Comment

Between Responsibility and Solidarity: COVID-19 and the Future of the European Economic Order

I. A Tale of Two Crises

At the end of 2019, discussions in the Eurozone institutions were as they should normally be: mostly technical and unexciting. Talks were primarily about updating the European Stability Mechanism's (ESM) mandate (since no Member State was receiving assistance anymore) and how the European Central Bank (ECB) could smoothly exit some of its crisis measures (a discussion that became more interesting in anticipation of news from Karlsruhe). This was a welcome respite from the long 2010s. The existential Eurozone crisis of that decade required the rearrangement of the European Union (EU) economic order in a way different from what most architects of Maastricht had on their plans. New instruments had to be created both to assist and to control Member States, and fundamental rules had to be read in a new light.[1] But with Grexit avoided and most economic indicators positive, things seemed to have stabilised.

COVID-19 violently interrupted this sense of comfort. The economic shock caused by the virus and the measures to contain it required drastic action and change of perceptions. Back in the 2010s, political and legal debates on how to address the Eurozone crisis were basically structured around the idea of "(national) responsibility". In contrast, now the structuring role is claimed by the principle of "solidarity". This shift is due to a variety of reasons, most prominently the nature of this crisis. But at the same time, COVID-19 revived some of the profound ideological and legal controversies that had been put to an uneasy sleep after 2015. Once more, this is a debate with a constituting character on a subject that is central for any composite polity: how to share money.

This debate opens a whole new chapter in the book of European integration – and with it also a broad research agenda. This short Comment wishes

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[1] *K. Tuori/K. Tuori*, The Eurozone Crisis: A Constitutional Analysis, 2014; *M. Ioannidis*, Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis, CML Rev. 53 (2016), 1237.

to touch upon only one of its dimensions: is the COVID-19 crisis a shock leading the Union to a new constitutional equilibrium between fiscal responsibility and fiscal solidarity? And what could be the promises and risks of this shift?

II. EU Money Becomes Real

Already from the beginning of the COVID-19 crisis, most actors recognised that this was no story for national economies alone. The EU had to step in – and so it did, using an impressively broad pallet of instruments. The ECB once more assumed a leading role – the second time in a few years, after the Eurozone crisis.[2] Tellingly, the ECB's intervention has been called as the "whatever it takes 2" moment,[3] alluding to *Mario Draghi's* iconic 2012 speech, which guaranteed the survival of the euro. On the intergovernmental side, on 9 April 2020, the Eurogroup agreed on a three-pronged approach: the European Investment Bank (EIB) would support companies, the European Stability Mechanism would contribute through its Pandemic Crisis Support, a virtually conditionality-free credit line available to euro area countries through a very expedient procedure, and a new instrument would be introduced to provide favourable loans to EU Member States in order to support their short-time working schemes (Support to mitigate Unemployment Risks in an Emergency, SURE).

The historic decision came in May 2020, when a French-German compromise paved the way towards the so-called "NextGenerationEU" recovery instrument. In July, the European Council agreed to the basic contours of the programme, which allows the EU to borrow €750 billion in order to finance €390 billion in non-repayable financial support (grants) and €360 billion in loans for the EU member states, as part of EU's 2021-2017 multiannual financial framework (MFF). As the President of the European Council, *Charles Michel*, noted after the momentous European Council, through this new agreement, Europeans "renewed their marriage vows for

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[2] On 18 March the ECB announced its "pandemic emergency purchase programme" (PEPP), a temporary asset purchase programme of private and public sector securities, and on 30.4.2020, its "pandemic emergency longer-term refinancing operations" (PELTROs), through which liquidity support is being provided to the euro area financial system. On 4.6.2020 the Governing Council decided to increase the €750 billion envelope for the PEPP by €600 billion to a total of €1,350 billion until at least end of June 2021.

[3] See *T. Tesche*, The European Union's Response to the Coronavirus Emergency: An Early Assessment, LSE "Europe in Question" Discussion Paper Series No. 157/2020 (June 2020), 10.

30 years", deciding for the first time to borrow collectively to finance expenditure.

1. From Fiscal Responsibility to Fiscal Solidarity

During the Eurozone crisis, national responsibility was used as powerful counterargument to solidarity and assistance to weaker Eurozone members. According to this approach, no solidarity was owed to those who were responsible for their ordeals: if the Greek debt ballooned due to the profligacy of the Greeks (or their elites), they should bear the cost of their choices and learn from that. One manifestation of national responsibility played a particularly important role in framing the understanding and the responses to the crisis: moral hazard.[4] The central idea behind moral hazard is that the expectance of assistance might reduce individual responsibility by distorting the incentives of the recipient of the assistance to show care and act prudently. These interlinked ideas, national responsibility and preventing moral hazard, were seen as underpinning certain provisions of the Treaties, such as Article 125(1) Treaty on the Functioning of the European Union (TFEU) and supported interpretations that would either deny assistance or couple it with strict conditions. "Strict conditionality" was ultimately also introduced in the Treaties, through an amendment of Article 136 TFEU, and was enshrined in a number of places of the ESM Treaty.[5]

This time, things seem to be different. Tellingly, the term "solidarity" appears both at the beginning and at the closing of the Eurogroup statement of 9 April 2020. The President of the Commission, *Ursula von der Leyen*, called SURE "real European solidarity in action".[6] *Wolfgang Schäuble*, the former German finance minister, and one of the figures most closely associated with the narrative of responsibility during the Eurozone crisis, warned that "[i]f Europe wants to have any chance at all, it must now show solidarity and prove that it is capable to act".[7]

The changing factor is, of course, the character of the pandemic. The shock caused by COVID-19 was not related to fiscal profligacy, corruption, or broken institutions, like back in 2010, but it *befell* the Member States.

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[4] On the relevance of this idea during the crisis, see in detail *M. Ioannidis* (note 1), 1245 et seq.

[5] See, for example, Articles 3 and 12 ESM Treaty.

[6] *U. von der Leyen*, Speech on the Recovery Plan and Resilience at the Fundação Champalimaud, 29.9.2020, available at <https://ec.europa.eu>.

[7] *W. Schäuble* warnt vor Einbruch, "wie wir ihn zu Lebzeiten nicht erlebt haben", Die Welt, 24.5.2020, available at <https://www.welt.de>.

According to the prevailing view, this is a very different situation from the Eurozone crisis, when the moral hazard argument had a much clearer basis and stronger political clout. There is something to be said both on the absoluteness of this claim and the normative implications politicians and scholars derive from it. I will return to this point later. In any case, what matters is that the fate-like nature of the shock made audiences and decision-makers across Europe much more receptive to arguments framed in terms of solidarity.

This is not to say that the morality tale of "southern sinners vs. northern saints" was forgotten.[8] An important (northern) camp was adamant that "coronabonds", or any equivalent form of debt mutualisation, would still cause moral hazard and, in the long term, damage the euro area. Originally, this battle of ideas led to a fault line between countries supporting favourable loans (Germany, Netherlands, Austria, and Finland) versus countries favouring grants, where the degree of fiscal solidarity is more evident (France, Spain, and Italy). When, to the surprise of many, Germany crossed the line to the grant camp, with the common Franco-German blueprint for a recovery fund presented on 18 May, the responsibility camp (or so-called "frugal four", composed of the Netherlands, Austria, Denmark and Sweden) drew new lines elsewhere. Amongst others, they were fundamentally expressed in two legal discourses: on conditionality and on the role of Article 122 TFEU.

a) The Decline of Conditionality

Conditionality bears the heavy stigma of the Eurozone crisis. It was the bitter pill the recipients of financial assistance had to swallow, and it was used to counter moral hazard generated from debt insurance effectively provided by the ESM and the other European assistance vehicles. The coupling of EU transfers with unpopular conditions left its long shadow over early discussions on COVID-19 measures. Especially in Southern Europe, any proposal for money coming from Europe triggered almost viscerally the reaction: "under which conditions"? In Italy, the fear of conditionality was dramatised to the extent that recourse to the ESM was a toxic no-go for the political system even in the darkest hours. Conditional transfers were not seen as an expression of solidarity but rather of external bureaucratic control.

8 *T. Tesche* (note 3), 6.

If they were to genuinely mark solidarity, COVID-19 transfers had to be disassociated from this legacy. *Giuseppe Conte*, the Italian prime minister, made a strong point for unconditional transfers at the critical July 2020 summit. Many saw a point in this insistence. In their common article entitled “A Response to the Corona Crisis in Europe Based on Solidarity”, *Heiko Maas*, the German Federal Minister of Foreign Affairs, and *Olaf Scholz*, the German Federal Minister of Finance, explicitly denounced the troika, *the* iconic institution of the Eurozone crisis. This time, they said, no “unnecessary conditions” were required, neither “a troika, inspectors, and a reform programme for each country drawn up by the Commission”.[9] This apparent abandonment of conditionality was not seen everywhere with the same sympathy. In Finland, the lack of conditionality became a cardinal issue, and the powerful Constitutional Law Committee concluded that it was “constitutionally necessary that Finland supports and only accepts ESM facilities that are based on conditionality”.[10]

German-French weight proved critical for the final decision on ESM assistance. A flexible reading of Article 136(3) TFEU and of the relevant ESM Treaty provisions prevailed. The only requirement to access the ESM Pandemic Crisis Support credit line is a commitment to use it to support domestic financing of direct and indirect healthcare, cure and prevention related costs due to the COVID-19 crisis.[11] Gone is the vilified Memorandum of Understanding, which characterised the Eurozone crisis, detailing – sometimes in excruciating detail – reform and austerity conditions. The “strict conditionality” of the Eurozone crisis now becomes “symbolic conditionality”[12] documented in a lean “Response Plan”, the template of which is a mere three-pager. Gone is also the troika. The European Commission is tasked with the “enhanced surveillance” of the beneficiary Member States, but it promised to focus its monitoring on the actual use of the funds to cover direct and indirect healthcare costs.[13] Actually, most of the intrusive rules of Regulation 472/2013 have been “deactivated”.[14] SURE assistance is

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9 Article available at <https://www.auswaertiges-amt.de>.

10 *P. Leino-Sandberg*, Constitutional Constraints Meet Political Pressure: Finlands Precarious Participation in the COVID-19 Solidarity Measures, VerfBlog, 12.5.2020, available at <https://verfassungsblog.de>.

11 Afterwards, euro area member states would remain committed to strengthen economic and financial fundamentals, consistent with the EU economic and fiscal coordination and surveillance frameworks, including any flexibility applied by the competent EU institutions, see <https://www.consilium.europa.eu>.

12 *T. Tesche* (note 3), 17.

13 Letter from *Valdis Dombrovskis* and *Paolo Gentiloni* to *Mário Centeno*, 7.5.2020, available at <https://ec.europa.eu>.

14 *Valdis Dombrovskis* and *Paolo Gentiloni* to *Mário Centeno* (note 13).

also essentially unconditional – it only requires beneficiary Member States to use financial assistance "primarily in support of their national short-time work schemes or similar measures and, where applicable, in support of relevant health-related measures".

With regard to the NextGenerationEU instrument, things were more challenging. To receive financial support under the Recovery and Resilience Facility (RRF), the main component of the NextGenerationEU, EU Member States need to prepare and submit to the Commission national Recovery and Resilience Plans (RRPs), setting out their investments and reforms plans for the years 2021-23. Although these are plans submitted by national governments, they need to meet some Union standards and will be assessed by the Commission and approved by the Council.[15] Disbursement of sums is conditional on recipient countries achieving agreed milestones and targets. As *Pisani-Ferry* notes, this arrangement is (yet) neither typical conditionality ("first reform your pensions, then we can talk") nor rubber-stamping ("here's the money, please tell us what you do with it").[16] Practice will show the true teeth of RRP conditionality – but for the time being it seems to be much less fearsome than in the Eurozone crisis.

b) The Rise of the Solidarity Clause

The second evidence for the re-balancing between national responsibility and Union solidarity during the COVID-19 crisis is the central role assumed by Article 122 TFEU, the "solidarity clause" of the EU economic constitution. The first paragraph of Article 122 TFEU contains the only explicit reference to the principle of solidarity in Title VIII of the TFEU, which is dedicated to economic and monetary policy, and its second paragraph, although it does not explicitly mention solidarity, has been read as a solidarity-based exception to the no-bail out clause of Article 125(1) TFEU.

During the euro zone crisis, Article 122 TFEU was a sideliner. Both in legal discourses and in the public debate, the big protagonist was Article 125(1) TFEU – the no-bail out clause, with its discipling rationale and focus on national fiscal responsibility. Article 122(1) TFEU had been declared ir-

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15 These standards include the Country Specific Recommendations and overall objectives such as strengthening the growth potential, job creation, and resilience of the Member State, and their contribution to the green and digital transition, see Point A19 of the Conclusions of the Special meeting of the European Council (17, 18, 19, 20 and 21.7.2020).

16 Europe's Recovery Gamble, Bruegel, 20.9.2020, available at <https://www.bruegel.org>.

relevant by the Court of Justice of the European Union (CJEU)[17] and Article 122(2) TFEU only served as the legal basis of the European Financial Stabilisation Mechanism (EFSM), established in 2010 as an EU entity operated by the Commission, issuing bonds guaranteed by the EU budget. With a limited funding capacity of €60 billion, the EFSM clearly was not meant to do the heavy weightlifting during the crisis. One of the difficulties with making the EFSM the basic vehicle of European financial assistance was exactly the fact that Article 122(2) TFEU, on which this mechanism was based, expressed the principle of solidarity, providing for assistance for difficulties stemming from reasons "beyond the control" of the Member States. Treating the Greek funding problems as such was for many a step too far.[18] Ultimately, the solidarity principle enshrined in Article 122(2) TFEU was superseded by the new principle expressed in Article 136(1) TFEU: assistance could only be possible under "strict conditionality".[19]

Corona-times seem again to be different. First, Article 122 TFEU served as the legal basis for SURE. Its solidarity character matches well the purpose of SURE and this time there was no hesitation as to the fulfilment of the "beyond-control" requirement. The wording of paragraph 2, according to which assistance may be provided "under certain conditions", is also perfectly in line with the very light SURE conditionality.

The transformative role of Article 122 TFEU is better appreciated in the context of the NextGenerationEU, where it serves as the legal basis of its basic component.[20] Here, it is being used as a solidarity exception from the principle of EU budgetary balance,[21] which requires that all Union items of revenue and expenditure "shall be shown in the budget" and that the "revenue and expenditure shown in the budget shall be in balance". According to the Commission's own explanations,[22] the funding of NextGenerationEU diverges from the standard practice for the establishment of the budget and financing of the Union, but this is justified as a temporary and exceptional

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17 Case C-370/12, *Pringle*, para. 116.

18 Greece only received €7.16bn in short term financial assistance to Greece under EFSM in the wholly exceptional post-referendum financing circumstances of summer 2015.

19 At its meeting of 16 and 17.12.2010, the European Council agreed that, as the ESM was designed to safeguard the financial stability of the euro area as whole, Article 122(2) of the TFEU will no longer be needed and used for such purposes, European Council Decision 2011/199/EU recital (4).

20 European Commission, Proposal for a Council Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 pandemic, COM(2020) 441.

21 Article 310(4) TFEU.

22 European Commission, Q&A NextGenerationEU: Legal Construction, Brussels, 9.6.2020, available at <https://ec.europa.eu>.

solution in the context of the crisis. According to the Commission, Article 122 TFEU "allows for targeted derogations from standard rules in exceptional crisis situations" and justifies "derogating from standard Treaty rules, which would not allow the financing of such large amounts in addition to the Union's budget and outside of the annual budgetary procedure".

This is not the place to discuss the merits of the recourse to Article 122 TFEU in the context of NextGenerationEU.[23] It suffices to note that the solidarity clause of the EU economic constitution has taken a central role in the legal discourses on the future of Europe. This might also be due to an element of Article 122 TFEU that makes it appealing also for some of the proponents in the responsibility camp: it has an in-built temporary character.[24] It is an emergency provision allowing for emergency solidarity. And underlying that the new solidarity mechanisms are meant to face an extraordinary event suits many constituencies well.

2. Promises and Risks

The prevailing perception is that, whereas during the Eurozone crisis the EU had to address asymmetric shocks, based on the assumption that some countries had made systematic mistakes in the past, this reasoning "clearly does not apply to the current crisis, where all countries are affected".[25] Of course, disease and death are great levellers. They know no borders and nationalities. But in economic terms, the coronavirus is a violently *asymmetric* shock.[26] From Germany, to Italy, and Sweden, the pandemic and its accompanying restrictions have affected different countries and different sectors in very different ways. But the fact that a shock is asymmetric does not mean that the discussion of solidarity is closed; only that it needs to be more refined.

Economic history has much to say about these matters and the (controversial) impact of plagues on institutions and economic structures. As *Guido Alfani* notes, the plagues of the 17th century, the worst to affect Europe

[23] For two different approaches, see *P. Leino-Sandberg*, NextGenerationEU. Breaking a Taboo or Breaking the Law?, CEPS, 24.6.2020, available at <https://www.ceps.eu> and *S. Grund/L. Guttenberg/C. Odendahl*, Sharing the Fiscal Burden of the Crisis, VoxEU, 5.4.2020, available at <https://voxeu.org>.

[24] See *Pringle* (note 17), para. 65.

[25] See, characteristically, *I. Garcia/P. Tang*, Coronabonds for a Europe of Solidarity, not Charity, Euractiv, 6.4.2020, available at <https://www.euractiv.com>.

[26] *J. Pisani-Ferry*, La postérité du plan de relance européen sera une affaire d'exécution, Le Monde, 6.6.2020, available at <https://www.lemonde.fr>.

after the 6th century Justinian's Plague and the 14th century Black Death, affected Italy more severely than other European areas notwithstanding the fact that Italian anti-plague institutions were, at the time, some of the best in the continent.[27] Moreover, these exceptionally severe plagues affected Italy (and other parts of south Europe) at a historical juncture that led to an economic contraction that proved permanent. According to this argument, the 17th century plagues contributed to shifting some of the formerly advanced European economies to a lower development path, and to the divergence between North and South.[28]

These observations provide some relevant insights, justifying the turn to solidarity. First, the extent of asymmetric shocks of pandemics can be "unfair", namely contingent upon chance rather than (the lack of) effort. The local economic consequences of a pandemic depend upon "unpredictable epidemiological factors and not only upon the quality of the health institutions and of the policies for pandemic containment".[29] In the case of COVID-19, this might mean, for example, that part of Italy's early dramatic experience was due to factors beyond its control, such as being the first one to be affected in Europe. Of course, this is not to say that decisions (or the lack of them) did not contribute to the calamity. It is rather that historical experience highlights that, in a pandemic, the balance between chance and human agency (and responsibility) is different from normal times. Second, pandemics have a great potential to deepen economic divergences.[30] These should not be acceptable, especially when asymmetric shocks are reinforced by the economic and monetary integration promoted by the Union.[31] As

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27 *G. Alfani*, Plague in Seventeenth-Century Europe and the Decline of Italy: An Epidemiological Hypothesis, European Review of Economic History 17 (2013), 408, 423. According to *Alfani*, previous plagues left Italy with permanent health boards and original tracts. Wartime conditions and epidemiological characteristics of the disease seemed to have played the most important role for its impact, according to this author.

28 *G. Alfani/M. Percoco*, Plague and Long-Term Development: The Lasting Effects of the 1629-30 Epidemic on the Italian Cities, The Economic History Review 72 (2019), 1175. Plagues, and especially the Black Death, have been also credited with contributing to institutional innovation and higher *per capita* income in pre-industrial economies under the Malthusian constraint, see *S. Pamuk*, The Black Death and the Origins of the "Great Divergence" Across Europe, 1300-1600, European Review of Economic History 11 (2007), 289; *N. Voigtländer/H.-J. Voth*, The Three Horsemen of Riches: Plague, War, and Urbanization in Early Modern Europe, Review of Economic Studies 80 (2013), 774.

29 *G. Alfani*, Pandemics and Asymmetric Shocks: Lessons from the History of Plagues, VoxEU, 9.5.2020, available at <https://voxeu.org>.

30 *G. Alfani* (note 29).

31 For this idea see *P. Krugman*, Lessons of Massachusetts for EMU, in: F. Giavazzi/F. Torres (ed.), Adjustment and Growth in the European Monetary Union, 1993. For discussion and critique, see *P. De Grauwe*, Economics of Monetary Union, 13th ed. 2020, 24 et seq.

economic integration deepens, countries and regions become more specialised. Specialisation makes good sense from a resource-allocation perspective: it is economically rational that big parts of the EU tourism industry are concentrated in Italy and Greece rather than in Belgium. Specialisation, however, also means that sector-specific shocks become more easily country-specific shocks. When such risks materialise, they affect some regions more than others, and this is also a matter for the EU and a reason for solidarity.

The proponents of responsibility have, however, an important point when noting that ex-post solidarity is ex-ante insurance. Strengthening insurance does sometimes reduce the incentive to prevent risk effectively, and in this way, moral hazard can be a valid concern. But it is not the major. What matters more is the inherent potential of transfers to break the link between effort and benefit. And this connection is a matter of justice as much as economic effectiveness. Failed transfer unions around the world should alert us on the risks of dependency, stagnation, and distortion. Transfers also have the potential to undermine with fresh resentment the foundations of the Union, this time from the North. Dismissing the concerns of Fins using some quasi-theological calls for "sharing" is to moralise a real economic and political problem in a way that invites fundamentalist (that is, about the merits of the Union itself) reaction. And there are populists in all corners of Europe.

3. An Agenda for the Future

Two strategies can help mitigate the risks associated with the justified shift to more solidarity: focus on trust-building between Member States and the democratic scrutiny of transfers. Trust differs from control in that it creates a presumption of agreement with one's actions. For that, it relies on the fulfilment of structural criteria rather than micro-management. At the level of the Union, these structural elements are economic but also the values of Article 2 of the Treaty on European Union (TEU). From this perspective, the decision to tie the NextGenerationEU to the European Semester and the insistence on rule-of-law conditionality are justified also from a solidarity-reinforcing perspective.[32]

In any case, transfers need *democratic* scrutiny at a *European* level. The use of European funds cannot be a national issue alone; but neither can it be

[32] See *A. von Bogdandy/J. Łacny*, Suspension of EU Funds for Member States Breaching the Rule of Law – A Dose of Tough Love Needed?, MPIL Research Paper No. 2020-24.

controlled in an International Monetary Fund (IMF)-inspired monitoring way, like during the Eurozone crisis. We need an accountable monitoring mechanism – something that somehow provocatively can be called a "democratic troika". The design of such mechanism is a fundamental issue that lies beyond the scope of this Comment. But the NextGenerationEU makes no big progress in this field either. According to the final compromise, the Commission assesses the fulfilment of the relevant milestones and targets and seeks the opinion of the Economic and Financial Committee (EFC) (a committee of technocrats from the national Finance Ministries) before going to the Council. Exceptionally, at the request of a Member State the matter can be brought to the European Council.

Whether the EFC and the "examination procedure" of comitology are adequate, transparent, and legitimate enough for discussing the conditions for accessing EU's biggest borrowing programme is doubtful. And the European Council may be a too high-level political forum to allow Members to effectively challenge their peers.[33] As *Pisani-Ferry* rightly notes, the risk is that the process ends up "in a bureaucratic squabble that the public cannot decipher but provides ammunition to populists".[34] This will bring us back to square one of the Eurozone crisis. In any case, monitoring alone cannot suffice. Most importantly, we now need a new form of discourse on how national governments spend European money. National RRPs need to be transparently exposed for criticism by all Europeans. There are already some elements of this, as European press comments on the Italian RRP as a matter of *European* interest. This is definitely something worth investing in.

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33 *G. B. Wolff*, Without Good Governance, the EU Borrowing Mechanism to Boost the Recovery Could Fail, Bruegel, 15.9.2020, available at <https://www.bruegel.org>.

34 *J. Pisani-Ferry* (note 26).