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The Next Generation EU Bond as Security and Next Step in EU Integration

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General Note about the Content

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Abstract

As a result of the coronavirus crisis, the European Union (EU) had to face unprecedented challenges during the years of 2020 and 2021. This crisis put to the trial the economic, social and health care systems of the EU Member States and also the solidarity among them. To handle the crisis, the EU adopted the ground-breaking Next Generation EU (NGEU) program and to ensure its financial background authorization was given to the European Commission to issue debt securities worth of maximum EUR 750 billion on behalf of the EU.

The paper examines the circumstances which led to the establishment of this new and exceptional temporary recovery instrument. As a basis of the research, it introduces the legal and economic background of debt security issuances in the EU and the legal framework regarding the EU as the issuer of debt securities. Strong emphasis is given on the Support to mitigate Unemployment Risks in an Emergency (SURE) program, which can be considered as the forerunner of NGEU. The most important part of the paper introduces the NGEU and the related debt security issuance program in detail. The legal aspects of NGEU and NGEU bonds regarding European integration are especially highlighted. The paper intends to find answers to the questions that what kind of effects do NGEU and the related bond issuance have on the EU? Is it well-founded to consider this achievement as the next step in European integration?

The paper is on the conclusion that NGEU and the related developments obviously all hint at the direction of a stronger European integration and solidarity. For example, NGEU represents the first large volume borrowing (bond issuance) of the EU and it introduced a new guarantee and liability sharing mechanism. New (and temporarily enhanced) system of own resources was considered necessary in connection with NGEU and the appropriate administrative, regulatory and institutional background of debt management was established. The protection for the EU's financial interests and values was also strengthened. The NGEU introduced new common policy objectives for the EU and ensured the necessary funds for their achievement. Some commentators even argue that Europe already reached a 'Hamiltonian moment' as a consequence of NGEU.

However, the Conclusions of the paper emphasize that NGEU was adopted as an exceptional and temporary emergency mechanism, which has *ad hoc* and *ex post* nature. Such a mechanism in itself cannot be considered as a next step in EU integration. If a similar instrument as NGEU would be established in the EU as a permanently available mechanism to treat future challenges, then this achievement definitely would represent a next step in EU integration. The reason is that the establishment of such a mechanism would confer significant new powers permanently to the EU, so a new and significant EU competence would arise. Considering the past crises in the 21st century, this paper predicts strong probability regarding the establishment of such *ex ante* and permanent risk sharing mechanism. However, whether the NGEU will evolve further to such a mechanism will largely depend on its success. Based on that, this paper emphasizes the important role of those politicians and bureaucrats who are taking part in the implementation of NGEU.

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Table of abbreviations

BOP	Balance of Payments
CBAM	Carbon Border Adjustment Mechanism
CF	Cohesion Fund
CJEU	Court of Justice of the European Union
CRII	Coronavirus Response Investment Initiative
CRII+	Coronavirus Response Investment Initiative Plus
CRIIs	Coronavirus Response Investment Initiatives
COVID-19, or COVID	coronavirus disease 2019
CPR	Common Provisions Regulation
EC	European Commission
ECB	European Central Bank
EEA	European Economic Area
EFSM	European Financial Stabilisation Mechanism
EP	European Parliament
ERDF	European Regional Development Fund
ESCB	European System of Central Banks
ESF	European Social Fund
ESG bonds	Environmental, Social, and Governance bonds
ETS	Emissions Trading System
EU	European Union
EURATOM	European Atomic Energy Community
EURI	European Union Recovery Instrument
EURI Regulation	European Union Recovery Instrument Regulation [Council Regulation (EU) 2020/2094]
EURS	European Unemployment Reinsurance Scheme
GDP	Gross Domestic Product
GNI	Gross National Income
G20	Group of Twenty
ICMA	International Capital Market Association
ICMA SBP	International Capital Market Association's Social Bond Principles

LGX	Luxembourg Green Exchange
LuxSE	Luxembourg Stock Exchange
MFA	Macro-Financial Assistance
MFF	Multiannual Financial Framework
NCB	national central bank
NGEU	Next Generation EU
PD Network	pan-European Primary Dealer Network
PHEIC	Public Health Emergency of International Concern
REACT-EU	Recovery Assistance for Cohesion and the Territories of Europe
RRF	Recovery and Resilience Facility
RRF Regulation	Recovery and Resilience Facility Regulation [Regulation (EU) 2021/241]
OECD	Organisation for Economic Co-operation and Development
ORD	Own Resources Decision
SARS-CoV	severe acute respiratory syndrome-related coronavirus
SARS-CoV-2	severe acute respiratory syndrome coronavirus 2
SME	small and medium-sized enterprise
SGP	Stability and Growth Pact
SURE	Support to mitigate Unemployment Risks in an Emergency
SURE Regulation	Support to mitigate Unemployment Risks in an Emergency Regulation [Council Regulation (EU) 2020/672]
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TOR	traditional own resources
UN	United Nations
WHO	World Health Organization

I. Introduction - The research topic of the master thesis

The coronavirus crisis imposed unprecedented challenges on the economic, social and health care systems of the European Union (EU) Member States. At the beginning of the crisis, during the first wave of the pandemic it already seemed inevitable that an enormous economic stimulus package would be necessary to facilitate recovery. This consideration pervaded the discussions about the budgetary and development policy aspects of the new 2021-2027 multiannual financial framework (MFF).[1] However, it became obvious that the ordinary EU budgetary framework will not be sufficient to facilitate a fast economic recovery and to rebuild Europe after the coronavirus crisis.[2] This is the reason why additional measures proved to be necessary to complement the EU funds which would be normally available in the 2021-2027 MFF. Based on these considerations the EU established the European Union Recovery Instrument[3] (Next Generation EU), which is a temporary recovery instrument with the aim to help the European economy to emerge from the current crisis.[4] This instrument in itself represents a new type of commitment and solidarity among Member States. Furthermore, for the financing of this new temporary recovery instrument the Member States decided to empower the EU to implement large scale debt issuance on the financial markets. Consequently, the EU received for the first time authorisation from its Member States to raise economically significant amount of debt financing to achieve its goals.[5] This kind of mutual

[1] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The EU budget powering the recovery plan for Europe' (Communication) COM(2020) 442 final 1-20.
[2] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – Europe's moment: Repair and Prepare for the Next Generation' (Communication) COM(2020) 456 final 1-11.
[3] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L 433I/23 (EURI Regulation).
[4] EURI Regulation, art 1(1); European Commission, COM(2020) 442 final 1, 3, 14; Chih-Mei Luo, 'The COVID-19 Crisis: The EU Recovery Fund and Its Implications for European Integration – a Paradigm Shift' [2021] European Review 1, 14-15.
[5] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L 424/1 (Own Resources Decision) art 5; Oliver Picek, 'Spillover Effects from Next Generation EU' (2020) 55 Intereconomics 325.

debt issuance probably will represent an additional element in the European integration.[6] This additional tie among Member States will influence the development of the EU and its long-term consequences are currently unforeseeable.

In my master thesis I intend to examine the circumstances which led to the establishment of this new and exceptional temporary recovery instrument. First I would like to analyse the coronavirus crisis and its economic consequences in the EU. I also summarize the initial measures which were adopted by the EU to handle the crisis. Then I intend to highlight the legal and economic background of debt security issuances in the EU and also the legal framework regarding the EU as the issuer of debt securities. I provide insight into the Support to mitigate Unemployment Risks in an Emergency (SURE) program, which already realised a significant amount of debt security issuance at EU level, so it can be considered as the forerunner of the financing solution adopted by the Next Generation EU. In the most important part of my master thesis my aim is to highlight the Next Generation EU program in detail. I intend to analyse the legal procedure which led to its adoption and I also introduce its main objectives. I scrutinize the debt security issuance programme which has the aim to finance this exceptional recovery instrument. I would like to find an answer to the questions of how is the legal construction of this common EU level debt security issuance framed and what kind of influence does it have on European integration in the future? What further effects may have that the EU will become a main public sector borrower on the European continent? May this lead to the establishment of new EU institutions or revenues? Is it well-founded to consider Next Generation EU and the associated large-scale bond issuance as the next step in European integration? As these questions are currently unanswered, the aim of my master thesis is to find the possible answers.

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[6] Picek (n 5) 325, 326, 331; Riccardo Crescenzi, Mara Giua, Giulia Valeria Sonzogno, 'Mind the Covid-19 crisis: An evidence-based implementation of Next Generation EU' (2021) 43 Journal of Policy Modeling 292; Lorenzo Codogno and Paul van den Noord, 'Assessing Next Generation EU' (2021) LSE 'Europe in Question' Discussion Paper Series LEQS Paper No. 166/2020 2. < https://www.lse.ac.uk/european-institute/Assets/Documents/LEQS-Discussion-Papers/LEQSPaper166.pdf > accessed 24 September 2021.

II. The coronavirus crisis in the European Union

1. The outbreak of the coronavirus crisis

Coronaviruses received their name because of their characteristic surface. When they are examined under an electron microscope, the virions show a distinctive crown-like appearance. This is reflected by the name *corona*, as this Latin word means crown. They were first identified in the 1960s and currently seven types of coronaviruses which infect humans are known by virologists.[7]

On 31 December 2019, the Wuhan Municipal Health Commission reported a cluster of pneumonia cases of unknown origin which appeared in Wuhan City, Hubei province, China. The first identified cases had a connection to Wuhan's Huanan Seafood Wholesale Market. On 9 January 2020 it was announced that the disease is caused by a novel coronavirus. The scientific analysis revealed that the newly identified virus genetically relates to the severe acute respiratory syndrome-related coronavirus (SARS-CoV) clade.[8] This is why this novel coronavirus was termed as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) and the disease caused by it as coronavirus disease 2019 (COVID-19, or COVID).[9] This virus is a new strain of coronavirus which was not previously identified in humans.[10]

According to the World Health Organization (WHO), the symptoms of COVID-19 are non-specific and the consequences of the infection can vary from no symptoms (asymptomatic) to

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[7] European Centre for Disease Prevention and Control, 'Cluster of pneumonia cases caused by a novel coronavirus, Wuhan, China - 17 January 2020' (ECDC, Stockholm 2020) 4. < https://www.ecdc.europa.eu/sites/default/files/documents/Risk%20assessment%20-%20pneumonia%20Wuhan%20China%2017%20Jan%202020.pdf > accessed 28 April 2021.

[8] ibid 1-2.

[9] Gianfranco Spiteri, James Fielding, Michaela Diercke et al., 'First cases of coronavirus disease 2019 (COVID-19) in the WHO European Region, 24 January to 21 February 2020' (2020) 25(9) Euro Surveill 1. < https://doi.org/10.2807/1560-7917.ES.2020.25.9.2000178 > accessed 28 April 2021.

[10] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak [2020] OJ L 159/1 (SURE Regulation) Preamble 3.

severe pneumonia and death. Based on the first scientific examinations of the COVID-19 cases, the symptoms included most importantly fever, dry cough, fatigue, sputum production, shortness of breath, sore throat and headache, etc.[11] The first case studies showed a crude fatality ratio of 3.8% regarding the newly identified virus.[12]

Until 30 January 2020 authorities reported more than 7 000 laboratory-confirmed COVID cases worldwide. Most of these cases appeared in China. However, the spread of the virus also affected other countries, as more than 70 cases were already reported outside China.[13] On 30 January 2020, the WHO issued a declaration which classified the COVID outbreak as a public health emergency of international concern (PHEIC). Until 4 March 2020, COVID cases were already reported from 77 countries worldwide.[14] During the upcoming months the virus showed a rapid spread and appeared almost everywhere on the globe. In the EU the first COVID cases were reported by France on 24 January 2020.[15] The first COVID-related death was also registered in France on 15 February 2020.[16]

On 11 March 2020 the WHO announced that according to its assessment the 'COVID-19 can be characterized as a pandemic.'[17] Until that date more than 118 000 COVID-19 cases were reported from 114 countries.[18] In his press briefing on 19 March 2020, United Nations (UN) Secretary-General António Guterres called the COVID pandemic a 'global health crisis unlike

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[11] World Health Organization, 'Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)' (World Health Organization, 16-24 February 2020) 11-12. < https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf > accessed 28 April 2021.

[12] This means that 2114 of the 55 924 laboratory confirmed cases have died until 20 February 2020. See ibid 12.

[13] European Centre for Disease Prevention and Control, 'Outbreak of acute respiratory syndrome associated with a novel coronavirus, China: first local transmission in the EU/EEA – third update 31 January 2020.' (ECDC, Stockholm 2020) 1. < https://www.ecdc.europa.eu/sites/default/files/documents/novel-coronavirus-risk-assessment-china-31-january-2020_0.pdf > accessed 28 April 2021.

[14] World Health Organization, 'Responding to community spread of COVID-19, Interim guidance 7 March 2020' (World Health Organization, 2020) 1. < https://www.who.int/publications/i/item/responding-to-community-spread-of-covid-19 > accessed 28 April 2021.

[15] European Centre for Disease Prevention and Control, 'Outbreak of acute respiratory syndrome associated with a novel coronavirus, China: first local transmission in the EU/EEA – third update 31 January 2020.' (n 13) 1.

[16] Spiteri, Fielding, Diercke et al. (n 9) 3.

[17] Dr Tedros Adhanom Ghebreyesus (World Health Organization), 'WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020' (World Health Organization, 2020) < https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 > accessed 28 April 2021.

[18] ibid.

any in the 75-year history of the United Nations (…)'.[19] He also emphasized that 'our world faces a common enemy. We are at war with a virus.'[20] He called attention to the economic consequences of the pandemic, because of its serious effect on the real economy. The UN Secretary-General emphasized also the strong possibility of a global recession which may have record dimension.[21]

Until 1 April 2020, 823 626 confirmed COVID cases were reported worldwide and 40 598 people already lost their lives in the pandemic. Almost all countries and regions reported cases, except for example North Korea, South-Sudan and Yemen.[22]

As at 8 April 2021, 27 513 674 COVID cases were reported in the EU/EEA and 627 242 people died due to the pandemic.[23]

2. The economic consequences of the coronavirus crisis in the European Union

On 13 March 2020, the WHO announced that Europe became the new epicentre of the COVID pandemic.[24] This situation required immediate response by the Member States, so

[19] United Nations University, 'UN Secretary-General: COVID-19 Pandemic Calls for Coordinated Action, Solidarity, and Hope' (virtual press conference on the COVID-19 crisis, opening remarks of United Nations Secretary-General António Guterres, 19.03.2020, United Nations University, New York 2020) < https://unu.edu/news/news/un-secretary-general-covid-19-pandemic-calls-for-coordinated-action-solidarity-and-hope.html > accessed 28 April 2021.
[20] ibid.
[21] ibid.
[22] World Health Organization, 'Coronavirus disease 2019 (COVID-19) Situation Report – 72, Data as reported by national authorities by 10:00 CET 1 April 2020.' (World Health Organization, 2020) < https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200401-sitrep-72-covid-19.pdf?sfvrsn=3dd8971b_2 > accessed 28 April 2021.
[23] European Centre for Disease Prevention and Control, 'The Home Page of European Centre for Disease Prevention and Control' Accessible < https://www.ecdc.europa.eu/en/covid-19 > accessed 8 April 2021; See also European Centre for Disease Prevention and Control, 'Communicable Disease Threats Report, CDTR Week 14, 4-10 April 2021' (ECDC, 2021) < https://www.ecdc.europa.eu/sites/default/files/documents/communicable-disease-threats-report-10-april-2021-all-users.pdf > accessed 18 December 2021.
[24] Dr Tedros Adhanom Ghebreyesus (World Health Organization), 'WHO Director-General's opening remarks at the media briefing on COVID-19 - 13 March 2020' (World Health Organization, 2020) < https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-mission-briefing-on-covid-19---13-march-2020 > accessed 28 April 2021; Tiaji Salaam-Blyther, Kristin Archick, Maria A. Blackwood, et al. (Congressional Research Service), 'Novel Coronavirus 2019 (COVID-19): Q&A on Global Implications and Responses' (CRS Report Prepared for Members and Committees of Congress, R46319,

extraordinary measures were introduced to hinder the spread of the virus and to flatten the curve.[25] The European Commission (EC) also issued recommendations on how to impede the spread of the virus with such measures.[26] Italy was the first Member State which imposed strict restrictions, but soon most of the other Member States followed the example. The adopted measures had similar characteristics. Such measures were for example the announcement of nationwide quarantines or the prohibition of non-essential movement within the country and the closing of non-essential businesses. Travel restrictions were adopted and also national border controls were temporarily restored within the EU's internal border-free Schengen Area by numerous Member States. Furthermore, Member States imposed restrictions on public gatherings to varying degrees and introduced community measures, including social distancing.[27] In this regard usually social and cultural meeting places (for example bars, restaurants, cafeterias, museums, theatres, cinemas, sport clubs, etc.) were closed. Mass gatherings (like sporting events, concerts, festivals, conferences, trade fairs, political rallies, etc.) were banned and governments took measures to discourage gatherings generally. Most European governments decided to close schools, universities and education institutions and applied online alternatives. Religious sites were also closed and faith-based events were cancelled. Voluntary self-isolation of vulnerable populations (such as the elderly and those with underlying medical conditions) was encouraged. Decisions were made to postpone any non-essential administrative procedures. Numerous EU Member States proclaimed a state of emergency and introduced curfews. The military forces were also

Congressional Research Service 2020) < https://crsreports.congress.gov/product/pdf/R/R46319/4 > accessed 28 April 2021.

[25] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013, Regulation (EU) No 1301/2013 and Regulation (EU) No 508/2014 as regards specific measures to mobilise investments in the health care systems of the Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative)' COM(2020) 113 final.

[26] European Commission, 'COVID-19 EU recommendations for community measures (18 March 2020)' (European Union, 2020) < https://ec.europa.eu/info/sites/default/files/covid19_-_eu_recommendations_for_community_measures.pdf > accessed 28 April 2021.

[27] ibid 2; Salaam-Blyther, Archick, Blackwood, et al. (Congressional Research Service) (n 24) 27-29.

mobilised in several Member States to provide assistance for handling the crisis. For example they set up makeshift hospitals to provide additional health care capacities.[28]

These measures had (and currently have) the aim to slow down the spread of the virus and to relieve the health care systems from overwhelming. However, the enacted measures resulted in high social and economic costs. As some sectors of the economy were closed (such as important parts of the service sector like hospitality industry/tourism and retail sales) economic activity and growth started to shrink in the EU and a strong recession seemed unavoidable. The measures adopted to handle the public health crisis sometimes also had a temporary disturbing effect on the proper functioning of the Single Market.[29]

The EC in its European Economic Forecast (Winter 2021) expected that the real gross domestic product (GDP) growth of the EU was -6.3% (and considering only the performance of the euro area, -6.8%) in 2020. This indicates a significant recession.[30] The largest economic setback took place undisputedly in the first half of the year, when EU economy showed an unprecedented contraction.[31] According to Eurostat 'in the first quarter of 2020, GDP had decreased by 3.6% in the euro area and by 3.2% in the EU.'[32] Considering the second quarter of 2020, GDP decreased by 12.1% in the euro area and by 11.9% in the EU. This second quarter result represents a 15.0% decrease in the EU GDP compared with the second quarter

[28] Tiaji Salaam-Blyther, Kristin Archick, Maria A. Blackwood, et al. (Congressional Research Service) (n 24) 27-28; European Commission, 'COVID-19 EU recommendations for community measures (18 March, 2020)' (n 26) 2; European Commission, 'Joint European Roadmap towards lifting COVID-19 containment measures' 2020/C 126/01 (Information from European Union Institutions, Bodies, Offices and Agencies, European Commission, 17 April 2020) 2. < https://op.europa.eu/en/publication-detail/-/publication/14188cd6-809f-11ea-bf12-01aa75ed71a1/language-en > accessed 28 April 2021.

[29] Danny Busch, 'Is the European Union going to help us overcome the COVID-19 crisis?' in Christos V. Gortsos and Wolf-Georg Ringe (eds), *Pandemic Crisis and Financial Stability* (European Banking Institute 2020) 3-4. < https://ebi-europa.eu/wp-content/uploads/2020/05/Gortsos-Ringe-eds-Pandemic-Crisis-and-Financial-Stability-2020-final.pdf > < SSRN: https://ssrn.com/abstract=3607930 > accessed 28 April 2021; European Commission, 'Joint European Roadmap towards lifting COVID-19 containment measures' (n 28) 2; European Commission, COM(2020) 113 final.

[30] European Commission, 'European Economic Forecast Winter 2021 (Interim)' (Institutional Paper 144, Luxembourg: Publications Office of the European Union, February 2021) 1. < https://ec.europa.eu/info/sites/info/files/economy-finance/ip144_en_1.pdf > accessed 28 April 2021.

[31] ibid 7.

[32] Eurostat, 'Newsrelease – Euroindicators' (121/2020 - 31 July 2020) 1. < https://ec.europa.eu/eurostat/documents/2995521/11156775/2-31072020-BP-EN.pdf/cbe7522c-ebfa-ef08-be60-b1c9d1bd385b > accessed 29 April 2021.

of 2019. These results indicate by far the most serious decrease in GDP since 1995, when Eurostat started to publish such observations.[33] The largest second quarter GDP decrease compared to the previous quarter took place in Spain (-18.5%), ahead of Portugal (-14.1%) and France (-13.8%).[34]

During the third quarter of 2020, after containment measures were lifted, significant recovery emerged in the EU economy. The GDP increased by 11.5% in the EU and by 12.4% in the euro area in the third quarter of 2020 (on a quarter on quarter basis).[35] This can be considered as a significant rebound in the European economy; however the economic activity did not reach its pre-pandemic level.[36]

As the number of infections grew significantly during the autumn of 2020, Member States had to reintroduce or tighten containment measures. These again affected the economy and set back the recovery process. However, the late autumn/winter wave (second wave) of the pandemic did not cause such an enormous economic setback which was experienced during the spring of 2020. The possible reason is that this time Member States adopted more targeted and relatively less stringent containment measures and also households and businesses probably learned how to coexist with the pandemic.[37] However, recently new variants of COVID-19 started to spread worldwide, which are sometimes more contagious (and maybe also more dangerous) than the first version of the virus.[38] The European economy hold on during the first quarter of 2021 and the GDP only showed a slight (about 0.1%) contraction.[39]

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[33] ibid 1.

[34] ibid 2.

[35] European Commission, 'European Economic Forecast Winter 2021 (Interim)' (n 30) 1.

[36] ibid 7.

[37] ibid 7-10, 12.

[38] World Health Organization, 'SARS-CoV-2 Variants COVID-19 - Global (Disease Outbreak News, 31 December 2020)' < https://www.who.int/emergencies/disease-outbreak-news/item/2020-DON305 > accessed 11 October 2021.

[39] European Commission, 'European Economic Forecast Summer 2021' (Institutional Paper 156, Luxembourg: Publications Office of the European Union, July 2021) 1-3, 6-16. < https://ec.europa.eu/info/sites/default/files/economy-finance/ip156_en.pdf > accessed 11 October 2021.

During the summer of 2021 the EC forecasted a GDP growth of 4.8% in 2021 and 4.5% in 2022 in both the EU and the euro area.[40]

3. The initial measures adopted by the European Union to handle the coronavirus crisis

As it became obvious during the spring of 2020 that the COVID crisis significantly paralyses the EU (and also world) economy, measures were introduced also at EU level to handle its immediate effects. In the field of crisis response, public health and national security matters mainly belong to the competence of the Member States.[41] However, important economic affairs and ensuring the proper functioning of the Single Market belong to the competences of the EU.[42]

Member States agreed in the 1997 Stability and Growth Pact (SGP) that they keep their national budgets in balance.[43] This agreement currently is incorporated into Articles 121, 126 and also Protocol No. 12 of the Treaty on the Functioning of the European Union[44] (TFEU).[45] Most importantly it is required from Member States that the ratio of the planned or actual government deficit to gross domestic product shall not exceed 3% and that the ratio of government debt to gross domestic product shall not exceed 60%.[46] Special rules are provided regarding the euro area (economic and monetary union) in Article 136 TFEU. Secondary

[40] ibid 1.
[41] Busch (n 29) 3-6.
[42] For example see art 121(1) of the Treaty on the Functioning of the European Union (TFEU).
[43] Busch (n 29) 12.
[44] Consolidated version of the Treaty on the Functioning of the European Union [2008] [2016] 2016/C 202/1, OJ C 202/47 (TFEU).
[45] For example art 121(1) of TFEU establishes the following: 'Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council'. Art 126(1) and (2) of TFEU requires that: 'Member States shall avoid excessive government deficits.' 'The Commission shall monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. In particular it shall examine compliance with budgetary discipline.' Art 126(2) also establishes the criteria based on which the EC shall examine compliance with budgetary discipline. The detailed reference values which shall be examined are specified in the Protocol on the excessive deficit procedure annexed to the Treaties. This is Protocol (No 12) on the Excessive Deficit Procedure.
[46] TFEU Protocol (No 12) on the Excessive Deficit Procedure, art 1; Busch (n 29) 12.

legislation provides the detailed rules about the implementation of the established requirements. Most importantly Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies[47] provides the preventive arm of the SGP and Council Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure[48] represents the corrective arm of SGP.[49]

As we already discussed, the COVID crisis imposed a serious negative effect on the EU economies and consequently on governmental incomes. Member States also had to introduce measures to increase the capacity of health care systems and it became necessary to provide assistance for those economic sectors which were mostly exposed to the pandemic and to citizens who lost their incomes.[50]

It became obvious that the strict requirements of the SGP cannot be upheld in the light of the COVID crisis situation. Therefore on 20 March 2020, the EC announced that according to its opinion it is reasonable to activate the so-called general escape clause, which makes it possible for Member States to temporarily depart from the strict requirements of the SGP and undertake budgetary measures to handle the crisis. Regarding the so-called preventive procedures of the SGP this opportunity is most importantly based on Articles 5(1) and 9(1) of Regulation (EC) 1466/97. These Articles establish that 'in periods of severe economic downturn for the euro area or the Union as a whole, Member States may be allowed

[47] Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L 209/1.

[48] Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L 209/6.

[49] European Commission, 'Legal basis of the Stability and Growth Pact - Find legislation relating to the EU's Stability and Growth Pact' < https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/stability-and-growth-pact/legal-basis-stability-and-growth-pact_en > accessed 30 April 2021.

[50] European Commission, 'Communication from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact' (Communication) COM(2020) 123 final 1; Christos Gortsos, 'The EU Policy Response to the Current Pandemic Crisis through the Lens of the Eurogroup Report of 9 April 2020: Overview and Assessment (Cut-Off Date: 14 April 2020)' (April 14, 2020) 7. < SSRN: https://ssrn.com/abstract=3579010 or http://dx.doi.org/10.2139/ssrn.3579010 > accessed 30 April 2021.

temporarily to depart from the adjustment path towards the medium-term budgetary objective (…), provided that this does not endanger fiscal sustainability in the medium term.'[51] Regarding the corrective procedures of SGP, Articles 3(5) and 5(2) of Regulation (EC) 1467/97 provide opportunity for the adoption of a revised fiscal trajectory in case of a severe economic downturn in the euro area or in the EU as a whole. This decision can be made by the Council of the European Union (Council) based on a recommendation from the EC.[52] The Eurogroup also agreed on the application of the general escape clause. So Member States received the opportunity, based on the general escape clause of the SGP, to apply more flexible budgetary measures on national level to handle the crisis.[53]

As the COVID crisis affected national economies severely, financial assistance to certain business sectors became inevitable. Member States intended to provide financial aid to ensure the survival of vulnerable business sectors, however such measures normally were limited by EU state aid rules. To clarify the available options for state intervention and to provide wider latitude for national governments, the EC adopted a specific and quite liberal temporary framework for state aid measures on 19 March 2020.[54] The EC Communication on this temporary framework for state aid measures observed that the COVID outbreak entailed the risk of a severe economic downturn in the EU and that it is necessary to provide well-targeted public support to ensure the availability of sufficient liquidity on the markets.[55] Based on that, the EU state aid rules enabled the 'Member States to take swift and effective action to support

[51] Council Regulation (EC) No 1467/97 art 5(1); Busch (n 29) 12; European Commission, COM(2020) 123 final 2; Gortsos (n 50) 7.

[52] Council Regulation (EC) No 1467/97 arts 3(5), 5(2); European Commission, COM(2020) 123 final 2; Gortsos (n 50) 7.

[53] Busch (n 29) 12.

[54] ibid 13; European Commission, 'Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' [2020] OJ C 91I/1; Christos Hadjiemmanuil, 'European economic governance and the pandemic: Fiscal crisis management under a flawed policy process' in Christos V. Gortsos and Wolf-Georg Ringe (eds), *Pandemic Crisis and Financial Stability* (European Banking Institute, 2020) 192. < https://ebi-europa.eu/wp-content/uploads/2020/05/Gortsos-Ringe-eds-Pandemic-Crisis-and-Financial-Stability-2020-final.pdf > < SSRN: https://ssrn.com/abstract=3607930 > accessed 30 April 2021.

[55] European Commission, 'Communication from the Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' [2020] OJ C 91I/1. 1.1.9.

citizens and undertakings, in particular SMEs, facing economic difficulties due to the COVID-19 outbreak.'[56] Since the adoption of this temporary framework it has been amended (extended) by the EC five times, lastly on the 28th January 2021.[57]

During the public health crisis it is especially important for Member States to have the opportunity to purchase the necessary equipment (for example medical devices, face masks, protective gloves, etc.) as rapidly and flexibly as possible. This was the reason why the EC issued guidance on using the public procurement framework in the emergency situation related to the COVID crisis.[58] The guidance described which methods could be used by public buyers under the EU public procurement framework[59] to achieve the highest possible flexibility and urgency in the procurement of goods and services which are necessary for crisis response.[60]

The EU also provided financial assistance to the Member States. For example the EC prepared a complex financing package called the Coronavirus Response Investment Initiatives (CRIIs) soon after the outbreak of the pandemic. On the 13th of March 2020 the EC introduced a proposal to the Member States, which had the aim to mobilise available European Structural and Investments Funds (ESI Funds) to respond the crisis.[61] Based on this proposal, the Coronavirus Response Investment Initiative (CRII) was adopted on the 30th of

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[56] ibid 1.1.9.

[57] European Commission, 'Communication from the Commission Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 outbreak (consolidated version)' < https://ec.europa.eu/competition/state_aid/what_is_new/TF_informal_consolidated_version_as_amended_28_january_2021_en.pdf > accessed 30 April 2021; European Commission, 'Communication from the Commission Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak and amendment to the Annex to the Communication from the Commission to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (2021/C 34/06) [2021] OJ C 34/6.

[58] European Commission, 'Communication from the Commission Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis' (Information) (2020/C 108 I/01) OJ C 108I/1; Busch (n 29) 14-15.

[59] In this regard the most important legal instrument is Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

[60] Busch (n 29) 14-15; European Commission, 'Communication from the Commission Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis' (n 58) 1-3.

[61] European Commission, COM(2020) 113 final 1.

March 2020.[62] The CRII had the aim to redirect all unspent amounts from the ESI Funds regarding the 2014-2020 MFF for crisis response and to provide liquidity for small and medium-sized enterprises (SMEs), labour markets and the healthcare systems of the Member States. For example the CRII relieved the Member States from the reimbursement obligation of EUR 8 billion in case of pre-allocated, but unspent EU funds. To assist those Member States which were most severely affected by the pandemic, the CRII made available EUR 800 million additional funding from the EU Solidarity Fund.[63] As the COVID crisis evolved, the EC considered additional measures necessary. On the 23rd April 2020, Regulation (EU) 2020/558 was adopted.[64] This legislative act established the Coronavirus Response Investment Initiative Plus (CRII+). The CRII+ provided for the Member States exceptional additional flexibility in ESI Funds management[65] and also it made possible to reallocate EUR 28 billion of not-yet-utilized funds in the 2014-2020 MFF.[66]

To provide additional financial assistance for the Member States which enables them to handle the consequences of the COVID crisis on their labour markets, Council Regulation (EU) 2020/672 of 19 May 2020[67] (SURE Regulation) was adopted.[68] The aim of this legislative act was to establish a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.[69] This new, temporary, loan-based instrument provides response to the crisis in the labour market in a

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[62] Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative) [2020] OJ L 99/5 (CRII Regulation).

[63] European Commission, COM(2020) 113 final 1-2; Hadjiemmanuil (n 54) 192; Gortsos (n 50) 8-9.

[64] Regulation (EU) 2020/558 of the European Parliament and of the Council of 23 April 2020 amending Regulations (EU) No 1301/2013 and (EU) No 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak [2020] OJ L 130/1 (CRII+ Regulation).

[65] CRII+ Regulation, Preamble (3).

[66] Hadjiemmanuil (n 54) 192-193.

[67] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L 159/1 (SURE Regulation).

[68] SURE Regulation, Preamble (8).

[69] SURE Regulation.

coordinated, rapid and effective manner,[70] as it allocates financial assistance in the form of a loan granted by the EU to the Member State concerned.[71] These loans are provided to the Member States under favourable terms.[72] Regarding the maximum amount of financial assistance the SURE Regulation determined that it shall not exceed EUR 100 billion for all Member States. This amount represents a significant contribution for the crisis response and it emphasizes the spirit of solidarity among Member States.[73] To ensure sufficient funds for this instrument, the EC is empowered to borrow on the capital markets or with financial institutions on behalf of the EU.[74] The master thesis discusses the SURE program in detail in its Chapter V.

The European Central Bank (ECB) also adopted significant monetary policy measures to mitigate the consequences of the COVID crisis. For example in March 2020, the ECB decided to establish a temporary pandemic emergency purchase programme (PEPP) as a separate purchase programme, with an overall envelope of EUR 750 billion.[75] This program allowed the ECB to purchase both public and private sector securities.[76] According to the Preamble of Decision (EU) 2020/440 of the ECB, 'PEPP is a measure which is proportionate to counter the serious risks to price stability, the monetary policy transmission mechanism and the economic outlook in the euro area, which are posed by the outbreak and escalating diffusion of COVID-19.'[77]

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[70] SURE Regulation, Preamble (6).
[71] SURE Regulation, art 4.
[72] Gortsos (n 50) 13-14.
[73] SURE Regulation, art 5, Preamble (6).
[74] Luís Silva Morais, 'The EU fiscal response to the COVID-19 crisis and the Banking sector: risks and opportunities' in Christos V. Gortsos and Wolf-Georg Ringe (eds), *Pandemic Crisis and Financial Stability* (European Banking Institute, 2020) 294-295. < https://ebi-europa.eu/wp-content/uploads/2020/05/Gortsos-Ringe-eds-Pandemic-Crisis-and-Financial-Stability-2020-final.pdf > < SSRN: https://ssrn.com/abstract=3607930 or http://dx.doi.org/10.2139/ssrn.3607930 > accessed 1 May 2021; SURE Regulation, art 4.
[75] Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17) [2020] OJ L 91/1. art 1(1).
[76] Decision (EU) 2020/440 of the European Central Bank, Preamble (5), art 1(2); Gortsos (n 50) 9.
[77] Decision (EU) 2020/440 of the European Central Bank, Preamble (4).

III. The economic and legal background of bond financing in the European Union

1. The economic background of bond financing

‘Bonds are debt securities with which an issuer borrows money from investors in exchange for periodic payments of interest and repayment in full of the loan.’[78] So a bond issued by an organization represents the promise to perform a sequence of predetermined payments to the owner of the bond. Bonds have two important attributes. They have a principal or a face value denominated in a certain currency (e.g. USD 100 or EUR 1000). Also they have a predetermined maturity (e.g. one year, five years and ten years).[79] Thus bonds have a predetermined, finite life (in contrast with shares, which are irredeemable).[80]

Bonds may have different names based on their origin (issuer organization) or characteristic. For example, bills are US bonds which have a maturity of less than one year. UK government bonds are known as gilts. A coupon bearing bond (in the case of which a coupon is paid every six months) with a maturity of two years through to ten years is called a note. ‘Bonds with maturity greater than ten years are called bonds.’[81]

Based on the issuers domicile and the currency used we can classify bonds into three main categories: domestic bonds, foreign bonds and Eurobonds. In case of domestic bonds both the issuer and the currency used are local. When a bond is issued by a foreign entity but the bond is denominated in the currency of the country where it is sold, then this bond is called as

[78] Stephen Kim Park, ‘Social Bonds for Sustainable Development: A Human Rights Perspective on Impact Investing’ (2018) 3 Business and Human Rights Journal 233, 239.
[79] Bill Dalton, *Financial Products: An Introduction Using Mathematics and Excel* (Cambridge University Press 2008) 141-142.
[80] Jason Laws, *Essentials of Financial Management* (Liverpool University Press 2018) 71.
[81] Dalton (n 79) 148.

foreign bond. 'Eurobonds are bonds denominated in one or more currencies other than the currency of the country in which they are sold.'[82]

However, the term 'Eurobond' may also refer to such debt instruments which would be issued 'with a joint and several guarantee by the Euro-area member countries to finance either the entire Euro area or individual member states.'[83]

The most important issuers of bonds are governments, municipal authorities, national and supranational financial institutions,[84] multinational and domestic corporations.[85] Government bonds are usually considered as a very safe investment. However, that depends also on the issuing government. If a stable government issued the bonds (such as the US the US Treasury bonds) and the government guarantees the repayment of the bonds, then these securities are considered (almost) risk-free. Municipal bonds are securities which are issued by towns and cities. Municipal bonds are also considered as a quite safe investment. We use the term corporate bonds to describe bonds issued by banks and companies. These investments represent a certain level of risk which depends on the creditworthiness of the issuing company.[86]

Based on the above, 'a bond is a promise of money in the future.'[87] As in the case of all such promises, bonds represent a value. Two main factors influence this value: the payments made by the bond and the creditworthiness of the issuer.[88] The creditworthiness of the issuer is measured by the bond ratings, which are generally prepared on the basis of default risk.[89] The

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[82] Sunil Parameswaran, *Fundamentals of Financial Instruments: An Introduction to Stocks, Bonds, Foreign Exchange, and Derivatives* (New York, Wiley 2011) 43.
[83] Jan von Gerich, 'Bond Watch: The many faces of Eurobonds' (Nordea Corporate, Rates Strategy, May 5, 2020) < https://corporate.nordea.com/article/57298/bond-watch-the-many-faces-of-eurobonds > accessed 18. December 2021 (In a broader definition, the bonds issued by the EU, EIB, ESM and EFSM are also very similar to the idea of Eurobonds. See Jan von Gerich, 'Bond Watch: The many faces of Eurobonds').
[84] Dalton (n 79) 143.
[85] Parameswaran (n 82) 43.
[86] Dalton (n 79) 143.
[87] ibid 143.
[88] ibid 143.
[89] Richard R West, 'Bond Ratings, Bond Yields and Financial Regulation: Some Findings' (1973) 16 Journal of Law and Economics 159, 159-160; Laws (n 80) 75.

first advocates for ratings were Roger Babson and Freeman Putney, Jr at the beginning of the 20th century. Putney personally participated in the process of rating bonds after he started to work for Poor's Publishing Company in 1910.[90] However, the first bond ratings were published by John Moody in 1909 regarding railroad investments. He was the founder of Moody's Investors Service, which became one of the major credit rating houses. The other important rater of bond issues is Standard and Poor's, which was formed in 1941, when Standard Statistics was merged with Poor's Publishing.[91] Fitch Ratings Inc. (founded in 1914 as Fitch's Publishing Company) can also be considered (among the above-mentioned two institutions) as the member of the 'Big Three' credit rating agencies.[92]

Basically we can distinguish between two main types of bonds based on the payments ensured by the bond: zero coupon bonds and coupon bearing bonds. Zero coupon bonds are providing just one payment, namely at maturity the face value of the bond is paid out. No other payments are undertaken based on the bond.[93] 'A coupon bearing bond pays out, each year, a fixed percentage of the face value.'[94] We call each of these payments a coupon. The bond also determines the timing of the coupon payments. Coupon payments have to be provided up to and including the maturity date. At maturity the bond also pays out the face value.[95] Based on the above, the payments associated with a bond (coupon and face value) are pre-determined, so known with certainty. Bonds lack the uncertainty which is present in case of shares regarding dividend payments.[96] Also it is possible to determine that the interest rate of the bond shall be adjusted periodically according to a predetermined formula. Consequently, the

[90] West (n 89) 159-160.
[91] ibid 160-161; Berry K. Wilson, 'On the Information Content of Ratings: an Analysis of the Origin of Moody's Stock and Bond Ratings' (2011) 18 Financial History Review 155, 155-156.
[92] West (n 89) 160-161; Elisabetta Cervone, 'Credit Rating Agencies: the Development of Global Standards' in CL Lim and Bryan Mercurio (eds), *International Economic Law after the Global Crisis: A Tale of Fragmented Disciplines* (Cambridge University Press 2015) 46.
[93] Dalton (n 79) 141.
[94] ibid 141.
[95] ibid 141-142.
[96] Laws (n 80) 71.

interest rate of the bond can be linked to an interest rate index (for example to LIBOR[97]). This is called as a floating rate bond (or variable or adjustable rate bond).[98]

In this master thesis two special types of bonds are also discussed, these are called social bonds and green bonds, so it is important to introduce their definition. 'A social bond is a type of bond that raises capital to finance projects with one or more social objectives.'[99] Green bonds are fixed-income financial instruments which are issued to raise capital to finance climate-related or environmental projects (low-carbon projects, assets, or business activities). Issuers usually distinguish green bonds from the standard bonds as they label it as 'green', based on the issuer's selected criteria. The European Investment Bank was the first institution which issued green bonds in 2007.[100] Green bonds and also social bonds (like the SURE bonds) belong to the group of Environmental, Social, and Corporate Governance (ESG) labelled bonds.[101]

The bonds we discuss in this master thesis can be traded on the capital markets as they are medium to long term debt securities. The capital markets have the role to channelize the funds from those who wish to save (i.e. investors) to those who would like to implement long term

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[97] London Interbank Offered Rate.

[98] US Securities and Exchange Commission, 'Invsetor.gov Glossary - Floating-rate Bond (or Variable or Adjustable rate Bond)' < https://www.investor.gov/introduction-investing/investing-basics/glossary/floating-rate-bond-or-variable-or-adjustable-rate > accessed 14 June 2021; Joseph Dach, 'Floating-Rate Loans in the Euro-market' (1971) 19 The American Journal of Comparative Law 700, 700-707.

[99] Park, 'Social Bonds for Sustainable Development: A Human Rights Perspective on Impact Investing' (n 78) 233, 239.

[100] Stephen Kim Park, 'Green Bonds and Beyond: Debt Financing as a Sustainability Driver' in Beate Sjåfjell and Christopher M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2019) 601; Scott Breen and Catherine Campbell, 'Legal Considerations for a Skyrocketing Green Bond Market' (2017) 31(3) Natural Resources & Environment 16.

[101] European Commission, *NextGenerationEU Funding Strategy* (European Union, 2021) 5. < https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/factsheet_1_funding_strategy_20.04.pdf > accessed 20 September 2021; European Commission, *NextGenerationEU Green Bonds* (European Union, 2021) 1-3. < https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/factsheet_2_green_bonds_14.04.pdf > accessed 23 September 2021.

investments.[102] So the borrowers are able to acquire the necessary funds for a medium to long term from the international bond market.[103]

2. The legal background of issuing bonds to the public in the European Union

Disclosure is a fundamental issue in case of securities transactions. It contributes preventing any fraudulent activity which may affect the rights represented by the security. Those firms which refuse to protect investors (for example through disclosure or otherwise) probably will be exposed to a higher cost of capital. If appropriate disclosure is ensured, any fraudulent activity is more likely to be detected.[104] Disclosure also intends to address the problems of information asymmetry between issuers and investors.[105] In the capital markets there is a problem which arises from information differences and conflicting incentives between entrepreneurs (who seek financing) and savers.[106] This information problem was analysed by Professor George A. Akerlof[107] in his article ‘The Market for “Lemons”: Quality Uncertainty and the Market Mechanism’[108], where he presented his famous lemon market theory. Based on the theory, imagine a situation where half of the business ideas (or investment opportunities) are good and the other half are bad. As we can assume that both investors and entrepreneurs behave rationally, their valuation about the investment opportunity will reflect their own information. If there is no opportunity for the investors to distinguish between good and bad business ideas, it is possible for entrepreneurs with bad ideas to assert that their ideas

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[102] Parameswaran (n 82) 40-41.
[103] ibid 43.
[104] Nicholas L. Georgakopoulos, *The Logic of Securities Law* (Cambridge University Press 2017) 63.
[105] Charlotte Villiers, *Corporate Reporting and Company Law* (Cambridge University Press 2006) 180.
[106] Healy Paul M and Palepu Krishna G, ‘Information asymmetry, corporate disclosure, and the capital markets: A review of the empirical disclosure literature’ (2001) 31 Journal of Accounting and Economics 405, 407-408.
[107] Professor George A. Akerlof (born June 17, 1940) is an American economist and university professor at Georgetown University and University of California, Berkeley. In 2001, he won the Nobel Memorial Prize in Economic Sciences.
[108] George A Akerlof, ‘The Market for “Lemons”: Quality Uncertainty and the Market Mechanism’ (1970) 84 (3) The Quarterly Journal of Economics 488-500.

are as valuable as the good ideas. Thus if there is no available information, investors simply cannot assess the merit of the investment opportunity appropriately.[109] The outcome will be that both good and bad ideas will be valued at an average level by investors. In case the information problem is not solved (and appropriate and reliable information is not disclosed to the investors) the 'capital market will rationally undervalue some good ideas and overvalue some bad ideas relative to the information available to entrepreneurs.'[110] Consequently, disclosure can facilitate more informed investment decision-making and provides opportunity for the investors to distinguish between good and poor investment choices.[111]

In case of bonds, bond ratings are important part of the disclosure mechanism.[112] They provide a judgement whether the issuing entity is able to fulfil its payment obligations based on the bond on time.[113] This is why the bond ratings of the most important rating agencies provide valuable information regarding the merits of the investment.

If we would like to introduce the rules of EU law which are applicable in case of issuance of bonds to the public, first we have to take a broader perspective and analyse in general the rules on the issuance of securities to the public.

Currently the most important aspects of issuing securities (also debt securities) are determined in the EU by Regulation 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (Prospectus Regulation).[114] The aim of this regulation is to harmonize the rules about the disclosure of information in cases of offers of securities to the public (or admission to trading on a regulated market) in the

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[109] Healy and Palepu (n 106) 407-408; See also Vendel Halász, *Vállalatfelvásárlás* (Menedzser Praxis Kiadó, Budapest 2021) 87-88.

[110] Healy and Palepu (n 106) 407-408; See also Vendel Halász, *Vállalatfelvásárlás* (Menedzser Praxis Kiadó, Budapest 2021) 87-88.

[111] Villiers (n 105) 180.

[112] Thomas F. Pogue, Robert M. Soldofsky, 'What's in a Bond Rating' (1969) 4 Journal of Financial and Quantitative Analysis 201, 201-205; Laws (n 80) 75.

[113] Pogue and Soldofsky (n 112) 201-205; Laws (n 80) 75.

[114] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L/12 (Prospectus Regulation).

EU. Disclosure requirements have fundamental importance in investor protection and also in the removal of information asymmetries between the investors and issuers. This harmonized framework of disclosure obligations made possible the establishment of a cross-border passport mechanism for a wide variety of securities in the EU.[115] This contributes to the creation of an internal market for capital. Based on the above, investor protection and market efficiency are core aims of the Prospectus Regulation.[116] The most important rule of the Prospectus Regulation is that (if the type of security concerned is not exempted under the scope of the Prospectus Regulation or under the obligation to publish a prospectus) securities shall only be offered to the public in the EU after prior publication of a prospectus.[117] This 'prospectus shall contain the necessary information which is material to an investor for making an informed assessment' of the investment decision.[118] The prospectus can be drafted as a single document or as separate documents.[119] When the prospectus is composed of separate documents, it shall contain the required information in a separate registration document, securities note and summary.[120] Summary is an important part of the prospectus in case of both drafting methods.[121] The summary provides the key information for the investors which are necessary 'to understand the nature and the risks of the issuer, the guarantor and the securities that are being offered or admitted to trading on a regulated market.'[122]

When the prospectus is drafted in separate documents, the registration document provides the necessary information relating to the issuer. The securities note includes the 'information concerning the securities offered to the public or to be admitted to trading on a regulated

[115] Prospectus Regulation, Preamble 3.
[116] Prospectus Regulation, Preamble 7.
[117] Prospectus Regulation, art 3.
[118] Prospectus Regulation, art 6(1).
[119] Prospectus Regulation, art 6(3).
[120] Prospectus Regulation, art 6(3).
[121] Tom Fagernas, Joel Kanervo, Gabriel Nunez and Andres Alcala, 'The Why and How of the New European Union Prospectus Regulation' (2019) 20(1) Business Law International 5, 14.
[122] Prospectus Regulation, art 7(1).

market.'[123] Prospectuses are complex and lengthy documents.[124] Their exact format and the list of necessary information is determined by an EC delegated regulation,[125] which is Commission Delegated Regulation (EU) 2019/980.[126] The requirements about the content of the prospectus depend in large manner on the type of the issuer, on the type of the security, on the type of issuance and whether or not there is an admission to trading.[127] In the terminology of the Prospectus Regulation, bonds belong to the group of non-equity securities.[128] The Prospectus Regulation also regulates the liability attaching to the prospectus and requires that the information in the prospectus shall be in accordance with the facts and no omission shall be made which may affect its import.[129] The prepared prospectus of an issuer shall not be published until the relevant competent authority has not approved it.[130]

The Prospectus Regulation sets up also specific solutions which facilitate multiple or recurring securities issuances. So a special flexibility and simplification is provided for secondary issuances and frequent issuers.[131] For example any issuer whose securities are admitted to trading on a regulated market is allowed to draw up every financial year a so-called universal registration document. This universal registration document significantly simplifies subsequent securities offerings for the frequent issuers as it entitles to a faster

[123] Prospectus Regulation, art 6(3).
[124] European Commission, 'Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading' SWD(2015) 255 final 8, 16-17.
[125] Prospectus Regulation, art 13.
[126] Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004 [2019] OJ L 166/26. (Prospectus Delegated Regulation).
[127] Prospectus Delegated Regulation, Preamble 2.
[128] Prospectus Regulation, art 2(c).
[129] Prospectus Regulation, art 11(1)-(2).
[130] Prospectus Regulation, art 20.
[131] Fagernas, Kanervo, Nunez and Alcala (n 121) 5, 8.

approval process.[132] These frequent issuers are already known to the capital markets and to the relevant competent authorities.[133]

In case of non-equity securities, a base prospectus can be applied, which contains the necessary information concerning the issuer and the securities offered to the public. Thus in case of individual issue of non-equity securities the issuer only has to provide the final terms of the offer to the valid and published base prospectus and prepare a summary to comply with the disclosure obligations.[134] The Prospectus Regulation also provides a simplified disclosure regime for secondary issuances, which means that regarding secondary issuances it is possible to choose to draw up a simplified prospectus.[135]

Based on the above, the most important regulatory element of the Prospectus Regulation is that it ensures the publication of reliable information regarding the investment decision by the requirement to publish a prospectus and with the liability attached to it. Therefore EU financial market regulation requires the mandatory disclosure of prospectus documents in case securities are offered to the public or admitted to trading on a regulated market. This requirement ensures that information is provided on securities (and issuers) to prospective purchasers. This rule is based 'on the assumption that more information would lead to better investment decisions.'[136] The disclosure provided by the Prospectus Regulation has the aim to protect investors and investors' confidence in the proper functioning of the market and also to ensure market efficiency and integrity.[137] Because all the relevant information is publicly disclosed, sophisticated and unsophisticated investors have equal opportunity to access it.

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132 Prospectus Regulation, arts 9, 20(6); Christos Gortsos, Marialena E. Terzi, 'The Prospectus Regulation (Regulation (EU) 2017/1129) and the Recent Proposal for an EU Recovery Prospectus: Elements of Continuity and Change with the Past and the Way Forward' (December 4, 2020) European Banking Institute Working Paper Series 2020 - no. 79, 12-13, 18. < https://ssrn.com/abstract=3742863 or http://dx.doi.org/10.2139/ssrn.3742863 > accessed 15 June 2021.

133 Fagernas, Kanervo, Nunez and Alcala (n 121) 5, 8, 9-10.

134 Prospectus Regulation, art 8.

135 Prospectus Regulation, art 14; Gortsos and Terzi (n 132) 4, 14.

136 Simone Alvaro, Raffaele Lener and Paola Lucantoni, 'The Prospectus Regulation. The long and winding road' (October 1, 2020). CONSOB Legal Research Papers (Quaderni Giuridici) no. 22, 11. < https://ssrn.com/abstract=3752798 or http://dx.doi.org/10.2139/ssrn.3752798 > accessed 15 June 2021.

137 ibid 11.

With this mandatory disclosure the information asymmetry between issuers and investors is also treated (or at least reduced).[138] The ex-ante review of the prospectus document by the relevant competent authority also intends to enhance investor confidence.[139]

However, the Prospectus Regulation is not applicable in all instances when securities are offered to the public or admitted to trading on a regulated market. There are multiple exceptions in the regulatory regime. For example Article 1 paragraph 2 b) of the Prospectus Regulation stipulates that it is not applicable to 'non-equity securities issued by a Member State or by one of a Member State's regional or local authorities, by public international bodies of which one or more Member States are members, by the European Central Bank or by the central banks of the Member States.'[140] Based on this rule, the bonds (as non-equity securities) issued by the EC (or the EU) and the ECB are not subject to the rules of the Prospectus Regulation.[141] This means basically that they are subject only to the requirements of applicable national law (most importantly the law of the market concerned). Of course it is allowed for an issuer, an offeror or a person asking for admission to trading on a regulated market that in case an offer of securities to the public or an admission of securities to trading on a regulated market is outside the scope of the Prospectus Regulation, to voluntarily decide to draw up a prospectus and to comply with the requirements (and also enjoy the benefits) of the Prospectus Regulation (Voluntary prospectus).[142]

Basically the debt securities issued by the EU are listed on the Luxembourg Stock Exchange (LuxSE) and the related documentation contains that they are governed by Luxembourg

[138] ibid 11-14.
[139] Prospectus Regulation, art 21, Preamble 7.
[140] Prospectus Regulation, art 1(2)(b).
[141] The ECB in its Opinion highlighted that the exclusion of non-equity securities issued by the ECB and European System of Central Banks (ESCB) national central banks (NCBs) is 'vital to ensure that Eurosystem monetary policy operations are not hampered, including, for example, any possible issuance of debt instruments by the ECB and the ESCB NCBs.' See Opinion of the European Central Bank of 17 March 2016 on a proposal for a regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading (CON/2016/15) [2016] OJ C 195/1.
[142] Prospectus Regulation, art 4(1)-(2); Gortsos and Terzi (n 132) 17.

law.[143] Also, the LuxSE is the premier listing venue for international bonds, where more than 33 000 debt securities are currently listed (including also green and social bonds). This market is ranked on the first place for international bond listings.[144] Based on that, it is important to examine the Luxembourg law regarding documentation requirements in connection with the public offering and admitting to trading of debt securities. The relevant law in Luxembourg is the Law of July 16, 2019 relating to prospectuses for securities and implementing Regulation (EU) 2017/1129 (the New Luxembourg Prospectus Act).[145] As we discussed above, the bonds issued by the EU are exempted under the requirement to publish a prospectus based on Article 1 paragraph 2 b) of Regulation (EU) 2017/1129. So in this case Part III of the New Luxembourg Prospectus Act is applicable, as it regulates offers to the public and admissions to trading on a regulated market of transferable securities not covered by the EU Prospectus Regulation. The New Luxembourg Prospectus Act in Article 18 stipulates that no public offering of transferable securities and other similar securities in Luxembourg shall be authorized without the prior publication of an alleviated prospectus.[146] However, the obligation to publish such an alleviated prospectus does not apply to some types of public offerings of securities, most importantly in our case to 'securities other than equity securities issued by the Luxembourg State or the municipalities of the Grand Duchy of Luxembourg, by

[143] European Union (EU) and European Atomic Energy Community (EURATOM), 'Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021' (Base Prospectus, Offering Circular, 4 June 2021) 7-8, 33. < https://www.bourse.lu/programme-documents/Programme-UE/14608 > accessed 23 September 2021 (NGEU Base Prospectus); European Union (EU) and European Atomic Energy Community (EURATOM), 'Debt Issuance Programme, 10. December 2019' (Base Prospectus, Offering Circular, 10. December 2019) 7, 30. < https://www.bourse.lu/security/EU000A283859/313968 > accessed 9 May 2021.

[144] Luxembourg Stock Exchange, 'The premier listing venue for international bonds' < https://www.bourse.lu/bonds > accessed 17 June 2021.

[145] Loi du 16 juillet 2019 :1° relative aux prospectus pour valeurs mobilières ; 2° portant mise en œuvre du règlement (UE) 2017/1129 du Parlement européen et du Conseil du 14 juin 2017 concernant le prospectus à publier en cas d'offre au public de valeurs mobilières ou en vue de l'admission de valeurs mobilières à la négociation sur un marché réglementé, et abrogeant la directive 2003/71/CE (Law of July 16, 2019: 1 ° relating to prospectuses for securities; 2 ° implementing Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 concerning the prospectus to be published in the event of a public offering of securities or with a view to the admission of securities to trading on a regulated market, and repealing Directive 2003/71/EC.) (New Luxembourg Prospectus Act) < http://legilux.public.lu/eli/etat/leg/loi/2019/07/16/a513/jo > accessed 15 June 2021.

[146] New Luxembourg Prospectus Act, art 18(1).

another Member State or by international public organizations to which one or more Member States adhere.'[147] But also for these transactions certain transparency/disclosure requirements are applicable, so a document containing information on the securities in question must be published.[148] According to Article 18 paragraph 6 of the New Luxembourg Prospectus Act, this document shall at least contain the identity of the issuer and any guarantor; the denomination, the identification code, the currency, the total amount and, where applicable, the nominal unit value of the non-equity securities; a description of the nature and category of the non-equity securities; a description of the terms and conditions for the repayment of securities other than equity securities; where applicable, a description of the terms of payment of interest on non-equity securities, including an indication of the interest rate or, if it is not known, information on its method of determination; where applicable, a description of the scope and nature of the guarantee; a description of the terms and reasons for the offer to the public.[149]

Similar rules apply in case of admissions of transferable securities to trading on a regulated market. Based on Part III, Chapter 2 of the New Luxembourg Prospectus Act, the publication of an alleviated prospectus is not required in case of non-equity securities issued by the Member States of the EU or by international public organizations to which one or more Member States adhere.[150] But similarly to the regulation of offers to the public, a document containing information on these securities must be published. This document basically shall contain the information required by Article 18 paragraph 6 with the exception that in this case 'an indication of the markets on which admission to trading is sought or on which non-equity securities are already admitted' shall be provided.[151]

[147] New Luxembourg Prospectus Act, art 18(2)(9).
[148] New Luxembourg Prospectus Act, art 18(6).
[149] New Luxembourg Prospectus Act, art 18(6).
[150] New Luxembourg Prospectus Act, art 41(2)(5).
[151] New Luxembourg Prospectus Act, art 41(2).

If a public offer or an admission to trading on a regulated market of a security is exempted from the obligation to publish an alleviated prospectus, it is possible for the issuer or the offeror (or the person requesting the admission to trading on a regulated market) to voluntarily draw up an alleviated prospectus.[152]

From this analysis of Luxembourg law we can conclude, that certain transparency, disclosure requirements also apply in case when an offer of securities to the public (or admission to trading on a regulated market) is not covered by the EU Prospectus Regulation and also it is not required to publish an alleviated prospectus based on national law. In such situations a document containing information on the securities is published which provides some basic information to the investors and the public. In connection with the research topic of this master thesis the most important information are that who is the issuer of Next Generation EU bonds, who guarantees the fulfilment of payment obligations in connection with the securities issued and what are the reasons for the offer to the public, i.e. how the proceeds of the offer will be used. Besides the applicable legislation, we also have to examine these published information documents to find answers to the questions of this research.

[152] New Luxembourg Prospectus Act, arts 19, 42.

IV. The legal and economic background of debt security issuances of the European Union

1. The legal background of debt security issuances of the European Union

As we discussed, ‘bonds are debt securities with which an issuer borrows money from investors (…)’,[153] so they are means of borrowing money from the capital markets. In this regard the most important question is whether the EU is capable of borrowing money for the achievement of its objectives and if the answer is yes, then what legal basis such transactions have in the EU Treaties. If the EU Treaties provide an opportunity for the EU to borrow money, it seems obvious that this also may take the form of issuing bonds. To answer this question, it is necessary to analyse the relevant articles of TFEU. Article 311 TFEU stipulates that ‘the Union shall provide itself with the means necessary to attain its objectives and carry through its policies.’[154] The EU has numerous objectives and also widespread competences and policies. For example Article 3 of the Treaty on European Union (TEU) identifies several objectives. Among these, the establishment of an internal market, the work for sustainable development, a highly competitive social market economy and aiming at full employment and social progress are important objectives of the EU.[155] The EU also ‘shall promote economic, social and territorial cohesion, and solidarity among Member States.’[156] Based on TFEU, to achieve these objectives, the EU shall have (and provide itself with) appropriate means.[157] The most important part of the EU’s financial means is provided by its own resources. These own resources comprise the traditional own resources (TOR), which are mostly customs

[153] Park, ‘Social Bonds for Sustainable Development: A Human Rights Perspective on Impact Investing’ (n 78) 233, 239.
[154] TFEU, art 311.
[155] TEU, art 3(3).
[156] TEU, art 3(3).
[157] TFEU, art 311; European Commission, ‘Questions and answers - Q&A : Next Generation EU - Legal Construction’ (QANDA/20/1024, Brussels 9 June 2020) 1. < https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1024 > accessed 29 June 2021.

duties charged on imports from outside the EU and additional levies on certain agricultural imports. The share of TOR revenues continuously declined in the EU budget over the years as customs duties being reduced through bilateral and multilateral trade agreements.[158] These revenues are collected on behalf of the EU by the Member States and they are entitled to keep 25 percent of such revenues as an administrative fee (collection cost).[159] National contributions also provide an important part of the own resources of the EU. In this category two important sources have to be mentioned: first, a share of the proceeds from each Member State's value added tax and second, a payment made by each Member State which is linked to their GNI.[160] Currently this GNI-linked source of revenue provides the largest part of its income for the EU.[161] Also there is a ceiling on the amount of own resources revenue. This own resources ceiling was annually 1.23% of the sum of all the Member States' gross national income (GNI) in the 2014-2020 MFF.[162] In the current 2021-2027 MFF the own resources ceiling is basically set at 1.40%.[163] As the average national budget of an EU member state is about 48% of its GDP, the EU budget is relatively small in size.[164]

However, according to the wording of Article 311 TFEU, own resources are not the exclusive revenue source of the EU budget. Other revenues may also provide financial means.[165] For example the fines on companies which have breached EU competition rules also provide revenue to the EU. (Of course such items are providing only a small portion of EU

[158] Iain Begg, 'The EU Budget and UK Contribution' (2016) 236(1) National Institute Economic Review 39, 41-42.
[159] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L 424/1. (Own Resources Decision) Preamble (10), art 9(2); George M. Guess and James D. Savage, *Comparative Public Budgeting: Global Perspectives on Taxing and Spending* (2nd ednCambridge University Press 2021) 106.
[160] Begg (n 158) 42.
[161] Guess and Savage (n 159) 106.
[162] ibid 104-105.
[163] The total amount of own resources allocated to the Union to cover annual appropriations for payments shall not exceed 1.40% of the sum of all the Member States' GNIs. See Own Resources Decision, art 3(1).
[164] Christina J. Schneider, *The Responsive Union: National Elections and European Governance* (Cambridge University Press 2018) 101.
[165] TFEU, art 311.

revenues.)[166] So the EU enjoys a certain level of discretion in choosing the proper financial means to achieve its objectives. Among such means, borrowing can be an available option. But it is an important consideration that the financial solutions of the EU should always respect the financial rules of the EU Treaties, so these rules provide a barrier in case of borrowing.[167] The most important financial rules in this regard are the principle of budgetary discipline and the principle of budgetary balance.[168] The principle of budgetary discipline reads as follows:

'With a view to maintaining budgetary discipline, the Union shall not adopt any act which is likely to have appreciable implications for the budget without providing an assurance that the expenditure arising from such an act is capable of being financed within the limit of the Union's own resources and in compliance with the multiannual financial framework (…)'.[169]

TFEU also requires that the necessary financial means should be available which ensure that the EU is capable to satisfy its legal obligations in respect of third parties.[170] Based on the above, it is only permissible for the EU to borrow funds if it is capable to repay the debt (including interest). The funds for repayment shall be basically ensured by the Own Resources Decision.[171] The Own Resources Decision serves as the legal basis for the own resources of the EU, so it sets the basic rules for the own resources system. It is adopted periodically (i.e. every few years) unanimously by the Council (the European Parliament is only consulted in this regard) and every Member State has to approve it according to its

[166] Begg (n 158) 42.
[167] European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157) 1.
[168] ibid 1-2.
[169] TFEU, art 310(4).
[170] TFEU, art 323.
[171] European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157) 1.

national constitutional rules.[172] Currently Council Decision (EU, Euratom) 2020/2053[173] is the applicable Own Resources Decision, which shall ensure adequate resources for the orderly development of the policies of the EU.[174]

Strict budgetary discipline shall be applicable to the system of own resources.[175] With the development of the system of own resources the development of the policies of the EU can also be significantly influenced and advanced.[176] So to provide an appropriate financial background for the EU to fulfil its debt service obligations it is necessary to adopt a sufficiently high own resources ceiling. This can ensure that sufficient financial latitude is provided for the EU in each year to fulfil its obligations. Also appropriate mechanism should ensure the availability of resources in all circumstances and this should be able to fully cover the EU's liability.[177]

The principle of budgetary balance requires that 'the revenue and expenditure shown in the budget shall be in balance.'[178] So the EU budget has to be in balance in each year.[179] The borrowing of the EU can be compatible with this rule. The borrowed funds fall into the category of other revenue[180] and they are not considered as own resources. Borrowing provides an exceptional additional amount to the EU annual budget as external assigned revenue (for the spending part) and these funds 'do not form part neither of revenue nor of expenditure under the annual budget.'[181] The borrowed funds have special financing purposes as they provide a one-off additional reinforcement of the EU's actions, so they finance

[172] Begg (n 158) 42; European Commission, 'EU legislation, Regulation on the current financial framework' < https://ec.europa.eu/info/strategy/eu-budget/how-it-works/budget-law/legislation_en > accessed 11 July 2021.
[173] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L 424/1 (Own Resources Decision).
[174] Own Resources Decision, Preamble (1).
[175] Own Resources Decision, Preamble (1).
[176] Own Resources Decision, Preamble (1).
[177] European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157) 1.
[178] TFEU, art 310(1).
[179] Robert Ackrill, 'The European Union Budget, the Balanced Budget Rule and the Development of Common European Policies' (2000) 20 Journal of Public Policy 1-2.
[180] TFEU, art 311.
[181] European Commission 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157) 2-3.

particular items of expenditure. Borrowed funds have to be repaid by the EU so they do not constitute such final revenue like the own resources which do not have to be repaid.[182] The borrowed funds cannot be used to fund general operational expenditures.[183]

Borrowing does not mean that the equilibrium is not ensured between the revenues and expenditures of the EU annual budget. The EU does not have the opportunity to undertake budgetary deficit (as Member States usually do) and so to engage in deficit spending.[184] Important requirement is that the financial background of borrowing shall be ensured before the transaction is carried out. The financial background shall be guaranteed by the Own Resources Decision, which shall provide an ex ante authorisation for the borrowing and set its conditions and limits. This legal act shall provide a guarantee for the repayment of borrowed funds with the provision of appropriate financial resources (i.e. own resources). So Member States shall agree in the Own Resources Decision to provide financial resources for the EU. However, because of the actual financial situation they provide those funds in the future (so with delay). This decision creates appropriate financial space in the EU budget to adopt an extraordinary and one-off borrowing transaction, which makes funds immediately available for the EU to achieve its objectives. In case these conditions are fulfilled, the principles of budgetary balance and budgetary discipline are not violated.[185]

To summarize the above, we can identify three important legal steps which are necessary for the EU to borrow funds and to use them to achieve its objectives. First of all, it shall receive an empowerment to borrow funds. This decision shall also determine the maximum amount of borrowing. Secondly, also a legal basis is needed to receive the borrowed funds and to use them for a particular objective. Thirdly, it is important to decide how (and until which date)

182 ibid 3.
183 Ackrill (n 179) 2.
184 European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157) 2; Guess and Savage (n 159) 107.
185 European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157) 2-3.

the borrowed funds shall be repaid. Regarding the first and third steps (empowerment to borrow funds and terms of repayment) the Own Resources Decision can constitute the legal basis.[186] Considering the second step, TFEU contains specific articles which may be referred to as legal basis under certain circumstances. Most importantly we can mention Article 122 TFEU in this regard, but – based on the examination presented in section 2 of this chapter – other legal bases are also possible. As the referred provision has the role to provide the legal basis for the receiving of the borrowed funds and attributing those to particular items of expenditure, it shall be based on objective factors. The legal basis chosen shall be appropriate also to withstand the test of judicial review (if necessary).[187]

2. The European Union as debtor

As we examined in this chapter, the EU has the opportunity to turn to the capital markets and borrow funds. The borrowing operations are carried out by the EC on behalf of the EU. In the past 40 years the EU made use of this opportunity and provided financial support for Member States and third countries through several lending programmes. The funding activities for these programmes are usually operated on a back-to-back basis.[188] This funding approach means that the EC 'issued bonds and transferred the proceeds directly to the beneficiary country on the same terms that it received (in terms of interest rate, maturity).'[189] As the EC is able to collect funds with comparatively attractive financing rates, the back-to-back lending mechanism transfers these benefits to the beneficiary country. Currently the EU operates four financial assistance programs, which are the Balance of Payments (BOP) assistance facility,

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[186] ibid 2-3.
[187] ibid 3.
[188] European Commission, 'Financial assistance programmes' < https://ec.europa.eu/info/strategy/eu-budget/eu-borrower-investor-relations/financial-assistance-programmes_en > accessed 24 June 2021.
[189] European Commission, 'Back-to-back funding' < https://ec.europa.eu/info/strategy/eu-budget/eu-borrower-investor-relations/back-back-funding_en > accessed 24 June 2021.

the European Financial Stabilisation Mechanism (EFSM), the SURE and the Macro-Financial Assistance (MFA).[190]

The BOP has its legal basis in Article 143 TFEU.[191] This provision of TFEU empowers the Council to grant mutual assistance to a Member State which is in difficulties or is seriously threatened with difficulties as regards its balance of payments, based on the recommendation of the EC. The Council adopts directives or decisions in this regard and these contain the conditions and details of the assistance.[192] Based on these provisions of TFEU, the BOP assistance facility was established by Council Regulation (EC) No 332/2002 (BOP Regulation).[193] Article 1 of the BOP Regulation declares the establishment of a Community medium-term financial assistance facility, which 'enabling loans to be granted to one or more Member States which are experiencing, or are seriously threatened with, difficulties in their balance of current payments or capital movements.'[194] There are two important limitations regarding the application of the BOP assistance facility. First of all, those Member States cannot benefit from this assistance which adopted the euro. So the BOP assistance facility is available only to Member States outside the euro area. The outstanding amount of loans under the BOP assistance facility is also limited; specifically it shall not exceed EUR 12 billion in principal.[195] The BOP Regulation empowers the EC on behalf of the European Community (EU) to contract borrowings on the capital markets or with financial institutions to ensure the necessary means for the financial assistance provided to the Member State(s).[196] Based on the

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[190] European Commission, 'Financial assistance programmes' (n 188).
[191] European Commission, 'Balance of payments (BoP) assistance facility, Information on how the EU offers BoP assistance to EU countries outside the euro area.'< https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/balance-payments-bop-assistance-facility_en > accessed 24 June 2021.
[192] TFEU, art 143(1)-(2).
[193] Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments [2002] OJ L 53/1 (BOP Regulation).
[194] BOP Regulation, art 1(1).
[195] BOP Regulation, art 1(1).
[196] BOP Regulation, art 1(2).

decision of the Council, the financial assistance may take the form of a loan or appropriate financing facility.[197]

According to the BOP Regulation, the loans provided by the BOP assistance facility shall be financed exclusively by way of recourse to capital markets and financial institutions.[198] In case of BOP assistance facility the ECB is entrusted to ensure the administration of the loans.[199] BOP assistance programmes so far provided effective financial assistance for Hungary, Latvia and Romania (most importantly to mitigate the impact of the financial crisis of 2008).[200]

The EFSM has its legal basis in Article 122 paragraph 2 TFEU. On this legal basis Council Regulation (EU) No 407/2010 (EFSM Regulation)[201] was adopted. The adoption of this regulation and the establishment of EFSM were necessary because of the deepening of the financial crisis and because borrowing conditions became unreasonably onerous for several Member States.[202] In this exceptional situation it appeared necessary to set up a Union stabilisation mechanism to preserve financial stability in the EU.[203] So EFSM Regulation set up the conditions and procedures under which it is possible to provide Union financial assistance 'to a Member State which is experiencing, or is seriously threatened with, a severe economic or financial disturbance caused by exceptional occurrences beyond its control.'[204] This EU financial assistance shall be provided in the form of a loan or of a credit line granted to the Member State concerned.[205] To acquire the necessary funds to provide financial assistance, the EFSM Regulation empowered the EC on behalf of the EU 'to contract

[197] BOP Regulation, Preamble (11), art 3(2).
[198] BOP Regulation, Preamble (9).
[199] BOP Regulation, art 9.
[200] European Commission, 'Balance of payments (BoP) assistance facility, Information on how the EU offers BoP assistance to EU countries outside the euro area.' (n 191).
[201] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L 118/1 (EFSM Regulation).
[202] EFSM Regulation, Preamble (4).
[203] EFSM Regulation, Preamble (5).
[204] EFSM Regulation, art 1.
[205] EFSM Regulation, art 2(1).

borrowings on the capital markets or with financial institutions.'[206] Thus in case the Council has decided to provide a loan to a Member State, the EC is authorised to borrow the necessary funds on the capital markets or from financial institutions at the most appropriate time (according to its assessment).[207] Based on these provisions, the EC also can turn to the capital markets and borrow funds for example with the issuing of bonds. Regarding the EFSM, the administration of the loans is carried out by the ECB.[208]

Ireland and Portugal received significant financial assistance from the EFSM between 2011 and 2014 (during the financial crisis) which was conditional on the implementation of reforms. (Greece also received short-term bridge loans from the EFSM in July 2015.)[209]

For example for the 2010-2013 period Ireland received a joint financing package of EUR 85 billion, from which EUR 22.5 billion was provided by the EFSM.[210] Originally the maximum average maturity of the loan was 7.5 years, but later it was extended to 19.5 years, and 'the maturity of individual tranches of the loan facility may be up to 30 years.'[211] Portugal received EUR 24.3 billion (the maximum possible allocation was EUR 26 billion) from the EFSM as part of an overall EUR 78 billion financial package.[212]

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[206] EFSM Regulation, art 2(1).
[207] EFSM Regulation, arts 2(1), 6(3).
[208] EFSM Regulation, art 8(1).
[209] European Commission, 'European Financial Stabilisation Mechanism (EFSM) Information on how the EFSM was created to provide financial assistance for EU countries and an overview of its programmes.' < https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/european-financial-stabilisation-mechanism-efsm_en > accessed 13 July 2021.
[210] 2011/77/EU Council Implementing Decision of 7 December 2010 on granting Union financial assistance to Ireland [2011] OJ L 30/34 (2011/77/EU Council Implementing Decision) art 1(1); European Commission, 'Financial assistance to Ireland, Information on Ireland's economic adjustment programme, post-programme surveillance and an overview of disbursements.' < https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/which-eu-countries-have-received-assistance/financial-assistance-ireland_en > accessed 13 July 2021.
[211] 2011/77/EU Council Implementing Decision art 1(1); 2013/313/EU Council Implementing Decision of 21 June 2013 amending Implementing Decision 2011/77/EU on granting Union financial assistance to Ireland [2013] OJ L 173/40 art 1(1).
[212] 2011/344/EU Council Implementing Decision of 30 May 2011 on granting Union financial assistance to Portugal [2011] OJ L 159/88, art 1(1); European Commission, 'Financial assistance to Portugal, Information on Portugal's economic adjustment programme, post-programme surveillance and an overview of disbursements.' < https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/which-eu-countries-have-received-assistance/financial-assistance-portugal_en > accessed 13 July 2021.

Currently the European Stability Mechanism (ESM) serves as the primary possible alternative to request financial assistance for those Member States whose currency is the euro. This is a permanent intergovernmental (financial) institution established in 2012. EFSM basically remained accessible if necessary and also it continues to manage its debt on the bond market.[213] ESM as an international financial institution also issued bonds (firstly in October 2013), which have a maximum maturity up to 45 years.[214]

The SURE program was an essential measure of the EU to handle the consequences of the COVID crisis on the employment market. The master thesis discusses this important program in detail in its Chapter V.

The MFA 'is an EU financial instrument extended to partner countries that are experiencing a balance-of-payments crisis.'[215] The legal basis of MFA is established by Articles 212 and 213 TFEU in case of third countries other than developing countries.[216]

Article 212 paragraph 1 TFEU states that the EU 'shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries.'[217] The necessary implementing measures in connection with this paragraph shall be adopted by the European Parliament (EP) and the Council in an ordinary legislative procedure.[218]

Article 213 TFEU provides authorisation for the Council to adopt the necessary decisions on a proposal from the EC if the situation in a third country requires urgent financial assistance

[213] European Commission, 'European Financial Stabilisation Mechanism (EFSM) Information on how the EFSM was created to provide financial assistance for EU countries and an overview of its programmes.' < https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/european-financial-stabilisation-mechanism-efsm_en > accessed 13 July 2021; Mauro Megliani, 'From the European Stability Mechanism to the European Monetary Fund: There and Back Again' (2020) 21 German Law Journal 674, 675-677.

[214] European Stability Mechanism, 'ESM Bonds' < https://www.esm.europa.eu/investors/esm/esm-bonds > accessed 14 July 2021.

[215] European Commission, 'Report from the Commission to the European Parliament and the Council on the implementation of macro-financial assistance to third countries in 2019' (European Commission Report) COM(2020) 296 final 3.

[216] ibid 1.

[217] TFEU, art 212(1).

[218] TFEU, art 212(2).

from the EU.[219] The MFA provides financial assistance most frequently in the form of (medium/long-term) loans. In this case the EC borrows from the capital markets and the acquired funds are provided as loans to the beneficiary country. It is also possible in the framework of the MFA to provide grants financed by the EU budget as financial assistance. The combination of these two methods is also allowed.[220] For example in May 2020 the EP and the Council adopted a decision in the framework of the MFA to provide macro-financial assistance to enlargement and neighbourhood partners in the context of the COVID-19 pandemic (COVID MFA Decision).[221]

Based on the COVID MFA Decision, financial assistance was provided in the form of loans to ten partner countries[222] which were facing a weak and rapidly worsening balance-of-payments and fiscal situation and economic recession due to the COVID-19 pandemic. The maximum total amount of this financial assistance is EUR 3 billion.[223] The EC received authorization 'on behalf of the Union, to borrow the necessary funds on the capital markets or from financial institutions and to on-lend them to the partner.'[224]

To ensure the necessary financial means for these four programmes the EC issued bonds. These bonds are all denominated in euro and some of them have significantly long maturity which even reaches 30 years. The EU/Euratom Debt Issuance Programme[225] provided the background for the issuance of these debt securities, which are listed at the LuxSE.[226]

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[219] TFEU, art 213.

[220] European Commission, COM(2020) 296 final 3; European Commission, 'Macro-Financial Assistance (MFA) to non-EU partner countries' < https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/international-economic-relations/macro-financial-assistance-mfa-non-eu-partner-countries_en > accessed 14 July 2021.

[221] Decision (EU) 2020/701 of the European Parliament and of the Council of 25 May 2020 on providing macro-financial assistance to enlargement and neighbourhood partners in the context of the COVID-19 pandemic (PE/11/2020/REV/1) [2020] OJ L 165/31 (COVID MFA Decision).

[222] These ten partner countries are Albania, Bosnia and Herzegovina, Georgia, Jordan, Kosovo, Moldova, Montenegro, North Macedonia, Tunisia and Ukraine. See COVID MFA Decision, art 1(1).

[223] COVID MFA Decision, Preamble (1), art 1(1)(2).

[224] COVID MFA Decision, art 1(2).

[225] See The Home Page of the Luxembourg Stock Exchange (Debt Issuance Programme, Union Europeenne) < https://www.bourse.lu/programme-documents/Programme-UE/14608 > accessed 29 Nov 2021, European Commission, 'Macro-Financial Assistance (MFA) to non-EU partner countries' (n 220); See also for example European Union (EU) and European Atomic Energy Community (EURATOM), 'Debt Issuance Programme, 10

3. The economic background of debt security issuance at European Union level

To ascertain the economic background of debt security issuances at EU level, first we have to analyse the economic conditions of EU Member States. In the EU and also in the euro area certain economic asymmetries between the different countries can be observed. Such asymmetries arose for example regarding the public accounts and fiscal policy considerations of Member States. Numerous Member States pursued a responsible fiscal policy during the previous decade(s) (such as Germany and the Netherlands). However, some other Member States were fiscally less responsible and (due to complex and different factors) accumulated relatively high public debt. This situation was intensified by the so-called European sovereign debt crisis (which was triggered by the financial crisis started in 2007-2008), when several euro area Member States needed financial assistance (for example Greece, Portugal, Ireland and Spain[227]).[228] Until the beginning of the COVID crisis some Member States still could not significantly reduce their public debt to GDP ratio (despite the relatively favourable economic conditions and significant efforts). For example at the end of 2019 the general government gross debt to GDP ratio was 176.6% in Greece, 134.8% in Italy, 117.7% in Portugal, 98.1% in France and 95.5% in Spain. This ratio was on average 84.1% in the euro area and 77.7% in

December 2019' (n 143); European Union (EU) and European Atomic Energy Community (EURATOM), 'Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021' (n 143)

[226] European Commission, 'Financial assistance programmes' < https://ec.europa.eu/info/strategy/eu-budget/eu-borrower-investor-relations/financial-assistance-programmes_en > accessed 24 June 2021.

[227] Interesting to mention that Spain and Ireland pursued a responsible fiscal policy before the European sovereign debt crisis. For example they did not exceed deficit targets and before the crisis they were also able to decrease their debt to GDP ratio. Despite this, they needed financial assistance. See Mai'a K. Davis Cross, *The Politics of Crisis in Europe* (Cambridge University Press 2017) 171.

[228] Nicola Acocella, *The European Monetary Union: Europe at the Crossroads* (Cambridge University Press 2020) 105-141; Cross (n 227) 167-170; Paweł Tokarski and Alexander Wiedmann, 'The Corona Debt Conundrum in the Eurozone - Limits to Stabilisation by Monetary Policy and the Search for Alternatives' (2021) No. 23. SWP Stiftung Wissenschaft und Politik German Institute for International and Security Affairs – SWP Comment, March 2021, 2-3. < https://www.swp-berlin.org/en/publication/the-corona-debt-conundrum-in-the-eurozone/ > accessed 26 June 2021.

the EU.[229] These results were already quite far from the original requirements of the SGP, namely that the ratio of government debt to GDP shall not exceed 60%.[230] However, the COVID crisis hit the EU suddenly and very severely during the spring of 2020. The economies of the Member States were significantly shrinking due to lockdowns and containment measures. Member States were also faced with significant government expenditures to strengthen the health care system and to apply necessary social and economic policy measures to mitigate the consequences of the pandemic. Due to the decreasing economic growth and higher government spending levels it was inevitable that government debt rose to an even higher level.[231] This also enshrines from the latest data. Until the last quarter of 2020 the ratio of government debt to GDP rose to 205.6% in Greece, 155.8% in Italy, 133.6% in Portugal, 120.0% in Spain, 115.7% in France and 114.1% in Belgium. This ratio became 98.0% in the euro area and 90.7% in the EU.[232]

Also an important problem is that the pandemic hit the service sector and particularly the hospitality industry/tourism sector especially severely. During the summer and autumn of 2021 (when this master thesis was written), some travel restrictions and requirements are also still applicable which may hinder the full recovery of the economy.[233] Some Member States of the EU (like Greece, Italy, Portugal or Spain) traditionally significantly rely on these sectors in their economies and so they were very seriously affected by the economic consequences of the pandemic and also their indebtedness is very concerning in the EU. Currently the ECB

[229] Eurostat, 'Newsrelease euroindicators,' 116/2020 - 22 July 2020 < https://ec.europa.eu/eurostat/documents/2995521/11129607/2-22072020-AP-EN.pdf/ab6cd4ff-ec57-d984-e85a-41a351df1ffd > accessed 26 June 2021.

[230] TFEU Protocol (No 12) on the Excessive Deficit Procedure, art 1; Cross (n 227) 160.

[231] European Commission, 'Communication from the Commission to the Council One year since the outbreak of COVID-19: fiscal policy response' COM(2021) 105 final 1, 4-6; Tokarski and Wiedmann (n 228) 1-2; Luo (n 4) 7-8.

[232] Eurostat, 'Newsrelease euroindicators,' 49/2021 - 23 April 2021 < https://ec.europa.eu/eurostat/documents/2995521/11563051/2-23042021-AP-EN.pdf/a794c696-ae8b-db1e-ba8b-76529919a843?t=1619178233484 > accessed 26 June 2021.

[233] Euronews, 'Delta variant prompts new travel restrictions across Europe' (29/06/2021) < https://www.euronews.com/travel/2021/06/28/portugal-germany-tighten-travel-restrictions-to-curb-delta-variant-spread > accessed 15 July 2021; Euronews, 'Where can I travel in Europe right now? A complete list of COVID-19 restrictions' (Euronews Travel, Updated: 01/10/2021) < https://www.euronews.com/travel/2021/09/30/what-s-the-latest-on-european-travel-restrictions > accessed 17 Oct 2021.

with its EUR 1 850 billion PEPP programme is able to successfully stabilize the euro area debt market and keep government bond interest rates low. However, it is an open question how long the ECB can continue such intensive monetary policy measures.[234] As economic recovery requires further governmental stimulus,[235] it is necessary to find its appropriate financial background. Taking into consideration that some Member States have a significantly high government debt level, it is a logical proposal that the EU should be involved in the financing of economic recovery. Because the EU has a very favourable credit rating,[236] it can borrow money (for example with the issuance of bonds) on comparatively attractive financing rates (and for example on-lend them to Member States on the same terms and conditions).[237] In case the funds are provided as grants by the EU to the Member States, it is also beneficial that this fiscal impulse will not translate into a higher deficit or debt on national level.[238] These funds effectively can be used 'to increase growth potential through structural reforms and investments while contributing to the green and digital transitions (…)' and to help economic recovery and growth after the crisis.[239]

[234] Tokarski and Wiedmann (n 228) 4-7; Luo (n 4) 7-8.
[235] European Commission, COM(2021) 105 final 8-14.
[236] The EU received AAA/Aaa (outlook stable) rating from Fitch and Moody's, and AA (outlook positive) from Standard & Poor's. See European Commission, 'EU's credit rating' < https://ec.europa.eu/info/strategy/eu-budget/eu-borrower-investor-relations/eus-credit-rating_en > accessed 15 July 2021.
[237] European Commission, 'Financial assistance programmes' < https://ec.europa.eu/info/strategy/eu-budget/eu-borrower-investor-relations/financial-assistance-programmes_en > accessed 15 July 2021.
[238] European Commission, COM(2021) 105 final 12.
[239] ibid 8-9.

V. The SURE bonds as forerunners of Next Generation EU bonds

1. The role of the SURE and the SURE bonds

After it became evident that the COVID pandemic has a serious negative impact on the EU economy (and also globally), measures were introduced at EU level to handle its consequences. In March 2020, the EC in its 'Communication on Coordinated economic response to the COVID-19 Outbreak'[240] already envisaged specific measures to mitigate the employment impact of the COVID crisis for individuals. The EC recognized appropriately that the public health crisis affects employment and it has even stronger effect in specific sectors (such as in the tourism and hospitality sector).[241] So it became necessary to provide protection for workers and help them to avoid unemployment and loss of income where possible.[242] According to the EC, for example short-time work schemes are appropriate measures to protect employees during the crisis. These are providing the possibility for the temporary reduction of working hours and also they support the income of employees.[243]
The 'Communication on Coordinated economic response to the COVID-19 Outbreak' also highlighted that the EU already provided support for the Member States to handle the risk of unemployment from the EU structural funds, including the European Social Fund (ESF). For example the CRII made available financial assistance for the Member States to adopt and temporarily support national short time working schemes and possibly to combine those with up-skilling and reskilling measures.[244]

[240] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogrup - Coordinated economic response to the COVID-19 Outbreak' (Communication) COM(2020) 112 final.
[241] ibid 1-3, 9.
[242] ibid 7.
[243] ibid 7.
[244] ibid 7-8.

The EC also emphasized that it accelerated the preparation of a legislative proposal for a European Unemployment Reinsurance Scheme (EURS). This initiative has the aim to support employment and also to protect those who have lost their jobs because of the consequence of a crisis. The proposed EURS would intend to provide assistance for Member States in this regard and so relieve the pressure on national budgets during crisis situations. It would provide support to national policies which intend to preserve jobs and skills, such as with the application of short-time work schemes.[245]

Based on the above preliminaries, the 'Proposal for a Council Regulation on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak' (SURE-proposal)[246] was introduced by the EC on the 2nd of April 2020. As the SURE-proposal emphasizes, SURE is intended to be a temporary instrument which shall be considered as an emergency operationalisation of a EURS because of the unprecedented situation of the COVID crisis. However, the establishment of SURE does not affect the possibility that a permanent instrument may be set up under a different legal basis in the TFEU to assist Member States in the handling of unemployment.[247] According to Fernandes[248] and Vandenbroucke[249], the SURE can be interpreted as a complement to normal unemployment insurance, as it provides job insurance in case of the current temporary emergency situation. It is possible that this mechanism evolves in the future towards the establishment of a permanent European unemployment

[245] ibid 7.
[246] European Commission, 'Proposal for a Council Regulation on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak' COM(2020) 139 final.
[247] ibid 2-3.
[248] Sofia Fernandes is the director of the Académie Notre Europe and senior research fellow for economic and social affairs at the Jacques Delors Institute.
[249] Frank Vandenbroucke is University Professor at the University of Amsterdam, and also Special Advisor on Social Affairs at the Jacques Delors Institute.

benefit scheme. So SURE may be a lynchpin for the development of a European unemployment reinsurance system.[250]

Based on the SURE-proposal, the SURE instrument has the aim to provide support for those Member States which are significantly exposed to the negative economic and social consequences of the pandemic. More specifically it intends to help Member States to alleviate the employment impact of the COVID crisis for individuals and in the hardest hit sectors. As Member States have to face a sudden and significant increase of public expenditure for the preservation of employment, the SURE instrument intends to offer them financial assistance to bear these costs. The SURE-proposal suggested that these additional financial resources shall be made available for the Member States in the form of favourable loans.[251] The necessary funds to provide these loans shall be borrowed by the EU on the financial markets and shall be guaranteed on a voluntary basis by the Member States.[252] The legal basis of the SURE-proposal is provided by Article 122 TFEU. Both paragraph 1 and 2 of this Article has a role in the establishment of the SURE instrument.[253] Article 122 paragraph 1 TFEU provides the legal background for the guarantee scheme of the SURE instrument. This Treaty provision provides authorization for the Council to adopt a decision, based on a proposal from the EC 'and in a spirit of solidarity between Member States, upon the measures appropriate to respond to the socio-economic situation following the COVID-19 outbreak.'[254] As a result of this opportunity a guarantee system is constructed, which is based on the voluntary contributions from the Member States to the EU. This provides the economic background for

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250 Sofia Fernandes and Frank Vandenbroucke 'SURE A welcome lynchpin for a European unemployment re-insurance' (2020) Notre Europe Jacques Delors Institute, Technical Report Social Europe Policy Paper No. 251 April 2020, 7. < https://institutdelors.eu/wp-content/uploads/2020/08/PP251_SURE_Fernandes-Vandenbrouck_200417_EN-1.pdf > accessed 21 May 2021.

251 European Commission, COM(2020) 139 final 1-3; Hadjiemmanuil (n 54) 195.

252 European Commission, COM(2020) 139 final 2-5; Hans Arno Petzold, 'The SURE Initiative, Short-Time Work Compensation, and State Aid' (2020) 19 European State Aid Law Quarterly 161, 162.

253 European Commission, COM(2020) 139 final 3-4.

254 Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L 159/1 (SURE Regulation) Preamble (1); TFEU, art 122(1).

the financial assistance which is offered by the SURE instrument. Regarding the organisation and management of the loan scheme, Article 122 paragraph 2 TFEU provides the legal basis.[255] This paragraph authorizes the Council, that on a proposal from the EC, it may grant, under certain conditions, Union financial assistance to a Member State which is 'in difficulties or is seriously threatened with severe difficulties caused by exceptional occurrences beyond its control.'[256] So the lending component of the SURE instrument is based on this Treaty provision.[257] Article 122 paragraph 2 TFEU previously also provided the legal background for the establishment of the EFSM. This temporary mechanism had the aim to help Member States which lost their access to financial markets during the financial crisis.[258] However, according to the EC, the EU financial assistance under Article 122 paragraph 2 TFEU is not only available in case of crises of a financial or financial stability nature. But it is possible to rely on this provision in case of any type of exceptional crisis event, and the 'Council has a broad margin of discretion for assessing whether the conditions of this legal basis are fulfilled.'[259] Because the SURE instrument is based on Article 122 TFEU, it can be considered as a European instrument and not an intergovernmental instrument like the ESM.[260]

The SURE-proposal was adopted in a non-legislative procedure on the 19th of May 2020 by the Council. It entered into force on the 20th of May 2020. This legislative act is called Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak (SURE Regulation).

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[255] European Commission, COM(2020) 139 final 4.
[256] ibid 4; SURE Regulation, Preamble (2); TFEU, art 122(2).
[257] European Commission, COM(2020) 139 final 4.
[258] This temporary instrument provided assistance for those Member States during the financial crisis, which were not able to collect funds from the markets (in full or in part) because of the severely deteriorating borrowing costs. Under EFSM, loans were granted to Ireland and Portugal and a bridge-finance for Greece. See European Commission, COM(2020) 139 final 4. See also Chapter IV Section 2 (The European Union as debtor) of the master thesis.
[259] Busch (n 29) 19-20; European Commission, COM(2020) 139 final 4.
[260] Fernandes and Vandenbroucke (n 250) 7.

The SURE instrument has the aim to provide a coordinated, rapid and effective response to the COVID crisis in the labour market. It also emphasizes and embodies the spirit of solidarity among Member States.[261] The EU may provide through the SURE instrument 'financial assistance to a Member State which is experiencing, or is seriously threatened with, a severe economic disturbance caused by the COVID-19 outbreak.'[262] The most important area of intervention in case of the financial assistance provided by the SURE instrument is definitely the measures related to the creation or extension of short-time work schemes and similar measures which have the aim to protect employees.[263] 'Short-time work schemes are public programmes that allow firms experiencing economic difficulties to temporarily reduce the hours worked while providing their employees with income support from the State for the hours not worked.'[264] Short-time work schemes have two important aims. On the one hand they intend to provide compensation for employees in case they have lost their incomes from their primary occupation. This aim is similar to the purpose of unemployment insurance schemes in general. However, as unemployment insurance schemes usually act after the employee already lost their job (so the contractual relation was terminated with the employer); short-time work schemes specifically intend to avoid the termination of employment. So these schemes intend to retain employment, but at reduced working hours. This is also beneficial for the employers, as they retain their skilled and proven personnel and so they are able to rapidly increase their economic activities after the conditions improve and demand increases.[265] The SURE instrument also can provide financial assistance for Member States to help self-employed persons, most importantly to provide them income replacement. These measures generally would like to reduce the possibility of unemployment and loss of income. Some health-related measures (especially in the workplace) also may be eligible under

[261] SURE Regulation, Preamble (6).
[262] SURE Regulation, art 1(2).
[263] SURE Regulation, Preamble (7), arts 1(2), 3(2).
[264] European Commission, COM(2020) 139 final 2; Petzold (n 252) 161.
[265] Petzold (n 252) 161.

SURE.[266] The SURE instrument has a complementary nature, which means that the instrument complements the national measures adopted by the Member States.[267] Member States have to fulfil some specific conditions to apply for the financial assistance provided by the SURE instrument. The requesting Member State has to introduce that it's actual (and possibly also planned) public expenditure has suddenly and severely increased as of 1 February 2020. This increase had to be triggered by the Member State's measures which are directly related to short-time work schemes and similar measures to address the socio-economic effects of the COVID pandemic.[268] Member States have to apply to receive the financial assistance. The EC examines the submitted applications of the Member States and consults with the Member State concerned without undue delay to verify the occurrence of necessary conditions and compliance with the rules of the SURE Regulation. Member States are required to submit to the EC appropriate evidence in this regard.[269] After consideration of this information the EC prepares a proposal to the Council and based on that, the financial assistance is provided by means of a Council implementing decision.[270] This Council implementing decision contains the details of the financial assistance provided to the Member State. Most importantly it determines the amount of the loan and the terms of its provision (maximum average maturity, pricing formula, maximum number of instalments, availability period, etc.).[271] Also it examines the compliance by the applicant Member State with the conditions for using the SURE instrument.[272] The Council implementing decision describes also those measures, which can be financed with the loan provided by the SURE instrument.[273]

[266] SURE Regulation, Preamble (7), arts 1(2), 3(2).
[267] SURE Regulation, art 2.
[268] Petzold (n 252) 162; SURE Regulation, art 3(1).
[269] SURE Regulation, art 6(2).
[270] SURE Regulation, art 6(1).
[271] SURE Regulation, art 6(3)(a).
[272] SURE Regulation, art 6(3)(b).
[273] SURE Regulation, art 6(3)(c); Hadjiemmanuil (n 54) 195.

The SURE instrument has established a very significant financial framework to provide assistance for the Member States. The maximum amount which can be provided to the Member States under the SURE instrument is EUR 100 000 000 000 altogether (maximum amount of financial assistance).[274]

The SURE Regulation imposes certain rules on the borrowing and lending operations which are carried out under the SURE instrument. Most importantly it is required that a loan agreement shall be concluded between the beneficiary Member State and the EC. This agreement shall contain the provisions which are necessary in case of financial assistance provided by the EU to Member States. These are established by Article 220 paragraph 5 of Regulation (EU, Euratom) 2018/1046.[275] The characteristic of the loan also shall be determined in the loan agreement.[276] The borrowing and lending operations under the SURE instrument are carried out in euros.[277] To provide safeguards for the appropriate functioning of the SURE instrument, conservative financial management, a maximum annual exposure and sufficient diversification of the loan portfolio is required.[278] Based on that, certain prudential rules are applicable to the portfolio of loans. Most importantly it is required that 'the share of loans granted to the three Member States representing the largest share of the loans granted shall not exceed 60 per cent of the maximum amount' of financial assistance.[279] Also, the amounts due by the EU in a given year shall not exceed 10 percent of the maximum amount of financial assistance.[280] The SURE Regulation establishes the possibility of rolling

[274] SURE Regulation, art 5, Preamble (6).
[275] SURE Regulation, art 8(2); Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] OJ L 193/1 (Financial regulation) art 220(5).
[276] SURE Regulation, art 8(2).
[277] SURE Regulation, art 8(1).
[278] SURE Regulation, Preamble (10).
[279] SURE Regulation, art 9(1).
[280] SURE Regulation, art 9(2).

over the borrowings contracted on behalf of the EU, so it is possible to refinance those if necessary.[281]

As of 22 October 2021, totally EUR 94.3 billion loan proposals has been approved by the Council and EUR 89.6 billion has already been disbursed to the beneficiary Member States. So taking into consideration the maximum possible amount of financial assistance, the funding opportunities are almost exhausted. The far most significant amount of financial assistance was provided to Italy and Spain. Italy already received EUR 27.438 billion and Spain received EUR 21.324 billion support in the form of favourable loans. Altogether the application of 19 Member States was approved for financial support in the framework of the SURE instrument. Significant amount of loan was disbursed also to Belgium (EUR 8.197 billion) and Poland (EUR 8.236 billion). Hungary received EUR 504 million and Austria does not applied for this support.[282]

2. The SURE bonds as securities

The EC issued social bonds to collect funds for the financial assistance provided to the Member States by the SURE instrument. During the first issuance of SURE bonds, the EC issued EUR 17 billion worth of social bonds. This was the first-ever social bond issuance of the EC. The transaction had an overwhelmingly favourable market reception, as the issued bonds were 13 times oversubscribed.[283] This represented a very significant market demand for the bonds issued by the EC. We can assume that an important factor behind this favourable market reception is that the EU is qualified as a very secure debtor by the credit rating

[281] SURE Regulation, art 9(3), Preamble (12).

[282] European Commission, 'SURE The European instrument for temporary Support to mitigate Unemployment Risks in an Emergency (SURE)' < https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/sure_en > accessed 22 October 2021.

[283] European Commission, 'EUR 17 billion EU SURE social bond listed on LuxSE, Luxembourg, 27 October 2020.' (Press release) < https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1981 > accessed 9 May 2021. See also n 286, n 287.

agencies and that creditworthiness is very desired by investors (especially during crises).[284] However, as the EC emphasized, probably it also contributed to the success of the transaction that the investors could invest in such bonds which have important social aims, namely to 'safeguard jobs and fight the rising unemployment in European countries (…).'[285]

The first bond issuance under the SURE instrument comprised two separate tranches: 'a EUR 10 billion tranche with a 10-year maturity[286] and a EUR 7 billion tranche with a 20-year maturity[287].'[288] The issued bonds were listed on the LuxSE on 27 October 2020. These social bonds are displayed on the Luxembourg Green Exchange (LGX).[289] After the examination of the published documentation regarding these debt securities, we can conclude that the SURE bond issuance used a then-existing Debt Issuance Programme (Continuously Offered Debt Issuance Programme) of the EU and the European Atomic Energy Community (EURATOM). The Base Prospectus (Offering Circular) was published on 10 December 2019.[290] The issued debt securities (and the non-contractual obligations arising out of or in connection with those) are governed by the law of Luxembourg.[291] Regarding the 'Use of Proceeds' the Base Prospectus contains just a general reference. It states that the net proceeds acquired with the issuance of debt securities 'is intended to be used by the relevant issuer for its general funding

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[284] Alberto Botta, Eugenio Caverzasi, Alberto Russo, 'Fighting the COVID-19 Crisis: Debt Monetisation and EU Recovery Bonds' [2020] 55(4) Intereconomics 239, 241.

[285] European Comission, 'EUR 17 billion EU SURE social bond listed on LuxSE, Luxembourg, 27 October 2020.' (n 283) 1.

[286] This EUR 10 billion tranche with a 10-year maturity is a fixed-rate bond which has ISIN Code EU000A283859, listed on the Bourse de Luxembourg (LuxSE), the listing date was 27 October 2020 and has a final maturity of 4 October 2030. The coupon is 0%. See Luxembourg Stock Exchange (The Home Page of the Luxembourg Stock Exchange), 'UE 0% 04/10/2030' < https://www.bourse.lu/security/EU000A283859/313968 > accessed 9 May 2021.

[287] This EUR 7 billion tranche with a 20-year maturity is a fixed-rate bond which has ISIN Code EU000A283867, listed on the Bourse de Luxembourg (LuxSE), the listing date was 27 October 2020 and has a final maturity of 4 October 2040. The coupon is 0.1%. See Luxembourg Stock Exchange (The Home Page of the Luxembourg Stock Exchange), 'UE 0,1% 04/10/2040' < https://www.bourse.lu/security/EU000A283867/313972 > accessed 9 May 2021.

[288] European Comission, 'EUR 17 billion EU SURE social bond listed on LuxSE, Luxembourg, 27 October 2020.' (n 283) 1.

[289] European Comission, 'EUR 17 billion EU SURE social bond listed on LuxSE, Luxembourg, 27 October 2020.' (n 283) 1.

[290] European Union (EU) and European Atomic Energy Community (EURATOM), 'Debt Issuance Programme, 10 December 2019' (n 143) 1-4.

[291] ibid 7.

purposes in accordance with the EU/Euratom legislation (…).'[292] In case of the EU as an issuer that includes financial assistance in the form of loans or credit lines to the EU Member States and also financial assistance loans to certain third countries.[293] More detailed information is provided regarding the 'Use of Proceeds' in the EU SURE Social Bond Framework document.[294] In this document it is affirmed that the SURE instrument has the aim to preserve employment in order to sustain families' income and the economy as a whole. This measure provides assistance to the general population impacted by the COVID-19 pandemic in the EU.[295] The EU has the intention to use social bonds under the SURE instrument as an ESG debt instrument. This provides opportunity for the investor community to contribute with their investment to the satisfaction of social needs of EU Member States hit by the COVID pandemic.[296] So based on the EU SURE Social Bond Framework document, the aim of SURE bonds is in compliance with the International Capital Market Association's Social Bond Principles (ICMA SBP).[297] According to the International Capital Market Association (ICMA), 'social bonds are any type of bond instrument where the proceeds will be exclusively applied to finance or refinance in part or in full new and/or existing eligible Social Projects.'[298] Consequently, in connection with social bonds the clear expectation is that the proceeds of the bond shall be used for social projects and the legal documentation of the security shall also clearly reflect that.[299] In the EU SURE Social Bond Framework document the 'Use of Proceeds' part provides the information that the EC will use an amount equal to

[292] ibid 34.
[293] ibid 34.
[294] European Union, 'EU SURE Social Bond Framework' (7 October 2020) < https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/eu_sure_social_bond_framework.pdf > accessed 8 May 2021.
[295] ibid 5.
[296] ibid 5-6.
[297] International Capital Market Association, 'The Social Bond Principles, Voluntary Process Guidelines for Issuing Social Bonds' (International Capital Market Association, June 2020) < https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/June-2020/Social-Bond-PrinciplesJune-2020-090620.pdf > accessed 9 May 2021; European Union, 'EU SURE Social Bond Framework' (n 294) 5-6.
[298] International Capital Market Association (n 297) 3.
[299] ibid 3.

the net proceeds from the EU SURE Social Bonds to provide loans on favourable terms to the Member States.[300] These loans are provided in compliance with the aims defined by the SURE Regulation.[301] Based on that, the EC also elaborated an internal guidance, which determines in detail the eligibility criteria of the actual and planned national expenditures.[302]

Until 15 May 2021, the EC has issued EUR 75.5 billion social bonds under the EU SURE instrument. The maturity of the issued bonds varies between 5 and 30 years. All six rounds of SURE bond issuances enjoyed a favourable market reception.[303] For example in November 2020, during the third round of SURE bond issuance, EUR 8.5 billion bonds were issued in a single tranche, which are due on the 4th of July, 2035 (15 year maturity). In this case the final order book size was at over EUR 114 billion, which represents a more than 13 times oversubscription. These bonds were priced extremely favourable as they had a negative yield of minus 0.102%. This negative interest rate advantage is passed on directly to the Member States, which means that they will also receive more funds due to the bond issuance as they have to pay back.[304] In case of shorter term SURE bonds (with for example 5 years maturity) such negative yield was quite common.[305] However, SURE bonds with considerably long

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[300] European Union, 'EU SURE Social Bond Framework' (n 294) 5.
[301] SURE Regulation, art 1(2).
[302] European Union, 'EU SURE Social Bond Framework' (n 294) 5-6.
[303] European Commission, 'SURE The European instrument for temporary Support to mitigate Unemployment Risks in an Emergency (SURE)' (n 282); European Commission, 'European Union EUR 14 billion dual tranche bond issue due 4th November, 2025 and 2050' (Press Release, European Commission, 10th November, 2020) < https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/sure_2nd_dual_tranche_press_release_final_0.pdf > accessed 13 May 2021.
[304] European Commission, 'European Union EUR 8.5 billion single tranche bond issue due 4th July, 2035' (Press Release, European Commission, 24th November, 2020) 1-3. < https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/sure_3_15year_press_release_final.pdf > accessed 13 May 2021; European Commission, 'Successful third issuance of EU SURE bonds by the European Commission' (Press Release, European Commission, 25 November 2020) < https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2196 > accessed 13 May 2021.
[305] This phenomenon also appeared for example in the case of the second and sixth emission rounds of SURE bonds. During the second emission of SURE bonds a EUR 8 billion tranche due for repayment in November 2025 was issued on a negative yield of minus 0.509%. In case of the sixth borrowing operation under the SURE instrument, the 5-year bond was priced at a negative yield of minus 0.488%. See European Commission, 'European Union EUR 14 billion dual tranche bond issue due 4th November, 2025 and 2050' (n 303); European Commission, 'Commission goes to the market for the sixth time under SURE, raises further €13 billion amid strong demand' (Daily news, European Commission, 24 March 2021) < https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1382 > accessed 13 May 2021; European Commission, 'European Union EUR 13.0 billion dual tranche bond issue due 4th March 2026 and 2nd May

maturity were also issued under very favourable terms. For example during the second emission round of SURE bonds, a EUR 6 billion tranche with 30 years of maturity was issued (so the bonds are due in November 2050). These bonds have a 0.317% yield. Regarding the sixth borrowing operation, a EUR 5 billion tranche due for repayment in May 2046 was issued, so these bonds have a 25 year maturity. The yield of these bonds is 0.476%, which also can be considered as a very favourable pricing.[306]

From the above analysis we can conclude that some SURE bonds were issued for a considerably long term, such as for 25 or 30 years. Consequently, the administration (and also the repayment or refinancing possibilities) of these bonds will provide tasks for the EC in the upcoming time period. To comply with these tasks the SURE Regulation requires that the EC shall establish the necessary arrangements for the administration of the loans with the ECB.[307] So basically the ECB will contribute to the administration of the SURE bonds.

3. The SURE and the spirit of solidarity among Member States

According to the Base Prospectus (Offering Circular) of the Debt Issuance Program, multiple layers of debt-service protection ensure that the EU serves its debt appropriately. First of all, 'the EU pays its own debt with the loan redemption payments received from the loan beneficiaries (back-to-back lending).'[308] This provides in itself significant assurance, as the beneficiaries of the loans provided by the EU so far have always reliably served their obligations. However, in the unprecedented and implausible case of non-payment by a loan

2046' (Press Release, European Commission, 23th March, 2021) < https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/sure_6th_dual_tranche_press_release_final_cln_pdf.pdf > accessed 13 May 2021.

306 European Commission, 'European Union EUR 14 billion dual tranche bond issue due 4th November, 2025 and 2050' (n 303); European Commission, 'Commission goes to the market for the sixth time under SURE, raises further €13 billion amid strong demand' (n 305); European Commission, 'European Union EUR 13.0 billion dual tranche bond issue due 4 th March 2026 and 2nd May 2046' (n 305).

307 SURE Regulation, art 10(1).

308 European Union (EU) and European Atomic Energy Community (EURATOM), 'Debt Issuance Programme, 10 December 2019' (n 143) 36.

beneficiary, the EU has substantial financial background to serve the payment obligations. So the EU budget serves also as an appropriate guarantee for the debt repayment obligations. In this regard the EC is able to make available its cash buffer or re-prioritise budgetary expenditure (if necessary). Also it is possible to ask additional funds from the Member States.[309] This approach generally can be applied regarding the issued debt securities.

However, the debt securities issued under the SURE instrument are covered by an additional guarantee. Based on Article 11 of the SURE Regulation, Member States have the possibility to contribute to the SURE instrument with their own guarantees, by counter-guaranteeing the risk borne by the EU.[310] Such contribution shall be provided in the form of irrevocable, unconditional and on-demand guarantees. The EC is entitled to conclude the agreements with the contributing Member States on these guarantees, which also shall define the payment conditions.[311]

Article 12 of the SURE Regulation clarifies the role of the guarantees provided by the Member States, as it states that the SURE instrument shall only become available after all Member States have contributed to it in the form of the above mentioned guarantees. These guarantees have to cover an amount representing at least 25 percent of the maximum amount of financial assistance (so at least EUR 25 billion). It is also an important condition that the relative shares of contributions of each Member State of the overall amount of Member States' contributions shall correspond to the relative shares of Member States in the total GNI of the EU.[312] The relative share of Member States in the EU GNI shall be determined on the basis of the general budget of the EU for the financial year 2020.[313]

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[309] ibid 36.
[310] SURE Regulation, art 11(1).
[311] SURE Regulation, art 11(2)(3).
[312] SURE Regulation, art 12(1); Busch (n 29) 19-20; Hadjiemmanuil (n 54) 195-196.
[313] See Definitive adoption (EU, Euratom) 2020/227 of the European Union's general budget for the financial year 2020 [2020] OJ L 57/1. Part A (Introduction and financing of the general budget), TABLE 3 Determination of uniform rate and breakdown of resources based on gross national income pursuant to point (c) of Article 2(1) of Decision 2014/335/EU, Euratom (Chapter 1 4) column (1); SURE Regulation, art 12(1).

The relative share of Member States in the EU GNI similarly would play an important role in case it becomes necessary to call the guarantees provided by Member States. According to the SURE Regulation, such calls on guarantees provided by Member States also shall be made pro rata on this basis. The method to determine the relative shares of Member States in the EU GNI is the same as in case of guarantee contributions, so it is based on the general budget of the EU for the financial year 2020. In addition, the SURE Regulation provides the right to the EC, that in case a Member State fails, in full or in part, to honour a call in time, in order to cover for the part corresponding to the Member State concerned, to make additional calls on guarantees to other Member States. Such additional calls also shall be made pro rata to the relative share of each of the other Member States in the EU GNI, but the relative share of the Member State concerned shall not be taken into account. The SURE Regulation also stipulates that the 'Member State which failed to honour the call shall remain liable to honour it.'[314] The EC will recover the amount of the unpaid guarantee contribution from the Member State concerned and reimburse the other Member States for their additional contributions. However, there is a general cap on the guarantee which can be called from a Member State. Namely it is limited in all circumstances by the overall amount of guarantee contributed by that Member State under the agreement concluded with the EC regarding this irrevocable, unconditional and on-demand guarantee.[315]

Therefore, the liability of Member States regarding the non-payment of other Member States is not unlimited. The maximum amount of guarantees called from a Member State cannot exceed the maximum amount of guarantee which was undertaken by it in the agreement concluded with the EC. Based on the above rules it is also an important element that guarantee calls shall be proportionate to the relative economic strength of the Member States

[314] SURE Regulation, art 11(4).

[315] SURE Regulation, art 11(3)(4); European Commission, COM(2020) 139 final 6-7; Fernandes and Vandenbroucke (n 250) 7-8.

in the EU (which is measured on the basis of their relative shares in the total GNI of the EU).[316]

Also a relevant consideration is that based on the wording of Article 11 of SURE Regulation, the contribution of the Member States to the SURE instrument with their own guarantees is not mandatory, but it is subject to their own decision. So these guarantees were provided on a voluntary basis by the Member States. They had the opportunity to determine the maximum amount of the guarantee which they wanted to undertake in the agreement concluded with the EC. However, based on Article 12 of the SURE Regulation, the financial assistance under the SURE instrument became available only after all Member States committed their guarantees to the EU and that contribution corresponded with the conditions of Article 12.[317] Thus basically if the Member States wanted to enjoy the benefits of the SURE instrument, they collectively had to contribute to its guarantee scheme. The adoption of the SURE Regulation only required a qualified majority voting by the Council. Nevertheless, as all Member States had to take part voluntarily in the guarantee system to make the SURE instrument financially operational, unanimity was required for that. So practically a veto would have been possible even by a single Member State.[318] As the SURE instrument was activated on the 22nd of September 2020,[319] this means that all Member States have undertaken the responsibility to help crisis response. Also those Member States contributed to the guarantee system, which did not decide to apply for the financial assistance provided by the SURE instrument. This represented solidarity between Member States and also served as a good starting point for the negotiation and adoption of the significantly larger and more comprehensive Next Generation

[316] SURE-Regulation, Preamble (9), art 11(3)-(5); European Commission, COM(2020) 139 final 6-7; Fernandes and Vandenbroucke (n 250) 7-8.
[317] European Commission, COM(2020) 139 final 6-7.
[318] Fernandes and Vandenbroucke (n 250) 7.
[319] European Commission, 'SURE The European instrument for temporary Support to mitigate Unemployment Risks in an Emergency (SURE) – Timeline' < https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/sure_en > accessed 19 May 2021.

EU plan. The SURE instrument is available until 31 December 2022, until which date it is possible to adopt Council implementing decisions to provide further financial assistance.[320]

The SURE Regulation did not intend to establish a harmonised system of short-time work compensation or support in the EU. But the financial assistance provided by the SURE instrument can ease the financial burden of those Member States which apply such schemes.[321]

[320] SURE Regulation, art 12(3).
[321] Petzold (n 252) 162.

VI. The Next Generation EU and Next Generation EU bonds

1. The adoption and content of Next Generation EU (European Union Recovery Instrument)

As the severe economic and social consequences of the COVID pandemic became evident, the EP perceived and articulated the need for a 'massive recovery and reconstruction package for investment to support European economy after the crisis (…).'[322] The European Council also shared similar view.[323] The EC responded rapidly to these calls and proposed a 'bold and comprehensive plan for European recovery'.[324] In its Communications published on the 27th of Mai 2020, titled 'The EU budget powering the recovery plan for Europe'[325] and 'Europe's moment: Repair and Prepare for the Next Generation'[326] the EC envisaged an ambitious and unprecedented recovery plan for the EU, which intended to mobilise the full potential of the EU budget.[327]

The proposed recovery plan contained two main components. Firstly, it proposed to set up an emergency European Recovery Instrument (European Union Recovery Instrument, EURI), which is also called the Next Generation EU (NGEU). The EURI was proposed as a

[322] European Parliament, 'European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences' [2020] (2020/2616(RSP)) 19.

[323] European Council, 'Conclusions of the President of the European Council following the video conference of the members of the European Council' 23 April 2020 (Press Release) < https://www.consilium.europa.eu/en/press/press-releases/2020/04/23/conclusions-by-president-charles-michel-following-the-video-conference-with-members-of-the-european-council-on-23-april-2020/ > accessed 16 September 2021; John Bachtler, Carlos Mendez and Fiona Wishlade, 'The Recovery Plan for Europe and Cohesion Policy: An Initial Assessment' (2020) European Regional Policy Research Consortium Paper 20/1, European Policies Research Centre, Glasgow and Delft, 6. < https://www.eprc-strath.eu/public/dam/jcr:0bde4db2-61d4-4cc6-b463-d7de1d3c049e/THE%20RECOVERY%20PLAN%20FOR%20EUROPE%20AND%20COHESION%20POLICY:%20AN%20INITIAL%20ASSESSMENT.pdf > accessed 16 September 2021.

[324] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The EU budget powering the recovery plan for Europe' (Communication) COM(2020) 442 final 1.

[325] ibid.

[326] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – Europe's moment: Repair and Prepare for the Next Generation' (Communication) COM(2020) 456 final.

[327] European Commission, COM(2020) 442 final 1, 16.

temporary and immediate measure with the aim to handle the most important recovery needs, help to kick-start the European economy and to contribute to sustainable and resilient growth. To provide immediately available funds for the Member States, the necessary financial resources were intended to be raised from the financial markets. So it was proposed by the EC that the EU shall be entitled to borrow funds with the issuance of bonds. Secondly the EC relied on the reinforced MFF for 2021-2027.[328] The proposal for the new MFF was already introduced on the 2nd of May 2018 by the EC.[329] However, due to the consequences of the pandemic the EC proposed significant modifications and reinforcement in the long-term EU budget. These comprise the creation of new tools in the budget and also the strengthening of existing and essential EU programmes.[330]

Important to mention, that the NGEU and the 2021-2027 MFF are existing in symbiosis. They reflect similar priorities and also a part of the funds of NGEU are provided to the Member States through the 2021-2027 MFF EU budget (so NGEU also provides additional funding to some existing programmes of the EU budget).[331] Based on the proposals, the EURI (NGEU) intended to involve EUR 750 billion and the 2021-2027 MFF about EUR 1100 billion (expressed in 2018 prices). These allocations represent a unique and unprecedented commitment to power the European recovery.[332]

The key considerations of NGEU proposal were the following: green and digital transition, fairer and more resilient society and economy, sustainability, more circular economy, fair and

[328] ibid 1-2, 14.
[329] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - A Modern Budget for a Union that Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027' (Communication) COM(2018) 321 final.
[330] European Commission, COM(2020) 442 final 1, 9-13.
[331] European Commission, COM(2020) 456 final 4-6; Karsten Staehr and Katri Urke, 'The Coronavirus Pandemic and Next Generation EU in the Baltic States' (2021) 22(1) CESifo Forum 20; Bachtler, Mendez and Wishlade (n 323) 6-13.
[332] European Commission, COM(2020) 442 final 1-2.

inclusive recovery, recovery based on fundamental rights and respect of the rule of law, building capacity to handle all kinds of emergencies.[333]

The legislative package which contains the NGEU and the new 2021-2027 MFF was adopted in December 2020. This includes – most importantly – the MFF Regulation for the years 2021 to 2027,[334] the Regulation establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis[335] (EURI Regulation, the regulation which legislatively established the Next Generation EU exceptional and temporary emergency mechanism[336]) and the Own Resources Decision[337] (which 'lays down rules on the allocation of own resources to the Union in order to ensure the financing of the Union's annual budget'[338]).

Of course numerous political debates took place between the Member States and also between EU institutions until these legislative acts were successfully adopted.[339] In this master thesis it is especially important to highlight two topics in this regard. There was a debate regarding the share of different components of the EURI, namely in what proportion it shall contain loans and grants. Austria, Denmark, the Netherlands and Sweden intended to (at least) decrease the share of grants in the EURI. Other Member States had the opinion that the EU shall provide a larger part of financial assistance as grants (for example France, Germany, Italy and Spain insisted to keep at least EUR 400 billion as grant). The European Council at its meeting on the

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[333] European Commission, COM(2020) 442 final 2-3, 5-12; European Commission, COM(2020) 456 final 1-6, 10-11, 14-16.

[334] Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L 433I/11 (MFF Regulation).

[335] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L 433I/23 (EURI Regulation).

[336] European Commission, COM(2020) 442 final 1, 3, 14; Alexandros Kyriakidis, 'The EU's Economic Response to the COVID-19 Pandemic: Preliminary Remarks' (European Law Blog, News and Comments on EU Law, 11 May 2021) < https://europeanlawblog.eu/2021/05/11/the-eus-economic-response-to-the-covid-19-pandemic-preliminary-remarks/ > accessed 26 October 2021.

[337] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L 424/1 (Own Resources Decision).

[338] Own Resources Decision, art 1.

[339] Caroline de la Porte and Mads Dagnis Jensen, 'The next generation EU: An analysis of the dimensions of conflict behind the deal' (2021) 55 Social Policy & Administration 388-402. < https://doi.org/10.1111/spol.12709 > accessed 18 September 2021; Bachtler, Mendez and Wishlade (n 323) 1-64.

21st of July 2020 reached compromise on this crucial question and the size of grants component was reduced from EUR 433.2 billion of the EC's initial proposal to about EUR 390 billion (however, the loan component was raised to leave the overall size of NGEU intact).[340]

The application of rule of law conditionality similarly generated significant debate. The EC explicitly was on the opinion that 'the recovery must be based on fundamental rights and full respect of the rule of law.'[341] A 'Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States' was already proposed in 2018. The proposal intended to make possible the suspension of payments and commitments or the reduction of funding under existing commitments in case of a generalised deficiency as regards the rule of law in a Member State (which affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union).[342] Generally the EP and most of the Member States supported the rule of law conditionality during the negotiations about the new MFF and on 5 November 2020, the Council and the EP reached an agreement on this topic. However, Hungary and Poland strongly opposed the rule of law mechanism and threatened to veto the whole financial package.[343] Finally, on 10 December 2020 a compromise was reached in the European

[340] Bachtler, Mendez and Wishlade (n 323) 17-32; BBC, 'Coronavirus: EU leaders reach recovery deal after marathon summit' (21 July 2020) < https://www.bbc.com/news/world-europe-53481542 > accessed 18 September 2021; European Council, 'Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions' Brussels, 21 July 2020 EUCO 10/20 1-67. < https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf > accessed 18 September 2021; Jorge Núñez Ferrer, 'Reading between the lines of Council agreement on the MFF and Next Generation EU' (2020) 18 CEPS Policy Insights 1-7. < https://www.ceps.eu/wp-content/uploads/2020/07/PI2020-18_MFF-Council-agreement.pdf > accessed 18 September 2021; The Economist – Intelligence Unit, 'Europe brief: leaders agree on post-pandemic recovery fund' (31st July 2020) < https://www.eiu.com/n/europe-brief-leaders-agree-on-post-pandemic-recovery-fund/ > accessed 18 September 2021; de la Porte and Jensen (n 339) 391-393; Kyriakidis (n 336).

[341] European Commission, COM(2020) 456 final 15.

[342] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States' (Regulation Proposal) COM(2018) 324 final, Preamble 10-13, arts 3-4 of the Proposal.

[343] Karoline Kowald (European Parliament, Members' Research Service), 'Legislative Train 08.2021 1 New Boost for Jobs, Growth and Investment, Proposal for a Regulation on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States' (15 August 2021) <

Council and based on that the 'Regulation on a general regime of conditionality for the protection of the Union budget'[344] was adopted. According to the compromise, the Member State's right to initiate an action for annulment against this regulation was explicitly mentioned (in March 2021, Poland and Hungary initiated the procedure). Also it was agreed that the EC shall adopt guidelines about the application of this regulation. However, – based on the agreement – these guidelines should not be adopted or any measure proposed by the EC until the Court of Justice of the European Union (CJEU) decides about the action for annulment. So practically the application of the regulation was delayed by this compromise.[345]

2. The composition of Next Generation EU (European Union Recovery Instrument)

The EURI (NGEU) was established to 'support the recovery in the aftermath of the COVID-19 crisis'.[346] It has a financial background up to an amount of EUR 750 billion in 2018 prices (this is about EUR 800 billion in current prices[347]), which is also reflected by the ORD.[348] The EC is empowered by the ORD to borrow funds on capital markets on behalf of the EU up to this amount.[349] EURI funds are allocated to the Member States in the following possible forms: loans, non-repayable support and repayable support through financial instruments, and

https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/new-boost-for-jobs-growth-and-investment/file/mff-protection-of-eu-budget-in-case-of-rule-of-law-deficiencies > accessed 18 September 2021; The Economist Intelligence Unit, 'Europe brief: leaders agree on post-pandemic recovery fund' (n 340).

344 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I/1.

345 Kowald (European Parliament Members' Research Service) (n 343); The Economist Intelligence Unit, 'Europe brief: leaders agree on post-pandemic recovery fund' (n 340).

346 EURI Regulation, art 1(1).

347 European Commission, 'NextGenerationEU Borrowing: Facts and Figures' (European Union, 14 April 2021) < https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/factsheet_3_general_14.04.pdf > accessed 18 September 2021.

348 EURI Regulation, art 2(1); Own Resources Decision, art 5(1).

349 Own Resources Decision, art 5(1).

provisioning for budgetary guarantees.[350] Up to EUR 360 000 million of the EURI funds may be used for providing loans to Member States.[351] Up to EUR 390 000 million of the EURI funds may be used for expenditure (i.e. 'grants').[352] From this amount a support of up to EUR 384 400 million is provided in the form of non-repayable support and repayable support through financial instruments,[353] and up to EUR 5 600 million 'for provisioning for budgetary guarantees and related expenditure for programmes aiming at supporting investment operations in the field of Union internal policies.'[354] (These amounts are provided in 2018 prices.)

The EURI intends to finance in connection with the COVID-19 crisis most importantly the following measures: measures to restore employment and job creation, measures for businesses affected by the economic impact of the COVID-19 crisis (strong focus on SMEs and on strengthening sustainable growth), measures for research and innovation in response to the COVID-19 crisis, measures for increasing the level of the EU's crisis preparedness and providing effective EU response to emergencies, measures which contribute to a just transition to a climate-neutral economy, reforms and investments to reinforce the potential for sustainable growth and employment, etc.[355]

The most important element of NGEU/EURI is the Recovery and Resilience Facility (RRF),[356] which was established by a separate regulation (RRF Regulation).[357] In the RRF an

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350 EURI Regulation, Preamble (8) - (9), art 2(2); Own Resources Decision, Preamble (14).
351 EURI Regulation, art 2(2)(b); Own Resources Decision, art 5(1)(b).
352 EURI Regulation, art 2(2)(a)(c); Own Resources Decision, art 5(1)(b); European Commission, 'EU's Next Long-Term Budget & NextGenerationEU: Key Facts and Figures' (11 November 2020) 1-2. < https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/mff_factsheet_agreement_en_web_20.11.pdf > accessed 19 September 2021; Staehr and Urke (n 331) 20; Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] OJ L 193/1 (Financial regulation) art 2(33): 'grant means a financial contribution by way of donation'.
353 EURI Regulation, art 2(2)(a); Own Resources Decision, art 5(1)(b).
354 EURI Regulation, art 2(2)(c).
355 EURI Regulation, art 1(2).
356 European Commission, 'NextGenerationEU Borrowing: Facts and Figures' (n 347).

amount of up to EUR 312 500 000 000 is available for non-repayable financial support ('grants') and an amount of up to EUR 360 000 000 000 is available for loan support to Member States (both in 2018 prices).[358]

As we can observe, these amounts represent a major part of total NGEU/EURI allocations. More specifically, RRF contains 80% of the grants provided by the NGEU. Also, the entire loan portfolio of NGEU is allocated to the RRF. The RRF has the main aim to finance investment and reforms in the EU Member States to achieve a resilient recovery in accordance with the EU's digital and green priorities.[359] It intends to mitigate the economic and social impact of the COVID-19 pandemic and ensure that the EU economies and societies become more sustainable and resilient. Also it has the aim to foster the preparedness to the green and digital transitions.[360] The RRF Regulation identifies those policy areas of European relevance which shall be supported through the RRF. These are organised into six pillars, which are the following:

'green transition; digital transformation; smart, sustainable and inclusive growth, including economic cohesion, jobs, productivity, competitiveness, research, development and innovation, and a well-functioning internal market with strong small and medium enterprises (SMEs); social and territorial cohesion; health, and economic, social and institutional resilience with the aim of, inter alia, increasing crisis preparedness and crisis response capacity; and policies for the next generation, children and the youth, such as education and skills.'[361]

Member States which wish to apply for the financial contribution provided by the RRF shall prepare a duly reasoned and substantiated national recovery and resilience plan (RRF plan)

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[357] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57/17 (RRF Regulation).

[358] RRF Regulation, art 6(1).

[359] Staehr and Urke (n 331) 20.

[360] European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (European Union 2021) 34. < https://op.europa.eu/en/publication-detail/-/publication/d3e77637-a963-11eb-9585-01aa75ed71a1/language-en > accessed 19 September 2021.

[361] RRF Regulation, Preamble (10); See also RRF Regulation, arts 3-4.

and submit that to the EC. The RRF plan shall contain the reform and investment agenda of the Member State concerned. These documents shall correspond to the scope, objectives and horizontal principles of the RRF.[362] The maximum amount of financial contribution under the RRF is calculated in case of each Member State according to a prior agreed formula which is based on a set of objective indicators.[363] The financial support provided by the RRF intends to be frontloaded to address urgent economic needs right after the COVID-19 crisis. In this regard RRF Regulation requires that 70% of the RRF grants shall be made available for allocation by the EC until 31 December 2022, and the remaining 30% from 1 January 2023 until 31 December 2023.[364] Member States may request loan support for the implementation of their RRF plans until 31 August 2023.[365] The deadline of payments to Member States from RRF funds is 31 December 2026.[366]

The objectives of the RRF are reflected in those rules which stipulate that the measures in the RRF plan of each Member State shall contribute to green transition with an amount that represents at least 37% of the RRF plan's total allocation, and to the digital transition with an amount which represents at least 20% of the RRF plan's total allocation.[367] The projects implemented in the framework of RRF will ensure such benefits as cleaner energy and transport, faster internet, renovated buildings, modern and digital public administration, education and training, new technologies, etc.[368]

The remaining (about 20%) part of NGEU grants are provided to the new Recovery assistance for cohesion and the territories of Europe (React-EU) facility and also as additional funding to specific existing EU financing facilities.[369]

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[362] RRF Regulation, arts 17-18.
[363] RRF Regulation, art 11; Codogno and van den Noord, 'Assessing Next Generation EU' (n 6) 4.
[364] RRF Regulation, Preamble (46), art 12; Staehr and Urke (n 331) 21.
[365] RRF Regulation, art 14.
[366] RRF Regulation, art 24.
[367] RRF Regulation, Preamble (23), arts 18(4)(e)(f), 16(2)(b), 19(3)(e)(f); Staehr and Urke (n 331) 21.
[368] European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (n 360) 34.
[369] Staehr and Urke (n 331) 20-21.

React-EU receives EUR 50.62 billion from NGEU. The objective of React-EU is to provide additional funding in 2020-2022 for the ongoing 2014-2020 MFF cohesion programmes, for example for the European Regional Development Fund (ERDF) or the ESF. This complements the crisis response and crisis repair measures of the CRII and CRII+ and provides a bridge to the long-term recovery programme.[370] The existing EU programmes which receive grants also from the NGEU are the Just Transition Fund (EUR 10.9 billion), the European Agricultural Fund for Rural Development (EUR 8.1 billion), InvestEU (EUR 6.1 billion), Horizon Europe (EUR 5.4 billion) and rescEU (EUR 2 billion) (these amounts are provided in prices as of November 2020).[371]

3. The Next Generation EU bonds

Based on the ORD, the EC received an exceptional authorisation to borrow funds on capital markets on behalf of the EU to finance measures to address the consequences of the COVID-19 crisis. This borrowing provides the necessary financial resources for the operation of the EURI. The maximum amount of borrowing is EUR 750 000 million in 2018 prices.[372] This is about EUR 806 billion in current prices.[373] The borrowing is temporary in nature.[374] This means that the 'new net borrowing activity should stop at the latest at the end of 2026.'[375] Therefore the EC has to borrow on average about EUR 150 billion per year between mid-2021 and 2026, so the EU will be among the largest issuers in euro.[376]After this period the EC may engage into borrowing transactions only for refinancing purposes, to ensure an efficient

[370] European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (n 360) 33.
[371] ibid 7-9; European Commission, 'EU's Next Long-Term Budget & NextGenerationEU: Key Facts and Figures' (n 352) 1-2.
[372] Own Resources Decision, Preamble (14) (16), art 5(1).
[373] European Commission, 'Communication from the Commission to the European Parliament and the Council on a new funding strategy to finance NextGenerationEU' COM(2021) 250 final 1.
[374] Own Resources Decision, Preamble (17) (19)-(20) (22), art 5(2).
[375] Own Resources Decision, Preamble (18).
[376] European Commission, *NextGenerationEU Funding Strategy* (n 101).

debt management.[377] The repayment of the borrowed funds is strictly regulated by the ORD. Repayment of the principal amount shall start before the end of the 2021-2027 MFF period. The maximum possible amount which can be used yearly for the repayment of borrowed funds is determined by the ORD.[378] It is required that all liabilities in connection with the borrowed funds shall be fully repaid at the latest by 31 December 2058.[379] Efficient debt management (until the full repayment of borrowed funds) will be an important task of the EC, which may also adopt refinancing operations.[380] The EC shall ensure that the schedule of repayments is in compliance with the principle of sound financial management and that a steady and predictable reduction of liabilities is achieved during the overall period.[381]

The maximum amount of borrowing is fixed each year by the EC in its annual borrowing framework decision. This has the aim to establish the key parameters of the planned borrowing operations for a one-year period.[382] It provides the elements of the planned borrowing operations and the 'range for maximum issuance amounts of long-term and short term funding, the average maturity of the Union's long-term funding and a limit for the amount per issuance.'[383] Such implementing decision was already adopted for the year 2021; this is Commission Implementing Decision of 1.6.2021 establishing the framework for borrowing and debt management operations under NextGenerationEU for 2021.[384] This legal act sets out that for the year 2021 in case of NGEU borrowing operations the following limits shall be applicable. Long-term funding is possible up to a maximum amount of EUR 125

[377] Own Resources Decision, Preamble (18) (21), art 5.
[378] Own Resources Decision, Preamble (20) - (21), art 5(2).
[379] Own Resources Decision, Preamble (20), art 5(2).
[380] Own Resources Decision, Preamble (18) (21), art 5(2).
[381] Own Resources Decision, Preamble (21), art 5(2).
[382] European Commission, *NextGenerationEU Funding Strategy* (n 101) 3.
[383] European Commission, Commission Implementing Decision of 14.4.2021 establishing the necessary arrangements for the administration of the borrowing operations under Council Decision (EU, Euratom) 2020/2053 and for the lending operations related to loans granted in accordance with Article 15 of Regulation (EU) 2021/241 of the European Parliament and of the Council [2021] C(2021) 2502 final (Commission Implementing Decision on borrowing and lending operations), Preamble (7), art 3.
[384] European Commission, 'Commission Implementing Decision of 1.6.2021 establishing the framework for borrowing and debt management operations under NextGenerationEU for 2021' C(2021) 3991 final.

billion (out of which an amount of EUR 20 billion shall be temporarily suspended) and short-term funding is possible up to a maximum outstanding amount of EUR 60 billion. The maximum amount per issuance of long-term funding is limited by the Commission Implementing Decision in EUR 20 billion.[385] The EC also shall adopt NGEU funding plans twice in a year, which provide the basis for NGEU borrowing operations. The funding plans shall indicate those NGEU borrowing operations and, if applicable, NGEU debt management operations which are planned in the concerned period of six months. They also provide the most important funding parameters.[386]

As we can observe, the EC has to manage borrowing operations with significant volume and complexity in the upcoming period. To comply with this task the EC intends to significantly rely on the best practices developed by sovereign issuers and it also set up a diversified funding strategy.[387] This was already envisaged by the EC's 'Communication on a new funding strategy to finance NextGenerationEU'.[388] This new approach is necessary because the financing methods so far applied by the EC were only suitable to address smaller financing needs. Although the EC, on behalf of the EU, is a longstanding and highly rated participant on the capital markets and has run several lending programmes during the past 40 years, these were much smaller in scale and complexity. The traditionally applied back-to-back financing method is not suitable for financing the NGEU, as too many borrowing transactions would be necessary (which also implies high transaction costs). This is one of the reasons why the EC adopted a new diversified funding strategy for NGEU borrowing operations and NGEU debt management operations. This applies the tools and processes used by large and frequent issuers.[389] The most important principles of this diversified funding

[385] ibid Sole article.
[386] Commission Implementing Decision on borrowing and lending operations C(2021) 2502 final, Preamble (8), art 4.
[387] European Commission, *NextGenerationEU Funding Strategy* (n 101) 1.
[388] European Commission, COM(2021) 250 final.
[389] ibid 1-3; European Commission, *NextGenerationEU Funding Strategy* (n 101) 2-3.

strategy are the combination of a wide range of funding instruments and techniques and the sustainment of an open and transparent communication in relation to the market participants (and the general public).[390] Also, the principle of sound financial management shall be respected.[391] The diversified funding strategy has the aim to achieve the indicative targets of the NGEU funding plan[392] and 'to borrow the required funding to meet in due time the needs of the NGEU programmes for repayable and non-repayable support, and to manage the resulting debt as efficiently and expeditiously as possible (…).'[393]

Based on the diversified funding strategy, it is possible to carry out transactions on the primary market, on the secondary market and on money markets in the frame of NGEU borrowing operations and NGEU debt management operations.[394] The diversified funding strategy also requires that 'the NGEU borrowing operations shall be organised through a programme of individual borrowings of different maturities (…).'[395] This means that both long-term and short-term funding is applied. Long-term funding describes those borrowing operations which have a term of more than one year. Short-term funding describes those borrowing operations which have a term below or equal to one year.[396] The EC will issue bonds with varying maturities (e.g. 3, 5, 7, 10, 15, 20, 25, 30 years maturity). So the range of maturity of issued bonds will vary basically between 3 to around 30 years. The maximum maturity shall be no longer than 31 years. As we mentioned, short-term funding is also part of the funding strategy. In this regard the EC will introduce EU-bills (EU-Bill Programme), which will have original maturity below one year. This will ensure access to the deep and liquid short-term money market and strengthen the ability to flexibly manage funding

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[390] European Commission, COM(2021) 250 final 3-4.
[391] Commission Implementing Decision on borrowing and lending operations C(2021) 2502 final, Preamble (2) – (3), arts 6(2), 7(2).
[392] ibid art 7(1).
[393] ibid art 7(2).
[394] ibid art 7(2)(a).
[395] ibid art 7(2)(b).
[396] ibid art 2(12) (13).

needs.[397] Based on the diversified funding strategy, to organise NGEU borrowing operations, a variety of funding techniques are available for the EC. Among the traditionally applied syndicated transaction methods, auction and private placement methods also can be applied. (In case of EU-bills always the auction method will prevail.)[398] It is possible to roll over the debt resulting from borrowing operations for the purpose of maturity management.[399] Among the NGEU debt management operations the EC may use derivatives (e.g. swaps) to treat interest rate or other financial risks; also it is possible to enter into specific secured or unsecured money market transactions. In this regard the EC may buy back and hold own bonds.[400]

Transparency is ensured by way of publication of the above-mentioned annual borrowing framework decisions and semi-annual NGEU funding plans. The EC also has to prepare a report on the execution of NGEU operations twice per year and submit that to the EP and the Council.[401]

The first NGEU bond issuance transaction was carried out on the 15th June 2021. The EC raised EUR 20 billion for the NGEU programme, to finance European recovery and to handle the consequences of the COVID crisis. The bonds have a ten years maturity and are due on 4 July 2031. The offered bonds attracted significant market demand, as the final order book contained orders worth more than EUR 142 billion. Consequently, the bond was more than seven times oversubscribed.[402]

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[397] ibid art 7(2)(b); European Commission, COM(2021) 250 final 3-5; European Commission, *NextGenerationEU Funding Strategy* (n 101) 4.

[398] Commission Implementing Decision on borrowing and lending operations C(2021) 2502 final, art 7(2)(c); European Commission, COM(2021) 250 final 2, 4-5; European Commission, *NextGenerationEU Funding Strategy* (n 101) 2-5.

[399] European Commission, *NextGenerationEU Funding Strategy* (n 101) 4; Commission Implementing Decision on borrowing and lending operations C(2021) 2502 final, art 7(2)(d).

[400] Commission Implementing Decision on borrowing and lending operations C(2021) 2502 final, art 7(3).

[401] ibid art 12; European Commission, COM(2021) 250 final 3, 7; European Commission, *NextGenerationEU Funding Strategy* (n 101) 3.

[402] European Commission, 'NextGenerationEU: European Commission raises €20 billion in first transaction to support Europe's recovery' (Press release, Brussels 15 June 2021) < https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2982 > accessed 23 September 2021.

Until the end of August 2021, two subsequent NGEU bond issuances were carried out. On the 29th June 2021, the EC raised EUR 15 billion in a dual-tranche transaction. In this transaction the two separate tranches were the following: EUR 9 billion 5-year bond due on 6 July 2026 and a EUR 6 billion 30-year bond due on 6 July 2051. This bond issuance was also very well received by the investors which resulted in a more than 11 times oversubscription.[403] Furthermore on the 13th of July 2021 the EC issued EUR 10 billion NGEU bonds with 20-years maturity, due on 4 July 2041. (Also funds were raised in a parallel issuance for the EFSM and MFA.) Investor interest remained very significant as the transaction was almost 10 times oversubscribed.[404] Consequently, the EC has raised until the end of August 2021 EUR 45 billion to finance the NGEU programme. The pricing of these issuances – due to the high investor demand – was very favourable. Based on the above information, NGEU bond issuances so far can be considered as a huge success.[405] These issued bonds[406] are listed on the LuxSE.[407]

[403] European Commission, 'NextGenerationEU: European Commission completes second successful bond issuance to support Europe's recovery' (Press release, Brussels 29 June 2021) < https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3287 > accessed 23 September 2021.

[404] European Commission, 'NextGenerationEU: European Commission raises further €10 billion in a successful third bond to support Europe's recovery' (Press release, Brussels 13 July 2021) < https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3682 > accessed 23 September 2021.

[405] ibid, European Commission, 'NextGenerationEU: European Commission raises €20 billion in first transaction to support Europe's recovery' (n 402); European Commission, 'NextGenerationEU: European Commission completes second successful bond issuance to support Europe's recovery' (n 403).

[406] EU000A3KSXE1 Fixed-rate bond issued amount 20 000 000 000 EUR Listing date on LuxSE 22/06/2021 Final maturity 04/07/2031; EU000A3KTGW6 Fixed-rate bond issued amount 6 000 000 000 EUR Listing date on LuxSE 06/07/2021 Final maturity 06/07/2051; EU000A3KTGV8 Fixed-rate bond issued amount 9 000 000 000 EUR Listing date on LuxSE 06/07/2021 Final maturity 06/07/2026 (supplemented with a EUR 2 495 000 000 tranche issued on the 29th September 2021); EU000A3KT6B1 Fixed-rate bond issued amount 10 000 000 000 EUR Listing date on LuxSE 20/07/2021 Final maturity 04/07/2041. See Luxembourg Stock Exchange (The Home Page of the Luxembourg Stock Exchange), 'Debt Issuance Programme' < https://www.bourse.lu/programme/Programme-UE/14608 >, 'UE 0% 04/07/2031' < https://www.bourse.lu/security/EU000A3KSXE1/338573 >, 'UE 0,7% 06/07/2051' < https://www.bourse.lu/security/EU000A3KTGW6/339392 >, 'UE 0% 06/07/2026' < https://www.bourse.lu/security/EU000A3KTGV8/339390 >, 'UE 0,45% 04/07/2041' < https://www.bourse.lu/security/EU000A3KT6B1/340169 > accessed 23 September 2021.

[407] European Commission, 'NextGenerationEU: European Commission raises €20 billion in first transaction to support Europe's recovery' (n 402); European Commission, 'NextGenerationEU: European Commission completes second successful bond issuance to support Europe's recovery' (n 403); European Commission, 'NextGenerationEU: European Commission raises further €10 billion in a successful third bond to support Europe's recovery' (n 404); European Union (EU) and European Atomic Energy Community (EURATOM), 'Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021 (NGEU Base Prospectus)' (n 143) 6-8.

The documentation of these issues is available at the home page of LuxSE. The most important document is the Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021 (NGEU Base Prospectus).[408]

The NGEU Base Prospectus in its 'Use of Proceeds' part emphasizes, that the net proceeds from the issued securities is intended to be used by the issuer for its general funding purposes. This has to comply with EU (or EURATOM) legislation. As the funding purpose of the issuer, the financing of NGEU programmes is especially emphasized. The 'Use of Proceeds' part expresses, that 'NGEU has been adopted to finance recovery initiatives, while facilitating the green and digital transition of the European Union economy.'[409] It states that the EC is empowered to borrow temporarily up to EUR 750 billion in 2018 prices on capital markets, which amount will provide financing for the EURI. EURI has the main aim to support the recovery in the aftermath of the COVID-19 crisis. The EURI provides the most important part of its financial assistance through the RRF, but also numerous other EU spending programmes are involved.[410]

It is important to emphasize that the EC plans to issue a significant proportion of green bonds as part of the NGEU bond issuance program. As we already highlighted, green bonds (and also social bonds, like the SURE bonds) belong to the group of ESG (Environmental, Social, and Corporate Governance) labelled bonds. According to the EC's intention, 30% of the funds raised for the NGEU program will be provided through the issuance of green bonds. Based on that, the amount of green bonds issued during the program can amount up to about EUR 250

[408] European Union (EU) and European Atomic Energy Community (EURATOM), 'Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021 (NGEU Base Prospectus)' (n 143)
[409] ibid 37.
[410] ibid 5, 37.

billion in current prices.[411] To achieve this aim, the EC intended to set up a Green Bond Framework, which is based on the four pillars outlined in the Green Bond Principles of the International Capital Markets Association. This significant green bond issuance will have numerous advantages. For example, it will provide a safe investment opportunity in a significant volume to those investors who intend to focus on ESG-labelled bonds, especially green investments. It will also contribute to the European green transition with providing funds on advantageous financial terms. As the RRF program intends to provide 37% of its funds dedicatedly to support the transition towards a green future (and also other EU programmes financed by the NGEU allocate significant amount to climate-related expenditure), the proceeds raised from the NGEU green bond issuance can be easily absorbed as financing those climate-related activities. With the issuance of these securities the EU will significantly contribute to the development of the green bond market.[412]

[411] ibid 37, European Commission, *NextGenerationEU Funding Strategy* (n 101) 5; European Commission, *NextGenerationEU Green Bonds* (n 101) 1-3; European Commission, COM(2021) 250 final 8-9.
[412] European Union (EU) and European Atomic Energy Community (EURATOM), 'Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021 (NGEU Base Prospectus)' (n 143) 37; European Commission, *NextGenerationEU Funding Strategy* (n 101) 5; European Commission, *NextGenerationEU Green Bonds* (n 101) 1-3; European Commission, COM(2021) 250 final 8-9.

VII. The most important legal aspects of Next Generation EU and Next Generation EU bonds regarding the European integration

1. The first large volume borrowing (bond issuance) of the European Union and the provided guarantees and liability sharing for repayment

The economic and social challenges of the COVID-19 crisis led to the situation that the EU is directly issuing a significant amount of mutual debt (bonds) for the first time. The SURE program (as the forerunner of NGEU) already included the issuance of bonds in a maximum amount of EUR 100 billion, and as we examined, during the NGEU program, debt securities worth of maximum EUR 750 billion (in 2018 prices) will be issued.[413] The authorization for this large-scale borrowing and the guarantees and liability sharing regarding the repayment of the debt all have specific legal aspects.

For the EU to borrow funds it is necessary to receive an empowerment for such borrowing and to decide how (and until which date) the borrowed funds shall be repaid. In case of NGEU the ORD provides the authorization to borrow and also it decides about the repayment of borrowed funds.[414] So regarding NGEU bond issuance, Article 5 of the ORD provides the empowerment to borrow, and it stipulates the maximum amount of borrowing. Similarly, the ORD regulates the repayment of the borrowed funds. It is determined by the ORD that all liabilities incurred by this exceptional and temporary empowerment of the EC to borrow funds shall be fully repaid at the latest by 31 December 2058.[415]

Furthermore, an appropriate legal basis is needed for the receipt of the borrowed funds by the EU and for their assignment to particular items of expenditure. In the case of NGEU, Article 122 TFEU provides such a legal basis. It grants authorization for targeted derogations from

[413] Picek (n 5) 325; Codogno and van den Noord, 'Assessing Next Generation EU' (n 6) 2; Luo (n 4) 11.
[414] European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157)
[415] ibid 1; Own Resources Decision, art 5.

standard Treaty rules in exceptional crisis situations as an expression of solidarity among Member States.[416] For example it is possible to provide under certain conditions, EU financial assistance to the concerned Member States.[417] It was necessary to invoke Article 122 TFEU because standard Treaty rules would not provide the possibility to finance such a large amount as the financial assistance provided by the NGEU in addition to the EU's budget and separately from the annual budgetary procedure. The application of such measures is (only) justified among the circumstances of the current crisis.[418] Based on Article 122 TFEU, the EURI Regulation was adopted, and the EURI was established. This instrument intends to provide additional financing by derogation to certain rules and its objective is the recovery and resilience of the EU in an unprecedented crisis situation.[419] EURI identifies the necessary recovery measures and decides about the allocation of the borrowed funds to various EU programmes.[420] EURI is 'an exceptional response to temporary but extreme circumstances, the support provided under it should only be made available for the purposes of addressing the adverse economic consequences of the COVID-19 crisis or the immediate funding needs to avoid a re-emergence of the COVID-19 crisis.'[421]

The Base Prospectus of NGEU bonds contains that multiple layers of debt-service protection ensures the debt service of the EU. First of all, the loan component of NGEU is basically paid back with the loan redemption payments received from the loan beneficiaries. Until now the EU's loan beneficiaries have always repaid their debts in time.[422] The RRF Regulation stipulates explicitly that the loan agreements concluded with Member States shall contain the

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[416] European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157) 1-3.
[417] TFEU, art 122.
[418] European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157) 2.
[419] ibid 3.
[420] ibid 1.
[421] EURI Regulation, Preamble (6).
[422] European Union (EU) and European Atomic Energy Community (EURATOM), 'Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021 (NGEU Base Prospectus)' (n 143) 39.

repayment schedule.[423] In case a loan beneficiary does not honour its debt, the EU budget and the system of own resources provides guarantee that the EU will timely service its debt. In this regard the EC can rely on its cash buffer or re-prioritise budgetary expenditure. Also, if necessary, the EC may ask additional resources from the Member States, for which the mechanisms established by Article 14 of Regulation (EU) 609/2014[424] clearly provide opportunity.[425] Because in the sole case of default under a loan contracted or guaranteed pursuant to Council regulations and decisions, in circumstances in which the EC cannot activate other measures provided for by the financial arrangements applying to these loans in time to ensure compliance with the EU's legal obligations to the lenders, the EC has the opportunity to draw in excess resources from the Member States.[426] The required excess amount 'shall be divided among the Member States, as far as possible, in proportion to the estimated budget revenue from each of them.'[427]

Generally, the adoption of the ORD serves as a strong guarantee for the repayment of NGEU bonds. The ORD has a quasi-constitutional nature. To enter into force of the ORD it is necessary that all Member States have approved it in accordance with their national constitutional requirements. This provides democratic legitimacy for the adopted ORD and ensures that Member States are clearly committed to bear the liability from the borrowing.[428]

The ORD stipulates that the repayment of the principal of the funds borrowed to be used for expenditure (so for providing non-repayable support, providing repayable support through financial instruments or provisioning for budgetary guarantees) and the related interest due

[423] RRF Regulation, art 15(2)(d).
[424] Council Regulation (EU, Euratom) No 609/2014 of 26 May 2014 on the methods and procedure for making available the traditional, VAT and GNI-based own resources and on the measures to meet cash requirements [2014] OJ L 168/39.
[425] European Union (EU) and European Atomic Energy Community (EURATOM), 'Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021 (NGEU Base Prospectus)' (n 143) 39.
[426] Council Regulation (EU, Euratom) No 609/2014, art 14(3).
[427] Council Regulation (EU, Euratom) No 609/2014, art 14(4).
[428] European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157) 2.

shall be borne by the EU budget.[429] This is an amount up to EUR 390 000 million in 2018 prices, which provides the financial resources for the grants component of the NGEU.

To ensure the debt repayment capacity of the EU budget, it is necessary to set the own resources ceiling sufficiently high. This creates appropriate financial background for the full coverage of the EU's liabilities.[430] The own resources revenue ceiling in the ORD has the role to set the maximum amounts of own resources that the EU can request and collect from Member States to finance its expenditures (the revenue ceiling).[431] Basically the ORD stipulates that 'the total amount of own resources allocated to the Union to cover annual appropriations for payments shall not exceed 1.40% of the sum of all the Member States' GNIs.'[432] However, to ensure the covering of all liabilities of the EU resulting from the large-scale NGEU borrowing, the own resources ceiling was increased by the ORD by 0.6 percentage points. This increase is temporary and will last until all liabilities from the NGEU borrowing have ceased to exist, and at the latest by 31 December 2058. This increase in the own resources ceiling shall be used only in the context of the recovery from the COVID-19 pandemic and not to cover any other liabilities of the EU.[433] This means that the maximum amount of own resources the EU can request from the Member States was temporarily (maximum until 31 December 2058) increased from 1.40% to 2.00% of the EU's GNI. We can conclude, that this represents a significant increase in the own resources collecting capability of the EU.[434] However, this increase does not necessarily mean that the EU will collect a significant additional contribution from the Member States. Rather, the increased

[429] Own Resources Decision, art 5(2).
[430] European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157)
[431] European Commission, 'Revenue ceilings' < https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2021-2027/revenue/revenue-ceilings_en > accessed 25 September 2021.
[432] Own Resources Decision, Preamble (12), art 3(1).
[433] Own Resources Decision, art 6; European Commission, 'Revenue ceilings' (n 431); European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157) 1.
[434] Own Resources Decision, art 6; European Commission, 'Revenue ceilings' (n 431).

own resources ceiling has the role to create additional budgetary space and to provide a joint guarantee regarding the issuance (and repayment) of NGEU bonds.[435]

Also it provides an additional assurance regarding the repayment of the incurred debt that new and additional own resources will be introduced in the later stage of the 2021-2027 MFF. These new own resources could help finance the NGEU borrowing.[436] We will discuss in detail this development in the following section.

In case of NGEU an additional safeguard mechanism was established to secure appropriate debt service. This mechanism can be found in Article 9 paragraphs (4) to (9) of the ORD. The role of this mechanism is to ensure that the EU always will be able to fulfil its legal obligations in respect of third parties in a timely manner regarding the NGEU borrowing.[437]

These specific rules authorize the EC for the following: 'during the period of the temporary increase in the own resources ceilings, to call on Member States to provisionally make available the relevant cash resources if the authorised appropriations entered in the Union budget are not sufficient to cover liabilities arising from the borrowing linked to that temporary increase.'[438]

This opportunity is available to the EC only as a last resort. So first the EC shall try to generate the necessary liquidity by activating other measures of active cash management, including, if necessary, through recourse to short-term financing on capital markets.[439] This is necessary to exhaust available options which could ensure timely compliance with the EU's obligations towards lenders, before the EC turns to the Member States. If the EC cannot generate the necessary liquidity, the Member States shall make the resources necessary for

[435] European Commission, 'Revenue ceilings' (n 431); European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157) 1.

[436] Own Resources Decision, Preamble (3) - (4), (6); European Commission, COM(2020) 442 final 3, 14, 15.

[437] Own Resources Decision, Preamble (23); European Union (EU) and European Atomic Energy Community (EURATOM), 'Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021 (NGEU Base Prospectus)' (n 143) 39.

[438] Own Resources Decision, Preamble (23).

[439] Own Resources Decision, Preamble (23).

that purpose available to the EC.[440] In such cases the EC 'may call on the Member States to provisionally provide the difference between the overall assets and the cash resource requirements, in proportion ('pro rata') to the estimated budget revenue of each of them.'[441] Such calls shall be announced by the EC to Member States duly in advance. The ORD also regulates the applicable process in case a Member State fails, in full or in part, to honour a call on time, or if it notifies the EC that it will not be able to honour a call. Under such circumstances the EC provisionally has the right to make additional calls on the other Member States (to cover for the part corresponding to the Member State which failed to honour a call).[442] These additional calls also shall be pro rata to the estimated budget revenue of each of the other Member States. The ORD stipulates that the Member State which failed to honour a call remains liable to honour it.[443] Based on the ORD, there is a cap on the total annual amount of cash resources the EC is entitled to call from a Member State if it lacks the necessary liquidity to fulfil its obligations under NGEU borrowing. The maximum total annual amount of cash resources that may be called from a Member State in this regard is limited to its GNI-based relative share in the extraordinary and temporary increase in the own resources ceiling.[444] So calls of the EC 'should be strictly pro rata to the estimated budget revenue of each Member State, and in any case, limited to their share of the temporarily increased own resources ceiling, that is 0.6% of Member States' GNI.'[445] These rules on

[440] Own Resources Decision, Preamble (23), art 9(4); European Union (EU) and European Atomic Energy Community (EURATOM), 'Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021 (NGEU Base Prospectus)' (n 143) 39-40.
[441] Own Resources Decision, art 9(5).
[442] Own Resources Decision, Preamble (23) art 9(5); European Union (EU) and European Atomic Energy Community (EURATOM), 'Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021 (NGEU Base Prospectus)' (n 143) 39-40.
[443] Own Resources Decision, art 9(5); European Union (EU) and European Atomic Energy Community (EURATOM), 'Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021 (NGEU Base Prospectus)' (n 143) 39-40.
[444] Own Resources Decision, art 9(6).
[445] Own Resources Decision, Preamble (23).

liability sharing in case of NGEU borrowing intend to provide additional safeguard for investors, but they also 'prevent a significant mutualisation of the debt.'[446]

2. Proposals for a new (and temporarily enhanced) system of own resources

We already emphasized the importance of the temporary lifting of the own resources ceiling to 2% of the EU GNI. This significant, 0.6 percentage point increase creates an additional financial space for the EU to implement and finance NGEU. Although this increase is temporary, it will be present in the foreseeable future (currently until 31 December 2058 the latest), and in my opinion, it has the chance to become permanent.[447] The EU budget has to repay NGEU borrowing basically from 2028 till 2058. To ensure that the repayment will be done in a fair and shared way, the EC intends to propose several new own resources.[448] This is also emphasized by the ORD, which – based on the conclusions of the European Council of 17 to 21 July 2020 – highlights that in the coming years the EU has to move towards the reforming of the system of own resources and the introduction of new own resources.[449] During this reform the important considerations are for example to better align the Union's financing instruments with its policy priorities, to better support the objectives of Union policies and to reduce the share of GNI-based contributions. The endeavours towards this reform are definitely not new. For example the EC already adopted in June 2017 a reflection paper on the future of EU finances.[450]

[446] Picek (n 5) 325; European Union (EU) and European Atomic Energy Community (EURATOM), 'Base Prospectus – European Union (EU) and European Atomic Energy Community (EURATOM) Debt Issuance Programme published on the 4th of June 2021 (NGEU Base Prospectus)' (n 143) 39-40.
[447] Own Resources Decision, art 6; European Commission, 'Revenue ceilings' (n 431); European Commission, 'Questions and answers - Q&A : Next Generation EU - Legal Construction' (n 157) 1; Codogno and van den Noord, 'Assessing Next Generation EU' (n 6) 1-10; de la Porte and Jensen (n 339) 399; Luo (n 4) 12-13.
[448] European Commission, COM(2020) 456 final 4.
[449] Own Resources Decision, Preamble (4), (6).
[450] Own Resources Decision, Preamble (4), (6).

The ORD made an important step in this direction when it introduced a new category of own resources based on national contributions calculated on the basis of non-recycled plastic packaging waste. This new own resource also has the aim to contribute to the reduction of pollution from plastic packaging waste, so it is aligned with the EU's such policy priorities as foster recycling and boost the circular economy.[451] The ORD introduced a 'uniform call rate to the weight of plastic packaging waste generated in each Member State that is not recycled.'[452] This uniform call rate is set at EUR 0.80 per kilogram. This revenue source is expected to provide about EUR 6 billion income for the EU budget per year. The ORD ensures annual lump sum reduction for certain Member States, e.g. for Bulgaria, Czechia, Estonia, Latvia, Lithuania, Hungary, Poland, Portugal, Romania, Slovenia and Slovakia.[453] This mechanism has the aim 'to avoid excessive contributions from less wealthy Member States.'[454]

The EC also proposes several new own resources which would complement the traditional own resources. In this regard a special emphasis is made on green own resources, which would correspond with the European Green Deal objectives and help the green transition of the European economy and society.[455] Such newly proposed green own resource is the carbon border adjustment mechanism. The EC already published its proposal on a Regulation establishing a carbon border adjustment mechanism.[456] This proposal has the aim to establish a carbon border adjustment mechanism (the 'CBAM') for addressing greenhouse gas

[451] Own Resources Decision, Preamble (7); European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (n 360) 22.
[452] Own Resources Decision, art 2(1)(c).
[453] Own Resources Decision, Preamble (7), art 2(1) - (2); European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (n 360) 22.
[454] European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (n 360) 22.
[455] European Commission, COM(2020) 442 final 14-15; European Commission, 'European Green Deal: Commission proposes transformation of EU economy and society to meet climate ambitions' (Press release, Brussels 14 July 2021) < https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3541 > accessed 25 September 2021.
[456] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism' COM(2021) 564 final.

emissions embedded in certain, pre-determined goods, upon their importation into the customs territory of the EU, in order to prevent the risk of carbon leakage.[457] This mechanism would ensure that products imported into the EU from third countries are bearing the same costs for their greenhouse gas emissions as the products manufactured in the EU which are currently subject to the EU Emissions Trading System (which is based on Directive 2003/87/EC[458]).[459] This new own resource may provide additional revenues ranging from about EUR 5 billion to EUR 14 billion (depending on its final terms and scope) for the EU budget.[460]

The proposed EU Emissions Trading System (ETS)-based own resource also belongs to the group of green own resources. It would be linked to the ETS, which serves as the EU carbon market. The ETS basically requires that greenhouse gas emitting companies pay a certain price to receive carbon emission allowances. These allowances enable them to emit a certain amount of greenhouse gasses, below a predetermined level. This emission cap is lowered periodically. The EC proposed that the emission rates should be decreased even faster and also suggested that this system should be extended to the maritime and aviation sectors. Based on the concept of this new own resource, the Member States would receive the same amount of revenue which they had from auctioning over the recent period. But any additional revenue generated by the ETS would be provided to the EU budget. This would allocate about EUR 10 billion new own resource for the EU.[461]

The digital levy or digital tax is also among the proposed new own resources. This would apply to certain digital activities. There are currently on-going discussions in the Organisation

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[457] ibid 24 (Proposal of the Regulation art 1).

[458] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32.

[459] European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (n 360) 23.

[460] European Commission, COM(2020) 442 final 15.

[461] European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (n 360) 22; European Commission, COM(2020) 442 final 15; European Commission, 'European Green Deal: Commission proposes transformation of EU economy and society to meet climate ambitions' (n 455).

for Economic Co-operation and Development (OECD) and Group of Twenty (G20) regarding the corporate taxation of a significant digital presence. If no global agreement is reached on this topic, the proposal of the EC is ready to ensure that digital companies also pay their fair share of tax. The digital levy would provide up to EUR 1.3 billion additional incomes for the EU budget per year in case it is applied on companies with a turnover above EUR 750 million.[462]

Also other types of new own resources are considered by the EC for the future. Among these, a financial transaction tax, a financial contribution linked to the corporate sector or a new common corporate tax base was mentioned.[463]

3. The establishment of the administrative and institutional background of borrowing and debt management

Although the EU is a longstanding and trusted actor on international capital markets, this is the first time when it raises a significant amount of debt. To achieve this aim, it is necessary to set up a highly efficient and agile funding apparatus and debt management capacity.[464]

An important step in the preparation for NGEU borrowing was the establishment of a new, diversified funding strategy. We already highlighted the importance of this step in Chapter VI, Section 3.

Similarly important step in the organization of NGEU borrowing was the establishment of a pan-European Primary Dealer Network for the EU (PD Network). The PD Network has the role to execute and support the raising of funds under the diversified funding strategy.[465] The

[462] European Commission, COM(2020) 442 final 15; European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (n 360) 23.
[463] European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (n 360) 23.
[464] European Commission, COM(2021) 250 final 1-2.
[465] ibid 4-5.

EC already adopted a Commission Decision regarding the establishment of the PD Network.[466] This Commission Decision has the aim to establish the PD Network and to lay down the eligibility criteria and procedural provisions for the selection of its members. Also it regulates the rights and obligations of the selected members.[467] Furthermore, it determines the commitments which the members of the PD Network shall undertake and it outlines the roles of the general terms and conditions and the fee schedule.[468] Only those credit institutions are eligible to participate in certain borrowing and debt management activities of the EC which are members of the PD Network. Such activities are for example the placement of debt securities on the primary capital markets and the promotion of liquidity of the Union and the EURATOM debt securities on the financial markets.[469] It was necessary to set up this network because the large scale and high frequency issuance of debt securities requires a capable and qualified network of credit institutions for the primary placement.[470]

The EC also had to establish and adopt its internal rules on the implementation of borrowing, debt management and lending operations (and of the PD Network). This happened by means of a Commission Decision.[471] The Decision stipulates that the Director-General of the Directorate-General for the Budget is designated as the authorizing officer by delegation in respect of these operations. So the EC delegated to the Director-General of the Directorate-General for the Budget (Director-General) the task to implement borrowing, debt management and lending operations.[472] In this regard the Director-General is for example

[466] European Commission, 'Commission Decision (EU, Euratom) 2021/625 of 14 April 2021 on the establishment of the primary dealer network and the definition of eligibility criteria for lead and co-lead mandates for syndicated transactions for the purposes of the borrowing activities by the Commission on behalf of the Union and of the European Atomic Energy Community' [2021] OJ L 131/170. (PD Network Commission Decision); European Commission, COM(2021) 250 final 4-5.
[467] PD Network Commission Decision, art 1.
[468] PD Network Commission Decision, arts 5, 8, 9.
[469] PD Network Commission Decision, art 3.
[470] PD Network Commission Decision, Preamble (5) – (8).
[471] European Commission, 'Commission Decision of 14.4.2021 on specific internal rules on the implementation of borrowing, debt management and lending operations and of the primary dealer network established by Commission Decision C(2021) 2500' [2021] C(2021) 2501 final (Commission Decision on internal rules of borrowing).
[472] Commission Decision on internal rules of borrowing, arts 5-6.

entitled to negotiate, review, sign, publish, implement and oversee the execution of agreements, transactions or documentation, to implement and oversee the execution of loan agreements, or to designate the signatories of borrowing documentation among authorizing officers by subdelegation.[473] The implementation of the primary dealers' network also belongs among his tasks.[474] The Director-General is also responsible for the establishment of the internal rules, inclusive guidelines, technical guidance, methodologies and templates which are necessary for the implementation of borrowing, debt management and lending operations.[475]

The EC also decided to set up the appropriate institutional and organizational background for the NGEU borrowing, debt management and lending operations. The most important developments are provided by the Commission Implementing Decision establishing the necessary arrangements for the administration of the borrowing and lending operations.[476] This Commission Implementing Decision requires that the operational capacities which are necessary for the management of NGEU borrowing, lending and debt management operations (NGEU operations)[477] under the diversified funding strategy shall be set up.[478] In this regard it is especially important that the principle of sound financial management shall be respected and a robust risk management and the documentation of processes and decisions shall be ensured.[479] It is also required that the Commission's Accounting Officer shall open a dedicated account ('NGEU account') for the management of the proceeds related to the NGEU operations. The management of this account is delegated to the relevant services in the

[473] Commission Decision on internal rules of borrowing, art 6(1).
[474] Commission Decision on internal rules of borrowing, art 5(2), art 6(1)(d).
[475] Commission Decision on internal rules of borrowing, art 6(2).
[476] European Commission, 'Commission Implementing Decision of 14.4.2021 establishing the necessary arrangements for the administration of the borrowing operations under Council Decision (EU, Euratom) 2020/2053 and for the lending operations related to loans granted in accordance with Article 15 of Regulation (EU) 2021/241 of the European Parliament and of the Council' [2021] C(2021) 2502 final (Commission Implementing Decision on borrowing and lending operations).
[477] Commission Implementing Decision on borrowing and lending operations, art 2(1) – (4).
[478] Commission Implementing Decision on borrowing and lending operations, art 11.
[479] Commission Implementing Decision on borrowing and lending operations, arts 11-12.

Directorate-General of the Budget. 'The NGEU account shall be held with the ECB on the basis of a contract on fiscal agency services.'[480] The Commission's Accounting Officer is responsible also for the appropriate accounting and the preparation of annual financial statements in respect of the NGEU operations.[481] Similarly, the risk management and compliance system for the NGEU operations were established. Important to highlight, that the role of Chief Risk Officer (for NGEU) was constituted. This officer is responsible that the systems and processes used to implement the NGEU operations are in compliance with the principles of sound financial management and the financial interests of the EU are protected appropriately. The Chief Risk Officer also has the role to prepare a High Level Risk and Compliance Policy. The Chief Risk Officer is supported by the Risk and Compliance Committee during the conduct of his responsibilities.[482] Based on the above, the borrowing and debt management capacities of the EU for the large-scale NGEU borrowing are established, with such core institutional elements which have the chance to evolve in the future into a separate debt management office or agency (if such capacity will be necessary in the future in the EU).[483]

4. A strengthened protection for the European Union's financial interests and values

The EU legislation intends (and intended) to ensure the appropriate protection of the financial interest of the EU with several measures when funding is provided from the EU budget. For

[480] Commission Implementing Decision on borrowing and lending operations, art 13.
[481] Commission Implementing Decision on borrowing and lending operations, arts 14-15.
[482] Commission Implementing Decision on borrowing and lending operations, arts 16-21.
[483] Clive Horwood, 'Next generation EU issuance will boost euro's reserve status' (*Official Monetary and Financial Institutions Forum*, 16 June 2021) < https://www.omfif.org/2021/06/next-generation-eu-issuance-will-boost-euro-reserve-status/ > accessed 30 September 2021.

example in the 2014-2020 MFF the applicable Common Provisions Regulation (CPR)[484] requires in connection with the ERDF, the ESF and the Cohesion Fund (CF) that the EU's financial interests shall be protected and to safeguard the budget of the EU, appropriate financial corrections shall be applied in case of certain breaches of EU and/or national law.[485] Similar rules are applicable for the 2021-2027 MFF in the new CPR.[486] In the NGEU programme the RRF Regulation contains provisions regarding the protection of the financial interests of the EU,[487] and requires the recovery of amounts wrongly paid or incorrectly used. Such cases as fraud, corruption and conflict of interest are especially provide a basis for the reduction of the support provided under the RRF.[488] The European Public Prosecutors Office also has the role to investigate and prosecute the misuse of EU funds.[489]

However, with the adoption of the 'Regulation on a general regime of conditionality for the protection of the Union budget', the EU made a significant step further. The basic underlying principle of this legal instrument is that there is a 'clear relationship between respect for the rule of law and the efficient implementation of the Union budget (…)'.[490] This regulation authorizes the adoption of appropriate measures if it is established that the 'breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the

[484] Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L 347/320 (Common Provisions Regulation, CPR).

[485] Common Provisions Regulation, Preamble (71), (72), arts 2(36), 83, 85, 142-147.

[486] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy [2021] OJ L 231/159 (new CPR) Preamble (70), (71), arts 70-71, 96-97, 103-104.

[487] RRF Regulation, art 22.

[488] RRF Regulation, art 22(1) – (2), (5).

[489] European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (n 360) 13.

[490] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I/1 [Regulation (EU, Euratom) 2020/2092] Preamble (13).

Union in a sufficiently direct way.'[491] Such appropriate measures include for example the interruption of payment deadlines, or suspension of payments from the EU budget.[492] The regulation is also ground-breaking in the sense that it provides a definition of rule of law and it identifies such situations which can be considered as indicative of breaches of its principles.[493] The definition of rule of law is based on the Union values enshrined in Article 2 TEU.[494] The definition also encompasses the principles of legality, which imply such fundamental requirements as the transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, etc. The separation of powers and non-discrimination and equality before the law as well has special importance.[495] It is relevant to mention that the exact situations which represent the breach of the principles of the rule of law in the context of the regulation are listed and defined in Article 4 paragraph 2 of the regulation. This reduces (but in this regard also concretises) the scope of application of the regulation. The regulation provides protection for the principle of rule of law only if the breach represents a sufficiently direct connection with the EU budget/EU financial interest. This regulatory approach is a somewhat diluted concept in comparison with the EC's initial proposal (and also in comparison with the position of France, Germany and the Netherlands) which suggested setting up a broader instrument to protect and promote the rule of law.[496] However, the regulation can be applied also in such cases when other procedures set out in EU legislation would not provide effective protection for the EU budget.[497] So the conditionality mechanism provides an additional layer

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[491] Regulation (EU, Euratom) 2020/2092, art 4.
[492] Regulation (EU, Euratom) 2020/2092, art 5.
[493] Regulation (EU, Euratom) 2020/2092, arts 2(a), 3.
[494] See Art 2 of TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'
[495] Regulation (EU, Euratom) 2020/2092, arts 2-3.
[496] Regulation (EU, Euratom) 2020/2092, art 4(1); de la Porte and Jensen (n 339) 393-395; European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (n 360) 13.
[497] Regulation (EU, Euratom) 2020/2092, Preamble (17), art 6(1).

of protection for the EU budget. It intends to restrain the 'breaches of the principles of the rule of law that affect or risk affecting the EU budget.'[498]

5. New common policy objectives and a (limited) fiscal policy initiative for the European Union

NGEU established new policy objectives for the EU and also assigned the necessary funds to foster those. With its significant resources NGEU boosts public investment. Basically this has the aim to enhance aggregate demand, to provide assistance for those Member States which were severely hit by the pandemic and also to strengthen the economic growth potential of the EU. However, NGEU is more far-reaching than supplementing demand in the crisis situation. NGEU would like to promote deep structural reforms and the reallocation of resources to raise the growth potential of the economy. Furthermore, it intends to achieve important common policy objectives. Such common policy objective is for example climate control.[499] This is clearly established both by the EURI and the RRF Regulations.[500] Digitalization is also an important example.[501] Similarly, the achievement of smart, sustainable and inclusive growth, strengthening cohesion or the increasing of the EU's crisis preparedness and resilience can be cited.[502] Based on these attributes, NGEU can be considered as the EU's 'Roosevelt moment'.[503]

[498] European Commission, *The EU's 2021-2027 long-term Budget and NextGenerationEU Facts and Figures* (n 360) 13.
[499] Codogno and van den Noord, 'Assessing Next Generation EU' (n 6) 4; de la Porte and Jensen (n 339) 388-389, 395-396, 399.
[500] EURI Regulation, Preamble (4), (7), art 1(2)(f); RRF Regulation, Preamble (7), (10), art 3(a)(c).
[501] EURI Regulation, Preamble (4), (7), art 1(2)(b)(c); RRF Regulation, Preamble (7) (10) (12) , art 3(b).
[502] EURI Regulation, art 1(2)(b)(c)(d)(e); RRF Regulation, art 3(c)(d)(e); Crescenzi, Giua and Sonzogno (n 6) 278, 279-282.
[503] Codogno and van den Noord, 'Assessing Next Generation EU' (n 6) 4; Luo (n 4) 12-13.

As response to the consequences of the COVID-19 pandemic, the NGEU provides the first example of EU common fiscal policy (and economic policy-making).[504] This approach breaks such pre-existing concepts of EU cooperation that no (significant) common EU debt issuance shall be allowed and there shall be no large-scale redistribution to alleviate the consequences of economic crises. During the previous crises (and most importantly during the 2008 financial crisis and its aftermath) the EU intended to solve the economic problems with the adoption of austerity policy measures.[505] However, the requirement of fiscal rigor as crisis response caused significant controversies.[506] In the light of the pandemic this approach was changed and a significant fiscal capacity was provided by the EU (with the authorisation of the Member States) to pursue a common recovery and growth agenda.[507]

6. The Hamiltonian moment for the European Union

Some commentators argue that NGEU may represent a 'Hamiltonian moment' for the EU. The significant amount of mutual debt issuance (which is however limited) and the resulting fiscal capacity to achieve common policy goals hints at that direction. But what is actually a 'Hamiltonian moment'? The term refers to the federalisation of American states' debt in the end of the 18th century.[508] This term is named after Alexander Hamilton, who was one of the Founding Fathers of the United States and also a renowned lawyer, Central Banker and economist, who also fought in the American Revolutionary War.[509]

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504 Crescenzi, Giua and Sonzogno (n 6) 292; Codogno and van den Noord, 'Assessing Next Generation EU' (n 6) 2; Picek (n 5) 325, 326, 331.
505 de la Porte and Jensen (n 339) 388-389; Luo (n 4) 11-12.
506 Acocella (n 228) 199; Luo (n 4) 8.
507 de la Porte and Jensen (n 339) 388-389; Luo (n 4) 7-8, 12-13.
508 Picek (n 5) 325; de la Porte and Jensen (n 339) 388-389; Luo (n 4) 12-13.
509 See United States House of Representatives, History, Art & Archives, 'Hamilton, Alexander' < https://history.house.gov/People/Listing/H/HAMILTON,-Alexander-(H000101)/ > accessed 4 October 2021; Britannica, 'Alexander Hamilton' < https://www.britannica.com/biography/Alexander-Hamilton-United-States-statesman/Hamiltons-financial-program > accessed 4 October 2021.

Alexander Hamilton became the first U.S. Treasury secretary in 1789 and led America's financial revolution. Until he left office in 1795, the six critical institutional components that characterize modern financial systems became established in the United States. These were the 'stable public finances and debt management; stable money; an effective central bank; a functioning banking system; active securities markets; and a growing number of business corporations, financial and nonfinancial.'[510]

From our perspective the most important is that based on Hamilton's 'The First Report on the Public Credit' (January 9, 1790.), The Congress adopted the assumption of the state debts which they had incurred when fighting the War of Independence.[511] Foreign debt was paid off and existing 'National' or 'Domestic' debt was continuously exchanged for packages of new Treasury debt (this meant a certain restructuring; however the government ensured investors about its commitment to serve the debt). Hamilton also made recommendations to ensure the financial background of debt management. He proposed an Excise Tax on distilled spirits, which was adopted and became a law on the 3rd March 1791 (Hamilton also proposed a protective tariff in 'The Report on Manufactures' to encourage manufacturers).[512] With these achievements Hamilton definitely enhanced the economic and political cohesion of the young United States.[513]

If we compare these measures with the NGEU, we can identify numerous similarities. For example NGEU also intends to handle the financial consequences of a crisis with a (limited) debt mutualisation. The financial and organizational background of common debt management are also under establishment in the EU, with planned or already adopted new own resources and institutional components. NGEU also set common policy objectives and

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[510] Richard Sylla, Robert E. Wright, and David J. Cowen, 'Alexander Hamilton, Central Banker: Crisis Management during the U.S. Financial Panic of 1792' Business History Review 83 (Spring 2009) 61-62.

[511] ibid 65-67; Alexander Johnston, James Albert Woodburn, *American Political History 1763-1876* (New York and London, G.P. Putnam's Sons) 106-110.

[512] Sylla, Wright, and Cowen (n 510) 65-67; Johnston, Woodburn (n 511) 106-114, 119-130.

[513] Sylla, Wright, and Cowen (n 510) 84.

adopted mechanisms which ensure the achievement of these goals in line with the EU's long term goals and fundamental values. These features show that the EU is at least moving towards a 'Hamiltonian moment'. From another point of view it is possible to argue that the EU already reached this in a temporary and limited manner.[514]

[514] de la Porte and Jensen (n 339) 389-390, 399; Luo (n 4) 12-13.

VIII. Conclusion

Jean Monnet[515] wrote in his Memoirs[516] the following: 'I have always believed that Europe would be built through crises, and that it would be the sum of their solutions.'[517] This visionary revelation excellently describes the current situation. The EU had to face an unprecedented crisis and ground-breaking solutions were adopted to handle it. The most significant and epoch-making element of these solutions was the adoption of NGEU and the related debt security issuance program. This measure has very significant public policy and economic aspects and also important implications on European integration.

As it was introduced in this master thesis, NGEU represents the first large volume borrowing (bond issuance) of the EU and it introduced a guarantee and liability sharing mechanism to ensure appropriate repayment under any circumstances. In connection with this achievement a new (and temporarily enhanced) system of own resources is proposed. The implementation of NGEU required the establishment of the administrative, regulatory and institutional background of increased borrowing and debt management. Member States also considered appropriate to strengthen the protection for the EU's financial interests and values. The NGEU introduced new common policy objectives for the EU and ensured the necessary funds for their achievement. In parallel, it can be considered as the first sign of a (limited) fiscal

[515] Jean Monnet (1888-1979) was a French economist and diplomat who is recognised as one of the 'Founding Fathers of Europe'. He served as the first President of the High Authority of the European Coal and Steel Community between 1952 and 1955. See Jean Monnet House, 'Jean Monnet, a man of peace' 'Bibliograpy' < https://www.jean-monnet-europe.eu/en/jean-monnet-man-peace > < https://www.jean-monnet-europe.eu/en/biography > accessed 11 November 2021; Britannica, 'Jean Monnet French politician' (The Editors of Encyclopaedia Britannica, 2021) < https://www.britannica.com/biography/Jean-Monnet > accessed 11 November 2021.

[516] See also European Commission, 'José Manuel Durão Barroso President of the European Commission Meeting with EU Heads of Delegation Brussels, 30 November 2011' (Speech, José Manuel Durão Barroso 30 November 2011) < https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_838 > accessed 11 November 2021.

[517] Jean Monnet, 'Memoirs' (translated by Richard Mayne, Doubleday & Company, Inc. Garden City, New York 1978) 417. See also Ivan T. Berend, 'The History of European Integration: A new perspective' (Routledge, London 2016) 6.

policy initiative for the EU.[518] These developments all represent significant new elements and the emergence of a new risk sharing mechanism in European integration. Furthermore, some commentators argue that Europe already reached a 'Hamiltonian moment' as a consequence of NGEU.[519] Based on these considerations, it is reasonable to examine whether the NGEU program embodies the next significant step in European integration.

In our answer we have to highlight that NGEU and the related developments obviously all hint at the direction of a stronger European integration and solidarity.[520] However, we cannot set aside the facts that the adopted measures are currently *ad hoc* and *ex post*.[521] NGEU is considered as an exceptional and temporary emergency mechanism.[522] It was adopted as an *ex post* answer to the COVID crisis, so after the crisis emerged. It is not a permanent, *ex ante* instrument, which intends to treat future crises in the EU automatically, with a certain level, pre-determined risk sharing among Member States.[523] If a similar instrument as NGEU would be established in the EU as a permanently available mechanism to treat future challenges (unexpected future challenges or such existing challenges which may pose a more significant threat in the future), so a similar *ex ante* and permanent risk sharing mechanism would come to existence,[524] than this achievement definitely would represent a next step in EU integration. The reason is that the establishment of such mechanism would confer significant new powers permanently[525] to the EU, so a new and significant EU competence would be established.[526]

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[518] See Chapter VII. Sections 1-5. of the Master Thesis.
[519] Picek (n 5) 325; de la Porte and Jensen (n 339) 388-389, 399; Luo (n 4) 1, 12.
[520] Luo (n 4) 1-2, 10; Euronews, 'After months of delay, EU nations finally ratify €750bn recovery fund' (Euronews, 28/05/2021) < https://www.euronews.com/2021/05/28/after-months-of-delay-eu-nations-finally-ratify-750bn-recovery-fund > accessed 14 November 2021.
[521] Codogno and van den Noord, 'Assessing Next Generation EU' (n 6) 2, 8.
[522] European Commission, COM(2020) 442 final 14, 16.
[523] Codogno and van den Noord, 'Assessing Next Generation EU' (n 6) 2, 4, 8, 10, 19-20.
[524] ibid 8, 10, 19-20; de la Porte and Jensen (n 339) 399; Luo (n 4) 12-15; Lorenzo Codogno and Paul van den Noord, 'Next Generation EU: can we do better?' (2021) 58 SUERF Policy Brief < https://www.suerf.org/suer-policy-brief/21677/next-generation-eu-can-we-do-better > accessed 14 November 2021; Jan von Gerich, 'Bond Watch: Next generation EU bonds' (Nordea Corporate, Rates Strategy, 30.07.2020) < https://corporate.nordea.com/article/59136/bond-watch-next-generation-eu-bonds > accessed 14 November 2021.
[525] Not just only until 2058. See Own Resources Decision, Preamble (20), art 5(2).

The possibility of permanent issuance of debt securities at EU level, the necessary related debt management institutions, the enhanced possibility to collect own resources and the authorization for fiscal policy intervention in connection with crisis management clearly would represent a new level of EU integration and solidarity.

As a result of this conclusion, it is reasonable to ask an important question in this regard. Is there a possibility that the concept of NGEU will evolve further, thus a similar *ex ante* and permanent risk sharing mechanism will be established? Based on the experiences of the previous two decades, this scenario is highly probable. The first two decades of the 21st century already brought a very turbulent period with numerous crises in Europe (for instance the financial crisis, migration crisis and currently the COVID crisis).[527] It is reasonable to expect that similar events will occur and challenges will continue to increasingly put to the trial the cohesion of European integration in the future. This may be a next pandemic, a migration crisis, a climate catastrophe, an upcoming financial crisis or something we could not even expect.[528] Consequently, the establishment of a common European *ex ante* and permanent risk sharing mechanism with appropriate crisis management capacities looks more reasonable than ever.[529]

However, we have to keep in mind that NGEU (and also probably a similar permanent mechanism) is funded from debt, so with the issuance of debt securities. As a European safe asset, like the bonds issued by the EU is very desirable for investors,[530] it is suitable to

[526] Luo (n 4) 1-3, 12-15; Tobias Lock, 'Why the European Union Is Not a State: Some Critical Remarks' (2009) 5 European Constitutional Law Review 407, 409-410.

[527] European Commission, COM(2020) 456 final 1-3; James Gerber, *A Great Deal of Ruin: Financial Crises since 1929* (Cambridge University Press 2019) 165-182; Vicki Squire, *Europe's Migration Crisis: Border Deaths and Human Dignity* (Cambridge University Press 2020) 1-202; Duhaâ M, Strohal C and Kieber S, 'The EU Migration Crisis and the Human Rights Implications of the Externalisation of Border Control' in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2018* (Intersentia 2018) 135-166.

[528] Codogno and van den Noord 'Assessing Next Generation EU' (n 6) 8.

[529] ibid 2, 20; Codogno and van den Noord, 'Next Generation EU: can we do better?' (n 524) 6; Luo (n 4) 12-13.

[530] Codogno and van den Noord, 'Next Generation EU: can we do better?' (n 524) 1-6; Horwood (n 483); von Gerich,'Bond Watch: Next generation EU bonds' (n 524).

provide appropriate financial firepower for the crisis treatment measures of the EU.[531] At the same time it is important to consider that the next generation will not only enjoy the potential benefits of NGEU, but also will share the burden of its costs.[532] Therefore, the policy objectives of the implemented measures shall be determined providently. Similarly, the outcome of the NGEU program probably will have a significant impact on whether a similar, common European *ex ante* and permanent risk sharing mechanism will be established in the future.[533] In this regard the achievement of the next step of EU integration will largely depend on the successful implementation of NGEU.[534] Consequently, those politicians and bureaucrats have a crucial role who are taking part in the implementation of this recovery program. Let's hope for the best for Europe.

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[531] European Commission, COM(2020) 442 final 3, 14.
[532] Kai Weiss, 'The next generations will pay for the Next Generation EU Fund' (BrusselsReport.eu, 29 April 2021) < https://www.brusselsreport.eu/2021/04/29/the-next-generations-will-pay-for-the-next-generation-eu-fund/ > accessed 12 November 2021.
[533] Luo (n 4) 1-3, 14-15.
[534] ibid 1, 14-15; Crescenzi, Giua and Sonzogno (n 6) 280.

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