Chapter 3 Solidarity and Next Generation EU: Rebalancing National and Common Interests

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1 Introduction

The principle of solidarity is permeating the whole system of EU law.[1] The solidarity principle comes to bear in this system in three different ways: explicitly in a series of provisions (in the Articles 2, 3 para. 3, 21, 24 para. 2 and 3 TEU, as well as in the Articles 67, 80, 122, 194 and 222 of the TFEU),[2] indirectly in a series of further norms providing, for example, for common action, burden-sharing or care for the disenfranchised[3] and in a systematic perspective through the overall structure and the finality of the EU treaties, having as their aim the promotion of the interests of the Members States (MS) and their people in an international order where the EU intends to contribute to peace, human rights, progress and prosperity. Many more – direct and indirect – references to solidarity can be found in secondary law. With the declaration of the Charter of Fundamental Rights in 2000 and even more after its integration in primary law in 2009 solidarity has achieved a more pronounced status in the law of the European Union which is in many ways still to be explored.

However, EU law does not provide for a common definition of "solidarity". Its exact meaning will vary, depending not only from the setting

1 See Peter Hilpold, 'Understanding Solidarity within EU Law: an Analysis of the "Islands of Solidarity" with Particular Regard to Monetary Union' (2015) 34 Yearbook of European Law 257. This article draws heavily on this contribution and develops the theses set out there further, applying them, in particular, to the Next Generation EU program.

2 See Roland Bieber and Francesco Maiani, 'Ohne Solidarität keine Europäische Union: Über Krisenerscheinungen in der Wirtschafts- und Währungsunion und im Europäischen Asylsystem' (2012) Schweizerisches Jahrbuch für Europarecht 2011/2012 297, 298.

3 To name only a few, reference could be made to Treaty on European Union art 42 (7), establishing solidarity in case of an armed attack on the territory of a Member States (MS), Treaty on the Functioning of the European Union art 196 on civil protection or TFEU art 208–211 on development cooperation.

where this principle shall apply but also from the specific circumstances of the time, as the meaning of solidarity, as will be shown, is in continuous evolution. It cannot be fixed once and for all but it will remain, for the foreseeable future, a matter of political and also legal controversies. Notwithstanding this broad spectrum of possible meanings attributable to the concept of solidarity and its dynamic evolution in time, it will be shown that some general considerations can be made attributing substantial content to this concept transforming it into a tool of dogmatic analysis of positive law and prospective analysis of future legal developments.

Summarizing a longer debate[4] it can be stated that solidarity may primarily be based on considerations of reciprocity but it may (also) be the expression of altruism. Reciprocity means *do ut des* and constitutes a principle that lies at the heart of the efficacy of large parts of international law.[5] In general, also the principle of reciprocity is, like the principle of solidarity, subject to some dynamic evolution, to some potential for continuous development, even though the potential might be considerably larger with solidarity. In ancient times, *do ut des* might have implied a rather strict commutative relationship that should be realized in a rather short period of time. In a modern perspective, in higher evolved legal orders, this might no longer be the case. Costs and benefits from a transaction can materialize also over a longer period of time; the overall balance can take into consideration also "insurance costs" and elements like interests. For example, even social benefits granted to subjects contributing to a social insurance system can be seen as an implementation of the principle of reciprocity if looked at from the viewpoint of an insurance contract. And even if there is, in the specific case, no economic relationship between the benefits and the contributions or contributions by one party are lacking at all, reciprocity in a larger understanding could nonetheless be given if we apply John Rawls´ "Theory of justice"[6] based on a situation where distributive decisions are taken under a "veil of ignorance".

Of course, such an extended understanding of reciprocity might more easily come to bear in higher evolved legal orders that can manage such sophisticated considerations and calculations. In the international legal order which has still preserved, under many aspects, the characteristics of

4 Hilpold (n 1) 261ff.

5 Bruno Simma, *Das Reziprozitätselement beim Zustandekommen völkerrechtlicher Verträge* (Duncker & Humblot 1972).

6 John Rawls, *A Theory of Justice* (Harvard University Press 1971).

a primitive system,[7] reciprocity may still have a narrower, more traditional meaning. Being EU law from its origin and at its core still international law, also the European legal order is necessarily premised on this concept and for the foreseeable future, notwithstanding its nature as a legal order "sui generis", it will most probably maintain this essential characteristic.[8] This "sui generis" character of EU law offers, however, also the opportunity to depart from a strict understanding of reciprocity and to bring it to bear in a meaning closer to that of national law. Eventually, it might display also elements of altruism which appear in larger number in national constitutional systems that consider themselves as "social states".

A highly-integrated community may consider selfless help, altruism in the stricter sense, as a natural device for self-preservation, as an act to be set without hesitancy and expected as a right.

Even if reciprocity, in its strict interpretation, no longer applies, in case beneficiaries of grants or concessions are part of a larger community, be it of a national, an international or a supranational character, elements of a *do ut des* still may be discernible at the backdrop. The beneficiary may be asked at least not to counteract the interests of the respective community or even perhaps to contribute in some ways to the further prosperity of this community. The tool, to achieve all this, is conditionality, a concept of world-wide relevance in the field of aid and concessions (in particular within the IMF system) but of special importance within the European Union.

These considerations, transposed to the European Union, might imply that the understanding we attribute to solidarity – and also to the aspects of reciprocity and altruism it builds on – will largely depend from the status of integration. The European Union is not yet a state and therefore solidarity, which can be expected within the MS, cannot be pretended from the Union towards the MS. The Union is, however, not only a mere

7 Yoram Dinstein, 'International Law as a Primitive Legal System' (1986–1987) 19 N.Y.U. J. Int'l L. & Pol. 1 1.

8 See Case 26/62 *van Gend and Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1 (ECJ, 5 February 1963) The Community constitutes a new legal order of international law ECR 1, 12; Case 6/64, *Costa v. E.N.E.L.* ECLI:EU:C:1964:66 (ECJ, 15 July 1964) By contrast with ordinary international treaties, the EEC Treaty has created its own legal system, ECR 585, 593.

international organization.[9] Famously qualified as an "association of states" ("*Staatenverbund*") by the German Constitutional Court[10] the role solidarity can play within this order, will largely depend from the measure of cohesion achieved. As will be seen, especially in the field of the European Monetary Union, clashing demands for more or less solidarity are regularly based, directly or indirectly, on different understandings of this status of integration.

2 *Solidarity in an environment of "constructive ambiguity" and "open texture" – some preliminary remarks on the development of the European Monetary Union (EMU)*

If solidarity is a constitutional principle within EU law with varying degrees of relevance in the single sectors of EU law, for the functioning of EMU, for its very survival, this principle is of fundamental importance. Again, solidarity has a specific meaning within EMU and specific requisites apply for it in this area but the main elements, as explained above, are clearly present.

Within EMU solidarity has the immediate finality to preserve a policy that constitutes a necessary strengthening and completion of the internal market. Due to the precariousness of the relevant primary law, reflecting an unresolved struggle during the negotiations for the Maastricht Treaty as to the extent, MS were prepared to yield sovereignty in this crucial area to the federal level, the exact extent, solidarity could be pretended from MS as a legal obligation, remained open. The relevant provisions are characterized by "constructive ambiguity"[11] or "open texture" in the words

9 See recently Koen Lenaerts, ' L'Autonomie de l'Ordre Juridique de l'Union ' in Gavin Barrett et al (eds), *The Future of Legal Europe: Will We Trust in It?* (Springer Cham 2021) 551–570.

10 So in the famous Treaty on European Union (Maastricht judgement) of 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92.

11 The notion of "constructive ambiguity" appears to be an extremely useful concept to explain why in international law and in EU law (perhaps more than in national law) norms, expressing an apparent but weak consent, are prone to transpose conflict into the future. It refers to the concept of *"dilatorischer Formelkompromiss"* coined by Carl Schmitt who was again influenced in this by Hans Morgenthau (many thanks to Karine Caunes for this hint). Constructive ambiguity is the expression of a compromise between a clear hard law provision not attainable due to unsurmountable clashes

of H. L. A. Hart[12], creating a grey area where the undecided conflicts of the Maastricht negotiation process had to be continued in the decades to come. At the very core of this ambiguity lies the question of the degree of integration the single MS are aspiring at. Do eventual specifications of this "grey area", this "fringe of vagueness"[13] lead to results that are still covered by the positive norm (in this, on EMU)? This dispute between MS and in academia continues up to this day. Anticipating somewhat the conclusions it can be stated that practice – and, on its track, academic discussion – in the last decade have been prepared to set the outer borders of the relevant norms continuously more generously.

3 EMU according to the Maastricht Treaty and beyond

3.1 EMU as an asymmetric construct

As is well known, by the Maastricht Treaty an asymmetric EMU was created with a loosely integrated economic union and a highly cohesive, fully integrated monetary union. For MS, to give up monetary sovereignty was the direct consequence of the introduction of the Euro; to transfer the competence for economic sovereignty would have meant to renounce on ulterior competences that are not only retained to be at the core of MS sovereignty but the extent of such a concession would furthermore hard to be delimited as there is no way for a clear-cut border between what will be part of its governmental economic function and what will not. Economic policy, with all its ramifications, is eventually, in respect to monetary policy, nothing else than the other side of the same coin. In this sense, monetary integration could have become the prelude to full European integration, a step for which no consent was given, neither at the beginning of the 1990s nor in the aftermath. In solidarity terms the great challenge the "Masters of the Treaties" had to face was the following:

– First, the monetary union is in itself a solidarity project. It meant for some MS, in particular Germany, to give up a hard currency that in the past had brought many advantages to them.

of interests and no norm at all, an inferior default situation none of the negotiators aspires to in the relevant situation.

12 See H. L. A. Hart, *The Concept of Law* (Oxford Clarendon Press 1961) 124.

13 Ibid 120.

– Second, care should be taken, not to overstretch the concessions implied by such a project. Moral hazard, whereby reckless spending would undermine the stability of the Euro, was to be avoided. MS with sound budgetary policies should not be overburdened with solidarity obligations in their attempt to preserve the monetary union. In more despicable words (often used by politicians and academics with a more austere budgetary policy of central and Northern Europe) the European Union should not become a "liability unions" or a "debt union". In this sense, concessions had to be made also by MS with weaker currencies.
– Third, countries with weaker currencies would lose the possibility to depreciate their currencies, putting them thereby, however, under considerable "competitive stress".

In sum, the introduction of the Euro was associated with a series of advantages, but also costs for all MS to be included in the Euro zone. At the outset it was not realistically foreseeable up to which point this compromise was balanced and what "stress tests" it would have to endure.

In order to provide some stability to this setting, a complex system of budgetary coordination rules as well as conditionality obligations both for entering EMU and for the time after was conceived.[14] The overall attempt was to guarantee solidarity with the EMU project with corresponding reciprocity obligations that would restrict MS sovereignty in economic matters to a minimum while leaving them budgetary powers to a maximum extent. The result was a complex edifice of rules and procedures with no precedent in any other national or international setting. Without being associated with somewhat stricter obligations it seemed to guarantee stability to EMU notwithstanding being further watered-down in 2005, paradoxically by France and Germany, with the latter country having been the main proponent of the stability provisions in the first place.[15]

Conditionality operated, first of all, as a gatekeeper for entering the Euro zone: The "Maastricht criteria", as contained in the "Deficit protocol"[16] fix "convergence criteria" among which stand out those regarding public finance: the annual government deficit must not exceed 3 % of GDP, government debt must not exceed 60 % of GDP. In order to avoid that MS

14 See Peter Hilpold, *Die Europäische Wirtschafts- und Währungsunion* (Springer 2021) 32ff.
15 See Council Regulation 1466/97 modified art 2 para 3 permitting the consideration of "other relevant factors" in the interpretation of the stability criteria by the Council.
16 Now Prot. no. 12 on the excessive deficit procedure.

would abandon budgetary discipline after entering EMU Germany insisted that these criteria would apply also in the aftermath and managed to extend their applicability by the Stability and Growth Pact (SGP) 1997[17] which entered into force in parallel with EMU on January 1, 1999.

Effectivity and credibility of budgetary discipline should be further enhanced by a surveillance and sanctions mechanism set out in the Articles 121 and 126 TFEU an well as in the SGP. On a whole, the mechanisms created thereby were extremely complicated and far from being effective.

3.2 The financial crisis as a strong impulse for reform

This became apparent after the finance and economic crisis broke out, starting in 2007. Widespread violation of the Maastricht criteria had led to debt burdens that risked becoming unsustainable in face of the need of further borrowing to sustain the dwindling economy and the ailing banking system in particular. Now, the EMU architecture was widely revised with measures inside and outside EU law while maintaining primary law unaltered, with one exception (Article 136 TFEU). Reforms consisted mainly in the following:

Starting in 2010, as an urgency measure, financial assistance was provided to MS at the risk of insolvency by the creation of temporary instruments: the European Financial Stability Mechanism (EFSM)[18] and the European Financial Stability Facility (EFSF)[19]. The EFSM was financed by the EU budget and therefore by all the (then) 27 MS. This fund, with a lending capacity of € 60 billion, remained operative until 30 June 2013. The EFSF was created as a special purpose vehicle in Luxembourg with a maximum lending capacity of € 440 billion whose activities have been taken over by the European Stability Mechanism (ESM), established on 27 September 2012 with an extended maximum lending capacity of € 500 billion. The establishment of the (permanent) ESM, an international organization located in Luxembourg, was made possible by an amendment of Article 136 TFEU to which the following para. 3 was added:

17 Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies based on TFEU art 121, 126.

18 Council Regulation (EC) 407/2010 establishing a European financial stabilisation mechanism (2010) OJ L118/1.

19 Representatives of the Governments of the Euro Area Member States Member States Meeting within the Council of the EU Decision, ECOFIN, 9 May 2010, Doc. 9614/10.

> "The member states whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."[20]

3.3 Conditionality

Already the EFSM and the EFSF operated under conditionality rules. By Article 136 TFEU conditionality became the linchpin for a permanent financial crisis instrument to be compatible with primary law. The reasons why primary law remained largely untouched reflect very well what was the common consensus on the role of solidarity within EU law and how the reciprocity rule was interpreted. First of all, it has to be considered that the financial crisis starting from the United States in 2007 had reached the European Union at a moment when negotiations about a reform of EU law had just been concluded and the Treaty of Lisbon was about to enter into force on December 1, 2009. This treaty, notwithstanding all the constructive ambiguities it displayed, offered a good argumentative basis for those MS which consistently had fought for the preservation of an asymmetric EMU, for upholding MS sovereignty in the field of economic policy and against a "liability union" and the creation of a "fiscal capacity". As to the exclusion of a "liability (or debt) union", for some MS, both Article 122 para. 2 TFEU as Article 125 TFEU seemed to operate exactly in this direction, thereby excluding both temporary as well as (and a fortiori) permanent aid mechanism in case of financial distress.

With regard to Article 122 para. 2 TFEU, recourse to which was taken in occasion of the urgent financial assistance actions in 2010, is was retained that the economic breakdown of a country like Greece was not an "exceptional occurrence" beyond the country´s control but that these events were foreseeable in view of irresponsible economic policy in the past.[21] In reality,

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20 European Council Decision of 25 March 2011 amending TFEU art 136 with regard to a stability mechanism for Member States whose currency is the euro (2011) OJ L91/1.; entered into effect on 1 May 2013.
See extensively on this whole reform process Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity – A Socio-Legal Inquiry* (Bloomsbury Publishing 2021).

21 See Kurt Faßbender, 'Der europäische 'Stabilisierungsmechanismus' im Lichte von Unionsrecht und deutschem Verwaltungsrecht' (2010) Neue Zeitschrift für Verwal-

however, this provision is not designed to limit financial aid to MS with an impeccable record as to their fiscal policy but aims rather at fending off extreme consequences for a MS and eventually also for the European Union in altogether exceptional situations. Help provided by the EFSM and the ESFS was understood in this sense: It focused on the prevention of further harm and it came at a price in the sense that it did not come for free (no grants were given but only repayable credits) and this help was provided on strict conditionality terms. If some had feared that the availability of help subsequent to extreme budgetary profligacy would disenable the educative pressure of market forces the actual practice of help on strict conditionality terms proved them wrong: Thereby a reasonable compromise had been found that avoided a financial cataclysm while evidencing the severe consequences of past irresponsible squandering, also in political terms, the respective governments had to bear.

Similar considerations applied when Article 125 TFEU had to be put into practice during the financial crisis. According to a strict reading, this provision would not only exclude "automatic" liability by the EU and its MS for debts incurred by a MS but also impede the "spontaneous", "free" provision of assistance by an instrument like the ESM. In the case C-370/12, Thomas Pringle[22], the ECJ had the opportunity to set out a series of clarifications that would allow solidarity to come to bear within EMU in a balanced manner, allowing on the one hand for emergency interventions when extreme circumstances, whatever their origin, put at peril the financial system of the MS, while on the other, upholding solidarity as a reciprocity-based concept.

Already GA Juliane Kokott had opted in her Opinion in the "Pringle" case for sound judgment when interpreting the "no bail out clause". In fact, to prohibit any aid at all for a MS in financial difficulties would have enormous consequences; it might even imply the need for a total ban on trade and commerce between MS.[23] The challenge was therefore to apply

tungsrecht 799, 800f.; and, in the same vein, as to the Irish financial crisis, Matthias Ruffert, 'The European Debt crisis and European Union law' (2011) 48(6) Common Market Law Review 1777, 1787.

22 Case C-370/12 *Thomas Pringle v Government of Ireland u. a.* ECLI:EU:C:2012:756 (ECJ, 27 November 2012).

23 Case C-370/12 *Thomas Pringle v Government of Ireland u.a.* ECLI:EU:C:2012:756 (ECJ, 27 November 2012), Opinion of AG Juliane Kokott, para 133.
Opinion delivered on 26 October 2012, para 133.

the restrictions to solidarity in a way that would not rule out effective help[24] while, at the same time, emphasizing the need for a responsible budgetary policy by the MS.

According to the ECJ such an approach, as reflected by the ESM whose legality stood at the centre of the Pringle case, is fully reconcilable with the treaties.[25] In fact, according to this Court, by providing assistance to another MS, neither the aiding MS nor the ESM would assume its debt.[26] The same is true for the purchase of bonds issued by the ESM: in addition, in this case, the issuing MS remain solely answerable to repay its debt.[27] In sum, the ECJ made clear that Article 125 TFEU left no space for a compulsory bail-out, but voluntary measures should be permissible under certain conditions. This "conditionality clause" was read into Article 125 by the Court, so that free-riding would become counterproductive for any MS.[28] To be rescued should not become an attractive prospect for any MS. Conversely, budgetary restraint could be interpreted as an act of solidarity.[29] As was shown also by the actual lending practice by the EU via EFSM, ESFS and ESM the price to be paid for the borrowing country was

24 What is often overlooked: This effective help is regularly in the interest of all MS. See the very acute remark in Case C-370/12 *Thomas Pringle v Government of Ireland u.a.* ECLI:EU:C:2012:756 (ECJ, 27 November 2012), Opinion of AG Juliane Kokott, para 140: "It must only be emphasised that a broad interpretation of Article 125 TFEU would [...] deprive the Member States of the power to avert the bankruptcy of another Member State and of the ability thereby to attempt to avert damage to themselves."

25 Case C-370/12 *Thomas Pringle v Government of Ireland u. a.* ECLI:EU:C:2012:756 (ECJ, 27 November 2012), para 131:
"It must be stated at the outset that it is apparent from the wording used in Article 125 TFEU, to the effect that neither the Union nor a Member State are to 'be liable for ... the commitments' of another Member State or 'assume [those commitments]', that that article is not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State."

26 Case C-370/12 *Thomas Pringle v Government of Ireland u. a.* ECLI:EU:C:2012:756 (ECJ, 27 November 2012), para. 137.

27 Ibid para 141.

28 Ibid para 137: „ [...] provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy".

29 Ulrich Hufeld brought this to the point by the following slogan: "Solidarity through solvency". See Ulrich Hufeld, 'Europäische Wirtschafts- und Währungsunion: Das System' (2022) 9 Enzyklopädie des Europarechts 71, 146f.

high. Reciprocity remained intact. The EU and its MS made considerable interest gains from the credits granted to MS in financial distress.[30]

Conditionality rules are gaining ever more importance and are extend to the "political" in an effort to preserve core European values.[31] This happens not only as a political bargain intended to promote political aims with economic tools but also in recognition of the fact that respect for the rule of law might have direct positive repercussions on the economic and financial stability of a MS.[32]

3.4 The struggle for a "fiscal capacity" and the ever more extensive interpretation of the "economic limb" of EMU

It has further to be pointed out that the EU succeeded in managing and overcoming the debt crisis of some of its MS without yielding to the pressure of some MS to create a so-called "fiscal capacity", a request which has been on the table for long time.

There is no legal definition of the term "fiscal capacity". In its most generic fashion, one can find the following definition: "A set of common budgetary instruments specific to the euro area which could include mechanisms to counter adverse economic shocks."[33] Most commonly, however, more far-reaching tools are envisaged when reference is made to this concept. In its most extensive notion, a "fiscal capacity" would be the equivalent of a specific budget, on a permanent basis, of a consistent dimension, to be used for an EU fiscal policy. As mentioned, the EU has no such

30 See Kimberley Amadeo, 'Greek Debt Crisis Explained' (The Balance, 17 May 2020) <https://www.thebalancemoney.com/what-is-the-greece-debt-crisis-3305525> [assessed 10 February 2024].; and Claire Stam, 'Germany earned €2.9 billion from Greece's debt crisis' (EURACTIV, 21 June 2018) <https://www.euractiv.com/section/economy-jobs/news/germany-earned-2-9-billion-euros-from-greeces-debt-crisis/> accessed 26 February 2024.

31 See Christophe Hillion, 'Compromising (On) the General Conditionality Mechanism and the Rule of Law' (2021) 58 Common Market Law Review 267, 284.

32 See Armin von Bogdandy and Michael Ioannidis, 'Das systemische Defizit – Merkmale, Instrumente und Probleme am Beispiel der Rechtsstaatlichkeit und des neuen Rechtsstaatlichkeitsaufsichtsverfahrens' (2014) 74 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 283, at 303.

33 Presidenza del Consiglio dei Ministri – Dipartimento per le Politiche Europee, 'Fiscal capacity' (Dipartimento per gli Affari Europei, 19 July 2018) <https://www.politicheeuropee.gov.it/it/comunicazione/europarole/fiscal-capacity/> accessed 26 February 2024.

competence, not even of a shared nature together with the MS. In the whole process of tackling the financial crisis within the EU, with its apex in the years between 2010 and 2012, no serious attempt was made to establish such a capacity. Emphasis was laid on the "Open Method of Coordination" whereby the EU should limit itself, in principle, to give a coordinating impulse, and apply sanctions only as an ultima ratio, if, after a long and cumbersome process, regulated primarily in Art. 126 TFEU and in the SGP, no adequate compliance had been achieved.[34]

The reforms during the period of the financial crisis did not aim at a radical departure from this system of an asymmetric EMU but tried rather to make economic policy coordination more effective through a new system of "Economic Governance". In the period between 2010 und 2013 two packages of secondary norms, the so-called "Six-Pack" of 2011 and the "Two-Pack" of 2013 were prepared and adopted. Thereby, a highly complicated system of preventive control procedures, of "corrective" measures in case prevention had failed, was introduced. Furthermore, a new institutionalized form of dialogue between MS and the EU associated with EU-wide transparency, the "European Semester", was created.[35]

For the adoption of all these measures it was retained that existing primary law, in particular Article 136 TFEU, would offer a sufficient legal basis. This provision came to be called a "competence giant"[36], with a clearly perceptible critical undertone that gave expression to ever louder opposition against secondary law-making on this legislative basis. This protest did not go unheard and "the giant was laid to rest".[37] Recourse was now taken to

34 See Peter Hilpold, 'Das Unionsrecht der repressiven Haushaltskontrolle' in Ulrich Hufeld and Christoph Ohler (eds), *Europäische Wirtschafts- und Währungsunion* (EnzEuR vol. 9, Nomos 2022) 569–592.

35 For a detailed analysis of this process see Rosa M. Lastra and Jean-Victor Louis, 'European Economic and Monetary union: History, Trends, and Prospects' (2013) 32(1) Yearbook of European Law 57–206; Bruno de Witte, 'EMU as Constitutional Law' in Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 278–292; Francesco Martucci, 'Non-EU Legal Instruments (EFSF, ES, and Fiscal Compact)' in Fabian Amtenbrink/Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 294–325 and Hilpold (n 14) 45ff.

36 See Jürgen Bast & Florian Rödl, 'Jenseits der Koordinierung? – Zu den Grenzen der EU-Verträge für eine Europäische Wirtschaftsregierung' (2012) 39 Europäische Grundrechte-Zeitschrift 269.

37 See Hilpold (n 14) 113.

an instrument outside the treaties: The Fiscal Compact[38] of 2012, in force since 2013, i.a. restated and strengthened previously introduced rules on budgetary discipline (in particular as to the obligation to reduce excessive debt burdens) and obliged parties to the Compact to bring into effect budgetary discipline "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes".[39]

3.5 Extending solidarity within the existing treaty boundaries: a test case for the future

The handling of the financial crisis revealed that it was possible to handle an epochal financial and economic crisis on a legal basis, created by the Treaty of Lisbon, that could not have foreseen a challenge of such a dimension. Notwithstanding the fact that MS and European institutions (not the least the ECJ!) had avoided a dogmatic attitude and were prepared to show a considerable degree of flexibility, crisis management as a whole was based on a rather prudent, conservative understanding of the leeway the treaties offered for appropriate action. The financial crisis, ignited and boosted to a considerable extent by the lack of budgetary discipline, would have been the wrong situation for switching to a solidarity concept based on altruism. Nonetheless, this was also an occasion where limits were tested and where dogmatism, for example as to a strict interpretation of Article 125 TFEU, according to which the EU and the MS would have been prohibited from aiding a struggling MS even on a voluntary basis associated with conditions, was overcome.

Much was done outside the treaties, both by international law and by private law instruments, when the competence basis offered by primary law seemed to have been exhausted. At the same time, conditionality was even re-enforced, advocates of rigor could see themselves confirmed. In reality, conditionality was more a concession to a group of stakeholders who rejected any departure from the strict operation of market rules also for highly indebted countries which should feel the full brunt of market forces as a consequence of their misbehavior.

38 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

39 Ibid art 3, para 2.

As a consequence, it can be said that apparently the formal rules had been respected but at the same time the perception was created that dogmatism was ill-placed in this area, that EMU rules offered some flexibility in interpretation and that solidarity was associated with a considerable degree of pragmatism.[40] At the same time, austerity measures engendered strong opposition by those groups (in some countries, especially in Greece, larger parts of the population) most affected by these measures, so that also conditionality as a political tool came under pressure.[41]

4 Next Generation EU – The Fall?

4.1 Preconditions

In early 2020, the Covid-19 epidemic broke out[42] and the ensuing economic crisis seemed to precipitate with continuously deteriorating forecasts. In March 2020 the nearly breakdown of supply chains with China, shutdowns in the social and the economic life, spreading unemployment and a world-wide crash in oil prices and the stock markets fueled fears of an unprecedented downturn with irremediable social consequences. These fears were further enhanced by the sudden evidence of profound inadequacies of some national health systems. Even within the EU it appeared that there were enormous differences in the strength and the resilience of the various health systems, also (but of course not exclusively) as a consequence of budgetary restrictions imposed by the SGP. Generally, all over the EU, the economic and societal fabric of the single MS was hit to a strongly varying degree.[43]

40 For some, already the reforms undertaken as a consequence of the financial crisis mark the transformation of the EMU from a "community of benefits" to a "community of benefits and risk-sharing". See Edoardo Chiti and Pedro Gustavo Teixeira, ´The constitutional implications of the European responses to the financial and public debt crisis' (2013) 50(3) Common Market Law Review 683.

41 For further detail, see Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Bloomsbury Publishing 2021).

42 For an account of these events see Thomas Plümper and Eric Neumayer, ´Lockdown policies and the dynamics of the first wave of the Sars-CoV-2 pandemic in Europe' (2022) 29(3) Journal of European Public Policy 321.

43 See Commission Staff Working Document SWD/2020/98 Final, *Identifying Europe´s Recovery Needs*, document annexed to the Communication from the Commission to the European Parliament, the European Council, the Council, the European Eco-

The response sought was Keynesianism in its purest form: deficit spending at any price. This U-turn in financial austerity had consequences, first of all, for the MS which had now regained full budgetary sovereignty. To make this possibe on the technical level, on 23 March 2020 the fiscal rules of the SGP were suspended by the activation of the so-called espace clause.[44] It was also clear, however, that permissive rules alone would not suffice for single MS to counter effectively this crisis. The national fiscal capacity was simply too small to fulfil this task effectively. The Union had to intervene as such and in view of their very limited leeway as to their own resources, a change of paradigm was needed that would affect also the Union´s stance towards fiscal policy.

4.2 The reaction by the European Union

In 2020, in an astonishingly short period, EU MS agreed on a series of aid measures that gave new meaning not only to solidarity within EU law but also re-interpreted the provisions on EMU in EU primary law in a way for which no consensus would have been possible only a few months before. What was most surprising was the fact that all this happened within the context of existing EU law while during the financial crisis measures of far less portend were considered to lie outside the existing competence rules.

At the beginning, in early spring 2020, the EU started with an aid package that was unconventionally large in amount if measured in relation to previous rescue measure but very conventional as to structure and nature of the various measures.

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nomic and Social Committee and the Committee of the Regions, ´Europe´s Moment: Repair and Prepare For the Next Generation'. As to the ensuing struggle between Northern and Southern EU MS, see Dani Marco and Agustin Josè Menendez, 'The European Stability Mechanism is a False Solution to a Real European Problem' (2020) Verfassungsblog <https://verfassungsblog.de/the-european-stability-mechanism-is-a-false-solution-to-a-real-european-problem/> accessed 26 February 2024.

44 European Council, 'Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis' (European Council, 23 March 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/> accessed 26 February 2024. The applicability of the escape clause has has been prorogated already twice. For 2023 the adoption of a largely revised SGP is envisaged.

Thus, on 26 April 2020 agreement was found among MS for package of initiatives that should consist in the following:

- € 100 billion for temporary **S**upport to mitigate **U**nemployment **R**isks in an **E**mergency (SURE program);
- € 200 billion for a Pan-European guarantee fund for loans to companies to be granted by the European Investment Bank
- € 240 billion were allocated to the ESM to enable this institution to finance pandemic support for MS.[45]

Further measures of minor dimension consisted in a re-direction of existing EU funds to counter the pandemic within the MS:

- €37 billion should be taken from structural funds
- up to €800 from the Solidarity Fund
- €31 billion from the 2020 budget[46]

Alongside these measures in the area of the real economy monetary policy measures of extraordinary amount were adopted. In March 2020 the European Central Bank (ECB) started the pandemic emergency purchase programme (PEPP)[47], a temporary asset purchase program of private and public sector securities. This purchase program for which not only all asset categories eligible under the existing asset purchase program (APP) could be considered but also securities issued by the Greek Government, was continuously extended: by further €600 billion on 4 June 2020 and by

45 See KPMG Insights, 'European Union: Government and institution measures in response to COVID-19' (KPMG, 18 November 2020) <https://home.kpmg/xx/en/home/insights/2020/04/european-union-government-and-institution-measures-in-response-to-covid.html > accessed 26 February 2024.

46 Ibid.

47 See Decision (EU) 2020/400 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (2020) OJ L248/24. Much helpful to this end proved the circumstance that the attack by the German Bundesverfassungsgericht in the PSPP case – that would have threatened more the PEPP program than the PSPP initiative – could be repelled by the public outcry the BVerfG judgment of 5 May 2020 had provoked. See Gavin Barrett, 'Coronavirus and EU Law: Driving the Next Stage of Economic and Monetary Union' in Gavin Barrett et al (eds), *The Future of Legal Europe: Will We Trust in It?* (Springer Cham 2021), 55–79 and Peter Hilpold, 'So long Solange? The PSPP judgment by the German Constitutional Court and the conflict between the German and the European 'Popular Spirit'' (2021) 23 Cambridge Yearbook of European Legal Studies, 159.

additional €500 on 10 December 2020, so as to reach eventually a volume of €1,850.[48]

Shortly after these first measures had been agreed upon in March 2020, the conviction had matured that these initiatives would not suffice and that a new approach was necessary.

Therefore, in May 2020, the European Commission proposed a new package of measures that epitomized a change of paradigm in the interpretation of the Union´s competences within EMU and a real quantum leap the EU was prepared to engage actively (and not only in a coordinator function) with fiscal policies within the EU.

4.3 The legal structure of Next Generation EU (NGEU)

The basis of NGEU is to be found in a proposal by the European Commission of 27 May 2020: "Europe's moment: Repair and Prepare for the Next Generation"[49]. The approval by the European Council followed two months later on 17–21 July 2020.[50] Specific aspects of the framework plan remained open until the end of 2020; in particular it had to be hammered out how much of this huge amount of funds should be given as grants and how much as loans, what would be the role of conditionality, how and to what extents these funds should be earmarked for the digital economy and for greening the EU and how these funds should be linked to the "ordinary" EU budget via the Multiannual Financial Framework (MFF), setting the ceiling of the EU budget and the "headings" for which these expenditures should be dedicated. Implementation in detail, in particular the adoption of the "Recovery and Resilience Facility – RRF"[51] happened only in early 2021. Implementation on the national level via the National Recovery and Resilience Plans is an ongoing process.

48 See European Central Bank, 'Pandemic Emergency Purchase Programme (PEPP)' (European Central Bank) <https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html> accessed 22 November 2022.

49 COM (2020), 456.

50 European Council Conclusions, 17–18–19–20–21 July 2020, EUCO 10/20.

51 European Parliament and European Council Regulation (EU) 241/2021 of 12 February 2021 establishing the Recovery and Resilience Facility (2021) OJ L57/17.

As it was efficiently said[52], NGEU as it was fixed between 2020 and 2021, is "essentially a huge pot of money" consisting of three components:[53]

a) The European Recovery Instrument (EURI)[54] sets the basic structure of NGEU by regulating, rather generically, in which areas (again very broadly defined) the overall amount of €750 billion should be spent in order to achieve "recovery" and "resilience", the central aims of NGEU. EURI further regulates to what extent these funds shall be allocated as grants or as loans and the period in which this instrument should be applicable (2021–2026).
b) Implementation of EURI required the adoption of a series of spending programs which specify the activities envisaged in EURI. At the center of these programs stands a newly created program, the Recovery and Resilience Facility (RFF) for which 672,5 billion (and therefore about 90 % of the NGEU funds as allocated in EURI) are earmarked.
c) For comprehensive budgetary planning, NGEU had not only to take care for the "spending side" (with EURI as the fundament and RFF and other, mostly already existing programs, as its specification) but also for the "passive side", for the provision of the money. To this end, the NGEU consists further of an amendment of the Own Resources Decision (ORD).[55] The necessary resources shall be obtained at the capital market where the European Union acts as the borrower.
d) The ORD has, therefore, a double function: to provide (ordinary) funding for the MFF 2021–2027[56] as well as providing funding for the NGEU, via borrowing on the capital market.[57]

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52 See Bruno de Witte, 'The European Union´s COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58(3) Common Market Law Review 635, 636.
53 Ibid.
54 European Council Regulation (EC) 2094/2020 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (2020) OJ LI433/23.
55 European Council Decision (EU, Euratom) 2053/2020 of 14 December 2020, on the system of own resources of the European Union (2020) OJ L424/1 and repealing Decision 335/2014/EU, Euratom.
56 European Council Regulation (EU, Euratom) 2093/2020 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 (2020) OJ LI433/11.
57 European Council Decision (EU, Euratom) of 14 December 2020, on the system of own resources of the European Union (2020) and repealing Decision 2014/335/EU

4.4 Solidarity as the legal basis

At the centre of the ongoing controversy about the legality of NGEU lies the question whether the European Union has sufficient competence for such a far-reaching project and eventually this is, at its very core, a conflict about the role and the interpretation of solidarity within EU law.

The way, the EU and its MS construed a competence basis for NGEU was somewhat peculiar:

For EURI, as explained, the financial foundation and delimitation of the whole project, Article 122 TFEU, the pivotal provision on solidarity within the EU, was used. As also set out, this provision allows for emergency measures of a temporary nature. When it comes to implement this project, first of all by the RFF, for which most of the NGEU funds are used, Article 122 is, however, no longer mentioned. Reference is, instead, made to Article 175 para. 3 TFEU[58] relating to cohesion policy.

It is interesting to note that in the past, cohesion policy was one of the most important bases for implementing a policy of solidarity.[59] What began rather modestly in 1975 – and as a consequence of special urgency by Great Britain which joined the European Communities in 1973 – with the creation of the European Regional Development Fund (ERDF) over time became an important instrument to address fundamental resource conflicts within the EU. With the "Single European Act" of 1986 a specific section on "Economic and Social Cohesion" was inserted in the EEC treaty, thereby giving the structural policy an explicit basis in primary law. By the Treaty of Maastricht, a Cohesion Fund was created which became operative in 1994 and which aimed at sustaining projects in the fields of environment and transborder infrastructure. Therefore, cohesion and structural policy in the EU since long has anticipated – on a smaller scale and on the basis of long-lasting negotiations – what now, by NGEU, has been implemented on a far broader dimension and on the basis of an extremely short negotiation and decision process.

Euratom, Article 5 "Extraordinary and temporary additional means to address the consequences of the COVID-19 crisis".

58 TFEU art 175 para 3 reads as follows:
"If specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions."

59 For more details see Hilpold (n 1) 268 ff.

But still the question remains whether all these developments really are the expression of a continuum, whether NGEU rests on a solid EU competence basis and whether this sort of solidarity is compatible with the treaties.

5 Conclusions

As already set out, opinions vary in literature and in practice as to the legal assessment of NGEU. There have been voices who see in NGEU a "paradigm change", a "template that the EU could use again, to address new financial urgencies such as the need to increase military expenditures and to cushion the economic consequences of transitioning away from Russian oil and gas"[60]. For other authors, also in principle seeing NGEU as compatible with the treaties, there is "some stretching of the EU´s competences in Article 122 and Article 175 TFEU, and the frank acceptance that the European Union can incur massive debt in the common interest of its Member States".[61] For others still, the discrepancy between what the treaties allow and what NGEU promises and implements is more worrying;[62] they pose the question whether we are facing a "quasi-Treaty change"[63] and they warn that NGEU is likely to pave the way for a fiscal capacity for the EU, with a permanently altered division of competences.[64]

60 See Federico Fabbrini, 'Next Generation EU: Legal Structure and Constitutional Consequences' (2022) REBUILD Centre Working Paper No. 3, 1, 22 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4121330> [assessed 26 February 2024].

61 De Witte (n 52) 681.

62 See Päivi Leino-Sandberg and Matthias Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) 59 Common Market Law Review 433.

63 ibid 459. See on this issue also Armin Steinbach, 'Next Generation EU – Rechtliche Aspekte der Aufbau- und Resilienzpläne' (2022) 37 Zeitschrift für Gesetzgebung 1.

64 See Päivi Leino-Sandberg and Matthias Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' (2022) 59 Common Market Law Review 459. For the German Constitutional Court (BVerfG) in its judgment of 6 December 2023 (2 BvR 547/21, 2 BvR 798/21) these fears are not justified, but the whole structure of the Court´s reasoning in this document cannot really satisfy. In this document, the BVerfG emphasizes the uniqueness of the NGEU project and at same time calls for close control of its implementation. There is no guarantee that other MS will interpret the NGEU project the same way as the BVerfG – visibly impressed by the sharp criticism it had to endure after its ill-fated attempt to reign in ECB lending in the PSPP case – did in its "Own Resources" decision.

There is no clear-cut answer as to which side is correct in this controversy. We have seen that the principle of solidarity is in continuous evolution. NGEU could really constitute a watershed and the future judgments of analysts looking back to the years 2020 – 2026 (when the implementation of NGEU shall have been completed) will heavily depend also on the willingness and the capacity of MS to implement this program in a way that recovery and resilience will have constituted a substantive aim and not only buzzwords and pretexts for syphoning off as much funds as possible from the common pot. The same holds true for the goals of a digital transition and fostering the "Green Deal".[65] As well-sounding these concepts may appear at first sight, everything will depend on how these goals are implemented. Pursuing earnestly these goals can make a difference. At the same time, they are generic enough to justify expenditures of the most variegated, the most traditional kind. As the implementation of the projects financed by the RFF lies wholly in the competence of the MS they bear enormous responsibility for the success of this endeavor – a responsibility that should be made effective also by the control responsibilities attributed by NGEU to the EU institution.

It is also open from where the resources for the repayment of €750 billion credit (in 2018 prices, over €800 in current prices) will stem from. €390 billion of this sum will consist in grants, €360 in repayable loans. It is to be hoped that the loans will be repaid by the recipients, while it is not yet fully clear how repayment of the sums conceded as grants shall take place until 2058 at the latest.[66] Proposals have been made to conceive levies that would, at the same time contribute to achieve environmental goals such as a Carbon Border Adjustment Mechanism (CBAM), related to the CO2 footprint in the production process, a share of residual profits from

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See Peter Hilpold, ʻNext Generation EU und die "Einnahmensourveränität": Das EU-Eigenmittelsystem vor dem BVerfGʼ (2023) EuZW 169 and Armin Steinbach and Sebastian Grund, ʻDer EU-Corona-Aufbaufonds – nächste Etappe in die Fiskal- und Transferunion?ʼ (2023) 7 NJW, 405.

65 At least 37 % of the expenditures shall regard measures of sustainability, at least 20 % digitalization. These are, however, categories of expenditures which can be defined very broadly.

66 As a guarantee the own resources ceiling of 1,4 % of EU gross national income (GNI) has been raised to 2 %. See Article 3c ORD. See Richard Crowe, ʻThe EU Recovery Plan: New Dynamics in the Financing of the EU Budgetʼ in Gavin Barrett et al (eds) *The Future of Legal Europe: Will We Trust in It?* (Springer Cham 2021) 117, 133. See also Maria Kendrick, ʻNextGenrationEU: will the Debt be Repaid by EU Own Resources or Member State Taxpayers?ʼ (2023) 48(1) E. L. Rev., 29.

multinationals re-allocated to EU MS or a plastic tax or be suited to adapt the tax system to new economic realities such as a digital tax or a financial transaction tax.[67]

For the time being these proposals are mainly on paper only (with the exception of the "plastic tax" which, however, meets with strong resistance in the MS) and it is not clear whether these proposals can be implemented as planned and whether they will generate significant revenue.[68]

In case revenues should fall behind expectations MS are liable for the difference: In this case NGEU would be tantamount to a giant financial re-distribution mechanism and solidarity, in a "postponed austerity conflict"[69], would gain a new meaning. Maybe the dimension of NGEU was the result of an unparalleled crisis where the expert forecasts were over-anxious, maybe this package had only been possible because, by mere accident, a group of European leaders had been in power who showed unusual preparedness to act, maybe it was pure gamble. Nonetheless, it offers an opportunity, a "laboratory"[70] to further clarify the concept of solidarity that should neither be missed nor abused. It offers the opportunity to fil the concept of solidarity with new purpose and meaning in a way that could reach far beyond the present crisis and far beyond the European Union. The way, MS implement NGEU will also be a test as to what extent they can handle highly evolved forms of solidarity, where reciprocity is still there but less and less visible, in a responsible way. It is a test as to whether MS are mature enough for opening up a chapter of higher integration where solidarity will decisively and unavoidably evidence pronounced traits of altruism.

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67 As to these proposals see European Commission, 'The Commission proposes the next generation of EU own resources' (22 December 2021) < https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7025> [assessed 26 February 2024]. Proposals for the introduction of a Financial Transaction Tax date back more than a decade. See European Commission, 'Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC', COM (2011) 594 final.

68 The European Commission calculates with additional €17 billion annually. See European Commission, 'The Commission proposes the next generation of EU own resources' (22 December 2021) < https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7025> [assessed 26 February 2024].

69 Delayed until 2028 and lasting potentially until 2058.

70 To use the same terminology as Martucci (n 35) 325, who qualified EMU Inter-see Agreements concluded as a reaction of the earlier financial crisis as a "laboratory for strengthening integration in the euro area".

At the same time, it should neither be lost from sight that EMU is much more than NGEU. With other words: Also, the complex EMU system, as amended during and in the aftermath of the financial crisis, needs further overhaul, development and stabilization.[71] What solidarity effectively means in this system can be judged only if a comprehensive perspective is taken. Due to the growing complicacy of this system to which layer after layer is added while unfinished tasks are left behind in great number[72], the task to define what solidarity effectively signifies in the EU order will not become easier. Maybe the time has come to wait until the dust has settled from the COVID-19 crisis, to see whether it is possible to implement NGEU in a way that gives effective substance to solidarity and to start afterwards a process of re-engineering EMU in a way that copes with new "transnational solidarity conflicts"[73] sustainably and provides stability, transparency and some guarantee of resilience in case of new challenges as we have seen them before and as they can neither be excluded for the future.[74]

71 See Sandra Eckert, Vincent Lindner and Andreas Nölke, 'EMU reform proposals and their (non) implementation: An overview' (2020) Leibniz Institute for Financial Research SAFE, SAFE White Paper Nr. 78. This also an attempt to further reduce "differentiated governance" of EMU which proves to be detrimental to EMU´s cohesiveness. See Stefania Baroncelli,'Differentiated Governance in European Economic and Monetary Union: From Maastricht to Next Generation EU' (2022) 7 European Papers, 867.

72 One has to think only on the SGP which, in all its compromise character, never really worked and is now again to be amended.
As to the complexity of this instruments as it stands at the moment see Peter Hilpold, 'Das Unionsrecht der repressiven Haushaltskontrolle' in Ulrich Hufeld and Christoph Ohler (eds), *Europäische Wirtschafts- und Währungsunion* (EnzEuR vol. 9, Nomos 2022).

73 As so excellently portrayed by Anuscheh Farahat, *Transnationale Solidaritätskonflikte* (Mohr Siebeck 2021) with regard to national and European measures in relations to the attempts to overcome the Euro crisis.

74 With catching irony, Ulrich Hufeld has paraphrased Carl Schmitt´s (in)famous saying "*Souverän ist, wer über den Ausnahmezustand entscheidet*" ("*Sovereign is who decides on the exception*") to *"Souverän ist, wer über den Einnahmezustand entscheidet" ("Sovereign is who decides about the budget")*. See Ulrich Hufeld, 'Das Recht der Europäischen Wirtschaftsverfassung' in Peter-Christian Müller-Graff (ed) *Europäisches Binnenmarkt- und Wirtschaftsordnungsrecht* (EnzEuR vol. 4, Nomos 2015) 1517, 1561. Do MS still decide about their budget and if yes, to what extent? If the SGP, the "European semester" and the means necessary to repay the debts taken to finance NGEU come to mind, doubts might arise.