SOVEREIGN FINANCING DURING THE COVID-19 PANDEMIC: THE DEBT IMPLICATIONS OF ITALY'S SOCIO-ECONOMIC MEASURES FOR 2020 AND THE RESPONSE OF THE EUROPEAN UNION

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1. Contrary to the neoliberal dogma of minimal involvement of the State in the economy that seems to have dominated (at least the narrative of) responses to the most recent crises, the coronavirus disease 2019 (Covid-19) pandemic has prompted across the world massive intervention of public authorities for the management both of the health emergency and its economic ramifications ([1]). Some are speculating about the possibility of a "paradigm shift" in this regard, since, from the beginning of the crisis, the need for resolute

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([1]) E.g. BIN, *Il ritorno dello Stato e l'importanza del Presidente*, *laCostituzione.info*, 28 March 2020, available on http://www.lacostituzione.info/index.php/2020/03/28/il-ritorno-dello-stato-e-limportanza-del-presidente/; CROCETTA, *Diritti sociali al tempo dell'emergenza coronavirus: una "prima analisi" in chiave antropologico-giuridica*, *BioDiritto*, 16 March 2020, available on https://www.biodiritto.org/content/download/3772/45251/version/1/file/07+Crocetta.pdf; DE BERNARDI, *Coronavirus: dietro l'economia di guerra si nasconde il controllo dello Stato*, *Progresso, Europa, Riforme*, Quaderno 8/2020, 3 May 2020, available on https://perfondazione.eu/coronavirus-dietro-leconomia-di-guerra-si-nasconde-il-controllo-dello-stato/; LUCHENA, *Il c.d. decreto liquidità è una minaccia per il liberismo? Brevi note sul "nuovo" golden power*, *dirittifondamentali.it*, 1 May 2020, available on http://dirittifondamentali.it/wp-content/uploads/2020/05/Luchena-Il-c.d.-decreto-liquidita%CC%80-e%CC%80-una-minaccia-per-il-liberismo-Brevi-note-sul-%E2%80%9Cnuovo%E2%80%9D-golden-power.pdf (De Bernardi and Luchena acknowledge but have reservations about this "return of the State").

State intervention has not been questioned at any level (2). On the contrary, the current emergency is certainly evidencing the difficulties of achieving authentic international or regional cooperation (see *infra* on the European Union), «a major and worrying contrast with the follow-up to the Global Financial Crisis», and testimony that recent attacks on multilateralism (including Trump's latest announcement that the US will terminate its relationship with the WHO) (3) «have had lasting damaging effects» (4).

Within Europe, Italy has been the first and among the countries most hard-hit by the pandemic. According to available data, as of 11 June 2020, the country reported 34,114 deaths and 235,763 total confirmed cases (563 deaths per 1 million population), second only to the United Kingdom, which totalled 41,213 deaths and 291,588 confirmed cases (601 deaths per 1 million population) (5). Therefore, after declaring on 31 January 2020 an exceptional 6-month nation-wide state of emergency in anticipation of the health crisis (6) (necessary, as it has been noted, in particular «to give the central

(2) LANZAFAME, *Il lockdown, l'avvio della «fase due», e i problemi della «fase tre». La gestione dell'emergenza, sanitaria ed economica, da Covid-19 tra disuguaglianze ingiuste e disuguaglianze necessarie*, *dirittifondamentali.it*, 19 May 2020, available on http://dirittifondamentali.it/2020/05/19/il-lockdown-lavvio-della-fase-due-e-i-problemi-della-fase-tre-la-gestione-dellemergenza-sanitaria-ed-economica-da-covid-19-tra-disuguaglianze-ingiuste-e/.

(3) *Trump Cuts U.S. Ties with World Health Organization Amid Pandemic*, *Foreign Policy*, 29 May 2020, available on https://foreignpolicy.com/2020/05/29/trump-pulls-out-of-who-coronavirus-pandemic-global-health-covid-china-beijing-influence-international-institutions-global-health/; see also TALMON, *The United States under President Trump: Gravedigger of International Law*, *Chinese Journal of Int. Law*, 2019, vol. 18, p. 645 ff.

(4) E.g. STRAUSS-KAHN, *Can We Compare Covid-19 and 2008 Crises?*, *New Atlanticist*, 5 May 2020, available on https://www.atlanticcouncil.org/blogs/new-atlanticist/can-we-compare-the-covid-19-and-2008-crises/.

(5) *Covid-19 Dashboard* by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU), available at https://coronavirus.jhu.edu/. Similar data are reported by the *WHO Coronavirus Disease (Covid-19) Dashboard*, available on https://covid19.who.int/.

(6) Decision of the Italian Council of Ministers 31 January 2020, "[d]ichiarazione dello stato di emergenza in conseguenza del rischio sanitario connesso all'insorgenza di patologie derivanti da agenti virali trasmissibili" (*G.U. S.G.* 1 February 2020 No. 26).

government the possibility to intervene directly in the affairs of the sub-state administrations (regions, provinces, metropolitan cities and communes) … bypass[ing] the principles of subsidiarity and division of competences applicable in normal times») ([7]), the Italian Government, similarly to many other Governments around the world, adopted several urgent measures to meet three pressing needs: a) the containment and management of the epidemic ([8]); b) the strengthening of the *National Health Service* ("Servizio Sanitario Nazionale, SSN") put under strain by Covid-19's relatively high reproduction rate (before social distancing measure were implemented) and high risks of complications ([9]); and c) the mitigation of the socio-economic consequences of the pandemic, including through the provision of financial support to families, workers and businesses.

This last goal in particular has been pursued by the Government mainly through four law decrees (see *infra*, Section 2), whose adoption was made necessary by the dramatic impact that the spread of the pandemic and the necessary containment measures are having on the national and global economies. According to the most recent IMF's estimates, global growth is projected at -3 percent in 2020 ([10]), «the worst recession since the Great Depression, … far worse than the Global Financial Crisis», when the world economy recorded

([7]) FOURNIER, *The Italian State of Emergency: Responses and consequences for fundamental freedoms*, *EUIdeas*, 25 March 2020, available on https://euideas.eui.eu/2020/03/25/the-italian-state-of-emergency-responses-and-consequences-for-fundamental-freedoms/.

([8]) I.a. through restrictions on freedom of movement and social distancing measures, including the suspension of all public events, cultural, educational and religious services, and non-essential commercial and public sector activities. At the time of writing, the most up-to-date provisions in this regard are provided by Law Decree 25 March 2020 No. 19: "[m]isure urgenti per fronteggiare l'emergenza epidemiologica da Covid-19" (*G.U. S.G.* 25 March 2020 No. 79). For a comment, see i.a. CINTIOLI, *Sul regime del lockdownin Italia (note sul decreto legge n. 19 del 25 marzo 2020)*, *Federalismi.it*, 6 April 2020, available on https://www.federalismi.it/.

([9]) Particularly through Law Decree 9 March 2020 No 14, "[d]isposizioni urgenti per il potenziamento del Servizio sanitario nazionale in relazione all'emergenza Covid-19" (*G.U. S.G.* 9 March 2020 No. 62] and Law Decree 17 March 2020 No. 18 (see, *infra*, footnote 24).

([10]) IMF, *World Economic Outlook, April 2020: The Great Lockdown*, IMF, April 2020, p. 5 (hereinafter, *IMF WEO 2020*) what, in perspective, seems a "mere" -0.1 percent real GDP growth ([11]). In advanced economies, growth is projected at -6.1 percent in 2020 (-7.5 percent in the Euro Area, compared to -1.0 percent in emerging market and developing economies), with great disparities among European Member States (Luxemburg faring best, -4.9 percent; Germany -7.0 percent; France -7.2 percent; Italy -9.1 percent; and Greece -10 percent) ([12]). Moreover, although global growth is currently expected to rebound to 5.8 percent in 2021 (4.5 percent in advanced economies and 6.6 percent in emerging market and developing economies) ([13]), «the level of [global] GDP at the end of 2021 … is expected to remain below the pre-virus baseline» ([14]), with a cumulative loss over 2020 and 2021 of «around 9 trillion dollars, greater than the economies of Japan and Germany, combined» ([15]). The Covid-19 pandemic and its economic repercussions risk taking, thus, a dire toll on the socio-economic reality of many States, pushing unprecedented numbers of people and especially the more vulnerable below the poverty line ([16]), and

([11]) GOPINATH, *The Great Lockdown: Worst Economic Downturn Since the Great Depression*, *IMFBlog* (14 April 2020) available at https://blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression/.

([12]) IMF, *WEO 2020*, p. 7. Data on Italy have been confirmed by the *Parliamentary Budget Office* (hereinafter, PBO), *Nota sulla congiuntura*, April 2020, p. 19.

([13]) IMF, *WEO 2020*, p. 6. Financial and fiscal monitoring institutions are stressing, however, that these forecasts are characterised by a very high degree of uncertainty, as they depend «on factors that interact in ways that are hard to predict, including the pathway of the pandemic, the intensity and efficacy of containment efforts, the extent of supply disruptions, the repercussions of the dramatic tightening in global financial market conditions, shifts in spending patterns, behavioural changes (such as people avoiding shopping malls and public transportation), confidence effects, and volatile commodity prices», IMF, *WEO, April 2020*, 1, 4-6, 8 and 20. On the reliability of the economic forecasts for Italy in particular, see PBO, *Nota sulla congiuntura*, p. 19; Report to the Parliament on *Italy's 2020 Stability Programme* ([*d]ocumento di economia e finanza 2020*), "[a]udizione informale del Presidente dell'Ufficio parlamentare di bilancio nell'ambito dell'attività conoscitiva preliminare all'esame del [d]ocumento di economia e finanza 2020", 29 April 2020, pp. 11-12.

([14]) IMF, *WEO 2020*, p. 6.

([15]) GOPINATH, *supra*, footnote 11.

([16]) See e.g. *Italy's informal workers fall back on charity*, *The Economist*, 6 June 2020; UN Secretary General, *The Impact of Covid-19 on Women*, *Policy Brief*, 9 April 2020, available on https://www.unwomen.org/-

increasing inequality within and across countries, including in Europe ([17]). This can be particularly true for Italy, which, as I noted elsewhere ([18]), has recorded since the global financial crisis a significant deterioration of all socio-economic indicators, and currently ranks in the lowest positions among EU countries for poverty, social exclusion and inequality (frequently associated, from this point of view, with upper-middle, rather than high-income economies in the EU) ([19]).

The adoption of measures to address the public health emergency and to support those particularly exposed to its economic consequences, thus, is not only absolutely necessary, but actually mandatory, *inter alia* under international law. Not only is Italy (as other States) under an obligation to realise the human right to health, also through the prevention, treatment and control of epidemic diseases ([20]). It is also under an obligation, more generally, to take

/media/headquarters/attachments/sections/library/publications/2020/policy-brief-the-impact-of-covid-19-on-women-en.pdf?la=en&vs=1406.

([17]) See e.g. *Covid-19 threatens Europe's success at fighting inequality*, *The Economist*, 6 June 2020.

([18]) SCALI, *Sovereign Debt, "Austerity" and Socio-Economic Rights: Italy's 2019 Budget between EU Fiscal Rules and International Human Rights Law*, *Italian Yearbook of Int. Law*, 2018, vol. 28, p. 135 ff. at p. 149.

([19]) According to the latest available Eurostat data, in 2018, 27.3 percent of the population in Italy (i.e. more than one in four persons, or approximately 16.5 million people out of a total population of around 60.5 million) was at risk of poverty or social exclusion (AROPE) (above the EU-28 average of 21.8 percent). In 2018, Italy ranked 23rd out of 28 EU countries for its share of AROPE, ahead only of Lithuania (28.3 percent), Latvia (28.4 percent), Greece (31.8 percent), Romania (32.5 percent) and Bulgaria (32.8 percent), Eurostat, *At risk of poverty visualised*, available on https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20191017-1; Eurostat, *Living conditions in Europe – 2018 edition*, available on https://ec.europa.eu/eurostat/documents/3217494/9079352/KS-DZ-18-001-EN-N.pdf/884f6fec-2450-430a-b68d-f12c3012f4d0.

([20]) See i.a. Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 16 December 1966, and Article 11 of the *European Social Charter* (Revised), 3 May 1996, European Treaty Series - No. 163. See also European Committee of Social Rights*, Statement of interpretation on the right to protection of health in times of pandemic*, 21 April 2020, available on https://rm.coe.int/statement-of-interpretation-on-the-right-to-protection-of-health-in-ti/16809e3640. For a comprehensive discussion of the right to health under international law, see i.a. ACCONCI, *Tutela della salute e diritto internazionale*, Padova, 2011.

steps to achieve progressively the full realisation of *all* economic and social rights – including the rights to work, to social security, to an adequate standard of living and to education threatened by the very economic consequences of the pandemic – ([21]) and to ensure «the widest possible enjoyment of these rights» and «to protect the more vulnerable members of society … at any time, even and especially in times of severe resources constraints» ([22]).

Yet, these obligations collide with practical limitations. The certainly due socio-economic measures adopted by many Governments to mitigate the economic consequences of the pandemic, necessitate of extraordinary resources, which many countries are able, at present, to raise only through additional borrowing. For countries, such as Italy, that entered the crisis from an already vulnerable fiscal position, this means not only that their fulfilment of such obligations is essentially left to the "friendliness" of financial markets, but also that it can only be achieved by compromising (possibly long-term) the sustainability of their public finances. This now overly familiar dilemma represents a political and legal contradiction that has remained unresolved, also during the current emergency. The economic shock generated by the pandemic may be symmetric, not necessarily so the ability of States to respond adequately to it.

This Chapter will illustrate the main socio-economic measures so far adopted by Italy to counter the economic effects of the pandemic and their budgetary implications (Section 2), before introducing (Section 3) and offering a very provisional interpretation (Section 4) of the new key mechanisms put in place by the EU to assist the exceptional financing needs of its Members States. Since the pandemic and its effects are, unfortunately, still unfolding, any account and assessment of these measure can only be partial at this time.

([21]) Articles 6, 9, 11 and 13 ICESCR. These and other economic and social rights are similarly protected by the European Social Charter.

([22]) Committee on Economic Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, UN Doc. E/1991/23, paragraphs 11-12; *An evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the Covenant*, 21 September 2007, UN Doc. E/C.12/2007/1, para. 4.

2. As mentioned above, the measures adopted by Italy in response to the economic consequences of the emergency have been laid out in Law Decree No. 9/2020 (limited to the communes in Lombardy and Veneto that have been most affected by the epidemic) ([23]) and later extended to the entire national territory and to additional categories of recipients with Law Decrees No. 18/2020 (so-called "Cura Italia"), No. 23/2020 (so-called "Liquidità") and No. 34/2020 (so called "Rilancio") ([24]). Several of these measures are aimed at strengthening the SSN, and at providing economic and financial support to businesses especially in the sectors that, in Italy, have been most affected by the containment measures (e.g. tourism and culture) ([25]). The decrees also provide economic support to

([23]) Law Decree 2 March 2020 No. 9, "[m]isure urgenti di sostegno per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da Covid-19" (*G.U. S.G.* 2 March 2020 No. 53).

([24]) Law Decree 17 March 2020 No. 18, "[m]isure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da Covid-19" (*G.U. S.G.* 17 March 2020 No. 70); Law Decree 8 April 2020 No. 23, "[m]isure urgenti in materia di accesso al credito e di adempimenti fiscali per le imprese, di poteri speciali nei settori strategici, nonché interventi in materia di salute e lavoro, di proroga di termini amministrativi e processuali" (*G.U. S.G.* 8 April 2020 No. 94); Law Decree 19 May 2020 No. 34, "[m]isure urgenti in materia di salute, sostegno al lavoro e all'economia, nonché di politiche sociali connesse all'emergenza epidemiologica da Covid-19" (*G.U. S.G.* 19 May 2020 No. 128, *S.O.* No. 21).

([25]) For a detailed overview of these measures and their budgetary implications, see Italy's *2020 Stability Programme* (*documento di economia e finanza 2020*), 24 April 2020, Doc. LVII n. 3, available on https://ec.europa.eu/info/sites/info/files/2020-european-semester-stability-programme-italy_it.pdf; PBO, Reports to the Parliament on the "Cura Italia" decree, "[m]emoria del Presidente dell'Ufficio parlamentare di bilancio sul DDL AS 1766 di conversione del DL 17 marzo 2020, n. 18 recante "misure di potenziamento del Servizio Sanitario Nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da Covid-19", 26 March 2020; on the "[l]iquidità" decree, "[m]emoria del Presidente dell'Ufficio parlamentare di bilancio sul DDL AC 2461 di conversione del DL 8 aprile 2020, n. 23 recante "misure urgenti in materia di accesso al credito e di adempimenti fiscali per le imprese, di poteri speciali nei settori strategici, nonché interventi in materia di salute e lavoro, di proroga di termini amministrativi e processuali", 30 April 2020; and on the "[r]ilancio" decree, "[a]udizione informale del Presidente dell'Ufficio Parlamentare di Bilancio sul DDL di conversione del DL 19 maggio 2020, n. 34 recante "misure urgenti in materia di salute, sostegno workers and families (more than €8 billion in "Cura Italia" and €25 billion in "[r]ilancio"), through an extensive set of measures which cannot be recalled in full here, but which include: 1) the suspension of payments i.a. for taxes, utility bills, social contributions and mortgage instalments; 2) the prohibition of individual dismissals and collective redundancies; 3) an extraordinary extension of existing wage supplementation schemes ("[c]assa integrazione guadagni") and the relaxation of eligibility criteria; 4) the provision of one-off indemnities for specific categories of workers (e.g. the self-employed, workers in tourism, agriculture or entertainment, and domestic and seasonal workers); 5) the extension of parental leave or, alternatively, access to "vouchers" for babysitting services; *7)* the strengthening of the "[s]olidarity fund for first home loans" ("[f]ondo di solidarietà per i mutui acquisto prima casa"); and 6) the creation with the "Rilancio" Decree of an "Emergency Wage" (REM) for households in financial difficulties ([26]).

While the measures provided by Law Decree No. 9/2020 (adopted when the authorities were still unaware of the actual scale of the emergency) have been financed essentially through the reallocation of existing resources (Article 36 Law Decree 9/2020), the "Cura Italia" and "Rilancio" decrees require additional funds for approximately €170 billion in 2020 and €25 billion in 2021, thus compelling the State to issue €75 billion circa (or 4.5 percent of

al lavoro e all'economica, nonché di politiche sociali connesse all'emergenza epidemiologica da Covid-19", 27 May 2020.

([26]) *Ibid*., p. 34. In addition, on 28 March 2020, the President of the Council of Ministers authorised the advance disbursement of €4.3 billion under the "Communal Solidarity Fund" ("[f]ondo di solidarietà comunale") to provide local authorities with additional liquidity, also to ensure the continued delivery of public services; and, on 29 March 2020, the Head of the Civil Protection Department has transferred additional €0.4 billion to local authorities (communes) for the implementation of "food solidarity" initiatives through the provision of food stamps, food and other essential goods, see Decree of the President of the Italian Council of Ministers 28 March 2020: "[c]riteri di formazione e di riparto del Fondo di solidarietà comunale 2020" (*G.U. S.G.* 29 March 2020 No. 83); Order of the Head of the Civil Protection Department (Ocdpc) 29 March 2020 No. 658: "[u]lteriori interventi urgenti di protezione civile in relazione all'emergenza relativa al rischio sanitario connesso all'insorgenza di patologie derivanti da agenti virali trasmissibili" (*G.U.* 30 March 2020 No. 83). See also Italy's *2020 Stability Programme*, *supra*, footnote 25, p. 137.

Italy's GDP) of "new debt" in 2020 (and €25 billion in 2021) ([27]). The need for additional borrowing entailed a marked revision of Italy's 2020 fiscal targets, requiring *1)* a clear deviation from EU fiscal rules, particularly the country-specific medium-term budgetary objective (MTO) ([28]), and 2) the activation of the special procedure foreseen by Article 81 of the Italian Constitution ([29]) and implementing Law 243/2012 ([30]).

With regard to EU fiscal rules, on 20 March 2020, the European Commission (EC) acknowledged that «as the [Covid-19] crisis is an event that is outside the control of governments … the unusual event provision [see *infra*] of the Pact applies[,] … impl[ying] that the budgetary impact of the above-mentioned measures will be excluded when the Commission assesses compliance with the Stability and Growth Pac» ([31]). More importantly, the EC announced that «given the expected severe economic downturn resulting from the Covid-19 outbreak», the current conditions permit to activate, for the first time since its inception in 2011, the "general escape clause" set out in Articles 5(1), 6(3), 9(1) and 10(3) of Regulation (EC) 1466/97 and Articles 3(5) and 5(2) of Regulation (EC) 1467/97 ([32]), which states that «in periods of severe economic downturn for the euro area or the Union as a whole, Member States may be allowed temporarily to depart from the adjustment path towards the medium-term budgetary

([27]) *Ibid.*, p. 9.
([28]) The MTO is a country-specific numerical value identifying the country's medium-term objective for its structural balance (i.e. not taking into account the effects of the economic cycle and one-off measures). It can vary, depending on the assumed trend growth and debt level, between a surplus of 1 percent and a deficit of 1 percent of GDP. Italy's MTO has been set at 0.0 percent of GDP in 2005.
([29]) On the recourse to Article 81 and the need to deviate from the MTO under the current emergency, see i.a. BUZZACCHI, *Scostamento di bilancio da coronavirus*, *lacostituzione.info*, 13 March 2020, available on https://www.lacostituzione.info/index.php/2020/03/13/scostamento-di-bilancio-da-coronavirus/; BARTOLUCCI, *Le prime risposte economico-finanziarie (di Italia e Unione europea) all'emergenza Covid-19*, *Federalism.it*, 13 March 2020.
([30]) Law 24 December 2012, No. 243, "[d]isposizioni per l'attuazione del principio del pareggio di bilancio ai sensi dell'art. 81, sesto comma, della Costituzione" (*G.U. S.G.* 15 January 2013 No. 12).
([31]) *Communication from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pac*t, 20 March 2020, COM (2020) 123 final, p. 1.
([32]) *Ibid.*

objective, provided that this does not endanger fiscal sustainability in the medium term» ([33]). According to the EC, activation of the clause «allows Member States to undertake budgetary measures to deal adequately with [the] situation, "within" the preventive and corrective procedures of the Stability and Growth Pact» ([34]). As the Chairman of the Italian PBO has observed, this announcement has *de facto* implemented a temporary suspension of the preventive arm of the Stability and Growth Pact ([35]).

Article 81 of the Italian Constitution – which has been amended in 2012 ([36]), in the aftermath of the 2009 Eurozone debt crisis, to introduce *inter alia* the balanced budget principle in the Constitution – now provides that recourse to borrowing can only be made «for the purposes of taking account of the effects of an economic cycle or, subject to authorisation by Parliament passed by an absolute majority vote of members, in "exceptional circumstances"» ([37]). Implementing Law 243/2012 defines, «in accordance with EU law» ([38]), «exceptional events» as referring to «a) periods of severe economic recession in the euro area or in the entire European Union; or b) extraordinary events beyond the control of the State, including serious financial crises and natural catastrophes that have a major

([33]) *Ibid*., p. 2.
([34]) *Ibid.* (emphasis added).
([35]) PBO, Report of the Chairman of the PBO to the Parliament, "[m]emoria del Presidente dell'Ufficio parlamentare di bilancio ai fini dell'attività conoscitiva preliminare all'esame della Relazione al Parlamento predisposta ai sensi dell'art. 6, c. 5 della L. 243/2012", 5 March 2020, p. 15.
([36]) Constitutional Law 20 April 2012 No. 1, "[i]ntroduzione del principio del pareggio di bilancio nella Carta Costituzionale" (*G.U.* 23 April 2012 No. 95).
([37]) Article 81(2) Italian Constitution, emphasis added.
([38]) Article 5(1) of Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (*O.J.* L 306/12 23 November 2011): «[i]n the case of an unusual event outside the control of the Member State concerned which has a major impact on the financial position of the general government or in periods of severe economic downturn for the euro area or the Union as a whole, Member States may be allowed temporarily to depart from the adjustment path towards the medium-term budgetary objective referred to in the third subparagraph, provided that this does not endanger fiscal sustainability in the medium term».

impact on the general financial position of the country» ([39]). When one such exceptional event occurs, Law 243/2012 requires «the Government … [to] submit a report to the Houses of Parliament, containing … a specific authorisation request specifying the expected magnitude and duration of the deviation from the original [budget] target, indicating the purposes for which the resources available as a consequence of the deviation will be allocated and setting out its plan for realigning the public accounts with the budget targets» ([40]). The Government's request must be authorised by the Parliament with an absolute majority vote of its members.

To this end, the Italian Government submitted to the Parliament, in March and April 2020, two authorisation "reports" in relation to the borrowing needs raised by the "Cura Italia" and "Rilancio" decrees ([41]), which the Parliament promptly approved, being there no doubts that the Covid-19 pandemic qualifies as an "exceptional event" under Article 81 of the Italian Constitution, justifying thus a deviation from established fiscal targets ([42]). Therefore, as it has been correctly argued, notwithstanding its exceptional character, Italy's additional borrowing is taking place "within" the existing fiscal regime ([43]). This has only been temporarily relaxed to create some necessary fiscal space.

It seems worth mentioning, as well, that in the present case, the socio-economic measures adopted by the Italian Government (and in a similar form by other European governments) resonate with the "guiding principles" that have been put forward in recent years by

([39]) Article 6(2) Law 243/2012.

([40]) Article 6(3) Law 243/2012.

([41]) *Relazione al Parlamento predisposta ai sensi dell'articolo 6, comma 5, della legge 24 dicembre 2012, n. 243*, submitted by the President of the Italian Council of Ministers (Giuseppe Conte) on 5 March 2020 (with an addendum of 11 March 2020), Doc. LVII-*bis* No. 1; *Relazione ai sensi dell'articolo 6, comma 5, della legge 24 dicembre 2012, n. 243*, annexed to Italy's 2020 Stability Programme (*Documento di Economia e Finanza 2020*), 24 April 2020, Doc. LVII No. 3 Annesso.

([42]) See also PBO, Report of 5 March 2020, *supra*, footnote 35, p. 15. Although the current emergency clearly represents an unprecedented event, it must be mentioned, however, that since 2014 (i.e. when the new constitutional rules started applying) the Italian government has always requested authorisation under Article 81(2) of the Constitution (which the Parliament has regularly approved), thus repeatedly postponing the achievement of its MTO, *ibid*., p. 14.

([43]) BUZZACCHI, *supra*, footnote 29.

the UNCTAD and key international human rights monitoring bodies to ensure compliance of the budgetary (including debt-related) practice of States with their human rights obligations ([44]). This adherence is, however, purely fortuitous (the guiding principles not being legally binding, nor even remotely mentioned within the documents of the Government) and probably due to the consonance, in practice, between the economic policy adopted by most governments to counter the effects of the Covid-19 pandemic and the underlying "Keynesian-oriented approach" of the principles ([45]).

As a consequence of the additional borrowing, Italy's deficit is expected to rise from 1.6 percent of GDP in 2019 to 10.4 percent of GDP in 2020, i.e. nowhere close to the 3-percent-of-GDP reference value of the Treaty on the Functioning of the European Union (Article 126), an excess that the European Commission has considered «exceptional but not temporary» ([46]). Italy's debt too is expected to rise from 134.8 percent of GDP at the end of 2019 to 158.9 percent in 2020. The Commission, however, has importantly affirmed that «notwithstanding risks, Italy's debt position remains sustainable over the medium-term, which takes account of important mitigating factors like the profile of government debt and the external position» ([47]).

3. Considering the outstanding financial efforts required to counter the effects of what, it seems worth repeating, is an exogenous symmetric shock, there has been intense discussion over

([44]) See, in particular, UNCTAD, *Principles on Promoting Responsible Sovereign Lending and Borrowing*, 10 January 2012; Report of the Independent Expert on "the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights", Cephas Lumina: Guiding principles on foreign debt and human rights, UN Doc. A/HRC/20/23 (2011); Human Rights Council, *Guiding Principles on Human Rights Impacts Assessments of Economic Reforms*, Report of the Independent Expert on "the effects of foreign debt and other related international financial obligations of State on the full enjoyment of human rights, particularly economic, social and cultural rights", UN Doc. A/HRC/40/57 (2018). For a more detailed discussion of these principles, see SCALI, *supra*, footnote 18.

([45]) *Ibid*., p. 149.

([46]) European Commission, *Italy: Report prepared in accordance with Article 126(3) of the Treaty on the Functioning of the European Union*, Brussels, 20 May 2020, COM (2020) 535 final, p. 8.

([47]) *Ibid*., p. 6.

whether the EU or the international community more at large have a "duty" to assist or cooperate with a (Member) State in difficulties ([48]). Under international law, in particular, the existence of a duty of international assistance and cooperation is still very uncertain, even more so where "economic" or "financial" assistance is involved. Such duty has been promoted, in particular, by the UN Committee on Economic, Social and Cultural Rights (CESCR), which has emphasised that «in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant [on Economic, Social and Cultural Rights] [i.e. particularly Article 2.1], international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States … [that] is particularly incumbent upon those [among them] which are in a position to assist others in this regard» ([49]). However, as it has been correctly argued, State practice appears to contradict this statement, nor the responses so far adopted by States and international organisations to the economic crisis triggered by the Covid-19 pandemic can lead to opposite conclusions ([50]).

In practice, however, the European Union has put in place a number of additional measures and new instruments to assist the Member States in their efforts to counter the economic consequences of the pandemic ([51]), some of which attempt to address the

([48]) For an analysis of the "solidarity clause" under Article 222 TFEU, see e.g. DE MIGUEL, ATIENZA-MACÍAS, *What Can We Expect from the EU Legal Framework in a Pandemic Outbreak?*, *BioDiritto*, 14 March 2020, available on https://www.biodiritto.org/content/download/3769/45245/version/1/file/04+de+Miguel_Atienza.pdf.

([49]) CESCR, *General Comment No. 3*, *supra*, footnote 22, para 14; *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/CN.4/1987/17, 6 January 1987, paragraphs 29-34.

([50]) For a consideration of this issue in relation to international disaster law and the current pandemic, see BARTOLINI, *Alcune questioni dell'emergenza Covid-19 in Italia in un'ottica di International Disaster Law (Parte I)*, *SIDIBlog*, 22 May 2020, available at http://www.sidiblog.org/2020/05/22/alcune-questioni-dellemergenza-covid-19-in-italia-in-unottica-di-international-disaster-law-parte-i/.

([51]) For a concise overview of the various measures so far implemented by the EU (including various initiatives to mobilise existing EU budget resources and a new temporary framework on State aid rules), see i.a. Italy's *2020 Stability* extraordinary financing needs of the Member States on a larger scale.

Firstly, the launch by the European Central Bank of a new "Pandemic Emergency Purchase Programme" (PEPP) for private and public sector securities (including, exceptionally, securities issued by the Greek government) which will operate – until at least the end of June 2021, or «[i]n any case, … until [the Governing Council of the ECB] judges that the coronavirus crisis phase is over» – with an envelope that, on 4 June 2020, was increased from initial €750 billion to a total of €1,350 billion ([52]).

Secondly, the establishment by the "European Stability Mechanism" (ESM) of the "Pandemic Crisis Support", i.e. a new line of credit (based on its "Enhanced Conditions Credit Line", ECCL) available until 31 December 2022 to all euro area Member States for amounts of 2 percent of the respective Member's GDP at the end of 2019. After intense negotiations and divergent opinions especially between Northern and Southern EU Member States ([53]), it was agreed that, differently from the ECCL and ESM practice more generally, financial support under the "Pandemic Crisis Support" scheme will not be subject to conditionality: the only eligibility requirement to access this line of credit is that «euro area Member States requesting support commit to use it to support domestic financing of direct and indirect healthcare, cure and

Programme, pp. 25-26; PBO, Report to the Parliament on *Italy's 2020 Stability Programme*, *supra*, footnote 25, pp. 32-47.

([52]) ECB, *Monetary Policy Decisions*, 4 June 2020, available at https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.mp200604~a307d3429c.en.html; ECB, *Meeting of 18 March 2020*, available on https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200409_1~baf4b2ad06.en.html. For details on the contents, objectives and legal basis of the PEPP, see i.a. PESCE, *Pandemic Emergency Purchase Programme (PEPP): contenuti, finalità e basi giuridiche dell'azione monetaria UE*, *I* Post *di AISDUE*, 15 April 2020, available on https://www.aisdue.eu/celeste-pesce-pandemic-emergency-purchase-programme-pepp-contenuti-finalita-e-basi-giuridiche-dellazione-monetaria-ue/.

([53]) See e.g. CABAZZI, *L'Unione Europea al tempo del coronavirus: solidarietà cercasi*, *lacostituzione.info*, 30 March 2020, available on http://www.lacostituzione.info/index.php/2020/03/30/lunione-europea-al-tempo-del-coronavirus-solidarieta-cercasi/.

prevention related costs due to the Covid-19 crisis» ([54]). The Eurogroup has clarified that «[a]fterwards, euro area Member States would remain committed to strengthen economic and financial fundamentals, consistent with the EU economic and fiscal coordination and surveillance frameworks, including any flexibility applied by the competent EU institutions» ([55]). In a letter to the Eurogroup, the EC has further explained that, given the «one-off» and «temporary nature» ([56]) of the Pandemic Crisis Support, differently from other credit normally provided by the ESM, it will entail only a «streamlined reporting and monitoring framework», which will be conducted by the Commission and will focus only «on the use of funds to cover direct and indirect healthcare costs» (para. 1). Furthermore, the EC has clarified that the Commission «will not conduct ad hoc on-site missions in addition to the standard ones that take place regularly within the framework of the European Semester» (para. 3), and that Article 7 of Regulation (EU) No. 472/2013, compelling a Member State requesting financial assistance from the MES to commit to a macroeconomic adjustment programme ([57]), «does not apply» (para. 5) ([58]). This announcement seems to dispel at least the risk, mentioned by some, that the "conditions" required by the EU institutions under the Pandemic Crisis Support could be unilaterally amended by the latter under

([54]) Eurogroup, *Eurogroup Statement on the Pandemic Crisis Support*, 8 May 2020, available on https://www.consilium.europa.eu/en/press/press-releases/2020/05/08/eurogroup-statement-on-the-pandemic-crisis-support/. The Pandemic Crisis Support was made operational by the ESM Board of Governors on 15 May 2020.
([55]) *Ibid*.
([56]) Letter of 7 May 2020 by Valdis Dombrovskis (Executive Vice-President of the European Commission) and Paolo Gentiloni (European Commissioner for the Economy) to Mário Centeno (President of the Eurogroup and Chairperson of the ESM Board of Governors), available on https://www.consilium.europa.eu/media/43823/letter-to-peg.pdf, at p. 2.
([57]) Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (*O.J.* L 140/1 27 May 2013).
([58]) Letter of 7 May 2020 from the EC to the Eurogroup, *supra*, footnote 56.

Article 7(5) of Regulation (EU) No. 472/2013 ([59]). Nonetheless, it has been noted that the loans under this new line of credit have a maximum average maturity of 10 years, during which the material conditions and political consensus underlining this initial repudiation of conditionality might change.

Thirdly, the establishment, on the basis of Article 122 TFEU, of a "European Instrument for Temporary Support to Mitigate Unemployment Risks in an Emergency" (SURE) with Council Regulation (EU) 2020/672 of 19 May 2020 ([60]), «to provide the affected Member States with sufficient financial means under favourable terms to enable them to deal with the impact of the Covid-19 outbreak on their labour market» (para. 8). Although this instrument is more extensively discussed elsewhere in this book, it seems worth recalling its essential details. A Member State may request financial assistance under SURE «where its actual and possibly also planned public expenditure has suddenly and severely increased as of 1 February 2020 due to national measures directly related to short-time work schemes and similar measures to address the socio-economic effects of the exceptional occurrence caused by the Covid-19 outbreak», and «shall use financial assistance primarily in support of their national short-time work schemes or similar measures, and, where applicable, in support of relevant health-related measures» (Article 3). Financial assistance under the instrument – which shall not exceed €100 billion for all Member States (Article 5), no more than 60 percent of which can go to the three Member States representing the largest share of the loans (Article 9) – will be available until 31 December 2022 (Article 12)

([59]) DANI, MENÉNDEZ, *Le conclusioni dell'Eurogruppo: anatomia di una capitolazione*, *lacostituzione.info*, 11 April 2020; *Le ragioni di un rotondo NO al MES*, *lacostituzione.info*, 3 April 2020.

([60]) 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, ST/7917/2020/INIT (*O.J.* L 159 20 May 2020), pp. 1-7. See i.a. COSTAMAGNA, *La proposta della Commissione di uno strumento contro la disoccupazione generata dalla pandemia Covid-19 ('SURE'): Un passo nella giusta direzione, ma che da solo non basta*, *SIDIBlog*, 5 April 2020, available on http://www.sidiblog.org/2020/04/05/la-proposta-della-commissione-di-uno-strumento-contro-la-disoccupazione-generata-dalla-pandemia-covid-19-sure-un-passo-nella-giusta-direzione-ma-che-da-solo-non-basta/.

and will «take the form of a loan granted by the Union to the Member State concerned», also in this case without any conditionality ([61]). To that end, «the Commission shall be empowered to borrow on the capital markets or with financial institutions on behalf of the Union at the most appropriate time so as to optimise the cost of funding and preserve its reputation as the Union's issuer in the markets» (Article 4). Member States «may contribute to the instrument by counter-guaranteeing the risk borne by the Union … in the form of irrevocable, unconditional and on-demand guarantees … pro rata to the relative share of each Member State in the gross national income of the Union …» (Article 11) (Italy – whose share in the GNI of the Union amounts to 12.7 percent – should provide guarantees for approximately €3.18 billion, assuming that the full capacity of the instrument, i.e. €100 billion, will be implemented) ([62]). However, SURE will «only become available after all Member States have contributed to the Instrument in accordance with Article 11 for an amount representing at least 25 per cent of the maximum amount referred to in Article 5» (Article 12).

Finally, on 27 May 2020, the EC has proposed the creation of a new recovery instrument, "Next Generation EU", through which the Union will raise €750 billion on the financial markets (by temporarily lifting the own resources ceiling to 2 percent of EU Gross National Income), and channel support to all Member States (particularly «the most affected and where resilience needs are the greatest») in the form of *grants* (€500 billion) and loans on favourable terms (€250 billion) ([63]). Of course, the possibility that, with this new instrument, financial support to Member States is provided also through non-refundable grants rather than through loans only, would represent a novelty and could pave the way to some form of (much needed) institutionalised redistribution of resources within the Union.

4. In conclusion, with the exception of (part of) this "Recovery Fund" (the contours of which, however, have not been clearly

([61]) *Ibid.*
([62]) PBO, Report to the Parliament of 29 April 2020, p. 39.
([63]) European Commission, *Europe's moment: Repair and prepare for the next generation*, Press Release, 27 May 2020, available on https://ec.europa.eu/commission/presscorner/detail/en/ip_20_940.

defined yet), all the instruments put forward so far at the EU level rest on some sort of debt logic. Financial assistance may be provided in a form that does not add up directly to the existing debt of the Member States that require it (although ESM and SURE credit will most probably enjoy priority status over the latter), and it temporarily provides much-needed "breathing space". Yet, it still creates an obligation to repay that inevitably weighs on those countries' future budgets ([64]). As it has been noted, furthermore, both these mechanisms and the relaxed EU fiscal regime are of a temporary nature. At the end of the emergency period, the situation will revert to normality and, at that point, Italy and other countries may find themselves in a seriously aggravated fiscal position, and the EU exposed to the risks that renewed tensions on financial markets might trigger a new sovereign debt crisis for the Eurozone. Some are already worrying that the inevitable course of action could be a new round of austerity ([65]), although the Italian Government, at present, is issuing reassurances against this prospect ([66]), Others argue that the only way forward will be «a massive restructuring of public and private debts» ([67]).

Even in a world afflicted by a pandemic, there seems to be no alternative to more debt. Sovereign financing remains, also in the EU, anchored to the pretence that, in a fully globalised economy, wealth is rather "individually" achieved by the States, and any existing form of international economic solidarity rests essentially on the benevolence of the wealthier. Perhaps the EU Recovery Fund, should it ever become reality, can inaugurate a different path, at least

([64]) For an extremely interesting discussion of this aspect by the chairpersons of the independent fiscal monitoring institutions of Italy, Spain and the Netherlands, see the webinar *Spending now, spending big: fiscal policy responses to the Coronavirus crisis* organised by CEPS Think Thank, 8 April 2020, available at https://www.youtube.com/watch?v=vzh7nwX28G0. See also MONACELLI, *MES o coronabond sempre debito è*, *lavoce.info*, 15 April 2020, available at https://www.lavoce.info/archives/65629/mes-o-coronabond-sempre-debito-e/.

([65]) SHOKAR, *Will Covid-19 usher on another decade of austerity within the United Kingdom? What does this mean for the protection of economic, social and cultural rights (ESCR)?*, *EJIL:Talk!*, 13 May 2020.

([66]) See Italy's *2020 Stability Programme*, *supra*, footnote 25, p. 35.

([67]) VAROUFAKIS, *The Past, Present & Post-Pandemic Future of Debt*, 10 June 2020, available on https://www.yanisvaroufakis.eu/2020/06/10/the-past-present-post-pandemic-future-of-debt-el-pais/.

of thinking, towards new and fairer modes of financing the Welfare State.