

# **Europe's Fractured Metabolic Constitution: From the Eurozone Crisis to the Coronavirus Response**

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## Summary

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## Abstract

*Among the many meanings given to the idea of a European ‘constitution’, perhaps the most widespread relates to the limitation and constraint of power. Missing from this conception, however, is arguably the very essence of genuinely ‘constituted’ authority: the capacity to mobilise fiscal resources—most importantly via taxation—in a legitimate and compulsory fashion, a power the EU obviously lacks on its own. We can call this the ‘metabolic constitution’ of the EU, a term meant to focus our attention on the capacity of a polity to convert resources into work toward public ends. The EU’s metabolic constitution is fractured in several ways, most importantly because of its complete dependence on the taxing power of the Member States severally. This dependence has limited the EU’s autonomous capacities to address a range of challenges over the last decade, from the Eurozone crisis, to the climate emergency, to the coronavirus pandemic response. This article surveys the evolution of the EU’s metabolic constitution over the many crises of the last decade and then considers whether and to what extent the most recent initiative in this regard—the common borrowing in the ‘Next Generation EU’ recovery fund in response to the coronavirus pandemic—can be understood as a critical juncture in the EU’s capacity to mobilise resources on its own, unmediated through the Member States.*

## 1. Introduction: Resource Mobilisation and the Essence of ‘Constituted’ Power

In 1986, in the landmark *Les Verts* judgment, the Court of Justice famously described the European Treaties as a ‘constitutional charter of a Community based on the rule of law’.<sup>1</sup> This lofty characterisation—which now casts the European Union (EU) as a vehicle for ensuring the rule of law through the enforcement of seemingly constitutional principles—has long dominated European legal scholarship even as there are persistent concerns today about its aptness.<sup>2</sup> This characterisation nonetheless contains an important element of truth, at least on a semantic level. Among the many meanings given to the term ‘constitution’,<sup>3</sup> perhaps the most widespread in the EU relates to the limitation and constraint of power, and more particularly of *national* power. For many advocates of integration, this function serves as integration’s ultimate *finalité*, addressing the pathologies of nationalism after the atrocities of 1914–1945, countering the ‘democratic malfunctions in national political processes’<sup>4</sup> and taming the domination of one or more nation-states over others.<sup>5</sup> The internal market has certainly been one the major achievements of that effort, requiring Member States in the EU to delegate power to supranational ‘pre-commitment’ bodies—the European Commission, the Court of Justice of the European Union (CJEU)—to police the Member States’ fulfilment of their mutual legal commitments to each other and thus prevent the asymmetric vindication of power by any single Member State.

And yet, even as the Union’s output legitimacy (at least in terms of a prosperous internal market) has arguably met expectations, the EU is nonetheless often portrayed as a paradoxical combination of strength and weakness. On the one hand, the Union itself has been accused of questionable self-empowerment,<sup>6</sup> as well as developing mechanisms of democratic legitimization that are far too weak to counter-balance the EU’s ‘supranational

<sup>1</sup> ECJ 23 April 1986, Case 294/83, *Parti écologiste ‘Les Verts’ v European Parliament*, para 23.

<sup>2</sup> This is particularly the case with regard to so-called ‘rule of law backsliding’. See, e.g., D. Kochenov and L. Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’, 11 *European Constitutional Law Review* (2015), p. 512.

<sup>3</sup> See R. Schütze, ‘Constitutionalism’, in R. Masterman and R. Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019) p. 40.

<sup>4</sup> M. P. Maduro, ‘Passion and Reason in European Integration’, FCE 3/10 *Forum Constitutionis Europae* (Humboldt University, Walter Hallstein-Institut Für Europäisches Verfassungsrecht 2010) p. 6.

<sup>5</sup> R. Bellamy, *A republican Europe of states. Cosmopolitanism, intergovernmentalism and democracy in the EU* (Cambridge University Press 2019) at p. 174–208.

<sup>6</sup> P. Lindseth, ‘The metabolic constitution and the limits of EU legal pluralism’, in G. Davies and M. Avbelj (eds.), *Research handbook on legal pluralism and EU law* (Edward Elgar 2018) p. 227.

technocracy'.<sup>7</sup> On the other hand, in terms of resources available to it, the EU is broadly recognised as quite weak. At least up until the coronavirus pandemic (about which more below), the EU's budget was capped at a level between 1.29% of all the Member States' GNI for commitment appropriations and 1.23% of the EU GNI for payment appropriations<sup>8</sup> (amounting to 153 billion euro in payments for 2020). In other words, the budget was traditionally set at an amount much smaller than the average budget of a medium-size Member State. This could hardly be sufficient to fulfil the demanding objectives set forth in the Treaties, much less addressing a crisis on the scale of the climate emergency or the coronavirus pandemic. According to the objectives set out in Article 3 TEU, integration is, among other things, supposed to help achieve 'the well-being of its peoples' and 'a highly competitive social market economy, aiming at full employment and social progress', while also 'combat[ting] social exclusion and discrimination' and contributing to 'the sustainable development of the Earth' and the 'eradication of poverty.'

But one might fairly ask: How could the EU possibly achieve these demanding goals if it lacks the ability to mobilise its own revenues, most importantly via its own taxing and borrowing authority? The EU Decision on own resources—which applies *both* to taxes as well as common borrowing under the Multiannual financial framework (MFF)—requires unanimity in the Council and only the consultation of the European Parliament, and its entry into force is conditional upon the approval of the Member States according to domestic constitutional requirements (Article 311 TFEU). Moreover, the EU budget has traditionally been financed by national contributions (nearly 80%), whereas the remainder has come from a series of taxes that are in fact collected nationally—historically sugar levies, custom duties, and a percentage of the harmonised Value Added Tax (VAT).<sup>9</sup> The pandemic response has altered this reality only slightly, by adding to these nationally-collected taxes a layer of shared EU debt, allowing the budget to reach a level of roughly 2% of GNI for a limited two-year period.<sup>10</sup> However, just as before, this debt will be backed by tax revenues mobilised at the national level, not the EU's own taxing authority.

In other words, there remains no EU tax collection service that 'wears the EU badge', so to speak, operating on the basis of the EU's own autonomous legitimacy rather than that of the Member States. The absence of a supranational power and legitimacy to mobilise these resources directly has created never-ending tensions around the EU budget between Member States that are net contributors and those that are net beneficiaries, as well as the recurrent claims by the former to so-called 'rebates' (first of all for the UK—while it was still a Member State—and thereafter for such net contributors as Austria, Denmark, Germany, the Netherlands, and Sweden).<sup>11</sup> The last decade of crisis in the EU has only accentuated these tensions in the European system. During the Eurozone crisis, observers

<sup>7</sup> N. Scicluna, 'Politicization without democratization: How the Eurozone crisis is transforming EU law and politics', 12 *International Journal of Constitutional Law* (2014), p. 545 at p. 562 ff.

<sup>8</sup> Article 3 of Council Decision 2014/335 on the Union's own resources.

<sup>9</sup> C. Fasone and N. Lupo, 'The Union Budget and the Budgetary Procedure', in R. Schütze and T. Tridimas (eds.), *Oxford Principles of European Union Law*, Vol. I (Oxford University Press 2018) p. 809 at 814-816.

<sup>10</sup> See *infra* nn. 92-102 and accompanying text.

<sup>11</sup> R. Crowe, 'The European Budgetary Galaxy', 13 *European Constitutional Law Review* (2017) p. 428 at p. 432-433.

rightly criticised the nature and the pace of the supranational response,<sup>12</sup> which was constrained in considerable part by the EU's lack of autonomous fiscal capacity. The persistent reliance on intergovernmentalism, as well as the use of extra-EU sources of law to manage an obviously pan-European problem—not to mention a heavy reliance on unconventional monetary measures by the European Central Bank (ECB)—brought the legitimacy and effectiveness of the collective European response into question.

The Eurozone crisis, alongside the incomplete nature of the Economic and Monetary Union (EMU)—long devoid of a fiscal pillar<sup>13</sup>—brought to the fore one of the main weaknesses of the European system: While the EU may claim an autonomously constitutional character, that character is based almost entirely on constraining Member States' power. The EU cannot, however, compel the legitimate mobilisation of resources on its own accord—arguably the very essence of genuinely 'constituted' authority. As argued elsewhere:

(...) The 'constitution' of power entails the sociopolitical emergence of mechanisms to extract and redirect ('mobilize') human and fiscal resources in a legitimate and compulsory fashion. Legitimate compulsory mobilization is the crucial element in the political metabolism of a community, converting social and economic resources into work for public ends. This 'metabolic' function, if you will, is the essential element of any genuinely 'constituted' public authority. (...) In this sense, legitimate compulsory mobilization is the true *sine qua non* of constitutional authority.<sup>14</sup>

Regardless of the breadth of the EU regulatory powers,<sup>15</sup> the unwillingness of Member States to equip the EU with the autonomous power to mobilise revenues in a compulsory fashion casts serious doubt on the EU's purportedly constitutional character, at least in the most robust sense. The metabolism of the EU remains primarily in the hands of the Member States and their budgetary authorities, even as that power is now subject to regulatory constraints at the supranational level. The conditionality imposed by the EU on this power may have many variants—linked, as it often is, to financial assistance, the compliance with macroeconomic rules, green standards, or the rule of law. But despite that conditionality, the situation—in terms of the actual mobilisation of resources—is not unlike the 'pre-constitutional' United States under the Articles of Confederation, in which the 'confederal' level, such as it was, remained entirely dependent on the polycentric legitimacy of its constituent states to mobilise resources on the confederation's behalf.<sup>16</sup>

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<sup>12</sup> M. Dawson and F. De Witte, 'Constitutional Balance in the EU after the Euro-Crisis', 76 *Modern Law Review* (2013) p. 817; A. Menéndez, 'The Existential Crisis of the European Union', 14 *German Law Journal* (2013) p. 453.

<sup>13</sup> See A. Verdun, 'An "Asymmetrical" Economic and Monetary Union in the EU: Perceptions of Monetary Authorities and Social Partners', 20 *Journal of European Integration* (1996) p. 59.

<sup>14</sup> Lindseth, *supra* n. 6, p. 223.

<sup>15</sup> See, amongst many, G. Majone, *Regulating Europe* (Routledge, 1996) p. 47-80 and 265-301.

<sup>16</sup> See T. Wozniakowski, 'Why the sovereign debt crisis could lead to a federal fiscal union: the paradoxical origins of fiscalization in the United States and insights for the European Union', 25 *Journal of European Public Policy* (2018) p. 630 at p. 631.

It follows that the EU's 'metabolic constitution'—the manner in which resources are mobilised toward the ends of European integration—is fractured in several ways. The most fundamental fracture, discussed in the first section below, flows from the disconnect between power and legitimacy in the Union, by which we mean the repeated conferral of regulatory power on European institutions, albeit without the EU enjoying the necessary democratic and constitutional legitimacy to support the exercise of this power through an autonomous mobilisation of resources in its own right. This article then explores how this break in the necessary 'power-legitimacy nexus'<sup>17</sup> has manifested itself in EU governance over the last decade, beginning with the Eurozone crisis. We then critically examine measures foreseen as part of the response to the climate emergency (the European Green Deal) as well as the coronavirus pandemic (most importantly, the Next Generation EU recovery instrument). Our overall aim with this analysis is to assess the extent to which these more recent efforts may constitute a paradigm shift—a 'critical juncture'<sup>18</sup>—in the EU's fractured metabolic constitution (spoiler alert: they do not, at least not fully and not yet). Finally, in conclusion, we take stock of where the EU now stands and what might need to happen in order to overcome the disconnect between power and legitimacy, thus perhaps leading to development of a genuinely autonomous constitutional metabolism at the supranational level in Europe.

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<sup>17</sup> P. Lindseth, 'The Democratic Disconnect, the Power-Legitimacy Nexus, and the Future of EU Governance', in F. Bignami (ed.), *EU Law in Populist Times. Crises and Prospects* (Cambridge University Press 2019) p. 508-510.

<sup>18</sup> See G. Capoccia, 'Critical Junctures and Institutional Change', in J. Mahoney and K. Thelen (eds.), *Advances in Comparative-Historical Analysis* (Cambridge University Press 2015), p. 147.

## 2. The Fundamental Fracture between Power and Legitimacy in European Integration

As has long been recognised, it can be very disorienting trying to come to terms with the EU's 'constitutional structure ... of bits and pieces'.<sup>19</sup> The complex interplay between the scope of the EU's power and its lagging legitimacy contributes directly to a sense of estrangement on the part of the average European citizen toward the European system. The power to mobilise resources in a compulsory fashion—most importantly, to tax—is intimately bound up with the scope of legitimacy enjoyed by the political structure in question, notably by a national legislature. Regulatory powers, by contrast, may be possessed by an entity with a lesser and more derivative legitimacy, such as technocratic agency within the limits provided by the principle of legality. In short, different degrees of legitimacy support different kinds of power. We can call this the 'power-legitimacy nexus', which refers to 'the linkage between the nature of the legitimacy enjoyed by a legal or political order (legal, technocratic, functional, or robustly democratic and constitutional) and the scope of power that the legal order can then successfully exercise'.<sup>20</sup>

No less than in any other system, that power-legitimacy nexus defines the scope of power that the EU can successfully exercise. The bases of legitimacy in the EU are, variously, national-executive (the European Council and the Council), technocratic (the Commission and the ECB) and juristocratic (the Court of Justice). Moreover, the EU's 'legislature' (European Parliament and Council), such as it is, may inject an electoral component into the system, either directly or indirectly, but that 'legislature' lacks the autonomous power and legitimacy to extract and redirect fiscal and human resources on a societal scale akin to a national parliament.<sup>21</sup> This crucial feature of the European system points us toward the ambiguous and incomplete 'constitutionalism' in EU public law.<sup>22</sup> European supranationalism undoubtedly reflects the constraining type constitutionalism, for example in the separation of powers or the protection of rights as well as in the use of various kinds

<sup>19</sup> D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', 30 *CML Rev* (1993) p. 17.

<sup>20</sup> Lindseth, *supra* n. 6, p. 235 V. A. Schmidt, *Europe's Crisis of Legitimacy. Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press 2020) p. 57-66, who talks of a 'split-level legitimacy'.

<sup>21</sup> See P. Lindseth, 'Executives, Legislatures, and the Semantics of EU Public Law: A Pandemic-Inflected Perspective', in D. Fromage and A. Herranz Surrallés (eds.) *Executive-Legislative (Im)Balance in the European Union* (Hart 2020, forthcoming).

<sup>22</sup> Not to mention that EU public powers are often exercised by or together with private actors: See A. Vauchez, 'In Search of Europe's Phantom Public. "Public-ness" and the European Union', 21 *German Law Journal* (2020) p. 46. For more details on the ambiguous and incomplete 'constitutionalism' in the EU, see P. Lindseth, 'The Perils of "As If" European Constitutionalism', 22 *European Law Journal* (2016) p. 696.

of conditionality mechanisms. But EU public law falls short of constitutionalism in the most robust sense, i.e., the legitimate-compulsory mobilisation of resources separate and apart from the Member States.

This is hardly to say that the constraining activity of EU institutions is without value. Indeed, the opposite is true: the EU acts as a crucial agent of peaceful cooperation and coordination, seeking to ensure that the Member States fulfil their myriad legal and political commitments to each other. ‘For this reason, as a matter of functional necessity, the EU must operate with a degree of autonomy from direct member-state control (although not from member-state legitimization).<sup>23</sup> But in pursuing this essential function, the EU lacks a robustly constituted power, precisely because the EU does not (as yet) possess the deep-rooted democratic and constitutional legitimacy of a pan-European variety needed to sustain it.<sup>24</sup> And it is for this reason that the metabolic constitution of the EU is polycentric, fractured among the several Member States, where—despite the extensive delegation of power to EU institutions—the robust form of democratic and constitutional legitimacy continues to reside.

In this way, the EU is ‘parasitic’ on the democratic and constitutional authority on the national level.<sup>25</sup> Thus, when national democracies suffer from constitutional retrogression or are under populist attack or risk a serious economic downturn, the EU is also affected in its ability to deliver. Since the 1990s, the increasing globalisation of economies and the interdependence among legal systems have combined with other challenges—from climate change to migration, terrorism, and health emergencies—to demand forms of governance beyond the nation-state. In the case of the EU, these challenges have further amplified both the functional demands for ‘more Europe’ as well as the gap between the EU’s needed powers and its lagging legitimacy. Not only is the legal basis for the exercise of EU authority often contested, but the EU is also unable to mobilise the needed resources in a compulsory and legitimate manner to support that authority even when it is legally determined to exist. Although the EU is often, functionally and even legally, the most apt level to act, it nonetheless cannot provide the fiscal and human lifeblood to the response. By contrast, national political communities, while equipped with the democratic and constitutional legitimacy to mobilise resources, are often functionally limited in what they can achieve alone and therefore must coordinate through the EU in order to address problems effectively.<sup>26</sup>

The challenge, therefore, is to bridge this fundamental disconnect between the two levels of governance in the EU, because both are essential to addressing the myriad challenges facing Europe—from the Eurozone crisis, to the climate emergency, to the coronavirus pandemic. From the perspective of the so-called ‘democratic deficit’ at the supranational level, this may appear primarily as a challenge of institutional engineering, something that

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<sup>23</sup> Lindseth, *supra* n. 6, p. 236.

<sup>24</sup> Of course, it also lacks constituent power on its own, though it has been argued that the EU enjoys a *pouvoir constituant mixte*: see J. Habermas, ‘Citizen and State Equality in a Supranational Political Community: Degrressive Proportionality and the *Pouvoir Constituant Mixte*’, 55 *JCMS* (2017) p. 171.

<sup>25</sup> On this concept, see, e.g., K. Tuori, *European Constitutionalism* (Cambridge University Press 2015) p. 42.

<sup>26</sup> See Lindseth, *supra* n. 6, p. 240.

can and should be addressed by further ‘democratisation’ at the EU level. That is a normatively attractive option but, as experience has shown, it has proven easier said than done. At this stage of the EU’s development, the true challenge is to find ways to bridge the ‘democratic disconnect’ between the European and national levels, which today requires finding a way to channel the democratic and constitutional legitimacy (and hence mobilisation powers) of the national governance to the supranational level. Such channeling remains essential unless and until a deeper transformation—that is, a ‘critical juncture’—takes place in the relationship between power and legitimacy in European governance.<sup>27</sup> As such, the problem is much more socio-political and socio-cultural than it is simply legal and institutional.

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<sup>27</sup> Lindseth, *supra* n. 17, p. 522-525.

### 3. The Multilevel Impact of the Democratic Disconnect In and After the Eurozone Crisis

Europe's experience with the global financial crisis, and more particularly with the Eurozone crisis, manifested this socio-political and socio-cultural challenge quite well. The Eurozone crisis was defined by two inter-related impacts operating in parallel: On the one hand, the sense of power-legitimacy fracture deepened at EU level; on the other hand, the response to the crisis brought the nexus between power and legitimacy at the national level into question as well. We will take each of these parallel effects in turn.

#### ***3.1 The Eurozone Crisis and the Deepening Sense of Power-Legitimacy Fracture at EU Level***

Confronted by a risk of collapse of some Member State economies (and hence, potentially, of the EMU as a whole), the EU was in desperate need of an immediate common response to the debt crisis that erupted in 2010. Aside from not having enough resources of its own to deal with the situation credibly, the EU also faced legal obstacles to a proper deployment of support and assistance. Articles 123 and 125 TFEU, as is well known, prevented two potentially helpful responses: on the one hand, the ECB was barred from providing financial assistance to Member States through direct purchase of government bonds; on the other hand, the Union itself was prohibited from 'assum[ing] the commitments of central governments, regional, local or other public authorities (...).' Despite these restrictions, EU institutions and the Member States were very creative in developing work-arounds in order to save the euro. At the very early stages of the Eurozone crisis, the EU established a temporary fund, the European Financial Stabilisation Mechanism (EFSM), to provide emergency lending of up to 60 billion euro, backed by an implicit guarantee in the EU budget.<sup>28</sup> The capacity of this fund, however, was much too small to handle the assistance needs of a growing number of countries. Consequently, in June 2010, the Eurozone Member States created a temporary mechanism, regulated under private law, known as the European Financial Stability Facility (EFSF). This mechanism laid the foundation for the eventual creation of a permanent fund, the European Stability

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<sup>28</sup> Council Regulation 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism. The first rescue programme to Greece in 2010 was also partly financed through bilateral loans by Member States. See C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', 10 *European Constitutional Law Review* (2014) p. 393 at 398 ff.

Mechanism (ESM), perhaps the most important institutional innovation in the context of the Eurozone crisis.

The ESM uses the combined capital contributions of the Member States as backing for the issuance of bonds, the proceeds of which are then loaned, at politically determined rates but subject to strict conditionality, to Member States that otherwise have lost access to the credit markets. Concerns about whether this fund might violate the ‘no bailout clause’ (Article 125 TFEU) were addressed in 2011 through an amendment to Article 136 TFEU, allowing the Eurozone countries to ‘establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole’ and to grant financial assistance under strict conditionality.<sup>29</sup> The *Pringle* judgment of the Court of Justice in 2012 provided an interpretation of the ESM and the Article 136.3 TFEU amendment in compliance with EU law.<sup>30</sup> In doing so, the Court upheld the validity of this legal by-product of the Eurozone crisis, even though it still operated primarily outside the EU legal framework.

Beyond the ESM, the other major vehicle to address the deepening Eurozone crisis was of course the European Central Bank. In an unprecedented attempt ‘to save the euro’, the ECB effectively reinvented its role through a series of unconventional monetary operations—the Securities Market Programme (SMP), the Outright Monetary Transactions (OMT) programme (whose mere announcement had been enough to calm the markets), and the various efforts at quantitative easing (QE) at mid-decade, notably including the Public Sector Purchase Program (PSPP). Through each of these programmes, the ECB attempted to provide needed liquidity to Eurozone countries experiencing financial and economic troubles. In pursuing these operations, an objective alliance between the (technocratic) ECB and the (juristocratic) Court of Justice proved crucial. Subject to conditions that to this point have been relatively easily satisfied (though this could change), the Court has recognised that these operations fall within the mandate of the ECB to guarantee price stability and, hence, are valid.<sup>31</sup> Despite the seal of approval from the Court, concerns have nonetheless persisted about whether these actions by the ECB have potentially breached its powers,<sup>32</sup> including (as we shall see) an eventual determination by the German Federal Constitutional Court in 2020 that the PSPP exceeded the scope of the ECB’s authority.<sup>33</sup> The ECB has been forced to stretch the limits of its mandate in this way, however, precisely because of the lack

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<sup>29</sup> European Council Decision 2011/199 of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.

<sup>30</sup> ECJ 27 November 2012, Case C-370/12, *Thomas Pringle v Government of Ireland and Others*. See T. Beukers and B. de Witte, ‘The Court of Justice approves the creation of the European Stability Mechanism: Pringle’, 50 *CML Rev* (2013) p. 805; A. Hinarejos, ‘The Court of Justice of the EU and the Legality of the European Stability Mechanism’, 72 *Cambridge Law Journal* (2013) p. 237.

<sup>31</sup> ECJ 16 June 2015, Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*; ECJ 11 December 2018, Case C-493/17, *Heinrich Weiss and Others*.

<sup>32</sup> See M. Dawson, A. Maricut, and A. Bobic, ‘Reconciling Independence and accountability at the European Central Bank: The false promise of Proceduralism’, 25 *European Law Journal* (2019), p. 75 at 79 ff.

<sup>33</sup> BVerfG 5 May 2020, 2 BvR 859/15, *PSPP*. See *infra* n. 80 and accompanying text.

of a fiscal capacity at the supranational level, justifying its efforts as a means of saving the EMU, albeit without a specific mandate and clear accountability limits.<sup>34</sup>

Other funds and instruments backed by capital contributions from the Member States have also played a key role in addressing the crisis. For example, the European Investment Bank (EIB), a body collectively owned by the Member States, was at various points activated during the crisis in order to help stimulate growth.<sup>35</sup> Nationally-mobilised resources also provided the necessary start-up funding to the Single Resolution Fund (SRF), a key component of the Single Resolution Mechanism (SRM) within the European Banking Union.<sup>36</sup> The SRF is being gradually built up based on contributions from financial institutions, but in the interim, participating Member States are providing the necessary bridge financing for bank resolution under the terms of an intergovernmental agreement,<sup>37</sup> with the ESM providing a further 'backstop'.<sup>38</sup> Beyond these steps, the Member States (or at least those in the north) have demonstrated great reluctance to mobilise resources to complete the Banking Union, to the extent this would mean open-ended commitments to share fiscal resources with what they still perceive as their inadequately self-disciplined neighbours to the south. This explains, for example, the continuing opposition, led by Germany, to the adoption of a jointly-funded 'European Deposit Insurance Scheme' (EDIS) as part of the Banking Union, despite pleas from the ECB.<sup>39</sup> If Europe is unable to adopt an EDIS, despite the seemingly compelling case,<sup>40</sup> it is difficult to imagine the Member States reaching an agreement over other reforms that would imply an even greater autonomous fiscal capacity at the supranational level (e.g., a Europeanised unemployment insurance scheme).

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<sup>34</sup> P. Lindseth, 'Power and Legitimacy in the Eurozone: Can Integration and Democracy Be Reconciled?', in M. Adams, F. Fabbrini and P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) p. 392-393 and Schmidt, *supra* n. 20, p. 150-170.

<sup>35</sup> See the so-called 'Juncker Plan' and the European Parliament and Council Regulation 2015/1017, On the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and Amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013.

<sup>36</sup> N. Xanthoulis, 'Single Resolution Fund and Emergency Liquidity Assistance: Status Quo and Reform Perspectives On Emergency Financial Support in the Banking Union', in G. Lo Schiavo (ed.), *The European Banking Union and the Role of Law* (Edward Elgar 2019) p. 273.

<sup>37</sup> See generally 'Single Resolution Mechanism- Consilium', European Council website, <<http://www.consilium.europa.eu/en/policies/banking-union/single-resolution-mechanism/>>, visited 30 July 2020.

<sup>38</sup> Lindseth, *supra* n. 17, p. 516. The use of the ESM to further supplement the SRF, if needed, has been repeatedly proposed since the Euro Summit Meeting of 29 June 2018, <<http://www.consilium.europa.eu/media/35999/29-euro-summit-statement-en.pdf>>, visited 30 July 2020.

<sup>39</sup> 'ECB's Draghi Renews Plea for Euro Area Deposit Insurance', *Reuters*, 9 July 2018, <<https://uk.reuters.com/article/us-ecb-policy-draghi/ecbs-draghi-pleads-with-parliament-for-euro-area-deposit-insurance-idUKKBN1JZ1KW>>, visited 30 July 2020.

<sup>40</sup> J. Carmassi et al., 'Completing the Banking Union with a European Deposit Insurance Scheme: Who Is Afraid of Cross-Subsidisation?', *Occasional Paper Series*, European Central Bank, April 2018, <<https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op208.en.pdf>>, visited 30 July 2020.

### **3.2 The Eurozone Crisis and the Growing Power-Legitimacy Fracture in the Member States**

In The second key dimension of the European response to the Eurozone crisis consisted of intensified supranational surveillance as well as deeper coordination of Member-State fiscal and macroeconomic policies. At first glance, supranational regulatory authority in this domain seems modest—just the power to coordinate national policies. However, the Eurozone crisis led creditor states to demand that the EU undertake more direct supervision of the Member States' exercise of their budgetary prerogatives. Depending on the fiscal and macroeconomic situation facing the particular Member State, each country sets its own medium-term budgetary objective, which the Commission takes as the 'polar star' for its biannual assessment. Subject to Council approval, the Commission then issues country-specific recommendations on the stability and the national reform programmes, and opinions, if any, on the draft budgetary plans.<sup>41</sup> The Commission also has the power to sanction non-compliant Member States—though, as we shall see below, this power has never been exercised.

The surveillance created by this regime can be understood as an extension and intensification of the 'pre-commitment' system traditionally at the heart European integration. The Member States have once again agreed to delegate authority to supranational agents to police their mutual legal commitments—in this case regarding fiscal discipline. But the enforcement of pre-commitments, i.e. the medium-term budgetary objective and the level of deficit and debt promised, 'can often be intrusive and painful, in seeming derogation of sovereignty.'<sup>42</sup> The so-called European and National Semesters operate according to a pre-defined schedule, regardless of national occurrences (e.g. governmental crisis, elections, etc.). Perhaps more importantly, in substance, the economic policy animating the system—based on fiscal rigour and austerity—is often experienced as a diktat from northern to southern countries, which in turn shapes the metabolic constitution both of the Member States as well as that of the EU (given its 'parasitic' nature).

As a consequence, the implementation of this regime of fiscal surveillance has a political and legal impact that is much more pervasive than mere coordination of domestic policies or mere policing of Member-State respect of their legal pre-commitments. For some Member States, the experience of this regime has been much more constraining than for others, particularly for those whose starting levels of public debt and deficits deviate significantly from the final common objective of the structural balanced budget. For such countries, the necessary budgetary policies to reach those targets have led to very strict

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<sup>41</sup> See, in particular, Regulation 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies and Regulation 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (part of the so-called 'six-pack'); Regulation 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (part of the so-called 'two-pack').

<sup>42</sup> Lindseth, *supra* n. 17, p. 507.

structural and institutional reforms, with the well-known side-effects in terms of populist and Eurosceptic backlash.<sup>43</sup>

Relatedly, beyond the European and National Semesters, conditionality mechanisms have been established with regard to the Member States' compliance with the new Eurozone fiscal rules in the use of cohesion funds. The relevant disbursement from the EU budget is made conditional on the observance of the reinforced Stability and Growth Pact. Following the 2013 amendments to the Common Provisions Regulation,<sup>44</sup> in addition to ex ante conditionality imposed on the receipt of money from the structural and investment funds, ex post macroeconomic conditionality has also been introduced. In particular, a suspension of cohesion fund payments can be triggered when a Member State either fails to take appropriate action in relation with the excessive macroeconomic imbalance procedure or does not implement the corrections envisaged in the excessive deficit procedure.<sup>45</sup> The use of the EU budget is now more closely linked to national fiscal choices but in a way that constrains and potentially impairs the ability of the Member States to exercise its fiscal powers as it sees fit.

The result has been to cast doubt on the autonomy of domestic metabolic constitutions, an impact even greater for those countries that have received financial assistance from the ESM, under strict conditionality and subject to the additional supervision by the Troika. In programme countries, the capacity of national lawmakers to enact redistributive policies at domestic level has been severely constrained,<sup>46</sup> through a system that many critics perceive to be nothing less than a top-down supranational technocracy without democratic legitimacy.<sup>47</sup>

From this perspective, the distortions introduced by this regime, taken to their logical extreme in programme countries, go well beyond the usual strengthening of national executives, typically understood as one of the key effects of the integration process.<sup>48</sup> No single parliament is able effectively to scrutinise the intergovernmental bodies essential to this regime—the European Council, the Euro Summit, the Ecofin Council and the Eurogroup—much less a technocratic body like the Troika, comprised of representatives from the Commission, the ECB and the International Monetary Fund. Moreover, whatever rights the national parliament may possess vis-à-vis their own finance minister or head of state or government, the collegial nature of decision-making of intergovernmental bodies

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<sup>43</sup> B. Bugaric, 'The Populist Backlash Against Europe: Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe', in F. Bignami (ed.), *EU Law in Populist Times*, *supra* n. 17, p. 477.

<sup>44</sup> See Regulation 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

<sup>45</sup> C. Scheinert and C. van Lierop, *Linking cohesion policy and the European Semester: Partnership and multi-level governance to boost investment and structural reforms*, European Parliamentary Research Service, PE 644.208 – December 2019, p. 19.

<sup>46</sup> See F. Nicoli, Democratic Legitimacy in the Era of Fiscal Integration, 39 *Journal of European Integration* (2017) p. 389 at p. 393-394.

<sup>47</sup> See Scicluna, *supra* n. 7, p. 562 ff.

<sup>48</sup> D. Curtin, 'Challenging Executive Dominance in European Democracy', 77 *Modern Law Review* (2014), p. 1 at p. 2-3.

generally places them beyond the reach of a particular national parliament. The only exceptions, of course, are certain privileged national parliaments in creditor countries that have successfully asserted their democratic rights in this regime. Consider, for example, the case of the national-parliamentary oversight of the third rescue package to Greece between July and August 2015. After the Eurogroup had agreed on it, the package could not proceed unless approved by the Austrian, Finnish and German parliaments, as required by domestic constitutional law.<sup>49</sup> In this way, the rights of these parliaments were unimpaired, thus allowing them pass on the financial assistance to Greece, while the Greek parliament found itself subject to constraints in a *Memorandum of Understanding* (MoU) over which it had little advance input. This suggests serious asymmetries among Eurozone countries and their influence over resource mobilisation in what is meant to be an optimal currency area.<sup>50</sup>

However, the rights of national parliaments as between debtor and creditor countries remained symmetrical in one crucial respect. Given the EU's inability to mobilise resources of its own, as well as the insistence of the creditor states that they would only provide assistance through loans subject to strict conditionality, this meant that all substantial costs had to be borne by the debtor states themselves, through increased debt burdens, austerity, and associated 'macro-economic adjustment'. However, it should also be stressed that the dreaded MoUs that memorialised the Troika's conditions in this regard—seemingly an expression of executive-technocratic power—were also, ironically, a sign of that power's ultimate weakness, at least in terms of legitimate-compulsory mobilisation. The Eurogroup and the Troika were able to set conditions on assistance but they were not able to fully displace national bodies in order to make those decisions themselves. They still needed to depend on the power and legitimacy of the debtor-state national parliament, even in an atmosphere of extreme crisis; hence the perpetual drama over the last decade in a country like Greece, in which the Eurogroup and the Troika repeatedly sought to compel the Greek parliament to take decisions contemplated by the MoU.<sup>51</sup> The reason for this ultimate dependence was the simple fact that the management of these many crises, at a micro level, required not only executive and technocratic (ie administrative) power—of which the EU has a vast amount—but more importantly the capacity of legitimate compulsory mobilisation of human and fiscal resources that only a Member-State parliament ultimately possesses.

This reality perhaps explains why, in the fiscal surveillance regime applicable even to non-programme countries, the Commission generally restricts itself to recommendations and opinions but, together with the Council, goes to great lengths to avoid using the sanctioning power that it (in theory) possesses against non-compliant Member States. Indeed, no sanctions have ever been imposed; moreover, since 2015 the European

<sup>49</sup> M. Moschella, 'When Some Are More Equal than Others: National Parliaments and Intergovernmental Bailout Negotiations in the Eurozone', 52 *Government and Opposition*, 52 (2017) p. 239 at p. 253 ff.

<sup>50</sup> C. Fasone, 'Eurozone, non-Eurozone and "troubled asymmetries" among national parliaments in the EU. Why and to what extent this is of concern', in 6 *Perspective on Federalism* (2014), p. 1 at p. 15 ff.

<sup>51</sup> M. Markakis, *Accountability in the Economic and Monetary Union. Foundations, Policy, and Governance* (Oxford University Press 2020) p. 85-102.

Commission has made ‘flexibility’<sup>52</sup> the new mantra in the implementation of the revised fiscal and macroeconomic rules, which has had the effect of frequently authorizing national deviation from the medium-term budgetary objectives (also under circumstances that did not appear exceptional, temporary and unforeseeable). In this regard, Turkuler Isiksel has noted a persistent tension between the effort to limit the autonomy of national budgetary authorities (*limiting*) and the perception that those authorities in fact have license to exercise new powers or broader discretion (*licensing*).<sup>53</sup> We would regard this tension as, in fact, an expression of the fractured metabolic constitution in the EU, and its ultimate dependence on the power and legitimacy of national parliaments to effectuate crucial goals of integration.

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<sup>52</sup> See European Commission, Communication on making the best use of flexibility within the existing rule of the Stability and Growth Pact, COM (2015) 12 def., 13 January 2015; Communication on the review of the flexibility under the Stability and Growth Pact, COM (2018) 335 def., 23 May 2018. On the flexibility shown by the Commission in its first assessment on the implementation of the Treaty on Stability, Economic Coordination and Governance in the Economic and Monetary Union, see European Commission Communication, The Fiscal Compact Taking Stock, (C(2017) 1200 final, 21 February 2017, p. 4.

<sup>53</sup> T. Isiksel, ‘Constitutionalism as Limitation and Licence’, in T. Ginsburg, N. D. Rosen, and G. Vanberg (eds.), *Constitutions in Times of Financial Crisis* (Cambridge University Press 2019) p. 187 at p. 198 ff.

## 4. The European Green Deal and The Struggle To Transcend The EU's Fractured Metabolic Constitution

In the years that followed the most acute phase of the Eurozone crisis (2011-2015), many proposals were put forward to stimulate the economies of the EMU and to foster growth and competitiveness in the Eurozone. Lacking an EU fiscal capacity to this end, the ECB necessarily took the lead, through the series of programmes already mentioned (SMP, OMT, QE/PSPP). Beyond these monetary interventions, other options were considered, which generally relied on ways to leverage the EU budget. These ranged from the European Fund for Strategic Investment (EFSI) (the cornerstone of the so-called Juncker Plan) to the perennially-debated idea of Eurobonds, through and including the transformation of the ESM into a European Monetary Fund,<sup>54</sup> as well as the Budgetary Instrument for Convergence and Competitiveness (BICC).

The debate over Eurobonds (which, as we shall see, the COVID-19 emergency brought back to the centre of public discussions as 'Coronabonds') in fact stretches back a decade.<sup>55</sup> The label 'Eurobonds' has been sufficiently capacious to encompass a variety of different proposals,<sup>56</sup> but they all share a common element—the mutualisation of the Member States' public debts to one extent or another—something considered anathema in the financially more secure Member States (at least until the coronavirus response). The more limited BICC proved more palatable, agreed at the Euro Summit of December 2018 by the Eurogroup in inclusive format, with implementation expected in the subsequent months. The BICC, which was expected to be part of the EU budget based on the new MFF for 2021-2027, was to provide Eurozone countries with grants under the form of direct financial contributions to concrete and detailed projects of investments and structural reforms, subject to a minimum national co-financing.<sup>57</sup>

<sup>54</sup> Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM (2017)827, 6 December 2017.

<sup>55</sup> See European Commission, Green Paper on the feasibility of introducing Stability Bonds, COM (2011) 818 final, 23 November 2011.

<sup>56</sup> See, for example, S. Grund, 'The Quest for a European Safe Asset - A Comparative Legal Analysis of Sovereign Bond-Backed Securities, E-Bonds, Purple Bonds, and Coronabonds', forthcoming in *Journal of Financial Regulation*, available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3455792&s=09](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455792&s=09)>, visited 30 July 2020..

<sup>57</sup> European Commission's Proposal of a Regulation of the European Parliament and the Council on a governance framework for the budgetary instrument for convergence and competitiveness for the euro area, COM (2019) 354 final, Brussels, 24 July 2019, which extends the program also to the countries within the EU's Exchange Rate Mechanism.

The appointment of a new Commission led by Ursula von der Leyen on 1 December 2019 gave hope to some observers that these sorts of initiatives would be extended and intensified. Among her new priorities was developing a strategy at the European level to address the mounting climate emergency, and the result was a collection of initiatives gathered under the rubric of the European Green Deal. This plan brought together an array of otherwise scattered initiatives into a comprehensive and long-term project to revamp both the national and supranational metabolic constitutions. The European Green Deal and the initial proposals to implement it were gradually presented and discussed from 11 December 2019 onward<sup>58</sup> (before being eclipsed by, and in some sense folded into, the Next Generation EU proposal to address the pandemic emergency, which we take up below). The Commission presented the European Green Deal as a new sustainable and inclusive growth strategy ‘aiming to transform the EU into a fair and prosperous society, with a modern, resource efficient and competitive economy.’<sup>59</sup> Most importantly, of course, the European Green Deal was aimed at achieving climate neutrality—eliminating net emissions of greenhouse gases—by 2050 in line with the UN 2030 Agenda, while also enhancing economic growth. In order to push for this ecological transition, the European Green Deal envisaged various soft forms of conditionality, principally by linking EU-funded support for farms, companies and Member States to environment- and climate-friendly practices, standards and legislation.

This ambitious plan, as announced, presented several advantages: it targeted all Member States’ economies (not just the Eurozone); it was meant to provide the EU with increased own resources (albeit, as always, dependent on votes at the national level for the approval); and it also sought to ensure redistribution across the Member States to guarantee sustainable growth while also making the EU a carbon free area in a few decades. Linked to the new MFF under negotiation, the European Green Deal was to take a holistic approach on how it expected to affect the different policy areas. All EU actions and policies were supposed to contribute to the European Green Deal’s objectives and be, to some extent, reshaped by them, from the EU industrial strategy (particularly digital transformation), to state aid, to the fully-fledged transition to circular economy.<sup>60</sup> Classic EU emission trading schemes were proposed to be revised along with the European Taxation Directive. National energy legislation was to be reviewed under the Union’s guidance, and the fiscal surveillance regime developed during the Eurozone crisis was to be reformulated to integrate the UN sustainable development goals.<sup>61</sup>

In order to achieve all these various objectives, a turn to green financing would also be necessary. As a consequence, the European Green Deal would seek to mobilise massive public investments from the EU budget (and national budgets) and would seek to incentivise private capital to generate further resources for the Union and its Member

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<sup>58</sup> European Commission Communication, The European Green Deal, COM(2019)240 final, 11 December 2019.

<sup>59</sup> Ibid., p. 2.

<sup>60</sup> Z. Radosavljevic, ‘Circular economy erected as “number one priority” of European Green Deal’, *Euractiv.com*, 12 November 2019, <<https://www.euractiv.com/section/circular-economy/news/circular-economy-is-number-one-priority-of-european-green-deal/>>, visited 30 July 2020.

<sup>61</sup> European Commission, *supra* n. 58, p. 3-6.

States. The headline number touted by the Commission was more than one trillion euro. How would this be possible considering the size of the EU budget and the limited amount of EU autonomous own resources? Achieving that goal would require not only redirecting a considerable part of the EU budget to green investments (25%, or around 503 billion euro);<sup>62</sup> rather, it would also necessitate several new revenue streams, for example new taxes on non-recycled plastic packaging waste, as well as redirecting to the EU budget 20% of the revenues from the auctioning of allowances in the new EU emission trading scheme. The EIB, in cooperation with national promotional banks and international financial institutions, was also expected to support green investments, becoming, in the Commission's aspirations, Europe's 'climate bank' by 2050.

The core resources for the European Green Deal, however, were supposed to be generated through the Sustainable Europe Investment Plan,<sup>63</sup> consisting of several legs. Private investments would be assembled through InvestEU—the successor to EFSI under the Juncker Plan—in which the key mechanism would be guarantees from the EU budget to de-risk private sustainable investments, certified through a Commission's sustainability proofing system, up to an amount estimated at around 279 billion euro over the period 2021-2030. Additional national co-financing, in conjunction with the environmental spending under the EU budget (39 billion euro), would contribute a further 114 billion euro. The Innovation and Modernisation Fund, would provide another 25 billion euro, again through the auctioning of carbon allowances under the Emissions Trading Scheme. Finally, the Commission also launched a Just Transition Mechanism with a clear redistributive aim to 'address specific challenges encountered by some regions' (eg coal-mining areas), offering 'targeted support to generate the necessary investments in these territories'.<sup>64</sup> Another 100 billion euro would be mobilised through the Just Transition Fund, via an InvestEU dedicated scheme, incentivizing private investments through a public-sector loan facility with the EIB. The proposed outlay for the Just Transition Fund under the draft MFF 2021-2027 was set at 7.5 billion euro and could be increased by linking the use of this fund to the European Regional and Development Fund, the European Social Fund Plus, as well as national co-financing.<sup>65</sup>

The complex financing of the European Green Deal raised a series of questions about its real capacity to transcend the EU's fractured metabolic constitution. At first glance, the articulation of the power-legitimacy nexus in the mobilisation of the European Green Deal's targeted resources may seem difficult to discern, particularly given the extent to which the plan depended on a complex interplay between resources from the EU budget, national co-financing and incentivised private investments. What seems apparent, however, is that the

<sup>62</sup> Ibid., p. 12.

<sup>63</sup> European Commission Communication on Sustainable Europe Investment Plan – European Green Deal Investment Plan, COM (2020) 21 final, 14 January 2020.

<sup>64</sup> Ibid., p. 17.

<sup>65</sup> Ibid., p. 19. See also the Proposal for a Regulation establishing the Just Transition Fund, COM(2020)22 final, 14 January 2020. C. Closa, 'The Green Pact and the Rule of Law in the EU', *Verfassungsblog*, 25 April 2020, <<https://verfassungsblog.de/the-green-pact-and-rule-of-law-in-the-eu/>>, visited 30 July 2020, warns against the possible misuse of this Fund to finance illiberal governments and indirectly feed the rule of law backsliding, as Poland is expected to get almost 25% of the Fund.

very complexity of the European Green Deal's financing was in part a product of the EU's lack of fiscal capacity on a scale commensurate with the challenges currently facing Europe. The Commission's various proposals did a heroic job creatively leveraging the EU's relatively meagre budget toward broader goals, but that creativity is a consequence of the fact that the EU must do indirectly what a genuinely constitutional entity, with legitimate-compulsory mobilisation powers of its own, would have much greater power to do directly. Of course, a constitutional state might also engage in creative financing, perhaps including public-private partnerships, in order to avoid raising taxes. But for the EU, the option of raising taxes requires a unanimous decision in the Council, followed by approval by every national parliament. Thus, the complexity of the proposed financing for the European Green Deal is testament to, rather than a transcendence of, the EU's power-legitimacy disconnect and its fractured metabolic constitution.

Criticisms of the European Green Deal stressed the lack of novelty in the financing proposals, which amounted primarily to redeploying existing funds toward greener goals.<sup>66</sup> From this perspective, the European Green Deal could not be said to offer the sort of breakthrough needed to transform the EU's metabolic constitution toward one no longer ultimately dependent on fiscal backing on the national level. The financing schemes were in fact very similar to many already experimented with in the Juncker Plan, from the guarantees backed by the EU budget to the loan facility provided through the EIB, which seek to make private investments particularly convenient given the conditions of the loans. There were few truly new own resources likely to be introduced in the short term (an example would be recycled plastic packaging waste tax) despite the promise to create 'the context for broad-based tax reforms, removing subsidies for fossil fuels, shifting the tax burden from labour to pollution, and taking into account social considerations'.<sup>67</sup> At least half of the resources envisioned for the European Green Deal would be the result of either national co-financing or outright transfers, along with the expected proceeds of leveraging mechanisms whose effectiveness could not easily be predicted. Asymmetric shocks, financial troubles affecting several Member States, as well as new crises would likely impair the capacity of the European Green Deal to mobilise resources, in particular depending on the attitude of private and public investors to follow the incentives set by the Commission.

Perhaps most importantly, the willingness of Member States to cooperate would, as always, be essential, given their centrality in the EU's metabolic constitution. The European Council's special meeting from 17 to 21 July 2020, which focused on the new MFF as well as the Next Generation EU recovery fund, simply served has a reminder of this. Indeed, the impact of that meeting on the European Green Deal was arguably profound. While the European Council maintained that at least 30% of the expenditures under the new MFF would support climate objectives,<sup>68</sup> they also introduced severe cuts to two of the principal vehicles to promote a carbon-free transition: InvestEU by more than 80%, and the Just

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<sup>66</sup> M. Sandbu, 'EU's eye-catching green measures are not quite what they seem', *Financial Times*, 29 January 2020.

<sup>67</sup> European Commission, *supra* n. 58, p. 17.

<sup>68</sup> Conclusions of the European Council's Special Meeting, EUCO 10/20, Brussels 21 July 2020, Annex, para 18.

Transition Fund by more than half.<sup>69</sup> Nonetheless, in that meeting the European Council also reached an historic agreement on shared debt in the MFF in order to address the severe economic and budgetary dislocations caused by the coronavirus pandemic. Thus, whereas the climate emergency was perhaps too long-term and chronic in character to drive real change in the EU's metabolic constitution, the more acute demands of the pandemic response perhaps have provided more fertile ground in which to transform the EU's fractured metabolic constitution. We turn to that question now.

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<sup>69</sup> Ibid., para A.14. See also E. Sánchez Nicolás, 'Recovery plan slammed for failing to tackle climate crisis', *EUObserver*, Brussels, 22 July 2020, <<https://euobserver.com/environment/149006>>, visited 30 July 2020.

## 5. Will the Coronavirus Pandemic Response Serve As a ‘Critical Juncture’ in the Transformation of the EU’s Metabolic Constitution?

The plans for the European Green Deal were initially developed at the end of 2019 and the beginning of 2020, when the arrival of the coronavirus pandemic was, at most, a mere ominous possibility based on news reports from China. Over the subsequent months, however, COVID-19 transformed itself into a full-blown public-health emergency, with massive consequences both in lives lost as well as severe economic dislocation. With the World Health Organization declaring a global pandemic on 11 March 2020, and with the growing number of infections and deaths throughout Europe, the COVID-19 crisis became the most serious challenge for the EU and its Member States since the Second World War.

This crisis was unprecedented in many respects: 1) the lethal and highly contagious nature of the disease placed the health-care systems of all EU Member States under serious strain; 2) the reduced exchange in goods and services in the global and the European markets (flowing significantly, but not exclusively, from lockdown measures) resulted in a serious economic crisis;<sup>70</sup> and 3) many EU Member States declared states of emergency and/or adopted very strict measures, including, but not limited to home confinement, the immediate suspension of all economic activities, a systematic limitation of the freedom of movement, assembly, religion, and, to a large extent, education. While some measures were gradually lifted as the health situation improved, there is no doubt that these steps, taken together, seriously affected fundamental rights in the name of the supreme value of public health. Moreover, national welfare systems hardly had the capacity to tackle the massive loss of jobs and the widespread increase in poverty and precarity, leading to further threats to basic social rights and the right to dignity.

On the EU level, beyond the many problems just highlighted, the arrival of the coronavirus pandemic acted as a sort of institutional and political earthquake. The reimposition of border controls, along with the fact that many Member States were understandably focused on the internal impact of the crisis and thus seemingly insensitive to the needs of a pan-European response, all helped to raise questions about the unity and

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<sup>70</sup> The Italian national GDP, for example, fell 12% in the second trimester of 2020.

integrity of the EU. And yet, due to its ‘borderless nature, COVID-19 [became] a matter of common European interest since its first detection on the continent’.<sup>71</sup>

A major obstacle to an effective response, however, was Europe’s fractured metabolic constitution, in which wealthier and more financially secure Member States were in a much better position to mobilise the resources needed to address the crisis, both in terms of public health and economic response. As will be detailed further below, one of the first steps the EU took, lacking resources of its own, was to temporarily free the Member States from EU fiscal constraints by activating the general ‘escape clause’ in budgetary surveillance regime.<sup>72</sup> Similarly, in the area of state aids, the Commission also announced the relaxation of a panoply of restrictions on Member-State support to private businesses.<sup>73</sup> As a consequence of these two steps, the Member States were able to pump nearly 2 trillion euro into the economy. However, as *The Economist* reported: ‘Half of this was in Germany: a problem if you are a producer based in a country that cannot afford to be so generous, but which must accept German-made goods’.<sup>74</sup> Fairness and equity demanded a European response. But what kind?

Given these pressures, the question arose whether, in effect, the EU’s fractured metabolic constitution—dependent as it has always been on nationally mobilised resources—now faced what French President Emmanuel Macron called a ‘moment of truth’,<sup>75</sup> or what academics often call a ‘critical juncture’.<sup>76</sup> By this is meant the confluence of profoundly demanding social and political circumstances that can radically undermine existing institutional settlements, thus overcoming the natural lags that favour those settlements (‘hysteresis’), thereby opening the way for genuinely new institutional configurations.<sup>77</sup> In the early months of the coronavirus pandemic, there was no telling what kind of Europe might emerge. There were concerns, given the lack of solidarity among the Member States, not to mention the obstacles to effective EU action, that a dramatic weakening of the integration project might be the result. But from late-April 2020 onward, there were more hopeful signs—eventually embodied in the Commission’s Next Generation EU plan for a

<sup>71</sup> A. Alemanno, ‘Testing the Limits of EU Health Emergency Power’, *Verfassungsblog*, 18 April 2020, <<https://verfassungsblog.de/testing-the-limits-of-eu-health-emergency-power/>>, visited 30 July 2020.

<sup>72</sup> See European Commission Communication on the activation of the general escape clause of the Stability and Growth Pact, Brussels, COM (2020) 123 final, 20 March 2020. See also the Statement of EU Ministers of Finance on the Stability and Growth Pact in Light of the COVID-19 Crisis, 23 March 2020, <<http://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/>>, visited 30 July 2020.

<sup>73</sup> See European Commission, Communication on Coordinated economic response to the COVID-19 Outbreak, COM (2020) 112 final, Brussels, 13 March 2020, and generally ‘Competition - State Aid - State Aid Rules and Coronavirus - European Commission’, <[https://ec.europa.eu/competition/state\\_aid/what\\_is\\_new/covid\\_19.html](https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html)>, visited 30 July 2020.

<sup>74</sup> See ‘The European Union Is Having a Bad Crisis’, *The Economist*, 14 May 2020, <<https://www.economist.com/leaders/2020/05/14/the-european-union-is-having-a-bad-crisis>>, visited 30 July 2020. See also J. Brusden, S. Fleming and M. Peel, ‘Crisis in Europe: Von Der Leyen’s Audacious Bid for New Powers’, *Financial Times*, 18 May 2020, <https://www.ft.com/content/775c4db2-4e3d-426f-b937-243f0673cc14>, visited 30 July 2020.

<sup>75</sup> E. Macron, ‘Transcript: “We Are at a Moment of Truth” (English)’, *Financial Times*, 17 April 2020, <<https://www.ft.com/content/317b4f61-672e-4c4b-b816-71e0ff63cab2>>, visited 30 July 2020.

<sup>76</sup> See eg Capoccia, *supra* n. 18, p. 147 at p. 147.

<sup>77</sup> For elaboration of the concepts of ‘critical juncture’ and ‘hysteresis’ in the context of the European integration, see Lindseth, *supra* n. 17, pp. 520–524.

recovery and resilience facility. However, as we shall see, like the European Green Deal before it, that plan arguably did not mark a major breakthrough in EU governance, most importantly with regard to the transfer of tax powers to the EU level.

### 5.1 The First Stage

The response to the crisis, at least at the outset, could be divided into two stages, the first 'pre' and the second 'post' the announcement of Next Generation EU. The first could be said to have begun as far back as 25 January 2020, with the alert (initially largely unheeded) sent by the European Centre for Disease Prevention and Control to all the Member States about the potential impact of COVID-19. Over the course of February and into March, however, the effects of the growing crisis gave momentum to national responses while the efforts of EU institutions remained tentative. Part of the reason for this imbalance was the fact that the EU's competences in public health are generally understood to be limited, extending only to supporting and coordinating Member States in the 'fight against [...] serious cross-border threats to health' and in the adoption of 'incentive measures designed to [...] combat the major cross-border health scourges' (Article 168.5 TFEU).

In this first stage of the pandemic response, as with the Eurozone crisis before it, the ECB necessarily provided the most important supranational input. After some uncertainties and confusing declarations,<sup>78</sup> on 18 March 2020 the ECB President Christine Lagarde announced an ambitious asset purchase programme, the Pandemic Emergency Purchase Programme (PEPP), to mobilise up to 750 billion euro in Eurozone assets and debt instruments: a very important signal for the financial markets. (The ECB provided further reassurance on 4 June 2020, when it increased PEPP by 600 billion euro for a total 1.350 trillion euro.)<sup>79</sup> The PEPP also once again pushed the ECB's competences to their outer limits, just as in the Eurozone crisis. Indeed, the PEPP may have potentially even crossed those limits, or at least that could be one implication of the landmark judgment of the German *Bundesverfassungsgericht* on 5 May 2020,<sup>80</sup> which dealt with the ECB's earlier Public Sector Purchase Program (PSPP), by far the largest of the ECB's mid-decade efforts at QE to stimulate the Eurozone economy in the face of low inflation and sluggish growth. The ECB has been repeatedly forced to take on this sort of central role in addressing crises in the EU, as one commentator aptly noted at the time, for a very simple reason: 'in Europe

<sup>78</sup> See Christine Lagarde's speech at the ECB Press Conference of 12 March 2020, in response to journalists' questions, affirming that 'The response should be fiscal, first and foremost (...). I don't think that anybody should expect any central bank to be the line of first response.'

<sup>79</sup> See, ECB, Monetary Policy Decisions by the Governing Council of the ECB, Press Release, 4 June 2020, <<https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.mp200604~a307d3429c.en.html>>, visited 30 July 2020.

<sup>80</sup> See *supra* n. 33. For some commentary on the import of that judgment, M. Dani and others, 'At the End of the Law', *Verfassungsblog*, 15 May 2020, <<https://verfassungsblog.de/at-the-end-of-the-law/>>, visited 30 July 2020; G. Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price', *European Law Blog*, 21 May 2020, <<https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price/>>, visited 30 July 2020; 'Editorial Comments', 57 *CML Rev* (2020) p. 965.

[it] is the only agency engaged in economic policy worthy of the name' and 'is the one part of the complex European constitution that actually functions with real authority and clout as a federal institution.<sup>81</sup>

By comparison, the early steps of the Commission to address the crisis were relatively feeble. The Commission, as already mentioned, was able to relax certain fiscal constraints on the Member States but was otherwise unable to mobilise resources of its own to any macro-economically significant extent. On 20 March 2020, the Commission presented its communication to the Council, for its endorsement, to activate the already-mentioned general 'escape clause' of the Stability and Growth Pact, thus allowing Member States to deviate from the medium-term budgetary objective so as to provide the necessary fiscal effort to protect citizens and businesses from the effects of the pandemic and to support the economy.<sup>82</sup> This more far-reaching flexibility—compared to the usual flexibility provided by the Commission on a case-by-case basis—was to apply both to the preventive and the corrective arms of the Pact. Complementing the relaxation of fiscal constraints was the similar approach the Commission announced on state aid, also mentioned above. The Commission activated a state aid temporary framework, treating the coronavirus crisis as an exceptional occurrence under Article 107(3) TFEU as to ease the notification process by national authorities and to guarantee national support measures for citizens and companies.<sup>83</sup> In terms of direct resource mobilisation, the Commission redirected 1 billion euro from the EU budget as a guarantee to the EU Investment Fund and incentivise banks to provide small and medium enterprises (SMEs) with additional liquidity. The Commission also allocated 37 billion euro to the Cohesion Fund to fight the emergency (for example, Member States can now use the unspent pre-financing for the structural funds toward the emergency). In addition, the Commission proposed extending the scope of the EU Solidarity Fund to include public health crises.

### 5.1.2 Building Toward the Second Stage

The shift to the second stage of the response to the COVID crisis—culminating in the announcement of Next Generation EU in May 2020—gained momentum over the course of April 2020, as the magnitude of the pandemic's impact made itself felt and the need for greater intergovernmental and supranational efforts became brutally apparent. At the beginning of April, the Commission proposed the Coronavirus Response Investment

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<sup>81</sup> A. Tooze, 'The Death of the Central Bank Myth', *Foreign Policy*, 13 May 2020, <<https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling/>>, visited 30 July 2020.

<sup>82</sup> See *supra* n. 72. In particular, the mechanisms for the escape clause is provided by Articles 5(1), 6(3), 9(1), and 10(3) of Regulation 1466/97 and Articles 3(5) and 5(2) of Regulation 1467/97.

<sup>83</sup> Communication from the Commission on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01, as subsequently modified.

Initiative Plus.<sup>84</sup> The measures proposed under this rubric included further flexibility in managing the cohesion policy, making possible transfers among the three main funds—European Regional Development Fund, European Social Fund and Cohesion Fund—as well as transfers between different categories of regions. The Commission also announced that it would accelerate a legislative proposal for a European Unemployment Reinsurance Scheme, an idea that had been under consideration since 2017. Meanwhile, on 2 April, the Commission presented a draft regulation establishing a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE).<sup>85</sup> This temporary mechanism—approved by the Council on 19 May—aims to provide financial assistance for up to 100 billion euro under the form of loans granted on favourable terms by the EU to the Member States who are forced to increase their expenditures to support employment.

These various initiatives, however, made abundantly clear that, given the EU's fractured metabolic constitution, addressing the pandemic at the sort of scale required would depend on national governments finding new ways to mobilise resources in a joint fashion. Pressure had been building since late March from a group of nine countries (Belgium, France, Greece, Ireland, Italy, Luxembourg, Portugal, Slovenia and Spain)<sup>86</sup> for a coordinated response to the economic consequences of the coronavirus crisis, including: 1) 'a common debt instrument issued by a European institution to raise funds on the market on the same basis and to the benefits of all Member States, thus ensuring stable long term financing for the policies required to counter the damages caused by this pandemic'; and 2) 'other tools like a specific funding for Corona-related spending in the EU budget, at least for the years 2020 and 2021'. These proposals, especially the common debt instrument (now redubbed 'Coronabonds') triggered a lively political and academic debate.<sup>87</sup> Arguing against were an (initially) cohesive front of northern countries—in this instance Austria, Finland, Germany, the Netherlands, and Sweden—which raised not just objections in EU law but also domestic constitutional concerns. For example, the constitutional law committee of the Finnish Parliament raised doubts about the compatibility of Coronabonds both with Article 125 TFEU—the infamous 'no bailout' clause—as well as with the Finnish constitution, spelling out clearly that, should the issuance of Coronabonds be authorised, Finland would need to amend its fundamental law.<sup>88</sup>

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<sup>84</sup> See in detail the relevant webpage of the Commission, <[https://ec.europa.eu/regional\\_policy/en/newsroom/news/2020/04/04-2-2020-coronavirus-response-investment-initiative-plus-new-actions-to-mobilise-essential-investments-and-resources](https://ec.europa.eu/regional_policy/en/newsroom/news/2020/04/04-2-2020-coronavirus-response-investment-initiative-plus-new-actions-to-mobilise-essential-investments-and-resources)>, visited 30 July 2020.

<sup>85</sup> See now 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.

<sup>86</sup> See the joint letter to the European Council President Charles Michel on 25 March 2020, the English text of which is available at <[http://www.governo.it/sites/new.governo.it/files/letter\\_michel\\_20200325\\_eng.pdf](http://www.governo.it/sites/new.governo.it/files/letter_michel_20200325_eng.pdf)>, visited on 30 July 2020.

<sup>87</sup> See, for example, the proposals put forward by an international group of economists for the 'European Renaissance Bonds', <<https://europeanrenaissance.altervista.org/>>, visited 30 July 2020 or the plea by an international group of legal scholars for the 'Coronabonds': see M. Goldmann et al., 'The Case for Corona Bonds. A Proposal by a Group of European Lawyers', *Verfassungsblog*, 5 April 2020, <<https://verfassungsblog.de/the-case-for-corona-bonds/>>, visited on 30 July 2020..

<sup>88</sup> P. Leino-Sandberg, 'Solidarity and Constitutional Constraints in Times of Crisis', *Verfassungsblog*, 8 April 2020, <<https://verfassungsblog.de/solidarity-and-constitutional-constraints-in-times-of-crisis/>>, visited on 30 July 2020.

In view of this resistance, pessimism reigned. The Eurogroup at first excluded any debt mutualisation and instead endorsed the many proposals presented by the Commission, including SURE and the need to adapt the MFF under negotiation to the new crisis, or the initiative of the EIB to create a pan-European guarantee fund of 25 billion euro to support SMEs. It was the Eurogroup, however, that first mentioned the idea of a recovery fund, while also proposing to use the ESM in a novel way to address the crisis.<sup>89</sup> In particular, the already-existing precautionary credit line of the ESM could be used to finance ‘direct and indirect healthcare expenditures, cure and prevention related costs’ with a loan that can reach up to 2% of the country GDP at the end of 2019. More importantly, it was proposed that such loans would be free of the usual strict conditionality, although some questioned that this promise could be kept.<sup>90</sup> This innovation represented yet another update of already existing instruments that still conformed to the fractured nature of the EU’s metabolic constitution.

Not by chance, the European Parliament, normally very creative and willing to participate actively in the decision-making process (despite the narrow power in the field), acknowledged in its resolution of 17 April 2020 that ‘the pandemic has shown the limits of the Union’s capacity to act decisively and exposed the lack of the Commission’s executive and budgetary powers.’<sup>91</sup> A first breakthrough came, however, in the meeting of the European Council on 23 April 2020, which tasked the Commission with the development of a ‘recovery fund’ built on borrowing within the scope of the Multiannual Financial Framework (MFF)—the EU’s regular, seven-year budget. The MFF would rise from the current 1.2 percent of Gross National Income (GNI) to around 2 percent of GNI for the first two years of the seven-year cycle.<sup>92</sup> The increase would be financed through EU debt backed by the guarantees of the Member States equal to each country’s proportional responsibility for the MFF.

The potential of the recovery fund as an instrument for debt-mutualisation and/or fiscal transfers could not be gainsaid, but a key issue was the extent to which the fund’s proceeds would be distributed via loans or outright grants—certainly the latter would be a major demonstration of European solidarity in the circumstances. The crucial turning-point on this question came in early May 2020, when President Macron enlisted the agreement of German Chancellor Angela Merkel, advancing a joint Franco-German plan for a recovery fund of 500 billion euro, distributed exclusively through grants. In so doing, Macron was said to have gotten Merkel to ‘jump[] over the shadow of tight-fisted German conservatism, [and] face[] down the high priests of fiscal and monetary orthodoxy in Frankfurt and

<sup>89</sup> See Eurogroup, Report on the comprehensive economic policy response to the COVID-19 pandemic, 9 April 2020, <<https://www.consilium.europa.eu/it/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic/>>, visited on 30 July 2020.

<sup>90</sup> M. Dani and A. J. Menéndez, ‘The European Stability Mechanism is a False Solution to a Real European Problem’, *Verfassungsblog*, 4 April 2020, <<https://verfassungsblog.de/the-european-stability-mechanism-is-a-false-solution-to-a-real-european-problem/>>, visited 30 July 2020, consider, amongst other things, that the nature of the loans and its conditions can be changed at a later stage, according to Article 7, para 5, of Regulation 472/2013.

<sup>91</sup> European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)), P9\_TA(2020)0054, para 69.

<sup>92</sup> D. M Herszenhorn, ‘EU Leaders Back Budget Reboot for Coronavirus Recovery’, *Politico.eu*, 23 April 2020 <<https://www.politico.eu/article/eu-leaders-back-budget-reboot-for-coronavirus-recovery/>>, visited 30 July 2020

Karlsruhe’—in the evocative words of one commentator.<sup>93</sup> A recovery fund entirely deployed through grants, however, was considered unacceptable for the leaders of the so-called ‘frugal four’—at this point comprising Austria, Denmark, the Netherlands, and Sweden—who insisted on the distribution through loans, which the recipient states would need to pay back.<sup>94</sup> In the formal proposal of the Commission at the end of May, the Next Generation EU was comprised of 750 billion euro, with up to 500 billion euro distributed by grants and up to 250 billion euro distributed through loans to be repaid in twenty-thirty years (and by 2058 at the latest).<sup>95</sup>

### 5.1.3 Next Generation EU and the EU’s Metabolic Constitution

What emerged out of the negotiations over the next several weeks, culminating in the European Council meeting of 17 to 21 July 2020, was a compromise, both in the mix between grants and loans as well as in the oversight procedures governing payments. The final agreement, coordinated to a significant extent by Council President Charles Michel, maintained the overall size of the fund at 750 billion euro, funded by new borrowing under the MFF, but the distribution among grants (390 billion euro) and loans (360 billion euro) was changed. The agreement further divided the fund between the Recovery and Resilience Facility (RRF) of 672.5 billion euro (of which 360 billion euro would be distributed by loans and the remainder in grants), with the remaining moneys distributed via grants under specific instruments such as InvestEU, the Just Transition Fund, and the like.<sup>96</sup>

In terms of governance and oversight, each Member State is required to submit a national recovery and resilience plan, which the Commission was given two months to assess, followed by approval by the Council acting by qualified majority. As a concession to the ‘frugal’ Member States, however, an ‘emergency break’ of sorts was adopted. Under this procedure, disbursements under a national recovery and resilience plan could be delayed by up to three months if another Member State challenged the plan’s compliance with ‘the relevant milestones and targets’ (a vague category to be sure) and referred the matter to the European Council.<sup>97</sup> Finally, contrary to the hopes of certain Member States, rebates were preserved (and even increased) for several of the EU’s largest net contributors to the MFF.

The historic innovation in recovery fund—indeed, perhaps a ‘Coronabond’ in all but name—was the use of the MFF as a temporary instrument of common borrowing and

<sup>93</sup> P. Taylor, ‘Merkel’s Milestone Moment’, *Politico.eu*, 19 May 2020 <<https://www.politico.eu/article/angela-merkel-milestone-moment-europe-coronavirus-response/>>, visited 30 July 2020.

<sup>94</sup> L. Bayer, B. Smith-Meyer and M. De La Baume, ‘Franco-German Recovery Deal Meets Resistance’, *Politico.eu*, 19 May 2020, <<https://www.politico.eu/article/franco-german-recovery-deal-meets-resistance/>>, visited 30 July 2020 and S. Fleming, ‘EU Divisions Laid Bare by “Frugal Four” Recovery Proposal’, *Financial Times*, 24 May 2020 <<https://www.ft.com/content/add218ac-f63d-4b65-af5c-3c4e9033e015>> visited 30 July 2020.

<sup>95</sup> See European Commission Communication on the EU budget Powering the Recovery Plan for Europe, COM (2020) 442 final, 27 May 2020.

<sup>96</sup> European Council, *supra* n. 68, para. A.14.

<sup>97</sup> *Ibid.*, para A.19.

macroeconomic stabilisation. In addition, the goals of the European Green Deal were to certain extent preserved, in that the final agreement guaranteed that 30% of all spending under the fund must go toward meeting climate targets (although, as anticipated, InvestEU and the Just Transition Fund specifically experienced the most cuts during the negotiations).<sup>98</sup> Nonetheless, it is important not to exaggerate too much the impact of the agreement on the EU's metabolic constitution. The increased borrowing will be temporary and still ultimately backed by the fiscal mobilisation capacities of the Member States severally, through their proportional obligations to the MFF. No doubt, the Commission proposed a series of new taxes (for example, on digital technology and single-use plastics), which thus would join customs duties and a portion of VAT as part of the EU's own resources. But the European Council's conclusions of 21 July were surprisingly vague on those new taxes,<sup>99</sup> and in any event, if and when they are in fact adopted, they will still need to be imposed and collected nationally, per the requirements of Article 311 TFEU. Indeed, in some countries (e.g., Austria and Germany), the national-parliamentary approval for these levies may require qualified majorities, the same needed to amend their respective Constitutions.<sup>100</sup> Given how the Member States have traditionally 'jealously guard[ed] their taxation powers',<sup>101</sup> committing additional direct revenues to the EU budget could well still prove controversial.

Thus, in terms of the EU's metabolic constitution, Next Generation EU still did not cross the crucial Rubicon, that of a proposed Europeanisation of taxation authority to accompany the increased borrowing under the MFF. The financial underpinnings of the new recovery fund would still be entirely in keeping with how the Member States financed the response to the Eurozone crisis over the prior decade—ultimately through their own fiscal capacities, whether directly or indirectly. The mechanism set in place—EU debt issuance—is also not new.<sup>102</sup> What is new, however, is the magnitude of that debt. Indeed, the EU is set to become one of 'Europe's largest bond issuers' in the financial markets, most likely triggering a transformation of European capital markets.<sup>103</sup> The EU's move toward debt-financed deficit spending is also historic in legal terms, given the long-standing interpretation of Article 310 TFEU as prohibiting the EU to finance its expenditures through borrowing.<sup>104</sup> As such, given the explicit requirement of an EU balanced budget (again, in Article 310 TFEU), this shift

<sup>98</sup> Ibid., para A.21.

<sup>99</sup> Ibid., para A.29.

<sup>100</sup> See L.F.M. Besselink, M. Claes, Š. Imamović, and J.H. Reestman, *National Constitutional Avenues for Further Integration*, Study requested by the European Parliament's Committees on Legal Affairs and on Constitutional Affairs, PE 493.046, 2014, p. 117 and 199.

<sup>101</sup> J. Brunsden and S. Fleming, 'Brussels Looks to New Taxes to Pay off Pandemic Recovery Debt', *Financial Times*, 25 May 2020, <<https://www.ft.com/content/e4ca5b01-9b26-413a-bbb9-960db6b5914a>>, visited 30 July 2020.

<sup>102</sup> G.L. Tosato, 'The Recovery Fund: Legal Issues', *LUISS School of European Political Economy*, Policy Brief 23/2020, 1 May 2020, p. 3, <<https://sep.luiss.it/sites/sep.luiss.it/files/The%20Recovery%20Fund.%20Legal%20Issues.pdf>>, visited 30 July 2020.

<sup>103</sup> T. Stubbington and M. Arnold, 'Investors hail Brussels as a new force in bond markets', *Financial Times*, 22 July 2020, <<https://www.ft.com/content/da0f71e4-e629-404d-ba65-fe1dcf3d4a14>>, visited 4 August 2020.

<sup>104</sup> P. Leino-Sandberg, 'Who is ultra vires now? The EU's legal U-turn in interpreting Article 310 TFEU', *Verfassungsblog*, 18 June 2020, <<https://verfassungsblog.de/who-is-ultra-vires-now-the-eus-legal-u-turn-in-interpreting-article-310-tfeu/>>, visited 30 July 2020.

may trigger, at least in the medium term, the creation of a real fiscal capacity at the EU level to make its budget sustainable.

This raises an interesting philosophical question, as one commentator quickly noted after the deal was announced: ‘whether ... the EU can initiate sovereign fiscal capacity through public debt alone? Or does it also require tax revenue raising capacity?’<sup>105</sup> Eventually, no doubt, any EU borrowing beyond the short-term and limited scale of Next Generation EU will need to be accompanied by autonomous taxing authority, which in turn would require treaty change. And, as this commentator rightly noted, any change of that magnitude would lay the groundwork for considerable political conflict in the future. Other commentators were more sanguine, seeing Next Generation EU as a vehicle for ‘reshap[ing] the EU’s political economy’: Because ‘what can be done once can be done again’, this means that national leaders ‘have boarded the train towards more common taxation and cannot get off and turn back’.<sup>106</sup>

Time will tell. To turn this temporary instrument into a permanent feature of European political economy (shifting responsibility to macroeconomic stabilisation to the EU, combined with authority to raise taxes) would indeed require a quite fundamental treaty change, something for which there clearly does not appear to be the political appetite. Thus, it is perhaps best to say that, even if the EU has not yet crossed the Rubicon, Next Generation EU has brought it right up to its banks. On the opposite shore is a new sociopolitical terrain, one marked by several more demanding macroeconomic and geopolitical features, whether completing EMU, developing a genuine European security and defense capacity, or meeting the demands of the climate emergency that will no doubt reassert themselves once the pandemic has passed. These new challenges require something beyond the traditional forms of supranational governance in the EU; that is, something more than regulatory power and technocratic-juristocratic ‘pre-commitment’ mechanisms, combined with one-off decisions to create borrowing capacity. What these challenges will demand, in other words, will be something approaching both the power and legitimacy of genuinely autonomous metabolic constitution for the EU in its own right.

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<sup>105</sup> A. Regan, @Aidan\_Regan, 23 July 2020, 9:02 AM EDT, <[https://twitter.com/Aidan\\_Regan/status/1286288755926667265?s=20](https://twitter.com/Aidan_Regan/status/1286288755926667265?s=20)> visited 30 July 2020.  
<sup>106</sup> M. Sandbu, EU crosses the Rubicon with its emergency recovery fund, *Financial Times*, 22 July 2020.

## 6. Conclusion: Taking Stock of Where We Are

Europe thus finds itself at a pivotal moment, potentially on the cusp of a genuine constitutional transformation but not there yet, at least not until the EU gains taxing authority in its own right to support increased borrowing capacity. There has been considerable debate over whether common borrowing, combined with distribution by grants, marks the arrival of a ‘Hamiltonian moment’ in the EU, though on this point, the sceptics have the better of the argument.<sup>107</sup> Many observers fixate on debt-mutualisation as the primary sign of such a moment, when in historical fact, the true Hamiltonian innovation of the founding period in the United States was the conferral of taxing authority on the federal government in the US Constitution.<sup>108</sup> Such authority remains, as of this writing, a bridge too far for the EU to cross. Lacking such capacity, the fractured metabolic constitution compels the EU to rely on more convoluted means to mobilise fiscal resources. For precisely this reason, Next Generation EU is both promising yet also quite limited. The EU’s fractured metabolic constitution has, as with the Eurozone crisis and the European Green Deal before it, forced the EU into a complex exercise in political and financial engineering—an effort that could have been, if not entirely avoided, at least mitigated if the EU had both the power and legitimacy to mobilise fiscal resources on its own.

The adoption of Next Generation EU and the revised MFF are thus perhaps just the first step in a longer process. The strategic cuts envisioned to some items in the EU spending, on research, education, environment, asylum and migration, will certainly be at the centre of an ongoing struggle over the final approval of the MFF.<sup>109</sup> As for payments out of the EU recovery fund, there remain the vague governance provisions in the European Council’s conclusions. If these are followed with any degree of rigour, the result will no doubt be further tensions among the Member States over compliance with ‘relevant milestones and targets’, a category capacious enough to include macroeconomic conditionality, observance of the country specific recommendations, as well as respect for carbon neutrality standards, among others. As one knowledgeable observer put it: ‘Endless recriminations are guaranteed, as the Dutch lambast the Italian government’s pension payments and Rome

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<sup>107</sup> As Wolfgang Münchau (@EuroBriefing) tweeted soon after the Macron-Merkel agreement on joint debt in May 2020: ‘A useful first step, but please spare us all this Hamilton nonsense’ (9:02 CET, 19 May 2020) <<https://twitter.com/EuroBriefing/status/1262639673043816448?s=20>>, visited 30 July 2020. See also S. Kapoor, ‘This Isn’t Europe’s “Hamilton” Moment’, *Politico.eu*, 22 May 2020, <<https://www.politico.eu/article/this-isnt-europe-hamilton-moment/>>, visited 30 July 2020.

<sup>108</sup> See generally M.M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Ebsco Publishing 2003); see also *supra* n. 16.

<sup>109</sup> European Parliament Resolution of 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020 (2020/2732(RSP)).

returns the favour with reports on the Netherlands' famous tax loopholes.<sup>110</sup> Rule of law compliance, moreover, is almost certain to become a point of deeper contestation as well, given how the European Council's conclusions avoided precision on this crucial topic.<sup>111</sup>

All these further tensions will play themselves out against the backdrop of the primary legacy of the last decade of crisis in the EU: a regime of fiscal austerity. In this sense, from the perspective of macroeconomic stabilisation, what Europe 'giveth' in terms of Next Generation EU, it very much can 'taketh away' in terms of enforcement of this regime.<sup>112</sup> This then points us toward the fundamental contradiction in the EU's fractured metabolic constitution, one only temporarily and partially reduced under Next Generation EU: 'National institutions are increasingly constrained in the exercise of their constitutional authority but supranational institutions cannot fill the void because they are unable to transition to genuine constitutionalism—that is the autonomous capacity to mobilise fiscal and human resources in a compulsory fashion.'<sup>113</sup>

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<sup>110</sup> Y. Varoufakis, 'The EU coronavirus fund will take Europe another step towards disintegration', *The Guardian*, 24 July 2020, <<https://www.theguardian.com/world/commentisfree/2020/jul/24/eu-coronavirus-fund-europe-recovery-package>>, visited 30 July 2020.

<sup>111</sup> See European Council, *supra* n. 68, para. A.22 and in detail, J. Morijn, 'The July 2020 Special European Council, the EU budget(s) and the rule of law: Reading the European Council Conclusions in their legal and policy context', Op-Ed, *Eulawlive.com*, 23 July 2020, <<https://eulawlive.com/op-ed-the-july-2020-special-european-council-the-eu-budgets-and-the-rule-of-law-reading-the-european-council-conclusions-in-their-legal-and-policy-context-by-john-morijn/>>, visited 30 July 2020.

<sup>112</sup> See, e.g., Eurogroup statement on Greece of 11 June 2020, <<https://www.consilium.europa.eu/en/press/press-releases/2020/06/11/eurogroup-statement-on-greece-of-11-june-2020/>>, visited 30 July 2020.

<sup>113</sup> Lindseth, *supra* n. 22, p. 701.

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