest income (due to the reduction in lending), lower commissions (for the provision of investment services), higher funding costs (due to the increase in funding itself) and higher liquidity costs (due to negative rates). In addition to the above-mentioned charges, there are also operating costs due to the implementation of

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<sup>7</sup>It worth recalling implementation of Directive 86/635/EEC, as integrated by Commission Recommendation No. 2000/408/EC of 23 June 2000 on the presentation of supplementary information on financial and other instruments

<sup>8</sup>See PANETTA, Why we all need a joint European fiscal response, in Politico, 21 April 2020

<sup>9</sup>See BATTISTINI - STOEVSKEY, Alternative scenarios for the impact of the COVID-19 pandemic on economic activity in the euro area, ECB Economic Bulletin, Issue 3/2020; EBA, COVID-19 is placing unprecedented challenges on EU banks, 25 May 2020; FSB, COVID-19 pandemic: Financial stability implications and policy measures taken, 15 April 2020.

See, also, KPMG, COVID-19: effetti sul Banking, 18 Marzo 2020; ESRB, The General Board of the European Systemic Risk Board takes second set of actions in response to the coronavirus emergency at its extraordinary meeting on 27 May 2020, 9 June 2020

sanitization activities and the development of information systems (and of the corporate functions that provide support to customers accessing home-banking services).

However, the operational impacts of the epidemiological emergency will extend to influence the organizational structure of the company functions; hence, there is the need to identify unambiguous criteria that allow administrators to report the results of the mapping of the economic impacts of the emergency in question in a uniform manner. There is no doubt that the introduction of mandatory rules would have the benefit of ensuring the comparability of the information produced by the banks, against minimum transaction costs linked to the updating of the reference accounting standards.<sup>10</sup>

With regard to the further impacts of emergency measures, it seems necessary to move on from Law Decree No. 34 of May 19, 2020. This Law Decree responds to the intent to broaden the scope of public support and, through a significant amount of legislation. Moreover it links and systematizes interventions responding to the needs and emergencies of the first months of 2020 (and, in particular, the measures introduced by Law Decree No. 18 of March 17, 2020, converted with amendments by Law No. 27 of April 24, 2020, and expanded by Law Decree No. 23 of April 8, 2020). This is, overall, a form of support to firms that is activated through the banking system, in specific areas related to liquidity, export, internationalization and investments; this, through measures to ensure the continuity of production units, which can be traced back to the ultimate goal of guaranteeing the continuity of production units.<sup>11</sup>

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<sup>10</sup>See BUTHE - MESSERSCHMIDT - CHENG, Policy Responses to the Coronavirus in Germany, In *The World Before and After COVID-19: Intellectual Reflections on Politics, Diplomacy and International Relations*, edited by Gian Luca Gardini. Stockholm – Salamanca: European Institute of International Relations; LAZZARINI - GIOVANETTI - MUSACCHIO, Leviathan As a Partial Cure? Opportunities and Pitfalls of Using the State-Owned Apparatus to Respond to the COVID-19 Crisis, in SSRN 3562406

<sup>11</sup>The economic implications induced by the pandemic have been easily understood, as - among these - the prospect of a significant recession reported in the most diverse locations, which will result in an inevitable loss of GDP inflicted on Italy and other Member States affected by the

In particular, credit institutions are at the centre of a dynamic that copes with the economic consequences of social distancing by increasing the sources of financing from banks, sometimes assisted by a State guarantee. In other words, in case of a high probability that companies will record a decrease in revenues and an increase in costs, it is possible to suppose that these records may not offset by direct interventions by the State (such as, for example, the support of labour costs). Hence, it is possible to record losses, but then it is also possible to intervene to facilitate the raising of financial resources by way of debt. This is one of the effects of Law Decree No 23 of 8 April 2020.

It has been argued that, in recent months, the Government has moved in an expansive direction, promoting credit operations backed by State guarantees.<sup>12</sup> However, public intervention has not been extended to the actual capital structure of companies, nor has it provided for the possibility to re-modulate the dynamics of their capital requirements. We refer, in particular, to the introduction of rules that facilitate the replacement of debt relationships. It must be borne in mind that the latter are currently characterized by acceleration clauses to ensure the recovery of credit and not also the productive capacity of the debtor. Therefore, the aforesaid replacement may involve other sources of financing at full risk (and, therefore, permanently allocated to the company), which may be represented by shares or financial instruments able to circulate on the market. In this context, such exposures would not be subject to the rules of prudential supervision and the usual conditions aimed at ensuring a privilege in the distribution of payments. In other words, what remains to be assessed is the possibility of a regulatory intervention allowing the debtor to repay the loans with shares, which the banks could then sell on the market

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‘contagion’, denotes specific gravity. The closure of the production chains, together with the blockage of all service sector activities, suggest a contraction in supply and demand, the consequence of which will be the start of a recessionary process; see CAPRIGLIONE, *La finanza UE al tempo del coronavirus*, in *Rivista Trimestrale di Diritto dell’Economia*, n. 1/2020, p. 6.

<sup>12</sup>See Acunto, *La politica fiscale in Italia ai tempi del Covid-19: dall’austerità espansiva al megamoltiplicatore*, in *Giustiziacivile.com*, 23 March 2020.

in order to liquidate the exposure.<sup>13</sup>

On balance, it is common to be aware of the effort required to banks and the accounting implications of such an effort, since the support to companies requires an increase in operations that is not free of constraints on regulatory capital.<sup>14</sup>

Thus, the provision according to which the Ministry of Economy and Finance is authorised to grant the State guarantee on the liabilities of Italian banks (in compliance with the European rules on State aid, up to a nominal value of €19 billion), pursuant to Articles 165 et seq. of Law Decree no. 34 of 19 May 2020.<sup>15</sup>

After all, what the health emergency is undermining are the long waves of liberalisation, financialisation and digitalisation of global society. In fact, the regulatory framework was not designed to face such an emergency and the accounting system was not ready to report a transnational emergency that would impose a significant discontinuity in the economic dynamics of this new millennium.

This being the case, it seems possible to draw an internal conclusion according to which the regulatory interventions of recent months interact directly with the activities and the assets of credit institutions. Hence, there is the expectation that this interaction will have a profound impact on banks' balance sheets. Therefore, it arises a confirmation of the need to evaluate disciplinary solutions that allow to proceed both to the revision of the values posted in previous years, and to the declination of new reporting criteria (if the possibility of a health emergency, social distancing, digitization of the reference market had been underestimated).

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<sup>13</sup>Obviously, these actions could also be used in the context of monetary transactions, as guarantees, in line with recent measures to extend the temporary scheme; see BANCA D'ITALIA, *Prestiti bancari a garanzia delle operazioni di finanziamento con l'Eurosistema. Misure adottate dalla Banca d'Italia in risposta all'emergenza COVID-19*, 20 May 2020.

<sup>14</sup>See, LAGARDE, *Video interview with Christine Lagarde, President of the ECB*, conducted by Roula Khalaf on 7 July 2020 and posted on 8 July 2020.

<sup>15</sup>See CAPRIGLIONE, *Il D.L. Liquidità. Una scommessa pericolosa per le banche*, in *ApertaContrada*, 10 April 2020; ID., *La finanza UE al tempo del coronavirus*, in *ApertaContrada*, 31 March 2020.

3. Nowadays, the information flows give continuous updates on the state of health of the population, on the conditions of exercise of the economic activities and on the trends of the financial markets. In addition to the primary news, a 'derived information' is put into circulation, the elaboration of which is connected to instantaneous analyses and, often, is the result more of freedom of expression than of the fulfilment of legal obligations (to which corresponds a specific responsibility towards the recipients of such information). Only in a few months' time, in fact, the financial statements will be prepared in accordance with the legal guarantees that the market requires in order to ensure the overcoming of the relevant asymmetries.<sup>16</sup>

In the light of the above, it is necessary to take into consideration the rules that guide banks in the preparation of their reporting documents. These reports are based on a variety of sources based on the ordinary criteria of representation of business activities, as they pursue the accounting of risks and the prudent appreciation of the ability to face these risks with own funds. Hence, the pre-eminent importance of the criteria used to draw up the balance sheet and the functionalisation of the latter to verify the capital adequacy (of the bank with respect to its risks).<sup>17</sup>

In general, regardless of the classifications in the financial statements, the events of these days have marked the state of affairs and the operational situations in which credit institutions have found themselves, raising doubts about the

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<sup>16</sup>It is useful to recall, in this regard, the considerations of VALENSISE, *Appunti sul dirigente preposto alla redazione dei documenti contabili societari in Banca borsa e titoli di credito*, 2016, p. 6 ff.

<sup>17</sup>See DI GABRIELE - QUARANTA - ZIGIOTTI, *Un'indagine sui bilanci delle banche italiane: "impairment test" degli intangibili e "disclosure"*, in *Banca impresa società*, 2017, p. 25 ff. See also CUSA, *L'intricato rapporto tra utili, perdite, riserve e imposte nelle banche di credito cooperativo*, in *Diritto della banca e del mercato finanziario*, 2017, p. 437 ff.; SPANO, *In attesa del legal standard*, in *Banca borsa e titoli di credito*, 2009, p. 644 ff. COLUMBA - ERAMO, *Strategie - Un'analisi dei bilanci dei primi cento gruppi bancari mondiali tra il 2000 e il 2005: il posizionamento degli intermediari italiani*, in *Bancaria*, 2008, p. 29 ff.; LEMMA, *L'applicazione del fair value alle banche: profili tecnico economici e giuridici in Banca borsa e titoli di credito*, 2006, p. 723 ff.

reference time of bank balance sheets.<sup>18</sup>

There is no doubt, in fact, that the banks are (in any case) running their activities, but the constraints of interdependence of the operations - ordinary and extraordinary - have undergone such changes that they cannot be grasped by the ordinary accounting principles without the representation of significant negative results. On the other hand, the splitting of the life of the company into periods poses the problem of the division of multi-period activities, such as those that typically characterize the disbursement of credit and the raising of a bank's own funds.<sup>19</sup>

Therefore, the doubts on the ordinariness of the 2020 financial statements do not appear provocative, proposing extraordinary forms of reporting (including the possibility of reviewing the assumptions underlying the accounting choices made in previous years and, therefore, to recalculate the related financial statements).

In this context, it should be noted that Bank of Italy itself highlights the role of banks as a vehicle for public policies, hence the problematic interference of the accounting effects of these policies with the data relating to the business activities carried out by the same banks. This is especially true with reference to the possibility that the banks may perform the function of liquidity insurer and lender for saving jobs.<sup>20</sup>

The expected impact on the balance sheet will be assessed with reference to the weightings of the guarantees due for the new loans, without prejudice to the possibility that the new loans may - in part - be pre-ordained to replace previous

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<sup>18</sup>See STAMEGNA - DELIVORIAS, Developing a pandemic emergency purchase programme: Unconventional monetary policy to tackle the coronavirus crisis, European Parliamentary Research Service, 2020.

<sup>19</sup>See LEMMA - TROISI, I bilanci bancari, in AA.VV., Manuale di diritto bancario e finanziario, Padova, 2019, p. 435 ff.

<sup>20</sup>Indeed, the 'Recommendation of the Bank of Italy on the distribution of dividends by less significant Italian banks during the COVID-19 pandemic' and the Recommendation addressed by the European Central Bank (ECB) to significant banks, both dated 27 March 2020, guide the interpreter in understanding the need for a capital strengthening. Moreover, this recommendation pursues the objective of allocating profits to the strengthening of equity and, therefore, to use the proceeds from banking activities in order to put the financial system in the best condition to absorb the losses that will materialize due to the serious health emergency.

lending operations.<sup>21</sup>

In this case, it would be possible to strengthen banks' capital base, as new exposures (although higher than previous ones) would benefit from favourable risk weights, hence a reduction in capital requirements. The same is true for the assessment of operational risk, as the emergency regulations introduce simplifications that could reduce the size and frequency of errors that can be made during the investigation phase, with the effect of reducing also the provisioning rates usually applied to deal with such events.

With particular regard to the application of IFRS 9 to economic support measures that pass through the assets and liabilities of the banks, it was deemed necessary to introduce regulations aimed at consolidating the classification indexes of positions. Indeed, the emergency regulations do not relate to the deterioration of individual debtors, the activation of moratoria or suspensions, nor the anticipation of liquidity to workers. In particular, the ECB's and EBA's guidelines can be traced back to uniformity in reference to the intention to avoid the use of excessively pro-cyclical accounting assumptions (in the determination of loan losses).<sup>22</sup>

It is no coincidence that the Bank of Italy has clearly indicated that, in the current emergency, intermediaries are called upon to play a leading role. This role does not end with the sound and prudent management of banking activities, but extends to ensuring that the measures adopted - or in the process of being adopted - by the Government produce the expected effects in support of the Italian economic and productive system.

This not only involves the ordinary obligation to ensure maximum transparency on the terms and conditions applied and on the conduct of relations

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<sup>21</sup>See "Decreto liquidità, così le banche potrebbero aggirarlo", published in "Il fatto Quotidiano", on 11 April 2020.

<sup>22</sup>See EBA provides clarity to banks and consumers on the application of the prudential framework in light of COVID-19 measures, 25 March 2020, with respect to the fact that "The EBA calls for flexibility and pragmatism in the application of the prudential framework and clarifies that, in case of debt moratoria, there is no automatic classification in default, forborne, or IFRS9 status".

with any individual customers,<sup>23</sup> but also the extraordinary burden of limiting - as far as possible - the negative impact of the emergency on all the customers.<sup>24</sup> Moreover, this occurs in a context in which the top management of our central bank have expressed the awareness that credit institutions, in Italy as in the rest of Europe, are strongly exposed to the economic consequences of the pandemic.<sup>25</sup>

From another point of view, it is clear that banks will have to record the degeneration of the merit of customers who have suffered a slowdown in their economic activity (even if the latter is the effect of the legislative measures adopted to deal with the current epidemiological emergency).<sup>26</sup>

However, prudential supervision rules require the creditworthiness of debtors to be assessed according to common parameters, which appear to be intended to reclassify (as non-performing) the loans of entrepreneurs who have simply suffered the negative effects of the above-mentioned restrictive measures or, more generally, of the new social conditions adopted to protect themselves against Covid-19. Hence, it follows the obligation to make write-downs that affect both supervisory reporting (increasing the NPL ratio) and the economic-financial profiles of customers (whose equity will decrease in consideration of the above-mentioned write-downs).

Against this background, it seems possible to hypothesise a suspension of banks' ordinary prudential assessments of customers' risk profiles (provided for by the CRR) and to proceed with broader analyses, which take into account the macro-economic environment (compromised by the socio-sanitary emergency), assuming a long-term time scenario as a reference. On closer examination, the approaches marked by a short-termism in a context in which the return to a new normality

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<sup>23</sup>See BANCA D'ITALIA, *Emergenza epidemiologica da COVID-19. Prime indicazioni in tema di rapporti con la clientela*, 3 April 2020.

<sup>24</sup>See BANCA D'ITALIA, *Raccomandazione su tematiche afferenti alle misure di sostegno economico predisposte dal Governo per l'emergenza*, 11 April 2020.

<sup>25</sup>In this regard, it notes the hearing of Paolo Angelini and Giorgio Gobbi before the Parliamentary Commission of Inquiry on the Banking and Financial System, 15 April 2020.

<sup>26</sup>See BAR-GILL - BEBCHUK, *Misreporting Corporate Performance* (2002). Harvard Law and Economics Discussion Paper No. 400 for a model representing the causes and consequences of misreporting of business performance.



seems distant.<sup>27</sup>

It is not only a matter of safeguarding the prudential equilibrium of credit institutions, but also of avoiding that the European approach to the management of banks' non-performing loans (geared to promoting the leakage of such loans from their balance sheets) leads to a crisis of intermediaries at a time of fragility of the entire economic system. This is a matter of general interest, which cannot be left to the technical discretion of independent authorities, but must be addressed directly by bodies with full democratic legitimacy and accountability. Hence, it comes into consideration the alternative between merely adhering to the existing rules or adopting a regulatory policy to safeguard savings, credit and - more generally - the stability of the internal market.

4. The joint observation of banks' relations with companies and banks as companies suggests a period of *incubation* that will only partially allow the reporting criteria to be adapted to the new normality that is emerging.

In this context, there is a clear need to evaluate the possibility of considering the experience of these days as a change of scenario, in which traditional computational methodologies need to be adapted in order to consider the conditions that will be determined in case of the affirmation of an '*ethic of virality*'.

There is no doubt, in fact, that the aims and principles of banking reporting fulfil a variety of functions, some of which are not merely addressed to closing accounts, but are functional to the protection of savings and the control of credit, with reference to the objectives of financial stability.

Indeed, in the reality that we live in, the interests of the various categories of people who use the financial statements may be in conflict in the choice of

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<sup>27</sup>See, in this regard, the analysis of the effects of governance policies promoted in accordance with the expectations of hedge funds made by BEBCHUK - BRAV - JIANG, *The Long-Term Effects of Hedge Fund Activism*, in *Columbia Law Review*, Vol. 115, 2015, p. 1085 ff. Se also DALLAS, *Short-Termism, the Financial Crisis, and Corporate Governance*, in *Journal of Corporation Law*, 2011, p. 264 ff.

accounting criteria, wanting to give priority to the distribution of the income for the year, to capital stability or to investments and corporate growth.<sup>28</sup> This differentiation could lead to instances aimed at separating the financial statements that perform private and internal functions (with respect to the needs of directors and shareholders), from the accounting documents used to protect particular categories of stakeholders or from those used by the competent authorities to supervise more far-reaching interests. On the other hand, in an emergency context, it is difficult to stem the concern (of the directors) to share certain information with the market, as the banks' external information flows are regulated in such a way as to represent the data with respect to both the purely quantitative profiles (of the legal relationships that give content to the relative assets) and the management prospective (that the directors have assumed as the basis for their management).

Hence, there is a specificity of the challenges posed by the emergency,<sup>29</sup> which - as we have seen - is not merely an event to be recorded in the effects on the contents of the bank's balance sheet. Indeed, the aforementioned challenges do not exhaust their value in the context of the deterioration of assets or the increase in costs;<sup>30</sup> rather, they extend their impact to the *commitment* to support the complex interventionist framework adopted by the Government (and converted into law by Parliament). Therefore, the activity of the banks results instrumental to the implementation of public policies (openly) aimed at achieving the social utility.<sup>31</sup> And

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<sup>28</sup>See GALGANO, Globalizzazione e conglomerazione, in *Contratto e impresa*, 2006, p. 73 ff.; ALPA, Il diritto commerciale tra lex mercatoria e modelli di armonizzazione, in *Contratto e impresa*, 2006, 86-92; GALGANO, *Lex mercatoria*, Bologna, 2001.

Recently, see MASERA, Il debito non è una colpa, ma..., in *Apertacontrada*, 7 April 2020; CIOCCA, Politica monetaria e di bilancio: una complementarità de facto nell'adesione all'Euro, in *Apertacontrada*, 21 January 2020

<sup>29</sup>See HEMEL - RODRIGUEZ, A Public Health Framework for COVID-19 Business Liability, in *Northwestern Law & Econ Research Paper No. 20-05*

<sup>30</sup>See TELLIS - SOOD, A. - SOOD, N., *How Long Should Social Distancing Last? Predicting Time to Moderation, Control, and Containment of COVID-19*, in *USC Marshall School of Business Research Paper* - SSRN no. 3562996

See also GENTILI, Una proposta sui contratti d'impresa al tempo del coronavirus, e CELOTTO, "Immuni" e la Costituzione, both in *GiusciziaCivile.it*, 2020

<sup>31</sup>See Conte, i nuovi paradigmi della ricerca giuridica ed economica nell'epoca della globalizzazione, in AA.VV., *etica finanza e nuovo umanesimo*, Bari, 2007, p. 139 ff. where the

this instrumentality should be recorded in the banks' financial statement in order to point out the social value of such institutions (at least in terms of positive externalities).

What is envisioned is, therefore, the further need for an evolution of the function assigned to the reporting of banks. Obviously, this perspective assumes that policy makers will take the path of the 'new normality' and, consequently, will adopt accounting criteria that are able to capture and compute additional elements with respect to changes in the balance sheet or the economic results of lending activities.<sup>32</sup> Hence, this is in order to implement a regulatory approach that favours the exercise of banking in a sustainable manner (and, therefore, accounts for the externalities that, until now, have not been reported in the bank's accounts), to which follows the expectation of significant innovations in the discipline dedicated to bank financial statements.

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A. pointed out that technological advances have made it possible to drastically reduce physical space and to compress as much as possible the time needed to extend initiatives from one part of the globe to the other; these words today suggests the possibility of recalling also the further consideration of the A. according to which ethics is gradually acquiring an increasingly incisive role in the habit of market relations and legal regulation.

<sup>32</sup>See Sen, A better society can emerge from the lockdowns, in Financial times, 14 April 2020, who raised the question: "Is it possible that shared experience of the pandemic will help alleviate such pre-existing problems? "

# LEGITIMACY DEFICITS OF AUSTRIAN LEGAL COVID-19 MEASURES

Konrad Lachmayer \*

**ABSTRACT:** *The Austrian Government reacted fast and successful to the Covid-19 Crisis in March 2020. The following paper analysis the legal and structural challenges of this response. As a state of emergency was not declared officially the Austrian Constitution had to be fully applied. Not only questions of legality of the governmental measures, especially the compliance with the constitutional principle of the rule of law, arose, but also a reluctance towards transparency and accountability could be observed. The paper looks out for the lacks of legitimacy in the governmental measures including emergency action as well as the economic crisis governance.*

**SUMMARY:** 1. Legal quibbles. - 2. Quantitative dimensions. - 3. Transparency. - 4. Accountability. - 5. Conclusions.

1. The Austrian Covid-19 crisis started with a health mismanagement of the pandemic in places of skiing tourism in the Tyrolean Alps,<sup>1</sup> but led quickly to governmental measure, especially a public lock-down from mid-March to the mid/end of April 2020. The implementation of these measures failed to comply with the Austrian rule of law standards<sup>2</sup> and as no state of emergency was declared, the

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<sup>1</sup>See further details Konrad Lachmayer, 'Austria: Rule of Law Lacking in Times of Crisis', *VerfBlog*, 2020/4/28, available at <https://verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/> (accessed 25.6.2020), DOI: <https://doi.org/10.17176/20200428-165012-0/>

<sup>2</sup>One rule of law example refers to Sec. 2 COVID-19 Measures Act, which empowered the Minister of Health as well as for regional and local health authorities to prohibit the access to certain (defined) places (see Sec. 2 of the COVID-19 Measures Act). Based on the already constitutionally problematic statutory law, the Minister of Health enacted an ordinance, which includes a general curfew (with certain exceptions) for Austria. The provisions setting forth the general curfew are clearly unlawful. See Konrad Lachmayer, 'Austria: Rule of Law Lacking in Times of Crisis', *VerfBlog*, 2020/4/28.

public criticism of lawyers regarding the way of implementation of measures rose quickly.<sup>3</sup> A core element of the criticism concerned an ordinance of the Minister of Health, which determined a general curfew and exempted in certain cases.<sup>4</sup> In the public debate it remained unclear and contested between lawyers, if it is allowed to go on the street to meet friends in private premises. A legally internal but publicly announced order of the Minister of Health declared regarding Easter celebrations that private meetings are allowed if only five persons meet (who are not living in the same household). Lawyers doubted the legality of the announcement<sup>5</sup> and criticised the overall approach to communicate internal orders in public,<sup>6</sup> which created the impression of legally binding nature, but only had pseudo-legal effects.<sup>7</sup> At the end of April the government conceded that there has never been a binding rule, which limited private meetings.<sup>8</sup>

At the begin of April the Austrian Chancellor Sebastian Kurz was interviewed in a famous Austrian evening news broadcast (ZIB 2)<sup>9</sup> and was confronted with the legal inconsistencies of the existing ordinances. The Chancellor answered that there will be always people, who are legally pedantic. He told the interviewer that we are living in times of crisis and it is not the time to cause a maximum of confusion; all people shall do, what is necessary to tackle the crisis. He, moreover, referred to moral arguments ignoring legal criticism. This example illustrates that the Austrian government was

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<sup>3</sup>See e.g. Alfred Noll, 'Corona-Krise: Der Verordnungsstaat', *Der Standard* 25.03.2020, available at <https://www.derstandard.at/story/2000116124769/corona-krise-der-verordnungsstaat> (accessed 25.6.2020); Manfred Matzka, 'Husch-pfusch-Gesetze, zahllose Erlässe: Das Virus im Maßnahmengesetz', available at <https://www.derstandard.at/story/2000116589247/husch-pfusch-gesetze-zahllose-erlaesse-das-virus-im-massnahmengesetz> (accessed 25.6.2020).

<sup>4</sup>See the Ordinance of the Minister of Health according to Sec. 2 No. 1 of the Covid-19 Measures Act, Federal Law Gazette II 98/2020.

<sup>5</sup>See <https://orf.at/stories/3160614/> (accessed 25.6.2020).

<sup>6</sup>Manfred Matzka, 'Husch-pfusch-Gesetze, zahllose Erlässe: Das Virus im Maßnahmengesetz', available at <https://www.derstandard.at/story/2000116589247/husch-pfusch-gesetze-zahllose-erlaesse-das-virus-im-massnahmengesetz> (accessed 25.6.2020).

<sup>7</sup>See further details Alexander Somek, 'Is the Constitution Law for the Court Only?: A Reply to Sebastian Kurz', *VerfBlog*, 2020/4/16, available at <https://verfassungsblog.de/is-the-constitution-law-for-the-court-only/> (accessed 25.6.2020), DOI: <https://doi.org/10.17176/20200416-182041-0>.

<sup>8</sup>See <https://www.derstandard.at/story/2000117145502/private-treffen-sind-erlaubt-aber-nicht-erwunscht> (accessed 25.6.2020).

<sup>9</sup>Available only at <https://www.youtube.com/watch?v=u3V9NbSaxbM> (accessed 25.6.2020).

only partly willing to comply existing and constitutionally binding “rule of law”-standards, but was much more focused on a daily staged performance in Austrian media.

While on the one hand publicity was a main issue of the governmental strategy, the crisis management of the Austrian government led to an enormous amount of legislation, which ignored the information of the public (and the opposition parties) in timely manner. A public debate to understand the measures and its consequences was not possible. In many cases the government conceded not even a week for the public debate on new legislation. While some measures at the beginning of the crisis in March 2020 could not be postponed, the necessity to rush these measures through parliament was incomprehensible and criticised, especially by the opposition parties.

This unnecessary hurry also led to a general unprofessional behaviour of the government, which had counterproductive effects and even generated jeopardising moments. One of these moments took place at the end of May, when the parliament should decide on the Corona-based federal budget. While the opposition parties criticized that the Minister of Finance did not consider the effects of Corona in the governmental revenues,<sup>10</sup> the government was careless when amending the proposed bill in parliament. In a final amendment of the bill in parliament the government forgot to add the noun “mil.” in the overall 102 bil. EUR high budget. This meant that the parliament had to decide upon instead of a 102.000 EUR budget instead on a 102 billion EUR budget. A member of the opposition party, precisely the Social Democrat’s spokesperson on financial matters, indicated in the last moment that the amendment was wrong and had to be amended itself.<sup>11</sup> The governmental majority of the parliament thereupon postponed the decision for one day and corrected the error. If this would not have happened and the parliament would have

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<sup>10</sup><https://www.derstandard.at/story/2000117696485/opposition-gegen-bluemels-fake-budget> (accessed 25.6.2020).

<sup>11</sup><https://www.derstandard.at/story/2000117770273/budgetbeschluss-im-parlament-im-letzten-moment-gestoppt-offenbar-fehler-im> (accessed 25.6.2020).

passed the law and risked that the formal procedure of the whole legislative procedure would have had to start again. A debate between lawyers showed that the interpretation of the missing “mil.” could lead to both results: on the one hand it was argued, that the missing amount would have been irrelevant, on the other hand the repetition of the whole budgetary procedure was demanded.<sup>12</sup> While the government did not care about “legal quibbles”, when it came to the restrictions of fundamental rights, the government did not ignore the risk of passing the wrong budget and corrected the bill.<sup>13</sup>

The Austrian governmental measures from emergency actions to economic crisis governance in the first half of 2020 show that the government was not willing to fully comply with or take care about constitutional rules and principles. The paper analyses the lack of legitimacy in Austrian legal Covid-19 measures. In a first step significant quantitative dimensions of the governmental measures will be disclosed (2.). In a second step deficits in transparency shall be analysed (3.) and in a third step possibilities of accountability will be discussed (4.). Finally, the conclusions will deal with the role of the rule of law in times of health and economic crisis in Austria (5.).

2. Different problems legality and legitimacy could be observed in extraordinary quantitative dimensions. Three of these quantitative dimensions shall be analysed here: the first refers to immense quantity of acts of legislation, the second dimension concerns the real quantity of administrative emergency action and the third dimension relates to the amount of state resources unlocked by the parliament for the governmental action.

The first quantitative dimension relates to the acts of legislation. From 15.3.2020 until 17.6.2020 the Austrian parliament enacted 20 COVID-19 Acts of

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<sup>12</sup><https://www.derstandard.at/story/2000117786757/was-bei-einem-budget-mit-zahlenfehler-passiert-waere> (accessed 25.6.2020).

<sup>13</sup>Ibid.

legislation. Most of these acts include amendments in various statutory acts.<sup>14</sup> Already at the begin of April criticism of these kind of “quick and dirty”-form of legislation was debated in public,<sup>15</sup> but did not stop the governmental approach to rush through parliament ignoring qualitative requirements. Some of these acts of legislation included a sunset clause (end of 2020),<sup>16</sup> but most of them empowered members of government to deviate from statutory law by ordinances. The compliance with constitutional requirements remained unclear.<sup>17</sup> The short time of review for the public and parliamentary opposition led to a reduced control as it has not been possible to review the drafts properly in time.

The Austrian Epidemic Act<sup>18</sup> is based on a decentralised concept, which did not assemble the main competence on the federal level at the Ministry of Health, but on a state level at the state governor or on a district level at the regional administrative authorities.<sup>19</sup> The crucial enforcement of the Epidemic, thus, did not only consists of the enactments of ordinances by the Minister of Health, but was based on an internal orders of the Minister of Health<sup>20</sup> and enforced by the regional administrative authorities. The public debate criticised the publicly announced internal orders of the Ministers,<sup>21</sup> but did not focus on the ordinances of regional authorities. Although the internal orders did not create any legally binding force for

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<sup>14</sup>The 2nd COVID Act alone (Federal Law Gazette I 16/2020) includes amendments in 40 statutory laws, from the Telecommunication Act to the University Act, and the enactment of four new Acts of legislation.

<sup>15</sup>Manfred Matzka, ‘Husch-pfusch-Gesetze, zahllose Erlässe: Das Virus im Maßnahmengesetz’, available at <https://www.derstandard.at/story/2000116589247/husch-pfusch-gesetze-zahllose-erlaesse-das-virus-im-massnahmengesetz> (accessed 25.6.2020).

<sup>16</sup>See e.g. the COVID-19 Measures Act, Federal Law Gazette I 12/2020.

<sup>17</sup>Konrad Lachmayer, ‘Austria: Rule of Law Lacking in Times of Crisis’, *VerfBlog*, 2020/4/28, available at <https://verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/> (accessed 25.6.2020) , DOI: <https://doi.org/10.17176/20200428-165012-0/>.

<sup>18</sup>The Austrian Epidemic Act was enacted in 1950 (Federal Law Gazette 186/1950) and amended in the Corona crisis 2020 three times.

<sup>19</sup>See Sec. 43 Epidemic Act.

<sup>20</sup>See <https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Rechtliches.html> (accessed 25.6.2020).

<sup>21</sup>Manfred Matzka, ‘Husch-pfusch-Gesetze, zahllose Erlässe: Das Virus im Maßnahmengesetz’, available at <https://www.derstandard.at/story/2000116589247/husch-pfusch-gesetze-zahllose-erlaesse-das-virus-im-massnahmengesetz> (accessed 25.6.2020).



the population, the governmental media announcements created this impression. These internal orders were published on the website<sup>22</sup> of the Ministry of Health,<sup>23</sup> but were only internally binding for state and regional authorities. The website contains information about 10 internal orders<sup>24</sup> and 57 official ordinances at the end of June 2020.

The qualitative deficits regarding the taken measure did not only relate to the Ministry of Health, but also to the ordinances of the regional administrative authorities, which were implementing the internal orders of the Ministry of Health. Austria consists of 94 legal and political districts.<sup>25</sup> Each of these districts had to enforce the rules of the Minister of Health, partly by formal ordinance considering the regional particularities of the health crisis. While in Tyrol the ordinances had been presented online,<sup>26</sup> there has not been a unified online platform for Austria, where it would have been possible to review these ordinances. On the contrary, it was highly difficult to get to know at least some of them.<sup>27</sup> Even the (Capital) City of Vienna did not provide appropriate information on their website.<sup>28</sup> Looking at the details of such ordinances (e.g. regarding the curfew), they included even worse provisions<sup>29</sup> than the ordinances and orders of the Minister of Health, which also

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<sup>22</sup>As they are not official documents, they could not be published on the official Federal Law Gazette, which again creates a lack of transparency.

<sup>23</sup>See in German <https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Rechtliches.html> (accessed 25.6.2020).

<sup>24</sup>The Ministry of Health did not leave all the orders on the website but deleted them. This means that it is formally not possible to know all the information and trace back the problems and deficits of these orders.

<sup>25</sup>These 94 regional administrative districts consist of 15 statutory cities and 79 rural districts.

<sup>26</sup><https://www.tirol.gv.at/gesundheit-vorsorge/infekt/coronavirus-covid-19-informationen/gesetze-und-verordnungen/uebersicht-ueber-die-verordnungen-des-landeshauptmannes-und-der-bezirksverwaltungsbehoerden-auf-grundlage-des-epidemiegesetzes-1950-und-des-covid-19-massnahmengesetzes/> (accessed 25.6.2020).

<sup>27</sup>See e.g. <https://hafnerbach.gv.at/aktuelles/2020/04/verordnungen-im-zusammenhang-mit-corona-der-bezirksverwaltungsbehoerde/> (accessed 25.6.2020).

<sup>28</sup>The particular website <https://coronavirus.wien.gv.at/> (accessed 25.6.2020) does not contain any relevant legal information.

<sup>29</sup>See e.g. the ordinance of the District Administrative Authority St. Johann im Pongau (Salzburg), which includes a series of rules that cannot be founded in the COVID-19 Measures Act.

were confronted with substantial legal problems.<sup>30</sup> In conclusion, deeper and hidden rule of law deficits occurred in significant quantity on a district level. Neither the federal state nor the state provided the necessary transparency and, thus, also limited the possibility of accountability regarding the regional law significantly. This situation is neither known nor discussed in the public debate.

A third dimension of quantity refers to the unbelievable amount of state resources, which have been released. While the Austrian government presented a federal state budget surplus in 2019 and illustrates that it is possible to successfully restructure state finance and reduce the state expenses,<sup>31</sup> the government unlocked resources in the Covid-19 crisis up to the amount of 38 billion EUR. The overall Austrian federal state budget reaches a size of 80 billion EUR.<sup>32</sup> A 6 billion EUR tax reform was considered to be as not affordable before the Covid-19 crisis.<sup>33</sup> In the next decade the ignorance of the existing financial possibilities will have huge effects on the economy, the social security, the health system, the education and research funding possibilities etc. While Austria struggled in the financial crisis significantly,<sup>34</sup> the quantitative dimension of state expenses unlocked in the year 2020 surpasses any existing financial dimension of the Austrian state budget.

All three presented dimensions of quantity illustrate different fields of fast legal interventions with huge effects. The first deals with the democratic foundation of legislation, the second concerns rule of law questions and the third refers to the demolished limits of state budgetary management. The last dimension raises deep concerns about the economic reasonability of the existing budgetary management

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<sup>30</sup>See Konrad Lachmayer, 'Austria: Rule of Law Lacking in Times of Crisis', VerfBlog, 2020/4/28, available at <https://verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/> (accessed 25.6.2020) , DOI: <https://doi.org/10.17176/20200428-165012-0/>

<sup>31</sup><https://www.derstandard.at/story/2000113205007/budget-ueberschuss-um-eine-milliarde-groesser-als-veranschlagt> (accessed 25.6.2020).

<sup>32</sup><https://www.derstandard.at/story/2000076541087/das-budget-im-ueberblick> (accessed 25.6.2020).

<sup>33</sup><https://www.profil.at/oesterreich/steuerreform-groesste-entlastung-aller-zeiten-kaum-finanzierbar/400915955> (accessed 25.6.2020).

<sup>34</sup>See Konrad Lachmayer, 'Between International Standards and Transnational Greed: Providing Transnational Rules of Law in Times of Economic Crisis' (2016) *The Hague Journal on the Rule of Law* 2016, 291-309.

through the formal parliamentary empowerment of the government (or in a substantive perspective a self-empowerment of the government). The legality and the legitimacy of the Covid-19 measures taken by the Austrian government are more than questionable. Transparency and accountability of these measures become crucial to assess their legitimacy.

3. The Austrian Covid-19 measures lacked certain aspects of transparency from the very beginning. The Austrian government was advised by health experts since the shut-down in March 2020. The advising experts, however, were not known to the public and the mechanism and criteria of their selection were not clear. The parliamentary opposition started a formal request at the government<sup>35</sup> and protocols of the expert committee were leaked in a critical Austrian newspaper.<sup>36</sup> It took until the mid of June that the Ministry of Health answered the parliamentary inquiry<sup>37</sup> and until the end of June that the protocols of the expert committee from end of February until the end of April were published in the internet.<sup>38</sup> The sub-committees of the expert group are still not clarified.<sup>39</sup> Further experts, who produced crucial studies at the end of March for the federal chancellery,<sup>40</sup> were never clarified.

In conclusion, decisions made by the government were not transparent and only partly comprehensible. The published information, however, showed that the government did not followed the expert committee in any suggestion and did not

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<sup>35</sup>See 'Schriftliche Anfrage der Abgeordneten Dr. Dagmar Belakowitsch, Kolleginnen und Kollegen an den Bundesminister für Soziales, Gesundheit, Pflege und Konsumentenschutz betreffend Beraterstäbe der Corona-Taskforce im BMSGPK' available at [https://www.parlament.gv.at/PAKT/VHG/XXVII/J/J\\_01627/index.shtml](https://www.parlament.gv.at/PAKT/VHG/XXVII/J/J_01627/index.shtml) (accessed 25.6.2020).

<sup>36</sup>See <https://www.falter.at/zeitung/20200512/was-passiert-wenn-es-eng-wird> (accessed 25.6.2020).

<sup>37</sup>[https://www.parlament.gv.at/PAKT/VHG/XXVII/J/J\\_01627/index.shtml](https://www.parlament.gv.at/PAKT/VHG/XXVII/J/J_01627/index.shtml) (accessed 25.6.2020).

<sup>38</sup><https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Taskforce.html> (accessed 25.6.2020).

<sup>39</sup><https://www.derstandard.at/story/2000118237451/tuerkis-gruen-laesst-bei-corona-massnahmen-transparenz-vermissen> (accessed 25.6.2020).

<sup>40</sup><https://www.derstandard.at/story/2000117097615/wissenschaftliche-corona-beratung-hinter-verschlossenen-tueren> (accessed 25.6.2020).

clarified its deviation,<sup>41</sup> while referring on the experts' advice at the same time. The composition of the expert committee consisted mainly of health experts<sup>42</sup> and did not consider other relevant expertise, which would have been crucial to balance the different perspectives on the challenges caused by the coronavirus. The government proved to be reluctant to create transparency. The lack of transparency relates to the overall approach of Chancellor Kurz since 2017 to control the flow information towards media, which was called "message control".<sup>43</sup> The Chancellor and his team actively restricted information to the public and focus on staging information in a prepared and controlled manner. This approach creates in the Covid-19 crisis a calculated lack of transparency.

Another element of lacking transparency refers to the (number of) infected persons in Austria. The statistical number of infected persons in Austria correlates to the number of coronavirus checks, which are daily performed. The overall number of virus checks in Austria at the end of June amount to more than 600.000. While the number sounds impressive, this assessment changes if one considers, that the overall population in Austria is more than 8.8 mil. people<sup>44</sup> and that the number of checks relates to a period of four months<sup>45</sup>. The average daily number of checks, thus, is 5.000. While at the beginning the numbers of tests increased, the virus checks ranged in June 2020 between and 2.376 and 8.508.<sup>46</sup>

At the end of March, the Austrian government claimed to increase the capacity to carry out coronavirus tests up to the amount of 15.000 per day.<sup>47</sup> On the

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<sup>41</sup>See regarding the ambivalence of expert committees <https://www.derstandard.at/story/2000117473133/die-angstprotokolle-politik-statt-expertokratie> (accessed 25.6.2020).

<sup>42</sup>See <https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Taskforce.html> (accessed 25.6.2020).

<sup>43</sup>See a debate <https://www.derstandard.at/story/2000110959806/message-control-kanzler-kommt-wieder-als-messias-daher> (accessed 25.6.2020).

<sup>44</sup>[https://www.statistik.at/web\\_de/statistiken/menschen\\_und\\_gesellschaft/bevoelkerung/index.html](https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/index.html) (accessed 25.6.2020).

<sup>45</sup>From March to June 2020.

<sup>46</sup><https://www.derstandard.at/story/2000115810293/aktuelle-zahlen-zum-coronavirus> (accessed 25.6.2020).

<sup>47</sup><https://kurier.at/coronavirus/coronavirus-kurz-und-kogler-informieren-ueber-letzte-details/400791020> (accessed 25.6.2020).

website of the Ministry of Health this claim is confirmed (since the end of May 2020).<sup>48</sup> The realisation of this amount of testing, however, never happened. The highest number of virus checks was reached on 22 April 2020, when 12.776 tests were reported.<sup>49</sup>

The low number of effective tests per day created a significant lack of transparency, when it comes to the number of infected people. A famous example refers to postal distribution centres around Vienna, which illustrated that precise testing will lead to the identification of infected persons.<sup>50</sup> The number of infected persons would increase, but the governmental measures would be more precise and the legitimization of these measures would be higher. An important testing case to gain more transparency for better health governance are (public) schools. While schools re-opened at the mid of May 2020, teachers had not been tested extensively.

Another example refers to antibody tests. These tests were carried out in June 2020 in the small mountain village Ischgl, which has been the Austrian Corona hotspot at the begin of March.<sup>51</sup> The results revealed that 40 percent of the inhabitants of the small Tyrolean village were infected.<sup>52</sup> Interestingly, the numbers of formerly infected persons is six times higher than the number of positively tested persons by the regular PCR<sup>53</sup>-test.<sup>54</sup>

The lack of transparency is, however, not restricted to emergency measures, but can also be observed in the context of the economic measures taken by the government. Regarding the huge amount of state budget involved, the parliamentary

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<sup>48</sup><https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Haeufig-gestellte-Fragen/FAQ--Testungen-und-Quarantaene.html> (accessed 25.6.2020).

<sup>49</sup>Due to delayed reporting the statistical highest number dates back to 2.4.2020 with 36.327 reported tests, which was in substance was not reached on one day. <https://www.derstandard.at/story/2000115810293/aktuelle-zahlen-zum-coronavirus> (accessed 25.6.2020).

<sup>50</sup><https://www.derstandard.at/story/2000117759680/positiver-fall-auch-in-briefverteilzentrum-in-wien> (accessed 25.6.2020).

<sup>51</sup>See Konrad Lachmayer, 'Austria: Rule of Law Lacking in Times of Crisis', *VerfBlog*, 2020/4/28, available at <https://verfassungsblog.de/rule-of-law-lacking-in-times-of-crisis/> (accessed 25.6.2020) , DOI: <https://doi.org/10.17176/20200428-165012-0/>

<sup>52</sup><https://www.i-med.ac.at/mypoint/news/746359.html> (accessed 25.6.2020).

<sup>53</sup>Polymerase chain reaction (PCR).

<sup>54</sup><https://www.i-med.ac.at/mypoint/news/746359.html> (accessed 25.6.2020).

opposition demanded since April 2020 the establishment of a parliamentary subcommittee to control the financial aid spent by the government.<sup>55</sup> The government, however, refused to create more transparency and argued that certain reporting obligations already exist in particular statutory Covid-Acts, that the Court of Auditors still have its control powers and that an advisory committee was established in the context of financial aid for corporation.<sup>56</sup> The aspects of transparency mentioned by the government are, however, still quite limited and cannot be compared to a fully transparent parliamentary control. Remarkably, the Ministry for the European and Constitutional Affairs started an initiative for a Freedom of Information Act,<sup>57</sup> which is still missing in Austria but discussed since years.<sup>58</sup> While the general debate for more transparency is crucial in Austria, the government is not willing to establish the obvious and necessary transparency in the context of the Covid-19 crisis.

In conclusion, various forms of lacking transparency emerged. The lacks of transparency refer to organisational and structural as well as to procedural and substantial aspects. The starting point is missing information of the parliament and the public, which makes it impossible to understand and retrace the measures taken by the government. It also creates a kind of governmental immunity to further accountability if information is not given. While the government disclosed some information step by step in the last months, a certain kind of reluctance to do so can be observed.

#### 4. The parliamentary opposition did not only demand a parliamentary sub-

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<sup>55</sup>[https://www.ots.at/presseaussendung/OTS\\_20200617\\_OT0256/covid-19-unterausschuss-opposition-fordert-rasche-einsetzung](https://www.ots.at/presseaussendung/OTS_20200617_OT0256/covid-19-unterausschuss-opposition-fordert-rasche-einsetzung); [https://www.parlament.gv.at/PAKT/VHG/XXVII/A/A\\_00421/imfname\\_792318.pdf](https://www.parlament.gv.at/PAKT/VHG/XXVII/A/A_00421/imfname_792318.pdf) (accessed 25.6.2020).

<sup>56</sup>[https://www.ots.at/presseaussendung/OTS\\_20200617\\_OT0256/covid-19-unterausschuss-opposition-fordert-rasche-einsetzung](https://www.ots.at/presseaussendung/OTS_20200617_OT0256/covid-19-unterausschuss-opposition-fordert-rasche-einsetzung) (accessed 25.6.2020).

<sup>57</sup><https://www.derstandard.at/story/2000117817278/edtstadler-kuendigt-gesetzesentwurf-fuer-abschaffung-des-amtsgeheimnisses-an> (accessed 25.6.2020).

<sup>58</sup>See e.g. a news report from 2012: <https://www.diepresse.com/1260095/osterreich-ist-schlusslicht-bei-informationsfreiheit> (accessed 25.6.2020).

committee to control the economic measures of the government, but a general investigatory committee to evaluate the way the government made its decisions.<sup>59</sup> While the possibility of a parliamentary investigation has been a possibility only for the majority of the parliament for a long time, a constitutional amendment in 2014<sup>60</sup> opened up this possibility for a parliamentary minority (46 out of 183 MPs). The possibilities to establish an investigatory committee are still limited as opposition parties (as minority) can only demand one investigatory committee at the same time. As the Ibiza Scandal from 2019<sup>61</sup> led to the establishment of an investigatory committee, which is not concluded yet,<sup>62</sup> the opposition parties have no possibility to establish another investigatory committee.

The investigatory committees are a core instrument of the parliament to hold the government politically accountable.<sup>63</sup> The government declined the attempt of two opposition parties to establish an investigatory committee regarding the crisis governance deficits of the government. The government argued that it is too early as Austria is still within the crisis.<sup>64</sup> It will be crucial that the parliamentary opposition will establish an investigatory committee after the other one will be concluded. This might be the case in 2021 and will give the possibility to reveal the governmental decision-making process. It shall reveal rationality, create transparency and finally

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<sup>59</sup><https://www.derstandard.at/story/2000117699621/fpoe-blitzt-mit-antrag-fuer-corona-u-ausschuss-ab> (accessed 25.6.2020).

<sup>60</sup>See Art 53 Federal Constitutional Act; Federal Law Gazette I 101/2014.

<sup>61</sup>The Ibiza scandal refers to a video showing the former Vice Chancellor and chairman of the right-populistic „Freedom Party” (FPÖ), in a meeting with supposed Russian oligarchs. In the video, *Strache* lays out a plan to manipulate voters through media takeovers and sketches possibilities of rigging procurement procedures. Konrad Lachmayer and Lukas Wieser, ‘*Entering into New Constitutional Territory in Austria: From a Conservative Minority Government to a Transitional Expert Government*’, *VerfBlog* 2019/6/03, <https://verfassungsblog.de/entering-into-new-constitutional-territory-in-austria/> (accessed 25.6.2020) DOI: <https://doi.org/10.17176/20190603-115423-0>.

<sup>62</sup>One significant problem within the current Ibiza investigatory committee is that the government is not willing to fully cooperate. The Chancellor and the Minister of Finance declined to give relevant information. See <https://www.derstandard.at/story/2000118367154/kanzler-kurz-im-u-ausschuss-die-anatomie-der-befragung>, <https://kurier.at/politik/inland/kurz-kam-laechelnde-und-liess-viele-fragen-ins-leere-laufen/400950299> (accessed 25.6.2020).

<sup>63</sup>See regarding the general possibility of political accountability Art. 76 Federal Constitutional Act.

<sup>64</sup><https://www.derstandard.at/story/2000117699621/fpoe-blitzt-mit-antrag-fuer-corona-u-ausschuss-ab> (accessed 25.6.2020).



lead to accountability.

Regarding the legal accountability, administrative courts started to annul fines of the police, which were imposed on the basis of the curfew.<sup>65</sup> Besides, more than 70 complaints have been filed (mainly directly) at the Constitutional Court, who will decide on the issue in June and July 2020.<sup>66</sup> The upcoming case law of the Constitutional Court will be crucial regarding the legal accountability of the governmental action. In the mid of April 2020, the representative of the administrative court judges argued for granting the Constitutional Court new competences regarding mechanisms of interim legal protection, which are missing so far.<sup>67</sup> Such mechanisms could provide effective legal protection; it is, however, doubtful, if the Court would be able to decide faster as time of preparation is also important for an apex court. The weighing of arguments and time for the formation of an opinion is also an important element of constitutional justice.<sup>68</sup> It might be, however, important to review the accountability mechanism of the Austrian Constitutional Court after the crisis. In the mid of April 2020, Chancellor Kurz answered – when confronted with constitutional concerns of the taken measures – that the passed legal acts will not be in force anymore when the constitutional court will decide in June 2020.<sup>69</sup> Interestingly enough, this is not the case. While the crucial curfew is not regulated anymore, the overall statutory act is still in force.<sup>70</sup>

The political and legal accountability regarding the taken measures are about to start. The government, however, has been, again, reluctant to enable and

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<sup>65</sup>See e.g. a judgement of the State Administrative Court (of first instance) in Lower Austria (LVwG 15.05.2020, LVwG-S-891/001-2020).

<sup>66</sup><https://www.derstandard.at/story/2000117981276/hoechstgericht-muss-sich-fuer-zweite-corona-welle-ruesten> (accessed 25.6.2020).

<sup>67</sup><https://www.wienerzeitung.at/nachrichten/politik/oesterreich/2057200-Verwaltungsrichter-fordern-rascheren-Rechtsschutz.html> (accessed 25.6.2020).

<sup>68</sup>See regarding the competences of the Austrian Constitutional Court Maria Bertel and Esther Happacher, ‘Constitutional Court of Austria’ (2018) *Max Planck Encyclopedia of Comparative Constitutional Law*, para. 13-33; Konrad Lachmayer, The Austrian Constitutional Court in: András Jakab/Arthur Dyeve/Itzcovich (eds.), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 75–114.

<sup>69</sup><https://www.derstandard.at/story/2000116907401/der-verfassungsgerichtshof-und-der-kanzler>.

<sup>70</sup>The Covid-19 Measures Act has a sunset clause (31. December 2020).



strengthen the possibilities of accountability. The existing limits of accountability restrict a fast review of the governmental measures. It will, however, be necessary to establish a slower and more sustainable critical review of the governmental measures taken in spring 2020.

5. The overall interim evaluation at the end of June 2020 is sobering. The taken Covid-19 measures of the Austrian government are lacking significant legitimacy.

On the one hand Austria can be seen as a successful country in meeting the challenges of the Coronavirus. The government did not declare a state of emergency, the number of infected persons had been limited to 18.000 and the number of deaths range about 700 persons. These numbers illustrate a situation under control. The restrictions in March and April 2020 had been dramatic (with regard to the restrictions of fundamental rights), but not as dramatic as in Italy, France or Spain. The government reacted fast and effective. Moreover, it also provided significant support with regard to the economy.

On the other hand, the governmental measures show a lack of transparency and reasonability. From a legal perspective the (even possible) compliance with the constitutional principle of the “rule of law” was neglected. This approach started with emergency measures in March 2020 and led to a significant ignorance towards the constitutional framework. The overall negative effect on the rule of law is difficult to evaluate as many legal measures have never been published appropriately. The changing attitude of the government by ignoring certain aspects of the legal framework might also create further challenges of constitutional compliance by the government in the future. The empowerment of the government in terms of the budgetary management of economic rescue packages still implies a much higher risk with significant long-term effects, which cannot be fully evaluated yet. Formal constitutional limitations to the governmental scope of action regarding the state

expenses were never introduced in the Austrian constitution.<sup>71</sup>

In conclusion, the paper has shown that the legitimacy of Covid-19 measures in Austria is questionable. While transparency was missing to a certain extent, it will be first of all up to the Austrian Constitutional Court to take first steps with regard to the accountability of the government and to strengthen the role of the rule of law again, which is even more necessary in times of crisis.

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<sup>71</sup>The latest attempt in October 2019 failed; see [https://www.parlament.gv.at/PAKT/PR/JAHR\\_2019/PK0992/](https://www.parlament.gv.at/PAKT/PR/JAHR_2019/PK0992/) (accessed 25.6.2020).

# THE CERTIFICATE OF GOOD HEALTH OF THE AUSTRIAN CONSOCIATIONAL DEMOCRACY DURING THE COVID-19 AND THE NEW PARADIGMS FOR THE PROTECTION OF FUNDAMENTAL FREEDOMS

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**ABSTRACT:** *This contribution analyzes the crisis management processes within the Austrian parliamentary system, trying to highlight not only the effective constitutional framework that legitimized the strong restriction of fundamental freedoms, but also how such interventions by the State authorities emphasizes the possibility for the affirmation of a new culture of fundamental rights and freedoms different from traditional liberal conceptions.*

**SUMMARY:** 1. Introduction. - 2. The constitutional framework for emergencies non-applied. - 3. The Epidemiegesetz vs. COVID-19 ad hoc legislation. - 4. The consociational parliamentarism in the pandemic crisis. - 5. The balance of rights between legislator, scientists and the Constitutional Court. - 6. Conclusions.

1. The management of the pandemic crisis has clearly highlighted some challenges in democratic systems<sup>1</sup>. With the adoption of the measures that profoundly limit the fundamental freedoms of the population there have emerged a series of tensions within the relations between the governing bodies but also in the relation between the state and the citizen.

The general doctrine of law has always stressed how emergency crises in general have some impacts that directly affect the balance between state bodies. In

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<sup>1</sup>See for the challenges that liberal constitutional orders have to face in periods of emergency, V. Ramraj and M. Guruswamy, Emergency powers, in: R. Tushnet, F. Fleiner and C. Saunders (ed.), New York, 2013, p. 85 f.

this regard the prevalence of the executive towards the legislative, of centralism towards federalism<sup>2</sup> and of monocratic organs towards the collegial bodies have been mentioned<sup>3</sup>. These institutional alterations compared with the normal constitutional processes can be observed - although lesser than in some other European systems<sup>4</sup> - in the Austrian parliamentary system. The reason for which these effects (centralization and monopolization of the decision-making level of the Government) can be observed for a lesser extend in the pandemic crisis management of the Austrian Government, is due to the fact that in Austria even in normal times the free dynamics of the constitutional processes are contained by government consociational logics that became structural in the Austrian parliamentary system in the post war period. Historically, these consociational mechanisms have their origin in the crisis management that Austria had to face immediately after the Second

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<sup>2</sup>See F. Palermo, Is there space for federalism in times of emergency?, in: Verfassungsblog on constitutional matters, <https://verfassungsblog.de/is-there-a-space-for-federalism-in-times-of-emergency/#comments>

<sup>3</sup>See A. Gamper, Corona und Verfassung, in: [www.unipress.at](http://www.unipress.at)

<sup>4</sup>Especially in Italy, the doctrine has raised a number of disconnects between the formal data provided by the Constitution and the effective dynamics according to which the system of government has worked in the health crisis. It has been pointed out in particular that the Parliament, especially in the first phase of the health crisis, failed to exercise the role recognizes by the Italian Constitution from 1948 and how the absence of intervention by the Head of State caused that the management of the pandemic was monopolized in the hands of the Government and in particular by the President of the Council of Ministers. This situation has created strong tensions in the system of legal sources and constitutional control provided for by the Italian Constitution. From the already conspicuous literature on the subject we note G. Cerrina Feroni, Diritto ed Istituzioni dopo il COVID-19, intervention carried out in the web talks on the University Suor Orsola Benincasa di Napoli, downloadable on [https://www.facebook.com/watch/live/?v=238636817245584&ref=watch\\_permalink](https://www.facebook.com/watch/live/?v=238636817245584&ref=watch_permalink); V. Lippolis, Virus, Governo al limite della Costituzione. Ora cambi strada, intervista su: [formiche.net](http://formiche.net) del 30 aprile 2020; F. Muzzati, Uso e abuso della decretazione d'urgenza e l'attuale situazione sanitaria emergenziale, in *Ius in itinere* del 2 aprile 2020; F. Clementi, Il lascito della gestione normativa dell'emergenza: tre riforme ormai ineludibili, in *Osservatorio Costituzionale AIC*, n. 3 del 7 aprile 2020; Id., La pandemia e il simulacro del Parlamento: gerarchia delle fonti e verticalizzazione della politica nell'epoca del COVID-19, in A. Campi (a cura di), *Dopo: come la pandemia può cambiare la politica, l'economia, la comunicazione e le relazioni internazionali*, Soveria Manelli, 2020, pp. 93 ss.; L.A. Mazzarolli, L.A., «Riserva di legge» e «principio di legalità» in tempo di emergenza nazionale. Di un parlamentarismo che non regge e cede il passo a una sorta di presidenzialismo extra ordinem, con ovvio, conseguente strapotere delle pp.aa. La reiterata e prolungata violazione degli artt. 16, 70 ss., 77 Cost., per tacer d'altri, in: [federalismi.it](http://federalismi.it); *Osservatorio Emergenza COVID-19* del 23 marzo 2020; F. Pastore, *Emergenza COVID-19 e dinamiche dei rapporti tra governo, maggioranza e minoranze parlamentari*, in *Dirittifondamentali.it* del 3 giugno 2020; S. Ceccanti, S., *Il Parlamento italiano durante la crisi Coronavirus*, in *Rivista ilMulino.it* del 24 aprile 2020 e N. Lupo, *L'attività parlamentare in tempi di coronavirus*, in *Forum Quaderni Costituzionali* del 16 aprile 2020.

World War. In this period the major political forces agreed on a new political culture - based on collaboration and sharing of resources - in order to face economic, social and political problems caused by the war and the consequent loss of the country's international sovereignty, occupied and controlled by the Allied Forces. This pact of collaboration between the major political parties, was at that time necessary for the reconstruction of the Austrian state, but continued even after the end of the specific crisis period. This had a strong and determining impact on the effective dynamics of the system of government – even with partial openings - up to the present day, as this convention to cooperate integrates the formal constitutional rules and deviates partially from it<sup>5</sup>.

Therefore, the apprehension expressed by the doctrine<sup>6</sup> seems reasonable, if the accelerated constitutional processes applied in the pandemic crisis, which is assuming not only global relevance but also a long and still uncertain temporal extension, could be likely to identify new paradigms of the political decision-making processes that could create a “new constitutional normality” within unchanged constitutional frameworks.

With this in mind, this contribution analyzes the crisis management processes within the Austrian parliamentary system, trying to highlight not only the effective constitutional framework that legitimized the strong restriction of fundamental freedoms, but also how such interventions of State authorities emphasize the possibility for the affirmation of a new culture of fundamental rights and freedoms different from traditional liberal conceptions.

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<sup>5</sup>The effective functioning according to consociative and non-competitive logics as the formal constitutional framework from 1920/1929 is based on historical origins, and in particular the conflicting democratic experiences that emerged from the radical parliamentarism practiced during the First Republic. Due to the fragmented internal political situation after World War Second there was no consensus among the political parties for the creation of a new Constitution. Instead of a new constitutional text it was decided to reinstate the Constitution from 1920/1929 and to integrate this formal framework with a new political culture consisting of a pact of collaboration and resource sharing among the most influential political forces. See U. Haider-Quercia, *La forma di Governo della Grande coalizione, Il parlamentarismo austriaco tra incompletezza e trasformazione*, Padova, 2019, pp. 67 ss.

<sup>6</sup>See A. Gamper, *Corona und Verfassung*, in: [www.unipress.at](http://www.unipress.at)

2. In the absence of a common EU intervention to coordinate the health emergency on the European continent, the COVID-19 crisis is being managed at national political level and with the tools provided by the Member States' Constitutions. Austria was, after Italy, the second European country<sup>7</sup> to enact with specific and provisional measures the lock down of most commercial activities and broad restrictions on the movement of people in places open to the public<sup>8</sup>.

Unlike many other Constitutions<sup>9</sup>, the Austrian Constitution does not know an explicit emergency constitution but the doctrine has identified a number of provisions that may form the legal basis for extraordinary measures of presidential competence<sup>10</sup>. A first reference to rules applicable in times of danger to the community is contained in art. 18, 3-5 of the federal Constitution, which enshrines the possibility of the Federal President to issue emergency decrees with the force of law (*Notverordnungsrecht*). The activation of this extraordinary measure is included in a series of institutional steps that require strong cooperation with other constitutional bodies. As result the emergency powers of the Austrian President are much more limited and controlled than the extraordinary powers provided for by art. 48 of the Constitution of the Weimar Republic of 1919, which was the model for

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<sup>7</sup>The lock down and the necessary measures were announced by Chancellor Sebastian Kurz, Minister of Health Rudolf Anschober and Interior Minister Karl Nehammer at a press conference held on 12 March 2020. Three days later, the National Council met in an extraordinary session over the weekend to deliberate an *ad hoc* legislative basis for the government's restriction measures.

<sup>8</sup>The containment measures included the closure of public-open places such as playgrounds and restrictions on commerce and catering. A special fund was created – initially with four billion euros and then increased – to purchase medical equipment, to compensate for losses caused to the private sector and to facilitate smart working. As in most other countries, the measures initially envisaged have been particularly restrictive. At first, people could leave their homes for only three reasons: non-procrastinable and non-viable work from home, food supply and help to other people. Meetings with more than five people, with the exception of members of the same family group, were banned. All shops except food, pharmacies, banks, tobacconists, fuel stations and a few others have been closed. The police was authorised to ensure compliance with the measures and the duration of civil and military service was extended for those in service, because the possible use of the army to deal with the emergency was envisaged.

<sup>9</sup>See art. 116 of the Spanish Constitution, art. 19 of the Portuguese Constitution art. 16 of the French Constitution.

<sup>10</sup>See M. Welan, *Der Bundespräsident. Kein Kaiser in der Republik*, Wien, Köln e Weimar, 1992, pp. 68 s.

reforming the semi-presidential sense also of the Austrian Constitution in 1929. The Constitution of Weimar had recognized to the President of the German Reich to exercise emergency powers also in absence of an explicit consent of the *Reichstag* that therefore in some circumstances has shied away from its responsibility<sup>11</sup>. Differently from the experience of the Weimar Republic, according to the Austrian Constitution, the powers of emergency of the Federal President require close cooperation between institutions and can only be activated on the proposal of the Government (which must also countersign them) after hearing the Standing Committee of the National Council (that means the first Chamber of the Austrian Parliament). The emergency rule also provides for precise material and temporal restrictions to ensure the maintenance of centrality of the Parliament and the government's political responsibility: the presidential emergency decree can be adopted in matters that normally require parliamentary deliberation only when "immediate adoption is necessary" to "avoid serious and irreparable damage to the community" and at a time when the Chamber of Deputies is not meeting or "cannot meet in a timely manner or is prevented from meeting by causes of greater force."<sup>12</sup> A similarly structured emergency decree power was included, with constitutional reform in 1998<sup>13</sup>, also at *Länder* level, providing extraordinary powers for the Government of the *Länder* (*Landesregierung*)<sup>14</sup>. A third mechanism that can be activated for the suspension of fundamental rights is provided by art. 15 of the European Declaration of Human Rights (ECHR) which has been recognized on constitutional rank in the Austrian legal system, and which allows for the suspension of certain rights in the event of war or another emergency that threatens the nation. But even this clause of constitutional rank, which has been activated by some

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<sup>11</sup>See D. Grimm, La Costituzione di Weimar vista nella prospettiva del Grundgesetz, in: Nomos - Le attualità nel diritto, n. 2/2012.

<sup>12</sup>See art. 18, 2 of the Austrian Federal Constitution. A further constraint are the significant restrictions on the content that the emergency decree may affect, and from which changes in federal constitutional laws, the provision of new permanent financial burdens and the alienation of state assets remain excluded (art. 15, 5 Austrian Federal Constitution).

<sup>13</sup> BGBl 1984/490.

<sup>14</sup> Art. 97, c. 3 and 4 Austrian Constitution.

countries in Eastern Europe and San Marino<sup>15</sup>, has not been invoked as a basis for legitimizing the measures to restrict large fundamental freedoms in Austria. The Austrian Government did not consider any of these mechanisms applicable, preferring to proceed with the ordinary legislative and administrative regulatory instruments provided by the federal Constitution. It was not considered necessary to proceed with the emergency powers of the Federal President, powers which have never been applied to date<sup>16</sup>, also due to the traditional weakness of the Head of State in the Austrian political system<sup>17</sup>.

3. A first important fact is that - as there have not been used the emergency powers of the President – the ordinary laws are applicable. At the level of ordinary legislation there exists a general law on epidemics, the law on the prevention of the fight against transmissible diseases (*Epidemiegesetz*; Law on Epidemics<sup>18</sup>). This legislation was included in the Austrian system in 1950, while the original version of the Epidemics Act dates back to 1913, and therefore to the period of monarchical constitutionalism when the rule of law and the protection of fundamental freedoms had a development still ahead of the welfare state and supranational Conventions on Human Rights. Although it has been modified and adapted in some parts since 1950<sup>19</sup>, it has retained some of its characteristics of its conception based on the monarchical liberal constitutionalism. In particular, it allows municipalities and district administrative authorities (and not the central government) to take restrictive

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<sup>15</sup>The Member States of the Council of Europe who have notified the Secretary-General of the organisation of the use of art. 15 ECHR are Latvia, Romania, Armenia, Moldova, Estonia, Georgia, Albania, Northern Macedonia, Serbia and San Marino. The updated list of waivers notified under art. 15 ECHR in the context of the spread of the COVID-19 is available on the CoE website [www.coe](http://www.coe). On the meaning of art. 15 ECHR for the health crisis see R. Lugarà, *Emergenza sanitaria e art. 15 CEDU: perché la Corte europea dovrebbe intensificare il sindacato sulle deroghe ai diritti fondamentali*, in: Osservatorio costituzionale AIC, n. 3 del 2 giugno 2020.

<sup>16</sup>See W. Berka, *Verfassungsrecht*, Wien, 2016, p. 692. The doctrine considers, therefore, that the Federal President's *Notverordnungsrecht* is now a dead right.

<sup>17</sup>See U. Haider-Quercia, *Il Presidente austriaco e le nuove coalizioni di governo*, in: *Percorsi costituzionali*, n. 3/2017, p. 875 f.

<sup>18</sup>BGBI. I, 186/1950

<sup>19</sup>See W. Heissenberger, *105 Jahre „Epidemiegesetz“ – Ein Gesetz im Wandel!*, in: *Journal für Medizin- und Gesundheitsrecht*, 2018, p. 163 f.



measures to prevent the spread of epidemics.

The Government used the Epidemics Act only in the early days of the pandemic, and in particular for the provision of the ban on assembly, but also for the implementation of government decisions by the Länder and other territorial authorities (*Bezirksverwaltungsbehörden*).

Another significant aspect of the Epidemics Act, which has been amended under the COVID-19 regulatory package<sup>20</sup>, is the special automatic compensation mechanism, that should be proportionate to the economic damage suffered under the administrative prohibition measures provided for by art. 32 of the law in question<sup>21</sup>. This consists of compensation for non-earnings and a refund for salaries paid in the closing period, which can be activated and automatically claimed by those affected by the measure. The characteristic logic of the law in question – which was also the legal basis for the management of the so-called Spanish flu that had hit the globe in 1918-1920 – is therefore not a generalized lock down but the suspension of some targeted commercial establishments to avoid the spread of an epidemic. The approach taken to deal with COVID-19 goes far beyond the measures devised by the Austrian Epidemic Law.

The duty of the State, under this law, to compensate for the damages actually suffered by the economic exercises that have been closed by an administrative act, and the poor economic sustainability of this mechanism was an additional reason why the Government changed course, and no longer considered as the basis of its interventions the existing legislation. Rather it presented, through the heads of the parliamentary groups corresponding to the two parties forming the governing coalition, a legislative proposal containing a broad and complex ad hoc legislation to deal with the COVID-19 pandemic<sup>22</sup>.

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<sup>20</sup>Art. 4, 2° comma.

<sup>21</sup>§ 32 c. 4 EpidemieG.

<sup>22</sup>396/A from 14.03.2020 (XXVII legislative period).

4. The Austrian National Council, the political Chamber of the Austrian Parliament<sup>23</sup>, has approved in an extraordinary session held very quickly on Sunday 15 March 2020<sup>24</sup> the federal law containing provisional measures to combat the spread of COVID-19 (COVID-19 *Maßnahmengesetz*), together with the establishment of a fund to deal with the virus-related crisis (COVID-19-*FondsG*)<sup>25</sup> and changes to some financial and labour laws to enable administrative measures to address the virus crisis (COVID-19-*FondsG*)<sup>26</sup>. These legislative measures have been adopted on the basis of a detailed legislative proposal presented by the governing parties and providing a broad government authorisation that has been extended throughout the year 2020, expiring on 31.12. if it is not going to be extended again<sup>27</sup>. Legislative deliberations were sent to the Chamber of Representatives of the *Länder*, the *Bundesrat*, which immediately approved all new legislations, so that they came into force at midnight on 16 March.

The first element that stands out is the high speed of the parliamentary process. For this reason, it was important that even in the first phase of the crisis the Austrian Parliament continued to carry out its role, and that it always and regularly met, having immediately established the mechanisms and methods to ensure the safety of its members<sup>28</sup>. The second element highlighted by the crisis is the strong

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<sup>23</sup>See T. Öhlinger e H. Eberhard, *Verfassungsrecht*, Wien, 2016, p. 192 f.

<sup>24</sup>The only precedent for a session of the Austrian Parliament during a weekend was in 1931, when urgent measures against unemployment were passed.

<sup>25</sup>*Bundesgesetz betreffend vorläufige Maßnahmen zur Verhinderung der Verbreitung von COVID-19-Maßnahmengesetz*, BGBl. I, 12/2020.

<sup>26</sup>This fund has been initially equipped with a fund of 4 billion euros, subsequently increased by the legislative modification BGBl. I, 23/2020.

<sup>27</sup>For an overview of the many legislative changes see R. Resch, *Das Corona Handbuch, Österreichs Rechtspraxis zur aktuellen Lage*, Wien, 2020.

<sup>28</sup>In fact, there was no debate about the use of digital technologies, such as electronic voting, as largely discussed in some other countries, including Italy and Great Britain. See F. Clementi, *Proteggere la democrazia rappresentativa tramite il voto elettronico: problemi, esperienze e prospettive (anche nel tempo del corona virus)*. Una prima introduzione, su [www.federalismi.it](http://www.federalismi.it), n. 6 del 18 marzo 2020; N. Lupo, *Perché non è l'art. 64 Cost. a impedire il voto "a distanza" dei parlamentari*. E perché ammettere tale voto richiede una "re-ingegnerizzazione" dei procedimenti parlamentari, in: *Osservatorio Costituzionale AIC*, n. 3 del 31.3.2020 e C. Sbailò, *Parlamento on line? Garantiamo la possibilità di violare il regolamento*. Il commento del prof. Sbailò, in: *Formiche.net* del 31.3.2020.

cohesion between Parliament (parliamentary majority) and government, which can be observed even in periods of constitutional normality<sup>29</sup>. In the management of the anti-COVID-19 legislation, this strong cohesion was further enhanced and also involved the parliamentary opposition (whose function in the Austrian parliamentary system is traditionally limited and of so-called „constrictive nature”<sup>30</sup>): all parliamentary groups – and therefore also those of opposition – had agreed to postpone all non-urgent issues in order to give priority to the anti-COVID-19 legislation. To this end, it was agreed - again unanimously by all members of Parliament - to shorten the normal deliberative procedures provided for by parliamentary regulations<sup>31</sup>. Derogating from them made it possible to adopt the COVID-19 (constitutional and ordinary) legislation in the shortest possible time: it has been voted by both Houses of Parliament within 48 hours.

The exception of ordinary legislative proceedings has suspended all parliamentary debates, nor have any substantive changes or additions been included in the proposal presented to the Parliament by the governing parties. Thus, the votes also showed strong cohesion between the Government, the parliamentary majority and the opposition. The first two legislative packages on the COVID-19 were unanimously approved, except for a few individual provisions. The other three COVID-19 legislations have been voted by the majority of Government (Peoples Party-The Greens), with the support of one of the parliamentary opposition groups<sup>32</sup>. The conflict was therefore particularly contained, essentially non-existent especially in the initial phase and only in the second phase began to grow but always in an ineffective way. This situation does not seem to change substantially not even with the recent vetoes expressed against several resolutions of the National Council by

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<sup>29</sup>See T. Öhlinger and H. Eberhard, *Verfassungsrecht*, Wien, 2016, p. 51.

<sup>30</sup>See U. Haider-Quercia, *La forma di Governo della Grande coalizione*, cit., p. 252 f. and M. Stelzer, *Neuere Tendenzen im österreichischen Parlamentarismus. Zur Entwicklung oppositioneller Rechte*, in: *European Review of Public Law*, 1997, p. 1080 f.

<sup>31</sup>The decision was taken by a simple unanimous agreement as the Parliament clearly was not able to change the regulations due to timing issues.

<sup>32</sup>In particular, the first law, the most important one, was passed unanimously in Parliament as well as in the budget commission.

the Federal Council, in which the Coalition of Government does not have a majority. The other two parties present (the Social Democrats and the National-Liberal Party)<sup>33</sup>, which together have a majority in the Chamber of the *Länder*<sup>34</sup>, have blocked the passage of the laws, criticizing the excessive haste of the governing majority in wanting to pass the new package of laws without due parliamentary debate<sup>35</sup>. However, the *Bundesrat* has only a suspensive veto, which in this case has been passed over by the Federal Council, which has reapproved its original resolution without the need for any particular majority<sup>36</sup>.

It was, in general, observed how the federal system operated as a highly centralized model. The dialectic between the Federation and the *Länder* has always been characterised by strong cooperation in Austria. In the case of the health sector this is for some extent provided by the Constitution and the allocation of powers that recognize a legislative responsibility of the *Länder* only for the organizational management of hospitals while all other competencies are centralized by the Federation<sup>37</sup>. Therefore, also the implementation of the choices made by the Federal Government by the *Länder* administrations took place with a very low conflict level that has been limited to individual cases of a non-existential scope<sup>38</sup>.

It has been pointed out that with the parliamentary adoption of the COVID-

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<sup>33</sup>The fifth party present at the National Council, the Liberals NEOS, is not represented in the *Bundesrat*.

<sup>34</sup>In fact, it is the first time in Austrian constitutional history that different majorities have been created in the two branches of Parliament. But in view of the *Bundesrat*'s limited position with respect to the National Council (the only chamber expressing confidence to the Government) this difference only marginally affects the processes of political deliberation.

<sup>35</sup>The meeting was convened in an extraordinary way in order to be able to proceed urgently with the approval of the new package of measures.

<sup>36</sup>Article 42 c. 3 Austrian Federal Constitution

<sup>37</sup>See U. Haider-Quercia, L'organizzazione sanitaria in Austria: il federalismo consociativo e la differenziazione delle casse mutue, in: R. Nania (a cura), Attuazione e sostenibilità del diritto alla salute, Atti della Giornata di studio 27 febbraio 2013 - Sapienza Università di Roma, Roma, Sapienza Università Editrice, 2013, p. 255 f. and C. Kopetzky, Krankenanstaltenrecht, in: M. Holoubek e M. Potacs (ed.), *Öffentliches Wirtschaftsrecht*, Wien, 2019, p. 431.

<sup>38</sup>This applies, for example, to the case of Vienna, where the municipal authorities opened the city parks while the federal parks remained closed. See P. Bußjäger, *COVID-19 crisis challenging Austrian cooperative federalism*, *Forum of Federations*, <http://www.forumfed.org/wp-content/uploads/2020/04/AustriaCOVID.pdf>.

19-legislation proposed by the Government the system of sources has been formally maintained and this has given also the impression that constitutional mechanisms are hale and healthy even in times of crisis<sup>39</sup>. It must be taken into account, however, that the only formal compliance with the procedures provided for by the Constitution has in fact led to an erosion of the parliamentary function which, as we have seen, in the adoption of the legislation of the health crisis has not played a sovereign decision role but has adopted the legislation materially prepared by the Government, outside the procedures provided and in the absence of guarantees recognized to the parliamentary opposition. The doctrine has shown that in the Austrian parliamentary system the parliamentary function has always been weak, a weakness that bases its origins in the historical evolution of the constitutional order, which since the Second World War has channeled conflicts often through extra-constitutional mechanisms. In fact, most of the debate in the field of economic and social legislation has been conducted within the system of trade unions and representations of the economic and commercial sectors that has been institutionalized outside the Constitutional provisions over time and is linked to the two main parties of the government coalitions<sup>40</sup>. In this system, the Government, and especially the Head of Government, assumes a role of coordinating the interests at stake and conveyed by the various trade union and chamber institutions, a situation which had from the outset weakened Parliament, limiting to the maximum the dialectic between majority and opposition to be carried out in the parliamentary assembly. It has long been one of the main limitations of the Austrian parliamentary system that legislative decisions were taken materially in non-constitutional institutions and by the government, and Parliament fulfilled its constitutional function by simply translating decisions materially taken elsewhere into law<sup>41</sup>. As a result, the role of the parliamentary

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<sup>39</sup>See F. Palermo, *La gestione della crisi pandemica in Austria: regolarità costituzionale e qualche distonia politica*, in corso di pubblicazione su: DPCE online, luglio 2020.

<sup>40</sup>See A. Pelinka, *Il modello Austria. 40 anni di concertazione e pace sociale*, Roma, 1991.

<sup>41</sup>See F. Ermacora, G. Baumgartner and G. Strejcek, *Österreichische Verfassungslehre*, Wien, 1998, p. 320 f. e H. Schäffer, *Il modello di governo austriaco. Fondamenti costituzionali ed esperienze*

opposition, which had for a long time a weak Parliament eroded in its functions, is also also weak<sup>42</sup>. This situation had eased over the last thirty years due to the transformations of the party system in a more pluralistic sense, making alternations in the coalitions of government possible. This new situation had increased the political value of the parliamentary assembly and the opposition represented in it, also by virtue of the government majorities not more predictable before the elections<sup>43</sup>. The pandemic crisis has in some ways highlighted a new reversal of the parliamentary dialectic processes, as it has shown very clearly how the decision-making level is effectively monopolized in the hands of the government and the parties that hold a majority in the National Council. The material legislature of the crisis was therefore the Government. The quick and effective negotiations with the relevant ministers and the labour unions, the chambers of labour, and the chambers of business and of agriculture (the so called social partners<sup>44</sup>) were presented in numerous press conferences supported by a massive media presence of the Members of the Government (in particular the Chancellor, the Vice-Chancellor, the Minister of Health and the Minister of Finance). This almost ubiquitous presence helped to spread the feeling of legitimacy of the restrictive measures adopted.

Thus, even if the governing parties had parliamentaryized the crisis, the guarantees of parliamentary processes were lacking. And this raises a number of critical issues when considering that the anti-COVID-19 regulatory measures have led to numerous very broad legislative changes in many areas, including several changes to the Constitution<sup>45</sup>. Some are changes to existing rules, while others have

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politiche, in: S. Gambino (ed.), *Democrazia e Forma Di Governo. Modelli Stranieri e Riforma Costituzionale*, Rimini, 1997, p. 167 f.

<sup>42</sup>See M. Stelzer, *The Constitution of the Republic of Austria. A contextual Analysis*, Oxford, 2011, p. 66 f.

<sup>43</sup>Cfr. Ulrike Haider-Quercia, *La forma di Governo della Grande Coalizione*, op. cit, p. 369 s.

<sup>44</sup>On the system of the social partners see A. Pelinka, *Austria: Out of the Shadow of the Past*, Oxford, 1998, p. 91 f.

<sup>45</sup>In order to ensure the continuity of the functions of the constitutional bodies, the possibility - limited in time until the end of 2020 - of carrying out the council of ministers' deliberations also through videoconferences has also been included at the constitutional level. This possibility has also been recognised (until the end of 2020) in municipalities that can make decisions by telematics or via

formalised long-past-hand customs<sup>46</sup>. The most incisive constitutional innovations caused by the virus are probably the changes concerning the competences of the *Länder*, for example in the field of energy law, in favour of the Federation<sup>47</sup>. In fact, several special procedural rules for public procurement law and specific provisions with the rank of ordinary law have been adopted for the procedures before the administrative authorities, administrative tribunals, the Administrative Court and the Constitutional Court in an own constitutional law. The regulatory measures also covered the control of Austria's borders with neighbouring countries, and the right to enter and stay in Austria was restricted for a period also for asylum seekers.

With regard to the aforementioned issue of compensation to businesses and restaurants closed by administrative measures, COVID-19 legislation is more restrictive than the Epidemic Act and gives the Government greater control over the financial aid to be provided: the provisions of the new legislation do not provide automatic and proportionate compensation to the damage actually suffered (as required by the Epidemics Act) but allow access to the government fund whose maximum amount is limited. As a result, the amounts that can be paid out upon request and on the basis of certain conditions, drawn up by the Government, have also been limited<sup>48</sup>.

The new regulations are therefore extensive and complex, and have covered in addition to the Constitution, more than thirty ordinary laws and introduced some

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videoconferencing.

<sup>46</sup>Cfr. M. Welan, *Demokratie auf Österreichisch oder die erstarrte Republik*, Wien, 1999, pp. 15 s. Among the latter, it is mainly the formalization at the constitutional level of the principle of unanimity for the decisions of the Council of Ministers, a principle which during the entire republican period constituted a kind of customary constitutional law.

<sup>47</sup>The allocation of the competencies in the energy field has always been subject of discussion and of centralizing interventions by the Federation.

<sup>48</sup>In addition to the different model of state aid to counteract the consequences of the crisis, this change has led to problems in terms of equality since some (few) companies closed before 15 March, before the adoption of the first COVID law, thus benefited from higher compensation than those whose activity was interrupted as a result of the ad hoc legislation to combat the coronavirus pandemic.



fifty new laws<sup>49</sup>, of which many will remain in place even when the pandemic is overcome.

With the adoption of the COVID-19 legislation the mechanisms provided for by the Constitution have formally remained unviolated, as a (formally) parliamentary law legitimizes the measures adopted by the Government. Nevertheless, there are problems in terms of legality, a principle that is one of the central principles of the democratic construction of the Austrian Constitution<sup>50</sup>. In fact, the legislative basis for restrictive measures was outlined by the parties of the Government, which, through administrative measures, is called to implement the provisions introduced by the new COVID-19 legislation, voted by the Parliament without modifications. In this way, the principle of legality has been bypassed, as it requires for the delegation and limit of administrative activity a law that expresses also materially the will of the Parliament, in which the popular sovereignty is proportionally represented. By adopting the new legislation outside of the parliamentary mechanisms, the opposition has not been able to carry out effective control on the government's extremely interventionist emergency work.

5. The Chancellor's central role in coordinating legislative and regulatory activity also emerged when initial criticisms were raised by scholars and some administrative judges about the adequacy and proportionality of the measures taken. Chancellor Sebastian Kurz's response was short and clear: it is legal sophistry and at the end of the pandemic it will be the Constitutional Court to assess the legitimacy of

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<sup>49</sup>The legislative system outlined in this way authorises the adoption of regulatory measures for the narrowing and enlargement in detail of the measures. On this basis, the individual federal ministries and the presidents of the *Länder* (according to their respective areas of expertise) have approved detailed regulations, e.g. in order to regulate access to public places, restaurants, workplaces, etc. Hundreds of regulations and circulars have been carried out in addition to the numerous detailed legislative forecasts, often with a major practical impact on the lives of citizens. For an updated list, see the website of the Federal Ministry of Social and Health <https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Rechtliches.html>.

<sup>50</sup>See M. Stelzer, *The Constitution of the Republic of Austria. A contextual Analysis*, Oxford, 2011, pp. 88 ss. E. A. Zei, *La funzione normativa tra Parlamento e Governo nella Repubblica federale austriaca*, Milano, 2004, pp. 109 f.



the regulatory packages and the administrative implementation measures<sup>51</sup>.

The Constitutional Court in Austria, as Felix Ermacora<sup>52</sup> has already pointed out, has often shown profiles of affecting also the government function<sup>53</sup>. After the first phase of the lock down, more than 70 direct appeals were lodged<sup>54</sup>, which means that the Court will have to deal immediately with the various issues relating to the proportionality of rights restrictions. It will be interesting to see how the constitutional judges will decide on the various issues brought to their attention<sup>55</sup>. It is difficult to predict the direction that the Austrian Constitutional Court will take in the various cases that have been brought to its attention<sup>56</sup>. However, it can be assumed that the Court will allow a broader political discretion in adopting the COVID-19 legislation, especially with regard to time limitation and proportionality of the conditioning of rights. The constitutional control of the individual issues raised before the Court must be carried out individually, although it is difficult to assume that all measures are constitutionally admissible; the longer the interventions on fundamental rights last, the more massive the crisis subsides, the more lenient possible alternatives are, the more likely it is that these measures will be lifted by the Constitutional Court - even if by the time of its ruling their validity will already be terminated<sup>57</sup>.

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<sup>51</sup>See „Kurz weist juristische Spitzfindigkeiten zurück“, in: die Presse 7th april 2020, <https://www.diepresse.com/5796917/kurz-weist-juristische-spitzfindigkeiten-zuruck>

<sup>52</sup>Cfr. F. Ermacora, G. Baumgartner e G. Strejcek, *Österreichische Verfassungslehre*, Wien, 1998, p. 198.

<sup>53</sup>See, for example, for the Court's intervention on same-sex marriage and the possibility of the adoption of children by same-sex couples, U. Haider-Quercia, *Il judicial activism del VfGH: I giudici costituzionali decidono sull'eguaglianza delle coppie omosessuali in via di ufficio*, sito Diritto pubblico comparato ed europeo, [www.dpce.it](http://www.dpce.it).

<sup>54</sup>See Art. 140 B-VG which provides for the possibility of filing a direct individual appeal against a law or a regulation if a person considers to be violated in its fundamental rights.

<sup>55</sup>See Covid Gesetz geht ans Höchstgericht, in: Wiener Zeitung 2nd april 2020, <https://www.wienerzeitung.at/nachrichten/politik/oesterreich/2056405-Covid-Gesetz-geht-an-Hoechstgericht.html>

<sup>56</sup>Criticisms include the indeterminacy of the legislative delegation for the enactment of administrative measures, the inequality of the applicability of the compensation mechanism to only closed companies before the Covid 19 legislation (so before 15 March) and the inequality in the re-opening of the negotiations since the re-opening criterion was based on the size of the store's surface.

<sup>57</sup>The health crisis sheds light on the lack of provisional legal protection by the Constitutional Court: in Austria there is no preventive regulatory control of the rules - provided for in Germany - which allows the Constitutional Court to assess the laws before the conclusion of the legislative procedure.

Here emerges another problematic aspect raised by the health crisis: the obligation to carry out the necessary balance in terms of proportionality and reasonableness also belongs in times of crisis in the first place to the (formal and material) legislature and the subject that emanates administrative acts<sup>58</sup>, but the crisis seems to have shifted this assessment more to the Constitutional Court with ex post interventions. In the current dynamics, the role played by the Constitutional Court in balancing rights, and especially in assessing the proportionality of the measures taken, could expand, to the detriment of the competence recognized by the Constitution in Parliament to define the legislative and political direction to guide and limit the activity of the executive. It can therefore be observed that in an emergency the role of the Constitutional Court tends to expand while any intervention by the Federal President was absent<sup>59</sup>.

There is an additional factor that is relevant to assess a proper balance of rights in compliance with the Constitution. The different phases of emergency were worked out by the Executive on the basis of scientific evidence on the danger and spread of the contagion, data that strongly determined the choices made<sup>60</sup>. From the study of forms of government we know that every form of government is constantly changing, and that the balance and collaboration between the political bodies can receive, even within the same formal constitutional frame, multiple implementations. The pandemic crisis raised the role of technicians and scientists in defining state measures in Austria. Since the beginning of the pandemic, the Government based and justified its decisions on the opinions of experts, task forces

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Consequently, in the case of a direct appeal against a law that has already come into force, the Court has no possibility of declaring its provisional inapplicability.

<sup>58</sup>See A. Somek, *Is the Constitution Law for the Court Only?: A Reply to Sebastian Kurz*, *Verf Blog*, 2020/4/16, <https://verfassungsblog.de/is-the-constitution-law-for-the-court-only/>.

<sup>59</sup>The Federal President remained out of the decision-making process, also because the Government has opted for an approach using the ordinary legislative instruments, only to be signed and promulgated by the Federal President, without his intervention in political terms. In this way, it has been reaffirmed that the consociative system continues to keep restricted any intervention of the President's political significance.

<sup>60</sup>See P. Bußjäger, *Bewertung der Maßnahmen zur Bekämpfung des COVID-19-Virusausverfas sungs- und verwaltungsrechtlicher Sicht*, [https://www.uibk.ac.at/public-relations/presse/dateien/rechtsgrundlagen\\_corona\\_bussjaeger.pdf](https://www.uibk.ac.at/public-relations/presse/dateien/rechtsgrundlagen_corona_bussjaeger.pdf)

and working groups which were selected and convened ad hoc for the pandemic<sup>61</sup>. Accordingly the various ministries have equipped themselves with special task forces composed of selected experts and scientists to receive technical-scientific support for the management of the health crisis. In this way, many of the choices made seem to be forced by virtue of the appreciation of scientists, and hypotheses for different political alternatives vanish. This also leaves room to hypothesize the emergence of a new form of government that of a “scientiocracy”, in which political decisions are submitted to an authority identified as “science”<sup>62</sup>. Even if this form of government cannot eliminate politics, it tends to marginalise it and make it unnecessary in the face of scientific constraints. During the crisis of COVID-19 politics left ample room for technicians to be part of the role of political orientation. This evolution can also have an effect on the relationship between the political decision-maker and the electorate and their respective responsibilities.

6. The constants of institutional functioning in Austria during the COVID-19 crisis can be summed up in three elements: the highly collaborative Parliament, the effective regulatory coordination of the Chancellor and the absence of conflict between Parliament and Government but also between the Länder and the federal administration. These elements have been traditionally characterizing the Austrian parliamentary government model, and in the pandemic crisis they have been re-accelerated. Thus, the choice not to apply the mechanisms and powers provided by the Constitution for emergencies and to create with ordinary constitutional instruments an ad hoc legislative basis for the restrictive measures of the Government, has meant that institutional relations also functioned in the crisis according to the ordinary dynamics that had established themselves structurally in the Austrian political system after the Second World War. As a consequence it can be

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<sup>61</sup>See for example for the Ministry of Welfare <https://www.sozialministerium.at/Informationen-zum-Coronavirus/Coronavirus---Taskforce.html>

<sup>62</sup>See G. de Vergottini, *Una overdose di esperti*.

observed how the management of the pandemic crisis has once again brought out the inclinations of the system towards forms of consociative collaborations between political forces and territorial authorities – both in the adoption of the ad hoc COVID-19 legislation and in the implementation phase of it. As a result the health crisis has exalted some of the dynamics that are typical of the Austrian parliamentary system that, even in periods of constitutional normality, has seen a reinforcement of the executive power. The Government in fact became the lead of the system, performing a coordination function of the interests at stake. A central role has been taken by the Chancellor: around him the coordination of the various legislative and regulatory activities has been monopolised and he has also emerged in public appearances and parliamentary work as the real manager of the crisis. Although in this way the material legislature of the crisis *de facto* is made up of the Government. The Parliament on the contrary lost its centrality in the identification of the strategy to deal with the pandemic and in the temporal and material determination of the emergency powers to be conferred to the Government. In any case the decision-making processes respected, at least from a formal point of view, constitutional regularity. The mechanisms applied to fight COVID-19 highlight also the now central role that the Constitutional Court has assumed in the Austrian parliamentary system. The Constitutional Court will be able to increase its role and have a significant impact on the evaluation and control of the balance of rights compressed by government measures. Particularly limited was, however, the role played by the parliamentary opposition, thus occurring very clearly in the management of the crisis the structural shortcoming of the weak parliamentary control that has always characterized the evolutions of the Austrian system. In addition, there has been no significant intervention by the Head of State, to whom the Constitution recognizes important powers also of political importance, although the President has never acquired political relevance in the party dynamics of the system. Thus even a crisis such as the health crisis was not an opportunity for a possible expansion of presidential powers, as in some circumstances can be observed for the Italian President. COVID-19

reaffirmed the strength of the party system and the parliamentary model in which the Government prevails and the coordination function is monopolised in the hands of the Chancellor. With the management of the Corona virus, we can, therefore, attest to the full health of the Austrian consociative model.

The Austrian experience also leads to another reflection that goes beyond the reassertion of the specific characteristics of the consociative parliamentary system. The pandemic was not only a test for the form of government but also a test to verify the degree of social and cultural penetration of fundamental rights. A trend that emerged very clearly in the COVID-19 experience in Austria, but which was also evident in other European countries and which may have an impact on the future legal-constitutional culture, actually emerges from this constitutional monitoring, concerns the general disposition of people to accept limitations on fundamental freedoms. Public opinion polls show a broad consensus for the Government that has managed the phase of the Corona virus, although citizens have suffered from the extensive measures adopted with restrictions of fundamental freedoms in so many spheres of private, social and economic life that are hardly compatible with a model of liberal democracy. This figure was noted for all European countries in the first report on the impact of the pandemic on rights published by the European Union Agency for Fundamental Freedoms. While for the traditional doctrine of the state the general restrictions on the freedoms of citizens were justified solely to ensure the survival of the state<sup>63</sup>, this seems to have changed in dealing with the Corona virus, where the protection of health and the health systems has become the reason, or almost a super-value, which justified the compression of numerous other rights, causing dramatic consequences in economic and social terms. These attitudes can have an effect on the parliamentary system of government and the model of representative democracy that is probably more resilient than those of the virus and the pandemic.

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<sup>63</sup>See H. Kelsen, *Allgemeine Staatslehre*, ristampa, Berlin 1966, p 156 f.



# THE IMPACT OF THE COVID-19 PANDEMIC ON CREDIT INSTITUTIONS AND THE IMPORTANCE OF EFFECTIVE BANK CRISIS MANAGEMENT REGIMES \*

Marco Bodellini \*\* and Pamela Lintner\*\*\*

**ABSTRACT:** *The economic crisis provoked by the Covid-19 pandemic is soon expected to also hit the banking and financial sector, mainly through a massive increase of non-performing loans resulting from bank borrowers' inability to repay their debts. Regulators and supervisors have already put in place a number of measures in response to the current situation mainly aimed to facilitate banks continued lending. It is still difficult to forecast whether bank capital will be sufficient to absorb the shock if the non-performing loans risk materializes.*

*Bail-in conversion powers remain largely untested and bail-in is accompanied by unintended negative contagion effects to credit supply and on the real economy, possibly hitting upon corporates and small and medium sized enterprises (SMEs), including the sectors most affected by Covid-19. Access to resolution funding is available in the European Union but, in a severe system-wide crisis, with rather neglectable firepower.*

*Having effective bank crisis management regimes in place, which may possibly also rely on public intervention, will be key to limiting spill-over effects that could pave the way to another global financial crisis. The current public interest test leads to the application of different conditions for access to resolution financing and the provision of public support, depending on whether the BRRD or the banking state aid framework under national insolvency rules is followed. This leads to uncertainties and*

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\*Although jointly elaborated, this article has been drafted as follows: paragraphs 1, 2, 3, 4, 5, 6, 6.1, 6.2, 7, 8, 8.1 and 10 by Marco Bodellini and paragraphs 8.2 and 9 by Pamela Lintner.

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*an unlevel playing field for investors and banks. Moreover, the obligatory 8% prior bail-in rule before use of public support under the BRRD is not clear-cut in particular as regards to the bridge bank tool. Covid-19 highlights the need for an overhaul of the public interest test and the development of a homogeneous set of resolution-like tools to smaller banks (under national insolvency) enabling authorities to take fast action and keep troubled bank's franchise value and critical functions, as is the case in the US and Italy. In order for bank crisis management regimes to work properly, more flexibility in financing by deposit guarantee schemes beyond pay-outs or simple loss contributions under resolution will be required to facilitate transfer tools.*

**SUMMARY:** 1. Introduction. - 2. The nature of the crisis caused by the Covid-19 pandemic and its impact on the banking system. - 3. The first supervisory and regulatory responses. - 4. The next steps. - 5. The pivotal importance of effective bank crisis management regimes. - 6. The main pillars of efficient bank insolvency proceedings. – 6.1 The US bank insolvency procedure. 6.2. The Italian bank insolvency procedure. - 7. The role of deposit insurers. – 8. Public intervention to rescue banks: i.e. back to the future? - 8.1. Precautionary recapitalisation. - 8.2 Bail-in versus bail-out in a systemic crisis. - 9. Resolution, the public interest test, and the legal safeguards. 10. Concluding remarks.

1. The Covid-19 pandemic has already generated an economic crisis of global impact. Such crisis is soon expected to also hit the banking and financial sector. This will likely take place due to the widespread inability of borrowers to pay back their loans and credit lines to banks that, in turn, will have a massive increase in their stock of non-performing assets. Regulators and supervisors have already reacted to the current situation by adopting a plethora of rules mostly aimed at allowing banks to keep on lending money in order for the economy to stay afloat. However, the most critical aspect is that it is still uncertain whether banks currently hold a sufficient amount of capital enabling them to absorb the shock created by the crisis. If that will not be the case, then having effective bank crisis management regimes in place, which possibly also rely on public intervention, will be key to limiting spill-over effects, potentially paving the way for another global financial crisis. In this regard,



from the policy and legislative perspective the main objective should be to ensure that the involved authorities are empowered to adopt all the existing tools, which in their view are useful for successfully handling troubled banks in the context of the right procedure. Accordingly, these regimes should provide the authorities with resolution-like tools to apply also in the context of insolvency procedures, thereby enabling them to make the bank's critical functions continue. The US and Italian bank crisis management regimes are in this regard particularly interesting to analyse since they both give their authorities an array of resolution-like powers to use within bank insolvency procedures, in this way allowing for the continuation of critical functions, typically through the involvement of another more sound and solid institution purchasing the assets and liabilities of the troubled one. Nonetheless, in order for them to properly work and, thereby for the winding-up to be orderly, stronger use of the deposit guarantee schemes should be made, as both the US and the Italian experiences show.

Yet, since all this might end up being insufficient, then rules on public intervention should be, at least temporarily, relaxed.

In advancing these arguments, this paper is divided into 10 sections as follows. After this introduction, section 2 analyses the nature of the current crisis caused by the Covid-19 pandemic and its impact on the banking system. Section 3 looks at the first supervisory and regulatory responses already implemented. Section 4 questions whether the current level of bank capital will be enough to absorb the likely future losses. Section 5 discusses the pivotal importance of effective bank crisis management regimes. Section 6 focuses on the US and Italian experiences in this regard. Section 7 touches upon the central role to be played by deposit guarantee schemes. Section 8 deals with public intervention and bail-in powers. Section 9 reflects on resolution, the public interest test and the legal safeguards and section 10 concludes.

## 2. The crisis provoked by the Covid-19 pandemic intrinsically differs from the

global financial crisis of 2007-2009. Whilst the latter was a crisis arising out of the financial system, which then dramatically impacted the real economy, by contrast, the current one is an economic crisis in nature,<sup>1</sup> mostly caused by the lockdown and the measures on containment and social distancing implemented in nearly all the main countries of the world.<sup>2</sup> Such measures, aimed at slowing down the propagation of the virus in a context where the vaccine still needs to be found, have significantly affected both demand and supply of goods and services, with only few economic activities and sectors (e.g. e-commerce and internet services) benefiting from the new reality.<sup>3</sup>

Yet, despite its economic nature, the current crisis is expected to hit, sooner or later, the banking system as well. Due to the close and numerous interconnections between the banking sector and the real economy it is just matter of when (and certainly not of whether) the former will be negatively impacted. Intuitively, the (many) enterprises that have been struggling over the last months due to the impossibility to operate (or fully operate) and the drastic drop in the demand for their services and goods have already started defaulting on repaying their loans to credit institutions. On top of this, households with members losing their jobs, at the end of the support programs activated by several governments, will become unable to repay their mortgages and credit lines as well, once again passing their (in)solvency issues onto the banking sector. This situation, replicated on a large scale, will first provoke many failures and then strike the banking system, potentially triggering a global financial crisis as well.<sup>4</sup>

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<sup>1</sup>Still, the first reaction of investors and markets was strikingly similar to the one resulting from the Lehman Brothers bankruptcy in 2008, triggering a parallel fall of stock prices. The situation normalised only after several governments adopted stabilization measures including borrower relief measures (moratoria and guarantees).

<sup>2</sup>Accordingly see *ex pluribus* Ringe, COVID-19 and European banks: no time for lawyers, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 43.

<sup>3</sup>Similarly see Hadjiemmanuil, European economic governance and the pandemic: Fiscal crisis management under a flawed policy process, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 175.

<sup>4</sup>See Draghi, We face a war against coronavirus and must mobilise accordingly, *Financial Times*, 25 March 2020, where the former President of the European Central Bank argues that the pandemic has

In such an environment, banks will indeed find increasing difficulties in lending money out due to the sharp deterioration of the risk profile of many of their borrowers.<sup>5</sup> This, in turn, might exacerbate the current economic crisis, probably prolonging its duration.<sup>6</sup> But what is even worse is that they will end up with plenty of non-performing loans in their balance sheets as well as, potentially, experiencing liquidity strains. The increase of non-performing loans is considered particularly threatening also in light of the fact that many banks had not managed yet to offload previously accumulated stocks of such ‘bad’ assets when the pandemic began between February and March 2020.<sup>7</sup> And now, naturally, cleaning up their balance sheets in the current market conditions might result extremely challenging.<sup>8</sup>

All these criticalities are further exacerbated by the low profitability that has characterised the commercial banking business model over the last years, particularly in Europe.<sup>9</sup> Commercial banks’ low profitability is the result of a combination of different factors, including interest rates having been close to zero (or even negative) for quite some time and an excess of capacity identifiable, in many countries, with too many branches and staff, proportionally increasing operating

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already provoked a spiral of economic consequences that will inevitably lead to a serious recession, with the risk of it then ‘morphing into a prolonged depression, made deeper by a plethora of defaults leaving irreversible damage’.

<sup>5</sup>Accordingly see Morais, The EU fiscal response to the COVID-19 crisis and the Banking sector: risks and opportunities, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 300.

<sup>6</sup>Accordingly see also Brescia Morra, Lending activity in the time of coronavirus, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 392.

<sup>7</sup>Even though Gortsos, The application of the EU banking resolution framework amidst the pandemic crisis, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 367, correctly points out that the rate of non-performing loans during the last years has, on average, significantly decreased mostly due to the introduction of the Council Action Plan of July 2017 on Non-Performing Loans and the accommodating macroeconomic conditions. However, the existing stock of NPLs resulting from the global financial crisis or the subsequent fiscal crisis in the Euro Area still varies significantly among Member States.

<sup>8</sup>The increase of non-performing loans in banks’ balance sheets is closely observed by supervisors; accordingly it has been reported that the European Central Bank has been assessing the appropriateness to create a Euro-Area bad bank in charge to manage huge portfolios of non-performing assets; see Arnold – Espinoza, ECB pushes for Euro Zone bad bank to clean up soured loans, *Financial Times*, 19 April 2020.

<sup>9</sup>See Bank for International Settlements, *Effects of Covid-19 on the banking sector: the market’s assessment*, BIS Bulletin, May 2020, 5.

costs. The capability to restart making profits will be thus pivotal for the banking industry to get out of the crisis and, even more so, to lead the economy ‘back onto its knees’.

In such a dark scenario, the (only) good news is that banks are, on average, much more and better capitalised than they used to be during the global financial crisis of 2007-2009. Indeed, because of the legislative and regulatory initiatives adopted in the aftermath of that crisis with a view to making banks stronger and more resilient, the latter have been requested to hold a much higher level of capital, mostly composed of more loss-absorbing items.<sup>10</sup> Incidentally, such higher levels of capital have already enabled supervisors to temporarily lower banks’ buffers thereby allowing them to keep on extending loans to borrowers.<sup>11</sup>

3. In the face of the severity of the current crisis, regulators and supervisors have already reacted by adopting a plethora of rules mostly aimed at permitting banks to continue to lend money out in order to keep the economy afloat.<sup>12</sup> Accordingly, a number of measures have been implemented, the most notable of which relate to: a) lowering capital buffers, b) favourable prudential treatments for

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<sup>10</sup>See Bodellini, The long ‘journey’ of banks from Basel I to Basel IV: has the banking system become more sound and resilient than it used to be?, ERA Forum, 2019, *passim*; see also International Monetary Fund, Global Financial Stability Report, October 2018: A Decade after the Global Financial Crisis: Are We Safer?, October 2018, available at [www.elibrary.imf.org/view/IMF082/253199781484375594/25319-9781484375594/ch02.xml](http://www.elibrary.imf.org/view/IMF082/253199781484375594/25319-9781484375594/ch02.xml); see Financial Stability Board, Implementation and Effects of the G20 Financial Regulatory Reforms, 3 July 2017, 3rd Annual Report, available at [www.fsb.org/wp-content/uploads/P030717-2.pdf](http://www.fsb.org/wp-content/uploads/P030717-2.pdf).

<sup>11</sup>See European Central Bank, ECB Banking Supervision provides temporary capital and operational relief in reaction to coronavirus, Press Release, 12 March 2020, available at [www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200312-43351ac3ac.en.html](http://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200312-43351ac3ac.en.html). On 16 April 2020, the European Central Bank also temporarily relaxed the capital requirements for market risk, see European Central Bank, ECB Banking Supervision provides temporary relief for capital requirements for market risk, Press Release, 16 April 2020, available at <https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200416~ecf270bca8.en.html>.

<sup>12</sup>These measures add on to the massive monetary policy interventions that central banks have been implementing in order to keep price stability and, sometimes, financial stability as well; the European Central Bank, for example, launched a huge assets purchase program, called Pandemic Emergency Purchase Programme (PEPP), that covers private and public sector securities, has a total volume of EUR 750 billion and runs at least until the end of 2020. Significantly, PEPP treats the capital key of national central banks in a more flexible manner, allowing the European Central Bank, through the National Central Banks, to help in a more targeted way the countries where the need is greatest.

non-performing loans in terms of less loss provisioning required, c) new rules on legislative and non-legislative moratoria on loan repayments, d) flexible application of the IFRS 9 international accounting rules, e) suspension of dividends distribution, share buy-backs and bonuses.<sup>13</sup>

With regard to capital requirements, on 12 March 2020, the European Central Bank (ECB) announced the relaxation of some prudential rules for significant banks under its direct supervisory remit. Such measures aim at exempting those institutions from a number of capital requirements.<sup>14</sup> The first capital buffer to be relaxed has been the so-called capital conservation buffer (CCB), which is a non-risk-weighted capital requirement, previously set at 2.5%, whose application depends on the assessment of the total risk exposure amount. The main effect arising from such a measure is that a growing portfolio of loans and/or, as will likely be the case in the current situation, an increase of the risk weighted density of a portfolio will not require additional capital to be held. Accordingly, banks should have more room for manoeuvre in extending loans.

Additionally, with regard to the Pillar 2 requirements, (*i.e.* the additional capital surcharge imposed by supervisors), the ECB has now decided that also less loss-absorbing instruments, such as Tier2 instruments, will be considered fit for the purpose. As a result banks will no longer be obliged to issue CET1 instruments to raise this additional amount of capital, on the grounds that in the current markets situation this could prove particularly difficult.

Concerning non-performing loans, in April 2020, the Basel Committee on Banking Supervision (BCBS) published a document entitled 'Measures to reflect the impact of Covid-19', arguing that the risk-reducing effects of the various extraordinary support measures adopted in many jurisdictions, particularly

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<sup>13</sup>See Busch, Is the European Union going to help us overcome the COVID-19 crisis?, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 29.

<sup>14</sup>See Joosen, Balancing macro and micro-prudential powers in the SSM during the COVID-19 crisis, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 344.

government guarantees and different payment moratorium, should be taken into consideration in calculating the risk-weighted assets and thereby the capital requirements. Accordingly the BCBS clarified that in determining the credit risk for loans benefiting from sovereign guarantees the relevant sovereign risk weight should be used.<sup>15</sup>

Furthermore, the BCBS, recalling that the Basel framework requests higher capital requirements for loans that are categorised as ‘past due’ or ‘defaulted’, has agreed that payment moratorium periods relating to the Covid-19 pandemic can be disregarded by banks when counting the days to categorise their non-performing loans.

Accordingly, the European Banking Authority (EBA) has issued new specific guidelines ‘on legislative and non-legislative moratoria on loan repayments in the light of the Covid-19 crisis’,<sup>16</sup> which have been followed by national measures introducing moratoria on payments of credit obligations and by the package adopted on 28 April 2020 by the European Commission.<sup>17</sup> The EBA Guidelines are particularly important since they set out the criteria to meet for payment moratorium in order not to trigger forbearance classification.<sup>18</sup> It has, however, been observed that, although the flexibility given to credit institutions to extend the period for the classification of loans as non-performing is justified in light of the need to support the economy, such a move, nonetheless, may cause huge problems after the lapse of the moratorium period.<sup>19</sup>

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<sup>15</sup>See Brescia Morra, Lending activity in the time of coronavirus, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 397-398.

<sup>16</sup>See European Banking Authority, *Guidelines on legislative and non-legislative moratoria on loan repayments in the light of the Covid-19 crisis*, 2 April 2020.

<sup>17</sup>See European Commission, *Commission Interpretative Communication on the application of the accounting and prudential frameworks to facilitate EU bank lending*, 28 April 2020, COM(2020) 169 final.

<sup>18</sup>See Morais, *The EU fiscal response to the COVID-19 crisis and the Banking sector: risks and opportunities*, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 300.

<sup>19</sup>See Gortsos, *The application of the EU banking resolution framework amidst the pandemic crisis*, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 368, who argues that the extent of these problems will be different among Member States, depending

With regard to accounting rules, the BCBS has also urged banks to take benefit of the transitional regime relating to the IFRS 9, given that it has been introduced with the aim of mitigating the impact of unexpected events on the regulatory capital.<sup>20</sup>

The ECB, too, adopted some measures concerning the application of accounting rules requesting banks to avoid pro-cyclical assumptions in their expected credit loss estimates under the IFRS 9.<sup>21</sup> Such measures are particularly relevant to address the tensions arising from the new levels of credit risk and potential credit losses.<sup>22</sup>

In relation to the suspension of dividends distribution, share buy-backs and bonuses, the EBA's Statement of 12 March 2020 pointed to the need to follow prudent policies,<sup>23</sup> and accordingly most national supervisors have expressed general expectations as to either limit or suspend any decision in this regard.<sup>24</sup> These measures have been further reaffirmed by the EBA's Statement of 31 March 2020.<sup>25</sup> Yet, it is the ECB's Recommendation issued on 27 March 2020 that is crucial.<sup>26</sup> Indeed, the ECB has urged every significant bank under its direct supervision to

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on the strength and duration of the current and upcoming recession, as well as among credit institutions, depending on the composition of their portfolio of loans.

<sup>20</sup>See Brescia Morra, Lending activity in the time of coronavirus, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 398, who argues that the European Union its implementation requires a recast of Regulation EU No. 575/2013 (CRR).

<sup>21</sup>See European Central Bank, ECB Banking Supervision provides further flexibility to banks in reaction to coronavirus, available at [www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200320-4cdbbcf466.en.html](http://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200320-4cdbbcf466.en.html).

<sup>22</sup> See Morais, The EU fiscal response to the COVID-19 crisis and the Banking sector: risks and opportunities, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 301.

<sup>23</sup>See European Banking Authority, EBA Statement on actions to mitigate the impact of COVID-19 on the EU banking sector, Press Release, 12 March 2020, available at [eba.europa.eu/sites/default/documents/files/document\\_library/General%20Pages/Coronavirus/EBA%20Statement%20on%20Coronavirus.pdf](http://eba.europa.eu/sites/default/documents/files/document_library/General%20Pages/Coronavirus/EBA%20Statement%20on%20Coronavirus.pdf).

<sup>24</sup>See Sciarrone Alibrandi – Frigeni, Restrictions on Shareholder's Distribution in the COVID-19 Crisis: Insights on Corporate Purposes, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 433.

<sup>25</sup>See European Banking Authority, Statement on dividends distribution, share buybacks and variable remuneration, Press release, 31 March 2020, available at [eba.europa.eu/coronavirus](http://eba.europa.eu/coronavirus).

<sup>26</sup>See European Central Bank, Recommendation of the European Central Bank of 27 March 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/1, available at [www.bankingsupervision.europa.eu/ecb/legal/pdf/oj\\_c\\_2020\\_102i\\_full\\_en\\_txt.pdf](http://www.bankingsupervision.europa.eu/ecb/legal/pdf/oj_c_2020_102i_full_en_txt.pdf).



suspend any dividends distribution and shares buyback at least until October 2020, also requesting the National Competent Authorities (NCAs) to adopt analogous measures concerning less significant banks. A similar decision has been made also by the UK Prudential Regulation Authority (PRA), that, having urged the seven largest UK lenders (*i.e.* the systemically important deposit-takers, namely HSBC, Nationwide, Santander, Standard Chartered Bank, Barclays, RBS, Lloyds Banking Group) not to distribute dividends,<sup>27</sup> has then published a statement where it publicly welcomed the choice of the latter to suspend dividends distribution and shares buyback until the end of 2020.<sup>28</sup>

Clearly, all these measures are beneficial since their rationale is to help banks carry out their vital function to support the economy through lending. Nonetheless, it is unlikely that they will be able in and of themselves to resolve the gigantic problems that credit institutions (and more broadly the economic system as a whole) have in front of themselves.

4. Hence, against this background the very question is whether such higher levels of capital currently held by banks will be enough to absorb the losses that they might end up suffering when stabilisation measures will be lifted and non-performing loans will become visible. It is still too early to answer such question, even though two opposite schools of thought have already emerged among scholars and commentators. Thus, on the one side are the ones who argue that institutions are well equipped to absorb the shock that will hit them and, as a consequence, they should be left free to also distribute dividends and buy-back their own shares on the condition that authorities make it clear that there will be no publicly-funded bail-

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<sup>27</sup>See Prudential Regulation Authority, Letters from Sam Woods to UK deposit takers on dividend payments, share buybacks and cash bonuses, 31 March 2020, available at [www.bankofengland.co.uk/prudential-regulation/letter/2020/letter-from-sam-woods-to-uk-deposit-takers-on-dividend-payments-share-buybacks-and-cash-bonuses](http://www.bankofengland.co.uk/prudential-regulation/letter/2020/letter-from-sam-woods-to-uk-deposit-takers-on-dividend-payments-share-buybacks-and-cash-bonuses).

<sup>28</sup>See Prudential Regulation Authority, Statement on deposit takers' approach to dividend payments, share buybacks and cash bonuses in response to Covid-19, 31 March 2020, available at [www.bankofengland.co.uk/prudential-regulation/publication/2020/pr-a-statement-on-deposit-takers-approach-to-dividend-payments-share-buybacks-and-cash-bonuses](http://www.bankofengland.co.uk/prudential-regulation/publication/2020/pr-a-statement-on-deposit-takers-approach-to-dividend-payments-share-buybacks-and-cash-bonuses).



outs.<sup>29</sup> This view is clearly based on the assumption that the market (*rectius* market players) is able to self-determine and that regulatory and supervisory interventions are consequently not needed.<sup>30</sup> On the other side are those who, more cautiously, argue that it is currently not possible to forecast whether the amount of capital held by banks will be enough for those purposes and, therefore, dividends distribution and share buy-backs should be temporarily suspended.<sup>31</sup> The latter are also more prudent in ruling-out public bail-outs on the assumption that they might end up being the only effective way to avoid widespread banks' failures in a new environment where States are increasingly expected to step in and bail (nearly all) enterprises out to enable economic activities to carry on.<sup>32</sup>

Naturally, if the banking system will succeed in absorbing such future losses, it will also manage to avoid its collapse, but if this will not be the case then a number of recapitalisations will be necessary. Yet, in a context where many private investors, in turn individually hit by the crisis, might be unwilling and/or unable to subscribe to large banks' increases of capital, then having effective bank crisis management regimes in place, which possibly also rely on public intervention, will be key to

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<sup>29</sup>In this regard, König, Foreword, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, vi-vii, has underlined that 'even if the nature of the current crisis prompts extraordinary taxpayer support to the real economy, we should not have the taxpayer standing up for non-viable banks in a way that undermines the resolution framework'.

<sup>30</sup>Yet, even if this line of argument is adopted, authorities still have incentives to make sure that banks issue enough bail-inable liabilities in order to enable the exercise of resolution powers and reduce as much as possible loss absorption by more vulnerable investors or creditors, such as retail bondholders or uninsured depositors, particularly as long as MREL is not fully built up.

<sup>31</sup>Some regulators and supervisors have already taken such a position; see European Central Bank, Recommendation of the European Central Bank of 27 March 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/1, available at [www.banking-supervision.europa.eu/ecb/legal/pdf/oj\\_c\\_2020\\_102i\\_full\\_en\\_txt.pdf](http://www.banking-supervision.europa.eu/ecb/legal/pdf/oj_c_2020_102i_full_en_txt.pdf); see European Banking Authority, Statement on dividends distribution, share buy backs and variable remuneration, Press Release, 31 March 2020, available at [eba.europa.eu/coronavirus](http://eba.europa.eu/coronavirus); see also Prudential Regulation Authority, Statement on deposit takers, Approach to dividend payments, share buybacks and cash bonuses in response to Covid-19, 31 March 2020, available at [www.bankofengland.co.uk/prudential-regulation/publication/2020/pra-statement-on-deposit-takers-approach-to-dividend-payments-share-buybacks-and-cash-bonuses](http://www.bankofengland.co.uk/prudential-regulation/publication/2020/pra-statement-on-deposit-takers-approach-to-dividend-payments-share-buybacks-and-cash-bonuses).

<sup>32</sup>In this regard the State has been labelled as 'payer of last resort', since it 'bails out companies, distributes subsidies, hands out loans, gives guarantees or pays cash directly to those in need'; see Lehmann, *Mothballing the economy and the effects on banks*, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 157.

limiting spill-over effects, potentially paving the way for another global financial crisis.<sup>33</sup> This argument also rests on the premise that the banking system is meant to play a pivotal role in granting credit and in continuing to do so over time, which in turn will be particularly important to keep the economy alive as well as to make it restart successfully working when the pandemic will end.<sup>34</sup> That is why a healthy and well-functioning banking system will be crucial to overcome the crisis.

5. For the reasons just discussed, bank crisis management regimes will be particularly important to mitigate the negative economic effects arising from the pandemic. Across the paper, the expression ‘bank crisis management regime(s)’ is used in a very broad sense to refer to every legal and regulatory tool and procedure that can be employed and/or initiated by the involved authorities, (*i.e.* supervisors, resolution authorities, central banks and other agencies, depending on the jurisdiction in question), in order to handle troubled banks at any stage of their life and also in the context of a systemic crisis.

In this regard, from the policy and legislative perspective the main objective should be to ensure that the involved authorities are empowered to adopt all the existing tools, which in their view are useful for those purposes, in the context of the right procedure. Obviously, the corollary arising from such an approach is that the same authorities need to be given discretion in choosing, on a case-by-case basis, the right tool(s) to use within the right procedure. This should not necessarily be seen as an issue in itself insofar as such authorities are made accountable to a representative body, such as the Parliament, and periodically requested to explain the reasons for their discretionary choices.

Having in place a legal regime to effectively handle troubled banks based on

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<sup>33</sup>These concerns are discussed also by Morais, The EU fiscal response to the COVID-19 crisis and the Banking sector: risks and opportunities, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 272.

<sup>34</sup>See Ringe, COVID-19 and European banks: no time for lawyers, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 45-46.

the intervention of the authorities is therefore the key element to cope with the current crisis when it will start seriously impacting the banking sector.<sup>35</sup> Still, the effectiveness of such regimes will also depend on the possibility to implement public interventions, which therefore should not be *ex ante* ruled out, since, as in the past, they might turn out to be the most efficient (and, sometimes, the only available) solution.<sup>36</sup> Yet, from this perspective, at the European Union level, a recast of the Bank Recovery and Resolution Directive (BRRD) might be needed since the regime in place, with the notable exception of the so-called precautionary recapitalisation<sup>37</sup> (outside resolution) and, perhaps, of the bridge bank tool (inside resolution), mandates the application of the bail-in tool to at least 8% of the eligible liabilities before that the injection of public money,<sup>38</sup> through the so-called government financial stabilisation tools,<sup>39</sup> can take place.<sup>40</sup>

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<sup>35</sup>There is already widespread consensus in thinking that soon many banks will become failing or likely to fail thereby meeting the first condition for resolution, or liquidation should the public interest to resolve the institution(s) be missing; see *ex multis* Gortsos, The application of the EU banking resolution framework amidst the pandemic crisis, in Gortsos – Ringe (Eds.), Pandemic Crisis and Financial Stability, European Banking Institute, 2020, 369.

<sup>36</sup>In this regard see Ringe, COVID-19 and European banks: no time for lawyers, in Gortsos – Ringe (Eds.), Pandemic Crisis and Financial Stability, European Banking Institute, 2020, 48, arguing that ‘policy makers are preparing alternatives to allow Member States to inject equity capital into domestic banks, should the situation worsen’.

<sup>37</sup>See Bodellini, Greek and Italian ‘lessons’ on bank restructuring: is precautionary recapitalization the way forward?, Cambridge Yearbook of European Legal Studies, 2017, 19, 144.

<sup>38</sup>See Bodellini, To Bail-In, or to Bail-Out, that is the Question, European Business Organization Law Review, 2018, 19, *passim*.

<sup>39</sup>These are the public equity support tool under article 57 of BRRD and the temporary public ownership tool under article 58 of BRRD. Both instruments can be used just as a last resort measure – after the other resolution tools have been applied – with a view of transferring the holding in the resolved institution to the private sector as soon as commercial and financial conditions allow. However, these two tools can be employed, according to article 56 paragraph 4 of the BRRD, just: a) when the use of the resolution tools is not enough to avoid a significant adverse effect on the financial system, or b) when the application of the resolution tools do not suffice to protect public interest, where extraordinary liquidity assistance from the central bank has previously been given to the institution, or c) in relation to the temporary public ownership tool, when the application of the resolution tools do not suffice to protect the public interest, where public equity support through the equity support tool has previously been given to the institution. And additionally, before their use, it needs that: a) a contribution to loss absorption and recapitalisation equal to an amount not less than 8% of total liabilities including own funds of the institution under resolution has been made by shareholders and creditors through write down, conversion or otherwise; (b) the Commission has authorised the public intervention according to the Union State aid framework.

<sup>40</sup> Gortsos, The application of the EU banking resolution framework amidst the pandemic crisis, in Gortsos – Ringe (Eds.), Pandemic Crisis and Financial Stability, European Banking Institute, 2020,

Tools and procedures to put at the authorities' disposal are numerous and, in this area, there are some jurisdictions that should be taken into consideration. The remaining part of the paper will therefore focus on some of these tools and procedures drawing lessons from two jurisdictions, namely the US and Italy. Particularly, special attention will be paid to the bank insolvency proceedings to initiate when the public interest test for resolution is not met, to the role of deposit guarantee schemes and to public interventions both inside and outside resolution.

6. Given that so far within the Banking Union the approach has been to submit to resolution only very large institutions,<sup>41</sup> then special attention should be paid to national insolvency regimes applying to banks, since they are likely to be activated to deal with the majority of banking crises.<sup>42</sup> Indeed, the BRRD rules are clear in stating that, in the face of a failing or likely to fail (FOLF) institution,<sup>43</sup> the default option is its submission to winding-up pursuant to the law of the Member State where it is established.<sup>44</sup> Accordingly, only if and when liquidation under the national rules is

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367, has already expressed the view that although the government financial stabilisation tools have been introduced in the legal framework to face systemic crises, it is unlikely that they will be significantly used during the current Covid-19 crisis, because they presuppose the previous application of the bail-in tool.

<sup>41</sup>Particularly, the Single Resolution Board has so far resolved only Banco Popular, see Lastra – Russo – Bodellini, Stock take of the SRB's activities over the past years: what to improve and focus on?, Study requested by the ECOM Committee of the European Parliament, March 2019, *passim*.

<sup>42</sup>This is the argument I advance in a forthcoming publication, see Bodellini, Alternative forms of deposit insurance and the quest for European harmonised deposit guarantee scheme-centred special administrative regimes to handle troubled banks, *Uniform Law Review*, 2020, 2-3, forthcoming.

<sup>43</sup>According to article 32 paragraph 4 of the BRRD, 'an institution shall be deemed to be failing or likely to fail in one or more of the following circumstances: (a) the institution infringes or there are objective elements to support a determination that the institution will, in the near future, infringe the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority including but not limited to because the institution has incurred or is likely to incur losses that will deplete all or a significant amount of its own funds; (b) the assets of the institution are or there are objective elements to support a determination that the assets of the institution will, in the near future, be less than its liabilities; (c) the institution is or there are objective elements to support a determination that the institution will, in the near future, be unable to pay its debts or other liabilities as they fall due; (d) extraordinary public financial support is required except' in a few cases.

<sup>44</sup>This has been further reiterated by the new article 32b of BRRD, introduced by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 (so-called BRRD 2), stating that Member States shall ensure that a FOLF institution in relation to which the resolution authority

not considered able to achieve the resolution objectives<sup>45</sup> to the same extent as resolution, then the authorities are meant resolve the FOLF institution.<sup>46</sup> Therefore, unless the Single Resolution Board (SRB) and the other National Resolution Authorities (NRAs) decide to change their approach by lowering the ‘bar’ for submission to resolution, winding-up proceedings, pursuant to national laws, will be the most frequently used procedures to handle FOLF banks also in the context of the current Covid-19 crisis.<sup>47</sup>

In this regard, however, there is widespread consensus in considering normal corporate insolvency proceedings run by law courts and purely aimed at liquidating the failing entity as generally inappropriate for peculiar institutions like banks.<sup>48</sup> This results from the fact that, if not properly managed, even the failure and ensuing winding-up of banks that do not satisfy the public interest test for their submission to resolution could negatively affect the banking and financial system and then possibly

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considers that all the conditions for resolution are met, except for the resolution action being in the public interest, shall be wound up in an orderly manner in accordance with the applicable national law.

<sup>45</sup>The resolution objectives are according to article 31(2) of BRRD: a) ‘the continuity of critical functions’; b) ‘to avoid a significant adverse effect on the financial system, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline’; c) ‘to protect public funds by minimising reliance on extraordinary public financial support’; d) ‘to protect depositors covered by Directive 2014/49/EU and investors covered by Directive 97/9/EC’; and e) ‘to protect client funds and client assets’.

<sup>46</sup>See Bodellini, *Impediments to resolvability: critical issues and challenges ahead*, Open Review of Management, Banking and Finance, 2019, 5, 52.

<sup>47</sup>See Dias – Deslandes – Magnus, *Recent measures for Banca Carige from a BRRD and State Aid perspective*, European Parliament Briefing, February 2019, 7, quoting Andrea Enria (then Chair of the European Banking Authority) who, referring to Veneto Banca and Banca Popolare di Vicenza, said that ‘The decision that there was no EU public interest at stake in the crises of two ECB-supervised banks that were hoping to merge and operate in the same region with combined activities of around EUR 60 billion sets the bar for resolution very high’.

<sup>48</sup>See Guynn, *Are Bailouts Inevitable?*, Yale J. on Reg., 2012, 29, 121, 137-140, arguing that bankruptcy intervention produces erosion of the financial institution’s value exacerbating the losses for creditors; see Ringe, *Bail-in between Liquidity and Solvency*, University of Oxford Legal Research Paper Series, Paper No. 33/2016, 5, who argues that there is consensus about the fact that traditional bankruptcy procedures are not appropriate to deal with failing global banks as they are usually long and complicated and therefore can undermine market confidence and destabilize the financial system; see Huertas, *The case for bail-ins*, in Dombret – Kenadjian (Eds.), *The Bank Recovery and Resolution Directive*, (Institute for Law and Finance Series), 167-168.

impact the real economy as well.<sup>49</sup> Such a risk mainly arises from the interruption of the FOLF institution's critical functions, which could potentially destabilise its counterparties and, more broadly, the banking and financial system and, possibly endanger its geographical area of operation, too. Therefore, it is crucial that insolvency proceedings applying to FOLF banks provide the authorities with effective tools to handle them in such a way that every negative impact on both the banking and financial system and the real economy can be avoided or, at least, mitigated. To reach this goal it is often necessary to find the way to enable the continuation of the FOLF bank's most critical functions, such as depositors' access to their deposits, payment services and borrowers' financing.

The legal instruments that can be applied in order for the FOLF bank's most critical functions to continue are – in substantial terms – similar to some of the resolution tools which are now regulated at European Union level by the BRRD, namely a sale of business-like tool, a bridge institution-like tool and an asset separation-like tool. Accordingly, insolvency proceedings applying to FOLF banks should provide the authorities involved with the power to make use of all these tools that in practice will be chosen depending on the features of each case.

Bank insolvency proceedings under US and Italian laws are in this regard particularly interesting since they both allow the authorities to use an array of resolution-like powers, whose application can enable the continuation of critical functions, typically through the involvement of another more sound and solid institution purchasing the assets and liabilities of the FOLF one. And the rationale for such an approach is similar – in some respect – to the one that lies behind resolution pursuant to the BRRD, namely ensuring that the FOLF bank's critical functions can continue, in this way avoiding any detrimental impact on its counterparties and,

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<sup>49</sup>Accordingly see European Forum of Deposit Insurers, EFDI State of Play and Non-Binding Guidance Paper, Guarantee Schemes' Alternative Measures to Pay-out for Effective Banking Crisis Solution, 7 November 2019, 27, arguing that 'it cannot be excluded that liquidation through pay-out of non-systemic banks (particularly if multiple) may be a threat to public confidence and financial stability in a specific situation of a single Member State and a particular credit institution'.

more broadly, on the banking and financial system as well as on the real economy.

One of the distinguishing features of the US framework is that during the crisis management process (also referred to as resolution), the Federal Deposit Insurance Corporation (FDIC) acts both as deposit insurer and as receiver (and sometimes as supervisor as well). Despite some concern about conflicts potentially arising from such a dual function, this setting has over time remained unchallenged and it is often regarded as one of the main reasons for the effectiveness of the US system.<sup>50</sup> Over its almost 90-year existence, the FDIC has developed a number of methods to successfully deal with troubled banks. In fact, it uses a broad range of transaction structures to transfer the assets and liabilities of such banks to other private players with a view to enabling the continuation of critical functions.<sup>51</sup>

The FDIC mostly relies on two resolution methods, *i.e.* liquidation (sometimes also referred to as payoff) and purchase and assumption (shortly P&A). These methods can be used singularly or together based on the estimated result arising from the application of the least cost principle. In addition, the FDIC can also establish a so-called bridge bank with a view to facilitating resolution while simultaneously preparing a P&A transaction or as an intermediate step preceding liquidation.

In the resolution process, typically, the troubled bank's assets and liabilities are transferred to a dedicated legal entity, called receivership, which is to be established for each failed bank. The FDIC is given the power to decide on how to handle the crisis, even though the FDIC Improvement Act (FDICIA) of 1991 has significantly constrained this discretion by requiring the US Authority to use the

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<sup>50</sup>See Gelpern – Veron, An Effective Regime for Non-viable Banks: US Experience and Considerations for EU Reform. Study Requested by the ECON committee of the European Parliament, Economic Governance Support Unit (EGOV) - Directorate-General for Internal Policies of the Union, July 2019, 20.

<sup>51</sup>Interestingly, during the period 2008 to 2013, the FDIC managed to close down almost 500 banks, including some very large institutions, without destabilising the market, see Federal Deposit Insurance Corporation, Crisis and Response: An FDIC History, 2008-2013. Federal Deposit Insurance Corporation, Washington DC, *passim*, available at <https://www.fdic.gov/bank/historical/crisis/>.



resolution method, which is least costly for the Deposit Insurance Fund (DIF).<sup>52</sup>

Liquidation takes place when the FDIC pays creditors using the proceeds arising from the sale of the assets. This resolution method can be implemented in different ways. Through the so-called ‘straight deposit payoff’, the FDIC just pays insured depositors.<sup>53</sup> Alternatively, the FDIC can also transfer insured deposits to a healthy bank to effect payoff (so-called ‘insured deposit transfer’), with the healthy bank in this way acting as the FDIC’s agent.

P&A is the most common resolution method adopted in the US and refers to a number of diverse transactions between the FDIC and acquiring institutions, which are usually other banks.<sup>54</sup> The purpose is to find a healthy institution willing to take over some or all of the assets and liabilities of the failed bank, with or without financial support provided by the FDIC itself, thereby ensuring the continuation of the failed bank’s most critical functions.<sup>55</sup>

6.2. In Italy, compulsory administrative liquidation is the administrative procedure to be initiated when a bank is FOLF and, at the same time, does not meet the public interest test for its submission to resolution.<sup>56</sup> With the submission of the

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<sup>52</sup>See Deslandes – Dias – Magnus, Liquidation of Banks: Towards an ‘FDIC’ for the Banking Union? In-depth analysis, European Parliament, Economic Governance Support Unit, Directorate-General for Internal Policies, February 2019, 6.

<sup>53</sup>See Gelpern – Veron, An Effective Regime for Non-viable Banks: US Experience and Considerations for EU Reform. Study Requested by the ECON committee of the European Parliament, Economic Governance Support Unit (EGOV) - Directorate-General for Internal Policies of the Union, July 2019, 10.

<sup>54</sup>See Deslandes – Dias – Magnus, Liquidation of Banks: Towards an ‘FDIC’ for the Banking Union? In-depth analysis, European Parliament, Economic Governance Support Unit, Directorate-General for Internal Policies, February 2019, 6.

<sup>55</sup>Gelpern – Veron, An Effective Regime for Non-viable Banks: US Experience and Considerations for EU Reform. Study Requested by the ECON committee of the European Parliament, Economic Governance Support Unit (EGOV) - Directorate-General for Internal Policies of the Union, July 2019, 22.

<sup>56</sup>The Minister of Finance, upon Bank of Italy proposal, submits a bank to compulsory administrative liquidation when: 1) the bank is FOLF, 2) there is no reasonable prospect that any alternative private sector measures, including measures by an Institutional Protection Scheme (IPS), or supervisory action, including early intervention measures taken in respect of the institution, would prevent the failure of the institution within a reasonable timeframe, and, 3) there is no public interest in resolving the bank.



bank to compulsory administrative liquidation, the Bank of Italy appoints the liquidator(s) as well as the members of the oversight committee, and keeps the power to instruct them.

The main legal effects arising from the submission of a bank to compulsory administrative liquidation are: 1) the withdrawal of the banking license, 2) the interruption of all liabilities' payment as well as of the return of assets to the bank's counterparties, 3) the termination of contractual relationships such as loans, overdrafts and current accounts, among others, with the effect that loans and credit lines are immediately called back; 4) the stay of individual enforcement actions, which, as a result, cannot be brought against the bank since assets' liquidation and creditors' payment must take place according to the special rules set out by the Consolidated Banking Act and the Insolvency Act.

The final objective of such a procedure is the liquidation of the assets and the repayment of creditors. Thus the creditors' interest to be repaid is to drive the action of both the authorities and the liquidators. Nevertheless, a number of other extremely relevant interests are taken into due consideration in running the liquidation procedure. Chief among them are the stability of the system, the confidence of depositors and investors and the safeguard of the going concern value of the FOLF bank.

Moving from the awareness that the interruption of critical functions, that usually results from an atomistic liquidation, can have destabilising effects on the bank's counterparties, and potentially beyond, the Italian authorities have seldom considered the latter as an effective and efficient crisis management procedure. Accordingly, the management of banking crises in Italy has most of the time taken forms resembling – to a certain extent – the ones of the current resolution procedure. This has been mainly achieved through the transfer of both assets and liabilities to another credit institution at market prices (which are expected to be higher than liquidation prices), thereby allowing for the continuation of (at least some of) the activities of the FOLF bank through the purchasing one and

safeguarding in this way the going concern value of the FOLF entity.

As a result, from a legal perspective, the compulsory administrative liquidation under Italian law has rarely been applied as a procedure (only) aimed at dissolving the bank in crisis after the sale of the assets and the repayment of the creditors. Rather, it has been primarily applied as a means to allow for the continuation of the failing bank's activity through a different bank, thereby merging together the dissolving function of the liquidation procedure with the business continuity character of the transfer of assets and liabilities. In this way, the achieved outcomes have been the following: 1) deposits have been moved to the purchasing bank and depositors, therefore, have been fully protected, thereby avoiding runs on other banks and possibly systemic risk, 2) borrowers (mainly enterprises and households) have been allowed to keep on accessing finance provided by the purchasing bank, avoiding to negatively affect the real economy, 3) assets and liabilities (or at least most of them) have been transferred to the purchasing bank, thereby allowing for the continuation of the business activity and maintaining the going concern value.

7. Nonetheless, in order for these bank insolvency proceedings to properly work and, thereby for the winding-up to be orderly, an active and leading role is to be played by deposit insurers, in the European Union referred to as deposit guarantee schemes (DGSs), as both the US and the Italian experiences show.

DGSs play a pivotal role in banking crises. Their existential function is the pay-box function, that is the covered depositors' reimbursement in the event of their bank failing and being liquidated. Such a function is certainly fundamental and needs to be included in the bank crisis management legal framework. Nonetheless, in many cases, the so-called optional functions that DGSs can be empowered to perform as well might end up being even more effective from a system-wide perspective. Such optional functions are the provision of financial support either at the early stage of the bank's crisis or in the context of liquidation typically with a view to enabling the smooth and uninterrupted access of depositors' to their deposits.

In the US, acting as deposit insurer the FDIC manages the DIF, that is funded in advance with risk-based contributions provided by banks.<sup>57</sup> Additionally, the DIF has a borrowing authority of USD 100 billion from the US Treasury and there is also in place a note purchase agreement for USD 100 billion with the Federal Financing Bank, which is a specialised government corporation under the Treasury.<sup>58</sup> Clearly, the possibility to rely on the DIF's means gives the FDIC the ability to quickly and successfully access financing sources to support the transfer of assets and liabilities from the troubled bank to the purchasing one.<sup>59</sup> Still, in so doing the FDIC is now requested to use the resolution method, which is least costly for the DIF.<sup>60</sup>

Similarly, in Italy, the effectiveness of the compulsory administrative liquidation has been over time mostly due to the willingness of the domestic DGSs to play a leading role in helping handle troubled banks. In fact, many bank crises were solved thanks to the decision of the DGSs to finance the acquisition of (some parts of) the bank placed under liquidation, by taking on the negative mismatch between the assets and liabilities to be transferred to the purchasing institution.<sup>61</sup> Of course, the DGSs always performed a cost-benefit analysis of their interventions. And the benchmark to consider in such an analysis was the hypothetical cost that they would have had to pay to reimburse covered depositors had their deposits not been transferred to another bank. If such assessment showed that the cost of depositors pay-out would have been higher than the funds to give to the purchasing bank in order to acquire the failing one's assets and liabilities, then the intervention was to take place.

Currently, at the European Union level there are a number of rules concerning

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<sup>57</sup>Interestingly, the DIF was left empty after the global financial crisis and refilled with bank contributions afterwards.

<sup>58</sup>See Federal Deposit Insurance Corporation, Annual Report 2018, *passim*, available at <https://www.fdic.gov/about/strategic/report/2018annualreport/2018ar-final.pdf>

<sup>59</sup>See Carnell – Macey – Miller, *The Law of Financial Institutions*, 6th Edition, New York, 2017, 410.

<sup>60</sup>See Deslandes – Dias – Magnus, *Liquidation of Banks: Towards an 'FDIC' for the Banking Union?* In-depth analysis, European Parliament, Economic Governance Support Unit, Directorate-General for Internal Policies, February 2019, 6.

<sup>61</sup>Over time in Italy DGSs have also intervened very often at the early stage of the crisis by supporting the bank's recapitalisation or its acquisition by another institution.

State aid provision and the extension of the depositor preference to DGSs subrogating to depositors' rights in the liquidation procedure that might significantly hinder the ability of the latter to keep on financing the transfer of assets and liabilities in the context of liquidation. From this perspective, therefore, a recast (at least temporarily in view of the current crisis) of the European Commission Banking Communication 2013 on DGSs alternative interventions and of article 108 BRRD concerning the extension of the depositor preference to DGSs would be needed to enable them to keep on playing a relevant function in banking crises.

8. Public intervention, in the jargon of the industry often referred to as bail-out, was the preferred rescue strategy for troubled banks and financial entities during the global financial crisis of 2007-2009, particularly after the bankruptcy of Lehman Brothers in September 2008. This was mostly due to the fact that back then authorities lacked effective legal tools to successfully handle troubled institutions.

Interestingly, it has already been argued that the promise, made after the global financial crisis, to never rescue again banks with public money may not be honoured in the current Covid-19 crisis.<sup>62</sup>

However, within the European Union, for this to happen on a large scale, a legislative reform of the BRRD might be needed, as the regime currently in place, which results from the will to end the 'too-big-to-fail' phenomenon, is grounded on the assumption that tax-payers money should in principle no longer be used to rescue troubled banks.<sup>63</sup> There are of course some rules enabling the injection of public money, yet on the premise that shareholders and creditors bear a minimum amount of losses. The most relevant exceptions to this new paradigm are the so-called precautionary recapitalisation (outside resolution) and perhaps, the bridge bank tool (inside resolution), as discussed below in paragraphs 8.1 and 8.2.

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<sup>62</sup>See Ringe, COVID-19 and European banks: no time for lawyers, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 48,

<sup>63</sup>See G20 Leaders' Statement, Pittsburgh, 24-25 September 2009, no. 13; see also FSB Key Attributes of Effective Resolution Regimes for Financial Institutions, 15 October 2014, Preamble.

From a systematic perspective, a temporary relaxation of the rigid BRRD rules on public intervention would be, after all, consistent with the package already adopted by the European Commission. Indeed, the latter, on the one side, has enabled Member States to deviate from the State aid general prohibition and accordingly has permitted them to rescue failing firms,<sup>64</sup> and on the other side, has activated, for the first time ever, the so-called ‘general escape clause’, which allows the Council to derogate from some of the Stability and Growth Pact’s prescriptions in the event of ‘a severe economic downturn in the euro area or in the Union as a whole’.<sup>65</sup> In so doing, the European Commission, with the approval of the Council, managed to remove the main legal constraints refraining Member States from supporting their economies through public money thereby increasing their fiscal deficits.<sup>66</sup>

The argument in favour of relaxing the rigid rules of the BRRD and accordingly enabling some sort of public intervention finds further support in the fact that the bail-in-centred approach looks inappropriate to tackle the current crisis which has not been caused by the banking and financial sector.<sup>67</sup> It follows that it could be

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<sup>64</sup>Initially, the European Commission Temporary Framework did not apply to the recapitalisation of enterprises with public funds. After conducting discussions with the Member States in April, however, on 8 May the European Commission decided to extend its ambit in that direction. Accordingly, Member States are now entitled to notify recapitalisation schemes or individual aid measures; see European Commission, Communication from the Commission, Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 2020/C 164/03, paragraphs 44-85, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?Uri=CELEX:52020XC0513\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?Uri=CELEX:52020XC0513(01)&from=EN).

<sup>65</sup>See Delivorias, The ‘General Escape Clause’ Within the Stability and Growth Pact: Fiscal Flexibility for Severe Economic Shocks, European Parliament Briefing PE 649.351, March 2020, available at [www.europarl.europa.eu/RegData/etudes/BRIE/2020/649351/EPRS\\_BRI\(2020\)649351\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649351/EPRS_BRI(2020)649351_EN.pdf).

<sup>66</sup>See Hadjiemmanuil, European economic governance and the pandemic: Fiscal crisis management under a flawed policy process, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 189; a list of the State aid measures already notified and approved since the eruption of the Covid-19 crisis is available on the European Commission website; see European Commission, Coronavirus Outbreak - List of Member State Measures Approved under Article 107(2)b TFEU, under Article 107(3)b TFEU and under the Temporary State Aid Framework, 13 May 2020, available at [ec.europa.eu/competition/state\\_aid/what\\_is\\_new/State\\_aid\\_decisions\\_TF\\_and\\_107\\_2\\_b\\_and\\_107\\_3\\_b.pdf](http://ec.europa.eu/competition/state_aid/what_is_new/State_aid_decisions_TF_and_107_2_b_and_107_3_b.pdf).

<sup>67</sup>Accordingly see Lehmann, Mothballing the economy and the effects on banks, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 164, who argues

gauged utterly unfair to make shareholders and, even more so, creditors suffer losses, which they do not have any responsibility for. As a consequence, the application of the bail-in tool to handle FOLF banks in the current Covid-19 pandemic scenario might be inadequate. This argument is further reinvigorated by the consideration that the amount of bail-inable instruments may still be sub-optimal for many institutions.<sup>68</sup> The application of this tool, therefore, could turn out to trigger widespread failures. This would happen if, for example, enterprises' bank deposits with a balance exceeding EUR 100,000 were to be bailed-in. Clearly, a similar resolution strategy would have severe pro-cyclical effects potentially able to endanger both economic and financial stability.

On this basis, it has been proposed to introduce in the legal framework a distinction between banking crises that result from risk-taking decisions made by the banks themselves, and those that have been provoked by external circumstances, such as the Covid-19 pandemic, and by the measures recommended by regulators to mitigate their effects.<sup>69</sup> Accordingly, whilst the current rules should fully apply in the first cases, by contrast, in the second ones public interventions should be allowed.

At any rate, if public interventions were to occur, then a different issue would arise. Notoriously, the fiscal capacity of Member States is different, with some having room for manoeuvre and others already overburdened with extremely high levels of public debt and therefore with little possibilities to rescue troubled banks.<sup>70</sup> This situation, which obviously does not characterise only the European Union, might be particularly disruptive within the (still incomplete) Banking Union, thereby

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that this is also motivated by the fact that 'the state now places additional strain on the bank's balance sheets. In order to achieve macroeconomic goals, regulators are actively interfering with commercial decision-making and risk-provisions by encouraging banks to spend more capital'.

<sup>68</sup>See Gortsos, The application of the EU banking resolution framework amidst the pandemic crisis, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 369, who consequently emphasises the risk that non-excluded deposits, *i.e.* deposits over EUR 100,000 per depositor per credit institution, could end up being written down or converted into capital.

<sup>69</sup>See Lehmann, Mothballing the economy and the effects on banks, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 165-166.

<sup>70</sup>This issue is emphasised also by Hadjiemmanuil, European economic governance and the pandemic: Fiscal crisis management under a flawed policy process, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 181.

threatening the same level playing field between banks established in different countries. This should stimulate scholars, commentators and, above all, policy-makers to think about the establishment of a rescue tool centralised, at least, at Euro-Area level and acting to the benefit of (potentially) every bank in need within the Banking Union.<sup>71</sup>

8.1 The BRRD enables the use of public money outside a resolution procedure and without the corresponding duty to bail-in a huge amount of liabilities through the so-called precautionary recapitalisation under article 32 paragraph 4.<sup>72</sup> According to this provision, in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability, the extraordinary public financial support can take the form of a precautionary recapitalisation, which is ‘an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the institution’ where the latter is not FOLF. Accordingly, these measures: a) shall be confined to solvent institutions, b) shall be conditional on final approval under the Union State aid framework, c) shall be of a precautionary and temporary nature, d) shall be proportionate to remedy the consequences of the serious disturbance, and, e) shall not be used to offset losses that the institution has incurred or is likely to incur in the near future. Also, the recapitalisation shall be limited to injections necessary to address capital shortfall established in the national, Union or SSM-wide stress tests, asset quality reviews or equivalent exercises conducted by the European Central Bank, EBA or national authorities, where applicable, confirmed by the competent authority.<sup>73</sup>

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<sup>71</sup>Such a tool centralised at European Union level and available to every bank established in the Member States would be potentially even more effective to protect the single market.

<sup>72</sup>See Micossi – Bruzzone – Cassella, *Fine-Tuning the Use of Bail-in to Promote a Stronger EU Financial System*, CESP Special Report No. 136, April 2016, 7, available at [www.ceps.eu](http://www.ceps.eu), who clearly define this legal tool as the only way under the new legal framework to provide public assistance to banks without the need to write down liabilities or convert them into equity.

<sup>73</sup>In this regard, however, on 12 March the European Banking Authority decided to postpone the 2020 EU-wide stress test exercise to 2021; see European Banking Authority, *EBA statement on actions to mitigate the impact of COVID-19 on the EU banking sector*, 12 March 2020, available at



Paraphrasing the words of article 32 paragraph 4 of the BRRD, the ECB has provided a definition of precautionary recapitalization, under which ‘a precautionary recapitalisation describes the injection of own funds into a solvent bank by the state when this is necessary to remedy a serious disturbance in the economy of a Member State and preserve financial stability. It is an exceptional measure that is conditional on final approval under the European Union State aid framework. It does not trigger the resolution of the bank’.<sup>74</sup>

This means that a precautionary recapitalisation can take place when a bank, although in need to be recapitalised, is not deemed to be FOLF. In this regard, the underlying assumption justifying the public intervention is that the capital shortfall of such a bank could quickly deteriorate as a consequence of ‘a serious disturbance in the economy’ of a Member State and then potentially create financial instability.<sup>75</sup>

It should also be noted that the English version of the Directive just refers to the case in which this tool is employed ‘in order to remedy a serious disturbance in the economy of a member state’, whilst the Italian, the French and the Spanish versions also mention the case in which it is used in order to avoid a serious disturbance in the economy of a member state.<sup>76</sup> Obviously such a wording difference is significant in practice, since in the first case the capital shortfall is due to

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[eba.europa.eu/sites/default/documents/files/document\\_library/General%20Pages/Coronavirus/EBA%20Statement%20on%20Coronavirus.pdf](http://eba.europa.eu/sites/default/documents/files/document_library/General%20Pages/Coronavirus/EBA%20Statement%20on%20Coronavirus.pdf).

<sup>74</sup>See European Central Bank, What is a precautionary recapitalization and how does it work?, 27 December 2016, available at [www.bankingsupervision.europa.eu](http://www.bankingsupervision.europa.eu); similarly, also Banca d’Italia, dealing with the Monte dei Paschi case, has defined precautionary recapitalisation as ‘a measure provided under European legislation (the Bank Recovery and Resolution Directive - BRRD) in exceptional circumstances, to remedy a serious disturbance to the economy of a Member State and preserve financial stability. In these cases, in order to strengthen the capital of a bank, extraordinary State aid of a precautionary and temporary nature is permitted as long as the bank is solvent and the intervention is compliant with the rules on State aid. These rules mean that a State can only intervene after the subordinated bonds have been converted into equity (the burden sharing principle)’; see Banca d’Italia, The ‘precautionary recapitalisation’ of Monte dei Paschi di Siena, available at [www.bancaditalia.it](http://www.bancaditalia.it).

<sup>75</sup>See Bodellini, Greek and Italian ‘lessons’ on bank restructuring: is precautionary recapitalization the way forward?, Cambridge Yearbook of European Legal Studies, 2017, 19, 155.

<sup>76</sup>The Italian version reads ‘*al fine di evitare o rimediare a una grave perturbazione dell’economia di uno Stato membro*’; the French version reads ‘*afin d’empêcher ou de remédier à une perturbation grave de l’économie d’un État membre*’; the Spanish version reads ‘*a fin de evitar o solventar perturbaciones graves de la economía de un Estado miembro*’.



a serious disturbance in the economy of a member state that has made the recapitalisation necessary in order to preserve financial stability, whilst in the second one, the tool is used with the aim to avoid that the bank's capital shortfall can create such a serious disturbance of the economy of a Member State which in turn could generate financial instability. The possibility to use the precautionary recapitalisation tool also in order to avoid a serious disturbance of the economy should allow for public intervention even outside a general crisis scenario, when it is deemed that the potential distress of a given bank can seriously impact the economy.<sup>77</sup>

However, the very point is that this instrument can be employed outside the scope of a resolution procedure. This is mainly the case of banks that are not deemed by the competent authorities to be FOLF but still in need to be recapitalised. The BRRD rules allow such banks to be recapitalised with public money but some conditions have to be met. First, such banks have to be assessed as solvent by their competent authorities. Then, their need for a capital increase has to be pointed out by the result of stress tests. And obviously, being the recapitalisation carried out by the States with public money, the rules of the State aid framework apply.

The new package adopted by the European Commission also deals with precautionary recapitalisation. According to the 'Commission Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak',<sup>78</sup> as amended on 8 May 2020, if due to the Covid-19 outbreak, banks would need extraordinary public financial support in the form of liquidity, recapitalisation or

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<sup>77</sup>See Bodellini, Greek and Italian 'lessons' on bank restructuring: is precautionary recapitalization the way forward?, *Cambridge Yearbook of European Legal Studies*, 2017, 19, 155.

<sup>78</sup>See European Commission, Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 19 March 2020, C(2020) 1863 final, paragraph 7, available at [https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/sa\\_covid19\\_temporary-framework.pdf](https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf); the first text read 'if due to the COVID-19 outbreak, banks would need direct support in the form of liquidity recapitalisation or impaired asset measure, it will have to be assessed whether the measure meets the conditions of Article 32(4)(d) (i), (ii) or (iii) of the BRRD. Where the latter conditions were to be fulfilled, the bank receiving such direct support would not be deemed to be failing-or-likely-to-fail. To the extent such measures address problems linked to the COVID-19 outbreak, they would be deemed to fall under point 45 of the 2013 Banking Communication, which sets out an exception to the requirement of burden-sharing by shareholders and subordinated creditors'.

impaired asset measure, it will have to be assessed whether the measure meets the conditions of Article 32(4)(d)(i), (ii) or (iii) of the BRRD and Article 18(4)(d)(i), (ii) or (iii) of the SRMR. Where the latter conditions are fulfilled, the bank receiving such extraordinary public financial support would not be deemed to be FOLF. To the extent that such measures address problems linked to the Covid-19 outbreak, they would be deemed to fall under point 45 of the 2013 Banking Communication, which sets out an exception to the requirement of burden-sharing by shareholders and subordinated creditors.<sup>79</sup>

The Temporary Framework, therefore, potentially paves the way for widespread precautionary recapitalisations to be conducted through the injection of public money in light of the fact that, in this way, it would be possible for the authorities to exempt both shareholders and subordinated creditors from the application of the burden-sharing requirement, when the need for such a measure results from the situation provoked by the Covid-19 pandemic. Yet, in practice the real limitation to the use of this tool is that in order to be eligible for a precautionary recapitalisation the bank in question still needs to be solvent. This might soon end up significantly restricting its scope of application.

It is still uncertain whether precautionary recapitalisation could be a useful tool in the current situation, even though it has already been indicated as ‘a strong candidate for the granting of public financial support’ in the midst of the Covid-19 crisis.<sup>80</sup> On the opposite side of the spectrum, it has been, by contrast, pointed out that precautionary recapitalisation should not be used to the benefit of banks that do

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<sup>79</sup>See European Commission, Communication from the Commission, Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 2020/C 164/03, paragraph 17, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0513\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0513(01)&from=EN).

<sup>80</sup>See Gortsos, The application of the EU banking resolution framework amidst the pandemic crisis, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 377.

not have ‘a sound business model simply to address legacy issues’.<sup>81</sup>

What is sure is that both individual financial institutions and governments have been asking for a significant relaxation of the strict conditions to take benefit of State aid provision as well as of the BRRD rules.<sup>82</sup> Accordingly, the European Commission has already made some steps into that direction through the Temporary Framework, which, as already emphasised, in relation to the provision of liquidity, recapitalisations and impaired asset measures, aimed at addressing issues provoked by the Covid-19 pandemic, allows for the application of the exception under point 45 of the Banking Communication 2013. As a result, after the public intervention, the burden sharing mechanism, affecting both shareholders and subordinated creditors, does not necessarily have to apply.<sup>83</sup>

At any rate, the main point to understand if precautionary recapitalisation could actually be a viable option to address the capital shortfalls that banks will soon experience relates to whether the Authorities involved in the decisions will be willing to interpret the conditions requested for resorting to this tool (particularly the FOLF condition) in a flexible way with a view to accommodating the special needs resulting from the Covid-19 pandemic.<sup>84</sup> This would mean for competent authorities and resolution authorities to engage in what is defined as supervisory forbearance,

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<sup>81</sup>See König, Foreword, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, vi, who also states that she ‘would be extremely concerned at any attempt to turn it into a bail-out in disguise’.

<sup>82</sup>See Ringe, *COVID-19 and European banks: no time for lawyers*, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 48.

<sup>83</sup>See European Commission, *Communication from the Commission, Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*, 2020/C 164/03, paragraph 17, available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0513\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0513(01)&from=EN).

<sup>84</sup>See Gortsos, *The application of the EU banking resolution framework amidst the pandemic crisis*, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 384; differently, Morais, *The EU fiscal response to the COVID-19 crisis and the Banking sector: risks and opportunities*, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, 304, argues that the use of the precautionary recapitalization tool requires a ‘new focus and, possibly, an overall review of the 2013 Banking Communication (in spite of some minor element of increased flexibility that result from the articulation between this Communication and the new Commission Communication on the Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak)’.

thereby pretending that a FOLF institution is actually not FOLF and, as such, is eligible for a precautionary recapitalisation. To make it work, the same approach should also be taken with regard to the requirement concerning incurred and likely future losses. Obviously, such a line of action would have a number of side effects, starting with a potentially excessive degree of discretion fully disconnected from law provisions given to the authorities as well as the implicit permission to use public money to the benefit of banks that possibly were already in distress before the pandemic outbreak. This in turn could lead to the adoption of inefficient and inconsistent decisions across the borders. For these reasons such a strategy has already been strongly discouraged.<sup>85</sup> Clearly, if this approach will be adopted on a large scale then we will likely witness a relevant number of recapitalisations performed with public money mostly in the Member States enjoying more fiscal capacity. By contrast, if this will not be the case, then, other solutions will have to be explored. One of these could be to actually lower, on a temporary basis, through specific rules the conditions requested for the application of precautionary recapitalisation. In other terms, article 32 paragraph 4 of the BRRD could be rewritten in order to narrow down the applicable FOLF condition by restricting its scope only to situations where the bank's assets are already less than its liabilities. Although the risk to end up helping banks that were already in distress before the pandemic outbreak would not be removed, the advantage in this way could be to more clearly drive the authorities in their decisions, thereby limiting the excessive amount of discretion that supervisory forbearance, fully disconnected from law provisions, would bring about.

8.2. Despite early intervention and government support measures,<sup>86</sup> potentially including precautionary recapitalization of a solvent bank, the impact of Covid-19 could lead to materializing credit risk (due to non-performing loans) on a

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<sup>85</sup>See König, Foreword, in Gortsos – Ringe (Eds.), *Pandemic Crisis and Financial Stability*, European Banking Institute, 2020, vi-vii,

<sup>86</sup>For an overview of measures adopted in ECA countries, see Dijkman – Salomão Garcia, *Borrower Relief Measures in ECA region*, World Bank /FinSAC, Policy Note, April 2020 *passim*.

bank's balance sheet that brings it to the point of FOLF or to the point of non-viability (PONV) requiring application of the resolution toolkit established in the wake of the global financial crisis.

In the current stressed environment, financial market sentiment will likely be unfavorable for recapitalization through the markets. Also, the appetite for takeovers under sale of business transfers will be reduced in times of system-wide deteriorating asset quality and falling revenues. Hence, in many cases authorities might be left with the choice between open bank bail-in or the creation of bridge banks both possibly combined with an asset management vehicle (AMV).

Bail-in was established as a firewall against bail-outs. Banks in many jurisdictions world-wide started building up 'high quality' loss absorbing capacity (MREL/TLAC) in the form of own funds and liabilities that can credibly and feasibly be written down or converted into equity in case of need. However, despite higher capital and liquidity levels, banks do not in all cases have a higher leverage ratio than before the global financial crisis. From a resolution perspective the leverage ratio is the key factor for bail-in as losses need to be absorbed regardless of any risk weighting. Application of the bail-in power comes with the risk of negative effects on credit supply and to the real economy<sup>87</sup> and increased contagion risk in a systemic crisis. Also, depending on the scale of loss and the MREL/TLAC built up so far, bail-in could hit uninsured corporates and SMEs, *i.e.* the sources of the non-performing loans caused by the Covid-19 lock-down. Moreover, in the European Union a relatively low protection coverage and the super-preference of DGS constitute an impediment to bail-in as current rules stipulate for the bail-in of all uninsured depositors to trigger use of DGS,<sup>88</sup> (or indirect bail-in by leaving assets behind under a

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<sup>87</sup>See Beck – Da-Rocha-Lopes – Silva, Bank bail-in: The effects on credit supply and real economy, VOX – CEPR Policy Portal, 27 May 2017, *passim*, available at <https://voxeu.org/article/bank-bail-effects-credit-supply-and-real-economy>.

<sup>88</sup>Pursuant to article 109 of the BRRD, the No Creditor Worse Off than under Liquidation (NCWOL) concept is designed as mere legal safeguard for use of DGS funds while triggering is based on loss abortion under Valuation 2. Contrary to the US, where the FDIC ranks *pari passu* with uninsured

transfer tool).

In the spirit of avoiding socialization of losses as experienced in the wake of the global financial crisis, the BRRD stipulates for prior 8% bail-in before use of the resolution fund for (in)direct loss absorbance,<sup>89</sup> as well as for the use of public money as a last resort in case of a 'systemic crisis' under the government financial stabilization tools.<sup>90</sup> The effects of Covid-19 on banks might well be expected to qualify as a systemic crisis justifying the use of taxpayers support to recapitalize failing banks.<sup>91</sup> Losses of more than 8% of a failing bank's balance sheet is a relatively high threshold and was not met in most cases in past crises.<sup>92</sup> In the ideal case, the 8% requirement is fulfilled with capital and high quality MREL debt. However, this will crucially depend on the amount of capital (non-risk weighted) still available in the bank when FOLF/PONV is decided (under valuation 1) and the amount of additional debt banks have built up. MREL is still a work in progress and banks in some countries, in particular the ones with less developed capital markets – some of them strongly hit by Covid-19, are faced with many constraints in building up TLAC, including cross border issues.<sup>93</sup>

Application of the 8% rule is less clear for use of the bridge bank tool in both cases of public support and access to the resolution funds. Article 101 paragraph (f) of the BRRD explicitly refers to the 8% requirement in case of using the resolution

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depositors and regularly contributes to resolution financing under the traditional small banks' resolution powers under the least cost test.

<sup>89</sup>See Article 101 of the BRRD.

<sup>90</sup>See Articles 37 and 57 of the BRRD.

<sup>91</sup>See Article 57 of the BRRD. Article 2 of the BRRD defines a systemic crisis as a disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy. All types of financial intermediaries, markets, and infrastructure may be potentially systemically important to some degree. Note that systemic crisis due to contagion can also be decided in the case of an idiosyncratic bank failure.

<sup>92</sup>See The Department of the Treasury, Orderly Liquidation Authority and Bankruptcy Reform, Report to the President of the United States Pursuant to the Presidential Memorandum Issued April 21, 2017, February 21, 2018, available at [https://home.treasury.gov/sites/default/files/2018-02/OLA\\_REPORT.pdf](https://home.treasury.gov/sites/default/files/2018-02/OLA_REPORT.pdf)

<sup>93</sup>See Fontà – Beck – D'Hulster – Lintner – Unsal, Banking Supervision and Resolution in the EU, Effects on small host countries in Central, Eastern and South Eastern Europe, Working Paper - World Bank, FinSAC, April 2019, *passim*.

funds for bail-in excluded creditors, whereas paragraph (d), regulating its use for the bridge bank tool, does not. The conditions for the application of the 8% rule under paragraph 2 apply to ‘entities under resolution’. They are less clear for example with regard to a recapitalization or the provision of a guarantee by the resolution fund to a bridge bank as indirect loss absorption. With regard to public support, the BRRD clarifies that government financial support tools (GFST) may be used only after resolution tools have been exploited to the maximum extent possible.<sup>94</sup> Hence, if financing of the bridge bank with public money happens outside the GFST tool, the application of the 8% requirement is not as explicit in the law as it is for the use of the GFST.

In euro area countries, the use of GFST is less clear as the directly applicable Single Resolution Mechanism Regulation (SRMR) does not make reference to them. The public backstop stipulated for in the Banking Union is via the European Stability Mechanism (ESM) to the Single Resolution Fund (SRF).<sup>95</sup> Thus, the law remains open as regards if and under what conditions a national government could provide public support, under a bridge bank or via the GFST, to its biggest domestic players under resolution action governed by the SRB. This is particularly worrisome in light of the limited firepower of the SRF and might increase the likelihood of a rescue measure prior to resolution under precautionary recapitalization.

In a severe system-wide crisis, where authorities have to operate in an environment of limited private loss absorbance capacity and acknowledging that TLAC/MREL is not fully built up yet, a combination of bail-in and bail-out open to a less rigid prior 8% rule (*i.e.* only where specifically required in law rather than following the spirit of the BRRD) could pave the way for pragmatic solutions.

9. In order to justify the taking of resolution measures under the BRRD, authorities need to demonstrate a public interest. This is the case if resolution

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<sup>94</sup>See article 56 paragraph 3 of the BRRD.

<sup>95</sup>See <https://www.esm.europa.eu/content/what-common-backstop-0>.



objectives – including ensuring the continuity of services and avoiding adverse effects on financial stability – would not be met to the same extent under liquidation.<sup>96</sup> There is no differentiation or weighting of the resolution objectives, nor with regard to the applicable tools. In the few BRRD-based resolution cases seen so far, the discretionary assessment of whether a bank is to be put into resolution or into national insolvency has led to interesting and rather diverse outcomes. As outlined in chapter 6 above, the SRB's approach stresses that the extra safety net of resolution is only for the few, not the many. Resolution powers have however been applied to very small banks at the national level, *e.g.* in Denmark and Italy in 2015 and 2016.<sup>97</sup> Some countries publish quantitative criteria laying out the conditions under which a bank is considered not to be resolvable via liquidation and where the taking of resolution action is anticipated. Action is taken regardless of the extent of prior resolution planning, a bank for which no plan was developed might be put into resolution or, vice versa, authorities might not take resolution action if this is no longer considered to be in the public interest at FOLF/PONV. In light of Covid-19, banks that would normally not be considered to provide critical economic functions (CEFs) or that are considered substitutable might well require the taking of resolution powers in a stressed economic environment with heightened risks of contagion and bank run. Also, regional aspects might play a role where economies are more affected by Covid-19.

If resolution action is justified in the public interest, the key legal safeguard to protect shareholder and creditor rights under the BRRD is the so called NCWOL principle, ensuring that no shareholder or creditor (including the DGS *in lieu* of insured depositors) loses more than under the hypothetical liquidation counterfactual. Gone concern losses will regularly be higher than resolution losses where the franchise value is kept. A breach of the NCWOL is rather unlikely unless

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<sup>96</sup>See Article 32 of the BRRD.

<sup>97</sup>See Lintner – Lincoln, Bank resolution and 'bail-in' in the EU: selected case studies *pre* and *post* BRRD, World Bank/FinSAC, 2016, *passim*.



bail-in is applied in violation of the *pari passu* principle to only part of the same rank (exclusions from bail-in) or if only some creditors of the same rank face losses by being left behind, which is more likely to happen in systemic events under increased contagion risk. Importantly the NCWOL safeguard does not apply to the second step of bail-in, *i.e.* for the conversion part, as creditors do receive value for that part in form of equity.

From a general legal and fundamental rights perspective, it is questionable if each and every exercise of resolution power actually requires a public interest justification. One could argue that in terms of protection of property rights, public interest is required as a legal safeguard only where powers are not covered by the NCWOL safeguard, *i.e.* for the bail-in conversion part.<sup>98</sup> This view is also upheld in comparison with the US regime, where traditional FDIC powers are exercised for all deposit taking banks regardless of their systemic nature whereas there is a quantitative limit and a systemic risk determination for application of bail-in powers under the US Orderly Liquidation Authority (OLA).<sup>99</sup>

Recent publications, as well as the SRB itself, have called for reform of the European Union resolution framework and the harmonization of resolution powers for ‘non systemic’ banks in the Union.<sup>100</sup> One way forward is to provide authorities with the tools and flexibility required to apply certain resolution powers also for

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<sup>98</sup>This argument seems to be supported in the *Ledra* case, paragraphs 74/75 (C-8/15 P to C-10/15 P) where the Court of Justice of the European Union justified the interference into property rights for the uninsured depositors converted into shareholders by public interest, whereas in *Kotnik* the Court of Justice of the European Union only makes reference to the no creditor worse off safeguard with regard to burden sharing loss under the Banking Communication (paragraph 78 C-526/14).

<sup>99</sup>This is obviously without questioning the justification of the FDIC powers in a wider understanding of public interest. OLA is invoked only as a backstop to bankruptcy where necessary under systemic risk determination as defined by the Treasury in consultation with the President upon recommendation by Federal Reserve (and FDIC) under super majority vote, concluding the companies bankruptcy would have serious adverse effects on US financial stability (12 US Code § 5383).

<sup>100</sup>See Gelpert – Veron, *An Effective Regime for Non-viable Banks: US Experience and Considerations for EU Reform*. Study Requested by the ECON committee of the European Parliament, Economic Governance Support Unit (EGOV) - Directorate-General for Internal Policies of the Union, July 2019, *passim*; see also Deslandes – Dias – Magnus, *Liquidation of Banks: Towards an ‘FDIC’ for the Banking Union? In-depth analysis*, European Parliament, Economic Governance Support Unit, Directorate-General for Internal Policies, February 2019, *passim*.

small(er) banks, required in particular during systemic crises to manage the failure of several smaller banks while keeping their franchise value. This could be done via an extension in scope of part of the BRRD powers or under national insolvency law. Resolution actions that do not imply bail-in conversion powers could be applied without requiring complex public interest test justification. This would create a two-tier system along the following lines:

- application of the P&A and bridge powers to all banks (including to non-systemic ones), justifying the taking of resolution action by a 'reduced public interest test' limited to depositor protection and, as in all cases, protected under the NCWOL safeguard (possibly regulated under national insolvency rules);
- alongside other resolution tools, open bank bail-in would continue to apply only to the few 'public interest' or systemic banks which otherwise would be too big to fail under an extended and more specific public interest test justifying the bail-in conversion power.

Such extensions of the authorities toolkit would provide a level playing field for dealing with the (simultaneous) failure of smaller banks in a systemic event and reduce the current uncertainties and discretionary exercise of powers associated with the public interest test which leads to different conditions for the provision of public support under European Union state aid and BRRD rules.

10. The Covid-19 pandemic is expected to soon provoke a crisis within the banking and financial sector. While banks are much better prepared than before the global financial crisis to face another crisis in terms of capital and liquidity, leverage ratios are not in all cases higher. The application of bail-in conversion powers is still untested and the building up of MREL/TLAC is still work in progress in many countries, particularly where capital markets are less developed and banks are largely funded by deposits. Legislators and regulators should therefore start preparing an effective reaction aimed at mitigating the ensuing shock including the provision of public support. The bank crisis management regimes that jurisdictions

have in place will be particularly important in this regard. Against this background this paper has argued that the rules on bank insolvency proceedings should provide authorities with resolution-like tools enabling them to make the bank's critical functions continue. Going beyond resolution planning, authorities should ensure that broader burden sharing concepts are in place stipulating for a possible combination of bail-in with bail-outs. Given the potential size of the impending crisis, however, these measures alone may be insufficient. This paper has therefore also advanced the argument that rules on public intervention should be, at least temporarily, relaxed.

# REIMAGINING AND RE-DESIGNING THE POST-COVID-19 HIGHER EDUCATION ORGANIZATIONS TO ADDRESS NEW CHALLENGES AND RESPONSES FOR SAFE AND EFFECTIVE TEACHING ACTIVITIES

Mirella Pellegrini <sup>\*</sup> - Vladimir Uskov <sup>\*\*</sup> - Nunzio Casalino <sup>\*\*\*</sup>

**ABSTRACT:** *The COVID-19 emergency has created several issues for professors and students, forcing them to quickly learn the various methods for carrying out distance learning, a skill that is not obvious especially for professors with difficulties in using new multimedia technologies. Considering the current global health situation, it is needed for European and USA Universities to discuss, learn and exchange experiences on adapting teaching activities to new learning situations in order to recover and thrive in a post COVID-19 educational world. To tackle these challenges, only a few meetings between expert groups on virtual and student mobilities was held to explore the opportunities of blended learning for the coming academic year. As continuously required in the last months several people in the academic environment are asking a support to manage and reduce the adverse effects of COVID-19 on the University lessons, exams, thesis dissertations, live laboratories, etc. We would like to focus on some opportunities that this global shock is leaving us trying to find a light at the end of the tunnel, but also to the fact that there is already a wide debate going on*

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*precisely the lack of adequate perception of the risks determined by COVID-19 in terms of teaching and digital innovation.*

**SUMMARY:** 1. Introduction. - 2. Manage and reduce the adverse effects of COVID-19. - 3. U.S. Higher Education Institutions during the COVID-19 pandemic: a brief review. - 4. Main factors that are restraining the teaching innovation in Universities. - 5. Notes, guidelines, procedures, and other recommendations that will impact on the organization of educational activities. - 6. Inadequacy of European current systems with respect to new global trends in online teaching methods and their implications. - 7. Short-term “To-Do List” for Fall-2020 and operational implications of hybrid teaching. - 8. Conclusions.

1. Considering the current global health situation, it is necessary for European and USA Universities to discuss, learn and exchange experiences on adapting teaching activities to new learning situations in order to recover and thrive in a post COVID-19 world. Unfortunately to effectively face these challenges, in most Universities only few meetings between real expert groups on online or hybrid teaching methods were held to explore the opportunities of blended learning for the coming academic year.

The COVID-19 emergency has created and is generating several difficulties for teachers and students, forcing them to quickly learn the various methods for carrying out distance learning, a fundamental skill that is not obvious especially for professors with difficulties in using new multimedia technologies. More than 1.5 billion students and youth across the planet are affected by school and university closures due to the COVID-19 outbreak. The International Association of Universities<sup>1</sup> is monitoring the impacts of COVID-19 on higher education around the world also, and the future, although various European and USA exponents of education policy have expressed

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<sup>1</sup>IAU is an independent global NGO created in 1950 and officially associated with UNESCO. It developed a global survey on the impact of COVID-19 on Higher Education. It will be followed by a second global survey, co-developed with partners from around the world, in the fall. The aim is to identify the major challenges Universities and other higher education institutions face in the short-medium- and long term and to share and help develop solutions.

themselves optimistically, is far from certain.

According to UNESCO, in April 2020, schools, and higher education institutions (HEIs) were closed in 185 countries, affecting 1.542.412.000 learners, which constitute 89.4% of total enrolled learners. At the beginning of May, some countries, experiencing decreasing numbers of cases and deaths, started lifting confinement measures. However, on 7 May, schools, and higher education institutions (HEIs) were still closed in 177 countries, affecting 1.268.164.088 learners, which constitute 72.4% of total enrolled learners<sup>2</sup>.

The goal (and for now remains so) is to return to the classroom in September while maintaining a certain flexibility, sometimes attempting to integrate distance learning to avoid gathering in the classes.

It is clear that in the Universities we have to continue to use distance learning to reduce risk of infection and ensure adequate at the same time the best service training. The main problem in this phase is that of trivialization and simplification: to think that it is sufficient to record a video to do distance learning. What skills<sup>3</sup> are needed today to face tomorrow, which the pandemic has revealed to be more uncertain and uncontrollable than we imagined until a few weeks ago? The concepts of volatility, uncertainty, complexity, and ambiguity - until now the subject of study, have suddenly entered our reality. We are in the middle of an acceleration whose scale we struggle to understand. To live in this new situation, we must learn a new digital alphabet, activating it, and experimenting new social and virtual practices, leave behind old patterns and cultures. We must acquire the competence of disapproving, which entails a twofold challenge.

The first is to focus on some key skills required by the new context: resilience,

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<sup>2</sup>More details are available on the IAU–COVID-19 Global Impact Survey 2020 - [https://www.iau-aiu.net/IMG/pdf/iau\\_covid19\\_and\\_he\\_survey\\_report\\_final\\_may\\_2020.pdf](https://www.iau-aiu.net/IMG/pdf/iau_covid19_and_he_survey_report_final_may_2020.pdf). It received 576 replies from 424 universities and other Higher Education Institutions (HEIs) based in 109 countries and two Special Administrative Regions of China (Hong Kong and Macao).

<sup>3</sup>Capriglione F., Casalino N. (2014), "Improving Corporate Governance and Managerial Skills in Banking Organizations", *International Journal of Advanced Corporate Learning (iJAC)*, Austria, vol. 7, issue 4, pp. 17-27.

adaptability to the physical and digital ecosystems in which we are immersed, collaborative problem solving, critical thinking. The second is to acquire a new culture of training no longer based on the separation between study time, work time and lifetime, but on the logic of lifelong, daily learning, using the multiplicity of tools in a constant process. What should we unlearn? We are understanding that learning is not a linear and cumulative process, measured in years of study and hours of training, but it is a path based on breaks and jumps in paradigms in which knowing how to disappoint and create voids is necessary to acquire and make room to new skills, cultures, reference models.

The reorganization of the classrooms will not consider plexiglass, as some European Ministers claimed; rather, lesson times could be lengthened and more classrooms used, and yet the first period of “mixed teaching” will be seen to decide, in as short a time as possible, whether to continue frontally or go back online<sup>4</sup>.

In the long list of things to be disappointed or, better to say, to deconstruct, together with the old bureaucratic cultures and the old organizational models, it is important to insert everything that falls within the style of cognitive rigidity. A rigidity that is also a psychological trait of a generation that has made rigid leadership models and styles a mantra. Instead, we must open to the opposite scheme, that of cognitive flexibility, which allows a rapid adaptation of people and organizations to new contexts<sup>5</sup>, challenges, opportunities. We must learn to learn from the experiences more significant that mark our evolution along the path of life, from the successes and mistakes, the ability to make applications to our network of relationships and to the web and then be able to filter the results, the information and knowledge, give it value and put it back into circulation. It is urgent to create a

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<sup>4</sup> Costa G., Scuole e atenei chiusi: ripensare e integrare “teaching” e “learning”, IlBoLive, Università di Padova, 2020.

<sup>5</sup>Casalino N., Zuchowski I., Labrinos N., Muñoz Nieto A.L., Martín-Jiménez J.A. (2019), “Digital strategies and organizational performances of SMEs in the age of Coronavirus: balancing digital transformation with an effective business resilience”, Law and Economics Yearly Review Journal - LEYR, Queen Mary University, London, UK, vol. 8, part 2, pp. 347-380.

new culture so that with the value of flexibility<sup>6</sup> will affirm a new capability to manage your personal life in time and space, as well as focus on the information key by adopting synthesis techniques. The sudden and massive use of smart working<sup>7</sup> and e-learning has highlighted that the lack of a specific culture of digital citizenship in the various countries is a social emergency.

Despite the fact that e-learning has been used to remedy the emergency health situation that we have experienced and that we are still experiencing, we wonder if it could have been a change from which we can no longer go back.

According to some, the increasingly total diffusion of digital technologies that was already catching on and now with the pandemic is at the centre of the system, the standard and secular mode that required the presence of students in the University premises will no longer be central and therefore fundamental.

According to a 2018 survey of “The World University Rankings”, rectors of over 200 universities had predicted that the most renowned universities would offer online degrees by 2030.

Only a quarter of them thought, however, that the telematic version of a course of study would be more popular than the traditional path. Overall, the wide range of respondents - 45 countries on 6 continents - was generally sceptical that digital education could soon replace the face-to-face one. And, according to many scholars, meeting people, interacting with colleagues and students, in short, living in a real university environment is the key to knowledge.

One wonders now what developments COVID-19 will have and in what situation Europe and USA will be in the Fall of the academic year, if the danger should remain so, lessons and exams must be guaranteed in online mode to allow

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<sup>6</sup>Cavallari M., De Marco M., Rossignoli C., Casalino N. (2015), “Risk, Human Behavior, and Theories in Organizational Studies”, Proceedings of Wuhan International Conference on E-Business, WHICEB 2015, Wuhan, China, AIS, Association for Information Systems, AIS Electronic Library (AISeL), pp.283-297.

<sup>7</sup>Casalino N., Saso T., Borin B., Massella E., Lancioni F. (2019), Digital Competences for Civil Servants and Digital Ecosystems for More Effective Working Processes in Public Organizations, LNCS, Springer, Heidelberg, Germany.



everyone to continue the own studies.

The efficiency of this system is given by the flexibility and the enormous potential that allows you to conduct business at any time and place through a simple connection Internet, also the non-compulsory attendance decreases costs for many students who are reaching every day the Universities far from own family-homes<sup>8</sup>.

Although all this seems very easy and accessible, there remains a basic scepticism, that is to say whether this system does not detract from the true educational experience of the University, eliminating listening to lectures and professors in the classrooms, interacting with the other students, confrontation and active listening that cannot be equal in front of a screen.

Naturally we hope that everything will return to a normal situation globally and that even the university world will regain the features it has always had and that make the years of study an important phase in the life of students, allowing them to grow as people and to live effectively the workplace<sup>9</sup>.

2. As continuously required in the last months several people in the academic environment are asking a support to manage and reduce the adverse effects of COVID-19 on the University lessons, exams, thesis dissertations, live laboratories, etc.

We would like to focus on some opportunities that this global shock is leaving us trying to find a light at the end of the tunnel, but also to the fact that there is already a wide debate going on precisely the lack of adequate perception of the risks determined by COVID-19 in terms of teaching and digital innovation.

Well, we think it is right to qualify as an opportunity the digital revolution derived by direct effects of the lockdown; Europe and USA between unforeseeable

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<sup>8</sup>Casalino N. (2014), "Learning to Connect: a Training Model for Public Sector on Advanced E-Government Services and Inter-Organizational Cooperation", *International Journal of Advanced Corporate Learning (iJAC)*, Austria, vol. 7, no.1, pp. 24-31.

<sup>9</sup>Pellegrini M., Casalino N., Krause V. (2016), "Challenges for expatriates returning: measures and approaches for a successful reintegration of employees in financial organizations", *Law and Economics Yearly Review Journal*, Queen Mary University, London, UK, vol. 5, part 1, pp. 125-150, Humanistic Management Network, Research Paper Series No. 45/16

pains and difficulties has in some cases discovered an unexpected reaction ability that allowed students to continue their training in a new but no less effective way. In general, we are implementing, or in many cases even developing, some digital skills that will increase our possibilities when we all get together physically. It is certainly a cultural theme: in order to continue to work, to inform us and to train, each of us having to make a supplementary effort to learn to act according to different trajectories than usual<sup>10</sup>.

Firstly, we think it is essential to distinguish the school issue from the university issue. With regard to the previous, we would just like to point out that while it is true that the new generations are being born digitally, the health emergency and the resulting lockdown has shown European and USA shortcomings in moving teaching out of classrooms. Different needs and situations have emerged that have made it impractical to effectively maintain teaching through that “physical distance” that was necessary during the peak of the risk of contagion. This unprecedented challenge imposed by COVID-19, is leaving the offer of distance learning in preschool and school age to the capacity and sensitivity of local authorities and therefore to the commitment and responsibility of educational institutions has determined as a logical consequence to witness solutions and offers unequal on the national territory.

Our aim is to call attention to the training that today has the opportunity to be included in a larger and more articulated project<sup>11</sup>. Education is a strategic area for the development of the countries and on this – and here is the first positivity – a general sharing has finally been achieved at the political level as well.

The virus found the school unprepared. It is enough to recall article 26 of the Universal Declaration of Human Rights and article 34 of Italian Constitutional Charter

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<sup>10</sup>Interview with Andrea Prencipe, Luiss University Rector; ID, Open space or not? The puzzle returns, on *Corriere dell’Innovazione* 29/5/2020.

<sup>11</sup>The sector has encountered many difficulties related not only to exquisitely technical problems but also - especially in the school - ethical-pedagogical dimensions, which have been left to the management of individual teachers, who have addressed the different critical issues that have presented themselves with responsibility and flexibility.

to emphasise the State's duty to guarantee education for all. But perhaps on this very profile it is possible to seize an opportunity, amid so much criticism of the *vulnus* to the constitutional rights that would occur<sup>12</sup>.

We are aware that in schools and universities education cannot be relegated to a simple transfer of information and knowledge; indeed it takes on the necessary time for the development of the person, for the relationship with others and increase own network, and also for a better inclusion in the society. We firmly believe in the importance that comes from the attendance of the community, in the school environment in the first place, but also in the university environment, in the process of personality development. And this profile is in line with the need not to make training an elitist right but, rather, as has been pointed out extensively since the seventies of the last century (Pototschnig, 1973; Cassese, 1976), a social right (Benvenuti, 2014) of which all individuals are held, regardless of economic and social conditions<sup>13</sup>.

We know that school does not mean mechanical learning of notions, it does not coincide with the dismantling of a keyboard, with the subjection to search engines; it means first of all sociality - horizontally (between scholars) and vertically (with teachers), dynamics of omni lateral formation, intellectual and moral growth, maturation of a civil and political consciousness. While distance learning has proven to be an extraordinary resource at a time of need, the awareness has emerged<sup>14</sup> that distance learning and in presence are not interchangeable. Centuries of traditions and heritage (the oldest European universities were founded in the 11th century) cannot be neglected or forgotten in a few weeks<sup>15</sup>.

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<sup>12</sup>On this point, read the report of the President of the Constitutional Court, Marta Cartabia, The activity of the Constitutional Court in 2019.

<sup>13</sup>Court Cost. 7 judgment of 1967; Nicodemo, The School: From the Past to the Future..., *Federalismi.it*, 6/5/2020, p.8.

<sup>14</sup>See the appeal of 16 intellectuals against the prospect of a "remote" model: Hunters, School is sociality. It does not replace with monitors and tablets, *La Stampa*, May 18, 2020.

<sup>15</sup>It is in attending school or university that you experience the pluralism of experiences and voices of both teachers and learners, who share experiences, you learn the coexistence and respect of others. The European Union also promotes tools to ensure that everyone, regardless of personal, social and

After this tragic experience and also because of the need to face the next semester safely many universities are implementing, or even developing, some digital skills showing a new scenario, opening up innovative spaces in which new technologies promote dialogue and cooperation between teachers and learners, citizens and structures, aware that technological innovation can become a relevant tool to bring culturally distant subjects and at risk of social exclusion.

The crisis has shown us the way to be inclusive: distance teaching can be useful to students with disabilities, to working students, to those who have various difficulties in attending classrooms. Technology can become a relevant tool for bringing culturally distant subjects at risk of social exclusion closer together, it can be the way to greater integration<sup>16</sup>.

Taking into account these considerations, I believe that the epidemiological crisis - forcing sudden changes in working and daily life - has had the merit of anticipating some long-awaited responses (funding for research, school, school building, innovation).

It has also emerged that Europe and USA, even if it is lagging behind in terms of infrastructure and staff training, is able to deal with the emergency thanks to the enormous efforts made by schools and universities (structures, teachers, students, technicians) in distance learning.

They are the real engine of the University context of all the world and now he deserves a better and wider attention.

3. At the beginning of March 2020, several well-known U.S. institutions of higher education (IHE) such as Stanford University (March 6, 2020)<sup>17</sup>, Harvard

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economic conditions, can acquire and develop specific and professional skills (Art. 165 and 166 TFUE; Strategy Europe 2020).

<sup>16</sup>Severino, La penisola degli atenei online, by Rizzini on Il Foglio, 26/5/2020.

<sup>17</sup>Letter from Provost Drell with COVID-19 updates: Online classes; Admit Weekend <https://news.stanford.edu/2020/03/06/letter-provost-drell-covid-19-updates-online-classes-admit-weekend/>

University (March 10, 2020)<sup>18</sup>, and others made a decision to move classes to online formats in place of in-person instruction due to Coronavirus Disease 2019 (COVID-19).

As a result, in March of 2020 the vast majority of about 4,300 degree-granting IHEs in the U.S. (including about 1,626 public colleges, 1,687 private non-profit schools and 985 for-profit schools)<sup>19</sup>, closed their campuses, cancelled face-to-face classes and campus-based activities, moved to online mode of teaching and learning, and adjusted their admissions policies.

Unfortunately, COVID-19 already has and will continue to have significant financial implications and impact on the U.S. IHEs. For example, University of Arizona is projecting to lose \$250 million from the COVID-19 pandemic, University of Michigan estimates losses from \$400 million to \$1 billion, and Syracuse University has already lost \$35 million in unexpected expenses since the pandemic started<sup>20</sup>.

In order to support the U.S. economy (including U.S. IHEs), on March 27, 2020, President Donald Trump signed into law The Coronavirus Aid, Relief and Economic Security (CARES) Act. Particularly, it provides \$14.25 billion funding and flexibilities for U.S. IHEs to respond to the COVID-19 emergency<sup>21</sup>. The U.S. Department of Education has released a table with allocation amounts for each IHE<sup>22</sup>.

During the Summer of 2020, the leaders of U.S. IHEs have an opportunity to review, analyse and discuss the outcomes (lessons) of Spring-2020 semester, predict and create various scenarios for Fall-2020, strategically build on that momentum and transform IHE into an educational institution that is more customizable and

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<sup>18</sup>COVID-19 – Moving Classes Online, Other Updates, <https://www.harvard.edu/covid-19-moving-classes-online-other-updates>

<sup>19</sup>A Guide to the Changing Number of U.S. Universities, <https://www.usnews.com/education/best-colleges/articles/2019-02-15/how-many-universities-are-in-the-us-and-why-that-number-is-changing>

<sup>20</sup>Impact of Coronavirus (COVID-19) on College Tuition and Finances, <https://www.forbes.com/sites/andrewdepietro/2020/06/02/impact-covid-19-tuition-finance/#1da71e684b88>

<sup>21</sup>American Council on Education, “Summary Of The Higher Education Provisions In H.R. 748, The Coronavirus Aid, Relief, and Economic Security (CARES) Act” (Washington: 2020), available at <https://www.acenet.edu/Documents/Summary-CARES-Act-HigherEd-Provisions-032620.pdf>

<sup>22</sup>Allocations for Section 18004(a)(1) of the CARES ACT, <https://www2.ed.gov/about/offices/list/ope/allocationsforsection18004a1ofcaresact.pdf>

affordable to the vast majority of people<sup>23</sup>. In summary, the IHEs in the U.S. have many pressing short-term issues to deal with right now; they include but are not limited to:

- 1) large budget cuts, shortage of revenues, and reduced amount of donations;
- 2) layoffs of faculty and staff, and hiring freeze;
- 3) urgent investments into technology/hardware/software to support advanced online/hybrid education;
- 4) pausing expensive capital building projects;
- 5) a growing reluctance among students to pay full tuition fees for online education;
- 6) demands for reimbursement of already-paid fees;
- 7) the possible disappearance of international students who pay full fees;
- 8) the large-scale deferral of admissions;
- 9) a sharp spike in the need for financial assistance among students because of the impact of the pandemic and ensuing recession;
- 10) the question of whether and how to reopen, and a development of a number of scenarios of IHE operation in case of COVID-19 spike on campus at any time during upcoming academic year.

For example, in terms of large funds cuts, the U.S. public colleges and universities have had to spend enormous sums of money to a) support their students through the pandemic, b) switch to online education, and c) issue refunds to students for parking, housing, and dining services for the period of time when they were not on campus in the spring. For many public colleges, these costs alone are much higher than the federal funding they will receive or have already received from the CARES Act; some examples of the CARES Act allocation and estimates of current and near-term lost revenue for selected university systems are available in the Table 1

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<sup>23</sup>A Post-Pandemic Strategy for U.S. Higher Ed, Harvard Business Review, <https://hbr.org/2020/06/a-post-pandemic-strategy-for-u-s-higher-ed>

below<sup>24</sup>.

Table 1.

*Public institutions (USA) face significant losses exceeding what the CARES Act provides in relief*

Institutions	CARES Act allocation	Maximum allowed for institutional relief	Spring semester costs (ex: housing/dining refunds, and online instruction)	Revenue losses expected for summer 2020	Loss in state appropriations*
Rutgers University System, New Jersey	\$54,160,640	\$27,080,320	\$50 M	\$60 million for medical centers	16.5 percent cut for the remainder of FY 2019–2020
University of California System	\$260,289,151	\$130,144,579	\$310 M	\$248 million for medical centers	10 percent cut for FY 2020–2021
University System of Georgia	\$249,745,437	\$124,872,726	\$200 M	\$150 million	Proposed 14 percent cut for FY 2020–2021
University of Wisconsin System	\$94,228,574	\$47,114,291	\$78 M	\$90 million**	Unknown
Ohio public four-year institutions	\$199,282,449	\$99,641,229	\$171 M	\$119–139 million**	3.8 cut for the remainder of FY 2019–2020

On the other hand, to answer the main question “Whether and how to reopen?”, the leaders of the U.S. IHEs should take into consideration and follow the IHE General Settings developed by the Center for Disease Control and Prevention in the U.S. (CDC); these are the way in which IHEs can help protect IHE’s students and employees, and slow the spread of the COVID-19<sup>25</sup>:

- Lowest Risk: Faculty and students engage in virtual-only learning options, activities, and events.
- More Risk: Small in-person classes, activities, and events. Individuals remain spaced at least 6 feet apart and do not share objects (e.g., hybrid virtual and

<sup>24</sup>Mounting Peril for Public Higher Education During the Coronavirus Pandemic, <https://www.americanprogress.org/issues/education-postsecondary/reports/2020/06/11/485963/mounting-peril-public-higher-education-coronavirus-pandemic/>

<sup>25</sup>Considerations for Institutions of Higher Education, <https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/considerations.html>

in-person class structures or staggered/rotated scheduling to accommodate smaller class sizes).

- Highest Risk: Full-sized in-person classes, activities, and events. Students are not spaced apart, share classroom materials or supplies, and mix between classes and activities.

4. Today, digital innovation goes far beyond that, not only enables the rapid transmission of information, but also a cultural and dialectical exchange between individuals around the world, a *face-to-face* exchange that enables interchangeable results within everyone's reach. The value of friendly technology has allowed the transition from physical meeting places to virtual classrooms<sup>26</sup>.

With regard to the academic field, we cannot fail to recognize the new opportunities that can emerge from the finally more pervasive use of technologies, aiming at various levels of complexity to support and integrate effectively the educational activities so far delivered in traditional modes. This, of course, puts the element of security in the first place (to be guaranteed in the next academic year to the actors involved in the training processes) that cannot be underestimated unfortunately due to any form of pressure from some colleagues reluctant to innovate their way of delivering lessons.

The possibility of safe outbreaks that would result from October and/or November (winter period in which flu coronaviruses have always become aggressive

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<sup>26</sup>See the book *Jugaad Innovation* by Navi Radjou, Jaideep Prabhu and whose Italian edition was curated in 2014 by the Luiss General Manager Giovanni Lo Storto. A book that notes that the traditional innovation model of the West has recently been challenged by competition from emerging markets, which produce efficient solutions at lower costs. Jugaad is the answer: a word that in Hindi describes a process of innovation that comes from below and is able to create efficient solutions at low cost. The first and perhaps most important strategy of innovators jugaad it is the repositioning: innovators jugaad they look at and interpret the world differently than all of us. This means that they will more easily see the glass half full when everyone else sees it half empty. You could think of innovators jugaad modern alchemists, capable of transforming *Mentally* adversity in opportunity. For the challenges this complex new world poses, innovation jugaad is a very powerful solution. <https://open.luiss.it/2018/01/27/jugaad-innovation-ovvero-pensare-frugale-per-creare-una-crescita-dirompente>.



and very pervasive indoors), would have a very negative impact on the image of the Universities involved.

At the moment we can identify at least five main factors that are restraining the teaching innovation in Universities:

1. (TIME factor)

Awareness that the use of distance learning is certainly two to three times more “time consuming” than the 50/60/72 hours of classroom teaching, typical of each of the courses taught in the University. Distance learning therefore requires much more time to devote to the planning of the lessons and the correct/profitable online conduct of the lessons/exercises, at the expense of professional activities, writing papers, conventions, etc. on which many teachers focus mainly.

2. (QUALITY factor)

“Compulsive” dislike by some colleagues to streaming and on-demand lessons (which students can view on the platform even later). Many teachers are also aware here that the lessons and teaching material will be better designed, updated and presented, given that the registration of each lesson will remain available on the platform in the months/years to come. It is certainly a cultural theme: in order to continue to work, to inform us and to train, each of us must make a supplementary effort to learn to act according to different trajectories than usual.

3. (INNOVATION factor)

Inability to innovate own teaching method, preferring to replicate the methods used in past years and without using, for example, supplementary modes to the classic theoretical/conceptual and/or laboratorial/appliated lessons. In addition, in most on-site universities, chair employees are not expected to support teachers to

encourage the use of multimedia educational tools, real-time simulations<sup>27</sup>, in-depth “extra-lesson” webinars, video conferences with experts and managers, and periodic tutorials to be assigned via e-learning platform and to be compiled online in the classroom and/or from home.

It will therefore serve a clear indication of the mission to be pursued and an appropriate process of teacher training.

#### 4. (ORGANIZATIONAL factor)

The most Universities, before the lock-down, had not provided alternative modes to on-site teaching. In the best cases (often at the explicit request of the Rectors’ delegates to the e-learning), they have equipped themselves with e-learning platforms (unfortunately very often not based on a solid and reliable infrastructure), but leaving the choice of the teachers to use them or not, and without any minimum central coordination that would make the use of them homogeneous.

5. (LEGAL-REGULATORY factor) The educational authorities are experiencing several difficulties in the regulation/obligation of having the universities, at least in a “blended” form, stimulating on a large scale on how to deliver courses in this way. This will cause an uneven delivery of university courses from September and will penalise both teachers (uninformed and prepared with a proper advance on to modify/adapt their lessons) and students who will find themselves in the first semester having to take unplanned/organized courses for a mode at least in “blended” and certainly managed in a very uneven way by the various teachers.

Taking into account these considerations, we can say that the real opportunity

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<sup>27</sup>Casalino N. (2014), “Simulations and Collective Environments: New Boundaries of Inclusiveness for Organizations?”, *International Journal of Advances in Psychology (IJAP)*, Science and Engineering Publishing, USA, vol. 3, issue 4, pp. 103-110.

– in addition to the aging and bureaucratisation of European and USA academic architectures – will concern low-income students who, paradoxically, in the presence of skills and merit, could aspire to enter prestigious universities previously unthinkable. The cost will be lower than travel, food and lodging costs and it is conceivable that these very elite places will be able to open up, thanks to super-platform, to a significantly higher number of students who could benefit from even lower fees linked to the largest number of paying students. Today the best international Universities are forced to select some excellent candidates discarding others for mere reasons of space. The technology will extend the courses to a wider audience, even if selected. For this reason, and it is the mirror effect, mid-level universities that hoard excellent students not admitted to Harvard, Stanford or the MIT will see this perspective gradually fade and will have to reinvent their offering, knowing that no one will want to attend a good university when they can attend a very good one.

Of course, these are students who do not breathe the academic environment of Princeton, but it seems predictable anyway an experience and teaching so excellent that it would however lead to results unthinkable for them. At this point, the legal value of the degree would also come into play, which in many countries has been abolished, although in others like<sup>28</sup> ours, although grafted into a wide debate, it still remains<sup>29</sup>.

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<sup>28</sup>The principle of the legal value of university degrees is summarized in the Single Text of higher education laws (R.D. 31.8.1933, n.1592, art. 167): Universities and higher institutions award, in the name of the Law, degrees and diplomas determined by the educational order. The Student Regulations (R.D. 4 June 1938, No.1269, Article 48) stipulates that the degrees and diplomas awarded by the Universities explicitly contain the word “Italian Republic” and “in the name of the law”. The university reform in Italy (DM 509/1999), which introduced the new academic qualifications of ‘graduate’ and ‘specialist degree’, wanted to explicitly confirm the principle of legal value by stating that the qualifications obtained at the end of the courses of the same level, belonging to the same class, have the same legal value (art. 4.3).

<sup>29</sup>It is clear that if one university degree equals another, it would be easy to choose a particular professional figure in a public competition, not the specific value of the degree that takes into account the vote and other components. And in fact, advocates of abolishing the legal value of the degree are pushing precisely on this point. Why universities would be forced to compete with each other, as the market would select the best professionals in the sector.

It’s however, it is true that the legal value of the degree flattens the importance of universities in the

So, access to a level of training previously unthinkable and obtaining a brand of excellence.

Here we also see risks and opportunities. Surely, in the short term, in order to stem the risks of a reduction in enrolments, the offer of medium universities should change and also focus on others, such as the safe hospitality of learners.

In essence, we see an epochal change: we go from a phase in which the three-year period was carried out in its own city focusing on the quality of the master's degree to a new phase that considers an off-site university, even foreign, from the three-year period and then aiming at new perspectives previously not considered for the master's degree.

The effects may be disruptive – certain, although not immediately – for those universities that will not be able to invest (for various reasons also related to staff) on the revision of the offer and will tend to continue in the traditional method.

It is no coincidence that a few days ago, the University of Cambridge was the first to announce that the next academic year all lessons will be held online: so much in advance it suggests that it is not so much a matter of caution as of perspective.

We do not want to be tough, but we think the universities of series B, C and beyond will get unpopular. Universities deemed to be better will increase fees at the risk of implementing natural selection based on census and not on the actual skill and<sup>30</sup> desire to redeem the less well-off social classes. The southern students would be particularly damaged, where both the per capita income and the university campuses are by no means thriving. We would end up going back to the beginning of the last century when we were told that the “elite” Universities were no longer capable to arrange their courses to mass people. It was no longer possible (economically) to have some brilliant graduates (which, among other things, have depopulated and depopulated internationally) and, at the same time, churn out a plethora of mediocre graduates who once hired in companies had to, preferably, be

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common opinion, favoring too much the piece of paper over the specific experience.

<sup>30</sup>See Time to think small, The Economist, 2/5/2020.

converted through business courses.

True over the years, the proliferation of structures that have arisen in a widespread way does not help and, in this phase of sudden but decisive innovation, certain universities will no longer have reason to exist. In the last days university enrolments are already expected to fall sharply and only today we are returning to the results of registrations achieved before<sup>31</sup> the financial crisis<sup>32</sup>.

There is much consensus that the opportunities offered by new teaching technologies should only serve to integrate/improve the irreplaceable approach in presence (equally non-replaceable in the case of internships, laboratory activities, etc. Teaching needs to be rethought according to the wider possibilities offered by digital but also the constraints imposed by physical distance, developing educational projects capable of keeping the attention and motivation<sup>33</sup> of the student and the teacher alive and maintaining if not enhance the effectiveness of learning. The elements of creativity, multimedia, interactivity, and collaboration are critical to remote learning.

5. Many universities are determining notes, guidelines, procedures, and other educational facilities recommendations that will impact on the organization and on the management of educational activities for next first half of academic year 2020/2021.

Considering the expansion of e-learning and the need for an “hybrid education” including teaching procedures for all degree courses of universities, they can be broadly categorized into four types:

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<sup>31</sup>Donato, The crisis leaves its mark. A proposal to stem the decline in university enrolments, The Southern Daily, 11 May 2020; Zunino, In July the live degree returns but the lessons will remain online, La Repubblica of April 19, 2020.

<sup>32</sup>Uskov V., Casalino N. (2012), “New Means of Organizational Governance to Reduce the Effects of European Economic Crisis and Improve the Competitiveness of SMEs”, Law and Economics Yearly Review Journal, Queen Mary University, London, UK, vol. 1, part 1, pp. 149-179.

<sup>33</sup>Frusciante A.D., Elshendy M., Casalino N. (2014), “How Motivation Brings to Healthy Organizations: Methods and Incentives to Increase Satisfaction, Efficiency and Productivity”, Open Review of Management, Banking and Finance, Regent’s University, London, UK, pp. 134-141.

a. Exclusively in presence teaching (on-site). Teaching (for example by workshops, exercises, experiential activities) is provided exclusively in presence. For students who will not be able to attend in presence, the acquisition of skills related to these experiences must be ensured through online material.

b. Dual teaching: teaching is delivered simultaneously in presence and online.

c. Blended teaching: teaching is provided for one part only online and for another part also in presence. In that case the presence part will still be guaranteed online.

d. Online teaching only: teaching is provided entirely and exclusively online. Naturally exclusively online teaching must be limited to those few situations for which dual teaching and blended teaching is not possible.

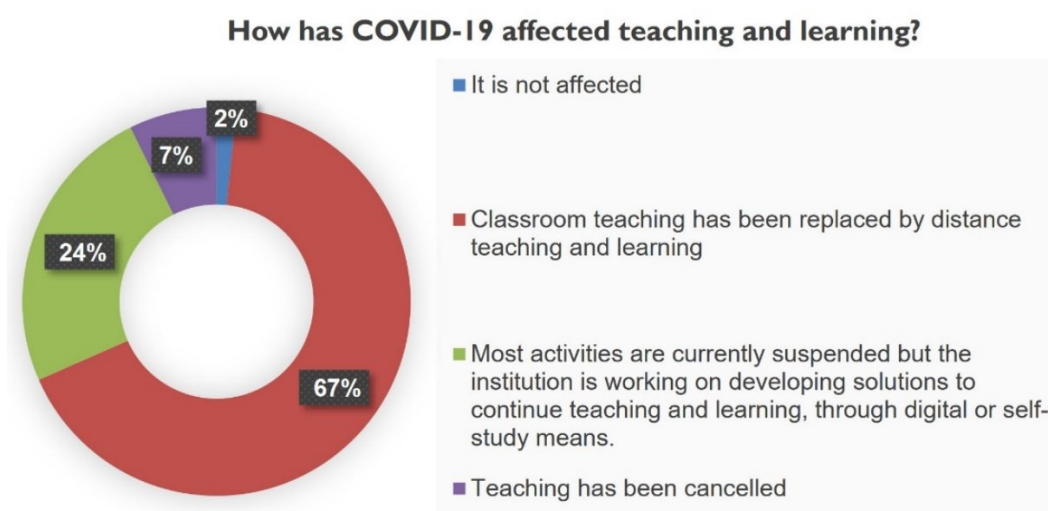
More than three months after the closure of the Universities and the compulsory (and almost total) transition to distance learning, 2 out of 3 students promote the experience behind us with reserve and, looking at the reopening of September, ask to mix the lessons in classroom with those online.

COVID-19 affected teaching and learning at almost all IHEs; only 2% of IHEs reported that teaching and learning is not affected. It is important to mention that 4 of the 7 IHEs that reported no effect on teaching and learning are virtual universities and 1 replied that the campus is open as usual, while the other 2 are traditional brick-and-mortar universities and replied that their campuses were closed. The fact that these two IHEs replied that teaching and learning is not affected, despite their campuses being closed, is surprising. Two-thirds reported that classroom teaching has been replaced by distance teaching and learning and one quarter that most

activities are currently suspended but the institution is working on developing solutions to continue teaching and learning, through digital or self-study means. Only 7% reported that teaching has been cancelled as indicated below (Fig. 1).

Figure 1.

*COVID-19 affected teaching and learning (IAU – COVID-19 Global Impact Survey, 2020)*



These results show that two-thirds of IHEs were able to move teaching online while one third was not. However, the majority of these IHEs are working on developing solutions to continue teaching online.

The student population now sees online teaching as its own acquired right. Of course, I am a minority - fortunately - those who think we can do without classrooms altogether. Although it is a substantial minority, it will be the hunting ground of private telematic universities. Endangering the finances of many public universities, with the drop in enrolments that is now expected. Because the incontrovertible fact is that young people, after having experienced the advantages of studying at home using the devices that are now their bionic prosthesis, are not willing to go back. And, at this point, the ball returns to the professors' field.

The university world had to resort to distance learning, entrusting to these

medium lessons, exams and even graduation discussions with students who found themselves obliged to celebrate one of the most important days of their life in front of a computer. The results of a well-done regional analysis are reported in the table 2 below.

*Table 2.*

*Impact on teaching and learning by Region (IAU – COVID-19 Global Impact Survey, 2020)*

	<b>Not affected</b>	<b>Classroom teaching replaced by distance teaching and learning</b>	<b>Teaching suspended but the institutions is developing solutions</b>	<b>Teaching cancelled</b>
Africa	3 %	29 %	43 %	24 %
Americas	3 %	72 %	22 %	3 %
Asia & Pacific	1 %	60 %	36 %	3 %
Europe	Almost zero	85 %	12 %	3 %

The table clearly shows that the percentage of HEIs at which teaching has been cancelled is very low in all regions except in Africa, where it is currently reported to be at 24%. Africa is also the only region where teaching has been suspended or cancelled at most higher education institutions. Only 29% of African HEIs were able to quickly move teaching and learning online, compared to 85% of HEIs in Europe.

The 3/4 of the students are convinced that the digital transformation of teaching is irreversible. Looking at the new year, only 30% of university students are confident of returning to the pre-emergency situation, the other 2/3 hope for a mixed programming between frontal and digital lessons. And with a greater opportunity for curricular hybridization through open teaching.

The teachers have so far stood up well to the emergency in although with inevitable gaps and operational difficulties. Most were unprepared for the intensive use of technologies: the live video lesson, as it was, was the most easily available tool



but, as we know, it is by far the worst. There is a problem of methodological upgrade and for many the need to look their students in the face in order to be able to involve them. Without an asynchronous and carefully prepared support, the endless wealth of insights, experiments, and testimonies typical of onsite lessons is lost.

The mood of the teachers is uncertain. The majority is hoped that we can quickly go back to the old days of closed classrooms. And the push, in many universities, will be in this direction. We hope that after the COVID-19 emergency everyone will return to reign on their teaching space. It should be said frankly: it is an illusion. Legitimate. But doomed to clash harshly with the students' demands, which this investigation highlights so clearly.

The choices that universities will make, in the challenge of hybrid teaching, are destined to influence their competitive positioning on the national and international chessboard.

6. A careful reflection would be imposed on the concept of democracy in the time of emergency and on the limits to the suspension of the Constitution. Moreover, it would transcend the meaning of this brief intervention aimed at highlighting how the reactions linked to the recent widening of the COVID-19 epidemic have shown that the most basic scientific knowledge is still lacking<sup>34</sup>. Not

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<sup>34</sup>The wide-ranging debate that has highlighted how this emergency (like every emergency) requires the answer to fundamental questions about the permanent functioning of the democratic method, the balance between individual rights and collective needs, the protection of the weakest, the illegitimate compression of constitutionally guaranteed individual rights with reference to the unprecedented use of technological tools. In particular, the provisions enacted with D.L. 22 of 8 April 2020, in an attempt to "support" the Italian university system at a particularly sensitive time (all universities were practically closed, the lessons of the second semester were held exclusively remotely, but also the examinations, oral ones and sometimes even those written, were kept online, not without perplexities and uncertainties because the technological infrastructure does not allow to verify the correctness and transparency of the test the administrative technical staff administrative staff works from home, libraries are closed, etc.), for many ended up "suspending" constitutionally guaranteed university autonomy.

The following shareable decisions have been taken for the university:

- The end of the academic year has been extended to June 15.
- The increase in specialization grants in the various medical specialties (totally insufficient: from the ventilated 5,000 more grants, for a total of about 12-13,000, it seems that we will

only for the dissemination of deliberately false news, but also for the lack of judgment and superficiality in assessing, adopting, and accepting, the prevention measures for the spread of the virus. In general, we are in a worrying situation<sup>35</sup>.

At least one of the 2018 Pisa test results is striking. On average, only 9% of the 600,000 15-year-old students from 79 OECD countries who took the test are able to understand, when reading a text, the difference between a fact and an opinion. If we add to this the figure related to functional illiteracy (in Italy 28% of the population between 16 and 65 years in 2018) you can understand some worrying aspects for our future<sup>36</sup>.

The computer revolution is still relatively young, but today the transition from new technology to its practical application is almost immediate. Models of economic development and the market can only adapt in real time, but the school seems to fail to realize this. The trend of information increasingly devoted to social networks (where content is necessarily synthetic) creates in itself a superficial view of problems.

The inability to understand real understanding – and therefore criticism – increases the development of increasingly radical attitudes and ideologies (also because they are easier to understand). It should not be forgotten that this phenomenon is also exploited for political reasons, influencing election appointments and the creation of opinion movements not based on proven facts<sup>37</sup>.

The consequences of inadequate education, especially in perspective, have often been underestimated. However, problems related to the updating of school curricula (interesting the proposal by Umberto Galimberti to introduce philosophy in

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have a total of 9,000 scholarships; the aspiring graduates are estimated at 18-19,000, and 1,500 young doctors who specialize abroad).

- Considering the commitment to expand the “closed number” to medical courses.
- The deadline for the payment of the last enrolment instalments has been postponed and entrusted to the autonomous decision of the individual universities.

<sup>35</sup>Sabbadini G., The Adam Smith Society, 2020.

<sup>36</sup>Sabbadini G., op. Cit.

<sup>37</sup>V., among others, Maurizio Molinari, *Siege of the West*, p. 46 – 59, The Ship of Theseus, Milan 2019.

primary school; fundamental a greater scientific culture), and the inadequacy of current systems with respect to new trends in teaching methods have been almost absent. Well, let us take the opportunity that comes to us from the tragedy that we have just experienced and<sup>38</sup> that we are still living. New training and creative opportunities can be seen in today's tragic contingency that becomes a potential testing ground for the future. We transform the crisis by changing organizational behaviours, products, and university processes, but we do not just do so to address change and respond to immediate needs. We identify the change we want, and we work hard to do so, without shortcuts and without falling into the short-sightedness that has characterized us for decades<sup>39</sup>.

Fuelled by the health emergency, the debate on teaching, in the classroom or entrusted to the digital *medium*, is much more recent, but it traces the now familiar lines of the debate between the *apocalyptic* and the *integrated*, as outlined by Umberto Eco in the book of 1964: there was talk of TV, but the advent of the digital<sup>40</sup> *medium* has made those pages appear increasingly prophetic, especially during the alternating events on the e-book<sup>41</sup>.

Well, the events related to the e-book that should have led to the progressive disappearance of the paperback can give us an idea of how the clash between supporters and opponents of digital platforms for teaching will end in a few years: dismantled the euphoria of those who see a future dominated by distance learning, it will be inevitable that the latter will conquer a space – specific and qualified – for some aspects of the interaction between students and learners. It is easy to predict that, like the paperback, the traditional experience of classroom teaching will be

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<sup>38</sup>Olivieri G., The University Today, Auditorium – Sigismondo Castromediano Museum, Lecce, 12 March 2004.

<sup>39</sup>Lo Storto G., Il Sole 24 Ore Not to underestimate the value that the CD can take today, 2020.

<sup>40</sup>Eco U., *Apocalyptic and integrated: Mass communications and mass culture theories*, Milan, Bompiani, 1964.

<sup>41</sup>On this point v. Zaccarello, An already-seen paperback debate vs. e-book? Classroom education vs. distance learning, on [https://www.rivistailmulino.it/news/newsitem/index/Item/News:NEWS\\_ITEM:5260](https://www.rivistailmulino.it/news/newsitem/index/Item/News:NEWS_ITEM:5260).

strengthened in its centrality<sup>42</sup>.

Indeed, it is already becoming common place to say that distance learning will favour rich pupils, with unbridgeable disadvantage for others. Scott Galloway, professor of marketing at the Stern School of Business in New York, ventures in New York Magazine a counterintuitive hypothesis: in the long run the commodity for the rich will become the teaching in presence<sup>43</sup>.

7. IHEs' leaders must use what they are learning in crisis (in Spring-2020) now to prepare their institutions for greatest impact in the near future (the Fall-2020 semester and the entire 2020-2021 academic year). A list of items in the To-Do list may be pretty long; however, the most important items include the following ones.

**Modes of teaching/learning to be used.** Faculty/department chairs and/or academic deans should determine the degrees of varying face-to-face, online, or hybrid/blended experiences required for each academic course. As a result, most of IHEs prepare plans for several possible scenarios, including:

- 1) Face-to-face teaching/learning in the re-designed classrooms arrangements that follow the CDC guidelines, for example a) COVID-19 classroom maximum capacity for each classroom, lab, meeting room, etc., b) social distancing of at least 6 feet or about 2 meters between people – students, faculty, professional staff, etc.) wearing cloth face masks on campus and in the classrooms and labs, etc., d) change class schedule in a way that a sub-group of students to meet in person one day while others work remotely; these groups could reverse the next time their class is held, e) break up longer class

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<sup>42</sup>Adam K., Technology is taking over English Departments, 2014, Readable On Site *newrepublic.com*). In Italy, for real, the publishing houses have not proceeded with the “dematerialization” of the works of ingenuity, indeed they have often given the impression of wanting to defend the traditional structure of their market, centered on the paperback. In this field, rapid mutations have been closely monitored, both on the technological side and in the habits of the public. More than a decade later, the limited spread of the e-book is noted, even finally aligned with VAT 4% of the paper correspondents (David Sax, *The Revenge of the Analog*, 2016). It is obvious that the frontal contrast of the two media as set since the late nineties has no reason to be.

<sup>43</sup>Gurrado A., Distance teaching is also a matter of marketing, *Il Foglio*, 31/05//2020.

periods into smaller time periods, and so on.

- 2) Fully online (in real time or asynchronous) teaching learning.
- 3) Hybrid (or, blended) teaching/learning.

The Chronicle of Higher Education<sup>44</sup> has tracked about 1,125 IHEs in the U.S. and has found that roughly:

- a) 65% of schools are preparing for in-person classes during Fall-2020 semester;
- b) about 14% of the schools plan to use a “hybrid model” for teaching in Fall (for example, the University of Southern California – USC - has announced that some classes will be offered online, some classes will be taught in-person and some classes will combine in-person and virtual instruction);
- c) 8% are planning for classes to be held online (for example, Harvard University and the entire California State University system are preparing for most classes to be held online);
- d) about 8% of the IHEs are still considering a range of scenarios;
- e) nearly 5% are still working on their decision strategy for Fall.

**Modern infrastructure to be used to support effective teaching/learning.** The IHEs should continue to invest a lot of resources into institution’s hardware/software/technology infrastructure to effectively support various modes of advanced technology-based teaching/learning. The list of required technology to support education includes but is not limited to:

- a) online class meetings’ and virtual classrooms’ platform such as Adobe Connect Meetings, Bongo Virtual Classroom, Google Meets, Microsoft Teams, Zoom, WhatsApp, etc.;
- b) modern Learning Management Systems (LMS) to support immersive and individualized learning such as Canvas, Moodle, Sakai, Open edX, Docebo,

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<sup>44</sup> Here’s a List of Colleges’ Plans for Reopening in the Fall, [https://www.chronicle.com/article/Here-s-a-List-of-Colleges-/248626?cid=wcontentgrid\\_hp\\_1b#maincontent](https://www.chronicle.com/article/Here-s-a-List-of-Colleges-/248626?cid=wcontentgrid_hp_1b#maincontent)

Talent LMS, iSpringLearn, Blackboard, Adobe Captiva Prime LMS, etc.;

- c) streaming video system/services in each classroom/lab/meeting room;
- d) systems for a design and development of pre-recorded video lectures and posting video clips on university/college LMS;
- e) systems for virtual labs and active use of virtual reality (VR), augmented reality (AR), mobile reality (MR), extended reality (XR);
- f) cloud computing and highly secure Virtual Private Networks (VPNs) from dorms and student houses to proprietary software systems in university/college computers labs;
- g) university wide systems for Data Analytics, Student Academic Progress (SAP) data analytics and intervention systems, and many other systems and technologies.

These technologies may provide quality online/hybrid education at a lower cost than that of conventional education.

**What is optimal tuition fee for Fall-2020, for 2020-2021 academic year and/or for new era on higher education?** The IHE's leaders should think about the impact of COVID-19 on tuition fees and finance. The equation to identify the "ideal" tuition fee has multiple variables; some of them are as follows<sup>45</sup>:

- 1) higher financial aid costs (it is expected that the number of undergraduates and graduate students applying for financial aid will increased dramatically, along with the amount of money each student received);
- 2) less state aid (for example, New York Gov. Andrew Cuomo announces that the pandemic might force massive cuts in his state's 2020-21 budget. A note: the higher education is the third-largest category in state budgets in the U.S., behind K-12 education and Medicaid);
- 3) more spending on health and wellness (spending on health, especially on

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<sup>45</sup>Higher education's 'to-do' list — the consequences of coronavirus, <https://thehill.com/opinion/education/494687-higher-educations-coronavirus-to-do-list>

mental health, has been one of fastest-growing items in many IHEs budgets; with the pandemic, stress, depression, and attempted suicides are climbing quickly, along with student demands for greater and more immediate access to therapists);

- 4) fewer international students (for example, on July 6, 2020, the Immigration and Customs Enforcement (ICE) in the U.S. announced new rules requiring international students to leave the U.S. if their colleges or universities institute online-only learning measures for the Fall under the threat of COVID-19<sup>46</sup>; this may have significant impact on more than 1 million international students in the U.S. IHEs. A note: international students make up about 6% of the total higher education student population in the U.S.)

8. The COVID-19 crisis is challenging higher education institutions in many new and unexpected ways. As universities must take radical measures and make major efforts to slow the contagion and to better understand the virus, they are forging new paths in crisis management. This brings both challenges and opportunities to Europe's universities, in particular in relation to digitalisation and digitally enhanced learning and teaching, research, quality assurance, university autonomy, funding and civic engagement.

In a short time, many have moved their learning and teaching online. For a sector serving more than 20 million students in Europe, this is no small feat.

As we have already said, in Europe and USA all staff (teachers, technicians, administrative people and librarians) is the true capital of the University, the lifeline that allowed the University, in the dark years of the cuts, to keep high the level of European and USA research and education.

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<sup>46</sup>Trump Move Against International Students May Have Backfired, <https://www.forbes.com/sites/stuartanderson/2020/07/09/trump-move-against-international-students-may-have-backfired/#548443fae3d1>

We must think of everyone, in the logic of unity that we have always advocated: we must all progress together. And then it will be necessary to ensure a constant and conspicuous influx of new levers, to which are offered certainties of being able to access and progress on the basis only of their own value, abolishing first of all the scourge of the precarious. Only then can the climate of trust and serenity that the University absolutely needs to perform the function to which it is called can be established<sup>47</sup>. And we will have to think about the funding of Basic Research, which has suffered so much in recent dark years, even if it does not go extinct, and which will be able to produce, in not only economic terms, if it has the opportunity to play, outside the need of emergency, its role of anticipation of knowledge and knowledge, to be made available in general but, in particular, in times of emergency. Finally, the right to study will have to be financed, in particular the state supplementary fund for the granting of student grants in order to avoid the phenomenon of *"beneficiaries without grants"*, thus respecting art. 34 of the Constitution which reads *"Capable and deserving, even if without means, have the right to reach the highest degrees of study."*

It has long been sought to train students who are able not only to know but also to understand the reasons that lead to the change when in social economic reality and institutional events.

After all, Plutarch gave us the way: "The mind is not a vase to be filled, but a fire to be lit". For the taste of research and a love of truth to be fiery.

With the unprecedented disruption caused by the pandemic, which led to a complete shift to online teaching and learning for European and USA universities, a considerable effort will be required to ensure that education and research needs are met in a satisfactory manner using virtual instruments.

Moreover, universities remain active in the research of new treatments and possible vaccines, while in the fab labs and incubators, innovative solutions for

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<sup>47</sup>D'Atri A., De Marco M., Casalino N. (2008). "Interdisciplinary Aspects of Information Systems Studies". pp. 1-416, Physica-Verlag, Springer, Germany.



producing respirators and facial protection, for example, are being tested out. Responding to the challenge through expertise in virology, epidemiology, or sociology, supporting society in so many ways, universities have demonstrated the dynamism and flexibility of the sector.

Now we are entering a phase in which we can catch our breath and begin to look forward, assessing the opportunities and threats that the crisis poses.

There are still several immediate challenges to be met in Europe and USA. Regulations concerning study times, social distancing on campus, new setups of classrooms and labs due to COVID-19 capacity standards, examinations and grants need to be adapted in a short time, considering the need for students to study safely. Teachers in many places still need to fine-tune their skills to take advantages from the new learning environments.

It is clear that the future of higher education needs rethinking in many ways. International and multilateral cooperation<sup>48</sup> within the higher education sector and with policymakers, communities and other stakeholders will need to be increased and strengthened.

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<sup>48</sup>Casalino N. (2014), “Behavioural Additivity and Organizational Impact of European Policies to Promote Internationalisation of High-growth Innovative SMEs”, *Journal of International Business and Economics*, American Research Institute for Policy Development, USA, vol. 2, no. 4, pp. 17-44.