Never Waste a Good Crisis? On the Emergence of an EU Fiscal Capacity

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I. Introduction

While the EU has for a long time fundamentally been designed and propelled by economic integration through opening up markets and the free movement of products and production factors, it has not been designed as a system that provides for the full integration of economic policies of the Member States, be it outside or inside the Euro area, nor for a major fiscal capacity at the supranational level, let alone a fiscal union. To be sure, the Economic and Monetary Union (EMU) as designed by the Treaty on European Union (Maastricht Treaty) has been a qualitative quantum leap for macroeconomic integration through the pooling of competences for monetary policy for the Euro area countries. Yet, EMU has neither de jure (at the level of the distribution of competences) nor de facto (in economic terms) resulted in the creation of a European economic union or more concretely in the unification of the fiscal policies of the Member States, including those that share the single currency. Instead, a European legal framework was introduced with the aim of coordinating the national budgetary policies and to limit the policy space available to the Member States, notably those participating in the single currency, through the introduction of numerical criteria for assessing the sustainability of national budgetary policy.

The shortcomings and risks emanating from this asymmetric integration of monetary and economic policy in the Euro area have become painfully evident most recently during the European sovereign debt crisis.[1] While the establishment of a currency union has limited the national economic policy toolbox of Euro area Member States through the loss of control over the interest rates and exchange rates, adequate instruments at the European level to deal with asymmetric shocks were missing. This has not only triggered an unprecedented level of regulatory activity geared towards the strengthening of economic policy coordination in the Euro area, both within and outside the current Treaty framework, but also fueled the debate at the European level about what has been coined the completion of EMU, primarily through the 2012 Four Presidents' Report *Towards a Genuine Economic and Monetary Union* and the 2015 Five Presidents' Report *Completing Europe's Economic and Monetary Union*.[2] Fast forward to 2020, while being of a different nature and arguably less asymmetric in its effects, the COVID-19 pandemic and particularly its major impact on the economies of the Member States has once more triggered the fundamental debate on the need for a greater fiscal capacity at the supranational level. At the same time, this crisis has led to the introduction of several

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[1] See generally Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014); Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015); Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (OUP 2016).

[2] Herman van Rompuy, President of the European Council, in close collaboration with José Manuel Barroso, President of the European Commission, Jean-Claude Juncker, President of the Eurogroup, Mario Draghi, President of the European Central Bank, 'Towards a Genuine Economic and Monetary Union' (5 December 2012) (hereafter Four Presidents' Report); Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, 'Completing Europe's Economic and Monetary Union' (22 June 2015).

(temporary) fiscal policy-related instruments at the EU level, which in the view of some observers is path-breaking for the creation of a much more substantive European fiscal capacity.[3]

In light of these preliminary observations, the question that this contribution seeks to answer is –as the title aludes to– whether the two major economic and –in the case of COVID-19– health crises have given European integration a significant and lasting impulse towards a greater fiscal capacity or even a fiscal union in the Euro area.[4] To this end, first of all the benchmark must be defined, that is what exactly is meant by fiscal capacity and fiscal union, as well as what instruments are linked thereto (section II). Thereafter, a brief account is given of the status quo prior to the two crises (section III). This is followed by an analysis of the measures taken in response to the sovereign debt crisis and, subsequently, the COVID-19 pandemic, thereby evaluating their contribution to the creation of a greater fiscal capacity or even a fiscal union in the Euro area (section IV). This contribution will be concluded with a forward-looking discussion on the other, missing elements for the creation of a greater fiscal capacity and a more complete fiscal union (section V).

II. Fiscal Capacity, Fiscal Integration, and Fiscal Union: Delineating Non-Legal Concepts

Before turning to the question inherent in the title of this contribution, it is necessary to define the notion of *fiscal capacity* and, to the extent necessary, to delineate it from related notions, namely those of *fiscal integration* and *fiscal union*. When dissecting these notions two main characteristics can be differentiated that are linked to the type of instruments covered and the degree to which they are deployed at the supranational, EU level.

The word *fiscal* is generally associated with public revenue, spending, and taxation.[5] Correspondingly, in macroeconomics, broadly speaking, fiscal *policy* describes *two* of the three main instruments utilized to implement macroeconomic policy with the view to influencing endogenous economic variables (gross domestic product (GDP), employment, wages, and price developments): government spending and taxation.[6] Despite this rather straightforward macroeconomic connotation, in the EU context, policy-makers and (legal) academics do not necessarily mean the same thing when referring to fiscal policy. In fact, a reduced notion of fiscal policy is often utilized, notably in debates on EMU. This is not least because of the political and economic realities in the EU. Exemplary in this regard is the 2012 Four Presidents' Report *Towards a Genuine Economic and Monetary Union*, where 'a qualitative move towards a fiscal union' is associated with a 'greater pooling of decision making on budgets commensurate with the pooling of risks, [as well as] effective mechanisms to prevent and correct unsustainable fiscal policies in each Member State'.[7] Similarly, the European Parliament has in the past referred to the EU's fiscal policy architecture as being geared towards building 'a robust and effective framework for the coordination and surveillance of the fiscal

[3] For an overview, see Paul Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture' (2020) 47 Legal Issues of Economic Integration 337.
[4] Consequently, it should be noted that the observations in this contribution are principally limited to the EMU.
[5] See for example the definitions offered by the Oxford English Dictionary (https://www.oed.com) and Merriam-Webster Dictionary (https://www.merriam-webster.com).
[6] Farrokh K. Langdana, *Macroeconomic Policy: Demystifying Monetary and Fiscal Policy* (Springer 2016) 9. The third instrument, the change in money supply, is attributed to monetary policy.
[7] Four Presidents' Report (n 2) 5.

policies of the Member States'.[8] On this reading, fiscal policy is thus understood as what has been summarized as 'a set of common budgetary instruments'.[9] Thus, when Schlosser argues that 'the euro crisis response has resulted in the emergence of a fiscal authority, understood as the institutionalization of central fiscal powers at Europe's centre', he recognizes that his analysis 'departs from the historical and classic meaning of "fiscal authority", taken as the legitimate ability of a nation-state to directly raise taxes in order to fund public expenditures'.[10] It is the latter and thus the ability to create revenue through (direct) taxation, which is currently not part of the EU's policy arsenal, that forms part of a thicker or broader definition of what fiscal policy amounts to.

Next to the types of policy fields covered, the reference to a fiscal union or fiscal integration can stand for different degrees of Europeanization of fiscal policy. Fiscal union in the proverbial sense of the word implies a unification of fiscal policies, that is 'a fully-fledged budget with broad tax and spending powers', which could include the harmonization of tax systems,[11] at the supranational level and thus the creation of an exclusive or at least shared Union competence in this regard. This could also be referred to as a *fully-fledged* or *genuine* fiscal union and would include, in its most minimal form, a central fiscal capacity or budget and a common debt instrument.[12] Yet, some authors also apply the term in a somewhat less ambitious way to signal a *partial* transfer of powers from the Member States to the EU, such as Dabrowski, who refers to the 'transfer of part of fiscal resources and competences in the area of fiscal policy and fiscal management from the national to supranational level'.[13] In contrast, definitions of the term fiscal integration can at times be somewhat more ambiguous (or broad) about the actual degree of Europeanization of fiscal policy, by referring, for example, in general terms to 'any attempt to further centralise fiscal policies in EMU, either by sharing resources or decision-making power'.[14]

What separates these different approaches in the literature is the extent to which the EU is expected to have instruments at its disposal to implement macroeconomic policy with the view to influencing the above-mentioned economic variables for the EU as a whole or the Euro area. Different building blocks for fiscal integration leading to a fiscal union have been identified, which correspond with the above-mentioned broader or narrower definition of fiscal policy. Thus, for example, Thirion refers to the existence of fiscal rules and policy

[8] As described in the European Parliament's fact sheets on the EU, available at: <https://www.europarl.europa.eu/factsheets/en/sheet/89/the-eu-framework-for-fiscal-policies> accessed 13 July 2021. See also referring to this definition: Alessandro D'Alfonso and Andrej Stuchlik, 'A Fiscal Capacity for the Euro Area? Options for Reforms to Counter Asymmetric Shocks' (20 September 2016) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/589774/EPRS_IDA(2016)589774_EN.pdf> accessed 13 July 2021 (hereafter D'Alfonso and Stuchlik, 'A Fiscal Capacity for the Euro Area?').

[9] D'Alfonso and Stuchlik, 'A Fiscal Capacity for the Euro Area?' (n 8) 3.

[10] Pierre Schlosser, *Europe's New Fiscal Union* (Palgrave Macmillan 2019) 4 (hereafter Schlosser, *Europe's New Fiscal Union*).

[11] Gilles Thirion, 'European Fiscal Union: Economic Rationale and Design Challenges' (January 2017) <https://www.ceps.eu/ceps-publications/european-fiscal-union-economic-rationale-and-design-challenges/> accessed 2 April 2021, 3 fn 1 (hereafter Thirion, 'European Fiscal Union').

[12] Schlosser, *Europe's New Fiscal Union* (n 10) 168.

[13] Marek Dabrowski, 'Monetary Union and Fiscal and Macroeconomic Governance' (June 2015) <https://ec.europa.eu/info/sites/info/files/dp013_en.pdf> accessed 2 April 2021, 7 (hereafter Dabrowski, 'Monetary Union and Fiscal and Macroeconomic Governance'). See also Benedicta Marzinotto, André Sapir and Guntram Wolff, 'What Kind of Fiscal Union?' (November 2011) Bruegel Policy Brief Issue 2011/06, 5 (hereafter Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union?'), who argue in favour of 'a limited euro-area fiscal union'.

[14] Thirion, 'European Fiscal Union' (n 11) 3.

coordination, crisis management mechanisms, a banking union, fiscal insurance, and joint debt issuance.[15] For Dabrowski, a fiscal union can entail 'a higher degree of centralization of fiscal resources at the Union level … the development of European revenue sources for the EU budget (instead of the contributions of member states) … harmonization of taxation/ entitlements within the EU/EMU … a mechanism of fiscal discipline at both the Union and national levels, including the mechanism of orderly sovereign default … building up of Union-wide insurance mechanisms against financial turbulences (bailout facilities), including a debt mutualization mechanism … the creation of institutions with fiscal authority on a supranational level (for example, creating an EU/EMU Ministry of Finance)'.[16]

While it has been pointed out that not all building blocks have to be necessarily present for the emergence of a fiscal union,[17] there seems to be an agreement among commentators on the core elements contributing to fiscal integration, namely the (larger) budgetary capacity of the EU, a mechanism to centralize debt issuing, strong European fiscal rules, and permanent mechanisms to deal with (unforeseen) crises. To be sure and as will become clear hereafter, there are clearly links and even interdependencies between these elements, as for example the EU's right to issue a debt instrument autonomously would contribute to and complement its budgetary capacity.

The building blocks of a fiscal union identify specific policy fields for which the EU should have instruments at its disposal, rather than the specific instruments themselves and their allocation to the various building blocks. In fact, a multitude of different instruments can be conceived and –to some extent– can currently be observed at the EU level. Moreover, as pointed out above, one instrument can in principle be attributed to more than one building block or policy field. Thus, for example, Fuest and Peichl have observed that, depending on the actual design, their proposal for a joint guarantee for Euro area government debt may be either a structural element of a new approach to fiscal governance at the EU level or closer to a crisis resolution mechanism.[18] It is thus hardly surprising that different authors identify similar elements that contribute to a fiscal union, yet assign them to different building blocks.

In light of these definitions of fiscal union and fiscal integration, the notion of fiscal capacity may be best understood as referring to the degree to which these building blocks of fiscal integration could be found at the supranational level in the shape of concrete instruments prior to the European sovereign debt crisis and the COVID-19 pandemic and/or whether they have emerged thereafter. The word 'capacity' can have both a qualitative and quantitative connotation. In addition to this, fiscal capacity is also referred to by some commentators as a shorthand for a common fiscal insurance device, namely 'a counter-cyclical tool designed to stabilize the EMU by supporting states facing asymmetric economic shocks',[19] although of

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[15] Ibid, 3. Similarly: Schlosser, *Europe's New Fiscal Union* (n 10) 4, who refers to enhanced fiscal surveillance, a fiscal capacity, a lending of last resort capacity, and a banking resolution regime.

[16] Dabrowski, 'Monetary Union and Fiscal and Macroeconomic Governance' (n 13) 7, with further references. Stressing the need of a European Minister of Finance: Marzinotto, Sapir and Wolff, 'What Kind of Fiscal Union?' (n 13).

[17] Clemens Fuest and Andreas Peichl, 'European Fiscal Union: What Is It? Does It Work? And Are There Really "No Alternatives"?' (March 2012) IZA Policy Paper No 39, 2 (hereafter Fuest and Peichl, 'European Fiscal Union').

[18] Ibid, 5.

[19] Federico Fabbrini, 'Europe's Economic and Monetary Union Beyond Covid-19' (3 June 2021) <https://www.gov.ie/en/publication/7b196-europes-economic-monetary-union-beyond-covid-19/> accessed 12 August 2021, 12.

course this does not need to be the (only) objective pursued by a fiscal capacity for the EU/Euro area.[20]

Hereafter this contribution applies the narrow definition of fiscal policy as a reference point, thus in principle excluding considerations on taxation,[21] and draws on the building blocks that have been identified above as the core elements contributing to fiscal integration. Moreover, this contribution focuses primarily on the Euro area.

III. The State of Affairs in the EU before the Two Crises

To evaluate to what extent the fiscal capacity of the Euro area has increased because of the regulatory response to the European sovereign debt crisis or the COVID-19 pandemic, it becomes necessary first to establish some temporal points of reference in relation to which the crisis-induced developments can be assessed. The 1992 Treaty on European Union, which introduced the EMU legal framework, and any relevant subsequent changes introduced by the 2001 Treaty of Nice and the 2007 Treaty of Lisbon, as well as any corresponding secondary Union law, seem an obvious choice in this regard.

A. The budgetary capacity of the Euro area

In a similar fashion to what has been observed in the previous section for the notion of *fiscal* union or capacity, a common definition of the notion of *budgetary* capacity is also missing. In the EU context, it may refer to the ability of the latter to generate its own sources of income but also to the volume of the (annual) resources. Linked to this understanding, budgetary capacity is also used, notably in the context of the Euro area, to describe the financial capability or flexibility of the Union, paired with corresponding instruments, to provide for a robust macroeconomic stabilization function at the supranational level.

The EU finances its budget through its own resources.[22] Yet, unlike what can be observed for the Member States, its primary source of revenue is not direct taxation, which is not directly governed by Union law, but mainly contributions by its Member States calculated in relation to their gross national income, as well as contributions based on value added tax collected by them and customs duties on imports from third countries into the EU. The rules for the allocation of own resources to the Union for the financing of its annual budget and namely the categories of resources and the method of their calculation are laid down in the Own Resources Decision (ORD), which is adopted by the Council, acting in accordance with a special legislative procedure, by unanimity and after consulting the European Parliament, and thereafter has to be ratified by all Member States.[23] The ORD accompanies the Union's Multiannual Financial Framework (MFF), which –since the Treaty of Lisbon– determines the

[20] As exemplified by the ill-fated Budgetary Instrument for Convergence and Competitiveness (BICC).

[21] See Chapters 4 and 5 by Edoardo Traversa and Elena Masseglia and by Christiana Panayi, respectively, in this volume.

[22] See further Chapter 8 by Cristina Fasone in this volume; Jan Inghelram, 'Budget and Finances' in Pieter Jan Kuijper, Fabian Amtenbrink, Deirdre Curtin, Bruno de Witte, Alison McDonnell and Stefaan van den Bogaert (eds), *The Law of the European Union* (5th edn, Kluwer Law International 2018) ch 9; Cristina Fasone and Nicola Lupo, 'The Union Budget and the Budgetary Procedure' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law: Volume 1: The European Union Legal Order* (OUP 2018) ch 25.

[23] Article 311 TFEU. See Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L424/1.

amounts of the annual ceilings on commitment appropriations by category of expenditure (corresponding to the EU's major sectors of activities) and on payment appropriations.[24] The commitment appropriations annexed to the MFF have so far not foreseen a separate category for the Euro area, hence there is no distinct Euro area budget.[25] Moreover, there is not a separate category of expenditure dedicated to the EU's capability to deal with economic shocks either.

This is not to say that in the past none of the Union's expenditure was geared towards stimulating economic and social developments in Member States or that no resources were allocated for the purpose of acute crisis management. One category of Union expenditure included in MFFs that is particularly worth mentioning is 'economic, social and territorial cohesion'. Under this heading the Union has allocated funds to its five European Structural and Investment Funds (ESIF), namely the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development, and the European Maritime and Fisheries Fund. The overarching purpose of ESIF is 'to invest in job creation and a sustainable and healthy European economy and environment'.[26] The importance of these funds for the national economies should not be underestimated, as they amount to a signification portion of the GDP of some Member States. According to the European Commission's own assessment from 2017, '…the [ESIF] have in recent years accounted for more than half of total public investment, contributing strongly to the process of the economic and social catching-up of regions and countries across Europe'.[27] It is even concluded that 'the EU budget also has a certain stabilising effect on the level of public investments over time…'.[28]

The MFF has also in the past foreseen thematic special instruments, such as the European Union Solidarity Fund, which is an instrument '… to allow rapid financial assistance in the event of major disasters occurring on the territory of a Member State or of a candidate country' that has been utilized in the past in the case of countries affected by natural disasters.[29] Moreover, there is the European Globalisation Adjustment Fund that aims '…to provide support for workers made redundant as a result of major structural changes in world trade patterns due to globalisation where these redundancies have a significant adverse impact on the regional or local economy'.[30] The EU considers that these instruments help to cushion

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[24] Article 312 TFEU. See Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L433I/11.

[25] See generally Richard Crowe, 'Is a Separate Eurozone Budget a Good Idea?' (May 2018) ADEMU Working Paper 2018/120 <http://ademu-project.eu/wp-content/uploads/2018/06/120-Is-a-separate-eurozone-budget-a-good-idea.pdf> accessed 4 August 2021.

[26] See <https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/european-structural-and-investment-funds_en> accessed 23 June 2021.

[27] Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank, 'Further Steps Towards Completing Europe's Economic and Monetary Union: A Roadmap' COM(2017) 821 final, 2.

[28] Ibid.

[29] See the Interinstitutional Agreement of 17 May 2006 between the European Parliament, the Council and the Commission on budgetary discipline and sound financial management [2006] OJ C139/1, section F (hereafter Interinstitutional Agreement on budgetary discipline and sound financial management); Council Regulation (EC) 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund [2002] OJ L311/3.

[30] Regulation (EC) 1927/2006 of the European Parliament and of the Council of 20 December 2006 on establishing the European Globalisation Adjustment Fund [2006] OJ L 406/1, Article 1(1).

economic shocks at national or local level.[31] The list provided here is by no means exhaustive.[32] A more recent example is the Brexit Adjustment Reserve aimed at providing financial assistance '…to counter unforeseen and adverse consequences in Member States and sectors that are worst affected by the withdrawal'.[33] Still, in the past, the ORD has not foreseen a category of own resources available to structurally or temporarily allocate substantive resources to address (asymmetric) economic shocks, such as in the case of a global financial crisis or a pandemic.[34]

Besides the limited scope of the types of expenditure foreseen in the ORD and the MFF, it is mainly the volume of the EU's own resources that restricts its budgetary capacity. About one-third of the Union's budget in the MFF 2014-2020 fell in the category of 'economic, social and territorial cohesion', with the MFF 2021-2027 foreseeing a slightly smaller percentage.[35] Yet, by observing the actual volume of the EU's resources we can put the scope of these supranational fiscal policy instruments into perspective. In 2019 the adopted total EU budget was a mere €165.8 billion (in commitment appropriations). In comparison, the targeted federal budget of Germany for the same year was set at €336.7 billion (expenditures). According to European Commission estimates, in 2019 the EU budget amounted to 'around 1% of combined EU income and only around 2% of public spending in the EU'.[36] Put differently, approximately 98% of public spending in the EU took place at the level of the Member States and thus formed part of the national budgets.

What derives from these observations is that by design the EU's budgetary capacity has been a fraction of the EU gross national income, thus seriously impairing the Union's financial capability to deploy an autonomous discretionary fiscal policy and a robust macroeconomic stabilization function at the supranational level. It is thus hardly surprising that neither the MFF nor the ORD have in the past specifically foreseen the allocation of resources to this end.

B. Centralized debt issuing

Proposals for the introduction of a supranational debt issuing capacity can be traced back to at least the early 1990s.[37] A detailed study of the merits and different scenarios for co-ordinated debt issuance was provided in the Report by the Giovannini Group from 2000, which discussed *inter alia* the introduction of a single Euro area debt instrument '…that could successfully

[31] Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank, 'New Budgetary Instruments for a Stable Euro Area within the Union Framework' COM(2017) 822 final, 2 (Brussels, 6 December 2017) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0822> accessed 4 August 2021.

[32] Other such mechanisms include the Youth Employment Initiative, which provides support to Member States and regions facing high youth unemployment, and the European Fund for Strategic Investment (also known as the Juncker plan), which aimed to help use public funding, including funding from the EU budget, to mobilize private investment for a wide range of projects carried out in the EU.

[33] See Interinstitutional Agreement on budgetary discipline and sound financial management (n 29), section H; Council Regulation 2020/2093 (n 24), Article 10.

[34] On the inclusion of such a possibility in the latest ORD, see section IV below.

[35] See Annex II, heading 1b and 2a of Council Regulation (EU, Euratom) 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020 [2013] OJ L347/884 and Council Regulation 2020/2093 (n 24), respectively.

[36] European Commission, *The EU Budget at a Glance* (Publications Office of the European Union 2019) 16.

[37] See Thomas Eger and Hans-Bernd Schäfer, 'Introduction: Eurobonds Beyond Crisis Management' (2016) 12 Review of Law & Economics 477 (hereafter Eger and Schäfer, 'Introduction: Eurobonds'), who refer to a 1993 proposal by the President of the European Commission Jacques Delors to finance investment by means of Eurobonds.

compete for funds on the global capital markets in competition with US Treasuries and [Japanese Government Bonds]'.[38] The aim at the time was mainly to address the undesired fragmentation in the Euro area public debt market. Thereafter, and especially since the start of the European financial and sovereign debt crisis, various proposals for centralized debt issuing and thus for the full or partial mutualization of the sovereign debt of the Euro area Member States, have been articulated. Commonly referring to the issuance of Eurobonds and/or the creation of a European safe asset, these proposals have mainly aimed to strengthen the Union's fiscal capacity.[39] The latter has been considered a tool to provide the Union or the Member States (depending on the perspective that is taken) with the necessary budgetary headroom for fiscal stabilization measures in the face of adverse economic developments, which –as has become apparent during the sovereign debt crisis– can restrict a country's access to market-based financing.[40] This is particularly relevant for the Member States of the Euro area, since they do not have an autonomous monetary and exchange rate policy to deal with economic shocks.[41]

Furthermore, highlighting the close interrelationship between different building blocks of a fiscal union, centralized debt issuing has also been described as 'a more promising way to impose fiscal discipline than the traditional way of economic policy coordination'.[42] By pooling debt issuing at the supranational level and by partially or completely restraining Member States from resorting to the financial markets, the European body responsible for providing loans to the Member States via the issuing of European debt would be in a position to not only monitor but effectively enforce the basic European budgetary rules enshrined in Article 126(1) TFEU and the Protocol on the Excessive Deficit Procedure, as well as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, by limiting the volume of loans and by applying conditionality.[43]

What derives from these observations is that, at the very least prior to the European financial and sovereign debt crisis, no mutualization of sovereign debt at the supranational level was foreseen in the EMU framework. This is hardly surprising given that numerous economic and legal concerns have been raised about the introduction of such a framework, relating mainly to 'moral hazard' problems arising from a system of joint and several liability, the concerns about a permanent fiscal transfer between Member States, the issue of how to deal with the existing debt of the Member States (legacy debt), and the salient question of whether

[38] Co-ordinated Public Debt Issuance in the Euro Area: Report of the Giovannini Group (8 November 2000) <https://ec.europa.eu/economy_finance/publications/pages/publication6372_en.pdf> accessed 13 July 2021.
[39] For an overview of the different –and in part incompatible– proposals, see Eger and Schäfer, 'Introduction: Eurobonds' (n 37); Fabian Amtenbrink, René Repasi and Jakob de Haan, 'Is There Life in the Old Dog Yet? Observations on the Political Economy and Constitutional Viability of Common Debt Issuing in the Euro Area' (2016) 12 Review of Law & Economics 605, 607ff (hereafter Amtenbrink, Repasi and De Haan, 'Is There Life in the Old Dog Yet?'). On safe assets, see also Chapter 9 by Michael Waibel and Sebastian Grund in this volume.
[40] Thirion, 'European Fiscal Union' (n 11) 15-16. The author also emphasizes the positive effects on financial market stability, namely that standardized European debt issuing would create a 'safe and liquid asset', while at the same time decoupling the national banking system from the sovereign.
[41] On the issue of asymmetric shocks in the EMU context, see Ben Patterson and Simona Amati, 'Adjustment to Asymmetric Shocks' (September 1998) European Parliament Directorate-General for Research Working Paper, Economic Affairs Series ECON-104.
[42] Amtenbrink, Repasi and De Haan, 'Is There Life in the Old Dog Yet?' (n 39) 606.
[43] The issue of whether the existing fiscal rules should be reformed or not is beyond the scope of this contribution.

such a system would require an amendment of primary Union law and/or would meet insurmountable constitutional hurdles in some Member States.[44]

Beyond EMU and the Euro area, it is worth noting that centralized debt issuing is certainly not entirely foreign to the EU. Thus, based on Article 172 in conjunction with Article 203 of the Treaty establishing the European Atomic Energy Community, the Council empowered the European Commission already in 1977 to issue Euratom loans for the very specific purpose of contributing to the financing of nuclear power stations, whereby the amount of lending is currently limited to €4 billion.[45] Another example concerns the European Investment Bank, which is authorized to borrow on the capital markets the necessary funds for the performance of its tasks and its lending operations.[46] For 2020 the borrowing authorization as reported has amounted to €70 billion.[47]

C. European fiscal rules

Strong fiscal rules have been identified as another building block of a stronger fiscal capacity of the EU, which implies that the legal framework governing the *E* of EMU is considered insufficient in this respect. As has been observed in the introduction to this contribution, legal integration in EMU has been designed as an asymmetric process along two axes. First, the Maastricht Treaty resulted in differentiated integration, making membership in the Euro area subject to a separate decision based on legal and economic (convergence) criteria and subjecting non-Euro area Member States (Member States with a derogation) to a somewhat less rigid economic policy coordination framework.[48] Secondly, while in the case of the Euro area Member States monetary policy was supranationalized and entrusted to a new Union institution designed for this purpose, i.e. the European Central Bank (ECB), the same was not foreseen for economic policy. In the categories and areas of competence foreseen in the TFEU, the Union is formally only given a coordinating competence for the economic policies of the Member States, which remain a national competence.[49] By design, most of the public spending takes place at the level of the Member States and, as has been pointed out above, the budgetary capacity of the Union has been small by comparison.

This has had important implications for the Euro area. For one, as budgetary policy has remained a national competence, budgetary discipline, which ensures public debt sustainability, had to be secured through a set of common budgetary rules and corresponding coordination and, to a much lesser extent, enforcement mechanisms to ensure compliance. The legal framework introduced by the Maastricht Treaty, notably what are currently Articles 121 and 126 TFEU, thereafter further specified in the two 1997 Council Regulations of the Stability and Growth Pact (SGP), had been geared towards the coordination of the national budgetary

[44] For more details see Amtenbrink, Repasi and De Haan, ‘Is There Life in the Old Dog Yet?’ (n 39), with further references to literature.

[45] 77/270/Euratom: Council Decision of 29 March 1977 empowering the Commission to issue Euratom loans for the purpose of contributing to the financing of nuclear power stations [1977] OJ L88/9 (as amended). See further <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/international-economic-relations/euratom-loans_en#legal-basis> accessed 13 July 2021.

[46] Statute of the European Investment Bank (version of 1 March 2020), Article 20.

[47] European Investment Bank, *Financial Report 2020* (European Investment Bank 2021) 7-8.

[48] See Articles 139-140 TFEU today.

[49] Article 5(1) TFEU.

policies of the Member States.[50] As has been observed elsewhere, the success of this framework has by-and-large rested on two main pillars.[51] First, it required the (political) commitment of national governments to adhere in their budgetary planning and actual spending to the basic budgetary rules laid down in Article 126(1) TFEU and the Protocol on the excessive deficit procedure and, linked thereto, the Broad Economic Policy Guidelines adopted by the Council in the context of the multilateral surveillance procedure. Secondly, the effective application of the Maastricht framework depended on the willingness of the Member States represented in the Council to enforce the rules and thus on peer review, which could be explained by the fact that in the original Treaty framework Council action was required for each of the significant steps in the multilateral surveillance and excessive deficit procedure. As it turned out, political commitment to the agreed-upon budgetary rules has varied across time and Member States, whereas the system of peer review could be witnessed breaking down occasionally, as illustrated from the inconsistent application of the excessive deficit procedure to Germany and France in 2003.[52] Given that by design the Euro area had to rely mainly on the capacity of the Member States themselves to stabilize their economies through automatic stabilizers and discretionary fiscal policies (i.e., government spending and taxes), the absence of a robust legal framework ensuring sound budgetary positions by the Member States should have been considered a serious flaw in the design of EMU.

D. Crisis resolution mechanisms for the Euro area

The observations in the previous sections on the design choices for EMU explain why calls for a more significant fiscal capacity for the Euro area have also included demands for the establishment of a permanent crisis resolution mechanism (or mechanisms) in a broad sense, such as a mechanism for sovereign debt resolution, the introduction of automatic stabilizers at the European level (namely through the re-insurance of national unemployment schemes or the establishment of a European unemployment insurance scheme), and a permanent European mechanism to provide financial assistance to Euro area Member States.[53] As the developments that have taken place since the start of the European financial and sovereign debt crisis will be discussed separately hereafter in section IV, it suffices to observe here that a comprehensive 'fiscal shock absorber'[54] function has been absent at the supranational level.

[50] See currently Articles 120-126 TFEU; Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1; Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6. On the past and present of fiscal integration, see also Chapter 6 by Antonio Estella in this volume.

[51] Fabian Amtenbrink, 'Economic and Monetary Union' in Pieter Jan Kuijper, Fabian Amtenbrink, Deirdre Curtin, Bruno de Witte, Alison McDonnell and Stefaan van den Bogaert (eds), *The Law of the European Union*, (5th edn, Kluwer Law International 2018) ch 26.

[52] Resulting in the much-noted Case C-27/04 (Full Court) *Commission of the European Communities v Council of the European Union* ECLI:EU:C:2004:436.

[53] See among many others François Gianviti, Anne Krueger, Jean Pisani-Ferry, André Sapir and Jürgen von Hagen, *A European Mechanism for Sovereign Debt Crisis Resolution: A Proposal* (Bruegel 2010); Fuest and Peichl, 'European Fiscal Union' (n 17); Thirion, 'European Fiscal Union' (n 11) 16ff, with further references; René Repasi, *Legal Options and Limits for the Establishment of a European Unemployment Benefit Scheme* (Publications Office of the European Union 2017).

[54] A term more widely used to generally describe various mechanisms geared towards addressing economic shocks in the Member States. See e.g. Daniel Gros, 'A Fiscal Shock Absorber for the Eurozone? Lessons from the

This is not to say, however, that the drafters of the Maastricht Treaty did not foresee any crisis mechanisms at all. Reference can be made to what are currently Articles 122(2) and 143 TFEU. Article 122(2) TFEU empowers the Council, on a proposal from the Commission, to grant, under certain conditions, financial assistance to a Member State that is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.[55] Granting financial assistance to a Member State on the basis of this Treaty provision would be predicated on the assumption that the difficulties facing the Member State concerned could be regarded as 'exceptional occurrences beyond its control'. This was not straightforward in the case of those Euro area Member States that –rightly or wrongly– were regarded as having brought these financial difficulties upon themselves.[56] Nevertheless, it will be seen that at the outset of the European sovereign debt crisis this provision became the legal basis for the establishment, by means of a secondary Union law act, of the European Financial Stabilisation Mechanism, whereby difficulties 'caused by a serious deterioration in the international economic and financial environment' were considered to be covered by the scope of Article 122(2) TFEU.[57] Moreover, in the context of the COVID-19 pandemic, the Council Regulations introducing the European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) and the European Union Recovery Instrument (EURI) were based on Article 122 TFEU.[58] Furthermore, Article 143 TFEU provides for the granting of mutual financial assistance to a non-Euro area Member State (in Treaty lingo: a Member State with a derogation) that is in difficulties or is seriously threatened with difficulties as regards its balance of payments, where such difficulties are liable in particular to jeopardize the functioning of the internal market or the implementation of the common commercial policy.[59] Article 143 TFEU cannot be used for the purpose of providing financial assistance to a Euro area Member State.

IV. The EU's Regulatory Response to the Sovereign Debt Crisis and the COVID-19 Pandemic

Having explored the scope of the Union's fiscal capacity with reference to the main building blocks identified in section II, this section turns to the core question of this contribution, that is the question to what extent the fiscal capacity of the Euro area has increased because of the regulatory response to the European sovereign debt crisis and/or the COVID-19 pandemic. In doing so, the analytical structure of section III is mirrored by assigning the different measures

Economics of Insurance' (19 March 2014) <https://www.ceps.eu/ceps-publications/fiscal-shock-absorber-eurozone-lessons-economics-insurance/> accessed 13 July 2021.

[55] As such, it is not limited to Euro area Member States.

[56] See also the extensive analysis by Alberto De Gregorio Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance' (2012) 49 CMLR 1613, 1632-35 (hereafter De Gregorio Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis').

[57] Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L118/1, preamble recital 2.

[58] See section IV.A below. It should be noted that SURE was based on *both* Article 122(1) and Article 122(2) TFEU. The EURI Regulation does not specify whether it was based on both paragraphs of Article 122 TFEU or not, but it is argued in the relevant literature that this was indeed the case. See Bruno de Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 CMLR 635, 653-655 (hereafter De Witte, 'The European Union's COVID-19 Recovery Plan')

[59] See Council Regulation (EC) 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments [2002] OJ L53/1.

adopted to the above-mentioned building blocks. In this context, it will be recalled that, as will become clear hereafter, a straightforward assignment of measures to different building blocks is not always possible, as elements of these measures can contribute to different building blocks.

A. *Budgetary capacity*

At first sight, it may appear that not much has changed with respect to the EU's public finances. To be sure, there has been no shortage of plans by high-level groups, EU institutions and Member States to create mechanisms of fiscal stabilization and convergence.[60] However, the European sovereign debt crisis did not result in a structural upgrade of the EU's fiscal capacity, as the crisis management mechanisms, examined *infra* in section IV.D, were primarily established *outside* the framework of EU law. The MFF still amounts to just over 1% of EU gross national income. As regards the EU's ability to generate its own sources of income, no new primary sources of revenue have actually been introduced, with the exception of a new own resource which is based on national contributions calculated on the basis of plastic packaging waste.[61] And yet the 'European budgetary galaxy'[62] now looks very different, owing to the landmark agreement reached in 2020 on the EU's next long-term budget (MFF 2021-2027), its own resources, and the recovery plan (NextGenerationEU).[63] It is the latter, which is not part of the EU's annual or long-term budget, that we will primarily focus on in this section.

In the early days of the COVID-19 pandemic, the EU activated and/or adopted several instruments,[64] the most important of which was the above-mentioned SURE. Regulation 2020/672 lays down the conditions and procedures enabling the Union to provide financial assistance, in the form of a loan, to an EU Member State experiencing, or seriously threatened with, a severe economic disturbance caused by the COVID-19 outbreak for the financing, primarily, of short-time work schemes or similar measures aimed at protecting employees and the self-employed, as well as for the financing, as an ancillary, of some health-related measures,

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[60] See extensively Federico Fabbrini, 'Fiscal Capacity' in Federico Fabbrini and Marco Ventoruzzo (eds), *Research Handbook on EU Economic Law* (Elgar Publishing 2019) ch 5, esp. 114-24; Päivi Leino and Tuomas Saarenheimo, 'Fiscal Stabilisation for EMU: Managing Incompleteness' (2018) 43 E.L. Rev. 623, esp. 626-31; Nazaré da Costa Cabral, *The European Monetary Union After the Crisis: From a Fiscal Union to a Fiscal Capacity* (Routledge 2021) esp. 167ff. For the pre-corona state of play, see also Paul Craig and Menelaos Markakis, 'EMU Reform' in Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (OUP 2020) ch 42.

[61] Council Decision 2020/2053 (n 23), Article 2(1)(c) and (2).

[62] Borrowed from Richard Crowe, 'The European Budgetary Galaxy' (2017) 13 EuConst 428.

[63] See generally Brigid Laffan and Alfredo De Feo (eds), *EU Financing for Next Decade: Beyond the MFF 2021-2027 and the Next Generation EU* (European University Institute 2020), available at: <https://cadmus.eui.eu/handle/1814/69015> accessed 5 August 2021; Alberto De Gregorio Merino, 'The Recovery Plan: Solidarity and the Living Constitution' (EU Law Live, 6 March 2021) <https://eulawlive.com/long-read-the-recovery-plan-solidarity-and-the-living-constitution-by-alberto-de-gregorio-merino/> accessed 6 August 2021; De Witte, 'The European Union's COVID-19 Recovery Plan' (n 58).

[64] See e.g. Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative) [2020] OJ L99/5; Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak [2020] OJ L117/3.

in particular in the workplace.[65] An EU Member State may request financial assistance where its actual and possibly also planned public expenditure has suddenly and severely increased as of 1 February 2020 due to national measures directly related to short-time work schemes and similar measures to address the socio-economic effects of the exceptional occurrence caused by the COVID-19 outbreak.[66] That date ensures the equal treatment of all Member States and allows for coverage of their increased spending irrespective of when the COVID-19 outbreak occurred in each specific country.[67] The maximum amount of financial assistance provided by SURE cannot exceed €100 billion for all Member States.[68] Under the SURE instrument, the EU has thus far disbursed €89.6 billion to 19 EU Member States.[69] SURE is currently available until 31 December 2022.[70] This period may be extended, if it is concluded that the severe economic disturbance caused by the COVID-19 outbreak affecting the financing of measures for which SURE provides assistance continues to exist.[71]

By far the most important increase of the EU's fiscal capacity stems from NextGenerationEU (NGEU), which is the EU's €750 billion recovery plan adopted in response to the COVID-19 crisis. The centrepiece of NGEU is the Recovery and Resilience Facility, which makes a total of €672.5 billion in loans and grants available to support reforms and investments undertaken by the EU Member States. Coupled with the MFF for 2021-2027 which was agreed upon at the same time as NGEU (€1074.3 billion),[72] this has been considered 'the largest stimulus package ever financed in Europe' (€1824.3 billion).[73]

There is a complex legal and financial construction behind NGEU, which will only be explained here insofar as relevant for this chapter.[74] Council Regulation 2020/2094 has established EURI, in order to support the recovery in the aftermath of the COVID-19 crisis.[75] Support under this Instrument is envisaged to finance the measures listed in this Regulation, to be carried out under specific Union programmes, in order to tackle the adverse economic consequences of the COVID-19 crisis or the immediate funding needs to avoid a re-emergence of that crisis. These include measures to restore employment and job creation; reforms and investments to reinvigorate the potential for sustainable growth and employment; measures for businesses affected by the economic impact of the COVID-19 crisis as well as support for

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[65] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak [2020] OJ L159/1, Article 1(2).
[66] Ibid, Article 3(1).
[67] Ibid, preamble recital 7.
[68] Ibid, Article 5.
[69] European Commission, 'SURE' <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/sure_en> accessed 15 June 2021; Cristina Dias, Giulia Gotti and Katja Komazec, 'SURE Implementation' (28 May 2021) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/659638/IPOL_BRI(2021)659638_EN.pdf> accessed 15 June 2021.
[70] Council Regulation 2020/672 (n 65), Article 12(3).
[71] Ibid, Article 12(4).
[72] See Council Regulation 2020/2093 (n 24).
[73] All figures are in 2018 prices. In current prices, NGEU amounts to €806.9 billion and would bring, coupled with the new MFF (€1210.9 billion), the total amount of the package to €2.018 trillion. See European Commission, 'Recovery Plan for Europe' <https://ec.europa.eu/info/strategy/recovery-plan-europe_en> accessed 7 August 2021.
[74] For the sequence of events and the political context in the run-up to the NGEU's adoption, see De Witte, 'The European Union's COVID-19 Recovery Plan' (n 58) 638-52.
[75] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L433I/23, Article 1(1).

investment in activities that are essential for sustainable growth; measures for research and innovation in response to the COVID-19 crisis; measures for increasing the level of the Union's crisis preparedness and enabling a quick and effective Union response in the event of major emergencies; measures to ensure that a just transition to a climate-neutral economy will not be undermined by the COVID-19 crisis; and measures to address the impact of the COVID-19 crisis on agriculture and rural development.[76]

The EURI is financed up to an amount of €750 billion on the basis of the empowerment provided for in the ORD.[77] This amount is allocated by the EURI Regulation to various spending programmes, both pre-existing and new, under which support is to be provided in the form of non-repayable support (€384.4 billion), loans (€360 billion), and provisioning for budgetary guarantees (€5.6 billion).[78] The bulk of this financing is allocated to the Recovery and Resilience Facility (RRF). This amounts to €672.5 billion in total, which comprises €312.5 billion in grants and €360 billion in loans.[79] For the purposes of the Financial Regulation,[80] direct expenditures under EURI (€390 billion) constitute external assigned revenue to the Union programmes to which the EURI Regulation allocates funding.[81] The rest of the money (€360 billion) is to be used for loans to the Member States under the Union programmes referred to in the EURI Regulation.[82] The majority of the funding is to be provided in the immediate aftermath of the crisis. More specifically, the related legal commitments for the provision of the financial support shall be entered into by 31 December 2023,[83] and payments will, as a rule, be made by 31 December 2026.[84]

Established by Regulation 2021/241, which was adopted on the basis of the third paragraph of Article 175 TFEU, the RRF is a dedicated instrument designed to tackle the adverse effects and consequences of the COVID-19 crisis in the Union.[85] Its main aim is to implement the measures foreseen by the EURI, hence it lays down the objectives of the Facility, its financing, the forms of Union funding under it, and the rules for providing such funding.[86] Recovery is aimed to be achieved, and the resilience of the Union and its Member States enhanced, through the support for measures that refer to policy areas of European relevance structured in six pillars: green transition; digital transformation; smart, sustainable and inclusive growth; social and territorial cohesion; health, and economic, social and institutional

76 Ibid, Article 1(2)-(3) and preamble recital 7.
77 Ibid, Article 2(1).
78 Ibid, Article 2(2).
79 The figures provided are in 2018 prices (as originally agreed). In current prices, the RRF is worth €723.8 billion, of which €338 billion are grants and €385.8 billion are loans.
80 See Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] OJ L193/1, Article 21.
81 Council Regulation 2020/2094 (n 75), Article 3(1). 'This implies that the regular rules on the implementation of the Union budget will apply to the use of these funds and the proceeds of borrowing will fall within the scope of the discharge procedure under Article 319 TFEU.' See Richard Crowe, 'An EU Budget of States and Citizens' (2021) ELJ <https://doi.org/10.1111/eulj.12398> accessed 12 August 2021, 9 (hereafter Crowe, 'An EU Budget of States and Citizens').
82 Council Regulation 2020/2094 (n 75), Article 3(2).
83 Ibid, Article 3(4)-(6).
84 Ibid, Article 3(9).
85 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17, preamble recital 8.
86 Ibid, Articles 1 and 6(1).

resilience with the aim of, *inter alia*, increasing crisis preparedness and crisis response capacity; and policies for the next generation, children and the youth.[87] Financial support to EU Member States is calculated on the basis of their population, GDP per capita and unemployment rate,[88] with a view to achieving the milestones and targets of reforms and investments as set out in their recovery and resilience plans.[89] These plans comprise measures for the implementation of reforms and public investment, which may also include public schemes that aim to incentivize private investment.[90] National measures from 1 February 2020 onwards are eligible, provided that they comply with the requirements set out in the RRF Regulation.[91] The relevance, effectiveness, efficiency and coherence of the recovery and resilience plans are assessed in light of the criteria set out in the Regulation.[92] Notably, the measures included in these plans are required to contribute to the climate and digital targets of the Union, for amounts that represent at least 37% and at least 20% of the plan's total allocation, respectively.[93]

In light of the above-mentioned features of NGEU, we agree with Bruno de Witte that '[t]his construction, combined with the fact that the recovery fund is explicitly presented as temporary, implies that there is still no stable fiscal capacity at the level of the Union'.[94] It remains to be seen whether the RRF could be turned into a common fiscal capacity or fiscal insurance device to deal with shocks, whether in the EU as a whole or exclusively in the Eurozone, possibly complemented by the issuance of common debt to finance its operations.[95] There is certainly an expectation among some powerful actors that this will be the case in the future.[96] As regards the current legal and financial construction of the RRF, it is rightly noted by De Witte that:

> The financial resources of the RRF are made available through the EURI Regulation whose temporary character results from its legal basis (Art. 122 TFEU) and is re-affirmed in the Own Resources Decision. The RRF is not part of the normal EU budget but 'assigned revenue' that will disappear upon termination of the NGEU programme… The continuation of the policies supported by the RRF, once the NGEU funds are exhausted, could still be based on Article 175(3) but that would require either new borrowing or the creation of new sources of revenue above the current MFF. Either way, the unanimous agreement of all the Member States would be required.[97]

[87] Ibid, Article 3.
[88] See ibid, Article 11(1) (regarding grants) and Article 14 (regarding requests for loan support).
[89] Ibid, Article 4(2).
[90] Ibid, Article 17(1).
[91] Ibid, Article 17(2). See further ibid, Article 17(3)-(5).
[92] Ibid, Article 19(3).
[93] Ibid, Article 19(3)(e)-(f).
[94] De Witte, 'The European Union's COVID-19 Recovery Plan' (n 58) 667.
[95] On the rationale for a fiscal capacity and joint debt issuance, as well as possible design options, see Thirion, 'European Fiscal Union' (n 11) 10-29; da Costa Cabral, *The European Monetary Union After the Crisis* (n 60) ch 5.
[96] See, e.g., Paola Tamma, 'Draghi Is "Certain" That Parts of Recovery Fund Are Here to Stay' (Politico Europe, 22 June 2021) <https://www.politico.eu/article/italys-draghi-is-certain-that-recovery-fund-is-here-to-stay/> accessed 22 June 2021; Fabio Panetta, 'After the Crisis: Economic Lessons from the Pandemic' (The ECB Blog, 27 July 2021) <https://www.ecb.europa.eu/press/blog/date/2021/html/ecb.blog210727~66d16d04d4.en.html> accessed 7 August 2021.
[97] De Witte, 'The European Union's COVID-19 Recovery Plan' (n 58) 659.

The European Parliament, Council and Commission have agreed in the 2020 budgetary Interinstitutional Agreement to work towards the introduction of new own resources over the duration of the MFF 2021-2027 with the aim of raising enough revenue to repay the principal and the interest of the funds borrowed for NGEU.[98] A roadmap is set out in Annex II to this Agreement, according to which the Commission will put forward proposals on the basis of a carbon border adjustment mechanism, a digital levy, and the EU Emissions Trading System (which may be possibly extended to aviation and maritime). Reference is also made to the possibility of introducing a Financial Transaction Tax and a financial contribution linked to the corporate sector or a new common corporate tax base. It will be recalled that in response to the European financial crisis and with the aim 'to ensure that the financial sector fairly and substantially contributes to the costs of the crisis' and 'to dis-incentivise excessively risky activities by financial institutions', the Commission had pushed for the introduction of a financial transaction tax, whereby it was envisaged that part of the revenues should be allocated to the Union budget as genuine own resources.[99] At the time of writing these plans have not materialized as no consensus has been reached in the Council between the Member States participating in the enhanced cooperation.[100]

B. EU debt issuing

Centralized debt issuing has taken off since the sovereign debt crisis and even more so because of the COVID-19 pandemic. Prior to the COVID-19 crisis, the EU was borrowing money on the markets to provide assistance through the European Financial Stabilisation Mechanism, the balance-of-payments facility, and the macro-financial assistance programme for third countries.[101] The European Stability Mechanism, examined *infra* in section IV.D.2, also borrows money to finance its operations. However, as the European Stability Mechanism falls outside the EU legal framework, the financial arrangements that come with the above-mentioned SURE and NGEU have the potential to be a major development within the EU legal framework in the direction of a significant supranational debt issuing capacity, not least due to the volume of these funding schemes. This is so notwithstanding the fact that both SURE and NGEU themselves are conceived as temporary instruments.

More specifically, under SURE, the Commission is empowered to borrow on the capital markets or with financial institutions on behalf of the Union.[102] Member States contribute to the SURE instrument by counter-guaranteeing the risk borne by the Union.[103] Contributions

[98] See the Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources [2020] OJ L 433l/28, Annex II. See, most recently, European Commission, 'Remarks by Commissioner Hahn at the Press Conference on New Own Resources' (22 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/speech_21_7082> accessed 3 January 2022.

[99] European Commission, 'Proposal for a COUNCIL DIRECTIVE implementing enhanced cooperation in the area of financial transaction tax' COM(2013) 71 final; European Parliament legislative resolution of 3 July 2013 on the proposal for a Council directive implementing enhanced cooperation in the area of financial transaction tax (COM(2013)0071 – C7-0049/2013 – 2013/0045(CNS)).

[100] For details see Gabriela Lagos Rodríguez, 'Financial Transaction Tax in Europe' (2021) 30 EC Tax Review 150, with further references.

[101] De Witte, 'The European Union's COVID-19 Recovery Plan' (n 58) 648.

[102] Council Regulation 2020/672 (n 65), Article 4.

[103] Ibid, Article 11(1).

from Member States are provided in the form of irrevocable, unconditional and on-demand guarantees.[104] These guarantees are voluntary in nature, as they are not foreseen in the ORD. However, unless the Member States had agreed to provide such guarantees for an amount of at least €25 billion, the SURE instrument would not have become available for financial support.[105] Each Member State's contribution to the overall amount of the guarantee corresponds to its relative share in the total gross national income of the Union, based on the EU budget for the financial year 2020.[106] This complex financial construction allows the EU to borrow more money than in the case of the European Financial Stabilisation Mechanism (see section IV.D.1 below), without the need to amend the ORD or to require higher contributions from the Member States.[107]

As regards the NGEU, while it is not part of the EU's budget, it is linked thereto through the ORD. More specifically, the new ORD empowers the Commission on an exceptional basis to borrow temporarily up to €750 billion on capital markets on behalf of the Union to be used for loans and expenditure for the sole purpose of addressing the consequences of the COVID-19 crisis through the EURI and the sectoral legislation referred to in the EURI Regulation.[108] To bear the liability related to the envisaged borrowing of funds, the ORD provides for an extraordinary and temporary increase in the own resources ceilings. The ceiling for appropriations for payments and the ceiling for appropriations for commitments are each increased by 0,6 percentage points for the sole purpose of covering all liabilities resulting from its borrowings to address the consequences of the COVID-19 crisis. The increase will expire when all funds borrowed have been repaid and all contingent liabilities relating to loans provided based on those funds have ceased, which should be by 31 December 2058 at the latest. The use of the increased own resources ceilings to cover any other EU liabilities not linked to the extraordinary and temporary measures to address the consequences of the COVID-19 pandemic is excluded.[109] The national ratification procedures of the new ORD were completed on 31 May 2021, and the Decision entered into force on 1 June 2021.[110] At which point, the EU was able to begin borrowing on the capital markets. The first NGEU issuance took place on 15 June 2021, marking the largest ever issuance from a European public sector institution and the largest amount the EU had raised in a single transaction (€20 billion).[111]

C. Towards more stringent fiscal rules in the Euro area?

It has been rightly observed that a fiscal union must be accompanied by further measures 'to reduce the occurrence of policy-induced shocks'.[112] The perceived failure of the EU fiscal and economic governance framework has already led to various important adjustments, ranging

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104 Ibid, Article 11(2).
105 Ibid, Article 12(1).
106 Ibid.
107 See further De Witte, 'The European Union's COVID-19 Recovery Plan' (n 58) 661-62.
108 Council Decision 2020/2053 (n 23), Article 5(1). See also ibid, preamble recital 14.
109 Ibid, Article 6. See also ibid, preamble recitals 16-17.
110 Alessandro D'Alfonso, 'National Ratification of the Own Resources Decision' (June 2021) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690520/EPRS_BRI(2021)690520_EN.pdf> accessed 20 June 2021.
111 As announced by Johannes Hahn, the EU Commissioner for Budget and Administration: <https://twitter.com/JHahnEU/status/1404845203979124738> accessed 20 June 2021.
112 Thirion, 'European Fiscal Union' (n 11) 29.

from the fine-tuning of existing instruments to the adoption of new rules.[113] These changes were effectuated both within ('six-pack' and 'two-pack' legislation) and outside the formal confines of the EU Treaties (the Fiscal Compact[114]). In either case, the Member States sought to enhance EU oversight of national fiscal and economic policy and 'to address the imbalance between the strong monetary union and the weak economic coordination between the members of the euro area'.[115] In terms of substance, the instruments adopted in response to the European sovereign debt crisis amended the SGP; created a new macroeconomic imbalances procedure; introduced uniform requirements for budgetary frameworks; and provided for enhanced economic coordination and surveillance in the Euro area. Some of these rules apply to all 27 Member States, whereas other rules only apply to the 19 Euro area Member States.[116]

Starting with those norms applicable to all Member States, the provisions which were enacted in response to the crisis may be divided into three categories. First, the Union legislator amended both the preventive and corrective arms of the SGP through two Regulations forming part of 'six-pack' legislation.[117] Regulation 1175/2011 aims to provide for 'more stringent forms of surveillance' and an 'improved economic governance in the Union', built upon 'a stronger national ownership of commonly agreed rules and policies' and 'a more robust framework at the level of the Union for the surveillance of national economic policies'.[118] In turn, Regulation 1177/2011 aims to strengthen the rules on budgetary discipline, 'in particular by giving a more prominent role to the level and evolution of debt and to overall sustainability', and to strengthen the mechanisms to ensure compliance with, and enforcement of, those rules.[119] Second, Regulation 1176/2011 created a new Macroeconomic Imbalance Procedure to prevent and correct macroeconomic imbalances in the Member States, thereby broadening the surveillance of the economic policies of the Member States beyond budgetary surveillance.[120] Thirdly, there is new legislation governing national budgetary frameworks (Directive 2011/85), also forming part of the 'six pack', which aims to ensure the Member

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[113] On the evolution of fiscal coordination in the EU, see Chapter 6 by Antonio Estella in this volume.

[114] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42012A0302(01)&from=EN> accessed 14 June 2021.

[115] Alicia Hinarejos, 'Economic and Monetary Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (3rd edn, OUP 2020) 598 (hereafter Hinarejos, 'Economic and Monetary Union').

[116] See extensively Fabian Amtenbrink, 'General Report' in Ulla Neergaard, Catherine Jacqueson and Jens Hartig Danielsen (eds), *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU* (The XXVI FIDE Congress in Copenhagen, 2014, Congress Publications Vol. 1, Djøf Publishing 2014); Jean-Paul Keppenne, 'Institutional Report' in ibid; Hinarejos, 'Economic and Monetary Union' (n 115) 598-601; Menelaos Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (OUP 2020) chs 2-3 (hereafter Markakis, *Accountability in the Economic and Monetary Union*); Jean-Paul Keppenne, 'Economic Policy Coordination: Foundations, Structures, and Objectives' in Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (OUP 2020) ch 27; Jean-Paul Keppenne, 'EU Fiscal Governance on the Member States: The Stability and Growth Pact and Beyond' in ibid ch 28; Leo Flynn, 'Non-Fiscal Surveillance of the Member States' in ibid ch 29.

[117] Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12; Council Regulation (EU) 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33.

[118] Regulation 1175/2011 (n 117), preamble recitals 4 and 8.

[119] Regulation 1177/2011 (n 117), preamble recital 12.

[120] Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25.

States' compliance with the Treaty obligation to avoid excessive government deficits (Article 126(1) TFEU).[121]

Moreover, it should be noted that the Common Provisions Regulation establishes a link between the ESIF and sound economic governance. The Commission can request a Member State to review and propose amendments to its Partnership Agreement and relevant programmes, where this is considered to be necessary to support the implementation of relevant Council Recommendations or to maximize the growth and competitiveness impact of the ESIF in Member States receiving financial assistance.[122] Where the Member State fails to take effective action in response to such a request, the Commission may propose to the Council that it suspend part or all of the payments for the programmes or priorities concerned.[123] It is further possible to suspend part or all of the commitments or payments for the programmes of a Member State which does not respect the EU fiscal rules, in the specific cases mentioned in the Common Provisions Regulation.[124]

As regards the rules which only apply to the Euro area Member States, 'six-pack' legislation sets out a system of sanctions for enhancing the enforcement of the preventive and corrective parts of the SGP in the Euro area (Regulation 1173/2011).[125] It further provides for sanctions for excessive macroeconomic imbalances (Regulation 1174/2011).[126] Moreover, the Fiscal Compact lays down the balanced budget rule and provides for the adoption of a correction mechanism at national level, which entails the obligation of the Member State concerned to implement measures to correct the deviations from fiscal targets over a defined period of time. The 'two-pack' legislation provides for enhanced economic and budgetary surveillance, again only in the Euro area.[127] Regulation 472/2013 lays down provisions for strengthening the economic and budgetary surveillance of Euro area Member States experiencing or threatened with serious difficulties with respect to their financial stability or the sustainability of their public finances, and of Euro area Member States which request or

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[121] Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41.

[122] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L347/320, as currently in force, Article 23(1).

[123] Ibid, Article 23(6).

[124] Ibid, Article 23(9). See most recently Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy [2021] OJ L231/159, Article 19.

[125] Regulation (EU) 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1.

[126] Regulation (EU) 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L306/8.

[127] Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1; Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11.

receive financial assistance.[128] Regulation 473/2013 sets out provisions for enhanced monitoring of budgetary policies in the Euro area and for ensuring that national budgets are consistent with the economic policy guidance issued in the context of the SGP and the European Semester.[129]

Space precludes a detailed analysis of the measures adumbrated above. Suffice it to say for present purposes that the reform measures adopted in response to the sovereign debt crisis have not resulted in more stringent fiscal rules in nominal terms, as the reference values in Article 126 TFEU, which in turn refers to Protocol (No 12) on the excessive deficit procedure, have remained unaltered. Moreover, judicial enforcement of these rules is still by-and-large excluded (see e.g. Article 126(10) TFEU, which has not been amended). Nevertheless, it can be argued that at the very least an attempt has been made by the European legislator to address some of the shortcomings of the original system. This is exemplified by the introduction of reversed qualified majority voting in secondary EU law for the Euro area Member States, as well as the fact that the multilateral surveillance now also focuses on other important economic factors (as shown by the macroeconomic imbalance procedure).

While the reforms triggered by the sovereign debt crisis have undoubtedly had the biggest impact on the system of economic policy coordination in EMU, notably as regards the Euro area Member States, this is not to say that the measures adopted in response to the COVID-19 pandemic have no bearing on the budgetary rules in EMU. Given the past experience and present practice with the application of conditionality to financial assistance and the ESIF, this is hardly surprising. In the context of NGEU, the release of the funds under the RRF is contingent on the satisfactory fulfilment of the relevant milestones and targets by the Member States set out in their respective recovery and resilience plans.[130] The RRF Regulation links financing to the European Semester, notably by requiring that Member States ensure that their recovery and resilience plans are consistent with the relevant country-specific challenges and priorities identified in the context of this multilateral economic coordination framework, with the National Reform Programmes, as well as –in the case of Euro area Member States– with the most recent Council recommendation on the economic policy of the Euro area.[131] Moreover, there is a mechanism linking the Facility more broadly to sound economic governance, in order to ensure respect by the recipient Member States for the EU's fiscal and economic governance framework. It allows (or requires, depending on the case) the EU institutions to suspend all or part of the commitments or payments under the Facility.[132] Suspension and the termination of agreements related to financial support as well as reduction and recovery of the financial contribution are also possible when the recovery and resilience plan has not been implemented in a satisfactory manner by the Member State concerned,[133] or in the case of serious irregularities, meaning fraud, corruption and conflicts of interest in relation to the measures supported by the Facility, or a serious breach of an obligation under the agreements related to financial support.[134]

[128] Regulation 472/2013 (n 127), Article 1(1).
[129] Regulation 473/2013 (n 127), Article 1(1).
[130] Regulation 2021/241 (n 85), Article 24(2)-(5).
[131] Ibid, Article 17(3).
[132] Ibid, Article 10(1)-(3).
[133] Ibid, Article 24(6), (8)-(9).
[134] Ibid, Article 22(5).

D. Crisis management mechanisms

We have seen that, prior to the European sovereign debt crisis, there was no mechanism for providing emergency financial assistance to a Euro area Member State experiencing financial difficulties. This has been rightly regarded as 'a major oversight in the architecture of EMU'.[135] Since the commencement of the European sovereign debt crisis, the EU/Euro area Member States have sought to establish financial mechanisms which would administer assistance to ailing Member States through various financial instruments, thereby safeguarding the financial stability of both the EU or the Euro area as a whole, and of its Member States.[136]

1. Temporary crisis mechanisms

The very first financial assistance programme to Greece, known as the Greek Loan Facility, consisted of bilateral loans from Euro area countries, pooled by the European Commission, and a loan from the International Monetary Fund.[137] Three financial mechanisms have come into existence thereafter: the European Financial Stabilisation Mechanism; the European Financial Stability Facility; and the European Stability Mechanism. The first two were considered temporary in nature, whereas the European Stability Mechanism is the Euro area's permanent stability mechanism.[138] Despite their varying legal basis and financial firepower, all three mechanisms share common characteristics. Notably, there are conditions attached to the financial assistance granted by them, which are laid down in a Memorandum of Understanding (MoU) concluded with the recipient Member State.[139]

The European Financial Stabilisation Mechanism (EFSM) was established by Council Regulation 407/2010, pursuant to Article 122(2) TFEU, and had a financial firepower of €60 billion.[140] The Commission was empowered on behalf of the EU to conduct borrowings on the capital markets or with financial institutions. The outstanding amount of loans or credit lines to be granted to Member States was limited to the margin available under the own resources ceiling for payment appropriations, namely the amount of money which was not allocated to specific policy domains under the MFF or committed for other unforeseen purposes.[141] The EFSM was activated for Ireland (€22.5 billion), Portugal (€24.3 billion), and short-term

[135] Thirion, 'European Fiscal Union' (n 11) 8.
[136] See generally De Gregorio Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis' (n 56); Tomi Tuominen, 'Mechanisms of Financial Stabilisation' in Federico Fabbrini and Marco Ventoruzzo (eds), *Research Handbook on EU Economic Law* (Elgar Publishing 2019) ch 4; Vestert Borger, 'EU Financial Assistance' in Fabian Amtenbrink and Christoph Herrmann (eds), *The EU Law of Economic and Monetary Union* (OUP 2020) ch 32; Ulrich Forsthoff and Jasper Aerts, 'Financial Assistance to Euro Area Members (EFSF and ESM)' in ibid ch 33.
[137] See European Stability Mechanism, 'What Is the Greek Loan Facility (GLF)?' <https://www.esm.europa.eu/content/what-greek-loan-facility-glf> accessed 8 June 2021; European Commission, 'First Programme for Greece' <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/which-eu-countries-have-received-assistance/financial-assistance-greece_en#first-programme-for-greece> accessed 8 June 2021.
[138] See section IV.D.2 below.
[139] See further Markakis, *Accountability in the Economic and Monetary Union* (n 116) 19-24, 85-102.
[140] Council Regulation 407/2010 (n 57), as is currently in force.
[141] Ibid, Article 2(1)-(2). See De Witte, 'The European Union's COVID-19 Recovery Plan' (n 58) 648.

assistance (a 'bridge loan') to Greece prior to the third financial assistance programme (€7.16 billion).[142]

The European Financial Stability Facility (EFSF) was not designed as an EU instrument. It is a *société anonyme* incorporated in Luxembourg, which was founded on 7 June 2010. Its shareholders are the Euro area Member States. A Framework Agreement was concluded between them and the EFSF, setting out the terms and conditions upon which it could provide financial assistance.[143] Financial assistance to a Euro area Member State under the EFSF could consist of facilities for the purchase of bonds on the primary or secondary market, precautionary facilities, or facilities to finance the recapitalization of its financial institutions.[144] The EFSF financed its lending operations by issuing or entering into bonds, notes, commercial paper, debt securities or other financing arrangements which were backed by irrevocable and unconditional guarantees of the Euro area Member States.[145] Its financial firepower was €440 billion.[146] It granted financial assistance to Ireland (€17.7 billion), Portugal (€26 billion), and Greece for its second programme (€130.9 billion).[147] Although it continues to operate, it may no longer engage in new financing programmes or enter into new loan facility agreements. These tasks are now performed solely by the European Stability Mechanism.[148]

2. *Permanent crisis mechanisms*

The sovereign debt crisis has led to the establishment of a permanent crisis management mechanism for the Eurozone, the European Stability Mechanism (ESM). The ESM was also set up outside the framework of EU law, by means of an international treaty concluded between the Euro area Member States.[149] It provides stability support, under strict conditionality, to Euro area Member States which are experiencing, or threatened by, severe financing problems, if indispensable to safeguard the financial stability of the Euro area as a whole and of its Member States.[150] For this purpose, it raises funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.[151] The Member States also amended the EU Treaties through a simplified revision (Article 48(6) TEU), in order to provide explicitly for the establishment of such a financial mechanism in Article 136(3) TFEU.[152] Initially, ESM financial assistance

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[142] See generally European Commission, 'European Financial Stabilisation Mechanism (EFSM)' <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/european-financial-stabilisation-mechanism-efsm_en#efsmprogrammes> accessed 8 June 2021.

[143] EFSF Framework Agreement, available at <https://www.esm.europa.eu/sites/default/files/20111019_efsf_framework_agreement_en.pdf> accessed 8 June 2021.

[144] Ibid, Article 2(1)(b) and (c).

[145] Ibid, preamble recital 4 and Article 2(2)-(7).

[146] Ibid, preamble recital 2.

[147] See European Stability Mechanism, 'Before the ESM: EFSF - The Temporary Fiscal Backstop' <https://www.esm.europa.eu/efsf-overview> accessed 8 June 2021.

[148] Ibid.

[149] Treaty establishing the European Stability Mechanism, available at <https://www.esm.europa.eu/legal-documents/esm-treaty> accessed 8 June 2021 (hereafter ESM Treaty).

[150] Ibid, Article 3.

[151] Ibid.

[152] European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L91/1.

could take the form of precautionary financial assistance, a loan, a loan for the specific purpose of recapitalizing the financial institutions of the Euro area Member State concerned, or a purchase of bonds on the primary or secondary market.[153] There is further a direct recapitalization instrument for Euro area financial institutions, which aims to help remove a serious risk of contagion from the financial sector to the sovereign by allowing the direct recapitalization of institutions.[154]

The ESM has an authorized capital stock of €704.8 billion, divided into paid-in (€80.5 billion) and callable shares (€624.3 billion).[155] It has the largest amount of paid-in capital among all major international financial institutions.[156] Its maximum lending volume is €500 billion.[157] It is empowered to borrow on the capital markets from banks, financial institutions or other persons or institutions for the performance of its purpose.[158] It has thus far provided assistance to Spain for the purpose of restructuring the country's banks (€41.3 billion), Cyprus (€6.3 billion), and Greece for its third programme (€61.9 billion).[159]

Since its establishment, the ESM has been subject to further reforms. These reforms may be grouped into two categories: those that were already in the pipeline prior to the COVID-19 crisis but were finalized during the same time as the COVID-19 pandemic; and those that were agreed upon specifically in response to the pandemic. Starting with the latter category, the ESM has made available a new financial assistance instrument, Pandemic Crisis Support. It is 'a form of precautionary financial assistance that aims to help ESM Members whose economic conditions are still sound to support domestic financing of direct and indirect healthcare, cure and prevention-related costs due to the COVID-19 crisis'.[160] It is available to all Euro area Member States for amounts of 2% of the respective country's GDP as of end-2019, as a benchmark.[161] The only requirement to access the credit line is that Euro area Member States requesting support commit in their individual pandemic response plan to use this credit line to support domestic financing of direct and indirect healthcare, cure and prevention related costs due to the COVID-19 crisis.[162] Requests for Pandemic Crisis Support can be made until 31 December 2022. However, this deadline may be extended in light of the evolution of the crisis.[163] The initial availability period for each facility granted under the

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[153] ESM Treaty, Articles 14-18.
[154] See European Stability Mechanism, 'Lending Toolkit' <https://www.esm.europa.eu/assistance/lending-toolkit> accessed 8 June 2021.
[155] ESM Treaty, Article 8(1)-(2).
[156] Kalin Anev Janse, 'The ESM: From Unexpected Start-Up to Innovative International Financial Institution' (Global Digital Banking Conference, Barcelona, 17 May 2019) <https://www.esm.europa.eu/speeches-and-presentations/esm-unexpected-start-innovative-international-financial-institution> accessed 8 June 2021.
[157] ESM Treaty, Article 39.
[158] Ibid, Article 21(1).
[159] European Stability Mechanism, 'Financial Assistance' <https://www.esm.europa.eu/financial-assistance> accessed 8 June 2021. For the state of play, see Jost Angerer and Cristina Dias, 'Macro-Financial Assistance to EU Member States: State of Play – May 2021' <https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/651367/IPOL_IDA(2020)651367_EN.pdf> accessed 15 June 2021.
[160] European Stability Mechanism, 'Proposal from the Managing Director for Financial Assistance in the Form of a Pandemic Crisis Support' (8 May 2020) <https://www.esm.europa.eu/sites/default/files/20200515_-_esm_bog_-_md_proposal_for_financial_assistance_-_draft.pdf> accessed 3 July 2021.
[161] Council of the European Union, 'Eurogroup Statement on the Pandemic Crisis Support' (8 May 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/05/08/eurogroup-statement-on-the-pandemic-crisis-support/> accessed 3 July 2021, para 3.
[162] Ibid, para 4.
[163] Ibid, para 7.

Pandemic Crisis Support is 12 months, which can be extended twice for 6 months, in accordance with the standard ESM framework for precautionary instruments.[164] The Pandemic Crisis Support was made operational on 15 May 2020.[165] If all 19 ESM Members were to draw from this credit line, the total sum provided would be approximately €240 billion.[166] Despite the favourable pricing modalities and the light conditionality attached to these loans, no ESM Member has thus far applied for assistance.

Apart from the changes made in response to the pandemic, a broader reform of the ESM had been in the works for a few years.[167] On 27 January and 8 February 2021, the ESM Members signed the Agreement Amending the ESM Treaty.[168] However, the revised ESM Treaty will only come into force when the Agreement has been ratified by the parliaments of all 19 ESM Members. Once it has entered into force, it will make a number of very important changes to the ESM, which are discussed extensively elsewhere.[169] In what follows, we will only discuss those changes that are directly pertinent to our present inquiry.

First, the revised ESM Treaty will make important changes to the existing precautionary financial assistance instruments: the precautionary conditioned credit line (PCCL) and the enhanced conditions credit line (ECCL). It is provided in the new text of the treaty that 'ESM precautionary financial assistance instruments provide support to ESM Members with sound economic fundamentals which could be affected by an adverse shock beyond their control.'[170] This type of assistance is reserved for ESM Members whose government debt is sustainable.[171] Overall, the conditions for accessing the PCCL are rendered stricter, but no MoU would be required from the recipient state.[172] Instead, conditionality takes the form of continuous respect of pre-established eligibility criteria to which the ESM Member concerned must commit in a Letter of Intent.[173] In the case of the ECCL, which is aimed for ESM Members that do not fully comply with the eligibility criteria for a PCCL, the conditionality attached to the assistance is detailed in an MoU.[174]

Second, the revised ESM Treaty will allow the ESM to provide the backstop facility to the Single Resolution Board for the Single Resolution Fund, in order to support the application

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164 Ibid, para 8.
165 European Stability Mechanism, 'ESM Board of Governors Backs Pandemic Crisis Support' (15 May 2020) <https://www.esm.europa.eu/press-releases/esm-board-governors-backs-pandemic-crisis-support> accessed 3 July 2021.
166 European Stability Mechanism, 'ESM Pandemic Crisis Support: Explainer, Timeline and Documents' <https://www.esm.europa.eu/content/europe-response-corona-crisis> accessed 3 July 2021.
167 For a detailed timeline, see European Stability Mechanism, 'ESM Reform' <https://www.esm.europa.eu/about-esm/esm-reform> accessed 3 July 2021.
168 Available at: <https://www.esm.europa.eu/about-esm/esm-reform-documents/esm-treaty-amending-agreement> accessed 3 July 2021.
169 Menelaos Markakis, 'The Reform of the European Stability Mechanism: Process, Substance, and the Pandemic' (2020) 47 Legal Issues of Economic Integration 359; Andrea Westerhof Löfflerová, 'Reform of the European Stability Mechanism Signed: A Landmark Achievement Fully Respectful of EU Constitutional and Institutional Limits' (EU Law Live, 6 March 2021) <https://eulawlive.com/weekend-edition/weekend-edition-no50/> accessed 6 August 2021.
170 Revised ESM Treaty, Article 14(1).
171 Ibid.
172 See further Cristina Sofia Pacheco Dias and Alice Zoppè, 'The Proposed Amendments to the Treaty Establishing the European Stability Mechanism' (18 January 2021) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/634357/IPOL_IDA(2019)634357_EN.pdf> accessed 3 July 2021, 4-7.
173 Revised ESM Treaty, Article 14(2) and Annex III.
174 Ibid, Article 14(3) and Annex III.

of the resolution tools and the exercise of resolution powers of the Single Resolution Board.[175] It will be recalled that the Banking Union was also created in response to the global financial crisis and the ensuing European sovereign debt crisis.[176] The currently existing building blocks or 'pillars' of the Banking Union, viz. the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM), centralize the arrangements for the supervision and resolution of banks, in order 'to strengthen an unbiased, neutral approach to bank oversight and resolution, thus mitigating forbearance and moral hazard, and to break the fatal link between sovereigns and their banks'.[177] The SSM Regulation has conferred specific supervisory tasks on the ECB,[178] which is directly supervising, at the moment, 115 'significant' entities in the 21 EU Member States that participate in the Banking Union.[179] The national competent authorities are supervising 'less significant' banks or branches under the watchful eye of the ECB.[180] The SRM Regulation has rendered the Single Resolution Board responsible for the resolution of 'significant' entities or groups, entities and groups directly supervised by the ECB, as well as other cross-border groups.[181] Its resolution activities are backed by the Single Resolution Fund, which is financed by bank contributions.[182] It is considered that this 'should increase the shock-absorption capacity of EMU in the event that a small- or medium-sized bank fails'.[183] However, the Banking Union has to be regarded as incomplete, as there is neither a common fiscal backstop to the Single Resolution Fund (in case the latter runs out of money in the event of a systemic crisis) nor a European Deposit Insurance Scheme, which is regarded as the third pillar of the Banking Union. The revised ESM Treaty will at least provide the said backstop. In this context, it has been observed that 'fiscal backstops – as a modality of governmental risk-sharing mechanisms – can act as "market-makers" and ensure a better functioning of private risk-sharing mechanisms, notably by enhancing the single market'.[184] It should be noted that the Direct Recapitalization Instrument for financial institutions will be replaced by the common backstop at the time the latter is introduced.[185] Assuming that the ratification process will proceed as planned, the common backstop will be introduced in the beginning of 2022.[186]

[175] Ibid, Articles 3(2), 12(1a), 18a.
[176] Council of the European Union, 'Banking Union' <https://www.consilium.europa.eu/en/policies/banking-union/> accessed 30 June 2021. See Chapter 3 by Kern Alexander in this volume.
[177] Jeffrey Gordon and Wolf-Georg Ringe, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take' (2015) 115 Columbia Law Review 1297, 1306.
[178] Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63, Articles 4 and 6(4)-(5) (hereafter SSM Regulation).
[179] European Central Bank, 'List of Supervised Banks' (1 November 2021) <https://www.bankingsupervision.europa.eu/banking/list/html/index.en.html> accessed 4 January 2022.
[180] SSM Regulation (n 178), Article 6(6).
[181] Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ L225/1, Article 7(2).
[182] Ibid, preamble recital 19.
[183] Thirion, 'European Fiscal Union' (n 11) 9.
[184] Da Costa Cabral, *The European Monetary Union After the Crisis* (n 60) 219. See also Thirion, 'European Fiscal Union' (n 11) 14.
[185] See the draft Board of Governors resolution for annulment of the Direct Recapitalisation Instrument, available at: <https://www.consilium.europa.eu/media/41671/20191206-draft-bog-resolution-3-annulment-of-the-dri.pdf> accessed 3 July 2021.
[186] Council of the European Union, 'Statement of the Eurogroup in Inclusive Format on the ESM Reform and the Early Introduction of the Backstop to the Single Resolution Fund' (30 November 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/11/30/statement-of-the-eurogroup-in-inclusive-

Lastly, the announced OMT programme by the ECB is regarded in the relevant literature as an element of the EU's incipient fiscal union. Thus, for example, Thirion describes the OMT as a crisis management tool which enables the ECB to become a lender of last resort to Euro area Member States,[187] while Schlosser regards the OMT as a lending of last resort capacity.[188] It will be recalled that this programme involves 'outright transactions in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy'.[189] A necessary condition for the implementation of the OMT programme is strict and effective conditionality attached to an appropriate ESM programme.[190] The OMT programme has never been implemented thus far. It should be stressed that, from a legal perspective, it constitutes a monetary policy measure. This is so, notwithstanding the fact that it might also be capable of contributing to the stability of the Euro area.[191]

V. Conclusions

The two crises examined in this contribution have arguably led to a transformation of EMU that is ongoing, notwithstanding the fact that this is almost always not reflected in the text of the EU Treaties. The measures adopted in response to the European sovereign debt crisis and the COVID-19 pandemic were either aimed at or nevertheless had the effect of addressing some of the glaring omissions in the EMU framework. It is rightly noted in the literature that every multi-level or fiscally-decentralized system, such as the EMU, faces a number of challenges, including *inter alia* how to address imbalances and structural divergences and how to counter (asymmetric) economic shocks.[192] Given the original architecture of EMU, it was both foreseeable and foreseen that these challenges 'would loom larger on the horizon'.[193]

Indeed, the very limited own sources of revenue of the EU and its comparably small budget have always stood in stark contrast to the budgetary capacity of its Member States and their ability (or sometimes the effective lack thereof) to stimulate economic activities and social developments. It also stood in stark contrast to the degree of economic and legal integration that has characterized Europeanization for the past 70 years. The establishment of EMU has not fundamentally changed this equation, not even for those Member States that eventually adopted the single currency. Unlike monetary policy, the legal framework governing EMU did not result in the supranationalization of the budgetary policies of the Euro area Member States, nor did it introduce a separate Euro area budget. Union law did not provide for instruments for risk-sharing or the mutualization of debt. At the same time, it boasted provisions such as Article 125 TFEU, better known in many circles as the 'no-bailout' clause, which (seemingly)

format-on-the-esm-reform-and-the-early-introduction-of-the-backstop-to-the-single-resolution-fund/> accessed 3 July 2021. This agreement was welcomed by the Euro Summit: see Council of the European Union, 'Euro Summit, 11 December 2020' <https://www.consilium.europa.eu/en/meetings/euro-summit/2020/12/11/> accessed 3 July 2021.

[187] Thirion, 'European Fiscal Union' (n 11) 9.

[188] Schlosser, *Europe's New Fiscal Union* (n 10) 103ff.

[189] European Central Bank, 'Technical Features of Outright Monetary Transactions' <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 29 June 2021.

[190] Ibid.

[191] See Case C-62/14 (Grand Chamber) *Peter Gauweiler and Others v Deutscher Bundestag* ECLI:EU:C:2015:400.

[192] Alicia Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU' (2013) 50 CMLR 1621, esp. 1623-24.

[193] Ibid, 1626.

restricted the course of action that could be taken by the Member States and the EU in the event of a crisis. Despite the loss of important crisis management tools resulting from the transfer of monetary sovereignty onto the independent ECB, and disregarding the clear interdependencies between the Euro area Member States, Union law did not foresee crisis management instruments in an unambiguous and predictable manner. During the sovereign debt crisis this called for intergovernmental, temporary, and even private law solutions.

From the analysis in section IV it is clear that some of the systemic risks emanating from the EMU legal framework have materialized in the sovereign debt crisis. At the same time, this crisis triggered frantic activity by the European legislator and the Member States to address some of these shortcomings. From assigning the measures taken in response to the sovereign debt crisis to the different building blocks identified in section II, it can be deduced that the emphasis has primarily rested on the reinforcement of the existing supranational fiscal rules and the closer coordination of the economic policies of the Member States. Moreover, with the establishment of the ESM but also with the second pillar of the Banking Union, new permanent crisis resolution mechanisms have been introduced. At the same time, beyond the very specific arrangements in the ESM (which is nevertheless situated outside the framework of EU law), these reforms have not endowed the EU or at least the Euro area with a greater budgetary capacity, nor have they entailed a new approach to risk-sharing. The EMU remained asymmetric and incomplete. As has been observed by Hinarejos in the aftermath of the European sovereign debt crisis, 'the system is still lacking when it comes to the ability of the centre to address structural asymmetries, and to prevent and counter asymmetric shocks, using powerful fiscal tools such as its own spending power, intergovernmental transfers, or the use of federal taxation as an automatic equalizing mechanism'.[194]

While certainly not providing a *permanent* solution to these shortcomings, the measures that were taken to address the economic impact of the COVID-19 pandemic are much more geared towards at least a temporary increase of the budgetary capacity of the EU on the basis of centralized debt issuing, as well as crisis management tools that are specifically geared towards dealing with an EU-wide economic shock. We have seen that the EU has reached agreement on the largest stimulus package ever financed in Europe, and that NGEU and SURE will provide, together with the 'ordinary' MFF, much-needed financing to the EU Member States on the basis of Commission borrowing on behalf of the Union on the markets. It is notable that both NGEU and SURE financing are available to the EU as a whole and not just the Euro area.[195] A way forward for the introduction of new own resources was also chartered.[196] Furthermore, as regards specifically the Euro area, important changes were made to ESM precautionary financial assistance instruments to provide support in case an ESM Member is affected by an adverse shock beyond its control, and a new instrument was introduced to help ESM Members finance healthcare, cure and prevention-related costs in response to the pandemic. The revised ESM Treaty will also provide the backstop to the Single Resolution Board for the Single Resolution Fund, which is also considered an element of a fiscal union.

All things considered, it can be concluded that the two major crises have given European integration a significant impulse towards a greater fiscal capacity by contributing to

[194] Ibid, 1633.
[195] See also Diane Fromage, 'Towards Increasing Unity and Continuing Executive Predominance within the E(M)U Post-COVID?' (2020) 47 Legal Issues of Economic Integration 385.
[196] See further Crowe, 'An EU Budget of States and Citizens' (n 81).

its major building blocks, in the manner explained in this contribution. This conclusion may not only –and, given the temporary nature of some of the key measures described above, maybe not even primarily– be drawn from the scope of the measures described throughout this contribution. Rather, it is what these measures may foreshadow. Political controversies, notably those linked to the establishment of a European automatic stabilization function in the shape of an unemployment benefit scheme and to centralized debt issuing,[197] have been at least temporarily set aside. Whether these events will provide a significant and lasting impulse towards a greater fiscal capacity or even a fiscal union will depend on whether with the realization that the European sovereign debt crisis and the Covid-19 crisis are unlikely to be singular events also comes the realization in the Member States that the EU requires a more robust, permanent fiscal capacity at least for the Euro area to be resilient. What is more, the third pillar of the Banking Union, the European Deposit Insurance Scheme, is also still missing. For the time being, however, it is hard to disagree with the conclusion drawn by Da Costa Cabral that:

> The abundant menu of (governmental) "risk-sharing mechanisms" in the EMU is still a work in progress, and the final model is yet unclear. A lot has to be done to give substance and meaning to the new fiscal capacity. The evolution of the economic situation in the near future and the political action of the new EU leaders … will confirm whether these instruments came to stay and to save the euro.[198]

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[197] For a view on this, see Sebastian Mack, 'Don't Change Horses in Midstream: How to Make NGEU Bonds the Euro Area's Safe Asset' (23 August 2021) <https://www.delorscentre.eu/en/publications/detail/publication/safe-asset> accessed 5 September 2021. See also Chapter 9 by Michael Waibel and Sebastian Grund in this volume.
[198] Da Costa Cabral, *The European Monetary Union After the Crisis* (n 60) 251.