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A solidaristic European Union? How the "economic constitution" of the EU pre-empts a solidaristic turn in European politics

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> "The near future had made up its mind to mince me into sausage-meat. What was I to do in the meanwhile? Read books? File the rough corners off my character? Earn money? I was sitting in a great waiting-room and its name was Europe. The train was due to leave in a week. I knew that. But no one could tell me where it was going or what would become of me. And now we are again seated in the waiting-room, and again its name is Europe! And again we do not know what will happen. We live provisionally, the crisis goes on without end!"
> Erich Kästner, *Fabian or Going to the Dogs, the story of a moralist*[1]

Introduction

In what sense can the EU be regarded as a polity founded on solidarity? Opinions seem to differ and vary over time. If we focus on the recent decades, the financial and fiscal crises of the 10s seem to have persuaded many that the EU is a "neoliberal" or "neoliberalising vehicle"

* Professor of Political Philosophy, Complutense University of Madrid.

[1] *Fabian or Going to the Dogs, the story of a moralist*, New York Review of Books Classics, New York, 2012, p. 44.

whose laws and policies would undermine solidaristic institutions. In the opposite direction, however, we find many scholars sustaining that how the EU has reacted to the corona syndemic seems to justify its characterisation as a solidarity community, overcoming the "mistakes" that may have plagued "austerity" policies.

In this paper, I will hopefully provide the reader with some of the elements needed to determine whether it makes sense to characterise the EU as a solidaristic polity and in which sense, and to what extent, if at all.

The argument proceeds in three steps.

First, I undertake a conceptual clarification of solidarity. I distinguish between solidaristic practices and institutions and provide an account of the potentiality and the risks of the institutionalisation of solidarity. On the positive side of the account, I briefly describe why the regulatory ideal of the Democratic and Social state must be regarded as providing an ideal institutionalisation of solidarity. On the negative side, I call the attention of the reader to the legal and political techniques that turn the normative value of solidarity upside down, allowing an unjustified transfer of responsibilities to the profit of the powerful in society (that is what I would refer as 'inverted' or 'exploitative' solidarity).

Second, I briefly consider the historical and structural relationship between the process of European integration and solidaristic practices. The founding Treaties of the Communities were ambivalent, rendering possible not only that European institutions would become facilitators of the development of solidaristic bonds across and within national borders but also a constraint pre-empting solidarity across and within national borders (and eventually the vehicle through which forms of inverted solidarity could be imposed). While in the sixties and seventies, Europe was predominantly a facilitator of the Democratic and Social State, from the late seventies, it also became first one of its main constraints and then the enforcer of inverted solidarity. This has resulted in what we could characterise as a complex and rather schizophrenic relationship between the European Communities (later the EU) and solidarity. Such a lopsided relationship was epitomised by the fundamental norms introduced by the Treaty of Maastricht, which, once and at the same time, led to the creation of a common currency while pre-empting the creation of mechanisms of insurance vis-à-vis the new economic risks that were being created.

In the third section, I zoom in on the government of the corona crisis. As already pointed out, this is usually claimed to have been an exercise in solidarity across borders, which would prove that the EU is indeed a

solidaristic polity. I start with a summary but detailed reconstruction of the government of the crisis. Then, I show why this is, at best, a very modest exercise in solidarity because the fundamental decisions that will determine the distributional impact and consequences of what has been done have yet to be taken.

The last section holds the conclusions.

1. *From social practices to legal institutions: what is there in a name*

1.1. *Solidaristic practices: Mutual aid in action*

Solidarity is based on the capacity of human beings to "feel for others", to imagine being somebody else and to understand what the other is experiencing or is likely to experience. Leaving aside many possible nuances, Adam Smith characterised this as the moral sentiment of sympathy[22]. At the same time, solidarity also presupposes a capacity to act in concert with others to engage in reciprocal help. In brief, to establish strong bonds with others, or simply, to bond with others. This is what Piotr Kropotkin characterised as "mutual aid"[3].

Mutual aid propelled by sympathy results in solidaristic practices.

Such practices have two key defining traits, which allow us to distinguish it from other morally relevant but different practices:

- First, solidaristic practices involve sharing the skills and/or resources of the participants so that they are partially fully divested in a common fund (the "solidum") and thus put in common. Through the referred "solidum", individuals "mutually support each other, strong and weak alike, for the welfare of the community"[4].
- Second, the common means (the "solidum") is disposed of according to common action norms, ensuring the mutuality and reciprocity of the aid to benefit those in need of assistance, *operationalising* mutual aid. Such common action norms tend to reflect the positive morality of the group to which the individuals belong[5].

While the tendency to stand together through different forms of

[2] A. SMITH, *Theory of Moral Sentiments*, Oxford University Press, Oxford, 1976.

[3] P. KROPOTKIN, *Mutual Aid: A Factor of Evolution*, Freedom Press, London, 1987.

[4] *Ivi*, p. 22.

[5] We will see in the next section that institutionalisation crucially involves the juridification of such common action norms.

"solida" can be observed not only in human societies but also among animals (as indeed Kropotkin claimed in the context of a then famous polemics about the proper way of interpreting Darwin's *The Origin of the Species*)[6], the second trait of solidaristic practices is characteristically and exclusively human.

For reasons of space, I cannot consider in detail how this definition allows us clearly to distinguish between solidaristic practices and other types of practices. I take leave to limit myself to two brief remarks.

The first is that while solidaristic practices result in exchanges (reciprocity is at the heart of mutual aid), not all exchanges are solidaristic because many of them, even if they may benefit the two parties, are undertaken considering only the self-interest of the parties. This is characteristic of standard market exchanges. To paraphrase Smith, if we owe our daily bread to the baker's self-interest[7], it makes no sense to speak of solidarity. For an exchange to be solidaristic, the parties need to be moved by an idea of mutual support, not the realisation of self-interest. Hybrid motivations are, of course, possible. Concrete actors may have a complex set of motivations. They may enter specific transactions which society presupposes are undertaken for self-interested reasons for what is a complex set of reasons, which may include other-regarding reasons. Indeed, individuals may come to merge their motivations and develop what some characterise as forms of "enlightened self-interest". However, it would be simply wrong to present what remain essentially self-interested transactions as expressions of solidarity. The key point is that capitalistic market transactions are not *in themselves* expressions of solidarity (independently of the intentions or wishes of specific actors) but are rather parasitic on non-market, solidaristic institutions. This brings me to a second and related consideration, namely, that the very possibility of creating and reproducing capitalistic markets relies on the existence of other non-capitalist institutions, which crucially include solidaristic communities of insurance against risk. In that regard, it is simply wrong to assume, as many tend to assume (not least on what concerns the process of European integration), that first we have capitalistic markets, and then we have, as a sort of luxury good, institutions ensuring redistributive

[6] See P. KROPOTKIN, *Mutual Aid*, cit. See also R. KINNA, *Kropotkin's Theory of Mutual Aid in Historical Context*, in *International Review of Social History*, 2/1995, pp. 259-283.

[7] See A. SMITH, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Oxford University Press, Oxford, 1976, vol. I, pp. 26-27 (corresponding to I.ii.2 in the standard reference system to quote from Smith's works).

justice. In that sense, ordoliberal theories are far more plausible: the capitalistic market is only possible within a given non-market *ordo*, which comes logically and normatively *first*[8]. To that ordo, one is tempted to claim, belong the key solidaristic institutions that make societies possible and which come, in logical and normative terms, *before capitalistic markets*. Or, to put it differently and briefly, the *hidden hand* of the capitalist market (self- interest) presupposes the *hidden hand* of the social order (sympathy, to stick to Adam Smith's terminology).

The second remark is that while charitable practices and actions are not typically self- interested, they do not presuppose either a "solidum" or norms binding the way in which the one who gives and the one who receives should behave. If subject to moral norms, those norms do not focus on the bond between the two parties but on their respective positions (levels of wealth and deprivation).

One may tend to assume an abundance of solidaristic practices in pre-modern societies before the emergence of the modern conception of the individual and markets propelled by individual self-interest. However, and quite evidently, solidarity plays a fundamental role in modern societies. The full recognition of the individual's dignity depends on the simultaneous affirmation of different kinds of solidaristic bonds. This renders it impossible to think of solidarity outside of an institutional context. This is what is considered in the next subsection.

1.2. *Institutionalisation: from solidaristic practices to the Democratic and Social State*

When technological change gives rise to new risks and potential threats, which call for new common action norms regulating what should be put in common in the "solidum" and/or the terms of reciprocity, the need to fully institutionalise solidaristic practices becomes pressing. This is so because the normative knowledge needed to guide the action of those engaging in mutual solidaristic practices cannot be drawn from the pre-existing positive moral norms. This is so because such norms are produced

[8] W. RÖPKE, *The Guiding Principles of the Liberal Programme*, in H.F. WÜNSCHE (ed.), *Standard Texts on the Social Market Economy*, Fischer, Stuttgart, 1982, as quoted in W. BONEFELD, *Freedom and the Strong State: On German Ordoliberalism*, in *New Political Economy*, 5/2012, pp. 633-56, esp. p. 637.

through slow processes of emergence and consolidation. As a result, the "tempo" of the production of new positive moral norms is simply too slow. We should add a second shortcoming of positive morality when it comes to stabilising solidaristic practices, namely, the limited resources available to encourage compliance. When the solidaristic community becomes larger, and individuals come to stand in relation to each other as strangers, i.e. those with whom not all in the group engage in face-to-face interactions, group pressure becomes an insufficient means to foster compliance[9].

The histories of the key solidaristic institutions of our societies, from public libraries to systems of public provision of water, from national health systems to social security arrangements, are indeed the histories of how different solidaristic practices got through different degrees of institutionalisation until they became organised around state institutions through state law (but, as we will see below, with state institutions not exhausting the institutional set-up of solidarity[10]).

The institutionalisation of solidaristic practices has some obvious advantages.

First and foremostly, the transcendence of face-to-face communities has the potentiality of increasing the size and scope of the solidaristic community. Not only may this create better conditions for inclusion (in particular, for the realignment of inclusion criteria with normative requirements), but also potentially increases the size of the "solidum" and thus the very capacity to confront complex and serious challenges. The more people we are bonded with, the more diluted the risks that we are facing together, and the easier it is for the community of insurance to endure when confronting them. That is even truer in the case of social security and national health services, where the whole population of a political community participate[11].

Second, it fosters the move from implicit and tacit to explicit and openly decided solidarity- organising common action norms. Ass already

[9] These forces account in general for the institutionalisation of common action norms and the emergence of the specific institution of modern law. See N. D. MACCORMICK, *The Legal Framework: Institutional Normative Order*, now in ID., *Questioning Sovereignty*, Oxford University Press, Oxford, 1999, pp. 1-15. See also chapters 1 and 2 of ID., *Institutions of Law. An Essay in Legal Theory*, Oxford University Press, Oxford, 2007, pp. 11-20 and pp. 21-37.

[10] A. DE SWAAN, *In Care of the State: Health Care, Education, and Welfare in Europe and the USA in the Modern Era*, Oxford University Press, Oxford, 1988.

[11] C. BEC, *La Sécurité Sociale. Une institution de la démocratie*, Gallimard, Paris, 2014; N. TIMMINS, *The Five Giants. A Biography of the Welfare State*, William Collins, London, 2017.

anticipated, this may result in such norms being more systematically shaped by normative criteria. As a result, questions of distributive justice are no longer left to the mere evolution of positive moral norms but are actually *decided through procedures where a common will may be elaborated and settled upon*. That opens the possibility of making normative reasons endorsed after reflection and deliberation to bear on the design of such common action norms.

From this perspective, the regulatory ideal of a Democratic and Social State, which emerged in the inter-war period and consolidated post-1945, can be regarded as one paradigmatic institutional concretisation of the value of solidarity. Let me anticipate here that a proper reconstruction of the law of the EU should place the Democratic and Social State, via the common constitutional traditions, right at the centre of the European legal space.

1.3. *The ambivalence of institutionalisation: in particular, of inverted solidarity*

The institutionalisation of solidaristic practices is not bereft of risks, including its institutionalisation through social states.

The larger the community of solidarity, the more there is a need to encourage compliance. As the pool of those insured grows, it is ever more important to ensure that all members, who in most cases are strangers to each other, do their part. This has tended to result in resorting to different forms of coercion, including the form of state coercion characteristic of modern law. The effectiveness of such a means comes, however, hand in hand with the potential of its subversion at the service not of guaranteeing the common good but at the imposition of exploitative patterns of distribution of burdens[12]. To state the obvious, law can be a form of democratic power, but also a means of exploitation. That is also true when it comes to solidarity.

As a result, the explicit positive character of common action norms (in the sense of positive, decided norms) does not by itself guarantee their legitimacy, which critically depends on the extent to which the will that

[12] Among other things, this is why coherent liberals claim that the any justification of the obligation to obey the law (understood as a coercive system) has to have consent at its core, something which presupposes the democratic formation of the law. See C.S. NINO, *Ética y Derechos Humanos*, Ariel, Barcelona, 1989, pp. 400-411.

poses the common norms can be regarded as a legitimately (i.e. democratically) formed common will. If that is not the case, the risk of an authoritarian declination of the legal norms organising the terms of contribution to the "solidum", and eventually the allocation from it, immediately materialises.

It can thus be said that state-mediated and legally organised solidarity is Janus-faced. If the state and the law are the institutions through which the common will is organised, new levels of solidarity can be achieved in terms of its breadth and depth. To put it differently, national health services or public libraries are in their better rendering paradigmatic examples of well- formed solidarity in action. But state power can be used to create legal institutions that turn upside down solidaristic relationships and create "solida" not as a way of standing together vis- à-vis risks or dangers but for the profit of the few. Or what is the same, the state and the law can become the instruments through which the happy few exploit the restless many *in the name of solidarity*. This is what I refer to as 'inverted' or 'exploitative' solidarity.

Consider the old legal institution of solidaristic responsibility. Its origin is found in the social practices of commercial traders, which formed societies in which they placed in common, totally, or partially, their wealth; practices which in their turn reflected the capacity to engage in forms of mutual insurance against looming dangers. Given the high risks involved in maritime commerce, traders created different forms of "solida", which instituted forms of mutual insurance against losses[13]. To paraphrase the title of a famous book by Peter Bernstein, it was a way of standing "against the gods", in particular against brute bad luck (in the form of storms or pirates)[14]. These practices were then legalised and gave birth to the legal institution of solidaristic responsibility (*obligatio in solidum*), which the lawmaker could then impose on different legal relationships[15]. How and with what effects this was done determined whether the law was acting as a facilitator of solidarity or turning solidarity into its head and manipulating its legal form at the service of exploitation.

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[13] See for example G. MIGNONE, *Le regole dei Mercanti: Introduzione al Diritto Mercantile*, Università degli Studi di Torino, Torino, 2022, pp. 37 and 53.

[14] P. BERNSTEIN, *Against the Gods. The Remarkable Story of Risk*, Wiley, New York, 1996. This practice constitutes an antecedent of modern insurance, which not only institutionalises such practices, but couples them with knowledge about probabilities.

[15] See for example G. AMORTH, *L'Obbligazione Solidale*, Giuffrè, Milano, 1959, pp. 7-10.

While in the case of commercial traders, the "solidum" was voluntarily created by the merchants, institutionalisation and legalisation meant that other debtors could see solidarity imposed upon them by the lawmaker as a way not of enabling them to do things they could not otherwise do (as was the case with the merchants), but as a way of protecting the interests of the creditors (who were the legislators themselves, or were in a position to shape the will of the legislators). Once invented, the legal technology of solidarity could be placed at the service of different goals and objectives. Institutionalised solidarity can indeed easily become exploitative.

1.4. *Other challenges of the institutionalisation of solidaristic practices, in particular, solidarity in federal polities*

The "inversion" of solidarity is not the only challenge involved in the institutionalisation of solidaristic practices. Two other challenges are especially significant.

First, the need for institutionalisation does not do away with the need for institutions to be rooted and supported by solidaristic practices and moral sentiments. This insight is related to some moral philosophers' objection to institutionalising solidarity per se. This is on the basis that solidarity is only a genuine moral sentiment and spur to action when action is spontaneously motivated, fully unrelated to the perspective of coercive imposition in case of non-compliance. It seems to me that the history of European states shows the extent to which the institutionalisation of solidarity can strengthen, not weaken, solidaristic sentiments and practices. Of course, the same political history abundantly illustrates the risks involved if we rely exclusively on state institutions as an expression of mutual aid propelled by sympathy.

Statism may hollow out the moral and social basis of support for solidaristic practices and institutions.

Second, it is to be decided the societal level at which institutionalisation of solidaristic practices should occur, or what is the same, what we may label the political geography of solidaristic institutions. This is where the process of economic integration plays a decisive role. The consolidation of the European Democratic and Social State in the postwar period was premised on the assumption that the nation-state was the level at which democracy and solidarity could be

realised[16]. However, Democratic and Social states also aspired to be open states. While it may be said that European integration did not lead, and has not led, to the creation of significant supranational communities of insurance since its launch, it has affected the shape of national communities of insurance. Not least, it has resulted in such communities being based on residence, not exclusively on nationality. Moreover, national communities of insurance keep on interlocking with other regional and local communities of insurance. This multiplicity of the institutional sites of solidarity results from the conflicting demands which must be reconciled into institutional design. On the other hand, and as I already pointed out, the bigger the community of insurance, the more diluted the risks, and the more resilient the community. On the other hand, the wider the community of insurance, the less likely that compliance can be fostered by propensities and sentiments other than the shadow of institutionalised coercion. The wider the community of insurance, the more likely there will be not only different renderings of positive morality, even if in view of different normative values, but also different historical trajectories, resulting in different ways of institutionalising solidaristic practices[17].

It is important to stress that, contrary to what is usually assumed, the co-existence of different levels at which communities of insurance need to be realised requires the maintenance of institutional and normative criteria to determine membership in the different communities, or what is the same, borders. The point of such borders should not be to practice forms of exclusionary distributive justice. Such borders are necessary to pre-empt the powerful and the better off avoiding their associated duties. In brief, legitimate borders are not typically those erected against the wretched of the earth but rather those which pre-empt tax evasion and financial crime.

[16] J. HABERMAS, *Citizenship and National Identity*, now in ID., *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, The Mit Press, Cambridge (Mass.), 1996, pp. 491-515, esp. pp. 498-500.

[17] This was indeed one of the major difficulties which leaders of workers movement faced when organising solidarity within the First International. N. DELALANDE, *La lutte et l'entraide: L'âge des solidarités ouvrières*, Seuil, Paris, 2019.

2. *The deep ambivalence of European integration from the standpoint of solidarity*

2.1. *The founding ambivalence of the European Communities*

For reasons of space, I cannot engage in depth with the complex postwar constitutional history of Western Europe, of which the process of European integration is a central part[18]. Suffice it to say that the European states aspired to be not only Democratic and Social but also open and cooperative. Such a commitment planted the constitutional basis of the process of European integration. The shape that the Western European economic and political order took was clearly determined by the international and military constraints at work in the period, not least American dominance, and hegemony[19]. But also by the different views regarding what was to be the point and purpose of creating European institutions.

Some actors aimed to establish a structure to complement and supplement the national Democratic and Social States. From that perspective, the European Communities would reconcile economic integration at the continental level (necessary to increase productivity levels and thus improve the conditions in which Europeans found themselves) with the consolidation of social states at home. This was, for example, the view which underpinned the action of the successive governments of the French Fourth Republic. To this was occasionally added the projection of solidarity to the continental level, either by means of redefining national communities of insurance in an inclusionary fashion or, eventually, by creating institutions organizing solidarity at the European scale.

Other actors, however, believed that supranational integration could and should allow the recreation of the liberal European economic order that had collapsed with the First World War (and had never been fully re-

[18] I refer to M. DANI e A.J. MENÉNDEZ, *È ancora possibile riconciliare costituzionalismo democratico-sociale e integrazione europea?*, in *DPCE Online*, 42, 2020, pp. 289-326.

[19] For example, it seems not exaggerated to claim that without the pressure exerted at critical moments by the US governments, the process would have taken a very different course. If it is fair to say that such US governments acted as "federators" of sorts, European leaders managed to implement American wishes in ways congenial to their political preferences, in the process increasing their margins of autonomy vis-á-vis the US. See A. MILWARD, *The Reconstruction of Western Europe, 1945-51*, Methuen, London, 1984.

established in the interwar period). This objective was sometimes based on the assumption that it was possible, even necessary, to combine interventionism at home with liberalism at the European and international levels (a view largely shared by British governments from the mid-40s to the 60s)[20]. Alternatively, it was said that the proper functioning of the national economies required a supranational liberal discipline, which could tame the choices made in postwar national democratic constitutions[21]. This was the view that ran through the bargaining position favoured by the German Chancellor of the Exchequer, which was shared by many of his ordoliberal collaborators (very fearful of French *dirigisme*). In both cases, the goal was to make the European Communities into a lever that would allow the European economy to be released from the "straitjackets" built in the interwar period (and quite obviously, during the Second World War) through a bold definition of transnational economic freedoms.

To summarise a long story in just a few lines, it should be said that the founding Treaties of the European Communities, and particularly the 1957 Treaty establishing the European Economic Community, can be said to be a compromise between these two competing visions. The result was an ambivalent legal text, the meaning and implications of which came to depend on the balance of forces at the national and at the supranational levels of government.

The balance changed with the passing of time. In the fifties, sixties and, to a considerable extent, the seventies, the "founding" ambivalence of the Communities was partially overcome in favour of building European institutions and norms in line with the requirements of the Democratic and Social state. Economic freedoms were not interpreted as harbingers of a socially unencumbered right to private property but rather as operationalisations of the principle of non-discrimination on the basis of nationality. In the spirit of postwar embedded liberalism, the common market fostered trade in goods while respecting national autonomy to choose a fiscal and monetary policy attuned to the specific needs of each

[20] The kind of approach that would be basically followed by the United Kingdom, resulting in their non- participation in the Communities and the favouring of looser European free trade agreements).

[21] Additionally, some saw in the process of European integration a unique chance to rectify in a liberal direction the constitutional commitments reflected in the constitutions drafted in the immediate postwar. See G. CARLI, *Cinquant'anni di vita italiana*, Laterza, Roma-Bari, 1993.

Member State by means of tight control of capital movements. On what concerns the latter, economic freedom was not about a radically free use of capital but the liberty to pay for cross-border non-financial transactions. In other terms, European individuals and companies were not left free to engage in transnational speculative operations. In this context, high and rapid economic growth favoured the recognition of the rights of foreign workers to be treated equally.

The radical shocks of the monetary crisis (from 1971) and the economic crises (1973 and 1979) rapidly altered the European social and economic context. Economies were simultaneously hit by stagnation and inflation (stagflation), leading to a fundamental transformation of the way in which monetary and fiscal policy were conducted. Neoliberal and ordoliberal visions started to merge into what may be called an ordo-liberal consensus, which left its imprint not only in European policies but also in the way in which Community law was interpreted and constructed. A process which may be referred to as of constitutional mutation started[22]. Next to the Community enabler of solidarity emerged, the profile of the Community as an external constraint of the national Democratic and Social States started to be developed. In particular, economic freedoms and the principle of undistorted competition slowly but steadily became the alpha and omega of public policy and the ultimate criterion by reference to which political and constitutional soundness was to be determined[23].

2.2. *The Maastricht decisive moment: the "constitutional" pre-emption of solidarity*

The creation of the European Monetary system in 1978 and the new understanding of economic freedoms favoured by the European Commission and the ECJ since 1979 marked the beginning of a radical transformation of the European Communities. While it is important to keep that in mind, it is hard to contest that the process of constitutional

[22] A.J. MENÉNDEZ, *A European in Constitutional Mutation*, in *European Law Journal*, 20, 2014, pp. 127-141.

[23] I refer to ID., *The "Terrible" Functional Constitution of the European Union: "Sound" Money, Economic Freedom(s) and "Free Competition"*, in M. GOLDONI and M. WILKINSON (eds.) *The Cambridge Handbook on the Material Constitution*, Cambridge University Press, Cambridge, 2023, pp. 351–366.

mutation was accelerated by the completion of the economic and monetary union in the late 1990s. In that regard, the Treaty of Maastricht was a decisive moment. Not only was the free movement of capital put on steroids, but the principle of radical fiscal independence of each Member State was made part of the Treaties (now Article 125 TFUE and indirectly 123 TFEU). This entailed a constitutional choice *against* solidarity across borders. Or what is the same, economic integration will deepen on the condition that no mechanisms of mutual insurance will be built to deal with the potential negative consequences of such deeper economic integration.

Key in that regard was erecting a wall of separation between national exchequers. Such a wall could only be lifted in the most extraordinary circumstances, as foreseen in what is now Article 122 TFUE. In its second paragraph, financial assistance is foreseen in case of "natural disasters"[24] or "exceptional occurrences beyond" the control of a Member State. In its first paragraph, it is rendered possible to take measures "appropriate to the economic situation, in particular, if severe difficulties arise in the supply of certain products, notably in the area of energy", measures which are to be taken "in a spirit of solidarity between the Member States"[25].

These very limited exceptions did not include the provision of financial assistance in the case of a fiscal crisis, as had been foreseen in the case of the balance of payments crisis (and remains part of the Treaties on what concerns Member States which are not part of the Eurozone). All this implied opting for increasing the risks bore in common while renouncing at the same time to build institutions through which common insurance could be obtained to face them. Such a decision was closely related to the splendid isolation of the European Central Bank, formally prevented from discharging a standard function of all central banks, namely, acting as buyer of last resort of the debt issued by public authorities (now Article 123 TFUE). The design of the European Union was based on pretending that the euro was the first currency without the backing of the state, merely supported by the self-interest of the actors in financial markets. It was an article of faith that such design will, by itself, prevent any crisis whatsoever.

The design of EMU propelled a radical neoliberal turn of European

[24] See Council Regulation (EC) No 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund, *OJ L 311, 14.11.2002, 3–8.*

[25] This was later operationalised through Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, OJ L 70, 16.3.2016, 1–6.

institutions. Still, the complexity of the European constitutional field and of EU law itself implied the jury was still out on what concerned the direction in which the EU would be moving. Not only did national constitutions, institutions and policies remain obstacles to a neoliberal triumph, but the same could be said of the previous layers of European law and policy, grown on a very different normative soil. If Maastricht confirmed the neoliberal direction of the European constitutional mutation, the full implications of such a turn would only be confirmed by the way in which European institutions governed the fiscal crisis of the '10s.

2.3. *The fiscal crises: breaching the Treaties, doubling down on the radical separation of national exchequers, and pushing solidaristic institutions to the breaking point*

Many contemporary observers predicted in the mid-1990s that EMU was bound to fail and collapse[26]. Not only did the Eurozone not meet the criteria for being regarded as an "optimal currency area" (OCA)[27], but its design ruled out putting in common the resources needed to stabilize it. This was the argument underpinning calls for fiscal (and banking) union alongside monetary union[28].

The critics were proven right, but not immediately so. The day of the reckoning was postponed for ten years by massive cross-border capital flows from the Northern "core" of the Eurozone to its "Southern" periphery. The latter seemed to converge with the former when, as a matter of fact, not only was the levelling up fake, but an explosive mountain of economic risks was being built. Precisely because EMU had been designed on the premise that risks would not be shared, it was unclear how and who would have to deal with the consequences of the mass of risks eventually materializing into losses.

In 2007, signals started to emerge of a coming financial crisis. It

[26] Critics of the euro came in from different social, economic and normative perspectives. Quite well know was the letter written by 62 German economists, and published in the *Frankfurter Allgemeine Zeitung* and in *Die Zeit* on 11 June 1992. Their view leaned towards ordoliberalism.

[27] *In extenso*, see A. BAGNAI, *Il tramonto dell'euro*, Imprimatur, Reggio Emilia, 2012.

[28] See for example D. MCKAY, *Federalism and European Union: A Political Economy Perspective*, Oxford University Press, Oxford, 1999, esp. p. 173.

exploded spectacularly in 2008 and morphed into a European fiscal crisis in 2009. Confronted with the need to both finance a double-digit deficit and roll over the considerable stock of Hellenic debt, the Greek state found itself close to fiscal asphyxia. Against the expectation built up by financial markets in the first decade of EMU, the Eurozone played by the book and stuck to the principle that it was the exclusive responsibility of the Greek government to deal with its fiscal problems. So- called "austerity measures" (draconian cuts in public spending affecting the core of the Greek welfare state) were implemented one after the other. However, the problem was compounded in the process, given their deflationary impact. Every dose of "austerity" only served to make Greek troubles bigger[29]. Moreover, the diagnosis leading to "austerity" policies neglected that what was at stake was not only the solvency of the Greek state, but also, and indeed foremostly, the solvency of Greek private debtors, something which necessarily concerned (and involved) the creditors of such debtors, who happened to be, in no small degree, the financial institutions of the Eurozone core. Finally, what started as the fiscal crisis of one state soon became a general fiscal crisis of the Eurozone periphery, compounded by an acute economic crisis, in turn aggravating the fiscal crisis and threatening to put an end to the monetary union.

As is well known, the solution that was finally taken to deal with the Greek fiscal crisis, later extended to other periphery states, was to require the Greek state to *Hellenise* the economic risks involved in cross-border flows, or what is the same, to *transfer* to the Hellenic Exchequer the losses stemming from cross-border debts, while at the very same time providing financial assistance to the Greek state, in the form of highly conditional loans. Austerity Europe, with its peculiar system of sources of law in economic agreements and memoranda of understanding, slowly came to be affirmed.

From the standpoint of solidarity among states, we can observe that the basic principles at the heart of EMU were both respected and breached. On what concerns the breach, the provision of financial assistance was hard to reconcile with article 125.1 TFUE. This gave way to all kinds of legal gimmicks, including pretending that the aid was being

[29] As acknowledged by the chief economist of the IMF, Olivier Blanchard in Olivier Blanchard and Daniel Leigh, *Growth Forecast Errors and Fiscal Multipliers*, Working Paper 13/1 IMF, available at https://www.imf.org/external/pubs/ft/wp/2013/wp1301.pdf; and IID., *Learning about Fiscal Multipliers from Growth Forecast Errors*, in *IMF Economic Review*, 62, 2014, pp. 179-212

granted in a bilateral but coordinated way, the creation of ad hoc instruments to provide it, both within and outside EU law, and finally, the amendment of Article 136 TFUE to sanction the creation of what was formally a new international institution, the European Stability Mechanism, for the specific purpose of providing financial assistance to Member States when the stability of the Eurozone as a whole was at stake. It is hard not to conclude that the Treaties were complied in the breach. At the same time, however, the government of the crisis was characterized by the reinforcement of the principle of radical separation between the national exchequers. Quite decisively, the losses resulting from the mountain of cross-border loans were nationalized and imposed upon the "debtor" countries while liberating creditors from any form of responsibility. The distributive impact of such a course of action was not to realise "solidarity", as constantly claimed by European institutions, but rather "inverted solidarity", making the citizens of "assisted" states pay the full costs of financial recklessness during a decade. In the short run, the Eurozone core financial institutions benefitted immensely as they were offered (again) a passport to escape their own mistakes. As a result, incumbent governments avoided having to rescue their own banks, which was always politically costly.

3. *A solidaristic infection? The Euro-corona syndemic or the existential crisis redux*

3.1. *The covid-19 syndemic: The policy response*

As is well-known, lockdowns were judged by most (but not all) governments as unavoidable for the purpose of saving massive numbers of human lives as covid-19 started to spread. This posed many daunting tasks, particularly so in the case of the Eurozone. In the following, I focus exclusively on the fiscal and monetary challenges. "Freezing the economy" could only be socially accepted if states deployed massive economic resources to protect the socio-economic structure, which required massive public spending well over the limits set by EU fiscal rules and by the capacity of Member States to borrow in financial markets. How the crisis was tackled had massive implications for the way in which the EU was conceived and the relationship it stood with solidaristic practices and institutions. The EU was ill-equipped, lacking a general

framework reconciling democratic political action with expedited decision-making in situations of emergency. As was the case from 2010, the Union was confronted with a crisis not only lacking many of the legal tools required to govern it but also being constrained by Treaty provisions which rendered extremely difficult effective decision-making. As was pointed out in section 2, EMU was so built that the EU lacked a federal fiscal capacity. Moreover, the government of the fiscal crisis had led to the strengthening of the wall of separation between national exchequers, with financial assistance implementing a form of "inverted" solidarity.

Under such circumstances, the government of the crisis can be reconstructed in four steps. First, fiscal rules were suspended (section 3.1.1). Then, the limits on the use of public expenditure to intervene in private companies was set aside de facto, if not fully de jure (section 3.1.2). At the same time, the ECB acquired massive amounts of the debt issued by Eurozone states through the expansion of its "ordinary" QE programme and the launching of a specific pandemic QE (section 3.1.3). These three measures allowed each Member State to spend as much as it deemed necessary to sustain the economy through the covid-19 syndemic. But because the position of the Member States was very different, reflecting historical trajectories and patterns, but also the effects of austerity policies, there was a serious risk not only that some states would only reluctantly spend but also that the different extent of state intervention would result in the consolidation of massive differences in the economic conditions faced by economic actors across the single market. This led to the design and implementation of the EU Next Generation programme (section 3.1.4). This was preceded by a series of false steps in which the EU tried to retool pre-existing institutions and programmes, some created during the fiscal crisis, with very limited success.

3.1.1. *Suspending Fiscal Rules*

The fiscal rules making up the Stability and Growth Pact, which constrain fiscal policy within certain boundaries, were officially "suspended" through the activation of the so-called "general escape clause" of the said Pact[30]. This entails that there were no limits, for the time

[30] Commision's proposal: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0123; Council's statement in lieu of decision:

being, to the accumulation of deficits and, consequently, to the size of public debt (the latter bound to grow automatically in relative terms due to the serious contraction of economic activity).

As we will consider later, it was left undecided for how long the rules were suspended, given that it was basically unforeseeable how long the corona emergency would last. At the time of writing (end of 2023), it is expected that the rules will be reapplied in full from January 1st, 2024. However, that may be conditional on states agreeing on a reform of the Stability and Growth Pact by the end of 2023. The Commission's recommendations within the European semester have been premised on fiscal rules being again in full force from the beginning of 2024[31].

3.1.2. *De facto suspending state aid rules*

Simultaneously, the limits placed on the capacity of governments to shape the institutional structure of the economy through the injection of resources into economic undertakings were put on hold, de facto licencing all forms of state aid.

A framework decision was taken on March 13th[32], followed by two amendments on April 3rd and May 8th[33]. The result was that states could ensure that corporations had ample liquidity, not only through the subsidisation of wages, cheap loans, financial guarantees, or tax cuts (direct or indirect through deferrals) but also through temporary nationalisations (ie of nationalisations not intended to transform the property of the means of production, but as a means of transforming the

https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/.

[31] See for example the assessment of draft budgetary plans, at https://economy-finance.ec.europa.eu/economic- and-fiscal-governance/stability-and-growth-pact/annual-draft-budgetary-plans-dbps-euro-area-countries/draft- budgetary-plans-2023_en.

[32] Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 19 March 2020, available at https://eur-lex.europa.eu/legal- content/EN/TXT/PDF/?uri=CELEX:52020XC0320(03)&from=EN.

[33] Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 8 April 2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0404(01)&from=EN; Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 8 May 2020, available at https://ec.europa.eu/competition/state_aid/what_is_new/sacovid19_2nd_amendment_temporary_framework_en.pdf.

state in the caretaker of private property while the conditions for profitability were not met). In addition, states coulduse other exemptions ("damage caused by natural disaster or exceptional occurrences") to support the worst-hit sectors of the economy[34].

The result was a steep increase in the levels of state aid granted in by the EU. The Commission estimates the aid granted in 2020 at 384,33 bn euro; in 2021, it remained rather high, at 335bn euro (in 2019, a year in which state aid was already on the increase, the estimated aid granted was estimated by the Commission at 134,6 bn euro)[35].

In theory, the combined effect of the suspension of fiscal rules and the licencing of all kinds of state aid set the stage for a massive public intervention which could "freeze", as it were, the economy, sheltering workers but also companies from the massive shock resulting from the lockdown of social activity needed to slow down the spread of the virus, without having to be worried about the limits that EU law normally imposed, via fiscal and competition rules, on such policies. States were left free (for the time being) to spend massively.

However, there was a serious risk that unleashing the "firepower" of public treasuries through the temporary freezing of state aid and fiscal rules led not to a homogeneous freezing of the economy and a coordinated reactivation but rather to the radicalisation of the divergence between states. As reiterated during the fiscal crisis in the *Pringle*, *Gauweiler*, and *Weiss* judgments by the European Court of Justice, it was a core element of the European fiscal "constitution" that public expenditure should only be covered through taxes or via the issuance of public debt on "markets" according to "market conditions". Given the different state of their public finances, different states had different capacities to borrow money on financial markets. And if the crisis was long enough, they all faced the risk of markets freezing and credit not being available. In the short run, there was a risk of an "asymmetric" reconstruction, which would give the lie to the (rather mythical) characterisation of the single market as a level playing field[36]. In the long run, all states faced a fiscal meltdown. There

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[34] L. HORNKOHL, J. VAN'T KLOOSTER, *With Exclusive Competence Comes Great Responsibility*, in *Verfassungsblog*, 29 April 2020, https://verfassungsblog.de/with-exclusive-competence-comes-great-responsibility/.

[35] See https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5369 and https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2407.

[36] A. WEBER, V. DENDRINOU, *Euro Area Under Threat From Uneven Virus Shock, EU Warns*, in *Bloomberg*, 6 May 2020, https://www.bloomberg.com/news/articles/2020-05-06/euro-area-survival-put-at-risk-from-uneven-virus-shock-eu-warns

was a limit to what could be collected through taxes without accelerating the economy's downward spiral.

These two factors rendered critical the intervention of the ECB through a massive expansion of its "non-conventional" policy par excellence, i.e. quantitative easing (QE).

3.1.3. *Expanding the acquisition of public bonds and launching a specific pandemic QE: The ECB as the unconditional lender of last resort to Member States*

The suspension of the fiscal and state aid rules was immediately followed by the stepping up and redefinition of the programme of quantitative easing of the ECB. In addition, the ECB launched a dedicated Pandemic Emergency Purchase Programme. The result was the massive monetisation of the public debt issued separately by all Member States of the Eurozone. Indeed, the ECB proceeded, for the first time explicitly and openly, to buy debt in proportions different from the capital key of the ECB itself, that is, in asymmetric proportions. Or what is the same, a higher proportion of Italian and Spanish debt was bought than German debt[37].

While the ECB claimed that it was aiming at ensuring "monetary stability" and the effectiveness of its monetary policy decisions (in line with what it claimed was the point and purpose of QE), the fact of the matter is that by stepping in, the ECB provided states with an alternative source of funding to taxes and financial markets (even if the public debt was still issued *as if* there was no central bank intervention). The ECB emerged even more so than before as *the* lender of last resort to both states (and financial institutions), and it did so *despite* the extent to which a key actor, the German Federal Constitutional Court, threw doubts on its authority in the very midst of the corona crisis[38].

At the height of the crisis, the ECB was buying around 70% of the debt issued by Eurozone states. As a result, by the end of 2021, the System of European Central Banks was holding public debt for a value close to

[37] True, the ECB had started asymmetric buying under its QE-1 programme well before this spring. But it had done so timidly, and only because it was forced to do so by "technical" reasons (among others, the limited supply of German debt on financial markets).

[38] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 -, paras. 1-237, https://www.bverfg.de/e/rs20200505_2bvr085915en.html, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

40% of the Eurozone GDP.

Undoubtedly, the dire state of financial institutions (German and French ones, above all) may have come a long way to prompt this new set of "unconventional" monetary policies. But it remains the case that such policies allowed national governments a breathing space. It seems there are good reasons to conclude that the "neo-ordo-liberal" rhetoric, as codified in the Treaties, was set aside (*for the time being*), prompted by powerful prudential considerations, not unrelated to the chronic weakness of the biggest European financial institutions.

3.1.4. *Common expenditure through jointly issued public debt?*

This was rightly perceived as a measure which not only was bound to be temporary but which, while allowing to overcome the different capacities of states to become indebted, would only further compose the problem in the long-term. By acting as an unconditional lender of last resort, the ECB created the conditions under which, in abstract terms, Spain and Italy could spend as much as Germany during the crisis. However, that would only result in even higher levels of indebtment in the long run. When the Eurozone would come back to "normal", the debt levels would be there, resulting in major constraints to the fiscal policy of the most indebted states. This created pressure to introduce elements of mutualisation of the debt issued during the syndemic.

As real as the political pressures were, the fact was that Article 125.1 remained part of the Treaty, and it forbade any form of mutualisation.

This is why the first decisions that were taken (and said to correspond to an envelope of more than 500 billion euros) were a reiteration of the means of financial assistance developed during the 2010s fiscal crisis (as is discussed in subsection a).

The situation was about to become even more complicated. As already pointed out, on May 5th 2020, the German Constitutional Court published a ruling in which it declared "ultra vires" the previous judgment of the European Court of Justice declaring quantitative easing compliant with European law while throwing very serious doubts on the conformity of the programme itself with German constitutional law[39]. Quite intriguingly, the German judges proceeded to require German institutions (and through them, the ECB) to produce a fresh set of reasons

[39] *Ibid.*

within a 3-month delay so as to prove that the design and implementation of the quantitative easing programme did not exceed what was required to avoiding deflation, without interfering excessively on the competence of Member States to shape fiscal policy. The conflict itself was overcome by means of a peculiar form of German "muddling through". In political terms, it could be concluded that the GFCC satisfied itself with raising the issue without drawing any immediate implications of the decisions (implicitly, it accepted the arguments put forward by the ECB and the Bundestag as good enough to prove the proportionality of the ECB QE programme).

For our present matters, it is important that the same reasons that the Karlsruhe court used to challenge the soundness of quantitative easing could apply in even more straightforwardly to the new pandemic programme, the PEPP. So, in a way, the German Federal Constitutional Court indicated the likelihood of a finding of unconstitutionality in the future. The judges touched a raw nerve. Massive buying by an institution lacking democratic accountability, which the ECJ came close to arguing was empowered to define the legal limits of its own powers (of what is and what is not monetary policy) created a democratic and legal black hole at the center of EMU.

The combination of the centrifugal effects of unequal levels of expenditure among Member States and the perspective of a declaration of German unconstitutionality spurred European leaders to agree on an unprecedented yet modest given the order of the task, common public expenditure programme, the EU Next Generation programme, as we will see below.

a) A *false step: Repurposing the instruments created during the fiscal crises of the 10s*

Before we deal at some length with the EU Next Generation programme, it is necessary to say that the Commission proposed using pre-existing tools and mechanisms to contain the covid- 19 crisis. In particular, it was proposed that the European Investment Bank will extend new credit, the European Stability Mechanism will extend credit with "no conditionality" and, at the same time, a new credit mechanism, known by the acronym of SURE, and which replicated the format of the ESM without its conditionality, will extend loans to fund schemes aimed at protecting employment through the crisis. The Commission claimed that this would

allow to mobilise 540 billion euros. Institutional optimism was misplaced. The EIB was bound to be slow and fail to meet the credit target, and the stigma associated with the ESM led to no country applying for its funding. It is only possible to speak of (relative) success when it comes to SURE. Even in that case, what was being proposed was the facilitation of national indebtment. But states piling even more national debt would not do anything to rebalance the fiscal capacity of the states. A different policy trajectory had to be followed.

b) EU *Next Generation*

As was pointed out in the introduction to this section, some form of partial mutualization or the costs of containing and overcoming covid-19 was much demanded by the countries which were, once and at the same time, more indebted at the beginning of the syndemic and more badly hit by the fallout from corona (both circumstances were met in the cases of Italy and Spain)[40]. The Commission was supportive of that initiative and started working on a dedicated new European fund[41]. This led on May 18th, 2020, to France and Germany announcing a political agreement to create some form of European Recovery Fund (a *solidum* to pay for the costs of the crisis)[42]. The Commission rendered explicit its proposals on May 27th[43]

[40] *Spanish PM calls on European Union for a Marshall Plan and "coronabonds"*, in *El País*, 23 March 2020, (https://english.elpais.com/politics/2020-03-23/spanish-pm-calls-on-european-union-for-a-marshall-plan-and-coronabonds.html); *Spain calls for Marshall plan, European debt mutualisation*, in *Reuters*, 5 April 2020, (https://www.reuters.com/article/health-coronavirus-spain-primeminister-idUSL8N2BT0NM/); L. DE CAROLIS, *Conte, un piano Marshall per scacciare i fantasmi*, in *Il Fatto Quotidiano*, 3 June 2020, (https://www.ilfattoquotidiano.it/in-edicola/articoli/2020/06/03/conte-un-piano-marshall-per-scacciare-i-fantasmi/5822554/amp/).

[41] J. STRUPCEZEWSKI, *What we know of EU Commission's post-coronavirus economic recovery plan*, in *Reuters*, 24 April 2020, available at: https://www.reuters.com/article/us-health-coronavirus-eu-recovery-explai/explainer-what-we-know-of-eu-commissions-post-coronavirus-economic-recovery-plan-idUSKCN22627F/.

[42] See *A French-German Initiative for the European Recovery from the Coronavirus Crisis*, 18 May 2020, (https://www.elysee.fr/en/emmanuel-macron/2020/05/18/french-german-initiative-for-the-european-recovery-from-the-coronavirus-crisis); A. CARBAJOSA and S. AYUSO, *Merkel y Macron anuncian un plan de ayudas de 500.000 millones para la reconstrucción de Europa*, in *El País*, 18 May 2020 (https://elpais.com/internacional/2020-05-18/merkel-y-macron-presentaran-una-iniciativa-conjunta-para-la-reconstruccion-de-la-ue.html?outputType=amp).

[43] Europe's moment: Repair and Prepare for the Next Generation, COM/2020/456 final,

and the European Council held from July 17th to 21st approved the main lines of the plan,[44] which were then codified into European law, mainly through Regulation 2021/241, establishing the Resilience and Recovery Facility[45].

The structure of the programme is marked by five of its features:

First, the fund will be part of the EU budget, which would be increased by 750bn, an amount which will be disbursed in the first three years (2021-2023) of the European fiscal cycle.

Second, the resources necessary to make the fund a reality will be raised in the financial markets. Or what is the same, the funding comes from the issuance of *supranational debt*. While this is not new, what is unprecedented is the level of common borrowing. This has prompted reference to the "Hamiltonian moment" of the EU[46].

Third, contrary to what Italy and Spain required, the whole amount was split in two main forms: aids (390 bn) and loans (360 bn). The latter amount will be spent if and only states make use of the possibility of receiving the loans.

Fourth, the granting of loans and the assignment of grants is subject not only to the forms of conditionality characteristic of economic governance (strengthened through Article 10 of Regulation 2021/241), but to four new forms of conditionality. Namely:

a) what may be labelled as "preconditionality", or the fact that national recovery plans were not only made in a template decided the European Commission (through the issuance of guidelines) but were drafted under the "non mandatory" supervision of the European Commission through a dedicated task force (named as RECOVER);

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available at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1590732521013&uri=COM%3A2020%3A456%3AFIN.

[44] Conclusions of the European Council 17-21 June 2020, available at https://www.consilium.europa.eu/en/press/press-releases/2020/07/21/european-council-conclusions-17-21-july- 2020/.

[45] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, *OJ L 57, 18.2.2021, 17–75.*

[46] Scholz introduced the turn of phrase into the debate. See *Solidarität in Europa und in Deutschland*, in *Die Zeit*, 19 May 2020, available at: https://www.zeit.de/2020/22/olaf-scholz-europaeische-union-reform-vereinigte-staaten. Expressing opposition in line with his previous positions, see O. ISSING, *The Covid-19 crisis: A Hamiltonian moment for the European Union?*, in *International Finance*, 2/2020, pp. 340-347. A critical comparative historical analysis in G. CHRISTAKIS, *Europe's "Hamiltonian moment"? On the political uses and explanatory usefulness of a recurrent historical comparison*, in *Economy and Society*, 1/2021, pp. 138-159.

b) goal conditionality: the objectives of the public expenditure rendered possible by the European Recovery Fund are determined by European law; the overarching goals are defined in Article 4 of Regulation 2021/241, while six specific objectives (ecological transition, digitalization, intelligent, sustainable and integrative growth and social and territorial cohesion, health and economic resilience, Next-Generation policies) are enshrined in Article 3 of the same Regulation;

to this, we have to add c) what we could name as "macroconditionality": periodic payments are subject to the control not so much of the actual way in which the money is spent but to compliance with the recommendations issued by the European Commission to each state under the European Semester, ex the fundamental Article 17.3 of Regulation 2021/241;

d) the rule of law conditionality, as enshrined in Regulation 2020/2092[47].

Fifth, the decision regarding how the amount spent in grants will be repaid and with what funds were not taken. The only actual decision was the introduction of a tax on non-recycled plastic residues, at a rate of 80 cents per kilo, which entered into force in 2021[48].

3.2. *A more solidaristic EU? Between the inklings of a federal solidum and austerity business as usual*

As was pointed out when reconstructing the government of the corona-crisis, EU Next- Generation has been trumped as leading not only to a "Hamiltonian moment", through which the EU would have become more of a federal state but also as a moment of "solidaristic infection". In this final subsection, I consider three reasons to pass a more sober and reserved judgment.

Firstly, the deeply asymmetric and dysfunctional design of the Eurozone, aggravated by the structural reforms undertaken in the wake of

[47] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ L 433I, 22.12.2020, 1–10.*

[48] Council Regulation (EU, Euratom) 2021/770 of 30 April 2021 on the calculation of the own resource based on plastic packaging waste that is not recycled, on the methods and procedure for making available that own resource, on the measures to meet cash requirements, and on certain aspects of the own resource based on gross national income, *OJ L 165, 11.5.2021, 15–24.*

the fiscal crisis of the 10s, left Europeans with no real possibility of organising a genuine collective response to the covid-19 crisis for months. As was described in the previous subsection, the initial response consisted of unleashing the capacity of Member States to get indebted and spend. While supranational interventions on the side of the Council of Ministers, the Commission and the ECB were necessary, the real spending was undertaken by the Member States, facilitated by the acquisition of their debt (in secondary markets) by national central banks. It is important to keep in mind that it was Bankitalia, Banque du France or the Bundesbank, and not the ECB, that bought the massive majority of the respective national bonds. Far from being solidaristic in any sense, such measures assumed that each state would contain and overcome the crisis by acting *independently* and that each would bear entirely the costs of the policies it will implement, even if they would have massive cross-border effects[49]. It is important to keep in mind not only that it took months for a collective response in the form of the EU Next-Generation to be organised but also that the size of the collective intervention was dwarfed by the amounts spent by national Treasuries acting alone.

Second, it could be argued that a community of insurance has resulted from the "non- conventional" policies of the System of European Central Banks (SECB). Not only were some of the purchases undertaken directly by the ECB (from supranational institutions such as the EIB) but the strict correspondence between acquisitions and the capital key of the ECB was set aside for the time being. In that regard, it could be argued that the timing and the content of the ruling of German Federal Constitutional Court of May 5th reveal that something *innovative* was being done, which would have played a role in prompting a very clear-cut response on the side of the German constitutional judges, which between the lines would

[49] By the same token, the loans from the European Investment Bank and from the SURE fund (no country made use of the credit lines from the ESM) had a very limited solidaristic character. Common debt was issued, but subject to full repayment on a separate basis by the Member States. Given the mechanics of credit granting, the extent to which interest rates were concessionary was very limited. What was put in common, and only to a limited extent, was the goodwill vis-á-vis the financial markets, resulting in lower interest rates that those demanded to some states when borrowing without the intermediation of these institutional arrangements. However, the *obligatio in solidum* would only emerge in the hypothetical case that these loans were not repaid, something which is unlikely not so much because of the specific terms enshrined in these loans, but because of the overall *disciplinary* character of European financial arrangements.

have, with their decisions, aimed at pre-empting the transcendence of the limits foreseen in Article 125.1 (even if the pandemic decisions were not the object of their ruling, at least not explicitly so).

However, it is important to add four caveats. The first is a reminder of what was said in the first item: most of the public debt which has been bought under QE and under PEPP has been acquired by *national* central banks. This constitutes a massive limit to the degree to which QE and PEPP have mutualised the costs of containing and overcoming the crises.

The second is that both QE and PEPP were de facto emergency decisions, undertaken in an undeclared state of emergency (as AG Cruz Villalón rightly pointed in his opinion in *Gauweiler*). It remains the intention of the ECB not only that the programmes would be discontinued (as has partially been the case already, although the proceedings of the debts coming to maturity are reinvested in newly issued public debt) but that the debt would be resold, replaced in the financial markets. Having said that, however, the fact of the matter is that, as was pointed, the SECB holds now debt for a value of approximately 40% of the Eurozone GDP, which renders hard to imagine how the SECB could replace that debt in the markets without triggering the fiscal crises of most, if not all, Member States. This renders it possible to imagine more innovative solutions to deal with such stock of debt, including their transformation into perpetual debt, which could constitute a further occasion to create a European solidum. The third is that the distributive impact of both QE and PEPP has been hardly progressive. The PEPP and the acceleration of QE prompted the collapse of EZ economies. But in the process, capital holders benefitted much more intensively than workers. This was clearly reflected in the complete decoupling of the value of financial assets from macroeconomic performance. Massive public debts prevented layoffs en masse, but at the price of feeding the financial bubble even further. Or what is the same, the enlargement of the (partial) European solidum benefitted first and foremost the better off.

Fourth, the EU Next Generation is a complex and, in many ways, yet-to-be-completed arrangement. The same conclusions put forward in the previous subsection regarding the EIB loans and the SURE loans apply to the extent that it is made of loans. There is little solidaristic in the provision of financial assistance when the creditor stands to benefit as much, if not more, than the debtor and when the power imbalance between creditor and debtor is preserved. It is only regarding the grants part of the European Recovery Fund that it makes sense to speak of solidarity. There

is no doubt that the approval of EU Next-Generation entails that the EU, acting as a collective, issues common debt at unprecedented levels and then makes use of the funds thus collected to distribute grants and loans to each and every Member State in proportion to the degree to which their economies were affected by the syndemic. Thus, a common solidum is created, and we find legal norms allocating the resources raised on the basis of principles which claim to correspond to the requirements of mutuality and reciprocity.

And still, further four caveats are due:

First, it is important to keep in mind that the actual macroeconomic size of the programme is smaller than what its advocates suggest, not least when comparing the programme with the series of decisions which led to the forging of a common federal treasury in the US. Consider the following three sets of considerations:

a) The real size of EU Next-Generation is smaller than the one constantly advertised by European institutions. I will not consider the tendency of the European Commission to quote a constantly bigger figure without explaining that the new amount results from adjusting the original figure to inflation. More relevant is the fact that the original figure of 750bn is only indicative of the maximum amount of the programme, which will only be reached if all Member States would borrow the maximum quota of loans allocated to them. Suffice it to say that in the case of the countries which financial markets perceive as representing a lesser risk, such as Germany or the Netherlands, it is cheaper to issue debt than to borrow money from the common fund. France does not have much of an incentive to borrow, if only because the meagre eventual financial benefits would not compensate for the loss of face (leading to eventual higher interest rates in the future). So, in 2021 prices, we are talking about 325,9 bn of grants and 166 bn of loans, that is, slightly under 500 bn.

b) European institutions fail to emphasise that the amount of funds will be spent not in one single year but basically over a five-year period. This entails that the actual macroeconomic impact is much smaller than what may seem at first sight, or what is the same, a trifle more than 4% of the EU GDP, spread over five years, or what is the same, and an average of 0,8% GDP per year, if (a big if) all grants and requested loans would lead to actual expenditure and investment. This is much below the level of expenditure that the European Commission itself calculated was necessary

to serve the most modest objective of the programme, namely, to compensate for the impact of the massive but unequal state aid granted by states from March 2020.

c) Additionally, it should be noted that the increase in real expenditure of 390bn comes hand in hand with reducing the "ordinary budget" of the EU, of the order of 100bn for the seven-year fiscal cycle. The result is that the new financial perspectives will have an expansionary effect in the first three years (2021- 2023) but will have a deflationary impact from year four (in particular, the cuts to the EU budget will have a major impact on the expenditure associated to the common agricultural policy and research and development). Second, raising funds through loans contributes, and not insignificantly, to the financialisation of the European economy. It could be argued that under the conditions prevailing in 2020 and 2021, there was not much of an alternative to funding most of the common expenditure but through the issuance of new public debt. Still, part of the costs could have been met through taxes collected on excessive profits, as famously John Maynard Keynes proposed when considering ways of paying for the Second World War[50]. As this was not done (despite Article 310.1, third paragraph), it is hard to avoid the conclusion that the programme contributes even further to the growth of financial assets, and, consequently, to the process of financialisation of the economy, even if at a smaller scale than the "standard" and the "pandemic" programmes of QE.

Third, the limits to the capacity of the EU to steer expenditure and of the Member States to channel the funds into public investment, both a consequence of the way in which European integration curtails public power, rendered from the very beginning very probable that most of the money would be applied to the subsidisation of private investment projects. As was pointed in the previous subsection, all money is transferred from the Union to national exchequers, with no money being spent from the centre. States are subject to a layer of conditionality requirements, as described in the previous subsection, which are more oriented to reinforce the capacity of the Commission to influence the overall design of national fiscal and social policies than to determine the way in which the funds are spent. Additionally, the radical downsizing of the public sector since the 1970s, compounded by the reduction of administrative capacities, accelerated by austerity policies, rendered it extremely difficult for Member States and their regions to actually make

[50] J. M. KEYNES, *How To Pay for the War*, MacMillan, London, 1940.

direct and effective use of the funds within the tight deadlines imposed upon them. As a result, a high percentage of the money is unlikely to end up being channelled to the creation and improvement of existing collective goods through public investment but rather would fund the public subsidization of private investment. Or what is the same, the programme will likely turn out to be a means to socialise risks while privatising benefits, an old practice now described as "derisking", and which has become dominant in the profile of contemporary states[51]. That can hardly be described as a way to realise solidarity. Rather, it seems to be another form of "inverted" solidarity.

Fourth, it remains unsettled how the cost of the programme will be funded, or what is the same, how the debt incurred to pay the grants will be repaid when it will become due. This is essential in order to determine the actual economic and normative effect of EU Next-Generation, and more particularly, the extent to which it can be described as a solidaristic programme. While it was generally agreed that the EU would see it recognised the power to collect new taxes or participate in the collection of existing ones at a level which would cover the costs of returning the principal of the debt issued to fund the EU Next-Generation programme, so far only a tax on the consumption of plastic has been implemented. In December 2021, the Commission proposed three additional new taxes[52], namely, one based on revenues from emissions trading (expected to yield at least 7bn euros per year, going up to19bn from 2028), one drawing on the resources generated by the (proposed) EU carbon adjustment mechanism (with a yield of 1,5bn per year from 2018), and finally one corporate income tax part of the proposed new framework of corporate taxation of the OCDE/G20 agreement. By June 2023 the Commission proposed a fourth tax, a specific form of tax on corporate profits (expected to generate 16bn per year from 2024)[53].[53] As a result, we still do not know to what extent this leads to a shift from the logic of apportioning common expenses to Member States, as is now the rule. In other words, the decision to issue debt has been taken and acted upon while leaving open the question of what taxes would be levied to pay such debt. If no decision is taken, the EU Next Generation programme would be paid through the EU budget, or what is the same, most of the grants would be paid by the very Member

[51] D. GABOR, *The (European) derisking state*, in *Stato e Mercato*, 1/2023, pp. 53-84.
[52] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7025.
[53] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3328.

States receiving them. In this case, a small redistributive impact between states will be coupled with an uncertain redistributive impact between Europeans as individuals. If new taxes are collected, whether the EU Next Generation reinforces solidarity would depend on the distribution of the tax burden, on the very characteristic of those taxes.

Conclusions: Back to a solidaristic EU?

In this paper, I have done four main things.

First, I have provided a minimalistic definition of institutionalised solidarity, revolving around the putting in common of resources or capacities in a "solidum" and the governing of such solidum by common action norms (a key part of which are bound to be legal norms) organising mutuality and reciprocity in the use of the common resources.

Second, I have stressed the opportunities, but also the risks, associated with the institutionalisation of solidaristic practices. Institutionalisation facilitates the creation and preservation of bonds of solidarity in the face of rapid change while allowing the creation of communities of insurance among strangers. However, it may also create dangers, not least the placing of the legal technology of solidarity not at the service of mutuality and reciprocity but of the exploitation of the many by the powerful few. This is what I propose to characterise as "inverted solidarity".

Third, I reconstructed the creation and transformation of the European Communities, later the EU, from the standpoint of solidarity. I departed from the ambivalence of the founding Treaties, reflecting two different visions of the point and purpose of European integration as a facilitator of the solidaristic society at the core of the regulatory ideal of the Democratic and Social State, or its constraint, with a view to expand the room for self-interested action. I also indicated that economic integration, as defined in the 50s, 60s and 70s, facilitated the consolidation of national social states while contributing to redefining the breadth and scope of national communities of insurance, by means of substituting nationality by residence as the main criterion of access. However, by the late 1970s, the direction in which the European integration process moved in socio-economic terms changed, and a hybrid of neoliberal and ordoliberal ideas started to inspire a slow but decisive process of constitutional mutation. This led to European Community law becoming, once and at the same

time, a champion, and an enabler of solidarity and a battering ram with which to undermine national communities of insurance, unleashing property owners from their solidaristic obligations. A further and decisive turn was taken with the decision to create a monetary union divorced from any community of insurance but rather premised on the complete separation of national treasuries. The stability of the resulting asymmetric union was ensured for a while by massive cross-border loans, which created a de facto community of risks uncoupled from any community of insurance. This unavoidably led to a massive fiscal crisis in the 10s. There, the rhetoric of solidarity was put at the service of cloaking the imposition of the losses resulting from the mountain of cross-border loans to the "debtor" states, allowing to escape unscathed the reckless creditors. This is a paradigmatic instance of "inverted" solidarity in action.

Fourth, I reconstructed the government of the covid-19 crisis by the EU, showing its ambivalence. For one, the brunt of what the EU did was to unleash the power of individual Member States to spend by means of suspending fiscal rules, state aid rules, and allowing national central banks to implement massive programmes of acquisition of the national public debt. For two, the EU also created and implemented a programme of common expenditure funded by jointly issued debt in unprecedented amounts. This seems, at first sight, to correspond to a solidaristic response: a "solidum" was created and disposed of in the application of legal norms that aimed at ensuring mutuality and reciprocity. Still, not only the amount spent is modest in relation to what would be required, but almost half of it consists of loans, not grants. Structural constraints on state capacity, largely resulting from the neo-ordo- liberal turn of European policy, render it improbable that most of the money will be employed for public investment. A good deal of the money would be used to "de-risk" private investment in such a way as socialising risks but privatising benefits. Moreover, no decision has yet been taken on how grants will be repaid, as the Commission has only put forward proposals which are not obvious would either be turned into actual regulations or, even if that would be the case, would raise enough revenue to pay for EU Next-Generation.

A solidaristic turn in European integration requires much more than the issue of some hundreds of millions of common debt. It requires a genuine and radical change in the socio-economic structure of the EU. Part of the answer lies in the development of supranational "solida" to fund, for example, common unemployment insurance, as was already proposed

in 1975. But the core of the answer lies in ensuring that member states mutually support each other instead of competing with each other, not least for tax bases. As I have argued before, nothing would be more solidaristic than to jointly put an end to the existence of tax havens within the EU[54].

[54] A.J. MENÉNDEZ, *Neumark Vindicated: the Three Patterns of Europeanisation of National Tax Systems and the Future of the Social and Democratic Rechtsstaat,* in D. CHALMERS, M. JACHTENFUCHS and C. JOERGES (eds.), *The End of the Eurocrats' Dream: Adjusting to European Diversity*, Cambridge University Press, Cambridge, 2016, pp. 78–126.