Insight

A Critical Analysis on the European Union's Measures to Overcome the Economic Impact of the COVID-19 Pandemic

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Abstract: The EU has fast reacted in adopting a so-called Next Generation EU Recovery Plan (NGEU) and a 2021-2027 Multiannual Financial Framework (MFF) with the aim of overcoming the consequences of the disruptive COVID-19 pandemic for citizens' health and businesses across Europe. However, there have been several political discussions during the negotiations until an agreement was reached on 21 July 2020. A political drift made the positions not just of northern and southern but also eastern and western EU Member States differ. NGEU and the 2021–2027 MFF have posed significant challenge to the notion of solidarity in the EU. Furthermore, these mechanisms have been complemented by the European Central Bank's (ECB) Pandemic Emergency Purchase Programme (PEPP) and the temporary increase of public deficit goals for Member States. Finally, a critical analysis and lessons learnt from the EU strategy to overcome the economic slump provoked by the outbreak.

Keywords: COVID-19 and the EU – European Union competences – Own Resources Decision – Next Generation EU Recovery Package – Multiannual Financial Framework – State aid measures.

I. Introduction

The European Union has responded quickly to the socio-economic impact of the COVID-19 crisis. This *Insight* discusses the Next Generation EU Recovery Instrument (NGEU), the 2021–2027 Multiannual Financial Framework (MFF), the European Central Bank's (ECB) Pandemic Emergency Purchase Programme (PEPP), the temporary increase of public deficit goals for Member States, as well as the State aid framework to assist companies and businesses heavily impacted by the COVID-19 crisis.

An economic contraction of -8.3 per cent of the EU's Gross Domestic Product (GDP) is forecasted for 2020 due to the coronavirus outbreak.[1] The pandemic and the im-

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posed non-essential travel restrictions to curb the spread of the virus are having devastating effects on jobs, society, companies and the global economy.[2] By prioritising recovery, emergency aid, public health expenditure, and investment in research and innovation, the EU aims rebuild the economy and the internal market to its pre-COVID-19 state, as well as build a resiliency for the future cross-border threats.

It is questionable whether the MFF and the Next Generation EU recovery instrument is a one-off step to save the EU economy, or a step to further European solidarity.[3] Moreover, the EU has developed recovery plans and schemes designed to recovery, invest, and prepare with financing from EU revenue streams.

II. The European Commission's efforts to protect the four freedoms and the internal market

A crisis is a situation of wide-ranging impact or political significance requiring a timely policy coordination and response at the EU political level.[4] The EU closed its external borders on 17 March 2020 to reduce the spread of the virus.[5] The EU aims to preserve the fundamental freedoms of movement of citizens, capitals, goods and services while protecting the internal market.[6] Thus, to ensure a consistent circulation and maintain the functioning of the internal market, the EU prioritised the freedom of movement, along with public health, research and innovation, economy, transportation, travel, education, crisis management and solidarity.[7]

The Commission coordinated the Civil Protection Framework which financed 90per cent of sufficient personal protective equipment and medical equipment, such as ventilators. EU leaders made the accessibility of medical equipment and supplies easier and consistent by removing import fees and the Commission contributed to 75 per cent of

[1] Commission, *European Economic Forecast. Summer 2020 (Interim)*, July 2020, ec.europa.eu.

[2] I. Carreño, T. Dolle, L. Medina, M. Brandenburger, *The implications of the Covid-19 pandemic on trade* in *European Journal of Risk Regulation*, 2020, p. 402 *et seq*.

[3] E. Spaventa, *Solidarity and the Covid Crisis*, COVID-19 and the Functioning of the Internal Market Webinar, *United Kingdom Association for European Law*, London, 22 July 2020.

[4] Council Implementing Decision (EU) 2018/1993 of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements, Art. 3; European Union, *The Common EU Response To COVID-19*, europa.eu.

[5] Schengen Visa Info Press Release, *EU Decides To Close All Schengen Borders For 30 Days*, 17 March 2020, www.schengenvisainfo.com.

[6] I. Maletia□c, *The Law And Policy Of Harmonisation In Europe's Internal Market*, Cheltenham: Edward Elgar, 2013, p. 28 *et seq.*

[7] Decision (EU) 2020/491 of the Commission of 3 April 2020 on relief from import duties and VAT exemption on importation granted for goods needed to combat the effects of the COVID-19 outbreak during 2020; Communication C/2020/1897 of 24 March 2020 from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services; European Council, *Video conference of the members of the European Council*, 17 March 2020, www.consilium.europa.eu; European Council, *Video conference of the members of the European Council*, 26 March 2020, www.consilium.europa.eu.

transport and operation costs, allowing a swift circulation of essential goods in the internal market.[8]

III. The European Union recovery instrument

The COVID-19 pandemic has caused disparities amongst Member States. It is established in Art. 174 TFEU that the EU shall provide economic strengthening provisions to promote an equal development and reduce disparities while relying on the EU's notion of solidarity. That is the reason why the European political leaders had to compromise on an ambitious plan to relaunch the European economy, following the Commission's initiative.

III.1. Negotiation of a balanced EU Recovery Agreement

According to Spaventa, the impact of the COVID-19 pandemic requires a "solidary response" for the EU to quickly recover, but according to Art. 175, para. 1, TFEU, it is up to the Council to determine what actions are to be taken by the EU to meet the Art. 174 objections. Art. 2 TFEU provides that the financial interests of the EU are protected according to their competence.[9]

In May 2020, the EU proposed the NGEU – an Emergency Recovery Instrument of €750 billion – and a revised MFF proposal for 2021-2027 that would mobilise €1.824 trillion from the EU's budget in different EU programmes.[10] The recovery packages aim to alleviate the consequences of the COVID-19 crisis by creating or replacing jobs affected and damage restoration caused by the pandemic.[11]

Negotiations in June 2020 sparked disagreement from the notorious "frugal four" States (The Netherlands, Austria, Denmark, Sweden) and Finland regarding whether the Commission can exceptionally issue €500 billion bonds on behalf of the EU while the remaining €250 are loans or issuing loans through the European Stability Mechanism (ESM). The disagreeing States also opposed the idea of supporting a transfer of money from wealthier Member States to the most affected ones in southern Europe. The Council agreed on the proposed €750 billion but modified the grant and loan amounts

[8] Commission, *Ensuring the Availability of Supplies and Equipment*, 2020, www.ec.europa.eu; K. Goniewicz, A.K. Manesh, A.J. Hertelendy, M. Goniewicz, K. Naylor, F.M. Burkle, *Current Response and Management Decisions of the European Union to the COVID-19 Outbreak: A Review*, in *Sustainability*, 2020, p. 1 *et seq*.

[9] European Union, *The Common EU Response To COVID-19*, cit.

[10] Communication COM(2020) 441 final of 28 May 2020 from the Commission, Proposal for a Council Regulation establishing a European Union Recovery Instrument to support in the aftermath of the COVID-19 pandemic; Commission, *Europe's moment: Repair and prepare for the next generation*, Press Release of 27 May 2020; Council, *A recovery plan for Europe*, 2020, www.consilium.europa.eu.

[11] A. Hinarejos, *Next Generation EU: On The Agreement On A COVID-19 Recovery Package*, in *European Law Review*, 2020, p. 451 *et seq*.

by reducing the €500 billion available for grants to €390 billion, and the €250 billion for loans was increased to €360 billion.[12]

III.2. The Next Generation EU Recovery Plan

The purpose of the NGEU is to execute a recovery from the COVID-19 pandemic and reignite the EU economy while strengthening its resilience. The EU has prioritised recovery before other tactics, which is what they are supposed to do.[13] The Own Resources ceilings have been increased by 0.6 per cent to cover recovery efforts relating to the COVID-19 crisis until 31 December 2058 at the latest.[14]

a) Financing the Recovery Plan through the Own Resources Decision.

Funding for the NGEU would be provided by the Own Resources decision, which was developed on Council Decision 2014/335/EU and then proposed in 2018 as a simplification of budget system.[15] This decision will temporarily raise by 2 per cent the Gross National Income (GNI)[16] and route the GNI, customs duties, VAT, emissions trading schemes, and national contributions for plastic wastes (to be introduced in 1 January 2021). Through grants and loans, Member States impacted most by the pandemic will receive a majority of the Commission's borrowed €750 billion, which will be repaid by future EU budgets.[17] However, Member States are responsible for any funds exceeding those allocated to them by the EU.

NGEU prioritises Member States by those who are most in need with the most potential but focuses on the recovery expected during the first few years.[18] A carbon border adjustment mechanism and a digital levy will be introduced on 1 January 2023, a politically and economically debatable financial transaction tax for the 2028-2034 MFF. The own resources decision's approval by unanimity by the Council was contested by members of the European Parliament that has to approve the NGEU and the MFF.[19]

[12] D. Cameron, *After Five-Day Marathon, EU Leaders Agree On €750 Billion Recovery Plan*, in *The Yale MacMillan Center*, 22 July 2020, www.macmillan.yale.edu.

[13] *Ibid*.

[14] General Secretariat of the Council, Special meeting of the European Council (17 – 21 July 2020); P. Craig, *COVID 19, Competence and Free Movement,* COVID-19 and the Functioning of the Internal Market Webinar, United Kingdom Association for European Law, London, 22 July 2020.

[15] Council Decision 2014/335/EU on the system of Own Resources of the European Union; Communication COM(2018) 325 final of 2 May 2018 from the Commission, Proposal for a Council Decision (EC) 2018/0135(CNS) on the system of Own Resources of the European Union.

[16] E. Gambaro, G. Massara, *Next Generation EU: The Commission's Proposal For The European Recovery*, in *Lexology*, 2020, www.lexology.com.

[17] A. Hinarejos, *Next Generation EU*, cit.

[18] AEBR, *The Recovery Package: Next Generation EU*, 2020, www.aebr.eu; E. Spaventa, *Solidarity and the Covid Crisis*, cit.

[19] G. Verhofstadt, *Conclusions of the extraordinary European Council meeting of 17-21 July 2020 (continuation of debate)*, 23 July 2020, www.europarl.europa.eu; The European Council Oversight Unit (ECOS),

However, it has been finally passed on 15 December 2020, pending on the approval by the EU Member States according to their constitutional requirements.[20]

b) The Next Generation EU Recovery Plan.

The NGEU has three pillars: Recovery and Resilience Facility (RRF), economic kick-starter, and lessons learned from the pandemic for the future. The RRF receives €672.5 billion of the €750 billion to support Member States' reformations and investments in sustainable recoveries. During NGEU Council negotiations, this was the controversial pillar that reallocated the grant and loan split of the €750 billion. The new decision of the RRF includes €312.5 billion in grants, €360 billion in loans, €10 billion for Horizon Europe, €5.6 billion for InvestEurope Fund, €47.5 billion for REACT-EU, €7.5 billion for the European Agricultural Fund for Rural Development (EAFRD), and €10 billion to the Just Transition Fund (JTF).[21]

Under the RRF, Member States are to present their recovery and resiliency plan of their economy, in full alignment with the European Semester, to access the funds dispersed between 2021–2023.[22] The green and digital transition becomes a relevant criterion (as along with country specific recommendations, job creation, growth potential or resilience targets) to assess national recovery and resilience plans by the Commission within two months after submission to disburse any amounts.[23] The Commission approves these plans prior consultation to the Economic and Financial Committee and the Council approves by qualified majority vote (QMV) without participation of the European Parliament. An examination procedure allows for the revision of any plan during the next Council meeting if any Member State raises concerns about serious deviations on the fulfilment of the targets by other Member State.

The remaining €77.5 billion for the second and third pillars are to replenish EU programmes. The second pillar, aimed at kick-starting the economy, received €26 billion for a solvency support instrument to support private companies affected most by the pandemic, in addition to a €5.6 billion grant for InvestEU, which "mobilises private invest-

Outcome Of The Special European Council Meeting Of 17-21 July 2020, in *European Parliamentary Research Service Blog*, 23 July 2020, epthinktank.eu.

[20] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of Own Resources of the European Union and repealing Decision 2014/335/EU..

[21] E. SPAVENTA, *Solidarity and the Covid Crisis*, cit.; Commission, *The Pillars Of Next Generation EU*, 2020, www.op.europa.eu; Communication COM(2020)442 final of 27 May 2020 from the Commission, *The EU Budget Powering The Recovery Plan For Europe*; D. CAMERON, *After Five-Day Marathon, EU Leaders Agree On €750 Billion Recovery Plan*, cit; Council of the EU Press Release of 17 December 2020, Multiannual financial framework for 2021-2027 adopted, and Multiannual Financial Framework 2021-2027 and Next Generation EU (Commitments, in 2018 prices), www.consilium.europa.eu.

[22] J. BRUNSDEN, S. FLEMING, M. KHAN, *EU Recovery Fund: How The Plan Will Work*, in *Financial Times*, 21 July 2020, www.ft.com.

[23] Conclusions of the Special meeting of the European Council (17-21 July 2020), cit..

ment" and strategizes investments for green and digital transitions.[24] The third pillar, lessons-learned from the pandemic for the future allocates €5 billion to research and innovation at Horizon Europe and €1.9 billion to RescEU for crises stockpile resources.

c) The rule of law.

The rule of law has been one of the most debated conditions by the EU Heads of State or Government in the Council summit of 17-21 July 2020. The Council acknowledged that the financial interests of the EU "shall be protected in accordance with the general principles", especially the values contained in Art. 2 TEU in addition to the relevance of the rule of law.[25] In 2018, the Commission proposed that future EU budgets be protected from financial risks linked to generalised deficiencies by Member States.[26] In essence, the EU may withhold funding from a Member State due to their disregard for the rule of law.[27] Structural funds are outlined with a cooperation between the Commission and the Member States. Thus, the structural fund administration is one of control and supervision.[28] The EU and the Member States share the competence of the management of funds, according to Art. 2(5) of the Structural Funds Regulation.[29] In the event of a breach of the rule of law, the Council will propose the adequate measures by a QMV, thus protecting the MFF and NGEU.[30]

However, the EU has the final responsibility for the implementation and any irregularities should result in the prosecution and recovery of funds, thereby tilting the shared power in favour of the EU.[31] This implies the EU's capacity to reduce or eliminate funding to a Member State.[32] The RRF is aimed at a resilient, better and faster recovery from the COVID-19 pandemic. Art. 175, para. 3, TFEU provides the legal basis for solidarity between Mem-

[24] D. Cameron, *After Five-Day Marathon, EU Leaders Agree On €750 Billion Recovery Plan*, cit.

[25] Conclusions of the Special meeting of the European Council (17-21 July 2020), cit.; E. Spaventa, *Solidarity and the Covid Crisis*, cit.

[26] Commission Proposal for a Regulation of the European Parliament and the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324 final; Communication COM(2018) 321 final of 2 May 2018 from the Commission, *A Modern Budget for a Union that Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027*.

[27] M.J.R. de Mesquita, *European Union values, Rule of Law and the Multiannual Financial Framework 2021-2027*, in *ERA Forum*, 2018, p. 287 *et seq*.

[28] H.C.H. Hoffman, G.C. Rowe, A.H. Türk, *Administrative Law and Policy of the European Union*, Oxford: Oxford University Press, 2011.

[29] Regulation (EC) 1083/2006 of the Council of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999.

[30] Conclusions of the Special meeting of the European Council (17-21 July 2020), cit.; B. Leyts, E. Arauzo-Azofra, *Special European Council, 17-21 July 2020*, www.consilium.europa.eu; E. Spaventa, *Solidarity and the Covid Crisis*, cit.

[31] Council Regulation (EC, Euratom) No 1605/2002 [2002] OJ L 248.

[32] H.C.H. Hoffman, G.C. Rowe, A.H. Türk, *Administrative Law and Policy*, cit.

ber States that has been under review during the Council negotiations.[33] The amounts allocated to Member States, as well as setting the rule of law conditionality to receive funds, have shown the weaknesses and difficulties of the European integration process.

The Commission's efforts to strengthen the rule of law conditionality have still not be met by the European Council's decision of 21 July 2020. However, despite countries such as Poland or Hungary that are being investigated by violations of the rule of law opposed any conditionality that attaches payments to the fulfilment of this requisite, Angela Merkel informed in a joint press conference with Emmanuel Macron on 21 July 2020 that the already approved by the European Parliament's Commission proposal on the rule of law conditionality of 2018 would be subject to discussion and voting in the near future. She referred to Hungary and its Prime Minister Victor Orbán in relation to the infringement procedure enshrined in Art. 7 TEU and the steps that the Hungarian Government should take to get such process towards a vote.[34] The vote on the breach of the core values of the EU enshrined in Art. 2 TEU requires 4/5 of the Council of Ministers for its approval. The joint vote against that motion by countries such as Poland to suspend the voting rights of the Hungarian Government requires unanimity.

If the Commission's proposal of 2018 is approved under the ordinary legislative procedure of Art. 294 TFEU that requires a QMV, Member States in breach of the rule of law requirement and other related values such as democracy and Human Rights would be deprived of funding by a QMV. Germany holds the EU Presidency for the second semester of 2020 and it is expected that it will schedule a voting on the Commission's 2018 proposal.[35] It is expected that the topic will be discussed at the "Conference on the Future of Europe" scheduled in 2020 and delated until 2021.[36]

In general terms, the rule of law conditionality attached to any disbursements under MFF 2021-2027 and NGEU must be distinguished from the general mechanisms to impose sanctions such as the aforementioned Art. 7 TEU procedure (the political procedure that requires unanimity at the Council to suspend the voting rights of Member States due to violations of the Union's core values), the ordinary infringement procedure of Art. 258 TFEU under which the Commission sues a Member State at the CJEU in case of violation of the EU's fundamental principles or the breach of obligations imposed by the Treaties, and the preliminary procedure of Art. 267 TFEU at the CJEU in matters related to the interpretation of EU law.[37]

[33] E. Spaventa, *Solidarity and the Covid Crisis*, cit.

[34] Joint Press Conference by Chancellor Merkel and President Macron in Brussels of 21 July 2020, www.bundesregierung.de.

[35] Democracy Reporting International, *Summit mythology: What did EU leaders decide on rule of law conditionality?*, 7 August 2020, www.democracy-reporting.org.

[36] J. de Zwaan, *The European Union and the Rule of Law: A new instrument*, in *Netherlands Helsinki Committee*, 22 December 2020, www.nhc.nl.

[37] *Ibid*.

The four major political parties of the European Parliament issued a joint letter on 26 August 2020 requesting the procedural involvement of the European Parliament "the incorporation of the Commission's forthcoming annual report on EU values, [...] the protection of the final recipients of the funds", and the "reintroduction of the 'reversed qualified majority' rule to adopt the Commission's proposal" unless the Council votes against it by QMV. However, the system envisaged under the European Council's decision of 21 July 2020 establishes that any proposal issued by the Commission to block funding regarding a Member State found in breach of the rule of law requisite to be adopted by the European Council by QMV.[38]

The European Parliament expressed its opposition to approving the MFF 2021-2027 unless NGEU's procedure for the infringement of the rule of law by a Member State is revised to meet its demands in line with the Commission's proposal of 2018. Moreover, the European Parliament's committee on Civil Liberties, Justice and Home Affairs will issue a decision on "The Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights"[39] was well received on 5 October 2020 by the plenary of the European Parliament.[40] Moreover, the Parliament warned that the mechanism must ensure transparency in the use of any funds by linking it to the fulfilment of the rule of law conditionality. Such instrument does not only concern MFF but NGEU. MEPs urged EU institutions in a report dated on 7 October 2020[41] "to agree clear rules" in this respect and a "new mechanism" providing "effective sanctions on Member States found to be in violation" of the EU's core values.[42]

The European Parliament and the Council reached an agreement on 5 November 2020 on the rule of law conditionality, extending its application to cases of corruption, fraud and the protection of the EU's core values, as well as final beneficiaries. The opposition of Hungary, Poland, and Slovenia at the European Council summit on 19 November 2020 led to a compromise at the summit on 10-11 December 2020[43] under the auspices of the German Presidency.[44] The conclusions provided for the adoption of guidelines by the Commission on the application of the Regulation and the right of

[38] V. MAKSZIMOV, *Parliament demands rule of law mechanism before signing off on EU budget*, in *EURACTIV*, 26 August 2020, www.euractiv.com.

[39] European Parliament Legislative Observatory, *The Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights,* 2020/2072(INL).

[40] *Ibid*.

[41] European Parliament Resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)).

[42] European Parliament News, *Rule of law: new mechanism aims to protect EU budget and values*, 6 October 2020 (updated on 17 December 2020), www.europarl.europa.eu.

[43] Conclusions of the Special meeting of the European Council (17-21 July 2020), cit.

[44] European Parliament, *New boost for jobs, growth and investment. Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States*, Legislative Train, December 2020, www.europarl.europa.eu.

Member States to "introduce an action for annulment of the Regulation" pending on the decision by the CJEU in this respect.[45]

The first requirement can be hardly met since the Council cannot interfere in the exercise of the Commission's legislative competences by ordering the Commission to elaborate on a subsidiary mechanism, as well as the methodology to carry out such assessment set up by the guidelines that should respect the principle of proportionality, among other conditions.[46] However, as de Zwaan points out, despite the political nature of the Council's conclusions, the President of the Commission, as a member of the Council, has "apparently [...] subscribed to the elements mentioned by the EU Council".[47]

The European Parliament has recalled that the second requirement stressed in the European Council's political declaration cannot lead to an interpretation of EU legislation in the application of the Regulation by the Commission; moreover, the Regulation is already in force since 1 January 2021.[48] This argument is backed by Alemanno and Chamon, who describe the Council's political declaration as *ultra vires*, arguing that "judicial review has no automatic suspensory effect" according to Art. 278 TFEU if an action for annulment following Art. 263 TFEU is initiated by Poland, Hungary or Slovenia, and that it creates an "institutional unbalance by determining the prerogatives of the European Parliament, Council, Commission and CJEU".[49] The Council is barred from exercising legislative functions according to Art. 15, para. 1, TEU, being the Commission obliged to act as a guardian of the Treaties and ensure their application as well as "measures adopted by the institutions pursuant to them", according to Art. 17, para. 1, TEU.[50] These grounds may give rise to an action for annulment by the European Parliament under Art. 263 TFEU opposing the conclusions of the European Council.[51]

The draft Regulation of 5 November 2020 was approved after a second reading by the European Parliament on 16 December 2020.[52] The conditionality mechanism can be triggered by the Commission to suspend or freeze any payments when it finds a Member State in breach of the EU's fundamental values, followed by the Council's vote in

[45] *Ibid*.

[46] J. DE ZWAAN, *The European Union and the Rule of Law*, cit.

[47] *Ibid.*

[48] European Parliament Press Release, *Rule of Law mechanism applies without further delay as of 1 January, MEPs stress*, 17 December 2020, www.europarl.europa.eu.

[49] A. ALEMANNO, M. CHAMON, *To Save the Rule of Law you Must Apparently Break It,* in *VerfassungsBlog,* 11 December 2020, www.verfassungsblog.de.

[50] A. DIMITROVS, *Rule of law-conditionality as interpreted by EU leaders*, in *EU Law Live*, 11 December 2020, www.eulawlive.com.

[51] A. ALEMANNO, M. CHAMON, *To Save the Rule of Law you Must Apparently Break It*, cit.

[52] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

one or three months, exceptionally, on the proposed measures by QMV.[53] The process cannot take longer than 7–9 months.[54]

IV. The European Central Bank's "Pandemic Emergency Purchase Programme" (PEPP)

The European Central Bank (ECB) showed solidarity by the approval of the "Pandemic Emergency Purchase Programme (PEPP)', which purchases up to €1.35 trillion private and public securities with the aim of countering "serious risks to the monetary policy transmission mechanism and the outlook for the euro area posed by the coronavirus outbreak".[55] The purchase of bonds ("corona-bonds") issued by companies or countries is aimed at countering the risks to monetary policy transmission mechanism created by the COVID-19 crisis.

According to Dermine and Markakis, bonds are defined as "joint debt instruments [...] issued at Eurozone level, with a collective [...] guarantee from all involved Member States, hence easing access to funding throughout the Eurozone, especially for those in the weakest financial position".[56] However this affirmation is subject to Art. 125 TFEU, the informally known as "no bailout clause", meaning that Member States may lend to other Member States to relieve the other Member State's debt, but they cannot assume the debts of other Member States. Craig shares the view that according to the *Gauweiler* and *Weiss* cases,[57] the purchase of those securities would be an *intra vires* act and in no case an *ultra vires* one.[58]

The purchase of "corona-bonds" constitutes an exception to the "no bailout clause" of Art. 125 TFEU. Measures can be agreed by the Council following a Commission's proposal according to Art. 122, para. 1, TFEU. As ruled in the *Pringle* case,[59] there should be no debt mutualisation (the ECB cannot directly purchase Member State's debt instruments, para. 123) and it should be limited to the "achievement of the instrument's goal

[53] European Parliament Press Release, *Parliament approves the "rule of law conditionality" for access to EU funds*, 16 December 2020, www.europarl.europa.eu.

[54] *Ibid*.

[55] European Central Bank, *Pandemic emergency purchase programme (PEPP)*, 2020, www.ecb.europa.eu; A. Rettman, *[Coronavirus] ECB Promises (Almost) Whatever It Takes*, in *EU Observer*, 19 March 2020, www.euobserver.com.

[56] P. Dermine, M. Markakis, *The EU Fiscal, Economic and Monetary Policy Response to the COVID-19 Crisis*, in *SSRN*, 2020, p. 1 *et seq.*

[57] Court of Justice, judgment of 11 December 2018, case C-493/17, *Heinrich Weiss and Others* [GC]; judgment of 16 June 2015, case C-62/14, *Gauweiler and Others v. Deutscher Bundestag* [GC].

[58] P. Craig, *COVID 19, Competence and Free Movement,* cit.

[59] Court of Justice, judgment of 27 November 2012, case C-370/12, *Thomas Pringle v Government of Ireland and Others*.

(policy conditionality)” to provide a solidary assistance in the context of the pandemic.[60] The ECB cannot directly provide “any form of financial assistance or credit to Member States” according to the *Weiss* case (para. 102) but is allowed to buy bonds only in the secondary market (international financial markets) not the primary one (para. 102–104). Moreover, the CJEU allows the ECB to sell the corona-bonds with flexibility “within the limits to achieve its goals” that include the support of the general economic policies of the EU according to Art. 282, para. 2, TFEU.[61]

However, the *Weiss II* judgment of the German Federal Constitutional Court (GFCC) of 5 May 2020[62] declared that the “Public Sector and Purchase Programme” (PSPP) was partly *ultra vires* colliding with the CJEU’s ruling in *Weiss*. The PSPP programme is part of the ECB’s “Asset Purchase Programme” (APP) along with the “Corporate Sector Purchase Programme (CSPP), the “Covered Bond Purchase Programme” (CBPP3) and the “Asset-Backed Securities Purchase Programme” (ABSPP).[63] The GFCC has exercised an *ultra vires* review of the ECB’s acts and the CJEU’s powers by exceeding its competence by pointing to the Bundestag and the Federal Government as the institutions that should assess the proportionality of the PSPP programme.[64] These provided a positive answer but this is not within their competences according to the CJEU’s judgment.[65]

The CJEU provides for a uniform interpretation of EU law to avoid any divergence in its application by Member States and the GFCC has breached that obligation. Nevertheless, the GFCC considers that the ECB has exceeded its mandate and there has been a lack of scrutiny by the German Federal Government to ensure that the ECB has carried out a proportionality assessment by adopting the PSPP programme. Complying with the inflation targets by the ECB is understood as within its functions according to the CJEU’s judgment in *Weiss* and the exercise of the ECB’s monetary policy may have indirect effects, allowing the ECB to step into monetary policy regardless of the indirect effects in the real economy.

According to the GFCC, there is a violation of the principle of proportionality contained in Art. 5, paras 1 and 4, TEU. Such “unfettered freedom to determine its competence” surpasses the limits of the CJEU’s competence contained in Art. 19, para. 1, TEU

[60] L. Garicano, *Towards a European Reconstruction Fund*, *Europe in the Time of Covid-19*, in *VoxEU*, 2020, p. 207 *et seq*.; P. Dermine, M. Markakis, *The EU Fiscal, Economic and Monetary Policy Response*, cit.

[61] L. Garicano, *Towards a European Reconstruction Fund*, cit.

[62] German Federal Constitutional Court (*Bundesverfassungsgericht*), judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

[63] European Central Bank, *Pandemic emergency purchase programme (PEPP) Questions & Answers*, 2020, www.ecb.europa.eu.

[64] M. Wendel, *Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception*, in *German Law Journal*, 2020, p. 979 *et seq.*

[65] *Ibid*.

according to the GFCC.[66] This is the reason why the GFCC has stated that the CJEU's ruling is an *ultra vires* act with no effects in Germany.

The very particular view on the principle of proportionality, however, cannot be transposed and applied to all the Member States in a uniform manner. It could lead to other Member State courts challenging the uniform interpretation of EU law and the CJEU's rulings.[67] Some authors argue that the ruling may potentially lead to the reform the European Monetary Union (EMU).[68] It is unlikely that other Member State courts would follow the *Weiss II* judgment and its German proportionality test.[69]

Some scholars, as a consequence of the *Weis II* judgment, have proposed the creation of "hybrid constitutional organ" such as a mixed Chamber of the Court of Justice of the European Union, composed by judges from national constitutional courts and the CJEU.[70] The idea has sparkled debate amongst academics but there are several burdens, since it would require the amendment of the TEU and its Art. 19 TEU. Ursula Von der Leyen opened the door to the infringement procedure of Art. 258 TFEU following the GFCC's *Weiss II* judgment. She stated that the EU's monetary policy is an exclusive competence of the EU, the primacy of EU law over national law and the binding nature of the CJEU's rulings over national courts.[71]

Furthermore, the Commission, the European Investment Bank (EIB) and European Stability Mechanism (ESM) provide financial assistance to Member States experiencing severe financial detriments via bonds or loans of up to €540 billion.[72] Member States have been sceptical of the use of these bonds and claim that it is just a way of moving money around.[73] Yet, the reasoning for the PEPP is centred around the EU notion of solidarity. Issuing the bonds at the "eurozone level" creates solidarity and commitment from all Member States by providing financial assistance to the Member States who are

[66] J. NOWAG, *The BVerfG's Proportionality Review in the PSPP Judgment and its Link to Ultra Vires and Constitutional Core: Solange Babel's Tower Has Not Been Finalised*, in *Lund University Legal Research Paper Series*, 2020, available at www.papers.ssrn.com.

[67] *Ibid*.

[68] A. BOBIĆ, M. DAWSON, *What did the German Constitutional Court get right in Weiss II?*, in *EU Law Live*, 12 May 2020, eulawlive.com; J. NOWAG, *The BVerfG's Proportionality Review*, cit.

[69] J. NOWAG, *The BVerfG's Proportionality Review*, cit.

[70] J.H.H. WEILER, D. SARMIENTO, *The EU Judiciary After Weiss – Proposing A New Mixed Chamber of the Court of Justice. A Reply to Our Critics*, in *EU Law Live*, 6 July 2020, eulawlive.com; other authors have commented on such proposal, see: P. ZINONOS, *A mixed chamber or an ad hoc advisory body for the Court of Justice of the EU?*, in *EU Law Live*, 20 July 2020, eulawlive.com.

[71] Commission, *Statement by President Von der Leyen*, Press Release of 10 May 2020, www.ec.europa.eu.

[72] European Stability Mechanism, *Lending Toolkit*, 2020, www.esm.europa.eu.

[73] P. CRAIG, *COVID 19, Competence and Free Movement,* cit.; R. KELLY, *COVID-19 – EU Bonds: Has The EU Had Its Hamilton Moment?*, in *Lexology*, 23 July 2020, www.lexology.com.

at financial risk.[74] Guy Verhofstadt considered that the first ever issuance of bonds by the ECB "will increase its fiscal capacity in a dramatic way".[75]

V. A temporary increase on public deficit goals for Member States

The Member States have adopted measures for €420 billion for the activation of the general escape clause,[76] alleviating the EU's fiscal rules under the Stability and Growth Pact and relieving the EU of budgetary requirements under the European fiscal framework.[77] Such escape clause is envisaged for times of serious and severe economic downturns in the Eurozone or the whole EU.[78]

The Eurogroup approved a "Pandemic Crisis Support" (PCS) for Member States that is based on the existing ESM Enhanced Conditional Credit Line Establishment of the ESM PCS. It allows for a deviation of Member State's 2 per cent of their Gross Domestic Product (GDP) based on 2019's figures until December 2022.[79] The support provided to Member States has totalled €240 billion.[80] The increase on the public spending is a sign of preparedness and solidarity across the EU to face the challenges posed by the COVID-19 crisis in Europe.

[74] P. Dermine and M. Markakis, *The EU Fiscal, Economic and Monetary Policy Response to the COVID-19 Crisis*, cit.

[75] G. Verhofstadt, *Conclusions of the extraordinary European Council meeting of 17-21 July 2020 (continuation of debate),* cit.

[76] Communication COM(2020) 123 final of 20 March 2020 from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact eur-lex.europa.eu. it was endorsed through: Council of the EU, *Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis*, Press release of 23 March 2020, www.consilium.europa.eu. It was well-received by: Council of the EU, *Joint statement of the Members of the European Council Brussels*, 26 March 2020, www.consilium.europa.eu; Eurogroup, *Report on the comprehensive economic policy response to the COVID-19 pandemic*, 9 April 2020, www.consilium.europa.eu.

[77] The so-called "Six-Pack" was published in 2011 – Directive 2011/85/EU of the Council of 8 November 2011 on regulatory budgetary frameworks of the Member States; P. Craig, *COVID 19, Competence and Free Movement,* cit.

[78] Arts 5, para. 1, and 9, para. 1, of Regulation (EC) 1466/97 of the Council of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; the "escape clause" includes a corrective mechanism under Arts 3, para. 5, and 5, para. 2, of the Regulation (EC) 1467/97 of the Council of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure.

[79] The PCS entered into force on 15 May 2020 after the approval by the ESM Board of Governors; see: European Stability Mechanism, *ESM Pandemic Crisis Support. Explainer, Timeline and Documents, 2020,* www.esm.europa.eu.

[80] Commission, *Jobs and economy during the coronavirus pandemic,* 2020, www.ec.europa.eu.

VI. The "Pan-European Guarantee Fund" and the "Support to mitigate Unemployment Risks in an Emergency" (SURE) programme

The EIB approved the structure and functioning of a €25 billion "Pan-European Guarantee Fund" to support small and medium sized companies (SMEs) by mobilising €25 billion with an impact target of €200 billion.[81] The Commission and the European Investment Fund (EIF) approved €1 billion from the "European Fund for Strategic Investments" on 6 April with an impact of €8 billion on 100,000 European SMEs.[82] Moreover, the EIB approved €40 billion on 16 March 2020 for the healthcare sector regarding emergency infrastructure and development of cures and vaccines.[83]

Aspiring to recover as quickly as possible, the EU has created a temporary €100 billion "Support to mitigate Unemployment Risks in an Emergency" (SURE) programme for short-time work schemes. The programme borrows from financial markets and provides back-to-back loans to Member States impacted socio-economically by the pandemic.[84] SURE aims to provide a job safety net by lowering the unemployed number, which will ease the burden of the Member State's unemployment benefits systems.[85] These exceptional temporary measures are based on Art. 122 TFEU. Finally, an additional €70 billion have been allocated by the EU's budget support.[86]

VII. The 2021–2027 Multiannual Financial Framework (MFF)

The MFF is the EU's long-term budget that shows the financial perspectives for seven years, while also containing qualifying conditions for specific sectors and fund dispersal of spending programmes. The purpose of the framework is to provide financial guidelines for programmes and ensure "budgetary discipline" to restrain the EU from spending more than

[81] The Board of Governors of the EIB approved the *Pan-European Guarantee Fund* on 26 May 2020, 2020-126-EN, proposed by the Commission on 16 April 2020 and endorsed by EU leaders on 23 April 2020; See D. Busch, *Is the European Union going to help us overcome the COVID-19 crisis?*, in *Capital Markets Law Journal*, 2020, p. 347 *et seq.* Commission, *Coronavirus: Commission and European Investment Fund unlock €8 billion in finance for 100,000 small and medium-sized businesses*, 6 April 2020, www.ec.europa.eu.

[82] Commission Proposal for a Council Regulation amending Regulation (EU, Euratom) No 1311/2013 laying down the multiannual financial framework for the years 2014-2020, COM(2020) 174 final.

[83] EIB Group, *EIB Group will rapidly mobilise up to EUR 40 billion to fight crisis caused by Covid-19 and calls on Member States to set up a further guarantee for SME and mid-cap support from EIB Group and national promotional banks*, Press Release of 16 March 2020, www.eib.org; EIB Group, *EIB Group moves to scale up economic response to COVID-19 crisis* 2020-094-EN, Press Release of 3 April 2020, www.eib.org.

[84] Regulation (EU) 2020/672 of the Council of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.

[85] L. Andor, *SURE – EU Capacity for Stabilising Employment and Incomes in the Pandemic., inIntereconomics*, 2020, p. 17 *et seq.*

[86] Commission*, Jobs and economy during the coronavirus pandemic*, cit.; Commission, *Coronavirus Response*, www.ec.europa.eu.

what is available.[87] The MFF is approved under the special legislative procedure requiring unanimity of the Council and the consent of the majority of the European Parliament.[88]

VII.1. The Commission's proposal

The Commission expects a €4.2 trillion global investment in providing a response to the health crisis and its consequences.[89] The 26 March 2020 video conference also proposed the activation of the Emergency Support Instrument of the MFF 2014–2020 regulation proposal to provide a €37 billion Coronavirus Response Initiative to Member States for assistance with the COVID-19 outbreak[90] and to amend the annual availability of €500 million of the EU Solidarity fund (EUSF).[91] The EUSF was established under Arts 175 and 212, para. 2, TFEU[92] in 2002 to provide relief to Member States, or accessing countries, who have endured a natural disaster. While the EUSF is not included in the EU budget, an annual availability of €500 million to include in the concerned Member State's public expenditure for emergency operations.[93]

A mobilisation of €140 million was pledged to health research, including research for a vaccine through Horizon Europe.[94] However, all remaining budgetary flexibility of the MFF 2014–2020 were exhausted by the Coronavirus Response Investment Initiative Plus.[95] The expenditure ceiling of the 2014–2020 MFF was increased to €6.04 billion, raising the "economic, social and territorial cohesion" to €53.1 billion, and the "Heading 4: Global Europe" to €9.7 billion. These impacted the increase of the EU's contribution for the "Solvency Support Instrument" under the European Fund for Strategic Investment and the EIF, and cohesion funds under the "Recovery Assistance for Cohesion and the Territories of Europe" (REACT-EU) programme, as well as additional funds for the European Fund for Sustainable Development,[96] legally based on Art. 312 TFEU.

[87] A. Huza, *The Cohesion Versus Better Spending Debate During the Negotiation of the EU Multiannual Financial Framework 2014-2020*, in *Knowledge Horizons. Economics*, 2014, p. 91 *et seq.*

[88] Art. 312, para. 2, TFEU.

[89] Commission*, Jobs and economy during the coronavirus pandemic*, cit.

[90] Communication COM(2020) 174, cit.

[91] European Council, Video conference of the members of the European Council, 26 March 2020, cit.

[92] See also: Regulation (EC) 2012/2002 of the Council of 11 November 2002 establishing the European Union Solidarity Fund and Regulation (EU) 661/2014 of the European Parliament and of the Council of 15 May 2014 amending Council Regulation (EC) No 2012/2002.

[93] European Parliament, *The Solidarity Fund. Fact Sheets On The European Union*, 2020, www.europarl.europa.eu.

[94] Regulation (EU) 1291/2013 of the European Parliament and of the Council establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC.

[95] E. Castellarin, *The European Union's Financial Contribution to the Response to the Covid-19 Crisis: An Overview of Existing Mechanisms, Proposals under Discussion and Open Issues*, in *European Papers*, Vol. 5, 2020, No 2, www.europeanpapers.eu, p. 1021 *et seq*.

[96] Proposal for a Regulation COM(2020) 174.

VII.2. Renegotiation of the MFF at the European Council Summit

The MFF and the NGEU "go together",[97] as one is the standard budget and the other is a budgeted recovery plan that will be repaid by the MFF over time after 2027 and by 2058.[98] The MFF 2021-2027 slightly reduced from €1.1 trillion to €1.074 trillion to meet the demands of the disapproving countries at the 17–21 July summit[99] was adopted on 16 December 2020 with the European Parliament's consent and implemented since January 2021.[100]

The MFF 2021–2027 includes the Own Resources ceiling.[101] Member States have the valuable opportunity to plan and prioritise areas of recovery through the grants funded by the Own Resources decision before receiving funding in January 2021. The €1.07 trillion MFF will ensure the fulfilment of the objectives of the NEGU, while also permitting the EU to "fulfil its long-term objectives".[102]

VII.3. Adjustments made by the European Parliament

The European Parliament brokered a deal with the Commission and the Council increasing the MFF by €16 billion based on the figures negotiated under the political agreement of 10 November between the European Parliament and the Council.[103] These amounts will benefit several flagship programmes by increasing the MFF budget for Horizon Europe in €4 billion (€84.9 billion in total), InvestEU in €1 billion (€9.4 billion in total), Erasmus+ in €2.2 billion (€23.4 billion in total), EU4Health in €3.4 billion (€5.1 billion in total), Integrated Border Management Fund & Border and Coast Guards in €1.5 billion (€7 billion in total), Creative Europe in €0,6 billion (€2.2 billion in total), Rights and Values programme in €0.8 billion (€1.4 billion in total), NDICI (Neighbourhood, Development and International Cooperation Instrument) in €1 billion (€71.8 billion in total), and Humanitarian aid in €0.5 billion (€10.2 billion in total). These programmes will receive an additional €15 billion while €1 billion is allocated for additional flexibility, mostly because of the new Own Resources that will provide further revenues

[97] Conclusions of the Special meeting of the European Council (17-21 July 2020), cit..

[98] A. Hinarejos, *Next Generation EU*, cit.; Commission, *Financing The Recovery Plan For Europe*, 2020, www.ec.europa.eu.

[99] D. Cameron, *After Five-Day Marathon, EU Leaders Agree On €750 Billion Recovery Plan*, cit.

[100] Commission, *EU Long-Term Budget 2021-2027: Commission Proposal May 2020*, 2020, www.ec.europa.eu.

[101] E. Castellarin, *The European Union's Financial Contribution to the Response to the Covid-19 Crisis,* cit.

[102] B.Leyts, E. Arauzo-Azofra, *Special European Council, 17-21 July 2020,* cit.

[103] Commission, *Questions and Answers on the agreement on the €1.8 trillion package to help build greener, more digital and more resilient Europe*, 11 November 2020, www.ec.europa.eu.

from 2022.[104] The MFF provides for more flexibility mechanisms aimed at tackling future uncertain events.[105]

VII.4. Relevance of the MFF negotiation in the light of the pandemic

The COVID-19 crisis has underlined the importance of a swift and flexible EU response to future crises, thereby creating a flexible budget.[106] The Commission proposed more funding in the 2021-2027 MFF to emergency tools. The 2021-2027 MFF has allocated €1.1 billion to RescEU and increased the EU4Health budget from €1.7 billion to €5.1 billion. The EU already agreed on a €9.467 billion budget for 2021-2027 in relation to the Solidarity and Emergency Aid Reserve (SEAR) which encompasses the European Union Solidarity Fund (EUSF) and the Emergency Aid Reserve (EAR) following the Council decision of 21 July 2020.[107]

While the MFF 2021-2027 endured a slight reduction to the budget due to the unwavering demands of the "frugal four plus Finland", the MFF 2021-2027 aims to recover and repair the damage of the COVID-19 crisis and also prepare for future health crises. By investing more funding in emergency aid measures, public health, and medical research, the EU and its Member States are more resilient to future cross-border threats, which and in turn reduces damage to the economy and society caused by these crises.

VIII. The temporary framework for State aid measures to support the economy in the current COVID-19 outbreak

The new NGEU and the 2021–2027 MFF have been accompanied by State aid measures, as a financial incentive to assist European companies thriving under the stringent economic impact. Many enterprises are running out of liquidity and the Commission has acknowledge their specific needs since the start of the outbreak.

[104] Interinstitutional agreement of 16 December 2020 on budgetary discipline, on cooperation in budgetary matters and on sound financial management 2018/2070(ACI); the first proposal was presented on 2 May 2018, COM(2018) 323 final. The Council proposed a Regulation on the same date laying down the multiannual financial framework for the years 2021 to 2027, COM/2018/322 final - 2018/0132 (APP); see also the Recommendation on the draft European Parliament legislative Resolution on the draft Council Regulation laying down the multiannual financial framework for the years 2021 to 2027 (09970/2020 – C9-0409/2020 – 2018/0166(APP)).

[105] Commission Press Release, *EU budget: European Commission welcomes agreement on €1.8 trillion package to help build greener, more digital and more resilient Europe*, 10 November 2020, www.ec.europa.eu.

[106] Commission, *Financing The Recovery Plan For Europe*, cit.

[107] Conclusions of the Special meeting of the European Council (17-21 July 2020), cit.

The Commission has approved a proposal to support the most affected sectors in Member States while providing solvency to viable companies.[108] These measures are complemented by national liquidity measures, including schemes approved under temporary and flexible EU State aid rules of up to €2.9 billion.[109] These expenditures were to provide immediate support during the crisis.

viii.1. The European Union's unique legislation on State Aid

State aid rules are unique to the EU and the construction of its internal market is the political reason of avoiding national rivalries.[110] State aid distorts competition but Art. 107(1) TFEU's incompatible provisions with the internal market (and its freedom of movements of citizens, goods, services and capitals) are derogated by the ones contained in Arts. 107(2) and 107(3) TFEU. The Commission adopted State aid measures known as the Temporary Framework, applying from 19 March 2020 to 31 December 2020 to support the economy and the internal market. The Temporary Framework protects the fundamental freedoms of movement of the EU in the light of the COVID-19 crisis by providing State aid to private companies.[111] Furthermore, the Commission has extended the Temporary Framework until 30 June 2021, while recapitalisation support is available until 30 September 2021.[112]

Member States are prohibited from giving financial aid or subsidies to some companies because it causes a distortion of the fair market competition. It creates a favouritism and frustrates the internal market, and therefore, must have clearance from the Commission to exist. In order for State aid to apply, the aid must be granted by state resources to the undertaking engaged in the economic activity, thereby creating an advantage and distorting or potentially distorting trade and competition. An exemption to State aid rules is the General Block Exemption Regulation (GBER), which is pre-approved aid for specific provisions that do not require the approval or notification of the Com-

[108] Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2015/1017 as regards creation of a Solvency Support Instrument, COM(2020) 404 final.

[109] Commission*, Jobs and economy during the coronavirus pandemic*, cit.

[110] K. Bacon, *European Union law of State aid*, Oxford: Oxford University Press, 2017, p. 4.

[111] V. de Vries, M. Friend, A. Bavasso, E. Besselink, L. Tolley, E. Bourne, *Covid–19 Coronavirus And The EU State Aid Response,* 2020, www.allenovery.comD. Bourne, *Covid–19 Coronavirus And The EU State Aid Response,* 2020; D. Slater, D. Waelbroeck, M. Cousin, *The Impact Of COVID-19: Navigating EU State Aid, Ashurst*, 2020, www.ashurst.com.

[112] Communication 2020/C 340 of 13 October 2020 from the Commission, 4th Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance.

mission.[113] Aid for SMEs as well as permanent and temporary staff layoffs resulting from the COVID-19 crisis fall under this category.[114]

VIII.2. Notifiable State Aid measures under Art. 107 TFEU

States can rely on Arts 107, para. 2, let. b), 107, para. 3, let. b), 107, para. 3, let. c), as well as the Temporary Framework for State aid relief. Art. 107, para. 2, let. b) TFEU compensates companies for the loss of revenues caused by exceptional occurrences or natural disasters[115] by notifying the Commission and proving a direct causal link between the exceptional occurrence and the damage. The Commission has recognised COVID-19 as an exceptional occurrence under Art. 107(2)(b),[116] but very few cases relating to the COVID-19 outbreak have met the conditions of Art. 107(2)(b).

The State aid rules aimed at supporting enterprises in need of financing in case of acute liquidity shortages facing bankruptcy caused by the COVID-19 outbreak are enshrined in Art. 107(3)(c) TFEU. Member States can support these companies through State aid rules such as the Commission's guidelines on rescue and restructuring aid.[117] The rescue aid is framed within the maximum allowed period of six months and a restructuring plan is undergoing to make the company financially viable.[118]

Moreover, the Commission has boosted public investment on research for a possible cure for COVID-19 compatible with State aid rules as stated in its Communication of April 4, 2020.[119] The Commission acknowledges the options available under Art. 107, para. 3, let. c, TFEU to support research and development aid as well as investment aid to support the production, upscaling infrastructure, and production expansion of products necessary to respond to the COVID-19 pandemic.

[113] Regulation (EU) 651/2014 of the Commission of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Arts. 107 and 108 of the Treaty; Pinsent Masons*, Introduction to State aid,* 2020, www.pinsentmasons.com.

[114] Regulation 651/2014, cit.

[115] Since the decision of 12 March 2020 on a Danish State aid scheme, State aid notification on compensation scheme cancellation of events related to Covid-19, SA.56685.

[116] Commission, *COVID-19: Commission Sets Out European Coordinated Response To Counter The Economic Impact Of The Coronavirus*, 2020, www.ec.europa.eu.

[117] Communication 2014/C 249/01 of 31 July 2014 from the Commission, *Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty*, .

[118] Commission, *State aid: Commission approves €1.2 billion Portuguese urgent liquidity support to TAP*, Press Release of 10 June 2020, www.ec.europa.eu.

[119] Communication C/2020/2215 of 4 April 2020 from the Commission, *Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*.

VIII.3. Legal basis and functioning of the temporary framework for State aid measures to support the economy

Most COVID-19 State Aid cases align with 107, para. 3, let. b, which covers severe economic situations. Member States may then remedy a serious economic disruption in another Member State by granting support.[120] The Commission enacted the Temporary Framework, based on Art. 107, para. 3, let. b), TFEU, which eliminates any distortion to competition while ensuring a transparent and efficient control of public State aid.[121] The Temporary Framework is available until mid-2021 and is based on Art. 107, para. 3, let. b), TFEU in order to avoid major distortions in the economy of a Member State. A level playing field is necessary to avoid any distortion in competition while ensuring a transparent and efficient control of public state aid.

SMEs can receive up to €800,000 in direct grants, loans, tax and payment advantage or any form of loans that cover the full risk, combined with de minimis rules under certain conditions.[122] Companies can defer tax or social security contributions and wage subsidies can be provided to avoid lay-offs and public support can be provided in the form of equity or hybrid capital instruments.

Member States provide solvency support by entering into the capital of companies under loans. Recapitalizations of enterprises is a last resort measure because it may have more distortionary effects than loans. Companies must recover viability without landing in a better position than before the start of the pandemic. Recapitalization measures include a step-up mechanism that increases the cost for the company and increases the remuneration of the State, incentivising shareholders to buy back capital from the state. The longer the Member State participates in the capital of the company the more expensive it becomes for that enterprise.

The Commission has an estimated budget of €2.8 trillion, most in the form of guarantees that will not probably be spent. Furthermore, companies other than SMEs receiving funds cannot acquire a more than 10 per cent in their competitors or companies operating in their same line of business and are barred from making dividend payments, buying back shares, or paying bonuses to their managers. A notification to the Commission is necessary when recapitalization for amounts of more than €250 million. If the company seeking financing has a predominant position in any of the markets

[120] V. J. G. Power, *European Union: competition – State aid and COVID-19*, in *International Company and Commercial Review,* 2020, p. 59 *et seq*.

[121] Communication C/2020/4509 of 2 July 2020 from the Commission, *Third amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*.

[122] Air and maritime transportation along with tourism are the most affected sectors: Commission, *Overview of the State aid rules and public service obligations rules applicable to the air transport sector during the COVID-19 outbreak*, 2020, www.ec.europa.eu; Commission, *Overview of the State aid rules and Public Service rules applicable to the maritime sector during the COVID-19 pandemic*, 2020, www.ec.europa.eu.

where it operates, the Member State needs to provide competition remedies to avoid any distortion of competition.[123]

VIII.4. Remarks on notifiable State Aid measures

Quantification of the damage suffered under Art. 107, para. 2, let. b), TFEU has proved to be burdensome compared to Art. 107, para. 3, let. b), TFEU. The minimum and maximum threshold set out by the Temporary Framework implies the possibility of receiving more aid than necessary to remedy the damage suffered by some recipients. Several factors must be considered for compensation such as the identification of a physical or material damage, the deterioration of market conditions, the loss of income, and extent of damages that may include the loss of profits.[124] For instance, the recapitalization of Lufthansa by the German Government for €6 billion consisted in the divestment of 24 slots/day at Frankfurt and Munich hub airports and other assets to ensure a fair competition to ensure that its predominant position could be challenged by competitors.[125] The Commission published a "White Paper"[126] on state aid control on non-EU foreign subsidies operating in the internal market to ensure that they do not obtain any advantage over EU companies.

The Temporary Framework has proved to be an efficient answer from the EU not just to avoid disruptions on the freedom of movement of citizens and goods across the Union but also in the context of avoiding bankruptcy and dissolution of companies effected by the COVID-19 crisis.[127] However, national governmental interventions via State aid has criticised Member States" uneven use of this aid.[128] Member States have been reminded by the Temporary Framework's third amendment that State aid cannot be used in a way that is harmful to the internal market.[129] Afterall, State aid must comply with the EU rules.[130]

[123] Commission, *Overview of the State aid rules and Public Service rules applicable to the maritime sector* cit.; C. Esteva-Mosso, *Tackling COVID-19 and State aids,* COVID-19 and the Functioning of the Internal Market Webinar, United Kingdom Association for European Law, London, 22 July 2020.

[124] P. Nicolaides, *Application of Article 107 (2)(b) TFEU to Covid-19 Measures: State aid to Make Good the Damage Caused by an Exceptional Occurrence*, in *Journal of European Competition Law & Practice*, 2020, p. 238 *et seq.*

[125] Decision SA.57153 of the Commission of 25 January 2020, COVID-19 – Aid to Lufthansa; Commission, *State aid: Commission approves €6 billion German measure to recapitalise Lufthansa*, Press Release of 25 June 2020, www.ec.europa.eu.

[126] Commission, White Paper on levelling the playing field as regards foreign subsidies, COM/2020/253 final.

[127] D. Garrod, A. Green, S. Casselbrant-Multala, *Hotly Anticipated Extension Of EU State aid Framework To Recapitalizations And Subordinated Debt, Akin Gump*, 2020, www.akingump.com.

[128] T. Wilson P. Gnatzy, S. Cranley, *The EC'S Third Amendment To The State aid Temporary Framework,* in *Kluwer Competition Law Blog*, 7 July 2020, www.competitionlawblog.kluwercompetitionlaw.com.

[129] *Ibid*.

[130] Commission, *What Is State aid?*, 2020, www.ec.europa.eu.

Ferri points out that a relaxation of the State aid rules will deepen the economic inequalities between Member States, even though Member State economies have benefitted from that advantageous scheme.[131] Nevertheless, this criticism may not have accounted for the economic disparities endured by the most-impacted Member States, such as Italy and Spain, compared to lesser-impacted Member States, such as Austria and Denmark.

IX. Conclusions, criticism and lessons learnt from the COVID-19 crisis

The EU's goal is to recover the economy as quickly as possible. Finance for the recovery instruments is provided by the Own Resources decision, which diverts EU revenue streams to fund the recovery. Emergency instruments like the €750 billion NGEU recovery package as well as the MFF 2021-2027 budget have constituted a swift response from the EU regarding the COVID-19 recovery.

IX.1. Political tensions over NGEU's rule of law requirement and the European Parliament's necessary approval of the 2021–2027 MFF

There have been many ups and downs during the intense negotiations that took place during the European Council Summit in July 2020. The EU Member States agreed on the amount, funding, and duration of the recovery instruments after months of intense negotiations and opposed positions. Nevertheless, the EU has the final say on the financial administration.

The EU's financial interests are protected and the EU's competence of the management of funds, while shared with Member States, is supreme. Although the EU is responsible to implement the recovery measures, the rule of law requirements on national recovery and resilience plans is still a contentious issue at stake: these will be scrutinised by the Commission and the Council under the examination procedure.

The debate still lies between the conditionality of the future mechanism to initiate an infringement procedure regarding the rule of law. The European Council's mechanism requires a QMV while the Commission's proposal of 2018 envisages an automatic approval of the Commission's decision unless a QMV in the European Council opposes such decision. It is expected that the political victory of Poland, Hungary and Slovenia regarding the implementation of the conditionality mechanism to protect the EU budget will only constitute a temporary relief for these countries. The conclusions of the European Council Summit of 10-11 December 2020 doubtfully compel the Commission to approve any guidelines on the way it applies the rule of law mechanism and the methodology to carry out such assessment. It is nevertheless unlikely that any action for an-

[131] D. Ferri, *The Role of EU State Aid Law as a "Risk Management Tool" in the COVID-19 Crisis*, in *European Journal of Risk Regulation*, 2020, p. 1 *et seq*.

nulment initiated by Poland or Hungary at the CJEU under Art. 263 TFEU succeeds and furthermore, the mechanism will continue in force since 1 January 2021 during the proceedings until the judgment is rendered by the court according to Art. 278 TFEU. Moreover, the European Parliament could start proceedings under Art. 263 TFEU against the Council's political declaration. The European Parliament is determined to ensure that MFF 2021-2027 and NGEU is pegged to a mechanism that respects its demands on the rule of lawby linking disbursements with such conditionality in case of breach of the rule of law and the values contained in Art. 2 TEU by any Member State.

NGEU and the MFF 2021-2027 have boosted investments in EU programmes aimed at preparing for future public health and cross-border crises, including more funding for emergency aid programmes and public health research. Likewise, the expansion of the MFF 2021-2027 budget relieves the Member States from bearing the strain of the NGEU recoupment while also providing a flexible budget which allows for faster responses to future crises.

The increase of the ECB's fiscal capacity through the PEPP as well as the €9.467 billion allocated under the MFF 2021-2027 to SEAR are a sign of the EU's fast response to tackle the pandemic. The EU recovery measures aim to recover, invest, and build resilience.

IX.2. The PEPP legitimacy should not be questioned by national judges in breach of the EU's exclusive competences

Member States enduring economic downturns amid the crisis may also use "coronabonds" provided by the ECB, which has sparked scepticism believing that bonds will merely shift money. However, the ECB has only issued these bonds for the EU territory and centred them on the solidarity notion.

It is still to be clarified how or when the EU will take any actions to counter the constitutional challenge posed by the GFCC's ruling on *Weis II* that declares the ECB's PSPP non-applicable to Germany and declares that the German proportionality test has not been met while partly considering the ECB's programme as an *ultra vires* act. The judgment contravenes the CJEU's *Weiss* ruling, that rightly frames the adoption of the PSPP as an ECB's *intra vires* act.

The deviations on the uniform interpretation on EU law that compels Member State courts, the paramountcy of EU law over national law and the avoidance of national interferences on the EU's exclusive competences, i.e. the ECB's monetary policy, is significant to ensure that the PEPP is not constitutionally challenged by Germany or any other Member State.

IX.3. Short-term work schemes, liquidity support and the Temporary framework for State aid measures in the current COVID-19 outbreak are fostering the economic recovery

In order for the economy to return to its pre-COVID-19 state as quickly as possible, it is necessary to stimulate the economy. The EIB has mobilised the Pan-European Guarantee Fund to support businesses and the European Fund for Strategic Investments for SMEs. Short term work schemes eased the pressure of unemployment and EU fiscal rules were lifted by the escape clause of Arts 5, para. 1, and 9, para. 1, of Regulation (EC) 1466/97. These measures allow for flexibility by stimulating the economy and investing in the internal market. In turn, capital is generated quickly, and therefore creates a swift recovery.

State aid has also provided an alleviation and kickstarted the economy by investing and providing rescue aid to companies and businesses. However, State aid is controversial and complex. Member States must abide by EU rules when granting aid to companies. The Commission must be notified and grant approval before the Member State can grant the aid because it alters the competition of the internal market. Despite its flaws, State aid provides valuable solutions for companies on the brink of liquidity and solvency due to the COVID-19 crisis.

IX.4. Solidarity: the core value for the EU's common response to the pandemic

Disagreements between Member States regarding the financing and recoupment of the Recovery Plan divided the Northern and Southern States. This led to a near split between the grant amount and loan amount and slightly reducing 2021-2027 MFF budget. Better governance mechanisms are necessary beyond intergovernmental level at the European Council level to tackle future crises.

Overall, solidarity has been achieved, although questionably, due to the political discussions in the European Council over the amounts to be allocated as transfers or loans as well as the rule of law for NGEU and the reduction on vital sectors and policies for the MFF 2021-2027. However, the decrease in respect of the initial budget has been mitigated by the new allocations that the European Parliament fought for during the negotiations concluded on 5 November 2020 with the Council, increasing the budget for flagship programmes, among which EU4Health received €5.1 billion instead of the €1.7 billion secured during the European Council Summit of 17-21 July 2020.

The agreement is positive for the EU and the most affected Member States by the pandemic. EU's solidarity has been shown through a fast response that has arrived sooner than expected in comparison to the 2008 financial crisis. Leaning on the notion of solidarity, the EU and its Member States will work together to rebuild and prepare the economy and internal market for another unpredictable pandemic.

The road to recovery will be difficult, but the financial measures provided by the EU will relieve some of the burden on Member States and supercharge a speedy recovery of the EU from the COVID-19 crisis.