

Improving urgency procedures and crisis preparedness within the European Parliament and EU institutions

Rationales for democratic, efficient and effective governance under emergency rule



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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCD Committee, analyses the obstacles to democratic, transparent and efficient decision-making in urgency situations at the EU level, with a specific focus on the European Parliament. It provides a systematic overview of Parliament's role and functions as well as the interinstitutional cooperation during recent crisis situations and concludes with proposals on how to improve the existing set-up and Parliament's internal procedures.

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LIST OF ABBREVIATIONS

ACTA	Anti-Counterfeiting Trade Agreement,
AFCO	Committee on Constitutional Affairs
AFET	Committee on Foreign Affairs
AGRI	Agriculture and Rural Development Committee
BECA	Special Committee on Beating Cancer
BLM-IIA	Inter-institutional agreement (IIA) on Better Law-Making
BSE	Bovine Spongiform Encephalopathy ("mad cow disease")
BSG	Brexit Steering Group
BUDG	Committee on Budgets
CAI	Comprehensive Agreement on Investment (EU-PRC)
CAP	Common Agricultural Policy
CCC	Conference of Committee Chairs
CCP	Common Commercial Policy
CF	Cohesion Fund
CFP	Common Fisheries Policy
CMO	Common market organisation
CoE	Council of Europe
CONT	Committee on Budgetary Control
CoP	Conference of Presidents
CoR	Committee of the Regions
COREPER	Comité des représentants permanents / Committee of the Permanent Representatives of the Governments of the Member States to the European Union
COSAC	Conférence des Organes Spécialisés dans les Affaires de l'Union européenne / Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union

COVID-19	Coronavirus disease 2019
CPM	Union Civil Protection Mechanism
CRII	Coronavirus Response Investment Initiative
CULT	Culture and Education Committee
ECB	European Central Bank
ECDC	European Centre for Disease Prevention and Control
ECHR	European Convention on Human Rights
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECON	Committee on Economic and Monetary Affairs
ECR	European Conservatives and Reformists
ECSC	European Coal and Steel Community
EEC	European Economic Community
EERC	European Emergency Response Capacity
EESC	European Economic and Social Committee
EFSF	European Financial Stability Facility
EFSM	European Financial Stabilisation Mechanism
EMA	European Medicines Agency
EMFF	European Fund for Maritime Affairs and Fisheries
EMPL	Committee on Employment and Social Affairs
EMU	European Monetary Union
ENVI	Committee on the Environment, Public Health and Food Safety
EPP	Group of the European People's Party (Christian Democrats)
ERCC	Emergency Response Coordination Centre

ERDF	Regional Development Fund
ESCB	European System of Central Banks
ESF	European Social Fund
ESM	European Stability Mechanism
EU	European Union
EUCFR	European Charter on Fundamental Rights
FA-IIA	Framework Agreement on relations between the European Parliament and the European Commission
FAO	Food and Agriculture Organisation of the United Nations
FEAD	Fund for European Aid to the Most Deprived
FEMM	Committee on Women's Rights and Gender Equality
GDP	Gross Domestic Product
GG	Grundgesetz (Constitution of the Federal Republic of Germany)
GM	Genetically-modified
GREENS	Group of the Greens/European Free Alliance
GUE/NGL	Group of the European United Left/Nordic Green Left
HERA	European Health Emergency Preparedness and Response Authority
ID	Identity and Democracy
i.e.	id est
ICER	Innsbruck Center for European Research
ILO	International Labour Organisation
IMCO	Committee on the Internal Market and Consumer Protection
IPCR	Integrated Political Crisis Response
IFI	International Fund for Ireland
IIA	Interinstitutional Agreement

INI	Non-legislative Initiative report/resolution
INL	Legislative initiative report/resolution
INTA	Committee on International Trade
IPC CFSP / CSDP	Inter-Parliamentary Conference for the Common Foreign and Security Policy and the Common Security and Defence Policy
IPC SECG	Interparliamentary Conference on Stability, Economic Coordination and Governance in the European Union
JPSG	Joint Parliamentary Scrutiny Group
JURI	Committee on Legal Affairs
LIBE	Committee on Civil Liberties, Justice and Home Affairs
MEP	Member of the European Parliament
MFF	Multiannual financial framework
NGEU	Next Generation EU
OLP	Ordinary Legislative Procedure
PACE	Parliamentary Assembly of the Council of Europe
PECH	Committee on Fisheries
PHEIC	Public Health Emergency of International Concern
PNP	Protocol on the role of national Parliaments
PSP	Protocol on the application of the principles of subsidiarity and proportionality
REGI	Committee on Regional Development
RENEW	Renew Europe group
RoP	Rules of Procedure
S&D	Group of the Progressive Alliance of Socialists and Democrats in the European Parliament
SEA	Single European Act
SECG	Conference on Stability, Economic Coordination and Governance in the European Union

SME	Small and medium-sized enterprises
SP	Six-Pack
URE	Support to mitigate Unemployment Risks in an Emergency
SWIFT	Society for Worldwide Interbank Financial Telecommunication
TCA	Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPC	Trade Policy Committee (Council) - Article 207 Committee
TFSA	Temporary Framework for State Aid measures
TRAN	Committee on Transport and Tourism
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
UKCG	United Kingdom Coordination Group
WHO	World Health Organization

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EXECUTIVE SUMMARY

Background and aim of the study

Unpredictable crises that challenge public safety and health or the stability of a society's socio-economic foundations put the pillars of parliamentary democracy to the test. As the management of such crises increases the need to take rapid decisions, some of which significantly encroach on fundamental and civil rights, political systems resort to instruments and procedures of emergency legislation that expand the decision-making rights of governments at the expense of those of parliaments. Most recently, the COVID-19 pandemic has forced countries around the world to confront a novel and dynamically changing health threat. States and confederations of states such as the European Union (EU) have had to make decisions, often without fully understanding the short-, medium-, and longer-term implications of the various options. The EU's response options were extremely limited: both the Member States and the European Commission had long underestimated the danger and virulence of COVID-19 infection. In the absence of clearly defined procedures under the EU's competence framework, the member states resorted to their own emergency instruments.

The role of Parliament has often been constrained by emergencies and other situations necessitating urgent reaction, relating to, for example, the economic and financial crisis of 2009–2012, the so-called migratory crisis of 2015–2016, the conclusion of the Multiannual Financial Framework (MFF), the provisional application of international agreements, and most recently the COVID-19 pandemic. In a number of situations, Parliament has also had to adapt its decision-making procedures in order to respond to an emergency or urgency. These adaptations included curtailing certain procedures, restricting the role and the fulfilment of the parliamentary mandate of its members, the involvement of parliamentary committees and reducing the time required for scrutiny. COVID-19 related legislative measures were typically dealt with under Rule 163 (urgency procedure) of Parliament's Rule of Procedure (RoP).

In order to draw lessons from the management, both within Parliament and between the EU Institutions, of past urgency situations, this study analyses obstacles preventing democratic, transparent, prompt and efficient decision-making in Parliament and the EU Institutions and looks for solutions to improve the situation. More specifically, we reflect on the situations in which Parliament has been obliged to take a decision under exceptional circumstances or within very short deadlines.

We analyse whether Parliament's internal processes and procedures need to be reviewed and enhanced in order to cope efficiently with such circumstances, while preserving Parliament's fundamental role as a legislative, budgetary and political control authority on the one hand and safeguarding its representation and interaction, policy-making, elective, and system-development functions on the other.

To examine how the internal capacity of Parliament could be improved to properly handle files in situations of urgency under the current constitutional set-up, we look into the current procedures and practices within Parliament at Committee and Plenary level. Moreover, we explore specific situations that can be identified as requiring urgent action on the side of Parliament. In this context, we consider, in particular, the following:

- Parliament's legislative powers and its policy-making function;
- Scrutiny powers and Parliament's control function;
- Appointment powers and Parliament's elective function;
- Para-constitutional powers and Parliament's system-development function; and

- The deliberative powers of Parliament and its interaction and/or representation function.

The study also reflects on whether specific procedures should be put in place in order to ensure proper scrutiny of the files under consideration; in this regard, we analyse whether **good practices on how to cope with emergency situations** can be identified at the level of **national parliaments** and **federal, confederal as well as international assemblies**.

With a view to Parliament's role within the larger, inter-institutional fabric of governance, we examine how to enhance the **cooperation between EU institutions** in times of urgency. We provide for a systematic overview of the current set-up and on how the cooperation between EU institutions has worked in recent emergency situations, such as the COVID-19 crisis, and analyse how such cooperation can be enhanced within the existing legal and procedural framework, in particular in the context of the Framework Agreement on relations between the European Parliament and the European Commission (FA-IIA), the inter-institutional agreement (IIA) on Better Law-Making (BLM-IIA), the IIA on Interinstitutional agreement on budgetary discipline, cooperation, sound financial management and own resources and the IIA between the European Parliament and the European Central Bank (ECB) on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism.

Finally, we turn to reflect on whether it would be conceivable to **develop a separate (original) emergency mechanism for Parliament and the other EU institutions** in order to be able to act effectively in emergency situations.

Conclusions and recommendations

The study shows that even under conditions of emergency, Parliament is able to perform its core functions efficiently. In doing so, there are non-negligible costs in terms of democratic quality and transparency.

Parliament was willing and able to react quickly and effectively to the challenges of the COVID-19 pandemic. In particular, in the exercise of its legislative functions, Parliament has shown that, **with the help of new digital procedures and voting arrangements**, it is able **to maintain its policy-making function** throughout all stages of the decision-making cycle. As we have seen in the MFF negotiations or in the debates on international agreements, Parliament demonstrated that it is able **to operate as a fully legitimate co-legislator** even under the more difficult conditions of the COVID-19 crisis.

Nevertheless, **the political costs of the special procedures** introduced should not be underestimated: **Virtually organised committee and plenary debates** are characterised by considerable sterility, as the usually observable, **spontaneous or informal role profiles of MEPs are reduced** to a minimum.

If the activation of an urgency procedure already leads to **considerable restrictions with regard to the possibilities of introducing and negotiating amendments**, the conversion to virtual deliberation and decision formats represents an additional constraint. Normally, MEPs consider and discuss proposed amendments to reports, resolutions and legislative measures in a free, cross-party exchange. In this process, compromise motions to combine individually tabled amendments are negotiated – often in informal exchanges and with the intensive participation of the parliamentary group staff, committee secretariats and parliamentary assistants. In the virtual consultation format, these possibilities are also given with the help of videoconferences arranged at short notice. However,

the imposed timing and quantity restrictions under the conditions of the state of emergency **prevent an open, informal exchange.**

It is precisely this **free, not strictly timetabled exchange**, however, that represents **an essential aspect** of the visualisation **of the parliamentary interaction and representation** function. Spontaneous responsiveness and informality make an essential contribution to MEPs being able to take the floor directly, unplanned and unpredictably in order to demand accountability from their counterparts.

Informational asymmetries are particularly striking **in virtual environments**: If the political decision-makers – in our case the **MEPs** – have to deliberate and decide physically detached from their assisting institutions (committee secretariats, parliamentary group staff, personal assistants) that are normally within reach, they **have less capacity to obtain negotiating information** than is the case with the Council or the Commission. After all, these two institutions also normally practise written or other distance-related procedures.

We identify advantages and drawbacks of the practice of virtual deliberation, decision-making and voting procedures. **The tested virtual procedures are suitable for the post-pandemic time**, in order to facilitate the participation of MEPs and staff who are prevented by force majeure from carrying out their duties at the places of meeting of Parliament. In this context, it would have to be considered within Parliament how **the principles of equality, multilingualism and the exercise of the free mandate** can be made compatible with the technical requirements of a virtually sitting parliament. In addition, it would be urgently necessary for **Parliament**, especially with the **Commission** and the **Council**, to **agree on jointly usable infrastructures and rules for virtual, inter-institutional negotiations across all phases of the policy cycle**. The **IIA on Better Law-making** would be a good place to start, as it already contains basic rules for inter-institutional cooperation in legislative planning, consultation, adoption, implementation and evaluation. **Specific rules for remote negotiations** could be integrated into the **Joint Declaration on practical arrangements for the codecision procedure**, especially with regard to points 7 and 8 on practical arrangements for trilogues as well as to the chapter of conciliations. In addition, the institutions should consider to **review the IIA on budgetary discipline, cooperation, sound financial management and own resources**, especially its annex I on inter-institutional cooperation during the budgetary procedure, to take into account the constraints of emergency situations. As to relations between Parliament and the ECB, the **IIA on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB** within the framework of the Single Supervisory Mechanism could be revised in order to integrate provisions with regard to the operation of Parliament's oversight and hearing procedures on the basis of remote procedures.

Additional efforts could be made to **increase the transparency and accountability of the EU decision-making process** in general. This should include publishing voting results in a more readable, visual, open and accessible format as the votes are proceeding. **The transparency of trilogues** could also be improved by organising **regular media briefings before and after trilogues**. The newly employed, digital tools of Parliament will allow for many activities to become purely online or hybrid in a post-pandemic situation.

1. INTRODUCTION

"A government which cannot meet emergencies is bound to fall sooner or later. There is no object in arguing against such emergency powers on the ground that they endanger the constitutional morale, and hence the maintenance of the constitutional order. Of course, they do. Any suspension of legal norms, no matter how temporary, raises doubts concerning their validity. But after all, what does an emergency mean, if not that the constitutional order is threatened."

Carl J. Friedrich (1950). Constitutional Government and Democracy. Ginn & Co.. Boston. 595-596.

The COVID-19 pandemic has forced countries around the world to confront a novel and dynamically changing health threat. States and confederations of states such as the European Union (EU) have had to make rapid decisions, often without fully understanding the short-, medium-, and longer-term implications of the various options. With the scientific community sometimes divided on the choices to be made, policymakers find themselves in an unenviable position.

Crises such as the COVID-19 pandemic are a challenge to every national, international, and supranational system of governance, and democratic-representative orders are no exception. In these, the directly elected parliament is the pivotal institution for legitimising public policy choices. Its ability to continue functioning during a crisis is a test of the strength, durability and resilience of the democratic system. Parliamentary procedures for monitoring and sanctioning the institutions endowed with executive functions provide safeguards against the abuse of governmental fantasies of omnipotence. In this respect, it is understandable, especially against the backdrop of unpredictable and cross-border crises, that political leadership bodies focus on rapid and effective decisions in order to avert dangers to the life and limb of the population. However, the sole focus on efficient, rapid action also entails the danger that the institutions (procedures, rules, routines, instruments) established in systems of representative democracies for constant feedback of executive government action to the directly elected representation of the citizens will be displaced. If emergency procedures are not limited - in time, scope, or their functional depth -, or are not subject to direct parliamentary feedback control, the single focus on the output legitimacy of governmental crisis re-action can quickly turn into autocratic governance.

Parliaments function through deliberations and decisions by elected representatives that sometimes take longer periods of time. When deliberation and decision making occur under normal conditions, representatives have ample time to interact with their constituents, consult experts, lobbies, and civil society, and discuss and weigh different perspectives before making a decision (Urbinati and Warren 2008). Parliamentary oversight of bodies vested with executive powers is ensured through instruments of ex-ante and ex-post control and is usually not subject to time limits or similar constraints. In times of crisis, however, decisions may have to be made very quickly. Moreover, it may be difficult or even impossible for parliamentarians to meet in person. This may be the case in times of war, when a country has been invaded, during a natural disaster such as a tsunami or earthquake, or, as in the case of the COVID-19 pandemic, during a public health emergency. In these circumstances, parliaments may have limited options. In some cases, they may try to continue their work more or less normally. In other cases, parliaments may be so limited in the effective exercise of their policy-making, oversight, interaction and representation functions that they cannot function "normally" or at all. Parliaments may delegate decision-making powers to the government by granting it special powers; various types of such delegated emergency powers are provided for in most constitutions around the world. But even when a situation is so urgent that the normal, parliamentary mechanisms of participation, interaction and

control must be overridden in favour of efficient and effective executive decision making, it is still essential that parliaments perform the tasks that ultimately make democratic systems more durable, effective, transparent, and just than all alternatives.

These tasks include legislation, i.e., passing laws necessary to address the crisis and support governance in emergencies. Parliaments must also provide effective oversight of the government - they must be able to verify and sanction that government actions are meeting urgent needs and that the government is treating citizens fairly and equitably in a situation where many are at risk and unable to protect themselves. Parliament must also pass the budget needed to address the crisis and, in turn, ensure that those funds are properly spent. Finally, as the institutional aggregate of society, Parliament and parliamentarians are called to represent the views, desires, ideas, fears, and anxieties of their constituents in the political process.

The COVID-19 pandemic is a rare example of all or nearly all countries in the world being seriously and fundamentally affected equally, albeit with varying degrees of loss of life or social and economic disruption (Beck 1986). The COVID-19 pandemic, comparable in recent human history only to the so-called Spanish flu pandemic of 1918-1920, forced most countries to take emergency measures and presented parliaments with very difficult decisions.

This study examines how the European Parliament (Parliament) has dealt with constraints during emergency situations, some imposed by external circumstances and actors and some self-imposed, regarding its work. Turning to the EU more specifically, the role of Parliament has often been constrained by emergencies and other situations necessitating urgent reaction, relating to, for example, the economic and financial crisis of 2009–2012, the so-called migratory crisis of 2015–2016, the conclusion of the MFF, the provisional application of international agreements, in particular the EU-UK trade and cooperation agreement and most recently the COVID-19 pandemic.

As mentioned above, most national parliaments in democratically constituted systems can delegate decision-making powers to the government by granting it special authority. As we will show, most constitutions in the world provide for various types of such delegated emergency powers. The European Parliament, on the other hand, does not enjoy this power of delegation. The parliamentary right of self-organisation, which is reflected in the freedom of Parliament to deliberate and express itself without restriction on all issues and problems, does not result in the right of parliamentary self-determination that is customary in parliamentary systems of government with regard to shaping the relationship with the executive bodies of the EU.

In 1983, the European Court of Justice (ECJ) confirmed the right for Parliament “to discuss any question concerning the Communities, to adopt resolutions on such questions and to invite the governments to act”.¹ Similarly, in 2005, the Statute of Members confirmed that “the right of initiative referred to in Article 5 is the key right of every Member.”² Article 5 continued the argument and clarified that “each Member shall be entitled to table proposals for Community acts in the context of Parliament’s right of initiative”. In its limited or bounded autonomy, the secret and the fate of the European Parliament are close to each other: Parliament is not divided into “government majority” and “opposition”. Although the Commission, the Council of Ministers and the European Council are entrusted with competences that we would assign to a “government” in the national context, this unique form of European “co-

¹ See: https://www.cvce.eu/content/publication/2002/12/16/6c015994-288a-4332-a4d3-0294977aa067/publishable_en.pdf.

² See: OJ L 262 (28.09.2005): Decision of the European Parliament of 28. September 2005 adopting the Statute for Members of the European Parliament: http://eur-lex.europa.eu/legal-content/DE/TXT/?uri=uriserv:OJ.L_.2005.262.01.0001.01.DEU&toc=OJ.L:2005:262:TOC.

government” does not operate as an EU executive that emerges indirectly from the European parliamentary elections and is endowed with a disposition of power for the duration of the legislative period, which relies on a majority group or coalition in Parliament. Parliament acts independently vis-à-vis this hybrid form of “co-government”; with changing, in legislation mostly large, cross-party majorities. The treaties’ majority requirements for Parliament’s votes do not want it any other way and thus implicitly produce a considerable communication and identification deficit.

The limited parliamentary autonomy established in the treaties does not, of course, prevent Parliament from declaring a state of emergency. In the last two years, we have witnessed Parliament’s governing bodies making intensive use of the intra-parliamentary restriction on MEPs and staff. And in fact, it was only in late 2019 that Parliament took the initiative with 429 to 225 votes, with 19 abstentions, and declared a climate emergency, holding that “no emergency should ever be used to erode democratic institutions or to undermine fundamental rights”.³ Here Parliament urged “the new Commission to fully assess the climate and environmental impact of all relevant legislative and budgetary proposals, and ensure that they are all fully aligned with the objective of limiting global warming to under 1,5 °C, and that they are not contributing to biodiversity loss”, [as well as] to address the inconsistencies of current Union policies on the climate and environment emergency, in particular through a far-reaching reform of its agricultural, trade, transport, energy and infrastructure investment policies”. In this respect, it would have been entirely within the realm of possibility if Parliament in February or March 2020 - after the declaration of the COVID-19 Public Health Emergency of International Concern (PHEIC) by the WHO⁴ - had been able to bring itself to launch the political initiative, analogous to the Climate Emergency Resolution of 2019, and in doing so also publicly discuss what exceptional measures the Commission and the Council should be called upon to take.

On the other hand, Parliament’s right of self-referral and the resulting right of resolution and initiative do not imply a compulsion to act, which must be articulated vis-à-vis the co-government, to initiate measures corresponding to the state of emergency.

In a number of situations, Parliament has also had to adapt its decision-making procedures in order to respond to an urgency. These adaptations may have included curtailing certain procedures, restricting the role and the fulfilment of the parliamentary mandate of its members, the involvement of parliamentary committees and reducing the time required for scrutiny, to mention a few. COVID-19 related legislative measures were typically dealt with under Rule 163 (urgency procedure) of Parliament’s Rule of Procedure (RoP), but other similar situations have led to the adoption of amending budgets, for example.

At the same time, the COVID-19 crisis has shown the need for Parliament to quickly adapt its internal working methods in emergency situations. Consequently, in December 2020, new Rules 237 a–d were adopted in order to ensure the functioning of Parliament in extraordinary circumstances.⁵

³ See: European Parliament resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP)).

⁴ See: Statement of 30 January 2020 on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV), [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

⁵ See: European Parliament decision of 17 December 2020 on amendments to the Rules of Procedure in order to ensure the functioning of Parliament in extraordinary circumstances (2020/2098(REG)), P9_TA(2020)0380.

1.1. Structure of the paper

In order to draw lessons from the management, both within Parliament and between the EU institutions, of past urgency situations, this study analyses obstacles preventing democratic, transparent, prompt and efficient decision-making for Parliament and the EU institutions and looks for solutions to improve the situation.

More specifically, we reflect on the **situations in which Parliament has been obliged to take a decision under exceptional circumstances or within very short deadlines**. We analyse whether Parliament's **internal processes and procedures** need to be reviewed and enhanced in order to cope efficiently with such circumstances, while preserving Parliament's fundamental role as legislative, budgetary and political control authority and safeguarding its representation and interaction, policy-making, elective, and system-development functions. To examine how the internal capacity of Parliament could be improved to properly handle files in situations of urgency under the current constitutional set-up, we look into the current procedures and practices within Parliament at Committee and Plenary level. Moreover, we explore specific situations that can be identified as requiring urgent action on the side of Parliament. In this context, we consider conceivable case constellations from the various functional fields of Parliament, regarding, in particular:

- a) **Parliament's legislative powers and its policy-making function.** Special attention will be given to Parliament's proceedings under the ordinary legislative, consultation, consent and budgetary procedures. In addition, we will place Parliament's respective activities against the legislative, policy-making activities of the Council of Ministers.
- b) **Scrutiny powers and Parliament's control function.** Here, we take into account the overall range of typical scrutiny instruments such as parliamentary questions, hearings, committees of enquiry, or budgetary discharge.
- c) **Appointment powers and Parliament's elective function.** We concentrate on Parliament's performance during inter-institutional appointment procedures.
- d) **Para-constitutional powers and Parliament's system-development function.** We focus on the constitutional procedures for adjusting or amending the treaties, and inter-institutional agreements that further develop constitutional provisions of the treaties.
- e) **The deliberative powers of Parliament and its interaction and/or representation function.** Here, we will focus on INI and INL procedures as well as on Parliament's interparliamentary delegations.

Analysing **national parliament's efforts** to cope with emergency situations, the study reflects on whether specific procedures should be put in place in order to ensure proper scrutiny of the files under consideration; in this regard, we analyse whether good practices can be identified at the level of national parliaments and federal, confederal as well as international assemblies, such as the Parliamentary Assembly of the Council of Europe (PACE).

With a view to Parliament's roles within the larger, inter-institutional fabric of governance, we examine how to **enhance the cooperation between EU institutions in times of urgency**. We provide for a systematic overview of the current set-up and on how the cooperation between EU institutions has worked in recent emergency situations, such as the COVID-19 crisis, and analyse how such cooperation can be enhanced within the existing legal and procedural framework, in particular in the context of the Framework Agreement on relations between the European Parliament and the European Commission (FA-IIA), the inter-institutional agreement (IIA) on Better Law-Making (BLM-IIA), the IIA on budgetary

discipline, on cooperation in budgetary matters and on sound financial management, and the IIA between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism.

Finally, we turn to reflect on whether it would be conceivable to **develop a separate (original) emergency mechanism for Parliament or EU institutions** in order to be able to act effectively in emergency situations. Which situations should such a mechanism primarily address? Which are the opportunities and challenges in setting up such a mechanism? By which means or measures could such a mechanism be introduced?

1.2. The normative set-up for emergency situations

Any process towards reacting to crisis by adjusting or reforming (parts of) the Union's acquis should be in conformity with the respect of the principle of democracy as it is defined under Articles 9 to 12 Treaty on the Functioning of the European Union (TFEU). This fundamental principle of the formation of a representative, parliamentary system is characterized through specific means for ensuring legislative-executive checks and balances: those appointed with executive functions should base their resulting power on directly elected legislatures. Parliaments should be in a position to effectively use their elective and control functions vis-a-vis the executive bodies. The EU's instruments, institutions and regimes that emerged during – or as a result of – the crisis are characterised by politically and legally binding decisions, which influence citizens' ways of living and constrains their individual freedom. Crisis sub-systems of the EU directly affect national legislatures and the linkage between citizens and the governing bodies of the Member States. Therefore, any **institutional design** that emerges under crisis mode faces a multitude of questions as to how **representative** the resulting system of emergency governance is, in which way its quasi-executive branches – the Eurogroup, its President, the European Council, the Council and the Commission – remain **accountable to citizens** via a directly legitimated body and how **democratic** the decision-making procedures are.

In this respect, it is safe to assume a continuous 'renaissance' of the German Constitutional Court's 1993 Maastricht ruling, which led to a general critique of the EU's parliamentary model. The basic assumption of the Court remains that a polity presupposes a demos in ethno-national or ethno-cultural terms (the national 'Volk' (People) instead of the denationalized or post-national 'Gesellschaft (Society)' or 'Gemeinschaft (Community or Citizenry)'. Without a single European people sharing heritage, language, culture and ethnic background, and without a European public space of communication that could shape the wills and opinion of the population, no European statehood could be founded. Assume that a socio-political entity, which is willing to produce democratic forms of governance, cannot simply dictate structural prerequisites and pre-constitutional elements of the future polity. One could then develop the Court's argument further and conclude that any attempt of institutional and procedural adjustment or reform is unreasonable unless the different EU-27 Demoi are identifying themselves as part of an emerging European Demos.

Against this line of analysis, I argue that the EU's reform and adjustment processes are not only about territory and identity or – in the language of the German Constitutional Court – about culture, shared heritage, language and ethnic belonging. I assume that any kind of a supra- or super-national governance structure without a directly elected parliamentary backbone beyond national assemblies would pervert the Union, or any other sub-system of the EU into an executive autocracy: a system that

would be apt to allocate and deliver common goods (i.e. to provide output-legitimacy), but not subject to any kind of continuous control (throughput-legitimacy) and never able to guarantee that the ways decisions are taken respect the rule of law (input-legitimacy) (Maurer 2002, Scharpf 2004, Schäfer 2006, Schmidt 2013). Therefore, I conceive the 're-parliamentarisation' of the EU's de-parliamentarised policies through both the European and the national parliaments as only one tool, but an essential one, for building a legitimate, universally accepted European order during and after emergency situations. The missing 'demos' is not a prerequisite, but an ideal product of successful, reflexive and continuous (re-)integration and institutional (re-)design (Maurer 2012). The "demos is constructed via democratic 'praxis'. [...] Instead of 'no EU democracy without a European demos', we have 'no European demos without EU democracy'" (Hix 1998). Taking this perspective seriously, I consider the very process of EU crisis reaction within the overall EU integration process as an ongoing search for opportunity structures, which allow the institutions of the EU's multi-level system to combine several demands for democracy-building beyond, but still with the nation state (Maurer 2002).

2. CONCEPTS AND TYPES OF EMERGENCIES⁶

Emergencies can be defined as a **dangerous or serious situation or process**, such as an accident, that happens **suddenly or unexpectedly** and needs **immediate action**. With regard to the organisation of states, inter- or supranational institutions, emergency situations trigger “the existential rationale” of the constitution (Ackermann 2004), i.e. alterations in the distribution of functions, powers and checks-and-balances among the different organs.

2.1. Framing the emergency

Most **national constitutions** contain provisions on emergency situations. In a minority of countries there is no emergency rule as such. Instead there are provisions to be applied in the event of war, danger of war, or other emergency situations (Ackerman 2004; Agamben 2005; Alexandre et.al. 2020; Atanassov et.al. 2020; Bentzen et.al. 2020; Binder et.al. 2020; Bjørnskov/Voigt 2018; Forejohn/Pasquino 2004). In **Norway, Denmark, Luxembourg, Sweden and Austria**, no emergency rule exists in the ordinary sense of the word. The government of **Denmark** may issue temporary acts when the MPs cannot be gathered and the circumstances are extremely urgent. However, such acts must not be in conflict with the constitution and have to be submitted to the Parliament for approval or disapproval at the beginning of the first possible assembly of the Parliament. In **Luxembourg**, although no emergency rule as such exists, in times of economic and social crises the legislature may pass enabling acts (habilitations législatives) empowering the executive to regulate certain areas that are not considered the exclusive domain of laws. In such situations the executive itself may pass decree-laws invoking the state of necessity as a condition of validity of such decree-laws. In **Austria**, if the Parliament cannot meet in time, or is impeded from action by circumstances beyond its control, to prevent obvious and irreparable damage to the community, the Federal President can, at the recommendation of the Federal Government and on his and their responsibility, take necessary measures by way of provisional law-amending ordinances. The Federal Government must present its recommendation with the consent of the Standing Sub-Committee, to be appointed by the Main Committee (Hauptausschuss) of the Nationalrat (National Council). Such an ordinance requires the countersignature of the Federal Government, and must be submitted by the Federal Government to the Nationalrat without delay. Within four weeks of submission, the Nationalrat must either vote a

⁶ This part of the study essentially draws on the answers provided by Member States for the Observatory of situations of emergency in Venice Commission Member States (https://www.venice.coe.int/WebForms/pages/?p=02_EmergencyPowersObservatory&lang=EN), the answers to a questionnaire of the PACE's Committee on Political Affairs and Democracy to national parliaments via the European Centre for Parliamentary Research and Documentation (ECPRD) (<https://pace.coe.int/pdf/f4ac61ff252d0d49b56e84ba2e5c8694cd49a737d292a4a547c485a548e4c3db/doc.%2015157.pdf>); Questionnaires focused on two main questions: The first referred to whether parliaments had adopted emergency legislation, and the second, whether parliaments have been consulted by the government on, and/or agreed to, introducing special measures, such as quarantine rules, curfew or a state of emergency.) the report by Jonathan Murphy (2020). Parliaments and Crisis: Challenges and Innovations (<https://www.inter-pares.eu/sites/interpares/files/2020-05/Parliaments%20and%20Crisis%20Challenges%20and%20Innovations%20Primer.pdf>) as well as the related INTER-PARES Parliamentary responses during the COVID-19 Pandemic – Data Tracker (<https://www.inter-pares.eu/en/parliamentary-innovations-times-crisis>), the answers provided to the IPU's Country compilation of parliamentary responses to the pandemic (<https://www.ipu.org/country-compilation-parliamentary-responses-pandemic>), and Parliament's EPRS study “States of emergency in response to the coronavirus crisis. Normative response and parliamentary oversight in EU Member States during the first wave of the pandemic” by Maria Díaz Crego and Silvia Kotanidis ([https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU\(2020\)659385_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf)).

corresponding Federal Law in place of the ordinance or pass a resolution demanding that the ordinance immediately be invalidated. In addition, certain ordinary laws provide the executive with the power to take measures in times of economic crisis or scarcity in order to provide necessary supplies.

The constitutions of most of the other Council of Europe (CoE) Member States contain specific provisions on emergency situations. In a minority of these countries (**Cyprus, Malta, Liechtenstein**) there is only one type of emergency rule. In **Cyprus**, for example, a proclamation of emergency may be issued in case of war or other public danger threatening the life of the nation. Similarly, the Constitution of **the Slovak Republic** provides for emergency rule without specifying its causes. In the ordinary legislation there are references to different types of emergency rule, such as the state of military alert, natural disasters and catastrophes. In a majority of states, however, there are different types of emergency rule to deal with different kinds of emergencies in proportion to the gravity of the situation.

In **Germany**, the 1968 amendments to the Basic Law (*Grundgesetz*, hereinafter GG) provide for three distinct types of emergency situation. Regrettably, the provisions of the "emergency constitution" (*Notstandsverfassung*) are not bundled in one section of the Basic Law; instead, they are distributed throughout the Basic Law in a rather confusing manner. In any case, the overriding objective of the emergency constitution is to protect the existence and the free democratic basic order of the federal and state governments in extreme cases by simplifying procedures and concentrating powers, both in terms of the vertical and horizontal separation of powers. A "state of defence" exists when the republic is under attack or threat of imminent attack by an armed force (Article 115a-i GG). A "state of tension" covers the conditions that precede a state of defence, such as a "situation approaching civil war or preparation for international war" (Article 80a GG). The "internal state of emergency" covers natural disasters, grave accidents, threats to the free democratic order in the federation or the Länder, or dangers to public security or order. Under Article 35(2)(1) of the Basic Law, a Land may request assistance from other Länder and the federal government in the event of threats to public safety and order of "particular significance" and under Article 35(2)(2) in the event of natural disasters and particularly serious accidents. Paragraph 2 is an expression of federal solidarity. Paragraph 3 regulates cases in which such natural disasters or accidents affect the territory of several federal states. In such cases, the federal government may order other states to make their police forces available to the extent necessary to effectively combat the disaster. Alternatively, or cumulatively, the federal government may use the federal police and the armed forces to assist the police. Here, then, the Basic Law takes a step back from federalism, which is otherwise so central to the Constitution, in favour of effective disaster response. However, the restrictions on the principle of the federal state are to be lifted "at any time at the request of the Bundesrat, and otherwise immediately after the elimination of the danger" (p. 2). Only the external state of emergency provides for deviating rules with regard to legislation, while the internal state of emergency leaves legislation completely untouched. Thus, only in the case of defence does a (small) joint committee under Article 53a of the Basic Law assume the position of the Bundestag and Bundesrat, which can act more effectively and nimbly. In the event of defence, the simplified procedure of Article 115d (2) and (3) of the Basic Law also applies, which has the effect of speeding up the legislative process in terms of submission, adoption and promulgation. Regarding the state of internal emergency, the Basic Law does not contain any provisions for the event that the Bundestag or another supreme federal body cannot meet or act.

The Constitution of **France** contains two provisions relating to the state of emergency: Article 16 grants exceptional powers to the President of the Republic when the institutions of the Republic, the independence of the Nation, the integrity of its territory or the execution of its international commitments are threatened in a serious and immediate manner and that the regular functioning of the constitutional authorities is interrupted. The National Assembly may not be dissolved during the

exercise of emergency powers. After thirty days of the exercise of the exceptional powers, the Constitutional Council can be referred to by the President of the National Assembly, the President of the Senate, sixty *députés* or *sénateurs*, to determine if the conditions are still met. The Council shall rule in the shortest time possible by a public ruling. The Council rules in the same conditions after sixty days of the exercise of the exceptional powers and at any moment beyond this period. Article 16 on exceptional powers was invoked only once, in 1961, following a failed coup attempt in then French Algeria. Article 36 regulates the “state of siege” (*état de siège*) in case of an “imminent peril resulting from a foreign war (*guerre étrangère*, or simply “war”) or an armed rebellion (*une insurrection à main armée*). The President can decree it in the Council of Ministers for a maximum period of twelve days. This period can only be extended with the approval of Parliament.

The state of emergency is not as such framed by the French Constitution. On two occasions, the Constitutional Council has ruled that the Constitution does not exclude the possibility for the legislature to provide for a state of emergency regime⁷. During the COVID-19 crisis, the French authorities did not use the emergency regimes provided for by the legislation in force (Law 55-385 of 3 April 1955), but introduced, by a law adopted to this effect in March 2020, a new “health emergency” regime. This state of emergency is framed by the law of 23 March 2020 and can be declared in the Council of Ministers for a period of two months. Extensions must be voted for by the Parliament. The prime minister is authorised to adopt measures in order to, inter alia, regulate or prohibit the movement of people and vehicles and regulate access to public transport and the conditions of their use, prohibit citizens from leaving their homes, order measures to place and keep in quarantine, place restrictions on the freedom of assembly, order the requisition of persons, goods and services necessary to combat the health disaster, take temporary measures to control the prices of certain products.⁸

In addition, Article 38 of the Constitution provides that in order to implement its programme, the Government may ask the Parliament for authorization, for a limited period, to take measures by Ordinance that are normally the preserve of statute law. Ordinances are issued in the Council of Ministers, after consultation with the Conseil d’État. They enter into force upon publication, but shall lapse in the event of failure to table before the Parliament the Bill to ratify them by the date set by the Enabling Act. They may only be ratified in explicit terms. At the end of the emergency period Ordinances may be amended solely by an Act of Parliament in those areas governed by statute law.

The **Spanish** and the **Hungarian** constitutions adopt a more diversified, plural model for declaring emergency rule. Article 116 of the Spanish Constitution refers to three specific situations which it terms “state of alarm”, “state of emergency”, and “state of siege” (or martial law). However, the Constitution does not define the causes for which emergency rule may be declared, leaving this task to organic legislation. According to Article 116, the Government shall declare the state of alarm by decree, decided upon by the Council of Ministers, and shall specify the territorial area to which the effects of the proclamation shall apply. It can last up to 15 days at maximum and only be extended, with no limit, by the authorization of the Congress. The state of exception should be authorized by the Congress and then declared by the Government by decree decided upon the Council of Ministers. It must specifically indicate its effects, the territorial area to which it is to apply and its duration which may not exceed 30 days, subject to extension for a further 30 days’ period with the same requirements. In addition, Article 55.1 of the Constitution establishes that only in the states of exception and siege can some fundamental rights be suspended, but not in the ‘state of alarm’, where they can only be limited. Based

⁷ See: Decisions No. 2015-527 QPC of 22 December 20 and 2016-535 QPC of 19 February 2016.

⁸ See: Code de la santé publique - Chapitre Ier bis : Etat d’urgence sanitaire (Articles L3131-12 à L3131-20), https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041867960/2020-05-30/.

on such constitutional empowerment, the Organic Law 4/1981 provides for a differentiated model in which the different types of emergency rule are based on different causes. Accordingly, the Organic Law defines the "state of alarm" as a response to natural emergency situations in order to deal with catastrophes, calamities or public disasters, health crises and periods of scarcity of basic commodities. The "state of emergency" is prescribed "when the free exercise of the citizen's rights and liberties or the normal functions of democratic institutions, public services essential for the community or any other aspect of public order are altered to the extent that the ordinary powers prove insufficient to re-establish or maintain them". Finally, the Organic Law defines the "state of siege" as a military emergency which may be declared "in the event of an insurrection or threat of insurrection or an act of force against the sovereignty or independence, territorial integrity and constitutional order of Spain which cannot otherwise be resolved". The Organic Law No. 4/1981 of 1st June 1981 on the alarm, exception and siege states was applied for only the second time in the recent Spanish constitutional history on 14th March 2020. The Government Decree No. 463/2020 'declaring the state of alarm for the management of the health crisis caused by COVID-19' was passed.

The **Hungarian** Constitution also defines three different types of emergency: The state of siege is declared in case of war or an immediate danger of foreign armed attack. In this case, a Council of National Defence is established to exercise the powers of the government, the President of the Republic, and other powers delegated to it by the National Assembly. The President of the Council of National Defence is the President of the Republic. Its members consist of the President of the National Assembly, leaders of the parliamentary party groups represented in the National Assembly, the Prime Minister, Ministers, the Commander and the Chief of the General Staff of the Hungarian Army. The state of emergency is declared in case of serious and violent acts which threaten the constitutional order or in case of natural or industrial disasters. During the state of emergency, exceptional measures are taken by the President of the Republic by decrees. Finally, the state of public danger is declared in cases of less serious threats to public order and public security, allowing government to issue decrees that may contradict existing laws. Based on Article 53 of the Fundamental Law which provides for a state of danger, on 30 March 2020, the Hungarian Parliament approved a law authorising the Government to manage the COVID-19 pandemic and its consequences by any means it deems necessary and proportionate. This Enabling act followed the Government's declaration of a state of danger due to the pandemic on 11 March 2020. Under the Enabling Act I, the Government received plenary law-making powers to enact decrees that may depart from or suspend existing acts of parliament without meaningful constitutional constraints. While the Parliament can terminate the state of danger any time, the ruling party (Fidesz) continues to control a two-thirds majority in the Parliament. A day after the adoption of the enabling act, the Government invoked its newly acquired powers to extend all previously introduced emergency measures until the end of the state of danger. Another decree resets the terms of judicial operations, introducing E-trials in certain cases and judgments without trial in others.⁹ Altogether, Enabling Act I provides for textual guarantees that the Parliament and the Constitutional Court would remain open and that most constitutional rights could not be infringed. In addition, it requires all decrees issued during a state of emergency to automatically sunset after 15 days unless renewed by the Parliament. With Enabling Act I, however, the Parliament delegated its power to renew decrees for the duration of the state of emergency to the government itself, thereby cancelling its most important check.¹⁰

⁹ See: Renáta Uitz (6 April 2020). Hungary's Enabling Act: Prime Minister Orbán Makes the Most of the Pandemic. <https://constitutionnet.org/news/hungarys-enabling-act-prime-minister-orban-makes-most-pandemic>.

¹⁰ See: Tímea Drinóczi & Agnieszka Bień-Kacała (2020) COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism, *The Theory and Practice of Legislation*, 8:1-2, 171-192, DOI: [10.1080/20508840.2020.1782109](https://doi.org/10.1080/20508840.2020.1782109).

2.2. Authorising and limiting emergency rule

In most countries, the power to declare emergency rule is divided between the legislative and executive branches. Usually the executive proposes and the legislature approves the declaration of emergency rule. In **Germany**, the state of defence and the state of tension need to be declared by a two-thirds majority of both the Bundestag and the Bundesrat. The government may request the Bundestag to initiate the state of defence, and the decision must then be promulgated by the Federal President. The state of tension may also be initiated by a two-thirds majority of the Bundestag without the concurrence of the Bundesrat being necessary. Only the internal state of emergency may be initiated without a formal resolution of the Bundestag. In **Spain**, the state of alarm may be declared by the Council of Ministers and the decree is communicated to the Congress of Deputies. The state of emergency may be declared by the Council of Ministers with the prior authorisation of the Congress of Deputies. The State of siege may be declared by an absolute majority vote of the Congress of Deputies at the exclusive request of the Council of Ministers. In **Portugal**, the state of siege and emergency rule may be declared by the President of the Republic upon proposal of the Government and prior authorisation by the Assembly of the Republic. In **Finland**, both the state of defence and the state of readiness are adopted by a decree of the President of the Republic in session with the Council of Ministers, and are then submitted to the Parliament. While the decree proclaiming a state of defence is effective immediately, the decree proclaiming a state of readiness may become effective, as a rule, only after it has been approved by the Parliament.

Some constitutions require qualified parliamentary majorities for the declaration of emergency rule. In **Germany**, this is a two-thirds majority of both the Bundestag and the Bundesrat for the declaration of the state of defence and the state of tension. In **Spain**, for the declaration of a state of siege, an absolute majority of the Congress of Deputies is required. In **Hungary**, the required majority for the declaration of the state of siege or emergency rule is a two-thirds majority of deputies. In **Greece**, if the Chamber of Deputies itself declares the state of siege, this requires a majority of three-fifths of the total number of deputies. If the Chamber of Deputies approves the state of siege declared by the executive, an absolute majority of the total number of deputies is required. In **Latvia**, the absolute majority vote of the members' present is required. In **Malta**, if emergency rule is declared by the House of Representatives, the required majority is two-thirds of all members.

Many constitutions provide a time-limit for emergency rule. This period is 14 days in **Malta**, 15 days in **Greece** and **Portugal**, 30 to 60 days in **Russia**, two months in **Cyprus**, three months for the state of defence and one year for the state of readiness in **Finland**, and six months in **Latvia**, **Lithuania** and **Turkey**. These periods are normally renewable. With the exception of **Croatia** and **Hungary**, nearly all EU Member States introduced temporary emergency measures to deal with the Covid-19 crisis, mainly through ordinary legislation. First emergency measures were generally introduced for a period of 15 days to approximately one month across all EU Member States, and were then renewed at least once. The state of emergency was prolonged at least once in almost all the EU Member States that had declared it. In some countries, the state of emergency was prolonged by Presidential decree (**Portugal**, **Romania**), in others by Parliament (**Bulgaria**, **France**, **Luxembourg**, **Czech Republic**, **Spain**), or by the government (**Estonia**).

In most countries, the declaration of a state of emergency involves the transfer of additional powers to the executive. In **Croatia**, the Chamber of Representatives may, for a maximum period of one year, authorise the Government to regulate issues falling within the competence of the Chamber of Representatives by decree-laws, except those relating to the elaboration of constitutionally

guaranteed freedoms and human rights, the rights of minorities, the election system, the organisation, functioning and responsibilities of government bodies and local self-government. In **Germany**, the Basic Law does not grant the executive the competence to issue special emergency decree-laws. Nonetheless, during a state of defence legislative procedure can be simplified, in that urgent government bills may be presented to both Houses simultaneously to be considered immediately.

From a democratic point of view, emergency measures adopted during a formal state of emergency should always be subject to effective safeguards. In this respect, the Venice Commission of the CoE, in its 2020 Reflections, stressed that "it is essential that both the declaration and possible prolongation of the state of emergency, on the one hand, and the activation and application of emergency powers on the other hand be subject to effective parliamentary and judicial control".¹¹ Such review should also extend to any – potential or effective – shifts in the distribution of powers and competences that might take place during a state of emergency.

"Best practice" can thus be identified in those states where **the declaration of the emergency situation and the associated delegation of powers from the parliament to the government – parliamentary legislation authorising government to take emergency measures by decrees depend on a parliamentary resolution.** Regarding the COVID-19 crisis, the **UK's** Coronavirus Act 2020 was introduced as emergency legislation on 19 March 2020 to enable the government to respond to an emergency situation. Similarly, the **Norwegian** Storting's temporary Corona Act delegated parliamentary powers to the government by providing government with the authority to add to or depart from certain legislation as far as is necessary to safeguard the intention of the respective law. The Storting limited the application of the delegation for one month and included a clause that allowed the Storting at any given time to repeal partly or in full the enabling act by a one-third minority vote in the Chamber. In **Spain**, the government introduced the state of alarm for the management of the health crisis situation caused by COVID-19 by royal decree on 14 March 2020 for a maximum period of 15 days and informed the Congress of Deputies immediately and asked authorisation from the Congress of Deputies to extend the state of alarm for another 15 days. This delegation procedure has subsequently been repeated several times. In addition, the Spanish government submitted to the Congress of Deputies, for debate and approval by vote, a number of decree-laws. Similarly, in Italy, the government first introduced, on 23 February 2020, a series of decree-laws, which had to be approved by the Houses of parliament within 60 days.

2.3. Conceptualisation of emergency situations by the ECHR

The European Convention on Human Rights (ECHR) or the International Civil Pact, **explicitly regulate the treatment of rights in the event of an emergency and could serve as a model** for further development. The ECHR, for example, standardizes in its Article 15 (ECHR 2021):

A) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

¹¹ See: Venice Commission (2020), Report - Respect for democracy, human rights and the rule of law during states of emergency: reflections - taken note of by the Venice Commission on 19 June 2020 by a written procedure replacing the 123rd plenary session, Doc. No. CDL-AD (2020)014, paragraph 14.

B) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

C) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

The European Court of Human Rights (ECHR) defined "other public emergency" in the famous *Lawless* case (ECHR 1961, Case of *Lawless v. Ireland*, No. 3., Application no 332/57) as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed". Article 15(1) of the ECHR thus sets very high factual hurdles for the taking of extraordinary measures. Furthermore, it is standardized that measures suspending human rights may only be taken "insofar as the situation absolutely requires". In addition, Article 15(2) ECHR excludes certain rights from the possibility of derogation, and Article 15(3) ECHR imposes comprehensive information obligations. In this respect, Article 15 ECHR does not only have an enabling function in the sense that secondary derogation is possible. More decisive are the limiting and warning functions of such a provision. Article 15 ECHR considerably limits possible emergency measures by means of high factual hurdles, explicit derogation of certain rights and special requirements for legal consequences. The information requirements of Paragraph 3 also have a warning function, both internally and externally. States should be made particularly aware of the extraordinary intensity of the measures and the population should be informed that the state of emergency is exceptional and that the restriction of their rights is extraordinary and temporary.

3. HOW THE EU TREATIES DEAL WITH EMERGENCY RULE

The EU's treaties do not contain specific provisions on the determination of the state of emergency and, therefore, no procedures that could particularly limit the work of the institutions (de Witte 2022: 5). On the other hand, the treaties, as well as secondary legislation based on them, indirectly refer to the triggers of national emergency constitutions. Moreover, the treaties contain provisions that constrain Parliament's – and only Parliament's! – powers in specific cases that may fall into the category of emergency. Parliament, on its side, restrains its powers by referring to Article 163 of its Rules of Procedure.

3.1. Solidarity clause and the Council's implementing decision

The so-called **"solidarity clause" of Article 222 TFEU** provides the option for the Union and its Member States to act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a disaster:

Article 222

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

- a) - prevent the terrorist threat in the territory of the Member States;
- protect democratic institutions and the civilian population from any terrorist attack;
- assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
- b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

The Council decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause¹² (**'implementing decision'**) gave also birth to some definitions to benchmark an EU emergency: Accordingly, **"disaster"** means any situation which has or may have a severe impact on people, the environment or property, including cultural heritage, **'terrorist attack'** means a terrorist offence as defined in Council Framework Decision 2002/475/JHA (5), **'crisis'** means a disaster or terrorist attack of such a wide-ranging impact or political significance that it requires timely policy coordination and response at Union political level, and **'response'** means any action taken in the event of a disaster or a terrorist attack to address its immediate adverse consequences."

¹² Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, OJ L 192, 1.7.2014, p. 53–58.

Article 5(3) of the implementing decision also provides for possible measures that could have an effect on the functioning of the Union and its institutions: hence, the Commission and the High Representative shall submit proposals to the Council concerning decisions on exceptional measures not foreseen by existing instruments, requests for military capabilities going beyond the existing arrangements on civil protection, or measures in support of a swift response by Member States. Member States shall assist the affected country at the request of the latter's political authorities. To that end, the Member States shall coordinate between themselves in the Council.

The solidarity clause was inserted in the Lisbon Treaty in order to regulate essentially security-related hazardous situations. This is already indicated by the treaty provisions regarding the implementation of the clause: **any implementing arrangement is defined by a decision of the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. Parliament is only informed.** The implementing decision specifies that the "Presidency of the Council will inform the President of the European Council and the President of the European Parliament of the invocation of the solidarity clause and of any major developments." The Council's internal coordination relies on the **EU Integrated Political Crisis Response (IPCR) arrangements**, approved by the Council on 25 June 2013. The security bias of the solidarity clause is further confirmed by the stipulation that the Council will be assisted by the Political and Security Committee, which in turn will draw on the structures developed under the Common Security and Defense Policy.

3.2. Article 122 TFEU and the EU's economic and financial crisis

With regard to the question of the definitional delimitation of the state of emergency within the Union, it is worth to look into Article 122 TFEU in relation to the EU's economic policy and Article 196 TFEU regarding civil protection.

According to Article 122, "where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned." According to Article 196, the Union "shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters."

Article 122 TFEU formed the **key legal basis during the economic and financial crisis** to adopt the EMU-related programmes for Greece, Ireland, Portugal, and Cyprus: the first programme for Greece took the form of the European Financial Stabilisation Mechanism (EFSM)¹³ whereby the Council decided alone and Parliament was informed later on. Respective implementation took the form of Council implementing decisions.¹⁴ Subsequent modifications of the Eurozone rescue and financial adjustment instruments, namely the European Financial Stability Facility (EFSF) and the permanent European Stability Mechanism (ESM)¹⁵, were then done outside the EU institutional framework.

¹³ See: OJ L 118, 12.5.2010, p. 1.

¹⁴ See: e.g. Council Implementing Decision (EU) 2016/544 of 19 August 2015 approving the macroeconomic adjustment programme of Greece (2015/1411), OJ L 91, 7.4.2016, pp. 27–32.

¹⁵ See: Treaty establishing the European Stability Mechanism (2012), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42012A0202\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:42012A0202(01)&from=EN).

Given that financial contributions emanated exclusively out of national budgets, **Parliament was not involved in the establishment of, and the individual decisions on the programmes of the EFSF and the ESM**, respectively. Parliament appears to have been systematically sidelined throughout the economic and financial crisis: in fact, most of the immediate financial measures and instruments relied on legal bases of the TFEU which do not provide for a strong role of Parliament. Instead, the **instruments of EMU's economic and fiscal policies** are decided by the Council and the European Council **under special legislative and non-legislative procedures**. In addition, intergovernmental instruments such as the **Fiscal Compact** (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union - TSCG) escape the EU's institutional and procedural system of checks and balances, because they have been **adopted outside the EU treaties' framework**. While they confirm the Council's and the European Council's roles in the Eurozone, they do not call for analogous rights for Parliament to co-decide with or to control these (inter-)governmental bodies. Fiscal policy and financial assistance instruments such as the ESM are not dependent on the EU's budget. Accordingly, the parliamentary arm of the EU's budget authority remains excluded from the decision-making and control of these instruments. Instead, however, the Council's Eurogroup decisions on loans, guarantees and financial assistance are subject to national parliamentary scrutiny.

The crisis reaction developments regarding the EMU effectively strengthened cooperation among the governments of the Euro-17, while widely ignoring the parliamentary component and the more general issue of democratic legitimacy of the EMU. Neither Parliament nor the national parliaments are provided with a uniform or coordinated, reliable control mechanism whereby parliamentary oversight is combined with the possibility of political and legal sanctions against the decision-makers of the European Council, its President, or the Eurogroup. And although the Lisbon Treaty explicitly holds that the European Council "shall not exercise legislative functions", the heads of state and government increasingly stepped in to mandate the Commission with rather fixed sets of reform proposals for further policy-initiation and to ask their President to present proposals with a view to reform the EMU. Parliament is only informed of the results of the European Council meetings and Eurogroup summits, its President participates at the beginning of the meetings, and some of its Members get informal access to the negotiation table, always at the discretion of the European Council. As a result, Parliament has at large remained a passive observer. The resulting democratic deficit is not compensated through national parliaments, since only a few of them were able to force their governments into both ex-ante and ex-post scrutiny (Wessels et.al. 2013).

3.3. Article 122 TFEU and the COVID-19 crisis

The first economic response of the EU in reacting to the COVID-19 pandemic was Regulation 2020/460 of 30 March 2020 on specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative, CRII).¹⁶ The Commission submitted its proposal on 13 March 2020, and Parliament's REGI Committee appointed the rapporteur three days later, on 16 March. On 23 March, the Committee referred the draft legislative resolution without report to the Plenary. Based on its

¹⁶ See: Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No 1301/2013, (EU) No 1303/2013 and (EU) No 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative) OJ L 99, 31.3.2020, p. 5–8.

budgetary powers, Parliament was thus formally fully involved and adopted the Commission's proposal without amendment via the urgency procedure under Article 163 of its RoP on 26 March 2020, by a remote vote with 683 votes to one, with four abstentions. The CRII promotes investment by mobilising cash reserves available in the European Structural and Investment Funds – the European Regional Development Fund (ERDF), the European Social Fund (ESF) and the Cohesion Fund (CF), and the European Fund for Maritime Affairs and Fisheries (EMFF) – in order to tackle the COVID-19 crisis without delay. Given that nearly EUR 8 billion of pre-financing from EU structural and investment funds was not used by Member States in 2019 and should have been repaid by the end of June 2020, Member States were allowed to keep this money.

Box 1: Coronavirus Response Investment Initiative (CRII)

On 13 March 2020, the Commission published the Communication “Coordinated Economic Response to the COVID-19 Outbreak”. The Communication launched a special investment initiative - the Coronavirus Response Investment Initiative (CRII) - to respond to COVID-19 with a special package of measures mobilizing the existing liquidity of €8 billion under the EU's Structural Funds. This amount was intended to trigger an additional €29 billion in EU co-financing from the Structural Funds in the Member States, which would result in up to €37 billion in public investment to combat the COVID-19 pandemic. The package of measures was fleshed out in (1) the proposal for a Regulation amending the CPR, ERDF, EMFF Regulations of the current financial period (2014–2020), and (2) the proposal for a Regulation amending the EU Solidarity Fund Regulation in order to provide financial assistance to Member States and countries negotiating their accession to the Union affected by a major health emergency. Both proposals were urgently presented and discussed in the Council just four days after their publication on 17 March 2020.

The fast-track procedure had the advantage of responding to the COVID-19 pandemic quickly and within the budgetary system already set up. However, the procedure had a disadvantage in that the distribution keys and funding commitments agreed in the basic Regulations remained untouched. The measure was therefore particularly advantageous for the states of Eastern and Central Europe, but disadvantageous for the states of Southern Europe, particularly affected in the first wave.

Parliament's involvement was different when more innovative economic instruments were introduced. **While a series of additional measures were adopted under the ordinary legislative procedure (OLP) or consent, consultation or budgetary procedures, several other important decisions were adopted under Article 122 TFEU without any parliamentary involvement.** In fact, Article 122 TFEU was extensively used by the Commission and the Council in the context of the immediate response to the COVID-19 crisis: Council Regulation 2020/2094 of 14 December 2020 established a EU Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis¹⁷, and Council Regulation 2020/672 of 19 May 2020 established a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak¹⁸. In addition, Council Regulation 2020/521 of 14 April 2020 activated the emergency support under Regulation (EU) 2016/369, and amended its provisions taking into account the COVID-19 outbreak.¹⁹

¹⁷ See: OJ L 433, 22.12.2020, pp. 23–27.

¹⁸ See: OJ L 159, 20.5.2020, pp. 1–7.

¹⁹ See: OJ L 117, 15.4.2020, pp. 3–8.

Box 2: Coronavirus Response Investment Initiative Plus (CRII+) and SURE

The Commission published a new communication on April 2, 2020, entitled “Responding to the Coronavirus - Every available euro will be used in every possible way to protect lives and livelihoods.” The subsequent legislative package “Coronavirus Response Investment Initiative Plus” (CRII+), proposed further measures in the area of cohesion policy to provide additional flexibility for the use of European Investment and Structural Funds in response to the COVID-19 pandemic. The objective of CRII+ was to support citizens and ensure the liquidity of the financial sector to support small and medium-sized enterprises (SMEs). Therefore, the Commission proposed a new temporary instrument called “Emergency Unemployment Risk Mitigation Support” (SURE) of €100 billion in loans for the most affected countries, mainly to help workers to keep their wages and employers to keep their employees. A major innovation of the CRII+ was that no national co-financing would be required for any of the funds. In this context, the Commission proposed to waive restrictions on thematic concentration. To reduce the administrative burden, Member States are exempted from the obligation to amend the partnership agreements, the deadline for the submission of annual reports is postponed, and some flexibility has been introduced in the closure of the program. Shortly after its introduction on April 2, 2020, the CRII+ was adopted by Parliament on 17 April and by the Council on 24 April 2020. The initiative entered into force shortly thereafter, on April 24, 2020, just 23 days after its submission.

On the other hand, the legal bases of the European Structural Funds were used in conjunction with the budgetary provisions to adopt further measures aimed at economic recovery within the framework of the OLP. The Commission thus proposed, on 28 May 2020 an extension of the CRIIs’ crisis response within the EU’s cohesion policy framework. The resulting REACT-EU program was designed to prevent a further worsening of socioeconomic disparities. Accordingly, funding of more than €58 million should be made available for the European Structural and Investment Funds (ESIF) in 2020, 2021 and 2022. REACT-EU thus complements the CRII+ interventions and offers special measures to allow exceptional flexibility in the use of the European Structural and Investment Funds. The successful implementation of REACT-EU depends to a large extent on three building blocks: (a) its financial endowment, (b) its rapidity (by using existing programs until 2023), and (c) full flexibility in the implementing rules. The funding system is based on two pillars: The European Economic Recovery Instrument NGEU including REACT-EU and the MFF 2021–2027. The REACT-EU Regulation of the European Parliament and of the Council was adopted on 23 December 2020 and entered into force on 1 January 2021. Although the REACT-EU Regulation met all the requirements for fast-track adoption, the two co-legislators agreed to make amendments to the Commission’s proposal, thus organizing the legislative process under “normal conditions”. Nevertheless, the adoption of REACT-EU succeeded much faster than the adoption of other legal acts of the 2021–2027 cohesion policy legislative package, whose adoption required almost three years of negotiations.

3.4. Article 196 TFEU, emergency situations and the Civil Protection Mechanism

While under 122 TFEU, Parliament is only informed by the President of the Council of the decisions taken, decision-making under **Article 196 TFEU is subject to the ordinary legislative procedure** (OLP). On this basis, Parliament and Council agreed on several mechanisms and instruments regarding the very meaning and implementation of civil protection.

First of all, the decision of the European Parliament and of the Council on a **Union Civil Protection Mechanism – CPM**²⁰ of 17 December 2013 aimed at strengthening cooperation between the Union and the Member States and at facilitating coordination in the field of civil protection in order to improve the effectiveness of systems for preventing, preparing for and responding to natural and man-made disasters. The material scope of the decision covered people, the environment and property, all kinds of natural and man-made disasters, including the consequences of acute health emergencies, occurring inside or outside the Union.

In adopting the decision, the Union legislator agreed to set up an **Emergency Response Coordination Centre (ERCC)** that shall ensure 24/7 operational capacity, and serve the Member States and the Commission in pursuit of the objectives of the CPM, as well as a **European Emergency Response Capacity (EERC)** consisting of a voluntary pool of pre-committed response capacities of the Member States and include modules, other response capacities and experts. Within the response action arm, enhanced coordination systems were established including, inter alia, a procedure for coordinated disaster response: when a disaster occurs within the Union, or is imminent, the affected Member State may request assistance through the ERCC. In exceptional situations of increased risk a Member State may also request assistance in the form of temporary pre-positioning of response capacities. The financial envelope for the implementation of the CPM for the period 2014 to 2020 derived from Union budget heading 3 ‘Security and Citizenship’ and heading 4 ‘Global Europe’ (EUR 368.428.000).

The original CPM decision was renewed by the decision of the European Parliament and of the Council amending Decision No 1313/2013/EU on a **Union Civil Protection Mechanism** of 13 March 2019.²¹ During negotiations with the Council, Parliament prevailed with the demand to extend the mechanism functionally to support Member States’ action to promote the implementation of a rapid and effective response when a disaster occurs or is imminent, including measures to mitigate the immediate consequences of disasters, to increase the availability and use of scientific knowledge on disasters, and to increase cooperation and coordination activities at cross-border level and between Member States exposed to similar types of disasters. Accordingly, the decision established “**rescEU**” to provide assistance in situations of overwhelming importance where the overall capacities existing at national level and the capacities previously allocated by Member States to the European Civil Protection Pool are insufficient to ensure an effective response to disasters. The Commission was authorised to adopt implementing acts for defining the capabilities of rescEU, taking into account the identified and emerging risks, overall capabilities and gaps at EU level, in particular in the fields of aerial forest fire fighting, chemical, biological, radiological and nuclear incidents and emergency medical response.

The most recent, legally valid decision of the European Parliament and of the Council amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism of 20 May 2021²² aims to strengthen the Union CPM in order to enable Member States to be better prepared and to respond rapidly and effectively to future crises with cross-border implications, such as the COVID-19 crisis. Whilst confirming the rescEU instruments, the new decision in addition calls the Commission to establish a **European Civil Protection Knowledge Network** to aggregate, process and disseminate knowledge and information relevant to the CPM, following an approach involving relevant civil protection and disaster management actors, centres of excellence, universities and researchers. The decision provides for a total amount of EUR 1.263 million in funds for the period 2021–2027. In addition, it includes a maximum

²⁰ COM(2011)0934 – C7-0519/2011 – 2011/0461(COD).

²¹ COM(2017)0772/2 – C8-0409/2017 – 2017/0309(COD).

²² COM(2020)0220 – C9-0160/2020 – 2020/0097(COD).

amount of EUR 2.056 million to implement civil protection related measures for addressing the consequences of the COVID-19 crisis foreseen in the EU Recovery Instrument within NGEU.²³

3.5. State aid and Emergency

Article 107 TFEU provides for distinct cases to define state aid compatible with the internal market: State aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; and (b) state aid to make good the damage caused by natural disasters or exceptional occurrences. Clearly, both exceptional cases can address effects of emergency situations. Regarding the overall application of these exceptional rules, Article 109 TFEU calls the Council to adopt any appropriate regulations after consulting Parliament. The regulation currently in force was adopted by Council on 13 July 2015.²⁴ Parliament approved, on 29 April 2015, without amendment, by 636 votes to 52, with 11 abstentions, the Commission proposal as adapted to the recommendations of the Consultative Working Party of the legal services of the European Parliament, the Council and the Commission. It is worth noting that the said regulation forms the basis for setting up an Advisory Committee on State aid, which is composed of representatives of the Member States and chaired by a representative of the Commission. Given Article 107 TFEU's rather unclear reference to "exceptional occurrences", treaty commentators are unanimous that this provision is also applicable to the triggering circumstances defined in the solidarity clause. Article 107(2.3) TFEU explicitly refers to such situations, providing the Council to decide unanimously on applications by Member States that aid which these states are granting or intend to grant shall be considered to be compatible with the internal market. In the absence of such Council decision within three months of the application, the Commission shall give its decision on the case.²⁵

The COVID-19 pandemic has been acknowledged to constitute such an exceptional circumstance, in the same way that past earthquakes, severe floods and major forest fires triggered the same mechanism. Aid that is compatible does not necessitate an assessment, but must still meet some requirements. The Commission found that the COVID-19 pandemic qualified as an "exceptional occurrence" in its first decision on the COVID-19 outbreak since it meets the following cumulative criteria: (i) it was unforeseeable or difficult to foresee, (ii) it is of a significant scale/economic impact, and (iii) it is extraordinary. To mitigate economic shocks and save businesses, the Commission therefore put in place flexible state aid rules, allowing Member States to provide direct support for companies and smaller firms. A first **"Temporary Framework for State Aid measures" (TFSA)** was adopted on 19 March 2020²⁶ and provided for five types of aid: direct grants (or tax advantages), subsidised state guarantees on bank loans, public and private loans with subsidised interest rates, existing lending capacities, using them as a channel for support for businesses – in particular to small and medium enterprises, and additional flexibility to enable short-term export credit insurance to be provided by

²³ The Commission put forward a proposal to establish a € 750 billion European Union recovery instrument, Next Generation EU (NGEU), on top of a revised 2021-2027 MFF worth € 1.1 trillion. The financing of the instrument would come from funds borrowed on the markets by the Commission on behalf of the EU, while a mix of new and already planned instruments under the EU budget would channel expenditure, combining grants (€ 500 billion) and loans (€ 250 billion).

²⁴ See: Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 TFEU to certain categories of horizontal State aid, OJ L 248, 24.9.2015, pp. 1–8.

²⁵ See: Cécile Remeur and Miroslava Karaboytcheva (2020). State aid and the pandemic. How State aid can back coronavirus economic support measures. EPRS Briefing. PE 649.399 – June 2020.

²⁶ See: Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak 2020/C 91 I/01, OJ C 91 I, 20.3.2020, pp. 1–9.

the state where needed. The TFSA was first amended on 3 April 2020 to increase possibilities for public support to research, testing and production of products relevant to fight the pandemic, to protect jobs and to further support the economy. A second amendment of 8 May 2020 enabled recapitalisation and subordinated debt measures, while a third amendment of 29 June 2020 allowed to further support micro, small and start-up companies and to incentivise private investments. On 13 October 2020, a fourth amendment enabled aid covering part of the uncovered fixed costs of companies affected by the crisis. In January 2021, the Commission decided to prolong the TFSA until 31 December 2021 and to expand the scope by increasing the ceilings for certain support measures and allowing the conversion of certain repayable instruments into direct grants until the end of 2022. A further extension until 30 June 2022 was decided in November 2021.²⁷ Here, the Commission introduced two new measures to create direct incentives for forward-looking private investment and solvency support measures.

3.6. Article 168 TFEU and the Decision on serious cross-border threats to health

As harsh as it may sound, the masters of the treaties have obviously not assumed that the EU would have to prepare for a health emergency as a result of a pandemic. In fact, the Union does not pursue its own health policy that could replace respective policies of the Member States (Brooks/Geyer 2020). Instead, the provisions of Article 168 TFEU serve to supplement the politics and measures of the Member States. The Lisbon Treaty newly allocated the competencies of the Union in Articles 4 and 6 TFEU. Accordingly, a clear distinction must be made between the fields in which the Union can only support, coordinate or supplement and those areas in which, according to Article 2 (2. para. 2) and Article 4 (2 lit k) TFEU, there is a shared competence between the Union and Member States. Building on this separation of competencies, Article 168 TFEU defines as tasks of the Union a) to improve cooperation between Member States to complement their health services in cross-border areas, and b) to encourage cooperation with third states and international organisations. Given the limitations of the Union's tasks, it has very limited facilities to act in its range of competencies.

The bovine spongiform encephalopathy (BSE or 'mad cow disease') crisis towards the end of the twentieth century gave birth to those exceptional areas,²⁸ where Parliament and Council can adopt, in accordance with the OLP, measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives, measures in the veterinary and phytosanitary fields to protect public health, and measures setting standards of quality and safety for medicinal products and related devices. Moreover, Parliament and the Council adopted several health programmes, from the first EU Public Health Programme (2003-2008), the Health Programme (2009–2013) and the Third Health Programme (2014-2020), to the current EU4Health programme (2021–2027). In addition, Article 168 TFEU was used to set up specialised agencies such as the European Medicines Agency (EMA) in 1993, the European Centre for Disease Prevention and Control (ECDC) in

²⁷ For the consolidated version see: https://ec.europa.eu/competition-policy/system/files/2021-11/TF_consolidated_version_amended_18_nov_2021_en_2.pdf.

²⁸ See: European Parliament. Report of 07 February 1997 (A4-0020/97) on alleged contraventions or maladministration in the implementation of Community law in relation to BSE, without prejudice to the jurisdiction of the Community and national courts. Temporary committee of inquiry into BSE / Rapporteur: Mr Manuel Medina Ortega; and Report of 14 November 1997 (A4-0362/97) on the European Commission's follow-up of the recommendations made by the Committee of Inquiry into BSE. Rapporteur: Mr Reimer Böge.

2004, and – in light of the current COVID-19 pandemic – the European Health Emergency Preparedness and Response Authority (HERA) in September 2021.

Regarding the issue of health emergency, Article 168 TFEU served as the key legal basis for **Decision No. 1082/2013/EU of Parliament and the Council of 22 October 2013 establishing a framework for dealing with cross-border threats to health**.²⁹ The decision contains a chapter 5 entitled “emergency situations”, which provides rules for the recognition of a health emergency, the legal effects of such recognition, and the termination of the emergency.

Article 3 of the decision defines “serious cross-border threat to health” as “a life-threatening or otherwise serious hazard to health of biological, chemical, environmental or unknown origin which spreads or entails a significant risk of spreading across the national borders of Member States, and which may necessitate coordination at Union level in order to ensure a high level of human health protection.”

Article 12 authorises the Commission to recognise, by means of implementing acts, a situation of public health emergency in relation to epidemics of human influenza considered to have pandemic potential under three alternative conditions:

- a) The Director-General of the WHO has been informed and has not yet adopted a decision declaring a situation of pandemic influenza in accordance with the applicable rules of the WHO.
- b) The Director-General of the WHO has been informed and has not yet adopted a decision declaring a public health emergency of international concern in accordance with the IHR, and where the serious cross-border threat to health in question endangers public health at the Union level, medical needs are unmet in relation to that threat (methods of diagnosis, prevention or treatment).
- c) Imperative grounds of urgency related to the severity of a serious cross-border threat to health or to the rapidity of its spread among Member States justify the Commission to recognise situations of public health emergency through immediately applicable implementing acts.

The legal effects of such recognition of health emergency are extremely limited. According to Article 13 of the decision, they allow for activating point 2 of Article 2 of Commission Regulation No 507/2006 of 29 March 2006 on the conditional marketing authorisation for medicinal products for human use falling within the scope of Regulation (EC) No 726/2004 of the European Parliament and of the Council,³⁰ or Article 21 of Commission Regulation No 1234/2008 of 24 November 2008 concerning the examination of variations to the terms of marketing authorisations for medicinal products for human use and veterinary medicinal products in order to allow the Commission to exceptionally and temporarily accept a variation to the terms of a marketing authorisation for a human influenza vaccine, where certain non-clinical or clinical data are missing.

The decision served the ECDC to put in place an **Early Warning and Response System**, and the **EU Health Security Committee** to coordinate the response to outbreaks and epidemics. Without making reference to the decision’s Articles 12-14, many ad hoc measures were adopted under urgency procedures: The Regulation 2020/1043 of the European Parliament and of the Council of 15 July 2020

²⁹ See: Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC Text with EEA relevance, OJ L 293, 5.11.2013, p. 1–15.

³⁰ See: OJ L 92, 30.3.2006, p. 6–9.

on the conduct of clinical trials with and supply of medicinal products for human use containing or consisting of genetically modified organisms intended to treat or prevent coronavirus disease (COVID-19), the Commission Communications “EU Strategy for COVID-19 vaccines” and “Preparedness for COVID-19 vaccination strategies and vaccine deployment”, and the Council recommendation of 13 October 2020 establishing common criteria and a common framework on travel measures in response to the COVID-19 pandemic.³¹ Throughout 2020, the Commission continued to take additional action to help build increased resilience across several areas in all Member States. Measures include connecting national contact-tracing apps, broadening travel exemptions, more extensive testing and securing supplies for vaccines. Further measures include the Commission’s communication on additional COVID-19 response measures, its recommendations on COVID-19 testing strategies, and on the use of rapid antigen tests.

Within its Communication of November 2020 entitled “Building a European Health Union: preparedness and resilience”, the Commission sketched proposals for a **Regulation on serious cross-border threats to health**,³² as well as for additional legal acts to extend the mandate of the EMA and the ECDC. Parliament, on 14 September 2021, adopted by 594 votes to 85, with 16 abstentions, amendments to the proposal. To prepare for trilogue negotiations, the matter was referred back to the committee responsible. The main amendments concern the scope of the Regulation (according to Parliament, the Regulation should apply to threats of biological origin including communicable diseases, including those of zoonotic origin, and to epidemiological surveillance of communicable diseases and monitoring of the impact of these diseases on major non-communicable diseases and health problems such as mental health. Parliament also calls on the Commission to draw up an EU prevention, preparedness and response plan, that should include (a) the mapping of the production capacities of medical products in the Union as a whole, the establishment of a Union stock of critical medicinal products, medical countermeasures and personal protective equipment as part of the rescEU emergency reserve, (b) the ensuring that healthcare services, including the screening, diagnosis, monitoring, treatment and care for other diseases and conditions, are provided without disruption during health emergencies, (c) the ensuring that national health systems are inclusive and provide equal access to health and related services, and that quality treatments are available without delays, and (d) monitoring whether adequate risk assessments, preparedness plans and training courses are foreseen for health and social care professionals. Moreover, Parliament urged the Commission to be more transparent when awarding contracts or making purchases. The precise quantities ordered by and supplied to each participating country and the details of their commitments should be made public. Joint procurement processes should be based on qualitative criteria for the award process, in addition to cost. Such criteria should also take into consideration, for example, the ability of the manufacturer to ensure security of supply during a health crisis. In this context, Parliament held that it reserves at all times the right to scrutinize, under existing confidentiality rules, the uncensored content of all contracts concluded in proceedings referred to in this Regulation.

³¹ See: Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, OJ L 337, 14.10.2020, p. 3–9.

³² See: Proposal for a Regulation of the European Parliament and the Council on serious cross-border threats to health and repealing Decision No 1082/2013/EU, COM/2020/727 final.

3.7. Free movement of citizens and the Schengen Borders Code

Another approach to define an emergency situation in the Union can be found within the framework of the free movement of citizens. According to Article 21 TFEU, every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. Article 67 (2) TFEU further specifies that the Union shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. Based on Article 21 (2) TFEU, Parliament and the Council may adopt provisions, if action by the Union should prove necessary to attain the key objective of free movement and residence, since the treaties have not provided the necessary powers. Regarding emergency situations in this context, it is Article 29 of **Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States**³³ that could have been invoked during the COVID-19 crisis. According to Article 29 of the said Directive, “the only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.” Moreover, Article 27(4) of the Free Movement Directive imposes an obligation on EU Member States to allow their own nationals expelled on public health grounds to re-enter their territory “without any formality”. This provision is understood as an explicit prohibition for the Member State of origin not to apply travel restrictions to returned nationals on COVID-19 grounds. In any case, EU Member States should, as a matter of priority, ensure that all people – regardless of their nationality and administrative status – have the right of access to health care and medical treatment, as enshrined in Article 35 of the European Charter on Fundamental Rights (EUCFR).

During the COVID-19 crisis, Article 21 TFEU has been used as the legal basis of the Council's Recommendation 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic. The recourse to Article 21 TFEU is surprising in that the measures referred to in the Council's Recommendation concerning travel within the internal market are governed by the Schengen Borders Code (SBS). However, the SBS does not refer to Article 21 TFEU but to Article 77 TFEU regarding the Union's policies on border checks, asylum and immigration. In fact, Article 77(2) TFEU calls on the Parliament and the Council to adopt measures concerning, i.a., the checks to which persons crossing external borders are subject, the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period, and the absence of any controls on persons, whatever their nationality, when crossing internal borders.

The Schengen Border Code³⁴ has been introduced to define the conditions of temporary reintroduction of border controls at internal borders in the so-called “Schengen area”, a border-free area comprising 22 EU countries, along with Iceland, Liechtenstein, Norway and Switzerland, in the event of a serious threat to public policy or internal security. The reintroduction of border control at

³³ See: Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30.4.2004, p. 77–123.

³⁴ See for the recent version: Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 77, 23.3.2016, p. 1–52.

the internal borders must be applied as a last resort measure, in exceptional situations, and must respect the principle of proportionality. According to Article 25 SBC, internal border controls may be exceptionally restored inside the Schengen area for a limited period of time where:

- there is a serious threat to public policy or internal security: border controls may be reintroduced by the affected Schengen countries for a maximum duration of 6 months in case of foreseeable events (e.g. important sport events or conferences) and for a maximum of 2 months in case of events requiring immediate action;
- the Schengen evaluation mechanism reveals that there are serious and persistent flaws in external border controls putting the overall functioning of the Schengen area at risk. In such cases, the Council may recommend that one or more EU countries reintroduce border controls at all or at specific parts of their internal borders for a maximum of 2 years.

Accordingly, the scope of the temporary reintroduction of border control depends on a clear and exhaustive set of conditions: a serious threat to public policy or internal security (Article 25 SBC), or situations following terrorist incidents or threats, and those posed by organised crime (Article 26 SBC). The duration of such a temporary reintroduction of border control at the internal borders is limited in time, depending on the legal basis invoked by the Member State introducing such border control. The scope and duration of reintroduced border control should be restricted to the bare minimum needed to respond to the threat in question. The reintroduction of border control is a prerogative of the Member States. Although the Commission – acting as the guardian of the treaties! – cannot veto a Member State's decision to reintroduce border control, it has an obligation to closely monitor Member States' activities and may issue an opinion assessing the necessity of the measure and its proportionality. Overall thus, the SBC provides a Union-led procedure whereby Member States are obliged to comply with a set of common criteria and procedures which fall under EU scrutiny. In theory, this procedure ensures the necessary checks and balances to avoid arbitrariness by states in derogating key EU freedoms and to facilitate coordination. The SBC covers situations where border controls are introduced for reasons of national security and public order or safety, as well as in times of declared emergency and crisis. A key feature of the procedure followed by the SBC is that the burden of proof is on Member States to demonstrate and justify the necessity and proportionality of border and travel restrictions that impede free movement. The weight of the proportionality test increases over the time of the restriction: the more frequently or the longer border controls are introduced or prolonged, the higher the justification requirements on the Member States. Such an increasing burden of proof means that Member States are required to constantly and rigorously assess the necessity and effectiveness of border controls, to consider whether there are less intrusive means to achieve the same public objective, and to ensure that these measures do not disproportionately interfere with or affect EU rights and freedoms.

Box 3: The reintroduction of internal border controls during the "migration crisis"

During the height of the "migration crisis" between autumn 2015 and spring 2016, six Schengen member states introduced controls at some of their internal EU borders. Germany made a start on 13 September 2015 at the border with Austria in order to better record the influx of people seeking protection. A few days later, Austria joined in at its southern border with measures to control the "Balkan route". As other main destination countries for refugees, Sweden, Denmark and Norway took similar steps from November 2015 onwards to monitor land, bridge and ferry connections to each other and to Germany. France, meanwhile, saw itself forced to declare a national state of emergency due to the terrorist attacks of 13 November 2015. Not least because the terrorists had previously moved freely in Europe, Paris reintroduced border controls in parallel. At the end of 2015, an evaluation of the EU Commission on the SBC found serious systematic deficiencies in Greece's external border management. This led some politicians to consider to temporarily suspend Greece as a full member of the Schengen zone. To avert this step, the Council decided in May 2016 to allow internal border controls as a compensatory measure. This mechanism had only been established in 2013 in response to an earlier crisis of the Schengen regime, which had been sparked by the irregular entry and onward movement of North African citizens following the so-called Arab Spring between Italy and France. After failing to establish an official distribution mechanism to assist Italy, France decided to carry out border controls unilaterally. According to the newly introduced Article 29 SBC, such internal border controls should only be allowed for more than six months and for up to two years, if the Council of Ministers, acting by qualified majority, recognises a systematic threat to the entire Schengen zone. Such a decision was taken for the first time in May 2016 in view of the situation in Greece and was subsequently used by Germany, Austria, Denmark, Sweden and Norway. France, on the other hand, once again took a special path and extended its border controls with reference to the ongoing terrorist threat. Article 25 SBC, which is used for this purpose, does not explicitly exclude the possibility of calling phases of control in the service of internal security directly one after the other, even if each one must be limited to up to six months. In view of the renewed serious terrorist attacks in Brussels on 22 March 2016, this interpretation of the SBC was not openly criticised. Instead, the Council urged further strengthening of the security aspects of Schengen, in particular mandatory as well as information-based checks on persons at all external borders. In the wake of these developments, the Commission recommended that all remaining stationary internal border controls should be dismantled by winter 2017 at the latest. While irregular migration via Libya to Italy increased, serious systemic risks for the Schengen zone could no longer be argued. The majority of irregular immigrants in Italy were rescued from distress at sea by European ships and increasingly registered in EU hotspots. Moreover, in November 2017, the legally permissible three times extension of border controls under Article 29 SBC had been exhausted. To compensate, the EU referred to the possibility of intensifying police checks in the area close to the border. Finally, the French government also lifted the national state of emergency in November 2017. Yet none of the six Schengen states concerned was willing to lift internal border controls again. Instead, they launched a legislative initiative already in September to extend the maximum permissible duration of temporary border controls under Article 29 SBC from two to four years. However, neither this initiative nor a compromise proposal by the Commission (three years) found sufficient support among the other Schengen members. Therefore, as of November 2017, Germany, Austria, Denmark, Sweden and Norway switched from Article 29 to Article 25 SBC to justify their control measures. With this step, they followed the procedure of France, which notified border controls for six months at a time for reasons of internal security. In practice, however, the controls were still directed at irregular or secondary migration.

It should be emphasised that public health is not explicitly listed among the reasons for the legitimate reintroduction of internal border controls in the SBC. Moreover, the provisions of the SBC also do not

foresee any legitimate possibility for EU Member States to apply any form of 'travel ban', or to temporarily prohibit or ban the entry of nationals and residents of another Schengen country.

Since the outbreak of COVID-19, nearly all Schengen countries used the SBC by rushing into reintroducing internal border controls. At the beginning of the crisis, they invoked Article 28 SBC as the legal basis. Given that the majority of the Schengen countries started to reintroduce their internal border controls around mid-March 2020, Article 28 SBC could serve as the legal basis only until mid-May 2020. However, only Iceland, which introduced its internal border controls on 24 April 2020, stayed within the maximum period of Article 28 SBC. All other Schengen members subsequently referred to Article 25 and Article 27 SBC to maintain internal border controls until mid-September to mid-November 2020. Austria, Denmark and France extended their existing internal border controls (not based on COVID-19), introduced on the basis of Articles 25 and 27 SBC, to include COVID-19-related border controls.

Already in its 2018 Report on the Functioning of the Schengen Area, Parliament expressed concerns about and regretted "the practice by Member States of artificially changing the legal basis for reintroduction to extend it beyond the maximum possible period in the same factual circumstances".³⁵ During the COVID-19 crisis, we observe a similar malpractice by some of the Member States not issuing separate notifications for different grounds, some of which are not at all related to the COVID-19 pandemic. According to Carrera and Luk, "the resulting picture shows an instrumental use of different legal bases of the SBC by a few interior ministries – i.e. jumping from one legal base to another – which results in unlawfully extending the originally-envisaged deadlines in the relevant SBC provisions" (Carrera/Luk 2020, 56). None of the EU Member States that are extending or currently (end 2021) applying internal border controls are acting in accordance with existing SBC rules. This misconduct and abuse of the law makes the provisional nature of border controls beyond the legally permitted period, as called for by the SBC, quasi-permanent. The result echoes a similar instrumental pattern practised by the six Schengen Member States (Austria, Denmark, France, Germany, Norway and Sweden), which in some cases have continued to unlawfully impose non-COVID 19-related internal border controls at some sections of their borders since 2015!

Most of the SBC notifications refer only in very broad terms to the COVID-19 pandemic as a serious threat to their public policy and internal security. Dubious justifications range from "a threat of" or "a need to reduce the spread of COVID-19", the "need to protect citizens' lives and health", the "need to ensure the capacity of healthcare facilities", the "protection of the property of citizens", or the "protection of the economy" (Carrera/Luk 2020: 57). Some Schengen countries went even further and contributed to the stigmatisation of citizens of neighbouring countries by pointing to the epidemiological situation there to justify the reintroduction of internal border controls. The worst cases in this regard are Austria and France, which justified their border closures not only on the basis of the risk of importing the virus from "abroad",³⁶ but went so far as to brand entire populations as a potential danger. Austria argued, for example, that the "current measures to combat the COVID 19 crisis (especially border closures) might cause that migrants get stranded in the countries of the Western

³⁵ See: European Parliament, Report on the annual report on the functioning of the Schengen Area (2017/2256(INI)), A8-0160/2018, PE 613.539, European Parliament, 3.5.2018, para. 9.

³⁶ The original of the remarks by then Chancellor Sebastian Kurz at a Press conference in December 2020 makes the racist language clear: "Wir hatten im Sommer sehr, sehr niedrige Ansteckungszahlen nach dem Lockdown und haben dann durch Reiserückkehrer und insbesondere auch durch Menschen, die in ihren Herkunftsländern den Sommer verbracht haben, uns Ansteckungen wieder ins Land hereingeschleppt. Daher ist es notwendig, dass wir diesmal auf ein sehr konsequentes Grenzregime setzen, das verhindern soll, dass wir in Österreich zwar mit den Zahlen nach unten kommen, uns aber dann durch Auslandsreisen in der Weihnachtszeit das Virus wieder ins Land einschleppen." See: Written Question to the Chancellor, 10 December 2020. https://www.parlament.gv.at/PAKT/VHG/XXVII/J/J_04439/fnameorig_858066.html.

Balkans" and, once lifted, will lead to "the migration pressure increase[ing]". France directly linked the COVID-19 pandemic to potential terrorist threats, noting that the "vulnerability of States whose security forces are heavily involved in combating the spread of the COVID-19 pandemic is conducive to new terrorist plots".

The SBC's provisions on the conditions for reintroducing border controls do not foresee 'public health' as a legitimate ground for Member States to reintroduce internal border checks. While Article 2(21) defines 'threat to public health' as "any disease with epidemic potential as defined by the International Health Regulations of the WHO and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States", the Code's specific provisions on the trigger conditions for internal border closures and controls do not provide a criterion that corresponds to the definition in Article 2(21). The terminology is only used within the Code's chapter II on the control of external borders and refusal of entry. Here, Article 8(2) allows border guards carrying out minimum checks on persons enjoying the right of free movement under Union law to "consult national and European databases in order to ensure that such persons do not represent a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States or a threat to the public health."

The non-inclusion of 'public health' in the provisions on the reintroduction of border controls at internal borders is due to successful amendments by the Parliament. While the Commission originally proposed to include 'a threat to public health' among these grounds, Parliament succeeded in deleting it by arguing that in the event of an outbreak the most appropriate and proportionate reaction would not be border controls but rather health-related measures such as quarantines.³⁷ Although 'public health' may not play a role in the reintroduction of internal border controls, the Commission's proposal for the Council Recommendation on a coordinated approach to restrictions on freedom of movement in response to the COVID-19 pandemic (COM(2020) 499) of September 2020 states that "restrictions on freedom of movement within the Union to contain the spread of COVID-19 shall be based on specific and limited public interest grounds, in particular the protection of public health".

Most EU Member States responded to the COVID-19 pandemic with hasty and uncoordinated restrictions on cross-border mobility, both within and outside the EU. Only a few Member States "complied fully with the procedural requirements of Article 27 SBC, confirming once more that Member States consider the reinstatement of controls at the internal borders a 'quasi-sovereign' prerogative" (van Eijken/Rijpma 2021). Many of these restrictions had a strong symbolic value to demonstrate the capacity of governments to act in an emergency. However, all restrictions on mobility within the EU

³⁷ The successful amendment presented by Parliament was justified as follows: "The Commission proposes to add 'threat to public health' to the grounds justifying the reintroduction of internal border controls. This is a completely new element so far not foreseen in the Schengen Implementing Convention, the Common Manual in force or the Decision of the Schengen Executive Committee of 20 December 1995 (SCH/Com-ex (95) 20, rev.2) [...]. There is, however, a difference between 'threat to public health' as a reason to refuse the entry for an individual person and 'threat to public health' as a reason to reintroduce internal border controls which would affect all persons wishing to cross the internal border. While for the first case it is easy to see the benefit of adding 'threat to public health' as a grounds for refusal (a person carrying a very serious disease which can easily infect many people should not be allowed entry into the Schengen zone), this is not really evident for the reintroduction of internal border controls: should there be an outbreak of such a disease on the territory of a Member State the appropriate and proportional policy reaction would be, for example, to put the affected persons in quarantine, maybe seal off a hospital or a few buildings. It is difficult to imagine that in such a case internal border controls should be reintroduced to undertake health checks of travellers (if 'threat to public health' is the justification to reintroduce controls then that makes only sense if the controls focus on detecting such a threat). See: European Parliament: Draft report (PE 355.529v01-00) on the proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (COM(2004)0391 – C6-0080/2004 – 2004/0127(COD)); Amendment No. 171 by Sylvia-Yvonne Kaufmann, p.20. Doc. No. AM\563299EN.doc.

were introduced long after COVID-19 arrived and spread throughout Europe. These restrictions created, and still create, profound legal uncertainty for EU citizens and have a negative impact on rights and freedoms in the EU. Even in the third year of the pandemic, the free movement of persons, one of the pillars of the integration project, has not been restored.

Despite all restrictions, Parliament has dealt with the abusive implementation of the SBC four times since the outbreak of the pandemic. The resolutions were adopted with large majorities and illustrate in an impressive way that MEPs used their control and interaction function to remind the executive bodies of the EU and its Member States of their treaty obligations of loyalty and solidarity. In its Resolution of 19 June 2020 on “the situation in the Schengen area following the COVID-19 outbreak (2020/2640(RSP))”, adopted by 520 votes to 86, with 59 abstentions, Parliament expressed concern about the situation with regard to the internal border controls in response to the COVID-19 outbreak. It considered that more targeted restrictions at regional level, including in cross-border regions, would have been more appropriate and less intrusive, and called on Member States to enter into negotiations with Parliament and the Commission for a Recovery Plan for Schengen and fully-fledged contingency plans in the event of health emergency, in order to prevent temporary internal border controls from becoming semi-permanent in the medium term. Furthermore, Parliament recalled that the assessment of the need to reintroduce or prolong internal border controls shall be made at EU level only. Accordingly, the Commission should closely monitor the application of the Schengen acquis and report to Parliament on the way it makes use of the prerogatives conferred on it by the Treaties. Parliament adopted a second Resolution on 17 September 2020 on “COVID-19: EU coordination of health assessments and risk classification, and the consequences for Schengen and the single market (2020/2780(RSP))” by 595 votes to 50, with 41 abstentions and reiterated its proposal to discuss with Parliament and the Commission a recovery plan for Schengen as quickly as possible. In addition, Parliament urged Member States to agree on harmonising standards for the definition for a positive case of COVID-19, for a death by COVID-19 and for recovery from infection, in order to allow a common analysis of the epidemiological risk at EU level. By the same token, the EU should agree on a common quarantine period with regard to essential and non-essential intra-EU travel, and essential and non-essential travel into the EU from third countries. Furthermore, Parliament proposed to define a common framework of health measures that public authorities should adopt in affected areas to avoid the spread of the virus. A third resolution “on the Schengen system and measures taken during the COVID-19 crisis (2020/2801(RSP))” passed the Plenary on 24 November 2020 by 619 votes to 45, with 28 abstentions. Parliament stressed that a swift return to a fully functional Schengen area depends on both the political will of the Member States and their commitment to coordinating measures under the Schengen acquis. It called the Commission to improve and support EU-wide cooperation and coordination among and with Member States during the pandemic, and to arrange the ‘Re-open EU’ website as a true one-stop shop to facilitate free movement during the pandemic. Furthermore, Parliament urged the Commission and the Council to fully implement the measures for overall coordination based on the best available science, notably regarding quarantine Regulations, cross-border contact tracing, testing strategies, the joint assessment of testing methods, the mutual recognition of tests, and temporary restrictions on non-essential travel into the EU.

Considering the long-term effects of the COVID-19 crisis on the Union’s fabric of democratic governance, Parliament adopted, on 13 November 2020, a resolution “on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights (2020/2790(RSP))” by 496 votes to 138, with 49 abstentions. Parliament called Member States to consider exiting the state of emergency or otherwise limiting their impact on democracy, the rule of law and fundamental rights, to ensure transparency when adopting measures and to provide their citizens with comprehensive, up-to-date, precise and objective information and data concerning the public health situation, and to evaluate the

restrictive measures regarding the freedom of movement against the full respect for EU law, in particular the SBC and the Free Movement Directive. Moreover, Parliament urged Member States to intensify their efforts to combat all types of discrimination which has been exacerbated by the pandemic. Combining its control- and interaction-function with its system-development function, and taking on an earlier resolution of 7 October 2020, Parliament invited the Commission and the Council to engage in the negotiation of an IIA on effective monitoring mechanisms on rule of law, democracy and fundamental rights.

In this resolution “on the establishment of an EU Mechanism on Democracy, the rule of law and Fundamental Rights (2020/2072(INI))”, adopted by 521 votes to 152, with 21 abstentions, Parliament forwarded a draft IIA on “Reinforcing Union Values”. The resolution warned that the Union is facing an unprecedented and escalating crisis of its founding values, threatening its long-term survival as a democratic peace project. In this regard, Parliament expressed concerns “by the rise and entrenchment of autocratic and illiberal tendencies, further compounded by the COVID-19 pandemic and economic recession, as well as corruption, disinformation and state capture, in several Member States”. To address the lack of a comprehensive reporting and evaluation mechanism on the state of democracy, the rule of law, fundamental rights and all other Union values, Parliament proposed to jointly set up a mechanism to monitor all Member States annually with respect to their adherence to Union values by entering into an IIA to that effect. The IIA shall entail an annual monitoring cycle in all areas of the Union’s values, including specific recommendations for each Member State, and a follow-up stage. The Annual Report shall point to both positive and negative developments in the field of the Union’s values in the Member States. Parliament and the Council shall adopt positions on the annual report by means of resolutions and conclusions. In addition, the Commission shall, on its own initiative or at the request of Parliament or the Council, enter into dialogue with one or more Member States with a view to facilitating the implementation of the recommendations. Finally, the Commission shall, on its own initiative or at the request of Parliament or the Council, draw up an urgent report when the situation in one or more Member States gives reason to believe that there is imminent and serious damage to the values of the Union.

Regarding its control function, Parliament expressed in a Resolution of June 2020 on the situation of the Schengen area following the COVID-19 outbreak that overall “Parliament has been uninformed”.³⁸ The fact that the Member States continue to decide on border controls at the EU’s internal borders as they see fit has two reasons - apart from the individual interests of the Member States’ governments: First, the Commission does not fulfil its obligation to review the restrictive measures of the Member States along the criteria and procedures laid down in the SBC. The Commission has never complained about the situation or called for a termination of enduring border controls (Montaldo 2020). Moreover, it has not exploited all the monitoring tools provided by the Schengen Evaluation System, such as visits in loco and interviews with the competent national authorities. The Commission has also failed so far to sanction irregular and illegal actions by the Member States with the help of the arsenal at its disposal (Infringement proceedings or rule of law proceedings). And second, parliamentary scrutiny of national restrictive measures is limited to ex-post information of the respective notifications. Within the SBC, no effective parliamentary sanction mechanism is established against the abusive, sometimes openly xenophobic and racist use of the restrictions and the respective notifications. As a result, Parliament can only turn to the Commission to remind it of its obligations under the treaties and the SBC, and

³⁸ See: European Parliament, Motion for a Resolution on the Situation in the Schengen area following the COVID-19 outbreak (2020/2640(RSP)), B9-1065/2020, European Parliament, 10.6.2020, paragraph 14.

punish corresponding failure via (a) a legal action because of its failure to act, or (b) a vote of no confidence.

3.8. Article 78(3) TFEU and the risk of excessive emergency measures

Another type of emergency procedure is foreseen in Article 78(3) TFEU regarding the Union's common policy on asylum, subsidiary protection and temporary protection. While measures taken under this provision are usually adopted by the OLP, paragraph 3 provides for a special procedure "in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries". The Council may then, on a proposal from the Commission, and after having consulted Parliament, adopt provisional measures for the benefit of the Member State(s) concerned. In addition to the formal obligation to consult Parliament, there is also in this case an effective safeguard in terms of democratic policy-making, as the Council and the Commission share the responsibility for selecting the trigger condition. The provision was first applied during the 2015 "migration crisis", when Italy and Greece faced unprecedented numbers of asylum seekers fleeing persecution or serious harm. The respective Council decisions involved a clearly temporary derogation, both in time and in substance, from certain provisions of the Dublin Regulation, which lays down the usual rules for the division of responsibilities. Parliament strongly supported the mandatory emergency relocation measures and voted, with 372 votes to 124 with 54 abstentions, in favour of the Commission's first relocation proposal to follow a fast-track procedure. Parliament adopted its resolution by urgent procedure, approving the Commission's proposal without amendments.

On 1 December 2021, the Commission presented a proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland,³⁹ in view of supporting them in managing the emergency situation caused by the actions of Belarus, leading to a sudden inflow of third country nationals in the current context of instrumentalization of migrants at the external borders. With the "instrumentalization of migrants", the Commission inserts a new basis for activating Article 78(3) TFEU without defining the term of instrumentalization in the explanatory memorandum or in the proposal's legal text.

According to the ECJ, Article 78(3) TFEU can be applied in exceptional circumstances in the event of a sudden influx of third-country nationals when the situation makes the normal functioning of the EU asylum system impossible.⁴⁰ Following the approach taken by the Court in assessing the 2015 emergency measures, the number of refugees should be assessed to determine whether (a) their volume would seriously disrupt Member States' asylum systems and (b) full saturation of the reception system could be achieved. At the press conference announcing the new proposal, Commissioner Johansson acknowledged that refugee numbers are indeed not very high. However, she stated in this context that the key element justifying the measures was "the instrumentalization of migrants for political purposes". Given the ECJ's jurisprudence on the interpretation of Article 78(3) TFEU, and given that the arrival of larger numbers of third-country nationals requesting international protection is

³⁹ See: European Commission proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania and Poland, COM/2021/752 final.

⁴⁰ See: ECJ, *Slovak Republic, Hungary v. Council of the European Union*, C-643/15 and C-647/15, 6 September 2017, ECLI:EU:C:2017:631.

already provided for in EU legislation⁴¹ to allow Member States flexibility in emergency situations and to allow them to depart, to a certain extent, from the generally applicable rules, the question arises as to whether the recent proposal constitutes an effort to circumvent the democratic process, given the limited, consultative role of Parliament in the adoption of provisional measures under Article 78(3) TFEU.

Regardless of the outcome of the proposed decision, Parliament should be warned that **emergency measures should always be considered in the context of normal procedures. As long as there are other measures of secondary law that sufficiently take into account the respective emergency situation, (a) the motivation for triggering an emergency measure should be critically questioned and (b) the legal basis of Article 78(3) TFEU should be challenged.** Under Article 78(3) TFEU, only "provisional measures" may be adopted. Building on the ECJ's evaluation of the 2015 decisions, such measures may be classified as "provisional" if it is not intended to regulate an area on a permanent basis and only if it applies for a limited period. The duration of the emergency measure must be determined in the light of the circumstances of the case and of the specific features of the emergency situation justifying the measures. Moreover, Article 78(3) TFEU shall not form a legal basis for any permanent amendment of secondary legislation outside of the confines of the OLP. Accordingly, Article 78(3) TFEU may allow for the adoption of measures which, in order to address a clearly identified emergency situation, derogate temporarily and on specific points from legislative acts in asylum matters.⁴² In any event, measures justifying the trigger of Article 78(3) TFEU should be necessary and proportionate to the objective pursued. And when the Union legislator has a choice between several appropriate measures, recourse should always be had to the least onerous and the disadvantages caused should not be disproportionate to the aims pursued. In its consideration of the proposed decision, Parliament should therefore take the utmost caution to ensure that the emergency measures envisaged do not serve to definitively remove, replace or amend higher-ranking legislation, and that these measures should not be used as a pretext to create similar "exceptional situations" which ultimately undermine the *acquis* of European asylum and immigration law.

3.9. Specific rules for urgency procedure

The treaty provisions presented so far are characterised by the fact that they deal with the situation of emergency in different ways and standardise incentive or opportunity structures for problem solving under exceptional circumstances. With regard to the deliberative and decision-making instruments at issue, all the cases considered so far are characterised by a narrowing of the institutional possibilities for participation. While the Council operates as the central decision-making body, the legislative participation as well as the oversight rights of Parliament are substantially limited. The cases considered so far always derive the applicable procedures from the initial situation of the state of emergency. It is noticeable that the declaration of a state of emergency a) originates from the respective Member States concerned and b) is not subject to any direct confirmatory or supervisory competence Parliament.

The treaties also provide for special urgency procedures in some areas, some of which refer to the justificatory context of the emergency situation:

⁴¹ See: Articles 6(5), 14(1), 31(3)(b), 43(3) of the recast Asylum Procedure Directive 2013/32, Articles 10(1) and 18(9) of the recast Reception Directive 2013/33, and in Article 18 of the Return Directive 2008/115.

⁴² See: Opinion of the Advocate General Bot, delivered on 26 July 2017 (1), Cases C-643/15 and C-647/15, paras. 75-78; <https://bit.ly/3orP00L>.

a) Regarding the conclusion of international agreements, the Parliament and Council may, in an urgent situation, agree upon a time limit for consent (Article 218(6) TFEU). It is remarkable that the provision does not define any triggering conditions of the urgent situation.

b) Moreover, for those cases of international agreements that only require the consultation of Parliament by the Council, the latter may set on its own discretion, according to Article 218(6b), a time-limit for the delivery of Parliament's opinion "depending on the urgency of the matter". In the absence of an opinion within that time limit, Parliament's tacit consent is considered to be given and the Council may act. The Council is not subject to any control to justify the trigger condition before or after the decision in question. In this case, the Parliament only has the possibility of challenging the chosen procedure within the framework of its time-limited consultation or before the ECJ. If the Parliament disputes the legal basis chosen by the Council in the ongoing, limited consultation procedure, the Council can still adopt the agreement, as it is not bound by the substantive considerations of the Parliament anyway. Only a challenge of the Council's action at the ECJ could – after the agreement has entered into force – lead to its annulment.

c) Similarly, the urgency procedure is materially indeterminate in the case of cooperation and assistance measures within the scope of Article 212 TFEU. Usually, measures adopted under Article 212 TFEU to carry out economic, financial and technical cooperation or assistance with third countries other than developing countries are adopted under the OLP. For exceptional cases, Article 213 TFEU specifies that "necessary decisions" can be adopted by the Council on a proposal from the Commission without involving Parliament, "when the situation in a third country requires urgent financial assistance from the Union". In contrast to the case of international agreements, the Council and the Commission share the responsibility for selecting the trigger condition. At least formally, there is thus a minimum of parliamentary follow-up of the procedure, since the Commission must justify itself before Parliament at any time and ultimately always acts under the reservation of a vote of no confidence.

d) Other treaty provisions foresee time limits for the Union's two consultative institutions, the European Economic and Social Committee (EESC, Article 304 TFEU), and the Committee of the Regions (CoR, Article 307 TFEU), without legitimising the restriction on grounds of urgency or emergency. In both cases, Parliament, the Council or the Commission may set the committees, for the submission of their opinions, a time limit which may not be less than one month from the date on which the committees' chairs receive notification to this effect. Upon expiry of the time limit, tacit consent is considered to be given and Parliament, Council or the Commission are not prevented further action.

3.10. Urgency procedures in the Institutions' Rules of Procedure

Looking beyond the treaties, the rules of procedure of the Institutions define the nature and sequences for urgency procedures.⁴³

⁴³ This chapter concentrates on the EU's law-making bodies. Regarding the adaptation of the European Court of Justice to the COVID-19 crisis, see Costas Popotas (2021). COVID-19 and the Courts. The Case of the Court of Justice of the European Union (CJEU). *International Journal for Court Administration*, Vol. 12, No.2. DOI: <https://doi.org/10.36745/ijca.381>. Amending its Rules of Procedure on 12 October 2021, the Committee of the Regions inserted Rules 80 on extraordinary measures and 81 on the remote attendance regime. See OJEC, L 472/1; and the Report of the Ad Hoc Commission on the revision of the Rules of Procedure, Doc. No. COR-2021-02272-00-01-TC-D-TRA (EN).

3.10.1. Urgency procedures in the Council's Rules of Procedure

According to Article 7 of the Rules of Procedure of the European Council, its decisions "on a matter of urgency may be taken by written vote if the President of the European Council proposes the use of this procedure. Written votes may be taken if all voting members of the European Council agree to this procedure". Article 7 thus allows the Heads of State or Government to opt collectively and by consensus for an urgent procedure if consent can indeed be obtained by written procedure. In this context, the General Secretariat of the Council regularly produces a summary of acts adopted by written procedure.

The urgency measures of the Council of Ministers are governed by Article 12 of its Rules of Procedure on the ordinary written procedure and silent procedure. Article 12(1) states that "acts of the Council on urgent matters may be adopted by written procedure if the Council or Coreper, acting unanimously, decides to use that procedure." In special circumstances, the President may also propose the use of this procedure; in such a case, written votes may be taken if all members of the Council agree to this procedure." In addition, "the agreement of the Commission to the use of the written procedure [...] shall be required where the written vote concerns a matter which the Commission has referred to the Council." Article 12(2) provides that the Council "may, on the initiative of the Presidency, act by a simplified written procedure known as the 'silent procedure'", listing the cases in which the Council may refer to this procedure. Building on these provisions, the Council adopted, on 23 March 2020, a Decision (EU) 2020/430 "on a temporary derogation from the Council's Rules of Procedure in view of the travel difficulties caused by the COVID-19 pandemic in the Union". Hence, for the Council's members, the COVID-19 related emergency measures "make it impossible or very difficult for certain Council members to travel with a view to being physically present at Council meetings held at the Council's seat". The restrictions thus "in turn make it difficult to reach the quorum required by Article 11(4) of the Council's Rules of Procedure, and consequently make it difficult for the Council to hold formal meetings." Against this background, Decision 2020/430 provides for a temporary derogation from the first subparagraph of Article 12(1) of the Council's Rules as regards decisions to use the ordinary written procedure. More specifically, the temporary amendment of Article 12(1) calls on the Council's Committee of the Permanent Representatives of the Governments of the Member States (COREPER) to take a decision to use the ordinary written procedure "in accordance with the voting rule applicable for the adoption of the Council act concerned." To ensure effective national coordination, public transparency, and the involvement of national parliaments in accordance with the practices of Member States, the Decision also stipulates that the use of the ordinary written procedure should be preceded by a thorough preparation in COREPER, and the Council act concerned should remain subject to prior political discussion by ministers, for example by informal videoconference. The derogation was initially foreseen to last until 23 April 2020. But given the development of the pandemic, it was subsequently extended by eleven Council decisions for further periods of a limited duration.⁴⁴ The latest Council decision extended the derogation until 28 February 2022. The introduction of the possibility of virtual meetings had significant effects on the frequency of meetings of the Council of Ministers. As shown in Figure 1, the number of (formal and informal) Council meetings increased to 123 in 2020. Since 89 of those meetings were conducted digitally, there were more digital meetings in 2020 than regular meetings on average in the years before. In 2021, the Council of Ministers met 125 times.

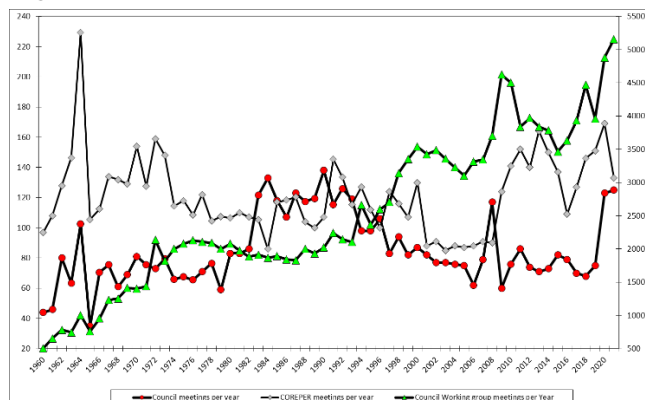
⁴⁴ See: Council Decision (EU) 2020/556 of 21 April 2020, Council Decision (EU) 2020/702 of 20 May 2020, Council Decision (EU) 2020/970 of 3 July 2020, Council Decision (EU) 2020/1253 of 4 September, Council Decision (EU) 2020/1659 of 6 November 2020, Council Decision (EU) 2021/26 of 12 January 2021, Council Decision (EU) 2021/454 of 12 March 2021, Council Decision (EU) 2021/825 of 20 May 2021, Council Decision (EU) 2021/1142 of 12 July 2021, Council Decision (EU) 2021/1725 of 24 September 2021, and Council Decision (EU) 2021/2098 of 25 November 2021.

The pandemic also changed the way negotiations and decision-making took place at the Council meetings themselves. Under normal conditions, the preparatory working groups and COREPER are key in preparing Council decisions. Especially the Council's working groups have a significant impact on the decision-making arena. Hence around 90% of EU legislation is prepared at this stage.⁴⁵ As there was no opportunity for informal negotiations or sub-meetings during the digital sessions, often only prepared statements were read out. Accordingly, the preparatory work of COREPER, which always met physically in 2020 and 2021, became even more important during the pandemic. One could argue that the high numbers of Council meetings are more or less in line with the number of sessions from 1984 to 1994 and do therefore not directly relate to the new session rules. However, this is contradicted by the fact that until June 2000 the Council of Ministers operated with many more policy area-specific Council formations.⁴⁶ The European Council of Seville of June 2002 reduced the number of Council formations massively from 16 to 9.⁴⁷ Against this background, the increase in the frequency of meetings in 2020 and 2021 is indeed a significant value, causally linked to the COVID-19 pandemic and the resulting changes in the modes of Council meetings.

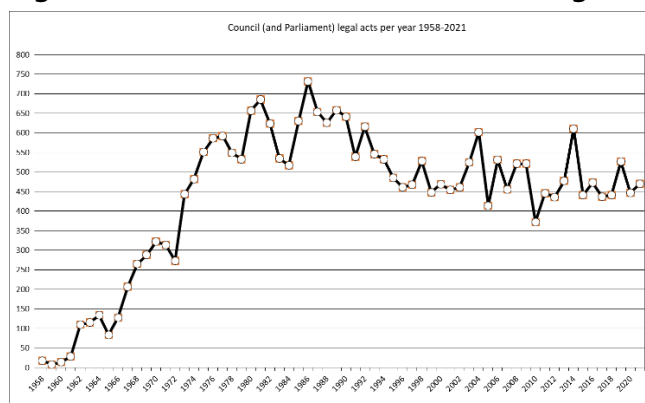
⁴⁵ See: Peter van der Knaap, *Government by Committee: Legal Typology, Quantitative Assessment and Institutional Repercussions of Committees in the European Union*, in: Robert Pedler and Günther Schäfer (eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process*, (Maastricht: EIPA, 1996), pp. 83-116 (here p. 114). The Council itself noted that some two thirds of its rolling agenda is closed by COREPER, out of which 70 % are agreed at the working groups level. See Rat der EG, *Der Rat der EG*, (Luxembourg: Amt für amtliche Veröffentlichungen, 1990), p. 22.

⁴⁶ Whereas in 1967 – after the entry into force of the Merger Treaty of the EEC, ECSC and Euratom – the Council met in seven different configurations to hold 20 meetings, in 1975 there were already twelve different configurations for 56 meetings. By 1987, these numbers had increased to 17 different configurations with 81 meetings. In 1999, the Council met in more than 20 different configurations and held 82 meetings. With a decision of June 2000, the Council reduced its formations to 16, with the frequency of meetings again increasing slightly to 87. The observed growth in the Council's work could be understood as the result of an equally growing number of Council decisions. However, the decision-making productivity of the Council and - since 1993 - of the European Parliament and the Council - has tended to decline. Whereas the Council adopted an average of 10 acts per session in the mid-1970s, in 2000 only three acts were adopted per session (see Figure 3). It should be noted, however, that the quantitatively measured decline in the Council's workload says nothing about the quality of the legal acts. In fact, since the beginning of the 1990s, the Council has been dealing much more than in the past with detailed and conflict-laden provisions - especially in the area of food control, health protection and economic policy. Dealing with these acts obviously requires more time and personnel than the measures adopted in the 1980s. Furthermore, it should be emphasised that since the mid-1980s the Council has been burdened with a multitude of tasks which do not directly result in generally binding legal acts, but which are nevertheless politically important and therefore take up an ever-increasing volume of the meeting time of Council meetings (resolutions, coordination tasks). Reforms of the Council have been underway since 1998/1999. The 1999 Trócaire/Pirís report was largely incorporated into the conclusions of the Helsinki European Council (10-11 December 1999). The separation of the agenda of the General Council into 'horizontal issues' (i.e. issues which also affect other Council formations) and 'external relations', which was suggested at that time, was already practised during the Belgian Council Presidency in 2001 and incorporated into the Council's Rules of Procedure.

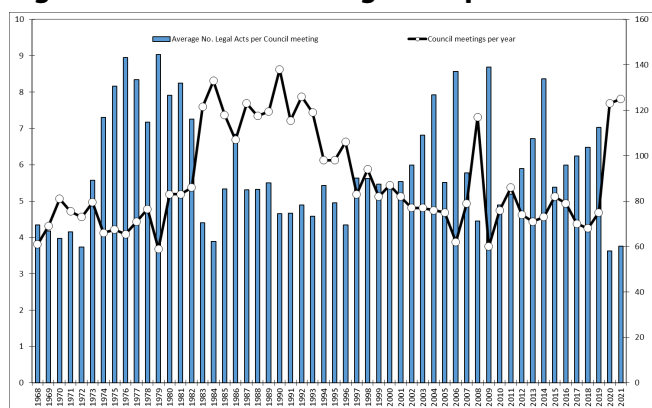
⁴⁷ The European Council of Seville embarked upon a process of reform at Helsinki in December 1999, when it adopted a set of recommendations, and then in Göteborg and Barcelona, where it took note of the reports by the Secretary-General/High Representative focusing on the European Council, the General Affairs Council, the Presidency of the Council, and the legislative activity of the Council and transparency. In the light of a summary report accompanied by detailed proposals submitted by the Presidency, the European Council agreed to a series of specific measures applicable, without amendment of the treaties, to the organisation and functioning of the European Council and of the Council. One of the key elements of these reforms concerned the reduction of the Council formats to 9: General Affairs and External Relations; Economic and Financial Affairs; Justice and Home Affairs; Employment, Social Policy, Health and Consumer Affairs; Competitiveness (Internal Market, Industry and Research); Transport, Telecommunications and Energy; Agriculture and Fisheries; Environment; and Education, Youth and Culture. See: Seville European Council. 21 and 22 June 2002; Presidency Conclusions, Doc. No. 13463/02/POLGEN 52.

Figure 1: Evolution of Council, COREPER and Working group meetings 1960–2021


Author's own calculations and compilation based on various sources: For 1960–2002, data were taken from the Commission's General Report on the activities of the European Communities/Union. For 2003–2021, data were taken from the Council's documents register (agendas, minutes, and meetings calendars).

Figure 2: Council and Parliament/Council legal acts per year 1958–2021


Author's own calculations and compilation based on EURLEX.

Figure 3: Evolution of EU legal acts per Council meetings


Author's own calculations and compilation based on various sources: Regarding the number of legal acts (Regulations, Directives, Decisions), data were taken from EURLEX. Regarding the number of Council meetings, for 1960–2002, data were taken from the Commission's General Report on the activities of the European Communities/Union. For 2003–2021, data were taken from the Council's documents register (agendas, minutes, and meetings calendars).

The European Council also resorted to digital meetings in the first months of the pandemic. From July 2020, the heads of state and government met again in person, although additional video sessions were also held. Following the renewed intensification of the pandemic in winter 2020 and spring 2021, the European Council did not hold its first physical meeting until May 2021. The materially far-reaching decisions of the European Council that intervene in the legislative process of the Council and the European Parliament, such as on the MFF and the NGEU, were all taken in face-to-face meetings.

3.10.2. Urgency procedures in Parliament's Rules of Procedure

With the start of the 9th parliamentary term (2019–2024), Parliament's rules of procedure were updated in December 2019. The relevant provision of the RoP governing the urgency procedure is Rule 163, which details the initiation and the handling of the procedure. According to Rule 163(1), "the President, a committee, a political group, Members meeting at least the low threshold, the Commission or the Council [...] may request Parliament to treat as urgent a debate on a proposal submitted to Parliament pursuant to Rule 48(1) RoP. Such requests shall be made in writing and shall state the reasons on which they are based". Rule 163(2) RoP defines the subsequent procedure: "As soon as the President has received a request for an urgent debate, this shall be communicated to Parliament. The vote on the request shall take place at the beginning of the sitting following the announcement, provided that the proposal to which the request relates has been distributed to Members in the official languages. Where there are several motions of urgency on the same subject, the adoption or rejection of the motion of urgency shall apply to all such motions concerning the same subject." In addition, Rule 163 clarifies who may speak during an expedited hearing and under what conditions. According to Rule 163(3) RoP, "before the vote [...] only the mover and one opponent and the chairman or rapporteur of the committee responsible, or both, may be heard. None of these speakers may speak for more than three minutes". Furthermore, matters to be dealt with under the urgency procedure shall always be given priority over other items on the agenda and may be conducted without a report or, exceptionally, on the basis of an oral report by the committee responsible. For many years, the urgency procedure played no role in the Parliament's internal decision-making process. As a result of the UK's withdrawal from the EU and the need to act before the expected exit date at the end of March 2019, Parliament applied the urgency procedure for the adoption of three Brexit-related dossiers. At the beginning of the ninth parliamentary term, the urgency procedure continued to be employed in 11 dossiers related to the UK's withdrawal from the EU.

3.10.3. Urgency procedures in the Commission's Rules of Procedure

Prior to the outbreak of the COVID-19 pandemic, the Commission's Rules of Procedure did not provide for specific decision-making procedures on the grounds of emergency or urgency. Nevertheless, the Rules of Procedure provided for several mechanisms that supplemented the standard procedure of voting by simple majority in the College, without defining the circumstances that should trigger these deviating practices. Similar to the European Council and the Council, the College could always make recourse to an agreement of College to a draft text from one or more of its Members by means of written procedure. According to Rule 12, the key condition for such written procedure is the approval of the Legal Service and the agreement of the departments consulted, or alternatively, the agreement between the Members of the Commission where a meeting of the College has decided, on a proposal

from the President, to open a finalisation written procedure as provided for in the implementing rules. As one of the consequences taken after the economic and financial crisis, the Commission inserted a paragraph 5 to this rule. Accordingly, any Member of the Commission seeking to suspend a written procedure in the field of coordination and surveillance of the economic and budgetary policies of the Member States, in particular of the euro area, "shall address a reasoned request to that effect to the President, explicitly identifying the aspects of the draft decision to which the request relates". The President may then decide to uphold or refuse the request for suspension. In the latter case, the Secretary-General "shall ask the other Members of the Commission for their views in order to ensure that the quorum laid down in Article 250 of the Treaty on the Functioning of the European Union is met."

Based on Rule 13, the Commission may also take decisions by empowerment procedure to empower one or more of its Members to take management or administrative measures on the College's behalf and subject to such restrictions and conditions as it shall impose. In a similar vein, the Commission may instruct one or more of its Members to adopt, with the agreement of the President, the definitive text of any instrument or of any proposal to be presented to the other institutions. Such delegated powers may also be conferred to the Directors-General and Heads of Department unless this is expressly prohibited in the empowering decision.

According to Rule 14, the Commission may adopt decisions by delegation procedure to delegate the adoption of management or administrative measures to the Directors-General and Heads of Department, acting on its behalf and subject to such restrictions and conditions as it shall impose.

Amending its Rules of Procedure with Decision 2020/555 of 22 April 2020, the Commission took its organisational consequences of the COVID-19 pandemic. The amendment is explicitly geared to ensure that its decision-making processes continue to run smoothly in exceptional circumstances. If such situations prevent Members of the Commission from attending meetings of the College in person, the President may invite them to participate by means of telecommunication systems allowing for their identification and effective participation (Rules 5(2) and 10(4)). Consequently, Members participating by virtual means should be deemed to be present for the purposes of the quorum (Rule 7, new subpara.).

In addition to the unchanged rules on the various written, empowerment, and delegated decision-making procedures, the 2020 amendment to the Rules of Procedure has thus also created a possibility to hold "ordinary" meetings of the College in a hybrid format. As the new rules do not set any thresholds for the number of members participating virtually, meetings of the College can be held both completely virtually, or in a mixed, hybrid, form of partial physical presence and partial virtual participation.

4. PARLIAMENT'S ROLES AND FUNCTIONS IN URGENCY SITUATIONS

Over the last years, the role of Parliament has often been constrained by emergencies and other situations necessitating urgent (re)action, relating to, for example, the economic and financial crisis of 2009-2012, the so-called migratory crisis of 2015-2016, or most recently the COVID-19 pandemic. In a number of situations, Parliament had to adapt its internal deliberation and decision-making procedures in order to respond to an urgency. These adaptations may have included curtailing certain procedures, restricting the role and the fulfilment of the parliamentary mandate of its members, the involvement of parliamentary committees and reducing the time required for scrutiny, to mention a few. The COVID-19 crisis has shown the need for Parliament to quickly adapt its internal working methods in emergency situations. Consequently, in December 2020, new Rules 237 a–d were adopted in order to ensure the functioning of Parliament in extraordinary circumstances.⁴⁸

In order to draw lessons from the management, both within Parliament and between the EU institutions, of past urgency situations, the following chapter analyses obstacles preventing democratic, transparent, prompt and efficient decision-making for Parliament and the EU institutions. More specifically, we will reflect on the situations in which Parliament has been obliged to take a decision under exceptional circumstances or within very short deadlines. We explore how Parliament's internal processes and procedures coped with such circumstances in order to preserve Parliament's fundamental role as legislative, budgetary and political control authority and to safeguard its representation and interaction, policy-making, elective, and system-development functions. In this context, we consider conceivable case constellations from the various functional fields of Parliament, regarding, in particular:

- Parliament's legislative powers and its policy-making function.
- Scrutiny powers and Parliament's control function.
- Appointment powers and Parliament's elective function.
- Para-constitutional powers and Parliament's system-development function.
- The deliberative powers of Parliament and its interaction and/or representation function.
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4.1. Parliament and EMU's financial and economic crisis

From a democratic point of view, the existing imbalance of EMU is coined by a fully supranationalised Monetary Union against a purely intergovernmental Economic [coordinating] Union. This imbalance is characterized by EMU's executive dominance at the expense of Parliament and, consequently by a procedural segmentation and institutional atomization of political accountability in EU Member States (Maurer 2013). Within EMU, the European Council, the Council of Ministers – let alone the Eurogroup – face no democratically elected institutions at their level that are equipped with control or co-decision powers similar to those of Parliament in areas such as the internal market or justice and home affairs. Within the treaty based requirements of EMU, Parliament can rely on the OLP only under Article 121(6) TFEU regarding the procedural aspects of the multilateral surveillance procedure⁴⁹, Article 129(3) TFEU

⁴⁸ See: European Parliament decision of 17 December 2020 on amendments to the Rules of Procedure in order to ensure the functioning of Parliament in extraordinary circumstances (2020/2098(REG)), P9_TA(2020)0380.

⁴⁹ In fact, the legal basis of Article 126 TFEU was used for the so-called Six-Pack of September 2012 to adopt the Regulation on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, the Regulation on the effective enforcement of budgetary surveillance in the euro area, the Regulation on

for amending certain provisions of the European System of Central Banks (ESCB) and the European Central Bank (ECB) Statute, and Article 133 TFEU regarding the currency law.⁵⁰ In all other EMU areas, however, Parliament's rights are limited to simple consultation or information. Moreover, whenever treaty provisions deal with the exclusive powers of the Eurozone, Parliament is neither consulted nor informed.

The extensive loss of Parliament as a democratic and control authority in the EMU is not compensated for by national parliaments. Indeed, according to the two protocols on the role of national parliaments (PNP) and on the application of the principles of subsidiarity and proportionality (PSP) annexed to the Lisbon Treaty, the national parliaments are to be fully informed and involved in the EU decision-making. But due to the treaty's hierarchy of norms set out in Articles 288-292 TFEU (Stancanelli 2007; de Witte 2008), the Union is under no obligation to inform and consult national parliaments in case of the following actions and decisions of the institutions:

- a) within the framework of multilateral surveillance of economic policies: prior to the adoption of the broad economic guidelines of the EU Member States and by the Council (Article 121 TFEU), and prior to the adoption of the Council's recommendations to the Member States (Article 121 (4) TFEU);
- b) within the framework of budgetary surveillance in the Member States with a view to maintaining budgetary discipline (Article 126 TFEU);
- c) within the framework of the annual review of the employment situation (Luxembourg process), before issuing employment policy recommendations to the Member States (Article 148 TFEU), and
- d) within the framework of the Council and the European Council for decisions in relation to the operational committees for EMU, employment policy and social protection policies.

After the outbreak of the European debt crisis, which has repeatedly tested several EU Member States as well as the Eurozone as a whole since 2008/09, new Regulations were gradually implemented. The range of measures extended from rescue packages for individual Euro Member States (Greece, Spain, Portugal, Ireland) to decisions, Directives and Regulations intended to bring about a coordinated economic and fiscal policy inside the EU. In this context, the EU legislation of the so-called 'six-pack' (valid for the entire EU, in force since 2012) and 'two-pack' (valid for the Eurozone, in force since 2013) should be mentioned above all. The reforms created the European Semester, which runs over the first six months of each year and includes, among other things, the preliminary discussion of national draft budgets, surveillance of national economies, country-specific recommendations from the Commission and the Council, stricter Regulations in the area of competitiveness and the quasi-automatic application of sanctions (e.g. a fine of 0.2% of the last gross domestic product). Further measures concern the newly created banking union or the permanent European Stability Mechanism (ESM). Of particular importance is the so-called Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG). Signed on 2 March 2012 by all EU Member States with the exception of the United Kingdom and the Czech Republic, this international treaty, often casually

enforcement measures to correct excessive macroeconomic imbalances in the euro area, the Regulation on the prevention and correction of macroeconomic imbalances, as well as for the so-called Two-Pack of March 2013 to adopt the Regulation on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area, and the Regulation on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

⁵⁰ The legal basis of Article 133 TFEU is used to adopt the Regulations on the issuance of euro coins.

referred to as the Fiscal Compact, represents a kind of “parallel regime” to the usual governance in the EMU within the framework of the EU Treaties. The TSCG is intended to bring about greater budgetary discipline in the Member States. Doing so it goes further than the EU Treaties (more specifically, their Articles 126 TFEU and Protocol No. 12) and the Stability and Growth Pact. The TSCG calls for the introduction of so-called “debt brakes” in the respective Member States, lays down sanctions for violations of the rules and is considered a precondition for funds from the ESM.

The entire new form of governance in EMU is repeatedly accused of lacking input legitimacy due to a lack of parliamentary participation. Here, the criticism sometimes refers to the weakening of national parliaments (Wessels/Rosenberg, 2013; Heftler/Wessels, 2013; Deubner, 2014: 24-28), sometimes to the apparently weak position of Parliament within the EMU (Fasone, 2012; Poptcheva, 2012; Hallerberg et al., 2011; Maurer, 2013), sometimes on both (Deubner, 2014). At the same time, it is rightly pointed out that at the EU level the European Council (Cisotta, 2013), the Council of Ministers, the Eurogroup and not least the ECB (Kunstein/Wessels, 2013) have meanwhile experienced an upgrading, in contrast to which Parliament seems institutionally weakened (Maurer, 2013: 2).

4.1.1. Negotiations on ‘six-pack’ regulations

Within ICER, Thomas Walli analysed in 2016 to what extent the assumption of too little parliamentary participation in the context of the debt crisis is supported by empirical evidence. Walli (2016) compared and contrasted the proposals of the Commission, the corresponding amendments of Parliament and the adopted legal texts in a synopsis. The comparison was limited to the legally binding parts of the respective texts. Parliament’s proposed amendments to the Commission proposals are classified. Whether and how they had been included in the finally adopted text is indicated to identify failed amendments, amendments that have been included in a modified form and amendments that have been adopted as proposed. The labels “substantively irrelevant amendment”, “slight amendment/detailed wording” or “fundamental amendment/insertion” give an indication of the depth of Parliament’s amendment proposals. From these evaluations, a summary table could be created for each of the six legislative initiatives. In these, the totals (absolute and percentage) of the individual amendment proposals are recorded.

Table 1: Six-Pack 1 (SP 1): Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (EP consultation procedure)

	1 Irrelevant Change		2 Slight Change		3 Fundamental Change		Sum	
		%		%		%		%
Accepted Amendments	1	1,49	5	7,46	9	13,43	15	22,39
Changed Amendments	0	0	2	2,99	5	7,46	7	10,45
Unsuccessful Amendments	5	7,46	15	22,39	25	37,31	45	67,16
Sum	6	8,96	22	32,84	39	58,21	67	100

Source: Walli 2016

Parliament was involved in Directive 2011/85/EU through the consultation procedure. The number of amendments not taken up by Council was relatively high at around two thirds. Nevertheless, of 67

amendments, 15 were adopted almost one-to-one (approx. 22%). Only 10% were slightly modified in the final legal text. As is typical for all six legal acts under review, most of the proposed amendments were fundamental changes or newly inserted passages (58%). While only approx. 9% represent substantively irrelevant changes, approx. one third are slight amendments. After all, three fifth of Parliament's amendments adopted by the Council of Ministers are fundamental amendments. This represents a slight disproportionate share of the total number of fundamental amendments (39 out of 67, or 58%).

Table 2: SP 2: Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (OLP)

	1 Irrelevant Change		2 Slight Change		Fundamental Change		Sum	
		%		%		%		%
Accepted Amendments	0	0	0	0	1	1,96	1	1,96
Changed Amendments	0	0	0	0	8	15,69	8	15,69
Unsuccessful Amendments	2	3,92	4	7,84	36	70,59	42	82,35
Sum	2	3,92	4	7,84	45	88,24	51	100

Source: Walli 2016

Although Parliament was equally involved through the OLP, the rate of successful amendments is the lowest of all six legislative texts, at 2% (accepted amendments) and 16% (modified amendments). Over 82% of the amendments did not find their way into the final legal text. This is partly due to the fact that Parliament's consultation rights, as requested by the ECON Committee, were already replaced by the new Chapter Ia (or "Chapter II: Economic Policy Dialogue" in the final legal act) in Parliament's amendments of 23 June 2011. The chapter allows the ECON Committee to invite "the Presidency of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Eurogroup" (Article 3: "Economic Policy Dialogue" of Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011) to specific consultation. The inclusion of this chapter can thus be seen as a success for Parliament overall, even though it did not take into account all the participation rights demanded at the beginning. The Council was obviously careful not to grant Parliament too many rights of control and oversight. For example, the ECON Committee called for an "Article -8b: Emergency measures", which would empower the Commission to take "the necessary measures to safeguard the euro" in the event of a threat to the Eurozone. Such a quasi-automatic application of sanctions failed due to the Council's resistance in order to keep a lever in hand in future emergency situations. Overall, it is striking that the majority of the parliamentary amendments concerned "fundamental changes" (88%), of which 17% were incorporated (with only one amendment being adopted one-to-one). Taken in isolation, this Regulation - although negotiated under OLP - represents Parliament's biggest – partial - failure within the Six Pack.

Table 3: SP 3: Regulation No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area

	1 Irrelevant Change		2 Slight Change		3 Fundamental Change		Sum	
		%		%		%		%
Accepted Amendments	2	7,69	3	11,54	6	23,08	11	42,31
Changed Amendments	2	7,69	1	3,85	2	7,69	5	19,23
Unsuccessful Amendments	0	0	3	11,54	7	26,92	10	38,46
Sum	4	15,38	7	26,92	15	57,69	26	100

Source: Walli 2016

In contrast to "SP2", Parliament was able to fully assert its ideas on this Regulation. More than 42% of the proposed amendments were adopted nearly one-to-one, 19% in a modified form. Particularly noteworthy is the fact that 8 out of 15 fundamental amendments (identification number 3) were included, while only 7 did not succeed.

Table 4: SP 4: Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies

	1 Irrelevant Change		2 Slight Change		3 Fundamental Change		Sum	
		%		%		%		%
Accepted Amendments	11	7,48	34	23,13	37	25,17	82	55,78
Changed Amendments	1	0,68	5	3,4	12	8,16	18	12,24
Unsuccessful Amendments	1	0,68	3	2,04	43	29,25	47	31,97
Sum	13	8,84	42	28,57	92	62,59	147	100

Source: Walli 2016

In the most comprehensive of the Six Pack Regulations, the ECON Committee passed a total of 147 amendments. This Regulation is the legislative act in which, in percentage (and absolute) terms, the most Parliament proposals were also incorporated into the final legal text (56% were adopted, 12% were modified, only 32% were not incorporated). The vast majority of irrelevant and minor amendments were incorporated; among the fundamental amendments 49 proposals were incorporated in one form or another, while 43 were not. Parliament clearly succeeded in enhancing its own role within the new EMU governance, again with the insertion of Article 1b on "Economic Dialogue". ECON's draft report version of the article was much shorter and more generally formulated than the one finally proposed by Parliament's amendments of 23 June 2011. In this context, Article 3 (4) also results in an explicit upgrading of Parliament: Parliament shall be fully involved in the European Semester. However, the supranational level was not only strengthened by an extended control function of Parliament, but also by an increased involvement of the Commission. This innovation can be traced back to amendments proposed by the ECON Committee, which in its report added the wording "and the Commission" to the powers of control and participation envisaged for the Council (e.g. in Article 4, 5, 8 and 9 of the Committee Report). In the vast majority of cases, Parliament's changes were incorporated into the final legal text.

Table 5: SP 5: Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances

	1 Irrelevant Change		2 Slight Change		3 Fundamental Change		Sum	
		%		%		%		%
Accepted Amendments	6	6,32	12	12,63	12	12,63	30	31,58
Changed Amendments	1	1,05	2	2,11	15	15,79	18	18,95
Unsuccessful Amendments	3	3,16	11	11,58	33	34,74	47	49,47
Sum	10	10,53	25	26,32	60	63,16	95	100

Source: Walli 2016

Parliament's success rate with regard to this Regulation was around 51% of amendments incorporated in some form. Again, most of Parliament's proposals concerned "fundamental changes", of which 33 were rejected and 17 included. In the case of "irrelevant" (6 included vs. 5 rejected) and "minor amendments" (14 accepted, 11 rejected), the success rate of accepted amendments was higher. A clear success for Parliament was – again – the incorporation of parliamentary oversight powers through Article 12a on the "dialogue on macroeconomic and budgetary surveillance" (the final act reads Article 14: Economic policy dialogue). In this case, Parliament's amendments elaborated the original, shorter passage of the ECON draft report in more detail. By its very nature, ordinary legislative procedures are characterised by compromise solutions. The Regulation's two articles "Article 4: Scoreboard" and "Article 5: In-depth review" (numbered according to the final text) can be taken as examples of this. The ECON Committee Report already contained some major changes and several insertions compared to the Commission's proposal. In the final legal text, many of these changes were not included or had been included in a modified form, and only a few had been adopted one-to-one. The large number of revised compromise text passages is a clear indication that the negotiations were particularly intensive. Those provisions of the Regulation that are clearly the result of amendments by the ECON Committee concern the social partnerships, the labour market and workers' rights.

Table 6: SP 6: Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (consultation procedure)

	1 Irrelevant Change		2 Slight Change		3 Fundamental Change		Sum	
		%		%		%		%
Accepted Amendments	5	6,67	9	12	9	12	23	30,67
Changed Amendments	1	1,33	5	6,67	8	10,67	14	18,67
Unsuccessful Amendments	5	6,67	11	14,67	22	29,33	38	50,67
Sum	11	14,67	25	33,33	39	52	75	100

Source: Walli 2016

Although the Regulation was adopted by means of a consultation procedure, the "success rate" of Parliament's ECON Committee was around 49%. About half of all amendments concern "fundamental changes", one third "minor changes". Thus, also in this case, the largest group is that of "fundamental, unsuccessful amendments" (29%). The rate is rather average in comparison with all Six Pack acts and is not higher than the rate of the same category in the other Regulations, all of which were adopted by

OLP. For this case, it can certainly not be argued that Parliament was not listened to sufficiently in the consultation procedure (this would be more the case for the Directive, “SP1”, for which the consultation procedure was also used).

Despite differences between the decision-making procedures (four times OLP, two times consultation) and the typologies of the legal acts (one Directive, five Regulations), we can identify significant commonalities. On the one hand, it is typical for all six cases examined that the largest amount of parliamentary amendment proposals (altogether about 63%) concern “fundamental changes/insertions”. This suggests that the ECON Committee worked intensively despite the pressure of urgency brought to bear on Parliament and MEPs were able to introduce numerous ideas and conceptions of their own on the subject. The second most frequent group concerns the “slight amendments/detailed wording”, which were also more frequently included than rejected in four of the six legal acts. The same applies to the numerically smallest group, that of “irrelevant amendments”. All in all, 51% of the parliamentary amendments were adopted, 35% even (almost) one-to-one. The ECON Committee was able to push through more than 50% of its concerns in one form or another in four of the six legal acts (SP 3, 4, 5, 6). Only in Directive 2011/85/EU (SP 1; consultation procedure) and in Regulation No. 1173/2011 (SP 2; OLP) did it not succeed. At first glance, it is surprising that Parliament was least often able to assert itself in this Regulation, which falls under the OLP, and yet overall found more of a voice in the two legal acts adopted under the consultation procedure. An identification of the reasons for this has been attempted above (under the point “SP 2”).

Taken together, there is another reason for the relative parliamentary success: Parliament negotiated the six legal acts as a package and made its own concessions in OLP procedures dependent on concessions made by the Council in the consultation procedures. In all six legal acts, however, it is also evident that rights for Parliament that go beyond the “Economic Policy Dialogue” could not be enforced. Nevertheless, with regard to the four legal acts in which more than half of the proposed amendments have been included, there can be no talk of neglecting Parliament. The strategy of package deals, which is usually attributed to Member States in negotiations to amend the treaties, was successfully used by Parliament. The argument of emergency and urgency (e.g. to calm the financial markets or - more broadly - to “save the euro”) repeatedly raised by the Member States could ultimately be countered with a profoundly democratic argument.

Since the Commission presented a variety of measures as a package, Parliament could link issues. Consequently, Parliament made the adoption of the entire legislative package conditional on concessions regarding further institutional empowerment (Meissner/Schoeller 2019). Building on our empirical evidence, we would therefore strongly encourage Parliament to consider the proposals forwarded by Focus Group II within the framework of the institutional reflexion process on the “Rethinking Parliamentary Democracy - A stronger European Parliament after COVID-19”:⁵¹

- Regarding legislative dossiers, Parliament could bundle together OLP and consultation proposals into package, to be decided on case by case, in order to build up leverage.
- With regard to international agreements, Parliament could promote the systematic use of “interim reports” in consent procedures (Rule 105 RoP) as some kind of a “quasi-first reading position” or “parliamentary co-mandate” and as basis for informal talks, in order to proactively influence the decision-making process before it is submitted for approval.

⁵¹ See: Document No. PE 695.632/BUR/FG.

- Finally, Parliament might also consider more openly blocking or even rejecting a budgetary decision, legislative proposal or international agreement in order to provoke institutional change or a better outcome.

4.1.2. The TSCG negotiations

In the following, we draw on preliminary work by Tsebelis and Kreilinger as well as a qualitative analysis by ICER (Walli 2016). The four MEPs who participated in the negotiations on the TSCG were Elmar Brok (EPP, Germany), Roberto Gualtieri (S&D, Italy), Guy Verhofstadt (ALDE, Belgium) and Daniel Cohn-Bendit (Greens/EFA, Germany). The delegation focused on a few key points, as they were also formulated in various resolutions of Parliament during the negotiation period between December 2011 and February 2012. For the data analysis, those passages from the resolutions were identified that reflect the TSCG contents requested by Parliament, in order to then compare them with the final draft treaty text. This made it possible to filter out, which articles were probably due to the influence of Parliament's delegation and which demands of Parliament were not taken on board. For this purpose, the concrete demands of Parliament's resolution of 18 January 2012 were used as a starting point. In a first step, these were compared with former demands regarding the governance of the European Semester in Parliament's resolution of 1 December 2011. This comparison allowed to determine the extent to which Parliament saw the Fiscal Compact as an opportunity to realise former demands on EMU governance. The final TSCG was then compared with the parliamentary demands and corresponding treaty draft provisions were identified. In order to assess whether these provisions were included at Parliament's insistence, a final comparison was made with the Parliament resolution of 2 February 2012. In this resolution, Parliament lists those points which, in its opinion, could be pushed through in the text of the treaty on its initiative. The timing of the inclusion of the requested measures provides an additional indication of whether corresponding treaty elements were integrated as a reaction to the Parliament's resolution of 18 January 2012 (period between the fourth and the last draft of the treaty) or whether they had already been integrated beforehand by the negotiating parties.

Parliament focused its demands on a few points:

- the assurance that the provisions of the TSCG would be transposed into the EU legal framework within five years;
- the primacy of EU law;
- an assurance, enshrined in the TSCG, of the application of the "Community method" and of the procedures foreseen in the TFEU;
- the right of EU members that do not have the euro as their currency to participate in Eurozone summits; and
- with regard to the parliamentary legitimacy of the Treaty, firstly, a provision on multilateral scrutiny of the TSCG through cooperation between national parliaments and Parliament, and secondly, the right of the President of the European Parliament to participate in the Eurozone summits.

Overall, Parliament was able to push through most of the demands in one form or another:

- The transfer of the TSCG's content into the EU legal framework has been taken over almost one-to-one in Article 16 of the Treaty in comparison with Parliament's demands of 18 January 2012.
- The application of EU law, in particular when adopting secondary legislation, is foreseen in Article 2 (1) of the TSCG.

- The possibility for Member States whose currency is not the euro to participate in Eurozone summit meetings was also included in the final treaty. However, the final text introduced the condition that Summit negotiations must be on fundamental issues such as the architecture of the Eurozone or key issues framed by the EU treaties such as competitiveness (Article 12 (3) TSCG).
- One of Parliament's greatest successes was the insertion of Article 13 TSCG, which provides for interparliamentary conferences to allow multilateral and joint scrutiny of the TSCG's executive arm, and to strengthen the parliamentary legitimacy of coordinated fiscal policy at both national and European level.

Parliament was less successful with regard to its demand for the primacy of EU law, which Member States already deleted in the third draft of the treaty of 10 January 2012. In Article 2 TSCG, there is only a reference to the fact that the Treaty is compatible with the EU Treaties and "does not affect the Union's powers of action in the field of economic union". As we learn from Parliament's resolution of 2 February 2012, it was also unable to push through its demand for its President being granted full participation rights in the Eurozone summit meetings. Instead, the invitation of the President remains voluntary (Article 12 (5) TSCG).

4.1.3. Parliament's system-development function and post-emergency EMU reform

The decisions on the European Financial Stabilisation Mechanism (EFSM), the European Financial Stability Facility (EFSF) and the permanent European Stability Mechanism (ESM), which were directly geared to economic and budgetary emergencies, were largely based on Article 122 TFEU, in which Parliament is neither to be involved in a controlling nor co-deciding capacity. This and the criticised "summit-isation" of EMU governance⁵² was loudly criticised by Parliament on several occasions. On the other hand, however, the analysis of the medium-term reform of EMU, in particular of European coordinated economic and fiscal policy, shows that Parliament was able to engage successfully through the leverage effect of the Six-pack. From the comparison between these negotiations, conducted as a coupled bargain, on the one hand, and the crisis response regimes of the Member States, agreed with argumentative recourse to the emergency situation, on the other, conclusions can therefore also be drawn with regard to the conditions that facilitate success of parliamentary democratic safeguards in crises:

- a) The parliamentary policy-making function can be maintained in times of crisis if, in the context of their elimination or containment, legal bases are to be mandatorily selected which grant Parliament a decisive say in the shaping of the measures based thereon. Even in the case of relatively weak parliamentary participation procedures (e.g. consultation vs. OLP), the policy-making capacity of Parliament is still given if "weak" procedures can be combined with "strong" procedures.**
- b) The parliamentary control function can be maintained even in times of crisis if Parliament concentrates on the sanction-proof scrutiny procedures and the resulting chains of legitimacy between Parliament and the Commission and, through these channels, claims the political accountability of the Council of Ministers or the European Council.**

⁵² See e.g. "Schulz: EU collapse is a 'realistic scenario'", in: Euractiv, 26. April 2012. <https://www.euractiv.com/section/future-eu/news/schulz-eu-collapse-is-a-realistic-scenario/>.

With regard to the system-development function, Parliament was also able to convincingly assert itself. In this context, the negotiations on the Fiscal Compact formed a crystalising juncture where political actors from the Member States sought, in exchange for strengthening the Parliament in a reformed EMU expanded to include fiscal policy aspects, on limiting the status of Parliament within the Eurozone and achieving an effective division within Parliament by limiting the voting rights of its members or creating a parliamentary body that differentiates between MEPs according to their country of origin's participation in the Eurozone (see Box 4). Proposals vary between the creation of a euro-chamber with delegations from national parliaments and the creation of a euro-parliament that would be composed of an equal number of MEPs and MPs. These proposals raised the fundamental question of whether Parliament or any other parliamentary body should co-decide and control instruments that only affect Eurozone countries.

Box 4: Proposals for splitting-up Parliament

Former Foreign Minister Joschka Fischer proposed the creation of a Euro-Chamber as a body composed by MPs, to scrutinize the new (proposed) "government of the euro area", that would consist of the governments of the Eurozone (Fischer 2011). This chamber should be provided with initially advising functions (while keeping the decision-making authority within national parliaments), and later, on the basis of an intergovernmental agreement, exerting effective parliamentary control. In our view, such a Chamber would be a step backwards to the dual mandate at national and European level, which MEPs had experienced until the first direct elections in 1979. Today, the MEPs face considerable difficulties to ensure their presence at three locations (Brussels, Strasbourg and in the home constituency) satisfactorily. Moreover, even with a clear limitation of the functions and powers, the Euro-Chamber would overlap and risk to duplicate in subject areas linked to the Eurozone with other parliamentary institutions of the EU. After all, the Chamber would be required to redefine its tasks in relation to Parliament and the national parliaments, in relation to the timing, the frequency and the inter-institutional setting of scrutiny. Should national parliaments forgo an independent review of the EU/Eurozone templates? Or should they be called to give 'their' representatives in the Chamber binding voting instructions? In short, the Euro-Chamber might practically evolve into a parliamentary assembly that could parliamentarise the existing institutional and decision-making structures of the Council of Ministers. However, regarding substance and voting behavior, the Chamber's composition and rationale would result in a duplication of the Council. The Chamber would therefore not be in a position to balance the Council and to compensate for the EMU's democracy deficits. The alternative proposal put forward by German MP Michael Roth to create a Euro-Parliament is not completely thought through either (Roth 2011): Roth calls for the creation of a secessionist, parliamentary body to be composed of both MEP and MP from those EU Member States that participate in the Eurozone. But how could a 150-strong cohort of MPs legitimize their decisions within the Euro-Parliament? If the Euro-Parliament would be qualitatively different from the Council of Ministers, it should clearly reflect the political party diversity in the Member States and the national parliamentary cohort should be in a position to act in partisan political groups. But if one should simultaneously take into account the criterion of the population size of the Member States, as referred to in the German Constitutional Court's reasoning on the principle of democracy - a Euro-Parliament with 150 MPs would surely be too small. Overall, the Euro-Parliament would establish the parliamentary core for a secession of the Eurozone and run against the TEU's principles of democracy. The then President of the European Council, representatives of the German government and the so-called "Future of Europe Group" (2012) suggested limiting Parliament's voting rights to MEPs from the Eurozone. The concept falls short of the TEU's requirements, since the EP represents the citizens and not the Member States of the Union and not

the citizens of the Eurozone or any other sub-system of the EU (Article 14 TEU). Moreover, according to Article 20 TFEU a citizen from a non-Eurozone country may be elected as an MEP in a Eurozone country and vice-versa. Within Parliament, MEPs act – since 1952 – according to denationalized, political groups and not according to nationality! As a result, they conduct their deliberations not based on member state interests, but according to the voters' mandate in the Union's interest. The idea of carving out a de-fact "Eurozone Parliament" within Parliament also runs against the design of the currency union itself. Indeed, the Euro is the currency of the Union and not of the Eurozone. With the exception of Denmark, and Sweden, all EU Member States are legally bound to participate in the third stage of EMU. Accordingly, any form of legislation aimed at the Eurozone should always be taken in the interest of the Union. Besides these legal reasons, the realization of the "limitation" proposal would have a huge impact on the internal cohesion of Parliament. Qualifying voting rights on the basis of the Member States' positions in EMU would affect MEPs regardless of whether they belong to a group that is in favour of or against the participation of 'their' member state in EMU. The designed discrimination of deputies would probably induce sanctions and offsets within the parliamentary factions, which would have a major impact on the decision preferences to policy areas beyond the EMU. Against these proposals, German MP Manuel Sarrazin focused on the very nature of the emergency situation of the financial and economic crisis, and argued that Parliament should authorize one of its committees to take decisions on Eurozone issues on behalf of the Parliament's Plenary. Concomitantly, this Committee should then act as Parliament's key interlocutor with special information and consultation rights in Council proceedings, where fast and confidential cooperation is required (Sarrazin 2012). Instead of discrimination on grounds of the MEPs nationality, Sarrazin suggested that Parliament itself would ensure an adequate presence of members of the Euro-states by amending its Rules of Procedure and on the basis of its autonomy for self-organization. The Commission sympathized with the idea, since its Communication of 28 November 2012 (Commission 2012) recognized the special role and integrative function Parliament as the interface for the EU, between any kind of self-declared 'center of gravity', and respective outsiders.

The bulk of Parliament's views expressed in the debate about solutions to remedy the EMU's democracy deficit aimed at transferring Parliament's weak participation procedures into stronger procedures (European Parliament-Thyssen 2012; European Parliament-Gualtieri/Trzaskowski 2012). Even though the debate on a possible deepening of the EMU is not over, the negotiations around the Fiscal Compact and the subsequent debates on further reform steps clearly show that Parliament has so far succeeded in rejecting the proposals to effectively discriminate against MEPs. To date, the implementation of the envisaged integrated budgetary and financial framework and the integrated economic policy framework would still be based on special legislative procedures or Council decisions with little or no involvement of Parliament. Against this background, the resulting democracy and parliamentary deficit could be reduced in two ways:

1. By referring to the simplified treaty amendment procedure of Article 48(7) subpara.2 TEU, the European Council could, after obtaining the consent of the EP, decide to replace the special legislative procedures by the OLP. Before taking this decision, all national parliaments would be informed. If the proposed treaty amendment would be rejected by one national parliament, this reform option would fail. This procedure could be applied to Articles 113 and 115 TFEU on tax harmonization, Article 127(6) TFEU for the transfer of banking supervision to the ECB and Article 129(4) TFEU to amend the statutes of the ESCB and the ECB. Moreover, the conversion of the special legislative procedure to the OLP could be organized in the same way for the excessive deficit procedure and for amending the reference values (Article 126(14) TFEU).

2. Alternatively, the transition to OLP would be possible by referring to the framework of enhanced cooperation on the basis of Article 333(2) TFEU. However, enhanced cooperation cannot be established on matters of exclusive EU competence, such as the monetary union. Here, the participating Member States would decide unanimously to adopt legal acts under enhanced cooperation by the OLP. This model would be applied to the reform of Article 113 and Article 115 TFEU. Other provisions would be excluded⁵³ because they are subject to unanimity of all EU Member States.

Any further approach to reform the EMU should be based on the principle of democracy and aim to remedy the democracy deficit of this specific policy area. Consequently, the process towards a reformed EMU should include both the transfer of Parliament's weak decision-making procedures into the OLP, increased scrutiny capacities of Parliament vis-à-vis the EMU's core executive institutions as well as the strengthening of national parliamentary scrutiny rights vis-à-vis their individual governments. In addition, the process towards EMU should be guided by the principles of existing inter-institutional relations of the EU system.

Rights and obligations arising from the treaties set tasks and functional attributions: thus, under Article 10(2) TEU, Parliament – and not a portion of Parliament – represents the citizens directly and as a whole at the EU level. Since it does not represent the Member States, since it organizes itself and operates along the lines of denationalized political groups, and since Article 20 TFEU provides for the active and passive voting rights of EU citizens to the direct elections of Parliament on the basis of their country of residency, Parliament should continue to act as a unitary, uniting and integrating body. Special i.e. functional or sector-specific parliamentary 'spin- or split-offs', which would correspond to the differentiated logic of the Council are therefore contrary to this principle. In fact, while the treaties' legal basis on the establishment and operation of enhanced cooperation explicitly provide for a formal differentiation of voting rights in the Council between the 'Ins' and 'Outs' (Article 20(3) TEU, Article 330 TFEU), they do not call for any corresponding discrimination inside Parliament. Similarly, Articles 136, 138(3), 139(4) and 140(2) TFEU provide for specific Council voting rights for those EU members whose currency is the euro without establishing a parallel discriminatory regime within Parliament. Due to the dual legitimacy of the EU – a union of peoples represented by Parliament and a union of states represented by the Council – the process towards EMU should incorporate opportunity structures for parliamentary involvement, which would allow both parliamentary levels of the EU's system to democratize its governance structures, while improving the internal and external capability of the Union to perform efficiently, and to implement decisions in a traceable way for the citizens in their capacity as 'recipients' and 'end users' of European law. The reformed system of the EMU and its subsystems – the Eurozone, the fiscal compact, and the ESM are thus faced with a triple challenge:

- a) EMU reforms should address the existing EU structure. The process towards EMU should remain in accordance with the principles outlined above. We should therefore assume lengthy parliamentary procedures, national referendums on staying in or leaving the Eurozone and lawsuits before constitutional courts with corresponding impacts on the ratification process.
- b) New governance structures of the EU or of any modulated sub-system should be configured in a way that their application meets the democratic principles of the EU.
- c) Governance structures of the EMU should be effective and enforceable without depending on discretionary 'goodwill' of individual Member States.

⁵³ In particular, Article 126(14) TFEU on the excessive deficit procedure and amending the reference values, Article 127(6) TFEU for the transfer of banking supervision to the ECB, and Article 129(4) TFEU to amend the ESCB and ECB Statute.

Overall, Parliament's strategy towards the Fiscal Compact negotiations proved successful in that MEPs prevented an intergovernmental conference held outside the EU treaties to generate structural segregation within the EU. In doing so, Parliament conceived today's Inter-parliamentary Conference on Stability, Economic Coordination and Governance in the European Union (SECG) in its report in November 2012 (drafted by Marianne Thyssen): "While reaffirming its intention to intensify the cooperation with national parliaments on the basis of Protocol No 1, [it] stresses that such a cooperation should not be seen as the creation of a new mixed parliamentary body which would be both ineffective and illegitimate on a democratic and constitutional point of view; [it also] stresses the full legitimacy of Parliament, as parliamentary body at the Union level for a reinforced and democratic EMU governance" (European Parliament – Thyssen report 2012). Clearly, given the existing mechanisms for interparliamentary, joint scrutiny and cooperation (COSAC, Joint Conferences of Parliaments etc.), Parliament and the national parliaments were particularly challenged to elaborate objectively convincing arguments for defining the characteristics of a multi-level democracy in the area of EMU. The debate required mutual recognition of prerogatives, power and participation levels as well as insight into the day-to-day performance and the limitations of parliamentary influence.

Thanks to Parliament's unity and strong input, the reformed EMU system continues to draw its legitimacy from both levels of parliament. **As the EMU system may develop into different layers or concentric circles of governance, a unitary, integrative and integrationist Parliament – at least as far as the vast majority of political groups and MEPs are concerned – is called to ensure that spin-off processes of self-proclaimed 'cores' do not create dynamics that will weaken the Union's overall structure, solidarity and inter-institutional cohesion.** Avant-garde dynamics should not hinder supranational policy decisions of the EU, but support the institutional and normative "loyalty to the Union" of states and civil societies. Although the very existence of Parliament constitutes no guarantee for a democratic EU system, the consolidation and further strengthening of Parliament's legislative and scrutiny rights (and responsibilities) constitutes the only way to ensure a democratic and effective inter-institutional and multi-layered system of checks and balances that also functions during emergency situations. The involvement of national parliaments in the EMU's outer (i.e. EU-related) and inner (i.e. Eurozone related) policy cycles may help to render governments more accountable for what they decide in the European Council, the Council of Ministers and its subordinated working mechanisms, especially during crisis. In this regard, networks for interparliamentary cooperation may be helpful. However, the simple formalization of an additional, joint body incorporating MEP's and MP's within the realm of new treaties such as the Fiscal compact also renders the EU more complex and less understandable (Coughlan 2013). Citizens may ask: If the (directly elected) European Parliament represents us, the citizens of the Union, the Council of Ministers the Member States through (our elected) governments, the European Economic and Social Committee the "economic and social components of civil society", and the Committee of the Regions the representatives of some of the Union's regional and local communities, what is the value added of a group of bodies bringing together some MEPs with some members of the national parliaments? "No parliamentary conference is in itself capable of providing democratic scrutiny or legitimacy. Parliament and national parliaments are not able to farm out their constitutional duties to a conference. [...] The core part of parliamentary work, the thorough examination and public discussion of issues to be decided, is practically impossible in a conference situation. In view of the debate on the role of parliaments in certain Member States, it is also necessary to emphasize that the notion of a "joint position of parliaments" has no foundation in reality. Parliaments do not take a particular position because they are parliaments. National parliaments look to the national interest and Parliament to the European interest. At both levels, there are differences between political groups; the position of any parliament is the outcome of discussion, compromise and voting. Conferences offer participants useful

support in their work in their home parliament. No conference can replace the work done in parliaments" (Parliament of Finland 2012). On the other hand, however, one should not underestimate the added value of the interparliamentary cooperation: Although respective joint conferences or committees could not replace level-specific powers and responsibilities in effectively providing democratic input to the reformed EMU system, they could help to create mutual trust and understanding between parliamentarians, and provide a platform for empowering "weak" parliaments by establishing an inter-parliamentary hub of scrutiny vis-à-vis the inter-governmental policy framework.

Parliament's ability to assert its system-development function even in the aftermath of the severe financial and economic crisis – and ultimately in the perspective of a renewed, crisis-like escalation of the European banking and financial systems – finally also became visible in the negotiations on widening the scope of competencies of the European Central Bank (ECB). On 12 September 2013, Parliament approved its position regarding the adoption of a Council Regulation conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions,⁵⁴ based on a report of the Committee on Economic and Monetary Affairs and the opinion of the Committee on Constitutional Affairs on the proposal for such Regulation.⁵⁵ The Council Regulation is based on Article 127(6) TFEU and the consultation procedure applied. On the occasion of the vote, Parliament's President and the ECB's President signed a joint declaration affirming the intention to negotiate an IIA.⁵⁶ One month later, and building on Parliament's position, its Committee on Constitutional Affairs (AFCO) adopted the report by Carlo Casini on the conclusion of an Interinstitutional Agreement (IIA) between Parliament and the ECB on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism.⁵⁷ The IIA contains far-reaching ex-ante and ex-post scrutiny procedures, a fully-fledged hearing procedure for the Chair and Vice-Chair of the Supervisory Board, specific procedures for ad hoc exchanges of views and confidential meetings on all aspects of the activity and functioning of the SSM covered by Regulation (EU) No 1024/2013, rules on Parliament's access to documents as well as regarding safeguards for ECB classified information and documents, procedures for parliamentary investigations, and a distinct procedure for Parliament's consultation on the SSM's code of conduct.

⁵⁴ See: Council Regulation No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63–89, European Parliament legislative resolution of 12 September 2013 on the proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (COM(2012)0511 – C7-0314/2012 – 2012/0242(CNS)).

⁵⁵ See: European Parliament report No. A7-0392/2012 (rapporteur: Marianne Thyssen and rapporteur for opinion: Andrew Duff).

⁵⁶ See: the Annex to Parliament's legislative resolution of 12 September 2013 on a proposal for such Regulation (Texts adopted, P7_TA(2013)0372).

⁵⁷ See: European Parliament decision of 9 October 2013 on the conclusion of an Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism (2013/2198(ACI)); note that the IIA itself has been published in the L series (legally binding acts) of the Official Journal: Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism, OJ L 320, 30.11.2013, p. 1–6.

4.2. Parliament's efficiency test: the MFF and the rule-of-law regulation

Against the background of the MFF discussions in Parliament and Council on the May 2018 proposals, the Commission presented on 27 May 2020 an amended proposal in the form of a Recovery and Resilience Package comprising the MFF 2021–2027, the revised draft decision on the own resources system and a new proposal for a Regulation establishing a Next Generation EU (NGEU) recovery instrument for 2021–2024 to support the economic and social recovery from the COVID-19 pandemic. According to the proposal, the NGEU funds of €750 billion should be borrowed by the Commission on behalf of the EU on the financial markets to increase the MFF 2021–2027 to €1.1 trillion. The funds borrowed on the financial markets were additional to the annual budget and not defined as part of the MFF and the annual budgetary procedure. In sum, the Commission proposed a package that was EUR 34.6 billion lower than its original 2018 proposal (-3%) and EUR 224.1 billion (-16.9%) lower than Parliament's November 2018 request. Contrary to Parliament's expectations, the Commission thereby cut allocations to programmes such as the Connecting Europe Facility (-8.4%), the European Solidarity Corps (-19.6%), Justice, Rights and Values (-19.6%), Erasmus+ (-6.7%), the European Defence Fund (-30%) and military mobility (-74%). In contrast, the NGEU funds were proposed to increase some spending areas (e.g. "Single Market, Innovation and Digital" (+€69.8 billion), "Cohesion and Values" (+€610 billion), "Natural Resources and Environment" (+€45 billion), "Resilience, Security and Defence" (+€9.7 billion), "Neighbourhood and World" (+€15.5 billion). In addition, the Just Transition Fund was included in the MFF with a budget of €40 billion (€10 billion under the MFF and €30 billion under the NGEU). The initial reaction of Parliament's negotiating delegation was rather modest: Parliament welcomed the Commission's NGEU Recovery Plan and warned not to achieve corresponding funding increases at the expense of the standard MFF and its broader objectives.

After the European Council reached an agreement at its extraordinary meeting on 17–21 July 2020, formal negotiations between Parliament and the Council began. Important elements of the European Council's agreement first concerned the structure and scope of the MFF and the NGEU: the MFF's commitment appropriations were to total €1,074.3 billion; compared to the MFF 2014–2020, this would have represented a decrease of almost 2%. In response to the European Council agreement, Parliament adopted a first resolution on 23 July 2020 stating that it "does not accept" the political agreement on the MFF 2021–2027.

Parliament's negotiating priorities focused mainly on the creation of effective rule of law mechanisms to protect the EU budget, a reform of the EU own resources system including the introduction of a basket of new funds to facilitate the repayment of costs related to the NGEU, more adequate funding for EU flagship programmes in areas such as climate, digital transformation, health, youth, culture, research, border management, a legally binding mid-term review of the MFF by the end of 2024 at the latest, improvements to the flexibility provisions, and adjustments to ensure parliamentary involvement in the steering and control mechanisms of the Recovery and Resilience Facility. Inter-institutional negotiations started on 27 August 2020 and ended on 10 November 2020 with a political agreement on all elements of the budget package, i.e. the MFF 2021–2027, the NGEU, the new own resources, and the rule of law budget conditions. As regards the MFF, the overall ceiling was maintained as agreed by the European Council in July 2020 (EUR 1 074.3 billion at 2018 prices). However, Parliament secured a gradual increase of the ceiling from 2022 onwards to include an additional EUR 11 billion for selected EU flagship programmes. In the distribution of the increase, the Council Presidency largely followed the proposals of Parliament (the research programme Horizon Europe thus received an increase of EUR 4 billion, InvestEU EUR 1 billion, Erasmus+ EUR 2.2 billion, and the Creative Europe programme EUR 0.6 billion). In contrast, the overall level of spending on cohesion and agricultural

policy remains at the 2014-2020 level and is only increased under the NGEU. Other parliamentary successes included the establishment of the Fair Transitions Fund, the Commission's commitment to a review of the functioning of the MFF by 1 January 2024, the tying of at least 30% of spending to support climate targets, and the introduction of an annual biodiversity target of 7.5% in the MFF from 2024 (with a target to reach 10% in 2026 and 2027).

However, the final steps of the negotiations, i.e. the consent vote in Parliament and the unanimous vote in the Council, were subsequently delayed by another month due to the dispute within the European Council over the mechanism linking the EU budget to the rule of law. It was not until 10 December 2020 that the heads of state and government found a – poisoned – solution, thus unblocking the procedure. The resulting dispute between Parliament and the European Council has a substantive and a procedural dimension: in terms of its functional scope, the rule of law Regulation should, in the view of Parliament, allow sanctions whenever Member States violate the EU's fundamental democratic and constitutional values. In the negotiations, Parliament made considerable concessions in this respect, as the trigger conditions for sanctions were limited, as demanded by the Council, to cases where violations of the rule of law only threaten the financial interests of the EU. Thus, the negotiated Regulation defines in Article 4(1) as a condition for concrete sanction measures that violations of the principles of the rule of law in a member state sufficiently directly affect or threaten to seriously affect the economic management of the Union's budget or the protection of its financial interests. From the European Council's point of view, "the mere finding of a breach of the rule of law [...] is not sufficient to trigger the mechanism." Even more serious from Parliament's point of view are the procedural assurances given by the European Council in a separate declaration. According to this, the Commission will first develop "guidelines" on the application of the mechanism before it is used for the first time. These were only to be finalised once the result of an action for annulment under Article 263 TFEU, which Hungary and Poland intended to bring against the Regulation before the ECJ, became available. By delaying the effective use of the rule of law mechanism in this way, the European Council placed itself above the EU's legislative bodies and thus contradicted the wording of the Regulation, which provides for application from 1 January 2021 and gives the Commission no political room for manoeuvre in the event of infringements.

On 14 December 2020, Parliament's BUDG Committee adopted the draft recommendation on the Regulation establishing the MFF and the joint inter-institutional declarations annexed to it by 30 votes in favour, two against and four abstentions. The AFCO Committee also approved the IIA on budgetary matters with 23 votes in favour, three against and two abstentions. On this basis, Parliament then gave its consent to the overall package on 16 December 2020. However, in the accompanying resolution on the MFF 2021–2027, the IIA, the EU Recovery Instrument and the rule of law Regulation, adopted by 496 votes to 134 against with 65 abstentions, Parliament stressed, that an effective rule of law Regulation and the introduction of new own resources were a precondition for the approval of the MFF package. With regard to the cross-compliance mechanism on the rule of law, which was hard-fought until the end, Parliament pointed out that the Union's co-legislators had agreed to activate the Regulation from 1 January 2021 for all commitments and payments.

Parliament rightly expressed its view that the content of the European Council's conclusions on this Regulation was superfluous, as the applicability, purpose and scope of the rule of law Regulation were clearly and conclusively set out in its text. According to Article 15(1) TEU, the European Council does not exercise any legislative functions. Therefore, the political declaration of the European Council can neither be regarded as a legislative instrument nor as an interpretative instrument. The applicability of the rule of law Regulation should therefore not be made dependent on the adoption of guidelines, as the agreed text was sufficiently clear and did not provide for any implementing instruments to be

adopted by Parliament and Council in their legislative capacity. Recalling its elective/creation (election of the Commission) and control (discharge and censure procedures) functions vis-à-vis the Commission, Parliament clarified that it had numerous, sanction-powerful means to ensure that the Regulation was enforced. Conclusions of the European Council could therefore not be made binding on the Commission when applying legal acts: The Commission alone, as guardian of the Treaties, had to ensure “that the Regulation is fully applied from the date agreed by the co-legislators [...] annulment of the Regulation or part of it [can] only be pronounced by the ECJ; [...] should a Member State bring an action for annulment of the Regulation or its parts, [Parliament] will defend before the Court of Justice the validity of the Regulation [...] and expects the Commission then to intervene in the proceedings to support Parliament’s position.” Finally, in order to put not only the “critical” states concerned, Poland and Hungary, but also the European Council, in its place, Parliament announced that it would apply for an accelerated procedure of action for failure to act on the basis of Article 265 TFEU. As the Commission remained inactive on the matter, Parliament increased the pressure on the Commission in spring 2021. In a first resolution adopted in March 2021, Parliament reiterated that the relevant conclusions of the European Council do not have legal effect and that the application of the new Regulation cannot be subject to practical, ultimately “merely” inter-administrative guidelines. If the Commission considered such guidelines necessary, they should be adopted by 1 June 2021 at the latest. To this end, however, MEPs also called on the Commission to consult the Parliament in advance. As the Commission still did not take any steps to implement the rule of law Regulation, Parliament, in a resolution adopted on 10 June 2021 by 506 votes in favour, 150 against and 28 abstentions, stated once again that the new rule of law instrument has been in force since 1 January 2021 and also applies to the NGEU. Since the Commission had not met the deadline of 1 June 2021 set by Parliament in its resolution of 25 March 2021 to finalise the guidelines for the application of the Regulation, the threshold had been reached for taking legal action against the Commission under Article 265 TFEU. Parliament therefore instructed its President, to call on the Commission to fulfil its obligations and, in the meantime, to start preparations for an action for failure to act against the Commission under Article 265 TFEU.

The example of the MFF negotiations shows that even under the conditions of the emergency rule, Parliament is able to conduct complex and conflictual negotiations across all phases of the policy cycle. Attempts by the member states to intervene in legislative procedures through the leverage of the European Council and the excessive interpretation of its role could not be prevented by the Parliament. However, Parliament has not been impressed by such illegal interventions of the European Council with regard to the implementation and interpretation of the Rule of Law Regulation⁵⁸ and has fully exercised both its policy-making and oversight functions. In the absence of an effective possibility of sanctioning the European Council, Parliament has rightly focused on the Commission and made its President responsible in her capacity as a member of the European Council. Even in the case of an unsuccessful action for failure to act at the ECJ (Platon 2021), Parliament still retains effective means of sanctioning the Commission: should the Commission still refuse to apply the Rule of Law Regulation after the judgment of the European Court of Justice of 16 February 2022,⁵⁹ Parliament could make use of its right of investigation, its right of budgetary discharge, and furthermore – as a last resort – its right to deliberate and decide on a vote of no confidence against the Commission.

⁵⁸ See: Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, (OJ 2020 L 433).

⁵⁹ See: ECJ judgments in cases C-156/21 - Hungary v Parliament and Council, and C-157/21 Poland v Parliament and Council.

4.3. Brexit and urgency requirements within Article 50 TEU and Article 218 TFEU

In the area of international agreements, Parliament is formally excluded from the direct negotiations and must therefore fall back on its rights of initiative, information, consultation, control and final ratification in order to influence the content of the agreements. According to Article 218(10) TFEU, Parliament "shall be immediately and fully informed at all stages of the procedure". Both the IIA-FA and the IIA-BLM provide for various pledges from the other EU institutions to inform and to consult Parliament during all stages of the procedure. Accordingly, Parliament can leverage its power of consent to influence the outcome of negotiations by providing its views on the content of an envisaged agreement. Parliament's related arsenal incorporates resolutions with recommendations at various stages of the negotiations (Rules 114(4), 132(2), 136(5)), own-initiative reports (Rule 54), or interim reports (Rule 105(5)). As we will show in the following two sub-chapters, Parliament's working mechanisms in relation to international agreements also function under the conditions of political urgency and emergency situations (For an analysis on the interpretation of Articles 218 and 207 TFEU, see the Annex).

The UK's withdrawal from the EU has revealed that the EU can be confronted with political urgencies without having recourse to treaty-based procedures to sanction a particular, intentional or unintentional behaviour of the negotiating partner. The withdrawal process is based on Article 50 TEU. Accordingly, the arrangements for a Member State's withdrawal shall be negotiated in accordance with Article 218(3). In this respect, the first step is already problematic: Article 50 TEU does not prescribe a time limit between the decision to withdraw, in paragraph (1) and the notification of the state's intention to withdraw as per paragraph (2) of the Article. Once a domestic decision to leave the EU has been taken there is an obligation to notify the EU. But neither Article 50 TEU nor Article 218 TFEU provide for specific deadlines for the period between the decision to withdraw and the formal notification of the withdrawal request to the EU (Papageorgiou 2021: 35-36). **In this respect, the indeterminacy of the first phase of withdrawal already creates an extraordinary uncertainty within the EU, which can quickly and unpredictably develop into an urgency of political decision-making.** The UK was aware that, after formal notification, it would lose control of the timetable. Hence Article 50 TEU clarifies that "the Treaties shall cease to apply to the State in question from the date of entry into force of the Withdrawal Agreement or, failing that, two years after the notification [...], unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period." The notification of withdrawal from the Union thus triggers a timetable, which the state wishing to leave can only change with the agreement of the EU. This timeline ultimately triggered the debate on the prospects and conditions of a "hard" or "soft" Brexit. In the first case, the UK would have left the EU without having negotiated a corresponding agreement. In the second case, the exit would be linked to the conditions of a Withdrawal Agreement that would only enter into force after approval by the British and Parliament. **Since Parliament itself has no influence on the adherence to and change of the timetable, and thus cannot influence how much time lies between the conclusion of a Withdrawal Agreement and its entry into force, the negotiation process harbours a high degree of uncertainty for the MEPs.**

Following the result of the referendum held on 23 June 2016, the UK Prime Minister waited to invoke Article 50 TEU on 29 March 2017, and thus began the two-year countdown to the UK formally leaving the EU. Consequently, the UK was expected to leave the EU on 29 March 2019. A Withdrawal Agreement and the political declaration setting out the framework for the future EU-UK relationship were initially agreed on 25 November 2018 (see AAR 2018). However, despite clarifications presented in an exchange

of letters on 14 January 2019 between the UK Prime Minister Theresa May and Presidents Tusk and Juncker, and an additional agreement of 11 March 2019 on an (interpretative) Instrument relating to the Withdrawal Agreement as well as a Joint Statement supplementing the Political Declaration, the UK government did not obtain the necessary support from its Parliament to proceed with the signature and ratification of the Agreement. However, following a House of Commons vote on 14 March 2019, the UK Government sought permission from the EU to extend Article 50 until 30 June 2019. The European Council agreed to grant the extension. On 2 April 2019, the Prime Minister sought a further extension to the Article 50 process. Brexit talks reached a standstill in spring 2019, with the House of Commons refusing to vote in favour of the negotiated Withdrawal Agreement, including a Protocol on Ireland/Northern Ireland. On 11 April 2019, at the UK's request, the European Council decided to extend the negotiating period, with a view to concluding a Withdrawal Agreement, until 31 October 2019. The extension led to the UK fully participating in the elections to the European Parliament on 23 May 2019. One day later, the then Prime Minister, Theresa May, announced her resignation as leader of the Conservative party. The ensuing leadership contest in the Conservative party led to the victory and subsequent appointment of Boris Johnson as the new UK Prime Minister, on 24 July 2019. His government then made a priority of finalising preparations for leaving the EU without a deal on 31 October 2019, unless the EU was willing to renounce the 'backstop' included in the concluded Protocol. However, both Parliament and the European Council continued to restate the EU's opposition to removing the legally operational safety net that would prevent a future hard border on the island of Ireland, in the absence of concrete proposals from the UK. Therefore, at the beginning of October 2019, the UK government sent proposals on revising the Protocol. Negotiations aimed at bridging the gap between the UK and EU positions intensified and, after a series of concessions, the EU and UK announced they had reached a revised Withdrawal Agreement. The European Council of 17 October 2019 then endorsed the Withdrawal Agreement, approved the Political Declaration, and called on the EU institutions to "take the necessary steps" to ensure that the agreement could enter into force on 1 November 2019.

Given the originally agreed timetable, only an extremely short period of two weeks was left for parliamentary ratification – on both sides of the channel. Otherwise, the UK would have left the EU on 31 October 2019 without an agreement. However, the House of Commons decided on 19 October 2019 to withhold approval for the revised deal until it passes the related implementing legislation. In accordance with the EU (Withdrawal) (No. 2) Act 2019, the UK Prime Minister thus requested a third extension to the Brexit process, and EU Ambassadors agreed to extend Brexit to 31 January 2020. On 12 December 2019, Boris Johnson won a majority in the UK General Election and reaffirmed his commitment to "get Brexit done" by 31 January 2020. After harsh ping-pong ratification debates in the UK Parliament, the European Council and the Commission Presidents signed the Withdrawal Agreement on 24 January 2020. Later on the same day, the document was also signed by Prime Minister Boris Johnson in London. On 29 January 2020, the UK confirmed it had ratified the Withdrawal Agreement. The same day, Parliament approved the Withdrawal Agreement by 621 votes in favour, 49 against and 13 abstentions. Accordingly, on 31 January 2020, the UK left the EU and entered a transition period until 31 December 2020.

The fact that the Withdrawal Agreement did not catch MEPs off guard was largely due to the internal parliamentary mechanisms accompanying the withdrawal process. The Conference of Presidents set up a special Brexit Steering Group on 6 April 2017. Working under the aegis of the CoP, the Brexit Steering Group's purpose was to coordinate and prepare Parliament's deliberations, considerations and resolutions on the UK's withdrawal from the EU. The Brexit Steering Group (BSG) finished its work on 31 January 2020. It was succeeded by Parliament's UK Coordination Group (UKCG), which liaises with the Parliament's committees that follow the EU-UK negotiations, particularly AFET

and INTA.⁶⁰ Both the BSG and the UKCG were established to provide ongoing parliamentary support to the negotiations between the UK and the EU. With the help of both groups, Parliament has therefore been able to participate comprehensively, timely and actively in all steps of the negotiations on the part of the EU and its Chief Negotiator. The specific monitoring of the Brexit negotiations by the BSG did not affect information within the Parliament in any way: Brexit was discussed in numerous parliamentary sessions (both statutory and special hearings), while the BSG kept the governing bodies, AFCE, INTA and other committees, as well as the Conference of Committee Chairs constantly informed about the situation. In addition, the EPRS and the parliamentary policy departments produced a large number of detailed enquiries on Brexit.

Viewed from the perspective of parliamentary opportunities under the conditions of the state of emergency or political urgency, both groups ultimately acted as early warning units of Parliament in order to be able to intervene quickly and in time in the course of negotiations if necessary. In fact, the BSG commented three times on Commission position papers and four times on UK position papers. In addition, the BSG orchestrated, together with political groups and the committees, six specific resolutions during the negotiations⁶¹.

The Brexit negotiations were characterised by a hitherto exceptional transparency with regard to the publication of the draft mandates, the adopted negotiating directives and the policy area-specific position papers. The largely unhindered access to documents, which as a rule are classified as confidential and can only be viewed by a small group of MEPs under considerable restrictions, made it easier for Parliament to deal with draft texts of the Commission or the Council even at short notice. In this respect, **the coordination of the BSG was crucially important to ensure that Parliament could not be unexpectedly surprised by the result of the negotiations. In this respect, the extremely shortened consultation period for the final consent procedure only posed a problem in formal terms.**

In the negotiations on the UK's withdrawal from the EU and the subsequent trade agreement, Parliament presented itself as a largely united and determined actor. The ratification of the Withdrawal Agreement on the EU side depended solely on Parliament's consent. Since the trade and cooperation agreement (TCA) also touches on policy areas that lie within the regulatory competence of the member states (e.g. social security, transport, energy or judicial cooperation in criminal matters), it was unclear for some time whether the agreement would be negotiated and ratified as an "EU-only" or a "mixed

⁶⁰ The Commission President decided, on 27 July 2016, to appoint Michel Barnier as Chief Negotiator in charge of the negotiations and of a dedicated Task Force. The latter was set up on 14 September 2016. The Council set up, on 22 May 2017, an ad hoc Work Party on Article 50 TEU,⁶⁰ to act as the main interface with the Commission's Task Force during the negotiations. On 22 October 2019, the Commission decided to merge its Task Force and the Brexit Preparedness Unit of the Secretariat-General to establish the UK Task Force (UKTF). The UKTF started on 16 November 2019 and has been in charge of the finalisation of the negotiations under Article 50 TEU, the preparedness work related to the withdrawal of the UK without a ratified deal at the end of the transition period, the preparation and conduct of the negotiations on the future relationship with the UK. The UKTF is coordinating the Commission's work on all strategic, operational, legal and financial issues related to the relations with the United Kingdom in close cooperation with the Secretariat-General and all Commission services concerned. The UKTF retains its coordinating role with other Institutions under the direct authority of the Commission President and in full respect for the role of the High Representative of the Union for Foreign Affairs and Security Policy (HR/VP).

⁶¹ The resolution (2020/2505(RSP)) of 15 January 2020 on implementing and monitoring the provisions on citizens' rights in the Withdrawal Agreement, the resolution (2019/2817(RSP)) of 18 September 2019 on the state of play of the UK's withdrawal from the European Union, the resolution (2018/2573(RSP)) of 14 March 2018 on the framework of the future EU-UK relationship, the resolution (2017/2964(RSP)) of 13 December 2017 on the state of play of negotiations with the United Kingdom, the resolution (2017/2847(RSP)) of 3 October 2017 on the state of play of negotiations with the United Kingdom, and the resolution (2017/2593(RSP)) of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the EU.

agreement". In the case of a "mixed agreement", the negotiation constellation would have been more complex and risky with regard to entry into force. For the entry into force of the agreement between the EU, its member states and the UK would then have required not only ratification by Parliament but also the consent of all national parliaments. In this respect, Parliament's UK Coordination Group, which emerged from the BSG, already had a first success to chalk up when it came to the conflict between the Commission and the Member States with regard to the question of the characterisation of the trade and cooperation agreement. Not only London, but also some EU governments and national parliaments preferred the negotiation of a "mixed agreement" in order to be able to articulate special national interests through this lever. However, a "mixed agreement" would also have led to more incentive structures for the UK side to be able to drive a wedge or two between the Commission and the member states. And that is precisely what the broad majority of Parliament had no interest in.

After having approved the Withdrawal Agreement on 29 January 2020 with 621 votes in favour, 49 against and 13 abstentions, Parliament passed a first resolution on the proposed mandate for negotiations on "a new partnership with the United Kingdom of Great Britain and Northern Ireland" on 12 February 2020 with 543 votes in favour, 39 against and 69 abstentions.⁶² The resolution was prepared by the UKCG and formally introduced by the EPP, S&D, Renew, Greens/EFA and GUE/NGL groups. In this '**co-mandating**' resolution, Parliament called for an agreement to be based on the following principles: The UK should not have the same rights and benefits as a member state of the EU, a member of EFTA or the EEA. The agreement should protect the full integrity of the single market, the customs union and the indivisibility of the four freedoms. With regard to the UK, it should be ensured that the level playing field and equivalence of standards in social, labour, environmental, competition and state aid policy are guaranteed within the framework of a "special partnership".

Building on this co-mandating resolution, Parliament deliberated on a substantially broader recommendation involving 15 committees in addition to the lead committees on International Trade (INTA) and Foreign Relations (AFET). Against the background of the slow negotiations and London's attempts to call parts of the Withdrawal Agreement into question, Parliament also underlined in **the recommendation and the respective resolution adopted on 18 June 2020**⁶³ with 527 votes in favour, 34 against and 91 abstentions that the successful conclusion of a trade agreement would have to be made dependent on the effective and full implementation of the Withdrawal Agreement before the end of the transition period. In particular, it would have to be ensured that citizens' rights were guaranteed both for Union citizens and for citizens of the United Kingdom and their families. A high level of rights for the free movement of persons would therefore also have to be sought in the trade agreement. Furthermore, the strict implementation of the Protocol on Ireland and Northern Ireland would have to be respected. In view of the TCA and London's attempts to the contrary, Parliament underlined the importance of the free movement of EU citizens and the freedom to provide services on the island of Ireland, and urged the British authorities to ensure that the economic rights of citizens in Northern Ireland are not diminished either. **Both resolutions** are noteworthy because they **illustrate Parliament's success in exploring the possibilities of an informal "co-mandate", which go beyond the role granted to Parliament in international agreements.** In the end, **Parliament scored a success through the leverage of suspending its vote of consent**, which also strengthened the Commission's negotiating power vis-à-vis the United Kingdom, but also vis-à-vis the member states.

⁶² See: European Parliament resolution of 12 February 2020 on the proposed mandate for negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland ([2020/2557\(RSP\)](#)).

⁶³ See: European Parliament recommendation of 18 June 2020 on the negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland ([2020/2023\(INI\)](#)).

According to Article 218 (5) TFEU, “the Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.” In this respect, Article 218 (6) TFEU clarifies that the Council may only adopt the final decision concluding the agreement “after obtaining the consent” of Parliament. Parliament cannot amend the agreement. It can approve or reject the agreement as a whole, and thus has a potential veto and considerable power of leverage. As noted above Parliament urged the negotiating parties during the last phase of the TCA negotiations in the late autumn of 2020 to adopt any agreement in sufficient time for it to be able to give its consent before the end of year deadline. However, the date for agreement was constantly slipping and when it was finally achieved it was too late for Parliament to vote on its consent at that time. The Council’s solution, decided on 29 December 2020, was that the TCA would be given provisional application pursuant to Article 215 (5) TFEU and that Parliament would be given until the end of February (later extended to April 2021) to give its consent. By accepting this before it had considered and pronounced on the TCA, Parliament already made a concession. Hence, Commission President Von der Leyen’s Political Guidelines had made a clear commitment that provisional application of trade agreements would take place only after Parliament had given its consent. Because of the chaos that a temporary no deal would entail in this very particular case, Parliament agreed to accept the provisional agreement of the TCA before giving its consent. Rapporteurs and UKCG members made it clear that this was granted on an exceptional basis and should not be considered as a precedent for the future.⁶⁴

Provisional application is a standard EU treaty-making practice. In the case of the TCA, there evidently was the urgency and need to ensure continuity between the end of the transition period under the Withdrawal Agreement and the application of the TCA. Usually, international agreements negotiated by the EU do not contain a fixed end date for provisional application (other than the date on which the agreement enters into force) and therefore neither any kind of an open-ended extension clause.⁶⁵ The solution opted for in the TCA was unique and seen as a compromise between the UK, which was against provisional application, and the EU, to give Parliament the time to scrutinise and ratify the Agreement. In addition, the TCA’s provisional application is unusual because it was approved and initiated by the Council before Parliament expressed its opinion. Although not legally obliged to do so, the institutions developed the practice of only initiating the provisional application of international (trade) agreements after having obtained the Parliament’s consent. But “given the particular, unique and specific circumstances”, the Parliament’s Conference of Presidents accepted the provisional application of the TCA before the Parliament’s approval “to mitigate the disruption for citizens and businesses and prevent the chaos of a no-deal scenario.”⁶⁶

While Parliament expressed its dissatisfaction with the limited period of provisional application to scrutinise the TCA, it started to use the short time given to review the agreement. However, Parliament and the Council needed more time to scrutinise the Agreement appropriately, to take into account the time needed to complete the legal-linguistic revision and authenticate all language versions. Therefore, the Commission asked to extend the provisional application to a date later than 28 February

⁶⁴ See: Francis Jacobs (2021). Could the European Parliament Kill Off the Brexit Deal? Brexit Institute News. March 18, 2021. <https://dcubrexitinstitute.eu/2021/03/could-the-european-parliament-kill-off-the-brexit-deal/>.

⁶⁵ See: Guillaume Van der Loo/Merijn Chamon (2021). The European Parliament flexes its muscles on the EU–UK trade deal. EPC, Brussels. <https://epc.eu/en/Publications/The-European-Parliament-flexes-its-muscles-on-the-EUUK-trade-deal~3c43bc>.

⁶⁶ See: European Parliament Press Release: European Parliament to scrutinise deal on future EU-UK relations. 28 December 2020. <https://www.europarl.europa.eu/news/en/press-room/20201228IPR94701/european-parliament-to-scrutinise-deal-on-future-eu-uk-relations>.

2021. The Partnership Council thus adopted Decision 1/2021 on 23 February, which extended the provisional application until 30 April 2021.

Until early March, there was little doubt that the Parliament would approve the TCA. Parliament was expected to approve the TCA at the plenary session of 24 March, meaning that the Council could approve the TCA in early to mid-April so that it enters into force on 1 May. But when the UK government decided on 3 March to unilaterally extend a grace period on a range of checks on trade between Northern Ireland and Great Britain, Parliament's mood shifted and warned to use its veto right over the TCA. Accordingly, Parliament decided not to set a date for approving the Agreement and recalled that in several resolutions, it signaled parties that a correct implementation of the Withdrawal Agreement is a precondition for approving the TCA.

Given the TCA saga, Parliament appears to have three main options for similar situations of political urgency within the framework of international agreements: It can adopt or reject the agreement within the presented timeframe, or else further postpone its vote. The first option is to give its consent to the agreement, since the deal is considered far better than the alternative of no deal. Parliament's formal legislative, consent resolution could then be accompanied by another resolution, pointing to the reasons for giving its assent, and analysing the strengths as well as weaknesses of the agreement, and how the agreement could be built on in the future. The second option is to reject the agreement. Parliament has rejected international agreements in the past (eg SWIFT in February 2010, or ACTA in July 2012). The third option would be to request or force a further postponement beyond the deadline set by the negotiating parties. There are precedents for such a postponement. In 1988, Parliament refused to give its assent to three Protocols in the EEC Israel Association Agreement. The matter was referred back to Parliament by the Council, but Parliament postponed giving its consideration to the Protocols for several months while the Commission negotiated with Israel to achieve concessions on Palestinian exports. Parliament then approved the Protocols.⁶⁷ Similar postponement could be more difficult in specific post-withdrawal cases like the TCA. If future terms of reference for another Partnership Council – set up in a Withdrawal agreement – allow both parties to decide on postponement, such parliamentary request would be difficult to achieve.

Threatening to reject an international agreement or else to postpone the consent vote does give Parliament some leverage, but once it has voted it will lose such power. In any event, Member States – especially those considering to leave the Union – are warned. **Parliament has given detailed indication of its views on the specific contents of a post-exit agreement, and these provide essential benchmarks for the future development of the EU's "Membership policy". In this regard, Parliament should make full use of the FA-IIA to reinforce its institutional position in the implementation of the TCA and the Withdrawal Agreement and indeed democratic accountability as a whole.** Decisions of the Partnership Council and of the other joint bodies that could potentially modify the TCA should not escape Parliament's scrutiny and potential veto. According to the FA-IIA, **Parliament must be fully informed and should systematically seek observers on the EU delegations to the Partnership Council.** Moreover, the FA-IIA provides for Parliament's consultation on modifications of the TCA, on additional measures (regulatory cooperation, or granting of equivalences in the field of financial services), or when there are breaches of the agreement.

⁶⁷ See Francis Jacobs (2021). Could the European Parliament Kill Off the Brexit Deal? Brexit Institute News. March 18, 2021. <https://dcubrexitinstitute.eu/2021/03/could-the-european-parliament-kill-off-the-brexit-deal/>.

4.4. Negotiating EU-China relations under emergency rule

Against the background of the geo-economic and geo-political rise of the People's Republic of China (PRC), the shaping of foreign trade relations between the EU and the People's Republic plays an important role in securing European standards of goods, services and risk production and promoting their spread in the Asia-Pacific region. A first step in this direction was the agreement between the EU and the PRC on cooperation in the field of geographical indications and their protection.⁶⁸ This agreement has been negotiated since September 2010 and received little public attention. It is intended to guarantee protection for product-related geographical indications of origin (so-called "geographical indications - GI") and to establish instruments against misleading practices and the misuse of GIs. Following the conclusion of negotiations in November 2019, the Council of Ministers adopted the authorisation for signature and forwarded the finalised text for ratification in June 2020. The lead Committee on International Trade (INTA) deliberated on the decision until autumn 2020, when the recommendation for consent was forwarded to the Plenary by 39 votes in favour, 2 against and 2 abstentions.⁶⁹ On the part of the other committees, only the Committee on Fisheries gave a positive opinion. On 11 November 2020, Parliament adopted a remarkable resolution of approval by 633 votes in favour, 13 against and 39 abstentions, as it was accompanied by numerous reservations and demands concerning Euro-Chinese relations.⁷⁰

Parliament is traditionally rather reluctant to formulate substantive demands or even conditions and reservations in resolutions approving international agreements that go beyond the corresponding consent or rejection formula required by the treaty.⁷¹ The possibility used in the agreements with South Korea, Peru/Colombia or Moldova to negotiate political barriers within the framework of the accompanying legislation (e.g. safeguard regulations) did not exist in the case of the GI agreement with China. In this respect, it was understandable, but in historical retrospect surprising, that in the resolution on the GI agreement, Parliament agreed across all political groups - with the exception of the extreme right-wing ID group - on an unusually long catalogue of demands and reservations, which both in Beijing, but also in the capitals of the EU, and here in particular with the incumbent German Council Presidency, became known as the "red lines" of Parliament. Parliament welcomed the GI agreement as a strong signal of China's willingness to cooperate with the EU and as a positive signal to the international community. Considering the EU-PRC investment agreement (CAI) under negotiation, Parliament underlined that the CAI should not only remove market asymmetries, but also ensure that human rights and core labour standards agreed within the ILO are protected and that climate change is addressed in line with the Paris Agreement by including a separate chapter on trade and sustainable development. Already the comparatively long and concrete accompanying text of Parliament's

⁶⁸ See: COM(2020) 213 final - 2020/0089(NLE), 27. May 2020, <https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=CELEX:52020PC0213&from=DE>.

⁶⁹ See: European Parliament: Report containing a motion for a non-legislative resolution on the proposal for a Council decision on the conclusion of the agreement between the European Union and the Government of the People's Republic of China on cooperation on, and protection of, geographical indications, (08359/2020 - C9-0298/2020 - 2020/0089M(NLE)), 30 October 2020.

⁷⁰ See: European Parliament: Resolution of 11 November 2020 on the draft Council decision on the conclusion of the agreement between the European Union and the Government of the People's Republic of China on cooperation on, and protection of, geographical indications (08359/2020 - C9-0298/2020 - 2020/0089M(NLE)).

⁷¹ See: Maurer, Andreas / Walli Thomas: Status, Überprüfungsmaßstab und Vergleichsanalyse des Gemeinsamen Auslegungsinstruments und der einseitigen Protokollerklärungen zum CETA, Innsbruck/Brussels 2016, ICER Paper, Vol. 3 No. 3 2017, S. 43ff. <https://www.icer.at/app/download/10047119352/ICER+Paper+Vol+3+No+3+2017.pdf?t=1516781694>.

resolution indicated that the overwhelming majority of MEPs did not want to see the investment agreement evaluated solely on the basis of purely economic policy considerations.

In this context, on 30 December 2020, the President of the European Council, the President of the Commission, the German Chancellor and the French President met with the Chinese President via video conference to announce the political agreement on the CAI, which has been negotiated since 2013. The CAI agreement aims to improve the conditions of access to the Chinese market for EU companies and thus contribute to redressing the economic imbalance between the EU and China.

In view of the public criticism of China's handling of human rights, the two EU presidents, the German chancellor and the French president, also emphasised that the agreement contains a chapter on sustainable development. And unlike the free trade agreements that the PRC negotiated with Switzerland and Iceland in 2013, the EU actually obtained cautious commitments from Beijing with regard to compliance with labour rights standards and the pending ratification of ILO conventions on the abolition of forced labour. However, in the agreement, the People's Republic only pledges to make "continuous and sustained efforts" with regard to the ratification of the ILO conventions in question. In addition to a dispute settlement mechanism, a separate working group on the chapter on sustainable development is to contribute to the implementation of these and other commitments. In terms of their functional scope and depth of intervention, these declarations of intent are far below what has been negotiated with regard to the implementation and enforcement of international labour, human rights and sustainability standards between the EU and other third countries since the entry into force of the Lisbon Treaty.⁷² For example, even a cursory comparison between Article 13.4.2. of the EU's trade agreement with Vietnam⁷³ and the corresponding Article 4 of the CAI shows that the EU's negotiators made significant concessions to China on labour and human rights standards that call into question the standard of protection, values and norms achieved over 20 years with other trading partners.

Prior to the announcement of the CAI negotiation agreement, on 17 December 2020, Parliament passed by a large majority (604 votes in favour, 20 votes against, 57 abstentions) an initial resolution strongly condemning the system of forced labour practised in China, e.g. against the Uyghur minority, and calling for the ratification of ILO Conventions No. 29 on forced labour, No. 105 on the abolition of forced labour, No. 87 on freedom of association and protection of the right to organise, and No. 98 on the right to organise and collective bargaining.⁷⁴ In addition, Parliament urged China to ratify the International Convention on Civil and Political Rights. For Parliament, the wording found in the CAI agreement in this regard ("continuous and sustained efforts") is too non-binding. Whether the criticism of the agreement will ultimately prevail remains to be seen. The Commission stressed that the CAI agreement is only one element of the broader EU-China strategy, according to which the EU treats China simultaneously as a negotiating partner, economic competitor and systemic rival. Further elements of the strategy to be pursued are, among others, the instrument to review foreign direct investments or the planned legislation on due diligence in supply chains, a sanction mechanism for human rights violations (analogous to the US Magnitsky Act) and the ongoing efforts against disinformation. However, on 20 May 2021, Parliament voted to halt ratification by 599 votes in favour, 30 against and 58 abstentions. Parliament reiterated its position in the resolution of 17 December 2020 that violations in Xinjiang constitute crimes against humanity. At the same time, it called on the EU and

⁷² See: Maurer, Andreas: Comparing EU and EFTA Trade Agreements: Drivers, Actors, Benefits, and Costs, Study for the European Parliament, Policy Department, Brussels 2016, doi:10.2861/67855.

⁷³ See OJEC, No. L 186 of 12 June 2020, <https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=OJ:L:2020:186-FULL&from=EN#page=132>.

⁷⁴ See: Entschließung des Europäischen Parlaments vom 17. Dezember 2020 zu Zwangsarbeit und der Lage der Uiguren im Uigurischen Autonomen Gebiet Xinjiang (2020/2913(RSP)).

its member states to intensify their efforts to win international support for an independent UN enquiry into the conditions in Xinjiang. The Commission and the Council should use all available means to persuade the Chinese government to close the labour camps. Moreover, China must lift the sanctions imposed on the EU before the Parliament reconsiders the agreement.

In the run-up to the ratification of the agreement, an intense debate is to be expected in the institutions and among the public. It remains to be seen whether the Commission will be able to convince a partly critical Parliament and whether some Member States will also join in the concerns. Colloquial evidence and classified information suggests that some EU capitals were surprised by the unexpectedly rapid conclusion between Christmas and New Year 2021. Anyway, **Parliament has convincingly demonstrated that even under conditions of emergency it is not rattled and is able to scrutinise and if necessary refuse to ratify obviously hasty trade agreements.**

4.5. Parliament and the COVID-19 health emergency

The COVID-19 pandemic and its accompanying constraints has had a profound impact on the practical work of parliaments worldwide. The challenges of the COVID-19 pandemic for parliaments differ from those faced in other emergencies and disasters for a number of reasons:

1. Unlike a single event such as earthquakes, forest fires or volcanic eruptions, after which societies rebuild economic and social systems, the coronavirus pandemic requires real-time decision-making in a highly volatile situation over a relatively long period of time.
2. The likely course of the pandemic was unknown, and health policy experts and decision-makers disagreed widely on the best course of action. Even socio-economically highly developed countries responded very differently to the pandemic, with no clear correlation between the measures taken and their impact in different countries that could be validated.
3. Parliamentarians were themselves exposed to a high risk of illness and death, as their work is normally characterised by physical meetings as a collective body.

Moreover, Parliament was additionally affected by the pandemic: unlike in most democratically constituted, national systems, Parliament is not involved in the definition and triggering of the emergency situation as such, but is dependent on decisions made accordingly by the Member States. However, the reactions of the Member States to the pandemic were and are different, both in terms of time and in terms of the substantial, freedom-restricting dimension. The COVID-19 crisis was first defined as a health crisis.⁷⁵ Given the EU's limited competence and legislative powers in the field of

⁷⁵ Although the European Centre for Disease Prevention and Control (ECDC) and the European Commission's Directorate-General for Health provided early and regular information about the infection situation in China, their warnings were not taken seriously at the political level. When the infections then increased steeply in northern Italy, the EU's Member States reacted exclusively with unilateral, uncoordinated border closures, without resorting to the crisis response instruments of the Union. On the contrary, Belgium, the United Kingdom, Hungary, Bulgaria and the Czech Republic put in place export bans on certain pharmaceutical drugs, fearing domestic shortages. In addition, Bulgaria decreed an exporting licensing requirement on disinfectants, whereas Germany did so for certain personal protective equipment. Moreover, the Czech Republic and France introduced an export ban on face masks (Pirker 2020; Sokol 2020). The EU's objectives include pursuing "common safety concerns in public health matters," (Article 4 TFEU). And Article 169 TFEU clearly states that a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities. Even though the EU's health policy competences are limited to coordinating measures, and harmonising measures are explicitly prohibited, the EU's members have committed to ensuring the health of all EU citizens, irrespective of their citizenship, place of residence or centre of life. In this respect, the member states already violated the goals of the EU by limiting their protective measures exclusively to "their" nationals, denying tests to EU foreigners and instead complimenting them out to their respective home countries. Early in 2020, the Commission, as guardian of the Treaties

health policy, there was an omnipresent fear that a joint EU response to a new, unprecedented health emergency would not be adequate. In addition, Member States were rather uncoordinated in supporting health priorities before the COVID-19 pandemic. As a result, there are asymmetrically distributed opportunities for MEPs in the performance of their treaty-based tasks, duties and functions. Moreover, the information asymmetries vis-à-vis the executive institutions – governments of the Member States, the European Council, the Council, and the Commission – which perform as emergency first responders and collectors of regulatory and administrative rescue measures, tended to keep the EU's only directly elected legislature excluded from core policy-making issues (Griglio 2020, 50).

Against this background, Parliament responded quickly to the challenges the epidemic posed to its functioning. In two successive decisions of 2 and 9 March 2020, it took initial emergency initiatives to adapt parliamentary procedures and instruments to the crisis. The decisions covered all parliamentary functions as they dealt with the introduction of a mechanism for remote debates and votes. In the course of the pandemic, Parliament adopted further adjustment procedures. These culminated in a reform of the Rules of Procedure in 2021 to give broader backing to measures previously authorised by Parliament's governing bodies.

Unlike the other EU institutions, which have merely used existing mechanisms such as written procedures to adapt their internal deliberation and decision-making procedures, Parliament has gone a significant step further by **reforming its Rules of Procedure (RoP)**: by means of this reform, Parliament **also communicates to the public how it intends to deal with emergency situations such as the pandemic at present and in the future**. Overall, Parliament's institutional response to the pandemic illustrates the special character of supranational parliamentary democracy: the developed solutions feature the proportional, consensual and integrative nature of Parliament's working methods.

Like the other EU institutions, Parliament shared the fate of slowing down procedures and disrupting direct as well as informal channels of communication due to border closures, curfews and travel restrictions. This rupture affected above all the assertion of Parliament's representational and interaction functions, but also its control-function and policy-making function in the negotiation phases of legislative work. As the Council Presidency made little effort to dynamise inter-institutional relations, numerous running dossiers on justice and home affairs policy, the "Green Deal" and framework legislation on the MFF were blocked anyway. After the first COVID infections were detected in officials and employees of the institutions, President Sassoli ordered the closure of parliamentary buildings to external visitors and all staff not directly employed by parliamentary bodies in early March 2020. All committee meetings were cancelled. Parliament also moved the subsequent Strasbourg plenary sessions to Brussels, limiting them to a maximum of three days. The Conference of Presidents (CoP) formalised these decisions in April and set a completely revised calendar of meetings. The alternation between caucus and committee weeks was equalised by shorter session periods, so that a hybrid form of parliamentary work has been established since April 2020: Parliament basically implemented the hygiene and social distancing rules in force in Belgium, thus allowing a mixture of physical presence with MEPs, officials and employees connected by telephone, video or internet. In addition to the existing infrastructure, numerous smaller meeting rooms were equipped with new video conferencing facilities so that remote meetings with simultaneous translation could take place for a limited period of time. Parliamentary business was thus able to proceed under nearly normal conditions from April 2020 on, albeit in an unusual form: Within just under 13 weeks since the first

and representative body of the European common interest, failed to react swiftly and forcefully to coordinate the protective measures and to transform them into a European protective framework.

COVID-19 wave, around 140 committee meetings and 42 committee coordinator meetings took place until the summer break.

Table 7: Committee meetings February – June 2020

February 2020	36
March 2020	0
April 2020	27
May 2020	57
June 2020	56

Source: The European parliamentary committees' response to COVID-19, Thematic Digest, July 2020

While the meetings of the interparliamentary delegations were also held in this format, Parliament cancelled almost all planned hearings, seminars and workshops by early October 2020.

As in other parliamentary assemblies, the adaptation measures were and are aimed at responding to the democratic, inter- as well as intra-organisational, health challenges posed by the pandemic. For Parliament, this means ensuring the continuity of its work across all functional areas, while at the same time preserving the health safety of the people involved, i.e. MEPs, but also the officials and staff working in Parliament's General Secretariat, political groups and Members' Offices, who ensure Parliament's functioning across all working levels and stages of the policy cycle. These measures to ensure continuity are reflected in the use of remote working methods, which clearly had an impact on all parliamentary work.⁷⁶

Parliament's response to the crisis can be divided into two types. First, the **intra-institutional measures taken by the executive bodies of Parliament to ensure immediate institutional continuity within Parliament.** This concerns the adjustment measures adopted by the Presidency of Parliament, the Conference of Presidents, the Conference of Committee Chairs (CCC), the Bureau and the Quaestors. Secondly, there is the **inter-institutional, legislative and regulatory response aimed at adapting rules and working methods with a view to cooperation with the other institutions of the EU**, which was essentially based on the parliamentary working group on the Rules of Procedure set up by the Committee on Constitutional Affairs (AFCO). In what follows, we examine these two categories in terms of what safeguards have been put in place to preserve the efficiency and effectiveness, transparency and democratic legitimacy of the EU's decision-making system.

4.5.1. Emergency measures taken by the Presidency and the Bureau

The COVID-19 crisis placed the executive bodies of parliaments in a political dilemma: to respect the competences and rights of individual members in times of crisis, while at the same time preventing parliamentary activities from becoming contagions within the institutions concerned and ultimately putting in danger their full functioning. Parliament, through its President and on the basis of the executive powers attached to the function, provided an initial response to this dilemma by means of

⁷⁶ For a critical assessment see: Bakó, E. (2020): How the pandemic strained the European Parliament's digital infrastructure. Heinrich-Böll-Stiftung Brussels. <https://eu.boell.org/en/2020/08/03/how-pandemic-strained-european-parliaments-digital-infrastructure>.

the decisions of 2 and 9 March 2020.⁷⁷ The decisions were based on the President's executive powers (Rule 22(5) RoP), according to which the **Presidency is responsible for the security and integrity of Parliament's buildings**, and on an opinion from the medical team. Based on this decision, as early as March 2020, the President took a number of measures deemed necessary to contain the pandemic in Parliament: The institution was closed, travel to and arrivals from contaminated areas were restricted and even banned. The decision led to the digitisation of parliamentary work and called on the Secretary General to ensure digital accessibility to the work of all parliamentary services.⁷⁸ As a result, on 8 May 2020, the wearing of a face mask became the rule in all parliamentary workplaces,⁷⁹ and on 15 June 2020, mandatory body temperature checks were introduced, as was an internal screening centre in Parliament. Most of these measures were extended by decisions of the Bureau.⁸⁰ On 23 November 2020, Parliament's Bureau approved reinforced risk-mitigation measures to enable Members' physical presence at official meetings as of December 2020 while staff continued to telework and all other preventive and health-safety prescriptions remained in place. These measures included, i.a., the introduction of 100% teleworking also for political group staff. Ahead of a given week, political groups could draft a precise list of up to 15% of their staff, dubbed indispensable and therefore exempt from the requirements. As to MEP's offices, the Bureau required on average 80% teleworking for staff per month; only one staff member per Member was allowed to be present on Parliament's premises at any given time. MEPs and their staff who have tested positive for COVID-19 were obliged to immediately inform Parliament's Medical Service, including any contact to ensure proper contact tracing.

4.5.2. Parliament's seat under emergency

Against the backdrop of restricted access to workplaces and limited mobility of parliamentary staff, the issue of Parliament's seat came to the fore again. It was hardly possible or reasonable for MEPs, parliamentary teams and officials to travel between Belgium and France in order to limit contagion and meet health obligations. Thus, since March 2020, it has no longer been possible to hold sittings in Strasbourg, even though the treaties provide for 12 plenary sessions a year at the official seat of Parliament. Even though MEPs are not tied to Brussels (although some of them reside there), almost all of Parliament's administrative and political actors are based in Belgium and were therefore subject to either a travel ban or a round-trip quarantine during this period (which is in effect a kind of travel ban). Apart from the mobility of persons, the introduction of a remote voting mechanism that allowed and recommended teleworking would certainly have led to a significant absence of the official organisation of the session in Strasbourg, thus weakening the official seat of the institution. Against this background, the Bureau sought to restore Strasbourg as the seat of the session in a communication of 13 July 2020.⁸¹ To this end, the Bureau presented a mechanism to enable the return to Strasbourg and reduce the risk

⁷⁷ See: President of the European Parliament, Decision, 2 March and 9 March 2020, Doc. No. CP 0(2020) 9886. This decision was renewed unchanged by decision on 26 March, 29 April, 28 May and 24 June 2020.

⁷⁸ "On 11 March 2020, all Directors-General of the General Secretariat were instructed by the Secretary-General to set up a 70% teleworking regime for all staff whose physical presence was not indispensable. In light of the evolution of the pandemic, this measure was revised on 15 March 2020, allowing for 100% teleworking arrangements for all staff whose physical presence was not indispensable. Similar guidelines were sent from the Quaestors to Members, recommending them to put in place teleworking arrangements with regard to their Accredited Parliamentary Assistants (APAs) and other staff, including trainees" (Welle 2020, 152).

⁷⁹ See: Decision of the Quaestors, Doc. No. PE644.381/QUEST.

⁸⁰ See: Decisions of the Bureau, Doc. No. PE657.899/BUR, and Doc. No. PE660.654/BUR.

⁸¹ See: Decision of the Bureau, Doc. No. PE653.525/BUR.

of contagion, in particular by imposing a limit on the number of staff and services present on site. The communication thus preceded the French President's letter of 27 September 2020 calling for the role of Parliament's seat in Strasbourg. It is true that the organisation of plenary sessions in Brussels is a violation of the treaties. But as long as the deliberations and votes can be conducted remotely, and health policy frameworks largely call into question Parliament's travel to and from Strasbourg, the EU Institutions have a political obligation to maintain a workable compromise. And as long as the health situation has not stabilised in all EU Member States and the pandemic-related restrictions on the free movement of persons have not been fully lifted, the remote voting system is likely to continue to apply, making Parliament's presence in its places of work a matter of discretion.

4.5.3. Towards Parliament's remote participation regime

The decline of the pandemic's first wave that began in the summer of 2020 indicated that the measures taken by Parliament could be relaxed. However, the second wave, starting in autumn 2020 eventually led to a tightening of the measures already in place, as shown, for example, by the President's decision of 29 October 2020.⁸² The physical presence of MEPs was completely banned, with the exception of a few trilogues. In addition, all physical meetings in the Parliament's buildings were banned.⁸³

The Bureau decided to supplement its former decision on rules governing voting in Parliament on 20 March 2020 and established an "alternative electronic voting system", complementary to the electronic voting system used on house premises, and which did not require MEPs to be physically present to participate in parliamentary sessions and vote.⁸⁴ The basic rules for remote voting were as follows: The voting list and the time at which the voting begins and ends shall be published on Parliament's website.

- The voting list, the voting slip and the time at which the vote begins and of voting shall be sent to each Member via the mailbox "plenaryvote@europarl.europa.eu" by e-mail to his or her official mailbox.
- MEPs shall vote by filling in and signing the paper voting slip.
- MEPs shall then send a copy of his/her voting slip - scanned or photographed in PDF or JPG format, or in a similar standard electronic format that allows a clear and legible image - by e-mail from his or her official mailbox to the official mailbox "plenaryvote@europarl.europa.eu".
- The President shall establish the result of the vote on the basis of the voting slips that meet the requirements and received before or on the date referred to the time of the end of voting.
- The very use of the alternative electronic voting system shall be recorded together with the result of the vote in the register and in the minutes of the meeting together with the result of the vote.

The new system was designed to complement existing voting procedures temporarily – only until 31 July 2020. Laying the foundations for Parliament's definitive, internal response to this crisis, it was extended several times: First, by decision of the Bureau of 14 September 2020 until 31 December 2020⁸⁵, later by decision of the Bureau of 23 November 2020 until 31 March 2021.⁸⁶

⁸² See: Decision of the Bureau, Doc. No. PE660.561/BUR.

⁸³ See: President of the European Parliament, Decision, Doc. No. PE 654.720.

⁸⁴ See: Decision of the Bureau, Doc. No. PE 649.211/BUR. See also [Parliaments in emergency mode – Lessons learnt after two years of pandemic](#), European Parliament, 2022.

⁸⁵ See: Bureau Notice No 7/2020.

⁸⁶ See: Bureau Notice No 10/2020.

For the first plenary session “under COVID-19” on 26 March 2020, Parliament introduced **the possibility of remote voting via e-mail** for the first time in its history, in order to comply with the rules of electoral and parliamentary law in force until then. The MEPs received the ballot papers electronically, filled them in and returned them by e-mail. Amendments were not voted on individually as usual, but in a single ballot. This remote voting system was supplemented by special meeting and voting software, which also made it easier to organise simultaneous translations. In the first remote vote on 26 March 2020, MEPs almost unanimously adopted three urgency proposals from the Commission under Rule 163 RoP: The Regulation amending Regulation (EEC) No. 95/93 on common rules for the allocation of slots at Community airports⁸⁷ to prevent so-called empty or ghost flights, the Regulation on special measures to mobilise investment in Member States’ health systems and other sectors of their economies to respond to the COVID 19 outbreak⁸⁸ and the Regulation on financial assistance to Member States and countries negotiating their accession to the Union seriously affected by a major public health emergency.⁸⁹

The bulk of the officials in Parliament’s General Secretariat have been working from home since the outbreak of the COVID-19 pandemic.⁹⁰ The organisation of committee, delegation and plenary work, including the research services, impact assessment and analysis units, which have been beefed up in recent years, functions largely smoothly at this level, as the necessary infrastructure for part-time and home-working models had been set up long before the COVID-19 crisis and Belgian telecommunications and internet service providers were well able to cope with the surge in the utilisation of their networks. Parliament, however, is not only composed of local employees. As a supranational parliament, MEPs affected by national border closures, exit and travel restrictions, their assistants as well as the staff of the political groups depend on network infrastructures that are not provided or controlled by the General Secretariat of the Parliament. Against this background, the disruptions in intra- and inter-institutional communication and decision-making that accompanied the pandemic hit these working levels of parliament particularly hard. For within Parliament, the implementation of the Lisbon Treaty under the leadership of Parliamentary Presidents Busek (EPP, PL) and Schulz (S&D, DE) was also used to shift working relations and political dossier responsibility from the parliamentary administration and committee secretariats to the political groups, MEPs and assistants. The price of this shift of responsibility became visible in the handling of the COVID-19 crisis, as it was precisely those whose decision-making and negotiating power was enhanced by the parliamentary implementation of the Lisbon Treaty who were hit hardest by the communication breakdowns.

⁸⁷ See: COM(2020)0111 - C9-0082/2020 - 2020/0042(COD).

⁸⁸ See: COM(2020)0113 - C9-0083/2020 - 2020/0043(COD)).

⁸⁹ See: COM(2020)0114 - C9-0084/2020 - 2020/0044(COD)).

⁹⁰ According to Parliament’s General Secretary, “various tools were made available to Members and staff for virtual meetings. Computer-accessible multipoint facilities can be booked like a meeting room, a multi-device tool where smaller and sensitive meetings can be organised using Parliament’s own infrastructure and a multi-device tool for larger, less sensitive meetings operating in the cloud. In parallel, administrative workflows were digitised to the largest possible extent. This concerns both applications and services for both Members and staff. In view of the increased needs of teleworking, on 11 May 2020 the Bureau decided to equip all Members with three per office and each staff member with one hybrid computers. As at 9 December 2020, more than 10.000 hybrids were deployed” (Welle 2020, 156). To enhance the well-being of staff while teleworking, the responsible services assessed staff needs for additional teleworking equipment. This concerns in particular external screens, keyboards, mice and ergonomic chairs. Staff who needed it most could receive these items from the existing stocks. 2326 screens, 2069 keyboards, 1968 mice and 378 ergonomic chairs were distributed until November 2020.

4.5.4. Measures to adapt legislative work

Those who thought of giving Parliament the role of a passive spectator under the conditions of the COVID-19 crisis were wrong: more than 30 dossiers directly related to the crisis were subject of the OLP (see Table 8 in Annex II).

In addition, MEPs were willing and able to clearly defend their positions and impress their respective counterparts in both the dossiers on the MFF – with 44 programme measures under OLP, two consultation procedures and three consent procedures.⁹¹ However, Parliament faced serious difficulties to successfully push through its legislative drafts vis-à-vis the Council in view of the narrow majorities with which the parliamentary amendment drafts on the Rule-of-law conditionality of the MFF or on refugee policy were passed. Hence, narrow majorities make it easier for the Council to exploit the division of the Parliament in its favour.

4.5.5. Remote Parliament – implications for committees and the Plenary

The work of Parliament largely concentrates on the work of the parliamentary committees. The committees prepare the legislative documents that are submitted to the plenary for voting. However, the implementation of the initial decisions taken by the President, which was of a general nature concerning Parliament as a whole, must start from a separate, original act, in particular in order to make progress on the precise details of the voting modalities, which is central to parliamentary activity. This was the purpose of the guidelines for the implementation of the decision of the Conference of Committee Chairs (CCC).⁹² In this respect, the decision of 8 April 2020 supports the decision of the Bureau of the Parliament on the amendment of the voting modalities in plenary session⁹³ in preparation for the plenary session of 26 March 2020. However, as these are non-binding guidelines, the CCC guidelines decision did not constitute a binding legal basis for the work in the parliamentary committees but rather a set of indications, the implementation of which remained the responsibility of the committee secretariats according to their own, often divergent, practices.

After the introduction of remote-voting arrangements in early-2020, Parliament deployed an electronic **voting application “iVote”** in committees to enable the processing of complex voting lists remotely. While “iVote” enables the creation of a digital voting list and the submission of ballots from remote, the tool relies, however, on an external IT infrastructure. As a consequence, Parliament services started working on an alternative solution, fully developed in-house. The new tool (“**EP Vote**”) provides a secure, Parliament-owned solution to fully control the data flows and storage. EP Vote has been gradually rolled-out prioritising committees which did not have a remote voting application yet. As by end of December 2020, the application was successfully tested and used in 10 committees.

⁹¹ See also chapter 4 of Parliament’s mid-term activity report “Developments and Trends of the Ordinary Legislative Procedure. 1 July 2019 - 31 December 2021 (9th parliamentary term)” by Vice-Presidents Katarina Barley, Nicola Beer, and Roberts Zile, and CCC Chair Bernd Lange. Doc. No. PE 703.724.

⁹² See: Guidelines of the Conference of Chairs of the Parliamentary Committees, 8 April 2020, Doc. No. PE639.592v03. See also the updated Guidelines of the CCC on the remote voting procedure in committees, 6 July 2021, Doc. No. PE639.592v07.

⁹³ The amendment of 20 March 2020 amending the Bureau decision of 3 May 2004 on voting modalities.

The CCC's guidelines decision indicates that the established procedures of the plenary session are the benchmark for the procedures of the parliamentary committees under the conditions of emergency.⁹⁴ Accordingly, the voting principle provides for a separate vote on amendments to legislation and a final vote after the vote on amendments. The voting principles adopted by the CCC are as follows: all voting, whether by members physically present or virtually, must be by e-mail; alternate members must be notified prior to voting and thus receive in advance the ballot papers for a voting session organised in a parliamentary committee; verification of quorums is done at the beginning of the session based on members present and voting. With regard to the preparation of the voting lists, the CCC guidelines decision refers to the usual principles for the preparation of voting lists. However, due to the remote deliberation and voting modalities, the guidelines prohibit the separate voting on compromise amendments as well as oral amendments on the basis of the rules provided for in Rule 180 (6) RoP.

Voting lists have a special role in Parliament: firstly, given the often fluctuating majorities due to proportional representation, the preservation of group discipline plays a lesser role than in national parliaments, so that voting lists are checked by each parliamentary office. Secondly, the fact that voting does not take place in the presence of MEPs means that they cannot rely on visual messages from rapporteurs or group coordinators during the session (thumbs up, thumbs down by rapporteurs to indicate voting instructions requested or previously agreed within the group). The voting list is therefore checked and processed individually by the parliamentary offices. The voting procedure in exceptional circumstances described in the CCC guidelines is representative of the practice of all votes that have taken place under the conditions of the COVID 19 pandemic. It is, of course, also suitable for votes in plenary session, since in this case it is not the secretariats of the parliamentary committees but the services of the plenary session that are responsible for receiving, validating and recounting the votes. **The new voting procedure is carried out exclusively by e-mail. All votes are therefore by roll call, so that the vote on each amendment is public.** The results of individual votes on each item on the voting list are published too. This differs from traditional votes in plenary, where a roll-call vote is usually only taken if requested by a group of MEPs.

At the opening of the vote, MEPs whose names have been communicated to the secretariat of the parliamentary committee by the referring political groups receive a voting list, which must be filled in from the MEP's address and returned by e-mail to the secretariat of the parliamentary committee responsible for the final vote. This voting list corresponds to a single text, which is voted on in two voting rounds, first on the amendments and then on the final vote. In this context, it is worth pointing out an important difference with the votes in plenary a special page setting on Parliament's intranet prevents attachments from being sent by e-mail and therefore forces the vote to go through a special, secure portal where MEPs enter their voting list directly. In plenary sessions, on the other hand, votes are not taken on a single text per voting session, but on a series or batch that the plenary secretariat compiles according to the total number of votes to be cast during the session week. The logical order, i.e. voting on amendments and the final vote, is of course maintained.

4.5.6. Adaptation of Parliament's Rules of Procedure

Article 6 of the Electoral Act provides that Members shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate. Likewise, Article 3(1)

⁹⁴ The guidelines use the term "exceptional circumstances", which refers to the name adopted by the Working Group on the Rules of Procedure in preparation for its reform.

of the Statute for Members provides that votes shall be held on an individual and personal basis. Building on these provisions, **Rule 186 RoP** provides that the right to vote is a personal right and Members shall cast their votes individually and in person. **Rule 187 RoP** on voting empowers the President to decide at any time that the voting operations be carried out by means of an electronic voting system. **Rule 192 RoP** calls on the Bureau to lay down instructions determining the technical arrangements for use of the electronic voting system. Accordingly, the Bureau Decision of 3 May 2004 on rules governing voting, as amended, lays down the technical arrangements for electronic voting. Given the emergency restrictions imposed by the Member States, at its meeting of 20 March 2020 the Bureau decided to review its rules on voting to allow Members to vote remotely. This was necessary to enable Parliament to adopt the urgent measures proposed by the Commission as part of the EU-coordinated response to COVID-19.

Following the vote in the plenary session of 26 March 2020, which was the first time electronic voting was practised, Parliament mandated a **"Working Group on the Rules of Procedure"** at the beginning of April to draw up possible reforms to **adapt the functioning of Parliament to exceptional circumstances that would prevent it from functioning normally**. The aim of this group was to draw up proposals for amendments by the summer of 2020, which could form the basis for a parliamentary report on the amendment of the Rules of Procedure. The working group's deliberations focused on several issues and on the methodology chosen. Should the Rules of Procedure be amended article by article, or should a specific article or chapter, then transversal, be dedicated to exceptional circumstances? In the end, the latter approach was preferred, which made it possible to clarify issues related to the parliamentary emergency, such as the definition of exceptional circumstances, their impact on the rules, procedures and routines of operation, as well as the central democratic policy issue of the control modalities of MEPs vis-à-vis the parliamentary governing bodies during the period in question.

The report was submitted to AFCO on 10 July 2020⁹⁵ and voted on 16 October 2020. The final vote in plenary took place on 17 December 2020.⁹⁶ The final version of the new rules was adopted by 598 to 58 votes with 33 abstentions. It adds a **new Title XIIIa "Extraordinary circumstances" incorporating a new Rule 237a-d to the Rules of Procedure**. Parliament decided that these changes should enter into force on 1 January 2021, but that they would only apply as of 18 January 2021, i.e. at the opening of the first ordinary part-session of 2021.

Rule 237a, entitled **"Exceptional measures"**, defines situations and phases in which Parliament cannot work in the traditional way or fulfil its obligations and must temporarily depart from its traditional ways of working in order to continue its activities. However, this is only possible under conditions which meet the criterion of force majeure (i.e. the external nature of the event, its unforeseeable and unstoppable character): in cases of "exceptional and unforeseeable circumstances beyond Parliament's control", or when the "political balance in Parliament is severely impaired because a significant number of Members or a political group cannot take part in Parliament's proceedings" under its usual procedures. The President of Parliament is authorised to trigger the course of action hereby framed if he considers that there is a concrete danger or that it is impossible for the institution to meet according to its normal working methods. Overall thus, the President is authorised to adopt extraordinary measures, but only as a last resort and to the extent that they are "strictly necessary to

⁹⁵ See: European Parliament, Report on amendments to the Rules of Procedure in order to ensure the functioning of Parliament in extraordinary circumstances, (2020/2098(REG)).

⁹⁶ See: European Parliament decision of 17 December 2020 on amendments to the Rules of Procedure in order to ensure the functioning of Parliament in extraordinary circumstances (2020/2098(REG)).

address the extraordinary circumstances under consideration” (Rule 237a(5)), in line with the principle of proportionality. In addition, Rule 237a is politically and legally framed by the following:

- the respect of the principles of representative democracy;
- the equal treatment of Members;
- the respect of the right of Members to exercise their parliamentary mandate without impairment, including their rights stemming from Rule 167 (multilingualism) and their right to vote freely, individually and in person;; and
- the respect of Protocol No 6 on the location of the seats of the institutions and of certain bodies, offices, agencies and departments of the EU, annexed to the Treaties, which provides, most notably, that Parliament must hold 12 sessions in Strasbourg, including the budgetary session, that additional sessions are to be held in Brussels, and that its committees meet in Brussels.

The measures taken by the President are subject to increased scrutiny by the Conference of Presidents and by the MEPs themselves. Anyway, extraordinary measures taken by the President need the approval of the Conference of Presidents. Only under circumstances of “imperative urgency” – when the Conference of Presidents is unable to meet neither in person nor virtually – the President may decide by him or herself to trigger extraordinary measures. Such a decision is to lapse five days after its adoption, unless the Conference of Presidents approves it. MEPs may hold, at the opening of the next plenary session following the President’s decision, a vote on the confirmation of presidential measures (rather than their annulment or revocation) at the request of a political group or of MEPs reaching an average threshold (10% of the MEPs). The de facto annulment of a Presidency decision only takes effect at the end of the plenary session. This rule procedure can effectively prevent decisions that affect the session in which the vote takes place from being declared null and void.

Building on the Bureau’s decisions, Rule 237a(3) enumerates the catalogue of possible extraordinary measures that Parliament can apply. The wording “all appropriate measures [...] and in particular [...] the following” suggests that this catalogue only lists measures by example, and that extraordinary measure could take other forms in the future. Accordingly, the non-exhaustive list of measures includes

- the postponement of a scheduled part-session, sitting or meeting of a committee, as well as the cancellation or limitation of meetings of inter-parliamentary delegations and other bodies;
- the displacement of a part-session, sitting or meeting of a committee from Parliament’s seat to one of its working places or to an external place, or from one of its working places to Parliament’s seat, to one of its other working places or to an external place;
- the holding of a part-session or a sitting on Parliament premises in whole or in part in separate meeting rooms allowing for appropriate physical distancing. Note that based on Rule 237d, the meeting rooms used are then considered to collectively constitute the Chamber and the President may determine the manner in which the respective meeting rooms can be used, in order to ensure that physical distancing requirements are respected);
- the holding of a part session, sitting or meeting of Parliament bodies under the remote participation regime as provided for in Rule 237c); and
- the temporary replacement of MEPs in a committee by political groups, unless the Members concerned oppose this.

Rule 237b deals with the “**disturbance of the political balance in Parliament**” induced by emergencies and allows the President to arrange for the remote participation of certain Members belonging either to the same political group or, as the case may be, to a specific geographical or regional group, if their involuntary absence causes a lasting disturbance of the political balance in Parliament. Accordingly, Rule 237b addresses a different exceptional situation only affecting a number of Members. If “for reasons of security or safety, or as a result of the non-availability of technical means”

a significant portion of MEPs or a political group cannot take part in Parliament's proceedings under usual procedures and if that circumstance leads to "severely" impair the political balance in Parliament, the President, after approval of the Conference of Presidents, may adopt measures to allow such Members to participate by the application of technical (as enumerated under Rule 237c(1)) or other appropriate means. The scope of such measures does not extend to all members, but only to a 'significant number of Members' if the exceptional circumstances which affect them occurred 'in a regional context' or to the members of a political group(s) if the exceptional circumstances are outside that group's control (Rule 237b(2)).

The details of the system of **remote participation** are listed in the new **Article 237c**. It continues to be used in plenary and committee meetings at the time of writing (January 2022). This system is largely based on the experience of the first months of the remote participation procedure and ensures, in particular, the individual character of the vote and respect for Members' ability to express themselves freely in plenary sittings.

Finally, Article 237d provides that, with a view to maintaining the physical distance between Members present in Parliament, all rooms used for the plenary session shall be considered as belonging jointly to the Chamber.

Overall, the adjustments made by Parliament are satisfactory. **The rapid response of the leadership to the emergency created by the pandemic and the establishment of structures for remote voting and participation within a few days** were achieved in agreement with the main political groups. They allow for an **efficient management under the conditions of the emergency, both in terms of short-term regulation and the legislative perspective provided by the reform of the Rules of Procedure**. As the General Secretary notes, "in terms of remote participation, the deployment of a complex, multilingual solution which would normally require months if not years was implemented in only few weeks. From March until November 2020 the remote meeting system was used for over 1680 meetings with more than 138 000 participants in total, thus allowing for Members to fully exercise their functions" (Welle 2020, 150).

The President's decision of 20 January 2022 reads: "The remote voting procedure has a major impact on the order of business of part-sessions, as it imposes additional constraints on the sequence according to which items are debated and put to the vote, leaving less time for debates. It is, thus, appropriate to currently not place on the plenary agenda debates on major interpellations, topical debates and one-minute speeches, to allow joint debates on items which are neither similar nor factually related, to proceed with the debates during votes and to replace the oral explanation of votes with written explanation of votes".⁹⁷ These rules continued to interfere to a considerable extent with the rights of MEPs, political groups and Parliament as a whole:

- No major interpellations under Rule 139(4) and (5) should be placed on the plenary agenda;
- Amendments to the final draft plenary agenda under Rule 158(1) could be proposed only if the political groups supported it by consensus;
- Catch-the-eye procedures under Rule 171(6), whereby MEPs may take the floor for short presentations, were not allowed;
- Topical debates under Rule 162 were not allowed;
- The Blue card procedure under Rule 171(8), whereby the President may give the floor to Members who indicate by raising a blue card their wish to put a question was not applied;

⁹⁷ See: Decision of the President of the European Parliament of 20 January 2022 on extraordinary measures enabling the European Parliament to carry out its duties and exercise its prerogatives under the Treaties, https://www.europarl.europa.eu/cmsdata/244330/F6_EN_12.pdf.

- One-minute speeches under Rule 172 were not allowed;
- Oral amendments and oral modifications under Rule 180(6) were not allowed to be put to the vote.

Although the majority of these restrictions has been lifted by the President's decision of 9 March 2022 "on extraordinary measures enabling the European Parliament to carry out its duties and exercise its prerogatives under the Treaties",⁹⁸ the initiated measures by Parliament's coordinating and leadership bodies since the COVID-19 outbreak raise numerous fundamental questions regarding the legality of the arrangements provisionally adopted, in particular their appropriateness with regard to the fundamental principles of parliamentary democracy, i.e. respect for the individual competences of the Members of Parliament elected by European citizens. These questions must be addressed, for example, the examination of the proportionality of the measures, the discussion on the legal basis for amending the Rules of Procedure in times of crisis, the numerical independence of voting procedures, in particular through the obligation to internalise the instruments, and compliance with transparency obligations as laid down in the Code of Conduct for Members of Parliament during dematerialised working sessions.

In view of the considerable scope of these restrictions - now in the third year of the pandemic! - **we believe it is urgent that the plenary discusses the measures, adjusts them if necessary and passes a resolution approving them.** In our view, it is not sufficient to have the CoP or the Bureau confirm the President's decisions. The European public should not get the impression that the basic rules of parliamentary work and the fundamental rights of parliamentarians are constantly being restricted by a few. **Any parliamentary act of institutional self-restraint must be supported and legitimised by a broad majority so that Parliament can continue to appear as an independent, self-empowered and resilient actor.**

4.6. Impact of the crisis on Parliament's functions – A macroscopic analysis

Parliaments are "direct organs", which functionally assume the task of conveying democratic legitimacy for the legal acts of the higher collective level (Maurer 2002). A parliament can be understood solely from the context of the concrete system of government in which it operates. This determines its competences, functions, working methods and, to a large extent, the behaviour of its members. In this context, functions are understood as fundamental tasks of parliaments for the existence and maintenance of the political system in which they operate. Parliamentary functions are mechanisms, routines, rules and behaviours with the help of which and through which parliament fulfils the basic functions of representation in democracy.

The functional analysis of Parliament based on Bagehot's set of indicators is complicated by the 'sui generis' character of the EU: firstly, **the EU lacks traditional parliamentary patterns of interaction and identification between the governing party(ies) and the opposition party(ies)**, which would help to enable the classification of Parliament as an arena of politically-ideologically charged decision-making. Secondly, **the political-institutional system of the EU does not know a strict separation between the 'legislative' and the 'executive'**; it gets by without a European government, which

⁹⁸ See: https://www.europarl.europa.eu/cmsdata/245750/F6_EN_13.pdf.

would have to rely on a parliamentary majority to exercise its office over the entire electoral period. Thus, one of the original tasks of parliaments – the election and control of the government resulting from elections – does not exist in the familiar form at the European level. Thirdly, given the objectives of the EU system, which are limited to certain policy areas, Parliament is not called upon to perform indefinite and unlimited tasks in all phases of the EU policy cycle. On the contrary, precisely due to the lack of all-encompassing competence of the EU, **Parliament's tasks and functions are concentrated on certain functions and phases of the policy cycles**. This concept, moreover, also prevents Parliament from being granted a claim as a body 'above' Member States and their national parliaments.

In the 1980s, Grabitz, Steppat, Schmuck and Wessels developed **a triad of European Parliament functions: policy-making – system-shaping – interaction**. They empirically supported the concept and it became a proven analytical framework for the conceptualisation of Parliament's powers in political science. However, due to the successive changes in the framework conditions and powers of Parliament since the Maastricht Treaty, we have defined and empirically verified additions and differentiations:

Policy-Making: In Grabitz et al. the policy-making function comprised the three areas of legislative initiative, parliamentary participation in law-making, and political control of the institutions endowed with executive powers. The function thus includes those activities of Parliament which aim at influencing EU policies substantially as it derives from Parliament's participation in the production of generally binding decisions. Accordingly, Parliament has potential enforcement options at its disposal, which vary according to the degree of parliamentary participation and influence as well as the Council's decision-making modes.

Control and Scrutiny: The control function, which Grabitz et al. captured in the policy-making function and which was not specifically listed, can be conceptualised as an independent function at the latest since Maastricht due to the incentive structures of Parliament in the area of legislative policy-making introduced by this treaty. The control function refers to ensuring the accountability of the EU institutions to Parliament due to its capacity as the only directly elected representative body of the EU. In exercising this function, Parliament can draw on the wide range of typical control instruments and sanction mechanisms, such as parliamentary questions, committees of enquiry, refusal of budgetary discharge, the passing of a vote of no confidence on the Commission and the monitoring of the transfer of specific delegated and implementing powers to the Commission, and, to a limited extent, vis-à-vis the Council and the European Council.

Elections and appointments: Parliament's electoral, recruiting or creative function, which is also not treated independently in the catalogue of functions by Grabitz et al. and which has also only become more pronounced since the Maastricht Treaty, emerges from the control function. It relates to the implementation of parliamentary recruitment and appointment rights and the increasingly apparent attempts to establish a government-like system within the EU, in which both the Treaties and the inter-institutionally applicable basic norms postulate a densification of the relationship between Parliament and Commission. Weaker creative functions can also be observed in the EP's relationship with the Court of Auditors, the Central Bank and the Court of Justice.

System-development: The system-development function refers to Parliament's role in the 'para-constitutional' further development of the EU system. This encompasses both the revision of the Treaties, the amendment of decision-making procedures and the reorganisation of the distribution of competences between the EU and the Member States, as well as Parliament's participation in accession and withdrawal processes, and in system-shaping processes below the level of Treaty revision. This includes, above all, inter-institutional agreements as treaty-interpreting and -developing instruments

as well as the processes of adapting institutional rules of procedure to the scope for action arising from the treaties and treaty revisions.

Representation and interaction: Finally, the articulation, communication or interaction function refers to the relations between the members of parliament and the electorate as well as to the relations between Parliament and the parliaments in the EU Member States, the associated and other third countries. The function involves the articulation of voters' interests, the publicity of parliamentary deliberations, the aggregation of different positions and the mobilisation of citizens for important concerns as well as - with regard to inter-parliamentary relations - communication and mutual information between MEPs.

4.6.1. Effects on Parliament's policy-making function

The policy-making function comprises Parliament's **participation in EU law-making**. The function covers those activities of Parliament which aim at influencing EU policies substantially as it derives from Parliament's participation in the production of generally binding decisions. Accordingly, Parliament has potential enforcement options at its disposal, which vary according to the degree of parliamentary participation and influence as well as the Council's decision-making modes. The raw data in Figures 4 and 5 on Parliament's legislative activity between 1987 (Single European Act) and 2021 illustrate a trend observed **since the entry into force of the Maastricht Treaty** towards a **concentration on legislative activities at the expense of non-legislative self-referrals, initiatives and urgent matters**: whereas in 1993 Parliament was involved in only 48.44% of all Council acts in one of the legislative procedures in question, in 1999 this share was already 60.05%, while it fell down to just 35% in 2010. Since then, the share increased towards 67,5 in 2014, but then decreased to oscillate between around 45% and 30%. If we exclude the routine – implementing or administrative – acts of the Council in the area of agricultural, fisheries and customs tariff policy, Parliament's participation rate increases firstly in general to about 80-90% and the share of the cooperation and OLP procedures from 30% (for all Council acts) to about 75%. The relatively lower EP participation rates in 1995, 2000, 2005, 2010, 2015, and 2020 are due to the direct elections in the respective period of the previous year and the subsequent investiture of the Commission. During these periods, the legislative activity of the EU institutions decreases overall. The comparison between the relative increase or decrease rates of decision-making procedures due to treaty reforms and the actual utilisation rates of the procedural rules offered by the treaties thus provides information on the quantitatively measurable success or failure of the gradual "parliamentarisation" of the EU decision-making system:

The reduction of the 'non-participation' of Parliament was successful both in the context of the further development of the EU Treaties as well as with regard to their day-to-day implementation. In both fields of investigation, a considerable decrease of Parliament's exclusion can be noted. At the same time, the utilisation of the 'full parliamentary' procedures - cooperation and OLP - as a proportion of all legal acts adopted by the Council or by Parliament and the Council alone is lower than their relative increase in importance following the treaty reforms would have suggested. The relative decline of the consultation procedure in relation to OLP and cooperation induced by Maastricht is also counteracted by the persistently high share of this procedure in the framework of treaty implementation until 2004/2007. Only since 2007 has the share of the consultation procedure fallen continuously, while the share of OLP fluctuates between 30% and 50%. Finally, the drastic increase in consent procedures since the entry into force of the Lisbon Treaty is striking. While the share of this procedure fluctuated between 0,5 % and 3 % of all Council acts until 2009, it was almost 12 % in 2012. In this area, the procedural treaty

reforms in the fields of international agreements and trade policy have had a direct and massive impact in favour of Parliament.

Figure 4: Legislative Resolutions adopted by Parliament 1990-2021

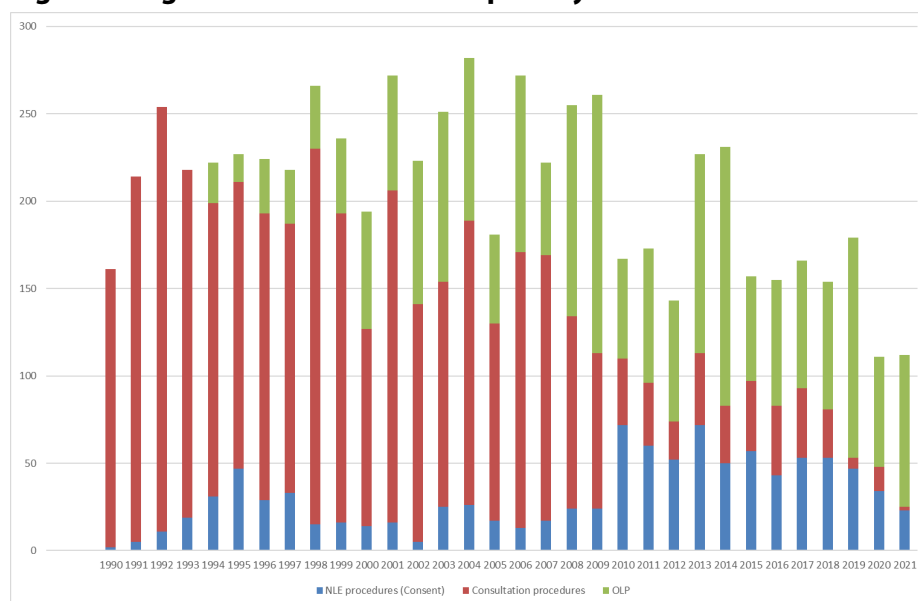
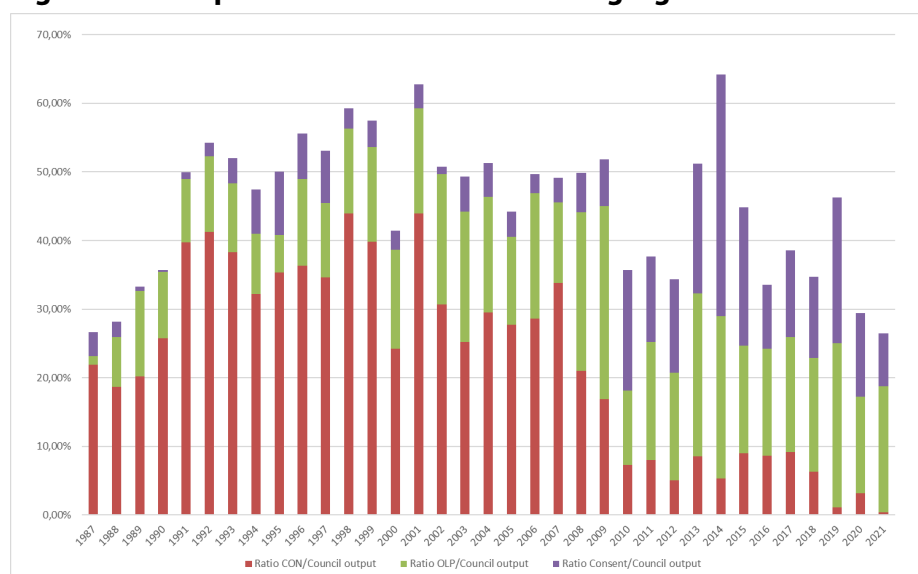


Figure 5: Participation of Parliament in binding legislation 1987-2021

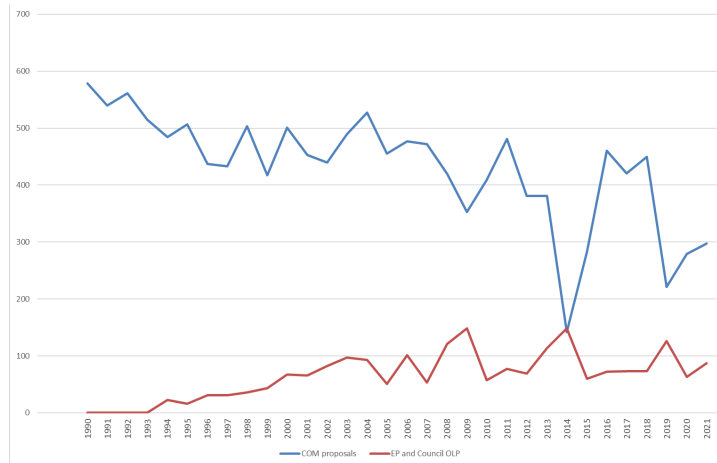


Author's own calculations and presentation based on data from EURLEX and OEIL.

The relatively drastic drop in the OLP values between 2009 and 2010 is also due to the wave of legislative packages ("omnibus procedures") regularly observed after the entry into force of new treaties, in which legislative measures that have already been under negotiation for some time are adopted "en bloc" according to the then new procedures introduced by Treaty reform. The oscillation of parliamentary participation along the variables "European elections" and "treaty revisions" is similar to that found with respect to the volume of legal acts of the Council. When measuring Parliament's participation in relation to the production rate of Commission initiatives, however, the effects of OLP

and the extension of its scope via the Treaty reforms of Amsterdam and Lisbon become much more apparent: since 2006, the parliamentary participation rate has oscillated around 70% of all Commission proposals, with the OLP accounting for a share that has been rising ever since. The effects of the COVID-19 pandemic are visible insofar as the number of Commission proposals in the years 2020 and 2021 increased slowly (see Figure 6). The comparison of the Figures 4 and 5 with Figures 6 and 10 thus also shows that the Council produces an unbroken high rate of binding acts in which the EP is generally not involved (see table 14 in the Annex I).

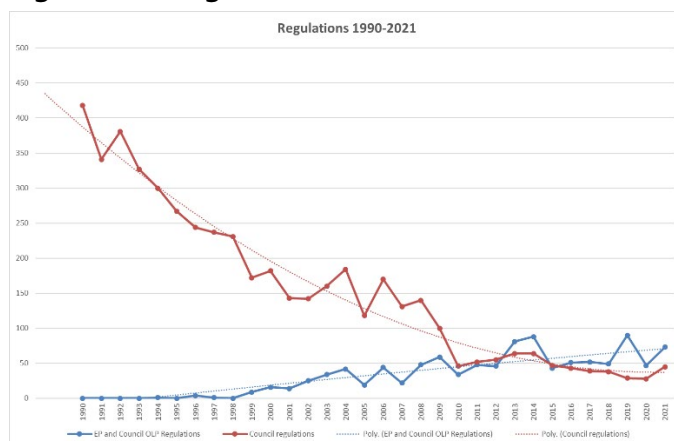
Figure 6: Commission legislative proposals vs. Parliament and Council legislative acts 1990-2021



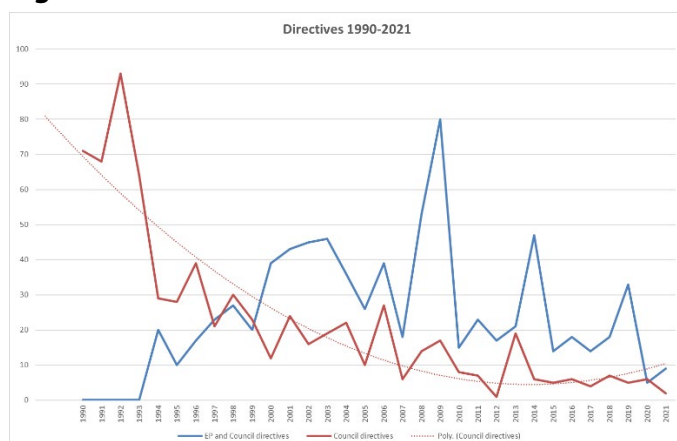
Author's own calculations and presentation based on data from EURLEX and OEIL.

The increase in Commission initiatives in 2020 and 2021 is stronger than the (re)increase in OLP in the same period. Figures 7 to 9 show that this discrepancy is confirmed when looking at the legal instruments in relation to the respective authorising institutions.

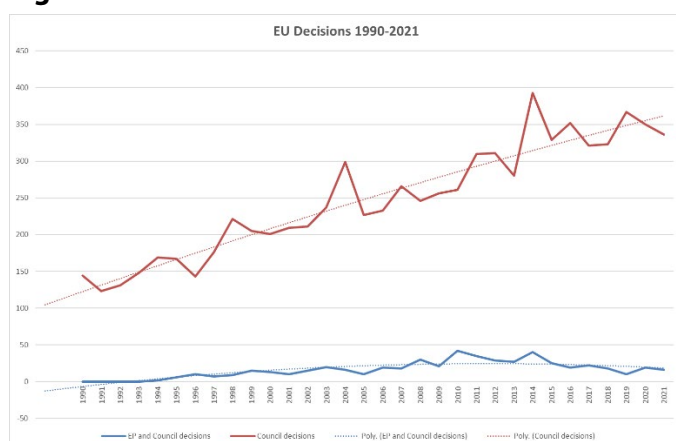
Figure 7: EU Regulations 1990-2021



Author's own calculations and presentation based on data from EURLEX and OEIL.

Figure 8: EU Directives 1990-2021


Author's own calculations and presentation based on data from EURLEX and OEIL.

Figure 9: EU Decisions 1990-2021


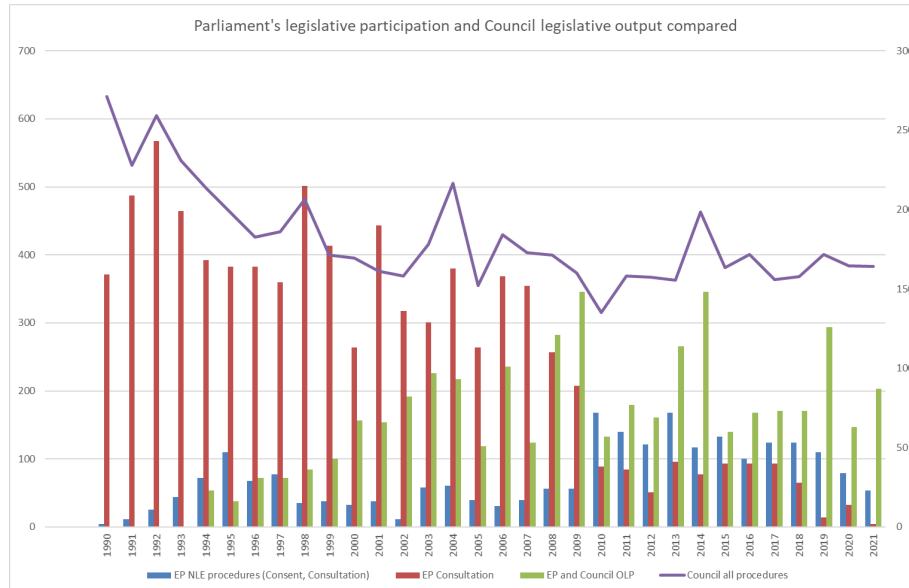
Author's own calculations and presentation based on data from EURLEX and OEIL.

In 2020, the percentage of Regulations (Figure 7) and Directives (Figure 8) adopted under OLP dropped significantly. Whereas in 2019, 75% of all Regulations and more than 85% of all Directives were adopted together with Parliament, in 2020 these numbers fell to 62% and 45%, respectively. One could jump to conclude that this “illustrates how the EP lost influence in legislation through the pandemic raising questions for the EU’s democratic legitimacy” (Mintel/Von Ondarza 2022). In our view, however, such a conclusion ignores, firstly, the long-lasting, declining trend in the production of legally binding acts of the EU and, secondly, the consideration of the pool of legal instruments at the disposal of Parliament and the Council as a whole.

In fact, the ratio of Regulations authorised by the Council alone has developed in favour of those adopted within the OLP. The COVID 19 crisis has not had a significant effect on this. The relationship between Directives adopted by the Council alone and those successfully negotiated in the OLP is similar. In contrast, the development of decisions (Figure 9) is striking. This legal instrument is much more important than is often assumed. The Council of Ministers uses the norm type of Decision not only to adopt administrative acts, but also to implement, adapt and - stealthily - modify regulations and directives adopted through the OLP. Moreover, Parliament and the Council of Ministers refer to the norm type of Decision to adopt program and program instruments, which are financed by the EU

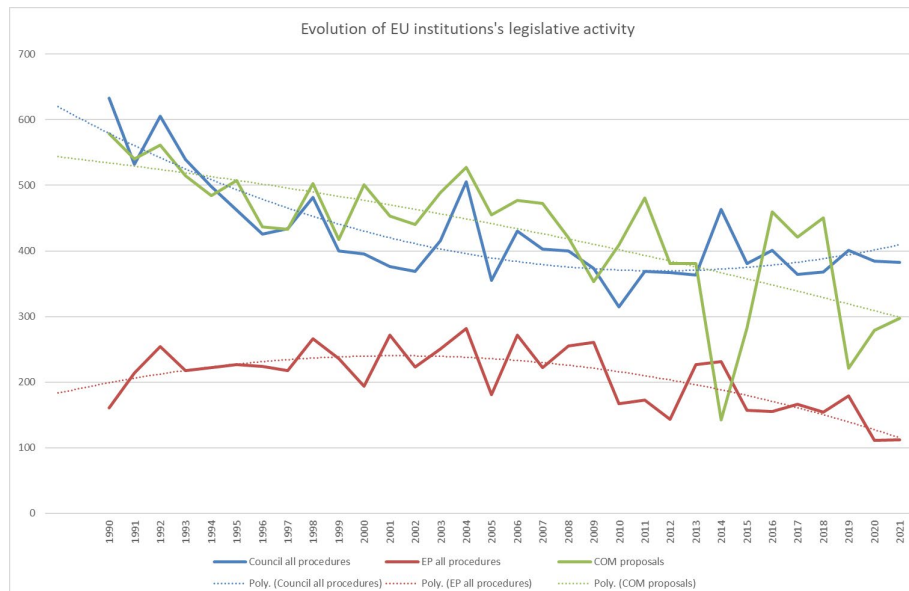
budget. In fact, the use of this instrument under OLP has remained relatively static at 5 to 10 acts per year. The number of Council decisions in which Parliament is not involved in any of the available procedures, on the other hand, has increased continuously, reaching a value of 367 files in 2019.

Figure 10: Parliament's legislative activity vs. EU legislative output 1990-2021



Author's own calculations and presentation based on data from EURLEX and OEIL.

Figure 11: EU institutions' overall legislative activity 1990-2021



Author's own calculations and presentation based on data from EURLEX and OEIL.

Table 8: Parliament's overall activity 1987-2021

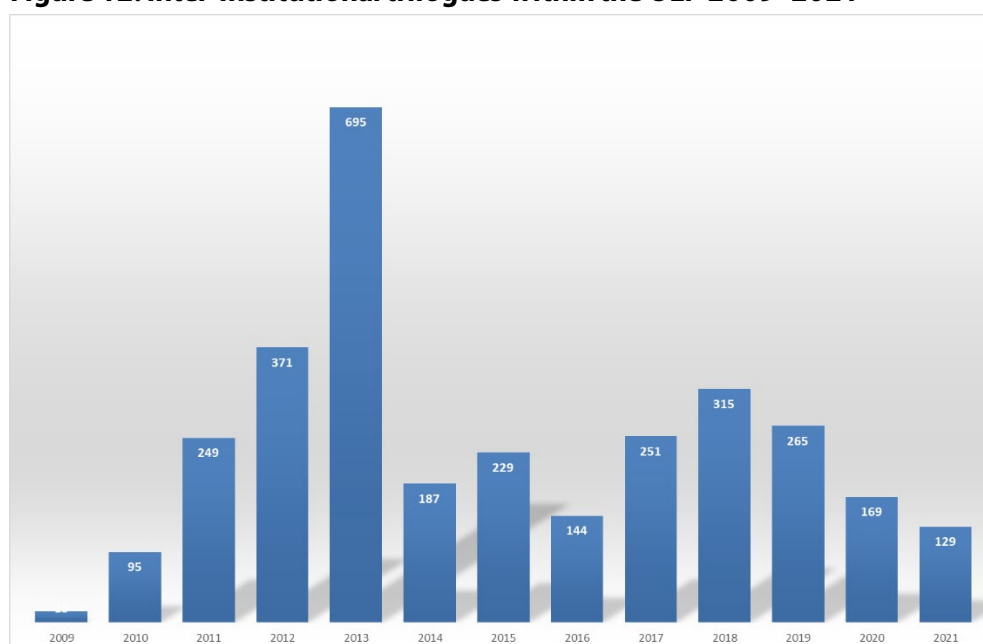
Year	COM ini.	Binding acts of Council or EP a.Council	CON	COOP	OLP		Consent and NLE	Budget procedures	Non.-leg. resolutions
	finalised				Failed / withdrawn				
1987	569	693	152	7			20	21	290
1988	612	700	131	44			14	39	316
1989	503	635	128	63			3	19	319
1990	579	618	159	56			2	27	282
1991	540	526	209	50			5	26	271
1992	561	589	243	62			11	28	257
1993	515	520	199	52		9	19	25	345
1994	484	521	168	21	23	3	31	31	298
1995	507	464	164	10	16	2	47	25	253
1996	437	451	164	25	31	-	29	27	231
1997	433	445	154	17	31	1	33	24	188
1998	503	489	215	24	37	1	15	16	168
1999	417	444	177	17	43	-	16	18	146
2000	501	466	113	0	67	11	14	22	153
2001	453	432	190	0	66	1	16	32	196
2002	440	443	136	0	84	0	5	31	111
2003	489	511	129	0	97	1	25	35	94
2004	527	552	163	0	93	0	26	42	117
2005	455	407	113	1	51	4	17	43	177
2006	477	552	158	0	101	0	13	40	230
2007	472	450	152	0	53	0	17	40	232
2008	420	523	110	0	121	0	24	50	244
2009	353	526	89	0	148	1	24	55	212
2010	409	524	38	0	57	0	72	33	241
2011	481	448	36	0	77	7	60	37	273
2012	381	439	22	0	69	7	52	30	236
2013	381	480	41	0	114	3	72	26	226
2014	142	625	33	0	148	36	50	38	195
2015	283	445	40	0	70	41	57	92	232
2016	460	463	40	0	72	1	43	84	258
2017	421	435	40	0	73	6	53	80	242
2018	450	441	28	0	73	9	53	76	320
2019	221	527	6	0	126	5	47	67	278
2020	279	447	14	0	63	16	34	72	280
2021	297	470	2	0	86	5	23	16	241

Author's own calculations and presentation based on data from EURLEX and OEIL.

Taken altogether, **Parliament's legislative activity** (Figures 9 and 10, Tables 9 and 10) **within both the OLP and consultation procedure is declining since the mid of the 2000s**, while the Council's legislative activity has remained rather stable. The COVID-19 pandemic is not causally responsible for this development. If one takes into account that the Lisbon Treaty has given the Union further regulatory competences, especially in the field of justice and home affairs, but also in international agreements and trade policy, then the general "recession" in legislative production under OLP rather indicates that the Union is not willing or able to effectively implement the competences entrusted to it. **The effects of the COVID-19 pandemic in terms of delaying, suspending or preventing decision-making processes did not cause this process, but rather confirmed or aggravated it.**

This empirically supported conclusion can be confirmed in particular with regard to the development of the number of inter-institutional trilogues (Figure 12).

Figure 12: Inter-institutional trilogues within the OLP 2009–2021



Author's own calculations and presentation based on data from Parliament's statistics.

From July 2019 to December 2021, the parliamentary committees participated in a total of 373 trilogue meetings with the Council and the Commission. Figure 12 shows the number of trilogue meetings per year since the beginning of the 2009–2014 parliamentary term. A peak was reached in 2013, due, in particular, to decisions linked to 2014–2020 Multiannual Financial Framework. While the number of trilogue meetings in the second half of 2019 is the same as in the last five years, the number of trilogue meetings in 2020 and 2021 is significantly lower than in the two reference years 2015 and 2016. This downturn is largely due to the COVID-19 crisis, which noticeably limited the opportunities for physical meetings. On the other hand, it is remarkable that the three institutions involved were able to agree on mechanisms of virtual, physical, and hybrid trilogue meetings to negotiate dossiers that cannot be postponed, such as the MFF 2021–2027, despite the limitations associated with the emergency situation. The hybrid or "semi-remote" format involved various working arrangements where, in addition to the main negotiators, the most important supporting staff from the secretariats and political groups were present in the room and the other participants were connected remotely. The meeting rooms were adapted to the specific infrastructural requirements of the pandemic, especially

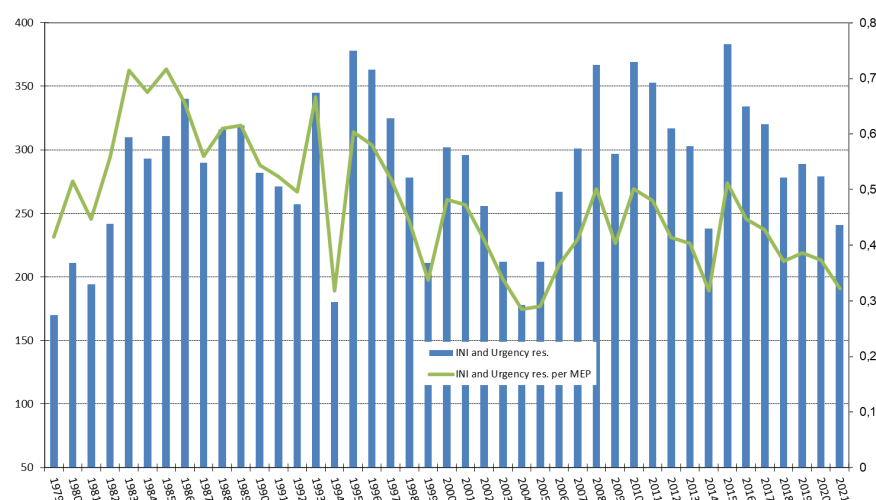
in terms of physical distance, interpreting booths and IT applications. Fully remote meetings were used only for trilogue meetings at the beginning of the pandemic in spring 2020, at the end of 2020 and at the beginning of 2021. Until the end of 2021, the option of hybrid meetings predominated in the trilogue negotiations. This proved to be essential in building trust between the parties to the proceedings and contributed to the success of the negotiations.⁹⁹

4.6.2. Effects on Parliament's interaction and emerging policy-initiation functions

Analysing the potential effects of the COVID-19 pandemic on Parliament's interaction function, we will concentrate on the developments of its Own-Initiative reports and Urgency resolutions. Measuring Parliament's activity with regard to its control function, we will then take a look into the development of Parliament's activity with regard to questions to the Commission, the Council and other institutions. "Parliaments generally have an important function to play as a platform and forum as well as an articulator and transmitter of ideas. Parliaments, however weak or strong their role in the scrutiny of legislative proposals, remain the theatre in which the policies of the Executive are discussed".¹⁰⁰ While Parliament has no formal power to initiate a legislative proposal, it may still be able to shape the EU policy arena by other, informal means. Such informal or indirect agenda-setting ability becomes traceable "when actors are able to raise the saliency of an issue and foster public and/or elite support for policy action" (Kreppel/Webb 2019). We defined parliamentary agenda-setting "as the continuing process through which public issues are transformed into parliamentary debate, receive attention, and priority. In this sense, agenda-setting is an exercise of hierarchizing and prioritising potential conflict, perceptions and solutions" (Maurer/Wolf 2021; see also Maurer 2002; Baumgartner/Green-Pedersen/Jones 2006; Rasch/Tsebelis, 2011; Romer/Rosenthal 1978). In this regard, and despite its inability to formally initiate legislative proposals, Parliament does dispose of a possible tool of informal agenda-setting — its capacity to adopt 'own initiative' reports. Own initiative (INI) and so-called urgency resolutions are an indicator for measuring the interest of MEP's in making an issue public to the outside world – towards the Union's citizenry but also towards the Council and the Commission. Given the historical lack of parliamentary power in relation to participation in binding EC/EU legislation, MEP's and political groups referred to the opportunity of own initiatives to give evidence of their general interests, their attention paid to a given issue or of their willingness to shape the policy agenda. For political groups, initiative resolutions are core instruments which allow them to present their original point of view on a given issue. Even if INI reports do not result in the adoption of new regulatory or redistributive legislation, they allow political groups to make prove of their collective – denationalised – interest and position in EU politics. Hence, in contrast to the OLP, where action against the Council after its first reading (amendments or rejection of the Council's draft) requires the approval of an absolute majority, INI resolutions other than those based on Article 225 TFEU pass with the simple majority of votes cast. Accordingly, INI reports and similar resolutions provide each political group the opportunity to present their original argument before the public. One major consequence of the shift towards Parliament's legislative power and its effective execution was a strong decrease in the number of INI resolutions, INI reports, and resolutions after statements or urgencies. The number of these activities fell sharply from 2,41 per MEP in 1979 to 0,15 per MEP in 2003!

⁹⁹ See Chapter 2 of Parliament's mid-term activity report "Developments and Trends of the Ordinary Legislative Procedure. 1 July 2019 - 31 December 2021 (9th parliamentary term)" by Vice-Presidents Katarina Barley, Nicola Beer, and Roberts Zile, and CCC Chair Bernd Lange. Doc. No. PE 703.724.

¹⁰⁰ See: Corbett/Jacobs/Shackleton 1995, p. 271.

Figure 13: Parliament's INI and Urgency Resolutions 1979-2021

Author's own calculations and presentation based on data from EURLEX and OEIL.

If we take into account the growth of Parliament due to the enlargement of the Union towards Spain, Portugal in 1985 and Finland, Sweden and Austria in 1995, we observe a significant decrease of INI resolutions per MEP from 1984 to 1985 and from 1994 to 1995 respectively. In other terms: The growth in number of MEP's did not result in an increase of non-legislative activity of Parliament. The trend only changed with the enlargements in 2004, 2007, and 2017 and seems to stabilise at the level reached after the entry into force of the Maastricht treaty.

The COVID-19 pandemic and the accompanying restrictions on work, deliberation, and decision-making by MEPs and political groups has not broken the oscillation in the number of INI resolutions that has now been observed for about 10 years. The data and the trend in the period 2019 to 2021 are comparable to that in the period 2014-2016.

On the other hand, the **COVID-19 crisis triggered a significant dynamic inside Parliament with regard to the instrument of so-called Legislative Initiative Reports (INL) based on Article 225 TFEU**. As Figure 14 shows, 2020 marks an all-time high of INL reports requesting the Commission to make legislative proposals. This is all the more notable as INL reports require a higher threshold to be adopted. While INI reports are adopted by a simple majority of the votes cast, INL reports require a majority of the Members of Parliament in accordance with Article 225 TFEU. Moreover, the drafting of INL reports is complicated by Parliament's Rules of Procedure, as their authors must include a draft of the requested secondary legislation (Maurer/Wolf 2020).

Table 9: Parliament's INL reports 2020-2021

Dossier Reference	Short title of the INL report	Committee(s)
2020/2005(INL)	Quality traineeships in the EU	EMPL
2020/2006(INL)	An EU legal framework to halt and reverse EU-driven global deforestation	ENVI
2020/2012(INL)	Framework of ethical aspects of artificial intelligence, robotics and related technologies	JURI
2020/2014(INL)	Civil liability regime for artificial intelligence	JURI
2020/2018(INL)	Digital Services Act: Improving the functioning of the Single Market	IMCO

2020/2019(INL)	Digital Services Act: Adapting commercial and civil law rules for commercial entities operating online	JURI
2020/2026(INL)	A statute for European cross-border associations and non-profit organisation	JURI
2020/2034(INL)	Digital Finance: Emerging risks in crypto-assets - regulatory and supervisory challenges in the area of financial services, institutions and markets	ECON
2020/2035(INL)	Combating Gender based Violence: Cyber Violence	LIBE/FEMM
2020/2051(INL)	A safety net to protect the beneficiaries of EU programmes: Setting up an MFF contingency plan	BUDG
2020/2073(INL)	Challenges of sport events' organisers in the digital environment	JURI
2020/2129(INL)	Corporate due diligence and corporate accountability	JURI
2020/2130(INL)	Responsible private funding of litigation	JURI
2020/2220(INL)	Proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage	AFCO
2020/2254(INL)	Fair and simpler taxation supporting the recovery strategy	ECON
2020/2255(INL)	Legal migration policy and law	LIBE
2021/2026(INL)	Citizenship and residence by investment schemes	LIBE
2021/2035(INL)	Identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU	FEMM/LIBE
2021/2054(INL)	Digitalisation of the European reporting, monitoring and audit	CONT
2021/2161(INL)	Digitalisation and Administrative Law	JURI
2021/2229(INL)	Composition of the European Parliament	AFCO
2021/2053(INL)	Draft regulation of the European Parliament laying down the regulations and general conditions governing the performance of the Ombudsman's duties	AFCO

Author's own presentation based on data from OEIL. For additional analysis see Maurer/Wolf 2020.

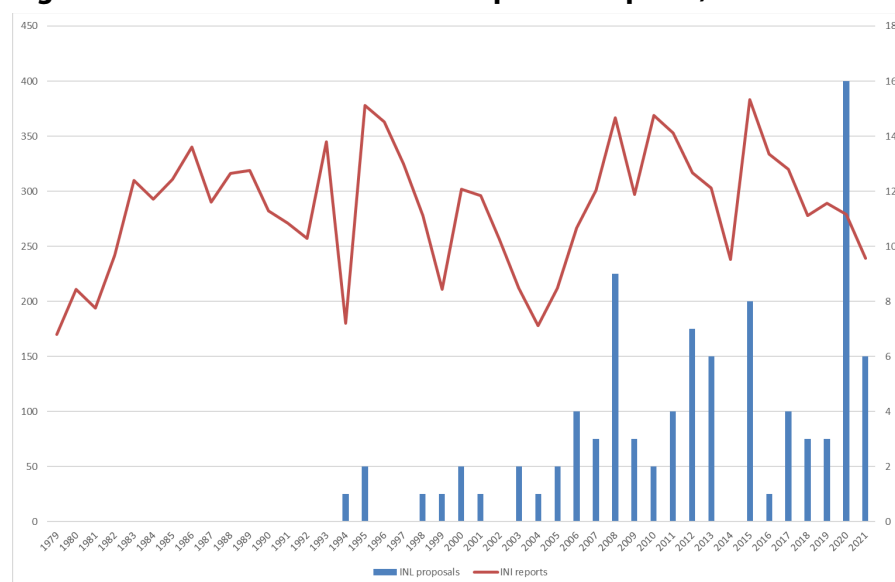
The remarkable increase in INL reports has several causes: Firstly, Parliament elected in 2019 is placing one of its constitutional-institutional priorities on the intensified use of Article 225 TFEU.¹⁰¹ The focus is also due to the announcement by the President of the Commission that she will respond more actively to INL-requests from the Parliament during her term of office. In her political guidelines for the Commission 2019-2024, presented on 16 July 2019 to Parliament, Mrs. Ursula Von der Leyen, made democracy a central theme of its future mandate.¹⁰² To inject "a new impetus for European democracy", she announced to contribute to substantially strengthen the role of Parliament. In this perspective, Von der Leyen announced: "I believe we should give a stronger role to the voice of the people, the European Parliament, in initiating legislation. I support a right of initiative for the European Parliament." In the same vein, the new President of the Commission argued that: "when Parliament, acting by a majority of its members, adopts resolutions requesting that the Commission submit legislative proposals, I commit to responding with a legislative act, in full respect of the proportionality, subsidiarity and better law making principles." It is in this context that AFCO is also discussing an INI report on the more intensive use of Article 225 TFEU and on reforms deemed necessary in this regard below the threshold

¹⁰¹ See: European Parliament, Committee on Constitutional Affairs, Report of 5 December 2018 on the state of the debate on the future of Europe (2018/2094(INI)).

¹⁰² See: Von der Leyen, Ursula (2019). A Union that strives for more. My agenda for Europe. Political Guidelines for the next European Commission 2019-2024.
https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

of treaty reform.¹⁰³ Secondly, the COVID-19 crisis has obviously also contributed to the fact that MPs, under the immediate impression of the emergency measures and restrictions imposed, are dealing more intensively with their policy-initiation function and the predetermined breaking points in relations with the Commission appointed in 2019/2020. In any case, the intensified use of the INL reports indicates that, despite the restrictions associated with the COVID-19 crisis, Parliament does not want to accept the fact that the Commission is stalling its legislative activities in numerous areas, invoking the crisis.

Figure 14: Parliament's INI and INL reports compared, 1979-2021



Author's own calculations and presentation based on data from EURLEX and OEIL.

Table 11 aims to compare the Parliament's activity in 2020 and 2021 with the equivalent first and second full calendar years of the preceding term (2015 and 2016). In 2020, Parliament sat for slightly fewer days than in 2015, and for barely half the hours of the earlier year. Despite the reduced sitting time, the Parliament held almost the same number of votes in 2020 as in 2015, thanks to the remote voting procedure introduced in March 2020. Moreover, Parliament adopted and rejected significantly more amendments in 2020 than in 2015, although overall it adopted fewer texts than it had five years earlier. In 2021, plenary sessions continued with the remote voting system, with significantly reduced sitting time than in 2016, although not by as much as in 2020. There were only three-quarters the number of votes in 2021 as in 2016, and fewer amendments, but overall the numbers of texts and legislative acts adopted in plenary were almost identical in the two years. The COVID-19 crisis thus had only one major, visible effect on Parliament's activity: While MEP's called 2841 (2015) and 2636 (2016) times for their right to speak within the framework of the catch-the-eye procedure, similar requests

¹⁰³ See the draft report of 13 August 2021 on Parliament's right of initiative (2020/2132(INI)), Rapporteur: Paulo Rangel, Doc. No. PE680.845v03-00. Parliament's demands for a legislative right of initiative have been raised repeatedly since the direct elections in 1979. Appropriate drafts were usually worded unobtrusively, since the vast majority of Parliament did not want to fundamentally question the Commission's monopoly of legislative initiative. As we have argued in our study for AFCO in 2020, this basic attitude, which supported the prerogatives of the Commission, has been questioned in recent years. While Parliament was content with the right to request legislation under Article 225 TFEU, the right of initiative of the Commission and the resulting power of agenda-setting was continuously hollowed by the creation and effective use of initiative powers by the European Council (see Maurer/Wolf 2020).

dropped dramatically to 535 in 2020 and only 29 in 2021.¹⁰⁴ The procedure was suspended by the President from the first remote Plenary in March 2020 onwards. The President's most recent decision of 20 January 2022 on extraordinary measures due to the COVID-19 pandemic still prohibits the use of the catch-the-eye procedure.

Table 10: Parliament's activity during the COVID-19 crisis compared

	2015	2016	2020	2021
Plenary sitting days	59	59	51	55
Plenary sitting hours	529	527	260	410
Plenary votes	6575	7397	5964	5373
Plenary amendments adopted	1585	1963	2809	1806
Plenary amendments rejected	1509	1578	2298	1392
Plenary all adopted texts	474	513	388	516
Plenary all adopted legislative texts	154	162	141	157
Catch the eye requests	2841	2636	535	29
Catch the eye interventions	1544	2006	323	29

Author's own calculations and presentation based on data from Parliament's statistics (<https://www.europarl.europa.eu/plenary/en/bilan-statistic.html>)

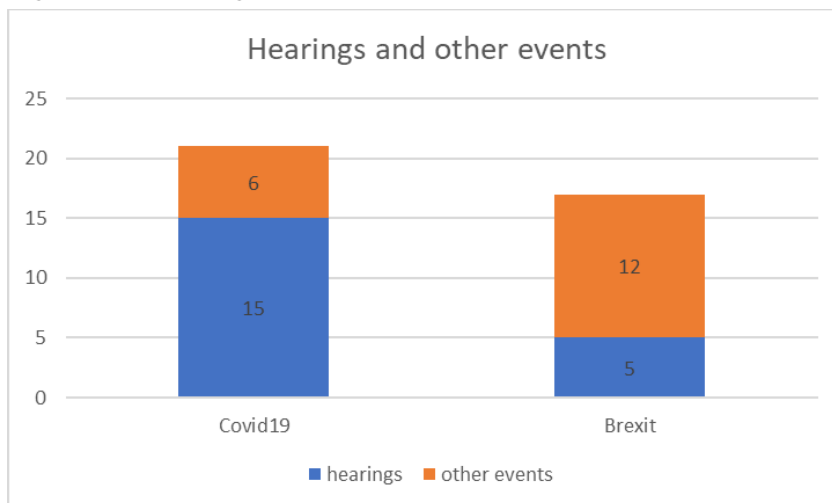
The abolition of catch-the-eye and blue-card procedures illustrates the impact that the restrictions on parliamentary operations associated with the COVID-19 crisis can have on the style and perception of parliamentary debate. Parliamentary debates serve to articulate opposing views on a given issue, regardless of their purpose (legislation, budget or scrutiny), in order to synthesise majority positions and enliven public debate. In this regard, public debates also serve to legitimise parliamentary democracy. The fact that MEPs debate and not just read off their speeches and vote develops argumentative claims that nourish public debate and, moreover, produce the very nature of Parliament as a citizens' aggregates arena (Maurer 2002) with which voters can identify. This pro and con can also be practised in the virtual environment. However, the virtual environment - especially in view of the multilingualism and multiculturalism of Parliament - leads to less lively, "colourful" debates - knowing well that parliamentary debates not only provide a nice show, but are also the central opportunity to reflect, generate, and aggregate the diversity of viewpoints in society within the arena of Parliament. Parliamentary debates ultimately serve to limit the authoritarian nature of power. They force Ministers, Commissioners or civil servants to listen to and respond to criticism. In a way, they transform the exercise of power into the practice of discourse. They break through the monopolistic claims to knowledge that civil servants tend to make. They also demonstrate that the power dispositions of the executive are always of a symbolic nature, temporary and dependent on parliamentary elections. Parliamentary debates are also a means of motivation and (self-)control for MEPs. Against the risk of free-riding, public debates always serve as an incentive for MEPs to participate in parliamentary life (Rozenberg 2020). In this way, debates also help to strengthen the internal cohesion of the parliamentary groups through the management of their speakers. Virtual parliamentary sessions, on

¹⁰⁴ During its 2014-2019 term, Parliament created the catch-the-eye procedure as a period and the end of parliamentary debates set aside for short speeches (one minute maximum) with a view to increasing the spontaneity of debates and Members' participation. Usually, this occurs at the end of the normal list of speakers, immediately prior to the closing speeches by the Commission, Council and the rapporteur(s) (where appropriate). The agenda sets aside a period of five minutes for "catch-the-eye", but this period can be shortened or extended by the President under Rule 171(6), on the basis of the overall time available. Members wishing for the floor under this procedure should attract the President's attention by raising their hand.

the other hand, can lead to MEPs delegating their work and carrying out several activities at the same time. An important argument for maintaining physical sessions is therefore that MEPs themselves must be present and it can be publicly known if this is not the case. In the WebEx world, on the other hand, there is constant uncertainty not only about the MEPs' level of attention, but also about their own identity. This can develop into a serious threat to parliamentary culture, as it enables more freeloading among MEPs and calls into question their democratic accountability to the electorate.

During the pandemic, Parliament was also active in conducting hearings, workshops and further events with third parties. If one compares the number of hearings and workshops conducted virtually, whose thematic focus was on the COVID-19 crisis, it is nevertheless impressively evident that **Parliament was able to adapt quickly to the restrictive conditions of the pandemic in this area of interaction with representatives of civil society and interest groups. The number of events on COVID-19 is even higher than the number of hearings and workshops on issues related to the UK's withdrawal from the EU.**

Figure 15: Hearings, Workshops and other events – Brexit and COVID-19 compared



Author's own calculation and presentation based on raw data provided by Parliament.

Table 11: Hearings and other events on COVID-19

HEARINGS		
Date	Topic	Committee(s)
09.12.2021	Digital public administration in COVID-19 era	IMCO
06.12.2021	Hearing on EU instruments and recovery from COVID-19, view from towns and cities	REGI
02.12.2021	Worker's rights and the future of work post-COVID 19	EMPL
14.07.2021	How to improve air passenger rights during the COVID-19 crisis?	PETI - TRAN
15.06.2021	Various aspects of women in poverty following the COVID impact	FEMM
10.05.2021	Lessons from a public health crisis: Impact of the COVID-19 pandemic on cancer prevention, health services, cancer patients and research	BECA
18.03.2021	Consumer protection in the context of digitalisation during the COVID-19 pandemic	IMCO
17.03.2021	Trade related aspects and implications of COVID-19	INTA
25.02.2021	ENVI-ITRE Hearing on enhancing production capacity and delivery of COVID-19 Vaccines	ENVI - ITRE

28.01.2021	Consequences and lessons from COVID-19 crisis for people in residential institutions	EMPL-LIBE
09.11.2020	EU-China Trade and Investment Relations in a post-COVID world	INTA
22.09.2020	How to secure access to COVID-19 vaccines for EU citizens	ENVI-ITRE
06.07.2020	Geopolitical implications of the COVID-19 crisis	AFET
15.06.2020	The COVID-19 outbreak, its expected impact on the EU economy and possible policy responses including monetary and fiscal measures	ECON
26.05.2020	The role of the European Investment Bank in the EU response to the COVID-19 outbreak and the post-crisis recovery	ECON - BUDG
OTHER EVENTS (Workshops)		
02.12.2021	Mental health and well-being in the digital world of work post COVID	EMPL
22.11.2021	Impacts of COVID-19 on EU fisheries and aquaculture	PECH
27.10.2021	Study presentation: Impacts of the COVID-19 pandemic on EU fisheries and aquaculture	PECH
14.10.2021	Youth in Europe: Effects of COVID-19	EMPL
02.09.2021	COVID-19 Consultation. Lessons from a public health crisis: Impact of the COVID-19 pandemic on cancer care	BECA
06.07.2021	Women leading the fight against COVID-19	FEMM

Author's own calculation and presentation based on raw data provided by Parliament.

4.6.3. Effects on Parliament's control function

It is essential that parliaments exercise oversight over emergency measures. This is, as the Venice Commission recalled in its 2020 reflections, "important for the realisation of the rule of law and democracy".¹⁰⁵ Likewise, PACE, in its Recommendation 1713(2005), underlined that "exceptional measures in any field must be supervised by Parliaments and must not seriously hamper the exercise of fundamental constitutional rights".¹⁰⁶ The Venice Commission's interim report of 8 October 2020 on the measures taken in the EU Member States as a result of the Covid-19 crisis and their impact on democracy, the rule of law and fundamental rights stressed: "If a state of emergency is declared by the executive, then parliament must be entitled to either approve or discontinue it. A certain time period, usually not exceeding a couple of weeks, must be established for its reaction."¹⁰⁷ In this regard, the report recalls that, "the question of by whom, how and when an emergency rule is to be terminated cannot also be left to executive enjoying its increased power. It must be the function of the Parliament".¹⁰⁸

Parliamentary oversight is particularly important in cases where legislative powers are temporarily transferred to the executive. From a normative perspective of representative democracy, any legally binding acts issued by the executive should be subject to a subsequent parliamentary approval and should cease to produce effects, if they do not secure such approval within a certain period of time.

As far as Parliament is concerned, its power to control and call to account the EU's "co-executive", i.e. the Commission, the Council and the European Council, is incomplete. While parliamentary scrutiny

¹⁰⁵ See: Venice Commission, Report - Respect for democracy, human rights and the rule of law during states of emergency: reflections - taken note of by the Venice Commission on 19 June 2020 by a written procedure replacing the 123rd plenary session, Doc. No. CDL-AD(2020)014, para. 80.

¹⁰⁶ See: PACE: Democratic oversight of the security sector in member states, report of the Political Affairs Committee, rapporteur: Mr de Puig. Text adopted by the Assembly on 23 June 2005 (23rd Sitting).

¹⁰⁷ See: Venice Commission: Opinion No. 995/2020, Doc. No. CDL-AD(2020)018.

¹⁰⁸ See: Venice Commission, Emergency Powers - Science and technique of democracy, No. 12, (1995), Doc. No. CDL-STD(1995)012, p. 24.

rights vis-à-vis the Commission are fraught with effective sanction possibilities (discharge procedure, vote of no confidence), the system of the Council is largely free of parliamentary control. Historically, this independence of the Council vis-à-vis oversight by Parliament is based on two fundamental concepts that determine the architecture of the EU institutional system until today. First, Article 16 TEU holds that the Council shall, “jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.” Against the background of the Council's executive powers as laid down in the Treaties and arising from secondary law, Article 16 TEU ultimately describes only part of its range of tasks or functions. Second, the Treaties conceive the Council's democratic control not vis-à-vis the “collective”, but exclusively vis-à-vis the institutions constituting the Council's collective in the form of the governments or ministers of the member states. In this conception, the Council's democratic strand of legitimacy consists in a hybrid form of unilateral supervision of government conduct by the national parliaments. This conceptualisation of the Council as a body that can only be controlled in its individual parts is reflected in Article 10 TEU, which states that “Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national parliaments, or to their citizens.”

In addition to the budgetary powers, the right to ask parliamentary questions was not only the most original instrument of control until the entry into force of the SEA, but also one of the most important instruments of parliamentary participation. Parliamentary questions are regarded as a largely unrestricted procedure in modern government systems, since they offer individual Members the opportunity to articulate interests, wishes and fears. While the Commission is accountable to Parliament comprehensively and across all policy areas, Parliament's right to put questions to the Council and the European Council only applies in individual cases explicitly listed in the treaties, in which the addressees perform functions similar to the Commission's initiative and executive tasks. If, in extreme cases, the Commission's failure to comply with the obligations to answer - resulting from Parliament's right to ask questions - leads to a vote of no confidence and thus to the collective resignation of the College, the use of the question instrument vis-à-vis the Council, the European Council and its President remains legally unsanctioned.

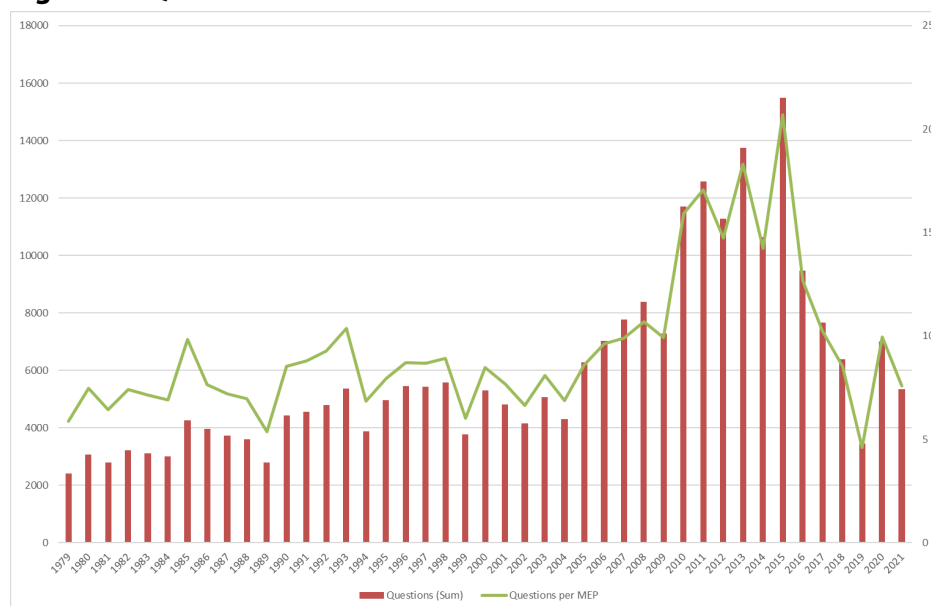
One of the fundamental prerogatives Parliament is the right to demand information from other EU bodies endowed with instruments of power about their operations and the intervention they intend to make or have made with regard to existing legal instruments, to deliberate publicly on the knowledge gained and, if necessary, to decide on sanctions. Originally, the EEC Treaties referred the parliamentary right of scrutiny only to the Commission. However, as a consequence of the extension of the EC/EU's policy areas to issues of external and internal security, which was laid down in the Maastricht Treaty, the control activity of Parliament now also includes the activity of the Council and the European Council. As instruments of parliamentary oversight, the Treaties provide for rights of questioning vis-à-vis the Council, the Commission and the European Central Bank, reporting and information obligations of the Commission, the Council, the European Council and the Member States, rights of inquiry, rights of action before the ECJ, rights of petition of EU citizens to Parliament and indirect supervision by entrusting the Court of Auditors with the task of issuing opinions. Parliament has five main means of scrutiny: written and oral questions; public debates on the annual general report and the Commission's annual work programme; Parliament's discharge of the Commission's financial management; the vote of no confidence in the Commission; and the right of enquiry.

In addition to the budgetary powers, the parliamentary right to ask questions was, until the entry into force of the SEA, not only the “most efficient instrument of control”, but also the essential instrument of parliamentary participation. Parliamentary questions are regarded as largely unrestricted

procedures in modern governmental systems, as they offer individual Members of Parliament the opportunity to articulate or channel their own and/or citizens' interests, wishes, fears, or concerns. While the Commission was already required by Article 23(3) of the ECSC Treaty, 140 of the EEC Treaty and Article 110 of Euratom Treaty to reply "orally or in writing to questions put to it by the European Parliament or its members", it was not until 1973 - following the Paris Summit of the Heads of States and Government - that the Council explicitly agreed "to reply to all written questions and [...] oral questions addressed to it in order to strengthen the European Parliament's powers of scrutiny" (Council of the EC 1973). The question instrument itself was supplemented by Parliament in 1973 with the introduction of Question Time. Here too, the addressees were initially the Commissioners present and only later the Council Presidency. The Maastricht Treaty widened the scope of Question Time to Article 36 (ex-Article J.7) TEU (CFSP with regard to the Council, the High Representative of the Union for Foreign Affairs and Security Policy and his/her Special Representatives) and ex-Article 39 TEU (Home Affairs and Justice Policy with regard to the Commission). Since the entry into force of the Lisbon Treaty, this right to question also applies to the European Council. While the Commission is therefore accountable to Parliament comprehensively and across policy areas, Parliament's right to ask questions towards the Council and the European Council only applies in those individual cases that are explicitly listed in the Treaties. Whilst the non-observance of the Commission's obligation to answer questions leads, in extreme cases, to a vote of no confidence and thus to the closed resignation of the College, the use of the question instrument vis-à-vis the Council, the European Council and its President remains legally sanction-free.

Shifts and changes in trends comparable to the development of INI resolutions can also be observed with regard to the use of the right to ask questions available to Members of Parliament. In fact, the number of questions per MEP had decreased from an average of ten questions in the period 1979-1987 to seven in the period 1993-2004.

Figure 16: Questions in Parliament 1979-2021

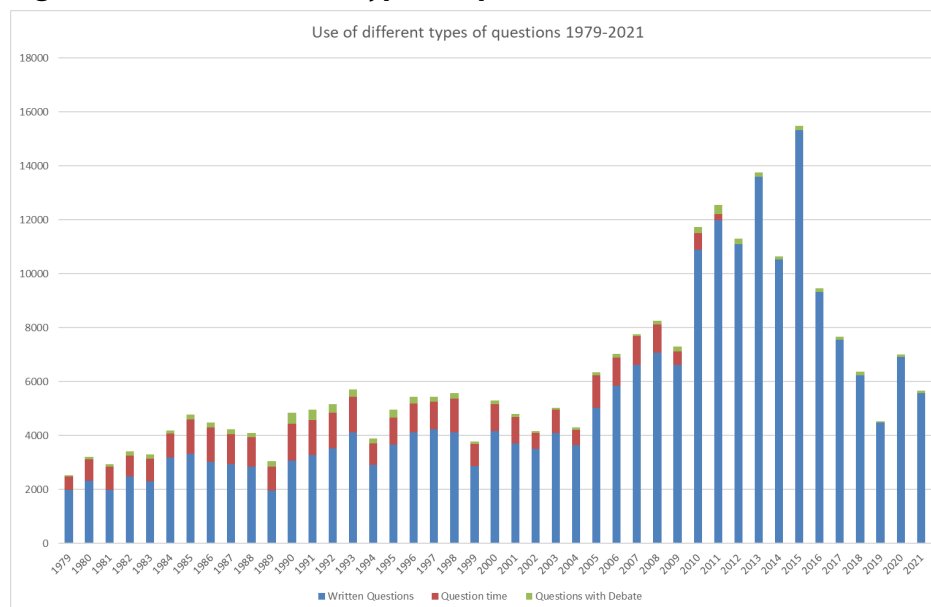


Author's own calculations and presentation based on data from Parliament's platform on questions.

The fluctuating development in the number of parliamentary questions up to 2004 can be explained by the European elections. In particular, the consistently high proportion of newly elected MEPs seems

to make lively use of the right to ask questions in the period following the elections. In addition, MEPs and committees concentrating on the legislative field also use the right to ask questions as a source of information for the further handling of pending legislative procedures. However, this form of interest aggregation and mediation recedes before the elections at the latest, firstly because the legislative cycle comes to a standstill for several months and secondly because the focus of individual parliamentarians' work is clearly on preparing for the (re-)election. The drastic increase in parliamentary questions since 2004/2005 has two main causes: First, members of the last wave of enlargement compensated for their lack of functional experience in policy-making through this instrument, and second, written questions in particular are used primarily by non-attached members to express their political orientation. The ratio between questions from political group members and the non-attached ones is relatively stable: in 2005, 365 written questions from group members were compared with 5075 questions from non-attached members; in 2010, there were 884 written questions from group members and 10.953 questions from non-attached members. The attractiveness of written questions is based not only on the largely direct and unfiltered communication between MEPs and the EU institutions, but also on the fact that both the questions and the answers are published in the Official Journal of the EU. If one considers the subordinate role of the individual MEP in relation to the political groups as key actors of Parliament, which is reflected in the minimum thresholds for attaining the status of a parliamentary group, the instrument of the written question is one of the rare opportunities in the intra-institutional structure of Parliament for individual MEPs to bring positions to the public, which otherwise only ever appear in filtered form via the committees, or the parliamentary groups.

Figure 17: Use of different types of questions 1979-2021

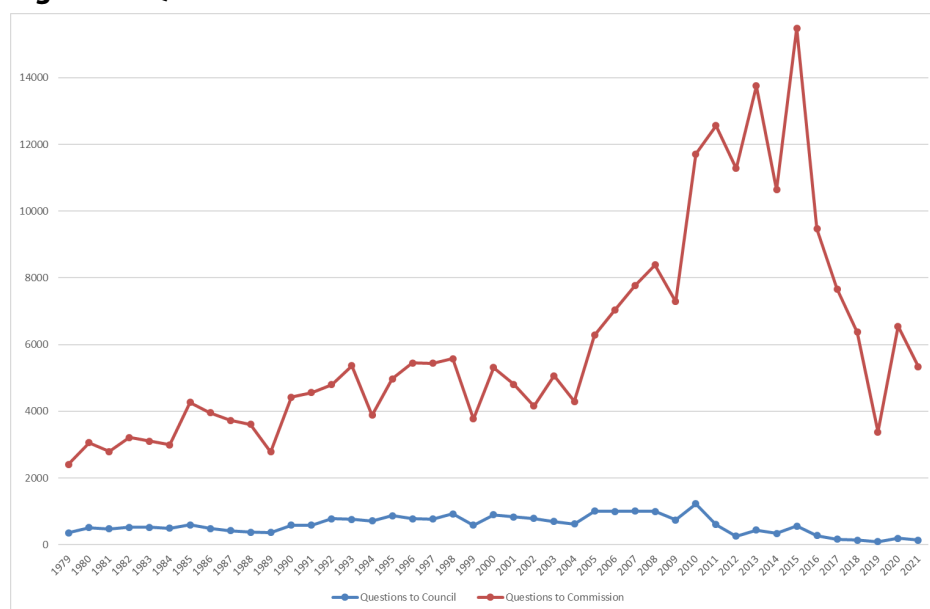


Author's own calculations and presentation based on data from Parliament's platform on questions.

The decline in parliamentary questions since 2015 is causally linked to a corresponding reform of the Rules of Procedure: According to Rule 136 RoP, only a committee, a political group or Members reaching at least the low threshold are allowed to put questions for oral answer with debate to the Council, to the Commission or to the High Representative of the Union for Foreign Affairs and Security Policy. The CoP then decides whether or not to place those questions on the draft agenda. Such type of questions not placed on Parliament's draft agenda within three months of being submitted shall

lapse. According to Rule 138 RoP, each Member, political group or committee may submit a maximum of twenty questions for written answer over a rolling period of three months. According to Rule 139 RoP, only political groups are allowed to put requests for major interpellations to the Council, the Commission or the High-Representative of the Union for Foreign Affairs and Security Policy. In view of the numerical restrictions imposed by the Rules of Procedure on written questions, it is not surprising that the use of this control instrument has declined drastically.

Figure 18: Questions to the Commission and the Council 1979-2021



Author's own calculations and presentation based on data from Parliament's platform on questions.

As already explained with regard to INI and Urgency resolutions, **we could not detect a significant effect of the COVID 19 crisis with regard to the classic control instrument of parliamentary questions in general. However, as can be seen from Table 13, the instrument of written question on the COVID-19 pandemic was disproportionately used by MEPs from smaller political groups: While the number of written questions from the S&D, RENEW and ECR groups roughly corresponds to their weight within Parliament, the number of written questions from the EPP and Green groups was significantly below their weight.**

Table 12: Parliament's questions (written/oral) regarding COVID 19

Year	COVID - Written Q.	EPP	S&D	Renew	Greens	ID	ECR	GUE/NGL	NA
2020	1521	20,71%	19,97%	15,25%	5,00%	20,05%	15,33%	12,36%	6,25%
2021	781	19,59%	19,83%	12,29%	7,17%	24,97%	12,29%	9,73%	8,83%
Group strength		25,18%	20,48%	14,37%	10,24%	9,96%	9,10%	5,55%	4,98%
	COVID - Oral Q.	EPP	S&D	Renew	Greens	ID	ECR	GUE/NGL	NA
2020	26	34,62%	34,62%	30,77%	23,08%	38,46%	15,38%	15,38%	0,00%
2021	29	58,62%	48,28%	48,28%	44,83%	48,28%	34,48%	37,93%	10,34%
Group strength		25,18%	20,48%	14,37%	10,24%	9,96%	9,10%	5,55%	4,98%

Author's own calculation on the basis of Parliament's database on questions.

5. PRACTICES AT THE LEVEL OF NATIONAL PARLIAMENTS AND INTERNATIONAL ASSEMBLIES

In the following section, we will discuss several parliaments and their reaction to the COVID-19 pandemic along the lines of their constitutional framework, their Intra-parliamentary settings (Rules of Procedure) and their actual actions during the pandemic. For this exercise, we selected five EU national parliaments, namely those of Hungary, Germany, Italy, Austria and Latvia. Outside the EU, the parliamentary assemblies of Switzerland, the United States, Australia, New Zealand, Brazil and Nigeria were chosen. The parliaments were selected based on availability of data, diversity and proximity to the inter-institutional setting or intra-institutional *modus operandi* of the European Parliament. Detailed reports of each parliament can be found in Annex 3.

5.1. Comparative overview

From an international perspective, almost all parliaments have struggled with their conflicting tasks of scrutinizing the executive and preserving public health while trying to prioritize business and keeping their members safe (Lilly & White, 2020, p. 7). Parliament members' unique rights, such as the freedom of expression or access to sensitive information – both often tied to physical presence – were curtailed almost everywhere around the globe. A lesson learned by many countries was that the legal framework needs to offer some sort of flexibility during times of crisis (Deveaux et al., pp. 6–8). Murphy (2020, pp. 18–19) concludes that most of the parliaments around the globe adopted different types of legislative acts in the area of public health and economic emergency measures. Some parliaments referred specific power to the government to enable it to respond adequately to the challenges of the pandemic. Almost all parliaments – as many other organizations and institutions – acknowledged the necessity of safety measures such as mandatory face masks and the exclusion of non-essential parliament members from the buildings at some point during the pandemic and adopted Regulations in this regard.

Table 13: Comparative overview on national parliaments' operation under COVID-19

Country	States of emergency provided in the Constitution effectively declared	Statutory regimes effectively declared	Measures adopted making use of special legislative powers (granted to the executive under urgent/special circumstances)	Measures adopted almost exclusively under ordinary legislation	Changes of Parliament's rules of procedure (or similar statutory acts)
Australia	No declaration, state of emergency is not regulated within Constitution.	>18 March 2020 - Biosecurity Act 2015 (Cth). The act lasts for three months but has been extended continuously. >13 March 2020 - the new National Cabinet was established, making reference to the Australian Health Sector Emergency Response Plan for Novel Coronavirus (COVID-19), which is not legally binding.	Measures taken under the provisions of the Biosecurity Act 2015 (Cth) are not subject to Parliament's scrutiny (Between 1 January and 30 June 2020 roughly 20% of all legislation was exempt from disallowance). Examples: ban of overseas travel, limitations of movements and closure of borders.	>Select Committee on Covid-19 to scrutinize the government's response to the pandemic. >600 legislative instruments (November 2021)	>Except of few extraordinary sessions, parliament was suspended between 23 March 2020 and 11 August 2020. >The new National Cabinet replaced the existing Council of Australian Governments and was announced to be institutionalized in May 2020.
Austria	No declaration, state of emergency is not regulated within Constitution.	March 2020 - ongoing. The Epidemic Act in Austria was first enacted by the government and amended a number of times by Parliament and the Second Chamber throughout the years 2020 and 2021.	n/a	The first measures taken by the Epidemic Act in Austria were exclusively replaced by the COVID 19 Measures Act (2020).	> no changes made to rules of procedure > change of hygiene/house rules, mandatory mask, and vaccination
Brazil	No constitutional state of emergency (state of defense and state of siege) has been declared as public health crisis are not included in the provisions.	6 February 2020 - 'Quarantine Act' (Federal Law 13.979)	3 February 2020 - declaration of Public Health Emergency of National Importance (Ordinance 188 of 3 February 2020), implementing Executive Decree 7.616. Ordinance 188 grants the Minister of Health extensive power such as managing the Corona-crisis according to WHO recommendations.	n/a	> Federal Law 13.979 grants the Health Minister extensive rights. > Resolution of the Chamber of Deputies 14/2020 to set up a virtual plenary. The first meeting took place 25 March 2020.
Germany	No declaration, state of emergency is not regulated within Constitution.	March 2020 - Infection Protection Act 2000	27 March 2020 - "Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance" grants the federal health ministry powers to adopt corona measures by decree.	> 27 March 2020 - "Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance" > 19 May 2020 - "Second Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance" > 18 November 2020 "Third Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance"	Introduction of Paragraph 126-a in the Rules of Procedure to allow continuation of parliamentary work under restricted conditions.
Hungary	> 11 March 2020 - declaration of "state of danger because of the pandemic" according to Article 53 and Article 15 (1). > June 2020 - declaration of medical emergency > 4 November 2020 - declaration of state of danger	30 March 2020 - Act on Protecting against the Coronavirus (Enabling Act).	"Act on Protecting against the Coronavirus" has been used by the government to issue several hundred decrees without legislation, such as a complete ban of public assemblies, the shutdown of all courts except the constitutional court and the postponement of referenda and elections.	Revocation of the Act on Protecting against the Coronavirus in June 2020, transforming it into a medical emergency.	> The Parliament remained in session. > The constitution was amended, expanding the conditions under which emergencies can be declared.

Country	States of emergency provided in the Constitution effectively declared	Statutory regimes effectively declared	Measures adopted making use of special legislative powers (granted to the executive under urgent/special circumstances)	Measures adopted almost exclusively under ordinary legislation	Changes of Parliament's rules of procedure (or similar statutory acts)
Italy	Declaration of a state of emergency from 31 March 2020 - ongoing	Government gained full legislative powers through the state of emergency	A number of decrees were first introduced by the government and later turned into law by Parliament, regarding the pandemic situation.	n/a	> changes made to functions by state of emergency, control and legislative functions of Parliament were highly limited by granting most of the power to the government and executive
Latvia	Declaration of a state of emergency from 12 March 2020 to 14 April 2020, from 9 November 2020 to 11 January 2021, 11 October 2021 to 28 February 2022	Appointment of the Ministry of Health as the responsible authority during the state of emergency.	Law on the Management of the Spread of Covid-19 Infection (June 2020)	n/a	> introduction of first E-Parliament with full remote working and establishment of online platform covering all parliamentary functions
New Zealand	Declaration of a state of emergency from 25 March 2020 - ongoing	n/a	n/a	Covid-19 Public Health Response Act 2020 (May 2020), must be renewed by Parliament every 90 days.	> regular changes to rules of procedure (NZ: Standing Orders) made by Business Committee > situative adjustments > proxy voting and video meetings of Committees
Nigeria	No state of emergency according to section 305 of the Constitution of the Federal Republic of Nigeria has been declared.	> 30 March 2020 - COVID-19 Regulations No. 1 of 2020. > 13 April 2020 - COVID-19 Regulations No. 2 of 2020	Quarantine Act 1926, which must no be approved by the Parliament.	House of Representatives passed the Emergency Economic Stimulus Bill 2020.	> Suspension of parliament on 24 March 2020 until 26 April 2020. > Plenary continued under strict social distancing guidelines, face masks recommendations and mandatory temperature checks. > Limitation on the number of visitors, including media representatives.
Switzerland	16 March 2020 - Swiss Constitution Article 185 and Epistemics Act (declaration of exceptional situation).	28 February 2020 - Ordinance 1 (Ordinance on Measures to Combat the Coronavirus (COVID-19)) 13 March 2020 - main Ordinance 2 (Ordinance on Measures to Combat the Coronavirus (COVID-19))	Ordinance 2 invokes Article seven of the Epistemics Act which gives the federal Council the power to take the necessary measures for the whole country or only parts of it.	25 September 2020 - Parliament passed the Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the Covid-19 Epidemic.	> Suspension of Parliament session on 15 March 2020 > An extraordinary session at the BERNEXPO was held to ensure social distancing on 4 May 2020.
USA	No declaration, state of emergency is not regulated within Constitution.	n/a	Customary legislative procedures were bypassed through executive orders issued by state officials in support of emergency response. This impacts long-term constitutional arrangements and statutory provisions pre-Covid that allowed administrative powers and restrictions on a level federal intervention.	Administrative declarations and orders were issued based on pre-pandemic laws rather than new laws or regulations	> Resolution 965 (2020) changed the rules of procedure during public health emergencies like Covid

Source: Authors own compilation, based on based on data of the "INTER PARES Parliamentary responses during the COVID-19 Pandemic – Data Tracker". , and the Venice Commission's Observatory of situations of emergency in Venice Commission Member States.

5.2. Interim conclusions and recommendations

Despite the restrictive emergency situation, most parliaments around the globe continued to perform two key functions: law-making and oversight. Specific empowering bills granting governments extraordinary powers were adopted despite the exceptional circumstances and pressure to use fast-track procedures. Standardised data-tracking by the Gothenburg-based V-Dem institute on violations of democratic standards in relation to Covid-19 measures (Kolvani et.al. 2020 and 2021), or the cross-national study run by a team at the Bar Ilan University Faculty of Law (Waismel-Manor et.al. 2020) show that parliaments developed various kinds and skills of oversight such as parliamentary questions or investigative committees.

Our comparison of the procedural changes made by the national parliaments under review during the COVID-19 crisis shows that many parliaments, such as in the United States of America, Latvia or Brazil, changed their rules of procedure to allow for remote and virtual working. Other parliaments, such as Australia, were not able to relocate their work to a virtual environment and meetings continued to be held in person. In some cases, such as Switzerland or Australia, extraordinary sessions were held, but MPs only dealt with issues directly linked to the COVID-19 pandemic. Increased sanitary measures were taken in all the parliaments studied here. These were also taken in Austria, where parliamentary work was not interrupted during the pandemic. The comparison shows that those parliaments that managed to quickly switch to virtual plenary sessions (E-parliament) - such as Latvia or Brazil - were able to continue their activities from the beginning of the pandemic in March 2020. The ability to make this transition depends, on the one hand, on an efficient and powerful IT system, which should be in place before the outbreak of the crisis. On the other hand, the Rules of Procedure must be flexible enough or, as in Germany, changed in such a way that it is possible to continue parliamentary proceedings under completely different conditions. **The measures taken on the part of Parliament are in line with the changes to the operation of national parliaments. The amendments made to Parliament's Rules of Procedure to this end should enable it to work efficiently and effectively even in future emergency situations.**

All of the parliaments examined here have adopted some form of emergency procedures to enable their governments to respond appropriately to the threat of a pandemic and its extraordinary challenges. However, the comparison does not provide a clear picture of whether emergency laws need to be enshrined in the constitution. While some countries declared the state of emergency provided for in the constitution, the majority refrained from doing so and invoked emergency procedures grounded in general legislation. In the case of Hungary, the declaration of a constitutional state of emergency under Article 53 and Article 15 (1) resulted in a government grab for power that effectively suspended parliamentary legislation. The executive in Nigeria, on the other hand, circumvented the constitution's emergency provisions and invoked the Quarantine Act of 1926 to empower the president and to circumvent parliamentary oversight.

In light of the cross-country comparison as well as the examined cases of handling emergency and urgency situations within Parliament, **we would therefore recommend that Parliament strongly advocates within the EU's inter-institutional structure to implement horizontal emergency legislation that is independent of policy areas.**

Such legislation should clearly define the triggering conditions of the state of health emergency, preferably on the basis of the respective rules of the WHO. Second, it should define which institutions should invoke, advocate, and finally propose the triggering of certain emergency measures and which institutions should authorize them. Furthermore, clear rules should be established on the duration of

emergency legislation, its extension, interruption and withdrawal, as well as on ex-ante and ex-post parliamentary accountability as well as judicial review of any delegation of power to the EU's co-executive. **The optimal way to achieve these objectives would be to amend the TEU, for example by changing Article 11 TEU in the chapter on the democratic principles of the Union.** In the meantime, however, it would be essential to **negotiate the relevant fundamental rules on the proclamation, invocation, duration, amendment and termination of a European emergency and its operational implementing rules for the conduct of the institutions below the threshold of a treaty amendment.** This could be done by adopting a **separate Decision of the European Parliament and the Council on the basis of Article 11** together with – and addressing – the legal bases examined in this study. Alternatively, an **amendment of the trilateral IIA-BLM** or – in case the Council refuses such a self-limitation of its de facto executive powers – of the **bilateral IIA-FA** could be considered in order to establish at least minimal provisions enabling the Parliament to act in a supervising and legislative capacity.

Turning to key parliamentary functions such as legislation, control or oversight, the result of our country comparison is even more unequivocal. At the beginning of the pandemic in March 2020, all the parliaments under review delegated powers to the executive branch to some extent so that the latter could deal with the emerging crisis situation. Not only did some parliaments, such as those in Switzerland, Nigeria, and Australia, suspend their sessions for a significant period of time and gave strict priority to COVID-19-related legislation. In some countries, such as Australia, the executive branch was given the power to enact legislation not subject to parliamentary oversight, or, as in Brazil, the federal health minister was allowed to manage the crisis in accordance with WHO recommendations.

Although empowering the executive in emergency situations is the normal case and considered a useful measure, two aspects should nevertheless be highlighted. First, even in cases where parliamentary oversight has continued more or less at pre-crisis levels, **empowering the executive branch requires increased parliamentary oversight and control.** Second, the declaration of a state of emergency and subsequent empowerment of the government was not reversed in all cases once the immediate crisis situation had been overcome. Hungary serves as a prime example, where the government used the pandemic to further expand its power.

As Table 15 in Annex IV reveals, 40 of the 166 national parliaments reviewed in the INTER PARES Data Tracker have intensified their oversight procedures vis-à-vis the executive branch by establishing special committees to continuously and independently review the prevention, response, and management of the COVID-19 crisis. In this regard, some parliaments are focusing more on ex-post scrutiny measures through the establishment of committees of inquiry to fully investigate the governance of the COVID-19 pandemic and hold their governments accountable. Parliament has so far conducted political control on the basis of the normal procedures laid down in the Treaties, its RoP, the IIA-FA, and the IIA-BLM. In addition, it has primarily used its right of self-referral to point out and denounce, through resolutions, the mismanagement of the crisis by governments and the Commission. The COVID-19-related actions of the Bureau, the CoP, and the CCC were essentially limited to the Parliament's internal management of the crisis.

In light of the empirical evidence obtained on the inadequate, diffuse, uncoordinated, and sometimes nationalist handling of the COVID-19 pandemic by member state governments as well as the EU co-executive, **we fully support Parliament's decision of 10 March 2022 to set up a Special Committee.**¹⁰⁹ **In our view, the Special Committee should not only investigate the impact of the**

¹⁰⁹ See: European Parliament decision of 10 March 2022 on setting up a special committee on 'COVID-19 pandemic: lessons learned and recommendations for the future, its responsibilities, numerical strength and term of office ([2022/2584\(RSO\)](#)).

pandemic on the different policy areas and (inter- and intra-)institutional settings. In addition, the Committee could explore MEPs and staff's individual experience with the crisis and with the measures set by the institutions' governing bodies to mitigate the spread of the infection and adjust their work to the pandemic.

6. CONCLUSIONS AND RECOMMENDATIONS

In most democratically constituted systems, **emergency measures and accompanying delegations of power are authorised by the parliament to the government** and thus – sometimes ex-post – democratically legitimised. To date, **the European Parliament does not enjoy this power of emergency delegation**. Hence, Parliament's right of self-organisation (*Selbstorganisationsrecht*), reflected in the freedom of Parliament to deliberate and express itself without restriction on all issues and problems, does not result in a right of parliamentary self-determination (*Selbstbestimmungsrecht*) with regard to shaping the relationship with the executive bodies of the EU. **Parliament's limited autonomy established in the treaties does not, of course, prevent Parliament from declaring a state of emergency**, limiting its own, intra-institutional opportunity structures, and urging the executive branches of the EU to adopt appropriate measures. In this respect, we have witnessed Parliament's governing bodies making intensive use of the intra-parliamentary restriction on MEPs and staff to react to the COVID-19 crisis. And in fact, it was only in late 2019 that Parliament took the initiative and declared a climate emergency, holding that "no emergency should ever be used to erode democratic institutions or to undermine fundamental rights".

The study has shown that the EU's normative basis for emergency governance is severely fragmented, materially incomplete and highly questionable in terms of its democratic legitimacy. A first comparative analysis of the **normative set-up for defining, triggering, governing and exiting emergencies** reveals that most national constitutions contain provisions on emergency situations. Emergency situations trigger **derogations from regular operations** in the inter-institutional functioning of constitutional bodies. These derogations are limited in time and materially (with regard to the depth of intervention of the authorised emergency measures). In some cases, the parliaments have far-reaching rights of control and recall to prevent the abusive exploitation of the emergency situation. Only in a minority of countries there is no emergency rule as such. In a majority of states, however, there are different types of emergency rule to deal with different kinds of emergencies in proportion to the gravity of the situation. In most countries, **the power to declare emergency rule is divided between the legislative and executive branches**. Usually the executive proposes and the legislature approves the declaration of emergency rule. Some constitutions require qualified parliamentary majorities for the declaration of emergency rule. Many constitutions provide a **time-limit or other sun-setting arrangements for terminating emergency rule**. These periods are normally renewable, but in most cases are **subject to strict parliamentary scrutiny**. We identify best practice in those states in which the declaration of the emergency situation and the associated delegation of powers from parliament to the government — parliamentary legislation authorising government to take emergency measures by decrees - depend on a parliamentary resolution. The Norwegian Storting's temporary Corona Act delegated parliamentary powers to the government by providing government with the authority to add to or depart from certain legislation as far as is necessary to safeguard the intention of the respective law. The Storting limited the application of the delegation for one month and included a clause that allowed the Storting at any given time to repeal

partly or in full the enabling act by a one-third minority vote in the Chamber. Similar 'best practice' could be identified for the United Kingdom, Spain and Italy.

The EU's treaties do not contain specific provisions on the determination of the state of emergency and, therefore, no procedures that could particularly limit the work of the institutions. The EU Charter of Fundamental Rights similarly does not provide for a general derogation clause that would allow limitations regarding its application in times of emergency. On the other hand, the treaties, as well as EU secondary legislation **indirectly refer to the triggers of national emergency constitutions. Moreover, the treaties contain provisions that constrain Parliament's – and only Parliament's! – powers in specific cases that may fall into the category of emergency.** Parliament, on its side, restrains its powers by referring to Article 163 of its Rules of Procedure. To illustrate the fragmented, even atomised structure of emergency provisions that potentially rule the EU's fabric of governance, the study has provided for a comprehensive analysis with regard to several potential cases:

- The solidarity clause of Article 222 TFEU, and the Council's implementing decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause.
- The application of the solidarity clause during the EU's economic and financial crisis within the scope of Articles 222 and 196 TFEU, and the application of Article 122 TFEU during the COVID-19 crisis.
- The application of the Union's Civil Protection Mechanism under Article 196 TFEU during emergency situations.
- The application of Article 107 TFEU on State aid under emergency mode (Temporary Framework for State Aid measures (TFSA)).
- The distinct application of Article 168 TFEU on the EU's health policy and the Decision on serious cross-border threats to health.
- The application and – in our view – abuse of the Schengen Borders Code to limit the free movement of citizens.
- The implementation of the Union's common policy on asylum, subsidiary protection and temporary protection under Article 78(3) TFEU.
- Moreover, the study looked into the treaty-based urgency procedures within the field of international agreements and Article 218(6) TFEU.

The analysed **treaty and secondary provisions** are characterised by the fact that they deal with the situation of emergency in different ways and standardise incentive or opportunity structures for problem solving under exceptional circumstances. With regard to the deliberative and decision-making instruments at issue, **all the cases considered are characterised by a narrowing of the institutional possibilities for participation: While the Council operates as the central decision-making and -implementing body, the legislative participation as well as the oversight rights of Parliament are substantially limited.**

The cases considered always derive the applicable procedures from the initial situation of the state of emergency. It is noticeable that the declaration of a state of emergency a) usually originates from the respective Member States concerned and b) is not subject to any direct confirmatory or supervisory measure of Parliament. Overall, **the provisions of EU primary law and the corresponding secondary law examined are strongly compromised by their executive bias.** Only in exceptional cases does the Commission, as a dual legitimate bearer of supranational executive power, assume a decisive function as guardian of member states' exceptional rights. In contrast, the Council in many cases

exercises its functions as a 'chameleon' – changing its 'colour' from legislative to executive, from administrative to coordinating etc. – without having to justify itself to a democratically legitimised supervisory power. The combination of weak Commission competence, strong Council authority and the extensive exclusion of Parliament as a potentially co-authorising body leads in the state of emergency situations to a considerable democratic deficit at the European level, which is not compensated for by the control procedures of the national parliaments. It is therefore not surprising that during the COVID-19 crisis, highly questionable member state practices have prevailed, which unhinge basic pillars of integration such as the free movement of persons.

Even under conditions of emergency, Parliament is able to perform its core functions efficiently. In doing so, there are non-negligible costs in terms of democratic quality and transparency. The study provides for a comprehensive analysis on the implementation of Parliament's key functions – policy-making, control, system-development – by focusing on Parliament's performance during the economic and financial crisis and during the COVID-19-crisis.

Regarding the EMU crisis, we show that the short-term decisions on the European Financial Stabilisation Mechanism (EFSM), the European Financial Stability Facility (EFSF) and the permanent European Stability Mechanism (ESM), which were directly geared to economic and budgetary emergencies, were largely **based on Article 122 TFEU, in which Parliament is neither involved in a controlling nor co-deciding capacity.** On the other hand, however, the analysis of the **medium-term reform of EMU**, in particular of European coordinated economic and fiscal policy, shows that **Parliament was able to engage successfully through the leverage effect of the Six-pack.**

Regarding the – still ongoing – **COVID-19 crisis**, we first point to the **asymmetrically distributed opportunities for MEPs in the performance of their treaty-based tasks, duties and functions.** Against this background, **Parliament responded quickly and efficiently to the challenges that the pandemic posed to its internal functioning.** It took several emergency initiatives to adapt parliamentary procedures and instruments to the crisis. These culminated in a reform of the Rules of Procedure in 2021 to give broader backing to measures previously authorised by Parliament's governing bodies.

Turning to the **macroscopic analysis on the measurable effects** of the COVID-19 crisis on Parliament's functions, we show that in 2020, the percentage of Regulations and Directives adopted under OLP dropped significantly. **But we warn against jumping to conclude that this development illustrates Parliament's loss in legislation through the pandemic!** In this regard, we provide comprehensive evidence for concluding that the witnessed decline of OLP is in line with a **long-lasting, declining trend in the production of legally binding acts of the EU. The effects of the COVID-19 pandemic in terms of delaying, suspending or preventing decision-making processes did not cause this decline, but rather confirmed it.**

Analysing the potential effects of the COVID-19 pandemic on Parliament's **interaction and control functions**, our empirical evidence suggests that **the COVID-19 pandemic and the accompanying restrictions on work, deliberation, and decision-making by MEPs and political groups have not broken the oscillation in the number of INI resolutions that has now been observed for about 10 years. On the other hand, the usage of INL reports has increased massively with an all-time high of 16 in 2020.** Regarding Parliament's use of questions, our evidence indicates that there is **no significant effect of the COVID-19 crisis with regard to the most classic control instrument of Parliament.**

6.1. The way forward – Supranational Parliamentary Democracy after the crisis

Against the backdrop of the limitations of parliamentary work under the conditions of the COVID crisis, the Parliament, on 31 March 2021 launched a broad reflexion on the **“Rethinking Parliamentary Democracy - A stronger European Parliament after COVID-19”**. Between April and July 2021, five **“Focus Groups”** considered the reform of the Plenary, the strengthening of parliamentary prerogatives, the improvement of parliamentary diplomacy, relations with citizens and communication, and the facilitation of Parliament’s internal organisation. The consolidated version of the recommendations, submitted to the Bureau in July 2021,¹¹⁰ summarises the proceedings of each Focus Group and its proposals.

Regarding the reform of the plenary, the group’s recommendations concentrate on improving democratic legitimacy at the European level through making debates in Parliament more visible, and by reviving the debate in the plenary. The ultimate task and are the result of extensive consultations within the Focus Group I on plenary reform. The long-term goal of the improvement proposals is to “make the European Parliament the central and representative platform within the creation of a European public sphere.”¹¹¹ To illustrate the proposals, the group presented a revised re-structuring for the Strasbourg part-sessions.

In our view, **the systematic alternation between debates and votes would have the advantage of strengthening Parliament’s autonomy, actorness and legislative role vis-à-vis the public.** However, if the rationale for maintaining the restrictive measures is that virtual deliberations and votes require more lead time and more follow-up time than in the normal case, Parliament could also review a far more fundamental measure.

In fact, Parliament could **make more regular use of the possibility of “mini-sessions”** in order to put on the agenda precisely **those items of deliberation that have been treated in an extremely restrictive manner since 2020**: Topical debates, interpellations and – why not? – Plenary hearings with stakeholders, interested citizens, and academics.

In recent years, the OLP has increasingly developed into a procedure that concludes compromises between Parliament and Council at first parliamentary reading stage on the basis of the compromises agreed in non-public trilogues. In this process, the public often perceives neither the - publicly accessible - initial position of Parliament nor the - publicly inaccessible - initial position of the Council. Debates on parliamentary positions on first reading would thus have the potential to turn public attention more towards the parliamentary component of the compromises negotiated in trilogues. However, Focus group I does not seem to have addressed the challenges that arise in this area when the EU institutions act under emergency conditions and Parliament focuses on urgency procedures in this framework.

We therefore recommend that the **proposals of Focus Group I be systematically reflected upon from the perspective of the emergency situation** and that the probably decisive question be addressed as to **how the claim of strengthening democratic-parliamentary legitimacy can also be maintained under emergency and urgency conditions.**

¹¹⁰ See: Document No. PE 695.632/BUR/FG.

¹¹¹ Ibid., p. 2.

In this context, it would be worth to reflect on **the recommendations of Focus Group II with regard to the balance between efficiency and transparency**: Parliament might consider to **make a wider use**, of the possibilities already offered by the RoP to request **a plenary vote on committee mandates** for trilogues (Rule 71 RoP) or propose to adopt a Parliament's first reading position in order to continue early second reading negotiations. Especially **under the conditions of emergency, Parliament should resist pressure to fast-track legislative processes**, as this may be detrimental to transparency, and the exercise of Parliament's prerogatives and key functions as the citizens' arm of the Union's legislator.

Furthermore, we would recommend the **introduction of a debate with representatives of the Council and the Commission to review those measures that are authorised by the Council alone during the emergency situation**, especially for the restructuring of the plenary debates from the point of view of creating parliamentary publicity and a European public sphere: **Whenever the Council uses emergency situations** to adopt measures restricting fundamental rights or financially intensive measures bypassing the EU's only directly legitimated institution, **Parliament should take the initiative to critically discuss the alternatives of such anti-parliamentary, executive legislation**.

6.2. Reviewing Parliament's rights under the state of emergency

Focus Group II on "Strengthening parliamentary prerogatives" was given the task of looking at the legislative and scrutiny powers of the Parliament, as well as its oversight, access to information to documents, and budgetary control. The group forwarded a first set of proposals to increase Parliament's capacity of legislative initiative, to strike the right balance between transparency and efficiency in legislative proceedings, to strengthen Parliament's powers in the legislative and budgetary areas.

Apart from the considerations already outlined above on linking the proposals of Focus Group II with those of Focus Group I,

it seems advisable to follow up on the idea to **revise Rule 71 RoP, especially against the background of Parliament's experience with emergency situations**.

The COVID-19 crisis has revealed that it can be used by Member States and the Council – accidentally, due to a lack of governance capacity, or intentionally as a tool to delay unwelcome policies - to put highly controversial dossiers (such as the asylum and migration package) on the back burner. Thus, in order **to increase the pressure on the Council to take decisions**, especially in those cases where legislative dossiers can be voted on by qualified majority, we would recommend, especially for times of crisis, to consider the amendments to the RoP presented by Group II:

Parliament should automatically vote its first reading if Council has not approved its negotiating mandate after three months, or if negotiations for a first reading agreement take more than six months. The well-known counter-argument is that Parliament cannot force the Council to negotiate before its first reading. Once Parliament has completed its first reading, the ball is in the Council's court, and if it does not move, Parliament cannot force it to move, since the first reading is not subject to any deadline. However, the current situation of waiting always also leads to OLP dossiers being postponed until doomsday and, in the event of public criticism of EU inaction, not realizing that it is not "the EU" but precisely the member

states that allow dossiers to dry up until eternity. In our view, this is primarily a matter of building political pressure and creating transparency about which arm of the European legislature is responsible for inaction.

In this regard, we would encourage Parliament to consider **setting up strategic in-house capacities to identify, denounce, and communicate the co-legislator's and/or the executives' failure**: Whenever Parliament's co-legislator is moving towards non-cooperation or delay on parliamentary input, Parliament should call out the Council forcefully for the failure to faithfully cooperate or to execute its duties.

At a similar scale, **Parliament could also call out the Commission in cases where it is not acting as a moderator or honest broker between the two co-legislators.**

6.3. Strengthening Parliament's access to information

Information is the oxygen that sustains oversight, control, scrutiny, or any other form of parliamentary involvement in policy-making. Any mandate to control a government's or – regarding the EU's institutions – an executive agents' work is of limited use unless it is accompanied by access to the relevant information. The normative basis for appropriate rules on Parliament's access to and handling of documents should primarily draw on the clear-cut principle of democratic theory and practice that applies in the vast majority of democratic systems. If confidential information is beyond the reach of public access, it must be available to parliamentarians (or institutions established by parliaments) scrutinizing those who negotiate on behalf of EU citizens. In principle, parliamentary access to classified information thus implies a privileged access to specific categories of information, which are justifiably exempt from access of the larger public and third parties.

The basic foundation for granting Parliament privileged access to such confidential information rests with the logic of parliamentary democracies. In parliamentary democracies, the executive is nothing else than the highest aggregate of parliament's majority. Governments obtain delegated power from their parliamentary majority. Rules on governance, including those restricting access to and treatment of documents – produced or owned by governments – are legal expressions of parliaments' willingness to provide the executive with some room of manoeuvre and discretion when interacting with third parties. Rules governing parliamentary access to classified information should therefore be set out in law as the counterweight of general freedom of / access to information laws. In clear contrast to EU Member States, where comprehensive rules on parliamentary access to documents and the classification of information (that is, limiting and controlling access to it) are based on parliamentary laws or regulations, Parliament's access to documents of the Commission and the Council is a matter of non-legislative rules. **Parliament's right of access to restricted EU documents is heavily constrained by a set of internal institutional rules and inter-institutional agreements (IIA).**

Colloquial evidence by MEPs as well as staff of the General Secretariat and the political groups indicated that receiving classified documents from the Commission and the Council is extremely difficult during times of emergency and several documents from Council were never submitted or completely blackened. For some documents, the Commission was forced to get approval from all Member States before sending some of their own documents to Parliament. Considering the proposals forwarded by

Focus Group II within Parliament's reflexion "Rethinking Parliamentary Democracy - A stronger European Parliament after COVID-19",

we suggest that **Parliament urges the Commission and the Council to negotiate and agree on a mechanism that would ensure access to classified information under the conditions of emergency.**

In practice, Parliament's **Bureau should review and upgrade its decision of 15 April 2013** on the Rules governing the treatment of confidential information by Parliament.

Most importantly, it should **entrust the General Secretariat to establish a virtual secure reading room** for the consultation of confidential information.

Given that such virtual infrastructure would certainly require an agreement with the Commission and the Council, Parliament should consider to **modify the Framework Agreement** on relations between the European Parliament and the Commission of 20.11.2010 (especially para. 24 and Annex II on the forwarding of confidential information to Parliament) for the inclusion of virtual secure reading room.

Regarding the Council, Parliament might **forward related proposals for reviewing the IIA of 20 November 2002 concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy (especially para. 3.2. and 3.3.), as well as the IIA of 12 March 2014 on forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the CFSP (especially Article 6 on the registration, storage, consultation and discussion of classified information in Parliament).**

Both colloquial evidence and the author's own experience in retrieving the important decisions and guidelines of the Bureau, the CoP, or the CCC also suggests that

Parliament could make an effort in increasing the transparency of its own governing bodies' documents.

As the Focus Group II on strengthening parliamentary prerogatives notes, Parliament "prides itself on being a transparent institution but many internal parliament documents should be more accessible so that not only stakeholders with good connections have all the information on the work of the Parliament."¹¹² The decisions and guidelines of Parliament's governing bodies are important documents that have determined the work of Parliament over a period of two years, which interpret and further develop the rules of the RoP in the light of a serious, unforeseeable emergency situation and guide the work of Parliament.

In view of their enormous importance, we believe **it would be advisable to add a "living document" to Parliament's RoP so that MEPs and employees, but also the interested public, get unhindered access to the decisions that shape Parliament's work.** Access to information and documents of Parliament's ruling bodies (CoP, Bureau, CCC) should be ensured, especially in times of emergency.

¹¹² See: Document No. PE 695.632/BUR/FG, p. 15.

6.4. Digital or digitalised democracy? Recommendations for the digitalisation of Parliament in a post-COVID world

“Parliamentary rules of procedure in representative democracies are commonly built upon the principles of pluralism, deliberation and transparency, aiming to provide an arena in which representatives of the people have the opportunity to publicly confront each other’s points of view in a free and fair setting. It is, therefore, safe to say that ordinary parliamentary practice and procedures are essentially incompatible with measures seeking to minimise social contacts and discourage – or directly forbid – mass gatherings” (Díaz Crego/Mañko 2022).

A comparison of the procedural adaptations shows that many parliaments, such as those in the United States of America, Latvia or Brazil, amended their Rules of Procedure to make remote and virtual working possible. Other Parliaments, for example Australia, were not able to move their work into a virtual setting and sessions remained in person. In some cases, like in Switzerland or Australia, extraordinary sessions were organized during which the MPs only dealt with Corona-related legislation, though. Furthermore, hygienic measures were taken. The comparison shows that those **parliaments that managed to quickly move to virtual plenaries (e-governance) – such as Latvia or Brazil – were able to carry on with their duties** from the very beginning of the pandemic in March 2020. The **ability for this transition hinges on the one hand on an efficient, secure and capable IT-System which ought to be in place even before the crisis emerges**. On the other hand, the Rules of Procedure must be flexible enough or, as in Germany, amended to allow for a continuation of the Parliament work under completely different conditions. Both features should be considered for the setting of Parliament to enable it to react efficiently when the next crisis erupts.

All countries discussed in this study invoked some form of emergency procedures to enable their governments to react adequately to the pending pandemic and its extraordinary challenges. However, **the comparison does not present a clear picture as to whether emergency laws need to be enshrined in the constitution**. While some countries declared states of emergency as provided for in the constitution, the majority refrained from doing so and invoked emergency procedures couched in ordinary legislation. In the case of Hungary, the declaration of a constitutional state of emergency according to Article 53 and Article 15 (1) resulted in a power grab by the president, effectively sidelining the legislation. The executive in Nigeria, on the other hand, circumvented the emergency ordinances of the constitution and invoked the Quarantine Act 1926 to empower the president – and to bypass parliamentary control.

Therefore, it is recommended that **if emergency laws are provided in the constitution, they should be unambiguous and tied to ex-ante Parliamentary accountability**.

Turning to parliamentary key-functions like legislation, scrutiny or oversight, the result is more unambiguous: At the start of the pandemic in March 2020, **all parliaments transferred power to a certain degree to the executive** in order for it to be able to deal with the emerging crisis situation. Not only did some Parliaments, such as in Switzerland, Nigeria or Australia, suspend their sessions for a considerable amount of time and strictly prioritize COVID-19 related legislation. Furthermore, some statutory regimes, like in Australia, granted the executive the ability to issue laws that were exempt from parliamentary scrutiny or, as in Brazil, allowed the Federal Minister of Health to manage the Corona-crisis along the lines of the recommendations of the WHO.

While empowering the executive is the normal course of events during emergency situations, and a sensible thing to do, two aspects should be pointed out nonetheless. First, even in those cases, in which

parliamentary control continued to be executed more or less at the pre-crisis level, the empowering of the executive should be accompanied by an increased oversight and scrutiny by parliament. Second, the declaration of a state of emergency and the subsequent empowerment of the government was not in all cases reversed once the immediate crisis situation was overcome. As a prime example serves Hungary, where the government used the pandemic to further expand its power.

As the study shows, **Parliament was willing and able to react quickly and effectively to the challenges of the COVID-19 pandemic.** In particular, in the exercise of its legislative functions, Parliament has shown that, **with the help of new digital procedures and voting arrangements, it is able to maintain its policy-making function throughout all stages of the decision-making cycle.** The proportion of “non-participation” of Parliament in the EU’s response to the crisis has not increased significantly overall. Parliament’s exclusion from the Council’s response instruments taking the form of decisions or recommendations is alarming in that it illustrates

(a) that the Treaties almost exclusively provide rules for emergency measures in which the Council can act alone and without any parliamentary ex-ante control,

(b) that the secondary legislation on emergency measures allows the Council an extraordinary margin of manoeuvre not covered by Articles 290 and 291 TFEU,

(c) that the Commission’s monitoring and control instruments are not mobilised in case of activation of emergency measures and that Parliament disposes in this case of no effective sanction possibilities (beyond the action for failure to act and the vote of no confidence), and

(d) that the lack of uniform and binding EU health policy measures originates from the fact that the EU has no corresponding competences and its capacity to act is explicitly limited by the prohibition of harmonisation.

On the other hand, our case studies on the MFF negotiations and the negotiation of international agreements show that Parliament demonstrated its ability to operate as a fully legitimate co-legislator even under the more difficult conditions of the COVID-19 crisis.

Nevertheless, **the political costs of the special procedures introduced should not be underestimated: Virtually organised committee and plenary debates** are characterised by considerable sterility, as the usually observable, **spontaneous or informal role profiles of MEPs are reduced to a minimum.** If the activation of an urgency procedure already leads to considerable restrictions with regard to the possibilities of introducing and negotiating amendments, the conversion to virtual deliberation and decision formats represents an additional constraint.

Preventing physical meetings can severely hamper Parliament’s effective influence on legislation. Ministers or Commissioners may be more strongly influenced when they enter the Parliament building, a place where they are somewhat isolated from their advisors and staff. Moreover, the opportunities for MEPs to have informal conversations in the lobbies, the gazes of participants in committee meetings, or the involuntary body language of speakers are all subtle elements that disappear behind a computer screen. For Parliament, this is compounded by the fact that these **features of parliamentary practice must hold their own in a multilingual and multi-gestural environment.** And for the political groups and committees, too, there is a **lack of opportunities to get to know each other under the conditions of the e-Parliament**, which cannot be compensated for by virtual so-called Facebook friendships.

Normally, MEPs consider and discuss proposed amendments to reports, resolutions and legislative measures in a free, cross-party exchange. In this process, compromise motions to combine individually tabled amendments are negotiated - often in informal exchanges and with the intensive participation

of the parliamentary group staff, committee secretariats and parliamentary assistants. In the virtual consultation format, these possibilities are also given with the help of videoconferences arranged at short notice. However, the timing and quantity limits imposed under the conditions of the state of emergency prevent an open, informal exchange. It is precisely this free, not strictly timetabled exchange, however, that represents an essential aspect of the visualisation of the parliamentary interaction and representation function. And it is precisely with regard to the **exercise of the control function vis-à-vis the institutions** endowed with executive powers that **freedom, spontaneous responsiveness and informality make an essential contribution to MEPs being able to take the floor directly, unplanned and unpredictably in order to demand accountability from their counterparts.**

Informational asymmetries are particularly striking in virtual environments: If the political decision-makers – in our case the MEPs – have to deliberate and decide physically detached from their assisting institutions (committee secretariats, parliamentary group staff, personal assistants) that are normally within reach, they have **less capacity to obtain negotiating information** than is the case with the Council or the Commission. After all, these two institutions also normally practise written or other distance-related procedures and can therefore use information advantages against Parliament for their own purposes. We identified advantages and drawbacks of the practice of virtual deliberation, decision-making and voting procedures.

The tested procedures are suitable for **the post-pandemic time**, in order to facilitate the participation of MEPs and staff who are prevented by force majeure from carrying out their duties at the places of meeting of Parliament.

In this context, it would have to be considered within Parliament **how the principles of equality, multilingualism and the exercise of the free mandate** can be made **compatible with the technical requirements of a virtually sitting parliament.**

In addition, it would be urgently necessary for Parliament, especially with the Commission and the Council, to **agree on jointly usable infrastructures and rules for virtual, inter-institutional negotiations across all phases of the policy cycle.**

The **IIA on Better Law-making** would be a good place to start, as it already contains **basic rules for inter-institutional cooperation in legislative planning, consultation, adoption, implementation and evaluation.**

Specific rules for remote negotiations could be **integrated into the Joint Declaration on practical arrangements for the codecision procedure**, especially with regard to points 7 and 8 on practical arrangements for trilogues as well as to the chapter of conciliations. First, particularly for reasons of legal certainty, the interinstitutional agreement would have to make it mandatory that trilogues and conciliation committee meetings be possible under emergency conditions. Second and consequently, it would have to be ensured that the move into virtual or hybrid meeting formats is jointly authorized by all three institutions. Third, the institutions would have to agree on the technical infrastructures of corresponding negotiation formats. In this context, it would have to be ensured that IT environments for virtual negotiation comply with the rules of data protection, transparency, confidentiality, and multilingualism. It will probably hardly be possible to prevent individuals from forwarding access options for virtual meetings to third parties or from logging meeting proceedings via secondary media. It would therefore be necessary either to clarify that trilogues or conciliation sessions are fully accessible to the public or, alternatively, to ensure that opportunities for unwanted participation or recording are hindered and that a breach of the rules is sanctioned. In addition, the agreement

should be adapted to take into account the special conditions of interpretation in virtual environments.

In addition, the institutions should **consider to review the IIA on budgetary discipline**, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, especially its annex I on inter-institutional cooperation during the budgetary procedure, **to take into account the constraints of emergency situations**.

As to relations between Parliament and the ECB, **the IIA on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism could be revised** in order to integrate provisions with regard to the operation of Parliament's oversight and hearing procedures on the basis of remote procedures.

Additional efforts could be made to **increase the transparency and accountability of the EU decision-making process in general**. This should include publishing voting results in a more readable, visual, open and accessible format as the votes are proceeding.

The transparency of trilogues could also be improved by organising regular media briefings before and after trilogues. The newly employed, digital tools of Parliament will allow for many activities to become purely online or hybrid in a post-pandemic situation.

A hybrid form of physical-and-online democracy may lead to a strengthened integration of MEPs and citizens in the political debate. Internet connectivity enables more people to participate in many discussions that may have been previously localized or too high-brow. While it is true that digital formats have **advantages in terms of outreach, saved travel time and travel cost** and the positive effect on the climate, Parliament should keep in mind that **the power of visibility and traceability lies in how the parliament builds its physical activities**.

Finally, the study also **provides indications for changes in treaty law**, which would be virtually mandatory in the event of a future revision of the treaties.

Since the treaties have so far only fragmentarily taken into account the case of a state of emergency,

it would be appropriate to **introduce a central, overarching EU treaty provision analogous to Article 15 ECHR**, which would define the trigger conditions, the resulting mandatory and optional possibilities for action at the levels of the EU and of the Member States, conditions and procedures for the phasing-out, and, most importantly, the fundamental and civil rights limits of the emergency measures.

The study also shows that the lack of appropriate health policy measures mitigating public health emergency such as the COVID-19 pandemic roots in the weak foundation of European health policy. In fact, the current division of health competences between the EU and its Member States limits the ability to act democratically, efficiently and effectively during a trans-national health emergency. The EU has some limited competence to harmonise laws that set standards of quality and safety of medicines, medical devices, substances of human origin such as blood; and to set animal and plant health standards that are directly aimed at protecting human health. For every other area of health, the EU needs to either shoehorn the desired measure into its internal market powers (used, e.g., to set standards for tobacco products) or adopt incentive measures that do not harmonise laws. The strong resistance by national actors against harmonised EU action in health policy essentially originates in large differences regarding the financing and organisation of healthcare and its quality among Member States.

It would therefore be advisable to **fundamentally revise Article 168 of the TFEU** so that the EU can respond with binding health policy measures in the event of a health emergency with cross-border implications. Given the catastrophic consequences of the COVID-19 pandemic and the human suffering caused by it, there are two possible ways of revising the treaty.

A first variant, presented by the European Health Union, envisages the upgrading of health policy as a shared competence. In order to implement a European Health Union,¹¹³ the introductory articles of the Treaty on the objectives and competences of the EU would have to be amended. The proposal also provides for a complete **amendment of Article 168 TFEU so that the Parliament and the Council can adopt health policy measures under the OLP in the same way as they adopt harmonisation provisions in the internal market.**

An alternative option to the treaty amendment would retain the categorisation of health policy as the competence to carry out actions to support, coordinate or supplement the actions of the Member States. However, the lessons of the COVID-19 pandemic would be incorporated by amending Article 168(4): Accordingly, the Union institutions would be given the competence, "by way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k)", to contribute to the achievement of the objectives referred to in Article 168 TFEU through adopting: **(d) measures to address cross-border public health emergencies, where the European Parliament and the Council, on the initiative of the Commission or at least two Member States, have declared a public health emergency in accordance with the OLP.**

6.5. Recommendations for internal reform

Regarding the reform of the Plenary, **the systematic alternation between debates and votes would have the advantage of strengthening Parliament's autonomy, actorness and legislative role vis-à-vis the public.** However, if the rationale for maintaining restrictive measures under emergency rule is that virtual deliberations and votes require more lead-time and more follow-up time than in the normal case, Parliament could also review a far more fundamental measure. In fact, Parliament could **make more regular use of the possibility of "mini-sessions"** to put on the agenda precisely **those items of deliberation that have been treated in an extremely restrictive manner since the beginning of the COVID-19 crisis:** Topical debates, interpellations and - why not? - Plenary hearings with stakeholders, interested citizens, and academics.

To maintain and improve democratic-parliamentary legitimacy under emergency and urgency conditions, we would recommend the introduction of a Plenary debate with representatives of the Council and the Commission to systematically review those measures that are authorised by the Council alone during the emergency situation. Parliament is considering proposals for restructuring of the plenary debates from the point of view of creating parliamentary publicity and a European public sphere. In this context, we would suggest that whenever the Council uses emergency situations to adopt measures restricting fundamental rights or financially intensive measures bypassing the EU's only directly legitimated institution, Parliament should **take the initiative to critically discuss the alternatives of such anti-parliamentary, executive legislation.** Moreover, **under the conditions of emergency, Parliament should resist pressure to fast-track legislative processes,** as this may be

¹¹³ See: European Health Union (2021): Position Paper "Treaty Change for a European Health Union", https://europeanhealthunion.eu/wp-content/uploads/2021/06/Treaty-change_position-paper_final.pdf.

detrimental to transparency, and the exercise of Parliament's prerogatives and key function as the citizens' arm of the Union's legislator.

The COVID-19 crisis has revealed that it can be used by Member States and the Council – accidentally, due to a lack of governance capacity, or intentionally as a tool to delay unwelcome policies - to put highly controversial dossiers (such as the asylum and migration package) on the back burner. Thus, in order **to increase the pressure on the Council to take decisions**, especially in those cases where legislative dossiers can be voted on by qualified majority, we would recommend, especially for times of crisis, to consider the following proposals:

Parliament should automatically vote its first reading if Council has not approved its negotiating mandate after three months, or if negotiations for a first reading agreement take more than six months.

Moreover, we would encourage Parliament to consider **setting up strategic in-house capacities to identify, denounce, and communicate the co-legislator's and/or the executives' failure**: Whenever Parliament's co-legislator is moving towards non-cooperation or delay on parliamentary input, Parliament should call out the Council forcefully for the failure to faithfully cooperate or to execute its duties.

At a similar scale, **Parliament could also call out the Commission in cases where it is not acting as a moderator or honest broker between the two co-legislators.**

In view of the considerable scope of internal restrictions - now in the third year of the pandemic! - we believe it is urgent that the Plenary discusses the measures, adjusts them if necessary and passes a resolution approving them. In our view, it is not sufficient to have the CoP or the Bureau confirm the President's decisions. The **European public should not get the impression that the basic rules of parliamentary work and the fundamental rights of parliamentarians are constantly being restricted by a few.**

Any parliamentary act of institutional self-restraint must be supported and legitimised by a broad majority so that Parliament can continue to appear as an independent, self-empowered and resilient actor.

In addition, we suggest that Parliament could make an effort in increasing the transparency of its own governing bodies' documents. In view of their enormous importance, we believe **it would be advisable to add a "living document" to Parliament's RoP so that MEPs and employees, but also the interested public, get unhindered access to the decisions that shape Parliament's work.** Access to information and documents of Parliament's ruling bodies (CoP, Bureau, CCC) should be ensured, especially in times of emergency

6.6. Improving inter-institutional cooperation under emergency rule

Emergency situations such as the COVID-19 crisis reveal asymmetries with regard to the handling and sharing of information, especially classified information. Such informational asymmetries are particularly striking in virtual environments: If the political decision-makers - in our case the MEPs - have to deliberate and decide physically detached from their assisting environments (committee secretariats, parliamentary group staff, personal assistants) that are normally within reach, they have less capacity to obtain negotiating information than is the case with the Council or the Commission.

We therefore suggest that **Parliament urges the Commission and the Council to negotiate and agree on a proper mechanism to ensure access to classified information under the conditions of emergency.**

In practice, Parliament's **Bureau could first review and upgrade its decision of 15 April 2013** on the Rules governing the treatment of confidential information by Parliament. Most importantly, it should **entrust the General Secretariat to establish a virtual secure reading room** for the consultation of confidential information.

Given that such virtual infrastructure would certainly require an agreement with the Commission and the Council, Parliament should consider to **modify the Framework Agreement** on relations between Parliament and the Commission of 20 November 2010 (especially para. 24 and Annex II on the forwarding of confidential information to Parliament) for the inclusion of virtual secure reading room.

Regarding the Council, Parliament could **forward related proposals for reviewing the IIA of 20 November 2002 concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy (especially para. 3.2. and 3.3.), as well as the IIA of 12 March 2014 on forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the CFSP (especially Article 6 on the registration, storage, consultation and discussion of classified information in Parliament).**

To develop a fabric for democratic and efficient governance during emergency situations, it would be urgently necessary for Parliament, the Commission and the Council to **agree on jointly usable infrastructures and rules for virtual, inter-institutional negotiations across all phases of the policy cycle.**

The **IIA on Better Law-making would be a good place to start, as it already contains basic rules for inter-institutional cooperation in legislative planning, consultation, adoption, implementation and evaluation.** More specific rules for remote negotiations could be integrated into the **Joint Declaration on practical arrangements for the codecision procedure**, especially with regard to points 7 and 8 on practical arrangements for trilogues as well as to the chapter of conciliations.

In addition, the institutions should **consider to review the IIA on budgetary discipline**, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, especially its annex I on inter-institutional cooperation during the budgetary procedure, **to take into account the constraints of emergency situations.**

6.7. Setting up the Special Committee on COVID-19

Viewed from the perspective of parliamentary opportunities under the conditions of the state of emergency or political urgency, Parliament reacted efficiently to the Brexit crisis by setting up specific, cross-political and cross-committee groups to coordinate oversight and co-mandating, and to interact with the other EU institutions during all phases of the withdrawal and trade agreement negotiations. With the help of both groups, the Brexit Steering Group (BSG), and the UK Coordination Group (UKCG), Parliament was able to participate comprehensively, timely and actively during all phases of the Brexit saga. The specific monitoring by the BSG and UKCG did not negatively

affect the very functioning of Parliament's Committees in any way: Brexit was discussed in numerous parliamentary sessions (both statutory and special hearings), while the BSG and UKCG kept the governing bodies, the committees, groups and individual MEPs constantly informed about the situation. **Both groups ultimately acted as key relay stations and early warning units of Parliament in order to be able to intervene quickly and in time in the course of negotiations if necessary.**

Unlike many national parliaments, during the COVID-19 crisis, Parliament has limited its political control to the normal procedures laid down in the Treaties, its RoP, the IIA-FA, and the IIA-BLM. In addition, it has primarily used its right of self-referral to point out and denounce, through resolutions, the mismanagement of the crisis by governments and the Commission. The COVID-19-related actions of the Bureau, the CoP, and the CCC were essentially limited to the Parliament's internal management of the crisis. In light of the empirical evidence obtained on the inadequate, diffuse, uncoordinated, and sometimes nationalist handling of the Covid-19 pandemic by member state governments as well as the EU co-executive, we propose that **Parliament's Special Committee set up by its decision of 10 March 2022**¹¹⁴ not only **investigates the impact of the pandemic on the different policy areas and (inter- and intra-)institutional settings.**

In our view, the Special Committee should also consider to **systematically look into MEPs and staff's individual experience with the crisis and with the measures set by the institutions' governing bodies to mitigate the spread of the infection and adjust their work to the pandemic.** It should not be forgotten that MEPs and staff have been exposed to considerable restrictions and strain for more than two years now and that they have so far only had rudimentary opportunities to be heard as directly aggrieved individuals. The Special Committee would therefore be well advised to carry out a comprehensive survey in the course of its deliberations, strictly respecting the personal rights of the respondents, which could usefully complement the framework data collected so far by the CoE's Venice Commission or the Inter Pares data tracker.

Furthermore, the Special Committee would also be an opportunity to **critically reflect**, against the background of Parliament's consistently positive experience with specific monitoring groups such as the BSG and the UKCG, **whether and under what conditions corresponding oversight bodies should not also have been established during the COVID-19 crisis.** The special oversight committees set up by some national parliaments on the COVID 19 pandemic (see table 15) could be **examined in order to synthesise possible best practices for Parliament.**

Hopefully, the Special Committee will be designed in such a way that alleged mistakes and mismanagement of the Union's actions could be comprehensively documented and analysed. In contrast to the former BSE Committee of Inquiry, the COVID-19 Committee would therefore not only have to look at the flawed health policies, but would have to cover all the areas examined in this study under Chapter 3. Fortunately, Parliament did not wait until some third institution declares the pandemic over before starting the investigation. Since the mistakes made in the management of the COVID-19 pandemic will certainly play a role in the next European election campaign, Parliament is well advised to operate the Committee in such a way that the results of its work are available by May 2024.

¹¹⁴ See: European Parliament decision of 10 March 2022 on setting up a special committee on 'COVID-19 pandemic: lessons learned and recommendations for the future, its responsibilities, numerical strength and term of office ([2022/2584\(RSO\)](#)).

6.8. Creating a horizontal emergency provision

Finally, the study also **provides indications for changes in treaty law**, which would be virtually mandatory in the event of a future revision of the treaties.

In light of our cross-country comparison as well as the examined cases of handling emergency and urgency situations within Parliament, **we would therefore recommend that Parliament strongly advocates within the EU's inter-institutional structure to implement horizontal emergency legislation that is independent of policy areas.** Such legislation should clearly define the trigger conditions of the state of health emergency, preferably on the basis of the respective rules of the WHO. Second, it should define which institutions should invoke, advocate, and finally propose the triggering of certain emergency measures and which institutions should authorize them. Furthermore, clear rules should be established on the duration of emergency legislation, its extension, interruption and withdrawal, as well as on ex-ante and ex-post parliamentary accountability as well as judicial review of any delegation of power to the EU's co-executive.

The optimal way to achieve these objectives would be to amend the TEU to introduce a central, overarching EU treaty provision analogous to Article 15 ECHR, which could define the trigger conditions, the resulting mandatory and optional possibilities for action at the levels of the EU and of the Member States, conditions and procedures for the phasing-out, and, most importantly, the fundamental and civil rights limits of the emergency measures. Such an amendment could address Article 11 TEU in the chapter on the democratic principles of the Union.

In the meantime, however, it would be essential to **negotiate the relevant fundamental rules on the proclamation, invocation, duration, amendment and termination of a European emergency and its operational implementing rules for the conduct of the institutions below the threshold of a treaty amendment.** This could be done by adopting a **separate Decision of the European Parliament and the Council on the basis of Article 11** together with – and addressing – the legal bases examined in this study. Alternatively, an **amendment of the trilateral IIA-BLM** or – in case the Council refuses such a self-limitation of its de facto executive powers – of the **bilateral IIA-FA** could be considered in order to establish at least minimal provisions enabling the Parliament to act in a supervising and legislative capacity.

6.9. Amending Article 168 TFEU on the EU's health policy

Given the EU's overall failure in developing a coherent and sustainable policy to tackle the health emergency, we also join those who advocate a fundamental revision of Article 168 of the TFEU so that the EU can respond with binding health policy measures in the event of a health emergency with cross-border implications. Given the catastrophic consequences of the COVID-19 pandemic and the human suffering caused by it, there are two possible ways of revising the treaty. A first variant, presented by the European Health Union, envisages the upgrading of health policy as a shared competence. In order to implement a European Health Union, the introductory articles of the Treaty on the objectives and competences of the EU would have to be amended. The proposal also provides for a complete **amendment of Article 168 TFEU so that the Parliament and the Council can adopt health policy**

measures under the OLP in the same way as they adopt harmonisation provisions in the internal market.

An alternative option to the treaty amendment would retain the categorisation of health policy as the competence to carry out actions to support, coordinate or supplement the actions of the Member States. However, the lessons of the COVID-19 pandemic would be incorporated by amending Article 168(4) TFEU: Accordingly, the Union institutions would be given the competence, "by way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k)", to contribute to the achievement of the objectives referred to in Article 168 TFEU through adopting: **(d) measures to address cross-border public health emergencies, where Parliament and the Council, on the initiative of the Commission or at least two Member States, have declared a public health emergency in accordance with the OLP.**

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ANNEX I – PARLIAMENT’S POWERS AND CONSTRAINTS UNDER ARTICLES 218 AND 207 TFEU

The Lisbon Treaty upgraded Parliament’s position in the area of the EU’s international agreements and trade policy considerably (Devuyst 2013; Maurer 2015). According to Article 207(2) TFEU, Parliament and Council now act as co-legislators on an equal footing when determining the framework for implementing the common commercial policy (CCP). Consequently, EU measures geared to implement trade agreement chapters such as safeguard clauses into EU law are subject to the OLP, which allows Parliament to link its consent to the agreement with EU internal rules for implementation. The Treaty also establishes Parliament as a co-legislator in the field of economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries (Article 212 (1) TFEU). Moreover, the Treaty establishes a legally binding obligation for the Commission to keep Parliament regularly informed on on-going negotiations, with the same degree of information that it provides to the special committee appointed by the Council (Trade Policy Committee - TPC). These provisions substantially reinforce Parliament’s profile as the EU’s only directly elected institution that legitimises those parts of the EU’s external policy, which are defined as an exclusive competence of the Union.

Box 5: The development of Parliament’s rights in CCP

Prior to the Lisbon Treaty, the EC Treaty did not require the consultation of Parliament on the EU’s Common Commercial Policy (CCP) measures and on the conclusion of the EU’s bi-, pluri- or multilateral trade agreements (Rengeling 1981). Moreover, trade agreements did not require the consent of Parliament unless they fell into one of the conditions set out in ex-Article 300 ECT. The only instances when Parliament was involved in the conclusion of such agreements was when the proposal at stake was based on more than one legal basis or, in exceptional circumstances, when the Council consulted Parliament on a facultative basis. Overall, the views of Parliament were not sought after until the Commission had reached a deal with the respective third country and the Council had endorsed it. The options of Parliament to shape the very substance of an agreement were almost non-existent. Therefore, Parliament used its instruments of own initiative reports (INI reports) and questions to shape the EU’s agenda for trade agreements. To informally develop Parliament’s rights of scrutiny in CCP, Council and Parliament first agreed on the so-called Luns-Westerterp procedures for association agreements ("Luns") in 1964 and international trade agreements ("Westerterp") in 1973. Both bilateral IIAs were introduced as a substitute for granting Parliament more extensive rights of assent. The two bipartite IIAs provided for a threefold involvement of Parliament during the negotiation phase of international agreement via (1) plenary debates before the start of negotiations, (2) permanent contacts between the EC/EU Chief negotiators and Parliament during the negotiations and (3) forwarding confidential information to Parliament about the outcome of negotiations, i.e. after the signature of an agreement, but before its final conclusion. Parliament translated these provisions in its RoP by providing for a right to call for suspending the opening of negotiations (ex-Rule 83(2)), to be ‘regularly and thoroughly’ informed (ex-Rule 83(4)) and to ‘adopt recommendations and require that these be taken into account before the conclusion of the international agreement under consideration’ (ex-Rule 83(5)). In addition, ex-Rule 83(6) postulated a parliamentary right of consultation or consent at the end of the negotiation phase, before the signature of the agreement. Yet, both IIAs did not guarantee Parliament a right to be continuously informed of the EC’s external trade relations. In fact, the implementation of the agreements remained at the Council’s discretion, and Parliament had no power to sanction the non-compliance of Council in this regard. For this reason, the Parliament’s former Committee on External Economic

Relations proposed a reform of the procedure that sought to enhance the Commission's responsibility vis-a-vis Parliament throughout the various steps of the procedure.¹¹⁵ Building on the 1990 Code of Conduct and the fact that the Commission was ready to agree on a set of bilateral, political commitments in implementing its responsibility towards Parliament,¹¹⁶ the 1995 Code of Conduct¹¹⁷ covered for the first time the negotiation of international agreements, thereby perpetuating and enhancing the interinstitutional compromise enshrined in the original *Luns and Westerterp* IIAs. Under point 3.10., the Commission agreed that, "in relation to international agreements, including trade agreements, [it] shall inform the competent parliamentary committee, in confidence where necessary, of the draft recommendations relating to the negotiating directives." Moreover, the Commission consented to "keep Parliament, through the Parliament committee, regularly and fully informed of the progress of negotiations." Finally, the Commission committed itself to "facilitate the inclusion of MEPs as observers in Community delegations negotiating multilateral agreements, on the understanding that the Members may not take part directly in the negotiating sessions themselves, wherever the Commission alone represents the Community."

Although the Nice Treaty (2001/2003) did not substantially change the legal provisions of Parliament's roles and functions regarding international agreements and the CCP, the 2000 Framework Agreement (FA-IIA) on relations between Parliament and the Commission¹¹⁸ developed the inter-institutional relationship some steps further. The scope, timing and frequency of information to be forwarded to Parliament in relation to international agreements was substantially widened ("quickly and fully inform [...] at all stages of the preparation, negotiation and conclusion of international agreements"). The Commission agreed that it should forward information at a stage that would enable it "to be able to take due account of the EP's views in so far as possible", and that would allow Parliament "to express its points of view if appropriate." As regards the scope, the 2000 FA-IIA explicitly covered information about "decisions concerning the provisional application or the suspension of agreements; and the establishment of a common position in a body set up by an agreement based on Article 310 of the EC Treaty." Finally, the provision regarding the inclusion of MEPs as observers in Community delegations negotiating multilateral agreements was widened to cover the regular information of MEPs "on the progress of negotiations during the meetings [...] in order for the Commission to be able to take account of the EP's views."

The 2005 FA-IIA continued the earlier reassurances on the timely and comprehensive flow of information, including the "draft negotiating directives, the adopted negotiating directives (and) the subsequent conduct of negotiations", to allow Parliament "to express its point of view if appropriate" which again shall be taken into account by the Commission "as far as possible". The 2005 FA-IIA generated a Council reaction expressing its concern "at the fact that several provisions of the new framework agreement seek to bring about, even more markedly than the framework agreement of 2000, a shift in the institutional balance resulting from the Treaties in force". Council "recalled" the two other institutions "that the procedures enabling the EP to be involved in international negotiations are governed by Article 300 of the EC Treaty."¹¹⁹

¹¹⁵ See: European Parliament: J. van Aerssen MEP: Working Document on the Luns-Westerterp Procedure, Brussels, 8 February 1980, Doc. No. PE 62937.

¹¹⁶ See : Code de Conduite - Parlement/Commission- amélioration des relations interinstitutionnelles, JOCE, 1990 No. C 68, 70.

¹¹⁷ OJEC 1995 C 089, 69.

¹¹⁸ European Parliament. Rules of Procedure, 15th edition (February 2003), OJEC 2003, L 61, Annex XIII – Framework agreement on relations between the EP and the Commission.

¹¹⁹ Council statement concerning the framework agreement on relations between the EP and the Commission, (OJEC 2005 C 161/1).

Combining the traditional “agenda-setting” instrument of INI reports with the newly gained power of consent, the INTA Committee sought for a way to translate the Lisbon treaty provisions on ex-ante information and consultation into an instrument for informally “co-mandating” the EU’s negotiator. The INTA Committee initiated its requests for the post-Lisbon treaty organisation of inter-institutional relations in the area of CCP through an opinion report on Parliament’s new role and responsibilities implementing the Treaty of Lisbon.¹²⁰ Objecting that the Lisbon treaty did not provide Parliament with the right to approve the mandate of the Commission to negotiate a trade agreement, INTA also asked for a procedure that would entitle Parliament to establish preconditions in order to give its consent. It therefore stressed the need to reinforce the 2005 FA-IIA, and in particular Article 19. INTA also called on the European Council, the Council and the Commission to consider the negotiation of a new, tripartite IIA to agree on a substantive definition of its involvement in every stage leading to the conclusion of an international agreement. Overall, the Committee pursued a strategy to widen the scope and content of information as well as to make its digestion more effective. Parliament therefore underlined the need to agree with the Commission on the set-up of an inter-institutional database for the inclusion and storage of all information that the Commission transmits to the TPC and all Commission working and advisory groups that are active in the field of the CCP. In addition, INTA asked the administrations of both Parliament and the Commission to consider methods for establishing a reciprocal mechanism for joint forward planning in relation to the CCP, covering, i.e., positions by the EU member states regarding trade agreements, proceedings in related, international organisations, monthly meetings of the Committee Coordinators and the Commission’s Director General for Trade to update information and policy options, in-camera-briefings by the Commission on ongoing negotiations, regular meetings of the Committee’s Chair with the TPC, joint meetings of the Committee’s and the Commission’s delegation before and during WTO and similar, international meetings.

Based on these demands, Parliament successfully negotiated the revision of the 2005 FA-IIA with the Commission in 2010. Article 23 of the 2010 FA-IIA now clarifies Article 218(10) TFEU and states that “Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives”. Article 24 of the FA-IIA stipulates that such information “shall be provided to Parliament in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament’s views as far as possible into account” and point 2 of Annex III to the FA-IIA further clarifies that “when the Commission proposes draft negotiating directives with a view to their adaptation by the Council, it shall at the same time present them to the Parliament”. Building on these commitments by the Commission, INTA, AFET, and DEVE decided to use INI reports on upcoming negotiations for bi- and pluri-lateral agreements not only to articulate its position, concerns and ideas, but also to formulate Parliament’s boundaries for the content of the proposed agreement. The use of INI reports and resolutions for defining Parliament’s minimum conditions to international agreements thus became a successful instrument for providing input to the Commission’s draft negotiation directives at an early stage.

¹²⁰ Opinion of the Committee on International Trade (*), 27 May 2008 for the Committee on Constitutional Affairs on Parliament’s new role and responsibilities in implementing the Treaty of Lisbon, (2008/2063(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A6-2009-0145&language=EN>.

Box 6: Negotiations and outcome of the negotiations on the 2010 FA-IIA

The Lisbon Treaty's provision of Article 207(3) is of crucial importance for Parliament. Even though, during negotiations towards international agreements, Parliament is not involved in terms of "consultation"¹²¹, Article 207(3) must be read in conjunction with the general provision on the negotiation and conclusion of international agreements¹²², that is to say Article 218 TFEU. This Article does not contain such a specific rule, but a more general provision, according to which Parliament "*shall be immediately and fully informed at all stages of the procedure*" (paragraph 10). The Lisbon Treaty thus establishes a legally binding obligation for the Commission to keep Parliament regularly informed on on-going negotiations, with the same degree of information that it provides to the Council's TPC. This Committee is a body of national experts dealing with the ex-ante scrutiny and consultation of Commission's proposals and activities with regard to the negotiation of international trade agreements. The TPC sits - in a strange way and similar to the Standing Committee on Agriculture - "between" COREPER and the Council. It pre-cooks any decisions that are formally taken by the Council in relation to agreeing on trade agreements, negotiation mandates etc. The TPC is key to understand how Member State governments secured for almost 50 years that the Commission cannot act alone, without any control by governments of the EU.¹²³ As all international trade agreements now always require Parliament's consent, the role of the TPC as well as the interest of Parliament in gathering information about the TPC changed. Whereas Parliament, until the entry into force of the Lisbon Treaty, focussed on what the 133 Committee *has been* dealing, it now moved on to a more ex-ante focus on what the TPC *will* deal with. For Parliament, such ex-ante information is essential in order to influence the negotiations and to ensure that it makes its position known before the actual conclusion of the negotiations. For the Commission, having an early feedback from Parliament is a way of ensuring that at the end of the negotiation procedure the agreement will be agreeable to Parliament. Building on this analysis, Parliament's negotiation team for the 2010 FA-IIA argued that the risk of Parliament withholding its consent could be minimised if Parliament can closely monitor the negotiations and the Commission has an opportunity to take Parliament's views into consideration throughout the negotiations, before the signing of the agreement. During the negotiations on the FA-IIA 2010, Parliament therefore wanted to ensure that it was fully informed about the intention to start negotiations as well as about the Commission's draft negotiating directives. In particular, Parliament requested to be informed on how the Commission intends to take its views into consideration and to be given reasons why some of its requests could not be considered during the negotiations. To fortify its requests for information and consultation, Parliament developed a critical analysis of the derived legal bases in the then ongoing procedures on the anti-dumping regulation (ADR, Council Regulation (EC) No 384/96¹²⁴, and the anti-subsidy regulation (ASR, Council Regulation (EC) No 597/2009¹²⁵).

¹²¹ It is only the Council's special committee that is formally consulted. Article 207 TFEU provides that 'The Commission shall conduct these negotiations in consultations with the special committee appointed by the Council to assist the Commission in this task...'.

¹²² Which also applies to the negotiation of trade agreements as stated in Article 207 (3), first subparagraph, TFEU and to agreements on economic, financial and technical cooperation.

¹²³ When the Treaty of Rome entered into force in January 1958, the Committee was set up to implement the transitional provisions of the then Article 111 TEEC. Since then, it comprises senior officials from the Member States in the field of commercial policy, usually at Director-General level. Its composition remained unchanged when, in February 1959, Article 113 TEEC on the principles governing the common commercial policy became applicable. With the launch of the Tokyo Round of trade negotiations in 1973, it became necessary to convene meetings of the Committee more frequently and sometimes at short intervals. This led to the inception of a Committee of deputies.

¹²⁴ Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJEC L 56, 6.3.1996, 1.

¹²⁵ Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community (Codified version), OJEC L 188, 18.7.2009, 93-126.

Given the Council's loud resistance against Parliament's demands, the provisions regarding international agreements became the most difficult negotiation item for the 2010 FA-IIA. In fact, the Council's Legal Service published several legal opinions, stating that the FA-IIA risks modifying the balance between the Institutions at the Council's expense.¹²⁶ More specifically, the Council's Legal Service criticised Points 9 and 19 to 25, as well as Annex 3, of the FA-IIA: According to the Council, these provisions "*aim to accord the EP prerogatives which are not provided for in Article 218 TFEU. More especially, this involves the obligations imposed on the Commission by Annex 3 to take due account of the Parliament's comments in the entire process of negotiation and to provide it with a whole series of documents (in particular the draft negotiating directives, draft amendments to negotiating directives, draft negotiating texts or any relevant documents received from third parties, subject to the originator's consent) relating to international negotiations. Such obligations, combined with the obligation on the Commission to take account of the EP's views and inform it of the way it has incorporated them in the texts negotiated, are not provided for by the Treaty.*"

However, the Commission finally agreed to the essential aim of Parliament, namely to be fully informed "at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives" in order to serve the purpose of facilitating Parliament's consent, to give more predictability to the procedure and to avoid non-conclusion of international agreements when the negotiation has already been completed. Parliament convinced the Commission that the Council's critique would isolate parts of Article 218 from the Treaty's overall construction. Of course, one may share the Council's view that Article 218(7) TFEU gives the possibility to the Council alone, when concluding an agreement, to give authorisation to the Commission. But the Council's further interpretation of Article 218(7) TFEU appears to miss three important points: Firstly, the provision states explicitly that it is a derogation, namely to paragraph 218(6) TFEU, and, according to constant case-law of the ECJ, derogations need to be interpreted strictly. Secondly, the authorisation from the Council is only possible if the agreement itself provides that a modification to it might be adopted by simplified procedure or by a body established by the agreement. Therefore, since Parliament is called to give its consent to the agreement itself, it is always up to its majority whether or not to accept this possibility, taking into account the scope and nature of the agreement in question as well as the Council's strict interpretation of the provision. Thirdly, in any case, the Council and the Commission remain under the general obligation to inform Parliament. It is reasonable to expect that both will take into consideration the possible reaction of the latter. To avoid problems at the later stages of a negotiation, this information should be given before the decision is taken by the Commission, in order to fully safeguard the *effet utile* of Article 218(10) TFEU. Furthermore, the Council's interpretation of Article 218 TFEU, forwarded to the Chairman of INTA in a letter on 5 May 2010, raised serious concerns inside Parliament about the Council's readiness to fully implement the Lisbon Treaty. According to the Council, the Treaties "*do not confer powers of action on the Parliament with respect to the preparation, negotiation and monitoring of trade agreements.*" Of course, Parliament does not have, nor does it want to have, the power to participate in the negotiation of trade agreements. However, this does not mean that Parliament is powerless in this regard: Firstly, Article 207(3) TFEU obliges the Commission to "*report regularly to the (...) EP on the progress of the negotiations*". Parliament may react at every stage by the political means at its disposal: hearings, written and oral questions, resolutions, etc. It is only natural to expect that the positions of Parliament will be taken into consideration at the negotiation stage in order to pave the way for the final parliamentary consent of the agreement. For this reason, it is simply not correct to say that Parliament has no power of action with regard to monitoring the negotiations. In fact, it is this provision together with Article 218(10) TFEU which foresees the full and immediate

¹²⁶ Opinion of the Council's Legal Service of 4 March 2010, 7149/10 JUR 122 INST 65, and Council's Legal Service opinion of 30 August 2010, 12964/10 JUR 348 INST 302 + REV 1 (en).

information of Parliament which aims specifically to fulfil that purpose. These provisions would be empty of substance if one were to hold that Parliament is only to be informed, but that it does not or should not monitor the negotiations.

Article 218(10) TFEU on the negotiation and conclusion of international agreements provides that Parliament "*shall be immediately and fully informed at all stages of the procedure*". Building on Parliament's positioning regarding the interpretation of this provision, "*all stages of the procedure*" means that full information is required at:

- a) the initial stage of the procedure:
 - recommendations submitted by the Commission, or, for agreements that relate exclusively or principally to the Common Foreign and Security Policy, by the High Representative, to the Council;
 - Council decision authorising the opening of negotiations and nominating the Union negotiator, together with the directives which the Council may address to the negotiator and any revisions thereof;
 - designation of a special committee in consultation with which the negotiations must be conducted, where applicable.
- b) the negotiation stage: all steps of the negotiations up to the initialling of the text of an agreement by the negotiators;
 - the final stage:
 - signature,
 - possible provisional application,
 - conclusion;
- c) other stages in the procedure:
 - suspension of the agreement,
 - modifications to the agreement when the agreement provides for a simplified procedure, and
 - the positions to be adopted by the Union in bodies established by the agreements.

To our understanding, the Council and the Commission are responsible for providing such information to Parliament in their respective roles. And nothing prevents Parliament from asking for information when they fail to deliver. According to Article 207(3) TFEU, the Commission is obliged to provide all the information about the negotiations and proposals it makes to the Council concerning recommendations for negotiation, proposals for signature and provisional application, etc. in relation to trade agreements. For other international agreements, the Council is responsible for providing all information at the stages of the procedure for which it is authorised by the Treaties, in particular the decision authorising the opening of negotiations, the decision nominating the negotiator and the negotiating directives addressed to the negotiator.

Moreover, Article 218(10) TFEU calls for the "*immediate and full*" information of Parliament and does not provide for any exception. "*Full*" information includes all information throughout the procedures covered by Article 218 TFEU, including mandates and negotiating texts, where they are available. Such information is pertinent, especially since with the coming into force of the Treaty of Lisbon the consent of the EP is required for the conclusion of all international agreements in fields to which either the

ordinary legislative procedure applies, or the special legislative procedure where consent of the EP is required.

Table 14: Council acts reacting to the COVID-19 pandemic excluding Parliament's involvement

Instrument	Legal Basis	Date
COUNCIL DECISION on a temporary derogation from the Council's Rules of Procedure, in view of the travel difficulties caused by the COVID-19 pandemic in the Union	Article 240(3) TFEU	20.03.2020
COUNCIL REGULATION activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak	Article 122(1) TFEU	08.04.2020
COUNCIL DECISION further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision (EU) 2020/430, in view of the travel difficulties caused by the COVID-19 pandemic in the Union	Article 240(3) TFEU	20.04.2020
COUNCIL REGULATION on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak	Article 122 TFEU	18.05.2020
COUNCIL DECISION further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision (EU) 2020/430, in view of the travel difficulties caused by the COVID-19 pandemic in the Union	Article 240(3) TFEU	20.05.2020
COUNCIL DECISION amending Council Decision (EU) 2016/915 as regards the reference period intended to be used for measuring the growth of CO ₂ emissions, to take account of the consequences of the COVID-19 pandemic in the context of CORSIA	Articles 192(1), 218(9) TFEU	05.06.2020
Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction	Articles 77 (2) (b) and (e), 292 TFEU	30.06.2020
COUNCIL DECISION on position to be taken on behalf of the European Union within the International Civil Aviation Organization as regards the notification of differences with respect to Annexes 1 and 6 to the Convention on International Civil Aviation due to the temporary measures related to the COVID-19 pandemic	Articles 100(2), 218(9) TFEU	02.07.2020
COUNCIL DECISION further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision (EU) 2020/430, in view of the travel difficulties caused by the COVID-19 pandemic in the Union	Article 240(3) TFEU	02.07.2020
COUNCIL IMPLEMENTING REGULATION amending Implementing Regulation (EU) 2019/2026 as regards the dates of application in response to the COVID-19 pandemic	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax	09.07.2020
COUNCIL DECISION further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision	Article 240(3) TFEU	02.09.2020

(EU) 2020/430, in view of the travel difficulties caused by the COVID-19 pandemic in the Union		
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Romania to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Czech Republic to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Hellenic Republic to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Italian Republic to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Portuguese Republic to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Slovak Republic to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Kingdom of Belgium to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Kingdom of Spain to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Cyprus to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Croatia to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020

COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Lithuania to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Latvia to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Malta to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Poland to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Bulgaria to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	17.09.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Latvia to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	18.09.2020
Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic	Articles 21(2), 168(6), 292 TFEU	13.10.2020
COUNCIL DECISION on the position to be taken on behalf of the European Union within the Council of the International Civil Aviation Organization as regards the adoption of Amendment 46 to Annex 6, Part I, and Amendment 39 to Annex 6, Part II, to the Convention on International Civil Aviation, related to deferral of the future equipage requirement for 25-hour cockpit voice recorder to avoid unintended consequences due to the COVID-19 pandemic	Articles 100(2), 218(9) TFEU	20.10.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Hungary to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	20.10.2020
Council Recommendation (EU) 2020/1632 of 30 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic in the Schengen area	Articles 77(2)(c) and (e), 292 TFEU	30.10.2020
COUNCIL DECISION further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision	Article 240(3) TFEU	04.11.2020

(EU) 2020/430, in view of the travel difficulties caused by the COVID-19 pandemic in the Union		
COUNCIL REGULATION establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis	Article 122 TFEU	17.11.2020
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Ireland to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	01.12.2020
COUNCIL DECISION further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision (EU) 2020/430, in view of the travel difficulties caused by the COVID-19 pandemic in the Union	Article 240(3) TFEU	08.01.2021
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Kingdom of Belgium to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	15.01.2021
Council Recommendation on a common framework for the use and validation of rapid antigen tests and the mutual recognition of COVID-19 test results in the EU 2021/C 24/01	Article 168(6) TFEU	22.01.2021
Council Recommendation (EU) 2021/119 of 1 February 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic	Articles 21(2), 168(6), 292 TFEU	01.02.2021
Council Recommendation (EU) 2021/132 of 2 February 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction	Articles 77(2)(b) and (e), 292 TFEU	02.02.2021
COUNCIL DECISION further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision (EU) 2020/430, in view of the travel difficulties caused by the COVID-19 pandemic in the Union	Article 240(3) TFEU	10.03.2021
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Estonia to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	16.03.2021
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Hellenic Republic to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	20.04.2021
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Latvia to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	20.04.2021
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Malta to mitigate	Council Regulation (EU) 2020/672 of 19	20.04.2021

unemployment risks in the emergency following the COVID-19 outbreak	May 2020 (SURE)	
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Lithuania to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	20.04.2021
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Kingdom of Belgium to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	20.04.2021
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1346 granting temporary support under Regulation (EU) 2020/672 to the Republic of Cyprus to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	20.04.2021
COUNCIL DECISION further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision (EU) 2020/430, in view of the travel difficulties caused by the COVID-19 pandemic in the Union	Article 240(3) TFEU	12.05.2021
Council Recommendation (EU) 2021/816 20 May 2021 amending Recommendation (EU) 2020/912 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction	Articles 77(2)(b) and (e), 292 TFEU	20.05.2021
Council Recommendation (EU) 2021/961 of 14 June 2021 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic	Articles 21(2), 168(6), 292 TFEU	14.06.2021
Council Recommendation (EU) 2021/1004 of 14 June 2021 establishing a European Child Guarantee	Articles 292, 153(2), 153(1)(j) TFEU	14.06.2021
COUNCIL DECISION on a temporary derogation from Decision 2013/471/EU on the granting of daily allowances to and the reimbursement of travelling expenses of members of the European Economic and Social Committee and their alternates in view of the travel difficulties caused by the COVID-19 pandemic in the Union	Article 301 TFEU	22.06.2021
COUNCIL DECISION further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision (EU) 2020/430, in view of the travel difficulties caused by the COVID-19 pandemic in the Union	Article 240(3) TFEU	07.07.2021
COUNCIL DECISION amending Decision (CFSP) 2018/2010 extending its implementation period due to the impact of the COVID-19 pandemic	Council Decision (CFSP) 2018/2010	14.09.2021
COUNCIL DECISION further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision (EU) 2020/430, in view of the travel difficulties caused by the COVID-19 pandemic in the Union	Article 240(3) TFEU	22.09.2021
COUNCIL DECISION further extending the temporary derogation from the Council's Rules of Procedure introduced by Decision	Article 240(3) TFEU	24.11.2021

(EU) 2020/430, in view of the travel difficulties caused by the COVID-19 pandemic in the Union		
Council Recommendation of 29 November 2021 on blended learning approaches for high-quality and inclusive primary and secondary education 2021/C 504/03	Articles 165, 166 TFEU	29.11.2021
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1561 granting temporary support under Regulation (EU) 2020/672 to Hungary to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	20.01.2022
COUNCIL IMPLEMENTING DECISION amending Implementing Decision (EU) 2020/1354 granting temporary support under Regulation (EU) 2020/672 to the Portuguese Republic to mitigate unemployment risks in the emergency following the COVID-19 outbreak	Council Regulation (EU) 2020/672 of 19 May 2020 (SURE)	20.01.2022
Council Recommendation (EU) 2022/107 of 25 January 2022 on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475	Articles 21(2), 168(6), 292 TFEU	25.01.2022
Council Recommendation (EU) 2022/108 of 25 January 2022 amending Recommendation (EU) 2020/1632 as regards a coordinated approach to facilitate safe travel during the COVID-19 pandemic in the Schengen area	Articles 77(2)(c) and (e), 292 TFEU	25.01.2022

Author's own compilation based on EURLEX.

ANNEX II – THE EU’S LEGISLATIVE RESPONSE TO THE HEALTH EMERGENCY

File	Initiated	Adopted	EP Amendments	EP Urgency Procedure	Voting record Yes – No – Abstain
Financial assistance to Member States and countries negotiating their accession to the Union seriously affected by a major public health emergency ***I 2020/0044(COD)	13.03.2020	30.03.2020	Trilogue	Yes	671 - 3 - 14
Allocation of slots at Community airports ***I 2020/0042(COD)	13.03.2020	30.03.2020	Trilogue	Yes	686 - 0 - 2
Specific measures to mobilise investments in the health care systems of the Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative) ***I 2020/0043(COD)	13.03.2020	31.03.2020	Trilogue	Yes	683 - 1 - 4
Council Regulation 2020/521 activating the emergency support under Regulation 2016/369, and amending its provisions taking into account the COVID-19 outbreak	02.04.2020	15.04.2020	No involvement of Parliament		
Multiannual financial framework for the years 2014-2020 *** 2020/0109(APP)	02.04.2020	17.04.2020	Yes	Yes	n.a.
Multiannual financial framework for the years 2014-2020 *** 2020/0055(APP)	02.04.2020	17.04.2020	No	Yes	n.a.
Resolution on EU coordinated action to combat the COVID 19 pandemic and its consequences 2020/2616(RSP)	16.04.2020	17.04.2020	Yes	No	n.a.
Mobilisation of the Contingency Margin in 2020: providing emergency assistance to Member States and further reinforcing the Union Civil Protection Mechanism/rescEU in response to the COVID-19 outbreak 2020/2057(BUD)	02.04.2020	21.04.2020	Yes	Yes	n.a.
Mobilisation of the Flexibility Instrument: migration, refugee inflows and security threats; immediate measures in the context of the COVID-19 outbreak; reinforcement of the European Public Prosecutor’s Office 2020/2056(BUD)	02.04.2020	21.04.2020	Yes	Yes	n.a.

Amending budget 2/2020: providing emergency support to Member States and further reinforcement of the Union Civil Protection Mechanism/rescEU to respond to the COVID-19 outbreak 2020/2055(BUD)	02.04.2020	21.04.2020	No	Yes	n.a.
Mobilisation of the Flexibility Instrument: migration, refugee inflows and security threats; immediate measures in the context of the COVID-19 outbreak; reinforcement of the European Public Prosecutor's Office 2020/2053(BUD)	27.03.2020	21.04.2020	Yes	Yes	n.a.
Amending budget 1/2020: assistance to Greece in response to increased migration pressure; immediate measures in the context of the COVID-19 outbreak; support to post-earthquake reconstruction in Albania; other adjustments 2020/2052(BUD)	27.03.2020	21.04.2020	No	Yes	n.a.
Medical devices *** 2020/0060(COD)	03.04.2020	23.04.2020	No	Yes	n.a.
Specific measures to mitigate the impact of the COVID-19 outbreak in the fishery and aquaculture sector *** 2020/0059(COD)	02.04.2020	23.04.2020	No	Yes	n.a.
Introduction of specific measures for addressing the COVID-19 crisis *** 2020/0058(COD)	02.04.2020	23.04.2020	No	Yes	n.a.
Specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak *** 2020/0054(COD)	02.04.2020	23.04.2020	No	Yes	n.a.
Resolution on the new multiannual financial framework, own resources and the recovery plan 2020/2631(RSP)	13.05.2020	15.05.2020	No	No	505 - 119 - 69
Council Regulation 2020/672 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak	02.04.2020	20.05.2020	No involvement of Parliament		
Interoperability of the rail system within the EU and Railway safety (4th Railway Package): extension of the transposition period *** 2020/0071(COD)	29.04.2020	25.05.2020	Trilogue	Yes	646 - 6 - 38
Specific and temporary measures in view of COVID-19 outbreak and concerning the validity of certain certificates, licences and	29.04.2020	25.05.2020	Trilogue	Yes	669 - 11 - 8

authorisations and the postponement of certain periodic checks and training in certain areas of transport legislation ***I 2020/0068(COD)					
Provision of port services and financial transparency of ports: enabling managing bodies or competent authorities to provide flexibility in respect of the levying of port infrastructure charges in the context of the COVID-19 outbreak ***I 2020/0067(COD)	29.04.2020	25.05.2020	Trilogue	Yes	531 - 141 - 16
Temporary measures concerning the general meetings of European companies (SE) and of European Cooperative Societies (SCE) *** 2020/0073(APP)	11.05.2020	25.05.2020	No	Yes	657 - 30 - 6
Common rules for the operation of air services in the Community in view of the COVID-19 pandemic ***I 2020/0069(COD)	29.04.2020	26.05.2020	Trilogue	Yes	541 - 29 - 17 -
Macro-Financial Assistance to enlargement and neighbourhood partners in the context of the COVID-19 pandemic crisis ***I 2020/0065(COD)	22.04.2020	26.05.2020	Trilogue	Yes	547 - 93 - 47
Council decision as regards the reference period intended to be used for measuring growth of CO2 emissions, to take account of the consequences of the COVID-19 pandemic in the context of CORSIA	19.05.2020	09.06.2020	No involvement of Parliament		
Resolution on European protection of cross-border and seasonal workers in the context of the COVID-19 crisis 2020/2664(RSP)	18.06.2020	19.06.2020	Yes	No	593 - 34 - 38
Resolution on transport and tourism in 2020 and beyond 2020/2649(RSP)	17.06.2020	19.06.2020	No	No	587 - 32 - 46
Resolution on the situation in the Schengen area following the COVID19 outbreak 2020/2640(RSP)	18.06.2020	19.06.2020	Yes	No	520 - 86 - 59
European Agricultural Fund for Rural Development (EAFRD): specific measures to provide exceptional temporary support under EAFRD in response to the COVID-19 outbreak ***I 2020/0075(COD)	30.04.2020	24.06.2020	No	Yes	n.a.
Capital Requirements Regulation: adjustments in response to the COVID-19 pandemic ***I 2020/0066(COD)	28.04.2020	24.06.2020	Yes	No	522 - 156 - 9

Taxation - administrative cooperation: deferral of certain deadlines for the filing and exchanging of information in the field of taxation due to the COVID-19 pandemic * 2020/0081(CNS)	08.05.2020	24.06.2020	No	Yes	n.a.
Resolution on the EU's public health strategy post-COVID-19 2020/2691(RSP)	08.07.2020	10.07.2020	Yes	No	526 - 105 - 50
Resolution on the rights of persons with intellectual disabilities and their families in the COVID-19 crisis 2020/2680(RSP)	08.07.2020	10.07.2020	No	No	682 - 3 - 10
Conduct of clinical trials with and supply of medicinal products for human use containing or consisting of genetically modified organisms intended to treat or prevent coronavirus disease *** 2020/0128(COD)	17.06.2020	15.07.2020	No	Yes	507 - 67 - 9
Emission limits and type-approval for internal combustion engines for non-road mobile machinery: transitional provisions in order to address the impact of COVID-19 crisis *** 2020/0113(COD)	02.06.2020	15.07.2020	Yes	Yes	653 - 17 - 11
European citizens initiative: temporary measures concerning the time limits for the collection, verification and examination stages in view of the COVID-19 outbreak *** 2020/0099(COD)	20.05.2020	15.07.2020	Trilogue	Yes	684 - 7 - 3
Value added tax (VAT) - administrative cooperation and combating fraud: postponement of the date of application due to the outbreak of the COVID-19 crisis * 2020/0084(CNS)	08.05.2020	20.07.2020	Yes	Yes	494 - 165 - 35
VAT e-commerce package: distance sales of goods and services: postponement of the date of application due to the outbreak of the COVID-19 crisis * 2020/0082(CNS)	08.05.2020	20.07.2020	Yes	Yes	485 - 162 - 43
Amending budget 6/2020: increase of payment appropriations for the Emergency Support Instrument to finance the 2020/1997(BUD)	28.08.2020	17.09.2020	No	Yes	n.a.
Resolution on COVID-19: EU coordination of health assessments and risk classification, and the consequences for Schengen and the single market 2020/2780(RSP)	15.09.2020	17.09.2020	No	No	595 - 50 - 41

Resolution on the cultural recovery of Europe 2020/2708(RSP)	10.07.2020	17.09.2020	No	No	598 - 42 - 46
Measures for a sustainable rail market in view of the COVID-19 pandemic ***I 2020/0127(COD)	19.06.2020	07.10.2020	Yes	Yes	678 - 3 - 5
Asylum, Migration and Integration Fund and Instrument for financial support for police cooperation, preventing and combating crime, and crisis management: decommitment procedure ***I 2020/0140(COD)	13.07.2020	21.10.2020	No	No	634 - 39 - 16
Resolution on the future of European education in the context of COVID-19 2020/2760(RSP)	19.10.2020	22.10.2020	Yes	No	593 - 58 - 36
Specific measures on L-category end-of-series vehicles in response to the COVID-19 outbreak ***I 2020/0251(COD)	07.09.2020	11.11.2020	No	No	677 - 4 - 6
Organic production: date of application and certain other dates ***I 2020/0231(COD)	04.09.2020	11.11.2020	No	Yes	683 - 3 - 8
Resolution on the impact of COVID-19 measures on democracy, the rule of law and fundamental rights 2020/2790(RSP)	12.11.2020	13.11.2020	No	No	496 - 138 - 49
Resolution on the Schengen system and measures taken during the COVID-19 crisis 2020/2801(RSP)	24.11.2020	24.11.2020	No	No	619 - 45 - 28
Foreign policy consequences of the COVID-19 outbreak 2020/2111(INI)	17.09.2020	25.11.2020	No	No	467 - 80 - 148
Temporary measures in relation to value added tax for COVID-19 vaccines and in vitro diagnostic medical devices * 2020/0311(CNS)	28.10.2020	01.12.2020	No	Yes	684 - 5 - 5
Council Regulation 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis	28.05.2020	14.12.2020	No involvement of Parliament		
Authorising the Commission to vote in favour of the capital increase of the European Investment Fund ***I 2020/0343(COD)	25.11.2020	23.12.2020	No	Yes	652 - 30 - 13
Exceptional additional resources and implementing arrangements under the Investment for growth and jobs goal to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and preparing a green, digital and resilient recovery of the economy (REACT-EU) ***I 2020/0101(COD)	28.05.2020	23.12.2020	Trilogue	No	663 - 17 - 15

The gender perspective in the COVID-19 crisis and post-crisis period 2020/2121(INI)	17.09.2020	21.01.2021	Yes	No	485 - 86 - 108
COVID-19 vaccines strategy and for the impact of the Corona Response Investment Initiative + - Mobilisation of the European Union Solidarity Fund: assistance to Croatia and Poland in relation to a natural disaster and payment of advances to Croatia, Germany, Greece, Hungary, Ireland, Portugal and Spain in relation to a public health emergency 2020/0299(BUD)	09.10.2020	27.01.2021	Yes	No	682 - 8 - 2
Amending budget 8/2020: mobilisation of the European Union Solidarity Fund to provide assistance to Croatia and Poland in relation to a natural disaster and to provide for the payment of advances to Croatia, Germany, Greece, Hungary, Ireland, Portugal and Spain in relation to a public health emergency 2020/0297(BUD)	09.10.2020	27.01.2021	No	No	682 - 8 - 2
Fund for European Aid to the Most Deprived (FEAD) 2014-2020: specific measures for addressing the COVID-19 crisis ***I 2020/0105(COD)	28.05.2020	10.02.2021	Trilogue	No	649 - 7 - 31
Recovery and Resilience Facility ***I 2020/0104(COD)	28.05.2020	12.02.2021	Trilogue	No	582 - 40 - 69
Temporary relief from the slot utilisation rules at Community airports due to the COVID-19 pandemic ***I 2020/0358(COD)	16.12.2020	16.02.2021	Yes	Yes	683 - 3 - 4
EU Recovery prospectus and targeted adjustments for financial intermediaries to help the recovery from the COVID-19 pandemic ***I 2020/0155(COD)	24.07.2020	16.02.2021	Trilogue	No	585 - 50 - 55
Markets in financial instruments: information requirements, product governance and position limits to help the recovery from the COVID-19 pandemic ***I 2020/0152(COD)	24.07.2020	16.02.2021	Trilogue	No	339 - 294 - 57
Amending Regulation (EU) No 575/2013 as regards adjustments to the securitisation framework to support the economic recovery in response to the COVID-19 crisis ***I 2020/0156(COD)	24.07.2020	31.03.2021	Trilogue	No	474 - 172 - 62
General framework for securitisation and specific framework for simple,	24.07.2020	31.03.2021	Trilogue	No	474 - 172 - 62

transparent and standardised securitisation to help the recovery from the COVID-19 crisis *** 2020/0151(COD)					
Amending budget 1/2021: financing the COVID-19 response and including refinements and updates related to the final adoption of the Multiannual Financial Framework 2021/0078(BUD)	24.03.2021	18.05.2021	No	Yes	660 - 32 - 4
Mobilisation of the European Union Solidarity Fund: assistance to Greece and France in relation to natural disasters and to Albania, Austria, Belgium, Croatia, Czechia, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Portugal, Romania, Serbia, Spain in relation to a public health emergency 2021/0077(BUD)	24.03.2021	18.05.2021	No	Yes	669 - 7 - 17
Digital Green Certificate - third-country nationals *** 2021/0071(COD)	17.03.2021	14.06.2021	Yes	Yes	553 - 91 - 46
Digital Green Certificate - Union citizens *** 2021/0068(COD)	17.03.2021	14.06.2021	Yes	Yes	546 - 93 - 51
Council Recommendation 2021/961 amending Recommendation (EU) 2020/1475 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic		16.06.2021	No involvement of Parliament		
The role of the EU's development cooperation and humanitarian assistance in addressing the consequences of the COVID-19 pandemic 2020/2118(INI)	17.09.2020	23.06.2021	No	No	443 - 40 - 209
Transitional provisions of certain machinery fitted with engines in the power range between 56kW and 130kW, and above 300kW in order to address the impact of COVID-19 crisis *** 2021/0129(COD)	18.05.2021	24.06.2021	No	Yes	647 - 28 - 17
Council Decision 2021/1072 on a temporary derogation from Decision 2013/471/EU on the granting of daily allowances to and the reimbursement of travelling expenses of members of the European Economic and Social Committee and their alternates in view of the travel difficulties caused by the COVID-19 pandemic in the Union		30.06.2021	No involvement of Parliament		
Trade related aspects and implications of COVID-19 2020/2117(INI)	17.09.2020	07.07.2021	No	No	509 - 63 - 120
European Fund for Sustainable Development (EFSD), the EFSD	28.05.2020	ongoing	Yes	No	n.a.

Guarantee and the EFSD Guarantee Fund *** 2020/0107(COD)					
Solvency Support Instrument *** 2020/0106(COD)	29.05.2020	ongoing	Yes	No	n.a.
Regulation of the European Parliament and the Council on serious cross-border threats to health and repealing Decision No. 1082/2013/EU	11.11.2020	ongoing	Trilogue	No	594 – 85 – 16

Authors own compilation based on data provided by EURLEX and OEIL.

ANNEX III – REPORTS ON A SELECTION OF THE EU NATIONAL PARLIAMENTS AND INTERNATIONAL ASSEMBLIES

NATIONAL PARLIAMENTS

1. HUNGARY

Hungary is a representative democracy. It has free elections and a multiparty parliamentary setting, however, since 2010, the rightwing party Fidesz dominates the political landscape largely unchallenged. The constitution of 1989 was subject to several amendments and in January 2012, the Prime Minister, Viktor Orbán, promulgated a revised constitution. The controversial new version is criticized for enhancing the power of the central government vis-à-vis the local governmental institutions. The Constitutional Court has the power to scrutinize and declare bills as obsolete. Since 2012, the president of the National Judiciary Office, who is elected by the Parliament, is granted extensive powers, such as heading the selection procedure for new judges. This enhancement of power has come at the expense of the self-governing body of judges, which has led to criticism of the neutrality and independence of the judicial system. The unicameral National Assembly holds legislative power. It appoints the Council of Ministers, the president of the Supreme Court, the chief prosecutor, and the president of the republic. The prime Minister heads the Council of Ministers, which is the focal institution for state administration (Vardy A. et al., 2021). Emergency Powers

1.1 Emergency procedures

Provisions for states of emergency are dealt with in Articles 48-54 of the Hungarian constitution.¹²⁷ The articles list a variety of situations in which the authorities may invoke a state of emergency – including state of extreme danger, danger of an external armed attack or natural or industrial disaster. Since the Constitution of 2012 attaches such great importance to emergency situations and endows the government with far-reaching powers it has also been referred to a “crisis management constitution”. In the past, the President, Viktor Orbán, repeatedly declared states of emergencies to increase his power and adopt measures that, albeit only temporary in nature, ultimately remained in place after the crisis (Kovács, 2020).

1.2 The Hungarian Parliament during COVID-19

Hungary’s first governmental response to the pending pandemic was declaring a “state of danger because of the pandemic” on 11 March 2020. The authorities referred to Article 53 of the Constitution, which states that “[t]he government shall declare a state of extreme danger and may adopt any extraordinary measure defined by a cardinal Act” but the decree’s main constitutional authorization comes from Article 15(1), stating that “[t]he Government shall be the general body of executive power, and its responsibilities and competences shall include all matters not expressly delegated by the Fundamental Law or other legislation to the responsibilities and competences of another body”. Since the state of emergency would cease to exist automatically after 15 days, the government submitted a draft of the “Act on Protecting against the Coronavirus” already on 23 March 2020.¹²⁸ It has since then

¹²⁷ https://www.constituteproject.org/constitution/Hungary_2011.pdf

¹²⁸ <https://perma.cc/9LMR-YS3L>

been referred to as the Enabling Act – a nod to the German Law of 1933 that granted the German Cabinet and the Chancellor the right to enforce laws without involving the Reichstag, that is the lower house of the legislative arm. Although Parliament was in session, the “Act on Protecting against the Coronavirus” prevented it from executing any means of scrutiny of the new measures by the executive. The Act provides that the government merely has to inform the Parliament about new measures, deriving the latter of any means of oversight or scrutiny. Provisions may be suspended or abrogated by the government without consent of the legislative arm. Despite fierce criticism, also from the EP¹²⁹ the Hungarian Parliament approved of the Enabling Act on March 30, 2020 (Kovács, 2020).

The Act does not only curb the functions of the parliament. It also postpones referenda and elections until the emergency is declared to be over and restricts the freedom of press. It circumvents the checks the constitution provides for emergency laws, such as the Parliament’s power to revoke an emergency law (Scheppele, 2020). While the Constitutional Court remained operational, all other courts were shut down even before schools. Since the Constitutional Court cannot check the government by itself but must rely on lawsuits brought by the normal courts, no control could be exercised on the government through this channel. In June 2020, the parliament revoked the declaration of state of emergency and transformed it into a medical emergency (Kovács, 2020). On 4 November, the government declared a “state of danger”, which Orbán used to amend the constitution and expand the conditions under which emergencies can be declared. In effect, the president received unlimited emergency powers (Kovács, 2021).

2. GERMANY

Germany’s constitutional framework is based within the Basic Law “Grundgesetz” (GG).¹³⁰ Both the national government and the 16 federal states are organized as parliamentary democracies. A law can only be enacted at the federal level if the Basic Law expressly allows the federal government to have legislative competence; otherwise, legislative competence lies with the Länder (Article 70 GG). In the area of public health, the Basic Law gives the federal government legislative competence for, among other things, measures to combat diseases (Article 74 Para. 1, Article 19 GG). This goes back to the Infection Protection Act,¹³¹ which regulates responses to infectious health threats such as pandemics. However, there is no competence of the federal government for civil disaster control – here again, the states are responsible (Kaiser et. al 2021).

2.1. Emergency procedures

Given the fact that the emergency constitution of the Weimar Republic played a decisive role in the downfall of the republic, the Grundgesetz is very restrictive when it comes to states of emergency. In its original 1949 version, the Grundgesetz did not include emergency measures. This changed in 1968, when some amendments concerning several emergency scenarios were inserted into the Grundgesetz. This includes a state of emergency that can be triggered due to natural disasters (Article 35), civil unrest (recast Article 91) and war (Articles 115a-115l of the Basic Law). This enumerative list of cases is considered exhaustive and does not allow room for more general emergency-triggering situations, such as a pandemic. By simplifying procedures as well as concentrating competences, both

¹²⁹ <https://www.europarl.europa.eu/news/en/press-room/20200324IPR75702/ep-stands-up-for-democracy-in-hungary-during-covid-19>

¹³⁰ https://www.gesetze-im-internet.de/englisch_gg/

¹³¹ <https://www.gesetze-im-internet.de/ifsg/>

in terms of the vertical and horizontal separation of powers, the existence and the free democratic constitutional order of the federal and state governments would be protected in emergency situations (Kaiser et. al, 2021). However, because these emergency Regulations did not apply to the COVID-19 situation, special health laws took effect. A state of emergency under the Basic Law was not declared.

The special law that applies in the case of the COVID-19 pandemic is the “Infektionsschutzgesetz”, the German Infection Protection Act (IPA). The implementation of this law is carried out federally, i.e. that the federal states are the primary authorities. These can take measures through legal decrees. Accordingly, the federal states enacted a multitude of individual restrictions within the parameters of a framework catalogue adopted in each case by the Conference of Minister Presidents (“Ministerpräsidentenkonferenz”), which were not necessarily coordinated with each other.

2.2. The German Parliament during COVID-19

2.2.1. Legislative function and policy making

Germany responded to the pending pandemic by issuing a federal decree based on Article 15 of IPA which regulated the reporting of the – at the time – novel coronavirus. At the beginning of the pandemic, the federal and state governments issued decrees, mainly without the involvement of parliaments, ordering contact restrictions, closures of schools, universities and stores.

On 27 March, 2020, the Bundestag hurriedly adopted the “Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance”¹³² which grants the federal health ministry extensive powers to regulate the pandemic through the issuance of decrees. These decrees may even deviate from existing acts of Parliament or contradict the IPA itself (Kaiser & Hensel, 2020). The transfer of power was based on the Bundestag having declared an “epidemic situation of national importance” and shall cease to exist as soon as the Parliament declares the exceptional situation to be over. However, there was no clear definition as to what even constitutes an “epidemic situation of national importance” (Mangold, 2021).

On 19 May, 2020, the “[Second Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance](#)”¹³³ was adopted but did not improve the issue of power transfer. Finally, the second revision of the “[Third Act on the Protection of the Population in the Event of an Epidemic Situation of National Significance](#)”, which was adopted on 18 November 2020 added a definition of this “epidemic situation of national importance” and also introduced the new § 28a IPA (Mangold, 2021): Accordingly, an epidemic situation of national importance exists if “there is a serious danger to public health throughout the Federal Republic of Germany because (a) the World Health Organisation has declared a public health emergency of international concern and there is a threat of a threatening communicable disease being introduced into the Federal Republic of Germany, or (b) there is a threat of or a dynamic spread of a threatening communicable disease across several Länder in the Federal Republic of Germany.”¹³⁴

¹³² https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBL&jumpTo=bgbl120s0587.pdf#_bgbl_-%2F%2F%5B%40attr_id%3D%27bgbl120s0587.pdf%27%5D_1642345206493

¹³³ https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBL&jumpTo=bgbl120s1018.pdf#_bgbl_-%2F%2F%5B%40attr_id%3D%27bgbl120s1018.pdf%27%5D_1642511645008

¹³⁴ Author’s own translation. Original reads: “Eine epidemische Lage von nationaler Tragweite liegt vor, wenn eine ernsthafte Gefahr für die öffentliche Gesundheit in der gesamten Bundesrepublik Deutschland besteht, weil die Weltgesundheitsorganisation eine gesundheitliche Notlage von internationaler Tragweite ausgerufen hat und die Einschleppung einer bedrohlichen übertragbaren Krankheit in die Bundesrepublik Deutschland droht oder eine dynamische Ausbreitung einer bedrohlichen übertragbaren Krankheit über mehrere Länder in der Bundesrepublik Deutschland droht oder stattfindet.

2.2.2. Working conditions, control and transparency

Overall, the Parliament continued to perform its functions of oversight, control and scrutiny. Given the severe restrictions adopted by the government, the lack of extra control can be criticized. However, as with Parliament, the committees had to drastically change the way they worked at the beginning of the pandemic. The number of physical participants was limited to ten people while the rest had to rely on online presence. The Parliament itself modified the Rules of Procedure with the adoption of the new paragraph 126-a to enable restricted meetings.¹³⁵ The alterations include the possibility for the MPs to cast their vote in different parts of the Bundestag as well as the introduction of an exception to the requirement of physical presence in cases where a personal vote is not needed (Ridard, 2020, pp. 5–7).

3. ITALY

Italy is a unitary parliamentary republic, with a bicameral system. The Constitution *Costituzione della Repubblica Italiana* was enacted in 1948 and has been in force ever since (*Costituzione della Repubblica Italiana*, 1948).

3.1. Emergency procedures

The Italian Constitution does not provide for a state of emergency. Initially, Italian national authorities took extraordinary measures in primary legislation. Although the Constitution does not directly regulate the state of emergency, it provides specific instruments for emergency situations which are regulated within Article 77 of the Constitution. In such emergency situations, the government may be granted special legislative power to enact legislative decrees. These legislative decrees are temporary measures issued by the government in cases of urgency. If they are not converted into a law by Parliament after 60 days, they cease to exist. Here, Parliament delegates to the Government the required powers to legislate on its own (Civitarese Matteucci et al, 2021).

The statutory state of emergency was officially declared on 31 January 2020 by the Council of Ministers, and has been in effect ever since. Parliament was not involved in the decision. This state of emergency granted exclusive legislative powers to the government and the executive, here mainly the Council of Ministers and the Minister of Health as well as the Department of Civil Protection. As the response to the pandemic has been mainly at the hands of the national government, a series of legislative decrees were issued. In sum, 18 decrees were adopted between 2020 and 2021 in Italy. The legal decrees, without actual legislative character due to a lack of parliamentary vote, issued during the pandemic replaced many pre-existing legal instruments. These decrees interfered with some fundamental rights in order to protect civilians during the state of emergency caused by the high number of cases (Fasone, 2021).

3.2. Italy's Parliament during COVID-19

Proposing the possibility of a virtual parliament was rejected in Italy because the Constitution and the Rules of Procedure of the Houses clearly require the physical presence of the members of Parliament (Ciolli, Luciani 2020).

¹³⁵ <https://www.bundestag.de/resource/blob/189760/8bf91792f5b01372eeea272d0344d969/reglement-data.pdf>

3.2.1. Legislative function

By changing the dynamics through an increase in power of the government, Parliament was mainly concerned with the transposition of the decrees into law (Ciolli, Luciani 2020). The Italian government restricted discussion and voting in the parliamentary plenary. Key governmental measures – like decree-laws and budget bills were adopted as so-called maxi-amendments (amendments composed of one article and thousands of paragraphs, replacing the entire text of the bill) combined with questions of confidence. Consequently, the ‘normal’ voting of bills in the plenary article by article has been effectively prevented. The acceleration of legislative procedures due to the high infection rates in Italy resulted in a systematic development toward some kind of “hidden” uni- or mono-cameralism through the decreased involvement of Parliament: Under normal conditions, the Constitution regulates the system of an equal vote of the two chambers. During the pandemic, legislative activity was concentrated in one House only. Amendments were only approved by the chamber that first started the reading of the bill and were rarely modified by the other. (Fasone, 2021). An early analysis by reveals that during the pandemic’s first wave, Parliament was effectively able to amend and influence the decree-making powers of the government: “Parliament ratified 15 statutory decrees and approved 860 amendments, with significant inflation of the content of the transposed acts compared to the original statutory decree. [...] This suggests Parliament’s ability to engage in effective scrutiny of statutory decrees; a capability that is, however, hampered by pre-existing issues which have been accentuated by the emergency. These issues not only relate to how the executive exercises its statutory decree-making powers, but also to the general relationship between Parliament and Government” (Civitarese Matteucci et.al. 2021, p. 33).

3.2.2. Control and transparency

As with legislation, the Italian Parliament was restricted in its control function. Normally, parliamentary scrutiny should be directed both to the health emergency and to its most direct consequence, the economic emergency. During the pandemic, parliamentary control was not exercised as usual due to the increased power of government and the resulting decrease in parliamentary ex-ante scrutiny and co-decision. Traditional scrutiny instruments such as urgent questions, question time, and urgent interpellations proved to be particularly useful in overseeing the Government’s Regulation making powers (Griglio 2020). The committees worked less, despite the heightened focus on pandemic issues. In order to improve the situation, a law has been proposed that includes the parliament in the decision-making process and in the ex-post control of the measures taken by the government by introducing a reduced two-chamber committee. This committee should control executive power through advisory acts and hearings. These measures have not been adopted but have been debated since (Ciolli, Luciani 2020). On the other hand, statutory decree n. 19/2020 tends to remedy the shortcomings in parliamentary scrutiny and forces government to communicate to the Parliament the measures adopted within one day from their publication in the Official Gazette. Moreover, the prime minister must inform the Parliament at least every 15 days about ongoing initiatives. Finally, the government provide both chambers with ex-ante insight into planned emergency measures, in order for MPs to give any recommendations. These provisions allow Parliament to move resolutions aimed to define the chambers’ position on specific matters. For example, in both July and October 2020, the two Houses moved and approved a resolution expressing their approval for extending the legislative state of emergency.

4. AUSTRIA

Austria's constitution is composed of several constitutional laws that define fundamental rights and principles for the organization of the state. While there is no single constitutional instrument at the federal level, the main source of constitutional law is the Federal Constitutional Law of 1920, which has been regularly amended since then (Republic of Austria, 2021).

4.1. Emergency procedures

Within the Austrian constitution the Federal President is enabled to issue Regulations if federal and provincial parliaments are no longer able to do so (Federal Constitutional Law, 1920, Article 18, 87). However, an official state of emergency is not defined within the Constitution or Constitutional law in Austria. In emergency situations, the Austrian Federal President is empowered to take the necessary measures by interim law-amending decrees, upon the proposal of the Federal Government and on its responsibility, if Parliament does not session or does not session in time or is prevented by circumstances beyond its control from averting manifest and irreparable harm to the polity. Such recommendation is made on behalf of the Federal Government with the approval of the Permanent Subcommittee to be appointed by the Main Committee ("Hauptausschuss") of the National Council. If the Federal President adopts such a decree, it must be countersigned by the Federal Government and submitted without delay to the National Council. Thereupon, within four weeks of its introduction, the National Council either adopts an appropriate federal law in place of the ordinance or passes a resolution calling for the immediate repeal of the ordinance. Another option available to the executive branch in Austria is to enact certain simple laws and Regulations for times of economic crisis or shortage to ensure necessary supplies (Venice Commission, 1995).

The only change made to this constitutional framework during the pandemic was the authorization to hold meetings of the Federal Government and local councils virtually. As all presidential Regulations must be submitted to Parliament without delay, which is regulated in Article 18 of the Federal Constitution, legislative procedures have been maintained. Four weeks within submission, Parliament can either confirm the presidential Regulation by replacing it with a federal law or pass a resolution repealing it immediately.

The Federal Constitution was amended in part to match the health crisis through the adoption of a legislative order of the Federal Constitution Act. Here it now reads Article 69(3): "Resolutions may be adopted by circular letter or by video conference. If the Federal Government meets in the personal presence of its members, it shall constitute a quorum if more than half of its members are present." Similar legislative adjustment was made for local council meetings. Meanwhile, the Federal Parliament still met in attendance. Here, supplementary Regulations - apart from the Rules of Procedure - helped to enable the continuation of meetings and the parliamentary procedures. Since at least one-third of the members must be present for votes (half in the case of constitutional amendments), the political groups agreed to limit the number of MPs present proportionally during the first phase of the pandemic. Remote working applied to most staff. Only those whose presence is absolutely necessary, work on site (e.g. security staff, technicians, registrar's office). Committee and plenary staff are present only on session days (Stöger, 2021). Another point of temporary amendment was the speed up of parliamentary procedures by limiting time and prioritizing only necessary business. Here, issues of emergency or priority were discussed primarily (Murphy, 2020 pp 19.).

The National and the Federal Parliament passed the first COVID-19 measures in a weekend session in March 2020, the first fast-track procedure in Austria ever. The subsequent COVID-19 legislative package, adopted by an independent motion of 5 members of parliament, was passed in a fast-track

procedure with the National Council. To this end, a separate plenary session was held on the same weekend. In order for the committee reports to be taken to second and third reading by the plenary, the National Council first had to decide to dispense with the 24-hour period of recess that would otherwise apply. After a debate that lasted a few hours, the National Council passed its resolution. At the end of the session, the official minutes still had to be read out so that they would be considered approved at the end of the session (and not at the end of the following working day). The resolutions could thus be executed immediately and forwarded to the Bundesrat. Without prior preliminary discussion in a committee, the Bundesrat then decided with a two-thirds majority and confirmed the National Council's resolution. In order to pass the law on COVID-19 measures on the same day, the official minutes were read out and signed by the President and the Federal Chancellor (Republic of Austria, Parliament 2021).

4.2. Austria's Parliament during COVID-19

The Austrian Parliament defines its role as a legislative and controlling entity. The functions of the Austrian Parliament are to legislate, to control the government and to represent the public. In addition, it is responsible for participation in the administration and the EU, the Austrian budget law and for the election of public officials (Republic of Austria, Parliament, 2021).

4.2.1. Legislative Function

For the National Council, the Rules of Procedure Law applies in addition to the Rules of Procedure. According to Article 82 of this law, members of parliament must vote in attendance (Republic of Austria, 1975). During COVID-19 this law continued to be applied, as Parliament amended its intra-parliamentary rules to ensure legislative procedures in attendance. Therefore, the option of video-conference meetings and plenary sessions was denied by the operative law. To allow for decision making via videoconference, the provisions in the rules of procedure would have had to be amended for committees and the Federal Constitution would have had to be amended for resolutions in the National Council and the Federal Council (Republic of Austria, Parliament 2021).

In order to maintain the ability to operate, the National Council, the Federal Council as well as the provincial parliaments were exempt from general restrictions that were applied to all other areas in Austria. Thus, for several weeks, there was no question time or topical debate in order to keep the sessions as short as possible. This limitation of time ensured efficiency within the operation of parliamentary procedures. In addition to these priority measures, the discussion of some plenary documents was postponed by consensus of the parliamentary groups to a later date. As the Rules of Procedure of the Austrian Parliament do not authorize remote meetings, the focus here was primarily on organizational, hygienic and security measures. Here, an amendment of the house rules was regularly modified to match the common rules and Regulations in Austria regarding health and hygiene. These rules were most recently reinforced on 06.12.2021 by an amendment order within the house rules, which states that now only fully vaccinated or recovered employees may enter the parliament buildings. In addition, the FFP2 mask requirement applied throughout the pandemic (Republic of Austria, Parliament 2021).

4.2.2. Control and transparency

The National Council controls the government by traditional instruments such as written and urgent questions, and the possibility of withdrawing confidence from the entire government or individual members of it, thus forcing their removal from office. By means of motions, the members of parliament can address political concerns to the government. The transparency of political processes and decisions in Austria is ensured by the public nature of its meetings (Republic of Austria, Parliament

2021). The measures that come with the controlling function of the National Council are all regulated within the rules of procedure. Regarding questions, the number of members of the National Council who submit them is particularly important. A written question addressed to a member of the Federal Government shall be treated as urgent if it is moved in plenary by five members of the Nationalrat or five members of the Bundesrat. The urgent questions are justified orally on the day they are tabled, and the member of the Federal Government who is questioned is required to make a statement, followed by a debate. At the beginning of sessions there is normally a time-slot for questions, during which the MPs may put short oral questions to the members of the Federal Government, which must be answered without delay. Five members of the National Council or three members of the Bundesrat have the right to demand information from the Federal Government or its members by means of written questions on all matters within their competence. The answer of those questions must be given within two months. Five members of the National Council or three members of the Federal Council may submit motions for resolutions in which the chambers express their wishes regarding the exercise of the administration of justice. The right to move a motion of no confidence and questions to members of government and parliament were increasingly used during the crisis in Austria (Republic of Austria, Parliament 2021). Opposition parties have a slim majority in the Federal Council, which they used twice to block government initiatives: In January 2021, the announcement of a probable veto led to the abandonment of a legislative proposal by the Government, and in March 2021, a bill was actually vetoed, postponing its entry into force until late May 2021.

5. LATVIA

Latvia has a unitary form of government with a unicameral system. Within the latter, the Latvian Constitution of 1922 serves as the constitutional framework (Bater, 2022).

5.1. Emergency procedures

Within the Latvian Constitution it is stated that the Cabinet can proclaim a state of emergency (Constitution of the Republic of Latvia, 1922). In addition to that, the Latvian Law of Emergency Situation and State of Exception is applied in those emergency situations (Law on Emergency Situation and State of Exception 2020). Within this framework, Latvia declared a state of emergency from 12 March to 14 April 2020, from 9 November 2020 to 11 January 2021 and most recently again from 11 October 2021 to 28 February 2022. It appointed the Ministry of Health as the authority responsible for coordinating operations during the emergency. Latvia thus stands out as one of few European states that proclaimed a state of emergency based on the constitution. With the imposition of the state of emergency in Latvia came procedural changes in the Cabinet, ensuring the ongoing legislature (Latvian Cabinet, 2020, 2021).

5.2. Latvian Parliament during COVID-19

The Latvian Parliament has legislative and control functions. In addition, it is responsible for adopting the state budget, appointing and confirming state officials, as well as for foreign policy (Latvijas Republikas Saeima, 2022).

5.2.1. Legislative function

As the Constitution of Latvia strictly prescribes that the Parliament retains the legislative function in the state of emergency, the functioning of the Parliament as one of the constitutional bodies was vital under all circumstances and its effectiveness a priority (Rodina et Inese, Libina-Egnere, 2020). To ensure

that, procedural changes were made based upon the state of emergency in Latvia. These changes were tied into the nation's already existing, highly developed e-government (Latvian Cabinet, 2020, 2021).

Since the outbreak of the COVID-19 pandemic, the Latvian Parliament, Saeima, has convened in a series of extraordinary sessions and taken urgent decisions to reduce the impact of the pandemic (Rodina et Inese, Libina-Egnere, 2020). Within these changes in spring 2020, a digital platform called e-Saeima was developed for parliamentary procedures and has since been put into operation, allowing plenary sessions to be held remotely, with MPs debating and voting on plenary agenda items in real time. Although MPs used the tool from different rooms inside the Parliament building during the sessions, the setup also allows for participation from anywhere outside the building. Sessions were held in eight separate parliament buildings to ensure social distance. The platform particularly stood out for its voting mode. After activating the voting mode, MPs have 30 seconds to vote using one of three buttons: "For", "Against" and "Abstain". During this time, MPs can also change their vote. Once the vote is completed, the results are displayed on the screen according to the seating plan of the plenary hall. Live information about the sessions, including progress on items, the list of speakers and voting results, is available online on the Saeima website. The work of the Saeima remained open to the public and session can be followed live on the Saeima website and on the Parliament's Facebook account (Rodina et Inese, Libina-Egnere, 2020). Through these technological changes, the Latvian Parliament ensured the smooth operation of parliamentary sessions, using the work environment as well as opening up the possibility of remote working. Additionally, the adaption of a digital system particular to parliamentary sessions stands out.

5.2.2. Control and transparency

The controlling function of the Saemia is exercised by investigative committees as well as parliamentary inquiries and questions (Latvijas Republikas Saemia, 2022).

The Law "On Emergency Situation and State of Exception" provides the Saemia with specific scrutiny functions with regard to the declaration of a state of emergency. Although the decision to declare a state of emergency is made by the Cabinet, it must inform the Saeima immediately. The Parliament prioritized the legislative decision-making processes during the state of emergency. Furthermore, the usual measures of parliamentary scrutiny, i.e., motions and questions, continued to be used. During the pandemic, the Saeima approved a total of twenty-two amendments in addition to the Cabinet decision on the declaration of the state of emergency (Rodina et Inese, Libina-Egnere, 2020).

INTERNATIONAL ASSEMBLIES

6. SWITZERLAND

Switzerland is a federal state. Its federal government executes (among others) the areas of external and internal security, foreign policy, customs, monetary system, military and social insurance programs. The bicameral Federal Assembly, Switzerland's national parliament, holds legislative power and consists of the National Council and the Council of States. Legislative proposals are considered in both chambers and must be approved by both chambers. The Parliament also elects the members of the Federal Council, the Federal Chancellor, as well as the federal court judges. Finally, it is responsible for overseeing the Federal Council, including activities of associated federal institutions such as the federal courts. Through procedural requests – motions, postulates, interpellation, questions or questions

posed at question time in the National Council – members of Parliament, groups or committees can attempt to initiate new legislation or demand reports and papers. These requests are usually directed towards the federal Council.¹³⁶ The federal government (federal Council), which only consists of seven members, holds the executive power. The small size of the Council has been subject to debates, but Swiss voters so far have refrained from altering the constitutional structure and allow for an enlargement. This can, in part, be traced back to the fact that the Swiss government, similar to the European Parliament, has to balance a great variety of linguistic and religious diversity and members of the Federal Council are appointed with respect to maintaining this subtle balance. A great deal of legislation is decided upon referendums and initiatives, granting the Swiss people a lot of power on questions of their own affairs, however, voter turnout is often low, and progress sometimes inhibited (Egli et al., 2021).

6.1. Emergency procedures

While the Swiss constitution provides no explicit legal framework for emergency situations, it does offer several provisions on how to proceed in such cases. Historically known is the “state of necessity” which was adopted during the two World Wars. If the Federal Assembly cannot meet and normal legislative procedure is inhibited, a regime of full powers may be adopted. The Federal Council, the highest executive authority, may then take any measures it deems necessary to safeguard national interests such as independence, the protection of security or the neutrality of the country. This “state of necessity” can be confirmed by the Federal Assembly, if it is able to meet. Another possibility is the “regime of strict necessity” in which the federal Council may enact laws by emergency decrees that might even deviate from the Constitution, however, there has never been such a case to date (Venice Commission, 1995). Lastly, according to Article 185 (1) and (3), the Federal Council takes measures to safeguard external and internal security. It has the power to “issue ordinances and rulings in order to counter existing or imminent threats of serious disruption to public order or internal or external security. Such ordinances must be limited in duration” ([Federal Constitution of the Swiss Confederation of 1999](#)).¹³⁷ These ordinances must be confirmed by the Parliament if they are to be valid for more than six months ([Government and Administration Organisation Act of 21 March 1997](#)).¹³⁸ In case of a health emergency, Article 185 is backed by the Epidemics Act of September 28, 2012, (EpidA) which differentiates between three different situations according to their severity (normal, special, and exceptional). It regulates the protection of humans against communicable diseases and provides the necessary measures to this end ([Bundesgesetz über die Bekämpfung übertragbarer Krankheiten des Menschen](#)).¹³⁹ However, also the Parliament has the power to issue emergency ordinances. Article 165 (1) of the constitution states that “Federal acts whose coming into force cannot be delayed (emergency federal acts) may be declared urgent by an absolute majority of the members of each of the two Councils and be brought into force immediately”. In general, emergency legislation by the Parliament is to be favored since it is perceived to hold greater democratic legitimacy, in especially, when the emergency situation can be expected to continue for a considerable amount of time (Maciel, 2021, p. 8; Uhlmann, 2020).

¹³⁶ See: Swiss Parliament:

<https://www.parlament.ch/en/über-das-parlament/parlamentswörterbuch/parlamentswörterbuch-detail?WordId=238>

¹³⁷ <https://www.fedlex.admin.ch/eli/cc/1999/404/en>

¹³⁸ https://www.fedlex.admin.ch/eli/cc/1997/2022_2022_2022/en

¹³⁹ <https://www.fedlex.admin.ch/eli/cc/2015/297/de>

6.2. The Swiss Parliament during COVID-19

6.2.1. Legislative and policy making

During the pandemic, the government passed various ordinances that included curbing economic activities or restricting the right of public assembly. The first ordinance was issued on 28 February 2020, in which relatively lax restrictions like the banning of events of more than 1.000 people were imposed ([Ordinance 1](#)).¹⁴⁰ The main ordinance, Ordinance 2, was passed on 13 March 2020 ([Ordinance 2](#)).¹⁴¹ Ordinance 2 invokes article seven of the Epidemic Act, (EpidA) which states that in exceptional situations, the Federal Council may order necessary measures for the whole country or for individual parts of it. Contrary to many other countries, the restrictions implemented were less strict – e.g., no general curfew was imposed – however, some of the content of the decrees was in contradiction with the constitution or the usual distribution of competences between the federal government and the cantons (Uhlmann, 2020). Issues not addressed or not explained in an exhaustive manner by Ordinance 2 remained under the responsibility of the Cantons. During the course of the first half of 2020 the Cantons subsequently adopted various legislations on their own, such as shutting down construction sites, which then led to an amendment of the ordinance on part of the Federal Council and so on. As a result, regulatory pandemic control has been described as a patchwork quilt (Uhlmann & Amman, 2021).

As discussed above, emergency ordinances issued by the executive must be approved by the legislative arm within six months of their declaration. The Swiss Parliament followed suit on 25 September 2020 by adopting the “Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the COVID-19 Epidemic”, or in short, COVID-19 Act ([COVID-19 Act](#)).¹⁴² This step simplified crisis response measures, however, various scholars criticized the Act, arguing that it is too vague, lacks a constitutional basis and, through its inclusion of discretionary clauses, overly empowers the executive (Uhlmann & Amman, 2021). Although the Act emphasizes that parliamentary measures are subordinate to executive measures, it does not contain any changes to the institutional framework in this regard (Ammann & Uhlmann, 2022).

6.2.2. Control function and transparency

The Federal Assembly, in order to set an example and protect its own members, colleagues and families, suspended its sessions on March 15, 2020 (Murphy, 2020, p. 21). Apart from the question of legality, members of Parliament criticized the government, warning of authoritarian tendencies. Although an extraordinary session was arranged for May 4, 2020 – which took place at the BERNEXPO exhibition center, a place vast enough to make social distancing for the 200 Parliamentarians possible (Murphy, 2020, p. 46) – it is noteworthy that this step was demanded by the Federal Council rather than the MPs themselves. With the adoption of the COVID-19 Act of September 2020 considerably empowering the Federal Council, the lack of transparency has been increasingly subject of criticism. As Uhlmann and Amman (2021) contest, it has become “increasingly evident that the deliberations among the seven members of the Federal Council cannot replace the wide debate that characterizes parliamentary sessions”.

¹⁴⁰ <https://www.fedlex.admin.ch/eli/cc/2020/107/de>

¹⁴¹ <https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/2020/141/20200402/en/pdf-a/fedlex-data-admin-ch-eli-cc-2020-141-20200402-en-pdf-a.pdf>

¹⁴² <https://www.fedlex.admin.ch/eli/cc/2020/711/en>

6.2.3. Working conditions

As discussed above, Parliament suspended its session on 15 March 2020. With BERNEXPO, a valid alternative location for the sessions of the Federal Assembly and the meetings of the parliamentary bodies was available. Afterwards, measures implemented in the parliamentary building ensured that although occasionally members tested positive on SARS-CoV-2, no bigger clusters developed. The restrictions included keeping distance from each other, sanitizing hands frequently, wearing masks, isolation in case of symptoms and avoidance of gatherings. Furthermore, with the progression of the pandemic, additional measures were implemented such as a reduction of people who were allowed to enter the Parliamentary building, Plexiglas partitions, and since autumn 2020, testing capacities for Council members. As of 2 October 2021, the building can only be entered with a COVID-certificate and a valid identification card. Council members who wear a mask will also be allowed to enter the building without a COVID-certificate. Parliamentary operations during the COVID-19 pandemic were based on the pandemic plan of 2009 that entails relevant fundamentals with regard to hygiene, behavioral Regulations or measures vis-à-vis the Employees of the Parliamentary Services. However, not all parts of the plan were implemented. For example, the pandemic plan provided that a crisis team of the Parliamentary Services would be activated. In the course of the Corona pandemic, however, this crisis team was not deployed – the tasks that arose were taken over by the project organization and the core group.¹⁴³

Concerning the government's communication with the public, Switzerland stands out positively. The Parliament's library and research services use tools to collaborate across the public and businesses, setting a prime example for the increasing trend of parliamentary openness and transparency (Williamson, 2021, p. 58). Furthermore, the website provides real-time updates, offers live streams from sessions taking place as well as audiovisual material like annotated videos (Deveaux et al., p. 62).

7. UNITED STATES OF AMERICA

The U.S.A. is a constitutional, federal republic. The U.S. Constitution, which has been in effect since 1789, recognizes the sovereignty of state and tribal governments and delegates jurisdiction over U.S. territories to the federal government. Each of the 50 states has its own constitution, executive, legislative, and judicial branches and is organized differently. The competencies of most local governments are determined by state constitutions and laws, which designate the degree to which local governments are self-governing (US Constitution, 1789).

7.1. Emergency procedures

With more than 65 million COVID cases, the United States is at present the nation with the highest number of COVID-19 cases in the world (John Hopkins University, 2022). Over the period of the pandemic, a large number of US politicians contracted COVID-19 (Ballotpedia, 2021) which hindered US Congressional work throughout the pandemic (Committee on House Administration, 2020).

The state of the emergency is not recognized explicitly within the US Constitution. In times of proclaimed emergency, the constitutional protection of individual rights is weighed against collective needs (Wiley et al, 2021). The President may, based on the U.S. Constitution and under certain limited and clearly defined circumstances in federal laws, use federal troops to combat domestic violence and

¹⁴³ For all measures implemented, see: <https://www.parlament.ch/centers/documents/de/2021-11-12-Bericht-lessons-learned-zuhanden-der-VD-publ.pdf>

quell civil unrest. In addition, there are minor state and local emergency provisions based on the police power of the state executive branch (governors, mayors, state governors) to take emergency action. These allow the state to interfere with constitutionally protected rights to protect public health, safety, and welfare in an emergency. Laws enacted by the executive branch do not affect the normal activities of the other branches of the federal government (Congress and the judiciary) or exceptions to fundamental rights. Constitutional rights remain in effect at all times (Venice Commission, 1995).

In the United States, the majority of policies in response to COVID-19 were made through administrative statements and orders based on pre-pandemic laws, rather than by new laws or Regulations. No further changes to federal or state constitutions in the United States were made as a result of the pandemic, but the actions taken in response to the pandemic impacted long-term constitutional arrangements and statutory provisions already effective before 2020 that allowed administrative powers and restrictions on a level federal intervention. Here, executive orders made by state officials that aided emergency responses bypassed standard procedures of lawmaking (Wiley et al, 2021).

7.2. US Senate during COVID-19

The US Senate has a legislative function and a control function vis-à-vis the president. In addition, it ratifies international treaties and has decision-making authority in the election of government employees and in the impeachment process (United States Senate, 2021).

7.2.1. Legislative function

The US Senate made changes to their legislative procedures through enacting a resolution to adapt to the COVID-19 situation. The US Senate ensured procedural changes to keep critical work of Congress ongoing. Resolution 965 authorizes - among other - remote voting by proxy in the House of Representatives and provides for official remote committee proceedings during a public health emergency due to a novel coronavirus (116th Congress, 2019-2020). The measures included the creation of committees for virtual hearings as well as an electronic funnel for the introduction of bills. In addition, a system for the electronic transmission of language amendments was developed and remote working was greatly enhanced through digital tools (Committee on House Administration, 2020). In addition to those measures, Congress was able to continue its work during the COVID-19 crisis by testing new procedures by House representatives to obtain testimony outside of traditional face-to-face hearings without making legal procedural changes. The hearings were replaced by written procedures known as "paper hearings" (Smith Baugh, Cooke 2020). Legislative decisions were facilitated by those additional rules, also opening up the possibility of reusing these rules in similar crises. On the one hand, the resolution opened up the possibility of remote voting by another authorized representative in the House of Representatives when voting on legislation. In addition, there were remote voting rules for parliamentary committees. This ensured the legislative function.

7.2.2. Control and transparency

While Resolution 965 ensured many possibilities for remote and virtual working options, the Senate was able to exercise its control function in person, during the pandemic. This was most evident in the two impeachment trials against former President Donald Trump. Both took place within the pandemic, under different working conditions. In both cases, the mode of operation was determined by sanitary measures. In the first impeachment trial, members were not allowed to leave their seats in the plenary chamber. This changed in the second trial, also due to vaccination. Mandatory masks and distance Regulations were ensured for a functioning mode of operation (McDaniel, 2021).

8. AUSTRALIA

Australia is a federal democracy, comprised of six states and two territories with governments at each level. Its constitutional framework is shaped after the models of the United Kingdom and the United States. While the parliamentary setting is modeled after the former – with parliament members choosing the governments of the Commonwealth of Australia as well as of the Australian States – the country's federal structure has been designed according to the USA model. The legislature is bicameral, with the House of Representatives (the lower house) consisting of 150 members and the Senate (the upper house) being comprised of 76 members. In order to alter the constitution, a majority in both houses as well as a follow-up referendum, which receives the approval of a majority of all voters and a majority in at least four of the six states, would be needed. The written constitution guarantees the division of powers between the states and the Commonwealth ([The Australian Constitution](#)).¹⁴⁴ The most important responsibilities for the federal government are immigration, defense, customs and excise as well as foreign policy. Crucially, during the Pandemic, the area of health (as well as justice and education) is supervised by the states (John David et al., 2022). The four main roles of the Commonwealth Parliament are debating and making laws, representation of the Australian people and the formation as well as control of the government. Scrutinization is conducted via the traditional ways of examining draft legislations in debates and committees, reviewing decisions and questioning the government in both houses.¹⁴⁵ Working methods also include the establishment of committees which are usually supported by a small secretariat. All Members of Parliament can call on the considerable resources of the Parliamentary Library. Usually, committees call for public submissions and hold public inquiries. The proceedings of Parliament, including the proceedings of most committee inquiries, are broadcast on television and on the internet.

8.1. Emergency procedures

On a federal level, the Biosecurity Act 2015 (Cth) regulates biosecurity emergencies ([Biosecurity Act 2015 \(Cth\)](#)).¹⁴⁶ Upon a declaration of emergency, the Minister of Health receives greater powers in order to, e.g. mitigate a pending pandemic. According to subsection 477 (2) of the Biosecurity Act, measures taken by the health minister under subsection 477 (1) cannot be rejected by the Parliament and are therefore exempt from disallowance. In addition, various bills allow delegated legislation related to the crisis. State of emergencies at the state or territory levels are regulated according to the Emergency Management Act 2005 ([Emergency Management Act 2005](#)) or,¹⁴⁷ in the case of a pandemic, the Public Health Act 2016 ([Public Health Act 2016](#)).¹⁴⁸

8.2. The Australian Parliament during COVID-19

8.2.1. Legislation and policy making

One of the first measures taken by the Australian Parliament was to agree on dealing only with legislation that was related directly to the Pandemic. It was not in session for legislation between 23 March 2020 and 08 April 2020. It did meet again on 12 and 14 May 2020, only to be suspended again

¹⁴⁴ <https://www.aph.gov.au/constitution>

¹⁴⁵ https://www.aph.gov.au/About_Parliament/Work_of_the_Parliament

¹⁴⁶ <https://www.legislation.gov.au/Details/C2019C00097>

¹⁴⁷ [https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_42669.pdf/\\$FILE/Emergency_Management_Act_2005_-_5B01-c0-05%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_42669.pdf/$FILE/Emergency_Management_Act_2005_-_5B01-c0-05%5D.pdf?OpenElement)

¹⁴⁸ [https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_44235.pdf/\\$FILE/Public_Health_Act_2016_-_5B00-I0-00%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_44235.pdf/$FILE/Public_Health_Act_2016_-_5B00-I0-00%5D.pdf?OpenElement)

until 11 August 2020. On the dates in April and May it only discussed COVID-19 related bills. Overall, the lower House sat 18 times fewer and the upper house 15 times fewer than originally planned. Between 18 March, 2020, and 25 November, 2021, 600 bills in response to the health crisis have been adopted, though, as discussed above, measures taken under the Biosecurity Act are exempt from disallowance by the Parliament.¹⁴⁹ According to the final report of the *Standing Committee for the Scrutiny of Delegated Legislation*, in the year 2020, 17.4% of all delegated legislation escaped scrutiny mechanisms through the parliament via an exemption from disallowance.¹⁵⁰ These do not only include those measures adopted under the Biosecurity Act but also laws concerning government debt and freedom of press and media (Rizzi & Tamara, 2021).

8.2.2. Control and Transparency

Australia reacted to the threats and challenges posed by the Coronavirus pandemic on 13 March 2020, by setting up a decision-making intergovernmental forum, the bipartisan new National Cabinet. Its goal was to spearhead a coordinated response to the public health crisis. Usually, when the government sets up a cabinet, it represents an inter-parliamentary body and would be collectively responsible to the national Parliament as well as follow rules of confidentiality and solidarity. However, the new National Cabinet – which is comprised of the Prime Minister of Australia as well as Premiers of the six states and Chief Ministers of the two territories – is an intergovernmental body and thus regulated differently. Rather than being based on the notion of collective responsibility, every single member has their responsibility vis-à-vis the respective state parliament. The issue of the lack of accountability for the actions of the National Cabinet has been addressed a month later, on 8 April 2020, when the labor-led Australian Senate set up a [Select Committee on COVID-19](#)¹⁵¹ which ought to scrutinize the actions taken by the government during the course of the crisis. While this represents a crucial step towards accountability, it should be noted that the report by the seven-members committee is due to only on 30 June, 2022 (Tamara et al., 2020). Furthermore, the National Cabinet replaced the Council of Australian Governments and contrary to the former, its documents are classified, meaning that they are protected from freedom of information requests. In May 2020, the Prime Minister announced that the new National Cabinet would become a permanent feature of the institutional landscape of Australian politics, but its alleged effectiveness comes at the expense of transparency and accountability – in especially because it is not responsible to the commonwealth parliament (Rizzi & Tamara, 2021).

On a state and territory level, the governments declared states of emergency in order for the executive to be able to react to the evolving COVID-19 outbreak and carry out decisions taken by the National Cabinet. (Tamara et al., 2020). Equally, since its first declaration on 18 March 2020, the emergency periods on a federal level – which last for three months – have been extended continuously.¹⁵²

¹⁴⁹ A full list can be found on the website of the Australian Parliament:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_COVID-19_instruments

¹⁵⁰ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation0-/Exemptfromoversight/Final_report

¹⁵¹ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19

¹⁵² At the time of writing, the last extension has been declared on 2 September, 2021.

<https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/covid-19-emergency-measures-extended-for-a-further-three-months-0>

8.2.3. Working conditions

In order to prevent an overcrowded plenary during the crises, the Parliament resorted to the already used practice of 'pairing', where two members of different parties agree not to attend a session – thus canceling each other out (Murphy, 2020, pp. 19–23). This strategy of downsizing and strict prioritization has not gone unchallenged, however (Lilly & White, 2020, p. 7). A group of former public servants voiced their concern over the suspension of the full parliament, calling it "undemocratic and unprecedented" (Knaus, 2020). This point of criticism could be avoided if hybrid or full virtual meetings were arranged like in Brazil. However, according to the Australian constitution, members of parliament must meet in person. A referendum to alter the constitution is inconceivable during a Pandemic, which renders remote working and electronic voting impossible (Williamson, 2021, p. 27).

Noteworthy is also Australia's online presence, which serves as a good example for a government trying to offer educational and explanatory material about its work and proceedings to the citizens. In especially during pandemic times, websites can be a valuable point of connection between legislators and the people, offering the latter information and a way of getting in touch with the government (Williamson, 2021, p. 61).

9. NEW ZEALAND

New Zealand does not have a complete written or supreme constitution. Provisions of a constitutional nature are laid down in various laws. These include a Constitutional Framework Act, a statutory Bill of Rights, Major Legislation, a Cabinet Manual of Executive Conventions and Protocols, Letters Patent Constituting the Office of the Governor-General and a treaty concluded with the indigenous Māori. New Zealand is a unitary, parliamentary democracy (Constitution Act 1986; Letters Patent Constituting the Office of the Governor-General 1981; New Zealand Bill of Rights Act 1990; Cabinet Office, Cabinet Manual 2017; Treaty of Waitangi Te Tiriti o Waitangi 1975).

9.1. Emergency procedures

A declaration of a state of emergency is not regulated within the New Zealand Constitution, whereas, under the Health and Civil Defense Acts, the declaration of a state of emergency is enabled. Within these rules, the state of emergency in New Zealand due to COVID-19 was declared on 25 March 2020 and has since been extended continuously (National Emergency Management Agency, 2021). Furthermore, these rules open up the possibility of overriding primary law, although these powers were not heavily used during the pandemic. Legislation regarding health, like e.g. the Epidemic Preparedness Act 2006, has been expanded by introducing the COVID-19 Public Health Response Act 2020 (May 2020), which must be renewed by Parliament every 90 days (Knight, 2021).

9.2. New Zealand Parliament during COVID-19

The New Zealand House defines its functions as government-forming, legislating, representative, and controlling (NZ Parliament, 2021).

9.2.1. Legislative function

Parliament's rules of procedure are the so-called "Standing Orders", which are reviewed every term. Within these it is regulated that, if necessary, temporary resolutions can be passed to change the primary rules. These temporary resolutions are called "Sessional Orders" (NZ Parliament, 2021). During the years 2020 and 2021, these Sessional Orders were heavily used in order to regulate the working

rules within Parliament. The Select Committees continued to work on bills and other matters during different COVID-19 Alert Levels (NZ Parliament, 2021).

One of the Parliaments Select Committees, the so-called “Business Committee” determines procedural changes within Parliament. Here, monthly revisions are made to continuously amend parliamentary procedures. These reviews have been a regulatory tool for ensuring an ongoing workflow within Parliament. Among deciding on a proxy voting option within Parliament, the Business Committee also changed the work setting to remote. Within these settings, remote meetings were held via Zoom (Business Committee, 2020). Attendance meetings of the Select Committees in person were made possible via video or teleconference. As the situation eased there were parliamentary sessions with cautions which were always adjusted to the current situation (NZ Parliament, 2021).

Furthermore, New Zealand’s Parliament established an Epidemic Control Committee (ECC) during the pandemic to scrutinize the government’s response to the COVID-19 outbreak. (NZ Parliament, 2021). This committee became New Zealand’s “parliament-in-miniature” during the lockdown. It was chaired by the leader of the opposition and with an opposition majority, it was given plenary powers to inquire into the government’s ongoing response to COVID-19. During the lockdown, the ECC met three mornings a week to question ministers and officials, as well as to run hearings with experts and those adversely affected. The ECC was “quite effective, especially in its first few weeks of operation during the lockdown. It pressed on many of the operational challenges and soft points of the lockdown, playing an important agenda-setting role in political discourse. But its proceedings eventually became more partisan and a little less constructive, especially once the height of the emergency passed. It ceased operating once usual parliamentary procedures fully resumed in late May 2020” (Knight 2021a).

9.2.2. Control and transparency

During the pandemic, Parliament worked under changing procedures adopted by the Business Committee on a monthly basis (NZ Parliament, 2021). This also impacted the control function. In general, Parliament has multiple options for scrutinizing the Government. These include questions, petitions, debates and investigations by select committees. Every day there is a question time during which the MPs ask the ministers questions about the way they manage the country’s affairs. These are usually up to 12 questions, answered orally. In this way, the performance of individual ministers and the government as a whole is examined. Petitions allow complaints to be made, a change in public policy or law to be demanded. These are then considered by special committees, and they may make recommendations in a report to Parliament. Within debates, government ministers must defend their policies and the management of the country’s affairs. In a weekly general debate, members can raise any issue that is close to their hearts. If a member raises an urgent matter that falls under the purview of a minister, the Speaker of the House may decide that the matter requires the urgent attention of the House. If this is the case, a debate follows. Questions may also be asked on any working day. A select committee may decide to hold an inquiry to examine the government’s performance in a particular area. This is supported by witness testimony, reported to Parliament, and Parliament then makes recommendations for the government to consider (NZ Parliament, 2021). Parliament’s involvement in holding the government to account during the pandemic was rated satisfactory overall (Knight 2021b).

10. BRAZIL

Brazil is a federal state with the legislative power being exercised by the bicameral National Congress (Congresso Nacional). The Chamber of Deputies (Câmara dos Deputados) is comprised of 513 officials appointed by the 26 states on a roughly proportional basis through universal suffrage. The Federal Senate (Senado Federal) consists of 81 representatives, directly elected by the citizens of the respective state. The National Congress is mostly responsible for fiscal policies as well as the administration of the union. It can also decide whether the federal government ought to intervene in state level affairs. The executive is comprised of the president, who is also the head of the state and a cabinet of ministers of state – also appointed by the president. Thus, not only economic and foreign policies or security affairs fall under its responsibility. The legislation as well as the executive hold legislative power. Bills submitted by the executive to National Congress can be scrutinized within a period of 30 days. However, such provisional acts produce immediate effect until rejected or confirmed (Burns et al., 2021). Article 62, states that “[i]n important and urgent cases, the President of the Republic may adopt provisional measures with the force of law and shall submit them to the National Congress immediately” granting the president the right to enact measures that become effective immediately ([Constitution of the federative republic of Brazil of 1988](#)).¹⁵³

10.1. Emergency procedures

According to Article 136 and 137 the President, with approval of Congress, may declare a state of defense or a state of siege. The provisions grant the executive extensive powers to curb the rights of the people, however, a public health crisis is not mentioned explicitly. Till date, there has not been a declaration for a state of emergency in Brazil (Octávio Luiz Motta et al., 2021).

10.2. The Brazilian Parliament during COVID-19

10.2.1. Legislative function

The public health crisis has been dealt with within the regular legal framework. According to Article 23, II of the constitution, “The Union, the states, the Federal District and the municipalities, in common, have the power: to provide for health and public assistance”. Since public health is an area of concurrent competences, conflicts and uncertainties between the various levels of state may arise (Octávio Luiz Motta et al., 2021) – as has been the case during the COVID-19 crisis.

In 2020, Brazil was among the top five most-infected countries (Deveaux et al., p. 9). It is also one of few examples, where specific temporary changes to the rules of procedure were adopted in order to enable the normal business of Parliament under the circumstances of the COVID-19 Pandemic (Deveaux et al., p. 13). On 4 February 2020, the government declared the outbreak of a Public Health Emergency of National Importance in Act. No. 188/GM/MS ([Act. No. 188/GM/MS](#)),¹⁵⁴ implementing Executive Decree 7.616 ([Executive Decree 7.616](#)).¹⁵⁵ Two days later, on 6 February 2020, Federal Law 13.979, a quarantine act, established the framework for the competencies at all states levels to address the Corona crisis and granted the minister of health extensive power – such as managing the public health emergency according to WHO recommendations ([Federal Law 13.979](#)).¹⁵⁶ On 3 March 2020, the government published Act No. 356, providing the Regulation and implementation of the measures ([Act No.](#)

¹⁵³ <https://www.globalhealthrights.org/wp-content/uploads/2013/09/Brazil-constitution-English.pdf>

¹⁵⁴ <https://perma.cc/7DT8-Y44F>

¹⁵⁵ http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Decreto/D7616.htm

¹⁵⁶ http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/L13979.htm

356/2020).¹⁵⁷ Like Australia, Brazil strictly prioritized Coronavirus related legislation. In order to be able to continue their task of oversight, the Parliament set up a committee of six legislators from the Chamber of Deputies and the Federal Senate (Murphy, 2020, p. 19).

10.2.2. Control and transparency

These interventions were mostly in line with the horizontal quarantine measures implemented around the world and were ultimately established at the state or municipal level. On a federal level, however, the president, Jair Bolsonaro, sought to use the COVID-19 pandemic to centralize power, disempower the legislation and undermine federal institutions. Provisional Act 926, for example, intended to establish that alleged essential economic activities cannot be suspended by the states (Authoritarianism Without Emergency Powers: Brazil Under COVID-19). Provisional Act 936 ([Provisional Act No. 936](#)),¹⁵⁸ in which Bolsonaro invoked Article 62 of the constitution, gave companies the right to cut wages up to 100% - a step that was criticized by various commentators but ultimately also confirmed by the Federal Supreme Court and extended in July 2020 for as long as the pandemic lasts (Meyer & Bustamante, 2020; Silveira & Satomi, 2020; Soares, 2020). Bolsonaro even attempted to suspend the period of 30 days in which Congress may overturn (or approve of) provisional acts proposed by the president for the duration of the pandemic. This request, which would have effectively undermined legislative power, as well as Bolsonaro's attempt to restrict access to information were stopped by the Federal Supreme Court (Meyer & Bustamante, 2020).

10.2.3. Working Conditions

The Chamber of Deputies passed resolution No. 14/2020 on March 17, 2020, that set up the Virtual Plenary ([Resolution of the Chamber of Deputies 14/2020](#)).¹⁵⁹ The first virtual plenary was held little more than a week later on March 25, 2020 (Deveaux et al., p. 21). For the transition to go smoothly, it was imperative to ensure presence and voting registration. The architecture of the program is thus based on the one hand on a videoconference service, transmitting images and sound, which, since plenary sessions are public, is also available for persons outside the Chamber of Deputies. On the other hand, it includes an app called *Infoleg* which is only accessible for internal users and which guarantees the functionalities of registering a MP's presence as well as their voting. Linked to the app is a legislative management system which shows to users "all phases of the legislative process, all versions of the bills, all amendments, the results of each voting, all speeches, the schedule and agenda of the committees' meetings, and many other information about what is going on in the legislative process." (Câmara dos Deputados, 2020, p. 2)

The Parliament's use of technology allowed it to maintain its transparency and to ensure public participation. As mentioned, it held sessions that were streamed live via its own media platforms (*Parliaments and Pandemic: Shifts in Citizen Participation and Inclusion*, p. 19). Furthermore, it set up a dedicated tool for the public to track spending on Pandemic related relief efforts. Legislation proposals that were submitted by citizens via the e-citizenship Portal were discussed in the Senate (Deveaux et al., p. 41).

The Parliament's adaptiveness to the challenges to the Pandemic has partly been formed by the tools that were already in use before the crises. The IT system, for example, had been designed so that members of Parliament would receive fiscal and spending updates in real time. The first website for

¹⁵⁷ <https://pesquisa.in.gov.br/imprensa/jsp/visualiza/index.jsp?data=12%2F03%2F2020&jornal=515&pagina=185>

¹⁵⁸ <https://www.in.gov.br/en/web/dou/-/medida-provisoria-n-936-de-1-de-abril-de-2020-250711934>

¹⁵⁹ <https://www2.camara.leg.br/legin/fed/rescad/2020/resolucaodacamaradosdeputados-14-17-marco-2020-789854-publicacaoori-qinal-160143-pl.html>

public participation in legislation, *e-Democracia*¹⁶⁰ was already created in 2008 (Williamson, 2021, p. 17). As highlighted in the e-Parliament report 2020, the challenges of implementing a virtual plenary system for over 500 MPs while most of the staff was working remote were nonetheless immense. However, as a result of its overall success, members of Parliament are now more open for innovation (Williamson, 2021, p. 19). Brazil also stands out in its willingness to share all the information about their technology and hosting the Open Data Hub¹⁶¹ where parliaments can seek help for technical questions and solutions (Williamson, 2021, p. 30).

11. NIGERIA

Nigeria is a federal state with a bicameral National Assembly, modeled after the United States and consisting of the House of Representatives and the Senate. The Federal Capital Territory (FCT) is comprised of 36 states. Each state appoints 10 members to the House of Representatives. The Senate is comprised of three members of each state as well as one from the Federal Capital Territory. The chambers' plenary takes place once a week. The President is elected by popular vote and holds the executive power. He serves as the chief executive as well as the head of state. All government officials are elected on a four-year basis (J.F. Ajayi et al., 2020). The National Assembly's three focal functions are Lawmaking, Appropriation and Oversight. It can set up committees scrutinizing bills or offer oversight over publicly funded entities. The consent of both chambers is required to pass legislation (Parliaments and Pandemic: Shifts in Citizen Participation and Inclusion, pp. 1–3). If there is a conflict between federal and state legislation, the former overrides latter (Abdulrauf, 2021).

With its dense concentration of people in large cities, Nigeria is prone to sanitary problems. Issues of medical and health services are examined at all levels of governments. (J.F. Ajayi et al., 2020). In addition, Nigeria's investment in the health sector is among the lowest in the world. There are five committees (three from the House of Representatives and two from the Senate) that focus on oversight of the health care sector. The national public health institution is the Nigeria Centre for Disease Control (NCDC), which was established in 2018 and which is the leading entity in the national public health response to the Coronavirus COVID-19. (Parliaments and Pandemic: Shifts in Citizen Participation and Inclusion, pp. 5–7).

11.1. Emergency Procedures

Emergency procedures are dealt with in the Nigerian Constitution under section 305 (Constitution of the Federal Republic of Nigeria 1999).¹⁶² It states that the President can proclaim a state of emergency if:

(a) the Federation is at war; (b) the Federation is in imminent danger of invasion or involvement in a state of war; (c) there is actual breakdown of public order and public safety in the Federation or any part thereof to such extent as to require extraordinary measures to restore peace and security; (d) there is a clear and present danger of an actual breakdown of public order and public safety in the Federation or any part thereof requiring extraordinary measures to avert such danger; (e) there is an occurrence or imminent danger, or the occurrence of any disaster or natural calamity, affecting the community or a section of the community in the Federation; (f) there is any other public danger which clearly

¹⁶⁰ <https://edemocracia.camara.leg.br/>

¹⁶¹ <https://www.ipu.org/innovation-hub/open-data-hub>

¹⁶² <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>

constitutes a threat to the existence of the Federation; or (g) the President receives a request to do so in accordance with the provisions of subsection (4) of this section.

Section 305 (2) requires the legislature to approve the proclamation of a state of emergency *ex post* immediately after it is declared, otherwise it expires. In addition, Section 45(2) permits emergency measures if they are justified by the situation at hand. In this case, it is up to the judiciary to assess the situation and limit the emergency powers. Finally, the provisions for crisis situations are specified in the Emergency Powers Act of 1961,¹⁶³ whose status is currently unclear, however (Abdulrauf, 2020).

11.2. The Nigerian Parliament during COVID-19

11.2.1. Legislation and policy making

Both chambers of the National Assembly acted early on the threat of the COVID-19 disease. Already on January 29 the House of Representatives put forth a motion, demanding state agencies and the Ministry of Health to prop up vigilance and the screening of incoming travelers. In order to provide the NCDC with enough resources to track the virus, the Senate called for increased funding on January 30. In total, between January and March, thirty interventions were made by the bodies, including debates or committee engagements.

There has been no declaration for a state of emergency in Nigeria according to section 305 of the Nigerian constitution. Instead, president Muhammadu Buhari invoked the Quarantine Act 1926,¹⁶⁴ which grants him expansive powers, such as making any Regulation necessary for the purpose of “preventing the spread of any dangerous infectious disease from any place within Nigeria [...]”. Crucially, while the legislative must approve emergency powers under section 305, the Quarantine Act is a mere executive instrument with no such oversight function. Following the Act, the first Regulations were adopted on 30 March 2020 (COVID-19 Regulations No. 1 of 2020).¹⁶⁵ Referring to sections 2, 3 and 4 of the Quarantine Act, the Regulations ordered “the cessation of all movements in Lagos and the FCT for an initial period of 14 days”. The Regulations – including the restrictions on movements – were extended for another period of 14 days on 13 April 2020. The actions taken by the president, in especially the lockdowns imposed on Lagos and Ogun, and Kano were criticized for lacking a legal justification. The critique is part of the bigger debate on the relationship between the Quarantine Act and the constitution (Abdulrauf, 2020, 2021; Eboibi & Robert, 2021).

11.2.2. Control and Transparency

Although the pandemic was increasingly brought under control during the Summer of 2020, the President continued to rule first and foremost unilaterally. The role of the parliament was reduced to an advisor of the federal government without any accountability function. While the Senate Committee engaged with the Federal Ministry of Health and the Presidential Task Force on COVID -19, the House of Representatives adopted the Emergency Economic Stimulus Bill 2020. The only real effort from the National Assembly to challenge the federal system was the Infectious Diseases Bill of 2020,¹⁶⁶ which, paradoxically, would have granted the executive even more power. The bill was withdrawn, however (Abdulrauf, 2021).

¹⁶³ <https://gazettes.africa/gazettes/ng-government-gazette-supplement-dated-1962-09-22-no-76-part-b>

¹⁶⁴ <http://lawsofnigeria.placnq.org/laws/Q2.pdf>

¹⁶⁵ <http://lawsofnigeria.placnq.org/laws/Q2.pdf>

¹⁶⁶ <https://placnq.org/i/wp-content/uploads/2020/05/Control-of-Infectious-Diseases-Bill-2020.pdf>

11.2.3. Working conditions

While normal business of the Assembly continued throughout most of March, on the 24th the plenary was adjourned until April 26, 2020. Essentially, the legislative arm of the government was shut down for a whole month. After the shutdown, plenary was held under (among others) strict social-distancing guidelines, face masks recommendations, mandatory temperature checks or the provision of hand sanitizers. However, also the transparency of the Parliament was curtailed. Limitations on the number of visitors were imposed as much as media representation was cut down (Parliaments and Pandemic Shifts in Citizen Participation and Inclusion, pp. 9–17).

ANNEX IV – SPECIFIC EMERGENCY OVERSIGHT MEASURES AND INSTITUTIONS

Table 15: Specific Emergency oversight measures and institutions

Country	Specific oversight measures
Belgium	Set-up of a Commission in charge of monitoring the implementation of the Laws enabling the King to take emergency measures against COVID-19
Bhutan	Set-up of a special Committee on COVID-19 preparedness and response
Bolivia	Set-up of a Joint Special Investigation Committee
Brazil	Set-up of a special committee in the chamber and of a mixed committee with 6 senators and 6 deputies
Bulgaria	Set-up of a Temporary Commission for the control of expenditures of public funds to overcome the consequences of the spread of COVID-19
Burkina Faso	Set-up of a fact-finding mission on the management of COVID-19 by the Government
Canada	Set-up of a Special Committee on COVID-19
Chile	Set-up of two special Committees of Inquiry on COVID-19 management
Czech Republic	Specific procedure set up to inform the Bureau of government measures
Djibouti	Set-up of a Commission for the support and monitoring of the fight against COVID-19
Dom. Republic	Bicameral Commission to follow-up on the declaration of the state of emergency
El Salvador	Set-up of an Inter-Institutional Committee to control strategies, plans, protocols, actions, and budgets of the COVID-19 pandemic
Ethiopia	Set-up of a State of Emergency Inquiry Board to empower the Council of Ministers to issue regulation
France	Set-up of a COVID-19 Commission of Inquiry
Gabon	Set-up of a Commission of Inquiry dedicated to the control and evaluation of the management of COVID-19
Guatemala	Set-up of a Committee on COVID-20
Honduras	Set-up of a Special Emergency Commission for COVID-19
Ireland	Set-up of a Special Committee on COVID-19 Response
Israel	Set-up of a Special Committee on the Novel Coronavirus and for Examining the State's Preparations for Epidemics and Earthquakes
Jamaica	Set-up of a Select Committee to review developments related to the COVID-19 pandemic
Kenya	Set-up of a Select Committee on COVID-19 (Prevention, Response and Management)
Kosovo	Set-up of a Commission of Inquiry on the management of the pandemic by the Government
Mauritania	Set-up of a Committee to follow up the special fund for social solidarity and combating coronavirus, which is integrated by MPs
New Zealand	Set-up of a special Epidemic Response Committee
Nigeria	Set-up of a Committee on COVID-19
Norway	Set-up of a Coronavirus Special Committee; Extension of minority rights obliging Government to revoke (parts of) a regulation if at least 57 MPs sent a written declaration to the Storting's Bureau stating that they did not support it

Pakistan	Set-up of a Committee on COVID-19
Papua New Guinea	Permanent Committee on Emergency to present a special report on COVID-19
Peru	Set-up of two special Committees for a 90-days period each
Philippines	Set-up of "Defeat COVID-19" Committee
South Korea	Set-up of a Special Committee for the response to COVID-19
Spain	Set-up of a Commission for Social and Economic Reconstruction
Suriname	Set-up of a COVID-19 crisis committee
Thailand	Set-up of a COVID-19 oversight Committee
The Gambia	Set-up of a Select Committee on the State of Public Emergency
Trinidad and Tobago	Public Accounts and Appropriations Committee conducts an inquiry into the preparedness of public authorities for COVID-19
Uganda	Set-up of a Technical Committee on COVID-19
United Kingdom	Committee on Health and Social Services conducts an inquiry on the management of the Coronavirus outbreak
USA	Set-up of a Subcommittee on the Coronavirus Crisis of the Committee on Oversight and Reform
Yemen	Set-up of a Special Committee to follow the pandemic

Author's own compilation presentation based on data of the "INTER PARES Parliamentary responses during the COVID-19 Pandemic – Data Tracker". <https://datastudio.google.com/embed/u/0/reporting/191dd812-cb5e-432c-aae1-a743bbc2678f/-page/c8SNB>, and the Venice Commission's Observatory of situations of emergency in Venice Commission Member States. https://www.venice.coe.int/WebForms/pages/?p=02_EmergencyPowersObservatory&lang=EN.

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, analyses the obstacles to democratic, transparent and efficient decision-making in urgency situations at the EU level, with a specific focus on the European Parliament. It provides a systematic overview of Parliament's role and functions as well as the interinstitutional cooperation during recent crisis situations and concludes with proposals on how to improve the existing set-up and Parliament's internal procedures.

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