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Next Generation EU and the Balancing of Economic Union through Horizontalisation*

Nuno Albuquerque Matos*

Abstract

The EU has developed a vertical relation with its Member States on economic and monetary policies as well as national parliaments. Next Generation EU arguably breaks with this verticalisation, by shifting the focus of the political process from Member State-coordination to EU-led fiscal funding. Facing complex events, such as the covid-19 pandemic and the current security and energy crises, the limits of inter-State coordination became clear. However, NGEU also represents continuity, as verticalisation endures, therefore blurring the transnational nature of the programme. In addition, NGEU pales in comparison with the US response to the pandemic.

EU citizens increasingly demand Union-wide policies. However, Member States are not capable of delivering in the European Council, given that Heads of State or Government's democratic mandate favour the adoption of policies with an eminent national nature. Hence, this participation mismatch needs to be addressed in order to better reflect majoritarian preferences over minoritarian bias as shown in the EU budgetary sagas on *juste retour*. Therefore, this paper argues that direct taxation of EU citizens is the least imperfect way to achieve it.

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1. Introduction

The European Union (EU) has experienced multiple crises in the last decade and a half, notably the euro crisis and most recently the covid-19 pandemic as well as the war in Ukraine. The most distinctive feature of the euro crisis was that the adopted responses entailed a significant degree of interconnection between supranational institutions and Member States. This interconnection was sometimes conducted by quasi-coercive means. For instance,. it significantly curtailed Member States economic and fiscal policies' autonomy, sparking severe democratic issues and introducing visible legal fragmentation between eurozone and non-eurozone members. On other occasions, it fostered moral hazard. Indeed, due to a lack of supranational fiscal capacity, the European Central Bank (ECB) was the 'only game in town' during the euro crisis.[1] Not only were targeted asset purchase programmes used as a means to enforce the EU economic governance provisions (a method still in place), but also the large bond-buying programme made some Member States dependent on ECB demand-creation on the secondary market. Lastly, supranational institutions are becoming increasingly dependent on national parliaments as a main source of legitimacy. This is visible on EU economic policy and, increasingly, on matters under the ECB realm, such as banking supervision and monetary policy. In all these cases, the responses generated hierarchical dependence, a relationship I describe as verticalisation of the Union. In my view, this is a significant source of imbalance between the Union and Member States.

Next Generation EU (NGEU) attempts to address these issues. By bringing back the fiscal response to the EU legal framework, it not only endows the Union with fiscal capacity, but it does so in an inclusive manner. As a result, while not designed for the purpose of stabilisation, NGEU adds an element of stability, in that it relieves Member States' increasing inability to effectively intervene in their economies, in particular those pertaining to Economic and Monetary Union (EMU). Concomitantly, it may also be a factor to increase Member States' economic resilience. To the extent that it translates into better conditions in the financial markets, the ECB could better focus on its Treaty-based mandate.

The foregoing is relevant enough to consider NGEU as a pivotal programme in EU integration. However, it is also endowed with old features deriving from EU constitutional architecture, such as the funding type and the predominance of intergovernmental institutions. Moreover, it pales in comparison with the US response. While mindful of differences in the evolutionary status of both political unions, this comparative overview is of added value for the EU, in particular given the combination of similarities on features such as population, economic

[1] Mohamed El-Erian, *The Only Game in Town: Central Banks, Instability, and Recovering from Another Collapse* (Yale University Press 2017).

development, system of governance and historical fiscal development.[2]

Hence, the question this paper addresses is how can EU economic policy better balance Union and Member States autonomy and democratic effectiveness. In so doing, it is important to analyse goal choice and institutional choice in tandem. For when a goal is set, there is always more than one route to be taken to achieve it institutionally.[3]

I will argue that the EU's response to the pandemic is an antechamber to a critical juncture that will transform the bloc's economic and political integration for the next decades. , It should do so by moving away from verticalisation towards horizontalisation, that is using direct taxation to bond EU citizens between themselves, around common objectives and purposes. Strong visibility and awareness of direct taxes increases the incentives for democratic participation which would further the EU budget's legitimacy. And their revenue sufficiency would allow the EU to adequately deliver results that are neither attainable nor expectable by any national budget., This will be pivotal in order to lay the foundations for subsequent institutional reform that restores Member State autonomy on economic matters and enhances decision-making legitimacy and accountability at Union and State levels.

As a result, I will join the literature that calls for EU taxation. However, I will do so with substantive and methodological differences. First, I will favour direct EU taxes, which is not the prevailing discourse, as most authors prefer indirect taxes, such as Value Added Tax (VAT)[4] or others connected to EU policies, such as the environment or the internal market.[5] Second, I will address the issue by adopting a participation-centred approach, in order to explain why direct taxes can enhance citizens' stakes and bolster democratic participation, which is essential to break the minoritarian bias identified in the European Council. To further support this finding, a comparative approach with the US will be used in order to show that direct taxes are key to successfully increase participation. I will start by briefly describing the main tenets of the

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[2] Gary Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* (Princeton University Press 2018); Tomasz P Woźniakowski, 'The Fiscal Origins of American Power: Federal Tax Policy and US Territorial Expansion in the Nineteenth Century' (2020) EUI Working Paper RSCAS 2020/103 <https://cadmus.eui.eu/handle/1814/69360> accessed 28 January 2023.

[3] Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (The University of Chicago Press 1997).

[4] Edoardo Traversa, 'The Long and Winding Road towards a Tax-Financed EU Budget: Constraints and Design Proposals from a Legal Perspective' in Hanno Kube and Ekkehart Reimer (eds), *Solid Financing of the EU* (Institut für Finanz- und Steuerrecht 2021) 57, 69; Iain Begg, *An EU Tax: Overdue Reform or Federalist Fantasy?* (Friedrich-Ebert-Stiftung 2011) <https://library.fes.de/pdf-files/id/ipa/07819.pdf> accessed 7 February 2023.

[5] European Commission, 'Future Financing of the EU, Final Report and Recommendations of the High Level Group on Own Resources' (2016) <https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2014-2020/revenue/high-level-group-own-resources_en> accessed 7 February 2023; Ivailo Kalfin, 'The Importance of Own Resources in The EU Budget' in Brigid Laffan and Alfredo De Feo (eds), *EU Financing for Next Decade: Beyond the MFF 2021-2027 and the Next Generation EU* (European University Institute 2020) 61, 69; Miguel Poiares Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice' (2012) <https://cadmus.eui.eu/bitstream/handle/1814/24295/RSCAS_PP_2012_11rev.pdf?sequence=1&isAllowed=y> accessed 9 February 2013, 13..

referred vertical relation and characterising them as a key imbalance between the Union and Member States. I will then focus on some of NGEU's features and compare it to the US response to the pandemic. Finally, I will lay out some ideas on what a horizontal citizens Union might entail.

2. Vertical relation between Union and Member States as a key imbalance

The present section will briefly outline the development of the relation between the Union and Member States in three main areas: economic policy, monetary policy and national parliaments' increasing intervention. I will argue that a relation of mutual dependence has been created, which undermines Treaty-based principles of market discipline and Member States' fiscal responsibility, as established in articles 125 and 126 TFEU, respectively. Moreover, it does not adequately address the issue of a perceived lack of Union democratic legitimacy. Hence, this construction is considered a key institutional imbalance in EU integration.

2.1. Economic policy

Since the Treaty of Maastricht that the Union and its Member States have established a vertical relation regarding public finances. Indeed, this primary law source first established the obligation for Member States to avoid excessive government deficits (Article 104c) in accordance with the reference values of the relevant Protocol.[6] In 1997, the original Stability and Growth Pact (SGP) was created by a European Council resolution, which essentially aimed to establish a political basis and provide Member States, the Council and the Commission with broad implementation guidelines.[7]

Indeed, at the outset, the EU was seen as being a regulatory state, acting as an independent agent of national democracies in order to enact efficiency-enhancing regulation, furthering not only market integration but also the bloc's commitment with open markets.[8] In a way, it resembled the situation in the United States before the New Deal and the so-called fiscal revolution, where the US government played a dim role both in redistribution and macroeconomic stabilization.[9] Importantly, the Commerce Clause enshrined in the US Constitution allowed the judiciary to create a single market by regulating interstate commerce,[10]

[6] The well-known 3% for public budget deficit and 60% for public debt, as indicated by article 1 of the Protocol on the excessive deficit procedure.
[7] Resolution of the European Council on the Stability and Growth Pact [1997] OJ C236/1.
[8] Waltraud Schelkle, 'The Contentious Creation of the Regulatory State in Fiscal Surveillance' (2009) 32 West European Politics 829, 830.
[9] Which took place between the presidencies of Herbert Hoover and Lyndon Johnson. See Gerstle (n 2).
[10] Akhil Reed Amar, *America's Constitution: A Biography* (Random House 2005) 114, argues that in 1787 the commerce clause encompassed a broader meaning, still retained today, referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets. However, modern lawyers and judges typically refer to the commerce clause as applicable only to economic interactions. In this latter sense, see Richard Epstein, 'The Proper Scope of the Commerce Power' (1987) 73 Virginia Law Review 1387; Grant Nelson and Robert Pushaw, 'Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulation but Preserve

which resembled the role of the CJEU in its early case-law.[11]

The SGP revision in 2005 arguably started the gradual transformation of the nature of EU's intervention from regulatory into fiscal surveillance. In this sense, Schelkle questions '[w]hy was strengthening the economic underpinning necessary, given that its architects portrayed the original SGP as the triumph of good economics over bad politics?'[12] The idea that EMU needed tighter fiscal rules was rebutted by many essentially because, from a national perspective, it did not make sense to restrict governments' fiscal policies after relinquishing monetary policy,[13] given that the latter was traditionally used by national governments to absorb economic shocks. Hence, the multiple principles foreseen by the Maastricht Treaty undermined the objective it purported to achieve.

At first sight, however, that seemed impossible: how could the prohibition of debt monetisation and bailouts, coupled with the excessive deficit procedure, not provide a robust enough legal framework, not convey the adequate incentives for both markets and Member States and the idea of State fiscal sovereignty and responsibility? By doing so, would it not strengthen Member States' incentives to anticipate problems and tackle them in an adequate and timely manner?[14]

Despite plausible, this reading may have been misleading. None of the foregoing explains the need for a procedure allowing EU authorities to require Member States to perform fiscal adjustment in the event of excessive debts or deficits. In fact, while the excessive deficit procedure is intended to prevent excessive debt accumulation, this situation is only a problem if there is a reason to expect that ensuing difficulties will be resolved by a bailout. Consequently, one can infer that the EDP casts doubt on the credibility of the Maastricht Treaty's no-bailout provision.[15] Moreover, the very act of regulating Member States public finances at the supranational and, later, at international level with the signing of the Treaty on Stability, Coordination and Governance (TSCG), signals a certain level of co-responsibility.

Other, non-fiscal principles also feed into the commitment problem, since letting a Member State endure a fiscal crisis could breach Union principles. In fact, as foreseen in article 3 (3)

State Control Over Social Issues' (1999) 85 Iowa Law Review 1. In the jurisprudence see United States v Lopez [1995] 514 US 549.

[11] Miguel Poiares Maduro, *We The Court: The European Court of Justice and The European Economic Constitution* (Hart Publishing 1998).

[12] Schelkle (n 8) 833.

[13] Willem Buiter and others, 'Excessive Deficits: Sense and Nonsense in the Treaty of Maastricht' (1993) 8 Economic Policy 57; Charles Goodhart and Stephen Smith, 'Stabilization' in Commission of the European Communities, *European Economy* (1993) 417.

[14] Barry Eichengreen and Jürgen Von Hagen, 'Fiscal Restrictions and Monetary Union: Rationales, Repercussions, Reforms' (1996) 23 Empirica 3, 15.

[15] ibid. In the same vein see Charles Blankart and Achim Klaiber, 'Subnational Government Organisation and Public Debt Crises' (2006) 26 Economic Affairs 48, 53; Christian Calliess, 'The Governance Framework of the Eurozone and the Need for a Treaty Reform' in Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Bloomsbury Publishing 2016) 37.

TEU, the Union 'shall promote economic, social and territorial cohesion, and solidarity among Member States', which could be interpreted as support for financial assistance, including debt monetisation. Hence, the need for an EDP to discourage hazardous behavior.

The financial crisis further deepened this state of affairs, as the European Commission was tasked to closely monitor States' budgets and economic indicators, thereby curtailing their autonomy in fiscal matters. Significantly, the EU moved from a paradigm of market discipline to one of public control.[16]

2.2. Monetary policy

Supranational fiscal control was added to the loss of monetary policy competence. This framework paved the way for verticalisation to developed into the realm of monetary policy. In fact, since 2010, the European Central Bank (ECB) adopted numerous unconventional measures in order to counter the euro crisis,[17] namely Securities Market Programme (SMP), Outright Monetary Transactions (OMT), the Public Sector Purchase Programme (PSPP), the Pandemic Emergency Purchase Programme (PEPP) and, finally, the Transmission Protection Instrument (TPI).

All these different programmes can be generally encompassed in two broad areas according to their justification and type of conditionality. Regarding the former, SMP, OMT and TPI are based on the prevention of monetary fragmentation. According to the ECB, monetary policy effects could be hindered and, therefore, unevenly reflected across the eurozone. On the contrary, PSPP and PEPP focused primarily on countering potential horizontal deflationary scenarios.

The second distinctive feature is related to the type of conditionality. Of all the relevant programmes, only SMP, OMT and TPI encompass this criterion to different degrees. While SMP slightly referenced the need for fiscal frugality, OMT's eligibility was conditioned upon the existence of a strict and effective conditionality programme attached to the European Financial Stability Facility (EFSF), the European Stability Mechanism (ESM) or a precautionary programme (Enhanced Conditions Credit Line), therefore reducing its scope. Differently, TPI is conditioned on compliance with regular economic union Treaty provisions and fiscal rules.[18]

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[16] Surveillance and fiscal constraints were further enhanced by the EU legal acts (Six-Pack and Two-Pack) and international law (Treaty on Stability, Coordination and Governance). See Michael Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed during the Eurozone Crisis' (2016) 53 Common Market Law Review 1237.

[17] For an overview see Mark Dawson and Ana Bobic, 'Quantitative Easing at the Court of Justice – Doing Whatever It Takes to Save the Euro: Weiss and Others' (2019) 56 Common Market Law Review 1005; Klaus Tuori, 'Monetary Policy (Objectives and Instruments)' in Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 615.

[18] Further remarks on TPI can be found at Nuno Albuquerque Matos, 'Transmission Protection Instrument: The European Central Bank as Promoter and "Enforcer" of Fiscal Discipline' (*EU Law Live*, 22nd July 2022) <https://eulawlive.com/op-ed-transmission-protection-instrument-the-european-central-

Notably, the ECB was not alone in its financial market intervention,[19] as other major central banks took similar approaches, such as the US Federal Reserve. Central banks of EU non-eurozone Member States followed the same expansionary pattern,[20] as did the Bank of England.[21] However, one key difference is that other major central banks do not purchase sovereign sub-national bonds,[22] which prompted commentators to highlight that the monetary tightening process will be the hardest challenge for the ECB, given that it is responsible for the 'biggest injection of monetary stimulus in the history of Europe's single currency, including the €2.2tn purchase of mostly government bonds',[23] with a comparatively weak accountability framework.[24]

From a fiscal point of view, the asset purchases programmes produce an umbilical connection between the ECB and Member States and produce fiscal effects vis-à-vis national budgets. Notwithstanding the fact that their legality has already been vetted and approved by the CJEU in Gauweiler and Weiss cases,[25] one should not underestimate the economic incentives such an approach provides Member States and their potential detrimental effect on the future of EU integration. Importantly, it seems that the Court of Justice has greenlighted a form of monetary financing by accommodating monetary policy flexibility in the spirit of the Treaties, gradually

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bank-as-promoter-and-enforcer-of-fiscal-discipline-by-nuno-albuquerque-matos/> accessed on 7 December 2022.

[19] Although the legality of the intervention is controverted, especially given the differences in mandates. See Nicolas Jabko, 'The Politics of Central Banking in the United States and in the European Union' in Anand Menon and Martin Schain (eds), *Comparative Federalism: The European Union and the United States in Comparative Perspective* (Oxford University Press 2007) 275, 286; Rosa Maria Lastra, 'The Role of Central Banks in Monetary Affairs: A Comparative Perspective' in Thomas Cottier and others (eds), *The Rule of Law in Monetary Affairs* (Cambridge University Press 2014) 78.

[20] For instance, the Central Banks of Poland and Bulgaria roughly trebled their balance sheets from 2010-2021: see https://www.nbp.pl/homen.aspx?f=/en/statystyka/bilans_nbp_mon/bilans_nbp.html and https://www.bnb.bg/Statistics/StBNBBalances/StBalancesIssueDepartment/StBIDMonthly/index.htm, respectively. See also Swedish Central Bank: https://www.riksbank.se/en-gb/statistics/riksbanks-balance-sheet/.

[21] See https://www.bankofengland.co.uk/weekly-report/balance-sheet-and-weekly-report.

[22] Financial differentiation and diverging inflation rates between US States' and regions does not prompt sub-national bond-buying by the US Federal Reserve. For US States' bond yields see Municipal Securities Rulemaking Board::EMMA (msrb.org). For US sub-national inflation rates see https://eig.org/the-geography-of-u-s-inflation-prices-are-rising-faster-in-lower-cost-states/.

[23] Martin Arnold and Tommy Stubbington, 'The Return of Inflation: Crunch Time for the European Central Bank' *Financial Times* (14 December 2021) <https://www.ft.com/content/e01ce60c-f602-4110-bb64-7fd60689b099> accessed 8 December 2022.

[24] Fabian Amtenbrink and Kees van Duin, 'The European Central Bank before the European Parliament: Theory and Practice after Ten Years of Monetary Dialogue' (2009) 34 European Law Review 561; Menelaos Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy and Governance* (Oxford University Press 2020); Rosa Maria Lastra, 'Accountability Mechanisms of the Bank of England and of the European Central Bank' (2020) <https://www.europarl.europa.eu/committees/en/econ/econ-policies/monetary-dialogue> accessed 9 December 2022.

[25] Case C-62/14, Peter Gauweiler and Others v Deutscher Bundestag [2015] ECLI:EU:C:2015:400; Case C-493/17, Heinrich Weiss and Others [2018] ECLI:EU:C:2018:1000. In the doctrine see Alexander Thiele, 'Friendly or Unfriendly Act? The "Historic" Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program' (2014) 15 German Law Journal 241; Vestert Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB: Gauweiler' (2016) 53 Common Market Law Review 139; Fabian Amtenbrink and René Repasi, 'The German Federal Constitutional Court's Decision in Weiss: A Contextual Analysis' (2020) 45 European Law Review 757.

conveying the perilous idea that, at a certain point in time, Member States will be rescued.[26]

2.3. National parliamentary involvement

National parliaments have an important role to play in the various functions they carry out at the national level, namely legislative, political control, budgetary and inter-parliamentary cooperation.[27] However, it is increasingly considered that more involvement from national parliaments in EU affairs, whatever the form,[28] is important for a variety of reasons, namely democratic legitimacy and accountability.[29]

First, as seen above, EU economic policy coordination at supranational level affects national budgetary policy. In fact, even if Member States formally retain such competence, the limitations imposed are so significant and surveillance for compliance so strict, that one could question whether countries are indeed capable of devising national budgets with effective autonomy. Second, empowerment of national executives in the European Council warrants more national parliamentary scrutiny, precisely because such an institution lacks an acceptable accountability framework, either collectively or at the level of each Head of State or Government individually.[30] Finally, the EU's democratic deficit may be understood as a relative inability by the European Parliament (EP) to compensate for the reduction of national parliamentary powers.[31]

As a result, Bellamy argues that, instead of continuing to hone the idea that the EU can be legitimated by directly elected representative institutions, such as the EP, the Union's legitimacy would need to become sourced in Member States' democracies.[32] Therefore, according to this view, the democratic disconnect should be mended by legitimacy-enhancing mechanisms

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[26] More on this topic can be found in Nuno Albuquerque Matos, 'Can (Any) ECB Crisis Tool Really Help Member States?' (*EU Law Live*, 2022) <https://eulawlive.com/op-ed-can-any-ecb-crisis-tool-really-help-member-states-by-nuno-albuquerque-matos/> accessed 8 December 2022.

[27] For a development of these functions see René Repasi, 'European Parliament and National Parliaments' in Fabian Amtenbrink and Christoph Herrmann (eds), *EU Law of Economic & Monetary Union* (Oxford University Press 2020) 456, 498.

[28] National parliamentary participation may take many forms, namely traditional scrutinizer, policy shaper, government watchdog, public forum, expert and European player. On this matter see Valentin Kreilinger, 'National Parliaments in Europe's Post-Crisis Economic Governance' (Hertie School of Governance 2019) <https://opus4.kobv.de/opus4-hsog/frontdoor/index/index/docId/2730>.

[29] Diane Fromage, 'How to Ensure That National Parliaments (Truly) "Contribute Actively to the Good Functioning of (Tomorrow's) EU"?' (2020) 26 European Law Journal 472; Tom van den Brink, 'National Parliaments and EU Economic Performance Policies. Impact Defines Involvement?' (2018) 40 Journal of European Integration 309.

[30] Deirdre Curtin, 'Challenging Executive Dominance in European Democracy' (2014) 77 The Modern Law Review 1; Markakis (n 19); Sergio Fabbrini, 'Who Holds the Elephant to Account? Executive Power Political Accountability in the EU' (2021) 43 Journal of European Integration 923.

[31] Ben Crum, 'Parliamentary Accountability in Multilevel Governance: What Role for Parliaments in Post-Crisis EU Economic Governance' (2017) 25 Journal of European Public Policy 268. In the same vein, see Joseph Weiler, Ulrich Haltern and Franz Mayer, 'European Democracy and Its Critique' (1995) 18 West European Politics 4.

[32] Richard Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press 2019) 12.

mediated through national institutions.[33] In this vein, Fromage argues that monetary policy impacts on Member States' fiscal policies would justify the existence of a formal dialogue between the ECB and willing national parliaments.[34] For this purpose, the framework used regarding supervision (the Banking Dialogue) could be applied to Monetary Dialogue.[35]

Before the Treaty of Lisbon, apart from urging national governments to forward information promptly to their parliaments, these did not enjoy any prerogative or direct right of information, as no direct channels of information between the EU institutions and national parliaments were established. The Treaty of Lisbon brought a renewed sense of urgency regarding democratic legitimacy, namely endowing national parliaments with new prerogatives, notably in article 12 TEU and Protocols No 1 and 2, ie information rights,[36] EMU-related powers,[37] subsidiarity and political scrutiny or interparliamentary conferences, therefore reinforcing the verticalisation of the EU.

However, in my view, several issues arise with this state of affairs, but I will focus on three. First, the intention to legitimise the EU through national parliaments does raise the issue of whether the principle according to which accountability is set to be guaranteed at the same institutional level still suits the Union,[38] in particular given the changes occurred since the financial crisis. As a result, the Banking Dialogue with national parliaments is considered a weak mechanism to deliver accountability, 'given the particular kind of mixed administration between European and national authorities in the Banking Union, which is a departure from the principle that institutions can only be held to account by Parliaments which are at the same level

[33] Alan Milward and Vibeke Sørensen, 'Interdependence or Integration? A National Choice' in Alan Milward and others (eds), *The Frontier of National Sovereignty: History and Theory 1945-1992* (Routledge 1993) 24.
[34] Fromage (n 29) 483.
[35] See Diane Fromage and Renato Ibrido, 'The "Banking Dialogue" as a Model to Improve Parliamentary Involvement in the Monetary Dialogue?' (2018) 40 Journal of European Integration 295. With a similar view, see Gavin Barrett, 'European Economic Governance: Deficient in Democratic Legitimacy?' (2018) 40 Journal of European Integration 249, 260.
[36] These are one of the most relevant prerogatives, as some information must be directly brought to their attention by Union Institutions, including draft legislative acts, consultation and planning documents. On the shortcomings in information sharing between national governments and their respective parliaments see Adam Cygan, 'Democracy and Accountability in the European Union - The View from the House of Commons' (2003) 66 The Modern Law Review 384.
[37] For instance, pursuant to the Two-Pack they are allowed to directly interact with the Commission on a number of circumstances, namely requesting it to present an opinion on draft budgetary plans, its recommendation to a Member State to correct excessive deficits, the adoption of precautionary corrective measures or to prepare a draft macroeconomic adjustment programme when needed. Exchange of views with the Commission also applies during enhanced surveillance and during the implementation of a macroeconomic adjustment programme.
[38] Although this problem is less acute regarding monetary policy issues, the President of the ECB has entered into informal exchanges with national parliaments when deemed politically sensitive. Still, those interactions rarely took place as national parliament remain 'peripheral entities' on this subject. See Davor Jančić, 'Accountability of the European Central Bank in a Deepening Economic Monetary Union' in Davor Jančić (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis* (Oxford University Press 2017) 141, 150.

as they are located'.[39]

Moreover, the vertical nature of the system poses challenges for national parliaments. Although the European Council can benefit from the fact that its members are individually accountable to their own national legislatures, the idea of legitimation via nationally-elected governments is far from a guarantee that the EU will be more responsive politically.[40] As the European Council is a sum of 27 different electoral 'validations' (given that each government has only national legitimacy) every collective decision taken in such realm will be, therefore, characterised by incomplete legitimacy (and will necessarily correspond to a breach of every other individual source of legitimacy). In addition, every government and parliament are naturally focusing on the interests of its own country and, consequently, will be less able or willing to take into account the interest of the Union as a whole. Therefore, they will be able to provide only partial and inadequate accountability.[41]

Finally, national parliaments have different working capacities and competences, meaning that their rise may, in a way, deepen State and legitimacy inequality.[42] For instance, national governments supported by a highly capable national parliament may be legitimised prior to every European Council meeting and, thus, be more or less assertive in the defense of their public.

2.4. Conclusion

Union economic and monetary policies have increasingly intermingled with Member States',

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[39] Repasi (n 27) 503. See also Fabbrini, 'Who Holds the Elephant to Account? Executive Power Political Accountability in the EU' (n 30) 934, arguing that national parliaments, even if networking with the EP, could hardly exercise a scrutinising role to the European Council, if anything because the latter's decisions are taken by Heads of State or Government that mirror national parliaments' majorities. Problematically, the opposite emerged, with national leaders using intergovernmental constraints to impose their views on their own legislative majorities.

[40] In the same vein see Armin von Bogdandy, 'The Euro Is Forcing the Realization of Political Union - and Perhaps a New Community' (2001) 2 German Law Journal E7; Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 The Modern Law Review 817, 842. A view also shared by Vivien Schmidt, 'The Forgotten Problem of Democratic Legitimacy: "Governing by the Rules" and "Ruling by the Numbers"' in Matthias Matthijs and Mark Blyth (eds), *The Future of the Euro* (Oxford University Press 2015) 90, 99.

[41] With the same view see Elena Griglio, *Parliamentary Oversight of the Executives: Tools and Procedures in Europe* (Hart Publishing 2020) 193. This is also what justifies the fact that national central bank governors should not be accountable neither to the EP nor to national parliaments. Regarding the former, because no EU body plays a role in their appointment. On the latter, because national parliaments lack legitimacy to assess how such Governors perform duties which explicitly preclude them from acting as defenders of national interests. As such, the ECB has argued that it is for the President of the ECB and the other members of the Executive Board to justify and explain the decisions taken collectively to the European Parliament. See European Central Bank, 'Monthly Bulletin' (2002) <https://www.ecb.europa.eu/pub/pdf/mobu/mb200211en.pdf> accessed 6 May 2022, 49.

[42] As an example, see the criticism regarding the deficient parliamentary accountability delivered by the Spanish parliament, argued by Juan Jovani, 'La Gobernanza Presupuestaria Surgida de La Crisis y Sus Implicaciones Para El Parlamento' in Elviro Aranda Álvarez (ed), *Las Implicaciones Constitucionales de la Gobernanza Económica Europea* (Tirant lo Blanch 2020) 161, 192. See also Elisabeth Lentsch, 'EMU Integration against the Backdrop of EU Law and Jurisprudence' in Stefan Griller and Elisabeth Lentsch (eds), *EMU Integration and Member States' Constitutions* (Hart Publishing 2021) 33, 40.

creating a relation whereby both levels of governance are very much dependent on each other. This section has briefly outlined three paradoxes that derive from this situation. While the EU economic governance was initially designed to foster market discipline, the opposite occurred, with hierarchical co-responsibility and surveillance emerging.

Concomitantly, monetary policy principles, such as prohibition of monetary financing, which also intended to foster market discipline and preserve central bank independence, are more fragile now than at the start of the euro crisis, given the amount of Member States' public debt held by the ECB.

Moreover, the recognition of democratic fragility at supranational level led to an increasing involvement by national parliaments in EU affairs. However, if anything, the adopted solution might have contributed to worsen such shortcoming.

As the next section will show, the EU's economic response to the covid-19 crisis significantly differs from previous ones is some respects, while presenting some similarities in others.

3. Next Generation EU: new perspectives, old features and comparative bittersweetness

NGEU was put in place within this context of 'verticalisation'. Arguably, this is one of the reasons why it is widely considered a pivotal programme in European integration, given that it shifts the focus of the political process on EU economic policy from Member State-coordination to EU-led fiscal funding. The importance of the latter became clearer with the sanitary crisis, as well as with the current security and energy crises, where the limits of inter-State coordination became evident when facing asymmetric sub-national fiscal capacity. In other words, when facing complex situations, coordination becomes much less effective, given that it is difficult to reconcile weaker and stronger links, as well as internalise externalities.

As is well-known, the EU pandemic recovery programme comprises a total of €750 billion (in 2018 prices), which may be used for loans up to an amount of €360 billion and grants up to an amount of €384.4 billion, mostly (€312.5 billion) allocated to financing recovery, economic and social resilience via support to reforms and investments, as established by article 2 of Council Regulation (EU) 2020/2094 (EURI Regulation). The remaining part is split between structural and cohesion programmes, civil protection, research and innovation, supporting territories transitioning towards a climate-neutral economy and rural areas.[43]

The volume of NGEU is very significant, especially when compared to the American Rescue Plan Act of 2021, that granted $360 billion in emergency funding for State and Local

[43] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L 433I/23.

governments.[44] However, the overall amount of the American response ascended to $1.9 trillion,[45] more than double the amount of NGEU and impacting a population of around ¾ of the EU's population in 2021.[46] Moreover, it comes on top of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a $2.2 trillion economic stimulus bill signed into law on March 27th 2020, of which $339.8 billion were assigned to State and Local governments.[47] Be that as it may, NGEU does represent a leap forward in terms of achieving a fiscal capacity for the EU in order to balance economic and monetary union.

3.1. Funding NGEU

Payment of the programme in the long-term will rest on Union's own resources. Specifically, the European Council issued a multi-step plan to be developed over the years. In particular, the resource based on non-recycled plastic waste, which came into force on January 2021, should be accompanied by the introduction of other new own resources, such as a carbon border adjustment mechanism and a digital levy. Moreover, the European Council invited the Commission to revise the EU Emission Trading System. Finally, in the course of the next Multiannual Financial Framework (MFF), the introduction of other own resources will be considered, such as a Financial Transaction Tax (FTT).[48]

Despite the commendable effort to introduce new sources of funding other than the one based on Gross National Income (GNI), with its notable setback of the *juste retour* phenomenon,[49] it is difficult to predict the sufficiency of revenue generated from own resources based on environmental concerns, especially if, as it is desired, environmental objectives are gradually achieved by Member States as well as third countries.

Moreover, other own resources such as the digital levy or the FTT could prove to be politically contentious and ultimately fail to reach consensus between Member States. This has already occurred with the FTT, in a process that started in 2013 and has yet to reach a final outcome.

Even if such agreement is reached, there is the question of scope. For instance, the FTT would be adopted by enhanced cooperation procedure, which could not only risk distortions and

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[44] Federico Fabbrini, *EU Fiscal Capacity: Legal Integration After Covid-19 and the War in Ukraine* (Oxford University Press 2022) 96.
[45] H.R.1319 - American Rescue Plan Act of 2021, available at https://www.congress.gov/bill/117th-congress/house-bill/1319/text.
[46] See https://data.worldbank.org/indicator/SP.POP.TOTL.
[47] H.R.748 - CARES Act, available at https://www.congress.gov/bill/116th-congress/house-bill/748.
[48] 'Conclusions of Special Meeting of the European Council (17–21 July 2020) EUCO 10/20, Brussels (21 July 2020)' <https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf> accessed 9 December 2022.
[49] On the EU budget see Brigid Laffan, *The Finances of the European Union* (Macmillan Press 1997); Brigid Laffan and Pierre Schlosser, 'Public Finances in Europe: Fortifying EU Economic Governance in the Shadow of the Crisis' (2016) 38 Journal of European Integration 237; Thiess Büttner and Michael Thöne (eds), *The Future of EU-Finances* (Mohr Siebeck 2016); Hanno Kube and Ekkhart Reimer, *Solid Financing of the EU* (Institut für Finanz- und Steuerrecht 2021).

fragmentation of the internal market,[50] but also cast doubts on whether the ensuing revenue could benefit the EU as a whole, as part of the EU budget.[51] In a way, the enhanced cooperation method for tax purposes is the antithesis of NGEU which may well have heralded the end of fragmented integration concerning EU economic policy[52] and eased the cycle of state domination over state equality that emerged during the euro crisis.[53]

Hence, a scenario where funding comes primarily from GNI cannot be excluded. In fact, this is admitted by the European Council, as the amendment to the Own Resources Decision allows the ceiling for commitment appropriations and expenditure to be raised by 0.6 % of EU27 GNI until the repayment of NGEU bonds. As Nettesheim states, 'the financial leeway is necessary in case the EU does not succeed in raising the funds necessary for the continuous repayment of the NGEU subsidy and at the same time the EU Member States do not repay the NGEU loans granted to them'.[54]

3.2. Spending NGEU

Regarding expenditure, article 3 of the Regulation (EU) 2021/241[55] (RRF Regulation) stipulates that NGEU should be allocated to a number of pre-defined policy areas of European relevance, such as the green transition, digital transformation, smart, sustainable and inclusive growth, social and territorial cohesion, health, and economic, social and institutional resilience, and policies for the next generation, children and the youth. In order to fund the pursuance of these priorities, NGEU empowered the Commission to borrow funds on the capital markets on behalf of the Union, not Member States individually,[56] similarly to what had already occurred with 'Support to mitigate Unemployment Risks in an Emergency', approved by Council Regulation 2020//672 (SURE Regulation).[57] In contrast, the SURE programme not only relied on Member State guarantees to a certain extent, which conditioned the availability of the

[50] James Buchanan and Richard Musgrave, *Public Finance and Public Choice: Two Contrasting Visions of the State* (The MIT Press 1999) 181.
[51] Federico Fabbrini, 'Taxing and Spending in the Euro Zone: Legal and Political Challenges Related to the Adoption of the Financial Transaction Tax' (2014) 39 European Law Review 155.
[52] A eurozone and non-eurozone Member States' division that came about acutely throughout the euro crisis, as explained by Alicia Hinarejos, *The Euro Crisis in Constitutional Perspective* (Oxford University Press 2015).
[53] On the inequity of the EU's economic institutional setup born out of the euro crisis see Federico Fabbrini, 'States' Equality v States' Power: The Euro-Crisis, Inter-State Relations and the Paradox of Domination' (2015) 17 Cambridge Yearbook of European Legal Studies 3; Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016).
[54] Martin Nettesheim, 'Next Generation EU: The Transformation of the EU Financial Constitution' in Hanno Kube and Ekkehart Reimer (eds), *Solid Financing of the EU* (Institut für Finanz- und Steuerrecht 2021) 9, 17.
[55] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.
[56] As in the European Stability Mechanism, where Member States signed an international treaty and were entrusted with specific obligations, such as directly providing for its funding.
[57] Council Regulation (EU) 2020/672 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 [2020] OJ L 159/1.

instrument (article 11 and 12 of the SURE Regulation), but also assistance would come only in the form of loans, not grants.

To a certain extent, NGEU shifted the nature of Union expenditure, which has focused on redistributive policies since inception, mostly agriculture and cohesion.[58] These are policies that are tailored for specific Member States or sub-national regions.[59] However, they are either not aligned with current societal needs or have generated many economic inefficiencies.[60] Interestingly, NGEU appears to have started a transition towards investing in policies[61] capable of delivering greater transnational benefits (European public goods), such as mitigating the socio-economic effects brought about by the pandemic, preparing the Union for future sanitary catastrophes as well as to achieve EU climate targets.[62]

Notwithstanding, some issues blur the transnational dimension of the programme. First, Member States are considered as the sole *beneficiaries* of the RRF, under direct management of the funds, which means that the Commission's legal responsibility stops at Member States' borders.[63] As a result, States bear the responsibility to formulate and implement their specific programmes.

Moreover, NGEU was predominantly set by intergovernmental institutions. In fact, the European Council and the Council had an important role regarding the own resources' decision as well as the approval of the Recovery and Resilience Plans and their monitoring, respectively. And, by linking these plans to the country specific challenges and priorities identified in the European Semester, as well as those identified in the Council recommendations on the economic

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[58] Giacomo Benedetto, 'The History of the EU Budget' (2019) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/636475/IPOL_IDA(2019)636475_EN.pdf> accessed 13 February 2023; Laffan (n 51).

[59] Agriculture, for instance, is a traditional French request and cohesion is meant to compensate potential losers from the single market.

[60] As Fabbrini argues, the agricultural sector is declining in economic and social importance in the EU. Although connected with important objectives, such as healthy nutrition, economic development in post-war Europe has been able to accommodate many of the sector's anxieties. Regarding cohesion policy, it has led to pork-barrel spending. As a result, financial support was needlessly granted to regions within richer Member States. See Sergio Fabbrini, 'Representation without Taxation: An Association or Union of States?' in Alfredo De Feo and Brigid Laffan (eds), *EU Own Resources: Momentum for a Reform?* (European University Institute 2016) 19, 22.

[61] The link between funding and policy areas was key for the Council's Legal Service to conclude that no financial assistance existed and, therefore, the requirements of article 122 (1) TFEU, as opposed to article 122 (2), were fulfilled. See Council of the European Union, 'Opinion of the Legal Service on the Proposals on Next Generation EU (2020) 9062/20' <https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf> acessed 10 December 2022, para 120-122.

[62] However, funding disbursement along national lines has been critisised, given that most of it is going to countries that have had problems before or are poorer. In this vein see Clemens Fuest, 'Panel Discussion' in Hanno Kube and Ekkehart Reimer (eds), *Solid Financing of the EU* (Institut für Finanz- und Steuerrecht 2021) 79, 92.

[63] Articles 8 and 22 (1) of the RRF Regulation. This significantly differs from the shared management modality adopted regarding EU cohesion policy, whereby the Commission retains powers throughout the whole process, from conception until disbursement and implementation of funding. See Antonio-Martín Porras-Gómez, 'The EU Recovery Instrument and the Constitutional Implications of Its Expenditure' (Published online 16 November 2022) European Constitutional Law Review 1, 9.

policy of euro area Member States, article 17 (3) of the RRF Regulation reinforces the national footprint and the vertical relationship described above.

By contrast, the American response, in addition to the provision of funding for States to administer, also provided cash payments to natural persons, increased unemployment benefits, forgivable loans to small businesses, among other measures,[64] making it a more integrated and coherent approach.

The nature of expenditures and the timeline of implementation makes NGEU a programme more designed to fit an allocation and redistributive role and less so one of stabilisation.[65] Although funding allocation took into account important factors for this latter role,[66] the first national programmes were approved in July 2021, more than a year after the first lockdowns, when many EU Member States were close to, or had already recovered, economic pre-pandemic levels. In comparison, the US invested heavily in the CARES Act in March 2020, which was reinforced, one year later, with the American Recovery Act, with targeted expenditures to provide immediate relief to natural and legal persons.

I do not wish to understate NGEU's importance and relevance. Straight comparisons with the US are useful only to a certain extent, given the stark differences in the evolutionary status of both political unions. However, despite endowing the EU with an important form of fiscal capacity, it is still very much connected to Member States, thereby reinforcing the vertical relationship.

4. In search of a less imperfect alternative: European citizens' participation as key for balance between Union and Member States

In a certain sense, the federal structure in the EU considerably resembles the one existent in the US before the Civil War (the antebellum period), whereby the States enjoyed broad autonomous authority over the 'classic trinity of sovereign powers: taxation, the police power, and eminent domain'. Therefore, the federalism in the 19th-century-US provided 'a receptive structure for expressions of state autonomy and pursuit of state-oriented economic objectives',[67] just as in the 21st-century-EU.

4.1. European Council as a form of minoritarian bias in economic policy

European citizens are clear-minded in what they want from the EU. In fact, citizens'

[64] H.R.748 - CARES Act (n 39) and H.R.1319 - American Rescue Plan Act of 2021 (n 47).
[65] In this vein see Pilar Más Rodríguez, 'The EU Budget: The New MFF and the Recovery Instrument: Next Generation EU' in Fernando Fernández Méndez de Andés (ed), *The Euro in 2021* (Fundación de Estudios Financieros 2021) 169; This follows the traditional perspective of public economic policy's role, proposed by Musgrave in Richard Musgrave, *The Theory of Public Finance* (McGraw-Hill 1959).
[66] Annex I of the RRF Regulation establishes factors with a stabilising nature, namely inverse per capita GDP; average unemployment rate over the past five years compared to the Union average in the 2015-2019 period, the fall in real GDP in 2020 as well as the fall in real GDP in 2020 and 2021 combined.
[67] Harry Scheiber, 'State Law and "Industrial Policy" in American Development, 1790-1987' (1987) 75 California Law Review 419.

preferences vary more regarding national than supranational policies and priorities. As Buti explains, there is a lot of popular convergence: 'In the non-economic area you have defense and security policies and policies for immigration. In the economic area there is transnational investment and other types of internal investments and goods where you have a critical mass and large spillovers'.[68]

However, the *juste retour* phenomenon around GNI own resource creates a nationalistic, short-term dynamic, favouring an allocation strategy towards budgetary components more easily 'returned' to the Member States and away from EU added value. This dynamic was displayed in the July 2020 European Council,[69] even within a pivotal context that would lead to the setting up of NGEU. In fact, despite numerous surveys in all Member States showing majoritarian support for more EU involvement in health-related issues (such as cooperation on vaccinations, strategies, purchasing medicine, strengthening European supply chains) Member States drastically cut EU budgetary programmes whose resources were not directly allocated to them, such as EU Health, Solvency Support, InvestEU or Horizon Europe, arguably due to less direct visibility.[70] In Buti's words, 'the natural political reflex is to look at how much they (the national governments) get directly rather than the focus on common goods. In economic terms, one could say that policymakers in EU negotiations, instead of optimizing overall EU welfare, optimize the sum of national welfare functions'.[71]

This practice increasingly generates a disconnect between what citizens demand from the EU and what their national governments are willing to provide in the European Council. In my view, this occurs because there is a silent majority in the EU citizenry, one that has limited incentives to participate in the EU political process. First, EU issues are seldom, if ever, the central topic in national elections. And for good reason: national elections should be primarily based on national, rather than EU, policies and priorities. Therefore, national governments' mandates in the EU realm are mainly to find a common denominator of national interests, not so much to address issues from a EU-wide perspective. Second, the only supranational elections are to an institution (the EP) that holds very limited involvement in the EU budgetary process. Notably, it only holds consultation competence prior to the decision on own resources (article 311 (3) TFEU) and consent competence regarding the MFF (article 312 (2) TFEU), the two main pillars of EU finances that broadly define the annual budget, where the EP does share power with the Council (article 314 TFEU). Third, citizens pay taxes to their national budgets,

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[68] Marco Buti, 'Panel Discussion' in Hanno Kube and Ekkehart Reimer (eds), *Solid Financing of the EU* (Institut für Finanz- und Steuerrecht 2021) 79, 108.
[69] Despite the fact that the budgetary issues largely pertain to the realm of the Council, pursuant to article 311 (3) and 313 (2) TFEU. On the emergence of the European Council as a dominant institution of EU budgetary matters see Richard Crowe, 'The European Council and the Multiannual Financial Framework' (2016) 18 Cambridge Yearbook of European Legal Studies 69.
[70] Franziska Brantner, 'Panel Discussion' in Hanno Kube and Ekkehart Reimer (eds), *Solid Financing of the EU* (Institut für Finanz- und Steuerrecht 2021) 79, 106.
[71] Buti (n 68) 109.

thereby not only establishing a direct link with their own borders but also broadly interpreting national contributions to the EU budget as a loss of national revenue.[72]

4.2. Addressing minoritarian bias in EU economic policy

a) Changing voting threshold on own resources decision?

Taking these factors into account, a voting change in the own resources decision (ORD) and the MFF, from unanimity into, for instance, qualified majority, could be envisaged. Crucially, it is indeed different to negotiate with the power of the vote rather than with the power of the veto:[73] indeed, a lower threshold of approval reduces the skewed distribution of power each Member States possesses under unanimity rule, which could prompt some Member States to be more aligned with citizens' preferences. As Komesar stresses, 'as majoritarian influence grows, we can get a countervailance between [majoritarian and minoritarian] forces and, with it, political outcomes that are more "balanced"'.[74]

Be that as it may, formal rule change can run afoul of informal established decision-making processes.[75] Therefore, one should not expect that changes in the voting threshold per se will necessarily lead to a (significant) change in national governments' behaviour in the supranational institutions, and indeed there is evidence that the logic of consensus prevails in the European Council and the Council regardless of majoritarian rule.[76] Continuing with Komesar, a possible explanation may be that '[m]ost legislators (…) are not motivated by resource allocation efficiency and the political process is subject to severe political malfunctions such as minoritarian bias and the associated costs of rent seeking'.[77] Hence, the voting pattern in the EU intergovernmental institutions, especially the one related to the *juste retour*, could be a form of minoritarian bias in play, representing the power of the few over the power of the many:[78] in the current case, the power of national governments individually considered within collective, intergovernmental EU institutions, over EU citizens at large.

Likewise, European citizens' current political participation does not seem enough to reduce

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[72] See Gabriele Cipriani, *Financing the EU Budget – Moving Forward or Backwards?* (Centre of European Policy Studies 2014); European Commission, 'Future Financing of the EU, Final Report and Recommendations of the High Level Group on Own Resources' (2016) <https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2014-2020/revenue/high-level-group-own-resources_en> accessed 12 December 2022.

[73] Maduro (n 11).

[74] Neil Komesar, 'The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness' [2013] Wisconsin Law Review 265, 297.

[75] Neil Komesar, 'Governance, Economics and the Dynamics of Participation' in Neil Komesar and others (eds), *Understanding Global Governance: Institutional Choice and the Dynamics of Participation* (European University Institute 2014) 29, 43.

[76] Luuk van Middelaar and Uwe Puetter, 'The European Council: The Union's Supreme Decision-Maker' in Dermot Hodson and others (eds), *The Institutions of the European Union* (5th edn, Oxford University Press 2022) 51; Uwe Puetter, 'The Council of the European Union' in Dermot Hodson and others (eds), *The Institutions of the European Union* (5th edn, Oxford University Press 2022) 78.

[77] Komesar, 'The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness' (n 74) 304.

[78] Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (n 3).

the skewed distribution of stakes in the EU political process. Paradoxically, more access to the decision-making process per se may not solve but aggravate the problems of participation, as its dynamics depend on the associated costs and benefits. If the individual benefits of most people are low, either because they are highly disseminated or because there is an insufficient degree of information, then participation decreases, hence turning the political process more prone to concentrated interests.[79] Indeed, EP elections are traditionally associated with low turnouts and reduced mobilisation of the European electorate, possibly because of the low level of importance this institution is entrusted with in budgetary issues and EU economic policy in general.[80]

In addition, the so-called technocratic, apolitical form of governance pursued by the Commission is, in itself, a feature that hinders participation, worsening this state of affairs. Interestingly, this matter was covered by the preparatory works leading to the 1787 US Constitutional Convention, where some scholars considered that as size increases and participation decreases, the result would be better decision-making, leaving it to the public interested government official. In a nutshell: distance from the action would produce better output. However, the framers of the US Constitution understood that the choice was not between a biased political process and independent and unbiased public servant, but rather the choice between biases (majoritarian and minoritarian), with the Federalists willing to risk more minoritarian bias as the price for less majoritarian bias.[81]

b) Direct taxation of EU citizens

That leaves us with direct taxation, which is linked to national budgets, and whether the Union should resort to such a method to fund its budget.[82] At the outset, it is important to stress that a federation is not subordinated to its constituent units, as its aim is to balance the autonomy of every layer of governance. As Larsen argues, the powers of a federation are characterised by:

> […] principles of independence and interdependence. The Member States come together in a federation to preserve themselves politically. Their statehood and autonomy are therefore not dissolved. However, it is not merely the Member States vis-à-vis the Union but also the Union vis-à-vis the Member States that has an autonomous status. The federation is characterized by a double autonomy: the

[79] Neil Komesar and Miguel Poiares Maduro, 'Governance Beyond the States: A Constitutional and Comparative Institutional Approach for Global Governance' in Neil Komesar and others (eds), *Understanding Global Governance: Institutional Choice and the Dynamics of Participation* (European University Institute 2014) 3, 21.
[80] Xavier Cabannes, 'Les Pouvoirs Financiers Du Parlement Européen : Illusion Ou Désillusions ?' (2019) 633 Revue de l'Union Européenne 603.
[81] See Komesar, 'Governance, Economics and the Dynamics of Participation' (n 75) 49.
[82] Specifically on EU own resources and taxation see Sylvain Plasschaert, 'Towards an Own Tax Resource for the European Union? Why? How? And When?' (2004) 44 European Taxation 470; Friedrich Heinemann, Philipp Mohl and Steffen Osterloh, *Reform Options for the EU Own Resources System* (Physica-Verlag 2008); Iain Begg, *An EU Tax: Overdue Reform or Federalist Fantasy?* (Friedrich-Ebert-Stiftung 2011); Alexandre de la Motte, 'A European Tax: Legal and Political Issues' (2014) 134 Revue de l'OFCE 141; Büttner and Thöne (n 49).

autonomy of the Member States and the autonomy of the Union as a whole. By coming together in a federation, the Member States give birth to a new political association that is autonomous from them. A federal union of states is different from the sum of its parts.[83]

Importantly, Larsen's description depicts a multi-pronged autonomy (ie politically, economically, socially) between Union and Member States. However, the former has seen a radical evolution regarding its connection with EU citizens. At the outset, the Union was created by sovereign States which wanted to guarantee peace and economic prosperity. This is what clearly derives, for instance, from article 2 of the Treaty on the European Economic Community (EEC Treaty), which very much focused on improving living standards and closer relations *between its Member States*, or the Assembly, which was composed of representatives of the *peoples of the States* (article 137 EEC Treaty). Differently, the TEU states that the Union's aim is to promote peace, its values and the well-being of *its peoples*, offering *its citizens* an array of guarantees (article 3 (1) (2) TEU) with the EP directly representing the *Union's citizens* (article 10 (2) TEU). Just as in the US constitutional history, the main constitutional difference between the Articles of Confederation and the 1787 Constitution is that the latter is primarily intended to affect rights of individuals and not those of States.[84]

Consequently, the EU, as a Union with federal features, cannot be considered as being subject to its Member States, as it has a direct responsibility vis-à-vis its citizens. In my view, it follows that Union direct taxation of its citizens can be a less imperfect alternative and deliver a better balance, namely on economic policy, both from a governance and societal point of view. It would be also a moment where the nature of EU integration would fundamentally change. Through direct taxation, European citizens would get not only connected *with* the Union but also connected *between* themselves, in a process I would designate as horizontalisation of the Union. If we look at the US experience in order to shed some light on the potential democratic impact, it would significantly increase participation in the political process.[85]

If this understanding is correct, EU citizens' voice[86] would be reframed. On the one hand, the introduction of direct EU taxes to European citizens would prompt increased political participation, thereby creating the conditions to break the vicious circle of nationalistic *juste*

[83] Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021) 78.
[84] Hylton v United States [1796] 3 U.S. 171, in particular the opinion of Justice James Iredell, which was one of the most fervent supporters of States' rights during the Philadelphia Convention. See also Bruce Ackerman, 'Taxation and the Constitution' (1999) 99 Columbia Law Review 1.
[85] This is what occurred after the 16th amendment came into force, in 1913, which vested the federal government with the power to lay and collect direct taxes on income without apportionment between States. See https://www.statista.com/statistics/1139763/number-votes-cast-us-presidential-elections/.
[86] See Albert Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations and States* (Harvard University Press 1970); Joseph Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403.

retour and its consequences concerning policy options. On the other hand, Member States should regain their economic policy autonomy, thereby reestablishing the value of people's vote in national elections.[87] Instead of the described vertical link, whereby an attempt is made to enhance supranational legitimacy by procedural means (so-called throughput legitimacy); fiscal restrictions and surveillance are adopted in order to avoid transfer of resources *between* States; while arguably allowing monetary financing to occur via loose monetary policy, hindering the ECB's credibility in the process, the EU would be in a situation where it could deliver equal treatment for equals.[88]

Due to sovereignty concerns, it is neither politically desirable to treat States differently, as astuciously perceived by Madison prior to the enactment of the US Constitution,[89] nor to place them in a position of equal fiscal ability through a system of intergovernmental transfers, as highlighted by Buchanan.[90] However, that is not the case with people, to which the principle of equality, foreseen in article 2 of TEU, should demand differentiation in treatment by taking into account the degree of citizens' economic and social disparity, regardless of their state of residence.

Consequently, a central financial authority could treat equals equally, not to ensure equivalent standard of public services, but rather to offset the divergencies in the income and wealth levels within the different Member States. An understanding such as the one I am proposing would, I believe, successfully address the 'poisonous tree' of European integration, which is the idea of the creation of a transfer union *between* States. Union equity transfers to individuals would neither represent subsidisation of some Member States nor charitable contributions to financially less well-off people. Rather, they would be necessary adjustments to keep the Union together and, as such, ethically due to lower-income citizens. Therefore, potential inequities in the treatment of equals would be due to Member State's autonomous political decisions, not related to citizens State of residence. Just as the federation, Member States are not simply subordinated subjects of the Union, as equal treatment for equals is

[87] For an overview of euro crisis emergency management, which sometimes introduced severe constraints of national democratic processes, see Akritas Kaidatzis, 'Socioeconomic Rights Enforcement and Resource Allocation in Times of Austerity: The Case of Greece 2015 – 2018' in Anuscheh Farahat and Xabier Arzoz (eds), *Contesting Austerity: A Socio-Legal Inquiry* (Hart Publishing 2021); Larsen (n 83).

[88] Equals means individuals in the same objective economic circumstances, usually employed in the calculation of tax burdens.

[89] Madison was of the view that it was correct to apportion a proportional share in the government to every district. However, among independent and sovereign States bound together, the parties, however unequal in size, ought to have an equal share in the common councils, in what he saw as a good balance between proportional and equal representation. See James Madison, 'No 62: Concerning the Constitution of the Senate, with Regard to the Qualifications of the Members; the Manner of Appointing Them; the Equality of Representation; the Number of the Senators, and the Duration of Their Appointments' in George Carey and James McClellan (eds), *The Federalist* (Liberty Fund 2001) 319, 320.

[90] James Buchanan, 'Federalism and Fiscal Equity' (1950) 40 The American Economic Review 583.

superior to that of equalisation among organic state units.[91]

Such an approach would favour foreseeability, transparency and match citizens expectations. First, it would detach potential future programmes resembling NGEU from the occurrence of emergency events, turning them more foreseeable and, as a result, enhancing the Union's economic stability. Second, it would favour transparency, given that the allocation and stabilisation functions would not get mixed (ie to further certain EU policies, there would be no need to devise unrelated requirements, such as unemployment rates or GDP losses, in order to boost funding for some States). Lastly, as referred above, the mismatch between what the EU delivers and citizens expectations is increasing,[92] which means that indirect taxes will probably not be enough to substitute current national contributions to the EU budget, let alone fund programmes such as NGEU or genuine, integrated EU policies. Just as in the United States, the first direct tax on income was established during the Civil War. Although it was temporary and extinguished shortly after the war came to a close, it was necessary due federal income shortage, given that revenue from customs duties and indirect taxes was still mostly allocated to pay States' debts associated with the Revolutionary War.[93]

5. Conclusion

NGEU is a landmark achievement and a pivotal moment in EU integration. In fact, the covid-19 pandemic and the war in Ukraine made Member States realise that acting as a whole is worth more than the sum of its parts. Importantly, the EU now has a temporary, supranational budgetary instrument at its disposal to deliver European public goods on an unprecedented scale, distributing part of the funding as grants, something that would have been unthinkable before the health crisis.

However, given NGEU's actual features and overall significance, the European Hamiltonian moment many proclaim seems an overestimation, as Member States remain fully responsible for their public debt. Moreover, the instrument's effect is not primarily one of stabilisation, as exemplified by the fact that most Member States had already achieved, or even surpassed, pre-pandemic economic levels when implementation started. It is possible that the investments fostered may result in more resilient economies in each Member State and in the EU as a whole, therefore providing a certain stabilisation effect for future crises. However, budgetary instruments which serve this purpose are meant to primarily deliver during economic

[91] ibid, 591.The principle of Member State fiscal responsibility would have to be respected. However, that would have to be made, in my view, through the market, not the political process, as it is currently the case in the EU.
[92] After NGEU, there were already mentions to possibly reforming and revamping the EU fund for defense (https://www.politico.eu/article/europe-defense-efforts-budget-underwhelming-war-ukraine-russia/) and to set up an EU fund to tackle the energy crisis (https://www.spdfraktion.de/system/files/documents/position-leitlinien-zukunftsgerichtete-europaeische-industriestrategie.pdf).
[93] See Woźniakowski (n 2).

downturns,[94] not after.

Although out of scope of this paper, in my view the horizontalisation of the EU would imply a significant restructuring of the economic governance framework currently in place, notably regarding institutional competences on ORD and MFF,[95] sub-national fiscal restrictions and surveillance, the form and locus of Member States representation[96] and the way leaders of EU institutions are chosen.

As Robbins asserts, a 'federation will stand or fall by the adequacy of its economic constitution'.[97] In fact, due to an initial failure to act, the three crises in the last decade and a half have shown the EU's added value to the European public. The war in Ukraine, in particular, may be the tipping point for the EU, just as the revolutionary and civil wars were for the US. Arguably, the EU is currently entering its most important critical juncture since its inception, whereby the responses it encounters to structurally change the economic union will transform the nature of the integration process for decades to come. Reconciling the growing gap between citizens' aspirations from Union action and Member State government's deliverables can best be done by directly connecting the citizens with the Union and citizens between themselves. Direct taxation and EU added value expenditure are the way to do it, as the American example so profusely teaches.

[94] Arjan Lejour and Willem Molle, 'The Value Added of the EU Budget: Subsidiarity and Effectiveness', *The EU Budget: What should go in? What should go out?* (Swedish Institute for European Policy Studies 2011) 87, 87.

[95] For instance, the length of the financial frameworks. See Ákos Kengyel, 'A Neglected Aspect of the Debates on the EU Budget: Duration of the MFF' (2018) 53 Intereconomics 225.

[96] Federico Fabbrini, 'The Relation Between the European Council and the Council: Institutional Arguments in Favour of an EU Senate' (2016) 22 European Public Law 489.

[97] Lionel Robbins, *Economic Aspects of Federation* (Macmillan 1941) 3.