

The use of Article 122 TFEU ¹

Institutional implications and impact on democratic accountability

ABSTRACT

This study, commissioned by the Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, looks into the peculiar nature of Article 122 TFEU as a non-legislative legal basis pursuant to which the European Parliament is not involved in the decision-making. It concludes that the recent recourse to Article 122 TFEU was legally defensible but that the Council does not sufficiently take into account the 'without prejudice to' clause in Article 122(1) TFEU. The analysis identifies different ways to bolster Parliament's position under the current Article 122 TFEU and makes suggestions for Treaty amendment.

This study was commissioned against the background of a recent surge in reliance on Article 122 TFEU as a legal basis. This recent surge must be nuanced since in different periods in the past, the Council of the European Union (Council) relied much more intensively on (the precursors of) Article 122 TFEU. Still, the recently adopted measures do seem to differ from earlier adopted measures given their economic significance. To assess the constitutionality of the Council's reliance on Article 122 TFEU, the peculiar, non-legislative, nature of Article 122 TFEU must be stressed. While it results in decision-making procedures with lower transparency and lower parliamentary involvement, in themselves, reduced transparency and parliamentary involvement are not pertinent when assessing the Council's recourse to the legal bases in Article 122 TFEU. After all, it is not the procedures that define the legal basis of a measure but instead, the legal basis of a measure determines the procedure to be followed. In turn, the legal basis should only be assessed in light of the standard 'choice of legal basis' test established by the Court of Justice.

To apply this test, the precise scope of the two legal bases in Article 122 TFEU is to be understood as follows: only Article 122(2) TFEU is a genuine emergency legal basis. Article 122(1) TFEU is not a crisis legal basis and, therefore, has a wider scope. Two main limits to the exceptionally broad power conferred by Article 122(1) TFEU on the Council exist. First, recourse to Article 122(1) TFEU to develop economic policy must not undermine or turn upside down the principle flowing from Articles 2(3) and Article 5(1) TFEU that the Member States remain the primary actors responsible for economic policy. Second, Article 122(1) TFEU prescribes that it is without prejudice to other legal bases in the Treaties. However, this does not result in an absolute priority of those other

¹ Full study in English : [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753307/IPOL_STU\(2023\)753307_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753307/IPOL_STU(2023)753307_EN.pdf)



legal bases over Article 122(1) TFEU. Instead, measures of which the aim and content points to another legal basis in the Treaties could still be adopted based on Article 122(1) TFEU if the context so requires.

In light of that understanding of the two legal bases in Article 122 TFEU, substantively, the measures recently adopted in the wake of the pandemic and the energy crisis appear to be properly based on Article 122 TFEU. However, the Council does not sufficiently motivate its measures in light of the 'without prejudice to' clause of Article 122(1) TFEU. The European Parliament's (Parliament) prerogatives would thus be better safeguarded by forcing the Council – and the European Commission (Commission) – to explicitly motivate the measures (and proposals) in light of the 'without prejudice to' clause. In addition, an explicit agreement could be reached between the political institutions on the 'facultative' consultation by default of Parliament whenever the adoption of Article 122 TFEU measures is contemplated. Such an approach appears more sound than leveraging Parliament's budgetary powers. The mechanisms established by the interinstitutional agreements of 16 December 2020 should remain budgetary mechanisms and should not be distorted to pursue (political) objectives unrelated to budgetary matters.

Finally, while the options for improving Parliament's position in the decision-making are almost unlimited when the Treaties would be amended, it appears advisable not to do so by prescribing the ordinary legislative procedure. Instead, a special legislative procedure prescribing the consent of Parliament appears more appropriate to ensure both greater transparency and Parliamentary involvement, without sacrificing speediness in those cases where urgent action is required.

KEY FINDINGS

- The recent recourse to Article 122 TFEU as the legal basis for emergency measures is not exceptional from a historical perspective, since the precursors to Article 122 TFEU have, at times, been relied on even more frequently.
- **Although both legal bases in Article 122 TFEU are usually conceptualised as emergency legal bases, this is only the case for Article 122(2) TFEU. While Article 122(1) TFEU can therefore be relied on other than in emergency situations, the 'without prejudice to' clause which introduces this provision ensures that reliance on this exceptionally broad legal basis does not go at the expense of the prerogatives of the Parliament.**
- In its recent decisions, the **Council has not sufficiently motivated, its recourse to Article 122 TFEU in light of that 'without prejudice to' clause.** One suggestion made is to **ensure a more explicit and detailed statement of reasons whenever the Council relies on Article 122 TFEU.**
- The study questions **the potential of the budgetary interinstitutional agreements of December 2020** to ensure greater involvement of Parliament in the decision-making pursuant to Article 122 TFEU. Instead, and staying within the current Treaty framework, the suggestion is made to **ensure agreement between Parliament and Council on the facultative consultation of the Parliament under Article 122 TFEU.**
- In terms of a possible amendment of Article 122 TFEU this study argues **against the insertion of the ordinary legislative procedure in Article 122 TFEU and in favour of a special legislative procedure pursuant to which Parliament has the power of consent.**

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