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# The COVID-19 pandemic and Fiscal Union:

# The Case for the Establishment of a Permanent Supranational Fiscal Shock Absorption Capacity and Important Lessons to be Learned from SURE and NextGenerationEU

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**The Case for the Establishment of a Permanent Supranational Fiscal Shock Absorption Capacity and Important Lessons to be Learned from SURE and NextGenerationEU**

Fabian Amtenbrink[1]

**Abstract**

The contribution reflects on the need for a permanent supranational fiscal shock absorption capacity against the background of the recent EU response to the Covid-19 pandemic. First, legal, economic, and political arguments in favour of more robust EU fiscal capacity are presented. This is followed by an analysis to what extent main measures taken in response to the pandemic, namely the temporary EU Recovery Instrument and the Recovery and Resilience Facility at the heart of NextGenerationEU, as well as the European instrument for temporary support to mitigate unemployment risks in an emergency, should be considered as a blueprint for the establishment of permanent mechanisms. It is argued that the main value of the ad hoc crisis measures lies in the uncovering of the various political, economic, and legal considerations that must go into the design of a permanent supranational fiscal shock absorption capacity.

**Keywords:** Supranational shock absorption capacity, EU fiscal capacity, EU Recovery Instrument, Recovery and Resilience Facility, EU borrowing

## 1. Introduction

In the past two decades the European Union (EU) and its Member States have faced no less than three major crises, including the euro-crisis, the COVID-19 pandemic, and the energy crisis following Russia's invasion of Ukraine. These crises did not only come with major socio-economic challenges in the Member States (albeit to varying degrees)[2], but in some instances have also posed an existential threat to the future of European (economic and monetary) integration.

Europe's response to these crises has had various facets, ranging from inaction and wait-and-see, makeshift solutions, structural revisions of the economic governance framework, to the formulation of ambitious, but yet to materialise, reform plans. For some commentators, with the establishment of the temporary EU Recovery Instrument and the Recovery and Resilience Facility (RRF) at the heart of NextGenerationEU (NGEU), but also with the adoption of the European instrument for temporary support to mitigate

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[2] On the impact of the COVID-19 pandemic see e.g. European Commission. Employment and Social Developments in Europe, 2021 Annual review, June 2021, chapter 2.

unemployment risks in an emergency (SURE), a new page of history has been turned in European fiscal policy integration.[3] The EU's approach to dealing with the economic impact of the unprecedented pandemic has been considered as a paradigm shift and the prelude and blueprint for a more substantial permanent supranational fiscal capacity of the EU. Yet, as will be argued hereafter, such assertions must be taken with a sizeable pinch of salt, as the value of the crisis measures may primarily be the uncovering of the various political, economic, and legal considerations and constraints that are associated with the designing of a permanent shock absorption capacity at the EU level.

This contribution is divided into four sections. Section 2 offers a working definition of the notion "fiscal shock absorption capacity". Section 3 presents the main arguments in favour of a permanent supranational fiscal shock absorption capacity. Section 4 then turns to main measures taken in response to the pandemic and the question to what extent they point the way for the establishment of a permanent supranational fiscal shock absorption capacity and important (legal) lessons can be drawn from these arrangements. Finally, section 5 offers conclusions and an outlook.

## 2. Terminology

Generally speaking, in economics the term fiscal capacity alludes to the ability of a(n) (country's) economy to address and mitigate macroeconomic shocks.[4] Various types of shocks have been identified in the relevant literature, such as temporary and permanent, exogenous and policy-induced shocks, that can arise in one or several countries (asymmetric shock), or even whole trading areas (symmetric shock).[5] Based on this categorisation, the pandemic has been characterised as '… a large symmetric exogenous shock for the euro area and the world, but with large asymmetric impact across countries and sectors'.[6] Similarly, also the global financial crisis had asymmetric effects across the euro area Member States.[7]

Regarding the instruments to address and mitigate and hence, absorb macroeconomic shocks, a basic distinction can be drawn between "marked-based" mechanisms, such as price and labour market adjustments, and "institutional" or fiscal mechanisms.[8] This contribution focuses on the latter, that is mechanisms that are foreseen in legislation and/or involve the

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[3] See Federico Fabbrini, *EU Fiscal Capacity* (OUP 2022).

[4] Cinzia Alcidi and Gilles Thirion, 'Assessing the Euro Area's Shock-Absorption Capacity', European Commission, Directorate-General for Employment, Social Affairs and Inclusion, Directorate A — Employment & Social Governance, Unit A4 - Thematic analysis, Working Paper, January 2017, < https://op.europa.eu/en/publication-detail/-/publication/4ca4b9df-e781-11e6-ad7c-01aa75ed71a1 >.

[5] Ben Patterson and Simona Amati, 'Adjustment to Asymmetric Shocks' European Parliament, Directorate-General for Research, Working Paper, Economic Affairs Series ECON-104, ECON-104, September 1998. < https://www.europarl.europa.eu/workingpapers/econ/pdf/104_en.pdf >.

[6] European Commission, Directorate General Economic and Financial Affairs, 'Adjustment to large shocks in the euro area – insights from the COVID-19 pandemic', Technical note for the Eurogroup, Brussels, 7/05/2021, 2. < https://www.consilium.europa.eu/media/49710/190521_adjustment-to-large-shocks-in-the-euro-area_eg_final.pdf >.

[7] Pilip R. Lane, 'The European Sovereign Debt Crisis', *The Journal of Economic Perspectives*, vol. 26, no. 3, 2012, 49-67, 55.

[8] Patterson and Amati (supra, n 5), 21 et seq.; Alcidi and Thirion (supra, n 4); Hugo Erken, Kasia Grabska, and Maurits van Kempen, 'Labour market adjustments during the Great Recession. An international comparison', CPB Background Document, June 2015, < https://www.cpb.nl/sites/default/files/publicaties/download/cpb-background-document-labour-market-adjustments-during-great-recession.pdf >.

intervention by public authorities, whereby two main mechanisms of macroeconomic stabilisation in times of economic shocks can be differentiated.

The first mechanism are so-called automatic stabilisers that is '… elements, built into government revenues and expenditures, that reduce fluctuations in economic activity without the need for discretionary government actions', that are linked to the tax and social benefits system.[9] The second mechanism takes the shape of counter-cyclical discretionary government spending geared towards counteracting the effects of an economic shock when it occurs.[10] This mechanism is also a main channel through which fiscal stability can contribute to financial stability.[11]

## 3. Main arguments in favour of the establishment of a permanent supranational shock fiscal absorption capacity revisited

Several arguments can be submitted in support of the need for a permanent supranational fiscal shock absorption capacity in the EU and the introduction of corresponding measures.

### *3.1. The absence of meaningful supranational fiscal shock absorption capacity*

The current EU economic governance framework does not foresee a *permanent* and robust fiscal shock absorption capacity at the supranational level.[12]

First, EU law cannot provide for permanent automatic stabilizers like what can be observed in Member States. Direct taxation, such as personal and corporate income taxes, remains a national competence and thus any stabilising function on income shocks takes place at the national level and the EU does not feature a supranational social benefit scheme of some sort, such as namely an unemployment benefit scheme.[13]

Some specific EU instruments can be classified as macroeconomic policy support tools, mainly the European Structural and Investment Funds (ESIF) as part of the EU's cohesion policy, which has been utilised for the European Commission's Coronavirus Response Investment Initiative.[14] Less well-known instruments include the European Globalisation

[9] Othman Bouabdallah, Cristina Checherita-Westphal, Maximilian Freier, Carolin Nerlich and Kamila Sławińska, 'Automatic fiscal stabilisers in the euro area and the COVID-19 crisis', ECB Economic Bulletin, Issue 6/2020, section 1.
[10] Jakob de Haan and Bram Gootjes, 'What Makes Discretionary Counter-Cyclical Fiscal Policy so Difficult? An Analysis of 32 OECD Countries', CESifo Economic Studies, Volume 69, Issue 1, March 2023, 1-20, < https://doi.org/10.1093/cesifo/ifad001 >, with further references.
[11] Fabian Amtenbrink, 'The (potential) contribution of the European Union's fiscal architecture to financial stability', *Journal of European Integration*, 45:1 (2023), 203-221, at 206.
[12] On the notions of fiscal capacity, fiscal integration, and fiscal union see Fabian Amtenbrink and Menelaos Markakis, 'Never Waste a Good Crisis? On the Legal Impact of the European Sovereign Debt and COVID-19 Crises on the Emergence of a European Fiscal Capacity', In Robert Schütze and Alicia Hinarejos (eds.), Fiscal Federalism in the European Union: Past, Present, Future (Oxford University Press, 2023),171-204, 173-176.
[13] On unemployment benefit scheme see further section 4.
[14] European Commission, 'Cohesion Policy and EU Solidarity Fund contribute to the Coronavirus Response Investment Initiative', Press release, 16 March 2020, < https://ec.europa.eu/regional_policy/en/newsroom/news/2020/03/16-03-2020-cohesion-policy-and-eu-solidarity-fund-contribute-to-the-coronavirus-response-investment-initiative >; European Commission, 'Coronavirus Response Investment Initiative Plus: New actions to mobilise essential investments and resources', Press release, 2 April 2020, < https://ec.europa.eu/regional_policy/en/newsroom/news/2020/04/04-02-2020-coronavirus-response-investment-initiative-plus-new-actions-to-mobilise-essential-investments-and-resources >.

Adjustment Fund for Displayed Workers (EGF), set up in 2007 as an instrument to support workers dismissed as a result of globalisation.[15] However, such instruments do not classify as *automatic* stabilisers and, moreover, and in most instances are rather narrow both in scope and in financial terms. For example, EGF does not only have a comparatively limited budget (€210 million for 2021-2027), but also cannot be used as an instrument cover unemployment benefit costs.

What is more, with the regular own resources ceiling of the EU amounting to a mere 1.4% of the EU's gross national income (GNI), the EU's supranational financial capacity to counter the economic effects of a major economic shock through discretionary fiscal spending is very limited in the best of circumstances. Leaving aside the Covid-19 pandemic-related measures, the EU's budget has hovered around the 1% of EU GDP mark for a long period.[16] To put things into perspective, the United States federal government spending amounts to approximately 23% of GDP for the United States.[17] As observed by the European Commission in 2017: 'While the EU budget has always promoted upward social and economic convergence and the lending firepower available at EU level was increased in recent years to respond to extreme circumstances, macroeconomic stabilisation has not been an explicit objective of the EU budget so far.'[18] This resulted in the need for a temporary increase of its own resources ceiling by 0.6% EU GNI to provide for the necessary budgetary headroom for the EU measures to mitigate the effects of the economic consequences of the pandemic

### *3.2. The limited ability of Member States to fulfil a fiscal stabilisation function*

Given the EU's very limited fiscal shock absorption capacity, today's economic governance framework heavily relies on the ability and political willingness of Member States to provide the fiscal stabilisation function, by ensuring the effective working of national automatic stabilisers and the capacity to engage in counter-cyclical discretionary spending. National governments must thus ensure the necessary budgetary headroom to have national automatic stabilisers work effectively and to be able to engage in countercyclical government spending to respond to shocks without unsustainable deficit financing. This calls for sound, counter-cyclical, fiscal policies.[19]

Neither the original economic governance framework introduced by the 1992 Treaty on European Union (Maastricht Treaty) and the supplementary 1997 Stability and Growth Pact, nor subsequent attempts to reinforce this framework in response to the euro area crisis, namely through the Six Pack and Two Pack legislation and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact), have been entirely successful in ensuring compliance with the most basic EU budgetary rule fiscal rule laid down in Article 126(1) TFEU and the Protocol on the excessive deficit procedure

[15] As noted in Amtenbrink and Markakis (supra, n 12), 178.
[16] Marco Buti, 'When will the European Union finally get the budget it needs?', Bruegel Analysis, 7 December 2023 < https://www.bruegel.org/analysis/when-will-european-union-finally-get-budget-it-needs > (accessed 31 January 2024).
[17] See < https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending/ > (accessed 31 January 2024).
[18] European Commission, 'New budgetary instruments for a stable euro area within the Union framework', Brussels, 6.12.201, COM(2017) 822 final, section 2.
[19] Amtenbrink (supra, n 11), 207.

annexed to the EU Treaties.[20] In fact, overall, a mixed picture has emerged as regards the avoidance of excessive government deficits and debts, the reduction of debt levels, and the implementation of necessary structural reforms.[21] National fiscal policy has been diagnosed to have a pro-cyclical tendency.[22]

The reasons for the shortcoming of the current economic governance framework are manifold, but arguably originate from the overly reliance of primary EU law legal framework on (political) self-commitment by Member States and peer-review as a main instrument to enforce the rule-based system, with Member State's compliance and Council and Commission enforcement lacking.[23]

### *3.3. Risk of contagion and euro area-wide economic shocks*

Dismissing the need for a supranational shock absorption capacity with reference to the individual budgetary responsibility of Member States is not only unrealistic given their track record in ensuring sustainable fiscal policies, but also because (a-)symmetric shocks in one or several Member States, bear the risk of contagion in the EU internal market. Spillovers endanger the stability of the euro area, such as resulting from a heightened risk assessment of sovereign debt and the 'cross-border transmission of sovereign risk', as could be observed during the euro area crisis.[24]

Even if countries would and could always observe sustainable fiscal policies, this would not rule out the need for a supranational fiscal shock absorption capacity in all instances. Economic shocks may be of a size that cannot be managed by (most) national economies alone. The euro area crisis and even more so the pandemic are cases in point. It is for this reason that already the 2015 Five President's Report argued in favour of a fiscal stabilisation function for the euro area, which has been echoed by the European Fiscal Board, the ECB, and the International Monetary Fund (IMF).[25]

### *3.4. Contribution of a permanent supranational fiscal shock absorption capacity to financial stability*

[20] On these reform measures see Jean-Paul Keppenne, 'Economic Fiscal Governance on the Member States: The Stability and Growth Pact and Beyond', In Amtenbrink and Herrmann In Fabian Amtenbrink and Christoph Herrmann, *The EU Law of Economic and Monetary Union* (Oxford University Press, 2020), 813-849.

[21] Fabian Amtenbrink and Jakob de Haan, 'Reforming the Stability and Growth Pact', *E.L. Rev.* 2006, 31(3), 402-413.

[22] Cinzia Alcidi and Gilles Thirion, 'Assessing the Euro Area's Shock-Absorption Capacity', Report written for the European Commission Directorate-General for Employment, Social Affairs and Inclusion Directorate A - Employment & Social Governance Unit A4 - Thematic analysis, January 2017, 10 et seq; Martin Larch and Stefano Santacroce, 'Numerical compliance with EU fiscal rules: The compliance database of the Secretariat of the European Fiscal Board', European Commission, 1 July 2020, 7-8, available at < https://commission.europa.eu/publications/study-numerical-compliance-eu-fiscal-rules-compliance-database-secretariat-european-fiscal-board_en#files >.

[23] Fabian Amtenbrink and Jakob de Haan, 'Economic Governance in the European Union - Fiscal policy discipline versus flexibility', *C.M.L. Rev.* 40: 1075-1106 (2003), 1089 et seq.

[24] Niels Gilbert, 'Euro area sovereign risk spillovers before and after the ECB's OMT announcement', De Nederlandsche Bank Working Paper No. 636, May 2019.

[25] European Commission, 'The Five President's Report: Completing Europe's Economic and Monetary Union', 22 June 2015, 14 et seq. < https://commission.europa.eu/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en >; European Fiscal Board, Fiscal Board, Annual Report 2020; European Central Bank, 'Monetary-fiscal policy interactions in the euro area', ECB Occasional Paper Series No 273 / September 2021; IMF, 'Reforming the EU Fiscal Framework: Strengthening the Fiscal Rules and Institutions' Departmental Paper No 2022/014, September 2022.

Fiscal policy can contribute to financial stability, through various channels, sustainable government debt levels being one, as the latter '… are a prerequisite to deal with risks to financial stability.'[26] As the ability of Member States to provide fiscal stability through sound budgetary policies and their economic shock absorption capacity may be impaired due to budgetary restraints and the size of an economic shock, the absence of a supranational shock absorption capacity can affect the financial stability of the euro area. Consequently, a fourth argument, linked to the first two arguments presented above, is that a supranational shock absorption capacity indirectly also contributes to financial stability in the EU.[27]

### *3.5. Threat of fiscal dominance*

The fifth argument is related to monetary policy in the euro area and the position of the ECB as the independent monetary policy authority.[28] During the euro area crisis, in the face of high debt levels, the inability of some Member States to mitigate the economic shock and in the absence of a readily available supranational shock absorption mechanism, the ECB's conduct of monetary policy effectively became constraint by considerations beyond – albeit in the view of the majority of legal commentators not in contradiction with – it's narrow statutory price stability mandate. This mainly concerns its anything but uncontroversial unconventional monetary policy measures and its involvement in the financial assistance programmes and the attached conditionality in the context of the ESM.[29]

This role of the ECB as a crisis manager has come at the prize of '… an unprecedented degree of contestation' both in legal and societal terms[30] that reverberates until today, even if the support for a European economic and monetary union with a single currency is currently high in most euro area Member States.[31] Central Banks, including the ECB for that matter, have been portrayed as becoming 'part of the "regulatory state"' and (risking to) entering '… more overtly political waters',[32] calling into question the very rationale for their independent position in the constitutional system.

Central bank officials themselves, including from the ECB , have stressed in recent years that central banks should not be 'the only game in town', thereby alluding to the need for a stronger role for national and supranational fiscal policy.[33]

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[26] Amtenbrink (supra, n 11), 207, with reference to Zlatuse Komárková, Vilma Dingová, and Lubos Komárek, 'Fiscal Sustainability and Financial Stability', Czech National Bank Financial Stability Report 2012/2013, 103-112, 105-106.

[27] See also chapter 4 by Christy Petit in this edited volume.

[28] Art. 13 TEU, Arts. 127(1), 130, 282 TFEU.

[29] Fabian Amtenbrink, 'The European Central Bank's intricate independence versus accountability conundrum in the post-crisis governance framework', (2019) *Maastricht Journal of European and Comparative Law*, 26(1), 165-179, 167; Dariusz Adamski, 'Objectives of EMU', In Amtenbrink and Herrmann (supra, n 21), 214-258, Klaus Tuori, 'Monetary Policy (Objectives and Instruments), in Amtenbrink and Herrmann (supra, n 21), 615-698.

[30] Fabian Amtenbrink, 'The European Central Bank's intricate independence versus accountability conundrum in the post-crisis governance framework', *Maastricht Journal of European and Comparative Law*, 26(1), 165-179, 167.

[31] Eurobarometer. Public opinion in the European Union. Standard Eurobarometer 97. Summer 2022, 33-34.

[32] Paul Tucker, 'How the European Central Bank and Other Independent Agencies Reveal a Gap in Constitutionalism: A Spectrum of Institutions for Commitment', *German Law Journal* (2021), 22(6), 999-1027, 1004.

[33] Peter Praet, 'The ECB's monetary policy: past and present', Speech held at the Febelfin Connect event, Brussels/Londerzeel, 16 March 2017. < https://www.ecb.europa.eu/press/key/date/2017/html/sp170316.en.html >.

## 4. SURE and NGEU: a blueprint for supranational fiscal shock absorption capacity?

The pandemic has resulted in an unprecedented response both from the Member States and the EU geared towards dealing with the economic impact of this crisis. Notable was both the speed at which Member States and EU institutions moved towards concrete action when compared to the euro area crisis, but also the willingness of the Member States to consider previously non-negotiable measures to address the crisis. To be sure, measures that were discussed as part of a supranational response to the economic consequences of the pandemic were not new as such.[34] Yet, what was different this time around was the political willingness, at least temporarily, to set aside ideological differences and accepting the need for a collective European response and the redistributive effects and risk sharing (at least to some extent) that this may entail. What is more, the EU itself could be seen playing a major macroeconomic stabilisation function beyond the regular provision of public goods and some redistribution of resources, such as in the contest of the ESIF.

However, to what extent this amounts to a lasting shift of paradigm in economic, political, and legal terms, whereby the chosen approach can function as a kind of blueprint for permanent supranational arrangements, remains to be seen.

### *4.1. Political perspective*

Member States have unanimously supported the establishment of the European Recovery Instrument (EURI) Regulation and the SURE Regulation,[35] They have also unanimously adopted the Own Resource Decision (ORD)[36] that provides the budgetary headroom for the establishment of the EURI, that finances the economic support measures introduced by the RRF Regulation.[37] Yet, it is doubtful whether this signifies a new consensus on the need for a permanent supranational shock absorption capacity and thus, the abandonment of the political and legal concerns in some Member States regarding a supranational scheme that involves risk sharing, the danger of moral hazard, and a permanent financial transfer between countries, also referred to by some as "transfer union."[38]

The pandemic was a particularly extraordinary situation involving multiple challenges mainly outside the economic sphere, whereby the EU's support of the Ukraine inter alia through the utilisation of the European Peace Facility and an upgraded Macro‑Financial Assistance Instrument highlight how the EU is willing to extent the approach it has taken during the Covid-19 pandemic to deal with new crises.[39] Yet, a permanent shock absorption mechanism would not be only geared towards significant and symmetric shocks that may moreover have

[34] Eric Jones, 'Next Generation EU: Solidarity, Opportunity, and Confidence', Sieps European Policy Analysis. June 2021: 11epa. < https://www.sieps.se/globalassets/publikationer/2021/2021_11epa.pdf >

[35] Council Regulation 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, (2020) OJ L 433l/23; Council Regulation 2020/672 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, (2020) L 159/1. Both legal acts are based on Art. 122 TFEU.

[36] Council Decision 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, (2020) L 424/1. Based on Art. 311, para. 3, TFEU and thereafter ratified in all Member States.

[37] Regulation 2021/241 establishing the Recovery and Resilience Facility, (2021) OJ L 57/17, Art. 6(1).

[38] David Howarth and Joachim Schild, 'Nein to 'Transfer Union': the German brake on the construction of a European Union fiscal capacity', (2021) *Journal of European Integration*, 43:2, 209-226.

[39] See Federico Fabbrini, 'Funding the War in Ukraine: The European Peace Facility, the Macro‑Financial Assistance Instrument, and the Slow Rise of an EU Fiscal Capacity' (2023) *Politics and Governance* 11(4), 52-61.

a significant geostrategic element to them, as is the case for the war in Ukraine. Member States may thus not be (financially) as accommodating when discussing the conditions for increasing the EU's fiscal capacity more permanently . In fact, without any acute crisis at hand, the political momentum for the introduction of such a mechanism may subside.

What is more, in the case of one of the most sceptical Member States when it comes to increasing the EU's role in fiscal policy, German politicians may find that they have limited legal leeway and little to profit in political terms from abolishing the well-established standoffish attitude towards the establishment of a more robust supranational fiscal capacity. While it goes beyond the scope of this contribution to offer a comparative analysis, the example of the German constitutional discourse on the role of national parliaments and namely their indispensable role in the national budgetary procedure, prominently lead by the German Federal Constitutional Court (*Bundesverfassungsgericht*), suggests that from the perspective of some national constitutional systems, caution is advised when considering the establishment of SURE and RRF as a sign of a lasting political and, moreover, legal shift of paradigm.[40] Indeed, some of what can be found in the December 2022 German court's judgment on the constitutional complaints against the German parliamentary act ratifying the ORD can be read as a clear cautioning regarding the design of any future permanent, rather than temporary, supranational fiscal capacity, albeit this judgment cannot be interpreted to categorically rule out the establishment of such a mechanisms.

While the German Federal Constitutional Court is one of the most outspoken national courts when it comes to the principle of democracy and the role of national parliaments, this is not to say that other national highest (constitutional or supreme) courts could not take a similar position in the case of the establishment of a permanent mechanism, thereby not limiting the political room for manoeuvre but also introducing constitutional requirements regarding the role of national parliaments in the financing of any future increased supranational fiscal (shock absorption) capacity, which stands separate from the question of the role of the European Parliament (EP).

### *4.2. Economic perspective*

To finance the supranational crisis response to the economic shock triggered by the pandemic, the EU has temporarily become a major quasi-sovereign debt issuer on the international financial markets, namely though the issuing of SURE Social Bonds and the EU Bonds and Bills, as well as NGEU Green Bonds. This is an astonishing development considering that the feasibility and possible forms of supranational debt issuing has been debated for some time.[41] However, the empowerment of the European Commission by the ORD to borrow funds on capital markets on behalf of the EU cannot be equated with the communitarisation of debt issuing that has formed the focal point of these debates. Member States are in no way restricted in issuing their own debt instruments. What is more, the applicable liability regime does not amount to the joint and several liability regime that has been considered a prerequisite for successful introduction of a supranational debt issuing framework.

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[40] In the German constitutional order these rights are protected namely by the Art. 20(1) and (2), Art. 79(3) of the Basic Law. BVerfG, Judgment of the Second Senate of 6 December 2022 - 2 BvR 547/21 -, paras. 1-47, para 134, with references to previous judgments. See also Fabian Amtenbrink, 'New Economic Governance in the European Union: Another Constitutional Battleground?', In Kai Purnhagen and Peter Roth, *Varieties of European Economic Law and Regulation. Liber Amicorum Hans W. Micklitz* (Springer, 2014), 207-234.

[41] For an overview of proposals see 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', *Rev. Law Econ.* 2016; 12(3): 605.

Repayment of EU borrowing on the capital markets to finance the EU Recovery Instrument takes place through the EU budget as fixed expenditure. The borrowing amounts to a joint, but not a several liability of the Member States, as the risk sharing is in principle limited to their own predetermined contribution to the EU's own resources (based on GNI) and does not amount to an independent liability of each Member State for the full extent of the EU borrowing. In fact, avoiding a system of joint and several liability has been considered one of Germany's main priorities in the negotiations on NGEU.[42] Still, the European Commission's view that the Member State's approval of the ORD is '… a clear commitment to bear the liability from the borrowing'[43] is accurate in the sense that the temporary increase in the ORD by 0.6% to cover the EU's liabilities expires only after the repayment of the sums Indeed, it has been observed that major credit rating agencies in their assigning of a sovereign rating to the EU as a debt issuer consider the guarantee of EU debt to be equivalent to joint and several liability.[44] This seems to have informed the risk models of the major credit rating agencies, such as Standard & Poor's, Moody's, and Fitch ratings, which have assigned very favourable ratings to the EU debt instruments.[45]

The European Commission's success in raising fund on the capital markets thus provides some useful insights as to what type of liability regime could be feasible for the financing of a permanent supranational shock absorption capacity, as investors are willing to assign comparably low risk premia to the loans to the EU despite the absence of an outright joint and several liability regime. This may somewhat diffuse the past politically and legally toxic discussion on the financing of a supranational shock absorption capacity through EU, to the extent that this would be (partially) based on EU borrowing on the capital markets.

As regards SURE, the liability arrangements applying to the financing of this instrument are somewhat different. The European Commission has been empowered to borrow on the capital markets on behalf of the EU to finance loans granted to Member States, with a set maximum of Euro 100 billion.[46] It is thus the EU that is liable for these loans, whereby the Member States have together provided a Euro 25 billion irrevocable and callable guarantee (amounting to 25% of the maximum amount in SURE). This amounts to more than just a joint liability. In principle Member States are liable for a maximum amount defined in a predetermined guarantee contribution key and any demands by the Commission on Member States under the guarantee agreement take place on a pro-rata basis (based on the share of each Member State in the EU's NGI). However, *if* a Member States cannot pay an amount called, other Member States are collectively liable for that amount, as the Commission can make additional calls on guarantees to other Member States pro rata to the relative share of each of the other Member States in the EU GNI. There is thus also an element of risk sharing involved in these arrangements that is however clearly delineated up front by the irrevocable guarantee of each Member State and more generally the limitation of the availability of the SURE instrument, which ended on 31 December 2022.

In section 2 it has been observed that automatic stabilisers and discretionary fiscal policy are considered as two main channels of a shock absorption mechanism. This begs the question

[42] Peter Becker, 'Germany as the European Union's status quo power? Continuity and change in the shadow of the Covid-19 pandemic', *Journal of European Public Policy* 30:8 (2023), 1473-1493.
[43] < https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_1024 > (accessed 10 January 2023).
[44] Rebecca Christie, Grégory Claeys and Pauline Weil, 'Next Generation EU borrowing: a first assessment', Policy Contribution 22/2021, Bruegel, 11.
[45] See <
https://commission.europa.eu/strategy-and-policy/eu-budget/eu-borrower-investor-relations/eu-credit-strength_en >.
[46] Art. 4 Council Regulation 2020/672.

how SURE and RRF fit into this picture. Financial assistance granted under SURE consists of loans to Member States, whereby the granting of these loans is subject to a Council implementing decision adopted based on a proposal from the Commission. The characteristics of the loan are agreed in a loan agreement between the Commission and the Member State.[47] These arrangements cannot be easily equated to the main design features of a supranational automatic stabiliser as they have been discussed mainly in the context of the establishment of a genuine or equivalent (i.e., reinsurance) unemployment benefits scheme.[48] One noticeable difference is the main source of financing, which for a genuine scheme is provided through contributions that are paid in advance directly by employers and employees, and for an equivalent scheme is provided through Member State's contributions to such a supranational scheme. Another importance difference is that automatic stabilisers have been discussed in the literature and by (EU) institutions to function like their national counterparts, that is automatically and without the need for government intervention involving discretionary decision-making.

The characteristics of the RRF make it even less of an automatic stabiliser given its scope and procedures. In fact, this temporary instrument can better be considered as a discretionary countercyclical fiscal policy instrument in the hands of the Council and European Commission. Yet, this characterisation may be somewhat less fitting for those parts of the national resilience and recovery plans (NRRPs) that are financed through loan agreements rather than through non-repayable grants. However, different to what may be observed for national discretional fiscal policies, the RRF Regulation applies rather strict conditionality to this supranational fiscal spending.[49] The mandatory NRRPs must be synchronised with main European policy priorities, such as the green transition and digital transformation, identified in the RRF Regulation.[50] Moreover, strict eligibility criteria apply for the acceptance of NRRPs.[51] Commitments and payments are linked to the observance by Member States of the EMU economic governance framework and namely the macroeconomic imbalances procedure[52], prompting Dermine to conclude that the EU's pandemic response is '… largely embedded into the wider, pre-existing policy framework of EU economic governance'.[53]

What is more, experience with the disbursement of funds to some Member States highlights that the process of granting financing under the RRF can involve considerable political bargaining that may be very well justified from the point of view of defending Union values and interests, including the Union's financial interest in the context of the recently adopted Rule of Law Conditionality Regulation,[54] but can stand in the way of RRF functioning as an effective crisis mitigation tool in all Member States.

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[47] Ibid, Arts. 6(1) and 8.
[48] Miroslav Beblavý and Karoline Lenaerts, 'Feasibility and Added Value of a European Unemployment Benefit Scheme. Main findings from a comprehensive research project', European Commission, Directorate-General for Employment, Social Affairs and Inclusion Directorate A — Employment & Social Governance Unit A4 - Thematic analysis, January 2017.
[49] See also chapter 12 by Niall Moran in this edited volume.
[50] Art. 3 Council Regulation 2020/672.
[51] Ibid, Art. 18.
[52] Ibid, Art. 10.
[53] Paul Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture', *Legal Issues of Economic Integration* 47, no. 4 (2020): 337-358, 337.
[54] Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, (2020) OJ L 433I/1. On the link of this Regulation with RRF see Federico Fabbrini, 'Next Generation EU: Legal Structure and Constitutional Consequences', *Cambridge Yearbook of European Legal Studies* 2022, 24:45-66, 54 et seq.

Finally, both for SURE and the relevant part of the funding scheme of the RRF the question arises, whether loans are a particularly useful element of a *permanent* shock absorption instrument. The interest that countries must pay for loans is assumably based on the EU's borrowing costs that will often result in savings for Member States that could not achieve such favourable rates on their own. Yet, this may not be the case for all Member States, as this depends on their individual sovereign ratings. While not necessarily in all instances linked to this consideration, it is nevertheless telling that as part of their initial NRRPs only 7 of the 27 EU Member States have concluded loan agreements. Yet, the number of countries receiving or having requested loans has almost doubled[55] with the emergence of the energy crisis and the introduction of the REPowerEU plan and corresponding chapters in the NRRP.[56]

### *4.3. Legal perspective*

SURE, the EURI Regulation, and the RRF Regulation are certainly remarkable legal developments in the EU fiscal sphere and indeed a 'rupture'[57] of the previous approach to EU economic governance, considering the tough and inconclusive debates on an increased fiscal capacity for the EU since the euro area crisis.[58] Some legal commentators view these developments rather critically, considering them '… the creation of a permanent fiscal capacity' without a robust EU legal fundament,[59] whereas others conceive them rather more positively as a testimony of the EU Treaties as '… a living instrument, whose interpretation can be adjusted in light of changing circumstances'.[60] What can in any event be observed is that considering these temporary measures as a shift in paradigm (in the positive sense of the word) and even more so as a model for a future permanent supranational shock absorption capacity is not entirely unproblematic, as the legal construction of SURE and RRF comes with significant legal drawbacks.

Not only is the legal construction of the main instruments and their means of financing fragile, but also the compatibility of these temporary measures with the EU budgetary principles and their democratic credentials is questionable. Several - partially intertwined - considerations can be submitted in support of this view, including the choice of legal bases, the construction of the financing of the temporary instruments, and the decision-making procedures for their application.

The interpretation of the scope of Article 122 TFEU and more specifically, whether this legal basis allows for more than temporary and ad hoc measures, is very relevant when it comes to finding appropriate legal bases for a future permanent mechanisms that allow for

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55 The deadline for the submission of (additional) loans as part of the submission of a revised RRP was 31 August 2023 (Art. 14(2) Council Regulation 2020/672). See European Commission, 'Final Overview of Member States' Loan Requests under the RRF', Note to the Council and the European Parliament, 1 September 2023. < https://commission.europa.eu/system/files/2023-09/01092023-Final-overview-of-MS-loan-requests-under-the-RRF_en.pdf >.

56 Regulation 2023/435 amending Regulation 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations 1303/2013, 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC, (2023) OJ L 63/1.

57 Dermine (supra, n 54).

58 As the present assessment is intended to be mainly forward-looking, for a more comprehensive discussion of the legality of the SURE, Recovery Instrument, and RRF Regulations see e.g. Dermine (supra, n 54); Päivi Leino-Sandberg and Matthias Ruffert, 'Next Generation EU and its constitutional ramifications: A critical assessment', (2022), 59, *Common Market Law Review*, Issue 2, 433-472, 472; Fabbrini (supra, n 55).

59 Leino-Sandberg and Ruffert (supra, n 59), 472.

60 Fabbrini (supra, n 55), 61.

discretionary supranational spending to mitigate economic crises.[61] In this context is can be recalled that the 2010 temporary European Financial Stabilisation Mechanism[62] was based on Article 122(2) TFEU. By contrast, the permanent ESM has been adopted in 2012 as an intergovernmental treaty, as an unequivocal competence and legal basis in the EU Treaties was considered lacking.[63] Whether it must then be concluded from the use of Article 122 TFEU as a EU legal basis for the establishment of SURE and the EU Recovery Fund that this provision forms a robust legal basis for the establishment of a permanent supranational shock absorption capacity is up for debate, not only regarding it's scope but also the applicable decision-making procedure.

On the one hand, the European Commission has stressed that the use of this legal basis is '… justified as a temporary and exceptional solution in the context of the [COVID-19] crisis'.[64] From the point of view of those considering this provision '… a true crisis clause'[65], the utilisation of this legal basis for an EU legal act introducing *permanent* fiscal shock absorption mechanism requires careful consideration.[66] On the other hand it has been argued that a distinction has to be made between the first and second paragraph of Article 122 TFEU, whereby '… the first paragraph … is textually not limited to crises or emergencies and that it is a legal basis distinct from that in the second paragraph (which is a crisis legal basis …)'.[67]

The possibility of an overstretching of the scope of Article 122 TFEU is not the only and perhaps not the most important argument in favour of refraining from the use of this legal basis for permanent mechanisms. Rather it is the intergovernmental nature of the applicable decision making procedure, which entirely excludes the EP. Utilising Article 122 TFEU as a legal basis for any future permanent fiscal shock absorption would have undesirable consequences for the democratic legitimacy of such a mechanism, but also for the application of established EU budgetary principles and procedures.

By funnelling the financial means for the RRF through the EURI Regulation, these borrowed funds have been effectively kept outside the annual EU budget, have not been part of the Multiannual Financial Framework (MFF) that is decided by unanimity vote by the Council and requires the consent of the EP, and have remained outside the annual budgetary

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[61] Martin Nettesheim, 'Legally Feasible, Constitutionally Dubious: Establishing 'Next Generation Europe' on the Basis of EU Secondary Legislation', *VerfBlog*, 2020/12/04. < https://verfassungsblog.de/legally-feasible-constitutionally-dubious/ >; Leino-Sandberg and Ruffert (supra, n 59).
[62] Regulation 407/2010.
[63] Jean-Paul Keppenne, 'Economic Policy Coordination. Foundations, Structures, and Objectives', In Amtenbrink and Herrmann (supra, n 21), 787-812, 805 et seq.
[64] Brackets added. European Commission (2020). Q&A: Next Generation EU – Legal Construction. Available at < https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_1024 > January 2023).
[65] Jean-Victor Louis, 'Guest Editorial: The no-bailout clause and rescue packages', (2010), 47, *Common Market Law Review*, Issue 4, 971-986. Generally, on the genesis and scope of Article 122 TFEU see Vestert Borger, 'EWU Financial Assistance', In Amtenbrink and Herrmann (supra, n 21), 963-978, with further references.
[66] See also Bruno de Witte, ' The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift', (2021) *Common Market Law Review* 58(3), 635-682, 655, argues that 122 TFEU for the RRF: '… Article 122 is clearly presented, in the TFEU, as a crisis instrument that can be used only to support countries facing exceptional circumstances', while at the time time pointing out that '… the amount of financial assistance covered by EURI is indeed entirely justified by the COVID-19 emergency faced by the Member States'.
[67] Merijn Chamon, 'The use of Article 122 TFEU', Study requested by the AFCO, Policy Department for Citizens' Rights and Constitutional Affairs. Directorate-General for Internal Policies. PE 753.307 - September 2023, with further references.

procedure.[68] The funds have been assigned to the various spending programmes by means of what Article 21(5) of the Financial Regulation[69] refers to as "external assigned revenue", i.e. an EU act that "assigns the revenue for which it provides to specific items of expenditure".[70] As "exceptional and one-off amounts"[71] these funds have been considered to come in addition to the EU's annual budget. In the December 2020 Interinstitutional Agreement between the EP, the Council, and the European Commission, the limited role of the former and the Council as budgetary authorities is recognised, and makeshift workarounds have been agreed upon, geared towards ensuring that in the context of the EU budgetary procedure both institutions are provided with relevant financial information by the Commission on the implementation of external assigned revenue under the EURI.[72]

What is more, by qualifying these funds in such a way, in technical legal terms they are considered to fall outside the scope of Article 310(1) TFEU, which inter alia states that *all* items of revenue and expenditure of the Union shall be sown in the budget (completeness of EU budget) and, moreover, the revenue and expenditure shown in the EU budget must be in balance, excluding the financing of operational costs through debt issuing.[73] This primary EU law provision does not rule out borrowing for the purpose of back-to-back lending, which can be considered budget neutral.[74] However, funds disbursed in the RRF take either the shape of *non-repayable* grants or loans that are not financed through back-to-back borrowing, but rather '…through a diversified funding strategy, which delinks the disbursement of loans to a Member State from the issuance of the EU bonds', whereby '… the repayments by the beneficiary Member States are used to service the EU debt'.[75] Leaving aside the salient question whether the construction of the EURI thus effectively amounts to a circumvention of the EU budgetary principles, these ad hoc and temporary arrangements, however much they may have been justified in the exceptional economic circumstances, do not lend themselves for a future permanent mechanism.

SURE and the RRF cannot be considered as a blueprint for securing the democratic legitimacy of a supranational fiscal shock absorption mechanism. The establishment of a permanent supranational shock absorption capacity in the shape of an automatic stabiliser and EU-financed discretionary fiscal policy instruments will have redistributional effects between the Member States and, moreover, may also entail a redistribution of spending priorities similar to what can be observed for RRF.[76] To be sure, as has been noted above, for RRF this is not achieved through additional net contributions by some Member States to the EU budget that are transferred to recipient Member States, but rather through common borrowing repaid

[68] Art. 312 TFEU and Art. 314 TFEU. Council Regulation 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, (2020) OJ L 433I/11 (as amended).
[69] Regulation 2018/1046.
[70] See Art. 3(1) Regulation 2020/2094.
[71] European Commission (supra, n 65).
[72] See Annex I, Part H, points 40-46 of the Interinstitutional Agreement 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 433I/28, Part H, point 39.
[73] Martin Nettesheim, 'Next Generation EU": Die Transformation der EU-Finanzverfassung', *Archiv des öffentlichen Rechts (AöR)* Jahrgang 145 (2020) / Heft 3, 381-437.
[74] Ibid, 418 et seq. ; Nettesheim (supra, n 62).
[75] Article 6(1) Regulation 2020/241; European Commission, 'Report from the Commission to the European Parliament and the Council on financial instruments, budgetary guarantees, financial assistance and contingent liabilities. Situation at 31 December 2021', Brussels, 28.10.2022, COM(2022) 560 final.
[76] Florian Dorn und Clemens Fuest, ' Next Generation EU: Gibt es eine wirtschaftliche Begründung?', ifo Schnelldienst 2 / 2021 74. Jahrgang 10. Februar 2021.

through the EU budget for which all Member States are jointly liable.[77] Still, as decision on redistributional policies should be the domain of democratically elected politicians, any such mechanisms call for adequate democratic legitimation. This is not limited to observing the democratic credentials of the legal acts on which these mechanisms are based and thus, the applicable legislative procedure, but mainly also mechanisms to hold the relevant institutional actors to account for their conduct.[78]

The establishment of the temporary increased supranational fiscal capacity to deal with the pandemic has relied on quasi-intergovernmental, rather than supranational decision-making procedures, which has severely limited the role of the EP as the only directly democratically legitimised EU institution. Concerning the EURI, it could be argued that at least to the extent that the necessary borrowing derives from the ORD democratic legitimation is ensured. After all, the ORD can be characterised as a quasi-primary EU law act, requiring the approval of all Member States and, moreover, the ratification by all Member States in accordance with their national constitutional requirements.[79] Yet, it seems exaggerated to conclude from this that this provides '… for the necessary democratic legitimacy' of the existing arrangements.[80]

Focusing here on the supranational level, reducing the role of the EP on such a fundamental issue as the authorizing of EU borrowing on capital markets to the right of being consulted, as provided by Article 311, para. 3, TFEU, hardly reflects the central position that the EP currently has in legitimizing the exercise of supranational public power foreseen in primary Union law. This also applies to the adoption of the EURI Regulation and the SURE Regulation. Article 122 TFEU foresees in a special legislative procedure in which the Council acts on a proposal from the Commission, whereby the EP is in principle only informed by the president of the Council.[81] The utilisation of Article 122 TFEU as legal basis is problematic considering that the EURI Regulation does not only determine the financing of the instrument and allocation of funds between grants and loans, but importantly also labels the funds borrowed by the European Commission on behalf of the EU as "external assigned revenue" with the legal consequences concerning namely the position of the EP, as highlighted above.

By contrast, the RRF Regulation has been adopted based on Article 175, para. 3, TFEU, which refers to the ordinary legislative procedure. On the one hand, the EP thus did have a decisive say in establishing the legal conditions under which the funds provided by the EURI Regulation are made available to Member States. On the other hand, the very limited role of the EP in the implementation of the RRF cannot be considered a blueprint for future permanent mechanisms.[82] Namely, the EP is not involved in the approval of the NRRPs and the associated payments-making, despite the considerable consequences for the financial position of the EU. The NRRPs are adopted by a Council implementing decision based on a Commission proposal.[83] Equally, the EP has not role in the suspending of commitments or payments to recipient Member State because of not meeting the milestones and targets agreed

[77] Whereby it has been noted that it is uncertain what the actual burden of Member States in the repayment due to '… uncertainty of gross national income projections up to 2058', see Zsolt Darvas, 'The nonsense of Next Generation EU net balance calculations', Policy Contribution 03/2021, Bruegel.
[78] The typology of input, throughput and output legitimacy can offer a useful and tested analytical tool in this regard, see Vivian A. Schmidt, *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press, 2020), chapter 2.
[79] Sandberg and Ruffert (supra, n 59) are nevertheless skeptical.
[80] European Commission (supra, n 65).
[81] Louis (supra, n 66), 983, regarding the decision-making procedure of Art. 122 TFEU observes that '[O]ne powerful arm of the budget authority' has been 'left out'.
[82] See also chapter 15 by Alastair MacIver in this edited volume.
[83] Art. 20 Regulation 2021/241.

upon in the NRRP, including compliance with rule of law conditionality[84], or not complying with any obligations deriving from the macroeconomic imbalances procedure or the balance of payments assistance facility.[85]

When it comes to holding the other main EU institutional actors to account for their action in the RRF, the legal framework follows a well-established formula in the EU economic governance framework that entails information rights and institutionalised regular exchanges with the EP.[86] Similar to what can be observed for the monetary policy (monetary dialogue), the European Semester (economic dialogue), and the Single Supervisory Mechanism (supervisory dialogue), the RRF Regulation foresees a Recovery and Resilience Dialogue between the EP and the European Commission.[87] It may still be too early to make a full assessment of the effectiveness of these exchanges. Yet, if the monetary dialogue[88] and supervisory dialogue[89] are any indication, the value of such a mechanism as a (democratic) accountability mechanism must not be overestimated.[90] Still, the EP has some instruments at its disposal to hold the Commission and – albeit to a lesser extent – the Council to account. Some of these are specific to the RRF Regulation, namely the EP's right to revoke the power assigned to the Commission to adopt delegated acts, blocking the adoption of any future delegated acts[91], and the general review clause, which may lead to an amendment of the Regulation subject to the ordinary legislative procedure.[92] Moreover, the EP has the instrument of parliamentary inquiries and the motion of censure vis-à-vis the European Commission at its disposal.[93]

Finally, in the context of the unprecedented pandemic, the EU could rely on a broad public support namely also regarding the provision of financial support to Member States.[94] However, to rely primarily on output legitimacy as main channel for the democratic legitimation of a future permanent shock absorption mechanisms is not a viable strategy. First, it cannot be taken as a given that the degree of public support for supranational fiscal

[84] On this point see chapter 13 by Niels Kirst in this edited volume.
[85] Art. 10 Regulation 2021/241. Reversed qualified majority decision making applies: a Commission proposal to this effect is considered to have been adopted by the Council unless the Council decides, by means of an implementing act, to reject such a proposal by qualified majority within one month of the submission of the Commission proposal.
[86] Information rights can be found in Arts. 10(7)-(8), 16, 25-26, 31, 32-34 of Regulation 2021/241 and, regarding the implementation of the EU Recovery Instrument in Part II, Point 17 of the Interinstitutional Agreement (supra, n 74).
[87] Art. 26 Regulation 2020/241.
[88] Fabian Amtenbrink and Kees van Duin, 'The European Central Bank before the European Parliament: Theory and Practice After Ten Years of Monetary Dialogue', (2009) 34 *E.L. Rev.* 561; Stefan Collignon and Sebastian Diessner, 'The ECB's Monetary Dialogue with the European Parliament: Efficiency and Accountability during the Euro Crisis?', 54 *JCMS - Journal of Common Market Studies* (2016), p. 1296–1312;
[89] See e.g. Fabian Amtenbrink and Menelaos Markakis, 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism', (2019) *European Law Review* 44(1), 3-23; Adina Maricut-Akbik, 'Contesting the European Central Bank in Banking Supervision: Accountability in Practice at the European Parliament', (58) *JCMS - Journal of Common Market Studies* (2020), 1199-1214.
[90] Edoardo Bressanelli, Nicola Chelotti, and Matteo Nebbiai, 'The Recovery and Resilience Dialogues: Cheap Talk or Effective Oversight?', *Politics and Governance* 2023, Volume 11, Issue 4, 297-310, 297. These authors summarise their finding by stating that '… the recovery and resilience dialogues are an effective instrument for information exchange and debate, but they serve as a weak instrument of political accountability.'
[91] Art. 33(3) Regulation 2020/241.
[92] Ibid, Art. 32.
[93] On these instruments Fabian Amtenbrink and Hans Vedder, European union Law (Eleven International Publishing, 2021, 133-136.levn publishers
[94] See European Commission, 'The EU and the coronavirus outbreak', Standard Eurobarometer. Summer 2020. Report, 16, stating what the EU should priorities in its response to the pandemic.

stabilisation measures that may occur in the case of very exceptional major crises occurring in all Member States, such as the pandemic, will be equally present in the case of a mechanism that may provide financial assistance to but a few Member States that are facing asymmetric shocks, whereby the risk-sharing or redistribution effects of such measures between Member States will become much more evident. Moreover, public support cannot compensate for a lack of input and throughput legitimacy.

**5. Conclusions**

The pandemic is a stark reminder of the need for a robust permanent fiscal shock absorption capacity in the EU and namely the euro area. As has been highlighted in this contribution, relying solely on Member States in this regard is not to a viable option. Indeed, not only may national automatic stabilizers lack the firepower to deal with a major (a-)symmetric economic shock, but experience shows that for various reasons at least some Member States are insufficiently capable of maintaining sound (counter-cyclical) budgetary policies that provide them with the financial headroom to engage in discretionary fiscal spending to mitigate crises. Doubts can be raised about the EU's ability to reform its economic governance framework to ensure the consistent compliance with a set of European rules that is geared towards ensuring fiscal sustainability.[95]

Regarding the debate on the feasibility and design of a future supranational fiscal shock absorption capacity, apart from highlighting the need for such mechanisms, perhaps the biggest added value of the temporary measures that have been taken in response to the pandemic lies in the uncovering of the various political, economic, and legal considerations that must go into its design. The crisis measures can be perceived as a legal testing ground highlighting the potential but also limitations of the current EU legal framework and specific legal constructs to provide the necessary fundament for future permanent arrangements.

This includes the current financing of the EU, which - compared to some countries - is downright poor, necessitating ad hoc legal arrangements to provide for the funding of much-needed discretionary fiscal policy measures to mitigate economic crises in the EU. Yet, before considering the establishment of structures geared towards a permanent EU borrowing capacity, the own resources of the EU should be structurally increased. Here, an increase of the GNI-based own resource provided through annual contributions by the Member States seems the most effective approach, as the creation of new own resources that are moreover not only geared towards financing the repayment of EU Recovery Instrument, such as the so-called plastic own resource, is unlikely to provide sufficient resources to increase the EU’s supranational fiscal capacity in a way that will allow discretionary fiscal spending to mitigate economic shocks.[96]

Financing permanent mechanisms through own resources rather than EU borrowing avoids the complex political and legal debates inter alia relating to the desirability of a mutualisation of debt, risk-sharing, the compatibility of such a system with the constitutionally protected position of national parliaments, as well as the positioning of the EP as a supranational source of democratic legitimation. At the same time, it must be recognised that the borrowing for the purpose of financing the EU’s crisis mitigation response has highlighted that the EU is

[95] Fabian Amtenbrink and Jakob de Haan, ‘The European Commission’s approach to a reform of the EU fiscal framework: A legal and economic appraisal’, (2023) *European Law Review* 48(4), 422-442. See also chapter 20 by Lucio Pench in this edited volume.

[96] Annex II of the Interinstitutional Agreement (supra, n 74) provides details on the interinstitutional cooperation regarding the introduction of new own resources.

certainly considered to be a credible and creditworthy sovereign debt issuer by the capital markets.

As to the establishment of a supranational automatic stabilizer, it can only be hoped that with the establishment of the temporary SURE new life can be brought to the supranational legislative efforts to create a European unemployment scheme. Yet rather than to rely on back-to-back lending by the EU based on discretionary decision making, a permanent scheme should be financed through contributions that are paid in advance directly by the social partners or through Member State's contributions.