

| ARTÍCULO

Los límites de la gobernanza económica europea a través de la ruta legislativa y jurisprudencial de la "constitución económica" alemana posterior a Weimar**A glimpse of the limits of the European economic governance through the legislative and jurisprudential route of the "after-Weimar" German "economic constitution"**

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RESUMEN.

El objetivo de esta investigación es reconstruir los límites de la gestión de las finanzas públicas en la Unión Monetaria Europea, utilizando la perspectiva del camino de la "constitución económica" alemana posterior a Weimar. El proceso federativo de la UE no presenta las mismas características legales de ningún otro, incluido el alemán. Sin embargo, algunos problemas son necesariamente similares y similares soluciones se pueden encontrar. En consecuencia, este documento se centra en la sucesión de reformas en la *governance* económica europea desde 2008 analizando, en particular, el tema de compartir las obligaciones de la deuda a nivel europeo, esto a través del diálogo entre el *Bundesverfassungsgericht* y la institución de la UE.

PALABRAS CLAVE.

Uem, Weimar, constitución económica, proceso federativo, *Bundesverfassungsgericht*, Eurobonds, impuestos

ABSTRACT.

The aim of this research is to reconstruct the actual limits of the legal framework of the management of public finances in the European Monetary Union, using the perspective of the path of the after-Weimar" German "economic constitution". The EU federative process doesn't present the same legal characteristics of any other, including the German one. Nevertheless, some problems are necessarily similar, and similar solutions may be found. Consequently, this paper focuses on the succession of reforms in European economic governance since 2008 analyzing, in particular, the theme of sharing debt liabilities at a European level through the dialogue between the *Bundesverfassungsgericht* and the EU institution.

KEY WORDS.

EMU, Weimar, "economic constitution", federative process, *Bundesverfassungsgericht*, Eurobonds, taxation

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1. Introduction

The crisis of government bonds has led to a succession of overlapping reforms in European economic governance. The leitmotiv of these reforms lies in the implementation of the economic-juridical theory summarized as "austerity". Theory that involves stringent compliance of the balance between revenue and expenses, for national public budgets, to reduce public debt and deficit.

Several studies addressing the policy of that period concluded that in a moment of deep crisis our policymakers chose "to legitimize the status quo, avoid abrupt, disruptive breaks with past regimes, and "muddle through" until the situation stabilizes". Similar was the objection posed to the choice made by the policymakers of the Republic of Weimar. For Kirchheimer the Weimar Constitution was "The constitution without decision"¹.

Departing from the above assertions, this paper aims to reconstruct the actual limits of the legal framework of the management of public finances in the European Monetary Union. This analysis is associated with the path of the after-Weimar" German "economic constitution" for two reasons.

The first reason is related to the construction of the German federation after World War II. Germany built up a social and economic system, around its Federal budget, able to answer at all the crises that hit the European continent since then. Furthermore, the after-war German system was able to defend himself not only against the blow of crisis but also from the construction of another supranational system: the European Union. A resistance that has shaped the EU in its current form.

The second, descendant from the first, concerns the constant dialogue, direct or indirect, between the *Bundesverfassungsgericht* and the EU institution (from *Solange I* e *Solange II* till the *OMT-Urteil*). Essential to reconstruct the current framework of European economic governance.

Finally, this paper focuses briefly on the succession of reforms in European economic governance since 2008 analyzing, in particular, the theme of sharing debt liabilities at a European level. Europe finds itself

¹ Kirchheimer, O.; *Weimar und was dann? Entstehung und gegenwart der weimarer Verfassung*, Laubsche Verlagsbhdlg., Berlin, 1930.

now with an overhang level of debt largely exceeding its GDP. More precisely, all the southern European members (Spain, Italy, Portugal, and Greece) find themselves now in this situation. Consequently, it is widely recognized that these economies are less resilient to shock and with less capacity to create an anti-cycle fiscal policy, both factors hampering the possibilities of growth. At the same time grows all around Europe a strong social and political movement against the European project itself. A movement that directly or indirectly binds the hands of governments and therefore the European institution through their representative (both factors linked with the 1931 crisis²).

Hence since the approval of ESM and Fiscal Compact growth in popularity the idea of reforming more deeply the European Union. Multiple proposals were drawn, addressing the Eu Budget, the system of own resources, the construction of a joint European bonds system, a deep reform of the Juncker plan using and internalizing the ESM. Proposals that comes from institutions (the European Court of Auditors, EIB, President Juncker), as well as a politician (as Wolfgang Schäuble) and from a consistent part of the academic literature (for instance the letter of the 14 French-German economists: “Reconciling risk sharing with market discipline: A constructive approach to euro area reform”). Hopes and proposals that were partially included in the Multiannual Financial Framework 2021-2027.

Whereas those proposal has received widespread concern and reviews from the economic and political world, with a harsh discussion about their capacity to solve the present and long-term crisis, little work has been done by the legal side. This research will, therefore, concisely examine those proposals looking for similarities with the stabilizing instruments used in the construction of the German federation.

The aim of this research, in conclusion, is to glimpse the future of the European union *de iure condendo*, from the perspective of the route of the German economic federation.

That with two premises. First, it's unnecessary to underline how the integration path of that juridical *tertium genus* that is the European Union is impossible to understand comprehensively only with the tools of comparative law. In fact, the EU federative process doesn't present the same legal characteristics of any other, including the German one. Nevertheless, some problems are necessarily similar, and similar solutions may be found. Second, the new century needs a global solution for Europe, where the social state is the center of the policy and consequently has a strong democratic legitimation. A system with the

² T. STRAUMANN, T.; *1931, debt, crisis and the rise of Hitler*, Oxford University Press, 2019, pp. VI.

strength to really carry out a common economic policy. Stands the existence and resistance of the German constitutional equilibrium in the way of that achievement?

2. The Constitution of the Weimar Republic and beyond. Limits at the EU economic governance from the German legal system: the taxation case.

Born by the ashes of the 1918's revolution, Weimar, constitutionally speaking, was built, in the intention of the principal party of the time (SPD), as a mediation between the western liberalism and the social-economic vision of URSS. The critics of that mediation affirm that the reached balance was not a balance but a confusion. Therefore unable to give answers and react at economic and social crisis (symbolic the freedom of association together with the non-constitutionalization of right to strike). The same scholars linked that as one of the main reasons for the German crisis of 1931³ and the connected rise to power of Hitler⁴.

However, the Weimar Constitution embodied the first critical rethinking of some of the main European public-law categories, starting from those re-leading to the notion of state-national sovereignty. But above all, it has laid the foundations of an "economic constitution" that endorsed the guarantee of the fundamental elements of the capital-labor relationship. For example, guaranteeing the right to property, while at the same time creating some corrective measures⁵. Just as its sanctioned forms of control on state expenditures albeit very limited⁶.

³ STRAUMANN, T.; *1931, Debt, crisis and the rise of Hitler, op. cit.*

⁴ On the theme FRAENKEL, E.; KAHN-FREUND, O.; KORSCH, K.; NEUMANN, F. and SINZHEIMER, H.; *Laboratorio Weimar: conflitti e diritto del lavoro nella Germania nazista*, GIANNI A. and VARDARO G.; (eds), Laterza, 1982, pp. 16.

⁵ Article 156

"The Reich may transfer economic enterprises suited for nationalization into common property [..]"

Article 165

"Workers and employees are called upon to participate, on an equal footing and in cooperation with the employers, in the regulation of wages and working conditions as well as in the economic development of productive forces. The organizations formed by both sides and their mutual agreements are recognized.

Workers and employees are granted, to represent their social and economic interests, legal representations in Enterprise Workers' Councils as well as in District Workers' Councils, organized for the various economic areas, and in a Reich workers' council."

⁶ Article 85

"All Reich revenues and expenses have to be calculated for every single financial year and have to be included in the budget.

The budget is determined before the financial year begins. Under normal circumstances, the expenses are approved for one year; under extraordinary circumstances, they can be approved for a longer period. Otherwise, regulations within the budget extending over the period

Those points of ambiguity were used as a point of strength in the economic constitution of the German federation. The function of asymmetric shock stabilizer that the German federal budget has (and that the EU budget has not yet achieved), allowed handling the unification of the guarantees on the debt of the individual states which occurred in 1990. At the same time, the federal budget has a pivotal role in absorbing the consequences deriving from the unification of the 5 Länder former belonging to the DDR. Therefore, allowing to keep the exchange rate of the two post-unification coins equivalent. All marking points secured by the function, power and roles of the *Bundesbank*, living archetype of the theory of the Central Bank Independence.

Regrettably, it is not possible to address in detail the points just mentioned. For the purposes of the present research it is sufficient to underline how the tetragonal structure of the "economic constitution" of the *Bundesrepublik Deutschland*, today strongly limits the evolutionary possibilities of European economic governance. In the impossibility of analyzing each aspect, we have chosen to take the latest reform as an example, in chronological order, concerning taxation.

In 2017, President Juncker proposed to change the internal majority rules in the Council of EU in order to make the rule of qualified majority the common method of decision-making, in particular as regards the choices on own resources and on taxation. This proposal, (which can be implemented through the use of the "bridging clause"⁷ established in the treaties) was identified as a focal point in the reform process promoted by the Commission. The transition to qualified majority approval on tax rules would have made it possible: to more effectively counter tax avoidance and evasion, speed up decisions regarding the overall stability of the EU(M), increase the resources of the European budget. This programmatic vision is reaffirmed also in 2018 by President Juncker⁸ and relaunched by the European Commissioner for

of one year, or which do not deal with the Reich's revenues or expenses, are not permissible. In the budget, Reichstag may not raise expenses in the budget without the approval of Reichsrat."

Article 86

"Regarding the utilization of the Reich's revenues, the minister of finances, in the name of the Reich government, will report to Reichsrat and Reichstag. Auditing will be regulated by a Reich law."

⁷ The term "bridging clause" refers to the procedure fixed by art. 48 TEU, which provides for the possibility of attributing to the Council the power to legislate on certain matters with different majorities or procedures from those provided for by the treaties. By qualified majority rather than unanimously and by ordinary legislative procedure rather than special. This attribution can concern both a specific act or an entire sector of EU policies and allows the work of the Council of the Eu to be speeded up and made more efficient BÖTTNER, R.; The Treaty Amendment Procedures and the Relationship between Article 31(3) TEU and the General Bridging Clause of Article 48(7) TEU, *European Constitutional Law Review*, 2016/12, pp. 499-519; BARATTA, R.; *Sulle fonti delegate ed esecutive dell'Unione europea*, *Il diritto dell'Unione Europea*, 2011/2, pp. 293.

⁸ https://ec.europa.eu/commission/priorities/state-union-speeches_en (6.05.2019): "When it comes to important single market questions, I want decisions in the Council to be taken more often and more easily by a qualified majority – with the equal involvement of the European

Economic and Monetary Affairs Taxation and Customs Union. Pierre Moscovici, in fact, underlined the Commission's intention to stimulate a wide debate on the reform in question highlighting how it is no longer a question of deciding "if" this reform will be implemented but only "how and when" this will happen⁹.

The programmatic phase was followed in January 2019 by a Commission communication entitled *Towards a more efficient and democratic decision making in EU tax policy*¹⁰. The communication (addressed to the Parliament, to the European Council and the Council of the European Union) underlines the positive effects that could generate a reform of the law-making process on the subject of taxation that would overcome the rule of unanimity. He then proceeds to highlight the reforms that have not been completed due to the existence of the need for unanimous approval by all Member States within the Council of the European Union¹¹. It states at the same time that what has been accomplished has turned out to be a downward compromise in determining the ability of the Member States and the EU to give effective and efficient responses to tax avoidance and evasion. Finally, he affirms that the abandonment of unanimity would not constitute a vulnus to the financial sovereignty of the Member States, not changing in any way the attributions of the EU¹².

The taxation field has, therefore, remained one of the last to have to be regulated, at the European level, through a legislative procedure that provides for the unanimous vote of the Council of the European Union. This provision is contained in articles 113 and 115, in conjunction with art. 194 last paragraph of

Parliament. We do not need to change the Treaties for this. There are so-called "bridging clause" in the current Treaties which allow us to move from unanimity to qualified majority voting in certain cases – provided the European Council decides unanimously to do so. I am also strongly in favour of moving to qualified majority voting for decisions on the common consolidated corporate tax base, on VAT, on fair taxes for the digital industry and on the financial transaction tax."

⁹ Think-tank Bruegel conference's <http://bruegel.org/2019/02/reforming-decision-making-for-eu-taxation-policy/> and https://www.youtube.com/watch?reload=9&v=Ug0IR_fua_Y (7.05.2019).

¹⁰ See https://ec.europa.eu/taxation_customs/sites/taxation/files/15_01_2019_communication_towards_a_more_efficient_democratic_decision_making_eu_tax_policy_en.pdf (6.05.2019).

¹¹ For some solved problems see https://ec.europa.eu/info/publications/annual-activity-report-2017-taxation-and-customs-union_it (21.05.2019), https://ec.europa.eu/taxation_customs/business/company-tax/tax-transparency-package_en (21.05.2019), https://ec.europa.eu/taxation_customs/business/company-tax/action-plan-corporate-taxation_en (21.05.2019), https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en (21.05.2019), https://ec.europa.eu/taxation_customs/business/vat/action-plan-vat_en (21.05.2019), https://ec.europa.eu/taxation_customs/business/vat/digital-single-market-modernising-vat-cross-border-ecommerce_en (21.05.2019); https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en (21.05.2019).

¹² Vv.Aa.; Assessment of EU fiscal rules. With a focus on the six and two-pack legislation, *European Fiscal Board report*, 2019, pp. 78, https://ec.europa.eu/info/publications/assessment-eu-fiscal-rules-focus-six-and-two-pack-legislation_en (4.10.2019).

the TFEU. However, of actual importance for the discussion in progress is the art. 192 of the TFEU which is listing the subjects to be approved by special legislative procedure. Art. 192 expressly establishes that “The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, may make ordinary legislative” on the subjects to be approved by special legislative procedure. The aforementioned rule, as already reported, is to be ascribed to the category of the so-called "bridging clauses", or the procedure envisaged by art. 48 of the TFUE at the 7th paragraph. Clauses which provides for the possibility of attributing to the Council of EU the power to legislate on certain matters with different majorities or procedures from those provided for by the treaties. By qualified majority rather than unanimously and with ordinary legislative procedure instead of special¹³.

The definitive overcoming of the need for unanimity in the Council of the European Union on the subject of taxation requires a unanimous decision of the European Council, of the validation by the European Parliament, and the possible intervention of national parliaments.

In this phase, the "Economic Constitution" of the Federal Republic of Germany intervenes since there are rules that make the questioning of national parliaments essential for every relevant decision in an economic and financial sphere made at the European level. The aim is to defend the prerogatives that the respective constitutions, together with the EU's fundamental treaties, enshrine as remaining in their hands. According to the combined provisions of the articles 23 and 79 of the *Grundgesetz* it is mandatory to request the approval of both the *Bundestag* and the *Bundesrat*¹⁴, by the same qualified majority envisaged for the modification of the Basic Law¹⁵, for every amendment of the fundamental treaties or substantial modification of the attributions of the member States. The vote has to be approved by 2/3 of the votes expressed for the *Bundestag* and by the 2/3 of the members for the *Bundestag*. Forecast further strengthened by an ordinary law that lists the decisions for which the German government must request

¹³ BÖTTNER, R.; The Treaty Amendment Procedures and the Relationship between Article 31(3) TEU and the General Bridging Clause of Article 48(7) TEU, *op cit.* p. 499-519; BARATTA, R.; Sulle fonti delegate ed esecutive dell'Unione europea, *op. cit.*, p. 293; PRADO, C. V.; Anticipated or Tacit EU Treaty Revision via Simplified Procedures under the Control of National Parliaments: The Case of Spain (Constitutional Conditions for the Participation of the Spanish Parliament), *Revista Universitaria Europea*, 2011/15, pp. 75-84.

¹⁴ Changes in the *Grundgesetz* made just before the approval of the Maastricht treaty BESSELINK, L. F. M.; CLAES, M.; IMAMOVIĆ, Š. and REESTMAN, J. H.; *National constitutional avenues for further eu integration, Citizens' Rights And Constitutional Affairs studies*, p. 111-125, <http://www.europarl.europa.eu/studies> (08.2019).

¹⁵ BESSELINK, L. F. M.; CLAES, M.; IMAMOVIĆ, Š. and REESTMAN, J. H.; *National constitutional avenues for further Eu integration, op. cit.*, pp. 112.

the approval of the *Bundestag* and the *Bundesrat*, including bridging clauses¹⁶. Not only, also the jurisprudence of the German Federal Court reiterated the obligation (for members of its government) to inform and request authorization from the *Bundestag* for any financial aid granted to a member state operated in any form.

It is not necessary to underline that these rules are fundamentally incompatible with the tax reform prospects mentioned above. Moreover, the *Bundesverfassungsgericht* has already widely expressed that the limits of the current system of European economic governance have been reached, as will be seen in the next paragraph.

3. The *Bundesverfassungsgericht's* judgments: the *limes* has been reached?

The importance of the *Bundesverfassungsgericht's* rulings has been particularly relevant in determining some key elements of post-2008 crisis legislation. This has led to the creation of a sort of "*limes*" that implicitly shows the route of any possible hypothesis of reform that the European economic governance would need to follow to be effective. This *limes*, is built on the role that national parliaments must have on EU economic and budgetary decisions, reviving somehow the theme of "no taxation without representation" (from the Lissabon Urteil till the OMT Urteil but particularly in the ESM Urteil). At the same time, it defines the boundaries of the intervention of EU to help member states in crisis (about the help plan for Greece BVerfG, 2 BvR 987/10 ESM BVerfG, 2 BvR 1390/12), but also the limitations of the role of ECB (OMT 2 BvR 2728/13, nonchè PSPP BvR 859/15).

The analysis of the jurisprudence of the Federal Constitutional Court of Germany is therefore necessary for various reasons. Among the national courts of the euro area, it was certainly the most prolific and structured in dealing with legal issues connected to the economic crisis, partly deriving from the possibility of direct recourse by citizens¹⁷. But moreover, the central theme of his jurisprudence was the democratic control of the choices made in the economic field by EU, a subject which, even in the specifics of the legal framework of Germany, brings interesting legal matters to every European state. Those legal-political contradictions, arising from proceeding with economic integration without a systematic

¹⁶ The so-called *integrationsverantwortungsgesetz* for the list of the acts that need that procedure see BESSELINK, L. F. M.; CLAES, M.; IMAMOVIĆ, Š. and REESTMAN, J. H.; *National constitutional avenues for further eu integration, op. cit.*, pp. 117.

¹⁷ PEDRINI, F.; *Il Meccanismo Europeo di Stabilità davanti al Bundesverfassungsgericht. Una griglia di problemi en attendant Karlsruhe, Quaderni Costituzionali*, 2012.

rethinking of the European and national regulatory framework, are exposed¹⁸. With budget sovereignty posed as an insurmountable limit.

Center of the jurisprudence of the Karlsruhe court is the sentence of 12 September 2012¹⁹, with which the court ruled on the constitutional legitimacy respectively of the Fiscal Compact, the European Stability Mechanism and the amendment of Article 136 of TFEU.

In it was stated, in the wake of previous jurisprudence, as a central point for the constitutionality of the aforementioned treaties, the non-exoneration of the *Bundestag* concerning the budgetary choices. That in relation with the maintenance of the financial autonomy of the state according to what established by the art. 109 and 110 of the German Constitution²⁰.

Particularly interesting are the limits indicated to comply with the above precondition:

- the exclusion of any type of automaticity in the granting of aid and the provision of sanctions²¹;
- the impossibility for the EU legislative bodies to grant unspecific authorizations in the economic field;
- the government's obligation to inform the *Bundestag* of any important decision to be taken, regardless of the obligation of secrecy established in art. 34 MES²²;

¹⁸ See DI FABIO, U.; The OMT decision of the German Federal Constitutional Court, *German Law Journal*, 2014/2, pp. 107-382.

¹⁹ See 2 BvR 1390/12 http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html (20.10.2019)

²⁰ See DI MARTINO, A.; La sentenza del Bundesverfassungsgericht sul Meccanismo Europeo di Stabilità e sul Fiscal Compact. Una lettura alla luce della giurisprudenza precedente, *Rivista di diritto Pubblico Italiano comunitario e Comparato*, 2015.

²¹ See Geti, P. L.; Il contributo della Giurisprudenza costituzionale tedesca nella determinazione dei rapporti con l'Unione Europea, <http://www.nomos-leattualitaneldiritto.it> 2015 (18/10/169).

²² Par. 7: "the representatives in the ESM appointed by Germany or by the German Governor shall not be entitled to rely on professional secrecy under Article 34 of the Treaty establishing the European Stability Mechanism vis-à-vis a request for information from the German Bundestag or its committees and members".

- to take into account the findings made by the *Bundestag* on the subject ²³;
- clearly define the conditionalities to which the countries subject to financial assistance from the ESM must be subjected;
- place an insurmountable limit on the sum provided by the ESM as a contribution by Germany ²⁴;
- last but not least, in affirming the compatibility of the ESM with the *Grundgesetz* within these limits, the Constitutional Court affirms that although it is external to the EU institutional framework, it must respect the same limits applied to the regulations of EU²⁵;

The relevance of these assertions of the Federal Constitutional Court is self-evident. If other courts would follow this path the set of rules concerning governance, would fall within a framework of well-defined constitutional limits, weakening the observance of the European regulatory reform.

The above sentence is confirmed by the decision of the Karlsruhe judges following the first preliminary ruling to the European Court of Justice.

With the judgment 2 BvR-2728/13 the Federal Court has expressed itself on the legitimacy of the Outright Monetary Transactions, endorsing them, even if revealing some critical points:

- the need for a wide-ranging constitutional reform to be able to determine the construction of a mechanism to support the economies of other member states through the purchase of securities on the secondary market;

²³ Par. 7: “*The Federal Government shall inform the German Bundestag and the Bundesrat in matters of this statute comprehensively, at the earliest possible date, continuously and as a general rule in writing. It shall allow the German Bundestag to express an opinion on matters which affect its competencies and shall take account of its opinions.*”

²⁴ ZUMBINI, A. F.; La sentenza del Bundesverfassungsgericht sul Meccanismo Europeo di Stabilità e sul Fiscal Compact, *Saggi*, 2015.

²⁵ See: “*The overall budgetary responsibility of the Bundestag is not endangered. The European Stability Mechanism cannot make any decisions with a budget significance which have not already been approved by the legislature in the Treaty or which needs a legislative decision in the course of further development. The authority to generate outside capital is therefore no more questionable than the authority to be able to grant financial assistance in the form of a loan and in other forms*”

- a strenuous defense of the principle of democratic legitimacy. Legitimacy which, according to the Court, can be considered present only where the bodies that are the expression of the popular vote have decision-making faculty concerning the choices made in the European context²⁶;
- the compatibility of OMTs with art. 125 of the TFEU, establishing the presence of the same, only in the case of the stipulation by the states of the MES and the FC;

The tool used to guarantee compliance with these principles is the power that the Court can exercise over the member state organs. In fact, after the aforementioned judgment at the *Deutsche Bundesbank* is forbidden the possibility, as a founding member of the ECB, to participate in the OMT program if the principles proposed by the Constitutional Court are not respected²⁷.

The German Supreme Court thus opens with the above sentences a new road in the path of European integration: the fundamental principles of the state are the very limits to the German further participation in the integration process²⁸. Therefore, the integration path seems to have, according to the jurisprudence referred to above, two options: muddle through until the situation stabilizes or stipulate a complete re-modulation of the System constituted by the fundamental treaties and by the national Constitutions of the member states²⁹. In the following pages, we will analyze which of the previous paths has been followed and whether it has led to the solution of the economic problems currently faced by the European economic governance, proposing, in the conclusions, a third way.

4. The efficacy of the last reforms of the EU(M): scarcity of resources.

The reform proposals put forward by the Commission following the 2008 crisis follow two different paths. The first is aimed at a more or less defined future, for which are proposed reforms that lead to the construction of a substantially para-federal system that resolves and addresses the economic-social problems emerging from the current governance of EMU. The second is aimed at the near future in which

²⁶ Par. 28 of the sentence.

²⁷ See par. 26-27-28.

²⁸ The so called: “controlimits doctrine”.

²⁹ DI MARTINO, V. A.; La sentenza del Bundesverfassungsgericht sul Meccanismo Europeo di Stabilità e sul Fiscal Compact. Una lettura alla luce della giurisprudenza precedente, *op. cit.*, 2015.

addresses those steps that should lay the foundations for the development of the previous plan. This near future is the one dealt with by the Multiannual Financial Framework 2021-2027, an optimal point therefore to understand the road taken by the reforms of European economic governance, as well as their effectiveness.

It is appropriate to start from what has been completed, at least from a legal-institutional standpoint, namely Banking Union. Invoked as a fundamental step for the EU's progress by the Commission, the Banking Union now sees the Single Supervisory Mechanism and the Single Resolution Mechanism in action, as well as the convergence between the national regulations and the overcoming of the interdependence between the national banking system and government bonds. However, the central issue of the centralization of the banking system is the stability of the system itself, to prevent the transformation of a liquidity crisis of the banking system into a crisis of government bonds (again). The solution to this problem lies substantially in the resources allocated to those instruments that act as backstops for the banks that risk being insolvent. In this case, the resources allocated to the "single resolution fund" and the "common guarantee system for bank deposits", as well as conveyed by the Bank Recapitalization Instrument of the MES resources that have not been increased. On this point, only a first agreement was reached concerning the modification of the MES treaty to adapt it to the function described above³⁰. An ESM however with further tasks but not with additional resources. The framework presented by the Banking Union, therefore, despite its overall positivity, is weakened on the side of the effectiveness of its instruments.

A similar analysis can be performed about the operation of the Juncker Plan.

The EFSI, launched in July 2015, was presented as a success by the Juncker Commission, which announced that the investments exceeded the target set at the end of 2017, managing to spread the pre-established sum of 315 billion euros³¹. Consequently, the Commission has proposed extending the action until 2020 to activate a total of 500 billion euros starting from an additional guarantee of 26 billion euros from the European budget and 7.5 granted by the EIB.

³⁰ Draft agreement <https://www.consilium.europa.eu/media/39772/revised-esm-treaty-2.pdf> (6.10.2019)

³¹ See <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2017-0200&language=EN> (26.09.2018) and EIB analysis <https://www.eib.org/en/publications/evaluation-of-the-functioning-of-the-efsi> (26.09.2018).

However, in order to carry out an adequate analysis of the results achieved by the Juncker plan, it is necessary to relate these with the objectives that the plan had to pursue according to the words and intentions of its creator.

In this sense, we recall how the European Fund for Strategic Investments plays the role of principal actor among the reforms actually implemented to give acceleration to the EU economic recovery. Not only, at least in part, the reasons for the current slowness, almost stagnation, in the recovery of the European economic system³² are identified as inherent in the competitiveness deficit which compresses the productive capacity of some areas of the EU and in any case prevents them from hooking up investments on the capital market. Therefore the EFSI has also been given the vanguard role of a series of reforms intended to bring the model of European economic governance closer to that of a state with a budget capable of making transfers to that part of its "community" in a situation of greater economic and social difficulty than another³³. In order to achieve, obviously at least a small part, of the aforementioned objectives, the Juncker plan should have intercepted projects lacking the capacity to attract investments on the capital market and obtain broader results through them than those that the resources destined would have achieved if indeed used in the original spending targets³⁴. Not only that, in order to have the desired impact, such projects should have been identified among those coming, not only from countries with a deficit in competitiveness, but also from areas with a strong depression in Member States that are overall recovering³⁵.

It can already be seen that the comparison between the results and the objectives summarized above was not intended to be particularly positive at the outset. Moreover, the Juncker Plan has been contested on several sides for its limited resources³⁶. Moreover, its own functioning has been indicated as non-

³² See as an example the actual situation of the German economy <https://www.bundesbank.de/en/tasks/topics/monthly-report-industry-and-exports-responsible-for-economic-slowdown-803942> (1.10.2019)

³³ See DE GRAUWE, P.; *Economia dell'unione monetaria*, Il Mulino, 2016; TOSATO, G. L.; L'integrazione europea ai tempi della crisi dell'euro, *Rivista di diritto internazionale*, 2012, pp. 681; TORRES, R.; Incomplete crisis responses: socioeconomic costs and policy implications, *International Labour Review*, 2010, pp. 227; BESSELINK, L.; *The Fiscal Compact and the European Constitutions: Europe Speaking German*, in *European Constitutional Law Review*, 2012, pp.1; DE WITTE, B.; *Treaty Games – Law as Instrument and as Constraint in the Euro Crisis Policy*, F. ALLEN, E. CARLETTI and SAVERIO SIMONELLI (eds.), *Governance for the Eurozone. Integration or Disintegration?*, *Policy report CEPR*, 2012, pp. 141.

³⁴ See CLAEYS, G. and LEANDRO, A.; Assessing the Juncker Plan after one year, *Bruegel working papers*, 2016, <https://bruegel.org/2016/05/assessing-the-juncker-plan-after-one-year/> (10.08.2019).

³⁵ See *ex multis* CITARELLA, A. and FILOCAMO, A.; Processo di integrazione europea: economia di mercato, vincoli di bilancio e obiettivi mancati della politica di coesione, *Rivista economica del Mezzogiorno*, 2017/2.

³⁶ See S&P WILKINS, M.; EKBOM, A.; SALMON, A.; SIX, J.-M.; LYSSENKO, T. and TAHIRI, S.; *Europe's Investment Plan Surges To €500 Billion, But Is It Working?*, 2017,

performing in the light of the areas of the economic and geographical origin of the projects identified by the Investment Committee³⁷. It should be noted that the same has been concentrated in a substantially equivalent manner on the Member States (for example by involving equally Italy and Germany³⁸) overall denoting the limited effectiveness of the redistributive effect of the Fund³⁹. Furthermore, looking within the areas of the financed projects, it is possible to see how the Juncker plan has intercepted proposals coming from already consolidated realities, not even operating within these areas to stimulate the convergence of the European industrial and social sectors⁴⁰. Function attributed to him by the words of President Juncker. In conclusion, it results that 3 projects financed out of 4 would have been able in an autonomous way to intercept investments on the capital market⁴¹.

The EFSI, whose funding has been confirmed, and indeed increased, also for the period 2021-2027, addresses the core of the topic addressed in the present research. In fact, it shows the level of ineffectiveness, in the economic sphere, reached by the instruments created by the EU institutions, showing the limited resources with which the Commission had to face the problems presented to it.

<https://www.spratings.com/documents/20184/1481001/Europes+Investment+Plan+Surges+To+500+Billion+Euros+But+Is+It+Working+Correction2/fd3bc20a-74ae-49bd-85fb-16292ff707bd> (20.11.2018). But also MAJOCCHI, A.; The juncker plan: a turning point, but not enough, *Centro Studi sul Federalismo*, 2015/3 nel quale si sottolinea peraltro che: “*There are two main flaws in the plan: firstly there is no additional public money on the table and, secondly, there is a problem of governance since the choice of investments and the distribution of benefits among Member States is not a technical issue but requires a political choice that cannot be assigned to the EIB*”. Sottolinea dalle pagine del Financial Times Sarah Gordon “*The idea was never quite what was advertised. The seed capital, about €20bn over three years, was not new money but was cannibalized from the EU's research plan Horizon 2020, the Connecting Europe transport infrastructure facility and the EU budget*”. GORDON, S.; *Juncker's European investment plan: the rhetoric versus reality*, Financial Times, <https://www.ft.com/content/90712920-138b-11e7-b0c1-37e417ee6c76#comments-anchor> (21.08.2019).

³⁷ See https://ec.europa.eu/commission/priorities/jobs-growth-and-investment/investment-plan-europe-juncker-plan/investment-plan-case-studies_it (09.09.2018) and Vv. Aa.; *Rapporto 2015 sull'Economia del Mezzogiorno*, Bologna, Il Mulino; BACHTLER, J.; MENDEZ, C. and POLVERARI, L.; Ideas and Options for Cohesion Policy Post-2020, *IQ-Net Thematic Paper*, 2016/38; SORIERO, G.; *Le politiche di coesione in europa tra austerità e nuove sfide*, M. CARABBA, R. PADOVANI e L. POLVERARI (eds), *Rapporto 2018 sull'Economia del Mezzogiorno-SVIMEZ*, Il Mulino, Bologna, 2016, pp. 131-134.

³⁸ *Ut supra*.

³⁹ On *less-developed area of UE* <https://www.politico.eu/article/eu-budget-battle-multiannual-financial-framework-graphics-gunther-oettinger/> (04.10.2018).

⁴⁰ See MAJONE, G.; *Dilemmas of European Integration*, Oxford University Press, 2005; MAJONE, G.; The regulatory state and its legitimacy problems, *West European Politics Journal*, 1999/22, pp. 1-24; SHUANGGE, W.; Less is More - A Critical View of Further EU Action towards a Harmonized Corporate Governance Framework in the Wake of the Crisis, *Washington University Global Studies Law Review*, 2013/12, pp. 41-94; PETRAGLIA C.; and PIERUCCI, C.; Fu vera convergenza? Le politiche di coesione e le periferie dell'Unione, *Giornale Di Scienze Regionali*, 2016/1; DE GRAUWE, P. and LI, Y.; *The Fragility of Two Monetary Regimes: The European Monetary System and the Eurozone*, *International Journal of Finance & Economics*, 2015/20, pp. 1-15; VINCI, F.; *L'efficacia dei fondi strutturali europei processi e protagonisti al vaglio della sociologia dell'azione pubblica*, Franco Angeli, Milano, 2013. For a dissenting opinion see NAVA, M.; *L'Allargamento dell'Unione Europea: questioni finanziarie, di competitività e di crescita*, *L'industria Rivista di economia e politica industriale*, 2004/2, pp. 219-240; KOK, W.; Facing the Challenge: The Lisbon Strategy for Growth and Employment, *Report from the High Level Group*, 2004.

⁴¹ See CLAEYS, G. and LEANDRO, A.; *Assessing the Juncker Plan one year after, op. cit.*

A constant element therefore appears to be the insufficiency of the funds destined to support the Commission's projects, a constant that is repeated in the analysis of the European Investment Stabilization Function. Which should have been the first step in the construction of a stabilization function that acts as a safeguard for the asymmetric macroeconomic shocks that will hit the Eurozone. Nevertheless, the budget allocated to it consists only 30 billions of euros for 5 years and is envisaged as a basis for a hypothetical leverage effect that should come from private investments and/or from third states. However, the stabilization function should intervene precisely where there is no possibility of "external" investments.

Finally, the system of own resources extended as envisaged by the Multiannual Financial Framework 2021-2027, should constitute the basis on which to build that single Minister of European Finance able to quickly deal with the decisions necessary to counter the negative effects of future crises or rather the founding stone of a budget capable of countering them. This should be matched by the creation of a European Monetary Fund supported by the internalization of the MES. While awaiting this latest evolution of the European Stability Mechanism, the enlargement of the system of own resources is, in the commission's forecast, barely sufficient to make up for the exit of the United Kingdom (and of the 95 billion euros that it brought to the European budget) from the EU⁴². In fact, the boundaries of expenditure commitments have been merely redesigned, although the funds allocated to the Common Agricultural Policy have been considerably reduced⁴³, which notoriously spills most of its funds over those areas of the EU, which are still trapped in a vicious circle of unemployment and not full use of inputs.

These inconsistencies have also been emphasized by the political world with agreed in stressing that the programs and corresponding funding presented by the MFF are too lukewarm for the tasks required⁴⁴,

⁴² F. J. NÚÑEZ e D. GROS, *The Multiannual Financial Framework, where continuity is the radical response*, CEPS Commentary, 2018.

⁴³ F. DE FILIPPIS, *Il futuro della Politica Agricola Comune nel prossimo quadro finanziario pluriennale*, Centro Studi sul Federalismo research paper, 2018.

⁴⁴ S&D members at European Parliament <https://www.socialistsanddemocrats.eu/newsroom/sds-disappointed-eu-commission-s-proposal-mff-not-enough-face-current-and-new-challenges> (04.10.2018), <https://cor.europa.eu/it/news/Pages/eu-budget-2021-2027-regions-and-cities-sound-alarm-as-cuts-and-centralisation-threaten-europes-future.aspx> (04.10.2018), <https://www.eesc.europa.eu/en/news-media/presentations/new-mff-good-starting-point-its-not-enough> (04.10.2018).

lacking basic steps for their implementation⁴⁵, others still winking at the onset of populism at the national level rather than designed to solve the problems of the citizens of EMU⁴⁶.

What in any case cannot be ignored is the difference between expectations and what will be potentially realized, remembering that, for example, according to the Report of the 4 Presidents and the Speech on the State of the Union of President Barroso of 2013, that future in which to achieve the sharing of risks and guarantees on government bonds and a modification of the treaties in this sense, corresponds temporally to that to which the Multiannual Financial Framework 2021-2027 is dedicated.

The solutions analyzed are clearly part of the path that "muddle through" until the situation stabilizes", a path compatible with the *limes* created by the dialogue between the *Bundesverfassungsgericht* and the Court of Justice. In the next paragraph will, therefore, be analyzed which alternatives are conceivable for the EU's integration route if what is possible to be implemented within the limits of the German constitutional system have proved to be ineffective.

5. Conclusions. The real question is: are Eurobonds a legal solution for Germany?

We have therefore seen as the point around which the main clash between the current system of managing European economic governance, and the economic constitution of the Federal Republic of Germany is taking place is the system of taxation. Theme closely linked with the democratic control. Strictly related it's also the main issue of the current system of European economic governance: finding resources to finance the transition from a "stability community" to a community able to face the challenges faced and resolved in the past by the German federation.

It is, therefore, possible to analyze in conclusion to the present research, a third way between maintaining the status quo and the overall rethinking of the European "economic constitution": debt sharing. Since 2010 growth in popularity the idea of sharing the guarantee of bonds that will cover all or part of the European states public debt. Called mainly "Eurobond", those assets will, in theory, give the possibilities

⁴⁵ <https://icds.ee/its-the-rules-stupid-estonia-in-the-eu-mff-negotiations/> (04.10.2018).

⁴⁶ http://www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/ari87-2018-kolling-marco-financiero-plurianual-2021-2027-perspectiva-espanola (04.10.2018) <http://aragonrural.org/leader/ue-pac-y-leader-2021-2027/ue-y-pac-2021-2027-noticias/> (04.10.2018) <http://www.ccoo.es/bd57f3bb0a96bc923d6df6ed7f7ef50a000001.pdf> (04.10.2018) <https://www.terre-net.fr/actualite-agricole/politique-syndicalisme/article/l-allemande-rejoint-la-france-pour-defendre-le-budget-de-la-pac-205-139694.html> (04.10.2018).

for the creditors to obtain their investment back from all of the Euro-governments and as a result, the interests and ratings of those will be respectively lower and higher for south European countries.

The masters of this game are however north European countries, whose reliability will be used as a guarantee in order to increase the lower rating levels of the southern European ones.

Quoting George Soros, Germany has to choose⁴⁷ "has to understand that going back is hard and will be far more damaging than going further".

Eurobonds, in a moderately optimistic scenario, will decrease the rate of interest, for instance of the Italian's bonds meaning nearly 60 billion of euro for year saved⁴⁸. That will allow structural and longtime reforms, with the possibility of reducing debt policy and long-term stability program.

What is more, the creation of Eurobonds itself is ultimately a strong tool in the hand of a central union system⁴⁹ in order to control the fiscal policy of every single state.

Secondly, this new instrument will create a domino's effect of building a stronger European union with a real grip on government policy, that in turn will need a democracy-based system led by the European parliament, annihilating the anti-euro populist forces⁵⁰.

The downside effects for Germany is the growth in the interest rates that could vary by a figure near 0 in the most positive option, (as to say bonds backed by all the European states with joint and several guarantees⁵¹), to an increase of 2%⁵² meaning an immediate loss of nearly 40 billion euros each year.

However, meanwhile is not necessary to explain that a general default will outreach by far this loss, is fundamental to underline that a strong fiscal union will have positive effects all around Europe

⁴⁷ SOROS, G.; Eurobonds or euro-exit: the choice is Germany's, *The Guardian*, April 2013.

⁴⁸ JONES, E.; *The Eurobond Proposals, Comments, and Speeches*, 2012; SAMUELSON, R.; Why the Economic Situation In Italy Matters, *Real markets*, 2016/1.

⁴⁹ VALLÉE, S.; "Paths to Eurobonds", 2013, pp. 13..

⁵⁰ Directorate general for internal policies and policy department, "EU Public Debt Management and Eurobonds" ECON 2010.

⁵¹ Vv.Aa., What will Eurobonds cost?, *Ifo Institute*, 2011.

⁵² The actual average between all the European bonds.

contending and finally beating out all the negative aspects of Eurobonds for each state, particularly for Germany.

Only concentrating our vision on the positive effect on the German economy of the stability of the consuming Italian market, the result would by far overrun the increase of the financing cost due to the growth of the interest rate.

Although, it is no possible to deny the switch of power into the European system that these reforms will need. Nearly risk-free Eurobonds will easily be the founding stone of a new system, but a system where the single state sovereignty is by far diminished.

Specifically, in this system will be possible before the emission of any Eurobonds to address national parliaments, specifically the *Bundestag* and *Bundesrat*? Again, will be possible, for German voters, to maintain this kind of “direct” democratic control over the choices made in the economic field by EU? The answer is obviously not. And therefore, this reform seems not possible without a constitutional change, or at list a change in the jurisprudence of the *Bundesverfassungsgericht*”. Change, that shall allow the reconstruction of the link between democratic control and political economy at the EU level.

On the other hand, what can be a legal challenge, and a fear for the German politician could be also their main allied. A common source of financial revenue will mean eventually the overrun of the fiscal European division. If not in a formal way, by fact, the ministries of the state will be under the control of the central overseer of the agency, ministry or institution, which will manage the common debt. At the same time in order to be part of this system southern European members will accept whatever compromise and legislative changes, also with a huge popular consensus.

The creation of a political ground where the democratic and political issues of the Europeans could be addressed and lead will need hard and long work, but still, Eurobonds gives at the central European governor powerful and final tools over the control of the peripheral economies. Control that has since now fall in is duty⁵³.

However, it appears evident that this proposal conflicts directly with the limes designed by the *Bundesverfassungsgericht*, making us conclude the present analysis with a consideration: Eurobonds are

⁵³ It is not necessary to quote the Greek default and the even worse inefficacy of the fiscal compact in reducing the PIIGS debt level.

an effective and legitimate solution for European economic governance, but a non-legal solution for *Bundesrepublik Deutschland*, are perhaps the only solution?

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