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DIALOGUE AND DEBATE: SYMPOSIUM ON THE (RE-)TURN TO ACTIVIST GOVERNMENT IN THE EUROPEAN UNION

EU-enabled state activism: equalising or asymmetric?

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Abstract

The article traces the trajectory of state activism in the EU and explores the institutional implications of its recent revival. It contends that, within the current European constitutional landscape, there is a strong democratic case for pursuing activist policies at the national level, with the EU serving as an enabler. Within the existing treaty framework, however, EU-enabled state activism may assume either an equalising or an asymmetric form. In the equalising mode, the EU helps narrow fiscal disparities among Member States, promoting a more balanced deployment of fiscal and industrial policies across the single market. In the asymmetric mode, by contrast, activist tools remain accessible primarily to Member States with substantial fiscal capacity. Crucially, the choice between these alternatives does not stem from democratic deliberation or political judgment, but rather from extant treaty constraints conceived at a time of subdued state interventionism. As a result, equalising EU-enabled state activism seems possible only in times of emergency, when EU institutions may temporarily loosen constitutional limits on national fiscal and industrial policy, adopt unconventional monetary measures, and muster the political consensus needed to approve significant fiscal programmes. In the absence of such emergencies, however, only the asymmetric form of state activism remains available – a mode of governance that poses serious risks to the integrity of the single market and to territorial cohesion. Thus, only treaty change, coupled with deeper political integration, could place state activism on a firmer footing and allow the EU to realise its equalising potential.

Keywords: state activism; industrial policy; fiscal policy; treaty change

1. Introduction

As in most advanced economies, the EU's response to the Covid-19 pandemic was marked by a revival of industrial policy and of many instruments associated with state activism.[1] Indeed, the need to finance health care systems, to shore up large sectors of national economies and to sustain workers during lock-downs required massive state interventions and favoured the rediscovery of tools and policies that until recently had seemed obsolete. This activism did not fade once the pandemic subsided. Instead, it was reaffirmed to support the green transition,[2] confront the

[1]See, eg, K Aiginger and D Rodrik, 'Rebirth of Industrial Policy and an Agenda for the Twenty-First Century' 20 (2020) Journal of Industry, Competition and Trade 189–207 and M C Barbieri Góes and G Viesti, 'The Revival of Industrial Policies in the EU?' 37 (2025) Review of Political Economy 344–68. Both articles share the view that contemporary industrial policy is remarkably different from the type of industrial policies implemented before their neoliberal demise.

[2]European Commission, 'The European Green Deal' COM (2019) 640 final, 15.

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consequences of the war in Ukraine,[3] narrow the EU's competitiveness gap with the US and China,[4] and address intensifying geopolitical tensions following Donald Trump's re-election.[5]

The EU resurgence of government activism took on distinctive features. First, most activist policies were implemented at the national level, with the Union playing primarily an enabling role. Member States deployed the main interventionist tools, while EU institutions relaxed legal constraints originally designed to limit state activism and, in some circumstances, provided financial support for states' intervention. Second, this revival occurred within a constitutional framework traditionally sceptical of state intervention resulting in a critical tension. On the one hand, by reinforcing state interventionism and potentially narrowing fiscal disparities among Member States, EU-enabled activism presented, at least in principle, a normatively appealing mode of governance. Consistent with its commitment to the single market[6] and territorial cohesion,[7] the Union appeared capable of fostering a more balanced use of fiscal and industrial policy and did so by mobilising domestic institutions, where democratic legitimacy remains mainly concentrated. On the other hand, the achievement of this outcome was hindered by an outdated treaty framework that constrains government activism. As a result, existing treaty restrictions on EU fiscal, industrial and monetary policy favoured an asymmetric form of state intervention: activist tools remained available primarily to Member States with substantial fiscal capacity, thereby threatening both territorial cohesion and the integrity of the single market.

This article traces the trajectory toward this form of EU-enabled state activism and explores both its equalising and asymmetric manifestations. It begins by defining state activism and outlining how, within the current treaty framework, this course of political economy is confined to a subdued role (Section 2). To set the stage, it briefly revisits the rise of state activism in the aftermath of World War II, before charting its gradual decline – first under the neoliberal turn in European policy following the oil shocks of the 1970s, and later under the Maastricht Treaty and the sovereign debt crisis. Next, the article accounts for the return of state activism in the EU in response to the COVID-19 pandemic (Section 3). It shows how the EU facilitated national economic and industrial policies by drawing on the flexibility embedded in the treaties and by employing creative legal engineering at a time of emergency. In practice, the EU loosened state aid and fiscal rules while simultaneously establishing monetary and fiscal programmes to support primarily the hardest-hit countries with limited access to financial markets. This produced a novel and unprecedented form of EU-enabled state activism marked by an evident equalising aspiration. While this approach chimes both substantively and institutionally with the EU's demoicratic architecture, its long-term viability remains constrained by the treaties, which ultimately confine such intervention to situations of emergency. Although the expansion of state activism during the pandemic appeared to herald a new phase, with interventionist tools seemingly poised to assume a more prominent role, this resurgence of government activism was never fully consolidated (Section 4). The launch of *Next Generation EU* – a major but one-off fiscal initiative at the EU level – allowed the European Central Bank to scale back its involvement. At the same time, the reimposition of revised legal constraints on national fiscal policy and, to a lesser extent, state aid, together with the difficulty of replicating large-scale EU fiscal instruments, transformed EU-enabled state activism into an asymmetric mode of governance. Instead of being equally accessible to all Member States, activist government is now viable mainly for those with sufficient fiscal space

[3]Informal meeting of the Heads of State or Government, Versailles Declaration of 10–11 March 2022 <https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf>.

[4]European Commission, 'A Competitiveness Compass for the EU' COM (2025) 30 final, 20.

[5]Joint White Paper for European Defence Readiness 2030: JOIN/2025/120 final, 19.03.2025.

[6]Arts 3(3) TEU and 26 TFEU.

[7]Arts 3(3) TEU and 174 TFEU.

and borrowing capacity. Consequently, only treaty change, combined with deeper political integration, can provide a more solid foundation for state activism and enable the EU to realise its equalising potential (Section 5).

2. From full-blown to subdued state activism

A. The rise and fall of full-blown state activism

In Western Europe, state activism emerged as the dominant paradigm of political economy in the aftermath of World War II.[8] Conceived as a response to *laissez-faire* – by then largely discredited after its debacle during the early 1930s – it was regarded not only as the most effective economic model for addressing citizens' material needs, but also as the most viable institutional arrangement for generating the political consensus necessary to re-legitimise the nation-state in the postwar order.[9] Indeed, state activism sought to promote through government intervention economic prosperity, full employment, social justice, and territorial cohesion. These ambitions made it particularly influential in countries vulnerable to the rise of communism[10] or seeking a moderate alternative to coercive economic planning.[11]

At least in its *dirigiste* form, state activism manifested itself in extensive government intervention across virtually every economic and social domain. It was articulated as a response to three mutually reinforcing economic and social concerns. First, it aimed to secure macroeconomic stabilisation through counter-cyclical demand management: during periods of recession, governments were expected to stimulate aggregate demand by increasing public expenditure (or reducing taxation) and accommodating monetary policies, even at the cost of budget deficits and inflation; conversely, when demand exceeded supply, they were expected to pursue budget surpluses and restrictive monetary policies.[12] Second, government activism was considered essential for both the reconstruction and modernisation of the economy, primarily through inward-looking industrial policies designed to reduce regional disparities, promote employment, and strengthen those sectors and firms deemed most promising for economic growth and social welfare.[13] Third, state intervention was regarded as indispensable for advancing income redistribution, notably through the broadening of the tax base, progressive taxation,[14] and the provision of social services.[15]

It is not the purpose of this article to survey the full range of these developments. What is essential to emphasise here is that state activism entailed a dynamic use of fiscal policy and, therefore, of the power of the state to collect revenue through taxes and to spend them in a variety of economic programmes involving indicative planning, state subsidies and the

[8]T Judt, *Postwar: A History of Europe since 1945* (Penguin 2006) 67, describes planning as 'the political religion of post-war Europe'.

[9]AS Milward, *The European Rescue of the Nation-State* (Routledge 2000) 27.

[10]See P Rosanvallon, 'The Development of Keynesianism in France', 193 and M De Cecco, 'Keynes and Italian Economics', 219–20, both in PA Hall, *The Political Power of Economic Ideas. Keynesianism across Nations* (Princeton University Press 1989).

[11]M Weir, 'Ideas and Politics: The Acceptance of Keynesianism in Britain and the United States', in Hall (n 10) 74–81. For the view that the Cold War favoured state interventionism see G Gerstle, *The Rise and Fall of the Neoliberal Order* (Oxford University Press 2023) 41–7.

[12]PA Hall, 'Introduction', in Hall (n 10) 6–7.

[13]F Bulfone, 'Industrial Policy and Comparative Political Economy: A Literature Review and Research Agenda' 27 (2023) Competition & Change 23.

[14]S Steinmo, *Taxation and Democracy* (Yale University Press 1993).

[15]C Offe, 'The European Model of "Social" Capitalism: Can It Survive European Integration?' 11 (2003) Political Philosophy 451–3.

nationalisation of businesses in key economic sectors.[16] Instrumental to expansive fiscal policy was the frequent and quantitatively conspicuous recourse to public borrowing, facilitated by accommodating monetary policies implemented by central banks operating with a broad mandate within the executive's reach[17] which involved low interest rates, money creation and the last resort purchase of public bonds.[18] Particularly the last tool was crucial in both ensuring the requisite resources to government programmes at a sustainable price[19] and stabilising the level of investments.[20]

If activist government could evolve and expand during the *Trente Glorieuses*, this was due in no small measure to embedded liberalism, the international economic order established at Bretton Woods to reconcile trade liberalisation with state intervention.[21] In Western Europe, this commitment was first taken up by the European Coal and Steel Community (ECSC) and subsequently by the European Economic Communities (EEC).[22] The ECSC is well known for its deployment of activist instruments in the government of coal and steel production. Likewise, the EEC became similarly entangled in state activism through its interventions in the agricultural sector. Yet, the most significant contribution of the Community institutions to the success of state activism laid less in their direct use of such instruments than in their enabling capacity: the resurgence of national economies owed, to a considerable extent, to the common market[23]– a project originally engineered and implemented so as to prevent the destabilisation of state activism. So much so, in fact, that until the 1980s, EU Member States retained wide latitude to support domestic firms without facing meaningful restraints or coordination requirements at the Community level.[24]

A generally deferential attitude toward state intervention prevailed within both the Community's political institutions and the European Court of Justice. Throughout the 1960s and 1970s, economic integration was conceived primarily as a means of enhancing firms' efficiency and innovation, rather than as an instrument to foster regulatory or tax competition among member states.[25] Not by chance capital mobility was subject to a restrictive regulatory regime,[26] on the assumption that full liberalisation of this critical factor of production might undermine national economic policies or destabilise balance-of-payments positions.[27] To be sure, government activism could in principle be curtailed by the treaty's constraints on state aid, designed to secure a level playing field for all undertakings within the common market.[28] Yet, the enforcement of these provisions remained largely dormant: only a limited number of measures were notified to the Commission, and of these, only a small fraction were declared incompatible

[16]J Foreman-Peck, 'European industrial policies in the post-war boom: "Planning the economic miracle"' in C Grabas and A Nützenadel (eds), *Industrial Policy in Europe after 1945: Wealth, Power and Economic Development in the Cold War* (Palgrave Macmillan 2014) 33.

[17]See B Blancheton, 'Central Bank Independence in a Historical Perspective. Myth, Lessons and a New Model' 53 (2016) Economic Modelling 101–7. For a reconstruction of this model of central banking see P Tucker, *Unelected Power. The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton University Press 2019) 76–81.

[18]O Chessa, *La costituzione della moneta. Concorrenza, indipendenza della banca centrale, pareggio di bilancio* (Jovene editore 2016) 256–62.

[19]É Monnet, *Controlling Credit. Central Banking and the Planned Economy in Postwar France, 1948–1973* (Cambridge University Press 2018) 184–98.

[20]P Ciocca, *La banca che ci manca. Le banche centrali, l'Europa, l'instabilità del capitalismo* (Donzelli editore 2014) 114.

[21]JK Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' 19 (1982) International Organization 393–8.

[22]Milward (n 9) 44.

[23]*Id.,* 120, 134–6.

[24]Barbieri Góes, Viesti (n 1) 345–6.

[25]C Kaupa, *The Pluralist Character of the European Economic Constitution* (Bloomsbury Publishing 2018) 52–3.

[26]For a long time, free movement of capital lacked direct effect. See Case 203/80, *Casati,* ECLI:EU:C:1981:261.

[27]Art 73 EEC.

[28]Arts 92–4 EEC.

with the treaty.[29] State activism also benefited from the limited effectiveness of the mechanisms for coordinating monetary and economic policies established in the treaty,[30] particularly with respect to addressing balance-of-payments disequilibria.[31] Ironically, this very weakness would later contribute to the erosion of state activism. As capital mobility increased, the poor performance of supranational coordination mechanisms generated severe monetary tensions between strong- and weak-currency states in the late 1960s and 1970s. These tensions, combined with the declining performance of *dirigisme*, ultimately favoured a shift in the prevailing political economy paradigm.[32]

Activist government, at least in its dirigiste rendering, came to be discredited as from the late 1970s.[33] The end of the Bretton Woods System, the gradual abolition of its attendant capital controls and the oil crises of the 1970s prompted a neoliberal reorientation of the European integration process.[34] In a context in which tackling government (rather than market) failures was emerging as the overriding priority, and economic prosperity was increasingly viewed as a function of both capital mobility and the capacity of national economies to attract to the most productive and innovative investments, the relative importance of fiscal policy and industrial policy was downsized.[35] Thus, what had once been the dominant model of political economy came, in little more than a decade, to be seen as obsolete, giving way to economic models and modes of governance more aligned with the prevailing neoliberal *Zeitgeist* – most notably the social market economy and the regulatory state.

The social market economy (*Soziale Marktwirtschaft*) had already emerged in West Germany after World War II as a deliberate alternative to dirigisme.[36] Designed to promote an export-oriented economy, it relied on an independent monetary policy focused on price stability, alongside measures to enhance market competition and maintain wage moderation. Thanks to this approach, West Germany navigated the 1970s oil crises relatively unscathed, unlike countries still influenced by dirigisme, and became a model for other Western economies with its ability to maintain both low inflation and low unemployment.[37] This success became particularly evident in the 1980s, when the European Monetary System exerted pressure on formerly dirigiste countries, forcing their political economies to converge towards neoliberal tenets.[38]

As a result, independent central banking and price stability became overriding objectives across Western Europe, pursued even at the cost of recessions and higher unemployment.[39] Increased capital mobility[40] and constraints on monetary financing of public deficits made expansive fiscal policies harder to implement.[41] Industrial policies were constrained and reoriented. On the one

[29]GL Tosato, 'La disciplina comunitaria degli aiuti tra economia di mercato e interessi generali' in C Pinelli and T Treu (eds), *La costituzione economica: Italia, Europa* (il Mulino 2010) 252–3.

[30]Arts 6, 103–9 EEC.

[31]E Mourlon-Druol, 'History of an Incomplete EMU' in F Amtenbrink and C Hermann (eds), *EU Law of Economic & Monetary Union* (Oxford University Press 2020) 18–19.

[32]A Moravcsik, *The Choice for Europe. Social Purpose & State Power from Messina to Maastricht* (Cornell University Press 1998) 241–74.

[33]KR McNamara, 'Economic Governance, Ideas and EMU: What Currency Does Policy Consensus Have Today?' 44 (2006) Journal of Common Market Studies 809.

[34]G Grégoire, 'The EU's Neoliberal Constitutionalism(s)' 3 (2024) European Law Open 705–45.

[35]G Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' 17 (1997) Journal of Public Policy 141–3.

[36]CS Allen, 'The Underdevelopment of Keynesianism in the Federal Republic of Germany', in Hall (n 10) 263.

[37]McNamara (n 33) 809.

[38]MI Vail, 'Europe's Middle Child: France's Statist Liberalism and the Conflicted Politics of the Euro' in M Matthijs and M Blyth (eds), *The Future of the Euro* (Oxford University Press 2015) 141–3.

[39]F Saraceno, *Oltre le banche centrali. Inflazione, disuguaglianza e politiche economiche* (Luiss University Press 2023) 68–9.

[40]See, in particular, Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty.

[41]W Bateman and J van't Klooster, 'The Dysfunctional Taboo: Monetary Financing at the Bank of England, the Federal Reserve, and the European Central Bank' 31 (2024) Review of International Political Economy 413.

hand, Community institutions promoted the liberalisation of markets in energy, transport, and telecommunications, often involving the privatisation of publicly owned firms.[42] On the other hand, the focus of industrial policies shifted: whereas under dirigisme they targeted specific firms or sectors to achieve domestic goals, in the new economic landscape they aimed increasingly at improving the business environment and integrating domestic firms and sectors into global capital and value chains.[43]

B. Subdued state activism

This neoliberal turn was entrenched with the Treaty of Maastricht, and was confirmed by the Lisbon Treaty. Above all, the purposive constitutional framework of the Economic and Monetary Union (EMU) embodied this structural shift signalling the definitive demise of dirigisme.[44]

Four distinctive features of EMU substantiate this claim. First, free movement of capital was strengthened through the extension of its scope to third countries.[45] The European Court of Justice abandoned its earlier cautious stance and aligned its jurisprudence with that of the other chapters of market adjudication.[46] In doing so, it recognised the direct effect of this fundamental freedom[47] and employed it as yet another powerful economic due process clause.[48]

Second, a single currency was established in the absence of the material capacities necessary for a robust pan-European economic policy,[49] most notably a sizeable supranational budget.[50] Despite the lofty aspirations to political unity surrounding the Treaty of Maastricht, EMU's negotiators could agree only on a modest increase in cohesion funds,[51] largely insufficient to exert significant macroeconomic effects.[52] The single currency designed at Maastricht thus rested on an asymmetric institutional framework[53] more conducive to the creation of a *Stabilitätsgemeinschaft* than a *Solidargemeinschaft*.[54] This outcome resulted from a combination of contingent and structural factors that have continued to shape the evolution of EMU. First of all, monetary unification was pursued in response to market pressures, but in the absence of meaningful security

[42]Barbieri Góes, Viesti (n 1) 347–8.

[43]Bulfone (n 13) 25–8.

[44]D Adamski, 'Objectives of the EMU', in Amtenbrink, Hermann (n 31) 219.

[45]Art 63 TFEU.

[46]J Snell, 'Free Movement of Capital: Evolution as a Non-Linear Process' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 552.

[47]Joined Cases C-163/94, C-165/94, C-250/94, *Sanz de Lera and others*, ECLI:EU:C:1995:451.

[48]See, eg, Case C-367/98, *Commission v Portugal*, ECLI:EU:C:2002:326 and Case C-112/05, *Commission v Germany,* ECLI:EU:C:2007:623.

[49]P Genschel and M Jachtenfuchs, 'More Integration, Less Federation: The European Integration of Core State Powers' 23 (2016) Journal of European Public Policy 43.

[50]Committee for the study of Economic and Monetary Union, *Report on economic and monetary union in the European Community* (1989) <http://aei.pitt.edu/1007/1/monetary_delors.pdf> 19–20 and 24.

[51]Moravcsik (n 32) 442–7.

[52]P De Grauwe, 'Design Failures in the Eurozone: Can they be fixed?', LEQS Paper No. 57/2013, 5–6, noting the absence of the automatic stabilisers (lender of last resort, progressive taxation and unemployment insurance) generally existing at a national level. Consider that the EU budget amounted to roughly 1 per cent of the EU GDP. Yet, in order to stabilise the European economic space, previous plans for monetary unification had suggested a budget initially amounting to 5–7 per cent of the European GDP and, in due course, of 20–25 per cent (See D MacDougall and others, *Report of the Study Group on the Role of Public Finance in European integration*, April 1977 <https://aei.pitt.edu/36433/1/Report.study.group.A13.pdf> 13–14).

[53]F Snyder, 'EMU Rivisited: Are We Making a Constitution? What Constitution Are We Making?' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 432.

[54]See BVerfGE 89, 155 (12 October 1993) (*Brunner*), §138. On the notions of *Stabilitätsgemeinschaft* and *Solidargemeinschaft,* see F Saitto, *Economia e stato costituzionale. Contributo allo studio della "Costituzione economica" in Germania* (Giuffré editore 2016), 282.

threats – a condition historically critical for the development of fully-fledged fiscal powers.[55] Next, the timing of monetary unification made it exceedingly difficult for Germany to commit to robust supranational solidarity at a time in which substantial portions of its budget were already earmarked to domestic reunification.[56] Lastly, the Union remained a polity in which the principal democratic and social resources were concentrated at the national level – a circumstance that rendered the centralisation of fiscal policy extraordinarily difficult.[57]

Third, to make up for the absence of a fully-fledged EU fiscal policy and the lack of convergence among national economies, the architects of EMU devised stricter mechanisms for coordinating national fiscal policies.[58] Supranational oversight on national budgets was intended to align fiscal policy with monetary policy and, in particular, to address persistent inflation differentials across Member States.[59] In line with neoliberal orthodoxy, inflation reduction was pursued primarily through the containment of public deficits and public debt, recast less as legitimate instruments of economic policy[60] than as sources of negative externalities.[61] Accordingly, the Treaty established a general prohibition on excessive deficits,[62] articulated through uniform quantitative limits on borrowing that applied indiscriminately, without regard to the purposes of indebtedness.[63]

Lastly, the constitutional framework of monetary policy revealed a pronounced neoliberal bias. Drawing on the experience of the *Bundesbank*,[64] the European Central Bank (ECB) was established as the most independent of central banks[65] and as an embodiment of 'pure' economic rationality.[66] Its decisions were insulated from political institutions and largely devoid of any meaningful mechanism of political accountability.[67] The ECB's mandate, enshrined at the constitutional level,[68] was narrowly defined around the primary objective of price stability, without scope for balancing this aim against competing goals such as financial stability or full employment.[69] Its operations were required to conform to the principle of an open market economy with free competition,[70] which excluded intervention in the public bond market. In contrast to the prevailing central banking practices of the dirigiste era,[71] the monetary financing of public deficits was expressly prohibited,[72] while the purchase of public securities was permitted

[55]RD Kelemen and KR McNamara, 'State-Building and the European Union: Markets, War, and Europe's Uneven Political Development' 55 (2021) Comparative Political Studies 975.

[56]D Howarth and J Schild, '*Nein* to 'Transfer Union': The German Brake on the Construction of a European Fiscal Capacity' 43 (2021) Journal of European Integration 221.

[57]B Crum, 'Saving the Euro at the Cost of Democracy?' 51 (2013) Journal of Common Market Studies 614–30.

[58]C Neumeier, 'Inventing the Asymmetrical Monetary Union' in R Weber (ed), *The Financial Constitution of European Integration* (Bloomsbury Publishing 2023) 49.

[59]K Tuori, *The European Central Bank and the European Macroeconomic Constitution. From Ensuring Stability to Fighting Crises* (Cambridge University Press 2022) 99.

[60]E Mostacci, 'Fedele a sé stessa: UEM, coordinamento delle politiche economiche e processi democratici' (2020) *Diritto pubblico comparato ed europeo* 1068.

[61]For a critical discussion of this argument, see JP Fitoussi and F Saraceno, 'European Economic Governance: The Berlin-Washington Consensus' 37 (2013) Cambridge Journal of Economics 492.

[62]Art 126 TFEU.

[63]Art 1 Protocol No 12 on the excessive deficit procedure.

[64]J Bibow, 'At the Crossroads: The Euro and its Central Bank Guardian (and Savior?)' 37 (2013) Cambridge Journal of Economics 612.

[65]M Dani, *La banca* centrale *nel diritto pubblico europeo* (FrancoAngeli 2024) 115–28.

[66]Tuori (n 59), 76.

[67]M Van der Sluis, 'Maastricht Revisited: Economic Constitutionalism, the ECB and the Bundesbank' in M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Bloomsbury Publishing 2014) 114–15.

[68]Art 127 TFEU.

[69]M Herdegen, 'Price Stability and Budgetary Restraints in the Economic and Monetary Union: the Law as Guardian of Economic Wisdom' 35 (1998) Common Market Law Review 15–17.

[70]Art 127 TFEU.

[71]Bateman, Van't Klooster (n 41) 428.

[72]Art 123 TFEU.

solely for the conduct of conventional monetary policy.[73] For the framers of the Treaties, this design was intended not only to promote fiscal rectitude and safeguard the financial independence of the central bank, but also to reflect the institutional architecture of a polity lacking a robust fiscal capacity, where exposure of the central bank to the risk of losses and of a recapitalisation had to be minimised.[74]

Within a constitutional framework so heavily tilted in a neoliberal direction, state activism could not but play a subdued role.

National governments found it increasingly difficult to pursue activist economic policies. In the fiscal sphere, the growing mobility of factors of production, coupled with the de facto impossibility of harmonisation,[75] generated a dynamic of competition that curtailed the scope for direct taxation.[76] Likewise, market discipline and fiscal regulatory constraints ostensibly rendered access to borrowing more difficult.[77] On the expenditure side, state activism was also severely curtailed. From the early 1980s, state aid rules had begun to be enforced with greater stringency, on the assumption that they would help level the playing field and ensure a more efficient use of taxpayers' resources.[78] Both the number of notifications and the volume of negative Commission decisions increased steadily.[79] Aid to public enterprises – then at the centre of broader programmes of privatisation and deregulation – was particularly targeted, consolidating the principle that state participation in economic initiatives should conform to the 'private investor' test.[80]

Narrowed down at state level, government activism could hardly be pursued by supranational institutions. Stringent procedural constraints limited the Union's capacity to raise revenues,[81] resulting in a budget that was not only far smaller than that of other federations but, crucially, highly dependent on national contributions.[82] In the absence of substantial fiscal capacity, EU borrowing was likewise discouraged. The principles of budgetary equilibrium and discipline[83] were interpreted as prohibiting the Union from issuing debt to cover budgetary shortfalls.[84]

[73]Art 18 of the Statute of the ESCB. Trade in low-risk financial assets is one of the means used to control short-term interest rates in financial markets to regulate the quantity of currency in circulation, J Van't Klooster, 'The Ethics of Delegating Monetary Policy' 23 (2020) The Journal of Politics 588.

[74]D Wilsher, 'Law and the Financial Crisis: Searching for Europe's New Gold Standard' 20 (2014) European Law Journal 255–6.

[75]Arts 114 (2) and 115 TFEU require unanimity voting.

[76]AJ Menéndez, 'The "Terrible" Functional Constitution of the European Union' in M Goldoni and MA Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023) 354.

[77]Admittedly, during the period under review, both types of constraints remained largely latent. It is well known that EU fiscal rules – even in the more restrictive version set out in the original Stability and Growth Pact (Regulation No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies) – were never rigorously enforced. Likewise, in the run-up to the creation of the euro and following its introduction, market discipline exerted by financial markets remained dormant, owing to the elimination of devaluation risk and the perceived absence of default risks (see M Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed during the Eurozone Crisis' 53 (2016) Common Market Law Review 1256–7). This led to an equalisation of borrowing conditions across euro-area states and, in turn, created significant space for national fiscal policies. I owe this observation to Damian Chalmers.

[78]In the EU, the overall amount of state aid declined from 2 per cent GDP in the 1980s to 0.5 per cent GDP before the financial crisis, see D Chalmers, G Davies, G Monti and V Heyvaert, *European Union Law* (Cambridge University Press 2024) 965.

[79]Tosato (n 29) 253.

[80]Case C-303/88, *Italy v Commission*, ECLI:EU:C:1991:136 and Case C-278/92, *Spain v Commission*, ECLI:EU:C:1994:325.

[81]Art 311(3) TFEU.

[82]Prior to 2020, own resources consisted in traditional own resources (customs duties and levies), revenues resulting from a uniform call rate on national value-added taxes and national contributions by Member States based on their gross national income. The latter category amounted to 80 per cent of the total, see R Crowe, 'The European Union's Public Finances in Times of Crisis: Fragmentation, Innovation, and Consolidation' in C Kilpatrick and J Scott (eds), *New Frontiers of EU funding: Law, Policy, Politics* (Oxford University Press 2024) 30.

[83]Art 310 (1) and (4) TFEU.

[84]Council of the European Union, *Opinion of the Legal Service on Proposals on Next Generation EU,* § 22.

This did not entirely preclude borrowing operations, but these were carried out only in the diminished form of 'back-to-back' operations[85] – borrowing for the purpose of lending to Member States or third parties under conditions more favourable than those available on the open market.[86] In such cases, repayment obligations rested with the beneficiaries, and EU liabilities would appear on the budget only in the event of a default.[87]

Predictably, the limited size of the EU budget translated into reduced spending opportunities. Not only was it incapable of fulfilling the functions of stabilisation, allocation, and redistribution typically associated with national budgets,[88] but it also proved ill-equipped to respond to sudden crises.[89] Based on its limited and derivative revenues, the EU could finance programmes in areas such as agriculture, cohesion, research, and industrial policy.[90] Yet even in these domains, expenditure reflected the Union's broader neoliberal orientation. From the Treaty of Maastricht onwards, the redistributive profile of cohesion policy was progressively diluted,[91] while industrial policy spending was expected to remain *Marktkonform*[92] and geared toward competitiveness.[93]

Summing up: with the establishment of EMU, the Treaty of Maastricht and its progeny did not create a constitutional framework amenable to government activism. On the contrary, and consistent with its predominantly neoliberal orientation, the institutional settlement sought to transform economic policies by curtailing state interventionism,[94] even at the risk of colliding with national democratic and social constitutions.[95] As a result, the role of state activism within the EU was eclipsed by the ascendancy of the regulatory state, due to the general assumption that accommodating monetary policy, expansionary fiscal measures, and industrial dirigisme were ill-suited to address the structural deficiencies of national economies.[96]

C. Subdued state activism reloaded

The interval between the Treaty of Maastricht and the Treaty of Lisbon largely overlapped with what is commonly described as 'the Great Moderation', a period characterized by sustained economic expansion, rising trade volumes, low inflation, and relative currency stability.[97] The principal drivers of this trajectory were private investment and the liberalisation of capital flows, whereas fiscal and industrial policies remained peripheral. Monetary policy was conducted in strict adherence to monetarist orthodoxy, oriented toward fundamental macroeconomic indicators and deliberately refrained from both credit allocation measures and the monetary financing of public deficits.[98]

[85] *Id.*, §§ 24–6.

[86] 'Back-to-back' lending was employed for Member States with a derogation with balance of payments problems (Art 143 TFEU) and for the macrofinancial assistance of third countries (Art 212 TFEU).

[87] Council of the EU (n 84) § 23. In that event, the shortfall in the EU budget would be covered through increased contributions by the Member States.

[88] C Fasone, 'EU Budget and Spending Powers' in A Hinarejos and R Schütze (eds), *EU Fiscal Federalism. Past, Present, Future* (Oxford University Press 2023) 239.

[89] L Van Middelaar, 'Investment Politics. A New Capacity to Project Union Action into the Future?', in Weber (n 58) 243–5.

[90] B De Witte, 'Integration Through Funding: The Union's Finances as Policy Instrument', in Weber (n 58) 222–4.

[91] L Diéz Sánchez, 'Why Cohesion Policy is Not about Cohesion' 62 (2025) Common Market Law Review 16–34.

[92] A J Menéndez, 'Neo-Ordo-Liberalism by other means. The economic constitution of the European Union revisited' in L Niglia (ed), *Europe's New Frontiers: Law, Crisis, Governance, Constitutional Transformations* (forthcoming).

[93] F Costamagna, 'The Long March of Competitiveness in the EU Legal Order' 3 (2024) European Law Open 221.

[94] K Dyson and K Featherstone, 'Italy and EMU as a 'Vincolo Esterno': Empowering the Technocrats, Transforming the State' 1 (1996) South European Societies and Politics 272.

[95] Chessa (n 18) 97–102.

[96] Adamski (n 44) 220.

[97] Tamborini, 'Banche centrali e politica monetaria dalla Grande Moderazione alla Grande Crisi' in G Nardozzi and F Silva (eds), *La globalizzazione dopo la crisi* (Brioschi 2013), 19. In the meanwhile, the imbalances that will become evident with the global financial crisis were in the making, Saraceno (n 39) 61–5.

[98] Tamborini (n 97) 20.

Institutional and policy developments within the EU broadly conformed to this framework. For present purposes, it is significant that despite extensive debates on political union and European constitutionalism at the turn of the century, no substantive progress was made toward completing EMU with a significant fiscal capacity. In the run-up to the second and third stages of EMU, national fiscal policies did move toward convergence, notwithstanding the fact that the enforcement of fiscal rules remained weak.[99] Once established, the ECB operated strictly within its mandate,[100] adopting an initial monetary policy strategy[101] that was fully consistent with monetarist tenets[102] and, therefore, with no room for accommodating measures, let alone for any form of monetary financing of public deficits.[103]

As for state intervention, the only notable development was a more permissive stance on state aid. State financing of public services was interpreted with greater flexibility under the treaty framework,[104] and with the *State Aid Action Plan 2005–2009*[105] the Commission refined its approach in two key respects. First, it adopted a more systematic economic methodology in assessing state aid proposals: Member States were required to demonstrate that interventions addressed clear market failures – such as externalities, information asymmetries, coordination problems, or public goods – and that aid was the most suitable instrument for remedying them, given its recognition as a generally suboptimal policy tool.[106] Second, the Commission sought to reorient state aid expenditures toward the objectives of the Lisbon Strategy, particularly innovation, research and development, support for new enterprises, and human capital formation.[107] To facilitate this shift, it exempted certain categories of aid from the notification procedure.[108] Building on the Enabling Regulation,[109] which had already empowered the Commission to waive notification requirements for specific types of aid, this reform streamlined approval processes, accelerated reviews, and reduced administrative burdens, thereby allowing the Commission to concentrate its scrutiny on the most consequential measures.[110]

The global financial crisis abruptly ended this course of political economy and triggered a fundamental reconsideration of key elements of the Maastricht economic constitution. In the face of dramatic world-wide market failures, state activism briefly re-emerged to stabilise capitalism and avert a global depression.[111] The EU participated in this effort: in December 2008, the European Council adopted a *European Economic Recovery Plan*, largely financed through national budgets and supported by the ECB's accommodating monetary policy.[112] Between 2008 and 2011, national governments provided the financial sector with support amounting to approximately

[99]F Amtenbrink, 'The Metamorphosis of European Economic and Monetary Union' in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2014) 726.

[100]N De Boer and J Van't Klooster, 'The ECB, the Courts and the Issue of Democratic Legitimacy after *Weiss*' 57 (2020) Common Market Law Review 1701–3.

[101]ECB, 'A stability-oriented monetary policy strategy for the ESCB', 13 October 1998 <https://www.ecb.europa.eu/press/pr/date/1998/html/pr981013_1.en.html>. The strategy was already updated in 2003, see ECB, 'The ECB's monetary policy strategy', 8 May 2003 <https://www.ecb.europa.eu/press/pr/date/2003/html/pr030508_2.en.html>.

[102]Tuori (n 59) 96.

[103]*Id.,* 124.

[104]Case C-280/00, *Altmark,* ECLI:EU:C:2003:415.

[105]European Commission, 'State Aid Action Plan. Less and better targeted state aid: a roadmap for state aid reform 2005–2009' COM (2005) 107 final.

[106]*Id.*, 6–7.

[107]*Id.*, 8–9.

[108]*Id.*, 10.

[109]Regulation No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid.

[110]European Commission, State Aid Action Plan (n 105) 12–13.

[111]Saraceno (n 39) 79.

[112]European Council, 'Presidency Conclusions 11–12 December 2008' <https://data.consilium.europa.eu/doc/document/ST-17271-2008-INIT/en/pdf>.

EUR 4.5 trillion.[113] However, by the autumn of 2009 stimulus measures were already being phased out and replaced with austerity programmes, premised on the belief that fiscal consolidation would restore economic growth.[114] This misguided policy shift, compounded by the panic following the disclosure of Greece's actual fiscal position, precipitated the sovereign debt crisis. In response, EU institutions doubled down on fiscal discipline, thereby further constraining state intervention.

Admittedly, at the height of the crisis, EU institutions pledged to pursue the long-term completion of a genuine fiscal union.[115] The envisaged roadmap entailed, first, the imposition of tighter budgetary constraints and the implementation of structural reforms at the national level, to be followed by treaty reforms establishing an EU fiscal capacity and common debt instruments. Of this ambitious plan, however, only the enhanced coordination of national budgets materialised. Economic policy coordination was broadened in scope,[116] rendered more entrenched,[117] and endowed with more ambitious fiscal targets.[118] It also became more detailed in prescribing structural reforms[119] and more intrusive in supervisory mechanisms.[120] Simply put: EU economic governance evolved into a form of executive federalism that constrained national democratic policymaking and curtailed state activism even more.[121] The authority of EU law was mobilised in the service of deeper economic convergence,[122] but little progress was made toward the creation of a pan-European democracy or a supranational activist government. The *European Fund for Strategic Investments (EFSI)* (the so-called 'Juncker Plan') stands as the sole significant gesture in that direction.[123] It established an EU guarantee of EUR 16 billion,[124] complemented by an additional EUR 5 billion guarantee from the European Investment Bank, which the latter leveraged to raise EUR 60 billion on capital markets. These resources were deployed to de-risk private investment by covering up to 20 per cent of the capital of selected projects.[125]

Against this backdrop, Member States remained the primary drivers of activist economic policies. In 2012, the Commission reinforced its approach with the *EU State Aid Modernisation (SAM)* initiative, building on the framework established by the *State Aid Action Plan*.[126] Aligning with the broader push for fiscal consolidation, the *SAM* sought to sharpen the focus of public expenditure on growth-oriented policies under the Lisbon Strategy.[127] This required stricter yet more targeted state aid control. Priority was given to aid measures that complemented private investment and incentivised beneficiaries to undertake activities they would not have pursued

[113]Chalmers et al (n 78) 993.

[114]European Council, 'Presidency Conclusions 29–30 October 2009' <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/110889.pdf>. The austerity turn had been anticipated by the introduction of a debt-brake in the German Basic Law in August 2009.

[115]European Commission, 'A blueprint for a deep and genuine economic and monetary union Launching a European Debate' COM (2012) 777 final. The proposal was further elaborated in the Five Presidents' Report of 22 June 2015 'Completing Europe's Economic and Monetary Union'.

[116]Art 9 of the Treaty on Stability Coordination and Governance in the Economic and Monetary Union (TSCG).

[117]Art 3(2) TSCG.

[118]Arts 3(1)(b) and 4 TSCG.

[119]M Dawson, 'The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance' 53 (2015) Journal of Common Market Studies 984–6.

[120]D Chalmers, 'Crisis reconfiguration of the European constitutional state' in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream. Adjusting to European Diversity* (Cambridge University Press 2016) 273.

[121]Crum (n 57) 621.

[122]Chalmers (n 120) 266.

[123]Regulation 2015/1017 on the European Fund for Strategic Investments, the European Investment Advisory Hub.

[124]*Id.*, Art 11.

[125]Crowe (n 82) 54.

[126]European Commission, 'EU State Aid Modernisation (SAM)' COM (2012) 209 final.

[127]*Id.*, 2–3 and 5.

otherwise.[128] The exemptions introduced under the Enabling Regulation were further expanded to cover additional aid categories and consolidated in a General Block Exemption.[129]

However, if EMU survived the global financial crisis and the sovereign debt crisis, it was not due to stricter fiscal discipline, to emergency financial assistance or the intergovernmental rescue plans designed to prevent its dissolution. Rather, it was thanks to the activism of the ECB.

Compared with other central banks, the ECB's transition to activism was rather slow and reluctant. Already at the outset of the global financial crisis central banks had embarked into unconventional monetary policies challenging the monetarist operational framework of central banking.[130] In a departure from their previously reactive mode of operation, central banks had engaged in massive purchase of private and public financial products.[131] Initially, these programmes had been conceived of as emergency measures justified by the need to secure financial stability; later, they were consolidated as the 'new normal' for central banking.[132]

For the ECB, unconventional monetary policies were particularly controversial due to political opposition within and outside its Governing Council and to the legal constraints established at Maastricht. In the early stages of the global financial crisis, the ECB was ready to provide banks with liquidity, purchase private bonds and relax collateral requirements – all of which weakened the commitment to act in accordance with the principle of an open market economy with free competition.[133] However, it was in coping with the sovereign debt crisis that the ECB became most embroiled in an interventionist spiral of unprecedented dimensions.[134]

Initially, with the *Targeted Longer-Term Refinancing Operations (TLTROs)*, the much-needed liquidity was offered to banks, creating the conditions for significant purchases of public bonds.[135] Then, sensing that the pricing of public bonds did not correctly reflect national economic fundamentals,[136] it decided to purchase debt instruments directly in the secondary market with the *Securities Markets Programme (SMP),*[137] a temporary plan aimed at purifying their price from irrational private investor assessments.[138] The same goal inspired the *Outright Monetary Transactions (OMT)*,[139] the programme through which the ECB signalled its determination to act as a conditional lender of last resort not only on behalf of financial actors but also of national governments entered in a macroeconomic adjustment programme or a precautionary programme under the European Stability Mechanism.[140] Finally, once the worst of the crisis had passed, but with European economies still threatened by deflation, the ECB normalised unconventional monetary policies through the *Asset Purchase Programme (APP),* a substantial programme of

[128] *Id.,* 4.

[129] See Commission Regulation No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Council Regulation (EU) 2015/1588 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid.

[130] M Moschella, *Unexpected Revolutionaries. How Central Banks Made and Unmade Economic Orthodoxy* (Cornell University Press 2024) 26.

[131] W Bateman, 'The Law of Monetary Finance under Unconventional Monetary Policy' 41 (2021) Oxford Journal of Legal Studies 933.

[132] M Magatti and L Gherardi, 'Il Quantitative Easing: una politica monetaria d'azzardo morale?' (2015) *Stato e Mercato* 119–120.

[133] Tuori (n 59) 140.

[134] H-W Sinn, 'The ECB's Fiscal Policy' 25 (2018) International Tax and Public Finance 1406.

[135] Tuori (n 59) 140–1.

[136] The assumption was controversial, see discussion in *Id.*, 169–73.

[137] Decision 2010/281/EU of the European Central Bank establishing a securities markets programme.

[138] V Borger, 'The Transformation of the ECB in Sovereign Bond Markets' in T Beukers, D Fromage and G Monti (eds), *The New European Central Bank: Taking Stock and Looking Ahead* (Oxford University Press, 2023) 47.

[139] European Central Bank, *Technical features of Outright Monetary Transactions*, 6 September 2012 <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html>.

[140] Given that admission to an ESM programme requires the unanimous consent of all Eurozone finance ministers (Art 5(6)(f) of the Treaty establishing the European Stability Mechanism), this condition effectively amounted to granting each national government a *de facto* veto over ECB financial support.

purchasing both private and public debt instruments. In particular with the *Public Sector Purchase Programme (PSPP)*,[141] the public bonds section of the *APP*, the ECB became the biggest creditor of Eurozone Member States[142] with the tacit acquiescence of national governments.[143] The policy could be explained as a manifestation of proportionate empowering[144] compensating for the absence of a robust fiscal authority.[145] Yet, as the German constitutional court was ready to highlight,[146] the departure from the narrow role assigned to the central bank by the Treaty of Maastricht was radical.[147] To certify this more interventionist role of the central bank, the interpretation of key treaty provisions had to be adapted to the new economic landscape. This involved reconciling the use of unconventional monetary policy with a treaty framework that was, to say the least, sceptical of central banking activism.[148]

The focal points of this hermeneutic massaging were the scope of monetary policy (and, therefore, the ECB's mandate) and the prohibition of monetary financing. As for the former, the Court of Justice had to decide whether Article 127 TFEU could legitimate the *OMT* and *PSPP* programmes as measures of monetary policy. The Court responded positively by ruling, rather uncontroversially, that the boundaries of EU monetary policy must be construed in the light of its treaty objectives and tools.[149] The standard of review employed by the Court of Justice to accomplish this task was more disputable:[150] rejecting the stricter approach suggested by the German Constitutional Court,[151] the Court of Luxembourg opted for a more deferential criterion on the basis of the technical nature and complexity of monetary policy.[152] This resulted in the recognition of broad discretion to the ECB: not only could the latter approve measures contributing to price stability,[153] but, in an application of the implied powers doctrine, it could also undertake programmes conducive to the adequate transmission and unity of monetary policy.[154] As for the tools, the Court of Justice recognised that, under article 18 of the ESCB Statute, the purchase of public bonds is legitimate.[155] Aware that unconventional monetary policies may indirectly affect national economic policies,[156] the Court ruled that their adoption was subject to the principle of proportionality. Under the favoured standard of review, this would leave the ECB with ample discretion.

With regard to the prohibition of monetary financing, the Court of Justice was called upon to clarify the extent to which Article 18 ESCB could be employed without infringing Article 123 TFEU. The issue was particularly delicate because, unlike under its orthodox application, the programmes at stake involved the purchase of low-rated public bonds, which could be held until

[141]Decision 2020/188 of the European Central Bank on a secondary markets public sector asset purchase programme.

[142]Wilsher (n 74) 274.

[143]Borger (n 138) 37–44.

[144]M Loughlin, 'The Silences of Constitutions' 16 (2018) International Journal of Constitutional Law 934 and A Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) 216–7.

[145]A Hinarejos, 'Fiscal Union by other Means? The ECB and the Courts' in Hinarejos and Schütze (n 88) 264–7.

[146]See, in particular, BVerfG, Order of 14 January 2014 – 2 BvR 2728/13, and BVerfG, Judgment of 5 May 2020 – 2 BvR 859/15.

[147]AL Högenauer and D Howarth, 'The Democratic Deficit and ECB Crisis Monetary Policies' 26 (2019) Maastricht Journal of European and Comparative Law 82.

[148]J van't Klooster, 'Technocratic Keynesianism: A Paradigm Shift without Legislative Change' 27 (2022) New Political Economy 775 termed this approach 'strategic ambiguity'.

[149]See Case C-62/14, *Peter Gauweiler and others*, ECLI:EU:C:2015:400, §§ 42 e 46 and Case C-493/17, *Heinrich Weiss and others*, ECLI:EU:C:2018:1000, § 50.

[150]J Mendes, 'Law and Discretion in Monetary Policy and in the Banking Union: Complexity between High Politics and Administration' 60 (2023) Common Market Law Review 1579.

[151]BVerfG, Order of 14 January 2014, §§ 58–60.

[152]See *Gauweiler*, § 68 and *Weiss*, § 73.

[153]*Weiss*, §§ 56–7.

[154]*Gauweiler*, §§ 47–50.

[155]*Id.*, §§ 53–4, and *Weiss*, §§ 68–9.

[156]*Gauweiler*, §§ 52–9 and *Weiss*, §§ 58, 66–7.

maturity. The Court began by emphasizing that Article 123 TFEU prohibits only the direct purchase of government debt instruments, leaving secondary market operations unaffected.[157] It then introduced two important qualifications on the use of Article 18 ESCB. First, secondary market purchases must not produce effects equivalent to direct purchases.[158] In practice, this required that primary market participants could not be certain that the ECB would subsequently acquire the bonds within a defined timeframe.[159] Second, unconventional monetary policies must not relieve governments of their responsibility to pursue sound budgetary policies.[160] Accordingly, the ECB had to retain the ability to sell debt instruments in cases of unsound national policies.[161] To reinforce fiscal discipline, the Court further noted that ECB interventions should be complemented by strict conditionality attached to financial assistance programmes (as with the *OMT*)[162] or by safeguards embedded in monetary measures – such as limits on the volume of eligible bonds, allocation of purchases according to the ECB capital subscription key, caps on the quantity of bonds acquired per issue and issuer, and stringent creditworthiness criteria (as applied in the *PSPP*).[163]

In sum, the global financial and sovereign debt crises left Europe with an incomplete EMU and an institutional framework persistently sceptical of state activism. Crisis responses largely reinforced the neoliberal paradigm rooted in Maastricht, as reflected in stricter constraints on national fiscal policies and the conditionality attached to financial assistance programmes. The ECB stood out as an exception: the deployment of unconventional monetary policies – first to cope with the emergency and safeguard the euro and later as a normalised tool to counter deflation – necessitated a reconsideration of its role and operational framework. Within this context, activist instruments that had once seemed obsolete were reluctantly rehabilitated.

3. Equalising EU-enabled state activism

In the original plans of the ECB, monetary activism was never meant to become the new normal in the EU political economy. On the contrary, unconventional monetary measures were viewed as temporary responses to crisis conditions, to be phased out once the economy stabilised. By 2018, the *APP* had been terminated, and by early 2019 the only remaining measure was the reinvestment of maturing bonds. The prevailing consensus thus favoured gradual disengagement – though not a full return to the pre-crisis status quo, as the ECB's balance sheet was expected to remain large for years. Yet already in September 2019, faced with weak growth and persistently low inflation, the ECB announced that asset purchases would resume in November.[164] Soon after, the outbreak of the COVID-19 pandemic dragged EU institutions again into activism.

A. Unleashing state activism

As during the height of the global financial crisis, in the most dramatic phases of the pandemic EU institutions once again turned to state interventionism as the last resort to shore up national economies. Vast financial resources were urgently required to reinforce health systems and support firms and workers while large parts of the economy remained frozen. A broad consensus

[157] *Gauweiler*, §§ 94–6.

[158] *Id.*, § 97.

[159] *Id.*, §§ 104–6. Accordingly, the Court specified the requirement of a 'black-out' period and that the purchases by the ECB would not be announced.

[160] *Id.*, § 109.

[161] *Id.*, § 117, and *Weiss*, § 135.

[162] *Gauweiler*, § 116.

[163] *Weiss*, §§ 137–42.

[164] European Central Bank, Monetary policy decisions, 12 September 2019, <https://www.ecb.europa.eu/press/pr/date/2019/html/ecb.mp190912~08de50b4d2.en.html>.

quickly formed around two points. First, state institutions were regarded as the most effective authorities to carry out these rescue efforts. Second, given the rapid deterioration of public and private finances, the necessary funds should be borrowed on financial markets rather than raised through taxation.[165]

EU institutions were called upon to complement Member States' initiatives. This required, first and foremost, a relaxation of key pillars of the EU's economic constitution that constrained state activism. In particular, legal limits on spending and borrowing were swiftly loosened.

State aid was the first policy area in which treaty constraints were relaxed. The Commission introduced soft-law instruments to streamline the authorisation of aid measures aimed at providing liquidity to firms, compensating otherwise healthy undertakings for the damage caused by the outbreak, and ensuring the continuity of economic activity.[166] As a result, compensation for companies in the sectors hardest hit – such as transport, tourism, culture, hospitality, and retail – was allowed under Article 107(2)(b) TFEU. Additional temporary measures were authorised under Article 107(3)(b) TFEU, provided that national governments complied with detailed compatibility conditions.[167] Finally, the scope of the General Block Exemption Regulation was both extended and prolonged.[168]

Next, fiscal constraints were loosened. EU finance ministers[169] decided to trigger the general escape clause of the Stability and Growth Pact.[170] This authorised national governments to temporarily deviate from their adjustment paths toward medium-term fiscal objectives.

Resorting to the flexibility built into the EU's economic constitution highlighted the purportedly contingent nature of the Union's return to state activism. Tellingly, EU institutions refrained from introducing reforms that would permanently shift the system from subdued to full-blown state activism, thereby preserving the Maastricht constitutional baseline. Yet, the mere relaxation of constitutional constraints was insufficient to resolve the crisis. Loosening the rules on state aid and fiscal policy enabled governments to intervene in support of their national economies.[171] Owing to the wide variation in national financial capacities and the lack of substantial equalising interventions by the EU budget, it was foreseeable that disparities within the Eurozone would deepen.[172] In practice, borrowing was not an equally viable option for all governments, as financially distressed Member States faced difficulties in accessing capital markets, especially in the absence of central bank support. It thus fell to the ECB once again to break the deadlock and avert the collapse of the EMU, for the second time in less than a decade, through measures that not only stretched the boundaries of its mandate but also further diluted the prohibition on monetary financing of government debt.

B. Monetary equalisation

Like other central banks in advanced economies, the ECB implemented a series of measures to provide commercial banks with liquidity on favourable terms during the most acute phase of the pandemic, so as to ensure the continued flow of credit to businesses and households. Additional

[165]M Draghi, 'We face a war against coronavirus and must mobilise accordingly', *Financial Times*, 25 March 2020.

[166]European Commission, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (2020/C 91 1/01), §9.

[167]*Id.*, § 19.

[168]See, respectively, regulation 2023/1315 and regulation 2020/972.

[169]Statement of EU Ministers of finance on the Stability and Growth Pact in the light of the Covid-19 crisis <https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/>.

[170]Art 5 (1) of the Regulation 1466/1997 as amended by Regulation 1175/2011.

[171]In 2019 EU Member States spent 0.81 per cent of GDP on state aid (see *State Aid Scoreboard 2020*, 14), while at the peak of the crisis in 2020 this figure rose to 2.39 per cent (*State Aid Scoreboard 2021*, 22).

[172]Consider that even following ECB intervention (on which see below in the text), in 2020, France accounted for 25 per cent of total state aid, Germany 16 per cent, and Spain 8 per cent (see *State Aid Scoreboard 2021*, 34).

measures – including purchases of private-sector securities and a redefinition of the eligibility criteria for collateral used by commercial banks to access ECB credit on advantageous terms – also supported this objective.[173]

However, by far the most important instrument designed to address the economic crisis was the *Pandemic Emergency Purchase Programme (PEPP)*.[174] Through this programme, the ECB committed to purchasing corporate bonds and government debt securities in response to the extraordinary crisis, so as to ensure the survival of companies and workers during a period of severe economic shock.[175]

The programme granted the ECB's Governing Council and Executive Board considerable flexibility to adjust interventions in response to the unpredictable developments of the pandemic.[176] Eurosystem central banks were thus required to purchase securities as necessary and proportionate to address the extraordinary economic and market challenges threatening the ECB's ability to fulfil its mandate.[177] Eligible securities were determined using the same criteria as in the *APP*, covering a wide range of maturities.[178] As under the *PSPP*, the capital key – each member state's share in the ECB's capital – served as the general criterion for allocating purchases; critically, however, compliance could be maintained in a highly flexible manner.[179] No explicit conditionality was imposed, nor were volume limits established for purchases from any single issuer.

The programme involved several clear departures from the requirements set by the Court of Justice regarding compliance with Article 123 TFEU. Remember that for purchases of government bonds in secondary markets to avoid being equivalent to direct financing, a blackout period was required, and the monthly volume of bonds purchased from any given Member State was supposed to remain uncertain. The first requirement was not implemented, and the second was effectively compromised, as the ECB purchased roughly three-quarters of the government bonds issued by Member States during this period.[180] Questions also arose regarding whether adequate safeguards existed to prevent these purchases from undermining sound budgetary discipline. First, the sheer scale of ECB intervention, combined with the relaxation of fiscal rules, could encourage excessive spending. Second, no limits were set on the volume of securities per issuing state, the capital key criterion was applied flexibly, and the credit-quality evaluation criteria were relaxed.

Although the ECB could not openly acknowledge it, its intervention had a significant equalising effect, as it ensured market access for the most indebted Member States.[181] Large-scale asset purchases by the Eurosystem not only exerted downward pressure on interest rates but could also generate monetary income that national central banks – subject to their own legal frameworks and profit-distribution rules – could partially transfer to their respective governments.[182] In principle, the prohibition on monetary financing, and particularly the capital key criterion derived from it, hindered this course of action. This obstacle was effectively circumvented through the flexibility built into the *PEPP*, which allowed the ECB to prioritise the debt instruments of countries in

[173]Tuori (n 59) 240–2.

[174]Decision 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme.

[175]*Id.*, recital 4.

[176]*Id.*, recital 5.

[177]*Id.*, article 4.

[178]*Id.*, article 2.

[179]*Id.*, article 5.

[180]É Monnet, *Balance of Power. Central Banks and the Fate of Democracies* (The University of Chicago Press 2024) 65. The total volume of purchases under the *PEPP* was EUR 1,850 billion.

[181]van't Klooster (n 148) 775–9.

[182]Art 32 ESCB.

greatest need during the most acute phases of the crisis, and subsequently stabilise its balance sheet through more proportional purchases once the worst had passed.[183]

The ECB's activist orientation was further confirmed in its updated monetary policy strategy,[184] formulated in 2021 as a revision of the frameworks established in 1998 and 2003. The document endorsed the paradigm shift in central banking that had emerged during the global financial crisis and the pandemic, while also reinforcing the activist trajectory of EU central banking. It achieved this by redefining the objective of price stability and strengthening the ECB's secondary mandate, particularly with respect to addressing climate change.

First, the ECB reaffirmed its commitment to its Treaty mandate while offering a broader interpretation of it. A key change concerned the definition of price stability: whereas the 2003 strategy targeted an inflation rate below, but close to, 2 per cent, the new strategy committed to achieving the same target in the medium term.[185] This revision recognised the deflationary pressures in the European economy and emphasised a symmetric approach, treating both negative and positive deviations as 'equally undesirable'.[186] It implied not only a more dynamic adjustment of key interest rates but also 'especially forceful or persistent monetary policy measures' to prevent negative deviations from becoming entrenched.[187] In practice, the ECB seemed to acknowledge that unconventional policies could be a standard instrument of monetary policy.[188]

The ECB's strengthened commitment to consider the impact of climate change on price stability and the financial system reinforced the perception that the central bank would maintain an interventionist stance.[189] By this time, the links between monetary policy and climate issues were widely acknowledged, particularly the tension between EU environmental policies and the ECB's credit policy.[190] Under its unconventional monetary policies, the ECB had purchased private securities according to the principle of market neutrality, that is, reflecting the composition of eligible securities.[191] In practice, however, this inadvertently supported environmentally harmful activities. This prompted the ECB to develop a climate-related action plan, aiming to make environmental considerations in its operations both systematic and transparent.[192] Concrete measures were first outlined in the 2021 *Action Plan*[193] and the 2022 *Climate Agenda*.[194] The ECB committed to reinvesting proceeds from previous purchases in issuers with stronger climate performance,[195] limiting the share of high-carbon securities accepted as collateral, and requiring credit rating agencies to give greater weight to climate-related risks. Unsurprisingly, the plan

[183]Between March 2020 and March 2022, the countries with the largest relative *PEPP* overweight were Italy, Spain, Belgium, and Greece, see C Birkholz and F Heinemann, *Allocation is key? Analysis of ECB public sector bond purchases' divergence from the capital key*, SUERF Policy Brief No. 401, August 2022.

[184]European Central Bank, The ECB's monetary policy strategy statement (2021) <https://www.ecb.europa.eu/mopo/strategy/strategy-review/ecb.strategyreview_monpol_strategy_statement.en.html>.

[185]*Id.,* § 5.

[186]*Id.*

[187]*Id.,* § 6.

[188]Monnet (n 180) 64.

[189]European Central Bank (n 184) § 10.

[190]A Steinbach, 'The greening of the Economic and Monetary Union' 59 (2022) Common Market Law Review 332.

[191]M Goldoni, 'Il ruolo della BCE nella costituzione economica europea: dalla neutralità all'efficienza di mercato' LXVIII (2023) *Giurisprudenza Costituzionale* 870–7.

[192]Steinbach (n 190) 340. This move aligned with an overall greening strategy of the EU, see E Chiti, 'Managing the ecological transition of the EU: The European Green Deal as a regulatory process' 59 (2022) Common Market Law Review 30–4.

[193]European Central Bank, *ECB presents action plan to include climate change considerations in its monetary policy strategy*, 8 July 2021 <https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210708_1~f104919225.en.html>.

[194]European Central Bank, *ECB takes further steps to incorporate climate change into its monetary policy operations*, 4 July 2022 <https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220704~4f48a72462.en.html>.

[195]S Dietz, 'Green Monetary Policy Between Market Neutrality and Market Efficiency' 59 (2022) Common Market Law Review 395.

raised questions regarding its compatibility with existing treaties[196] and the prominent role the ECB had assumed in the absence of a robust system of democratic accountability.[197]

C. One-off fiscal equalization

Unlike during the sovereign debt crisis, EU political institutions took an active role in managing the COVID-19 crisis through prominent fiscal policy initiatives. Confronted with the EU's limited fiscal capacity and treaty constraints, policymakers were forced to seek alternative sources of financing and resort to a certain degree of creative legal engineering.[198]

A first step toward modest fiscal equalisation was the *European instrument for temporary Support to mitigate Unemployment Risks in an Emergency (SURE)*.[199] Its objective was to fund national measures aimed at 'reducing the incidence of unemployment and loss of income' resulting from containment policies.[200] The instrument was designed as temporary, complementary,[201] and voluntary.[202] Under *SURE*, the Commission could raise up to EUR 100 billion on international capital markets[203] to finance national job-retention schemes in participating Member States.[204] Financial assistance took the form of loans based on the 'back-to-back' operations model.[205] The servicing of EU debt thus relied primarily on national repayments. To reinforce the credibility of this commitment, Member States irrevocably, unconditionally, and on demand counter-guaranteed the risks borne by the Union.[206] Given the unpredictable course of the pandemic and the voluntary nature of the programme, the allocation of loans among participating Member States remained highly discretionary,[207] subject only to a concentration limit whereby no more than 60 per cent of the total envelope could be granted to the three Member States receiving the largest shares.[208]

The programme supported a range of job-retention schemes covering roughly one-third of total EU employment.[209] Nineteen Member States benefited from the financial assistance, which proved particularly significant for those most severely affected by the pandemic and facing higher borrowing costs. By leveraging the EU's credit rating and the joint guarantees of all Member States, beneficiaries realised considerable interest savings.[210] The equalising character of the

[196]See the discussion in C Zilioli and M Ioannidis, 'Climate Change and the Mandate of the ECB: Potential and Limits of Monetary Contribution to European Green Policies' 59 (2022) Common Market Law Review 363.

[197]S Grünewald and J van't Klooster, 'New Strategy, New Accountability? The European Central Bank and the European Parliament after the Strategy Review' 60 (2023) Common Market Law Review 959.

[198]This approach prompted divergent academic assessments: some scholars regarded it as a legitimate exercise in ordinary treaty interpretation (B De Witte, 'The European Union's Covid -19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' 58 (2021) Common Market Law Review 681), while others criticised it as amounting to a *de facto* treaty amendment circumventing formal revision procedures (P Leino-Sandberg and M Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessment' 59 (2022) Common Market Law Review 434). Ultimately, the dispute appears just an iteration of the broader dialectic between 'project' and 'system' explored by PW Kahn, *Origins of Order. Project and system in the American legal imagination* (Yale University Press 2020).

[199]Council Regulation No 2020/672 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak.

[200]*Id.*, Art 1 and recitals 4-6.

[201]*Id.*, Art 2.

[202]*Id.*, Art 3 (1).

[203]*Id.*, Arts 4–5.

[204]*Id.*, Art 3 (2) and recital 7.

[205]*Id.*, Art 4.

[206]*Id.*, Art 11 (1), (2) and (4). Before calling on national guarantees, the Commission was expected to first examine whether the margin available under the own-resources ceiling for payment appropriations could be drawn upon (Art 11 (5).

[207]Id., Art 6 (4).

[208]Id., Art 9 (1).

[209]Commission Staff Working Document, 'Evaluation – Evaluation of the European Instrument for temporary Support to mitigate Unemployment Risks in an Emergency (SURE)' SWD(2025) 47 final, 23.

[210]Estimated in around EUR 9 billion, *Id.*, 44–5.

programme was evident both in the fact that the three largest beneficiaries – Italy, Spain, and Poland – were among the countries hardest hit by the pandemic, while the non-beneficiary countries largely coincided with those able to raise resources on more favourable terms than the EU.[211]

However, the boldest fiscal response to the COVID-19 crisis was *Next Generation EU (NGEU)*, an unprecedented programme financed through EU borrowing on financial markets to support national recovery and resilience plans.[212] While widely hailed as a potential model for future EU fiscal integration, *NGEU* had limited macroeconomic stabilising effects[213] and was explicitly approved as a one-off instrument,[214] justified by the exceptional circumstances of the pandemic.[215] Nonetheless, even if temporary, the programme required a reconsideration of longstanding Treaty interpretations.[216]

The financial framework of *NGEU* consisted of an envelope of EUR 750 billion,[217] raised on financial markets[218] and allocated to Member States primarily in the form of loans and non-repayable grants.[219] To comply with Article 310 (1) TFEU – which requires that all EU revenue and expenditure appear in the budget – the grant portion of the programme was classified as 'external assigned revenue'.[220] This arrangement allowed borrowing to remain off-budget, thereby avoiding a formal breach of the principle of budgetary balance.[221] Yet, this temporary 'shadow budget'[222] merely deferred fiscal pressures: debt repayments, scheduled between the end of the 2021–2027 Multiannual Financial Framework (MFF) and 2058,[223] are expected to create liabilities in future EU budgets. To reconcile this with Article 310 (4) TFEU, the principle of budgetary discipline received an evolutionary interpretation: the EU could borrow for expenditure provided that the corresponding liabilities were matched by solid assets.[224] Accordingly, funds allocated as loans were to be repaid directly by the beneficiary Member States, while funds disbursed as grants would ultimately be repaid through the EU budget, supported by a temporary and dedicated increase in national contributions.[225]

On the whole, such a complex architecture served distinct equalising goals evident in the distribution criteria enshrined in programme.[226] It is well known that those fundings were earmarked

[211] *Id.*, 15–7.

[212] Council Regulation No 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (EURI), Art 1 (2). The link between the plan and pandemic-related economic impacts remains contested, see Leino-Sandberg, Ruffert (n 198) 446–7.

[213] K Bańkowski et al, 'Four years into NextGenerationEU: what impact on the euro area economy?', ECB Occasional Paper Series No 362.

[214] EURI, Art 1 (2) and recitals 5–6. See also Council Decision 2020/2053 on the system of own resources of the European Union (ORD), recital 14.

[215] EURI, recital 2.

[216] A De Gregorio Merino, 'The Recovery Plan: Solidarity and the Living Constitution' 50 (2021) EU Law Live 2.

[217] EURI, Art 2 (1).

[218] ORD, Art 5 (1)(a).

[219] Initially, this envelope was divided into €338 billion in grants, €385.8 billion in loans, and €83.1 billion for existing EU programmes. Subsequently the grant component was increased by €17.3 billion, financed through the Emissions Trading System (ETS), and by €1.6 billion from the Brexit Adjustment Reserve (BAR).

[220] EURI, Art 3 (1).

[221] Council of the EU (n 82) §§ 33–34. Consider that Art 17 (2) of the Regulation No 2018/1046 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union prohibited the Union from raising loans 'within the framework of the budget'.

[222] De Witte (n 198) 668.

[223] ORD, Art 5 (2).

[224] Council of the EU (n 84) §§ 39–40.

[225] Technically, this was achieved through a temporary increase of the own resources ceilings, see ORD, Art 6. If appropriations proved insufficient, the Commission was authorised, as a last resort, to call on Member States to cover the shortfall (ORD, Arts 9 (4)–(9)).

[226] Not by chance the facility was based on Art 175 (3) TFEU. Recourse to this legal basis and, namely, the evolutionary interpretation of the remit of cohesion policy is also disputed. Compare De Witte (n 194) 658 with P Lindseth,

to pursue a wide variety of policy goals,[227] that the governance of the plan loosely followed the template of cohesion policy,[228] and that disbursements were subject to a complex mix of *ex ante*[229] and *ex post* conditionalities.[230] To our purposes, what is of special significance is that the *NGEU* and, most notably, its grant part, was conceived of as a tool for significant cross-country redistribution.[231] EU legislators were aware that, absent equalising measures, the post-pandemic recovery risked being very uneven in different Member States and that, owing to their different fiscal abilities, divergences between national economies were poised to increase endangering both the single market and territorial cohesion.[232] Therefore, support should target in particular hard hit Member States.[233]

This notion was reflected in the allocation mechanism for non-repayable grants, which considered the economic impact of the pandemic, per capita GDP, and the unemployment rate as key variables alongside population.[234] Admittedly, the extent of cross-country redistribution remains contested. Some scholars argue that the programme is regressive, as it neither fully reflects the pandemic's actual impact nor ensures substantial redistribution from wealthier to poorer Member States.[235] Others note that the final allocation mechanism departed from the Commission's initial proposal by reducing support to lower-income countries, instead favouring larger economies and those with steeper GDP declines, making the system resemble a form of fiscal insurance.[236] A definitive assessment of the redistributive effects of the plan will only be possible once decisions on debt repayment are finalised.[237]

Nevertheless, two preliminary conclusions can already be advanced. First, hard-hit and fiscally constrained countries received the largest allocations of non-repayable grants. For instance, Spain (22.85 per cent) and Italy (20.43 per cent) – reflecting both their economic weight and pandemic toll – topped the list, followed by France (11.08 per cent) and Germany (8.29 per cent), though the latter's share was modest relative to its GDP. Per capita, Greece, Portugal, Spain, and Italy ranked highest, while Eastern European states such as Bulgaria, Croatia, and Slovakia received two to three times more than their German and French counterparts.[238] Second, no substantive legal constraint barred the EU from spending significant amounts of financial resources. Provided national governments unanimously consent and secure revenue, the EU can deliver substantial (albeit not unlimited) grant-based assistance to Member States.[239]

P Leino-Sandberg, 'Crisis, Reinterpretation, and the Rule of Law: Repurposing "Cohesion" as a General EU Spending Power', Paper No 84/2024, Legal Studies Research Paper Series, University of Helsinki.

[227]Regulation No 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility (RRF), Art 3, referring to the green transition; the digital transformation; smart, sustainable and inclusive growth; social and territorial cohesion; health, economic, social and institutional resilience; policies for the next generation.

[228]Financial assistance was provided on the basis of national recovery and resilience plans, but co-financing by national governments was not required and regional authorities were not involved (I owe to Päivi Leino-Sandberg this clarification). See *Id.*, Art 18.

[229]*Id.*, Arts 17 (3) and 18 (4), referring to the country-specific recommendations enacted in the European semester.

[230]*Id.,* Art 10 for macroeconomic conditionality and the regulation No 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget.

[231]RRF, Art 4.

[232]EURI, recital 3.

[233]*Id.*, recital 5.

[234]RRF, Art 11.

[235]Díez Sánchez (n 91) 47.

[236]Z Darvas, 'Having the cake, but slicing it differently: how is the grand EU recovery fund allocated?' <https://www.bruegel.org/blog-post/having-cake-slicing-it-differently-how-grand-eu-recovery-fund-allocated>.

[237]Menéndez (n 92). In July 2025 the Commission has launched the negotiation of the *MFF* 2028–2034 proposing a modest increase of the *MFF* to cover for the repayments of the *NGEU* loans, see G Sorgi, G Faggionato, Y Stasiuk and T Ross, 'Commission proposes EU budget of €1.816 trillion', *Politico.eu,* 16 July 2025.

[238]Percentages calculated on the basis of the Commission note to the Council and the European Parliament, 'RRF: Update of the Maximum Financial Contribution', 30 June 2022 <https://commission.europa.eu/system/files/2023-05/2022%2006%2030%20update%20maximum%20financial%20contribution%20RRF%20grants.pdf>.

[239]S Grund and A Steinbach, 'Debt-Financing the EU' 61 (2024) Common Market Law Review 1004–5.

D. Emergency equalisation?

The response to the Covid-19 pandemic witnessed the emergence of an original and unprecedented form of EU-enabled state activism, characterised by a clear equalising aspiration. EU institutions played a central role not only by loosening legal constraints that normally limit state action but also by implementing a range of monetary and fiscal measures designed, whether explicitly or implicitly, to reduce territorial disparities. Creative interpretations of the treaties have ushered in a mode of intervention that holds substantive and institutional appeal. Substantively, EU equalising programmes may help narrow fiscal disparities among Member States and thus enable forms of activist government that respect their equal status, promote territorial cohesion, and avoid disrupting the single market. Institutionally, EU-enabled state activism seems to offer the model of intervention most consistent with the Union's demoicratic character:[240] rather than developing forms of direct EU rule, for which the Union currently lacks both the democratic credentials and the institutional capacity, EU measures strengthen domestic state institutions, recognising them as the most appropriate venues for revitalising state activism given their deeper democratic embeddedness and greater administrative capacity.

To be sure, concerns remain about the actual implementation of equalising EU-enabled state activism during the pandemic. The modes of governance tested in both monetary and fiscal equalising programmes relied heavily on unaccountable technocratic bodies and executive authorities,[241] and the conditionalities attached to *NGEU* are difficult to square with the principle of conferral and with national democratic self-government.[242] Moreover, the underlying logic – particularly evident in *NGEU* – is that the substantial financial support provided by the Union to Member States with more limited fiscal capacity comes at the price of equally substantial constraints on their discretion over activist policy choices.[243] Nonetheless, even if imperfect, EU-enabled state activism may be understood as a first approximation of a mode of governance in which most activist efforts take place at the level where democratic resources and collective identities are primarily located, while the Union plays a complementary enabling role that is consistent with its current democratic credentials.[244]

Importantly, this equalising dynamic was largely driven by the emergency context. The crisis justified relaxing state aid rules, easing fiscal constraints, allowing the ECB to purchase significant amounts of state debt with temporary deviations from the capital key, and creating key mechanisms of financial assistance. Without an emergency to justify these legal relaxations and exert pressure on political institutions, the EU would remain constrained by its constitutional framework. Indeed, there are limits to what legal creativity can achieve, and several obstacles stand in the way of enabling state activism in ordinary times, chief among them the requirement of unanimity for both the mobilisation of the EU budget and the issuance of EU public debt to finance an EU fiscal policy.[245] Absent a treaty reform, state activism would likely remain inchoate or develop in a highly asymmetric manner.

[240]See F Cheneval and F Schimmelfennig, 'The Case for Demoicracy in the European Union' 51 (2013) Journal of Common Market Studies 337–8, referring to the entrenchment and predominance of national polities, the fragmentation of public spheres and the weakness of the transnational political system.

[241]P Dermine, 'The Planning Method: An Inquiry into the Constitutional Ramifications of a New EU Governance Technique' 61 (2024) Common Market Law Review 959–2.

[242]M Dani, 'Costituzione economica e ordine materiale dell'economia nell'Unione europea: verso un interventismo post-politico?' LXVII (2022) Giurisprudenza Costituzionale 3025–50.

[243]I am grateful to Damian Chalmers and Floris De Witte for this point, which upon closer examination reveals an asymmetry at the core of this form of equalising EU-enabled state activism: whereas member states that rely primarily on their own budgets enjoy broad discretion over the direction of their public investments, those with more limited fiscal capacity are subject to far more intensive supranational oversight and constraint.

[244]For this reason, the resulting mode of governance seems consistent with 'republican federalism', the variety of demoicracy put forward in R Schütze, 'Models of Demoicracy: Some Preliminary Thoughts', EUI Working Paper Law 2020/08, 36–45.

[245]De Witte (n 198) 659.

4. Asymmetric EU-enabled state activism

The expansion of state activism during the pandemic appeared to herald a new phase, with interventionist tools seemingly poised to assume a more prominent role. Although this resurgence of government activism was far from fully entrenched, the implementation of a significant EU-level fiscal initiative such as *NGEU* enabled the ECB to scale back its involvement. This shift, along with the reinstatement of revised legal constraints on national fiscal policy and, to a lesser extent, state aid, made state activism increasingly uneven across the EU. Rather than being equally within reach for all Member States, it can now be pursued primarily by those with sufficient fiscal space and borrowing capacity.

A. ECB disengagement

For the ECB, the post-pandemic phase was marked by decisions designed to gradually realign monetary policy with monetarist orthodoxy. This entailed a normalisation of monetary policy and, in particular, the progressive withdrawal of support for national fiscal policies. In effect, this amounted to retreating from the equalising role that monetary policy had played during the pandemic.

The first step in this direction was the introduction in July 2022 of the *Transmission Protection Instrument*,[246] a new tool that redefined the conditions for ECB interventions to safeguard the transmission mechanism of monetary policy. With this decision, the ECB explicitly signalled its intention to cease using monetary policy as a means of accommodating government expenditures. Indeed, compared with the *PEPP*, the *TPI* could more credibly be presented as a tool to safeguard the effective transmission of monetary policy. It represented an adapted version of the *OMT* since, like the latter, it could be selectively activated to counter unwarranted market turbulence that threatened monetary policy in the euro area.[247] In addition, it permitted the purchase of government bonds on secondary markets without any predefined limits, with eligible securities having maturities between one and ten years. Unlike the *OMT*, however, the activation of the *TPI* was not tied to a macroeconomic adjustment programme or to the involvement of the European Stability Mechanism, thus removing a key obstacle to ECB intervention, namely the opposition of national governments. Moreover, the *TPI* also imposed conditions reinforcing fiscal policy coordination, as it limited ECB support to states facing deteriorating financing conditions that were not attributable to their underlying economic fundamentals.[248]

The second step in the ECB's disengagement strategy was the launch of *Quantitative tightening*,[249] namely the gradual divestment of securities acquired under previous quantitative easing programmes. The purchase of public bonds under *PEPP* had already been discontinued in March 2022[250] and under *APP* in June of the same year.[251] Divestment began in the spring of 2023 and was carried out in a phased manner through the partial reinvestment of maturing securities,

[246]European Central Bank, *The Transmission Protection Instrument,* <https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220721~973e6e7273.en.html>.

[247]And, like the *OMT*, the *TPI* has not yet been used, which suggests that the principal value of both instruments lies more in their very existence than in their actual deployment.

[248]*Id.* In order to qualify for coverage from the central bank, a Member State would have had to meet four cumulative criteria relating to the respect of fiscal rules, to the rules on macroeconomic imbalances, fiscal sustainability criteria for public debt, and to the conditions of recovery and resilience plans.

[249]European Central Bank, *ECB decides on detailed modalities for reducing asset purchase programme holdings* <https://www.ecb.europa.eu/press/pr/date/2023/html/ecb.pr230202~1a4ecbe398.en.html>.

[250]European Central Bank, *Monetary policy decisions,* 16 December 2021, <https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.mp211216~1b6d3a1fd8.en.html>. Maturing securities would be rolled over until mid-2024, see ECB, *Monetary policy decisions,* 14 December 2023 <https://www.ecb.europa.eu/press/pr/date/2023/html/ecb.mp231214~9846e62f62.it.html>.

[251]European Central Bank, *Monetary policy decisions*, 9 June 2022, <https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.mp220609~122666c272.en.html>. Maturing securities would be roll-over until the end of 2024.

with the expectation that excess liquidity would be absorbed by 2029. Even then, however, the pre-global financial crisis conditions would not be restored, as the ECB's balance sheet would remain three times larger than in 2007.

This strategy served multiple purposes.[252] First, the ECB judged that its reserves exceeded what was necessary to steer short-term market rates. In this context, it could reduce its holdings while regaining flexibility for future interventions should the scope for interest rate policy be exhausted again. Second, divestment was intended to correct the distortions created by unconventional monetary policies, since the ECB recognised that its large-scale interventions had inflated the value of financial assets and real estate – developments with adverse implications for both financial stability and social cohesion. Gradual sales would ease these imbalances and contribute to the fight against inflation. Third, the ECB also sought to limit its exposure on financial and political grounds. Within a context still shaped by monetarist orthodoxy, the size of its balance sheet risked reviving fears of fiscal dominance, potentially undermining confidence in monetary policy. In short, while the ECB acknowledged it could not revert to the marginal role it had occupied before the financial crisis, it was equally determined to reassure markets and governments that its turn toward interventionism was only temporary.

Lastly, the opportunity to demonstrate its attachment to monetary orthodoxy was provided by the surge in inflation that emerged in the final stages of the pandemic and was later exacerbated by the shock following the Russian invasion of Ukraine. Already in 2021, looming price increases linked to pandemic-related supply chain disruptions were evident. In response to the first signs of inflation, central banks adopted a cautious stance, waiting to see whether the increases would fade on their own or whether interest rate intervention would be required.[253] The outbreak of war in Ukraine, however, pushed central banks to abandon this wait-and-see approach and to implement aggressive interest rate hikes, even though many analysts contended that the inflationary shock would be temporary.[254] The Federal Reserve was the first to act, and other major central banks soon followed, motivated by concerns over capital flight and excessive currency depreciation. In June 2022, the ECB Governing Council decided a 25-basis-point rate increase, announcing a further rise for September, and left open the prospect of additional hikes if necessary.[255] After almost a decade of near-zero rates, the main refinancing rate began to climb again, rising from 0.25 per cent in July 2022 to 4.50 per cent in September 2023.[256]

Although forced by the Federal Reserve's moves, the ECB's shift in monetary policy represented a radical departure from the pandemic phase. While the pandemic response had been managed with some success through the coordination of monetary, fiscal, and industrial policy, the inflationary shock of 2022 marked a rapid return to monetarism. This response rested on the questionable assumption that the situation resembled the inflationary shocks of the 1970s,[257] and that the raising of interest rates was therefore the most appropriate policy answer. The decision to raise interest rates, however, came with significant drawbacks. Higher rates could dampen inflationary pressures, but they also constrained national governments' access to financial markets, thereby curbing public investment at a moment when it was most needed. Moreover, tighter monetary policy carried the danger of slowing economic activity and pushing unemployment upward. In this sense, the ECB's return to monetarist orthodoxy not only

[252]I Schnabel, *Quantitative Tightening: rationale and market impact*, 2 March 2023 <https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230302~41273ad467.en.html>.

[253]Saraceno (n 39) 110.

[254]*Id,* 111–13.

[255]European Central Bank (n 251).

[256]See Key ECB interest rates, at <https://www.ecb.europa.eu/stats/policy_and_exchange_rates/key_ecb_interest_rates/html/index.en.html>.

[257]The comparison with the immediate post-World War II period could have justified policies in the opposite direction, see B DeLong, 'The First Inflation Problem of the Twenty-First Century' 11 (2023) Review of Keynesian Economics 117.

overlooked the distinctive nature of post-pandemic inflation but also foreclosed the possibility of an economically more nuanced and socially more balanced response.[258]

B. The return of (revised) legal constraints

With the worst phase of the pandemic behind, legal constraints on national fiscal and industrial policies were expected to be reinstated. However, this process was delayed and only partially implemented due to another unforeseen crisis: Russia's invasion of Ukraine. Beyond its geopolitical impact, the war caused severe and widespread economic disruptions, further postponing the full restoration of state aid rules. Building on the lessons of the Covid-19 Temporary Framework, the Commission introduced a new Communication setting out compatibility criteria for approving aid measures.[259] Priority was given to liquidity support for the most severely affected businesses,[260] as well as measures aimed at accelerating the green transition through strategic investments.[261] Consequently, Member States increasingly directed aid toward environmental protection, energy, and technological innovation,[262] with block-exempted measures accounting for 88 per cent of total state aid.[263]

It was, however, through the reform of the rules governing the coordination of economic policies that the EU signalled its aspiration to scale back fiscal activism.[264] For at least a decade, the European fiscal rules under the Stability and Growth Pact had been at the centre of expert debates. Critics highlighted their pro-cyclical effects, excessive complexity, lack of transparency, and overall ineffectiveness.[265] During the suspension of these rules, the European Commission had attempted to address such concerns with a cautious amendment proposal, which already suggested that the priority in Brussels was reducing public spending rather than promoting public investment.[266] In short, rather than a paradigm shift, Europe was moving toward a revival, albeit stripped of its harshest elements, of the pre-pandemic framework.[267] Once the proposal reached the Council, it was amended to become even more restrictive. The approved text thus left little doubt: European institutions were steering toward disengagement from national public investments and a return to fiscal consolidation policies.

Admittedly, on the surface, the new Stability and Growth Pact appeared to pursue more balanced objectives, such as the gradual, realistic, and lasting reduction of debt and the creation of

[258]It has been argued that an alternative path might have been more effective and less damaging. Instead of treating the inflationary surge as a generalised phenomenon to be suppressed through higher borrowing costs, policy could have targeted the specific sectoral drivers of inflation – such as energy markets, supply bottlenecks, and food prices. A mix of sector-specific interventions, coordinated with fiscal and industrial policies, would have addressed the root causes of price increases without undermining investment or employment, see Saraceno (n 39) 128–32.

[259]Under the Article 107(3)(b) exception. See European Commission, 'Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia' (TCTF), 2023/C 101/03, § 57.

[260]TCTF, § 31.

[261]TCTF, § 30.

[262]These aid measures amounted to 0.8 per cent of the EU GDP, see *Scoreboard State Aid 2024*, 28.

[263]*Id.*, 15.

[264]The package includes Regulation No 2024/1263 of the European Parliament and of the Council on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97, Regulation No 2024/1264 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, and Directive (EU) 2024/1265 amending Directive 2011/85/EU on requirements for budgetary frameworks of the Member States.

[265]See, eg, A Benassy-Quéré et al, 'Reconciling risk-sharing with market discipline: a constructive approach to euro area reform', CEPR Policy Insight 91/2018, and O Blanchard, A Leandro and J Zettelmeyer, 'Redesigning EU fiscal rules: From rules to standards', PIIE Working Paper 21/1.

[266]European Commission, 'Communication on orientations for a reform of the EU economic governance framework' COM (2022) 583 final.

[267]In particular, the rule requiring the annual reduction of debt by 1/20 was repealed, on the assumption that in the changed economic context its application, besides being unrealistic, would likely be counterproductive, *Id.*, 7.

fiscal space for countercyclical policies and investment strategies.[268] Yet, beyond this rhetoric, continuity with the previous framework and its inherently restrictive character becomes evident upon closer examination of the substantive and procedural features of the new institutional setup.

First, the European Semester[269] and the Maastricht Treaty's deficit and debt limits were reaffirmed.[270] Within this longstanding institutional framework, a new instrument was introduced as the primary reference point for fiscal policy coordination: the medium-term national structural budget plan.[271] This plan required national governments, the Commission, and the Council to agree on a programme of reforms, investments, and – most importantly – an individualised debt reduction path spanning four years, with the possibility of a seven-year horizon if the government committed to more ambitious reforms.[272] The overarching objective of these paths was to ensure compliance with the Maastricht criteria by the end of the adjustment period,[273] particularly aiming for the deficit to return well below the 3 per cent threshold.[274]

Second, the new Stability Pact established specific rules governing the pace of deficit and debt reduction. To ensure debt sustainability, it required that the debt-to-GDP ratio decline by at least one percentage point per year for states with public debt above 90 per cent of GDP, and by 0.5 percentage points for those with debt between 60 per cent and 90 per cent.[275] Regarding deficits, an annual structural improvement of 0.4 per cent of GDP was mandated, but this could be lowered to 0.25 per cent if the adjustment period was extended.[276]

Thus, while deficits and public debt were – at least on paper – placed on a steady trajectory toward meeting treaty-mandated targets, the approach to public investment remained ambivalent. On one hand, the new Stability and Growth Pact introduced a limited 'golden rule' for EU-cofinanced investments, allowing expenditures fully or partially supported by European funds to be excluded from net spending calculations.[277] On the other hand, it stopped short of establishing a growth-oriented trajectory for public capital spending comparable to the rigid debt-reduction requirements, and it did not extend the 'golden rule' to exempt nationally financed investments.

This framework could be interpreted in two rather opposite ways. On a benign reading, it could reflect a preference for the type of EU-enabled state activism tested during the NGEU era: by shielding only EU-funded investments from fiscal constraints, the rules encouraged Member States to pursue structural reforms while implementing public investments with shared financing and under Brussels' oversight. On a more critical reading, however, the same rules reinforced fiscal discipline, leaving state activism contingent on future intergovernmental agreements on additional EU fundings. Without unanimous consent, such activism would become an asymmetric privilege, accessible only to deep-pocketed countries.

C. Stumbling blocks to a stronger EU fiscal capacity

The economic environment in which European institutions operate today differs sharply from that of the early 1990s, when the Maastricht Treaty was adopted. At the time, fiscal and industrial

[268] Regulation 2024/1263, recitals 5 and 7.

[269] *Id.*, Arts 3–4.

[270] *Id.*, Art 6. The regulation claims to incorporate into Union law the substance of Title III (Fiscal Compact) of the TSCG, recital 42.

[271] *Id.*, Art 1 (2) and Chapter IV.

[272] *Id.*, Arts 13–14.

[273] *Id.*, Art 6.

[274] *Id.*, Art 8 (1), which introduces the goal of a common resilience margin in structural terms of 1.5 per cent of GDP relative to the 3 per cent deficit reference value.

[275] *Id.*, Art 7.

[276] *Id.*, Art 8 (2).

[277] *Id.*, Art 2 (2).

policies were largely dismissed as outdated, while growth was expected to stem from free capital movement and the capacity of national economies to attract the most productive and innovative investment flows. Today, however, European institutions face mounting societal demands for public investment to support decarbonisation, digitalisation, and responses to the geopolitical instability.[278]

On all these fronts, European institutions confront a dual challenge. On the one hand, they must contend with the scale of subsidies and public investment mobilised by the U.S. and China for the green and digital transitions.[279] On the other hand, they remain constrained by the precarious budgetary position of many Member States and by the fiscal limits imposed under the renewed Stability and Growth Pact. The imperative to avoid falling behind global competitors while preventing further divergence within Europe points to a clear policy direction: the development of EU-level fiscal and industrial interventions.[280] This need is further underscored by requirements for macroeconomic stabilisation and by renewed, albeit still largely rhetorical, aspiration to financing European public goods.[281] However, significant legal and political obstacles stand in the way of the transition from emergency fiscal measures to a strategically oriented fiscal policy.[282]

From a legal standpoint, it is important to recall not only that the approval of *NGEU* was explicitly framed as exceptional, but also that this exceptionality proved decisive in the German Federal Constitutional Court's ruling on it.[283] The Court held that the extraordinary nature of *NGEU* was essential in satisfying certain EU law requirements, especially in preventing the tenuous link between recovery plan and the pandemic emergency from amounting to a manifest violation of the treaties.[284] While Karlsruhe ultimately validated the key legal innovations underpinning *NGEU*, it also set out substantive guardrails that, in the absence of guidance from the European Court of Justice,[285] cast a shadow over new EU fiscal initiatives. Notably, the Court accepted a reinterpretation of the balanced budget rule to authorise EU borrowing: although the treaties do not explicitly confer such powers, they may be read as permitting them by analogy to national fiscal regimes.[286] The Court also endorsed the use of 'shadow budgets' to finance limited-duration spending programs, and even the recourse for spending purposes to legal bases other than Article 122 TFEU's emergency clause.[287] However, the Court conditioned the viability of this solution on strict requirements: (1) borrowing authorisation must accrue exclusively to the EU; (2) the funds raised must be used solely to pursue objectives within EU competences;

[278]K R McNamara, 'Transforming Europe? The EU's Industrial Policy and Geopolitical Turn' 31 (2023) Journal of European Public Policy 2376–7.

[279]Barbieri Góes, Viesti (n 1) 357–9.

[280]The European Commission initially estimated the annual funding required for the green transition at €260 billion (1.5 per cent of the EU GDP in 2018), see European Commission (n 2) 15. More recent assessments (see M Draghi, 'The Future of European Competitiveness. A Competitiveness Strategy for Europe' <https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en> 59) have raised this figure to €750–800 billion per year (4.4–4.7 per cent of EU GDP), an estimate the Commission itself now appears to endorse, see European Commission (n 4) 20.

[281]M Buti, A Coloccia and M Messori, 'European Public Goods' in F Cerniglia, F Saraceno and A Watt (eds), *Financing Investments in Times of High Public Debt* (European Public Investment Outlook 2023) 191.

[282]Van Middelaar (n 89) 245–50.

[283]BVerfG, judgment of 6 December 2022 – 2 BvR 547/21 (ORD Judgment).

[284]*Id.*, § 176 and §§ 186–188. On this point, see also the dissenting opinion of Justice Müller, §§ 17–25.

[285]Unlike in *Gauweiler* and *Weiss*, on this occasion the Federal Constitutional Court omitted to refer a preliminary ruling to the Court of Justice. The result of the omission was the pre-emption of the Court's interpretive role, P Dermine and A Bobić, 'Of Winners and Losers: A Commentary of the Bundesverfassungsgericht ORD Judgment of 6 December 2022' 20 (2024) European Constitutional Law Review 172 and 179.

[286]ORD Judgment, § 150–5.

[287]Grund, Steinbach (n 239) 1006–7.

(3) borrowing must be subject to temporal and quantitative limits; and (4) the loan volume cannot exceed the Union's total revenue from own resources.[288]

The Federal Constitutional Court's ruling foreshadows the possibility of deploying future financial instruments similar to *NGEU*, but only within qualitative and quantitative limits that may weaken their effectiveness.[289] Beyond these substantive constraints, the creation of new fiscal policy programs remains exposed to veto risks: whether through fresh borrowing mechanisms or new revenue streams for the EU budget, additional own resources require unanimous approval and national ratifications. While national governments succeeded in meeting this requirement during the Covid-19 emergency, replicating such consensus under less urgent and cogent circumstances appears far less likely.[290] As a result, the prospects for an EU-level fiscal policy remain tied to the possibility – yet for now an improbable one – of a new intergovernmental agreement.[291]

Both the Federal Constitutional Court's decision and a sober reading of the treaties should therefore temper the optimism of those who see *NGEU* as heralding a new era of EU fiscal autonomy. Institutional creativity and expansive treaty interpretation may stretch the existing constitutional framework, but hard legal constraints – above all the procedural requirements prescribed by Article 311 TFEU – remain immovable barriers. Mounting geopolitical and economic pressures undoubtedly push towards deeper fiscal integration, yet equally powerful countervailing forces – whether through active resistance or passive inertia – continue to block substantial progress. Indeed, since the pandemic, no major experiment in EU fiscal policy has emerged. Instead, we have seen only low-profile measures, such as modest increases and reallocations within *NGEU* resources.[292]

Let us be clear: procedural hurdles are only the tip of a far deeper structural iceberg. The stringent requirements of Article 311 TFEU for establishing new EU revenue streams reveal a deeper flaw in EMU's original design, namely the construction of an incomplete (or asymmetrical) monetary union. This institutional choice reflected an often-overlooked reality that continues to shape debates on EMU's future: neither at Maastricht nor in today's EMU has there ever been a supranational political community or political system capable of generating the solidarity needed to legitimise a genuine and sufficiently robust European fiscal policy.[293]

Against this backdrop, it is hardly surprising that the Commission's flagship initiative, the *Competitiveness Compass*,[294] falls short on the crucial issue of funding. While the document acknowledges that achieving its objectives would require investment increases of around five percentage points of EU GDP per year, it places its main bet on mobilising private capital

[288]ORD Judgment, § 149.

[289]Particularly the reference to time limits and maximum volume could be an obstacle. As much as the Federal Constitutional Court has been particularly benevolent in applying the latter criterion – agreeing to measure the size of indebtedness against the Multiannual Financial Framework rather than the Union's annual budget (see Id., §§ 193–200) – the European institutions will find themselves constantly having to calibrate the scale of their indebtedness with the overall size of the EU budget.

[290]Howarth, Schild (n 56) 222.

[291]Moreover, a rather ominous passage in the Federal Constitutional Tribunal's ruling suggests that a treaty amendment removing the national veto on this matter could infringe upon national constitutional identity, ORD Judgment, § 166.

[292]The loans envelope of *NGEU* was increased and repurposed to cope with the economic consequences of the Russian invasion of Ukraine. Accordingly, the recovery and resilience plans were endowed with a 'REPower Chapter' designed to boost measures for the green transition and diversification of energy supplies and for the support of firms and vulnerable households affected by energy price increases, Regulation No 2023/435 amending Regulation No 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations No 1303/2013, 2021/1060 and 2021/1755, and Directive 2003/87/EC.

[293]P Leino-Sandberg, 'Constitutional Imaginaries of Solidarity: Framing Fiscal Integration Post-NGEU' in Weber (n 58) 187.

[294]European Commission (n 4).

through a 'Savings and Investment Union'.[295] In this vision, EU fiscal policy plays only a marginal role: the next *MFF* will see a modest increase[296] and the available resources will be redirected to a 'European Competitiveness Fund' aimed primarily at de-risking private investment in strategic technologies and manufacturing.[297] Yet, one can doubt that this strategy alone will mobilise the required scale of investment. If the EU risks falling short of its competitiveness agenda, it will likely have no choice but to resort to a new round of monetary equalisation or rely on asymmetric state activism.[298] In this regard, the Commission appears committed to steering national expenditures towards shared EU goals in overt disregard of regional disparities, building on instruments developed during earlier crises. Still, such efforts will do little to prevent distortions in the internal market and the widening of regional inequalities.[299]

D. Industrialization through rearmament

The indirect bias of the existing treaty framework toward asymmetric EU-enabled state activism is particularly evident in the field of investments for security and defence. Confronted with the twin pressures of Russian militarism and declining U.S. reliability,[300] both EU institutions and national governments have shown growing determination to strengthen deterrence capabilities.[301] As a result, security and defence expenditures are set to rise to unprecedented levels, with clear repercussions for both industrial and fiscal policy.[302]

Despite the European Commission's grand rhetoric,[303] the EU's adoption of a more bellicist posture has not triggered a qualitative or quantitative leap toward a federal structure grounded in both economic and security concerns.[304] In the Union's new strategic blueprint – labelled *Readiness 2030* – security imperatives more modestly drive the reorientation of the existing institutional framework rather than its transcendence.[305] Instead of creating a common supranational defence or preparing the EU for high-intensity warfare through structural reform of

[295] *Id.*, 20.

[296] The Commission has proposed an increase from 1.1 to 1.26 per cent of the EU GNI to repay the post-Covid common debt. For this purpose, the Commission will propose three new taxes targeting electric waste, tobacco products and companies in the EU with turnover exceeding € 50 million, see <https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/eu-budget-2028-2034_en>.

[297] *Id.*, 21. This commitment is reiterated and articulated in European Commission, 'The Clean Industrial Deal: A joint roadmap for competitiveness and decarbonisation' COM (2025) 85 final, 9–12. For a critique of de-risking as a strategy reinforcing rather than transcending the neoliberal inclination of the EU project, see Menéndez (n 92).

[298] See European Commission, 'Framework for State Aid measures to support the Clean Industrial Deal', C/2025/3602, §§ 3, 7, and 18. The same approach emerges in European Commission, 'Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, 2021/C 528/02, §§ 15, 19, and 30.

[299] Barbieri Góes, Viesti (n 1) 360–1.

[300] Common Market Law Review, 'Editorial Comments: ReArm Europe/Readiness 2030: European Defence in Times of War' 62 (2025) Common Market Law Review 1–12.

[301] Special meeting of the European Council, 6 March 2025, Conclusions <https://www.consilium.europa.eu/media/tzkadtec/20250306-european-council-conclusions-en.pdf>. See also NATO Heads of State and Government, The Hague Summit Declaration, 25 June 2025 <https://www.nato.int/cps/en/natohq/official_texts_236705.htm>, in which NATO members have committed to defence and security investments for an amount of 5 per cent of their GDP.

[302] The role of defence as an important driver for competitiveness and innovation is highlighted in European Commission (n 4) 15. Already the Versailles Declaration (n 3) envisaged that the Russian invasion of Ukraine prompted a new growth and investment model aligned with the geopolitical situation.

[303] European Commission (n 5). On the hiatus between the aspiration to establish a true European defence and security union and the actual measures envisaged in the plan approved by the European Council see M Dani and AJ Menéndez, 'The EU's (not so) Cheap Talk on Defence' 4 (2025) European Law Open 425–40.

[304] Kelemen, McNamara (n 55) 964.

[305] P Genschel, 'Bellicist Integration? The War in Ukraine, the European Union and Core State Powers' 29 (2022) Journal of European Public Policy 1885–900.

the defence governance, the initiative focuses primarily on stimulating national military spending with only limited equalisation measures. In short, rather than leveraging defence as a catalyst for deeper political integration, the EU appears to be treating rearmament as a proving ground for asymmetric state activism.

At first glance, *Readiness 2030* appears to follow the familiar blueprint of the EU's Covid-19 response, promoting an equalising form of EU-enabled activism in a context of emergency. Much like during the pandemic, the plan prioritises unleashing national fiscal policy, although this time only to bolster defence investments. To achieve this, fiscal rules are selectively relaxed, allowing member states to trigger national escape clauses in a coordinated fashion for security purposes.[306] Beyond fiscal flexibility, the EU offers financial assistance to reduce disparities in spending capacity and enhance interoperability, notably through joint procurement initiatives.

Upon closer examination, the equalising potential of *Readiness 2030* proves largely illusory. While the plan encourages national governments to finance defence spending through market borrowing, it critically lacks ECB backing – a safeguard that would mitigate borrowing costs for highly indebted states. Unsurprisingly, this omission has created preconditions for further divergence. On the one hand, many fiscally constrained Member States have refrained from profiting from the national escape clause.[307] On the other hand, several countries have tremendously accelerated their activist plans. Germany, in particular, has moved decisively in that direction. Its recent constitutional amendment permanently exempts defence expenditures exceeding 1 per cent of GDP from debt-brake rules.[308] Additionally, it creates a EUR 500 billion special fund for infrastructure and climate neutrality, valid for 12 years.[309] This move not only entrenches Germany's fiscal dominance but also widens the gap with other Member States, which lack comparable fiscal room.

Aware of this issue, EU institutions have sought to introduce an element of equalisation into what remains a deeply asymmetrical industrial and fiscal framework. Building on the *SURE* experience, the Council recently approved *Security Action For Europe (SAFE)*, a new temporary and emergency instrument grounded in Article 122 TFEU.[310] Like *Readiness 2030*, *SAFE* aims to strengthen the European defence technological and industrial base. Its contribution comes via a EUR 150 billion fund,[311] borrowed by the Commission on capital markets,[312] and used to finance loans to national governments.[313] These loans will be available until the end of 2030[314] and must

[306]Regulation 2024/1263, Art 26. The European Commission has acknowledged that the conditions for activating the general escape clause (Art 25) are not yet met, but under this framework, national governments can temporarily exceed deficit limits to increase defence spending. Specifically, the Council has authorised deviations of up to 1.5 per cent of GDP from their medium-term structural expenditure paths for a four-year period starting in 2025, see European Commission, 'Accommodating increased defence expenditure within the Stability and Growth Pact' C (2025) 2000 final, 2–6.

[307]So far, Belgium, Bulgaria, Czechia, Denmark, Germany, Estonia, Greece, Croatia, Latvia, Lithuania, Hungary, Poland, Portugal, Slovenia, Slovakia, and Finland have decided to request the activation of the clause, see Council of the EU, 'Coordinated activation of the National Escape Clause' <https://www.consilium.europa.eu/en/press/press-releases/2025/04/30/coordinated-activation-of-the-national-escape-clause/>.

[308]See the amended versions of Arts 109 (3) and 115 (2) of the German Basic Law. On the controversial process leading to the amendment, see AJ Menéndez, 'Editorial: Rewriting the German Fundamental Law in a Blitz' 3 (2024) European Law Open 687–702.

[309]See the amended version of Art 143h of the German Basic Law. The compatibility of this constitutional amendment with the revised Stability and Growth Pact is debated, see A Steinbach, J Zettelmeyer, 'Germany's fiscal rules dilemma', Bruegel, 24 April 2025 <https://www.bruegel.org/analysis/germanys-fiscal-rules-dilemma>.

[310]Regulation No 2025/1106 establishing the Security Action for Europe (SAFE) through the Reinforcement of the European Defence Industry Instrument.

[311]*Id.* Art 6.

[312]*Id.* Art 9.

[313]*Id.* Art 5.

[314]*Id.* Art 12.

be repaid within up to 45 years.[315] As with *SURE*, financial assistance in *SAFE* is both complementary[316] and voluntary.[317] *SAFE* is designed to address gaps, inefficiencies, and fragmentation within European defence systems,[318] thereby enhancing interoperability and interchangeability across the EU. This objective is pursued primarily through common procurement.[319]

Beyond responding to long-standing defence concerns, *SAFE* carries significant industrial and fiscal implications. On one hand, the financial assistance is explicitly structured to benefit contractors, infrastructure, and products predominantly based in, or originating from, EU member states, EEA EFTA states or Ukraine.[320] On the other hand, it is likely – much as in the case of *SURE* – that fiscally constrained countries will be the main beneficiaries, though some adjustment may be made in favour of Member States facing heightened military threats.[321] Nevertheless, *SAFE* on its own appears insufficient to correct the EU's uneven defence and industrial landscape. Compared with national initiatives, its funding is too modest to create a level playing field. Moreover, the reliance on loans subject to uncertain interest rates and allocation rules does little to address entrenched structural disparities.[322]

5. Concluding remarks

This article has traced the trajectory of state activism in the EU and examined the institutional implications of its recent resurgence. It has argued that, within the current constitutional landscape, there is a strong demoicratic case for implementing activist policies at the national level, with the EU playing a key enabling role by relaxing legal constraints on state intervention and providing financial support for industrial and fiscal policies. Yet, within the existing treaty framework, state activism can take either an equalising or an asymmetric form. Crucially, the choice between these alternatives does not stem primarily from democratic deliberation or political judgement but rather from treaty constraints conceived at a time of subdued state interventionism. As a result, equalising EU-enabled state activism is possible only in times of emergency, when EU institutions may temporarily loosen constitutional limits on national fiscal and industrial policy, adopt unconventional monetary measures, and muster the political consensus needed to approve meaningful fiscal programmes. In the absence of such emergencies, however, only the asymmetric form of state activism remains available – a mode of governance that poses serious risks to the integrity of the single market and to territorial cohesion, and whose sustainability ultimately depends on the uncertain spill-over effects of fiscal policy in deep-pocketed countries on countries with reduced fiscal capacity.

In describing the shift from government interventionism to the regulatory state, Giandomenico Majone observed that 'the institutional and intellectual legacy of the interventionist state is a major impediment to the speedy adjustment of governance structures to the new strategies'.[323] Ironically, the same can now be said of the struggle to revive state activism in the face of the

[315] *Id.* Art 10 (2).
[316] *Id.* Art 3.
[317] *Id.* Art 4.
[318] *Id.* recital 15.
[319] *Id.* Art 4 (1).
[320] *Id.* Art 16.
[321] *Id.* recital 8. Expression of interests for a total of €127 billion have been submitted to the Commission by the governments of Belgium, Bulgaria, Czechia, Estonia, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Hungary, Poland, Portugal, Romania, Slovakia and Finland, see European Commission, '18 initial Member States request at least €127 billion under the SAFE defence instrument' <https://defence-industry-space.ec.europa.eu/18-initial-member-states-request-least-eu127-billion-under-safe-defence-instrument-2025-07-30_en>.
[322] The Commission retains broad discretion in the distribution of the loans, being subject only to the principles of equal treatment, solidarity, proportionality and transparency, see *Id.* Art 8 (5).
[323] Majone (n 35) 163.

entrenched legacy of the regulatory state. Unlike in the 1990s, however, this shift cannot be orchestrated from Brussels in a top-down fashion only through technocratic arrangements and creative legal engineering.[324] While reforms to the EU's institutional architecture and economic policy framework can readily be envisaged to place state activism on firmer footing and to allow the Union to realise its equalising potential, far more difficult to secure is the parallel deepening of political integration that such a transformation would require.

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[324]Leino-Sandberg (n 293) 182. For a more general call to legitimise democratically EU authority, see S Garben, 'The Constitutionalization of European Integration as a Single, Protracted 'Constitutional Moment' Towards the Establishment of EU Final Authority' in M Dani, M Goldoni and AJ Menéndez (eds), *The Legitimacy of European Constitutional Orders. A Comparative Inquiry* (Edvard Elgar Publishing 2024) 259–81.

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