UNIVERSITÀ COMMERCIALE "LUIGI BOCCONI"

PhD SCHOOL

PhD Program in Legal Studies
Cycle 34°
Disciplinary Field: IUS/10

The 'Janus Trap'

-

Governing Fiscal Policy Risk in the EU Fiscal Network

Advisor: Prof. Giacinto DELLA CANANEA

PhD Thesis by
Rocco STEFFENONI
ID number: 3081094

Year 2022

Abstract

This research investigates the use of public law in the area of EU and Italian fiscal policies as an instrument to organise institutional complexity, mitigate institutional risk, and promote institutional conducts encouraging risk-taking for greater public investments in a multilevel system. Two normative concepts are therefore developed to interpret and assess such scenario: 'EU Fiscal Network' and 'Fiscal Policy Risk'.

The 'EU Fiscal Network' provides a macro representation of the EU fiscal policy intertwined interactions and coordination mechanisms, via hard and soft law, occurring both in the 'European sub-system', pertaining to the EU institutions, and in the 'Domestic sub-system', pertaining to the domestic institutions of Eurozone Member States. For the scope of the present research, Italy was chosen among Member States.

The 'Fiscal Policy Risk' represents the institutional risk for a Member State's central government – that remains the 'final responsible entity' towards the Union – of not being able to comply with the fiscal obligations due to the subnational governments' financial misconducts. Further, risk constitutes an organising principle of the EU Fiscal Network.

In so doing, this research argues that, alongside with conventional and unconventional monetary and fiscal instruments, policy makers may consider public law within the policy mix for macroeconomic stability thanks to its risk mitigation and risk-taking capacity in relation to the unsolved institutional fragility of the Economic and Monetary Union (EMU) after the 1992 Maastricht Settlement. Indeed, the EMU still presents an asymmetric model, whereby a 'forward-looking' governance of centralised monetary policy at EU level coexists with a 'backward-looking' governance of decentralised fiscal policy at national level with soft coordination obligations towards the Union. As a metaphor, we have then named this asymmetric setup as the 'Janus Trap', as it recalls the ancient Roman myth having 'two faces' that was worshipped to presiding over transitions and changes.

In order to complement this set of arguments, this research provides a detailed overview of the development of the EU legal framework on fiscal policy ('European sub-system'), as well as the diverse set of measures that Italy has put in place, by means of public law, to ensure stability by enhancing fiscal coordination and governing the Fiscal Policy Risk arising from its intergovernmental fiscal relations ('Domestic sub-system'). On the latter, Italy appears to have embraced a trend of de facto greater institutional centralisation to address the Fiscal Policy Risk as to avoid the triggering of systemic events at subnational level affecting the domestic stability or even that of the EU Fiscal Network.

Finally, this research considers the 'promotional capacity' of public law to equally sustain an expansionary legal policy encouraging and enabling risk for countercyclical sustainable investments within the EU Fiscal Network – as exemplified by the 'Next Generation EU' programme, combining an innovative mix of capital injections, performance-based monitoring, and conditionality over domestic structural and policy reforms in line with the common EU strategic objectives. This innovative and temporary EU instrument is based on solidarity as it selectively addresses the Member States most affected by the COVID-19 economic recession while benefitting from the advantages of aggregate funding costs in providing support via additional sources of finance borrowed through an historical bond issuance by the Union on the markets.

Such policy device calls into question the ongoing debate over the suitability and effectivity of the current EU fiscal rules and economic governance of the Union that is likewise considered in this research with a strong preference for a constitutional shift beyond the 'Janus Trap': A centralised Fiscal Union overcoming the structural asymmetry of the EMU for a greater growth and stability.

The ECB is not the only game in town as national governments have stepped in[1].

(Vítor Constâncio, 2020)

The introduction of a plethora of economic governance measures has essentially led to the birth of a new area of law: the law of public finances, superimposing disciplines and normative standards in an area which until now government discretion reigned[2].

(Takis Tridimas, 2019)

There is no more obvious expression of power than the performance of a conductor. Every detail of his public behaviour throws light on the nature of power. […] Every player feels that the conductor sees him personally, and, still more, hears him. The voices of the instruments are opinions and convictions on which he keeps a close watch. He is omniscient, for, while the players have only their own parts in front of them, he has the whole score in his head, or on his desk. At any given moment he knows precisely what each player should be doing. His attention is everywhere at once, and it is to this that he owes a large part of his authority. He is inside the mind of every player. He knows not only what each should be doing, but also what he is doing. He is the living embodiment of law, both positive and negative. His hands decree and prohibit. His ears search out profanation.

Thus for the orchestra the conductor literally embodies the work they are playing, the simultaneity of the sounds as well as their sequence; and since, during the performance, nothing is supposed to exist except this work, for so long is the conductor the ruler of the world[3].

(Elias Canetti, 1960)

[…] constitutionalism is a system of systems. System effects can arise at the first level, the aggregation of individual properties into institutional outcomes; at the second level, the aggregation of institutional properties into an overall constitutional order; or at both levels, with complex interactions[4].

(Adrian Vermeule, 2011)

---

[1] Report of a telephone call between Vitor Constancio, former Vice President of the European Central Bank, and David Marsh, Chairman of the think tank 'Official Monetary and Financial Institutions Forum' (OMFIF), 3 April 2020.

[2] Takis Tridimas, 'Foreword' in George Gerapetritis, *New Economic Constitutionalism in Europe* (Hart Publishing 2019) vii–viii.

[3] Elias Canetti, *Crowds and Power* (Continuum 1962) 394-396, translated from *Masse und Macht* (Claassen Verlag 1960) 265-266.

[4] Adrian Vermeule, *The System of the Constitution* (OUP 2011) 27 (hereafter Vermeule, *The System of the Constitution*).

Acknowledgment

I am greatly indebted to professor Giacinto della Cananea, in his capacity of my academic supervisor at Bocconi University, for his qualified, experienced, and sympathetic support in guiding me through the overall PhD process. I am also grateful for the academic and mentoring support that I have received over the years particularly by professors Marcello Clarich, Philipp Paech, Carol Harlow, Erminio Ferrari, Georg Hermes, Sara Valaguzza, Miriam Allena, and Michele Trimarchi. I wish then to sincerely thank Bocconi University for its open academic environment and for the valuable support I was granted.

Table of Contents

Introduction

In approaching the topic of EU economic governance, and precisely that of the EU fiscal policy, we have faced an enormous number of materials ranging from legal, economic, and political science scholarships to the institutional policy works that cover almost the period from the Schuman Declaration in 1950 till our days. As we consider providing an innovative analysis of such framework, which has been performed on the adagio that 'Europe will not be made all at once, or according to a single plan'[5], we believe that such pathways of trials and errors should be analysed through a set of analytical tools: Network, complexity, and risk.

The main legal focus of our analysis on the governance of the Economic and Monetary Union (EMU), in both its European and national dimensions, has been then attributed to public law that stands at the cornerstone of the institutional design in the interest of the concerned polity. Further, to narrow the scope of the study on the domestic element of the EMU, we have specifically chosen Italy as an example of a Eurozone Member State.

As we proceed, we aim at investigating how public law may constitute, in a multilevel system like the EMU, an instrument to organise institutional complexity, mitigate institutional risk, and promote institutional conducts encouraging risk-taking for greater public investments, thus representing an additional toolkit for policy makers intending to maintain macroeconomic stability in an incomplete and asymmetric economic and monetary union.

To this end, in order to couple the analytical tools of network, complexity, and risk

[5] Robert Schuman, 'Declaration', 9 May 1950 (hereafter 'Schuman Declaration').

with the scope of public law in the area of the EU fiscal policies, we have developed two normative concepts: 'EU Fiscal Network' and 'Fiscal Policy Risk'. Yet, before delving into such ideas, it is worth setting the scene of the EU legal framework on economic governance.

The starting point of the current analysis is the asymmetric constitutional arrangement that came out from the 1992 Maastricht Settlement and that is commonly regarded as the original sin of the EMU. More precisely, the asymmetric economic governance of Maastricht consists of a centralised monetary policy and a decentralised economic policy with soft coordination obligations towards the Union.

In such a context, we are aware that this setup was at the time a regrettable necessity for political reasons, as we are equally aware that some earlier policy makers, like the rapporteurs of the MacDougall Report in 1977, firmly recommended that a fiscal union should have preceded the monetary union. The later burst in 2008 of the Great Recession at global level which turned out to trigger in 2010 a European Debt Crisis in the Eurozone has made this point very clear in the overall debate that is still thriving.

Yet, the Maastricht Treaty's compromise on economic governance is rather fragile since it combines the said two models of governance that are hard to reconcile: A centralised monetary policy at EU level and a decentralised fiscal policy at national level. Respectively, these two models appear as the combination of a 'forward-looking' approach towards the future of the EU that ideally could lead up to a 'Fiscal Union' in which fiscal policy would be equally governed at EU level, and a 'backward-looking' attitude for maintaining sovereignty over specific matters of national interest.

Despite diverse attempts to overcome the weaknesses of the Maastricht setup

throughout the last decade, the constitutional stalemate on the economic governance is to date apparent in the Union. For the sake of highlighting the paradox of this uneven model, we hence propose to make an imaginative and metaphorical reference to Janus, the ancient Roman myth having two faces looking at opposite ways and worshipped to preside over transitions and changes.

In so doing, we could posit that the Union is experiencing a 'Janus Trap' in terms of governance and identity that appears hard to overcome and, for what it is worth, we also express the expectation for a progressive move towards a 'forwardly-looking' model of a centralised EU economic governance that could eventually overcome the original asymmetry for a greater growth and stability of the Union.

Having that in mind, in order to build up our arguments we then consider the need for looking at aggregate phenomena as to achieve a macro representation of the Union's fiscal policy arrangements. This proposition is important for the sake of studying the EU economic governance for at least two reasons.

First, no legal analysis can be pursued on the EMU governance without having in mind the economic discourse on monetary and fiscal policies that inevitably exert a significant degree of influence upon legal systems. Consequently, it does not mean that it is necessary to employ economics beyond all means, as it is not the scope of this research, but at least to be aware of such existing influences onto the institutional framework.

Second, as Kaarlo Tuori and Klaus Tuori noted, '[…] if the emphasis in the Rome Treaty and the subsequent case law of the ECJ lay on what we call the microeconomic constitution, the crisis has highlighted the role of the second, macroeconomic layer of

the European economic constitution'[6]. This quote allows us to emphasise the importance of the macro analysis and of studying aggregate phenomena while assessing the EMU and, even to a greater extent, as long as public law and its influence over institutional complexity in a multilevel system is concerned.

On that note, for this study, we have intended to explore a recent academic work of Yair Listokin advancing a stimulating – and hopefully promising – theory on law and macroeconomics that looks at the law and regulation as additional policy instruments to achieve macroeconomic stability alongside with the traditional monetary and fiscal policies.

In our view, this approach has suggested us that the case of the EU fiscal policy could be a very fitting area of study for looking into public law and its functions and characteristics in relation to macroeconomic stability.

To better clarify this, it is worth referring back to the aforementioned notions of network, complexity, and risk. Indeed, our scrutiny around the functions and characteristics of public law within the EMU benefits from the two normative ideas of 'EU Fiscal Network' and 'Fiscal Policy Risk' that we hence propose to disentangle across the present study.

As per 'EU Fiscal Network', we deem that the EMU can be aptly assessed if described as an interdependent system of fiscal dynamics and considered from a macro perspective as the aggregate of the existing institutional interactions and coordination mechanisms on fiscal matters.

[6] Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014) 6 (hereafter Tuori and Tuori, *Eurozone Crisis*).

For the sake of clarity, the EU Fiscal Network has been then distinguished, as a multi-system, between the 'European sub-system', concerning the EU institutions, and the 'Domestic sub-system', concerning the national institutions. As an example of the 'Domestic sub-system', we have selected Italy, being a founding member of the Union and of the EMU, with a domestic multilevel governance, that, in recent times, has experienced severe economic effects because of the European Debt Crisis and the COVID-19 pandemic putting a strain on its institutional setup.

Moving to 'Fiscal Policy Risk', we intend to posit that in the EU Fiscal Network the concept of risk is meaningful, and it aptly relates to public law since it constitutes an organising principle of such system. In this regard, we advance the idea of 'Fiscal Policy Risk' representing the institutional risk for a Member State's central government – that remains the 'final responsible entity' towards the Union on fiscal matters[7] – of not being able to comply with the fiscal obligations stemming from the participation to the EMU due to subnational governments' financial misconducts. Because of that, the Fiscal Policy Risk is relevant not only at national level but also in relation to the whole EU Fiscal Network to the extent that such risk occurring at Member State level does not trigger systemic events potentially affecting the overall interdependent network and even jeopardising the financial stability of the Eurozone.

Besides examining the idea of public law as a possible macroeconomic stabiliser in addition to the monetary and fiscal policies, we have also resolved to assess the possible use of public law as a risk-enabler so to further contribute to the overall

[7] Italian Constitutional Court decision No 78/2020. Similarly, see also decisions Nos 107/2016, 247/2017, and 101/2018. The former stressed, at para. 3, the State's obligation to ensure that subnational governments pursue and respect the national public finance objectives set forth in the EU Treaties for which the national government acts as a 'guardian' ('custode della finanza pubblica allargata'). Further references and detailed analyses below in Sections 1.3, 3.2, and 4.1.

macroeconomic stability of an economic system.

In fact, we believe that the use of public law in a positive manner (i.e., legal incentives) rather than in a negative one (i.e., legal sanctions) may promote institutional risk-taking and thus contributing to increase the overall investment spending in the EU Fiscal Network. Thanks to such promotional capacity of public law, it can be explored the viability of expansionary legal policy to further sustain the economy in case of recession.

By that reasoning, we will also address the recent ambitious EU project ('Next Generation EU' – 'NGEU') for soliciting the Member State's economic resilience in the aftermath of the global pandemic while also setting conditionality over domestic structural and policy reforms in line with common EU strategic objectives. The link between capital injection and pro-growth policy reforms, alongside with the innovative instrument of an aggregate EU bond issuance for reducing the funding costs, makes the temporary in scope NGEU instrument as a promising model for tackling debt and recessions with enhanced conditions for growth, also by means of public law. Also in this regard, the case of Italy is very significant being the Member State targeted by the highest amount of EU recovery funds under the said programme.

Against this background, this research assesses speculative and concrete issues in the area of EU and national fiscal policy, and it focuses specifically on Italy as far as the domestic/ regional dimension is concerned. So, it mostly develops arguments on an empirical basis since, for the scope of this research, there is relatively scarce litigation and therefore few case law to consider. Further, it does not carry out a comparative study.

Moreover, it shall be mentioned that as we refer to the Italian subnational governments as part of our focus on the intergovernmental financial relations, we mostly consider local authorities without entirely comprising regions and autonomous provinces for at least three reasons: This choice allows to better perimeter the scope of the research, the greatest amount of administrative competences and subnational spending occur at local authorities level (to the extent that the regional expenses on healthcare are excluded), and no scattered influences arise from the special statutes conferred to some autonomous regions or provinces.

In terms of plan of the research, we propose to outline this work in five Chapters followed by the conclusions.

To begin with, Chapter 1 singles out the analytical tools that form the basis of our research: Network, complexity, and risk[8]. In addition to that, the idea of looking at macro phenomena and the related field of study of law and macroeconomics have been also considered. Thereupon, we outline the normative ideas of 'EU Fiscal Network' and 'Fiscal Policy Risk' to be further employed in the ensuing Chapters. We then respectively cover the notions of network and complexity in Section 1.1, the theory of law and macroeconomics in Section 1.2, the concept of risk and risk regulation in 1.3, and finally we wrap up those arguments so to contend in favour of the rationale of conducting an aggregate/ macro analysis for the legal assessment of the EU fiscal policy.

Chapter 2 depicts the legal framework of the 'European sub-system' within the EU

[8] In making this decision, we have been influenced by the (broader in scope) idea that 'Saranno le domande a guidare i metodi' in Sabino Cassese, 'Il sorriso del gatto, ovvero dei metodi nello studio del diritto pubblico' in AIPDA (ed), *Annuario 2006: Analisi economica e diritto amministrativo* (Giuffrè 2007) 101 (hereafter Cassese, *Il sorriso del gatto*).

Fiscal Network and it retraces the different phases of its making distinguishing among the different kind of economic shocks experienced by the EMU and the related legal response to them. It starts off under Section 2.1 describing the original asymmetry between a centralised monetary policy and a decentralised economic policy that we have metaphorically named as the 'Janus Trap' of the Union. Section 2.2 then considers the burst of the Great Recession and the ensuing European Debt Crisis. In our view, this economic shock represents an asymmetric shock that nonetheless triggered at the time a symmetric response from the Union to tackle the said economic (and legal) crisis that is hence considered in detail. Then, in Section 2.3 we observe that the COVID-19 pandemic generated a symmetric shock that, on this occasion, has rather determined an asymmetric economic response via the 'Next Generation EU' as a form of enhanced solidarity among Member States. In spite of being temporary in scope, such recovery instrument raises very important policy questions on the future of the EU fiscal policies that we therefore explore from a legal standpoint.

As we tend to acknowledge that the 'Janus Trap' has thus far influenced the overall design of the EU legal framework on fiscal policy in a somehow doomed-to-fail manner both in terms of governance (i.e., political discretion over sanctioning)[9] and economic effects (i.e., procyclicality), Chapter 3 proceeds with the analysis of the 'Domestic sub-system' of the EU Fiscal Network by looking at Italy's domestic legal responses after the participation to the EMU[10]. In so doing, we substantiate the argument that the

[9] To provide an example, see Carlo Azeglio Ciampi's commenting 'Certo, non mi sfugge che la crisi finanziaria mondiale ha indotto i governi a fare di necessità virtù e ha indebolito la forza persuasiva dei parametri e dei vincoli creati per mantenere la cornice di stabilità macro', *Non è il paese che sognavo* (Il Saggiatore 2010) 117 (hereafter Ciampi, *Non è il paese che sognavo*).

[10] As suggested by Kenneth Armstrong, 'There are, therefore, two challenges for scholarships. The first challenge is to evaluate the modalities and effects of the EU discipline on national fiscal and budgetary processes as this new governance architecture is put in practice. The second challenge is to address the constitutional legality and democratic legitimacy of the new governance of fiscal discipline', 'The New Governance of EU Fiscal Discipline' (2013) 38 European Law Review 601 (hereafter Armstrong,

Italian central government has put forward, by means of public law, a set of legal instruments to organising the institutional complexity stemming from the 'European sub-system' of the EU Fiscal Network (Section 3.1), as well as mitigating the Fiscal Policy Risk in the intergovernmental fiscal relations (Section 3.2). For each Section, we then specifically provide an overview of several domestic policies (e.g., budgetary harmonisation, programming activities, controlling, and recovery/ insolvency rules, …). We hence conclude noting that a de facto centralist trend can be retraced as a *fil rouge* of the overall legal policies that have been put in place by the Italian government as to better coordinate and mitigate the institutional complexity and risks that would otherwise arise from the subgovernmental level.

Besides the scrutinised (negative) function of public law in relation to risk mitigation, Chapter 4 explores the (positive) idea of public law as risk enabler. To support this argument, Section 4.1 sets the scene of the legal regime of public investments under the Stability and Growth Pact, with a specific focus on subnational governments' spending. Then, Section 4.2 provides an assessment of the Italian 'National Recovery and Resilience Plan' (NRRP) as part of the 'Next Generation EU' programme claiming that it represents an example of the possible use of public law to perform an expansionary legal policy. As a final remark, Section 4.3 takes from the foregoing assessment concerning Italy and it enquires about a prospective reform of the EU fiscal policy regime seeking for the right governance and policy mix for the EMU that may enable a proper and flexible fiscal stabilisation function at Union level.

Before the conclusive section, Chapter 5 intends to draw some theoretical conclusion on the implications of the foregoing arguments over the idea and function of public

The New Governance of EU Fiscal Discipline).

law. In this regard, we support the idea that the 'law of public finances' appears indeed to constitute a new branch of public law posing an additional perspective to the public law discipline with important and challenging theoretical issues to be prospectively addressed.

Finally, as we then proceed to developing our arguments in the ensuing Chapters, we have to point out that the quotes in the text are intentionally in their original language as to better ensure their correct understanding. Still, we have hopefully provided the reader with sufficient background and context in English to grasp their general meaning.

1. 'EU Fiscal Network' and 'Fiscal Policy Risk': The Rationale for a Public Law Analysis over Fiscal Policy

The scope of this research is at investigating the instrument of public law in relation to multilevel, interdependent, and dynamic institutional systems like the fiscal policy legal framework of the Economic and Monetary Union (EMU) in its European and national dimensions. In our view, this is a very suitable vantage point in understanding the systemic implications of public law in relation to economic stability.

More specifically, we aim at assessing how in the EU fiscal policy context public law performs risk-mitigation and risk-taking functions upon the concerned institutions that could be relevant for the policy makers to consider, while addressing macroeconomic stability scenarios, in addition to the toolkit of conventional/ unconventional monetary policy and fiscal policy that are already at disposal.

As we have increasingly noted that economic stability in the EMU cannot rely as much on ECB monetary capacity and that national Member States have limited resources to address economic shocks, being it symmetric or asymmetric, it is of outmost importance to embrace additional – but not necessarily alternative – instruments to ensure stability. On that note, we claim that public law could prove to be the case thanks to its capacity of reducing risk through institutional design as well as promoting expansionary policies[11] through legal design.

To this end, we consider that the understanding of public law functionalities would benefit from the notions of network, complexity, and risk, as well as from considering

[11] On the possible 'expansionary' function of legal policy as part of the macroeconomic policy toolkit for central banks, see Yair Listokin, *Law and Macroeconomics: Legal Remedies to Recessions* (HUP 2019) 127ff and 198ff (hereafter Listokin, *Law and Macroeconomics*). Accordingly, see Sections 2.3 and 4.2.

institutions from a 'macro' or 'aggregate' standpoint. For the sake of clarity, in the proceedings we are going to touch upon the very promising field of law and macroeconomics that had a considerable degree of influence over this current study, although it shall be noticed that strictly speaking the present study does cover to any extent the field of macroeconomics since it would be out of the scope of our research questions.

On the basis of such analytical tools, we expect to disentangle some of the inherent functioning that public law exerts over the fiscal policy framework in organising institutional complexity, mitigating institutional risk, and promoting institutional conducts encouraging risk-taking for an enhanced public investments' capacity.

In this context, we deem that the topic of EU fiscal policy is a very suitable subject to conduct our study due to its multilevel structure and still unpolished governance. In this regard, the choice of Italy, as a Member State, for our enquiry is meaningful since it presents certain governance characteristics (i.e., multilevel institutional setup not reaching the status a fully-fledged federalism) that have evolved over the last decades and still appear to be in an unresolved settling in period from an institutional perspective. Further, Italy was at the front line of the two major socio-economic events that agitated the constitutional setup of the Union: The European Debt Crisis (2010-2012) and the COVID-19 pandemics (2019-ongoing).

By combining these two layers of analysis, it is worth stressing that the main thrust of this study is particularly concerned in carrying out a research on public law tools that, in the context of the European Union legal framework, the Italian central government has progressively put in place as to regulate the intergovernmental financial relations

as a result of its participation to the Economic and Monetary Union (EMU)[12].

One of the main challenges of the EMU is indeed combining 'diversity' among Member States, as Jacques Delors nicely put it[13], but it extends also to the diversity within the different institutional levels of the domestic national and subnational governments.

In this regard, we note that the participation of a country to a monetary union entails a paradigm shift in the national and subnational economic constitution due to the specific source of institutional risk[14] that a Member State, like Italy, shall consider for the sake of complying with the obligations stemming from the participation to the EMU within the European Union. This shift is not neutral from a public law perspective and necessitates of a deeper analysis on the related set of legal implications.

To better clarify this, and before moving to the EU (Chapter 2) and national (Chapter 3) perspectives of the fiscal policy legal conundrum, we regard that it is fundamental to assess in the following Sections the most compelling analytical instruments of

[12] As noted, 'euro area Member States share certain legal obligations which are indispensable for the functioning of the euro as a supernational currency of nineteen sovereign States, Fabian Amtenbrink and Christoph Herrmann, 'Introduction' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 5-6. On the importance of a detailed rationalisation of the national budgetary framework to adjust and sustain the monetary policy towards the objective of economic stability, see Fabio Merusi, 'Credito e moneta nella Costituzione' in Associazione per gli studi e le ricerche parlamentari, *Quaderno n. 2, Associazione per gli studi e le ricerche parlamentari, Seminario 1991* (Giuffrè 1991) 177-178.

[13] In referring to the legacy of Tommaso Padoa-Schioppia, Jacques Delors called the challenge of the EMU, and more broadly of multilateralism in international relations, as 'la sfida più attuale lanciata alle democrazie in questo scorcio del XX secolo: la sfida delle diversità', 'Prefazione' in Tommaso Padoa-Schioppa, *Efficienza stabilità ed equità* (Il Mulino 1987) 9.

[14] The concept of risk is discussed below in Section 1.3. For a definition, more focused on regulation rather than intergovernmental (financial) relations, institutional risk is 'the risk that the regulator will not meet its organisational and policy objectives', Julia Black, 'The Role of Risk in Regulatory Processes' in Robert Baldwin, Martin Cave, and Martin Lodge (eds), *The Oxford Handbook of Regulation* (OUP 2010) 303, 327 (hereafter Black, *The Role of Risk*). Further, Niamh Moloney, 'EU financial market regulation after the global financial crisis: 'More Europe' or more risks?' (2010) 47 Common Market Law Review 1326 (hereafter Moloney, *EU financial market regulation*) (on the containment of 'fiscal risk' as the scope of the EU rulemaking and supervision following the Great Recession).

network, complexity, and risk, alongside with the relevance of studying aggregate institutional phenomena.

Building on that, in the ensuing Sections we therefore contend that the institutional organisation of the multilevel fiscal policy framework can be named 'EU Fiscal Network', while the risk to which public law operates as a risk mitigation tool can be labelled 'Fiscal Policy Risk'. These two normative concepts constitute the main conceptual bases of our analysis and will be extensively employed across the ensuing Chapters.

Against this backdrop, we therefore proceed with providing some preliminary definitions of the proposed notions of 'EU Fiscal Network' and 'Fiscal Policy Risk'.

By 'EU Fiscal Network' we refer to the interconnected and interdependent multilevel system of fiscal dynamics at EU and domestic level organised via public law, in a hard law and soft law manner, to ensue fiscal coordination and fiscal discipline among Member States which are part of an economic and monetary union, like the EMU. We specifically consider the interdependencies among national legal systems in the context of the supranational, national, and regional public powers' interactions[15].

This qualifies as a normative claim since we believe that the characterisation of the governance framework on fiscal policy as an interdependent system of systems, like the EU Fiscal Network, entails a 'macro' regulatory strategy in terms of institutional organisation to support the economic and financial stability objectives of the Union.

[15] For a study on the multilevel governance in the EU, see Sabrino Cassese 'Il concerto regolamentare europeo delle telecomunicazioni' (2002) Giornale di diritto amministrativo 689, as later taken in broader sense by the legal scholarship. For an example, see Edoardo Chiti, 'Le ambivalenze del concerto regolamentare europeo nel settore delle comunicazioni elettroniche' in Giacinto della Cananea (ed), *Il nuovo governo delle comunicazioni elettroniche* (Giappichelli 2005) 19.

As per 'Fiscal Policy Risk', this research indicates the risk for the central government of a Member State of not complying, due to domestic institutional failures occurring at subnational government level, with the fiscal policy obligations that arise from the participation to the EMU.

Such institutional risk is relevant for the central government of a Member State since it is the sole 'final responsible entity'[16] towards the Union in relation to the fiscal sustainability of the Treaty-based category of the national 'general government'[17] which, in addition to the central government, considers the aggregate fiscal positions of regional, local government, and social security funds.

This specific source of institutional risk is hence relevant not only for the Member State in respect to the Union but it is also in the interest of the whole EU Fiscal Network since, because of the said interdependencies within the system, the risk of default or noncompliance from a Member State could trigger a systemic event to the detriment of the overall stability of the network.

[16] As per the Italian constitutional case law on fiscal matters, the Italian Constitutional Court has recently referred to the central government as the 'final responsible entity' for the general government (decision No 78/2020). Further, for the State's power of general coordination for the macro stability of the aggregate of the multilevel governments in Italy, so called 'finanza pubblica allargata', see the landmark decision No 425/2004. On the latter decision, see also below (nn 609 and 632).

[17] On the European notion of 'general government' in relation to the fiscal policy regulation, see below at Section 2.1. More specifically, 'As the EU budgetary surveillance framework applies to the general government sector as a whole […], the conduct of budgetary policy by sub-national authorities and the coordination arrangements between public authorities at different levels are key components if national budgetary frameworks are to ensure the consistent conduct of fiscal policy at all levels of government and effective application of EU and national fiscal rules', Commission, 'Commission staff working document Review of the suitability of the Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States' SWD(2020) 211 final 67 (hereafter 'Review of the suitability of the Council Directive 2011/85/EU – Working Staff Document') 68-69. Further, see Commission, 'Communication on common principles on national fiscal correction mechanisms' COM(2012)342 final 4-5 (hereafter 'Common principles on national fiscal correction mechanisms') stressing that 'But there must be strong safeguards that the achievement of the general government budgetary targets, for which the central government is responsible vis-à-vis the EU level, is not put at risk by the behaviour of sub-sectors'.

As such, the EU Fiscal Network is not neutral to Fiscal Policy Risk and, on the one hand, the Union has laid down different forms of disciplining to address the case of non-compliance of a Member State to the duties of fiscal coordination. Broadly speaking, these could vary in (i) soft governance and soft law mechanisms (e.g., peer pressure, recommendations, best practices, code of conducts, informal guidance documents, capacity building, meetings, letters, transparency, …), (ii) hard law economic sanctions (iii) financial market sanction[18]. On the other hand, a Member State like Italy has put forward legal responses in the form of economic coordination and budgetary surveillance in the domestic intergovernmental financial relations.

As such, the institutional and legal context[19], at the basis of the analysis on the fiscal

[18] Notably, Lorenzo Bini Smaghi critically summarised the 'misplaced' four key assumptions for the economic and fiscal dimension in the euro area, as follows: (i) market disciplining; (ii) [SGP] measures based on 'monitoring, peer pressure and, sanctions'; (iii) no bail-out 'if a member of the euro area were unable to implement sound fiscal policies'; (iv) national economic policies would converge at euro area level if the single market is strengthened; Lorenzo Bini Smaghi, 'Challenges for the Euro Area, and the World Economy', (*ECB* 28 May 2010) <http://www.ecb.int/press/key/date/2010/html/sp100528.en.html> accessed 3 January 2022. On a similar line, Jean-Paul Keppenne contends that 'The experience [of SGP] so far can help to identify some deficiencies. First, the compliance with the rules has been disappointing. Once Member States joined the euro area, there was no perceived risk of being effectively sanctioned and the financial markets did not exercise the expected pressure on the individual Member States', Jean-Paul Keppenne, 'EU Fiscal Governance on the Member States' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 820 (hereafter Keppenne, *EU Fiscal Governance on the Member States*). Further, on the possibility that 'The Single Market Program, together with EMU, may therefore strengthen the forces of market discipline', Timothy Lane, 'Market discipline' (1992) 42 IMF Staff Papers 20 <https://doi.org/10.5089/9781451846157.001> accessed 3 January 2022. On a different line of thought, Charlotte Rommerskirchen, 'Debt and punishment: market discipline in the Eurozone' (2015) 20 New Political Economy 752 (hereafter Rommerskirchen, *Debt and punishment*) (proposing a different view on the conventional wisdom of the failure of market discipline is incomplete). On the preference for the external constraint exerted by the markets upon the Italian institutions for the sake of encouraging the phasing in of structural reforms, see Guido Carli's opinion at (n 79).

[19] For a distinguished legal analysis on the constitutive elements of institutions, State, and law, see Santi Romano, *L'ordinamento giuridico* (2nd edn, Sansoni 1946) advancing a 'pluralistic' general theory of public law in terms of both organisation and functioning. Further on Romano's theory, see Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hanseatische Verlagsanstalt 1934) 24; Julius Stone, *Social Dimensions of Law and Justice* (Stevens and Sons 1966) 516-45; Sabino Cassese, 'Ipotesi sulla formazione de "L'ordinamento giuridico" di Santi Romano' (1972) Quaderni fiorentini per la storia del pensiero giuridico moderno 243.

policy phenomenon occurring at EU and domestic level, raises fundamental questions on the specific notion and functions of public law to be adopted in the current work.

Over a century, public law – to be regarded as specifically comprising the legal fields of constitutional law and administrative law – has been significantly influenced by the political and socio-economic transformations that increased the level of complexity and interdependency among legal systems. In such scenario, the new sources of mutation and variation[20] in the legal systems of the Union and Member States raise fundamental questions on the organisation and functioning of public law that impose a systematic and multidisciplinary approach to be nailed down in the ensuing Sections of this Chapter[21].

For the scope of this research, we hence refer to public law in the sense of an instrument for organising, constituting, and governing public powers, whereas less attention is devoted to the relations between public and private which provide a limited research interest in the area of fiscal policy, at least if considered in a narrow sense.

For the current study we focus indeed on a narrow meaning of 'fiscal' which pertains to the 'sole' budgetary expenditures rather than also on budgetary revenues (i.e., taxation). Further, when using 'fiscal federalism' we refer to the traditional Richard

[20] According to Santi Romano, 'Un ordinamento giuridico, a meno che non sia del tutto malcostruito, se da un lato ha la funzione suddetta [stabilizzatrice], dall'altro ha sempre la possibilità di rinnovarsi e di far posto a modificazioni radicali e profonde della sua struttura e del suo funzionamento. Se così non fosse non sarebbe vitale' Santi Romano, 'Diritto (funzione del)' in Id., *Frammenti di un dizionario giuridico* (Giuffrè 1953, Quodlibet Ius 2019) 113.

[21] In this sense, Sabino Cassese posits 'Secondo imperativo è quello di costruire ponti tra diritto e "humanities" e "social sciences", perché il diritto è scienza sociale. Superamento non vuol dire abbandono del "metodo giuridico", ma sua integrazione con ambiti disciplinari diversi, abbandonando l'ingenua idea ottocentesca dei saperi differenziati. [...] La grammatica quella sviluppata dai vari rami della scienza del diritto un po' dovunque nel mondo: si tratta ora di ricondurre a unità le loro linee portanti per dare nuove fondamenta allo studio del diritto pubblico' Id., 'Il futuro del diritto pubblico' (2017) Giornale di diritto amministrativo 176. Further analysis on the theorical implications of this research in relation to public law below at Chapter 5.

Musgrave's classification in relation to the debate on the right level of government and the right balance between own and derivative resources across subnational governments for the provision of public services to a concerned polity[22].

On a final note, besides the risk-mitigation function of public law within the EU Fiscal Network, we further contend that public law could be considered for fostering economic growth by increasing the risk-taking capacity and the overall attitude towards investment spending among the concerned institutional actors. We hence focus on a specific source of spending that concerns public investments.

In this regard, the public law function in the area of fiscal policy is not only limited to ex-ante economic coordination and disciplining (i.e., SGP 'negative coordination mechanisms'[23]), but also extends to promoting countercyclical national fiscal policy that are deemed to reduce, 'in a monetary union, the impact of country-specific shocks'[24]. To provide an example, the 'Next Generation EU' package[25] adopts countercyclical policies via public law (i.e., reducing national structural imbalances), thereby performing an ex-post policy coordination that exerts a shock-absorbing

[22] Richard A. Musgrave, *The Theory of Public Finance* (McGraw-Hill 1959) 179ff. Additional references on a notion of fiscal federalism, upon the influence of Hayekian idea of liberty in relation to competitive governments and fiscal competition, at James M. Buchanan, 'Federalism and Fiscal Equity' (1950) 40 American Economic Review 583. For a greater analysis on the EU and Italian domestic perspectives, see below respectively at Alicia Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU' (2013) 50 Common Market Law Review 1621 (hereafter Hinarejos, *Fiscal Federalism*), and at (nn 92 and 329).

[23] Negative coordination mechanisms are, for example, those EMU sanctioning measures that punish 'countries running excessive public deficits. [In so doing], the SGP allows the ECB to "play on the safe side" by putting a strong limit to the discretional power of the national governments in setting their independent fiscal policies', as noted by Giovanni Di Bartolomeo et al, 'Macroeconomic Stabilization Policies in the EMU: Spillovers, Asymmetries, and Institutions' (2005) Cesifo Working Paper No 1376 7.

[24] Cinzia Alcidi and Gilles Thirion, 'Assessing the Euro Area's Shock-Absorption Capacity' (2017) Centre for European Policy Studies 39.

[25] For an overview, see below (n 274) and more in general Sections 2.3 (on the 'European sub-system') and 4.2 (on the 'Domestic sub-system').

function upon the recipient Member States.

Accordingly, we maintain that, for reaching the objective of stability within a monetary union, like the EMU, the EU fiscal policy shall make a better use of the law, and specifically of public law, because of what appears to be its inherent enabling and promoting function of institutional conducts[26].

However, this approach does not necessarily lead to an enhanced rule-based regime of 'negative coordination' in the EMU, while it should rather suggest to increasing the 'positive coordination' mechanisms in the EU Fiscal Network with a greater attention to combining EU strategic structural reforms together with countercyclical financial support through the EU budget facility. To better complement these arguments, we also refer to a useful interpretative tool in assessing the EU fiscal policy framework advanced by Norberto Bobbio on the use of 'positive sanctions'[27] for encouraging a certain conduct rather than discouraging the same conduct ('negative sanction')[28].

---

[26] On the rewarding function of the law ('Lohn Recht'), Rudolf von Jhering, *Der Zweck im Recht* (Breitkopf und Härtel 1904), *Lo scopo nel diritto* (Aragno 2021) (introducing the idea of rewarding function of the law) 147-178; Norberto Bobbio, *Dalla struttura alla funzione* (Editori Laterza 2007) (hereafter Bobbio, *Dalla struttura alla funzione*) 18-44. On a similar line, in providing a comment on Santi Romano, Marco D'Alberti posits 'Le leggi, dunque, possono essere obbligatorie, ma sono anche permissive, organizzative, direttive, interpretative' Id., 'Santi Romano e l'istituzione' (2014) Rivista trimestrale di diritto pubblico 584-585.

[27] 'Intendo per «funzione promozionale» l'azione che il diritto svolge attraverso lo strumento delle «sanzioni positive», cioè attraverso meccanismi, genericamente compresi col nome di «incentivi», i quali mirano, anziché a impedire atti socialmente indesiderabili, ciò che è il fine precipuo di pene, multe, ammende, riparazioni, restituzioni, risarcimenti, ecc., a «promuovere» il compimento di atti socialmente desiderabili' Bobbio, *Dalla struttura alla funzione* (n 26) 14-15. On a similar note, it is worth mentioning the studies of public law scholars on incentives and administrative action, like Giuseppe Pericu, *Le sovvenzioni come strumento di azione amministrativa* (Giuffrè 1967) 35 and 168, as well as Alberto Predieri, *Pianificazione e costituzione* (Edizioni di Comunità 1963) 204-213 (stressing on the use of positive and encouraging propositions in the Italian Constitution). For a more recent analysis, see also the behavioural studies on the use of law and regulation, like notably Richard H. Thaler and Cass R. Sunstein, *Nudge* (Penguin 2009, 2nd edn, Penguin 2021) 74ff.

[28] In greater details, according to Norberto Bobbio, there is no fixed relationship between positive or negative law and positive or negative sanctions 'Anche se di fatto le norme negative vengono rafforzate abitualmente con sanzioni negative, mentre le sanzioni positive vengono predisposte e applicate

As a reference to this, the 'Next Generation EU' programme that the Union has recently set up appears to incentivise Member States – in a 'positively' manner – as to carry out a set of reforms and investments within a strict temporal timeline with the reward of very favourable forms of financing (either in the form of grants or loans), alongside with specific negative sanctions in case of non-performance[29] or in case of breach at domestic level of the rule of law principle that is an 'essential precondition' for the respect of the EU principles of sound financial management[30].

Having provided some preliminary references on the perimeter and scope of this research, in the ensuing Sections it is worth to come to terms with the main analytical tools to be addressed in the following Chapters: Network and complexity (Section 1.1), risk regulation (Section 1.2), and law and macroeconomics (Section 1.3). Respectively, Section 1.1 provides for the idea of 'EU Fiscal Network' in relation to the main facets of network and complexity theories, while Sections 1.2 and 1.3 pave the way for the

---

prevalentemente per il rafforzamento di norme positive, non vi è alcuna incompatibilità tra norme positive e sanzioni negative, da un lato, e norme negative e sanzioni positive dall'altro' Bobbio, *Dalla struttura alla funzione* (n 26) 23.

[29] Article 24, Regulation (EU) No 241/2021 on establishing the Recovery and Resilience Facility [2021] OJ L 57/17. Further on the 'Next Generation EU', in the 'European sub-system', below in Section 2.3 and (n 275), while in its 'Domestic sub-system' regarding the Italian NRRP see below at Section 4.2.

[30] On the general regime of conditionality for the protection of the EU budget and NGEU, Recital 7 reads 'Whenever Member States implement the Union budget, including resources allocated through the European Union Recovery Instrument established pursuant to Council Regulation (EU) 2094/2020, and through loans and other instruments guaranteed by the Union budget, and whatever method of implementation they use, respect for the rule of law is an essential precondition for compliance with the principles of sound financial management enshrined in Article 317 of the [TFEU]', Regulation (EU, Euratom) No 2092/2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I/1. For further references, see European Council, Conclusions of 17-21 July 2020 - Special meeting of the European Council; European Parliament, Resolution of 17 December 2020 on the Multiannual Financial Framework 2021-2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (2020/2923(RSP)); Council Legal Service, Opinion on Part I of the Conclusions of the European Council of 10 and 11 December 2020 - Conformity with the Treaties and with the text of the Regulation on a general regime of conditionality for the protection of the Union budget, 11 December 2020, 13961/20. For a comment from the legal scholarship, see Giacinto della Cananea, 'On Law and Politics in the EU: the Rule of Law Conditionality' (2021) Italian Journal of Public Law 1 (focussing on the use of EU finances to ensure the applicability of rule of law across Member States).

notion of 'Fiscal Policy Risk' developing from risk regulation and from law and macroeconomics. Finally, we stress that this work diverges to an extent from each of such approaches taken alone and it posits that for the purpose of the current assessment it is rather more apt a blended approach focussing on the analysis of 'macro' phenomena. The conclusive reasoning on this interpretive approach is then presented in Section 1.4.

1.1 Network and Complexity Analyses – EU Fiscal Network

The network analysis is a rising instrument in legal studies which purports that by looking at the interconnections within a system it is also possible to better understand and organise interdependent legal networks[31]. By that means, it draws a new

[31] For a recent application of network or system theory in legal analysis, see Yoon-Ho Alex Lee and Alessandro Romano, 'Insider Trading and Macroeconomic Risk' (SSRN, 19 November 2020) 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731719> accessed 3 January 2022 (on the insider trading analysis and on financial regulation); Luca Enriques, Alessandro Romano, and Thom Wetzer, 'Network-Sensitive Financial Regulation' (2019) 451 ECGI - Law Working Paper <https://ecgi.global/working-paper/network-sensitive-financial-regulation> accessed 3 January 2022 (on network-sensitive policies in relation to systemic risk); Luca Enriques and Alessandro Romano, 'Rewiring Corporate Law for an Interconnected World' (2021) Bocconi Legal Studies Research Paper No 3814822 1 (on the importance for corporate law to consider the sensitivity of microeconomic events in preventing macroeconomic shocks in interconnected contemporary economies); Rosa Lastra, 'Systemic risk and Macro-prudential supervision' in Niamh Moloney, Eilís Ferran, and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) 310, 322-323 (hereafter Lastra, *Systemic Risk*) (presenting also the interest of (macro) financial supervisors in network analysis); Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 European Law Journal 542 (on the problem of accountability in the system of multilevel governance, like the EU, which are organised around networks); Adrian Vermeule, *The System of the Constitution* (n 4) 14-37 (proposing a systemic analysis of US Constitutional Law with particular regard to two-level-systems); Les Metcalfe, 'The European Commission as a Network Organisation' (1996) Publius: The Journal of Federalism 43 (concluding that the EC is not a network organisation). Some other works also employed network analysis in the legal domain, Radboud Winkels, Nicola Lettieri, and Sebastiano Faro (eds), *Network analysis in law* (ESI 2014); James Fowler et al, 'Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court' (2007) 15 Political Analysis 324; Tommaso Agnoloni and Ugo Pagallo, 'The Case Law of the Italian Constitutional Court between Network Theory and Philosophy of Information' (2016) 25 Informatica e diritto 139. For other relevant studies, Niklas Luhmann, 'Differentiation of Society' (1977) 2 The Canadian Journal of Sociology 29; Sanjeev

dimension in studying the implications of the law in a given environment[32].

Likewise, complexity analysis studies specifically co-evolving multi-layered networks, whereby elements have non-static interactions and non-linear dynamics[33]. This perspective on systems elegantly complements the network analysis, especially in relation to investigating collaborative mechanisms within such environment[34].

In our view, the EU Fiscal Network, which we regard as the multilevel system of interdependent fiscal and financial relations which regularly occur in the EMU among diverse actors (e.g., EU institutions, Member States, national sub-governments, and national institutions) is therefore a relevant network to investigate from a legal standpoint.

Accordingly, once ascertained that Member States are not anymore – if ever[35] – independent entities both at EU level and in the national fiscal dynamics, the very

---

Goyal, *Connections: An Introduction to the Economics of Networks* (Princeton University Press 2009); Mark Buchanan, *Nexus: Small Worlds and the Groundbreaking Theory of Networks* (WW Norton & Company 2002). For a similar analysis, see Sabino Cassese, *The Global Polity* (Global Law Press 2012) 24 (referring on mutual interconnections and linkages in the global legal space); Hinarejos, *Fiscal Federalism* (n 22) (on fiscal challenges of multilevel systems).

[32] Maria Lucia Passador and Antonio Romano, 'Why legal scholars should study network theory' (2021) Rivista delle società 1036 (pointing out with case studies the importance of social structures and interpersonal connections in legal studies in comparison to the doctrine of law and economics).

[33] Stefan Thurner, Rudolf Hanel, and Peter Klimek, *Introduction to the Theory of Complex Systems* (OUP 2018) 21-22; Melanie Mitchell, *Complexity: A Guided Tour* (OUP 2009). On variation in complex systems, see Scott E. Page, *Diversity and Complexity* (Princeton University Press 2011) 148ff (hereafter Page, *Diversity and Complexity*).

[34] The field of legal studies in Administrative law is familiar with this overall discussion. For some references, see Donald T. Hornstein, 'Complexity Theory, Adaptation, and Administrative Law' (2005) 54 Duke Law Journal 913; Sara Valaguzza, *Collaborare nell'interesse pubblico* (Editoriale Scientifica 2019); Carla Barbati, 'La decisione pubblica al cospetto della complessità: il cambiamento necessario' (2021) Diritto Pubblico 15.

[35] Mario Draghi, 'Sovereignty in a globalised world', Speech on the award of Laurea honoris causa in law from Università degli Studi di Bologna, 22 February 2019 <https://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp190222~fc5501c1b1.en.html> accessed on 3 January 2022. On a similar note, Guido Carli, 'Considerazioni finali del Governatore all'Assemblea generale straordinaria dei partecipanti' 13 June 1973 46 (hereafter Guido Carli, *Considerazioni finali*).

consequence is that also the domestic intergovernmental financial relations of a given Member State must play a significant factor in influencing the balance and stability of the overall network. To put it differently, in the EMU the fiscal dynamics which occur at domestic level within a single Member States are so deeply entrenched in the network relationships between the central Government of a given Member State and the EU institutions that cannot be effectively studied in isolation from the EU Fiscal Network as a whole.

In the EU context, this interpretative approach in studying the EMU fiscal relationships seems compelling for several reasons, especially after the Maastricht Treaty entered into force in 1992[36].

First, it shall be regarded that the EU Fiscal Network has progressively increased coordination mechanisms[37] among the concerned Member States exposing the complexity of having in place effective legal instruments to govern the asymmetries of the 'Janus Trap' through monitoring and coordinating Member States' national economic and fiscal policies. As we have pointed out, the economic and fiscal governance of the Eurozone Member States, despite being subject to the Union rules, is not fully within the remits of the EU, as it is conversely the case for monetary policy[38].

---

[36] Treaty on European Union [1992] OJ C 191/1. For its historical background, see Tommaso Padoa-Schioppa et al, *Efficiency, Stability and Equity: A strategy for the evolution of the economic system of the European Community. Report to the European Commission* (OUP 1988). Further, below at (n 110).

[37] Despite a large degree of economic policy still remains at Member State level, although Article 120 TFEU compels Member States to conduct such policies 'with a view to contributing to the achievement of the objectives of the Union'. As it will be developed in great details in Section 2.2, after the Great Recession, the European Semester and the other specific measures set out in the 'Six-Pack' and 'Two-Pack' have been introduced to enhance the coordination and surveillance of economic governance.

[38] The need for a greater coordination at EU level is broader than the sole fiscal policy area, as indeed, pursuant to Article 4 TFEU, 'Member States shall coordinate their economic policies within the Union" outside the area of monetary policy where the Union bears 'exclusive competence' according to Article 3 TFEU. However, the boundaries between 'economic' and 'monetary policy' are still highly debated. For a comprehensive analysis, see Rosa Lastra and Jean-Victor Louis, 'European Economic and Monetary

Second, the EU budget is historically limited in resources and fiscal capacity[39]. Thus far, the EU multiannual financial framework has lacked the political and institutional power to implement a comprehensive economic and budgetary strategy[40], notwithstanding some very recent progress for a prospective fiscal capacity, as a consequence of the COVID-19 crisis, through market-based funding mechanisms linked to the EU budget for supporting the 'Next Generation EU' programme[41].

The hurdles of economic coordination, particularly in the area of fiscal policy, are indeed a long-lasting issue in the EU, as it was already apparent in the critique that in 1989 the Delors Report raised towards the 'insufficient' results of the 1974 Council decision on the 'attainment of a high degree of convergence of the economic policies of the Member States'[42].

In this respect, the said report notably stressed the importance of coordination of national budgetary policies since the risk of uncoordinated and divergent policies

---

Union: History, Trends, Prospects' (2013) 32 Yearbook of European Law 57, 90ff (hereafter Lastra and Louis, *European Economic and Monetary Union*) (stating that economic union is a "misnomer" because it means economic policy coordination); Michael Waibel, 'Monetary Policy: An Exclusive Competence Only in Name?' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States*, (Hart Publishing 2017) 90 (stating that monetary policy is an exclusive competence of the EU in name only); Jean-Paul Keppenne, 'Economic Policy Coordination' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 787 (hereafter Keppenne, *Economic Policy*).

[39] Marco Buti and Mario Nava, 'Towards a European budgetary system' (2003) EUI working papers RSC 8 (on the inconsistency of the EU budget for the future prospect of the EU integration); Brigid Laffan, *The Finances of the European Union* (St. Martin's Press 1997) 94-95 (stressing the collective action issues with the EU budgetary expenditures); High Level Group on Own Resources, 'The Future Financing of the EU' (2016) 62-71 (hereafter 'Monti Report') (also discussing new strategies for EU revenue).

[40] Iain Begg, 'Future Fiscal Arrangements in the European Union' (2004) 41 Common Market Law Review 780 (on the importance of the political commitments if there are substantial budgetary flows between central and sub-national tiers of government).

[41] As developed below in Section 2.3, the Multiannual Financial Framework (MFF) for 2021-2027 has been reinforced with a Recovery Instrument, 'Recovery and Resilience Facility' (RRF) within the Next Generation EU programme (NGEU), which is funded through the issuance by the Commission of lending instruments on behalf of the EU.

[42] Committee for the study of Economic and Monetary Union, 'Report on economic and monetary union in the European Community' (1989) 11 (hereafter 'Padoa-Schioppa Report').

'would undermine monetary stability and generate imbalances in the real and financial sectors of the Community'[43]. Accordingly, the report also pointed out that since the 'monetary policy alone cannot be expected to perform [… adjustment] functions', but at the same time fiscal policies would 'remain the preserve of Member States even at the final stage of economic and monetary union', establishing 'a fiscal/monetary policy mix appropriate for the preservation of internal balance' would be achieved through a greater budgetary coordination[44].

As further illustrated by the Delors Report, the EU economic and fiscal coordination among Member States was already insufficient at the time and it still appears to be so, despite the degree of institutional complexity and the overflow of legal production – with different relevance in respect of the hierarchy of norms – which has been conceived[45].

Though, economic surveillance, by means of both fiscal and non-fiscal mechanisms, has not achieved over time the much-awaited convergence in a far-reaching manner.

For instance, the Union pursued soft economic policy through intergovernmental policy coordination, like the 'open method of co-ordination' (OMC), to establish an alternative 'mode' of economic governance[46] on the basis of 'guidelines, benchmarks, and

[43] *Ibid.* 19.

[44] *Ibid.* 19-20.

[45] For a comprehensive reference to primary and secondary EU legislation on economic governance following the European Debt Crisis triggered by the Great Recession, see below Section 2.2.For an example onto the legal density and volume to be considered in the Stability and Growth Pact analysis, there are also some guidance documents, though with 'no legal value per se', as pointed out by Keppenne, *EU Fiscal Governance on the Member States* (n 18) 829: The 2019 edition 'Vade Mecum on the Stability and Growth Pact' (hereafter 'SGP Vade Mecum of 2019'), the 2017 edition of the 'Code of Conduct of the Stability and Growth Pact', the 2016 edition of the 'Code of Conduct of the Two-Pack', the 2016 edition 'Compendium on the Macroeconomic Imbalance Procedure', and the first and 2013 edition 'Vade mecum on the Stability and Growth Pact'.

[46] Dermot Hodson and Imelda Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-Ordination' (2001) 39 Journal of Common Market Studies 719 (referring to the

recommendations combined with national reporting, monitoring and surveillance, and peer review'[47] without having to adjust to the level of competences set out in the Treaties for enacting legislation (community method). An example of such soft approach is visible with the Broad Economic Policy Guidelines (BEPGs). Through such policy, in line with Article 121 TFEU, the Council aimed at exerting peer pressure upon Member States via a name and shame mechanism, notwithstanding that in some instances such a practice generated a lot of national political backlash against the Union, as it happened with Ireland in 2001 or with Greece in 2010[48].

Further, the European Debt Crisis (2010-2012), that was triggered by the Global Financial Crisis (2007-2009), has intensified the need for economic coordination and surveillance, but it showed a push for a 'broader use of binding measures' in line with the community method vis-à-vis the previous reliance on soft mechanisms, like the OMC[49]. On this line, some authors have argued that a 'semi-intergovernmental method'

---

adoption of OMC already in the important Lamfalussy Report on the regulation of the EU securities market). For a complete overview, Mark Dawson, 'Three waves of new governance in the European Union' (2011) 36 EL. Rev. 208; Mario P. Chiti (ed), *Diritto amministrativo europeo* (Giuffrè 2011) 340ff; Jacques Delors, 'Economic governance in the European Union' (2013) 51 J Common Mark Stud 170ff (hereafter Delors, *Economic governance in the European Union*). See also, Gráinne De Búrca and Jonathan Zeitlin, 'Constitutionalising the open method of co-ordination. What should the convention propose?' (2003) 31 CEPS Policy Brief <https://www.ceps.eu/ceps-publications/constitutionalising-open-method-coordination-what-should-convention-propose> accessed 3 January 2022 (describing OMC as a valuable tool for promoting deliberative problem-solving and cross-national learning across the EU, especially in domestically sensitive areas); Susana Borrás and Kerstin Jacobsson, 'The Open Method of Co-ordination and the New Governance Patterns in the EU' (2004) 11 Journal of European Public Policy 185 (also stating that OMC procedures are not neutral); Kenneth Armstrong, Iain Begg, and Jonathan Zeitlin, 'JCMS Symposium: EU Governance After Lisbon' (2008) 46 JCMS 413 (on the Lisbon governance architecture via the OMC and its constitutional implications for the EU).

[47] Armstrong, *The New Governance of EU Fiscal Discipline* (n 10) 602.

[48] For a critical analysis on the BEP Guidelines, see Dermot Hodson, *Governing the Euro Area in Good Times and Bad* (OUP 2011) 78-92 (hereafter Hodson, *Governing the Euro Area*). Further, see below paras. 2.1 and 2.2.

[49] European Parliament Resolution on economic governance [2011] OJ C236 E/68, 16 (hereafter 'European Parliament's Resolution on economic governance'). For a critical analysis, see below at Section 2.2.

took place in the euro area[50], whereby, with the purpose of sidestepping some political and legal deadlocks, Member States agreed to establish private or public international law entities outside the Union – as in 2010 with the European Financial Stability Facility (EFSF)[51], in 2012 with the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG)[52], and then with Treaty Establishing the European Stability Mechanism (ESM Treaty)[53].

Having that in mind, the network and complexity analyses appear useful tools to ascertain both the asymmetries stemming from a decentralised fiscal policy governance and more broadly the complexity of the multilevel framework concerning

[50] Keppenne, *Economic Policy* (n 38) 805-809. On a different line, arguing '*In most cases, the choice is not between the community method and the intergovernmental method but between a coordinated European position and no position at all*', Angela Merkel, 'Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year' (*College of Europe*, 2 November 2010) <https://www.coleurope.eu/content/news/Speeches/Europakolleg%20Brugge%20Mitschrift%20english.pdf> accessed 3 January 2022.

[51] The European Financial Stabilisation Mechanism (hereafter 'EFSF') was created by Council Regulation (EU) No 407/2010 on establishing a European financial stabilisation mechanism [2010] OJ L 118/1 and it operates in a similar manner to a balance of payment facility for Member States. Accordingly, the EU can borrow on the market and lend to the concerned Member State through back-to-back operations without a direct implication on the EU balance sheet. Further on fiscal risk sharing mechanisms in Section 2.3. It shall be mentioned that, according to Eurostat's decision of 27 January 2011, the EFSF does not qualify as an 'institutional unit' from an accounting standpoint (ESA 2010) as it presents no decision autonomy being subject to unanimous approval of the Eurogroup. Consequently, the concerned operations could have been in theory accounted, at least in part, within the national government's accounts.

[52] The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 1-2 March 2012 (hereafter 'TSCG') is an intergovernmental treaty to integrate and complement the Stability and Growth Pact. For further references, see below Section 2.2 and, more specifically, (n 217). In this regard, see Rose D'Sa, 'The Legal and Constitutional Nature of the New International Treaties on Economic and Monetary Union from the Perspective of EU Law' (2012) 5 European Current Law 11 (critical on the justification of establishing TSCG due to its interdependence with the implementation of EU Law); Giacinto della Cananea, 'Lex Fiscalis Europea' (2014) 34 Quaderni costituzionali 24 (assessing the innovative capacity of the TSCG if duly considered in relation to the constitutional traditions common to the Member States on fiscal matters).

[53] The European Stability Mechanism (hereafter 'ESM') is an intergovernmental organisation which was set up in 2012 as a rescue fund to provide financial assistance to distressed euro area Member States, as later amended in Treaty has been agreed by the Eurogroup on 14 June 2019 (see below n 87). For further references and comments see below (nn 156 and 199).

the EU and domestic fiscal interactions in the EU Fiscal Network[54]. For this purpose, the concerned fiscal system could be considered according to the most common set of relationships in a (complex) network: Nodes and interconnections/links, where the nodes are connection points, and the interconnections are the relationship between the nodes.

For instance, the nodes could be the diverse institutions involved in the fiscal policy discourse at EU level and in a Member State, like Italy, which form part of what it has been named 'EU Fiscal Network'. More precisely, at EU level there are at least the ensuing nodes acting on the fiscal policy: Council, Commission, European Council, European Parliament, ECB, European Fiscal Board, Euro Summit, and Eurogroup; while at domestic level, in a country like Italy, there can be narrowly found the following institutions: Central government, Parliament, Fiscal Board, Court of Auditors, Regions, Municipalities, other coordination fora like Conference of State-Regions, Conference of State-Municipalities and Local Authorities, and Unified Conference[55].

Within the EU Fiscal Network, there are hence multiple connections among the nodes (e.g., information sharing, authorisations, request for support or waiver, informal negotiations, and other interactions) which may take shape of both 'inward' and 'outward' links. In doing so, such interconnections form part of a network in which actors are mutually interdependent and perform a different degree of interactions and control among each other.

In this regard, it is worth noticing that a large degree of scholarship has focused on

[54] Erik-Hans Klijn and Joop Koppenjan, 'Governance network theory: past, present and future' (2012) 40 Policy & Politics 587.

[55] On the 'polycentrism' of the institutional framework on public finance, see Giacinto della Cananea, *Indirizzo e controllo della finanza pubblica* (Il Mulino 1996) 27, 170, and 353 (hereafter della Cananea, *Indirizzo e controllo della finanza pubblica*).

the theory of Multilevel Governance (MLG) which considers the interlinks between supranational and sub-national state and non-state actors in the pursue of carrying out policy outcomes[56]. As such, alongside with the network analysis, it is also possible to consider the MLG theory at least for its explanatory capacity to depict the institutional complexity and 'legal' entropy of the EU governance and to the extent that such studies investigate the relevance of the governance for subnational governments, and 'their myriad connections with other levels'[57], particularly in the context of the European Union[58].

At the same time, we do raise some concerns over the very idea of MLG – as Gary Marks contends – in being a 'process of institutional creation and decisional allocation that has pulled some previously centralised functions of the state up to the supranational level and some down to the local/regional level'[59], since we rather argue that in the EU Fiscal Network the subnational institutional risks – and specifically Fiscal Policy Risk – has determined a de facto reappropriation by the State, in a centralist manner, of coordination and risk mitigation activities towards the Union by means of public law.

To further proceed with a network analysis of the EU Fiscal Network, it shall be regarded that this constitutes topologically a system in the meaning of 'an

[56] Ian Bache and Matthew Flinders (eds), *Multi-level Governance* (OUP 2004).
[57] Gary Marks, 'Structural policy and multilevel governance in the EC' in Alan Cafruny and Glenda Rosenthal (eds), *The State of the European Community* (Boudler 1993) 392 (hereafter Marks, *Structural policy and multilevel governance in the EC*).
[58] George Pagoulatos and Lukas Tsoukalis, 'Multilevel Governance' in Erik Jones, Anand Menon, and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012) 62. On the implications of multilevel governance in the 'Domestic sub-system' concerning Italy, see below Chapter 3 and Massimo Luciani, 'Gli equilibri di bilancio in un ordinamento multilivello' in Corte dei Conti, Sviluppo economico, vincoli finanziari e qualità dei servizi: strumenti e garanzie - *atti del LXIV Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2018* (Giuffrè 2019) 45-54 (hereafter Luciani, *Gli equilibri di bilancio*).
[59] Marks, *Structural policy and multilevel governance in the EC* (n 57) 392.

interconnected set of elements that is coherently organized in a way that achieves something'[60], that we would claim is fiscal stability.

Moreover, the interconnections among the nodes constitute two different sub-systems: one at EU level ('European sub-system') the other at domestic level ('Domestic sub-system'). Both the sub-systems have one main node in common which is the central government of a given Member State, whose pivotal function in the EU Fiscal Network is to liaise with two binary relations (EU/ domestic) to ensure, on the one end, the compliance of the country with the EU fiscal framework (European sub-system) and, on the other end, the cascading of such commitments towards the multilevel intergovernmental relations (Domestic sub-system)[61].

In other terms, we contend that the central government of a Member State plays the 'centrality' role in the EU Fiscal Network, as it is the final responsible entity towards the Union. As such, according to system theory, it represents the most relevant actor within such network. Further, as per the distribution of existing connections in a given network, which is technically called 'density', we posit that within the EU Fiscal Network the connections are predominately distributed within the two sub-system, without significant direct interactions between the EU institutions and the sub-governments, meaning between European sub-system and Domestic sub-system.

Against this background, the network and complexity analyses appear as meaningful tools to enquiry into the interdependent dynamic relations among the EU and Italian

[60] Donella Meadows, *Thinking in Systems* (Chelsea Green Publishing 2008) 11.

[61] On the difficult 'interplay between Union fiscal rules and national fiscal frameworks' which still needs an 'improvement', Commission, 'Economic governance review - Report on the application of Regulations (EU) No 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013 and on the suitability of Council Directive 2011/85/EU' COM(2020) 55 final (hereafter 'Report on Economic governance review').

institutions within the EU Fiscal Network, especially for the purpose of assessing, within the Domestic sub-system of Italy, how public law has been employed to organise the multilevel relations occurring among the Italian central government and the subnational governments as to ensure the overall fiscal stability of such a Member State as regards its general government.

1.2 Law and Macroeconomics – Fiscal Policy Risk

Leaving aside the network and complexity theories, which we regard as suitable tools to better understand the structure of the EU Fiscal Network, it is possible to proceed with exploring the aforementioned notion of Fiscal Policy Risk which is the risk for the central government of a Member State of not complying with the EU fiscal policies framework due to domestic institutional failures (e.g., intergovernmental financial relations). This specific source of risk can be considered according to a twofold approach: In relation to the very nascent discipline of law and macroeconomics, as it follows in the current Section, and then to the field of risk regulation (Section 1.3).

Before discussing the specificities of law and macroeconomics, in order to set the basis for the understanding of the idea of Fiscal Policy Risk, it is worth, first, examining the overall attitude among public law scholars towards the law and economics movement and, second, questioning why it 'took so long' in the legal academia to become aware of macroeconomics in general. We then conclude that public law scholars should pay greater attention to the emerging studies on law and macroeconomics given that, as we posit in this research, public law can constitute an effective tool for increasing macroeconomic stability by mitigating institutional risks and encouraging risk-taking to

increase public spending.

As we briefly touched upon, an emerging branch of the economic analysis of the law has criticised that the development of law and economics has remarkably favoured microeconomics[62] while sidestepping for a long time the contribution of macroeconomics to this field of study[63]. As Yair Listokin aptly put it: 'Law and economics should really be called 'law and microeconomics''[64] and this proposition appears utterly convincing[65]. Indeed, from the outset, important exponents of the law and economics have frankly emphasised their preference for the microeconomic approach over macroeconomics[66]. Further, the large influence of the mainstream

[62] The traditional law and economics analysis was forged around the paradigm of homo economicus which constitutes the basis for the microeconomic analysis. For an overview, see Ronald Coase, 'The Problem of Social Cost' (1960) 56 The Journal of Law and Economics 837; Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 Yale L.J. 499; Richard Posner, 'The Economic Approach to Law' (1975) 53 Texas Law Review 757; Richard Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014). It shall also be mentioned the 'New Institutional Law and Economics' movement proposing a methodological approach closer to political science. For an overview, see Richard Posner, 'The New Institutional Economics Meets Law and Economics' (1993) 149 Journal of Institutional and Theoretical Economics 73 (concluding on the diverse overlaps among the Law and Economics and New Institutional Economics movements).

[63] Listokin, *Law and Macroeconomics* (n 11) 5-6.

[64] Yair Listokin, 'A Theoretical Framework for Law and Macroeconomics' (2019) 21 American Law and Economics Review 46 (presenting a theoretical framework for analysing the effects of laws on aggregate demand). Similarly, on the relevance of macroeconomics in the economic analysis the law, Fabio Merusi, 'Conclusioni' in AIPDA (ed), *Annuario 2006: Analisi economica e diritto amministrativo* (Giuffrè 2007) 311, 313. Further analysis at Désirée U. Klingler, 'Government Purchasing During COVID-19 and Recessions: How Expansionary Legal Policies Can Stimulate the Economy' (2020) 50 Public Contract Law Journal 1 (exploring the idea of expansionary legal policies vis-à-vis deregulation by a looking at some procurement policies in response to COVID-19).

[65] Accordingly, Francesco Denozza posits 'L'individualismo metodologico che ispira l'analisi economica del diritto induce a porre al centro dell'attenzione la cellula più elementare di tutto il sistema sociale e cioè la transazione tra due individui', Francesco Denozza, 'Poteri della pubblica amministrazione e benessere degli amministrati' in AIPDA (ed), *Annuario 2006: Analisi economica e diritto amministrativo* (Giuffrè 2007) 8. On a similar note, Thomas W. Merrill, 'Private and Public Law' in Andrew S. Gold et al (eds), *The Oxford Handbook of the New Private Law* (OUP 2020) 575 (noting the luck of public law studies in the field of law and economics, thus far relegated to private law scholars due to the utilitarian influences).

[66] For an example, see 'Many lawyers think that economics is the study of inflation, unemployment, business cycles, and other mysterious macroeconomic phenomena remote from the day-to-day concerns of the legal system. Actually the domain of economics is much broader. As conceived in this book, economics is the science of rational choice in a world — our world — in which resources are

economics at the time did not help over the years the law and economics movement to reshuffle the main tenets at the basis of their legal reasoning, hence neither sufficiently focussing on alternative strand of micro analysis (e.g., behavioural economics, nonmarket behaviours)[67] nor adopting different perspectives like macroeconomics[68].

A possible explanation for such nascent interest of the legal academia over macroeconomics is that, despite few forerunners among scholars[69], the recent economic and financial turmoil of the Global Financial Crisis, which ceased the relative economic stability of the Great Moderation (1980-2007), conferred a greater relevance upon the macroeconomics and consequently also sparked the interest of legal scholars towards macroeconomics[70]. Furthermore, since law and macroeconomics studies 'the

limited in relation to human wants', Richard Posner, *Economic Analysis of Law* (3rd edn, Wolters Kluwer 1986) 3. Similarly, Robert Cooter, Ugo Mattei, Pier Giuseppe Montaneri, Roberto Pardolesi, and Thomas Ulen, *Il mercato delle regole, Analisi economica del diritto civile* (Il Mulino 2006) 13 (hereafter Cooter, *Il mercato delle regole*), as they contend: 'Nel complesso, peraltro, i due volumi restano fedeli al disegno originario di rendere conto dello «stato dell'arte» dell'EAL [analisi economica del diritto] applicata al diritto civile'.

[67] Ugo Mattei, 'The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi' (2005) 64 Maryland Law Review 248-249 (criticising the mainstream law and economics belief in ideological and abstract formulas). On the critique to the homo economicus theory assuming perfect rationality of individuals acting in a legal system as maximisers of their satisfactions, see Cass R. Sunstein, *Behavioral Law and Economics* (CUP 2012); Eyal Zamir and Doron Teichman, *The Oxford Handbook of Behavioural Economics and the Law* (OUP 2014). On the relevance of nonmarket behaviours, Gary Becker, *The Economics of Discrimination* (University of Chicago 1971). On the fact that efficient markets can be irrational, see Financial Services Authority, 'The Turner Review', March 2009 39-42.

[68] Yair Listokin, 'Law and Macro: What Took So Long' (2020) 83 Law & Contemp. Probs. 141 (hereafter Listokin, *Law and Macro*) (advancing the thesis that the favour for microeconomics stems both from the Great Moderation and the intellectual origin of law and economics in the University of Chicago, notably hostile to the Keynesian macroeconomics). For some analysis on aggregate phenomena, interestingly Denozza showed an interest on the allocation or distribution effects of a law imposing a ban on sale, Francesco Denozza, *Norme efficienti* (Giuffrè 2002) 136 and 155 (hereafter Denozza, *Norme efficienti*). For a study on the influence of macroeconomic factors over the US Supreme Court decisions, Thomas Brennan et al, 'The Political Economy of Judging' (2009) 93 Minnesota Law Review 1503.

[69] Mark Kelman, 'Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics' (1993) 45 Stanford Law Review 1215; Bruno Meyerhof Salama, 'The Art of Law and Macroeconomics' (2012) 74 U. Pitt. L. Rev. 131.

[70] Critical on the scarce interest of the US administrative law legal doctrine on the institutional issues pertaining to central banks, Listokin, *Law and Macro* (n 68) 152, as he claims that: 'The problem for

role of law in determining aggregate variables such as interest rates, total output, unemployment, inflation, and productivity growth'[71], legal scholars can henceforth add an additional layer of analysis to the law. Accordingly, some authors have also claimed that law can be an additional macroeconomic policy tool, which is also beneficial 'for stimulating aggregate demand when monetary policy is ineffective'[72].

Once verified that macroeconomics could represent a useful perspective in legal studies, it is thus debatable how public law scholars have approached the law and economics in general and if the macroeconomics could improve the interest towards such analytical tool.

In essence, it is noticeable that the law and economics analysis, due to the said strong influence from microeconomics, has been mostly prone to focus on some areas of the law (e.g., contracts, property rights, liability)[73] rather than others like public and administrative law[74]. However, over time, public law scholars have entered

administrative law scholars may be that the study of central banks plainly requires macroeconomic sophistication, yet very few administrative law scholars have the macroeconomic background necessary to evaluate specific monetary policy or financial regulatory decisions on their own terms. Over time, however, the study of central banks as legal actors is likely to be a growing part of law and macroeconomics'. Similarly, Giulio Napolitano, 'Administrative Law' in Alain Marciano and Giovanni Battista Ramello (eds), *Encyclopedia of Law and Economics* (Springer 2014) (hereafter Napolitano, *Administrative Law*) (stating that the limited interest of both the law and economics movement and the administrative law scholars to focus on administrative law is a missed opportunity); Fabio Merusi, 'Il giudice amministrativo fra macro e micro economia' (2018) Rivista trimestrale di diritto dell'economia 136 (on the relationship between administrative tribunals and control on the national fiscal policy).

[71] Yair Listokin and Daniel Murphy, 'Macroeconomics and the Law' (2019) 15 Annual Review of Law and Social Science 378.

[72] Listokin, *Law and Macroeconomics* (n 11) 3.

[73] See (n 62). In addition, for some references to the Italian academic works in the field of law and economics on contract law and civil liability: Pietro Trimarchi, *Rischio e responsabilità oggettiva*, (Giuffrè 1961); Antonio Gambaro, 'L'analisi economica del diritto nel contesto della tradizione giuridica occidentale' in Guido Alpa et al (eds), *Analisi economica del diritto privato* (Giuffrè 1999) 461; Cooter, *Il mercato delle regole* (n 66); Roberto Pardolesi and Bruno Tassone, *I giudici e l'analisi economica del diritto privato* (Il Mulino 2003); Guido Alpa, 'Interpretazione economica del diritto' in *Novissimo Digesto Italiano – Appendice* (Utet 1980) 315; Denozza, *Norme efficienti* (n 68).

[74] Giulio Napolitano, 'Analisi economica del diritto pubblico' in Sabino Cassese (ed), *Dizionario di diritto pubblico* (Giuffrè 2006) 299; Natale Longo, 'L'insostenibile leggerezza della responsabilità

progressively into the law and economics debate[75], particularly assessing the effects of public law over market failures (e.g., competition, public goods, macroeconomic imbalances, financial crises)[76]. Further, some contributions among the public law scholars can be retraced to the (different) Public Choice movement[77], which has been properly called a 'hybrid' because of 'the application of the economist's methods to the political scientist's subject' like the legislative process. Nonetheless, the overall interest of the legal academia on the specific field of economic analysis of administrative law is still limited[78].

Dispite the interest of the public law scholars to consider macroeconomics within the field of law and economic analysis appears to be scarce, if not negligible, there are

amministrativa: un contributo di «Law and Economics»' (2005) 5 Riv. Corte conti 225.

[75] Susan Rose-Ackerman (ed), *Economics of Administrative Law* (Elgar 2007); Edwin Woerdman, 'Administrative Law and Economics' in Jürgen G. Backhaus (ed), *The Elgar Companion to Law and Economics* (2nd edn, Elgar 2005) 239; Napolitano, *Administrative Law* (n 70). For some further references in Italian, Maurizio Cafagno, *Lo Stato banditore*, (Giuffrè 2001); Mariateresa Fiocca and Giancarlo Montedoro, 'Il costo dell'impazienza: un'analisi giureconomica della legislazione sulle grandi opere' (2004) Urbanistica e appalti 1132; AIPDA (ed), *Annuario 2006: Analisi economica e diritto amministrativo* (Giuffrè 2007); Fabio Merusi, 'Analisi economica del diritto e diritto amministrativo' (2007) Dir. Amm., 2007 434; Cassese, *Il sorriso del gatto* (n 8); Giulio Napolitano and Michele Abrescia, *Analisi economica del diritto pubblico* (Il Mulino 2009) (hereafter Napolitano and Abrescia, *Analisi economica*).

[76] As Cassese contends 'L'analisi economica del diritto, però, pur provocando una crisi del pensiero giuridico tradizionale, lo arricchisce, perché fornisce una chiave universale per esaminare gli ordinamenti giuridici, che consente ai giuristi di non restare prigionieri dei singoli diritti positivi nei quali operano; e perché fornisce uno strumentario per sottomettere anche lo Stato ad alcune regole (non esiste intervento pubblico che non abbia costi)', Cassese, *Il sorriso del gatto* (n 8) 100. For further references see also (n 70).

[77] An important contribution to this field of study is James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Liberty Fund 1962). See also, Murray J. Horn, *The Political Economy of Public Administration*, (CUP 1995). For a legal analysis, see Daniel A. Farber and Philip P. Frickey, *Law and Public Choice. A Critical Introduction* (Chicago University Press 1991). For a public law perspective, Napolitano and Abrescia, *Analisi economica* (n 75) 31-40. For critical view on the overall quality of the public choice analysis, see Cooter, *Il mercato delle regole* (n 66) 12, as it is stated that '[…] trent'anni di riflessione principalmente dedicate ai property rights, ai contratti e alle liability rules hanno reso il dibattito privatistico molto più sofisticato e sfumato rispetto a modelli un po' rozzi, ancora largamente tributari della letteratura sulle public choices, che la giuspubblicistica economica ha fin qui saputo produrre'.

[78] Giulio Napolitano, 'Diritto amministrativo e processo economico' (2014) Diritto Amministrativo 704.

rather good reasons why public lawyers should engage in macroeconomics and paying greater attention to it. First, the very interests of macroeconomics (e.g., employment, investment, inflation, …) relate to the States' and public institutions' activities, which of course are of outmost relevance for the public law analysis. Second, macroeconomics is intertwined and influenced by the States' and public institutions' functioning, policies, and decisions, thus making public powers' activities far from macroeconomically neutral. Third, States are increasingly dependent upon macroeconomic fluctuations and to an extent the legal design on fiscal policies has relied on the 'external control' exerted upon the State by the markets on the basis of the macroeconomic conditions[79]. Finally, in the area of fiscal policies, public law scholars are significantly exposed to understanding macroeconomic notions, like business cycles, crises and recessions, economic output etc…, which are nowadays inextricably part of the legal analysis.

With that in mind, we then leave the remaining part of the conclusive reasoning on this topic to the ensuing Section 1.4, where we will try to elaborate that, if public lawyers do not indulge in law and macroeconomics, it would be welcomed if at least increased their interest in the analysis of 'macro' or 'aggregate' phenomena, which of course would consist in a broader and more general scope than the more specific field of macroeconomics. If so, there would be room for a greater attention among legal scholars to understanding the interactions, relationships, and influences between public law and aggregate institutional variables influencing the economic and financial

[79] To provide an example, see the idea of external constraints ('vincolo esterno') presented by Guido Carli, in *Cinquant'anni di vita italiana* (Laterza 1993) 9. For an overview on the concept of 'vincolo esterno', see Kenneth Dyson and Kevin Featherstone, 'Italy and EMU as a "Vincolo Esterno": Empowering the Technocrats, Transforming the State' (1996) 1 South European Society and Politics 272 (providing an analysis on the alleged strategy of Italian negotiator for the Maastricht Treaty shifting to externally-imposed fiscal discipline for achieving consensus over otherwise unattainable public reforms at domestic level).

stability as a whole. In this regard, the following Section 1.3 pertaining to the notion of risk and risk regulation combines well to this line of reasoning.

1.3 Risk Regulation – Fiscal Policy Risk

The discussion around the field of law and macroeconomics, which has been carried out in the foregoing Section, sets the stage for the fiscal policy analysis and particularly on the governance of risk pertaining to 'macro' or 'aggregate' phenomena which – it is here purported – public law is able to mitigate. Indeed, in the current analysis it is claimed that public law constitutes a tool to mitigate institutional risk and specifically what so far has been called 'Fiscal Policy Risk': The risk for a Member State of not complying with the EU fiscal policies framework due to domestic institutional failures involving the intergovernmental financial relations.

The attention paid to the concept of risk and its mitigation is crucial for the institutional design to which public law contributes[80]. Indeed, the academic shift on the concept of risk from the technical domain to social sciences – notably through the contributions of Ulrich Beck and Mary Douglas[81] – ushered a large degree of analyses, also within

[80] Mario Draghi, 'Risk-reducing and risk-sharing in our Monetary Union', speech at the European University Institute, 11 May 2018 <https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180511.en.html> accessed 3 January 2022 (hereafter Draghi, *Risk-reducing and risk-sharing*); Moloney, *EU financial market regulation* (n 14); Luca Gandullia and Lucia Leporatti, 'Subnational fiscal balance, interregional redistribution and risk-sharing in Italy' (2020) 54 Regional Studies 318.

[81] The pioneer of such new understanding of risk (albeit very interested in the influences exerted by technology) is the sociologist Ulrich Beck with the book Risikogesellschaft (Suhrkamp, 1986), translated in English as Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage Publications 1992). In this regard, Giddens claimed 'To analyse what risk society is, one must make a series of distinctions. First of all, we must separate risk from hazard or danger. A risk society is not intrinsically more dangerous or hazardous than pre-existing forms of social order', Antony Giddens, 'Risk and Responsibility' (1999) 62 Modern Law Review 3. For a reference on foundational studies on risk from an anthropological perspective, see Mary Douglas and Aaron Wildavsky, *Risk and Culture: An Essay on the Selection of*

the field of law[82]. Needless to say, the legal domain was well aware of the function of law as a means of risk allocation[83], even before the development of the economic analysis of the law. Yet, while such topic mostly concerned contract law and tort law, through doctrines like 'reasonable foreseeability' or 'negligence', public law has indulged to a lesser extent with the idea of risk: For instance, after the Maastricht Treaty a great degree of studies focused on the precautionary principle concerning the EU environmental or food regulation[84].

Starting from the Maastricht Treaty, the Union primary law is not anew to the notion of 'risk'. The Treaty on the Functioning of the European Union (TFEU) contains indeed multiple references to risk, especially in the Title on 'Economic and Monetary Policy', indicating – for instance – the risk of 'jeopardising the proper functioning of economic and monetary union' (Article 121(4)) or the risk of 'an excessive deficit in a Member State' (Article 126(3))[85]. Then, also the Treaty on Stability, Coordination and

Technological and Environmental Dangers (University of California Press 1983). Further, for an historical overview, Peter Bernstein, *Against the Gods: The Remarkable Story of Risk* (John Wiley & Sons 1998).

[82] Maria Weimer, 'The Origins of "Risk" as an Idea and the Future of Risk Regulation' (2017) 8 European Journal of Risk Regulation 10-11. Many contributions to the legal study of "risk" are available in the "European Journal of Risk Regulation" since its inception in 2020. For a recent EU analysis of risk regulation, see also Maria Weimer and Anniek de Ruijter (eds), *Regulating Risks in the European Union* (Hart Publishing 2017).

[83] A different kind of risk is 'legal risk', which relates to the uncertainties caused by the application of the law (operational risk). As Johanna Benjamin aptly states, 'legal uncertainty cannot be eliminated: it can only be managed', Joanna Benjamin, 'The Narratives of Financial Law' (2010) 30 Oxford Journal of Legal Studies 807. For a comprehensive study on legal risk in financial markets, see Roger McCormick and Chris Stears, *Legal and Conduct Risk in the Financial Markets* (3rd edn, OUP 2018) For EU law analysis on legal risk, see Emilia Mišćenić and Aurélien Raccah (eds), *Legal Risks in EU Law* (Springer International Publishing 2016).

[84] The precautionary principle is now laid down under Article 191(2) TFEU. For a further reference, see Commission, 'Communication on the precautionary principle' COM(2000)1 final 4 stating 'The precautionary principle should be considered within a structured approach to the analysis of risk which comprises three elements: risk assessment, risk management, risk communication'.

[85] Another interesting reference to 'risk' can be found under Article 256 dealing with the 'serious risk of the unity or consistency of Union law being affected' which entails the exceptional review of a General Court decision by the Court of Justice. For more references to the TSCG, see Section 2.2 and, more specifically above (n 52) and below (n 217).

Governance in the Economic and Monetary Union (TSCG) pays particular attention to 'risk' referring, under the Title 3 on 'Fiscal Compact', to the 'country-specific sustainability risk' or to 'risks in terms of long-term sustainability of public finances' [86]. And similarly, as laid down under Article 13 of the ESM Treaty as it reads that among the criteria for providing the financial assistance there is the duty 'to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States'[87].

Further, during the European Debt Crisis, some scholars pointed out that the flaws in the institutional structure of the EMU represented 'a major source of global instability'[88]. Hence, it has been purported that the deliberate (but necessary) choice, which came out from the negotiation of the Maastricht Treaty, for an incomplete EMU in relation to the decentralised governance of fiscal policy, as opposed to a centralised monetary policy, was per se an additional source of instability to the financial markets. Indeed, the shortcomings of such institutional design of the EU economic governance, that thus far we have metaphorically dubbed 'Janus Trap', and that can be regarded as the lack of EU-wide fiscal stabilisers as well as some legal limitations to the monetary policy[89], contributed to endanger the economic crises in the euro area.

---

[86] Respectively, Article 3(1)(b) and (d). Moreover, recital No 12 also stresses the importance of a commonly agreed MTO methodology for 'reflecting appropriately the risks of explicit and implicit liabilities for public finance'.

[87] As further confirmed in principle at the Eurogroup meeting of 30 November 2020 dealing with on the ESM reform and the early introduction of the backstop to the Single Resolution Fund, as well as previously confirmed in the draft revised text of the ESM Treaty (see n 53) as agreed by the Eurogroup on 14 June 2019.

[88] Dariusz Adamski, 'National power games and structural failures in the European macroeconomic governance' (2012) 49 Common Market Law Review 1319 (hereafter Adamski, *National power games*). On the development of the EMU from a 'community of benefits into a more complex community of benefits and risks', see Edoardo Chiti and Pedro Gustavo Teixeira, 'The constitutional implications of the European responses to the financial and public debt crisis' (2013) 50 Common Market Law Review 704.

[89] Among others, it can be mentioned the prohibition of monetary financing (on the primary market) for both the ECB and the national central banks, according to Article 123 TFEU, whose aim was also

Against this background, the area of fiscal policy epitomises the relevance of the notion of risk, albeit difficult to delimitate[90], and more broadly shows the importance of the theory of risk regulation as an analytical tool in legal studies[91]. Such an approach can hence stimulate the discussion around the role of public law in shaping and mitigating what it has been named so far 'Fiscal Policy Risk'.

In other terms, while in the EMU 'compliance with the rules involves the behaviour of all levels of government, it is effectively the central government that is held responsible and that bears the costs of non-compliance'[92]. As such, the perimeter of such source of institutional risk and the attribution of its responsibility is significantly meaningful and it sets the basis of our subsequent analysis.

To further clarify such proposition, it might be useful to refer to the distinction suggested by Adrian Vermeule between 'first-order risks' and 'second-order' risks. While the first-order risks have been described as 'ordinary risks addressed by

understood to be 'encourag[ing] the Member States to follow a sound budgetary policy, not allowing […] privileged access by public authorities to the financial markets to lead to excessively high levels of debt or excessive Member State deficits' CJEU, Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag* [2015] OJ C 279/100. On this line, Edoardo Chiti, 'L'Unione e le conseguenze della pandemia' (2020) Giornale di diritto amministrativo 436, 438 (hereafter Chiti, *L'Unione e le conseguenze della pandemia*). Further information below at (nn 155 and 199).

[90] Critical on the misleading notion of 'risk', Jenny Steele, *Risks and Legal Theory* (Hart Publishing 2004). Similarly, according to Niklas Luhman, 'There is no definition of risk that could meet the requirement of science', in *Risk: A Sociological Theory* (Walter de Gruyter 1993) 6.

[91] As a discipline, risk regulation studies the interactions between law and policy in addressing risks which spans from hazards like terrorism, climate change, natural disasters to regulated sectors like banking or the food industry. Notably the studies of scholars like Julia Black, Cass Sunstein, Robert Baldwin, Alberto Alemanno, and Colin Scott explored the different application of risk in the regulatory process. For some references, see Julia Black and Robert Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32 Law & Policy 2010 181; Cass R. Sunstein, *Risk and Reason: Safety, Law, and the Environment* (CUP 2002); Alberto Alemanno, 'Regulating the European Risk Society' in Alberto Alemanno et al, *Better Business Regulation in a Risk Society* (Springer 2013) 37. For an overview on the Italian scholarship, see Loredana Giani, Marina D'Orsogna, and Aristide Police (eds), *Dal diritto dell'emergenza al diritto del rischio* (Editoriale Scientifica 2018).

[92] Fabrizio Balassone and Daniele Franco, 'Fiscal Federalism and the Stability and Growth Pact: A Difficult Union', February 2001 <https://ssrn.com/abstract=2095225> accessed 3 January 2022 615 (hereafter Balassone and Franco, *Fiscal Federalism and the Stability and Growth Pact*).

administrative risk regulation' pertaining to technology, market, or nature[93] (e.g., the idea of precautionary principle), the second-order risks refer to institutional failures which may be regarded as 'risks that arise from the design of institutions, the allocation of legal and political power among given institutions, and the selection of officials to staff those institutions'[94].

According to such distinction, we contend that the notion of second-order risks, and more specifically to the extent it pertains to institutional design, seems like a fitting conceptualisation to define the idea of 'Fiscal Policy Risk' as a means to describe at the same time both a specific source of institutional risk occurring at intergovernmental level in the fiscal policy area and a set of legal solutions which, by means of public law, can be carried out by the central government, as the 'final responsible entity' towards the Union on fiscal matters[95], to mitigate such risk occurring in the EU Fiscal Network.

As such, expanding on the definition of institutional risk, as suggested by Julia Black[96], we believe that the institutional dynamics in the domestic intergovernmental financial relations of a given Member State also follow within the scope of this specific type of risk.

---

[93] Adrian Vermeule, *The Constitution of Risk* (CUP 2013) 3-5 (hereafter Vermeule, *Constitution of Risk*) (also focussing on constitutional rule making as a means to regulate and manage political risks and ways to optimise constitutions in order to address such risks). For some insightful propositions on preventive constitutionalism, see also Bruce Ackerman, *The Decline and Fall of the American Republic* (HUP 2013) (on the use of institutional design as a precaution to prevent the risk of a presidential or military coup, given that courts have only an ex post power of review).

[94] Adrian Vermeule, 'Introduction: Political Risk and Public Law' (2012) 4 Journal of Legal Analysis 1. Further, Vermeule argues that political risk is the main subject of constitutionalism only as a consequence of a more general claim 'By and large, however, what is distinctive about constitutions is that they offer second-order rules, which create institutions and allocate official power to and across institutions; it follows naturally that the main subject of constitutionalism is political risk', Vermeule, *Constitution of Risk* 4-5.

[95] See above at (n 7).

[96] Above at (n 14).

Finally, as it will be elaborated in the next Section, in combining the risk analysis to the macro perspective, we can purport the idea of qualifying Fiscal Policy Risk as an organising principle[97] of the fiscal policy domain.

1.4 Law and Macro – The Quest for Public Law in the Fiscal Policy Analysis within the EU Fiscal Network

In the previous Sections, we have explored three suitable analytical tools in legal studies which can shed light on the suggested notions of 'EU Fiscal Network' and 'Fiscal Policy Risk': Network and complexity theories, law and macroeconomics, and risk regulation. Yet, while taking inspiration from such instruments, we believe that, for the purpose of this research, a fitting approach to the public law analysis of the implications of the EU fiscal policies towards the Italian intergovernmental financial relations can be considered in a 'macro' perspective studying the aggregate institutional phenomena and the risk that is posed upon the concerned institutional system[98].

Indeed, by looking at the macro developments which progressively occurred within the Italian legal system at sub-governmental level as a result of the participation of Italy to the EU Fiscal Network, it is possible to investigate the use of public law as a risk mitigation tool which has been carried out by the Italian central government against

[97] For this claim, see Black, *The Role of Risk* (n 14) 303, where she posits: 'Risk is becoming a significant organising principle of government and a distinct unit of governance'.

[98] Macro-level and micro-level analyses are common framework in sociology, but also in comparative law. For an overview, see Jaakko Husa, *The Future of Legal Families* (Oxford Handbooks 2016) (proposing a macro-comparative law's approach to legal families as a classification of legal systems); Alessandro Romano, 'Micro-Meso-Macro Comparative Law: An Essay on the Methodology of Comparative Law' (2016) 17 The Chicago-Kent Journal of International and Comparative Law 1 (proposing a 'meso' analysis as an alternative to a micro/reductionist and a macro/holistic approach to comparative law).

the Fiscal Policy Risk.

Further, in our analysis, the EU Fiscal Network is composed by two different but intertwined sub-systems: the 'European sub-system' and the 'Domestic sub-system'. This model represents a multi-system that is organised by means of public law. To develop from Adrian Vermeule's arguments, it could be represented a 'two-level system' according to which 'the interaction among institutions itself creates a system at the second level, one which may have very different properties than the institutions that compose it'[99].

In this regard, the interdependencies among the institutional components of the EU Fiscal Network necessitate that the organisation of such system is arranged via public law and that intergovernmental financial relations are equally regulated to prevent a specific source of institutional risk that is the risk for a Member State of not complying with the EU fiscal obligations arising due to institutional failures at subgovernmental level on financial matters.

As a consequence of administering the Fiscal Policy Risk in the context of the EU Fiscal Network, public law does not only reduce institutional risks, but it also contributes to preventing the triggering of systemic events[100] in a greatly interconnected institutional

[99] Adrian Vermeule, *The System of the Constitution* (n 4) 27.

[100] An early definition of systemic events (in the banking system) is 'the disruption to the flow of financial services that is (i) caused by an impairment of all or parts of the financial system; and (ii) has the potential to have serious negative consequences for the real economy', IMF, BIS, and FSB Staff, 'Report to G20 Finance Ministers and Governors, Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments: Initial Considerations', 2009, 5-6. For a seminal study on systemic risk, Oliver de Bandt and Philipp Hartmann, 'Systemic risk: A survey' 35 ECB Working Paper Series, November 2000 <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp035.pdf> accessed 3 January 2022. On systemic risk and macroeconomics, see Tarik Roukny, Stefano Battiston, and Joseph Stiglitz, 'Interconnectedness as Source of Uncertainty in Systemic Risk' (2016) 35 Journal of Financial Stability 93. For an application a systemic risk approach towards financial regulation, Philipp Paech, 'Systemic Risk, Regulatory Powers and Insolvency Law: The Need for an International Instrument on the Private Law Framework for Netting' (2010) 116 Working Paper Series, Institute for Law and Finance,

network, i.e. a monetary union like the EMU, involving the area of fiscal policy[101]. As per systemic events, we refer to the risk of a ripple effect or contagion over the macroeconomic stability caused by the default or noncompliance of a Member State on fiscal rules in a system, like the EU Fiscal Network, where linkages and interconnections are significant.

So, it can be posited that the inherent coordination function of public law in relation to the financial nexus between central and sub-central governments is an essential risk mitigation instrument in relation to vulnerability to macro shocks, like fiscal shocks, not only for the concerned Member State but also for the Eurozone as a whole.

In other terms, similarly to macro-prudential regulation with respect to financial stability, which has been wrought after the Great Recession in 2007-09[102], we contend that the participation to the EU Fiscal Network has made it necessary for the Italian Government to adopt macro measures, by means of public law, to put under control the public financial risks arising from intergovernmental relations (Fiscal Policy Risk).

Accordingly, Chapter 3 will be devoted to the analysis of several public law measures that have been put in place by Italy to organise the Italian 'Domestic Sub-system' of the EU Fiscal Network and to mitigate Fiscal Policy Risk.

Notwithstanding the foregoing, there has been little attention to such a phenomenon

---

Goethe Universität.

[101] From a financial perspective, interconnectedness is regarded by the IMF Staff as 'the complex webs of contract relationships across financial institutions', Nicolas Arregui et al, 'Addressing Interconnectedness: Concepts and Prudential Tools' (2013) 199 IMF Working Paper 4 <https://www.imf.org/external/pubs/ft/wp/2013/wp13199.pdf> accessed 3 January 2022.

[102] As Rosa Lastra posits 'Before the crisis, risk-based supervision was mostly concerned with the safety and soundness of individual institutions (the concept of micro-prudential supervision). After the crisis, the focus has shifted towards the robustness of the whole financial system', Lastra, *Systemic risk* (n 31) 315.

in the academic debate concerning the EMU and its spillovers to the national fiscal dynamics involving the domestic subgovernments, especially for an analysis encompassing at the same time both the European and the national perspectives. As such, we believe that it is worth proceeding with this analysis for the scope of the current research.

As we aim at ascertaining how public law could constitute a risk mitigation tool against institutional risks triggering systemic events due to fiscal interconnectedness in a context of multilevel governance, like the EMU, it is also possible to further claim that, due to such characteristic, public law could represent an instrument of macro coordination that contributes to enhance the overall macroeconomic stability and resilience within the EU Fiscal Network.

Still, the idea of risk is not per se necessarily negative by all means. In some instances, as we will develop in Chapter 4, public law may represent an instrument to facilitate the risk-taking capacity of the concerned actors in EU Fiscal Network. To better clarify this, we have chosen the 'Next Generation EU' programme as an example of how the law can be employed – 'positively', as Norberto Bobbio would argue[103] – for promoting rather than preventing given conducts.

Finally, besides conventional/ unconventional monetary and fiscal policies, public law, in its capacity of risk mitigator and risk enabler, could be therefore regarded as an additional toolkit at policy makers' disposal for increasing macroeconomic stability in the EU according to the right policy mix for the concerned scenario.

Deliberately, the claim that the rules of economic governance, by means of public law,

[103] See above (n 27)

may constitute an instrument of macroeconomic stabilisation takes inspiration from the aforementioned Listokian argument according to which expansionary legal policy could be an additional policy tool, especially under certain financial scenarios[104]. On this note, this research aims at providing an additional layer to the public law analysis on the current discussion in the area of the EU fiscal policy.

[104] Listokin, *Law and Macroeconomics* (n 11), in which he argues that law can constitute an additional 'unconventional' tool for monetary policy especially if – for instance – the so called 'liquidity trap' scenario occurs: When short-term nominal interest rate is at or near zero (ZLB), reducing otherwise the capacity of central banks to stimulate the economy. Further on the importance of the fiscal equilibrium in relation to monetary policy, 'Il fine primario che questo [il livello medio dei prezzi] persegue, la stabilità della moneta, è strettamente connesso, sul piano teleologico, con l'equilibrio finanziario: entrambi sono indispensabili per evitare che vi siano alterazioni nella liquidità complessiva del sistema, tali da porre a rischio il risparmio e, così, l'equilibrio nei confronti dell'esterno e le retribuzioni' della Cananea, *Indirizzo e controllo della finanza pubblica* (n 55) 325 and 352. Additional references at Jonathan Masur and Eric A. Posner, 'Should Regulation Be Countercyclical?' (2016) 782 University of Chicago Law School Coase-Sandor Working Paper Series in Law & Economics 1 (exploring the Listokian idea of law and macroeconomics by looking at environmental regulation).

2. The 'Janus Trap' - The Making of the European Legal Framework on Fiscal Policy in the Economic and Monetary Union (EMU)

The legal foundation of the European 'Economic and Monetary Union' (EMU), as comes out from the Maastricht Treaty in 1992, is strongly intertwined with its asymmetric development due to the alternate fortune of the cultural[105] and political[106] debate around the design and future of such an ambitious and almost unprecedented polity like the European Union[107].

In order to provide a metaphor for this asymmetric legal design of the EMU, it has been developed the imaginative idea of the 'Janus Trap' that, in our perspective, exemplifies the legal and economic inconsistency of such setup on economic governance.

Indeed, by referring back to the ancient myth of Janus, presenting a double-faced head looking at opposite directions, we aim at stressing how hard is to reconcile the coexistence of a 'backward-looking' decentralised governance over economic and fiscal matters mostly under national sovereignty, and a 'forward-looking' governance of monetary policy that is centralised at EU level and well representing what would prospectively be like the possible future of an equally centralised fiscal policy (so called

[105] Markus K Brunnermeier, Harold James, and Jean-Pierre Landau, *The Euro and the Battle of Ideas*, (Princeton University Press 2016).

[106] Erik Jones, 'The Politics of Economic and Monetary Union' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 53.

[107] On the unique element, see Christopher Allsopp and Michael J Artis, 'The Assessment: EMU, Four Years on' 19 (2003) Oxford Review of Economic Policy 2 (hereafter Allsopp and Artis, *The Assessment of the EMU*); Report on Economic governance review (n 61) 2. For some references on previous tentative monetary unions, especially the Austro-Hungarian monetary union of 1867 and the Latin monetary union of 1865 (to which also Italy and France were part), see Lastra and Louis, *European Economic and Monetary Union* (n 38) 58; Barry Eichengreen, 'European Monetary Unification' (1993) 31 Journal of Economic Literature 1321-22 (hereafter Eichengreen, *European Monetary Unification*).

'Fiscal Union').

More particularly, for those Member States which adopted the euro, the EMU is a fiscally decentralised monetary union governed by a politically independent central bank and it constitutes a de facto irreversible membership[108] presenting certain conditionality to accede. To this end, the Treaties lay down the economic and legal convergence criteria under which Member States may join the Eurozone (so called 'Third stage') and – in theory[109] – the primary law of the Union still considers as a temporary derogation or a mere delay the fact that certain Member States have not adopted the euro yet (in absence of country-specific opt-out clauses, e.g., negotiated by Denmark).

Because of such characteristics, one of the most controversial facets of the EMU remains its asymmetric governance in relation to the difference between euro area Member States and the rest of the EU Member States, as well as in relation to the uneven development of the degree of sovereignty over the monetary and the economic

[108] Despite formally Article 3a(2) TEC, as inserted by the Maastricht Treaty, is not anymore part of the primary law, on the irreversibility of the euro see Mario Draghi as it states, just a sentence before the famous 'whatever it takes': 'I do not think we are unbiased observers, we think the euro is irreversible. And it's not an empty word now, because I preceded saying exactly what actions have been made, are being made to make it irreversible', 'Remarks', Speech at the Global Investment Conference in London, 26 July 2012 <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> accessed 3 January 2022. Further, on the de facto element pertaining to the unsustainable economic cost of the withdrawal of a Member State from the Eurozone, especially after the quantitative easing monetary policy which has expanded the central banks' balance sheets, see Mario Draghi stating: 'Se un paese lasciasse l'Eurosistema, i crediti e le passività della sua BCN nei confronti della BCE dovrebbero essere regolati integralmente', 'Interrogazione con richiesta di risposta scritta QZ-120', 18 gennaio 2017 <https://www.ecb.europa.eu/pub/pdf/other/170120letter_valli_zanni_1.it.pdf?3ea18e5d94e7b941415 81bc89c182772> accessed 3 January 2022.For some reflections on legal matters, Phoebus Athanassiou, 'Withdrawal and expulsion from the EU and EMU some reflections' 10 ECB Working Paper Series, November 2009 <https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp10.pdf> accessed 3 January 2022; Cornelia Manger-Nestler, 'The Architecture of the EMU' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 192.

[109] In this regard, the white paper issued by President Juncker European Commission confirms the still ongoing discussion on a multispeed Europe, Commission, 'White Paper on the future of Europe: Avenues for unity for the EU at 27' COM(2017)2025 (hereafter 'White Paper on the future of Europe').

element of the Union. The latter prong of the debate around the asymmetries of the EMU would be greater considered along this Chapter.

Indeed, whilst it is not the scope of this research to present an overarching historical study on the institutional developments which led to the establishment of the EMU and to its functioning[110], this Chapter is going to build on the original sin of the EMU: The asymmetry between an incomplete set of rules governing the economic policy vis-à-vis a 'fully federalised' monetary policy[111].

In developing the analysis, we also pay regard to a recent statement of Eric Leeper at the 2021 Jackson Hole Symposium as he posits 'We often treat monetary and fiscal policies as independent influences on the macroeconomy. That independence is a fiction. At times, it is a convenient fiction. But the fiction conflicts with both basic economic reasoning and with even a cursory look at the world we live in. When a fiction becomes ingrained and unquestioned, it becomes risky. It can interfere with thinking clearly about policy options and policy impacts'[112].

---

[110] This account is remarkably addressed by many authors, among which Kenneth Dyson and Kevin Featherstone, *The Road to Maastricht: Negotiating Economic and Monetary Union* (OUP 1999) (hereafter Dyson and Featherstone, *Road to Maastricht*); Harold James, *Making the European Monetary Union* (HUP 2012); Tommaso Padoa-Schioppa, *The Road to Monetary Union in Europe* (Clarendon Press 1994); Eichengreen, *European Monetary Unification* (n 107); Tuori and Tuori, *Eurozone Crisis* (n 6) 119ff and 181ff; Lastra and Louis, *European Economic and Monetary Union* (n 38); Ashoka Mody, *Eurotragedy: A Drama in Nine Acts* (OUP 2018); Emmanuel Mourlon-Druol, 'History of an Incomplete EMU' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 13.

[111] In this regard, 'The construction ('framing') of EMU as at heart a monetary problem, and the corresponding downplaying of its fiscal and structural policy dimensions as epiphenomena' Dyson and Featherstone, *Road to Maastricht* (n 110) 14. Further, Federico Fabbrini, 'Fiscal Capacity' in Federico Fabbrini and Marco Ventoruzzo (eds), *Research Handbook on EU Economic Law* (Elgar 2019) 109 (hereafter Fabbrini, *Fiscal Capacity*) (pointing out – in accordance to the Lamfalussy's famous quote – that the Maastricht compromise on the different level of integration between the letters 'M' and 'E' of the EMU); Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015) 3 (hereafter Hinarejos, *The Euro Area Crisis*) (on the interrelation between the original EMU structural imbalances and the European Debt Crisis).

[112] Eric M. Leeper, 'Shifting Policy Norms and Policy Interactions' in Jackson Hole Economic Symposium

On that note, in line with the proposed analytical tools, this Chapter sets out the legal characteristics of the 'European sub-system', as part of the EU Fiscal Network, upon which developing the ensuing Chapter 3 on the 'Domestic sub-system' concerning the Italian legal system in the area of fiscal policies.

The interlink between the two sub-systems was already manifest under Protocol No 5 of the Maastricht Treaty where, as part of the excessive deficit procedure, it required Member States to 'ensure that national procedures in the budgetary area enable them to meet their obligations in this area deriving from this Treaty'[113]. By doing so, it could be possible to assess the influence that Fiscal Policy Risk posed to a Member State like Italy resulting in the use of public law to mitigate the risk of systemic events triggered by fiscal interconnectedness at subnational level (Fiscal Policy Risk), thus aiming at drawing attention to the possible stabilisation capacity of public law in addition to the common macroeconomic tools in the form of monetary and fiscal policies.

In greater details, the structure of this Chapter is built around the ideas of symmetry and asymmetry in relation to internal and external (or 'exogenous' and 'endogenous') sources of risks within the EMU. With a temporal perspective, the analysis starts off by focussing on the rise of the original asymmetry of the EMU, whereby economic and fiscal policy is carried out by means of intergovernmental coordination (the so called 'Community method'), posing risk to the integrity and macroeconomic stability of the Eurosystem (Section 2.1), and it proceeds with the (asymmetric) economic crisis triggered by the Global Financial Crisis which emphasised the unsustainable architecture of the EMU, as implemented through the SGP, while at the same time

(ed), Proceedings of the 2021 Jackson Hole Symposium 1 <https://www.kansascityfed.org/documents/8357/Leeper_JHPaper.pdf> accessed 3 January 2022.

[113] Later under Protocol No 12, annexed to the Treaty on the European Union ('TEU') and the Treaty on the Functioning of the European Union ('TFEU').

stimulating a vivid discussion around its possible reforms (Section 2.2). After almost a decade of discussions around the future of the EMU and the EU Economic Governance in general, in a single year (2020) two historic events occurred: The completion of the Brexit procedure with the final 'Withdrawal Agreement' signed by the United Kingdom and the pandemic outbreak of COVID-19[114]. As a scenario, it boosted an unprecedented policy response at EU level which may end up reshaping permanently the 'E' element of the EMU, which only few months before the pandemic was already put under intense scrutiny in relation to effectiveness of its framework for economic and fiscal surveillance[115]. In this regard, Section 2.3 dwells on the challenges posed by the (symmetric) pandemic crisis of COVID-19 which prompted the EU to recur to a political agreement for an asymmetric response, via the 'Next Generation EU' programme, to heal the most economically affected Member States, thus setting an important legal a political precedent for a prospective fiscal capacity of the EU.

2.1 The Foundation of the EMU – The Rise of the 'Asymmetry'

The Economic and Monetary Union, in its constitutional dimension[116], is the tottering

[114] Upon the result of a domestic referendum and the ensuing notification on 29 March 2017 of its result to the Union pursuant to Article 50 TEU, on 17 November 2019 the European Union and the United Kingdom reached an agreement ('Withdrawal Agreement'), which entered into force on 1 February 2020. For a general background on Brexit and its institutional implications for the EU, see Federico Fabbrini, *Brexit and the Future of the European Union* (OUP 2020) (hereafter Fabbrini, *Brexit and the Future of the European Union*).

[115] Report on Economic governance review (n 61) and further below in Section 4.3.

[116] Bruno de Witte, 'EMU as Constitutional Law' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 278 (hereafter de Witte, *EMU as Constitutional Law*); Koen Lenaerts, 'EMU and the EU's constitutional framework' (2014) 39 European Law Review 753. For the constitutional implications of the Great Recession to the EMU, see Paul Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in Maurice Adams, Federico Fabbrini, and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Bloomsbury 2014) 19 and below at Section 2.2.

result of a highly political compromise which extends from the 1957 Treaty of Rome establishing the foundation of an economic union based on the Single Market to the 1992 Maastricht settlement that later paved the way for the European Community and lastly to the Union.

As part of the EMU, it has been highlighted that the Maastricht Treaty provides for a macroeconomic asymmetry by distinguishing among a centralised monetary union in which an independent monetary authority, the European Central Bank (ECB), stirs a single monetary policy and oversees a single currency according to a mandate to secure price stability; and a decentralised economic policy coordination where the Treaty introduces also some fiscal and budgetary policy limitations on Member States adopting the euro. Thus, it bestows upon the EU institutions the function of monitoring and converging the national economic policies through guidelines, economic policy corrections, and sanctions.

Nonetheless, this institutional and procedural outcome of the economic union represents the very success of the Delors Report[117] that in two years (1988-1989) reached a seemingly unattainable political convergence over a proper constitutional reform[118]. Though, it was a compromise bearing some shortcomings, since the monetary policy integration in the EMU runs short of the economic policy element for which Member States retained their national sovereignty.

---

[117] Delors Report (n 42).

[118] Notably, the previous concrete attempt to establishing a monetary union dates back to the Werner Report (1969-1972), European Council and European Commission, 'Report to the Council and the Commission on the realization by stages of economic and monetary union in the Community', 8 October 1970, Document L 6.956/II/70-D <https://ec.europa.eu/economy_finance/publications/pages/publication6142_en.pdf> accessed 3 January 2022 (hereafter 'Werner Report'). On the political failure of the Werner Report, Dyson and Featherstone, *Road to Maastricht* (n 110) 19-20; Eichengreen, *European Monetary Unification* (n 107) 1324-25.

The economic convergence was indeed relegated as ancillary, being an exclusive competence of the Member States, in an attempt of the EU in non-encroaching excessively upon the national authority in relation to the control of budgetary, fiscal policies and taxation[119]. Of course, the said national authority came with the 'quid pro quo' of the national liability (i.e., no bail-out principle)[120].

In other terms, despite the proposition put forward in 1990 by the Commission that the Maastricht Treaty should deliver the benefit of 'the recasting of the role of national budget policies in the monetary union, and the intensified pressure in due course on national public expenditure and tax system'[121], the political realism behind the Delors Report resolved to leave the possible shift towards fiscal centralisation as an unsettled issue[122] and the stance for risk-sharing among Member States as (still) a non-viable option[123]. In so doing, such asymmetric framework denotes a remarkably different degree of integration of the exclusive competence over the monetary architecture compared to the lessened fiscal harmonisation over the economic policy

[119] Lastra and Louis, *European Economic and Monetary Union* (n 38) 60 (on the dominant monetary feature of the EMU as opposed to weak economic governance coordination). Further, Lorenzo Bini Smaghi, Tommaso Padoa-Schioppa, and Francesco Papadia, 'The Transition to EMU in the Maastricht Treaty' (1994) 194 Princeton Studies in International Finance 21 (hereafter Bini Smaghi, Padoa-Schioppa, and Papadia, *The Transition to EMU*) (stressing that the Delors Report does not provide explicit quantitative economic-convergence preconditions for the passage to the 'third' final stage of the Union).

[120] Paul Craig, 'The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility' (2015) 22 Indiana Journal of Global Legal Studies 256. In relation to the 'no bail out clause', now set forth in Article 125 TFEU, it is noticeable the ECB's written answer No 139/2015 to a MEP as it states that, despite its 'colloquially' reference, the provision 'solely states that Member States cannot take on the debts of another Member State [and] it does not rule out Member States 'bailing out' other countries by lending to them'. Further information, below at (nn 156 and 252).

[121] European Commission, 'European Economy: One Market, One Money' COM(1990)44 23.

[122] The Delors Report reads 'Apart from the system of binding rules governing the size and the financing of national budget deficits, decisions on the main components of public policy in such areas [...] and hence on the level of composition of government spending, as well as many revenue measures, would remain the preserve of Member States even at the final stage of economic and monetary union', Delors Report (n 42) 19.

[123] Hinarejos, *Fiscal Federalism* (n 31). Further on this, Draghi, *Risk-reducing and risk-sharing* (n 80); Moloney, *EU financial market regulation* (n 14).

components[124]. From a macroeconomic perspective, however, it is fairly settled that the right policy mix would necessarily require the monetary and the fiscal policy altogether to stir an economy effectively[125].

In absence of a (symmetric) fully-fledged centralisation within the EMU, the coordination of national economic policies, in the sense of both economic convergence and sound public finances, can be conducted only on an intergovernmental basis via the so called 'Community method'. Nonetheless, this represents an essential facet of the original ('level 3') objectives of the EMU on economic policy, given that 'uncoordinated and divergent national budgetary policies would undermine monetary stability'[126] and consequently jeopardise the delivery of the economic prosperity goals of the Union.

It shall be noticed that the asymmetry of the Maastricht settlement is the very result of a compromise between two opposing views enrooted in the cultural and cognitive approaches among the national negotiators at the time. These views have been aptly dubbed 'behaviouralist' and 'institutionalist'[127], echoing the Werner's categories of 'economist' and 'monetarist'[128]. More particularly, according to such categorisation, the behaviouralists were meant to trust in the intergovernmental attitude to converge and

[124] Federico Fabbrini, 'Economic Policy in the EU After the Crisis: Using the Treaties to Overcome the Asymmetry of EMU' (2016) 20 Diritto dell'Unione europea 529. Also, on the fragility of the monetary architecture of the euro area, see Mario Draghi's quote 'But we know that our Monetary Union is not complete' in Draghi, *Risk-reducing and risk-sharing* (n 80).

[125] See below at Section 4.3 and (n 191). To complement this, see also above at (n 112) the quote from Eric M. Leeper on the 'fictional' independence between monetary and fiscal policy.

[126] Delors Report (n 42) 19. Further references also at Dariusz Adamski, 'Objectives of the EMU' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 221.

[127] Bini Smaghi, Padoa-Schioppa, and Papadia, *The Transition to EMU* (n 119).

[128] Werner Report (n 118). On the difference between the 'monetarist' (not to be confused with the Chicago monetarist school founded by Milton Friedman) and 'economist' approaches, see Elena Danescu, *Pierre Werner and Europe* (Springer Professional 2018) 189ff and Lastra and Louis, *European Economic and Monetary Union* (n 38) 64.

therefore 'the passage to a more advanced stage of unification must be the natural outcome of a process in which the behavior of economic agents and policymakers has converged'[129]. The institutionalists rather believed that 'the integration of the Community can only be achieved through institutional and legal changes that foster convergent behavior and policies'[130]. Hence, the resulting asymmetry on the sphere of the economic convergence, to be conducted through the 'Community-method', could be attributable to the outcome of such ideological clash in favour of the 'behaviouralist'.

In relation to the closer coordination of economic policies, the conclusive view of the Maastricht Treaty is that in order to achieve a 'high degree of convergence of economic performance' (Article 2) there shall be two different pillars of 'unequal strength'[131]: One of 'soft' multilateral surveillance based on the soft Broad Economic Policy Guidelines (BEPG) pursuant to Article 103 (now 121 TFEU), the other setting out the 'hard' excessive deficit procedure (EDP) under Article 104c (now 126 TFEU) and the annexed Protocol No 5 (now No 12).

In a broad sense, Article 4 TEC (now 119(1) TFEU) provides indeed that '[…] the activities of the Member States and the Community shall include […] the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives […]'.

The diversity among the two said approaches of 'behaviouralist' and 'institutionalist' is

[129] Bini Smaghi, Padoa-Schioppa, and Papadia, *The Transition to EMU* (n 119) 11.
[130] *Ibid*.
[131] Jean Pisani-Ferry, 'Only One Bed for Two Dreams: A Critical Retrospective on the Debate over the Economic Governance of the Euro Area' (2006) 44 Journal of Common Market Studies 827 (drawing attention to the limits of the 'French' governance-by-co-ordination model and the 'German' governance-by-rules model).

then apparent and not only because of the very presence of sanctions limited to the EDP as opposed to the non-binding recommendations resulting out from the BEPG procedure, even after the reinforced fiscal surveillance that comes out from the SGP and the Great Recession[132]. Again, the sociological element was strongly embedded in framing such compromise over the European economic legal framework.

In coherence with Delors' disbelief towards market disciplining[133], the multilateral surveillance mechanism was conceived to enhance the coordination and convergence in a fiscally decentralised monetary union, although it was not – and still is not[134] – a proper shared competence but rather 'a matter of common concern' (Article 103). The mechanism is stirred by the Economic and Financial Affairs Council (Ecofin) and it has been designed upon the pre-Maastricht procedure adopted by the Council in 1990 with Decision 90/141/EEC to roll out 'convergence programmes' on macroeconomic, microeconomic, and structural policies[135].

In its aim, the multilateral surveillance assumes that publicity around the BEPGs procedure and the risk of being targeted by non-binding recommendations would have exerted sufficient peer-pressure over Member States to impede economic divergence from such guidelines. However, over time this mechanism has been criticised for its

[132] See below in the current Section for the Stability and Growth Pact, while for the 'Six-Pack' and 'Two-Pack' Regulations see further under Section 2.2.

[133] On this line, 'EMU membership [which has an impact on credit risk] led to a decrease in market punishment and by implication led to investor moral hazard' but at the same time 'policy-makers consolidate[d] public finances in response to higher debt servicing costs. Crucially, governments' responsiveness is stronger within the Eurozone' Rommerskirchen, *Debt and punishment* (n 8) 772.

[134] Article 5 TFEU.

[135] European Council, Decision 90/141/EEC on the attainment of progressive convergence of economic policies and performance during stage one of economic and monetary union [1990] OJ L 78/23, following a Commission's proposal of 13 October 1989, COM(89) 446 final, as amended by COM(90) 82 final, stating in the Recitals that 'in this coordination process calls for flexibility, subsidiarity and mutual commitments in decision-making as well as for learning-by-doing'. On this, see also Francis Snyder, 'EMU Revisited Are we Making a Constitution? What Constitution are we Making?' (1998) 6 EUI Working Paper Law 65-74 (hereafter Snyder, *EMU Revisited*).

failures to deliver the expected results[136].

On a different note, the Maastricht Treaty lays down the excessive deficit procedure serving the purpose of achieving greater coordination among Member States in the area of budget expenditures through a set of reference values[137].

Pursuant to Article 104(c) of the Maastricht Treaty, Member States shall avoid excessive government deficits and therefore the Commission is entrusted with a monitoring function on the development of the Member States' budgetary situation and of the stock of government debt so to ensure Member States' compliance with the budgetary discipline set out in two specific and fixed reference values, set forth in the Protocol No 5: The thresholds of 3% 'for the ratio of the planned or actual government deficit to gross domestic product at market prices' and 60% 'for the ratio of government debt to gross domestic product at market prices'[138].

In identifying the possible 'gross errors' undertaken by the Member States in stirring

---

[136] Hodson, *Governing the Euro Area* (n 48) 78ff (on the reasons why the BEPGs have been used so sparingly as an instrument of peer pressure); Keppenne, *Economic Policy* (n 38) 789-790 (on the scarce, weak and belated use of sanctions as part of the economic coordination laid down in the Maastricht Treaty).

[137] As noted, the broad idea of having a qualitative provision in the Treaties and an (amendable) quantitative provision in the Protocols has been considered as 'l'unico modo per dare ai Paesi più divergenti, in rapporto al debito e al disavanzo, l'opportunità di aderire fin dall'inizio alla terza fase dell'UEM; per consentire diverse scelte di finanza pubblica e, al tempo stesso, il raffronto tra i corrispondenti risultati sulla base di standard comuni' Giacinto della Cananea, 'La pseudo-riforma del patto di stabilità e crescita' (2005) 25 Quaderni costituzionali 670. Further on this, Peter Sutherland points out critically that 'Nobody is under any illusion that there is something magical about these numbers', 'The Case for EMU: More than Money' (1997) 76 Foreign Affairs 11. Additionally, 'It makes no economic sense to subject countries to a numerical limit (3%) that has no valid scientific basis' Paul De Grauwe, *Economics of Monetary Union* (12th edn, OUP 2018) (hereafter De Grauwe, *Economics of Monetary Union*) 242.

[138] Notably, pursuant to Article 104c(14) of the Maastricht Treaty, the annexed Protocol No 5 (later renumbered to No 12) on the excessive deficit procedure could be amended upon the following procedure: 'The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the ECB, adopt the appropriate provisions which shall then replace the said protocol'.

their fiscal policies, the Commission shall consider – as a mitigation[139] – if the budgetary deficit 'has declined substantially and continuously and reached a level that comes close to the reference value' or, as an alternative, 'the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value'. Further, with regard to the sovereign debt threshold, the Commission is meant to abstain from carrying out a deeper assessment if 'the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace'.

As consequence of the possible non-compliance with the said reference values, the Commission shall prepare a report taking into account 'whether the government deficit exceeds government investment expenditure and take into account all other relevant factors, including the medium-term economic and budgetary position of the Member State'[140]. Still, the Commission bears the right to proceed towards a Member State in a similar manner, notwithstanding the fulfilment of the criteria set out in the reference values, if it is of the 'opinion that there is a risk of an excessive deficit in a Member State'[141]. The Commission's report is then commented by the Ecofin, as part of the EDP procedure, before being addressed to the Council for an opinion.

Within such procedure, the Council shall decide, by a qualified majority, 'after an overall assessment whether an excessive deficit exists'[142] and, if so, it addresses the Member State with a recommendation to discontinue the infringing conduct. Such recommendation could be made then public by the Council so to exert a 'market

[139] In this regard, Jean-Paul Keppenne posits 'The legal framework is not seen as a static set of rules to be mechanically applied to any given event, but as a flexible system of governance driven by long-term macroeconomic purposes', Keppenne, *EU Fiscal Governance on the Member States* (n 18) 814.
[140] Article 104c(3) of the Maastricht Treaty. In relation to the notion of 'relevant factors', see Article 2(3) of Council Regulation (EC) No 1467/97, as amended by Article 1(2)(c), Regulation (EU) No 1177/2011, as considered below in Section 2.2.
[141] *Ibid*.
[142] Article 104c(6) of the Maastricht Treaty.

discipline' pressure upon the Member State and, in case of reiterated non-compliance by the concerned Member State, the Council could 'take, within a specified time-limit, measures for the deficit reduction' which is judged necessary 'in order to remedy the situation'[143]. In this respect, the Member State may also be requested to submit scheduled report in order to let the Council examine the 'adjustment efforts'.

In case the concerned Member State persists in failing to comply with the aforementioned recommendation, the Council may consider, alongside with informing the European Parliament, to act on a recommendation from the Commission by a majority of two-thirds of the votes of its members (excluding the representative of the concerned Member State) with one or more of the following reputational or economic measures[144]: (i) to require the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities; (ii) to invite the European Investment Bank to reconsider its lending policy towards such Member State; (iii) to require the Member State to make a non-interest-bearing deposit of an appropriate size with the Community until the excessive deficit has, in the view of the Council, been correct; (iv) to impose fines of an appropriate size[145]. At any time, the Council may still abrogate some or all of the said decisions to the extent that the excessive deficit has been corrected, whereas the Commission or another Member State may also take the appropriate actions that may lead up to the Court of Justice.

As it appears from the above, the regulatory strategy coming out from Maastricht in relation to the EDP procedure is about striking the right balance among qualitative and quantitative criteria – though with clear preference to the qualitative ones –, as well

[143] Article 104c(9) of the Maastricht Treaty.
[144] Article 104c(13) of the Maastricht Treaty.
[145] Article 104c(11) of the Maastricht Treaty.

as on setting out the conditions for their enforcement. In its essence, the EDP activities, both on the Commission and Council sides, appears strikingly discretional[146] and the overall decision making remains entirely within the remits of the EU institutions and Member States involved in the assessment process, without any possible attempt for the concerned citizens to have a say on the procedure and its outcome[147]. This makes the outcome of the EDP procedure highly unpredictable and it confers a significant degree of political pressure upon the Commission qualitative assessment, hence reducing the general deterrence and disciplining effects towards the Member States in respect to undertaking sound budgetary policies.

In this regard, as a representation of the strong systemic interactions between the 'European sub-system' and the 'Domestic sub-system', it is noticeable that Protocol No 5 of the Maastricht Treaty (now No 12) on the EDP imposes on Member States to 'ensure that national procedures in the budgetary area enable them to meet their obligations in this area deriving from this Treaty' (Article 3).

This is a crucial provision for the current research, as it bestows upon Member States the obligation with regard to the result to be achieved in a fiscally decentralized monetary union to avoid the risk of institutional divergence that we have named 'Fiscal Policy Risk'. Indeed, the duty to sound government finances for Member States pertains to the 'general government' sector which comprises both the institutional units

[146] For an overview on the degree of discretionary decisions involving the EDP procedure since its inception, Francis Snyder, 'EMU – Integration and Differentiation: Metaphor for the European Union' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) (hereafter Snyder, *EMU – Integration and Differentiation*) 705-709.

[147] General Court, Case T-215/11 *ADEDY and Others v Council* [2012] ECLI:EU:T:2012:627 stating the inadmissibility of the action of annulment brought by a Greek trade union and some other civil servants against a Council Decision (2010/320/EU), addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, due to the lack of standing of the applicants.

of central government and the local government[148].

This brings us to the very notion of 'general government' which assumes a central function for setting out the perimeter of applicability of the EU fiscal framework. Pursuant to Article 2 of Protocol No 5, the legal definition of 'government' is indeed broad, and it overarches 'central government, regional or local government and social security funds' while expressly excluding 'commercial operations', as set forth in the 'European System of Integrated Economic Accounts' (ESA) accounting framework. Consequently, for the purpose of the EDP the 'debt' notion comprises the consolidated amount between and within sectors of the 'general government'[149].

In order to distinguish if an entity falls within the scope of the 'general government' umbrella[150], a threefold test shall be carried out. The first-level check is about the entity being an 'institutional unit', which mostly concerns its capacity of decision-

[148] Article 1(2), Council Regulation (EC) No 3605/93 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community [1993] GU L 332, later repealed and replaced by Council Regulation (EC) No 479/2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community [2009] OJ L 145/1. Further below at Chapter 3 on the 'Domestic sub-system'.

[149] Over the years, the Commission has strongly proceduralised the implementation of the ESA standards, as it is noticeable in the Commission's 'Manual on Government Deficit and Debt' lastly published by Eurostat in 2019 (hereafter 'Eurostat's EDP Manual').

[150] In relation to the 'S.13' component on the net lending and borrowing of the 'government' it refers to 'non-market producers controlled by the government, whose output is intended for individual and collective consumption, and are financed by compulsory payments made by units belonging to other sectors', as well as 'institutional units principally engaged in the redistribution of national income and wealth, which is an activity mainly carried out by government' Eurostat's EDP Manual (n 149) 11. For a critical reference to the variable perimeter of the notion of 'public administration' in Italy, see Sabino Cassese, *Il sistema amministrativo italiano* (Il Mulino 1983) 7ff, while on the legal implications of the said unstable legal definition of 'public administration' and 'public entities' as per the fiscal policy matters, see Giacinto della Cananea, 'La "pubblicità" dei disavanzi eccessivi: tecniche di determinazione ed effetti' (2009) 19 Rivista italiana di diritto pubblico comunitario 575; Walter Giulietti and Michele Trimarchi, 'Nozione di amministrazione pubblica e coordinamento statale nella prospettiva dell'interesse finanziario' (2016) 10 Diritto e processo amministrativo 925 (hereafter Giulietti and Trimarchi, *Nozione di amministrazione pubblica*); Salvatore Cimini, 'L'attualità della nozione di ente pubblico' (2015) Federalismi.it 1; Giovanna Colombini, 'La dinensione finanziaria dell'amministrazione pubblica e gli antidoti ai fenomeni gestionali di cattiva amministrazione' (2017) Federalismi.it 1.

making autonomy[151]. Secondly, such entity shall qualify as a government-controlled institutional unit due to a direct or indirect form of control by resident general government units[152]. Finally, the concerned entity is subject to a market/ non-market test as to ascertain that it does not finance its operational activity by sales of goods and services at economically significant prices[153].

Having clarified that, it shall be highlighted that the coordination of economic and fiscal behaviours is mostly intended to reduce the risk of free riding[154] among Member States after having entered an (irreversible) asymmetric monetary union, like the EMU. As such, in case of an unsustainable increase of deficit and debt levels, there is an explicit prohibition under Article 104 to impede the risk of a direct monetary financing of a Member State by the central bank[155]. On the same line, Article 104b rules out also the possibility for Member States to take on the debts of another Member State ('no bail-out clause'), though it has been proposed a more nuanced interpretation over time[156].

---

[151] See para. 2.12 of the European System of National and Regional Accounts ('ESA 2010') as per Regulation (EU) No 549/2013 of the European Parliament and of the Council on the European system of national and regional accounts in the European Union [2013] OJ L 174/1, formerly European System of Accounts 1995 ('ESA 95') as per Council Regulation (EC) No 2223/96 on the European system of national and regional accounts in the Community [1996] OJ L 310/1.

[152] See para. 20.310, ESA 2010.

[153] See para. 20.19, ESA 2010.

[154] 'In theory, EMU functioning well along these lines is a collective good', Martin Heipertz and Amy Verdun, *Ruling Europe: The Politics of the Stability and Growth Pact* (CUP 2010), xi. On a similar note, Stefan Collignon, 'The End of the Stability and Growth Pact?' (2004) 1 International Economics and Economic Policy 19.

[155] In this regard, the famous 'Gauweiler Case' (nn 89 and 155) clarified that Article 123 TFEU (formerly 104 TEC), prohibiting all financial assistance from the ESCB to a Member State, 'does not preclude, generally, the possibility of the ESCB purchasing from the creditors of such a State, bonds previously issued by that State' (para. 95). On the prohibition of monetary financing, see also Article 21 Protocol No 4 TEU on the ESCB, whilst for additional remarks it can be referred to the 'Weiss Case' (Case C-493/17 *Weiss and Others* [2018] EU:C:2018:1000) concerning the validity of ECB Decision (EU) 2015/774 on a Public Sector Purchase Programme (PSPP) for the purchase of assets on financial markets. For further comments and references on OMT, see also below (n 199).

[156] Despite the 'no bail-out' label, in the famous 'Pringle Case' (CJEU, Case C-370/12 *Pringle* [2012] OJ C 26) the Court found the ESM Treaty (see n 53) compliant to Article 125 TFEU (formerly 104b TEC) since 'that article is not intended to prohibit either the Union or the Member States from granting any

These concerns, as to how ensuring stability-oriented policies, are typical examples of collective-action problem[157] and the solutions to overcome such concerns have led progressively to a plethora of primary and secondary law EU procedures (and later also intergovernmental instruments). Indeed, it did not take long for Member States to realise that, beside Treaty-based multilateral surveillance and the excessive deficit procedure, the economic policy coordination required an additional layer of secondary legislation as it was the case with the 'Stability and Growth Pact' (SGP).

Ahead of its introduction of the euro in January 1999, the Stability and Growth Pact sets out in 1997 a detailed procedure for the multilateral surveillance (preventive arm)[158] and for the excessive deficit procedure (corrective arm)[159]. The main aim of the SGP was to reduce discretion at Union level, increase transparency/ deterrence, and operationalise the fiscal provisions laid down in the Maastricht Treaty[160].

---

form of financial assistance whatever to another Member State' (para. 130). On the interpretation of Article 125 TFEU, Thomas Beukers and Bruno De Witte, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle' (2013) 50 Common Market Law Review 838-843.

[157] On this line, 'The Maastricht convergence process and the SGP can be seen as ways of solving these collective-action problem' Allsopp and Artis, *The Assessment of the EMU* (n 107) 15. Similarly, Hinarejos, *The Euro Area Crisis* (n 111) 10; Pier Carlo Padoan, 'EMU as an Evolutionary Process' in David M. Andrews et al (eds), *Governing the World's Money* (Cornell UP 2002) 125-6. Further, echoing the famous Elinor Ostrom's studies on collective actions and cooperation, see Richard Wagner, *Deficits, Debt, and Democracy: Wrestling with Tragedy on the Fiscal Commons* (Elgar Publishing 2012).

[158] Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1.

[159] Council Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6.

[160] For the historical background, see Snyder, *EMU Revisited* (n 135) 55-65; Fabian Amtenbrink, Jakob De Haan, and Olaf Sleijpen 'The stability and Growth Pact: Placebo or Panacea' (1997) European Business Review 202–236. Further background references may be found in the European Council Resolution on the Stability and Growth Pact [1997] OJ C 236/1 and in Richard Morris, Hedwig Ongena, and Ludger Schuknecht, 'The Reform and Implementation of the Stability and Growth Pact' (2006) 47 ECB Occasional Paper Series <https://www.ecb.europa.eu/pub/pdf/scpops/ecbocp47.pdf> accessed 3 January 2022. On the innovative nature of SGP in relation to EU framework, Giacinto della Cananea, 'Il patto di stabilità e le finanze pubbliche nazionali' (2001) Riv. dir. fin. 569 (hereafter della Cananea, *Il patto di stabilità e le finanze pubbliche nazionali*).

Though, it shall be noted that, according to the hierarchy of norms, the SGP represents secondary law vis-à-vis the EU Treaties (and later to specific international agreements). This is not a simplistic legal formalism, but it has become relevant in the institutional discourse concerning the SGP proceedings[161], as well as in relation to the critique around the lack of an adequate democratic involvement in the SGP legislative enactment[162].

Having that in mind, the preventive arm of the SGP introduces an 'early stage' examination and monitoring of 'stability programmes' and 'convergence programmes', depending on the participation of a Member State to the 'Third stage' of the EMU (i.e., adopting the euro currency) or not, which together form part of the multilateral surveillance carried out by the Council. In this regard, it is noteworthy the reference to 'close to balance or in surplus' (CTBOIS) in setting the medium-term objective for the budgetary position and the related adjustment path, since it seems to move towards the direction of a (cyclically adjusted) balanced budget[163].

However, the rule-based approach of the SGP did not overcome the structural complexity of the original asymmetry of the EMU which could be otherwise achieved

[161] To provide an example, see the famous dispute among the EU institutions on economic governance – more below (n 167) – as per the AG Tizzano's reference to the secondary legislation nature of the SGP which could not 'diminish the Council's power to adopt acts recommended by the Commission in the context of that procedure', CJEU, Case C-27/04 *Commission of the European Communities v Council of the European Union* [2004] ECR I-06649 paras. 37-40 (hereafter *Commission v Council*). Additional elements of analysis on the relation among the Treaties and the EDP procedure under the SGP can be found at Keppenne, *EU Fiscal Governance on the Member States* (n 18) 827-829.

[162] This formed part of a series of fierce but earnest critiques on the SGP by Giuseppe Guarino arguing for its incompatibility with the EU Treaties, in *Ratificare Lisbona?* (Passigli 2008).

[163] As clarified, 'by maintaining a budget position of 'close to balance or in surplus', Member States have the necessary room for manoeuvre for cyclical stabilisation through the working of the automatic stabilisers without the 3% of GDP reference value for deficits being breached', Commission, 'Communication to the Council and the European Parliament of November 2002 on strengthening the co-ordination of budgetary policies' COM(2002) 668 final (hereafter 'Strengthening Coordination Communication'). In this regard, see also Jakob de Haan, Helge Berger, and David-Jan Jansen, 'Why has the Stability and Growth Pact Failed?' (2004) 7 International Finance 238.

only through politics[164]. Consequently, beside some minor cases involving Ireland and Portugal[165], the effectiveness of the SGP was watered down shortly thereafter, as in 2002 and 2003 the Commission requested the Ecofin Council to initiate an early warning procedure towards Germany and later France[166]. After multiple procedural steps, the Council concluded that the two procedures could be held in abeyance while not adhering to the Commission's recommendation on this matter. As a result, the Commission challenged in court the failure of the Council to adopt the formal instruments contained in its recommendations claiming that such failure was a challengeable act for the annulment. In the end, the main claim was dismissed on procedural grounds[167]. Hence showing not only that even a rule-based procedure, like EDP, cannot prevent any institutional uncertainty and enforcement risk, causing a loss of credibility, but also that 'judicial activism that occurs in other areas of EC law […] may not be expected in the area of economic policy coordination'[168].

As a consequence, the question around the 'effective enforcement'[169] of the SGP has

[164] Alberto Predieri aptly commented that 'The procedure on excessive budget deficits and the Growth and Stability Pact cannot replace political integration' in 'Money Markets and Poliarchic Democratic States' (1998) 9 Open economies review 720. On a similar note, see below Section 4.3.

[165] The Irish case concerned the BEPG as part of the multilateral surveillance in which the Council asked Ireland to 'remove the inconsistency' by taking 'countervailing budgetary measures during the current fiscal year' (Council Decision 2001/191/EC, OJ L 69/22), while the Council Decision on Portugal concerned the corrective arm in assessing the existence of an excessive deficit (Council Decision 2002/923/EC, OJ L 322/30). Notably, on 28 April 2004, the Commission also called for the activation of the early warning system in the case of Italy with the aim of preventing the deficit becoming excessive.

[166] On Germany, see Council Decision 2003/89/EC OJ L 034/16, while on France see Council Decision 2003/487/EC OJ L 165/29.

[167] *Commission v Council* (n 161). For some comments, Guido Rivosecchi, 'Patto di stabilità e Corte di giustizia: una sentenza (poco coraggiosa) nel solco della giurisprudenza comunitaria sui ricorsi per annullamento' (2005) Giurisprudenza italiana 899; Rita Perez, 'Corte di giustizia e regole fiscali dell'Unione' (2004) 10 Giornale di diritto amministrativo 1073; Iain Begg and Waltraud Schelkle, 'The Pact is Dead: Long Live the Pact' (2004) 189 National Institute of Economic and Social Research 86.

[168] Lastra and Louis, *European Economic and Monetary Union* (n 38) 116.

[169] Marco Buti, Daniele Franco, and Hedwig Ongena, 'Fiscal Discipline and Flexibility in EMU: The Implementation of the Stability and Growth Pact' (1998) 14 Oxford Review of Economic Policy 95 (also arguing that fiscal discipline and flexibility are complementary and interdependent features of budgetary behaviour in EMU). Similarly, 'Though 'hard law', the EDP is full of the permissive language of politics'

remained critical showing some structural flaws of the Pact[170]. Furthermore, still during the early 2000s economic recession, the very adherence to the nominal deficit target was politically contentious[171]. With the aim of overcoming such impasse, the Commission[172] and the Council[173] have then opened up a discussion around reforming the SGP aiming at 'not to increase the rigidity or flexibility of current rules but rather to make [it] more effective'[174]. This view eventually converged to the European Council meeting in Brussels on 22 and 23 March 2005 where a revision of the SGP was agreed[175].

According to the new functioning of the preventive arm[176], Member States shall adhere to (country-specific) medium term objective (MTO) for budgetary positions 'close to balance or in surplus' (CTBOIS). These two references remain different and may even diverge to the extent that the 'safety margin' is in line with the 3% reference value for the deficit limit. Further, the adjustment path to the MTO devotes a great degree of

---

Snyder, *EMU – Integration and Differentiation* (n 146) 700.

[170] Council Regulation (EC) 1055/2005 amending Regulation (EC) 1466/97 [2005] OJ L174/1.

[171] In this regard, the European Fiscal Board contends that the initial SGP focus on nominal variables 'entailed some pro-cyclical bias', European Fiscal Board, 'Assessment of EU fiscal rules with a focus on the six and two-pack legislation', 11 September 2019 56 (hereafter 'EFB Assessment of EU fiscal rules').

[172] Strengthening Coordination Communication (n 163); Commission, 'Public finances in EMU – 2004', 24 June 2004; Commission, 'Strengthening economic governance and clarifying the implementation of the Stability and Growth Pact' COM(2004) 581 final (hereafter 'Strengthening SGP Communication'). For further analysis on the SGP reform in relation to the topic of public investments, see below Section 4.1.

[173] Council (Ecofin), 'Report on strengthening the implementation of the SGP', 7 March 2003 <https://ec.europa.eu/commission/presscorner/detail/en/PRES_03_61> accessed 3 January 2022; Council (Ecofin), 'Report on Improving the implementation of the Stability and Growth Pact', 7423/05, 21 March 2005 (hereafter 'Improving SGP Council Report').

[174] Strengthening SGP Communication (n 172). On a critical note, 'It is clear that the SGP has been guided more by the fear of unsustainable government debts and deficits than by the need for flexibility', De Grauwe, *Economics of Monetary Union* (n 137) 238.

[175] For a background reference, see Jean-Victor Louis, 'The Review of the Stability and Growth Pact' (2006) 43 Common Market Law Review 85 (noting that nothing about the original structure of the Pact was changed by the reform). For a further comment, see Waltraud Schelkle, 'EU Fiscal Governance: Hard Law in the Shadow of Soft Law?' (2007) 13 Columbia Journal of European Law 705 (focussing on the 2005 SGP reform and suggesting that there are three dimensions of soft law governance: obligation, delegation, and precision).

[176] Council Regulation (EC) No 1055/2005 amending Regulation (EC) No 1466/97 [2005] OJ L174/1.

attention to the sustainability of public finances (i.e., structural reforms with long-term cost-saving effects)[177] so that the general government debt ratio may converge to prudent levels over the cycle. Additionally, the concerns raised over the SGP procyclicality have been also partially addressed, under the amended Article 9 of Regulation No 1466/97, for the sake of imposing to the Council, as part of over the adjustment path towards the MTO, to 'tak[ing] into account whether a higher adjustment effort is made in economic good times, whereas the effort may be more limited in economic bad times'[178].

Likewise, the amendments to the corrective arm were meant to increase the overall flexibility of the procedure from a mostly quantitative to a more qualitative approach[179]. This is exemplified, among others, by a broader definition of 'severe economic downturn' and of the 'other relevant factors' (i.e., public investments). The overall purpose of such review appears indeed 'to assist rather than to punish, and therefore to provide incentives for Member States to pursue budgetary discipline, through enhanced surveillance, peer support and peer pressure' – as pointed out by the Council[180]. Nonetheless, the replaced Articles 6 and 7 of Regulation No 1467/97 maintain the sanctions in case of non-compliance, while extending the duration of the procedure in all its facets.

Despite the efforts to promote a smooth economic coordination in the EMU, the SGP seemed unfit to prevent not only some collective action problems, like political moral

[177] Accordingly, 'The deviation from the MTO should reflect the net cost of the reform to the publicly managed pillar, provided the deviation remains temporary and an appropriate safety margin to the reference value is preserved', Improving SGP Council Report (n 173) 12.
[178] Still, the SGP framework has been regarded by the Commission as unable to withstand the procyclical fiscal policies of Member States, Report on Economic governance review (n 61) 8.
[179] Council Regulation (EC) No 1056/2005 amending Regulation (EC) No 1467/97 [2005] OJ L174/5.
[180] Improving SGP Council Report (n 173) 12. It further states also that 'policy errors should be clearly distinguished from forecast errors in the implementation of the excessive deficit procedure'.

hazards entailing proper violations, as epitomised by the aforementioned disputes concerning France and Germany[181], but also free riding behaviours by those Member States, like Italy, which have postponed for years the very implementation of less popular structural and debt-reduction policies thanks to the favourable and more accommodating macroeconomic environment after the participation to the EMU[182].

In this context, in which Member States and EU institutions have attempted to strike an institutional balance on fiscal policies[183], it proved appropriate the original Delors' fear for the risk of an unbalanced mix of fiscal and monetary policy because of the structural asymmetry of the EMU. Indeed, the fact that the Eurozone Member States run short of the monetary policy levers (i.e., nominal exchange rate and nominal interest rates), that have been meanwhile conferred to an independent central bank, and remain with the (fettered) fiscal element as the sole policy instrument for the national macroeconomic stability, illustrates the critical inconsistency summarised in the metaphor of the 'Janus Trap' scenario, whereby it is hard to put forward viable policy mixes for the greater stability of the EU Fiscal Network. In such regard, the SGP appears flawed by design from its outset, being as much necessary as insufficient in preventing economic and institutional imbalances for a stable and sustainable growth.

In such an institutional arrangement, the ensuing Section addresses the capacity for an asymmetric EMU to tackle the complexity of an economic crisis with asymmetric

[181] *Commission v Council* (n 161).

[182] On the SGP shortcomings, 'The last more than ten years have demonstrated that the arms were fundamentally flawed both economically and institutionally' Adamski, *National power games* (n 59) 1322.

[183] It is striking paragraph 81 of *Commission v Council* (n 161) as it critically states 'Nevertheless, it follows from the wording and the broad logic of the [fiscal policy] system established by the Treaty that the Council cannot break free from the rules laid down by Article 104 EC and those which it set for itself in Regulation No 1467/97. Thus, it cannot have recourse to an alternative procedure, for example in order to adopt a measure which would not be the very decision envisaged at a given stage or which would be adopted in conditions different from those required by the applicable provisions'.

characteristics. Indeed, as Alsopp and Vines pointed out, 'For the stabilization of a country within EMU, fiscal policy is effectively the only policy instrument available for dealing with countryspecific shocks and adjustments'[184]. The next Section will be therefore devoted to this analysis.

2.2 Asymmetric Shocks (Economic Crisis) in an Asymmetric EMU

As soon as the Global Financial Crisis sparked in 2007-2009 across the US markets and reached the EMU[185], calling into question the sustainability of a large number of Eurozone national debts in fragmented markets and triggering what it has been later named as the 'European Debt Crisis', it became manifest not only that the fiscal policies are a 'matter of vital common interest'[186], but also that an unwise fiscal consolidation

[184] Christopher Allsopp and David Vines, 'The Macroeconomic Role of Fiscal Policy' (2005) 21 Oxford Review of Economic Policy 505; and further 'The euro's medium-term future will prove much shakier when Europe is hit by the fiscal crises looming for the majority of the eurozone's member countries' Niall Ferguson and Laurence Kotlikoff, 'The Degeneration of the EMU' (2000) 79(2) Foreign Affairs 110. On a similar note, see also Iain Begg, 'Fiscal and Other Rules in EU Economic Governance: Helpful, Largely Irrelevant or Unenforceable?' (2017) 239 National Institute Economic Review 4-5.

[185] Many authors have discussed about the economic crises and its institutional implications in the Union which occurred as a consequence of the 'Great Recession' in its multiple facets. For some references, see Tuori and Tuori, *Eurozone Crisis* (n 6); Hinarejos, *The Euro Area Crisis* (n 111); Antonio Estella, *Legal Foundations of EU Economic Governance* (CUP 2018) 160ff; Rita Perez R, 'La crisi del debito pubblico' (2016) Rivista Trimestrale di Diritto Pubblico 669; Amy Verdun, 'A Historical Institutionalist Explanation of the EU's Responses to the Euro Area Financial Crisis' (2015) 22 Journal of European Public Policy 219; Giacinto della Cananea, 'L'ordinamento giuridico dell'Unione europea dopo i nuovi accordi intergovernativi' (2012) La Comunità internazionale 3; Matthias Ruffert, 'The European Debt Crisis and European Union Law' (2011) 48 Common Market Law Review 1777; René Smits, 'The European Debt crisis and European Union Law: Comments and Call for Action' (2012) 49 Common Market Law Review 827; Annamaria Viterbo and Roberto Cisotta, 'La crisi del debito sovrano e gli interventi dell'UE: Dai primi strumenti finanziari al Fiscal Compact' (2012) 17 Dir. Un. Eur. 323; Waltraud Schelkle, 'A tale of two crises: the euro area in 2008/09 and in 2010' (2011) 10 European Political Science 375; Filippo Donati, 'The Euro Crisis, Economic Governance and Democracy in the European Union' (2013) 2 Italian Journal of Public Law 2013 130; Giulio Peroni, *La crisi dell'euro: limiti e rimedi dell'unione economica e monetaria* (Giuffrè 2012).

[186] Jean-Claude Juncker, Donald Tusk, Jeroen Dijsselbloem, Mario Draghi, and Martin Schulz, 'The Five Presidents' Report: Completing Europe's Economic and Monetary Union' (2015) 14 (hereafter 'Five Presidents' Report').

may add further risk to the EU Fiscal Network in a procyclical manner. As such, the European Debt Crisis showed how numerous and significant are the shortcomings with the current asymmetric European macroeconomic constitution[187].

As part of the acknowledgment around the institutional vulnerabilities of the EMU, that we have dubbed under the 'Janus Trap' metaphor, it markedly arises the de facto failure of the SGP coordination architecture in mitigating the risk of collecting action problems around excessive public indebtedness within the Union[188].

While such tension between centralisation and decentralisation may be considered as the normality in 'fiscally decentralised systems' – as highlighted by Alicia Hinarejos –, the EMU necessitates of a greater legal strategy to enhance fiscal discipline, reduce structural inequalities, and tackle asymmetric shocks[189].

The economic governance of the EMU is notably as complex as any (asymmetric) multilevel governance may expected to be, especially for a multi-country currency area, like the euro area, where the theory of optimal currency area may be further questioned[190]. As a consequence, in principle, the Eurozone Member States are subject

[187] On the negative spillovers of the differentiated level of asymmetric coordination between the economic and monetary policy in the EMU, see the famous definition of Carlo Azeglio Ciampi on the *lameness* ('zoppia') of the EMU, Ciampi, *Non è il paese che sognavo* (n 9) 117.

[188] For a reference, see Commission, 'A blueprint for a deep and genuine economic and monetary union: Launching a European Debate' COM(2012) 777 final/2 2 (hereafter 'A blueprint for a deep and genuine EMU Communication'). On a similar note, Lucas Papademos, Vice President of the ECB, posits that 'the [SGP's] rules and procedures for the correction of excessive deficits proved inadequate to guide fiscal policies towards a prompt and steady reduction of deficits and the achievement of a balanced budgetary position', 'The political economy of the reformed Stability and Growth Pact: implications for fiscal and monetary policy', Speech at the conference 'The ECB and Its Watchers VII' 3 June 2005 <https://www.ecb.europa.eu/press/key/date/2005/html/sp050603_1.en.html> accessed 3 January 2022

[189] Hinarejos, *The Euro Area Crisis* (n 111) 51, which draws on Hinarejos, *Fiscal Federalism* (n 31).

[190] On this, it shall be noticed that 'the ECB does not target the shocks of any particular country, but rather the average European shocks' Alberto Alesina, Robert J. Barro, and Silvana Tenreyro, 'Optimal Currency Areas' (2002) 17 NBER Macroeconomics Annual 310. A classical reference on optimal currency areas and transaction costs is then Robert A. Mundell, 'A Theory of Optimum Currency Areas' (1961) 51

to the same monetary policy, irrespective of country-specific economic contingencies. To this end, under evolving macroeconomic conditions, the monetary policy alone would not feasibly lead to the stability of the Eurozone if not complemented with sound and viable fiscal policies[191].

On that note, since the inception of the EMU, the Commission appeared to be aware of the risks arising from uncoordinated fiscal policy asymmetries which, alongside with other asymmetries (i.e., legal differences, political cycles, public purchasing), could lead to shocks in the internal market[192]. Yet, these shocks were regarded at most as 'regionally asymmetric' rather than 'country-specific', as was rather the case with the sovereign debt crisis. To this end, over the years the EU established budgetary (i.e., European Structural and Investment Funds) and loan mechanisms (i.e., EIB, EFSI) to assuage such regional asymmetries.

Multiples are indeed the kind of economic shocks in the economic literature and a large degree of macroeconomic responses are contingent upon such differences. The economic disturbances can be temporary or permanent, symmetric or asymmetric, and exogenous or policy-induced. In this regard, the budgetary policy is regarded as capable for performing a shock-absorption function, which may be severely limited in its anticyclical scope to the extent that a Member State has an unsustainable debt.

American Economic Rev 657. For an overview on the said theory and its critique, see Paul De Grauwe, *Economics of Monetary Union* (13th edn, OUP 2020) 3-55. For a further analysis, see Donato Masciandaro and Davide Romelli, 'Optimal Currency Area and European Monetary Membership: Economics and Political Economy' (2017) Baffi Carefin Centre Research Paper Series 1 (on the existing macroeconomics trade-offs of EMU membership).

[191] On the interactions between monetary policy and fiscal policies in the EMU, see European Central Bank, 'One monetary policy and many fiscal policies: ensuring a smooth functioning of EMU' Monthly Bulletin [2008] 65. See also above (nn 112 and 125).

[192] Commission, 'Adjustment to asymmetric shocks' (1998) PE 167.739 5 (hereafter Commission, *Adjustment to asymmetric shocks*).

Furthermore, at the very beginning of the EMU it was a widespread opinion that 'centralised monetary policy should be used to respond to symmetric shocks, while decentralised fiscal policy should be used in response to asymmetric shocks'[193]. Yet, such proposition proved to be somehow aspirational if we consider the pivotal role that the ECB and, in general, the monetary policy had all along the sovereign debt crisis because of the rigidities by design of the EMU.

Nonetheless, a great degree of initiatives to reduce the EU structural asymmetries remain still (politically) unexplored.

Among these, it is remarkable how the Commission already back in 1997 touched upon a possible treaty revision to enhance mutual assistance among Member States in the event of balance of payments disequilibria, as well as to introduce a debt issuance capacity for the EU for underpinning fiscal activism[194]. The latter topic, as part of the later pandemic toolkit, will be particularly considered in the following Section regarding the debate around tackling a severe negative common shock like the COVID-19 recession.

With that in mind, this Section will particularly focus on the measures implemented at EU level to increase economic and fiscal coordination in times of country-specific asymmetric shocks within an asymmetric eurozone. In so doing, we still agree to the importance of a negative answer to the question 'Can we reduce the European crisis to its financial and 'public debt' dimensions?'[195]. As we believe indeed that rather than

[193] Commission, 'Economic policy in EMU. Part A: Rules and adjustment' (1997) 1110452/97-EN 34.
[194] Commission, *Adjustment to asymmetric shocks* (n 192) 9.
[195] Edoardo Chiti, Agustín José Menéndez, and Pedro Gustavo Teixeira (eds), 'The European Rescue of the European Union?' (2012) RECON Report No 19 - ARENA Report 3/12 391 <www.reconproject.eu/projectweb/portalproject/Report19_EuropeanRescueEuropeanUnion.html> accessed 3 January 2022. On a similar line, Marco Buti and Nicolas Carnot argue that 'Fiscal profligacy is neither the sole nor the main origin of Europe's fiscal crisis', 'The EMU Debt Crisis: Early Lessons and

single epiphenomena, like the 2010 Greek debt crisis[196], the structural shortcomings of the EMU legal framework constitute per se the main sources of risk of macroeconomic and fiscal destabilisation.

Besides that, two additional strands of analysis could also be ascertained while dealing with the legal implication of the sovereign debt crisis.

The first prong is the immediate EU response to the sovereign debt crisis which extends from structural reforms like the Banking Union and the Capital Markets Union – that broadly-speaking centralised the eurozone banking supervision under the reins of the ECB (Single Supervisory Mechanism), created a single entity to oversee the risk of failing banks (Single Resolution Mechanism), and set the regulatory basis for a greater integration of the financial markets[197] – to the establishment of one-off (like EFSM and EFSF) or permanent facilities (like ESM) in order to ensure a sort of last resort financial assistance and crisis management in the euro area[198].

Reforms' (2012) 50 Journal of Common Market Studies 903.

[196] It shall be mentioned that it is widely recognised that Greece made severe irregularities in sharing fiscal statistics with the Commission, cfr. Commission, 'Report on Greek Government Deficit and Debt Statistics' COM(2010) 1 final.

[197] On the Banking Union, see *ex multis* Marco Macchia, *Integrazione amministrativa e unione bancaria* (Giappichelli 2019); Chiara Zilioli, 'The Independence of the European Central Bank and its New Banking Supervisory Competences' in Dominique Ritleng (ed) *Independence and Legitimacy in the Institutional System of the European Union* (OUP 2016) 125; Marcello Clarich, 'I poteri di vigilanza della Banca centrale europea' (2013) 3 Diritto pubblico 975. On the Capital Markets Union, see *ex multis* Danny Busch, Emilios Avgouleas, and Guido Ferrarini, *Capital Markets Union in Europe* (OUP 2018); Niamh Moloney, 'Capital Markets Union: "ever closer union" for the EU financial system' (2016) 41 European Law Review 307.

[198] Menelaos Markakis, *Accountability in the Economic and Monetary Union* (OUP 2020) 19ff (providing an overview of the setting-up of the various financial mechanisms). See also, Alberto de Gregorio Merino, 'Legal Developments in the EMU during the Debt Crisis' (2012) 49 Common Market Law Review 1613; Giuilo Napolitano, 'Il Meccanismo Europeo di Stabilità e la nuova frontiera costituzionale dell'Unione' (2012) Giornale di Diritto Amministrativo 461; Giacinto della Cananea, 'Ex crisibus Europa oritur' (2021) 41 Quaderni costituzionali 203. It shall be noted that, from a Eurostat perspective, the ESM is regarded as a European 'institutional unit' (S.212) and 'The impact on government accounts of an actual call [of the initial paid-in capital by the Member States] would be treated as a capital transfer only if it were to cover losses of the ESM or shortfalls in payments by a debtor country to the ESM',

The second prong is the intervention of the ECB all along the crisis via conventional and unconventional monetary policy in the context of the existing treaty-based prohibitions, like inflationary monetary financing or monetary bail-out of Member States, which prevent the central bank to monetise an excessive budgetary deficit[199].

Nonetheless, as this Section is concerned predominantly with the economic and fiscal coordination and its revamping[200], these two prongs will be considered only to the extent that they offer a concrete contribution to our main area of enquiry.

The fact that the Union entered the sovereign debt crisis after a very recent treaty revision by the 2007 Treaty of Lisbon was, moreover, a relatively neutral event in

---

Eurostat's EDP Manual (n 149) 76.

[199] For a brief summary of the role of the ECB during the sovereign debt crisis, see Viral V. Acharya and Sascha Steffen, *The Importance of a Banking Union and Fiscal Union for a Capital Markets Union* (European Union 2017) 22ff. Among the ECB's initiatives to preserve the monetary policy transmission and the singleness of the monetary policy it shall be mentioned that in 2012 the ECB announced a programme named 'Outright Monetary Transaction' (OMT) to support the secondary market sovereign bond purchasing, via the European System of Central Banks (ESCB), under the conditionality set out in the EFSF/ESM macroeconomic adjustment programmes. Though never activated, the ECJ found the OMT compatible with the EU Law in the 'Gauweiler case' (see above nn 89 and 155). For further background, see Alicia Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' (2015) 11 European Constitutional Law Review 564ff.

[200] Commission, 'Reinforcing economic policy coordination' COM(2010) 250 final (hereafter 'Reinforcing economic policy coordination Communication'); Commission, 'Enhancing economic policy coordination for stability, growth and jobs – Tools for stronger EU economic governance' COM(2010)367 final; A blueprint for a deep and genuine EMU Communication (n 188); Herman Van Rompuy, 'Towards a Genuine Economic and Monetary Union' (2012) EUCO 120/12 (hereafter 'Four Presidents' Report'); Commission, 'Economic governance review - Report on the application of Regulations (EU) No 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013', COM(2014) 905 final; Commission, 'Making the best use of the flexibility within the existing rules of the Stability and Growth Pact' COM(2015) 12 final (hereafter 'Best use of SGP communication'); Five Presidents' Report (n 186); European Court of Auditors, 'Further Improvements Needed to Ensure Effective Implementation of the Excessive Deficit Procedure', Special Report No 10, (European Union 2016); Commission, 'Reflection Paper on the Deepening of the Economic and Monetary Union' COM(2017) 291; White Paper on the future of Europe (n 109); Commission, 'Further Steps Towards Completing Europe's Economic and Monetary Union: A Roadmap' COM(2017) 821 final (hereafter 'Roadmap Communication'); Commission, 'Reflection paper on the future of EU finances' COM(2017) 358 (hereafter 'Reflection paper on the future of EU finances'); EFB Assessment of EU fiscal rules (n 171); Commission, 'Deepening Europe's Economic Monetary Union: Taking stock four years after the Five Presidents' Report' COM(2019) 279 final (hereafter 'Deepening Europe Communication').

respect to the legal toolkit at disposal of the policy makers to manage the crisis. Indeed, from a legal standpoint, since that Lisbon Treaty left almost untouched the highly contentious economic chapter, apart from some minor amendments[201], the crisis was merely challenged at EU level on the basis of 'legal creativity'[202], notwithstanding significant shortcomings in terms of democratic accountability and transparency[203]. As such, in absence of a clear legal basis to enhance economic and fiscal coordination by redressing the asymmetry of an intergovernmental economic union, the secondary legislation, alongside with intergovernmental arrangements[204], became the main domain for a review of the SGP functioning with the aim of achieving a sustainable economic growth through an effective economic coordination and fiscal discipline.

The earliest response of the Union to the financial crisis, in relation to the economic and fiscal policy coordination, comes under the name 'Six-Pack' and it was enacted in 2011. It represents for the EMU an instrument of 'meta-coordination'[205] that covers

[201] For a summary of the main Treaty of Lisbon amendments on the EU economic governance, see René Repasi, 'Implementation of the Lisbon Treaty – Improving functioning of the EU: Economic and Monetary Policy', European Parliament's Directorate-General for Internal Policies - Constitutional Affairs [PE 556.952] 8. For a critical note, Mario P. Chiti, 'La crisi del debito sovrano e le sue influenze per la governance europea, i rapporti tra Stati membri, le pubbliche amministrazioni' (2013) Rivista italiana di diritto pubblico comunitario 25; Joseph H. H. Weiler, 'Europe in Crisis - On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'' in (2012) Singapore Journal of Legal Studies 249-51.

[202] Keppenne, *Economic Policy* (n 38) 792. On a similar note, Bruno de Witte posits that 'There is no doubt that, during these electrifying five years, the law on Economic and Monetary Union has undergone a 'metamorphosis', whereas the text of the Treaties remained virtually untouched', 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) 11 European Constitutional Law Review 434 (hereafter de Witte, *Euro Crisis Responses*).

[203] A similar critical argument could be posed to the 'Next Generation EU' programme, though temporary in scope, in relation to the use of the EU budget as a fiscal buffer. Further information on this, below at (n 274) and Section 2.3.

[204] As exemplified by French and German convergence on EU economic governance in-between 2009 and 2012, Sergio Fabbrini, 'Intergovernmentalism and Its Limits: Assessing the European Union's Answer to the Euro Crisis' (2013) 46 Comparative Political Studies 1003.

[205] Paul Craig and Menelaos Markakis, 'EMU Reform' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 1403 (hereafter Craig and Markakis, *EMU Reform*).

both the area of fiscal policy[206] as well as the 'new' area of macroeconomic imbalances[207] that beforehand was not part of the SGP.

The importance of a greater preventive dialogue between the Union and the Member States in the area of multilateral surveillance lays on the 'experience gained and mistakes made during the first decade [of the EMU]' with the Stability and Growth Pact[208] and it lead to the creation of the 'European Semester', a guidance mechanism with a clear timetable for a collaborative in-depth assessment of both 'national reform programmes' on growth strategies and 'stability or convergence programmes' on budgetary strategies.

The 'European Semester' starts at the beginning of every budgetary cycle with a horizontal review of the European-wide macro fiscal and macro structural policy intentions of the Union (Euro Area Recommendation, 'EAR'). The Commission and the Council then undertake a vertical review of the overall consistency of the national programmes according to the EU economic guidelines (e.g., BEPGs, Europe 2020 strategy, …) and provide Member States with country-specific recommendations ('CSRs') to be taken into consideration while drafting the national budget. Thereupon,

[206] European Parliament and Council Regulation (EU) No 1175/2011 on amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L 306/12; Council Regulation (EU) No 1177/2011 on amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L 306/33; European Parliament and Council Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L 306/1 - notably, Article 8 sets out sanctions concerning the manipulation of statistics for which investigatory powers is conferred to the Commission; Council Directive 2011/85/EU on requirements for budgetary frameworks of Member States [2011] OJ L 306/41. On the implementation of the latter in Italy see below Section 3.1.2.

[207] European Parliament and Council Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L 306/25; European Parliament and Council Regulation (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L 306/8.

[208] Recital No 8, Regulation (EU) No 1175/2011.

the Union conducts a persistent monitoring of the implementation phase with the scope of identifying 'actual or expected significant divergences of the budgetary position from the medium-term budgetary objective, or from the appropriate adjustment path towards it'[209]. Indeed, if such divergence qualifies as a 'significant observed deviation'[210], it may provoke an early warning notice to the concerned Member State for the possible commencement of an excessive deficit procedure[211].

Furthermore, the 'Six-Pack' pillar also introduces a new surveillance framework for macroeconomic imbalances which forms part of the country-specific recommendations issued within the European Semester[212]. The 'Macroeconomic Imbalance Procedure' (MIP) becomes then a fundamental component of the European Semester as it aims at detecting a new source of risk which is a macro risk affecting the proper functioning of the EMU[213]. Such imbalances may result for a Member State from both internal indicators (e.g., private sector credit flow, public and private indebtedness, financial and asset market developments, evolution of unemployment, …) and external

[209] Article 6(1), Council Regulation (EC) No 1466/97, as amended by Regulation (EU) No 1175/2011.
[210] *Ibid*., Article 6(2).
[211] Notably, Regulation (EU) No 1175/2011 introduces the reverse qualified majority for the Council voting procedure concerning the SGP decisions issued by the Commission. Such EC decisions are indeed deemed to be adopted, unless the Council, by simple majority, rejects such recommendation within 10 days. As a voting mechanism, it was later extended by TSCG also to an earlier stage of the EDP procedure. For a comment on this, see Rainer Palmstorfer, 'The Reverse Majority Voting under the 'Six Pack': A Bad Turn for the Union?' (2013) 20 European Law Journal 186 (critical on the compatibility of the reverse majority vote in relation to the Treaties).
[212] On the basis of Article 121(2) TFEU.
[213] For an overview, Leo Flynn, 'Non-Fiscal Surveillance of the Member States' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 850; Commission, Economic and Financial Affairs, 'The Macroeconomic Imbalance Procedure: Rationale, process, application: a compendium' (2016) Institutional Papers 39 10.2765/958247 (hereafter 'MIP Compendium'). For a critical assessment, Dariusz Adamski, 'Europe's (Misguided) Constitution of Economic Prosperity' (2013) 50 Common Market Law Review 53ff. For economic analyses, see Lorenzo Codogno, 'Macroeconomic imbalances procedure' (2020) Economic Governance Support Unit PE 634.403 (also conducting a counterfactual exercise with pre-crisis macroeconomic data); Claudio Borio and Piti Disyatat, 'Global imbalances and the financial crisis: Link or no link?' (2011) 346 BIS Working Papers 1 (on the importance of financial imbalances, like unsustainable credit and asset price booms, in contributing to the crisis).

indicators (e.g., current account and net investment positions, real effective exchange rates, export market shares, changes in price and cost developments, non-price competitiveness, …). Importantly, in outlining the scoreboard with a set of these indicators, the Commission shall liaise with the European Systemic Risk Board ('ESRB')[214] which deals with the macro prudential supervision of the EU financial markets for the prevention and mitigation of systemic risk[215].

As in the case of fiscal surveillance, the MIP presents an alert mechanism for a prompt identification and monitoring of the said imbalances. Similarly, in the event that an in-depth review shows a risk or an already existing imbalance for a Member State, it may follow either a preventive or a corrective action. In accordance with the fiscal surveillance, the preventive action follows the same procedure set out in Article 121(2) TFEU with the Council that, upon a Commission's recommendation, may issue a country-specific decision. By the same token, the excessive imbalance procedure (EIP) presents an almost equivalent set of provisions for the fiscal surveillance (EDP) which likewise may lead up to economic sanctions, although it has never occurred so far in the case of EIP.

The 'European Semester' is certainly the main achievement of the 'Six-Pack' pillar, to which gradually the EU architecture added an intergovernmental policy commitment

[214] Following the report of the High-Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière, in 2009, on 24 November 2010 European Parliament and of the Council Regulation (EU) No 1092/2010 was passed concerning the 'European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board' [2010] OJ L 331/1, as later amended by European Parliament and of the Council Regulation (EU) No 2176/2019 on amending Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board [2019] OJ L 334/146. As per Article 6, a member of the Commission is appointed in the General Board, thus 'establish[ing] a link with the macroeconomic and financial surveillance of the Union' (Recital 25).

[215] On systemic risk, see above (n 100).

in 2011 ('Euro Plus Pact')[216], an intergovernmental treaty in 2012 ('TSCG')[217], as well as a further legislative package in 2013 ('Two-pack')[218]. Despite being significantly different from a legal perspective, all these agreements serve the same purpose of enhancing the scope of action of the European Semester towards a greater fiscal integration in the EMU.

A paradigmatic example of this ambition is the TSCG (or 'Fiscal Compactt') which, despite not being part of the EU law, purportedly complements the SGP to better combine fiscal sustainability with fiscal stabilisation. Its main instrument, for the sake

[216] The text of the Euro Plus Pact, which was open also to non-eurozone Member States, is annexed to the conclusions of the European Council of 24/25 March 2011 and – as noted – it 'is not legally binding', Lastra and Louis, *European Economic and Monetary Union* (n 38) 124. For further analysis, see Hubert Gabrisch and Karsten Staehr, 'The Euro Plus Pact: Competitiveness and External Capital Flows in the EU Countries' (2015) 53 Journal of Common Market Studies 558 (raising doubts on the enforceability of the commitments set out in the pact due to the absence of sanctions). As noted by the Italian Constitutional Court in the decision No 88/2014, 'Con il patto "Euro Plus" […] gli Stati membri dell'Unione europea si sono impegnati ad adottare misure volte a perseguire gli obiettivi della sostenibilità delle finanze pubbliche, della competitività, dell'occupazione e della stabilità finanziaria, e in particolare a recepire nella legislazione nazionale le regole di bilancio dell'Unione europea fissate nel patto di stabilità e crescita, ferma restando «la facoltà di scegliere lo specifico strumento giuridico nazionale cui ricorrere», purché avente «una natura vincolante e sostenibile sufficientemente forte (ad esempio costituzione o normativa quadro)» e tale da «garantire la disciplina di bilancio a livello sia nazionale che subnazionale»' (para. 5).

[217] Notably the Czech Republic, alongside with the United Kingdom before Brexit, abstained from signing the accord which entered into force on 1 January 2013, although in 2019 the Czech Republic acceded to Title V only. For some comments on TSCG, see Paul Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) 37 E.L. Rev. 231 (providing an extensive legislative analysis); Federico Fabbrini, 'The Fiscal Compact, the Golden Rule and the Paradox of European Federalism' (2013) 36 Boston College International & Comparative Law Review 25 (also conducting a comparison between the TSCG 'golden rule' and the US model of fiscal federalism). For a later proposal on the transposition of the Fiscal Compact into Union Law, as set forth under Article 16 TSCG, see Roadmap Communication (n 200) 7 and Commission, 'Proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States' COM(2017) 824 final. For the Commission's background analysis in relation to the TSCG, see Common principles on national fiscal correction mechanisms (n 17). For a comment on this proposal, see Filippo Croci, 'Is it worth the effort? The European Commission's proposal for integrating the substance of the 'Fiscal Compact' into the EU legal order' (2018) The Revue de l'euro 52.

[218] European Parliament and Council Regulation (EU) No 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L 140/1; European Parliament and Council Regulation (EU) No 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of Member States in the euro area [2013] OJ L 140/11.

of this analysis, is to enhance compliance by reducing discretion on the side of both the Union and the Member States.

In so doing, the contracting parties committed, on one hand, to a specific budgetary rule ('Balanced Budget Rule') to be transposed into their national legal systems 'preferably' at constitutional level[219], by which the contracting parties, also taking into consideration the economic cycle, shall maintain for their general governments the annual structural balance 'at its country-specific medium-term objective' (MTOs), whilst the annual structural deficits shall be of 0.5% of GDP or lower[220]. This commitment is then particularly guaranteed by an Article 273 TFEU clause, which entrusts upon the ECJ the power to act as an adjudicator of the inter-state disputes between Member States that may arise from such multilateral agreement to the extent that the dispute 'relates to the subject matter of the Treaties'.

On the other hand, the TSCG imposes on contracting Member States to 'facilitate' the adoption of measures stemming from the EDP even if this may entail to compel a

[219] Article 3(2), TSCG. It is noticeable that the Euro Plus Pact (above n 216), while discussing the importance of a Member States' commitment to translating EU fiscal rules set out in the SGP into national legislation, considered as alternative the constitution or framework law to the extent that 'it has a sufficiently strong binding and durable nature'. For transposition of this principle, as set forth in TSCG, into the Italian Constitution by means of Constitutional Law No 1/2012, see below at Sections 3.2.1 and 4.1, and (nn 337, 492, and 614) drawing attention to the domestic implementation of the notion of 'budget equilibrium' rather than that of 'balanced budget'. More information on the other Member States' transpositions can be found in Commission, 'Report from the Commission presented under Article 8 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union' C(2017) 1201 final; Federico Fabbrini, 'Il pareggio di bilancio nelle costituzioni europee' (2011) Quaderni Costituzionali 933. Interestingly, in the famous – and at the time confidential – letter of the ECB Presidents (Jean-Claude Trichet and, its successor, Mario Draghi) to Italy in 2011 it was stated that 'A constitutional reform tightening fiscal rules would be appropriate', 'Letter from ECB President Jean Claude Trichet to Italian Prime Minister Silvio Berlusconi', 5 August 2011 <https://www.ecb.europa.eu/ecb/access_to_documents/document/pa_document/shared/data/ecb.dr.par2021_0001lettertoItalianPrimeMinister.en.pdf>.

[220] According to Article 3(1)(c), TSCG, there may be a temporal deviation from the MTOs or the adjustment path towards it only if there are 'exceptional circumstances'. Notably, Articles 3-8 TSCG are part of Section 3 which is also known as 'Fiscal Compact'.

mandatory deficit reduction. This mechanism aims at providing an automatic correction in the event of 'significant observed deviations from the medium-term objective or the adjustment path towards it'[221]. As a further automatism, the TSCG provides that if the reference value on the debt to GDP, pursuant to Protocol No 12 annexed to the TEU, exceeds the 60% limit, the concerned contracting Member State 'shall reduce it at an average rate of one twentieth per year as a benchmark'[222].

Moreover, to increase the predictability of the Council vote, as part of the EDP, the contracting Member State have also committed for the default rule of supporting the Commission's proposal or recommendation, unless there is a qualified majority against such decision[223]. Yet, irrespective of increased degree of automatisms, the sanction for the breach of the budgetary policy remains 'always a matter of judgement'[224] there being inherently political. In the end, a higher degree of procedural predictability does not necessarily assure credibility which is rather based on coherent and consistent accountability of the actors involved with EDP, alongside with transparency of the related decision-making process[225].

On this line, few months after the TSCG entered into force, the 'Two-pack' was adopted to complement the previous 'Six-Pack' on fiscal surveillance. Despite some overlaps

[221] Article 3(1)(e), TSCG.
[222] Article 4, TSCG.
[223] Article 7, TSCG.
[224] Lastra and Louis, *European Economic and Monetary Union* (n 38) 125.
[225] In this regard, the Commission acknowledges that 'The framework has nevertheless become more complex and arguably less predictable' Commission, 'Commission staff working document accompanying the Report on the application of Regulations (EU) No 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013 and Council Directive 2011/85/EU' SWD(2020) 210 final 6 (herafter Report on Economic governance review – Working Staff Document). Further, for a request of greater transparency and predictability of the SGP procedure, Council, 'Eurogroup Statement on the Draft Budgetary Plans for 2016' 858/15. On a similar note, the Court of auditor criticised the lack of transparency on the criteria underlying the final decisions on MIP recommendations, European Court of Auditors, 'Audit of the Macroeconomic Imbalance Procedure (MIP)' (2018) Special Report No 3/2018 7. On a similar note, Five Presidents' Report (n 186) 14.

with TSCG[226], which de facto were partially transposed in EU law, the new legislative package introduces a reinforced (ex-ante and ex-post) surveillance for Member State experiencing or threatened with serious difficulties so to mitigate the risk of contagion in terms of financial stability for the rest of the eurozone. Additional contributions of the 'Two-pack' pertain to the stronger budgetary surveillance, thanks to the duty of Member States to set up independent fiscal council to provide public assessments on national fiscal rules,[227] and stronger budgetary coordination, whereby the Commission shall receive the draft budgetary plan by 15 October and is even empowered 'in exceptional circumstances' to issue a request of revision in case of 'particularly serious non-compliance' with the SGP obligations[228]. These measures build on the significant review that the 'Six-Pact', via Directive 2011/85/EU, undertook in respect to the harmonisation of minimum standards for the national budgetary frameworks[229].

The importance of a common Eurozone timeline for drafting the annual national budget and the availability of reliable, timely, and independent fiscal data, covering also macroeconomic forecasts, for all sub-sectors of general government are indeed crucial for the smooth functioning of the monitoring process within the rule-based framework of the European Semester[230]. Along the same line, for all the stages of the national budgetary procedure (e.g., fiscal planning, country-specific numerical fiscal rules,

[226] As an example of the overlaps, the 'Two-pack', under Regulation (EU) No 473/2013, provides for a greater coordination between Member States and the Commission pertaining to the debt issuance plans (Article 8), as well as economic partnership programmes as part of the EDP (Article 9).
[227] Art. 5, Regulation (EU) No 473/2013. For a comment on the Italian fiscal board, as adopted by Law No 243/2012, see Mario P. Chiti, 'L'ufficio parlamentare di bilancio e la nuova governance della finanza pubblica' (2013) Rivista italiana di diritto pubblico comunitario 977 (pointing out the grounds for establishing a new supervisory entity in the Italian fiscal framework); Chiara Goretti, 'Pareggio di bilancio e credibilità della politica fiscale: il ruolo del fiscal council nella riforma costituzionale italiana' (2012) 154 Astrid rassegna 1.
[228] Art. 7, *Ibid*.
[229] Directive 2011/85/EU was implemented in the Italian legal system by Legislative Decree No 54/2014.
[230] Articles 3-4, Directive 2011/85/EU.

budgetary forecasts, multiannual planning, …) Member States are mandated to establish appropriate mechanisms of coordination across all sub-sectors of general government[231] with the aim of managing what we have so far referred as 'Fiscal Policy Risk'.

Overall, the new legal architecture on multilateral surveillance shows the political intent to reconsider the soft law model of EU governance, in accordance with the tenets of the 'open-method of co-ordination'[232], in a shift towards a 'Community method' model based on hard law rules and (automatic) sanctions. Nonetheless, even in a rule-based governance, the enforcement still presents a significant margin of interpretation on the Commission side[233], therefore making relatively blurred the distinction between such two methods in the area of fiscal policy[234].

The progressive dismissal of soft law – at least on paper – is further exemplified by a larger use of incentives and penalties in legislation to promote economic convergence in what the European Parliament called 'carrot and stick approach'[235] but in its essence results in 'conditionality'[236]. In that sense, the framework regulation on the provision

[231] Articles 12, *Ibid*. On a similar note, see also Article 3, Protocol No 12 annexed to the TEU.

[232] In this regard, the European Parliament's Resolution on economic governance (n 49) point 16, whilst presenting the Europe 2020 strategy, dismisses the model of soft governance purported by the precedent Lisbon Strategy. For further references on the debate around the OMC governance model see above at (n 46).

[233] An example of this is the guidance arranged by the Commission to offer an explanation on three different policies can be pursued in compliance with the SGP 'without modifying existing legislation', see Best use of SGP communication (n 200) para. 1.

[234] For a reference on the hybrid coexistence of rules-based and co-ordination-based forms of governance, see Armstrong, *The New Governance of EU Fiscal Discipline* (n 22). Similarly, 'Hard and soft law intertwine in this area to an unprecedented degree', Hinarejos, *The Euro Area Crisis* (n 111) 200.

[235] European Parliament's Resolution on economic governance (n 49) para. 21.

[236] For an example of this conditionality mechanism, see also Article 2(3), Regulation (EU) No 472/2013 setting out tighter surveillance ('enhanced surveillance') for Member State in receipt of financial assistance on a precautionary basis. Furthermore, on the conditionality attached to the 'Next Generation EU' programme, see (n 30).

of European Structural and Investment Funds introduces an 'external control' on Member States by linking the provision of funds to sound economic governance[237].

To conclude, it may be questioned if such extensive review of the fiscal arrangements which occurred to the EMU along the sovereign debt crisis may be 'commensurate with the requirements of monetary union'[238]. Undoubtedly, the wide array of risks arising from the scenario of the 'Janus Trap' metaphor, the original asymmetry of the EMU in-between the monetary and fiscal governance, may have been mitigated but certainly not solved[239].

Nonetheless, the EMU, as a 'living constitution'[240], showed legal and institutional vitality for a progressive shift from a macroeconomic constitution based on the objective of price stability, as in Maastricht, to the wider notion of financial stability[241] where fiscal policy can act as a countercyclical buffer both in a centralised and in a decentralised manner. The next Section is going to expand upon the attainability of redistributive and fiscal stabilisation policies within the EMU, especially if the Union could borrow, on

[237] Article 23(9), European Parliament and Council Regulation (EU) No 1303/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L 347/320.

[238] Mario Draghi, 'Hearing before the Plenary of the European Parliament on the occasion of the adoption of the Resolution on the ECB's 2010 Annual Report' 1 December 2011 <https://www.ecb.europa.eu/press/key/date/2011/html/sp111201.en.html> accessed 3 January 2022.

[239] Fabbrini, *Fiscal* Capacity (n 111) 113.

[240] de Witte, *EMU as Constitutional Law* (n 116) 292 also referring to Aileen Kavanagh's definition of 'living constitution' as being 'capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers', 'The Idea of a Living Constitution' (2003) 16 Canadian Journal of Law and Jurisprudence 55.

[241] Tuori and Tuori, *Eurozone Crisis* (n 6) 184 (also arguing based on the Pringle case that the new objective of financial stability concerns both the prevention and the resolution of insolvency cases). For a critical analysis, Giacinto della Cananea, 'L'Unione europea, oltre la stabilizzazione dei conti pubblici' (2020) 26 Diritto pubblico 167; 176 (hereafter della Cananea, *L'Unione europea, oltre la stabilizzazione dei conti pubblici*) (discussing about the possible move of the EU from a fiscal stability-oriented supervision over national fiscal policies oriented to a fully-fledged Fiscal Union).

a stable basis, from the markets to pursue its own agenda.

2.3 Symmetric Shocks (COVID-19) and Asymmetric Responses in the EMU

The development of the Union has been conceived as gradual[242] and it has historically advanced though a shock-dependent path[243]. As the sovereign debt crisis hit asymmetrically the euro area Member States, the quest for instruments of macro adjustment to address and stabilise economic shocks became immediately controversial both in a political and constitutional manner.

The shortcomings and delays arising from the EMU asymmetries, which exacerbated the European Debt Crisis across the Union, proved indeed to be inherently political as regards the principle of solidarity, as now enshrined in the Treaties[244]. Then, the institutional solutions to hamper the crisis had to resort to 'interstitial changes'[245], albeit arguably narrow in scope, within the constitutional framework of the Union for the sake of overcoming the inefficiencies by design of the EMU. In this regard, while during the economic crisis the macroeconomic scope of monetary policy was at the height of

[242] Accordingly, in the famous Declaration on 9 May 1950 Robert Shumann posits 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity'.

[243] Sabino Cassese, 'L'Europa vive di crisi' (2016) Rivista trimestrale di diritto pubblico 779 (hereafter Cassese, *L'Europa vive di crisi*) (also referring to a Helmut Schmidt's quote in 1974 on the influence of crises to the development of the Union).

[244] Vestert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 European Constitutional Law Review 7 (discussing the legal dimension of the notion of solidarity adopted across the debt crisis); Esin Küçük, 'Solidarity in EU Law. An Elusive Political Statement or a Legal Principle with Substance?' (2016) 23 Maastricht Journal of European and Comparative Law 965 (addressing the notion of solidarity as a legally binding principle of the Union). For recent analyses, see Vestert Borger, *The Currency of Solidarity* (CUP 2020) 23-78; Filippo Croci, *Solidarietà tra stati membri dell'Unione europea e governance economica europea* (Giappichelli 2020).

[245] de Witte, *Euro Crisis Responses* (n 202) 436; 444; 453.

its capacity with the initiatives that the ECB undertook, within its mandate[246], the macroeconomic function of fiscal policies (e.g., shock absorption, countercyclical policies, …) was inadequately coordinated with the diverse national levels, if not excessively harnessed for the sake of the stability (over growth) mantra[247].

Back in 1977 the MacDougall Report voiced that the 'Community budget is so relatively very small' to consider monetary union as a practicable option[248]. Indeed, as pointed out in Section 2.1, following to the Maastricht Settlement, the Union developed an asymmetric model which, irrespective of a centralised monetary policy, relies on national budgets for fiscal policies instead of setting up a proper 'federal debt' with extensive cushion buffers to increase potential growth and with a redistributive function across the euro area[249]. As it has been highlighted, this constitutes a very vexed issue in the European discourse, although in the current times it seems a relatively settled opinion that the Union is 'ill-equipped to tackle very large country-specific or euro area-wide shocks'[250].

At the same time, there is little doubt that the EMU was not meant – at its inception –

---

[246] For a summary of the ECB's initiatives along the sovereign debt crisis, see above (n 199). For the 'Pringle case' involving the establishment of the ESM and its compatibility with Article 125 TFEU, see above (n 156).

[247] On the limited scope of a 'Stabilität Union' in relation to fiscal policies, see della Cananea, *L'Unione europea, oltre la stabilizzazione dei conti pubblici* (n 241).

[248] Commission, 'Report of the Study Group on the Role of Public Finance in European Integration' [1977] 12 (hereafter 'MacDougall Report'). On this line, Sabino Cassese posits 'l'Unione europea è un gigante regolatorio mentre è un nano finanziario: il suo bilancio è inferiore a quello di molte città europee', *L'Europa vive di crisi* (n 243) 784. Similarly, Reflection paper on the future of EU finances (n 200) 2.

[249] For an overview on the extensive debate on this, see Päivi Leino-Sandberg and Tuomas Saarenheimo, 'A fiscal union for the EMU?' 95 ADEMU Working Paper Series 1. For an historical reference on the viability of a 'federal debt' in the Union, see Adjustment to asymmetric shocks (n 192) 58.

[250] Deepening Europe Communication (n 200) 12; similarly, also Monti Report (n 39) 6. In this regard, in a recent paper Jacques Delors claimed that in his 1989 report he 'underestimated' the notion that 'a single market with a single currency could exacerbate, to such a point, the divergences between Member States, even despite the size of the economic and social cohesion funds', 'Delors, *Economic governance in the European Union* (n 46) 176. For a reference to the Delors Plan see above (n 42) and Section 2.1.

as a 'Transfer Union' with a proper risk sharing of financial liabilities among Member States[251]. Accordingly, the 'no bail-out clause', set forth in Article 125 TFEU (formerly Article 104a TEC), lays down the principle of national fiscal autonomy and liability. This provision is indeed regarded as the key deterrent to containing the moral hazard of Member States towards unsound and irresponsible budgetary policies[252]. The overall objective of Article 125 TFEU is to encourage Member States pursuing budgetary discipline on the fiscal side, in conjunction with the substantially equivalent prohibition on the monetary side preventing the ECB, under Article 123 TFEU, from direct financing Member States. Fittingly, in occasion of the famous Pringle case Advocate General Kokott spelled out that 'Under European Union law no Member State is under any obligation to satisfy the creditors of another Member State'[253], thus arguing for the absence of debt pooling in the euro area neither as a consequence of the participation to the monetary union nor due to the (later) establishment of a eurozone lending facility like the ESM.

In this context, it is worth distinguishing between the two different strands of discussion around the status of reforming the fiscal policies in the EU[254]. Till today, these remain lingering points in the debate on the importance of expansionary fiscal policy, especially in the current macroeconomic scenario in which interest rates have reached zero and the monetary policy has become – purportedly – 'largely

[251] Tuori and Tuori, *Eurozone Crisis* (n 6) 181.

[252] For a critical analysis on the 'no-bailout' clause, Adamski, *National power games* (n 59) 1327 (claiming that Articles 123 and 125 were 'non-credible' because, if fully obeyed, would entail disproportional effects).

[253] View of Advocate General Kokott delivered on 26 October 2012, Case C-370/12 *Pringle* [2012] OJ C 26 ECLI:EU:C:2012:675, para. 114.

[254] For an overview, see René Repasi, 'Legal Options for an Additional EMU Fiscal Capacity' (2013) European Parliament's Committee on Constitutional Affairs PE 474.397 <https://www.europarl.europa.eu/RegData/etudes/note/join/2013/474397/IPOL-AFCO_NT%282013%29474397_EN.pdf> accessed 3 January 2022; Fabbrini, *Fiscal* Capacity (n 111) 107ff.

ineffective'[255].

On the one hand, it is about introducing further fiscal stabilisation mechanisms in the Eurozone, in addition to the structural and investment funds[256], with the aim of increasing the number of tools to address financial shocks effectively[257].

An example of this is the – later stalled at the European Parliament and Council – Commission's proposal on the establishment of a stabilisation capacity instrument, the European Investment Stabilisation Function (EISF), maintaining that 'structural reforms, automatic fiscal stabilisers, discretionary fiscal policy measures as well as the single monetary policy of the Eurosystem cannot fully mitigate large macro-economic shocks'[258].

Likewise, the European Fund for Strategic Investments (EFSI) was conceived with a similar stabilization function[259] and interestingly, as a budgetary instrument to sustain the aggregate demand, it was open to finance as a means to mobilising capitals through EU budget guarantees and triple-A rated bonds of the European Investment

[255] Further, see Agnès Bénassy-Quéré and Francesco Giavazzi (eds), *Europe's Political Spring* (CEPR Press 2017) 10-11 (also pointing out that there is still no consensus on a fiscal stabilisation tool at aggregate level in case of insufficient monetary policy's results in dealing with a shock). On a similar note, ECB, 'Economic Bulletin - Issue 5' (2021) 83 (hereafter ECB, *2021 Economic Bulletin*).

[256] These instruments of cohesion policy are mainly the European Regional Development Fund, the Cohesion fund, the European Social Fund, the European Maritime and Fisheries Fund, and the European Agricultural Fund for Rural Development. Other cushioning instruments are also the European Union Solidarity Fund, the Youth Employment Initiative, and European Globalisation Adjustment Fund.

[257] On this line, Five Presidents' Report (n 186) 14.

[258] Commission proposal for a Regulation of the European Parliament and of the Council on the establishment of a European Investment Stabilisation Function COM/2018/387. Further, see also Commission, 'Communication to the European Parliament, the European Council, the Council and the European Central Bank on new budgetary instruments for a stable euro area within the union framework' COM(2017) 822 final. As per the European Parliament's procedure, the related procedure (2018/0212(COD)) is stalled since October 2019.

[259] According to the classification put forward by Nazaré da Costa Cabral, the EFSI is a bottom-up convergence instrument as opposed to top-down stabilisation instruments (e.g., European Stabilisation Fund ('ESF')), *The European Monetary Union After the Crisis* (Routledge 2020) 229ff.

Bank[260]. Moreover, the EFSI investment contribution, if co-financed by Member States, is conceived as outside the scope of the fiscal adjustment assessment as part of the SGP preventive and corrective arms[261].

On the other hand, another discussion on reforming the EU fiscal policies concerns the possible issuance of a common bond for the Union instead of (or in addition to) the current scenario in which the European sovereign bond market is almost entirely based on national treasury bonds. In the intention of the supporters of such debt pooling, the common issuance of a new EU safe and liquid asset would increase stability and reduce fragmentation in the EMU, as well as allowing the euro to compete with the US Dollar market as a reserve currency at global level. As an example, it can be referred to the extensive debate over differently labelled but equally controversial proposals (e.g., 'Delors bonds'[262], 'Eurobonds', and others…[263]) to the extent that it may

[260] The EFSI, alongside with the European Investment Advisory Hub (EIAH), was part of an EU initiative launched in 2014 under the name 'Investment Plan for Europe' (also known as 'Juncker Plan'). For an overview on the EFSI, as a means of growth-friendly fiscal consolidation, see European Parliament and of the Council Regulation (EU) No 2015/1017 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 — the European Fund for Strategic Investments [2015] OJ L 169/1. For an overall assessment, see European Investment Bank, 'The European Fund for Strategic Investments: the Legacy' (EIB 2020). On the relationships between the EFSI investments and the 'investment clause' within the SGP framework, see below Section 4.1.

[261] Best use of SGP communication (n 200) 5-6. For further comments, see European Court of auditors, 'Opinion No 4/2015 concerning the proposal for a Regulation on the European Fund for Strategic Investments' [2015].

[262] 'The expansion of financial market activity in ECUs [European Currency Unit] reflects in part a growing issuance of ECU-denominated debt instruments by Community institutions and public-sector authorities of some member countries, and in part the ECU's attractiveness as a means of portfolio diversification and as a hedge against currency risks', Delors Report (n 42) 9. On this line, see the 'Union Bonds' proposal during the Delors' presidency, see Commission, 'White Paper on Growth, competitiveness, and employment. The challenges and ways forward into the 21st century' COM(1993) 700 final.

[263] On the Commission's assessment on 'Stability Bonds', see Commission, 'European Commission Green Paper on the feasibility of introducing Stability Bonds' [2011] MEMO/11/820. For a summary of the debate, see Alberto Quadrio Curzio, 'On the Different Types of Eurobonds' (2011) 28 Economia politica 279; Mario Monti, 'A New Strategy for the Single Market - Report to the President of the European Commission, Jose Manuel Barroso' (2010) 61-64 <https://ec.europa.eu/archives/bepa/pdf/monti_report_final_10_05_2010_en.pdf> accessed 3

conceivably lead in the long term to the 'natural development'[264] of a 'Fiscal Union'.

The two aforementioned lines of analysis, respectively a fiscal capacity and a safe asset for the Eurozone, can be considered together for the scope of this Section. Indeed, these form part of the combined EU response to a different kind of crisis[265], the COVID-19 global pandemic, which dramatically erupted in 2020 affecting Member States symmetrically but with severe asymmetric socio-economic consequences.

To further appraise this, it shall be considered that also Brexit represented an additional kind of symmetric shock in the form of a disruptive political event. Notwithstanding the historical consequences of the staggering withdrawal of the United Kingdom from the EU, it is noticeable that, at least in respect to the area of fiscal policies, it has also been interpreted as a (fairly bittersweet) opportunity for a greater integration of the Union, sidestepping the previous UK veto on many pivotal negotiations on future constitutional arrangements[266].

As pointed out in the previous Sections, and summarised under the 'Janus Trap' metaphor, in the policy and academic debate it is a long-lasting concern the need for overcoming the euro area asymmetries by design which are still preventing a proper

January 2022. For a recent proposal for the functioning of a European Debt Agency to build up a common bond in the EMU, see Massimo Amato et al, 'Transforming Sovereign Debts into Perpetuities through a European Debt Agency' (2020) <https://ssrn.com/abstract=3579496> accessed 3 January 2022.

[264] Five Presidents' Report (n 186) 14.

[265] In this regard, Lorenzo Codogno and Paul van den Noord, 'The rationale for a safe asset and fiscal capacity for the Eurozone' (2019) 144 LSE 'Europe in Question' Discussion Paper Series 1.

[266] Lucas Guttenberg, Johannes Hemker, and Sander Tordoir, 'Alles wird anders – Wie die Pandemie die EU-Finanzarchitektur verändert' (2021) 101 Wirtschaftsdienst 77 (arguing on an interrelation between Brexit and the revamping of the debate around reforming fiscal policies in the Union); Fabbrini, *Brexit and the Future of the European Union* (n 114) 136 (on the unsustainability of the current EU status quo and the unavoidable constitutional reform momentum stemming from the UK's withdrawal from the EU). For further references on Brexit see above (n 114).

financial and fiscal integration across the EMU[267]. Yet, since economic and now even pandemic shocks must be regarded as cyclically affecting the Eurozone in the near or distant future, it has become apparent the importance of having a sufficient degree of monetary and fiscal levers at disposal for a swift institutional response in mitigating the risk of 'contagion' across Member States. After all, as we noted above, the room for manoeuvre of monetary policy is currently deemed as limited in a zero-lower-bound environment[268], and so the weaker is the eurozone governance on fiscal policies, the greater is expected the procyclical effect of a shock for the spread of systemic risk across the EU Fiscal Network.

Over the last decade, the development of the Eurozone responses to adverse shocks reveals a new attitude towards risk-sharing among Member States in addition to merely reaping the benefits from the participation to the Union[269]. Nonetheless, in the EU discourse it has been thus far politically challenging tempering the idea of an enhanced EU fiscal capacity due to the envisaged high risk of moral hazard among Member States, especially among the highly indebted ones, in complying adequately with sound fiscal and structural policies. Therefore, in any future or even merely conjectural arrangement of the EU fiscal policy, the governance complexity of risk-sharing policies at EU level, like debt pooling in its diverse facets, tends necessarily to require a prudent balance between models for fiscal capacity enhancement and behavioural constraints, like fiscal or market discipline. This attitude seems to be recurrently confirmed hitherto.

---

[267] For an overview, in addition to the references set out in this Section, see European Fiscal Board, 'Annual Report 2018', 10 October 2018 70ff and further below at Section 4.3.

[268] See also above (nn 104 and 255).

[269] This observation comes from Edoardo Chiti, Agustín José Menéndez, and Pedro Gustavo Teixeira (eds), 'The European Rescue of the European Union?' (2012) RECON Report No 19 - ARENA Report 3/12 422. See also above (n 88).

Along this line, a first attempt 'not to coordinate fiscal constraints, but rather fiscal expansion'[270] – as Charlotte Rommerskirchen fittingly contended – can be retraced straight after the sovereign debt crisis in the form of the European Economic Recovery Plan (EERP)[271]. In the intention of the Commission, a greater coordination of budgetary policies could promote a faster and more stable recovery via a sustained demand[272]. Still, the overall idea and commitments at the time behind this plan shows measured ambition and creativity in the EU discourse in presenting solutions still within the 'status quo' of the European fiscal policies at that time[273].

On the contrary, the later established facilities, meaning the EFSI and later the European Union Recovery Instrument[274], as part of the wider project 'Next Generation EU' (NGEU)[275] rolled out by the EU to combat the recession caused by the exogenous COVID-19 pandemic, show new forms of strategies for financing the EU budgetary

[270] Charlotte Rommerskirchen, *EU Fiscal Policy Coordination in Hard Times* (OUP 2019) 19.

[271] Commission, 'Communication on a European Economic Recovery Plan' COM(2008) 800 final. On a similar line, see also the 2012 Compact for Growth and Jobs, as decided on 29 June 2012 by the European Council for an amount of around 120bn Euro.

[272] In this regard, José Manuel Barroso, the former Commission's President, posits: 'Although the renewed Stability and Growth Pact allows for government deficits to expand during economic downturns, it is clear that Member States must have plans in place setting out how government budgets will return to positions consistent with sustainable public finances in the longer term' (2009) 47 JCMS 9.

[273] The political and governance complexity behind the EERP is noticeable in the wording put forward by the Commission as it reads 'The Commission is proposing that, as a matter of urgency, Member States and the EU agree to an immediate budgetary impulse amounting to € 200 billion (1.5% of GDP), to boost demand in full respect of the Stability and Growth Pact'.

[274] Council Regulation (EU) 2094/2020 on establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L 433I/23. Further, the measures referred to in Regulation (EU) No 2094/2020 shall be implemented under the 'Recovery and Resilience Facility' pursuant to Regulation (EU) 241/2021 on establishing the Recovery and Resilience Facility [2021] OJ L 57/17.

[275] Commission, 'Communication on Europe's moment: Repair and Prepare for the Next Generation' COM(2020) 456 final; Commission, 'The EU budget powering the recovery plan for Europe' COM(2020) 442 final; European Parliament, 'Resolution on the new multiannual financial framework, own resources and the recovery plan' 2020/2631(RSP); Commission, 'Communication on Economic policy coordination in 2021: overcoming COVID-19, supporting the recovery and modernising our economy' COM(2021) 500 final.

interventions, as well as new approaches towards an enhanced coordination of pro-growth economic policies at European scale beyond fiscal consolidation.

In terms of increasing the EU fiscal levers to boost the level of aggregate demand with public and private investments in the single market, together with pursuing some of the main EU policy priorities in reshaping the economy, it is of utmost interest the very recent response of the EU with the NGEU device. Indeed, as agreed during the special meeting of the European Council in July 2020, the NGEU represents a massive in size but limited in time recovery effort of the Union to support Member States' economies[276]. Accordingly, in an historical move, the Union has established a Recovery and Resilience Facility (RRF), a one-off solution for supporting the Member States in planning and delivering their investment agendas as part of the NGEU strategy.

On the economic coordination side, Member States are indeed requested to draft national recovery and resilience plans (RRP) presenting their reform and public investment projects in compliance with a set of strategic pillars (e.g., green transition, digital transformation, social and territorial cohesion, …)[277]. These plans shall be compliant with the challenges and priorities set out in the European Semester's country-specific recommendation and National Reform Programmes[278]. In this regard, Member States are mandated, on the basis of the 'horizontal principle', not to receive support from the RRF as a substitute of recurring national budgetary expenditure, unless duly justified, and also to respect the principle of additionality of Union funding[279]. Though, the RRPs can also combine additional domestic resources under

[276] European Council, 'Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions' EUCO 10/20.
[277] Article 3, Regulation (EU) No 241/2021.
[278] Recital 32, Articles 17(3), 18(4)(b), and Annex V 2.2, *Ibid*. For an overview on the European Semester process, as set out under Article 2a, Regulation (EC) No 1466/97 see above Section 2.2.
[279] Articles 5(1) and 9, Regulation (EU) No 241/2021. In particular, the RRF support shall be additional

the same umbrella.

The Commission then carries out a duly assessment of the relevance, effectiveness, efficiency, and coherence of the submitted plans and makes a proposal to the Council for its approval by means of an implementing decision[280]. In this regard, it is noticeable the possible influence not only of the experience gathered by the Commission in managing structural and cohesion policy instruments[281], but also the experience of the advisory hubs, as part of the former InvestEU project to which the EFSI was part, also with the EIB contribution[282]. Still, all along the RPPs assessment, Member States are entitled to make a proposal to amend or replace the Council implementing decision if the ex-ante agreed milestones and targets, set out in their plans, are no longer achievable, either partially or totally[283].

In line with the previous analysis, in the overall regulation concerning the RRF, there is also a strong link between the adopted measures and the principles of sound economic governance[284]. Indeed, the Commission is entrusted with the additional power to propose to the Council, under certain conditions, to suspend all or part of the commitments or payments in case of noncompliance with effective actions to correct the excessive deficit. Then, in line with the reasoning introduced by the 'Six-Pack, the Commission's proposal is considered as adopted, unless the Council decides to reject

to the support provided under other Union programmes and instruments. See also below at (n 655) in relation to the Italian NRRP in the context of the NGEU programme.

[280] Articles 19 and 20, *Ibid*.

[281] See also above (n 237).

[282] For an overview, see Commission, 'Europe investing again Taking stock of the Investment Plan for Europe and next steps' COM/2016/0359 final. Further, see Regulation (EU) No 2017/2396 of the European Parliament and of the Council amending Regulations (EU) No 1316/2013 and (EU) 2015/1017 as regards the extension of the duration of the European Fund for Strategic Investments as well as the introduction of technical enhancements for that Fund and the European Investment Advisory Hub [2017] OJ L 345/34.

[283] Article 21, *Ibid*.

[284] Article 10, *Ibid*.

it by qualified majority[285].

However, this provision needs to be interpreted in the context of the activation of the so-called 'general escape clause'[286] of the SGP, as introduced by the 2011 'Six-Pack' reform, which has been strongly advocated since the very outbreak of the COVID-19 pandemic[287], alongside with an enhanced flexibility also in the state aid framework[288].

Albeit the immediate enthusiasm among the SGP detractors, it must be stressed that the general escape clause does not put the entire SGP procedures on hold. Indeed, a proper suspension of the SGP would have been neither politically attainable nor in the interest of reducing the prospective economic fragmentation in the single market as a consequence of the pandemic crisis. In other terms, the idea behind such SGP compromise was the 'policy dilemma'[289] between the adverse effects of a procyclical

[285] Article 10(3), *Ibid*. There are then other cases, under Article 10(6), in which Council is bound to lift the suspension of commitments, as put forward by the Commission,

[286] See Council, 'Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis of 23 March 2020' [2020], as endorsed by the European Fiscal Board in the statement of 23 March 2020 <https://ec.europa.eu/info/sites/default/files/2020_03_24_statement_of_efb_on_covid_19.pdf> accessed 3 January 2022. In addition to the 'unusual events clause' under the preventive arm, the 'general escape clause' is set out under bothe the preventive and corrective arms pursuant to Articles 5 (1) and 9(1), Regulation (EC) No 1466/97 and Articles 3(5) and 5(2), Regulation (EC) No 1467/97. In theory, also the 'unusual events clause', pursuant to 6(3) and 10(3), Regulation (EC) No 1466/97, could have been activated but the severity of the pandemic economic downturn – outside of the Member States' control – fulfilled all the requisites for a more far-reaching EU reaction within the European fiscal framework.

[287] As an example, see Mário Centeno, 'Remarks following the Eurogroup conference call of 4 March 2020' 121/20 [2020]; Roberto Gualtieri, 'Letter to Valdis Dombrovskis and Paolo Gentiloni of 6 March 2020' [2020].

[288] Commission, 'Communication from the Commission of 19 March 2020' C(2020)1863 OJ C 91I/1, as further amended multiple times. Further, in relation to the state aid compliance of the RRPs, see Commission, 'Practical guidance to Member States for a swift treatment of State aid notifications in the framework of the Recovery and Resilience Facility' <https://ec.europa.eu/competition-policy/system/files/2021-03/practical_guidance_to_MS_for_notifications_under_RRF.pdf> accessed 3 January 2022.

[289] In this regard, Paul Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture' (2020) 47 Legal Issues of Economic Integration 340.

fiscal consolidation – as it happened during the European Debt Crisis – and the risk of moral hazard/ free riding among Member States as a result a loose fiscal strategy[290]. Nonetheless, according to the common positioning it was reached, whilst Member States shall remain committed to the SGP, the Commission and the Council are allowed to 'undertake the necessary policy coordination measures within the framework of the Pact, while departing from the budgetary requirements that would normally apply'[291].

In any event, although the general escape clause has been later extended until 2022, it is in theory 'expected to be deactivated as of 2023'[292]. Further, the Commission's decision to deactivate or continue the application of such general escape clause appears not to be automatic but rather based on a quantitative assessment trough the economic spring forecasts and still 'country-specific situations will continue to be taken into account after the deactivation of the general escape clause'[293].

In proposing fiscal policy guidance, the Commission has also committed to make use of 'all the flexibilities within the Stability and Growth Pact' in the event that a Member

[290] As noted, '[…] making access to the central fiscal capacity conditional upon compliance with the EU fiscal rules should be viewed as an effective positive incentive for some national governments to improve fiscal policymaking' European Fiscal Board, 'Annual Report 2020', 28 September 2020 85 (hereafter 'EFB Annual Report 2020').

[291] Commission, 'Communication on the activation of the general escape clause of the Stability and Growth Pact' COM(2020) 123 final 6.

[292] Commission, 'Communication on Economic policy coordination in 2021: overcoming COVID-19, supporting the recovery and modernising our economy' COM(2021) 500 final. On this line, on a wider scale, see the remarks in the G7 communication as of 13 June 2021 following the Carbis Bay summit in Cornwall: 'Once the recovery is firmly established, we need to ensure the long-term sustainability of public finances to enable us to respond to future crises and address longer-term structural challenges, including for the benefit of future generations' (point 20).

[293] Commission, 'Communication on one year since the outbreak of COVID-19: fiscal policy response' COM(2021) 105 final 8 (hereafter 'Commission's Communication on COVID-19 fiscal policy response'). In this regard, it is noticeable the letter of some finance ministers of Member States, released on 11 September 2021 stating that 'The deactivation of the General Escape Clause and a possible reform of the Stability and Growth Pact should not be linked' while also stressing that 'Discussions on improving the current economic governance framework need ample time and should be based on broad consultations by the Commission […, since] Quality is more important than speed'.

State has not recovered to the pre-crisis level of economic activity[294]. This kind of approach has then formed part of a wider intention put forward by the Commission for a possible consultation on reforming the EU economic governance[295].

Moving to the NGEU financing side, the scheme provides for the EU borrowing whose proceeds will then be disbursed in the form of repayable (loans) and non-repayable (grants) supports via the instruments and programmes of the Multiannual Financial Framework (MFF) for 2021-2027[296]. Indeed, the NGEU has been put forward by the Commission in 2020 as complementary to the already complex negotiations[297] which then resulted in the adoption of MFF, while also taking into consideration the negative effects of Brexit in terms of loss of contribution to the Union's budget. In the MFF, the

[294] *Ibid*. It shall also be remembered that in 2021 the Commission found that the observed deficit for all Member States (but Luxembourg) in 2020 'provides prima facie evidence of the existence, in those Member States, of an excessive deficit as defined by Article 126 of the Treaty', Commission, 'Report on economic policy coordination in 2021: overcoming COVID-19, supporting the recovery and modernising our economy' COM(2021) 529 final 3.

[295] In continuity with the Report on Economic governance review (n 61) in February 2020, during a press conference on 5 October 2021, Paolo Gentiloni, EU commissioner for Economy, reiterated the intention of the Commission – as previously set out during the Ursula von der Leyen's State of the Union speech on 15 September 2021 – to resume the debate on reforming the European economic governance 'with the objective of achieving consensus on the way forward well in time for 2023'. On 19 October 2021, the Commission has then launched the public consultation on review of EU economic governance, Commission, 'Communication on the EU economy after COVID-19: implications for economic governance' COM(2021) 662 final (hereafter 'EU economy after COVID-19 Communication') stressing that 'Reducing high and divergent public debt ratios in a sustainable, growth-friendly manner will be a key post-crisis challenge'. For a comment, see Marco Buti and Marcello Messori, 'The search for a congruent euro area policy mix: Vertical coordination matters' (2021) VoxEU.org <https://voxeu.org/article/search-congruent-euro-area-policy-mix> (hereafter Buti and Messori, *The search for a congruent euro area policy mix*) (pointing out the complexity of finding the right 'policy mix' for the asymmetric EMU in good and bad times).

[296] Council Regulation (EU, Euratom) 2020/2093 on laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L 433I/11.

[297] For an overview on the turbulent adoption of the new MFF, especially in relation to the concerns raised by Hungary and Poland on the attached conditionality upon the respect of the rule of law, see 'Editorial comments' (2021) 58 Common Market Law Review 267. For the finally agreed text, see Regulation (EU, Euratom) 2092/2020 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I/1. Accordingly, see also Commission, 'Communication on a new EU Framework to strengthen the Rule of Law' COM(2014)0158 final.

Union provides references for the annual expenditure ('MFF ceilings')[298] which, together with the own resources ceilings[299], constitute the total authorised appropriations for the Union. In this respect, the EU budget is notably a 'sui generis construction'[300], being subject to an annual balanced budget rule (Article 310 TFEU) and complemented with a general duty for the Union bodies not to raise loans within the framework of the budget[301]. In other terms, it has been contended that in its essence 'the EU budget does not run an annual deficit, is not financed by borrowing money on the financial markets and thus does not build up public debt'[302].

However, for the 'sole purpose' of addressing the exceptional situation of the COVID-19 pandemic crisis, the Commission has been empowered to borrow funds on capital markets on behalf of the Union to financing the European Union Recovery Instrument, as enabled by Article 122 TFEU[303]. As a consequence, such additional means to the

[298] Article 2, *ibid*. It is also worth noticing that, under the same Article 2(2), commitments and corresponding payment appropriations relating to some special instruments (European Globalisation Adjustment Fund, Solidarity and Emergency Aid Reserve, Brexit Adjustment Reserve, and Flexibility Instrument) shall be entered in the budget over and above the relevant MFF ceilings.

[299] Pursuant to Article 311(3) the Council can unanimously adopt a decision laying down the provisions relating to the system of own resources of the Union ('Own Resources Decision'). In this regard, see Council Decision 2014/335/EU, Euratom on the system of own resources of the European Union [2014] OJ L 168/105, as later amended by Council Decision 2020/2053/EU, Euratom of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L 424/1.

[300] Monti Report (n 39) 6. On the 'sui generis' nature of the EMU, see also Henrik Enderlein et al, 'Completing the Euro A road map towards fiscal union in Europe - Report of the "Tommaso Padoa-Schioppa Group"' (Notre Europe 2012) 21 and 49. For a similar note, see also the Carlo Azeglio Ciampi's quote at (n 187).

[301] Article 17, European Parliament and Council Regulation (EU, Euratom) No 1046/2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] OJ L 193/1. It shall be noticed that other entities – being outside or within the Union law –, like ESM, EIB or ECB, are ordinarily entitled to take out loans outside the scope of Article 310 TFEU.

[302] Monti Report (n 39) 7. For a related comment in the context of NGEU, Päivi Leino-Sandberg, 'Next Generation EU – Breaking a Taboo or Breaking the Law?' (2020) CEPS-Articles in Brief.

[303] Article 5, Council Decision 2020/2053/EU, Euratom. Further, as set out under Recital No 22 and Article 4, it is clarified that as a rule, the Union should not use funds borrowed on capital markets for

own resources ceilings, as governed by Article 311 TFEU and though temporary and extraordinary, represent NGEU expenditures (interest costs and repayments) that must be somehow secured by sufficient proceeds. To this end, in a joint declaration the European Parliament, the Council, and the Commission clarified that prospectively there will be 'sufficient new own resources' for the Union[304], so to ensure the new liabilities incurred in the bond market are not meant to running afoul of Article 310 TFEU neither in terms of negative impact on the existing EU programmes and funds within the MFF nor in terms of budgetary deficit, equal to the increases 0.6 percentage to the own resources ceilings.

The overall strategy of the Commission in terms of financing aims at repaying by at latest 2058 the sums raised for NGEU in two different manners: The loans are repaid directly by the Member States, while the grants are paid through the contributions to the EU budget[305]. In compliance with the principle of sound financial management, as per Article 317 TFEU, the Commission has set out a comprehensive approach towards the capital markets, especially in the form of back-to-back financing via 'EU-Bills' (i.e., same interest rates and maturity for the beneficiary), also taking from the very recent positive experience with the bond issuance to finance the SURE loans to mitigate unemployment risks related to COVID-19 across the Union[306]. In that case, the

---

the financing of operational expenditures. On the complexities of using Article 122 as a legal basis, see Council Legal Service, 'Opinion on the Proposals on Next Generation EU' [2020] 9062/20 115 (hereafter 'Council Legal Service's opinion on NGEU').

[304] Joint declaration by the European Parliament, Council and Commission on the treatment of NGEU interest costs and repayments in the 2021-2027 MFF 2020/C OJ C 444I/4. It was indeed the view of the EU Parliament the need for new own resources provides for the 'credibility and sustainability of the NGEU repayment plan', 'Resolution 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020' 2020/2732(RSP) point 10.

[305] Commission, 'Communication on a new funding strategy to finance NextGenerationEU' COM(2021) 250 final.

[306] Council Regulation (EU) 2020/672 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak [2020] OJ L 159/1. For additional information, see Commission, 'Working Staff Document - Next

Commission relied on the high ranking and of the EU as well as on voluntary guarantees from Member States to borrow, via syndicated transactions, at a favourable price from markets investors, then passing loans to the recipient Member States on the same terms and conditions. In so doing, this mechanism resembles the idea of 'common borrowing schemes', which according to the IMF could represent, together with other solutions like a 'rainy day fund' or a 'centralized budget', a viable instrument for implementing fiscal risk sharing in the EMU[307].

More particularly, for the NGEU-related bonds the Commission has already set up an account at the ECB and it aims at using both syndicated transactions and auctions for both medium- and long-term bonds and EU-bills based on a funding plan in line with the 2020 Own Resources Decision, as duly ratified at domestic level, which has enabled such mechanism[308].

In all respects, as we tried to represent in this Chapter, the NGEU programme constitutes a tentative final point of a much wider discussion around the future setup of the EU economic governance in order to overcome the 'Janus Trap', that consists in

---

Generation EU - Green Bond Framework' SWD(2021) 242 final; Commission, 'Implementing Decision establishing the framework for borrowing and debt management operations under NextGenerationEU for 2021' C(2021) 3991 final; Commission, 'EU SURE Social Bond Framework', 7 October 2020.

[307] Helge Berger, Giovanni Dell'Ariccia, and Maurice Obstfeld 'Revisiting the Economic Case for Fiscal Union in the Euro Area' (2018) 3 IMF Departmental Paper 31. On a similar line, see also Paul De Grauwe and Ji Yuemei, 'How to Reboot the Eurozone and Ensure Its Long-term Survival' in Richard Baldwin and Francesco Giavazzi (eds), *How to Fix Europe's Monetary Union: Views of Leading Economists* (VoxEU.org 2016) 137 <http://voxeu.org/content/how-fix-europe-s-monetary-union-views-leading-economists> accessed 3 January 2022.

[308] The most relevant complexity in relation to the 2020 ORD ratification concerns Germany. In particular, following an application for preliminary injunction, on 15 April 2021 the German Constitutional Court considered the claim at a summary examination neither inadmissible from the outset nor clearly unfounded. Still, in its reasoning the Court contends, among others, that the 2020 ORD does not appear to deprive the Bundestag of its decision-making prerogative and it does not create direct liabilities for the German federal budget. Yet, the Court anticipates that, should be the 2020 ORD regarded as an *ultra vires* act or encroaching upon the constitutional identity, in the principal proceedings it would not refrain from taking all the further actions (BVerfG, Beschluss des Zweiten Senats, 2 BvR 547/21 Rn. 1-112; Press Release No 29/2021 of 21 April 2021).

the shortcomings of the structural economic and monetary asymmetries. As noted by the European Fiscal Board, the enhanced room for fiscal policy with the NGEU is characterised by two main components: on the one hand, 'The EU's high credit rating secures low interest rates', while, on the other hand, 'the proposed allocation key includes elements that partly reflect the impact of the Covid-19 crisis in the Member States'[309]. In other terms, both the sources of market-based financing and the very kind of allocation among Member States are fundamental in the strategy behind the NGEU instrument.

From a legal perspective, overcoming the 'Janus Trap' is far from being a simple effort. The constitutional hurdle of this new arrangement, even if sticking at the NGEU device, is more than apparent in the analysis of the Council Legal Service where the de Witte's theory of 'interstitial changes'[310] has been evidently put under strains[311]. Optimistically, the current magmatic status of the EU institutional and political developments may envisage a future progress in terms of mutualisation and risk-sharing for the sake of a greater growth and stability, at least among euro area Member States[312]. In the end, despite being of outmost complexity from the constitutional and political standpoints

[309] EFB Annual Report 2020 (n 290) 81.

[310] Above (n 245).

[311] Legal Service's opinion on NGEU (n 303) 66ff.

[312] In this regard, '[…] two new initiatives, Next Generation EU and SURE [Unemployment Risks in an Emergency], if implemented successfully, can pave the way towards more permanent CFC [central fiscal capacity]', EFB Annual Report 2020 (n 290) 76. Further, Ignazio Visco stated 'Per garantire in tempi rapidi liquidità e spessore al mercato di questo nuovo strumento si può pensare a una gestione comune di una parte dei debiti dei singoli paesi attraverso un fondo di ammortamento che ritirerebbe gli strumenti nazionali emettendo titoli europei. Questa parte dovrebbe almeno includere il debito contratto da tutti i paesi membri negli ultimi due anni per far fronte agli effetti della pandemia', 'Intervento del Governatore della Banca d'Italia - Giornata Mondiale del Risparmio del 2021', 21 October 2021, 12. Critically, Wolfgand Schäuble states 'As the first Treasury secretary, Hamilton obliged the new US states in 1792 to deposit good collateral, practise budgetary discipline and reduce their debts. That was the crux of the oft-cited "Hamilton moment", not the mutualisation of debts sometimes recommended for the EU', Schäuble W, 'Europe's social peace requires a return to fiscal discipline', *The Financial Times*, 2 June 2021.

to pursue, the capacity for a proper EU debt-based expenditure is what could properly make a State out of the Union.

3. Organising Complexity and Mitigating Risk through Public Law in the Italian Intergovernmental Fiscal Relations within the EU Fiscal Network

In the previous Chapters we pointed out the relevance of investigating how, by means of public law, Italy has introduced over the last decades a series of legal provisions to mitigate the risk for a Member State of not complying with the EU fiscal policy framework due to domestic institutional failures occurring at subgovernmental level.

This specific risk has been named 'Fiscal Policy Risk' and it sets its basis in the context of the EU Fiscal Network, the interconnected and multilevel system of fiscal coordination and fiscal discipline in the EMU, which has been covered so far in Chapter 2 in its 'European sub-system' dimension. We refer to this as the series of institutional linkages occurring at EU level in the area of fiscal policy where the central government of a given Member State represents at the same time the main shared node of interactions with both the Union and its own 'Domestic sub-system' (e.g., Italy as a Eurozone Member State, for our scope of analysis).

In its essence, the EU Fiscal Network constitutes a system[313], where there is a significant degree of complexity and interdependence among the different involved actors (e.g., EU institutions, central governments, subgovernments, domestic institutions). In addition, the rules and dynamics governing such network are not linear mostly due to constitutional constraints at EU level (i.e., in the area of EU economic policy as opposed to monetary policy[314]) and due to further constitutional constraints existing at domestic level (i.e., in the various nuanced forms of federalism in place in

[313] As noted above in Section 1.1, 'Systems that produce complexity consist of diverse rule-following entities whose behaviors are interdependent' Page, *Diversity and Complexity* (n 33) 17. Further, complex systems 'can attain equilibria, both fixed points and simple patterns, as well as produce long random sequences', *ibid*.

[314] On this asymmetry within the design of the EMU, see above Chapter 2.

most Member States).

A system presenting such an asymmetric structure by design, that we have termed the 'Janus Trap' due the coexistence in the EMU of a forward-looking governance of centralised monetary policy and a backward-looking decentralised economic governance, requires therefore a wide array of legal techniques to ensure a smooth and effective functioning of the interactions within the network[315]. Coordination mechanisms can take indeed different forms depending on the degree of autonomy of the concerned institutions within a system as we aim to explore in the following Sections.

In the previous Chapter, we focused on the 'European sub-system' dimension of the EU Fiscal Network, which remains significantly discretionary and political in its essence[316], while in the current Chapter we intend to review the main facets of the 'Domestic sub-system' pertaining to Italy which appears to be characterised by institutional and hard law safeguards set out to governing the complexities and risks arising from such network[317].

Moreover, in Section 1.3 we have also claimed that risk is an organising principle. In line with this, we argue that institutional design through public law constitutes a

[315] On the relevance of asymmetries in the institutional design of federalism, see Giuseppe Franco Ferrari, 'Il federalismo fiscale nella prospettiva comparatistica' in Corte dei Conti, *Il Federalismo fiscale alla prova dei decreti delegati: atti del LVII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2011* (Giuffrè 2012) 132.

[316] As pointed out by Antonio Brancasi, 'Il coordinamento della finanza pubblica nel federalismo fiscale' in Corte dei Conti (ed), *Il Federalismo fiscale alla prova dei decreti delegati: atti del LVII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2011* (Giuffrè 2012) 473 (hereafter Brancasi, *Il coordinamento della finanza pubblica nel federalismo fiscale*) (claiming that the EU fiscal rules are 'conjunctural' in their nature since in the end are left to political decisions).

[317] As noted by Jenna Bednar, '[…] federalism is not a panacea: the federal structure is often blamed for political crisis, where observers complain that the federation is either over- or undercentralized', *The Robust Federation* (CUP 2009) 2 (hereafter Bednar, *The Robust Federation*).

mitigator of 'second-order risks'[318] like the ones occurring across intergovernmental financial relations in the context of the EU Fiscal Network. In so doing, Fiscal Policy Risk represents a specific source of institutional risk which shall be mitigated by means of public law.

Accordingly, in the ensuing Sections we aim at developing the analysis on the 'Domestic sub-system' concerning the Italian legal system, as part of the EU Fiscal Network, cascading up to the multilevel intergovernmental financial relations. In particular, it can be retraced the legal architecture which has been progressively put in place in Italy for the sake of managing the Fiscal Policy Risk as a result and in view of the constitutional developments stemming from the Maastricht settlement onwards[319].

In doing so, it is possible to argue that public law could been employed as an instrument of macro coordination of institutional conducts contributing to pursue monetary and fiscal goals, in addition to conventional monetary policy and the common fiscal toolkit, hence representing a possible additional instrument of financial stability in the EU. The Italian institutional developments occurring at subgovernmental level – as we contend – appears to provide a vivid example of that.

To this end, the current Chapter is divided into two main Sections. Section 3.1 deals

[318] For a reference to this concept, see above Section 1.3.

[319] On this line, 'since the 1997 adoption of the Stability and Growth Pact, which makes central governments accountable for all public sector deficits, several vulnerable central governments have passed legislation aimed at enhancing the central government's ability to control subnational borrowing', Jonathan Rodden, *Hamilton's paradox: The Promise and Peril of Fiscal Federalism* (CUP 2006) 279. Further, the Italian Constitutional Court has also pointed out the link between the obligations arising from the participation of Italy to the European Union and the subsequent internal mechanisms arranged at subgovenmental level to ensure a proper coordination, as it states 'A tali vincoli [europei] si riconnette essenzialmente la normativa nazionale sul "patto di stabilità interno", il quale coinvolge Regioni ed enti locali nella "realizzazione degli obiettivi di finanza pubblica"' (decision No 267/2006).

with legal measures implemented with a coordination function within the Italian 'Domestic sub-system' of the EU Fiscal Network. Then, Section 3.2 focuses on the (aggregate) risk reduction mechanisms across the institutional system (e.g., internal and external controls over municipalities, recovery procedures for failing or likely to fail local entities), as set out in the Italian legislation in order to mitigate the Fiscal Policy Risk stemming from the multilevel intergovernmental relations.

Yet, before entering into such specific debates, it is worth succinctly retracing the main strands of the developments of decentralisation in Italy for the sake of setting the scene for the ensuing Sections[320].

The progressive shift of Italy towards an increased degree of devolution of powers from the central governments to subgovernments took place mostly in the period between 1990s and 2000s and it builds upon the republican constitution of 1948, which at that time provided for some relatively plain and very limited provisions on the regional and municipal status in terms of both political and administrative powers[321].

[320] On the not fully federalised governmental system for Italy (i.e., 'quasi-federalism' or 'federalist like'), see Francesco Palermo and Alex Wilson, 'The Dynamics of Decentralization in Italy: Towards a Federal Solution?' (2013) European Diversity and Autonomy Papers EDAP 5 (stressing on the asymmetries in the federal devolution of powers); Albert Breton and Angela Fraschini, 'Is Italy a Federal or even a Quasi-Federal State?' (2016) 234 POLIS Working Papers. On the qualification of Italy as a 'regionalised country' by the Commission, see Review of the suitability of the Council Directive 2011/85/EU – Working Staff Document (n 17) 67. For further references, see Giuseppe Franco Ferrari, 'Federalismo, regionalismo e decentramento del potere in una prospettiva comparata' (2006) 34 Le Regioni 643-644 (on the differences between federalism and regionalism and on the 'neoregionalism' of Italy after the 2001 constitutional reform); Lorenza Violini, 'Dopo il referendum: quale dei tanti regionalismi si prospetta?' (2016) 44 Le Regioni 909 (critical on the 'centralist' interpretation carried out by the Italian Constitutional Court on the shared competences set out in the 2001 constitutional reform); Scilla Vernile, 'La Costituzione «dimenticata» l'adeguamento dei principi e dei metodi della legislazione alle esigenze del decentramento' (2021) Rivista Trimestrale di Diritto Pubblico 49; Corte dei Conti, (2018) 'Rapporto 2018 sul coordinamento della finanza pubblica' 375-392 (on the different forms of federalism in Italy). For an historical summary on the relationships among national and subnational governments in Italy, see Sabino Cassese, *Governare gli Italiani* (Il Mulino 2019) 103-115; Id., *Il sistema amministrativo italiano* (Il Mulino 1983) 130ff.

[321] On the belated establishment of the regional level of government in Italy and its first process of

Despite some earlier reforms[322], in the late 1990s the Italian politics showed a clear intention to reviewing centralisation in favour of an enhanced decentralisation[323], as part of a wider (though failed) constitutional revision[324]. Still, the overall proposal was later reinterpreted, through primary level legislation and in a narrower scope, by expanding governance, powers, and fiscal relationships of regional and local governments in light of a greater subsidiarity[325].

Nonetheless, within a few years a wide-ranging constitutional change was passed in 2001 rewriting the federal dimension of Italy under 'Title V' of the Constitution[326]. The

administrative implementation starting from the 1970's, see Sabino Cassese and Luisa Torchia, 'The meso level in Italy' in Laurence James Sharpe (ed), *Between locality and centre: the rise of meso in Europe* (Sage 1993) 91.

[322] In particular, see law No 281/1970 whereby the State transferred to the 'ordinary' regions limited functions on the occasion of the first regional elections and law No 382/1975, as later implemented by d.P.R. No 616/1977, concerning the devolution of additional functions to regions and local authorities, without incurring constitutional amendments. For an overview, see Massimo Severo Giannini, *Commissione per il completamento dell'ordinamento regionale* (Il Mulino 1977); Franco Bassanini and Augusto Barbera (eds), *I nuovi poteri delle regioni e degli enti locali* (Il Mulino 1978).

[323] Massimo Bordignon et al, 'Il federalismo fiscale in Italia: fatti e problemi' (2007) 234 Quaderni rossi ASSBB 30ff (focussing on the quantification of the devolution of authority and functions to subnational governments over the 1990s).

[324] As per Constitutional Law No 1/1997, a 'Bicameral Commission' ('Commissione parlamentare per le riforme costituzionali' or 'Bicamerale') was set up to review the Italian Constitution (in its second half) and lasted for around one year until a political stalemate occurred. For a summary, see Gianfranco Pasquino and Claire Marie O'Neill, 'A Postmortem of the Bicamerale' (1998) 14 Italian Politics 101. Notably, in 1999 a constitutional reform was passed (Law No 1/1999) on the specific electoral system for the direct election of the regional presidents. In doing so, 'This not only transformed the nature of regional government, but also maintained the pressure for reforms of a federalist type, since many of the regional presidents exploited their new positions to this effect', Martin Bull and Gianfranco Pasquino, 'A long quest in vain: Institutional reforms in Italy' (2007) 30 West European Politics 683.

[325] Among these, particularly relevant are laws Nos 59-127/1997 and 191/1998 ('leggi Bassanini') setting out the basis for a further devolution of powers to subgovernments, as well as law No 281/1997 enhancing the instrument of standing 'conferences' for intergovernmental relations. For a reference on the devolution of administrative powers in relation to law No 59/1997 and the ensuing constitutional reform, see Enrico Follieri, 'Le funzioni amministrative nel nuovo Titolo V della parte seconda della Costituzione' (2003) 31 Le Regioni 443ff; Luisa Torchia, 'La potestà legislativa residuale delle Regioni' (2002) 30 Le Regioni 360.

[326] Constitutional law No 3/2001, as later approved by a constitutional referendum pursuant to Article 138 of the Italian Constitution and further implemented at primary level by law No 131/2003 (legge 'La Loggia'). For an overview, see Antonio D'Atena, 'La difficile transizione. In tema di attuazione della riforma del Titolo V' (2002) 30 Le Regioni 305; Alice Valdesalici, 'Financial relations in the Italian regional system' in Erika Arban, Giuseppe Martinico, and Francesco Palermo (eds), *Federalism and Constitutional*

new setup provides for assignment criteria concerning the distribution of legislative and administrative functions among State and subgovernments. For the legislative power, such criteria may indeed take the form of an 'exclusive' competence either of the national government or of the regions, while there can also be a 'concurrent' or 'shared' competence of these two levels of government, hence being responsibility of the regions to the extent that the national government has set the 'fundamental principles'[327]. Further, the subsidiarity principle, alongside with the principles of differentiation and adequacy, become the central instruments for the (bottom-up) devolution of administrative functions to regions and local governments[328].

Overall, both Regions and local authorities are entrusted with autonomy in terms of revenue and expenditure. The original purpose of the reform was meant to increase the accountability across the different level of subnational governments by limiting the direct contribution from the central government. In theory, there should be then a

Law (Routledge 2021) 82; Carlo Desideri, 'A Short History of Regionalism in Italy Since the Republican Constitution. Italian Regionalism and Its Evolution' in Stelio Mangiameli (ed), *Italian Regionalism: Between Unitary Traditions and Federal Processes* (Springer 2014) 50ff. Notably, such constitutional reform has also terminated the preenactment review by the State of regional laws and local administrative acts.

[327] Because of the preference of the Italian legislator for a distributive criterion of competences for the legislative power among State and Regions based on the enumeration by subject-area ('riparto per materie'), over the years the overall level of hermeneutic complexity and the related number of disputes in the form of principaliter proceedings ('giudizio in via principale') arising before the Constitutional Court pursuant to Article 127 of the Italian Constitution has been quite significant. For a critical analysis, see Roberto Bin, 'I criteri di individuazione delle materie' (2006) 34 Le Regioni 889; Valerio Onida, 'Il giudice costituzionale e i conflitti tra legislatori locali e centrali' (2007) 35 Le Regioni 11. A recent study has carried out an extensive overview on the constitutional disputes the legislative competences of State and regions in Italy, Corrado Caruso, *La garanzia dell'unità della Repubblica. Studio sul giudizio di legittimità in via principale* (Bononia University Press 2020).

[328] Paolo Caretti, 'La Corte e la tutela delle esigenze unitarie: dall'interesse nazionale al principio di sussidiarietà' (2004) 32 Le Regioni 381 (referring to a series of Constitutional Court's decisions, following to the 2001 reform, which mitigated the effectiveness of the subsidiarity principle in favour of national interest); Sabino Cassese, 'L'amministrazione nel nuovo titolo quinto della Costituzione' (2001) Giornale di diritto amministrativo 1193. In terms of funding, for local authorities a principle equivalent to the 'no unfunded mandate' was originally enshrined under Article 27, Law No 468/1978.

parallelism among the assigned competences and the related financial autonomy[329], though limited achievements are noticeable hitherto in the area of fiscal federalism[330].

In the ensuing years, there have been three additional attempts (2005[331], 2012, and 2016[332]) to reorganise at constitutional level the intergovernmental relationships in

[329] Article 52 Legislative Decree No 446/1994 and Article 149 Legislative Decree No 267/2000 represents the main legal framework for the fiscal autonomy of municipalities. Nonetheless, it debatable why fiscal federalism never entirely escalated in Italy. Some further references on the statutory provisions can be made to Law No 42/2009 which assigned the Government with the function of setting out a comprehensive reform, later enacted by Legislative Decree No 23/2011, as well as to Articles 33-37 of Legislative Decree No 68/2011 establishing a permanent commission for the coordination of public finance ('Conferenza permanente per il coordinamento della Finanza pubblica'). Further notes on this below (n 433). For some academic references, see Luca Antonini, 'Federalismo fiscale (Diritto Costituzionale)' in *Enciclopedia del diritto*, Vol. X (Giuffrè 2017) 409 (providing a general overview on the notion of fiscal federalism); Pietro Giarda, 'Decentralization and intergovernmental fiscal relations in Italy: a review of past and recent trends' (2004), Rivista di Diritto finanziario e Scienza delle finanze 527 (on the complexities of combining autonomy with uniformity and budgetary control in the context of the enhanced fiscal federalism in Italy following the 2001 constitutional reform); Alice Valdesalici, *Federalismo fiscale e responsabilizzazione politico-finanziaria* (Edizioni Scientifiche Italiane 2018) (providing a complete and accurate overview also with comparative analysis on fiscal federalism in Italy); Antonino Gentile, *Fondamenti di contabilità pubblica e finanza locale* (Il Mulino 2020) 161-191 (focussing on fiscal autonomy and revenue collection of municipalities). For a preliminary assessment of the said legal framework, see also the report of the Italian Parliament's special committee on the implementation of fiscal federalism ('Commissione tecnica paritetica per l'attuazione del federalismo fiscale') as of 30th June 2010, doc. XXVII, No 22. Finally, for a renowned overview of the general topic, see Wallace Oates, *Fiscal Federalism* (Harcourt Brace Jovanovich 1972).

[330] Critically, Corte dei Conti, (2015) 'Rapporto 2015 sul coordinamento della finanza pubblica' 36 as it states 'i processi di decentralizzazione e di spostamento degli enti territoriali da un meccanismo di finanza derivata a un meccanismo di autonomia finanziaria devono ancora trovare la loro realizzazione'. As later reiterated in Corte dei Conti, (2016) 'Rapporto 2016 sul coordinamento della finanza pubblica' 93-94 (hereafter Corte dei Conti, *Rapporto 2016*).

[331] Later in 2006, the constitutional reform was subjected to a referendum which rejected, by a large majority, such reform. For a reasoned comment on the diverse views of Italian scholars pertaining to the implications for the regions as a consequence of the 2006 constitutional reform, see Giandomenico Falcon, 'La riforma costituzionale e la legislazione regionale' (2005) 33 Le Regioni 707.

[332] Similar to the outcome of the 2006 referendum, also the 2016 constitutional reform was not approved by the referendum. For an overview, see Graziella Romeo, 'The Italian Constitutional Reform of 2016: An 'Exercise' of Change at the Crossroad between Constitutional Maintenance and Innovation' (2017) The Italian Law Journal 31 (also stressing the relevance of the political context to better explain the outcome of the referendum rather than necessarily the merit per se of the proposed reform). For further analysis on intergovernmental relationships, see Carlo Padula, 'Riflessioni sparse sulle autonomie territoriali, dopo la (mancata) riforma' (2016) 44 Le Regioni 857 (assessing the diverse facets of the failed 2016 constitutional reform in light of the unsolved contentious issues in intergovernmental relationships in Italy); Alessandro Morelli, 'Dopo il referendum costituzionale: quali prospettive per il sistema delle autonomie?' (2016) 44 Le Regioni 847 (on the way forward for reforming the constitutional relationships between government and subgovernments in Italy).

Italy, but only the 2012 reform – comparatively more limited in scope – passed through the hurdles of the approval procedure with the favour of an unusual convergence in the political debate at the very peak of the European debt crisis[333]. Indeed, following the adoption of the Euro Plus Pact[334] in 2011, though not legally binding, the European institutional pressure onto Italy showed the importance of 'taking all the appropriate actions' to reduce the excessive exposure of the government bond market[335]. Among these, it was suggested that 'a constitutional reform tightening fiscal rules would also be appropriate'[336], which hence took the form of a constitutional bill presented by the government to the parliament to be later approved with a large majority in less than six months without the necessity of a referendum[337].

---

[333] For an outline of the impact of the 2010-2012 European Debt Crisis triggered by the Great Recession onto the Italian Regionalism, see Stelio Mangiameli, 'The Regions and the Reforms: Issues Resolved and Problems Pending' in Stelio Mangiameli (ed), *Italian Regionalism: Between Unitary Traditions and Federal Processes* (Springer 2014) 25-29. For an overarching analysis on the influence of Great Recession (2008-09) to the Italian intergovernmental relations, see Maria Flavia Ambrosanio, Paolo Balduzzi, and Massimo Bordignon, 'Economic Crisis and Fiscal Federalism in Italy' in Ehtisham Ahmad, Massimo Bordignon, and Giorgio Brosio (eds), *Multi-level finance and the Euro crisis: Causes and Effects* (Edward Elgar Publishing 2016) 212 (hereafter Ambrosanio et al, *Economic Crisis and Fiscal Federalism in Italy*). On the impact of 'Euro-crisis law' to the Member State's national parliaments, see Cristina Fasone, 'Taking budgetary powers away from national parliaments? On parliamentary prerogatives in the Eurozone crisis' (2015) EUI Working Paper Law No 37 1. See also below at Section 4.1.

[334] See above (n 216) and, more generally, Section 2.2. The implications for the intergovernmental relationships of the Euro Plus Pact, and later to the Fiscal Compact, to the introduction of a nuanced version of the balanced budget rule that is the notion of 'budgetary equilibrium', though not constitutionalised, it will be covered below in Section 3.2.1. For an analysis, see Pasquale Annichino and Giovanni Boggero, 'Who Will Ever Kick Us Out?': Italy, the Balanced Budget Rule and the Implementation of the Fiscal Compact' (2014) 20 European Public Law 247.

[335] A very significant example is the letter which the ECB sent to the Italian government on 5 August 2011. In particular, in relation to the sustainability of public finances, the ECB suggested, at page 2, that 'borrowing, including commercial debt, and expenditures of regional and local governments should be placed under tight control, in line with the principles of the ongoing reform of intergovernmental fiscal relations'.

[336] *Ibid*.

[337] The constitutional bill was presented on 15 September 2011 and the Constitutional Law No 1/2012 was adopted on 20 April 2012. Beside the governmental proposal (No 4620), seven other proposals of a constitutional bills on similar matters have been presented by MPs (No 4205 by Cambursano et al, No 4525 by Marinello et al, No 4526 by Beltrandi et al, No 4594 by Merloni et al, No 4596 by Lanzillotta et al, No 4607 by Antonio Martino et al, and No 4646 by Bersani et al). Further references at Tania Groppi, 'The Impact of the Financial Crisis on the Italian Written Constitution' (2012) 7 Italian Journal of Public

As regards the intergovernmental financial relations, the 2012 constitutional revision introduced specific constraints for subgovernments to ensuring compliance with the economic and financial commitments and fiscal obligations arising from the participation of Italy in the Union[338]. Further, local authorities are conferred with a limited capacity to recourse to borrowing only as a means of financing investment expenditure[339], in such events subgovernments are then mandated to adopt 'amortisation plans' as well as to ensure that the budgetary equilibrium principle shall be respected for all the entities which form part of the concerned Region[340]. Then, the 2012 reform confers within the sole remits of the State the 'harmonisation of public accounts', which formerly was a shared competence between the State and the Regions.

In so doing, the 2012 constitutional reform constitutes the result of a greater trend of institutional centralisation that was already exemplified by some constitutional decisions in-between 2010 and 2012. In particular, in 2010 the Italian Constitutional Court ruled on constitutionality of a law that the Parliament issued to prevent subnational governments to enter derivatives contracts without a set of specific conditions set forth in the law, thus confirming a de facto lessened degree of financial autonomy among regional and local entities based on the need of unitarity for the

Law 4ff. Additional references and analyses, below in Sections 3.1 and 3.2.

[338] For an overview, see Giorgio Lattanzi, 'Intervento' in Corte dei Conti, *Sviluppo economico, vincoli finanziari e qualità dei servizi: strumenti e garanzie - atti del LXIV Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2018* (Giuffrè 2019) 29. On the 'aggregate risk in the federation', see Commission, Adjustment to asymmetric shocks (n 192) 28-29.

[339] On this topic, please see below Section 4.1 developing extensively the topic of deficit spending for investments on infrastructures in the context of the EU fiscal framework and the ensuing domestic legislation for the mitigation of the Fiscal Policy Risk.

[340] For a reference on the principle of 'balanced budget' (better interpreted as 'balance equilibrium' or 'budgetary equilibrium') in the Italian legal system, see below at Sections 3.2.1 and 4.1 and (nn 492 and 614).

equilibrium of public finance[341]. Later in 2012, before the revision of Article 81(3) of the Italian Constitution took place on imposing (also to the budgetary law) the obligation to providing the resources to cover expenditures, the Court annulled a regional budgetary law on the basis of an extensive interpretation of the existing constitutional provisions, as set forth in the former Article 81(4), so to ensure that such coverage is reached on the basis of 'credible, sufficiently certain, non-arbitrary or irrational' elements[342].

Against this background, the institutional arrangements concerning subgovernments are believed to have macroeconomic implications, especially in the EU Fiscal Network context, thus requiring a sound legal infrastructure for fiscal management[343]. The intergovernmental relations in the context of fiscal policies are indeed at the centre and at the periphery of a broader discussion on the scope and the instrumental use of

[341] The concerned decision (No 52/2010) is about Article 62 of Law No 112/2008 on the containment of use of derivative instruments and indebtedness of regions and local authorities. For some comments, see Ines Ciolli, 'La "supremacy clause all'italiana". Regioni e strumenti finanziari derivati davanti alla Corte costituzionale' (2011) Rivista AIC 1 (stressing the de facto revision of 'Title V' of the Italian Constitution in the sense of a greater centralisation of legislative competences); Davide Paris, 'Il Titolo V alla prova dei piani di rientro: delegificazione dei principi fondamentali e asimmetria fra Stato e Regioni nel rispetto delle procedure' (2014) 42 Le Regioni 203 (providing an overview on the coordination of public finance as a mechanism for the distribution of legislative competences in limiting the general government expenditures). On a similar note, setting out the Italian Constitutional Court's interpretative bases for the centralisation trend both at statutory and regulatory level vis-à-vis subnational governments, see also decisions Nos 303/2003 (below nn 626 and 672), 425/2004 (above n 16 and below nn 609 and 632), 417/2005, and 237/2009.

[342] Italian Constitutional Law No 70/2012 (para. 2.1) on the budgetary law of Campania Region (Law No 5/2011 on the estimate budget for 2011). For a comment, see Giovanni Boggero, 'Gli obblighi di Regioni ed enti locali dopo la legge n. 243/2012' (2014) 44 Amministrare 100-101 (pointing out that the Italian regions were subject to enhanced obligations on financial coverage of expenditures since Article 19(2) of Law No 196/2009 even before the 2012 reform).

[343] In this regard, 'Good governance and transparent use of public funds, together with a need to maintain overall macroeconomic stability in order not to jeopardize all jurisdictions of a country as a result of profligate behaviour of some subnational governments' Ehtisham Ahmad and Giorgio Brosio, 'Introduction: Fiscal Federalism - A Review of Developments in the Literature and Policy' in Ehtisham Ahmad and Giorgio Brosio (eds), Handbook of Fiscal Federalism (Edward Elgar 2006) 23. On a similar note, see also Timothy J. Goodspeed, 'Decentralization and intra-country transfers in the Great Recession: the case of the European Union' (2020) 54 Regional Studies 931.

public law[344], which can be employed as an additional instrument at policy maker's disposal to complement monetary and fiscal stabilisation in pursuing a sustainable growth[345]. The following Sections build upon such context and provide a detailed analysis of some significant legal mechanisms put in place through public law in the Italian 'Domestic sub-system' to contain Fiscal Policy Risk, which ultimately constitutes an organising principle, whereas the next Chapter 4 proposes a reasoned overview about the legal framework on deficit spending for investments and the role of public law in promoting risk-taking activities like investing into public infrastructures.

3.1 EU Fiscal Network – coordination, constraints, and multilevel dynamics among subnational governments in Italy

As part of the enquiry on the Italian 'Domestic sub-system' of the EU Fiscal Network, the scope of this Section is to provide an overview on the legal techniques adopted in the multilevel fiscal dynamics occurring among subgovernments in Italy for the sake of ensuring the compliance of the central government to the fiscal obligations arising from the Maastricht Treaty onwards ('Fiscal Policy Risk')[346].

---

[344] Along this line, 'La finanza è così diventata il nodo centrale attorno al quale si aggrovigliano le problematiche dell'intero sistema pubblico' della Cananea, *Indirizzo e controllo della finanza pubblica* (n 55) 175; 'Parlare di risorse finanziarie e di bilancio significa parlare di poteri' Luciani, *Gli equilibri di bilancio* (n 58) 43. Similarly, on the importance in a post-Maastricht scenario of putting in place new constitutional arrangements, also in the form of shifting the burden from the central government to subgovernments, Francesco Forte, 'The Italian Post War Fiscal Constitution: Reasons of a Failure' (1999) 7 European Journal of Law and Economics 113.

[345] See above Sections 1.2 and 1.4 and below Chapter 5.

[346] On this line, see Nicola Lupo, 'Le procedure di bilancio dopo l'ingresso nell'Unione economica e monetaria' (1999) 19 Quaderni costituzionali 524, 527-528. An example of this trend, at governmental level, is the amendment of Article 3 of Law No 468/1978, the former Italian law for public finances and accounting, with an additional paragraph (4-*bis*) by means of Article 2(11) of Law No 208/1999 on the increased transparency for the Government to the Parliament on the review of the 'Economic and Financial Planning Document' (DPEF) because of the SGP process of review and Regulation (EC) No

As we pointed out in Chapter 2, the EU governance has so far striven for providing pragmatic and viable responses to the financial and sovereign debt crisis which have occurred over the last decade. While in the midst of such events, it became apparent that the legal and institutional instruments, available at the time, were somehow insufficient. Neither the 'preventive' nor the 'corrective' arms of the SGP had been able to achieve the level of coordination and governance among Member States to ensure an adequately sound economic policy both in terms of surveillance and sanctioning. As noted by the OECD, the 2008 economic crisis triggered by the Global Financial Crisis 'exposed major weakness in fiscal frameworks and the co-ordination between administrations within countries'[347].

The answer to such shortcomings was 'legal hybridity'[348] which is exemplified by different sources of coordination and convergence mechanisms, extending from the Euro Plus Pact[349], a non-binding intergovernmental agreement adopted at a European Council meeting in 2011, to the Fiscal Compact ('TSCG'), an international treaty entered in 2012 by almost all Member States which is situated outside the EU

1466/97.

[347] Hansjörg Blöchlinger and Junghun Kim, 'Fiscal Federalism 2016 - Making decentralisation work' (2016) OECD Publishing 3.

[348] In this regard, Francesco Martucci, 'Non-EU Legal Instruments (EFSF, ESM, and Fiscal Compact)' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 318.

[349] For a reference, see above (nn 216 and 334).

Treaties,[350] to increase economic policy coordination and fiscal discipline in the EMU[351].

Although the TSCG per se was far from being a panacea, it well represents the importance of coordination to foster economic and financial stability in a complex and interlinked network like the EU Fiscal Network. Naturally, the relevance of coordination in the EU economic relations is not a sole prerogative of the Union as it generally constitutes a core element of convergence in multilevel dynamics[352]. Indeed, well before the TSCG, the importance of economic and fiscal coordination among Member States referred back to Maastricht, as later implemented by the 'Six-pack' and 'Two-pack' legislation[353], and to an extent even beforehand to the Treaty of Rome[354].

The kind of complexity arising in the 'European sub-system' is then mirrored to an extent in the 'Domestic sub-system' of the EU Fiscal Network, where likewise a combined hard and soft law strategy has been implemented over the years at national

[350] Detailed analysis on the Treaty on Stability, Coordination and Governance (TSCG) can be found above in Section 2.2 and further references under footnotes (nn 52 and 217). For a comment on the implementation of Article 3(2) TSCG in Italy, see below Section 4.1 and (n 612) Monica Bonini and Stefania Ninatti, 'Italy' in Stefan Griller and Elisabeth Lentsch (eds), *EMU Integration and Member States' Constitutions* (Hart Publishing 2021) 334. For an analysis on two different visions of the European construction ('ever closer union' and 'wider and looser union') and the related legal implications on the 'last resort' instrument of enhanced cooperation (e.g., Schengen Agreement in 1985 and Prüm Convention in 2005) or 'internal' international treaties outside the EU Treaties (e.g., Benelux Treaty, TSCG), see Giacinto della Cananea, 'Differentiated Integration in Europe After Brexit: A Legal Analysis' (2019) 4 European Papers 457-461.

[351] Nonetheless, it has been pointed out by Jean-Paul Keppenne, while referring to an increased 'semi-intergovernmental' method in the Eurozone, that '[…] the Member States could not use the TSCG provisions to enter into a day-by-day coordination of their policies because that would inevitably lead to contradictions with or circumvention of the Community method' Keppenne, *Economic Policy* (n 38) 806.

[352] See above Section 1.1 and (n 58). As an example, Article 11 TSCG provides 'With a view to benchmarking best practices and working towards a more closely coordinated economic policy, the Contracting Parties ensure that all major economic policy reforms that they plan to undertake will be discussed ex-ante and, where appropriate, coordinated among themselves'.

[353] References above in Section 2.2 and respectively under footnotes (nn 206, 207, and 218).

[354] An example is Article 145 on the function of the Council concerning the general economic policies of Member States, as well as Articles 104 and 105(2) in the area of monetary policies.

level[355]. In doing so, the Member States shall ensure that they have in place effective national procedures for their respective 'general government', meaning 'central government, regional or local government and social security funds'[356], to meet the concerned EU fiscal obligations.

Having that said, the ensuing Sections scrutinise three different subjects of investigations pertaining to the coordination activities on public finance within the Italian legal system as part of the EU Fiscal Network. In particular, Section 3.1.1 provides an overview on the coordination activities mechanisms setting out the main distinction between the notions of 'static' and 'dynamic' coordination. Therefore, on that basis, Section 3.1.2 provides an example of 'static' coordination by dealing with budgetary harmonisation. The following two sections serve as examples of 'dynamic' coordination. Respectively, Section 3.1.3 focuses on programming activity of sub-governments, while Section 3.1.4 examines the evolutions of the Domestic Stability Pact for sub-governments. In so doing, it explores some illustrative legal mechanisms put forward by the central government through public law to enhance supervision and disciplining of sub-national fiscal rules towards sub-governments to ensure the compliance of the general government with the external objective of SGP.

3.1.1 'Static' and 'Dynamic' National Coordination Activities – An Overview

In the EU Fiscal Network, Member States have been progressively encouraged to

[355] In this regard, for a comparative analysis see Istituto di Studi e Analisi Economica, 'Rapporto ISAE - L'attuazione del Federalismo' March 2006 104-115; Maurice Adams, Federico Fabbrini, and Pierre Larouche (eds), *Constitutionalization of European Budgetary Constraints: Comparative and Interdisciplinary Perspectives* (Hart Publishing 2014).
[356] Article 2, Protocol No 12 annexed to the TEU.

'reinforcing the preventive dimension of budgetary surveillance' which constitutes 'an integral part of closer coordination of fiscal policy'[357]. Member States have then gradually incorporated the Treaty objective of sound public finances into national law according to the respective constitutional architectures.

Overall, the level of coordination[358] in a system is dependent upon the degree of autonomy among the concerned actors[359]. In this regard, despite the constitutional revisions, the overall autonomy of subgovernments in Italy has evolved in an asymmetrical manner over the years[360], given that the conferral of administrative

[357] Reinforcing economic policy coordination Communication (n 200) 4.

[358] For an overview on the Italian scholarship concerning the principle of coordination among different (administrative) actors, see Vittorio Bachelet, 'Coordinamento' in *Enciclopedia del diritto*, Vol. X (Giuffrè 1962) 635 (on the importance of autonomy as a prerequisite for institutional coordination); Luigi Arcidiacono, *Organizzazione pluralistica e strumenti di collegamento* (Giuffrè 1974) (stressing the importance of coordination in relation to activities rather than acts); Corte dei Conti, *Coordinamento e collaborazione nella vita degli enti locali: atti del V Convegno di scienza dell'amministrazione promosso dalla amministrazione provinciale di Como, Varenna, Villa Monastero, 17-20 settembre 1959* (Giuffrè 1961); Franco Piga, 'Coordinamento (principio del)' in *Enciclopedia giuridica Treccani*, Vol. IX (Treccani 1988); Fulvio Cortese, *Il coordinamento amministrativo: dinamiche e interpretazioni* (Franco Angeli 2012) 59-106.

[359] On the level of autonomy of the sub-governments in Italy, see Antonio Brancasi, *L'ordinamento contabile* (Giappichelli 2005) 21-56 (hereafter Brancasi, *L'ordinamento contabile*); Enrico Carloni and Fulvio Cortese, *Diritto delle autonomie territoriali* (Cedam 2020) 23-44. Further, see also Santi Romano stating that the autonomy is a relational concept which mostly concerns the entities which derive from other entities, 'Autonomia' in Id., *Frammenti di un dizionario giuridico* (Giuffrè 1953, Quodlibet Ius 2019) 37.

[360] Marcello Clarich, 'Federalismo fiscale e federalismo amministrativo' in Corte dei conti, *Il Federalismo fiscale alla prova dei decreti delegati: atti del LVII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2011* (Giuffrè 2012) 115-116 (stating that there is a direct link between the level of autonomy and fiscal dynamics in a multilevel system). On a similar line, Andrea Crismani, 'Il problema della gestione del debito pubblico' in Lucia Cavallini Cadeddu (ed), *Il coordinamento dinamico della finanza pubblica* (Jovene Editore 2011) 100ff. Additional references on the autonomy of sub-governments, Massimo Severo Giannini, 'Autonomia (saggio sui concetti di autonomia)' in Id., *Scritti, Vol. II* (Giuffrè 2002 [1951]) 370-374; Antonio Brancasi, 'L'autonomia finanziaria degli enti territoriali: note esegetiche sul nuovo art. 119 Cost' (2003) 31 Le Regioni 97ff; Rita Perez, 'Autonomia finanziaria degli enti locali e disciplina costituzionale' (2010) Rivista giuridica del Mezzogiorno 1343 (stressing the importance of a unitary interpretation of Article 119 of the Italian Constitution where the state may have the primacy); Giacinto della Cananea, 'Autonomie regionali e vincoli comunitari' (2006) Federalismi.it 1 (analysing the different kind of influences arising from the participation of Italy to the Union which are capable of limiting the autonomy of the concerned entities and the corresponding change of strategy and mindset at domestic level for the same actors).

autonomy for local governments has run short of an equivalent degree of effective financial leeway in terms of tax sharing and spending powers (Article 119 of the Italian Constitution.)[361]. Nonetheless, it shall be noted that some drawbacks may also arise at macro level from an increased reliance of local entities to own resources as it makes the resources available for subgovernments more volatile in accordance with the overall economic cycle.

Following the EU secondary legislation on SGP in 1997, the Commission has increasingly advocated for the adoption of more ex-ante coordination mechanisms in the national fiscal frameworks in order to achieve a better EU budgetary surveillance in line with the priorities of the Union[362].

Then, as examined in Section 2.1, from 2005 onwards the 'original' SGP was appreciably amended with an increased attention to country-specific circumstances and greater flexibility[363]. Afterwards, from 2010 the introduction of the European Semester[364] and the 'Six-pack' legislation aimed at increasing the (physiological) conditions for the attainment by Member States of the medium-term sound budgetary position (MTO), as part of the 'preventive arm' of the SGP framework.

In Italy, after the 2001 constitutional revision, the legal system has embraced a model

[361] In this regard, Article 7 of Law No 59/1997 ('Bassanini', above n 325) spelled out that the financing towards sub-governments was meant to be appropriate to the conferred function. For a critical analysis on this, Antonio Brancasi, 'La finanza pubblica a dieci anni dalla «riforma Bassanini»' in Gianfranco D'Alessio and Francesca Di Lascio, *Il sistema amministrativo a dieci anni dalla «riforma Bassanini»* (Giappichelli 2009) 213. In this regard, the fiscal federalism – above at (n 329) – is still far from being accomplished in Italy. For an analysis, see Francesca Migliarese Caputi, *Diritto degli enti locali* (Giappichelli 2016) 118ff. Additional references are also above (nn 341 and 342) and below (n 365).

[362] Reinforcing economic policy coordination Communication (n 200) 6.

[363] See above (n 170).

[364] Article 2-a, Council Regulation (EC) 1466/97 (n 158), as amended by European Parliament and Council Regulation (EU) No 1175/2011 (n 206). In addition, see also the soft law instructions set out by the Commission in the Best use of SGP communication (n 200).

of shared competences between State and Regions in relation to the 'coordination of public finance and taxation system' (Article 117(3)). This is the result of the said trend of devolution of powers which became prominent at that time, although it was later partially reconsidered over the years at constitutional[365] and political level.

A clear example of that was the 2012 constitutional reform in Italy which – as it will be discussed in greater details in Section 3.1.2 – shifted the 'harmonisation of public accounts' from a shared competence among State and regions to an exclusive competence of the State.

On a similar line, it is noticeable the 2016 failed proposal of constitutional revision in Italy[366], which advocated for shifting the shared competence of 'coordination of public finance and taxation system' to an exclusive competence of the State. Further, this proposal intended also to reinstate a sort of 'supremacy clause', which somehow existed under Article 117 of the original 1948 Constitution before the 'Titolo V' constitutional reform in 2001, according to which, upon a Government's proposal, the State could exceed the regional competences to the extent that it is justified by the economic and legal unit, or it is in the national interest[367]. Yet, the bold dismissal of such constitutional revision via referendum entailed that these elements have

[365] It shall be mentioned decisions No 37/2004 of the Italian Constitutional Court stating that it is on the State not only the power of laying down the determination of the fundamental principles governing this matter, but also setting out the general framework and the limits in which the sub-governments can exercise legislative power. Similarly, see also decisions Nos 36/2004, 417/2005, and 205/2016. On the Italian Constitution being adamant in leaving too much leeway to sub-governments in relation to public finance, see Marco Belletti, *Corte Costituzionale e spesa pubblica* (Giappichelli 2016) 92-109. For a critical analysis, Rita Perez, 'Is There Really A Fiscal Federalism in Italy?' (2009) Italian Journal of Public Law 211.

[366] See above (n 332).

[367] The proposed clause reads 'Su proposta del Governo, la legge dello Stato può intervenire in materie non riservate alla legislazione esclusiva quando lo richieda la tutela dell'unità giuridica o economica della Repubblica, ovvero la tutela dell'interesse nazionale' (Article 31 of the final text approved by the Chambers, as available at GU No 88 of 15 April 2016.

remained entirely untouched, at least in terms of hard law[368].

In this regard, in absence of a clear-cut constitutional stance, the Italian legal scholarship[369] , then the Italian Constitutional Court[370], and finally the law[371] have explored two different types of coordination mechanisms in relation to public finance to better manoeuvre the complexity arising from the participation of Italy to the EU Fiscal Network: the 'static' coordination and the 'dynamic' coordination[372].

The 'static' dimension of the coordination of public finance consists in the applicable legal framework regulating the distribution of authority between national and subnational governments and the related allocation of financial resources. It therefore sets the limits of the autonomy for each of the concerned actor in EU Fiscal Network. Then, from a hierarchical perspective, such provisions have normally a higher authority

[368] On the nuanced version of 'supremacy clause' based on the interpretative activity of the Italian Constitutional Court, see above (n 341).

[369] On public finance coordination, see Guido Rivosecchi, 'Il coordinamento della finanza pubblica: dall'attuazione del Titolo V alla deroga al riparto costituzionale delle competenze?' in Stelio Mangiameli (ed), *Il regionalismo italiano tra giurisprudenza costituzionale e involuzioni legislative dopo la revisione del Titolo V* (Giuffrè 2014) 143; Giacinto della Cananea, 'Il coordinamento della finanza pubblica alla luce dell'Unione economica e monetaria' (2004) Giurisprudenza costituzionale 77; Roberto Cavallo Perin, 'I principi costituzionali e il potere di coordinamento della finanza pubblica come potere unilaterale della Repubblica Italiana' (2015) Diritto Amministrativo 639; Ilaria Rivera, 'Il coordinamento della finanza pubblica tra riforma istituzionale e giurisprudenza costituzionale' (2016) 44 Le Regioni 921.

[370] Italian Constitutional Court decisions Nos 78/2020, 154/2017, 219/2013, and 229/2011.

[371] For a statutory reference to 'dynamic' coordination, see Article 18 Law No 42/2009 on convergence agreements ('Patto di convergenza'). In this regard, see the reference in the reasoning of the Court in decision No 370/2010 (para. 3.4).

[372] Salvatore Buscema, *Trattato di Contabilità Pubblica - vol. I – Principi generali* (Giuffrè 1979) 186 (also distinguishing between 'static' as structural and 'dynamic' as congiuntural phenomena); Lucia Cavallini Cadeddu, 'Il coordinamento dinamico della finanza pubblica nelle riforme' (2011) 11 Federalismi.it 1; Brancasi, *Il coordinamento della finanza pubblica nel federalismo fiscal* (n 316) 471-489; Guido Rivosecchi, 'Il coordinamento dinamico della finanza pubblica tra patto di stabilità, patto di convergenza e determinazione dei fabbisogni standard degli enti territoriali' (2012) Rivista AIC 1 (hereafter Rivosecchi, *Il coordinamento dinamico*) (stating that the number of 'dynamic' provisions set out by the state represent the vast majority and as such it is necessary to ensure an adequate access to court litigation for sub-governments); Marco Pieroni, 'Gli strumenti nazionali di coordinamento della finanza pubblica' in Corte dei Conti (ed), *Dalla crisi economica al pareggio di bilancio: prospettive, percorsi e responsabilità - atti del LVIII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2012* (Giuffrè 2013) 273-278, 298-307.

than the 'dynamic' ones[373].

Moreover, it constitutes a 'dynamic' type of coordination what relates to the functioning of such a system for the coordination of public finance that may vary in a quantitative and qualitative manner over time depending on the contribution of the subnational governments for the overall respect of the fiscal obligations committed by Italy towards the EU.

As such, these rules ensure that each single actor in the EU Fiscal Network performs the scope that is expected to pursue according to the given competences. In so doing, the 'dynamic' provisions aim at increasing the convergence among the concerned actors with the 'aggregate' or 'macro' strategic fiscal objectives[374].

On that basis, despite the shared competence on the coordination of public finance, the Italian Constitutional Court has stated that even detailed legislative provision (i.e., concerning administrative and technical regulation, data collection, or supervision) may not encroach upon the sub-governmental competences to the extent that the scope of the coordination is achieved in practice[375].

In its reasoning concerning the 'coordination of public finance' constitutional clause, the Court has put forward that the prevalence of the State legislative provision over the regional remits shall be considered lawful given that the central government had committed at EU level to reach a certain objective (i.e., pertaining to the timeliness of payments) and the concerned provision aimed to achieve such target at national

[373] Giuseppe Franco Ferrari and Eugenio Madeo (eds), *Manuale di contabilità pubblica* (Giuffrè 2019) 8.
[374] Rivosecchi, *Il coordinamento dinamico* (n 372) 2.
[375] See decision No 78/2020 of the Italian Constitutional Court. On a similar line, also decisions Nos 154/2017 and 229/2011. Further, on the relevance of national interest ('ragioni connesse ad obiettivi nazionali') for the competence of the State in setting out also a general provision which limits the spending capacity of the regions, see decision No 399/2006.

level[376].

In another remarkable decision, according to the Court, the coordination of public finance was not even limited to its mere 'negative' dimension, by which the coordination has the scope of containing expenditures,[377] but it was even extended to a 'positive' idea of supervision promoting a sound financial management[378].

These two references distinctly show to what extent coordination is at the core of the EU Fiscal Network. To this end, it is worth enquiring in greater details into the legal mechanisms that have been put in place by Italy to ensure a proper governance for the financial stability and sound public finances of its domestic general government[379]. Further, by embracing the said distinction among 'static' and 'dynamic' coordination, it is possible to address the following Sections accordingly.

3.1.2 Budgetary and Accounting Harmonisation

If considered at macro level, it is apparent that the coordination function in the area of budgetary and accounting harmonisation[380] is essential for the fiscal equilibrium of

[376] *Ibid.* (para. 5.4.1).
[377] Such 'negative' interpretation of the coordination was acknowledged since decision No 284/2009 (see also decision No 219/2013).
[378] See decision No 272/2005. For a comment, see Tania Scarabel, 'L'evoluzione del coordinamento della finanza pubblica: brevi considerazioni a margine di Corte cost. 272/2015' (2016) Le Regioni 414.
[379] For a reference, see Carlo Sica, 'La Presidenza del Consiglio nella nuova governance della finanza pubblica' in Presidenza del Consiglio dei Ministri (ed), *La Presidenza del Consiglio dei Ministri a trent'anni dalla legge n. 400 del 1988 (Atti del Convegno di Studi del 20 febbraio 2018 Roma, Università LUISS Guido Carli)* (PCM 2020) 106; Federico Sorrentino, 'I vincoli dell'ordinamento comunitario e degli obblighi internazionali' in Corte dei Conti, *L'attuazione del VV della Costituzione: atti del L Convegno di studi di scienza dell'amministrazione*, Varenna, Villa Monastero, 20-22 settembre 2004 (Giuffrè 2005) 237.
[380] At least an 'embryo' of harmonisation in the budgetary framework has been attained in Europe whose 'idea was to complement the rules-based fiscal framework at Union level by binding provisions at national level to increase national ownership of fiscal rules', as referred in Keppenne, *EU Fiscal Governance on the Member States* (n 17) 842ff.

the general government ('equilibrio unitario della finanza pubblica')[381]. There is indeed a strong link between the implementation of the EU excessive deficit procedure and the domestic regulation to uniform the national budgetary framework[382]. Therefore, the progressive harmonisation involving the budgetary principles and the related technicalities in the accounting methodologies enhances the consistency in the proper representation of the very health of the sub-governmental public accounts in Italy[383].

In doing so, the progressive implementation of budgetary harmonisation allows the central government to carry out an effective risk assessment of its general budgetary exposure also in relation to the Fiscal Policy Risk arising from subgovernments and to pursue a macro coordination – by means of public law – of the complex interactions of its concerned regional and local entities in a multilevel system like European Fiscal Network[384].

Accordingly, it has been stated that the public budget is a 'common good'[385] as it is

[381] Italian Constitutional Court decision No 88/2014. On this line, see also Article 5(2)(c), Constitutional Law No 1/2012 setting out the principle by which the framework law on budgetary shall determine the specific modes for the subgovernments' contribution to the overall debt sustainability of the general government. For an analysis on this, see Giuseppe Vegas, *Il bilancio pubblico* (Il Mulino 2016) 100. On the controlling activities upon municipalities, see below Section 3.2.1.

[382] In this regard, see Article 126(14) TFEU, which also formed as a basis for the Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States [2011] OJ L 306.

[383] As noted by the Italian Constitutional Court in the decision No 88/2014, 'L'avvio dell'armonizzazione delle regole contabili e degli schemi di bilancio, costituisce una irripetibile occasione per rendere più leggibili i conti degli enti territoriali, anche al fine del consolidamento della finanza pubblica' (p. 6). On a similar note, see also decisions Nos 390/2004, 326/2010, and 184/2016. Further, 'Il superamento delle problematiche coinvolte dall'applicazione della contabilità armonizzata sono di cruciale importanza per il recupero della trasparenza e per la credibilità dei conti degli enti territoriali', Corte dei conti, Sez. Aut., 18 March 2016, No 9, para. 9.

[384] It is indeed believed that 'transparency and discussion of forecasting methodologies can significantly increase the quality of macroeconomic and budgetary forecasts for fiscal planning', Recital No 8, Directive 2011/85/EU.

[385] The Italian Constitutional Court posits in the decision No 184/2016 that the budget is a common good 'nel senso che è funzionale a sintetizzare e rendere certe le scelte dell'ente territoriale, sia in ordine all'acquisizione delle entrate, sia alla individuazione degli interventi attuativi delle politiche pubbliche, onere inderogabile per chi è chiamato ad amministrare una determinata collettività e a sottoporsi al giudizio finale afferente al confronto tra il programmato e il realizzato'.

able to stimulate good administrative practices and to provide a transparent picture of the performed activities in a given public entity[386]. It constitutes indeed a settled principle stemming from the SEC 2010 regulation on the European system of public accounts[387] that the public budget shall portray the economic and financial situation, as well as the assets and liabilities of public entities. In other terms, as recognised also by the Commission, 'financial stability is based on trust' and therefore it relies on complete, accurate, and comparable fiscal data across the EMU[388].

The recent legislative process leading to the harmonisation of accounting rules, methods, and systems in Italy presents multiple steps, which for local authorities build upon the 1990[389] and 2000[390] framework laws setting out the financial, budgetary, and accounting procedures[391].

In particular, the enacting of Legislative Decree No 118/2011[392] introduced for local

[386] On the link between budgetary transparency, democracy, and electoral cycle, see the Italian Constitutional Court decision No 247/2017.

[387] Regulation (EU) No 549/2013 ('SEC 2010'), formerly Council Regulation (EC) No 2223/96 ('SEC 95').

[388] Commission, 'Communication to the Council and the European Parliament of March 2013 towards implementing harmonised public sector accounting standards in Member States' COM(2013) 114 final 2 (hereafter 'Implementing harmonised public sector accounting standards Communication'. In this regard, see also Article 338 TFEU on the production of Union statistics. It is further indisputable that Member States have a public interest obligation in relation to the state of public finances towards citizens and market participants of the sovereign bond market.

[389] Legislative Decree No 142/1990 granting for the first time a certain degree of autonomy to local authorities in the area of accounting, though within the limits set out by a national legislation (Article 59(1)), as later further refined with an increased framework on budgetary and accounting by Legislative Decree No 77/1995. For the sake of completeness, it shall be noted that the regional accounting and budgetary framework was in place since Law No 335/1976.

[390] Law No 267/2000 (hereafter 'TUEL', which stands for the 'Consolidated Law for Local Government') and, particularly, Articles 149-161.

[391] For an overview on the progressive set-up of an accrual accounting system in the Italian public sector, see Fabio Giulio Grandis and Giorgia Mattei, 'The Harmonization of Accounting in the Italian Public Sector: A New Accrual Basis Standard Versus Ipsas' (2012) 4 Italian Journal of Public Law 392-395; Giuseppe Farneti and Stefano Pozzoli (eds), *Principi e sistemi contabili negli enti locali* (Franco Angeli 2005); Adriana Bruno, *New Public Management (NPM) and the Introduction of an Accrual Accounting System* (Springer 2021) 46ff.

[392] Notably, Legislative Decree No 118/2011 was issued almost together with the 'sister' legislation on the harmonisation of national accounting and budgetary system by means of Legislative Decree No

authorities the principle of 'enhanced financial accruals' ('competenza finanziaria potenziata'), whereby the contracted obligations shall be accounted for the financial year in which are due. In doing so, there is a nuanced distinction[393] between the cash accounting (a payment is registered at the date in which is made) and accruals accounting (registering the time in which the economic value is created), as it enables a more accurate representation of the net borrowing ('deficit') in relation to the EDP procedure and its compliance at general government level[394].

Under the impulse of Directive 2011/85/EU[395] on national budgetary requirements, which formed part of the 'Six-pack' EU legislative measures[396], Member States have been encouraged to roll out a greater fiscal coordination and accountability on the various sub-sectors of general government, also favouring the adoption of accruals-based accounting standards[397]. As such, Italy has resolved to further enhance the harmonisation in the perimeter of local authorities. In fact, even before implementing Directive 2011/85/EU[398], Italy passed a constitutional reform in 2012[399] which shifted the legislative competence in the area of the 'harmonisation of public accounts' from a shared competence between State and regions to the sole competence of the

91/2011 implementing Article 2 of Law No 196/2009 on the adaptation of accounting systems. It is indeed noticeable that this piece of legislation (No 118/2011) is strictly related to the wider accounting reform at national level set out by the aforementioned Law No 196/2009 (repealing the former Law No 468/1978), as well as Law 42/2009 on fiscal federalism.

[393] As pointed out by the Commission in the Implementing harmonised public sector accounting standards Communication (n 388), 'In fact, accruals accounting should be seen as complementary, rather than as an alternative, to pure 'cash accounting'. In providing the full picture of the economic and financial position and performance of the entities, it puts cash accounting in its overall context' 4.

[394] In this regard, see Guido Rivosecchi, 'I controlli sulla finanza pubblica tra i diversi livelli territoriali di governo' (2019) Rivista Trimestrale di Diritto Pubblico 747.

[395] See above (n 382).

[396] See above (n 206) and (n 207).

[397] Articles 3, 12, and 13, Directive 2011/85/EU.

[398] Directive 2011/85/EU was transposed into national law by Legislative Decree No 54/2014.

[399] Constitutional Law No 1/2012. For an analysis on the context and references, see above (n 337).

State[400].

In the earlier constitutional interpretation, the 'harmonisation of public accounts' was considered an 'hendiadys'[401], hence a duplication, of the 'co-ordination of public finance' due to a relatively blurred distinction among the two. At any matter, it is possible not to overstate the implications of such constitutional revision in respect to budgetary harmonisation.

On one hand, the conferral of such competence to the State only reproduces a settled principle at that time for the general government in the constitutional interpretation on intergovernmental relationships[402]. Since the public finance constraints arising from the national participation to the EU Fiscal Network are assessed on a consolidated basis in relation to the whole general-government cohort, the related national accounting principles and methodologies should necessarily converge to the Union guidelines with no exception to any prior or subsequent autonomy assigned to subnational governments[403]. This de facto requirement of intelligibility across a multilevel network leads progressively to the standardisation of accounting[404].

On the other hand, the importance of budgetary harmonisation cannot impinge upon a series of other areas of activities – essential for the dynamic coordination – which

[400] Article 3, Constitutional Law No 1/2012 provides for the move of the wording 'harmonisation of public accounts' from Article 117(3) to Article 117(2)(e) of the Italian Constitution. See also above Section 3.1 and below Section 4.1.

[401] Italian Constitutional Court decision No 17/2004 (para. 3.2). For a further comment on this, see Giulietti and Trimarchi, *Nozione di amministrazione pubblica* (n 150) 953ff.

[402] According to the Italian Constitutional Court (decision No 80/2017) there is an 'ontological' reason in shifting the competence on the harmonisation of public finance to the State since there is a compelling necessity of standardisation in public accounting so to ensure the accurate reading and understating on the related data by different actors.

[403] This interpretation was reiterated by the Italian Constitutional Court decision No 80/2017 (para. 3.4).

[404] As it is striking at Article 1(1) of Law 196/2009, as amended by Law No 39/2011, on the coordination principles in accounting and public finance.

are regulated and performed at sub-governmental level according to the shared competence of the 'co-ordination of public finance'[405]. Although there is indeed a strong interdependence between the accounting standardisation and other activities equally instrumental for achieving public finance and budget objectives, the Italian Constitutional Court has aptly pointed out that this may not entail an excessive expansion of the perimeter of the competence of the State on the basis of the 'harmonisation of public accounts' constitutional clause[406].

Thus, in the Italian intergovernmental relationships, a considerable degree of shared legislative competence among the State and the regions still persists, even after the 2012 constitutional revision on the sole competence of the State in the area of budgetary harmonisation.

3.1.3 Programming Activity

The programming activity is fundamental[407] for sub-governments to carry out a sound

[405] In this regard, Guido Rivosecchi posits 'le modalità di redazione dei bilanci vengono ricondotte […] ad un intreccio di titoli di competenza che […] non possono essere ritenuti esclusivamente statali, impingendo nella potestà legislativa concorrente (coordinamento della finanza pubblica), in quella residuale regionale e nell'autonomia finanziaria dell'ente territoriale riconosciuta dall'art. 119 Cost.', 'L'armonizzazione dei bilanci degli enti territoriali alla luce della giurisprudenza costituzionale: orientamenti e prospettive' in Corte Costituzionale – Servizio Studi, September 2016 25. On a similar note, though before the 2012 constitutional reform, Brancasi, *L'ordinamento contabile* (n 359) 53.

[406] Accordingly, the Italian Constitutional Court decision No 80/2017 reads 'l'armonizzazione si colloca contemporaneamente in posizione autonoma e strumentale rispetto al coordinamento della finanza pubblica: infatti, la finanza pubblica non può essere coordinata se i bilanci delle amministrazioni non hanno la stessa struttura e se il percorso di programmazione e previsione non è temporalmente armonizzato con quello dello Stato' (para. 3.4). And further, 'La riforma poggia dunque anche sugli artt. 11 e 117, primo comma, Cost., oltre che – e soprattutto – sui princìpi fondamentali di unitarietà della Repubblica (art. 5 Cost.) e di unità economica e giuridica dell'ordinamento (art. 120, secondo comma, Cost.), unità che già nel precedente quadro costituzionale era sottesa alla disciplina della finanza pubblica e che nel nuovo ha accentuato la sua pregnanza' (decision No 88/2014, para. 7.2).

[407] Article 151(1), TUEL states that the municipalities shall adhere to the principle of programming. See also Annex No 4/1 to Legislative Decree No 118/2011, as lastly amended by the Decree of the Treasury

management of their functions and budgets as it is likewise in the interest of the central government as to avoid, at macro level, an unexpected budgetary exposure. In that sense, programming is therefore strongly intertwined with budgeting.

To provide an overview, this Section focuses on the programming activities performed by municipalities, as part of the domestic general government within the European Fiscal Network for which the central government is responsible towards the Union[408].

The main elements of the municipal programming comprise the Unified document of programming ('Documento unico di programmazione', 'DUP'), which is made of a strategic section and an operational section, also allocating the resources for the envisaged activities[409]; the Financial Forecast Budget ('Bilancio di previsione finanziario', 'BPF') includes operational and budgetary facets, while the Executive Management Plan ('Piano esecutivo di gestione', 'PEG') and the 'Executive Performance Plan' ('Piano esecutivo della performance', 'PEF') regulate different performance aspects.

Of course, while there are no doubts around the programming function of the financial budgeting for public activities, which serves a similar scope to the DUP or the PEG, the BPF provides also the basis for the definition of the 'general equilibrium' ('equilibrio

of 7 September 2020, concerning the accounting principle applied to programming in the area of public finance.

[408] As an example, see also the establishment, following the conclusions of the special Ecofin Council meeting of 7 September 2010, of the 'European Semester' from 2011 as a means to enhance the economic policy coordination which has a cascade effect towards the Member State's domestic multilevel legal frameworks.

[409] As noted by the Italian Court of Auditors, the DUP plays a pivotal function in the political and administrative management of municipalities, therefore stating 'In sostanza, non sembra superfluo sottolineare la necessità che questo adempimento, soprattutto nella sua prima manifestazione, sia curato nella piena consapevolezza della sua funzione fondativa di un nuovo criterio di impostazione della gestione; un criterio che, in particolare, esalta l'aspetto della continuità dell'azione amministrativa verso la realizzazione degli obiettivi di sviluppo economico-sociale', Corte dei conti, Sez. Aut., 18 March 2016, No 9 (p. 10).

complessivo') on monitoring the positive or negative variation of the budgetary provisioning in-between the forecast and the final budget[410]. This is a relevant indicator for the accounting of public entities – not to be overlapped with the notion of 'budgetary equilibrium'[411] – and a relevant term of reference in the assessment of the municipal activities' performance.

On this note, the starting point of the DUP is the election of the mayor, which shall present to the City council ('Consiglio comunale') its programmatic manifesto concerning the activities and plans to be performed during the term of office[412]. This manifesto constitutes the political precondition for the DUP, which is then replicated in a more distinct manner for the administrative machinery. Upon proposal of the Governing council ('Giunta comunale'), the municipalities shall adopt the DUP every year by 31 July, that is the reference for the ensuing forecast budgeting to be approved by 31 December[413]. Over time, the DUP can be further amended, especially for consistency reasons in relation to the BPF, and it can be subject to specific controls on the relevant outcomes[414].

The main components of the DUP are the Strategic section ('Sezione Strategica', 'SeS') lasting for a duration equivalent to the term of office – normally five years – and the Operational section ('Sezione Operativa', 'SeO') covering a time span which is the same

[410] As noted by the 'Arconet' Commission on public accounting matters, among the representatives of the main Italian institutional actors among public entities, the general equilibrium – as set forth in Article 1(821) Law No 145/2018, Annex 10 Law No 118/2011, and Articles 162, 187, and 188 TUEL – 'svolge la funzione di rappresentare gli effetti della gestione complessiva dell'esercizio e la relazione con il risultato di amministrazione' (report from the meeting on 11 December 2019).
[411] Article 9, Law No 243/2012. Further analysis also below (n 450).
[412] Article 46(3), TUEL.
[413] Articles 151(1) and 170(5), TUEL. Due to the further postponement by the Ministerial Decree of the Ministry for the Home office as of 28 October 2015, the starting date for the DUP and related activities has been set from the 2016 financial year.
[414] Article 147-*ter*, TUEL provides for a specific unit within the municipality to supervise the strategic outcomes.

as the forecast budget[415].

As part of the DUP, the SeS shall be drafted according to the programming activity of the concerned region and to the public finance targets set out at national level in coherence with the procedure and the criteria put forward by the Union[416]. Among other elements, the SeS takes a position on the current and prospective expected expenses (e.g., public works), as well as the related economic resources, with a particular attention to the compelling budgetary constraints.

On a yearly basis, the targets set forth in the SeS are assessed, although the municipality can amend them by providing supporting reasons. Once at the end of the term of office, the municipality shall draft a report, which is also signed by the mayor,[417] describing the performed activities in accordance with the SeS, to which they can be held accountable.

The SeO constitutes the operational part of municipal programming within the DUP, as it provides the rationale for the programmed activities in coherence with the SeS. For each activity it shall be then reported a comprehensive list of the expected source of revenues, while for borrowing the SeO shall assess in detail the debt sustainability for the municipality on an actual and prospective basis. The SeO is subsequently divided into two main sections.

On the one hand, the SeO singles out the envisaged activities categorising them into specific objectives ('missioni') which are binding for the future programming activities in line with the principle of coherence in programming.

[415] Article 170(3), TUEL.
[416] Article 8.1, Annex No 4/1, Legislative Decree No 118/2011.
[417] Article 4, Legislative Decree No 149/2011.

As per the resources, this section of the SeO is also devoted to the 'Multiannual Restricted Fund' ('Fondo Pluriennale Vincolato', 'FPV')[418], which represents the expected set of revenues for the municipality on an accrual basis, hence taking into consideration the proceeds arising from obligations to be paid to the municipality and therefore collected in a given year[419]. The FPV indicates indeed the balance between the ascertained revenues and the committed liabilities to be accounted to the financial year in which are due[420]. This reference shall be considered for the expenses, both current and capital, in relation to the programmed activities and targets assigned to the administration.

On the other hand, the SeO provides for the programming on public works, human resources, and municipal assets. In relation to public works, the relevant programming is set out covering the time span of three years, to be then updated on an annual basis,[421] despite being subject to further amendments due to the possible variations arising from the approval of the annual national budget[422].

Further, the non-compliance of the municipal resolutions with the DUP is then

[418] According to the Italian Constitutional Court, the FPV is 'Il fondo è costituito da risorse già accertate e già impegnate in esercizi precedenti, ma destinate al finanziamento di obbligazioni passive dell'ente che diventeranno esigibili in esercizi successivi a quello in cui è accertata l'entrata' (decision No 101/2018). In an earlier decision, the Italian Constitutional Court described the FPV as 'criterio armonizzato per il consolidamento dei conti nazionali' (No 247/2017) and later the Italian Treasury ministerial circular No 8 of 15 March 2021 clarified that it also constitutes a reference value for the viability of borrowing activities.

[419] On a similar note, see also Article 180(3)(d), TUEL on the possible constraints on the resources arising from the tax collection.

[420] As per the Italian Court of Auditors, the FPV performs two different objectives, which are the programming and the managing, Corte dei conti, Sez. Aut., 17 February 2015, No 4.

[421] Article 21, Legislative Decree No 50/2016 ('Italian Public Procurement Code') and Ministerial Decree of Ministry for Transport 16 January 2018, No 14 outlining the reporting templates. On a similar note, but at national level, see Article 2, Legislative Decree No 228/2011.

[422] Pursuant to Articles 5(6), for public works contracts, and 7(6), for public services contracts and supply contracts, of Ministerial Decree of Ministry for Transport 16 January 2018, No 14 it is mandated to review the programming by 90 days following the approval of the state budget.

sanctioned as no proceedings may be pursued[423].

Besides the DUP, the Financial Forecast Budget ('BPF') also plays a considerable part in the programming activities of local entities[424]. It represents indeed the adaptation of the DUP in an accounting form overarching at least a period of three years[425].

From a procedural perspective, each year, no later than 15 November, the Governing council of the municipality submits the scheme of the BPF to the City council, alongside with a proposed detailed allocation of the concerned resources,[426] that the City council shall approve by 31 December[427]. Upon the approval of the BPF, the Governing council adopts the related allocation of the resources which constitutes the Executive Management Plan ('PEG')[428].

As part of the BPF, a specific schedule also provides an overview on the coherence for the municipality between the financial forecast and the specific public finance constraints[429], thus outlining how the balance is projected to be reached in current and capital terms.

In relation to the PEG, the plan is approved by either the municipal secretary or the general director of the municipality, depending on the size of the concerned administration, and it provides a breakdown of the resources rolled out for the specific programming activity. The relevant allocations may be then amended between 30

[423] Article 8.3, Annex No 4/1, Legislative Decree No 118/2011.
[424] Articles 151(3) and 162(1), TUEL.
[425] Article 9.1, Annex No 4/1, Legislative Decree No 118/2011. The BPF also follows the categories set forth under Articles 12, 13, and 14 of Legislative Decree No 118/2011.
[426] Article 174(1), TUEL.
[427] Article 151(1), TUEL.
[428] Article 169, TUEL.
[429] Article 9.10, Annex No 4/1, Legislative Decree No 118/2011 and Article 172(1)(e), TUEL. Further analysis on the Domestic Stability Pact and its revision below in Section 3.1.4.

November and 31 December.

Further, based on the PEG, the municipality sets the Executive Performance Plan ('PEF') for the monitoring and evaluations of its activities, which is bound to be approved by 31 January and then yearly reported to the general public by 30 June[430]. The non-compliance with such provisions is sanctioned with a pay cut for the executive public officer of an amount equivalent to the pay-for-performance component of their salaries, which would be otherwise awarded as a reward in case they meet the targets or achieve the goals in line with the programming[431].

3.1.4 The Rise and Fall of the Domestic Stability Pact in the Intergovernmental Fiscal Relationships

As noted in the previous Sections, cooperation performs a key function in a multilevel system experiencing a federalist development while being part of an economic and monetary union[432]. Though, while coordination requires a certain degree of cooperation among actors, decentralisation presents a cyclical sensitivity, both in terms of exposure to taxation volatility[433], and an increased indebtedness due to greater

[430] Article 169(3-*bis*), TUEL and Article 10, Legislative Decree No 150/2009.
[431] Article 10(5), Legislative Decree No 150/2009, as amended by Legislative Decree No 74/2017.
[432] In this regard, see also Andrea Morrone, 'Tendenze del federalismo in Europa dopo la crisi' (2018) Le Regioni 13; Georges Tournemire, 'Coordination arrangements across government sub-sectors in EU Member States' (2014) European Economy - Economic Papers No 517/2014 (stressing that coordination arrangements constitute an essential building block of a budgetary framework).
[433] Volatility to be considered in the sense of the uncertainty on the tax base due to the economic cycle but also to the legal framework. As it stands, indeed, the municipal finance is mostly based on Law No 42/2009 and Legislative Decree No 23/2001 on fiscal federalism. The main sources of revenues for municipalities come from a surcharge on the personal income tax (IRPEF), from rubbish and waste collection and disposal (TARI), as well as from a council tax (IMU and TASI). Though, many revenue sharing options which have been included in the aforementioned statutes have been so far disattended or not entirely implemented, with the effect of a reduced capacity of the municipalities in tax collecting. Furthermore, some other sources of income, like the epitomised tax reliefs in 2008 and 2016 for the

administrative functions assigned to local governments[434].

Within the EU Fiscal Network, legal mechanisms in the form of dynamic coordination are therefore instrumental to steer and coordinate the intergovernmental fiscal relationships[435]. More particularly, in performing their activities, subnational governments do not present an unfettered autonomy in spending and taxing, being progressively bestowed upon a duty – later even constitutionalised[436] – to ensuring compliance with the national economic and fiscal obligations under EU law.

In this regard, the overall idea of setting up in Italy a Domestic Stability Pact ('Patto di stabilità interno', 'DSP')[437] stems from the necessity of making decentralisation to aggregately converge with the European SGP framework[438]. There is indeed a potential

property elected as main residence, have been restricted. For an updated overview, on the sources of regional finances see Corte dei Conti, (2020) 'Rapporto 2020 sul coordinamento della finanza pubblica' 152-164.

[434] Balassone and Franco, *Fiscal Federalism and the Stability and Growth Pact* (n 92) 630.

[435] Guido Rivosecchi, 'Patto di stabilità interno e coordinamento dinamico della finanza pubblica' in Giuseppe Franco Ferrari and Pierciro Galeone (eds), *Patto di stabilità e finanza locale: la governance multilivello dei paesi dell'Unione Europea* (Marsilio 2012) 29. Also stating 'Il Patto di stablità interno costituisce quindi l'esempio più compiuto della più generale tendenza dell'ordinamento a privilegiare forme di coordinamento in senso dinamico delle finanze pubbliche, in quanto meglio in grado di assicurare quella necessaria elasticità e flessibilità che costituisce indispensabile presupposto per assiurare il rendimento di un sistema policentrico […]' 57.

[436] This principle has been inserted in the Italian Constitution under Article 119(1) by means of Article 6(1) of the Constitutional Law No 1/2012, having effect from the 2014 financial year. See also above Section 3.1 and below Section 4.1

[437] Ambrosanio et al, *Economic Crisis and Fiscal Federalism in Italy* (n 333) 218ff (stressing the risk of procyclicality in the use of DSP); Giuseppe Franco Ferrari and Pierciro Galeone (eds), *Patto di stabilità e finanza locale: la governance multilivello dei paesi dell'Unione Europea* (Marsilio 2012) 117-215 (presenting a thorough comparative analysis on the different policies carried out by some Member States for the SGP compliance by adopting domestic stability pacts to contain and govern the public finance in the intergovernmental relationships); Francesco Staderini, Paolo Caretti, and Pietro Milazzo, *Diritto degli enti locali* (Wolters Kluwer 2019) 410ff; Alessandro Boca and Walter Tortorella, 'Il patto di stabilità interno: passato, presente e futuro del coordinamento della finanza pubblica italiana (2012) 78 Il Politico 59 (providing an overview of the evolution of the DSP framework from the prospective of local authorities).

[438] In this regard, see Italian Constitutional Court decision No 267/2006 (para. 4). On the DSP as an 'indirect' consequence of the SGP, see della Cananea, *Il patto di stabilità e le finanze pubbliche nazionali* (n 160).

trade-off between the level of autonomy of subnational governments in a regionalised or quasi-federal state and the national participation to a monetary union, like the EMU[439]. In so doing, the DSP aims at reducing the risk of moral hazard[440] – and even conflict of interest[441] – among subgovernments in undertaking irresponsible financial activities relying to a subsequent bail-out by the central government, thus endangering the fiscal position of the general government and putting at greater risk the consolidation of Italian public finances in the EU Fiscal Network.

In its original setup, the DSP is largely allocative[442], as it postulates a contribution from regions and local authorities in order to achieve at national level a progressive reduction in the general government deficit and stock of debt[443]. It pursues also a

[439] On the link between autonomy and responsibility of subnational governments, see the preparatory documents ('relazione di maggioranza') on Law No 448/1998 (A.C. 5267-A) stating 'Nella manovra di bilancio per gli anni 1999-2001 regioni ed enti locali trovano conferma delle linee di azione consolidatesi progressivamente negli anni precedenti: incremento della loro autonomia tributaria e finanziaria e, corrispettivamente, assunzione della piena responsabilità per il disavanzo che esse determinano. [… E quindi] assumono, per la loro parte, i vincoli e gli obblighi che derivano dalla partecipazione dell'Italia alla moneta unica europea'. Further, see Luciano Vandelli, 'Sovranità e federalismo interno: l'autonomia territorial all'epoca della crisi' in Corte dei Conti (ed), *Dalla crisi economica al pareggio di bilancio: prospettive, percorsi e responsabilità - atti del LVIII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2012* (Giuffrè 2013) 561. More generally, on fiscal discipline in a decentralised framework, Teresa Ter-Minassian, 'Fiscal Rules for Subnational Governments: Can They Promote Fiscal Discipline?' (2007) 6 OECD Journal on Budgeting 1.

[440] David E. Wildasin, 'Externalities and Bailouts. Hard and soft Budget Constraints in Intergovernmental Fiscal Relations' (1997) 1843 World Bank - Fiscal Policy Working Papers 1; Jonathan Rodden, 'The dilemma of fiscal federalism: grants and fiscal performance around the world' (2002) 46 American Journal of Political Science 673; Barry Eichengreen and Jürgen von Hagen, 'Fiscal Policy and Monetary Union: Is There a Tradeoff between Federalism and Budgetary Restrictions?' (1996) 5517 National Bureau of Economic Research Working Paper 1 <https://www.nber.org/system/files/working_papers/w5517/w5517.pdf> 14-15; Giuseppe Pisauro, 'Intergovernmental Relations and Fiscal Discipline: Between Commons and Soft Budget Constraints' (2001) IMF Working Paper WP/01/65 1; Torsten Persson and Guido Tabellini, 'Federal Fiscal Constitutions: Risk Sharing and Moral Hazard' (1996) 64 Econometrica 623.

[441] Balassone and Franco, *Fiscal Federalism and the Stability and Growth Pact* (n 92) 602.

[442] Paolo De Ioanna and Chiara Goretti, *La decisione di bilancio in Italia* (Il Mulino 2008) 237 (hereafter De Ioanna and Goretti, *La decisione di bilancio in Italia*).

[443] For local authorities, see Italian Treasury ministerial circular of 12 March 1999, No 11. For regions, see Italian Treasury ministerial circular of 12 March 1999, No 12. Additionally, see also Italian Treasury and Home office ministerial circular of 23 February 1999, No 11. Of course, these are the objectives set out under Protocol No 12 annexed to the TEU on the excessive deficit procedure (see above Section

normative and programmatic approach since it indicates the objectives but not the means to achieve them[444]. Hence, the non-compliance with the DSP provisions does not affect the validity of the concerned budget, but involves a certain degree of responsibility on the side of the rule-infringing or opportunistic subnational governments (e.g., burden sharing in case of SGP sanctions)[445]. Nonetheless, the DSP later evolved in adopting more stringent expenditure ceilings[446] in relation to own revenues with a lessened attention to the autonomy of the recipient entities.

Prior to its statutory introduction in 1999[447], the DSP was anticipated by some soft law administrative provisions which sought for a similar set of cost reduction objectives[448]. The DSP overarches a financial period of three years and, in spite of a large degree of substantial revisions occurring every year, it lasted for almost 20 years before being replaced with effect from 2017[449] by a comparatively more clear-cut coordination mechanism based on the total net change ('saldo non negativo'[450]) rather than on

2.1).

[444] This element also represents a consequence of the shared competence among State and regions on the coordination of public finance that the State sets the overall limit on expenses while it lets to the local governments the autonomy for the allocation of resources among the different expenditure clusters and targets (Italian Constitutional Court decision No 36/2004).

[445] Italian Treasury ministerial circular of 12 March 1999, No 11 (pp 8-9).

[446] For instance, Article 24(2), (3), and (4), Law No 448/2001 setting a maximum of 6 per cent increase. For a comparative overview on national expenditures limits onto subnational governments, see Camila Vammalle and Indre Bambalaite, 'Fiscal Rules for Subnational Governments: The Devil's in the Details' (2021) 35 OECD Working Papers on Fiscal Federalism 23ff.

[447] Article 28, Law No 448/1998, as later amended by Article 30(2), Law No 488/1999. On this, the Italian Constitutional Court issued a decision (No 36/2004) which considered lawful the expenditure ceiling for local governments.

[448] Giacinto della Cananea, 'Riordino dei conti pubblici e "riforma" dello stato sociale' (1998) Giornale di diritto amministrativo 124 (hereafter della Cananea, *Riordino dei conti pubblici*). As an example, see Italian Treasury ministerial circulars of 20 October 1998, No 73 and of 9 January 1997, No 2.

[449] Article 1(463) and (464-487), Law No 232/2016 (Italian 'Budget Law for 2017').

[450] More precisely, Article 9, Law No 243/2012 reads 'I bilanci […] si considerano in equilibrio quando, sia nella fase di previsione che di rendiconto, conseguono un saldo non negativo, in termini di competenza, tra le entrate finali e le spese finali […]'. Critically, see Court of Auditors, Sez. Aut., No 6/2019 stating 'L'articolata architettura contabile dell'equilibrio finanziario risulta, allo stato, solo parzialmente sovrapponibile a quella del "pareggio di bilancio", quale declinata dall'art. 9, l. n. 243/2012 - e dalla relativa disciplina attuativa - in termini di equilibrio di competenza tra entrate e spese finali'.

single expenditures.

Despite the uneven evolution of the DSP over the years, which has been widely criticised for its top-down[451], short-sighted[452], and somehow erratic regulatory strategy[453], it is worth exploring a breakdown of the DSP main facets since these well represent the diverse public law mechanisms which have been rolled out to mitigate the Fiscal Policy Risk. This review of the DSP follows three lines of analysis: the subjective and objective requirements; the monitoring activities; and the incentives and sanctions in place to ensure compliance among local governments.

At the outset, the DSP was applicable to all subnational governments (i.e., regions, provinces, municipalities, and 'mountain communities'), although the perimeter varied multiple times with the inclusion or exclusion of a number of categories of local governments falling under certain criteria, as well as certain categories of expenses[454]. Likewise, also the areas of application of the DSP have changed over time[455], even in

[451] Matteo Barbero, 'La "territorializzazione" del patto di stabilità interno' (2010) Riv. dir. fin. 359. Further, for a critical reference, Antonio Brancasi, *L'ordinamento contabile* (Giappichelli 2005) 139 (stating that, despite the shared competence on the coordination of public finance, the Italian Constitutional Court has not ensured a proper participation of regions to the Domestic Stability Pact).

[452] Acoff - Alta commissione per la definizione dei meccanismi strutturali del federalismo fiscale), 'Relazione finale', 2005 57.

[453] Critically, 'Reduction of the pact's reference deficit (which excludes major budget items, including interest expenditures) does not actually guarantee that net new borrowing will diminish', Balassone and Franco, *Fiscal Federalism and the Stability and Growth Pact* (n 92) 629.

[454] For example, municipalities with less than 5,000 inhabitants pursuant to Article 29 Law No 289/2002 are not subject to the DSP. Following to Article 31 Law No 183/2011, such number has been reduced to 1,000 inhabitants with effect from 2013.

[455] As per Article 83 Law No 338/2000 and later Article 29 Law No 289/2002, the healthcare expenses – which are under the regional competence – have been excluded from the DSP due to the specific statutory framework to curb public spending (e.g., Article 26, Law No 488/1999; Article 59, Law No 388/2000; Law-Decree No 17/2001; Articles 19 and 40, Law No 448/2001). In 2001, a specific 'Health Care Pact' has been entered among State and regions. On this matter, see also Articles 1(129)(a) and 1(130), Law No 220/2010 providing a list of excluded expenses with the express abrogation of all the previous exclusions. A similar solution was existing also for interest and investment expenditures. Though, the latter was later considered as part of the DSP by Law No 311/2004. Pursuant to Article 32(4) Law No 183/2011, a list of areas of expenses (e.g., European funds, emergency funds) are exempted from the DSP calculations. A further example is the exemption of the expenses for

relation to the exclusion of expenses pertaining to single events[456].

From an accounting perspective, originally the DSP adopted cash as a method, whereas the European System of Accounts was promoting accruals as a principle[457]. This decision was criticised as asymmetrical in respect to the SGP[458] and it induced to the progressive use of both cash and accruals for the DSP accounting[459]. Then, the system of accounting moved to a model of 'mixed competence', whereby the total net change results from the sum of the current expenditures (establishment of revenue minus commitments) and the capital expenditures (revenues minus payouts)[460].

In order to overcome the possible regional imbalances, the DSP was further amended as to allow regions to adopt internal regulation on financial relations with subregional entities while maintaining their duties in terms of total volume of deficit and indebtedness towards the central government[461]. The available models for the regional setup of the DSP ('territorializzazione') are horizontal and vertical. In the vertical model, the region can increase the leeway for local governments by bearing an equivalent increase of its regional target balance vis-à-vis the national government. In the horizontal model, local governments may interchange their targets without impinging upon the total regional targets. On a same line, the idea of such a 'market

environmental remediation due to mining activities according to Article 1(716) Law No 208/2015.

[456] To provide an example, the expenses related to the 'Expo 2015' exhibition were excluded as per Article 9(3), Legislative Decree No 85/2010. Accordingly, see Italian Treasury ministerial circular of 6 April 2011, No 11 (p. 26).

[457] On the national harmonisation of public accounting and budgets, see above Section 3.1.2.

[458] In this regard, see De Ioanna and Goretti, *La decisione di bilancio in Italia* (n 442) 241; della Cananea, *Riordino dei conti pubblici* (n 448); Balassone and Franco, *Fiscal Federalism and the Stability and Growth Pact* (n 92) 627.

[459] Article 29, Law No 289/2002.

[460] For a statutory definition, see Article 31(3), Law No 183/2011.

[461] Article 77-*ter*, Law No 133/2008 and, especially, with reference to 2011 financial year, Article 1(138), (139), (140), and (143) Law No 220/2010 for the vertical model, as later extended also to provinces by Article 1(122) Law No 228/2012, and Article 1(141) and (142) Law No 220/2010 for the horizontal model. See also, Italian Treasury ministerial circular of 6 April 2011, No 11 (p. 30-33).

in deficit permits'[462] was afterwards extended nation-wide[463], whereby local governments could put in place a similar mechanism on an inter-regional basis.

A paradigm shift in the multilevel fiscal dynamics occurs then with the implementation at national level of the principles of budgetary equilibrium and debt sustainability as a result of the constitutional reform in 2012[464]. In particular, the new organic law on fiscal matters provides a definition of subnational fiscal equilibrium when, at both the budget formation and the outturn approval stages, there is a non-negative commitment-based balance of final revenues and final expenditure[465].

In the ensuing years, the DSP has been revised in conformity with the new paradigm set forth in Article 9 of Law No 243/2012 based on the aforementioned notion of 'saldo di finanza pubblica', hence repealing the previous forms of constraints upon subnational governments (i.e., aggregate expenditure ceilings)[466]. In line with this, the further amendments to the DSP have been conceived as a simplification of the applicable regime with a preliminary effect starting from the 2016 financial year and a full applicability from 2017[467].

More recently, the DSP was subject to further adjustments[468]. In particular, as a result

[462] Balassone and Franco, *Fiscal Federalism and the Stability and Growth Pact* (n 92) 622.
[463] Article 4-*ter* Law-Decree No 16/2012, as converted with amendments by Law No 44/2012.
[464] See above (n 337).
[465] Article 9, Law No 243/2012, above (n 450). For a critical analysis on the shortcomings of this framework law, see Franco Gallo, 'Il principio costituzionale di equilibrio di bilancio e il tramonto dell'autonomia finanziaria degli enti territoriali' (2014) Rassegna Tributaria 1208.
[466] Article 1(463), Law No 190/2014.
[467] Article 1(707), Law No 208/2015 and Article 1(463-484), Law No 232/2016. For an analysis, see Corte dei Conti, *Rapporto 2016* (n 330) 197-218 stressing in this regard that 'questi Enti avevano già abbandonato il patto per un equilibrio di bilancio con ben 6 saldi diversi, saldo corrente e saldo finale di competenza, di cassa ordinaria e sanitaria' 197. For more recent regulatory instructions towards local authorities, see also Italian Treasury ministerial circulars of 9 March 2020, No 5 and of 15 March 2021, No 8.
[468] Article 1(776-790), Law No 205/2017; Article 1(819-830), Law No 145/2018; Article 1(626), Law 160/2019; Article 1(850-853) Law No 178/2020.

of some landmark decisions of the Italian Constitutional Court[469], there has been an increased attention on the link between budgetary equilibrium and a sufficient degree of stable resources for programming the administrative responsibilities conferred to municipalities. Then, the State and local governments reached an interpretative convergence on fiscal relationships concerning the use of budgetary surpluses, as part of the local governments' contribution to the containment of public finances, as well as on the related investments[470].

Another important element of the DSP is monitoring, which constitutes an essential part of the fiscal dialogue within the EU Fiscal Network contributing to transparency and accountability. This is also in line with the overall EDP framework under Article 126 TFEU pertaining to information in the context of the 'corrective arm'.

To this end, the monitoring activity has been increasingly accompanied by informative tools, like the 'SIOPE' which in 2003 established a comprehensive mechanism concerning the data on the cash flow of local governments[471]. Additionally, the local

[469] Decisions Nos 247/2017, 101/2018, and 6/2019. As clearly summarised by the Italian Constitutional Court in the decision No 77/2019 'Per le autonomie ordinarie e a statuto speciale le modalità e i tempi di passaggio dal precedente sistema dei vincoli del patto di stabilità a quello dell'equilibrio di bilancio sono stati differenziati e scaglionati in un arco temporale compreso tra il 2015 e il 2018. Il nuovo sistema è stato ulteriormente corretto da questa Corte con la sentenza n. 101 del 2018, dichiarando costituzionalmente illegittimi, per tutti gli enti territoriali, il vincolo relativo all'utilizzo dell'avanzo di amministrazione, correttamente accertato in sede di approvazione del rendiconto, e il divieto di utilizzare le somme conservate nel fondo pluriennale già assegnate a specifici obiettivi di investimento' (para. 2.2). For some comments, see Clemente Forte and Marco Pieroni, 'Le sentenze n. 101/2018 e n. 6/2019 della Corte costituzionale: il rapporto tra legge e bilancio e gli effetti delle pronunce sui saldi di finanza pubblica' (2020) Forum di Quaderni Costituzionali 1; Francesco Sucameli, '"Patto di stabilità", principi costituzionali ed attuazione politica: la legge di bilancio 2019 e l'art. 9 della l. n. 243/2012 attraverso il prisma della giurisprudenza del Giudice delle leggi' (2019) Federalismi.it 1.

[470] State-regioni agreement of 15 October 2018, as per Article 46(6) Law-Decree No 66/2014 and Article 1(680) Law No 208/2015. Along this line, following the Italian Constitutional Court decision No 88/2014, see also the repeal, by Law No 164/2016 and, of Article 12(3) Law No 243/2012 on the local governments' contribution to reducing the public debt without a sufficient voice and participation of the local governments on such allocation.

[471] Article 28, Law No 289/2002, which in some cases may also prevent the municipal treasurer from authorising the payment orders not mentioning the relevant SIOPE code. For a further example, Articles

governments shall regularly fill out questionnaires as for the budget formation and the outturn approval according to specific guidelines arranged by the Italian Court of Auditors[472]. In general, once every quarter, the information sharing is mandatory for local authorities ensuring compatibility with budgetary indicators on cash and accrual bases[473].

In this context, the interplay between monitoring and sanctions is significant[474]. As an example, alongside the approval of the estimate budget, the municipalities are requested to draft a compliance statement showing the budgetary total net change to be achieved[475]. A similar information shall be attached to all the subsequent budgetary variations, as well as for the outturn with a specific report on the final results to be submitted yearly to the Treasury. In case of breach, the municipal auditors are meant to take the responsibility of the municipal government and until the report is ready and delivered to the Treasury any national disbursement of resources to the municipality is suspended.

In addition to the internal oversights carried out at municipal level, in the activities of monitoring and sanctioning the Italian Court of Auditors represents a central actor in the Domestic sub-system of the EU Fiscal Network[476] concerning the cascading of the

5 and 6, Law No 118/2011, and the related Annex No 7, provide a list of codes which provide specific information on a large degree of activities and transactions ('transazione elementare').

[472] Article 1(166) and (167), Law No 266/2005.

[473] Article 1(685), Law No 296/2006, as amended by Article 1(379)(h) Law No 244/2007. In this regard, see also Italian Treasury ministerial circular of 7 February 2013, No 5 (pp. 51ff).

[474] On the importance of sanctions for the fiscal disciplining in a multilevel system, see De Ioanna and Goretti, *La decisione di bilancio in Italia* (n 442) 257. For an example of an economic sanction exerted to a municipal officier due to the breach of monitoring duties, see Court of Auditors, appellate decision No 233/2020.

[475] Article 227, TUEL.

[476] In this regard, see the Italian Constitutional Court decision No 228/2017 stating 'I controlli di legittimità sui bilanci degli enti locali – a differenza di quelli collaborativi sulla gestione – sono strumentali al rispetto degli «obblighi che lo Stato ha assunto nei confronti dell'Unione europea in ordine alle politiche di bilancio. In questa prospettiva, funzionale ai principi di coordinamento e di armonizzazione

fiscal policy commitments across the national subgovernments[477]. The main type of sanction is a cap in spending which, depending on the years and to the target deviation, varies among limited recourse to good or services, recruiting of personnel[478], and increase in current expenses or resort to debt for investments[479]. Sanctions may also be exerted upon individuals (i.e., mayor, public officers responsible for budgetary drafting) in case of breach of DSP provisions with the effect of increasing the overall municipal debt exposure[480].

In this regard, it is noticeable the 2016 amendment to Law No 243/2012 providing for the application of the principle of proportionality in rewards and penalties for the local governments, and allocating the related figures among similar entities, though partially phased out afterwards[481].

Because of its characteristics, the DSP framework turned out occasionally to be a scapegoat for the local government's inefficiencies[482]. However, simply because the

---

dei conti pubblici», detti controlli «si giustificano in ragione dei caratteri di neutralità e indipendenza del controllo di legittimità della Corte dei conti» (sentenza n. 39 del 2014)'. See also, for an overview on the monitoring activities on local governments Antonio Brancasi, 'Il controllo finanziario e contabile sugli enti territoriali' (2006) 12 Diritto pubblico 847.

[477] Articles 148 and 148-*bis*, TUEL, as replaced and introduced by Law-Decree No 174/2012 and later by Law No 116/2014.

[478] As noted also by the decisions No 4/2004, 169/2007, and 191/2017, the cost for the personell has a significant impact on the municipal buget stating '[…] il legislatore ha infatti perseguito l'obiettivo di contenere entro limiti prefissati una delle più frequenti e rilevanti cause del disavanzo pubblico, costituita dalla spesa complessiva per il personale […]'. For a reference on this, see Article 29(15), Law No 289/2002.

[479] For an example, pursuant to Article 1(33) Law No 311/2004 the municipalities in breach of DSP in 2003 were subject to specific constraints starting from the financial year 2006. Further examples, at Article 29(15), Law No 289/2002.

[480] Court of Auditors, Region Liguria, decision No 212/2018; Id., Region Apulia, decision No 611/2018; Id., Region Piedmont, No 6/2013. For a comment on the latter decision, see Paola Maria Zerman, 'Elusione del patto di stabilità interno e responsabilità per danno erariale degli amministratori degli enti locali' (2013) Contabilita-pubblica.it 1.

[481] Article 4, Law No 243/2012, as amended by Law No 164/2016. In this respect, Article 1(823) and (827-830) Law No 145/2018 have repealed many constraint provisions, also in compliance with the referred 2016 amendments.

[482] Additional references on this, and more in general on austerity policies and public investments, below

Italian DSP originates from the Stability and Growth Pact it does not allow for the brisk conclusion that it would be equally 'stupid' – to recall a famous definition of the SGP[483].

In a sense, a DSP-like model is inescapable in any monetary union where multi-level economic and fiscal interdependences are very significant. As such, even though the DSP may have been often regarded as ill-suited, this is not sufficient to overcome the very idea supporting its adoption: Due to the participation of Italy to the EMU, the central government bears the ultimate responsibility towards the Union, and indirectly towards the Eurozone Member States, in relation to the fiscal sustainability of its general government.

At the same time, such understanding does not necessarily mean for domestic local governments to forgo the devolutionary trend in place in Italy since 2001. Rather, the purpose of the DSP is to make sure that the regions and local governments exercise their autonomy within a complex, interdependent, and dynamic system, the EU Fiscal Network, for which the central government shall recourse to the necessary public law safeguards to contribute to the mitigation of the Fiscal Policy Risk.

Of course, in a timespan of over 20 years the central government's activities with the DSP have been performed in a scattered manner and it swinged from an instrument of coordination to an additional source of indirect financing. Undeniably, the multiple inconsistencies and the lack of predictability in the overall regulatory strategy of the

---

at (nn 595 and 608).

[483] On 17 October 2002, Romano Prodi frankly stated in an interview with *Le Monde* that 'I know very well that the stability pact is stupid, like all decisions which are rigid', in Dariusz Adamski, *Redefining European Economic Integration* (CUP 2018) 40. More recently, while referring to the SGP and EU fiscal framework in general, Paolo Gentiloni, EU Commissioner for economy, posits on a similar line that 'You need common rules that are connected to the economic challenges we have. Otherwise, the risk is that the European Commission will spend the next decade finding creative ways to bypass its own rules, which I think is not the best solution we can have', in 'EU economy chief urges end to 'muddling through' with budget rules', *The Financial Times*, 29 July 2021.

Italian central government have put therefore into questions the reasonability in the overall containment of regional and local expenditures, as well as the effective and coherent use of municipal resources in an anticyclical manner. In doing so, the DSP also established a bad narrative at local level on the legal implications of the SGP, and related agreements[484], influencing the very perception of the EMU across the general public.

If the 'trial-and-error' method carried out by the central government in subgovernmental fiscal relationships raises criticism, the DSP can also be positively associated with some more structural reforms, especially in the area of accounting, as to increase transparency, measurability, and certainty regarding the expected outcomes of the DSP measures[485]. Likewise, the enhanced monitoring and control on the subnational governments represent considerable steps forward in terms of good governance of complex dynamics, especially in relation to the progressive qualification of the Italian Court of Auditors as an organ of the 'State-community' to protect the widespread national interest at macro level in light of the EU fiscal rules[486].

---

[484] See above Section 2.1. For an analysis, see also Adriano Cozzolino, 'The Discursive Construction of Europe in Italy in the Age of Permanent Austerity' (2020) 58 Journal of Common Market Studies 580.

[485] Silvia Scozzese, 'Il patto di stabilità interno nel triennio 2012-2014' in Giuseppe Franco Ferrari and Pierciro Galeone (eds), *Patto di stabilità e finanza locale: la governance multilivello dei paesi dell'Unione Europea* (Marsilio 2012) 21. On the importance of transparency in the multilevel fiscal dynamics, see Aldo Carosi, 'Il principio di trasparenza nei conti pubblici' (2018) Rivista AIC 1. See also above at Section 3.1.2.

[486] For a reference, see Francesco Saverio Marini, 'La corte dei conti di fronte all'autonomia delle regioni: prospettive di riforma in un'ottica di rafforzamento della democrazia e della legalità' (2020) Rivista della Corte dei Conti 23. Further, it is noticeable the relevance that the Court of Auditors has assumed in the context of the European dialogue on fiscal matters. In this regard, with reference to Law No 54/2014 implementing Directive 2011/85/EU it posits 'richiamandosi ai principi alla direttiva europea, in materia di caratteristiche dei quadri di bilancio degli Stati membri, attribuisce rilevanza comunitaria alle verifiche svolte dalla Corte dei conti sui bilanci di tutte le amministrazioni pubbliche' (Corte dei Conti, (2018) 'Rapporto 2018 sul coordinamento della finanza pubblica' 378). Additional references on the idea of 'Stato-comunità' are retraceable in the Italian Constitutional Court decisions Nos 29/1995 (para 9.2), 470/1997 (para. 2), while in decisions Nos 60/2013 (para. 5.2) and 39/2014 (para. 6.3.4.3.2) referring to the notion of 'Stato-ordinamento'. For a critical analysis on the limited definition of 'State-community'

As a result, if then the DSP does not qualify for the neglected 'stupid' appellative, it may certainly be acknowledged its very nature of a 'legal monster'[487]. This definition somehow confirms the hitherto mixed approach of Italy in relation to diverse trade-offs like federalism, local autonomy, and fiscal coordination in the EU Fiscal Network and it leads us to the next Section which further develops on the relationship between (institutional) risk in the form of Fiscal Policy Risk and the governance of local fiscal dynamics via public law.

as it does not sufficiently consider the EU dimension, see Giacinto della Cananea, *Indirizzo e controllo della finanza pubblica* (n 55) 293-295.

[487] In an interview to *Sole 24 Ore* on 13 November 2014, Pietro Giarda posits 'Sa qual è il vero problema degli enti locali? L'eccesso di legislazione. Il corpus di norme sull'attività di regioni, comuni e province è una sorta di mostro giuridico'. And it continues by saying in the interview 'Quando venne istituito, il Patto di stabilità interno «aveva come obiettivo prioritario il saldo di bilancio, se pur vincolato a certi risultati. Anni dopo siamo all'oppressione normativa. Ed è obiettivamente complesso spiegare le decisioni di bilancio attraverso i riferimenti normativi, leggi e regolamenti»'.

3.2 Fiscal Policy Risk - backstop, mitigation, and disciplining mechanisms among subgovernments in Italy

Following to the analysis on public law instruments deployed in Italy at national level to govern the complexity of an interdependent system of intergovernmental fiscal relationships in a multilevel environment like the EU Fiscal Network, the focus of this research can then shift onto the notion of Fiscal Policy Risk and the related legal strategy that has been carried out for the containment of the source of such risk. As we have posited, the legal mechanisms put forward by the central government to mitigate the set of institutional risks arising from the participation of Italy to the EMU constitute a vivid example of the use of public law as a macro-coordination tool for fiscal stabilisation.

In this regard, public law seems to represent a valid instrument to control institutional financial asymmetries and therefore it could complement the conventional and unconventional monetary and fiscal policy toolkit at policy makers' disposal with an additional instrument to respond adequately to financial stress[488].

The relevance of the interlink between the participation to the EU Fiscal Network and the related responsibilities of the national government is noticeable in Italy in the constitutional settlement among multilevel entities. For example, pursuant to Article 120(2), the Italian 'Government can act for bodies of the regions, metropolitan cities, provinces and municipalities if the latter fail to comply with international rules and

[488] As noted above in Section 1.4, law can be regarded as also performing countercyclical and expansionary economic policies, as Yair Listokin states: 'Law pervades economic life. […] If every judge and regulator worked through the macroeconomic implications of their actions and chose the option of stimulated aggregate demand in close cases at the zero lower bound, then expansionary legal policy could end or mitigate prolonged periods of economic weakness, even if monetary and fiscal policy were hamstrung', Listokin, *Law and Macroeconomics* (n 11) 196-197.

treaties or EU legislation […] or whenever such action is necessary to preserve legal or economic unity and in particular to guarantee the basic level of benefits relating to civil and social entitlements […]"[489]. In this respect, in Chapter 2 we have retraced the main strands of the EU fiscal obligations ('European sub-system') arising for the Italian national government ('Domestic sub-system') from Maastricht onwards which entail a degree of cascading legal effects upon the domestic local governments for the sake of containing the general government's fiscal risk before it may become beyond control.

In addressing the Fiscal Policy Risk, we claim that this scenario has progressively led to a legal framework in which domestic multilevel dynamics are mitigated through public law from the possible systemic escalation impinging on the overall economic, monetary, and fiscal stability of the Union.

A vivid example of that institutional objective is hence represented by the system of legal mechanisms which are in place as risk containment measures[490]. To provide an overview of some relevant legal techniques, Section 3.2.1 is going to explore the increased set of (internal and external) institutional controls that have been progressively introduced to oversee local governments, and especially municipalities,

[489] Official translation by the Italian Constitutional Court. For a reference on the power of substitution of regions upon municipalities, see Italian Constitutional Court decision No 43/2004 stating 'La Costituzione ha voluto dunque che, a prescindere dal riparto delle competenze amministrative, come attuato dalle leggi statali e regionali nelle diverse materie, fosse sempre possibile un intervento sostitutivo del Governo per garantire tali interessi essenziali', as commented by Francesco Merloni, 'Una definitiva conferma della legittimità dei poteri sostitutivi regionali' (2004) Le Regioni 1074. Further, it shall be mentioned that Article 120, as amended by means of the 2001 constitutional reform, was later proceduralised under Article 8, Law No 131/2003.

[490] For a reference, the aforementioned Law No 131/2003 provides, under Article 7(7): 'La Corte dei conti, ai fini del coordinamento della finanza pubblica, verifica il rispetto degli equilibri di bilancio da parte di Comuni, Province, Città metropolitane e Regioni, in relazione al patto di stabilità interno ed ai vincoli derivanti dall'appartenenza dell'Italia all'Unione europea'. In this regard, Francesco Staderini commented, while discussing on the 2001 Constitutional reform before the Italian Senate on 31 October 2001, that 'uno dei problemi maggiori che emergono nell'attuale evoluzione dell'ordinamento è quello che alla condivisibile espansione dell'autonomia delle scelte gestionali non corrisponde la ricostruzione di un quadro unitario finanziario, funzionale alla riallocazione delle risorse, né gestionale'.

in order to contain the Fiscal Policy Risk. There are indeed multiple set of controls that enable the central government to assess the status of public finances at subnational level. Moreover, Section 3.2.2 reviews the specific instability procedures designed for failing or likely to fail local entities. Overall, these procedures demonstrate the relevance of an effective legal framework in the EU Fiscal Network as to limit the risk of divergence of local governments from national fiscal goals.

3.2.1 The Control of the Multilevel Fiscal Equilibrium

Besides the limits on national fiscal transfers[491], it is a settled principle that the general government shall abide to the principle of 'balanced budget', in its very meaning of 'budgetary equilibrium', across the multilevel governance of fiscal relationships within the 'domestic sub-system' of the EU Fiscal Network[492]. However, since setting a policy target is not per se sufficient for its achievement, it has been therefore necessary to set up a series of legal instruments, in form of soft or hard law, to ensure the compliance to such objectives. There is indeed need for an adequate system of controls over the multilevel fiscal dynamics[493].

[491] See above Section 3.1.4.

[492] Articles 81, 97, and 119 of the Italian Constitution, as amended by Constitutional Law No 1/2012; Article 9.10, Annex No 4/1, Legislative Decree No 118/2011; Article 9(1) and (1-*bis*), Law No 243/2012; Article 1(821), Law No 145/2018. In relation to the latter, the Italian Treasury ministerial circular of 15 March 2021, No 8 points out that the current criteria for the respect of the budgetary equilibrium at local level for single entities comes out from 'saldo tra il complesso delle entrate e delle spese, con utilizzo avanzi, Fondo pluriennale vincolato e debito' while compliance with Article 9 of Law No 243/2012, which is 'saldo tra il complesso delle entrate e delle spese finali, senza utilizzo avanzi, senza Fondo pluriennale vincolato e senza debito', is ascertained on an ex-ante and aggregate basis. For a further reference on 'budgetary equilibrium' pertaining to Italian local governments, see also the Italian Constitutional decisions Nos 88/2014, 10/2015, and 155/2015 and below Section 4.1 and (nn 613 and 614).

[493] For a reference to the network model of controls exerted upon public institutions in the Italian legal system, Giacinto della Cananea, *Indirizzo e controllo della finanza pubblica* (n 55) 294, stating 'Il punto

More precisely, in budgetary terms, the financial equilibrium is achieved in three different manners[494]. In terms of competence, the equilibrium is represented by the compliance with the programming and the overall capacity for the local entity to employ the ascertained available resources. As per budgetary residuals, an assessment of the balance sheet accounts on a time series basis can also provide a model for the budgetary equilibrium. Then, with reference to cash management, the equilibrium can be achieved by looking at the reliability of the budgetary forecasts in relation to the effective level of revenues and pay-outs.

In this context, the Court of Auditors undertakes an essential function[495] and, irrespective of the fact that the 2012 constitutional reform has not amended its relevant legal framework at constitutional level[496], the Court has increasingly appeared as 'guarantor'[497] of the multilevel fiscal equilibrium in Italy[498]. Besides the central role

è che i controlli seguono un modello di organizzazione dei pubblici poteri in cui questi non si configurano secondo uno schema piramidale, al cui vertice è posto il Parlamento, bensì secondo uno schema "a rete"'.

[494] Court of Auditors, Sez. Aut., No 6/2019; Id., Sez. Reg. Contr. Abruzzo, No 274/2021. Further, see also Article 1(820-821), Law No 145/2018.

[495] For an overview on the evolution of administrative controls in Italy, Giacinto della Cananea, 'I controlli sugli enti territoriali nell'ordinamento italiano: il ruolo della Corte dei conti' (2009) 37 Le Regioni 864ff as it states 'si deve anzitutto rilevare che, più che di controllo al singolare, oggi, in Italia come altrove, si deve parlare di controlli al plurale. Ne esistono, infatti, più specie' 866. Further references at Giacinto della Cananea, *Indirizzo e controllo della finanza pubblica* (n 55) 245-301; Fabrizio Fracchia, 'La Corte dei conti tra funzione giurisdizionale, di controllo, di consulenza e di certificazione' (2014) Diritto dell'economia 403; Aldo Carosi, 'La Corte dei conti nell'ordinamento italiano' in Corte Conti (ed), *Relazione 150° anniversario dell'istituzione della Corte dei conti (1862-2012*), December 2012 <https://www.corteconti.it/Home/ChiSiamo/Storia/Cerimonie> accessed 3 January 2022 (hereafter Carosi, *La Corte dei conti nell'ordinamento italiano*).

[496] In relation to the controls, as per Article 100(2) of the Italian Constitution, the Court of Auditors 'exercises preventive control over the legitimacy of Government measures, and also ex-post auditing of the administration of the State Budget. It participates, in the cases and ways established by law, in auditing the financial management of the entities receiving regular budgetary support from the State. It reports directly to the Houses on the results of audits performed'. Further, regarding the jurisditional activities, Article 103(2) provides that 'The Court of Auditors has jurisdiction in matters of public accounts and in other matters laid down by law' [official translations of the Italian Constitutional Court].

[497] According to decision No 29/1985, the Court of Auditors was redarded as 'garante imparziale dell'equilibrio economico-finanziario del settore pubblico'.

[498] For a reference, see Article 7(7), Law No 131/2003, as considered by the Italian Constitutional Court

of the Court in the system of controls, there are multiple controlling functions that municipalities shall put in place with a sufficient degree of autonomy[499] in order to contain the risk of deviation from the accounting, budgetary, and financial standards ('Fiscal Policy Risk').

Overall, the control mechanisms can broadly take 'internal' or 'external' forms, which are equally crucial for the good governance of the municipal activities in pursuing the scope of transparency, efficiency, cost-effectiveness, and more generally of sound management in fiscal matters. To this end, while internal controls are referred as the municipalities' organisational duties for the control of the administrative and accounting regularity, external controls are those concerning the functioning of the internal controls as well as accounting and budgetary equilibrium.

The relations between municipal autonomy, budget, and controls are hence strictly intertwined[500].

Moreover, because of the substantial implications of the municipal budget upon the subjective rights of the communities, it has been aptly noted that the control activity performed by the Court of Auditors upon the municipal entities is increasingly more

decision No 267/2006. Additional information on the notion of 'State-Community' above at (n 486).

[499] In this regard, Antonio Brancasi stresses the enabling function of autonomy in federalism, by which 'singole comunità [possono] autodeterminarsi e […] scegliere la combinazione che più preferiscono di intervento pubblico e stato sociale, da un lato e di pressione fiscale, dall'altro', thus requiring an equivalent level of control, 'Il coordinamento della finanza pubblica nel federalismo fiscale' (2011) 17 Diritto pubblico 451.

[500] To clarify this, Salvatore Buscema contended already in 1967 'D'altra parte, la incapacità della grande massa degli enti di realizzare un proprio equilibrio finanziario è stata una valida giustificazione per rendere sempre più penetrante la «tutela» degli organi dello Stato nei confronti della finanza e quindi della vita degli enti', 'Il coordinamento della finanza locale con gli altri settori della finanza pubblica' in Corte dei Conti (ed), *I problemi delll'entrata e della spesa nella finanza degli enti locali: atti del XIII Convegno di studi di scienza dell'amministrazione promosso dalla amministrazione provinciale di Como, Varenna, Villa Monastero, 18-21 settembre 1967* (Giuffrè 1969) 240.

'jurisdictional' in its essence[501]. These two elements constitute fundamental interpretative strands to analyse the complex and diverse system of controls for local entities in Italy.

In relation to the internal controls, the national subgovernments shall put in place effective mechanisms to regulate and measure the outcomes of the existing controls[502]. With particular reference to municipalities, the most significant type of control concerns the administrative and accounting regularity of the administrative activity. This can take the form of a preventive or subsequent control, and it aims at putting in place a management control on the verifiable quality and overall performance of the administrative actions in relation to the commitment undertaken during the programming phase[503]. To better complement this, the information on the attainment of the administrative targets shall be then submitted also to the Court of Auditors for its own perusal[504].

In practice, each municipality shall appoint internal officials responsible for the

[501] For a reference on this, see Andrea Luberti, 'I controlli della corte dei conti come giurisdizione nell'ottica di razionalità della "costituzione in senso sostanziale"' (2020) Bilancio Comunità Persona 127. More specifically, on the capacity for the Italian Court of Auditors to invoke the judicial review before the Constitutional Court while exercising control activities, Guido Rivosecchi, 'Controlli della Corte dei conti e incidente di costituzionalità' (2017) 23 Diritto pubblico 357; Marta Caredda, *Giudizio incidentale e vincoli di finanza pubblica. Il giudice delle leggi prima e dopo la crisi* (Giappichelli 2019) 178ff. Additional recent analyses on this matter are available at the decisions of the Court of Auditors, Sez. reg. contr. Campania, Nos 11/2020 and 23/2020; and at Gaetano D'Auria, 'Corte dei conti in sede di controllo e accesso al giudizio incidentale di costituzionalità (ma il controllo di «sana gestione» è ... fuori dal gioco)' (2020) Giurisprudenza Costituzionale 2227 (critically pointing out the risk of a grey area of constitutional non-justiciability due to the very administrative nature of some external controls upon local entities).

[502] With reference to regions and autonomous provinces, the legal basis for the submission to the Court of Auditors of a report concerning the internal controls in place is Article 1(6) Law-Decree No 174/2012, as amended by Law-Decree No 91/2014.

[503] Articles 147(1)(a), (b), and (e); 147-*bis*(1), TUEL.

[504] Article 198-*bis*, TUEL. For an overview on the consequences of the failure to implement internal controls or on their inadequate adoption, Marco Scognamiglio, 'La responsabilità amministrativa da assenza o inadeguatezza del sistema di controllo interno negli enti locali' (2021) Bilancio Persona Comunità 162.

administrative and financial controls. Upon audit of the conformity and effectiveness of the internal control system, the competent official issues an authorisation decision, which the Governing council or the City council could in theory overturn by providing adequate reasoning[505]. An additional level of supervision then occurs ex-post and it is mostly undergone via sample-based control for which the municipal secretary is responsible[506].

Besides the administrative and accounting control, the internal municipal oversight is further carried out through strategic and quality controls. The strategic control is strictly connected with the programming activity, as enucleated in the 'DUP'[507], and it serves the scope of evaluating the functionality of the methodologies and indexes (benchmarking) in relation to the conformity to the set of expected objectives to be achieved by the municipality. In this regard, the administration ensures also that the control systems in place for the assessment of the quality of the performed services is functioning correctly and it provides an adequate level of customer satisfaction, as set forth in the relevant municipal resolutions and internal regulations for the sake of clarity and general accountability of the administrative activity[508].

Additionally, the system of internal controls also oversees, on a permanent basis, the status of the budgetary equilibrium in accruals, residuals, and cash terms, thus ensuring the compliance with the multilevel public finance objectives[509]. To this end, the relevant procedure shall be set out in specific municipal rules of audit for each entity in keeping with the applicable national legal framework on fiscal policies and

[505] Article 49(4), TUEL.
[506] Article 147-*bis*(2), TUEL.
[507] See above Section 3.1.3.
[508] For a reference, see Court of Auditors, Sez. Aut., decision No 23/2019.
[509] Article 147(1)(c) and (d), TUEL.

Articles 81 and 119 of the Italian Constitution[510].

Furthermore, an additional layer of control for the municipalities' obligations concerns transparency in the flow of information. At least by every 31 July, the City council shall indeed pass a resolution confirming the achieved budgetary equilibrium[511], whereas, on the contrary, the said resolution shall rather enumerate the necessary measures as to restore balance, to reconsider the allowance for doubtful accounts concerning receivables that the municipality does not expect to actually collect, and to clear off-balance debts pursuant to the specific procedure set forth[512]. In determining the resources to cover such undue financial exposure, municipalities are prevented from taking out loans and to release previously earmarked resources though[513].

In case of non-compliance from the municipality to such obligations, set out for the safeguarding of the budgetary equilibrium, the relevant region is enabled to act in subsidiarity and, should the municipal non-performance persist, the procedure may lead up to the dissolution of the City council[514].

Finally, depending on their specific organisation within the local government, the municipal general director or the secretary are responsible for assessing the respect of the fiscal objectives also in relation to the economic and financial performance of the municipal external bodies (e.g., in-house providing, non-listed affiliated companies, …)[515]. Accordingly, in line with the broad definition of the general government, the

[510] Article 148-*quinquies*, TUEL.
[511] Article 193, TUEL.
[512] Article 194, TUEL. Notably, on the liquidity risk in relation to off-balance debt exposures, see Italian Constitutional Court decisions No 4/2020 and 80/2021 pertaining to a specific accounting fund established to manage bad loans ('Fondo crediti di dubbia esigibilità') and its limits.
[513] Article 193(3), TUEL, in its temporarily applicable regulatory scope.
[514] Articles 141(2) and 193(4), TUEL.
[515] Article 148-*quinquies*(3), TUEL generally referring to 'organismi gestionali esterni'. More specifically, Article 147-*quater*, TUEL regulates the controls upon non-listed affiliated companies of the municipality.

scope of these provisions are to increase the level of certainty of the municipal economic and financial exposure in all its facets.

Moving to external controls, it shall be preliminary mentioned the function of the municipal Board of auditors ('Collegio dei revisori') in assisting independently the City council with the manifold activities related to the budgetary procedure (programming, estimate, and outturn)[516]. The City council appoints three members, which remain in office for three years, despite being possibly reappointed up to two times[517]. Among the function of the Board of auditors, there is the duty to report its findings to the City council and to provide recommendations and qualified opinions upon request, as well as to submit a formal complaint to raise concerns on budgetary infringements or unlawful behaviours.

Besides that, the main role in external controlling is certainly carried out by the Court of Auditors in its institutional capacity of representative of the 'State-community', hence not limited to the centralist idea of 'State-government', for pursuing the budgetary and financial equilibrium across the multilevel governments[518]. Referring to the Court, this shift is the result of a progressive move from the State perimeter[519] to the greater and more comprehensive perimeter of the general government or 'finanza

---

For an overview on such system of controls, see Fabrizio Fracchia, 'I controlli sulle società pubbliche' (2018) Diritto Processuale Amministrativo 869ff. It is then noticeable that, according to Article 11-*bis* Legislative Decree No 118/2011, municipalities are mandated to include in the consolidated financial statement such entities, and precisely 'qualsiasi ente strumentale, azienda, società controllata e partecipata, indipendentemente dalla sua forma giuridica pubblica o privata, anche se le attività che svolge sono dissimili da quelle degli altri componenti del gruppo […]' (para. 3).

[516] Article 239, TUEL.

[517] Article 234, TUEL.

[518] See above (n 486).

[519] Article 100 of the Italian Constitution on the controlling activity upon the State perimeter, to be considered alongside with the former Article 119 before the 2001 reform providing for the sole State's legislative competence over the coordination of public finance, and Article 13, Law No 786/1981 conferring to the Court of Auditors the competence over a macro control on the management of local entities to be then yearly reported to the Parliament.

pubblica allargata'[520].

In so doing, a far as the controlling activity is concerned, the Court has been performing two different set of regulatory strategies for achieving budgetary soundness within a multilevel system: 'reporting' and 'regularity'[521]. To this end, the Court's activity on control has been regarded as not performing an administrative activity, due to its constitutional autonomy, impartiality, and independence vis-à-vis the concerned administration subjected to control, but intrinsically jurisdictional in spite of being strictly speaking non-adjudicatory in such analysis[522].

On the one hand, the turning point in the system of controls performed by the Court took place with the 1994 reform[523], which significantly limited the preventive controls and established greater subsequent controls (e.g., on cost-efficiency, effectiveness) also involving the perimeter of local governments[524]. Such 'reporting' model went indeed for informative reports to encourage collaborative and self-corrective mechanisms between the auditor (Court) and the auditee (local entity), which have

[520] See above (nn 7 and 16).

[521] Aldo Carosi, 'Il controllo di legittimità-regolarità della Corte dei conti sui bilanci degli enti territoriali anche alla luce della giurisprudenza della Corte costituzionale' in Francesco Capalbo (ed), *Il controllo di legittimità-regolarità della Corte dei conti* (Editoriale Scientifica 2018) 22.

[522] Aldo Maria Sandulli, *Manuale di diritto amministrativo* (Jovene 1989) 410ff (stressing on the independence element of the Court in relation to the performed controlling activity). On this note, see further Italian Constitutional Court decision No 226/1976 stating that 'la funzione […] svolta dalla Corte dei conti è, sotto molteplici aspetti, analoga alla funzione giurisdizionale, piuttosto che assimilabile a quella amministrativa, risolvendosi nel valutare la conformità degli atti che ne formano oggetto alle norme del diritto oggettivo, ad esclusione di qualsiasi apprezzamento che non sia di ordine strettamente giuridico' (para. 3).

[523] Laws Nos 19 and 20/1994, as well as Article 148, TUEL specifically referring to the latter as far as the control over local entities is concerned. For an overview on the system of controls introduced by Law No 20/1994, see Brancasi, *L'ordinamento contabile* (n 359) 454-464.

[524] With reference to Article 3, Law No 20/1994, the perimeter of control on subnational governments is notably considered by the Italian Constitutional Court decision No 29/1995 stating that the control performed by the Court of Auditors over regions is constitutionally legitimate. For the sake of completeness, a first attribution to the Court of Auditors in relation to the control of (major) local entities can be referred back to Article 13, Law No 786/1981, whereby the Court was meant to refer to the Parliament about the relevant administrative activities of such entities.

been considered adequate in terms of constitutional autonomy of the concerned subnational governments[525].

On the other hand, in the ensuing years, the Court of Auditors has been bestowed upon significant tasks and functions[526], which are epitomised by Law-Decree No 174/2012 amending the Consolidated Law for Local Governments ('TUEL') on the relevant provisions concerning the external control for municipalities[527]. Due to the influences of the EU framework in the national budgetary legal discourse, such 'regularity' model upon the local entities appears to be carried out according to a mostly rule-based regulatory regime[528].

Accordingly, within the EU Fiscal Network, the Italian Court of Auditors complements the internal control performed by local entities and, on a yearly basis, duly examines the report drafted by the municipality pursuant to specific guidelines and questionnaires[529]. In the event of non-compliance, the Court shall issue economic sanctions to the officials that perpetrated the administrative and budgetary violations.

---

[525] Articles 7(7), 8, and 9, Law No 131/2003 and the interpretation advocated by the Italian Constitutional Court decisions Nos 29/1995, 64/2005, and 179/2007.

[526] Pursuant to Article 7(8), Law No 131/2003, the Court oversees on the correct functioning of the internal controls set out by the local entities, while, according to Article 1(168) and (170) Law No 266/2005, the Court was increasingly responsibile for monitoring and discipling. Critically, 'Negli ultimi sei o sette anni, non c'è legge finanziaria o manovra di finanza pubblica che non abbia attribuito nuovi compiti alla Corte', Gaetano D'Auria, 'I "nuovi" controlli della Corte dei conti (dalla "legge brunetta" al federalismo fiscale, e oltre' (2009) Il lavoro nelle pubbliche amministrazioni 489.

[527] In particular, see Articles 148 and 148-*bis*, TUEL.

[528] In this regard, Guido Rivosecchi posits 'Mentre nella fase precedente alla legge costituzionale n. 1 del 2012 i procedimenti di controllo della Corte dei conti scaricavano soltanto nel circuito democratico-rappresentativo locale i loro esiti, salvaguardando l'autonomia degli enti sub-statali perché all'interno dell'autonomia stessa si definivano gli effetti dei procedimenti affidati alla Corte dei conti, in forza dei rinnovati parametri costituzionali la fase successiva vede privilegiare controlli di legittimità-regolarità dei conti intestati alle Sezioni regionali nell'interesse più comprensivo alla legalità finanziaria e al rispetto degli obblighi che discendono dal Diritto dell'Unione europea', 'La decisione di bilancio e la contabilità pubblica tra Unione europea, Stato e autonomie territoriali' (2021) Bilancio Comunità Persona 79.

[529] Court of Auditors, Sez. Aut., decision No 13/2021 setting out the guidelines and questionnaire for the local entities.

As a result, the Court exercises its primary role in the area of coordination of public finance which pertains to ensuring the general government's sustainability for respecting the national obligations arising from the participation of Italy to the Economic and Monetary Union[530].

3.2.2 Recovery Rules and Procedures for Local Authorities

In the traditional literature on fiscal decentralisation and intergovernmental fiscal relations, it is widely believed that a certain degree of constraints on local governments is both necessary and desirable[531]. Indeed, in any multilevel system, without an effective disciplining, the moral hazard of even a small pool of single entities may endanger the overall risk exposure of an interdependent network.

In the EU Fiscal Network, the very reason for having in place specific instability procedures (respectively 'dissesto' and 'predissesto') for local governments is therefore to reduce opportunistic behaviours stemming from the otherwise implicit insurance that in case of excessive deficits at local level the central government would step in bailing out the failing[532] or likely-to-fail subnational government. As a result, such

[530] Italian Constitutional decisions Nos 40/2014; 250 and 266/2013.

[531] For some references on this, see above (nn 133, 252, and 440). Other authors prefer to employ a more behavioural interpretation stating that 'Intergovernmental rivalry is inevitable and therefore transgressions are a normal part of any federal practice' Bednar, *The Robust Federation* (n 317) 63. On a similar note, the regulatory reflection on the link between financial stability and viability of banks is noticeable after the Global Financial Crisis in Directive 2014/59/EU (Bank Recovery and Resolution Directive, 'BRRD'), where some 'bail-in' mechanisms have been put in place for the purpose of reducing the risk of opportunism by making banks' shareholders and creditors pay with priority the cost of the resolution, as opposed to the general bail-out whereby the general taxpayers straightforwardly bear such costs.

[532] Of course, the use of 'failing' expression is deliberately generic and it shall be considered that local entities, despite being subject to specific procedures, cannot technically fail due to the essential activities that are meant to provide for their local communities. In this regard, 'A differenza di ciò che avviene nel mondo commerciale, l'ente territoriale "fallito" non muore e non può morire perché ciò significherebbe

public law procedure may be regarded as constituting a risk mitigation tool in relation to the Fiscal Policy Risk, which ensures that the local entities diverging from a sound budgetary trajectory are mandated to an effective rebalancing, as to avoid the triggering of systemic events potentially affecting the overall stability of EU Fiscal Network.

In that regard, in Italy a specific procedure for regulating the risk of instability consists in the specific legal framework on the management of critical financial issues involving local entities[533]. In particular, it is no coincidence that the first regulation on local governments' instability was issued in parallel with the progressive devolution of powers from central government to subnational governments[534] so to safeguard the general government's exposure, as a whole, in terms of public expenditure[535].

Nonetheless, the procedure was at first significantly State-oriented as it provides that, should a province or a municipal entity not be able to meet its own obligations toward the local polity, the concerned local government should approve a financial recovery plan. In doing so, the municipality regulates the financial rebalancing for the sake of achieving the budgetary equilibrium by reducing the existing liabilities both in terms of fiscal deficit and off-balance sheet. Once ascertained that the municipalities cannot

abbandonare la collettività locale a se stessa privandola di qualsiasi supporto di natura sociale', Carosi, *La Corte dei conti nell'ordinamento italiano* (n 495). On a similar line, see Italian Constitutional Decision No 155/1994 (para. 5) and Silvia Fissi and Elena Gori, *Il dissesto finanziario negli enti locali* (Franco Angeli 2014) 44.

[533] According to a study carried out by Farmafactoring, a specialty finance company, 'between 1989 and 2017, more than 800 Municipalities [were] concerned by critical financial issues' in Italy, Marcello Degni and Giaime Gabrielli, 'Critical issues in the Italian municipalities: a reconstructive analysis' (2018) Farmafactoring Foundation Research Papers 12.

[534] More references above in Section 3.1.

[535] For an overview, see Brancasi, *L'ordinamento contabile* (n 359) 53; Pasquale Pupo, *Dissesto Finanziario degli enti locali: ambito di competenza dell'O.S.L., azioni esecutive individuali e par condicio creditorum* (Edizioni Scientifiche Italiane 2020) 31ff; Paolo Tenuta, *Dissesto e predissesto finanziario negli enti locali* (Franco Angeli 2015) 56ff (hereafter Tenuta, *Dissesto e predissesto finanziario negli enti*).

(entirely) offset the said liabilities with the proceeds from the sale of assets or from one-off revenues, such debit balance could be taken on by the central government upon the Ministry of Home office decision via a credit line of the national development bank ('Cassa Depositi e Prestiti')[536].

Further, alongside with the bail-out, the municipalities affected by the rebalancing procedure were subjected to specific disciplining mechanisms (e.g., temporary limits in recruiting officials, appointment of a special commissioner with executive powers to ensure the full compliance with the municipal obligations set forth in the recovery plan, …).

Consequently, the overall procedure was conceived in a more 'bankruptcy' friendly manner, as it expressly refers to an automatic activation of the rebalancing procedure for the local entity in case of overexposure towards private creditors affecting the fulfilment of mandatory municipal obligations[537]. In echoing the restructuring and insolvency procedures in place for private parties, the liquidation process pertaining to the debts assumed before the formal resolution on the distress is managed by a specific entity ('Organismo straordinario di liquidazione', 'OSL'). Moreover, on macro prudential grounds, the central government's debt exposure towards the municipal debt restructuring is limited in its amount with a specific financial threshold depending on the number of municipal inhabitants.

---

[536] Article 25(1), (7) and (8), Law Decree No 66/1989. As noted, since the 'debt of Italian municipalities is mainly taken out with Cassa Depositi e Prestiti, which applies a debt service costs defined ex-ante for all local governments […] credit conditions are not affected by real or perceived modifications of the credit status. Thus, rising credit default risks cannot
increase public debt service costs' Wildmer Daniel Gregori and Luigi Marattin, 'Determinants of fiscal distress in Italian municipalities' (2019) 56 Empirical Economics 1273.

[537] Article 21, Law Decree No 8/1993. In particular, the obligation to recourse to such procedure was interpreted on the basis of the expression 'ogni qualvolta', as set out in the Article.

With the aim of incentivising the local governments in providing a correct representation of their finances[538], additional procedures have been then introduced to complement the instability procedure[539].

On the one hand, local administrators and municipal auditors are called to give relevance to financial distress at an earlier stage so to address the instability status before it may lead to a failing status ('riequilibrio finanziario pluriennale' or 'predissesto')[540]. On the other hand, a complementary procedure to instability ('dissesto guidato') allows the Court of Auditors to solicit local governments to promptly take action in adopting financial remedies against accounting irregularities or structural imbalances[541]. In the event that the local entity does not comply to such order, the Court is entitled to inform the Civil governor ('Prefetto'), hence starting a procedure that could lead to the mandatory declaration of insolvency in case of reiterated non-compliance.

Over the years, the instability procedures have been hence subjected to multiple reviews[542], that, while remarkably extending the involvement of the Court of Auditors in the overall process, partially raised criticism due to the non-systematic way in which have been carried out[543].

---

[538] Article 248(5) and (5-*bis*), TUEL provides an example of incentive upon public administrators and auditors to bring forward the possible financial risks, as there the very stringent and severe sanctions upon individuals arising from the insolvency are not applicable in case of a financial distress limited to instability.

[539] Article 3, Law-Decree No 174/2012 amending the TUEL by the additional Articles 243-*bis*, 243-*ter*, 243-*quater*, 243-*quinquies*, and 243-*sexies*; Article 6(2), Legislative Decree No 149/2011.

[540] Article 243-*bis*, TUEL, as introduced by Article 3(1)(r), Law-Decree No 174/2012.

[541] Article 6(2), Legislative Decree No 149/2011.

[542] To name but a few, Legislative Decree Nos 77/1995, 336/1996, 342/1997, 410/1998, 267/2000, and 149/2011; Law-Decree Nos 174/2012, 34/2019, and 76/2020; Law Nos 208/2015 and 205/2017.

[543] Court of Auditors, Sez. Aut., No 6/2019 stressing 'Le procedure di dissesto e di riequilibrio pluriennale presentano forti criticità (strozzature procedurali e eccessiva burocratizzazione) e non sembrano affrontare con incisività sia i casi di squilibrio strutturale sia quelli accidentali. [Si rende quindi necessario

However, before providing an overview on the current legal regime for instability procedures involving local entities, it shall be noted that these mostly present similar characteristics in financial terms, while differing to an extent in the disciplining (e.g., significant sanctions upon the local administrators and auditors are limited to the insolvency) and in the competences (e.g., while for instability the City council remains the responsible for the financial restructuring, the insolvency procedure entails the appointment of the OSL, in its capacity of body appointed with the financial liquidation of the concerned local entity)[544].

In greater details, the instability procedure commences with a discretionary decision of the local entity stating that there are no other options to possibly recover the budgetary equilibrium[545]. According to such procedure, that is alternative to the 'dissesto guidato' one[546], the City council issues a municipal resolution ascertaining the risk of structural deficit, to be shared with the Court of Auditors and to the Home office within five days.

As a consequence of that, the enforceability of all the credit recovery procedures initiated against the municipality is suspended until the final approval by the Court of Auditors[547] concerning the recovery plan to be drafted by the City council within ninety days from the resolution[548]. In its definition, the recovery plan may consider a timespan

---

un intervento legislativo] al fine di superare la copiosa legislazione asistematica che ha caratterizzato gli ultimi anni'.

[544] Tenuta, *Dissesto e predissesto finanziario negli enti* (n 535) 107-109. On the activities performed by the municipality bodies within the instability procedures, see also Court of Auditors, Grand Chambers, No 19/2018.

[545] The possible options are set out under Articles 193 and 194 of TUEL (e.g., adopting a payment schedule with off-balance municipal creditors). In relation to the relevance of budgetary equilibrium and prompt responses to take action against a budgetary deficit, see the comments of the Italian Constitutional Court decision No 49/2018 (para. 3.2).

[546] See above (n 541).

[547] Article 243-*quater*(3), TUEL.

[548] Article 243-*bis*(4) and (5), TUEL.

between four and twenty years for reaching the budgetary equilibrium, depending on the total level of liabilities and commitments of expenditures. It shall also single out the possible grounds that have led to the budgetary imbalances, as well as the strategies to recover from such over exposures, also by taking into account the expected distribution of budgetary surpluses over the concerned years[549].

Within thirty days from its submission, the draft recovery plan is assessed by the Court of Auditors, alongside with the Home office[550], and it can be appealed before the Court of Auditors both in case of approval or rejection[551]. Further, should the plan be approved, the Court of Auditors bears the responsibility on its supervision. Nonetheless, if the plan is not timely lodged or it is rejected, or even not entirely performed over its execution, the Court of Auditors may recourse to 'dissesto guidato', thus making a concrete step towards to the failing status procedure[552].

In such case or more broadly in case of an inevitable risk of being in default on its liabilities, the procedure due to the failing status may be triggered[553]. Once the conditions are met, the City council is bound[554] to adopt a resolution, that cannot be

[549] Article 243-*ter*(7) and (8), TUEL. More particularly, upon Article 243-*ter* TUEL, it is possible to recourse to 'Fondo di rotazione' by which the local entities may receive a budgetary advance granted by the central government to be paid back within ten years. As noted, this fund was therefore not subjected to the DSP framework, Giancarlo Verde, 'Lo squilibrio finanziario degli enti locali', March 2013, 10 <https://finanzalocale.interno.gov.it/docum/studi/varie/squilibrio_2013.pdf> accessed 3 January 2022. Further, two important decisions have been issued by the Italian Constitutional Court (Nos 18/2019 and 115/2020) setting out stringent limits on accounting techniques to review and amend the ongoing recovery plans, especially if the plan covers a significant timespan (i.e., twenty or even thirty years), also to the detriment of intergenerational justice.

[550] The competent committee ('Commissione per la finanza e gli organici degli enti locali') is indicated under Article 155, TUEL.

[551] Article 243-*quater*(5), TUEL.

[552] Some temporary and limited in scope exceptions – suspending the applicability of 'dissesto guidato' – are indicated at Article 12(2), Law-Decree No 76/2020.

[553] Article 244, TUEL.

[554] Confirming that the municipality has a duty and not discretion to issue a resolution to start off the insolvency procedure, see TAR Firenze, (Toscana), decision No 206/2020.

indeed revoked, nailing down the causes of the failing status, to which also the auditors' report is annexed[555]. Additionally, a special commissioner, in charge of ensuring the applicability of the plan, may also be appointed[556].

Finally, the effect of failing status upon the local entities consists in the suspension of the deadlines for the budgetary approval, the termination of the enforceability of the ongoing credit recovery procedures, the inadmissibility of any action to recover sums within the remits of the OSL, as well as the noninterest-bearing nature of the credits which form part of the OSL competence[557].

Despite the overall procedural complexity and the detailed nuances among the said procedures involving failing or likely to fail local entities, it is hence noticeable that the very element of having such procedures in place for municipalities is to square the circle in the intergovernmental fiscal relationship as to avoid excessive risks at local level over financial within the EU Fiscal Network.

[555] Article 246, TUEL.
[556] Article 141(3), TUEL.
[557] Article 248, TUEL.

3.3 Concluding Remarks on Public Law Mechanics Enhancing Coordination and Mitigating Institutional Risk in Fiscal Relationships in Italy

The foregoing Sections of this Chapter have provided an overview around the main legal mechanisms that the Italian government has progressively put in place as a consequence of the fiscal obligations stemming from the participation of Italy to the EMU.

We have particularly focused on two main strands of analysis on the use of public law to govern the Italian fiscal matters involving subnational governments: Coordination of institutional activities and mitigation of institutional risks.

On the one hand, the characteristics and functioning of the 'Domestic sub-system' of the EU Fiscal Network in Italy have been mostly considered in relation to local entities. In this respect, the coordination activity by means of public law that the State has put forward upon subnational governments is instrumental for a sound financial management at macro level and for ensuring the overall stability in multilevel fiscal dynamics. To this end, the ideas of 'static' and 'dynamic' coordination offer a solid interpretative and regulatory basis for setting out the distribution of authority among the different levels of government and, at the same time, their very functioning according to the central government's fiscal strategy in line with the evolving macroeconomic conditions of Italy within the EMU.

As such, in order to comply with the European legal framework on economic governance, there has been a resolute move of the national government towards the harmonisation of public accounts and on the standardisation of the very elements functional for the effective transparency, comparability, and reliable representation of

the health status of the concerned local entities. Then, by adopting a 'trial-and-error' method, the national legislation has also put forward a very hectic regulation of the intergovernmental fiscal relations, extending from the introduction of the Domestic Stability Pact, which has been fiercely criticised from the outset for limiting the capacity of investments by the local entities, to its full rationalisation at a later stage in light of a greater flexibility and predictability.

Nonetheless, the push for a review of budgetary and accounting legal provisions regulating subnational governments is not limited to financial matters, since it also involves good administration practices and intergenerational responsibility towards local communities[558].

It is indeed fairly accepted that there is a strong link between fiscal rules and the branch of ethics considering (financial) obligations towards future generations, as well as economic justifications for the present generation to raising long-term debts for certain spending (i.e., infrastructures) in the interest of prospective beneficiaries of

[558] For a general reference and related bibliography, see Massimo Luciani, 'Generazioni future, distribuzione temporale della spesa pubblica e vincoli costituzionali' (2008) Diritto e società 145. On this topic, it is then worth referring to Franco Modigliani's argumentative use of the idea of intergeneration equity as he posits that 'considerations of inter-generation equity suggest the desirability of a compromise between the orthodox balanced-buget principle and the principle of funcional finance […]', 'Long-Run Implications of Alternative Fiscal Policies and the Burden of the National Debt' (1961) 71 The Economic Journal 755. In broader terms, it is also interesting to make a reference to Gustavo Zagrebelsky that, while questioning – beyond fiscal matters – the legal significance of the 'rights of future generations', posits 'il discorso sulle generazioni future ristabilisce il legame di debiti e crediti che per secoli si teorizzava esistere tra viventi e non viventi, cambiando però direzione: per secoli, i figli sono stati considerati debitori nei confronti dei padri; oggi, i padri si devono sentire debitori nei confronti dei figli', *Diritti per forza* (Einaudi 2017) 176 [ebook version]. This reasoning combines well with the Immanuel Kant's analysis that 'What remains disconcerting […] is firstly, that the earlier generations seem to perform their laborious tasks only for the sake of the later ones, so as to prepare for them a further stage from which they can raise still higher the structure intended by nature; and secondly, that only the later generations will in fact have the good fortune to inhabit the building on which a whole series of their forefathers (admittedly, without any conscious intention) had worked without themselves being able to share in the happiness they were preparing', in Hans Reiss (ed), *Kant: Political Writings* (2nd edn, CUP 1991) 44.

public investments[559].

Further, the importance of programming activity it is representative of such good governance practices, as it stands at the heart of the functioning of the public administration in the interest of the governed polity. It therefore supports not only the public administrators in putting in place a more streamlined administrative activity, but also the citizens in gauging the outcomes of their local governments' policies on the occasion of elections[560].

In that sense, coordination has a pivot function in the EU Fiscal Network as it makes decentralisation of authority and multilevel dynamics to aggregately converge with the objectives of the European fiscal framework, thus contributing to macroeconomic stability by means of public law.

On the other hand, the risk of deviation among subnational governments from the expected fiscal conducts (Fiscal Policy Risk) is too systemically relevant for the central government for not putting in place an adequate system of controls and sanctioning. In this vein, the broad definition of 'general government', to which also local entities are part, makes significantly relevant setting out a legal framework to contain the Fiscal Policy Risk, as the risk for the central government of not abiding to the EU fiscal commitments due to the default or non-compliance of subnational governments in relation their domestic fiscal obligations.

[559] See below (n 621)

[560] It is striking that, besides the increasing reference of the Italian Constitutional Court to the concept of intergenerational equity in decisions on intergovernmental fiscal matters – decisions Nos 18/2019 (para. 6) and 80/2020 (para. 6), to name but a few – this concept goes together with the political responsibility. On the latter decision it is indeed stated that 'La pluriennale diluizione degli oneri di ripianamento del maggior deficit incorre anche nella violazione dei principi di responsabilità del mandato elettivo e di equità intergenerazionale' (para. 6.1).

The use of public law appears as such to possibly prevent that such specific source of institutional risk – and more precisely of the kind of 'second-order risks' by design according to the Adrian Vermeule's categorisation – does not trigger systemic events to the detriment of the very fiscal obligations, assumed by the Italian central government towards the EMU, and to the stability of EU Fiscal Network as a whole.

In this regard, the trade-offs between federalism, local autonomy, and fiscal coordination are deemed to further requiring legal provisions to balancing (internal and external) controlling instruments, as well as forms of encroaching mechanisms upon failing or likely to fail municipalities, so to ensure that effective or potential financial crisis situations can be orderly and timely managed at domestic level before generating systemic events with a macroeconomic impact.

Then, attention has been conclusively devoted to the Italian Court of Auditors that, in spite of experiencing no specific constitutional changes in the aftermath of the European Debt Crisis, has increasingly gained wider competence and relevance in the multilevel fiscal relationships for the sake of undertaking a comprehensive monitoring of complex fiscal dynamics

In that sense, the Court appears to engage, as an organ of the 'State-community', in a vital activity within the 'Domestic sub-system' of the EU Fiscal Network overseeing, at micro level, over single institutional behaviours of the general government as to ensure, at macro level, the compliance in the aggregate of the Italian obligations in line with the EU fiscal rules.

To conclude, if considered altogether, such set of diverse legal measures, that over the years the central government has put in place by means of public law to govern

the institutional risks occurring at subnational level, appears to emphasise that the Fiscal Policy Risk performs an organising function in the Italian legal system, as part of the EU Fiscal Network, inducing a shift towards a de facto recentralisation, on stability grounds, of the multilevel governance after years of devolutionary trend.

4. Promoting Investment Spending at Subgovernmental level in Italy – The Legal Expansionary Policy of the NRRPs in the Context of the 'Next Generation EU'

In the previous Chapters we have considered the European and Italian legal frameworks on fiscal policies as to ascertain how public law could be instrumental for the stability of the EU Fiscal Network in organising institutional complexity and mitigating institutional risks arising from the aggregate of subnational governments ('general government' or 'finanza pubblica allargata') for which the central government of a Member State is sole responsible towards the Union's fiscal obligations.

Still, the contribution of public law for a greater macroeconomic stability in an incomplete and asymmetric economic and monetary union, like the EMU, is not necessarily limited to a risk-mitigation function, it can rather extend to encouraging risk-taking for greater public investments, hence performing and sustaining an expansionary function[561].

In this respect, public law may constitute an enabler of counter-cyclical measures (e.g., infrastructure spending) to be deployed at domestic level so to increase the overall stability of a Member State. Such an approach on the use of law is particularly relevant in the Eurozone, as it has been aptly pointed out that 'If a jurisdiction is suffering from a recession when the rest of the currency union's economy is thriving, then contractionary monetary policy (appropriate for the currency union as a whole) may entrench the recession and cause hysteresis and political unrest'[562].

[561] See above (nn 11 and 104).

[562] Listokin, *Law and Macroeconomics* (n 11) 161. It further states that 'to avoid a painful down-turn, the jurisdiction should consider expansionary legal policy in spite of its institutional flaws'.

From this perspective, the Next Generation EU constitutes a very significant example of coordination of pro-growth structural reforms according to the common strategic objectives of the Union[563].

Thus far, in our analysis, the NGEU framework has been mostly addressed under Section 2.3 from a European perspective in relation to the innovative elements of mutualisation and risk-sharing that, in the long run, could possibly turn out to stabilising such 'temporary' instrument for the completion of the EU Fiscal Union. Building on that, the present Chapter aims at considering the NGEU, and more specifically the related National Recovery and Resilience Plans ('NRRPs'), as an example of expansionary legal policy[564] thanks to the economic policy coordination characteristics of the EU recovery instrument by means of public law[565].

Along this line, Section 4.1 provides an analysis on the legal status of a long-term and countercyclical policy like government investments in the context of the EU and Italian fiscal policy framework setting out limits on deficit spending. In so doing, we particularly refer to the uneven development of the Italian legal framework on investment spending pertaining to subnational governments ('finanza pubblica allargata') for the sake of mitigating Fiscal Policy Risk. Then, Section 4.2 touches upon the specific area of the legal regime of investment spending (i.e., infrastructures, …) in Italy as part of the domestic NRRP promoting an expansionary use of public law.

---

[563] On this line, Ian Harden, 'Money and the Constitution: Financial control, reporting and audit' (1993) 13 Legal Studies 16 (on the relationship between the control of money and the control of policy).

[564] Above (n 562).

[565] For an overview on the use of public law as an instrument of pianification, see Marcello Clarich, 'Il piano nazionale di ripresa e resilienza tra diritto europeo e nazionale: un tentativo di inquadramento giuridico' (2021) Corriere Giuridico 1025 (noting the precedents in the Italian legislation involving general pianification mechanisms as useful references for the analysis of the Italian NRRP in the context of NGEU); Massimo Severo Giannini, 'Pianificazione' in *Enciclopedia del diritto*, Vol. XXXXIII (Giuffrè 1983) 629.

Then, it further draws some preliminary conclusions on the 'positive' use of public law to enhance a greater fiscal stimulus capacity of the Union sustaining a uniform and consistent growth in the Eurozone. Finally, Section 4.3 takes from the foregoing conclusions, and it outlines the current discussion concerning the institutional reforms of the EU fiscal policy framework in a post-NGEU scenario.

4.1 The Legal Regime of the SGP Investment Clause and the Pursuit of Public Investments at Subgovernmental Level in Italy

In the previous Chapters, we stressed on the relevance of the structural asymmetries of the Eurozone, by legal design, which since its inception have led to an over reliance to the exclusive competence of monetary policy to sustain and stabilise the concerned national economies[566], while the domestic economic policies were left to a scarcely effective coordination in terms of both deficit reducing and investment promoting.

In this respect, we noted that the overall excessive deficit procedure (EDP) model, pursuant to Article 126 TFEU, was conceived in the EU Fiscal Network as too prone to rely on the adoption of a sanctioning mechanism against the concerned Member States according to a 'negative' rule-based model of coordination.

To briefly recall what it has been discussed under Chapter 2, the Commission is in charge with the monitoring of the developments of the budgetary situation and of the stock of government debt of the Member States, that are mandated by the Treaty to avoid excessive government deficits. In case of 'gross errors' to be found by the

[566] Marco Buti, 'Le regole europee di finanza pubblica: un bilancio delle recenti riforme' in Alessandro Balestrino et al (eds), *La dimensione globale della finanza e della contabilità pubblica* (Editoriale Scientifica 2020) 57.

Commission, according to the reference values of the debt-to-GDP and deficit-to-GDP, the Commission shall proceed with the specific Treaty-based procedure.

On that note, as an alternative or a complementary regulatory strategy in relation to the EU economic governance, it could be suggested that it is conceivable a possible different model of coordination for incentivising fiscal expansion in the Eurozone[567], as it appears to be the case with the NGEU programme. This argument takes from Norberto Bobbio's theory on 'positive sanctions', capable of encouraging a conduct rather than discouraging a deviation[568], and it appears like a suggestive instrument for interpreting the NGEU stabilisation device.

With that in mind, the incentives upon Member States to take the preventive and the corrective arms seriously have lowered over time[569]. Indeed, it is a nearly settled opinion that the significant leeway of discretion granted upon the Commission[570] within the EDP, together with the ensuing increased politicisation of the fiscal surveillance procedure among the involved EU institutions and the over-complexity of the SGP framework[571], has reduced the likelihood for a Member State of being sanctioned.

At the same time, it has been also widely recognised that, especially in economic

[567] According to a similar wording suggested by Charlotte Rommerskirchen, above (n 270).
[568] See above (nn 26 and 28).
[569] Critically, the Commission posits that '[…] over the past years tensions have accumulated in the application of the SGP, leading to a loss of credibility and ownership and institutional uncertainty' Strengthening SGP Communication (n 172) 3. Also in relation to the MIP, a country like Italy has been reported in 2019 there being considered for six years as experiencing 'excessive macroeconomic imbalances', Annex 3, Commission, Communication on '2019 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011' COM(2019) 150 final.
[570] Especially after the enhanced margin of flexibility for the Commission introduced in 2015 by the Best use of SGP communication (n 200).
[571] In this regard, Report on Economic governance review – Working Staff Document (n 225) 6; European Court of Auditors, 'Further improvements needed to ensure effective implementation of the excessive deficit procedure' (2016) Special report No 10, 19 April 2016.

downturns, 'a rigid application of the fiscal rules could have undermined the continuation of a still fragile recovery'[572], thus adding an additional layer of complexity in striking a balance across the overall policy discourse between fiscal consolidation and deficit financing to speed up growth via public investments[573].

In that regard, public investments perform diverse functions extending from the principle of equality among citizens across the national territories[574] to countercyclical measures mitigating recessionary trends in the economy[575].

There are therefore economic and political grounds supporting greater (pro-growth) public investments which can be retraced in several legal provisions pertaining to the 'European sub-system' of the EU Fiscal Network.

Nonetheless, the very definition of public investments shall be considered alongside to that of government expenditure that is broader in scope. To provide an example, the EDP procedure provides, under Article 126(3) TFEU, that, in case of non-compliance

[572] European Court of Auditors, 'Is the main objective of the preventive arm of the Stability and Growth Pact delivered? (2018) Special report No 18, 12 July 2018 83.

[573] In this regard, see Article 16(2), Regulation (EU) No 473/2013, as part of the 'Two-Pack', whereby 'By 31 July 2013, the Commission shall report on the possibilities offered by the Union's existing fiscal framework to balance productive public investment needs with fiscal discipline objectives in the preventive arm of the SGP, while complying with it fully'. In relation to the intergenerational aspects pertaining to deficit spending (e.g., for infrastructures), see above (n 558) and below (n 621).

[574] A reference can be made to Article 119 providing for the establishment of a specific national fund ('fondo perequativo') to reducing the inequalities among the Italian territories. Moreover, for an overview on the public responsibility over public spending in infrastructure for social equalisation, to which the German legal doctrine refers as 'Gewährleistungsverantwortung', see Georg Hermes, *Staatliche Infrastrukturverantwortung* (Mohr Siebeck 1998) 324ff.

[575] SGP Vade Mecum of 2019 (n 45) 6. Further, the coexistence of such two different (political and economic) functions of public investments is well represented under Article 104b(1) of the German Constitution on 'Financial assistance for investments' stating that the Federation may grant assistance to the *Länder* to the extent that is necessary to: '1. avert a disturbance of the overall economic equilibrium, 2. equalise differing economic capacities within the federal territory, or 3. promote economic growth' [Official translation from Gesetze-im-internet.de]. Further references on public investments in relation to local governments below in this Section and at (n 530) for the Italian legal system, while it can be referred to Article 104c of the German Constitution for additional analysis on specific investment spending for the municipal education infrastructure.

by a Member State with the deficit and debt reference values[576], the Commission shall prepare a report taking in account 'whether the government deficit exceeds government investment expenditure and take into account all other relevant factors, including the medium-term economic and budgetary position of the Member State'.

The relevance of the notion of 'government expenditure' as a benchmark has been then complemented by the SGP secondary legislation for both the preventive and corrective arms. Respectively, as part of definition of the MTO objectives and the adjustment path towards it shall be regarded to the 'planned growth path of government expenditure'[577], while for the Commission's report it is stated that 'shall include the targets for government expenditure and revenue and for the discretionary measures on both the expenditure and the revenue side […], as well as information on the measures taken and the nature of those envisaged to achieve the targets'[578].

In assessing the sustainability of the underlying fiscal position of Member States towards the MTO, significant attention has been attributed to government expenditure as well as to public investments supporting economic growth. As such, in the current EU legal framework it appears a certain leeway for flexibility on public spending 'driven by long term macroeconomic purposes' – as Jean-Paul Keppenne neatly contends[579] – and in this sense the notion of public investments is not at all a neutral component.

---

[576] See above Section 2.1 and (n 138).

[577] Article 3(2), Regulation (EC) No 1466/1997, as amended by Article 1(6), Regulation (EU) No 1175/2011.

[578] Article 3(4a), Regulation (EC) No 1467/1997, as amended by Article 1(4), Regulation (EU) No 1177/2011. See also, Commission delegated Regulation (EU) No 877/2013 on supplementing Regulation (EU) No 473/2013 of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L 244/23.

[579] See above (n 139). Notably, it is noticeable that the money spent by domestic national promotional banks (i.e., Cassa Depositi e Prestiti in Italy) 'on behalf of the government will be treated as government expenditure' Best use of SGP communication (n 200) 19.

In fact, despite the progressive revision of the SGP from 2005 onwards for the sake of increasing greater flexibility and attention onto public investments[580], the SGP original attitude towards investments was perceived from its outset as growth-reducing and therefore harshly criticised to an extent[581]. On that note, since then it has proved problematic all along the legal and economic discourse within the Eurozone to reconcile temporary cyclical circumstances with medium and long-term fiscal discipline.

In addition to that, due to the structural limits of the SGP, and more broadly of the EU economic governance framework, the Commission does not feasibly require Member States to transfer the budgetary surplus to the economy so to endeavour reducing the output imbalances in the Eurozone[582].

As such, these structural deficiencies, further exacerbated by the weak enforcement of the SGP, became even more apparent as the Great Recession burst and subsequently the sustainability of the European national economic policies was put under severe scrutiny by the international financial markets with specific regard to the

[580] See above Section 2.1 and (nn 174 and 175). And later, Best use of SGP communication (n 200), as well as Commission, 'Communication on the review of the flexibility under the Stability and Growth Pact', COM(2018) 335 final (hereafter 'SGP Flexibity Review').

[581] In the Commission's own words, '[…] the fiscal framework had not sufficiently preserved the level of public investment during periods of fiscal consolidation, while public finances had not become growth-friendlier', Report on Economic governance review (n 61) 15. On a similar note, stating that the existing EU fiscal rules 'failed to provide incentives for prioritising key public spending for the future of our sovereignty, including public investments', Mario Draghi and Emmanuel Macron, 'The EU's fiscal rules must be reformed', *The Financial Times*, 23 December 2021 (hereafter Draghi and Macron, *The EU's fiscal rules must be reformed*). For an assessment on the Italian critique arising from the local administrators, Paolo Chiades and Vanni Mengotto, 'Il calo degli investimenti nei Comuni tra Patto di stabilità interno e carenza di risorse' (2013) 210 Banca d'Italia - Questioni di Economia e Finanza 6ff.

[582] Among others, see Stefano Micossi, 'What Future for the Eurozone' (2015) Luiss Policy Brief 5. On this line, see also Lorenzo Bini Smaghi stating that the suggested 'return to [SGP] normality' after the pandemic, as suggested by Wolfgang Schäuble, cannot be limited to the sole countries with high debt, as 'It should also affect those that have consistently delivered excessively restrictive fiscal policy, thus creating an imbalanced policy mix in the eurozone', 'The eurozone must not return to its pre-crisis 'normality', *The Financial Times*, 14 June 2021. In this regard, it shall also be noted that '[the SGP] did not include explicit provisions on output stabilisation', European Fiscal Board, 'Annual Report 2017', 15 November 2017 53.

accrued level of debt. This scenario then led to enhanced consolidation policies at national level in a negative spiral of procyclicality that eventually posed a risk over the financial viability of the domestic banking sectors.

To make matters worse, some years later, the economic policy related to COVID-19 pandemic, like deferral of tax deadlines, suspension of tax debt enforcement, or business support measures[583], have contributed to drastically increase the level of debts of the Eurozone Member States[584].

Henceforth, the present context of high sovereign indebtedness in the Eurozone it is likely to make – if ever[585] – the EDP corrective arm pertaining to the debt rule, which stands at 60 percent of GDP unless 'sufficiently diminishing and approaching the reference value at a satisfactory pace'[586], de facto politically unattainable in the foreseeable years[587].

---

[583] Commission, 'Draft note on statistical implications of some policy measures in the context of the COVID-19 pandemic', 30 March 2020 (updated 9 April 2020).

[584] According to Eurostat, 'Government debt up to 100.5% of GDP in euro area', while in 'the first quarter of 2020 [was at] 86.1%', Report No 84/2021, 22 July 2021. Further, the same Eurostat document certifies that, as per 2020, with exception to Bulgaria, Denmark, and Sweden, all the other 23 Member States exceeded the 3% of GDP reference value for general government deficit.

[585] Notably, the debt rule has been operational since 2012 with a progressive phase-in. For an example on the enforcement of the debt-to-DGP ratio, in June 2019 the Commission reported the noncompliance of Italy 'with the debt criterion' in 2018 failing to comply 'with the debt reduction benchmark in 2018 (gap of some 7 ½% of GDP)', since (*i*) 'Italy's general government gross debt reached 132.2% of GDP in 2018, well above the 60% of GDP reference value of the Treaty, and Italy did not comply with the debt reduction benchmark in 2018 based on outturn data'; (*ii*) 'Italy is not projected to comply with the debt reduction benchmark in either 2019 or 2020 based on both the government plans and the Commission 2019 spring forecast', Commission, 'Report prepared in accordance with Article 126(3) of the Treaty on the Functioning of the European Union' COM(2019) 532 final 2 and 21. Though, Upon a significant scrutiny, on 4 July 2019 the Commission, through Valdis Dombrovskis and Pierre Moscovici, wrote to at the time Italian Treasury Minister, Giovanni Tria, that 'this package [Working Staff Document SWD(2019) 430 final and Communication COM(2019) 351 final] is material enough to conclude that the opening of an Excessive Deficit Procedure is no longer warranted at this stage'.

[586] According to Article 2(1a) of Regulation (EC) No 1467/97, as amended by Article 1, Regulation (EU) No 1177/2011.

[587] On this line of reasoning, the Commission posits 'The pandemic has significantly changed the context of the public debate, with higher levels of debt and deficit and significant output losses, increased

Against this background, it is worth retracing, from a legal standpoint, the main elements of the discussion around the status of public investment within the EU fiscal framework and then to proceeds by looking at the subnational governments' investment spending. To this end, it is indeed significant to highlight that, according to a recent Commission's assessment, 'Regarding public investment, the EU has faced a widespread and persistent decline over the last decade (in some cases even below replacement levels keeping the stock of public capital stable)'[588]. This statement comes at the end of a long-lasting debate on the flexibility of the SGP and it plainly shows how unsolved is such an important matter of common concern among the Eurozone Member States.

Nonetheless, as opposed to the original setup of the SGP, as of 1997, it shall be noted that in the assessment of the deviation from the MTO or the path to achieve it[589] there has been an increased attention to specific factors[590], like structural reforms and public investments. This new policy trend becomes more apparent in the Ecofin Council meeting of 27 November 2015 as it was reached a commonly agreed position on the use of flexibility in the SGP in relation to structural reforms and public investments, also taking into consideration the Commission's Communication on the best use of SGP[591]. According to such arrangement, Member States are then evaluated on the

investment needs and the related introduction of new policy tools at EU level', Commission's Communication on COVID-19 fiscal policy response (n 293) 14.

[588] Report on Economic governance review – Working Staff Document (n 225) 20.

[589] Strengthening SGP Communication (n 172) 4.

[590] Article 5(1), Regulation (EC) No 1466/97, as amended by Article 1(3), Regulation (EC) No 1055/2005, reads that in defining the MTO adjustment path or in allowing a temporary deviation to it 'the Council shall take into account the implementation of major structural reforms which have direct long-term cost-saving effects, including by raising potential growth, and therefore a verifiable impact on the long-term sustainability of public finances' ('structural reform clause').

[591] Best use of SGP communication (n 200). Following the Ecofin meeting, as of 27 November 2015, it is also worth mentioning the following Ecofin meeting on 12 February 2016 concerning the 'Commonly agreed position on Flexibility' which formed part of the update of the previous 2013 version of the SGP 'Vade mecum'.

basis of a 'matrix' concerning the fiscal adjustment requirements to be pursued in the economic upturn and downturn so to reduce the risk of procyclicality in the MTO assessment.

More importantly, for the scope of the analysis under the current Section, during the same Ecofin meeting it has also been clarified that 'Government investments aiming at, ancillary to, and economically equivalent to the implementation of major structural reforms' may have the same exemption in terms of fiscal deviation due to structural reforms[592]. In other terms, a certain degree of public investments could be exempted from the MTO, though not all public investments would qualify for such exemption being limited only to those falling within the area of structural reforms.

Then, it is also relevant to stress that at the time the investments pertaining to the European Fund for Strategic Investments (EFSI)[593] were considered part of the 'structural reforms' and therefore 'National contributions to the EFSI will not be taken into account by the Commission when defining the fiscal adjustment under either the preventive or the corrective arm of the Pact'[594]. This set of reasoning is significant if considered in view of the later NEGU strategy in combining investments with pro-growth reforms[595].

---

[592] Council, 'Commonly agreed position on Flexibility in the Stability and Growth Pact', 30 November 2015, 14345/15, para 4. On this, see also the reference to 'investments' under Article 2a, Regulation (EC) No 1466/97, as amended by Article 1(5), Regulation (EU) No 1175/2011.

[593] On the EFSI, see above (n 260). Further, allowances could be also granted for national expenditures related to co-financed project originating from Structural and Investment Funds, Trans-European-Network (TEN), or Connecting Europe Facility (CEF). More particularly, Member States shall ensure that 'co-financed expenditure should not substitute for nationally-financed investments, so that total public investments do not decrease' SGP Vade Mecum of 2019 (n 45) 24. However, on this point the European Fiscal Board critically notes 'If the flexibility clause's objective is to incentivise a Member State to increase public investment, then the rule needs to be adjusted', EFB Assessment of EU fiscal rules (n 171) 73.

[594] Best use of SGP communication (n 200) 8.

[595] As noted by Paul De Grauwe, *Economics of Monetary Union* (n 137) 239 as it states 'Public investment has been one of the many casualties of the austerity programmes that have been imposed on the

Then, from an operational perspective, a Member State may request to the Council the 'public investment' allowance, either ex-ante, as part of the assessments pertaining to the 'Stability and Convergence Programmes' ('SCPs') – if the concerned Member State has already joined the euro currency or not – or ex-post depending on 'the effective payments of EU Structural Funds and on the corresponding effective co-financing'[596]. In case of an ex-ante application, the concerned Member State may ask for the allowance within the SCP one year ahead of the actual activation.

Further, in order to gain the said allowance, the concerned investments of a Member State shall fall within a strict twofold assessment so to justify the MTO deviation or the adjustment path towards it. Indeed, the investment shall be regarded as having 'positive, direct and verifiable long-term effects' on 'growth' and on 'the sustainability of public finances under certain conditions', which are, for instance, that 'GDP growth is forecast to be negative or to remain well below its potential' and that the Member State 'remains in the preventive arm and at the time of the assessment of the application for use of the clause, an appropriate safety margin with respect to the 3% of GDP deficit reference value is preserved'[597].

After the introduction of the said flexibility clauses within the SGP, in 2018 the Commission performed a review of the new legal framework pointing out that 'Nearly half of the Member States would have been eligible to apply to make use of the structural reform clause but most did not request to do so'. Still, in the concerned timespan, Italy was the only Member State successfully seeking for the application of

Eurozone countries since the sovereign debt crisis. This is paradoxical since it is public investment that is key to recovery in the Eurozone'.

[596] SGP Vade Mecum of 2019 (n 45) 24-25. Further operational guidance on the 'investment clause' is available at the related para. 1.3.2.4, under the title 'Taking into account investment', and in Annex 14 on 'A numerical example of the flexibility clauses in the preventive arm'.

[597] SGP Vade Mecum of 2019 (n 45) 24.

both structural reforms and investment clauses[598], while others Member States (Latvia, Lithuania, and Finland) were granted for the former and Finland for the latter[599].

From the foregoing analysis, it comes out clearly that there is not at EU level any 'golden rule' that broadly exempts national investments from deficit and debt computation, thus allowing a Member State to issue debt to finance specific investments[600]. Nor there seems to be political appetite to that, possibly because – as the European Fiscal Board critically indicates – 'The experience matured so far suggests that flexibility is used de facto as an escape clause to avoid an assessment of non-compliance with the EU fiscal rules'[601].

To support this argument, it is often referred to the German decision to overcome in 2009 its 'golden rule' (*Goldene Regel*), as it was set forth in Article 109 of the Basic Law (Grundgesetz), whereby the investment expenditure was excluded from the deficit calculations. In introducing a rather generalised debt brake (*Schuldenbremse*)[602], that

---

[598] The Commission's 'Report prepared in accordance with Article 126(3) of the Treaty on the Functioning of the European Union', COM(2019) 532 final, refers to additional 'flexibility' allowances due to 'refugee-related expenditure', 'exceptional security measures related to the terrorism threat', 'preventive investment plan for the protection of the national territory against seismic risk', 'refugee crisis', 'preventive plan to limit hydrogeological risks', and 'extraordinary maintenance programme for the road network'. On the latter, Council, 'Recommendation on the 2020 National Reform Programme of Italy and delivering a Council opinion on the 2020 Stability Programme of Italy' [2020] (2020/C 282/12) OJ C 282 74 (hereafter 'Council CSR 2020') refers that '[…] for 2019 Italy was granted an allowance of EUR 1 billion under Union fiscal rules for an investment plan to secure road infrastructure similar to the Morandi bridge' (para. 22).

[599] SGP Flexibity Review (n 580) 3.

[600] Wolf Heinrich Reuter, 'Benefits and drawbacks of an "expenditure rule", as well as of a "golden rule", in the EU fiscal framework' (2020) Economic Governance Support Unit PE 645.732 8 (on the positive 'ownership' effect that the 'golden rule' would cause to Member States' attitude towards investments); Fabrizio Balassone and Daniele Franco, 'Public investment, the stability pact and the "Golden Rule"' (2000) 21 Fiscal Studies 207 (on the risks of introducing a 'golden rule' in the EU fiscal framework); Giacinto della Cananea, 'Government Deficits and Investments: A European Legal Framework' (2013) 5 Italian Journal of Public Law 123-124 (reading Article 126(3) as setting out a pro-investment choice in the form of a sort of golden rule for the recourse to borrowing only for funding investments).

[601] EFB Assessment of EU fiscal rules (n 171) 73.

[602] For an analysis, see Raffaele Bifulco, 'Il pareggio di bilancio in Germania: una riforma costituzionale postnazionale? (2011) Rivista AIC 1 (stressing the shortcomings of the influence of the European

consists in an obligation to balance the budgets without recourse to borrowing, the central government has intended to limit the (historically high[603]) structural deficit of the regional states (*Länder*) and local governments.

As such, despite still leaving certain elements of flexibility on the *Länder*[604], the 2009 reform has reduced the previously existing leeway in deficit spending at least for investments which are both on the interests of future generations and anti-cyclical policies[605]. To this end, it is noticeable that, over the recessionist effects of the COVID-19 pandemics, Germany has announced the temporary suspension of the debt brake mechanism[606].

To move on with the analysis on 'golden rules', as far as Italy is concerned, it shall be mentioned that from 2012 onwards it is in theory possible at central government level to recourse to borrowing for the purpose of taking account of the 'adverse effects' of the economic cycle, as well as if 'exceptional circumstances' occur and there is a parliamentary authorisation by an absolute majority vote of the members[607]. As such,

---

economic constitution over the domestic constitutional reform).

[603] For an overview, see Joerg Luther, 'Crisi economica ed impatto sulle istituzioni nazionali: i punti di vista della Germania' (2016) Federalismi.it 1.

[604] For a recent study on the existing degree of fiscal flexibility for the *Länder* in the German legal system, see Giovanni Boggero, 'Le relazioni finanziarie tra Stato e autonomie territoriali. Profili comparati con l'esperienza tedesca' in Alessandro Balestrino et al (eds), *La dimensione globale della finanza e della contabilità pubblica* (Editoriale Scientifica 2020) 301ff. For a comment on the cultural influences on the national fiscal limits on investment expenditures among Member States, see Giacinto della Cananea, 'L'Unione economica e monetaria venti anni dopo: crisi e opportunità' (2011) Costituzionalismo.it 5. More broadly, for a stimulating comparison between the American and German fiscal constitution, with particular reference to government and local expenditures, see Kenneth W. Dam, 'The American Fiscal Constitution' (1977) 44 The University of Chicago Law Review 294-298 and 300-304.

[605] Critically, Wolfgang Münchau posits that 'The [2009] balanced budget constitutional law is therefore not about economics. It is a moral crusade, and it is the last thing, Germany, the eurozone and the world need right now', 'Berlin weaves a deficit hair-shirt for us all', *The Financial Times*, 21 June 2009.

[606] For an overview, see Lars P. Feld et al, 'Von der Corona-bedingten Schuldenaufnahme zur Wiedereinhaltung der Schuldenbremse' (2021) 22 Perspektiven der Wirtschaftspolitik 20.

[607] Article 81(2), Italian Constitution, as amended by Article 1, Constitutional Law No 1/2012. The Italian scholarship has largely debated around the possible disjunctive interpretation ('or' instead of 'and') of the wording of such constitutional provision, as it seems to be the most settled opinion, Massimo Luciani,

one cannot conclude that a 'golden rule' is applicable for the national State budget[608].

On the contrary, from 2001 Italy has in place a sort of 'golden rule' or 'quasi golden rule' for local authorities' borrowing capacity, which is limited to financing investment expenditures[609]. Then, following the 2012 constitutional revision[610], it has been added that such investment spending at local level shall be accompanied by 'the concomitant adoption of amortisation plans and subject to the condition that budget balance is ensured for all authorities of each region, taken as a whole'[611].

More particularly, such constitutional amendments shall be interpreted, together with Article 81 on the State budget, in the context of the European Debt Crisis and of the TSCG (or 'Fiscal Compact') requesting the contracting parties, like Italy, to introduce

---

'Costituzione, bilancio, diritti e doveri dei cittadini' in Corte dei Conti, *Dalla crisi economica al pareggio di bilancio: atti del LVIII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2012* (Giuffrè 2013) 729ff; Tomaso Francesco Giupponi, 'Il principio costituzionale dell'equilibrio di bilancio e la sua attuazione' (2014) 34 Quaderni costituzionali 60. For a further comment, see Nicola Lupo and Renato Ibrido, 'Le deroghe al divieto di indebitamento tra Fiscal Compact e articolo 81 della Costituzione' (2017) Rivista trimestrale di diritto dell'economia 206 (stressing the risk of a political stalemate in activating the 'exceptional circumstances' clause, as arising from the absolute majority vote, due to the necessary contribution of the parliamentary opposition).

[608] From a differend prospective, stressing that a sort of 'golden rule' is de facto in place in Italy, see Ignazio Visco, governor of the Bank of Italy, stating 'Nel nostro paese, poi, dal 1998 il disavanzo è stato quasi sempre prossimo o superiore al 3 per cento del prodotto, un valore superiore a quello della spesa per investimenti: di fatto, è come se avessimo mantenuto il bilancio (di parte corrente) in pareggio o in leggero disavanzo e avessimo realizzato investimenti in deficit, applicando la golden rule. Pertanto, se c'è una carenza di infrastrutture in Italia, le ragioni vanno ricercate soprattutto nella qualità della spesa, non nelle regole di bilancio', 'Il vincolo del debito pubblico' in Corte dei Conti, *La tutela degli interessi finanziari della collettività nel quadro della contabilità pubblica: principi, strumenti, limiti - atti del LXIII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 21-23 settembre 2017* (Giuffrè 2018) 113-114.

[609] Article 119(6), Italian Constitution and Article 3(16-21), Law No 350/2003, the latter also providing a detailed list of type of investments under paragraph 18. In particular, the typologies of investments are not amendable by an administrative decision of the Italian National Institute of Statistics (Istat), as originally set forth, as clarified by the Italian Constitutional Court decision No 425/2004 on the ground of a rule of law argument (para. 8). For a broad overview on the evolution of the Italian constitutional framework in relation to multilevel fiscal dynamics, see above Chapter 3.

[610] Constitutional Law No 1/2012 (n 337)

[611] Article 119(6), Italian Constitution, as amended by Article 4(1)(b), Constitutional Law No 1/2012, and Article 10 Law No 243/2012 [official translation of the Italian Constitutional Court].

at domestic level – 'through provisions of binding force and permanent character, preferably constitutional' – specific obligations pertaining to a cyclically adjusted notion of 'budgetary position of the[ir] general government […] balanced or in surplus'[612].

In that regard, it is noteworthy that, despite the heading of the Italian Constitutional Law No 1/2012 emphatically referring to 'balanced budget' ('Introduzione del principio del pareggio di bilancio nella Carta costituzionale'), neither such constitutional law nor the ensuing domestic provisions (i.e., the implementing Law No 243/2012) are regarded as having introduced the principle of 'balanced budget' in the Italian legal system[613].

Instead of the 'balanced budget', it was rather preferred the (softer and sounder) notion of 'budgetary equilibrium' between revenue and spending[614] that, nonetheless, the Commission deemed in compliance with the TSCG obligations[615].

In line with our analysis, the aforementioned constitutional amendments in 2012 on investment spending at local level exemplify the set of measures that – as we argue – have been progressively put in place to mitigate the Fiscal Policy Risk arising from the

[612] Article 3(1) and (2), TSCG. For further references, see also above Section 2.2 and (n 219), to be considered also in relation to the previous Euro Plus Pact's non-binding provisions (nn 216 and 334).
[613] As aptly noted by the Court of Auditors stating, in relation to Article 81 of the Italian Constitution, 'Il pareggio di bilancio è, in realtà, rimasto solo in rubrica: nel testo, infatti si fa riferimento all'"equilibrio fra le entrate e le spese"' (decision No 3/2011/CONS commenting on the draft version of the Constitutional Law No 1/2012).
[614] As opposed to the stricter 'balanced budget' rule, the budgetary equilibrium' allows 'in caso di output gap negativo [di…] rispetta[re le prescrizioni europee…] in presenza di un disavanzo, nell'ambito di un saldo strutturale di medio periodo in pareggio', Court of Auditors, decision No 3/2011/CONS. For a comprehensive analysis on the current notion of 'budgetary equilibrium' and its functioning in respect to the subgovernmental fiscal relations, see Court of Auditors, Sez. contr. No 20/2019 and the correspondent Italian Treasury and Home office ministerial circular of 9 March 2020, No 5, as later confirmed by the aforementioned circular of 15 March 2021, No 8 (above n 492), and Ministerial Decree of the Treasury as of 1 August 2019 amending Annex No 4 of Legislative Decree No 118/2011.
[615] Commission, 'Country Annex "Italy" to the Report from the Commission presented under Article 8 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union' C(2017) 1201 final 6.

multilevel governance of a Eurozone Member State like Italy.

Accordingly, the Italian legal regime on investments and deficit spending for local authorities has been heavily regulated, via public law, both in terms of procedures[616] and accounting rules[617] as to mitigate the risk of an unforeseen increase of the general government's total debt exposure for the central government vis-à-vis the Union.

At the same time, as it has been earlier pointed out[618], the rationale for supporting (pro-growth) public investments is of significance both in political and economic terms. To this end, Article 119 of the Italian Constitution presents a balance between the programmatic element of increasing social cohesion at local level and the economic favour for allowing public investments that are meant as pro-growth in their nature.

As regards paragraphs 3 and 5, Article 119 ensures that the subnational governments receive a sufficient (de minimis) allocation of funds, while leaving to the State the capacity of conferring 'supplementary resources' to the general allocation of funds, as to 'to promote economic development along with social cohesion and solidarity, to eliminate economic and social imbalances, to foster the exercise of the rights of the person or to achieve goals other than those pursued in the ordinary implementation of their functions'[619].

Then, under paragraph 6, Article 119 provides for an exception to the otherwise general prohibition of deficit spending among subnational governments for the sake

[616] For investment spending, see Articles 199-201, Legislative Decree No 267/2000 ('TUEL'). For borrowing, see Articles 202-207, TUEL, while for regions Article 62, Legislative Decree No 118/2011, as amended by Article 1(1)(aa), Legislative Decree No 126/2014. Further, on the different categories of local authorities' borrowing that follow within the regulatory scope of Article 119 of the Italian Constitution, see Article 3(17), Legislative Decree No 350/2003.
[617] See Annex No 4, Legislative Decree No 118/2011.
[618] Above (nn 577 and 578).
[619] [Official translation of the Italian Constitutional Court].

of pursuing public investments. In so doing, within the limits arising from the EU Fiscal Network, in terms of fiscal rules and fiscal commitments undertaken by the central government, local government are then positively regarded in exercising their authority and financial capacity, in adherence with the subsidiarity principle, for contributing to the national sustainable growth.

Against this background, we proceed with the analysis of regulating public investments within the 'Domestic sub-system' and, to better exemplify this, we specifically single out the topic of infrastructure spending in relation to the 'quasi golden rule'.

As noted by James Buchanan, there is a non-negative relation between investments and borrowing and the overall discourse around deficit spending for national infrastructures makes no exception to that. Indeed, if it is unquestionably true that debt financing shifts 'the real cost of expenditures to future generations', hence bringing about concerns over intergeneration responsibility[620], it is equally true that '[…] the exclusive reliance on tax financing was shown to provide decisions biased against long-term public investment projects'[621].

In this perspective, it is possible first to consider the distribution of legislative and administrative competences among the State and regions in Italy so to represent the legal conundrum that governs the public policy on investment spending. This multilevel complexity, alongside with the fiscal implications of the nuanced setup of the Domestic

[620] See above (n 558).

[621] James M Buchanan, *Public Principles of Public Debt – Vol. 2* (Liberty Fund 1999) 130. Further on future generations and fiscal policies, see Italian Constitutional Court decision No 88/2014 stating 'Si deve aggiungere che l'attuazione dei nuovi princìpi, e in particolare di quello della sostenibilità del debito pubblico, implica una responsabilità che, in attuazione di quelli «fondanti» (sentenza n. 264 del 2012) di solidarietà e di eguaglianza, non è solo delle istituzioni ma anche di ciascun cittadino nei confronti degli altri, ivi compresi quelli delle generazioni future' (para. 7.2). More recently, also No 163/2020.

Stability Pact[622] and a generalised lack of programming and implementing capacity, has reasonably led to the 'critical' reduction of public investments at regional and local level[623].

In terms of governance, the 2001 constitutional reform represents a turning point in Italy as it reverses the previous setup for the distribution of competences among State and regions which was almost entirely on the sole State responsibility with limited exceptions (i.e., public works of 'regional interest')[624]. In so doing, it includes important competences pertaining to infrastructures (i.e., 'large transport and navigation networks', 'civil ports and airports', or 'national production, transport and distribution of energy') in the area of 'concurrent' or 'shared' legislative competence among the State and regions, meaning that the national government has a power limited to setting out the 'fundamental principles' while leaving to the concerned region the detailed regulation.

Over time, such wobbly institutional setup has been challenged by the national government with the scope of attracting larger competences by enacting a framework legislation on infrastructure regulation and programming in the timespan 2002-

[622] See above Section 3.1.4.

[623] Corte dei Conti, (2021) 'Rapporto 2021 sul coordinamento della finanza pubblica' 361. According to the Italian Court of Auditors, 'Dal 2001 al 2019, infatti, il mondo delle autonomie territoriali ha fatto registrare una caduta della spesa in conto capitale in termini reali di poco inferiore al 55 per cento, pari ad una perdita del volume di spesa (a prezzi 2015) di circa 28 miliardi. L'andamento negativo si è riverberato anche sugli investimenti fissi lordi che rappresentano oltre il 50 per cento della spesa in conto capitale e che si sono ridotti di oltre il 48 per cento (dai 24,2 miliardi del 2001- sempre a prezzi 2015 – ai 12,5 del 2019)'. On the importance of stable financing for the subnational government's programming, see the 'warning', spelled out by the Italian Constitutional Court towards the State, as it posits 'La sottrazione *ex lege* di parte delle risorse attuative di programmi già perfezionati negli esercizi precedenti finisce per ledere anche l'autonomia dell'ente territoriale che vi è sottoposto' (decision No 101/2018, para. 6.2.2).

[624] Susanna Screpanti, 'Le politiche infrastrutturali' in Sabino Cassese (ed), *La nuova costituzione economica* (6th edn, Laterza 2021) 49.

2013[625]. Upon a landmark decision of the Italian Constitutional Court[626], it has been stated that it is not per se constitutionally illegitimate a legislation that confers to the sole State an administrative power in an area of shared competence on the basis of the principles of subsidiarity and differentiation, to the extent that it is deemed proportional and there has been a multilevel agreement ('intesa') with the concerned region[627].

In this regard, we earlier noted that in 2016 it occurred a (failed) attempt to reform the Italian Constitution introducing, among others, a 'supremacy clause'[628]. Such provision was meant to grant the government with the power to solicit the State's legislative competence over the regions whenever it is necessary for preserving the 'legal or economic unity or for reasons of 'national interest'[629]. In addition to that, the shared competence over regulating 'national production, transport and distribution of energy' was intended to move to the sole State's remit, while a specific State competence was accorded in relation to 'strategic infrastructures and large transport networks' of national interest[630]. Though, such initiative remained dead letter since the referendum for the confirmation, following to the Parliamentary approval of the constitutional amendments, rejected the overall text.

At local level, in coherence with the 'quasi golden rule' set out in the Italian Constitution

[625] Law No 443/2001 ('Legge Obiettivo'), later repealed by Article 217(1)(d), Legislative Decree No 50/2016 ('Italian Public Procurement Code').
[626] Italian Constitutional Court, decision No 303/2003 (see also below n 672). For a critical comment stressing that the decision offers 'una lettura pericolosa e tendenzialmente espansiva del principio di sussidiarietà', Francesco Merloni, 'Infrastrutture, ambiente e governo del territorio' (2007) 35 Le Regioni 61.
[627] For a (negative) example, see Italian Constitutional Court decision No 233/2004.
[628] See above (nn 332 and 366).
[629] Article 31(1) of the text of the constitutional reform amending Article 117 of the Italian Constitution, as published in the Italian official journal (Gazzetta Ufficiale) No 88 of 15 April 2016.
[630] *Ibid*.

under Article 119(6), the recourse to borrowing for local governments is allowed exclusively for investment expenditure and under an enhanced budgetary scrutiny[631].

In implementing the said constitutional provision, the rules governing local authorities then set out specific criteria as to assess the municipal capacity for taking out loans according to the current sources of incomes (e.g., direct municipal taxation) and expenditures (e.g., public employees, provision of goods and services)[632].

Moreover, before confirming the viability to municipal borrowing, the concerned local entity enters into an agreement ('intesa') with the region[633] so to assure the respect, for the relevant year, of the budgetary rules in relation to of final revenues and final expenditure (both at the budget formation and the outturn approval stages)[634]. This constitutes a preliminary analysis for ensuring the budgetary equilibrium that is a

[631] In providing an opinion concerning Article 119(6) of the Italia Constitution, the Court of Auditors for the Campania Region put forward a public interest argument in decision 96/2020 stating 'L'art. 119 comma 6 Cost, come è noto, viene considerato una norma costituzionale a applicazione diretta, la quale, per la completezza della sua fattispecie, può determinare (*recte* limitare) la validità o meno di negozi. […] Tale divieto è espressione, per la sua collocazione apicale nel sistema, di un principio di ordine pubblico economico, certamente in grado di generare, da solo, una ipotesi di nullità virtuale (art. 1418 c.c. comma 1) del negozio' (para. 4.3).

[632] For a reference, see Article 204, TUEL. On the accounting criteria for distinguishing among current and investment expenses, see Articles 5.2 (current expenditures) and 5.3 (investment expenditures) Annex 4.2, Law No 118/2011. On this matter, we further refer to the important decision of the Italian Constitutional Court No 425/2004 on the 'non-univocal' definition of investment expenditures and debt stating 'Non si tratta di nozioni il cui contenuto possa determinarsi a priori, in modo assolutamente univoco' (para. 6), as commented by Matteo Barbero, 'Golden Rule: "Non è oro tutto quello che luccica"!' (2005) 33 Le Regioni 675. Also, Regulation No 549/2013 ('SEC 2010') provides some interpretative references to investment expenditures (paras. 3.124 and 20.104) and debt (paras. 20.71, 20.72, and 20.117).

[633] Article 10(3), Law No 243/2012. Additionally, paragraph 4 provides for a 'national solidarity pact' which is residual to the regional agreement and serves the scope of ensuring a de minimis level of protection of rights. Indeed, as the Italian Consitutional Court posits 'Entrambe le previsioni, nella loro complementarità, trovano, dunque, la ragion d'essere in quel complesso di princìpi costituzionali già richiamati, ed in particolare in quelli di solidarietà e di eguaglianza, alla cui stregua tutte le autonomie territoriali, e in definitiva tutti i cittadini, devono, anche nella ricordata ottica di equità intergenerazionale, essere coinvolti nei sacrifici necessari per garantire la sostenibilità del debito pubblico' (No 88/2014, para. 10.2).

[634] As set forth in Article 9, Law No 243/2012. On the 2012 constitutional reform that forms the basis for the aforementioned Law, see above (n 465) and Section 3.1.2.

prerequisite for deficit borrowing[635].

In case of non-compliance with the budgetary equilibrium obligations, either ex-ante or ex-post, the concerned local authorities shall make sure to abide with the obligations within three years under the monitoring of the Treasury and Italian Court of Auditors[636], whereas in case of borrowing for non-investment purposes it entails that the ensuing contract is void and null and the Italian Court of Auditors may issue an economic sanction against the involved officials[637].

In the recent years, thanks to a series of important decisions of the Italian Constitutional Court on budgetary and accounting matters, local authorities in Italy can rely on additional sources of income (i.e., unencumbered budgetary surpluses, …) or means of investments (i.e., lesser limits on the use of 'Fondo Pluriennale Vincolato' for capital expenditures, …)[638]. In so doing, it has been marginally expanded for subnational governments the budgetary leeway for investments, which is therefore meant to exert an effect also upon the infrastructure sector. On top of that, the current scenario characterised by the economic and legal framework supporting the NRRP development appears to open up a series of new opportunities in this regard, as we

[635] See Treasury ministerial circular of 15 March 2021, No 8.

[636] Article 9(2), Law No 243/2012; Article 148-*bis*, TUEL.

[637] Article 30(15), Law No 289/2002.

[638] Italian Constitutional Court decisions Nos 247/2017, 61/2018, and 101/2018. For a comment, 'Ricordo al riguardo che anche la Corte […] ha lambito queste questioni: infatti, riconoscendo il recupero del Fondo pluriennale vincolato (FPV) e dell'avanzo di amministrazione delle autonomie territoriali nell'ambito delle entrate valevoli ai fini dell'"equilibrio", ne ha valutato gli effetti favorevoli sul riavvio degli investimenti, in precedenza mortificato dalle regole del Patto di stabilità; con la sentenza n. 61[/2018] si è anche riconosciuta la natura anticiclica degli interventi previsti dal nuovo art. 81 Cost.' Giorgio Lattanzi, 'Intervento' in Corte dei Conti, *Sviluppo economico, vincoli finanziari e qualità dei servizi: strumenti e garanzie - atti del LXIV Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2018* (Giuffrè 2019) 33. Specifically on decision No 61/2018, see Chiara Bergonzini, 'Fondi vincolati, interventi strutturali dello Stato e competenze delle Regioni: le conseguenze della natura sostanziale della legge di bilancio e del «principio di anticiclicità»' (2018) 46 Le Regioni 712 (stressing the importance of the argumentative shift on competence from the single subject-matter to public policies).

develop in the following Section.

4.2 The Development of a National Recovery and Resilience Plan for Italy in relation to investment spending

The present Section retraces the legal response of Italy to the 'Next Generation EU' (NGEU) programme that is the recovery package that the Union has put forward to boost the economic and institutional resilience of the Member States most affected by the COVID-19 pandemic[639].

In so doing, we build upon the scrutiny on the 'European sub-system' dimension of the EU Fiscal Network, as an interconnected multilevel system of fiscal relations. In particular, we have emphasised the legal response to asymmetric shocks across the EMU, like the global pandemic, pointing out the importance of setting an agenda for a long-awaited reform of the EU economic governance on fiscal policies that takes inspiration from the positive strategy of the NGEU.

Further, the perspective we undertake is to consider pro-growth investment spending (e.g., infrastructures, research and developments, …) and the related legal toolkit coming out from the NGEU as an example of the use of public law for promoting economic expansion and countercyclical measures, hence performing a possible stabilisation function at policy maker's disposal in addition to the monetary and fiscal policy.

[639] For references on the 'Europen sub-system' of the NGEU see (n 275) and Section [2.3] more in general.

On that note, in line with the deadline set forth in Article 30 of the RRF Regulation[640], Italy presented, on 30 April 2021, its proposal for a National Recovery and Resilience Plan (NRRP) to the Commission[641], taking into consideration not only the mandatory flagship investment areas (e.g., green transition, digital transition, …) but also the National Reforms Programmes (NRPs) and Country-specific Recommendations (CSRs) addressed to Italy in 2019 and 2020 within the European Semester[642].

Accordingly, the initiatives that are financed by the NGEU funds shall be expenditures that 'bring beneficial results to society, the economy and/or the environment' with particular regard to those 'promoting measures that, if taken now, would bring about a structural change and have a long-lasting impact on economic and societal resilience, sustainable competitiveness (green and digital transitions), and employment'[643].

The overall assessment of the Italian NRRP proposal was eventually deemed positive by the Union[644], hence approving the allocation to Italy of around € 69 billion of grants and € 123 billion of loans, coming from the 'extraordinary and temporary additional

[640] Regulation (EU) No 241/2021 establishing the Recovery and Resilience Facility. (n 29).

[641] In theory, Article 18, Regulation (EU) No 241/2021 reads that the NRRPs 'shall be officially submitted, as a rule, by 30 April [2021]'. However, at a later stage, the Commission states 'As a rule, Member States are invited to notify their plans before 30 April but can do so at any point in time until mid-2022. 30 April is an orientation date, not a deadline', 'Questions and answers: The Recovery and Resilience Facility', 22 April 2021.

[642] On a general note, see Article 14(2), 15(3)(a), 16(3)(a), Annex II(2.2), Regulation (EU) No 241/2021. On Italy, see Council CSR 2020 (n 598); Council, 'Recommendation on the 2019 National Reform Programme of Italy and delivering a Council opinion on the 2019 Stability Programme of Italy' [2019] OJ C 301/69. Pertaining to infrastructure, the latter CSR provides 'Investment is needed to raise the quality and sustainability of the country's infrastructure. In the transport sector, Italy has not delivered on its infrastructure investment strategy (Connettere l'Italia). Very limited progress has been made in implementing the planned investments in rail, road and sustainable urban mobility. This is due to administrative delays, spending inefficiencies, incomplete implementation of the Code on procurement and concessions and litigation' (para. 22).

[643] Commission, 'Working Staff Document – Guidance to Member States Recovery and Resilience Plans' SWD(2021) 12 final 16.

[644] Commission, 'Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Italy' COM(2021) 344 final; Commission, Staff Working Document – Analysis of the recovery and resilience plan of Italy' SWD(2021) 165 final.

means' borrowed on capital markets[645], for a total number of 190 measures broken down in 58 reforms and 132 investments to be performed by 31 August 2026. In addition to the prefinancing of 13% (€ 24.9 billion), as requested by Italy and already disbursed by the Commission in mid-August 2021[646], the related payments will be therefore paid progressively in instalments to Italy as to ensure that the set of milestones and targets (agreed ex-ante with the Commission) are fulfilled in line with 'the efficient budgetary management of the appropriations needed to cover repayments for the funds borrowed'[647].

On top of that, the Union has also contributed for the stabilisation of Italy via the REACT-EU resources, for which the Commission has increased the basket of economic support providing around € 13 billion, later committed to up to € 14,4 billion, for the sake of supporting access to the labour market while also contributing to social inclusion, anti-discrimination and poverty eradication measures[648].

In this context, Italy has further intended to complement with own resources the sums already allocated by the EU ('Piano nazionale per gli investimenti complementari', 'PNC') amounting to around € 31 billion between 2021-2026[649]. In coherence with the NRRP strategy, the PNC contribution will employ the same methodology, objectives,

[645] See Article 5, Council Decision (EU, Euratom) No 2053/2020 (n 299). It is also worth stressing that the NGEU loans are repaid by the borrowing Member States, while the NGEU grants are repaid by the EU budget.

[646] As a precondition for the financing, Italy has been requested to enter both a financing agreement (pursuant to Article 23(1), Regulation (EU) No 241/2021) and a loan agreement (pursuant to Article 15(2), Regulation (EU) No 241/2021).

[647] *Ibid*. (Recital 20).

[648] Recovery Assistance for Cohesion and the Territories of Europe ('REACT-EU') as provided at Regulation (EU) No 2221/2020 amending Regulation (EU) No 1303/2013 as regards additional resources and implementing arrangements to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and its social consequences and for preparing a green, digital and resilient recovery of the economy (REACT-EU) [2020] OJ L 437/30.

[649] Article 1, Law-Decree No 59/2021, as converted in law by Law No 101/2021.

and monitoring set out in the plan approved by Council[650], except from the reporting to the Commission and time limit obligations for the implementation which in this case are not provided for due to the national – and not European – source of funds.

As a whole, these three main financing facilities make the overall firepower of the NRRP strategy for Italy totalling to around € 235 billion in the timespan between 2021 and 2026. In this regard, as opposed to the loans, it is important to highlight that the EU funds in the form of grants present a special accounting regime having no impact on government net lending/borrowing since 'the transfers from the EU institutions are not considered national government expenditure but as EU expenditure'[651].

Furthermore, other sources of EU funds (e.g., InvestEU programme, Horizon Europe missions, Digital Europe Programme, and Facility and the cohesion policy funds, …) shall be considered together with the relevant NRRP financing.

Indeed, since its outset, the NGEU acknowledged that the Member States were still meant to receiving 'existing or planned Union financing'[652]. Nonetheless, as a matter of principle, the support from the Recovery Facility 'shall not, unless for duly justified cases, substitute recurring national budgetary expenditure and shall respect the principle of additionality of the Union funding […]'[653], meaning that such support 'shall be additional to the support provided under other Union funds and programmes' to the extent that it 'does not cover the same cost'[654]. Within the NRRP, Italy shall hence roll out a clear strategy to avoid double-funding, as well as differentiating 'the specific

[650] To this end, pursuant to Article 6, Law-Decree No 77/2021, it has been established within the Treasury a specific PNRR office for the operational coordination, monitoring, reporting, and control.
[651] Eurostat, 'Manual on Government Deficit and Debt – Implementation of ESA 2010', 2019 edition (p. 124, para. 26).
[652] Article 18(4)(l), Regulation (EU) No 241/2021.
[653] Article 4a(1), Regulation (EU) No 241/2021.
[654] Article 8, Regulation (EU) No 241/2021.

measures, activities and projects funded under the Recovery and Resilience Facility from those financed under other Union programmes and instruments'[655].

In terms of domestic allocation of NGEU funds, the Italian government has then assigned the financial resources to the relevant ministries and central public administrations[656] that are entrusted with the administrative cascading and operational coordination, monitoring, reporting, and control[657]. Such sums, stemming from the NGEU programme to the Italian NRRP, are therefore centrally managed by the Treasury which has set up two different non-interest-bearing current accounts for loans and grants ('Fondo di rotazione per l'attuazione del Next Generation EU-Italia') for the disbursement in favour of the beneficiaries[658].

Such beneficiaries could be either the public administrations/entities responsible for the implementation of single projects upon instruction by the competent central administration or the central administration that can therefore suballocate the concerned sums to the final beneficiaries or to the single public administrations/entities responsible for the implementation of single projects[659]. The difference between the

[655] Commission, 'Staff Working Document – Guidance to Member States Recovery and Resilience Plans' SWD(2021) 12 final 42. For an example on the specific conditions to avoid double-funding at domestic level, see Italian Treasury ministerial circular No 33 of 31 December 2021.

[656] Italian Treasury Ministerial Decree of 6 August 2021 (published on the Italian Official Journal on 24 September 2021).

[657] Article 8(1) Law-Decree No 77/2021. In terms of monitoring, the d.P.C.M. of 15 September 2021 has set out detailed instructions for the concerned administrations (e.g., on the use of a specific code for each project (DUP) indicating the set of information to be monitored). For some comments, see Marco Villani and Sergio Vasarri, 'La governance del Recovery Fund ed il Sistema dei controlli' (2021) 1 Rivista della Corte dei Conti 19 (stressing the importance for the Italian Court of Auditors of a 'project cycle management' approach for an ongoing monitoring and controls of the NRRP); Guido Rivosecchi, 'La Corte dei conti ai tempi del "Recovery plan": quale ruolo tra responsabilità amministrativa-contabile, semplificazioni e investimenti' (2021) Federalismi.it 1 (on the possible risk of turning the Court of Auditors into a body for consulting activity as opposed to controlling ex-post the results of the administrative activity).

[658] Article 1(1037), Law No 178/2020 (2021 Budget Law); Article 5, Law No 183/1987; Italian Treasury's Decree 11 October 2021.

[659] Article 2(3-4), Italian Treasury Ministerial Decree 11 October 2021 (published on the Italian Official

two forms of allowance seems indeed to rest in the different programming of the concerned initiatives.

In greater details, the NRRP sums are transferred domestically in instalments to the concerned responsible entity starting with a 10% pre-financing, then with further instalments up to 90% of the overall cost of the initiative, and finally with the outstanding 10% for full and final settlement, once having provided the degree of performance according to the concerned milestones and targets, as well as to other specific forms of conditionality attached to the NRRP funds (e.g., territoriality, climatic and digital objectives[660], respect of the principle of 'do not significant harm' on the environmental impact[661], …). On the EU financing side, following to the aforementioned 13% prefinancing to Italy, the Treasury can make biannually a request for the payment of the Union contribution, alongside with the relevant evidence on the attainment of the NRRP objectives. Hence, as the Commission receives such request, it carries out a preliminary assessment before disbursing the related sums.

Additionally, specific provisions have been catered so to increase flexibility of the domestic accounting framework on public finance for the recipient of the funds among the concerned entities (i.e., waiver for certain obligations on budgetary provisioning/reserve, speeding up the process on the commitment of expenditures, …)[662], provided that the PNRR sums shall be considered as under full supervision both at national and European level.

The allocated sums may still be subject to revocation in case of non-performance of

Journal on 23 November 2021).

[660] So called 'tagging' pursuant to Article art. 9, Regulation (EU) No 241/2021.

[661] As per Article 17, Regulation (EU) No 852/2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2088/2019 [2020] OJ L 198/13.

[662] Article 15(3, 4, and 4-*bis*), Law-Decree No 77/2021.

the obligations pertaining to time scheduling and monitoring, to the extent that no legally binding financial commitment has been duly undertaken[663]. In terms of competence, the minister responsible for a central administration shall revoke the financing, while the funds belonging to a central administration are revoked by means of a decree of the President of the Council of Ministers ('d.P.C.M.')[664]. The financial amounts accrued because of such revocations are hence reallocated to administrations on a reward basis taking into account the standard of the best use of financial resources. The Home office is then entitled to the foreclosure of financial sums from the defaulting administrations[665].

Besides the NGEU idea of setting up a performance-based investment instrument (through milestones and targets), we earlier stressed that an important degree of innovation of the NGEU strategy is characterised by combining the injection of additional public finance with horizontal, enabling, and structural reforms (e.g., public administration, competition law, public procurement, judiciary system, taxation, disability, and administrative simplifications in the energy sector, …)[666]. It is indeed the view of the Commission that 'A consistent mix between monetary and fiscal policies along with structural reforms and measures to maintain financial stability will continue to be essential for the good functioning of the euro area, in full compliance with the respective roles of the Member States and institutions under the Treaty'[667].

---

[663] Article 1(7-*bis*), Law-Decree No 59/2021.
[664] *Ibid*.
[665] Article 1(128-129), Law No 228/2012.
[666] Recital No 6, Regulation (EU) No 241/2021 reads 'Sustainable and growth-enhancing reforms and investments that address structural weaknesses of Member State economies, and that strengthen the resilience, increase productivity and lead to higher competitiveness of Member States, will therefore be essential to set those economies back on track and reduce inequalities and divergences in the Union'.
[667] Recital No 5, Council, 'Recommendation on the economic policy of the euro area' COM(2021) 742 final.

As such, the fact that strengthening the national institutional framework is regarded as an essential instrument of complementary economic stabilisation in addition to the NGEU financing leads us to confirm our tentative claim that a legal expansionary mechanism can be conceived through public law.

Such legal enabling function for the economy is then accompanied in Italy with a domestic multi-level governance for the NRRP involving mainly central and local administrations[668].

In view of that, it shall be distinguished between the political and the administrative governance of the domestic plan and then between the national and subnational government management of the single initiatives set out in the NRRP.

On the one hand, the Italian NRRP political governance[669] comprises of a Steering Committee ('Cabina di Regia') at the Presidency of the Council of Ministers, with coordinating and subsidiary powers[670], a Technical Secretariat ('Segreteria Tecnica'), supporting the Steering Committee, a Central Service for the NRRP ('Servizio centrale per il PNRR') at the Treasury, for operational coordination, a Permanent Roundtable

[668] Article 1(4)(o), Law-Decree No 77/2021 reads that qualify as 'Soggetto attuatore' 'i soggetti pubblici o privati che provvedono alla realizzazione degli interventi previsti dal PNRR' that, on the public side, comprises of 'Amministrazioni centrali, le Regioni, le provincie autonome di Trento e Bolzano e gli Enti locali (sulla base delle specifiche competenze istituzionali ovvero della diversa titolarità degli interventi definita nel PNRR) attraverso le proprie strutture ovvero avvalendosi di soggetti attuatori esterni individuati nel PNRR ovvero con le modalità previste dalla normativa nazionale ed europea vigente' (Article 9(1), Law-Decree No 77/2021).

[669] Articles 2-8, Law-Decree No 77/2021. Commenting the preliminary works of such Law-Decree with a highlight on the complexity of the multilevel governance, Italian Court of Auditors, 'Memoria sul decreto legge n. 77/2021 - A.C. 3146' June 2021. For a comparison on the French model of governance of the national NRRP, Angelo Bianchi, Raffaele Colaizzo, and Antonio Valerio Di Michele, 'La realizzazione delle opere pubbliche nel Recovery Plan' (2021) Amministrazione in cammino 1.

[670] In relation to the subsidiary powers, according to Article 12 Law-Decree No 77/2021, in case of non-performance of a subnational government's obligation within the NRRP, the Steering Committee can order the concerned entity to take action by 30 days and afterwards reassign the responsibility to another administration or to a special commissioner to ensure the complete execution of the activity.

('Tavolo permanente per il partenariato economico, sociale e territoriale'), for enhancing the coordination and general consultation among national associations (e.g., trade unions, employers' federation, banking associations, non-profit associations, …), and an Audit Unit, with monitoring, reporting, and controlling functions. Then, two committees are also regarded to perform additional coordination functions in relation to investments, and specifically: The already existing Inter-ministerial committee for Economic Programming and Sustainable Development (CIPESS) and the Interministerial Committee for Ecological Transition (CITE). Finally, each central administration responsible for performing NRRP activities is mandated to establish an internal unit serving as a point of contact with the said Central Service for the NRRP that carries out the monitoring/control towards the concerned entities as well as the financing liaison with the Commission.

On the other hand, in terms of administrative governance there are two possible means to implement the NRRP initiatives according to the design conceived by the Italian government: Directly managed by the central administration (i.e., a Ministry) performing all the necessary activities from the tender to the final reporting or indirectly managed ('a regia') by another public entity/subnational government to which the central administration grants/allocates the funds via call for tenders/interests or according to a specific financing law. In the latter scenario, the central administration enters into an agreement with the assignee entity on the terms of financing concerning the objectives (milestones and targets) and a miscellanea of ancillary obligations (e.g., monitoring, reporting, …)[671].

[671] Such agreements among public administrations are regulated by Article 15, Law No 241/1990 ('Italian administrative procedure Code') and by Articles 5 and 6, Legislative Decree No 50/2016 ('Italian procurement Code'), as noted at page 8 by Italian Treasury's 'Istruzioni tecniche per la selezione dei progetti PNRR' of 11 October 2021, annexed to Italian Treasury ministerial circular No 21 of 14 October

To conclude, in line with the famous institutional compromise arranged by the Italian Constitutional Court back in 2003[672], whereby the principles of subsidiarity, differentiation, and adequacy are instrumental for conferring upward-looking administrative competences in Italy also where subject matters are under 'concurrent' or 'shared' legislative powers among State and regions, the model of multilevel governance intended for the Italian NRRP combines a strong preference for centralisation and a residual degree of decentralisation, where territorial or specific local administrative competences are needed.

This attitude appears to confirm a nuanced corollary of the proposed notion of 'Fiscal Policy Risk', that has so far supported within the EU Fiscal Network a stronger encroachment of the Italian central government upon the subnational governments, being the sole responsible entity towards the Union, for the sake of ensuring the overall stability of such system.

Indeed, as it is the case with a 'negative' function of public law, as a means to governing risk-taking in a multilevel governance, a similar conclusion can be drawn with a 'positive' function of public law as a means to enabling and encouraging risk-taking among the institutions in relation to pro-growth public investments.

To conclude, referring back to the Norberto Bobbio's theory about the 'promotional' function of the law[673], we can embolden the argument that a similar centralisation effect in favour of the central government, as the sole responsible entity in the EU

2021.

[672] We refer to the Italian Constitutional Court Decision No 303/2003 (see also above n 626). For some comments, see Antonio Brancasi, Il coordinamento della finanza pubblica come potestà legislativa e come funzione amministrativa' (2004) 32 Le Regioni 763; Sergio Bartole, 'Collaborazione e sussidiarietà nel nuovo ordine regionale' (2004) 32 Le Regioni 578; Luisa Torchia, 'In principio sono le funzioni (amministrative): la legislazione seguirà' (2003) Astridonline.it 1.

[673] Above (n 27).

Fiscal Network, vis-à-vis subnational governments could likewise take place in the case of the NGEU as it appears to complement, in the form of an expansionary legal policy, the monetary and fiscal policies to sustain a stable and sustainable economy.

4.3 Perspectives for an Analysis on the Possible Way Forward in a Post-NGEU Union

As we progressively move towards the end of this research, we aim at outlining the importance of advocating for a specific institutional development in a post-NGEU Union that would consist in overcoming the 'Janus Trap': The asymmetric governance of the EMU stuck on a centralised monetary policy at EU level and decentralised economic and fiscal policy at Member States' level[674].

For this pivotal discussion, we have so far chosen the image of Janus, the two-faced ancient Roman myth, that iconifies the importance of a strong and timely push beyond such a dysfunctional constitutional governance that simultaneously 'looks' at the past and at the future of the Union, respectively a 'backward-looking' model based on national sovereignty and a 'forward-looking' model of conferral of sovereignty.

The metaphor of the 'Janus Trap' represents indeed the very quagmire and institutional burden to which the Union is politically and legally entangled, although it is these days increasingly common to read institutional position papers stating that 'Ideally, in a deeper Economic and Monetary Union, the central fiscal capacity would have a sufficiently large budget fully based on own resources and with the capacity to borrow'[675].

[674] See above Section 2.
[675] EFB Annual Report 2020 (n 290) 78.

While the current Section does not intend to advance a comprehensive reform on the EU fiscal policy nor to retrace the series of policy proposals for reforming the EMU that have been authoritatively presented[676], it is worth stressing that, in terms of fiscal governance and policies, it is a fairly widespread opinion that 'Europe's Economic and Monetary Union (EMU) today is like a house that was built over decades but only partially finished'[677]. While this sense of 'non finito' may be of utmost beauty in the Michelangelo's sculpture, it does not fit very well in institutional design.

To this end, as we earlier noted, there is an ongoing Union-wide debate on reforming the EU economic governance, starting from the SGP framework[678] and then possibly moving to the plethora of ancillary regulations taking different legal forms (from soft law to international treaties) that could be simplified and transposed to the Union law. In that sense, at least shifting away from complexity and from the overall lack of predictability of the SGP appears to be an as meaningful as attainable policy objective.

Of course, this does not mean to repeal neither the very essence of the ex-ante economic coordination element of the EU fiscal rules (e.g., Country-Specific Recommendations, European Semester, …) nor the ex-post fiscal surveillance/discipline which remain essential – and inescapable – for a fully functioning monetary union in reducing to an extent the risk of moral hazard among Member States.

For sure, increased dialogue, transparency, and support among both the concerned Member States and the EU institutions Commission/Council would be much welcomed

[676] For an overview, see above (n 200) and Craig and Markakis, *EMU Reform* (n 205).
[677] Five Presidents' Report (n 186) 4.
[678] For some references, see Reforming SGP: Report on Economic governance review (n 61), Report on Economic governance review – Working Staff Document (n 225), Review of the suitability of the Council Directive 2011/85/EU – Working Staff Document (n 17).

as these would bring value to the economic convergence element. Likewise, a greater macroeconomic-oriented policy guidance, building upon the MIP procedure, could also bring important awareness on targeting and monitoring policies for enhancing economic integration.

Though, these elements are per se not sufficient in case of severe macroeconomic stress – as we have understood from the different crises and recessionary shocks occurred across the EMU over the last decade.

Indeed, such economic downturns have shown, on the one hand, that the monetary policy cannot be regarded in the EMU as the sole solution for all the economic scenarios, while, on the other hand, national budgets and fiscal stabilisers are equally insufficiently and inefficiently capable of withstanding tough economic crisis if taken alone[679].

To better exemplify this, we can recall a witting quote of Mohamed El-Erian according to which monetary policy cannot be considered 'the only game in town' as indeed, at least under the current global macroeconomic conditions, central banks have lost their grip for stabilisation[680]. This proposition appears to be even more important in the case of the EU economic governance scenario, if considered in light of what we have metaphorically named the 'Janus Trap'. In such a context, additional fiscal levers are hence to be considered with greater attention, and therefore in the area of EU

[679] As pointed out by the Commission, 'Reducing high and divergent public debt ratios in a sustainable, growth-friendly manner will be a key post-crisis challenge' Report on Economic governance review (n 61) 10.

[680] Mohamed A. El-Erian, *The Only Game in Town* (2016 Random House). On a similar line, '[…] monetary policy remains close to the effective lower bound, which would motivate a stronger role for fiscal policy' Othman Bouabdallah et al, 'ECB Economic Bulletin - Issue 6' (2020) 129. Additional comments also at Francesco Giavazzi et al, 'Revising the European Fiscal Framework' <www.governo.it/sites/governo.it/files/documenti/documenti/Notizie-allegati/Reform_SGP.pdf> accessed 3 January 2022.

economic and fiscal governance there is still much to do in terms of setting up a proper rule-based fiscal stabilisation mechanisms that may go beyond government discretion and be automatically activated under the conditions of downturns and upturns of the economic cycle[681].

In such regard, the ECB has aptly noted that 'effective macroeconomic stabilisation requires fiscal policy and monetary policy to complement each other in times of crisis' and from that it would naturally follow the need for a constitutional twist for establishing a permanent fiscal stabilisation function in the Eurozone[682].

To better complement this, it can be further referred to Carlo Azeglio Ciampi's statement that 'Non c'è niente da fare: alla moneta deve seguire il coordinamento delle politiche economiche, deve nascere un vero mercato europeo, devono armonizzarsi le politiche fiscali e di sviluppo. Solo così alla condizione che l'euro garantisce di stabilità si potrà davvero affiancare l'azione necessaria ad assicurare la crescita'[683].

In other terms, a Eurozone-wide fiscal stabilisation mechanism shall be regarded as a structural and economically sound consequence of the monetary union and, with the aim of combining growth with stability, a strong rebalancing of the 'economic' element of the Union shall ineludibly be at the very forefront of the EU political agenda.

Accordingly, it then constitutes a relevant interpretative element that on 26 November 2021 Italy and France, both founding members of the Eurozone, have agreed for an enhanced bilateral cooperation whereby the two parties stressed the strategic

[681] On economic upturns, the European Fiscal Board's members have pointed out that 'Once again, many governments failed to take advantage of good economic conditions to build buffers' Niels Thygesen et al, 'Reforming the EU fiscal framework: Now is the time' (2020) VoxEU.org <https://voxeu.org/article/reforming-eu-fiscal-framework-now-time> accessed 3 January 2022.
[682] ECB, 2021 Economic Bulletin (n 255) 83.
[683] Ciampi, *Non è il paese che sognavo* (n 9) 117.

importance of completing the EMU[684]. It is certainly a broad statement, but it appears at least to highlight the shared political commitment for overcoming the said 'Janus Trap' pertaining to the original EMU asymmetry.

However, unless a larger political convergence takes place, the EMU remains trapped in what it has been aptly described as a 'policy mix trilemma', meaning that 'one cannot have, at the same time, (a) asymmetric fiscal rules of the Maastricht type, (b) monetary policy constrained by the effective lower bound (ELB), and (c) no-central fiscal capacity'[685].

To put it differently, Paul De Grauwe contents that, to the extent that there is no political agreement on the centralisation of the national government budgets, either 'national fiscal policies should be used in a flexible way' or 'substantial autonomy should be reserved for these national fiscal policies'[686] – though none of these options are really considered in the current SGP framework.

On this line of reasoning, some institutional commentators have long since believed that 'the SGP is […] is more about stability than growth' as well as that the fiscal framework should have made 'more explicit the incentives for countries to accelerate

[684] Article 3(3) reads 'Esse agiscono insieme a favore dell'integrazione economica e finanziaria dell'Unione Europea, del completamento dell'Unione economica e monetaria e del rafforzamento della moneta unica, fattore di autonomia strategica per l'Unione Europea'. On this line, the later FT article Draghi and Macron, *The EU's fiscal rules must be reformed* (n 581).

[685] Buti and Messori, *The search for a congruent euro area policy mix* (n 295). Though, for a critique of the 'policy mix' solution from a US standpoint, see Alan Blinder, 'Interactions between Monetary and Fiscal Policy: Yesterday, Today, and Tomorrow' in Jackson Hole Economic Symposium (ed), Proceedings of the 2021 Jackson Hole Symposium 4 <https://www.kansascityfed.org/documents/8368/JH_2021.pdf> accessed 3 January 2022, as he states 'today's policy issue is not the monetary-fiscal mix; both authorities are doing everything they can to stimulate aggregate demand. The more immediate fiscal-monetary issue (at least potentially) is what has come to be called quasi-fiscal policy, meaning central bank purchases of assets (or making loans) that entail some risk of loss - thus "spending taxpayer money" in an actuarial sense'.

[686] De Grauwe, *Economics of Monetary Union* (n 137) 221.

structural reforms'[687]. In that regard, it is relevant to understand that, in the view of the Commission, the European Semester process and the Recovery and Resilience Plans within the NGEU are expected to complement each other and that, in so doing, 'The two processes will be intrinsically linked, making the best use of the existing synergies and without creating overlaps'[688].

Against this background, the very question appears to be if the NGEU instrument – though still temporary in scope – may represent the forerunner of a much-awaited permanent adjustment mechanisms, based on simple and predictable rules and economic indicators, to absorb macroeconomic shocks across the EMU.

By comparing the NGEU programme with the idea of a stabilisation function set out in the 2017 Commission's Roadmap[689] it shall be acknowledged that it somehow resembles that idea. The NGEU combines indeed the favour for flexibility, performed-based assessment, and expenditure-based criteria for the allocation of funds, alongside with a preliminary form of EU fiscal capacity, managed by the Commission and complementary to existing EU budget instruments, by which a national platform for investments is financed through grants and loans.

To draw a preliminary conclusion, if a proper stabilisation fund would be ever permanently operationalised at EU level pushing the economic governance beyond the 'Janus Trap', the pioneering idea of the NGEU would prove how it matters the effectiveness of the inexorable activity of policy research on EU economic governance, having designed for years legally and economically viable solutions to move beyond the EMU institutional impasse while waiting for the right political and societal

[687] Italian Treasury, 'Integrating Structural Reforms in the SGP' (2004) 1.
[688] EU economy after COVID-19 Communication (n 295) 13.
[689] Roadmap Communication (n 200).

momentum – to which the economy is intrinsically embedded – to eventually break through.

5. Theoretical Implications for Public Law

The foregoing analysis is relevant for public law in general terms. It is relevant, first, because it confirms that some of its facets that have been employed over the last decades in the area of fiscal policy could be regarded as mitigating sources of institutional risks for greater macroeconomic stability. Second, it is relevant because it indicates some of the prospective developments in the use of public law for conducting legal policies that would be inherently expansionary.

5.1 A Quick Recapitulation

In order to develop these two lines of reasoning, we would first roll out in brief some of the arguments that have been touch upon in the earlier Chapters alongside with theoretical implications onto public law.

First, we have considered public law, as comprising constitutional law and administrative law, in its capacity of organising, constituting, and governing public institutions in a dynamic, evolving, and lively environment.

In relation to this, it can be argued that public law can, and often does, evolve as its objects change, in connection with the evolution of public functions and powers. More specifically, it coevolves with the variations occurring within the concerned areas of regulation as to remain capable of targeting the relevant sources of risks that it is meant to address and favourably discourage unnecessary limitations to the very functioning of an institutional system[690].

[690] On this note, Guido Carli posits 'il raggiungimento dell'unificazione europea è considerato un evento indispensabile per la sopravvivenza stessa dei valori ai quali si ispirano gli ideali nazionali', in *Considerazioni finali* (n 35) 37.

From that it follows that public law analysis shall embrace a critical function in ascertaining the potentiality of the theory on living constitution, hence supporting in an interpretative manner the necessary adjustments in the self-preservation interest of the concerned system.

Second, public law provides for legal definitions of economic significance that form an essential part in the functioning of the overall fiscal policy governance and also serve as a signalling for the relevant financial markets in relation to specific macroeconomic conditions. For instance, this is the case with the definition of debt, deficit, investment, Medium-Term Budgetary Objectives (MTOs), and many others. Additionally, it shall be noted that such economic elements also influence the understanding and the application of public law legal provisions ending up in a sort of circular argument.

Third, coordination mechanisms via public law may take the form of an ex-ante or ex-post coordination and may be negatively or positively designed for the sake of discouraging or encouraging institutional conducts. To provide an example, we have referred to the SGP framework as an ex-ante form of coordination, where Member States are (negatively) mandate not to undertake certain conducts, and to the NGEU programme as an ex-post type of coordination, where Member States are (positively) encouraged to implement certain conducts.

Accordingly, public law should embrace a new strategy in the area of fiscal policy that is as much concerned to regulate the risk of negative institutional conducts as to promote positive institutional behaviours. To better complement this, public law should provide an adequate balancing between risk-mitigating legal policies and risk-taking legal policies as to also encourage investments on a reward-basis rather than on a sanction-basis only.

Fourth, public law analysis may benefit from the influences of social science and economics, as to better understand its scope of action and complement the legal reasoning with a better understanding of the perimeter of the law and its implication towards other fields of studies, like the functioning of institutions and the macroeconomic implications of legal design.

In this regard, over this study we have come across relevant analytical tools like the idea of risk and risk regulation, the idea of network theories and complexity, as well as the idea of studying institutional behaviours as aggregates in light of the emerging discipline of law and macroeconomics.

5.2 From Micro-economics to Macro-economics: A Public Law Perspective

The remarks made thus far suggest that macro-analysis would open up avenues for public law legal reasoning moving beyond the micro-analysis of the law and institutions that has influenced the law and economics movement in the last decades.

Against this background, these analytical instruments have helped us in developing specific concepts as to better reflect on legal phenomena involving the area of fiscal policy at EU and domestic (Italian) level, and specifically: The notions of 'Fiscal Policy Network', representing the multilevel linkages among fiscal dynamics occurring in a complex multi-system of institutional conducts, and 'Fiscal Policy Risk', the institutional risk of default or noncompliance among subnational governments that could affect the fulfilment of the fiscal policy obligations undertaken by the central government of a Member States towards the Union in the interest of the greater EMU stability.

These two concepts bear normative legal implications. In relation to the 'Fiscal Policy Network', we have claimed that such institutional complexity necessitates to be

governed by public law as to ensure the smooth functioning of such a multisystem network. In relation to the 'Fiscal Policy Risk', we have argued that the very presence of such risk imposes a centralist approach in the governance of multilevel fiscal relations as to ensure that the central government, being the final responsible entity towards the Union, may be in a position to reduce the risk of 'aggregate' noncompliance on financial matters.

These two normative propositions involve directly public law, in its organising capacity, but are not limited to that. In such a context, public law does not only arrange and coordinate institutional fiscal behaviours, it also sets the basis for a legal design that addresses sources of institutional and economic instability.

At this stage of our discourse, sociology and economics would then step in as to embolden the latter proposition. On the one hand, the institutional analysis that sociology pursues would be apt to envisage the correlation among public law design of interdependent networks and the institutional conducts. On the other hand, (macro)economics could explore the significance of legal design (or even 'engineering') in respect to the overall financial stability of such interdependent network of fiscal relations.

As a result, by combining the foregoing analysis, we have noted that public law, thanks to its risk-mitigation capacity, may spread mitigating effects upon the risk of negative events (i.e., aggregate defaults in relation to the Fiscal Policy Risk) triggering the spreading of systemic risks across the EU Fiscal Network, thus posing risks and endangering the stability of the whole multi-system to the detriment of the very functioning of the EMU.

Having that in mind, we can further move to sketching out the main results of our experimental study on how public law may constitute, in a multilevel system like the EMU, an instrument to organise institutional complexity, mitigate institutional risk, and promote institutional conducts encouraging risk-taking for greater public investments, thereby possibly representing an additional policy makers' toolkit for maintaining macroeconomic stability in an incomplete and asymmetric economic and monetary union.

As regards the European sub-system of the EU Fiscal Network, we have noted the importance of overcoming what we have metaphorically called the 'Janus Trap', meaning the still unresolved asymmetry of the EU economic governance, from the 1992 Maastricht Settlement onwards, whereby the economic and fiscal policy are (still) decentralised as opposed to the monetary policy that has been centralised at EU level since then.

Indeed, to the extent that the macroeconomic conditions cannot be (anymore) sufficiently resolved via the prevalence of the monetary policy instrument, the 'Janus Trap' prevents the Union from catering, via the EU budget, effective countercyclical measures with shock-absorbing function against severe recessions not only in relation to country-specific economic shocks but also to EU-wide economic shocks.

In spite of being temporary in scope, the NGEU programme appears to possibly pave the way for a stable public law EU instrument, through a Commission-stirred common debt issuance, for complementing at domestic level national investments with reforms in line with the European strategy, as to increase the sustainable growth capacity of Member States in financial distress.

In light of the above, by means of public law, the NGEU investment device fittingly complements to the scope of (temporarily) rebalancing the EMU governance asymmetry with risk-mitigating and risk-taking mechanism, hence trying to move away from 'Janus Trap'.

Hence, the NGEU instrument performs a risk-mitigating function for the sake of strengthening the Euro area fiscal stance to stabilise the economy. Then, it pursues a risk-taking function by promoting at national level pro-growth investments with strong monitoring and conditionality as to ensure the sustainability of the incurred debt at domestic and EU level. Lastly, it further seems to acknowledge that no monetary union can avoid a strong coordination of the monetary with the fiscal element and, likewise, the EMU cannot afford to keep lagging behind on such an existential policy element.

As per the Domestic sub-system of the EU Fiscal Network pertaining to Italy, we have come across significant developments in the institutional and governance setup on fiscal matters across the country. Such developments have been influenced in part by the European legal framework, and in part by external conditions (i.e., economic or pandemic crises) causing acute economic recessions that have been far neutral from a legal standpoint.

We have therefore focused on substantial elements on the Italian fiscal policy discourse on fiscal matters, as well as on the related institutional organisation of fiscal dynamics, with a specific attention to the subgovernmental fiscal relations among the State and the local governments.

On the substantial element, we have noted how it has been progressively shaped by means of public law the notion of 'budgetary equilibrium' in the domestic

(constitutional and statutory) legislation as a more nuanced alternative to the stricter idea of 'balanced budget'. This is a crucial notion for the legal analysis, and it shows an increased attention by the national legislator in determining the conditions for the said budgetary equilibrium of local governments that sets the conditions for incentivising a greater investment capacity without affecting the overall national fiscal sustainability.

5.3 The Multi-level Dimension

Finally, from an institutional perspective, we have come across the progressive importance over the last four decades of the multilevel fiscal dimension in Italy.

As a result of an earlier decentralist trend, the importance of regulating financial and accounting positions of local governments and concerned public institutions (so called 'conto consolidato delle amministrazioni pubbliche') has steeply increased in Italy, besides the importance of the State's budget. In parallel, the European economic governance has attributed greater attention to the domestic multilevel governments (the so called 'finanza pubblica allargata').

In such a scenario, we have noted the importance of the aggregate of the fiscal position of subnational governments (also named 'Fiscal Policy Risk') that has determined the expansion of the central government's authority (i.e., monitoring, controls, and responsibility) upon such entities on financial stability grounds.

To exemplify this, we have also noted two elements of constitutional relevance.

On the one hand, the constitutional shift in 2001 of the competence over the area of the 'coordination of public finance' from the sole State's remits to the 'concurrent' or

'shared' competence together with the regions that was not amended even by 2012 the constitutional reform. On the opposite, in the occasion of the said 2012 constitutional reform, the competence over the 'harmonisation of public accounts' was reassigned to the sole State competence, after being attributed for less than ten years also to regional remits as a shared' competence.

On the other hand, the progressive 'corrective' interpretation by the Italian Constitutional Court in relation to the State's prerogatives over fiscal matters, emphasising the importance of an enhanced coordination at national level in the greater interest of the aggregate financial stability and of the European fiscal obligations, have also played an important role in the public law analysis.

As such, dwelling on the public law changes and innovations that occurred in Italy in the last decades in relation to the national fiscal governance, our main findings appear to show a de facto centralist trend by which the State has increasingly assumed a pivot function in the domestic sub-system in being the 'natural' point of contact with the Union and therefore the 'final responsible entity' on fiscal matters – as recently contended by the Italian Constitutional Court in decision No 78/2020.

The conclusion we advance on such a centralist trend regarding the intergovernmental fiscal matters is far from being disruptive in constitutional terms and it simply makes explicit formerly existing legal provisions on organisation, as set out under Articles 117, 119, and 97 of the Italian Constitution, together with the constitutional interest for pursuing macro stability objectives as set out under Article 47 of the Italian Constitution.

Furthermore, such a de facto constitutional development in favour of a greater centralisation of fiscal matters upon the State's remits appears in line with the institutional analysis in terms of organisation that we have so far developed on the increased importance and relevance of the central government dimension in the overall EU Fiscal Network.

Likewise, it is also coherent with the functional analysis of public law that we have carried out in relation to the relevance of the Fiscal Policy Risk as to mitigate the institutional complexity and risk stemming from the aggregate of subnational government's default or noncompliance with the fiscal obligations for which the central government has committed towards the Union, as well in terms of capacity of promoting risk-taking conducts among the institutions in relation to public investment spending which are constitutionally encouraged for increasing growth across the country.

That being said, we would then preliminarily conclude with an open question pertaining to a quote of Takis Tridimas claiming that 'the introduction of a plethora of economic governance measures has essentially led to the birth of a new area of law: the law of public finances, superimposing disciplines and normative standards in an area which until now government discretion reigned'[691].

On this line of thought, based on the information and arguments that we have tried to collect thus far, it could be argued that the law of public finances seems to certainly exist, and it constitutes in all respect a new branch of public law to build upon and it

[691] Above (n 2).

also offers to public scholars an additional perspective with important theoretical challenges to this legal discipline.

Conclusions

As we reach the end of this research, this research has investigated how the law, and specifically public law, can represent an additional toolkit for policy makers in organising institutional complexity, mitigating institutional risk, and promoting institutional conducts for encouraging risk-taking for greater public investments, thus contributing to achieve macroeconomic stability objectives in an incomplete and asymmetric economic and monetary union like the EMU.

In our experimental analysis concerning the area of EU and Italian fiscal policies, we have ascertained that public law – thanks to its organising, mitigating, and promoting functions – could serve as a macroeconomic stabiliser to be therefore considered within the policy mix in addition to the conventional and unconventional monetary and fiscal instruments. Time has indeed proved that, under certain macroeconomic conditions, the economic stability of the EMU cannot rest solely on the ECB's shoulders and that fiscal policy really matters: Public law should equally step in.

From a constitutional standpoint, the EU governance on economic policy is on a decade-long political stalemate that we have metaphorically dubbed the 'Janus Trap' of the Union. Like the ancient Roman myth having two faces and presiding over changes, with the 1992 Maastricht settlement the EU has embraced a 'forward-looking' governance of monetary policy that since its outset it has been conceived as centralised at EU level and simultaneously a 'backward-looking' decentralised economic and fiscal arrangement at national level that has led Member States to a poor economic coordination that is still strongly influenced by scattered political cycles and never-ending sovereignty dilemmas.

As it already came out in 1977 with the MacDougall Report on the role of public finance in the EU, the European economic and monetary cooperation has fallen short of a properly centralised fiscal policy strategy, while it only achieved a soft economic coordination not to be compared to the rather centralised monetary policy that eventually led to European single currency.

However, it is a fairly settled opinion that the EMU is far from being a 'optimum currency area' by the book and a centralised fiscal policy would perform a significant and effective counter-cyclical role. Lacking such a structural element for the smooth functioning of the EMU, the legal design has become more than necessary to reducing the original structural vulnerability that would be otherwise unable to tackle uneven and asymmetric negative shocks due to the absence of a sufficient degree of centralised budget and automatic fiscal stabilisers.

In such a weak institutional setup, negative economic shocks have showed that the monetary levers for achieving economic stability are increasingly ineffective, especially in a 'Zero Lower Bound' or 'liquidity trap' monetary scenario where central banks have a lessened capacity to stimulate the economy via interest rates. That is where and why States, and therefore fiscal policy, could increasingly make a contribution, as it has become apparent with the institutional design connecting the 'European Economic Recovery Plan' in 2008, the 'European Commission Investment Plan for Europe' in 2017, and eventually the 'Next Generation EU' in 2020.

Still, before any further debate on the future of the Union takes place, Member States shall come to terms with the asymmetries of the 'Janus Trap' metaphor that over the years has strongly impinged upon the overall public perception of the very functioning of the EU economic governance in delivering stability and growth.

These kinds of concerns are addressed in Chapter 2 as we retrace the unresolved EMU asymmetries and we develop the legal response to that both in case of asymmetric shocks, like the Great Recession in 2007-2009 that have led to the European Debt Crisis in 2010-2012, and symmetric shocks, like the COVID-19 pandemic crisis, that appear to have brought greater attention to the uneven economic effects among the different European 'regional' territories.

In such a scenario, we believe that public law, as it compounds the aggregate of the existing institutional interactions and coordination mechanisms on fiscal matters, can perform an organising function of the institutional complexity of the EMU design for its greater macroeconomic stability, as we have intended to posit across this research.

In order to argue that, in the earlier Chapter 1 we put forward two different interpretative notions that are normative in their essence: The idea of 'EU Fiscal Network', as an organised system of interdependent fiscal dynamics, that takes inspiration from the notions of network and complexity and, on the other and, the idea of 'Fiscal Policy Risk' that is strongly influenced by the theories of risk regulation and law and macroeconomics. In our view, by combining public law with the analytical tools of network, complexity, and risk, as well as to that of macro analysis, we could have a sufficient set of instruments to properly address the EU fiscal policy conundrum.

First, the 'EU Fiscal Network' appears to be a fitting definition to posit that, to better understand the EU fiscal policy framework, we must look at it in its 'macro' dimension that comprises not only the 'European sub-system' but also the 'Domestic sub-system'. The European and domestic sub-systems present indeed strongly interdependent and dynamic relations within the EU Fiscal Network.

More precisely, the EU Fiscal Network represents a multi-system model of coordination organised by public law, in a hard and soft law manner, where the two elements seamlessly interact and influence each other to a large extent.

Due to the complexity and mutual dependence among the sub-systems of the EU Fiscal Network, we consider worth stressing the risk mitigation function that public law performs in reducing the EMU vulnerabilities by design in multilevel dynamics.

Accordingly, the Italian legal framework represents a fitting case for our analysis, being an example of a founding EMU Member State with a multilevel institutional setting that has significantly experienced the troubled waters of both the European Debt Crisis and COVID-19 economic recessions.

In this regard, in Chapter 3 we drew attention to the legal measures that Italy has largely put in place in order to navigate through the coordination hurdles of its domestic multilevel setup. Indeed, without an adequate control, the domestic subnational governments could have raised serious concerns not only for the Italian central government in terms of compliance with the EU fiscal rules, for which it remains the sole responsible entity towards the Union, but also to the overall economic stability of the EMU due to the said interdependencies.

Moreover, this strand of analysis shows a trade-off between multilevel governance and fiscal rules that, due to the risk of moral hazard, forces the pivot institutions of such sub-system to adopting a specific framework on fiscal matters for the containment of various sources of instability, as it happened – for instance – at Union level with the Stability and Growth Pact from 1997 onwards and likewise in Italy with the Domestic Stability Pact from 1999 to 2017 governing the subnational governments fiscal

relationships.

Second, moving from the studies of Julia Black and Adrian Vermeule, respectively on systemic risk in financial markets and on institutional 'second-order risks' in constitutional arrangements due to failures by legal design, we have named 'Fiscal Policy Risk' the specific institutional risk arising from domestic subnational governments' unsound fiscal decisions that, based on the broad definition of 'general government' set out in the EU fiscal rules, is at the heart of the multilevel institutional dynamics of the Domestic sub-systems within the EU Fiscal Network.

In that sense, we have claimed that the Fiscal Policy Risk is an organising principle of the EU Fiscal Network. As such, we could further argue that, in mitigating such specific source of institutional risk posing systemic ripple effects onto such an interdependent, interconnected, and dynamic network, public law may constitute an additional instrument at policy makers' disposal for setting out the right policy mix, alongside with the monetary and fiscal levers, for a greater macroeconomic stability of the EU Fiscal Network as a whole.

On such interpretative framework rests the analysis on the Italian Domestic sub-system by which we aim at testing the foregoing arguments. To this end, in Chapter 3 we overarched the main sets of public law measures that Italy has progressively introduced so to pursue a greater stability at national level. In so doing, we noted that the Italian central government has intended to organise, in a de facto centralist manner, the complexity of the multilevel institutional interactions within the Domestic sub-systems and to mitigate the Fiscal Policy Risk stemming from subnational governments.

In Section 3.1, we consequently assess the different coordination mechanisms so to enhance subnational governments' budgetary harmonisation, programming activities, spending limits, and transparency, while in Section 3.2 we encompass the degree of controls that are in place for monitoring the subnational governments' conduct, as well as managing and limiting at aggregate level the risk of divergence from the national fiscal goals in case of financial distress among failing or likely to fail municipalities.

Finally, taking from the recent studies on law and macroeconomics by Yair Listokin, as he posits that there can be an expansionary legal policy, we could consolidate the legal significance of 'positive coordination' mechanisms that, according to the Norberto Bobbio's theory on the promotional function of law, law can perform. In light of that, we have argued that this appears to be specifically the case for public law in the EU Fiscal Network as it performs not only a 'negative' function, by mitigating specific sources of (institutional) risks as per the case of the Fiscal Policy Risk, but also a 'positive' function as a risk-enabler promoting risk-taking, in the form of enhanced investments, within the EU Fiscal Network for a greater economic stability.

On those lines, in Chapter 4 we develop upon the argument on the positive function of public law in encouraging countercyclical investment spending so to carry out and sustain the said legal expansionary policy as it has recently become manifest in the context of the 'Next Generation EU' programme of the Union ('NGEU') sustaining the economy affected by the COVID-19 pandemics whilst achieving the common strategic objectives of the EU. Similar to the centralist trend of the governmental activities in Italy, that we have ascertained on the occasion of the mitigation measures to address Fiscal Policy Risk, we have also identified a similar trend in the Italian central government's legal response to the NGEU, via the national Recovery and Resilience

Plan, as it is likewise the sole responsible entity towards the Union in relation to such obligations.

In spite of being temporary in scope, two striking novelties of the NGEU are also noticeable: The Commission's aggregate borrowing of a significant amount of money on capital markets for funding both nonrepayable financial support and loan support to the recipient Member States, as well as the use of such common pooled sums to undertake economic stabilisation in a manner that resembles the MacDougall Report's ideas of 'budget equalisation schemes' or 'conjunctural convergence facility' to reduce cyclical concerns 'leading to increasing economic divergences' at Member States' domestic level[692].

Whether the NGEU instrument would eventually normalise in a permanent redistribution mechanism under the Union's umbrella is the very open-ended question that is currently hovering over the European and national cabinets because of the subsequent constitutional and Treaties' revision shortcomings.

As per now, developing from the one-off and temporary NGEU mechanism, we can only show a strong idealistic preference for the prospective setting up of an enhanced risk-sharing, shock-absorption, and mutualisation among Member States within the EU budget starting from the Multiannual Financial Framework, though it would reasonably entail additional reforms in terms of taxation, common defence, and democratic representation – to say the least. In other terms, it would signify to abandon the intergovernmental model.

One could indeed remember that the 1950 Schuman declaration reads that 'The

[692] MacDougall Report (n 248) 16.

pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe'[693] and therefore it may conclude, with the same economic and political realism, in favour of swiftly abandoning the 'Janus Trap', being the metaphor of the unsettled EMU asymmetric economic governance, that it is hampering and putting at risk the EU economic prosperity and prospective stability.

If ever, this constitutional review would represent for the Union a truly 'Hamiltonian' moment, to refer back to the sensible political decision in 1790 of federalising among the US states the debt incurred for the American Revolutionary War bonds, which seems nevertheless well beyond the present model of political enclosures that is occurring across the EU and national discourse over fiscal levers.

Leaving aside such Panglossian optimism, in the long run a feasible political compromise could more reasonably take place at EU secondary law level, once it will be finalised the ongoing Commission's public consultation over the current SGP framework, as it could be proposed a more balanced and transparent degree of (simpler) rules, (clearer) institutional responsibilities, and (more effective) market discipline. Yet, this could alleviate the pain of some of the compelling hurdles and complexities within the EU Fiscal Network, but it will not constitutionally cure the 'Janus Trap' in the interest of the future generations. For that, public law, economics, sociology, and politics should join forces for an alliance over growth and stability in the Economic and Monetary Union.

[693] Schuman Declaration (n 5).

Bibliography

Ábrahám A et al, 'On the Optimal Design of a Financial Stability Fund' (2018) 105 ADEMU Working Paper 1

Acharya V V and Steffen S, *The Importance of a Banking Union and Fiscal Union for a Capital Markets Union* (European Union 2017)

Ackerman B, *The Decline and Fall of the American Republic* (HUP 2010)

Acoff - Alta commissione per la definizione dei meccanismi strutturali del federalismo fiscale), 'Relazione finale', 2005

Adams M, Fabbrini F, and Larouche P (eds), *Constitutionalization of European Budgetary Constraints: Comparative and Interdisciplinary Perspectives* (Hart Publishing 2014)

Adamski D, 'Objectives of the EMU' in Amtenbrink F and Herrmann C (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 214

Adamski D, *Redefining European Economic Integration* (CUP 2018)

Adamski D, 'Europe's (Misguided) Constitution of Economic Prosperity' (2013) 50 Common Market Law Review 47

Adamski D, 'National power games and structural failures in the European macroeconomic governance' (2012) 49 Common Market Law Review 1319

Agnoloni T and Pagallo U, 'The Case Law of the Italian Constitutional Court between Network Theory and Philosophy of Information' (2016) 25 Informatica e diritto 139

Ahmad E and Brosio G, 'Introduction: Fiscal Federalism - A Review of Developments in the Literature and Policy' in Ahmad E and Brosio G (eds), Handbook of Fiscal Federalism (Edward Elgar 2006)

Ahmad E, Bordignon M, and Brosio G (eds), *Multi-level finance and the Euro crisis: Causes and Effects* (Edward Elgar Publishing 2016)

Alcidi C and Thirion G, 'Assessing the Euro Area's Shock-Absorption Capacity' (2017) Centre for European Policy Studies 1

Alemanno A, 'Regulating the European Risk Society' in Alemanno A et al, *Better Business Regulation in a Risk Society* (Springer 2013) 37

Alesina A, Barro R J, and Tenreyro S, 'Optimal Currency Areas' (2002) 17 NBER Macroeconomics Annual 301

Allsopp C and Vines D, 'The Macroeconomic Role of Fiscal Policy' (2005) 21 Oxford Review of Economic Policy 485

Allsopp C and Artis MJ, 'The Assessment: EMU, Four Years on' 19 (2003) Oxford Review of Economic Policy 1

Ambrosanio MF, Balduzzi P, and Bordignon M, 'Economic Crisis and Fiscal Federalism in Italy' in Ahmad E, Bordignon M, and Brosio G (eds), *Multi-level finance and the Euro crisis: Causes and Effects* (Edward Elgar Publishing 2016) 212

Alesina A, Favero C, and Giavazzi F, *Austerity: When It Works and When It Doesn't* (Princeton University Press 2019)

Alesina A and Giavazzi F, *Fiscal Policy after the Financial Crisis* (University of Chicago 2013)

Allsopp C and Artis M, 'The Assessment: EMU Four Years On' (2003) 19 Oxford Review of

Economic Policy 1

Almunia J, 'EMU@10: successes and challenges after 10 years of Economic and Monetary Union' (2008) <https://ec.europa.eu/economy_finance/publications/pages/publication12682_en.pdf>

Alpa G, 'Interpretazione economica del diritto' in *Novissimo Digesto Italiano – Appendice* (Utet 1980) 315

Amato M et al, 'Transforming Sovereign Debts into Perpetuities through a European Debt Agency' (2020) <https://ssrn.com/abstract=3579496>

Amato G, Bribosia H, and De Witte B (eds), *Genèse et destinée de la Constitution européenne: Commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives* (Bruylant 2007)

Ambrosanio MF, Balduzzi P, and Bordignon M, 'Economic Crisis and Fiscal Federalism in Italy' in Ahmad E, Bordignon M, and Brosio G (eds), *Multi-level finance and the Euro crisis: Causes and Effects* (Edward Elgar Publishing 2016) 212

Amtenbrink F and Herrmann C (eds), *EU Law of Economic and Monetary Union* (OUP 2020)

Amtenbrink F, De Haan J, and Sleijpen O, 'The stability and Growth Pact: Placebo or Panacea' (1997) European Business Review 202–236

Anderson G, *Fiscal Federalism: A Comparative Introduction* (OUP 2009)

Andrle M et al, 'Italy: Toward a Growth-Friendly Fiscal Reform' (2018) 59 IMF Working Papers 1

Angelini F and Benvenuti M (eds), *Il diritto costituzionale alla prova della crisi economica, Atti del Convegno di Roma, 6-7 aprile 2012* (Jovene Editore 2012)

Angiolini V, *Necessità ed emergenza nel diritto pubblico* (Cedam 1986)

Anheier HK, *Governance Challenges and Innovations: Financial and Fiscal Governance* (Helmut Anheier 2013)

Annett A, Decressin J, and Deppler, MC, 'Reforming the Stability and Growth Pact' (2005) IMF Policy Discussion Paper 1

Annichino P and Boggero G, 'Who Will Ever Kick Us Out?': Italy, the Balanced Budget Rule and the Implementation of the Fiscal Compact' (2014) 20 European Public Law 247

Antonini L, 'Federalismo fiscale (Diritto Costituzionale)' in *Enciclopedia del diritto*, Vol. X (Giuffrè 2017) 409

Antonio S et al, 'Fiscal policy for the crisis' (2008) 29 IMF Staff Position Note 1

Arachi G, Baldini M, and Toso S, *La finanza pubblica italiana* (Il Mulino 2021)

Arcidiacono L, *Organizzazione pluralistica e strumenti di collegamento* (Giuffrè 1974)

Ardy B et al (eds), *Adjusting to EMU* (Palgrave Macmillan 2006)

Arghyrou MG and Kontonikas A, 'The EMU sovereign-debt crisis: fundamentals, expectations and contagion' (2012) 22 Journal of International Financial Markets 658

Armingeon K, 'The politics of fiscal responses to the crisis of 2008-2009' (2012) 25 Governance 543

Armstrong K, 'The New Governance of EU Fiscal Discipline' (2013) 38 European Law Review, 601

Armstrong K, Begg I, and Zeitlin J, 'JCMS Symposium: EU Governance After Lisbon' (2008) 46 JCMS 413

Arregui N et al, 'Addressing Interconnectedness: Concepts and Prudential Tools' (2013) 199 IMF Working Paper 1

AIPDA - Associazione italiana dei professori di diritto amministrativo (ed), *Annuario 2006: Analisi economica e diritto amministrativo* (Giuffrè 2007)

Athanassiou P, 'Of Past Measures and Future Plans for Europe's Exit from the Sovereign Debt Crisis: What is Legally Possible (and What is Not)' (2011) 36 European Law Review 558

Athanassiou P, 'Withdrawal and expulsion from the EU and EMU some reflections' 10 ECB Working Paper Series, November 2009 <https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp10.pdf>

Avdikos G, 'Judicial and Constitutional Review During the Greek Sovereign Debt Crisis: A General Overview' (2020) 26 European Public Law 237

Bache I and Flinders M (eds), *Multi-level Governance* (OUP 2004)

Bachelet V, 'Coordinamento' in *Enciclopedia del diritto*, Vol. X (Giuffrè 1962) 635

Balassone F and Franco D, 'Fiscal Federalism and the Stability and Growth Pact: A Difficult Union' (2001) 1 <https://ssrn.com/abstract=2095225>

Balassone F and Franco D, 'Public investment, the stability pact and the "Golden Rule"' (2000) 21 Fiscal Studies 207

Balestrino A et al (eds), *La dimensione globale della finanza e della contabilità pubblica* (Editoriale Scientifica 2020)

Ballabriga F and Martinez-Mongay C,' Has EMU Shifted Policy?' (2002) 166 European Economy - Economic Papers 1

Balke N and Ravn M O, 'Time-consistent fiscal policy in a debt crisis' (2016) 49 ADEMU Working Paper No 2016 1

Barbati C, 'La decisione pubblica al cospetto della complessità: il cambiamento necessario' (2021) Diritto Pubblico 15

Barbero M, 'La "territorializzazione" del patto di stabilità interno' (2010) Riv. dir. fin. 356

Barbero M, 'Golden Rule: "Non è oro tutto quello che luccica"!' (2005) 33 Le Regioni 675

Bartole S, 'Collaborazione e sussidiarietà nel nuovo ordine regionale' (2004) 32 Le Regioni 578

Bassanini F and Barbera A (eds), *I nuovi poteri delle regioni e degli enti locali* (Il Mulino 1978)

Bassi G, *Partecipazione degli enti locali ed equilibri di finanza publica dopo la legge di stabilità 2014* (Maggioli Editore 2014)

Bauer C and Herz B, 'Reforming the European Stability Mechanism' (2020) 58 Journal of Common Market Studies 636

Beck U, *Risk Society: Towards a New Modernity* (Sage Publications 1992)

Becker G, *The Economics of Discrimination* (University of Chicago 1971)

Bednar J, *The Robust Federation* (CUP 2009)

Beetsma R and Debrun X (eds), *Independent Fiscal Councils: Watchdogs or lapdogs?* (CEPR Press 2018)

Begg I, 'Fiscal and Other Rules in EU Economic Governance: Helpful, Largely Irrelevant or

Unenforceable?' (2017) 239 National Institute Economic Review 1

Begg I, 'Future Fiscal Arrangements in the European Union' (2004) 41 Common Market Law Review 775

Begg I, 'Hard and Soft Economic Policy Co-ordination under EMU: Problems, Paradoxes and Prospects' (2003) 103 Working Paper Series - Center for European Studies 1

Begg I and Schelkle W, 'Can Fiscal Policy Co-ordination be Made to Work Effectively?' (2004) 42 Journal of Common Market Studies 1023

Begg I and Schelkle W, 'The Pact is Dead: Long Live the Pact' (2004) 189 National Institute of Economic and Social Research 86-98

Belletti M, *Corte Costituzionale e spesa pubblica* (Giappichelli 2016)

Bénassy-Quéré A and Giavazzi F (eds), *Europe's Political Spring* (CEPR Press 2017)

Benjamin J, 'The Narratives of Financial Law' (2010) 30 Oxford Journal of Legal Studies 787

Bergonzini C, 'L'Europa e il Covid-19. Un primo bilancio' (2020) Quaderni costituzionali 761

Bergonzini C, 'Fondi vincolati, interventi strutturali dello Stato e competenze delle Regioni: le conseguenze della natura sostanziale della legge di bilancio e del «principio di anticiclicità»' (2018) 46 Le Regioni 712

Bernstein P, *Against the Gods: The Remarkable Story of Risk* (John Wiley & Sons 1998)

Beukers T, De Witte B, and Kilpatrick C (eds), *Constitutional Change through Euro-Crisis Law* (CUP 2017)

Berger H, Dell'Ariccia G, and Obstfeld M 'Revisiting the Economic Case for Fiscal Union in the Euro Area' (2018) 3 IMF Departmental Paper 1

Bevilacqua D, 'L'europeizzazione dell'Istat' (2010) Riv. trim. dir. pubbl. 91

Bi R, Chamon M, and Zettelmeier J, 'The Problem That Wasn't: Coordination Failure in Sovereign Bond Restructurings' (2011) 265 IMF Working Papers 1

Bianchi A, Colaizzo R, and Di Michele AV, 'La realizzazione delle opere pubbliche nel Recovery Plan' (2021) Amministrazione in cammino 1

Bifulco R, 'Il pareggio di bilancio in Germania: una riforma costituzionale postnazionale? (2011) Rivista AIC 1

Bin R, 'L'autonomia finanziaria delle Regioni speciali tra vincoli europei, obbligo di solidarietà e leale cooperazione' (2015) 43 Le Regioni 799

Bin R, 'I criteri di individuazione delle materie' (2006) 34 Le Regioni 889

Bini Smaghi L, 'The eurozone must not return to its pre-crisis 'normality'', *The Financial Times*, 14 June 2021

Bini Smaghi L, 'Reconciling risk sharing with market discipline – Comment on the CEPR Policy Insight n. 91' (2018) LUISS Policy Brief < https://sep.luiss.it/sites/sep.luiss.it/files/Policy%20Brief%20Format.pdf>

Bini Smaghi L, 'Challenges for the Euro Area, and the World Economy', (*ECB* 28 May 2010) <http://www.ecb.int/press/key/date/2010/html/sp100528.en.html>

Bini Smaghi L and Casini C, 'Monetary and Fiscal Policy Co-Operation: Institutions and Procedures in EMU' (2000) 38 Journal of Common Market Studies 375

Bini Smaghi L, Padoa-Schioppa T, and Papadia F, 'The Transition to EMU in the Maastricht

Treaty' (1994) 194 Princeton Studies in International Finance 1

Bishop G, Damrau D, and Miller M, *1992 and Beyond: Market Discipline CAN Work in the EC Monetary Union* (Salomon Bros 1989)

Black J, 'The Role of Risk in Regulatory Processes' in Baldwin R, Cave M, and Lodge M (eds), *The Oxford Handbook of Regulation* (OUP 2010) 303

Black J, 'Critical Reflections on Regulation' (2002) 27 Australian Journal of Legal Philosophy 1

Black J and Baldwin R, 'Really Responsive Risk-Based Regulation' (2010) 32 Law & Policy 2010 181

Blinder A S, 'Interactions between Monetary and Fiscal Policy: Yesterday, Today, and Tomorrow' in Jackson Hole Economic Symposium (ed), *Proceedings of the 2021 Jackson Hole Symposium* 1 <https://www.kansascityfed.org/documents/8368/JH_2021.pdf>

Blöchlinger H and Kim J, 'Fiscal Federalism 2016 - Making decentralisation work' (2016) OECD Publishing 1

Blyth M, *Austerity: The History of a Dangerous Idea* (OUP 2013)

Boadway R and Shah A (eds), *Fiscal Federalism: Principles and Practice of Multiorder Governance* (CUP 2009)

Bobbio N, *Dalla struttura alla funzione* (Editori Laterza 2007)

Boca A and Tortorella W, 'Il patto di stabilità interno: passato, presente e future del coordinamento della finanza pubblica italiana (2012) 78 Il Politico 59

Boggero G, 'Le relazioni finanziarie tra Stato e autonomie territoriali. Profili comparati con l'esperienza tedesca' in Alessandro Balestrino et al (eds), *La dimensione globale della finanza e della contabilità pubblica* (Editoriale Scientifica 2020) 289

Boggero G, 'Gli obblighi di Regioni ed enti locali dopo la legge n. 243/2012' (2014) 44 Amministrare 93

Bognetti G, 'Il pareggio di bilancio nella Carta Costituzionale' (2011) Rivista AIC 1

Bonatti L and Cristini A, 'Breaking the stability pact: was it predictable?' (2008) 30 Journal of Policy Modeling 793

Bonetti P, 'L'autonomia finanziaria regionale e locale come motore delle autonomie territoriali: un'introduzione dall'art. 114 all'art. 119 Cost.' (2010) Le Regioni 1161

Bonini M and Ninatti S, 'Italy' in Griller S and Lentsch E (eds), *EMU Integration and Member States' Constitutions* (Hart Publishing 2021) 331

Bonura H and Mattarella BG, 'Brevi note sulla relazione 2020 della Corte dei Conti sui rapporti finanziari con l'Unione europea e l'utilizzazione dei fondi comunitari: una "voce chiara" tra vecchi mali e nuovi bisogni' (2021) 1 Rivista della Corte dei Conti 9

Bordignon M et al, 'Il federalismo fiscale in Italia: fatti e problemi' (2007) 234 Quaderni rossi ASSBB 1

Bordignon M and Baglioni A, 'Which Future for Italy in Europe?' (2019) 72 Ifo Schnelldienst 13

Borger V, *The Currency of Solidarity* (CUP 2020)

Borger V, 'EU Financial Assistance' in Amtenbrink F and Herrmann C (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 963

Borger V, 'Outright Monetary Transactions and the stability mandate of the ECB: Gauweiler' (2016) 53 Common Market Law Review 139

Borger V, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 European Constitutional Law Review 7

Borio C and Van den Bergh M, 'Co-ordination of Fiscal Policies in an European Monetary Union', Letter to Dr Baer, 24 October 1988 <https://www.ecb.europa.eu/ecb/access_to_documents/archives/delors/documents/shared/data/ecb.dr.delors881027_CoordinationFiscalPolicies.en.pdf>

Borio C and Disyatat P, 'Global imbalances and the financial crisis: Link or no link?' (2011) 346 BIS Working Papers 1

Borrás S and Jacobsson K, 'The Open Method of Co-ordination and the New Governance Patterns in the EU' (2004) 11 Journal of European Public Policy 185

Bouabdallah O et al, 'ECB Economic Bulletin - Issue 6' (2020) 115

Boushey H, Nunn R, and Shambaugh J (eds), *Recession Ready: Fiscal Policies to Stabilize the American Economy* (Brookings 2019)

Brancasi A, 'Le trasformazioni dell'assetto e del governo della finanza pubblica negli ultimi cinquanta anni' (2018) 24 Diritto pubblico 413

Brancasi A, 'L'autonomia finanziaria degli enti territoriali di fronte ai vincoli europei ed alla riforma costituzionale sul "pareggio di bilancio"' (2014) 20 Le Regioni 49

Brancasi A, 'L'introduzione del principio del c.d. pareggio di bilancio: un esempio di revisione affrettata della Costituzione' (2012) 32 Quaderni costituzionali 108

Brancasi A, 'Il coordinamento della finanza pubblica nel federalismo fiscale' in Corte dei Conti (ed), *Il Federalismo fiscale alla prova dei decreti delegati: atti del LVII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2011* (Giuffrè 2012) 467

Brancasi A, 'Il coordinamento della finanza pubblica nel federalismo fiscale' (2011) 17 Diritto pubblico 451

Brancasi A, 'La disciplina costituzionale del bilancio: genesi, attuazione, evoluzione, elusione' (2011) Il Filangeri-Quaderno 7

Brancasi A, 'Il bilancio dell'Unione dopo Lisbona: l'apporto delle categorie del nostro ordinamento nazionale alla ricostruzione del sistema' (2010) 16 Diritto pubblico 675

Brancasi A, 'La finanza pubblica a dieci anni dalla «riforma Bassanini»' in D'Alessio G and Di Lascio F, *Il sistema amministrativo a dieci anni dalla «riforma Bassanini»* (Giappichelli 2009) 213

Brancasi A, 'La Corte costituzionale risolve un problema di veridicità dei conti in termini di violazione dell'obbligo della copertura finanziaria' (2008) 36 Le Regioni 976

Brancasi A, 'Il controllo finanziario e contabile sugli enti territoriali' (2006) 12 Diritto pubblico 847

Brancasi A, *L'ordinamento contabile* (Giappichelli 2005)

Brancasi A, Il coordinamento della finanza pubblica come potestà legislativa e come funzione amministrativa' (2004) 32 Le Regioni 763

Brancasi A, 'L'autonomia finanziaria degli enti territoriali: note esegetiche sul nuovo art. 119 Cost' (2003) 31 Le Regioni 41

Brancasi A, 'Divieto di disavanzi eccessivi e strumenti di politica di bilancio' (1998) Rivista italiana di diritto pubblico comunitario 1195

Brancasi A, *Legge finanziaria e legge di bilancio* (Giuffrè 1985)

Brancasi A and Merloni F, 'Politiche statali, politiche regionali e autonomia politico-amministrativa e finanziaria degli enti territoriali' (2009) 37 Le Regioni 9

Brennan T et al, 'The Political Economy of Judging' (2009) 93 Minnesota Law Review 1503

Breton A and Fraschini A, 'Is Italy a Federal or even a Quasi-Federal State?' (2016) 234 POLIS Working Papers 1

Brugnano C et al, 'Fiscal federalism and equalization design under the growing public finance constraint: a case of Italian municipalities' (2020) MPRA Paper No 102001 1 <https://mpra.ub.uni-muenchen.de/102001>

Brunila A, Buti M, and Franco D (eds), *The Stability and Growth Pact: The Architecture of Fiscal Policy in EMU* (Palgrave 2001)

Brunnermeier MK, James H, and Landau JP, *The Euro and the Battle of Ideas* (Princeton University Press 2016)

Bruno A, *New Public Management (NPM) and the Introduction of an Accrual Accounting System* (Springer 2021)

Buchanan M, *Nexus: Small Worlds and the Groundbreaking Theory of Networks* (W W Norton & Company 2002)

Buchanan JM, *Public Principles of Public Debt – Vol. 2* (Liberty Fund 1999)

Buchanan JM and Tullock G, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Liberty Fund 1962)

Buchanan JM, 'The Pure Theory of Government Finance: A Suggested Approach' (1949) 57 Journal of Political Economy 496

Buchheit LC and Lastra R, *Sovereign Debt Management* (OUP 2014)

Buffoni L, 'Il potere sostitutivo del Governo e l'equilibrio di bilancio' (2018) 46 Le Regioni 687

Buiter W, *Central Banks as Fiscal Players* (CUP 2021)

Buitler W, Corsini G, and Roubini N, 'Excessive Deficits: Sense and Nonsense in the Treaty of Maastricht' (1993) Economic Policy 60

Bull M and Pasquino G, 'A long quest in vain: Institutional reforms in Italy' (2007) 30 West European Politics 670

De Búrca G and Zeitlin J, 'Constitutionalising the open method of co-ordination. What should the convention propose?' (2003) 31 CEPS Policy Brief <https://www.ceps.eu/ceps-publications/constitutionalising-open-method-coordination-what-should-convention-propose>

Buscema S, *Trattato di Contabilità Pubblica - vol. I – Principi generali* (Giuffrè 1979)

Buscema S, 'Il coordinamento della finanza locale con gli altri settori della finanza pubblica' in Corte dei Conti (ed), *I problemi delll'entrata e della spesa nella finanza degli enti locali: atti del XIII Convegno di studi di scienza dell'amministrazione promosso dalla amministrazione provinciale di Como, Varenna, Villa Monastero, 18-21 settembre 1967* (Giuffrè 1969) 240

Busch D, Avgouleas E, and Ferrarini G, *Capital Markets Union in Europe* (OUP 2018)

Buti M, 'Le regole europee di finanza pubblica: un bilancio delle recenti riforme' in Balestrino A et al (eds), *La dimensione globale della finanza e della contabilità pubblica* (Editoriale Scientifica 2020) 47

Buti M (ed), *Monetary and Fiscal Policies in EMU* (CUP 2003)

Buti M et al (eds), *The Euro: The First Decade* (Cambridge University Press 2010)

Buti M and Carnot N, 'The EMU Debt Crisis: Early Lessons and Reforms' (2012) 50 Journal of Common Market Studies 899

Buti M, Eijffinger S, and Franco D, 'Revisiting the Stability and Growth Pact: Grand Design or Internal Adjustment?' (2003) 3692 Discussion Paper - Centre for Economic Policy Research 1

Buti M and Franco D, *Fiscal Policy in Economic and Monetary Union* (Elgar Publishing 2005)

Buti M, Franco D, and Ongena H, 'Fiscal Discipline and Flexibility in EMU: The Implementation of the Stability and Growth Pact' (1998) 14 Oxford Review of Economic Policy 81

Buti M and Messori M, 'The search for a congruent euro area policy mix: Vertical coordination matters' (2021) VoxEU.org <https://voxeu.org/article/search-congruent-euro-area-policy-mix>

Buti M and Nava M, 'Towards a European budgetary system' (2003) EUI working papers RSC 8

Buti M and Pench LR,' Why do large countries flout the Stability Pact? And what can be done about it?' (2004) 42 Journal of Common Market Studies 1025

Buti M, von Hagen J, and Martinez-Mongay C (eds), *The Behaviour of Fiscal Authorities* (Palgrave 2002)

Buzzacchi C, 'Il custode della finanza pubblica allargata e gli oneri della potestà di coordinamento' (2016) 44 Le Regioni 748

Buzzacchi C, 'Spesa pubblica ed indebitamento: le regole dei nuovi artt. 81 e 97 Cost.' (2016) Rivista Italiana di Diritto Pubblico Comunitario 421

Cabras D, 'L'introduzione del principio del c.d. pareggio di bilancio: una regola importante per la stabilizzazione della finanza pubblica' (2012) Quaderni Costituzionali 111

Cafagno M, *Lo Stato banditore* (Giuffrè 2001)

Caianiello G, 'Principio di legalità e ruolo della Corte dei conti' (1999) 6 Diritto pubblico 899

Calabresi G, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 Yale L.J. 499

Caldarelli S, *I vincoli al bilancio dello Stato e delle pubbliche amministrazioni* (Roma Tre Press 2020)

Carbone G, 'Dal disavanzo al debito: un passaggio necessario' (1992) Rivista della Corte dei conti 210

Caredda M, *Giudizio incidentale e vincoli di finanza pubblica. Il giudice delle leggi prima e dopo la crisi* (Giappichelli 2019)

Caretti P, 'La Corte e la tutela delle esigenze unitarie: dall'interesse nazionale al principio di sussidiarietà' (2004) 32 Le Regioni 381

Carli G, *Cinquant'anni di vita italiana* (Laterza 1993)

Carli G, 'Considerazioni finali del Governatore all'Assemblea generale straordinaria dei partecipanti', 13 June 1973 <https://www.bancaditalia.it/pubblicazioni/relazione-annuale/1972/index.html>

Carloni E and Cortese F (eds), *Diritto delle autonomie territoriali* (Cedam 2020)

Carosi A, 'Il sindacato degli atti di natura finanziaria' in Corte Costituzionale (ed), *Il diritto del bilancio e il sindacato sugli atti di natura finanziaria* (Giuffrè 2019) 65

Carosi A, 'Il principio di trasparenza nei conti pubblici' (2018) Rivista AIC 1

Carosi A, 'Il controllo di legittimità-regolarità della Corte dei conti sui bilanci degli enti territoriali anche alla luce della giurisprudenza della Corte costituzionale' in Capalbo F (ed), *Il controllo di legittimità-regolarità della Corte dei conti* (Editoriale Scientifica 2018) 22

Carosi A, 'La Corte dei conti nell'ordinamento italiano' in Corte Conti (ed), *Relazione 150° anniversario dell'istituzione della Corte dei conti (1862-2012)*, December 2012 1 <https://www.corteconti.it/Home/ChiSiamo/Storia/Cerimonie>

Cartabia M and Lupo N, *The Constitution of Italy* (Hart Publishing 2022)

Caruso C, *La garanzia dell'unità della Repubblica. Studio sul giudizio di legittimità in via principale* (Bononia University Press 2020)

Caruso C and Morvillo M, 'Economic Governance and Budgetary Rules in the European Context: a Call for a New European Constitutionalism' (2014) Diritto dell'Unione europea 699

Casini L, 'Un argine contro l'«esondazione» legislativa del Governo? La Corte costituzionale e la legge di bilancio' (2019) 39 Quaderni costituzionali 431

Cassese S (ed), *La nuova costituzione economica* (6th edn, Laterza 2021)

Cassese S, *Governare gli Italiani* (Il Mulino 2019)

Cassese S, 'Il futuro del diritto pubblico' (2017) Giornale di diritto amministrativo 176

Cassese S, 'L'Europa vive di crisi' (2016) Rivista trimestrale di diritto pubblico 779

Cassese S, *The Global Polity* (Global Law Press 2012)

Cassese S, 'L'Unione europea e il guinzaglio tedesco' (2009) Giornale di diritto amministrativo 1003

Cassese S, 'Il sorriso del gatto, ovvero dei metodi nello studio del diritto pubblico' in AIPDA (ed), *Annuario 2006: Analisi economica e diritto amministrativo* (Giuffrè 2007) 87

Cassese S, 'Il concerto regolamentare europeo delle telecomunicazioni' (2002) Giornale di diritto amministrativo 689

Cassese S, 'L'amministrazione nel nuovo titolo quinto della Costituzione' (2001) Giornale di diritto amministrativo 1193

Cassese S, 'Le due culture del bilancio' (1986) Democrazia e diritto 167

Cassese S, *Il sistema amministrativo italiano* (Il Mulino 1983)

Cassese S, 'Ipotesi sulla formazione de "L'ordinamento giuridico" di Santi Romano' (1972) Quaderni fiorentini per la storia del pensiero giuridico moderno 243

Cassese S and Torchia L, 'The meso level in Italy' in Sharpe LJ (ed), *Between locality and centre: the rise of meso in Europe* (Sage 1993) 91

Cavallini Cadeddu L, 'Il coordinamento dinamico della finanza pubblica nelle riforme' (2011) 11 Federalismi.it 1

Cavallo Perin R et al (eds), *Attualità e necessità nel pensiero di Santi Romano* (Editoriale Scientifica 2019)

Cavallo Perin R, 'I principi costituzionali e il potere di coordinamento della finanza pubblica come potere unilaterale della Repubblica Italiana' (2015) Diritto Amministrativo 639

Chang M, 'Reforming the Stability and Growth Pact: size and influence in EMU policymaking' (2006) 28 European Integration 107

Chiades P and Mengotto V, 'Il calo degli investimenti nei Comuni tra Patto di stabilità interno e carenza di risorse' (2013) 210 Banca d'Italia - Questioni di Economia e Finanza 1

Chieppa R, 'Misure contro lo sfondamento della spesa pubblica e proposte sull'organizzazione regionale' in Cassese S and Arabia AG, *L'amministrazione e la Costituzione: proposte per la Costituente* (Il Mulino 1993) 139

Chiti E, 'L'Unione e le conseguenze della pandemia' (2020) Giornale di diritto amministrativo 436

Chiti MP, 'La crisi del debito sovrano e le sue influenze per la governance europea, i rapporti tra stati membri, le pubbliche amministrazioni' (2013) Rivista italiana di diritto pubblico comunitario 22

Chiti MP, 'L'ufficio parlamentare di bilancio e la nuova governance della finanza pubblica' (2013) Rivista italiana di diritto pubblico comunitario 977

Chiti MP (ed), *Diritto amministrativo europeo* (Giuffrè 2011)

Chiti E, 'Le risposte alla crisi della finanza pubblica e il riequilibrio dei poteri nell'Unione' (2011) Giornale di diritto amministrativo 311

Chiti E, 'Le ambivalenze del concerto regolamentare europeo nel settore delle comunicazioni elettroniche' in della Cananea G (ed), *Il nuovo governo delle comunicazioni elettroniche* (Giappichelli 2005) 19

Chiti E, Menéndez AJ, and Teixeira PG (eds), 'The European Rescue of the European Union?' (2012) RECON Report No 19 - ARENA Report 3/12

Chiti E and Teixeira PG, 'The constitutional implications of the European responses to the financial and public debt crisis' (2013) 50 Common Market Law Review 683

Ciampi CA, *Non è il paese che sognavo* (Il Saggiatore 2010)

Cimini S, 'Gli equilibri di finanza pubblica nella prospettiva del buon andamento delle amministrazioni pubbliche' in Balestrino A et al (eds), *La dimensione globale della finanza e della contabilità pubblica* (Editoriale Scientifica 2020) 495

Cimini S, 'L'attualità della nozione di ente pubblico' (2015) Federalismi.it 1

Ciolli I, 'La "supremacy clause all'italiana". Regioni e strumenti finanziari derivati davanti alla Corte costituzionale' (2011) Rivista AIC 1

Clarich M, 'Il piano nazionale di ripresa e resilienza tra diritto europeo e nazionale: un tentativo di inquadramento giuridico' (2021) Corriere Giuridico 1025

Clarich M, 'La sicurezza economica?' (2012) Aperta Contrada 1

Clarich M, 'I poteri di vigilanza della Banca centrale europea' (2013) 3 Diritto pubblico 975

Clarich M, 'Federalismo fiscale e federalismo amministrativo' in Corte dei conti, *Il Federalismo fiscale alla prova dei decreti delegati: atti del LVII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2011* (Giuffrè 2012) 113

Coase R, 'The Problem of Social Cost' (1960) 56 The Journal of Law and Economics 837

Codogno L, 'Macroeconomic imbalances procedure' (2020) Economic Governance Support Unit PE 634.403 1

Codogno L and van den Noord P, 'The rationale for a safe asset and fiscal capacity for the Eurozone' (2019) 144 LSE 'Europe in Question' Discussion Paper Series 1

Collignon S, 'The End of the Stability and Growth Pact?' (2004) 1 International Economics and

Economic Policy 15

Collignon S, 'Economic Policy Co-ordination in EMU: Institutional and Political Requirements' (2001) Center for European Studies (CES) - Harvard University <https://ces.fas.harvard.edu/uploads/files/Working-Papers-Archives/PSGE_01_5.pdf>

Colombini G, 'La dinensione finanziaria dell'amministrazione pubblica e gli antidoti ai fenomeni gestionali di cattiva amministrazione' (2017) Federalismi.it 1

Colombini G, 'Il "nuovo" Sistema dei controlli della Corte dei Conti sui bilanci degli enti territoriali. Spunti di riflessione' (2015) Rivista della Corte dei conti 589

Committee for the study of Economic and Monetary Union, 'Report on economic and monetary union in the European Community' (1989)

Cooter R, Mattei U, Montaneri PG, Pradolesi R, and Ulen T, *Il mercato delle regole, Analisi economica del diritto civile* (Il Mulino 2006)

Corsetti G (ed), *Austerity: Too Much of a Good Thing. A VoxEU.org eCollection of views by leading economists* (CEPR 2012)

Corsetti G et al (ed), *A new start for the Eurozone: Dealing with debt, Monitoring the Eurozone 1* (CEPR 2015)

Corte dei Conti (ed), *Coordinamento e collaborazione nella vita degli enti locali: atti del V Convegno di scienza dell'amministrazione promosso dalla amministrazione provinciale di Como, Varenna, Villa Monastero, 17-20 settembre 1959* (Giuffrè 1961)

Cortese F, 'Sulla forma di Stato e sul diritto pubblico nell'Europa della crisi: alcuni rilievi teorici' (2018) Le Regioni 51

Cortese F, 'La Corte conferma che le ragioni del coordinamento finanziario possono fungere da legittima misura dell'autonomia locale' (2014) Le Regioni 792

Cortese F, *Il coordinamento amministrativo: dinamiche e interpretazioni* (Franco Angeli 2012)

Cottarelli C, 'How could the Stability and Growth Pact be simplified?' (2018) Economic Governance Support Unit PE 614.503 1

Cottarelli C and Guerguil M (eds), *Designing a European Fiscal Union: Lessons from the Experience of Fiscal Federations* (Routledge 2015)

Council of Europe Steering Committee on Local and Regional Democracy, 'Recovery of local and regional authorities in financial difficulties' (2002) Report No. 77 1

Cozzolino A, 'The Discursive Construction of Europe in Italy in the Age of Permanent Austerity' (2020) 58 Journal of Common Market Studies 580

Craig P, 'The Eurogroup, Power and Accountability' (2017) European Law Journal 234

Craig P, 'The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility' (2015) 22 Indiana Journal of Global Legal Studies 243

Craig P, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in Fabbrini F et al (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014)

Craig P, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in Adams M, Fabbrini F, and Larouche P (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 19

Craig P, 'Pringle: Legal Reasoning, Text, Purpose and Teleology' (2013) 53 Maastricht Journal of European and Comparative Law 3

Craig P, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) 37 E.L. Rev. 231

Craig P and Markakis M, 'EMU Reform' in Amtenbrink F and Herrmann C (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 1400

Crismani C, 'Il problema della gestione del debito pubblico' in Cavallini Cadeddu L (ed), *Il coordinamento dinamico della finanza pubblica* (Jovene Editore 2011) 87

Croci F, *Solidarietà tra stati membri dell'Unione europea e governance economica europea* (Giappichelli 2020)

Croci F, 'Is it worth the effort? The European Commission's proposal for integrating the substance of the 'Fiscal Compact' into the EU legal order' (2018) The Revue de l'euro 52

D'Alberti M, 'Santi Romano e l'istituzione' (2014) Rivista trimestrale di diritto pubblico 579

Dam KW, 'The American Fiscal Constitution' (1977) 44 The University of Chicago Law Review 271

D'Auria G, 'Corte dei conti in sede di controllo e accesso al giudizio incidentale di costituzionalità (ma il controllo di «sana gestione» è ... fuori dal gioco)' (2020) Giurisprudenza Costituzionale 2227

D'Auria G, 'I "nuovi" controlli della Corte dei conti (dalla "legge brunetta" al federalismo fiscale, e oltre' (2009) Il lavoro nelle pubbliche amministrazioni 489

D'Atena A, 'La difficile transizione. In tema di attuazione della riforma del Titolo V' (2002) 30 Le Regioni 305

da Costa Cabral N, *The European Monetary Union After the Crisis* (Routledge 2020)

Danescu E, *Pierre Werner and Europe* (Springer Professional 2018)

Dawson M, 'Three waves of new governance in the European Union' (2011) 36 EL. Rev. 208

Dawson M and Bobic A, 'Quantitative Easing at the Court of Justice – Doing whatever it takes to save the euro: Weiss and Others' (2019) Common Market Law Review 1005

Dawson M and de Witte F, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 Modern Law Review, 817

Debrun X et al, 'Tied to the mast? National fiscal rules in the European Union' (2008) 23 Economic Policy 298

de Bandt O and Hartmann P, 'Systemic risk: A survey' 35 ECB Working Paper Series, November 2000 < https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp035.pdf>

De Giorgi Cezzi G and Papa M, 'Il danno da elusione del patto di stabilità interno e dell'equilibrio di bilancio' in Mirabelli C and Schlitzer EF, *Trattato sulla nuova configurazione della giustizia contabile* (Editoriale Scientifica 2018) 255

Degni M and Gabrielli G, 'Critical issues in the Italian municipalities: a reconstructive analysis' (2018) Farmafactoring Foundation Research Papers 1

De Grauwe P, *Economics of Monetary Union* (13th edn, OUP 2020)

De Grauwe P and Yuemei J, 'How to Reboot the Eurozone and Ensure Its Long-term Survival' in Baldwin R and Giavazzi F (eds), *How to Fix Europe's Monetary Union: Views of Leading Economists* (VoxEU.org 2016) 137 <http://voxeu.org/content/how-fix-europe-s-monetary-union-views-leading-economists>

de Gregorio Merino A, 'Legal Developments in the EMU during the Debt Crisis' (2012) 49

Common Market Law Review 1613

de Haan J, Berger H, and Jansen DJ, 'Why has the Stability and Growth Pact Failed?' (2004) 7 International Finance 235

de Haan J, Berger H, and Jansen DJ, 'The End of the Stability and Growth Pact?' (2003) Netherlands Central Bank - Research Department <https://www.econstor.eu/bitstream/10419/76502/1/cesifo_wp1093.pdf>

De Ioanna P and Degni M, *Il vincolo stupido. Europa e Italia nella crisi dell'Euro* (Castelvecchi 2015)

De Ioanna P and Forte C, *Il bilancio dello Stato* (La nuova Italia scientifica 1996)

De Ioanna P and Goretti C, *La decisione di bilancio in Italia* (Il Mulino 2008)

della Cananea G, 'On Law and Politics in the EU: the Rule of Law Conditionality' (2021) Italian Journal of Public Law 1

della Cananea G, 'Ex crisibus Europa oritur' (2021) 41 Quaderni costituzionali 203

della Cananea G, 'L'Unione europea, oltre la stabilizzazione dei conti pubblici' (2020) 26 Diritto pubblico 165

della Cananea G, 'Dal pareggio di bilancio all'equilibrio della finanza pubblica' in Corte Costituzionale (ed), *Il diritto del bilancio e il sindacato sugli atti di natura finanziaria. Atti del convegno del 16-17 marzo 2017 dedicato alla magistrature contabile* (Giuffrè 2019) 241

della Cananea G, 'Differentiated Integration in Europe After Brexit: A Legal Analysis' (2019) 4 European Papers 447

della Cananea G, 'Parlamento e spesa pubblica un quarto di secolo dopo: in memoria di Paolo De Ioanna' (2019) 34 Rivista giuridica del Mezzogiorno 103

della Cananea G, 'No Representation without Taxation: the European Union' in Papadopoulou L, Pernice I, and Weiler JHH (eds), *Legitimacy Issues of the European Union in the Face of the Crisis* (Nomos 2017) 95

della Cananea G, 'Lex Fiscalis Europea' (2014) 34 Quaderni costituzionali 7

della Cananea G, 'Government Deficits and Investments: A European Legal Framework' (2013) 5 Italian Journal of Public Law 103

della Cananea G, 'L'ordinamento giuridico dell'Unione europea dopo i nuovi accordi intergovernativi' (2012) La Comunità internazionale 3

della Cananea G, 'L'Unione economica e monetaria venti anni dopo: crisi e opportunità' (2011) Costituzionalismo.it 1

della Cananea G, 'La "pubblicità" dei disavanzi eccessivi: tecniche di determinazione ed effetti' (2009) 19 Rivista italiana di diritto pubblico comunitario 575

della Cananea G, 'I controlli sugli enti territoriali nell'ordinamento italiano: il ruolo della Corte dei conti' (2009) 37 Le Regioni 855

della Cananea G, 'Autonomie regionali e vincoli comunitari' (2006) Federalismi.it 1

della Cananea G, 'La pseudo-riforma del patto di stabilità e crescita' (2005) 25 Quaderni costituzionali 668

della Cananea G, 'Il coordinamento della finanza pubblica alla luce dell'Unione economica e monetaria' (2004) Giurisprudenza costituzionale 77

della Cananea G, 'Integrazione europea e bilanci pubblici' in Cavallini Cadeddu L (ed), *Linee di*

riforma dei bilanci pubblici (Giappichelli 2003) 35

della Cananea G, 'Unione europea e finanza pubblica' (2002) 55 Rivista della Corte dei conti 296

della Cananea G, 'Il patto di stabilità e le finanze pubbliche nazionali' (2001) Riv. dir. fin. 559

della Cananea G, 'Il Patto di stabilità e le finanze pubbliche nazionali' in Bassi ML (ed), *Le nuove regole del bilancio statale* (Franco Angeli 2001) 256

della Cananea G, 'Riordino dei conti pubblici e "riforma" dello stato sociale' (1998) Giornale di diritto amministrativo 124

della Cananea G, *Indirizzo e controllo della finanza pubblica* (Il Mulino 1996)

della Cananea G and Napolitano G (eds), *Per una nuova costituzione economica* (Il Mulino 1998)

Delors J, 'Economic governance in the European Union' (2013) 51 J Common Mark Stud 169

Delors J, *Mémoires* (Plon 2003)

Delors J, 'Prefazione' in Padoa-Schioppa T, *Efficienza stabilità ed equità* (Il Mulino 1987) 7

De Mello L and Tovar Jalles J, 'The global crisis and intergovernmental relations: centralization versus decentralization 10 years on' (2020) 54 Regional Studies 942

Denozza, F, 'Poteri della pubblica amministrazione e benessere degli amministrati' in AIPDA (ed), *Annuario 2006: Analisi economica e diritto amministrativo* (Giuffrè 2007) 5

Denozza F, *Norme efficienti* (Giuffrè 2002)

Dermine P, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture' (2020) 47 Legal Issues of Economic Integration 337

Deroose S, Hodson D, and Kuhlmann J, 'The Broad Economic Policy Guidelines: Before and After the Re-launch of the Lisbon Strategy' (2008) 46 Journal of Common Market Studies 827

De Sadeleer N, 'The New Architecture of the European Economic Governance: A Leviathan or a Flat-Footed Colossus?' (2012) 19 Maastricht Journal of European & Comparative Law 354

De Siano R and D'Uva M, 'Fiscal Decentralization and Spillover Effects of Local Government Public Spending: The Case of Italy' (2017) 51 Regional Studies 1507

Desideri C, 'A Short History of Regionalism in Italy Since the Republican Constitution. Italian Regionalism and Its Evolution' in Mangiameli S (ed), *Italian Regionalism: Between Unitary Traditions and Federal Processes* (Springer 2014) 35

de Witte B, 'EMU as constitutional law' in Amtenbrink F and Herrmann C (eds), EU *Law of Economic and Monetary Union* (OUP 2020) 278

de Witte B, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) 11 European Constitutional Law Review 434

de Witte B and Beukers T, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle' (2013) 50 Common Market Law Review 805

de Witte B, Héritier A, and Trechsel AH, 'The Euro Crisis and the State of European Democracy' (2013) Policy Report of the EUI Global Governance Programme <https://cadmus.eui.eu/handle/1814/27016>

Di Bartolomeo G et al, 'Macroeconomic Stabilization Policies in the EMU: Spillovers, Asymmetries, and Institutions' (2005) Cesifo Working Paper No 1376

Donati F, 'The Euro Crisis, Economic Governance and Democracy in the European Union' (2013) 2 Italian Journal of Public Law 2013 130

Douglas M and Wildavsky A, *Risk and Culture: An Essay on the Selection of Technological and Environmental Dangers* (University of California Press 1983)

Draghi M, 'Sovereignty in a globalised world', Speech on the award of Laurea honoris causa in law from Università degli Studi di Bologna, 22 February 2019 <https://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp190222~fc5501c1b1.en.htm>

Draghi M, 'Europe and the euro 20 years on', Speech at Laurea Honoris Causa in Economics by University of Sant'Anna, 15 December 2018 <https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp181215.en.html>

Draghi M, 'Risk-reducing and risk-sharing in our Monetary Union', speech at the European University Institute, 11 May 2018 <https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180511.en.html>

Draghi M, 'Interrogazione con richiesta di risposta scritta QZ-120', 18 gennaio 2017 <https://www.ecb.europa.eu/pub/pdf/other/170120letter_valli_zanni_1.it.pdf?3ea18e5d94e7b94141581bc89c182772>

Draghi M, 'Europe's Pursuit of 'A More Perfect Union'', speech at the Harvard Kennedy School of Government, 9 October 2013 <https://www.ecb.europa.eu/press/key/date/2013/html/sp131009_1.en.html>

Draghi M, 'Remarks', Speech at the Global Investment Conference in London, 26 July 2012 <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>

Draghi M, 'Hearing before the Plenary of the European Parliament on the occasion of the adoption of the Resolution on the ECB's 2010 Annual Report' 1 December 2011 <https://www.ecb.europa.eu/press/key/date/2011/html/sp111201.en.html>

Draghi M and Macron E, 'The EU's fiscal rules must be reformed', *The Financial Times*, 23 December 2021

D'Sa R, 'The Legal and Constitutional Nature of the New International Treaties on Economic and Monetary Union from the Perspective of EU Law' (2012) 5 European Current Law 11

Dyson K, *States, Debt, and Power: 'Saints' and Sinners' in European History and Integration* (OUP 2014)

Dyson K and Featherstone K, *The Road to Maastricht: Negotiating Economic and Monetary Union* (OUP 1999)

Dyson K and Featherstone K, 'Italy and EMU as a "Vincolo Esterno": Empowering the Technocrats, Transforming the State' (1996) 1 South European Society and Politics 272

Dziemianowicz RI, 'Fiscal Responsibility Laws in EU Member States and Their Influence on the Stability of Public Finance' (2015) 10 International Journal of Business & Information 153

Eccleston R and Krever R, *The future of Federalism: Intergovernmental Financial Relations in an Age of Austerity* (Elgar Publishing 2017)

Eichengreen B and Von Hagen J, 'Fiscal Policy and Monetary Union: Is There a Tradeoff between Federalism and Budgetary Restrictions?' (1996) 5517 National Bureau of Economic Research Working Paper 1 <https://www.nber.org/system/files/working_papers/w5517/w5517.pdf>

Eichengreen B, 'European Monetary Unification' (1993) 31 Journal of Economic Literature 1321

El-Erian MA, *The Only Game in Town* (2016 Random House)

Enderlein H et al, 'Completing the Euro A road map towards fiscal union in Europe - Report of the "Tommaso Padoa-Schioppa Group"' (Notre Europe 2012)

Enderlein H et al, 'The EU Budget: How Much Scope for Institutional Reform?' (2005) 27 ECB Occasional Paper Series 1

Enriques L, Romano A, 'Rewiring Corporate Law for an Interconnected World' (2021) Bocconi Legal Studies Research Paper No. 3814822 1

Enriques L, Romano A, and Wetzer T, 'Network-Sensitive Financial Regulation' (2019) 451 ECGI - Law Working Paper <https://ecgi.global/working-paper/network-sensitive-financial-regulation>

Estella A, *Legal Foundations of EU Economic Governance* (CUP 2018)

European Investment Bank, 'The European Fund for Strategic Investments: the Legacy' (EIB 2020)

Eyraud, L and Moreno Badia, M, 'Too Small to Fail? Subnational Spending Pressures in Europe' (2018) IMF Working Paper, WP/13/46 1

Fabbrini F, *Brexit and the Future of the European Union* (OUP 2020)

Fabbrini F, 'Fiscal Capacity' in Fabbrini F and Ventoruzzo M (eds), *Research Handbook on EU Economic Law* (Elgar 2019) 107

Fabbrini F, 'Economic Policy in the EU After the Crisis: Using the Treaties to Overcome the Asymmetry of EMU' (2016) 20 Diritto dell'Unione europea 529

Fabbrini F, *Economic Governance in Europe* (OUP 2016)

Fabbrini F et al (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014)

Fabbrini F, 'The Fiscal Compact, the Golden Rule and the Paradox of European Federalism' (2013) 36 Boston College International & Comparative Law Review 25

Fabbrini F, 'Il pareggio di bilancio nelle costituzioni europee' (2011) Quaderni Costituzionali 933

Fabbrini F and Ventoruzzo M (eds), *Research Handbook on EU Economic Law* (Elgar 2019)

Fabbrini S, 'Intergovernmentalism and Its Limits: Assessing the European Union's Answer to the Euro Crisis' (2013) 46 Comparative Political Studies 1003

Falcon G, 'Una breve riflessione introduttiva per la discussione sul federalismo in Europa' (2018) 46 Le Regioni 35

Falcon G, 'La riforma costituzionale nello specchio del regionalismo' (2015) 43 Le Regioni 3

Falcon G, 'La crisi e l'ordinamento costituzionale' (2012) 40 Le Regioni 9

Falcon G, 'La riforma costituzionale e la legislazione regionale' (2005) 33 Le Regioni 707

Farber D A and Frickey P P, *Law and Public Choice. A Critical Introduction* (Chicago University Press 1991)

Farneti G and Pozzoli S (eds), *Principi e sistemi contabili negli enti locali* (Franco Angeli 2005)

Fasone C, 'La relazione 2017 dell'European Fiscal Board: un bilancio in chiaro-scuro del primo anno di attività' (2018) 38 Quaderni costituzionali 242

Fasone C, 'Taking budgetary powers away from national parliaments? On parliamentary prerogatives in the Eurozone crisis' (2015) EUI Working Paper Law No 37 1

<https://cadmus.eui.eu/bitstream/handle/1814/36658/LAW_2015_37.pdf>

Fasone C, 'National Parliaments under "external" fiscal constraints: the case of Italy, Portugal, and Spain facing the Eurozone crisis' (2014) Working paper series - School of Government LUISS Guido Carli <http://bpr.camera.it/bpr/allegati/show/CDBPR17-1112>

Fedeli S and Forte F, 'Measures of the Amending Power of Government and Parliament. The Case of Italy 1988–2002' (2007) Economics of Governance (2007) 309

Feld LP et al, 'Von der Corona-bedingten Schuldenaufnahme zur Wiedereinhaltung der Schuldenbremse' (2021) 22 Perspektiven der Wirtschaftspolitik 20

Feld LP and Daskaran T, 'Federalism, Budget Defict and Public Debt: on the Reform of Germany's Fiscal Constitution' (2010) 6 Review of Law & Economics 365

Feldstein M, 'EMU and International Conflict' (*Foreign Affairs*, November 1997) 60

Ferrari GF, 'Il federalismo fiscale nella prospettiva comparatistica' in Corte dei Conti (ed), *Il Federalismo fiscale alla prova dei decreti delegati: atti del LVII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2011* (Giuffrè 2012) 129

Ferrari GF (ed), *Federalismo, sistema fiscale e autonomie: Modelli giuridici comparati* (Autonomie 2010)

Ferrari GF, 'Federalismo, regionalismo e decentramento del potere in una prospettiva comparata' (2006) 34 Le Regioni 589

Ferrari GF and Galeone P (eds), *Patto di stabilità e finanza locale: la governance multilivello dei paesi dell'Unione Europea* (Marsilio 2012)

Ferrari GF and Madeo E (eds), *Manuale di contabilità pubblica* (Giuffrè 2019)

Ferraro L, *Crisi economica ed evoluzione delle forme di governo: un'analisi comparata* (Edizioni scientifiche italiane 2019)

Financial Services Authority, 'The Turner Review', March 2009

Fiocca M and Montedoro G, 'Il costo dell'impazienza: un'analisi giureconomica della legislazione sulle grandi opere' (2004) Urbanistica e appalti 1132

Fissi S and Gori E, *Il dissesto finanziario negli enti locali* (Franco Angeli 2014)

Flores E et al, 'The Framework for Fiscal Policy in EMU: What Future after Five Years of Experience?' (2005) 223 Economic Papers <https://ec.europa.eu/economy_finance/publications/pages/publication702_en.pdf>

Flynn L, 'Non-Fiscal Surveillance of the Member States' in Amtenbrink F and Herrmann C (eds), EU Law of Economic and Monetary Union (OUP 2020) 850

Follieri E, 'Le funzioni amministrative nel nuovo Titolo V della parte seconda della Costituzione' (2003) 31 Le Regioni 439

Forsthoff E, *Die Verwaltung als Leistungsträger* (Kohlhammer 1938)

Forte C and Pieroni P, 'Le sentenze n. 101/2018 e n. 6/2019 della Corte costituzionale: il rapporto tra legge e bilancio e gli effetti delle pronunce sui saldi di finanza pubblica' (2020) Forum di Quaderni Costituzionali 1

Forte F, *Manuale di scienza delle finanze* (Giuffrè 2007)

Forte F, 'The Italian Post War Fiscal Constitution: Reasons of a Failure' (1999) 7 European Journal of Law and Economics 103

Forte F, 'Le regole della costituzione fiscale per il bilancio pubblico' in Forte F (ed), *Le regole*

della costituzione fiscale (Politea 1998) 9

Forte F, *Teoria generale della finanza pubblica – Volume 1* (Boringhieri 1976)

Fowler J et al, 'Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court' (2007) 15 Political Analysis 324

Fracchia F, 'I controlli sulle società pubbliche' (2018) Diritto Processuale Amministrativo 855

Fracchia F, 'La Corte dei conti tra funzione giurisdizionale, di controllo, di consulenza e di certificazione' (2014) Diritto dell'economia 403

Gabrisch H and Staehr K, 'The Euro Plus Pact: Competitiveness and External Capital Flows in the EU Countries' (2015) 53 Journal of Common Market Studies 558

Gallo F, 'Il principio costituzionale di equilibrio di bilancio e il tramonto dell'autonomia finanziaria degli enti territoriali' (2014) Rassegna Tributaria 1199

Gambaro A, 'L'analisi economica del diritto nel contesto della tradizione giuridica occidentale' in Alpa G et al (eds), *Analisi economica del diritto privato* (Giuffrè 1999) 461

Gandullia L and Leporatti L, 'Subnational fiscal balance, interregional redistribution and risk-sharing in Italy' (2020) 54 Regional Studies 318

Garben S and Govaere I (eds), *The Division of Competences between the EU and the Member States*, (Hart Publishing 2017)

Garrett E, Graddy EA, and Jackson HE (eds), *Fiscal Challenges: An Interdisciplinary Approach to Budget Policy* (CUP 2008)

Gastaldi F and Liberati P (eds), *I nodi della finanza pubblica: teoria e politica. Scritti in onore di Antonio Pedone* (Franco Angeli 2018)

Gentile A, *Fondamenti di contabilità pubblica e finanza locale* (Il Mulino 2020)

Gentiloni P, 'EU economy chief urges end to 'muddling through' with budget rules', *The Financial Times*, 29 July 2021

Gerapetritis G, *New Economic Constitutionalism in Europe* (Hart Publishing 2019)

Giampaolino L, 'Intervento introduttivo del Presidente della Corte dei conti' in Corte dei Conti (ed), *Dalla crisi economica al pareggio di bilancio: prospettive, percorsi e responsabilità - atti del LVIII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2012* (Giuffrè 2013) 35

Giannini MS, 'Pianificazione' in *Enciclopedia del diritto*, Vol. XXXXIII (Giuffrè 1983) 629

Giannini MS, *Commissione per il completamento dell'ordinamento regionale* (Il Mulino 1977)

Giannini MS, 'Autonomia (saggio sui concetti di autonomia)' in Id., *Scritti, Vol. II* (Giuffrè 2002 [1951]) 345

Giani L, D'Orsogna M, and Police A (eds), *Dal diritto dell'emergenza al diritto del rischio* (Editoriale Scientifica 2018)

Gianviti F et al, 'A European mechanism for sovereign debt crisis resolution: a proposal' (2010) Bruegel <https://www.bruegel.org/2010/11/a-european-mechanism-for-sovereign-debt-crisis-resolution-a-proposal/>

Giavazzi F et al, 'Revising the European Fiscal Framework' <https://www.governo.it/sites/governo.it/files/documenti/documenti/Notizie-allegati/Reform_SGP.pdf>

González-Páramo JM, 'New Perspectives on Fiscal Sustainability' 13 October 2005

<https://www.ecb.europa.eu/press/key/date/2005/html/sp051013.en.html>

Giddens A, 'Risk and Responsibility' (1999) 62 The Modern Law Review 1

Giovannelli A, 'Vincoli europei e decisione di bilanci' (2013) 33 Quaderni costituzionali 933

Giulietti W, 'Funzione politica del bilancio e tutela dell'interesse finanziario tra tecnica e diritto' (2019) 65 Il diritto dell'economia 298

Giulietti W and Trimarchi M, 'Nozione di amministrazione pubblica e coordinamento statale nella prospettiva dell'interesse finanziario' (2016) 10 Diritto e processo amministrativo 925

Giupponi TF, 'Il principio costituzionale dell'equilibrio di bilancio e la sua attuazione' (2014) 34 Quaderni costituzionali 55

Golia jr A, 'L'equilibrio di bilancio e le sue corti: considerazioni su legittimazione della Corte dei conti e giudizio incidentale' (2019) 39 Quaderni costituzionali 901

Goretti C, 'Pareggio di bilancio e credibilità della politica fiscale: il ruolo del fiscal council nella riforma costituzionale italiana' (2012) 154 Astrid rassegna 1

Gori L, 'Manovra di bilancio 2019: un'autorizzazione presidenziale con lettera' (2019) 39 Quaderni costituzionali 159

Gotti P, 'La problematica "nozione finanziaria" di pubblica amministrazione, l'elenco Istat e la regola della spending review' (2016) Diritto Amministrativo 177

Goyal S, *Connections: An Introduction to the Economics of Networks* (Princeton University Press 2009)

Grembi V, Nannicini T, and Troiano U, 'Policy Responses to Fiscal Restraints: A Difference-in-Discontinuities Design' (2012) IZA Discussion Paper No. 6952 1

Griglio E and Fasone C, 'Can Fiscal Councils Enhance the Role of National Parliaments in the European Union? A Comparative Analysis' in de Witte B et al (eds), *The Euro Crisis and the State of European Democracy* (European University Institute Press 2014)

Goodspeed TJ, 'Decentralization and intra-country transfers in the Great Recession: the case of the European Union' (2020) 54 Regional Studies 931

Grandis FG and Mattei G, 'The Harmonization of Accounting in the Italian Public Sector: A New Accrual Basis Standard Versus Ipsas' (2012) 4 Italian Journal of Public Law 376

Gregori WD and Marattin L, 'Determinants of fiscal distress in Italian municipalities' (2019) 56 Empirical Economics 1269

Griller S and Lentsch E (eds), *EMU Integration and Member States' Constitutions* (Hart Publishing 2021)

Grisostolo FE, 'Il potere decisionale dei Parlamenti nazionali in materia finanziaria fra rispetto dei vincoli europei e dell'autonomia regionale: i casi italiano e spagnolo' (2019) Diritti fondamentali 1

Groppi T, 'The Impact of the Financial Crisis on the Italian Written Constitution' (2012) 7 Italian Journal of Public Law 1

Gros D, 'Lessons from the Covid-19 Crisis for Euro Area Fiscal Rules' (2020) 55 Intereconomics 281

Gros D, 'On the stability of public debt in a monetary union' (2012) 50 Journal of Common Market Studies 36

Group of Ten, 'The resolution of sovereign liquidity crises' (1996)

Guarino G, *Ratificare Lisbona?* (Passigli 2008)

Guarino G, 'Sul regime costituzionale delle leggi di incentivazione e di indirizzo' (1961) Atomo petrolio elettricità 1

Guella F, 'Iunge et impera? Legittimità costituzionale ed effetti strutturali del c.d. auto-coordinamento delle Regioni sul riparto delle riduzioni di spesa' (2017) 45 Le Regioni 1331

Guella F, L'evoluzione delle logiche perequative nella finanza regionale italiana: redistribuzione delle risorse o delle competenze? (2016) 44 Le Regioni 225

Guella F, 'Il principio negoziale nei rapporti finanziari tra livelli di governo' (2014) 42 Le Regioni, 131

Guella F, 'Il patto di stabilità interno, tra funzione di coordinamento finanziario ed equilibrio di bilancio' (2013) 33 Quaderni costituzionali 585

Guttenberg L, Hemker J, and Tordoir S, 'Alles wird anders – Wie die Pandemie die EU-Finanzarchitektur verändert' (2021) 101 Wirtschaftsdienst 77

Habermas J, *The Crisis of the European Union: A Response* (Polity Press 2013)

Hallerberg M, Strauch R, and Von Hagen J, *Fiscal Governance in Europe* (CUP 2009)

Hallerberg M, 'Fiscal federalism reforms in the European Union and the Greek crisis' (2011) 12 European Union Politics 127

Hallerberg M, 'Fiscal governance and fiscal outcomes under EMU before and after the crisis' in Caporaso J and Rhodes M (eds), *The Political and Economic Dynamics of the Eurozone Crisis*, (OUP 2016) 145

Hamilton DK and Stenberg CW (eds), *Intergovernmental Relations in Transition: Reflections and Directions* (Routledge 2018)

Henning R and Kessler M, 'Fiscal federalism: US history for architects of Europe's fiscal union' (2012) Bruegel Essay and Lecture Series <https://www.bruegel.org/wp-content/uploads/imported/publications/essay_fiscfed_web_01.pdf>

Harden I, 'The Fiscal Constitution of EMU' in Beaumont P and Walker N (eds), *The Legal Framework of the Single European Currency* (Hart Publishing 1999) 71

Harden I, 'What Future for the Centralized Enforcement of Community Law?' (2002) 55 Current Legal Problems 495

Harden I, 'Money and the Constitution: Financial control, reporting and audit' (1993) 13 Legal Studies 16

Harlow C and Rawlings R, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 European Law Journal 542

Heimberger P, 'Potential Output, EU Fiscal Surveillance and the COVID-19 Shock' (2020) 55 Inter Economics 167

Heipertz M and Verdun A, *Ruling Europe: The Politics of the Stability and Growth Pact* (CUP 2010)

Herdegen ML, 'Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom' (1998) Common Market Law Review 9

Hermes G, 'Gewährleistungsverantwortung als Infrastrukturverantwortung' in Schuppert GF, *Der Gewährleistungsstaat - Ein Leitbild auf dem Prüfstand* (Nomos 2005) 111

Hermes G, *Staatliche Infrastrukturverantwortung* (Mohr Siebeck 1998)

High Level Group on Own Resources, 'The Future Financing of the EU' (2016)

Hinarejos A, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015)

Hinarejos A, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' (2015) 11 European Constitutional Law Review 563

Hinarejos A, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU' (2013) 50 Common Market Law Review 1621

Hodson D, *Governing the Euro Area in Good Times and Bad* (OUP 2011)

Hodson D and Maher I, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-Ordination' (2001) 39 Journal of Common Market Studies 719

Hofmann C, 'A Legal Analysis of the Euro Zone Crisis' (2013) 18 Fordham J. Corp. & Fin. L. 519

Holland S, Union Bonds, 'Eurobonds and a New Deal for Europe' <www2.euromemorandum.eu/uploads/background_paper_holland_union_bonds.pdf>

Horn MJ, *The Political Economy of Public Administration* (CUP 1995)

Hornstein DT, 'Complexity Theory, Adaptation, and Administrative Law' (2005) 54 Duke Law Journal 913

Horvath M, 'EU Independent Fiscal Institutions: An Assessment of Potential Effectiveness' (2018) 56 Journal of Common Market Studies 504

Husa J, *The Future of Legal Families* (Oxford Handbooks 2016)

IMF, BIS, and FSB Staff, 'Report to G20 Finance Ministers and Governors, Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments: Initial Considerations', 2009

Immordino D, 'L'autonomia finanziaria a dieci anni dalla riforma costituzionale' (2011) 39 Le Regioni 415

Immordino D, 'Ragioni e prospettive della specialità finanziaria nel nuovo assetto del sistema di finanza pubblica' (2009) 32 Le Regioni 1309

Immordino D, 'Le clausole di riserva allo Stato del gettito di tributi compartecipati, tra tutela delle esigenze di finanza pubblica e salvaguardia dell'autonomia finanziaria (siciliana)' (2012) 40 Le Regioni 260

Inman RP and Rubinfeld DL, 'The EMU and Fiscal Policy in the New European Community: An Issue for Economic Federalism' (1994) 14 International Review of Law and Economics 147

Ioannidis M, 'Europe's new transformations: how the EU economic constitution changed during the eurozone crisis' (2016) 53 Common Market Law Review 1237

Istituto di Studi e Analisi Economica, 'Rapporto ISAE - L'attuazione del Federalismo' 2006

James H, *Making the European Monetary Union* (HUP 2012)

Johnson J, Fortune J, and Bromley J, *Systems, Networks, and Policy, in Non-Equilibrium Social Science and Policy* (Springer 2017)

Jones E, 'The Politics of Economic and Monetary Union' in Amtenbrink F and Herrmann C (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 53

Kahan D and Braman D, 'Cultural Cognition of Public Policy' (2006) 24 Yale Law & Policy Review 147

Kavanagh A, 'The Idea of a Living Constitution' (2003) 16 Canadian Journal of Law and Jurisprudence 55

Kelman M, 'Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics' (1993) 45 Stanford Law Review 1215

Keppenne J-P, 'Economic Policy Coordination' in Amtenbrink F and Herrmann C (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 787

Keppenne J-P, 'EU Fiscal Governance on the Member States' in Amtenbrink F and Herrmann C (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 813

King M, 'Commentary: monetary implications of greater fiscal discipline. In Budget Deficits and Debt: Issues and Options' in Jackson Hole Economic Symposium (ed), *Proceedings of the 1995 Jackson Hole Symposium* 171 <https://www.kansascityfed.org/documents/6803/KingCommentary_JH95.PDF>

Klingler DU, 'Government Purchasing During COVID-19 and Recessions: How Expansionary Legal Policies Can Stimulate the Economy' (2020) 50 Public Contract Law Journal 1

Kirkegaard JF, 'A More Perfect Fiscal Union' in Kirkegaard JF and Posen A (eds), *Lessons for EU Integration from US History* (European Commission 2018)

Klijn E-H and Koppenjan J, 'Governance network theory: past, present and future' (2012) 40 Policy & Politics 587

Kombos C, 'Constitutional Review and the Economic Crisis: In the Courts We Trust?' (2019) 25 European Public Law 105

Küçük E, 'Solidarity in EU Law. An Elusive Political Statement or a Legal Principle with Substance?' (2016) 23 Maastricht Journal of European and Comparative Law 965

Laffan B, *The Finances of the European Union* (St. Martin's Press 1997)

Lago-Peñas S, Martinez-Vazquez J, and Sacchi A, 'Fiscal stability during the Great Recession: putting decentralization design to the test' (2020) 54 Regional Studies 919

Lamfalussy A, 'The need for co-ordination of fiscal policies in a European Economic and Monetary Union' 31 January 1989 <https://www.ecb.europa.eu/ecb/access_to_documents/archives/delors/documents/shared/data/ecb.dr.delors19890131TheneedforcoordinationoffiscalpoliciesinaEuropeanEconomicandMonetaryUnionMonetaryPolicyinco-operRedacted.en.pdf>

Lane PR, 'The European sovereign debt crisis' (2012) 26 Journal of Economic Perspectives 49

Lane T, 'Market discipline' (1992) 42 IMF Staff Papers 1

Larch M and Braendle T, 'Independent Fiscal Councils: Neglected Siblings of Independent Central Banks? An EU Perspective' (2018) 56 Journal of Common Market Studies 267

Lastra R, 'Systemic risk and Macro-prudential supervision' in Moloney N, Ferran E, and Payne J (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) 310

Lastra R and Buchheit LC, *Sovereign Debt Management* (OUP 2014)

Lastra R and Louis J-V, 'European Economic and Monetary Union: History, Trends, Prospects' (2013) 32 Yearbook of European Law 57

Lattanzi G, 'Intervento' in Corte dei Conti, *Sviluppo economico, vincoli finanziari e qualità dei servizi: strumenti e garanzie - atti del LXIV Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2018* (Giuffrè 2019) 29

Lee Y-H A and Romano A, 'Insider Trading and Macroeconomic Risk' (SSRN, 19 November

2020) 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731719>

Leino-Sandberg P and Saarenheimo T, 'A fiscal union for the EMU?' 95 ADEMU Working Paper Series 1

Leino-Sandberg P, 'Next Generation EU – Breaking a Taboo or Breaking the Law?' (2020) CEPS-Articles in Brief 1

Lenaerts K, 'EMU and the EU's Constitutional Framework' (2014) 39 European Law Review 753

Leeper E M, 'Shifting Policy Norms and Policy Interactions' in Jackson Hole Economic Symposium (ed), Proceedings of the 2021 Jackson Hole Symposium 1 <https://www.kansascityfed.org/documents/8357/Leeper_JHPaper.pdf>

Listokin Y, 'Law and Macro: What Took So Long' (2020) 83 Law & Contemp. Probs. 141

Listokin Y, 'A Theoretical Framework for Law and Macroeconomics' (2019) 21 American Law and Economics Review 46

Listokin Y, *Law and Macroeconomics: Legal Remedies to Recessions* (HUP 2019)

Listokin Y, 'Law and Macroeconomics: The Law and Economics of Recessions' (2017) 34 Yale J. on Reg. 791

Listokin Y and Murphy D, 'Macroeconomics and the Law' (2019) 15 Annual Review of Law and Social Science 377

Lo Conte G, *Equilibrio di bilancio, vincoli sovranazionali e riforma costituzionale* (Giappichelli 2015)

Longo N, 'L'insostenibile leggerezza della responsabilità amministrativa: un contributo di «Law and Economics»' (2005) 5 Riv. Corte conti 225

Losada F, 'A Europe of Creditors and Debtors: Three Orders of Debt Relations in European Integration' (2020) 58 Journal of Common Market Studies 787

Loubert A, 'Sovereign Debt Threatens the Union: The Genesis of a Federation' (2012) 8 European Constitutional Law Review 442

Louis J-V, 'The Review of the Stability and Growth Pact' (2006) 43 Common Market Law Review 85

Louis J-V, 'A legal and institutional approach for building a monetary Union' (1998) 35 Common Market Law Review 33

Luberti A, 'I controlli della corte dei conti come giurisdizione nell'ottica di razionalità della "costituzione in senso sostanziale"' (2020) Bilancio Comunità Persona 127

Lucattini S, 'Lo stato debitore' (2014) Rivista Trimestrale di Diritto Pubblico 977

Luciani M, 'Gli equilibri di bilancio in un ordinamento multilivello' in Corte dei Conti, Sviluppo economico, vincoli finanziari e qualità dei servizi: strumenti e garanzie - *atti del LXIV Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2018* (Giuffrè 2019) 39

Luciani M, 'Costituzione, bilancio, diritti e doveri dei cittadini' in Corte dei Conti, *Dalla crisi economica al pareggio di bilancio: atti del LVIII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2012* (Giuffrè 2013) 685

Luciani M, 'Generazioni future, distribuzione temporale della spesa pubblica e vincoli costituzionali' (2008) Diritto e società 145

Luciani M, 'Economia nel diritto costituzionale' in *Digesto delle discipline pubblicistiche* (Utet

1990) 374

Luhmann N, *Risk: A Sociological Theory* (Walter de Gruyter 1993)

Luhmann N, 'Differentiation of Society' (1977) 2 The Canadian Journal of Sociology 29

Lupo N, 'Costituzione europea, pareggio di bilancio ed equità tra le generazioni. Notazioni sparse' (2011) Amministrazione in Cammino 1

Lupo N, 'Le procedure di bilancio dopo l'ingresso nell'Unione economica e monetaria' (1999) 19 Quaderni costituzionali 523

Lupo N and Ibrido R, 'Le deroghe al divieto di indebitamento tra Fiscal Compact e articolo 81 della Costituzione' (2017) Rivista trimestrale di diritto dell'economia 206

Luther J, 'Crisi economica ed impatto sulle istituzioni nazionali: i punti di vista della Germania' (2016) Federalismi.it 1

Macchiarelli C, Gerba E, and Diessner S, 'The ECB's Unfinished Business. Brussels' (European Parliament 2019) <https://www.europarl.europa.eu/cmsdata/186941/LSE_FINAL-original.pdf>

Meyerhof Salama B, 'The Art of Law and Macroeconomics' (2012) 74 U. Pitt. L. Rev. 131

Majone G, *Rethinking the Union of Europe Post-Crisis* (CUP 2014)

Manger-Nestler C, 'The Architecture of the EMU' in Amtenbrink F and Herrmann C (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 191

Mangiameli S, 'The Regions and the Reforms: Issues Resolved and Problems Pending' in Mangiameli S (ed), *Italian Regionalism: Between Unitary Traditions and Federal Processes* (Springer 2014) 2

Markakis M, *Accountability in the Economic and Monetary Union* (OUP 2020)

Marks G, 'Structural policy and multilevel governance in the EC' in Cafruny A and Rosenthal G (eds), *The State of the European Community* (Boudler 1993) 391

Marini FS, 'La corte dei conti di fronte all'autonomia delle regioni: prospettive di riforma in un'ottica di rafforzamento della democrazia e della legalità' (2020) Rivista della Corte dei Conti 23

Martucci F, 'Non-EU Legal Instruments (EFSF, ESM, and Fiscal Compact)' in Amtenbrink F and Herrmann C (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 293

Masciandaro D, 'La non emendabilità delle leggi di spesa e di bilancio: analisi teorica e profili istituzionali' in Monorchio A, *La finanza pubblica italiana dopo la svolta del 1992* (Il Mulino 1996) 399

Masciandaro D and Romelli D, 'Optimal Currency Area and European Monetary Membership: Economics and Political Economy' (2017) Baffi Carefin Centre Research Paper Series 1

Massa Gallerano G, 'Il federalismo demaniale tra crisi economica e riduzione del debito: verso la dismissione dei beni pubblici?' (2013) Le Regioni 575

Mattei U, 'The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi' (2005) 64 Maryland Law Review 220

McCormick R and Stears C, *Legal and Conduct Risk in the Financial Markets* (3rd edn, OUP 2018)

Meadows D, *Thinking in Systems* (Chelsea Green Publishing 2008)

Merkel A, 'Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st

academic year' (*College of Europe*, 2 November 2010)

Merloni F, 'Il sistema amministrativo italiano, le Regioni e la crisi finanziaria' (2011) Le Regioni, 599

Merloni F, 'Infrastrutture, ambiente e governo del territorio' (2007) 35 Le Regioni 45

Merloni F, 'Una definitiva conferma della legittimità dei poteri sostitutivi regionali' (2004) Le Regioni 1074

Merrill T W, 'Private and Public Law' in Andrew S. Gold et al (eds), *The Oxford Handbook of the New Private Law* (OUP 2020) 575

Merusi F, 'Il giudice amministrativo fra macro e micro economia' (2018) Rivista trimestrale di diritto dell'economia 136

Merusi F, 'Debito pubblico e giudice amministrativo' (2014) Dir. Proc. Amm. 3

Merusi F, 'Conclusioni' in AIPDA (ed), *Annuario 2006: Analisi economica e diritto amministrativo* (Giuffrè 2007) 311

Merusi F, 'Governo della moneta e indipendenza della Banca centrale nella federazione monetaria dell'Europa' (1997) Studi e note di economia 7

Merusi F, 'Credito e moneta nella Costituzione' in Associazione per gli studi e le ricerche parlamentari (ed), *Quaderno n. 2, Associazione per gli studi e le ricerche parlamentari, Seminario 1991* (Giuffrè 1991) 171

Merusi F, 'Art. 47' in Branca G, *Commentario della Costituzione – Rapporti economici, Tomo III* (Zanichelli 1980) 155

Merusi F (eds), *La legislazione economica italiana dalla fine della guerra al primo programma economico* (Giuffrè 1974)

Merusi F, *Servizi pubblici instabili* (Il Mulino 1990)

Messori M, *Recovery pathways. The difficult Italian convergence in the Euro area* (Bocconi University Press 2021)

Metcalfe L, 'The European Commission as a Network Organisation' (1996) Publius: The Journal of Federalism 43

Micklitz H-W, 'The COVID-19 Threat: An Opportunity to Rethink the European Economic Constitution and European Private Law' (2020) 11 European Journal of Risk Regulation 1

Micossi S, 'La riforma del Patto di stabilità e crescita' (2021) Luiss Policy Brief No 12 1

Micossi S, 'What Future for the Eurozone' (2015) Luiss Policy Brief No 8 1

Migliarese Caputi F, *Diritto degli enti locali* (Giappichelli 2016)

Mišćenić E and Raccah A (eds), *Legal Risks in EU Law* (Springer International Publishing 2016)

Mitchell M, *Complexity: A Guided Tour* (OUP 2009)

Modigliani F, 'Long-Run Implications of Alternative Fiscal Policies and the Burden of the National Debt' (1961) 71 The Economic Journal 730

Mody A, *Eurotragedy: A Drama in Nine Acts* (OUP 2018)

Moloney N, 'Capital Markets Union: "ever closer union" for the EU financial system' (2016) 41 European Law Review 307

Moloney N, 'European Banking Union: Assessing its risks and resilience' (2014) 51 Common Market Law Review 1609

Moloney N, 'EU financial market regulation after the global financial crisis: 'More Europe' or more risks?' (2010) 47 Common Market Law Review 1317

Monti M, 'A New Strategy for the Single Market - Report to the President of the European Commission, Jose Manuel Barroso' (2010) <https://ec.europa.eu/archives/bepa/pdf/monti_report_final_10_05_2010_en.pdf>

Morelli A, 'Dopo il referendum costituzionale: quali prospettive per il sistema delle autonomie?' (2016) 44 Le Regioni 847

Morlino L and Sottilotta CE (eds), *La crisi dell'Eurozona e l'Europa del sud. Un'analisi comparata* (Mulino 2020)

Morris R, Ongena H, and Schuknecht L, 'The Reform and Implementation of the Stability and Growth Pact' (2006) 47 ECB Occasional Paper Series

Morrone A, 'Tendenze del federalismo in Europa dopo la crisi' (2018) Le Regioni 13

Morrone A, 'Pareggio di bilancio e Stato costituzionale' (2013) 27 Lavoro e diritto 357

Mortati C, *La costituzione in senso materiale* (Giuffrè 1940)

Mosley L, *Global Capital and National Governments* (CUP 2003)

Mourlon-Druol E, 'History of an Incomplete EMU' in Amtenbrink F and Herrmann C (eds), *EU Law of Economic and Monetary Union* (OUP 2020) 13

Münchau W, 'Berlin weaves a deficit hair-shirt for us all', *The Financial Times*, 21 June 2009

Mundell R A, 'A Theory of Optimum Currency Areas' (1961) 51 American Economic Rev 657

Musgrave R A, *The Theory of Public Finance* (McGraw-Hill 1959)

Napolitano G, 'Administrative Law' in Marciano A and Ramello GB (eds), *Encyclopedia of Law and Economics* (Springer 2014)

Napolitano G, 'Diritto amministrativo e processo economico' (2014) Dir. Amm. 695

Napolitano G, 'Il Meccanismo Europeo di Stabilità e la nuova frontiera costituzionale dell'Unione' (2012) Giornale di Diritto Amministrativo 461

Napolitano G, 'L'incerto futuro della nuova governance economica europea' (2012) Quaderni Costituzionali 141

Napolitano G, 'Analisi economica del diritto pubblico' in Cassese S (ed), *Dizionario di diritto pubblico* (Giuffrè 2006) 299

Napolitano G and Abrescia M, *Analisi economica del diritto pubblico* (Il Mulino 2009)

North D, *Institutions, Institutional Change, and Economic Performance* (CUP 1990)

Notermans T and Piattoni S, 'EMU and the Italian Debt Problem: Destabilising Periphery or Destabilising the Periphery?' (2020) 42 Journal of European Integration 345

Oates W, *Fiscal Federalism* (Harcourt Brace Jovanovich 1972)

Olson M, *The Logic of Collective Action* (HUP 1965)

Onida V, *Le leggi di spesa nella Costituzione* (Giuffré 1969)

Onida V, 'The Historical and Constitutional Foundations of the Budgetary System in Italy' in David Coombes (ed), *The Power of the Purse. The Role of European Parliaments in Budgetary Decisions* (Allen and Unwin 1976) 215

Onida V, 'Il giudice costituzionale e i conflitti tra legislatori locali e centrali' (2007) 35 Le Regioni

11

Onida V, *Constitutional Law in Italy* (2nd edn, Wolters Kluwer 2019)

Onida V, 'Portata e limiti dell'obbligo di indicazione della copertura finanziaria nelle leggi che importano nuove o maggiori spese' (1966) Giurisprudenza costituzionale 4

Ostrom E, 'An agenda for the study of institutions' (1986) 48 Public Choice 3

Ostrom E, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 1990)

Padoa-Schioppa T et al, *Efficiency, Stability and Equity: A strategy for the evolution of the economic system of the European Community. Report to the European Commission* (OUP 1988)

Padoa-Schioppa T, *The Road to Monetary Union in Europe* (Clarendon Press 1994)

Padoa-Schioppa T, *La veduta corta* (Il Mulino 2009)

Padoan PC, 'EMU as an Evolutionary Process' in Andrews DM et al (eds), *Governing the World's Money* (Cornell University Press 2002)

Padula C, 'Riflessioni sparse sulle autonomie territoriali, dopo la (mancata) riforma' (2016) 44 Le Regioni 857

Paech P, 'Systemic Risk, Regulatory Powers and Insolvency Law: The Need for an International Instrument on the Private Law Framework for Netting' (2010) 116 Institute for Law and Finance, Goethe Universität Working Paper Series 1

Page SE, *Diversity and Complexity* (Princeton University Press 2011)

Pagoulatos G and Tsoukalis L, 'Multilevel Governance' in Erik Jones, Anand Menon, and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012) 62

Palermo F and Wilson A, 'The Dynamics of Decentralization in Italy: Towards a Federal Solution?' (2013) European Diversity and Autonomy Papers EDAP

Papademos L, 'The political economy of the reformed Stability and Growth Pact: implications for fiscal and monetary policy', Speech at the conference 'The ECB and Its Watchers VII' 3 June 2005 <https://www.ecb.europa.eu/press/key/date/2005/html/sp050603_1.en.html>

Paris D, 'Il Titolo V alla prova dei piani di rientro: delegificazione dei principi fondamentali e asimmetria fra Stato e Regioni nel rispetto delle procedure' (2014) 42 Le Regioni 203

Pasquino G and O'Neill CM, 'A Postmortem of the Bicamerale' (1998) 14 Italian Politics 101

Passador ML and Romano A, 'Why legal scholars should study network theory' (2021) Rivista delle società 1036

Pedone A, 'Federalismo fiscale e politiche di bilancio nell'ambito della riforma della governance europea' in Corte dei Conti (ed), *Il Federalismo fiscale alla prova dei decreti delegati: atti del LVII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2011* (Giuffrè 2012) 61

Peers S, 'The Stability Treaty: Permanent Austerity or Gesture Politics?' (2012) 8 European Constitutional Law Review 404

Perez R, 'La crisi del debito pubblico' (2016) Rivista Trimestrale di Diritto Pubblico 669

Perez R, 'Il Trattato di Bruxelles e il Fiscal Compact' (2012) Giornale di diritto amministrativo 469

Perez R, 'Corte di giustizia e regole fiscali dell'Unione' (2004) 10 Giornale di diritto

amministrativo 1073

Perez R, 'Autonomia finanziaria degli enti locali e disciplina costituzionale' (2010) Rivista giuridica del Mezzogiorno 1343

Perez R, 'Is There Really A Fiscal Federalism in Italy?' (2009) Italian Journal of Public Law 211

Perez R, 'Finanza pubblica' in Cassese S (ed), Trattato di diritto amministrativo (Giuffrè 2000) 533

Perez R, *Le procedure finanziarie dello Stato* (Angeli 1978)

Pericu G, *Le sovvenzioni come strumento di azione amministrativa* (Giuffrè 1967)

Peroni G, *La crisi dell'euro: limiti e rimedi dell'unione economica e monetaria* (Giuffrè 2012)

Perotti R, 'Fiscal policy in good times and bad' (1999) 114 The Quarterly Journal of Economics 1399

Persson T and Tabellini G, 'Political Economics and Public Finance' in Auerbach A and Feldstein M (ed), *Handbook of Public Economics* (North-Holland 2002)

Persson T and Tabellini G, 'Federal Fiscal Constitutions: Risk Sharing and Moral Hazard' (1996) 64 Econometrica 623

Pesce G, 'La sostenibilità del debito pubblico della pubblica amministrazione nella nuova costituzione finanziaria dello Stato' (2015) Rivista Italiana di Diritto Pubblico Comunitario 531

Peterson J, 'Juncker's political European Commission and an EU in crisis' (2017) 55 Journal of Common Market Studies 349

Pieroni M, 'Gli strumenti nazionali di coordinamento della finanza pubblica: aspetti giuridici' in Corte dei Conti, *Dalla crisi economica al pareggio di bilancio: atti del LVIII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2012* (Giuffrè 2013) 273

Piga F, 'Coordinamento (principio del)' in *Enciclopedia giuridica Treccani*, Vol. IX (Treccani 1988)

Pisani-Ferry J, *Le réveil des démons: La crise de l'euro et comment nous en sortir* (Edition Fayard 2011)

Pisani-Ferry J, *The Euro Crisis and Its Aftermath* (OUP 2014)

Pisani-Ferry J, 'Only One Bed for Two Dreams: A Critical Retrospective on the Debate over the Economic Governance of the Euro Area' (2006) 44 Journal of Common Market Studies 823

Pisauro G, 'Intergovernmental Relations and Fiscal Discipline: Between Commons and Soft Budget Constraints' (2001) IMF Working Paper WP/01/65 1

Pitruzzella G, 'Chi governa la finanza pubblica in Europa?' (2012) Quaderni Costituzionali 9

Pitruzzella G, 'La crisi e l'Europa delle Regioni' (2011) Le Regioni 1125

Pizzetti F, 'La ricerca del giusto equilibrio tra uniformità e differenza: il problematico rapporto tra il progetto originario della Costituzione del 1948 e il progetto ispiratore della riforma costituzionale del 2001' (2003) 31 Le Regioni 599

Polanyi K, *The Great Transformation* (2nd edn, Beacon Press 2001)

Polanyi K, *La libertà in una società complessa* (Bollati Boringhieri 1987)

Popper K, 'The Paradoxes of Sovereignty' in Miller D (ed), *Popper Selections* (Princeton University Press 1985) 320

Posner R, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014)

Posner R, *Economic Analysis of Law* (3rd edn, Wolters Kluwer 1986)

Posner R, 'The Economic Approach to Law' (1975) 53 Texas Law Review 757

Posner R, 'The New Institutional Economics Meets Law and Economics' (1993) 149 Journal of Institutional and Theoretical Economics 73

Pardolesi R and Tassone B, *I giudici e l'analisi economica del diritto privato* (Il Mulino 2003)

Predieri A, 'Money Markets and Poliarchic Democratic States' (1998) 9 Open economies review 713-725

Predieri A, *Pianificazione e costituzione* (Edizioni di Comunità 1963)

Prosser T, 'Constitutionalising Austerity in Europe' (2016) Public Law 111

Pupo P, *Dissesto Finanziario degli enti locali: ambito di competenza dell'O.S.L., azioni esecutive individuali e par condicio creditorum* (Edizioni Scientifiche Italiane 2020)

Quadrio Curzio A, 'On the Different Types of Eurobonds' (2011) 28 Economia politica 279

Ramirez SA, 'The Emergence of Law and Macroeconomics: From Stability to Growth to Human Development' (2020) 83 Law and Contemporary Problems 219

Reiss H (ed), *Kant: Political Writings* (2nd edn, CUP 1991)

Repasi R, 'A. Court of Justice Judicial protection against austerity measures in the euro area: Ledra and Mallis' (2017) 54 Common Market Law Review 1123

Repasi R, 'Implementation of the Lisbon Treaty – Improving functioning of the EU: Economic and Monetary Policy' (2016) European Parliament's Directorate-General for Internal Policies - Constitutional Affairs [PE 556.952]

Repasi R, 'Legal Options for an Additional EMU Fiscal Capacity' (2013), European Parliament's Committee on Constitutional Affairs [PE 474.397] <https://www.europarl.europa.eu/RegData/etudes/note/join/2013/474397/IPOL-AFCO_NT%282013%29474397_EN.pdf>

Rescigno GU, 'Rapporto tra legge rinforzata e legge comune e altre questioni in materia di bilancio a seguito della revisione costituzionale' (2017) Giurisprudenza costituzionale 2377

Reuter WH, 'Benefits and drawbacks of an "expenditure rule", as well as of a "golden rule", in the EU fiscal framework' (2020) Economic Governance Support Unit PE 645.732 1

Reviglio F, 'Il buongoverno dei conti pubblici' (2011) Riv. dir. fin. 463

Rivera I, 'Il coordinamento della finanza pubblica tra riforma istituzionale e giurisprudenza costituzionale' (2016) 44 Le Regioni 921

Rivosecchi G, 'La decisione di bilancio e la contabilità pubblica tra Unione europea, Stato e autonomie territoriali' (2021) Bilancio Comunità Persona 71

Rivosecchi G, 'La Corte dei conti ai tempi del "Recovery plan": quale ruolo tra responsabilità amministrativa-contabile, semplificazioni e investimenti' (2021) Federalismi.it 1

Rivosecchi G, 'Manovra di bilancio 2019: la rientrata procedura di infrazione per debito eccessivo' (2019) 39 Quaderni costituzionali 155

Rivosecchi G, 'I controlli sulla finanza pubblica tra i diversi livelli territoriali di governo' (2019) Rivista Trimestrale di Diritto Pubblico 740

Rivosecchi G, 'Decisioni di bilancio e politiche pubbliche fra Unione europea, Stato e autonomie

territoriali' (2018) 24 Diritto pubblico 385

Rivosecchi G, 'Controlli della Corte dei conti e incidente di costituzionalità' (2017) 23 Diritto pubblico 357

Rivosecchi G, 'L'armonizzazione dei bilanci degli enti territoriali alla luce della giurisprudenza costituzionale: orientamenti e prospettive' in Corte Costituzionale – Servizio Studi (ed), September 2016 1

Rivosecchi G, 'Il coordinamento della finanza pubblica: dall'attuazione del titolo V alla deroga al riparto costituzionale delle competenze?' in Mangiameli S (ed), *Il regionalismo italiano tra giurisprudenza costituzionale e involuzioni legislative dopo la revisione del Titolo V* (Giuffrè 2014) 143

Rivosecchi G, 'Patto di stabilità interno e coordinamento dinamico della finanza pubblica' in Ferrari GF and Galeone P (eds), *Patto di stabilità e finanza locale: la governance multilivello dei paesi dell'Unione Europea* (Marsilio 2012) 29

Rivosecchi G, 'Il coordinamento dinamico della finanza pubblica tra patto di stabilità, patto di convergenza e determinazione dei fabbisogni standard degli enti territoriali' (2012) Rivista AIC 1

Rivosecchi G, 'Patto di stabilità e Corte di giustizia: una sentenza (poco coraggiosa) nel solco della giurisprudenza comunitaria sui ricorsi per annullamento' (2005) Giurisprudenza italiana 899

Rivosecchi G, 'Procedure finanziarie e vincoli del patto di stabilità e crescita' in Di Gaspare G and Lupo N (eds) *Le procedure finanziarie in un sistema istituzionale multilivello: atti del Convegno, Roma, 27 maggio 2004* (Giuffrè 2005) 13

Rommerskirchen C, *EU Fiscal Policy Coordination in Hard Times* (OUP 2019)

Rommerskirchen C, 'Debt and punishment: market discipline in the Eurozone' (2015) 20 New Political Economy 752

Rodden J, *Hamilton's paradox: The Promise and Peril of Fiscal Federalism* (CUP 2006)

Rodden J, 'The dilemma of fiscal federalism: grants and fiscal performance around the world' (2002) 46 American Journal of Political Science 670

Rodriguez-Tejedo I and Wallis JJ, 'Fiscal Institutions and Fiscal Crises' in Conti-Brown P and Skeel D (eds), *When States Go Broke* (CUP 2012) 9

Romano A, 'Micro-Meso-Macro Comparative Law: An Essay on the Methodology of Comparative Law' (2016) 17 The Chicago-Kent Journal of International and Comparative Law 1

Romano S, 'Diritto (funzione del)' in Id., *Frammenti di un dizionario giuridico* (Giuffrè 1953, Quodlibet Ius 2019) 103

Romano S, 'Autonomia' in Id., *Frammenti di un dizionario giuridico* (Giuffrè 1953, Quodlibet Ius 2019) 37

Romano S, *L'ordinamento giuridico* (2nd edn, Sansoni 1946)

Romeo G, 'The Italian Constitutional Reform of 2016: An 'Exercise' of Change at the Crossroad between Constitutional Maintenance and Innovation' (2017) The Italian Law Journal 31

Romp W and De Haan J, 'Public Capital and Economic Growth: A Critical Survey' (2007) 8 Perspektiven der Wirtschaftspolitik 6

Rosa S, 'La nuova finanza locale: pareggio di bilancio e superamento del patto di stabilità

interno – interessi delle comunità amministrate' in Corte dei Conti (ed), *La tutela degli interessi finanziari della collettività nel quadro della contabilità pubblica: principi, strumenti, limiti - atti del LXIII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 21-23 settembre 2017* (Giuffrè 2018) 253

Rose-Ackerman S (ed), *Economics of Administrative Law* (Elgar 2007)

Rossi E, 'L'ordinanza n. 17 del 2019 e il rischio dell'annullamento della legge di bilancio*'* (2019) Quaderni costituzionali 165

Roukny T, Battiston S, and Stiglitz J, 'Interconnectedness as Source of Uncertainty in Systemic Risk' (2016) 35 Journal of Financial Stability 93

Ruffert M, 'The European Debt Crisis and European Union Law' (2011) 48 Common Market Law Review 1777

Ruiz Almendral V, 'Stemming the tide during the crisis in Spain: Fiscal rules and regional finances' (2019) Quaderni costituzionali 212

Saito-Jensen M, *Multilevel Governance Theory* (Center for International Forestry Research 2015)

Salerno GM, 'Equilibrio di bilancio e vincoli europei' in Istituto della enciclopedia italiana (ed), *Libro dell'anno del diritto* (Istituto della enciclopedia italiana 2018) 254

Salvemini G (ed), *I guardiani del bilancio* (Marsilio 2004)

Salvemini MT and Bassanini F (eds), *Il finanziamento dell'Europa: il bilancio dell'Unione e i beni pubblici europei* (Passigli 2010)

Sandulli AM, *Manuale di diritto amministrativo* (Jovene 1989)

Sapir A, 'High Public Debt in the Euro Area: A Tale of Belgium and Italy' (2020) 58 Journal of Common Market Studies 672

Scarabel T, 'L'evoluzione del coordinamento della finanza pubblica: brevi considerazioni a margine di Corte cost. 272/2015' (2016) Le Regioni 414

Scharpf FW, 'Monetary Union, Fiscal Crisis and the Pre-emption of Democracy' (2011) 9 Zeitschrift für Staats- und Europawissenschaften (ZSE) / Journal for Comparative Government and European Policy 163

Scharpf FW 'Legitimate diversity: the new challenge of European integration' (2002) Cahiers Européens de Sciences Po 1

Scharpf FW, 'Introduction: the problem-solving capacity of multi-level governance' (1997) 4 Journal of European Public Policy 520

Schäuble W, 'Europe's social peace requires a return to fiscal discipline', *The Financial Times*, 2 June 2021

Schelkle W, 'A tale of two crises: the euro area in 2008/09 and in 2010' (2011) 10 European Political Science 375

Schelkle W, 'EU Fiscal Governance: Hard Law in the Shadow of Soft Law?' (2007) 13 Columbia Journal of European Law 705

Schmitt C, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hanseatische Verlagsanstalt 1934)

Schuknecht L, 'EU fiscal rules: issues and lessons from political economy' (2004) 421 ECB Working Paper 1

Schlesinger P, 'La norma costituzionale sul pareggio del bilancio nell'ambito della politica monetaria dell'Unione europea' Corrias P (ed), *Liber amicorum per Angelo Luminoso: contratto e mercato* (Giuffrè 2013) 67

Schuman R, 'Declaration', 9 May 1950

Scognamiglio M, 'La responsabilità amministrativa da assenza o inadeguatezza del sistema di controllo interno negli enti locali' (2021) Bilancio Persona Comunità 162

Screpanti S, 'Le politiche infrastrutturali' in Cassese S (ed), *La nuova costituzione economica* (6th edn, Laterza 2021) 35

Serges G, 'Norme "tecniche" e norme ideologiche: una riflessione sulle regole dell'austerità e sull'articolo 81 della Costituzione' in Grasso G (ed), *Il Governo tra tecnica e politica: atti del seminario annuale dell'Associazione "Gruppo di Pisa"* (Editoriale scientifica 2016) 273

Sica C, 'La Presidenza del Consiglio nella nuova governance della finanza pubblica' in Presidenza del Consiglio dei Ministri (ed), *La Presidenza del Consiglio dei Ministri a trent'anni dalla legge n. 400 del 1988 - Atti del Convegno di Studi del 20 febbraio 2018 Roma, Università LUISS Guido Carli* (PCM 2020) 101

Sileoni S, 'La capacità contributiva tra obblighi tributari e equilibrio di bilancio' (2018) Quaderni costituzionali 879

Simonati A, 'La tutela delle attribuzioni regionali, tra principi dell'edilizia e coordinamento della finanza pubblica (ma nel rispetto della sussidiarietà)' (2016) Le Regioni 150

Sinn H-W, 'The Euro Trap: On Bursting Bubbles, Budgets, and Beliefs' (OUP 2014)

Smits R, 'The European Debt crisis and European Union Law: Comments and Call for Action' (2012) 49 Common Market Law Review 827

Snyder F, 'EMU – Integration and Differentiation: Metaphor for the European Union' in Craig P and de Búrca G (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 687-716

Snyder F, 'EMU Revisited Are we Making a Constitution? What Constitution are we Making?' (1998) 6 EUI Working Paper Law

Sorrentino F, 'I vincoli dell'ordinamento comunitario e degli obblighi internazionali' in Corte dei Conti, *L'attuazione del Titolo V della Costituzione: atti del L Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2004* (Giuffrè 2005) 237

Spaventa L and Chiorazzo V, *Astuzia o virtù? Come accadde che l'Italia fu ammessa all'Unione monetaria* (Donzelli 2000)

Staderini F, Paolo Caretti, and Pietro Milazzo, *Diritto degli enti locali* (Wolters Kluwer 2019)

Staderini F, 'Audizione parlamentare del 31 ottobre 2001 relativa all'Indagine conoscitiva sugli effetti nell'ordinamento delle revisioni del Titolo V della parte II della Costituzione' 31 October 2001

Steele J, *Risks and Legal Theory* (Hart 2004)

Steinmo SH, *The Leap of Faith: The Fiscal Foundations of Successful Government in Europe and America* (OUP 2018)

Stone J, *Social Dimensions of Law and Justice* (Stevens and Sons 1966)

de Streel A, 'The Evolution of the EU Economic Governance Since the Treaty of Maastricht: An Unfinished Task' (2013) 20 Maastricht Journal of European & Comparative Law 336

Sucameli F, '"Patto di stabilità", principi costituzionali ed attuazione politica: la legge di bilancio 2019 e l'art. 9 della l. n. 243/2012 attraverso il prisma della giurisprudenza del Giudice delle

leggi' (2019) Federalismi.it 1

Sucameli F, 'Il patto di stabilità interno fra politica e diritto' (2004) 24 Quaderni costituzionali 407

Sunstein C R, *Behavioral Law and Economics* (CUP 2012)

Sunstein C R, *Risk and Reason: Safety, Law, and the Environment* (CUP 2002)

Sutherland P, 'The Case for EMU: More than Money' (1997) 76 Foreign Affairs 9

Tabacchi A, 'La costituzionalizzazione del principio dell'equilibrio di bilancio nell'evoluzione delle regole di finanza pubblica' in Camera dei deputati, *Il Parlamento della Repubblica: organi, procedure, apparati* (Camera dei deputati 2019) 97

Tabellini G, 'Reforming the Eurozone: Structuring versus restructuring sovereign debts' (2017) VoxEU.org <https://voxeu.org/article/structuring-versus-restructuring-sovereign-debts-eurozone>

Tabellini G, 'Building common fiscal policy in the Eurozone' (2016) VoxEU.org <https://voxeu.org/article/building-common-fiscal-policy-eurozone>

Talani LS and Casey B (eds), *Between Growth and Stability: The Demise and Reform of the European Union's Stability and Growth Pact* (Elgar 2008)

Tanzi V, 'The Stability and Growth Pact: its role and future' (2004) 24 Cato Journal 57

Tenuta P, *Dissesto e predissesto finanziario negli enti locali* (Franco Angeli 2015)

Ter-Minassian T, 'Fiscal Rules for Subnational Governments: Can They Promote Fiscal Discipline?' (2007) 6 OECD Journal on Budgeting 1

Ter-Minassian T and Fedelino A, 'Impact of the Global Crisis on Sub-National Governments' Finances' (2010) Bank of Italy Occasional Paper 1

Thurner S, Hanel R, and Klimek P, *Introduction to the Theory of Complex Systems* (OUP 2018)

Thygesen N et al, 'Reforming the EU fiscal framework: Now is the time' (2020) VoxEU.org <https://voxeu.org/article/reforming-eu-fiscal-framework-now-time>

Thygesen N, 'The Delors Report and European Economic and Monetary Union' (1989) 65 International Affairs 637

Torchia L, 'In crisi per sempre? L'Europa fra ideali e realtà' (2016) Rivista trimestrale di diritto pubblico 617

Torchia L, 'In principio sono le funzioni (amministrative): la legislazione seguirà' (2003) Astridonline.it 1

Torchia L, 'La potestà legislativa residuale delle Regioni' (2002) 30 Le Regioni 343

Torchia L, 'I vincoli derivanti dall'ordinamento comunitario nel nuovo Titolo V della Costituzione' (2001) 29 Le Regioni 1203

Torchia L, 'Il mercato secondario dei titoli di Stato' (1990) Rivista trimestrale di diritto pubblico 703

Tridimas T, *Foreword*, in Gerapetritis G, 'New Economic Constitutionalism in Europe' (Hart Publishing 2019) vii–viii

Tridimas T, 'EU-Financial Regulation: From Harmonisation to the Birth of EU Federal Financial Law' in James H, Micklitz H-W, and Schweitzer H (eds), *The Impact of the Financial Crisis on the European Economic Constitution* (2010) 5 EUI Working Paper Law <https://cadmus.eui.eu/bitstream/handle/1814/14055/LAW_2010_05b.pdf>

Toniolo G, 'Economic Problems of the Unification' in Toniolo G and Rees M (eds), *An Economic History of Liberal Italy* (Routledge 1990) 48

Tosato GL, 'The Union's budget balance pursuant to art. 310 TFEU: What is the impact on European anti-coronavirus measures?' (2020) 21 Policy Brief 1

Tosato GL, 'La riforma costituzionale sull'equilibrio di bilancio alla luce della normativa dell'Unione: l'interazione fra livello europeo e interno' (2014) Rivista di diritto internazionale 5

Tournemire G, 'Coordination arrangements across government sub-sectors in EU Member States' (2014) European Economy - Economic Papers No 517/2014 1

Trimarchi M, 'Premesse per uno studio su amministrazione e vincoli finanziari: il quadro costituzionale' (2017) Rivista Italiana di Diritto Pubblico Comunitario 623

Trimarchi P, *Rischio e responsabilità oggettiva* (Giuffrè 1961)

Trichet J-C and Draghi M, 'Letter from ECB President Jean Claude Trichet to Italian Prime Minister Silvio Berlusconi', 5 August 2011 <https://www.ecb.europa.eu/ecb/access_to_documents/document/pa_document/shared/data/ecb.dr.par2021_0001lettertoItalianPrimeMinister.en.pdf>

Tufano ML, 'Il principio del no bail-out nel diritto comunitario' (2002) Dir. Un. Eur. 505

Tuori K and Tuori K, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014)

Turner J, 'Letter: Macron and Draghi's plan is 'naive' and 'a fantasy'', *The Financial Times*, 30 December 2021

Valaguzza S, *Collaborare nell'interesse pubblico* (Editoriale Scientifica 2019)

Valdesalici A, 'Financial relations in the Italian regional system' in Erika Arban, Giuseppe Martinico, and Francesco Palermo (eds), *Federalism and Constitutional Law* (Routledge 2021) 82

Valdesalici A, *Federalismo fiscale e responsabilizzazione politico-finanziaria* (Edizioni Scientifiche Italiane 2018)

Vammalle C and Bambalaite I, 'Fiscal Rules for Subnational Governments: The Devil's in the Details' (2021) 35 OECD Working Papers on Fiscal Federalism 1

Vandelli L, 'Qualche appunto sulle tendenze delle istituzioni territoriali' (2018) Le Regioni 85

Vandelli L, 'Sovranità e federalismo interno: l'autonomia territorial all'epoca della crisi' in Corte dei Conti (ed), *Dalla crisi economica al pareggio di bilancio: prospettive, percorsi e responsabilità - atti del LVIII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 20-22 settembre 2012* (Giuffrè 2013) 561

Vegas G, *Il bilancio pubblico* (Il Mulino 2016)

Verde G, 'Lo squilibrio finanziario degli enti locali', March 2013 <https://finanzalocale.interno.gov.it/docum/studi/varie/squilibrio_2013.pdf>

Verdun A, 'A Historical Institutionalist Explanation of the EU's Responses to the Euro Area Financial Crisis' (2015) 22 Journal of European Public Policy 219

Vermeule A, *The Constitution of Risk* (CUP 2013)

Vermeule A, 'Introduction: Political Risk and Public Law' (2012) 4 Journal of Legal Analysis 1

Vermeule A, *The System of the Constitution* (OUP 2011)

Vernata A, 'L'Ufficio parlamentare di bilancio: tra virtualità ausiliarie e soggettività eurounitaria' (2017) Diritto pubblico 469

Vesperini G, 'La crisi e le nuove amministrazioni' (2016) Rivista Trimestrale di Diritto Pubblico 695

Villani M and Vasarri S, 'La governance del Recovery Fund ed il Sistema dei controlli' (2021) 1 Rivista della Corte dei Conti 19

Violini L, 'Dopo il referendum: quale dei tanti regionalismi si prospetta?' (2016) 44 Le Regioni 909

Visco I, 'Intervento del Governatore della Banca d'Italia - Giornata Mondiale del Risparmio del 2021', 21 October 2021

Visco I, 'Il vincolo del debito pubblico' in Corte dei Conti (ed), *La tutela degli interessi finanziari della collettività nel quadro della contabilità pubblica: principi, strumenti, limiti - atti del LXIII Convegno di studi di scienza dell'amministrazione, Varenna, Villa Monastero, 21-23 settembre 2017* (Giuffrè 2018) 103

Viterbo A and Cisotta R, 'La crisi del debito sovrano e gli interventi dell'UE: Dai primi strumenti finanziari al Fiscal Compact' (2012) 17 Dir. Un. Eur. 323

Vogiatzis K, 'The Independence of The European Court of Auditors' (2019) 56 Common Market Law Review 667

von Jhering R, *Der Zweck im Recht* (Breitkopf und Härtel 1904), *Lo scopo nel diritto* (Aragno 2021)

Wagner R, *Deficits, Debt, and Democracy: Wrestling with Tragedy on the Fiscal Commons* (Elgar Publishing 2012)

Wallace S, *State and Local Fiscal Policy: Thinking outside the Box?* (Edward Elgar 2010)

Wallis J, 'Fiscal Institutions and Fiscal Crises' in Conti-Brown P and Skeel D (eds), *When States Go Broke* (CUP 2012) 9

Waibel M, 'Monetary Policy: An Exclusive Competence Only in Name?' in Garben S and Govaere I (eds), *The Division of Competences between the EU and the Member States*, (Hart Publishing 2017) 90

Watt A, 'A quantum of solace? An assessment of fiscal stimulus packages by EU Member States in response to the economic crisis' (2009) ETUI <https://www.etui.org/sites/default/files/WP%202009%2005%20EN%20Web%20Version.pdf>

Weiler JHH, 'Europe in Crisis - On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'' in (2012) Singapore Journal of Legal Studies 248

Weimer M, 'The Origins of "Risk" as an Idea and the Future of Risk Regulation' (2017) 8 European Journal of Risk Regulation 10

Weimer M and de Ruijter A (eds), *Regulating Risks in the European Union* (Hart Publishing 2017)

Wierts PJ, *Fiscal Policy Surveillance in Europe* (Palgrave Macmillan 2006)

Wildasin DE, 'Externalities and Bailouts. Hard and soft Budget Constraints in Intergovernmental Fiscal Relations' (1997) 1843 World Bank - Fiscal Policy Working Papers 1

Wildavsky A, *How to limit government spending* (UCP 1980)

Winkels R, Lettieri N, and Faro S (eds), *Network analysis in law* (ESI 2014)

Woerdman E, 'Administrative Law and Economics' in Backhaus JG (ed), *The Elgar Companion to Law and Economics* (2nd edn, Elgar 2005) 239

Wright DS, *Understanding Intergovernmental Relations* (Brooks 1988)

Yared P, 'Rising Government Debt: Causes and Solutions for a Decades-Old Trend' (2019) 33 Journal of Economic Perspectives 115

Zagrebelsky G, *Diritti per forza* (Einaudi 2017)

Zamir E and Teichman D, *The Oxford Handbook of Behavioral Economics and the Law* (OUP 2014)

Zerman PM, 'Elusione del patto di stabilità interno e responsabilità per danno erariale degli amministratori degli enti locali' (2013) Contabilita-pubblica.it 1

Zilioli C, 'The Independence of the European Central Bank and its New Banking Supervisory Competences' in Ritleng D (ed) *Independence and Legitimacy in the Institutional System of the European Union* (OUP 2016) 125

Zilioli C and Selmayr M, *La banca centrale europea* (Giuffrè 2009)