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THE BUDGET PROCESS AND THE "CONSTITUTION"

A Comparison Between the Budgetary Procedures in the US and in the EU and Their Systemic Troubles

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Introduction

The way taxpayers' money is spent by the public authority, i.e. how fiscal and spending powers are allocated between the federal government and the Member States and between the executive and the legislature, marks a significative element of judgement for the accomplishments of a certain form of State and of Government. However, much of the performance depends on how and how many revenues are collected by the central authority in order to finance public goods. Once acquired such resources, democracies go through a budget process, strictly prescribed by law, which involves both the legislative and the executive branches of the Government in the determination of public expenditures. The outcome varies based on their interaction within the procedures and practices they have put in place. However, in recent years, due to economic trends and the setting of new rules, the role of the executive is grown over the decentralized administrations and the legislature[1]; in particular, in Europe, many constitutional reforms in favour of the executive (and central) hold over the budget process took place, due to the budgetary measures taken to prevent States recession[2].

The budget is the financial blueprint of an authority, it states the estimated income and expenses for a defined time in order to fulfil the achievement of certain established objectives. The process through which the budget gets defined in contemporary democracies has increasingly become complicated due to the several agents participating in its shaping and to the complexity of the rules underpinning it; while this complexity[3] ensures a fairer, and less vulnerable to corruption process due to the distribution of budget powers among the various authorities, it is also liable of generating shortcomings. Indeed, the tendency of failing to deliver some of its goals and to observe its principles has, on the one hand, triggered pushes for a reform of the system, and on the other, has led to the disappointment of the citizens, who rely on the institutions' action and therefore hold them accountable. Hence, the

[1] RUIZ ALMENDRAL (2015; pp. 18-22)
[2] RUIZ ALMENDRAL (2013); FABBRINI F. (2013)
[3] Both in the US: "Budgeting for the federal Government is an enormously complex process. It entails dozens of subprocesses, countless rules and procedures, the efforts of tens of thousands of staff persons in the executive and legislative branches, millions of work hours each year, and the active participation of the President and congressional leaders, as well as other members of Congress and executive officials". HENIFF JR., LYNCH, TOLLESTRUP (2012; p.1); and in the EU: "Everybody agrees that the current system is too opaque, too complex, and, let's be frank, outdated". *Towards a better, fairer and simpler funding of the EU budget*, statement by the Commissioner Janusz Lewandowski after the first meeting of the High-Level Group on Own Resources, 4 April 2014 as cited by CIPRIANI (2014; p. 29); "The HLGOR duly recognizes that the EP, the Commission, and even the Court of Auditors have raised vociferous criticism of the current system. These institutions have criticized it as being too complex and non-transparent". FABBRINI S. (2016; p. 24)

stability of the State and its form of Government, which in this analysis is the democracy, depends on the budget process (among many other factors) that, to make the State survive, must be reformed if it is not able to deliver.
This study aims to compare the budget process of the United States (US), a federal State[4], with that of the European Union (EU), a confederation of Member States[5], taking into consideration the means in which coffers are swelled (the revenue side) and how these funds are actually appropriated to the different categories of expenditure. In doing so, there will be outlined similarities between the two budget processes and the differences between the two will emerge as well. Besides, the last chapter will deal with the systemic troubles that beset both procedures: those are likely to spark major inconveniencies for the citizens on one hand (the US), and, on the other, highlight that the current design of the system of own resources may not be suitable for the aims envisaged by the Treaties (the EU).

The selection of the two case studies, the US and the EU, for a comparison is consistent with the idea that both can be defined as a *compound democracy*[6], namely, the simultaneous presence of politically diverse and asymmetric units that represent different interests and share the decision-making power in a multilevel form of Government. Indeed, according to Fabbrini[7], the EU presents certain federal elements (such as the common currency, the election of the Parliament, the judicial review, the role of the bank, the qualified majority vote rule in the Council etc.) that along with the horizontal and vertical separation of powers foster a closer link with the US form of federalism. Moreover, the two political entities share a tradition of constitutional pluralism[8], which may be the base for federalism.

However, this thesis does not seek to emphasize the federal features of the EU or to claim that the EU already has, or shall have, a federal-like form of State, it is rather focused exclusively on the comparison between the two budget processes which, regardless of the federal nature of the system, happen to possess many similarities, especially in the procedure for the setting of annual expenditures, and an expected (and desirable) common evolution path.

[4] "A Constitution is federal if two levels of government rule the same land and people, each level has at least one are of action in which it is autonomous, and there is some guarantee of the autonomy of each government in its own sphere". RIKER (1964; p. 11)
[5] "A Confederation is a loose system of administration in which two or more organizational units keep their separate identities but give specified powers to a central authority for reasons of convenience, mutual security, or efficiency". MCCORMICK (2008; p.18).
[6] S. FABBRINI (2005; p. 14); For an in-depth analysis see: S. FABBRINI (2007)
[7] S. FABBRINI (2005; p. 10)
[8] SCHUTZE (2010; pp. 32-33)

Chapter I. Revenues: the US and the EU frameworks' evolution

1.1 The origins of the federal power to tax in the US Constitution of 1789

In order to deal with federal revenues in the US, it is proper to investigate the emergence of the central government's power to tax; therefore, an in-depth historical perspective is necessary to grasp the motives and the needs that led to such framework. The transition from the Articles of Confederation to the US Constitution represents a significant shift in the distribution of competences between the states and the central power in favour of the latter. Among the powers granted to the federal authority, the ability to collect revenues (in this case through a tariff on imports) remarkably empowered the Congress[9].

The thirteen colonies of the United States adopted the Declaration of Independence on the 4th of July 1776; however, they became effectively autonomous once they managed to militarily defeat the United Kingdom (UK), the motherland, in the Revolutionary War. Such event required huge efforts and took place only in 1783. During those years, in order to economically sustain the war, the, at that time Continental, Congress and the states had to borrow money, thus assuming debts; those were essential to finance the independence struggle. According to some authors[10], it was precisely the fiscal crisis generated by the states' debts that brought to the provision of a federal power to tax in the circumstance of the drafting of a new Constitution.

The constitutional history of the thirteen colonies begins with the gathering of the first Continental Congress in 1774. This association of states-colonies, which had in common the willing to make their voice heard and eventually revolt against the UK, became increasingly tighter on the basis of the common goals of its members; therefore, the Articles of Confederation, which stand

[9] KLARMAN (2016; p. 145)
[10] SARGENT (2012); WOZNIAKOWSKI, (2018; p. 636; pp. 641-642)

out as the first constitution of the US, were drafted in 1777 and ratified later in 1781.
According to this legal basis, Congress had no competences in terms of fiscal policy, only states had, they were the only authorities able to impose and collect revenues from the citizens. However, prior to the Articles of Confederation as well as after their enactment, the federal Congress was charged with the coordination of the war efforts, so it needed means to finance its action. Accordingly, the main sources for funds were three: seeking for contributions from the states which were named as *requisitions*, printing paper money through the emission of *bills of credit* in the form of investor owned utilities (IOUs) and relying on loans with a certain interest rate from domestic and foreign creditors. The first of these sources proved quite hard to get since the Congress had no legal power to force the states to provide for federal funds and the states have often been reluctant to give their monies to the Congress because of the free rider dilemma[11]. Since the Congress had to maximise the other two sources of revenue, it ended up accumulating a huge amount of debt. The emissions of bills of credit was done on the credit of the states (since the federal authority itself could not guarantee the repayment) and the states themselves were issuing bills of credit and borrowing money in order to finance the war. This brought to a high depreciation of the paper currencies and an alarming inflation rate. It is estimated that the ratio of the federal debt plus the states' debt to Gross Domestic Product (GDP) was of approximately 40% and that the two thirds of the debt was owed by the Congress while the rest had to be divided between the thirteen states[12].

Once the war was won, the Congress and the states had to meet their obligations to repay their debts, especially with foreign creditors. While states could make use of fiscal policy raising taxes on the citizens, the central authority, which had a larger amount of debts, could not do so; at the same time, it could not even adopt a monetary policy, whereby printing more money, since it already made a large use of it and the inflation rate was too high. Therefore, the Congress tried twice to make all the states agree (due to the unanimity requirement) on an amendment of the Articles of Confederation which would have provided a duty of 5 per cent on the imported goods. The first time, in 1781, only the state of Rhode Island did not approve the proposal on the ground that it was not clear in terms of time restrictions, spending

[11] "For instance, between November 1777 and October 1779 Congress asked for four requisitions amounting to $95 million, but the states provided just $54.7 million. Moreover, from three calls between August 1780 and March 1781 amounting to $10.6 million, the states provided just $1.6 million. In total, before 1784, the states contributed only $5.8 million in specie value, i.e., cash in the form of gold or silver coins, to Congress, which fell far short of the amount needed to finance its expenditures." WOZNIAKOWSKI (2018; p. 634)
[12] SARGENT (2012; 12-13 ss.)

purpose of the income and collectors' liability. Whilst, for the second attempt, in 1783, it was the state of New York that three years later did not ratify the amendment, and in doing so, it left the Congress, again, with no revenues from taxes.

The states instead, could count on tax revenues to pay their debts and accordingly they applied a strict fiscal policy: they imposed heavy taxes on their citizens in order to face the crisis. The massive levies, far higher than those imposed during the colonial rule, generated revolts and popular unrest. The main rebellion occurred in 1786 in the state of Massachusetts, one of the most democratic states of the confederation, leaded by Daniel Shays. It was feared[13] that this event could be contagious to other states, especially where there is no such democratic participation (the state of Virginia, the most influential and populated one, was an example of that), and could threaten the very existence of the United States along with their independence (due to the alleged complicity of the UK) and those constitutional freedoms so hardly earned. The fear of contagion was real, indeed the revolts spread in the states of New Hampshire, Connecticut and Vermont; besides, a spark seemed to be growing in Virginia. There was a motivated perception that the confederation could crumble down for the same reason it came alive: the taxation issue.

In 1787, representatives of the thirteen states (named Founding Fathers or Framers) reunited in Philadelphia and drafted a new Constitution for the United States which was ratified in 1789. Following Wozniakowski's argument:

> "it was the tax-motivated political turmoil that convinced the élite in 1787 to 'revise' the Constitution – the Articles of Confederation, so soon – only six years after it was ratified. Indeed, we have a lot of evidence to suggest that Washington decided to attend the federal convention in Philadelphia after learning about Shays's Rebellion from the Knox's letters. It was, in fact, Washington's presence that was crucial to the success of the convention in drafting the Constitution that was later ratified by the states"[14]

One of the major changes of the new legal framework was indeed the attribution of a power to tax to the federal government, which was deemed necessary, along with the states' debt assumption, to relieve the burden of the states and thus placate social unrest. Moreover, the federal authority was granted exclusive competence in the area of international trade, thereby assuring the implementation of a unitary tariff policy on imports.

It is striking to note that in 1781, and especially in 1783, the states did not reach an agreement to amend the Articles of Confederation in the sense of

[13] By the elite, including George Washington

[14] WOZNIAKOWSKI (2018; p. 639)

granting a small part (5%) of their imports' income to the payment of Congress' debt but, after few years, in 1789, they did grant all the income from imports' tariffs to the federal government for the same reason (paying off the debt). This time they changed the whole arrangement for the allocation of legislative competences.
As laid down in Article (art.) I, Section (sec.) 8 of the U.S. Constitution of 1787:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; To borrow Money on the credit of the United States; To regulate Commerce with foreign Nations, and among the several States"[15]

Paradoxically, the way to lighten the states' reckless taxation was to assign a taxation power to the federal level. The levy on which the states agreed upon was a tariff on imported goods, a choice that was ideal for several reasons: the tariff was an indirect form of taxation, hence it was included in the price of imported goods, which usually were affordable only by wealthy citizens, thus avoiding popular discontent; it was imposed through coastal states, which thereby lost their prerogative of taxing the goods entering from their ports, but the burden was shared with all the US citizens who decided to purchase such goods; the coastal states were also assured by the provision that the federal tariff would finance common defence, since they were the most vulnerable states to a British attack; before the federal tariff, the thirteen states had thirteen different tariffs, thus they competed in a race to the bottom that was not beneficial to anyone and favoured British retaliation after the war, as the Constitution assigned Congress the power to regulate trade with foreign nations, a federal tariff proved immediately successful by significantly increasing the gains from international trade; due to its profitable impact, the tariff could repay the debts; and finally, the states no longer had the obligation to pay for current federal expenditures.

The federal tariff proved extremely beneficial to the US; indeed, it was the major source of federal revenues in the following years and was essential to service the debt and spur economic growth. It is estimated that the yearly value of the tax on imported goods amounted to 2% of the country's GDP.
At that time the United States, due to a debt crisis that ended up threatening its sustainability, underwent to what Wozniakowski classifies as a *fiscalization* process, whose origins are determined to lie in endogenous economic threats. As the author puts it:

[15] Art. I, § 8, U.S. Constitution

> "Fiscalization is a process through which a certain level of government (supranational/central or state level) expands its power to raise its own sources of revenue, and in so doing it decreases the level of vertical fiscal imbalance"[16].

The vertical fiscal imbalance can be used as an indicator that marks the financial independence of the central authority. The power to raise revenues from its own resources (the financial independence), as a competence on taxation in certain fields, is a fundamental feature of a federal system: "In order to become viable, central governments must therefore at some point become financially independent"[17]. In 1789, the Unites States adopted a federal Constitution, which was sustainable due to the granting to a central government of a federal power to tax, wherever such a power is missing either it is not a federal system, or such a legal order is not sustainable.

1.2 Hamilton's proposal and beyond: Federal debt assumption and monetary arrangements

Once the US Constitution entered into force, and the Department of Treasury had been established by Congress, its first Secretary, Alexander Hamilton, in 1790 raised a controversial proposal to the legislative branch, namely making the federation assume all the debts accrued by the states. According to Hamilton's assessment, the total debt (accumulated by Congress and the thirteen states collectively) amounted to 79 million dollars, of which nearly one third (25 million) was owed by states[18].

One of the major controversies was that not all the states had the same amount of debt, thus some states (like South Carolina and Massachusetts) would have been much more favoured by a federal debt assumption than others (like Virginia and North Carolina) that have been more virtuous in paying off their debts possibly through the imposition of high taxes in the 1780s. Another crucial issue to get Congress' approval was the treatment of speculators, notably the final holders of the bills of credit emitted by states, which during the fiscal crisis, were eventually traded at huge discounts; it seemed unfair to

[16] WOZNIAKOWSKI (2018; p. 633)
[17] ivi, p. 630
[18] SARGENT (2012; p. 13)

spare investors the risk of losing their money in the light of a prospective state default, also because it was feared a tremendous increase in speculation due to federal guaranteed or alleged bailout (this particular matter will be ruled upon years later). More concerns were the empowerment of the federal government to the detriment of that of the states and a fair settlement of accounts between creditor and debtor states.

States which incurred into massive debts claimed that they did so in order to finance the Revolutionary War, a common cause of national scope, and for this reason their debts had to be assumed by the federal government. Notwithstanding this claim, Southern states (except for South Carolina), Virginia (the economically most powerful state) and Maryland which paid most of their debt, were opposing the proposal. Virginia, specifically, insisted that there was no clause in the Constitution that allowed the federal bailout of states and claimed that a federal debt assumption would have reconciled the reckless moral hazards of some states which had not compelled with their duties, while those who did compel had to pay also for the others[19].
On the issue of speculation, Hamilton was seeking to pay back creditors in order to boost the reputation of the new-born federation in the eyes of the financial markets, hence he offered the debt holders fresh federal bonds ensured by a sinking fund to fully repay their credit. However, since speculators took advantage of the fiscal crisis purchasing the states' bonds below the original price, James Madison, at the time representative of the state of Virginia, proposed that "the Treasury should devise a formula for dividing the proceeds between the original recipient of an outstanding debt certificate and its final holder"[20]. His idea was supported by Thomas Jefferson, the then Secretary of the State Department, and by most southern states.

As a consequence of these disagreements, the first time Hamilton's proposal reached Congress, it was rejected, but there was room for bargaining. Indeed, with the Act of August 4 1790, the Congress nationalised states' debts, but this provision had been slightly modified from the original Hamilton's proposal. In fact, the extent of federal assumption was reduced, from the initial 25 to 21.5 million dollars, and for every indebted state the amount assumed by the government was less than the total. Besides, the creditors were granted the full value of the bonds they held (thus avoiding paying off the original holders, who were for the most part war veterans) and were offered a combined package of three new bonds in exchange of the elder ones. The outcome was quite positive: "By the time Hamilton left office in early

[19] STEINBACH (2015)
[20] ivi, p.11

1795, 98 percent of domestic [federal and state] debt had been exchanged on these terms”[21].

Concerning the issue of the different amounts of debt owed by states, the Congress provided for a settlement of accounts through the Act of August 5 1790. The aim of the settlement was to equalise the per capita cost of providing funds for the Revolutionary War. The opponents of Hamilton’s plan did not want to pay for other states’ debts. The final settlement is summarized here by Henning and Kessler: “The creditor states ended up being owed $3.5 million by the debtor states and were issued this amount in new federal bonds plus another $0.5 million to cover interest arrears […] The debtor states were forgiven the corresponding balance that they owed”[22]. Virginia, the most influential and economically powerful state, was convinced to agree by ensuring that its net payment for the debt would be null and, most importantly, by the transfer (in 10 years) of the capital of the United States from New York to the District of Columbia.

Although there have been compromises and conditions, in 1790 the Congress approved that the federal government would assume states’ debts on the ground that these incurred due to the funding of the Revolutionary War. The same thing, a debt assumption by the federal government, happened when the states had to assume debts in order to finance the War of 1812 against the UK. However, there is no article in the US Constitution and no Congress’ legislation that commits the federation to the assumption of states’ debts. Nevertheless, during the recession of the 1830s when many states defaulted on their debts, for the most part owned by foreign creditors, the latter expected (misguidedly) the federal government, due to the two precedents just cited, to bailout the states.

From the 1820s, also because of the expansion to the west, states happened to seek loans in order to finance several infrastructural projects, such borrowing was deemed to be repaid by the tolls expected by these facilities. The central government refused its responsibility in building these infrastructures, thereby state governments assumed the task. Due to the alleged confidence in the return of the loans and the apparent assurance of the federal state, many European investors were convinced to grant credit to American states for infrastructure building. Once, in the end of the 1830s nine states proved insolvent, being unable to pay off their debt, the Congress debated about assuming their debt and allay foreign investors. The indebted states, in order to make the federal government assume their debts, mentioned

[21] HENNING and KESSLER (2012; p. 9)
[22] ibidem

the two precedents arguing that the federal assurance, although not explicit, was implied. However, the Congress rejected the debt assumption proposal this time because, while for the other two cases debts were made in order to finance a national purpose (the war), in this case the states did not fund federal public goods but local projects. Moreover, the US economy was no longer highly reliant on foreign capital.

As a negative implication: "This episode cost the U.S. a hard-earned high-quality reputation for all U.S. government debt, federal as well as state […] For years, the reputation of federal credit in Europe suffered along with that of the states"[23]. Not only the US reputation was in jeopardy but also their security: John Quincy Adams, at that time representative of the state of Massachusetts, worried about another war against the UK if the states' debts were not paid off by the federal government[24]. Consequently, all US bonds were cut off from European lenders.

On the positive end, the refusal of Congress to assume states' debts marked the establishment of a *no bailout norm*, which is "neither a clause in the US Constitution nor a provision of federal law. Nevertheless, whereas no bailout request had been denied by the federal government prior to 1840, no such request has been granted since"[25]. Besides, Congress' decision led several states (more than half, even the ones that did not default) to amend their Constitution or to enact state laws that enforced a balanced budget. Eventually, defaulted states managed, in some years' time, to repay their debts; this step was necessary to be granted access to financial markets.

Currently, each state of the US, except for Vermont, is provided with its own balanced budget rule (laid down either in the state Constitution or the legislation) to limit the levels of deficit and debt. Such requirement exists on a federal level as well, even though their introduction has been very recent and subject to modifications (this topic will be discussed in paragraph 2.7 on sequestration).

The other side of the Hamilton's proposal envisaged the creation of a national bank which became true in February 1791 when the Congress chartered the Bank of the United States for a twenty years term despite the opposition of some members of Congress, including James Madison and Thomas Jefferson, who deemed the institution unlawful because it was not explicitly included into the Constitution. According to Hamilton instead, this executive power

[23] SARGENT (2012; p. 26)
[24] RODDEN (2005; pp. 55-64)
[25] HENNING and KESSLER (2012; p. 12)

was *implied* since the Constitution assigned to the government the administration of the State's finances.

The newly established bank was for the most part privately owned: the Government held the 20% of its shares, enough to be the main stockholder, but it was the same Bank of the United States to lend the executive the money to purchase these shares, considering the large debt in which the US was incurring then. Apart from its commercial functions, the bank acted as a fiscal agent of the government and as a repository for federal revenues; moreover, the bank was responsible to issue paper monies (to control the money supply) and emit bills of credit in exchange for short term loans, governmental as well as commercial (thus circumventing the alleged prohibition for the federal government to do so, even though not explicitly spelled in the Constitution)[26].

Along with the bank, and as part of Hamilton's plan, in April 1792 Congress created the US mint which began the coinage of the US dollar, very similar in size and composition to the Spanish dollar. Both currencies, plus the Mexican peso, circulated simultaneously in the country with fluctuating exchange rates and convertibility. Hence, in the US there were multiple legal tenders[27]. Thereby, "we had multiple currencies that presented citizens with choices about holding currencies bearing different risks and returns. There was no lender of last resort, no deposit insurance, and no presumption of federal bailouts of banks' depositors"[28].

The model of monetary arrangement spelled out in Hamilton's proposal and carried out by Congress meets the US Constitution's requirement of art.1, sec. 8: "The Congress shall have power […] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures"[29].

The First Bank of the United States, created in 1791, did not last any further than its term of twenty years and terminated its functions in 1811 due to Congress' disagreement on its renewal. However, five years and a war later (the abovementioned War of 1812 against the UK), in 1816, the Second Bank of the United States was created, precisely by, the now President, James Madison to deal with the debt assumed during the war. The bank had similar functions to the first bank and a term of twenty years which again, was not renewed.

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[26] While Article I, section 10, of the Constitution was clearly aimed at preventing states from coin money and emit bills of credit, no such provision was referred to the federal government. However, the alleged prohibition was claimed from the debate on the issue among the framers and the approval of Madison's motion to not grant such a power. Nevertheless, there is no explicit restriction of this sort for the federal government.

[27] This was true until the Coinage Act of 1857

[28] SARGENT (2012; p.23)

[29] Art. I § 8, U.S. Constitution

During the lifetime of the Second Bank, in 1819, the debate on the constitutionality of the national bank rose again because of the refusal, by the cashier of the Baltimore branch of the bank, Mr. James W. McCulloch, to pay the taxes imposed on the bank by the state of Maryland (controlled by Jefferson's party). The case[30] was therefore brought to the US Supreme Court which decided that the Congress had the authority to establish a national bank and that the states could not interfere with the federal government in the execution of its constitutional duties due to the *supremacy clause*. The Congress' power to create the bank, even if not expressly written into the Constitution, was *implied* pursuant to the *necessary and proper clause* which grants the Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof"[31]. The Constitution, which implies the congressional power to establish a national bank, along with the laws made in pursuance thereof (as it is the law to create a national bank), is supreme over state authority.

For the record, the central banking history of the US went through a Free Banking Era (1837-1862) in which only state banks existed and later in 1863 the National Banking Act created a system of national banks which were frequently exposed to liquidity crises and to the volatility of the Treasury bond market. Finally, to address financial panics, the Federal Reserve System was introduced in 1913 granting its Board full authority on monetary matters.

1.3 Appropriations Control in the US

Once outlined the historical evolution of fiscal and monetary powers moving towards the central authority as a result of specific crises and needs, and once ascertained the existence of a *no bailout norm* in favour of the states, it is proper to examine who, or which institution, is the actual holder and collector of public funds at federal level and who shall decide how many taxpayers monies are drawn for the realization of multiple public goods.

It suffices to give a look at the US Constitution to ensure a rough understanding of the matter, indeed, art. 1 sec. 9 states: "No money shall be drawn from the treasury, but in consequence of appropriations made by

[30] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)
[31] Art. I § 8, U.S. Constitution

law"[32]. This makes clear that, first, federal revenues are located into the Treasury, which is part of the executive branch and that, secondly, it is the legislature (hereby, the Congress) that is entitled to draw funds from the Treasury and authorize other entities or agencies to spend them on behalf of the United States.

It is important to note that the Congress, in this sphere, is not only vested with the power to legislate (this power is part of Art. 1 Sec. 8, that lists all the legislative powers) but, most importantly, it has an obligation to act, it must exercise this power due to the so-called *appropriations clause*, just cited above. The latter also provides for the indication of the form in which Congress must act, this cannot be any other act but a law. Moreover, there is no way federal, and thereby executive, action can be funded other than by legislative authorization of the Congress. If the Congress fails to appropriate constitutionally mandated governmental activities (as matters of foreign affairs can be defined) the executive is still not entitled to spend funds, but it can bring the case to the Supreme Court which will rule on the issue[33]. However, if the President, as a matter of urgency or threat to the nation, needs to finance some executive activities he can employ his emergency powers[34] (thus declaring a state of emergency) to withdraw monies from the Treasury; this happened, for instance, during the Civil War.

Within the legislation to appropriate funds to certain expenditure categories it is specified not only the amount but also the conditions for which this shall be used: every appropriation must come with an *object* that defines the activity and purpose for which it is made. Accordingly, as codified by Title 31 of the U.S. Code, the funds appropriated cannot be spent for any other object and shall respect the time period established by the law[35]. Besides, "often, the appropriations act explicitly incorporates other legislation, notably substantive legislation creating particular federal agencies or programs or granting particular agency powers"[36].

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[32] Art. I, § 9, U.S. Constitution

[33] The funds for those executive activities (i.e. to receive ambassadors, to make treaties and to grant pardon) are constitutionally required and the Congress is not allowed to interfere with their exercise. For example, according to the US Supreme Court ruling in *United States v. Klein* (1871), the Congress cannot limit the effects of the pardon power of the President. However, in the case that the Congress fails to act on these appropriations not even the Supreme Court has enforcement authority on the legislature branch which is, nevertheless, "expected" to act pursuant to its sentence. See *Reeside v. Walker* (1850) and *National Association of Regional Councils v. Costle* (1977). The Congress still retains the exclusive power to act upon appropriations.

[34] Such powers have been considered *implied powers* arising from constitutional provisions. However, the Congress regulated the subject in 1976 through the National Emergency Act.

[35] Title 31, § 1301(a), § 1502, U.S. Code

[36] STITH (1988, p. 1353)

Here it comes to the two principles that shape federal funds management: the principle of *public fisc* and the principle of *appropriations control*.
The principle of *public fisc* stipulates, as Stith puts it:

> "All funds belonging to the United States – received from whatever source, however obtained, and whether in the form of cash, intangible property, or physical assets – are public monies, subject to public control and accountability. This principle implies that all monies received by the United States are in 'the Treasury' to use the language of the Constitution. 'The Treasury' includes not only tax receipts, but also any borrowing on the credit of the United States and proceeds from the sale of government goods and services and gifts to the government"[37]

This principle might be found in a law Congress passed to define an operational framework in the matter of appropriations. Through the Act of March 3, 1849, the Congress passed the Miscellaneous Receipts Act which stipulated that funds received from any source for the use of the United States shall be deposited into the Treasury. This was later codified in Title 31 of the US Code, indeed Sec. 3302 states: "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim"[38].
Once clarified the general requirement of the principle, it is interesting to note the exceptions to it, made by legislation. The Congress may decide to let certain agencies keep the proceeds of their fees and make them able to spend those collected funds without any new appropriation law; however, Congress may impose a cap on spending that can be paid off by collections. Another kind of exception is the creation of *revolving funds*: those are targeted at governmental activities (initially appropriated by Congress) which are arranged as income generating for the service they provide, therefore Congress may allow agencies that perform such commercial operations to retain their earnings without any further appropriation. Last exception is the granting of gift authority. According to the Miscellaneous Receipts Act, all gifts for the use of the United States received by any federal agent or agency must be deposited into the Treasury, therefore even in the case of conditional donations (a gift for a specific purpose), it is Congress to hold the authority to appropriate funds for that activity, hence conditional gifts shall be placed into the Treasury as any other revenue and only an appropriation legislation can direct them to the purpose sought by the donor. In the last century, however, Congress granted some federal agencies the power to receive contributions (for general or specific purposes) and directly spend these funds

[37] ivi, p. 1356
[38] Title 31, § 3302(b), U.S. Code

without the obligation to deposit them in the Treasury or to be appropriated (gift authority).

The principle of *appropriations control* instead, regards, more particularly, the expenditures of public funds because it states, following the appropriations clause of Art. 1 Sec. 9 of the US Constitution, that any expenditure of any executive body must be authorized by an appropriation law made by Congress. Thereby, it is Congress alone to have, by Constitution, the power of the purse, and notably the prerogative to determine the drawing of certain amounts of funds from the Treasury and address them to any sort of activity is in the hands of the sole Congress. Federal revenues can be used by the United States only through legislative authorization.

The principle of *appropriations control* is better refined in another law, the Anti-Deficiency Act, enacted firstly with the Act of July 12, 1870 and again in 1905, when criminal penalties for its violation were incorporated. Its aim is to prevent any federal agency to borrow monies beyond the appropriations granted by Congress (in anticipation of future funding) and get the nation into liabilities. As it is codified in Sec. 1341 of Title 31:

> “an officer or employee of the United States Government or of the District of Columbia government may not— (a) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; (b) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law”[39]

Before its enactment, it was a common practice for federal agencies to incur in debts in the view of future appropriations, thus Congress was morally[40] bound to the payment of those federal debts. The Anti-Deficiency Act is precisely designed to prevent this reckless behaviour. However, it allows for defections to this rule when authorized by the same Congress.

The implementation of the principle of *appropriations control* resides in the unlawfulness of an expenditure of an amount greater than the actual appropriation made by Congress. In addition, as it was partially shown above, the executive cannot finance any of its activity by itself: neither with private funds (unless authorized by law) nor with a transfer of funds from an object appropriated to another. An appropriation law, made by Congress, is the only condition that allows any federal agency to perform its duties.

[39] Title 31, § 1341 (a)(b), U.S. Code

[40] As Congress never authorized the borrowing there would be no legal coercion for its service. However, there exist moral and political considerations since the agents contracting the debt officially represents the United States, and for this reason the creditor expects to be paid off.

The Anti-Deficiency Act contains also a rule against voluntary service as a broader application of the principle of *appropriations control.* As codified in Title 31 of the US Code: "An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law"[41]. This requirement has been subjected to diverse interpretations since on the one hand a voluntary service may generate a payment claim against the United States but on the other hand, when the service is *truly* voluntary, especially in the case of a written statement that ditches any expectation to get any financial contribution, it should be deemed acceptable.

The introduction of exceptions to the principle of *public fisc* through legislation by Congress creates what is known as a *backdoor* spending which, by its nature, may generate an appropriation permanent in time and indefinite in amount for executive agencies. Thereby:

> "it is doubtful that every creation of permanent, indefinite, or backdoor spending authority performs the function of an "Appropriation [] made by law" under the Constitution. The only way to subject collections, revolving funds, and gifts to full appropriations control would be to require the agency to debit all of these receipts against the amount of spending authority periodically appropriated by Congress"[42]

Therefore, when it comes to establish exceptions to the principle of *public fisc* it is essential to not disregard the principle of *appropriations control* as well. Congress still holds the power of the purse and it must oversee the activities of the executive. An elected Congress cannot prevent future elected Congresses to rule upon certain attribution of funds, that still maintain their public character (they are not private funds of the agency). Hence, when Congress grants spending authority to federal agencies, it must attach clear time, object and amount limits to such concessions in order to perform its constitutionally mandated task of control over appropriations. The spending authority must therefore face periodic legislative review.

Another tool in the hands of Congress to monitor the activities of the government is the option to deny the financing of certain government activities by failing to provide an appropriation legislation for the undesired actions. This can easily become a matter of litigation between the two branches, especially when it comes to the denial of sensitive federal activities such as foreign affairs. This usually consist of an object limitation for a

[41] Title 31, § 1342, U.S. Code
[42] STITH (1988, p. 1380-81)

specific purpose as in the cases of Cambodian operations in the Vietnam War and the support of *contras* militias in Nicaragua. In this manner, government cannot use appropriated funds to the agency to support that operation. While in the latter case the leverage is all on Congress' side, when the President declares a state of emergency (as mentioned above) the power structure is completely reversed; a case in matter, except for the Civil War financing of President Lincoln, can be the intended financing for the construction of a barrier at the Southern border by President Trump in 2019.

To sum up, I use the words of Stith:

> "Together, the Principles of the Public Fisc and of Appropriations Control give meaning to the Constitution's appropriations requirement. The first principle defines the public fisc [...] as encompassing all funds received by the United States. The second principle prohibits expenditure from the public fisc [...] except pursuant to legislative appropriation"[43]

This represents the foundation of spending discipline in the United States, the revenues of the federation shall be drawn from the Treasury only by a Congress' decision in the form of law and the executive must comply with the requirement imposed by the legislature to ensure a correct usage of public monies.

Moreover, along with the appropriation clause, the US Constitution complements the appropriation requirement with a statement and account requirement that can be found in the same section of the former: "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[44] This statement makes Congress accountable to the citizens who elect its members, and who are also, as taxpayers, providers of the funds to be spent on public goods.

1.4 Evolution of the system of own resources in the European Union

From the dawn of the European integration process, the issue of the financing of the common institutions, in order to pursue common objectives and, since 1957, primarily for the construction of an internal market, has triggered disputes and sparked different views across the continental political spectrum,

[43] ivi, p. 1377
[44] Art. I, § 9, U.S. Constitution

the latter including member States, European institutions and citizens. The trade-off between national contributions to the budget and European autonomy to collect its revenues underpins the form the EU could be able to assume. However, it would be appropriate to first deal with the historical evolution of the way the European budget has been financed and mark the frequent modifications and adjustments.

The starting point of the European integration is the Treaty of Paris, signed in 1951 by six States (the Federal Republic of Germany, France, Italy, Belgium, the Netherlands and Luxembourg), which established the European Coal and Steel Community (ECSC) with the task of managing the production of coal and steel through common institutions. Art. 49 of the Treaty gave to the High Authority (the executive organ of the institutional framework, equivalent to the upcoming European Commission), the power to procure the funds necessary to the achievement of the task assigned to it, through the setting of levies on the production of coal and steel and by taking loans. Art. 50 of the same Treaty, instead, provided that

> "these levies shall be assessed annually on the various products according to their average value, but that their rate shall not exceed 1% unless this is previously authorized by the Council, acting by a two-thirds majority, the mode of assessment and the collection being determined by a general decision of the High Authority taken after consulting the Council"[45]

These two articles clearly display the aim of this first association of states, which notably was to assign financial autonomy to the supranational institutions by granting a power to tax to its executive organ, thus sealing the transfer of sovereignty on that matter[46]. Moreover, the states decided to impose limits on this power through art. 50 of the Treaty (1% rate threshold). Those, however, could have been overcome by the same states which are represented in the Council (the intergovernmental institution) acting by a 2/3 majority (4 out of 6 states approval was necessary to enact a modification) thereby neglecting any unanimity requirement (in contrast with the common practice of international organizations); the states were also involved in the executive decision on the assessment and collection of revenues through a consultation. The revenues system of the ECSC is identified with the *supranational/communitarian* method: the finances of the organization are handled independently by its institutions which are granted a fiscal power that is essential to its functioning and to the achievement of common goals; states instead, are left out of the process.

[45] STRASSER (1981; p. 2)
[46] LAFFAN (1997; p.2); DE FEO (2015; pp. 29-30)

After the failure of the European Defence and Political Communities, the European integration moved forward in 1957 with the Treaty of Rome, signed by the same six countries, which established the European Economic Community (EEC) and the European Atomic Energy Community (EAEC or Euratom). Unlike the ECSC budget, the EEC and EAEC budgets were financed entirely by contributions coming from the member states (art. 200 of the EEC Treaty). These lump-sum payments were agreed upon based on a percentage scale envisaged in the Treaty (therefore there had been a prior political agreement between the states). The three bigger states (Italy, France and Germany) provided each for the 28% of the funds, while Belgium and the Netherlands paid 7.9% per cent of the total and only the 0.2% was owed by Luxembourg. The percentages were different for the financing of the European Social Fund. These shares could be modified only through a unanimous decision of the Council.

Revenues amount (consisting of national contributions) is dependent on the amount of expenditures decided in the budget process; the EEC Treaty assigned the budget authority in the hands of the Council, the intergovernmental branch. Hence, the states oversaw the decision on the amount they themselves would have had to pay to the Community. This represent a significant shift from the supranational method reported above to the *intergovernmental* method: in this case states were the only masters (as they are the masters of the treaties) of European finances and the common institutions were not able to raise their own revenues.

In 1965 the Merger Treaty reunited the executive bodies of the three European Communities (ECSC, EEC, EAEC) into a single Commission and the three intergovernmental bodies into a single Council. Moreover, apart from the operational budget of the ECSC, the confluence of the budgets of the European Communities (including the ECSC administrative budget) into a single budget was completed in 1970.

Art. 201 of the EEC Treaty and art. 173 of the EAEC Treaty envisaged that member States' contributions to the Community's budget shall be replaced by a system of own resources. The step towards this modification of the revenue system was taken in 1970 through a decision of the Council[47] taken in parallel with the signing of the Treaty of Luxembourg that, likewise, amended certain budget provision related to the expenditures.

The Council Decision introduced the system of own resources based on European common policies. Indeed, it was required that the European

[47] Decision of the Council, 21 April 1970, 70/243/ECSC, EEC, Euratom: *on the replacement of financial contributions from Member States by the Communities' own resources*

Communities shall receive their revenues from custom duties (collected by the states at the borders of the custom union), agricultural levies (taken from its jurisdiction on the Common Agricultural Policy) and sugar levies (due to the control of the sugar markets): these revenues constitute the traditional own resources within the European framework; the states retained 10% for collection costs. Besides, this system included a value added tax (VAT) based revenue (collected from the transactions within the European Common Market) with a rate of 1% which was implemented in full only in 1980[48] due to the difficult harmonisation of the VAT base among the member States.

This new system should have been implemented gradually (resorting to national contributions during the process) and become effectively operative in 1975 when the European budget should have been financed entirely by own resources. Therefore, financial contributions by member States were made in order to fund the residual necessities of the European Communities during the transitional period which in fact lasted until 1979[49], when for the first time the Council Decision was applied in full.

It is important to note that the latter had to be ratified by all member States according to their constitutional requirements. So, the States approved and were the architects of the transition from an intergovernmental method of financing to a supranational one: the system of own resources was aimed to grant the European Communities financial autonomy. Unanimity was necessary to modify again this provision. Moreover, in order to refine the change, the Luxembourg Treaty drew more influence on the European Parliament (EP) within the budget process framework; and a more prominent role for the EP was assured also by the Treaty of Brussels of 1975, and further enhanced by the first direct election of its members in 1979.

The traditional own resources presented some problems with regard to amount of custom tariffs' revenues' since the regulation of international trade which was set through the General Agreement on Tariffs and Trade (GATT), which will be later replaced by the World Trade Organization (WTO), whose trend was increasingly reducing fees on imports. The agricultural levies, instead, were highly dependent on the price of goods. However, as noted by Strasser, the VAT based resource, which was harmonized only in 1979, presented the major deal:

> "the rate the Community can collect – a maximum of 1% - under the harmonized common basis of assessment is not added to rate(s) fixed nationally. In a sense each Member State 'deducts' it from its national VAT revenue and then reassigns it to the Community. Secondly, alternative rules exist for determining the collection of

[48] CIPRIANI (2014; p.3)

[49] European Commission, *European Union Public Finance*, V ed. (2014; p.22)

> revenue […] VAT contributions are paid each month in twelfths of the budget estimates adopted for the current financial year, which is further confirmation of the predetermined nature of these payments which bear no relation to day-to-day economic reality, unlike agricultural levies and custom duties. On the other hand, it should be noted that the VAT percentage made over to the Community is an own resource in the sense that the Member States pay it to the Community each month automatically and it is therefore no longer available to them."[50]

Thereby, if the traditional revenues were not deemed as stable resources, the VAT, aside from the complexity arising from its calculation, recalled the financial contributions of Member States and appeared to have a regressive effect.
Therefore, in the following years, the Community realized that the revenues envisaged in the Own Resources Decision were inadequate to finance the rising expenditure of the organization. The GATT made progress in reducing the number of tariffs while agricultural imports' levies heavily decreased due to the sector self-sufficiency achieved through the Common Agricultural Policy (CAP). Thus, to address the inconsistency between revenues and expenditures the Council reached an agreement, to be enacted in 1986, to raise the VAT rate from 1% to 1.4%; during the transition period, advances taken from States' contributions were made in order to balance the budget.

Another pressing issue was caused by the States' increasing focus on their net balances that encouraged the net contributors (those Member States who paid more than they received) to the Community budget to seek for a compensation. In particular the UK, that entered the European Communities in 1973, had a lower GDP per capita than the Community average and, despite its large contributions, it did not benefit from the CAP due to its small agricultural sector; moreover, its VAT base was much higher than its Gross National Product (GNP)[51]. Hence, the UK was unsatisfied by its great budgetary burden and claimed a compensation. This came true in 1984 when a rebate in favour of the UK was agreed in the European Council of Fontainebleau, this was a political victory for the Prime Minister Margaret Thatcher who campaigned to get *her money back* from Europe. The rebate consisted in a reduction of the VAT based payments of the UK to be calculated every year since it was made of "two-thirds (66%) of the difference between the UK share in VAT bases and its share of total allocated expenditure, applied to the total allocated expenditure"[52]. Moreover, a year later, Germany, another net contributor to the Community budget, was

[50] STRASSER (1981; p. 121)
[51] European Commission, *European Union Public Finance*, V ed. (2014; p. 29)
[52] Ivi, p. 30

granted, through a Council Decision, a reduction in its share of UK rebate funding (paying only two-thirds of its amount).

The above displays the failure of the own resources system designed in 1970 that aimed to switch from an intergovernmental budget to a communitarian one. Member States were still focused on their national benefits (the difference between payments and receipts) rather than the financing of the European public goods. Hence, due to the growing rhetoric of net (in)balances and the inadequacy of the traditional resources (which are genuine own resources), the Community budget was again becoming subject to Member States intentions, the latter will soon confirm their role of *masters of the Treaties*.

Indeed, in 1988, through a decision[53], the Council aimed at ensuring to the organization sufficient, stable and guaranteed revenues for its budget in order to be able to correctly perform its activities. This was done by introducing a new resource in the form of financial contributions of the States at a uniform rate based on the States' GNP, to take into account their respective prosperity and therefore their different abilities to provide funds.

> "It was calculated by applying to a base, made up of the sum of the Member States' gross national product at market prices, a rate to be determined during the budgetary procedure in the light of the yield of all the other categories of own resources"[54]

Hence, this new revenue was used as a top-up source, its function was to balance the budget to enable the Community to meet the yearly level of expenditures. In this way the organization was always guaranteed a sufficient amount of funds.

The 1988 Council Decision modified also the VAT based resource which was capped at the 55% of each State GNP due to its alleged regressive effect[55], while its rate was kept at 1.4%. Moreover, it was established the implementation of a global own-resources ceiling, a limit on the amount of revenues the Community could have available, the latter was expressed by a percentage of States' total GNP. Accordingly, if the traditional and VAT based revenues were not able to match the funding of the Community activities, the GNP based resource intervened to reach the ceiling and balance the budget. By the time of this arrangement, the traditional own resources' revenues were decreasing overtime whilst the VAT based revenues played the major role. Along with these reforms, the multiannual financial

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[53] Decision of the Council, 24 June 1988, 88/376/EEC, Euratom: *on the system of the Communities' own resources*

[54] European Commission, *European Union Public Finance*, V ed. (2014; p.34)

[55] This was refuted by GROS and MICOSSI (2005)

framework (MFF) was introduced by an interinstitutional agreement (IIA) with the objective of predicting the budget expenditure, and thereby the revenues, by imposing ceilings to the different categories, for the five following years (which will later become seven).

Further changes were made by a Council Decision[56] providing that by 1999 the VAT based resource had to be capped at 50% of the States' GNP and its rate would decrease gradually from 1.4% to, again, 1% while the global own-resources ceiling would be increased. The latter nearly did not match the appropriations for payments due to an economic recession that reduced considerably the VAT and GNP based resources because of their connection to the GNP, while the revenues from tariffs were only marginally affected. Nevertheless, during this period, the traditional own resources maintained a constant yield while the VAT based resource reduced its contribution to the European budget in favour of an increase of the GNP based resource.

The European Commission produced in 1998 a report on the own resources system[57] focused on the fairness and equal share of contributions between Member States, proposing a reform of the revenue side of the budget either by introducing a new own resource related to tax revenues or by replacing the traditional and VAT based resources with the sole GNP based resource (considered the most reliable with respect to the economic situation of the Member States), along with a modification of the correction mechanism adopted for the UK rebate and a compensation for the net contributors.

However, these recommendations were not received by the Council Decision[58], which brought minor modifications to the system attempting to make it fairer based on national shares, in an increasing intergovernmental environment. The VAT based resource rate would gradually decrease from 1% to 0.5% by 2004 while the costs retained by the States for the collection of tariffs would increase from 10% to 25%, thus favouring the countries where the imported goods enter the European common market, this was deemed as a hidden compensation to net contributors. As far as the correction mechanisms are concerned, it was granted to four net contributor States a great reduction of their payment to the UK rebate: Austria, Sweden, the Netherland and Germany would now contribute to only one quarter of their share. Moreover, it was envisaged the access of ten net beneficiaries'

[56] Decision of the Council, 31 October 1994, 94/728/EC, Euratom: *on the system of the European Communities' own resources*
[57] Report of the European Commission, 7 October 1998, COM (98) 560 final: *The financing of the European Union. Commission report on the operation of the own-resources system*
[58] Decision of the Council, 29 September 2000, 2000/597/EC, Euratom: *on the system of the European Communities' own resources*

countries due to the eastward enlargement; although the own resources *acquis* applied in full to these fresh members of the Community, they were guaranteed transitional benefits to attempt to place them on an equal footing with much more developed countries. Besides, the GNP measure was replaced by the Gross National Income (GNI), which was considered more accurate in terms of actual appraisal of Member States' ability to pay.

The budget framework for the following MFF (2007-2013) has been characterized by very thorough negotiations. The issues at stake were the measures to be taken for the enlargement expenses and the complaints of the net contributors for a more equal system and for the large size assumed by the Community budget. Again, a Commission report proposed an overhaul of the system: this time by providing a generalized correction mechanism for every net contributor (thus eliminating the UK rebate which was specific only to one country) and proposing candidates for the employment of a future fiscal own resources.
The Council, again, derailed from the Commission's indications in its decision on own resources[59] taken in 2007 and ratified by all the member States only in 2009 (it had, however, retroactive effect starting from the beginning of the expenditure plan, in January 2007). The global ceiling of own resources was established at 1.23% of the GNI of the Community, the harmonised VAT based resource rate was reduced from 0.5% to 0.3% and the same States that benefited again from a reduction in their share of the UK rebate were granted an even lower rate while other correction mechanisms in favour of Sweden and the Netherlands were provided by the GNI based resource. This past few modifications only led to an enhanced complexity of the European budget which seems definitively a matter between States (intergovernmental) that negotiate on the basis of their different net balances trying to contribute as little as possible.

The latest modifications, for the MFF 2014-2020 went in the same direction. While, on the one hand, the Commission proposed the elimination of the VAT based resource and all the correction mechanism (only a generalized lump-sum payments based on the GNI resource for net contributors) together with two new own resources that will be further examined in the third chapter. On the other, the Council could agree on the reduction of the collection costs of the tariffs from 25% to 20% , the reduction, for Germany, the Netherlands and Sweden, of the VAT rate and correction mechanisms in the form of

[59] Decision of the Council, 7 June 2007, 2007/436/EC, Euratom: *on the system of the European Communities' own resources*

compensations for the GNI based resource to Austria and Denmark in addition to the already existing ones in favour of Sweden and the Netherlands.

The negotiations for the new MFF for the period 2021-2027 are currently ongoing. On its proposal of May 2018[60], the Commission, also considering the expected withdrawal of the UK from the EU, advocated for the gradual elimination of most of the correction mechanisms that favour certain Member States, the reduction of custom duties' collection costs (10%), a simplified calculation of the VAT based resource with a 1% rate and a slight reduction of the GNI revenue which will maintain its role as balancing resource. It also proposed the introduction of three new own resources linked to EU policies based on the recommendations of the High-Level Group on Own Resources[61]. Reminding that it will be the Council to unanimously take a decision on the matter, I refer the topic of fresh own resources to the third chapter of this study.

1.5 The EU legal framework and its complexity: a brief overview

The Treaty on the Functioning of the European Union (TFEU) contains in its Art. 311 the legal framework underlying the financing of the European Union (EU) budget which takes place through the system of own resources: "The Union shall provide itself with the means necessary to attain its objectives and carry through its policies. Without prejudice to other revenue, the budget shall be financed wholly from own resources"[62]. In addition, the article establishes that the provisions regarding the own resources system shall be determined by a Council decision adopted through a special legislative procedure: voting unanimously and consulting the EP. Moreover, once the decision on the system of own resources is adopted by the Council, each Member State shall ratify it, in accordance with its constitutional requirements, in order to make it enter effectively into force. Therefore, the own resources decision, for the way it is designed, is comparable to primary law at EU level: "the own resources decision constitutes a 'Treaty' within the

[60] Proposal of the European Commission, 2 May 2018, COM/2018/321 final: *A Modern Budget for a Union that Protects, Empowers and Defends, The Multiannual Financial Framework for 2021-2027*
[61] Future Financing of the EU, Final Report and Recommendations of the High-Level Group on Own Resources (2016)
[62] Art. 311 par. 1-2 TFEU

Treaties"[63]. So, not only it grants each State government a veto power in the Council, due to the unanimity rule, but it also gives national Parliaments the same power, with a potential delay in its application. However, even though own resources decisions do not have a deadline for their application it is common practice to make them (packed every time with new elements/modification) coincide with the MFF (that envisages a spending period of seven years). Thereby, when the ratification by member States is delayed, the new own resources decision, by the time it enters into force, is provided with a retroactive effect applying from the beginning of the new expenditure plan; while, if not approved by national Parliaments, the previous decision shall remain valid.

The implementation of the own resources' decision has a twofold nature. First, according to art. 311 par. 4 TFEU, the Council, acting by qualified majority and with the previous consent of the Parliament, shall pass a regulation setting out measures intended to implement the own resources decision, including control and supervision measures. And secondly, pursuant to art. 322 par. 2 TFEU, the Council shall envisage methods and procedures to make the funds generated by EU own resources available to the Commission and implement measures to meet the cash requirements; this is to be done through another special legislative procedure requiring the qualified majority in the Council and the consent of the EP and the Court of Auditors.

The system of own resources, as analysed in the previous paragraph, is now composed by revenues based on traditional own resources, VAT and GNI. The latter, initially planned to play the role of the residual resource to allow the EU budget to meet the global own resources ceiling (fixed by the own resources decision), has, overtime, also due to the decrease of the other two resources, assumed the greatest share of the financing system. Moreover, in line with the principle enshrined in the European Council of Fontainebleau (1984), that any Member State bearing an excessive budget burden is entitled to a compensation, the own resources decision establishes the framework for the UK rebate (which is permanent) and the other (always temporary so far) correction mechanisms.
The actual system requires a transfer of funds from the Member States to the Union. The EU is not equipped with a tax authority, hence, even the most genuine own resources, the tariffs, are collected by the States' authorities and enter their accounts before being credited to the Commission's account, retaining a given collection cost (now the 20%). Instead, the VAT and GNI

[63] CIPRIANI (2014; p.8)

based resources are transferred to the EU by the Member States every month by one twelfth on the amount established in the annual budget. Both procedures are pursuant to Council Regulation (EC, Euratom) No. 1150/2000. The fact that the funds of the EU budget accrue from the Member States' coffers does not imply any intervention of the national Parliaments in the process, since these transfers are *automatic*. Indeed, the States' legislatures authorize these automatic transfers in the procedure envisaged for the entry into force of the own-resources decision of the Council, thus through its ratification.

The complexity of the EU budget does not merely stem from the calculations of the VAT based resource and the medley of correction mechanisms but also from the parallel existence of more budget disciplines within what has been defined a *budgetary galaxy*[64]. The competences of the EU, extended over the years up until the Treaty of Lisbon (which entered into force in 2009), have not been matched by an equivalent expansion of the EU budget, therefore there have been laid down different mechanisms to finance the various activities, which result in a highly fragmentated structure.

Some elements of differentiation are provided by the Treaties themselves. Art. 41 of the Treaty on European Union (TEU) establishes that the financing of the common foreign and security policy (CFSP) shall be financed by the Union budget, unless, only for the operational expenditures, the Council unanimously decides otherwise. By contrast, in the case of military and defence operations, the financing is assigned to the participant Member States in accordance with GNP scales. Moreover, when some Member States establish an enhanced cooperation in an area of non-exclusive competence of the EU in accordance with art. 20 TEU, the expenditures related to it shall be funded by the participating Member States, unless the Council, unanimously, and after consulting the EP, decides otherwise (as established by art. 332 TFEU). In addition, some Member States that opted-out from some policy areas do not bear the costs arising from them. Finally, the European Central Bank (ECB) and the European Investment Bank (EIB) have their own budget financed by participating member States.

Besides, in 2012 the euro area member States signed in Brussels an international agreement designed to grant stability to the common currency and to provide financial assistance to the Eurozone bailout countries, the European Stability Mechanism (ESM); this was established outside the Treaties' framework even though it regards a European policy objective. The financing is placed in the hands of the Euro area States but the Commission has the role of contracting loans on behalf of the member States in need of

[64] CROWE (2017)

assistance; in the case that the latter default on the loans, the Union budget is liable for up to 60 billion euros[65]. The ESM, accordingly, assigns task not only to the Commission but also to the European Court of Justice (ECJ) and to the ECB. For these reasons, in 2017, the Commission, under the impulse of the EP, proposed to incorporate the ESM into a European Monetary Fund (EMF) which would have been the sole Eurozone stability instrument and integral part of EU law, thereby accountable to the EP (the ESM is now only accountable to national Parliaments) and a heading in the EU budget.

The creation of the ESM in 2012 was not the only response to the 2010 European sovereign debt crisis, indeed, in 2011, the renewed Stability and Growth Pact aimed, through the introduction of the Six-Pack[66] and the European Semester[67], at coordinating fiscal policies and providing economic surveillance for the 28 EU Member States.

In the twisty budgetary galaxy, can be found also hybrid financing instruments in which the Union and the Member States share the burden. This is true, for example, for the trust funds established and managed by the Commission for the Union external action, to which member States and other international actors may donate on a voluntary basis. The same applies to the coordination mechanisms, whose great example is the Refugee Facility for Turkey to which all the Member States contribute in accordance to their GNI. The issues with this funding mechanism are the lack of an enforcement method in the hands of the Commission to make the States pay their contribution and the circumvention of the EU budget rules.

From an overview of the EU revenue system the evident flaws reveal themselves straightaway. Some examples are the lack of fiscal autonomy (no *fiscalization* process so far), transparency and democratic accountability in a highly fragmentated process that gives consideration to the States' budgetary balances rather than the citizens and the delivery of communitarian public goods. Those, and their reforms perspectives, will be dealt with in the last chapter of this analysis.

[65] Ivi, p. 439

[66] A set of six legislative acts (5 regulations and 1 directive)

[67] Cyclic six-month coordination/monitoring mechanism

Chapter II. Expenditures: the budget cycles

After going through the way in which public funds are raised (the revenue side), it seems worth to move on to how the budgets of the US and of the EU take shape, notably, getting to explore the two budget cycles (the expenditure side). These two happen to possess certain common features as well as some substantial differences.

Indeed, in this chapter, the comparison between the two systems appears more evident since the processes will be addressed in parallel. After initially dealing with the nature of the budget acts (par. 2.1), the focus will shift on the actual processing of the budget: starting with the proposal of the executive bodies (par. 2.2), the discussion will then treat the planning of the future actions on the budget[68] differentiated between the US (par. 2.3) and the EU (par. 2.4); afterwards, it addresses the procedures for appropriations acts in Congress (par. 2.5) and for the annual budget in the EU (par. 2.6), lastly, it deals with the enforcement and control mechanisms over the implementation of the budget put in place in both systems (par. 2.7). In this way, the similar framework that the two systems possess will be displayed, but the same applies for the substantial differences that indeed lead to different outcomes.

2.1 The nature of the budget and the judiciary's involvement

The budget law is an act, or a set of acts, that defines the revenues and the expenditures of a political entity for a given period (usually a year). In the majority of the cases, it is envisaged in the States' Constitutions and it is usually contained in an ordinary bill passed by the legislature, thereby, as a primary source of law, it only has to comply with constitutional provisions. This is the case for the two systems at stake here, whereby the Treaties (TEU and TFEU) operate as the material Constitution of the EU[69].

[68] As we will see, the planning involves multiple annual budgets

[69] The Treaties are interpreted as a constitutional charter by the ECJ, which acts, *de facto*, as a Constitutional Court. See Case C-294/83 *Les Verts v. European Parliament* (1986; par. 23) and Case C-402/05 *Kadi v. Commission* (2008; par. 281)

The constitutional design provides that the executive and the legislative branches work closely for the realization of the budget law, usually with a governmental draft and its passage in Parliament for approval or amendments. However, Laband[70] pointed out that, the budget and the difficult calculations that it is composed of, never constituted a law in a material sense, but it was rather an administrative act whose classification as a law was just in a *formal* sense. Formally, according to the Constitution[71], the two branches shall find an agreement on the act, but, in fact, if the budget is not agreed upon, the executive could still have at its disposal the State coffers to impose its policy choices bypassing the legislature. Other scholars[72] asserted that the budget law's nature is distinct from that of a true law, since it is does not match the features of universality and generality because it is passed every year for the exclusive duration of a year timeframe, thereby it contains a great deal of specificity.
While this theory is now outdated, since Parliaments have, in practice, successfully consolidated their powers over financial matters, an ongoing trend[73] sees, again, the executives gaining the upper-hand on the budget law determination due to major historical events[74] that increased the size (and the related control over it) of annual public spending, thus rendering complicated a parliamentary democratic debate on the various issues.
Nevertheless, in the two case studies considered here, the legislative branch still retains the major hold over the decision making on expenditures. This is due to the clear separation of powers in budgetary matters enshrined in the US Constitution and to the strict requirements of the TFEU for the annual budget procedure, in which the Council and the EP are placed on an equal footing.

In the US, it is the Constitution to establish the framework for the use of budgetary powers and, even though it grants the *power of the purse* expressly to the Congress in its Art. I, § 8-9 (examined above in par. 1.3), it does not contain any provision on how this power shall be exercised; thus, no specific procedure requirement is envisaged by the fundamental law. Indeed, it has been Congress' legislation to codify all the measures that the federal Government shall apply in terms of budget procedure and enforcement: the most relevant of these will be addressed throughout this chapter.

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70 LABAND (1871)
71 In his case, it is the German Constitution, but this condition is applicable to many Constitutions
72 Hegel (1830), *Enzyklopädie der philosophischen Wissenschaften*; Schmitt (1923), *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*
73 RUIZ ALMENDRAL (2015; p. 19)
74 Notably the post-World War II economic setup that increased the reliance on welfare state or the fiscal constraints in the Eurozone

As of the nature of the budget law in the US, the decisions over mandatory (par 2.3) and discretionary (appropriation acts discussed in par. 2.5) spending are in the form of legislative acts of the Congress. The latter is left with great discretion over their content and the procedures to adopt and to enforce them, since it can, at any time, revise the rules that itself previously established. The only requirements and principles that the Congress has to comply with are those of the Constitution. Indeed, in 1998, the US Supreme Court ruled unconstitutional the Line Item Veto Act, passed by Congress in 1996, in the case Clinton v. City of New York[75] since it allowed the President to veto single provisions in spending legislation after their enactment while the constitutional veto power[76] provides for the eventual cancellation of the entire bill (not part of it) before it is duly enacted into law. Hereby, the US Supreme Court is liable to enforce the supremacy of the constitutional provisions over all the legislative acts, including those related to the budget.

In the EU, the Treaties provide for a detailed discipline (inclusive of rules and principles) over the budget process that involves the major EU institutions in the articles from 310 to 325 of the TFEU (Title II of Part Six). However, a significant part is also played by the Financial Regulation[77], the EP's Rules of Procedure[78] and the inter-institutional agreements of binding force[79]. As regards the nature of the act instead, it is appropriate to distinguish between the MFF and the EU annual budget. The former, which since 1988 was part of inter institutional agreements is now, from the Treaty of Lisbon, a regulation, thus a secondary source of law. The latter instead, as the ECJ has ruled in a 2011 judgement[80], is not a legislative act, it is rather "an accounting document setting out estimates for the European Union of all income and expenditure over a certain period"[81]; the act is however, according to par. 60 of the judgement, open for challenge before the ECJ for the purposes of Art. 263 TFEU since it is liable to produce legal effects.

[75] Clinton v. City of New York 524 U.S. 417 (1998)
[76] Art. I § 7, U.S. Constitution
[77] Regulation (EU, Euratom) of the European Parliament and of the Council of 25 October 2012, No. 966/2012 *on the financial rules applicable to the general budget of the Union*, OJ L 298 26.10.2012 p. 1-96
[78] Title II, Chapter 8 of the Rules of Procedure of the European Parliament is entirely dedicated to budgetary procedures
[79] As the ones concluded by the EP, the Council and the Commission in compliance with the Treaties are
[80] Case C-77/11 *Council of the European Union v. European Parliament* (2013:559)
[81] ivi, par. 59

2.2 The executive proposal: the roles of the President and the Commission

The budget cycles take place every year, due to the principle of annuality of the expenditures, following a standard procedure (revised overtime), enshrined in multiple sources of law, that involves the executive and legislative branches. One of the elements to take into consideration, common to both the processes, is the presence of strict deadlines. An analysis of the executive proposals of the President of the US (POTUS) and the European Commission can indeed serve as an early element of understanding of this matter. It is in fact in the executive organ that lays the prerogative to start every year the budget cycle. Therefore, the executive action will be addressed, first the POTUS' budget request and thereafter the Commission's budget proposal.

In the US Constitution there is no indication regarding the role of the executive and the President. Thereby, it is legislation, statutes and congressional rules to establish the federal budget cycle.

Prior to any codification, the procedure through which federal agencies were submitting their budget requests to Congress was entirely decentralized and neither the President nor the Treasury were involved at all. However, during the second half of the 19th century, some agencies began to deliver their budget requests to the Department of the Treasury which compiled and, in turn, submitted them to Congress in the form of the *Book of Estimates*. This was just a common practice adopted by some agencies, while the others kept submitting their requests directly to the legislature. Such differentiation was valid until the Act of July 7, 1884 when it was established, by law, that it shall be the Secretary of the Treasury to submit to Congress the estimates of appropriations of all the federal agencies; the latter were later required by the Act of March 3 1901 to submit their requests to the Treasury by the deadline of October 15 of each year while the Secretary of the Department had until the 1st of November to submit the *Book of Estimates* to Congress. Nonetheless, although the executive requests were submitted all together, they lacked any mechanism of coordination (they were drafted independently by the single agencies, the Treasury only ensured a uniform and simultaneous submission) and the involvement of the POTUS was marginal. The Commission on Economy and Efficiency, created in 1910 by the then President Taft and charged with the task of proposing reforms to the executive budget process, recommended, in its 1912 report, some features of a submission of the executive budget by the President which will be adopted later on.

Indeed, in 1921, in a period of recurring deficits and constantly rising federal spending, Congress passed the Budget and Accounting Act[82] that served as a legal basis for a unitary and coordinated executive budget. The President was required to submit the federal budget to Congress every year, based on all agencies' requests, within a specified deadline. To assist the President in this task, it was created the Bureau of Budget as a branch of the Department of the Treasury; it later became a part of the Executive Office of the President and in 1970 was reorganized as the Office of Management and Budget (OMB). The President has delegated many of his tasks and authorities, as regards the drafting of the budget proposal, to the OMB. The OMB is responsible for managing all federal agencies in the process of their budget requests, it coordinates the procedure by issuing guidance and instructions. The agency must oversee and review the consistency of agencies' requests with each other and with the President's policy objectives.

The 1921 act established that the deadline for the submission of the President's budget proposal had to be the first day of each regular session of Congress; however, the deadline was modified in 1950 by the Budget and Accounting Procedure Act (fifteenth day of each regular session) and in 1985 through the Balanced Budget and Emergency Deficit Control Act (first Monday after the 3rd of January) until the last modification that occurred in 1990 when the Budget Enforcement Act established the first Monday of February of each year as the latest term for submission in a timeframe starting from the first Monday of January. The rationale of this change was that a newly elected President (inaugurated on the 20th of January according to the 20th amendment) could be able to make its own proposal, which is often an indicator of policy orientation, without being influenced by his predecessor's dispositions.

Henceforth, it is proper to introduce the concept of *fiscal year* (FY), which considers the range of planned expenditures and revenues of the whole federal structure intended for a specific year time; in the US, the FY begins on the 1st of October and ends on the 30th of September of a given year and it is classified by FY plus the year it refers to, for example FY2020 begins in October 2019 and ends in September 2020 replaced by FY2021.

[82] Codified in Title 31 of the U.S. Code

The preparation for every fiscal year's budget gets started much more in advance. It occurs approximatively 9 months before the President's submission within the various federal agencies that, with the assistance of the OMB officers assigned to them, prepare their request and deliver it to the examination of the OMB, which will review them along with the President and his staff, until they submit it to Congress by the first Monday of February. Therefore, keeping as point of reference a given fiscal year, FY2020, the law states that the President's submission shall occur in February 2019 and its implementation will start in October 2019; however, federal agencies prepare their estimates and requests for FY2020 around May 2018, when they are implementing the appropriations of FY2018 and awaiting those of FY2019 (to be enacted in October 2019) while the funds for FY2020 will be appropriated only 29 months later (almost two years and a half). Accordingly, these budget requests are prepared in a situation of high uncertainty about future conditions of the economic status, President's priorities and congressional majorities.

The Budget and Accounting Act of 1921, while enabling the POTUS to submit a budget proposal to Congress within a certain deadline, does not spell out any indication regarding the form it shall assume, rather the act leaves discretion to the President even in the extent of information and details it shall provide. However, following legislation happened to address these omissions, that are now codified in Title 31 of the U.S. Code. According to sec. 1105 of the latter, the budget of the U.S. Government shall include: appropriations, expenditures and receipts of the previous fiscal year; estimated revenues, expenditure and proposed appropriations for the year under consideration plus 4 years after that; information on the Government's debt; separated allowances for estimated expenditure, proposed appropriations and unpredicted circumstances; information on the status of the US economy and on the costs and performance of federal programs and activities[83]. The President's budget must include estimates and proposals for the legislative and judicial branches, that, once prepared the drafting of their requests, transmit those to the President but, unlike federal agencies, they shall be submitted to Congress without any modification. This is also true for other independent agencies, such as the Board of Governors of the Federal Reserve System. Moreover, certain agencies, like the Security and Exchange Commission (SEC), are bound, by statute, to submit their budget request directly to Congress.

[83] CHRISTENSEN (2013)

Complying with the abovementioned guidelines, the President, with the assistance of the OMB, drafts its proposal. As to the composition of the latter, it is observable a certain extent of similarity regarding the structure and format of last years' President's budgets. The budget proposal is presented to Congress in multiple volumes, those include the Budget of the U.S. Government, Historical Tables, Analytical Perspectives and Appendix, plus Supplemental Materials. The first volume contains the message of the POTUS to Congress, as provided by Title 31 § 1105 USC, which highlights the policy priorities of the Administration for the fiscal year concerned; it also contains the funding proposals for every department of the executive and the federal agencies; at the end it provides summary tables that display the impact of the budget proposal on, among others, the GDP growth, the deficit between receipts and outlays and the public debt for each of the fiscal years taken into consideration (for FY2020 it is expected a public debt growth). The Historical Tables volume is characterized by an historical overview of all the receipts, outlays, surpluses and deficits of the federal government, from several decades ago with a view to next fiscal years (until 2024 in the case of FY2020). The Analytical Perspectives volume contains an extensive analysis of the government activities proposed in the President's budget, including programs in cooperation between federal agencies; it also comprises long range projections on some economic measures (such as productivity growth and revenues as percentage of the GDP) that for the FY2020 proposal go as far as 2044; this volume contains two reports, required by Title 31 USC, on the annual federal performance plan of the budget and on the costs and benefits of federal regulations. In the Appendix volume are provided detailed budget estimates by agency, that means the actual appropriations account for each of the programs proposed by the presidency; it gives an in-depth explanation of the use of the funding allocated to every program and compares, if possible, the amount proposed with the two previous fiscal years, thus displaying the expansion or the cut occurred to each program. Additionally, the President's budget usually includes a Supplemental Materials volume where there is place for a guide and a summary addressing funding consolidations and reductions. The Trump Administration, whose first budget proposal was that of FY2018, has introduced, since then, a new feature for the composition of the budget: an additional volume named Major Savings and Reforms which contains detailed information on discretionary eliminations and reductions of federal programs funding and reform proposals aimed at bringing federal spending under control. For FY2020 the document predicts a reduction of the deficit that would amount to $2.7 trillion over the budget window.

Once the President's budget is submitted to Congress, circumstances under which the proposal was made may vary during the budget cycle. For this reason, Title 31 of the U.S. Code allows the President to modify his proposal revising the budget recommendations or even submitting fresh requests when unforeseen circumstances occur. Changes made to the current fiscal year are referred to as *supplementals* while modifications to the proposal for the next fiscal year are named *amendments*. These modifications can be either corrective measures or even increased funding. Besides, according to sec. 1106 of Title 31, the President is also required to submit a Mid-Session Review of his budget to Congress by the 15th of July: it shall consist of an update of estimated receipts, outlays, budget authority and deficit expectations that concerns the current fiscal year to 10 years ahead.

The executive budget proposal only constitutes a policy tool in the hands of the POTUS, useful to direct the agencies of the executive branch and express his national policy plans. The request submitted to Congress, therefore, represents a mere intention of policy recommendation since the legislature is not compelled to accept any of the financing proposals, rather, being the holder of the power of the purse and the master of appropriations, it can overturn the policy plans. This may occur especially when the President and the Congress' majority do not belong to the same party (a phase of divided Government). However, even if not binding, the President's proposal influences the upcoming Congress decisions on the budget (spending levels and revenues projections) and marks the start of the budget cycle. The Congress alone, cannot kick-start the budget process in the absence of a presidential proposal.

In the EU, equally to the US, it is the executive branch (the Commission) which is bound to begin the procedure every year. The annual budget process shall be carried out by a special legislative procedure pursuant to art. 314 TFEU. The EU budget has its respective deadlines, different from the US ones; indeed, the *financial year* (not fiscal) elapses as a regular year from the 1st of January to the 31st of December. Nevertheless, the deadlines envisaged in the Treaties are usually anticipated: the institutions, due to common practice, follow a *pragmatic calendar*.

The ECSC Treaty entrusted its executive institution, the High Authority, with autonomous decision-making powers over the organization's budget, as another indicator of its supranational preferences. The Treaty of Rome (EEC) instead, awarded the executive (the European Commission) with the powers to establish a *preliminary* draft budget (the actual draft budget was agreed upon in the Council by qualified majority) and to implement the budget, whose adoption was, of course, assigned to the Council, underlining the intergovernmental aims of the Community. The Treaty of Lisbon in turn, attributed to the Commission the exclusive power to draft a budget (no longer preliminary) proposal and submit it to the Council and the EP, whose role upgraded overtime.

The deadlines are established by art. 314 par. 1-2 TFEU:

> "1. With the exception of the European Central Bank, each institution shall, before 1 July, draw up estimates of its expenditure for the following financial year. The Commission shall consolidate these estimates in a draft budget. which may contain different estimates. The draft budget shall contain an estimate of revenue and an estimate of expenditure. 2. The Commission shall submit a proposal containing the draft budget to the European Parliament and to the Council not later than 1 September of the year preceding that in which the budget is to be implemented"

Therefore, by the 1st of July, the Commission shall receive the budget estimates of all the European institutions for the following financial year and is bound to submit its budget proposal to the *budget authorities* (Council and EP) by the 1st of September. The institutions' estimates might potentially be modified by the Commission before the submission at its discretion.

In the task of drafting the budget proposal, the Commission is assisted by one of its departments, the Directorate General for the Budget (DG Budget), which has similar functions to those of the OMB in the Executive Office of the POTUS. Indeed, it has assumed a prominent role in the management of the European financial and budgetary policy from the administration of the revenues to the implementation of the budget and the preparation of EU-wise annual accounts, but, most importantly, it is responsible for the drafting of the EU annual budget.

However, as it happens in the US, the preparation for the budget begins long before its actual submission. The Council Budget Committee (COMBUD) and the Committee on Budgets of the EP establish their respective guidelines for the upcoming financial year's budget in February/March. The DG Budget instead, usually begins the activities for the annual budget with a budget circular transmitted to all the Commission's departments in the month of December of the year before the year in which the proposal shall be submitted. In the circular are spelled out the instructions for the drafting of the budget given the forecasted economic situation and the limits of the financial plan. Each department, accordingly, formulates an expenditure estimate (with detailed information and justifications) by the end of February. Then the DG Budget, in March, organizes hearings with members of the various departments analysing in-depth their requests. Moreover. the

institutions of the EU provide for their own budget estimates usually by the 1st of May (not the 1st of July, as envisaged by the TFEU timetable). Once obtained the whole EU structure's estimates, the DG Budget brings them together in the draft budget which is set to the approval of the Commission that may decide to modify it based on the priorities given to the different issues. Normally, in the first half of the year, before the submission of the budget proposal by the Commission, it is set a trilogue meeting between representatives of the Commission, the Council and the EP that opens an interinstitutional discussion on the priorities for the next financial year: the Council (represented by the President of the COMBUD) and the EP (represented by the Chairman of the Budgets Committee) debate in the light of their guidelines while the Commissioner responsible for the Budget has already gone through the departments' hearings as the meeting takes place usually in late March.
The Commission's proposal is submitted to the Council and the EP in May according to this pragmatic calendar, nearly 100 days before the official date of submission (1 September); this is done to guarantee more time to discuss and deliberate to the two budget authorities, enabled to approve a budget before the beginning of the next financial year. However, the Commission can still update its estimates, and therefore amend the act, for some time that will be specified later in this study. What the Commission is not allowed to do is to withdraw its budget proposal, unlike what is foreseen for legislative proposals[84].

As I have done for the US budget, an example could help to grasp the long preparations that occurs for each annual budget; again, I use the year 2020 as point of reference. For the financial year 2020, the proposal is to be submitted in May 2019 (it was actually submitted in June 2019 due to the occurrence of the EP elections), 7 months before its actual enactment in January 2020; the procedure in turn, begins with the DG Budget instructions in December 2018, 6 months before the Commission's proposal and 13 months prior to implementation of the budget; therefore, also the work of the Commission's departments and the institutions to prepare their estimates gets started much in advance (almost one year before the beginning of the financial year). In December 2018, the EU is still implementing the budget for the financial year 2018 and is going to move to the financial year 2019' implementation within one month; at the same time, it begins the preparation for financial year 2020 that will proceed until two years from that moment (December 2020). As in the US, the uncertainty for the future economic situation must be considered

[84] FASONE and LUPO (2018; p.830)

but the institutions' composition is likely to remain unaltered[85]. It can be argued that the preparation for the federal budget process in the US begins even earlier than the European one, so the European institution appear to have less time than their American counterparts to decide over the annual expenditures; but it must be mentioned that firstly, the overall size, and the amount of money in circulation, of the EU budget is much smaller than that of the US, given the limited competences it possesses and, secondly, the EU annual budget leeway for growth is limited by the ceilings imposed by the MFF (decided upon by the Members States' governments) enhancing the intergovernmental structure of the EU financing.

However, differently from the US, in this very first phase of the process it appears clearly a framework designed for collaboration and compromise between the institutions of the EU: the trilogue meeting (that will be renewed later in the procedure) is an evident sign of desired complicity. The Commission's proposal is the formal start of a procedure that has already begun. In the US instead, the budget authority (Congress) does not intervene during the executive proposal drafting, thereby disagreement and confrontation over the federal priorities can be easily generated after the submission of the proposal: a divided Government is not the only reason for this to happen since Congress is unaware of the President's proposed appropriated activities and legislation before the submission of the budget request.

2.3 Congress: the budget resolution and reconciliation directives

As anticipated in the previous section, although attributing the *power of the purse* to Congress (art. I sec. 8), the Constitution does not lay down any specific procedure for the adoption of the budget by the legislative branch. It has been the federal legislation to define the features of the congressional budget process, as it occurred for the executive budget proposal. Indeed, in the early 70s emerged the need for Congress to make its action on budgetary matters unitary, coordinated and less dependent from the executive: spending decisions of Congress were somewhat fragmented since it lacked an

[85] The Commission and the EP terms last for five years, the only institution that can slightly change its composition is the Council, due to the possible establishment of new Governments in certain Member States after the national elections. In the US instead, the representatives in the House have a two years term that can more easily modify the chamber's majority and the policy orientation accordingly.

expenditures' control mechanism and moreover, the President was deemed to have too much power on fiscal and spending decisions[86], a power that, by Constitution, shall belong to Congress.

The Congressional Budget and Impoundment Control Act of 1974 created a budget tool in the hands of Congress, namely the annual adoption of a budget resolution by both the chambers of the legislature, therefore, a *concurrent* resolution. A congressional resolution is not an ordinary bill. It does not have the force of law, thus no money can be spent or collected in compliance to it and, at the same time, it does not need the President's signature, nor it is subject to his veto power. The budget resolution is an agreement between the House and the Senate establishing the priorities for the next fiscal year; these indications are going to be enforced later in the budget process. The objects defined by Congress are the overall size of the federal budget (the aggregates) and the spending allocations to each of the functional categories. The act of 1974 created also the Congressional Budget Office (CBO) in order to assist Congress in drafting the budget resolution and to provide an alternative source of information and data on the federal budget to the executive one, the OMB. Hence, the legislative had its own provider of analyses on the budget (considered more impartial) and it did no longer have to rely on the executive reports.

According to the initial setup, Congress had to pass two budget resolutions for each fiscal year but since the Balanced Budget and Emergency Deficit Control Act of 1985, Congress is required to approve one concurrent resolution per year. The current codification establishes that a budget resolution shall be adopted by the 15th of April of each year[87] but seldom Congress has respected such deadline. The path towards the resolution begins with the annual CBO report, issued before the 15th of February, on the economic status of the country and the baseline budget projections which are usually updated before the budget resolution gets approved. The congressional procedure instead, starts once the executive budget is submitted, with the House and Senate Committees holding relevant hearings (especially having witnesses from the Administration) in order to draw their *views and estimates* for the budget regarding their respective jurisdiction. Under sec. 301(d) of the Budget Act, these views and estimates must be determined within six weeks from the President's proposal and transmitted to the House and Senate Budget Committees, which in turn, are not bound to

[86] In 1972, President Nixon denied spending funds on some social programs, previously appropriated by Congress, claiming that Congress had no formal power to prevent any President's impoundment.
[87] The deadline had been the 15th of May until 1985

observe any recommendation. Additionally, the CBO prepares a report containing its analysis of the President's budget request. Gathering information from these sources (committees' estimates and CBO report), plus their own hearings with Government officials (to question agencies' policy perspectives), the House and Senate Budget Committees are charged with the task of drafting a concurrent resolution that goes to the both chambers' floor for adoption[88].

The House and the Senate follow different rules for the consideration of the concurrent resolution, especially with regard to amendments. In the House of Representatives, according to a special rule established every year (set forth by the House Committee on Rules), the only amendments allowed for consideration are the ones that entirely substitute the resolution, dealing with broad policy changes. Therefore, the House has overtime considered and adopted very few amendments to the budget resolution. In the Senate instead, the procedure for the consideration of amendments is not that strict, indeed it allows for amendments to focus on major changes as well as on specific issues[89]; in fact, Senate is supposed to be overloaded with budget resolutions' amendments but "[i]n the Senate, the amendment process is less structured, relying on agreements reached by the leadership through a broad consultative process"[90]. The amendments are approved, in both chambers, by a simple majority vote. In the case that there is no agreement between the two chambers on the same resolution, a House-Senate conference is set up in order to reconcile the differences and define a common text for the budget resolution, which will be finally adopted when both, the House and Senate, pass the conference report through a simple majority vote. The convening of a bicameral conference is due to the nature of the budget resolution, which shall be concurrent, thus adopted by both chambers of Congress. However, if there is no room for agreement within Congress in a certain or more fiscal years and no resolution can be agreed upon, particularly in a divided Congress[91] scenario, the last concurrent resolution that both passed maintains its validity: in fact, since the Balanced Budget Act of 1997, the budget resolution is required to cover five fiscal years but, according to congressional practice, each budget resolution provide for the aggregates and allocations for the following ten years. Nevertheless, in this way, the principle of annuality might not be respected and the economic conditions under which a budget resolution was approved might change from year to year.

[88] Rule X, clause 1(d)(1), Rules of the House of Representatives, One Hundred Sixteenth Congress; Rule XXV, clause (e)(1), Standing Rules of the Senate
[89] Rule XVI, Standing Rules of the Senate
[90] HENIFF JR., LYNCH, TOLLESTRUP (2012; p.13)
[91] The majorities in the House and the Senate belong to different parties

> “Changing economic and technical factors over the past year, however, may have rendered the prior budget levels out of date, thereby undermining their value as a realistic basis for enforcement of present policies. Further, the House and Senate must adopt a new budget resolution each year in order for the enforcement of annually appropriated spending levels to be continuous”[92]

Therefore, it is now a consolidated practice for each chamber, in the event that a concurrent resolution is not agreed upon, to pass a *deeming resolution*, which is a unilateral budgetary plan adopted by each chamber alone in order to establish and enforce budget aggregates and spending allocations.

As of the content of the resolution, the concept of aggregates includes: the total revenues collected by the Government (covering predictions until ten years beyond the FY considered), the spending ceiling (including new budget authority and outlays), the surplus or deficit of the federal budget (hence the difference between expenditures and revenues) and the public debt. It is important to make a distinction between budget authority and outlays, since the first is the capacity for federal agencies to enter into obligations (the funding occurs throughout multiple years) while the second is the actual amount of spending for a given fiscal year which often contains budget authority previously attributed, thus it affects the public deficit (outlays represent the proper cash flow from the Treasury).
Plus, the budget resolution sets forth the amounts of funds (allocations) to be provided to each of the budget functional categories. These allocations are distributed to congressional committees with jurisdiction over spending under sec. 302(a) of the act of 1974; besides, according to sec. 302(b), the House and Senate Appropriations Committees *sub-allocate* their respective allocations by dividing them among their 12 subcommittees. The resolution, however, does not fund any specific program or account, it just allocates certain amounts to functional categories, there will be appropriation acts to decide in the merit.
The spending ceiling (both budget authority and outlays) and the total revenues established by Congress cannot be infringed under sec. 311 of the Budget Act. The spending allocations instead, provide an amount of fund to each House and Senate Committee that cannot be overcome under sec. 302(f) of the same act. Therefore, any legislation considered later in the process must comply with the budget ceiling and the spending allocations decided upon in the budget resolution, its enforcement is guaranteed by substantive and procedural points of order in Congress.

[92] LYNCH (2013a; p. 2)

One of the most relevant features of the budget resolution is the presence of reconciliation directives which are recommended changes in direct spending or fiscal policy (revenue). It is time to draw a distinction between discretionary spending, which is defined each year through the appropriations process at the discretion of Congress, and direct (or mandatory) spending which is decided upon in laws different than appropriations[93] and regards some programs, including entitlement[94] ones (like Medicare and Medicaid), and the interest on the national debt[95].

Congress, in its concurrent resolution[96], sets forth reconciliation instructions that modify mandatory spending, tax laws or both under sec. 310 of the 1974 act. Those are addressed to the congressional committees of both chambers in whose field (jurisdiction) policy changes are recommended. The directives include a strict timetable (by setting deadlines) for the committees to produce legislation meeting certain fixed targets, even though no specific program modification is specified (this is left to the committees' discretion). The various outcome of the Committees work is incorporated by the Budget Committee of each chamber in a unitary bill (the reconciliation bill) consisting of multiple provisions. The Budget Committees are not allowed to substantially revise the competent committees proposed legislation changes. Thereby, House and Senate shall resolve the differences between the two competing bills by reaching a final agreement in a bicameral conference, whose resulting text shall be then approved.

Accordingly, the final reconciliation bill goes to the House and Senate floor for adoption. Given that both chambers previously agreed upon the modifications in the budget resolution and they did so, once again, in the conference, the room for amendments of the reconciliation bill at this point is very limited. This is true in the House but in the Senate in 1990 has been introduced the so-called *Byrd rule*[97]: any Senator may raise a point of order (under Byrd rule) to delete any provision in the bill that is deemed to deal with extraneous matter to the field of reconciliation; the point of order is automatically approved unless a waiver motion is adopted with the votes of 60 senators (this majority requirement makes the motion's passage harder). Once the reconciliation bill is adopted by both chambers, it is then subject to the presidential veto.

[93] Legislation outside of the budget cycle including reconciliation bills

[94] Providing for benefit payments and eligibility requirements

[95] For the first time in the budget cycle, such a distinction is necessary. So far, the executive budget and the congressional budget resolution considered discretionary and direct spending together. However, this separation is going to become essential with respect to next topics.

[96] Deeming resolutions cannot contain reconciliation directives due to their unilateral nature

[97] Named after the proponent of the rule: Senator Robert Byrd of West Virginia

The reconciliation process seems to deliver optimally in terms of efficiency, linearity and timing but it shall be restricted to its areas of competence: the programs financed through mandatory spending and the federal revenues. Moreover, it does not need to take place every year as the appropriations process.

2.4 European planning: The Multi-annual Financial Framework

The European institutional structure, due to the growing budgetary challenges and the intention to respect principles of budget discipline, equipped itself with an instrument of planning for future expenditures: the multi-annual financial framework (MFF). This procedure has now a primary source of law unlike the congressional budget resolution which is not envisaged in the US Constitution. Indeed, it has been codified by the Treaty of Lisbon of 2007 in art. 312 TFEU (having effect from 2009), but previously, it drew its source from institutional practice.

The first time in which the multi-annual financial framework came up was in 1988 when the Delors[98] I package of financial reforms was implemented. It was set up as part of an inter-institutional agreement between the Commission, the Council and the EP on the financial perspectives for the next five years (1988-1992): the institutions arranged to control budgetary growth and to establish limits on the expenditure and regarded the agreement as binding. Subsequently, when the first MFF expired, the institutions updated it again through an IIA mechanism for the implementation of the Delors II package; this time the period concerned was established to be of seven years (1993-1999). The practice kept going for the next seven years' period (2000-2006) when the eastward enlargement had to be managed and again for the period 2007-2013 when the EU had to adapt to the Treaty of Lisbon innovations.

There was no provision in the Treaties nor in the legislation for the issuing of an IIA every seven years containing a financial plan, but the Treaty of Lisbon turned such a practice into a Treaty rule. Therefore, the MFF 2014-2020 has been the first one mandated by a Constitutional provision as well as the only one so far in the form of a regulation, as a result of the application of art. 312 TFEU. The same will be valid for the next MFF (2021-2027).

[98] Jacques Delors has been the President of the European Commission from 1985 to 1995. He had a major role on the empowerment of the Commission and on the negotiations of the Treaties of Maastricht (1992) and Amsterdam (1997) which increased the share of EU competences

Art. 312 TFEU establishes, first of all, the task of the MFF, which is to "ensure that Union expenditure develops in an orderly manner and within the limits of its own resources"[99] thereby linking it with the annual budget process and the own resources decision as a substantive element of the budget cycle. Besides, its duration shall be of at least five years (as it was for the first MFF in 1988) but the practice provides for a seven years plan in order to preserve the predominant role of the Member States to the detriment of those of the Commission and the EP, whose stance would be reinforced by the adjustment of the MFF to the duration of their terms (5 years each); an opportunity that could have come true in 2014, when the EP elections were scheduled and a new MFF had to be drawn. However, the Council did not allow that and

> "[m]oreover, given the length of the negotiations and the very time-consuming procedure, a five-year perspective would have forced all the institutional actors involved, in particular the Commission, to put forward a proposal and then to enter a new bargaining position for the next multi-annual financial framework almost immediately after the agreement on the previous one"[100]

Usually, the debate on every new MFF begins way before the actual procedure: nearly three years in advance, the Commission publishes a proposal defining its recommendations on the features of the next MFF, then the EP releases its analysis of the Commission proposal and draws its own expectations for the MFF in an interim report and later on, the Council intervenes by providing its opinions on the matter. In this way, the orientation of the institutions for the upcoming financial plan are already set out and the EU action is more predictable and geared towards a compromise. Moreover, during the negotiations in the General Affairs Council (GAC), the EP and the Commission are briefed and somehow involved (through trilogue meetings) in the process. However, par. 2 of art. 312 TFEU envisages a special legislative procedure for the adoption of a regulation[101] that entrenches the MFF: after receiving the consent of the EP, acting by a simple majority, it is the Council to decide upon the MFF unanimously, unless all the members of the European Council authorize it to vote by a qualified majority. The exclusive[102] choice of the regulation places the MFF as a secondary source of law within the EU framework, thus enhancing its relevance. The procedure instead, confers a predominant role to Council as it occurs for the own resources determination (which is a Council Decision), thereby highlighting the connection between the two and the prevalence of the intergovernmental method within the EU finances decision-making, both for expenditures and

[99] Art.312 par. 1 TFEU
[100] FASONE and LUPO (2018; p. 826)
[101] The MFF 2014-2020 was the first to be adopted as a regulation, but it was in an IIA as well
[102] From Lisbon, the MFF shall be in an ad hoc regulation, no IIA is considered valid

revenues (particularly in this first stage); the latter, decided by an agreement between the Members States, are determined on the basis of the former, which are equally decided by the Member States confirming, once again, to have the leadership over the EU budget.

The MFF is required to define the annual budget ceilings of expenditure for all the financial years considered (seven). The ceilings are expressed as a percentage of the total EU GNI and are divided in appropriations commitments and appropriations payments: respectively the obligations that the EU institutions are allowed to assume in order to finance their programs (the funding occurs in one or more years) and the total amount that can be spend by the Union every year. This reminds of the distinction between budget authorities and outlays in the congressional budget resolution which shares with the MFF the setting of a spending ceiling as well. The ceiling set out in the own-resources decision cannot be exceeded representing the limit for spending growth. All these ceilings are basically established by the Council that in doing so shapes the decisions over every annual budget process which by law "shall comply with the multi-annual financial framework"[103] establishing a hierarchy between the two. Therefore, the annual budget process becomes increasingly predictable, as for the US budget after the congressional budget resolution.
As regards the commitments appropriations, these shall be divided in categories of expenditure (headings and sub-headings) that correspond to the EU major policy areas, setting a ceiling for each of them[104], just as the budget resolution distributes allocations for its functional categories.

The adoption of a multi-annual financial framework is crucial for a correct, transparent, predictable and non-confrontational budgetary exercise. For this reason, in the case that the EU institutions, or, more specifically, the Member States in the Council, do not reach an agreement on a MFF regulation[105] for the new financial period by its outset, the ceilings and other provisions established by the previous MFF for its last year shall be retained valid until an agreement is found on a new financial plan. This provision, contained in par. 4 of art. 312 TFEU, reflects the one applicable when the budget resolution is not adopted in the US. However, while the EU planning occurs every seven years (in practice), the Congress shall act on a resolution every fiscal year, thereby increasing the possibility of disagreement, especially if two chambers belong to a different majority (divided Congress). Moreover, not only the EU

[103] Art. 312 par. 1, TFEU
[104] The amounts not spent for a certain category cannot be used for the financing of a different category
[105] Never happened so far and very unlikely to occur due to EU principles and art. 312 par. 5 TFEU

institutions shall respect the principles of institutional balance and loyal cooperation enshrined in the TEU but, particularly for the MFF procedure, "the European Parliament, the Council and the Commission shall take any measure necessary to facilitate its adoption"[106]. This emphasises again the desired coordination and concordance of the EU budget cycle vis-à-vis the conflictual nature of the US one.

2.5 The congressional appropriations process

Whilst direct, or mandatory, spending is enacted through the process of reconciliation outlined above or through any other form of substantive legislation, discretionary spending instead, which constitutes a large share of US expenditures, is subject to the congressional appropriations process. Hereby, it is the legislative branch that is vested with the power to determine the appropriations, Congress' power arises from the US Constitution itself[107] and establishes the principle of *appropriations control*, discussed in paragraph 1.3 of this study. Pursuant to this principle, the amount appropriated cannot be exceeded by a federal agency and the funds cannot be employed for any other purposes than those decided upon by Congress in the appropriations bills. "An appropriations act is a law passed by Congress that provides federal agencies legal authority to incur obligations and the Treasury Department authority to make payments for designated purposes"[108].

Prior to any appropriation, in compliance with House and Senate rules[109], Congress must enact an authorization act. The latter is a law serving for establish federal agencies or programs and define their scope. Moreover, through these acts the enactment of subsequent appropriations is authorized, and a related spending ceiling might be set. Authorization measures can be valid permanently, for a sole fiscal year or for multiple years; when they expire, they shall be renewed if any appropriation in favour of the agency or program at stake must be made. For this purpose, authorizing acts can be decided by Congress at any time of the year. Authorizations and

[106] Art. 312 par. 5 TFEU
[107] Art. I, § 9 states that "No money shall be drawn from the Treasury but in consequence of appropriations made by law"
[108] HENIFF JR., LYNCH and TOLLESTRUP (2012; p. 20)
[109] Rule XXI, clause 2, Rules of the House of Representatives, One Hundred Sixteenth Congress; Rule XVI, Standing Rules of the Senate

appropriations are always, and strictly, separated because legislative provisions cannot be included into appropriations measures[110]; indeed, committees' jurisdiction is split between legislation and appropriation, with the inability of any of them to interfere in the sphere of the other.

Therefore, all appropriations shall be authorized by law, consisting in authorization measures carried out by legislative committees. However, when an authorizing act is passed, Congress is not bound to provide the related appropriation. On the contrary, when an appropriation measure includes a spending purpose not covered by the authorization act, or its funding is higher than the ceiling set in the authorization, it is the case of an *unauthorized appropriation*. In the same way, appropriations acts may happen to contain legislative measures (strictly forbidden by the rules since it is a prerogative of legislative committees), such as creating, amending, or repealing law. In those two instances, the House and Senate might choose to disregard their rules[111], as frequently happened[112].

> "The division between an authorization and an appropriation is a construct of House and Senate rules created to apply to congressional consideration so that the term "unauthorized appropriations" does not convey a legal meaning with regard to funding. If unauthorized appropriations or legislation remain in an appropriations measure as enacted, either because no one raised a point of order or the House or Senate waived the rules, the provision will still have the force of law. Unauthorized appropriations, if enacted, are therefore generally available for obligation or expenditure. Legislative provisions enacted in an annual appropriation act also generally have the force of law for the duration of that act unless otherwise specified"[113]

The set of rules and practices put into effect by Congress that emerged overtime to deal with the funding of discretionary federal spending shapes the congressional appropriations process. One of its most significative features is that appropriations acts are annual: even though no provision lays down this requirement, appropriations are made for the duration of a single fiscal year, thus they expire at the end of the FY (on the 30th of September of each year), unless differently provided in the act. Whereby, "[a]n appropriation that does not mention the period during which the funds are to be available is a one-year appropriation"[114]. Therefore, the appropriations process is part of the budget cycle and shall take place every year right after the presidential budget

[110] ibidem

[111] Or otherwise, representatives and senators may raise points of order claiming those violations intended to suppress them.

[112] Especially in the case of unauthorized appropriations for ongoing programs whose authorization expired and shall be renewed.

[113] SATURNO, HENIFF JR. and LYNCH (2016; p. 11)

[114] HENIFF JR., LYNCH and TOLLESTRUP (2012; p. 21)

proposal's submission and the congressional budget resolution, where applicable.
The jurisdiction over appropriations is in the hands of the House and Senate Committees on Appropriations. Their work begins upon the President's budget submission, when each of their subcommittees holds hearings with government officials, of the agencies and programs they are supposed to fund, and experts in the various fields as witnesses. During this phase, the members of the subcommittee are provided with supporting materials that justify the agencies' requests so that they are able to realize the motives behind the executive's choices (presented in the President's budget) and to make their own choices about Congress' priorities. As soon as the budget resolution (either concurrent or deeming) is passed by Congress, the Committees on Appropriations receive funds for spending, and once the subcommittees hearings are concluded, the committees sub-divide the monies among their respective twelve subcommittees, in the process of *sub-allocations* (the decision over prioritization is made)*;* the subcommittees, the same[115] in both chambers, have jurisdiction over a defined part of the spending and are responsible for drafting the appropriation bill corresponding to their category, so, regularly, appropriations bills shall be 12 and each of them shall be considered separately by Congress.

The appropriations bills are firstly considered in the House of Representatives, where the subcommittees of the Appropriations Committee draft the bill for their area of competence complying with the allocations at their disposal and the ceilings determined in the authorization measures. Thereafter, the bill is reported to the full Committee on Appropriations which can adopt amendments to it before bringing it to the House floor. The House generally adopts a special rule to consider appropriations bills. These are considered in the Committee of the Whole[116] with a limited time for debate and limited leeway for amendments (subject to various requirement). The Committee then reports the bill with the related amendments to the House which votes on the amendments proposed and the bill's passage, that once agreed upon goes to Senate. The Senate, as of recent practice, considers the bill that has come out of its Appropriations Committee, rather than the House-approved bill, as a substitute. Here, requirements for amendments are less strict than in the House but, often, the Senate agrees, unanimously, to set certain parameters. The different versions of the bill are to be reconciled in a bicameral conference where the members of the two House and Senate subcommittees whose field of competence's bill is under scrutiny take part,

[115] Same in number and for their baseline category. Each Appropriations subcommittee in the House has its own parallel in the Senate, and vice versa.
[116] A committee that includes all the members of the House.

as well as the Chair and the Ranking Member of both Appropriations Committees. The conference does not have a time limit, it ends its scope only when a majority of members of each chamber signs a conference report, which entirely substitutes the bill and goes to the chambers' floors for passage. The report is not amendable, but, the House, which is usually the first chamber considering it, can recommit it to the conference for further consideration; rejection of the report leads to the same result: further negotiations on the matter in the conference. If the House decides to adopt it, the conference is disbanded, thereby the second chamber considering it, usually the Senate, is left with two options (adoption or rejection). The chambers shall agree on the same exact bill before sending it to the President for his signature or veto, the latter can be overridden by a two-thirds majority in both chambers[117].

Federal agencies and programs funded through the appropriations process shall receive the resources to operate every fiscal year. The financing shall occur in the form of regular appropriations acts, which shall be passed separately from each other for any of the twelve areas of discretionary expenditure, following the procedure set out above, and within the beginning of the next fiscal year. Frequently, instead of considering 12 regular appropriations acts, Congress combines some of them (the number can vary every time) into a package named *omnibus appropriations act*. The merger usually occurs at a later stage in the process, when the regular acts are being discussed in the bicameral conference. Packaging the acts may serve to resolve stalemate between Congress' chambers and between Congress and the President (both are likely to happen along party lines in the events of divided Congress and divided Government) by bringing more issues to the table in order to find a broader compromise. This procedure, however, precludes the possibility for Congress to debate and vote separately on the bills and hinders the presidential veto power, since it involves the whole act (not part of it).
Regular appropriations acts fund federal agencies and programs for the next fiscal year but, during an ongoing fiscal year, additional resources might be needed to finance unforeseen events or certain programs or activities for which previously appropriated funds are insufficient. For this purpose, Congress may enact *supplemental appropriations acts*, that provide funds for the current fiscal year.

Due to the annual and, at times, conflictual nature of the budget cycle, there exists the risk of failure to pass appropriations acts (even a single missed

[117] According to Art. I, § 7 of the US Constitution

regular appropriation may generate huge troubles for the federal government) within the 1st of October, the beginning of each fiscal year. The deadline is strict, and the delays are frequent, particularly during the last years. The financial flow to government agencies shall never be interrupted, otherwise it triggers a government shutdown (which will be dealt with in the last chapter). The mechanism that enables Congress to prevent this eventuality and to continue the funding of government agencies, even if appropriations acts are not passed in time, is the adoption of a continuing resolution, which is "a joint resolution to allow agencies or programs to continue to obligate funds at a particular rate (such as the rate of operations for the previous fiscal year) for a specific period of time, which may range from a single day to an entire fiscal year"[118]. The continuing resolution may be a stop-gap funding, to prevent a shutdown when the regular or omnibus appropriations act is slightly delayed and on the way to its passage, or even a full-year funding, due to the absolute disagreement between the Congress and the President. This type of temporary funding envisages a specific date of expiration (that can range from one day to one year) renewable by Congress, nonetheless it loses its effect when the regular/omnibus appropriations acts are approved.

The congressional appropriations process terminates the budget cycle in the US by refining the items of expenditure envisaged since the executive proposal and by specifying the amount granted to every government agency and program. It is important to note that, notwithstanding its uncooperative nature, in the end of the budget process all the parts at stake, the two chambers and the President, must agree on the various degrees of federal expenditures.

2.6 The EP and the Council: the annual budget procedure

Even though the annual budget procedure of the EU begins with the Commission's proposal, the main activities are carried out once the draft budget is submitted (within the 1st of September according to the TFEU but usually it is done before June) by the two *budget authorities*, the EP and the Council. These two institutions are charged with the task of finding a joint agreement on the same text. The annual budget shall comply with the ceilings for appropriations commitments and appropriations payments set out, for each heading and sub-heading of expenditure, by the MFF that refers to it.

[118] SATURNO, HENIFF JR. and LYNCH (2016; p. 13)

The latter is basically decided upon by the Council (with only the consent of the EP) but the specificity of the annual budgets' amounts often triggers intense negotiations between the two budget authorities.

Since the Treaty of Rome, Community's expenditures have been under the jurisdiction of the Member States in the Council. From 1970 (Treaty of Luxembourg), there was a distinction between compulsory and non-compulsory expenditures. While the former were assigned to the Council, the latter, which saw their share grow dramatically during the years even surpassing the other category[119], were handled by the EP, whose clout over the budget process was therefore increasingly remarkable, particularly when, from 1975 (Treaty of Brussels), the EP had the prerogative to reject the budget as a whole. The distinction, that had the non-compulsory category as the residual one[120], was deleted by the Treaty of Lisbon which instead determined that the two budget authorities shall consider the whole range of EU spending on an equal footing. The current procedure is laid out in art. 314 of the TFEU, whose first two paragraphs, already discussed, deal with the Commission's proposal.
Thereafter, the draft budget is transmitted to the Council and the EP concurrently; however, it is envisaged that the Council shall act first on it by taking a position. This is firstly considered by the COMBUD, and later, it is passed to the COREPER II which, depending on the degree of agreement obtained in the COMBUD, can either just vote for approval or discuss it. If still no agreement is found, an economic and financial affairs Council on the Budget (ECOFIN Budget) featuring the ministers of the economy and finances of the 28 member states may be convened in order to approve the position to be taken by Council on the budget. Unlike the decisions on own resources and on the MFF, which are taken by unanimity, the Council's position shall be delivered by a qualified majority vote even though "the position of the Council is usually approved by unanimity or by an overwhelming majority of countries"[121]. As of the timing, while par. 3 of art. 314 states that the position shall be adopted not later than the 1st of October, the stance is taken around late August/early September[122]; indeed, no matter whether the agreement is reached early in the COMBUD, in the COREPER II or later in the ECOFIN Budget, the national parliaments shall be granted eight weeks to examine the Commission's proposal and give instructions to their executive. Besides, the Council shall attach to its position, transmitted

119 From 8% in 1970 to 60% in 2010.
120 While the compulsory expenditures were those resulting from Treaties' provisions and acts adopted accordingly.
121 FASONE and LUPO (2018; p. 831)
122 The draft budget is submitted to Council around late May/early June

to the EP, the reasons that led to the adoption of it, as established by the Treaties[123].

The EP, for its part, has a period of 42 days from the communication of the Council's position to consider it. The process might be concluded in the circumstance that the supranational institution decides to approve the Council's outcome or in the case that it does not take any action within the six weeks' timeframe, automatically backing the Council's position. However, this is very unlikely to occur due to the fervent activity of the EP' committees and political groups. These prepare amendments to the draft budget and present them to the Committee on Budget which in turn submit the ones it approved to the plenary session of the Parliament, taking place usually in October. The amendments are considered through a majority vote. If adopted, the draft budget, as amended by the EP plenary, is transmitted to the Council and the Commission. Subsequently, "[t]he President of the European Parliament, in agreement with the President of the Council, shall immediately convene a meeting of the Conciliation Committee"[124]. The meeting of the Conciliation Committee can be avoided if, within 10 days from the EP's expression, the Council decides to approve all the amendments adopted, thus concluding the annual budget procedure. However, this, as well as the two cases for the end of the procedure outlined before, seldom happens; indeed "[r]esorting to the Conciliation Committee has become the rule in the practice of the post-Lisbon budgetary procedure as the Parliament and the Council are not able to agree on the same text as first reading"[125].

The Conciliation Committee is composed by 56 members, 28 members of the Council representing the 28 member States and an equal amount of members of the EP[126]; moreover "[t] he Commission shall take part in the Conciliation Committee's proceedings and shall take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council"[127], thereby it does not hold any voting right. Indeed, the task of the Conciliation Committee is to reach an agreement on a joint text for the EU budget within 21 days from the day it is convened. The decision of the Conciliation Committee shall be backed by a qualified majority of the representatives of the Council and the majority of the votes of the EP's representatives.

When no agreement is reached between the two institutions within the 21 days at their disposal, the Commission shall submit a new draft budget, according

[123] Art. 314 par. 3 TFEU
[124] Art. 314 par. 4 TFEU
[125] FASONE and LUPO (2018; p. 833)
[126] Rule 95, clause 2, Title II, Rules of Procedure of the European Parliament
[127] Art. 314 par. 5 TFEU

to par. 8 of art. 314 TFEU. This occurred in 2010 and 2012 for financial years 2011 and 2013. However, the annual budget for these two financial years was approved timely thanks to the interinstitutional cooperation.
In the case that, instead, the Council and the EP reach an agreement on a joint text in the Conciliation Committee, both institutions have 14 days from the day of the agreement to approve it[128]. From this point, the procedure leaves room for different outcomes depending on the choices of the two institutions. If, within the 14 days, both institutions approve the joint text or both do not take a decision on it, or one of them approves it while the other does not act: the budget is adopted. If, both institutions reject the joint text or one of them rejects it while the other does not take a decision: the budget is not adopted, and the Commission shall submit a new draft budget. The differentiation comes when the two institutions assume a contrasting stance on the joint text. If the Council approves the joint text while the EP rejects it: the budget is not adopted, and a new budget proposal shall be submitted. If instead the Council rejects the joint text, the EP can approve, within 14 days from the Council's rejection and by the majority votes of its members and with the three fifths of the votes cast, the budget as amended in its first reading with all or some of the amendments (voting on each of them for the sake of reaching the required majority). "Where a European Parliament amendment is not confirmed, the position agreed in the Conciliation Committee on the budget heading which is the subject of the amendment shall be retained"[129]. If the EP is not able to reach the abovementioned majority, it can still approve the joint text by a simple majority vote, even though Council rejected it. This circumstance displays the predominant position over the annual EU budget procedure the EP has achieved under the Treaty of Lisbon reforms. However, apart from the fact that this case is quite unlikely to verify[130], some[131] argue that the system that was in place before the revision, was more favourable to the EP. This procedure sharpens conflicts by compelling the two institutions to reach an agreement every year following a strict deadline on the exact same text, which at the end of the procedure shall be signed by the President of the EP (and not concurrently by the President of the Council) to be enacted[132], as par. 9 art. 314 TFEU states.

The Conciliation Committee envisaged by the TFEU reminds of the bicameral conference of the US Congress for the passage of appropriations

[128] Art. 314 par. 6 TFEU
[129] Art. 314 par.7 (d) TFEU
[130] Council rejecting the joint text it has agreed upon in the Conciliation Committee
[131] BAUER and BECKER (2017); BAUER, GRAHAM and BECKER (2018)
[132] The ECJ ruled on the matter in Case C-77/11 *Council of the European Union v. European Parliament* (2013)

bills with the sole differences of the time limit to reach the agreement (21 days) and the qualified majority requirement for one of the parts (the Council). The same goes for the examination of the joint text or report (both not amendable) issued by these: it slightly favours the chamber/institution representative of the citizens than the one representative of the federal/member States and the range of outcomes are easily comparable. The preliminary analysis in the committees (on appropriations and on budgets) of the executive's proposal by both chambers/institutions is yet another major commonality. However, while in the US when Congress does not pass appropriations bills within the deadline of the 30th of September it may resort to continuing resolutions (otherwise a Government shutdown occurs), in the EU when no agreement is reached within the 31st of December, art. 315 envisages the system of *provisional twelfths* (a US-like shutdown can never come into play). Accordingly, the institutions keep looking for an agreement on the current financial year budget but, in the meanwhile, "a sum equivalent to not more than one twelfth of the budget appropriations for the preceding financial year may be spent each month in respect of any chapter of the budget"[133]. The Council can lift the sum arising from the previous year's budget choices to more than one twelfth on proposal of the Commission and given the consent of the EP.

One practical peculiarity of the recent EU annual budget procedure is that the budget is frequently modified by budget amendments.

> "In the post-Lisbon period, no fewer than six amending budget acts have been approved every year and the amount of resources they are able to reallocate is immense. With this process, several thousand billion euro have been distorted from their original commitments and payments or new commitments have been established"[134]

Amendment proposals are indeed allowed at any time throughout the course of the financial year following the same procedure of the annual budget envisaged in art. 314 TFEU (just addressed). While these shall be introduced only in exceptional cases like unforeseen circumstances and urgent needs, as the *supplemental appropriations acts* in the US, the practice sees a persistent reliance on amendments to the EU budget. This means that the passage of the budget does not halt the process of financing, which happens to last until the end of the financial year. Such practices are apparently pursued due to the timetable of the annual budget procedure, which seeks for a decision on the whole budget before the beginning of the financial year; instead, the two

[133] Art. 315 TFEU
[134] FASONE and LUPO (2018; p. 835)

institutions may decide to delay decisions on certain topics in order to get to a two-sided satisfactory compromise later. However, as Fasone and Lupo point out:

> "[T]he budgetary procedure has become highly fragmented and subject to a process of progressive updates and accommodations. This makes the initial adoption of the annual budget just one step in a series of other micro and most often macro interventions that shape the EU budget and policies during the financial year […] perhaps this is the trade-off that must be made in order to obtain the flexibility that is needed to carry out the budgetary process in the presence of a highly complex institutional framework"[135]

Indeed, in the EU, the budget procedure may seem to never come to an end; in fact, while amendments for an ongoing financial year are being discussed and voted, the negotiations for the next financial year' budget are being carried out, thus generating a perpetual process of financing characterized by a cross-item and cross-temporal bargaining between the Council and the EP. Therefore, differently from the US, the budget cycle is practically not concluded here (even though it formally is).

Nevertheless, the Parliament appears to have a stronger stance in this procedure (compared to its role in the others) since it can co-decide with the Council on EU annual expenditures and has granted a favoured position over the approval of the joint text come out from the Conciliation Committee (even though such a case is rare). However, despite the semblance of EP prevalence, it is still Council to run the finances of the EU: the decision on own resources and the ceilings established by the MFF (both firmly in its hands) play a major role over the decision on the annual budgets, thereby revealing, once again, the actual bias towards the intergovernmental method in budgetary matters.

2.7 Budget enforcement: sequestration and discharge

A further element of the budget cycle is the means by which the budget is enforced and controlled. These serve as guarantees and checks to determine the correct implementation of the approved budget and to preserve sound expenditures (considering debts and deficit). The implementation of the

[135] Ibidem

budget is clearly placed under the administration of the executive branches both for the US and the EU (the President's Administration and the Commission), but the enforcement and control mechanisms differ between the two. In the US, Congress has provided for the sequestration mechanism while in the EU, Treaties empower the EP with the discharge procedure.

A sequester consists in an automatic reduction of spending (by deleting previously enacted spending) in order to achieve the budgetary requirements established by law. It was envisaged for the first time by the Balanced Budget and Emergency Deficit Control Act of 1985 for the enforcement of certain deficit targets. The act has been amended in 1990 by the Budget Enforcement Act (BEA) which established caps on discretionary spending (the congressional appropriations) and created the pay-as-you-go (PAYGO) process to ensure that legislation on direct spending and revenues would not increase deficit. These requirements, enforced through sequestration, lasted until FY2002.

Nevertheless, sequestration mechanisms have been revived under most recent budgetary legislation. The Statutory Pay-As-You-Go Act, enacted in 2010, requires (as the BEA) that direct spending legislation and revenue cuts shall be offset, thus not increasing the deficit, otherwise sequestration of direct spending occurs.

> "The PAYGO process did not preclude Congress from enacting legislation to increase direct spending; it only required that the increase be offset by reductions in other direct spending programs (which could include increases in offsetting receipts), by increases in revenues, or by a combination of the two in order to avoid a sequester"[136]

Besides, sequestration is triggered by the Budget Control Act (BCA) of 2011 to enforce two separate requirements. First, the limits (caps) on discretionary spending established until FY2021 and secondly, reduction of at least $1.2 trillion of deficit to be achieved, likewise, by FY2021[137].

Sequestration occurs by means of a presidential order which comes after a sequestration report by the OMB, issued within 14 (for the PAYGO) or 15 (for the BCA) days from the end of the congressional session. In its report the OMB accurately calculates the reduction amount needed and the accounts that shall be cut, thus defining a *sequestrable base*. Not all the accounts can incur

[136] HENIFF JR., LYNCH, TOLLESTRUP (2012; p.17)

[137] This objective has been the purpose of the Joint Select Committee on Deficit Reduction, created by the BCA and composed by Senators and Representatives who failed to reach a deal to enact legislation on these cuts, thereby triggering the automatic process for spending reduction envisaged by the BCA.

in reductions, some are exempt[138] and some are provided with special rules[139]. The non-exempt accounts instead, shall be reduced by a uniform percentage applied to all programs, projects and activities within a budget account. Through this process, the OMB prepares the executive order issued by the President and thereafter the agencies arrange the cuts laid down in it, automatically cancelling expenditures enacted by Congress.

The purpose of sequestration is to enforce the statutory budget requirements. The latter are established by Congress but enforced by the executive. However, Congress can enforce them through points of order during the discussion on the budget and, most importantly, can enact legislation to modify those requirements or derogate from their application for a certain period, thus displaying its strong and unchallenged hold on the US purse.

In the EU, according to art. 317 TFEU, the implementation of the annual budget is a Commission's task, in cooperation with the Member States. The budget is implemented "on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management"[140]. The Commission possesses a variety of internal control mechanisms[141] and a further control is exercised by the Court of Auditors. However, the most relevant control over Commission's work, to enforce budgetary rules and the appropriation caps imposed by the budget authorities, is the discharge procedure pursuant to art. 319 TFEU.
The discharge is a decision taken by the EP, on recommendation of the Council, that marks the closure of the financial activity of a given year, thereby *discharging* the Commission of its duties by approving its performance. This procedure was codified by the Treaty of Maastricht of 1992, even though it already constituted institutional practice due to the *ex post* control powers the EP had over the Commission's implementation of the budget, defined by the 1975 Treaty of Brussels. The current procedure (art. 319 TFEU) confirms the exclusive role of the Parliament, while the other budget authority, the Council, is left with the prerogative of recommendation.

As of the timing, the Financial Regulation establishes that the decision on discharge for the budget of a given financial year shall be taken before the

[138] Most of the exemptions regard mandatory programs like Social Security, Medicaid, Children's Health Insurance Program etc. but also some discretionary programs like the ones of the Department of Veteran Affairs and those related to military personnel are included.
[139] Reductions cannot exceed a given percentage.
[140] Art. 317, TFEU
[141] Internal Audit Service, Internal Audit Capabilities and Audit Progress Committee

15th of May of two years later[142]. Indeed, the year after the financial year concerned, the Commission draws up the final consolidated accounts and sends them to the EP, the Council and the Court of Auditors; the latter is responsible for carrying out the annual report, along with the institutions replies received, by the 30th of November. This is essential for the discharge procedure since on that basis the Council prepares its recommendation while the EP's Committee on Budgetary Control, once received all these documents[143], drafts, by the 30th of April[144] (of two years later),the resolution of discharge to be submitted to the plenary assembly. To that effect, the Committee on Budgetary Control (to be distinguished from the Committee on Budgets) may ask the Commission to provide more data for the sake of gaining further information on the Commission's work.

In the light of the materials submitted by the Commission[145] and by the Court of Auditors and on recommendation of the Council, the EP votes on the discharge decision (proposed by the Committee on Budgetary Control) by absolute majority. The EP may grant the discharge approving the proposal, thereby reliving the Commission from its budgetary responsibilities related to that financial year and thus closing the accounts. The EP may attach to the discharge certain observations to be fulfilled by the Commission. "The Commission shall take all appropriate steps to act on the observations in the decisions giving discharge and on other observations by the European Parliament relating to the execution of expenditure, as well as on comments accompanying the recommendations on discharge adopted by the Council"[146].

The other outcome of this decision might be the postponement of discharge, triggered by the rejection of the proposal, thereby requiring the Commission further explanation over its implementation of the budget. The postponed vote, which shall take place in October of two years after the financial year concerned, may either grant the discharge or refuse it[147]. The latter option has never been adopted in full, notwithstanding the two precedents of 1984 and 1998[148], so its effects are still uncertain. "In institutional practice, the main foundation for the European Parliament's strategic use of budgetary powers

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142 Art. 164 Title X, Regulation (EU, Euratom) No 966/2012
143 Art. 1 Annex V, Rules of Procedure of the European Parliament
144 Art. 2 Annex V, Rules of Procedure of the European Parliament
145 The accounts, the financial statement of the assets and liabilities of the Union and the evaluation report on the Union's finances as prescribed by art. 318 TFEU.
146 Art. 319 par. 3 TFEU
147 Art. 5 Annex V, Rules of Procedure of the European Parliament
148 In 1984 the "undischarged" Commission had almost concluded its term, while in 1998 an ad-hoc Committee of Independent Experts suggested a motion of censure, but the Commission resigned before it could get approved.

can probably be identified in its prerogative to give a discharge to the Commission"[149].

Moreover, pursuant to Rule 100 Title II of the EP rules of procedure, the discharge procedure envisaged by art. 319 TFEU concerning the Commission, shall also apply to the other EU institutions and bodies for the correct implementation of their own budget[150]. Among these institutions[151], it is listed the Council, which has been reluctant to be subjected to the control of the EP since it is regarded as a budget authority on the same level of the EP; indeed, when the EP refused to grant discharge to the Council, the latter refused the EP authority to do so based on a different interpretation of art. 319 TFEU and of the principle of sincere cooperation[152].

The two mechanisms (sequestration and discharge) put in place for the enforcement of budget regulation and for a sound financial management by the executive branches do not have major similarities as of timetable (sequestration is automatic) and as of the effects. However, they share the scope (the correct implementation of the budget) and the relevance of the institution representing citizens (even though sequestration is attributed to the executive, the law that establishes this mechanism is passed by Congress, which may decide, anytime, to amend it as it pleases).

[149] FASONE and LUPO (2018; p. 841)
[150] It is important to note that the Treaties provide the discharge to the sole Commission, while EP's internal rules envisage (and operate) the same discharge procedure for multiple institutions
[151] Which include, for example, the President of the EP (for the EP budget), the ECJ and even the Court of Auditors
[152] FASONE and LUPO (2018, p. 843)

Chapter III. Systemic troubles

This last chapter will address the systemic troubles that affect the two systems; in particular, once provided the underlying frameworks in the first two chapters, I will deal with what appear to be the major flaws and weaknesses of the two processes along with the perspectives for change. For the US, it regards the expenditures side: notably, the lately most frequent non-compliance with the codified deadlines through the whole annual process of determination of the budget (par. 3.1) and the disastrous eventuality of a lack of funding for federal agencies, the Government shutdown scenario (par. 3.2). Whereas for the EU, I will move on the revenue side since I will analyse, first, the large utilization of correction mechanisms for the contributions to the budget (par. 3.3) and thereafter, I will consider the need for fresh own resources for the EU financing (par. 3.4), hence, report the reforms that will possibly occur in the near future.

3.1 US: budget delays and failures to act

As it was outlined during the consideration of the budget cycle, the process in the US is characterized by multiple sub-processes, starting from the presidential proposal until the appropriations acts; each of them has to follow, in accordance with the timing of the fiscal year, strict deadlines. The latter have been decided by the Congress through legislation over the years. However, the observance of these time limits, apparently due to different reasons, does not occur every fiscal year, especially in recent times. In this paragraph, I will examine each sub-process of the US budget cycle separately, considering the historical timing record, thus displaying the extent of the delays over the fiscal years along with the eventual causes and effects of them on the whole budget process' outcome. I anticipate that the *regular order* of the budget process, i.e. the strict application of budget rules established by Congress legislation intended to guarantee the correct functioning of the federal government procedure in the determination of annual expenditures, has not been always complied with, especially in the past few fiscal years;

this tendency has led to the classification of the process as a *regular disorder*[153].

The first sub-process to consider is the one that initiates the budget cycle in the US, namely, the President's budget request. The latter was introduced in 1921 by the Budget and Accounting Act, which provided the first day of Congress' regular session as deadline; however the latest term has been changing over the years by new acts until the current codification[154], envisaged by the Budget Enforcement Act of 1990 which set the first Monday of February of each year as time limit. This term implies that a new President, that is elected in November, and who takes office after the inauguration in January, can carry out its own budget proposal, not relying on his predecessor's indications[155]. Moreover, it allows the President to put forward his program to the Congress and to the nation in the annual State of the Union address, that takes place at the end of January, before the actual submission of the budget to the legislature.

The abovementioned act of 1921 envisaged FY1923 as the first fiscal year to which the deadline was applicable; hence, from FY1923 until now (FY2020), the President's budget has been submitted to Congress 98 times with different deadlines in force throughout those years. The President cannot be exempt from the budget's submission because it is vital for the correct implementation of the budget process of the US and implicitly contains his policy recommendations for the following fiscal year. Among the so far 98 presidential budgets, 54 of them have been submitted by the required deadline, 22 even before the deadline, 5 within the extended deadline while 17 were the actual delays. In fact, the Congress can decide to pass legislation to extend the timeframe for the President's submission, this happened on 6 occasions: the latest of which, referred to FY1991[156], was the only one not observed (submitted 7 days after the expiry of the extended deadline) and it is therefore counted within the 17 delayed.

Thus, in 17 fiscal years the President submitted the budget to Congress after the deadline[157]. The first delay was that of FY1955 amounting to only one day, followed, chronologically, by the six days delay of FY1976. This is to show that delays are mainly a recent trend. Among the 17 cases there have been 8 occasions in which the delay has exceeded 30 days: FY1989, FY1994,

[153] MCCARTY (2014; p. 1); TESTA (2016; p. 25)
[154] Contained in Title 31, § 1105(a), U.S. Code
[155] As we will see, this has been a common justification for delays
[156] It corresponds to the first year of George H. W. Bush presidency
[157] For an in-depth analysis on the timing of submission (from FY1923 to FY2014) see *Table 2* of CHRISTENSEN (2013; pp. 11-16)

FY1997, FY2002, FY2010, FY2014, FY2018 and FY2020. Half of them have been justified by presidential transitions: 66 days in FY1994 for the first year Clinton Administration (the second longest delay), 63 days in FY2002 for the first year of George W. Bush Administration (the fourth longest delay), 94 days in FY2010 for the first year of Obama Administration (the longest delay in American history) and 38 days in FY2018 for the first year of Trump Administration. To these I can add the already mentioned delay of FY1991 (first year of George H.W. Bush Administration) to assess that the President's budget submission has incurred into a delay in each of the five last presidential transitions. The small time (less than three weeks) from the President's inauguration of the 20th of January[158] to the first Monday of February's deadline might be a reason for this frequent delay, even though the 94 days[159] of FY2010 is an unprecedent negative record, with a large gap over the others invoking the same justification (almost 30 days more).

If those fiscal years' delays have been motivated by presidential transitions, the remaining four delays exceeding 30 days have also a common explanation: the delayed enactment of previous fiscal years' appropriations. This occurred for the 45 days delay of FY1989 during Reagan Administration, for the 43 days delay of FY1997 during Clinton Administration, for the 65 days delay of FY2014 during Obama Administration (the third longest delay) and for the 34 days delay of FY2020 during Trump Administration. Moreover, in three of these occasions it has been provided for further justifications (generally by the Director of the OMB): Clinton (FY1997) had to deal with a revision of mandatory programs and tax policy[160], Obama (FY2014) was engaged in fiscal cliff negotiations and in a possible sequestration procedure[161], whilst President Trump (FY2020) had to cope with the longest Government shutdown in American history.

The compliance with the deadline may be an indicator of the relation between the White House and Capitol Hill: a delayed submission, in the absence of valid motivation, restricts the time of parliamentary debate. However, it is key to note that within the last eleven submissions (from FY2010 to FY2020) only twice (FY2011 and FY2016) the President has submitted the budget in time while nine times out of eleven occasions (with a percentage higher than the 80%), the President submitted the budget after the deadline. This reinforces the theory of a recent trend that may be hard to convert, especially

[158] According to Amendment XX to the US Constitution
[159] The deadline was the 2nd of February, but it was submitted on the 7th of May
[160] CHRISTENSEN (2013; p. 9)
[161] TESTA (2016; p. 8)

if the other sub-processes, with their own peculiarities and troubles still have to begin.

After the President's submission, the Congress starts the work to pass a budget resolution. The latter was introduced in 1974 by the Congressional Budget and Impoundment Control Act which provides for the adoption of a concurrent resolution (agreed upon by the two chambers of Congress) on budgetary matters. The deadline established by the act of 1974 was that of the 15th of May; however, this has been moved to the 15th of April in 1985, by the Balanced Budget and Emergency Deficit Control Act which also removed the previous requirement of two budget resolutions per year.

The 1974 Budget Act was applicable from FY1976, thus, until FY2020, we consider here 45 fiscal years[162]. Congress complied with the deadline only six times: twice (FY1976 and FY 1977) when the deadline was in May, and four (FY1994, FY2000, FY2001 and FY2004) since it is in April. Congress has therefore incurred in long delays: the longest has been that of FY1991 when the Congress was able to pass a budget resolution only on the 9th of October (177 after the 15th April deadline). However, a delay of its adoption, occurred 26 times, is not the worst case for the budget resolution since, 13 times out of 45, Congress failed to act on a budget resolution. This happened for the first time in FY1999 (while from FY1976 to FY1998 Congress always adopted a budget resolution) and it is an evident recent trend: if we analyse, as above, the last eleven fiscal years (from FY2010 to FY2020), we arrive to the conclusion that only twice (FY2010 and FY2016) a budget resolution has been adopted, while for nine out eleven fiscal years the Congress has failed to act; moreover, if we consider only the last ten years (excluding FY2010, when the resolution passed), just one budget resolution (FY2016) has been adopted.

The budget resolution is a tool in the hands of Congress to plan future actions on the budget and it is not subject to the *veto power* of the President (see par. 2.3). It is not a prerequisite to continue with the budget process, so if there is no agreement between the chambers (and not even in the conference) it can be bypassed. However, one of its key features is to establish spending allocations among the House and Senate appropriations committees, an aspect that cannot be skipped in order to not undermine the following steps of the process. For this reason, the Budget Enforcement Act of 1990 envisaged that the resolution would cover 5 fiscal years and, in actual practice, budget resolutions actually cover 10 fiscal years: for instance, the last resolution

[162] For an in-depth analysis on the timing of adoption see *Table 12* of HENIFF JR. (2015; p. 29)

adopted, that of FY2016 covers until FY2025[163] and its provisions would be replaced in the event that a new budget resolution is passed by Congress.
A reason for Congress failures to act may arguably be the presence of different party majorities in the two chambers[164]. However, except for the years from 1981 to 1987 in which a divided Congress passed the resolution, within the 13 occasions in which the budget resolution has not been adopted by Congress, only in 6 of them (less than 50%) the two chambers of Congress belonged to different party majorities while in 7 occasions House and Senate were aligned on the same party line (6 times the Republican Party and 1 the Democratic Party) and still did not adopted a budget resolution. This displays a Congress that is unwilling or unable to carry out properly its constitutionally provided power of the purse.

An important, although optional, feature of the budget resolution is that of the reconciliation directives that eventually lead to reconciliation bills that modify mandatory spending legislation and fiscal policy (for a further analysis see par. 2.3). According to the Congressional Budget Act of 1974 the deadline for the completion of actions on reconciliation bills is two months after the adoption of the budget resolution, thereby the time limit is the 15th of June. The first time reconciliation measures were instructed by Congress in the budget resolution was for FY1981 and among the 32 budget resolutions adopted, 21 of them included reconciliation directives; some of them provided for two reconciliation measures for the same fiscal year, indeed the total amount of reconciliation instructed has been 24. However, given that reconciliation bills are federal laws, they are subjected to the signature or the *veto* of the President. Indeed, among the 24 reconciliation measures, 4 of them (FY1996, FY2000, FY2001 and FY2016) have been vetoed by the President[165].

The reconciliation process initiates when the budget resolution is finally adopted and comes to an end when reconciliation legislation is enacted (or vetoed). The timing for processing of reconciliation acts has varied over years, it took on average 155 days to complete the process[166]: the longest has been the 384 days related to FY2006, followed by the 337 days of FY2010 and 300 days of FY1983 while other 4 reconciliation processes have exceeded the 200 days (286 in, again, FY2006; 249 in FY1986; 248 in FY2016 and 215 in FY1990)[167]. Even though there have been cases of short reconciliations

[163] ivi, pp. 11-12 (*Table 5*)
[164] The President does not take part in the process
[165] See *Table 1* in LYNCH (2016; pp. 2-3)
[166] ivi, p. 5
[167] ivi, p. 6

processes (FY1991, FY1998, FY2002 and FY2004), the overall timeline, seldom respected the two months envisaged by the act of 1974 and only twice the deadline of the 15th of June (FY2002 and FY2004).

It is arguable that much of the timing of the reconciliation process depends on the timely or not adoption of the budget resolution. The unique case in which both were on time has been that of FY2004. Sometimes, even if the reconciliation takes a fair amount of time (two months), it does not respect the deadline because of the delay in the adoption of the resolution: this is the case for FY1998 (resolution adopted on the 5th of June, reconciliation bills enacted on the 5th of August) and for FY1991 when the reconciliation process took only 27 days (the shortest in history) but the resolution was adopted on the 9th of October with 177 days delay (longest ever). However, the event that the budget resolution is adopted timely or with few days of delay does not mean that the reconciliation will not take long: in FY2000 the resolution passed on schedule while the reconciliation process took 161 days and in FY2005 the resolution's delay was just 13 days while the two reconciliation measures envisaged took 286 and 384 days, respectively. Still, as Lynch affirms:

> "[t]imely adoption of the budget resolution can facilitate timely enactment of reconciliation legislation, just as tardy adoption of the budget resolution can delay completion of the reconciliation process. For example, the FY2002 budget resolution was adopted only 25 days after the deadline, and the reconciliation process for that year was completed in another 28 days (compared to the average of 155 days). Conversely, the FY1986 budget resolution was adopted 108 days after the deadline, and the reconciliation process took another 249 days to complete"[168]

An explanation for the length of the reconciliation process is the possibility of *filibustering*, namely, the minority party obstructs the work of the Congress on an unwanted bill for the sake of delaying it by exhausting the counterpart with amendments and points of order. This is even easier in the Senate, from 1990, due to point of orders raised pursuant to *Byrd rule*, that requires a 60 votes majority to be waived (see par. 2.3): a very large use of it was done in FY2010[169] when the reconciliation process took 339 days (the second longest delay). Moreover, it can also be sparked by a divided Government since this time also the President is part of the process with the signature or veto.

Lastly, I take into consideration the appropriations process, i.e. the acts that, every fiscal year, determine the discretionary spending of the US. For an in-

[168] ivi, p. 8
[169] TESTA (2016; p. 14)

depth analysis of it, I refer to par. 2.5 of this study. Here it suffices to say that appropriations bills shall be adopted by the Congress and signed by the President before or on the beginning of each fiscal year (the 1st of October) to guarantee funding for federal agencies and programs. Additionally, the number of appropriations bills (regular) to be adopted each fiscal year has varied over years (13 until FY2005, 11 in FY2006 and FY2007 and 12 from FY2008 to now) and sometimes Congress packages more regular appropriation bills into one *omnibus* appropriations bill, thereby facilitating passage. Now I will deal with the timing of their adoption, regardless of their merging.

Once the deadline of the 1st of October is overcome and some appropriation acts have not been adopted, the federal activities funded through the missing appropriations may experience a funding gap (an amount of time during which they are not provided with any federal budget authority), thereby they are not able to operate and thus they would cease their functions into what is known as a shutdown scenario (the topic of the next paragraph, 3.2). However, in order to prevent this pernicious contingency, Congress may decide to enact temporary mechanisms to finance the federal activities (based on previous year's funding levels) on which it has not found an agreement yet: these are called *continuing resolutions* (CRs), which might vary in terms of content, duration, amounts, purposes and legislative provisions[170]. They, of course, terminate their effect once the related appropriations are enacted or when they are intended to expire.

Even though they are an essential tool to avoid funding gaps, the adoption of CRs inherently underlies a delay in the appropriations process. The latter has been an almost constant feature of the process and the abuse of CRs led to the "governing by CR"[171] definition. In a time-span that goes from FY1977 to FY2019[172], only 4 times out of 43 (FY1977, FY1989, FY1995 and FY1997) all the appropriation acts had been adopted before the 1st of October[173]; that implies that for all the remaining fiscal years (39), Congress resorted to CRs to finance part or all of the federal activities for a certain period of time. The delays in appropriations are very common as McCarty[174] shows in a study conducted from FY1974 to FY2013, but they sharply increase their occurrence in the FY2002-FY2013 timeframe. Even more, from FY2002 to

[170] CRS Report coordinated by MCCLANAHAN (2019; pp. 8-9)
[171] MCCARTY (2014; p. 9)
[172] FY2020 cannot be considered here because, by the time I am writing, the appropriations process for that fiscal year is still ongoing
[173] See *Table 2* of the CRS Report coordinated by MCCLANAHAN (2019; pp. 10-11)
[174] MCCARTY (2014; pp. 10-11)

FY2019 the appropriations bills adopted on time have been 0 in 10 occasions out of 18 (more than the 60%) while from FY1974 to FY2001 they have been 0 only 5 times out of 28 (less than 20%). Overall, very few appropriation acts have been adopted before the deadline in the last years and on three occasions (FY2007, FY2011 and FY2013) the CRs funding lasted for the full fiscal year (365 days) displaying a Congress conscious of its inability to agree on budget measures[175]. An entire fiscal year funded by CRs amounts to a total failure to act by the federal Government, since the proper funding shall be exercised by appropriation acts.

Now that I have outlined all the sub-processes of the budget cycle in the US and displayed the chronic delays and failures to act that they are characterized of, especially in the last years, I proved that the regular order is relatively not observed, or better, it is observed always less than the past. The reasons for this outcome might be different: polarization of the political spectrum, political bargaining[176] or a long-term trend in procedural performance[177]. However, the effects that the mishandling of the procedure is liable to generate are detrimental: reduction of time available for planning and implementation of budget measures and for any other substantive legislation, policy uncertainty, deficits (hence, the sequestration procedure), public backlashes and, in general, hardships for the citizens (particularly in the event of a shutdown), who are the ones that actually finance the budget by paying taxes and are, ultimately, the subjects of budget choices.

These effects might, arguably, be controlled if we take into consideration some reform proposals of the appropriations process. According to the current design of the system, the blame for the delays in appropriation acts, the packaging of them into an omnibus bill and the adoption of CRs (in other words, the decline of the regular order) is, for the most part, put on the Senate because it is the chamber where the debate is, too often, and for too long, extended. While it appears unfeasible to limit the number of amendment proposals (which still must comply with several criteria, as explained in par. 2.5), it seems instead the right time to let the Senate act concurrently with the House on appropriations (the House is now required to always initiate their consideration, thus restricting the time available for the Senate) and to limit *filibustering* by allowing a simple majority of senators (now the majority required is 60 senators) to end the prolonged debate on appropriation acts[178];

[175] Also here, as for the reconciliation process, actions of obstruction in the Senate can be quite recurring
[176] WOON and ANDERSON (2012)
[177] MCCARTY (2014)
[178] HANSON (2015)

in this way, the party who controls the chamber would activate a sort of *nuclear option*, as in the case of the cloture on presidential nominees.

3.2 A setback in US budgetary politics: the shutdown scenario

If delays and failures to act appear, rightly, to be major troubles within the US budgetary politics, further developments may lead to even worse outcomes affecting negatively the national economy and having also a direct impact on the public. The shutdown scenario reveals the flaws of a system that is structurally at risk of failing to deliver its mission and is frequently, and too often, overly vulnerable to partisanship at the expenses of everybody.

As explained above, appropriation acts (whether in the form of regular or omnibus appropriation bills) shall be adopted before the beginning of every fiscal year (the 1st of October) for every of the now 12 spending categories; when there is no agreement within the Congress or between the Congress and the President (which is liable to sign or veto the appropriation acts) they can choose to extend their negotiation time through the enactment of continuing resolutions that temporarily[179] (having a fixed term) provide funds at the spending level of the past fiscal years (CRs require agreement between Congress and the President as well). However, whenever all or part of the appropriation bills or CRs are not enacted on time or if the CRs expire during a given fiscal year, it can be said that the federal Government is experiencing a funding gap that can eventually lead to a shutdown of certain federal agencies and programs.

Funding gaps shall be distinguished from shutdowns insofar as the formers are indefinite intervals of time in which some, or all, federal activities financed through discretionary spending are not funded by appropriations or CRs, while the latter are the suspension of those not funded activities (the non-essential ones) that imply the furlough of federal employees. Hence, shutdowns are primarily generated by funding gaps (it is a precondition) but not every funding gap leads to a shutdown: when a funding gap lasts for a very short interval (i.e. funding is resumed within the same day) or it is expected to last less than a full calendar day, the shutdown plans do not begin because the funds will be provided within an amount of time adequate to not cease the operations. Therefore, shutdowns happen when there is a more than

[179] It can also amount to a full fiscal year time

a full calendar day long funding gap and its restoring does not seem imminent; however, it occurs only for the affected federal agencies and programs which have not been appropriated by Congress.

The recurrence of shutdowns began in the eighties stemming from a strict interpretation of the Anti-Deficiency Act by the then Attorney General Benjamin R. Civiletti, who issued two opinions, in 1980[180] and in 1981[181], regarding the situation of a funding gap. The principle of *appropriations control* (already discussed in par. 1.3) is enshrined into the US Constitution ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"[182]) and refined into the Anti-Deficiency Act[183] which states that Government officials cannot incur into obligations without appropriations made by law. According to the Attorney General's opinions, in the occurrence of a funding gap, federal agencies are not allowed to incur in any obligation, including the payment of their employees, that shall be promptly furloughed. Thereby, the only way for the heads of federal agencies to comply with the Anti-Deficiency Act (which, by the way, includes criminal sanctions) is, in the absence of appropriations made by law, to cease all the agency operations that are deemed non-essentials. There exist, however, exceptions to the obligations that can be made by federal agencies: emergency situations related to the safety of human life or the protection of property and obligations that have been already authorized by law. The latter include multiple-year and no-year appropriations (as long as budget authority is still available during the funding gap), agencies that draw funds from their own operations (like the U.S. Postal Service), activities that permit obligations in advance of appropriations (such as contract authority), entitlement authority (provided through acts other than appropriations) and all those obligations necessary to presidential activities[184] and, according to Civiletti, the obligations needed to cease the agency in an orderly way.

A shutdown is, by itself, a failure to act of the federal Government to the extent that it was not able to find an agreement on the concerned appropriations or on any CR that could have postponed the consideration of those. This event took place too often for the disastrous effect it is liable to produce. From FY1977, the first fiscal year in which the congressional budget

[180] Opinion of the Attorney General, 25 April 1980, 224: *Applicability of the Anti-deficiency Act Upon a Lapse in an Agency's Appropriation*
[181] Opinion of the Attorney General, 16 January 1981, 293: *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*
[182] Art. I, § 9, clause 7, U.S. Constitution
[183] Title 31, §§ 1341-1342, §§ 1511-1519, U.S. Code
[184] Government Accountability Office, *Principles of Federal Appropriations Law*, 3rd ed., vol. II, pp. 6-150

process as envisaged by the act of 1974 was implemented, to FY2019, the more than a full calendar day long funding gaps have been 20[185], with various duration. From FY1977 to FY1980, 6 funding gaps have occurred (three only in FY1978): they ranged from 8 days to 17 days lack of funding. However, during this period, federal agencies did not undertake the suspension of their activities (it was believed that they should continue to operate because Congress never specified or intended to do otherwise), they just minimized all non-essential operations and obligations in the absence of appropriated funds. After the issuing of the two Attorney General's opinions that envisaged the shutdown of the federal activities affected by the funding gap, the paradigm seemed to switch: from FY1981 to FY1995, no funding gap (among the 9 occurred) exceeded the 3 full calendar days and therefore many of them did not result in a shutdown, either for their short duration or for the expected imminent funding; for instance, the FY1984 3 days funding gap never led to a shutdown because of a three-day holiday weekend and an imminent signature of President Reagan on the CRs already passed by Congress. This trend has been interrupted during FY1996, when two partial Government shutdowns occurred: the first lasted 5 days, it started on the 13th of November 1995 due to the veto of President Clinton on a CR passed by the Republican Congress and involved 10 of the 13 appropriation bills (3 of them had already been enacted), it terminated on the 19th of November when a CR extending the funding through the 15th of December was enacted; by that day four regular appropriations had been adopted but there was no agreement on the other six and not even on a new CR, thereby the Government shutdown again until the funding was restored by a CR enacted on the 6th of January 1996, this time the shutdown lasted 21 days[186].

From the experience of FY1996 on, no funding gap has occurred for the next 17 fiscal years, until FY2014, when, during Obama Administration, the House (Republican party majority) and the Senate (Democratic party majority) were not able to agree on the same text of a CR (shipping the law back and forth several times) that would temporarily fund all the 12 appropriation categories from the beginning of the fiscal year[187] (the 1st of October 2013); the shutdown of the activities of all federal agencies and programs ended 16 days later, on the 17th of October, when Obama signed into law a new CR. In FY2018 instead, a two days shutdown occurred for the expiry of the third consecutive CR funding the 12 discretionary spending categories on the 20th of January, however, another CR, the fourth in a row, was enacted on the 22nd of January[188]. The most recent shutdown took place

[185] See *Table 1* in SATURNO (2019; p. 3)
[186] Ivi, pp. 6-7
[187] See TESTA (2016; pp. 19-23)
[188] SATURNO (2019; p. 8)

during FY2019, when President Trump and the Congress (particularly the House, which had a Democratic party majority) did not find an agreement on a new CR (after two already enacted) for seven of the 12 regular appropriations; it began on the 21st of December 2018, the expiration date of the latest CR enacted and, this time, the partial shutdown set a record insofar that it was the longest in American history, 34 full calendar days, until a new CR was signed into law on the 25th of January 2019.

When a Government shutdown is likely to occur, the affected federal agencies shall terminate their operations in an orderly manner (in doing so they have the possibility to incur in obligations, but they cannot provide any payment), thereby, aware of this eventuality, they would make, beforehand, a shutdown plan. The planning is made under the guidance of the OMB, especially referring to *Circular No. A-11*, which provides the instructions for agencies' plans and their submission to the OMB for review. Moreover, these plans shall be revised, and submitted, with a minimum frequency of two years. In their formulation agencies must strictly comply with the two Attorney General's opinions and they shall make different plans based on the eventual 'periods' of the shutdown: one for the first five days and another one in the case that the shutdown drags longer. In their plans, agencies specify which, if any, of their activities is excepted from the termination and how many employees would be retained (not furloughed) without being paid for the performance of those activities that are authorized by law, paid by mandatory spending, or necessary to protect human life and property. However, the OMB can always direct agencies' actions through the issuing of bulletins and *memoranda*.

Therefore, one of the immediate effects of a shutdown is the furlough of federal employees, i.e. their placement in an undefined temporary, non-pay, non-duty status[189]. This may amount to a large scale impact depending more on the number of the regular appropriation bills not enacted than on the duration of the shutdown: for example, during the first shutdown of FY1996 that lasted 5 days and involved 10 regular appropriations, it is estimated that 800.000[190] federal employees were furloughed while for the second FY1996 shutdown that lasted 21 days involving 6 regular appropriation only 280.000[191] employees were, reportedly, furloughed. In FY2014 instead, the 16 days shutdown involving all the 12 regular appropriations is reported to have placed in furlough more than 800.000 federal employees[192]. Whilst the

[189] CRS Report coordinated by BRASS (2018; p. 13)
[190] SATURNO (2019, p; 5)
[191] Ivi, p. 6
[192] Ivi, p. 7

longest shut down in history involving seven out 12 regular appropriations, led to the furlough of roughly 400.000 federal employees[193]. However, once the shutdown is ended by the restoration of the funding, federal employees who were excepted from furlough (i.e. retained by their respective agencies) would receive their expected compensations[194] while for those who, having been furloughed, did not perform their duties, legislation usually[195] provides for the payment of their salaries retroactively.

Overall, the shutdown has a negative impact on the national economy affecting part (sometimes a large part) of Government operations and services to the public, including mandatory spending activities, such as entitlement programs[196]. In FY1996 the effects were confined to part of the federal activities financed through discretionary spending but still there were major shortcomings for the citizens: unprocessed applications for passports and visas; closure of national parks, museums and monuments; the National Institute of Health (NIH) clinical centre could not accept new patients into clinical research; cancellation of recruitment and testing of federal law-enforcement officials etc[197]. Ultimately, the two FY1996 shutdowns are estimated to have costed 1.4 billion dollars especially due to the retroactive payment of furloughed employees[198]. In FY2014 the shutdown involved all the appropriations spending, indeed even though the duration of the shutdown was shorter, the effects on the economy and the public were larger and are discussed in detail in a OMB report[199] which claims that, among other things, it hindered trade, disrupted private sector lending to individuals and small businesses, disrupted tourism and travel by closing national parks, it was responsible for uncollected revenues etc. Moreover, "[d]uring the 16-day shutdown, Federal government employees were furloughed for a combined total of 6.6 million days"[200] and "[m]illions of Americans were impacted by the shutdown, due to furloughs of Federal employees, reduced services for the public, and delays in payments to Federal grantees, States, localities,

[193] KAUFMAN and MURPHY (2019), *Federal employees prepare for a long shutdown*, in CNN Politics, available online
[194] Under OMB *Memorandum* M-11-13, *Planning for Agency Operations During a Lapse in Government Funding*, April 7, 2011
[195] It always occurred for past shutdowns
[196] For such programs the funding is permanent, and it keeps flowing during a shutdown but employees who work for these federal programs receive their salary through appropriation bills (discretionary spending). Therefore, employees are not paid, and they are excepted for furlough, but the programs would not process new entitlement claims during the funding gap
[197] CRS Report coordinated by BRASS (2018; p. 27)
[198] Ivi, p. 34
[199] OMB (2013), *Impacts and Costs of the October 2013 Federal Government Shutdown*
[200] Ivi, p. 4

contractors, and individuals"[201]. The GDP instead was reduced by 0.3 percentage points for the fourth quarter of 2013[202]. FY2019 shutdown, the longest in history, only had a limited impact because it involved only 25% of the total discretionary spending outlays. However, a CBO report[203] estimates that, among other things: the GDP decreased of 0.1 percentage points in the fourth quarter of 2018 and of 0.2 in the first quarter of 2019; businesses were prevented from access to loans, federal permits and certifications; the timing for collection of tax revenues has been altered; a reduction of the aggregate demand in the private sector for goods and services occurred etc.[204] The FY2019 shutdown had also a significative impact on the Transportation Security Administration (TSA), thereby causing unrest at the national airports; but most importantly, it is reportedly[205] claimed that the shutdown delayed the consideration, from regulatory officials of the Federal Aviation Administration (FAA), of the software updates on the Boeing 737 Max which, allegedly, may have caused the crash of Ethiopian Airlines Flight 302 with all the 157 people on board killed.

A Government shutdown, even if partial, has proven to lead not only to catastrophic effects for the national economy, but it also has an impact on the day-to-day life of the citizens, who would not be able to benefit from the public goods on which they have rights. Too often, the failure to guarantee these rights must be attributed and blamed on the political process for the determination of the budget. More specifically, the three most significative shutdowns (FY1996, FY2014 and FY2019), whose effects have been outlined above, result from conflicts arising from party lines. Notably, in all of the three occasions the United States lied in a situation of divided Government: the President belongs to a party different from the party that controls at least one of the two chambers of the Congress. During FY1996, the Democratic party's President, Bill Clinton, was struggling with the Congress (which had a Republican party's majority in both chambers) on spending decisions: he vetoed a CR (passed by the Republicans on the expiry date of the last CR, allegedly on purpose) that would prevent the shutdown (and the furlough of 800.000 federal employees) because it included cuts in Medicare, Medicaid, education and technology while he argued to increase spending in those fields

[201] ibidem
[202] LABONTE (2015; p. 1)
[203] CBO (2019), *The Effects of the Partial Shutdown Ending in January 2019*
[204] The CBO also expects that many of these effects will be impacted in a contrary way (boosting) by the increased spending of the following months
[205] TIMMONS (2019), *Ethiopian Airlines crash came after US shutdown delayed Boeing 737 Max fixes*, in *Quartz*, available online; TANGEL and PASZTOR (2019), *Boeing to Make Key Change in 737 MAX Cockpit Software and Boeing* and *Regulators Delay Jetliner Fixes Prompted by Lion Air Crash*, in *The Wall Street Journal*, available online

and raising the debt limit. Moreover, Clinton sustained that the CR adopted was "part of an overall back-door effort by the Congressional Republicans to impose their priorities on our nation"[206]. In FY2014, the Democratic-controlled Senate had an exhausting fight with the Republican-controlled House of Representatives over a CR that, according to the will of House Republicans, would have suspended the discretionary financing of the *Patient Protection and Affordable Care Act* enacted by the Democratic President, Barack Obama. The Senate was obviously not favourable to this option, and therefore, the two chambers shipped the law back and forth (in the Senate, the Democrats were subject to harsh *filibustering* by the Republican counterparts) with basically the same amendments every time for each side until the new fiscal year began (at midnight of the 1st of October) and no funding was provided for all the 12 regular appropriations, thus opening the shutdown[207]. The Senate Majority Leader, Harry Reid, during the debate stated: "[t]hese fanatics really point to disapproval for Obamacare as justification for taking the Federal Government and our economy hostage to their demands"[208]. For the FY2019 shutdown, the Republican President, Donald Trump, and the Democratic-controlled House of Representatives disagreed over immigration policy and generated the longest shutdown of American history. The President argued he would not sign any spending bill that not provided 5.7 billion dollars for the construction of a physical barrier at the southern border with Mexico, but, after 34 days, and many shortcomings, the funding was restored by a CR (first through February and then until the end of the fiscal year). However, the President decided to pursue his border wall plans through a national emergency declaration concerning the southern border of the United States[209].

Given the high-degree of partisanship that characterized American politics in the last decades and the large utilization of the budget process, and its deadlines, as means to achieve various political aims different from those of finances, it would be needed to think of a reform of the system that would, at least, prevent a shutdown scenario. The US budget process seems to have a structural pathology[210] that, too frequently in recent years, gets close (or in the worst cases, reaches) to the harmful effects of a Government shutdown, especially in periods of divided Government, which may easily be the norm considering the two-years term of the congressmen in the House. Therefore,

[206] CLYMER (1995), *Battle Over the Budget: The Overview; President Vetoes Stopgap Budget; Shutdown Looms*, in The New York Times, available online
[207] TESTA (2016; pp. 19-23)
[208] Ivi, p. 20
[209] Proclamation 9844, 2019 – 03011, Executive Office of the President, February 15, 2019
[210] TESTA (2016; p. 19)

it has been proposed the introduction of automatic continuing resolutions (ACRs): a mechanism that keeps any funding gaps from happening, by granting, automatically, the funding for discretionary spending activities whenever appropriation acts or CRs are not enacted by the federal Government[211]. In this way, the President, and especially the Congress, are not pressured into a fast-paced budget process and may have more time available for negotiating, while the possibility of a shutdown would be completely, or partly, dismissed depending on the form ACRs would assume. Indeed, ACRs may be permanent or shaped by a sunset provision (valid until a certain fiscal year); they can enter into force indefinitely or when some conditions are met (only fiscal years when there is a general election); they can regard some specified federal activities or all of them; they also vary in terms of their duration and the funding level they provide[212]. The topic of ACRs it is not that new, it was discussed since the two opinions of the Attorney General were issued and, in some cases, both chambers of the Congress took floor action on ACRs: an amendment containing an ACR mechanism was adopted by the Congress (105th U.S. Congress) but later vetoed by President Clinton[213], while the Pay Our Military Act was passed unanimously by both chambers of Congress (113th U.S. Congress) and signed into by President Obama on the 30th of September 2013, before the FY2014 total Government shutdown would have begun. The latter act, provided for automatic funding, in the near and highly expected event of a shutdown, for the activities of the Department of Defence (DOD) and some programs of the Department of Homeland Security (DHS); the funding level was indefinite and the duration (expiry) remains ambiguous[214] because it terminated its effect once the October 17 CR was enacted and no further funding gap occurred in FY2014.

While, on the one hand, the case for the introduction of ACRs holds, in the sense that it would avert shutdowns and their catastrophic effects in addition to encouraging a more relaxed debate on discretionary spending (without a threat of an imminent shutdown); on the other, it is impossible to ignore that an automatic funding mechanism would make it more difficult to adopt appropriation legislation because it gives a great advantage to those who do not favour a change in discretionary spending, thereby they would delay the debate and not be willing to compromise since the ACR already provides a

[211] It may remind of the system of *twelfths* provided by art. 315 TFEU (see par. 2.6), which automatically continues the financing of the EU activities by one twelfth of the previous financial year appropriations per month. However, the cooperative nature of the EU budget process must be distinguished from the US conflictual circumstances.
[212] TOLLESTRUP (2015; pp. 4-5)
[213] Ivi, p. 14
[214] Ivi, p. 17

certain level funding. Plus, ACRs do not foresee variations between the financing of federal programs and may undermine agencies accountability to Congress[215]. Notwithstanding these consequences, in presence of a responsible and cooperative political framework[216], ACRs would not generate all these concerns, they would instead be an, arguably, sporadic, short-termed and very helpful mechanism for financial soundness; but, for the time being, in the US a shutdown scenario might be preferable to a system that incentivizes the failure to act on appropriations.

3.3 EU: the use of correction mechanisms

In the European Union framework, the major troubles regard the revenues side of the budget process, in particular, the own resources system, envisaged by the Treaties as the means for financing the EU budget ("Without prejudice to other revenue, the budget shall be financed wholly from own resources"[217]), whose evolution and features have been largely analysed in par. 1.4 of this thesis. In this section instead, it is worth to mention that the EU budget currently drags its revenues from three different sources: traditional own resources (agricultural and sugar levies plus custom duties, for which the Member States retain the 20% as collection costs); a VAT-based resource, collected at a (not always) uniform rate across the EU (it now amounts to 0.3%); and a residual resource based on the financial contributions of the Member States in accordance with their GNI. However, there is more than that since several and diverse correction mechanisms have been introduced throughout the years to reduce the contributions of some Member States; here, I will discuss the reasons that pushed to their adoption and the extent of these corrections mechanism as well as the arbitrariness of their calculation and their demonstrated ineffectiveness.

The introduction of correction mechanisms happens basically due to the reliance of Member States on the concept of net balance during the Council negotiations for the decisions on own resources for the financing of the EU. The net balance is, plainly, the difference between a Member State's amount of contributions to the budget and the amount it receives back from the EU in the form of expenditures. Or better:

[215] Ivi, p. 11
[216] As the EU is, where the *twelfths* system in place has never been implemented in recent years
[217] Art. 311, par. 2, TFEU

> "Calculating a nation's net contributions to the European budget – or net national budgetary balances – consists in totalling all the payments made by that country's State Treasury to the Union's budget –- revenue from common "own resources" collected on its soil and contributions from its national budget voted in parliament– in the debit column and the total expenditure in favour of the country or its residents – payments to farmers, expenditure by regional and structural funds in favour of different regions, etc., in the credit column"[218]

In particular, the focus on Member States' net balances began in the seventies with the liberalisation of international trade favoured by GATT policies, which thereby decreased the amounts of custom duties and increased the share sustained by the VAT-based resource, culminating with the establishment of the principles of Fontainebleau in 1984. Beforehand, surely there were already imbalances in national contribution but the Secretary General of the Commission, Emile Noël, prohibited any calculation of them[219]. Another major factor that led to the enforcement of correction mechanism was the UK accession to the EEC in 1973 (along with Ireland and Denmark). The UK, at the time, due to its peculiar features and due to the manner in which the EU budget was structured paid a very large share of it: a great portion of the Community budget was spent in agriculture while British agricultural sector was very small and undeveloped compared to those of the other EEC members; a large part of the financing of the EEC budget occurred through VAT-based revenue, which in the UK was, proportionally to its GNP, the highest within the Community; and notwithstanding its share of the budget, the UK was "among the less well-off Member States, with a per capita income lower than the EEC average"[220].

Therefore, the topic of the nation's unfair share of contribution to the European Communities, has been a topic within the UK since its admission and was an issue also during the 1975 referendum about the nation's EEC membership (which was successfully maintained). However, the most hard-line position against the EEC was taken during the eighties by the UK Prime Minister, Margaret Thatcher, who threated to veto the activities of the Community (the unanimity rule allowed this retaliatory stance) if she did not get *her money back*. Indeed, at the European Council of Fontainebleau of 1984, Thatcher was able to cut a permanent[221] rebate: the UK VAT-based payments to the budget would be reduced of the 66% every financial year. More markedly, at Fontainebleau the Member States established a principle

[218] LA CACHEUX (2005; p. 13)
[219] Ivi, p. 3
[220] D'ALFONSO (2016a; p. 3)
[221] Included in Decision of the Council, 7 May 1985, 85/257/EEC, Euratom: *on the Communities' system of own resources*

according to which “any Member State sustaining a budgetary burden which is excessive in relation to its relative prosperity may benefit from a correction at the appropriate time”[222].

The UK rebate’s cost is clearly shared by all the other Member States based on their GNI. However, there have been introduced some exceptions (the so-called *rebates on the rebate*): since the implementation of the UK rebate, Germany, claiming the Fontainebleau principle, obtained to pay only two thirds (the 66%) of its share; this was true until 2002, when its contribution was reduced of the 75% of its share, thereby paying only the 25% and the same applied to Austria, the Netherlands and Sweden. Thus, the cost of the UK rebate is financed for the 60% by three Member States: France, Italy and Spain[223]. The UK rebate depends on everchanging variables such as the VAT base of the EU and annual European expenditures share received by the UK, thereby its amount varies every year. Nevertheless, it is subject to some adjustments like, for example, the ones due to the capping of the VAT base or the introduction of the GNP/GNI resource or the deduction from the rebate of the costs of the eastward enlargement: in this latter case, it seemed appropriate to make the UK share the burden, being the UK one of its major advocates; the rationale behind the various adjustments “is that the result of the calculation should be similar to what it would have been had the overall state of play not changed since 1985”[224].

Apart from the UK rebate, and the corrections thereof, just described above, there have been other correction mechanisms, especially decided within the last two the MFFs (2007-2013 and 2014-2020). Stemming from net imbalances calculation based on the principles of Fontainebleau and drawing experience from the popularity gained domestically by Thatcher for the UK rebate “[s]ome member states gradually learnt that asking a reduction in their contribution to the budget could somewhat boost their domestic approval rate, especially if they could declare before the national press that they were able to negotiate a great deal for the country”[225]. This was possible because they could use a veto threat on the budget if their requests were not successfully accommodated, due to the unanimity requirement (see par. 2.4).
Indeed, for the 2007-2013 MFF it was agreed a reduction of the uniform VAT call rate (0.3 %) to four Member States: Austria (0.225%), Germany (0.15%), Sweden (0.1 %) and the Netherlands (0.1%). In addition, the latter two Member States benefited from lump-sum reductions of their share of the GNI-

[222] Conclusions of the Presidency of The European Council, Fontainebleau (25-26 June 1984)
[223] See *Table 2* in D’ALFONSO (2016a; pp. 5-6)
[224] Ivi, p. 4
[225] CITI (2017; p. 5)

based resource as well: for each of the seven financial years of the MFF, Sweden received €150 million back, while the Netherlands received €605 million. For the following MFF, 2014-2020, the same kind of correction mechanisms occurred: a 0.15% reduced VAT call rate for Germany, the Netherlands and Sweden while this time the reductions of the GNI contributions amounted to €695 million for the Netherlands, €185 million for Sweden, €130 million for Denmark and a decreasing reduction for Austria (€30 million in 2014, €20 million in 2015 and €10 million in 2016). Moreover, there is a hidden correction mechanism in the form of the collection costs retained from the custom duties on imports, notably, a high percentage of collection costs favours the countries were extra-communitarian goods enter into the EU Single Market, this is the case especially for Belgium and the Netherlands[226]. Hence in the MFF 2000-2007, as a form of unreported correction mechanisms, the collection costs were raised from 10% to 25% to be reduced only by 5% in the MFF 2014-2020.

The use of correction mechanisms is based on the perceived net budgetary imbalances in which Member States assume to incur in. According to these measures, they have justified their requests for a reduction of their contribution, since they believed to pay, in proportion, more than the other countries, being thus net contributors to the budget, as opposed to the condition of net beneficiaries (those which have a positive net balance, receiving more than they paid).

Arguably, the calculations made for such net balances use quite arbitrary methods. Firstly, from an accounting perspective, it presents some troubles on how to count the actual beneficiary country of expenditures made on common European programmes such as the *Erasmus* or on how to consider that, Member States forecasts about their share of the GNI-based resource, authorized by national Parliaments (see par. 1.5), are very likely to be overestimated (also due to the Commission's policy); indeed "a certain percentage – often nearly 10% in recent years – of the contributions initially approved by national Parliaments has in the end been reimbursed to national budgets"[227]. Secondly, apart from the fact that net balances vary each financial year depending on contingencies, it is key to determine the unit used for the calculation because the result is very much likely to vary depending on whether it is in per capita terms, absolute terms (billions of euros), as a percentage of the GDP or as a percentage of the GNI. Thirdly, while net beneficiary countries receive the greatest shares of the structural and cohesion funds, those expenditures benefit also net contributor countries, which are

[226] D'ALFONSO (2016a; p. 6); LA CACHEUX (2005; p. 13)
[227] LA CACHEUX (2005; p. 14)

wealthier and with a stronger industrial sector: indeed the flow of money increases the demand in benefiting countries for goods (that flow freely into the Single European Market) and services (investments in infrastructures through European-wide bids) provided exactly by the net contributor Member States which indirectly benefit from those policies[228].

A further element of arbitrariness regards the abovementioned principle of Fontainebleau whose criteria, according to the European Court of Auditors (ECA) lack of a clear definition: how to quantify whether a budgetary burden is excessive enough to trigger a correction mechanism and how to assess whether the conditions that led to the correction are still in place or whether some other Member State qualifies for a correction mechanism (lack of monitoring of the system)[229]. Indeed, the Commission noted, in its 2011 report[230], that the conditions under which the rebate was granted to the UK substantially changed: only a small part of the EU budget is now spent on agricultural policy; the VAT-based resource is not that relevant as it was in the eighties (the largest share of the EU financing is provided by the GNI resource); and the UK's per capita income has increased since then, being above the average of the EU countries.

Therefore, some European institutions (in particular, the supranational ones: the EP[231] and the Commission[232]) have advocated for a complete removal of the correction mechanisms since, apart from their evident arbitrariness, they also contribute to the complexity and the lack of transparency of the EU system of own resources. However, the decisions on own resources, and thereby on the applicable correction mechanisms, are made by the Council unanimously with the ratification of all the Member States, accordingly, everybody shall agree upon their modification (as it did not happen for the

[228] Ivi, pp. 19-20

[229] Opinions of the ECA No. 4/2005, No. 2/2006 and No. 2/2012

[230] Staff Working Paper of the European Commission, 29 June 2011, SEC (2011) 876 final: *Financing the EU budget – Report on the operation of the own resources system*

[231] Resolution of the European Parliament of 23 October 2012 in the interests of achieving a positive outcome of the Multiannual Financial Framework 2014-2020 approval procedure (COM(2011)0398 – COM(2012)0388 – 2011/0177(APP)); Resolution of the European Parliament of 16 April 2014 on the draft Council decision on the system of own resources of the European Union (05602/2014 — C7-0036/2014 — 2011/0183(CNS))

[232] Proposal of the European Commission, 29 June 2011, COM (2011) 510 final *Proposal for a COUNCIL DECISION on the system of own resources of the European Union*; Communication of the European Commission, 2 May 2018, COM/2018/321 final, *A Modern Budget for a Union that Protects, Empowers and Defends, The Multiannual Financial Framework for 2021-2027*

generalised mechanism in 2004[233] and lump-sum reductions in 2011[234], both proposed by the Commission) or likewise, their removal.

While the corrections made for the VAT and GNI based resources are temporary in nature (they last for the seven years envisaged by the relative MFF), the UK rebate and the reduction for its financing are permanent. Nevertheless, it might have occurred a condition that facilitates a rethinking of the system: the triggering of the art. 50 TEU withdrawal procedure by the UK in March 2017 (Brexit). Obviously, the expected UK withdrawal would delete any provision regarding the rebate (including its differentiated financing) and may therefore, lead to a reform of the EU budget as conceived by High-Level Group on Own Resources which on the Brexit affirms that: “Withdrawal of the UK from the EU entails the discontinuation of the UK correction mechanism and the related ‘rebates on rebate’. This in turn makes much of the rationale for the present statistical VAT-based own resource superfluous”[235]. Indeed, since the rebate is based on a VAT calculation, the UK withdrawal incentivizes a revision of this revenue; as D’Alfonso noted before the referendum of June 2016: “proposals to eliminate the current VAT-based resource have not been successful so far, and the fact that it is an essential element in the calculation of the UK rebate is seen as an obstacle to reform in this direction”[236].

While the revision of the EU budget will be the topic of the next paragraph, here the last focus is going to be on the actual efficacy of the correction mechanisms. National governments seek for correction mechanisms because, apart from the well embraced domestic approval rate’s boost, they believe that, in this way, their country’s negative net balance would be somehow redressed. Thus, the question is whether these correction mechanisms are useful to that scope. To this purpose, Citi[237] developed a study over the variations of the Operating Budgetary Balance (OBB) of each Member State adjusted to their respective GNI over the years, thus including, when applicable, the occurrence of correction mechanisms. The OBB is an accounting measure that computes a country’s net balance towards the EU (the difference between net contributions and net expenditures); however, while

[233] Report of the European Commission, 10 February 2004, COM (2004) 505 final, Volume II, *Financing the European Union – Commission report on the operation of the own resources system*
[234] Proposal of the European Commission, 29 June 2011, COM (2011) 510 final: *Proposal for a COUNCIL DECISION on the system of own resources of the European Union*
[235] Future Financing of the EU, final report and recommendations of the High-Level Group on Own Resources chaired by Mario Monti (2016; p. 61)
[236] D’ALFONSO (2016a; p. 8)
[237] CITI (2017)

> "[i]t provides no information on the impact it produces on the national economies […] it remains a solid and reliable measure of the member state's net fiscal position *vis-à-vis* the EU budget. In fact, it is the indicator most frequently used by the member states during the negotiations" [238]

According to the author's findings, most of the correction mechanisms introduced have not been useful to reverse the negative trend in the net contributors' OBB values. For example, the corrections made for Germany not only did not prove useful for their intent, but also had the paradoxical effect of decreasing even more its OBB (the ones made in 1984 and in 2007). Quite telling instead is the case of the UK, whose rebate has had a negative impact, decreasing in the long run its net balance. The same goes for the corrections made in 2007 in favour of Sweden and the Netherlands, whose effects appear positive in the short-term but in the long-term their net balances decrease even more than when the correction was adopted. Thereby, the conclusions appear evident: "Whenever a member state has requested, and thoroughly negotiated, a rebate or correction mechanism, the effect on its net budgetary balance has either been insignificant or has produced an effect that is paradoxically contrary to the original intention"[239].

On the other hand, the negative effect for net contributors is counterbalanced by a positive OBB for relatively poorer member States. This may be due to their reliance on the EU financing stemming from the structural and cohesion funds; these indeed, previously, favoured member states like Spain, Ireland, Denmark and Italy, which developed by then and now are experiencing decreases in their net balances (even negatives) and, lately, benefited the eastern member states (Poland, Hungary, Slovakia, Czech Republic), whose regions are more in need of structural investments. This seems to be the representation and realization of another principle established at Fontainebleau which states that: "Expenditure policy is ultimately the essential means of resolving the question of budgetary imbalances"[240]. Indeed, since member states do not have the same strong hold on annual expenditures as they do on revenues, their control over the spending decisions (shared with the EP) is much more limited, thus allowing the worse-off member states to benefit from them notwithstanding such hardly negotiated, and biased, requests of correction mechanisms.

[238] Ivi, p. 8
[239] Ivi, p. 14
[240] Conclusions of the Presidency, European Council, Fontainebleau (25-26 June 1984)

3.4 The need for fresh own resources for the EU budget

Whilst the phasing out of correction mechanisms is a crucial step towards a less complex budget, it must, concurrently, be limited the possibility to claim net imbalances from Member States (the cause that generated such a complexity in the first place) by abandoning, at least partly, the reliance of the EU budget on national contributions (VAT and GNI based resources) through the introduction of fresh own resources. Thereby, the new resources shall be simple, transparent, efficient, democratically accountable, progressive, equitable among Member States and, most importantly, linked to policies conferred to the EU.

The Treaties, in art. 311 TFEU, specify that "[t]he Union shall provide itself with the means necessary to attain its objectives and carry through its policies. Without prejudice to other revenue, the budget shall be financed wholly from own resources"[241]. Therefore, the Union budget is expected to be financially autonomous from the Member States. However, this is evidently not the case. The means for the financing of the EU, according to the same art. 311 TFEU, are decided unanimously by the Council, with the consent of the EP, through a decision that is ratified by the Member States according to their constitutional requirements. In accordance with the practice, the own resources decision is revised every seven years in order to coincide with the MFF regulation. Indeed, the level of revenues of the EU, along with their type and nature, is established once the expenditures are determined. "The EU budget is driven by 'expenditure'; revenue is adjusted accordingly"[242].

Currently, the EU revenues scheme consists of traditional own resources (custom duties plus sugar and agricultural levies), a VAT-based resource and a GNI-based resource. These sources of financing accrue to the EU budget automatically, without further consideration from national parliaments (see par. 1.5). However, the VAT and GNI based resources, stemming from the general national taxation, are accounted as expenditures in some Member States[243]; thereby, resulting in *juste retour* claims. The own resources decision instead, does not indicate any distinction between the three own resources it envisages, they are all deemed as own resources regardless of their nature. Nevertheless, only traditional own resources, also according to the High-

[241] Art. 311, par. 1-2 TFEU
[242] CIPRIANI (2016; p. 2)
[243] Future Financing of the EU, final report and recommendations of the High-Level Group on Own Resources chaired by Mario Monti (2016; p. 23)

Level Group on Own Resources, are *genuine* own resources since they are related to an EU policy area (the custom union and the single market), they are not assigned to any Member State in particular (even though Belgium and the Netherlands bear a higher amount) and a large part of their share flows automatically to the EU budget (collection costs are 20%). VAT and GNI based resources arise from national budgets, do not have a link to EU policies and are easily assignable to specific Member States.

The complex calculation for the VAT-based resources account for a relatively small part of the EU revenue (12% in 2018[244]) and its removal, largely advocated, is incentivized by the withdrawal of the UK from the EU (see the paragraph above). Alternatively, it can be replaced by another form of VAT-based resource that will be discussed later. The GNI-based resource is simple, stable and equitable among Member States, but it is detached from EU policies and objectives as well as from the Treaties provisions regarding the system of own resources. However, it operates the function of balancing the budget, granting the EU always sufficient funding to cover expenditures, since it is not allowed to incur in deficits ("The revenue and expenditure shown in the budget shall be in balance"[245]), but, in recent decades, this resource has accounted for the largest share of the EU revenues (71% in 2018[246]).
Therefore, the need for fresh own resources stems precisely from the excessive reliance on national contributions. Thereby, since revenues depend on expenditures, even though fresh own resources would be introduced, this would not increase the amount of revenues that accrue to the budget (which have a fixed ceiling), but it would decrease the share of the GNI-based resource (thus, offering, in many cases, more funds available to national budget) which can still perform as a residual source, given that the other revenues are considered volatile and highly unpredictable. As the High-Level Group on Own Resources recommends:

> "The introduction of new own resources or other types of revenue would therefore — all other things being equal — result in reductions in GNI-based contributions, and could thereby create some margin of manoeuvre for national budgets or national fiscal policy"[247]

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[244] Proposal of the European Commission, 2 May 2018, COM/2018/325 final: *Proposal for a COUNCIL DECISION on the system of Own Resources of the European Union*
[245] Art. 310 par. 1 TFEU
[246] Proposal of the European Commission, 2 May 2018, COM/2018/325 final: *Proposal for a COUNCIL DECISION on the system of Own Resources of the European Union*
[247] Future Financing of the EU, final report and recommendations of the High-Level Group on Own Resources chaired by Mario Monti (2016; p. 24)

The new own resources shall be visible to EU citizens and linked to EU policies. More precisely, adhering with the principles of fiscal federalism stating that the levels of government shall distribute fiscal powers among them on the basis of the estimated best performance, the own resources' candidates must demonstrate that the EU action (especially harmonising the taxation) in that field has an added value, reminding of the principle of subsidiarity used for EU competences[248]. Thereby, the focus should shift from individual contributions' concerns to EU-wide common objectives, benefiting the EU as a whole, that could be better achieved at a supranational level rather than through national differentiated frameworks. The common interests of all the Member States in such policies and the cross-boundary nature of the new levies, may facilitate the adoption of the reform with the procedure envisaged by art. 311 TFEU.

The most up-to-date official report on the financing of the EU is represented by that of the High-Level Group on Own Resources, which arose from the negotiations on the MFF 2014-2020, when the EP made its approval conditional to a revision of the system of own resources. Indeed, in 2014 the Commission, the EP and the Council established the group chaired by former Italian Prime Minister Mario Monti and composed of three members appointed by each institution (which however do not represent the institution's will). The High-Level Group is entrusted with the task of recommending improvements to the financing of the EU complying with four guiding principles: simplicity, transparency, equity and democratic accountability. In its 2016 report it proposes several new own resources that will be analysed more in depth later in this paragraph. However, the introduction of any of the following fresh own resources does not imply a revision of the Treaties aimed at the attribution of a fiscal power to the EU, rather it is based on the harmonisation of national raised and collected taxes, whose competence is provided by art. 113 TFEU, and the consequent automatic attribution of certain percentages at EU level through the own resources decision of art. 311 TFEU.

> "The Group wishes to be extremely clear that the proposals for reform it promotes can be implemented within the current Treaty framework, without compromising the Member States' fiscal competences whatsoever […] Thus, given that tax competences remain with national authorities, the Union's own resources can be defined as revenue allocated irrevocably to the Union to finance its budget and accruing to it automatically without the need for any subsequent decision by the national authorities. The initial decision to attribute any particular source of revenue remains a national competence, and this is expressed in the clearest manner by the decision-making

[248] Art. 5 par. 3 TEU

> process applicable to own resources, which requires both unanimity in Council and ratification by all Member States in accordance with their respective constitutional requirements"[249]

Before taking into consideration new own resources, I will deal with the replacement of an existing own resource with a new, simpler one. The elimination of the current VAT-based resource may coincide with the introduction of a new VAT resource more easily calculated and more transparent. The current VAT-based resource is based on a complex computing exercise of a harmonised average rate across Member States and it is not perceived by citizens since it accrues from national VAT bases. Instead, the new VAT resource would apply a uniform call rate (1% hypothetically) to supplies of goods and services that have a standard rate across Member States, thereby the fiscal burden on consumers would be unchanged (since the EU VAT is part of the already fixed national rate) and taxpayers would contribute equally regardless of the country they are in. Another option for a new VAT resource is to provide the same rate for a wider range of goods and services: in this case the call rate would be lower, but it would include also goods that in some EU countries are exempted from VAT, thereby imposing a new burden. Moreover, it could be made visible to EU citizens through its incorporation in fiscal receipts[250], thus rendering EU institutions' expenditures more accountable to citizens. In any case, all the complex calculations and corrections would be removed, and the tax value is more visible. The VAT represents a stable resource since it is less impacted by economic downturns than other resources[251], it has a substantial yield (more than the previous VAT), its harmonisation (laid down by art. 113 TFEU) contributes to the completion of the internal market (linked to an EU activity) and national administrations are already well equipped for its collection (no administrative costs). A simplification of the VAT-based own resource has been put forward also by the Commission in its proposal for the upcoming own resources decision of the Council[252].

A suitable option for an EU-wide taxation may regard the financial sector, which is exempted from taxation and, at the same time, largely benefited from state aids during the 2008 economic crisis. Indeed, in its 2011 proposal[253], the

[249] Future Financing of the EU, final report and recommendations of the High-Level Group on Own Resources chaired by Mario Monti (2016; p. 20)
[250] CIPRIANI (2016; pp. 14-15)
[251] D'OULTREMONT (2013; p. 17)
[252] Proposal of the European Commission, 2 May 2018, COM/2018/325 final: *Proposal for a COUNCIL DECISION on the system of Own Resources of the European Union*
[253] Proposal of the European Commission, 29 June 2011, COM (2011) 510 final: *Proposal for a COUNCIL DECISION on the system of own resources of the European Union*

Commission proposed a financial transaction tax (FTT) of 0.1% over bonds and shares and a 0.01% on the transaction of derivatives between financial firms. The FTT was not adopted by the Council in its own resources decision, but it authorized 11 Member States (10, after Estonia pulled back) to pursue an enhanced cooperation for the definition of the new tax; however, the negotiations did not produce any concrete result. Nonetheless, the High-Level Group included the FTT in its 2016 final report[254]. A taxation on the financial sector could only produce positive effects if imposed at a European level, rather than a national one, thus avoiding fragmentation and relocation of financial firms, since the FTT would ideally be imposed on every transaction that involves a party whose tax residence is in the EU[255]. Moreover, it would curb the volume of speculations[256], have a progressive nature and would be linked to the functioning of the internal market and the preventing of the distortion of competition (EU policies). However, on the negative side, given the high volatility of the financial market, its yield would be unpredictable and its collection, which clearly remains in the prerogatives of the Member States (EU would provide the harmonisation through art. 113 TFEU) would be limited in a certain number of countries where more financial institutions reside and more financial transactions take place. The Group provided also for alternative measures of taxation to the financial sector, such as a financial activities tax and a bank levy, but none of these has been considered by the 2018 Commission proposal.

Alternatively, an option brought forward by the Commission in the 2018 proposal has been an EU corporate income tax (CIT) with a fixed uniform call rate (3%) applied to a common consolidated corporate tax base (CCCTB). Hence, a condition to the tax implementation, shall be the harmonisation of the corporate tax base across Member States, a plan that the EU seems very willing to pursue since 2015[257]. The CCCTB would help to address the diversification of national taxations that multinational corporations use to their advantage (through relocation) and would, thus, avoid the race to the bottom that occurs between EU countries. The enforcement of this tax on big companies' profits is linked to the refinement of the internal market and to the objective of a fair competition, since all corporations benefit from the freedoms granted by the EU single market. This new own resource would be simple, fair and transparent; however, its volatile yield, based on the profits

[254] Future Financing of the EU, final report and recommendations of the High-Level Group on Own Resources chaired by Mario Monti (2016)
[255] D'OULTREMONT (2013; p. 23)
[256] D'ALFONSO (2016b; p. 65)
[257] Communication of the European Commission, 17 June 2015, COM/2015/302 final: *A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action*

of the companies, is expected to produce 6% on average of EU revenues in the period 2021-2027[258].

The other two new own resources proposed by the Commission in its most recent proposal[259], are strictly linked to the EU environmental policy to fight climate change. The first regards a 20% share of the emission allowances auctioned through the EU Emission Trading Scheme (ETS); these allowances are already collected at a national level and a half of them is directed to climate-related activities, therefore it would be appropriate to redirect part of them to the EU, where this policy originates. The second, prompted by a communication of the Commission[260], provides for a €0,8/kg uniform call rate to the quantity of non-recycled plastic packaging waste generated in each Member State every year, as reported by Eurostat; in this way, the EU countries would be incentivized to reduce their plastic wastes and a EU common objective would be more easily achieved. However, these two new own resources are highly volatile and unpredictable, moreover, their yield is considerably small and hopefully decreasing (if environmental policies are successful): estimated 2% and 4% respectively of the share of EU revenues on average in the period 2021-2027[261].

The High-Level Group proposed other viable options for EU fresh own resources. Two of them were very innovative, in fact, they had never been considered by EU institutions before. They are a motor fuel levy and an electricity tax. The first consists of a tax on fossil fuels which already exists at national level and it is, partially, coordinated by the EU[262], as well as linked to the common environmental policy, notably, the decarbonisation of the transport sector; a, full or partial, transfer of receipts to the EU would harmonise the taxation across Member States and be consistent with art. 192 TFEU ("Without prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environment policy"[263]). The electricity tax already operates at national level, but its attribution to the EU would likely generate economies of scale in the integrated internal market, thus benefiting electricity companies and consumers as well; it would be transparent (incorporated in the electricity bills) and equal among EU

[258] Proposal of the European Commission, 2 May 2018, COM/2018/325 final: *Proposal for a COUNCIL DECISION on the system of Own Resources of the European Union*
[259] ibidem
[260] Communication of the European Commission, 18 January 2018, COM/2018/028 final: *A European Strategy for Plastics in a Circular Economy*
[261] Proposal of the European Commission, 2 May 2018, COM/2018/325 final: *Proposal for a COUNCIL DECISION on the system of Own Resources of the European Union*
[262] Directive of the Council, 27 October 2003, 2003/96/EC: *restructuring the Community framework for the taxation of energy products and electricity*
[263] Art. 192, par. 4 TFEU

citizens[264] (richer regions, that consume more, would contribute more). These two new own resources' candidates would provide a stable and significant yield with small or no administrative costs from Member States, while also pursue EU objectives like environment protection (the first) and completion of the internal market (the second). However, the political transition costs appear exorbitantly high.

These other two own resources' candidates have been considered by the Commission in 2011 (not included in the proposal to the Council) and re-proposed by the High-Level Group in its 2016 final report: a carbon tax and a resource related to seigniorage. While the carbon tax analysed by the Commission concerned a uniform minimum rate on greenhouse gas emissions (the negotiations for its introduction were deadlocked), the Group proposes, in alternative, an indirect carbon tax on the products calculated on the amount of CO2 emitted during the whole production chain, thus encompassing goods produced, even if in part, outside the EU[265]. The taxation would involve all those sector that are not covered by the ETS, thereby being complementary to it and essential for a full-fledged contrast of climate change. The EU added value for the imposition of the taxation and the pursuit of the EU objective are clear, however, while the yield would be profitable in the short term[266], it should decrease over time for the expected achievements of the policy. Seigniorage, the monetary income made by central banks for their issuance of the currency, "is currently distributed by the European Central Bank to the National Central Banks of the countries whose currency is the euro"[267]; the proposal consists in the transfer of this income to the EU budget, because it is linked to an EU exclusive competence (the monetary policy) and to the results the euro achieved as a reserve currency for its reliability. While this own resource is simple, fair and with a significant yield, it would be limited to the Eurozone countries creating a hardly sustainable double mechanism.

Other two own resources candidates have been analysed, and discarded, by the Commission before its 2011 proposal: an air transport duty and a communication tax. The first is certainly more viable at a EU level than a national one, to avoid differentials and relocations; but, although visible to EU citizens and linked to EU policy, the concern is that it could have "a negative impact on the international competitiveness of EU air transport and

[264] Future Financing of the EU, final report and recommendations of the High-Level Group on Own Resources chaired by Mario Monti (2016; p. 47)
[265] Ivi, p. 42
[266] ibidem
[267] D'ALFONSO (2016b; p. 71)

on the economy of regions that are much dependent on air transport due to their geographical features"[268]. The second instead, would arguably go in the opposite direction to the EU objective of a Digital Agenda[269].

According to Tarschys[270], the EU would better look at innovating sectors, currently unaffected by taxation, where a large political entity, like the EU, would be much more effective, in imposing fiscal constraints, than the Member States alone; in particular, the author, refers to the challenges resulting from the developments of the digital economy. The latter is indeed, leading to changing patterns of production, distribution and consumption[271] while also exploiting the loopholes of diversified, often absent, regulations.

After going through all the most relevant own resources options for the EU budget, it must be reminded that the purpose is not to provide a greater amount of sources to the EU, but it is to render the financing system more simple, transparent, equitable and efficient. However, to do so, it must be reached an agreement between the Member States in the Council that must be ratified by each EU country, according to art. 311 TFEU. Therefore, to facilitate the adoption of a reform, the new own resources shall be acceptable to every EU Member States, which are solely accountable to their respective national constituency, hence, driven by national politics agendas. In order to prevent the reliance on national returns, the new EU revenues shall not encompass a loss on the national side, thereby addressing a fiscal space that is not already occupied by any of the Member States fiscal policies, since they are not willing to renounce to, or reduce, their fiscal income, unless the common interest happens to be very strong. Thus, new own resources such as carbon tax, motor fuel levy, electricity tax, seigniorage etc., that draw their incomes from gains that are already attributed to the Member States, will very likely never be agreed upon especially if their yield, in the case of the electricity tax and the motor fuel levy, is particularly profitable (Member States would surely wish to retain their highest profits). Instead, fresh own resources that involve fields where the levying of taxation or its coordination would benefit everyone like FTT, digital economy and EU CIT, have higher odds to be adopted, as the decision-making mechanism does not change. This would be even more beneficial to Member States, since the reduction of the GNI-based resource, would provide them more income to be employed on a national level.

268 Ivi, p. 68
269 Communication of the European Commission, 19 May 2010, COM/2010/245 final: *A Digital Agenda for Europe*
270 TARSCHYS (2016)
271 Ivi, p. 16

While the introduction of fresh own resources is not linked to an expansion of the EU budget, it is argued that the finances of the EU shall increase their size. Indeed, the share of own resources, the only way to fund the EU, is very small compared to the objectives the EU seeks to achieve in its art. 3 TEU. Fasone and Lupo argue that "in spite of the fact that each Treaty reform has expanded the catalogue of EU competences, there has not been a parallel enlargement of its budget"[272]. Therefore, a radical reform of the EU budget appears needed, but substantial achievements involving the autonomy of the Member States (in this case, fiscal powers), are usually subject to a slow process in the EU integration history.

[272] FASONE and LUPO (2018; p. 812)

Conclusions

The death of 157 people for the crash of the Ethiopian Airlines Flight 302 in March 2019, allegedly[273], triggered by the delay of the consideration of the software updates on the aircraft Boeing 737 Max 8 (after a first crash of the same model in October 2018) by regulatory officials of the Federal Aviation Administration (FAA), due to the 2019 US Government shutdown; and plus, the Commission's proposal[274] to link, from the MFF 2021-2027, EU spending[275] to the Member States' compliance with the rule of law[276], (enshrined in the common values of art. 2 TEU), particularly deficient in countries like Poland and Hungary[277] that benefit the most from cohesion and structural funds; perhaps are, respectively, the two most recent striking events that reveal the prominence of the budget process in today's American and European political landscape, and prompt the debate over its delivery and the perspectives for reforms.

The budgetary procedures may appear marginal, or on the edge of the domain of politics; however, as widely shown, they are essential for the realization of policy targets and central for the everyday lives of citizens. Moreover, as stressed by Lindseth[278], those mechanisms do not have the function to limit institutional power, rather they constitute it, allowing the performance of the *metabolism* of the community, that turns resources into actions serving the public interests[279].

The scope of the comparison between the budget processes of the US and the EU has been to assess, once outlined the different contexts and evolutions of the two systems of revenues and the relatively comparable annual cycles of

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[273] TIMMONS (2019); TANGEL and PASZTOR (2019)
[274] Proposal of the European Commission, 2 May 2018, COM 2018/324 final: *for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States*
[275] Including suspension of payments and termination of legal commitments. See MANKO (2018; pp. 5-6)
[276] It recalls the use of *conditionality*, already applied in the framework of EU law in cases like the admission procedure (art. 49 TEU) and the EMU membership. However, while these criteria are largely decisive for the accession, its oversight afterwards lacks a substantive enforcement method. See HEINEMANN (2018; p. 298)
[277] For which the traditional mechanisms have not proven effective, including that envisaged by art. 7 TEU. See HALMAI (2018)
[278] LINDSETH (2017)
[279] According to the author the EU lacks the *demos* and the socio-political emergence (not just legal) of those procedures, thereby it cannot be deemed as constitutional (it has rather an administrative governance). See LINDSETH (2017; pp. 10-11)

expenditures, the endemic shortcomings that characterize both processes and, therefore, appraise whether, in which extent, and how, they can take lessons from the measures adopted across the Atlantic to address those systemic troubles.

The comparison highlighted a certain degree of similarity in the series of sub-processes related to the determination of the expenditures as well as in the abuse of the budgetary procedures for political and institutional confrontation (between party lines in the US[280] and between Member States in the EU[281]), notwithstanding the different size of the two budgets and the different nature of the two political entities. However, while in the US the budget cycle is undermined by delays and failures to act that stress conflicts between the executive and the legislative branches (or within the legislative itself), in the EU the timeline for the adoption of the annual budget is even anticipated and the institutions always deliver, emphasizing the spirit of consensus, inspired by the Treaties.

The substantial differences re-emerge in their revenue schemes and reflect their institutional setup: while the US went through a historical process that guaranteed the central government fiscal powers, the EU is still largely hostage of its Member States' will. The latter shall be incentivized to grant new fiscal spaces to the EU budget, as they would reduce their contribution and have more sources to spend on a national level.

The two cases analysed, can draw lessons from each other in order to significantly improve their performance. For example, in the US, the shutdown can turn out to be, as shown in par 3.2, a devastating event; such a calamity, in the EU, cannot occur due to the provision of the system of the twelfths and would be however very limited given the small capacity of the EU budget. The same goes for the delays in the appropriations process, which might be more likely prevented if the *filibuster rule* of the Senate is removed. Nevertheless, while the US Congress, along with the President, may act for the adoption of these measures, the EU institutions, by themselves, cannot. Indeed, while a reform of the revenue side of the EU budget is evidently needed, either in the form of new resources collected by national administrations or by providing a fiscal autonomy in certain sectors, the now 28 Member States shall agree on these measures and singularly ratify them according to their constitutional requirements, both for the special legislative

[280] This may occur between the Congress and the President or even within the Congress itself
[281] Referring to the thorough negotiations in the Council and the contrast/divide between net contributors and net beneficiaries to the EU budget that eventually led to the use of correction mechanisms

procedure of art. 311 TFEU (the own resources decision) and for a Treaty revision pursuant to art. 48 TEU.

The attribution of fiscal powers to the US central government arise from a states' sovereign debt crisis in the 1780s (see par. 1.1); a states' sovereign debt crisis occurred also in the EU in the 2010s. Such a factor may paradoxically lead to the centralisation of fiscal authority, as argued in a parallelism made by Wozniakowski[282]. However, the outcome of the recent crisis has been the attribution to the EU of the power of regulating national fiscal policies (the Fiscal Stability Treaty), but not the attribution of a taxation power. The effect is that in this way the Member States have even more constraints than the ones they would have had if they renounced to part of their fiscal sovereignty.

An EU power to tax would increase the clout of the EP in fiscal matters, providing it the power to raise revenues for the EU budget and fulfil its scope of adequately represent the EU citizens, whilst the current system encompasses *representation without taxation*[283]. The fiscal capacity of the EU is surely a political issue[284] that also relates to the transformation of its political setup into a federal system, although there would be some legal problems[285] for its processing.

Nevertheless, the "EU budget is much more than an accounting document. It is a realm of political confrontation between rival views of the EU, both as an organization and a project"[286]. EU Member States have different ideas of the EU and what the EU should aim to become; its budget reflects the lowest level of integration since every Member State is part of it and has a veto power, while the monetary union may display a higher degree of integration. Thus, it results the suggestion to proceed with a fiscal integration confined exclusively to the Eurozone countries, which appear more willing and in need of such a provision for a better management of the single currency and for countering asymmetrical shocks[287], indeed, currency unions across the world (the US, amongst all), are provided with fiscal powers.

[282] WOZNIAKOWSKI (2018; p. 643)
[283] FABBRINI S. (2016; p. 24)
[284] SCHRATZENSTALLER (2013; p. 310)
[285] HINAREJOS (2012)
[286] FABBRINI S. (2016; p. 20)
[287] FABBRINI F. (2019)

Still, it should be borne in mind that the EU aims to build "an ever closer union among the peoples of Europe"[288] and that its budget "shall be financed wholly from own resources"[289], thereby the Member States shall abide to what they signed instead of being focused on their national interests. Such a discrepancy between the Treaties and the reality, is unsustainable with regard to the challenges the EU faces in such an internationally competitive environment (considering not only States, but also multinational corporations and financial companies), particularly since the competition, so far, seems mostly internal.

288 Art. 1 TEU
289 Art. 311 TFEU

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Summary

Introduction

The way taxpayers' money is spent by the public authority, i.e. how fiscal and spending powers are allocated between the federal government and the Member States and between the executive and the legislature, marks a significative element of judgement for the accomplishments of a certain form of State and of Government. However, much of the performance depends on how and how many revenues are collected by the central authority in order to finance public goods. Once acquired such resources, democracies go through a budget process, strictly prescribed by law, which involves both the legislative and the executive branches of the Government in the determination of public expenditures. The outcome varies based on their interaction within the procedures and practices they have put in place. However, in recent years, due to economic trends and the setting of new rules, the role of the executive is grown over the decentralized administrations and the legislature[290]; in particular, in Europe, many constitutional reforms in favour of the executive (and central) hold over the budget process took place, due to the budgetary measures taken to prevent States recession[291].

The budget is the financial blueprint of an authority, it states the estimated income and expenses for a defined time in order to fulfil the achievement of certain established objectives. The process through which the budget gets defined in contemporary democracies has increasingly become complicated due to the several agents participating in its shaping and to the complexity of the rules underpinning it; while this complexity[292] ensures a fairer, and less vulnerable to corruption process due to the distribution of budget powers among the various authorities, it is also liable of generating shortcomings. Indeed, the tendency of failing to deliver some of its goals and to observe its principles has, on the one hand, triggered pushes for a reform of the system, and on the other, has led to the disappointment of the citizens, who rely on

[290] RUIZ ALMENDRAL (2015; pp. 18-22)

[291] RUIZ ALMENDRAL (2013); FABBRINI F. (2013)

[292] Both in the US: "Budgeting for the federal Government is an enormously complex process. It entails dozens of subprocesses, countless rules and procedures, the efforts of tens of thousands of staff persons in the executive and legislative branches, millions of work hours each year, and the active participation of the President and congressional leaders, as well as other members of Congress and executive officials". HENIFF JR., LYNCH, TOLLESTRUP (2012; p.1); and in the EU: "Everybody agrees that the current system is too opaque, too complex, and, let's be frank, outdated". *Towards a better, fairer and simpler funding of the EU budget*, statement by the Commissioner Janusz Lewandowski after the first meeting of the High-Level Group on Own Resources, 4 April 2014 as cited by CIPRIANI (2014; p. 29); "The HLGOR duly recognizes that the EP, the Commission, and even the Court of Auditors have raised vociferous criticism of the current system. These institutions have criticized it as being too complex and non-transparent". FABBRINI S. (2016; p. 24)

the institutions' action and therefore hold them accountable. Hence, the stability of the State and its form of Government, which in this analysis is the democracy, depends on the budget process (among many other factors) that, to make the State survive, must be reformed if it is not able to deliver.

This study aims to compare the budget process of the United States (US), a federal State[293], with that of the European Union (EU), a confederation of Member States[294], taking into consideration the means in which coffers are swelled (the revenue side) and how these funds are actually appropriated to the different categories of expenditure. In doing so, there will be outlined similarities between the two budget processes and the differences between the two will emerge as well. Besides, the last chapter will deal with the systemic troubles that beset both procedures: those are likely to spark major inconveniencies for the citizens on one hand (the US), and, on the other, highlight that the current design of the system of own resources may not be suitable for the aims envisaged by the Treaties (the EU).

The selection of the two case studies, the US and the EU, for a comparison is consistent with the idea that both can be defined as a *compound democracy*[295], namely, the simultaneous presence of politically diverse and asymmetric units that represent different interests and share the decision-making power in a multilevel form of Government. Indeed, according to Fabbrini[296], the EU presents certain federal elements (such as the common currency, the election of the Parliament, the judicial review, the role of the bank, the qualified majority vote rule in the Council etc.) that along with the horizontal and vertical separation of powers foster a closer link with the US form of federalism. Moreover, the two political entities share a tradition of constitutional pluralism[297], which may be the base for federalism.

However, this thesis does not seek to emphasize the federal features of the EU or to claim that the EU already has, or shall have, a federal-like form of State, it is rather focused exclusively on the comparison between the two budget processes which, regardless of the federal nature of the system, happen to possess many similarities, especially in the procedure for the setting of annual expenditures, and an expected (and desirable) common evolution path.

[293] "A Constitution is federal if two levels of government rule the same land and people, each level has at least one are of action in which it is autonomous, and there is some guarantee of the autonomy of each government in its own sphere". RIKER (1964; p. 11)

[294] "A Confederation is a loose system of administration in which two or more organizational units keep their separate identities but give specified powers to a central authority for reasons of convenience, mutual security, or efficiency". MCCORMICK (2008; p.18).

[295] S. FABBRINI (2005; p. 14); For an in-depth analysis see: S. FABBRINI (2007)

[296] S. FABBRINI (2005; p. 10)

[297] SCHUTZE (2010; pp. 32-33)

Chapter I. Revenues: the US and the EU frameworks' evolution

In the US, the transition from the Articles of Confederation to the US Constitution represented a significant shift in the distribution of competences between the states and the central power in favour of the latter. Among the powers granted to the federal authority, the ability to collect revenues (through a tariff on imports) remarkably empowered the Congress[298].

The Continental Congress and the thirteen states had to assume debts in order to finance the Revolutionary War against the UK (1775-1783). According to some authors[299], it was precisely the fiscal crisis generated by the states' debts that brought to the provision of a federal power to tax in the Constitution of 1789. Indeed, the Congress borrowed money on the credit of the states, since it had no fiscal powers. Two attempts of amending the Articles of Confederation by providing it with a small duty on imports failed, respectively, in 1781 and 1783. It was instead the Shays' Rebellion[300] of 1786 in Massachusetts that, allegedly[301], due to the fear of contagion to other states, led to the 1787 convention, with the presence of George Washington, that drafted the US Constitution. The latter attributes a federal power to tax to the federal government in its art. 1, sec. 8, thus completing the process of *fiscalization*[302].

After the enactment of the Constitution, the Secretary of the Treasury, Alexander Hamilton, proposed the federal assumption of states' debts since they had been undertaken in order to finance the independence war (a common cause); after much debate[303] and compromise[304], the Congress approved his proposal. The same happened for the money borrowed by the states to sustain the War of 1812 against the UK, but the bailout did not occur in the 1830s when many states defaulted due to the financing of local projects. Thereby a *no bailout norm*[305] was established, and many states amended their Constitution or enacted state laws that enforced a balanced budget. Today all the states adopted this norm, with the sole exception of Vermont.

Hamilton's plan encompassed also the creation of a national bank and a mint. While the latter is pursuant to art. 1 sec. 8, the former underwent some intense dispute which culminated with the Supreme Court's judgement[306] relative to the constitutionality of the institution of the Second National Bank of the US:

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[298] KLARMAN (2016; p. 145)

[299] SARGENT (2012); WOZNIAKOWSKI, (2018; p. 636; pp. 641-642)

[300] Caused by the imposition of high taxes in order to pay the debts

[301] WOZNIAKOWSKI (2018; p. 639)

[302] Ivi, p. 633

[303] There was no clause in the Constitution and some states have been more virtuous than others (eventually by raising taxes)

[304] Virginia gained the transfer of the capital of the United States

[305] HENNING and KESSLER (2012; p. 12)

[306] *McCulloch v. Maryland*: 17 U.S. (4 Wheat.) 316 (1819)

according to the *necessary and proper clause* the power to charter a bank is *implied* by the US Constitution, that, along with federal laws is supreme over states' authority.

In compliance with the *appropriations clause,* enshrined in art. 1 sec. 9 of the US Constitution, federal revenues are located into the Treasury and the funds can be drawn only if authorized by Congress, which must act through a law. Every congressional appropriation must come with an object that defines the activity and purpose for which it is made. Federal finances management shall abide by two principles: the principle of *public fisc* and the principle of *appropriations control*. The first stipulates that funds received from any source for the use of the United States shall be deposited into the Treasury[307], although the Congress can make exceptions to it[308]. The second provides that any expenditure of any executive body must be authorized by an appropriation law made by Congress, thereby establishing the congressional *power of the purse*. This is better refined by the Anti-Deficiency Act of 1870, which makes unlawful for any federal agency to borrow monies beyond the appropriations granted by Congress. These two principles constitute the foundation for budgetary discipline in the US and must be observed concurrently.

In Europe, the revenue system went through several modifications over time. While the Treaty of Paris of 1951, founding the ECSC, granted the High Authority a certain degree of fiscal autonomy, the Treaty of Rome, founding the EEC and the EAEC, envisaged a system of national contributions. The latter, in consequence of a decision of the Council[309], were replaced by a system of own resources composed of traditional own resources (custom duties, agricultural and sugar levies) and a VAT-based resource (consisting of a harmonized call rate across Member States). A further source for the EC budget was added in 1988 by another Council Decision[310]: a GNP (later GNI) based resource, namely, a national contribution based on the Member States' ability to pay, with the purpose of balancing the budget, since it cannot incur into deficits (playing the role of the residual resource). This introduction was due to the progress of the GATT in decreasing tariffs, the instability of the other traditional own resources, the complex calculation of the VAT resource and its regressive effect. Changes in the own resources system occur, usually, every 7 years through a decision of the Council that corresponds to the MFF regulation (revenues are decided based upon expenditures).

[307] Title 31, § 3302(b), U.S. Code

[308] However, it is essential to not disregard the principle of *appropriations control* while providing for exceptions to the principle of *public fisc*. See STITH (1988; p. 1380-1381)

[309] Decision of the Council, 21 April 1970, 70/243/ECSC, EEC, Euratom: *on the replacement of financial contributions from Member States by the Communities' own resources*

[310] Decision of the Council, 24 June 1988, 88/376/EEC, Euratom: *on the system of the Communities' own resources*

The special procedure for the own-resources decision is laid down by art. 311 TFEU: unanimity in the Council consulting of the EP, plus the ratification of all the Member States according to their constitutional requirements; every Member States has therefore a double veto power. Indeed, "the own resources decision constitutes a 'Treaty' within the Treaties"[311]. Since the States authorize the enactment of the Council's decision through its ratification, the consequent transfer of resources from national coffers, is *automatic*. The EU does not possess any collection or raising power, so the Member States perform the task and, while for custom duties they retain the collection costs, the VAT and GNI based resources are systematically transferred to the EU every month by one twelfth on the amount established in the annual budget.

Besides, a steady pattern of the European budget has been the resort to correction mechanisms, due to the reliance of Member States on their net balances towards the Community. The most significant one has been the UK rebate which was established by the European Council of Fontainebleau in 1984; although this is the only permanent correction mechanism, many other temporary mechanisms have been accorded.

The complexity of the EU budget does not merely stem from the calculations of the VAT based resource and the medley of correction mechanisms but also from the parallel existence of more budget disciplines within what has been defined a budgetary galaxy[312], i.e. different mechanisms to finance the various EU activities, which result in a highly fragmentated structure.

Chapter II. Expenditures: the budget cycles

The budget cycle is the process through which the expenditures of the political entities are determined. In this analysis, those of the US and the EU are addressed in parallel in order to emphasize both the similarities and the substantial differences.

The budget act is envisaged by the Constitution and it is usually contained in an ordinary bill passed by the legislature, whereby the Treaties operate as the material Constitution of the EU[313]. The US Constitution, although assigning the *power of the purse* to the Congress, does not contain any provision on how this power shall be exercised, thus it has been the Congress itself to regulate the measures that the federal Government shall apply in terms of budget procedure and enforcement, complying with constitutional provisions[314]. The Treaties instead, provide for a more detailed budget

[311] CIPRIANI (2014; p. 8)

[312] CROWE (2017)

[313] The Treaties are interpreted as a constitutional charter by the ECJ, which acts, *de facto*, as a Constitutional Court. See Case C-294/83 *Les Verts v. European Parliament* (1986; par. 23) and Case C-402/05 *Kadi v. Commission* (2008; par. 281)

[314] As proved by the US Supreme Court judgement *Clinton v. City of New York*, 524 U.S. 417 (1998)

discipline in Title II of Part Six but the annual budget is deemed merely as an *accounting document*[315].

The executive and the legislative branches work closely for the realization of the budget law. The budget cycle, indeed, begins every year with the executive's budget proposal to the legislative. In the US, since 1921[316], it is the President, with the assistance of the OMB, to submit the executive budget request to the Congress within the first Monday of February (the deadline has been modified several times). Even though its preparation gets started much in advance and there is a high level of technicality, the executive budget proposal only constitutes a policy tool in the hands of the POTUS, useful to direct the agencies of the executive branch and to express his national policy plans, which can be overturned by the Congress at its will, as it is the holder of the power of the purse. In the EU, it is the Commission, with the assistance of the DG Budget, to begin the budget cycle every year with a budget proposal to be submitted to the Council and the EP, the two budget authorities, by the 1st of September. However, the process follows a pragmatic calendar resulting in the presentation of the draft budget as early as May. In the EU, the executive's preparation for the annual budget starts in advance as well, but its leeway is limited by the relatively small size of the budget and the ceilings of the MFF. A substantial difference in this initial phase is that the EU has a framework designed for collaboration and compromise between its institutions highlighted by the trilogue meetings. In the US instead, Congress is unaware of the President's proposed appropriated activities and legislation before the submission of the budget request.

After the President's request, the Congress, since 1974[317], coordinates its action on the budget through the budget resolution, which is concurrent between the two chambers. It is not an ordinary bill. It does not have the force of law, thus no money can be spent or collected in compliance to it and, at the same time, it does not need the President's signature, nor it is subject to his veto power. The deadline, seldom observed, is scheduled on the 15th of April. The House and the Senate established different rules for amendments and a conference might be convened to resolve their differences. The resolution's essential function is to establish the budget aggregates and the spending allocations across the appropriations subcommittees. In the event that during a fiscal year it is not adopted, the last resolution the Congress could agree upon is deemed enforceable; however, from 1997[318], it plans the financing for the following five years (ten, according to the practice). It may include reconciliation directives for modifications of mandatory spending or tax laws.

[315] Case C- 77/11 *Council of the European Union v European Parliament*
[316] Budget and Accounting Act
[317] Congressional Budget and Impoundment Control Act
[318] Balanced Budget Act

Similarly, the EU plans its action on the following annual budgets through the MFF, envisaged, from the Treaty of Lisbon, in the form of a regulation, while the previous MFFs were interinstitutional agreements of binding force. The special legislative procedure of art. 312 TFEU provides for a unanimous vote of the Council with the consent of the EP; it shall cover a period of five years (seven, according to the practice). It establishes the budget ceilings and the spending allocations per heading making the annual budget increasingly predictable, as for the US budget after the congressional budget resolution. Likewise, if an MFF regulation is not adopted in time, the ceilings and other provisions established by the previous MFF for its last year shall be retained valid until an agreement is found on a new financial plan.

In the US, the discretionary spending, the largest share of expenditures, is decided by the annual congressional appropriations process. The appropriation bills, according to the rules of procedure[319], cannot contain legislation, therefore they shall be preceded by authorization acts which can be enacted at any time by Congress, establishing the ceilings and their duration. After the allocations to the appropriations committees of the House and the Senate (through the budget resolution), the latter sub-allocate their amounts to their 12 subcommittees[320] which shall act separately on an appropriation bill relative to their spending category and submit it, first, to the full committee, and later to their chamber's floor. The House and Senate adopt, again, different rules for amendments and their differences can be resolved by a bicameral conference, which adopts a report to be passed by both chambers, with a slight advantage to the House[321]. The Congress can package more appropriation bills into an *omnibus* bill to facilitate compromise and can enact continuing resolutions to avoid funding gaps that may lead to a Government shutdown. Every appropriation act, including *omnibus* bills and continuing resolutions, shall be signed by the President to enter into force.

In the EU, art. 314 TFEU lays down the procedure for the adoption of the annual budget, by the two budget authorities. After the Commission's proposal and its examination by national parliaments, the Council adopts its position, usually more than one month before the 1st October deadline, by qualified majority; thereby, the EP, within 42 days, either approves the Council's position or amends the budget by simple majority. At this stage, a Conciliation Committee[322] is convened, with a 21 days' timeframe to find agreement on a joint text which then goes to both institutions for approval,

[319] Rule XXI, clause 2, Rules of the House of Representatives, One Hundred Sixteenth Congress; Rule XVI, Standing Rules of the Senate

[320] Same between the House and the Senate for number and for their baseline category. Each Appropriations subcommittee in the House has its own parallel in the Senate, and vice versa

[321] It can return the act to the conference for a reconsideration

[322] Comparable to the bicameral conference in the US appropriations process with the differences of the time limit and the qualified majority requirement to one of the parts (the Council)

with a slight advantage to the EP[323]. Nonetheless, the EP and the Council are constrained by the MFF's ceilings. The two institutions shall be able to find an agreement, otherwise the system of *twelfths*[324] is triggered. One practical peculiarity of the recent EU procedures is that the budget is frequently modified by budget amendments. Those are indeed allowed at any time throughout the course of the financial year following the same procedure of the annual budget and may serve to delay decisions.

Lastly, it seems appropriate to discuss the enforcement and control mechanisms employed to guarantee the correct implementation of the approved budget. The means differ between the US (sequestration) and the EU (the discharge procedure). A sequester consists in an automatic reduction of spending (by deleting previously enacted spending) in order to achieve the budgetary requirements established by law[325]. Sequestration occurs by means of a presidential order which comes after a sequestration report by the OMB, where it calculates the reduction amount needed and the accounts that shall be cut. Not all the accounts can incur in reductions, some are exempt[326] and some are provided with special rules[327]. The purpose of sequestration is to enforce the statutory budget requirements. The latter are established by Congress but enforced by the executive.

The discharge, envisaged by art. 319 TFEU, is a decision taken by the EP, on recommendation of the Council (based on the annual report of the Court of Auditors), that marks the closure of the financial activity of a given year, thereby *discharging* the Commission of its duties by approving its performance. The decision on discharge for the budget of a given financial year shall be taken before the 15th of May of two years later[328]. The EP may either grant the discharge, thus relieving the Commission of its budgetary responsibilities for that financial year, or postpone it, requesting more explanations. The subsequent vote can either grant or refuse discharge. The latter option has never been adopted in full, notwithstanding the two precedents of 1984 and 1998[329], so its effects are still uncertain.

[323] If the Council approves the joint text while the EP rejects it: the budget is not adopted, and a new budget proposal shall be submitted. If instead the Council rejects the joint text, the EP can approve, within 14 days from the Council's rejection and by the majority votes of its members and with the three fifths of the votes cast, the budget as amended in its first reading with all or some of the amendments. The EP can still approve the joint text by a simple majority vote, even though Council rejected it

[324] Art. 315 TFEU

[325] Currently is used for the Statutory Pay-As-You-Go Act of 2010 and the Budget Control Act of 2011

[326] Most of the exemptions regard mandatory programs like Social Security, Medicaid, Children's Health Insurance Program etc. but also some discretionary programs like the ones of the Department of Veteran Affairs and those related to military personnel are included.

[327] Reductions cannot exceed a given percentage.

[328] Art. 164 Title X, Regulation (EU, Euratom) No 966/2012

[329] In 1984 the "undischarged" Commission had almost concluded its term, while in 1998 an ad-hoc Committee of Independent Experts suggested a motion of censure, but the Commission resigned before it could get approved.

Chapter III. Systemic troubles

Once outlined the underlying frameworks in the first two chapters, I will now deal with what appear to be the major flaws and weaknesses of the two processes along with the perspectives for change.

In the US each sub-process of the budget cycle follows strict deadlines. The latter have been decided by the Congress through legislation over the years. However, the observance of these time limits, apparently due to different reasons, does not occur every fiscal year, especially in recent times.

The presidential budget request was introduced in 1921 and firstly applied for FY1923; so far, the President has submitted the budget 98 times having to comply with different deadlines. The delays have been 17 but they display a growing trend in the last years. Eight presidential budgets have been submitted more than 30 days after the deadline, 4 of them, including the 94 days delay during FY2010 (the longest delay in history) are justified by presidential transitions[330], while the other 4 by the delayed enactment of previous fiscal year's appropriations, plus other peculiar reasons. However, it is key to note that within the last eleven submissions (from FY2010 to FY2020) only twice (FY2011 and FY2016) the President has submitted the budget in time, while for nine times the submission has been delayed.

The congressional budget resolution, introduced in 1974, was firstly applied in FY1976, thereby in 45 fiscal years (until FY2020) the resolution has been adopted timely only 6 times. The delays have been 26, with the longest being the 177 days of FY1991, and the failures to act have been 13 so far, with the first occurring only in FY1999. Indeed, this represent a recent trend as well: during the last ten fiscal years (from FY2011 to FY2020) only one budget resolution has been adopted (FY2016). A reason for Congress failures to act may arguably be the presence of different party majorities in the two chambers. However, within the 13 occasions in which the budget resolution has not been adopted by Congress, only in 6 of them the two chambers of Congress belonged to different party majorities while in 7 occasions House and Senate were aligned on the same party line (6 times the Republican Party and 1 the Democratic Party) and still did not adopted a budget resolution. This displays a Congress that is unwilling or unable to carry out properly its constitutionally provided power of the purse. The reconciliation process instead, took on average 155 days[331] (far from the two months' time envisaged by the act of 1974[332]) with the longest being the 384 days of FY2006. The delays might be explained by the possibility of *filibustering* in the Senate.

[330] The last five presidential transitions years have incurred in a, quite serious on average, delay in the submission of the budget request to the Congress

[331] LYNCH (2016; p. 5)

[332] Congressional Budget and Impoundment Control Act

For the appropriations process, the Congress has until the beginning of the fiscal year (1st October) to pass appropriations acts (either as singular bills or packaged), otherwise it would experience a funding gap that eventually leads to a shutdown. To avoid this, it enacts continuing resolutions, temporary mechanisms to finance federal activities. The adoption of CRs inherently underlies a delay in the appropriations process. From FY1977 to FY2019[333], only 4 times out of 43 all the appropriation acts have been adopted before the 1st of October[334]; that implies that for all the remaining fiscal years (39), Congress resorted to CRs. Even more, from FY2002 to FY2019 the appropriations bills adopted on time have been 0 in 10 occasions out of 18. Overall, very few appropriation acts have been adopted before the deadline in the last years, and on three occasions (FY2007, FY2011 and FY2013) the CRs funding lasted for the full fiscal year, displaying a Congress conscious of its inability to agree on budget measures[335]. An entire fiscal year funded by CRs amounts to a total failure to act by the federal Government. A suggestion for reform might be to let the Senate act concurrently with the House on appropriations and to limit *filibustering* by allowing a simple majority of senators to end the prolonged debate on appropriation acts[336].

Whenever all or part of the appropriation bills or CRs are not enacted on time, or if the CRs expire during a given fiscal year, the federal Government is experiencing a funding gap that can eventually lead to a shutdown of certain federal agencies and programs. A shutdown is the suspension of not funded activities (the non-essential ones) that imply the furlough of federal employees. It was introduced by a strict interpretation of the Anti-Deficiency Act by two Attorney General's opinions[337]. A shutdown is, by itself, a failure to act of the federal Government to the extent that it was not able to find an agreement on the concerned appropriations or on any CR that could have postponed the consideration of those. This event took place too often for the disastrous effect it is liable to produce. During FY1996, two partial shutdowns occurred lasting, respectively, 5 and 21 days. A full government shutdown happened in FY2014 and lasted 16 days. Whilst the longest has been that of FY2019, which took 34 days. Federal agencies prepare to this eventuality by making plans to promptly cease operations, under the guidance of the OMB.

A Government shutdown, even if partial, has proven to lead not only to catastrophic effects for the national economy, but it also has an impact on the day-to-day life of the citizens. The US budget process seems to have a

[333] FY2020 cannot be considered here because, by the time I am writing, the appropriations process for that fiscal year is still ongoing

[334] See *Table 2* of the CRS Report coordinated by MCCLANAHAN (2019; pp. 10-11)

[335] Here, as for the reconciliation process, actions of obstruction in the Senate can be quite recurring

[336] HANSON (2015)

[337] Opinion of the Attorney General, 25 April 1980, 224; Opinion of the Attorney General, 16 January 1981, 293

structural pathology[338] that, too frequently in recent years, gets close (or in the worst cases, reaches) to the harmful effects of a Government shutdown, especially in periods of divided Government, given the high-degree of partisanship that characterized American politics in the last decades and the large utilization of the budget process, and its deadlines, as means to achieve various political aims different from those of finances. Therefore, it has been proposed the introduction of automatic continuing resolutions (ACRs): a mechanism that keeps any funding gap from happening, by granting, automatically, the funding for discretionary spending activities whenever appropriation acts or CRs are not enacted by the federal Government.

In the EU, the major troubles regard the revenues' side of the budget process, notably, the own resources system and the corrections applied to it throughout the years in order to reduce the contributions of some Member States. The introduction of correction mechanisms happens basically due to the reliance of Member States on the concept of net balance[339]. The first of this kind has been the UK rebate which was permanent[340] and based on an annual reduction of the British VAT payments (the 66%). More markedly, at Fontainebleau the Member States established a principle according to which "any Member State sustaining a budgetary burden which is excessive in relation to its relative prosperity may benefit from a correction at the appropriate time"[341]. Thereby, other corrections have been implemented: the rebates on rebate, the reduction of the VAT call rate and lump-sum payments to reduce the GNI contributions, plus the hidden correction of raising the collection costs for custom duties. However, the calculations made for net balances use quite arbitrary methods[342] and a further element of arbitrariness regards the abovementioned principle of Fontainebleau whose criteria lack of a clear definition and of a monitoring system[343]. Therefore, some European institutions have advocated for a complete removal of the correction mechanisms since, apart from their evident arbitrariness, they also contribute to the complexity and the lack of transparency of the EU system of own resources[344]. This can be achieved in the event of the imminent UK withdrawal, whose conditions for rebate became unreasonably outdated[345]. Moreover, it has been proven[346] that the

[338] TESTA (2016; p. 19)

[339] The net balance is, plainly, the difference between a Member State's amount of contributions to the budget and the amount it receives back from the EU in the form of expenditures

[340] Included in Decision of the Council, 7 May 1985, 85/257/EEC, Euratom: *on the Communities' system of own resources*

[341] Conclusions of the Presidency of The European Council, Fontainebleau (25-26 June 1984)

[342] LA CACHEUX (2005)

[343] Opinions of the ECA No. 4/2005, No. 2/2006 and No. 2/2012

[344] Resolution of the European Parliament of 16 April 2014 on the draft Council decision on the system of own resources of the European Union (05602/2014 — C7-0036/2014 — 2011/0183(CNS)); Proposal of the European Commission, 29 June 2011, COM (2011) 510 final *Proposal for a COUNCIL DECISION on the system of own resources of the European Union*

[345] Staff Working Paper of the European Commission, 29 June 2011, SEC (2011) 876 final

[346] CITI (2017)

use of correction mechanisms is completely ineffective in redressing the net imbalances.

Whilst the phasing out of correction mechanisms is a crucial step towards a less complex budget, it must, concurrently, be limited the possibility to claim net imbalances from Member States by abandoning, at least partly, the reliance of the EU budget on national contributions through the introduction of fresh own resources. Thereby, the new resources shall be simple, transparent, efficient, democratically accountable, progressive, equitable among Member States and, most importantly, linked to policies conferred to the EU.

The EU, according to art. 311 TFEU, shall be financially autonomous but, effectively, it increasingly relies on national contributions, especially due to the large share of the GNI-based resource. Indeed, this is where the need for fresh own resources stems from. Nevertheless, since revenues depend on expenditures, even though fresh own resources would be introduced, this would not increase the amount of revenues that accrue to the budget (which have a fixed ceiling), but it would decrease the share of the GNI-based resource (thus, offering, in many cases, more funds available to national budget) which can still perform as a residual source. Adhering with the principles of fiscal federalism, the own resources' candidates must demonstrate that the EU action in that field has an added value. Thereby, the focus should shift from individual contributions' concerns to EU-wide common objectives, that could be better achieved at a supranational level rather than through national differentiated frameworks. The common interests of all the Member States in such policies and the cross-boundary nature of the new levies, may facilitate the adoption of the reform with the procedure envisaged by art. 311 TFEU.

Hereby, the new own resource that have been brought forward by the Commission in its 2018 proposal[347] have been: a new VAT-based resource, easier and more transparent than the one currently in place[348], a corporate income tax, a share of emission allowances auctioned through the EU ETS and a uniform call rate on the quantity of non-recycled plastic. Plus, the other fresh own resources taken into consideration are: a financial transaction tax, a financial activities tax, a bank levy, a motor fuel levy, an electricity tax, a carbon tax, a resource related to seigniorage, an air transport duty, a communication tax and a tax on the digital economy.

To facilitate the adoption of a reform, the new own resources shall be made acceptable to every EU Member State. The new EU revenues shall not encompass a loss on the national side, thereby addressing a fiscal space that is not already occupied by any of the Member States' fiscal policies, since

[347] Proposal of the European Commission, 2 May 2018, COM/2018/325 final: *Proposal for a COUNCIL DECISION on the system of Own Resources of the European Union*
[348] CIPRIANI (2016)

they are not willing to renounce to, or reduce, their fiscal income, unless the common interest happens to be very strong.

Conclusions

The death of 157 people for the crash of the Ethiopian Airlines Flight 302 in March 2019, allegedly[349], triggered by the delay of the consideration of the software updates on the aircraft Boeing 737 Max 8 (after a first crash of the same model in October 2018) by regulatory officials of the Federal Aviation Administration (FAA), due to the 2019 US Government shutdown; and plus, the Commission's proposal[350] to link, from the MFF 2021-2027, EU spending[351] to the Member States' compliance with the rule of law[352], enshrined in the common values of art. 2 TEU and particularly deficient in countries like Poland and Hungary[353] that benefit the most from cohesion and structural funds; perhaps are, respectively, the two most recent striking events that reveal the prominence of the budget process in today's American and European political landscape, and prompt the debate over its delivery and the perspectives for reforms.

The budgetary procedures may appear marginal, or on the edge of the domain of politics; however, as widely shown, they are essential for the realization of policy targets and central for the everyday lives of citizens. Moreover, as stressed by Lindseth[354], those mechanisms do not have the function to limit institutional power, rather they constitute it, allowing the performance of the *metabolism* of the community, that turns resources into actions serving the public interests[355].

The scope of the comparison between the budget processes of the US and the EU has been to assess, once outlined the different contexts and evolutions of the two systems of revenues and the relatively comparable annual cycles of expenditures, the endemic shortcomings that characterize both processes and, therefore, appraise whether, in which extent, and how, they can take lessons

[349] TIMMONS (2019); TANGEL and PASZTOR (2019)
[350] Proposal of the European Commission, 2 May 2018, COM 2018/324 final: *for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States*
[351] Including suspension of payments and termination of legal commitments. See MANKO (2018; pp. 5-6)
[352] It recalls the use of *conditionality*, already applied in the framework of EU law in cases like the admission procedure (art. 49 TEU) and the EMU membership. However, while these criteria are largely decisive for the accession, its oversight afterwards lacks a substantive enforcement method. See HEINEMANN (2018; p. 298)
[353] For which the traditional mechanisms have not proven effective, including that envisaged by art. 7 TEU. See HALMAI (2018)
[354] LINDSETH (2017)
[355] According to the author the EU lacks the *demos* and the socio-political emergence (not just legal) of those procedures, thereby it cannot be deemed as constitutional (it has rather an administrative governance). See LINDSETH (2017; pp. 10-11)

from the measures adopted across the Atlantic to address those systemic troubles.

The comparison highlighted a certain degree of similarity in the series of sub-processes related to the determination of the expenditures as well as in the abuse of the budgetary procedures for political and institutional confrontation (between party lines in the US[356] and between Member States in the EU[357]), notwithstanding the different size of the two budgets and the different nature of the two political entities. However, while in the US the budget cycle is undermined by delays and failures to act that stress conflicts between the executive and the legislative branches (or within the legislative itself), in the EU the timeline for the adoption of the annual budget is even anticipated and the institutions always deliver, emphasizing the spirit of consensus, inspired by the Treaties.

The substantial differences re-emerge in their revenue schemes and reflect their institutional setup: while the US went through a historical process that guaranteed the central government fiscal powers, the EU is still largely hostage of its Member States' will. The latter shall be incentivized to grant new fiscal spaces to the EU budget, as they would reduce their contribution and have more sources to spend on a national level.

The two cases analysed, can draw lessons from each other in order to significantly improve their performance. For example, in the US, the shutdown can turn out to be, as shown in par 3.2, a devastating event; such a calamity, in the EU, cannot occur due to the provision of the system of the twelfths and would be however very limited given the small capacity of the EU budget. The same goes for the delays in the appropriations process, which might be more likely prevented if the *filibuster rule* of the Senate is removed. Nevertheless, while the US Congress, along with the President, may act for the adoption of these measures, the EU institutions, by themselves, cannot. Indeed, while a reform of the revenue side of the EU budget is evidently needed, either in the form of new resources collected by national administrations or by providing a fiscal autonomy in certain sectors, the now 28 Member States shall agree on these measures and singularly ratify them according to their constitutional requirements, both for the special legislative procedure of art. 311 TFEU (the own resources decision) and for a Treaty revision pursuant to art. 48 TEU.

The attribution of fiscal powers to the US central government arise from a states' sovereign debt crisis in the 1780s (see par. 1.1); a states' sovereign debt crisis occurred also in the EU in the 2010s. Such a factor may paradoxically lead to the centralisation of fiscal authority, as argued in a

[356] This may occur between the Congress and the President or even within the Congress itself

[357] Referring to the thorough negotiations in the Council and the contrast/divide between net contributors and net beneficiaries to the EU budget that eventually led to the use of correction mechanisms

parallelism made by Wozniakowski[358]. However, the outcome of the recent crisis has been the attribution to the EU of the power of regulating national fiscal policies (the Fiscal Stability Treaty), but not the attribution of a taxation power. The effect is that in this way the Member States have even more constraints than the ones they would have had if they renounced to part of their fiscal sovereignty.

An EU power to tax would increase the clout of the EP in fiscal matters, providing it the power to raise revenues for the EU budget and fulfil its scope of adequately represent the EU citizens, whilst the current system encompasses *representation without taxation*[359]. The fiscal capacity of the EU is surely a political issue[360] that also relates to the transformation of its political setup into a federal system, although there would be some legal problems[361] for its processing.

Nevertheless, the "EU budget is much more than an accounting document. It is a realm of political confrontation between rival views of the EU, both as an organization and a project"[362]. EU Member States have different ideas of the EU and what the EU should aim to become; its budget reflects the lowest level of integration since every Member State is part of it and has a veto power, while the monetary union may display a higher degree of integration. Thus, it results the suggestion to proceed with a fiscal integration confined exclusively to the Eurozone countries, which appear more willing and in need of such a provision for a better management of the single currency and for countering asymmetrical shocks[363], indeed, currency unions across the world (the US, amongst all), are provided with fiscal powers.

Still, it should be borne in mind that the EU aims to build "an ever closer union among the peoples of Europe"[364] and that its budget "shall be financed wholly from own resources"[365], thereby the Member States shall abide to what they signed instead of being focused on their national interests. Such a discrepancy between the Treaties and the reality, is unsustainable with regard to the challenges the EU faces in such an internationally competitive environment (considering not only States, but also multinational corporations and financial companies), particularly since the competition, so far, seems mostly internal.

[358] WOZNIAKOWSKI (2018; p. 643)
[359] FABBRINI S. (2016; p. 24)
[360] SCHRATZENSTALLER (2013; p. 310)
[361] HINAREJOS (2012)
[362] FABBRINI S. (2016; p. 20)
[363] FABBRINI F. (2019)
[364] Art. 1 TEU
[365] Art. 311 TFEU