The Future of EMU Architecture Post-COVID*,**

1 EMU AS A FIELD PERMANENTLY UNDER CONSTRUCTION OVER THE PAST DECADE

It is beyond any doubt that, since March 2020, European Union (EU) Member States and the EU institutions have been immersed in a race against the clock in trying to limit the negative consequences of the economic downturn provoked by the Coronavirus diseases 2019 (COVID-19) outbreak. The measures adopted, which have been both numerous and varied as shown in this editorial, may, for some of them, be viewed as groundbreaking or even revolutionary, whilst others 'solely' amount to the conclusion of negotiations that had been on-going when the pandemic broke out. As, for example, the European System of Financial Supervision (ESFS), created to reinforce micro – and macro-prudential financial supervision within the EU, celebrates its tenth anniversary[1]; there is, indeed, little doubt that the field of Economic and Monetary Union (EMU) has been constantly under construction over the past decade. The question thus arises as to how the reforms adopted in response to the COVID crisis fit within the pre-existing EMU governance framework as it had resulted from the economic and financial crisis, how it has developed generally so far and may be expected to continue to evolve in the future, and what sort of evolution would be desirable in view of the shortcomings that had become apparent prior to the pandemic; these are the pressing questions this special issue on the Future of EMU architecture post-COVID seeks to answer.

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1 European Commission, *European System of Financial Supervision* (accessed 15 Dec. 2020), https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/european-system-financial-supervision_en.

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The economic and financial crisis that broke out in Europe at the end of the 2000s as part of the Great (or Global) Financial Crisis, which started in 2007–2008 in the United States, led to the EMU framework established by the Treaty of Maastricht being significantly reshaped and reinforced. As is well-known, the EMU has been characterized by a severe asymmetry between, on the one hand, the monetary policy for which the Union has been attributed exclusive competence (within the Euro area), and economic and fiscal policy, where coordination among Member States only still applies. Member States have, for instance, the duty to respect the rules contained in the Stability and Growth Pact in designing their fiscal policies: this should lead to their maintaining sound public finances. Yet, they have regularly infringed these rules since their definition in 1997, and France and Germany were the first ones calling for their relaxation when the European Commission tried to enforce them strictly in the early 2000.[2] As it became evident that such lax application of the rules in place was one of the factors that contributed to the eurocrisis, the rules governing these efforts of coordination were significantly reformed, both by means of EU law and through the adoption of the intergovernmental Treaty on Stability, Coordination and Governance.[3] These reforms included, for instance, changes to the Stability and Growth Pact and the creation of the European Semester for economic coordination, with the latter having since been reformed on several occasions. EU institutions, and especially the European Commission, gained significantly more powers in this process.[4] Resultingly, Member States were called to act within the more stringent framework defined at the EU level and, therefore, parliaments' 'power of the purse' was reduced.[5] Yet, as these reforms also took a piecemeal approach, that is they occurred as the various crises arose and not as part of the realization of a master plan, the resulting legal framework is characterized by a very high level of complexity. It is defined both by instruments of EU and international law, and is defined by its differentiated application to Member States depending, for instance but not exclusively, on whether they belong to the euro area or not. Calls in favour of the simplification of the rules in

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2 Among many others, most recently: Caterina Domenicali, *La flessibilità dei numeri: la Commissione europea e le trattative multilivello sui bilanci nazionali,* in *Il governo dei numeri: Indicatori economico-finanziari e decisione di bilancio nello Stato costituzionale* 155–180, 167ff. (Corrado Caruso & Marta Morvillo eds, Il Mulino 2020).

3 The reforms conducted at that time are commonly referred to as 'eurocrisis law'. *See* among many others, *Constitutional Change Through Euro-Crisis Law* (Thomas Beukers, Claire Kilpatrick & Bruno de Witte eds, Cambridge University Press 2017); Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); Kaarlo Tuori & Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014).

4 Päivi Leino & Tuomas Saarenheimo, *Discretion, Economic Governance and the (New) Political Commission*, in *EU Executive Discretion and the Limits of Law* 132–154 (Joana Mendes ed., Oxford University Press 2019).

5 *See* on parliaments' standing in EMU post-crisis: Diane Fromage & Ton van den Brink eds, *National Parliaments, the European Parliament and the Democratic Legitimation of the European Union Economic Governance*, 40(3) J. Eur. Integration (2018).

place have been recurrent.[6] Already prior to the pandemic, a move towards the simplification of the rules and the procedures for economic and fiscal coordination appeared all the more necessary as, firstly, shortcomings had existed in Member States' observance of the existing rules,[7] and as, secondly, the control of their implementation by the European Commission and the Member States had, in practice, been characterized by flexibility and leniency. This state of fact has attracted criticism on the grounds of unfairness and lack of transparency. The European Commission launched a review of the effectiveness of the economic surveillance framework in February 2020, and it was thus still on-going as the COVID-19 crisis broke out.[8] Similarly, proposals to improve parliamentary scrutiny and accountability have recurrently been made.[9]

Next to these important changes made to the framework of economic and fiscal coordination within the EU, it should be noted that the European Central Bank (ECB), too, has significantly changed the instruments it uses in the conduct of its monetary policy in the past decade. It had to resort to unconventional monetary policy instruments, resulting in its now owning large amounts of euro area government debt.[10] These operations were challenged before national and European courts on several occasions, and most recently and problematically in the *Weiss* case whose decision the German Federal Constitutional Court rendered in the midst of the pandemic.[11] In this instance, the Federal Constitutional Court went as far as refusing the interpretation provided by the Court of Justice – which had confirmed the

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6 Most recently: European Fiscal Board, *Annual Report 2019* (28 Sept. 2019) (accessed 15 Dec. 2020), https://ec.europa.eu/info/sites/info/files/2019-efb-annual-report_en.pdf and European Commission, *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions on the Economic Governance Review Report on the Application of Regulations (EU) No 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013 and on the suitability of Council Directive 2011/85/EU*, COM(2020) 55 final (2020).

7 For example, in Dec. 2019, eight Member States' draft budgetary plans were assessed as non-compliant by the European Commission. Jost Angerer & Maja Sabol, *Implementation of the Stability and Growth Pact – March 2020*, Economic Governance Support Unit PE 497.746, 2 (2020). This was also one of the reasons why the European Commission launched its review of the EU economic governance framework in 2020: European Commission, *Commission Presents Review of EU Economic Governance and Launches Debate on Its Future* (5 Feb. 2020) (accessed 15 Dec. 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_170.

8 European Commission, *supra* n. 6.

9 In the most elaborate form as the Treaty on the democratization of the economic and social government of the European Union (T-Dem). Stéphanie Hennette et al., *How to Democratize Europe* (Harvard University Press 2019).

10 *See* for the corresponding figures: European Central Bank, *Asset Purchase Programme* (accessed 15 Dec. 2020), https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html.

11 This judgment has attracted unprecedented levels of attention by scholars from all over Europe. *See* for instance EU Law Live, https://eulawlive.com and Verfassungsblog, https://verfassungsblog.de, Fabian Amtenbrink & René Repasi, *The German Federal Constitutional Court's Decision in Weiss: A Contextual Analysis*, 45(6) Eur. L. Rev. 757–778 (2020) and Francesco Martucci ed., *La BCE, entre Union de droit et démocratie,* (4) Revue trimestrielle de droit européen (2020).

legality of the ECB's Public Sector Purchase Programme – and, instead, entrusting two German constitutional organs, the Bundestag and the Federal Government, with the task to ultimately decide on this matter. Regardless of how objectionable this outcome may be, it remains that the ECB's monetary policy, too, needs re-examining and adapting since it is conducted in an economic environment which has undergone dramatic changes over the past decade (as evidence of this, it suffices to mention the impossibility for the ECB to reach its inflation target). Like other central banks before it,[12] the ECB launched its monetary policy strategy review in January 2020, and it was expected to be completed by the end of the same year.[13] Due to the pandemic, this deadline had to be pushed back, and it is now expected around mid–2021.

The ECB's role and standing within the EU was further affected by the creation of the European Banking Union (EBU) in 2012.[14] The EBU enhanced the efforts of coordination in the area of supervision which had already started with the establishment of the ESFS in 2010. It is composed of three pillars: the Single Supervisory Mechanism (SSM), the Single Resolution Mechanism (SRM) relying on a Single Resolution Fund (SRF) operating on the basis of an intergovernmental agreement, and the European Deposit Insurance Scheme (EDIS). Whilst the SSM and the SRM could start functioning in 2014 and 2016 respectively, the EDIS is yet to be set up; the COVID crisis appears to have reinvigorated the debate on its establishment.[15] Furthermore, the SRF is considered to be too limited in size. A backstop is now expected to be set up and it is to be provided by the European Stability Mechanism (ESM).[16]

As part of this brief account of the evolution within the EMU over the past decade, the crisis instruments of financial assistance must be mentioned as well. The financial situations of several Member States indeed deteriorated to such a dramatic extent that common rescue mechanisms had to be designed at the EU level. These included the European Financial Stability Mechanism[17] and the Balance of Payments Facility (primarily) available to euro area and non-euro area Member States, respectively, as well as the temporary European Financial Stability Facility, which was replaced by the intergovernmental ESM in 2012. The creation of the ESM outside of

12 For example, the US Federal reserve also conducted a review. Board of Governors of the Federal Reserve System, *Review of Monetary Policy Strategy, Tools, and Communications* (accessed 15 Dec. 2020), https://www.federalreserve.gov/monetarypolicy/review-of-monetary-policy-strategy-tools-and-communications.htm.

13 European Central Bank, *Strategy Review* (accessed 15 Dec. 2020), https://www.ecb.europa.eu/home/search/review/html/index.en.html.

14 European Commission, *Communication from the Commission to the European Parliament and the Council a Roadmap Towards a Banking Union*, COM(2012) 510 final (2012).

15 Paschal Donohoe, *Letter to President Charles Michel of 4 Dec. 2020* (accessed 15 Dec. 2020), https://www.consilium.europa.eu/media/47177/20201204-letter-to-president-charles-michel.pdf.

16 *See* Menelaos Markakis in this special issue.

17 Alice Zoppè & Cristina Sofia Pacheco Dias, *The European Financial Stabilisation Mechanism: Main Features*, Economic Governance Support Unit PE 645.718 (2020).

the EU legal framework, and with the involvement of EU institutions in its operation, was subject to judicial review, but the Court of Justice eventually upheld its legality.[18] In 2015, the Five Presidents' report[19] started an initiative to deepen the EMU based on the fact that numerous reforms had been adopted as immediate responses to the crisis, but that the framework in place was not yet sufficiently strong to resist future crises. The enhancement of the ESM was part of this attempt, and the negotiations which started in October 2017[20] were only finalized very recently, on 30 November 2020.[21] At the time of submitting this special issue, the required ratification procedures at the national level still have to be completed, such that a successful outcome is not yet guaranteed,[22] despite the important role the ESM could have to play in the economic recovery post-COVID, inter alia as a backstop to the SRF.

A myriad of EU and non-EU institutions and (informal) bodies are involved in the EMU governance framework as it has resulted from the eurocrisis. The role and tasks they assume shifted, as is for instance visible in the fact that the European Council clearly took a lead in the management of the crisis, and in the fact that the Eurogroup was, among others, attributed important responsibilities in the rescue of national economies in difficulty. These shifts in the EU and national institutional frameworks were not accompanied by all-encompassing adjustments so that, for example, some accountability gaps have emerged. Important tensions also became visible in judicial proceedings before national and European courts, most notably in the *Pringle, OMT*, *Landeskreditbank* and *Weiss* cases.[23]

Finally, it should be noted that the process to deepen the EMU launched by the Five Presidents' report in 2015 did not only consist in the proposal to reform the ESM. It outlined four main areas of priority: a genuine Economic Union, a Financial Union requiring the completion of the EBU and a move

18 Case C-370/12, *Thomas Pringle v. Government of Ireland and Others,* ECLI:EU:C:2012:756.

19 Jean-Claude Juncker et al., *Completing Europe's Economic and Monetary Union* (22 June 2015) (accessed 15 Dec. 2020), https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf.

20 Eurogroup, *Eurogroup 9 October 2017 Main Results* (9 Oct. 2017) (accessed 15 Dec. 2020), https://www.consilium.europa.eu/en/meetings/eurogroup/2017/10/09/.

21 Eurogroup, *Statement of the Eurogroup in Inclusive Format on the ESM Reform and the Early Introduction of the Backstop to the Single Resolution Fund* (30 Nov. 2020) (accessed 15 Dec. 2020), https://www.consilium.europa.eu/en/press/press-releases/2020/11/30/statement-of-the-eurogroup-in-inclusive-format-on-the-esm-reform-and-the-early-introduction-of-the-backstop-to-the-single-resolution-fund/.

22 In Italy, voices against the reform have not lacked. Alessandro Follis, *Italian Opposition Forces Still Against ESM Reform*, Euractiv (2 Dec. 2020) (accessed 15 Dec. 2020), https://www.euractiv.com/section/politics/short_news/italian-opposition-forces-still-against-esm-reform/.

23 *See* the contribution by Marco Lamandini, David Ramos Muñoz and Violeta Ruiz Almendro in this special issue.

towards a Capital Markets Union, a Fiscal Union, and a Political Union 'that provides the foundation for all of the above through genuine democratic accountability, legitimacy and institutional strengthening'.[24] To reach these objectives, the Commission published discussion papers on Deepening the EMU and the Future of EU finances in Spring 2017,[25] and it presented a roadmap including a policy package in December 2017.[26] The proposed reforms would have entailed the creation of a European Monetary Fund which would have replaced the ESM, the 'integrat[ion] of the substance' of the TSCG in EU law, some changes in the Structural Reform Support Programme and the creation of new budgetary instruments for a stable euro area (which eventually served as a basis for the project of Budgetary Instrument for Convergence and Competitiveness (BICC),[27] since abandoned), a new European Minister of economy and finance, and a reform of the Common Provisions regulation.[28] This policy package did not far very well, as none of its flagship proposals were eventually adopted.[29] Discussions on the BICC and on the reform of the ESM Treaty were nonetheless still ongoing in March 2020.

The COVID-19 pandemic thus broke out at a point in time when numerous and varied shortcomings had become apparent and when, therefore, the norms governing the EMU were already being reviewed. Indeed, even though significant improvements could be witnessed in the years that followed the peak of the economic and financial crisis since, for example, Member States' economies became sounder or since the amount of non-performing loans significantly diminished, the EMU still had to be fully completed and reinforced.

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24 Juncker et al., *supra* n. 19, at 5.

25 European Commission, *Commission Sets Out Roadmap for Deepening Europe's Economic and Monetary Union* (6 Dec. 2017) (accessed 15 Dec. 2020), https://ec.europa.eu/commission/publications/completing-europes-economic-and-monetary-union-factsheets_en.

26 European Commission, *Communication on Further Steps Towards Completing Europe's Economic and Monetary Union: a Roadmap*, COM(2017) 821 final (2017); European Commission, *Completing Europe's Economic and Monetary Union* (6 Dec. 2017) (accessed 15 Dec. 2020), https://ec.europa.eu/commission/sites/beta-political/files/further-steps-completing-emu_en.pdf.

27 *See* on the BICC: Alice Zoppè & Cristina Sofia Pacheco Dias, *What do we Know About the BICC Today?*, Economic Governance Support Unit PE 634.359 (2020).

28 European Commission, *supra* n. 26.

29 *See* on some of the reasons for this: Paul Dermine, *The Commission's December Package 18 Months Later,* in *Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection* Maastricht Law Faculty Working Papers, WP 2019/03 (Diane Fromage & Bruno de Witte eds, 2019). Arguably, some of the Commission's proposals, such as the creation of a Minister of Economy and Finance, should be viewed as an attempt by the Commission to highlight existing issues and put them on the agenda, rather than as serious proposals. This is, for instance, visible in the fact that said proposal took the form of a Communication. *See* generally, on the difficulty of conducting reforms in EMU: Stefan Griller & Elisabeth Lentsch, *Why the EU's Constitutional Deadlock is Hampering EMU Reforms, and How This Could be Resolved*, J. Eur. Pub. Pol'y (2020).

2 THE COVID-19 PANDEMIC AS AN ADDITIONAL CATALYST FOR CHANGE

Before presenting a summary of the EU's response to the economic challenges posed by the current pandemic, its character as a moving target must be underlined. For instance, an agreement on the reform of the ESM Treaty has just been reached by the economic ministers of the euro area and endorsed by Heads of States and Governments at the time of submitting this special issue, but ratification at the national level is still required, and its positive outcome may not be taken for granted. Additionally, the breadth of the economic downturn, and the timing, the size and the shape of recovery are largely unknown. They are highly dependent on the evolution of the sanitary situation and the potential need to impose further lockdowns, both of which no one can possibly predict. Hence, it is uncertain at this stage whether the measures that have been taken so far will suffice, or whether, on the contrary, additional ones may still be required. This notwithstanding, it remains that the numerous and far-reaching developments of the first nine months following the COVID-19 outbreak (March 2020 – December 2020) are worthy of examination as they can already be expected to have long-lasting effects as shown by the articles included in this special issue. This is so for two main reasons. Firstly, the pandemic acted as an incentive to pass reforms that had been under discussion for long: it exposed the need to compensate for the existing gaps even more acutely. Secondly, the measures adopted – though meant to remain temporary – will no doubt have some consequences in the future as is shown in the remaining part of this editorial.

Even though the COVID-19 pandemic caught the EU – and the world – by surprise, Member States and EU institutions alike were remarkably swift in adopting measures to counter the negative shock caused by the pandemic and the ensuing lockdowns and hindrances to international trade.[30] They adopted both short-term instruments, as well as longer-term ones in all areas of EMU, i.e., monetary policy, fiscal and economic coordination, support to the banking system and companies, and financial assistance.

To the first category belong measures adopted by the ECB, the European Commission, and the Member States acting within the (European) Council as well as other bodies and agencies, such as the European Banking Authority (EBA).[31] The

30 A constantly updated timeline is being kept by the European Commission. *See* European Commission, *Timeline of EU Action* (accessed 15 Dec. 2020), https://ec.europa.eu/info/timeline-eu-action_en. Furthermore, the European Banking Institute publishes a weekly report on the 'Pandemic Crisis-related' *Economic Policy and Financial Regulation Measures: International, EU and Euro Area Levels'* (accessed 15 Dec. 2020), https://ebi-europa.eu/covid-regulatory-tracker/. The European Parliament also regularly publishes an account of the adopted measures: 'EU/EA measures to mitigate the economic, financial and social effects of coronavirus'.

31 The European Investment Bank, too, deployed a set of measures which are, however, beyond the scope of the present analysis.

ECB's reaction was particularly swift as it already acted when lockdowns and restrictions started to be introduced in March 2020.[32] It aimed at increasing banks' lending capacities, guaranteeing financial stability through international cooperation, ensuring that short-term concerns do not prevent lending, preserving access to credit for firms and households, maintaining affordable borrowing, and supporting the economy to absorb the shock caused by the pandemic. As part of the measures adopted, the Pandemic Emergency Purchase Programme (PEPP) deserves to be outlined as it may be expected to be the object of judicial review like the PSPP already was. The European Commission's response intervened very soon after the outbreak of the pandemic as well. It, for instance, relaxed the rules governing State aid by means of its State Aid Temporary Framework so that Member States could protect their economy, and it proposed the relaxation of the capital requirements set on banks.[33] The operation of the EU's framework for bank supervision was generally adapted by the EBA and the ECB. Furthermore, the rules set out by the Stability and Growth Pact were (temporarily) suspended following the first-ever activation of the escape clause after the Commission had made a proposal in this sense on 20 March 2020.[34] Financial assistance was secured to Member States should they need it: one of the instruments of the ESM created in 2012 in response to the eurocrisis served as a basis for the Pandemic Crisis Support. Euro area Member States in distress may thus apply for precautionary financial assistance amounting to up to 2% of their GDP, whilst non-euro area Member States may avail themselves of the Balance of Payment Facility.

Recognizing that the fiscal space available and hence their capacity to support their economies varied significantly across the different Member States, Member States mobilized swiftly as well. The temporary Support to mitigate Unemployment Risks in an Emergency (SURE) instrument was approved in May 2020.[35] To support the implementation of their short-term schemes, Member States may receive up to 100 billion from SURE which allows the EU to provide loans under

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32 *See* the ECB's website section dedicated to its response to the pandemic outbreak for an account of all the measures adopted: European Central Bank, *Our Response to the Coronavirus Pandemic* (accessed 15 Dec. 2020), https://www.ecb.europa.eu/home/search/coronavirus/html/index.en.html.

33 European Commission, *Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak*, OJ C 91I (2020) and Regulation (EU) 2020/873 of the European Parliament and of the Council of 24 June 2020 amending Regulations (EU) No 575/2013 and (EU) 2019/876 as regards certain adjustments in response to the COVID-19 pandemic (CRR – Capital Requirements Regulation – 'quick fix'), OJ L 204.

34 European Commission, *Coronavirus: Commission Proposes to Activate Fiscal Framework's General Escape Clause to Respond to Pandemic* (20 Mar. 2020) (accessed 15 Dec. 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP. *See also* the in-depth analysis prepared by Erik Jones for the European Parliament: Erik Jones, *When and How to Deactivate the SGP General Escape Clause?*, Economic Governance Support Unit PE 651.378 (2020) and Paul Dermine in this special issue.

35 Council Regulation 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, *OJ L 159*.

favourable terms. To be eligible for these loans, however, Member States first need to set up short-term schemes using their own resources, which EU funds only complement but do not replace. Although the EU budget acts as a guarantee as well, Member States have had to provide guarantees to back the bonds issued by the European Commission on international capital markets on behalf of the EU to finance SURE. The legal basis for SURE is Article 122(1) and (2) Treaty on the Functioning of the EU (TFEU), which provides that the Council may adopt, by qualified majority, measures to provide Union financial assistance to Member States faced with severe difficulties caused by exceptional occurrences beyond their control. Under this procedure, the European Parliament is not involved, and neither are national parliaments since this proposal does not fall within the remit of the usual scrutiny and subsidiarity procedures. It must be noted that the Eurogroup (in inclusive format, i.e., with the ministers from all EU Member States and not only from the euro area) played a key role in the set-up of SURE, since it was tasked to design proposals to counter the COVID-19 pandemic by the European Council.[36]

These measures adopted in the immediate aftermath of the pandemic were also complemented by longer-term instruments to ease the economic recovery. Two instruments, a specific recovery programme (Next Generation EU (NGEU) and the Multiannual Financial Framework (MFF) are meant to be used to this end. They are intrinsically linked as remarked by the European Council in July 2020:

> NGEU and MFF go together. We need the Recovery effort as a quick and effective answer to a temporary challenge, but this will only yield the desired result and be sustainable if it is linked to and in harmony with the traditional MFF that has shaped our budgetary policies since 1988 and offers a long-term perspective.[37]

Actually:

> [t]he choice, made by the European Council in July, to link Next Generation EU to the existing European financial procedures and, in particular to the seven-year budgetary cycle, was somewhat mandatory, both for the overlapping timing – the MFF not having being adopted since it was first presented in 2018, but due by the end of 2020 –and for the need to respect the EU Treaty provisions (Articles 310 and 312 TFEU) and the Financial Regulation (Regulation EU, Euratom 2018/1046, Articles 7, 17 and 33), in particular the principles of unity of the budget, of equilibrium, of sound financial management and of ordered development of the expenditures within the limits of the own resources.[38]

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36 European Council, *Joint Statement of the Members of the European Council* (26 Mar. 2020) (accessed 15 Dec. 2020), https://www.consilium.europa.eu/media/43076/26-vc-euco-statement-en.pdf. In fact, prior to that, the Eurogroup had already adopted a statement on the economic policy response to the COVID-19 outbreak on 16 Mar. (accessed 15 Dec. 2020), https://www.consilium.europa.eu/en/press/press-releases/2020/03/16/statement-on-covid-19-economic-policy-response/#.

37 European Council, *Special European Council Meeting,* Conclusions 1 (17–21 July 2020).

38 Cristina Fasone, *The European Parliament Faces up to the Recovery and Resilience Facility,* in *National and European Parliamentary Involvement in the EU's Economic Response to the COVID Crisis*, Weekend Edition No. 36 EU Law Live, 13 (Bruno Dias Pinheiro & Diane Fromage eds, 2020).

The Resilience and Recovery Facility (RRF) is the most important one of the seven programmes comprised in NGEU. It is proposed on the basis of Article 175(3) TFEU on the EU's cohesion policy, and the Structural Funds that contribute to its objective. It provides that:

> [i]f specific actions prove necessary outside the Funds and without prejudice to the measures decided upon within the framework of the other Union policies, such actions may be adopted by the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

The European Parliament is thus a co-legislator.[39] To finance NGEU, Member States agreed, by means of the Own Resources Decision, to the Commission borrowing 750 billion euros on behalf of the EU. Of these 750 billion euros, 360 billion are to be granted as loans whilst the remaining 390 billion euros would be grants which Member States would thus not have to repay. Repayments are furthermore scheduled at a much later stage as they are not expected before 2058. Differently from what was put in place for SURE, the Commission's bond issuance programme is to be backed by (callable) Member States' contributions to a (temporary) expansion of the Own Resources ceilings. For this to be possible, the European Parliament and national parliaments must be involved though. In the process of the necessary changes to the Own Resources Decision, which is defined in Article 311 TFEU, the European Parliament is only to be consulted by the Council whilst national parliaments' consent may be required: Article 311(3) TFEU indeed provides that:

> [t]he Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

This matters as political agreement among the Member States could only be reached with difficulty in December 2020 owing to Member States' contrasting views on the rule of law conditionality now applicable in the implementation of the EU budget overall.[40] In fact, at the time of submitting this special issue in December 2020, the

[39] This could, in fact, be the reason why the RRF was proposed on the basis of Art. 175(3) TFEU where Art. 122 TFEU may have been the most obvious legal basis.

[40] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 Dec. 2020 on a general regime of conditionality for the protection of the Union budget, *OJ L 433I*. *See* on this controversy and its outcome: Kim Lane Scheppele, Laurent Pech & Sébastien Platon, *Compromising the Rule of Law while Compromising on the Rule of Law,* Vervassungsblog (13 Dec. 2020) (accessed 15 Dec. 2020), https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/; Aleksejs Dimitrovs, *Rule of Law-conditionality as Interpreted by EU Leaders,* EU Law Live, Op-Ed (11 Dec. 2020).

adoption and the ratification procedures required to set up all these instruments adopted in response to the pandemic crisis are yet to be completed.

Prior to turning to the presentation of the contributions to this special issue in the next section, some additional remarks related to the general context are in order. Indeed, despite their not being strictly (or only) related to EMU, two additional elements to the circumstances under which the pandemic struck the EU should still be mentioned because they have had some influence on the form of the response to it, and may be expected to be relevant in the future.

The first one is Brexit, which is relevant for several reasons. First, it is the British opposition that forced the resort to intergovernmental cooperation (as opposed to EU law instruments) in the response to the economic and financial crisis. Second, with the exit of the United Kingdom (UK), the balance between the euro area and non-euro area, and therefore between euro area and EU-27/Internal market is significantly diminished, and this gap is further reduced following the accession of Bulgaria and Croatia to the 'euro area waiting room' (ERM II) in July 2020. Third, the departure of the UK enhances the need for EU Member States to be more cohesive as a block and thus to have a stronger common framework within the EU, so that the EU as a whole may compete on an equal footing with the UK. Finally, the never-ending tumultuous negotiations with the UK are one of the reasons why the MFF covering the period between 2021 and 2027 still had not been agreed upon at such a late point in time prior to its beginning. Yet, as highlighted above, this may be viewed as both a threat and an opportunity.

The second development which could play a decisive role in shaping the EMU going forward is the *Weiss* decision of the German Federal Constitutional Court. At first sight, the risk that it leads to a dramatic outcome for E(M)U integration may appear to have vanished by now. A pragmatic solution could be found without the ECB having to answer directly to two national constitutional organs upon the request of a national court as anything else would have amounted to a denial of the Court of Justice's authority, and the legality of the ECB's action has been confirmed. Better still, Germany's support for the European Commission's large-scale issuance of bonds and the attribution of grants and loans in the framework of the RRF (as opposed to loans only) has been interpreted as a means to counter-balance the Constitutional Court's decision. However, it would certainly be naïve to believe that everything is for the best in the best of all possible worlds. Despite repeated statements arguing that the *Weiss* judgment leaves the legality of the PEPP deployed by the ECB in response to the pandemic unaffected, a procedure to challenge it has already been launched, as has been a procedure to dispute the legality of the way in which the *Weiss* judgment has been executed. As the sentiment that the pandemic crisis is exogenous and symmetric disappears, and as its full economic impact comes to sight, it is likely that the true consequences for the EU legal order of the profound *malaise* evidenced by *Weiss* will appear. In other words, the response provided to the Court's judgment does not solve the problems in the design of the EMU it underlines, like it does not eliminate the differences in Member States' stances on the conduct of economic and fiscal policies.

3 WHERE DO WE STAND? PRESENTING THE CONTRIBUTIONS TO THIS SPECIAL ISSUE

This special issue examines the reforms to the EMU architecture recently conducted from a variety of perspectives, which justifies some of the measures being considered in more than one of the contributions to it.

It begins with an analysis of the EMU framework as it currently stands, and aims at identifying and solving the sometimes dramatic clashes which have occurred in the areas of Monetary Union, Banking Union and fiscal and budgetary coordination. To this end, in their contribution, Marco Lamandini, David Ramos Muñoz and Violeta Ruiz Almendral underscore the disconnect existing on the one hand between a very sophisticated EMU framework and, on the other, the absence of underpinning political consensus regarding its definition, and how it should continue to evolve in the future. They show that the existing misalignments, which have become visible for instance in the clash between national and European courts, is largely a problem of framework and of an insufficient dialogue. To remedy these issues, they first suggest that 'more imaginative dialogue(s)' be established between national and European Courts. The referring Constitutional Court could be given special standing in preliminary reference procedures where the last say belongs to the Court of Justice, whereas a 'reverse reference' where the Court of Justice asks national courts a question could be established when the Court of Justice is called to adjudicate on national law's constitutionality. Second, the authors propose the creation of a multi-level 'Single Accountability Mechanism' encompassing court-administered legal accountability, as well as political and specialist/administrative levels. Finally, they also argue in favour of parliaments making a more extensive use of the tools at their disposal.

The second contribution to this special issue by Paul Dermine considers if, and to what extent, the response to the COVID crisis in the realm of fiscal policy is characterized by change or, on the contrary, whether it may be viewed as being in the continuity of the path adopted thus far. To fulfil this goal, he provides one of the first finely grained analysis of the measures adopted thus far in terms of negative and positive fiscal integration, i.e., surveillance, and common fiscal instruments on the basis of solidarity to foster economic recovery. In so doing, Paul shows that some of the lines that had been deemed uncrossable, for instance because they required risk-sharing, were unexpectedly crossed in a clear demonstration of solidarity among

States. Thus, 'the EU's initiatives are exceptional, embody a new approach to fiscal policy, public investment, and their role in the EU's policy mix, and contribute to rebalance the negative and positive prongs of fiscal integration'. At the same time, Paul also outlines that next to these novel elements, 'the EU's fiscal response is largely embedded into the wider, pre-existing policy framework of EU economic governance, and continues, in many regards, the institutional philosophy of that system we inherited from the Eurozone crisis'. Though he (rightfully) refrains from making any prognosis for the future, Paul concludes that the evolutions witnessed in the past months could lead to long-lasting changes in EU fiscal policy.

In the third article of this collection, Menelaos Markakis focuses on the recent evolution of the ESM both still pending because to be induced by its reform (on which political agreement could be reached in early December 2020), and already enacted by its use as one of the instruments to counter the negative economic consequences of the pandemic. Regarding this latter issue, he sets out how the ESM was put to good use to offer a safety net to Member States in the form of precautionary financial assistance, and examines how this use differs from the one made of the ESM until now. Followingly, he offers a very detailed account of the changes that may be expected and the process that led to their introduction, and finds that the proposed reform has the potential to remedy some of the gaps that have arisen in the field of EMU, for instance in the area of banking resolution to which it is meant to contribute as a backstop, and in the changes made to precautionary financial instruments. The role of the ESM Managing Director is found to have been clarified and strengthened in financial assistance, which is a welcome development as well. Yet, Menelaos also criticizes the missed opportunity this reform embodies for a much-needed improvement of the ESM's governance structure, the status of the non-Euro area Member States within it and issues of transparency and accountability. He finally (critically) discusses the ESM's maintained status outside of the EU legal framework.

The final article included in this special issue by Diane Fromage looks at the issues of institutional balance and (dis)unity within E(M)U. It analyses how the balance among (EU) institutions in the answer to the pandemic crisis may be compared to the one that had emerged in the answer to the euro crisis. The study of the measures adopted during the first nine months of the pandemic reveals that even if a broader range of EU institutions and bodies have mobilized (and even though they have acted much more swiftly and in a more comprehensive way), it is still the Member States that have the last word when there are financial implications, whilst the Commission rather continues to assume a role of technical expertise. The predominance of the European Council which had become visible in the response to the eurocrisis endured, but the decisive role attributed to the Eurogroup (in inclusive format) is a distinct feature of this crisis. The article also looks at the divide between euro area and EU27 which appeared to become an ever more permanent feature of the EU in the past decade, and finds that the instruments adopted in response to the pandemic, as well as other phenomena including Brexit, actually point towards more unity within the E(M)U. Such a development would be most welcome to reduce complexity and enhance accountability and legibility, not least towards citizens.

4 WHERE IS EMU (ARCHITECTURE) HEADING POST-COVID?

As already mentioned, at the time of submission, the responses to the economic consequences of the pandemic are still being crafted, the exact depth and shape of the economic damages that the COVID-19 outbreak will cause eventually are still impossible to predict, and it is thus impossible to know whether the solutions envisaged so far will suffice. Therefore, any conclusions may only be preliminary at this stage.[41]

This notwithstanding, some larger trends are already taking shape along the lines of (temporary) changes, but also (and primarily) continuity.

Elements pointing towards some changes relate to the pace of the EU's and Member States' response and the breadth of the measures it contained, the balance among the institutions involved in the response, the alliances among Member States, and obviously the financing and the size of the adopted programme of economic recovery. As shown in section 2 of this editorial and in the articles contained in this special issue, the EU institutions and the Member States' mobilization was immediate, and the measures adopted unprecedentedly far-reaching and varied. This may be a sign that some lessons were learnt from the previous crisis, but could also have been facilitated by the exogenous and symmetric character of the crisis: as all Member States were simultaneously affected by an event outside of their control, an agreement could be more easily found. In terms of institutional balance, first, as a result of the variety of the instruments deployed, this time around the ECB was not left alone and, therefore, responsibilities were more equally spread among EU institutions, and especially between the supranational institutions and the Member States. Whereas the coordination of the European response undoubtedly falls under the European Commission's remit, Member States' governments played a predominant role as well; this is arguably an element pointing towards continuity as the European Council was the main decision-making forum again. Yet, the Eurogroup meeting in inclusive format, that is bringing all the finance ministers together and not only those representing euro area Member States, was also actively mobilized, leading, inter alia, to an even larger accountability gap owing to the Eurogroup's informal

[41] Some of these elements were outlined by Bruno de Witte in his conclusions to the workshop during which the papers included in this special issue were presented.

nature. This de facto duplication of the ECOFIN Council should arguably be fought against in the future where possible, especially considering the (controversial) undefined nature of the Eurogroup as an informal body.[42] It is furthermore interesting to observe that EU Member States have been divided in new blocks, with the four self-proclaimed 'frugals' (Austria, Denmark, Finland and the Netherlands) clearly standing out. Finally, the response to this crisis represents a paradigmatic change as it contains numerous elements of solidarity among Member States: both SURE and NGEU are financed by bonds issues by the European Commission at advantageous rates, and NGEU foresees that a large share of the funding made available be channelled to the Member States in the form of grants instead of loans. At the same time, however, this change may not be as groundbreaking as it seems: first, both SURE and NGEU are temporary instruments. They are not the stabilization instrument many have been long wishing for, and at this stage at least, it is unlikely that a step in such direction be taken any time soon considering how important the temporary and limited character of these instruments were to some of the Member States, and especially the 'frugals'.[43] Second, although of course symbolically the value of these instruments should not be undermined, their size remains limited and is unlikely to suffice to compensate for the huge downturn Member States economies will suffer from in the next years. Hence, especially if no sufficient safeguards are put in place to guarantee that funds are adequately spent and may even be spent by all the Member States,[44] it is doubtful whether their added-value will be as great as it should be, or whether this will become sufficiently known to citizens. Nonetheless, the agreements on SURE and NGEU are certainly significant because of the radical change in Germany's attitude they symbolize. Whereas Germany had pushed for austerity and the self-responsibility of the individual Member States until now, in the response to the COVID crisis, it has supported solidarity among Member States. This change may be due to the dire situation Germany found itself in after the *Weiss* judgment, but it could also be explained by the fact that more solidarity fosters the good functioning of the Internal market, which is in Germany's own interest. Whatever the underlying motivation, Germany's change of attitude was certainly decisive in allowing for a European response to be agreed upon.

As groundbreaking as they are, the latest developments are also decisively characterized by their alignment with the pre-existing framework and dynamics (admittedly, in view of the stalemate that had characterized the reform discussions

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42 Most recently on this issue: Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, *Council v. Chrysostomides & Co. and Others*, ECLI:EU:C:2020:1028.

43 Bruno Dias Pinheiro & Diane Fromage, *National Parliaments and Their (Limited) Role in the EU in a Crisis: The Example of SURE*, Weekend Edition No. 36 EU Law live, 5–11 (2020).

44 The Member States that most need them may indeed not be able to disburse the huge amounts of funds put at their disposal. Financial Times, *EU Recovery Plan Faces Bottleneck, Economists Warn* (5 Jan. 2021).

over the past years, it could perhaps not have been otherwise). Such continuity materializes in the following way: as noted above, Member States governments do still play a predominant role. Likewise, the hybrid nature of the rules governing EMU between EU norms and intergovernmental agreements was not only confirmed but further reinforced. Especially the ESM came centre-stage, both in the immediate response to the pandemic crisis, and in the longer-term response. Also, the legal bases used for the instruments were in line with pre-existing practice as evidenced, for example, by the resort to Article 175 TFEU despite the fact that the link to cohesion policy is dubious or, at least, despite Article 122 TFEU appearing to be a more natural legal basis for the type of instruments adopted. The modes of implementation designed for these programmes were also identical: the pre-existing European Semester is meant to be used as a vehicle for yet again another procedure even if it has not proved fully fit for purpose, and EU funds in the RRF are meant to be disbursed via the standard EU programmes. Finally, as shown by Paul Dermine especially, the fiscal policy measures still largely match the prevailing philosophy to date.

When seeking to provide a preliminary assessment of the EMU architecture post-COVID, we thus notice that the (im)balance in the degree of supranational integration that exists between the different components of EMU as a result of the existing Treaty framework naturally remains, but is diminishing, following a trend already launched in response to the eurocrisis. The flexibility provided by the current legal framework has, again, been widely exploited, and this must certainly be praised. As, however, these changes happen on a case-by-case basis and as the whole institutional architecture is not adapted at the same pace, important shortcomings arise that will need remedying to ensure the viability and the future legitimacy of the system in place. Some pragmatic solutions may be found without any Treaty change, as shown in this special issue. In view of the dire economic situations Member States will no doubt find themselves in in the coming years, they and the EU institutions alike would thus be best advised to continue the extraordinary efforts they have made since March 2020 in patching the existing gap and enhancing the EMU's resilience generally.

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